Nos. 25-1210, -1211

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

MERCK SERONO S.A.,

Appellant,

v.

HOPEWELL PHARMA VENTURES, INC.,

Appellee.

Appeal from the United States Patent and Trademark Office,
Patent Trial and Appeal Board in IPR2023-00480 and IPR2023-00481

APPELLEE HOPEWELL'S RESPONSE TO APPELLANT MERCK SERONO S.A.'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC

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Dated: January 6, 2026

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 25-1210

Short Case Caption Merck Serono S.A. v. Hopewell Pharma Ventures, Inc.

Filing Party/Entity Hopewell Pharma Ventures, Inc.

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Hopewell Pharma Ventures, Inc.	Hopewell Pharma Ventures LLC	
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INTRODUCTION

Merck claims that the panel applied a bright-line rule inconsistent with this Court's precedent and sound policy. Not so. The panel simply applied the well-settled principle that 35 U.S.C. § 102(e)'s "'by another' means that an application issued to the same inventive entity cannot qualify as § 102(e) prior art." *EmeraChem Holdings, LLC v. Volkswagen Grp. of Am., Inc.*, 859 F.3d 1341, 1345 (Fed. Cir. 2017). The rule is as sound as it is longstanding—this Court's predecessor adopted it sixty years ago in part to ensure that added inventors do not unfairly obtain a patent that is not actually novel and nonobvious over others' art. *In re Land*, 368 F.2d 866, 879 (CCPA 1966).

Merck cannot seriously claim that the panel misapplied the law—indeed, the panel stated the law exactly as it is recited in reputable treatises.[1] What Merck's argument really boils down to is that the en banc Court should *overrule* the law to track ambiguous statements in the MPEP and to effectuate what Merck believes

[1] *Compare* Op.21-22 ("Any incongruity in the inventive entity between the inventors of a prior reference and the inventors of a patent claim renders the prior disclosure 'by another[.]'"), *with* 2 Chisum on Patents § 3.08[2][a] (2021) ("In determining whether prior work is in fact by 'another,' the theory of the inventorship entity must be applied. The sole work of one person is usable against the joint work of that person with another."), *and* 3 Moy's Walker on Patents § 10:44 (4th ed. 2025) ("[T]wo groups of joint inventors are considered to be the same inventive entity only if they contain the identical list of individuals; any difference in membership causes the prior work to be classified as that of another.").

should be the statute's policy goals. Merck asks the Court to create a new rule: disclosure by a subset of inventors within the one-year grace period can *never* be prior art to a patent by the full set of inventors.

That is itself a bright-line rule. And one that is illogically asymmetric: it would trigger § 102(e)'s bar only when inventors are subtracted but not added. The rule makes little policy sense, as it would incentivize companies to strategically manipulate collaborative arrangements so as to sidestep their own art. It would likewise confer a windfall to latecomers (like De Luca here) whose work is not patentable over the previously disclosed work of their co-inventors. The rule is also unnecessary, as Congress already addressed the collaboration policy concerns that Merck raises: The CREATE Act prevents a collaborator's earlier-filed application from being used to reject a later invention for obviousness provided certain conditions are met. Merck never tried to show those conditions are met here.

Even if Merck's arguments had some force (they do not), en banc review still would not be warranted for this issue, which is unique to pre-AIA patents. The judicial resources needed for en banc review should not be devoted to addressing an issue that arises only infrequently and will never arise again in a few years once all pre-AIA patents expire. Moreover, this case is a poor vehicle for addressing the issue because the Board made alternative findings that doom Merck's appeal even under Merck's new rule.

Merck's backup APA argument fares no better. As the panel correctly determined, the MPEP supports the Board's ruling when read in context and, in any event, is not controlling. As a result, Merck was not entitled to rely on it. Besides, the Board allowed Merck to address the issue via supplemental briefing, and Merck never requested that the Board reopen the evidentiary record.

Neither the MPEP nor Merck's failure of proof necessitate en banc review. The panel's unanimous decision is thorough, carefully reasoned, and correct. Merck's petition should be denied.

