

Conference Call

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1 Mr. Dave Cotta: Hello?

2 Mr. Caleb Pollack: Hi, this is Caleb Pollack and Guy Yonay.

3 Mr. Dave Cotta: Hi, Caleb. This is Dave Cotta.

4 Mr. Caleb Pollack: Hi.

5 Mr. Dave Cotta: Hi, I've also got Peter Cuomo and Kongsik Kim
6 here with me.

7 Mr. Caleb Pollack: Okay, thank you. I just got your email.

8 Thank you for not objecting to Ohad Mayblum attendance.

9 Mr. Dave Cotta: No problem.

10 Mr. Caleb Pollack: I guess nobody from the USPTO has dialed in
11 yet.

12 Mr. Dave Cotta: Apparently not.

13 Judge: Hello, everyone, this is Judge Arbes in the Patent Trial
14 and Appeal Board. I have with me on the line Judge Scanlon and
15 Judge Wormmeester. This is a conference call in case IPR
16 2015-00579. Do we have counsel for the petitioner on the line?

17 Mr. Dave Cotta: Yes, we do, Your Honor. We have David Cotta
18 and along with me are Peter Cuomo and Kongsik Kim.

19 Judge: Okay, and counsel for patent owner?

20 Mr. Caleb Pollack: Yes, we do. We have Caleb Pollack, Guy
21 Yonay and Zeev Pearl.

22 Judge: Okay, and do we have anyone else on the call?

23 Mr. Ohad Mayblum: Yes, this is Ohad Mayblum from

24 [INDISCERNIBLE].

25 Judge: Mr. Pollack, I believe that we received an email

1 regarding an additional person that would be on the call?

2 Mr. Caleb Pollack: That would be Ohad Mayblum.

3 Judge: Okay. This is an employee of Medtronic, I take it?

4 Mr. Caleb Pollack: Correct.

5 Judge: Okay, and counsel for petitioner, do you have any

6 objection to them listening in on the call today?

7 Mr. Dave Cotta: We have no objection.

8 Judge: Okay, great. I understand there's a court reporter as
9 well?

10 Mr. Caleb Pollack: There should be. I think the court reporter
11 was supposed to dial in.

12 Judge: Okay, can the court reporter hear us? This is Judge
13 Arbes.

14 Mr. Caleb Pollack: I guess I will send an email to the court
15 reporter, but assuming that's not going to delay things.

16 Judge: Yes, why don't we proceed. If the court reporter
17 attends just let us know and we can recap if necessary. Okay,
18 so the purpose of the call today, the panel requested this call
19 with the parties for two purposes. One is to discuss the
20 pending Inter Partes Reexam of the challenged patent and discuss
21 the facts of that proceeding, make sure our understanding is
22 correct, and then to also hear from the parties as to what
23 impact that proceeding has, if any, on the IPR proceeding that
24 we're discussing today. First we'd like to confirm our
25 understanding of the facts of the Inter Partes Reexam. Counsel,

1 I'll ask counsel for both parties, are you familiar with the
2 facts? I believe it may be at least some of the same counsel
3 involved. Counsel for petitioner?

4 Mr. Dave Cotta: Yes, Your Honor.

5 Judge: Okay, and counsel for patent owner?

6 Mr. Caleb Pollack: Yes.

7 Judge: Okay, great. Our understanding of the Reexam that's
8 going on, 95002175, was filed by petitioner IntraMedic in 2012.
9 The examiner granted Reexamination as to one ground. During the
10 course of the Reexam claim one, the sole claim of the patent,
11 was amended in two different respects, and how the Reexam has
12 proceeded is that the examiner has found that the primary
13 reference involved in the grounds in which the Reexam was
14 instituted, the primary reference Mullick was not
15 [INDISCERNIBLE] and that IntraMedic has appealed that decision.
16 The examiner has filed the answer to the appeal brief, and
17 briefing is almost completed on that appeal. Is our
18 understanding correct, counsel for petitioner?

19 Mr. Dave Cotta: That's correct, Your Honor.

20 Judge: Okay, and counsel for patent owner?

21 Mr. Caleb Pollack: That's generally correct, yes.

22 Judge: Okay, are there any other facts that either party
23 believes we should be aware of regarding the Inter Partes
24 Reexam?

25 Mr. Dave Cotta: On behalf of petitioner, not that are not

1 otherwise stated in our petition. I think we've said everything
2 we believe is relevant about the IPX, the Inter Party Reexam
3 proceeding, in our petition.

