Filed: September 21, 2023

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAYER CROPSCIENCE LP AND MONSANTO COMPANY,
Petitioners,

v.

CORTEVA AGRISCIENCE LLC,
Patent Owner.

IPR2023-01037
U.S. Patent No. 11,149,283

PATENT OWNER'S UNOPPOSED MOTION TO SEAL AND ENTER AGREED-TO PROTECTIVE ORDER

I. Introduction

Patent Owner Corteva Agriscience LLC requests entry of the parties' agreed-to Protective Order attached as Appendix A and that the confidential versions of Exhibits 2002-2011 be sealed under 37 C.F.R. § 42.54. Good cause to seal these documents exists because a public version of Exhibit 2002 has also been filed as Exhibit 2003 and the redacted information, along with the entirety of the information in Exhibits 2004-2011, reflects Patent Owner's proprietary protein research information that is not publicly available. Counsel for Patent Owner asked Petitioners' counsel whether Petitioners would oppose a motion to seal documents containing Patent Owner's confidential information. In response, counsel for Petitioners stated that Petitioners consent to this Motion.

The Board's November 2019 Consolidated Trial Practice Guide ("Trial Practice Guide") provides that the parties "may propose modifications to the Default Protective Order." Trial Practice Guide at 115. It also provides that the Board "generally will accept such proposed changes" that are "agreed to by the parties." *Id.* The parties have agreed to adopt the Board's Default Protective Order (*see id.* at 117-122) with modifications to Section 2(B)-(E) and adding Section 2(G) to clarify who may access confidential information and to limit the number of in-house counsel to a maximum of four individuals as identified by each party under the parties' stipulated protective order in the related district court litigation. The parties

also agreed to modify Section 6 to include provisions from the parties' stipulated protective order in the related district court litigation. A clean copy of the proposed agreed-upon Protective Order and a redline against the Default Protective Order are attached as Appendices A and B, respectively.

II. Governing Rules and PTAB Guidance

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, but a party may file a concurrent motion to seal and the information at issue shall be sealed pending the outcome of the motion.

Similarly, 37 C.F.R. § 42.14 provides:

> The record of a proceeding, including documents and things, shall be made available to the public, except as otherwise ordered. A party intending a document or thing to be sealed shall file a motion to seal concurrent with the filing of the document or thing to be sealed. The document or thing shall be provisionally sealed on receipt of the motion and remain so pending the outcome of the decision on the motion.

It is, however, only "confidential information" that is protected from disclosure. 35 U.S.C. § 316(a)(7) ("The Director shall prescribe regulations -- . . . providing for protective orders governing the exchange and submission of confidential

information"). In that regard, the *Office Trial Practice Guide*, 77 *Fed. Reg.* 48756, 48760 (Aug. 14, 2012) provides:

> 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.
>
> * * *
>
> *Confidential Information*: The rules 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. § 42.54.

III. Identification of Confidential Information

The confidential information consists of Patent Owner's proprietary protein research information that is not publicly available. This information is contained in the following documents:

- Exhibit 2002 at pages 2-3, 10-17, 19-23, 433-444, 446, 448-450, 452-453, 864-875, and 938-947.
- Exhibit 2004
- Exhibit 2005
- Exhibit 2006
- Exhibit 2007
- Exhibit 2008

- Exhibit 2009
- Exhibit 2010
- Exhibit 2011

IV. Good Cause Exists for Sealing the Confidential Information

The Board's rules 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. Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,760 (Aug. 14, 2012) ("The rules 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."). Here, the confidential information that Patent Owner seeks to seal pertains to proprietary protein research information that is not publicly available.

The Board has found good cause to seal proprietary scientific research information under similar circumstances and should find the same here. For example, in *Illumina, Inc. v. Cornell Research Foundation, Inc.*, the Board found good cause to grant a patent owner's motion to seal a document contain non-public research data, noting that it was subject to a protective order in a related district court litigation. IPR2016-00549, Paper 20 at 4-6 (PTAB May 26, 2017); *see also* IPR2016-00553, Paper 21 at 4-6 (PTAB May 26, 2017); IPR2016-00557, Paper 52

at 4-6 (PTAB May 26, 2017); IPR2016-00559, Paper 21 at 4-6 (PTAB May 26, 2017). The Board also found good cause to seal portions of a declaration and the Patent Owner's Response that cited such non-public data. IPR2016-00549, Paper 20 at 4-6 (PTAB May 26, 2017). In *Intelligent Bio-Systems, Inc. v. Illumina Cambridge Ltd.*, the Board similarly found good cause to grant a patent owner's motion to seal copies of documents that contained "proprietary technical and product development information," as well as declarations and papers discussing that confidential information. IPR2013-00517, Paper 83 at 4-5 (PTAB Jan. 29, 2015).

