

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

EVERLIGHT ELECTRONICS CO., LTD.,
and EMCORE CORPORATION,

Plaintiffs,

v.

NICHIA CORPORATION, and
NICHIA AMERICA CORPORATION

Defendants and
Counter-Plaintiffs.

v.

EVERLIGHT ELECTRONICS CO., LTD.,
EMCORE CORPORATION, and
EVERLIGHT AMERICAS, INC.,

Counter-Defendants.

Case No. 12-cv-11758

UNITED STATES DISTRICT COURT JUDGE
GERSHWIN A. DRAIN

UNITED STATES MAGISTRATE JUDGE
MONA K. MAJZOUB

**ORDER REGARDING NICHIA'S MOTION CLARIFYING THE PAGES OF THE
TRIAL EXHIBITS TO REMAIN UNDER SEAL AND SEEKING ENFORCEMENT
OF THE PROTECTIVE ORDER FOR SUCH PAGES**

I. INTRODUCTION

Earlier this year, Nichia Corporation ("Nichia") filed a Request to Redact Confidential Trial Testimony from Public Versions of the Phase 2 Trial Transcripts ("Request"). [Dkt. No. 592] As a result of that Request, among other things, the Court ordered Nichia to file another motion before the Court would rule on the Request (the "Request Order"). [Dkt. No. 597] Nichia has since filed a Motion Clarifying the Pages of the Trial Exhibits to Remain under Seal and Seeking Enforcement of the Protective Order for Such Pages ("Motion to Clarify"). [Dkt.

No. 598] The parties have fully briefed the Motion to Clarify. For the reasons discussed below, the Motion to Clarify is granted in part and denied in part.

II. BACKGROUND

A. Pre-Trial Matters

On May 6, 2013, the parties entered into a Stipulated Protective Order (“Protective Order”) [Dkt. No. 81] meant to govern this case. Additionally, on April 1, 2015, prior to the commencement of trial in this matter, the parties entered a Sealed Joint Final Pretrial Order (“Pretrial Order”). [Dkt. No. 457] The Pretrial Order covered the April 2015 jury trial (“Phase I”) and the bench trial conducted in June 2015 (“Phase II”). Each of these Orders was agreed upon by the parties and contains information relevant to the instant dispute. For example, the Protective Order indicated what information would be considered confidential throughout this dispute and how it would be labeled:

The designation “Confidential – Attorneys’ Eyes Only” shall refer to Discovery Materials that include non-public proprietary information or information, the disclosure of which would cause serious commercial injury to the Disclosing Party, including but not limited to, trade secrets, manufacturing processes, customer lists, costs and pricing of products and/or services, technical information, business/marketing strategies and plans, financial records, proprietary technical information and specifications, manufacturing techniques, research and development information, sales information, cost information, pricing information, and other competitively sensitive information. Discovery Materials so designated are referred to as “Confidential – Attorneys’ Eyes Only Information.”

Dkt. No. 81, at ¶ 1(a). The Pretrial Order specified how the parties would handle confidential information at trial:

The Parties request that the trial be open to the public and not sealed unless a party requests that a particularly sensitive portion be sealed and not open. The Parties propose to jointly give the Court by April 3, 2015, a list of non-public proprietary documents and topics for testimony that they believe the disclosure of which would cause serious commercial injury to themselves, their customers and/or their licensees, such that they request that the portion of the trial disclosing such documents and/or testimony be sealed and not open. Further, each party

requests to be able to make such requests during the trial, subject to objections from the opposing party and obtaining the Court's approval, and for good cause shown.

[Dkt. No. 457, at § XIII, ¶ 6]. The Pretrial Order also provided that, in "all such instances where the trial shall be closed and sealed, the courtroom will be cleared of those individuals not qualified under the Protective Order entered into this case to be present when such documents and testimony are disclosed." *Id.* The courtroom was not closed during Phase I or Phase II of the trial.

