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*.

PETITIONERS' SURREPLY IN OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE PURSUANT TO 37 C.F.R. § 42.64[1]

[1] This Surreply was authorized by email on December 6, 2017.

In its motion to exclude ("MTE," Pap. 41, 48), PO improperly includes **new argument** and **new evidence**: (1) attempting to identify a commissure support element ("CSE") in Petitioners' SAPIEN 3 ("S3") purportedly to show a nexus between the S3 and '608; (2) attempting to distinguish statements made during '608's prosecution that undercut its nexus argument; and (3) offering a dictionary definition of "attached" to support an untimely claim construction argument. Use of a motion to exclude as a substantive surreply is procedurally improper and PO's new arguments and new evidence should be disregarded. *Kyocera Corp. v. Softview LLC*, IPR2013-7, Pap. 51, 34 (PTAB Mar. 27, 2014) ("A motion to exclude is neither a substantive sur-reply, nor a proper vehicle for arguing whether a reply or supporting evidence is of appropriate scope."); *Marvell Semicond., Inc. v. Int. Vent. I LLC*, IPR2014-552, Pap. 65, 2 (PTAB Aug. 13, 2015) (expunging unauthorized supplemental information cloaked as motion to exclude); Trial Pract. Guide, 77 Fed. Reg. 48765, 48767 (Aug. 14, 2012) (("a reply that raises a new issue or belatedly presents evidence will not be considered and may be returned").

PO's motion (Pap. 41 at 7) overstepped by adding further explanation to the deficient CSE analysis in PO's Response, which merely circled three areas on pictures of the S3 with no identification of any components that purportedly embody a CSE. Response (Pap. 21) at 51; Ex. 2080, Appx. B, Elements 1.2-1.3. PO's MTE Reply (Pap. 48) takes its impropriety further—by *adding a figure* **never**

before cited (Pap. 48 at 4 (pasting Ex. 2046 at 28)), identifying components of S3 as a CSE that it never before mentioned ("a 'PET layer,' 'tissue integral tabs,' and sutures" (*id.* (citing Ex. 2046 at 28))), and then arguing Petitioners *ignored* this "evidence." It is untenable that PO could have "clearly" identified elements and figures it never before mentioned or cited. Exhibit 2046 was cited only once by PO for an unrelated issue. Response at 60 (citing Ex. 2046 at 10). PO's Dr. Brecker never cited Ex. 2046 or mentioned a PET layer, tissue integral tabs, or sutures.

Also for the first time, PO attempts to distinguish its arguments and amendments made to obtain the '608 that require the claimed seal to double over the frame, adding new arguments and figures to suggest the S3's discrete, two-skirt construction is covered by '608 even though no S3 skirt doubles over the frame. (Pap. 48 at 2-4). Again, PO's reply is not the proper vehicle to introduce new arguments and evidence.

Finally, for the first time, PO submits a dictionary definition of "attached" (Pap. 48 at 4-5) that is not only unauthorized supplemental information, but also fails to even support PO's untimely nexus arguments. Nothing in this new definition supports PO's assertion that the BRI of "attached to" permits treating the integral structure of the S3 frame with a commissure window as artificially separate structures "attached to" one another.

Petitioners request that PO's new arguments and evidence be disregarded.

Dated: December 11, 2017

Respectfully submitted,

/s/ Gregory S. Cordrey

Gregory S. Cordrey, Esq. (Reg. No. 44,089)
Brian P. Egan, Esq. (Reg. No. 54,866)
Catherine Nyarady, Esq. (Reg. No. 42,042)
Attorney for Petitioners
Edwards Lifesciences Corporation,
Edwards Lifesciences LLC, and
Edwards Lifesciences AG

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that on December 11, 2017, a complete and entire copy of **PETITIONERS' SURREPLY IN OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE PURSUANT TO 37 C.F.R. § 42.64** has been served in its entirety by e-mail on the following addresses of record for Patent Owner:

jennifer.sklenar@apks.com

wallace.wu@apks.com

marc.cohn@apks.com

matthew.wolf@apks.com

edward.han@apks.com

Dated: December 11, 2017

/s/ Gregory S. Cordrey
Gregory S. Cordrey, Esq. (Reg. No. 44,089)
Attorney for Petitioners
Edwards Lifesciences Corporation,
Edwards Lifesciences LLC, and
Edwards Lifesciences AG