

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

BOX, INC., and DROPBOX, INC.,
Petitioners

v.

TOPIA TECHNOLOGY, INC.,
Patent Owner.

Case No. IPR2023-00432
U.S. Patent No. 10,754,823

**PETITIONERS' UNOPPOSED MOTION TO SEAL AND
FOR ENTRY OF AGREED PROTECTIVE ORDER**

I. Introduction

Pursuant to 37 C.F.R. § 42.54, Petitioners Box, Inc. and Dropbox, Inc., respectfully submit this unopposed motion to seal Exhibit 1030 and paragraph 6 of Exhibit 1029 to Petitioners' Preliminary Reply to Patent Owner's Preliminary Response. Below, Petitioners explain that good cause exists for filing and maintaining this content under seal. Petitioners further move for entry of the parties' proposed Protective Order appended below as Appendix A. Concurrent with this motion, Petitioners are filing a redacted version of Exhibit 1029.

II. Applicable Legal Principles for Sealing Confidential Information

There is a strong public policy for making all information filed in an administrative proceeding open to the public, especially in an *inter partes* review which determines the patentability of claims in a patent and therefore affects the rights of the public. *St. Jude Med., Cardiology Div., Inc. v. Volcano Corp.*, IPR2013-00258, Paper 28, 2 (PTAB Aug. 12, 2013). 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. *Id.*

However, "confidential information" may be 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 Patent Trial and Appeal Board Consolidated Trial Practice Guide (Nov. 2019) provides:

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. 37 C.F.R. § 42.54.

The standard for granting a motion to seal is “good cause.” 37 C.F.R. § 42.54.

The Board has applied a four-pronged test in assessing motions to seal:

a movant to seal must demonstrate adequately that (1) the information sought to be sealed is truly confidential, (2) a concrete harm would result upon public disclosure, (3) there exists a genuine need to rely in the trial on the specific information sought to be sealed, and (4) on balance, an interest in maintaining confidentiality outweighs the strong public interest in having an open record.

Argentum Pharm. LLC v. Alcon Research, Ltd., IPR2017-01053, Paper 27, 4 (PTAB Jan. 19, 2018) (informative) (citing to 37 C.F.R. § 42.54(a)).

III. Good Cause Exists for Sealing Exhibit 1030 and Paragraph 6 of Exhibit 1029

Exhibit 1030 is a Joint Defense and Information Sharing Agreement (“JDA”). Petitioners respectfully request to seal in full Exhibit 1030 as it comprises confidential information of third parties and in view of Petitioners’ contractual obligations to use all reasonable efforts to maintain confidentiality of the document. Exhibit 1030, § 2.2.4. The confidential information includes confidential business information and details about the membership and nature of the JDA that, to Petitioners’ knowledge, have been maintained in confidentiality by all parties to the agreement. Public disclosure of the JDA would cause a concrete harm to the parties to the agreement, as explained in the JDA itself. *Id.*, §§ 2.2.4, 2.3. There exists a genuine need to rely in the trial on the specific information sought to be sealed, which is responsive to Patent Owner’s arguments regarding the nature of the JDA. In addition, aside from addressing Patent Owner’s arguments regarding the nature of the JDA, the terms of the JDA have no relevance to these proceedings or the public’s interest in these proceedings. Petitioners’ interests in maintaining confidentiality therefore outweigh the strong public interest in having an open record. For the foregoing reasons, Petitioners seek to designate the JDA as

“HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” pursuant to the Proposed Protective Order included below in Appendix A.

Exhibit 1029 is the Declaration of Heidi L. Keefe in Support of Petitioners’ Preliminary Reply and paragraph 6 contains quotations and detailed descriptions of the confidential information contained in Exhibit 1030 and, for the same reason above, Petitioners seek to designate paragraph 6 of Exhibit 1029 as “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” pursuant to the Proposed Protective Order included below in Appendix A.

