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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

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| Proceeding no. | 91247175 |
| Party | Defendant<br>Allogene Therapeutics, Inc. |
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**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE**
**BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

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| Atara Biotherapeutics, Inc.,<br>Opposer,<br>v.<br>Allogene Therapeutics, Inc.,<br>Applicant. | Application No. 88/117,993<br>Opposition No. 91247175 (Parent)<br>Mark: ALLOCAR T |
| Atara Biotherapeutics, Inc.,<br>Opposer,<br>v.<br>Allogene Therapeutics, Inc.,<br>Applicant. | Application No. 88/117,972<br>Opposition No. 91247177 (Child)<br>Mark: AUTOCAR T |

**APPLICANT ALLOGENE THERAPEUTICS, INC.'S**
**ACCELERATED CASE RESOLUTION REBUTTAL BRIEF**

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## I. INTRODUCTION

Although Opposer[1] bears the burden in this case, its opening ACR brief fails to even acknowledge this fact. *See* 38 TTABVUE. Opposer must show that it is more likely than not, based on the evidence of record in this proceeding, that Applicant's Marks are merely descriptive. *Anheuser Busch, Inc. v. Holt*, 92 U.S.P.Q.2d 1101, 1105 (T.T.A.B. 2009); *Plyboo Am. Inc. v. Smith & Fong Co.*, 51 U.S.P.Q.2d 1633, 1639 (T.T.A.B. 1999). Opposer has not met this burden. Opposer has failed to proffer any evidence regarding a critical segment of the relevant purchasers of Applicant's applied-for therapies—patients. Instead, it refers to inapposite case law attempting to show that the very people who affirmatively consent to, receive, and whose insurance premiums pay for Applicant's applied-for therapies are not relevant purchasers. Upon close examination, this case law does not dictate an outcome in Opposer's favor. But even if the only relevant purchasers of Applicant's applied-for therapies are oncologists and other medical professionals (and Applicant has presented substantial evidence that this is not the case), Opposer has failed to carry its burden with respect to these purchasers.

The Board should therefore deny Opposer's opposition and hold that Applicant's applied-for trademarks, ALLOCAR T and AUTOCAR T, are not merely descriptive.

## II. ARGUMENT

### A. Opposer's case law does not show that patients are excluded as relevant purchasers

Patients are relevant purchasers of Applicant's therapies, and Opposer's case law to support its claim that primarily oncologists and other medical professionals are "relevant purchasers" is misplaced. In *In re Stereotaxis, Inc.*, 429 F.3d 1039, 1040 (Fed. Cir. 2005), the

[1] The defined terms in Applicant's ACR Brief (39 TTABVUE) are given the same meaning in this brief.

goods for which the applicant sought registration were "magnetic surgery equipment" used by medical professionals to perform surgeries. And in *In re Liebherr-Werk Biberach GmbH*, Ser. No. 79271097, 10 TTABVUE 7 (T.T.A.B. Aug. 10, 2021) (non-precedential), the goods at issue were "cranes for the construction industry." In both of these cases, the goods at issue were equipment sold only to and used only by the professionals in the industry—no end consumer purchased, used and/or received the goods. In this case, however, the end consumer of Applicant's therapies—cancer patients—will be targeted by marketing efforts for the therapies, will discuss these therapies with their clinicians and physicians, and will ultimately consent to, receive, and have their insurance premiums pay for these therapies. *See* 39 TTABVUE 3–4 (and evidence cited therein); Holt Decl. ISO ACR Brief, Ex. 2 at 37:21–38:11 (39 TTABVUE 64–65). Similarly, in *Continental Plastic Containers v. Owens Brockway Plastic Prods., Inc.*, 141 F.3d 1073, 1080–81 (Fed. Cir. 1998), the court held that the relevant purchasers of empty bottles without lids or labels in which the plaintiff claimed trade dress rights were wholesale purchasers of those empty bottles, and not retailer consumers because retail consumers were purchasing the juice in the bottles, not the bottles themselves. Here, the end consumers of Applicant's therapies, patients, are consenting to, receiving, and their insurance premiums are paying for the therapies themselves. Therefore, *In re Stereotaxis*, *In re Liebherr-Werk*, and *Continental Plastics* do not control here, and the perspective of patients should certainly be considered in the merely descriptive determination.

