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Paper 11
Entered: February 24, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GLOBUS MEDICAL, INC.,
Petitioner,

v.

FLEXUSPINE, INC.,
Patent Owner.

Case IPR2015-01755
Patent 7,909,869 B2

Before WILLIAM V. SAINDON, HYUN J. JUNG, and TIMOTHY J. GOODSON, *Administrative Patent Judges.*

GOODSON, *Administrative Patent Judge.*

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

I. INTRODUCTION

Globus Medical, Inc. ("Petitioner") filed a Petition (Paper 1, "Pet.") requesting *inter partes* review of claims 23 and 37 of U.S. Patent No. 7,909,869 ("the '869 patent"). Flexuspine, Inc. ("Patent Owner") filed a Preliminary Response (Paper 9, "Prelim. Resp.") to the Petition. We have jurisdiction under 35 U.S.C. § 314.

To institute an *inter partes* review, we must determine that the information presented in the Petition shows "a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." 35 U.S.C. § 314(a). For the reasons set forth below, we conclude that the information presented in the Petition establishes a reasonable likelihood that Petitioner will prevail in challenging claims 23 and 37 of the '869 patent. Pursuant to 35 U.S.C. § 314, we hereby authorize an *inter partes* review to be instituted as to claims 23 and 37.

Our factual findings and conclusions at this stage of the proceeding are based on the evidentiary record developed thus far. This is not a final decision as to patentability of claims for which *inter partes* review is instituted. Our final decision will be based on the full record developed during trial.

A. Related Matters

Patent Owner is asserting the '869 patent against Petitioner in a civil action in the U.S. District Court for the Eastern District of Texas, *Flexuspine, Inc. v. Globus Medical, Inc.*, Case No. 15-cv-00201-JRG-KNM. Pet. 2–3; Ex. 1002, 1; Paper 5, 2. In addition, four other petitions for *inter partes* reviews involving the same parties are pending:

- IPR2015-01721, which concerns U.S. Patent No. 7,316,714;
- IPR2015-01749, which concerns U.S. Patent No. 7,204,853;

- IPR2015-01795, which concerns U.S. Patent No. 8,647,386; and
- IPR2015-01830, which concerns U.S. Patent No. 8,123,810.

See Pet. 3; Paper 5, 2.

B. The '869 Patent

The '869 patent is directed to an expandable intervertebral implant. Ex. 1001, (57). Figures 12a–12c, reproduced below, show posterior lumbar interbody fusion (PLIF) cage 300, which includes external cage element 301 and internal expandable element 302. *Id.* at 3:38–39, 11:65–12:1.

