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I. Patentability Requirements

A. Inventorship/Invention and Priority Dates

1. Coinventorship/Joint Inventors

a. Co-Inventors Fail to Testify

“There is no per se requirement to infer that the testimony of an inventor who fails to testify would be harmful to the position of his co-inventor.” *Dionex Softron GmbH v. Agilent Techs., Inc.*, 2021-2372, 1/6/23.

“In *Borror*, we explained that, under the circumstances described by Dionex, “a strong negative inference may be reasonable.” 666 F.2d at 574 (emphasis added).” *Dionex Softron GmbH v. Agilent Techs., Inc.*, 2021-2372, 1/6/23 (quoting *Borror v. Herz*, 666 F.2d 569, 574-75 (C.C.P.A. 1981)).

2. Corroboration

“Bäuerle may not have known every detail, but such omniscience is unnecessary under the rule of reason.” *Dionex Softron GmbH v. Agilent Techs., Inc.*, 2021-2372, 1/6/23.

a. Inventor’s Documents

“As we have previously held, uncorroborated testimony cannot be corroborated by uncorroborated evidence.” “Following well-established precedent preventing parties from creating an ouroboros of corroboration, the ALJ reasonably rejected Philip Morris’s circular path of corroboration.” *Philip Morris Prods. S.A. v. Int’l Trade Comm’n*, 2022-1227, 3/31/23.

Crediting a “a document depicting the prototype . . . , which was admitted as Exhibit 2152.” “While Exhibit 2152 was last modified after reduction to practice, there was evidence it was created before then, including Bäuerle’s [a non-inventor] testimony that the successful prototype had the configuration generally depicted in Exhibit 2152.” *Dionex Softron GmbH v. Agilent Techs., Inc.*, 2021-2372, 1/6/23.

B. Prior Art Invalidity

1. Reference Disclosure

a. Disclosure to POSITA

i. Context of Challenged Patent

Finding that substantial evidence supported PTAB’s determination that one of ordinary skill in the art would not understand a prior art reference’s list of command codes to disclose the claimed list of communication methods, based on evidence including “the patent specification itself distinguishes a list of communication methods from a separate

list of command codes.” “[T]he Board’s finding was supported by substantial evidence. Specifically, the Board’s finding flows from the ’853 patent specification itself and Dr. Turnbull’s testimony.” *Roku, Inc. v. Universal Elecs., Inc.*, 2022-1058, 3/31/23.

ii. Context of Entire Reference

“Read in context with the remainder of the specification, the Commission’s understanding is not unreasonable.” *Philip Morris Prods. S.A. v. Int’l Trade Comm’n*, 2022-1227, 3/31/23.

2. Anticipation (§ 102)

a. Public Use Bar

“[T]he patented technology was “in public use” because, before the critical date, Minerva disclosed fifteen devices having the technology at an event—the industry’s “Super Bowl.” Minerva’s disclosure of these devices spanned several days and included Minerva showcasing them at a booth, in meetings with interested parties, and in a technical presentation. Minerva did not disclose the devices under any confidentiality obligations, despite the commercial nature of the event.” *Minerva Surgical, Inc. v. Hologic, Inc.*, 2021-2246, 2/15/23.

“[O]ur standard for disclosure rising to the level of public use is not predicated on a device being physically handled by the public.” *Minerva Surgical, Inc. v. Hologic, Inc.*, 2021-2246, 2/15/23.

i. Ready for Patenting

“[A]t the time of the public use, the technology was “ready for patenting.” Specifically, Minerva had created working prototypes and enabling technical documents describing the claimed technology.” *Minerva Surgical, Inc. v. Hologic, Inc.*, 2021-2246, 2/15/23.

3. Obviousness (§ 103)

a. Motivation/Apparent Reason to Combine/Modify

i. Known Reason to Combine

“It’s enough for [challenger] to show that there was a known problem of cache coherency in the art, that [the second reference]’s secondary cache helped address that issue, and that combining the teachings of [the first reference] and [the second reference] wasn’t beyond the skill of an ordinary artisan. Nothing more is required to show a motivation to combine under KSR, so we reverse the Board’s finding to the contrary.” *Intel Corp. v. PACT XPP Schweiz AG*, 2022-1037, 3/13/23.

ii. Evidence of Reasons not to Combine

In a single reference obviousness ground, the reference itself contained language defeating the argument. “Morgan itself provides strong evidence against a conclusion that it would have been obvious to replace the circumferential heaters with a centered heater. Indeed, Morgan explains that its circumferential placement is advantageous and goes so far as to modify the tobacco sticks instead of resorting to a central heater.” Philip Morris Prods. S.A. v. Int’l Trade Comm’n, 2022-1227, 3/31/23.