These cases are also inapposite for a second reason. Opposer claims that the Board and Federal Circuit have "found" that the relevant purchasers consist of consumers with knowledge of the types of goods for sale and who are equipped to make the purchasing decision—i.e., only professionals in the relevant industries. 38 TTABVUE 5. But a close reading of Opposer's cited

cases shows that the Board and Federal Circuit did not "find" these facts; instead, the applicants *agreed* on the scope of the relevant purchasers. In other words, the issue of who the relevant purchasers were was never disputed in those cases, and the Board and Federal Circuit were not asked to and did not resolve disputed facts regarding the identity of the relevant purchasers. *See In re Stereotaxis, Inc.*, Ser. No. 78108674, 2004 WL 1739244, at *2 (T.T.A.B. July 20, 2004) (non-precedential) (applicant acknowledges that "the term 'stereotaxis' has several meanings **in the medical field**") (emphasis added); *In re Liebherr-Werk Biberach GmbH*, Ser. No. 79271097, 10 TTABVUE 6–7 (T.T.A.B. Aug. 10, 2021) (non-precedential) ("Applicant stated…that it 'manufactures machines including…cranes for [the] construction industry."). And Opposer's remaining case in support of its contention that primarily the opinions of oncologists and other medical professionals should be considered is not binding here because, as Opposer acknowledges, *Continental Plastic*, 141 F.3d 1073 concerns a likelihood of confusion inquiry, not a mere descriptiveness claim.

This is not a likelihood of confusion case, nor has Applicant admitted that the relevant purchasers of Applicant's therapies comprise only oncologists and other medical professionals. To the contrary, Applicant has shown that the relevant purchasers in this case include patients, in addition to oncologists and medical professionals. *See* 30 TTABVUE 6–9; 39 TTABVUE 2–4. As Applicant explained in its first ACR brief, the relevant purchasing public is determined by the identification of goods and services in the application at issue. *In re Chamber of Commerce of the U.S.A.*, 102 U.S.P.Q.2d 1217, 1219 (Fed. Cir. 2012). *Los Angeles Rag House, Inc. v. The Rag Place, Inc.*, Cancellation No. 92055710, 2015 WL 9907037, at *3 (T.T.A.B. Feb. 27, 2015) (non-precedential); *In re Huck Int'l*, Serial No. 75/650,428, 2002 WL 58905, at *3 (T.T.A.B. Jan. 16, 2002) (non-precedential). This is not a case where Applicant's applied-for therapies will

only be targeted to and purchased by oncologists and medical professionals. The ultimate consumer of Applicant's therapies to treat cancer are those patients suffering from cancer. 39 TTABVUE 3–4 (and evidence cited therein). Patients are indisputably part of the target consumers and relevant purchasers of Applicant's therapies.

**B. Relevant purchasers, however defined, do not understand ALLOCAR T and AUTOCAR T to be abbreviations of specific, descriptive wording**

But no matter how the relevant purchaser group is defined, Opposer has not met its burden to show that it is more likely than not that the relevant purchasers understand Applicant's Marks to be merely descriptive. Opposer has produced no evidence regarding how patients understand the term ALLOCAR T and AUTOCAR T. Opposer claims, without citation to any factual support in the record, that some highly educated patients "will also no doubt understand that the term 'allo' is an abbreviation for allogeneic, and 'auto' is an abbreviation for autologous." 38 TTABVUE 9. Assumption does not constitute evidence necessary for Opposer to meet its burden. Only Applicant offered the testimony of an individual who interacts with patients involved in clinical trials for Applicant's therapies, Ms. Nazy Zomorodian, N.P.[2] *See* Holt Decl. ISO ACR Brief, Ex. 4 (39 TTABVUE 87–92). Ms. Zomorodian explains that, in her experience, clinicians and treating physicians do not use scientific terminology (like allogeneic or autologous) with patients. *Id.* at ¶¶ 10–13. Because practitioners do not use the scientific

[2] Contrary to Opposer's suggestion, Ms. Zomorodian's testimony is not untimely disclosed expert opinion or improper lay opinion simply because her testimony in this matter may resemble some statements in her expert report in a parallel proceeding. It is "a well-settled concept that an individual may serve the dual role of both an expert witness and a fact in witness," even in the same case. *Nelson-Ricks Cheese Co., Inc. v. Lakeview Cheese Co., LLC*, 331 F. Supp. 3d 1131, 1146 (D. Idaho 2018), *aff'd*, 775 F. App'x 350 (9th Cir. 2019) (holding that although witness provided expert testimony on certain aspects of the case, the witness's testimony based on his experience and perspective as CEO of plaintiff was fact testimony). The Rules of Evidence distinguish between expert and lay *testimony* (not witnesses), and lay testimony "results from a process of reasoning familiar in everyday life" and is permissible where the witness's testimony "is limited to what [he or she] observed." *See, e.g.*, *United States v. Christian*, 673 F.3d 702, 708–09 (7th Cir. 2012). In this case, Ms. Zomorodian's testimony is lay testimony because it is limited to her personal experiences with patients and administering CAR T cell therapies and her observations during those interactions. *See* Holt Decl. ISO ACR Brief, Ex. 4 (39 TTABVUE 87–92).

terminology, patients do not understand this terminology, let alone that ALLOCAR T or AUTOCAR T could allegedly be abbreviations for such terminology. *Id.* at ¶¶ 9, 14; *see also* 39 TTABVUE 9–10.

