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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 No. IPR2017-00444

Patent 6,915,560

**PETITIONER'S OPPOSITION TO PATENT OWNER'S
MOTION TO EXCLUDE EVIDENCE**

Petitioner Edwards Lifesciences Corp. (“Petitioner” or “Edwards”) opposes Patent Owner Boston Scientific Scimed, Inc.’s (“Patent Owner’s” or “Boston’s”) Motion to Exclude Evidence (“Motion”) (Paper 25). The Board should deny Boston’s Motion for three reasons. First, a motion to exclude evidence is an improper mechanism to argue that a reply brief contains new arguments and evidence. Second, the arguments identified by Boston are directly responsive to issues first presented in Boston’s Patent Owner’s Response and, thus, Edwards’ arguments are appropriate for its Reply. Third, Edwards did not apply any “new” claim constructions in its Reply. Edwards has applied the same claim constructions throughout this *inter partes* review.

I. BOSTON’S MOTION TO EXCLUDE IS IMPROPER

The Board has repeatedly stated that a “motion to exclude evidence filed for the purpose of striking or excluding an opponent’s brief and/or evidence that a party believes goes beyond what is permitted under 37 CFR § 42.23 is improper.” *Palo Alto Networks, Inc. v. Finjan Inc.*, Case IPR2015-01979, Paper 62, at 66 (PTAB Mar. 15, 2017) (collecting cases). “An allegation that evidence does not comply with 37 CFR § 42.23 is not a sufficient reason under the Federal Rules of Evidence for making an objection and requesting exclusion of such evidence.” *Id.*; *see also Blackberry Corp. v. Zipit Wireless, Inc.*, Case IPR2014-01508, Paper 49,

at 40 (PTAB Mar. 29, 2016) (“a motion to exclude is not a proper vehicle for a party to raise the issue of arguments exceeding the permissible scope of a reply”).

Boston’s Motion seeks to exclude Petitioner’s *entire* Reply (Papers 17 and 18) and the *entire* Supplemental Declaration of Neil Sheehan (Exhibit 1127) pursuant to 37 CFR § 42.23 on the purported basis that they include “two new claim construction issues raised for the first time in Petitioner’s Reply.” Mot. at 4. Boston does not identify any other basis to exclude Edwards’ Reply or Mr. Sheehan’s Supplemental Declaration. Thus, Boston’s Motion is improper and should be denied. *See e.g., Palo Alto*, Case IPR2015-01979, Paper 62, at 66 (denying improper motion to exclude evidence); *Valeo N.A., Inc. v. Magna Elecs., Inc.*, Case IPR2014-00227, Paper 44, at 2 (PTAB Jan. 14, 2015) (expunging improper motion to exclude evidence).

II. EDWARDS PROPERLY RESPONDED TO BOSTON’S NEW CLAIM CONSTRUCTIONS

Boston alleges that paragraphs 32 and 45 of Mr. Sheehan’s Supplemental Declaration include new claim constructions arguments for “operatively engaged” and “distinct connection locations.” Mot. at 4. Boston mischaracterizes Mr. Sheehan’s Supplemental Declaration. In both paragraphs 32 and 45, Mr. Sheehan appropriately responded to claim constructions first presented by Boston in its Patent Owner’s Response and explained why Boston’s claim constructions are

overly-narrow and inconsistent with the understanding of a Person of Ordinary Skill in the Art (“POSITA”).

A petitioner is entitled to respond to arguments raised in a patent owner response. 37 CFR § 42.23. “The mere fact that a Reply presents evidence that was not in the record previously does not make that evidence improper.” *The Toro Co. v. MTD Prods. Inc.*, Case IPR2016-00194, Paper 41 at 12 (May 10, 2017). The “back-and-forth” identified by Boston “shows that what [Boston] characterizes as an argument raised ‘too late’ is simply the by-product of one party necessarily getting the last word.” *Idemitsu Kosan Co. v. SFC Co.*, 870 F.3d 1376, 1381 (Fed. Cir. 2017).

Boston’s implicit contention that Mr. Sheehan and Edwards should have “preemptively addressed” Boston’s new claim constructions in the Petition “is plainly mistaken.” *Idemitsu*, 870 F.3d at 1376. Boston did not even raise these claim constructions in its Patent Owner’s Preliminary Response. POPR (Paper 7) at 32-33. Instead, Boston first raised the constructions of “operatively engaged” and “distinct connection locations,” at least implicitly, in its Patent Owner’s Response. Edwards “simply countered, as it was entitled to do.” *Idemitsu*, 870 F.3d at 1376.

Moreover, the responsive arguments in Mr. Sheehan's Supplemental Declaration are consistent with the arguments in his initial declaration. Mr. Sheehan did not offer any "new" arguments.

A. Mr. Sheehan Disagrees with Boston's Overly-Narrow Construction of "Operatively Engaged"

In support of Patent Owner's Response, Boston's declarant, Dr. Solar, argues that Yasumi's "moveable pieces" and "side plates" are not "operatively engaged." Patent Owner's Response (Paper 15) at 26-27. To make this argument, Dr. Solar imports a direct fixation requirement into the claim term "operatively engaged." For example, Dr. Solar opined that Yasumi does not satisfy the "operatively engaged" limitation because there is no evidence that Yasumi's support disks are "*fixed to, and not moving relative to, the side plates.*" Ex. 2016 (Solar Decl.) at ¶51 (emphasis added). Dr. Solar also opined that there "is no disclosure that the either support disk is *fixed* in any manner to either side plates." *Id.* (emphasis added). Boston adopted Dr. Solar's erroneous claim construction in its Patent Owner's Response, arguing "there is no evidence that the moveable pieces, the support discs, or the setting piece is *affixed to* any side plate...." Patent Owner's Response (Paper 15) at 27 (emphasis added).

Edwards' declarant, Mr. Sheehan, responded to these new arguments in his Supplemental Declaration. Ex. 1127 (Sheehan Supp. Decl.) at ¶41. Mr. Sheehan

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