

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

ARGENTUM PHARMACEUTICALS LLC  
Petitioner

v.

RESEARCH CORPORATION TECHNOLOGIES, INC.  
Patent Owner

Patent No. RE38,551

Issue Date: July 6, 2004

Title: ANTICONVULSANT ENANTIOMERIC AMINO ACID DERIVATIVES

---

*Inter Partes* Review No. IPR2016-00204

---

**PETITIONER'S REQUEST FOR REHEARING  
UNDER 37 C.F.R. § 42.71(d)**

Pursuant to 37 C.F.R. § 42.71(d), Argentum Pharmaceuticals LLC (“Petitioner”) hereby requests rehearing of that part of the Board’s Decision (Paper No. 19, May 23, 2016) regarding Grounds 1A and 1B of the Petition, which asserts that claims 1-13 are anticipated and/or obvious in view of LeGall. The Board reviews a request for rehearing for an abuse of discretion. For the reasons set forth below, Petitioner respectfully submits that the standard is met.

### **I. Introduction**

Under 37 C.F.R. § 42.71(d), “[t]he burden of showing a decision should be modified lies with the party challenging the decision” and the “request must specifically identify all matters the party believes the Board misapprehended or overlooked.”

Petitioner respectfully submits that the Board overlooked or misapprehended important points presented in the Petition regarding the public accessibility of LeGall and overlooked evidence establishing a “reasonable likelihood” that LeGall was publicly accessible and thus prior art. Specifically, the Board overlooked or misapprehended recently issued Federal Circuit case law: *Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 1350 (Fed. Cir. 2016), a decision that did not issue until after the Petition and the Patent Owner Preliminary Response were filed, but which Petitioner expressly raised in connection with LeGall during the March 8,

2016 conference call. (Ex. 2026, Hr’g Tr. 14:5-15:8.) The Board also overlooked and misapprehended the clear evidence of record that established a roadmap confirming that LeGall was publicly accessible during the relevant period:

- 1) Three prior art scientific articles cited LeGall and directed the public to the existence of LeGall.
- 2) One prior art reference from 1988 expressly directed the reader to LeGall in order obtain additional scientific data relating to compounds disclosed in the reference.
- 3) A renowned organic chemist, Dr. Clayton Heathcock, stated that one of skill in the art would be able to find LeGall based on the citation in the prior art.
- 4) A library request form from the University of Houston indicated that a visitor could obtain and access books and other materials maintained in the University of Houston library system during the relevant time period.
- 5) The University of Houston has refused to produce information to Petitioner that is relevant to the issue of LeGall’s public accessibility because release of that information would cause financial harm to the University.

## **II. Under Federal Circuit Law, The Evidence Established That LeGall Is Prior Art**

To qualify as a printed publication, a reference “must have been sufficiently accessible to the public interested in the art.” *In re Cronyn*, 890 F.2d 1158, 1160 (Fed. Cir. 1989); *In re Hall*, 781 F.2d 897, 898-99 (Fed. Cir. 1986). A reference is considered publicly accessible if it was “disseminated or otherwise made available

to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence, can locate it.” *Kyocera Wireless Corp. v. Int’l Trade Comm’n*, 545 F.3d 1340, 1350 (Fed. Cir. 2008). Whether a reference qualifies as a printed publication is a legal conclusion based on underlying factual determinations. *In re Lister*, 583 F.3d 1307, 1311 (Fed. Cir. 2009)

Importantly, indexing is not necessary to establish public accessibility. *Lister*, 583 F.3d at 1312 (“While cataloging and indexing have played a significant role in our cases involving library references, we have explained that neither cataloging nor indexing is a necessary condition for a reference to be publicly accessible[;]. . . a variety of factors may be useful . . .”).

The Federal Circuit has further explained that a “research aid,” or roadmap, can also establish public accessibility of a reference. *See Bruckelmyer v. Ground Heaters, Inc.*, 445 F.3d 1374, 1379 (Fed. Cir. 2006). “An adequate roadmap need not give turn-by-turn directions, but should at least provide enough details from which we can determine that an interested party is reasonably certain to arrive at the destination: the potentially invalidating reference.” *Blue Calypso, LLC v.*

*Groupon, Inc.*, 815 F.3d 1331, 1350 (Fed. Cir. 2016).<sup>1</sup>

Here, the evidence of record establishes a clear roadmap for one of skill in the art to arrive at LeGall and confirm its public accessibility. First, LeGall was cited in three peer-reviewed scientific articles that are prior art. Articles published by Dr. Kohn's research group—articles that scientists interested in LeGall's functionalized amino acids would read—explicitly cite to the thesis by the author's name (Philippe LeGall) and location (University of Houston). (Ex. 1016, LeGall 1988, p. 279 (citing "Masters dissertation of this author," listed as "Philippe LeGall" at "University of Houston"); Ex. 1017, Kohn 1993, p. 3360 n.9b (citing "LeGall, P. M.S. Thesis, University of Houston, 1987"); Ex. 1010, Choi 1995, p. 7013 n.16 (citing "LeGall, P. M.S. Thesis, University of Houston").)<sup>2</sup> These

---

<sup>1</sup> *Blue Calypso* issued on March 1, 2016, after both the Petition and the Patent Owner Preliminary Response were filed. Petitioner raised this case in a conference call with the Board on March 8, 2016. (Ex. 2026, Hr'g Tr. 14:5-15:8.)

<sup>2</sup> While the citation to LeGall in Exhibit 1010 lists a publication date of 1982, one of ordinary skill in the art would have nonetheless considered the citation as a research aid to identify LeGall because it named the author, identified the University of Houston, and was cited with respect to the hydroxymethyl compound (Compound 2d). (See Petition at 4.)

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.