

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ABIOMED, INC., ABIOMED R&D, INC., and
ABIOMED EUROPE GMBH,
Petitioner,

v.

MAQUET CARDIOVASCULAR, LLC,
Patent Owner.

IPR2017-01201; IPR2017-01202; IPR2017-01203 (Patent 9,545,468 B2)
IPR2017-01204 and IPR2017-01205 (Patent 9,561,314 B2)

Before BART A. GERSTENBLITH, JEREMY M. PLENZLER, and
KEVIN W. CHERRY, *Administrative Patent Judges*.

CHERRY, *Administrative Patent Judge*.

DECISION
Denying Petitioner's Requests for Rehearing
37 C.F.R. § 42.71

IPR2017-01201; IPR2017-01202; IPR2017-01203 (Patent 9,545,468 B2)
IPR2017-01204 and IPR2017-01205 (Patent 9,561,314 B2)

I. INTRODUCTION

Abiomed, Inc., Abiomed R&D, Inc., and Abiomed Europe GmbH (collectively, “Petitioner”) filed Petitions to institute an *inter partes* review of various claims from U.S. Patent No. 9,545,468 B2 (“the ’468 patent”), and U.S. Patent No. 9,561,314 B2 (“the ’314 patent”). IPR2017-01201, Paper 1 (“’1201 Pet.”)¹; IPR2017-01202, Paper 1 (“’1202 Pet.”)²; IPR2017-01203, Paper 6 (“’1203 Pet.”)³; IPR2017-01204, Paper 2 (“’1204 Pet.”)⁴; IPR2017-01205, Paper 2 (“’1205 Pet.”)⁵. In our Decisions Denying Institution, we determined that Petitioner failed to establish a reasonable likelihood of prevailing at trial on any of its asserted challenges in any of the Petitions listed above. *See, e.g.*, IPR2017-01201, Paper 8 (“Decision” or “Dec.”). Petitioner requests rehearing of those Decisions. IPR2017-01201, Paper 9 (“Request” or “Req. Reh’g”).⁶ Having considered Petitioner’s arguments, Petitioner’s Request is denied for the reasons provided below.

¹ The ’1201 Petition challenges claims 1–3, 5, 6, 8, 14, 16, 18, 20, and 21 of the ’468 patent.

² The ’1202 Petition challenges claims 4, 7, 10–13, 15, 17, and 19 of the ’468 patent.

³ The ’1203 Petition challenges claims 22–24 and 26 of the ’468 patent.

⁴ The ’1204 Petition challenges claims 1–8, 10–23, 25, and 26 of the ’314 patent.

⁵ The ’1205 Petition challenges claims 27, 29, and 30 of the ’314 patent.

⁶ A separate request for rehearing was filed in each of IPR2017-01201, IPR2017-01202, IPR2017-01203, IPR2017-01204, and IPR2017-01205. Each of those requests for rehearing is effectively identical to that filed in IPR2017-01201. For simplicity, this decision references specifically the Request from IPR2017-01201, with the understanding that the discussion applies equally to the other proceedings. References to the record are to IPR2017-01201, unless otherwise noted.

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II. STANDARD OF REVIEW

When considering a request for rehearing, the Board reviews its decision for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may arise if the decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if an unreasonable judgment is made in weighing relevant factors. *Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005); *Arnold P'ship v. Dudas*, 362 F.3d 1338, 1340 (Fed. Cir. 2004); *In re Gartside*, 203 F.3d 1305, 1315–16 (Fed. Cir. 2000). We further note that 37 C.F.R. § 42.71(d) states:

The burden of showing a decision should be modified lies with the party challenging the decision. The request must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed in a motion, an opposition, or a reply.

