No. 2018-1885

United States Court of Appeals for the Federal Circuit

PFIZER, INC.,
APPELLANT

v.

BIOGEN, INC., GENENTECH, INC.,
APPELLEES

APPEAL FROM THE UNITED STATES PATENT AND TRADEMARK OFFICE,
PATENT TRIAL AND APPEAL BOARD
CASE NO. IPR2017-01115

REPLY BRIEF OF APPELLANT PFIZER, INC.

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CERTIFICATE OF INTEREST FOR APPELLANT PFIZER, INC.

Counsel for Appellant Pfizer, Inc., Charles B. Klein, certifies the following:

1. The full name of every party represented by me is:

Pfizer, Inc.

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

Pfizer, Inc.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me before the agency or are expected to appear in the court (and who have not or will not enter an appearance in this case) are:

Winston & Strawn LLP: Matthew J. Mezger*

5. The title and number of any case known to me to be pending in this or any other court or agency that will directly affect or be directly affected by this Court's decision in the pending appeal are:

Celltrion, Inc. v. Genentech, Inc., No. 18-2161
Genentech, Inc. v. Celltrion, Inc., No. 1:18-cv-11553 (D.N.J.)
Genentech, Inc. v. Celltrion, Inc., No. 1:18-cv-00574 (D.N.J.)
Pfizer, Inc. v. Biogen, Inc., IPR2018-00285 (PTAB)
Pfizer, Inc. v. Biogen, Inc., IPR2017-01166 (PTAB)

December 14, 2018

/s/ *Charles B. Klein*
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

SUPPLEMENTAL JURISDICTIONAL STATEMENT

Appellees (collectively, "Genentech") agree that "[i]t appears that Pfizer will be able to meet its burden" of showing standing to maintain this case. Br. 3. Among other things, Pfizer satisfied its burden of proving standing in its opening brief by explaining, and citing unrebutted evidence, that it had completed Phase III clinical trials of its rituximab biosimilar product. Opening Br. 11. On December 13, 2018, Pfizer filed a motion to supplement the record to confirm these actions and to note subsequent events, which further confirm that Article III is, indeed, satisfied here—namely, Pfizer's filing of an abbreviated Biologics Licensing Application ("aBLA") with FDA for its rituximab biosimilar product in September 2018.[1] Dkt. 48.

To establish standing, Pfizer need only show "that it has concrete plans for future activity that creates a substantial risk of future infringement or likely cause the patentee to assert a claim of infringement." *JTEKT Corp. v. GKN Auto. LTD.*, 898 F.3d 1217, 1221 (Fed. Cir. 2018). In the pharmaceutical context, this Court has found standing where "'invalidating the [] patent … that is the subject of [the] appeal is imperative to removing that patent as an obstacle to the filing and approval of'"

[1] FDA regulations provide that after a manufacturer "submit[s] an application to" FDA, the application "shall not be considered as filed until all pertinent information and data have been received by [FDA]." 21 C.F.R. § 601.2(a). As explained below, FDA accepted Pfizer's aBLA for filing in September 2018. *See* Appx17720.

an application to market a drug. *Altaire Pharm., Inc. v. Paragon Bioteck, Inc.*, 889 F.3d 1274, 1282 (Fed. Cir. 2018).

That is the situation here. As background, Pfizer is a leading global biopharmaceutical company that develops, manufactures, and distributes numerous brand-name and generic drugs. Appx17713, ¶ 4. Pfizer's business strategy is centered on developing and bringing medicines and vaccines to market. *Id.* ¶ 5. Pfizer has a decade of experience in biosimilars and, to date, has obtained FDA approval for four biosimilar drugs. Appx17714, ¶ 8.

Pfizer has nearly completed its development of a rituximab biosimilar product, and has so far devoted significant resources to that development. Appx17715, ¶ 10; Appx17716, ¶ 11. Before noticing this appeal, as explained in Pfizer's opening brief, Pfizer completed a successful Phase III clinical study for its rituximab product, which demonstrated equivalence statistically in overall response rate for the first-line treatment of patients with CD20-positive, low tumor burden, follicular non-Hodgkin's lymphoma. Appx17716, ¶ 11; Opening Br. 11.

Given its successful Phase III trial, Pfizer submitted an aBLA to FDA, which the agency accepted for filing on September 21, 2018. Appx17716, ¶ 12; Appx17720 (FDA's acceptance-for-filing letter, with immaterial and confidential information redacted); *see also* 21 C.F.R. § 601.2(a). Following FDA approval, and

subject to patent disputes, Pfizer plans to distribute its rituximab product in the United States. Appx17716, ¶ 14.

Pfizer understands that U.S. Patent Number 7,820,161 B2 is assigned to Genentech. Appx17717, ¶ 15. The '161 patent claims, among other things, a method of treating rheumatoid arthritis by administering more than one intravenous dose of rituximab along with methotrexate. *Id*. Based on Pfizer's reading of the '161 patent, Pfizer reasonably believes that Appellees will bring a patent infringement suit seeking to prevent Pfizer from bringing its rituximab biosimilar product to market before the '161 patent expires. *Id.* ¶ 17. Indeed, Biogen and Genentech filed infringement suits against two other companies for filing applications to market their respective rituximab biosimilar products.[2] *Id.* ¶ 16.

