UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DEXCOM, INC.,

Petitioner,

vs.

ABBOTT DIABETES CARE, INC.,

Patent Owner,

IPR2023-01396, IPR2023-01397, IPR2024-00520

Patent 11,866,335

Telephonic Hearing before John New, Ryan H. Flex, and Cynthia M. Hardman, Administrative Patent Judges, taken on March 13, 2024, at 11:00 a.m. EST.

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2

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1 JUDGE NEW: Good morning, everybody. This is
2 Judge New. I'm here today joined by my
3 colleagues, Judges Flax and Hardman.
4 Before we begin, let me just start by
5 asking: Are counsel for both parties present on
6 the line?
7 MR. MASON: Yes. For petitioner this is Andy
8 Mason of Klarquist Sparkman. And my
9 understanding is that Derrick Toddy of my firm
10 is also on the line.
11 JUDGE NEW: Very good.
12 Counsel for patent owner, are you
13 present and will you make your appearance?
14 MR. McANDREWS: Yes, Your Honor. This is
15 Peter McAndrews.
16 JUDGE NEW: Thank you, Mr. McAndrews.
17 Is anybody else representing patent
18 owner on the line.
19 MR. McANDREWS: I believe I have Dave Petty
20 on the line. And I might have Michael Carrozza,
21 but I'm not certain of that.
22 JUDGE NEW: All right. Very good.
23 And I gather from what I heard a moment
24 ago that one of the parties has engaged a court

1 reporter. Is the court reporter here?
2 THE COURT REPORTER: Yes. This is Cheryl
3 Sandecki.
4 JUDGE NEW: Thank you. Were you engaged by
5 petitioner or patent owner?
6 THE COURT REPORTER: Patent owner.
7 JUDGE NEW: Very good.
8 Mr. McAndrews, I'm going to ask you if
9 you would be so kind as to submit the transcript
10 from this conference as an exhibit in this case.
11 MR. McANDREWS: Yes, Your Honor. I will do
12 that.
13 JUDGE NEW: Actually, do it in all three
14 cases, I should say. Very good.
15 We met here today in the matter of
16 Dexcom, Incorporated, versus Abbott Diabetes
17 Care, Incorporated. That's IPR2023-01396 and
18 01397 and IPR2024-00520, challenging claims, all
19 three of them, of patent 11,866,335.
20 And if you'll indulge me, let me just
21 go on for a minute and sort of set the stage for
22 this. And you can correct me if I
23 misapprehended what we're here to talk about
24 today.

1 So the 1396 and 1397 IPRs each
2 challenge the same patent and they challenge the
3 same claims, that's 1 to 4, 8, 9, and 11 to 27
4 of the '335 patent. And there is some overlap
5 in the references that are used to challenge
6 those claims.
7 We're not going to discuss the merits
8 of material differences between those two IPRs.
9 That's been fully briefed and will be addressed
10 in the Board's decision either denying or
11 instituting interparty's review next month.
12 The 520 IPR petition was submitted
13 after patent owner had submitted their
14 preliminary response in the 1396 and 1397 IPRs.
15 And if I understand correctly, it challenges
16 Claims 5 to 7 of the '335 patent, which were not
17 challenged in the other two IPRs with some
18 overlap in the challenging references.
19 And patent owner has now requested that
20 it be allowed to file a different response to
21 petitioner's statement of material differences
22 in the 520 IPR because it will come out after
23 the Board's decision on institution or denial of
24 institution in the other two previous IPRs. And

1 petitioner opposes that for various reasons,
2 which we will discuss.
3 Is that basically correct?
4 MR. McANDREWS: That sounds correct, Your
5 Honor. Yes. That's a very good recitation of
6 the issue.
7 JUDGE NEW: Thank you.
8 Mr. McAndrews then for patent owner,
9 would you please address the issue of why you
10 want to submit a different statement or response
11 to petitioner's statement of material
12 differences in the 520 IPR?
13 MR. McANDREWS: Yes, Your Honor.
14 So it's equally parts that we may have
15 to submit something different given a change in
16 circumstances. And according to the rule, there
17 is no reason why we wouldn't be able to submit
18 something different.
19 The rule that petitioner had pointed us
20 to addresses parallel proceedings. And, of
21 course, this is not a parallel proceeding, as
22 Your Honor said back to us there.
23 The petition, the 520 petition was not
24 filed until after our POPR was filed and that

