

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MOM Enterprises, LLC,
Petitioner,

v.

ELAINE AND REINHOLD W. VIETH,
Patent Owner,

Case IPR 2023-00726
Patent 9,066,958

**PATENT OWNERS' MOTION TO SEAL
UNDER 37 CFR § 42.54**

I. INTRODUCTION

During a teleconference hearing held on October 27, 2023, the Board authorized the parties to file a motion for entry of a proposed protective order at such time as a party seeks to file a document under seal. Ex. 2015, page 38, lines 4-12. The parties' Joint Motion for Entry of Stipulated Protective Order is filed herewith.

The Board authorized Patent Owners to file a motion for additional discovery. *See* Order, dated Dec. 21, 2023, Paper 46. Patent Owners' motion for additional discovery filed herewith refers to certain information designated by Petitioner as Highly Confidential-Attorney's Eyes Only. This motion is submitted by Patent Owners in compliance with the agreed Stipulated Protective Order.

II. MOTION TO SEAL

"The Board may, for good cause, issue an order to protect a party or person from disclosing confidential information." 37 C.F.R. § 42.54(a); *see also* PTAB Consolidated Trial Practice Guide ("TPG"), 19-20. The TPG requires that parties "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." TPG, 19.

Patent Owners submit this Motion to Seal portions of Patent Owners' Motion for Additional Discovery, filed herewith. There is good cause to seal portions of Patent Owners' Motion for Additional Discovery because it contains information designated by the Petitioners as Highly Confidential-Attorney's Eyes Only as required by the proposed Stipulated Protective Order. Nothing in the information designated is claimed as confidential by Patent Owners.

Appendix 1 contains a proposed public version of Patent Owners' Motion for Additional Discovery.

Dated: December 28, 2023.

Respectfully submitted,

By: /Mark E Ungerman/
Mark E. Ungerman (Reg. No. 32,070)
UNGERMAN IP PLLC
2305 Calvert St., N.W.
Washington, DC 20008
Tel: (202) 461-3200
Fax: (202) 350-2547
Email: mungeman@ungermanip.com

Alan M Anderson (*pro hac vice*)
Matthew Palen (*pro hac vice*)
L. Reagan Florence (*pro hac vice*)
ALAN ANDERSON LAW FIRM LLC
Crescent Ridge Corporate Center
11100 Wayzata Blvd., Suite 545
Minneapolis, MN 55305
TEL: 612-756-7010
FAX: 612-756-7050
Email: aanderson@anderson-lawfirm.com
rflorence@anderson-lawfirm.com
mattpalen@comcast.net

Counsel for Patent Owners

APPENDIX 1

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MOM Enterprises, LLC,
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v.

ELAINE AND REINHOLD W. VIETH,
Patent Owners,

Case IPR 2023-00726
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**PATENT OWNERS' MOTION FOR ADDITIONAL DISCOVERY UNDER
37 C.F.R. § 42.51(b)(2)**

TABLE OF EXHIBITS

Exhibit Number	Description
2001	Docket Sheet: 1:22-cv-00332-GBW Ddrops Company et al v. MOM Enterprises, LLC, Gregory B. Williams, presiding, Date filed: 03/16/2022, Date of last filing: 06/22/2023. Accessed through PACER, June 23, 2023.
2002	CIVIL DOCKET FOR CASE #: 0:15-cv-03981-WMW-SER, U.S. District Court, U.S. District of Minnesota (DMN), Accessed through PACER, June 23, 2023.
2003	CIVIL DOCKET FOR CASE #: 0:16-cv-04278-JNE-TNL, U.S. District Court, U.S. District of Minnesota (DMN), Accessed through PACER, June 23, 2023.
2004	Declaration of Chris Temovsky
2005	Claim Construction Order, Case 1:22-cv-00332-GBW, Ddrops Company et al v. MOM Enterprises, LLC, Gregory B. Williams, presiding, D.I. 72, Filed 06/02/23
2006	MARC STANDARDS, Library of Congress Network Development and MARC Standards Office, MARC 21 Format for Bibliographic Data, https://www.loc.gov/marc/ last accessed June 23, 2023
2007	U.S. Bureau of Labor Statistics, Occupational Outlook Handbook, Interpreters and Translators, https://www.bls.gov/ooh/media-and-communication/interpreters-and-translators.htm , last accessed June 23, 2023.
2008	Declaration of Reinhold Vieth
2009	Declaration of Warren D. Woessner
2010	Transcript of Markman Hearing, June 1, 2023, Case No. 1:22-cv-00332-GBW Ddrops Company et al v. MOM Enterprises, LLC, Gregory B. Williams, presiding

