

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FRESENIUS KABI SWISSBIOSIM GMBH,
Petitioner,

v.

REGENERON PHARMACEUTICALS, INC.,
Patent Owner.

Case: IPR2025-01268
U.S. Patent No. 11,084,865

PATENT OWNER'S REPLY
IN SUPPORT OF DISCRETIONARY DENIAL

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<i>Valve Corp. v. Elec. Scripting Prods., Inc.</i> , IPR2019-00064, Paper 10 (P.T.A.B. May 1, 2019)	4

OTHER AUTHORITIES

U.S. CONST. art. I, § 8, cl. 8	5
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TABLE OF EXHIBITS

Exhibit	Description
2001	Mylan Redacted Trial Decision, 22-cv-61, Dkt. 692 (N.D.W. Va.)
2002	SB Redacted PI Decision, 24-md-3103, Dkt. 194 (N.D.W. Va.)
2003	Formycon Redacted PI Decision, 24-md-3103, Dkt. 247 (N.D.W. Va.)
2004	Celltrion Redacted PI Decision, 24-md-3103, Dkt. 248 (N.D.W. Va.)
2005	SB Appeal Decision, 24-1965, Dkt. 76 (Fed. Cir.)
2006	Formycon Appeal Decision, 24-2009, Dkt. 67 (Fed. Cir.)
2007	Celltrion Appeal Decision, 24-2058, Dkt. 62 (Fed. Cir.)
2008	Fresenius, Fresenius to Expand Biopharma Portfolio with a New Licensing Agreement to Commercialize a Proposed Aflibercept Biosimilar (Dec. 20, 2024), https://www.fresenius.com/node/6982
2009	Email from D. Berl to S. Gibson re Scheduling Conference (Sept. 12, 2025)
2010	Zaltrap® Label
2011	Regeneron v. Mylan, 22-cv-61, Trial Transcript (Public Excerpts) (N.D.W. Va.)
2012	J.L. Fast et al., Physical Instability of a Therapeutic Fc Fusion Protein: Domain Contributions to Conformational and Colloidal Stability, 48 BIOCHEM. 11724 (2009) (“Fast”)
2013	Regeneron v. Mylan, 22-cv-61, Trial Ex. DTX-3619A, Fusion Proteins Disclosed in Papadopoulos
2014	International Publication No. WO 00/75319 (“WO 00/75319”)
2015	U.S. Patent Application Pub. No. 2006/0058234 A1 (“Daly”)
2016	W. Wang, Protein Aggregation and Its Inhibition in Biopharmaceutics, 289 INT. J. PHARM. 1 (2005) (“Wang 2005”)
2017	J. Gaudreault et al., Preclinical pharmacokinetics of Ranibizumab (rhuFabV2) after a single intravitreal administration, 46(2) INVEST OPHTHALMOL VIS SCI. 726 (2005) (“Gaudreault”)

Exhibit	Description
2018	Thomas et al., Comparative Effectiveness of Aflibercept for the Treatment of Patients with Neovascular Age-Related Macular Degeneration, 7 CLINICAL OPHTHALMOLOGY 495 (2013) (“Thomas”)
2019	International Publication No. WO 2005/102303 A2 (“Peyman”)
2020	M.R. Marmour, Retinal detachment from hyperosmotic intravitreal injection, 18(12) INVEST OPHTHALMOL VIS SCI. 1237 (1979) (“Marmour ”)
2021	Declaration of Kenneth S. Graham, dated April 18, 2024
2022	Excerpts of File History of U.S. Patent No. 11,084,865
2023	Scheduling Order, Case No. MDL 24-md-3103, ECF No. 663

Fresenius seeks to avoid discretionary denial by invoking a through-the-looking-glass version of *Fintiv*. It argues that non-party status is “dispositive,” Opp. 10; whereas in reality *Fintiv* holds the opposite. Fresenius claims that seven judicial decisions upholding the ’865 patent are not a “significant investment,” Opp. 14; but the Director and Board have held otherwise, *Celltrion Inc. v. Regeneron Pharm., Inc.*, IPR2025-00456, Paper 14, at 2 (P.T.A.B. June 25, 2025); *Samsung Bioepis Co., Ltd. v. Regeneron Pharm., Inc.*, IPR2025-00176, Paper 12, at 14-16 (P.T.A.B. June 2, 2025). It asserts that “the Federal Circuit’s oral argument assessment” is “*particularly strong*” evidence of unpatentability, Opp. 9; but it ignores the District Court’s post-trial decision rejecting Fresenius’s identical prior-art challenge. And, most fantastically, it argues that successfully defeating *ten challenges* to the ’865 patent’s validity somehow creates a settled expectation of perpetual “continued challenges.” Opp. 15. Fresenius’s grab-bag of remaining arguments is equally meritless—including its assertion of unconstitutionality that cites not a single constitutional provision. Opp. 18-20. The Board should deny institution.

