

Filed on behalf of Junior Party

Paper No. \_\_\_\_

THE REGENTS OF THE UNIVERSITY OF CALIFORNIA,  
UNIVERSITY OF VIENNA, AND EMMANUELLE CHARPENTIER

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

**THE REGENTS OF THE UNIVERSITY OF CALIFORNIA, UNIVERSITY  
OF VIENNA, AND EMMANUELLE CHARPENTIER**  
Junior Party

Applications 15/947,680; 15/947,700; 15/947,718; 15/981,807;  
15/981,808; 15/981,809; 16/136,159; 16/136,165; 16/136,168; 16/136,175;  
16/276,361; 16/276,365; 16/276,368; and 16/276,374,

v.

**TOOLGEN, INC.,**

Senior Party  
Application 14/685,510

Patent Interference No. 106,127 (DK)

**CVC REPLY IN SUPPORT OF MISCELLANEOUS MOTION 5  
(Motion to Exclude)**

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1 ***I. Statement of Precise Relief Requested***

2 The PTAB should grant CVC’s Motion. Specifically, the PTAB should exclude Exhibit  
3 1283 as lacking authentication and Exhibit 1593 as hearsay and double hearsay, as explained in  
4 CVC’s Motion. Additionally, the PTAB should disregard the untimely supplemental evidence  
5 (Exs. 1614 and 1615) that ToolGen first served with its Opposition in an improper attempt to  
6 authenticate Exhibit 1283 well after the deadline for doing so. CVC understands that ToolGen  
7 has requested authorization to refile its Opposition in a form omitting reference to this improper  
8 evidence and requested expungement of Exs. 1614 and 1615, and CVC supports that request. MF  
9 22; Ex. 2541.

10 ***II. Argument***

11 ***A. ToolGen cannot attempt to Authenticate Exhibit 1283 with supplemental***  
12 ***evidence served for the first time with its Opposition***

13 ToolGen has no defense to its failure to authenticate Exhibit 1283 by the service  
14 deadline. Instead, ToolGen belatedly attempts to authenticate it now, by submitting additional  
15 exhibits that purportedly show the origins and source of the video. *See* Paper 866, ToolGen Opp.,  
16 2:17-20 (introducing Exs. 1614 and 1615). Based on that belated attempt at authentication,  
17 ToolGen then argues that it should not have needed to authenticate the exhibit at all because  
18 CVC should have known about the YouTube video’s provenance. *Id.* Nowhere among  
19 ToolGen’s circular reasoning did ToolGen rebut CVC’s position that Exhibit 1283 lacked proper  
20 authentication. Without such authentication, the exhibit is inadmissible under the rules.

21 Importantly, ToolGen does not dispute that CVC timely objected to Exhibit 1283 for lack  
22 of authentication. MF 1; 37 C.F.R. § 41.155(b)(1). ToolGen also does not dispute that it did not  
23 offer any supplemental evidence to address CVC’s objection by August 5, 2021, the deadline for

1 doing so. MF 20. Instead, ToolGen attaches Exhibits 1614 and 1615 to its Opposition, belatedly  
2 alleging that it has evidence of the source and origination of the video. MF 21.

3 ToolGen’s untimely presentation of this evidence violates the Board’s established rules  
4 regarding the admissibility of evidence and it should be disregarded. 37 C.F.R. § 41.155(b)(2)  
5 (providing that the deadline for serving supplemental evidence in response to an objection is  
6 “within ten business days of service of the objection”); 37 C.F.R. § 41.151 (“Admissibility.  
7 Evidence that is not taken, sought, or filed in accordance with this subpart shall not be  
8 admissible.”); *Cf. Heymes v. Takaya*, 6 U.S.P.Q.2d 1448 (B.P.A.I. 1988) (“Evidence which is  
9 merely attached to a reply brief is manifestly ‘not taken or sought and filed in accordance with  
10 this subpart.’”). ToolGen cannot cure its violation of the Rules with more violations.

11 While ToolGen may contend that its arguments citing to improperly-submitted Exhibits  
12 1614 and 1615 are independently supported, *see* Ex. 2541, that alleged support is limited to the  
13 objectionable exhibit itself (Ex. 1283) and Dr. Doudna’s curriculum vitae (Ex. 2024), which says  
14 nothing about the video. Once Exhibits 1614 and 1615 are discounted, there is no authentication  
15 for Exhibit 1283 and no support for ToolGen’s arguments regarding its admissibility.

