

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

EXCELSIOR MEDICAL CORPORATION,
Petitioner,

v.

BECTON, DICKINSON AND COMPANY,
Patent Owner.

Case IPR2014-00880
Patent 8,740,864 B2

Before PHILLIP J. KAUFFMAN, HYUN J. JUNG, and
MITCHELL G. WEATHERLY, *Administrative Patent Judges*.

KAUFFMAN, *Administrative Patent Judge*.

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

I. INTRODUCTION

Petitioner, Excelsior Medical Corporation, filed a Corrected Petition, requesting an *inter partes* review of claims 10–14 of US Patent No. 8,740,864 B2 (Ex. 2001, “the ’864 patent”). Paper 6 (“Pet.”). Subsequently, Patent Owner, Becton, Dickinson and Company, filed a Preliminary Response. Paper 11 (“Prelim. Resp.”).

After considering the record to this point in the proceeding, we determine that Petitioner has shown a reasonable likelihood that it would prevail with respect to a challenge to the patentability of claims 10, 12, and 14 of the ’864 patent, but has not made such a showing with regard to claims 11 and 13. *See* 35 U.S.C. § 314.

II. BACKGROUND

A. *Related Proceedings*

Petitioner indicates that the ’864 patent is involved in the following lawsuits: *Excelsior Medical Corp. v. Becton, Dickinson and Co.* 14-cv-03502 (D.N.J.), and *Ivera Medical Corp. v. Excelsior Medical Corp.*, 14-cv-1348 (S.D. Cal.). Pet. 1–2.

Patent Owner indicates the following matters may be affected by this proceeding: *Catheter Connections, Inc. v. Ivera Medical Corp.*, 2:2014-cv-03512 (D.N.J.); *Hospira, Inc. v. Ivera Medical Corp.*, 2:2014-cv-03513 (D.N.J.); *Ivera Medical Corp. v. Catheter Connections, Inc.*, 3:14-cv-01346 (S.D. Cal.); *Ivera Medical Corp. v. Hospira, Inc.*, 3:14-cv-01345 (S.D. Cal.). Paper 8, 2.

B. Asserted Grounds of Unpatentability and Prior Art

Petitioner presents the following grounds of unpatentability under 35 U.S.C. § 103:

References	Claims challenged
White ¹ , Harding ² , and Genatempo ³	10
White, Harding, Genatempo, and Paradis ⁴	11
White, Harding, and Genatempo	12
White, Harding, Genatempo, and Busch ⁵	13
White, Harding, Genatempo, and Busch	14
Menyhay ⁶ and Genatempo	10
Menyhay, Genatempo, and Paradis	11
Menyhay and Genatempo	12
Menyhay, Genatempo, and Busch	13
Menyhay and Genatempo	14

Pet. 4–5

¹ Ex. 1021, US Patent No. 5,242,425 (Sept. 7, 1993).

² Ex. 1022, US Patent Pub. US 2003/0109853 A1 (June 12, 2003).

³ Ex. 1024, US Patent No. 4,440,207 (Apr. 3, 1984).

⁴ Ex. 1025, US Patent No. 6,117,114 (Sept. 12, 2000).

⁵ Ex. 1026, US Patent Pub. US 2004/0004019 A1 (Jan. 8, 2004).

⁶ Ex. 1029, US Patent No. 5,554,135 (Sept. 10, 1996).

C. The '864 Patent

The '864 patent is titled “Patient Fluid Line Access Valve Antimicrobial Cap/Cleaner,” and relates to a device for antiseptically maintaining a patient fluid line access valve. Ex. 2001, 1:34–35.

