

HONORABLE RICHARD A. JONES

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7 UNITED STATES DISTRICT COURT
8 WESTERN DISTRICT OF WASHINGTON
9 AT TACOMA

9 UNIGEN PHARMACEUTICALS, INC., a
10 Delaware corporation,

11 Plaintiff,

12 v.

13 WALGREEN CO., a Illinois corporation,

14 Defendant.

NO. C07-0471RAJ

**MOTION FOR RECONSIDERATION
OF THE COURT'S ORDER OF
FEBRUARY 12, 2008 (DOCKET NO.
58)**

**Note for Hearing:
February 19, 2008**

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16 Pursuant to Federal Rule of Civil Procedure 60(b)(6), plaintiff Unigen
17 Pharmaceuticals, Inc. ("Unigen") moves for reconsideration of the Court's February 12, 2008
18 Order (Docket No. 58).

19 In the Order, the Court acknowledged that "determining the validity of a patent before
20 construing its claims is improper." Order at 2. In light of this acknowledgement, the Court
21 ordered "Unigen to submit, within two weeks of this order, a proposed claim construction for
22 each of the asserted claims of the patents-in-suit." *Id.* The Court ordered that "Unigen should
23 not offer argument in favor [of] its proposed claim construction, but should ensure that it
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1 submits sufficient explanation to permit the court to understand its proposed claim
2 construction.” *Id.* Unigen seeks reconsideration of this part of the Court’s Order and requests
3 that the Court delay consideration of Walgreen’s motion until after it has construed the claims
4 in accordance with the previously set schedule, which encompasses expert reports, rebuttal
5 expert reports, claim construction briefing, and a *Markman* hearing. In the alternative,
6 Unigen seeks the Court’s permission to submit argument in favor of its proposed claim
7 construction and an additional seven days to make whatever submissions the Court deems
8 proper.
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10 At issue is defendant Walgreen Co.’s (“Walgreen”) Motion for Partial Summary
11 Judgment of Invalidity of U.S. Patent No. 7,192,611 (Docket No. 36). Walgreen argues that
12 United States Patent No. 7,192,611 (“the ’611 patent”), which is assigned to Unigen, is
13 invalid because it is anticipated by United States Patent No. 5,650,433 (“the ’433 patent”).
14 Motion at 1.
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16 This Court has acknowledged “that determining the validity of a patent before
17 construing its claims is improper.” Order at 2. As Walgreen acknowledges, “[t]he objective
18 of claim construction is to determine what a person of ordinary skill in the art, having read the
19 written description and prosecution history, would understand the claims to mean.” Motion at
20 7 (citing *Vanderland Inds. Nederland BV v. Int’l Trade Comm’n*, 366 F.3d 1311, 1318 (Fed.
21 Cir. 2004); *Toro Co. v. White Consol. Indus., Ltd.*, 199 F.3d 1295, 1299 (Fed. Cir. 1999)); *see*
22 *also Phillips v. AWH Corp.*, 415 F.3d 1303, 1313 (Fed. Cir. 2005) (*en banc*) (“how a person
23 of ordinary skill in the art understands a claim term provides an objective baseline from which
24 to begin claim interpretation”). Unigen simply cannot sufficiently explain its proposed claim
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1 construction, which must be from the perspective of a person of ordinary skill in the art,
2 without “offer[ing] argument in favor [of] its proposed claim construction” Order at 2.

3 The technology addressed in the ’611 and ’433 is not simple, and in his scheduling
4 order Chief Judge Lasnik recognized that claim construction in this case would be a non-
5 trivial exercise. Minute Order Setting Trial Date & Related Dates (Docket No. 19). Judge
6 Lasnik scheduled a *Markman* hearing on July 24, 2008, but scheduled the following events
7 (spanning over three months) to precede that hearing: (a) expert witness reports on *Markman*
8 issues (April 18, 2008); (b) rebuttal expert witness reports on *Markman* issues (May 18,
9 2008); (c) joint claim chart to be submitted by the parties (May 30, 2008); (d) opening claim
10 construction briefs due (June 13, 2008); and (e) responsive claim construction briefs due
11 (June 27, 2008). *Id.* The Court appears to acknowledge the complexity of the issues involved
12 in claim construction by holding that “Unigen will not be bound by its proposed claim
13 construction except in the court’s consideration of the motions before it. Unigen may advance
14 a different interpretation of its claims during the formal claim construction in this litigation.”
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16 Order at 2.

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18 Unigen appreciates the Court’s recognition of the complexity involved in claim
19 construction, and appreciates the opportunity to “advance a different interpretation of its
20 claims during the formal claim construction in this litigation.” Order at 2. If Unigen is
21 forced, however, to propose claim construction without being able to offer argument, this
22 opportunity may well become moot if the Court were to grant Walgreen’s motion for
23 summary judgment of invalidity of all claims of the ’611 patent. Because claims are
24 construed from the perspective of one of ordinary skill in the art, *Phillips*, 415 F.3d at 1313, if
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1 Unigen is foreclosed from making arguments in favor of its proposed claim construction it
2 will not have “a full and fair opportunity to ventilate the issues prior to the district court’s
3 summary judgment on these claims.” *Greene v. Solano County Jail*, No. 06-16957, -- F.3d --,
4 2008 WL 170313, at *7 (9th Cir. Jan. 22, 2008) (reversing the district court’s *sua sponte* grant
5 of summary judgment).
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7 For the foregoing reasons, Unigen asks the Court to reconsider its February 12, 2008
8 Order and either (a) stay decision of Walgreen’s pending motion until after the close of formal
9 claim construction; or (b) afford Unigen the opportunity to make arguments in support of its
10 proposed claim construction and grant a seven-day extension of the deadline until and
11 including March 5, 2008, to submit its proposed claim construction and supporting
12 arguments.
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15 Dated this 19th day of February, 2008.
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17 **MERCHANT & GOULD P.C.**
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1 **CERTIFICATE OF SERVICE**

2 I hereby certify that on February 19, 2008, I caused the foregoing MOTION FOR
3 RECONSIDERATION OF THE COURT'S ORDER OF FEBRUARY 12, 2008 (DOCKET
4 NO. 58) to be filed with the Clerk of the Court using the CM/ECF system, which will send
5 notification of such filing to the following via email:
6

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