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571-272-7822

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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DEXCOM, INC.

Petitioner,

v.

WAVEFORM TECHNOLOGIES, INC.

Patent Owner.

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IPR2016-01679

Patent No. 7,146,202

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**PATENT OWNER'S UNOPPOSED MOTION TO EXPUNGE  
SEALED DOCUMENT**

Pursuant to 37 C.F.R. § 42.56, Patent Owner WaveForm Technologies, Inc. (“WaveForm”) hereby moves for an order expunging a protected document filed under seal in this proceeding, namely Exhibit 1041, and replacing it with a redacted version of the exhibit to be submitted by Petitioner.<sup>1</sup> Patent Owner has conferred with Petitioner Dexcom, Inc. (“Dexcom”), and Dexcom does not oppose WaveForm’s motion to expunge this exhibit. The document Patent Owner seeks to expunge is a sealed deposition transcript disclosing confidential technical and business information that was not relied on in any submission in this case. The only submissions relying on any portion of Exhibit 1041 were the parties’ public briefing on Dexcom’s Motion to Exclude Evidence (Papers 41, 46), and WaveForm does not seek to expunge portions of Exhibit 1041 referred to therein. Further, in its Final Written Decision, the Patent Trial and Appeal Board (the “Board”) stated that it did not rely on the evidence Petitioner sought to exclude—let alone the deposition testimony referred to in the Motion to Exclude briefing—and so dismissed that Motion as moot. (*See* Paper 53 at 48-49.)

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<sup>1</sup> Patent Owner consulted with P.T.A.B. staff on June 5, 2019, and was informed that it is not possible for Patent Owner to file a replacement exhibit in the “1000” range. It was recommended that Petitioner file the Exhibit on Patent Owner’s behalf, which Petitioner has agreed to do upon submission of this Motion.

If the Board is not inclined to grant this motion, Patent Owner respectfully requests a conference call with the Board to discuss the issues raised in this motion before any information becomes public.

**I. Statement of Precise Relief Requested**

Patent Owner WaveForm requests that sealed Exhibit 1041 be expunged from the record, and replaced with a redacted version of Exhibit 1041 prepared by Patent Owner, which will be submitted by Petitioner upon filing of this Motion.

**II. Reasons the Requested Relief Should Be Granted**

Confidential exhibits ordinarily become public after the final judgment in an *inter partes* review. See Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,761 (Aug. 14, 2012). “A party seeking to maintain the confidentiality of information, however, may file a motion to expunge the information from the record prior to the information becoming public.” Trial Practice Guide, 77 Fed. Reg. at 48,761. The moving party has the burden to establish that it is entitled to the requested relief. 37 C.F.R. § 42.20(c).

“Confidential information” is protected from disclosure by statute. 35 U.S.C. § 316(a)(7). “Confidential information” is defined as “trade secret or other confidential research, development, or commercial information.” 37 C.F.R. § 42.2. The standard for granting a motion to seal information is “for good cause.” 37 C.F.R. § 42.54. For example, where the details of the confidential business or commercial

information are unimportant to the merits of the case and the public's interest in having access to such information is minimal, such information may be sealed for good cause. *See* 37 C.F.R. § 42.54(a)(7); Trial Practice Guide, 77 Fed. Reg. at 48,760. Where the Final Decision does not rely (or only minimally relies) on the confidential information, the Board has granted motions to expunge, finding that there is limited public interest in the confidential information and the record is minimally affected. *See, e.g., Unverferth Mfg. Co. v. J&M Mfg. Co.*, IPR2014-00758, Paper 29 at 2 (P.T.A.B. Sept. 30, 2015) (granting the motion because the final decision did not rely upon the exhibit at issue and “the file and decision remain understandable in the absence of” the exhibit).

Therefore, Patent Owner respectfully requests that the Board expunge the confidential information in Exhibit 1041. In addition, the information was not relied upon by the Board in the Final Written Decision, or by the parties in any submission in this proceeding, and the redactions to this exhibit will not hinder the public's understanding of the file or the Board's Final Written Decision.

**A. Expungement of Exhibit 1041 Is Appropriate**

Where the Board has found no need to rely on documents sought to be protected as sealed in terminating a proceeding, it has expunged those documents upon entry of judgment. *See LG Elecs., Inc. v. Cypress Semiconductor Corp.*, IPR2014-01405, Paper 25, at 2-3 (P.T.A.B. Aug. 6, 2015) (“In entering judgment,

we find it unnecessary to rely on documents the Patent Owner seeks to maintain as sealed, and, therefore, we expunge from the record the sealed documents....”)

Here, the Board issued its Final Written Decision without relying on Exhibit 1041, or on any submission discussing Exhibit 1041.<sup>2</sup> The exhibit is a transcript of the deposition of WaveForm employee Ellen Anderson, who had submitted a brief factual declaration in support of WaveForm’s Patent Owner Response (Exhibit 2035). Petitioner took Ms. Anderson’s deposition and moved to exclude the declaration based on certain deposition testimony. (Papers 41, 46, 47.) The Board did not rely on Ms. Anderson’s declaration in its Final Written Decision, and so dismissed Petitioner’s Motion to Exclude as moot. (Paper 53 at 48-49.) Exhibit 1041 contains confidential business and technical information relating to the development, design, manufacture, testing, and regulatory approval of Patent Owner’s glucose monitoring products, including products currently in development. (See Exhibit 1041 at pp. 35-38, 40-44, 49-55, 96, 99-100, 123-124, 134-135, 138-141.)<sup>3</sup> Petitioner did not rely on this information in its Motion to Exclude Evidence.

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<sup>2</sup> Exhibit 1041 is referred to briefly in a footnote to Petitioner’s Reply (Paper 36 at 2 n. 2), but only in reference to its forthcoming Motion to Exclude, which had not been filed at the time of the Reply. Patent Owner also does not seek to expunge the portion of Exhibit 1041 referred to in Petitioner’s Reply.

<sup>3</sup> Ms. Anderson also provided her home address on page 3, which has been removed in the redacted transcript submitted herewith. The Board has directed the expungement of personal information unrelated to the merits of a case. *See*

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