

UNITED STATES PATENT AND TRADEMARK OFFICE

**BEFORE THE PATENT TRIAL AND APPEAL
BOARD**

TWI PHARMACEUTICALS, INC.,
Petitioner,

v.

MERCK SERONO SA,
Patent Owner.

Case IPR2023-00050

Patent 8,377,903

**PATENT OWNER'S MOTION TO SEAL AND FOR ENTRY OF
DEFAULT PROTECTIVE ORDER**

Motion to Seal and For Entry of Default Protective Order

I. INTRODUCTION

Under 37 C.F.R. §§ 42.54 and 42.14, Patent Owner, Merck Serono SA, hereby moves to seal Exhibits 2039, 2048, 2049, and 2050 submitted with the Patent Owner's Response. Good cause to seal these documents exists because they include highly confidential, competitively sensitive information of Patent Owner, which Patent Owner designated as "PROTECTIVE ORDER MATERIAL." Patent Owner further moves for entry of the Board's Default Protective Order. Petitioner, TWi Pharmaceuticals, Inc., has consented to the Board's Default Protective Order with respect to information for which good cause to seal is established, but has not taken a position regarding Patent Owner's Motion to Seal.

II. AUTHORIZATION FOR THIS MOTION

Prior Board authorization is not required for "motions where it is impractical for a party to seek prior Board authorization." Consolidated Trial Practice Guide (Nov. 20, 2019) (the "Consolidated Trial Practice Guide"), p. 37. "Motions where it is not practical to seek prior Board authorization include motions to seal. . . ." *Id.*

III. CERTIFICATION OF CONFERENCE

Under 37 C.F.R. § 42.54, Patent Owner, through the undersigned,

Motion to Seal and For Entry of Default Protective Order

hereby certifies that it corresponded with Petitioner through counsel on February 29 and March 8, 2024 in good faith regarding this motion.

Petitioner agreed to entry of the Board's Default Protective Order for information which Patent Owner establishes good cause to seal, but has not taken a position as to whether any particular exhibits should be sealed.

IV. GOOD CAUSE EXISTS FOR SEALING EXHIBITS 2039, 2048, 2049, AND 2050

The Board may issue protective orders for good cause to protect a party from disclosing confidential information. Consolidated Trial Practice Guide, pp. 19-20; 37 C.F.R. § 42.54. In deciding whether to grant a motion to seal, the Board must find “good cause,” and must “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.” *Garmin International, Inc. et al. v. Cuozzo Speed Technologies LLC*, IPR2012-00001, Paper 36 at 4 (P.T.A.B. April 5, 2013). “Confidential Information” is identified in a manner consistent with Fed. R. Civ. P. 26(c)(1)(G), “which provides for protective orders for trade secret or other confidential research, development, or commercial information.” *Id.*

Good cause for sealing material can be established by demonstrating that the balance of the following considerations favors sealing the material:

Motion to Seal and For Entry of Default Protective Order

whether (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. *See Argentum Pharms. LLC v. Alcon Research, Ltd.*, IPR2017-01053, Paper 27 at 4 (P.T.A.B. January 19, 2018).

Exhibits 2039 (“Deposition Transcript of Nicholas Bodor, February 15, 2024”), 2048 (the “IVAX-Serono Agreement”), 2049 (“December 17, 2003, Briefing Document”), and 2050 (“August 27, 2003, Meeting Minutes”) contain confidential research, development, or business information designated as “PROTECTIVE ORDER MATERIAL” under the Default Protective Order that was agreed-upon by the parties. Patent Owner moved to seal three of the same exhibits—Exhibits 2048, 2049, and 2050—unopposed in IPR2023-00480 and -00481. The balance of the *Argentum* factors favors sealing Exhibits 2039, 2048, 2049, and 2050.

a. Exhibits 2039, 2048, 2049, and 2050 Contain Confidential Information

The information Patent Owner seeks to seal in Exhibits 2039, 2048, 2049, and 2050 is “truly confidential.” *See* Fed. R. Civ. P. 26(c)(1)(G).

Motion to Seal and For Entry of Default Protective Order

Exhibits 2039, 2048, 2049, and 2050 contain confidential technical information regarding drug development and/or financial and business information of Patent Owner and non-parties to this proceeding. The information contained in Exhibits 2039, 2048, 2049, and 2050 is subject to non-party confidentiality obligations (*e.g.*, with development partners and Patent Owner's affiliate) or would cause competitive business harm to Patent Owner if publicly disclosed.

First, the Deposition Transcript of Nicholas Bodor, February 15, 2024 is a true and correct copy of the deposition of Dr. Nicholas Bodor in IPR2023-00480 and -00481, which took place on February 15, 2024. This transcript contains Patent Owner's and non-party Ares Trading S.A. and IVAX's highly confidential information relating to drug development research Dr. Bodor performed that is not relevant to any issue in dispute in this proceeding. *See* Ex. 2039. Patent Owner submits a public, redacted version of the transcript as Exhibit 2041 and requests sealing of Exhibit 2039, the full, unredacted transcript containing this confidential information. To the best of its knowledge, Patent Owner has not made, and does not intend to make, this research publicly available. IVAX (now Teva) does not oppose making this full transcript available in this proceeding, subject to this motion to seal and treatment of the transcript under the Board's Default Protective

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.