In addition, Pfizer's standing is bolstered by the possibility that it could be estopped from asserting obviousness in future litigation over the '161 patent. *See Altaire*, 889 F.3d at 1283; Appx17717-17718, ¶ 18. Under 35 U.S.C. § 315(e), where an IPR "results in a final written decision," a petitioner "may not assert either in a civil action … or in a proceeding before the International Trade Commission …

[2] *See Genentech, Inc. v. Celltrion, Inc.*, No. 1:18-cv-574 (D.N.J.) (dismissed pursuant to agreement on November 1, 2018); *Genentech, Inc. v. Sandoz, Inc.*, No. 1:17-cv-13507 (D.N.J.) (dismissed pursuant to agreement on December 6, 2018). Appx17796-18082.

that the claim is invalid on any ground that the petitioner raised or reasonably could have raised during that inter partes review."

If applicable, this bar could conceivably prevent Pfizer from raising an obviousness defense in the infringement suit that Pfizer reasonably expects Genentech to bring based on Pfizer's rituximab biosimilar product. Any such estoppel, in turn, could result in substantial losses to Pfizer caused by delayed market entry. Appx17717-17718, ¶ 18. "[T]his potential estoppel effect … further supports [Pfizer's] claimed injury in fact." *Altaire*, 889 F.3d at 1283.

INTRODUCTION

As confirmed by two separate exhibits—(1) the Package Insert Label approved by FDA for the Rituxan product (Exhibit 1037), and (2) the Internet Label Genentech posted on its own website (Exhibit 1055)—the Rituxan label distributed with vials of the product was publicly accessible before the May 1998 critical date of the '161 patent. Either form alone is sufficient to find that the Rituxan label's relevant teachings—the dosing regimen for rituximab and its use with corticosteroids—were disclosed in a printed publication under 35 U.S.C. § 102. Nothing in Genentech's brief warrants a different result, and the Board's contrary decision should be vacated.

The Package Insert Label. Genentech concedes that FDA approved a label for Genentech's biologic drug Rituxan in November 1997. Br. 31. Exhibit 1037, which FDA represents is a copy of that originally approved label, disclosed the relevant dosing and co-administration regimen claimed in the '161 patent. Appx1260-1261. Genentech points to no record evidence that the substance of that label changed at all, much less materially, when Genentech launched Rituxan with its product label (as required by FDA regulations) one month later, in December 1997. Appx1457; Appx1407; Appx2895-2896. In fact, Genentech posted the Internet Label—which is substantively identical to Exhibit 1037—to its website after its December 1997 product launch. This circumstantial evidence was more than

sufficient to show that the relevant teachings from the Rituxan label were in the prior art well before the May 1998 critical date. That should end the matter.

Like the Board, however, Genentech exalts form over substance. In denying that the Package Insert Label is prior art, Genentech relies on its own allegation that Exhibit 1037 differs in some undisclosed way from the version of the product label that was indisputably distributed with Rituxan vials before the critical date. Br. 32-33. Yet the question was not whether Exhibit 1037 itself is an exact facsimile of that Rituxan label, formatting and all. Instead, the question was whether the Rituxan label that Genentech concedes was publicly accessible in the prior art contained the relevant teachings about Rituxan's dosage and use with corticosteroids. As shown below, all of the record evidence—including, but not limited to, Exhibit 1037—confirms that the answer is "yes." And no evidence, let alone substantial evidence, supports a contrary conclusion.

The Internet Label. Independently, the teachings in the Rituxan label also were publicly accessible before the critical date on Genentech's website. Appx1497-1504. Unlike with the Package Insert Label, Genentech does not dispute that the Internet Label was publicly accessible—in particular, Genentech itself posted the Internet Label on its website before the critical date. *See id.*; Appx1505-1519. Instead, Genentech resorts to another "gotcha" argument: the Internet Label allegedly was not "easily located." Br. 47-48.

No evidence supports that contention. An archived copy of the website as it appeared before the critical date shows that any user could have accessed the Internet Label easily and quickly simply by navigating to Genentech's homepage and following the three most prominent links for "Medicines," "Rituxan," and "Full Prescribing Information." Appx1504; Appx1508; Appx1510. Genentech complains that Pfizer did not produce expert testimony that Genentech's website was easy to use (Br. 47-48), but this Court's cases hold that no such testimony was required. *Infra* 20-24. Genentech also asserts that Pfizer produced no evidence that a skilled artisan exercising reasonable diligence would have located the Rituxan label. Br. 51-52. But the record confirms that this, too, is wrong. Pfizer's petition showed that the prior art funneled skilled artisans to Genentech's Rituxan product, which Genentech characterizes as a "revolutionary" product. *Id*. at 9.

In short, the undisputed evidence demonstrates that the Rituxan label was a printed publication publicly accessible before the critical date of the '161 patent—as evidenced by the Package Insert Label and, independently, the Internet Label. The Board's contrary conclusion is not supported by the record. In addition, the Board's "partial institution" of Pfizer's challenge to the '161 patent is contrary to the Supreme Court's instruction that the Board must consider all challenged claims and grounds. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348, 1354 (2018). This Court should vacate the Board's decision and remand the case for further proceedings.

ARGUMENT

I. The product label distributed with Rituxan vials indisputably is a prior-art printed publication under 35 U.S.C. § 102.

Genentech concedes key facts underlying Pfizer's position. First, Genentech admits that FDA approved a label to be distributed with vials of Rituxan. Br. 31. Second, Genentech admits that federal regulations and FDA instructions required Genentech to distribute an FDA-approved label with Rituxan. *Id.* at 32. Third, Genentech admits it "engaged in substantial sales" of Rituxan beginning in 1997—well before the May 1998 critical date—and that the product was sold with a label. *Id.* at 32; Appx2895-2896. In other words, Genentech concedes—as it must—that the product label for Rituxan was publicly accessible before the critical date.

