

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APOTEX CORP.,
Petitioner

v.

ALCON RESEARCH, LTD.,
Patent Owner.

Case IPR2013-00428
U.S. Patent No. 8,268,299 B2

**ALCON RESEARCH, LTD.'S MOTION TO SEAL AND MOTION FOR
ENTRY OF PROPOSED PROTECTIVE ORDER**

Pursuant to 37 C.F.R. §§ 42.14 and 42.54, Patent Owner Alcon Research, Ltd. (“Alcon”) hereby respectfully moves to seal confidential laboratory notebooks and adjunctive data (Exhibits AL 2059—2073), portions of the Declaration of Dr. Henry Grabowski, Ph.D. (Exhibit AL 2007), and certain exhibits on which Dr. Grabowski relied in forming his opinions (Exhibits AL 2032–2042). In support of this Motion, Alcon is also submitting a proposed protective order (Exhibit AL 2056). *See* 37 C.F.R. § 42.54(a). Petitioner Apotex Corp. (“Apotex”) does not oppose the motion and agrees to the proposed protective order.

A. Motion to Seal

The standard for granting a motion to seal is “for good cause.” 37 C.F.R. § 42.54; Decision – Revised Motion to Seal, *Garmin Int’l, Inc. v. Cuozzo Speed Techs. LLC*, Case IPR2012-00001 (JL), at 4 (Apr. 5, 2013) (hereinafter *Garmin Decision*). Good cause exists for sealing these exhibits.

1. Laboratory notebooks and adjunctive data

Exhibits AL 2059–2073 are excerpts of confidential laboratory notebooks and adjunctive data used by Alcon employees to record their research and development work. These documents are being submitted in support of affidavits filed pursuant to 37 C.F.R. § 42.61 describing how certain data in the specifications of Alcon patents were generated. Although the data on which Alcon relies in this proceeding are disclosed in public patent specifications, the

documents Alcon proposes to seal also disclose internal Alcon laboratory methods and practices and additional, unpublished testing data. Public disclosure of these confidential, internal documents reflecting Alcon's research and development work has the potential to cause Alcon competitive harm.

Because the data on which Alcon relies in this proceeding are already in the public record, the public's interest in having access to these documents in order to "maintain a complete and understandable file history" is minimal. *Garmin Decision* at 8 (balancing need for confidentiality against public's interest).

Moreover, pursuant to 37 C.F.R. § 42.61, these documents are being submitted in conjunction with the declarations of Bhagwati Kabra, Ph.D., and Stephen Shannon, MBA, Ph.D. Dr. Kabra's and Dr. Shannon's declarations explain the testing data in the patent specification, explain in general the significance of the laboratory notebooks and adjunctive data, and are not being filed under seal. Accordingly, a "complete and understandable file history" will be available to the public even if these exhibits are sealed.

2. Summaries of IMS Health and Encuity Research Data

Exhibits AL 2032–2042 summarize data provided to Alcon by IMS Health and Encuity Research. These exhibits contain data on sales, units, prescriptions, and promotional spending for a number of pharmaceutical products. These data were provided by IMS Health and Encuity Research to counsel for Alcon pursuant

to agreements to keep the data confidential. It is undersigned counsel's understanding that IMS Health and Encuity Research charge customers for these data, that they do not make their data generally available to the public, and that they would be harmed by the public disclosure of these data without a confidentiality agreement.

The public's interest in having access to these exhibits is minimal. *See Garmin Decision* at 8. These exhibits are being provided in support of the declaration of Dr. Henry Grabowski, Ph.D. In conjunction with this motion, Alcon is submitting a non-confidential, redacted version of Dr. Grabowski's declaration. The substance of Dr. Grabowski's opinions can be fully ascertained from the redacted declaration; the only information not reflected in the redacted declaration is data from IMS Health and Encuity Research and Dr. Grabowski's specific calculations based on that data. Moreover, interested members of the public can obtain the data in question directly from IMS Health and Encuity Research (presumably for a fee).

3. Dr. Grabowski's Declaration

Exhibit AL 2007 is the declaration of Dr. Henry Grabowski, Ph.D. This exhibit discloses data (and calculations derived therefrom) obtained from IMS Health and Encuity Research. As explained above, good cause exists to seal these data, *see supra* Part A.2, and for the same reasons, good cause exists to seal the

portions of Dr. Grabowski's declaration which disclose these data or calculations derived therefrom.

B. Proposed Protective Order

Pursuant to 37 C.F.R. § 42.54, Alcon is submitting a proposed protective order, attached hereto as Exhibit AL 2056. Alcon requests that the proposed protective order be entered and that its terms govern the confidentiality of the exhibits which are the subject of this motion.

The proposed protective order is based on the PTAB's default order, but the parties have agreed to modify it in three ways intended to minimize the administrative burdens of complying with the order. First, party representatives need not sign an acknowledgment to have access to confidential materials. Second, party representatives include not only counsel of record, but also other attorneys working at the firms of Williams & Connolly LLP and Sterne, Kessler, Goldstein & Fox PLLC. Third, persons who receive confidential information need not maintain a record of the locations of copies of that information.

C. Certification of Conference with Opposing Party Pursuant to 37 C.F.R. § 42.54

Alcon certifies that it has conferred with Apotex regarding this motion and the scope of the proposed protective order, and that Apotex does not oppose this motion and agrees to the terms of the proposed protective order.

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