

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

JEISYS MEDICAL INC.,
Petitioner,

v.

SERENDIA, LLC
Patent Owner.

U.S. Patent No. 10,869,812
Filed: October 3, 2017
Issued: December 22, 2020
Inventor: Jongju Na

TITLE: METHOD, SYSTEM, AND APPARATUS
FOR DERMATOLOGICAL TREATMENT

Inter Partes Review No. IPR2024-00463

**PETITIONER'S REPLY TO
PATENT OWNER'S PRELIMINARY RESPONSE**

EXHIBITS

Exhibit	Description
1001	U.S. Patent No. 10,869,812 (“’812 Patent”)
1002	File History of the ’812 Patent
1003	Declaration of Dany Bérubé, Ph.D.
1004	<i>Curriculum Vitae</i> of Dany Bérubé, Ph.D.
1005	Order No. 35: Construing Certain Terms of the Asserted Claims, Inv. No. 337-TA-1356
1006	U.S. Patent No. 8,608,737 to Mehta <i>et al.</i> (“Mehta”)
1007	International Patent Application Publication No. WO 2010/016848 by Na <i>et al.</i> (“Na’848”)
1008	Korean Registered Utility Model KR20-0441552 to Lee <i>et al.</i> (“Lee”)
1009	Certified Translation of Korean Registered Utility Model KR20-0441552 to Lee <i>et al.</i> (“Lee”)
1010	International Publication Number WO 2008/005477 by Livneh (“Livneh”)
1011	U.S. Patent No. 8,540,705 to Mehta <i>et al.</i> (“Mehta’705”)
1012	U.S. Patent No. 9,775,774 to Na (“’774 patent”)
1013	U.S. Patent Application Publication No. 2009/0093749 by Shalev <i>et al.</i> (“Shalev”)
1014	U.S. Patent Application Publication No. 2009/0048557 by Yeshurun <i>et al.</i> (“Yeshurun”)
1015	Korean Registered Patent KR10-0719395 to Kang (“Kang”)

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Exhibit	Description
1016	Certified Translation of Korean Registered Patent KR10-0719395 to Kang (“Kang”)
1017	U.S. Patent No. 7,824,394 to Manstein (“Manstein”)
1018	U.S. Patent No. 7,618,429 to Mulholland (“Mulholland”)
1019	U.S. Patent Application Publication No. 2007/0142885 by Hantash <i>et al.</i> (“Hantash”)
1020	U.S. Application No. 61/449,080 by Na (“Na’080”)
1021	Substitute Declaration of Jean Woloszko, Ph.D.
1022	Serendia-Ilooda Settlement Agreement
1023	Excerpt from November 7, 2023 Evidentiary Hearing Transcript from related ITC proceeding
1024	Order No. 3 (Proposed Scheduling Order) from related ITC proceeding
1025	Order No. 2 (Ground Rules) from related ITC proceeding

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Patent Owner disclaimed eight of the twenty '812 patent claims. EX2144.

The remaining dependent claims include conventional features that do not impart patentability. The Board should institute trial.

I. SECTION 325(d) SUPPORTS INSTITUTION

The *Advanced Bionics* framework to address section 325(d) supports institution. *Advanced Bionics, LLC v. MED-EL Elektromedizinische Geräte GmbH*, IPR2019-01469, Paper 6 (PTAB Feb. 13, 2020) (precedential). With respect to Part 1, the Office has not previously considered the prior art references used, and arguments presented, in the Petition.¹ Contrary to Patent Owner's arguments (*see* POPR at 25-28), primary references Mehta and Livneh are materially different from Mehta '705 and Mehta '182, respectively.

Mehta '705 does not include Mehta's FIGS. 9A-9G and 10A-F or the description relating thereto (*see* EX1006 at 27:65-34:54)—which is relevant to the disputed “desired distance” limitations. Those teachings of Mehta (which are absent from Mehta '705) allow a physician to select a distance the needles extend, and, if necessary, to direct further extension of the needles via an appropriate motor control signal. *See id.* at 32:67-33:3, 33:24-27, 33:30-34, FIGS. 10B, 10E; Pet. at 27-28. Patent Owner's contention that Livneh's teachings “were previously

¹ Na '848 is also not among the references the Office considered because it was not identified as prior art but rather as a parent of the '812 patent. *See* EX1002.

before the Office in [Mehta '182]" is incorrect because Livneh's disclosure of an "electrical contact" including an extendable pin is not identified in Mehta '182. *See, e.g.*, EX1010 at [0015]-[0017], [0047], [0049], FIGS. 6-9; Pet. at 72-73. Because Petitioner's primary references include disclosure relevant to the disputed "desired distance" and "electrical contact" limitations not previously presented to the Office, Patent Owner has not met Part 1 of *Advanced Bionics. See Wolfsped, Inc. v. The Tr. of Purdue Univ.*, IPR2022-00761, Paper 13, at 7-8 (PTAB Mar. 30, 2023) (Vidal, K.) (reference not "substantially the same prior art" when it includes disclosure relevant to unpatentability grounds not present in references previously before the Office).