C. Invalidity Based on § 112

1. Written Description (¶ 1)

a. Genus Disclosure Supporting Sub-Genus or Species Claim

Federal Circuit rejected argument that disclosure of a claim multiply-dependent on 46 other claims supported the specific sub-genus defined by 6 of those 46 claims. “Following this maze-like path, each step providing multiple alternative paths, is not a written description of what might have been described if each of the optional steps had been set forth as the only option.” “[A]ll those optional choices do not define the intended result that is claim 1 of the ’830 patent . . . we affirm the Board’s decision that there is no *ipsis verbis* written description.” Regents of the Univ. of Minn. v. Gilead Scis., Inc., 2021-2168, 3/6/23.

“[C]ommon structural features . . . must constitute the near-entirety of the structures being compared. But the structures here are so extensive and varied that the structures of P1 claim 47, which, through its multiple dependencies, encompasses a significantly larger genus than that claimed in the ’830 patent, are not sufficiently common to that of claim 1 of the ’830 patent to provide written description support.” Regents of the Univ. of Minn. v. Gilead Scis., Inc., 2021-2168, 3/6/23.

2. Indefiniteness (¶ 2)

a. Valid

i. Intrinsic evidence definition

Despite the claim including language stating that the “pressurization fluid would not mix with said test sample *because of the nature of their density difference*” the CAFC vacated the indefiniteness conclusion for “enlarged chamber.” “The intrinsic record informs a skilled artisan that the ’877 patent and its claims are directed to a viscometer with an “enlarged chamber” that is large enough to prevent pressurization fluid from entering the lower section of the pressure vessel—where the viscosity of the test sample is being measured—during elevated pressurization.” Grace Instrument Indus., LLC (Grace) v. Chandler Instruments Co., 2021-2370, 1/12/23.

“Thus, in the context of this patent, “enlarged chamber” does not require that chamber to be larger than some baseline object; rather it must be large enough to accomplish a particular function.” This was sufficient even if the claim stated that the function was

accomplished by a density difference without mentioning the size of the chamber. *Grace Instrument Indus., LLC (Grace) v. Chandler Instruments Co.*, 2021-2370, 1/12/23.

D. Section 101

1. Found in Nature/Preemption of Natural Phenomenon

Affirmed 101 invalidity where “the only difference between at least one embodiment within the scope of the claims and natural milk is that the NR in the former is isolated.” “[T]he act of isolating the NR compared to how NR naturally exists in milk is not sufficient, on its own, to confer patent eligibility.” *ChromaDex, Inc. v. Elysium Health, Inc.*, 2022-1116, 2/13/23.

2. Abstract Idea Exclusion

a. Claimed Subject Matter

First step of ineligibility satisfied for claims “directed to those same general abstract ideas—displaying images, converting them into a format, transmitting them, and so on.” *Hawk Tech. Sys., LLC v. Castle Retail, LLC*, 2022-1222, 2/17/23.

b. Inventive Concept/Transformation Exception

No transformation even if claims recite parameters where “the claims fail to specify precisely what the parameters are and the parameters at most concern abstract data manipulation—image formatting and compression.” *Hawk Tech. Sys., LLC v. Castle Retail, LLC*, 2022-1222, 2/17/23.

II. Other Defenses

A. Laches

1. In Prosecution

“PMC asserts that its “compliance” with the Consolidation Agreement and the PTO’s rules precludes a finding of laches as a matter of law. We disagree.” *Personalized Media Commc’ns, LLC v. Apple Inc.*, 2021-2275, 1/20/23.

“[Appellant] asserts that Apple needed an expert on PTO proceedings to support its case. *Hyatt* does not require PTO testimony for a laches determination to be supported, and [appellant] cites no case law suggesting otherwise. Nor is there any other basis in the record to suggest that the district court needed an expert’s specialized knowledge to help understand the administrative records and the PTO regulations in this case.” *Personalized Media Commc’ns, LLC v. Apple Inc.*, 2021-2275, 1/20/23.

a. Prejudice

“Because Apple began developing FairPlay in the early 2000s and launched it in 2003, Apple necessarily invested in or worked on FairPlay before 2003, which is undisputedly during the period of delay.” *Personalized Media Commc’ns, LLC v. Apple Inc.*, 2021-2275, 1/20/23.

