

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

EDWARDS LIFESCIENCES CORPORATION, EDWARDS
LIFESCIENCES LLC, AND EDWARDS LIFESCIENCES AG

Petitioners,

v.

BOSTON SCIENTIFIC SCIMED, INC.,

Patent Owner.

Case IPR2017-00060

Patent 8,992,608

Before the Honorable NEIL T. POWELL, JAMES A. TARTAL, and
ROBERT L. KINDER, *Administrative Patent Judges.*

PATENT OWNER'S REQUEST FOR RECONSIDERATION

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Patent Trial and Appeal Board
U.S. Patent & Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

I. STATEMENT OF THE PRECISE RELIEF REQUESTED

Pursuant to 37 C.F.R. § 42.71(d) and the Board’s February 9, 2018 Decision (the “Decision,” Paper 57), Patent Owner Boston Scientific Scimed, Inc. (“Patent Owner”) respectfully requests reconsideration and that the Board find good cause exists to set aside the requirement that a motion to seal be filed concurrently with papers 21, 39, and 48 and exhibits 2094, 2096, 2098, 2099, and 2100 and/or that such requirement should be set aside in the interest of justice.

II. GOVERNING RULES

37 C.F.R. § 42.71(d) states:

A party dissatisfied with a decision may file a single request for rehearing without prior authorization from the Board. The burden of showing a decision should be modified lies with the party challenging the decision. The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply. A request for rehearing does not toll times for taking action. Any request must be filed:

(1) Within 14 days of the entry of a non-final decision or a decision to institute a trial as to at least one ground of unpatentability asserted in the petition.

(37 C.F.R. § 42.71(d).)

Further, the Board’s Decision indicated an additional motion to seal would not be considered absent “a showing of good cause to set aside the requirement

that a motion to seal be filed concurrently with the document to be sealed, or in the interest of justice” (Paper 57 at 13.)

III. STATEMENT OF MATERIAL FACTS

Based on the following facts, Patent Owner submits that a showing of good cause and/or the interests of justice has been made to set aside the requirement that a motion to seal be filed concurrently with papers 21, 39, and 48 and exhibits 2094, 2096, 2098, 2099, and 2100.¹

Paper 21 is Patent Owner’s Response, Paper 39 is Patent Owner’s Motion for Observations on Cross-Examination, and Paper 48 is Patent Owner’s Reply in Support of Its Motion to Exclude Evidence Pursuant to 37 C.F.R. § 42.64. All of these documents contain information that Petitioner Edwards Lifesciences Corp. (“Petitioner”) designated confidential in accordance with the Stipulated Protective Order (Ex. 2092; *see* Paper 29 (Order entering Stipulated Protective Order)) or highly confidential in accordance with the Protective Order entered in the United States District Court for the District of Delaware matter captioned *Boston Scientific Corp., et al. v. Edwards Lifesciences Corp., et al.*, No. 1:16-cv-275-JFB-SRF (the

¹ Petitioner informed Patent Owner that it intends to also file a request for reconsideration regarding at least these same papers and exhibits that specifically identifies what information Petitioner contends is confidential and its importance to Petitioner.

“Delaware Action”) (D.I. 78)—designations that Patent Owner does not dispute. Patent Owner also publicly filed redacted versions of these documents as papers 22, 40, and 49, respectively. These versions contain redactions tailored to encompass only the information previously designated confidential or highly confidential by Petitioner.

Exhibit 2094 is the deposition transcript of Petitioner’s expert Nigel P. Buller, exhibit 2096 is the deposition transcript of Petitioner’s witness Larry Wood, exhibit 2098 is the deposition transcript from the Delaware Action of Petitioner’s witness Larry Wood, exhibit 2099 is Petitioner’s document titled “Global THV – Q2 2016 Update,” and exhibit 2100 is Patent Owner’s Demonstrative Exhibits. All of these documents contain information that Petitioner designated confidential in accordance with the Stipulated Protective Order (Ex. 2092) or highly confidential in accordance with the Protective Order entered in the Delaware Action—designations that Patent Owner does not dispute. At the time of filing, Patent Owner could not publicly file redacted versions of exhibits 2094, 2096, 2098, and 2099 because Petitioner’s confidential and highly confidential information is pervasive within these exhibits and Patent Owner was not in a position to determine what information Petitioner wanted redacted. Patent Owner publicly filed a redacted version of exhibit 2100 as exhibit 2101, which

contains redactions tailored to encompass only the information previously designated confidential or highly confidential by Petitioner.

IV. STATEMENT OF THE REASONS FOR THE RELIEF REQUESTED

First, this Request is timely because it is filed within 14 days of the Board’s February 9, 2018 Decision. (37 C.F.R. § 42.71(d)(1); *see* Paper 57 at 16.)

Second, pursuant to its Decision, the Board indicated that it may reconsider a motion to seal papers and exhibits upon “a showing of good cause to set aside the requirement that a motion to seal be filed concurrently with the document to be sealed, or in the interest of justice” (Paper 57 at 13.) The foregoing facts demonstrate that good cause exists, and/or the interest of justice requires such a consideration here.

Papers 21, 39, and 48 and exhibits 2094, 2096, 2098, 2099, and 2100 were all filed by Patent Owner but contained the confidential information of Petitioner. Because of this, Patent Owner did not know at the time of filing certain facts that must be included in a motion to seal, including what portions of its submissions Petitioner contended were confidential and/or Petitioner’s “reasons why the information . . . is confidential and should not be made publicly available.” (Paper 24 at 7 n.3 (quoting Patent Office Trial Practice Guide, 77 Fed. Reg. at 48,711); *see id.* at 6-7 (“This includes showing that the information is truly confidential, and that such confidentiality outweighs the strong public interest in having an open

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