The question here, therefore, is simply whether Pfizer sufficiently evidenced that this Rituxan product label—again, a label that indisputably was distributed to the public months before the critical date—contained the relevant, prior-art teachings. The Board's conclusion that Pfizer failed to meet that burden should be vacated.

A. The Package Insert Label (Exhibit 1037) and the Internet Label (Exhibit 1055) evidence that the Rituxan product label contained the relevant, prior-art teachings.

Before the Board, Pfizer merely had to show "by a preponderance of the evidence" that Exhibit 1037 accurately reflects the content of the Rituxan label that indisputably is a prior-art printed publication. *See Nobel Biocare Servs. AG v.*

Instradent USA, Inc., 903 F.3d 1365, 1375 (Fed. Cir. 2018). The Board held that Pfizer did not meet its burden. But as our opening brief showed, there is no evidence—much less substantial evidence—supporting the Board's decision. All of the record evidence shows, at least circumstantially, that Exhibit 1037 accurately reflects the substantive content of the product label that Genentech concedes was disseminated with the Rituxan product before the critical date. Opening Br. 23-27.

To be sure, Genentech argues that "there were changes made" to the Rituxan label sometime between November 26, 1997, and May 7, 1999. Br. 32. But Genentech has never argued—much less produced evidence showing—that any of those "changes" were made between November 1997 (when the label was approved) and December 1997 (when Genentech began selling Rituxan, just one month later). *Id.* at 31-32. Nor has Genentech ever even argued that any such changes altered the teachings that Pfizer relied on in its petition. *Id.*

In fact, Genentech admitted that the label distributed with the Rituxan product included the same sections of the label that Pfizer cited before the Board. Appx2898-2899 (admitting that the product label "included a section called 'WARNINGS,' a section called 'ADVERSE REACTIONS,' and a section called 'DOSAGE AND ADMINISTRATION'"). And, as discussed below, the Internet Label confirms that that label publicly accessible with Rituxan vials is substantively identical to the label FDA approved a month before the product launch. Unsupported—and illogical—

speculation that FDA materially changed the label during the month-long period from November 1997 (when it was first approved) to December 1997 (when it was included with Rituxan vials sold to the public) is not evidence, much less substantial evidence, that such a change occurred.

Unable to respond on the merits, Genentech offers the hyper-technical argument that "Exhibit 1037"—which FDA represents to be the label it approved for Rituxan a month before the product launch—"is not ***the*** 'Package Insert Label' that was distributed with the product." Br. 31. In other words, Genentech argues that it can avoid invalidity here—regardless of the merits—because the Rituxan label actually distributed with the product may have been formatted differently than the label FDA approved. This elevation of form over substance makes a mockery of the Patent Act, harms the public, and defeats the purpose of "inter partes review … [to] help[] protect the public's paramount interest" in "challenging patents that should not have issued." *Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2144 (2016) (quotations and alterations omitted). Most importantly, it fails as a matter of law.

1. *Genentech's argument misstates the law—which allows for proof of a prior-art printed publication through circumstantial evidence.*

Quoting the Board's Final Written Decision, Genentech argues that Pfizer "did not submit any evidence to the Board 'establishing that Exhibit 1037'"—i.e., the label that FDA represents was approved for distribution with Rituxan in 1997—

"'was, in fact, the drug label disseminated with Rituximab at any time.'" Br. 29 (quoting Appx16). But like the Board, Genentech trains its fire on the wrong target. Pfizer's burden was not to prove that Exhibit 1037 was a perfect copy of the product label distributed with Rituxan beginning in December 1997. Instead, Pfizer's burden was to prove "by a preponderance of the evidence"—including circumstantial evidence—that the Rituxan label indisputably available to the public as of the critical date contained the pertinent prior art teachings, i.e., the FDA-approved dosage for Rituxan and its combination with corticosteroids. *Nobel Biocare Servs.*, 903 F.3d at 1375.

Arguing otherwise, Genentech ignores "hornbook law that direct evidence of a fact is not necessary. Circumstantial evidence is not only sufficient, but may also be more certain, satisfying and persuasive than direct evidence." *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1318 (Fed. Cir. 2009) (internal quotes omitted); Opening Br. 31. Here, it was "not necessary" to submit an actual copy of the label that was physically included with vials of Rituxan in order to prove its contents. Indirect but equally compelling evidence from FDA (which approved the label) and Genentech's website (which reproduced it) was more than enough.

Indeed, this Court has never required a perfect, unblemished copy of a prior-art reference to establish its public accessibility. On the contrary, in *In re Enhanced Securities Research, LLC*, the Court held that a prior-art manual was publicly

accessible even though the copy that was submitted to the Patent Office was missing multiple pages in its entirety. 739 F.3d 1347, 1356 (Fed. Cir. 2014). The fact that no actual copy of the reference was disseminated in the prior art without those pages was beside the point. As the Court explained, there is "no authority for the proposition that the PTO is categorically precluded from considering a reference if it is incomplete," and "nothing in the Manual here suggests that the missing pages were necessary to an understanding of the pertinent parts of the reference." *Id*.

The same logic applies here. So long as Exhibit 1037 accurately reflects "the pertinent parts" of the Rituxan label that indisputably was accessible publicly before the critical date, this exhibit constitutes sufficient circumstantial evidence to prove the relevant, prior-art teachings—regardless of whether the precise form of Exhibit 1037 was accessible before the critical date. *Enhanced Research*, 739 F.3d at 1356. As shown below, the record overwhelmingly confirms that Exhibit 1037 does, in fact, reflect the substance of the publicly-accessible label disseminated with Rituxan before the critical date—indeed, there literally is no contrary evidence.