B. ITC-Only Defenses

“We need not resolve whether the directive to “consult with” HHS within this particular statutory framework requires more than notice in the Federal Register and an opportunity to comment.” *Philip Morris Prods. S.A. v. Int’l Trade Comm’n*, 2022-1227, 3/31/23.

III. Relief

A. Injunction

1. ANDA-specific injunctions

a. Orange Book Modifications

“An inquiry into whether a patent may be properly listed or delisted from the Orange Book therefore clearly requires a determination of what that patent claims.” *Jazz Pharms., Inc. v. Avadel CNS Pharms., LLC*, 2023-1186, 2/24/23.

“[T]he delisting statute does not require us to consider whether the patent holder violated the law by listing the patent in the first instance. It simply provides that those accused of infringing a listed patent may request an order requiring the patent holder to correct or delete listings for patents that do not claim the drug or a method of using the drug.” *Jazz Pharms., Inc. v. Avadel CNS Pharms., LLC*, 2023-1186, 2/24/23.

B. ITC Exclusion and Civil Penalty Orders

1. Factors Required for Exclusion Orders

“[T]he Commission provided a sufficient basis for issuance of an exclusion order . . . [t]he ALJ and the Commission properly considered and weighed the public interest evidence put forth by the parties, including expert testimony, scientific evidence, and, importantly, over 30 FDA documents regarding the IQOS products, including the PMTA and MRTPA documents on which Philip Morris relies. The Commission reasonably agreed with the ALJ that, notwithstanding the granted PMTAs and MRTPAs, numerous FDA documents in the record demonstrate that exclusion of the IQOS products will not adversely impact the public health and welfare, particularly given the existence of other non-tobacco therapies that reduce tobacco use and consideration of the population as a whole.” *Philip Morris Prods. S.A. v. Int’l Trade Comm’n*, 2022-1227, 3/31/23.

IV. Claim Construction

A. Claim Language

1. Preambles

a. Top Level Label is Limiting or Affects Body Construction

“[M]ethod claims require the performance of steps; claims that describe physical components of a whole are system, or apparatus, claims.” *Jazz Pharms., Inc. v. Avadel CNS Pharms., LLC*, 2023-1186, 2/24/23.

2. Plain and Ordinary Meaning

a. Grammar Rules

Where a noun was followed by a prepositional phrase and then a participle phrase, the Court concluded that “the most natural reading” was to modify the noun with the participle phrase rather than modifying the object of the prepositional phrase. *Grace Instrument Indus., LLC (Grace) v. Chandler Instruments Co.*, 2021-2370, 1/12/23.

3. Open/Closed Claims, Generic and Negative Limitations

a. Conjoined or Additional Elements

“Nothing in the claim language or specification indicates that the “receiving end” cannot include additional elements.” *Philip Morris Prods. S.A. v. Int’l Trade Comm’n*, 2022-1227, 3/31/23.

b. Range Limitations and Measurements

“The specification [], however, contains no requirement regarding the size of the filter openings. Although it is true that each embodiment [] contains a mesh filter, which has very small openings, the scope of a claim is not ordinarily limited to preferred embodiments or specific examples in the specification.” *SSI Techs., LLC v. Dongguan Zhengyang Elec. Mech. LTD*, 2021-2345, 2/13/23.

4. Section 112(f)

a. How Applied

i. Corresponding Structure/Material/Acts

All structures needed to perform the function are included. “The specification provides no details suggesting that the magnet holder, for example, could be solely responsible, without additional structure, for rotating the rotor. The other magnetic coupling components also are required to rotate the rotor.” “We thus disagree with Grace’s attempt to define the “means for driving” as any individual component that relays power to the rotor.” *Grace Instrument Indus., LLC (Grace) v. Chandler Instruments Co.*, 2021-2370, 1/12/23.

“Grace argues that means-plus-function claims must be limited to disclosed structures and equivalents, not locations of disclosed structures. We disagree.” “We reject Grace’s attempt to disassociate the disclosed structure from the location of the disclosed structure.” Grace Instrument Indus., LLC (Grace) v. Chandler Instruments Co., 2021-2370, 1/12/23.

