

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 IPR2017-00444
Patent 6,915,560 B2

Before NEIL T. POWELL, JAMES A. TARTAL, and
STACY B. MARGOLIES, *Administrative Patent Judges*.

TARTAL, *Administrative Patent Judge*.

DECISION

Granting-in-Part Joint Motion to Seal
37 C.F.R. §§ 42.5, 42.14 and 42.54

Edwards Lifesciences Corporation (“Petitioner”) and Boston Scientific Scimed, Inc., (“Patent Owner”), (collectively, “the Parties”), jointly move to seal Exhibit 1128 and related portions of Petitioner’s Reply Brief. Paper 19 (“Motion” or “Mot.”).

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.” Our regulations 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, the Office Patent Trial Practice Guide sets forth the following:

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. 48,756, 48,771 (Aug. 14, 2012). Similarly, the Case Management and Scheduling Order sets forth the following:

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 10, 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.

With respect to Exhibit 1128, the Parties states that Exhibit 1128 is “an invention disclosure by the named inventor on U.S. Patent No. 6,915,560” and that the exhibit “includes information considered sensitive by” Patent Owner. Mot. 2; *see also id.* at 1 (stating that Exhibit 1128 contains Patent Owner’s confidential business and technical information). The Parties further represent that the information sought to be sealed has not been published or otherwise made available to the public and that efforts to maintain the confidentiality of the information have been undertaken by Patent Owner. *Id.* at 2.

A redacted version of Exhibit 1128 was not filed. Few, if any, exhibits, even business records, should ever be filed as confidential in their entirety because it is unlikely that *all* of the information contained therein is truly sensitive. *See* 37 C.F.R. § 42.54(a). Even business records often contain some non-confidential information serving to identify the nature of confidential portions of the exhibit. 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.

In this case, the Motion fails to establish that “every paragraph, every sentence, and every word” in Exhibit 1128 “constitutes confidential information that should be sealed.” *See, e.g., Unified Patents Inc. v. Blitzsafe Texas, LLC*, IPR2016-00118, Paper 13, 3 (PTAB Feb. 29, 2016); *see also FFF Enterprises, Inc., v. AmerisourceBergen Specialty Grp., Inc.*, CBM2014-00154, Paper 36, (PTAB Jan. 28, 2016); *Palo Alto Networks, Inc. v. Finjan, Inc.*, IPR2016-00151, Paper 50 (PTAB Feb. 24, 2017). A statement asserting in a conclusory manner that the exhibit “includes information considered sensitive by” Patent Owner is, on its face, insufficient to support sealing that exhibit in its entirety. Nor does the designation of a document as “Highly Confidential – Attorney’s Eyes Only” by Patent Owner during production as part of discovery demonstrate that the entirety of the document contains confidential information. Accordingly, we conclude that good cause has not been shown to seal Exhibit 1128.

With regard to Petitioner’s Reply, in addition to the version filed under seal as Paper 17, Petitioner also filed a redacted version available to the public as Paper 18. We have reviewed the portions of Petitioner’s Reply that have been redacted and determine that the redactions do not appear to be facially excessive and appear to be tailored to encompass asserted confidential information. Accordingly, we grant the joint request to seal the unredacted version of Petitioner’s Reply (Paper 17).

As set forth in the order below, the unredacted version of Paper 17 shall remain under seal. Exhibit 1128 shall be made publicly available after July 10, 2018, unless, on or before July 10, 2018, either party files a Revised Motion to Seal directed to Exhibit 1128, including, if good cause cannot be shown to seal the entire document, a redacted version of Exhibit 1128.

It is

ORDERED that the Joint Motion to Seal is *granted, in part*, and that the unredacted version of Petitioner's Reply (Paper 17) shall remain under seal;

FURTHER ORDERED that the Joint Motion to Seal is, in all other regards, *denied*; and,

FURTHER ORDERED that Exhibit 1128 shall be made publicly available on July 10, 2018, unless, on or before July 10, 2018, Petitioner or Patent Owner files a revised Motion to Seal directed to Exhibit 1128.

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