

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

VANTAGE SPECIALTY CHEMICALS, INC.,
Petitioner,

v.

CARGILL, INC.,
Patent Owner.

IPR2023-00589
Patent 11,248,245 B2

Before SHERIDAN K. SNEDDEN, TIMOTHY G. MAJORS, and
MICHAEL A. VALEK, *Administrative Patent Judges*.

MAJORS, *Administrative Patent Judge*.

ORDER
Granting Parties' Joint Motion to Seal and
Granting Entry of Protective Order
37 C.F.R. §§ 42.5, 42.14, 42.54

I. INTRODUCTION

On February 2, 2024, the parties filed a motion to seal and further requested entry of a protective order. *See generally* Paper 29 (“Motion” or “Mot.”); Paper 31, App’x A (“Proposed Protective Order”).¹

The Board recognizes “a strong public policy for making all information filed in a quasi-judicial administrative proceeding open to the public, especially in an *inter partes* review which determines the patentability of claims in an issued patent and therefore affects the rights of the public.” *Garmin Int’l v. Cuozzo Speed Techs., LLC*, IPR2012-00001, Paper 34 (PTAB Mar. 14, 2013), 1–2. Except as otherwise ordered by the Board, the record of an *inter partes* review shall be made available to the public. 35 U.S.C. § 316(a)(1); 37 C.F.R. § 42.14.

The standard for granting a motion to seal is “for good cause.” 37 C.F.R. § 42.54(a). In determining whether good cause has been shown in relation to motions to seal, the Board has identified the following considerations: “(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*

¹ The parties’ Motion renews a request from an earlier motion to seal and for a protective order, which the Board denied without prejudice. Paper 28. Although the reasoning supporting the parties’ present request for entry of a protective order is provided in a separate paper that is not captioned as motion (Paper 31), we will treat that request as a motion and consider it together with the Motion presented in Paper 29.

Pharms. LLC v. Alcon Research, Ltd., IPR2017-01053, Paper 27 (PTAB Jan. 19, 2018) (informative), 2–3.

The parties jointly request that Patent Owner’s Response and certain exhibits filed with that response be sealed. More specifically, the parties request that Exhibits 2014, 2050–2055, and 2057 be sealed in their entirety, that a portion of paragraph 141 of Exhibit 2009 (Declaration of Dr. Thomas Schultz) be sealed, and that Patent Owner’s Response (Paper 22) be sealed because it includes confidential content from the aforementioned exhibits. Mot. 1–8. Regarding Exhibit 2009 and Patent Owner’s Response (Paper 22), Patent Owner has filed redacted, public-versions of that exhibit (Exhibit 2009, public version) and its response (Paper 25, Paper 30).

As an initial matter, Patent Owner has filed two public versions of its Patent Owner Response (*see* Paper 25 (filed Dec. 7, 2023) and Paper 30 (filed Feb. 2, 2024)). The Motion does not explain why Patent Owner filed two public versions of the Patent Owner Response or indicate what is different between those filings. Based on our comparison, it appears those versions differ in that some of the redactions on page 42 were removed in the later-filed version. *Compare* Paper 30, 42, *with* Paper 25, 42. Apart from the redactions, we assume there are no other differences between the non-redacted version of Patent Owner’s Response (Paper 22) and the redacted version filed February 2, 2024 (Paper 30). If that assumption is wrong, Patent Owner must promptly request a conference call with the Board. For clarity of the record, the parties will meet and confer and consider whether Paper 25 should be expunged and, if they agree, request authorization from the Board to move to expunge that paper.

We turn to the exhibits that are the subject of the present Motion. Patent Owner contends that Exhibit 2014 contains confidential manufacturing details for its Flora Esters products, and that a portion of paragraph 141 in Exhibit 2009 references the confidential information from Exhibit 2014. Mot. 4–5. With respect to Exhibits 2050–2055 and 2057, Petitioner contends that such exhibits contain confidential research and development information about Petitioner’s jojoba products, and further comprise internal market intelligence and strategic documents. *Id.* at 5–8. The parties represent that the underlying exhibits (except Dr. Schultz’s testimony in Exhibit 2009) have been marked confidential and are subject to a protective order in related litigation. *Id.* at 3–4. Insofar as the Patent Owner Response relies on and discloses confidential information from the aforementioned exhibits, the parties request that such response be sealed as well. *Id.* at 2–3.

