UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DEXCOM, INC.
Petitioner,

v.

ABBOT DIABETES CARE INC.,
Patent Owner.

Case IPR2023-01409
U.S. Patent No. 11,202,591

TELEPHONIC CONFERENCE CALL

* * *

February 2, 2024
Portland, Oregon

SINEAD R. WILDER, RPR, CSR, CCR
Court Reporter

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DEXCOM EXHIBIT 1043
Dexcom v. Abbott
IPR2023-01409

APPEARANCES:
(All parties appearing telephonically)

Judges present:

JUDGE HARDMAN

JUDGE FLAX

JUDGE NEW

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Also Present: None

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EXHIBITS

(None)

PORTLAND, OREGON; FRIDAY, FEBRUARY 2, 2024

11:00 a.m.

* * *

(Times noted are Pacific Standard Time)

CONFERENCE CALL

JUDGE HARDMAN: Good afternoon, Counsel. Let's go on the record. 12:00:01

This is Judge Hardman, and I am joined by Judges New and Flax. 12:00:01

This is a conference call for IPR2023-01409, Dexcom, Incorporated versus Abbott Diabetes Care Incorporated. 12:00:01

Let's start with appearances, please. Who do we have on the line for petitioner? 11:00:27

MR. MASON: Yes. For petitioner, this is Andy Mason of Klarquist Sparkman. 11:00:33

And as noted in my email to the board, we -- we did arrange for a court reporter, Your Honor. 11:00:37

JUDGE HARDMAN: Thank you, Mr. Mason. 11:00:43

Once the transcript of this call is available, would you please file it as an exhibit in this proceeding? 11:00:45

MR. MASON: Yes, Your Honor. 11:00:52

JUDGE HARDMAN: Thank you. 11:00:56

And who do we have on the line for patent owner, please? 11:00:56

MR. MCANDREWS: Yes. Good afternoon, Your Honor. This is Peter McAndrews on behalf of patent owner. 11:01:01

JUDGE HARDMAN: Thank you, Mr. McAndrews. 11:01:06

Because we do have a court reporter on the line, please try to, for a clear record, state your name before you speak, just a reminder for that. 11:01:11

We convened this call today in response to petitioner's request to file a five-page reply brief to patent owner's preliminary response. 11:01:20

We understand that pat -- sorry, petitioner wants to address patent owner's arguments for discretionary denial under Section 325(d). And we understand that patent owner opposes the request. 11:01:28

So before I turn it over to Mr. Mason, for petitioner, I think it would be most helpful if you could focus on the good cause required for -- for an additional brief in this case. 11:01:43

And it would be most helpful if, specifically, you'd focus on -- you know, we saw 11:01:56

the petition, that petitioner acknowledges that all of its cited prior-art references were before the office on an information disclosure statement, except for one that had a counterpart of the -- of the reference that was on the information disclosure statement.

And as you know, our precedential case, Advanced Bionics, indicates that presence of references on an information disclosure statement satisfies the first prong of that two-prong framework set out in the case. 11:02:17

And so the question is, given the prosecution history here, and the case law, why petitioner didn't already address the 325(d) arguments that patent owner raises. 11:02:32

So with that in mind, go ahead, Mr. Mason. 11:02:47

MR. MASON: Yes, Your Honor. Thank you. Andy Mason for Petitioner Dexcom. 11:02:52

So, yeah, this was a -- given the -- the circumstances here -- and I'm going to be focusing on the good cause -- this was -- these arguments from patent owner, that it would spend, you know, 30 pages without any other substantive arguments in its preliminary response on this issue was not 11:02:54

foreseeable, given the, at best, cursory consideration of these miscited references, or allegedly cumulative references during -- during prosecution.

I mean, in similar circumstances, I have not seen, you know, where there's no -- absolutely no mention of the record, no discussion of any other references on the record, no rejections based on these references in the record, have -- have not seen any instance where -- where there's been a Section 325(d) denial. 11:03:23

And so I think, you know, pointing to that lack of -- of any meaningful analysis, coupled with the -- the petitions showing of unpatentability as presented in the -- in the grounds, it illustrates how the examiner failed to -- to consider the references. 11:03:40

And we didn't foresee that this would be the issue that patent owner makes it out to be with its -- its 30 pages of briefing. 11:03:58

The preliminary response points only to the initialing of multiple IDS pages, you know, which were part of over 60 pages of IDSs. 11:04:04

The POPR identifies no discussion of the prior art or any other meaningful events during 11:04:14

prosecution.

