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Transcript of Conference Call

Date: June 19, 2018

Case: Pfizer, Inc. -v- Genentech, Inc. (PTAB)

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Pfizer v. Genentech
IPR2017-01488
Genentech Exhibit 2060

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<p>1 UNITED STATES PATENT AND TRADEMARK OFFICE 2 BEFORE THE PATENT TRIAL AND APPEAL BOARD 3 BEFORE JUDGE POLLOCK AND JUDGE YANG 4 ---o0o--- 5 PFIZER, INC., : 6 Petitioner, : 7 vs. : Nos. IPR2017-01488 8 GENENTECH, INC., : IPR2017-01489 9 Patent Owner. : 10 ----- : 11 12 13 14 15 TELEPHONIC HEARING 16 June 19, 2018 17 18 19 Job No.:195342 20 Pages: 21 Reported by: Laura Axelsen, CSR 6173 22 23 24 25</p>	<p>1 APPEARANCES 2 3 FOR THE PETITIONER: 4 5 KIRKLAND & ELLIS, LLP 6 BY: BENJAMIN LASKY, ESQ. 7 601 Lexington Avenue 8 New York, New York 10022 9 10 FOR THE PATENT OWNER: 11 12 WILMER, CUTLER, PICKERING, HALE & DORR, LLP 13 BY: ROBERT J. GUNTHER, JR., ESQ. 14 ANDREW J. DANFORD, ESQ. 15 KEITH SYVERSON, ESQ. 16 7 World Trade Center 17 250 Greenwich Street 18 New York, New York 10007 19 20 21 ---o0o--- 22 23 24 25</p>
<p>1 UNITED STATES PATENT AND TRADEMARK OFFICE 2 BEFORE THE PATENT TRIAL AND APPEAL BOARD 3 BEFORE JUDGE POLLOCK AND JUDGE YANG 4 ---o0o--- 5 PFIZER, INC., : 6 Petitioner, : 7 vs. : Nos. IPR2017-01488 8 GENENTECH, INC., : IPR2017-01489 9 Patent Owner. : 10 ----- : 11 12 13 14 15 16 17 18 19 20 21 22 23 24 25</p>	<p>1 JUDGE POLLOCK: IPR 20170488 and IPR 20701374. 2 I'm Judge Pollock. Judge Yang is on the line. Who do 3 we have on the line for Patent Owner Genentech? 4 MR. GUNTHER: Good morning, Judge Pollock. 5 Bob Gunther on the line. With me is Andrew Danford and 6 Keith Syverson. We're all from the Wilmer Hale firm 7 JUDGE POLLOCK: Good morning. Who do we have 8 on the phone for petitioner? 9 MR. LASKY: Good morning. This is Benjamin 10 Lasky from Kirkland & Ellis for the petitioner. 11 JUDGE POLLOCK: Are there any other parties? 12 THE REPORTER: This is the court reporter. 13 JUDGE POLLOCK: Okay. Who retained the court 14 reporter? 15 MR. GUNTHER: This is Bob Gunther. The patent 16 owner retained the court reporter, and with your 17 permission, we'll file the transcript as an exhibit. 18 JUDGE POLLOCK: That would be excellent. I 19 understand that patent owner seeks authorization to file 20 a motion to strike relating to certain arguments, 21 Pfizer's May 25th, 2020 reply brief. Yesterday we 22 entertained a conference call where the petitioner, 23 Celltrion, raised similar challenges to the same patent 24 at issue here. 25 Mr. Gunther, is this the same issue you wish</p>

