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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAYER CROPSCIENCE LP AND MONSANTO COMPANY.
Petitioner,

v.

CORTEVA AGRISCIENCE LLC,
Patent Owner.

IPR2023-01036 (Patent 10,947,555 B2)
IPR2023-01037 (Patent 11,149,283 B2)
IPR2023-01038 (Patent 11,299,745 B2)[1]

Before MICHAEL J. FITZPATRICK, ROBERT A. POLLOCK, and TIMOTHY G. MAJORS, *Administrative Patent Judges.*

MAJORS, *Administrative Patent Judge*.

ORDER
Conditionally Granting Patent Owner's Unopposed Motion to Seal
and Enter Agreed-To Protective Order
37 C.F.R. §§ 42.5, 42.14, 42.54

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[1] This Order addresses issues that are the same in the listed cases. Therefore, we exercise our discretion to enter one Scheduling Order to be filed in each case. The parties are not authorized to use this style heading for any subsequent papers.

I. INTRODUCTION

On September 21, 2023, Patent Owner filed a motion to seal certain exhibits and further moved for entry of a protective order. *See generally* Paper 6 ("Motion" or "Mot.").[2] Patent Owner indicates that motion is unopposed and that the parties are in agreement about the content of the proposed protective order (Mot., App'x A). Mot. 1–6. The date for Petitioner to oppose the Motion has passed.

A. Documents Subject to Patent Owner's Motion to Seal

Patent Owner moves to seal portions of Exhibit 2002, and the entire contents of Exhibits 2004–2011. Mot. 3–4.

According to Patent Owner, those exhibits include Patent Owner's proprietary and non-public research information and good cause exists to seal them. *Id.* at 3–5. Patent Owner contends that various pages of Exhibit 2002 (excerpts from a pleading in a related lawsuit) substantially describe or characterize Patent Owner's proprietary scientific research, including non-public information about certain proteins and analysis of those proteins. *Id.* at 3, 6 (listing pages 2–3, 10–17, 19–23, 433–444, 446, 448–450, 452–453, 864–875, and 938–947 as including confidential information). Patent Owner also states that it has provided a "public" version of this same exhibit with the confidential portions redacted. *Id.* (citing Exhibit 2003 as the public version). Patent Owner contends that the entirety of Exhibits 2004–2011 should be sealed because they are "entirely confidential, and redaction would not be practical." *Id.* at 5–6. Further, Patent Owner contends,

[2] Patent Owner filed similar papers in IPR2023-01037 and IPR2023-01038 but, for convenience, we cite only the papers entered in IPR2023-01036.

Exhibits 2004–2011 include, *inter alia*, laboratory notebooks, along with proprietary protein-sequence information and Patent Owner's analysis and internal presentations about the same. *Id.*

B. Proposed Protective Order

Patent Owner also requests entry of the agreed-to Proposed Protective Order ("PPO") that is attached as Appendix A to the Motion. *Id.* at 6. Patent Owner contends the PPO includes only "minor" changes to the Board's default protective order (as shown in a redline attached as Appendix B to the Motion). *Id.*; *see also id.* at 1 (citing the Board's Trial Practice Guide for the proposition that the Board "generally will accept proposed changes" to the default order that are "agreed to by the parties").[3]

II. DISCUSSION

For the reasons discussed below, we conditionally grant Patent Owner's motion to seal and for entry of the PPO.

"There is 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. For this reason, except as otherwise ordered, 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.

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[3] *See* Consolidated Trial Practice Guide ("Trial Practice Guide") at 115; *see also* 84 Fed. Reg. 64,280 (Nov. 21, 2019); available at https://www.uspto.gov/TrialPracticeGuideConsolidated.

The moving party bears the burden of showing that the relief requested should be granted. 37 C.F.R. § 42.20(c).

The standard for granting a motion to seal is "for good cause." 37 C.F.R. § 42.54(a). *See Argentum Pharms. LLC v. Alcon Research, Ltd.*, IPR2017-01053, Paper 27 (PTAB Jan. 19, 2018) (informative), 2–3 ("[A] movant to seal must demonstrate adequately 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.").