ARGUMENT

I. The panel correctly applied this Court's "by another" precedent, and that precedent reflects sound policy.

A. Merck's new rule cannot be squared with *Land*.

Merck says (at 8-9) that § 102(e)'s plain language supports its proposed rule, apparently because the phrase "by another" in the statute does not require complete identity of inventorship. But that is wrong (and begs the question). "'Another' clearly means another than 'the applicant(s),'" *Land*, 368 F.2d at 875, and here, the applicants were four joint inventors, 35 U.S.C. § 116(a) ("When an invention is made by two or more persons jointly, they shall apply for patent jointly … ."). Thus, as the panel correctly recognized, the relevant inquiry is whether those inventors *jointly* contributed to Bodor's invalidating disclosure. Op.10-22. They

did not—as the Board found and the panel affirmed, inventor De Luca did not contribute to Bodor at all. *Id.* at 25-27.

Land fully supports the panel's analysis. There, a joint application reflecting collaboration by Land and Rogers was rejected as obvious over one patent to Land and another to Rogers. The patentee argued, just as Merck does here, that the earlier patents were not prior art because they disclosed the named inventors' "own knowledge and disclosures." *Id.* at 12 (quoting 368 F.2d at 880). The *Land* Court framed the issue as follows:

> There appears to be no dispute as to the law that A is not 'another' as to A, B is not 'another' as to B, or even that A & B are not 'another' as to A & B. But that is not this case, which involves … the question whether either A or B is 'another' as to A & B as joint inventors under section 102(e).

Id. at 13 (quoting 368 F.2d at 877).

Thus, A & B is different from A or B alone "in the sense that an invention made jointly by A & B cannot be the sole invention of A or B and vice versa." *Id.* (quoting 368 F.2d at 879). But that difference is "not enough to determine whether the specific disclosures relied on in the individual references should be considered prior art because those portions of the reference may also disclose the joint invention." *Id.* Rather, one must determine whether the entity that contributed to the invalidating disclosure is the same inventive entity of the challenged claims. If it is, the reference is not prior art:

> When the joint and sole inventions are related, as they are here, inventor A commonly discloses the invention of A & B in the course of describing his sole invention and when he so describes the invention of A & B he is not disclosing 'prior art' to the A & B invention, even if he has the legal status as 'another.'

Id. (quoting 368 F.2d at 879). *Land* thus requires a fact-intensive inquiry as to the contributions that each inventor makes to the invalidating disclosure, irrespective of whether any of those inventors are named on the face of the prior-art reference.

Merck attempts to cabin *Land* to its facts, emphasizing that the case involved two individual patents that would expire more than six years before the joint application and did not address "disclosure followed by collaboration within the grace period, as Section 102(b) allows." Pet.13. But the panel already considered and correctly rejected these arguments, concluding that "the *Land* opinion did not rest on those idiosyncrasies of the case." Op.14. Rather, the opinion rests on the principle, derived from careful parsing of the statute and precedent, that "by another" means by another inventive entity.

At bottom, the panel applied *Land* exactly as this Court has done for the past sixty years. Op.20-22 (collecting cases).[2] Merck's disagreement with the panel's

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[2] Merck tries (at 13-15) to distinguish this Court's cases on their facts. But Merck "confuses the factual contours" of *Land* and its progeny for their "unmistakable holding." *Thurston Motor Lines, Inc. v. Jordan K. Rand, Ltd.*, 460 U.S. 533, 535 (1983). For example, Merck's attempt (at 14) to read *Riverwood International Corp. v. R.A. Jones & Co., Inc.*, 324 F.3d 1346 (Fed Cir. 2003), as requiring less than "complete identity of inventive entity" to disqualify a § 102(e) reference ignores that case's holding that, "[w]hat is significant is … whether the

application of well-established law "is not a sufficient reason for en banc review." *Dow Chem. Co. v. Nova Chems. Corp. (Can.)*, 809 F.3d 1223, 1227-1228 (Fed. Cir. 2015) (Moore, J., concurring in denial of rehearing en banc).

B. Merck's cited cases are consistent with *Land* and the panel's opinion.

Merck suggests (at 10-12) that the panel decision is inconsistent with *Applied Materials, Inc. v. Gemini Research Corp.*, 835 F.2d 279 (Fed. Cir. 1987), and *Allergan, Inc. v. Apotex Inc.*, 754 F.3d 952 (Fed. Cir. 2014). It is not.

Merck focuses on a single sentence from *Applied Materials*: "[e]ven though an application and a patent have been conceived by different inventive entities, if they share one or more persons as joint inventors, the 35 U.S.C. § 102(e) exclusion for a patent granted to 'another' is not necessarily satisfied." Pet.10 (quoting 835 F.2d at 281). According to Merck, that sentence supports a rule that, as long as the patent at issue adds inventors not named on the invalidating reference, the reference is disqualified as prior art. But Merck takes that sentence out of context.

