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I. Patentability Requirements

A. Inventorship/Invention and Priority Dates

1. Conception

“An inventor need not know, however, that an invention will work for its intended purpose in order for conception to be complete, as verification that an invention actually works is part of its reduction to practice.” *Dana-Farber Cancer Inst., Inc. v. Ono Pharm. Co.*, 2019-2050, 7/14/20.

2. Coinventorship/Joint Inventors

“[T]he statute and our case law make clear that joint inventors need not contribute to all aspects of a conception. That [two inventors] were not present for or participants in all the experiments that led to the conception of the claimed inventions does not negate their overall contributions throughout their collaboration with [another inventor].” *Dana-Farber Cancer Inst., Inc. v. Ono Pharm. Co.*, 2019-2050, 7/14/20 (citations omitted).

“[J]oint inventorship does not depend on whether a claimed invention is novel or nonobvious over a particular researcher’s contribution. Collaboration and concerted effort are what result in joint inventorship.” *Dana-Farber Cancer Inst., Inc. v. Ono Pharm. Co.*, 2019-2050, 7/14/20 (citations omitted).

“[Defendant] also urges us to hold categorically that research made public before the date of conception of a total invention cannot qualify as a significant contribution to conception of the total invention. Such a rule would ignore the realities of collaboration, especially that collaboration generally spans a period of time and may involve multiple contributions.” *Dana-Farber Cancer Inst., Inc. v. Ono Pharm. Co.*, 2019-2050, 7/14/20 (citations omitted).

B. Prior Art Invalidity

1. Anticipation (§ 102)

a. Claim Interpretation

i. Product by Process

“[A] claim to a recombinant EPO composition must be analyzed for novelty by comparing the recombinant EPO to the prior art urinary EPO . . . simply because prior art urinary EPO was not made recombinantly was not enough to avoid anticipation as a matter of law.” “There is no logical reason why the nesting of a product-by-process limitation within a method of treatment claim should change how novelty of that limitation is evaluated.” *Biogen MA, Inc. v. EMD Serono, Inc.*, 2019-1133, 9/28/20.

C. Invalidity Based on § 112

1. Written Description (§ 1)

a. Four Corners v. Expert/Fact Testimony

“The district court also pointed to the [sequences] disclosed in the specification and concluded that, in addition to Figure 4 and the reference to Smith 1990, these two disclosed sequences would have directed a POSA to the full p75 sequence at the time of the invention. Although Sandoz criticizes this finding, the district court credited expert testimony that a POSA would be led to the complete p75 sequence using these disclosures. Thus, Sandoz’s argument that the district court erred by looking outside the four corners of the specification or engaged in an “obviousness-based” written description analysis is without merit. The district court properly considered how a POSA would understand the specification.” *Immunex Corp. v. Sandoz, Inc.*, 2020-1037, 7/1/20.

2. Indefiniteness (§ 2)

a. Invalid

i. Impact of Patentee’s Proposed Construction

“Such inclusion [in the proposed construction] is at odds with the above passages [of the specification] and creates uncertainty as to the boundaries of a “half-liquid.”” *IBSA Institut Biochimique, S.A. v. Teva Pharm. USA, Inc.*, 2019-2400, 7/31/20.

b. Surrounding claim language

Indefiniteness affirmed where “the claim language clarifies only that a “half-liquid” differs from a liquid.” *IBSA Institut Biochimique, S.A. v. Teva Pharm. USA, Inc.*, 2019-2400, 7/31/20.

D. Double Patenting

1. Obviousness-Type

a. Common Ownership

“where one of the rights transferred is the right to prosecute the patent at issue, identification of the effective “patentee” is informative in evaluating whether the patents are “commonly owned” for purposes of obviousness-type double patenting. Where, as here, a party ultimately controls prosecution of both sets of patents, the “all substantial rights” test aids in preventing the unjustifiable issuance of claims that are patentably indistinct from claims already owned by that party.” *Immunex Corp. v. Sandoz, Inc.*, 2020-1037, 7/1/20.

E. Section 101

1. Claim Considered as a Whole

“[F]eatures that are not claimed are irrelevant as to step 1 or step 2 of the *Mayo/Alice* analysis.” *American Axle & Manuf., Inc. v. Neapco Hldgs. LLC*, 2018-1763, 10/3/19 and reissued 7/31/20.

2. Abstract Idea Exclusion

a. Application of Mathematical Algorithm(s)

Invalidity under 101 reversed where “claimed method classifies and separates individual particles from a sample “more accurately than in any other separation system.” *Diehr’s* claims and the asserted claims of the ’559 patent each represent a purported improvement to otherwise-known industrial or laboratory processes through specific application of mathematical algorithms.” *XY, LLC v. Trans Ova Genetics, LC*, 2019-1789, 7/31/20 (citations omitted).

b. Information Processing

“Like the SRI claims, claim 19 purports to meet a challenge unique to computer networks, identifying disjointed connection flows in a network environment. The claim solves a technological problem by identifying and refining a conversational flow such that different connection flows can be associated with each other and ultimately with an underlying application or protocol. The claims detail how this is achieved in several steps. The claimed “parser sub-system” extracts information from the packet. This packet information is checked against “flow-entry memory” by the claimed “lookup engine.” The flow insertion engine coupled to the memory and the lookup engine determines whether the packet matches an entry in the flow-entry database. If there is a match, the flow insertion engine updates the matching entry with data from the new packet. If there is no match, the engine creates a new entry.” *Packet Intelligence LLC v. NetScout Sys., Inc.*, 2019-2041, 7/14/20.

