

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COALITION FOR AFFORDABLE DRUGS II LLC
Petitioner

v.

NPS PHARMACEUTICALS, INC.
Patent Owner

Case IPR2015-01093
Patent 7,056,886

**PATENT OWNER'S COMBINED MOTION TO SEAL AND MOTION FOR
ENTRY OF PROTECTIVE ORDER**

Pursuant to 37 C.F.R. § 42.54, Patent Owner NPS Pharmaceuticals, Inc. (“NPS”) moves to file certain Exhibits filed with its Patent Owner’s Response under seal. As detailed below, these Exhibits contain highly confidential and extremely sensitive information related to financial matters pertaining to Patent Owner’s core business. Further, as set forth below, Patent Owner also requests entry of the Protective Order filed with this Motion as Ex. 2050.

Counsel for Patent Owner contacted Counsel for Petitioner and requested Petitioner’s consent to file certain Exhibits under seal and for consent to enter a modified Protective Order. The parties have been unable to reach an agreement with respect to the modified Protective Order, and Patent Owner understands that Petitioner opposes this motion. Specifically, Petitioner seems to object to the two-tiered format of the Modified Protective Order proposed by Patent Owner that includes an “Attorneys’ Eyes Only” provision. However, due to the granular and highly confidential nature of the Attorneys’ Eyes Only information contained in the relevant Exhibits, Patent Owner requests that that the attached Modified Protective Order, which differs from the Model Protective Order only in that it contains a second tier of confidentiality be entered so that the two identified exhibits may be designated “Attorneys’ Eyes Only.” Further, Patent Owner seeks to have two Confidential (but not Attorneys’ Eyes Only) exhibits sealed from

public view under paragraph 2 of the Modified Protective Order, which mirrors the provisions for Confidential material in the Default Protective Order.

I. GOOD CAUSE EXISTS FOR SEALING CONFIDENTIAL INFORMATION

The Office Patent Trial Practice Guide provides that “the rules aim to strike a balance between the public’s interest in maintaining a complete and understandable file history and the parties’ interest in protecting truly sensitive information.” 77 Fed. Reg. 48756, 48760 (Aug. 14, 2012). Further, those rules “identify confidential information in a manner consistent with Federal Rule of Civil Procedure 26(c)(1)(G), which provides for protective orders for trade secret or other confidential research, development, or commercial information.” *Id.* (citing 37 C.F.R. § 42.54).

As summarized in Table 1 below and detailed below, Patent Owner is submitting two categories of information to support arguments presented in Patent Owner’s Response. The first category of Confidential information includes two expert declarations that summarize sensitive competitive information relating to R&D and testing and marketing research, all of which that falls under paragraph 2 of the Modified Protective Order.¹ Patent Owner does not believe there is any

¹ As noted, this information would also be considered confidential information under the Default Protective Order.

dispute that this “Category 1” information would be considered Confidential even under the Default Protective Order, and thus should be sealed under the “standard” confidentiality provisions. Based on the arguments presented in the Patent Owner Response, Patent Owner believes that the Board will need to rely only on this summary information in making its determinations. Similarly, Patent Owner believes that the Petitioner will need to rely only on this summary information in formulating its arguments in response to the Patent Owner Response.

The second category of information the Highly Confidential – Attorneys’ Eyes Only – R&D and testing and marketing research at a competitively significant level. There are only two documents that would qualify as “Category 2” information, each identified in the chart below. This information serves as the underlying foundation for the declarations provided as “Category 1” material. Patent Owner presents this level of detail only to provide the Board and Petitioner with its basis for the arguments and conclusions presented in the expert declarations associated with the Patent Owner Response.

The disclosure of this information, however, would significantly harm Patent Owner’s competitive position as it would allow a hedge fund entity, or at least an entity owned and controlled by Hedge Funds (see generally Pet., 3-5; Paper 9), to have direct access to some of the most sensitive R&D and marketing information

there is. Patent Owner also submits that it is necessary to designate preclude Petitioner's in-house counsel from accessing certain information because it is believed that they are substantively involved in the decision-making of Petitioner (and other RPI's to this proceeding). Allowing Petitioner access to Patent Owner's this highly sensitive information in this proceeding would be both unnecessary and dangerous.

The public interest will not be harmed by the entry of this attached Modified Protective Order, filing of the Category 1 exhibits under seal as Confidential information, or filing the Category 2 exhibits under seal as Attorney's Eyes Only. In particular, there should be no reason for the Board to rely on Category 2 material in any decision regarding patentability. Thus, the Category 2 materials should not be implicated. Further, to the extent that any sealed Confidential materials are relied on by the Board in any decision regarding patentability, they may ultimately become part of the public record regardless of the outcome of the instant motion.

As mentioned above, Petitioner's ability to raise its claims or defenses will not be impacted by filing the identified exhibits under seal. In particular, Petitioner (both in-house and outside counsel) will have access to the core information that supports Petitioner's Patent Owner Response. Additionally, to the extent Petitioner's outside counsel needs access to the underlying Attorneys' Eyes Only

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