

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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C.R. BARD, INC.,  
Petitioner,

v.

MEDICAL COMPONENTS, INC.,  
Patent Owner.

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Case IPR2015-01660  
Patent 8,257,325 B2

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Before LYNNE E. PETTIGREW, DANIEL N. FISHMAN, and  
KERRY BEGLEY, *Administrative Patent Judges*.

BEGLEY, *Administrative Patent Judge*.

DECISION  
Denying Institution of *Inter Partes* Review  
37 C.F.R. § 42.108

C.R. Bard, Inc. (“Petitioner”) filed a Petition requesting *inter partes* review of claims 1, 2, 5–13, 15–19, 21, and 22 (collectively, “the challenged claims”) of U.S. Patent No. 8,257,325 B2 (Ex. 1001, “the ’325 patent”). Paper 1 (“Pet.”). Medical Components, Inc. (“Patent Owner”) filed a Preliminary Response to the Petition. Paper 7 (“Prelim. Resp.”).

Pursuant to 35 U.S.C. § 314(a), an *inter partes* review may not be instituted unless “the information presented in the petition . . . and any response . . . shows that there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition.” Having considered the Petition and the Preliminary Response, we determine that the information presented does not show that there is a reasonable likelihood that Petitioner would prevail in establishing that any of the challenged claims of the ’325 patent are unpatentable. Therefore, we deny institution of *inter partes* review.

## I. BACKGROUND

### A. THE ’325 PATENT

The ’325 patent discloses a venous access port assembly with a marking that identifies a characteristic of the port and is visible by X-ray examination when the port is implanted in a patient. Ex. 1001, [57], 1:40–44. For example, the port may include the letters “CT,” for “computed tomography” or “contrast enhanced computed tomography,” to indicate “power injectable capability,” i.e., that the port is rated for power injection of a contrast fluid. *Id.* at 1:59–2:1.

Embodiments of the venous access port disclosed in the ’325 patent include a housing and a septum. *Id.* at 2:5–6. One embodiment of the housing is depicted in Figure 13 and a portion of Figure 11, reproduced below:

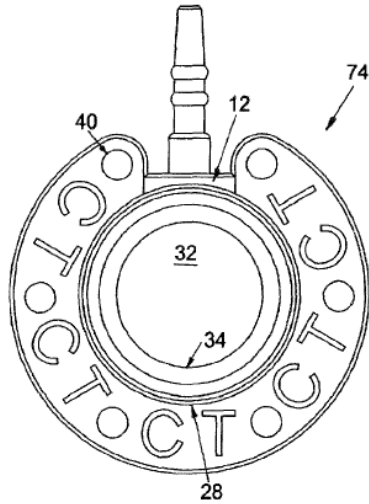


Figure 11

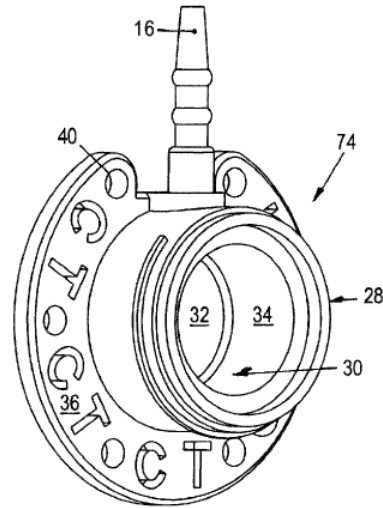


Figure 13

Figure 11 shows a top view and Figure 13 shows an isometric view of an embodiment with housing base 28, including well 30 having bottom floor 32 and side walls 34. *Id.* at 3:24–33, 4:44–57. Housing base 28 also includes flange 36, which features integrally molded “CT” markings alongside suture openings 40. *Id.* at 4:44–57. The “CT” markings are voids in the flange, “as if cut or punched out of” the flange material. *Id.* at 4:54–57. If base 28 or flange 36 is comprised of a metal material, the letters “CT” will be visible by X-ray examination. *Id.* at 4:65–5:3. If base 28 is made of a plastic material, a radiopaque agent or fluid can be applied to the letters “CT,” flange 36, or base 28 to allow the applied area to be visible by X-ray examination. *Id.* at 4:61–65.