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<p style="text-align: right;">5</p> <p>1 to discuss with respect to the IPR 20170488 and IPR 2 20701374? 3 MR. GUNTHER: Yes, your Honor, it is, and what 4 I would say is in addition to the argument relating to 5 the 1989 Foote paper, which is Exhibit 1193, that's the 6 issue that we had discussed yesterday with respect to 7 Celltrion. We also have a second point that where we 8 believe that, uhm, Pfizer has also injected a new 9 argument relating to the call reference. 10 And so what we're requesting, uhm, similar to 11 what was ordered yesterday is the ability to file a 12 10-page motion to strike in connection -- on Friday at 13 the same time that we filed our motion to exclude and to 14 be able to cover both of those grounds and, Judge 15 Pollock, I'm happy to speak to both of those grounds, if 16 that's appropriate. 17 JUDGE POLLOCK: Yes, please. Before we 18 continue, Judge Yang informs me that I have been getting 19 one of the case names wrong. So this is in relation to 20 so IPR 201700488 and IPR 201700489. So the record is 21 clear. Please continue, Mr. Gunther. 22 MR. GUNTHER: Thank you, Judge Pollock. So 23 our position is that with respect -- and I'll start with 24 the Foote reference, that our request with respect to a 25 motion to strike on the Foote reference really is very</p>	<p style="text-align: right;">7</p> <p>1 immunogenic," and then they have a cite to our POR at 2 page 66, described in the Reichmann 1998 paper, were 3 made using the consensus approach. 4 So they go on, and they're actually using, as 5 did Celltrion, they're using for the first time in their 6 reply the Foote 1989 paper in order to support their 7 position that that reference is prior art to the 8 consensus sequence limitation of the four consensus 9 sequence claims in the '213 patent. 10 JUDGE POLLOCK: Mr. Gunther, does that apply 11 to both the 1488 and the 1489 case? 12 MR. GUNTHER: It is. That's correct, your 13 Honor, and I gave you the quote with respect to their 14 brief in the 1488, but they have similar language in 15 their reply brief in the 1489 petition as well. And -- 16 and in their petition, your Honor, Pfizer relied on a 17 different reference for this claim limitation. They 18 relied on the Queen 1990 reference, which is 19 Exhibit 1050. 20 So we think that the switching from Queen 1990 21 to Foote 1989 is inappropriate at this stage, 22 particularly given the fact that -- that -- that 23 Dr. Foote was their -- is their expert, and certainly 24 this is something that was known to him and could have 25 been put in their petition.</p>
<p style="text-align: right;">6</p> <p>1 similar to the argument that you heard yesterday with 2 respect to Celltrion, but it's even stronger in this 3 respect. 4 Pfizer's expert in this case is Dr. Foote, the 5 same Dr. Foote that is the lead author with respect to 6 the 1989 Foote reference, which is Exhibit 1193. So at 7 the time that he filed his petition, there was nothing 8 said with respect to the -- to the Foote 1989 paper, and 9 so our position is that the first time that this came 10 into -- into these IPRs was during the redirect 11 examination by Pfizer of Dr. Foote during his 12 deposition, that -- that -- that reference was not 13 raised during the patent owner's affirmative deposition 14 of Dr. Foote. 15 And the first time that we saw in writing what 16 their position was with respect to the Foote 1989 17 reference was in their reply, and they both in their 18 reply at page 27, they talk about the Foote reference. 19 It is under the heading of unexpected results, but they 20 go broader than just talking about unexpected results, 21 and they note, and -- and I'm quoting here from page 27 22 of their reply in the -- in the 01488, uhm, reply they 23 say, quote, "Notably, as patent owner acknowledged 24 during prosecution, the, quote, prior art humanized 25 antibodies, close quote, patent owner criticizes as</p>	<p style="text-align: right;">8</p> <p>1 Uhm, you know, as I pointed out, I think it 2 goes beyond any argument that they are -- that that 3 relates simply to secondary considerations, and the one 4 thing I would say is there are multiple paragraphs -- 5 and this will be -- this will be laid out if the Board 6 allows us to file the motion to strike. 7 There are probably about 10 paragraphs in 8 Dr. Foote's declaration that was submitted in support of 9 their reply that talks about the Foote 1989 reference 10 and very much in the context of arguing it as prior art 11 to the consensus sequence limitation claims. 12 The third thing, your Honor -- just two quick 13 more quick things in terms of the Foote reference and 14 then I'll stop, is that, you know, to the extent that 15 they're arguing, oh, you know, we had a right to do this 16 in connection with talking about unexpected results in 17 terms of secondary considerations, they raised 18 unexpected results in their petition. 19 In their paper number one, this is in the 20 1488, at 63 to 65, they talked about the issue of 21 unexpected results, and they certainly could have relied 22 on the Foote reference at that point had they -- had 23 they wanted to. They did not. 24 And then, finally, you know, they -- while 25 they -- while I expect that they will argue, as did</p>