1 was filed until after our first response to
2 petitioner's first statement of material
3 differences was filed.
4 And so the statements in the rules
5 about filing the same five-page statement of
6 material differences and response that appears
7 in this rule about parallel proceedings, which
8 this is not. And so ordinarily here what we
9 would have been faced with had petitioner not
10 filed these two statements of material
11 differences in the 396 and the 397, we'd have a
12 situation where no rule would have prevented us
13 from filing whatever response we felt necessary
14 in the 520 matter.
15 But because petitioner filed the two
16 statements in the 396 and 397, we're left with
17 two filings by petitioner that are now not yet
18 responded to.
19 Whether it was appropriate for them to
20 have filed the statement of material differences
21 between the 396 and 397, we're not here to argue
22 about. I mean, they have been filed. They
23 can't be unfiled at this stage. The toothpaste
24 is out of the tube, so to speak. So it would be

1 fair that we be able to respond to the 396 and
2 397 currently given the current circumstances.
3 And then in the 520, when that comes
4 due, file what is necessary there, which would
5 be a five-page response that should not be
6 restricted by the fact that we were required to
7 respond in the 396 and 397.
8 So it's argued that the rules just
9 naturally would allow for this. And I guess
10 I'll go one step further.
11 The petitioner is now requesting as a
12 condition, to the extent the Board allows us to
13 file a different five-pager in 520, that they
14 are automatically allowed a reply. And, of
15 course, the reply is not allowed for by the
16 rules.
17 If we look at the 520 in isolation,
18 what would ordinarily happen is we would file a
19 five-page response and the petitioner would not
20 be naturally allowed a reply, absent some
21 showing of good cause. And perhaps they can
22 meet that standard at some later date depending
23 on what our five-page response in the 520 says.
24 But it would be premature for them to claim any

1 right to automatically receive a three-page
2 reply right now because that's -- that's simply
3 not allowed by the rules.
4 So unless Your Honor has any questions,
5 that's petitioner's position.
6 JUDGE NEW: Patent owner's position you mean?
7 MR. McANDREWS: I'm sorry, patent owner's
8 position. Yes, Your Honor,
9 JUDGE NEW: All right. Please don't confuse
10 me.
11 Mr. Mason, let me just begin by asking:
12 Since your statement of material differences in
13 the 520 IPR is necessarily different from the
14 statement of material differences that's been
15 submitted in the 1396 and 1397, why shouldn't
16 patent owner be allowed to respond with a
17 responsive different statement of material
18 differences in the 520? And how does good cause
19 exist there for you to submit a sur-reply in
20 response to that?
21 MR. MASON: Yes, Your Honor. So I just -- I
22 think I want to make one thing clear is that,
23 you know, there has already been a five-page
24 paper filed by patent owner in the 1396 and

1 1397, and we understand that they're going to
2 file a different paper in the -- you know,
3 addressing this more recently filed five-page
4 paper by the petitioner. And we don't oppose
5 them filing something different, a different
6 five-page paper than what's already been filed
7 in the 139 -- you know, that's already been
8 filed in the 1396 and 1397 discussing the
9 differences between those two petitions.
10 What we're saying is that to the extent
11 the patent owner is filing any paper, you know,
12 and it has a right to do so in the 520, and we
13 think -- we don't oppose it filing that same
14 paper in the 1396. But what we do oppose is
15 that they file one now five-page paper
16 responsive to our what's been filed as paper two
17 in 520 and then later, you know, with its POPR
18 in the 520 proceeding, filing a different
19 five-page paper, which would then result in --
20 essentially, it sounds like it's asking for --
21 patent owner is asking for, essentially, three
22 different five-page papers to be filed? Is that
23 clear? I want to make sure.
24 JUDGE NEW: I think I'm a little confused by

