

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ARGENTUM PHARMACEUTICALS LLC,
Petitioner,

v.

ALCON RESEARCH, LTD.,
Patent Owner.

Case IPR2017-01053
Patent 8,268,299 B2

Before GRACE KARAFFA OBERMANN and SUSAN L. C. MITCHELL,
Administrative Patent Judges.

OBERMANN, *Administrative Patent Judge.*

ORDER

*Denying without Prejudice Patent Owner's
Motion to Seal and for Entry of Proposed Protective Order
35 U.S.C. § 316; 37 C.F.R. §§ 42.14, 42.54*

On December 22, 2017, Patent Owner filed a Motion to Seal (directed to Exhibits 2008–2022, 2029, and 2040–2058) and for Entry of Proposed Protective Order. Paper 24 (“Motion” or “Mot.”). In response to a Board inquiry, Petitioner advised that it would file no opposition. *See* Ex. 3001 (email communication). For reasons set forth below, the Motion is *denied without prejudice* subject to the conditions explained in this Order.

Motion for Entry of Protective Order

Our rules provide for entry of a protective order when necessary to protect confidential information filed in a proceeding. *See* 37 C.F.R. §§ 42.14, 42.54. As explained in the next section, the Motion does not demonstrate “good cause” for sealing any of the exhibits that are the subject of the Motion. Accordingly, we *deny without prejudice* the request for entry of a protective order. The exhibits sought to be sealed in the Motion, however, shall continue to be provisionally sealed until such time as the Board resolves a second motion to seal, a request to unseal, or until the exhibits are expunged pursuant to the guidance in this Order. *See* 37 C.F.R. § 42.14 (discussing Board’s authority to provisionally seal information).

Motion to Seal

Patent Owner seeks to seal Exhibits 2008–2022, 2029, and 2040–2058. Mot. 2. In an *inter partes* review, the moving party bears the burden of showing that the relief requested should be granted. 37 C.F.R. § 42.20(c). A party moving to seal must show “good cause” for the relief requested. 37 C.F.R. § 42.54(a). We direct the parties to prior Board decisions for guidance on how to establish “good cause” to seal a document or thing in an *inter partes* review. *See Garmin Int’l v. Cuozzo Speed Techs., LLC*, Case IPR2012-00001 (PTAB Mar. 14, 2013) (Paper 34) (“IPR001”) and *Corning*

Optical Communications RF, LLC, v. PPC Broadband, Inc., Case IPR2014-00440 (PTAB April 6, 14, and 17, 2015) (Papers 46, 47, 49) (“IPR440”).

For reasons that follow, we determine that the Motion fails to show “good cause” for sealing Exhibits 2008–2022, 2029, and 2040–2058. 37 C.F.R. § 42.54(a). Accordingly, the Motion is *denied without prejudice* to file a second motion subject to the conditions set forth below.

1. The “Good Cause” Standard

The “good cause” standard for granting a motion to seal reflects the strong public policy for making all information in an *inter partes* review open to the public. 37 C.F.R. § 42.54; *see* IPR001, Paper 34, 3. We are mindful that, in district court, a party routinely will determine (by marking or stamping a document “confidential”) whether a document is produced under the terms of a district court protective order. By contrast, in an *inter partes* review, “the default rule is that all papers . . . are open and available for access by the public.” IPR001, Paper 34, 2; *see* IPR440, Paper 46, 3 (explaining that, unlike in a civil action in district court or an investigation before the U.S. International Trade Commission, motions to seal in an *inter partes* review are made “at trial”; therefore, information will be sealed by only upon a showing of “good cause”).

“Good cause” for sealing is established by a “sufficient explanation as to why” the “information sought to be sealed is confidential information” (IPR001, Paper 34, 3), a demonstration that the information is not “excessively redacted” (IPR440, Paper 46, 2), and a showing that, on balance, the strong “public[] interest in maintaining a complete and understandable record” is outweighed by “the harm to a party, by disclosure of information” and “the need of either party to rely specifically on the

information at issue.” IPR440, Paper 47, 3 (footnote omitted).

Consequently, a movant to seal must demonstrate adequately that (1) the information sought to be sealed is truly confidential, (2) a concrete harm would result upon public disclosure, (3) there exists a genuine need to rely in the trial on the specific information sought to be sealed, and (4), on balance, an interest in maintaining confidentiality outweighs the strong public interest in having an open record. 37 C.F.R. § 42.54(a); IPR440, Paper 47, 2–3; IPR440, Paper 49, 2.

2. Exhibits 2008–2022

The Motion avers that Exhibits 2008–2022 are “confidential laboratory notebooks” and “adjunctive data used by [Patent Owner’s] employees to record their research and development work.” Mot. 2. The Motion, however, lacks explanation of how these exhibits relate to any disputed issue of fact, much less why they are necessary to a specific position taken by a party in this proceeding. On that point, Patent Owner incongruously asserts that “the data on which [Patent Owner] relies in this proceeding are disclosed in public patent specifications.” Mot. 2.

Even if we accept that the information reflected in these exhibits has never been disclosed to the public, the Motion fails to describe adequately a harm that will result in the event of disclosure. In that regard, the Motion stops short of stating that public disclosure of Exhibits 2008–2022 will result in any concrete injury. Instead, the Motion avers that disclosure “has the potential to cause” competitive harm. *Id.* at 3.

Having failed to identify sufficiently either a harm incident to disclosure or a reason why the information is necessary in this trial, the Motion fails also to balance “the public’s interest in maintaining a complete

and understandable record” against a “harm to a party” incident to “disclosure of information” or “the need of either party to rely specifically on the information at issue.” IPR440, Paper 47, 3 (footnote omitted). In addition, no corresponding public redacted versions of these exhibits were filed with the Motion. The Motion is silent on that point, providing no reason why the exhibits should be sealed in their entirety.

3. Exhibit 2029

Patent Owner seeks to seal portions of Exhibit 2029, which is the declaration of Dr. Henry Grabowski. Mot. 4. In an attempt to make out the “good cause” standard, the Motion refers us to arguments made in connection with Exhibits 2040-2058. For reasons that follow, however, the Motion fails to make out “good cause” for sealing Exhibits 2040–2058. Our analysis below applies with equal force to Exhibit 2029.

4. Exhibits 2040–2058

The Motion avers that Exhibits 2040–2058 “summarize data provided to [Patent Owner] by IMS Health/IQVIA and Encuity Research”; namely, two entities that are non-parties in this proceeding. Mot. 3. Patent Owner asserts no ownership interest in the information sought to be sealed, and the Motion advances no other information sufficient to show that Patent Owner is competent to establish that the exhibits reflect truly confidential information. Nor does the Motion establish that Patent Owner is competent to address any harm that would inure to the owners of the information, in the event that the exhibits are disclosed to the public. *See generally* Mot.

The Motion suggests that the owners of the information freely permit disclosure to members of the public who pay a fee. Mot. 3–4 (reflecting “undersigned counsel’s understanding that” the owners of the information

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