In *Applied Materials*, the district court had erroneously invalidated a patent to McNeilly, Benzing, and Locke based on an earlier patent to McNeilly and Benzing, on the sole basis that the named inventors on the two patents were

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portions of the reference relied on as prior art, and the subject matter of the claims in question, represent the work of a common inventive entity." *Id.* at 1356.

different. 835 F.2d at 281. This Court vacated that ruling, holding that "the district court erred by placing too much reliance on the inventive entity '*named*' in the '712 reference patent." Op.15 (citing 835 F.2d at 281). It was in *that* context that the Court said (in the statement Merck quotes) that the mere fact that the earlier reference names a different inventive entity is not dispositive. Instead, as *Land* instructs, "the key question was whether the disclosure of the earlier reference … evidenced knowledge by 'another' before the patented invention." *Id.* On the facts, the Court concluded that the relevant disclosure in the McNeilly-Benzing application did not indicate knowledge by McNeilly and Benzing separate from or before their joint invention with Locke. *Id.* at 15-16 (quoting 835 F.2d at 281). Hence, the pertinent disclosure in the earlier application did not reflect knowledge "by another."

Merck attempts to elide *Applied Materials*' and *Land*'s careful distinction between inventors *named* on an earlier reference (who need not be the same as the inventors of the challenged claims to disqualify the reference as prior art) and inventors who contributed to the reference's invalidating disclosure (who *do* need to be the same). Here, the named Merck inventors are *not* the same as the contributors to Bodor's invalidating disclosure.

Clinging to its flawed interpretation of *Applied Materials*, Merck argues (at 10-11) that the earlier McNeilly-Benzing application could not have anticipated

the challenged patent because the latter was a continuation-in-part that added new matter. But whatever new matter may have been added did not affect this Court's analysis. Rather, the Court assumed the facts most favorable to the patent challenger—namely, that the earlier reference was anticipatory—but held it was not prior art. 835 F.2d at 281 ("[I]f the invention claimed in the '313 patent is fully disclosed in the [earlier] '712 patent, this invention had to be invented before the filing date of the '712 patent and the latter cannot be 102(e) prior art … ."). The point is that, just as in *Land*, the Court looked beyond the names on the earlier application and focused on whether the disclosure alleged to be invalidating reflected knowledge by a different set of inventors before the inventors of the challenged claims.

Merck's invocation of *Allergan* fares no better. There, the Court considered whether references listing as authors VanDenbergh, Brandt, Chen, and Whitcup were prior art to a later patent naming as inventors Woodward and VanDenbergh.[3] Op.18 (citing 754 F.3d at 967). The patentee argued that the earlier references were not prior art because the relevant disclosures were really the work of VanDenbergh alone. *Id.* (citing 754 F.3d at 968). This Court found otherwise. Because several

[3] Having correctly described the later patent in *Allergan* as to Woodward and VanDenbergh, the panel here subsequently erroneously referred to it as the "VanDenburgh-Brand patent." Op.19. But that minor typographical error does not affect the soundness of the panel's reasoning.

people contributed to the relevant portions of the earlier reference who did not contribute to the later patent, the earlier disclosure was "by another" and the earlier reference was prior art. *Id.* (citing 754 F.3d at 970). The Court thus applied *Land*'s rule and determined whether the inventive entities were the same.

Merck says (at 12) that if the panel's rule here were the law, the Court in *Allergan* would not have needed to "delve[] into the evidence" to determine who contributed to what. But that is exactly what *Land* requires, and that is exactly what the Board correctly did here, as affirmed by the panel. *See supra* p.4; Op.8 (noting Board's determination that Merck failed to show DeLuca's contribution to Bodor). *Allergan* is thus entirely consistent with *Land* and supports the panel's holding here.

C. *Land* is sound as a policy matter and should not be overruled.

Merck next asserts (at 15-17) that if *Land* cannot be distinguished on its facts, it should be overruled. Merck says its own interpretation of § 102(e) better reflects what Merck believes was Congress's goal to encourage collaboration.