#### B. ILLUSTRATIVE CLAIM

Claims 1, 12, and 17 of the '325 patent are independent claims. See *id.* at 5:11–8:2. Claim 1, reproduced below, is illustrative of the recited subject matter:

1. A venous access port assembly for implantation into a patient, comprising:

- a housing comprising a base defining a bottom wall of at least one reservoir, a discharge port extending from the at least one reservoir, and a flange adjacent to the at least one reservoir, the flange comprising a height extending from a top surface of the flange to a bottom surface of the flange, the flange further comprising X-ray discernable indicia configured to indicate, under X-ray examination, that the port assembly is rated for power injection, the X-ray discernable indicia located in the flange and extending through the height of the flange from the top surface of the flange to the bottom surface of the flange so that the X-ray discernable indicia are visually discernable to a naked eye from both the top surface of the flange and the bottom surface of the flange prior to implantation of the port assembly; and
- a needle-penetrable septum communicating with the housing.

*Id.* at 5:12–30.

#### C. ASSERTED PRIOR ART

The Petition relies upon the following references, as well as the supporting Declaration of Steven J. Tallarida (Ex. 1009):

U.S. Patent No. 6,826,257 B2 (issued Nov. 30, 2004) (Ex. 1007, “Sayre”);

U.S. Patent No. 7,785,302 B2 (filed Mar. 6, 2006) (issued Aug. 31, 2010) (Ex. 1003, “Powers”);

French Patent No. 1,509,165 (issued Dec. 4, 1967) (published Jan. 12, 1968) (Ex. 1005, “Meyer”);<sup>1</sup>

BARD ACCESS SYSTEMS, HICKMAN® SUBCUTANEOUS PORTS & HICKMAN®/BROVIAC® CATHETERS (1992) (Ex. 1017, “Hickman”);

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<sup>1</sup> Petitioner submitted the original version of Meyer, a French patent, as Exhibit 1005 and, as required under 37 C.F.R. § 42.63(b), a certified English translation of the patent as Exhibit 1006. For purposes of this decision, our citations to Meyer are to the certified English translation.

BARD ACCESS SYSTEMS, PORTS (2003) (Ex. 1002, “PORTS”); and

BARD ACCESS SYSTEMS, POWERPORT: GUIDELINES FOR CT  
TECHNOLOGISTS (2007) (Ex. 1004, “PowerPort”).

#### D. ASSERTED GROUNDS OF UNPATENTABILITY

Petitioner asserts the following grounds of unpatentability. Pet. 3.

| Challenged Claims             | Basis              | References                            |
|-------------------------------|--------------------|---------------------------------------|
| 1, 2, 5–13, 15–19, 21, and 22 | § 103 <sup>2</sup> | PORTS, Powers, PowerPort, and Hickman |
| 1, 2, 5–13, 15–19, 21, and 22 | § 103              | PORTS, Powers, Sayre, and Hickman     |
| 1, 2, 5–13, 15–19, 21, and 22 | § 103              | PORTS, Powers, Meyer, and Hickman     |

## II. ANALYSIS

### A. CLAIM INTERPRETATION

We interpret claims in an unexpired patent using the “broadest reasonable construction in light of the specification of the patent in which [they] appear[.]” 37 C.F.R. § 42.100(b). Here, Petitioner proffers claim terms for construction and argues that all claim terms, including those proposed for construction, “should be afforded their ordinary and customary meanings.” Pet. 4–6. In response, Patent Owner “reserves the right to challenge Petitioner’s asserted claim constructions” but does not proffer a construction of any term. Prelim. Resp. 7. For purposes of this decision, we determine that none of the claim terms requires an express construction to resolve the issues currently presented by the patentability challenges. See *Vivid Techs., Inc. v. Am. Sci. & Eng’g, Inc.*, 200 F.3d 795, 803 (Fed. Cir.

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<sup>2</sup> The Leahy Smith America Invents Act (“AIA”), Pub. L. No. 112–29, 125 Stat. 284 (2011), revised 35 U.S.C. § 103, effective March 16, 2013. Because the ’325 patent has an effective filing date before March 16, 2013, our references to § 103 are to its pre-AIA version.