F. Incorrect Inventorship

1. Error Correction

“We hold that the AIA did not narrow the meaning of “error.” Accordingly, § 256 does not exclude “considered acts,” or even “deceptive intention,” from the meaning of “error.” “Error” is simply the incorrect listing of inventors.” *Egenera, Inc. v. Cisco Sys., Inc.*, 2019-2015, 8/28/20 (citations omitted).

G. Post-Issuance Invalidity

1. Reexamined Claims

“[E]ven were dependent claims 15 and 16 [added in the reexamination] broader than unamended, independent claim 6, the remedy would not be to find claim 6 invalid as

broadened, but to invalidate added claims 15 and 16.” *Network-1 Techs., Inc. v. Hewlett-Packard Co.*, 2018-2338, 9/24/20.

II. Other Defenses

A. License/Covenant Not to Sue

1. Express

a. Unenforceable Licenses

“[T]he plain terms of the agreement provide that [appellant]’s option turns on a future contract between the parties This renders Section 4 an unenforceable agreement to agree.” *Phytelligence, Inc. v. Wash. State Univ.*, 2019-2216, 8/27/20.

“Courts are not in the business of making contracts.” *Phytelligence, Inc. v. Wash. State Univ.*, 2019-2216, 8/27/20.

B. Lack of Subject Matter Jurisdiction

1. Standing (see also II.H)

a. Right to Sue/Enforce

“We have explained that the nature and scope of the licensee’s right to sue, together with the nature of the licensor’s retained right to sue, is ‘[f]requently . . . the most important consideration.’” “Once Roche’s secondary right to sue vests, the ability to rectify infringement is “solely” with Roche, and may not pass to Immunex. After the 180-day notice period, Roche can decide “whether or not to bring suit, when to bring suit, where to bring suit, what claims to assert, what damages to seek, [and] whether to seek injunctive relief.” Retention of “such broad right[s]” is “thoroughly inconsistent” with a conclusion that the patents-in-suit were effectively assigned to Immunex.” *Immunex Corp. v. Sandoz, Inc.*, 2020-1037, 7/1/20.

b. Right to Transfer

“[R]estrictions on the ability to transfer patent rights are inconsistent with a transfer of all substantial rights.” *Immunex Corp. v. Sandoz, Inc.*, 2020-1037, 7/1/20.

c. Option to Purchase

The license provision giving licensee an option to purchase patents for \$50,000 did not give licensee all substantial rights. *Immunex Corp. v. Sandoz, Inc.*, 2020-1037, 7/1/20.

d. Curing Standing Defects

i. Joinder

Sovereign patent owner with substantial rights who reserved immunity cannot be involuntarily joined as plaintiff. *Gensetix, Inc. v. Baylor College of Medicine*, 2019-1424, 7/24/20.

Abuse of discretion not to go forward without patent owner having substantial rights if plaintiff has identical interests. *Gensetix, Inc. v. Baylor College of Medicine*, 2019-1424, 7/24/20.

2. Mootness

a. Copending/Companion Appeals

“Because we have determined [in a copending appeal] that the overlapping claims failed the Section 101 threshold [], Apple “no longer has the potential for injury, thereby mooting the [obviousness] inquiry” at issue in the instant appeals.” *Apple Inc. v. Voip-Pal.com, Inc.*, 2018-1456, 9/25/20.

“We recognize that these appeals did not arise from a civil case in a federal court but rather from proceedings before an administrative agency. This difference in procedural history does not merit a different remedy.” *Apple Inc. v. Voip-Pal.com, Inc.*, n.3, 2018-1456, 9/25/20.

III. Literal Infringement

A. Evidence of Infringement

1. Comparisons with Patentee’s Commercial Embodiment

a. Product Mentioned in or Removed From Asserted Patent

“The fact that the inventors chose to cease referencing Meter-Flow in later patent applications does not support the inference that MeterFlow does not practice the patent.” *Packet Intelligence LLC v. NetScout Sys., Inc.*, 2019-2041, 7/14/20.

IV. DOE Infringement

A. Prosecution History Bar

1. Amendment Estoppel

a. Scope of Estoppel

i. Merely Tangential

If two claim limitations were added at the same time, “the inventors’ decision to add the [first] limitation must be considered in the context of adding, at the same time, the [second] limitation” for purposes of determining what is tangential to the rationale for amending. Tangential exception confirmed on appeal. *Bio-Rad Labs. Inc. v. 10X Genomics, Inc.*, 2019-2255, 8/3/20.

“Because the prior art references at issue taught the use of the alleged equivalent for the claimed function, the tangentiality exception to prosecution history estoppel could not apply.” *Bio-Rad Labs. Inc. v. 10X Genomics, Inc.*, 2019-2255, 8/3/20.

V. Relief

A. Attorneys’ fees

1. Exceptional Case (§ 285)

a. Against Patentee

i. Other Patentee Enforcement

“[Patentee]’s manner of litigation and the broader context of [patentee]’s lawsuit against [movant] are relevant considerations.” “ECT’s demand for a low-value settlement—ranging from \$15,000 to \$30,000—and subsequent steps—such as failure to proceed in litigation past claim construction hearings—indicates the use of litigation to achieve a quick settlement with no intention of testing the strength of the patent or its allegations of infringement.” *Elec. Comm’n Techs., LLC v. ShoppersChoice.com, LLC*, 2019-2087, 7/1/20.