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<p style="text-align: right;">9</p> <p>1 Celltrion, that they can cabin the Foote reference to 2 only secondary considerations, I think that's difficult 3 in view of the -- in view of the federal circuit cases, 4 including the, uhm, Cyclobenzaprine case, and in 5 addition, uhm, I think that the notion that -- that it 6 can be cabined is inconsistent with the extensive use of 7 footnote 1989 throughout Dr. Foote's reply declaration. 8 So for those reasons we would ask that we have 9 a right to file a motion to strike with respect to the 10 Foote reference. Now I'll stop and see if your Honor -- 11 your Honors have any questions, but I do have the Kurrle 12 thing that I want to pick up before we finish. 13 JUDGE POLLOCK: No questions about your 14 position on Foote. Let's talk about Kurrle. 15 MR. GUNTHER: Okay. So here's the situation 16 with Kurrle. Uhm, in the petition, in their petition, 17 they did not reference the Kurrle reference or use the 18 Kurrle reference as disclosing the consensus sequence 19 limitations of the consensus sequence claims. The first 20 time that came up is in their reply, and, for example, 21 on the 1488 reply brief, and this is the first time we 22 saw this was at pages 616 and 17. 23 In their petitions, Pfizer argued that the 24 consensus -- and I mentioned this before -- that the 25 consensus sequence limitation was met by queen 1990.</p>	<p style="text-align: right;">11</p> <p>1 sort of makes clear that shifting arguments in this 2 fashion is foreclosed by the statute are precedent in 3 the Board's guidelines. 4 So for that reason we would ask to have the 5 ability to file a motion to strike with respect to the 6 use of the Kurrle reference as prior art to the 7 consensus sequence claims. 8 JUDGE POLLOCK: All right. Mr. Lasky? 9 MR. LASKY: Thank you, your Honor. Uhm, let 10 me address the -- I guess the Foote -- it's been called 11 the Foote issue, but if -- if one really looks at what 12 they are asking for here, this is not really about the 13 Foote reference. It's about evidence that the Campath 14 antibody that is described in the Reichmann publication, 15 which was relied on explicitly in the petition as 16 showing state of the art, that that used a consensus 17 sequence for the light chain. 18 That's what they don't want you to hear, uhm, 19 at the -- at the upcoming hearing. Now, uhm, although 20 Mr. Gunther said that, uhm, that, uhm, you know, this 21 issue is stronger with respect to Pfizer, with respect, 22 I have read the transcript from yesterday's hearing, 23 uhm, and, you know, acknowledging that the Board, your 24 Honors, granted the request with respect to Celltrion, 25 there are several key factors that Mr. Gunther omitted</p>
<p style="text-align: right;">10</p> <p>1 They didn't say anything about Kurrle with respect to 2 the consensus sequence limitation. And here's an 3 example. If you look at the 1488 proceeding, if we 4 consider their proposed grounds for institution in the 5 petition, and this is paper one on page 6, ground one 6 asserts certain claims anticipated by Kurrle. Notably 7 absent from that list of claims in the petition are the 8 claims that expressly recite the consensus sequence 9 limitations. Those are claims 4, 33, 62, and 64. 10 None of them were mentioned in connection with 11 the anticipation claim by Kurrle. They only relied on 12 Queen 1990 in the 1489 proceeding. Kurrle was not -- 13 that's the second IPR that we're talking about today. 14 Kurrle was not even used as part of their prima facie 15 case of obviousness. They relied on that entirely in 16 the 1488, and if they had believed that in the 1489 that 17 Kurrle disclosed consensus sequence, our position is 18 they should have talked about that in their petition. 19 And, you know, rather than explaining how in 20 its original petition, you know, that that was correct, 21 Pfizer's reply argument that Kurrle discloses a 22 consensus sequence amounts to an entirely new theory of 23 prima facie obviousness, and I just cite the Board to 24 the WASICA Financial Case in the Federal Circuit, 853 25 Fed 3rd 1272-1286 from 2017, that basically, you know,</p>	<p style="text-align: right;">12</p> <p>1 that we think push the close call that your Honors found 2 yesterday in favor, strongly in favor, of denying the 3 request here. 4 The first, uhm, the first thing is that, uhm, 5 Mr. Gunther omitted that in the materials and including 6 the Foote declaration that was submitted with the 7 petition, at paragraph 103, uhm, Dr. Foote, who had 8 knowledge of this, explicitly stated that the Campath -- 9 the light chain of the Campath antibody was derived not 10 from an individual sequence, but from a consensus 11 sequence, which was based on identification of common 12 and uncommon residues from Kabat in 1983. 13 So that was directly, uhm, relied upon in -- 14 in Foote's -- Dr. Foote's initial declaration cited in 15 the petition, and this is a key distinction that we 16 understand from what is at play in the Celltrion case. 17 Uhm, not only that, but Mr. Gunther himself was at 18 Dr. Foote's deposition. He took Dr. Foote's deposition, 19 and he deposed Dr. Foote on that very paragraph. 20 And he asked Dr. Foote, uhm, what, you know, 21 what the basis for that statement was, that it was a 22 consensus, and Dr. Foote explained that this sequence 23 was taken from his -- his own construct, and -- and this 24 was throughout his, uhm, normal -- his direct 25 examination, and in redirect he described that process,</p>

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4 (13 to 16)