Genentech nonetheless accuses Pfizer of "urg[ing] this Court to adopt a novel legal standard that public accessibility focuses on the information contained in the reference rather than whether the reference itself was publicly accessible." Br. 36. But that accusation rests on a mischaracterization of our argument. We *do* rely on a specific prior-art reference that was publicly available: the Rituxan product label that

Genentech admits was widely distributed beginning in December 1997. Br. 32. The question is whether *that* reference taught the dosing regimen of rituximab and its use with corticosteroids, as evidenced (at least circumstantially) through Exhibit 1037. Thus, none of the cases that Genentech cites over six pages of its opposition brief to prove that a printed publication must be based on a "*reference*" or "*document*" undermine our point. Br. 34-40. Indeed, none of those cases bar the use of circumstantial evidence to prove the contents of a printed publication.

By insisting on an exact copy of a Rituxan label actually disseminated with a Rituxan product before the critical date to prove its contents, it is Genentech—not Pfizer—that urges this Court to adopt a novel and erroneous legal standard. "Whether a document qualifies as a 'printed publication' that is 'available to the public'" under 35 U.S.C. § 102 "is a question of law based on underlying findings of fact." *Enhanced Research*, 739 F.3d at 1354. Public "[a]ccessibility," in turn, "goes to the issue of whether interested members of the relevant public could obtain the information if they wanted to." *Id.* And "[t]his Court has interpreted § 102 *broadly*." *Id.* (emphasis added).

Given this plain authority, the Board—and, by extension, Genentech—misstates the law when positing the extremely *narrow* view that, to satisfy § 102 here, Pfizer needed to prove that the Package Insert Label submitted with its petition "'was, in fact, the drug label disseminated with Rituximab'" before the critical date.

Br. 29 (quoting Appx16). Circumstantial evidence that interested members of the relevant public could obtain the relevant "information" from the Rituxan label that indisputably was disseminated before the critical date was more than sufficient to satisfy the correct legal standard. *Enhanced Research*, 739 F.3d at 1354.

2. *The Board never addressed whether Pfizer provided sufficient proof, through circumstantial evidence, that Exhibit 1037 accurately reflects the teachings of the prior-art Rituxan label.*

The Board rejected Pfizer's petition on the ground that Exhibit 1037 *itself* (and its Internet counterpart, Exhibit 1055) was not "publicly accessible prior to the critical date so as to render it a 'printed publication' under 35 U.S.C. §102(b)." Appx20. But, again, that was not the pertinent question. Instead, the key question—which was adequately raised before the Board—focused on substance and not form: namely, whether "Exhibit 1037, *the text*, maybe it doesn't have that little rituximab written in on the top, ... was publicly available … [because i]t was disseminated with [Genentech's] product." Appx700 (emphasis added). The Board never addressed whether Pfizer met its burden, through circumstantial evidence, of showing that "the text" of Exhibit 1037 relevant to this proceeding was in the prior art.[3]

[3] Genentech's argument that Pfizer waived this argument is meritless. When opposing Genentech's motion to exclude Exhibit 1037, Pfizer explained that Exhibit 1037 was relevant, among other reasons, because "Patent Owners were required by FDA regulation to include an approved label with all sales of Rituxan®." Appx579. In support, Pfizer pointed to FDA's letter approving the original Rituxan label, which warned that "[a]ny changes … in the manufacture, packaging or labeling of the product … will require the submission of information to your biologics license

Had the Board addressed the proper question, it would have had to recognize that the record points to one—*and only one*—conclusion. That is, thousands of vials of Rituxan were distributed before the critical date with a product label that taught the dosage for Rituxan and its use with corticosteroids claimed in the '161 patent. Genentech does not argue otherwise; any such argument would be absurd.

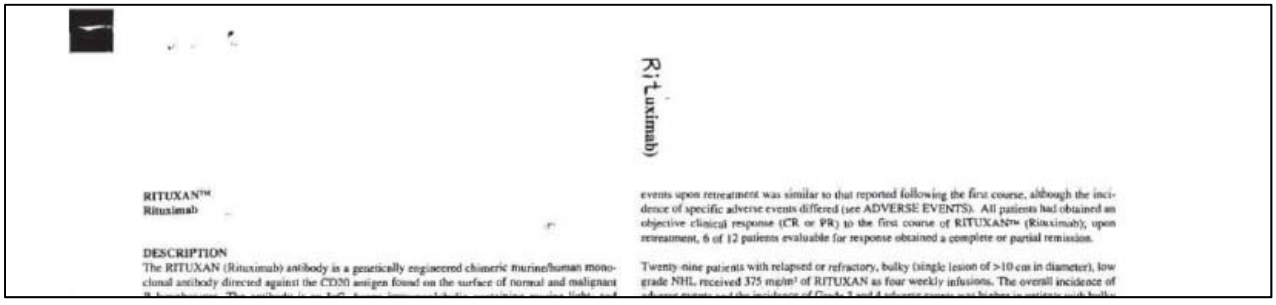
After all, Exhibit 1037 comes directly from FDA's website, where this federal agency represents to the public that this document is a true and correct copy of the Rituxan label that FDA approved in November 1997. Appx1260. Genentech does not dispute this fact. And as noted, Genentech was legally required to distribute the FDA-approved label with every vial of Rituxan sold before the critical date. *See* Appx1406-1407; 21 C.F.R. § 601.12. There is not a shred of evidence that FDA approved any changes (much less material changes) to this label between FDA's approval in November 1997 and the initial product launch just one month later in December 1997.

application for our review and written approval consistent with 21 CFR 601.12." Appx1407. In addition, Pfizer submitted an SEC filing demonstrating that Genentech engaged in substantial sales of Rituxan from the moment it was launched in December 1997. *See* Appx1457. And at the oral hearing, petitioners stressed: "[W]e [] know [Genentech] had to have a label in their packaging. We know that on the FDA website, this is the label that's shown as the approved label as of that date, 1998. If you put all of that together, there cannot be any doubt that Exhibit 1037 … was publicly available." Appx700.