With respect to Part 2 of the *Advanced Bionics* test, even if considered substantially the same, the Examiner did not discuss Mehta '705 or Mehta '182 during prosecution, or otherwise indicate an analysis or evaluation of Mehta '705 or Mehta '182 was conducted. *See Hanshow Am. Inc. v. SES-Imagotag Inc.*, IPR2024-00208, Paper 14, at 11-12 (PTAB May 20, 2024) ("We determine that the signed and initialed IDS, without more, does not indicate that the Office conducted any analysis or evaluation of [the reference]."); *Keysight Techs., Inc. v. Centripetal Networks, Inc.*, IPR2022-01421, Paper 14, at 8 (PTAB Aug. 24, 2023) (Vidal, K.) (holding Examiner's initials in IDS did not support denial in the absence of clear explanation from the Examiner why the document did not impact patentability). To

the extent that Mehta '705 and Mehta '182 are substantially the same as Mehta and Livneh, respectively, the Office misapprehended or overlooked the teachings of those references as explained in the Petition with Mehta and Livneh as primary references, and Part 2 is not met.

II. THE *GENERAL PLASTIC* FACTORS SUPPORT INSTITUTION

A. Factor 1

Petitioner and prior petitioner Cartessa are competitors who sell different products. The Board will apply the *General Plastic* analysis to the second petition if the petitioners have “a significant relationship...with respect to [the challenged patent].” *Valve Corp. v. Elec. Scripting Prods., Inc.*, IPR2019-00062, Paper 11, at 2, 9 (PTAB Apr. 2, 2019) (precedential). Patent Owner relies on Petitioner and Cartessa having been two of 14 co-respondents in a parallel ITC investigation involving the '812 patent. There is no “significant relationship” between them. *See, e.g., Ford Motor Co. v. Neo Wireless LLC*, IPR2023-00763, Paper 28, at 3 (PTAB Mar. 22, 2024) (Vidal, K.) (“[T]he Board does not recognize a ‘significant relationship’ between parties having different accused products that merely engage in court-ordered pretrial coordination.”); *see also, e.g., Qualcomm Inc. v. Monterey Rsch., LLC*, IPR2020-01492, Paper 9, at 16 (PTAB Mar. 8, 2021) (participation in joint-defense group); *Twitter, Inc., v. Palo Alto Rsch. Ctr.*, IPR2021-01458, Paper 11, at 31-33 (PTAB Apr. 6, 2022) (coordinated invalidity positions in litigation).

Patent Owner contends joint submission of a proposed procedural schedule and an invalidity expert report in the ITC evidence a “significant relationship.”² See POPR at 8-9. The ITC-required joint submissions,³ which does not create a “significant relationship.” See *Ford*, IPR2023-00763, Paper 28, at 3. Jeisys and Cartessa had no “interactions or agreements regarding implementation of the accused [technology]...into their respective accused products,” so “other relevant or extenuating facts or circumstances” of *Ford* are absent here. *Id.* at 10-11.

Valve has not been extended to relationships between petitioners accused of infringement based on different products. See, e.g., *Illumina, Inc., v. Ravgen, Inc.*, IPR2021-01271, Paper 12, at 16-17 (PTAB Jan. 26, 2022) (noting “the ‘significant relationship’ in *Valve* turned in large part on the fact that co-defendants and serial petitioners in that case...were each accused of infringement based on the same device.”); *Unified Patents, LLC, v. Torchlight Tech LLC*, IPR2022-01500, Paper 15, at 18 (PTAB May 4, 2023) (holding *Valve* does not apply because petitioners were not accused of infringement based on the same products). Patent Owner's reliance on *Mitek Systems* is misplaced because there the accused activities of

² Patent Owner wrongly argues Jeisys and Cartessa “presented a joint validity defense at the evidentiary hearing.” POPR at 9. Cartessa had settled by November 7, 2023, and did not thereafter participate at the ITC evidentiary hearing or the post-hearing briefing. See EX1023 at 820:13-20; EX2125.

³ See, e.g., EX1024 (joint submission of a procedural schedule); EX1025 at G.R. 2 (motion practice), G.R. 3.1 (discovery).

different petitioners were based on the *same product*. See *Mitek Sys., Inc. v. United Servs. Auto. Assoc.*, IPR2020-00882, Paper 29, at 19-20 (PTAB Nov. 6, 2020).

