

Filed: November 22, 2017

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MYLAN PHARMACEUTICALS INC., TEVA PHARMACEUTICALS USA,
INC. and AKORN INC.,¹
Petitioners,

v.

ALLERGAN, INC.,
Patent Owner.

Case IPR2016-01127 (US 8,685,930 B2)
Case IPR2016-01128 (US 8,629,111 B2)
Case IPR2016-01129 (US 8,642,556 B2)
Case IPR2016-01130 (US 8,633,162 B2)
Case IPR2016-01131 (US 8,648,048 B2)
Case IPR2016-01132 (US 9,248,191 B2)

**PETITIONERS' OPPOSITION TO
ST. REGIS MOHAWK TRIBE'S MOTIONS TO SEAL**

¹ Cases IPR2017-00576 and IPR2017-00594, IPR2017-00578 and IPR2017-00596, IPR2017-00579 and IPR2017-00598, IPR2017-00583 and IPR2017-00599, IPR2017-00585 and IPR2017-00600, and IPR2017-00586 and IPR2017-00601, have respectively been joined with the captioned proceedings. The word-for-word identical paper is filed in each proceeding identified in the caption pursuant to the Board's Scheduling Order (Paper 10).

I. INTRODUCTION

Petitioners oppose the motion to seal filed by the St. Regis Mohawk Tribe (“the Tribe”) because the Tribe’s request is overly broad and would seal information that is already the subject of public record, and in any event, has not been established as so sensitive as to outweigh the public’s right to a full and transparent record in this proceeding. For example, the Tribe has failed to establish that the proposed redactions to Sections 3(b)-(c) and Schedule 3A of Exhibit 2086 and Schedule 1.43 of Exhibit 2087 are necessary to protect trade secret or other confidential research, development, or commercial information.² Petitioners accordingly request that the Board deny the Tribe’s motion to seal, except as noted below.

II. PROCEDURAL BACKGROUND

On September 8, 2017, the Board ordered the Patent Owner, Allergan Inc. (“Allergan” or “Patent Owner”), to file the Long Form Agreement and allowed Allergan to restrict public access only if necessary. On September 9, 2017, Allergan did so, designating the entirety of both documents as available only to the

² Paper numbers and exhibits cited in this Opposition refer to those documents filed in IPR2016-01127. Similar papers and exhibits were filed in the other proceedings.

Board and the Parties. However, on September 11 and September 26, the Board held conference calls during which counsel and the Board discussed the content and meaning of Exhibits 2086 and 2087. The transcripts of those calls, Exhibits 1137 and 1143, are publicly available in their entirety.

On October 10, 2017, Petitioners asked the Tribe to identify what material from Exhibits 2086 and 2087 “remains confidential” because “much of the underlying agreements has already been made public (for example, through reference in the Tribe’s motion).” EX1166. The Tribe’s counsel responded that it would “confer about what, if anything, needs to remain under seal” after Petitioners filed their opposition to the Tribe’s motion to dismiss (Paper 86). *Id.* Neither the Tribe nor Allergan did so.

On November 9, 2017, almost 9 weeks after Allergan originally filed the exhibits in these proceedings, the Board ordered the parties “to meet and confer as to whether any of the information in Exhibits 2086 and 2087 and Paper 86 [Petitioners’ Opposition] should be treated as confidential.” Paper 97 at 2. The Board ordered the Tribe to show good cause as to why any information sought to be sealed constitutes confidential information and “provide a detailed explanation of the efforts undertaken to protect the confidentiality of the information.” *Id.*

Following the Board’s Order, the Petitioners and Tribe met and conferred regarding the appropriate scope of any confidentiality remaining in Exhibits 2086,

2087 and Paper 86. The Tribe agreed that Petitioners' Opposition (Paper 86) could be filed publicly without redaction. However, Tribe's proposed redactions to Exhibits 2086 and 2087 remained under discussion when the Tribe prematurely filed its motion to seal on November 16, 2017, without having received Petitioner's response regarding the remaining redactions and one day before the filing deadline. The Tribe's Motion incorrectly stated that the Petitioners consented to the Tribe's Motion. Paper 98 at 1.

II. CURRENTLY REDACTED PORTIONS OF EXHIBIT 2086 AND EXHIBIT 2087 SHOULD BE AVAILABLE TO THE PUBLIC.

“There is a strong public policy that favors making information filed in an *inter partes* review open to the public,” and the Tribe bears the burden to establish good cause for sealing the information. *Garmin Int'l, Inc. v. Cuozzo Speed Techs. LLC*, IPR2012-00001, Paper 34 at 1-2 (PTAB Mar. 14, 2014); 37 C.F.R. § 42.14. Indeed, “the default rule is that all papers filed in an *inter partes* review are open and available for access by the public.” *Id.* at 2. Furthermore, as a threshold matter, only “confidential information” may be protected from disclosure. *Id.*; 35 U.S.C. § 316(a)(7); Office Patent Trial Practice Guide, 77 Fed. Reg. 48756, 48760 (Aug. 14, 2012); 37 C.F.R. § 42.54. Even if information is not public, it must contain “trade secret or other confidential research, development, or commercial information” to be eligible for sealing. *Garmin*, IPR2012-00001, Paper 34 at 2 (quoting Trial Practice Guide, 77 Fed. Reg. at 48760). Even when a movant

demonstrates that information is non-public and “truly sensitive,” it must also establish that its interest in protecting the information outweighs the public’s interest in a complete and understandable file history. *See Garmin*, IPR2012-00001, Paper 34 at 3-4 (citing Trial Practice Guide, 77 Fed. Reg. at 48760).

The Tribe has failed to establish that Allergan or the Tribe has any protectable trade secret or competitive interest in the proposed redactions to Section 3(b)-(c) and Schedule 3A of Exhibit 2086 and Schedule 1.43 of Exhibit 2087, much less that such an interest outweighs the public interest in access to that information.

A. The Tribe’s Motion Ignores Express Requirements for a Motion to Seal Identified in the Board’s Order.

In the order of November 9, 2017, the Board established substantive requirements for any motion to seal any information in Exhibits 2086 and 2087. The Board specified that (1) “the Tribe may file a motion to seal these documents with a showing of ‘good cause’ as to why the information sought to be sealed constituted confidential information,” and (2) any such motion “shall provide a detailed explanation of the efforts undertaken to protect the confidentiality of the information.” Paper 97 at 2.

The Tribe’s motion to seal fails even to address, much less “provide a detailed explanation” of the efforts, if any, that have been undertaken to protect the confidentiality of the information the Tribe now seeks to have sealed. Under 37

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