

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

**DR. REDDY'S LABORATORIES S.A. AND
DR. REDDY'S LABORATORIES, INC.,**
Petitioners,

v.

EYE THERAPIES, LLC,
Patent Owner

U.S. Patent No. 11,833,245

Title: VASOCONSTRICTION COMPOSITIONS AND METHODS OF USE

Inter Partes Review No. IPR2024-00467

PETITIONERS' MOTION FOR ADDITIONAL DISCOVERY

Petitioners submit this Motion for Additional Discovery seeking the ability to use documents from Patent Owner, Eye Therapies, LLC, and real parties in interest, Bausch & Lomb, Inc. and Bausch & Lomb Ireland Limited (“Bausch”) that were produced in a related litigation. The complete list of requested documents is attached as Appendix 1 (“Document Requests”).

Petitioners and Patent Owner have been litigating U.S. Patent No. 11,833,245 (“the ’245 patent”), and its family members, in the District of New Jersey for nearly four years. The ’245 patent and its family members all claim the use of low-dose brimonidine in the treatment of eye redness. In December 2023, Patent Owner filed a motion for a preliminary injunction, asserting three claims of the ’245 patent. The parties filed numerous declarations and took depositions of those declarants in connection with that motion, including nearly all individuals that submitted declarations in this proceeding. In January 2024, the District Court held a six-day evidentiary hearing on the preliminary injunction motion, hearing live testimony from both fact and expert witnesses.

All documents requested by Petitioners in Appendix 1 have already been produced in the underlying District Court litigation, mostly in connection with the preliminary injunction motion. These documents, however, contain information that Patent Owner (or Bausch) claims is confidential and is subject to a protective order. The parties’ protective order, filed with this motion as Ex. 1039, prohibits use of

confidential information for purposes other than litigation. Ex. 1039 at ¶ 2. The parties filed the protective order while two IPR proceedings challenging patents related to the '245 patent were pending, IPR2022-00142 and IPR2022-00146, and included a provision regarding potential cross-use of documents between the District Court case and the then-pending IPRs. *Id.* at ¶ 2 (“If IPR2022-00142 and/or IPR2022-00146 is instituted, the Parties will confer regarding the need for, and appropriate terms of, an agreement permitting the cross-use of Counsel’s Eyes Only information in IPR2022-00142 and/or IPR2022-00146.”).

The parties have not been able to negotiate a broad, cross-use agreement, but have agreed that the parties may use certain confidential litigation documents in the pending IPR proceedings. For example, prior to the filing of Patent Owner’s Response, the parties agreed that the parties could use the transcripts of depositions taken in connection with the preliminary injunction hearing or the prior IPR in the currently pending IPR proceedings. In preparation for Petitioners’ Replies, Petitioners sought a similar agreement related to additional documents disclosed in litigation. On December 18, 2024, Petitioners provided Patent Owner with a list of categories of documents that contain information relevant to the issues presented in Patent Owner’s Response, seeking permission to use the identified documents in the pending IPRs. Patent Owner refused, arguing that these documents do not contain information relevant to the issues before the Board. Petitioners narrowed the list of

documents to those sought in this motion, but the parties were still unable to reach agreement. Patent Owner indicated that it would consent to cross-use of the requested documents under two conditions: (1) Petitioners redact any personal identifying and protected health information from the clinical study reports before use in depositions or Petitioners' Replies and (2) Petitioners agree that Patent Owner may file expert declarations with its Sur-Replies to the extent Petitioners raise arguments in its Replies based on any of the documents requested. Petitioners have agreed to the first condition, but modification of the rules governing Sur-Replies is not appropriate at this time.

