UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

KELONIA THERAPEUTICS, INC,
Petitioner,
v.

INTERIUS BIOTHERAPEUTICS, INC.,
Patent Owner

U.S. Patent No. 11,767,366

Case No. PGR2024-00008

PATENT OWNER'S SUR-REPLY

Kelonia's Reply fails to sufficiently distinguish the prior art relied on in the Petition from that considered during prosecution and fails to identify material error by the Examiner. There is no dispute that all references in Grounds 1 & 2 were before the Examiner during prosecution and that the only reference that was not explicitly considered by the Examiner was the RCSB PDB ("PDB"), relied on in Grounds 3 & 4. But Kelonia cannot avoid the fact that substantially the same information was considered in a different reference, Nikolic. Kelonia's allegation of error is based only on the lack of a rejection during prosecution, which is insufficient to overcome § 325(d). For the reasons in Interius's Preliminary Response and further discussed below, the Board should deny the Petition.

I. THE RCSB PDB DISCLOSURES ARE SUBSTANTIALLY THE SAME AS ART THAT WAS PRESENTED TO THE EXAMINER

Kelonia's claim that the Examiner was unaware of the PDB is incorrect. Kelonia concedes that the '366 patent and Nikolic refer to "crystal structure snapshots" of VSV-G. Paper 9 at 3. Kelonia also admits (Paper 1 at 69 n. 14) that Nikolic directs the reader to the 3-D structure data: "**Data availability.** The atomic coordinates and structure factors have been deposited in the Protein Data Bank (accession code 5OYL and 5OY9)." Ex. 1018 at 11. Thus, contrary to Kelonia's Reply, the Examiner was aware of the 3-D structure via the disclosure of Nikolic.

Assuming, however, that the Examiner was unaware of PDB, Kelonia's attempts to distinguish it from Nikolic fall flat. Kelonia claims that the snapshots in

Nikolic are significantly different from the information in PDB because they "do not identify each of the nearby amino acid residues and distances needed to appreciate the desirability of the I182E and I182D mutations." Paper 9 at 3. But PDB similarly does not explicitly identify the residues and distances—one has to manipulate the data to determine this information. Kelonia, in essence, is arguing that § 325(d) shouldn't apply because the Examiner lacked the hindsight-laden testimony of Kelonia's expert. The Board has repeatedly denied petitions despite the submission of expert testimony supporting invalidity. *CSL Behring GmbH v. Shire ViroPharma Inc*., IPR2019-00459, Paper 8, at 19 (July 2, 2019).

Even accepting Kelonia's position that PDB provides additional information, this is insufficient to overcome § 325(d). *See*, *e.g.*, *Evergreen Theragnostics, Inc. v. Advanced Accelerator Applications SA*, PGR2021-00002, Paper 9, at 12-13 (P.T.A.B. Apr. 14, 2021) (denying petition where noncumulative information was not before the Examiner); *Risen (Suzhou) Pharma Tech. Co. v. Alzheon, Inc.*, IPR2022-01200, Paper 14, at 31 (P.T.A.B. Jan. 9, 2023) (denying petition where additional art provided a minimal contribution to the record before the Examiner).

II. KELONIA IDENTIFIES NO MATERIAL ERROR

Kelonia's only identification of error is that the "Examiner did not make any rejections based on *Perkins* or *Hwang*, or offer any analysis of these references." Paper 9 at 1. The Board, however, has noted that simply the lack of a rejection is

insufficient to establish material error. *Microsoft Corp. v. ThroughPuter, Inc.*, IPR2022-00757, Paper 10, at 21 (Nov. 1, 2022) ("[T]he lack of a rejection itself is not dispositive of whether there was material error."); *see also Eyenovia, Inc. v. Sydnexis, Inc.*, IPR2022-00963, Paper 7, at 19 (Nov. 8, 2022).

Kelonia's reliance on *BioNTech* is misplaced. There, the Board found that the Examiner materially erred by remaining silent in response to clearly inaccurate assertions by the applicant. *BioNTech SE v. ModernaTX, Inc.*, IPR2023-01358, Paper 19, at 16 (P.T.A.B. Mar. 19, 2024) ("The Examiner's silence in response to an assertion from applicant that is plainly refuted by disclosure in the references of record suggests that the Examiner overlooked such disclosure and demonstrates error."). There is no such evidence here.

Kelonia supports its positions with the same mischaracterizations of the disclosure of the two Perkins references. As explained in the Preliminary Response, Kelonia's assertion that Perkins and the Perkins Provisional "have identical disclosures" is plainly false. Paper 9 at 2. The two documents have different disclosures, including, most importantly, Perkins disclosing an embodiment having only four mutations including a mutation at the I182 residue where the Perkins Provisional lacks such a disclosure. Paper 6 at 20-22.

Thus, the Board should deny institution under § 325(d).

Respectfully submitted,

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CERTIFICATE OF SERVICE

Pursuant to 37 CFR § 42.6(e)(4), the undersigned certifies that a true and correct copy of PATENT OWNER'S SUR-REPLY, was provided via email, to the Petitioner by serving the correspondence email addresses of records as follows:

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