16 Finally, on page 3 lines 1-2 of its Opposition, ToolGen argues that CVC’s motion “to  
17 exclude only the portion relevant to Dr. Carroll’s admission—15 seconds of a 53-minute video—  
18 further demonstrates that authentication is not an issue.” The response is that ToolGen’s  
19 mischaracterization of CVC’s motion makes no sense, and cites no evidence. CVC moved to  
20 exclude Exhibit 1283—the exhibit ToolGen cites in its papers—in its entirety. Paper 854, CVC  
21 Mot. to Exclude, 2. To be sure, Exhibit 1283 is only a portion of a larger video. But that is  
22 irrelevant. If anything, the 15-second excerpt constituting Exhibit 1283 establishes that original  
23 source of the video has been somehow edited—only further highlighting ToolGen’s failure to  
24 authenticate its own evidence. In turn, that failure and ToolGen’s belated attempts to try to

1 rehabilitate this flawed evidence still leave the PTAB in the dark about the context and source of  
2 this video *excerpt*, who *excerpted* it, and whether it still accurately portrays the original subject  
3 matter in its *excerpted* form.

4 ***B. Exhibit 1593 is a Third-Party Interview that is Not Admissible Evidence for the***  
5 ***Truth of the Matters Asserted Therein***

6 ToolGen cannot refute that Exhibit 1593 is double hearsay, only one level of which  
7 arguably falls under an exception. On page 3 line 25 to page 4 line 4 of its Opposition, ToolGen  
8 dismisses all of CVC’s cited case law as not “applicable” because the cases cited are “non-patent  
9 cases.” The response is that there is not a separate set of Federal Rules of Evidence for patent  
10 cases. Hearsay is hearsay. And, as numerous courts have pointed out, there is no hearsay  
11 exception for a third-party edited out-of-court interview of a party witness.

12 Even if, as ToolGen argues, Dr. Doudna’s statements (the *first* level of double hearsay)  
13 were considered to fall within the party-admission exception under Rule 801, ToolGen’s attempt  
14 to justify admitting the edited interview (the *second* level of hearsay) through the catch-all  
15 provision of Rule 807 nonetheless fails. Courts have specifically found that mainstream media  
16 interviews edited for publication to a lay audience lack the traditional indicia of reliability that  
17 Rule 807 requires, because quotes in such publications are cherry-picked to give a sense of  
18 drama and “capture the interest of ... readers, who might otherwise have little interest,” rather  
19 than to present an accurate or fulsome account of events. *New England Mut. Life Ins. Co. v.*  
20 *Anderson*, 888 F.2d 646, 650 (10th Cir. 1989); *see also Ohio v. Roberts*, 448 U.S. 56, 65 (1980);  
21 *Horta v. Sullivan*, 4 F.3d 2, 8 (1st Cir. 1993).

22 Consequently, to fall within the Rule 807 exception, the disputed out-of-court statement  
23 must be “more probative on the point for which is offered than any other evidence that the  
24 proponent can obtain through reasonable efforts.” FRE 807(a)(2). That is not the case here. Dr.

1 Doudna provided a sworn declaration and submitted herself to a deposition on this precise topic.  
2 Contrary to ToolGen’s allegations of “trustworthiness,” Paper 866, ToolGen Opp., 4:15-24, the  
3 mere fact that Dr. Doudna recalled in her deposition giving the interview does not validate the  
4 editor’s choices in how her statements were presented. As Dr. Doudna testified, “I have not  
5 always been accurately quoted by reporters.” Ex. 1570, 92:3-4.

6 Specifically here, when asked in deposition whether “Exhibit 1593 is a transcript of a  
7 question-and-answer series with you,” Dr. Doudna stated: “I don’t know that to be true.” Ex.  
8 1570, 199:5-7. *See also id.* at 210:1-18 (“If you’re asking me whether this is a verbatim  
9 transcript of what I said to another person, I don’t know that to be true.”); *id.* at 203:14-17 (Q:  
10 “And that’s a quote from you?” A: “I don’t know that to be true.”); *id.* at 208: 2-4 (Q: “And that  
11 was your answer to the question posed to you, Dr. Doudna?” A: “I don’t know.”); *id.* at 208:9-11  
12 (Q: “[T]hat’s your statement, isn’t it?” A: “I don’t know.”). Thus, far from having traditional  
13 indicia of reliability, ToolGen received clear confirmation from Dr. Doudna herself that  
14 reliability is precisely what Exhibit 1593 lacks.