Exhibit Number	Description
2011	Oxford English Reference Dictionary, 2 nd Edition, the Oxford University Press, 1996 (Definitions of adhere and viscosity)
2012	DECLARATION IN SUPPORT OF PATENT OWNERS' MOTION FOR PRO HAC VICE ADMISSION OF ALAN M. ANDERSON
2013	DECLARATION IN SUPPORT OF PATENT OWNERS' MOTION FOR PRO HAC VICE ADMISSION OF L. REAGAN FLORENCE
2014	DECLARATION IN SUPPORT OF PATENT OWNERS' MOTION FOR PRO HAC VICE ADMISSION OF MATTEW PALEN
2015	Transcript of 27 Oct. 2023 Board Conference Call
2016	EXPUNGED
2017	EXPUNGED
2018 [New]	[Proposed] PROTECTIVE ORDER
2019 [New]	REDLINE OF [Proposed] PROTECTIVE ORDER AGAINST DEFAULT PROTECTIVE ORDER

Patent Owners submit this Motion and Memorandum to compel depositions of 3 individuals who have information relating to secondary indicia of non-obviousness. *See* Order, dated Dec. 21, 2023, Paper 46. Patent Owners ask the Board to compel Petitioner’s two current employees and to authorize the issuance of a subpoena to a former employee to appear for depositions. Specifically, Patent Owners request to depose Yasmin Kaderali, CEO of Petitioner; Stephanie Medina, Senior Director of Research & Development and Quality of Petitioner; and Tisha Winters, who formerly was Brand Manager for the product in issue.

Kaderali has intimate, first-hand knowledge relevant to issues of commercial success, copying, and long-felt but unmet need. Kaderali is “leading the company’s growth strategy while also working hard to maintain the awesomeness of working at [Petitioner]. She keeps the brand close to her heart and stays actively involved in the creative direction of marketing & innovation plans.” *See* <https://mommysbliss.com/blogs/mom/runonthepowerofmomasyasmin>. Kaderali previously signed two declarations in the underlying District Court litigation in which she states her familiarity with the packaging and labeling on Petitioner’s product. *See Ddrops Co. v. MOM Enterprises, LLC*, No. 1:22-cv-00332-GBW (D. Del.), Docs. 110-1, ¶2; 130, ¶4.

Medina has been with Petitioner since June 2015, and played a key role in redesigning Petitioner’s product to address flaws in its predecessor product and its

subsequent commercial success. In her current position, she is “always figuring out ways to perfect [Petitioner’s] products and on the lookout for new ideas”. *See* <https://mommysbliss.com/blogs/mom/runonthepowerofmomsstephaniem>. She has knowledge relevant to copying, commercial success, and long-felt but unmet need.

Finally, Winters was Brand Manager for Petitioner from October 2020 to September 2021, when Petitioner redesigned its baby vitamin D product and changed the chemical composition to match Patent Owners’ product as claimed in the ‘958 Patent, the subject of this IPR. *See* <https://www.linkedin.com/in/tishawinters/>. She has knowledge relevant to copying and commercial success following introduction of the knock-off product in February 2021.

Additional discovery is available when it “is in the interests of justice.” 37 CFR §42.51(b)(2)(i). The requested depositions are necessary considering “the totality of the relevant circumstances.” 77 Fed. Reg. 48,693 (Aug. 14, 2012) (citing *U.S. v. Roberts*, 978 F.2d 17, 22 (1st Cir. 1992)). The Board previously granted Patent Owners’ motion for additional discovery and required Petitioner to produce documents pertinent to secondary considerations of non-obviousness. *See* Order, dated Dec. 6, 2023, Paper 45. After reviewing the documents, Patent Owners request limited, targeted testimony from 3 individuals to “shed further light” on certain documents, which will further establish secondary considerations of copying,

commercial success, and long-felt but unmet need. *See Kashiv Pharma, LLC v. Purdue Pharma L.P.*, IPR2018-00625, IPR2018-00717, Paper 20 at 3, 5 (PTAB July 31, 2018).

