

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UMICORE AG & CO. KG,
Petitioner,

v.

BASF CORPORATION
Patent Owner.

Case No. IPR2015-01123
U.S. Patent No. 8,404,203

**PATENT OWNER COMBINED MOTION TO SEAL AND MOTION FOR
PROTECTIVE ORDER**

Patent Owner BASF Corporation (“Patent Owner”) hereby moves for entry of the Protective Order appended below as Addendum A and further moves to seal certain highly confidential and competitively sensitive exhibits submitted with its Patent Owner Response, as described herein. Petitioner Umicore AG &Co. KG (“Petitioner”) has not provided its position on the motion to file under seal or the motion for entry of the Protective Order, however Petitioner indicated that it will provide its position after reviewing the exhibits. Petitioner has agreed that until the present combined motion is decided, the confidential exhibits will be treated as **HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY**.

Patent Owner submits its Response concurrently with the filing of this combined motion. In support of its Response, Patent Owner submits certain documents designated as **HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY** by Patent Owner. Patent Owner submits that these supporting exhibits are confidential and competitively sensitive and must be properly sealed in order to protect its highly confidential business information from disclosure to its direct competitor’s employees and the general public.

I. MOTION TO SEAL

Patent Owner moves to seal portions of the declaration of Dr. Ahmad Moini (Exhibit 2019) and the declaration of Olivia Schmidt (Exhibit 2034) submitted with this motion. Patent Owner has concurrently filed a redacted declaration of Dr.

Ahmad Moini and a redacted declaration of Olivia Schmidt. Patent Owner has served Petitioner with both confidential and redacted versions of the Response and supporting exhibits.

These declarations include competitively sensitive business information of Patent Owner. This highly confidential business information includes non-public technical information regarding the composition of Patent Owner's commercial products (in Exhibit 2019) and confidential market share information regarding the relevant market for such products (in Exhibit 2034).

The record of an *inter partes* review proceeding, including documents and things, is made available to the public, except as otherwise ordered. 37 C.F.R. § 2.14. But despite the default rule of public availability, the Board will seal confidential information for "good cause," because it is necessary 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." 37 C.F.R. § 42.54(a); 77 Fed. Reg. 48756, 48760 (Aug. 14, 2012). As laid out in the Office Trial Practice Guide, the Board treats confidential information "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.* at 48760. Patent Owner submits that good cause to seal Exhibits 2019 and 2034 exists.

Petitioner in this proceeding is a direct competitor. In fact, Petitioner is one of only three major companies in the relevant market, including Patent Owner. If the highly confidential composition of its products and the related market share information were disclosed publicly or to the Petitioner's employees, this disclosure would cause competitive business harm to Patent Owner.

In other *inter partes* review proceedings, the Board has found good cause to seal sensitive and confidential trade secret information like that contained in Exhibit 2019. See, e.g., *First Quality Baby Products, LLC v. Kimberly-Clark Worldwide, Inc.*, IPR2014-01024, Paper 56, at 32 (PTAB December 14, 2015). Exhibit 2019 discusses the composition of Patent Owner's commercially available product and its contents are competitively sensitive information that would cause competitive harm to Patent Owner if its contents were disclosed to employees of Petitioner, who is a direct competitor, or the general public. The sealing of Exhibit 2019 will not inhibit the general public from understanding the underlying arguments and evidence that Patent Owner is relying upon in the public versions of its filings.

Further, as evidenced by other *inter partes* review proceedings, the Board has held that confidential information such as the confidential market share information can be sealed. See, e.g., *Baby Trend, Inc. v. Wonderland Nurserygoods Co., Ltd.*, IPR2015-00841, Paper 35, at 3 (PTAB November 17,

2015). In *Baby Trend*, the Board held that market share information that was not otherwise public was evidence that good cause existed for sealing this information. *Id.* The sealing of this competitively sensitive and confidential market share information will not inhibit the general public from understanding the underlying arguments and evidence that Patent Owner is relying upon in the public versions of its filings.

As stated above, Patent Owner's undersigned counsel certifies that Patent Owner has in good faith attempted to confer with Petitioner as to the entry of the Proposed Protective Order, but Petitioner has elected to review the confidential exhibits prior to providing its position.

II. MOTION FOR ENTRY OF A PROTECTIVE ORDER

The parties have met and conferred regarding the entry of a protective order, which is appended as Addendum A. The proposed Protective Order is consistent with the Default Protective Order of this Board with certain edits applicable to this case. A redline of these edits is appended as Addendum B.

Patent Owner's undersigned counsel certifies that Patent Owner has in good faith attempted to confer with Petitioner regarding the entry of a Protective Order however counsel for Petitioner has stated that it would state its position on the Protective Order until after having reviewed the present motion.

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