I. The *Fintiv* Factors Strongly Support Discretionary Denial

Factors 3-5. Fresenius asks the Board to ignore “decisions in other litigations, when Fresenius was not a party to those litigations,” Opp. 1, and baldly asserts that its non-party status is “dispositive of the *Fintiv* analysis,” *id.* at 11. Precedent flatly refutes Fresenius’s argument. Unrelated petitioners must “address [the] other

district court or Federal Circuit proceedings involving the challenged patent . . . *even if the petition is brought by a different party.*” *Apple Inc. v. Fintiv, Inc.*, IPR2020-00019, 2020 WL 2126495, at *6 (P.T.A.B. Mar. 20, 2020) (precedential) (emphasis added). Fresenius never does so. Nor does it dispute that it seeks to overturn multiple prior adjudications that: (1) there is no *prima facie* anticipation; (2) Dix’s pre-lyophilized disclosure does not anticipate; (3) Dix does not teach all limitations arranged as in the claims; and (4) 98% native conformation is not inherent.

Factor 3 requires consideration of the extensive prior investment in the parallel litigation. *See, e.g., Edwards Lifesci. Corp. v. Colibri Heart Valve LLC*, IPR2020-01649, 2021 WL 1158197, at *5-6 (P.T.A.B. Mar. 26, 2021). Fresenius’s incredible assertion (at 13) that a bench-trial decision, three preliminary-injunction decisions, and three appellate decisions affirming those injunctions evidence a “lack of significant investment” disregards numerous decisions by the Board and Director finding precisely the opposite. *Celltrion*, IPR2025-00456, Paper 14, at 2; *Samsung*, IPR2025-00176, Paper 12, at 14-16. And its argument that “[t]he existence of non-overlapping claims” supports institution (Opp. 14) ignores that “the mere existence of non-overlapping claims does not . . . favor[] institution,” *Samsung Elecs. Co. v. Clear Imaging Rsch., LLC*, IPR2020-01551, 2021 WL 628829, at *7-9 (P.T.A.B. Feb. 17, 2021), and Fresenius identifies no new issues raised by those claims.

Factor 2. The District Court has now set an MDL case schedule consistent

with trial in early 2027. Ex.2023. Thus, *contra* Opp. 12, Factor 2 favors denial if Fresenius—like all other biosimilar applicants—joins the MDL; and regardless, this factor cannot overcome the other factors strongly favoring denial of institution.

Factor 6. Far from “overlook[ing]” Factor 6 (Opp. 4), Regeneron detailed precisely why Fresenius’s challenge is weak and unlikely to prevail. Paper 6 (“Br.”) 19-20; Paper 8 (“POPR”). Fresenius, by contrast, doubles down on its baseless theory that a panel’s questions are evidence of “likely invalidation,” Opp. 15, ignores all of the oral argument remarks acknowledging the deficiencies in Mylan’s (and Fresenius’s) anticipation theory, *see* POPR at 20-21, and baldly asserts that the Board may disregard the repeated parallel findings as to “arranged as in the claims,” non-inherency, and Dix’s pre-lyophilized solution, Opp. 5-7. The Petition’s failure “to mention” and Fresenius’s ongoing failure to “attempt to address the substance of the district court’s findings . . . suggest[] a weakness in [Fresenius’s] asserted grounds”—not a showing of merit. *Samsung*, IPR2025-00176, Paper 12, at 22-23.