Figure 1 is reproduced below:

FIG. 1

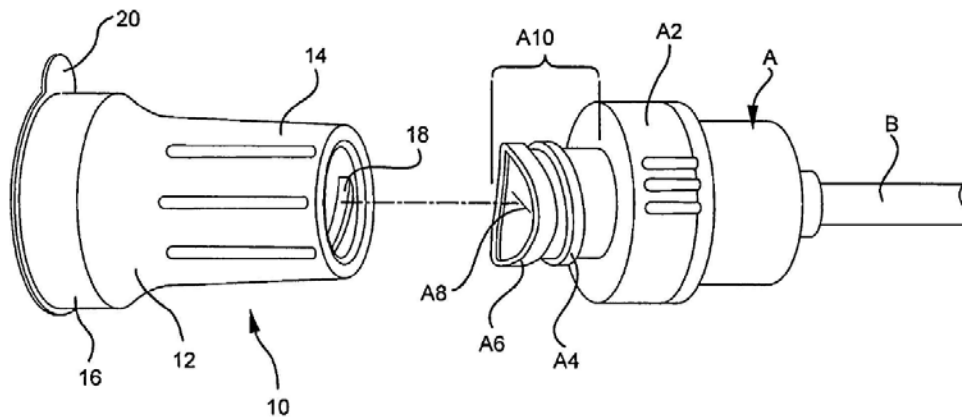


Figure 1 is an exploded view of a first embodiment of the device that includes patient fluid line access valve cap/cleaner device 10 and patient fluid line access valve A. *Id.* at 1:43–45; 1:66–2:1.

Figure 2 is reproduced below:

FIG. 2

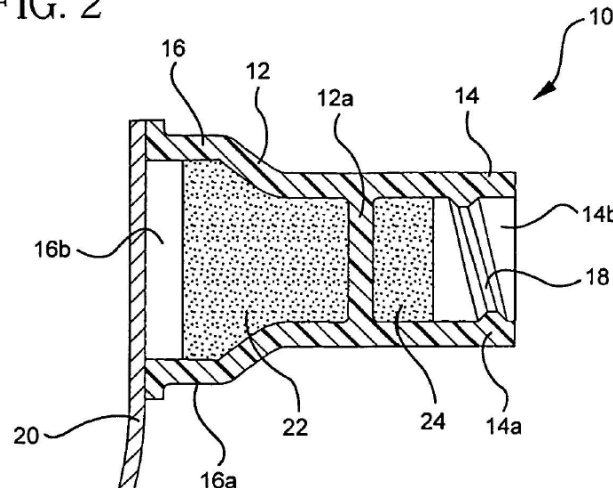


Figure 2 is a cross-sectional view of the first embodiment of cap/cleaner device 10. *Id.* at 1:46–47.

Cap/cleaner 10 includes housing 12 having cap end 14 and cleaning end 16. *Id.* at 2:1–3. Cleaning end 16 is covered by lid 20 which may be removed to expose wet pad 22. *Id.* at 2:19–20, 24–28; Fig. 2. Cap end 14 is open and contains thread 18 for interlocking to thread A4 of access portion A10 of access valve A. *Id.* at 2:10–12, 18–19, 60–63; Fig. 3. In an alternative embodiment, the pad in the cap end (pad 80) may be either a dry pad or a wet pad. *Id.* at 4:63–65; Fig. 7.

Patient fluid line access valve A includes access portion A10 formed by the exposed surface of septum A6 and at least a portion of the exposed surface of housing A2. *Id.* at 2:4–7. Patient fluid line access valve A also includes thread A4.⁷ *Id.* at 2:3–4.

The '864 patent includes claims 1–19, of which, claims 10–14 are challenged in this proceeding. Independent claim 10, the sole independent claim challenged, is illustrative and reads as follows:

10. A device for maintaining a patient fluid line access valve having an access portion with an end face that includes a septum and external threads on the access portion proximate the septum, the device comprising:

a housing for covering the access portion of the patient fluid line access valve, the housing having an open end, a closed end, and a cavity, the housing including a thread on an inner wall of the cavity for engaging the external threads on the access portion of the patient fluid line access valve;

⁷ Thread A4 corresponds to the “external threads” recited in claim 10.

a wet pad impregnated with a cleaning solution prior to attachment of the housing to the access portion of the patient fluid line access valve, the wet pad being positioned within the cavity for contacting the end face to disinfect the end face and at least a portion of the external threads of the access portion of the patient fluid line access valve when the housing is positioned over and covers the access portion; and

a lid over the open end of the housing to seal the cavity with the wet pad within the cavity and provide a moisture barrier, the lid being removable to expose the wet pad and allow insertion of the access portion of the patient fluid line access valve into the cavity so that the end face of the access portion contacts the wet pad.