5. Effect of Other Limitations in Claim

a. Definition Found in the Claim

Federal Circuit defined “filter” based on functional language in the claim. “[A] filter need only perform the function set forth in claim 9 of the patent: to “substantially prohibit one or more gas bubbles of the fluid from entering the sensing area.”” SSI Techs., LLC v. Dongguan Zhengyang Elec. Mech. LTD, 2021-2345, 2/13/23.

6. Method Claims

a. Required Order of Steps

“[N]either the logic nor grammar of the claim compel such a result under the applicable broadest reasonable construction approach. Instead, as the Board concluded, “determining” could occur during the forwarding of the piston, much like a fuel pump determines the amount of fuel necessary to fill a vehicle’s fuel tank during filling, a comparison described by Agilent’s expert and credited by the Board.” Dionex Softron GmbH v. Agilent Techs., Inc., 2021-2372, 1/6/23.

B. Written Description

1. Disclosed Embodiment(s)

a. Coverage Irrelevant

“But for all of these arguments, Grace’s logic is circular. Each argument relies on Grace’s preferred interpretation that “bottom section” refers to the pressure vessel, not the viscometer. Under the correct interpretation that “bottom section” refers to the viscometer, the preferred embodiments are not excluded and there is no conflict with claim 14.” Grace Instrument Indus., LLC (Grace) v. Chandler Instruments Co., 2021-2370, 1/12/23.

C. Prosecution History

1. Terms Added During Prosecution

“[I]n view of the parallelism between the amendment to claim 1 and the error-detection capabilities disclosed elsewhere in the ’153 patent, we agree with the district court that the amendment to claim 1 was intended to capture the error-detection capability of the controller.” SSI Techs., LLC v. Dongguan Zhengyang Elec. Mech. LTD, 2021-2345, 2/13/23.

D. Timing of Construction and Parties' Positions

1. Construction Different as Applied

“[T]he district court’s application of DZEM’s construction makes clear that there is a substantial difference between the two constructions.” “It is clear from that analysis that the district court understood the word “porous” to require that the filter openings be smaller than a certain unspecified maximum size.” *SSI Techs., LLC v. Dongguan Zhengyang Elec. Mech. LTD*, 2021-2345, 2/13/23.

V. Procedural Law

A. Preemption

“We hold that the district court abused its discretion in issuing the preliminary injunction because the applicable speech-protective legal standards are not met.” *Lite-Netics, LLC v. Nu Tsai Capital, LLC*, 2023-1146, 2/17/23.

“Subjective bad faith must be addressed if allegations are determined to be objectively baseless, but not otherwise.” *Lite-Netics, LLC v. Nu Tsai Capital, LLC*, 2023-1146, 2/17/23.

“[W]e conclude that Lite-Netics’s position on all three of those disputes [2 claim constructions and DOE] has not been shown, at this stage of the litigation (before, e.g., full claim-construction proceedings or possible expert reports on infringement), to be objectively baseless.” *Lite-Netics, LLC v. Nu Tsai Capital, LLC*, 2023-1146, 2/17/23.

“Given the First Amendment principles that are part of the patent-preemption doctrine at issue here, we see no basis for a weaker tailoring requirement in the present context. We therefore reject HBL’s all-or-nothing defense of the preliminary injunction.” *Lite-Netics, LLC v. Nu Tsai Capital, LLC*, 2023-1146, 2/17/23.

B. International Trade Commission/Customs

1. Domestic Industry

Adequate domestic industry affirmed even though product was not approved for sale at the time of the complaint. “Even if the articles could not be sold commercially in the United States, the parties do not dispute that sufficient investment in labor and capital had been expended. In addition, the record demonstrates that, at the time of the complaint, Reynolds’ VUSE products were being sold in the United States with knowledge of the FDA.” *Philip Morris Prods. S.A. v. Int’l Trade Comm’n*, 2022-1227, 3/31/23.

C. Transfer to New Judge or Venue

“In sum, on the record before us, four factors favor transfer and four factors are neutral. No factor weighs against transfer.” “The district court clearly erred . . . and its decision to

deny [defendant]’s motion to transfer was a clear abuse of discretion.” In re Google LLC, 2023-101, 2/1/23.

