Trials@uspto.gov
571-272-782

Paper 11
Entered: January 8, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NIKE, INC.,
Petitioner,

v.

SHERRYWEAR LLC,
Patent Owner.

IPR2024-01126 (Patent 10,219,550 B1)
IPR2024-01129 (Patent 10,869,510 B1)[1]

Before MEREDITH C. PETRAVICK, ZHENYU YANG, and JON M. JURGOVAN, *Administrative Patent Judges*.

JURGOVAN, *Administrative Patent Judge*.

ORDER
Granting In Part Patent Owner's Motions to Seal
37 C.F.R. §§ 42.14, 42.54

[1] This Order applies to both of the listed cases. We exercise our discretion to issue one Order to be filed in each case. The parties, however, are not authorized to use this style heading in any subsequent papers.

I. INTRODUCTION

On December 20, 2024, Patent Owner filed a Motion to Seal in each of the above identified proceedings (collectively, "Patent Owner's Motions to Seal"). Paper 9.[2] Patent Owner's Motions to Seal do not propose a protective order for entry in these proceedings. Patent Owner represents that Petitioner does not oppose Patent Owner's Motions to Seal. *Id.* at 2.

For the reasons discussed below, we *grant in part* Patent Owner's Motions to Seal and enter the Board's Default Protective Order.

II. MOTIONS TO SEAL

Patent Owner's Motions to Seal seek to seal Exhibit 2005, and portions of Exhibit 2001 and Patent Owner's Preliminary Response (Paper 8). *See id*. at 1 ("Patent Owner . . . submits this motion to seal SherryWear's Opposition to Institution, exhibit 2001, and exhibit 2005."). Patent Owner concurrently filed Exhibits 2065 and 2066, which presumably identify portions of Exhibit 2001 and Patent Owner's Preliminary Response to be sealed.

The record of an *inter partes* review shall be made available to the public, except as otherwise ordered, and a document filed with a motion to seal shall be treated as sealed until the motion is decided. 35 U.S.C. § 316(a)(1); 37 C.F.R. § 42.14. Only "confidential information" may be protected against public disclosure. 35 U.S.C. § 316(a)(7); 37 C.F.R. § 42.54. The Board observes a strong public policy in favor of making

[2] For convenience, all citations in this Order are to IPR2024-01126. Patent Owner filed similar motion and exhibits in IPR2024-01129.

information filed in *inter partes* review proceedings open to the public. *See Argentum Pharms. LLC v. Alcon Research, Ltd.*, IPR2017-01053, Paper 27 at 3–4 (PTAB Jan. 19, 2018) (informative).

The standard for granting a motion to seal is "good cause." 37 C.F.R. § 42.54(a). The moving party bears the burden of showing that the relief requested should be granted. 37 C.F.R. § 42.20(c). That includes a sufficient showing that

> (1) the information sought to be sealed is truly confidential, (2) a concrete harm would result upon public disclosure, (3) there exists a genuine need to rely in the trial on the specific information sought to be sealed, and (4), on balance, an interest in maintaining confidentiality outweighs the strong public interest in having an open record.

Argentum, Paper 27 at 3–4; *see also Corning Optical Commc'ns RF, LLC v. PPC Broadband, Inc.*, IPR2014-00440, Paper 46 at 2 (PTAB April 6, 2015) (requiring a showing that information has not been "excessively redacted").

Patent Owner explains that Exhibit 2005 is a license to a third party that "contains a confidentiality provision" and "public production of the exhibit would violate the confidentiality provision." Paper 9, 1. As such, Patent Owner "requests that Exhibit 2005 be stricken from the docket." *Id.*

We note that Exhibit 2005 has already been expunged from the records of these proceedings. Accordingly, Patent Owner's Motions to Seal are dismissed as moot with respect to Exhibit 2005.