Ex. 2001, 6:3–26.

III. CLAIM CONSTRUCTION

Our analysis necessitates construction of the following terms under the broadest reasonable construction in light of the specification of the patent in which they appear. *See* 37 C.F.R. § 42.100(b).

A. external threads on the access portion proximate the septum

Independent claim 10 is directed to a device for maintaining a patient fluid line access valve. The preamble recites that the device has an access portion with an end face that includes a septum and “external threads on the access portion proximate the septum.”⁸

⁸ We note that this limitation was not in the originally filed claims. *See* Ex. 1009, Amendment B 2. Neither party identifies, nor do we discern, anything in the prosecution history that would aid our interpretation of this limitation.

Neither party provides an explicit construction of this limitation. *See* Pet. 18–19; Prelim. Resp. 23–25. However, Petitioner’s argument that Harding’s external threads correspond to external threads as claimed because those threads are “near the septum,” implies that “proximate” as claimed means “near.” *See* Pet. 23.

The preamble’s recitation of external threads on the access portion is necessary to understand the requirement in the claim body that the open end of the housing for covering the access portion of the patient fluid line access valve includes a thread for engaging the external threads on the access portion of the patient fluid line access valve. For this same reason, the preamble serves as an antecedent basis for the external threads recited in the body of the claim.

The Specification does not expressly define “proximate,” and the term is not used in the ’864 patent outside of the claims.⁹ An ordinary meaning of “proximate” is “very near.”¹⁰

The term “near” is a relational term that must be interpreted in context. Here, claim 10 requires that the septum is included in the end face of the access portion and the external threads are on the access portion, proximate the septum. Therefore, claim 10 requires that the external threads are very near the end face of the access portion as

⁹ Independent claim 1 uses the term “proximate” similarly to independent claim 10.

¹⁰ *Proximate Definition*, MERRIAM-WEBSTER ONLINE DICTIONARY, www.merriam-webster.com/dictionary/proximate (visited Oct. 28, 2014).

compared to other positions on the access portion. With this context in mind, we turn to the Specification.

The Specification describes that patient fluid line access valve cap/cleaner device 10 includes access valve A, which includes housing A2, septum A6, and thread A4. Ex. 2001, 2:1–4; Fig. 1. The exposed surface of septum A6 and at least a portion of the exposed surface of housing A2 form access portion A10. *Id.* at 2:4–7; Fig. 1. Consistent with the ordinary meaning of “proximate,” thread A4¹¹ is nearer the end of access portion 10 having septum A6 than to the opposite end of access portion A10. *Id.* The ’864 patent makes no disclosure inconsistent with the ordinary meaning of the term proximate.

On review of the entire patent, the preamble of claim 10 is limiting in that it requires the access portion to include external threads proximate the septum. *See Catalina Marketing Int’l, Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801, 808 (Fed. Cir. 2002).

Therefore, we construe claim 10 to require the external threads to be located on the access portion very near the end face as compared to other parts of the access portion.

B. length

Claim 11 depends from independent claim 10 and recites that the thread of the housing has “a length that is less than the inner circumference” of the inner cavity of the housing. Claim 11 does not refer to the length of the thread along the axial length of the inner

¹¹ Corresponding to “external threads” in claim 10.

cavity of the housing; rather, claim 11 simply refers to the length of the thread.

The Specification does not expressly define “length.” An ordinary meaning of length is “the measurement or extent of something from end to end.” Ex. 2002, CONCISE OXFORD ENGLISH DICTIONARY, 815 (11th ed. 1990); *see also* Prelim. Resp. 24 (citing this definition and a similar definition in Ex. 2003, LONGMAN DICTIONARY OF AMERICAN ENGLISH, 520 (3d ed. 2004)).

The Specification describes that cap device 78 includes inner circumference 82 that defines a cavity, and includes thread or threading 18 “having a length that is less than inner circumference **82**.” Ex. 2001, 5:3–6; Fig. 10B. Such description is consistent with the ordinary meaning of length.