Here, the confidential information in Exhibits 2002 and 2004-2011 is confidential information disclosed in laboratory notebooks, presentations, data and analysis files, and correspondence that reflects Patent Owner's proprietary protein research, analyses, and amino acid sequences. These documents have been produced on a confidential basis under the parties' agreed-to protective order in the related district court litigation. Patent Owner has maintained these documents and the information they contain as confidential and proprietary. If such confidential information is made public, it would create a competitive disadvantage for Patent Owner and provide competitors with knowledge of Patent Owner's proprietary protein research.

Accordingly, Patent Owner seeks to seal the entirety of Exhibits 2004-2011 because they are entirely confidential, and redaction would not be practical. For

example, Patent Owner seeks to seal the entirety of Exhibits 2006, 2007, and 2010, which are presentations describing non-public proteins and analyses of them. Patent Owner seeks to seal the entirety of Exhibits 2004, 2005, and 2008, which are files containing the sequences of non-public proteins. Patent Owner also seeks to seal the entirety of Exhibits 2009 and 2011, which disclose non-public proteins and non-public protein analyses. Patent Owner seeks to seal Exhibit 2002, portions of which cite, reproduce, and/or substantially describe or characterize Patent Owner's proprietary scientific research. A public version of Exhibit 2002, with those confidential portions redacted, has been filed as Exhibit 2003. This information includes confidential information about non-public proteins and analyses of them. Accordingly, there is good cause to grant this motion to seal.

V. Proposed Protective Order

Pursuant to 37 C.F.R. § 42.54(a), Patent Owner proposes that the Board enter the modified protective order attached as Appendix A. Petitioners do not oppose entry of this proposed Protective Order. A redline showing the minor modifications to the Default Protective Order is also attached as Appendix B.

VI. Conclusion

For the reasons set forth above, Patent Owner respectfully requests that the Board grant this unopposed motion to seal and enter the proposed, agreed-to Protective Order attached as Appendix A.

Respectfully submitted,

Dated: September 21, 2023

/Pier D. DeRoo/
Pier D. DeRoo
Reg. No. 69,340

Appendix A

PROTECTIVE ORDER

The following Protective Order will govern the filing and treatment of confidential information in the proceeding:

Protective Order

This protective order governs the treatment and filing of confidential information, including documents and testimony.

1. Confidential information shall be clearly marked "PROTECTIVE ORDER MATERIAL."

2. Access to confidential information is limited to the following individuals who have executed the acknowledgment appended to this order:

(A) Parties. Persons who are owners of a patent involved in the proceeding and other persons who are named parties to the proceeding.

(B) Party Representatives. (i) Representatives of record for a party in the proceeding; and (ii) partners, associates, employees, and staff of any such party representative to whom it is reasonably necessary to disclose the information for this proceeding, including supporting personnel employed by a party representative, such as paralegals, legal secretaries, and legal clerks.

(C) Experts. Retained experts of a party in the proceeding who further certify in the Acknowledgement that they are not a competitor to any party

or employed by such a competitor with respect to the subject matter of the proceeding.

(D) In-house counsel. Up to four in-house counsel identified by each party under the parties' Stipulated Protective Order (D.I. 30) in the related district court litigation, C.A. No. 22-1046-GBW (D. Del.).

(E) Support Personnel. Administrative assistants, clerical staff, court reporters and other support personnel of the foregoing persons who are reasonably necessary to assist those persons in the proceeding, including any support staff for a party representative or attorneys identified in Section 2.B. above, shall not be required to sign an Acknowledgement, but shall be informed of the terms and requirements of the Protective Order by the person they are supporting who receives confidential information.

