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Paper 11
Entered: March 7, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GLOBUS MEDICAL, INC.,
Petitioner,

v.

FLEXUSPINE, INC.,
Patent Owner.

Case IPR2015-01795
Patent 8,647,386 B2

Before WILLIAM V. SAINDON, HYUN J. JUNG, and TIMOTHY J. GOODSON, *Administrative Patent Judges*.

SAINDON, *Administrative Patent Judge*.

DECISION
Institution of *Inter Partes* Review
37 C.F.R. § 42.108

I. INTRODUCTION

Petitioner requests an *inter partes* review of claims 1–4 of U.S. Patent No. 8,647,386 B2 (Ex. 1001, "the '386 patent"). Paper 1 ("Pet."). Patent Owner filed a Preliminary Response to the Petition. Paper 9 ("Prelim. Resp.").

We have jurisdiction under 35 U.S.C. § 314, which provides that an *inter partes* review may not be instituted "unless . . . there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." Upon consideration of the Petition, the exhibits cited therein, and Patent Owner's Preliminary Response, we institute an *inter partes* review of all challenged claims.

Our factual findings and conclusions at this stage of the proceeding are based on the evidentiary record developed thus far. This is not a final decision as to the patentability of claims for which *inter partes* review is instituted. Our final decision will be based on the record as fully developed during trial.

A. Related Matters

Petitioner represents that it has been accused of infringement of the '386 patent in *Flexuspine, Inc. v. Globus Medical, Inc.*, Case 15-cv-00201-JRG-KNM (E.D. Tex.). Pet. 2–3; Paper 4, 2. Petitioner also represents that it has simultaneously requested *inter partes* reviews of several other patents owned by Patent Owner. Pet. 3.

B. Illustrative Claim

Independent claim 1 is the sole independent claim challenged by Petitioner and is reproduced below.

1. An intervertebral implant system for a human spine, comprising:

a first body comprising:

a first external surface configured to be disposed adjacent a first vertebra during use; and

a first internal surface opposite the first external surface;

a second body comprising:

a second external surface configured to be disposed adjacent a second vertebra during use, and

a second internal surface opposite the second external surface;

an elongated insertion instrument releasably couplable to the first or second body during use; and

a spacer linearly advanced between the first internal surface of the first body and the second internal surface of the second body during use, wherein the elongated insertion instrument guides at least a portion of the linear advancement of the spacer after the first and second bodies have been disposed substantially between the first and second vertebrae from a position remote to the first and second bodies during use, and wherein the linear advancement of the spacer results in expansion of the intervertebral implant such that the first external surface and the second external surface move away from one another to expand a height of the implant.

C. Prior Art and Asserted Grounds

Petitioner challenges claims 1–4 under 35 U.S.C. § 103 as unpatentable over U.S. Patent No. 6,595,998 B2 to Johnson, issued July 22, 2003 (Ex. 1004, "Johnson") and the knowledge of one of ordinary skill in

the art. Pet. 13–49. Petitioner also relies on the testimony of Jorge A. Ochoa, Ph.D., P.E. (Ex. 1005).

II. ANALYSIS

A. Claim Construction

We interpret the claims of an unexpired patent using the broadest reasonable interpretation in light of the specification of the patent. 37 C.F.R. § 42.100(b); *In re Cuozzo Speed Techs., LLC*, 793 F.3d 1268, 1278 (Fed. Cir. 2015), *cert. granted sub nom. Cuozzo Speed Techs., LLC v. Lee*, 84 U.S.L.W. 3218 (U.S. Jan. 15, 2016) (No. 15-446). Under the broadest reasonable interpretation standard, claim terms are given their ordinary and customary meaning, as would be understood by one of ordinary skill in the art in the context of the entire disclosure. *In re Translogic Tech. Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007). Any special definition for a claim term must be set forth with reasonable clarity, deliberateness, and precision. *In re Paulsen*, 30 F.3d 1475, 1480 (Fed. Cir. 1994).

1. "first body"

Petitioner first argues that the "first body" limitation is a "recitation[] of the intended use for the claimed apparatus" and "is not material to patentability." Pet. 18–19. We disagree because the claim is directed to a structure—a body—and that body is claimed to have certain features by being "configured to be disposed adjacent a first vertebra during use." Although broad, the "configured to" limitation precludes those structures not capable of being disposed adjacent a vertebra. *See K-2 Corp. v. Salomon S.A.*, 191 F.3d 1356, 1363 (Fed. Cir. 1999) ("the functional language tells us

something about the structural requirements of the attachment between the bootie and the base [of an inline skate] . . . .").

Petitioner's alternative argument as to why Johnson teaches this limitation, in the event it is given weight, sheds light on Petitioner's interpretation of this limitation. Petitioner argues that a person of ordinary skill in the art "would have understood that . . . the wafer columns . . . would be supported between the bone surfaces." Pet. 19. In other words, Petitioner is reading the claimed "first body" on the uppermost wafer in the stack of wafers depicted in Figure 37 of Johnson. The following annotated version of Figure 37 of Johnson illustrates Petitioner's position:

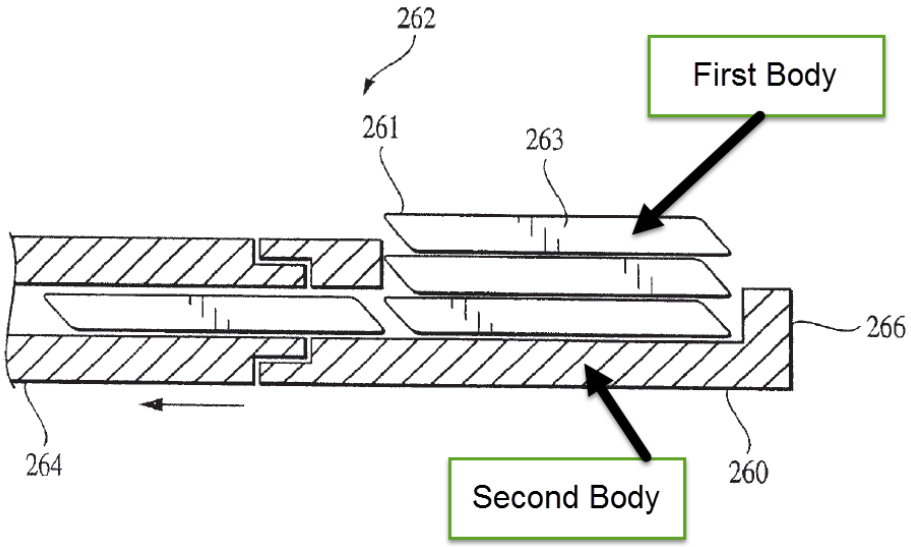

FIG. 37

Figure 37 of Johnson depicts detachable tip wafer inserter 260, wherein wafers 263 are inserted to distract and support tissue, such as vertebrae. Ex. 1004, 4:54–65, 17:47–50, 21:26–33. Petitioner has identified detachable tip 260 as the claimed second body and wafer 263 as the claimed first body. *See, e.g.*, Pet. 20 (noting identifications on annotated figure).

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