It is in the interest of justice for Petitioners, and the Board, to have access to the requested materials in this proceeding. Patent Owner argues that objective indicia of non-obviousness outweigh a finding of obviousness in this case, and the requested documents are directly relevant to these arguments. Categories 1–6 are all relevant to Patent Owner's allegations of commercial success. The requested documents include financial statements, marketing reports, and testimony from Mr. John Ferris, the same individual who provided a declaration in this proceeding, and Ms. Annalise Riebling, an employee Mr. Ferris supervises, each of which include information regarding Bausch's marketing efforts and the factors that drive sales of the alleged commercial embodiment. Category 7 seeks the full versions of clinical trial reports that Patent Owner cited in its Response as evidence of unexpected results. With its

Response, Patent Owner filed selectively excerpted versions of these documents, and Petitioner requests the ability to use the entirety of the reports.

Each of these documents contains information that Patent Owner or Bausch has identified as confidential. Patent Owner, however, should not be permitted to unilaterally restrict what portion of the already-produced evidence may be presented to the Board. Patent Owner has benefited from using documents and transcripts from the preliminary injunction hearing and IPR2022-00142 in this proceeding¹, but is using the protective order to restrict access to information that has already become part of the dispute between the parties. It is in the interest of justice to prevent Patent Owner from controlling the evidence presented in this case and excluding evidence that is unfavorable to its positions.

There is no cognizable prejudice to Patent Owner if these documents were to be used pursuant to the agreed protective order in this proceeding. The only additional disclosure of confidential information will be to this Board, which does not introduce any risk of competitive harm. Patent Owner need not take any action

¹ Indeed, the bulk of the evidence submitted with Patent Owner's Preliminary Response were documents from the preliminary injunction hearing (*see, e.g.*, Ex. 2002, 2006, 2007, 2009, 2012, 2013, 2015, 2016, 2017 (transcripts, expert declarations, and deposition transcripts from the preliminary injunction hearing)).

besides acknowledging that Petitioners may use these documents in this case. As explained below, Petitioners' requests also easily meet the requirements established in *Garmin Int'l, Inc. v. Cuozzo Speed Techs. LLC*, IPR2012-00001, Paper 26 at 6–7 (P.T.A.B. Mar. 5, 2013), as they are narrowly tailored document requests.

Factor 1: More than a Possibility and a Mere Allegation. Petitioners are “already [] in possession of a threshold amount of evidence or reasoning tending to show beyond speculation that something useful will be uncovered.” *Garmin*, Paper 26 at 7. Counsel for Petitioners are in possession of these documents and know that the requested documents contain information that is relevant to Patent Owner's arguments on secondary considerations of non-obviousness. Petitioners, therefore, have “evidence or reasoning tending to show beyond speculation” that the information would be useful in Petitioners' argument.

Patent Owner alleges that commercial success supports a finding of non-obviousness of the challenged claims. The documents that Petitioners request contain information regarding other economic and commercial factors that have impacted sales of the alleged commercial embodiment of the claims. Specifically, the declarations and deposition transcripts and related exhibits discuss Lumify's marketing and promotional campaigns. This evidence will show that the commercial success of Lumify continues to be due to factors other than the allegedly novel aspects of the claims of the '245 patent. The relevance of this information is more

than mere speculation because Patent Owner made similar arguments in the related IPR2022-00142. In response, this Board found that “Patent Owner’s evidence of secondary considerations does not outweigh the strong evidence of obviousness,” noting that “although Lumify may enjoy significant sales and market share, we find Patent Owner’s secondary evidence of non-obviousness was attributable ‘to other economic and commercial factors unrelated to the quality of the patented subject matter.’” IPR2022-00142, Paper 77 at 66–67. These additional documents further support Petitioners’ arguments that any commercial success bears no nexus to the claims of the ’245 patent.

Additionally, Patent Owner argues that Lumify exhibits unexpected results and cites to portions of clinical trial reports to support this argument. The versions of the clinical study reports Patent Owner filed, however, are small excerpts of much larger documents. Petitioners seek access to the full versions of these documents because they contain information that may provide appropriate context for or rebut Patent Owner’s unexpected results arguments.