15 Finally, ToolGen argues on page 5 lines 1-8 of its Opposition that the statements quoted  
16 in Exhibit 1593 fit into a larger narrative created by similar articles. The response is that whether  
17 other articles (equally unreliable as mainstream publications and double hearsay) have  
18 perpetuated a similar narrative due to their dramatic appeal does not corroborate the truth of the  
19 matters asserted in those articles. *Cf. Gehin v. Wisconsin Group Ins. Bd.*, 692 N.W.2d 572, ¶ 92  
20 (Wis. 2005) (“bootstrap[ing] uncorroborated hearsay with uncorroborated hearsay would  
21 eviscerate the requirement that there be corroboration of hearsay in order for the hearsay  
22 evidence to form the basis of an agency’s finding of fact”). Praising evidence because it fits a  
23 desired narrative is classic confirmation bias. It is not an indication of reliability. The interview

1 is not probative, as ToolGen argues, and falls under no hearsay exceptions. Exhibit 1593 should  
2 be excluded.

3 **III. Conclusion**

4 The PTAB should grant CVC's Miscellaneous Motion 5, exclude Exhibits 1283 and  
5 1593, and disregard untimely and improper Exhibits 1614 and 1615 first served with ToolGen's  
6 Opposition.

7

8

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9



**APPENDIX A: EXHIBIT LIST**

Exhibit No.	Description
1283	Dana Carroll, Issues in CRISPR-Cas Editing, YOUTUBE, 32:42–32:57 (Nov. 4, 2017), <a href="https://www.youtube.com/watch?v=5bHKz142FHs">https://www.youtube.com/watch?v=5bHKz142FHs</a> .
1520	Deposition Transcript of Dana Carroll, Ph.D., The Regents of the University of California v. ToolGen, Inc., Interference No. 106,127, June 17, 2021
1570	Deposition Transcript of Jennifer Doudna, Ph.D., The Regents of the University of California v. ToolGen, Inc., Interference No. 106,127, July 8, 2021.
1593	Jennifer Doudna Interview, “I have to be true to who I am as a scientist.” The Guardian, July 2, 2017.
1614	Innovative Genomics Institute, <a href="https://innovativegenomics.org/jennifer-doudna/">https://innovativegenomics.org/jennifer-doudna/</a>
1615	Opening Screen of Ex. 1283 (Dana Carroll, Issues in CRISPR-Cas Editing, YOUTUBE, 32:42–32:57 (Nov. 4, 2017), <a href="https://www.youtube.com/watch?v=5bHKz142FHs">https://www.youtube.com/watch?v=5bHKz142FHs</a> ).
2023	Declaration of Jennifer Doudna, Ph.D.
2024	Curriculum Vitae of Jennifer Doudna, Ph.D.
2032	Pandika, Rising Stars: Jennifer Doudna, CRISPR Code Killer, OZY (Jan. 7, 2014) (Ex. 2230), <a href="http://ozy.com/rising-stars/jennifer-doudna-crispr-code-killer/4690">http://ozy.com/rising-stars/jennifer-doudna-crispr-code-killer/4690</a> .
2033	Jinek, M., <i>et al.</i> , “RNA-programmed genome editing in human cells,” <i>eLife</i> 2:e00471, 1-9 (2013)
2279	“The CRISPR Revolution,” CATALYST MAGAZINE, College of Chemistry, University of California, Berkeley, available at: <a href="http://catalyst.berkeley.edu/slideshow/the-crispr-revolution/[19/12/2014 12:40:53]">http://catalyst.berkeley.edu/slideshow/the-crispr-revolution/[19/12/2014 12:40:53]</a> (July 9, 2014)
2335	Decision on Motions 37 C.F.R. § 41.125(a), <i>The Broad Institute, Inc., v. The Regents of the University of California</i> , Patent Interference No. 106,048, Paper 893, (February 15, 2017)
2348	Declaration of Dana Carroll, Ph.D.
2540	Junior Party’s Objections to Evidence, Interference No. 106,127, July 22, 2021, 4 pages
2541	Email from Timothy Heverin to Pauline Pelletier, <i>et al.</i> , dated October 14, 2021, 3 pages

1                                    **APPENDIX B: STATEMENT OF MATERIAL FACTS**

2                                    **CVC's Material Facts 1–6 and ToolGen's Answers**

3                    1. Exhibits 1283 and 1593, were first submitted with ToolGen's July 15, 2021  
4                    Oppositions. CVC 3 timely objected July 22, 2021. Ex. 2540.

