

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 IPR2017-0060
Patent 8,992,608

**JOINT REVISED MOTION TO FILE CONFIDENTIAL DOCUMENTS
UNDER SEAL**

Pursuant to the Board's Order (Paper 57) and 37 C.F.R. §§ 42.14 and 42.54, Petitioners and Patent Owner respectfully submit this Joint Motion to Seal Portions of Exhibits 1049, 1050, 1062, 1063, 2031, 2034, 2036, 2039, 2041, 2042, 2043, 2044, 2045, 2046, 2055, 2056, 2057, 2063, 2077, 2085, 2086, 2088, 2089, 2090, and 2091.¹

I. BACKGROUND

On October 12, 2016, Petitioners filed their petition for *inter partes* review and various prior art and expert declarations as Exhibits 1001-1034, all of which were publicly filed. On June 23, 2017, Patent Owner filed its Response, and Exhibits 2014-2091, many of which are highly confidential documents. None of these confidential documents contain Patent Owner's confidential information; these documents include only Petitioners' confidential information. Patent Owner had access to these documents only via discovery in the co-pending litigation in the District of Delaware (the "Delaware Litigation"). In the Delaware Litigation, the parties are subject to a protective order, which the parties are bound to follow regarding treatment of the other party's Confidential and Highly Confidential information. Thus, unlike the more typical IPR proceeding where all or nearly all of the documents are publicly available prior art documents or the patent owner's

¹ Pursuant to 37 C.F.R. § 42.54(a), Petitioners and Patent Owner hereby certify that they have conferred in good faith on this Joint Motion.

own internal materials to support secondary considerations of nonobviousness, here Patent Owner has alleged (and Petitioners dispute) that it is Petitioners' products that provide evidence of secondary considerations. Although many hundreds of pages of Petitioners' Highly Confidential information have been filed with the Board, only a few dozen pages from the documents identified in this Motion have been cited and relied on by either party.

On August 10, 2017, the Board granted the parties' Joint Motion for Entry of Stipulated Protective Order. Pap. 29; *see also* Pap. 26, Ex. 2092.

On July 28, 2017, the Parties filed a Joint Motion to File Confidential Documents Under Seal (Pap. 25) (the "First Motion to Seal") requesting authorization to file under seal portions of Exhibits 2031, 2034, 2036, 2039, 2041, 2042, 2043, 2044, 2045, 2046, 2055, 2056, 2057, 2063, 2077, 2080, 2085, 2086, 2087, 2088, 2089, 2090, and 2091. On September 22, 2017, Petitioners filed a Motion to File Confidential Documents Under Seal (Pap. 32) (the "Second Motion to Seal") requesting authorization to file under seal Petitioners' Reply (Pap. 33) and Exhibits 1045, 1046, 1049, 1050, 1061, 1062, and 1063.

On February 9, 2018, the Board granted-in-part and denied-in-part the First and Second Motions to Seal. Paper 57. In its Decision, the Board granted the Parties' request to file under seal the redacted portions of Ex. 2080 and all of Ex. 2087 as requested in the First Motion to Seal. The Board also granted Petitioner's

request to file under seal the redacted portions of Ex. 1045, the redacted portions of Ex. 1046, all of Ex. 1061, and the redacted portions of Petitioners' Reply (Pap. 33) as requested in the Second Motion to Seal. The Board denied the remainder of the motions subject to the Patent Owner or Petitioner filing a revised Motion to Seal directed to these exhibits or a request that the exhibit be expunged by the party that filed the exhibit. Paper 57 at 16.

The parties now move pursuant to the Board's February 9, 2018 Order and the Stipulated Protective Order to file under seal portions of Exhibits 1049, 1050, 1062, 1063, 2031, 2034, 2036, 2039, 2041, 2042, 2043, 2044, 2045, 2046, 2055, 2056, 2057, 2063, 2077, 2085, 2086, 2088, 2089, 2090, and 2091. As instructed by the Board (Pap. 57 at 14–15), Petitioners include herein case law that supports its efforts to distinguish what is “confidential and properly redacted from material that is not confidential and must be publicly disclosed.” Pursuant to the Board's guidance that even amidst much Highly Confidential information, there may be non-confidential information that may help the public to discern at a basic level what the document addresses (Paper 57 at 10), Petitioners have also prepared and respectfully submit simultaneously herewith proposed redacted public versions to replace the fully sealed exhibits previously submitted by both Patent Owner and Petitioner. *See Samsung Elec. Co. v. Nvidia Corp.*, IPR2015-01028, Paper 11 at 3 (PTAB Oct. 14, 2015) (“with any renewed motion to seal, [p]atent [o]wner should

provide a redacted version demonstrating those portions of its [p]reliminary [r]esponse and [e]xhibits that it believes contain confidential information.”). In the below summary, *infra* § III, Petitioners have also revised their previously-submitted descriptions of the confidential information in these exhibits to more thoroughly explain why the information is confidential. Petitioners have also included the specific page numbers of each exhibit that are explicitly relied upon in any party submission, which further delineates the relevant portions of each exhibit for purposes of this proceeding from the large number of highly confidential pages in each exhibit that are not cited or relied upon by either party in this proceeding (and are thus generally of limited or no relevance to this proceeding).

II. LEGAL STANDARD

“[T]here is a strong public policy for making all information filed in an *inter partes* review open to the public. Factual evidence submitted in a trial to support a party’s case for patentability must be made available to the public, unless there is good cause for protecting the evidence.” *Garmin Int’l, Inc. v. Cuozzo Speed Techs. LLC*, IPR2012-00001, Pap. 36 at 7–8 (PTAB Apr. 5, 2013). As provided by Fed. R. Civ. P. 26(c)(1)(G), the types of information likely to be confidential and competitively sensitive are “trade secret or other confidential research, development, or commercial information.” *See Garmin*, IPR2012-00001, Pap. 36 at 4; *see also Illumina, Inc. v. Columbia Univ.*, IPR2012-00007, Pap. 74 at 5–6

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