1. Mandamus to Resolve Important Venue Issue

“The unusual, exceptional circumstances presented by this case render mandamus review appropriate, as such review will permit us to resolve an important issue relating to proper judicial administration on which district courts have been divided. In looking to Federal Circuit law, dis-trict courts have been deeply split over whether a defendant can defeat personal jurisdiction under Rule 4(k)(2) by unilaterally consenting to suit in a different district, with some courts concluding that personal jurisdiction cannot be established under Rule 4(k)(2) when defendants “represent that [they] would be amenable to suit in [another state],” while others have concluded that a “defendant must do more than simply say, ‘I designate State X as an alternate forum’ in order to avoid application of Rule 4(k)(2).”” In re Stingray IP Solutions, LLC, 2023-102, 1/9/23.

2. Determining Venues Where Case Could Have Been Brought

“[W]e now confirm that “the defendant’s burden under the negation requirement entails identifying a forum where the plaintiff could have brought suit—a forum where jurisdiction would have been proper at the time of filing, regardless of consent.”” In re Stingray IP Solutions, LLC, 2023-102, 1/9/23.

3. Sources of Proof Factor

Neutral sources of proof determination “was clearly erroneous as this factor favors transfer.” “Physical prototypes of the accused products have been identified only as in the [transferee forum].” “The [transferee forum] would clearly provide easier access to sources of proof, including documents, and be more convenient for potential non-party witnesses.” In re Google LLC, 2023-101, 2/1/23.

4. Local Interest Factor

“[I]ts conclusion was an abuse of discretion as it gave significant weight to [patentee]’s office and corporate residence in Waco. The court recognized that [patentee] “established itself in Waco less than one year before it filed this lawsuit,” and “none of its personnel are here in this District.” [Patentee] incorporated in Texas in February 2021 and established an office in Waco in August 2021, just one month before it filed suit against [defendant]. [Patentee] conducts no activities from Texas that relate to the accused technology. Under such circumstances, [Patentee] has no meaningful presence in the Western District of Texas that should be given significant, let alone, comparable weight to the facts tying the litigation to the California forum, where both the patented and accused technology were developed.” In re Google LLC, 2023-101, 2/1/23.

5. Congestion Factor

District court held that court congestion weighed slightly against transfer. “[I]n this case it was a clear abuse of discretion to accord this factor any weight. It appears undisputed that

[patentee] (unlike its predecessor owners of the patents) is not engaged in product competition in the marketplace and is not threatened in the market in a way that, in other patent cases, might add urgency to case resolution and give some significance to the time-to-trial difference. Nor does the record reveal any other basis on which to accord significance to whatever greater speed the district court speculates it could reach trial as compared to [transferee forum].” In re Google LLC, 2023-101, 2/1/23 (citations omitted).

6. Credibility of Declarants

“The court weighed this factor only slightly in favor of transfer after finding Ms. True’s declaration was unreliable, but the steep discounting of this factor is unreasonable on the record.” “The district court faulted Ms. True for not addressing three of Google’s Texas employees that Jawbone identified as having potentially relevant knowledge based on Jawbone’s review of their online profiles, but Google provided sworn, unequivocal deposition testimony from each employee explaining that none of them work on the accused features.” In re Google LLC, 2023-101, 2/1/23 (citation omitted).

VI. Federal Circuit Appeals

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

1. ITC Appeals

Even if an issue is raised to the Commission, “failure to raise an issue before an ALJ during an investigation constitutes forfeiture of that issue.” Philip Morris Prods. S.A. v. Int’l Trade Comm’n, 2022-1227, 3/31/23.

B. Issue Preclusion on Appeal

1. Invalidity/Unpatentability Findings

Where the Federal Circuit had affirmed infringement, but vacated and remanded on damages, an affirmance of IPR invalidity before the appeal of the new damages judgment is addressed, resulted in vacating the damages judgment and remanding with instructions “to dismiss the case as moot.” VirnetX Inc. v. Apple Inc., 2021-1672, 3/31/23 (nonprecedential).

C. Appellate Jurisdiction

1. Final Decision/Judgment

a. Pending Counterclaims

“In general, a determination of non-infringement does not moot a counterclaim of invalidity such that there is no Article III case or controversy. Moreover, once the case-or-controversy requirement has been satisfied, jurisdiction continues “absent further information.”” SSI Techs., LLC v. Dongguan Zhengyang Elec. Mech. LTD, 2021-2345,

2/13/23 (citations omitted and quoting *Benitec Australia, Ltd. v. Nucleonics, Inc.*, 495 F.3d 1340, 1344–45 (Fed. Cir. 2007)).