5                    **Response: Admitted.**

6                    2. Drs. Jennifer Doudna and Dana Carroll submitted sworn declarations in this  
7                    proceeding, *see* Exs. 2023 and 2348, and were subject to ToolGen's cross-examination, *see* Exs.  
8                    1520 and 1570.

9                    **Response: Admitted.**

10                  3. Published excerpts from an interview with Dr. Doudna submitted as Exhibit 1593 are  
11                  being offered for the truth of the matters asserted therein, such as the inventors' knowledge and  
12                  10 expectations regarding CRISPR-Cas9's functionality in eukaryotes. *See* Paper #718, ToolGen  
13                  11 Opp. 1, 21, A2-10; Ex. 1570, 198–199 and 210.

14                  **Response: Admitted.**

15                  4. The purported YouTube video featuring Dr. Carroll submitted as Exhibit 1283 was not  
16                  authenticated by any ToolGen witness.

17                  **Response: Admitted that the video was not authenticated by a ToolGen witness, but**  
18                  **denied that the video is not authenticated. Exhibit 1283 is authenticated, as explained in**  
19                  **this Opposition. It is CVC's own video, submitted for publication by Innovative Genomics**  
20                  **Institute, an initiative between UC Berkley and UC San Francisco, that was founded by Dr.**  
21                  **Jennifer Doudna. Ex. 1283; Ex. 1614; Ex. 1615; Ex. 2024.**

22                  5. ToolGen did not ask Dr. Carroll about Exhibit 1283 during his deposition, nor did  
23                  ToolGen ask him to authenticate the exhibit. *See* Ex. 1570.

24

1           **Response: Admitted that ToolGen did not ask Dr. Carroll about Exhibit 1283**  
2 **during his deposition, but denied that the Exhibit is not properly authenticated. Exhibit**  
3 **1283 is properly authenticated, as explained in this Opposition.**

4           6. There is no evidence in the record regarding who posted this video (Ex. 1283), when it  
5 was posted, who extracted it to make it an exhibit, when it was extracted, whether it was edited,  
6 and whether it accurately reflects Dr. Carroll’s statements and understanding.

7           **Response: Denied.**

8

9                           **ToolGen’s Additional Alleged Facts 7-19 and CVC’s Answers**

10           7. The portion of Exhibit 1283 that CVC seeks to exclude accurately depicts a portion of  
11 a lecture given by Dr. Dana Carroll. Ex. 1283.

12           **CVC Response: Denied.**

13           8. Dr. Carroll can be seen and heard throughout the almost hour-long video giving a  
14 lecture on “Issues in CRISPR-Cas Editing” and discussing various aspects of the CRISPR-Cas  
15 system. Ex. 1283.

16           **CVC Response: Denied.**

17           9. The video was uploaded to YouTube by the Innovative Genomics Institute, an  
18 initiative between UC Berkley and UC San Francisco, that was founded by Dr. Jennifer Doudna.  
19 Ex. 1283; Ex. 1614; Ex. 1615; Ex. 2024.

20           **CVC Response: Denied.**

21           10. Dr. Doudna is a party opponent.

22           **CVC Response: Denied.**

1           11. The asserted statement includes Dr. Doudna saying: “People have asked me over and  
2 over again: ‘Did you know it was going to work?’ But until you do an experiment you don’t  
3 know—that’s science.” Ex. 1593.

4           **CVC Response: Admitted that the disputed exhibit contains the quoted language.  
5 Denied that the quoted language is probative of any issue in this proceeding.**

6           12. Dr. Doudna confirmed twice during her deposition that Exhibit 1593 was an article  
7 written from her interview with journalist Hannah Devlin. Ex. 1570 (Doudna Tr.), 198:22–199:4  
8 (“Q: Okay. So you gave an interview to Hannah Devlin for The Guardian, correct? A: Well, it  
9 states that there. Q: Do you have any reason to doubt that? A: I don’t.”), 210 1:20–211:5 (“Q:  
10 Okay. I’m asking you whether this reflects an interview with you done by Hannah Devlin? A: I  
11 believe it reflects an interview that was conducted by Hannah Devlin.”).

