

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 (PAPER 48)**

A. Introduction.

Patent Owner (“PO”) has once again burdened the Board with a baseless motion, this time seeking to seal a declaration (EX2029) that PO itself intentionally filed as publicly available. PO’s claim that it filed EX2029 under a supposed “mistaken understanding” that the declaration would remain non-public unless its prior motion was granted defies logic and lacks any credible support. Notably, PO offers no explanation for why it originally designated the document as “Public” during filing, failed to file a motion to seal with EX2029, or why it waited until the Board denied its prior motion to suddenly claim confidentiality.

PO’s motion also ignores critical facts. The PTAB’s electronic filing system (P-TACTS) requires express selection of a document’s availability status during submission, which PO designated as “Public.” PO and its counsel received multiple notifications confirming this designation via the P-TACTS submission system and via P-TACTS’ email, yet they took no action for 14 days to address the public availability of EX2029. Moreover, PO fails to cite any authority or procedural rule to support its purported belief that a publicly filed exhibit would somehow remain confidential.

This motion reflects yet another unjustified shift in PO’s position, driven solely by its current self-interest and wasting the Board’s time and resources. The record plainly shows that PO deliberately filed EX2029 as a public document,

neglected to act promptly despite receiving multiple notifications, and has conclusively waived any claim of confidentiality. For these reasons, PO's motion should be denied in its entirety.

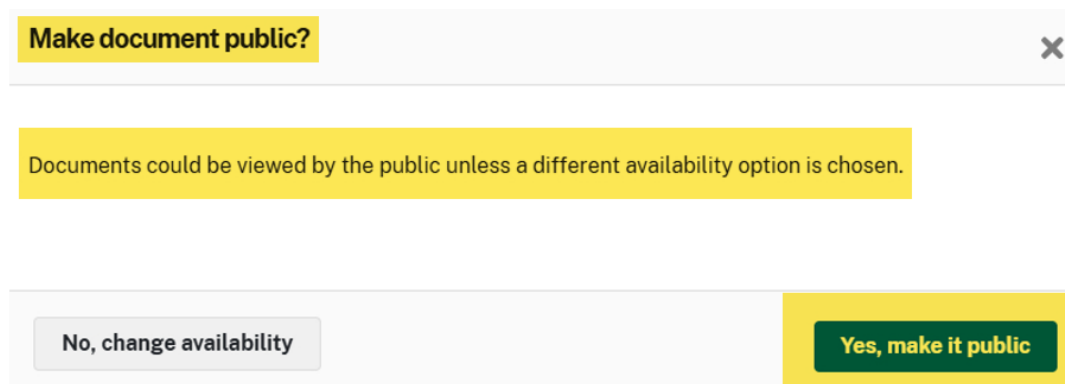
B. Argument.

Buergofol's motion is meritless and should be denied outright for the following reasons:

PO Fails to Address the *Argentum* Factors. PO's motion completely ignores the four factors outlined in *Argentum Pharm. LLC v. Alcon Research, Ltd.*, Case IPR2017-01053, Paper 27 at 4 (PTAB Jan. 19, 2018). PO provides no discussion of what information it alleges to be confidential, no proposed redacted version of the exhibit, no identification of any harm resulting from public disclosure, no explanation of the need to rely on the exhibit, and no acknowledgment of the public's interest in full disclosure. This fundamental failure alone renders the motion fatally deficient. Petitioner has already demonstrated in its opposition (Paper 45) to PO's prior motion to seal that the declaration contains no confidential information.

PO Intentionally Filed EX2029 as Public. PO knowingly filed EX2029 as a public document on November 8, 2024, through the PTAB's P-TACTS system. During the submission process, the system required PO to select an "Availability" option, clearly offering the choices of "Public" or "Parties and Board." PO does not claim it selected the wrong option, and it is undisputed that PO selected "Public" as

the availability status for EX2029. Furthermore, PO would have received the following confirmation pop-up before finalizing its addition of EX2029, reiterating the public designation of the document:



Make document public? ×

Documents could be viewed by the public unless a different availability option is chosen.

No, change availability Yes, make it public

PO has offered no explanation for how it could have possibly misunderstood the public filing process or how it believed EX2029 would remain non-public. This deliberate act of filing EX2029 as a public document is unequivocal.

