

**UNITED STATES PATENT AND TRADEMARK OFFICE**

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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MODERNA THERAPEUTICS, INC.  
Petitioner

v.

PROTIVA BIOTHERAPEUTICS, INC.,  
Patent Owner

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Case IPR2018-00739  
Patent 9,364,435 B2

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**PETITIONER'S NOTICE OF APPEAL  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FEDERAL CIRCUIT**

***Mail Stop "PATENT BOARD"***  
Patent Trial and Appeal Board  
U.S. Patent and Trademark Office  
P.O. Box 1450  
Alexandria, VA 22313-1450

Case IPR2018-00739  
Patent 9,364,435 B2

Notice is hereby given, pursuant to 37 C.F.R. § 90.2(a), that Petitioner Moderna Therapeutics, Inc. ("Petitioner") hereby appeals to the United States Court of Appeals for the Federal Circuit from the Patent Trial and Appeal Board's Final Written Decision (Paper No. 51) in Case No. IPR2018-00739 entered September 11, 2019 and from all underlying orders, decisions, rulings, and opinions which adversely affected Petitioner.

In accordance with 37 C.F.R. § 90.2(a)(3)(ii), Petitioner further indicates that the issues on appeal include, but are not limited to, the Board's determination of unpatentability of claims 7, 8, 10, 11, 13 and 16-20 of U.S. Patent No. 9,364,435 (the "'435 patent") under 35 U.S.C. §§ 102 & 103; the Board's application of its interpretation of the claims of the '435 patent to the facts of record; the Board's consideration of record evidence, including but not limited to confidential drawings, fact witness declarations about alleged prior sale and use, and expert testimony; and all findings or determinations supporting or relating to those issues, as well as any other issues decided adversely to Petitioner in any orders, decisions, rulings, and opinions. The issues on appeal further include the unconstitutionality of the panel entering the final written decision under the Appointments Clause of the Constitution. *See Arthrex, Inc. v. Smith & Nephew, Inc.*, No. 2018-2140 (Fed. Cir. Oct. 31,

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2019); *see also* *UNILOC 2017 LLC v. Facebook, Inc.*, No. 2018-2251 (Fed. Cir. Oct. 31, 2019) (nonprecedential order).

Pursuant to 37 C.F.R. § 90.2(a)(1) and (a)(2), and as reflected in the attached Certificate of Service, this Notice of Appeal is being electronically filed with the Board through PRPS and the United States Court of Appeals for the Federal Circuit through CM/ECF along with the requisite filing fee. A copy is also being served on the Office of the General Counsel at the U.S. Patent and Trademark Office.

Dated: November 13, 2019

Respectfully submitted,

/s/ Michael R. Fleming

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**CERTIFICATE OF FILING AND SERVICE**

The undersigned certifies in accordance with 37 C.F.R. § 42.6(e) that on November 13, 2019, a copy of the foregoing PETITIONER'S NOTICE OF APPEAL TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT was served via email upon the following by email:

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I also certify that in addition to being filed electronically with the Board through PRPS, the original of the foregoing Notice of Appeal is being served, pursuant to 37 C.F.R. § 104.2, by hand on November 13, 2019 to the United States Patent and Trademark Office at the following address: Office of the General Counsel, 10B20, Madison Building East, 600 Dulany Street, Alexandria, Virginia.

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I further certify that a copy of the foregoing Notice of Appeal is being filed via CM/ECF on November 13, 2019 with the United States Court of Appeals for the Federal Circuit.

Dated: November 13, 2019

By: *Susan M. Langworthy*  
Susan M. Langworthy