4 Judge: Okay. Counsel for patent owner, anything else that we
5 should be aware of?

6 Mr. Caleb Pollack: Only that the claim was amended in the
7 Reexamination and that the appeal is being decided on the
8 amended claim.

9 Judge: Okay, let's proceed then. The issue that we'd like to
10 discuss with the parties is that now that the sole claim of the
11 challenge

12 [00:05:00]

13 patent has been amended in the Inter Partes Reexam and
14 prosecution has closed, I guess our question to the parties is
15 why you believe that it's appropriate or not appropriate to go
16 forward on the IPR as to the original claim. It seems that
17 there may be two possible outcomes to the Reexam at this point.
18 One, the patent owner prevails and the patent survives with the
19 amended claim or some version of it. Or two, the petitioner,
20 the third-party requestor, prevails and the patent does not
21 survive with any claims. In either case the original claim is
22 no longer at issue. What we'd like to discuss and explore with
23 the parties is why is it appropriate to go forward with the IPR
24 at this point as to the original claim. Counsel for petitioner,
25 would you like to express your views on that?

1 Mr. Dave Cotta: Sure, and I think you summarized it accurately.
2 I think we've addressed the CMOS issue pretty thoroughly in our
3 petition. So, regardless of what the state of the claims is we
4 don't think the CMOS limitation lends patentability to the
5 claims. But to the extent that the patent owner alleges that it
6 does, it's already been addressed in full at our petition. On
7 page 25 of our petition, we talk about the impact of CMOS as
8 compared to a CCD camera. Paragraph 35 through 40 of the Wood
9 Declaration, we explain the impact of the CMOS and the CCD
10 camera. We think we've already covered it. And if you go
11 through ground by ground, you know, the grounds that we're
12 relying on, in ground one, Yoon includes a CMOS camera. In
13 ground two Welch Allyn includes a CMOS camera. In ground three
14 both Welch Allyn and Danna include a CMOS camera. In ground
15 four Danna include a CMOS camera. In ground five Danna includes
16 a CMOS camera. We think we've already kind of set it up so that
17 we've addressed the CMOS issue, whether it's in play or not. If
18 you look at the petitioner's preliminary response at page 21,
19 they say they should be permitted to amend the claim to recite a
20 CMOS camera. As I said before, I don't think the CMOS camera
21 lends patentability to the claim, but certainly if the patent
22 owner would like to move to amend they have that right and they
23 can argue that it is patentable under the standards that you've
24 set forth.

25 Judge: Okay, this may be a new scenario in Inter Partes Review,

1 in particular with respect to the interaction with an ongoing
2 Inter Partes Reexam. I'd like to explore this issue a little
3 bit more with the parties, and that's why we're asking
4 questions. The situation that frankly concerns me, counsel, is
5 that with respect to the timing of the Inter Partes Reexam.
6 It's theoretically possible that a Reexam certificate could
7 issue. Let's speculate, for instance, we were to institute in
8 an IPR. It is theoretically that a Reexam certificate would
9 issue in the middle of a trial. In that case the original claim
10 would no longer be in effect, only the amended claim would.
11 Correct me if I'm wrong but we'd have to terminate in that
12 scenario because the original claim that has been instituted on
13 is no longer in effect. Can you respond to that?

14 Mr. Dave Cotta: I'm not sure that you would have to terminate.
15 I would say from a practical standpoint we've certainly provided
16 all of the evidence. We already have all of the evidence that
17 relates to the amended claim. I don't think that you would
18 necessarily have to terminate.

19 Mr. Caleb Pollack: If I may, I'd like to respond to what was
20 said before.

21 Judge: I'm sorry, is this counsel for petitioner?

22 Mr. Caleb Pollack: Yes.

23 Judge: Okay, thank you.

24 Mr. Caleb Pollack: We agree with your assessment as to what
25 would happen. We think that moving forward with the claim as

1 unamended with prejudice Given. First of all-

2 Judge: I'm sorry, just to recap is this counsel for patent
3 owner?

4 Mr. Caleb Pollack: Yes.

5 Judge: Okay, well let's finish hearing from petitioner and then
6 we'll move to the patent owner. Counsel for petitioner, would
7 you like to complete your thought and then we can move on?