The relationship between Petitioner and Cartessa is also not “significant” because there was no coordination in any proceeding capable of patent invalidation. “[T]he ITC does not have the authority to invalidate a patent, and thus ITC decisions do not preempt issues addressed in an *inter partes* review proceeding.” *Samsung Elecs. Co. Ltd. v. BitMicro, LLC*, IPR2018-01720, Paper 14, at 26-27 (PTAB Mar. 29, 2019).

B. Factors 2 through 5

The remaining *General Plastic* factors are “necessarily outweigh[ed]” when the different petitioners have no “significant relationship.” *Videndum Prod. Sols., Inc. v. Rotolight Ltd.*, IPR2023-01218, Paper 12, at 6 (PTAB Apr. 19, 2024) (Vidal, K.) (“[W]here, as here, the first and second petitioners are neither the same party, nor possess a significant relationship under *Valve*, *General Plastic* factor one ***necessarily outweighs*** the other *General Plastic* factors.”) (emphasis added); see also *Toshiba Am. Info. Sys., Inc. v. Wallelex Microelectronics Ltd.*, IPR2018-01538, Paper 11, at 21 (PTAB Mar. 5, 2019). *Videndum* is controlling here.

Patent Owner's pre-*Videndum* authority would invite the Board to “improperly expand[] the discretionary principles set forth in *General Plastic* and *Valve*.” *Videndum*, IPR2023-01218, Paper 12, at 6. For example, *Shanghai Lunion*

Info. Techs., Ltd., v. Telefonaktiebolaget LM Ericsson, IPR2018-00995, Paper 12, at 17, 23-24 (PTAB Nov. 13, 2018) and *Shenzhen Silver Star Intelligent Tech. Co., Ltd. v. iRobot Corp.*, IPR2018-00761, Paper 15, at 9-10, 14-15 (PTAB Sept. 5, 2018) (decided prior to *Valve*) found that factor 1 favored institution.

Factors 2 through 5 do not support denial of institution in any event. The Petition presents invalidity grounds that differ from those set forth in the *Cartessa* IPR. “That Petitioner apparently may have reviewed and considered strategies undertaken by prior petitioners on similar issues does not, in and of itself, constitute unfairness to Patent Owner or create a relationship with any of the prior petitioners.” *Micron Tech., Inc. v. Netlist, Inc.*, IPR2022-00418, Paper 14, at 11 (PTAB Sept. 1, 2022). Roadmapping or timing of the Petition therefore should carry little, if any weight. *Samsung Elecs. Co., Ltd. v. MemoryWeb, LLC*, IPR2022-00222, Paper 12, at 11 (PTAB June 13, 2022); *see also Videndum*, IPR2023-01218, Paper 12, at 6.

Patent Owner's litigation strategy resulted in the number and timing of petitions filed against the '812 patent. The Board should institute trial in these circumstances. *See, e.g., Nearmap US, Inc. v. Eagle view Techs., Inc.*, IPR2022-01090, Paper 9, at 9 (PTAB Jan. 12, 2023) (“[I]t is reasonable that Petitioner filed its own Petition after the three previous petitions filed by unrelated parties given that ‘the present litigation dispute between Petitioner and Patent Owner did not

begin until . . . well after the last of the three prior IPR petitions was filed”); *Samsung Elecs. Co. v. Iron Oak Techs., LLC*, IPR2018-01554, Paper 9, at 30 (PTAB Feb. 13, 2019); *Samsung Elecs. Am., Inc. v. Uniloc Luxembourg S.A.*, IPR2017-01797, Paper 8, at 33-34 (PTAB Feb. 6, 2018).

C. Factors 6 and 7

Factors 6 and 7 favor institution. The Petition presents compelling evidence of unpatentability and furthers “the Board’s mission to improve patent quality.” *Code200, UAB v. Bright Data Ltd.*, IPR2022-00861, 2022 WL 3646167, at *3 (PTAB Aug. 23, 2022). The Petition—the only one challenging the ’812 patent now before the Board—provides an efficient means for resolving patentability. *See Micron Tech., Inc. v. Sonrai Memory Ltd.*, IPR2023-00909, Paper 7, at 9 (PTAB Nov. 28, 2023). The Board should review patentability independently of the ITC because the ITC cannot invalidate a patent, and its invalidity rulings are not binding. *See Tandon Corp. v. U.S.I.T.C.*, 831 F.2d 1017, 1019 (Fed. Cir. 1987).

D. Factor 8

Petitioner and Cartessa were not similarly-situated defendants facing the same-in-time hazard from “the same litigation threat at the same time.” Patent Owner’s reliance on *Shenzhen II* (POPR at 23-24) is therefore misplaced. The Petition follows Patent Owner’s ITC complaint against Petitioner, filed almost two years after Patent Owner’s lawsuit against Cartessa.

III. DR. WOLOSZKO'S PRIOR TESTIMONY IS CONSISTENT WITH HIS DECLARATION

The term “desired distance” has the same meaning in all claims, which is simply that needles extending or extendable a desired distance are distinguished from those that extend an undesired distance. That meaning is fully consistent with and supported by the intrinsic evidence cited by Patent Owner. *See* POPR at 34-38.

