

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ABIOMED, INC., ABIOMED R&D, INC., and
ABIOMED EUROPE GMBH,
Petitioner,

v.

MAQUET CARDIOVASCULAR, LLC,
Patent Owner.

Cases¹

IPR2017-01025 (Patent 7,022,100 B1)
IPR2017-01208 (Patent 9,597,437 B2)
IPR2017-01209 (Patent 9,597,437 B2)

Before BART A. GERSTENBLITH, JEREMY M. PLENZLER, and
KEVIN W. CHERRY, *Administrative Patent Judges*.

GERSTENBLITH, *Administrative Patent Judge*.

DECISION

Denying Petitioner's Request for Rehearing
37 C.F.R. § 42.71

¹ We exercise our discretion to issue one Decision and Order in each of these proceedings. The parties may not use this caption style.

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I. INTRODUCTION

Abiomed, Inc., Abiomed R&D, Inc., and Abiomed Europe GmbH (collectively, “Petitioner”) filed Petitions to institute *inter partes* review of several claims from U.S. Patent Nos. 7,022,100 B1 (“the ’100 patent”) and Patent 9,597,437 B2 (“the ’437 patent”). IPR2017-01025, Paper 2 (“the ’1025 Pet.”)²; IPR2017-01208, Paper 2 (“the ’1208 Pet.”)³; IPR2017-01209, Paper 1 (“the ’1209 Pet.”)⁴. In our Decision Denying Institution in each proceeding, we determined that Petitioner failed to establish a reasonable likelihood of prevailing at trial on any of its asserted challenges in any of the Petitions listed above. See, e.g., IPR2017-01025, Paper 8 (“Decision” or “Dec.”). Petitioner requests rehearing of those Decisions. IPR2017-01025, Paper 9 (“Request” or “Req. Reh’g”); IPR2017-01208, Paper 9; IPR2017-01209, Paper 9.⁵ Having considered Petitioner’s arguments, Petitioner’s Request is denied for the reasons provided below.

II. STANDARD OF REVIEW

When considering a request for rehearing, the Board reviews its decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may arise if the decision is based on an erroneous interpretation of

² The ’1025 Petition challenges claims 16–18 of the ’100 patent.

³ The ’1208 Petition challenges claims 7–9 and 11–15 of the ’437 patent.

⁴ The ’1209 Petition challenges claims 5, 10, 16, and 25 of the ’437 patent.

⁵ Petitioner filed a Request for Rehearing in each of the above-captioned proceedings. The Requests for Rehearing effectively are identical. This Decision specifically references the Request from IPR2017-01025 although the discussion applies equally to Petitioner’s Requests in IPR2017-01208 and IPR2017-01209. Citations are to IPR2017-01025, unless otherwise indicated.

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law, if a factual finding is not supported by substantial evidence, or if an unreasonable judgment is made in weighing relevant factors. *Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P'ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000). We further note that 37 C.F.R. § 42.71(d) states:

The burden of showing a decision should be modified lies with the party challenging the decision. The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.

III. ANALYSIS

Initially, we note that our Decision was not an independent assessment of all evidence in the record to determine whether the challenged claims would have been obvious. Rather, the Decision to deny institution of *inter partes* review was based on Petitioner's failure to establish a reasonable likelihood of success at trial *based on the arguments presented in the Petition*, and the *evidence relied upon in support of those particular arguments*. Petitioner has the burden of showing, in its petition, a reasonable likelihood that it would prevail. 35 U.S.C. § 314(a). That reasonable likelihood is measured by considering the analysis offered by Petitioner. 37 C.F.R. § 42.104(b) (setting forth the requirements of a petition, including specificity and identification of support).

In its Request, Petitioner contends that our Decision includes “factual findings regarding Aboul-Hosn FIGS. 3 and 23 [that] are not supported by any evidence,” “represents unreasonable judgment in weighing relevant factors,” and “is based on an erroneous interpretation of the law.” Req.

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Reh’g 2. The contentions laid out in the Request essentially boil down to disagreement with our Decision. That disagreement is with respect to whether Aboul-Hosn expressly discloses that the pump in Figures 1–13 is included in Figure 23. *See, e.g., id.* at 4 (“Aboul-Hosn also expressly confirms that the pump of FIG. 3 is used in the manner described for FIG. 23 because, as Dr. Collins explained: ‘Aboul-Hosn **expressly discloses** that the pump 420 would include the pump system and its components shown in FIGS. 1–13, **expressly recognizing** that the pump system in FIGS. 1–13 can also be introduced into the body percutaneously.’”) (citing Ex. 1002 ¶¶ 108, 109, 113, 137).

There is no express disclosure from Aboul-Hosn identified by Petitioner, in the Petition, or even in its Request, that the pump in Figures 1–13 is included in Figure 23. In fact, and as noted in our Decision (Dec. 9), Aboul-Hosn expressly states that “Figure[] 23 . . . illustrate[s a] different embodiment[] of the present invention” (Ex. 1004, 30:20–21). Petitioner faults our characterization of the above passage from Aboul-Hosn, noting “[t]he ellipses, missing language and brackets are materially important.” Req. Reh’g 12. Petitioner contends that “[t]he Board’s errant paraphrase gives the misimpression that Figure 23 is an entirely different invention than any other in Aboul-Hosn. But, in context, the meaning is different. Figure 23 is a different embodiment than Figure 24. . . .” *Id.* at 12–13. The entire sentence spanning lines 20–21 on page 30 of Aboul-Hosn reads: “Figures 23 and 24 illustrate two different embodiments of the present invention.” Ex. 1004, 30:20–21. We are not persuaded that we misread that sentence. That sentence specifically references Figures 23 and 24 as *two* different embodiments, meaning that Figures 23 and 24 are *each* different

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embodiments, not only with respect to one another, but also with respect to the other embodiments disclosed.⁶

Contrary to Petitioner's contentions, we considered the arguments and supporting evidence presented in the Petition and determined it insufficient to institute trial. *See, e.g.*, Dec. 10 ("Ultimately, the Petition is deficient because of the failure to explain sufficiently and support the challenges therein."). We are not persuaded that we abused our discretion in reaching that determination.⁷ Disagreeing with our Decision is not, by itself, an appropriate basis for rehearing.

IV. ORDER

For the reasons given, it is

ORDERED that Petitioner's Request for Rehearing is *denied*.

⁶ Even if Aboul-Hosn's statement was intended only to contrast Figure 23 with Figure 24, the Petition remains deficient for failing to establish sufficiently that Figure 23 is part of the Figure 1–13 embodiment or provide a sufficient rationale to modify the embodiments disclosed in Aboul-Hosn. *See* Dec. 9–10.

⁷ Petitioner includes additional argument in its Request directed to rationale for the combination of Aboul-Hosn's teachings from Figures 1–13 with those from Figure 23. In the Petition, Petitioner did not propose sufficient rationale for combining the various teachings from Aboul-Hosn with one another. *See* Dec. 9–10.

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