That argument is a nonstarter. "[S]tatutory text … best reflects Congress's intent"—not the other way around. *Republic of Hungary v. Simon*, 604 U.S. 115, 137 (2025). And this Court should not "carve out an exception to 35 U.S.C. § 102(e) in the guise of interpreting 'to another' [*sic*]" to effectuate Merck's policy concerns. *In re Fong*, 378 F.2d 977, 980 (CCPA 1967) (rejecting request to

overrule *Land* based on purported "modern research techniques in which groups rather than individuals make inventions").

Merck's argument also fails on its own terms. Merck says that *Land*'s holding only makes sense when the challenged patent *removes* inventors of a prior invalidating work, not when the patent *adds* inventors. In the latter case, Merck urges, *Land* effectively "punish[es] inventors who collaborate with later inventors to promote the progress of science." Pet.3-4, 12. But *Land* itself involved collaboration between inventors (Land and Rogers) and did not remove anybody from anything.

More to the point, Merck has it backwards. *Land*'s rule that the panel applied here does not "punish" inventors who collaborate with later inventors; it prevents later-named inventors (like Merck's in-house patent counsel De Luca) from adding collaborators to avoid the collaborators' prior art. The rule also prevents latecomers from reaping a windfall by obtaining patents without having to confront prior art to which they made no contribution. Merck does not dispute that A & B's earlier work is prior art to C's work. Pet.9. If that is true, why should the result change when C adds A & B to her patent?

This case proves the point. There is no reason why the Bodor reference should not count as prior art against inventor De Luca, when the relevant portions of Bodor reflect no contribution by DeLuca. That the challenged claims were held

invalid in view of Bodor suggests that whatever De Luca contributed to the later claims was not of patentable weight. *Cf. Fina Oil & Chem. Co. v. Ewen*, 123 F.3d 1466, 1473 (Fed. Cir. 1997) ("[A] person will not be a co-inventor if he or she does no more than explain to the real inventors concepts that are well known and the current state of the art."); *Kendall Co. v. Tetley Tea Co.*, 189 F.2d 558, 563 (1st Cir. 1951) ("[T]he disclosure by Reed and Ryan jointly[] … cannot be held to be patentable invention if the earlier invention by Reed alone was such an encroachment upon the field that what it left was too little by way of creative advance to support a patent.").

Merck's related argument (at 15) that *Land* should be overruled because it "arose in a very different time, when patent applications published only after patents issued," suffers from a similar flaw. Merck seems to read *Land* as being mainly about preventing timewise extensions of patent monopolies, when in reality it is about simple fairness: applicants, whether individual or joint, should not be able to obtain patents without addressing prior art by different inventive entities. And, in any event, *Land*'s holding has been consistently applied in the modern era (after automatic publication of patent applications) without any problems. *See, e.g.*, *Google LLC v. IPA Techs. Inc.*, 34 F.4th 1081 (Fed. Cir. 2022).

Merck's purported policy concerns about collaboration are also misplaced because those concerns have already been addressed by Congress. The Cooperative

Research and Technology Enhancement Act of 2004 Pub. L. No. 108-453 ("The CREATE Act") amended pre-AIA § 103(c) to disqualify a reference involving subject matter developed by "another"[4] from being used in an obviousness challenge if, among other things, "the claimed invention was made as a result of activities undertaken within the scope of [a] joint research agreement" that "was in effect on or before the date" of the claimed invention. Pre-AIA 35 U.S.C. § 103(c)(1)-(3).

The Act was intended to "spur the development of new technologies by making it easier for collaborative inventors who represent more than one organization to obtain the protection of the U.S. patent system for their inventions." 108 Cong. Rec. H10,219 (daily ed. Nov. 20, 2004) (statement of Rep. Sensenbrenner); 108 Cong. Rec. S2,558-59 (daily ed. Mar. 10, 2004) (statement of Sen. Hatch). These are precisely the policy issues that Merck professes to be concerned about. Yet Merck did not even try to meet the requirements of the Act.

Land's same-inventive-entity requirement has been the law for nearly sixty years without having noticeably chilled collaboration or innovation in the United

[4] The legislative history of the Act's predecessor statute confirms that "[t]he term 'another' … means any inventive entity other than the inventor." Section-by-Section Analysis of H.R. 6286, Patent Law Amendments Act of 1984, 130 Cong. Rec. H10,527 (Oct. 1, 1984). That history reinforces that "another" in § 102(e) carries the same meaning.

States. Merck has not cited any examples suggesting otherwise. And this Court should not distort the statute or overrule precedent to address Merck's policy concerns when Congress has already addressed them.

