

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 SEAL AND
ENTER STIPULATED PROPOSED PROTECTIVE ORDER**

I. Introduction

Patent Owner Eye Therapies, LLC (“Eye Therapies”) requests that the confidential versions of the Patent Owner Response, declaration Exhibits 2020-2021 and 2023-2024, and documentary Exhibits 2028, 2052, 2057, 2058, 2156, 2166-2168, 2195, and 2196 be sealed under 37 C.F.R. § 42.54. Good cause to seal these documents exists because public versions of the Patent Owner’s Response, declaration Exhibits 2020-2021 and 2023-2024, and Exhibits 2028, 2052, 2057, 2058, 2156, 2166-2168, 2195, and 2196 have also been filed, and the redacted information in these exhibits, is sensitive, non-public excerpts of Bausch & Lomb, Inc.’s (“Bausch & Lomb”) New Drug Application (“NDA”), and sensitive business and financial information. Petitioner does not oppose the motion to seal or the entry of the proposed protective order.

II. Governing Rules and PTAB Guidance

Under 35 U.S.C. § 316(a)(1), the default rule is that all papers filed in an *inter partes* review are open and available for access by the public, but a party may file a concurrent motion to seal and the information at issue is sealed pending the outcome of the motion.

Similarly, 37 C.F.R. § 42.14 provides:

The record of a proceeding, including documents and things, shall be made available to the public, except as otherwise ordered. A party intending a document or thing to be sealed

shall file a motion to seal concurrent with the filing of the document or thing to be sealed. The document or thing shall be provisionally sealed on receipt of the motion and remain so pending the outcome of the decision on the motion.

It is, however, only “confidential information” that is protected from disclosure. 35 U.S.C. § 316(a)(7) (“The Director shall prescribe regulations -- . . . providing for protective orders governing the exchange and submission of confidential information”). In that regard, the *Office Trial Practice Guide*, 77 Fed. Reg. 48756, 48760 (Aug. 14, 2012) provides:

The rules aim to strike a balance between the public’s interest in maintaining a complete and understandable file history and the parties’ interest in protecting truly sensitive information.

* * *

Confidential Information: The rules identify confidential information in a manner consistent with Federal Rule of Civil Procedure 26(c)(1)(G), which provides for protective orders for trade secret or other confidential research, development, or commercial information. § 42.54.

III. Identification of Confidential Information

The confidential information falls into three categories.

The first category consists of non-public excerpts of Bausch & Lomb’s NDA.

This information is contained in the following documents:

- Patent Owner’s Response, pages 43, 63-65

- Exhibit 2020 (Declaration of Robert J. Noecker), ¶¶ 149, 172, 190, 198, 245, 275, 287-301, 304, 305, 309, 312
- Exhibit 2021 (Declaration of Robert O. Williams, III, Ph.D.), ¶ 43
- Documentary Exhibits 2028, 2166-2168, 2195, 2196¹

The second category consists of Bausch & Lomb’s sensitive business and financial information. This information is contained in the following documents:

- Patent Owner’s Response, page 70
- Exhibit 2023 (Declaration of John Ferris), ¶¶ 4, fn. 1, 10, 14-17, fn. 2, 20-25, 28-31
- Exhibit 2024 (Declaration of John Jarosz), ¶¶ 26, fn. 2, 59, 62-63, 70, 71, 73-80, 87-89, fn. 12, 91, 94, 96-98, 121, 122, 132, 134, Appendices 3-27
- Documentary Exhibits 2052, 2057, 2058, 2156

¹ In the related district court proceeding, Patent Owner designated these documents “COUNSEL’S EYES ONLY – SUBJECT TO DISCOVERY CONFIDENTIALITY ORDER.” Patent Owner is providing an unstamped version of the documents in this proceeding for legibility purposes.

IV. Good Cause Exists for Sealing the Confidential Information

The Board's rules identify confidential information in a manner consistent with Federal Rule of Civil Procedure 26(c)(1)(G), which provides for protective orders for trade secret or other confidential research, development, or commercial information. Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,760 (Aug. 14, 2012). Accordingly, the Board has recognized that New Drug Applications ("NDA") and Abbreviated New Drug Applications ("ANDA") contain confidential commercial information that should be protected from public disclosure. *See Sandoz, Inc. v. EKR Therapeutics, LLC*, IPR2015-00005, paper 21. In sum, here, the public's interest in the instant proceeding does not outweigh the parties' interest in protecting their sensitive business information.

The first category of information that Patent Owner seeks to seal is information contained in Bausch & Lomb's NDA, which was filed confidentially with the Food and Drug Administration ("FDA") in order to obtain FDA approval to market its innovative pharmaceutical product. Patent Owner thus requests that the portions of the Patent Owner's Response, pages 43, 63-65, and the declaration Exhibits 2020 (¶¶ 149, 172, 190, 198, 245, 275, 287-301, 304, 305, 309, 312) and 2021 (¶ 43) that cite or substantially describe the NDA exhibits be sealed in their entirety as "PROTECTIVE ORDER MATERIAL" for the duration of this proceeding. Similarly, Patent Owner requests that documentary Exhibits 2028,

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