(F) The Office. Employees and representatives of the United States Patent and Trademark Office who have a need for access to the confidential information shall have such access without the requirement to sign an Acknowledgement. Such employees and representatives shall include the Director, members of the Board and their clerical staff, other support personnel, court reporters, and other persons acting on behalf of the Office.

(G) Persons from the Producing Party. The author, recipient, or custodian of material containing "PROTECTIVE ORDER MATERIAL," or a currently

employed officer or employee of the party that produced the information marked "PROTECTIVE ORDER MATERIAL," shall have such access without the requirement to sign an Acknowledgement.

3. Employees (e.g., corporate officers), consultants, or other persons performing work for a party, other than those persons identified above in (2)(A)–(E) and (G), shall be extended access to confidential information only upon agreement of the parties or by order of the Board upon a motion brought by the party seeking to disclose confidential information to that person and after signing the Acknowledgment. The party opposing disclosure to that person shall have the burden of proving that such person should be restricted from access to confidential information.

4. Persons receiving confidential information shall use reasonable efforts to maintain the confidentiality of the information, including:

(A) Maintaining such information in a secure location to which persons not authorized to receive the information shall not have access;

(B) Otherwise using reasonable efforts to maintain the confidentiality of the information, which efforts shall be no less rigorous than those the recipient uses to maintain the confidentiality of information not received from the disclosing party;

(C) Ensuring that support personnel of the recipient who have access to the confidential information understand and abide by the obligation to maintain the confidentiality of information received that is designated as confidential; and

(D) Limiting the copying of confidential information to a reasonable number of copies needed for conduct of the proceeding and maintaining a record of the locations of such copies.

5. Persons receiving confidential information shall use the following procedures to maintain the confidentiality of the information:

(A) Documents and Information Filed With the Board.

(i) A party may file documents or information with the Board along with a Motion to Seal. The Motion to Seal should provide a non-confidential description of the nature of the confidential information that is under seal, and set forth the reasons why the information is confidential and should not be made available to the public. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The documents or information shall remain under seal unless the Board determines that some or all of it does not qualify for confidential treatment.

(ii) Where confidentiality is alleged as to some but not all of the information submitted to the Board, the submitting party shall file confidential and non-

confidential versions of its submission, together with a Motion to Seal the confidential version setting forth the reasons why the information redacted from the non-confidential version is confidential and should not be made available to the public. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The non-confidential version of the submission shall clearly indicate the locations of information that has been redacted. The confidential version of the submission shall be filed under seal. The redacted information shall remain under seal unless the Board determines that some or all of the redacted information does not qualify for confidential treatment.

(B) Documents and Information Exchanged Among the Parties. Documents (including deposition transcripts) and other information designated as confidential that are disclosed to another party during discovery or other proceedings before the Board shall be clearly marked as "PROTECTIVE ORDER MATERIAL" and shall be produced in a manner that maintains its confidentiality.

6. Within 60 days after the final disposition of this action, including the exhaustion of all appeals and motions, or such later date as agreed to by the parties, each party receiving confidential information must return, or certify the destruction of, all copies of the confidential information to the producing party; provided,

however, that no one shall be required to return or destroy any confidential information that is contained on back-up or other archival media, which should be treated in accordance with standard retention policies, i.e., which are not retained indefinitely without being overwritten.

(k) Standard Acknowledgement of Protective Order. The following form may be used to acknowledge a protective order and gain access to information covered by the protective order:

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BAYER CROPSCIENCE LP AND MONSANTO COMPANY,
Petitioners,

v.

CORTEVA AGRISCIENCE LLC,
Patent Owner.

IPR2023-01037

U.S. Patent No. 11,149,283

Standard Acknowledgment for Access to Protective Order Material

I _____, affirm that I have read the Protective Order; that I will abide by its terms; that I will use the confidential information only in connection with this proceeding and for no other purpose; that I will only allow access to support staff who are reasonably necessary to assist me in this proceeding; that prior to any disclosure to such support staff I informed or will inform them of the requirements of the Protective Order; that I am personally responsible for the requirements of the terms of the Protective Order

and I agree to submit to the jurisdiction of the Office and the United States District Court for the Eastern District of Virginia for purposes of enforcing the terms of the Protective Order and providing remedies for its breach.

