UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ABBOTT LABORATORIES,
Petitioner

v.

MIRACOR MEDICAL SA,
Patent Owner.

IPR2025-00114
U.S. Patent No. 11,572,879

PETITIONER ABBOTT LABORATORIES RESPONSE TO PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

Patent Owner ("PO")'s experts incorrectly assert that, as of the priority date of the '879 Patent (the "Challenged Patent"), implanting an LVAD at the apex of the heart would be "impossible." Paper 27, Petitioner Reply at 30 (citing Ex.2015, ("Leschinsky") ¶156; Ex.2017, ("Gallegos") ¶51). In response, Petitioner—and its experts Mr. Crosby and Dr. Wieselthaler—identified numerous contemporaneous printed publications evidencing the opposite: LVADs had, in fact, been implanted in humans at the apex of the heart years before the priority date of the Challenged Patent. *See, e.g.*, Ex.1044. Those publications formed the foundation for Mr. Crosby's and Dr. Wieselthaler's opinions rebutting the notion that a POSA would not have been motivated to combine Bourque (Ex.1007) and Wampler (Ex.1008). *See, e.g.*, Ex.1041, ¶¶46–83 (citing Exhibits 1015, 1044, 1046, and 1050); Ex.1042, ¶¶103–121 (citing Exhibits 1015, 1044, 1046, and 1050). Moreover, introducing those publications as evidence in this proceeding was both timely and within the proper scope of Petitioner's reply[1]—as the Federal Circuit has regularly

[1] Because Petitioner filed its replies more than a month ago, on December 22, 2025, and the Oral Hearing is less than three weeks away (i.e., February 25, 2026), the time to move to strike any allegedly improper evidence or arguments accompanying Petitioner's replies has long-since expired. *See* PTAB Trial Practice

held, "the petitioner in an *inter partes* review proceeding may introduce new evidence after the petition stage if the evidence is a legitimate reply to evidence introduced by the patent owner." *Apple Inc. v. Andrea Elecs. Corp.*, 949 F.3d 697, 706–07 (Fed. Cir. 2020) (quoting *Anacor Pharm., Inc. v. Iancu*, 889 F.3d 1372, 1380–81 (Fed. Cir. 2018). Thus, those publications are properly before the Board, and PO identifies no ***evidentiary reason*** why they should be excluded.

Because Petitioner demonstrated that PO's experts' testimony is "plainly inconsistent with the record" and should therefore be disregarded, *Homeland Housewares, LLC v. Whirlpool Corp*., 865 F.3d 1372, 1378 (Fed. Cir. 2017), PO attempts to exclude Petitioner's record evidence based on a pretense—that Petitioner's experts' opinions are based on "physical devices." Initially, even if that were true, it is irrelevant—Federal Rule of Evidence would plainly permit such testimony. And critically, PO's motion identifies no "physical devices" that it seeks to exclude—it instead seeks to exclude several printed publications and the

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Guide at 81 ("Generally, authorization to file a motion to strike should be requested within one week of the allegedly improper submission."); *see also Activision Blizzard, Inc. et al. v. Acceleration Bay LLC*, IPR 2015-01964, Paper 82 at 3 (PTAB Nov. 18, 2016) (denying authorization to file a motion to strike less than three weeks from Oral Hearing as untimely).

related testimony. PO's self-defeating motion is in reality a dispute as to the weight the PTAB should afford the testimony that demonstrates the unreliability of PO's own experts' opinions, which is not the proper basis of a motion to exclude.

For these reasons and all the reasons demonstrated below, PO's motion to exclude Exhibits 1041, 1042, 2028, 1015, 1038, 1044, 1046, 1049, and 1050 (and the related testimony) should be denied.

I. ARGUMENT

A. Underlying Exhibits 1015, 1038, 1044, 1046, 1049, and 1050 Are Admissible Evidence.

PO's attempt to bar the admission of Exhibits 1015, 1038, 1044, 1046, 1049, and 1050 for being evidence of a "physical device" is nonsensical. Mot. at 7. *First*, "physical device" evidence is not a legal term rooted in patent law or before this Board, and PO has not asserted any such definition other than to point to 35 U.S.C. § 311(b). Mot. at 4, 7. Indeed, under PO's logic, any patent or publication contemplated by 35 U.S.C. § 311(b) that describes a device would be unavailable for use in *inter partes* review proceedings—a plainly absurd result. It is thus unsurprising that PO could not find legal support for this novel argument.

