

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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INCYTE CORPORATION,  
Petitioner,

v.

CONCERT PHARMACEUTICALS, INC.,  
Patent Owner.

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Case IPR2017-01256  
Patent 9,249,149 B2

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Before LORA M. GREEN, MICHAEL J. FITZPATRICK, and  
TINA E. HULSE, *Administrative Patent Judges*.

HULSE, *Administrative Patent Judge*.

DECISION  
Granting Petitioner's Request for Rehearing  
*37 C.F.R. § 42.71*

Incyte Corporation (“Petitioner”) filed a Request for Rehearing (Paper 12, “Reh’g Req.”) of our Decision Denying Institution (Paper 9, “Dec.”) of an *inter partes* review of claims 1–15 of U.S. Patent No. 9,249,149 B2 (Ex. 1001, “the ’149 patent”).

In its Petition (Paper 1), Petitioner alleged that the challenged claims are unpatentable based on the following grounds:

Reference(s)	Basis	Claims challenged
Jakafi Prescribing Information, <sup>1</sup> Shilling, <sup>2</sup> and Concert Backgrounder <sup>3</sup>	§ 103	1–15
Rodgers <sup>4</sup>	§ 102	1–15
Rodgers, Shilling, and Concert Backgrounder	§ 103	1–15

Petitioner requests a rehearing of our decision as to Grounds 1 and 3 regarding obviousness, but not as to Ground 2 regarding anticipation. *See* Reh’g Req. 1. Specifically, Petitioner argues that we misapprehended and overlooked (1) the lead compound analysis, (2) the standard and substantial

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<sup>1</sup> Jakafi Prescribing Information (revised 11/2011) (“Jakafi Prescribing Information,” Ex. 1004).

<sup>2</sup> Shilling et al., *Metabolism, Excretion, and Pharmacokinetics of [<sup>14</sup>C]INCB018424, a Selective Janus Tyrosine Kinase ½ Inhibitor, in Humans*, 38 DRUG METABOLISM AND DISPOSITION 2023–31 (2010) (“Shilling,” Ex. 1005).

<sup>3</sup> CoNCERT Pharmaceuticals, Inc., Precision Deuterium Chemistry Backgrounder (“Concert Backgrounder,” Ex. 1006).

<sup>4</sup> Rodgers et al., US 7,598,257 B2, issued Oct. 6, 2009 (“Rodgers,” Ex. 1007).

evidence for motivation, and (3) the standard and substantial evidence for a reasonable expectation of success.

The party requesting rehearing has the burden to show that the decision should be modified. Under 37 C.F.R. § 42.71(d), the request for rehearing must identify, specifically, all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply. When rehearing a decision on a petition, we review the decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may arise if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if an unreasonable judgment is made in weighing relevant factors. *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000).

Having considered the Request for Rehearing, the current record, and our Decision denying institution, we are persuaded that we applied an overly restrictive standard for the lead compound analysis and for the reason to combine the cited references. *See* Reh’g Req. 2–12. Accordingly, we grant Petitioner’s Request for Rehearing and concurrently issue a decision granting institution on Ground 3. Paper 14.

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