Patent Owners' Deposition Requests easily meet the framework established by *Garmin Int'l, Inc. v. Couzzo Speed Technologies LLC*, IPR2012-00001, Paper 26 at 6-7 (PTAB Mar. 5, 2013). Each of the *Garmin* factors supports Patent Owners' requested depositions.

Garmin Factor 1: "[T]he requester of information should already be in possession of a threshold amount of evidence or reasoning tending to show beyond speculation that something useful will be uncovered." *Id.* at 7. Here, Patent Owners have far more than that – the documents that the Board ordered Petitioner to produce. Patent Owners' counsel is confident the requested testimony will be favorable and substantively valuable to counter Petitioner's obviousness arguments. No "speculation" exists that the requested testimony might be useful to Patent Owners. *Cf. Garmin*, at 8. The depositions requested will result in testimony that will contribute to proving secondary considerations of non-obviousness and will "shed further light on" the documents produced. *Kashiv Pharma*, Paper No. 20, at 3, 5 (Board noted that Patent Owner "identifies several pieces of 'threshold' evidence that supports the requested discovery.").

The Board has already determined that the product sold by Patent Owners'

licensee, Ddrops, “embodies the claimed invention.” Paper 10, at 41. Petitioner also markets a product that embodies the claimed invention. It had a predecessor product that was unsuccessful. Petitioner **Redacted**

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Redacted Unlike the product in *Garmin*, no other features exist which potentially could be responsible for commercial success. *Cf. Garmin* at 8-9.

At the same time, Petitioner embarked on a **Redacted**

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Petitioner’s **Redacted** product has been commercially successful. Kaderali and Medina will provide testimony regarding Petitioner’s sales, marketing plans and related documents that show the commercial success of Petitioner’s **Redacted**

Redacted. See, e.g.,

Redacted

Kaderali will also shed light on the long-felt but unmet need for the invention disclosed in the ‘958 Patent. She has been CEO since March 2008. See <https://www.linkedin.com/in/yasmin-kaderali-91624a3/>. She touts her involvement in launching new products at Petitioner. See *id.* The “new products” include not only the initial, sunflower oil-based baby vitamin D product, but also the Redacted

Redacted Ddrops, which Redacted

Redacted. She thus also has knowledge that will shed light on the long-felt need for Patent Owners’ invention and MOM’s decision to introduce Redacted

Redacted Given her employment since 2015, Medina will also have evidence pertinent to long-felt need. See, e.g.,

Redacted

Garmin Factors 2-5: The other *Garmin* factors are easily satisfied and may be summarily considered. The requested depositions do not seek Petitioner’s litigation positions and the underlying basis for those positions. The testimony sought is targeted to facts pertinent to secondary indicia of non-obviousness and to shed light on documents MOM has produced.

Patent Owners have no other viable means to generate equivalent information. Only Petitioner and the 3 identified witnesses have information regarding their **Redacted** Ddrops. The identified witnesses have knowledge of the commercial success of Petitioner's **Redacted** product. Kaderali, in light of her more than 12 years in the industry, has knowledge regarding the long-felt but unmet need for a baby vitamin D product that embodies the invention claimed in the '958 Patent. As the Board found in *Kashiv Pharma*, "While Patent Owner is already in possession of documents from the related litigation, we are not persuaded that the additional information sought through the depositions [of a current and a former executive] could necessarily be obtained through other less intrusive means." *Kashiv Pharma*, Paper 20 at 5.

By seeking limited testimony of three identified individuals, the requested depositions are easily understandable. Patent Owners, as required by 37 CFR §42.53(d)(3), have identified in their proposed deposition notices, their present list of documents on which they will rely during the depositions. *See Appendix.*

Finally, the requested depositions will not be overly burdensome. As indicated in the proposed deposition notices, each of them will be taken virtually. The Winters and Medina depositions will be taken on the same day. The Kaderali deposition will be taken on a single day, and should last no more than 5 hours. In contrast, Petitioner would have been subject to 10 fact depositions or more of up to 7 hours length in the

District Court. Patent Owners are not requesting a Fed. R. Civ. P 30(b)(6) deposition that would require Petitioner to designate and prepare one or more people to answer questions regarding various topics and documents. Written interrogatories and requests for admission would be more time-consuming. They would require Petitioner to consult with multiple individuals and would necessitate many questions and requests in anticipation of alternative responses. Three focused depositions are substantially less burdensome than any alternative. This greatly reduced burden is consistent with Congressional intent limiting discovery in an IPR.