Genentech retorts by citing its discovery response that Exhibit 1037 is not a "true and correct copy of [the] document that Genentech distributed within the U.S. with [vials of] Rituxan®." Appx2900; *see, e.g.*, Br. 28, 32. In Genentech's view, the notion that Exhibit 1037 might not be a precise reproduction of the Rituxan label is case-dispositive. But Genentech is mistaken.

As the Board acknowledged, although Genentech has denied that Exhibit 1037 is a "true and correct" copy of the Package Insert Label, it has never once provided "an explanation regarding how Exhibit 1037 differs from the labeling included with the Rituxan product distributed for sale." Appx17 n.15. Nor has Genentech permitted Pfizer to inspect the Rituxan label that it distributed before the critical date, which it admits is in its possession. Appx2907-2908.

The most likely explanation for Genentech's denial—one it has not disputed—is that Exhibit 1037 contains a minor blemish. As reproduced below, a photocopying error cut off the "Rit" in Rituximab printed at the top of the first page. Appx1260. The exhibit thus reflects that someone, likely an FDA employee, handwrote the letters "Rit."



Appx1260. This non-substantive blemish falls far short of a sufficient basis to exempt Genentech from defending its patent on the merits. *See Enhanced Research*, 739 F.3d at 1354 (public "[a]ccessibility goes to the issue of whether interested members of the relevant public could obtain the *information* if they wanted to" from a printed publication) (emphasis added).

In short, Genentech's position is that something as small as this immaterial blemish on Exhibit 1037 provides a sufficient basis for the Board to withhold substantive scrutiny of the '161 patent. This is not, and certainly should not be, the law. *See Enhanced Research*, 739 F.3d at 1354.

3. *The Internet Label confirms that the relevant information in the Package Insert Label was publicly available before the critical date.*

While the Package Insert Label (Exhibit 1037) alone was enough to meet Pfizer's burden before the Board, and is enough to warrant vacatur on appeal, the record contains additional evidence that further confirms the Board's error: the substantively identical Internet Label (Ex. 1055), which Genentech itself posted on its website before the critical date. *Compare* Appx1260 *with* Appx1497. To be sure, the Package Insert Label is formatted as a paper drug label, and the Internet Label is optimized for online viewing, but the two documents are otherwise substantively identical. Appx467.

On appeal, Genentech does not dispute the authenticity of the Internet Label. Br. 52-53. And as Pfizer showed before the Board, "there are *no differences*—aside for the placement of a period—between the two labels in the 'Dosage and Administration' and 'Adverse Events' sections, the two sections relied upon by Petitioner." Appx467 (emphasis added); *see also* Appx1260; Appx1499.

That the relevant sections of both Exhibit 1037 and the Internet Label are word-for-word identical provides indisputable support that the Rituxan label accompanying the product disseminated to the public before the critical date contained the same teachings. Indeed, assuming Genentech abided by federal drug labeling laws, there is no possible explanation for how the Internet Label could contain the relevant teachings while the label distributed with Rituxan vials *at the same time* did not. Yet the Board completely ignored the Internet Label as corroborating the contents of the Package Insert Label.

Genentech argues that, under this Court's non-precedential opinion in *B/E Aerospace, Inc. v. C & D Zodiac, Inc.*, the Board lacked sufficient evidence to determine the contents of the Rituxan label available in the prior art. 709 F. App'x 687 (Fed. Cir. 2017) (unpublished). But *B/E Aerospace* is inapposite. There, the disputed prior-art reference was a loose-leaf binder containing floor plans and drawings for an aircraft interior. *Id.* at 697. Because pages could have been removed from the binder, no witness could confirm that the record version of the binder

accurately reflected a publication that was ever available before the relevant date. *See id.* at 697-98. This Court agreed, noting that the binder's "format highlights" the need to be sure that a particular version was actually made publicly accessible. *Id.* Here, in contrast, there is no dispute that an FDA-approved Rituxan label was publicly available before the critical date. And the circumstantial evidence—including the Package Insert Label (Exhibit 1037) as well as the Internet Label (Exhibit 1055), both of which are word-for-word identical in all material respects—confirms that the publicly accessible Rituxan label contained the relevant prior-art information. *See* Appx1260; Appx1497.

At bottom, while Pfizer's evidence of the content of the label disseminated with Rituxan products is circumstantial, it is incontrovertible. The Board's decision should be vacated for these reasons alone.