1 that. Is it your position that patent owner is
2 requesting that it file a response paper now and
3 then it file a separate response paper with its
4 preliminary response?
5 MR. MASON: That's my understanding; that it
6 be allowed to file one responsive paper in the
7 1396 and 1397 proceedings right now and then it
8 later then be allowed to augment or change or
9 file a completely different five-page paper with
10 its preliminary response in the 520.
11 That's my understanding of what they're
12 seeking. Maybe Mr. McAndrews can confirm that.
13 JUDGE NEW: Yes. Could you please clarify
14 that, Mr. McAndrews?
15 MR. McANDREWS: Yes, Your Honor, that's
16 correct. So that would not be -- we would not
17 be filing two separate five-page papers in the
18 520. We would be filing only the one that we're
19 entitled to and we would be filing that, you
20 know, at the time of our POPR, which is going to
21 be after any institution decision.
22 JUDGE NEW: You mean in the 1396 and
23 1397 cases?
24 MR. McANDREWS: Right.

1 JUDGE NEW: So you would only be filing a
2 single response with your preliminary response
3 in the 520 and you can follow petitioner's
4 admirable completeness and file it in the 1396
5 and 1397 and that will be the same paper,
6 though, right?
7 MR. McANDREWS: No, Your Honor. So what
8 we -- I'm sorry. So just to be clear, we would
9 plan on filing now, you know, as soon as Your
10 Honors tell us to, we would be filing a response
11 in the 1396 and 1397.
12 And the reason for that is because
13 there is now an additional paper filed in each
14 of the 1396 and 1397, there is an additional
15 paper filed in each of those by petitioner that
16 we have not yet had a chance to respond to. And
17 to the extent that that paper would influence
18 your decision whether to institute or not, it
19 would be too late for us to file whatever we're
20 going to file in the 520 in the 1396 and 1397 if
21 we don't file it until our POPR is due in the
22 520.
23 JUDGE NEW: I think I see what you're saying
24 there, Mr. McAndrews.

1 But I can tell you right now --
2 actually, I was afraid I was going to have to
3 come here today and tell you that we can't help
4 you because this 520 IPR was not actually
5 paneled until yesterday evening and so I
6 wouldn't have any authority to make any rule
7 under the 520 IPR at all.
8 However, that has been resolved. And
9 so the 520 IPR is paneled by the same panel
10 that's here today. So we're in business there.
11 I understand your position. My
12 position, as being on the Board, is that the
13 second filing of the copy of the 520 statement
14 of material differences is not going to play a
15 role in -- or is likely not going to play a role
16 in our institution decision in 1396/1397 because
17 it is a paper from another IPR that's not
18 related to the claims or the references or only
19 distally related to the references that are at
20 issue in the 1396 and 1397 IPRs.
21 And it does seem that allowing patent
22 owner to file a response in the 1396 and 1397
23 IPRs that's going to be different from the one
24 that is going to be filed in the 520 IPR in due

1 course following or at the time of the
2 submission of the patent owner's preliminary
3 response, does allow patent owner to have
4 something of an advantage here and that there
5 are two additional -- well, basically, two
6 papers arguing material responses to material
7 differences as opposed to just one in the 520.
8 Can you elaborate on that, please,
9 Mr. Mason?
10 MR. McANDREWS: I'm sorry, Your Honor, are
11 you asking patent owner?
12 JUDGE NEW: No. I was asking petitioner if I
13 have their position right.
14 MR. MASON: Yeah, no. I mean, I think that
15 essentially sums up, you know, what I had had
16 planned to say. Yeah. I think that that's
17 accurate, including that the most recent
18 five-page paper should not really be -- because
19 it's related to the three claims and the
20 arguments presented in the third petition, it
21 should not impact the institution decision on
22 the first two.
23 And I can answer further questions.
24 But I think you summarized the point that I

1 wanted -- most of the points that I wanted to
2 make.
3 JUDGE NEW: All right. Mr. McAndrews, any
4 response?
5 MR. McANDREWS: Yes, Your Honor.
6 So, again, we would not be filing two
7 five-page responses in the 520. We would be
8 filing a single five-page response in the 520
9 and that would come with our POR.
10 But the reason why it would be unfair
11 not to allow us to file a five-page response in
12 the 1396 and 1397 is it's the petitioner's
13 choice of filing a new petition after the
14 institution decision that has led us -- I'm
15 sorry, after -- I'm sorry. After our PORs --
16 POPRs in the 1396 and 1397, it was their choice
17 to file at that time that has led us to this
18 situation.
19 So if there is any fairness --
20 unfairness here, it is only because of
21 petitioner's choice in the timing of their
22 filings. So when the 520 -- we do not plan --
23 just to be crystal clear here, we do not plan on
24 filing any five-pager in the 520 now or at any