For the foregoing reasons, the Board should grant Patent Owners' motion and compel Petitioner to produce Kaderali and Medina for examination, and to authorize Patent Owners to subpoena Winters to testify by deposition.

Dated: December 28, 2023.

Respectfully submitted,

By: /Mark E Ungerman/
Mark E. Ungerman (Reg. No. 32,070)
UNGERMAN IP PLLC
2305 Calvert St., N.W.
Washington, DC 20008
Tel: (202) 461-3200
Fax: (202) 350-2547
Email: mungeman@ungermanip.com

Alan M Anderson (*pro hac vice*)
Matthew Palen (*pro hac vice*)
L. Reagan Florence (*pro hac vice*)
ALAN ANDERSON LAW FIRM LLC
Crescent Ridge Corporate Center
11100 Wayzata Blvd., Suite 545
Minneapolis, MN 55305

TEL: 612-756-7010

FAX: 612-756-7050

Email: aanderson@anderson-lawfirm.com

rflorence@anderson-lawfirm.com

mattpalen@comcast.net

Counsel for Patent Owners

Appendix 1

UNITED STATES PATENT AND TRADEMARK OFFICE

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MOM Enterprises, LLC,
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ELAINE AND REINHOLD W. VIETH,
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Patent 9,066,958

PATENT OWNERS' NOTICE OF DEPOSITION OF

Yasmin Kaderali

(Address) _____

Pursuant to 37 C.F.R. § 42.53, Patent Owners, Elaine and Reinhold W. Vieth, by and through its counsel, will take the testimony by deposition of Yasmin Kaderali as follows:

Date/Time: January __, 2024, starting at 9:00 am PST, or at such other time as the parties may agree. A list of the exhibits to be relied upon during the deposition and a general description of the scope and nature of the testimony to be elicited is specified in the Attachment hereto.

Location: By video conference.

The deposition will be taken by video conference before a court reporter, notary public, or other person authorized to administer oaths. The deposition will be recorded stenographic and/or by audio-visual means.

Dated: January __, 2024.

Respectfully submitted,

//

Mark E. Ungerman
Reg. No. 32,070
UNGERMAN IP PLLC
2305 Calvert Street, N.W.
Washington, DC 20008
Attorney for Patent Owner
Tele: (202) 461-3200
Fax: (202) 350-2547
Email: mungerman@ungermanip.com

Alan M. Anderson (*Pro hac vice*)
L. Reagan Florence (*Pro hac vice*)
Matthew Palen (*Pro hac vice*)

ALAN ANDERSON LAW FIRM LLC
Crescent Ridge Corporate Center
11100 Wayzata Blvd., Suite 545
Minneapolis, MN 55305
Tel: (612) 756-7000
Fax: (612) 756-7050

Counsel for Patent Owners

Case IPR 2023-00726

ATTACHMENT TO DEPOSITION NOTICE TO: Yasmin Kaderali

1. General description of the scope and nature of the testimony:

Secondary considerations based on objective evidence of non-obviousness.

Long-felt but unsolved needs;

Commercial success;

Copying;

Nature of Mommy's Bliss Baby Vitamin D Organic Drops, both MCT version and Sunflower oil version – design, composition, instructions for use, reasons for commercial success, reasons for sales, marketing, market share, motivation and decision making behind foregoing. Knowledge of Ddrops, its patents, its products, product ingredients, and instructions for the use of its products. Known challenges to the administration and dosing of vitamin D to infants and others. Competitive research and knowledge of competitive products and competitors.

2. Documents which may be introduced as exhibits:

MOM_0000008-10; MOM_0000601-620; MOM_0001369; MOM_0001463-1488;
MOM_0001539-1589; MOM_0001620-1642; MOM_0001661-1686;
MOM_0001727; MOM_0001729-1749; MOM_0001750-1793; MOM_0001808-
1828; MOM_0001895-1925; MOM_2007-2039; MOM_0002099-2156;

MOM_0002250-2302; MOM_0002303-2312; MOM_0002313-2370;
MOM_0002371-2418; MOM_0002480-2581; MOM_0002596; MOM_0004239-
4243; MOM_0004311-43223; MOM_0004324-4380; MOM_0004711;
MOM_0005310-5312; MOM_0005332-5333; DDROPS-0022416-424; DDROPS-
0022425-428; DDROPS-0022429-432.

