

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNIFIED PATENTS INC,
Petitioner

v.

DRAGON INTELLECTUAL PROPERTY, LLC,
Patent Owner.

Case IPR2014-01252
Patent 5,930,444

Before NEIL T. POWELL, GREGG I. ANDERSON, and
J. JOHN LEE, *Administrative Patent Judges*.

POWELL, *Administrative Patent Judge*.

DECISION
Petitioner's Motions to Seal
37 C.F.R. §§ 42.14 and 42.54

I. Introduction

Petitioner has filed a number of motions to seal various exhibits and pleadings, either in whole or in part. Patent Owner has filed oppositions to all of Petitioner's motions to seal. On November 15, 2014, Petitioner filed a Motion to Seal Exhibits 2001, 2003–2005, 2007–2009, 2011–2013, and 2015–2016. Paper 12 (“First Motion to Seal”). Patent Owner filed an Opposition to the First Motion to Seal. Papers 21, 22 (“First Opposition”).¹ On December 5, 2014, Petitioner filed a Motion to Seal Petitioner's Reply Brief on Real Party in Interest and Exhibit 1015 filed therewith. Paper 17 (“Second Motion to Seal”). Patent Owner filed an Opposition to the Second Motion to Seal. Paper 32 (“Second Opposition”). On December 24, 2014, Petitioner filed a Motion to Seal, in which Petitioner requested that we seal Patent Owner's First Opposition, Patent Owner's Motion for Additional Discovery (Paper 24), Exhibit 1017, “as well as portions of this Motion.” Papers 27, 28 (“Third Motion to Seal”).² On January 5, 2015, Petitioner filed a Motion to Seal Petitioner's Opposition to Patent Owner's Motion for Additional Discovery (Paper 31). Paper 30 (“Fourth Motion to Seal”). Patent Owner filed an Opposition that opposes both the Third Motion to Seal and the Fourth Motion to Seal. Paper 35 (“Third Opposition”). Patent Owner also filed another Opposition that opposes the Fourth Motion to Seal. Paper 36 (Fourth Opposition). For each of the exhibits and pleadings that Petitioner moves to seal, two versions have been filed: an unredacted, confidential version, and a redacted, public version.

¹ Paper 21 is an unredacted, confidential version of the first Opposition. Paper 22 is a redacted, public version of the first Opposition.

² Paper 27 is a redacted, public version of the third Motion to Seal. Paper 28 is an unredacted, confidential version of the third Motion to Seal.

In its Motions to Seal, Petitioner identifies three categories of information in the exhibits and pleadings that Petitioner wishes to have sealed. *E.g.*, Paper 27, 3. In the first category, Petitioner asserts that the identities of its members constitute confidential information that should remain sealed. Paper 12, 2; Paper 17, 2–3; Paper 27, 3; Paper 30, 4–7. In the second category, Petitioner asserts that its membership terms and business strategy constitute confidential information that should remain sealed. Paper 12, 2; Paper 17, 3; Paper 27, 3; Paper 30, 3. In the third category, Petitioner asserts that its financial information constitutes confidential information that should remain sealed. Paper 27, 3. We address each of these categories separately below.

In connection with the Motions to Seal, Petitioner has filed a Protective Order stipulated to by the parties. Ex. 1014. We address the Protective Order after the Motions to Seal.

II. Discussion

The record for 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. The Office Trial Practice Guide provides that:

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.

77 Fed. Reg. 48,756, 48,760 (Aug. 14, 2012).

The standard for granting a motion to seal is “good cause.” 37 C.F.R. § 42.54. There is a strong public policy that favors making information filed in *inter partes* review proceedings open to the public. *See Garmin International v. Cuozzo Speed Technologies, LLC*, Case IPR2012-00001, slip op. at 1-2 (PTAB March 14, 2013) (Paper 34) (discussing the standards of the Board applied to motions to seal). The moving party bears the burden of showing that the relief requested should be granted. 37 C.F.R. § 42.20(c).

a. Identities of Petitioner’s Members

Petitioner asserts multiple reasons in support of its contention that the identities of its members should remain under seal. Petitioner argues that the identities of its members should remain under seal because of concerns that Petitioner’s members would experience retaliation from non-practicing entities (“NPEs”) if the identities of the members became public. Paper 12, 2, 4; Paper 17, 2–4; Paper 27, 7; Paper 30, 6. Patent Owner counters that this argument is speculative and unsupported by evidence that Petitioner’s members would suffer any retaliation if their identities became public. Paper 22, 5–7.

