

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

OMEGA LINER COMPANY, INC.,

Petitioner

v.

BUERGOFOL GmbH,

Patent Owner.

IPR2023-01372

Patent 9,657,882 B2

**PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO
SEAL AND REQUEST TO ENTER PROTECTIVE ORDER (PAPER 28)**

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A. Introduction.

PO fails to identify anything “confidential” in the customer complaint contained in Exhibits 1060-63. Rather, PO simply concludes that it doesn’t make customer complaints public and similar materials are designated confidential in the district court (Paper 28 at p. 5). This hand-waving is a far cry from meeting its burden under *Argentum*.

PO identifies nothing specific in these exhibits, nor does it offer to redact anything specific. It just takes the position that *everything* should be hidden from the public. However, PO has failed to establish any confidentiality in communications with a former third-party customer that has no confidentiality obligations, particularly one it previously sued. Moreover, PO has waived any claim to confidentiality through its own actions.

B. PO Failed to Establish Good Cause Under the *Argentum* Factors.

1. No Confidential Information in Email.

Regarding the first *Argentum* factor, PO failed to identify or demonstrate that any information in the February 26, 2009 email from Saertex (“Saertex Email” - Exhibits 1060-1063) is confidential and proposes no specific redactions in this regard. *Argentum Pharm. LLC v. Alcon Research, Ltd.*, Case IPR2017-01053, Paper 27 at 4 (PTAB Jan. 19, 2018). Rather, PO once again believes it can just over-designate here consistent with its district court practice.

The Saertex Email is nothing but a customer complaint, *i.e.*, the customers complaining about the adhesion problem of PO's inner film used in Saertex's CIPP liners who in turn complained to PO. (EX1060.) Customer complaints are not confidential. *Reyna v. Arris Int'l PLC*, 2018 WL 1400513, at *3 (N.D. Cal. Mar. 20, 2018) ("The Court has previously found that customer complaints 'are not confidential, because they are known by third parties—the customers reporting the complaints.'") In addition, Saertex has no confidentiality obligations to PO and PO has not alleged or demonstrated otherwise. (EX1082, 19:8-11, 26:22-23.)

Indeed, PO has also publicly disclosed other customer complaints about adhesion and tearing problems in its inventor declarations. (EX2003, ¶¶21-24; EX2004, ¶¶12, 14, 18, 19.) This testimony is based on the complaints of its customers expressed during private meetings to the inventors that PO chose to publicly disclose in their declarations. (*Id.*) PO certainly discloses customer complaints when it finds it beneficial to its case.

PO cannot selectively publicly disclose which customer complaints it intends to wield as a sword to support its positions while simultaneously attempting to shield unfavorable customer complaints that contradict its positions. Indeed, it had an ethical obligation to serve such inconsistent positions with the filing of its brief; it did not. *Spectrum Solutions LLC v. Longhorn Vaccines & Diagnostics, LLC*, IPR2021-00847, Paper No. 142 at 21-32 (PTAB July 11, 2024).

2. No Harm If the Email Remains Publicly Available.

PO only provides bare attorney argument that if the Saertex Email remains public it will somehow damage “PO’s image” with potential and existing customers. (Paper 28, p. 6.) However, Buergofol fails to inform the Board that it initiated litigation against Saertex in 2012, during which numerous complaints by Saertex about quality issues with Buergofol’s film products were extensively detailed in publicly available German court orders. *Buergofol GmbH v. Omega Liner Company, Inc.*, 22-cv-04112-KES, Dkt. 491 at 8-9 (D.S.D.). If PO were truly concerned about its reputation with potential and existing customers, it would not publicly sue its customers, particularly in cases where PO’s quality problems were a central issue. Setting aside that PO refuses to specify any particular material in the disputed exhibits as confidential, or explain a *concrete* harm, PO has waived any such protections by disclosing the very same information in its own public submissions. (Section C, *infra*.)

3. There Is a Genuine Need for Petitioner to Rely on Email.

PO contends that the email constitutes hearsay but disregards the declaration of Mr. Nils Fuechtjohann, the author of the Saertex Email, who remains employed at Saertex and has authenticated the email (EX1063, pp. 2-3). PO’s claims regarding admissibility (Paper 28, p. 8) are baseless and have no bearing on the confidentiality determination in any event.

Next, PO confusingly insists that Petitioner has no need to rely on the Saertex Email, claiming it is irrelevant to the merits of this proceeding and raising improper merit-based objections (Paper 28, p. 7). Of course, the Saertex Email directly addresses and undermines PO's secondary indicia arguments, its attempts to mislead the Board, its failure to meet its Duty of Candor and its duty to disclose inconsistent information (37 C.F.R. § 42.51(b)(1)(iii)), and the lack of credibility of PO's witnesses. Accordingly, the Saertex Email is highly relevant. (*See, e.g.*, Paper 24, pp. 15-16).

4. The Public's Interest Is in Full Disclosure.

As set forth below, PO cannot claim an interest in the confidentiality of the Saertex Email after having publicly disclosed a screenshot of the Saertex Email and other customer complaints about the adhesion problem. Further, PO's attempts to minimize the importance of the Saertex Email do not address the public's interest in its full disclosure. Instead, its arguments against its admissibility and attempts to spin the meaning of the contents of the Saertex Email go to the weight of the evidence and only serve to highlight the need for the Saertex Email to remain available to the public as a focus of PO's sur-reply briefing.

