UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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C.R. BARD, INC.
Petitioner,

v.

MEDICAL COMPONENTS, INC.
Patent Owner

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Case IPR2015-01660
Patent 8,257,325 B2

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PETITIONER'S REQUEST FOR REHEARING PURSUANT TO 37 C.F.R § 42.71(d)

Mail Stop PATENT BOARD, PTAB
Commissioner for Patents
P.O. Box 1450
Alexandria, VA 22313-1450

Pursuant to 37 C.F.R. § 42.71(d), Petitioner C.R. Bard, Inc. hereby requests rehearing of the Board's Decision Denying Institution of *Inter Partes* Review 37 C.F.R. § 42.108 (Paper 9, February 9, 2016)("Decision").

I. INTRODUCTION

Petitioner respectfully submits the Board overlooked or misapprehended important points regarding the '325 patent (Ex.1001), the prior art, Mr. Tallarida's testimony (Ex.1009), and the knowledge of a person of ordinary skill in the art at the time of invention ("POSA"), such that the Board improperly concluded that the information presented does not show that there is a reasonable likelihood that Petitioner would prevail in establishing that any of the challenged claims of the '325 patent are unpatentable. Paper 9, p.2.

II. IMPORTANT POINTS OVERLOOKED OR MISAPPREHENDED

A. The Board Overlooked And Misapprehended That The '325 patent Describes An Access Port That Can Be Constructed To Include X-ray Discernable Indicia Indicating That The Assembly Is Rated For Power Injection

The Board stated that "[t]he Petition and Mr. Tallarida's cited testimony do not explain how the Titanium Implanted Port of PORTS would have been modified so as to be rated for power injection, nor do they point to any disclosure in Powers that would have suggested how such a modification would have been made." Paper 9, p. 12. The Board overlooked and misapprehended that the '325 patent does not disclose how to construct an access port, and only provides general information

regarding the elements of an access port. (Ex.1001).

The '325 patent is directed to "a venous access port assembly that provides a medical practitioner with the capability to discern an important property of the port assembly after the port assembly has been implanted into a patient." Ex.1001, 1:33-36. "One such characteristic could be power injectable capability; that is, an indication that the venous access port is rated for the power injection of contrast fluid. Power injection capability can be indicated with the letters 'CT,' for 'computed tomography,' or 'contrast enhanced computed tomography.'" Ex.1001, 1:59-64. Thus, the ports disclosed in the '325 patent could be constructed with indicia, such as letters "CT", to show the port is rated for power injection.

The '325 patent, being written with respect to a POSA, does not provide details regarding port construction or use, but discloses general structure of access ports. Ex.1001, 3:24-45. A patent need not teach, and preferably omits, what is well known in the art. *In re Buchner,* 929 F.2d 660, 661 (Fed. Cir. 1991); *Hybritech, Inc. v. Monoclonal Antibodies, Inc.,* 802 F.2d 1367, 1384 (Fed. Cir. 1986); and *Lindemann Maschinenfabrik GMBH v. American Hoist & Derrick Co.,* 730 F.2d 1452, 1463 (Fed. Cir. 1984).

The '325 patent discloses similar structures to the Titanium Implanted Port including an access port with a flange that can be constructed to include X-ray discernable indicia. Pet. 24-26. Power injectable ports and rating of ports as being

power injectable, such as by the use of letters "CT", were clearly known at the time the application for the '325 patent was filed. Thus, it was well within the knowledge of a POSA how to construct a port to withstand the high pressures and flow rates used for injection of contrast fluid, such as disclosed by Powers, so that the port could be rated as power injectable. Ex.1009, ¶¶148,196-198; Pet.7, 31.

Like the '325 patent, each of PORTS, Powers and PowerPort discloses access ports. Pet. 18-21. Powers and PowerPort disclose power injectable ports. Pet. 20-21, 29. Because the Board overlooked the limited disclosure of the '325 patent, and that it does not distinguish between conventional access ports and access ports that can be marked as rated for power injection, the Board misapprehended the knowledge of a POSA, and that the '325 patent was written with respect to the knowledge of a POSA.

B. The Board Overlooked And Misapprehended The Knowledge Of A POSA, And That A POSA Would Have Known How To Modify A Conventional Access Port So As To Be Rated For Power Injection.

The claims of the '325 patent are directed to an access port assembly with indicia that the assembly is rated for power injection. Indeed, the '325 patent discloses and claims structures having the same elements as the Titanium Implanted Port, *e.g.,* a base, a flange, a reservoir and a septum. *Compare* Titanium Implanted Port (Ex.1002) with '325 patent (Ex.1001), Fig. 5; Ex.1009, ¶¶26-36, 47-75; Pet. 12, 24. Moreover, power injectable and non-power injectable ports

comprise similar structures, such that a POSA would have known that a Titanium Implanted Port could be constructed to handle power injection as taught by Powers. Ex.1009, ¶165.

As discussed in the Section A above, the '325 patent does not disclose how to modify conventional access port structures to be rated for power injection. All that the '325 patent discloses is that the port can include indicia that it is rated for power injection, *i.e.,* constructed as a power port by being rated for power injection. The '325 patent does not disclose how to make or use power injectable ports. Rather, the '325 patent merely discloses that a port can have indicia visible by X-ray examination, identifying a characteristic of the port. One such characteristic could be power injectable capability.

No distinction is made in the '325 patent between the structures of power injectable and non-power injectable ports:

> Venous access ports for the infusion and/or withdrawal of fluids from a patient are well-known, secured to the proximal end of an implanted catheter. …. The ports are assemblies of a needle-impenetrable housing with a discharge port in fluid communication with a catheter and a reservoir within the port housing, and provide a subcutaneous self-sealing septum that defines an access site for multiple needle sticks through the covering skin tissue of the patient, through the septum, and into the reservoir, without the need to continuously search for new access sites. Examples of such ports are disclosed, for

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