

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 Patent Owner's and Petitioner's Motions to Seal
37 C.F.R. §§ 42.14, 42.54

Patent Owner filed three Motions to Seal. Papers 48, 62, 65. In Paper 48, Patent Owner seeks to seal its “Motion for Additional Discovery” (filed at Paper 49). Paper 48, 1. In Paper 62, Patent Owner seeks to seal Patent Owner’s Response (filed at Paper 61), and twenty-nine supporting exhibits (i.e., Exhibits 2022, 2026, 2027, 2042–2047, 2049–2058, 2060, 2062–2068, 2071, and 2072). *See* Paper 62, 1. In Paper 65, Patent Owner seeks to seal corrected Exhibits 2051, 2064, and 2065.¹ *See* Paper 65, 1.

Petitioner filed a Motion to Seal its Opposition to Patent Owner’s Motion for Additional Discovery (filed at Paper 47). Paper 50, 1.

Legal Standards

The Board recognizes a strong public policy interest in making information filed in a quasi-judicial administrative proceeding open to the public, especially in an *inter partes* review that determines the patentability of claims in an issued patent and therefore affects the rights of the public. *See Garmin Int’l, Inc. v. Cuozzo Speed Techs. LLC*, IPR2012-00001, Paper 34 at 1–2 (PTAB Mar. 14, 2013). Under 35 U.S.C. § 316(a)(1), the default

¹ By email dated February 12, 2024, the Board authorized Patent Owner to file corrected versions of Exhibits 2051, 2064, and 2065. *See* Ex. 3007. The Board advised that it will expunge the originally-filed versions of these exhibits upon counsel’s email confirming that the corrected exhibits had been filed. Patent Owner filed corrected Exhibits 2051, 2064, and 2065 as part of a single Paper (Paper 64), as opposed to individually filing the documents as exhibits. Patent Owner also did not advise the Board that the corrected exhibits had been filed. Patent Owner shall file the corrected exhibits (as exhibits, not as a paper), and shall reply-all to the Board’s February 12, 2024 email to advise the Board of the filing, so that the Board may expunge the originally-filed exhibits.

rule is that all papers filed in an *inter partes* review are open and available for access by the public.

That said, a party may file a motion to seal truly sensitive information. *See* 37 C.F.R. § 42.14; Trial Practice Guide,² 19. The standard for granting a motion to seal is “for good cause.” 37 C.F.R. § 42.54(a). That standard includes a showing 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.

See Argentum Pharms. LLC v. Alcon Research, Ltd., IPR2017-01053, Paper 27 (PTAB Jan. 19, 2018) (informative), 3–4. The moving party has the burden of proof in showing it is entitled to the requested relief. *See* 37 C.F.R. § 42.20(c).

Analysis

In Paper 48, as justification for why portions of its Motion for Additional Discovery should be sealed, Patent Owner states only that the Motion “contains information designated by the Petitioners as Highly Confidential-Attorney’s Eyes Only as required by the proposed Stipulated Protective Order.” Paper 48, 2. In Paper 65, Patent Owner asserts that the information sought to be sealed is Petitioner’s “sensitive financial and business information as it relates to strategy and sales.” Paper 65, 1.

² Patent Trial and Appeal Board Consolidated Trial Practice Guide (Nov. 2019), *available at* <https://www.uspto.gov/TrialPracticeGuideConsolidated>.

In Paper 62, Patent Owner states that the materials sought to be sealed “contain information designated either by the Petitioner, the Patent Owner, or a non-party as Highly Confidential-Attorney’s Eyes Only,” and “contain sensitive financial and business information as it relates to strategy and sales, in particular as evidence of secondary considerations, and as such certain of the designated information is extremely sensitive.” Paper 62, 1.

Turning to Petitioner’s motion, Petitioner states that the Opposition “contains confidential business information that is unknown to the public, such as descriptions and excerpts from Petitioner’s competitive strategy documents and email communications reflecting the same.” Paper 50, 2.

The parties’ justifications in all four motions to seal fail to satisfy the good cause requirement of 37 C.F.R. § 42.54(a).