D. This issue is not of "exceptional importance," as it is unique to pre-AIA law and likely would not even change the outcome here.

Still further, Merck's petition does not present a question of "exceptional importance." The AIA amended § 102, and so, as Merck acknowledges, this issue will likely not arise once the last pre-AIA patent expires (sometime in the 2030s). In the interim, it is unlikely that courts or the Board will encounter the issue with any frequency, so devoting the Court's resources to en banc review is not warranted.

Merck suggests (at 4) that the issue may have greater significance "if the panel's rule is similarly applied to the AIA." If and when that happens, the en banc Court can consider taking up the issue at that time to address the nuances of the AIA. There is no reason to do so now.

Furthermore, Merck's proposed rule is not even likely to change the outcome in this case. Once again, Merck does not dispute that, to disqualify a disclosure as prior art, all contributors of the disclosure must be inventors of the later-filed patent. Pet.9. And, as Merck acknowledges (at 11 n.4), the Board found that this requirement was not satisfied since Drs. Bodor and Dandiker contributed

to Bodor's invalidating disclosure and are *not* named inventors on Merck's patents. Op.8.

The panel did not address the Board's finding on this score, *id.* at 27, but that finding is entitled to deference, RBr.46-48. Thus, the panel would likely find on remand that Bodor is prior art *even if* the Court were to change the law as Merck proposes. This case thus serves as a poor vehicle for upending longstanding precedent.

II. The panel did not overlook Merck's APA argument.

Finally, Merck asserts (at 17-19) that the panel overlooked Merck's APA argument. In Merck's telling, it was "surprise[d]" when the Board applied *Land*'s allegedly "new" rule instead of the MPEP. Pet.18-19. Merck says that the Board (and the panel) should have allowed it to redo the IPRs applying the correct law. Not so.

Merck's premise—that the MPEP conflicts with *Land*—is wrong. As the panel noted, the MPEP, as a whole is consistent with *Land*. For example, MPEP § 2136.04 states that an earlier reference "by a different inventive entity, whether or not the application shares some inventors in common with the patent, is *prima facie* evidence that the invention was made 'by another.'" Op.24. Section 2136.05(b) more explicitly rejects Merck's position:

> In the situation where one application is first filed naming sole inventor X and then a later application is filed naming joint inventors X & Y, it

> must be proven that the joint invention was made first, was thereafter described in the sole inventor's patent, or [patent application publication], and then the joint application was filed.

MPEP § 2136.05(b) (citing *Land*, 368 F.2d 866); *see also* MPEP § 2139.02 ("[O]nly one joint inventor needs to be different for the inventive entities to be different and a rejection under pre-AIA 35 U.S.C. 102(e) is applicable even if there are some joint inventors in common between the application and the reference."). Hence, the MPEP itself refutes the notion that Merck was somehow led astray.

Even to the extent the MPEP contains "some arguably contrary language," Op.24, Merck cannot seriously claim it was blindsided by the Board's application of sixty-year, binding precedent. The Board correctly followed that precedent over loose language in the MPEP that "does not have the force of law." *Molins PLC v. Textron, Inc.*, 48 F.3d 1172, 1180 n.10 (Fed. Cir. 1995); *EmeraChem*, 859 F.3d at 1348 ("To the extent the MPEP describes our case law differently … that interpretation does not control."). Indeed, not only is the MPEP not binding on issues of substantive patent law, it is not "binding authority in *inter partes* reviews" at all. *Smith & Nephew, Inc. v. Arthrex, Inc.*, 2016 WL 5389056 (P.T.A.B. 2016).

The panel did not misconstrue Merck's APA argument as an argument that the MPEP controlled the panel's statutory interpretation. Rather, the panel correctly determined that, because the MPEP is not controlling (on either the panel

or the Board), Merck was not entitled to rely on it. Op.24. As a result, the Board did not owe Merck a chance to redo its analysis under the correct law.

Finally, Merck's argument rings hollow given that the Board *did* permit Merck to address this very issue. The Board called for supplemental briefing on the "by another" issue, and Merck made its case in that briefing. Appx11799-11802. Merck suggests that the Board should have reopened the evidentiary record, but Merck never asked for such relief, and so the Board could hardly be faulted for not providing it. There was no APA violation. The panel overlooked nothing.

CONCLUSION

The Court should deny Merck's petition.

Dated: January 6, 2026

Respectfully submitted,

/s/ John Christopher Rozendaal

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

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