B. Willfulness

1. JMOL/Summary Judgment

JMOL of nonwillfulness denied where “[infringer] contests that its executives’ lack of knowledge regarding the patents and continued infringing activity after this suit was filed cannot support willfulness.” “At trial, [infringer]’s corporate representative [] admitted that he did not read the patents but still testified that he believed [the inventor] lied and stole the claimed inventions. [Infringer]’s CEO [] testified that he could not recall ever reviewing the asserted patents and confirmed that, even though [infringer] was phasing out the

accused products, he would sell one to a customer if the product was demanded.” Packet Intelligence LLC v. NetScout Sys., Inc., 2019-2041, 7/14/20.

C. Injunction

1. Preliminary Injunction

a. Irreparable Harm

i. Market Impact of Sales

“Though we have recognized that price erosion and loss of market share may in some cases be irreparable injuries, a bare assertion of irreparable harm is never sufficient to prove such harm or justify the “extraordinary remedy” of a preliminary injunction.” Takeda Pharm. U.S.A., Inc. v. Mylan Pharm. Inc., 2020-1407, 7/31/20 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 24 (2008)).

b. Lack of Compliance with Biologics Act for Biosimilars

Notice requirement in Section 262(l)(8)(A) is triggered by each “biological product,” not each manufacturing or label change for the same product. Preliminary injunction to require manufacturing or label change notice denied. Genentech, Inc. v. Immunex Rhode Island Corp., 2019-2155, 7/6/20.

2. Permanent Injunction

a. Irreparable Injury

i. First Mover Advantage

“Money damages will not be able to compensate Bio-Rad for the harms stemming from 10X’s first mover advantage.” Bio-Rad Labs. Inc. v. 10X Genomics, Inc., 2019-2255, 8/3/20.

b. Sunset Periods

“The district court carefully crafted an injunction that allows existing 10X customers to continue their important research but attempts to mitigate the harm to Bio-Rad from 10X’s first mover advantage. The court also provided 10X with an opportunity to design non-infringing alternatives, which 10X has done for all but two infringing product lines. In these circumstances, we conclude that the district court did not abuse its discretion in granting Bio-Rad an injunction, except as to the Linked-Reads and CNV product lines.” Bio-Rad Labs. Inc. v. 10X Genomics, Inc., 2019-2255, 8/3/20.

D. Reasonable Royalty

1. Established and Comparable Royalties/License Agreements

a. Comparability Threshold

“Here, the district court concluded that Mr. Malackowski had met a showing of “baseline comparability” and that the “degree of comparability is a factual issue best addressed through cross examination.” The Caliper/RainDance and Applied-Bio/QuantaLife licenses covered patents related to micro-fluids. The third license, Applera/Bio-Rad, dealt with thermal PCR cyclers—instruments that are used in bio-chemical reactions. The “degree of comparability” was appropriately left for the jury to decide. Accordingly, we see no abuse of discretion in allowing Mr. Malackowski to testify about these licenses.” *Bio-Rad Labs. Inc. v. 10X Genomics, Inc.*, 2019-2255, 8/3/20.

b. No Separate Apportionment Requirement

“[Expert] concluded that no quantitative adjustment of the royalty rate in the three agreements was required.” He “look[ed] at comparable license agreements between competitors for similar technologies and assess[ed] whether the importance of that technology to the particular license was similar to the hypothetical negotiation. He [] relied on the reports, testimony, and conclusions of other witnesses to understand that the licenses were technologically comparable, and that the proportion of licensed/unlicensed features was comparable to the present case.” “His analysis could reasonably be found to incorporate the required apportionment. Our case law does not require more.” *Bio-Rad Labs. Inc. v. 10X Genomics, Inc.*, 2019-2255, 8/3/20.

c. Substantial Evidence of Comparability

A license “involved 500+ patents relating to microfluids, not three [asserted] patents dealing with specific droplet generation and manipulation” from which plaintiff relied upon a “15% rate” from the license that “never really actualized because [licensor] and [licensee] never competed in the licensed space.” Licensor corporate witness testimony that “the large number of [licensed] patents [] were a necessary but very small part of the [] portfolio; the main technology was the droplet technology, covered by the three patents-in-suit” and “confirming that once [licensee] directly competed with [licensor], the 15% royalty rate would apply” was sufficient for comparability. *Bio-Rad Labs. Inc. v. 10X Genomics, Inc.*, 2019-2255, 8/3/20.

2. Post Verdict Sales/Ongoing Royalties

District court “awarded on-going royalties in that amount for both the adjudicated products and certain un-adjudicated products. It reasoned that, because [patentee] demonstrated at trial that [] standard-compliant devices [] infring[e] the asserted claims, the unaccused, unadjudicated products “are not colorably different tha[n] the accused products.” “We affirm all of the court’s rulings and the verdict predicated thereon.” *Godo Kaisha IP Bridge 1 v. TCL Commc’n Tech. Holdings Ltd.*, 2019-2215, 8/4/20.

3. Use of a Claimed Method

Because “[m]ethod claims are “not directly infringed by the mere sale of an apparatus capable of performing the claimed process.” *Joy Techs., Inc. v. Flakt, Inc.*, 6 F.3d 770, 773 (Fed. Cir. 1993),” a patentee’s “theory that [the infringer]’s internal testing, customer support, and customer training was pre-suit activity infringing the method patents and thus supporting damages [was not] evidence supporting damages caused by or resulting from these pre-suit activities.” Because the “damages expert, applied a calculated reasonable royalty to revenue from [the infringer]’s sales of [] products[, the] damages base was not tailored to any alleged internal use of the claimed methods.” *Packet Intelligence LLC v. NetScout Sys., Inc.*, 2019-2041, 7/14/20.