Similarly, Opposer has failed to meet its burden that oncologists and other medical professionals recognize Applicant's Marks to be abbreviations of merely descriptive terms. Opposer strenuously argues that oncologists and other medical professionals are the primary relevant purchasers of Applicant's therapies because "both types of therapies ***must*** be prescribed by and administered under the care of a physician…and must be administered intravenously by a medical professional," and yet it fails to offer the testimony of a single physician or medical professional who administers the types of CAR T cell therapies at issue in this case. 38 TTABVUE 4. Indeed, Mr. Kresnak does not interact with patients or administer CAR T therapies, and Dr. Burger's report makes no mention of administering CAR T cell therapies to patients. *See* Holt Decl. ISO ACR Brief, Ex. 2 at 14:13–15 (39 TTABVUE 49); 28 TTABVUE 108–125. And Opposer's reliance on Dr. Bernatchez's understanding of the potential meaning of ALLOCAR T and AUTOCAR T (38 TTABVUE 7–8) is similarly misplaced because Dr. Bernatchez has a highly specialized background in the stem cell transplant context that is distinct from the CAR T cell therapy context. *See* 28 TTABVUE 214–215, 219–220 (Ex. 9 at 11:4–12:5, 22:9–23:3); *see also* 39 TTABVUE 8 (explaining that one of the flaws of Dr. Burger's opinions is that he transposes his own understanding of what "allo" means in the stem cell transplant field). Despite Opposer's repeated emphasis that the relevant purchasers in this case consist primarily of oncologists and other medical professionals, it fails to offer any direct testimony from a single oncologist, clinician, physician, or any other medical professional who that actually administers CAR T therapies to patients.

Opposer's reliance on *In re Omaha Nat'l Corp.*, 819 F.2d 1117 (Fed. Cir. 1987) is misplaced here. Significantly in that case, the applicant conceded that the term "first tier" (from which the applied-for mark, FirsTier, was derived) was "a descriptive 'word of art' in the banking industry." *Id.* at 1119. Thus, once the banking industry was determined to be part of the relevant purchasers, the applicant had conceded the term's descriptiveness. *Id.* Here, unlike *In re Omaha*, Applicant not only disputes that oncologists and medical professionals understand Applicant's Marks to be merely descriptive, but has affirmatively shown that these purchasers do not understand Applicant's Marks to be merely descriptive. *See* 39 TTABVUE 8–9; 30 TTABVUE 9–14.

### C. The Board should disregard Opposer's procedurally improper argument regarding Applicant's bona fide intent to use AUTOCAR T

The Board should not indulge Opposer's belated attempt to add a new, lack of bona fide intent claim to these proceedings. Opposer argues, without first amending its notice of opposition, that Applicant allegedly lacks a bona fide intent to use the AUTOCAR T mark in connection with any goods or services. 38 TTABVUE 3. However, the Trademark Trial and Appeal Board Manual of Procedure is clear that "[a] plaintiff may not rely on an unpleaded claim. The plaintiff's pleading must be amended (or deemed amended), pursuant to Fed. R. Civ. P. 15(a) or (b), to assert the matter." T.B.M.P. § 314. Opposer has offered no such amendment here, and the Board should therefore disregard any such argument made by Opposer.

## III. CONCLUSION

For all of the reasons explained above, Applicant respectfully requests that the Board deny Opposer's opposition.

Respectfully submitted,

Dated: February 25, 2022

By: */Thomas L. Holt/*

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**ATTORNEYS FOR APPLICANT ALLOGENE THERAPEUTICS, INC.**

**CERTIFICATE OF SERVICE**

The undersigned affirms that APPLICANT ALLOGENE THERAPEUTICS, INC.'S ACCELERATED CASE RESOLUTION REBUTTAL BRIEF was served on Opposer Atara Biotherapeutics, Inc. by emailing a copy to Opposer's attorney of record, Jesse A. Salen of Sheppard Mullin Richter & Hampton LLP, at docketing@sheppardmullin.com and jsalen@sheppardmullin.com, as required pursuant to 37 CFR § 2.119 and TRADEMARK TRIAL AND APPEAL BOARD MANUAL OF PROCEDURE § 113.04, on the date set forth below.

Dated: February 25, 2022

*/Thomas L. Holt/*
Thomas L. Holt