CERTIFICATE OF SERVICE

I hereby certify, pursuant to 37 C.F.R. § 42.6 that on January __, 2024, PATENT OWNERS' NOTICE OF DEPOSITION OF Yasmin Kaderali is being served by filing this document through the Patent Trial and Appeal Case Tracking System (P-TACTS) and, as specified by Petitioner, upon the following, by ELECTRONIC MAIL:

David B. Conrad
Lance E. Wyatt
Sarika Patel
Casey Kraning
Fish and Richardson P.C.
To: IPR53953-0001IP1@fr.com

//
Mark E. Ungerman

UNITED STATES PATENT AND TRADEMARK OFFICE

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PATENT OWNERS' NOTICE OF DEPOSITION OF

Stephanie Medina

(Address) _____

Pursuant to 37 C.F.R. § 42.53, Patent Owners, Elaine and Reinhold W. Vieth, by and through their counsel, will take the testimony by deposition of Stephanie Medina as follows:

Date/Time: January __, 2024, starting at the later of the conclusion of the deposition of Tisha Winters or 1:30 pm PST, or at such other time as the parties may agree. A list of the exhibits to be relied upon during the deposition and a general description of the scope and nature of the testimony to be elicited is specified in the Attachment hereto.

Location: By video conference.

The deposition will be taken by video conference before a court reporter, notary public, or other person authorized to administer oaths. The deposition will be recorded stenographic and/or by audio-visual means.

Dated: January __, 2024.

Respectfully submitted,

//
Mark E. Ungerman
Reg. No. 32,070
UNGERMAN IP PLLC
2305 Calvert Street, N.W.
Washington, DC 20008
Attorney for Patent Owner
Tele: (202) 461-3200
Fax: (202) 350-2547
Email: mungerman@ungermanip.com

Alan M. Anderson (*Pro hac vice*)

L. Reagan Florence (*Pro hac vice*)
Matthew Palen (*Pro hac vice*)
ALAN ANDERSON LAW FIRM LLC
Crescent Ridge Corporate Center
11100 Wayzata Blvd., Suite 545
Minneapolis, MN 55305
Tel: (612) 756-7000
Fax: (612) 756-7050

Counsel for Patent Owners

Case IPR 2023-00726

ATTACHMENT TO DEPOSITION NOTICE TO: Stephanie Medina

1. General description of the scope and nature of the testimony:

Secondary considerations based on objective evidence of non-obviousness.

Long-felt but unsolved needs;

Commercial success;

Copying;

Nature of Mommy's Bliss Baby Vitamin D Organic Drops, both MCT version and Sunflower oil version – design, composition, instructions for use, reasons for commercial success, reasons for sales, marketing, market share, motivation and decision making behind foregoing. Knowledge of Ddrops, its patents, its products, product ingredients, and instructions for the use of its products. Known challenges to the administration and dosing of vitamin D to infants and others. Competitive research and knowledge of competitive products and competitors.

2. Documents which may be introduced as exhibits:

MOM_0000008-10; MOM_0000601-620; MOM_0001369; MOM_0001463-1488;
MOM_0001539-1589; MOM_0001620-1642; MOM_0001661-1686;
MOM_0001729-1749; MOM_0001750-1793; MOM_0001808-1828; MOM_2007-
2039; MOM_0002099-2156; MOM_0002250-2302; MOM_0002313-2370;

MOM_0002371-2418; MOM_0002480-2581; MOM_0004239-4243;
MOM_0004311-43223; MOM_0004324-4380; MOM_004711; DDROPS-
0022416-424; DDROPS-0022425-428; DDROPS-0022429-432.

CERTIFICATE OF SERVICE

I hereby certify, pursuant to 37 C.F.R. § 42.6 that on January __, 2024, PATENT OWNERS' NOTICE OF DEPOSITION OF Stephanie Medina is being served by filing this document through the Patent Trial and Appeal Case Tracking System (P-TACTS) and, as specified by Petitioner, upon the following, by ELECTRONIC MAIL:

David B. Conrad
Lance E. Wyatt
Sarika Patel
Casey Kraning
Fish and Richardson P.C.
To: IPR53953-0001IP1@fr.com

//
Mark E. Ungerman

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PATENT OWNERS' NOTICE OF DEPOSITION OF

Tisha Winters

(Address) _____

Pursuant to 37 C.F.R. § 42.53, Patent Owners, Elaine and Reinhold W. Vieth, by and through its counsel, will take the testimony by deposition of Tisha Winters as follows:

Date/Time: January __, 2024, starting at 9:00 am PST, or at such other time as the parties may agree. A list of the exhibits to be relied upon during the deposition and a general description of the scope and nature of the testimony to be elicited is specified in the Attachment hereto.

