UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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AVANOS MEDICAL, INC.
Petitioner,

v.

STRATUS MEDICAL, LLC,
Patent Owner.

_____

IPR2024-01211
U.S. Patent No. 10,736,688

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PATENT OWNER'S REPLY TO PETITIONER'S PARTIAL OPPOSITION TO PATENT OWNER'S MOTION TO SEAL

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I. INTRODUCTION

As the Board recently noted, "The AIA was 'designed to establish a more efficient and streamlined patent system that will improve patent quality and limit unnecessary and counterproductive litigation costs.'" Paper 28 at 3 (quoting H.R. Rep. No. 112-98, 48 (2011)). Stratus, a private startup, now again seeks relief from the satellite litigation activities of the petitioner, a vastly larger and publicly traded competitor, who has taken the rare step of challenging Stratus's designation of confidential information in the declaration of Stratus's employee, Cody Jorgensen.

The Opposition (Paper 20, "Opp'n") largely fails to clearly identify (*e.g.*, by paragraph and line numbers) the specific redactions it challenges. Stratus is thus left in most instances to guess at which redactions the petitioner is challenging.

II. RESPONSE TO PETITIONER'S CHALLENGES

A. The "RFA Cannula Market"

The petitioner's challenge of Stratus's designation of the "RFA cannula market" as confidential is misdirected. The question is not what is publicly known about Stratus's Nimbus device, *see* Opp'n at 11-12, but rather whether Stratus's own, internal definition of the market in which it competes is confidential. The RFA market is complex and varied and can be defined in multiple ways (*e.g.*, including or not RF probes, including or not RF signal generators). Stratus's strategic choice as to how to categorize a subset of this market inherently embodies Stratus's assessments of and strategies relative to the larger market. The petitioner or other

direct competitors could potentially benefit from seeing Stratus's focus on the "cannula" aspect of the Nimbus device as a comparison point for their products. Further, as Stratus expected the title to remain confidential, little effort was expended on its accuracy or precision. It could, for example, more accurately be termed the "RF nerve ablation" or "RF neurotomy" market.

Whatever right Stratus once had to redact the term "RFA cannula market," however, is now moot due to the petitioner's counsel publicly exposing this information shortly after receiving it. *Compare* Ex. 2015-2016 ¶ 16 *with* Paper 19 at 5. Due to this breach, Stratus sees no purpose in now defending the confidentiality of this information and thus proposes that it no longer be redacted.

B. Stratus's Revenue

Remarkably, the Opposition challenges Stratus's designation of its own sales data as confidential. *See* Opp'n at 8. The Opposition fails to cite any legal authority that Stratus must identify the ***source*** of this data for it to be treated as confidential. *See id.* Nevertheless, Stratus here confirms that all of its own sales data presented in the Jorgensen Declaration were generated internally. Moreover, Stratus guards this information in strict confidence and has never published it. The Board routinely seals such sales data for its unquestionable satisfaction of all *Argentum* factors. *See, e.g.*, *EIS GmbH v. Novoluto GmbH*, IPR2020-00007, Paper 41 at 66 (Sept. 23, 2021).

C. Market Share Data and Analysis

The Opposition appears to challenge Stratus's redaction of its confidential market research involving Stratus's competitors, including Stratus's comparison of its own revenue, market share, growth rate, and sales force data to those of its competitors. *See* Opp'n at 2, 4, 5, 7-9. The petitioner's principal challenge to the confidentiality of that data again focuses on an alleged requirement for Stratus to identify the ***source*** of this confidential information. Opp'n at 2, 5, 8-9. And again, the Opposition cites to no legal authority for such a requirement. There is none.

Nevertheless, Stratus here affirms that all redacted market data was generated internally or privately commissioned by Stratus and is owned by Stratus. This market data was obtained by Stratus's own efforts and at its own expense. Of course, that includes Stratus's own confidential data. That also includes Stratus's estimates of competitor data. Stratus holds this information in strict confidence and has never published it.

The Opposition makes a non-sequitur argument that because market research is conducted on third parties, that information must come from outside Stratus and perforce is not confidential. *See* Opp'n at 5, 9. Competitor data always originates with third parties. But the collection of that data, its comparison, and the information drawn from it can nevertheless be company confidential, particularly where the company itself has done this work internally, paid third parties to assist, and

maintains that information in confidence.

The Board routinely seals market analysis for its unquestionable satisfaction of all *Argentum* factors. *See, e.g.*, *MOM Enters., LLC v. Vieth*, IPR2023-00726, Paper 112 at 99 (Sept. 10, 2024) (market share data is "of the type that businesses typically keep confidential to avoid competitive harm"). Stratus has redacted only the essential words and has maintained as public the general headings and discussions, which favors such redactions. *See Shure Inc. v. ClearOne, Inc.*, IPR2017-01785, Paper 52 at 6 (Sept. 11, 2018) (granting motion to seal where market data captions were retained so the thrust of underlying evidence could be discerned).

Notwithstanding the foregoing, Stratus concedes the fact that certain of Stratus's competitors are among the largest ten medical device companies can be disclosed publicly. Thus, parts of paragraph 17 no longer need to be redacted.

D. Mr. Jorgensen's Characterizations

The Opposition makes oblique portrayals of Mr. Jorgensen's characterizations of certain facts as self-serving puffery. *Id*. at 13-14. However, such aspersions are not relevant to the *Argentum* factors. Mr. Jorgensen's characterizations reflect the underlying data and are as equally deserving of confidentiality as the underlying data itself. Using metaphors to state fact is not necessarily the expression of an opinion. Even if Mr. Jorgenson's characterizations were opinions, those "opinions" and facts

are so inextricably intertwined that making his opinions public would reveal the underlying confidential facts on which those "opinions" are based.

E. Public Information

Stratus concedes that its manufacturing in the U.S., original marketing in Australia, and substantial revenue growth are not confidential. *See* Opp'n at 10-11. Stratus proposes to remove their redactions. Stratus would have voluntarily removed those redactions, had the petitioner asked, rather than opposing the Motion to Seal.

III. UPDATED REDACTIONS

In view of the foregoing, Stratus proposes to remove certain confidential redactions from the record by filing updated versions of the Jorgensen Declaration (Ex. 2015-16) and Response (Paper 15-16). Submitted herewith is Exhibit 2039, which identifies the redactions that Stratus proposes to remove in **gold** highlighting and those it proposes to maintain in **violet** highlighting.

The OUTSIDE COUNSEL ONLY designation is appropriate. The petitioner is an aggressive direct competitor. Moreover, Stratus has a reasonable fear that its confidential information may be leaked, as has already happened.

IV. CONCLUSION

Stratus's Motion to Seal (Paper 18) should be granted with respect to the confidential information identified for redaction (violet highlighting) in Exhibit 2039. Stratus will then file new confidential and redacted versions of the Response and Jorgensen Declaration consistent with Exhibit 2039.

Date: *2025 July 23*

/ M.C. Phillips /
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CERTIFICATE OF SERVICE

I hereby certify that on July 23, 2025, copies of the foregoing PATENT OWNER'S REPLY TO PETITIONER'S PARTIAL OPPOSITION TO 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:

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