8 Mr. Dave Cotta: Yeah, I'm not sure I remember exactly where I
9 left off. What was the pending question?

10 [00:10:00]

11 Judge: The question we have is I guess for the parties, and I'm
12 not sure the situation has come up yet in an Inter Partes Review
13 but would the--let's say an Inter Partes Review is instituted on
14 a claim that's been amended on in an Inter Partes Reexam and a
15 certificate issues from the Reexam. What we're left with in
16 that scenario is that the claim that was instituted on is no
17 longer in effect. I believe you were saying that the board
18 would not need to terminate in that situation, but I would like
19 to know what authority do you base that on?

20 Mr. Dave Cotta: I don't have it off of the top of my head, Your
21 Honor, but I believe I've seen cases where the board has
22 permitted Reexamination proceedings to proceed at the same time
23 as in IPR proceedings, notwithstanding the possibility that the
24 claim could still be amended. Here we're already at the point
25 where the prosecution has closed so we know what the scope of

1 the claims would be. We've already provided evidence on the
2 amended claim. So, I guess in response to your question would
3 we have to terminate under that hypothetical situation, I don't
4 believe that you would. I suppose if you want additional
5 briefing on it we could provide it. I'm not aware of any
6 authority that says you would have to terminate them and
7 certainly as a petitioner we are entitled to challenge both
8 Reexam and IPR at the same time. There's no statute or
9 regulation that would preclude that.

10 Judge: Let me ask one more question before I move on to the
11 patent. Counsel for petitioner, do you agree that the only two
12 realistic outcomes of the Reexam at this point are a certificate
13 that issues with the amended claim or some version of it or a
14 certificate that issues with no claims. Do you agree that those
15 are the only two possible outcomes to the Reexam?

16 Mr. Dave Cotta: I don't want to put myself in the position of
17 the board, but certainly any time there's an appeal there's
18 always a possibility that they could re-open prosecution. How
19 likely that is in this scenario, it's difficult to say. I don't
20 think it's likely but I can't say that's not a possibility.

21 Judge: I guess the question I have is whether it's even a
22 possibility that the Reexam results in the original claim
23 remaining in the patent. Is that, is that a possibility?

24 Mr. Dave Cotta: Okay. I see what you're asking. Well, I guess
25 if the Reexam comes out invalid then either way the original

1 claim would not be in the proceeding, that's correct.

2 Judge: Okay, so you agree that there is no outcome of the
3 Reexam under which the original claim is still part of the
4 patent?

5 Mr. Dave Cotta: Barring the reopening of prosecution and even
6 then it seems unlikely.

7 Judge: Okay then why don't we--counsel for patent owner, would
8 you like to respond? I'd like to hear your views as well.

9 Mr. Caleb Pollack: Sure. We agree generally with your
10 assessment of the procedural outcomes for the Reexamination, and
11 we agree there is... we don't see any situation where the claim
12 as it is in the IPR will result from the Reexamination. There
13 will be amended claim. The most likely scenario is that amended
14 claim issues in the Reexamination or, of course, no claim. The
15 counsel for-- for-- for petitioner is correct that they have a
16 right to file the Reexamination. They have a legal right to
17 file the Reexamination and a legal right to file the IPR, but in
18 the spirit of the IPR laws and regulations, are efficiency when
19 it comes to USPTO resources and efficiency when it comes to
20 prejudice to the patent owner. So, while the patent petitioner
21 has a right to file these multiple proceedings, it's basically a
22 waste of resources to file these multiple proceedings and to go
23 forward with what we consider to be the incorrect claim in the
24 IPR when deciding whether to institute the IPR. As the statute
25 says, the director may determine the manner in which the Inter

1 Partes Review or other proceeding may proceed and it seems clear
2 to us that the most efficient thing is

3 [00:15:00]

4 that the IPR should be--the institution of the IPR should be
5 considered on the most realistic claim, the correct claim.

6 Regarding--

7 Judge: Counsel, I'm sorry to interrupt, but let me get your
8 thoughts on that. The IPR must--the decision whether to
9 institute must be based on the claim of the patent as it exists
10 today. It cannot be based on a claim--a potentially amended
11 claim that may or may not come out of the Reexam. So, whatever
12 decision on institution that the board will render, has to be
13 based on the claim as it exists at this moment. And that is the
14 original claim of the patent. So I'd like to hear your
15 thoughts, why should we consider the--why and what basis do we
16 have for considering the amended claim when determining whether
17 to institute an Inter Partes Review?