IV. Certification of Non-Publication

To the best of Petitioners’ knowledge, the information sought to be sealed has not been published or otherwise made public and the confidentiality of this information has been consistently maintained by the Petitioners.

V. Certification of Conference with Opposing Party Pursuant to 37 C.F.R. §42.54 and Proposed Protective Order

Petitioners have conferred with Patent Owner and reached agreement as to the terms and the scope of the Proposed Protective Order, appended below as Appendix A. In addition, Patent Owner indicated that it does not oppose this motion. Accordingly, Petitioners moves for entry of the appended protective order and for the Board to grant Petitioners’ motion to seal.

The Proposed Protective Order is modeled after the default protective order set forth in the Patent Trial and Appeal Board Consolidated Trial Practice Guide

(Nov. 2019) to govern the handling of confidential information in this proceeding, with additional restrictions including a designation for Attorneys' Eyes Only information to prevent this information from being disclosed to potential competitors or competitive decision-makers of Patent Owner. The JDA and paragraph 6 of Exhibit 1029 are "HIGHLY CONFIDENTIAL – ATTORNEYS' EYES ONLY" information for the reasons described above and have been designated accordingly under the Proposed Protective Order.

Should the Board be inclined to deny the present Motion to Seal and for Entry of Agreed Protective Order, Petitioners respectfully request a conference call with the Board to discuss any concerns prior to the Board issuing a decision on the Motion.

VI. Conclusion

For the above reasons, Petitioners respectfully request that Exhibit 1030 and paragraph 6 of Exhibit 1029 be treated as confidential information and be placed under seal.

Dated: June 8, 2023

Respectfully submitted,

COOLEY LLP

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By: / Heidi L. Keefe /
Heidi L. Keefe
Reg. No. 40,673
Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify, pursuant to 37 C.F.R. Section 42.6, that a complete copy of the attached **PETITIONERS' UNOPPOSED MOTION TO SEAL AND FOR ENTRY OF AGREED PROTECTIVE ORDER** is being served on the 8th day of June, 2023, via electronic mail upon counsel of record for the Patent Owner as follows:

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DATED: June 8, 2023

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APPENDIX A

UNITED STATES PATENT AND TRADEMARK OFFICE

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[PROPOSED] PROTECTIVE ORDER

The following Protective Order will govern the filing and treatment of confidential information in the proceeding:

Protective Order

This protective order governs the treatment and filing of confidential information, including documents and testimony.

1. Confidential information shall be clearly marked “CONFIDENTIAL – PROTECTIVE ORDER MATERIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY.”

2. Access to confidential information marked “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” is limited to the following individuals who have executed the acknowledgement appended to this order:

(A) Outside Counsel: Outside counsel of record for a party in the proceeding, including employees of outside counsel of record’s law firm(s) to whom it is reasonably necessary to disclose this information to assist outside counsel of record in connection with this proceeding, including members of their firms, associate attorneys, paralegal, clerical, and other regular employees of such counsel. All in-house counsel and other representatives of the parties (other than outside counsel of record) shall not be allowed to view HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY Information.

(B) Experts. Retained experts of a party in the proceeding who further certify

in the Acknowledgement that they are not a competitor to any party, or a consultant for, or employed by, such a competitor with respect to the subject matter of the proceeding.

(C) The Office. Employees and representatives of the United States Patent and Trademark Office who have a need for access to the confidential information shall have such access without the requirement to sign an Acknowledgement. Such employees and representatives shall include the Director, members of the Board and their clerical staff, other support personnel, court reporters, and other persons acting on behalf of the Office.

(D) Support Personnel. Administrative assistants, clerical staff, court reporters and other support personnel of the foregoing persons who are reasonably necessary to assist those persons in the proceeding shall not be required to sign an Acknowledgement but shall be informed of the terms and requirements of the Protective Order by the person they are supporting who receives confidential information.