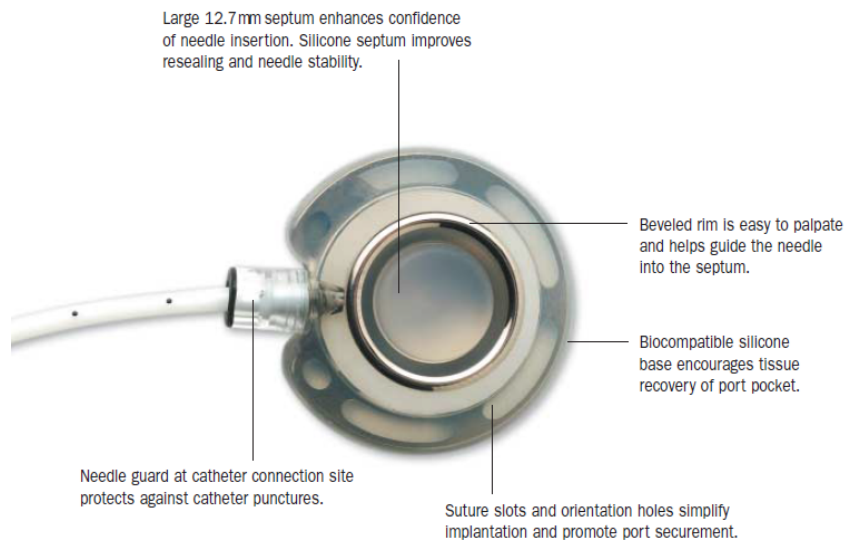
1999) (holding that only claim terms that “are in controversy” need to be construed and “only to the extent necessary to resolve the controversy”).

B. OBVIOUSNESS OVER PORTS, POWERS, POWERPORT, AND HICKMAN

We turn to Petitioner’s assertion that the challenged claims would have been obvious over the combination of PORTS, Powers, PowerPort, and Hickman. Pet. 27–50.

1. *PORTS*

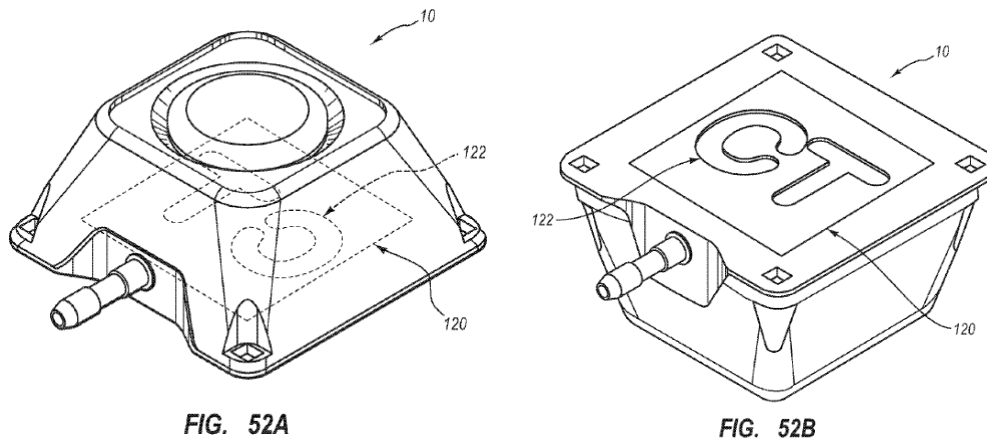
PORTS is a Bard Access Systems brochure that discloses several implanted ports, including a Titanium Implanted Port. Ex. 1002, 10, 16. The following figure from page 10 of PORTS illustrates the Titanium Implanted Port:



*Id.* at 10. As shown in the figure above, the Titanium Implanted Port includes a “silicone-encapsulated base” and a “[s]ilicone septum.” *Id.* The base includes a flange with “[s]uture slots and orientation holes [that] simplify implantation and promote port securement.” *Id.*

## 2. Powers

Powers describes an access port with a feature structured to identify the port as being rated for power injection after subcutaneous implantation. Ex. 1003, [57], 1:66–2:2, 3:60–64, 11:55–12:2. Figures 52A and 52B of Powers illustrate a top and bottom perspective view of an embodiment of an access port with an alphanumeric message in the bottom:



See *id.* at 3:17–21. The port shown in Figures 52A and 52B includes the letters “CT” etched in disk or plate 120 in the bottom of the port to identify the port as power injectable. *Id.* at 3:48–52, 4:8–10, 11:55–61. Powers explains that the plate may be metal such that the alphanumeric message would be visible on an X-ray. *Id.* at 11:55–58; see *id.* at 11:66–12:2.