1 time before your institution decisions in the
2 1396 and 1397. We would only be filing the
3 single five-pager that is allowed to us by the
4 rules in the 520.
5 In the 1396 and 1397, Your Honor, your
6 response earlier was that you might not consider
7 their five-page -- their second five-page filing
8 in the 1396 and 1397. It's the petitioner that
9 now has two different five-pagers in the 1396
10 and 1397. We responded to the first one at the
11 time we were supposed to. They went ahead and
12 then filed a second without permission, by the
13 way, and not allowed by the rules because it's
14 not a parallel proceeding, so not allowed by the
15 rules, they went and filed -- you know, it
16 wasn't put in as an exhibit; it was filed --
17 1396 and 1397, they filed a new five-pager in
18 each of those.
19 And if there is no response from us
20 before your institution decision, we will have
21 lost the ability to respond to that to the
22 extent that it may influence your institution
23 decisions in the 1396 and 1397. So it's only
24 fair to allow us to respond in the 1396 and 1397

1 at the time that is necessary, which is before
2 your institution decision. And we're forced to
3 do that because if we file it later, then we've
4 lost the ability to make any sort of statement
5 that could influence your institution decision
6 there.
7 But then if we have to file it now,
8 we're forced to address issues in the 520 before
9 we would have had to address them. So any
10 unfairness here is because of the timing
11 petitioner chose.
12 JUDGE NEW: I understand. Thank you for
13 clarifying that for me, Mr. McAndrews. And
14 perhaps I didn't speak with sufficient clarity
15 earlier. We would not consider the paper
16 submitted into the 520 IPR -- together with the
17 520 IPR petition in our decision in the 1396 and
18 1397 IPR.
19 I see no reason to, namely, because
20 it's not a follow-on petition as far as I can
21 tell in the general classic sense. It addresses
22 different claims that aren't being challenged in
23 the prior two, 1396 and 1397, IPRs. So I see no
24 reason why we would even consider that

1 statement.
2 I think it was just filed as a matter
3 of completeness, though I may be wrong about
4 that. But it is the same paper filed in 1396,
5 1397, and 520 by petitioner considering the
6 material differences between the 520 and the
7 prior two IPRs.
8 So I don't see how that would play any
9 bearing on our decision to institute or not to
10 institute in 1396 and 1397 and why we would
11 consider it.
12 MR. McANDREWS: Your Honor, then it sounds
13 like you're leaning towards ruling against us on
14 filing a different paper in the 520 if we were
15 allowed to file one in the 1396 and 1397. And,
16 therefore -- and I understand, Your Honor,
17 you're saying that you would not consider them.
18 But, you know, same day down the road a
19 reviewing court may look at this and wonder why
20 we didn't respond.
21 So as an alternative, Your Honor, then
22 I would request expungement of the five-page in
23 each of the 1396 and 1397 of petitioner's
24 outside-the-rules second five-pager. That way

1 we can be assured that the record actually only
2 discloses information that the Board considered
3 in deciding to institute or not.
4 JUDGE NEW: Very good. Thank you very much
5 for that.
6 Mr. Mason, any response on that?
7 MR. MASON: Yeah, just a couple
8 clarifications.
9 One, I think Abbott's counsel has said
10 that this is not allowed by the rules. I think
11 Your Honor has it right that we filed this as a
12 matter of completeness and that it's required by
13 the rules, it's required by the Trial Practice
14 Guide, which requires that the same paper be
15 filed with each petition. So in an abundance of
16 caution, to make sure we were complete, we filed
17 this paper in the 1396 and 1397 proceedings.
18 If the Board is not going to -- we
19 don't think it should have any bearing on those
20 first two proceedings; you know, one, because it
21 relates to the third petition and, two, it ranks
22 that third petition third behind the other two.
23 And so, you know, to the extent patent
24 owner is seeking expungement and the Board feels