“Even if [the infringer]’s own use of the patented method drove sales for [] products, that fact would only justify instances of internal use being counted as part of the royalty base.” *Packet Intelligence LLC v. NetScout Sys., Inc.*, 2019-2041, 7/14/20.

E. Multiple Claims or Patents

“The jury found all three patents valid and willfully infringed. It also awarded damages in the amount of \$23,930,716.” “[W]e affirm the judgment of infringement of the ’083 patent and the entirety of the jury’s damages award. We reverse, however, the district court’s construction of the asserted claims of the ’407 and ’193 patents and vacate the judgment of infringement of those patents.” “As Bio-Rad explained during oral argument, affirming the judgment of infringement on the ’083 patent—which includes the only asserted apparatus claims—would leave the damages award undisturbed. 10X did not dispute this point either at oral argument or in its briefing to us. In fact, in its opening brief, 10X argued that reversal as to the ’083 patent would affect the damages award, but did not make such an argument for the ’407 and ’193 patents.” *Bio-Rad Labs. Inc. v. 10X Genomics, Inc.*, 2019-2255, 8/3/20 (citations omitted).

VI. Claim Construction

A. Special Constructions

1. Broadest Reasonable Interpretation During Prosecution

Affirming Board’s construction as the broadest reasonable interpretation when there was nothing in the claim language requiring a narrower reading and the appellant could point to no other support for limiting the scope of the claim. *Alacritech, Inc. v. Intel Corp.*, 966 F.3d 1367, 1374 & n.7 (Fed. Cir. 2020), 2019-1467, 7/31/20.

B. Claim Language

1. Preambles

a. Construed as Limitation

i. Antecedent Reference

“The language relied upon for antecedent basis in the preamble at issue is intertwined with the rest of the preamble.” “Based on the antecedent relationship, it is clear the claim drafters intended to limit the claimed methods to on-chip reactions, using both the preamble and the body of the claim to define the claimed invention. Accordingly, we conclude that the district court’s claim construction is erroneous. Under the correct construction, the claimed methods are limited to on-chip reactions.” *Bio-Rad Labs. Inc. v. 10X Genomics, Inc.*, 2019-2255, 8/3/20.

2. Plain and Ordinary Meaning

a. Physically Possible Meanings

“[I]t is nonetheless improper to add limitations to constructions to exclude only certain inoperable embodiments.” *Network-1 Techs., Inc. v. Hewlett-Packard Co.*, 2018-2338, 9/24/20.

3. Open/Closed Claims, Generic and Negative Limitations

a. “Portions” of Elements

“The claimed surface cannot be an imaginary one, yet [patentee]’s infringement theory would permit [patentee] to point to an imaginary slice of a solid cast pile tip as the claimed “end plate having a substantially flat surface.”” *Neville v. Foundation Constructors, Inc.*, 2020-1132, 8/27/20.

“[Patentee] cannot manufacture a factual dispute by drawing imaginary lines through the accused pile tip to create an “end plate” and “substantially flat surface” where none exist.” *Neville v. Foundation Constructors, Inc.*, 2020-1132, 8/27/20.

b. Conjoined Elements

“We agree with the district court that the plain meaning of the claim, which requires that the “protrusion” is “extending outwardly” from the “end plate,” does not extend to a structure in which the alleged “end plate” is an indistinguishable part of the alleged “protrusion”; an object cannot protrude from itself.” “Under [patentee]’s view, there is no meaningful difference between the “protrusion” and “end plate,” since any object could be arbitrarily partitioned into a portion labeled as an “end plate” and a remaining “protrusion.”” *Neville v. Foundation Constructors, Inc.*, 2020-1132, 8/27/20.

c. Defining/Positioning/Connecting Terms

“We agree with the district court that the plain meaning of the claim, which requires that the “protrusion” is “extending outwardly” from the “end plate,” does not extend to a structure in which the alleged “end plate” is an indistinguishable part of the alleged “protrusion”; an object cannot protrude from itself.” *Neville v. Foundation Constructors, Inc.*, 2020-1132, 8/27/20.

d. Multiple Word Limitations Including Modifiers

“But the claim phrase is not limited to the word “low,” and the claim construction analysis should not end just because one reference point has been identified. To be sure, the claim phrase “low level current” does not preclude a lower bound by use of the word “low.” Rather, in the same way the phrase should be construed to give meaning to the term “low,” the phrase must also be construed to give meaning to the term “current.”” *Network-1 Techs., Inc. v. Hewlett-Packard Co.*, 2018-2338, 9/24/20.

e. Range Limitations and Measurements

A claim that required a first measurement of surface tension to be greater than a second met when the second quantity did not exist, had not such surface, such that it had no tension measurement based on the purpose of the greater surface tension being achieved. *Bio-Rad Labs. Inc. v. 10X Genomics, Inc.*, 2019-2255, 8/3/20.

4. Section 112, paragraph 6

a. When Applied

i. Impact of Dependent Claims

“Mere inclusion of a limitation within a structure does not automatically render the limitation itself sufficiently structural.” *Egenera, Inc. v. Cisco Sys., Inc.*, 2019-2015, 8/28/20.

ii. Overcoming Presumption Against 112, 6

“But the cases [patentee] cites do not compel its favored outcome and do not endorse black-box claiming.” *Egenera, Inc. v. Cisco Sys., Inc.*, 2019-2015, 8/28/20.

iii. Specific Nonce Terms

“[A] claim term is subject to § 112(f) if it recites “function with-out reciting sufficient structure for performing that function.” [Patentee] does not explain how [nonce term] “logic”—even assuming it connotes some possible structure in the general sense of software, firmware, or circuitry—amounts to “sufficient structure for performing [the modification] function.”” *Egenera, Inc. v. Cisco Sys., Inc.*, 2019-2015, 8/28/20.

