

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MOM ENTERPRISES, LLC,
Petitioner,

v.

ELAINE AND REINHOLD W. VIETH,
Patent Owner.

IPR2023-00726
Patent 9,066,958 B2

Before JOHN G. NEW, SHERIDAN K. SNEDDEN, and
CYNTHIA M. HARDMAN, *Administrative Patent Judges*.

HARDMAN, *Administrative Patent Judge*.

ORDER
Denying Without Prejudice Joint Motion for
Entry of Stipulated Protective Order
37 C.F.R. § 42.54

The parties filed a Joint Motion for Entry of Stipulated Protective Order. Paper 47 (“Mot.”). The Proposed Protective Order (submitted as Exhibit 2018) seeks to modify the Board’s Default Protective Order by, among other things: (1) adding a designation of “Confidential – Attorneys’ Eyes Only;” (2) “clarifying the persons permitted to receive designated information and procedures for disclosure to such persons;” and (3) “permitting use of designation previously made under a protective order entered in concurrent litigation.” Mot. 1; *see also* Ex. 2019 (redline comparison of Proposed Protective Order and the Board’s Default Protective Order).

As set forth in the Board’s Consolidated Trial Practice Guide, the Board generally will accept proposed modifications to the Board’s Default Protective Order, if the modifications are consistent with the integrity and efficient administration of the proceeding. *See* Patent Trial and Appeal Board Consolidated Trial Practice Guide (November 2019) (“Trial Practice Guide”),¹ 115. The Trial Practice Guide specifically provides that parties may propose additional tiers or categories of confidential information, such as “Attorneys’ Eyes Only.” *Id.* The Board, however, will not accept overly inclusive definitions that encourage the parties to categorize all or most of their discovery materials as “Attorneys’ Eyes Only.” *Id.* at 115–16.

The Proposed Protective Order reasonably limits the “Confidential – Attorneys’ Eyes Only” designation to “extremely sensitive Confidential

¹ Available at <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

Information the disclosure of which to another Party or Non-Party would create a substantial risk of serious harm that could not be avoided by less restrictive means,” and requires that a party mark information with this designation “only upon a good faith belief that the information is so commercially sensitive that its dissemination deserves even further limitation than information designated as ‘Confidential.’” *See* Ex. 2018 ¶¶ 1, 4. This modification, and the other proposed modifications to the Board’s Default Protective Order, appear to be consistent with the integrity and efficient administration of the proceeding, with one exception.

Paragraph 10 of the Proposed Protective Order permits any party to “request a change in the designation of any information designated ‘Confidential’ or ‘Confidential – Attorneys’ Eyes Only.’” Ex. 2018 ¶ 10. In pertinent part, this paragraph further provides that if “the requested change in designation is not agreed to, ***the party seeking the change may move for appropriate relief***,” and further specifies which party shall of the burden of proof in such a motion. *Id.* (emphasis added).

This portion of Paragraph 10 of the Proposed Protective Order is inconsistent with Board practice. Generally, in *inter partes* reviews, a motion will not be entered without prior Board authorization. 37 C.F.R. § 42.20(b). The quoted statement from Paragraph 10, however, appears to assume that a party seeking a change in a confidentiality designation is pre-authorized to file a motion with the Board, and seeks to set parameters governing that motion. Pursuant to Board practice, to resolve disputes, the parties must first meet and confer, and if attempts to resolve the dispute fail, a party may request a conference call with the Board to discuss the dispute

and the appropriate means of resolving it. *See, e.g.*, Trial Practice Guide 9–10, 37–38.

For this reason, we deny the parties’ request to enter the Proposed Protective Order (Exhibit 2018). The parties may renew their motion with an appropriately revised proposed protective order.

ORDER

In consideration of the foregoing, it is hereby:

ORDERED the Joint Motion for Entry of Stipulated Protective Order is *denied* without prejudice;

FURTHER ORDERED that parties are authorized to file a renewed joint motion for entry of a protective order.

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