

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

**PATENT OWNER'S RESPONSE TO PETITIONER'S MOTION TO
EXPUNGE
UNDER 37 C.F.R. § 42.107**

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Patent Owner disagrees that expungement of Paper No. 8 (“Original Redacted Preliminary Response”) is proper at this stage of the proceeding and therefore opposes Petitioner’s motion.

A motion to expunge a document from the record is only proper “[a]fter denial of a petition to institute a trial or after final judgment in a trial.” 37 C.F.R. § 42.56 (emphasis added). This is because, in order to show that expungement is warranted, the moving party “must show that...[its] interest in expunging [a document] outweighs the public’s interest in maintaining a complete and understandable file history of [an] *inter partes* review.” *RPX Corp. v. VirnetX Inc.*, IPR2014-00171, Paper No. 62 at 3 (Sept. 9, 2014). Such an assessment cannot be made until there is a final Board decision that, importantly, may or may not substantively rely on information that is provisionally sealed. *See Arista Networks, Inc. v. Cisco Systems, Inc.*, IPR2016-00309, Paper No. 51 at 4-5 (May 8, 2017) (“[I]f a final written decision substantively relies on any information in a sealed document, or if the information otherwise becomes publically available, the information may be unsealed by an Order of the Board or may become public if the parties do not to move timely to expunge it....”). It is also not appropriate to expunge a document if the confidential information contained therein becomes publicly available before the final decision. *Id.*

Petitioner's motion to expunge was filed prematurely and therefore fails to address whether expungement "outweighs the public's interest in maintaining a complete and understandable file history of this *inter partes* review." *RPX Corp.*, IPR2014-00171, Paper No. 62 at 3.

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Instead of explaining why it believes that expungement at this stage of the proceeding is proper, Petitioner makes false accusations against Patent Owner in its motion. *See* Mot. 5-6. Patent Owner is compelled to respond.

First, Petitioner accuses Patent Owner of not conducting a meet and confer. *See* Mot. 5 ("Patent Owner's Motion to Seal (Paper 9), mak[es] no representation that Patent Owner met and conferred with Petitioner."). This is demonstrably false. The parties met and conferred about the scope of protection for this proceeding and agreed to use the default protective order, as reported in Patent Owner's motion. *See* Patent Owner's Motion To Seal (Paper 9) at 2 ("Patent Owner and [Petitioner] Mylan conferred regarding the entry of a protective order in this case. The parties agreed to adopt the Board's default protective order."). Patent Owner first emailed Petitioner on June 13, more than a week before filing the Preliminary Response, about the entry of a protective order in the proceedings. *See* Ex. 2036 at 1. The parties then held a meet and confer over teleconference two days later about the submission of documents under seal. *Id.*

Second, Petitioner accuses Patent Owner of “delay tactics” for the delay in Petitioner’s request to seal and expunge the Original Redacted Preliminary Response (Paper No. 8). *See* Mot. 6. But the timeline in Petitioner’s own motion shows that this is not true. Petitioner first informed Patent Owner that it sought additional redactions of the Preliminary Response *five days* after it was filed. *See* Mot. 5 (June 22 to June 27).¹ Patent Owner made itself available for a meet and confer two days later. *Id.* (June 27 to June 29).

On the meet and confer, Petitioner asked patent owner to expunge the Original Redacted Preliminary Response. After reviewing PTAB regulations and decisions concerning expungement, discussed above, Patent Owner responded the next day that it believed a request for expungement was improper and advised instead that Petitioner should file a motion to seal if it believed the Original Redacted Preliminary Response contained confidential information.

Petitioner then waited *another five days* to request to file a motion to seal and expunge with the Board. *See* Mot. 5-6 (June 30 to July 5). Thus, it was not Patent Owner’s actions, but rather was Petitioner’s inactivity, that resulted in the

¹ In its request for a meet and confer on this issue, Petitioner also raised additional issues related to this IPR, including a request to correct its Petition (which the Board denied) and the parties’ district court litigation.

Original Redacted Preliminary Response being on the public docket for almost two weeks.

Dated: July 20, 2017

Respectfully submitted,

/s/Gary N. Frischling

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