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Subject: IPR2021-00406 || POP Request
Date: Thursday, August 18, 2022 2:58:31 PM
Attachments: [2022.08.16 \[406-79\] Patent Owner Request for Rehearing.pdf](#)

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Patent Owner United Therapeutics Corporation (UT) hereby requests review by the Precedential Opinion Panel of the Final Written Decision in the above-captioned IPR. UT has concurrently filed a request for rehearing of the Final Written Decision.

Based on my professional judgment, I believe this case requires an answer to the following precedent-setting question of exceptional importance: if a person of ordinary skill in the art must rely on a “research aid” to find a reference, does the date of public accessibility of that reference depend on the date on which the research aid became publicly accessible? I further believe that the panel’s decision is contrary to the following decisions and statutes: 35 U.S.C. §102 (pre-AIA); *Kyocera Wireless Corp. v. ITC*, 545 F.3d 1340 (Fed. Cir. 2008); *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560 (Fed. Cir. 1988); *In re Lister*, 583 F.3d 1307 (Fed. Cir. 2009).

The detailed reasons for requesting Precedential Opinion Panel review are as follows. As discussed in greater detail in UT’s accompanying rehearing request, the defining feature of a “printed publication” under §102(b) is whether the reference was publicly accessible to a person of ordinary skill in the art before the critical date. Here, the critical date is one year before the priority date. In concluding that the challenged claims of the ’793 patent are obvious, however, the Final Written Decision relies on two abstracts—Voswinckel JESC (Ex. 1007) and Voswinckel JAHA (Ex. 1008)—that were not publicly accessible until *after* that critical date.

In the panel’s view, the two Voswinckel references were prior art under §102(b) because a skilled artisan could have found them by way of two research aids—Ghofrani (Ex. 1010) and Sulica (Ex. 1104), respectively. But neither Ghofrani nor Sulica was itself publicly accessible more than one year before the priority date. So even assuming Ghofrani and Sulica provide a skilled artisan with the requisite “roadmap” to find the Voswinckel abstracts (*see* FWD at 11), neither could have led the skilled artisan to the relevant Voswinckel abstract before the critical date. The panel’s decision effectively allows a petitioner to use a research aid published within a year of the application date to bootstrap another reference that was not found publicly accessible on its own terms.

That conclusion warrants the review of the Precedential Opinion Panel. This case lies at the

intersection of public accessibility and research aids: can a petitioner establish the public availability of an otherwise nonpublic reference *before* the §102(b) critical date by pointing to a research aid from *after* the critical date? UT submits that the answer follows necessarily from the legal principles discussed above: if a petitioner is relying on research aids to establish public accessibility of an otherwise-unavailable reference, the date of public availability is the date on which the *research aid* became publicly accessible. But the panel's decision to the contrary makes clear that further guidance on this question is sorely needed.

For these reasons, UT respectfully requests the review by the Precedential Opinion Panel.

Respectfully submitted,

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