<p style="text-align: right;">13</p> <p>1 which he introduced in paragraph 103, and he explained 2 that the sequence in Campath was taken from his own 3 anti-lysozyme construct, which was in the Foote 4 reference, Exhibit 1193, and that Foote reference was 5 introduced during the redirect at the deposition. 6 And all of the evidence that he's -- that is 7 being relied upon now, that Dr. Foote is relying upon 8 now, was presented during that, uhm, deposition, which 9 happened before the patent owner response occurred and 10 before, uhm, Genentech put in its evidence, and you, 11 know, its expert declaration. 12 So that is the first key distinction from the 13 Celltrion case addressed yesterday. Another key 14 distinction is how, uhm, it is the -- that evidence is 15 being relied upon, uhm, in the reply. Now, uhm, 16 Mr. Gunther did not take you to pages 15 to 17 of the 17 reply in his discussion of the Foote reference, and 18 you'll see, if you go to the those pages, that that is 19 where the consensus variable domain limitation is 20 described in the obviousness analysis. And that is 21 consistent with the petition, where we are arguing that 22 Queen 1990 discloses that limitation, and the Foote 23 reference is not mentioned. 24 If you then go to page 27, which is where 25 Mr. Gunther took you to, what he didn't explain is the</p>	<p style="text-align: right;">15</p> <p>1 the petition, discussed in the petition, and, therefore, 2 squarely within these proceedings, even if it weren't, 3 this argument and this evidence is directly responsive 4 to -- to the, uhm, position, the factually incorrect 5 position, that Genentech and its expert have taken, and 6 what they want to do is they want to create a misleading 7 picture of the state of the art and not let us correct 8 that, and we think that's inappropriate, not only 9 because -- 10 JUDGE POLLOCK: -- argument, Mr. Lasky. Why 11 don't you tell me about Kurrle? 12 MR. LASKY: With respect to Kurrle, again, 13 Mr. Gunther did not point out the, uhm, discussion in 14 the petition and in the Foote declaration regarding 15 Kurrle. Uhm, if one looks at page 20 of the 1488 16 petition, which is where we described Kurrle, the 17 petition makes clear that Kurrle teaches the human 18 framework residues could be switched to consensus 19 sequence residues, according to the method in that 20 reference, and that was supported by Dr. Foote, and -- 21 and he described that, uhm, in his opening declaration, 22 Exhibit 1003, at paragraph 123. 23 Now, this -- again, it's not -- this isn't a 24 case where we're switching reliance on Queen 1990 for 25 Kurrle. We're not seeking to do that. The ground is</p>
<p style="text-align: right;">14</p> <p>1 context in which that evidence is being placed, and that 2 is this: In the patent owner response and in the 3 supporting expert declaration, Genentech argues that its 4 consensus approach, which it claims to have invented, 5 was particularly advantageous, and in particular that it 6 was less immunogenic than the Campath antibody in 7 Reichmann, and which they say was a best fit, uhm, 8 approach rather than a consensus approach. 9 That is simply wrong and -- and -- and we 10 should be entitled to point out that it's wrong. As we 11 note on page 27, as Dr. Foote mentioned in his opening 12 declaration, as he mentioned at his deposition, as was 13 acknowledged during prosecution of the patent, which 14 they also want to strike, the applicants knew the 15 Campath was made using Dr. Foote's consensus sequence. 16 So this is not a case where we are saying, 17 okay, we're giving up on Queen 1990. We're changing to 18 Foote, as Mr. Gunther represented. What we're pointing 19 out is, uhm, Genentech and its expert are factually 20 incorrect when they try to compare their approach with 21 the Reichmann approach. And we couldn't have known they 22 were going to try to do that in the petition. So we 23 couldn't have rebutted that in our discussion of 24 unexpected results. 25 This is even -- even though it is mentioned in</p>	<p style="text-align: right;">16</p> <p>1 Queen 1990 for these claims, but what -- what Genentech 2 and its expert did in response is they said that the -- 3 the consensus approach that they claim to have invented 4 is fundamentally different and has advantages over the 5 very best fit approach, and what we're doing and what 6 our expert is doing is pointing out that there is no 7 fundamental difference between those approaches, and 8 they, uhm, they can and do sometimes lead to the same 9 results. And that is shown in Kurrle where all the 10 difference -- where Kurrle started with the best fit, 11 looked at the differences between the best fit sequence 12 and the consensus, and changed all of those to mouse. 13 JUDGE POLLOCK: You talked about Kurrle being 14 cited in the 1488 petition. Where is it in the 1489? 15 MR. LASKY: Well, Kurrle -- Kurrle is not 16 at -- is not a reference in the 1489 petition. It is -- 17 it is an exhibit, but it's not a reference that we've 18 relied upon as a ground, uhm, but, again, the reliance 19 here is responsive to the very same argument that 20 they've raised in the, uhm, 1489 petition, which is that 21 the best-fit approach by Queen, which is in the ground 22 in both petitions, is fundamentally different from 23 consensus. 24 JUDGE POLLOCK: What does Dr. Kurrle say about 25 the Kurrle reference in the 1489 case --</p>

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