_____

[Signature]

Appendix B

~~DEFAULT~~ PROTECTIVE ORDER

The following ~~Default~~ Protective Order will govern the filing and treatment of confidential information in the proceeding:

~~Default~~ Protective Order

This protective order governs the treatment and filing of confidential information, including documents and testimony.

1. Confidential information shall be clearly marked "PROTECTIVE ORDER MATERIAL."

2. Access to confidential information is limited to the following individuals who have executed the acknowledgment appended to this order:

(A) Parties. Persons who are owners of a patent involved in the proceeding and other persons who are named parties to the proceeding.

(B) Party Representatives. (i) Representatives of record for a party in the proceeding~~.~~; and (ii) partners, associates, employees, and staff of any such party representative to whom it is reasonably necessary to disclose the information for this proceeding, including supporting personnel employed by a party representative, such as paralegals, legal secretaries, and legal clerks.

(C) Experts. Retained experts of a party in the proceeding who further certify in the Acknowledgement that they are not a competitor to any party~~,~~

~~or a consultant for,~~ or employed by~~,~~ such a competitor with respect to the subject matter of the proceeding.

(D) In-house counsel. ~~In~~Up to four in-house counsel ~~of a~~identified by each party~~.~~ under the parties' Stipulated Protective Order (D.I. 30) in the related district court litigation, C.A. No. 22-1046-GBW (D. Del.).

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(F) The Office. Employees and representatives of the United States Patent and Trademark Office who have a need for access to the confidential information shall have such access without the requirement to sign an Acknowledgement. Such employees and representatives shall include the Director, members of the Board and their clerical staff, other support personnel, court reporters, and other persons acting on behalf of the Office.

(G) Persons from the Producing Party. The author, recipient, or custodian of material containing "PROTECTIVE ORDER MATERIAL," or a currently

employed officer or employee of the party that produced the information marked "PROTECTIVE ORDER MATERIAL," shall have such access without the requirement to sign an Acknowledgement.

3. Employees (e.g., corporate officers), consultants, or other persons performing work for a party, other than those persons identified above in (~~d)(~~2)(A)–(E) and (G), shall be extended access to confidential information only upon agreement of the parties or by order of the Board upon a motion brought by the party seeking to disclose confidential information to that person and after signing the Acknowledgment. The party opposing disclosure to that person shall have the burden of proving that such person should be restricted from access to confidential information.

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(B) Documents and Information Exchanged Among the Parties. Documents (including deposition transcripts) and other information designated as confidential that are disclosed to another party during discovery or other proceedings before the Board shall be clearly marked as "PROTECTIVE ORDER MATERIAL" and shall be produced in a manner that maintains its confidentiality.

6. Within 60 days after the final disposition of this action, including the exhaustion of all appeals and motions, or such later date as agreed to by the parties, each party receiving confidential information must return, or certify the destruction of, all copies of the confidential information to the producing party~~.~~; provided,

however, that no one shall be required to return or destroy any confidential information that is contained on back-up or other archival media, which should be treated in accordance with standard retention policies, i.e., which are not retained indefinitely without being overwritten.

(k) Standard Acknowledgement of Protective Order. The following form may be used to acknowledge a protective order and gain access to information covered by the protective order:

~~[CAPTION]~~

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I _____, affirm that I have read the Protective Order; that I will abide by its terms; that I will use the confidential information only in connection with this proceeding and for no other purpose; that I will only allow access to support staff who are reasonably necessary to assist me in this proceeding; that prior to any disclosure to such support staff I informed or will inform them of the requirements of the Protective Order; that I am personally responsible for the requirements of the terms of the Protective Order

and I agree to submit to the jurisdiction of the Office and the United States District Court for the Eastern District of Virginia for purposes of enforcing the terms of the Protective Order and providing remedies for its breach.

_____

[Signature]

CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing **Patent Owner's Unopposed Motion to Seal and Enter Agreed-To Protective Order** was served electronically via email on September 21, 2023, in its entirety on the following:

Dov P. Grossman
Ben Picozzi
Williams & Connolly LLP
680 Maine Avenue SW
Washington, DC 20024
dgrossman@wc.com
bpicozzi@wc.com

Petitioners have consented to service by email.

Dated: September 21, 2023

/William Esper/
William Esper
Case Manager and PTAB Coordinator
Finnegan, Henderson, Farabow,
Garrett & Dunner, LLP