

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MOM Enterprises, LLC,
Petitioner,

v.

ELAINE AND REINHOLD W. VIETH,
Patent Owners,

Case IPR 2023-00726
Patent 9,066,958

**PATENT OWNERS' RENEWED MOTION TO SEAL
UNDER 37 CFR § 42.54**

Pursuant to the REVISED PROPOSED STIPULATED PROTECTIVE ORDER entered in this IPR and the ORDER Denying Without Prejudice Patent Owners' and Petitioner's Motions to Seal 37 C.F.R. §§ 42.14, 42.54, Paper 73 entered April 3, 2024, Patent Owners hereby renew their Motion to Seal with respect to information designated under the Protective Order in this Proceeding by Patent Owners or their licensee Ddrops Company ("Ddrops").

The Board entered an order granting the parties' proposed protective order on April 3, 2024, Paper 72. Patent Owners have filed three Motions to Seal in this proceeding. Papers 48, 62, 65. In Paper 48, Patent Owners sought to seal its "Motion for Additional Discovery" (filed at Paper 49). Patent Owners' Response, Paper 61, was filed on February 9, 2024, together with confidential supporting Exhibits 2022, 2026, 2027, 2042-2047, 2049-2058, 2060, 2062-2068, 2071, and 2072, containing information designated either by the Petitioner, the Patent Owners, or a non-party as Highly Confidential-Attorney's Eyes Only together with PATENT OWNERS' MOTION TO SEAL, Paper 62. On February 12, 2024, Patent Owners filed a Notice of Submission of Corrected Exhibits, Paper 64, and a Motion to Seal Corrected Exhibits, Paper 65.

On April 3, 2024, Paper 73, The Board entered an ORDER Denying Without Prejudice Patent Owners' and Petitioner's Motions to Seal 37 C.F.R. §§ 42.14,

42.54, (the “Order”). The Order states, “First, as stated in the Scheduling Order, ‘[i]t is the responsibility of the party whose confidential information is at issue, not necessarily the proffering party, to file the motion to seal.’” Paper 74, page 4. The Order also stated that “Any renewed motion to seal should be filed by the party who seeks to seal its own confidential information.” *Id.*

Patent Owners’ (or Patent Owners’ licensee Ddrops’) confidential information is present in Patent Owners’ Response, Paper 61, and supporting exhibits 2068, 2071, and 2072. Patent Owners hereby renew their motion to seal Patent Owners’ Response, Paper 61; Exhibit 2068 – Vieth Declaration; Exhibit 2071 - Temovsky Declaration; and Exhibit 2072 – Reid Declaration.

The Board recognizes a strong public policy interest in making information filed in a quasi-judicial administrative proceeding open to the public, especially in an inter partes review that determines the patentability of claims in an issued patent and therefore affects the rights of the public. *See Garmin Int’l, Inc. v. Cuozzo Speed Techs. LLC*, IPR2012-00001, Paper 34 at 1-2 (PTAB Mar. 14, 2013). Under 35 U.S.C. §316(a)(1), the default rule is that all papers filed in an inter partes review are open and available for access by the public.

“The Board may, for good cause, issue an order to protect a party or person from disclosing confidential information.” 37 C.F.R. §42.54(a); *see also* PTAB Consolidated Trial Practice Guide (“TPG”), 19-20. The TPG requires that parties

“identify confidential information in a manner consistent with Federal Rule of Civil Procedure 26(c)(1)(G), which provides for protective orders for trade secret or other confidential research, development, or commercial information.” TPG, 19.

The standard for granting a motion to seal is “for good cause.” 37 C.F.R. §42.54(a). That standard includes a 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.

See Argentum Pharms. LLC v. Alcon Research, Ltd., IPR2017-01053, Paper 27 (PTAB Jan. 19, 2018) (informative), 3-4. The moving party has the burden of proof in showing it is entitled to the requested relief. See 37 C.F.R. §42.20(c). Good cause is present for each of the documents sought to be sealed.