And -- and so given that, we did not -- reasonably did not foresee that patent owner would argue that Advanced Bionics, factor one would satisfy the method, in that we had not made a showing under the factor two. 11:04:20

Moreover, you know, the -- Abbott argues this case -- that this issue is case dispositive. And in similar situations, you know, given potentially dispositive natures of issues raised by patent owner in the preliminary response, especially when they're procedural like this, the board has often allowed for filing good cause for additional briefing. 11:04:35

And third, this -- this briefing will -- will aid the board, given that the dis -- case-dispositive -- or allegedly case-dispositive nature of this issue, additional briefing would -- would aid the board in -- in resolving the issue. 11:04:57

And then, finally, I think, you know, the Masimo v. Apple decision -- that's IPR2023-00634, Paper 11 -- that's a split decision. They also address IPR-00635 in that decision. 11:05:12

But we will focus on IPR2023-0034. 11:05:30

That's page four of Paper 11.

You know, the board found that there's, you know -- no rule, statute or precedent requires a petitioner to meet any burden on Section 325(d) issues in the petition, and prior to the filing of a patent owner's preliminary response. 11:05:37

So -- and it goes on to explain that, quote, Burdens related to the Section 325(d) analysis will be applied to the time of conducting -- and it's end of quote -- the 325(d) analysis. 11:05:51

And so at this point in time, given the lack of prosecution, the lack of any indication that the examiner considered these references, this was not a foreseeable -- it's not the foreseeable issue that patent owner makes it out to be. 11:06:03

And then given it's devoted 30 pages of its reply to this issue, it's appropriate for petitioner to have five pages on it. 11:06:17

JUDGE HARDMAN: Thank you, Counsel. 11:06:29

You know, I'm a little surprised that you rely on the Masimo v. Apple case, because, as you acknowledge, it's a split decision. 11:06:30

And it seems to me that the other 11:06:39

portion of the -- that decision that you don't rely on undercuts your argument. Because the facts of that second part of the case seem closer to our situation here.

And there the board found that it was foreseeable that patent owner would present the 325(d) argument for references that were already before the office, and therefore, didn't permit the additional briefing. 11:06:53

So can you speak to why -- you know, how that other portion of the case impacts your arguments here? 11:07:08

MR. MASON: Yeah -- yes, Your Honor. 11:07:17

So the -- the other portion -- and this is the portion of Masimo involving IPR ending in 00635. 11:07:18

There, the -- the references in dispute there had been -- were cited and applied by the examiner during prosecution. 11:07:26

So it was, you know, a very clear, and as I understand it, undisputed prosecution record, where these -- these references, in that instance, were substantially considered and evaluated on the record by the examiner, and patent owner had overcome those rejections on the record with 11:07:34

respect to those -- those references.

And -- and so in that instance, the petitioner's failure to (inaudible), that was a foreseeable issue for petitioner. 11:07:54

Here are -- are facts are much more aligned with the first portion, the 634 portion of the Masimo decision, where there's, you know, just hundreds, if not thousands -- over a thousand references that were on that IDS. 11:08:03

There's no substantive discussion on -- on -- of any of those references, no rejections based on any of those references, and really, no meaningful prosecution history whatsoever that -- that the patent owner has identified here. 11:08:18

And then, in addition, I think the 635 portion of the Masimo decision involved a situation where patent owner had also raised arguments in its preliminary response as to why the claims -- the patent -- well, for the same reason that the examiner had previously found -- here, there's no -- there's no merits-based arguments for the patentability of the claims in the preliminary response. 11:08:31

JUDGE HARDMAN: Okay. Let me hear from Mr. McAndrews, please. 11:08:59

MR. MCANDREWS: Yes, Your Honor. Thank you. 11:09:03

So this is Peter McAndrews for patent owner. 11:09:05

Let me start with the Masimo decision, because we do think that that case very nicely separates the two types of circumstances you might have in determining the issue of foreseeability. 11:09:08

So the portion of the Masimo decision in which a preinstitution reply was granted, that involved an argument of cumulativeness. 11:09:21

There was no argument that the very same references -- there was no argument for -- for, essentially, any of the references that were used in the IPR, that those same references were before the examiner. 11:09:32

Instead, there was a substantial effort by the patent owner to describe those -- the references that were being used as cumulative to other references. 11:09:45

So they were -- they were not related. They were not counterparts. They did not share the same inventor names. They were unrelated. And so there's an argument of cumulativeness. 11:09:54

One can certainly understand that the -- 11:10:06

that sort of argument is very difficult, if not impossible, to guess that your opponent would address.

