UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DEXCOM, INC.,
Petitioner,

v.

WAVEFORM TECHNOLOGIES, INC.,
Patent Owner.

Case IPR2016-01679 (Patent 7,146,202 B2)
Case IPR2016-01680 (Patent 8,187,433 B2)

Record of Oral Hearing
Held: December 7, 2017

Before ERICA A. FRANKLIN, JON B. TORNQUIST, and ELIZABETH M. ROESEL, *Administrative Patent Judges.*

APPEARANCES:

ON BEHALF OF THE PETITIONER:
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The above-entitled matter came on for hearing on Thursday, December 7, 2017, commencing at 10:00 a.m., at the U.S. Patent and Trademark Office, 600 Dulany Street, Alexandria, Virginia.

P R O C E E D I N G S

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JUDGE ROESEL: We will now hear argument in case numbers IPR2016-01679 and 01680, Dexcom, Inc., versus WaveForm Technologies, concerning U.S. patent number 7,146,202 and 8,187,433. Would counsel please introduce yourselves, starting with petitioner.

MR. GRIFFITH: Your Honor, Calvin Griffith with Jones Day on behalf of the petitioner, Dexcom, Inc. And with me is Matthew Johnson, also with Jones Day, and our technical assistant, Alan Eaton.

JUDGE ROESEL: Thank you.

MR. EADS: Good morning, Scott Eads from the Schwabe, Williamson & Wyatt law firm on behalf of the patent owner, WaveForm Technologies, Inc. And I'm here with Karri Bradley, also from Schwabe Williamson, and with our technical, Laura Rochellis.

JUDGE ROESEL: Thank you. So today, according to our November 8, 2017, order, each side will have one hour total to present its arguments regarding both of the IPRs before us today. Petitioner will argue first and may reserve rebuttal time. And patent owner may not reserve rebuttal time.

So the parties are reminded that this hearing is open to the public and a full transcript of it will become part of the record. If either party wishes to touch on confidential information that is the subject of a motion to seal, counsel are asked to please alert the panel or if you see the other side is going to touch on such information, we can discuss how to handle that at the time.

Each party has filed objections to the other side's demonstrative slides. So patent owner's objections to petitioner's slides 30, 31, 32 and 48 are tentatively sustained on the basis that they contain evidence or arguments not presented in the briefing. Patent owner's remaining objections are overruled.

Petitioner's objections to patent owner's slide 39, the second bullet, and slides 40, 58, 59, 65 and 66 are tentatively sustained on the basis stated in petitioner's objections. So neither party may refer to the slides that I have just listed unless they first present an argument that convinces us to overrule the objection. So as a courtesy, counsel should refrain from interrupting the other side's presentation. Any objection should be stated during your own argument.

So with that, petitioner may begin. And please let us know how much time you would like to reserve for rebuttal time.

MR. GRIFFITH: Sure, Your Honor, I anticipate using 45 minutes in my opening remarks and reserving 15 minutes rebuttal, best approximation right now. Could be 45 to 50 minutes for opening.

JUDGE ROESEL: That's fine.

MR. GRIFFITH: Your Honor, we have hard copies, color copies of our demonstratives that we can hand up to the Board if that would be -- if the Board would wish and would like to have a hard-copy handy.

JUDGE ROESEL: Please do.

MR. GRIFFITH: Your Honors, there are a number of grounds of unpatentability that are at issue today. The Wilson plus Rosenblatt

ground is common to both the '202 and '433 patents, so to both IPRs. Primarily the case boils down to these two issues, would it have been obvious in June 2003 to use a platinum-clad tantalum electrode instead of a platinum-iridium electrode or a platinum electrode in an implantable glucose sensor; and second, does Hagiwara anticipate.

Your Honors, this is a case of a simple substitution of one known sensor wire for another, just substituting a platinum-clad anode for a platinum anode. Both were well known. The motivation is to reduce cost, and that motivation is explicitly described in the references. It yields a predictable result, lower cost and the anode that functions entirely as an anode. And that is exactly what Section 103 and *KSR*, the doctrine of obviousness, are all about. It's why we have it in the patent statute. This is a textbook case of obviousness.

Now, the patent owner has mounted a number of arguments against our prima facie case of obviousness and they essentially relate to these issues. The first is whether Rosenblatt is analogous art. It addresses the same problem as the '202 and '433 patents, a point that the patent owner virtually ignores in its response and in its slides filed earlier this week. It's a bit of an ostrich sticking its head in the sand, I would submit. The only problem that the patent owner discusses at any length is sensor breakage rather than cost savings, the high cost of platinum that Rosenblatt explicitly calls out and that the '433 and '202 patents call out. Yet that breakage problem is related to the robustness characteristic that was actually stricken from the claims. It was removed from the claims early on in the prosecution history.

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