IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

W.L. GORE & ASSOCIATES, INC.,	)	
	)	
Plaintiff,	)	
	)	
v.	)	Civil Action No. 11-515-LPS-CJB
	)	
C.R. BARD, INC. and BARD PERIPHERAL VASCULAR, INC.,	)	
	)	
Defendants.	)	

REPORT AND RECOMMENDATION

In this action filed by Plaintiff W.L. Gore & Associates, Inc. ("Gore" or "Plaintiff") against Defendants C.R. Bard, Inc. and Bard Peripheral Vascular, Inc. (collectively, "Bard" or "Defendants"), Gore alleges infringement of United States Patent No. 5,735,892 (the "asserted patent" or the "patent-in-suit").[1] Presently before the Court is Gore's Motion for Summary Judgment of No Anticipation (the "Motion"). (D.I. 226) The Court recommends that the Motion be GRANTED-IN-PART.

I. BACKGROUND

A. The '892 Patent

The '892 patent, entitled "Intraluminal Stent Graft[,]" was issued on April 7, 1998. (D.I. 96, ex. A)[2] The patent is directed to thin-wall intraluminal graft devices. The patent explains

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[1] Gore originally asserted infringement of U.S. Patent No. 8,221,487 (the "'487 patent"), but is no longer asserting that patent. (D.I. 191 at 1-2) And until recently, Gore was also asserting infringement of U.S. Patent No. 5,700,285 (the "'285 patent"). The '285 patent is no longer at issue following the District Court's adoption of the Court's recommendation to grant summary judgment of non-infringement of that patent. (D.I. 405 at 10-11; D.I. 423)

[2] The asserted patent is found in a number of places in the record, including as Exhibit A to D.I. 96. Further citation will simply be to the "'892 patent."

that implantation of conventional vascular grafts usually required invasive surgery that caused major trauma to the patient. ('892 patent, col. 1:9-20) As an alternative, some physicians had begun to use intraluminal devices that combined conventional vascular grafts with stents which were placed inside the damaged portion of the vessel using a less invasive "catheter type of delivery system." (*Id.*, col. 1:22-26, 37-38) However, the "relatively thick, bulky wall[s]" of prior art devices made them difficult to "be contracted into a small cross-sectional area for insertion into a blood vessel." (*Id.*, col. 2:10-15) The present invention claims thin-walled stent-graft devices "useful as an inner lining for blood vessels or other body conduits[,]" and methods of making such devices. (*Id.*, col. 1:5-6)

B. Procedural History

On June 10, 2011, Gore commenced this action. (D.I. 1) On January 10, 2014, Bard timely answered Gore's Second Amended Complaint, and asserted counterclaims against Gore. (D.I. 189) On November 29, 2011, this case was referred to the Court by Chief Judge Leonard P. Stark to hear and resolve all pretrial matters, up to and including the resolution of case dispositive motions. (D.I. 20) After a hearing, (D.I. 130), the Court issued a Report and Recommendation on claim construction on August 8, 2014, (D.I. 221). Chief Judge Stark overruled objections to that Report and Recommendation on September 28, 2015. (D.I. 405)

Briefing on the instant Motion was completed on November 12, 2014, (D.I. 333), and the Court held oral argument on the Motion (and various other summary judgment and *Daubert* motions filed in the case) on January 30, 2015, (D.I. 360 (hereinafter, "Tr.")). A 10-day trial is set to begin on December 7, 2015. (D.I. 362)

II. STANDARD OF REVIEW

A. Summary Judgment

A grant of summary judgment is appropriate where "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The moving party bears the burden of demonstrating the absence of a genuine issue of material fact. *See Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 585 n.10 (1986). If the moving party meets this burden, the nonmovant must then "come forward with specific facts showing that there is a *genuine issue for trial*." *Id.* at 587 (emphasis in original) (internal quotation marks and citation omitted). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). During this process, the Court will "draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

However, in order to defeat a motion for summary judgment, the nonmoving party must "do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586; *see also Podobnik v. U.S. Postal Serv.*, 409 F.3d 584, 594 (3d Cir. 2005) (party opposing summary judgment "must present more than just bare assertions, conclusory allegations or suspicions to show the existence of a genuine issue") (internal quotation marks and citation omitted). The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986) (emphasis in original). Facts that could alter

the outcome are "material," and a factual dispute is genuine only where "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Id.* at 248. "If the evidence is merely colorable, . . . or is not significantly probative, . . . summary judgment may be granted." *Id.* at 249-50 (internal citations omitted). A party asserting that a fact cannot be—or, alternatively, is—genuinely disputed must support the assertion either by citing to "particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials"; or by "showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact." Fed. R. Civ. P. 56(c)(1)(A) & (B).

B. Invalidity

A patent granted by the United States Patent and Trademark Office ("PTO") is presumed to be valid. 35 U.S.C. § 282(a); *Microsoft Corp. v. i4i Ltd. P'ship*, 131 S. Ct. 2238, 2245-46 (2011). The rationale underlying this presumption of validity is that "the PTO, in its expertise, has approved the claim[.]" *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 426 (2007). The burden of proving invalidity rests with the patent challenger at all times, who must establish a patent's invalidity by clear and convincing evidence in order to prevail. *Microsoft Corp.*, 131 S. Ct. at 2245-49. Clear and convincing evidence places within the mind of the fact finder "an abiding conviction that the truth of [the] factual contentions are highly probable." *Procter & Gamble Co. v. Teva Pharms. USA, Inc.*, 566 F.3d 989, 994 (Fed. Cir. 2009) (quoting *Colorado v. New Mexico*, 467 U.S. 310, 316 (1984)).

C. Anticipation

A claim is anticipated under 35 U.S.C. § 102(a) or (b) if:

> (a) the invention was known or used by others in this country, or patented or described in a printed publication in this or a foreign country, before the invention thereof by the applicant for patent, or
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of the application for patent in the United States . . . .

35 U.S.C. § 102.[3] A patent claim is anticipated if each and every limitation is found, either expressly or inherently, in a single prior art reference. *In re Gleave*, 560 F.3d 1331, 1334 (Fed. Cir. 2009); *Moba, B.V. v. Diamond Automation, Inc.*, 325 F.3d 1306, 1321-22 (Fed. Cir. 2003). This test mirrors, to some extent, the test for infringement, and "it is axiomatic that that which would literally infringe if later anticipates if earlier." *Bristol-Myers Squibb Co. v. Ben Venue Labs., Inc.*, 246 F.3d 1368, 1378 (Fed. Cir. 2001). In order to anticipate, however, a reference must enable one of skill in the art to make and use the invention without undue experimentation, *In re Gleave*, 560 F.3d at 1334 (citing *Impax Labs., Inc. v. Aventis Pharms. Inc.*, 545 F.3d 1312, 1314 (Fed. Cir. 2008)), and must also "show all of the limitations of the claims arranged or combined in the same way as recited in the claims," *Net MoneyIN, Inc. v. VeriSign, Inc.*, 545 F.3d 1359, 1370 (Fed. Cir. 2008).

"While anticipation is a question of fact, it may be decided on summary judgment if the record reveals no genuine dispute of material fact." *Encyclopaedia Britannica, Inc. v. Alpine*

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[3] The Court will rely upon the version of 35 U.S.C. § 102 in effect prior to passage of the Leahy-Smith America Invents Act; this prior version of Section 102 applies to all patents with an effective filing date of on or before March 16, 2013, including the asserted patent. *See Solvay S.A. v. Honeywell Int'l Inc.*, 742 F.3d 998, 1000 n.1 (Fed. Cir. 2014).

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