That's not what we have here. What we have here is a circumstance -- Your Honor, you pointed out, right out of the gate here today -- is that of the five references that the petitioner relies on in its IPR, all five of them, or an identical disclosure from a counterpart, were in front of the examiner, were considered by the examiner. 11:10:14

And not only that, but they were acknowledged by petitioner here as -- as existing in the record. 11:10:40

So there is no surprise, there cannot be any assertion of surprise that the first prong of the Advanced Bionics is met here. 11:10:45

Mr. Mason, in what he's attempting to argue here, is that he might have had a good argument for the second part of the Advanced Bionics test, but he didn't make it. He didn't make the effort to make that second argument. 11:10:55

He's not arguing here today -- I haven't heard it yet -- that it wasn't foreseeable that we would both assert, and that the board would 11:11:11

recognize from the record, as you did independently, that the first prong of Advanced Bionics is met.

And so that's what Masimo asks. The Masimo case asks whether it was foreseeable that we would point out that petitioner's petition lacks any discussion of the second prong of Advanced Bionics. 11:11:26

And of course, we would point that out, because petitioner utterly failed on the second prong. 11:11:42

So not only was it foreseeable, they actually did foresee it. They made a -- they made a 325(d) argument. They just didn't address material error. 11:11:48

There is no discuss of material error as required by the second prong of Advanced Bionics. And it was foreseeable that they would have had to make that argument. 11:11:59

So what did they do? They made a strategic decision not to address that. 11:12:05

And what did that do? What that does, is it -- is it puts us, the patent owner, in an unenviable position of having to make the argument first, even though it's their burden. And then he 11:12:10

gets to sit in the driver's seat and respond to that, if he assumes that he's going to be allowed a reply.

And that's what -- actually, what the Edwards Lifesciences case says that we cited in our patent owner response. It says that the petitioner should not expect a reply, because that puts them at a strategic advantage. 11:12:28

They shouldn't assume that the panel is going to allow a reply for them to get a do-over and fill in the gaps that were foreseeable -- you know, foreseeable gaps, gaps that they knew they should have addressed, but they -- they chose not to. 11:12:43

And I want to -- I want to mention one additional issue, something that Mr. Mason said during his argument, is he -- he referenced, essentially, their 314(a) arguments, you know, arguing that that is enough to prove material error, I guess what his suggestion was. And the Vital Connect case tells us that's not so. 11:12:59

The 325(d) inquiry of examiner material error is a different matter than 314(a). Otherwise, they would -- there wouldn't be a second test. There wouldn't be a second part of 11:13:23

Advanced Bionics. It would simply be enough to present a 314(a) argument.

So they did not -- you know, the words, Material Error, do not appear. They don't -- they don't acknowledge, even though they should have, the second part of the Advanced Bionics test. 11:13:38

And it's -- it's simply not enough for him to say, Well, by the way, look at our 314(a) arguments. 11:13:51

Now where they have us is they have us at a strategic disadvantage. Patent owner made decisions in responding to the petition, selected the right arguments. 11:13:58

And the right arguments here are that petitioner did not make -- did not meet its burden under Advanced Bionics. And they chose not to -- not to address that. And they should not be granted a reply to backfill and fill in gaps. 11:14:10

JUDGE HARDMAN: Okay. Thank you, Counsel. 11:14:35

Mr. Mason, would you like to respond? 11:14:37

MR. MASON: Yeah. 11:14:40

I'd just respond -- I mean, first, I guess I can start with the driver's seat argument in terms of, you know, us putting patent owner at 11:14:40

a strategic disadvantage.

