UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AVANOS MEDICAL, INC.,
Petitioner,

v.

STRATUS MEDICAL, LLC,
Patent Owner.

Case IPR2024-01210
Patent 10,736,688

PATENT OWNER'S MOTION TO SEAL
AND ENTER AGREED-TO PROTECTIVE ORDER

TABLE OF CONTENTS

I. INTRODUCTION 1

II. DOCUMENTS TO BE SEALED AND INFORMATION TO BE PROTECTED 1

A. Exhibit 2015 1

B. Paper 15 1

III. GOOD CAUSE FOR SEALING THE IDENTIFIED DOCUMENTS 2

A. Truly Confidential 3

B. Concrete Harm From Public Disclosure 3

C. Genuine Need to Rely 4

D. Balancing 4

IV. CERTIFICATION OF CONFERENCE WITH OPPOSING PARTY PURSUANT TO 37 C.F.R. § 42.54 (A) 5

V. NON-CONFIDENTIAL VERSIONS OF CONFIDENTIAL DOCUMENTS 5

VI. PROTECTIVE ORDER 5

VII. CONCLUSION 7

TABLE OF AUTHORITIES

Cases

Argentum Pharms. LLC v. Alcon Research, Ltd.,
IPR2017-01053, Paper 27 (Jan. 19, 2018) (informative) 2, 3

Crocs, Inc. v. Int'l Trade Comm'n,
598 F.3d 1294 (Fed. Cir. 2010) 4

Leo Pharm. Prods., Ltd. v. Rea,
726 F.3d 1346 (Fed. Cir. 2013) 4

Statutes

35 U.S.C. § 316(a)(7) 2

Regulations

37 C.F.R. § 42.14 1

37 C.F.R. § 42.54 1

37 C.F.R. § 42.54(a) 2

Other Authorities

Consol. Office Trial Practice Guide, (Nov. 2019) 2

I. INTRODUCTION

Pursuant to 37 C.F.R. §§ 42.14 and 42.54, Stratus respectfully submits this motion to seal, which is contemporaneously filed along with a protective order (Ex. 2017).

II. DOCUMENTS TO BE SEALED AND INFORMATION TO BE PROTECTED

A. Exhibit 2015

Exhibit 2015 is a declaration from Cody Jorgensen, the Director of Marketing for Stratus. Confidential information appears in paragraphs 12, 14-28, 30, 47, and 49 of that declaration.

Those paragraphs contain information that has been marked "PROTECTIVE ORDER MATERIAL—OUTSIDE COUNSEL ONLY" pursuant to the protective order. The confidential information in those paragraphs is manufacturing, marketing, and sales data for the Nimbus device, sales data for the devices of its competitors, and their relative positions in the market ("*Sales and Market Share Data*"). Stratus relies on the *Sales and Market Share Data* as evidence of commercial success as an objective indicia of non-obviousness.

B. Paper 15

Paper 15 is Stratus's response, which reproduces and discusses the *Sales and Market Share Data* on pages 17, 18, and 67-72.

III. GOOD CAUSE FOR SEALING THE IDENTIFIED DOCUMENTS

When enacting *inter partes* reviews, Congress directed the Office to "provid[e] for protective orders governing the exchange and submission of confidential information." 35 U.S.C. § 316(a)(7). Thus, "[t]he Board may, for good cause, issue an order to protect a party or person from disclosing confidential information . . ." 37 C.F.R. § 42.54(a). In *Argentum Pharmaceuticals LLC v. Alcon Research, Ltd.*, IPR2017-01053, Paper 27 (Jan. 19, 2018) (informative), the Board set forth the standard for sealing confidential information:

> [A] movant to seal must demonstrate adequately that (1) the information sought to be sealed is truly confidential, (2) a concrete harm would result upon public disclosure, (3) there exists a genuine need to rely in the trial on the specific information sought to be sealed, and (4), on balance, an interest in maintaining confidentiality outweighs the strong public interest in having an open record.

Id. at 3. While there is a presumption in favor of public disclosure, and the burden is on the movant to seal, application of the foregoing factors should be tempered by reasonableness, which is the touchstone of good cause. Overly harsh or stringent application of the "good cause" requirement would be contrary to Congress's intent that IPRs be "quick and cost effective alternatives to litigation." Consol. Office Trial Practice Guide at 56 (Nov. 2019) (citing legislative history). Extensive satellite

litigation about good cause for sealing should be avoided, especially where a patent owner, subjected to an involuntary proceeding to defend its patent, must reasonably rely on confidential information. What constitutes good cause should take into consideration due process and the rights of parties under the Administrative Procedure Act.

As explained below, the *Argentum* factors confirm that the *Sales and Market Share Data* should indeed be sealed in this case.

A. Truly Confidential

The *Sales and Market Share Data* are truly confidential. Stratus is currently a private company. Stratus is not obligated to disclose the specific *Sales and Market Share Data* in Exhibit 2015 and Paper 15 and wishes to keep that data confidential. After reasonably diligent inquiry, it is believed that the *Sales and Market Share Data* in Exhibit 2015 and Paper 15 have not been published or otherwise made public.

B. Concrete Harm From Public Disclosure

Public disclosure of the *Sales and Market Share Data* would cause concrete harm to Stratus by giving the public detailed financial data that a competitor or others could use to gain an unfair advantage over Stratus.

