

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

EDWARDS LIFESCIENCES CORPORATION,
Petitioner,

v.

BOSTON SCIENTIFIC SCIMED, INC.,
Patent Owner.

Case IPR2017-00060
Patent 8,992,608 B2

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

TARTAL, *Administrative Patent Judge*.

DECISION

Granting Motions to Seal in Part, Denying in Part, and
Additional Conduct of the Proceeding
37 C.F.R. §§ 42.5, 42.14 and 42.54

This Decision addresses various papers and exhibits filed by Edwards Lifesciences Corporation, Edwards Lifesciences LLC, and Edwards Lifesciences AG (“Petitioner”) and Boston Scientific Scimed, Inc., (“Patent Owner”), (collectively, “the Parties”), with restricted public access, as well as two pending motions to seal. For the reasons that follow, the motions to seal identified below are granted in part, and denied in part, as set forth in the Order below. We also grant Petitioner’s request to file amended objections to Patent Owner’s demonstratives.

We begin by summarizing portions of our prior Decision on July 20, 2017, in which we denied the Joint Motion (Paper 20) of for entry of a proposed Stipulated Protective Order and authorized the Parties to file a motion for entry of a substitute protective order to address the concerns we raised. Paper 24, 8 (the “July 20 Decision”).¹ In our July 20 Decision the Parties were further ordered:

that on, or before, July 28, 2017, with respect to *each and every paper or exhibit filed with restricted public access*, the Parties *shall*:

- (1) file a non-confidential, redacted version of each exhibit or paper sought to be maintained as confidential;
- (2) notify the Board to specifically identify each exhibit or paper, if any, no longer sought to be maintained as confidential; and
- (3) notify the Board to specifically identify each exhibit or paper, if any, sought to be expunged and no longer relied upon in this proceeding;

July 20 Decision, 9 (emphasis added); *see also id.* at 7–8 (stating that

¹ Subsequently, the Parties filed a revised Joint Motion for Entry of Stipulated Protective Order on July 28, 2017, (Paper 26), which we granted on August 10, 2017 (Paper 29).

“Patent Owner or Petitioner shall file a motion to seal addressing every document filed with restricted public access by July 28, 2017, for which confidentiality is sought to be maintained”).

The July 20 Decision expressly identified Paper 21 (the Patent Owner’s Response) as having been filed with restricted public accessibility, along with a public redacted version, but without a concurrent motion to seal. *Id.* at 5. The July 20 Decision also expressly identified Exhibits 2031, 2034, 2035, 2036, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2055, 2056, 2057, 2063, 2077, 2078, 2080, 2085, 2086, 2087, 2088, 2089, 2090, and 2091 as having been filed with restricted public accessibility, but without either public redacted versions or a concurrent motion to seal. *Id.*

The July 20 Decision explained in detail the requirements of the Board’s rules for submitting documents with restricted public access, which counsel already should have been very well aware of:

The requirement that a motion to seal must accompany the filing of a document with restricted public access is unambiguous. In accordance with 37 C.F.R. § 42.14, “[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*” (emphasis added). Our regulations clearly state that the “record of a proceeding, including documents and things, shall be made available to the public, except as otherwise ordered.” 37 C.F.R. § 42.14. To this end, as set forth in the Board’s default protective order:

Where confidentiality is alleged as to some but not all of the information submitted to the Board, the submitting party shall file confidential and non-confidential versions of its submission, together with a Motion to Seal the confidential version setting forth the reasons why the information redacted from the non-confidential

version is confidential and should not be made available to the public. The nonconfidential version of the submission shall clearly indicate the locations of information that has been redacted. The confidential version of the submission shall be filed under seal.

Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,771. Similarly, as set forth in the Case Management and Scheduling Order:

The Board has a strong interest in promoting public accessibility to the proceedings. If a party seeks to redact information from documents filed in this proceeding in accordance with a protective order, the redactions must be limited to isolated passages consisting entirely of confidential information, and the thrust of the underlying argument or evidence must remain clearly discernible.

Paper 8, 3. Thus, the default rule is that all papers filed in an *inter partes* review are open and available for access by the public; only “confidential information” may be protected from disclosure upon a showing of good cause. *See* 35 U.S.C. §§ 316(a)(1) and 316(a)(7); 37 C.F.R. §§ 42.14 and 42.54(a). Generally, the party asserting confidentiality bears the burden of showing that the relief requested should be granted. 37 C.F.R. § 42.20(c). This includes showing that the information is truly confidential, and that such confidentiality outweighs the strong public interest in having an open record. A motion to seal will not be granted if based only on broad or generic contentions of confidentiality. Moreover, information subject to a protective order will become public if identified in a final written decision in this proceeding, and a motion to expunge information will not necessarily prevail over the public interest in maintaining a complete and understandable file history. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,761. As such, the Parties are encouraged to stipulate to facts or use other means to present evidence without the need for a motion to seal.

Counsel should be well-aware of the procedures for filing confidential documents, including the requirement for a motion to seal. Counsel are directed to review the Office Patent Trial Practice Guide, the Case Management and Scheduling Order, and the Board's regulations to assure adherence to such procedural requirements.

July 20 Decision, 5–7. We also expressly cautioned the Parties against filing documents that are redacted in their entirety, noting that:

To the extent further guidance is necessary, we make the following observations. Few, if any, exhibits, even business records, should ever be confidential in their entirety, without good cause to show that *all* of the information contained therein is truly sensitive. *See* 37 C.F.R. § 42.54(a). Even business records (e.g., sales forecasts, license agreements) often contain some non-confidential information serving to identify the nature of confidential portions of the exhibit. Conversely, deposition transcripts, declarations, and papers containing a party's arguments will generally contain *substantial* non-confidential portions. In all cases, the Motion to Seal must *set forth the reasons why the information redacted from the non-confidential version is confidential and should not be made publicly available*. Patent Office Trial Practice Guide, 77 Fed. Reg. at 48,771 (emphasis added).

July 20 Decision, 7 n.3.

First Motion to Seal

On July 28, 2017, the Parties filed a Joint Motion to File Confidential Documents Under Seal directed to Exhibits 2031, 2034, 2035, 2036, 2039, 2040, 2041, 2042, 2043, 2044, 2045, 2046, 2055, 2056, 2057, 2063, 2077, 2078, 2080, 2085, 2086, 2087, 2088, 2089, 2090, and 2091. Paper 25 (the "First Motion to Seal"). In consideration of the First Motion to Seal, we make the following determinations:

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