

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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MYLAN PHARMACEUTICALS, INC.,  
Petitioner,

v.

BAYER INTELLECTUAL PROPERTY GMBH,  
Patent Owner.

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Case IPR2018-01143  
Patent 9,539,218 B2

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Before JACQUELINE WRIGHT BONILLA, *Acting Deputy Chief  
Administrative Patent Judge*, RAMA G. ELLURU and  
TINAE. HULSE, *Administrative Patent Judges*.

HULSE, *Administrative Patent Judge*.

DECISION

Granting Petitioner's Motion for Entry of Stipulated Protective Order and  
Denying Without Prejudice Petitioner's Motion to Seal  
*37 C.F.R. § 42.54*

## I. INTRODUCTION

Mylan Pharmaceuticals Inc. (“Petitioner”) filed a Motion to Seal Exhibits 1066–1068. (Paper 9, “Mot.”). In that Motion, Petitioner requests entry of a Stipulated Protective Order. Mot. 1. Bayer Intellectual Property GmbH (“Patent Owner”) did not file an opposition to the Motion.

For the reasons set forth below, we grant Petitioner’s motion for entry of a Stipulated Protective Order and deny without prejudice Petitioner’s Motion to Seal.

## II. ANALYSIS

The standard for granting a motion to seal is “for good cause.” 37 C.F.R. § 42.54. Petitioner, as the moving party, has the burden of proof in showing entitlement to the requested relief. 37 C.F.R. § 42.20(c). The Board has a strong interest in the public availability of the proceedings. Accordingly, our rules aim 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.” Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,760 (Aug. 14, 2012) (“Trial Practice Guide”).

### A. *Proposed Modified Protective Order*

Petitioner requests entry of the Stipulated Protective Order submitted as Exhibit 1070. Paper 9, 1. The Stipulated Protective Order differs from the Default Protective Order in the Trial Practice Guide by replacing the word “Representatives” with the phrase “Attorneys associated with the law firm.” *Id.* (citing redline comparison in Ex. 1071).

Having considered the minor changes in the proposed Stipulated Protective Order, we grant Petitioner’s motion for entry of the Stipulated Protective Order.

*B. Motion to Seal Exhibits 1066–1068*

Petitioner requests that Exhibits 1066–1068 (“the Exhibits”) be sealed because they allegedly contain “non-public, business-sensitive information.” *Id.* at 2. The Exhibits are briefs filed under seal in the district court case and are governed by the protective order in that case. *Id.* Here, Petitioner cites the exhibits to support its claim construction argument, noting that Patent Owner “asked the district court to further construe Bayer’s construction of rapid-release tablet.” Paper 8 (“Reply”), 1 (citing Exhibits 1066–1068).

To show good cause, Petitioner contends the following:

Mylan’s competitors are not privy to the redacted portions of Exhibits 1066–1068. Disclosure of this non-public briefing to Mylan’s competitors may subject Mylan to business-related competitive harm. Mylan has minimized any prejudice to the public’s interest in access to the record in these proceedings by filing its Reply brief without redaction (while preserving the confidentiality of the redacted information in the exhibits). The prospect of competitive harm to Mylan, coupled with the minimal public interest in accessing the underlying exhibits that were filed under seal at the district court, favors sealing the unredacted documents.

Mot. 2.

It is unclear from Petitioner’s Motion how disclosure of the claim construction arguments in the Exhibits could cause Petitioner “business-related competitive harm.” *Id.* The only explanation Petitioner provides is that its “competitors are not privy to the redacted portions” of the exhibits. *Id.* But that assertion does not explain how the information would cause

competitive harm, particularly when the information relates to claim construction and will likely—if not necessarily—become public during trial. Moreover, we question the confidentiality of certain redactions, which include quotes from public documents, such as the '218 patent specification (Ex. 1067, 1) and public filings in this proceeding (Ex. 1066, 1–2).

We also note that Patent Owner filed its Surreply (Paper 10) under seal in its entirety without an accompanying motion to seal. One month later, Patent Owner filed a redacted, public version of the Surreply, redacting the allegedly confidential information from Petitioner's Exhibits.<sup>1</sup> Paper 11. But the public version of the Surreply also redacts quotes from public documents (*see id.* at 1), which again raises doubt as to the confidentiality of the information redacted.

Accordingly, having considered the arguments, we determine Petitioner has not established good cause to seal Exhibits 1066–1068 (or the Surreply). We, therefore, deny Petitioner's Motion to Seal without prejudice. If Petitioner maintains that the redacted information is

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<sup>1</sup> We assume Patent Owner did not file a motion to seal because it is Petitioner who contends the information is confidential. As a practical matter, however, a party who is submitting under seal the opposing party's confidential information may concurrently file a motion to seal with the filing (*see* 37 C.F.R. § 42.14) and indicate that it is doing so because the opposing party has designated it confidential information. The panel may then require the designating party to respond with an explanation as to why the information should be sealed.

We also note that a public, redacted version of the Surreply should have been filed along with the confidential version. *See* Trial Practice Guide, 77 Fed. Reg. at 48,770 (“Where confidentiality is alleged as to some but not all of the information submitted to the Board, the submitting party shall file confidential and non-confidential versions of its submission . . .”).

confidential and requires sealing, Petitioner may renew its Motion to Seal the redacted portions of Exhibits 1066–1068 and the redacted portions of the Surreply by December 14, 2018. The documents shall remain under seal until the motion is decided. If, however, Petitioner does not renew its motion, the documents shall become public.

### III. CONCLUSION

For the foregoing reasons, we conclude that Petitioner has established good cause to enter its Stipulated Protective Order, but has not established good cause to seal Exhibits 1066–1068.

### IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that Petitioner’s motion for entry of the Stipulated Protective Order is *granted*;

FURTHER ORDERED that Petitioner’s Motion to Seal Exhibits 1066–1068 is *denied without prejudice*;

FURTHER ORDERED that Petitioner may file a Renewed Motion to Seal Exhibits 1066–1068 and Patent Owner’s Surreply by December 14, 2018; and

FURTHER ORDERED that the documents shall remain under seal until the Renewed Motion to Seal is decided or if Petitioner does not file a Renewed Motion by December 14, 2018.

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