

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SLAYBACK PHARMA LLC,

Petitioner,

v.

EYE THERAPIES, LLC,

Patent Owner.

Case IPR2022-00142
U.S. Patent No. 8,293,742

**PATENT OWNER'S MOTION TO PRESERVE THE RECORD PENDING
APPEAL**

I. Statement of Relief Requested

Pursuant to the Board's June 15, 2023 authorization, Patent Owner respectfully submits this Motion to Preserve the Record Pending Appeal. This Motion extends to the entire docket in IPR2022-00142, including all confidential versions of documents that are currently sealed pursuant to the Board's Orders in Papers 56 and 76.

The documents currently under seal include confidential versions of Patent Owner's Response, declaration Exhibits 2020, 2021, 2023, 2024, and documentary exhibits 2028, 2052, 2057, 2058, 2156, 2166-2168, 2195, 2196, 1047, 1051. The confidential information contained in these exhibits relate to Bausch & Lomb's highly confidential and competitively sensitive information, which the Board did not rely on in its Final Written Decision. Further, the public's interests are served by the redacted versions of the exhibits, which are publicly available. Thus, maintaining these documents under seal during the pendency of appeal does not affect public interest. Patent Owner certifies that the parties have conferred in good faith regarding this motion, and that Petitioner has indicated that it will not oppose this motion.

II. Background

On August 29, 2022, Patent Owner filed a motion to seal and enter stipulated proposed protective order, requesting that the Board seal confidential versions of

Patent Owner's Response, declaration exhibits 2020, 2021, 2023, and 2024, and confidential versions of documentary exhibits 2028, 2052, 2057, 2058, 2156, 2166-2168, 2195, and 2196. *See generally*, Paper 29. On February 1, 2023, the Board granted the motion to seal with respect to the exhibits containing Bausch & Lomb's business and financial information but denied it with respect to the exhibits containing excerpts of Bausch & Lomb's NDA. *See generally* Paper 56. The Board also granted the parties' stipulated proposed protective order. *Id.*

On February 10, 2023, Patent Owner filed a second motion to seal requesting that the Board seal confidential versions of documents containing confidential information from Bausch & Lomb's NDA (Patent Owner's Response, Exhibits 2020, 2021, 2028, 2166-2168, and 2196), and Petitioner's exhibits containing Bausch & Lomb's sensitive commercial and financial information (Exhibits 1047 and 1051). *See generally*, Paper 60. On May 12, 2023, the Board granted Patent Owner's second motion to seal. *See generally*, Paper 76.

On May 15, 2023, the Board entered a Final Written Decision in this proceeding. *See* Paper 77. The confidential versions of the documents listed above currently remain under seal and are subject to the protective order entered in this proceeding.

III. Reasons for Relief Requested

The Consolidated Patent Trial Practice Guide (Nov. 21, 2019) (“CPTG”) provides that “[c]onfidential information that is subject to a protective order ordinarily would become public 45 days after denial of a petition to institute a trial or 45 days after final judgment in a trial.” CPTG at 21-22. A party seeking to maintain the confidentiality of information may file a motion to expunge the information from the record prior to the information becoming public. *Id.*; 37 C.F.R. § 42.56. Here, the date 45 days after entry of final judgment is June 29, 2023.

The Board is required by the Federal Rules of Appellate Procedure and the Federal Circuit Rules to retain the record pending appeal. Specifically, Federal Circuit Rule 17(a) states that “[t]he agency must retain the record.” Federal Circuit Rule 17(d) titled “Access to Parties and Counsel to Original Record” requires that the parties and their counsel have access to both the sealed and unsealed portions of the record “[w]hen a petition for review or notice of appeal is filed.” The deadline for filing a notice of appeal is 63 days from entry of final judgment, that is, July 17, 2023.

Patent Owner intends to file a notice of appeal. If the record is not preserved in its entirety during the appeal, the Federal Circuit will not be able to fully consider the issues raised by Patent Owner, which would cause prejudice. Under similar circumstances, the Board has granted motions to preserve the record pending appeal.

See Boehringer Ingelheim Int'l GmbH v. AbbVie Biotechnology Ltd., IPR2016-00408, Paper 49, at 2 (PTAB Oct. 19, 2017); *See Illumina, Inc. v. The Trustees of Columbia Univ. in the City of New York*, IPR2012-00006, Paper 133, at 4 (PTAB April 25, 2014).

IV. Conclusion

For the reasons set forth above, Patent Owner respectfully requests that the Board preserve the record of this IPR in its entirety in its present form, including preservation of documents filed under seal, in their sealed, non-public form, pending completion of any appeal to the Federal Circuit Court of Appeals.

Dated: June 27, 2023

Respectfully submitted,

By: /Bryan C. Diner/
Bryan C. Diner, Reg. No. 32,409

Finnegan, Henderson, Farabow,
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Counsel for the Patent Owner

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