1 that's the appropriate remedy, we would not
2 oppose that. We think that's fine.
3 Again, I think the biggest thing here
4 is that we wanted to make sure we complied with
5 the rules and that's why we filed it in the
6 first two proceedings.
7 And, yeah, just in terms of timing,
8 too, I mean, this was -- certainly we would have
9 loved to have filed this petition earlier. I
10 think we filed it very promptly after learning
11 that these three new claims had been asserted.
12 So it wasn't our choice to sit and lay and wait
13 for the POPRs to be filed in the first two. We
14 moved as expeditiously as possible in getting
15 this petition on file. And so it wasn't our
16 choice to just sit and wait.
17 And so that was the only two points I
18 would like to make unless there are further
19 questions.
20 JUDGE NEW: All right. Well, thank you.
21 That's very helpful and I appreciate your zeal
22 in making sure that the record is complete.
23 I'm not sure it really applies under
24 the Trial Practice Guide. Generally, it seems

1 to be talking about petitions that are filed
2 simultaneously and not with a large time lag and
3 also not talking about petitions that file it --
4 that challenge and file different claims between
5 the 1396 and the 1397 and the 520.
6 If you'll permit me, I'm going to put
7 you on hold for a moment while I confer with the
8 other members of the Panel and see if we have
9 any other questions. So we'll be back shortly.
10 MR. McANDREWS: Your Honor, Your Honor. I'm
11 sorry to interrupt.
12 JUDGE NEW: Yes.
13 MR. McANDREWS: This is Mr. McAndrews.
14 I do have one point of clarification
15 because of something Mr. Mason said. It's
16 actually unfortunate that he made a substantive
17 argument to try to justify the timing, so I feel
18 like I need to respond to that.
19 So his statement that they filed the
20 later petition because we had asserted new
21 claims, that is factually untrue.
22 The circumstances here -- and this is
23 in part what we planned to provide in any
24 five-pager to be responded to in 1396 and 1397

1 -- is that that basis for filing a second one at
2 the time that they did is simply an untrue
3 statement.
4 So what actually happened is at the
5 time they filed the 1396 and 1397, there were no
6 asserted claims other than Claim 1 that was
7 identified in the complaint of the parallel
8 litigation. So they chose to file early when
9 any additional claims were not yet asserted.
10 They chose the claims that -- or the totality of
11 what showed up in the 1396 and 1397.
12 At a later date, it's true that the
13 totality of the asserted claims was identified.
14 But it went from Claim 1 being identified to a
15 number of claims being identified. They chose
16 to file early before they knew what claims were
17 being asserted in the litigation in totality.
18 It is not, however, the case -- and I
19 think that this is what Mr. Mason would have led
20 you to believe -- is that the claims identified
21 in the 1396 and 1397 were asserted at one point
22 in time and at a later point in time the
23 additional claims in the 520 patent were then
24 asserted as new assertions. That statement is

1 untrue. I just wanted to clear that for the
2 record.
3 JUDGE NEW: And when you say they were
4 asserted, were you talking about what's going on
5 in the District Court litigation in Delaware; am
6 I correct?
7 MR. McANDREWS: That's correct. At one time
8 there was only Claim 1 asserted and then there
9 was a large chunk of claims asserted that
10 included all the claims across 1396, 1397, and
11 520. But there was not a new assertion of the
12 three claims that they added in the 520 that it
13 -- to the extent that they -- they could have
14 added those same claims in the 1396 and 1397;
15 there was nothing new that happened.
16 JUDGE NEW: I understand.
17 Mr. Mason, any response to that?
18 MR. MASON: Oh, yeah. I mean, respectfully,
19 there's no misleading statement. The fact that
20 -- the suggestion that we were trying to mislead
21 with the statement is untrue. We -- you know, I
22 think everybody knows that petitioners for
23 various reasons need to move as expeditiously as
24 possible in filing the initial petition, whether