Taken in the context of claim 11, the length of the thread refers to the measurement from end to end of that thread. This interpretation is consistent with Petitioner’s assertion that length as claimed refers to the helical length of the thread along the wall of the inner cavity. *See* Pet. 19. Our interpretation differs from Petitioner’s alternative interpretation that length means the axial length. *Id.*

IV. 35 U.S.C. § 325(d)

Under 35 U.S.C. § 325(d), the Board may take into account and reject a petition because the same or substantially the same prior art or argument was presented previously to the Office. Patent Owner asks that the Board exercise its discretion under 35 U.S.C. § 325(d) to reject the Petition because the grounds set forth in the Petition either

rely on the same art (or in one case, a cumulative secondary reference) or the same arguments considered by the Office during the prosecution of the application that issued as the '864 patent. Prelim. Resp. 1, 9. For the reasons given below, we are not persuaded by Patent Owner's arguments under 35 U.S.C. § 325(d). We analyze Patent Owner's contention by addressing the grounds of unpatentability asserted in the Petition in two groups: (1) grounds based at least in part on White, Harding, and Genatempo, and (2) grounds based at least in part on Menyhay and Genatempo. *See* Pet. 4–5.

A. White, Harding, and Genatempo

In each of the grounds of unpatentability that rely at least in part on White, Harding, and Genatempo, Petitioner contends that the external threads of White's access valve are not located as claimed, and proposes to modify White's threads to be positioned as disclosed by Harding. Pet. 4, 21–32; Ex. 1037 ¶ 23. In contrast, during prosecution, the Examiner relied upon White as disclosing external threads as claimed. Ex. 1017, 14; *see also* Prelim. Resp. 9–10 (citing the Fifth Office Action, now Ex. 1017). Therefore, with respect to this limitation, the arguments and prior art previously presented to the Office differ from the grounds of unpatentability in the Petition.

Patent Owner contends this distinction is not meaningful because Petitioner has not established sufficiently that White does not disclose external threads as claimed and because Harding is cumulative to White. Prelim. Resp. 2–9. Petitioner need not

establish that the Examiner was in error. The focus of our inquiry is whether the same or substantially the same prior art or arguments presented in the Petition were previously presented to the Office. As explained above, we determine that they were not.

Regarding Patent Owner's contention that Harding is cumulative to White, we disagree. During prosecution, the Examiner considered the claim term "proximate" to mean "very near," but did not consider the context of claim 10. Ex. 1017, 14. Specifically, without the frame of reference provided by the location of the septum on the end face, the term "very near" has no meaning and effectively reads the term "proximate" out of claim 10. *See also Stumbo v. Eastman Outdoors, Inc.*, 508 F.3d 1358, 1362 (Fed. Cir. 2007) (rejecting claim constructions that render phrases in claims superfluous). White's threads (externally threaded shoulder 74) are positioned as far from the septum end (septum 84) of the access portion as is possible while still remaining on the access portion (proximal member 82). Ex. 1021, 7:23–35; Fig. 7.¹²

Consequently, we are not persuaded by Patent Owner's arguments under 35 U.S.C. § 325(d) regarding the combination of White, Harding, and Genatempo.

¹² We are mindful that neither party has construed expressly the limitation at issue, and that our claim construction, which is not based upon a fully developed record, may evolve as this proceeding progresses.

B. Menyhay and Genatempo

In each of the grounds of unpatentability that rely at least in part on Menyhay and Genatempo, Petitioner contends that Menyhay differs from the claimed subject matter in three respects but that Genatempo teaches the limitations not described by Menyhay. Pet. 33–36.

Patent Owner contends that during prosecution, some of the claims were subject to a rejection based upon anticipation by Menyhay, and also contends that Genatempo was considered during prosecution for the same teachings relied upon in the Petition. *See* Prelim. Resp. 4–5, 14–16 (citing the first Office Action, Ex. 1006 and the fourth Office Action, Ex. 1013).