And those are precisely the type of arguments that -- that were rejected by Masimo, or which discusses when the -- when the burdens related to Section 325(d) were applied. 11:14:49

I mean, here, again, with the -- with the petition, there was -- given -- given the lack of a record, and -- and given the many instances previously where the board has rejected 325(d) arguments by patent owner when there's no meaningful prosecution, and certainly when -- when -- when there's no tie between the prosecution history and any merits-based arguments, or any arguments being presented by the -- by -- from the petition by patent owner. 11:15:02

So in that situation, there's no foreseeability. And it's -- it's entirely reasonable for petitioner and, indeed, fair for petitioner to have a chance to respond in those circumstances when -- when patent owner does raise -- raise the arguments. 11:15:25

The Vital Connect decision referred to by -- by patent owner counsel, my understanding is that's -- that is not prec -- a precedential decision. 11:15:42

And so I -- I mean, I think when -- when the petition notes the complete lack of a record during prosecution, and there's -- there's no -- and then shows in the grounds how the claims are unpatentable, there's no -- if there's a lack of a record, there's no -- no manner in which to show that the arguments made and discussed by patent owner in prosecution are different from the arguments presented in -- in the petition. 11:15:54

And -- and here, in addition to -- you know, I guess one other point I'll make, too, is in addition to the references that are relied on here, you know, the examiner does not have before him or her the -- the particular combinations that are relied on of those references, nor the expert declaration explaining the reasons for combining those -- those references. 11:16:17

JUDGE FLAX: Counsel, this is Judge Flax. 11:16:42

Before -- going back in time, before you filed your petition, were you of the opinion that the examiner erred in not rejecting the claims over the art that you're now asserting? 11:16:46

MR. MASON: Yes. 11:17:05

JUDGE FLAX: Okay. So why did you not 11:17:06

even say that once in your petition?

MR. MASON: I -- I -- it's -- it's 11:17:12
implicit in the petition that it's, you know, the petitioner's position, Your Honor, that -- that the -- all these challenged claims are unpatentable, and that there was an error in allowing the claims over the -- the prior art.

JUDGE FLAX: But I guess, my question 11:17:27
is, you saw fit to include a section in your petition addressing 325(d) identifying the references that you were asserting, noting that they were all of record in an IDS, or cumulatively so.

And then you didn't bother to say 11:17:45
anything about an error during prosecution in not rejecting your claims over them.

MR. MASON: Yeah. That is correct, Your 11:17:55
Honor.

But to -- to find such an instance 11:17:56
forecloses any type of reply by -- by petitioner, and I guess, at best, would put -- put form over substance in terms of the rule.

I mean, I think, if looking at the 11:18:09
petition, the petition would not be brought unless there is a strong belief, and a conviction even,

that the claims were unpatentable over the art of record, both by petitioner and the -- and its expert.

Sorry for cutting you off. 11:18:28

JUDGE HARDMAN: This is Judge Hardman again. 11:18:32

Oh. Sorry. 11:18:33

It's Judge Hardman, again. 11:18:34

I -- I think I hear you saying that the grounds themselves show the error. 11:18:36

So why the need for an additional brief, if what we're going to hear is that the error is already shown via the same arguments you make in your grounds? 11:18:41

MR. MASON: Well, if that's the case, then there -- then there may be no need for a brief. 11:18:55

But, I -- I mean, I -- to the extent that there is -- you know, the board sees this as a live issue, we -- we -- and -- and sees it in a case dispositive manner that patent owner does, then we -- we respectfully request a reply. 11:19:00

And I -- I think, to Your Honor's point, the Edwards case noted by -- by Mr. McAndrews, did indeed institute IPR without that need for 11:19:12

additional 325(d) briefing. So did the Progenity case that's cited on pages 31 and 32 of the POPR.

The other case cited by patent owner denied institution on a completely separate basis on the merits. 11:19:30

And I -- and I think also on the -- the -- on the Masimo case, the 635 portion of the Masimo case, the board denied on the merits, and -- and there was no Section 325(d) denial in that instance. 11:19:36

So we're aware of no instance where the board has denied institution under circumstances like this one, even if it did preliminarily deny a reply to the preliminary response. 11:19:49

JUDGE HARDMAN: Okay. 11:20:06

Mr. McAndrews, any final words before we -- before the panel deliberates? 11:20:06

MR. MCANDREWS: Your Honor, the only thing I would add is -- is that I don't think I heard good cause here. 11:20:14

What I heard is, instead, the argument that was foreseeable that he wanted to make, but now does not have good cause, doesn't have an explanation for why it wasn't made the first time around. 11:20:19

