

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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I.M.L. SLU,

Petitioner,

v.

WAG ACQUISITION, LLC,

Patent Owner.

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Case IPR2016-01656

Patent 8,122,141

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**PETITIONER I.M.L. SLU'S MOTION TO EXPUNGE**

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I.M.L. SLU

## **I. STATEMENT OF RELIEF REQUESTED**

Pursuant to 37 C.F.R. § 42.56, Petitioner I.M.L. SLU respectfully requests that all documents in the record that were filed under seal be expunged from the record because they contain sensitive confidential information.

Specifically, Petitioner identifies the following materials to be expunged: Paper 7, Paper 9, Paper 10, Paper 23, Paper 24, Paper 36, Paper 39, the unredacted version of Paper 42, Exhibit 2005, Exhibit 2006, Exhibit 2008, Exhibit 2009, Exhibit 2010, and Exhibit 2012.

Counsel for Petitioner has conferred with counsel for Patent Owners, who indicated that Patent Owners would oppose this Motion, except for Exhibit 2010.

## **II. STATEMENT OF REASONS FOR RELIEF REQUESTED**

### **A. Procedural background**

Petitioner filed the Petition in this proceeding on August 22, 2016. Paper 1. Before filing its Preliminary Response, Patent Owner filed a Motion for Discovery under seal on November 30, 2016 related to the question of whether all real parties in interest had been named in the Petition. Paper 7.<sup>1</sup> In that Motion for Discovery, Patent Owner noted that the Paper “[r]eferences [i]nformation [s]ubject to

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<sup>1</sup> All of the remaining documents filed under seal also pertain to Patent Owner’s real-party-in-interest allegations.

[p]rotective [o]rder.” Paper 7 at 1. In particular, the Motion for Discovery references documents that were produced pursuant to a protective order (which had not yet been entered in this PTAB action) in a related action in the United States District Court for the District of New Jersey. Paper 7 at 2--5. Petitioner I.M.L. opposed the Motion for Discovery and similarly filed its Paper under seal because it also referred to materials subject to a protective order. *See e.g.* Paper 9 at 1, 4-5.

On February 27, 2017, the Board issued a Decision to Institute *inter partes* review. Paper 11. The Decision to Institute did not rely on any of the sealed confidential information, and thus, Petitioner is not requesting to expunge that Decision. The Parties then agreed to Petitioner’s Unopposed Motion for Entry of Protective Order, which stated that for documents to be appropriately filed under seal, they must contain the “confidential and business-sensitive details of the Petitioner’s organizational structure, business processes, financing, and corporate and legal operations.” Paper 14 at 1. All of the subsequent filings under seal (and documents produced) were filed and produced subject to the Unopposed Protective Order.

WAG eventually filed another Motion for Discovery under seal referencing material subject to the protective order (*See* Paper 23 at 1) along with various exhibits (Exhibits 2005-2008). WAG simultaneously filed a Motion to Seal,

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noting that there was good cause to seal the confidential documents included in its filing and that “[t]o the best of Patent Owner’s knowledge, and based on statements by Petitioner about its own information, the confidential information contained in the Discovery Motion has not been made publicly available.” Paper 22 at 2. Indeed, WAG’s Motion for Discovery refers at length to documents produced under the protective order. *See e.g.* Paper 23 at 1-3. Similarly, I.M.L.’s Brief in Opposition specifically cites these documents. *See* Paper 24. The Board held Oral Argument on November 30, 2017, with both a public and non-public session. The non-public session discussed the real-party-in-interest issues, and the parties submitted proposed redactions to that transcript (Paper 36) on January 10, 2018, which are currently under review by the Board.

In response to the Board’s comments at the Oral Argument, Petitioner I.M.L. SLU Requested Adverse Judgment (Paper 38) and Patent Owner submitted (again under seal) a Motion in Opposition (Paper 39) with Exhibits (Exhibits 2009-2012). WAG’s Opposition Motion cites portions of the non-public hearing transcript, documents produced pursuant to the Protective Order, and even the single exhibit WAG now agrees should remain confidential (Exhibit 2010). *See e.g.* Paper 39 at 8-9. Finally, On February 26, 2018, the Board issued a Termination Decision.

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Paper 42. That decision cites the transcript of the non-public portion of the Oral Argument. Paper 42 at 6.

### **B. Applicable legal standards**

The Office Patent Trial Practice Guide provides that “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.” 77 Fed. Reg. 48,756, 48,760 (Aug. 14, 2012). Under the Board’s Rules, “confidential information [is identified] 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.” *Id.* (citing 37 C.F.R. § 42.54).

The default rule in trial proceedings is that such confidential information will become public ordinarily 45 days after a final judgment in a trial. *See* 77 Fed. Reg. 48,756, 48,761 (Section I.E.6.) (Aug. 14, 2012). “A party seeking to maintain the confidentiality of the information, however, may file a motion to expunge the information from the record prior to the information becoming public.” *Id.* Under 37 C.F.R. § 42.56, “[a]fter denial of a petition to institute a trial or after final judgment in a trial, a party may file a motion to expunge confidential information in the record.”

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