

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

INNOPHARMA LICENSING, INC., INNOPHARMA LICENSING LLC,
INNOPHARMA INC., INNOPHARMA LLC,
MYLAN PHARMACEUTICALS INC., and MYLAN INC.,
Petitioner,

v.

SENJU PHARMACEUTICAL CO., LTD., BAUSCH & LOMB, INC., and
BAUSCH & LOMB PHARMA HOLDINGS CORP.,
Patent Owner.

Case IPR2015-00902
Patent 8,669,290 B2

Before FRANCISCO C. PRATS, ERICA A. FRANKLIN, and
GRACE KARAFFA OBERMANN, *Administrative Patent Judges*.

OBERMANN, *Administrative Patent Judge*.

ORDER

Granting Petitioner's Motion to Seal and
Granting Petitioner's Motion to Enter Default Protective Order
37 C.F.R. §§ 42.14 and 42.54

In an Order dated June 21, 2016, the Board denied Patent Owner's request to enter a Stipulated Protective Order. Paper 85. That same day, the Board denied without prejudice all pending motions to seal documents. Papers 85–89. Thereafter, on July 28, 2016, the Board entered a Final Written Decision. Paper 90. On July 29, 2016, Petitioner filed a combined Motion to Seal and Motion to Enter Default Protective Order. Paper 97 (“Motion” or “Mot.”). This Order addresses that Motion. Patent Owner does not oppose the Motion. *See* Mot. 4.

Granting Motion to Seal Exhibit 2109 in its Entirety

Exhibit 2109 was the subject of a prior request to seal filed by Patent Owner, which was denied because it was “based upon an unacceptable protective order.” Paper 85, 5; *see* Paper 36, 1 (Patent Owner's request to seal Exhibit 2109). Petitioner now moves to seal Exhibit 2109, which Petitioner describes as an excerpt of Petitioner's Abbreviated New Drug Application (“ANDA”). Mot. 3–4, 6. Petitioner states that the ANDA “was filed confidentially with the FDA in order to obtain FDA approval to market [Petitioner's] generic pharmaceutical product,” which “has not yet been marketed and remains confidential.” *Id.* at 6. Petitioner also states that “Exhibit 2109 is only an excerpt of the much larger [] ANDA and redaction of this excerpt would not be practical.” *Id.* On that basis, Petitioner contends that Exhibit 2109 should “be sealed in its entirety.” *Id.*

The Board denied a prior motion to seal certain documents because Petitioner did not describe properly the papers sought to be sealed. Paper 86, 2–3. Specifically, we denied Petitioner's prior motion to seal

because, among other things, it identified five documents sought to be sealed in their entirety that were not characterized even by title. *Id.*; Paper 55, 3. Based on the information presented in the instant Motion, by contrast, we are persuaded that Petitioner identifies Exhibit 2109 adequately. Mot. 6. Our review of the unredacted version of Exhibit 2109, furthermore, persuades us of the correctness of Petitioner’s view that redacting that document “would not be practical” and, therefore, that Exhibit 2109 should be sealed in its entirety. *Id.* Accordingly, Petitioner’s request to seal Exhibit 2109 is *granted*.

Granting Motion to Seal Two Paragraphs of Exhibit 2082

Petitioner moves to seal two paragraphs of a declaration of Dr. Robert O. Williams, III (Ex. 2082). Mot. 6–7. Patent Owner previously moved to seal portions of Exhibit 2082, but that request was denied because it was “based upon an unacceptable protective order.” Paper 85, 5. Petitioner now requests sealing paragraphs 171 and 194, which are alleged to describe “the confidential information contained in the ANDA in connection with secondary considerations of non-obviousness.” Mot. 6. Petitioner states that “public disclosure of the contents” of paragraphs 171 and 194 of Exhibit 2082 “would disclose confidential business terms in a highly competitive market.” *Id.* at 7. Petitioner establishes good cause for sealing paragraphs 171 and 194 of Exhibit 2082. Accordingly, Petitioner’s request to seal paragraphs 171 and 194 of Exhibit 2082 is *granted*.

Granting Motion to Seal Page 51 of Patent Owner's Response

Petitioner moves to seal page 51 of Patent Owner's Response (Paper 32) because "the third sentence of the second full paragraph" discusses Petitioner's "ANDA product and cites to paragraph 171 of [Exhibit 2082]." Mot. 7. Patent Owner previously moved to seal portions of Patent Owner's Response, but that request was denied because it was "based upon an unacceptable protective order." Paper 85, 5. Petitioner now seeks to seal page 51 of that Response to protect "confidential business terms in a highly competitive market." Mot. 7. Petitioner establishes good cause for sealing page 51 of Patent Owner's Response. Accordingly, Petitioner's request to seal page 51 of Patent Owner's Response is *granted*.

Granting Motion for Entry of Default Protective Order

We previously denied entry of a Stipulated Protective Order because it differed from the Board's Default Protective Order by establishing categories of confidential information not shown to be necessary, given that discovery had concluded at that time. Paper 85, 3–4. In the instant Motion, Petitioner "requests entry of the Default Protective Order." Mot. 8. Petitioner states that "Patent Owner does not oppose" the request. *Id.* at 4. Accordingly, we grant Petitioner's request for entry of the Default Protective Order, which shall apply to confidential information filed in this proceeding. Mot., App'x A (copy of Default Protective Order).

Requiring a Joint Stipulation and Counsel Certification

By September 2, 2016, Patent Owner and Petitioner shall file a Joint Stipulation that identifies with particularity the exact portions (by page or paragraph number) of all sealed papers and exhibits that are cited in the Final Written Decision. The Joint Stipulation shall include a Counsel Certification attesting to the accuracy and completeness of the Joint Stipulation, including a statement verifying that the exact portion of each paper and exhibit cited in the Final Written Decision is identified (by page or paragraph number) in the Joint Stipulation.

We specifically provided the parties advance notice “that information subject to a protective order will become public if identified in a final written decision in this proceeding.” Paper 85, 4. Further, the Rules of Practice for Trial Before the Patent Trial and Appeal Board (“Rules of Practice”) provide that:

Confidential information that is subject to a protective order ordinarily will become public 45 days after denial of a petition to institute a trial or 45 days after final judgment in a trial. *There is an expectation that information will be made public where the existence of the information is referred to in a decision to grant or deny a request to institute a review or is identified in a final written decision following a trial.* A party seeking to maintain the confidentiality of information, however, may file a motion to expunge the information from the record prior to the information becoming public.

77 Fed. Reg. No. 157, Part V at Section I.E.6. (Aug. 14, 2012) (emphasis added). There is a presumption, therefore, that any confidential information cited in the Final Written Decision, entered July 28, 2016, shall become public on September 12, 2016.

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