B. Independently, the Internet Label itself is a prior-art printed publication under 35 U.S.C. § 102.

The Internet Label independently serves as a prior-art printed publication—a position Pfizer expressly preserved below. *See* Appx17532.[4] Genentech concedes both that the Rituxan label was posted on its website, and that the label was accessible before the critical date. *See* Br. 43, 52-53. Instead, Genentech argues that

[4] "All references to the Rituxan® label in this Petition should be understood to refer both to the label at Exhibit 1037, and to the Genentech website label at Ex. 1055; both versions reflect the same content." Appx17532; *see also* Appx91 (same).

the Internet Label was not publicly accessible because Pfizer did not rely on expert testimony specifically establishing that the label could be "easily located" on the website, and because the website purportedly was not properly indexed. Br. 47-48. Alternatively, Genentech asserts that a skilled artisan exercising reasonable diligence would not have visited Genentech's website. Br. 51-52. Genentech is wrong.

1. *Expert testimony was not required to show that the Internet Label could be "easily located" on Genentech's website.*

Genentech defends the Board's decision by insisting that Pfizer "did not submit any evidence" from an expert that the Internet Label "could be easily located" on Genentech's website. Br. 47. Once again, Genentech misses the point.

Where, as here, a factual question underlying obviousness is not "beyond the comprehension of laypersons," the factfinder may properly rely on "logic, judgment, and common sense, in lieu of expert testimony." *Wyers v. Master Lock Co.*, 616 F.3d 1231, 1239-40 & n.5 (Fed. Cir. 2010) (quotation omitted). As the Supreme Court emphasized: "Rigid preventative rules that deny factfinders recourse to common sense … are neither necessary under our case law nor consistent with it." *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007).

The record contains an archived version of Genentech's website as it existed in January 1998, months before the May 1998 critical date. *E.g.*, Appx1504. As

explained in our opening brief (at 35), and shown below, the homepage of Genentech's website displayed just eight options, one of which was "Medicines":

Appx1504.

There is no dispute that clicking on "Medicines" brought the user to a page with links to only seven approved drug products, including "Rituxan." Appx1508. In turn, clicking the "Rituxan" link brought the user directly to the Rituxan page, which featured a prominent link to Rituxan's "Full Prescribing Information," i.e., the Internet Label. Appx1510; Appx1511. Thus, any person with access to the Internet beginning in January 1998, when Genentech's website was archived, would have been able to find the Internet Label by navigating to Genentech's homepage and clicking the three most obvious links.

Contrary to Genentech's assertions, the Board did not need any additional evidence, much less expert testimony, to conclude that the Internet Label was easily located. In *Voter Verified v. Premier Election Solutions, Inc.*, the Court affirmed a district court's determination that an online article was accessible. 698 F.3d 1374, 1381 (Fed. Cir. 2012). In reaching its conclusion, the Court determined that upon accessing the magazine's website, "an interested researcher would have found the []

article using that website's own search functions and applying reasonable diligence." *Id.* Importantly, both this Court and the district court reached that conclusion without any expert testimony. The only record evidence supporting the Court's "reasonable diligence" finding was a declaration from the website "maintainer" that a user could find the article by entering "vote, voting, ballot, election, and/or voting booth" into the website's search feature. *See Voter Verified, Inc. v. Premier Election Sols., Inc.*, 739 F. Supp. 2d 1340, 1350 (M.D. Fla. 2010), *aff'd*, 698 F.3d 1374.

Suffolk Technologies, LLC v. AOL Inc. is also on point. There, the Court held that a college student's post in an online CGI newsgroup was a printed publication. 752 F.3d 1358, 1365 (Fed. Cir. 2014). Although the newsgroup was neither indexed nor searchable, the Court found that, on its face, the newsgroup was "organized in a hierarchical manner." *Id.* Based on that finding, the Court determined that "someone interested in CGI could *easily locate* a list of posts in this newsgroup." *Id.* (emphasis added). Again, there was no expert testimony in the record that the posts could be "easily locate[d]"—the Court was able to discern that fact based on the newsgroup itself. *Id.*; *see also Suffolk Techs. LLC v. AOL Inc.*, 2013 WL 12156057, at *2 (E.D. Va. 2013), *aff'd*, 752 F.3d 1358 (relying only on testimony from the author of the post in concluding that the post was accessible).

Genentech has no basis to distinguish *Voter Verified* and *Suffolk Technologies*. As to *Voter Verified*, Genentech contends there was evidence in the

record there, but not here, showing that an interested researcher would have found the disputed article by "'applying reasonable diligence.'" Br. 50. But as discussed above, the only such evidence was that a user could have found the article using certain search terms. *Voter Verified*, 739 F Supp. 2d 1350. Likewise, here, the undisputed record shows that a user could have accessed the Internet Label by clicking on three prominent links. Appx1497; Appx1504; Appx1508; Appx1510. There was no expert evidence in *Voter Verified* that the website was easy to navigate for a skilled artisan. And there was no such evidence required here.

Genentech also asserts that, unlike in this case, "there was evidence of actual dissemination" in *Suffolk Technologies*. Br. 50. But as a matter of law, that evidence was not required: So long as "accessibility is proved, there is no requirement to show that particular members of the public actually received the information." *Constant v. Advanced Micro-Devices, Inc.*, 848 F.2d 1560, 1569 (Fed. Cir. 1988); *accord Enhanced Research*, 739 F.3d at 1354.