First, as stated in the Scheduling Order, “[i]t is the responsibility of the party whose confidential information is at issue, not necessarily the proffering party, to file the motion to seal.” Paper 11, 3. Patent Owner states that its motions seek to seal Petitioner’s material (Paper 48, 2; Paper 65, 1), or materials designated confidential by Petitioner, Patent Owner, and/or a non-party (Paper 62, 1). Petitioner at one point suggests that it seeks to seal its own confidential information (*see* Paper 50, 2), but also states that it “submits this Motion to safeguard the confidential information of the relevant parties,” where the “relevant parties” are Petitioner and Patent Owner (*see id.* at 1, n.1). Any renewed motion to seal should be filed by the party who seeks to seal its own confidential information. To the extent a party moves to seal a non-party’s information, that party should establish its standing to assert the interest of the non-party with respect to the

subject information, or should contact the Board for further guidance. *See* Paper 11, 3 n.2; *see also* n.3, below.

Second, the parties' blanket statements that the materials sought to be sealed contain non-public and/or sensitive financial and/or business information are insufficient to establish good cause. *See* Paper 62, 1; Paper 65, 1; Paper 50, 2. The motions do not provide a particularized showing, for each document, as to what specific content constitutes the alleged confidential information. Any renewed motion to seal should address the specific information sought to be sealed in each document, to permit the Board to evaluate good cause on a document-by-document basis. Any renewed motion should also include a showing 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." *See Argentum Pharms. LLC*, IPR2017-01053, Paper 27, at 3–4. Note that documents being marked as Confidential or Confidential-Attorney's Eyes Only in parallel district court litigation is not a sufficient reason, in and of itself, for us to seal the documents. Nor is the mere fact that a document is non-public sufficient to demonstrate that it should be sealed.

Third, any renewed motion to seal shall include a certification that, to the best of the party's knowledge, the information sought to be sealed has not been published or otherwise made public.

Finally, "[w]here 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.” *See* Trial Practice Guide 111. “Redactions to documents filed in this proceeding should be limited to the minimum amount necessary to protect confidential information, and the thrust of the underlying argument or evidence must be clearly discernible from the redacted versions.” Paper 11, 3. The redacted version should be submitted together with the confidential version and motion to seal. *See id.* Parties should not file redacted documents as exhibits or appendices to the motion to seal. If the redacted document is an exhibit, it should be filed as an exhibit. If the redacted document is a paper, it should be filed as a paper.

The parties here did not submit any redacted documents, with one exception. Patent Owner submitted a proposed redacted copy of its Motion for Additional Discovery. *See* Paper 48, Appendix 1. The material Patent Owner proposes to redact in this document appears to belong to Petitioner. *See* Paper 48, 2. To the extent Petitioner seeks sealing of material in Patent Owner’s Motion for Additional Discovery, upon filing its motion to seal, Petitioner shall file a new version of Patent Owner’s Motion for Additional Discovery with its proposed redactions.

The materials that are the subject of the motions to seal (Papers 48, 50, 62, 65) shall continue to be provisionally sealed until the Board rules on any renewed motion(s) to seal these materials. *See* 37 C.F.R. § 42.14 (discussing Board’s authority to provisionally seal information). Should a party not file a motion to seal within the timeframe provided below, the

Board will unseal the materials belonging to a party that are the subject of the motions to seal (Papers 48, 50, 62, 65).³

ORDER

In consideration of the foregoing, it is hereby:

ORDERED that Patent Owner's Motions to Seal (Papers 48, 62, 65) and Petitioner's Motion to Seal (Paper 50) are *denied* without prejudice;

FURTHER ORDERED that if a party seeks to seal the materials referenced in these motions, then within thirty days of the date of this Order, that party shall file a renewed motion to seal, together with a redacted version of the material sought to be sealed; and

FURTHER ORDERED that, should a party not timely file a motion to seal as authorized above, the Board will unseal the materials sought to be sealed in Papers 48, 50, 62, and 65 that belong to a party.

³ In any renewed motion to seal, if a party is unable to assert the interest of a non-party with respect to information sought to be sealed, within thirty days of this Order the parties shall contact the Board by email and (1) identify the specific material belonging to a third party for which sealing is requested; and (2) request a conference call to discuss how to address the non-party material.

IPR2023-00726
Patent 9,066,958 B2

For PETITIONER:

David Conrad
Lance Wyatt
FISH & RICHARDSON P.C.
conrad@fr.com
wyatt@fr.com

For PATENT OWNER:

Mark Ungerman
UNGERMAN IP PLLC
mungerman@ungermanip.com

Peter Davis
WHITEFORD, TAYLOR & PRESTON LLP
pdavis@wtplaw.com

Alan Anderson
Laura Florence
ALAN ANDERSON LAW FIRM LLC
aanderson@anderson-lawfirm.com
rflorence@anderson-lawfirm.com