

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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CISCO SYSTEMS, INC. AND QUANTUM CORPORATION  
Petitioners,

v.

CROSSROADS SYSTEMS, INC.  
Patent Owner

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Case IPR2014-01544  
Patent 7,051,147

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**PATENT OWNER'S REPLY TO PETITIONERS'  
OPPOSITION TO PATENT OWNER'S MOTION TO SEAL**

## **I. Evidence of Non-Obviousness Is Properly Sealed.**

Petitioners argue that because information contained in Exhibits 2040, 2042, 2044 and 2045 (the “Exhibits”) is relevant to patentability, it follows that these exhibits must be made available to the public. Paper 23 at 2-5. If true, little if any evidence in an *inter partes* review could be kept confidential, as almost all such evidence relates to patentability. But Petitioners’ argument is invalid; the public interest is satisfied when a complete and understandable file history is maintained. Paper 18 at 1. Patent Owner’s Response indicates what the exhibits are and what they indicate, referencing the aggregated data contained in the confidential exhibits to support its argument that the patented invention has enjoyed commercial success. Paper 20 at 53-55; Ex. 2043 at 2-4; Ex. 2039 at 2-3. Thus, the file history remains complete and understandable to the public, even without access to the sealed exhibits.

The Board has authorized sealing similar information, offered to show objective evidence of non-obviousness just like the exhibits at issue here, on multiple prior occasions. *See, e.g., Laird Techs., Inc. v. Graftech Int’l Holdings, Inc.*, IPR2014-00023, Papers 26 (PTAB June 25, 2014) and 30 (PTAB Aug. 8, 2014) (Paper 26, at page A-1, presenting confidential license terms, customer information, and gross sales data as objective indicia of nonobviousness, and Paper 30 at 4, granting motion to seal, stating “[w]e agree that the information is sensitive financial information that a business would not make public”); *Torrent Pharms. Ltd. v. Novartis AG*, IPR2014-

00784, Paper 29 at 2-5 (PTAB Apr. 3, 2015) and Paper 41 at 7 (PTAB May 7, 2015) (referencing multiple exhibits, including sensitive sales data, as evidence of objective indicia of non-obviousness, and granting motion to seal). Petitioners' argument that information used to show nonobviousness cannot be sealed is simply wrong.

Petitioners also misrepresent the Board's precedents. Petitioners take statements from *Garmin Int'l. v. Cuozzo Speed Techs., LLC*, IPR2012-00001, Paper 37 (PTAB April 5, 2013) out of context to manufacture an unsupported "standard" for the filing of documents under seal. Contrary to Petitioners' suggestion, the Board in *Garmin* did not deny the motion because the "exhibits were submitted on [patent owner's] own initiative." Paper 23 at 3. In *Garmin* the patent owner sought to seal documents, not because they were confidential, but because they were subject to the attorney-client privilege. The Board unsurprisingly noted that patent owner's voluntary submission of privileged documents resulted in the waiver of privilege. *Garmin*, Paper 37 at 9-10. Acknowledging the waiver, patent owner argued that if the documents were publically available, third parties might allege a broad waiver and seek additional attorney-client communications. *Id.* The Board refused to seal the documents because patent owner's worries about general waiver were speculative. *Garmin*, Paper 37 at 10. Unlike *Garmin*, Patent Owner's request here to seal is unrelated to any attorney-client privilege issue. *Garmin* is thus inapplicable.

Petitioners' other cited authority similarly fails to support their argument. In *St.*

*Jude Med. v. Volcano Corp.*, IPR2013-00258, Paper 28 (PTAB Aug. 12, 2013), it was the **petitioner** St. Jude that filed the motion to seal, while “rel[ying] on these exhibits as evidence of nonobviousness to establish unpatentability . . . St. Jude is relying on such evidence **offensively** to cancel claims in an issued patent. . . . It is fundamentally unsupportable that a **Petitioner** should be allowed to attack the claims of an issued patent based on evidence it refuses to reveal to the public.” *Id.* at 5-6 (emphasis added). Here, Patent Owner is forced to use confidential information **defensively**, and should not have to make a Hobson’s choice between making its (and its licensees’) confidential information public, or not being able to fully argue its validity claim. Also, in *St. Jude* the Board noted that “[i]t is fundamentally odd . . . that St. Jude seeks to prove what was commonly known by relying on information that was not in the public domain but held in secret by the Petitioner . . . . That constitutes all the more reason why the public has a strong interest in knowing what information was relied on to prove what was commonly known.” *Id.* at 6. Here, by contrast, Patent Owner is not seeking to rely on sealed exhibits to establish what was commonly known.

Next, Petitioners argue that revealing the Exhibits to the public would not harm Patent Owner. In making this argument, Petitioners only discuss Exhibits 2044 and 2045. Paper 23 at 4-8. Petitioners fail to consider Exhibits 2040 and 2042, effectively conceding that allowing the public to access those exhibits would harm Patent Owner.

Petitioners’ arguments as to why disclosure of Exhibits 2044 and 2045 would

be harmless fail. Petitioners argue that because Exhibits 2044 and 2045 do not reveal current pricing and unit sales, the information cannot be sealed. Paper 23 at 5. But Exhibits 2044 and 2045 **do** show the number of units of individual products shipped/sold. Ex. 2044 at 4-5; Ex. 2045 at 4-5. Further, the exhibits contain commercial information like that which the Board has allowed to be sealed elsewhere. *Smith v. Nephew, Inc. v. Convatec Techs., Inc.*, IPR2013-00097, Papers 89 at 2-3 (PTAB May 19, 2014) and Paper 85 at 7 (PTAB May 7, 2014) (granting motion to seal product-specific sales and profit information); *Autel U.S. Inc. v. Bosch Auto. Serv. Soln's, LLC*, IPR2014-00183, Paper 59 at 54-55 (PTAB May 5, 2015); Paper 28 at 2 (PTAB July 14, 2014) (sealing the dollar amount of patent owner's sales of patented products). Here, the Exhibits show shipments and overall sales data - precisely the type of commercial information the Board has held may be sealed to avoid competitive harm.

## **II. The Public Is Not Harmed By Sealing These Confidential Documents.**

Petitioners argue that the information Patent Owner has publically presented is irrelevant, claiming Patent Owner is “suppressing” “unfavorable” information. Paper 23 at 6. Petitioners’ argument relates to the relevance of the information presented, missing the real issue of whether the Exhibits contain confidential information that may justifiably be sealed. Instead, such an argument goes to the weight of the evidence. Petitioners also fail to identify specifically what “unfavorable” information

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