The consideration of Menyhay during prosecution identified by Patent Owner was for anticipation and involved a different claim than what is now claim 10. The consideration of Genatempo during prosecution identified by Patent Owner was in combination with White, not with Menyhay. Patent Owner has not identified, nor do we discern, how the Office considered the combination of Menyhay and Genatempo presented in this Petition during prosecution. *See* Prelim. Resp. 1–20. Nor do the Examiner’s comments in the Notice of Allowance demonstrate that the Examiner expressly considered the subject matter of claim 10 (then claim 79) to be nonobvious over the combination of Menyhay and Genatempo. *See* Ex. 1019, 8–9.

Consequently, we are not persuaded by Patent Owner’s arguments under 35 U.S.C. § 325(d) regarding the combination of Menyhay and Genatempo.

V. ANALYSIS

A. *Independent Claim 10*

Petitioner contends that claim 10 would have been obvious over White, Harding, and Genatempo. Pet. 21–26, 29–30. Alternatively, Petitioner contends that claim 10 would have been obvious over Menyhay and Genatempo. Pet. 32–36, 38–40. Other than the argument based upon 35 U.S.C. § 325(d), Patent Owner presents no arguments against these grounds of unpatentability for claim 10. Prelim. Resp. 20–22.

Petitioner explains how the challenged claim is unpatentable, including specifically alleging where each element is found in the prior art with citations by exhibit number to the specific portion of the evidence that supports the challenge. *See* Pet. 21–26, 29–30, 32–36, 38–40. Petitioner provides a rationale for modifying White’s external threads to be positioned as taught by Harding so that at least a portion the external threads is disinfected, and also provides a rationale for adding a removable lid as taught by Genatempo. *Id.* at 22–26. Petitioner provides a supporting declaration that is cited and explained as applicable. *See, e.g.*, Pet. 22 (citing Ex. 1037 ¶ 22). We determine that Petitioner has demonstrated a reasonable likelihood of prevailing in establishing that claim 10 is unpatentable over White, Harding, and Genatempo and, alternatively, over Menyhay and Genatempo.

B. Dependent Claims 11–14

Patent Owner contends that Petitioner’s grounds of unpatentability against dependent claims 11–14 are deficient because they do not address the limitations of claim 10 from which they depend. Prelim. Resp. 20–21. Petitioner asserts that claim 10 is unpatentable over White, Harding, and Genatempo (Pet. 4, 21–26), followed by a ground of unpatentability based upon White, Harding, Genatempo, and Paradis (Pet. 4, 26–27, 30–31) that explains how the additional limitation of claim 11 would have been obvious in view of Paradis. For this reason, Patent Owner’s argument that the grounds are deficient is unpersuasive.

C. Claim 11

Claim 11 depends from claim 10 and recites, “wherein the cavity comprises an inner circumference and the thread comprises a length that is less than the inner circumference.”

White, Harding, Genatempo, and Paradis

Petitioner contends that claim 11 is unpatentable over White, Harding, Genatempo, and Paradis.¹³ Pet. 4, 26–27, 30–31. Petitioner only identifies a specific portion of Paradis as disclosing threads as claimed. *Id.*

Petitioner’s contention that the length of the internal thread of White would have been a matter of design choice would render

¹³ Viewed as a whole, this ground of unpatentability is over White, Harding, Genatempo, and Paradis, so that the omission of Harding and Genatempo from the heading (Pet. 26) is an unimportant distinction. See Pet. 4, 21–27, 29–31.

Paradis superfluous. *See* Pet. 26. The same is true with regard to the contention that it would have been obvious to modify the cap in White to adapt to the external threads of Harding, and the contention that it would be obvious to modify the threads to have the claimed length because it would expose more of the threads to the pad within the cavity to antiseptic. Pet. 26-27 (citing, but not explaining what is contained in Ex. 1037 ¶ 29). This ground of unpatentability is based upon White, Harding, Genatempo, and Paradis, and we will not consider grounds that have not been properly presented. *See* Pet. 4, 26–27, 31 (providing a specific citation to only Paradis with regard to the limitation at issue¹⁴).