1. Patent Owners' Response, Paper 62

A redacted version of Paper 62 is filed herewith. The following redactions have been made: Pages 53 and 54 – the terms of confidential settlement agreements between Patent Owners and the defendants in prior patent infringement actions have been redacted. Pages 62-64 – Ddrops' confidential market share

information has been redacted. This information sought to be sealed is truly confidential and there is no strong public interest requiring disclosure of such information. The Patent Owners need to rely on the redacted information as evidence of secondary considerations.

There is also information redacted on pages 48 and 50-53, which has been designated by the Petitioner, subject to the Petitioner seeking to seal such information.

2. Exhibit 2068 – Vieth Declaration

A non-confidential version of Exhibit 2068 is filed herewith having highly sensitive confidential information redacted from pages 76-96. The redacted information is excerpted from the inventor's notebook and shows confidential research and development information of the type authorized to be protected as set out in the Trial Practice Guide. The development and invention of the subject matter of the '958 patent is pertinent to issues in dispute in this proceeding and Patent Owners' interest in maintaining confidentiality outweighs any public interest in having this confidential information published in this proceeding.

3. Exhibit 2071 – Temovsky Declaration

A non-confidential version of Exhibit 2071 is filed herewith. Portions of Exhibit 2071 reflect highly sensitive confidential information of Ddrops, the licensee of Patent Owners in this proceeding. The highly sensitive confidential

information is redacted from the non-confidential version of Ex 2071. Such information includes market share data and trade secret information, Ex 2071, pages 22-25, 202, and 203, the disclosure of which would be detrimental to Ddrops' business and is prohibited by contractual provisions restricting disclosure and use of the market share information imposed by the vendor of the information. The redacted information includes the results of scientific assays as to the precise nature of Ddrops' products, EX 2071, pages 36, 37, 39, 41-42, and 44-49, the publication of which would be harmful, particularly if the information was known to its competitor, the Petitioner in this proceeding. Also redacted are the terms of certain confidential settlement agreements entered into to settle prior patent litigation involving the '958 patent, Ex 2071, pages 28, 29, 237-245, and 249. The settlement agreements are important to the secondary considerations relied upon by Patent Owners in this proceeding, but they impose contractual restrictions on Patent Owners and Ddrops restricting disclosure. Any public interest in the redacted information is outweighed by Patent Owners' interest in maintaining confidentiality of the redacted information as required by the terms of the settlement agreements.

4. Exhibit 2072 – Reid Declaration

A non-confidential version of Exhibit 2072 is filed herewith. Portions of Exhibit 2072 reflect highly sensitive confidential information of Ddrops, the

licensee of Patent Owners in this proceeding. The highly sensitive confidential information is redacted from the non-confidential version of Ex 2072. Such information includes market share data and trade secret information (pages 55-58), the disclosure of which would be detrimental to Ddrops' business and is prohibited by contractual provisions restricting disclosure and use of such information imposed by the vendor of the information. Any public interest in the redacted information is outweighed by Patent Owners' interest in maintaining confidentiality of the redacted information.

Exhibit 2072 also includes certain information designated by the Petitioner on pages 52-58. Such information is redacted from the non-confidential version of Exhibit 2072 to prevent disclosure pending such time as Petitioner seeks to seal such information.

Certification

The undersigned, on behalf of Patent Owners, certifies that to the best of the Patent Owners' knowledge, the information sought to be sealed has not been published or otherwise made public.

Dated: May 3, 2024.

Respectfully submitted,

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Patent Owners' Renewed Motion to Seal
IPR 2023-00726

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that the foregoing Patent Owners' Motion to Seal is being served on May 3, 2024, by filing this document through the Patent Trial and Appeal Case Tracking System (P-TACTS) and by electronic mail as directed by Petition upon the following counsel of record for Petitioners:

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