On July 30, 2015, after Everlight filed its Opening Post-Trial Brief following Phase II of the trial, the Court entered an Order directing the Clerk of the Court to seal the following exhibits until further order of the Court:

Dkt. No. 576-17
Dkt. No. 576-18
Dkt. No. 576-19
Dkt. No. 576-20
Dkt. No. 576-21
Dkt. No. 576-22
Dkt. No. 576-23
Dkt. No. 576-24
Dkt. No. 576-4
Dkt. No. 576-5
Dkt. No. 576-6

Dkt. No. 585, at PgID 49900. Hereinafter, the exhibits at Dkt. Nos. 576-17, 576-18, 576-19, 576-20, 576-21, 576-22, 576-23 and 576-24 shall be referred to as the "Technical Exhibits," and the exhibits at Dkt. Nos. 576-4, 576-5 and 576-6 shall be referred to as the "Transcript Exhibits."

B. The Request Order

In the Request Order, the Court concluded, in part:

To begin, the Court emphasizes the discretion this Court has when deciding to seal trial records. *See In re Knoxville NewsSentinel Co., Inc.*, 723 F.2d at 474. Nichia emphasizes that it minimized disruptions at trial for the benefit of the Court, and "certainly did not understand that failure to clear the courtroom would mean that a document discussed in part during trial could thereafter be

filed in whole publicly.” Dkt. No. 596 at 2-3 (emphasis in original). This being the case *Nichia argues that “[a]t a minimum, only the portions of these documents actually displayed at trial should now be considered public.”* *Id.* at 3. *The Court agrees; everything not displayed at trial should remain sealed.* The larger question, however, is whether the Court should allow the redaction to the extent requested by Nichia. The Court will not.

Dkt. No. 597, at PgID 50806-07 (emphasis in *bold and italics* added). The Court also stated:

[T]here is something to be said for Everlight’s contention that some of this information that will be redacted does not involve sensitive information. . . . Indeed, *the entire trial transcript does not contain sensitive information. As Nichia impliedly concedes, the trial testimony and “the portions of [] documents actually displayed at trial should now be considered public.”*

Id. at PgID 50807 (emphasis in *bold and italics* added). Finally, the Court held:

Specifically, the Court will permit the redaction of testimony and documents that include (1) actual trade secrets and confidential information and (2) things that were not presented at trial. However, the broad swath of information that Nichia seeks to exclude contains things like Everlight’s opening statement and the trial testimony at large. Such a broad exclusion is unwarranted, and *the portions of testimony and documents actually displayed at trial that don’t constitute trade secrets will ultimately be considered public[.]*

This is a broad characterization of what the Court will permit. There still remains the issue of specifying exactly what will be redacted. Nichia only stated broadly which portions of the *trial transcript* it wanted to exclude. Rather than going through each line of the *transcript* and attempting to decipher what is important, the Court **HEREBY ORDERS** Nichia to abide by the Court’s Local Rules for the sealing of the requested documents.

Id. at PgID 50808 (emphasis in *bold and italics* added).

III. ANALYSIS

A. Technical Exhibits to be Sealed

After briefing pursuant to the Request Order, the scope of what Nichia seeks to have sealed is narrower and more clear than it was at the time Nichia filed the Request. Most significantly, Nichia has withdrawn its request to have any pages of the trial transcript filed under seal (*i.e.*, the Transcript Exhibits). In addition, although Nichia generally continues to

seek to have Technical Exhibits sealed, Nichia acknowledges that the following items need not be sealed: (a) Dkt. No. 576-17 (in its entirety), and (b) the pages of the Technical Exhibits identified below, each of which was actually displayed at trial and/or contained in a public newspaper article:

Dkt. No. 576-18	Bates Nos.	NICH0078473-75
Dkt. No. 576-19	Bates Nos.	NICH0083148 NICH0083149 NICH0083150 NICH0083153 NICH0083154 NICH0083157 NICH0083176 NICH0083182
Dkt. No. 576-20	Bates Nos.	NICH0084258 NICH0084263 NICH0084326 NICH0084327 NICH0084332 NICH0084333 NICH0084371 NICH0084383 NICH0084384 NICH0084385
Dkt. No. 576-21	Bates Nos.	NICH0083584 NICH0083592
Dkt. No. 576-24	Bates No.	NICH0084786

Based on the parties' briefs, the parties have different interpretations of the Request Order, however, the Court finds that their disagreement does not impact the resolution of the matter before the Court. First, the Protective Order for this case has never been dissolved and remains in full force and effect. As such, as a general rule, to the extent that information, documents, etc. subject to the Protective Order (collectively, "Confidential Information") have not been made public, such Confidential Information is still protected by the Protective Order



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