

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

L'ORÉAL USA, INC.,  
Petitioner,

v.

LIQWD, INC.,  
Patent Owner.

---

Case PGR2018-00025  
Patent 9,668,954 B2

---

Before TONI R. SCHEINER, CHRISTOPHER M. KAISER, and  
TIMOTHY G. MAJORS, *Administrative Patent Judges*.

MAJORS, *Administrative Patent Judge*.

ORDER

Granting Motion to Seal Portions of Paper 61  
*35 U.S.C. § 326; 37 C.F.R. §§ 42.14, 42.54(a)*

## BACKGROUND

In the July 30, 2019 Final Written Decision (Paper 78), the Board ordered the parties to file a redacted version of the decision along with a joint motion to seal. Paper 78, 105–106. At the same time, the Board also instructed the parties to file a motion to seal relating to Paper 61 (and certain other Papers, the confidentiality and/or redaction of which have since been resolved). *Id.* at 103; *see* Paper 82 (order that Papers 73 and 74 should not be sealed, and that Paper 67 be sealed (with a redacted version of Paper 67 filed as Ex. 1075)). After being granted several extensions, the parties filed a Joint Motion to Seal on September 6, 2019. Paper 81.

The Board, after considering the parties’ submission (Paper 81 and related papers) and following discussion with the parties, issued an order requiring the parties to further confer about the confidentiality status of Papers 61 and 78, and to file a Revised Joint Motion to Seal addressing those papers. Paper 82, 3–4. The parties have since conferred further and, according to the Joint Motion to Seal Portions of Paper 61 (the motion entered as Paper 86), Petitioner is no longer maintaining that it is necessary to seal Paper 78.<sup>1</sup> Paper 86, 2 (“Petitioner believes that it is no longer necessary to seal Paper 78”). Accordingly, Paper 78 (Final Written Decision), will be unsealed and entered in the record without redaction.

---

<sup>1</sup> The Board requested that the parties file the transcript of the conference held on September 11, 2019, which transcript has now been filed as Exhibit 2085. As confirmed during that conference, Patent Owner’s position was (and apparently remains) that no portion of Papers 61 or 78 needs to remain sealed. Ex. 2085, 6:5–12 (Judge Majors: “In other words, for Patent Owner’s part those documents [Papers 61 and 78] in their entirety could be made public?” Mr. Blackburn: That’s correct, Your Honor.”).

Petitioner maintains that two portions of Paper 61 should remain sealed (*see* Ex. 1076, showing redaction to part of one sentence on page 7, and redaction to part of a sentence spanning the last line of page 8 and the first two lines of page 9). Without revealing the specific content of those redacted passages, they relate to certain details about Petitioner’s product development and Petitioner’s assessments of a potential acquisition. Indeed, the proposed redactions include quoted content taken directly from Petitioner’s internal documents (i.e., internal emails and presentation slides; Exs. 2068 and 2071) on those subject matters.

#### DISCUSSION

As provided under Rule 42.54(a), “[t]he Board may, for good cause, issue an order to protect a party from disclosing confidential information,” including forbidding the disclosure of protected information or specifying the terms under which such information may be disclosed. 37 C.F.R. § 42.54(a). The Board also observes a strong policy in favor of making all information filed in post-grant review proceedings open to the public. Under 37 C.F.R. § 42.14, the default rule is that all papers filed in post-grant review proceedings are available to the public. Only “confidential information” is subject to protection against public disclosure. 35 U.S.C. § 326(a)(7); 37 C.F.R. § 42.55. In that regard, as noted in the Office’s Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,760 (Aug. 14, 2012):

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 the Federal Rules 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.

Petitioner, as the party proposing in the Joint Motion that certain portions of Paper 61 remain sealed, bears the burden of showing that the relief requested should be granted. 37 C.F.R. § 42.20(c). And the standard for granting Petitioner's requested relief is "good cause." 37 C.F.R. § 42.54(a). In this regard, Petitioner must make a sufficient showing that the information it seeks to redact in the public version of Paper 61 (Exhibit 1076) is confidential, and that such confidentiality outweighs the interest in a completely open record.

For the reasons below, we conclude good cause exists to grant Petitioner's requested relief and maintain the limited portions of Paper 61 under seal at this time.

First, Petitioner represents that Patent Owner's use of Exhibits 2068 and 2071<sup>2</sup> in this proceeding was only allowed if Patent Owner agreed to observe the confidentiality restrictions put in place at the district court concerning those exhibits. Paper 86, 2–3. Petitioner also notes that those exhibits presently remain under seal at the district court. *Id.* Patent Owner does not challenge Petitioner on either point. Second, the redacted content relates to Petitioner's internal product designs and to business acquisition analyses, which falls squarely within the categories of sensitive research, development, and commercial information. *See* 37 C.F.R. § 42.54. Indeed, even the native documents from which the redacted content derives are

---

<sup>2</sup> As noted, these exhibits are the source of the limited, quoted content that Petitioner requests be maintained confidential.

marked as confidential, suggesting that Petitioner sought to limit distribution of the information in those documents. (For example, Exhibit 2068 is marked “CONFIDENTIAL-NO COPY ALLOWED”). Third, Petitioner cites the district court’s Joint Pretrial Order, which provides, notwithstanding the emphasis that “the Court should be open to the public for the entirety of the presentation of evidence at trial,” that trial exhibits marked as confidential, “while displayed at trial, will not be filed publicly.” *See* Paper 86, 3 (quoting portions of the Joint Pretrial Order). This language is more consistent with Petitioner’s position that admission of a particular document as a trial exhibit or even display of that document in a public proceeding did not necessarily remove that document’s status as confidential. If, as Patent Owner suggests, the document’s display in open court means that such document is, by definition, non-confidential, the district court’s order against publicly filing confidential-marked (but otherwise publicly-displayed) trial exhibits makes little sense. Fourth, as for our interest in an open record, against the balance of the whole record, the redactions now sought by Petitioner are few and the redacted content is in no way pivotal to the public’s fulsome understanding of the parties’ arguments and the conclusions reached by the Board. Finally, given the apparent existing status of the exhibits in question as sealed at the district court, to the extent the parties still dispute the confidentiality of those exhibits, the Board suggests the court is in a better position to sort out those disputes in light of the public record developed before it during trial and its own orders.

Patent Owner contends that the court’s pretrial order is not determinative because this motion does not relate to filing exhibits in the Delaware litigation. Paper 86, 5. Nor, Patent Owner contends, does the

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.