

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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INITIATIVE FOR MEDICINES, ACCESS & KNOWLEDGE (I-MAK), INC.  
Petitioner

v.

GILEAD PHARMASSET LLC  
Patent Owner

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Case No. IPR2018-00123  
U.S. Patent No. 8,735,372

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**PETITIONER'S REQUEST FOR REHEARING**

Petitioner Initiative for Medicines, Access & Knowledge (I-MAK), Inc. (“Petitioner”) respectfully requests rehearing of the Board’s Decision Denying Institution of *Inter Partes* Review (“IPR”) of Gilead Pharmasset LLC’s (“Gilead”) U.S. Patent 8,735,372 (“the ’372 patent”) (“Decision”; Paper 7) because the Board misapprehended or overlooked that Sofia (Ex. 1012) is a printed publication.

Notably, Patent Owner has never disputed that Sofia is a printed publication as of September 2007, either in this matter or any of the related matters where Sofia is also of record, *e.g.* IPR2018-00119 (Ex. 1004) and IPR2018-00121 (Ex. 1004). The Board also did not dispute that Sofia was a printed publication in any of those other matters. The Board’s finding in this matter that Sofia is not a printed publication as of September 2007 thus stands alone and contradicts both Patent Owner’s implicit concessions and the Board’s previous findings that it is.

Further, the Internet Archive’s Wayback Machine confirms Sofia was published on Patent Owner’s own website by at least October 5, 2007. Ex. 1014 (printouts of <https://web.archive.org/web/20071005041918/http://investor.pharmasset.com:80/events.cfm> and PDF reached by link labelled as “View Phosphoramidates presentation” under “Sep 10, 2007”). Petitioner has requested an affidavit from the Internet Archive to attest to that fact and will seek leave to submit that affidavit as supplemental evidence as soon as it is received. However, there is no doubt it will state, as the Board has received such affidavits in

the past, see, e.g., IPR2017-00677, Paper 32, p. 46, and the Internet Archive publishes its Standard Affidavit for such requests. Ex. 1015 (printout of <https://archive.org/legal/affidavit.php>). Namely, the affidavit will state:

2. The Internet Archive is a website that provides access to a digital library of Internet sites and other cultural artifacts in digital form. Like a paper library, we provide free access to researchers, historians, scholars, and the general public. The Internet Archive has partnered with and receives support from various well-known institutions and libraries, including the Library of Congress.

3. The Internet Archive has created a service known as the Wayback Machine. The Wayback Machine makes it possible to surf more than 400 billion pages stored in the Internet Archive's web archive. Visitors to the Wayback Machine can search archives by URL (i.e., a website address). If archived records for a URL are available, the visitor will be presented with a list of available dates. The visitor may select one of those dates, and then begin surfing on an archived version of the Web. The links on the archived files, when served by the Wayback Machine, point to other archived files (whether HTML pages or images). If a visitor clicks on a link on an archived page, the Wayback Machine will serve the archived file with the closest available date to the page upon which the link appeared and was clicked.

4. The archived data made viewable and browseable by the Wayback Machine is compiled using software programs known as crawlers that surf the Web and automatically store copies of website files, preserving these files as they exist at the point of time of capture.

5. The Internet Archive assigns a URL on its site to the archived files in the format `http://web.archive.org/web/[Year in yyyy][Month in mm][Day in dd][Time code in hh:mm:ss]/[Archived URL]`. Thus, the Internet Archive URL `http://web.archive.org/web/19970126045828/http://www.archive.org/` would be the URL for the record of the Internet Archive home page HTML file (`http://www.archive.org/`) archived on January 26, 1997 at 4:58 a.m. and 28 seconds (1997/01/26 at 04:58:28). A web browser may be set such that a printout from it will display the URL of a web

page in the printout's footer. The date assigned by the Internet Archive applies to the HTML file but not to image files linked therein. Thus images that appear on the printed page may not have been archived on the same date as the HTML file. Likewise, if a website is designed with "frames," the date assigned by the Internet Archive applies to the frameset as a whole, and not the individual pages within each frame.

Ex. 1015.

Thus, here, the Wayback Machine proves that Patent Owner's own website published Sofia no later than October 5, 2007, because the URL is <https://web.archive.org/web/20071005041918/http://investor.pharmasset.com:80/vents.cfm> that embeds the date October 5, 2007. Ex. 1014.

Petitioner asked Patent Owner to stipulate that Sofia was published on its own website in September 2007, but Patent Owner refused. Ex. 1016. Petitioner made this request because the Internet Archive is a not-for-profit with limited resources that asks requesters to first seek a stipulation as to when documents within its archive were published. Ex. 1017. The Internet Archive also says the "best source" for such information is the owner of the website. Ex. 1017.

Specifically:

Before asking the Internet Archive to authenticate your documents, we ask that you please seek judicial notice or simply ask your opposing party to stipulate to the documents' authenticity. Of course, the best source of such information is the party who posted the information on the URLs at issue, and the second-best source of such information is someone who actually accessed the historical versions of the URLs.

See Ex. 1017 (print out of <https://archive.org/legal/>). Here, the best party to

stipulate to the date Sofia was published is Patent Owner. Its refusal to stipulate to an easily demonstrable fact, and instead forcing a resourced strapped non-profit to prepare an affidavit on the issue, is litigation gamesmanship the Board should neither support nor encourage. Petitioner has indeed informed Patent Owner that, “Petitioner believes Patent Owner's failure to provide material information regarding the patentability of its claims may be a violation of its duty candor and good faith to the board.” Ex. 1016.

For the foregoing reasons, Petitioner respectfully requests that the Board rehear its decision denying institution and institute a trial on all challenged claims.

Respectfully submitted,

Dated: July 13, 2018

/Daniel B. Ravicher/  
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