5. Effect of Other Limitations in Claim

a. Meanings of different terms should be sensibly related

“As suggested by the word “end,” the relevant surface of the end plate is the external one at the second end of the pile tip.” *Neville v. Foundation Constructors, Inc.*, 2020-1132, 8/27/20.

6. Effect of Other Claims

Outweighs lexicography. “[Appellee] argues that because the patent defines the term “antibody” in column 5, we should invalidate all dependent claims which would not be consistent with that definition such as claims 4 and 19. We do not agree. The plain language of these dependent claims weighs heavily in favor of adopting [appellant]’s broader claim construction.” *Baxalta Inc. v. Genentech, Inc.*, 2019-1527, 8/27/20.

a. Relationship Between Independent and Dependent Claims

“The dependent claims confirm that “antibody” is not so limited” where they recite “said antibody or antibody fragment is selected from the group consisting of [several options and] [e]ach of these claimed “antibodies” falls outside of the district court’s construction.” *Baxalta Inc. v. Genentech, Inc.*, 2019-1527, 8/27/20.

C. Written Description

1. Lexicography

a. Insufficient Definition

Specification statement that “[a]ntibodies are immunoglobulin molecules having . . .” not adopted as a definition. “When considered in the context of the remainder of the written description and the claims, we read the excerpt in column 5 as a generalized introduction to antibodies rather than as a definitional statement.” *Baxalta Inc. v. Genentech, Inc.*, 2019-1527, 8/27/20.

2. Limitations Not Imported

“Nothing in the claims of the ’930 patent precludes the conversion of AC power to DC power, and it was error for the district court to add such a limitation.” *Network-1 Techs., Inc. v. Hewlett-Packard Co.*, 2018-2338, 9/24/20.

D. Prosecution History

1. Priority Applications

“[W]hen discrepancies between a foreign priority document and the U.S. filing exist, it may be proper to view the discrepancies as intentional.” *IBSA Institut Biochimique, S.A. v. Teva Pharm. USA, Inc.*, 2019-2400, 7/31/20.

2. Issuing Application

a. Changes Meaning

i. Claims Later Deleted

“During the prosecution of the ’390 patent the applicant had a pending claim using “half-liquid” and another claim, depending from that claim, using the term “semi-liquid.” Although the claim using “semi-liquid” was ultimately removed, this is additional evidence that the applicant knew the term “semi-liquid” yet elected to use “half-liquid” to mean something different.” *IBSA Institut Biochimique, S.A. v. Teva Pharm. USA, Inc.*, 2019-2400, 7/31/20 (citations omitted).

E. Timing of Construction and Parties’ Positions

1. Post Trial Claim Constructions

“Neither Biogen nor the district court can reframe the anticipation inquiry on JMOL to focus on the unclaimed three-dimensional protein structure, where the jury was instructed, without objection, to decide anticipation based on the linear amino acid sequence.” *Biogen MA, Inc. v. EMD Serono, Inc.*, 2019-1133, 9/28/20.

F. Limited and Ordinary Meaning Constructions

1. Questions of Fact in Applying Constructions

Affirming that “patentee was permitted to prove [infringement] by showing that: (1) the patent claims are essential to mandatory aspects of [a] standard; and (2) the accused products practice that standard.” “We find no error in the submission of these questions to the jury in the context of an infringement trial.” *Godo Kaisha IP Bridge 1 v. TCL Commc’n Tech. Holdings Ltd.*, 2019-2215, 8/4/20.

VII. Procedural Law

A. Applicable Circuit Law

1. Motions to Seal Information

Regional circuit law applied to review orders on motions to seal. *Uniloc 2017 LLC v. Apple Inc.*, 2019-1922, 7/9/20.

2. Judicial Estoppel

“For questions of judicial estoppel, we apply the law of the regional circuit—here the First Circuit.” *Egenera, Inc. v. Cisco Sys., Inc.*, 2019-2015, 8/28/20.

B. Preclusion

1. Claim Preclusion - Res Judicata

“[T]he district court erred in its claim-preclusion analysis by failing to compare the scope of the patent claims asserted in the 2012 lawsuit with the scope of the patent claims asserted in the 2016 lawsuit.” *XY, LLC v. Trans Ova Genetics, LC*, 2019-1789, 7/31/20.

a. Timing of Accused Acts

Affirming claim preclusion judgment for infringing acts after judgment based on application of same conduct standard from issue preclusion case. *Sowinski v. Cal. Air Res. Bd.*, 2019-1558, 8/21/20.

b. Adjudication on the Merits

“Res judicata, or claim preclusion, may be based on failure to prosecute . . . Federal Rule of Civil Procedure 41(b) provides that a dismissal for failure to prosecute “operates as an adjudication on the merits,” with exceptions not here applicable.” *Sowinski v. Cal. Air Res. Bd.*, 2019-1558, 8/21/20.

C. JMOL (Rule 50) / Summary Judgment (Rule 56)

1. Evidence Required to Oppose Summary Judgment

Declaration as to a party’s “subjective “understanding” of his communications with” another party “is insufficient to create a material factual dispute” as to the actual content of those communications. *Phytelligence, Inc. v. Wash. State Univ.*, 2019-2216, 8/27/20.