The public's right to full disclosure of the Saertex Email is necessary to fully understand the written record and the deficiency of PO's secondary consideration arguments.

C. PO Waived Confidentiality by Publicly Disclosing Saertex Email.

On November 8, 2024, just two weeks after filing this motion, PO has itself **publicly disclosed a screenshot of the same email** in Gregor Schleicher's declaration as shown below:

10. I have been made aware of an email dated February 26, 2009, from a former customer of PO, Saertex, to a salesman of PO, Tobias Abfall, which was

copied to six other people. (EX1060) In the email, Mr. Fuechtjohann of Saertex informs PO's salesman, Mr. Abfall:

Dear Mr. Abfall,

During several construction projects, our customers complained on a massive scale because the inner foil you supplied was extremely difficult to remove from the liner after installation. Foils with the following order numbers were used:

10803825
10802754

We hereby complain about these two order numbers.

(EX1060, Page 2 of 3)

(EX2029, ¶10.) PO never made any redactions of the product numbers or any other information in the screenshot of the email. PO's publicly filed declarations by Dr. Boutrid and Mr. Schleicher with P-TACTS each identifies, quotes from and discusses the Saertex Email and its contents. (EX2028, ¶¶ 8-14; EX2029, ¶¶ 10-15.)

In sum, PO failed to identify or demonstrate any confidential information in the Saertex Email, and in any event, PO has itself publicly disclosed the very same information. Again, voluntarily doing so when it finds such disclosure helpful to its case.

Furthermore, PO has previously filed several now-public documents with the Board that discuss customer problems (EX2003, ¶¶21-24; EX2004, ¶¶12, 14, 18, 19) so no “concrete harm” can come from the public disclosure of the Saertex Email absent specific explanation of how these particular documents are different than the other public complaint documents. Indeed, now that PO has publicly filed two new declarations which identify, quote from, discuss, and provide a screenshot of the Saertex Email and its contents, PO’s position is no longer tenable. (EX2028, ¶¶ 8-14; EX2029, ¶¶ 10-15.)

D. PO’s False Claims Regarding the Saertex “Follow-Up” Email.

Finally, PO falsely claims that Petitioner withheld a “follow up” email from Saertex and suggests this omission somehow harmed PO’s reputation:

As is evident from EX1060-EX1063, this was a complaint that referenced a follow up, and **failing to provide that follow up evidence harms PO even more severely**. PO very well could have completely resolved the issue favorably, **but by only presenting the initial document, PO’s reputation is damaged**.

(Paper 28, 6:9-13.) Despite the gravity of this claim, PO failed to provide the Board with a copy of the alleged “follow-up” to substantiate its assertion. Attached as

EX1084¹ is the referenced “follow up” email, which is nothing more than a routine follow up email stating the following:

Dear Messrs. Abfall and Boutrid,

I would like to ask you to provide us with feedback on the complaint below by March 18, 2009 at the latest.

Thank you very much.

Best regards

p.p. Dr. Nils Füchtjohann

[bilingual text:] Entwicklung / Laborleitung
Development / Head of Laboratory

The logo for SAERTEX multiCom, featuring a stylized globe icon above the text "SAERTEX" in bold and "multiCom" in a smaller font.

(EX1084, p. 2.)

PO’s assertion that the absence of this email from the record damaged its reputation is just baseless gamesmanship. PO has this email in its possession and understands it adds nothing. That is, PO continues to play “hide-and-seek” with the facts believing that it can simply withhold inconsistent documents as necessary to steer its false narrative.

¹ Exhibit 1084 includes the February 26, 2009 Saertex email that is subject to PO’s present motion to seal (Paper 28). Out of an abundance of caution, Petitioner is filing Exhibit 1084 with availability to only “Parties and Board” until PO’s motion to seal (Paper 28) is decided.

E. PO's Improper Use of the Motion to Secure Additional Briefing

As discussed in Petitioner's email to the Board (EX3001), pages 6-11 of PO's motion to seal (Paper 28) improperly addressed the merits of the case. Furthermore, PO used the motion to seal to baselessly attack Petitioner. For example, PO's motion baselessly claimed that Petitioner was "sandbagging PO" and "purposefully side-stepping the protective order in the litigation" to deflect from its own Duty of Candor violation. (Paper 28, 6:17-18, 7:4-5.)

Considering PO does not even attempt to identify any alleged confidential information in the Saertex Email, the only rational purpose for the motion was to game the Board's resources to attack Petitioner and improperly present arguments that should have been presented in its sur-reply thereby effectively giving PO significantly more than the 5,600 words allowed pursuant to 37 C.F.R. § 42.24(c)(4).

F. Conclusion.

PO's motion to seal should be denied.

Dated: November 19, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing *PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO SEAL AND REQUEST TO ENTER PROTECTIVE ORDER (PAPER 28)*, was served by filing this document on the date indicated below through the Patent Trial and Appeal Case Tracking System (P-TACTS) and via e-mail to the following attorneys of record for the Patent Owner listed below:

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