

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

PELOTON INTERACTIVE, INC.,
Petitioner,

v.

NEC CORPORATION,
Patent Owner.

Case IPR2023-01241
U.S. Patent No. 9,769,427

**PETITIONER'S OPPOSITION TO PATENT OWNER'S
MOTION TO SEAL**

Petitioner Peloton Interactive, Inc. (“Peloton”) submits this Opposition to Patent Owner NEC Corporation’s Motion to Seal (Paper 21), filed May 1, 2024. The Motion to Seal requests sealing Exhibits 2011, 2012, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2022, and 2023. Paper 21 at 3–4. As Patent Owner notes in its Motion, the parties have agreed to entry of the Default Protective Order in this inter partes review, *id.* at 2–3, but NEC’s request to seal the exhibits should be denied.

Strong public policy exists for making all information in an inter partes review open to the public. *Garmin Int’l v. Cuozzo Speed Techs.*, LLC, IPR2012-00001, Paper 34 at 1–2 (PTAB Mar. 14, 2013); Consolidated Office Trial Practice Guide at 91 (“The Board has a strong interest in the public availability of trial proceedings.”). All papers filed in inter partes reviews are by default available to the public. 35 U.S.C. § 316(a)(1). “[C]onfidential information” may be granted protection from disclosure only “for good cause.” 37 C.F.R. § 42.54(a); 35 U.S.C. § 316(a)(7).

NEC argues that its request should be granted because “the public interest will not be harmed by sealing these Exhibits.” Paper 21 at 4. But this is not the appropriate test. Parties moving to seal have “the burden of showing that the relief requested should be granted” and that an interest in confidentiality “outweighs the strong public interest in having an open record.” *Argentum Pharm. LLC v. Alcon Research, Ltd.*, IPR2017-01053, Paper 27 at 2, 4 (PTAB Jan. 19, 2018) (Informative); 37 C.F.R. § 42.20(c). In meeting this burden, a patent owner must

show that “concrete harm would result upon public disclosure” of the material in dispute. *Argentum Pharm.*, Paper 27 at 4. In other words, NEC must show that it will suffer actual harm from *failure* to seal the exhibits, not simply that sealing the exhibits will not cause harm to the public interest (which is also disputed). NEC has made no such argument, much less such a showing, so its motion to seal should be denied.

NEC has also failed to show that the information it seeks to seal is “truly confidential,” which is required to overcome the strong public interest in preserving an open record. *Argentum Pharm.*, Paper 27 at 4. “Few, if any, exhibits, even business records, should ever be confidential in their entirety, without good cause to show that all of the information contained therein is truly sensitive.” *Edwards Lifesciences Corp. v. Boston Scientific Scimed, Inc.*, IPR2017-00060, Paper 24 at 7 (n.3) (PTAB July 20, 2017). Moreover, “[a] motion to seal will not be granted if it is based only on broad or generic contentions of confidentiality.” *3M Co. v. Westech Aerosol Corp.*, IPR2018-00576, Paper 30 at 5 (PTAB Mar. 15, 2019). But NEC has provided nothing more than generic contentions of confidentiality. NEC’s recitation of the exhibits it seeks to seal simply regurgitates the same claim that they contain confidential information. Paper 21 at 3–4. A review of these exhibits proves this to be unsupported:

- Exhibit 2011 is a declaration from an inventor of the '427 Patent, Kunihiro Taniguchi. Paragraphs 1–7 discuss Mr. Taniguchi's background and research interests. Paragraph 8 describes what was “known in the art.” Ex. 2011 ¶ 8. Paragraphs 9–16 are generic assertions related to NEC's claims regarding conception and reduction to practice that are repeated publicly in its Patent Owner Response. *Compare* Paper 20 at 9–19 *with* Ex. 2011 ¶¶ 9–16.
- Exhibits 2012 and 2013 are a presentation (and translation thereof) NEC relies upon to support its argument for an earlier priority date for the '427 Patent. In other words, NEC claims that the presentation includes similar, if not “substantially identical” information to that included in a publicly available document (the '427 Patent). Paper 20 at 13. The exhibits also include several pages with information described as “PRIOR ART.” Ex. 2013 at 3–6.¹ NEC's Patent Owner Response (publicly filed) also includes many excerpts of the figures in this presentation. NEC does not nothing more than baldly assert this presentation includes “confidential technical information” and does not

¹ Every page of Exhibit 2013 is marked “NEC, Exh. 2013, p, 1” in the lower right corner of the document, so this opposition refers to the numbers in the lower right of the document above that marking.

explain how this differs from information already made publicly available, per its own priority date argument.

- NEC presents no explanation as to how Exhibits 2014 and 2015 (screenshots purporting to show metadata related to the presentation in Exhibits 2012 and 2013) supposedly contain confidential information that could harm NEC if made public.
- Exhibits 2016–2019 are documents pertaining to a draft patent application, which NEC claims without further explanation contain “confidential technical information” and a “confidential work request.” Paper 21 at 3. Faced with similarly-scant explanations related to “draft patent applications” materials, the Board has held that this does not “explain[] sufficiently and with particularity why the content of each exhibit is ‘confidential information’ under 35 U.S.C. § 316(a)(7) and 37 C.F.R. § 42.54, or address[] any of the considerations . . . for establishing good cause.” *DISH Network LLC v. Broadband iTV, Inc.*, IPR2020-01267, Paper 57 at 5 (PTAB Oct. 7. 2021).
- Exhibits 2022 and 2023 are declarations containing generic assertions related to NEC’s claims surrounding reduction to practice that are repeated publicly in its Patent Owner Response. *Compare* Paper 20 at 17–19 *with* Ex. 2022; Ex. 2023.

NEC has not shown that the information contained in the documents it seeks to seal is “truly confidential,” or that any “concrete harm” will result from their public disclosure. NEC presently seeks to seal the exhibits in their entirety, *see* Paper 20 at 1, and it has not indicated what information would not be redacted in its proposed “redacted version for public records” of each of those documents,² *id.* at 4. Because NEC has not carried its burden, Peloton respectfully requests that NEC’s motion to seal be denied.

Date: June 3, 2024

Respectfully submitted,

By /Scott C. Weidenfeller/

Scott C. Weidenfeller

Registration No.: 54,531

Anupam Sharma

Registration No.: 55,609

Counsel for Petitioner

² Presumably, NEC will seek to redact at least some of the information about the “PRIOR ART” that is marked as “NEC Confidential.” Ex. 2013 at 3–6.

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6, I hereby certify that the foregoing Petitioner's Opposition to Patent Owner's Motion to Seal was served by electronic mail today on the following counsel of record for Patent Owner:

Eliot Williams (eliot.williams@bakerbotts.com; dlbbnec@bakerbotts.com)
Robert Maier (robert.maier@bakerbotts.com)
Jennifer Tempesta (jennifer.tempesta@bakerbotts.com)
Michael Knierim (michael.knierim@bakerbotts.com)
Nicholas Palmieri (nicholas.palmieri@bakerbotts.com)
BAKER BOTTS L.L.P.

And with courtesy copy to:

Darren Franklin (dfranklin@sheppardmullin.com)
Daniel Yannuzzi (dyannuzzi@sheppardmullin.com)
Mark W. Catanese (mcatanese@sheppardmullin.com)
SHEPPARD, MULLIN, RICHTER & HAMPTON

Date: June 3, 2024

/Scott C. Weidenfeller/
Scott C. Weidenfeller
Registration No.: 54,531