D. New Trial; Altering or Amending Judgment (Rule 59)

1. Improperly Admitted Evidence

“In its motion for JMOL, 10X argued that Mr. Malackowski’s testimony was not sufficiently tied to the facts of the case because it was based on technologically noncomparable licenses. The district court agreed with 10X as to the Applera/Bio-Rad license, finding that Bio-Rad had failed to present sufficient evidence of the technological comparability of this license. But it nonetheless denied 10X’s motion for JMOL because the other two licenses provided sufficient support for Mr. Malackowski’s reasonable royalty opinions.” “On this record, we see no abuse of discretion in admitting Mr. Malackowski’s testimony, even if the district court ultimately determined that Bio-Rad did not provide substantial evidence of technological comparability of one of the three licenses.” *Bio-Rad Labs. Inc. v. 10X Genomics, Inc.*, 2019-2255, 8/3/20.

E. Construction

1. Statutes/Regulations

“Key here, Section 42.12(b) uses the term “include,” which signifies a non-exhaustive list of sanctions.” *Apple Inc. v. Voip-Pal.com, Inc.*, 2018-1456, 9/25/20.

F. Discovery/Evidence

1. Protective Orders and Sealed Papers

“There is a strong presumption in favor of access to documents filed with a court.” *Uniloc 2017 LLC v. Apple Inc.*, 2019-1922, 7/9/20.

a. Third Party Information

“Such third parties were not responsible for Uniloc’s filing of an overbroad sealing request. Their information calls for an analysis not dependent on the overbreadth rationale just discussed.” *Uniloc 2017 LLC v. Apple Inc.*, 2019-1922, 7/9/20.

G. International Trade Commission/Customs

1. Petitions to Modify or Rescind Exclusion Orders

An “invalidity challenge is not a permissible basis for it to petition for rescission or modification of the GEO.” *Mayborn Group, Ltd. v. Int’l Trade Comm’n*, 2019-2077, 7/16/20.

VIII. Federal Circuit Appeals

A. New Arguments/Issues on Appeal/Waiver/Judicial Estoppel

1. District Court/ITC Appeals

a. Judicial Estoppel

“For questions of judicial estoppel, we apply the law of the regional circuit—here the First Circuit.” *Egenera, Inc. v. Cisco Sys., Inc.*, 2019-2015, 8/28/20.

“We do not think that multiple corrections under § 256 are per se “mutually exclusive.” In any event, the district court’s intervening claim-construction and inventorship determinations further justify any seeming inconsistency.” *Egenera, Inc. v. Cisco Sys., Inc.*, 2019-2015, 8/28/20.

“[E]ven though we agree that judicial estoppel can occur in an administrative tribunal, we disagree that a § 256 petition, without more, counts as “persuasion” of a “court” for judicial-estoppel purposes.” *Egenera, Inc. v. Cisco Sys., Inc.*, 2019-2015, 8/28/20.

“The focus of [appellant]’s motivation to combine argument remained the therapeutic benefits of the claimed invention, and it was not error for the district court to frame its analysis accordingly.” *Immunex Corp. v. Sandoz, Inc.*, 2020-1037, 7/1/20.

b. Claim Construction Waiver

“We agree with [appellee] that [appellant] cannot now seek a much narrower construction on appeal.” *Egenera, Inc. v. Cisco Sys., Inc.*, 2019-2015, 8/28/20.

i. Expert Claim Construction Testimony at Trial

“[Appellant] also appears to argue that the district court’s acceptance of [an expert]’s testimony regarding [limitation not taught by prior art] is a new issue of claim construction. But a review of the trial transcript reveals that [appellant] failed to object during the challenged portion of [expert] testimony, including during his testimony regarding his understanding of what the claims require. [If appellant] understood [the expert] to be testifying inconsistently with the district court’s claim construction order or testifying to material beyond of the scope of his report, [appellant] was required to object *at trial* to preserve its arguments for judgment as a matter of law. And [appellant]’s failure to object amounts to waiver of these issues.” *Packet Intelligence LLC v. NetScout Sys., Inc.*, 2019-2041, 7/14/20 (emphasis in original).

c. Exceptions

i. Discretion Not to Apply Waiver

“[Appellee] contends that [appellant] waived any argument against judicial estoppel. Regardless, whether to apply the waiver rule is discretionary. Here, there has been complete briefing and argument on the judicial estoppel issue. To apply waiver would not serve judicial economy or promote fairness, and so we address the merits.” *Egenera, Inc. v. Cisco Sys., Inc.*, n.6, 2019-2015, 8/28/20.

B. Issue Preclusion and Unappealed Determinations

1. Invalidity/Unpatentability Findings

“A patent claim is extinguished upon a final judgment of invalidity or a final decision of unpatentability In contrast, the legal status of the ’850 patent is unaffected by Mayborn’s wish to present an invalidity challenge.” *Mayborn Group, Ltd. v. Int’l Trade Comm’n*, 2019-2077, 7/16/20.

2. Related Appeals

“St. Jude argues that because Snyders expressly waived its *Arthrex*-based challenge in a companion appeal, [], we should deem the argument waived in this appeal. Snyders was not obligated to press every argument available to it in a different appeal to maintain its rights in this one. The companion appeal addresses inter partes reviews of a different patent

than the one at issue in this appeal. We do not find waiver on this record.” *Snyders Heart Valve LLC v. St. Jude Med., LLC*, n.2, 2019-2111, 9/9/20 (nonprecedential).