Under the circumstances here, Patent Owner has shown good cause to seal the cited portions of Exhibit 2002 and to seal Exhibits 2004–2011. These exhibits appear to include details about Patent Owner's proprietary protein research and analysis, and there is no indication that such information is otherwise known to the public. Patent Owner also contends, without dispute, that it would be disadvantaged relative to its competitors if its research information were disclosed and made available to the public. Mot. 5. The extent to which the parties or the Board will need to substantively rely on the information sought to be sealed moving forward in this proceeding is, however, less clear. At this point, Patent Owner's and the Board's citation to the exhibits that include the allegedly confidential information has been minimal and non-specific. *See, e.g.*, Paper 7, 17 n.3 (Patent Owner's Preliminary Response, citing generically in a footnote to sequences in Exhibit 2002), 33 n.7 (non-detailed citation to Exhibits 2002 and 2004–2011); Paper 11, 39 n.26 (Institution Decision with similar non-

specific cite in footnote to Ex. 2002). Patent Owner's Preliminary Response and the Board's Institution Decision are, nevertheless, unredacted and open to the public and, given generic citations and minimal role served by the allegedly confidential exhibits at present, the public's interest in an understandable and open record is not materially impaired. We may, as appropriate, revisit the balancing of interests and require the parties address whether the exhibits should remain sealed at later stages of this proceeding.

Further, our grant of the motion to seal is "conditional" because the public version of Exhibit 2002 (i.e., Exhibit 2003) includes redactions on page 8 that do not appear to be confidential. *Compare*, *e.g.*, Ex. 2003 ¶¶ 29, 31 (redacted), *with id.* ¶ 47 (not redacted). Patent Owner did not identify page 8 of Exhibit 2002 in its Motion (Mot. 3 (listing pages)), so the redactions on that page may have been included by mistake. As a condition to granting this Motion, Patent Owner must, within ten (10) days from entry of this Order, file a corrected version of Exhibit 2003 that removes the redactions on page 8. If those redactions on page 8 were purposeful and Patent Owner intends to maintain them, Patent Owner will promptly notify the Board and request a conference call.

Turning to the PPO, it modifies the Board's default protective order in a handful of ways. In Sections 2(B)–2(E), the PPO clarifies, for example, who qualifies as party representatives (e.g., partners, associates, etc. to whom disclosure of confidential information is reasonably necessary). Mot. (App'x B). Section 2(D), concerning access by in-house counsel, is revised to limit distribution to no more than "four" in-house counsel identified by each party. *Id.* The PPO also adds a Section 2(G) that allows certain persons (e.g., a document's author or custodian) to have access without

requiring a signed "Acknowledgment." *Id.* Lastly, the PPO modifies Section 6 to allow the parties to agree to a later date—later than the default "60 days" following an action's disposition—for parties receiving confidential to return or certify destruction of confidential information. *Id.*

We find that Patent Owner has established good cause and the motion for entry of the PPO is granted. Although the Board generally encourages adoption of the Board's default protective order (*see* Trial Practice Guide, 91), the PPO is agreed to by the parties and the modifications, overall, seem to involve modest changes. We accept Patent Owner's representation that the modifications help align certain provisions of the PPO with the parties' stipulated protective order in the related district court litigation. Mot. 1–2. Moreover, it is not evident that any of the modifications involve provisions that are "unnecessary" to Board proceedings or that would meaningfully restrict practice before the Office. *See, e.g.*, Trial Practice Guide, 116 (explaining, e.g., that prosecution bars are usually disfavored in proceedings before the Board).

III. ORDER

ORDERED that Patent Owner's Motion is *conditionally granted*;

FURTHER ORDERED that Exhibit 2002 is sealed provided, however, Patent Owner files a corrected version of Exhibit 2003 (i.e., a public version of Exhibit 2002) within ten (10) days after entry of this Order that modifies the redactions as explained in Section II above;

FURTHER ORDERED that Exhibits 2004–2011 are sealed; and

FURTHER ORDERED that the Proposed Protective Order attached as Appendix A to the Motion is entered.

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