Trials@uspto.gov
571-272-7822

Paper 76
Date: October 7, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC,
Petitioner,

v.
DDC TECHNOLOGY, LLC,
Patent Owner.

IPR2023-00707 (Patent 9,420,075 B2)
IPR2023-00708 (Patent 9,811,184 B2)
IPR2023-00709 (Patent 10,528,199 B2)
IPR2023-00711 (Patent 11,093,001 B2)[1]

Before SHEILA F. MCSHANE, MICHAEL T. CYGAN, and JULIET MITCHELL DIRBA, *Administrative Patent Judges*.

DIRBA, *Administrative Patent Judge*.

ORDER
Granting-in-Part Motions to Seal and
Granting Motion for Protective Order
37 C.F.R. §§ 42.14, 42.54

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[1] This Decision addresses an issue that is the same in these proceedings, so we exercise our discretion to issue one Order to be docketed in each. The parties are not authorized to use this caption.

In this Order, we resolve the pending motions to seal.[2] We begin with a background summarizing the relevant history, and then we address each of the pending motions.

BACKGROUND

In each of these proceedings, the parties have filed several motions to seal: Paper 13 ("First Motion"); Paper 18 ("Second Motion"); Paper 19 ("Third Motion"), Paper 37 ("Renewed Motion"); Paper 48 ("Fourth Motion"); Paper 53 ("Fifth Motion"); and Paper 60 ("Sixth Motion").[3]

On October 26, 2023, the Board granted-in-part the First Motion and granted the Second and Third Motions. Paper 29. Specifically, the Board identified deficiencies with respect to the arguments presented for one of the exhibits identified in the First Motion (i.e., Exhibit 2034)[4] (*id.* at 4), but ordered that the remaining papers and exhibits be sealed and entered a protective order (*id.* at 6–7; *see* First Motion, Appx. A ("First Protective Order")). For Exhibit 2034, the Board explained: (1) the exhibit appears to include at least some public information, (2) there is no public, redacted version of this exhibit, (3) sealing this exhibit may "implicate public access

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[2] We cite only to the papers and exhibits in IPR2023-00707, but substantially similar documents were filed in each of the other proceedings except where otherwise noted. Also, we use dates from IPR2023-00707 to explain the sequence of events, but some papers were filed a few weeks later in IPR2023-00709 and IPR2023-00711.

[3] In IPR2023-00708, the Fifth Motion includes only a subset of the relief requested in other proceedings, and no Sixth Motion was filed.

[4] In IPR2023-00709 and IPR2023-00711, this is Exhibit 2024.

issues" because Patent Owner relies on it to support its arguments regarding objective indicia of non-obviousness, and (4) "neither party provides any justification of [the confidentiality] designation or explanation for why the document is confidential." *Id.* As a result, the Board conditionally sealed Exhibit 2034 and authorized the parties to file a supplemental motion to seal. *Id.* at 4–5.

On November 9, 2023, Patent Owner filed the Renewed Motion along with a proposed redacted version of Exhibit 2034. In the Renewed Motion, however, Patent Owner stated that it "does not believe that anything in Exhibit 2034 is confidential" and "it does not believe that there is good cause to redact Exhibit 2034 or file it under seal." Renewed Motion 2. Patent Owner further explained that "Petitioner has indicated that it believes that Exhibit 2034 should be sealed" and provided a three-sentence quote from Petitioner. *Id.*

On December 19, 2023, the Board emailed the parties to explain that the Renewed Motion was "unacceptable" because "the movant contends that there is not, in fact, good cause for relief" and "the parties fail to adequately brief their respective positions" regarding the confidentiality dispute. Ex. 3009, 2 (citing, *inter alia*, 37 C.F.R. § 42.20(c)). The Board ordered the parties to meet and confer to discuss whether Exhibit 2034 includes confidential information and "discuss an appropriate modification to the protective order to avoid similar problems in the future." *Id.* at 3. The Board also reminded the parties that the Board has ordered that, "[w]hen confidential information is to be entered into the record, it is the responsibility of the party whose confidential information is at issue, not

necessarily the proffering party, to file the motion to seal." *Id.* (citing Papers 28, 29).

On January 8, 2024, the parties emailed the Board to certify that they had met, conferred, and agreed to a modified protective order, but stated that they were unable to agree on the confidentiality of Exhibit 2034. Petitioner requested authorization to file another motion to seal, and Patent Owner stated that "[Petitioner's] proposed redactions do not meet the standard for being sealed, [but] Patent Owner does not intend to file an opposition brief." Ex. 3009, 1–2. The Board authorized the motion (*id.* at 1), and Petitioner thereafter filed the Fourth Motion, which moves to seal Exhibit 2034 and seeks entry of a modified protective order agreed to by both parties.