## 3. PowerPort

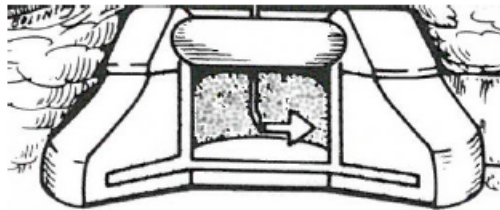
PowerPort is a one-page sheet with guidelines for computed tomography (“CT”) technologists using Bard Access Systems’ PowerPort implanted port, which is “indicated for power injection of contrast media” when used with another product. Ex. 1004. One of the ports disclosed in PowerPort is the PowerPort - M.R.I. Device, shown in the following image:



*Id.* The image above appears to show the PowerPort - M.R.I. Device under X-ray examination, with the characters “C” and “T” formed as voids. *See id.*

#### 4. *Hickman*

Hickman is a Bard Access Systems chart providing information about various subcutaneous ports and catheters. Ex. 1017. A portion of a figure from Hickman depicting a Hickman® subcutaneous port is reproduced below:



*Id.* at 1, 4. The image above illustrates a cutaway of a Hickman® subcutaneous port. *Id.*

#### 5. *Discussion*

##### *i. Independent Claim 1*

Beginning with independent claim 1 of the '325 patent, Petitioner contends that the combination of PORTS and Powers teaches all of the recited limitations. Pet. 27–34. Petitioner cites to the additional asserted prior art references, PowerPort and Hickman, only for emphasis or

confirmation of particular aspects of the proposed combination. *Id.* at 28, 32–33. Specifically, Petitioner cites to Hickman to “confirm[] that the Titanium Implanted Port disclosed in PORTS has a base defining a reservoir,” as claim 1 requires. *Id.* at 27–28. Likewise, Petitioner refers to PowerPort to “emphasize[] the obviousness” of the limitation reciting “the flange further comprising X-ray discernable indicia configured to indicate, under X-ray examination, that the port assembly is rated for power injection.” *Id.* at 27, 33.

Patent Owner disputes Petitioner’s showing regarding “the flange further comprising X-ray discernable indicia configured to indicate, under X-ray examination, that the port assembly is rated for power injection,” as recited in claim 1. Prelim. Resp. 7–30, 38. For this limitation, Petitioner asserts that the flange of the Titanium Implanted Port of PORTS is composed of titanium, an X-ray discernable material, and includes suture slots and orientation holes. Pet. 28, 30–33; *see* Ex. 1009 ¶¶ 59–60, 68–69. In addition, Petitioner cites Powers for its disclosure of a power injectable port with an alphanumeric message that, under X-ray examination, indicates that the port is rated for power injection. Pet. 29. Petitioner also alleges that Powers discloses that suture apertures may be positioned so as to identify the port after subcutaneous implantation. *Id.* Moreover, Petitioner cites PowerPort for disclosing the PowerPort - M.R.I. Device with the characters “C” and “T” formed as voids to identify the port as rated for power injection under X-ray examination. *Id.* at 29–30. Notably, Petitioner does not contend that either Powers or PowerPort discloses X-ray discernable indicia *in a flange*, as claim 1 requires. *See id.* at 28–33.

Petitioner proceeds to argue that it would have been obvious to combine these teachings to reach the venous access port assembly of

claim 1. *See id.* at 31–34. Acknowledging that the Titanium Implanted Port of PORTS is not power injectable and does not have indicia indicating “the [port] assembly is rated for power injection,” as claim 1 requires, Petitioner argues that a person of ordinary skill in the art at the time of the invention would have known that the Titanium Implanted Port of PORTS “could be constructed to handle power injection.” *Id.* at 31. Specifically, according to Petitioner, “the Titanium Implanted Port would be modified in view of Powers to handle the higher pressure and flow rates associated with power injection for injecting contrast media.” *Id.* (citing Ex. 1009 ¶¶ 147–48).