Petitioner asserts that Paradis discloses a thread having a length less than the circumference of its cylindrical connector. Pet. 26. Petitioner does not explain cogently how or why a person of ordinary skill in the art would have modified the proposed combination of White, Harding, and Genatempo, to include threads as disclosed by Paradis. Petitioner has the burden to explain how the challenged claim is unpatentable and has not done so sufficiently here. *See* 37 C.F.R. § 42.104(b)(4); *see also Unigene Labs., Inc. v. Apotex, Inc.*, 655 F.3d 1352, 1360 (Fed. Cir. 2011) (obviousness requires more than a showing that the prior art includes separate references covering each limitation of the claims, it must also be shown that a person of ordinary skill in the art would have selected and combined those elements to yield the claimed invention).

¹⁴ *See* 37 C.F.R. § 42.104(b)(5).

Menyhay, Genatempo, and Paradis

Petitioner contends that claim 11 is unpatentable over Menyhay, Genatempo, and Paradis.¹⁵ Pet. 5, 36, 40. Petitioner relies upon Paradis here in a manner that parallels the ground of unpatentability over White, Harding, Genatempo, and Paradis analyzed above. Our analysis there is equally applicable here.

Conclusion

We determine that Petitioner has not demonstrated a reasonable likelihood of prevailing in establishing that claim 11 is unpatentable over White, Harding, Genatempo, and Paradis or over Menyhay, Genatempo, and Paradis.

D. Claim 12

Claim 12 depends from claim 10 and recites, “wherein the cleaning solution comprises an antimicrobial agent.” Patent Owner presents no arguments against these grounds of unpatentability other than the arguments that we address in sections IV and V.B. above. *See* Prelim. Resp. 20–22.

White, Harding, and Genatempo, or Menyhay and Genatempo

Petitioner explains how the challenged claim is unpatentable, including specifically alleging where this element is found in White and Menyhay, with citations by exhibit number to the specific portion

¹⁵ Viewed as a whole, this ground of unpatentability is over Menyhay, Genatempo, and Paradis, so that the omission of Genatempo from the heading (Pet. 36) is an unimportant distinction. *See* Pet. 5, 32–36, 38–40. The same is true with regard to the remaining grounds of unpatentability.

of the evidence that supports the challenge. *See* Pet. 4–5, 27, 31, 36–37, and 40.

Conclusion

We determine that Petitioner has demonstrated a reasonable likelihood of prevailing in establishing that claim 12 is unpatentable over White, Harding, and Genatempo, and alternatively, over Menyhay and Genatempo.

E. Claim 13

Claim 13 depends from claim 12 and recites, “wherein the antimicrobial agent comprises at least one of chlorhexidine gluconate and chlorhexidine diacetate.” Consequently, claim 13 requires the wet pad to be impregnated with either chlorhexidine gluconate or chlorhexidine diacetate.

White, Harding, Genatempo, and Busch

Petitioner contends that claim 13 is unpatentable over White, Harding, Genatempo, and Busch. Pet. 5, 27–28, 30–31. Petitioner acknowledges that White does not disclose an antimicrobial agent as claimed. Pet. 27. Petitioner asserts that it would have been obvious to substitute chlorhexidine gluconate as used in Busch’s skin preparation package for White’s povidone-iodine solution. Pet. 27–28.

White discloses a catheter assembly that includes an outer protective cap 64 that contains a sponge 68 saturated with a disinfectant or antiseptic material that protects the septum of the device from the introduction of pathogens. Ex. 1021, 1:54–55; 6:49–55; 6:67–7:1; Fig. 7. In contrast, Busch does not disclose that skin

preparation package 28 may be utilized to protect a device from the introduction of pathogens; rather, as the name implies, Busch's package 28 contains a solution appropriate for preparing skin for an epidural. Ex. 1026 ¶¶ 11, 26. Petitioner's only evidence that chlorhexidine gluconate and povidone-iodine were known substitutes, is the '864 patent. *See* Pet. 28 (citing Ex. 1002 ¶ 23¹⁶). The portion of the '864 patent cited by Petitioner is not in the *Background* portion of the Specification. Nor does the cited disclosure otherwise indicate that the antimicrobial agents were known substitutes prior to the filing of the application that became the '864 patent.

Consequently, Petitioner has not adequately established that chlorhexidine gluconate as used in Busch's skin preparation package was a known substitute for White's povidone-iodine solution.

