

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

Denying Patent Owner's Request for Reconsideration of
Our Decision Granting Motions to Seal in Part, Denying in Part, and
Additional Conduct of the Proceeding (Paper 57)
37 C.F.R. §§ 42.71(d)

I. INTRODUCTION

Boston Scientific Scimed, Inc., (“Patent Owner”) filed a Request for Reconsideration (Paper 59 (“Request” or “Req.”)) of our Decision (Paper 57 (“Decision” or “Dec.”)) ordering that documents filed by Patent Owner with restricted public access (Papers 21, 39, and 50¹ and Exhibits 2094, 2096, 2098, 2099, and 2100), but unaccompanied by a motion to seal, be made publicly available or expunged. Patent Owner’s request is denied for the reasons provided below.²

II. STANDARD OF REVIEW

The party seeking to modify a decision bears the burden of showing the decision should be modified. 37 C.F.R. § 42.71(d). Such a request “must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed.” *Id.*

¹ With regard to the documents at issue, Patent Owner filed three documents as its Reply in Support of Its Motion to Exclude: the first as Paper 48 with restricted public access, the second as Paper 49 with public access in a redacted form, and the third as Paper 50 with restricted public access. Prior to the Decision, Patent Owner requested that the version filed as Paper 48 be expunged. Thus, Paper 48 has been expunged, leaving at issue Paper 50 accompanied by a redacted version filed as Paper 49.

² Petitioner Edwards Lifesciences Corporation, Edwards Lifesciences LLC, and Edwards Lifesciences AG separately requested reconsideration of the Decision. Paper 60. The information at issue in both requests for reconsideration was designated as confidential by Petitioner, not by Patent Owner. We will separately determine whether all documents at issue should be disclosed, expunged, or further addressed when we resolve Petitioner’s pending request for reconsideration.

Recognizing the seriousness of the use and disclosure of confidential information, our Decision did not require that the documents at issue be immediately expunged or publically disclosed to permit the parties an opportunity to file requests for reconsideration. Dec. 15. Thus, we further explained in our Decision that “[a]bsent a showing of good cause to set aside the requirement that a motion to seal be filed concurrently with the document to be sealed, or in the interests of justice, no additional motion to seal in this case is authorized at this time.” *Id.* at 13 (citing 37 C.F.R. § 42.14, 42.5).

III. DISCUSSION

Patent Owner has not identified any matter we misapprehended or overlooked and has not shown good cause or the interests of justice supports reconsideration of our prior decision. As explained below, Patent Owner’s conduct demonstrates a *repeated, intentional, and inexcusable* disregard of not only the Board’s rule requiring that a party file a motion to seal when a document is filed with restricted public access, but also our prior orders *in this case* providing explicit guidance. Accordingly, Patent Owner’s request for reconsideration is denied.

1. *Patent Owner repeatedly filed documents with restricted public access unaccompanied by a motion to seal.*

On June 23, 2017, Patent Owner filed its Patent Owner Response as a confidential document with restricted public access. Paper 21. On the same date, Patent Owner also filed a publically accessible version of the Patent Owner Response with redactions of Petitioner’s allegedly confidential information. Paper 22. Patent Owner did not file a motion to seal Paper 21.

On November 3, 2017, Patent Owner filed its Motion for

Observations and Exhibits 2094, 2096, 2098, and 2099 as confidential documents with restricted public access. Paper 39. On the same date Patent Owner also filed a publically accessible version of its Motion for Observations with redactions of Petitioner's allegedly confidential information. Paper 40. Patent Owner did not file publically accessible versions of Exhibits 2094, 2096, 2098, and 2099. Patent Owner did not file a motion to seal Paper 39 or Exhibits 2094, 2096, 2098, and 2099.

On December 1, 2017, Patent Owner filed its Patent Owner Reply in Support of Its Motion to Exclude as a confidential document with restricted public access. Paper 50. On the same date Patent Owner also filed a publically accessible version of the Patent Owner Reply in Support of Its Motion to Exclude with redactions of Petitioner's allegedly confidential information. Paper 49. Patent Owner did not file a motion to seal Paper 50.

On December 19, 2017, Patent Owner filed as Exhibit 2100 demonstratives for use in the hearing as a confidential document with restricted public access. On the same date, Patent Owner also filed a publically accessible version of its demonstratives with redactions of Petitioner's allegedly confidential information. Exhibit 2101. Patent Owner did not file a motion to seal Exhibit 2100.

Thus, the record demonstrates that Patent Owner repeatedly filed documents with restricted public access unaccompanied by a motion to seal.

2. *Patent Owner knew of its obligation to file motions to seal corresponding to documents it filed with restricted public access.*

Patent Owner is obligated to be aware of the rules governing practice before the Board, including 37 C.F.R. § 42.14, which states that “[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).³ The record further makes clear that Patent Owner knew of its obligation to file a motion to seal *before* it filed its Patent Owner Response with restricted public access. On June 20, 2017, Patent Owner and Petitioner filed a Joint Motion for Entry of a Stipulated Protective Order. Paper 20, 1. The Stipulated Protective Order, proposed by Patent Owner jointly with Petitioner and based on the Default Protective Order, explicitly stated that:

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.

Ex. 2012, 5–6 (emphasis added). The first Stipulated Protective Order proposed by the Parties was denied entry for various reasons. *See* Paper 24. A revised Stipulated Protective Order (Ex. 2092) filed on July 28, 2017, was entered August 10, 2017, and contained the same requirement that a party submitting confidential information also file an accompanying motion to seal. Paper 29; Ex. 2092, 5. Thus, Patent Owner’s own proposed protective order, which we entered, required Patent Owner to file a motion to seal when Patent Owner filed documents with restricted public access.

³ Patent Owner also had resources available explaining “how to” actually file a motion to seal. *See, e.g.*, <https://www.uspto.gov/patents-application-process/patent-trial-and-appeal-board/ptab-e2e-frequently-asked-questions#G1>. How do I file other documents (e.g., a motion to seal or proposed protective order)? (“G1. How do I file other documents (e.g., a motion to seal or proposed protective order)?”).

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