12           **CVC Response: Admitted that the deposition transcript contains the quoted  
13 language. Denied that the quoted language “confirmed” anything.**

14           13. Exhibit 1593 represents only one of many instances of Dr. Doudna expressing the  
15 doubts she and her team experienced in the summer of 2012. *See, e.g.*, Ex. 2279 (“Our 2012  
16 paper [Jinek 2012] was a big success, but there was a problem. We weren’t sure if CRISPR/Cas9  
17 would work in eukaryotes—plant and animal cells.”); Ex. 2032 (“[I]f the system could be made  
18 to work in human cells, it would be a really profound discovery.”); Ex. 2033 (“These findings  
19 suggested the exciting possibility that Cas9:sgRNA complexes might constitute a simple and  
20 versatile RNA10 directed system for generating DSBs that could facilitate site-specific genome  
21 editing. However, it was not known whether such a bacterial system would function in  
22 eukaryotic cells.”).

23           **CVC Response: Denied.**

1           14. Dr. Doudna has not made any corrections to her statements in Exhibit 1593 in the  
2 four years since it was published, which was July 2017.

3           **CVC Response: Denied.**

4           15. During her deposition, Dr. Doudna was asked about and did not disavow any of her  
5 statements in Exhibit 1593.

6           **CVC Response: Denied.**

7           16. CVC all but admits that the interview accurately reflects Dr. Doudna’s responses,  
8 given that it includes “bracketed text within Dr. Doudna’s responses,” Mot. at 3, indicating that  
9 the author took care to reflect Dr. Doudna’s responses and to make clear where the author added  
10 content.

11           **CVC Response: Denied.**

12           17. The interview, Exhibit 1593, is highly probative of Dr. Doudna’s contemporaneous  
13 thoughts regarding the doubts she had that CRISPR-Cas9 could be adapted for use in eukaryotic  
14 cells.

15           **CVC Response: Denied.**

16           18. CVC’s arguments against Exhibit 1593 ignore the Board’s expressed view that  
17 contemporaneous statements are more reliable than testimony prepared for litigation. *See* Ex.  
18 2335 (’048 Decision on Motions) at 14:3–15 (“We pay particular attention to the statements  
19 made contemporaneous statements are more reliable than testimony prepared for litigation. *See*  
20 Ex. 2335 (’048 Decision on Motions) at 14:3–15 (“We pay particular attention to the statements  
21 made contemporaneously . . . because where such statements conflict with testimony prepared  
22 for litigation, contemporaneous statements have been considered to be stronger evidence of a  
23 particular situation.”).

24           **CVC Response: Denied.**

1 19. CVC attempts to rewrite the contemporaneous record, which demonstrates time and  
2 time again the shared doubts of the CVC inventors and the field at large.

3 **CVC Response: Denied.**

4

5 **CVC's Additional Material Facts**

6 20. ToolGen did not offer any supplemental evidence to address CVC's timely objection  
7 to Exhibit 1283 by August 5, 2021, the deadline for doing so.

8 21. Exhibits 1614 and 1615, which purport to authenticate Exhibit 1283, were served for  
9 the first time in this proceeding as attachments to ToolGen's Opposition to CVC's Motion to  
10 Exclude.

11 22. In response to CVC's objections to Exhibits 1614 and 1615 as untimely, ToolGen  
12 has offered to remove Exhibits 1614 and 1615 from its Opposition, and ToolGen requests  
13 expungement of Exhibits 1614 and 1615. *See Ex. 2541.*

**CERTIFICATE OF SERVICE**

I hereby certify that the foregoing **CVC REPLY IN SUPPORT OF MISCELLANEOUS MOTION 5 (Motion to Exclude)** is being filed via the Interference Web Portal by 8:00 PM Eastern Time on October 15, 2021, pursuant to an agreement between the parties, and thereby served on the attorney of record for the Senior Party pursuant to ¶ 105.3 of the Standing Order. Pursuant to the agreement between the parties, the foregoing was also served via email by 11:00 PM Eastern Time on counsel for the Senior Party at:

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