JUDGE HARDMAN: Okay. Thank you, Counsel. We're going to put you on hold. And the panel will be back in a few minutes. 11:20:35

MR. MASON: Oh. Your Honor, can I -- this is Mr. Mason. Can I just make one more point I -- that I forget to mention earlier? I apologize. 11:20:40

JUDGE HARDMAN: Go ahead. 11:20:47

MR. MASON: Yeah. 11:20:48

I just wanted to note that in the Vital Connect case at page 19, it's my understanding that the board faulted petitioner for not seeking a reply to the preliminary response. 11:20:48

That's all I wanted to note. Thank you. 11:20:59

JUDGE HARDMAN: Okay. Thank you. 11:21:01

(A recess was taken from 11:21 a.m. to 11:25 a.m.)

JUDGE HARDMAN: Okay. Counsel, we are back. This is Judge Hardman. 11:25:03

We are going to take this under advisement and issue an order with our decision shortly, hopefully by early next week. 11:25:07

So before we go, just any questions or comments before we adjourn? 11:25:15

MR. MASON: No -- 11:25:27

MR. MCANDREWS: No, Your Honor. 11:25:27

MR. MASON: -- questions from 11:25:28

petitioner's counsel, either. Although I think the -- one question I just -- procedurally would be, would the -- would the board like a -- I think currently we have the transcript coming in at the end of next week.

Would the board like the transcript to 11:25:40

be gotten sooner and filed sooner than that?

JUDGE HARDMAN: The sooner the better. 11:25:46

Because it will help us, you know, with the decision --

MR. MASON: Okay. 11:25:53

JUDGE HARDMAN: -- and finalizing the 11:25:53

order. So yeah.

MR. MASON: We can -- we will ask to get 11:25:57

that sooner.

And then I think the court reporter was 11:25:59

hoping to get a spelling of the judges' names, if that's possible. We tried to provide them --

JUDGE HARDMAN: Sure. 11:26:05

MR. MASON: -- as best as possible. But 11:26:07

I want to make sure.

JUDGE HARDMAN: Okay. Yes. This is 11:26:10

Judge Hardman-- H-A-R-D, like David, M-A-N.

We have Judge New -- N-E-W, and Judge Flax -- F-L-A-X. 11:26:14

MR. MASON: Great. Thank you so much. 11:26:28

JUDGE HARDMAN: Okay. Thank you, Counsel. Have a good day. 11:26:29

MR. MASON: You as well. 11:26:32

MR. MCANDREWS: Thank you, Your Honor. 11:26:34

(The telephonic conference call concluded at 11:26 a.m.)

C E R T I F I C A T E

I, Sinead R. Wilder, a Notary Public for Oregon, do hereby certify that, pursuant to stipulation of counsel for the respective parties hereinbefore set forth; that at said time and place I reported in Stenotype all testimony adduced and other oral proceedings had in the foregoing matter; that thereafter my notes were reduced to typewriting under my direction; and that the foregoing transcript, pages 1 to 24, both inclusive, constitutes a full, true and accurate record of all such testimony adduced and oral proceedings had, and of the whole thereof.

Witness my hand and notarial seal at Portland, Oregon, this 2nd of February, 2024.

SINEAD R. WILDER
Certified Shorthand Reporter
Certificate No. 13-0426
My Commission Expires 12/31/24

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Federal Rules of Civil Procedure

Rule 30

(e) Review By the Witness; Changes.

(1) Review; Statement of Changes. On request by the deponent or a party before the deposition is completed, the deponent must be allowed 30 days after being notified by the officer that the transcript or recording is available in which:

(A) to review the transcript or recording; and

(B) if there are changes in form or substance, to sign a statement listing the changes and the reasons for making them.

(2) Changes Indicated in the Officer's Certificate. The officer must note in the certificate prescribed by Rule 30(f)(1) whether a review was requested and, if so, must attach any changes the deponent makes during the 30-day period.

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Veritext Legal Solutions represents that the foregoing transcript is a true, correct and complete transcript of the colloquies, questions and answers as submitted by the court reporter. Veritext Legal Solutions further represents that the attached exhibits, if any, are true, correct and complete documents as submitted by the court reporter and/or attorneys in relation to this deposition and that the documents were processed in accordance with our litigation support and production standards.

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