II. The Interim Guidance Factors Strongly Support Discretionary Denial

Settled Expectations. The ’865 patent withstood ten validity challenges across numerous District Court decisions, three Federal Circuit appeals, and three IPR challenges. Br. 20. Fresenius shows no error in those decisions, instead asserting that because “the ’865 Patent has been challenged so many times, . . . [t]he only expectation is to see continued challenges.” Opp. 15. Unsurprisingly,

Fresenius cites nothing in support of this novel theory, which inverts the principle that “serial and repetitive attacks . . . favor denying institution.” *Valve Corp. v. Elec. Scripting Prods., Inc.*, IPR2019-00064, Paper 10, at 17 (P.T.A.B. May 1, 2019). Fresenius’s theory would subject patent owners to serial, meritless harassment—precisely what this consideration and the discretionary denial process strive to avoid. *Id.* Fresenius’s observation (at 15) that patents are a “limited monopoly” is wholly irrelevant, as the unexpired ’865 patent has had its validity repeatedly upheld.

Fresenius again mischaracterizes the *Mylan* oral argument (at 15) and ignores the post-trial District Court decision rejecting Fresenius’s identical challenge. *Regeneron Pharm., Inc. v. Mylan Pharm. Inc.*, 714 F. Supp. 3d 652, 730-34 (N.D.W. Va. 2024). Regeneron’s Preliminary Response addressed at length the post-trial decision and oral argument, both of which refute Fresenius’s baseless claim that the ’865 patent “was nearly invalidated.” Opp. 15; POPR at 20-21; Ex.1008, 17:6-13.

Fresenius also vaguely suggests (at 16) that “built-in issues limit[ed] earlier challenges” to the ’865 patent. That is plainly untrue: Mylan ran its anticipation defense at trial in June 2023, and nothing prohibited Fresenius from filing its copycat petition years ago. *Cuozzo Speed Techs. v. Comm. for Intellectual Prop.*, 579 U.S. 261, 279 (2016) (IPR petitioner need not have constitutional standing).

Economic and Public Health Factors. Fresenius (at 16) argues that “fostering innovation and decreasing drug prices” warrants institution. But the

public interest “nearly always weighs in favor of protecting property rights in the absence of countervailing factors, especially when the patentee practices his inventions,” as Regeneron undisputedly does here. *Apple Inc. v. Samsung Elec. Co.*, 809 F.3d 633, 647 (Fed. Cir. 2015). Whatever value there may be to “competition” (Opp. 16) from an Eylea[®] copycat cannot overcome this public interest, particularly where prior decisions consistently have upheld the ’865 patent’s validity. *See Douglas Dynamics, LLC v. Buyer Prods. Co.*, 717 F.3d 1336, 1346 (Fed. Cir. 2013).

Expert Testimony. Contrary to Fresenius’s assertion (at 17), “extensive reliance on expert testimony . . . may suggest that the questions are better resolved in an Article III court.” *See* FAQ 22 of the Interim Processes for PTAB Workload Management. This factor thus favors denial or is irrelevant.

III. Fresenius’s Constitutional and Statutory Arguments Lack Merit

The Constitution confers rights to “promote the progress of science and useful arts,” U.S. CONST. art. I, § 8, cl. 8, not to allow serial administrative challenges to established property rights, Opp. 18-19. Fresenius complains, without authority, that the Director’s procedures “contravene statutory and due process obligations.” Opp. 18-19. That cursory assertion is meritless, as are the other half-baked arguments conjuring a non-existent “time limit” on IPR petitions and various APA violations. *Id.* Conclusory, skeletal arguments cannot preserve issues, much less demonstrate statutory violations. *See In re Killian*, 45 F.4th 1373, 1385-86 (Fed. Cir. 2022).

Date: November 3, 2025

/David I. Berl/

David I. Berl

Reg. No. 72,751

Williams & Connolly LLP

680 Maine Avenue SW

Washington, D.C. 20024

Lead Counsel for Patent Owner

CERTIFICATE OF SERVICE
(37 C.F.R. § 42.6(e))

The undersigned hereby certifies that on November 3, 2025, I caused true and correct copies of the following materials:

- Patent Owner's Discretionary Denial Reply
- Exhibit 2023

to be served via e-mail on the following:

Name	E-Mail Address
Imron T. Aly	Imron.Aly@afslaw.com
Sailesh K. Patel	Sailesh.Patel@afslaw.com

Date: November 3, 2025

/David I. Berl/
David I. Berl
Reg. No. 72,751
Lead Counsel for Patent Owner