

United States Court of Appeals for the Federal Circuit

2008-1248

ARIAD PHARMACEUTICALS, INC.,
MASSACHUSETTS INSTITUTE OF TECHNOLOGY,
THE WHITEHEAD INSTITUTE FOR BIOMEDICAL RESEARCH,
and THE PRESIDENT AND FELLOWS OF HARVARD COLLEGE,

Plaintiffs-Appellees,

v.

ELI LILLY AND COMPANY,

Defendant-Appellant.

Appeal from the United States District Court for the District of Massachusetts in case No. 02-CV-11280, Judge Rya W. Zobel.

Before MICHEL, Chief Judge, NEWMAN, MAYER, LOURIE, RADER, SCHALL, BRYSON, GAJARSA, LINN, DYK, PROST, and MOORE, Circuit Judges.

PER CURIAM.

ORDER

Plaintiffs-Appellees ARIAD Pharmaceuticals, Inc., et al. filed a petition for rehearing en banc. The petition for rehearing en banc was presumed to request relief that can be granted by the panel that heard the appeal, and action on the petition for rehearing en banc was deferred until the panel had an opportunity to grant the relief requested. The panel requested a response from Defendant-Appellant Eli Lilly and Company, who filed a response. The court granted Novozymes A/S's motion for leave to file a brief as amicus curiae.

The petition for rehearing was considered by the panel that heard the appeal, and thereafter the petition for rehearing en banc, the response, and the amicus curiae brief were referred to the circuit judges who are authorized to request a poll on whether to rehear the appeal en banc. A poll was requested and taken, and the court has decided that the appeal warrants en banc consideration.

Upon consideration thereof,

IT IS ORDERED THAT:

- (1) The petition of Plaintiffs-Appellees for rehearing en banc is granted.
- (2) The court's April 3, 2009, opinion is vacated, and the appeal is reinstated.
- (3) The parties are requested to file new briefs addressing the issues raised in the petition:
 - a. Whether 35 U.S.C. § 112, paragraph 1, contains a written description requirement separate from an enablement requirement?
 - b. If a separate written description requirement is set forth in the statute, what is the scope and purpose of the requirement?

This appeal will be heard en banc on the basis of the originally filed briefs, additional briefing ordered herein addressing the issues set forth above, and oral argument. An original and thirty copies of all briefs shall be filed, and two copies served on opposing counsel. The Plaintiffs-Appellees shall file its brief within forty-five (45) days from the date of filing of this order. The Defendant-Appellant's response is due within thirty (30) days from the date of service of the Plaintiffs-Appellees' brief. The Plaintiffs-Appellees' reply, if any, is due within fifteen (15) days from the date of service of the Defendant-Appellant's response. Briefs shall adhere to the type-volume limitations set forth in Federal Rule of Appellate Procedure 32 and Federal Circuit Rule 32.

Briefs of amici curiae will be entertained, and any such amicus briefs may be filed without leave of court but otherwise must comply with Federal Rule of Appellate Procedure 29 and Federal Circuit Rule 29. The United States is invited to submit an amicus brief.

Oral argument will be held at a time and date to be announced later.

FOR THE COURT

August 21, 2009

Date

/s/ Jan Horbaly

Jan Horbaly
Clerk

cc: John M. Whealan, Esq.
Charles E. Lipsey, Esq.
Kenneth J. Burchfiel, Esq.