III. ANALYSIS

Initially, we note that our Decision was not an independent assessment of all evidence in the record to determine whether the challenged claims would have been obvious. Rather, the Decision to deny institution of *inter partes* review was based on Petitioner's failure to establish a reasonable likelihood of success at trial *based on the arguments presented in the Petition*, and the *evidence relied upon in support of those particular arguments*. Petitioner has the burden of showing, in its petition, a reasonable likelihood that it would prevail. 35 U.S.C. § 314(a). That reasonable likelihood is measured by considering the analysis offered by Petitioner. 37 C.F.R. § 42.104(b) (setting forth the requirements of a petition, including specificity and identification of support).

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In its Request, Petitioner contends that our Decision includes “factual findings regarding Aboul-Hosn FIGS. 3 and 23 [that] are not supported by any evidence,” “represents unreasonable judgment in weighing relevant factors,” and “is based on an erroneous interpretation of the law.” Req. 2. The contentions laid out in the Request essentially boil down to disagreement with our Decision. That disagreement is with respect to whether Aboul-Hosn expressly discloses that the pump in Figures 1–13 is included in Figure 23. *See, e.g., id.* at 4 (“Aboul-Hosn also expressly confirms that the pump of FIG. 3 is used in the manner described for FIG. 23 because, as Dr. Collins explained: ‘Aboul-Hosn **expressly discloses** that the pump 420 would include the pump system and its components shown in FIGS. 1–13, **expressly recognizing** that the pump system in FIGS. 1–13 can also be introduced into the body percutaneously.’”) (citing Ex. 1002 ¶ 147).

There is no express disclosure from Aboul-Hosn identified by Petitioner, in the Petition, or even in its Request, that the pump in Figures 1–13 is included in Figure 23. In fact, and as noted in our Decision (Dec. 11), Aboul-Hosn expressly states that “Figure[] 23 . . . illustrate[s a] different embodiment[] of the present invention” (Ex. 1004, 30:20–21). Petitioner faults our characterization of the above passage from Aboul-Hosn, noting “[t]he ellipses, missing language and brackets are materially important.” Req. 12. Petitioner contends that “[t]he Board’s errant paraphrase gives the misimpression that Figure 23 is an entirely different invention than any other in Aboul-Hosn. But, in context, the meaning is different. Figure 23 is a different embodiment than Figure 24.” *Id.* The entire sentence spanning lines 20–21 on page 30 of Aboul-Hosn reads: “Figures 23 and 24 illustrate two different embodiments of the present invention.” Ex. 1004, 30:20–21.

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We are not persuaded that we misread that sentence. That sentence specifically references Figures 23 and 24 as *two* different embodiments, meaning that Figures 23 and 24 are *each* different embodiments, not only with respect to one another, but also with respect to the other embodiments disclosed.⁷

Contrary to Petitioner’s contentions, we considered the arguments and supporting evidence presented in the Petition and determined it insufficient to institute trial. *See, e.g.*, Dec. 11–12 (“Ultimately, the ’1201, ’1202, and ’1203 Petitions are deficient because of the failure to explain sufficiently and support the challenges therein.”). We are not persuaded that we abused our discretion in reaching that determination.⁸ Disagreeing with our Decision is not, by itself, an appropriate basis for rehearing.

IV. ORDER

For the reasons given, it is

ORDERED that Petitioner’s Requests for Rehearing in IPR2017-01201, IPR2017-01202, IPR2017-01203, IPR2017-01204, and IPR2017-01205 are *denied*.

⁷ Even if Aboul-Hosn’s statement was intended only to contrast Figure 23 with Figure 24, the Petition remains deficient for failing to establish sufficiently that Figure 23 is part of the Figure 1–13 embodiment or provide a sufficient rationale to modify the embodiments disclosed in Aboul-Hosn. *See* Dec. 10–11.

⁸ Petitioner includes additional argument in its Request directed to rationale for the combination of Aboul-Hosn’s teachings from Figures 1–13 with those from Figure 23. In the Petition, Petitioner did not propose sufficient rationale for combining the various teachings from Aboul-Hosn with one another. *See* Dec. 11.

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