Petitioner later filed the Fifth Motion and the Sixth Motion, which seek to seal papers and exhibits entered during trial.

ANALYSIS

Legal Standard

There is a strong public policy in favor of making information filed in an *inter partes* review open to the public, especially because the proceeding determines the patentability of claims in an issued patent and, therefore, affects the rights of the public. *See Garmin Int'l v. Garmin Speed Tech's, LLC*, Case IPR2012–00001 (PTAB Mar. 14, 2013) (Paper 34). Under 35 U.S.C. § 316(a)(1) and 37 C.F.R. § 42.14, the default rule is that all papers filed in an *inter partes* review are open and available for access by the public.

A party seeking to depart from the default rule may file a motion to seal. If such a motion is filed, the moving party bears the burden of proof in showing entitlement to the requested relief. 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). 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. *See* PTAB Consolidated Trial Practice Guide ("Trial Practice Guide")[5] 19.

Renewed Motion

In the Renewed Motion, Patent Owner moves to seal Exhibit 2034, but states that it "does not believe that anything in Exhibit 2034 is confidential" and "it does not believe that there is good cause to redact Exhibit 2034 or file it under seal." Renewed Motion 2.

We *deny* Patent Owner's Renewed Motion. *Accord* Ex. 3009, 2–3. "The moving party has the burden of proof to establish that it is entitled to the requested relief." 37 C.F.R. § 42.20(c). The movant (Patent Owner) contends that there is *not* good cause for relief, and we are not persuaded that the short quote of Petitioner's position establishes good cause.

Fourth Motion

After the Board explained via email that the Renewed Motion was unacceptable, Petitioner filed the Fourth Motion, in which Petitioner moves to seal Exhibit 2034 and notes that a proposed redacted version of this

[5] *Available at* https://www.uspto.gov/TrialPracticeGuideConsolidated.

exhibit has already been filed. Fourth Motion 1, 3. Petitioner asserts that this exhibit "reflects non-public business and technological discussions between Petitioner and Patent Owner." *Id.* at 4–5. Petitioner also asserts that "the public can see the information that Patent Owner relies upon for its secondary consideration argument" because the proposed redacted version of the exhibit includes this information and redacts only information that does not relate to patentability (including, for example, email addresses of its employees). *Id.* at 5. In addition, Petitioner requests entry of the Second Protective Order and represents that both parties have agreed to it. *Id.* at 4. Patent Owner did not oppose the Fourth Motion.

We *grant* Petitioner's Fourth Motion.

We are persuaded that Exhibit 2034 contains non-public information that is not germane to the issues disputed in these proceedings. Moreover, Petitioner has filed a proposed redacted version of this exhibit (also identified as Exhibit 2034), and that public version includes the information relied upon by the parties in their arguments regarding objective indicia of non-obviousness.[6] As a result, we are persuaded that the understandability of the public record will not be materially diminished by maintaining the confidential version of Exhibit 2034 under seal.

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[6] We note that the public version redacts the full email address for Clay Bavor, Alex Kauffmann, and Andrew Nartker, including both the local-part and the domain. During a conference call with the Board on August 6, 2024, Petitioner's counsel represented that redaction of the domain name was unintentional. We agree that information should be public, and we clarify that each individuals' email address ends with "@google.com."

In addition, Petitioner has shown good cause for entering the Second Protective Order. Petitioner represents that the Second Protective Order is similar to the previously entered First Protective Order, except that it specifies that the designating party is responsible for filing a motion to seal its confidential information and requires a meet and confer to de-designate confidential material. Fourth Motion 4; *see also id.* at Ex. 1 (redline of differences between the proposed Second Protective Order and the previously entered First Protective Order). Both parties have agreed to this order. *Id.* at Ex. 2 (signed version of Second Protective Order). Accordingly, the Second Protective Order replaces the First Protective Order, which was entered by Paper 29.

Fifth Motion

In the Fifth Motion, Petitioner requests sealing of Paper 54 ("Petitioner's Reply") and Exhibits 1023, 1024, and 1026.[7] Fifth Motion 1. Petitioner filed proposed redacted versions of its Reply (*see* Paper 55) and Exhibit 1023, but did not file a proposed redacted version of either Exhibit 1024 or Exhibit 1026. Petitioner addresses each of the three exhibits individually, and moves to seal the portions of Petitioner's Reply that discuss the confidential information in those exhibits. Fifth Motion 1–3. Patent Owner did not oppose the motion.

We *grant* Petitioner's Fifth Motion.

[7] In IPR2023-00708, the Fifth Motion only requests sealing of Exhibit 1023.