P-TACTS Email Confirms Public Availability. On November 8, 2024, the P-TACTS system sent an email notification to all three of PO’s attorneys, expressly stating that EX2029 was “Available for everyone”:

IPR2023-01372: Document(s) Filed - Omega Liner Company, Inc. v. Buergofol GmbH

 PTACTS_System@uspto.gov
To:  Michael Neustel;  patrick.doody@pillsburylaw.com
Cc:  Monte Bond;  darien@imperiumpw.com;  smckeown-ptab@wolfgreenfield.com;
 lester@imperiumpw.com

  Reply  Reply All  Forward   Fri 11/8/2024 6:24 PM

Document Filing Notice

AIA Review No.: IPR2023-01372
Petitioner: Omega Liner Company, Inc. of Canton, SD
Patent Owner: Buergofol GmbH of , DE
Patent No.: 9657882
Submitted Date: 11/08/2024
Submitted By: Darien Wallace, darien@imperiumpw.com

The following document(s) has/have been filed.

Document(s) List

No.	Document No.	Document Type	Document Name	Filing Party	Availability
1	35	Motion: Other	Patent Owner's Motion to File New Evidence in the Form of Declarations from Dr. Boutrid and Mr. Schleicher	Patent owner	Available for everyone.
2	2028	Exhibit	Second Declaration of Abdel-Kader Boutrid	Patent owner	Available for everyone.
3	2029	Exhibit	Second Declaration of Gregor Schleicher	Patent owner	Available for everyone.

Questions regarding this receipt should be directed to the Patent Trial and Appeal Board at 571-272-7822 or e-mail to Trials@uspto.gov.

Despite this clear notification, none of PO's attorneys took any action to address the public availability of the exhibit. PO's inaction undermines any claim of confusion or error regarding the filing status.

PO Failed to File a Motion to Seal with EX2029. PTAB procedures require a motion to seal to accompany any document submitted as "Parties and Board Only." PO failed to file such a motion when submitting EX2029, further confirming its intent to publicly file the exhibit. This procedural failure highlights PO's lack of diligence and undermines its belated claims of confidentiality.

No Evidence of PO's Alleged "Misunderstanding." PO's motion lacks any statement in its prior motion to seal (Paper 35) indicating that it intended to later file a motion to seal or that EX2029 contained confidential information. The motion to

seal is based on a post hoc rationalization after the Board denied PO's previous motion. This is not only procedurally improper but also nonsensical.

PO's Motion Is Illogical and Self-Contradictory. Even if PO's statements were believed, its motion is nonsensical. PO alleges it intended to wait until the Board granted its motion to then publicly disclose EX2029 before filing a motion to seal. This approach is entirely irrational—waiting until a document is publicly disclosed to seek its sealing is contrary to both PTAB procedures and basic logic.

PO Cites No Rule or Authority to Justify Its Belief. PO fails to provide any rule or legal authority to support its alleged belief that EX2029, filed with a "Public" designation, would somehow remain confidential. Instead, PO relies solely on its unsupported and unreasonable assertions, which lack any basis in law or procedure.

PO Took No Timely Action Despite Repeated Notifications. PO's failure to act promptly underscores the baselessness of its claims. On November 18, 2024, the Board notified PO that its motion to file the declaration had been denied (EX3004). Despite this, PO did nothing for four days to address the alleged disclosure. Similarly, after Petitioner filed its opposition to PO's prior motion to seal on November 20, 2024, PO took no action for another three days. These repeated delays further demonstrate that PO has waived any claim of confidentiality.

PO Has Waived Any Confidentiality. PO's intentional public filing of EX2029, coupled with its failure to act after receiving multiple notifications, constitutes a clear waiver of any claim of confidentiality. Courts and the PTAB have consistently held that such delays and procedural missteps result in waiver. PO cannot now retroactively claim confidentiality for information it knowingly made public.

C. Conclusion.

PO's motion to seal is nothing more than an after-the-fact attempt to publicly remove a document that demonstrates PO's additional attempt to present false statements to the Board and lacks any legal or factual basis. PO intentionally filed EX2029 as a public document, failed to act despite receiving multiple notifications of its public availability, and has now waived any claim of confidentiality. PO's motion ignores *Argentum*, offers no justification for its belated arguments, and relies solely on unsupported and illogical assertions.

The Board should not condone PO's repeated misuse of its time and resources. Petitioner respectfully requests that the Board deny PO's motion in its entirety.

Dated: November 22, 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 (PAPER 48)*, 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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