

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 IPR2017-0060  
Patent 8,992,608

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**PETITIONERS' REQUEST FOR RECONSIDERATION OF THE  
BOARD'S FEBRUARY 9, 2018 ORDER REGARDING FILING OF  
CONFIDENTIAL DOCUMENTS UNDER SEAL**

Pursuant to the Board’s February 9, 2018 Order (Paper 57) and 37 C.F.R. §§ 42.14, 42.54, and 42.71, Petitioners Edwards Lifesciences, Edwards Lifesciences LLC, and Edwards Lifesciences AG (“Petitioners”) submit this Request for Reconsideration of the Board’s February 9 Order Regarding Sealing of Papers 21, 39 & 48 and Exs. 1077, 2094, 2096, 2098, 2099 & 2100.<sup>1,2</sup> Alternatively, if the Board is not inclined to grant Reconsideration and authorize the filing of a motion to seal these documents, Petitioners request that the documents be expunged, as explained below.

## **I. BACKGROUND**

On June 23, 2017, Patent Owner (“PO”) filed under seal its Response (Paper 21) with restricted access and concurrently filed a publicly available redacted version (Paper 22). PO also filed as exhibits many confidential documents produced to it by Petitioners as part of discovery in the co-pending litigation in the District of Delaware, C.A. No. 16-275-JFB-SLR. Many of these exhibits (and

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<sup>1</sup> Petitioners and Patent Owner have conferred and agreed that Petitioners and Patent Owner will each file a request for reconsideration addressing the confidential documents filed under seal without an accompanying motion to seal.

<sup>2</sup> Petitioners do not include in this request Paper 47 and understand that Paper 47 will be made public and the redacted version (Paper 46) will be expunged. As such, the only remaining document of Petitioners at issue is Ex. 1077.

PO's Response) contain Petitioners' Highly Confidential information, which PO is required by the Stipulated Protective Order to file under seal.<sup>3</sup> None of these exhibits contain PO's Confidential or Highly Confidential information.

On July 28, 2017, the parties filed a Joint Motion to Seal various exhibits PO filed with its Response ("First Motion to Seal"; Paper 25), along with their revised Joint Motion for Entry of Stipulated Protective Order (Paper 26), which the Board entered on August 10, 2017 (Paper 29). On September 22, 2017, Petitioners filed their Reply (Paper 33) and a motion to seal ("Second Motion to Seal"; Paper 32) that Reply and certain of the concurrently-filed exhibits. Petitioners simultaneously submitted redacted versions of their Reply (Paper 34), as well as the Reply Declaration of Nigel P. Buller (Ex. 1045) and the Declaration of Larry Lee Wood (Ex. 1046).

PO subsequently filed: PO's Motion for Observations on Cross-Examination (Paper 39) with restricted access and concurrently filed a publicly available redacted version (Paper 40); Exs. 2094, 2096, 2098, and 2099 with restricted public access, with no public redacted version; PO's Reply in Support of its Motion to Exclude (Paper 48) with restricted access and filed a publicly available redacted version (Paper 49); and its demonstrative exhibits (Ex. 2100)

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<sup>3</sup> The Delaware protective order imposes this same requirement.

with restricted access, along with a public redacted version (Ex. 2101). PO did not file motions to seal with any of these filings.

On December 19, 2017 at Oral Argument, the Board addressed the parties' failure to file motions to seal concurrent with the filing of those documents with restricted access not identified in the First or Second Motions to Seal, including the parties' demonstratives (Exs. 2100 & 1077). Petitioners understood (in hindsight, misunderstood) that because the motions to seal were not filed concurrently with each paper or exhibit filed with restricted access, the Board's authorization was required before the motions could be filed. Following the Oral Argument, the parties conferred and worked diligently over the intervening holiday weeks to reach agreement on a motion to seal those papers. Believing that Board authorization was required before filing the motion, on January 8, 2018, the parties emailed the Board to obtain authorization to file a joint motion to seal their unredacted demonstrative exhibits and the other unredacted papers having confidential information. Ex. 3001, 2. The parties again sought authorization to file a joint motion to seal in the email to the Board on January 17, 2018. Ex. 3001, 1 ("Subject to the Board's authorization (per the request in the [January 8, 2018] email below), Petitioners will file a joint motion to seal papers and exhibits (including the demonstrative exhibits) that contain confidential information and which previously were filed in this proceeding."). Petitioners acknowledge that

their request to file a joint motion to seal did not explicitly identify the papers and exhibits that would be the subject of the motion to seal, and instead made reference generically to confidential information previously filed in this proceeding.

On February 9, 2018, the Board held that “Petitioner’s unsupported and ambiguous request to file a motion to seal ‘other papers and exhibits’ is denied.” Paper 57 at 13. In its February 9 Order, the Board further held that “unless Petitioner or Patent Owner files, no later than February 23, 2018, a request for reconsideration of this Decision or the party that filed the paper or exhibit requests expungement of the paper or exhibit” the documents filed with restricted access will be made publicly available. *Id.* at 16.

Pursuant to the Board’s Order, Petitioners request reconsideration of the Board’s Decision regarding sealing portions of Papers 21, 39 & 48 and Exs. 1077, 2094, 2096, 2098, 2099, & 2100. As explained below, good cause exists for and/or the interests of justice would be served by grant of this relief.

**II. GOOD CAUSE EXISTS AND/OR THE INTERESTS OF JUSTICE WOULD BE SERVED BY RECONSIDERING THE FEBRUARY 9 ORDER REGARDING SEALING PATENT OWNERS’ FILINGS: PAPERS 21, 39 & 48 AND EXHIBITS 2094, 2096, 2098, 2099 & 2100**

Petitioners submit that there exists “good cause to set aside the requirement that a motion to seal be filed concurrently with the document to be sealed, or [that it is] in the interests of justice.” Paper 57 at 13. The documents at issue contain Petitioners’ Highly Confidential information – not Patent Owner’s – that was in

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