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## PTAB Institutes Kyle Bass IPR Against Pharmaceutical Patent Based On SEC Document

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Kyle Bass has filed numerous prior IPR petitions against pharmaceutical patents, some of which have been denied due to use of prior art references that were not sufficiently proven to be “publicly accessible” (see [“Clinical Trials as Prior Art: PTAB Denies Bass IPR With Only A “Hope” Of Efficacy”](#)). However, in [IPR2015-01850](#), the PTAB instituted IPR against a patent covering Ampyra based upon a Kyle Bass petition that utilized a Securities Exchange Commission (SEC) document which disclosed a clinical protocol for treating multiple sclerosis. This highlights a risk for pharmaceutical companies, who need to coordinate patent filings not only to precede scientific and clinical publications, but also other kinds of publicly accessible corporate documents that may discuss clinical trials.



Specifically, the key document that led to the institution decision in this IPR was an “S-1” filed by Accorda with the SEC, titled “Registration Statement Under the Securities Act of 1933 (Form S-1) (Sept. 26, 2003).”

In order to show that the document was publicly accessible as of a date prior to the effective filing date of the patent, petitioner relied upon a [declaration](#) from a retired academic librarian, who provided an explanation of the SEC’s electronic filing system and how documents can be accessed by the public after they are filed.

The PTAB noted in its decision as follows:

“public accessibility” is “the touchstone” in determining whether a reference is a printed publication. In re Hall, 781 F.2d at 899. “A given reference is ‘publicly accessible’ upon a satisfactory showing that such document has been disseminated or otherwise made available to the extent that persons interested and ordinarily skilled in the subject matter or art exercising reasonable diligence, can locate it.” SRI Int’l, Inc. v. Internet Sec. Sys., Inc., 511 F.3d 1186, 1194 (Fed. Cir. 2008) (quoting Bruckelmyer v. Ground Heaters, Inc., 445 F.3d 1374, 1378 (Fed. Cir. 2006))

Under this standard, the PTAB concluded that petitioner adequately showed the document to be publicly accessible prior to the effective filing date of the patent. This case highlights the need for corporate counsel to coordinate publicly available documents that may relate to clinical results with patent counsel, to ensure that applications are filed prior to any public disclosures. For petitioners, comparing this success to earlier denials in situations involving unconventional forms of prior art, the case highlights the value of an expert declaration to explain how the document would be publicly accessible as of a certain date.

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