Second, 35 U.S.C. § 311(b) states only that the ***ground*** for the IPR must be based on "prior art consisting of patents or printed publications." None of these exhibits serve as the basis for any ground asserted in this IPR. Rather, as PO concedes, these contemporaneous publications expressly underly Dr.

Wieselthaler's and Mr. Crosby's ***rebuttal*** opinions to PO's arguments regarding a ***motivation to combine*** certain prior art. Mot. at 7; *see also infra* § I.B.2. They are not the "prior art consisting of patents or printed publications" that form the grounds identified in the Petition. Thus, 35 U.S.C. § 311(b) is inapplicable here.

B. Dr. Wieselthaler's and Mr. Crosby's Testimony Are Admissible Under FRE 702.

PO's Motion also lacks a substantiated reason to exclude Dr. Wieselthaler's and Mr. Crosby's expert opinions. Even assuming their opinions were based solely on "physical device" evidence, which they are not, it is well-established that Federal Rule of Evidence 702 permits qualified expert witnesses like Dr. Wieselthaler and Mr. Crosby to render opinions based on such evidence and their personal knowledge. Regardless, both expert's opinions are also corroborated by numerous contemporaneous printed publications.

1. As qualified experts, Dr. Wieselthaler and Mr. Crosby may opine based on their experience in the field.

PO asserts that because Dr. Wieselthaler's and Mr. Crosby's testimony was purportedly based on the evidence found in Exhibits 1015, 1038, 1044, 1046, 1049, and 1050—and such evidence is so-called "physical device evidence"—such testimony is unreliable in violation of FRE 702. Mot. at 7. Decades of case law says otherwise.

First, PO does not contend that Exhibits 1015, 1038, 1044, 1046, 1049, and 1050, even if they are "physical device evidence" (they are not), are unreliable. Mot. at 7. Instead, PO only contends that "physical device evidence" is inadmissible, and thus, the underlying evidence is unreliable. Mot. at 7. But PO provides no support for this notion.

Moreover, even assuming such exhibits were inadmissible (they are not), qualified experts may testify "to the state of relevant technological developments within the field of endeavor that may inform a POSA's understanding and application of the prior art at issue [without] corroboration by other documentary evidence." *DraftKings Inc., a Delaware Corporation v. Interactive Games LLC*, IPR2020-01107, Paper 39 at 17 (PTAB Jan. 4, 2022) (citing Fed. R. Evid. 702) (denying motion to exclude). This includes "non-prior art evidence" for indication of "the level of ordinary skill in the art, what certain terms would mean to one with ordinary skill in the art, and how one with ordinary skill in the art would have under-stood a prior art disclosure." *Yeda Rsch. v. Mylan Pharms. Inc.*, 906 F.3d 1031, 1041 (Fed. Cir. 2018) (quoting *Dominion Dealer Sols., LLC v. AutoAlert, Inc.*, IPR2014-00684, 2014 WL 5035359, at *5 (PTAB Oct. 6, 2014)). PO does not object as to whether Dr. Wieselthaler or Mr. Crosby are qualified experts in the field of LVADs, so that argument is waived. Thus, the testimony of both experts is

admissible without any additional corroboration, be that by non-"physical device evidence" or otherwise.

Finally, as discussed above and conceded by PO in its Motion, the portions of Dr. Wieselthaler's and Mr. Crosby's opinions that PO seeks to exclude are ***rebuttal*** testimony further supporting their opinions that a POSA would have been ***motivated to combine*** certain prior art. Mot. at 7; *infra* § I.B.2. It is therefore confusing as to why PO complains that "[r]ather than focus on how a POSA would understand the actual disclosures of Bourque-2001 and Wampler … Dr. Wieselthaler instead testifies at length regarding various physical devices allegedly known to the POSA around the time of the invention." Mot. at 3. It is well-settled law that whether a POSA would be motivated to combine prior art teachings is dependent on a POSA's "good reason to pursue the known options within his or her technical grasp." *Shockwave Med., Inc. v. Cardiovascular Sys., Inc.*, 142 F.4th 1371, 1384 (Fed. Cir. 2025) (quoting *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 421 (2007)).

Again, PO has not preserved an objection that Dr. Wieselthaler is not a POSA, and 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 be motivated to combine teachings describing such devices. In any event, rebuttal testimony regarding a motivation to combine is not evidence of

whether any physical device or other reference discloses the asserted claim limitations, and thus the applicability of 35 U.S.C. § 311(b) is ultimately irrelevant.

