

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIQUIDIA TECHNOLOGIES, INC.,
Petitioner,

V.

UNITED THERAPEUTICS CORPORATION,
Patent Owner.

Case IPR2020-00770
Patent 9,604,901

**PATENT OWNER'S REQUEST FOR REHEARING
UNDER 37 C.F.R. § 42.71**

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I. INTRODUCTION

In response to the decision (Paper No. 7, "Decision" or "Dec.") instituting *inter partes* review of U.S. Patent No. 9,604,901 ("the '901 patent"), United Therapeutics Corporation ("Patent Owner") respectfully seeks rehearing of institution under 37 C.F.R. § 42.71(d), and requests that the Patent Trial and Appeal Board ("Board") reconsider and deny institution.

There are three reasons that the Decision improperly instituted trial, each of which is independently sufficient to modify the Decision to deny review. First, the Decision critically rests for both grounds on an inherency finding that lacks substantial evidence. Specifically, the Decision misapprehended the second ground in finding that "Moriarty and Phares teaches the same process steps as challenged claim 1." Dec., 27. Yet the steps are not the same as the Petition itself acknowledges (Pet., 61), and the obviousness ground requires removing a step. *Id.* Second, based on this unsupported finding, the Decision finds that "the product from these steps would include the same resulting impurities." Dec., 27. Yet using inherency at the point of modification is improper in an obviousness analysis. Third, the Decision overlooks the objective indicia of nonobviousness described in the '901 patent and file history, but ignored in the Petition, and in the POPR. POPR, 71. The first ground suffers at least the same deficiencies. Dec., 31.

II. LEGAL STANDARD

A rehearing “request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.” 37 C.F.R. § 42.71(d).

III. ARGUMENT

A. The Decision Misapprehended the Differences Between Claim 1's Pharmaceutical Batch and the Combination of Moriarty and Phares

A linchpin factual determination in the Board's decision is that Moriarty and Phares teach the same steps as claim 1: “we are persuaded by Petitioner's evidence and arguments that because the combination of Moriarty and Phares teaches the same process steps as challenged claim 1, the product from these steps would include the same resulting impurities. *See* Pet., 56.” Dec., 27. Yet this finding is not supported by substantial evidence and, in fact, goes beyond what even Petitioner argued.

The Petition acknowledges that claim 1's recited steps differ from Phares and Moriarty because they do not involve isolation of treprostinil intermediate. Specifically, Petitioner argues that a POSA would be motivated to modify the prior art steps and not isolate treprostinil (Pet., 37-38, 61) in order to remove a step from

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