Patent Owner further explains that "[t]he same confidentiality provision also forbids public disclosure of the existence of the license." Paper 9, 1. The information Patent Owner seeks to seal in Exhibit 2001 and

Patent Owner's Preliminary Response (Paper 8) relates to "references to the license in Exhibit 2005." *Id*.

Upon review of Exhibit 2001 and Patent Owner's Preliminary Response (Paper 8), as well as concurrently filed Exhibits 2065 and 2066 (proposed redacted versions), we are persuaded that good cause exists to seal the unredacted versions because they contain confidential licensing information whose public disclosure would likely result in a concrete harm.

III. ENTRY OF PROTECTIVE ORDER

The Board may, for good cause, issue a protective order "to protect a party or person from disclosing confidential information." 37 C.F.R. § 42.54(a). A protective order is not entered by default but must be proposed by one or more parties and must be approved and entered by the Board. Patent Trial and Appeal Board Consolidated Trial Practice Guide 19–20, 107 (Nov. 2019) ("Trial Practice Guide").[3] The Trial Practice Guide sets forth specific guidelines on proposing a protective order and provides a Default Protective Order. *See* Trial Practice Guide 19–20, 107–122.

Patent Owner's Motions to Seal do not propose a protective order. Neither Patent Owner nor Petitioner has requested entry of a protective order in these proceedings. In this circumstance, in the absence of a proposed protective order from either party, we determine that the Board's entry of the Default Protective Order set forth in the Trial Practice Guide is appropriate because no prejudice is shown and Petitioner does not oppose Patent Owner's Motions to Seal.

[3] Available at http://www.uspto.gov/TrialPracticeGuideConsolidated.

We note that the parties may later propose modifications to the Default Protective Order and the Board will generally accept such proposed changes if they are consistent with the integrity and efficient administration of the proceedings. Trial Practice Guide 115. For example, the parties may agree to provide additional tiers or categories of confidential information, such as "Attorneys' Eyes Only," and the Board will presumptively accept agreed-to changes that provide additional categories of confidentiality as long as they are reasonable and adequately define what types of materials are to be included in the additional categories. *Id.* at 115–116.

Accordingly, it is

ORDERED that Patent Owner's Motions to Seal are *granted* with respect to Exhibit 2001 and Patent Owner's Preliminary Response (Paper 8) in IPR2024-01126, and Exhibit 2001 and Patent Owner's Preliminary Response (Paper 8) in IPR2024-01129;

FURTHER ORDERED that the public versions of Exhibit 2001 and Patent Owner's Preliminary Response (Paper 8) in IPR2024-01126, and the public versions of Exhibit 2001 and Patent Owner's Preliminary Response (Paper 8) in IPR2024-01129 shall be filed within 5 business days from entry of this Order;

FURTHER ORDERED that Patent Owner's Motions to Seal are *dismissed* as moot with respect to Exhibit 2005 in IPR2024-01126, and Exhibit 2005 in IPR2024-01129; and

FURTHER ORDERED that the Default Protective Order attached below be entered in each of the above identified proceedings.

DEFAULT PROTECTIVE ORDER

The following Default Protective Order will govern the filing and treatment of confidential information in the above identified proceedings:

Default 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. Access to confidential 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.

(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.

(E) Support Personnel. Administrative assistants, clerical staff, court reporters and 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 information.

(F) The Office. Employees and representatives of the United States Patent and Trademark Office who have a need for access to the confidential 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. 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. Persons receiving confidential 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 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 information to a reasonable number of copies needed for conduct of the proceeding and maintaining a record of the locations of such copies.

5. Persons receiving confidential 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 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.

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

(k) Standard Acknowledgement of Protective Order. The following form may be used to acknowledge a protective order and gain access to information covered by the protective order:

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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 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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FOR PETITIONER:

W. Baker
Todd.baker@kirkland.com

Noah Frank
Noah.frank@kirkland.com

FOR PATENT OWNER:

Micah Drayton
mdrayton@caldwellip.com