PO also argues that the "physical device" evidence and related testimony "presents substantial danger of confusing the issues, causing undue delay, and wasting time in this trial—and should therefore be excluded." Mot. at 7. Even if true (it is not), "[t]he policy considerations for excluding expert testimony, such as those implemented by the gatekeeping framework established by the Supreme Court in *Daubert*, are less compelling in bench proceedings, such as *inter partes* reviews, than in jury trials." *Legend3D, Inc. v. Prime Focus Creative Services Canada Inc.*, IPR 2016-00806, Paper 73 at 10–11 (PTAB Sept. 18, 2017) (denying request to exclude); *see also VirnetX Inc. v. Apple Inc.*, 665 F. App'x 880, 884 (Fed. Cir. 2016) ("PTAB 'members, because of expertise, may more often find it easier to understand and soundly explain the teachings and suggestions of prior art without expert assistance.'"). PO's concerns are thus unwarranted.

2. Regardless, both Dr. Wieselthaler's and Mr. Crosby's opinions are also corroborated by printed prior art and Patent Owner's own experts.

In any event, contrary to PO's assertions, both Dr. Wieselthaler's and Mr. Crosby's opinions and testimony are also corroborated by evidence other than the purported "physical device evidence." Mot. at 4–6. In addition to contemporaneous

printed publications, Dr. Wieselthaler's and Mr. Crosby's opinions and testimony are corroborated by PO's own experts.

For instance, PO's expert, Dr. Gallegos, agrees that the HVAD was implanted in humans before the priority date and that its design progressed from the Wampler design. Ex.1045, Gallegos Tr. 103:25-104:6 (explaining that "the HeartWare HVAD is a Wampler pump"). And while PO argues in its Motion that that "Wampler and the HeartWare HVAD were different pumps," (Mot. at 4), the record evidence explains that these related designs all used the same critical feature—an axially aligned "inlet tube serves as the inflow cannula and is placed into the apex of the left ventricle." Ex.1008 (Wampler), [0075]; Ex.1015 (the HVAD "has a short integrated inflow cannula" and "the perpendicular relationship of outflow to the inflow allows for intrapericardial pump placement"); Ex.1038 (same); Ex.1044 (the HVAD's "integrated inflow cannula" allows for "implanta[tion] in the pericardial space."). As such, Dr. Wieselthaler's testimony regarding the HVAD pump is well-founded and supports his opinions regarding motivations to combine the cited prior art. *Cf.* Mot. at 4–5 (citing Ex.1041, ¶¶53, 75-76; Ex.2028, 54:13–57:15, 58:3–58:10).

Likewise, PO mischaracterizes Dr. Wieselthaler's testimony regarding the DuraHeart. Mot. at 6 (citing Ex.2028, 38:23-40:21). Dr. Wieselthaler's comments regarding the DuraHeart being "definitely too big" was only in reference to

placement in the pericardial space—not for all forms of implantation at the apex of the heart. Ex. 2028, 40:8-15. Indeed, Dr. Wieselthaler clarified that "these pumps," including the DuraHeart and VentrAssist, could be placed "in [the] apical cannulation … in a subdiaphragmal position." Ex.2028, 40:8-15. Akamatsu (Ex.1006), which Mr. Crosby opined is embodied by the DuraHeart, corroborates such positioning. Ex.1006, Fig. 1; Ex.1042, ¶¶107, 112–13.

Ultimately, PO's arguments are not evidentiary issues. Rather, they are unfounded assertions that Dr. Wieselthaler's and Mr. Crosby's testimony is contradictory to the record evidence and to one another. Mot. at 4–6. Put another way, PO disputes the ***weight*** that should be given to Petitioners' experts' testimony and underlying exhibits. But the PTAB "is capable of weighing [Petitioners' experts] testimony against the other evidence considered" in this proceeding. *Legend3D*, IPR 2016-00806, Paper 73 at 11. "A motion to exclude is not a vehicle for addressing the weight to be given evidence—arguments regarding weight should appear only in the merits documents," and thus PO's motion to exclude should be denied. PTAB Trial Practice Guide at 79.

II. CONCLUSION

For the foregoing reasons, the Board should deny Patent Owner's Motion to Exclude in its entirety.

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Respectfully Submitted,

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I hereby certify that on February 10, 2026, I caused to be served a true and correct copy of the foregoing and any accompanying exhibits by priority mail on the following:

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