Genentech's case, *Acceleration Bay, LLC v. Activision Blizzard Inc.*, is distinguishable. Br. 44-45. There, the Court affirmed the Board's decision that an article merely posted to a university's online repository was not a printed publication. 908 F.3d 765, 772-73 (Fed. Cir. 2018). Although the online repository could be sorted by author and by year, it could not be sorted by subject matter. *Id.* at 773. The Board concluded that the article was not publicly accessible because

neither sorting the titles by author nor year would assist a researcher looking for the reference. *Id.* The author was unknown in the field, and the article was buried among "hundreds of titles in the same year, with most containing unrelated subject matter." *Id.* At the same time, "the website's advanced search form … was not reliable." *Id.*

Rather than supporting Genentech, *Acceleration Bay* provides a helpful contrast to the record here. Whereas the website in *Acceleration Bay* was a repository for "hundreds of titles" each year "containing unrelated subject matter," sortable only by author and title (908 F.3d at 773), Genentech's website was organized logically by subject and by drug. *E.g.*, Appx1504; Appx1509; Appx1510; Appx1519. As noted above, a user could locate the Internet Label simply by following the three most intuitive links from Genentech's homepage. That is apparent from the face of the website itself, and *Acceleration Bay* does not compel a different conclusion.

2. *Indexing is not required to find public accessibility; but, in any event, it was established on this record.*

Genentech also complains that Pfizer "presented no evidence to the Board that [the Internet Label was] 'indexed and thereby findable by an internet search engine.'" Br. 48 (quoting Appx19). As Genentech admits, however, "'[t]he test for public accessibility is not 'has the reference been indexed?'" Br. 44 (quoting *Acceleration Bay*, 908 F.3d at 774). Indeed, this Court has "consistently held that

indexing or searchability is unnecessary for a reference to be a printed publication under § 102(b)." *Jazz Pharm., Inc. v. Amneal Pharm., LLC*, 895 F.3d 1347, 1359 (Fed. Cir. 2018). Nevertheless, the evidence shows that it is highly likely that the Internet Label was indexed, which only further confirms its accessibility.

Referring to the Wayback Machine, Genentech asserts that "[s]imply because the Wayback Machine encountered [the Internet Label] by crawling the internet sheds no light on whether … [it] was 'indexed and thereby findable by an internet search engine' in 1998." Br. 49. Yet the fact that the Wayback Machine found the Internet Label by "crawling the internet" is precisely why it is so relevant to showing that the Internet Label was indexed by a search engine.

Crawling the internet is exactly how search engines index websites. *See, e.g.*, *Google LLC v. Equustek Sols. Inc.*, 2017 WL 5000834, at *3 (N.D. Cal. Nov. 2, 2017) ("Google crawls third-party websites and adds them to its index."). This was as true in the late 1990s as it is today. *See Florists' Transworld Delivery, Inc. v. Originals Florist & Gifts, Inc.*, 2000 WL 1923321, at *5 (N.D. Ill. 2000) ("[I]ndexes are created when the search engines routinely 'crawl' through the Internet."). Thus, the fact that the Wayback Machine crawled the Internet and indexed the Internet Label demonstrates that other search engines at the time would have indexed the Internet Label too.

Alternatively, Genentech posits that "it cannot be assumed that the internet search engines today were available as of May 1998." Br. 49. Genentech notes that "Google, for example, was not even founded until September 1998." *Id.* But search engines such as Yahoo! and Altavista were widely used by 1998. *See generally In re Yahoo! Inc. Customer Data Sec. Breach Litig.*, 313 F. Supp. 3d 1113, 1120 (N.D. Cal. 2018) ("Yahoo was founded in 1994."); *Intel Corp. v. Alacritech, Inc.*, 2018 WL 6190430, at *6 (P.T.A.B. Nov. 26, 2018) ("Search engines, such as Altavista, were operable [in 1997] and at the time [the Wayback Machine] recorded a copy of the [] web pages."). The Board did not require additional evidence of this basic fact, which, in any event, was legally not required to find public accessibility.

3. *The record confirms that an interested party exercising reasonable diligence would have located the Internet Label.*

Finally, Genentech argues that Pfizer failed to show that a skilled artisan interested in treating rheumatoid arthritis would have located the Rituxan label, because it was indicated for a different treatment. Once again, Genentech ignores that "[t]his Court has interpreted § 102 *broadly*" when it comes to public accessibility. *Enhanced Research*, 739 F.3d at 1354 (emphasis added). Doing so here leads to the inescapable conclusion that, as argued by Pfizer and confirmed by the record evidence, the prior art would have led a skilled artisan focusing on rheumatoid arthritis treatments directly to the Rituxan label.

Genentech offers the meritless response that "Pfizer now asserts for the first time on appeal that 'a person of ordinary skill in the art would have been motivated to treat rheumatoid arthritis using Rituxan—and would have obviously turned to Genentech's Rituxan website to view its prescribing information.'" Br. 51 (citing Blue Br. at 39-40). This was the heart of Pfizer's petition. For example, Pfizer's expert declared that "[a] person of ordinary skill in the art would have been motivated to treat [rheumatoid arthritis] patients with rituximab because Edwards 1998 explicitly suggests that use, B cells were known to play a role in [rheumatoid arthritis], and rituximab had been shown to effect B-cell depletion in NHL." Appx784. Pfizer's expert also pointed out that Edwards was "well received by a person of ordinary skill in the art." Appx778.

In short, Edwards would have encouraged a skilled artisan to investigate Rituxan (i.e., branded rituximab) for treating rheumatoid arthritis. That encouragement, in turn, naturally includes seeking out the drug's product label. Genentech is arguing, in essence, that an interested party exercising reasonable diligence before May 1998 would not have known to use the Internet to search for a specific pharmaceutical product label. Nonsense. *See, e.g.*, *Intel Corp.*, 2018 WL 6190430, at *6 (explaining that "search engines, such as Altavista, were operable" in 1997).

