

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE OFFICE OF THE UNDER SECRETARY OF COMMERCE
FOR INTELLECTUAL PROPERTY AND DIRECTOR OF THE
UNITED STATES PATENT AND TRADEMARK OFFICE

PAR HEALTH, INC.,
Petitioner,

v.

INFORLIFE, S.A.,
Patent Owner.

PGR2026-00036
Patent 12,370,153 B2

Before JOHN A. SQUIRES, *Under Secretary of Commerce for Intellectual
Property and Director of the United States Patent and Trademark Office.*

DECISION
Denying Institution of *Inter Partes* Review

Par Health, Inc. (“Petitioner”) filed a Petition requesting post-grant review of claims 1–23 of U.S. Patent No. 12,370,153 B2 (“the ’153 patent”). Paper 2 (“Petition” or “Pet.”). InfoRLife, S.A. (“Patent Owner”) filed a preliminary response (Paper 5, “Prelim. Resp.”) in which it noted its disclaimer of claims 1, 3–5, 13, and 18 of the ’153 patent. *Id.* at 7 (citing Ex. 2001). Accordingly, only claims 2, 6–12, 14–17, and 19–23 remain at issue.

After considering the arguments and evidence presented for merits and non-discretionary considerations, denial of institution was appropriate in this proceeding. *See* Paper 6 (“Notice”), 2. This determination was based on the totality of the evidence and arguments presented, only a select portion of which I discuss in the following opinion. *See id.*

For its two asserted grounds (anticipation and obviousness), Petitioner relies on a data sheet for a ketamine product manufactured by Biomed Limited (Ex. 1005, “Biomed”). Pet. 5–6. In support of its contention that “Biomed is prior art to the ’153 patent under 35 U.S.C. § 102(a)(1),” Petitioner, with the support of its declarant, points to the “date of revision” (June 15, 2021) appearing on its last page. *Id.* at 6 (citing Ex. 1005, 11); Ex. 1003 ¶ 60. Petitioner, also with the support of its declarant, states that “Biomed is a product approved for sale in New Zealand” (Pet. 36 (citing Ex. 1003 ¶ 135), and cites Biomed for stating that the product was first approved on May 5, 2011. *Id.* at 22 (citing Ex. 1005, 11); Ex. 1003 ¶ 60. Patent Owner argues that Petitioner fails to establish that Biomed qualifies as prior art under section 102. Prelim. Resp. 16–22. In particular, Patent Owner argues that “the June 15, 2021 date only indicates when the document was *revised*, and has no bearing on whether or when the document

was *published*, much less whether or when any alleged product described by the document became publicly available.” *Id.* at 20.

I agree with Patent Owner that Petitioner has failed to show sufficiently that Biomed qualifies as a prior art printed publication. The Board’s precedential decision in *Hulu, LLC v. Sound View Innovations, LLC*, IPR2018-01039, Paper 29 (PTAB Dec. 20, 2019) (precedential), addresses prior-art qualification in the related context of instituting an *inter partes* review. *Hulu* states that “the petition must identify, with particularity, evidence sufficient to establish a reasonable likelihood that the reference was publicly accessible before the critical date of the challenged patent and therefore that there is a reasonable likelihood that it qualifies as a printed publication.” *Id.* at 13; *see also Jazz Pharm. Inc. v. Amneal Pharm., LLC*, 895 F.3d 1347, 1356 (Fed. Cir. 2018) (“[T]he IPR petitioner . . . had the burden to prove that a particular reference is a printed publication.”). The same guidance applies to post-grant reviews, albeit with the “more likely than not” standard applicable. *See* 35 U.S.C. § 324(a); *Hulu*, Paper 29 at 13 n.5. *Hulu* also states that “there is no presumption in favor of institution or in favor of finding a reference to be a printed publication under [37] § 42.108(c).” *Hulu*, Paper 29 at 16.

In this case, Petitioner merely cites a “date of revision” appearing within Biomed. Pet. 6 (citing Ex. 1005, 11). Yet, a revision date alone does not establish that Biomed was disseminated or made publicly available. And, although indicia appearing within a reference can sometimes support the printed publication status of the reference, I find the record to be devoid of any such indicia, or other evidence, supporting that Biomed was publicly disseminated or accessible by the June 15, 2021 “date of revision.” *See Hulu*, Paper 29 at 16–18. Thus, Petitioner fails to show that it is more likely

than not that Biomed was publicly accessible before the priority date of the '153 patent.

For these reasons, Petitioner fails to demonstrate that it is more likely than not at least one of the claims challenged is unpatentable.

In consideration of the foregoing, it is:

ORDERED that Petitioner's petition is *denied*.

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