C. Genuine Need to Rely

Stratus relies on the *Sales and Market Share Data* to establish commercial success of the invention as an objective indicia of non-obviousness. *Crocs, Inc. v. Int'l Trade Comm'n*, 598 F.3d 1294, 1310 (Fed. Cir. 2010) (objective indicia "can be the most probative evidence of non-obviousness in the record, and enables the … court to avert the trap of hindsight." (emphasis added) (citation omitted)); *Leo Pharm. Prods., Ltd. v. Rea*, 726 F.3d 1346, 1358 (Fed. Cir. 2013)) (noting that commercial success in relevant marketplace has been repeatedly recognized as highly relevant objective evidence of nonobviousness).

D. Balancing

Stratus's need for confidentiality outweighs the public's interest in having a fully open record. Stratus, as an involuntary participant in this case, should not be forced to reveal its sensitive and confidential internal business information to fully defend its patents. Stratus's redactions are narrowly tailored to remove just its confidential information while revealing to the public as much as possible, striking an appropriate balance of the public's qualified interest in having an open record, on one hand, and Stratus's interest in maintaining it confidential business information.

IV. CERTIFICATION OF CONFERENCE WITH OPPOSING PARTY PURSUANT TO 37 C.F.R. § 42.54 (A)

Counsel for Stratus and the petitioner have conferred in good faith. The petitioner reserves the right to oppose this motion after considering the specific *Sales and Market Share Data* in Exhibit 2015 and Paper 15.

V. NON-CONFIDENTIAL VERSIONS OF CONFIDENTIAL DOCUMENTS

Stratus provides a public, redacted version of Exhibit 2015 as Exhibit 2016. Stratus also provides a public, redacted version of Paper 15 as Paper 16. The redactions are not excessive and are reasonably tailored to protect the confidential information. Specifically, the redactions are limited to just the *Sales and Market Share Data* and nothing else in those documents. The redactions, like the "PROTECTIVE ORDER MATERIAL—OUTSIDE COUNSEL ONLY" markings, are just on a few pages of each document.

VI. PROTECTIVE ORDER

The jointly proposed protective order filed contemporaneously with this motion as Exhibit 2017 is based on the default protective order in the Consolidated Trial Practice Guide but revised to include a tier of confidential information that is for outside counsel only. A marked-up comparison with the default protective order is included as Exhibit 2018. The specific differences between the protective order used here and the Board's default are as follows:

First, in § 1, rather than using just the "PROTECTIVE ORDER MATERIAL" designation in the default order, the protective order here utilizes an additional document-designation tier, "PROTECTIVE ORDER MATERIAL—OUTSIDE COUNSEL ONLY." This change enables the parties to designate some documents as confidential documents and to further limit the availability of some documents from the other party and the other party's in-house counsel. The same change is made in § 7(B), which corresponds with § 5(B) in the default protective order.

Second, in § 3, which does not have an equivalent in the default protective order, the categorization of individuals who can access confidential information here is limited to the party representatives, experts, support personnel, and the Office. The protective order in this case retains § 3 of the default order (as § 5 of this order) to permit employees, consultants, or other persons performing work for a party to access confidential information after signing the Acknowledgement but qualifies that those persons are other than those "identified in Sections 2(A)–(E)."

Third, in § 4, which also does not have an equivalent in the default protective order, limits the use of the "PROTECTIVE ORDER MATERIAL—OUTSIDE COUNSEL ONLY" document-designation tier "upon a good faith belief that the information is so commercially sensitive that its dissemination deserves even further limitation than information designated as "PROTECTIVE ORDER MATERIAL." Also, § 4 provides defining examples of information that merits being marked as

"PROTECTIVE ORDER MATERIAL—OUTSIDE COUNSEL ONLY" such as "the producing party's confidential financial information (including, for example, sales data) . . . [and] confidential marketing information (including, for example, product pricing information and market intelligence information such as market share data)."

Fourth, in § 7(A)(i), which corresponds to § 5(A)(i) in the default protective order, a requirement is added for designating a document or information as "PROTECTIVE ORDER MATERIAL—OUTSIDE COUNSEL ONLY." To fulfill the requirement, reasons must be provide in the Motion to Seal for the elevated restrictions of access.

Other than these changes, the protective order here is substantively the same as the default order.

VII. CONCLUSION

Stratus therefore respectfully requests that the Board grant this motion to seal, and enter the protective order.

Respectfully submitted,

Date: 2025 May 23

By: /M.C. Phillips/
Matthew C. Phillips
Registration No. 43,403
Lead Counsel for Patent Owner

CERTIFICATE OF SERVICE

I hereby certify that on May 23, 2025, copies of the foregoing PATENT OWNER'S MOTION TO SEAL and all documents filed with it were served via electronic mail, as agreed to by counsel, upon the following counsel for the Petitioner:

Christopher Kelly:	ckelly@mcciplaw.com
Gregory Carlin:	gcarlin@mcciplaw.com
Warren Thomas:	wthomas@mcciplaw.com
Lee Hamilton:	lhamilton@mcciplaw.com

/ M.C. Phillips /
Matthew C. Phillips
Registration No. 43,403