

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 B2

Before SUSAN L. C. MITCHELL, ZHENYU YANG, and
KRISTI L. R. SAWERT, *Administrative Patent Judges*.

MITCHELL, *Administrative Patent Judge*.

DECISION
Motions to Seal
37 C.F.R. §§ 42.1 and 42.54

Cosmo Technologies Limited (“Patent Owner”) filed a motion to seal, along with a request for entry of the Board’s default protective order.

Paper 9. Mylan Pharmaceuticals Inc. (“Petitioner”) also filed a motion to seal and a motion to expunge. Papers 11, 12, respectively. Each motion is discussed in detail in turn below.

Discussion

The Board’s standards for granting motions to seal are discussed in *Garmin International v. Cuozzo Speed Technologies, LLC*, IPR2012-00001 (PTAB Mar. 14, 2013) (Paper 34). In summary, there is a strong public policy for making all information filed in *inter partes* review proceedings open to the public, especially because the proceeding determines the patentability of claims in an issued patent. *Id.* at slip op. 1–2. Under 35 U.S.C. § 316(a)(1) and 37 C.F.R. § 42.14, the default rule is that all papers filed in an *inter partes* review are open and available for access by the public. A party, however, may file a concurrent motion to seal, and the information at issue is sealed pending the outcome of the motion. It is only “confidential information” that is protected from disclosure. 35 U.S.C. § 316(a)(7); *see* Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,760 (Aug. 14, 2012). The standard for granting a motion to seal is “for good cause.” 37 C.F.R. § 42.54(a). The party moving to seal bears the burden of proof in showing entitlement to the requested relief, and must explain why the information sought to be sealed constitutes confidential information. 37 C.F.R. § 42.20(c).

We remind the parties of the expectation that confidential information relied upon or identified in a final written decision will be made public. *See* Office Trial Practice Guide, 77 Fed. Reg. 48756, 48761 (Aug. 14, 2012).

Confidential information that is subject to a protective order ordinarily becomes public 45 days after final judgment in a trial. A party seeking to maintain the confidentiality of the information may file a motion to expunge the information from the record prior to the information becoming public. 37 C.F.R. § 42.56.

a. Parties' Motions

Patent Owner filed a motion to seal its Patent Owner Preliminary Response and Exhibit 2025, a nonpublic trial transcript in *Cosmo Technologies Ltd. v. Actavis Laboratories FL*, No. 15-164-LP (D. De. May 23, 2017) (“Actavis Litigation”). Paper 9, 2–3. Patent Owner has filed a redacted version of its Preliminary Response. *See* Paper 8. The motion includes a request to enter the Board’s default protective order. Paper 9, 1.

Petitioner responded that because it was not a party to Actavis Litigation, it takes no position as to “whether Exhibit 2025 and any description of Exhibit 2025 by Patent Owner in its Preliminary Response contains confidential information,” and therefore does not oppose Patent Owner’s motion. Paper 16, 1–2. Petitioner does, however, file its own motion to seal asserting that, in addition to the passages that Patent Owner asserts should be redacted, the following additional passages of Patent Owner’s Preliminary Response contain confidential information and should also be redacted. Paper 11, 3.

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.”

Id. Petitioner states, “[t]he identified portions reveal confidential information regarding Petitioner’s ANDA product—specifically how the active ingredient in Petitioner’s ANDA product is distributed.” *Id.*

Patent Owner responds that although it does not believe that it revealed Petitioner’s confidential information in its redacted Preliminary Response, because Petitioner’s motion to seal “is unrelated to Patent Owner’s information, and in the interest of efficiency, Patent Owner does not oppose Petitioner’s motion to seal.” Paper 13, 1.

Petitioner also files a motion to expunge Patent Owner’s redacted version of its Preliminary Response (Paper 8) from the record and requests that we enter a replacement redacted preliminary response with the additional proposed redactions set forth above. Paper 12. Patent Owner opposes Petitioner’s motion to expunge as improper at this stage of the proceeding. Paper 14, 2.

b. Analysis

Patent Owner represents that Petitioner does not oppose the motion for entry of the Board’s default protective order, and in fact, agreed to adopt the Board’s default protective order. Paper 9, 2. Patent Owner provided the default protective order as Addendum A to its motion. Paper 9, Addendum A. We grant Patent Owner’s request to enter the Board’s default protective order.

We also find that Patent Owner has established good cause to seal Exhibit 2025 based on its representation that it is a nonpublic document, and to seal the unredacted Preliminary Response (Paper 7) that Patent Owner asserts quotes the nonpublic transcript. We grant Patent's Owner's motion to seal both of these documents. In reviewing the transcript (Ex. 2025), however, it appears that it was a hearing held in open court and that not all of the information contained in the transcript is confidential. Therefore, we order Patent Owner to file a redacted, public version of this transcript.

Upon receipt of Petitioner's request to file a motion to expunge, we sealed the redacted Preliminary Response submitted by Patent Owner (Paper 8) because Petitioner stated that unredacted portions of this public document contains its confidential information. Petitioner represents that this confidential information relates to its ANDA product. Paper 11, 2. Petitioner represents that "[n]o information from the ANDA has been made public by Petitioner or by the FDA, and it is not otherwise available to the public." *Id.* We find that Petitioner has shown good cause to seal the additional portions of Patent Owner's Preliminary Response. We therefore grant Petitioner's motion to seal, and order Patent Owner to file a redacted, public version of its Preliminary Response redacting these additional portions Petitioner identifies as confidential.

We do not, however, find that Patent Owner's redacted Preliminary Response should be expunged. Patent Owner appropriately filed its Preliminary Response in accordance with the Board's rules and orders. Because it is currently sealed, and will remain so pending resolution of this *inter partes* proceeding, the confidentiality of the information Petitioner asserts is not public will be maintained. Thus, we do not need to expunge it

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