

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BERKSHIRE HATHAWAY ENERGY COMPANY and
PACIFICORP,
Petitioners,

v.

BIRCHTECH CORP.,
Patent Owner.

IPR2025-00422
Patent 10,668,430 B2

Before KRISTINA M. KALAN, ZHENYU YANG, and
DAVID COTTA, *Administrative Patent Judges*.

YANG, *Administrative Patent Judge*.

ORDER

Granting Patent Owner's Motions to Seal (Papers 15, 18, 23, 54, 68)

Granting Petitioners' Motion to Seal (Paper 72)

Granting Petitioners' and Patent Owner's Motion to Seal (Paper 76)

37 C.F.R. §§ 42.14, 42.54

I. INTRODUCTION

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 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.

II. 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”).¹ 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, 107–22.

The parties agree to be bound by the Board’s Default Protective Order and request entry of the same. *See* Paper 15, 1. We grant the parties’ request and enter the Default Protective Order (Trial Practice Guide 117–22).

III. PATENT OWNER’S MOTIONS TO SEAL

Patent Owner filed several Motions to Seal, seeking to seal Exhibits 2011 and 2017 (Paper 15), Exhibits 2037–2042 and Patent Owner’s Preliminary Response (Paper 18), Sur-Reply to Petitioners’ Reply to Patent Owner’s Preliminary Response (Paper 23), Exhibits 2050–2053, 2056, and Patent Owner’s Response (Paper 54), as well as Exhibits 2059–2062 and Patent Owner’s Supplemental Response (Paper 68). Petitioners did not oppose any of the sealing motions.

Exhibit 2011 is the Opening Expert Report of Dr. Stephen Niksa filed in *Midwest Energy Emissions Corp., et al. v. Arthur J. Gallagher & Co., et al.*, 1:19-cv-01334 (D. Del.). Patent Owner argues that good cause exists to seal this exhibit because it was designated confidential in the district court. Paper 15, 1–2. Patent Owner represents that Petitioners do not oppose sealing Exhibit 2011. *Id.* at 2.

Exhibit 2017 is a Declaration of Thomas Erickson. Patent Owner argues that

Exhibit 2017 contains details regarding confidential processes maintained by a third party—the Energy & Environmental

¹ Available at <http://www.uspto.gov/TrialPracticeGuideConsolidated>.

Research Center (“EERC”). In particular, the document contains information regarding the EERC’s use of and operating procedures for its Pilot Test Combustor, which it generally maintains as confidential to protect its research initiatives and the confidentiality of information from entities that work with the EERC.

Paper 15, 2.

According to Patent Owner, Petitioners stated that it “do[es] not oppose sealing [Exhibits 2017] provided Patent Owner demonstrates satisfaction of the factors in *Argentum Pharms. LLC v. Alcon Research, Ltd.*, IPR2017-01053, Paper 27 (Jan. 19, 2018).” Paper 15, 2.

Exhibits 2037–2042 are certain Petitioners’ agreements with refined coal suppliers, which were produced by Petitioners to Patent Owner and designated by Petitioners as “Restricted – Attorneys’ Eyes Only.” Paper 18, 1–2. Patent Owner argues that both Patent Owner’s Preliminary Response (Paper 19) and Sur-Reply to Petitioners’ Reply to Patent Owner’s Preliminary Response (Paper 24) include quotations or references to these exhibits. *Id.* at 2; Paper 23, 1–2. Patent Owner represents that Petitioners do not oppose sealing these exhibits and Patent Owner’s Preliminary Response and Sur-Reply to Petitioners’ Reply to Patent Owner’s Preliminary Response. Paper 18, 2; Paper 23, 2.

Exhibits 2050–2053 are various documents filed under seal in *In re: Midwest Energy Emissions Corp. Pat. Litig.*, No. 4:24-md-03132 (S.D. Iowa). Paper 54, 1–2. Patent Owner argues that Exhibit 2056 and Patent Owner’s Response (Paper 55) include quotations or references to these exhibits. *Id.* at 2–3. Patent Owner represents that Petitioners do not oppose sealing these documents. *Id.* at 3.

Exhibits 2059, 2061, and 2062 are the deposition transcripts of two Petitioners' corporate representatives and one employee, respectively. Paper 68, 1. Exhibit 2060 is a confidential document produced by Petitioners. *Id.* at 2. Patent Owner argues that Patent Owner's Supplemental Response (Paper 69) includes quotations or references to these exhibits. *Id.* Patent Owner represents that Petitioners do not oppose sealing these documents. *Id.*

Upon review of Exhibits 2011, 2017, 2037–2042, 2050–2053, 2056, and 2059–2062, Patent Owner's Preliminary Response (Paper 19), Sur-Reply to Petitioners' Reply to Patent Owner's Preliminary Response (Paper 24), Patent Owner's Response (Paper 55), and Patent Owner's Supplemental Response (Paper 69), we are persuaded that good cause exists to seal these exhibits and papers because they contain confidential information whose public disclosure would likely result in a concrete harm. We, therefore, grant Patent Owner's Motions to Seal.

IV. PETITIONERS' MOTION TO SEAL

Petitioners filed a Motion to Seal, seeking to seal Exhibits 1151 and 1153–1159 and Petitioners' Supplemental Reply to Patent Owner's Supplemental Response (Paper 71). Paper 72, 1.

Exhibit 1151 is a deposition transcripts of Patent Owner's corporate representative. Paper 72, 1. According to Petitioners, the deposition discussed confidential documents, including Exhibits 2052 and 2053. *Id.* at 2. Exhibits 1153–1155 are communications among counsel for the parties, discussing the terms of Exhibits 2052 and 2053. *Id.* Exhibits 1156–1159 are various documents filed under seal in *In re: Midwest Energy Emissions Corp. Pat. Litig.*, No. 4:24-md-03132 (S.D. Iowa). *Id.* at 2–3. Petitioners argue that their Supplemental Reply to Patent Owner's Supplemental

Response (Paper 71) cites to Exhibits 1151 and 1153–1159. *Id.* at 1. Petitioners represent that Patent Owner does not oppose sealing these documents. *Id.* at 4.

Upon review of Exhibits 1151 and 1153–1159 and Petitioners’ Supplemental Reply to Patent Owner’s Supplemental Response (Paper 71), we are persuaded that good cause exists to seal these documents because they contain confidential information whose public disclosure would likely result in a concrete harm. We, therefore, grant Petitioners’ Motions to Seal.

V. PETITIONERS’ AND PATENT OWNER’S MOTION TO SEAL

The parties jointly filed a Motion to Seal, seeking to seal portions of the Institution Decision (Paper 74). Paper 76, 1. The parties pointed out that the Institution Decision includes quotations or references to confidential documents, including Exhibits 2037 and 2053. *Id.* at 1–2. The parties jointly filed a redacted version of the Institution Decision. *See* Paper 77.

Upon review of the redacted version of the Institution Decision, we are persuaded that the parties limited the redactions to portions that reflect the confidential information. We, therefore, grant Petitioners’ and Patent Owner’s Motion to Seal.

VI. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that the Default Protective Order is entered in this proceeding;

FURTHER ORDERED that Patent Owner’s Motions to Seal (Papers 15, 18, 23, 54, 68) are granted;

FURTHER ORDERED that Petitioners’ Motion to Seal (Paper 72) is granted; and

FURTHER ORDERED that Petitioners' and Patent Owner's Motion to Seal (Paper 76) is granted.

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