

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIQUIDIA TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED THERAPEUTICS CORPORATION,
Patent Owner.

IPR2020-00770
Patent 9,604,901 B2

Before ERICA A. FRANKLIN, ZHENYU YANG, and
JOHN E. SCHNEIDER, *Administrative Patent Judges*.

PER CURIAM

Denying Patent Owner's Request for Rehearing of
Final Written Decision
37 C.F.R. § 42.71(d)

INTRODUCTION

Liquidia Technologies, Inc. (“Petitioner”) filed a Petition (Paper 1), seeking *inter partes* review of claims 1–9 of U.S. Patent No. 9,604,901 B2. We instituted trial to review the challenged claims. Paper 7. Thereafter, United Therapeutics Corporation (“Patent Owner”) filed a Response to the Petition (Paper 12), Petitioner filed a Reply (Paper 15), and Patent Owner filed a Sur-reply (Paper 25).

At the conclusion of the trial, we issued a Final Written Decision, determining that Petitioner has shown the unpatentability of claims 1–5, 8, and 9, but not claims 6 and 7. Paper 45 (“Decision” or “Dec.”). Patent Owner timely filed a Request for Rehearing of the Decision as to claims 1–5, 8, and 9. Paper 46 (“Reh’g Req.”). Patent Owner also timely filed a request for Precedential Opinion Panel (POP) review. Paper 47; Ex. 3002. The POP panel denied that request and instructed this panel to consider Patent Owner’s rehearing request. Paper 48, 2.

For the reasons explained below, we deny Patent Owner’s Request for Rehearing.

STANDARD OF REVIEW

The party challenging a decision in a request for rehearing bears the burden of showing the decision should be modified. 37 C.F.R. § 42.71(d). A request for rehearing “must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed.” *Id.*

ANALYSIS

Patent Owner argues that our Decision “relied on inadmissible, unsworn expert statements submitted by Petitioner that, when timely

objected to by Patent Owner, Petitioner failed to timely cure as required by [3]7 C.F.R. § 42.64(b)(2).” Reh’g Req. 2. The unsworn expert statements Patent Owner refers to are from Exhibit 1002, the purported Winkler Declaration. *Id.* at 4.

During trial, the parties briefed, among other issues, whether we should exclude Exhibit 1002. Papers 31, 32, 37. In our Decision, we denied Patent Owner’s Motion to Exclude Exhibit 1002. *See* Dec. 54–58. And in determining that claims 1–5, 8, and 9 are unpatentable, we relied on certain statements from Exhibit 1002. *Id.* at 32–34, 36, 37, 41, 42 (citing Ex. 1002 ¶¶ 47, 49, 148, 151, 152, 159, 174, 176–178).

In its Request for Rehearing, Patent Owner contends that we “erred by considering and relying extensively on the inadmissible original Winkler Declaration.” Reh’g Req. 6. Patent Owner, however, does not identify any matter that we allegedly misapprehended or overlooked. Indeed, in our Decision, we dedicated numerous pages discussing Patent Owner’s contentions regarding Exhibit 1002. *See* Dec. 54–58 (citing 37 C.F.R. §§ 42.2, 42.53, 42.63, 42.64).¹ For example, we acknowledged that “[a]s Patent Owner correctly points out, Exhibit 1002, the purported declaration of Dr. Winkler, ‘does not state that the testimony is true or believed to be true, much less reference the penalty for making willful false statements.’” *Id.* at 54. We also agreed with Patent Owner that it timely objected to Exhibit 1002, which sufficiently put Petitioner on notice, but Petitioner failed to submit supplemental evidence in response by the required deadline. *Id.* at 55–57. Nevertheless, we found that Patent Owner suffered no undue

¹ Our regulations allow us to waive or suspend a requirement of part 42 of our Rules. *See* 37 CFR § 42.5(b).

prejudice, and thus, denied Patent Owner's Motion to Exclude Exhibit 1002. *Id.* at 58.

In its Request for Rehearing, Patent Owner argues that “[t]he Board does not have discretion to allow *unsworn* statements that fail to comply with the statutory sworn-testimony requirements, and it cannot rely on such statements over a timely, uncured objection just by asserting a lack of ‘prejudice.’” Reh’g Req. 7. According to Patent Owner, the prejudice suffered is that “the Board actually relied on the challenged document.” *Id.* at 8. Patent Owner, however, does not point to where this alleged prejudice was previously addressed. *See* 37 C.F.R. § 42.71(d).

Instead, in our Decision, we explained why Patent Owner suffered no undue prejudice. Dec. 58. Specifically, we pointed out that Patent Owner deposed Dr. Winkler, under oath, on his opinions in Exhibit 1002. *Id.*; *see also* Paper 44, 63:12–15 (“JUDGE SCHNEIDER: Doesn’t the fact that you were able to depose Petitioner's expert cure any issues that you might have had with the lack of authentication? MR. CARSTEN: Well, Your Honor, certainly we were able to depose him.”). Indeed, the record shows that, during trial, Patent Owner acknowledged that it did not suffer a specific cognizable prejudice. Dec. 58 (citing Paper 44, 64:5–6).

Patent Owner does not identify where we misapprehended or overlooked its arguments as to Exhibit 1002. Rather, Patent Owner disagrees with our decision to deny its Motion to Exclude Exhibit 1002. It is not an abuse of discretion to have made an analysis or reached a conclusion with which a party disagrees. Thus, Patent Owner's Request for Rehearing is denied.

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ORDER

Accordingly, it is

ORDERED that Patent Owner's Request for Rehearing is *denied*.

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