As for Exhibit 1024, we determine that Petitioner has shown good cause for sealing this exhibit in full. We are persuaded that this document contains confidential sales and revenue information of Petitioner and other entities, and given the nature of the information at issue, we are sufficiently persuaded that harm could result from disclosure. Although the specific sales numbers in this exhibit are relied upon in the parties' objective indicia arguments, we are persuaded that Petitioner's interest in maintaining the confidentiality of this information outweighs the public's interest in obtaining access to it.

As for Exhibit 1026, we determine that Petitioner has shown good cause for sealing this exhibit in full. Exhibit 1026 is an email chain between employees of Petitioner and Mr. Patrick Buckley, the inventor of the challenged patents. We are persuaded that this exhibit includes non-public information regarding their discussions. Moreover, although Petitioner did not file a proposed redacted version of this exhibit, Petitioner relies upon it only for two minor points. *See* Petitioner's Reply 11 (advocating a particular construction of the term "lever," which appears in certain claims of one of the challenged patents, based on the inventor's statements in an email), 29 (asserting that Petitioner promoted Patent Owner's predecessor-in-interest and provided encouragement). Given the nature of these arguments, we are persuaded that the understandability of the public record will not be materially diminished by maintaining this exhibit under seal.

As for Exhibit 1023, we determine that Petitioner has shown good cause for sealing portions of this exhibit. Exhibit 1023 is the deposition transcript of the patent's inventor, Mr. Buckley, and it discusses confidential

information found in other exhibits as well as information regarding Patent Owner's predecessor-in-interest. Fifth Motion 3. Petitioner has filed a proposed redacted version of this exhibit that omits the allegedly confidential information. We have compared the confidential and public versions of this exhibit, and we are persuaded that the information regarding Patent Owner's predecessor-in-interest that has been redacted is confidential. We are also persuaded that the other redactions are narrowly tailored to omit sealed information from other exhibits. Given the parties' arguments, some of the redacted information may ultimately bear upon our analysis of issues disputed in this case. Nevertheless, we are persuaded that the parties' interest in maintaining the confidentiality of this information outweighs the public's interest in obtaining access to it.

Finally, for Petitioner's Reply, we determine that Petitioner has shown good cause for sealing the portions of this paper that discuss confidential exhibits. Petitioner has publicly filed a proposed redacted version of Petitioner's Reply that redacts only the confidential portions of Petitioner's Reply. *See* Paper 55.

Sixth Motion

In the Sixth Motion, Petitioner requests sealing of Paper 58 ("Patent Owner's Sur-reply").[8] Sixth Motion 1. Concurrently with this motion, Patent Owner filed a proposed redacted version of its Sur-reply (*see* Paper 59), and Patent Owner did not oppose the motion.

[8] No Sixth Motion was filed in IPR2023-00708.

We *grant* Petitioner's Sixth Motion. We determine that Petitioner has shown good cause for sealing portions of this paper that discuss confidential exhibits. Specifically, as Petitioner notes (Sixth Motion 1), Patent Owner's Sur-reply refers to financial information derived from Exhibit 1024. Patent Owner has publicly filed a proposed redacted version of Patent Owner's Sur-reply that redacts only the confidential portions of Patent Owner's Sur-reply. *See* Paper 59.

CONCLUSION

For the reasons explained above, we *deny* the Renewed Motion and *grant* the Fourth, Fifth, and Sixth Motions.

ORDER

Accordingly, it is:

ORDERED that the Renewed Motion (Paper 37 in IPR2023-00707, Paper 39 in IPR2023-00708, Paper 34 in IPR2023-00709, and Paper 34 in IPR2023-00711) is *denied*;

FURTHER ORDERED that the Fourth Motion (Paper 48 in IPR2023-00707, Paper 50 in IPR2023-00708, Paper 46 in IPR2023-00709, and Paper 46 in IPR2023-00711) is *granted*;

FURTHER ORDERED that the Fifth Motion (Paper 53 in IPR2023-00707, Paper 55 in IPR2023-00708, Paper 51 in IPR2023-00709, and Paper 51 in IPR2023-00711) is *granted*;

FURTHER ORDERED that the Sixth Motion (Paper 60 in IPR2023-00707, Paper 58 in IPR2023-00709, and Paper 56 in IPR2023-00711) is *granted*;

FURTHER ORDERED that the papers and exhibits currently filed under seal in these proceedings shall remain confidential; and

FURTHER ORDERED that the First Protective Order is *vacated* and the Second Protective Order (Fourth Motion, Ex. 2) is *entered*.

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IPR2023-00711 (Patent 11,093,001 B2)

PETITIONER:

Michael Kiklis
KIKLIS AND CLARK, PLLC
mike@kiklislaw.com

Mark Liang
O'MELVENY & MYERS LLP
mliang@omm.com

FOR PATENT OWNER:

Cortney Alexander
KENT & RISLEY LLC
cortneyalexander@kentrisley.com

Timothy Haller
HALLER LAW PLLC
haller@haller-iplaw.com