

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

MULTI PACKAGING SOLUTIONS, INC.,
Petitioner,

v.

CPI CARD GROUP – MINNESOTA, INC.,
Patent Owner.

Case IPR2017-01650
Patent 8,419,889 B2

Before GRACE KARAFFA OBERMANN, CHRISTOPHER M. KAISER,
and JEFFREY W. ABRAHAM, *Administrative Patent Judges*.

OBERMANN, *Administrative Patent Judge*.

ORDER

*Granting Petitioner's Unopposed Motion to Seal and
Granting Joint Request for Entry of Default Protective Order*
35 U.S.C. § 316; 37 C.F.R. §§ 42.14, 42.54

INTRODUCTION

This Order addresses Petitioner’s Motion to Seal (Paper 23, “Mot.”) filed on April 17, 2018. The Motion to Seal is directed to allegedly “confidential information belonging to a third party and to [Petitioner]” and is accompanied by “a joint stipulation for entry of the Board’s default protective order.” Mot. 1; *see* Paper 21 (joint stipulation); *see also* Ex. 1052 (copy of protective order).

DISCUSSION

Petitioner seeks to seal portions of Patent Owner’s Response (Paper 19) and the entirety of Exhibits 2014–2018 and 2020. Mot. 1, 2. Petitioner alleges that the information sought to be sealed pertains to “e-mail communications that contain discussions of a third party’s request to [Petitioner] to supply card packages” as well as “portions of a deposition transcript from a former” representative of Petitioner, which “discusses those communications.” *Id.* at 2 (citing Exs. 2014–2018, 2020). Petitioner states that “Patent Owner does not oppose sealing of this information.” *Id.* at 3.

We apply the “good cause” standard when assessing a motion to seal, which reflects the strong public policy for making all information in our administrative proceedings open to the public. 37 C.F.R. § 42.54. We organize our discussion into two parts. First, we consider whether Petitioner establishes good cause for sealing the information at hand. Second, we address whether the redactions applied to Paper 19 and Exhibits 2014–2018 and 2020 comply with our prior instructions in this proceeding, regarding the redaction of confidential information. *See* Paper 12, 4 (scheduling order, setting forth instructions for strictly limiting redactions to confidential information).

A. Good Cause For Sealing the Information at Hand

Petitioner recognizes that a party, seeking to seal information, must establish 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. Mot. 1 (citing *Argentum Pharms. LLC v. Alcon Research, LTD.*, IPR2017-01053, Paper 27 at 4 (PTAB Jan. 19, 2018) (“*Argentum Order*”).

Petitioner shows sufficiently that the information sought to be sealed is truly confidential. Specifically, we accept counsel’s representation that the information previously was designated as “highly confidential in” related “district court litigation.” Mot. 3. On that point, we recognize that, “in district court, a party routinely will determine (by marking or stamping a document ‘confidential’) whether a document is produced under the terms of a district court protective order”; however, in our forum “the default rule is that all papers” will be “open and available for access by the public.” *Argentum Order* 3 (citations omitted). As a consequence, the circumstance of sealing information in a district court action, standing alone, is not always adequate to establish that the information should be sealed in our forum. In this case, however, that circumstance persuades us that the information at issue has not been disclosed publicly, but rather, has been maintained in a manner to preserve confidentiality. Mot. 2.

Petitioner alleges additional facts showing that public disclosure of the information would result in a concrete harm to Petitioner and, possibly, to a third party customer of Petitioner. On that point, Petitioner avers that the information pertains to “how the third party conducts its business” and reveals “specifications

for package graphics supplied by the third-party customer.” *Id.* Petitioner also asserts that “[p]ublic disclosure of these documents would cause concrete harm to [Petitioner] and the third party” because the information disclosed therein pertains to Petitioner’s “sales to the third party, and the third party’s procedures for interacting with [Petitioner] as a supplier.” *Id.* Those assertions are consistent with our review of the redacted portions of Paper 19 and Exhibits 2014–2018 and 2020. We further rely on counsel’s representation that “[t]he relevant third party informed [Petitioner] that it considers” the information “confidential and granted permission for their production in this proceeding subject to a protective order.” Mot. 3.

Petitioner “does not believe that there is a genuine need to rely on” the information sought to be sealed “in this proceeding.” *Id.* Our review of the redacted portion of Patent Owner’s Response, however, persuades us that the information is necessary to Patent Owner’s assertions pertaining to secondary considerations of non-obviousness; specifically, alleged evidence of copying. Paper 19, 66–73. Accordingly, on this record, we find that there exists “a genuine need to rely in the trial on the specific information sought to be sealed.” Mot. 1.

Accordingly, based on the information presented, we determine that Petitioner shows an interest in maintaining confidentiality that outweighs the strong public interest in having an open record during the course of this trial. In view of the parties’ stipulation (Paper 21), the Board’s default protective order shall govern the exchange and disclosure of confidential information during the trial. *See* Ex. 1052 (copy of protective order). Any other paper or exhibit filed under seal in this proceeding shall be accompanied by a motion to seal in accordance with 37 C.F.R. § 42.14.

B. Compliance with Instructions Pertaining to Redactions

We next turn to whether the redactions applied to Paper 19 and Exhibits 2014–2018 and 2020 comply with our prior instructions regarding redactions. Paper 12, 4. We previously instructed the parties that “[i]nformation subject to a protective order will become public if identified in a final written decision in this proceeding. A motion to expunge the information will not prevail necessarily over the public interest in maintaining a complete and understandable file history.” Paper 12, 4; *see* Rules of Practice, 77 Fed. Reg. No. 157, Part V at Section I.E.6. (Aug. 14, 2012) (“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.”). In other words, well before the filing of Paper 19 and Exhibits 2014–2018 and 2020, the Board placed both parties on notice that the introduction of confidential information in this proceeding would present a risk of possible disclosure in a final written decision. We also previously instructed the parties that, when filing confidential information in this proceeding, “[r]edactions should be limited strictly to isolated passages consisting entirely of confidential information. The thrust of the underlying argument or evidence must be clearly discernable from the redacted version.” Paper 12, 4.

Petitioner argues that “the exhibits at issue consist almost entirely of confidential information, such that redaction would not be practical” and, on that basis, asserts that Exhibits 2014–2018 and 2020 “require filing entirely under seal.” Mot. 2. We are not persuaded that the entirety of Exhibit 2014, which is a fifty-page partial deposition transcript, is truly confidential. *See generally* Mot. Our review of Exhibit 2014 persuades us that at least some of the information contained therein is not confidential. Two non-exclusive examples are the

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