

Filed on behalf of: Facet Technologies, LLC

Entered: September 6, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LIFESCAN, INC.,
Petitioner,

v.

FACET TECHNOLOGIES, LLC,
Patent Owner.

IPR2023-00712
Patent 8,840,635

**PATENT OWNER FACET TECHNOLOGIES, LLC'S RENEWED
UNOPPOSED MOTION TO FILE DOCUMENTS UNDER SEAL
AND FOR A PROTECTIVE ORDER**

I. INTRODUCTION

Pursuant to 37 C.F.R. §§ 42.14 and 42.54, Patent Owner Facet Technologies, LLC (“Facet”) respectfully requests the Board authorize the filing under seal of Patent Owner’s Response and Exs. 2023, 2024, 2030, 2040, 2044, 2045, 2050-2052, and 2058 (collectively, “Confidential Exhibits”).¹ In addition, Facet respectfully requests the Board enter the Joint Proposed Protective Order, a copy of which is filed herewith as Exhibit 2066.

This Motion renews Patent Owner’s previous Unopposed Motion to File Under Seal, filed December 19, 2023 (Paper 20). On August 23, the Board denied Patent Owner’s original Motion without prejudice and ordered Patent Owner to file a revised Motion without a prosecution bar as part of the Joint Proposed Protective Order. Paper 72 at 3. Accordingly, the Joint Proposed Protective Order (Exhibit 2066) is substantively identical to the one previously submitted as Appendix A to Paper 20, with the exception of Section 8 (Prosecution Bar), which has been deleted

¹ Facet filed a redacted public version of Exhibit 2030 concurrently with its original motion, as it contains only Facet’s protective order material. Facet filed redacted copies of Patent Owner’s Response and Exs. 2023 and 2040 after conferring with Petitioner who provided redactions.

and reserved to preserve numbering of subsequent sections. The Parties have also signed the Joint Proposed Protective Order according to the Board's instructions.²

The Confidential Exhibits contain Facet's and LifeScan's highly confidential information that either Facet or LifeScan has designated as confidential materials, under either the designation "CONFIDENTIAL" or "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" under the attached Joint Proposed Protective Order. The designated materials Facet seeks to seal include highly confidential technical and financial information, including financial data, design documents, and business information. These materials relate to the core of Facet's and LifeScan's business. Public disclosure of this information would significantly harm Facet's and LifeScan's competitive position because it would allow competitors to access sensitive technical information.

Importantly, the parties have both produced and are continuing to produce such sensitive information in the related currently-pending district court litigation, *Facet Technologies, LLC v. LifeScan, Inc.*, No. 2:22-cv-01717-MCS-MAR (C.D. Cal.). The parties previously arrived at a mutual agreement that such information is

² Note that the Acknowledgement at the end of the Protective Order is for House Counsel and Experts/Vendors under Section 7.2, and not for Outside Counsel or the Office.

highly confidential information relating to their core businesses, and that public disclosure of this information could significantly harm their competitive positions (collectively, “Protective Order Material”). To that end, in the related currently-pending district court action between the parties involving the patent-at-issue in this proceeding, the parties negotiated, and the district court signed and entered, a protective order that is in effect, a copy of which was attached as Appendix B to Paper 20. The parties have jointly agreed to model the Joint Proposed Protective Order for this proceeding (Exhibit 2066) on the district court order (Appendix B of Paper 20) with the exception of the Prosecution Bar. *See* Consolidated Trial Practice Guide at 116 (“When a proceeding before the Board involves the same parties and subject matter as a parallel district court proceeding, parties may propose that a protective order entered by the district court be adopted by the Board.”).

Facet respectfully submits that the status of the parties as mutual competitors; the district court’s approval, notwithstanding the public interest in general in court proceedings being public, of the parties’ negotiated confidentiality protections for this Protective Order Material; the fact that LifeScan joins in the Joint Proposed Protective Order; the wide acceptance of the fact that highly sensitive and confidential technical information should be afforded protections from disclosure; and the confidential nature of the information that is the subject of the Joint Proposed Protective Order all weigh strongly in favor of granting this motion.