Petitioner further argues that the list of its members is a trade secret, and that the “*Office Patent Trial Practice Guide* (‘*OPTP Guide*’) explains that rule 37 C.F.R. § 42.54 identifies ‘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.’” Paper 27, 4 (citing *Office Patent Trial Practice Guide*, 77 Fed. Reg. 48,756, 48,760 (Aug. 14, 2012)). Asserting that California state law governs the agreements with its members, Petitioner states that a trade secret under California law “includes (a) information (b) which is valuable because unknown to others and (c) which the owner has attempted to keep a secret.” Paper 27, 4 (citing *ABBA Rubber Co. v. Seaquist*, 286 Cal. Rptr. 518, 526 (Cal. Ct. App. 1991)). Petitioner

argues that it meets this test with respect to the list of its members. Paper 27, 5–8; Paper 30, 5–7.

Petitioner contends that the list of its members would be valuable to NPEs because NPEs could use the list of members to identify litigation targets. Paper 27, 5–7; Paper 30, 5–7. Petitioner argues that “[Petitioner]’s current membership list contains economic value because it would provide NPEs with the means to identify companies that were concerned about NPE litigation, retaliate against them, and hurt [Petitioner]’s ability to deter NPEs.” Paper 27, 7; Paper 30, 6.

Patent Owner argues that Petitioner does not demonstrate that the list of its members is a trade secret. Paper 35, 1–2. In particular, Patent Owner argues that Petitioner does not provide sufficient evidence to support its assertion that the list of Petitioner’s list of members meets the test for a trade secret under California law. *Id.*

Consistent with Patent Owner’s assertion, Petitioner has cited limited evidence to support its concerns about retaliation against its members. For example, in the Third Motion to Seal, Petitioner cites evidence that its members fear retaliation. Paper 27, 6. At the same time, the fact that “the ’444 patent, has been asserted against ten companies in district court patent infringement proceedings” (Paper 14, 1) illustrates a reasonable basis for concerns about litigation.

In addition to Petitioner’s needs in protecting the identities of its members, we must consider the public’s interest in maintaining a complete and understandable file history of this case. 77 Fed. Reg. at 48,760. We agree with Patent Owner that if any of Petitioner’s members are real parties-in-interest in the present case, the identities of those members needs to be disclosed to the public. As explained in our decision instituting *inter partes* review, however, the current record does not demonstrate that any of Petitioner’s members are real parties-in-

interest. Paper 37, 8–14. Accordingly, at this stage of the proceeding, the public has little interest in knowing the identities of Petitioner’s members.

Balancing Petitioner’s need to maintain the identities of its members confidential against the public’s need to know the identities of Petitioner’s members, we conclude that Petitioner has shown good cause to seal the identities of its members. Consequently, we grant Petitioner’s motions to seal the identities of Petitioner’s members.

b. Membership Terms and Business Strategy

Petitioner cites multiple reasons that information about its membership terms and business strategy should be sealed. Paper 12, 2; Paper 27, 9–10; Paper 30, 9. Petitioner asserts that it guards this information to protect its business. Paper 12, 2; Paper 17, 3. Petitioner argues also that its membership terms and business strategy constitute trade secrets. Paper 27, 9–10; Paper 30, 9. In support of this, Petitioner argues that the membership terms and business strategy are valuable because “[d]isclosing this information to the public would provide [Petitioner]’s competitors or would-be competitors with a roadmap of how to replicate [Petitioner]’s business model, which is very valuable.” Paper 27, 9; Paper 30, 9. Petitioner further notes that its membership agreements contain confidentiality provisions and are marked HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY in this proceeding. Paper 27, 10. Petitioner concludes that even if its membership terms and business strategy do not qualify as trade secrets, they “constitute highly sensitive business information, deserving of protection.” *Id.*

We are persuaded that Petitioner’s membership terms and business strategies are highly sensitive confidential information. As Petitioner notes, its membership agreements (Exhibits 2003, 2004, and 2005) include confidentiality provisions and have been marked as highly confidential for this case. Paper 27, 10. Additionally,

we find persuasive Petitioner's concerns that disclosing its membership terms and business strategy could harm Petitioner by enabling others to replicate its business.

