

Filed on behalf of FLEXSTENT, LLC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ABBOTT VASCULAR, INC., ABBOTT LABORATORIES,
ABBOTT CARDIOVASCULAR SYSTEMS, INC., and ABBOTT VASCULAR
SOLUTIONS, INC.

Petitioner,

v.

FLEXSTENT, LLC,
Patent Owner.

Case No. IPR2019-00882

Patent 6,187,035

**PATENT OWNER'S REPLY IN SUPPORT OF PATENT OWNER'S
MOTION TO EXCLUDE**

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Apple Inc. v. DSS Tech. Mgmt., Inc.,
IPR2015-00369, Paper 40 (June 17, 2016) 2, 5

I. Petitioner offers Morton-Article for the truth of the matter asserted.

The statement on which Petitioner seeks to rely asserts that the struts of the NIR stents described in Morton-Article¹ “are square in cross section and allow transition from flexible geometry (unexpanded) to rigid (expanded).” Ex. 1037. Petitioner attempts to use this statement as evidence that “confirms” the truth of the very thing asserted in the statement: that the struts of the NIR stents described in Morton-Article “are square in cross section and allow transition from flexible geometry (unexpanded) to rigid (expanded).” Reply 14-15. This is hearsay.

II. Petitioner is not using Morton-Article to show how a person of skill would have interpreted Richter-Handbook.

Petitioner contends that it is using Morton-Article “to show how a person of skill in the art would have understood the words ‘Strut Design: Square, transform from flexible to rigid’ in the Richter-Handbook.” Opp. 1. This assertion is false.

If that was what Petitioner was using Morton-Article for, Petitioner’s Reply would be drafted differently. It would not assert that Morton-Article “confirms” a factual statement about the NIR stent’s struts—that they “are square in cross-section.” Reply 14. It would assert that Morton-Article “confirms” what Petitioner now says that it is using Morton-Article as evidence of: that a person of ordinary skill in the art would have interpreted the statement “square: transform

¹ The cross-sectional shape of the NIR stent struts varied. Sur-Reply 16.

from flexible to rigid” in Richter-Handbook to mean “square in cross section.”

Petitioner argues that it cannot possibly be using Morton-Article as evidence that the NIR stent struts are in fact square in cross-section because “whether the real-life NIR stent had a square-shaped cross section” is not ultimately what Petitioner must prove. Opp. 1. This is a red herring. While it is true that the Petition ultimately turns on what Richter-Handbook discloses about the NIR stent it describes—not on the shape of actual NIR stents—Petitioner does not use Morton-Article as evidence of the ultimate point it must prove. Instead, Petitioner uses Morton-Article as supposed evidence about the shape of the cross-section of actual NIR stents. (Petitioner then uses this supposed fact about the actual NIR stents to argue that its interpretation of Richter-Handbook is correct, because it supposedly comports with reality. *See Reply 14-15.*)

Petitioner attempts to compare this case to *DDS*, but that attempt fails. *DDS* involved a construction dispute about the phrase “low duty cycle.” *Apple Inc. v. DSS Tech. Mgmt., Inc.*, IPR2015-00369, Paper 40 at 8-15 (June 17, 2016). The patent owner argued that “low duty cycle” required the transmitter to be energized for “less than ten percent” of the transmission period. *Id.* 9-10. The petitioner contended that the “ten percent” bound was “arbitrary and unduly narrow.” *Id.* 11.

To support its position, the patent owner relied on references that used the phrase “low duty cycles” to describe cycles in which the transmitter was energized

for less than ten percent of the transmission period. The patent owner offered these references as evidence that those of skill in the art understood “low duty cycles” to have the meaning set forth in its proposed construction—i.e. as evidence of how a disputed term was used and understood at the time of the invention. For this reason, the Board concluded that the patent owner’s use was not a hearsay use: the patent owner was relying on the references in question to show how “low duty cycles” was understood—not as evidence of the truth of any factual proposition the publications asserted (e.g. about any property of the systems they described).

Unlike in *DDS*, here Petitioner is not relying on Morton-Article to show how a person of skill in the art would have understood Richer-Handbook. Indeed, Petitioner’s reply does not say that Morton-Article shows how a person of skill in the art would have understood the statement “square: transform from flexible to rigid.” It says the statement “confirms” that the NIR stent struts “are square in cross section. *See* above. Moreover, the reason for this is that there is nothing in Morton-Article does that even suggests that those of skill understood “square” without more to mean “square in cross section.” If anything, that the authors of Morton-Article decided that it was necessary to describe the struts as “square in cross-section”—not just “square”—shows that “square,” without more, would have been ambiguous.

III. Petitioner’s Rule 703 arguments fail.

(1) As Petitioner has argued, “although FRE 703 permits experts to rely on hearsay in forming their opinions if they are of the type reasonably relied on by experts, an expert cannot act as a conduit for the hearsay of another.” Paper 38, 12. Here, Petitioner does not rely on an expert opinion that in turn relies on a hearsay statement in Morton-Article. Petitioner relies on the hearsay statement in Morton-Article itself—that the NIR stents described in Morton-Article “are square in cross section”—for the truth of the matter asserted. Reply 14-15. In doing so, Petitioner cites not just Morton-Article itself but also to its expert’s declaration, in which its expert quotes from Morton-Article. *Id.* (quoting Rao-Reply ¶49.) But Petitioner cannot make an end run around the rule against hearsay by quoting its expert quoting hearsay, instead of just quoting the hearsay directly.

(2) Before an expert can rely on hearsay, the proponent of that expert must show that “experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject.” Fed. R. Evid. 703. But Petitioner offers no expert testimony or other evidence showing that experts in the field would reasonably rely on Morton-Article to form opinions about Richter-Handbook. Petitioner’s own evidence establishes that the cross-sectional shape of the NIR stent’s struts was not always the same but instead varied and could be “any desired or suitable shape, such as circular, oval-shaped, rectangular, or any of a number of irregular shapes.” Ex. 1016, 3:50-52. Petitioner’s expert makes no

attempt to show that the particular variant of NIR stent in the Morton-Article was the same as the one in Richter-Handbook. And—even though more than five years passed between when Richter-Handbook was published and when Morton-Article was—Petitioner makes no attempt to show that the shape of NIR stents remained the same during that time. *Cf. DSS, IPR2015-00369, Paper 40 at 8-15.*

Petitioner argues that the NIR stents described in Morton-Article and Richter-Handbook must be the same because (a) the diameter Morton-Article stents falls within the diameter range for the Richter-Handbook stents; and (b) the two references have supposedly “identical” pictures of the NIR stent. Opp. 5-6. These arguments fail. First, Petitioner’s attorney argument is not a substitute for evidence. And as explained above, the record is completely devoid of any evidence even suggesting that the two publications are discussing the same stent. Second, that the diameter of the Morton-Article NIR SV stents is within the range described in Richter-Handbook does not establish that the references discuss the same stent. Two stents can have the same diameter, but have struts of different shapes. Third, the pictures are not “identical.” And to the extent Petitioner means to say that the depicted stents have a similar overall configuration, this is no surprise: the overall configuration of all the NIR stents was similar. But their cross-sectional shape varied and could be “any desired or suitable shape.” Ex. 1016 (Richter-794) 3:50-52.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing **Patent Owner's Reply in Support of Patent Owner's Motion to Exclude** was served by electronic mail this 30th day of June, 2020, on counsel for Petitioner as follows:

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