

Case IPR2016-00820
U.S. Patent No. 7,064,197

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HOLOGIC, INC., and BECTON, DICKINSON AND COMPANY,
Petitioner

v.

ENZO LIFE SCIENCES, INC.,
Patent Owner

Case IPR2016-00820

U.S. Patent No. 7,064,197
TITLE: SYSTEM, ARRAY AND NON-POROUS SOLID SUPPORT
COMPRISING FIXED OR IMMOBILIZED NUCLEIC ACIDS
Issue Date: June 20, 2006

**ENZO'S REPLY IN SUPPORT OF ITS
MOTION TO EXCLUDE EVIDENCE**

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U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

In response to Enzo's motion to exclude paragraphs 3 and 5 of and Attachment A to Petitioner's Exhibit 1037 (Bhattacharyya Declaration) under Federal Rule of Evidence ("FRE") 602, Petitioner fails to identify any evidence that Dr. Bhattacharyya ("the declarant") has personal knowledge that the laboratory protocol attached as Attachment A ("Attachment A protocol") to her declaration is the same protocol cited in Diehl in 2001.

Petitioner does not dispute that the declarant does not have personal knowledge of the contents of the web address listed in Diehl during the relevant timeframe in 2001. She did not visit the web address at that time and she has no personal knowledge of the activities described in the Diehl paper. Instead, Petitioner argues that declarant's testimony regarding her alleged retrieval of the Attachment A protocol on April 5, 2017 provides sufficient basis for personal knowledge of the content that would have been found at that web address 16 years ago. But, as explained in Enzo's Motion to Exclude, Petitioner has provided no facts to support a finding that the declarant has personal knowledge of the contents of the laboratory protocol website *as of 2001*, when it was cited in the Diehl article. (Paper 43.)

Petitioner's argument that the Attachment A protocol's version date indicating that it was purportedly last updated on October 6, 1999 has no bearing on whether the declarant has personal knowledge of that website as it existed when

Case IPR2016-00820

U.S. Patent No. 7,064,197

it was cited by Diehl in 2001. (Paper 46, 2.) As an initial matter, because the declarant has no personal knowledge whether the protocol has been updated since 1999, no basis exists to know whether the version date is actually correct. Furthermore, the date on the protocol in Attachment A cannot establish that it was located at the web address listed in Diehl in 2001. Moreover, as Petitioner admits, the Attachment A protocol is not even currently located at the web address identified in Diehl (<http://cmgm.stanford.edu/pbrown/MGuide/>), which is no longer available. Rather, the declarant testified that the Attachment A protocol is located at a different web address that was accessed after clicking on multiple other links. (Paper 46, 2-3 (“the protocol can be accessed by first going to the webpage at <http://cmgm.stanford.edu/pbrown/MGuide/> and clicking on “Protocols” and then clicking on “Slide Preparation” under the “Protocols” header. The URL for the “Slide Preparation” subpage is http://cmgm.stanford.edu/pbrown/protocols/1_slides.html”).) Thus, the declarant has no personal knowledge of the two critical portions of her testimony necessary to authenticate the Attachment A protocol: (1) “[t]he protocol website cited in *Diehl* (http://cmgm.stanford.edu/pbrown/MGuide) is still in use today,” and (2) “Attachment A to this Declaration is a *true and correct copy of the protocol cited in Diehl.*” (Ex. 1037 ¶¶ 3, 5 (emphasis added).)

Case IPR2016-00820
U.S. Patent No. 7,064,197

Because the declarant lacks any personal knowledge that the Attachment A protocol that she purportedly accessed in April 2017 is the same protocol cited in the 2001 Diehl article, Paragraphs 3 and 5 and Attachment A of Exhibit 1037 should be excluded under Fed. R. Evid. 602.

Dated: May 15, 2017

Respectfully submitted,

/kkm/

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Case IPR2016-00820
U.S. Patent No. 7,064,197

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that on May 15, 2017, a complete copy of the foregoing was served on counsel of record for the Petitioner by filing this document through PTAB E2E and by sending this document via electronic mail to the following addresses:

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