Accordingly, we are persuaded that Petitioner has shown good cause for maintaining its membership terms and business strategy under seal. Consequently, we grant Petitioner's motion to seal this information.

c. Financial Information

In support of the assertion that its financial information should remain under seal, Petitioner argues that the Board has previously maintained financial information under seal where reasonable redactions were proposed and the thrust of the underlying argument or evidence could reasonably be discerned from the redacted versions. Paper 27, 10 (citing *Greene's Energy Grp., LLC, Inc. v. Oil States Energy Svcs., LLC*, IPR2014-00216, Paper 27, 5 (Sept. 23, 2014)). In concert with this, Petitioner asserts that the redactions related to Petitioner's financial information relate only to the financial information, and do not affect the underlying arguments made by Patent Owner. Paper 27, 10–11.

We are persuaded that Petitioner has shown good cause for maintaining its financial information under seal. We agree that the redactions of Petitioner's financial information do not obscure the thrust of Patent Owner's underlying arguments thus far in this proceeding. On the current record, Patent Owner's arguments to date have not demonstrated the relevance of any specific portion of Petitioner's financial information to the real party-in-interest issue. *See* Paper 37, 8–14. Accordingly, the public's interest in knowing Petitioner's financial information is relatively low, such that it is outweighed by Petitioner's interest in maintaining its financial information confidential. Therefore, we grant Petitioner's motion to seal this information.

d. Protective Order

The parties' stipulated Protective Order differs from the default protective order in various ways. For example, in addition to the general class of confidential information marked "CONFIDENTIAL – PROTECTIVE ORDER MATERIAL," the parties' stipulated Protective Order identifies another class of confidential information marked "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY." Ex. 1014, 1–3, 10–11. The stipulated Protective Order provides more stringent restrictions on who can view the "HIGHLY CONFIDENTIAL" information, as compared to the restrictions on who can view general "CONFIDENTIAL" information. For example, the stipulated Protective Order provides that general "CONFIDENTIAL" information can be disclosed to in-house counsel who have signed the Acknowledgment (*id.* at 4), but in-house counsel cannot view "HIGHLY CONFIDENTIAL" information (*id.* at 2). Additionally, the stipulated Protective Order specifies that "HIGHLY CONFIDENTIAL" information may be viewed by retained experts of the parties only if such experts "are not employed by any party" (*id.* at 2), whereas the default protective order does not proscribe disclosure of confidential information to retained experts who are employees of a party (77 Fed. Reg. at 48,771).

Compared to the default protective order, the stipulated Protective Order also specifies more extensive procedures to be used by the parties in connection with filing documents designated as confidential by a party. In particular, the stipulated Protective Order provides detailed procedures for handling circumstances where a party intends to file a document or information received from another party who has designated the document or information confidential. Ex. 1014, 6–10.

In addition to the foregoing, the stipulated Protective Order differs from the default protective order in various other ways. For example, the stipulated

Protective Order provides that “HIGHLY CONFIDENTIAL” and “CONFIDENTIAL” information can be disclosed to support personnel only if those personnel have signed the Acknowledgment (*id.* at 2–3), whereas the default protective order provides that support personnel need not sign the Acknowledgment to have access to confidential information (77 Fed. Reg. at 48,771).

After reviewing the stipulated Protective Order, we determine that it is acceptable.

III. Conclusion

For the foregoing reasons, Petitioner’s motions to seal are granted, and the stipulated Protective Order is entered in this proceeding. Circumstances may arise, however, in which some or all of the information identified in Petitioner’s motions to seal may be unsealed. For example, if we later determine that any of Petitioner’s members constitute a real party-in-interest, the identity of such members will be unsealed. Additionally, confidential information that is subject to a protective order ordinarily becomes public 45 days after final judgment in a trial. 77 Fed. Reg. at 48761. There is an expectation that information will be made public where the existence of the information is identified in a final written decision following a trial. *Id.* Petitioner may, after final judgment in a trial, file a motion to expunge confidential information from the record prior to the information becoming public. *See* 37 C.F.R. § 42.56.

IV. Order

In consideration of the foregoing, it is hereby:

ORDERED that Petitioner’s Motions to Seal are *granted*;

FURTHER ORDERED that the stipulated Protective Order filed as Exhibit 1014 is entered in this proceeding.

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