

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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3M COMPANY,

Petitioner,

v.

BAY MATERIALS, LLC,

Patent Owner.

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Case IPR2022-01214  
Patent No. 10,946,630

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**PATENT OWNER'S MOTION TO SEAL**

## **I. Introduction**

Patent Owner Bay Materials, LLC requests that the confidential versions of Patent Owner's Sur-Reply and Exhibits 2088, 2090, 2091, and 2092 be sealed under 37 C.F.R. § 42.54. Good cause to seal these documents exists because public versions of Patent Owner's Sur-Reply and Exhibits 2090, 2091, and 2092 have also been filed, and the redacted information, along with the entirety of the information in Exhibit 20088, is Patent Owner's confidential and sensitive business information that is not publicly available. Counsel for Patent Owner asked Petitioner's counsel whether Petitioner would oppose a motion to seal documents containing Patent Owner's confidential information. In response, counsel for Petitioner stated that Petitioner does not oppose Patent Owner's request to apply the Board's Default Protective Order to Patent Owner's confidential information.

## **II. Governing Rules and PTAB Guidance**

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, but a party may file a concurrent motion to seal and the information at issue is sealed pending the outcome of the motion.

Similarly, 37 C.F.R. § 42.14 provides:

The record of a proceeding, including documents and things, shall be made available to the public, except as otherwise ordered. A party intending a document or thing to be sealed

shall file a motion to seal concurrent with the filing of the document or thing to be sealed. The document or thing shall be provisionally sealed on receipt of the motion and remain so pending the outcome of the decision on the motion.

It is, however, only “confidential information” that is 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 *Office Trial Practice Guide*, 77 Fed. Reg. 48756, 48760 (Aug. 14, 2012) 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.

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*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. § 42.54.

### **III. Identification of Confidential Information**

The confidential information consists of Patent Owner’s sensitive business information that is not publicly available, such as proprietary technical and testing

information and customer information. This information is contained in the following documents:

- Patent Owner's Sur-Reply in pages iii, 20, 21, and 23-25;
- Exhibit 2088;
- Exhibit 2090 in pages 38-41, 47, 54, 55, 60, 72, 74, 81, 86, 87, and 90;
- Exhibit 2091 in pages 2 and 3; and
- Exhibit 2092 in pages 9 and 16.

#### **IV. Good Cause Exists for Sealing the Confidential Information**

The Board's 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. Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,760 (Aug. 14, 2012). Here, the information that Patent Owner seeks to seal is information pertaining to confidential and sensitive business information that is not publicly available.

Several of the documents disclose the characteristics and composition of Patent Owner's Zendura™ FLX product. Such information is regarded as highly proprietary and is kept confidential and not otherwise disseminated to the public. If this information were disclosed to competitors, they would unjustly gain an advantage over Patent Owner or would be able to introduce competitive products

resulting in significant harm to Patent Owner, including, but not limited to, financial damage, damage to business relationships, damage to Patent Owner's commercial standing, and/or other irreparable harm from public disclosure of the confidential proprietary, commercial, and competitively sensitive business information.

Several of the documents contain confidential business information of Patent Owner's customers, such as details regarding the composition of their products. Additionally, the identity of Patent Owner's customers is not publicly available information. Indeed, Patent Owner and its customers have entered into Supply Agreements, which require Patent Owner to protect customer-confidential information. The customers have requested that their identities as Patent Owner's customers be treated as confidential business information to avoid disclosure of the supplier or composition of the materials used in the customer's products, and Patent Owner treats the customers' identities as confidential business information.

These exhibits would enable competitors to identify Patent Owner's customers, and thus would provide competitors with highly confidential information about the composition of the customers' products. According to the customers, they would be at a competitive disadvantage and suffer competitive harm if their confidential relationship to Patent Owner were made public.

Accordingly, Patent Owner seeks to seal the entirety of Exhibit 2088 because it is entirely confidential, and redaction would not be practical. For example, Patent

Owner seeks to seal the entirety of Exhibit 2088, which is a material specification describing the confidential and proprietary polymer composition of Patent Owner's Zendura™ FLX product, in order to prevent public disclosure of this sensitive information.

In addition, Patent Owner seeks to seal the portions of Patent Owner's Sur-Reply (pages iii, 20, 21, and 23-25); Exhibit 2090 (pages 38-41, 47, 54, 55, 60, 72, 74, 81, 86, 87, and 90); Exhibit 2091 (pages 2 and 3); and Exhibit 2092 (pages 9 and 16), which cite, reproduce, or substantially describe Patent Owner's confidential information. This information includes highly confidential technical information about Patent Owner's Zendura™ FLX product and the confidential identity of Patent Owner's customers. Patent Owner seeks to seal only the portions of Patent Owner's Sur-Reply, Exhibit 2090, Exhibit 2091, and Exhibit 2092 that include this confidential information.

### **III. CERTIFICATION OF NON-PUBLICATION**

The undersigned counsel certifies the information sought to be sealed by this Motion to Seal has not, to their knowledge, been published or otherwise made public. Patent Owner has made efforts to maintain the confidentiality of this information in a related district court proceeding. In that district court proceeding, the information that Patent Owner presently moves to seal has been produced and designated "Highly Confidential Information."

#### **IV. CONCLUSION**

For the reasons set forth above, Patent Owner respectfully requests the Board grant this Motion to Seal.

Respectfully submitted,

Dated: September 19, 2023

/Charles T. Collins-Chase

Charles T. Collins-Chase

Reg. No. 78,019

**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing **PATENT OWNER'S MOTION TO SEAL** was served electronically via email on September 19, 2023, in its entirety on the following:

Heidi L. Keefe  
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Petitioner has consented to electronic service by email.

Dated: September 19, 2023

/William Esper/  
William Esper  
Case Manager and PTAB Coordinator  
FINNEGAN, HENDERSON, FARABOW,  
GARRETT & DUNNER, LLP