Then, according to Petitioner, it would have been obvious to provide the Titanium Implanted Port, modified to handle power injection, with X-ray discernable indicia to indicate, under X-ray examination, that the assembly is rated for power injection, particularly in view of the ports disclosed in Powers and PowerPort with X-ray discernable alphanumeric messages indicating that they are rated for power injection. *Id.* at 31–33. Next, Petitioner contends that it would have been obvious to form such X-ray discernable indicia as voids extending through the flange of the Titanium Implanted Port of PORTS because the flange of the Titanium Implanted Port already includes suture slots and orientation holes that function as indicia of orientation under X-ray examination. *Id.* Petitioner submits that the obviousness of including X-ray discernable indicia in the form of voids in the flange of the Titanium Implanted Port of PORTS is “emphasized” by PowerPort’s disclosure of X-ray discernable alphanumeric characters in the form of voids indicating that a port is power injectable. *Id.* at 33.

Patent Owner’s primary contention in its Preliminary Response is that the Petition fails to provide adequate reasoning for combining the references in the manner asserted in the Petition. *See Prelim. Resp.* 7–31, 38. Having

reviewed both parties' arguments and evidence, we agree with Patent Owner that Petitioner has not articulated sufficient rationale with support in the record for modifying the Titanium Implanted Port of PORTS as proposed in the Petition. In particular, we are persuaded by the following arguments presented by Patent Owner.

First, we agree with Patent Owner that the Petition does not provide adequate reasoning with rational underpinning for why it would have been obvious in view of Powers to modify the Titanium Implanted Port of PORTS—which Petitioner does not allege is indicated for power injection—to be rated for power injection. *See id.* at 8–11; Pet. 24–25, 31. Although claim 1 does not require the recited port assembly to be rated for power injection, modifying the Titanium Implanted Port to handle power injection is an important first step in Petitioner's obviousness analysis. *See* Pet. 31. Specifically, as noted above, Petitioner contends that a person of ordinary skill in the art would have known that the Titanium Implanted Port “could be constructed to handle power injection” by modifying it “in view of Powers to handle the higher pressures and flow rates associated with power injection.” *Id.* (citing Ex. 1009 ¶¶ 147–48).

This assertion, however, is conclusory, and relies exclusively on Mr. Tallarida's declaration testimony, which merely repeats the conclusory statements in the Petition without citation to the asserted prior art references or any other evidence. *See id.*; Ex. 1009 ¶ 148. Accordingly, his testimony has little, if any, probative value. *See* 37 C.F.R. § 42.65(a) (“Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight.”); *see Rohm & Haas Co. v. Brotech Corp.*, 127 F.3d 1089, 1092 (Fed. Cir. 1997) (“Nothing in the [federal] rules [of evidence] or in our jurisprudence requires the fact finder

to credit the unsupported assertions of an expert witness.”). The Petition and Mr. Tallarida’s cited testimony do not explain how the Titanium Implanted Port of PORTS would have been modified so as to be rated for power injection, nor do they point to any disclosure in Powers that would have suggested how such a modification would have been made. *See* Pet. 31; Ex. 1009 ¶ 148.

Second, we also find persuasive certain aspects of Patent Owner’s argument that the Petition fails to explain sufficiently why it would have been obvious to modify the flange of the Titanium Implanted Port of PORTS to have X-ray discernable indicia in the form of voids configured to indicate that the port assembly is rated for power injection, as alleged in the Petition. *See* Prelim. Resp. 14–30. In particular, Patent Owner finds fault with Petitioner’s assertion that the flange of the Titanium Implanted Port has suture slots and orientation holes that function as indicia of orientation under X-ray examination, a linchpin of Petitioner’s obviousness analysis. *Id.* at 15–16. As Patent Owner points out, PORTS discloses that the function of the suture slots and orientation holes of the Titanium Implanted Port is to “simplify implantation and promote port securement.” Ex. 1002, 10; *see* Prelim. Resp. 16. Thus, according to Patent Owner, PORTS indicates that the orientation holes are used to secure orientation of the port, not to provide X-ray discernable indicia of orientation after implantation. Prelim. Resp. 15–16.