Menyhay, Genatempo, and Busch

Petitioner contends that claim 13 is unpatentable over Menyhay, Genatempo, and Busch. Pet. 5, 37, 40–41. Petitioner's ground of unpatentability parallels the ground based upon White, Harding, Genatempo, and Busch, and our analysis there is equally applicable here.

Conclusion

We determine that Petitioner has not demonstrated a reasonable likelihood of prevailing in establishing that claim 13 is unpatentable over White, Harding, Genatempo, and Busch, or over Menyhay, Genatempo, and Busch.

¹⁶ This is the pre-grant publication of the '864 patent. *See also* Ex. 2001, 2:49–54 (making the same disclosure in the '864 patent).

F. Claim 14

Claim 14 depends from claim 12, and recites, “wherein the cleaning solution is an alcohol-based cleaning solution.”

White, Harding, Genatempo, and Busch

Petitioner contends that claim 14 is unpatentable over White, Harding, Genatempo, and Busch. Pet. 4, 28, 32. Specifically, Petitioner contends that a person of ordinary skill in the art would have substituted Busch’s alcohol-based solution for White’s povidone-iodine. Pet. 28. In addition to the cited disclosure of Busch, Petitioner attempts to support the ground by asserting that a person of ordinary skill in the art would know that it was standard nursing practice to wipe the access port septum with an alcohol wipe prior to accessing the septum. *Id.*

As discussed in section V.E. above, Petitioner has not adequately established the link between use of an agent in a skin preparation package such as disclosed in Busch and use in a device such as White’s. This short-coming is not remedied by Petitioner’s assertion regarding the knowledge of a person of ordinary skill in the art because Petitioner presents only attorney argument, unsupported by evidence. *In re Geisler*, 116 F.3d 1465, 1470 (Fed. Cir. 1997) (Attorney arguments and conclusory statements that are unsupported by factual evidence are entitled to little probative value).

Consequently, Petitioner has not adequately established that isopropyl alcohol as used in Busch’s skin preparation package is a known substitute for White’s povidone-iodine solution.

Menyhay and Genatempo

Petitioner contends that claim 14 is unpatentable over Menyhay and Genatempo. Pet. 5, 37, 41. Specifically, Petitioner asserts that Menyhay discloses use of isopropyl alcohol in the wet pad (sponge 12) of an access valve. Pet. 37, 41. Petitioner explains how the challenged claim is unpatentable, including specifically alleging where each element is found in the prior art with citations by exhibit number to the specific portion of the evidence that supports the challenge.

Conclusion

Accordingly, we determine that Petitioner has not demonstrated a reasonable likelihood of prevailing in establishing that claim 14 is unpatentable over White, Harding, Genatempo, and Busch, but has demonstrated such with regard to Menyhay and Genatempo.

VI. CONCLUSION

For the foregoing reasons, we are persuaded that the information presented in the Petition establishes that there is a reasonable likelihood that Petitioner would prevail with respect to claims 10, 12, and 14 of the '864 patent, but not with respect to claims 11 and 13.

The Board has not made a final determination on the patentability of any challenged claims.

VII. ORDER

For the reasons given, it is

ORDERED that pursuant to 35 U.S.C. § 314(a), *inter partes* review of the '864 patent is instituted on the following grounds:

A. Claims 10 and 12 under 35 U.S.C. § 103 by White, Harding, and Genatempo; and

B. Claims 10, 12, and 14 under 35 U.S.C. § 103 by Menyhay and Genatempo;

FURTHER ORDERED that no other grounds of unpatentability alleged in the Petition are authorized for this *inter partes* review; and

FURTHER ORDERED that pursuant to 35 U.S.C. § 314(c) and 37 C.F.R. § 42.4, notice is hereby given of the institution of a trial; the trial commencing on the entry date of this decision.

PETITIONER:

Michael Kenaga
Sean Swidler
patentmail@iphorgan.net

PATENT OWNER:

David Cavanaugh
Heather Petruzzi
Wilmer Cutler Pickering Hale and Dorr LLP
david.cavanaugh@wilmerhale.com
heather.petruzzi@wilmerhale.com