

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 EXHIBITS 2036, 2037, 2038, AND 2039 (PAPER 74)**

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A. Introduction.

PO fails to identify any confidential information in Exhibits 2036-2039. Instead, PO merely asserts that it does not make communications with third parties public—an argument that falls far short of meeting its burden under *Argentum*. For instance, PO provides no evidence that the third parties involved, such as customers, are under any confidentiality obligation to PO, nor does it identify any confidentiality agreements.

PO’s claim that information such as a commercial product name, 12-year-old pricing data, delivery bill numbers, and general discussions about customers is confidential lacks any merit. PO further fails to explain how disclosure of this information would cause harm. Additionally, PO neglects to address the “genuine need” *Argentum* factor for keeping Exhibits 2036-2039 sealed and fails to substantively apply the balancing test regarding the public’s strong interest in open disclosure.

In addition, fails to inform the Board that it has already publicly disclosed the much of the same information in other legal proceedings without redactions. Moreover, PO’s counsel has waived any claim of confidentiality by ineffectively redacting the PDF files and failing to verify the redactions before filing.

For these and the following reasons, PO’s motion to seal Exhibits 2036-2039 should be denied in its entirety.

B. No Confidential Information.

Regarding the first *Argentum* factor, PO fails to identify or demonstrate that any of the redacted information in Exhibits 2036-2039 is confidential. *Argentum Pharm. LLC v. Alcon Research, Ltd.*, Case IPR2017-01053, Paper 27 at 4 (PTAB Jan. 19, 2018). For this reason alone, PO's motion to seal should be denied.

1. Old Pricing Data Is Not Confidential (EX2036, EX2038).

The redacted portions of Exhibit 2036 and the first redacted portion of Exhibit 2038 pertain solely to 12-year-old pricing information disclosed to a third-party customer with no confidentiality obligations to PO. Obsolete pricing data of this age holds no value to PO or its competitors. Furthermore, "pricing information conveyed to a customer that the customer is at liberty to divulge is not confidential." *Unisource Worldwide, Inc. v. Carrara*, 244 F. Supp. 2d 977, 987 (C.D. Ill. 2003). PO has neither produced a confidentiality agreement with Brandenburger nor claimed that Brandenburger had any confidentiality obligations to PO.

Therefore, the pricing information in Exhibits 2036 and 2038 is not confidential.

2. Delivery Bill Numbers Not Confidential (EX2037).

The redacted portion of Exhibit 2037 contains delivery bill numbers from over 12 years ago, which cannot be considered confidential. These numbers are routinely used in bills of lading, delivery notes, and invoices to track shipments and are freely

shared with third parties, such as suppliers, customers and carriers, without any confidentiality obligations.

PO has not provided a confidentiality agreement with Brandenburger or claimed that either Brandenburger or the delivery companies owed PO any confidentiality duty. Moreover, the goods were delivered over 12 years ago, making it unclear why PO would regard this information as confidential. Delivery bill numbers have no present value to PO, and PO has not demonstrated any need to keep them confidential.

Finally, PO fails to inform the Board that it has previously publicly disclosed its delivery bill numbers in multiple proceedings, including its German cancellation action against Patent No. DE 202010016048 (Exhibit D27) and its opposition to European Application No. EP11730556A (Exhibit E15). In the EPO opposition, PO explicitly stated it was disclosing “delivery note number 20200621” as Exhibit E15. (EX1013, 22:9.) PO has never previously treated delivery bill numbers as confidential in its public filings.

Accordingly, the delivery bill numbers in Exhibit 2037 are not confidential.

3. General Discussion of Patents Not Confidential (EX2038).

The second redacted portion of Exhibit 2038 relating to “customer’s patent information” is redacted without any explanation by PO as to how this information is possibly confidential. It is unclear why PO made the second redacted portion of

Exhibit 2038 as nothing appears to be confidential, it merely relates to unidentified publicly available patents of a customer, and PO has made no argument as to its confidentiality. General information that a customer has patents is not confidential.

For the above reasons, the general information that a customer has patents in EX2038 is not confidential.

4. Commercial Product Name Not Confidential (EX2039).

On page 1 of Exhibit 2039, PO redacts the commercial product name that it provides to customers without any obligation of confidentiality. PO has neither presented a confidentiality agreement nor alleged that any customer is bound by a confidentiality duty, meaning customers are free to disclose the product name to anyone.