We agree with Patent Owner that Petitioner has not shown sufficiently that the suture slots and orientation holes in the flange of the Titanium Implanted Port of PORTS function as X-ray discernable indicia. Petitioner does not direct us to any specific disclosure in PORTS describing the suture slots or orientation holes as X-ray discernable after implantation. *See*

Pet. 18–19, 31–32, 36. Furthermore, Mr. Tallarida’s testimony that the flange of the Titanium Implanted Port is known as a location for X-ray discernable indicia is conclusory and lacks adequate explanation and support. *See, e.g.*, Ex. 1009 ¶¶ 64–65, 150, 157, 159, 163, 183. The only supporting citation Mr. Tallarida provides for this testimony is to the entirety of PORTS, a seventeen-page exhibit. *E.g., id.* ¶¶ 65, 157 (citing Ex. 1002). Consequently, his testimony on this point is entitled to little or no weight. *See* 37 C.F.R. § 42.65(a).

In addition, we agree with Patent Owner that Petitioner has not provided adequate reasoning based on Powers and PowerPort for modifying the Titanium Implanted Port of PORTS to include X-ray discernable indicia of power injection capability *in the flange*. *See* Prelim. Resp. 23–29. Powers discloses an alphanumeric message, indicating power injection capability under X-ray examination, etched in a disk or plate in the bottom of a port. Ex. 1003, 11:55–61. The alphanumeric message disclosed in Powers, however, is not in a flange or in the form of voids. *Id.* at 11:56–61, Figs. 52A–B. Petitioner also refers to suture apertures in Powers that may be positioned so as to identify the access port after implantation. Pet. 29, 32 (citing Ex. 1003, 10:16–18, Fig. 20). Yet Petitioner does not contend that these apertures are in a flange or are indicia of power injection capability. *See id.* Accordingly, we are not persuaded that Petitioner has shown sufficiently that a person of ordinary skill, in view of Powers, would have modified the flange of the Titanium Implanted Port to include X-ray discernable indicia in the form of voids indicating that the port is rated for power injection, as Petitioner proposes.

Turning to PowerPort, we likewise agree with Patent Owner that Petitioner has not shown sufficiently that PowerPort provides adequate

reasoning to modify the flange of the Titanium Implanted Port to include such indicia. *See* Prelim. Resp. 26–29. Petitioner does not assert that PowerPort’s X-ray discernable indicia of power injection capability are located in a flange. *See* Ex. 1004; Pet. 20–21, 29–33. Therefore, we are not persuaded by Petitioner’s argument that PowerPort “emphasize[s]” the obviousness of including X-ray discernable indicia in the form of voids *in the flange* of the Titanium Implanted Port. *See* Pet. 30–31.

For at least these reasons, Petitioner has not provided adequate reasoning with rational underpinning for combining the asserted references to reach the venous access port assembly recited in claim 1. *See In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006), *quoted with approval in KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007) (holding that the “legal conclusion of obviousness” must be supported by “some articulated reasoning with some rational underpinning”).

*ii. Independent Claims 12 and 17*

Similar to claim 1, independent claim 12 recites a venous access port assembly that requires a “flange comprising: X-ray discernable material” and “one or more cutouts comprising one or more voids in the X-ray discernable material, the one or more cutouts configured to indicate, under X-ray examination, that the port assembly is rated for power injection.” Ex. 1001, 5:56–6:5. Likewise, independent claim 17 recites a venous access port assembly, including a “flange comprising . . . one or more X-ray discernable indicia configured to indicate, under X-ray examination, that the port assembly is rated for power injection.” *Id.* at 6:28–43. Petitioner contends that the asserted prior art references teach or suggest these limitations and would have been obvious to combine for largely the same

reasons presented with respect to the corresponding limitations of claim 1. *See* Pet. 39–43, 45–46.

For the reasons discussed above with respect to claim 1, we also determine that Petitioner has not articulated a sufficient rationale for combining the references to arrive at the port assembly recited in independent claims 12 and 17, with a flange configured to indicate, under X-ray examination, that the assembly is rated for power injection. Claim 17’s limitations regarding the recited “X-ray discernable indicia” are nearly identical to those in claim 1. Moreover, claim 12’s requirement of “one or more cutouts comprising one or more voids in the X-ray discernable material,” as opposed to the “X-ray discernable indicia” recited in claim 1, does not alter Petitioner’s proffered analysis in a manner that impacts our determination that Petitioner has failed to provide adequate reasoning to combine the references, outlined above for claim 1. *See id.* at 39–43.