18 Mr. Caleb Pollack: If that's the case, then the IPR should be
19 dismissed because again, as you noted, the most realistic or the
20 only outcome for a claim resulting from the
21 Reexamination--excuse me, the only outcome from the
22 Reexamination is something that the IPR [INDISCERNIBLE] either
23 there will be an amended claim or there will be no claim. In no
24 outcome for the Reexamination will there be anything that makes
25 this IPR as it stands now, a useful exercise.

1 Judge: So you agree there is no possible outcome of the Reexam
2 at this point that results in the original claim being part of
3 the patent?

4 Mr. Caleb Pollack: Correct.

5 Judge: The patent owner has given up the original claim and is
6 pursuing the amended claim in the Inter Partes Reexam.

7 Mr. Caleb Pollack: Correct.

8 Judge: Okay. Counsel for petitioner, would you like to respond
9 to that in particular the patent owner's position that it would
10 be a waste of office resources given the situation to assess the
11 patentability of the original claim?

12 Mr. Dave Cotta: Your Honor, I don't necessarily think that it
13 would, but to the extent that the patent owner is arguing that
14 the patent--that the CMOS limitation confers patentability on
15 the claim I would say let them test that. They said in their
16 petition that they'd be--that they wanted permission to amend a
17 claim.

18 Judge: I'm sorry counsel, we're getting a little bit of
19 feedback on the phone. Could everyone else that is not speaking
20 mute their phones. We're hearing some conversation in the
21 background.

22 Mr. Dave Cotta: Should I go on Your Honor? I still hear the
23 conversation.

24 Judge: Yes, why don't we proceed and try to speak up if you
25 can.

1 Mr. Dave Cotta: Okay. I'll do my best. Your Honor, I think if
2 you go forward on institution and evaluating the claims under
3 the current status then I think we've met the threshold for
4 institution. The petitioner has said that they'll amend the
5 claims and if they think that adding CMOS to the claims lends
6 patentability to them, they have every opportunity to explore
7 that by moving to amend. If the board is concerned about
8 consistency, you know, we don't agree that CMOS lends
9 patentability to the claims, but we don't object to proceeding
10 on the grounds of the amended claim. We'd be willing to do
11 that.

12 Judge: Counsel, counsel--

13 Mr. Dave Cotta: And I think both parties have already put in
14 evidence with respect to the CMOS, including the patent owner.
15 I mean you can look at their brief at page 22 to 23. They
16 address the CMOS argument. So it's not like we're talking about
17 something that's new or different. It's not going to slow down
18 resolution in any respect.

19 Judge: Counsel, let me explore that for a minute. You say that
20 the patent owner could theoretically file a motion to amend in
21 the IPR with, let's say the exact same CMOS amendment that is an
22 issue in the Inter Partes Reexam. I think what we have in that
23 situation then is two proceedings going forward at the office
24 assessing the patentability of the exact same claim. Why is
25 that-- why is that something that the-- the-- the office should

1 do?

2 Mr. Dave Cotta: Well I think we set forth in our petition very
3 clearly why we think the [INDISCERNIBLE] is different, and I
4 think we've provided patent-ably distinct grounds that we're
5 entitled to explore and entitled to have evaluated. I mean I
6 think your question comes down to really are the grounds that
7 we've presented redundant or repetitive of the arguments that
8 were made during reexamination, and we address

9 [00:20:00]

10 that in quite a bit of detail in our petition at pages 14
11 through 21.

12 Judge: Well, no counsel, I think our question is a little bit
13 different. Because of the timing and the status of the two
14 proceedings, what we have is a situation where the claim that we
15 would be assessing the patentability of is not possible
16 given--given the--given the other--the other proceeding, that
17 there are only two possible outcomes to that, and in neither of
18 those cases is the original claim still at issue. So whatever
19 determination that we might reach on the patentability of that
20 original claim, the original claim will not be part of the
21 patent the minute a Reexams certificate issues. Do you disagree
22 with that?

23 Mr. Dave Cotta: No, I agree with that, Your Honor. I would
24 point to the timing as well. I mean the--the--you know, when
25 you factor in appeal and the [INDISCERNIBLE] Inter Partes Reexam

1 proceeding, you know, the likelihood that a certificate would
2 come down before trial is small and doesn't provide a reason, I
3 think, to not institute.