3. Access to confidential information marked “CONFIDENTIAL – PROTECTIVE ORDER MATERIAL” is limited to the following individuals who have executed the acknowledgment appended to this order:

(A) Above Personnel: Those persons or entities identified in paragraph 2 of this Protective Order under the conditions set forth in that paragraph.

(B) Parties. Persons who are owners of a patent involved in the proceeding and other persons who are named parties to the proceeding.

(C) In-house counsel. In-house counsel of a party.

4. Employees (e.g., corporate officers), consultants, or other persons performing work for a party, other than in-house counsel and in-house counsel's support staff, who sign the Acknowledgement shall be extended access to confidential information only upon agreement of the parties or by order of the Board upon a motion brought by the party seeking to disclose confidential information to that person. The party opposing disclosure to that person shall have the burden of proving that such person should be restricted from access to confidential information.

5. Persons receiving confidential information shall use reasonable efforts to maintain the confidentiality of the information, including:

(A) Maintaining such information in a secure location to which persons not authorized to receive the information shall not have access;

(B) Otherwise using reasonable efforts to maintain the confidentiality of the information, which efforts shall be no less rigorous than those the recipient uses to maintain the confidentiality of information not received from the disclosing party;

(C) Ensuring that support personnel of the recipient who have access to the

confidential information understand and abide by the obligation to maintain the confidentiality of information received that is designated as confidential; and

(D) Limiting the copying of confidential information to a reasonable number of copies needed for conduct of the proceeding and maintaining a record of the locations of such copies.

6. Persons receiving confidential information shall use the following procedures to maintain the confidentiality of the information:

(A) Documents and Information Filed With the Board.

(i) A party may file documents or information with the Board along with a Motion to Seal. The Motion to Seal should provide a nonconfidential description of the nature of the confidential information that is under seal and set forth the reasons why the information is confidential and should not be made available to the public. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The submission shall be treated as confidential and remain under seal, unless the Board determines that the documents or information do not to qualify for confidential treatment. The information shall remain under seal unless the Board determines that some or all of the information does not qualify for

confidential treatment.

(ii) Where confidentiality is alleged as to some but not all of the information submitted to the Board, the submitting party shall file confidential and non-confidential versions of its submission, together with a Motion to Seal the confidential version setting forth the reasons why the information redacted from the non-confidential version is confidential and should not be made available to the public. A party may challenge the confidentiality of the information by opposing the Motion to Seal. The non-confidential version of the submission shall clearly indicate the locations of information that has been redacted. The confidential version of the submission shall be filed under seal. The redacted information shall remain under seal unless the Board determines that some or all of the redacted information does not qualify for confidential treatment.

(B) Documents and Information Exchanged Among the Parties. Documents (including deposition transcripts) and other information designated as confidential that are disclosed to another party during discovery or other proceedings before the Board shall be clearly marked as “CONFIDENTIAL – PROTECTIVE ORDER MATERIAL” or “HIGHLY CONFIDENTIAL – ATTORNEYS’ EYES ONLY” and shall be produced in a manner that

maintains its confidentiality.

7. Within 60 days after the final disposition of this action, including the exhaustion of all appeals and motions, each party receiving confidential information must return, or certify the destruction of, all copies of the confidential information to the producing party.

Dated: June 8, 2023

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EXHIBIT A

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Standard Acknowledgment for Access to Protective Order Material

I, _____, affirm that I have read the Protective Order; that I will abide by its terms; that I will use the confidential information only in connection with this proceeding and for no other purpose; that I will only allow access to support staff who are reasonably necessary to assist me in this proceeding; that prior to any disclosure to such support staff I informed or will inform them of the requirements of the Protective Order; that I am personally responsible for the requirements of the terms of the Protective Order and I agree to submit to the jurisdiction of the Office and the United States District Court for the Northern District of California for purposes of enforcing the terms of the Protective Order and providing remedies for its breach.

Executed on _____, 20__

By _____