Factor 2: Litigation Positions and Underlying Basis. Petitioners’ document requests do not request information about Patent Owner’s litigation positions. Rather, given the unique history of this case, Patent Owner has already taken these positions in arguments to the Board or to the District Court. As discussed above, many similar positions have been discussed during the previous preliminary

injunction hearing. Therefore, Petitioners are not using these requests to inappropriately seek Patent Owner's litigation strategy.

Factor 3: Ability to Generate Equivalent Information by Other Means.

Petitioners do not have any other means to generate this information. The requested documents contain historical financial data by Bausch, internal presentations and documents regarding Bausch's marketing campaigns, and clinical study reports conducted by Bausch and/or Patent Owner. Petitioners cannot replicate this information or obtain equivalent information elsewhere.

Factor 4: Easily Understandable Instructions. Petitioners have definitively described the exact documents at issue, identifying the documents by Bates number or docket entry number from the underlying District Court litigation.

Factor 5: Not Overly Burdensome. Petitioners request a narrow set of documents that have already been produced. There is no burden on Patent Owner as Petitioners' counsel are already in possession of the documents. Petitioners only request authority to use these documents in this proceeding.

CONCLUSION

For the foregoing reasons, the Board should grant Petitioners' motion and compel Patent Owner to produce the documents specifically identified and contained in Appendix 1.

Date: January 22, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Linnea P. Cipriano, certify that I caused to be served a true and correct copy of the foregoing **PETITIONERS' MOTION FOR ADDITIONAL DISCOVERY** by email, as follows:

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APPENDIX 1

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EYE THERAPIES, LLC,
Patent Owner.

Case No.: IPR2024-00467

U.S. Patent No.: 11,833,245

PETITIONERS' REQUESTS FOR PRODUCTION OF DOCUMENTS

Petitioners request the following documents from *In re Lumify*, No. 3:21-cv-16766-RK-RLS (D.N.J.) be made available for use in this IPR proceeding, subject to the Protective Order.

Description of Documents:

1. Unredacted, native versions of the Bausch & Lomb financial spreadsheets from 2021 to present, identified as Exhibits 213 (BAU_LUM00080128) and 212 (BAU_LUM00080129) to Docket Entry 283, *In re Lumify*, 3:21-cv-16766-RK-RLS.
2. Unredacted versions of all quarterly Brand Health Trackers for Lumify, as identified in Docket Entry 389 at 8, *In re Lumify*, 3:21-cv-16766-RK-RLS.
3. Unredacted Declaration of Annelise Riebling and the documents cited therein (Exhibit 155 to Docket Entry 279, *In re Lumify*, 3:21-cv-16766-RK-RLS).
4. Unredacted Declaration of John Ferris and the documents cited therein (Exhibit 162 to Docket Entry 279, *In re Lumify*, 3:21-cv-16766-RK-RLS).
5. Unredacted Second Declaration of John Ferris and the documents cited therein (Exhibit 108 to Docket Entry 284, *In re Lumify*, 3:21-cv-16766-RK-RLS).
6. Unredacted transcripts and corresponding exhibits from the depositions taken in the district court litigation, *In re Lumify*, 3:21-cv-16766-RK-RLS, including:
 - a. The deposition transcript of John Ferris (Exhibit 295 to Docket Entry 283) and marked exhibits;
 - b. The deposition transcript of Annelise Riebling (Exhibit 298 to Docket Entry 283) and marked exhibits; and
 - c. The deposition transcript of Bausch & Lomb's 30(b)(6) witness, John Ferris, and marked exhibits.

7. Unredacted versions of all clinical study reports for IND No. 108,524, including:

- a. BAU_LUM00002744 (Study # 10-100-0008)
- b. BAU_LUM00001699 (Study # 11-100-0015)
- c. BAU_LUM00044972 (Study # 13-100-0005)

Dated: January 22, 2025

Respectfully submitted,

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