4 Judge: Okay. Counsel for patent owner, would you like to
5 respond?

6 Mr. Caleb Pollack: Yeah, a few things. First of all, in the
7 Reexamination, the examiner issued an examiner's answer, so the
8 likelihood that Reexamination certificate will come down during
9 trial [INDISCERNIBLE]. The other thing is, if I'm understanding
10 correctly, and I don't want to mischaracterize your arguments,
11 counsel for petitioner argues that more or less their brief
12 cover--their petition, excuse me, and therefore, our preliminary
13 response covers both claims; the claim in the-- the claim in
14 expected issue and the reexamination and the claimant issue in
15 the patent. I would say that-- I would say that that's not
16 true. I mean, both-- both parties made an effort, to some
17 extent, to cover those contingencies, the two different claims
18 but I'd at least patent owner has not had a chance to fully
19 respond in the preliminary response to the claim that's expected
20 to issue in the reexamination. In addition, while we're
21 confident on our appeal in the reexamination, there's a chance
22 that if it gets sent back out to the examiner there would be a
23 further amendment.

24 Judge: Okay, and how does that possibility--or how should that
25 possibility affect our analysis now?

1 Mr. Caleb Pollack: You know, it shows further the waste of time
2 of having these two parallel proceedings.

3 Judge: Okay. Counsel, is there any litigation involving the
4 634 patent going on?

5 Mr. Caleb Pollack: No.

6 Judge: Okay, so counsel for petitioner, you are not under
7 any--any time bar for filing an IPR petition?

8 Mr. Dave Cotta: No, we're not.

9 Judge: Okay. Okay, what I'd like to do now is confer with
10 either panel members briefly to see if we have any further--any
11 further questions. We'll go on mute for, for just a minute and
12 be back shortly.

13 [MUTED AUDIO 23:59 to 26:13]

14 [00:25:00]

15 [MUTED AUDIO 23:59 to 26:13]

16 Judge: Okay, this is Judge Arbes, do we still have both parties
17 on the line?

18 Mr. Dave Cotta: Yes, Your Honor.

19 Mr. Caleb Pollack: Yes, Your Honor.

20 Judge: Okay, okay, the appeal has conferred. I don't believe
21 we have any further questions for the parties at this point and
22 thank you for your time and for discussing the matter today.

23 Does either party have anything else that they'd like to add or
24 any other issues to discuss?

25 Mr. Dave Cotta: I'd just like to point out, Your Honor, my

1 understanding is--and we could probably identify authority or
2 provide briefing on it, if you'd like, but that the board has on
3 multiple prior occasions allowed reissues or reexaminations to
4 proceed where the claims were amended at the same time that an
5 IPR proceeding was pending. So I mean-- I don't know that this
6 is as unique as it-- as it may appear and we'd be happy to
7 provide briefing on that if it would be helpful to the court.

8 Judge: We're--and again, the particular with Inter Partes
9 Reexams, this may be-- maybe a new issue where at least all of
10 the claims, the original claims that would be challenged are--
11 have been-- have been amended and were not--that may or may not
12 have happened in other situations-- in other situations. But,
13 counsel for petition, would you-- would you be requesting
14 additional briefing on this then?

15 Mr. Dave Cotta: If you think it's helpful; if you think it
16 would help you to resolve the issues.

17 Judge: Okay, counsel for patent owner, what is your view on
18 that?

19 Mr. Caleb Pollack: We don't request additional briefing but, of
20 course, if there is we'd want to participate.

21 Judge: Okay. Why don't-- we'll do this, the panel will confer
22 very briefly and why don't we do this-- we'll confer after the
23 call and let the parties know if any briefing is authorized.
24 Anything else from either parties?

25 Mr. Dave Cotta: No, Your Honor.

1 Mr. Caleb Pollack: No, not from us, Your Honor.

2 Judge: Okay. Thank you very much. Was there--was there a
3 court reporter at all on the call?

4 Mr. Caleb Pollack: I believe there was. I received an email
5 saying there was.

6 Judge: Okay. Counsel for patent owner, were you the one that
7 retained the court reporter?

8 Mr. Caleb Pollack: Yes, we did.

9 Judge: Okay. Please file the copy of the transcript if it's
10 available as an exhibit in the proceeding as soon as you can.

11 Mr. Caleb Pollack: Sure.

12 Mr. Dave Cotta: Thank you.

13 Judge: Thank you all.

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