UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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GRÜNENTHAL GMBH,
Petitioner

v.

ANTECIP BIOVENTURES II, LLC,
Patent Owner.

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Case PGR2019-00003
Patent 9,867,839 B2

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Record of Oral Hearing
Held: February 4, 2020

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Before TONI R. SCHEINER, GRACE KARAFFA OBERMANN, and SHERIDAN K. SNEDDEN, *Administrative Patent Judges.*

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The above-entitled matter came on for hearing on Tuesday, February 4, 2020, commencing at 10:00 a.m. at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

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1 P-R-O-C-E-E-D-I-N-G-S
2 10:01 a.m.
3 JUDGE SNEDDEN: Good morning. This is final hearing of
4 PGR 2019-00003. I am Judge Snedden and with me on our Panel are
5 Judge Scheiner and Obermann. Let's begin with Petitioner -- I mean let's
6 begin with appearances, starting with Petitioner. Please stand, introduce
7 yourself and who you have with you today.
8 MR. MINION: Thank you, Your Honor. Daniel Minion from
9 Venable on behalf of the Petitioner. With me is Katherine Adams and
10 William Solander, also, from Venable.
11 MR. JOHNSON: Good morning, Your Honors. Brent Johnson
12 for Antecip, and I am by myself.
13 JUDGE SNEDDEN: All right, well welcome. Per our order, this
14 oral hearing -- per our order granting this oral hearing, each party will have
15 60 minutes of total time to present its arguments. Petitioner will open the
16 hearing by presenting its case with regard to the challenged claim to which
17 we institute a trial. Patent Owner will then respond to the argument, and
18 each party may reserve rebuttal time. Mr. Minion, when you're ready, you
19 may begin. And will you be reserving rebuttal time?
20 MR. MINION: Yes, Your Honor. I'd like to reserve 20 minutes
21 of rebuttal time.
22 JUDGE SNEDDEN: Okay. You may start when ready.
23 MR. MINION: Good morning again, Your Honors. We have six
24 grounds that were set forth in the petition. Today I am going to focus on

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1 two of those grounds. Ground two, which is obviousness for claims 1
2 through 14 of the 839 patent, and then ground six, which is obviousness of
3 claims 15 through 30 of the 839 patent.
4 So for ground two, the subject matter of these claims -- which I will
5 get to in a moment -- will be familiar with the Board. We've been through
6 this subject matter now. This will be the third of six PGRs that have been
7 instituted, directed to the use of neridronic acid in patients with complex
8 regional pain syndrome. As you'll see in Patent Owner's rebuttal, the
9 principal argument of the first argument will be, again, whether Petitioner
10 has met its burden to demonstrate that its non-prior art references constitute
11 printed publications under U.S. Section 35 -- 103. And Your Honors will
12 be familiar with these references, I hope. Varenna 2012 -- it's the subject
13 of request for re-hearing in the 245 PGR. The first of these three
14 proceedings. Muratore and Gatti were also found to be prior art in the -- in
15 the 245, though it's not challenged on the request for re-hearing.
16 Again, here is the Board's finding as to Varenna 2012 in the 245
17 PGR. We find that Varenna qualifies as prior art against the challenged
18 claims of the 245 patent, even if we set aside Dr. Robinson's declaration.
19 So based on just the indicia on Varenna 2012 itself, this Board found that it
20 qualified as prior art. Again, just as in the 245 PGR proceeding, Patent
21 Owner -- it did not object to Varenna 2012, and therefore it has waived any
22 hearsay, authenticity or evidentiary objection, so the statements in Varenna
23 2012 are admitted as evidence for the truth of the matter asserted. They are
24 not hearsay.

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1 Second, again, just as in the 245, Patent Owner has not come forth
2 with any evidence calling into question Varenna 2012's stated publication
3 and copyright dates, or that it is not -- was not publically available prior to
4 the filing of the 839 patent. Instead, we have, from Patent Owners, some
5 what I characterize as unsupportable legal arguments. The first is that they
6 state that Petitioner did nothing more than point to the date on the face of
7 each document as proof of its printed publication status. The law requires
8 considerably more than that. That is, of course, incorrect. And as you
9 see, if you look at the Patent Owner response, there is no legal authority for
10 that position because throughout all of these proceedings and all of the
11 stages of these PGRs, Patent Owner has yet to come forth with a single
12 instance where a publication in a scientific journal was determined by any
13 tribunal -- including the Patent Office or the PTAB -- was not a piece of
14 prior art. I am not aware of any instance, and certainly none has been cited.
15 Patent Owner continues that they say -- assert that a reference
16 standing alone cannot serve as prove of its own dissemination or availability
17 before the critical date, even if that reference were to survive an
18 admissibility challenge. First of all, we don't have an admissibility
19 challenge. And I will get to a case in a moment that says the opposite, that
20 a reference alone can actually serve as proof of its own dissemination.
21 Last, Patent Owner states that there are profoundly negative policy
22 implications for allowing a non-patent reference to qualify as a printed
23 publication based solely on its appearance, without evidence of
24 dissemination or availability. I'd be happy to get into policy implications

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