

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SCHOTT GEMTRON CORPORATION,
Petitioner,

v.

SSW HOLDING COMPANY, INC.,
Patent Owner.

Case IPR2014-00367
Patent 8,286,561 B2

Before JUSTIN T. ARBES, PHILIP J. HOFFMANN, and
GEORGIANNA W. BRADEN, *Administrative Patent Judges*.

ARBES, *Administrative Patent Judge*.

DECISION
Patent Owner's Motion to Seal
37 C.F.R. §§ 42.14 and 42.54

Patent Owner filed a motion to seal its Response (Paper 26, unredacted; Paper 27, redacted) and Exhibits 2108–2119 and 2123 in this proceeding. Paper 25 (“Mot.”). Patent Owner requests that the materials be sealed under the terms of the proposed protective order previously agreed to and submitted by the parties (Exhibit 1113), which is a copy of the protective order entered in related Case IPR2013-00358 involving the same challenged patent.¹ *See* Mot. 2. Subsequent to filing its motion, Patent Owner filed a notice withdrawing its request as to the Response and Exhibits 2108–2112, 2115–2119, and 2123, and filed non-confidential versions of the Response (Paper 28) and exhibits. Paper 29. Thus, the only materials still at issue with respect to Patent Owner’s motion are Exhibits 2113 and 2114. Petitioner filed an opposition. Paper 31 (“Opp.”). For the reasons stated below, Petitioner’s motion is *conditionally granted*.

There is a strong public policy in favor of making information filed in an *inter partes* review open to the public, especially because the proceeding determines the patentability of claims in an issued patent and, therefore, affects the rights of the public. Under 35 U.S.C. § 316(a)(1) and 37 C.F.R. § 42.14, the default rule is that all papers filed in an *inter partes* review are open and available for access by the public; a party, however, may file a concurrent motion to seal and the information at issue is sealed pending the outcome of the motion. It is, however, only “confidential information” that is protected from disclosure. 35 U.S.C. § 316(a)(7). In that regard, the

¹ Petitioner previously filed a motion to seal along with its opposition to a motion for additional discovery filed by Patent Owner. Paper 19. We denied the motion for additional discovery and denied the motion to seal as moot. Paper 20 at 9. Thus, no protective order has been entered in this proceeding.

Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,760 (Aug. 14, 2012) provides:

The rules aim to strike a balance between the public's interest in maintaining a complete and understandable file history and the parties' interest in protecting truly sensitive information.

...

Confidential Information: The rules identify confidential information in a manner consistent with Federal Rule of Civil Procedure 26(c)(1)(G), which provides for protective orders for trade secret or other confidential research, development, or commercial information. § 42.54.

The standard for granting a motion to seal is “for good cause.” 37 C.F.R. § 42.54(a). Patent Owner, as movant, bears the burden of proof in showing entitlement to the requested relief. 37 C.F.R. § 42.20(c). Patent Owner must explain why the information sought to be sealed constitutes confidential information.

Patent Owner argues that Exhibits 2113 and 2114 are “customer release schedule[s] providing details about” the “anticipated delivery requirements and schedule” of one of Patent Owner’s customers. Mot. 3–4. According to Patent Owner, the exhibits include confidential information relating to “business analysis and intelligence related to sales of parts for appliances manufactured and sold by” the customer. *Id.* We have reviewed the exhibits, and are persuaded that they contain confidential information and that good cause exists to have them remain under seal. Also, the proposed protective order (Exhibit 1113) is acceptable for the same reasons as in the related proceeding. *See* IPR2013-00358, Paper 76 at 2–3.

Petitioner makes two arguments in its opposition. First, Petitioner contends that the information in the exhibits is not confidential because it is

“substantially the same type of information that Patent Owner disclosed publicly in Exhibit 2057.” Opp. 1–2. That does not appear to be the case, however. Exhibit 2057 lists quarterly “Sales” and “Quantity” for the years 2010 to 2013. As Patent Owner states in its motion, Exhibits 2113 and 2114 list “anticipated” quantities for 2014 and future dates. *See* Mot. 3–4. Thus, we are not persuaded that Exhibits 2113 and 2114 disclose substantially the same information as non-confidential Exhibit 2057.

Second, Petitioner argues that Patent Owner failed to include with its motion “a certification that [it] has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute,” as required by 37 C.F.R. § 42.54(a), and only contacted Petitioner for the first time after filing the motion. Opp. 1. Petitioner is correct that the motion does not include the required certification. Further, the parties should be well-aware of the procedures for motions to seal, given the disposition of such motions in this proceeding and the related proceeding. *See* Paper 12 at 3–4 (specifically reminding the parties of the requirement to confer with each other before filing a motion to seal); IPR2013-00358, Papers 44, 47, 57, 76, 97. Although we do not deny Patent Owner’s motion for failure to confer with Petitioner in advance, we will require the parties, for the remainder of this proceeding, to obtain authorization before filing any motion to seal. The parties may do so by sending an email to *Trials@uspto.gov* requesting a conference call with the Board, and stating in the email that the parties have conferred with each other regarding specific documents or portions of documents that one or both of the parties believe should be kept under seal.

Finally, we note that Exhibits 2113 and 2114 are not labeled with page numbers, as required by 37 C.F.R. § 42.63(d)(2). Patent Owner shall re-file the exhibits with the proper labelling.

In consideration of the foregoing, it is hereby:

ORDERED that Patent Owner's proposed protective order (Exhibit 1113) is entered and shall govern the treatment and filing of confidential information in this proceeding;

FURTHER ORDERED that Patent Owner's motion (Paper 25) is *conditionally granted*, and Exhibits 2113 and 2114 will be maintained under seal unless and until the Board refers to material in the exhibits in a final written decision;

FURTHER ORDERED that Patent Owner shall re-file Exhibits 2113 and 2114, labeled in compliance with 37 C.F.R. § 42.63(d)(2), by October 17, 2014, after which the original versions of the exhibits will be expunged;

FURTHER ORDERED that Papers 26 and 27, and the confidential versions of Exhibits 2108–2112, 2115–2119, and 2123 filed on September 5, 2014, are expunged from the record of this proceeding; and

FURTHER ORDERED that the parties must obtain authorization from the Board before filing any future motion to seal in this proceeding.

IPR2014-00367
Patent 8,286,561 B2

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