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Paper 39
Entered: June 30, 2014

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BROADCOM CORPORATION
Petitioner

v.

TELEFONAKTIEBOLAGET L. M. ERICSSON
Patent Owner

Case IPR2013-00602
Patent 6,466,568

Before KARL D. EASTHOM and MATTHEW R. CLEMENTS,
Administrative Patent Judges.

CLEMENTS, *Administrative Patent Judge*.

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

INTRODUCTION

Four motions to seal are pending in this proceeding:

Paper 10: Telefonaktiebolaget L.M. Ericsson ("Patent Owner") moves to seal Exhibit 2009. Paper 10, unredacted; Paper 12, redacted. Exhibit 2009 is designated "Parties and Board Only." Patent Owner contends that Exhibit 2009 contains confidential business information relating to its license negotiations with a number of parties and it remains confidential in a co-pending legal proceeding. Petitioner did not file an opposition to Patent Owner's Motion to Seal.

Paper 15: Broadcom Corporation ("Petitioner") moves to seal (1) the portion of its Opposition to Patent Owner's Motion for Additional Discovery ("Opposition") (Paper 17, unredacted)(Paper 16, redacted); (2) the Declaration of David Djavaherian (Exhibit 1018); and (3) the portion of its Opposition (Paper 17) that addresses Exhibit 1018. Paper 15, unredacted; Paper 14, redacted. Paper 17 and Exhibit 1018 are designated as "Parties and Board Only." Petitioner contends that its Opposition references Exhibit 2009, which Patent Owner has moved to seal. Petitioner also contends that Exhibit 1018 contains confidential statements regarding Broadcom's relationship with the defendants in *Ericsson Inc. v. D-Link Corp. et al.*, Civil Action No. 10-cv-473 (E.D. Tex.) Patent Owner did not file an opposition to Petitioner's motion to seal.

Paper 24: Petitioner moves to seal Patent Owner's Emergency Motion for Relief from the Protective Order, 6:10-cv-473 (E.D. Tex., March 8, 2013) (Exhibit 1019). Paper 24. Petitioner also contends that Exhibit 1019 contains confidential statements regarding Broadcom's relationship with the defendants in *Ericsson Inc. v. D-Link Corp. et al.*, Civil Action No.

10-cv-473 (E.D. Tex.) Patent Owner did not file an opposition to Petitioner's motion to seal.

Paper 34: Patent Owner moves to seal the portion of its Patent Owner Response (Paper 36, unredacted)(Paper 37, redacted) that addresses Exhibit 2009, which Patent Owner previously moved to seal. Paper 34, unredacted; Paper 35, redacted. Patent Owner contends that its Patent Owner Response references confidential Exhibit 2009. Petitioner did not file an opposition to Patent Owner's Motion to Seal.

The parties have agreed to the Board's default protective order. Paper 15, 4; Paper 24, 2; Paper 34, 3. Accordingly, the parties must file a joint Default Protective Order with a signed Standard Acknowledgement for Access to Protective Order Materials. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,771 (Aug. 14, 2012) ("TPG"). As a consequence, the Default Protective Order will govern the treatment and filing of confidential information in this proceeding.

DISCUSSION

There is a strong public policy for making all information filed in a quasi-judicial administrative proceeding open to the public, especially in an *inter partes* review which determines the patentability of claims in an issued patent and therefore affects the rights of the public. Under 35 U.S.C. § 316(a)(1), the default rule is that all papers filed in an *inter partes* review are open and available for access by the public; and a party may file a concurrent motion to seal and the information at issue is sealed pending the outcome of the motion.

Similarly, 37 C.F.R. § 42.14 states the following:

> The record of a proceeding, including documents and things, shall be made available to the public, except as otherwise

> ordered. A party intending a document or thing to be sealed shall file a motion to seal concurrent with the filing of the document or thing to be sealed. The document or thing shall be provisionally sealed on receipt of the motion and remain so pending the outcome of the decision on the motion.

It is, however, only "confidential information" that is protected from disclosure. 35 U.S.C. § 316(a)(7)("The Director shall prescribe regulations - - . . . providing for protective orders governing the exchange and submission of confidential information"). In that regard, the TPG at 48,760 provides the following guidance:

> 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.

The standard for granting a motion to seal is "for good cause." 37 C.F.R. § 42.54. Patent Owner, as the moving party, has the burden of proof in showing entitlement to the requested relief. 37 C.F.R. § 42.20(c). We need to know why the information sought to be sealed constitutes confidential information. A motion to seal is required to include a proposed protective order and a certification that the moving party has in good faith conferred or attempted to confer with the opposing party in an effort to come to an agreement as to the scope of the proposed protective order for this inter partes review. 37 C.F.R. § 42.54.

An expectation exists that confidential information will be made public where the existence of the information is identified in a final written

decision following a trial. *See Office Patent Trial Practice Guide* at 77 Fed. Reg. 48,756, 48,761 (Aug. 14, 2012)). "After . . . a final judgment . . . , a party may file a motion to expunge confidential information from the trial." 37 C.F.R. § 42.56.

Upon review of the parties' papers, we are persuaded that good cause exists to have the requested materials remain under seal at least until a final judgment. We agree with Patent Owner that the existence of Exhibit 2009 contains, at least in part, confidential information pertaining to Patent Owner's business, and that the document should continue to be treated as confidential under the terms of the protective order. As to Exhibits 1018 and 1019, we agree with Petitioner that the documents contain, at least in part, confidential information pertaining to Patent Owner's business, and that the documents should continue to be treated as confidential under the terms of the protective order. Finally, the unredacted papers referencing Exhibits 2009 and 1018—i.e., Petitioner's Opposition (Paper 17) and Patent Owner's Patent Owner Response (Paper 36)—reference the same confidential information, and the redactions in corresponding Papers 16 and 37 are narrowly tailored to redact only confidential information.

The motions to seal will be granted conditionally until a final judgment on the conditions that if a final written decision substantively relies on any information in a sealed document, if the information otherwise becomes publically available, or for other reasons arising from new circumstances, the information may be unsealed by an Order of the Board or may become public if the parties do not to move timely to expunge it pursuant to 37 C.F.R. § 42.56. *See also* TPG at 48,761 ¶ 6 (*Expungement of Confidential Information*).

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