

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MYLAN PHARMACEUTICALS INC.,
Petitioner,

v.

COSMO TECHNOLOGIES LIMITED,
Patent Owner.

Case IPR2017-01035

Patent 9,320,716

PETITIONER'S MOTION TO SEAL

I. Introduction

Pursuant to the Board's authorization via email on July 7, 2017, Petitioner hereby moves to seal *a few sentences* of the Patent Owner's Preliminary Response ("Preliminary Response") (Paper 7) under 37 C.F.R. §§ 42.14 and 42.54. The information identified as confidential in this Motion has not been published or otherwise made public. The Parties have met and conferred and Patent Owner opposes this motion.¹

II. Legal Standard

Under 35 U.S.C. § 316(a)(1), the default rule is that all papers filed in an *inter partes* review are open and available for access by the public and a party may file a motion to seal and that the information at issue is sealed pending the outcome of the motion. 37 C.F.R. § 42.14 provides that "[a] party intending a document or thing to be sealed shall file a motion to seal concurrent with the filing of the document or thing to be sealed." The moving party has the burden of establishing "good cause" for sealing documents containing confidential information. *Garmin Int'l, Inc. v. Cuozzo Speed Techs. LLC*, IPR2012-00001, Paper 37 at 4 (PTAB, Apr. 5, 2013); *see also* 37 C.F.R. §§ 42.20(c), 42.54.

¹ Patent Owner also filed a public redacted Preliminary Response (Paper 8), which is the subject of Petitioner's concurrently filed motion to expunge.

The Board’s 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. Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,760; *see also Illumina, Inc. v. Trustees of Columbia University in the City of New York*, IPR2013-00011, Paper 66 at 6 (PTAB Aug. 12, 2013) (granting a motion to seal “technical and business information”).

III. Identification of Confidential Information

In this Motion to Seal, Petitioner requests limited portions of the Preliminary Response be sealed as “PROTECTIVE ORDER MATERIAL” under the Default Protective Order for revealing Petitioner’s confidential information pertaining to Petitioner’s ANDA product. Petitioner’s ANDA was filed confidentially with the Food and Drug Administration (“FDA) in order to obtain FDA approval to market a generic pharmaceutical product. No information from the ANDA has been made public by Petitioner or by the FDA, and it is not otherwise available to the public. *Sandoz, Inc. v. EKR Therapeutics, LLC*, IPR2015-00005, Paper 21 at 2 (PTAB Apr. 24, 2014) (sealing entire ANDA). Indeed, Patent Owner admits in its Preliminary Response that Petitioner has claimed that its ANDA information is confidential information, and that such information is subject to the District Court’s Protective Order. Preliminary Response at 6 fn. 3; *Sandoz, Inc.*, IPR2015-

00005, Paper 21 at 3 (PTAB Apr. 24, 2014) (discussing relevance of considering the Protective Order in the Board’s determination).

The following passages of the Preliminary Response contain confidential information that Petitioner seeks to redact:

- The portion of the sentence on page 6, footnote 2, the parenthetical at line 6 that is between the phrases “prove infringement” and “is nevertheless”;
- The portion of the sentence on page 36 lines 6-8 that is between the phrases “in district court litigation—” and “—should be rejected”; and
- The portion of the sentence on page 51 lines 9-11 that is between the phrases “in district court litigation—” and “—should be rejected.”

The identified portions reveal confidential information regarding Petitioner’s ANDA product—specifically how the active ingredient in Petitioner’s ANDA product is distributed.

IV. Good Cause Exists for Sealing the Confidential Information

Petitioner requests that the above identified three (3) statements revealing confidential information about Petitioner’s ANDA product be sealed. Public disclosure of information regarding the arrangement of a component in Petitioner’s ANDA product, or how it is created/tested, would reveal confidential business information and is trade secret and/or confidential commercial information. It therefore qualifies as confidential information under 37 CFR § 42.2. Public disclosure of the information that Petitioner seeks to seal would be commercially harmful to Petitioner.

The Board has recognized such information, especially if it reveals information from the ANDA, should be protected from public disclosure. *See Sandoz, Inc.*, IPR2015-00005, Paper 21 at 2 (PTAB Apr. 24, 2014) (sealing entire the ANDA); *InnoPharma Licensing, Inc. v. Senju Pharm. Co., Ltd.*, IPR2015-00902, Paper 100 at 2-3 (PTAB Aug. 29, 2016) (sealing portions of the ANDA).

Even though Patent Owner did not submit Petitioner's ANDA itself as an exhibit, the assertions made by Patent Owner in its Preliminary Response with respect to the arrangement of a component in Petitioner's ANDA product is based on information Patent Owner gained because it has access to Petitioner's ANDA, and the related defenses being asserted by Petitioner, in the related District Court litigation. The information Petitioner seeks to seal is directly derived from Petitioner's ANDA.

In its Motion to Seal (Paper 9), Patent Owner asserts that the sole basis to seal the Preliminary Response is because it quotes Exhibit 2025, excerpts of a trial transcript from another district court litigation. Paper 9 at 3. Petitioner, however, was not a party to that other litigation and no information about Petitioner's ANDA product was revealed in that litigation. Nevertheless, the Preliminary Response reveals information regarding Petitioner's ANDA product. Tellingly, several of the redactions made by Patent Owner do not even cite or reference Exhibit 2025,

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.