UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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LIQUIDIA TECHNOLOGIES, INC.,
Petitioner,

v.

UNITED THERAPEUTICS CORPORATION,
Patent Owner.

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Case IPR2020-00770
Patent 9,604,901

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**PATENT OWNER'S OPPOSITION TO PETITIONER'S MOTION TO SUBMIT SUPPLEMENTAL INFORMATION**

## I. INTRODUCTION

United Therapeutics Corporation ("UT") does not oppose submitting what is arguably relevant—the district court's[1] claim construction order—but UT does oppose Petitioner's motion to flood the record with ancillary material—Exhibits 1053 (*Markman* hearing transcript) and 1054 (proposed *Markman* order) (Paper 38 or "Motion").[2] Specifically, UT submits with this paper and with Petitioner's consent, Exhibit 2035, the district court's *Markman* order for certain terms of the patent at issue, U.S. Patent No. 9,604,901. But admission of the hearing transcript and now-superseded order is not in the interests of justice, and Petitioner has failed to meet its high burden under 37 C.F.R. § 42.123(b).

Aside from claim construction rulings made orally during the hearing (which are now formalized in the order of Exhibit 2035), Petitioner's other citations to the hearing transcript amount to attempts to supplement the record with its own further

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[1] *United Therapeutics Corporation v. Liquidia Technologies, Inc.*, C.A. No. 20-755 (RGA) (D. Del.).

[2] Despite the title of Petitioner's motion, UT treats the filing as a motion to submit supplemental information.

attorney argument and engage in a game of gotcha regarding allegedly inconsistent statements. Moreover, Petitioner cites only a handful of portions of the transcript despite requesting submission of over 100 pages. The Board should not be required to scour the transcript for a nugget of relevance. Likewise, UT should not be ambushed with new attorney arguments imported from another proceeding. The parties have had extensive opportunity to submit evidence and argument relating to claim construction, including evidence and argument from the parallel district court case. Dumping another 100+ pages of transcript from another proceeding does nothing to aid in resolving the issues at hand here.

## II. LEGAL STANDARDS

Petitioner's Motion is governed by 37 C.F.R. § 42.123(b). Petitioner must show that the information could not be submitted earlier and submission is in the interests of justice. No interest of justice is served by raising new issues (like indefiniteness) and loading up the record with redundant and unsupported attorney argument, particularly when UT has no opportunity to respond with argument and evidence in turn. 5 U.S.C. § 554 (requiring notice and opportunity to respond meaningfully).

## III. ARGUMENT

Petitioner has failed to demonstrate that submission of Exhibits 1053 and 1054 is in the interests of justice. The draft *Markman* order (Exhibit 1054) has now been superseded by the actual order (Exhibit 2053), and justice does not benefit from dumping 100+ pages of attorney argument from another proceeding into the record on the eve of the oral hearing. Indeed, this supplemental evidence adds a host of issues not briefed in this proceeding, such as Petitioner's allegation of indefiniteness in the parallel proceeding—the very type of material, inconsistent position that Petitioner claims UT has engaged in.

### A. Exhibit 2035 Should Be Admitted in Lieu of Exhibits 1053 and 1054

Exhibit 1054 is merely a proposed order that was submitted to the Court after the *Markman* hearing. In view of the signed *Markman* order submitted herewith as Exhibit 2035, there is no reason to admit Exhibit 1054 as supplemental information – it is merely an unsigned proposed order that has no relevance or provenance in this proceeding. The parties agree that Exhibit 2035 can be submitted.

Similarly, the issued order also obviates the need to admit the hearing transcript (Exhibit 1053) as evidence of the Court's *Markman* rulings, since these rulings are now formalized in the issued order of Exhibit 2035.

Petitioner's motion to admit Exhibits 1053 and 1054 should therefore be denied in favor of admitting Exhibit 2035 as the most direct evidence of the district court's claim construction rulings.[3]

### B. Petitioner's Attempted Reliance on Exhibit 1053 Demonstrates that its Admission Is Not in the Interests of Justice

Petitioner has failed to demonstrate that submission of the evidence Exhibits 1053 and 1054 is in the interests of justice. Rather, Petitioner seeks to flood the record with its own attorney argument as "evidence" and manufacture inconsistencies on the eve of oral hearing. Justice does not condone, much less require, submission of Exhibits 1053 and 1054 in these circumstances.

#### 1. Petitioner should not be permitted to supplement the record with its own attorney argument

Petitioner's first argument for admitting Exhibit 1053 is that "the parties addressed the same issues present here related to the person of ordinary skill in the

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[3] While UT does not object to Exhibit 2035 being introduced as evidence in this proceeding, UT doubts that the Court's "plain and ordinary meaning" constructions are particularly helpful to the Board here, since the Board must serve as the ultimate trier of fact and determine what the actual "plain and ordinary meanings" are sufficiently to resolve the invalidity disputes in this proceeding.

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