### *iii. Conclusion*

For the foregoing reasons, based on our review of the parties’ arguments and evidence, we conclude that Petitioner has not established a reasonable likelihood that it would prevail in showing that any of the challenged claims—-independent claims 1, 12, and 17 as well as claims 2, 5–11, 13, 15, 16, 18, 19, 21, and 22, which depend from these claims—would have been obvious in view of PORTS, Powers, PowerPort, and Hickman.<sup>3</sup>

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<sup>3</sup> Because we conclude Petitioner has not provided sufficient reasoning for combining the asserted prior art references, we need not address Patent Owner’s other arguments disputing the sufficiency of Petitioner’s showing regarding specific claim limitations and evidence that certain references qualify as printed publications. *See* Prelim. Resp. 38–54.

## C. OBVIOUSNESS OVER PORTS, POWERS, SAYRE, AND HICKMAN

Petitioner also argues that the combination of PORTS, Powers, Sayre, and Hickman renders the challenged claims obvious. Pet. 50–54.

1. *Sayre*

Sayre discloses a marking device for defining the margins and orientation of radiography specimens removed from a patient’s body. Ex. 1007, [57]. A distinctively shaped marker composed of radiopaque material, with indicia “photoetched from the radiopaque material,” is attached to a specimen to indicate the orientation of the specimen prior to removal from a patient. *Id.* at 4:6–10, Figs. 1, 2A–C. Indicia also may be formed in radiopaque markers “by stamping, laser cutting, or by other means.” *Id.* at 4:24–26.

2. *Discussion*

Petitioner argues that the challenged claims would have been obvious over PORTS, Powers, Sayre, and Hickman “for the same reasons these claims would have been obvious” over PORTS, Powers, PowerPort, and Hickman, “because Sayre, like PowerPort, teaches indicia in the form of alphanumeric character cutouts (voids).” Pet. 50. In its analysis, Petitioner replaces PowerPort with Sayre, arguing that “[t]he obviousness of including X-ray discernable indicia in the form of cutouts (voids) in the flange of the Titanium Implanted Port” of PORTS “is emphasized by Sayre’s disclosure of X-ray discernable indicia, such as alphanumeric characters, defined by apertures (voids) in radiopaque material that can also aid in indicating orientation and receive sutures.” *Id.* at 52.

For substantially the same reasons discussed above with respect to the asserted ground relying on PORTS, Powers, PowerPort, and Hickman, Petitioner has not provided adequate reasoning based on rational

underpinnings for combining the references to arrive at the claimed invention. With regard to Sayre, we agree with Patent Owner that Petitioner has not shown that Sayre cures the deficiencies of PORTS and Powers. *See* Prelim. Resp. 31–34. In particular, Sayre’s radiopaque indicia are not in a flange, much less in a flange of a venous access port. *See* Ex. 1007, [57], Figs. 2A–C. Therefore, we are not persuaded by Petitioner’s argument that Sayre “emphasize[s]” the obviousness of including X-ray discernable indicia in the form of cutouts or voids *in the flange* of the Titanium Implanted Port of PORTS. *See* Pet. 50–52.

Thus, we determine the Petition does not show a reasonable likelihood that Petitioner would prevail in showing that any of the challenged claims would have been obvious over PORTS, Powers, Sayre, and Hickman.

#### D. OBVIOUSNESS OVER PORTS, POWERS, MEYER, AND HICKMAN

In addition, Petitioner asserts that the challenged claims would have been obvious over PORTS, Powers, Meyer, and Hickman. *Id.* at 54–59.

##### 1. *Meyer*

Meyer discloses a plastic collar for a container with characters used for identification or inspection purposes. Ex. 1006, 2 (col. 1–2), 3 (col. 1). In one embodiment, characters “are formed by cutouts in the body of the collar.” *Id.* at 3 (col. 1).