“However, even in cases in which a district court has jurisdiction to hear a declaratory judgment claim, the Declaratory Judgment Act permits the court to decline to exercise jurisdiction over the claim as a matter of discretion.” *SSI Techs., LLC v. Dongguan Zhengyang Elec. Mech. LTD*, 2021-2345, 2/13/23.

D. Cross-Appeals v. Alternate Bases for Affirmance

1. Alternative Bases in Agency Appeals

“Meritorious or not, the PTO’s arguments cannot sustain the Board’s decision below because they do not reflect the reasoning or findings the Board actually invoked.” *In re Google LLC*, 2022-1012, 1/9/23.

E. Harmless Error

1. Rule 12 v. Rule 56 Disposition

“Here, the court erred when it did not expressly reject the outside matters or treat the motion as one for summary judgment under Rule 56. But we hold that the district court’s error was harmless.” *Hawk Tech. Sys., LLC v. Castle Retail, LLC*, 2022-1222, 2/17/23.

F. Precedent

1. Conflicting/Vacated/Implicitly Overruled Decisions

“We, as a panel, cannot overrule *Rosen* or *Durling* without a clear directive from the Supreme Court. *Deckers Corp. v. United States*, 752 F.3d 949, 965 (Fed. Cir. 2016) (explaining panels are “bound by prior panel decisions until they are overruled by the court en banc or the Supreme Court”).” *LKQ Corp. v. GM Global Tech. Operations LLC*, 2021-2348, 1/20/23 (nonprecedential).

VII. Patent Office Proceedings

A. Interferences

1. Claim Construction

“[I]t was Dionex’s copying of Agilent’s claims that provoked the interference. That renders the Agilent application the originating disclosure.” “Although we have not had occasion to apply this rule in circumstances in which there was a prior unsuccessful effort between the same parties to provoke an interference, we neither see nor have been provided any persuasive reason not to apply our rule in this context.” *Dionex Softron GmbH v. Agilent Techs., Inc.*, 2021-2372, 1/6/23.

B. Inter Partes Review

1. Appeal

a. Reversal of PTAB Refusing to Cancel

Reversing Board finding regarding reference teaching under substantial evidence standard because “[w]e can discern no other reasonable understanding of this figure.” *Intel Corp. v. PACT XPP Schweiz AG*, 2022-1037, 3/13/23.

i. Reasons to Combine

“It’s enough for [challenger] to show that there was a known problem of cache coherency in the art, that [the second reference]’s secondary cache helped address that issue, and that combining the teachings of [the first reference] and [the second reference] wasn’t beyond the skill of an ordinary artisan. Nothing more is required to show a motivation to combine under KSR, so we reverse the Board’s finding to the contrary.” *Intel Corp. v. PACT XPP Schweiz AG*, 2022-1037, 3/13/23.

2. Board Final Written Decision

a. Timing

“The Director has delegated that time-adjustment authority to the Board. And that delegation is permissible for at least two reasons. First, absent affirmative evidence of contrary congressional intent (which CyWee hasn’t shown), agency heads have implied authority to delegate to other officials within the agency. Second, Congress’s vesting of broad rulemaking powers with the Director provides an alternative source of her authority to delegate.” *CyWee Group Ltd. v. Google LLC*, 2020-1565, 2/8/23 (citations omitted).

b. Addressing Parties’ Arguments

i. Adequate Analysis

“[Appellant] appears to have wanted the Board to provide an express “credibility determination or other fact-finding” concerning its expert’s testimony. That is not required by the APA.” *Regents of the Univ. of Minn. v. Gilead Scis., Inc.*, 2021-2168, 3/6/23 (citation omitted).

3. Interaction with Litigation

a. Contrary Validity Determinations

“[W]e affirmed the district court’s entry of judgment of no invalidity, based on the jury having “heard expert testimony that Kiuchi’s client-side and server-side proxies terminate the connection, process information, and create a new connection – actions that are not ‘direct’ within the meaning of the asserted claims.” That we upheld this verdict, which was based on a finding that Apple failed to prove anticipation by clear and convincing evidence,

did not preclude the Board from finding, on a different record, anticipation by its own standard of a preponderance of the evidence.” *VirnetX Inc. v. Mangrove Partners Master Fund, Ltd.*, n.8, 2020-2271, 3/30/23 (nonprecedential).

C. Rejection Appeal Procedure

1. Board Reliance on Examiner Statements

“An examiner’s assertion that a particular fact or principle is well-known is not evidentiary support.” *In re Google LLC*, 2022-1012, 1/9/23.