Finally, fails to inform the Board that PO identified the same commercial product name in PO's PowerPoint presentation dated August 10, 2012 submitted in its lawsuit against Saertex multiCom GmbH ("Saertex") as Exhibit 5. Notably, the PowerPoint presentation was by Dr. Kurt Stark, the lead inventor of the '882 Patent. This PowerPoint presentation was even attached in a September 5, 2012 decision by the German court.

The commercial product name in Exhibit 2039 holds no confidentiality interest and offers PO no commercial advantage or value.

5. General 12-Year Old Statements Not Confidential (EX2039).

On page 3 of Exhibit 2039, PO redacts two portions generally describing contract negotiations with a customer. First, there is no confidential information in the redacted statements. Second, PO has not demonstrated that the customer was under any confidentiality obligation with PO. Third, the information is from 2012—over 12 years ago. PO offers no reasonable basis for asserting that such outdated information is confidential.

General statements with no confidential information about 12-year old negotiations are not confidential.

C. No Concrete Harm If the Exhibits Made Publicly Available.

PO contends that public disclosure of customer complaints would somehow damage its “image” with potential and existing customers. (Paper 74, p. 5.) However, this argument fails because the redacted information in Exhibits 2036-2039 does not pertain to customer complaints. In fact, the customer complaints are already fully disclosed in the non-redacted portions of these exhibits. (EX2036-EX2039, Public Versions.)

PO further asserts—without evidence—that revealing obsolete 12-year-old pricing information, which was provided to a customer under no confidentiality obligation, would somehow be “harmful to PO’s business interests.” (Paper 74, p. 5.) Yet, PO does not identify any concrete harm that could result from disclosing

obsolete pricing data. PO offers no explanation of how such outdated information, already shared with a third party with no confidentiality obligation, could adversely affect its business.

Lastly, PO argues that the “film identification and pricing information mentioned in the Exhibits ... is not needed by the public.” (Paper 74, p. 6.) However, this statement fails to allege any harm to PO if the information were disclosed.

In sum, PO has not demonstrated how disclosure of the redacted information in Exhibits 2036-2039 would cause any harm to its business or reputation.

D. PO Fails to Address Third *Argentum* Factor: Genuine Need.

Although PO cites the third *Argentum* factor in the legal authority section of its motion (Paper 74, p. 3), it provides no substantive discussion or explanation of any genuine need to rely on Exhibits 2036-2039.

E. The Public’s Interest Is in Full Disclosure.

PO has knowingly misled the PTAB by falsely claiming it had no knowledge of adhesion-tearing issues with its film before the “spring of 2012,” yet EX2038 directly contradicts this assertion, demonstrating that PO was fully aware of these problems years earlier. There is no public interest in concealing fraudulent statements submitted to the USPTO, which violate the Duty of Candor. *Spectrum Solutions LLC v. Longhorn Vaccines & Diagnostics, LLC*, IPR2021-00847, Paper 142 at 21-32 (PTAB July 11, 2024).

PO vaguely asserts that Exhibits 2036-2039 “would create more confusion” but provides no explanation of how or what confusion would result. (Paper 74, p. 6.) Similarly, PO’s claim of “reputational harm” is unsupported and the exhibits only contain non-confidential information known by third-party customers without any obligation of confidentiality.

PO has failed to establish any legitimate confidentiality interest in Exhibits 2036-2039, much less one that outweighs “the strong public interest in having an open record.”

F. PO Waived Confidentiality by Ineffective Redactions.

The public versions of Exhibits 2036-2039 and 2044-2047 were ineffectively redacted by PO’s counsel, who merely placed removable black boxes over the text instead of using proper redaction software (e.g., Adobe Acrobat’s redaction tool). Additionally, PO’s counsel failed to adequately inspect the PDF files before filing to ensure the alleged confidential information was permanently removed (e.g., by performing a CTRL+F search for the redacted terms).

For nearly four weeks, any third party who downloaded the publicly available exhibits could easily access the alleged confidential information by either (1) copying and pasting the text into a separate document, (2) editing the PDF to move or remove the black boxes, or (3) exporting the PDF file to a Word file.

By publicly disclosing this information without proper redactions, PO has waived any claim of confidentiality over the contents of these exhibits.

G. Conclusion.

For the above reasons, PO's motion to seal (Paper 74) should be denied in its entirety.

Dated: February 1, 2025

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 EXHIBITS 2036, 2037, 2038, AND 2039 (PAPER 74)*, 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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