Filed: October 24, 2025

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AVANOS MEDICAL, INC.,

Petitioner,

v.

STRATUS MEDICAL, LLC,

Patent Owner.

Case IPR2024-01211
Patent 10,736,688

PETITIONER'S RESPONSIVE BRIEF TO
PATENT OWNER'S BRIEF REGARING EXHIBITS 2044 AND 2045

The Office's Rules, Trial Practice Guide ("TPG"), and the Scheduling Order entered in this case all expressly prohibit filing any new evidence (other than deposition transcripts of a reply witness) with a sur-reply. 37 C.F.R. § 42.23(b); TPG, 73-74; Paper 10, 6. Nevertheless, Stratus chose to submit two new exhibits with its sur-reply in disregard of these well-established rules. Petitioner Avanos alerted the Board to this issue, and on October 3, the Board authorized (i) Stratus to file a brief "explaining that its Sur-Reply fully complies with [Rule 42.23(b)]" and (ii) this response. Ex-3003. Instead of explaining how its sur-reply "complies" with that rule, however, Stratus used its brief to revisit the merits and to justify its violation. Nowhere does Stratus even claim that its conduct accords with the Rule—nor could it. *See generally* Paper 50 ("PO Br.").

The facts leading to this issue are not in dispute. Stratus's PO Response argued, relying exclusively on Crosby's testimony, that Stratus's narrow interpretation of "Racz's modified device" (RMD) would've been "impossible to build." PO Br., 1; *see also, e.g.*, Ex-2006 ¶260 (Crosby testifying he "cannot conceive of any way to make the channels in [RMD]" and "[n]or would a POSITA have been able to do so"). Avanos responded by arguing that Crosby's testimony about "the inability to manufacture" was based on false assumptions, unsupported, and entitled to no weight. Paper 33 ("Reply"), 19-20. Avanos also introduced prior art documentary evidence undermining Crosby's testimony: excerpts of two

undergraduate engineering textbooks. Specifically, Avanos cited Kalpakjian for teaching manufacturing techniques that would "allow for 0.1mm and 0.005mm precision"—a precision Crosby suggested was "impossible" as of the priority date. *Id.* (citing Ex-1063, 541, 546). Stratus objected to the admissibility of both textbooks under FRE 106 on September 12. Paper 36.[1] Avanos did not provide any supplemental evidence under 37 C.F.R. § 41.155(b)(2). Stratus then filed its sur-replies on September 26 including the new exhibits.

Stratus plainly had independent access to the Kalpakjian textbook (*plus* a later edition) but never identified any specific information it believed should be in the record—to either Avanos or the Board—before filing its new exhibits with the sur-replies. And Stratus is now using its Motion(s) to Exclude to rehash and supplement its merits briefing about those exhibits. *See* Paper 49, 2-7.

Stratus presents five reasons for its new evidence. Avanos addresses them in the same order. **First**, the additional pages in Ex-2044 *are* "new evidence" prohibited under the rule, and Ex-2045 is indisputably new. **Second**, although FRE 106 does not "restrict the time for" additional evidence, Rule 42.23(b) does.

Third, Stratus argues that "due process requires" it be able "to present

[1] Although Stratus objected to *both* exhibits, Stratus only moved to exclude Ex-1063 and attempted to add new evidence related to that exhibit.

rebuttal evidence," which it raised "at the first available opportunity." PO Br., 2–3. But the Board's Rules and Orders are "readily available and Patent Owner knew or should have known that submitting Exhibits [2044 and 2045] with its Sur-reply was prohibited." *Satco Products, Inc. v. Seoul Semiconductor Co.*, IPR2020-00836, Paper 45, 76 (striking sur-reply exhibits). Stratus could have *asked* the Board to waive Rule 42.23(b) under 37 C.F.R. § 42.5 (perhaps citing the authorities it relies on now, after the fact), but it didn't. Due process is not denied where a party fails to invoke the available procedures available to it.

Fourth, Stratus asserts that "truth and completeness trump" the Board's rules. Taken seriously, that position would eliminate any constraint on the rolling submission of new evidence. All trials (in courts and the PTAB) require constraints on when and how evidence is considered. Rule 42.23(b) imposes such a constraint. **Fifth** and relatedly, Stratus speculates it may have been a "scheme" for Avanos to submit *documentary* evidence of the state of the art rather than expert *testimony* that Stratus could cross-examine. But as noted above, Stratus and Crosby had ready access to the same prior art evidence, yet they chose not to cite *any* documents to support Crosby's opinions. Finally, Stratus's new exhibits (and arguments) are not inconsistent with Avanos's position that Crosby was wrong to believe that combining the prior art was "impossible."

Accordingly, the Board should deny Stratus's belated request.

Respectfully submitted,

/Warren Thomas/
Warren J. Thomas (Reg. No. 70,581)

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §§ 42.6(e) and agreement of the parties, I certify that on October 24, 2025, a copy of Petitioner's Response to Patent Owner's Brief in Support of Its Filing of Exhibits 2044 and 2045 was served on counsel for the Patent Owner by email to:

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