C. Appellate Jurisdiction

1. Jurisdiction Requirements for ITC Petition for Review

a. Denial of Petition to Rescind

A party filing a denied petition to rescind a General Exclusion Order (GEO) had standing to appeal because “given the strong possibility the Commission or CBP might act to enforce the GEO at any time and Complainants’ ongoing efforts to assert the GEO against [the party], [the party] has alleged that the GEO has injured it in a “particularized” and “concrete” manner.” “[I]t is the Commission that has issued the GEO, and it retains the ability to enforce, modify, or rescind it. Thus, [the party]’s injuries may be fairly traced to the conduct of the Commission.” *Mayborn Group, Ltd. v. Int’l Trade Comm’n*, 2019-2077, 7/16/20.

2. Collateral Order Doctrine

Order denying motion to seal is appealable under collateral order doctrine. *Uniloc 2017 LLC v. Apple Inc.*, 2019-1922, 7/9/20.

D. Cross-Appeals v. Alternate Bases for Affirmance

1. Alternative Basis for Dismissal

CAFC “may affirm a judgment of a district court on any ground the law and the record will support so long as that ground would not expand the relief granted.” *Glaxo Grp. Ltd. v. TorPharm, Inc.*, 153 F.3d 1366, 1371 (Fed. Cir. 1998) (applied to Rule 12 dismissal in *Golden v. Apple Inc.*, 2020-1508, 9/3/20).

E. Scope of Claim Construction Review

1. Claim Construction Modified on Appeal

a. Vacate and Remand in View of New Construction

“[T]he district court correctly construed “low level current” but erred in its construction of “main power source,” and as a result of that error, Network-1 is entitled to a new trial on infringement. We therefore vacate the district court’s judgment of non-infringement and remand for a new trial.” *Network-1 Techs., Inc. v. Hewlett-Packard Co.*, 2018-2338, 9/24/20.

“As a court of review, we refuse to decide, in the first instance, whether 10X’s systems would infringe under the correct construction. Even Bio-Rad concedes that the district court precluded 10X from arguing that the entire preamble is limiting. Accordingly, we vacate the district court’s judgment of infringement of the claims of the ’407 and ’193

patents and remand for a new trial on those issues.” Bio-Rad Labs. Inc. v. 10X Genomics, Inc., 2019-2255, 8/3/20.

F. Standards of Review and Record/Appendix on Appeal

1. Substantial Evidence Threshold

a. Evidence v. Attorney Argument

“[T]here is no merit to FanDuel’s suggestion that the Board was somehow obligated to defer to Mr. Kitchen’s expert opinion of claim 6’s unpatentability just because the patent owner in this case did not supply opposing expert guidance.” FanDuel, Inc. v. Interactive Games LLC, 2019-1393, 7/29/20.

“Facebook’s position, which is based on attorney argument rather than evidence in the record, does not persuade us that the Board’s understanding of Roseman’s system is incorrect. It also does not undermine the substantial evidence that supports the Board’s finding that claim 1 would not have been obvious over the prior art of record.” Facebook, Inc. v. Windy City Innovations, LLC, 2018-1400, 9/4/20.

2. Abuse of Discretion

a. Application of Local Rules

“A district court does not abuse its discretion simply because it elects to strictly enforce its local procedural rules.” Uniloc 2017 LLC v. Apple Inc., 2019-1922, 7/9/20.

b. Assessing 285 Attorneys’ Fees Determinations

“While [appellant] stops short of claiming that either [of two cases decide by a different district court] bind the District Court,[] the absence in the Attorney Fee Order of any reference to either relevant case, or any allusion to their opposing conclusions, is problematic.” “Accordingly, we conclude that the District Court abused its discretion in weighing relevant factors in its exceptional case analysis.” Elec. Comm’n Techs., LLC v. ShoppersChoice.com, LLC, 2019-2087, 7/1/20.

G. Relief Outside Appeal Process

1. Mandamus

Mandamus petition challenging denial of stay in view of IPR denied where district court order only said “staying the case would only further delay its resolution,” which is true for every stay; “[d]enying the stay would allow the Parties to obtain a more timely and complete resolution of infringement, invalidity, and damages issues,” which is always true in comparison to an IPR given the conjunction; and “Plaintiff opposes the stay,” which is true for all relevant situations. In re Sand Revolution LLC, 20-145, 9/28/20 (nonprecedential).

H. Harmless Error

1. Impact of Flawed Jury Instructions

“As a preliminary matter, we disagree that the failure to object decides this matter. We are bound by the law, not by the jury charge, even if the charge was not objected to. And [appellant]’s failure to object to the district court’s jury instruction does not render the instruction law of the case for evaluating the sufficiency of the evidence.” Packet Intelligence LLC v. NetScout Sys., Inc., 2019-2041, 7/14/20 (citations omitted).

2. Flawed Claim Construction

“Because the general verdict form does not indicate the basis for the jury’s decision, where the evidence shows that HP relied on the district court’s erroneous construction for its argument that it does not infringe the asserted claims, we conclude that Network-1 has established that it was prejudiced by the claim construction.” Network-1 Techs., Inc. v. Hewlett-Packard Co., 2018-2338, 9/24/20.

I. Remand Determination

1. Resolution in the First Instance

a. Obviousness

“However, it is inappropriate for the court to determine obviousness ab initio on appeal.” Fitbit, Inc. v. Valencell, Inc., 2019-1048, 7/8/20.

b. Claim Preclusion

“We leave it to the district court to decide these issues in the first instance and compare the scope of the asserted claims to those asserted in the prior litigation.” XY, LLC v. Trans Ova Genetics, LC, 2019-1789, 7/31/20.