It is no answer for Genentech to quibble with the language in Pfizer's petition—arguing that "Petitioners' petition to the Board only stated . . . that Edwards 'explicitly suggested' the use of rituximab to treat RA, rather than actually describing such use." Br. 52. As this Court has repeatedly held, "there is no requirement that the prior art contain an express suggestion to combine known elements"—much less an actual description of steps—"to achieve the claimed invention." *Motorola, Inc. v. Interdigital Tech. Corp.*, 121 F.3d 1461, 1472 (Fed. Cir. 1997). Indeed, "a motivation to combine prior art references [may be found] even absent any hint of suggestion in the references themselves." *DyStar Textilfarben GmbH & Co. Deutschland KG v. C.H. Patrick Co.*, 464 F.3d 1356, 1368 (Fed. Cir. 2006). Under the proper inquiry, therefore, the Board merely had to address whether "a skilled artisan would have been motivated to seek out" the Rituxan label. *Jazz Pharm.*, 895 F.3d at 1360. Given that Pfizer's expert confirmed that a skilled artisan would have been motivated to seek more information about Rituxan, it logically follows that an interested party would have sought out the Rituxan label from Genentech's website. And as explained above, an interested person would have had no trouble finding the Internet Label on that website.

Genentech's reliance on *Blue Calypso, LLC v. Groupon, Inc.*, is equally unfounded. 815 F.3d 1331 (Fed. Cir. 2016). There, the Court affirmed the Board's conclusion that a reference was not a printed publication where it was only "available

via a hyperlink located on a personal webpage created by a graduate student." *Id.* at 1348. The Court reasoned that "there was no evidence that the ordinarily skilled artisan would know of [the graduate student's] personal webpage or its web address." *Id*. at 1349-50. Here, in contrast, Genentech was hardly unknown. It was the sole manufacturer of Rituxan, which it hails as its "revolutionary biologic product." Br. 9. A skilled artisan searching for Rituxan's prescribing information on the Internet logically and naturally would have navigated to Genentech's website and, from there, readily found the Rituxan label.

II. On remand, the Board should address all of the challenged patent claims.

Genentech does not dispute that the Supreme Court's decision in "*SAS* requires institution on all challenged claims and all challenged grounds." *BioDelivery Scis. Int'l, Inc. v. Aquestive Therapeutics, Inc.*, 898 F.3d 1205, 1209 (Fed. Cir. 2018). As Genentech admits, the Board did not follow that requirement here—it only "instituted an *inter partes* review of claims 1-3, 5-7, and 9-11 of the '161 Patent." Br. 6. Thus, Pfizer's "request for remand to implement the Court's decision in *SAS* [should be] granted." *BioDelivery*, 898 F.3d at 1210.

Genentech argues that "Pfizer has no right to any *SAS Institute*-related relief[] [because] Pfizer filed a joint motion to dismiss all claims and grounds of its petition other than those instituted in Celltrion's IPR." Br. 53. But that motion was filed "prior to *SAS*, [when] any attempt to argue against partial institution would have

been futile under the Board's regulations and [this Court's] precedent." *BioDelivery*, 898 F.3d at 1209 (quotations and brackets in *BioDelivery* omitted). In light of pre-*SAS* law that applied at the time, "[i]t is clear that waiver does not apply." *Id*.

Genentech also argues that "any alleged error based on the Board's decision not to institute all claims and all grounds was, at most, harmless"—but only "assuming affirmance of patentability of independent claims 1, 5, and 9." Br. 54. For all the reasons shown above, that finding should not be affirmed, but vacated based on the Board's failure to recognize the Rituxan label as prior art.

Lastly, Genentech cites this Court's unpublished decision in *South-Tek Systems, LLC v. Engineered Corrosion Solutions, LLC* to argue that "Pfizer waived the [*SAS*] argument here because it did not promptly seek relief—i.e., file a motion for remand based on *SAS Institute* upon filing the notice of appeal in April 2018." Br. 55. But *South-Tek* does not support Genentech—the Court held that "remand is appropriate for the Board to address the non-instituted grounds." 2018 WL 4520013, at *5 (Fed. Cir. Sept. 20, 2018). In any event, Pfizer promptly preserved its request for remand under *SAS* as soon as this appeal began by raising in its docketing statement "whether the Board's final written decision impermissibly failed to address 'any patent claim challenged by the petitioner.'" Dkt. 5 at 4.

The Court should thus follow its decisions in a number of "cases since *SAS* … f[inding] it appropriate to remand to the Board to consider arguments addressed to

non-instituted claims and f[inding] waiver inapplicable to a prompt remand request due to the significant change in the law." *Adidas AG v. Nike, Inc.*, 894 F.3d 1256, 1258 (Fed. Cir. 2018) (collecting cases).

CONCLUSION

The record evidence demonstrates that the Rituxan label was a printed publication under 35 U.S.C. § 102(b) that taught the dosage for Rituxan and the use of Rituxan with corticosteroids. The Board's contrary decision is not supported by substantial evidence. This Court should vacate the Board's decision and instruct the Board on remand to consider the patentability of all challenged claims of the '161 patent on all challenged grounds in Pfizer's petition.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on December 14, 2018, I electronically filed the foregoing reply brief using the Court's CM/ECF filing system. All counsel of record were electronically served by and through the Court's CM/ECF filing system per Fed. R. App. P. 25 and Fed. Cir. R. 25(a) and 25(b).

/s/ Charles B. Klein
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CERTIFICATE OF COMPLIANCE

Appellant Pfizer, Inc.'s brief is submitted in accordance with the type-volume limitations of Rules 32(a) and 32(b) of the Rules of the Court of Appeals for the Federal Circuit. This brief contains 6,805 words.

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