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Paper 15
Entered: January 10, 2020

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VETERINARY ORTHOPEDIC IMPLANTS, INC.,
Petitioner,

v.

DEPUY SYNTHES PRODUCTS, INC.,
Patent Owner.

IPR2019-01331 (Patent 8,523,921 B2)
IPR2019-01332 (Patent 8,523,921 B2)
IPR2019-01333 (Patent 8,523,921 B2)[1]

Before HYUN J. JUNG, CHRISTOPHER G. PAULRAJ, and TIMOTHY G. MAJORS, *Administrative Patent Judges.*

MAJORS, *Administrative Patent Judge*.

ORDER
Granting In Part Patent Owner's Unopposed Motion to Seal
37 C.F.R. §§ 42.14, 42.54

[1] We exercise our discretion to issue one Order to be filed in each of the above-listed proceedings. Parties are not authorized to use this caption format absent permission of the Board.

I. INTRODUCTION

On October 25, 2019, Patent Owner filed an Unopposed Motion to Seal (Paper 9, "Motion" or "Mot.") a confidential version of its Preliminary Response (Paper 8) and Exhibits 2100–2102 and 2104–2112.[2] Patent Owner also moves to enter the proposed protective order filed in the Motion as Attachment A. Mot. 5–7. Patent Owner indicates Petitioner does not oppose the Motion. Mot. 3. For the reasons discussed below, Patent Owner's Motion is *granted-in-part*.

II. DISCUSSION

The parties agreed to a Proposed Protective Order, which is entered in each of the above identified proceedings. Mot. 3, 5–7 ("Attachment A").

As provided under Rule 42.54(a), "[t]he Board may, for good cause, issue an order to protect a party from disclosing confidential information," including forbidding the disclosure of protected information or specifying the terms under which such information may be disclosed. 37 C.F.R. § 42.54(a). The Board also observes a strong policy in favor of making all information filed in *inter partes* review proceedings open to the public. *See Argentum Pharms. LLC v. Alcon Research, Ltd.*, IPR2017-01053, Paper 27, 3–4 (PTAB Jan. 19, 2018) (informative).

Under 37 C.F.R. § 42.14, the default rule is that all papers filed in such proceedings are available to the public. Only "confidential information" is subject to protection against public disclosure. 35 U.S.C.

[2] Unless otherwise noted, all citations are to the papers and exhibits filed in IPR2019-01331.

§ 326(a)(7); 37 C.F.R. § 42.55. In that regard, as noted in the Office's Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,760 (Aug. 14, 2012):

> The 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
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> ***
>
> *Confidential Information*: The rules identify confidential information in a manner consistent with the Federal Rules of Civil Procedure 26(c)(1)(G), which provides for protective orders for trade secret or other confidential research, development, or commercial information. § 42.54.

Patent Owner, as the moving party bears the burden of showing that the relief requested should be granted. 37 C.F.R. § 42.20(c). And the standard for granting Patent Owner's requested relief is "good cause." 37 C.F.R. § 42.54(a); *Argentum*, Paper 27 at 3–4. To demonstrate "good cause," Patent Owner must make a sufficient showing 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.

Argentum, Paper 27 at 3–4; *see also Corning Optical Communications RF, LLC, v. PPC Broadband, Inc.*, IPR2014-00440, Paper 46 at 2 (PTAB April 6, 2015) (requiring a showing that information has not been "excessively redacted").

Regarding Exhibits 2100–2102 and 2104–2111, Patent Owner states that these exhibits "reflect Patent Owner's commercially sensitive product

design files relating to the conception and reduction to practice of the challenged patent, including confidential information about Patent Owner's internal research and development of its products, performance testing, and business information." Mot. 2. Patent Owner asserts these Exhibits were "produced under 'HIGHLY CONFIDENTIAL – ATTORNEY EYES ONLY' or 'Confidential' (as marked) conditions in the related district court litigation," and that "[d]isclosure of this information could result in competitive harm." *Id.*

Upon reviewing Exhibits 2101, 2102, and 2104–2111, which appear to contain confidential information in their entirety, and upon Patent Owner's arguments regarding their confidential nature, we are persuaded that good cause exists to seal these Exhibits.[3] We are also persuaded that good cause exists to seal Patent Owner's confidential version of its Preliminary Response. Paper 8. Patent Owner filed a public, redacted version of its Preliminary Response, which appears to be tailored to redact only confidential information. Paper 7.

Regarding Exhibit 2100 ("DuPuy Synthes' Tenth Supplemental Objections and Responses to VOI's First Set of Interrogatories (excerpted)") and Exhibit 2112 ("Declaration of Timothy Horan"), however, we are unpersuaded that these documents contain only confidential information,

[3] In IPR2019-01331, Patent Owner filed Exhibit 2009 ("VOI's Motion to Stay") as Exhibit 2109, rather than what we presume was the intended "Sterilization Rationale/Adoption Question" document. The apparently correct document was filed as Exhibit 2109 in IPR2019-01332 and IPR2019-01333. Patent Owner is authorized to file a motion to expunge exhibit 2109 in IPR2019-01331 and refile the correct document.

such that the entirety of the exhibits should be sealed. For example, the "General Objections" section of Exhibit 2100 does not appear to contain any commercially sensitive confidential information regarding Patent Owner's products. *See* Exhibit 2100, 3–6. And although Patent Owner asserts that Exhibit 2112 discusses the confidential information contained in Exhibits 2100–2102 and 2104–2111 (Mot. 2), Exhibit 2112 appears to contain at least some non-confidential information as well. For example, the public version of Patent Owner's Preliminary Response states "a physical embodiment practicing or reflecting at least claims 1-9 was conceived and actually reduced to practice by August 8, 2005, and no later than August 11, 2005." Paper 7, 43. Thus, at least the reduction to practice dates discussed in the public version of the Preliminary Response and in Exhibit 2112 appear to be non-confidential. Accordingly, we are not persuaded that good cause exists to seal Exhibits 2100 and 2112 in their entirety. Patent Owner is granted leave to file a Supplemental Motion to Seal that 1) explains the reasons, with particularity, why there is good cause to seal Exhibits 2100 and 2112 in their entirety, or 2) provides redacted versions of Exhibits 2100 and 2112 and explains why there is good cause to seal the redacted portions.

III. ORDER

It is

ORDERED that Patent Owner's Motion to Seal (Paper 9) in each of the above-identified cases is *granted* with respect to Patent Owner's Preliminary Response (Paper 8) and Exhibits 2101, 2102, and 2104–2111, and is *denied* without prejudice with respect to Exhibits 2100 and 2112;

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