

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ASML NETHERLANDS B.V., EXCELITAS TECHNOLOGIES CORP.,
and QIOPTIQ PHOTONICS GMBH & CO. KG,
Petitioner,

v.

ENERGETIQ TECHNOLOGY, INC.,
Patent Owner.

Case IPR2015-01277 (Patent 8,309,943)
Case IPR2015-01279 (Patent 7,786,455)
Cases IPR2015-01300, -01303, -01377 (Patent 7,435,982)
Case IPR2015-01362 (Patent 8,969,841)
Case IPR2015-01368 (Patent 8,525,138)
Case IPR2015-01375 (Patent 9,048,000)¹

Before SALLY C. MEDLEY, JONI Y. CHANG, and
BARBARA A. PARVIS, *Administrative Patent Judges*.

PARVIS, *Administrative Patent Judge*.

ORDER
Conduct of the Proceeding
37 C.F.R. § 42.5

¹ This Order applies to each of the listed cases. We exercise our discretion to issue one Order to be docketed in each case. The parties, however, are not authorized to use this caption for any subsequent papers.

IPR2015-01277, IPR2015-01279, IPR2015-01300, IPR2015-01303, IPR2015-01362, IPR2015-01368, IPR2015-01375, and IPR2015-01377

A conference call in the above proceedings was held on February 16, 2016, among respective counsel for Petitioner and Patent Owner, and Judges Medley, Chang, and Parvis. The purpose of the call was to discuss a request by Patent Owner, Energetiq Technology, Inc., to file a motion to revise the Board's default protective order in each of IPR2015-01277, IPR2015-01279, IPR2015-01300, IPR2015-01303, IPR2015-01362, IPR2015-01368, IPR2015-01375, and IPR2015-01377 ("IPR proceedings"). *See* Default Protective Order, Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,769–71 (Aug. 14, 2012) (Appendix B).

During the call, Patent Owner explained that it seeks to submit five unredacted documents that include third-party confidential information, such as technical information and a license agreement, and, therefore, are subject to a Protective Order in a co-pending International Trade Commission (ITC) proceeding. Patent Owner indicated that the third party agreed to allow Patent Owner to submit these five documents in these IPR proceedings on the condition that the five documents are not shown to employees of the third party's competitors, including in-house counsel of Petitioner.

Petitioner, ASML Netherlands B.V., Excelitas Technologies Corp., and Qioptiq Photonics GmbH & Co. KG, responded that its in-house counsel is actively involved in preparing arguments and obtaining evidence for these IPR proceedings. Petitioner, therefore, opposes restrictions on use of the information that would prohibit disclosure to its in-house counsel.

The parties were reminded that confidential information that is subject to a protective order in these proceedings ordinarily would become public 45 days after final judgment in a trial. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,761. Additionally, the parties were reminded that there is

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an expectation that information will be made public where the existence of the information is identified in a final written decision following a trial. *Id.* Furthermore, a motion to expunge the information will not necessarily prevail over the public interest in maintaining a complete and understandable file history.

Patent Owner did not provide persuasive explanation indicating that Patent Owner made sufficient efforts to de-designate, redact or otherwise eliminate or at least reduce the amount of third party confidential information subject to the protective order in the ITC proceeding that Patent Owner seeks to submit in these IPR proceedings. Accordingly, Patent Owner's request to file a motion to modify the Board's standard protective order is premature. We urge Patent Owner to contact the third party regarding de-designating or redacting so as to eliminate third party confidential information that Patent Owner seeks to submit in these IPR proceedings. We additionally require that the Patent Owner remind the third party that information submitted in these IPR proceedings may be made public, as set forth in the Office Patent Trial Practice Guide, so as to ensure that the third party's agreement to the use of its information in these IPR proceedings is with the knowledge of the risks associated with the submission of the information to the Board.

Patent Owner should not report back to us before they have complied with the above. Patent Owner, however, need not contact the Board if Patent Owner no longer seeks to revise Board's default protective order.

We further note that the Scheduling Orders in these IPR proceedings indicate that it is the responsibility of the party whose confidential information is at issue, not necessarily the proffering party, to file the motion

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to seal, unless the party whose confidential information is at issue is not a party to these IPR proceedings. *See, e.g.*, IPR2015-01277, Paper 14. For the avoidance of doubt, if Patent Owner obtains the fully-informed agreement of the third party to use its information in these proceedings and Patent Owner proceeds with the Board's default protective order rather than contacting us, Patent Owner is responsible for filing the motions to seal in each of the IPR proceedings and has the burden of proof to establish that it is entitled to the requested relief, i.e., sealing of the documents. *See* 37 C.F.R. § 42.20(c).

ORDER

For the foregoing reasons, it is:

ORDERED that Patent Owner's request to file a motion to revise the Board's default protective order is *denied*.

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