Moreover, importantly, Facet submits that the negotiated specific protections in the existing protective order in district court with respect to the Protective Order Material should be preserved. The parties negotiated these terms for several months prior to arriving at an agreed-upon protective order in the district court litigation. Specifically, sensitive business information and technical documents have been produced in the district court action under specific provisions to preserve its confidentiality. For example, under the protective order in the district court, sensitive business information and technical documents are not permitted to be seen by the non-producing party or more than a limited number of its in-house counsel. These documents may be seen by outside counsel of record, their employees, outside consultants or experts, and the Court. Facet requests that this limitation on access to the Protective Order Material, which was negotiated between and agreed to by both Facet and LifeScan in the district court litigation and in this proceeding, should likewise be approved by the Board in this proceeding. This restriction applies only to information that would already be sealed from the public view by the other provisions of the Joint Proposed Protective Order.³

³ If the Board disagrees that these protections in the district court should be preserved, Facet respectfully requests an opportunity to either supplement its motion

Submitted herewith as Exhibit 2066 is a copy of the Joint Proposed Protective Order, that the parties jointly request be entered. Facet respectfully requests that the Joint Proposed Protective Order (Exhibit 2066) govern these materials in this proceeding to the extent they are found to contain Protective Order Material. Facet will abide by the terms of the Joint Proposed Protective Order.

Pursuant to 37 C.F.R. § 42.54, Facet certifies that it conferred in good faith with LifeScan regarding this motion and the scope of the Joint Proposed Protective Order for this *inter partes* review. LifeScan does not oppose this motion to seal and the parties agree to the terms of the Joint Proposed Protective Order submitted herewith as Exhibit 2066, signed by outside counsel for both Parties.

II. THE BOARD SHOULD SEAL THE CONFIDENTIAL EXHIBITS

A. Good Cause Exists to Seal the Confidential Exhibits

The Trial Practice Guide provides that “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.” 77 Fed. Reg. 48756, 48760 (Aug. 14, 2012). Further, the rules “identify confidential information in a manner consistent with Fed. R. Civ. P. 26(c)(1)(G), which provides

as to this question, or to withdraw its filed Confidential Exhibits to prevent its disclosure beyond the disclosure permitted in the district court.

for protective orders for trade secret or other confidential research, development, or commercial information.” *Id.* (citing 37 C.F.R. § 42.54).

Here, good cause exists to allow Facet to file the Patent Owner Response and Confidential Exhibits under seal. As described in more detail below, the information in these materials that Facet seeks to seal falls into the same general categories: (1) non-public financial and business information (e.g., internal records of revenue and profits and agreements); and (2) non-public technical information relating to the design and functionality of Facet’s and LifeScan’s lancets (e.g., internal communications regarding design and design files) As explained in detail for each exhibit below, good cause exists to seal the Confidential Exhibits for several reasons. First, each contains highly sensitive, non-public, commercial information, disclosure of which would create an elevated risk of commercial or apparent harm to Facet or LifeScan. Second, all of the Confidential Exhibits are designated under the protective order in the related district court litigation as being confidential or highly confidential and restricted to attorneys’ eyes only. Third, the parties have conferred, and LifeScan does not oppose Facet’s designation of its confidential information pursuant to the attached Joint Proposed Protective Order.

The Board should grant this motion in its entirety and enter the attached Joint Proposed Protective Order.

B. The Patent Owner Response and Confidential Exhibits Contain Confidential Information That Should Be Sealed

As explained above, in order to strike the appropriate balance and ensure that only truly confidential information is being sealed, Facet provides the following detailed descriptions of the information in the Patent Owner Response and the Confidential Exhibits that it seeks to seal; identifies the portions of each that it seeks to seal; and explains why the Board should seal these specific portions.

1. Patent Owner Response

Facet requests that the Board seal the Patent Owner Response, which contains references to Facet's and LifeScan's confidential, non-public business information. The Patent Owner Response provides an analysis of commercial success and copying that refers to Facet's and LifeScan's highly sensitive, non-public confidential business information, including financial data, agreements and product development documents that have been designated under the Protective Order in the district court litigation.

The Board should seal the information in the Patent Owner Response for several reasons. First, it includes non-public, confidential information that is highly sensitive to Facet and LifeScan. For example, the technical information is the result of significant resources by Facet and LifeScan in developing, maintaining, and improving the technology underlying their respective lancet products; public disclosure of this information would allow competitors more easily copy their technology and development process. Second, disclosure of this information could

cause Facet or LifeScan serious competitive harm by, for example, providing competitors with a strategic and unfair business advantage against either party in the marketplace. Third, this information is derived from documents designated “CONFIDENTIAL” and “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” pursuant to the protective order entered in the related district court litigation. Fourth, Facet submitted a redacted version of the Patent Owner Response (Paper 57), thus striking the appropriate “balance between the public’s interest in maintaining a complete and understandable file history and the parties’ interest in protecting truly sensitive information.” 77 Fed. Reg. 48756, 48760, 48770 (Aug. 14, 2012).

