

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

BOSTON SCIENTIFIC SCIMED, INC.  
Patent Owner

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Case IPR2017-00060  
Patent 8,992,608

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

**PETITIONERS' OPPOSITION TO PATENT OWNER'S MOTION TO  
EXCLUDE EVIDENCE PURSUANT TO 37 C.F.R. § 42.64**

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## **I. INTRODUCTION**

Patent Owner's Motion to Exclude should be denied in its entirety. Instead of carrying its burden to show that exclusion is proper, *see* 37 C.F.R. § 42.20(c), the Motion attacks Petitioners' expert, Dr. Buller, solely on the unsupported assertion that his original declaration (Ex. 1007) and reply declaration (Ex. 1045) should be excluded for allegedly failing to consider PO's supposed evidence of secondary considerations. Even if true (it isn't), PO is wrong that this would warrant exclusion of Dr. Buller's testimony. At most, such criticisms go to the weight that should be given to Dr. Buller's testimony. For these reasons, PO's Motion should be denied.

## **II. PETITIONERS AND DR. BULLER ADDRESSED PATENT OWNER'S SECONDARY CONSIDERATIONS ONCE THEY WERE ASSERTED**

PO presented no secondary considerations in its Preliminary Response (POPR). Paper 6, at 30 n.4 ("PO does not set forth herein its evidence of secondary considerations."). PO did not raise secondary considerations until its Response (Paper 22). In its response, PO relied on the alleged failure of others, long-felt need, copying, industry praise, and commercial success, which were based on its unsupported claim that Petitioners' SAPIEN 3 transcatheter heart valve ("S3 THV") is an embodiment of the Challenged Claims. Paper 22 at 47-72.

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