Patent Owner applies an unduly narrow interpretation of “desired distance” and takes the testimony of Petitioner's expert, Dr. Woloszko, out of context. *See* POPR at 38. Dr. Woloszko testified that there are at least three ways to meet the “desired distance” limitation: (1) selecting a cartridge with needles of a particular length; (2) using a motor to extend the needles to a programmed distance; and (3) adjusting the needle depth by manually checking the needle location. EX2125 at 1151:2-18. He thus explained that the “desired distance” can be met by programming the system to extend the needles to a desired distance *or* by using by non-adjustable needles of “a particular needle length.” *Id.*

Dr. Woloszko's testimony does not support Patent Owner's arguments that the “desired distance” language excludes (1) user selection of a cartridge having needle lengths corresponding to a desired distance and (2) user adjustment of the needle extension distance after an initial extension. *See* POPR at 38, 45-53. But even if the Board adopted Patent Owner's construction of “desired distance” as

based on a user's selection (POPR at 34-37), Mehta and the Mehta-Lee combination disclose this feature as explained in Grounds I and IV of the Petition.

IV. PATENT OWNER'S SECONDARY CONSIDERATIONS DO NOT OVERCOME THE COMPELLING CASE OF OBVIOUSNESS

Patent Owner's evidence of secondary considerations is not relevant to Ground I. Institution should therefore be granted. As for the remaining grounds, the evidence does not overcome a compelling case of obviousness. *Ohio Willow Wood Co. v. Alps S., LLC*, 735 F.3d 1333, 1344 (Fed. Cir. 2013).

Patent Owner did not demonstrate a nexus between its claims and any secondary considerations. It acknowledges that SylfirmX's claimed commercial success is "due *in part* to implementation of the inventions claimed in the '812 Patent." POPR at 65 (emphasis added). It elsewhere argues using bipolar AC RF energy to generate coagulation around microneedle electrodes—the so-called "Na Effect"—is the reason for commercial success. *See Ilooda v. Serendia*, IPR2024-00386, Paper 13, at 61-63. Because the "Na Effect" is not claimed in the '812 patent, Patent Owner's commercial success evidence does not support patentability. *See Ormco Corp. v. Align Technology, Inc.*, 463 F.3d 1299, 1312 (Fed. Cir. 2006) (commercial success due to an unclaimed feature irrelevant).

Nor can a user-selectable needle extension distance provide a nexus, as Patent Owner argues. *See* POPR at 64-65. Patent Owner agrees that this feature

was known via Lee. *See* POPR at 56 (“Lee’s . . . disclosure of a user selection is a ‘mode switch’ that can be pressed to select the mode, which ‘controls . . . the insertion depth of the needles.’”), *Ilooda v. Serendia*, IPR2024-00383, Paper 13, at 57, n. 3 (“Lee is...[an] example of distance control” and “Lee’s modes include the...depth of insertions.”). By attributing the evidence to a known feature, the requisite nexus is absent. *See Rambus Inc. v. Rea*, 731 F.3d 1248, 1257 (Fed. Cir. 2013).

Institution should be granted because the evidence does not establish which features of the challenged claims are responsible for the secondary considerations. *See, e.g., Medtronic, Inc. v. Nuvasive, Inc.*, IPR2014-00074, Paper 15, at 21 (PTAB Apr. 8, 2014). Patent Owner’s reliance on *Semiconductor Component Industries*, *Coalition for Affordable Drugs*, *Merial*, and *Omron*, is also misplaced. The evidence relied on there had previously been used to determine patentability. *See Semiconductor Component Indus. v. Power Integrations, Inc.*, IPR2016-01588, Paper 15, at 28-29 (PTAB Feb. 17, 2017); *Coal. for Affordable Drugs V LLC v. Hoffman-LaRoche Inc.*, IPR2015-01792, Paper 14, at 17-18 (PTAB Mar. 11, 2016); *Merial Ltd. v. Virbac*, IPR2014-01279, Paper 13, at 26-27 (PTAB Jan. 22, 2015); *Omron Oilfield & Marine, Inc. v. MD/TOTCO*, IPR2013-00265, Paper 11, at 12-13 (PTAB Oct. 31, 2013). At minimum, the Board should consider such evidence in light of a fully developed record.

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Respectfully submitted,

Date: June 7, 2024

/s/ Wesley O. Mueller

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Lead Counsel for Petitioners

CERTIFICATE OF SERVICE

The undersigned certifies that a complete copy of this Reply to Patent Owner's Preliminary Response was served via electronic email on Patent Owner's counsel of record listed below, pursuant to its January 26, 2024 Mandatory Notices, on Friday, June 7, 2024:

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