

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Duration Media LLC
Petitioner,

v.

Rich Media Club LLC
Patent Owner.

IPR2023-00953
US Patent 11,443,329

Filing Date: May 11, 2021
Issue Date: September 13, 2022
Title: System and Method for Creation, Distribution and Tracking of Advertising
Via Electronic Networks

PETITIONER'S MOTION TO SEAL

I. Introduction

Pursuant to 37 C.F.R. § 42.54 and the parties' agreed-upon protective orders in this matter (Paper 28, Default Protective Order and the Modified Protective Order) Petitioner Duration Media LLC ("Duration Media") requests that Patent Owner Rich Media Club LLC's ("RMC") Patent Owner Response and Exhibits 2045 and 2055 be maintained under seal.

II. Good Cause Exists for Sealing Confidential Information

Under 35 U.S.C. § 316(a)(1), the default rule is that all papers filed in *inter partes* review are open and available for access by the public, and a party may file a concurrent motion to seal and the information at issue is sealed pending the outcome of the motion. *See* 37 C.F.R. § 42.14 ("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."). The rules promulgated by the USPTO "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." *Office Trial Practice Guide*, 77 Fed. Reg. 48756, 48760 (Aug. 14, 2012). The moving party has the burden of establishing "good cause" for sealing

documents containing confidential information. *Arista Networks, Inc. v. Cisco Systems, Inc.*, IPR2016-00309, Paper 51, at 2.

Here, good cause exists for maintaining the confidentiality of the documents, or portions thereof, recited in the Introduction of this document. In particular, Exhibit 2055 contains confidential commercial and financial information disclosed by Duration Media in response to RMC's Interrogatory 1, which discloses Duration Media's revenue. Duration Media is a privately held company and, as such, this information is not made public. Instead, Duration Media keeps this information confidential in its ordinary course of business. Furthermore, the parties have verbally agreed that this information will be subject to an Attorneys' Eyes Only ("AEO") designation, as set forth in the Modified Protective Order attached to this motion with clean and marked-up versions. Furthermore, EX2045 is a declaration by RMC's technical expert Robert Sherwood, which discloses the same confidential information from EX2055 designated as AEO and sought to be sealed. Also, the POR (pp. 37–38) the Sherwood (EX2045, ¶¶ 93, 94) and the Tchibirev declarations (EX2026, ¶¶ 9, 10, 12) also contain confidential business information concerning Duration's due diligence practices that could be used against duration in future negotiations with potential partners.

Additionally, Petitioner requests portions of the Patent Owner's Response that incorporate the AEO-designated confidential information disclosed in Exhibits 2045

and 2055 regarding Duration Media's revenue remain under seal. The parties also coordinated on filing public versions of the Patent Owner Response and Exhibits 2045 and 2055.

Note that the parties are currently coordinating with the Board to file substituted exhibits that provide appropriate highlights and redactions corresponding to the two motions to seal. Duration's confidential/AEO information is in yellow, and RMC's confidential information is in green.

III. Certification of Conference with Opposing Counsel

Pursuant to 37 C.F.R. § 42.54, Counsel for Duration Media has conferred with Counsel for RMC, and RMC does not oppose this motion.

IV. Conclusion

For the above reasons, Petitioner Duration Media requests that the Patent Owner's Response and Exhibits 2045 and 2055 be placed under seal.

Dated: December 22, 2023

Respectfully submitted,

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~~DEFAULT~~ MODIFIED PROTECTIVE ORDER

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

~~Default~~ Modified 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. Attorneys Eyes Only (AEO) information shall be clearly marked “ATTORNEYS EYES ONLY.”

2.3. Access to confidential and AEO 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 shall have access to confidential information but not AEO information.

(B) Party Representatives. Representatives of record for a party in the proceeding.

(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-house counsel of a party shall have access to confidential information but not AEO information.

(E) Support Personnel. Administrative assistants, clerical staff, court reporters and 118 other support personnel of the foregoing persons who are reasonably necessary to assist those persons in the proceeding 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 and AEO information.

(F) The Office. Employees and representatives of the United States Patent and Trademark Office who have a need for access to the confidential and AEO 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.

3.4. 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), 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.

4.5. Persons receiving confidential or AEO 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 and AEO 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 and AEO information to a reasonable number of copies needed for conduct of the proceeding and maintaining a record of the locations of such copies.

56. Persons receiving confidential and AEO 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 and AEO 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.

76. Within 60 days after the final disposition of this action, including the exhaustion of all appeals and motions, each party receiving confidential and AEO information must return, or certify the destruction of, all copies of the confidential and AEO information to the producing party.

[CAPTION]

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 and AEO 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]

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MODIFIED PROTECTIVE ORDER

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Modified Protective Order

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(H) Party Representatives. Representatives of record for a party in the proceeding.

(I) 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.

(J) In-house counsel. In-house counsel of a party shall have access to confidential information but not AEO information.

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4. 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), shall be extended access to confidential and AEO 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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(E) Maintaining such information in a secure location to which persons not authorized to receive the information shall not have access;

(F) 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;

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

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

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7. Within 60 days after the final disposition of this action, including the exhaustion of all appeals and motions, each party receiving confidential and AEO information must return, or certify the destruction of, all copies of the confidential and AEO information to the producing party.

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[Signature]

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Petitioner's Motion to Seal and Modified Protective Order has been served on all parties via email on this the 22 day of December, 2023.

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Dated: December 22, 2023

Respectfully submitted,

/Kevin Greenleaf/
Kevin Greenleaf
Reg. No. 64,062