##### 2. *Discussion*

Petitioner argues that the challenged claims would have been obvious over PORTS, Powers, Meyer, and Hickman “for the same reasons that these claims would have been obvious” over PORTS, Powers, PowerPort, and Hickman as well as over PORTS, Powers, Sayre, and Hickman, because “Meyer, like PowerPort and Sayre, teaches indicia in the form of alphanumeric characters (voids).” Pet. 55. Similar to the ground based in

part on Sayre, Petitioner essentially replaces PowerPort with Meyer in its analysis, arguing that the obviousness of including X-ray discernable indicia in the form of voids in the flange of the Titanium Implanted Port is “emphasized by Meyer in its disclosure of indicia in the form of alphanumeric cutouts (voids) in a flange adjacent to a container.” *Id.* at 57.

For substantially the same reasons discussed above with respect to the asserted ground based on PORTS, Powers, PowerPort, and Hickman, Petitioner has not provided adequate reasoning with rational underpinning for combining PORTS, Powers, Meyer, and Hickman to arrive at the invention recited in the challenged claims. We agree with Patent Owner that Petitioner has not shown that Meyer cures the deficiencies of PORTS and Powers. *See* Prelim. Resp. 35–37. Petitioner alleges that the alphanumeric cutouts in the plastic collar of Meyer would be visible under X-ray examination, yet neither Meyer nor the cited paragraphs from Mr. Tallarida’s declaration testimony sufficiently support this assertion, particularly in light of contradictory evidence in the record. *See* Pet. 55 (citing Ex. 1006; Ex. 1009 ¶¶ 278–84); *see also* Ex. 1009 ¶ 193 (opining that silicone is radiotransparent); Ex. 1001, [57], 2:13–17, 4:61–5:3 (explaining that radiopaque agent can be applied to plastic material, such as silicone elastomer, to allow indicia to appear under X-ray examination). Moreover, even if the collar in Meyer can be considered a flange,<sup>4</sup> it is not a flange of anything resembling a venous access port. Petitioner also has not shown adequately that Meyer, which discloses collars for containers, is “from the same field of endeavor” or “reasonably pertinent to the particular problem”

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<sup>4</sup> We note that Meyer’s collar does not meet Petitioner’s proffered construction of the term “flange,” “a rim extending outwardly from the base for attachment of the port to a patient.” Pet. 5; *see* Prelim. Resp. 36.

addressed by the inventors of the '325 patent in developing the venous access ports recited in the challenged claims, as required to be prior art under 35 U.S.C. § 103. *Innovention Toys, LLC v. MGA Entm't, Inc.*, 637 F.3d 1314, 1321 (Fed. Cir. 2011) (quoting *In re Bigio*, 381 F.3d 1320, 1325 (Fed. Cir. 2004)); see Ex. 1006, 3 (Summary); Prelim. Resp. 35. Therefore, we are not persuaded by Petitioner's argument that Meyer "emphasize[s]" the obviousness of including X-ray discernable indicia in the form of cutouts or voids in the flange of the Titanium Implanted Port of PORTS. See Pet. 57.

Accordingly, we determine that the Petition does not show a reasonable likelihood that Petitioner would prevail in showing that any of the challenged claims would have been obvious over PORTS, Powers, Meyer, and Hickman.

#### E. REAL PARTY-IN-INTEREST

Patent Owner argues in its Preliminary Response that the Petition should have named Bard Access Systems, Inc. as a real party-in-interest in addition to C.R. Bard, Inc. Prelim. Resp. 54–59. In view of our determination that Petitioner has not made a sufficient showing that it would prevail in establishing that any of the challenged claims are unpatentable, we do not reach this issue.

### III. CONCLUSION

For the reasons given, we determine that the information presented in the Petition and Preliminary Response does not establish that there is a reasonable likelihood that Petitioner would prevail in showing that any of the challenged claims, claims 1, 2, 5–13, 15–19, 21, and 22 of the '325 patent, are unpatentable. Therefore, we do not institute *inter partes* review of any of the challenged claims on any of the asserted grounds.

IV. ORDER

Accordingly, it is:

ORDERED that pursuant to 35 U.S.C. § 314(a), the Petition is *denied*.

IPR2015-01660  
Patent 8,257,325 B2

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