We find that the parties have, at this time, established good cause to seal the exhibits in question. Those exhibits appear to include, *inter alia*, confidential research or manufacturing information about their respective products. Moreover, the parties appear to be competitors in the marketplace for such products, and we agree that disclosure of confidential information, including product research and manufacturing details and market analysis, could result in competitive harm. Mot. 2–8. We, thus, grant the parties’ motion to seal Exhibits 2009 (partial as to paragraph 141), 2014, 2050–2055, and 2057. For the same reasons, we grant the parties’ request to seal the Patent Owner Response (Paper 22). We note, as discussed above, the filing of partially redacted and publically-available versions of the Patent Owner Response (Paper 30) and Exhibit 2009. The parties’ interests in keeping the

above materials private, at this stage, outweighs the public's need for access to that information.

We turn next to the parties' request for entry of a protective order. Paper 32 (redacted version at Paper 31); *see* Proposed Protective Order, Paper 32, App'x A. The parties request entry of a Proposed Protective Order that differs in some aspects from the Board's Default Protective Order. In short, the parties request the default order be changed to limit party representatives to (a) outside counsel, and (b) in-house counsel that have been previously designated under the protective order in the related district court case (including counsels' support staff as necessary). *See* Ex. 2067, 1–2 (redline comparing the parties' Proposed Protective Order to the Board's Default Protective Order). Moreover, the parties' Proposed Protective Order, unlike the Default Protective Order, includes a two-year "Prosecution Bar" provision. Ex. 2067, 3–4.

We grant the parties' request to enter the agreed-to Proposed Protective Order. The order's limitation on party representatives who will have access to materials that have been designated confidential (i.e., limiting to certain counsel and their support staff) is reasonable under the circumstances. The parties are direct competitors and we are persuaded that those additional limitations are prudent to reduce the risks of inadvertent disclosure of confidential technical or commercial information. *See* Paper 31, 1–3.²

² Paper 31 (and similarly Paper 32) includes four unnumbered pages that provide the parties' rationale for why the changes to the Default Protective Order are justified, followed by an Appendix that includes the Proposed Protective Order. In citing Paper 31 herein, we treat those four pages as if they were consecutively numbered pages 1–4.

Although the Board does not usually grant protective orders that include a prosecution bar, we are persuaded to do so here for three reasons. First, as already noted, the parties are competitors and there is a heightened risk of harm through inadvertent disclosure of highly confidential technical information affecting patent prosecution activities. *Id.* Second, Patent Owner is not seeking to amend or reissue the claims in this proceeding so the prosecution bar should not affect its representation in this proceeding. *Id.* at 2.³ Third, the parties represent that a protective order of “commensurate” scope has been entered by the district court in the parallel litigation. *Id.* at 1. Because the parties and their counsel are already bound by substantially the same prosecution bar provision, it is hard to see how declining to include that provision here provides any greater flexibility to them. The absence of a prosecution bar in the Board’s order would be a dubious defense to a violation of the court’s order—assuming (as is likely) that the confidential information at issue was also produced in the parallel litigation and subject to both the Board’s and the court’s protective orders.

For the reasons above, the parties’ Proposed Protective Order (Appendix A to both Papers 31 and 32) is, therefore, entered and will control access to confidential materials in this proceeding absent a further order from the Board modifying such access.

³ As explained in the Consolidated Trial Practice Guide (“TPG”), prosecution bars are usually disfavored in Board proceedings because of “disadvantages” such provisions can impose on patent owners wishing to make use of the amendment or reissue process. TPG at 116; *see* 84 Fed. Reg. 64,280 (Nov. 21, 2019); available at <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

II. ORDER

ORDERED that the Parties' Joint Motion to Seal is *granted*;

FURTHER ORDERED that Patent Owner's Response (Paper 22), as well as Exhibit 2009 (paragraph 141), and Exhibits 2014, 2050–2055, and 2057 are sealed; and

FURTHER ORDERED that the Parties' Proposed Protective Order at Appendix A of Paper 31 (also at Appendix A of Paper 32) is entered.

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