1 it's punitive or maximizing the efficiency. The
2 public interest efficiency is gained by a
3 District Court stay in view of IPR.
4 So we best identified the claims per
5 challenge prior to receiving the full
6 infringement contentions. As Mr. McAndrews
7 noted, you know, one claim was identified in the
8 complaint. They could have identified more
9 claims in the complaint.
10 So in our initial petitions, we
11 challenged the claims that we had best
12 identified as the ones that would most
13 reasonably be in play and in attempts to bring a
14 focused case to the Board. And then after they
15 asserted the three new claims that we had not
16 anticipated them asserting, on December 20th we
17 moved quickly thereafter to challenge those
18 claims.
19 JUDGE NEW: Mr. McAndrews, let me just ask,
20 how is that not fair play?
21 MR. McANDREWS: Your Honor, so whether what
22 he just described there is fair play or not is
23 not the issue. It was the misimpression that
24 was left. And if Your Honor didn't take it the

1 way he had described it, that's okay.
2 But one way to interpret the reason
3 they've given for filing later is that the
4 patent owner had at a later point in time
5 asserted new claims. He's used the term "new
6 claims" now twice during this call. And as long
7 as it's understood that new claims simply means
8 they chose to address new claims in the 520 that
9 hadn't been addressed in the 1396 and 1397,
10 that's okay.
11 But if the understanding or implication
12 of saying new claims is that the patent owner at
13 some point in time went from one set of asserted
14 claims to a new set of asserted claims in the
15 parallel litigation, that would be untrue.
16 That's the clarification I was attempting to
17 make, Your Honor.
18 JUDGE NEW: I understand that, Mr. McAndrews.
19 And thank you very much. You've been quite
20 clear.
21 With that, I'm going to ask you both to
22 wait while I put you on hold and discuss this
23 with members of the Panel and I'll be back
24 shortly.

1 (Short pause in proceedings.)
2 JUDGE NEW: Good morning again. This is
3 Judge New. I returned with Judge Flax and Judge
4 Hardman.
5 It's the consensus of the Panel that
6 the probably most equitable and simplest thing
7 to do is simply expunge paper nine, that is,
8 say, petitioner's second statement of material
9 differences relating to the 520 IPR from the
10 record in the 1396 and 1397 IPR, and the Panel
11 will certainly not consider that expunged
12 document in its decision to either institute or
13 deny institution in the 1396 and 1397 IPRs.
14 So we will expunge that second
15 statement submitted by petitioner in the 1396
16 and 1397 IPRs. That paper will not be
17 considered in any way in our institution
18 decision. And patent owner can, of course, file
19 a response in the 520 IPR to petitioner's
20 statement of material differences in that
21 proceeding.
22 Are there any questions about that?
23 MR. McANDREWS: No, Your Honor, not behalf of
24 the patent owner.

1 MR. MASON: Nor for petitioner.
2 JUDGE NEW: All right. Are there any other
3 issues that we need to address while we are here
4 today?
5 MR. McANDREWS: None for patent owner, Your
6 Honor.
7 MR. MASON: None for petitioner, Your Honor.
8 Thank you for the clarification.
9 JUDGE NEW: Thank you very much, folks. It's
10 been a clarifying discussion. I appreciate your
11 candor and look forward to moving along in the
12 proceedings with us. Thank you very much and I
13 wish you a good day.
14 MR. McANDREWS: Good day.
15 MR. MASON: Good day.
16 JUDGE NEW: And we're adjourned now.
17 (The proceedings concluded at
18 11:32 a.m. EST.)
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1 CERTIFICATE OF CERTIFIED SHORTHAND REPORTER
2
3
4 I, Cheryl L. Sandecki, the officer
5 before whom the foregoing deposition was taken,
6 do hereby certify that the foregoing transcript
7 is a true and correct record of the testimony
8 given; that said testimony was taken by me
9 stenographically and therefore reduced to
10 typewriting under my direction; that reading and
11 signing was requested; and that I am neither
12 counsel for, related to, nor employed by any of
13 the parties to this case and have no interest,
14 financial or otherwise, in its outcome.
15 IN WITNESS WHEREOF, I have here unto
16 set my hand this 20th day of March, 2024.
17
18
19 CHERYL L. SANDECKI, RPR, CLR
CERTIFIED SHORTHAND REPORTER
20 Thompson Court Reporters
IA CSR NO.: 1423
21 IL CSR NO.: 084-03710
ID NO.: SRL-1145
22 NJ CCR NO.: 30XI00241500
TN NO.: 823
23 WA CCR NO.: 22001795
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