

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

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

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Case IPR2015-00903<sup>1</sup>  
Patent 8,129,431 B2

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

OBERMANN, *Administrative Patent Judge*.

ORDER  
Granting Petitioner's Renewed Motion to Seal  
*37 C.F.R. §§ 42.14 and 42.54*

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<sup>1</sup> Case IPR2015-1871 has been joined with this proceeding.

In an Order dated June 21, 2016, the Board denied Patent Owner's request to enter a Stipulated Protective Order. Paper 77. That same day, the Board denied without prejudice all pending motions to seal documents. Papers 77–80. On July 29, 2016, Petitioner filed a Renewed Motion to Seal. Paper 88 (“Motion” or “Mot.”). This Order addresses that Motion. Patent Owner has “agreed not to oppose this Motion.” Mot. 6.

Concurrently herewith, we enter an Order granting the parties' joint request for entry of an Amended Stipulated Protective Order (Paper 81, App'x A (copy of Amended Stipulated Protective Order)), which governs disclosure of confidential information in this proceeding.

*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 77, 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. 1, 4. 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 4. 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 request to seal certain documents because Petitioner did not describe properly the papers sought to be sealed. Paper 77, 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 50, 3. Based on the information presented in the instant Motion, by contrast, we are persuaded that Petitioner identifies Exhibit 2109 adequately. Mot. 4. 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, 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 77, 5. Petitioner now requests sealing paragraphs 181 and 187, which are alleged to describe “the confidential information contained in the ANDA in connection with secondary considerations of non-obviousness.” Mot. 4. Petitioner states that “public disclosure of the contents” of paragraphs 181 and 187 of Exhibit 2082 “would disclose confidential business terms in a highly

competitive market.” *Id.* at 5. Petitioner establishes good cause for sealing paragraphs 181 and 187 of Exhibit 2082. Accordingly, Petitioner’s request to seal paragraphs 181 and 187 of Exhibit 2082 is *granted*.

*Granting Motion to Seal Page 59 of Patent Owner’s Response*

Petitioner moves to seal page 59 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 181 of [Exhibit 2082].” Mot. 5. Patent Owner previously moved to seal portions of Patent Owner’s Response, but that request was denied because it was “based on an unacceptable protective order.” Paper 77, 5. Petitioner now seeks to seal page 51 of that Response to protect “confidential business terms in a highly competitive market.” Mot. 5. Petitioner establishes good cause for sealing page 59 of Patent Owner’s Response. Accordingly, Petitioner’s request to seal page 59 of Patent Owner’s Response is *granted*.

*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 77, 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.

A strong public interest favors maintaining a complete and understandable record of the patent history, including the factual basis for the Board’s findings and the intelligibility of the Final Written Decision. Petitioner recognizes that public interest but fails to show sufficiently that it is outweighed by any private business interest in this case. Mot. 2–5. By placing confidential information before the Board, Petitioner accepted the risk that the information would become public if relied upon in the Final Written Decision. Rules of Practice, 77 Fed. Reg. No. 157, Part V at Section I.E.6. (Aug. 14, 2012) (“There is an expectation that information will be

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