2. No Resolution of Issues in the First Instance

“[T]he district court failed to conditionally rule on Network-1’s motion for a new trial on validity even though it was required to do so by Federal Rule of Civil Procedure 50(c).” “We decline to consider Network-1’s motion in the first instance.” Network-1 Techs., Inc. v. Hewlett-Packard Co., 2018-2338, 9/24/20.

IX. Patent Office Proceedings

A. Inter Partes Review

1. Institution

a. Effect on Final Decision

“By finding at institution that Fan-Duel had a reasonable likelihood of succeeding in its obviousness challenge to claim 6, despite one reference’s contested prior art status, the Board was not adopting a position on the ultimate import of the three references.” *FanDuel, Inc. v. Interactive Games LLC*, 2019-1393, 7/29/20.

2. Joinder

“The clear and unambiguous text of § 315(c) does not authorize same-party joinder, and does not authorize the joinder of new issues.” *Facebook, Inc. v. Windy City Innovations, LLC*, 2018-1400, 9/4/20.

“To join a party to an instituted IPR, the plain language of § 315(c) requires two different decisions. First, the statute requires that the Director (or the Board acting through a delegation of authority, see 37 C.F.R. §§ 42.4(a), 42.122)) determine whether the joinder applicant’s petition for IPR “warrants” institution under § 314.” “Second, to effect joinder, § 315(c) requires the Director to exercise his discretion to decide whether to “join as a party” the joinder applicant.”” *Facebook, Inc. v. Windy City Innovations, LLC*, 2018-1400, 9/4/20.

3. Amendments

“The PTAB correctly concluded that it may consider § 101 patent eligibility when considering the patentability of proposed substitute claims in an IPR.” *Uniloc 2017 LLC v. Hulu, LLC*, 2019-1686, 7/22/20.

4. Appeal

a. Jurisdiction Over Appeals Challenging PTAB Decisions

i. Joined Party Appeals

“Fitbit’s rights as a joined party [sic] applies to the entirety of the proceedings and includes the right of appeal, conforming to the statutory purpose of avoiding redundant actions by facilitating consolidation, while preserving statutory rights, including judicial review.” *Fitbit, Inc. v. Valencell, Inc.*, 2019-1048, 7/8/20.

“Nothing in § 314(d), nor any other statute, overcomes the strong presumption that we have jurisdiction to review that joinder decision.” *Facebook, Inc. v. Windy City Innovations, LLC*, 2018-1400, 9/4/20.

5. Scope of Estoppel

“Because a joining party cannot bring with it grounds other than those already instituted, that party is not statutorily estopped from raising other invalidity grounds.” *Network-1 Techs., Inc. v. Hewlett-Packard Co.*, 2018-2338, 9/24/20.

6. Board Final Written Decision

a. New Theories Adopted by Board

“[T]he different standards of proof required to institute versus to invalidate permit the Board to adopt different views of the sufficiency of a petitioner’s asserted obviousness arguments in its initial versus final decisions without first alerting the parties to that possibility.” *FanDuel, Inc. v. Interactive Games LLC*, 2019-1393, 7/29/20.

“From the moment FanDuel filed its petition, it was on notice that the Board would decide whether those references taught what FanDuel claimed they taught. That is exactly what the Board ultimately did. No APA violation results from such a course.” *FanDuel, Inc. v. Interactive Games LLC*, 2019-1393, 7/29/20.

b. Addressing Parties’ Arguments

i. Inadequate Analysis

“The Board’s analysis of the disclosure of the reassembly limitations in claims 41–43 falls short of that which the APA and our precedent require. After briefly reciting some of the parties’ arguments in two terse paragraphs, the Board merely concludes that “data portions of packets are reassembled” in both claim 41 and the asserted prior art. In doing so, the Board appears to misapprehend both the scope of the claims and the parties’ arguments.” *Alacritech, Inc. v. Intel Corp.*, 2019-1467, 7/31/20 (citations omitted).

“Although the Board cited to the relevant portions of Intel’s petition as it recounted certain arguments made by Intel, the Board did not endorse, adopt, or otherwise suggest that it was persuaded by those arguments, much less explain why it found those arguments persuasive.” *Alacritech, Inc. v. Intel Corp.*, 2019-1467, 7/31/20 (citations omitted).

c. Indefiniteness and Claim Correction

“The Board erred in declining to accept the parties’ uniform position and correct the error that claim 4 depend from claim 3.” *Fitbit, Inc. v. Valencell, Inc.*, 2019-1048, 7/8/20.

7. Due Process Violations

“Apple chose, however, not to address the substance of Voip-Pal’s letters—the very same letters that Apple claims “tainted” its IPR proceedings. Thus, we fail to see how the Board’s sanctions orders deprived Apple of due process.” *Apple Inc. v. Voip-Pal.com, Inc.*, 2018-1456, 9/25/20.

B. Rejection Appeal Procedure

1. Constitutionality of PTAB APJs

Arthrex applies to “the Board’s decisions in ex parte appeals.” In re Boloro Global Ltd., 2019-2349, 7/7/20.

C. Appeals to District Court Under Sections 145 and 146

1. IPRs

“Because Congress foreclosed the possibility of collateral APA review of inter partes review decisions by district courts, and because [appellant] cannot bring an APA challenge when the statutory scheme separately establishes an adequate remedy in a court for its constitutional challenge, we affirm the district court’s dismissal.” *Security People, Inc. v. Iancu*, 2019-2118, 8/20/20.