UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ABBOTT LABORATORIES,

Petitioner,

v.

MIRACOR MEDICAL SA,

Patent Owner.

IPR2025-00113
U.S. Patent 11,376,415

PATENT OWNER MIRACOR MEDICAL SA'S REPLY IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE

Petitioner's Response (Paper 33) to Patent Owner's Motion to Exclude Evidence (Paper 32) posits "Dr. Wieselthaler's testimony certainly sheds light as to the **devices** known to the POSA as of the priority date of the Challenged Patent and whether a POSA would have been motivated to combine teachings describing **such devices**." Paper 33 at 6 (emphasis added). But these "devices known to the POSA," i.e., devices that Petitioner's witnesses assert were in public use prior to the claimed inventions, are not prior art that can form the basis of an inter partes review. 35 U.S.C. § 311(b). Petitioner's evidence regarding alleged public uses of the HeartWare HVAD, the Terumo DuraHeart, the Ventracor VentrAssist, the MicroMed DeBakey, and the Jarvik-2000 is irrelevant to the issues properly before the Board and should therefore be excluded. Fed. R. Evid. 401-402.

Petitioner cannot dispute that IPR may be requested "only on the basis of prior art consisting of patents or printed publications," § 311(b), and not on the basis of physical "devices known to the POSA." As such, Petitioner attempts to link Dr. Wieselthaler's and Mr. Crosby's testimony regarding these physical devices to the printed publications on which the Petition was based (and trial was instituted) by arguing that the physical devices "embod[y]" the teachings of the printed publications. *See* Paper 33 at 8-9. These assertions are contradicted by the record, including the testimony of Petitioner's witnesses.

In fact, the evidence demonstrates material differences between the printed publication designs discussed in the Petition and the physical devices that Petitioner's witnesses now assert were known to have been implanted at the apex of the heart. For example, the portion of Wampler's second embodiment that would be required to fit between the heart and the diaphragm for such positioning has a size and shape that is very different from the HeartWare HVAD. *Compare* Ex. 1008 at FIG. 13 *with* Ex. 2024 at 51. Although Dr. Wieselthaler asserted that the HVAD "progressed from the design disclosed in Wampler's Patent" (Ex. 1041 at ¶ 53), he agreed during cross-examination that the HVAD was "not the same device" as the design shown in FIG. 13 of Wampler. Ex. 2028 at 54:13–57:15, 58:3–58:10. And, while Mr. Crosby testified in his Reply Declaration that the HVAD was "largely identical to the Wampler second embodiment" (Ex. 1042 at ¶ 65), he later admitted that he had no idea what the structure of the HVAD was. Ex. 2027 at 36:17–48:13.

Similarly, the Terumo DuraHeart was an altered version of the Akamatsu pump, set up for implantation in a preperitoneal pocket with a perpendicular inflow tube just like the similarly sized Bourque-2001 pump. *Compare* Ex. 1006 *with* Ex. 2026 at 1423, FIGS. 1, 3; *see also* Ex. 2028 at 38:23–40:21 (DuraHeart "was

definitely too big" for pericardial space).[1] Petitioner's evidence regarding alleged public uses of these materially different physical devices sheds no light on how the POSA would have understood the disclosures of Exhibits 1005-1008.

Petitioner also misinterprets the case law it cites to argue that its use of "non-prior art evidence" is permissible. *See* Paper 33 at 5 (citing *Yeda Rsch. v. Mylan Pharms. Inc.*, 906 F.3d 1031, 1041 (Fed. Cir. 2018)). In *Yeda*, the Federal Circuit explained that, while "non-prior art evidence" can play a "supporting role[]" in IPR, it "cannot be applied, independently, as teachings separately combinable with other prior art." *Yeda*, 906 F.3d at 1041. The Court then went on to find that one such improper use was reliance on non-prior art evidence "in deciding whether a POSITA would have had a reasonable expectation of success" in making a proposed modification or combination. *Id.* at 1042. In *Yeda*, however, the Court found this error to be harmless because the Board had already cited numerous prior art references providing the same teaching. *Id.*

Similar to *Yeda*, Petitioner in this case is improperly relying on non-prior art evidence to argue that the POSA would have had found it obvious to make its

[1] Although not part of his direct testimony, Dr. Wieselthaler also speculated on cross-examination that the DuraHeart might fit "in a subdiaphragmal position"—but he then admitted he had never attempted such positioning. Ex. 2028 at 40:8-21.

proposed modifications to the prior art, including moving the pump of Bourque-2001 (Ex. 1007) from its preperitoneal pocket to the apex of the heart in view of Wampler (Ex. 1008), as asserted in Petitioner's Ground 2. *See* Exhibit 2029 (citing relevant passages from the Petition and Exhibit 1003). Unlike *Yeda*, however, this improper reliance cannot be considered "harmless" because there is no printed publication in the record that discloses implantation at the apex of the heart for a pump with the size and shape taught in Bourque-2001.

Petitioner's evidence regarding alleged public uses of the HeartWare HVAD, the Terumo DuraHeart, the Ventracor VentrAssist, the MicroMed DeBakey, and the Jarvik-2000 is ultimately irrelevant to the question before the Board: whether the POSA would have found the challenged claims to be obvious in view of Exhibits 1005-1008. For the reasons discussed above, and in Patent Owner's Motion (Paper 32), this inadmissible evidence should be excluded.

Respectfully submitted,

Date: February 17, 2026

/ Joshua P. Larsen /

Joshua P. Larsen
Reg. No. 62,761

Lead Counsel for Patent Owner
Miracor Medical SA

Barnes & Thornburg LLP
11 South Meridian Street
Indianapolis, Indiana 46204
Telephone: (317) 231-6422

Facsimile: (317) 231-7433
E-mail: joshua.larsen@btlaw.com

CERTIFICATE OF SERVICE

Under 37 C.F.R. § 42.6(e), the undersigned certifies that on this 17th day of February 2026, I caused a true and correct copy of the foregoing PATENT OWNER MIRACOR MEDICAL SA'S REPLY IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE to be served via e-mail on the following counsel of record for Petitioner:

Scott M. Border
sborder@winston.com
Charles B. Klein
cklein@winston.com
Saranya Raghavan
sraghavan@winston.com
Nimalka R. Wickramasekera
nwickramasekra@winston.com

/ Joshua P. Larsen /
Joshua P. Larsen
Reg. No. 62,761

Lead Counsel for Patent Owner
Miracor Medical SA