

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 SECOND MOTION TO SEAL

I. Introduction

Patent Owner Eye Therapies, LLC (“Patent Owner”) renews its request to seal the confidential version of its Patent Owner Response, exhibits containing excerpts of regulatory documents related to the commercial product Lumify, and certain exhibits filed with Petitioner’s Reply, pursuant to the Board’s February 1, 2023, Order, which denied without prejudice the portion of Patent Owner’s motion to seal related to these documents, each of which contain Bausch & Lomb’s (Patent Owner’s RPI) confidential information. As requested by the Board, this motion specifically addresses the *Argentum* factors, including how and why public disclosure of the information sought to be sealed would cause concrete harm to Patent Owner and Bausch & Lomb.

II. Governing Rules: The *Argentum* Factors

A party moving to seal a document must show “good cause” for the relief requested. 37 C.F.R. §§ 42.20(c), 42.54. The “good cause” standard “reflects the strong public policy for making all information in an inter partes review open to the public.” *See Argentum Pharms. LLC v. Alcon Research, Ltd.*, IPR2017-01053, Paper 27 at 3 (PTAB Jan. 19, 2018) (informative). The moving party must show that:

- (1) the information sought to be sealed is truly confidential,
- (2) a concrete harm would result upon public disclosure,

(3) there exists a genuine need to rely in the trial on the specific information sought to be sealed, and

(4) on balance, an interest in maintaining confidentiality outweighs the strong public interest in having an open record.

Id. at 4.

III. Identification of Confidential Information

This motion refers to confidential information in two categories, both of which relate to sensitive, confidential information of Bausch & Lomb. Bausch & Lomb is the exclusive licensee of the '742 patent, the registered holder of the IND and NDA for the commercial product Lumify, and a real-party-in interest in this proceeding. The categories are summarized below:

(1) *Non-public Bausch & Lomb regulatory documents and discussions thereof, reflecting Bausch & Lomb's confidential research and development.*

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, 2196¹

(2) *Non-public discussion of Bausch & Lomb's sensitive commercial and financial information.* This information is contained in the following documents:

- Exhibit 1047 (Declaration of Ivan T. Hofmann), ¶¶ 25, 33, 44-47 (including footnote 55), 52
- Exhibit 1051 (Deposition Transcript of John Ferris), 22:14-22:15, 22:18-23:7, 24:10-27:18, 27:21-29:2, 29:7-29:11, 29:13-29:21, 30:4-8, 30:11-31:2, 31:4-31:17, 31:20-32:3, 32:5-32:16, 32:19, 32:21-35:16, 40:10-40:13, 40:16-40:17, 40:19-40:20, 41:2-41:5, 41:8-41:17, 43:2-43:4, 43:6-43:7, 43:12-43:17, 43:19-44:19, 44:22-45:9, 45:12-45:22, 46:2-46:5, 46:7-46:8, 46:11-47:8, 47:10-47:16, 47:18, 48:3-48:6, 48:9-48:12, 48:14-48:15, 48:18-48:22, 49:2-50:17, 50:19-52:4, 54:11-53:6, 53:18-54:12, 59:5-59:6, 59:9-60:16, 60:18-61:2, 61:5-61:10, 61:12, 61:15-62:22, 63:10-63:12, 63:15-63:18, 63:20-64:13,

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

64:17-65:5, 67:5-67:8, 67:17-67:21, 68:11-68:18, 68:20-70:4, 70:7-71:19, 72:1-72:10, 72:13-72:14, 72:16-72:19, 72:21-74:7, 75:11-75:14, 76:7-78:9, 79:7-79:9, 79:12-79:15, 79:17-79:20, 80:1, 80:3-80:5, 80:8-81:17, 81:20-82:4, 82:7-82:11, 82:13-82:14, 82:19-83:18, 83:21, 84:3-84:19, 85:1-85:4, 85:6-85:7, 85:9-85:20, 86:2-86:9, 86:11-87:2, 87:11-13

IV. Good Cause Exists for Sealing the Confidential Information

Good cause exists for sealing all of the above, as all four *Argentum* factors are met. Each category of documents is addressed below.

A. Good Cause Exists for Sealing the Regulatory Documents and Discussions Thereof (Category 1)

First, there is no question that the Lumify regulatory documents (i.e., *Investigational New Drug* (IND) and *New Drug Application* (NDA) files) are truly confidential. They were confidentially submitted to the FDA, and that confidentiality has been maintained since submission.

Second, concrete harm would result upon public disclosure. As background, Lumify is a patent-protected commercial product, which was approved in late 2018 and launched in 2019—just about four years ago. Thus, although some of the referenced documents are seemingly a decade old, the reality is that they relate to the approval of a relatively new commercial product. Moreover, Bausch & Lomb has publicly announced that it has Lumify-related products in its pipeline that likely

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.