Location: By video conference.

The deposition will be taken by video conference before a court reporter, notary public, or other person authorized to administer oaths. The deposition will be recorded stenographic and/or by audio-visual means.

Dated: January __, 2024/

Respectfully submitted,

//
Mark E. Ungerman
Reg. No. 32,070
UNGERMAN IP PLLC
2305 Calvert Street, N.W.
Washington, DC 20008
Attorney for Patent Owner
Tele: (202) 461-3200
Fax: (202) 350-2547
Email: mungerman@ungermanip.com

Alan M. Anderson (*Pro hac vice*)
L. Reagan Florence (*Pro hac vice*)
Matthew Palen (*Pro hac vice*)

ALAN ANDERSON LAW FIRM LLC
Crescent Ridge Corporate Center
11100 Wayzata Blvd., Suite 545
Minneapolis, MN 55305
Tel: (612) 756-7000
Fax: (612) 756-7050

Counsel for Patent Owners

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ATTACHMENT TO DEPOSITION NOTICE TO: Tisha Winters

1. General description of the scope and nature of the testimony:

Secondary considerations based on objective evidence of non-obviousness.

Commercial success;

Copying;

Nature of Mommy's Bliss Baby Vitamin D Organic Drops, both MCT version and Sunflower oil version – design, composition, instructions for use, reasons for commercial success, reasons for sales, marketing, market share, motivation and decision making behind foregoing. Knowledge of Ddrops, its patents, its products, product ingredients, and instructions for the use of its products. Known challenges to the administration and dosing of vitamin D to infants and others. Competitive research and knowledge of competitive products and competitors.

2. Documents that may be introduced as exhibits:

MOM_0000008-10; MOM_0001990; MOM_0002209-2249; MOM_0002371-2418; MOM_0002480-2518; MOM_0002566-2569; MOM_0002570-2572; MOM_0004711; DDROPS-0022416-424; DDROPS-0022425-428; DDROPS-0022429-432.

CERTIFICATE OF SERVICE

I hereby certify, pursuant to 37 C.F.R. § 42.6 that on January __, 2024, PATENT OWNERS' NOTICE OF DEPOSITION OF Tisha Winters is being served by filing this document through the Patent Trial and Appeal Case Tracking System (P-TACTS) and, as specified by Petitioner, upon the following, by ELECTRONIC MAIL:

David B. Conrad
Lance E. Wyatt
Sarika Patel
Casey Kraning
Fish and Richardson P.C.
To: IPR53953-0001IP1@fr.com

//
Mark E. Ungerman

CERTIFICATE OF SERVICE

I hereby certify, pursuant to 37 C.F.R. § 42.6(e) that on December 28, 2023, **PATENT OWNER’S MOTION FOR ADDITIONAL DISCOVERY UNDER 37 C.F.R. § 42.51(b)(2) AND MEMORANDUM IN SUPPORT THEREOF** is being served, by filing this document through the Patent Trial and Appeal Case Tracking System (P-TACTS) and by electronic mail as directed by Petitioner upon the following counsel of record for Petitioners:

David B. Conrad
Lance E. Wyatt
Sarika Patel
Casey Kraning
Fish and Richardson P.C.
To: IPR53953-0001IP1@fr.com

/Mark E Ungerman/
Mark E. Ungerman

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that the foregoing Patent Owners' Motion to Seal is being served on December 28, 2023, by filing this document through the Patent Trial and Appeal Case Tracking System (P-TACTS) and by electronic mail as directed by Petition upon the following counsel of record for Petitioners:

David B. Conrad
Lance E. Wyatt
Sarika Patel
Casey Kraning
Fish and Richardson P.C.
To: IPR53953-0001IP1@fr.com

/Mark E Ungerman/
Mark E. Ungerman
(Reg. No. 32,070)