Facet requests that the Board seal the Patent Owner Response given that it contains Facet’s and LifeScan’s nonpublic financial, marketing, and technical information.

2. Financial Information

Facet requests that the Board seal Exhibits 2030 and 2040, which contain Facet’s and LifeScan’s highly sensitive, non-public financial information, including profits and revenues. Exhibit 2030 is a financial report containing Facet’s revenues and profits. Exhibit 2040 is a financial report containing LifeScan’s revenues and profits.

The Board should seal Exhibits 2030 and 2040 because of the significant potential harm that would come from disclosure. First, the financial information in these exhibits is highly sensitive to Facet and LifeScan, respectively. Second, disclosure of this financial information could cause Facet and LifeScan serious competitive harm by, for example, providing competitors with a strategic and unfair advantage against the two. In addition, Facet has filed public, redacted versions of Exhibits 2030 and 2040.

3. Business Information

Facet requests that the Board seal Exhibits 2023, 2024, 2052, and 2058 which contain Facet's and LifeScan's highly sensitive, non-public business information, including a third-party agreement. Exhibit 2023 is LifeScan's confidential response to an interrogatory in the district court litigation containing LifeScan's confidential business information and know-how. Exhibit 2024 is the deposition transcript from the related district court litigation of a former Facet employee who was involved with the development of LifeScan's Delica Plus lancets, and may contain LifeScan's and/or a third-party's confidential business information and know-how. Exhibit 2052 and 2058 are confidential agreements entered into by LifeScan and Facet, respectively.

The Board should seal Exhibits 2023, 2024, 2052, and 2058 because of the potential harm from disclosure substantially outweighs the public's interest in

maintaining a complete and understandable file history for several reasons. First, the business information in these exhibits is highly sensitive to LifeScan. Second, disclosure of this business information contained in the market analyses could cause LifeScan serious competitive harm by, for example, providing competitors with a strategic and unfair business advantage against them.

4. Documents Relating to Design and Development

Facet requests that the Board seal Exhibits 2044, 2045, and 2050-2051, which contain LifeScan's, Facet's, and a third-party's highly sensitive, non-public technical information, including documents relating to the design and development of their respective lancet products. Exhibits 2044 and 2045 are confidential emails produced by a third party containing information relating to the design and development of the Delica Plus product. Exhibits 2050 and 2051 are confidential emails containing information relating to the design and development of Facet's products.

The Board should seal Exhibits 2044, 2045, and 2050-2051 because of the significant potential harm that would come from public disclosure. First, the technical information and information relating to the design of their lancets is highly sensitive to Facet and LifeScan. Second, disclosure of this information could cause Facet or LifeScan serious competitive harm by, for example, providing competitors with a strategic and unfair advantage against them. Facet invests significant

resources in developing, maintaining, and improving the technology underlying its competitive lancets, and public disclosure of this information would allow competitors more easily to copy Facet's technology and allow them unfairly to market competing products without making the same research and development investment as Facet.

III. CONCLUSION

For the foregoing reasons, Facet respectfully requests the PTAB grant this motion and enter the Joint Proposed Protective Order file herewith as Exhibit 2066.

Respectfully submitted,

Dated: September 6, 2024

By: / Steven W. Peters /

Steven W. Peters (Reg. No. 73,193)
steven.peters@lw.com
Latham & Watkins LLP
555 Eleventh Street, NW, Ste. 1000
Washington, D.C. 20004-1304
Telephone: 202.637.2200
Fax: 202.637.2201

*Counsel for Patent Owner
Facet Technologies, LLC*

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I certify that on this 6th day of September, 2024, a copy of **Patent Owner Facet Technologies, LLC's Renewed Unopposed Motion To File Documents Under Seal And For A Protective Order** was served by electronic mail on Petitioner's lead and backup counsel at the following email addresses:

Michael J. Lyons (Reg. No. 37,386)
Alexander B. Stein (Reg. No. 71,397)
Gerald W. Griffin (*pro hac vice*)
An Le (*pro hac vice*)
MORGAN, LEWIS & BOCKIUS LLP
1400 Page Mill Road
Palo Alto, CA, 94304
Tel.: 650.843.4000
Fax: 650.843.4001
Email: LifeScanFacetIPRs@morganlewis.com

By: / Steven W. Peters /

Steven W. Peters (Reg. No. 73,193)
steven.peters@lw.com
Latham & Watkins LLP
555 Eleventh Street, NW, Ste. 1000
Washington, D.C. 20004-1304
Telephone: 202.637.2200
Fax: 202.637.2201

*Counsel for Patent Owner
Facet Technologies, LLC*