UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ONE WORLD TECHNOLOGIES, INC.,
D/B/A TECHTRONIC INDUSTRIES POWER EQUIPMENT,
Petitioner,

v.

CHERVON (HK) LIMITED,
Patent Owner.

Case IPR2020-00886
U.S. Patent 9,826,686

PETITIONER'S REPLY IN SUPPORT OF ITS MOTION FOR SANCTIONS

Patent Owner admits it produced an unredacted version of the confidential and sealed Sowell transcript (Exhibit 2029) in the parallel litigation, and thus violated the Default Protective Order ("D.P.O.") in this proceeding. *See* Patent Owner's Opposition (Feb. 24, 2021) ("Opp."), 1. None of Patent Owner's actions since that time absolve Patent Owner of that violation or render this briefing moot. Petitioner respectfully requests that the Board enter an order for the relief sought.

I. Patent Owner's "Replacement" of the Confidential Transcript in the Parallel Litigation Continues to Violate the Default Protective Order.

Patent Owner contends that Petitioner's motion should be denied as moot because, after this Board's hearing on Feb. 10, 2021, it withdrew the unredacted transcript in favor of "a replacement redacted version" in the parallel litigation. Opp., 1, 4. While the *body* of the replacement transcript is indeed redacted, the *Index* produced by Patent Owner remains unredacted and reveals the confidential information behind the redactions. The relief requested – that Patent Owner be ordered to withdraw the exhibit from the parallel litigation – remains valid.[1]

II. Patent Owner Misconstrues Confidentiality.

Patent Owner's view of "confidentiality" is at odds with D.P.O.'s. It argues that it complied with the D.P.O. because it kept the Sowell transcript "protected

[1] Pursuant to the Board's Feb. 11 Order, Petitioner filed a public version of the transcript with no index precisely because it reveals the redactions. *See* Ex.1039.

from third parties." Opp., 2. But the D.P.O. is more restrictive than that, and forbids circulation of confidential information not only to third parties but even to attorneys in the same law firm if they are not "of record for a party in the [IPR] proceeding." D.P.O., ¶2(B). Confidentiality according to the D.P.O.'s Acknowledgement also requires the signer to agree that "I will use the confidential information only in connection with this proceeding and for no other purpose." The parallel litigation is clearly an "other purpose" and is not "this proceeding." Moreover, despite Patent Owner's disagreement over the testimony's confidential designation (Opp., 4 n.3), it "had an obligation under the Protective Order to keep the information confidential, even if it disagreed with its designation as such." *RPX Corp. v. Applications in Internet Time, LLC*, Case IPR2015-01750, slip op. at 5 (PTAB May 6, 2016) (Paper 58). It was improper for Patent Owner to apply its own view of confidentiality in place of the D.P.O.'s.

Patent Owner also contends it has, by now, informed Petitioner of persons to whom the transcript was circulated. But that information is limited to those who accessed or viewed "the originally-produced Sowell transcript in the Litigation" (Opp., 1; *see* Ex. 2034, p.52), *i.e.*, the copy in the *litigation document production*. Patent Owner has not fully identified "to whom (and when) access to Mr. Sowell's transcript or its content was provided." *See* Petitioner's Motion, 5 (relief (3)). In fact, under FRCP 34, litigation document productions come from a "*party's*

possession, custody or control," so the transcript's production in the litigation implies that it exists in Patent Owner's files. The requested relief remains valid.

III. Patent Owner Misconstrues Harm.

Patent Owner argues the motion should be denied because Petitioner suffered only "speculative" harm. Opp., 3. First, Patent Owner overlooks the actual harm of untethering the Sowell transcript from the restrictions of the D.P.O., including the return-or-destroy requirement. D.P.O., ¶6. Second, Patent Owner ignores this briefing as well as the profession's "need to promote respect for, and meticulous observance of protective orders," where "[c]omplete good faith compliance with protective orders is essential to modern discovery practices…." *Intri-Plex Techs., Inc. v. Saint-Gobain Perf. Plastics Rencol Ltd*., Case IPR2014-00309, slip op. at 6 (PTAB Mar. 30, 2015) (Paper 84) (internal citations omitted).

IV. Patent Owner's Requested Order is Beyond this Board's Authority.

In an effort to turn the tables, Patent Owner asks this Board to order production of the transcript in the parallel litigation. Opp., 5 n.5. In the decision Patent Owner cites in support of this proposition, the Board instead advised that parties to a separate dispute desiring confidential IPR material must "go[] through the proper discovery channels in *that* jurisdiction to obtain it." *Sanofi-Aventis U.S. LLC v. Immunex Corp.,* Case IPR2017-01879, slip op. at 3 (PTAB March 2, 2018) (Paper 22) (emphasis added). The Board should decline Patent Owner's request.

Respectfully submitted,

Dated: March 4, 2021

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CERTIFICATE OF SERVICE

The undersigned certifies service pursuant to 37 C.F.R. §§ 42.6(e) and 42.105(b) on the Patent Owner by electronic copy of this:

PETITIONER'S REPLY IN SUPPORT OF ITS MOTION FOR SANCTIONS

Service is made electronically upon agreement of the parties.

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