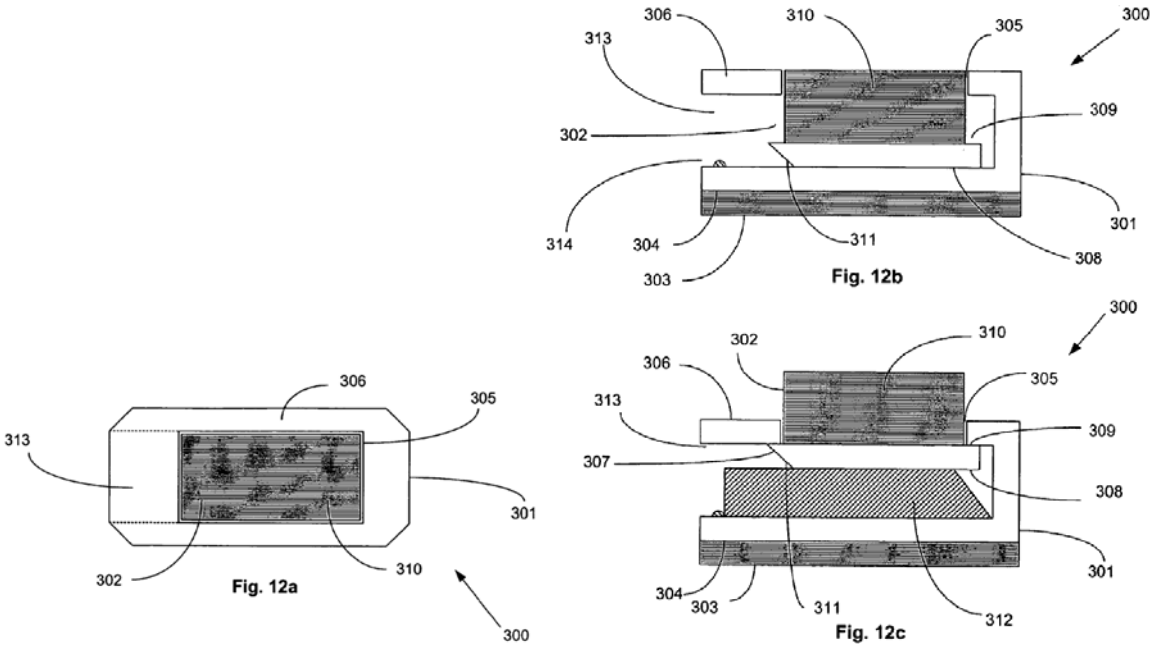
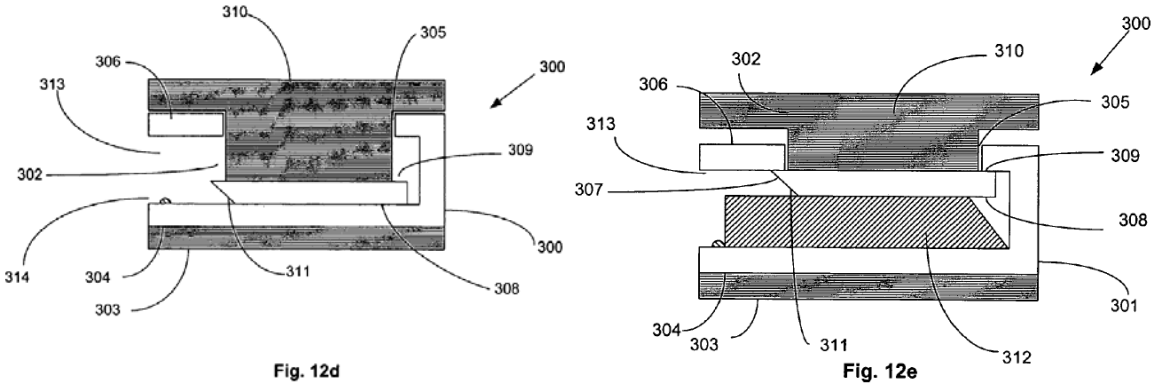


Figure 12a is a top view of PLIF cage 300. *Id.* at 8:60–61. Figures 12b and 12c are side cross-sectional views of PLIF cage 300 before and after expansion, respectively. *Id.* at 8:62–67. Internal expandable element 302 includes generally planar plate member 307 and osteoconductive mesh structure 310. In use, expansion plate 312 is inserted into posteriorly located expansion slot 313 of PLIF external cage element 301 and engages lifting notch 311 of planar plate member 307 of internal expandable element 302.

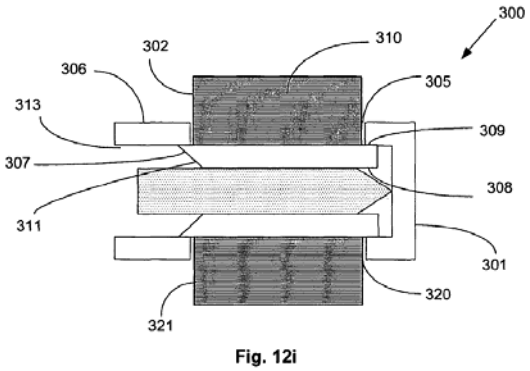
Id. at 12:10–16. Locking lip 314 prevents dislocation of expansion slot 313. *Id.* at 12:16–18.

Figures 12d and 12e, reproduced below, show transforaminal lumbar interbody fusion (TLIF) cage 300. *Id.* at 3:39–40, 12:19–20.



Figures 12d and 12e are side cross-sectional views of TLIF cage 300 before and after expansion, respectively. *Id.* at 9:1–6. The primary difference between PLIF cage 300 of Figures 12a–12c and TLIF cage 300 of Figures 12d–12e is the T-shaped osteoconductive mesh structure 310, which provides more surface area between mesh structure 310 and bony endplates within the intervertebral space. *Id.* at 12:20–29.

Figure 12i, reproduced below, is a cross-sectional view of an expandable cage that can be expanded in two dimensions. *Id.* at 9:13–14, 12:30–31.



As depicted in Figure 12i, cage element 301 includes expansion window 320 through its inferior surface and second expandable element 321. *Id.* at 12:31–33. In use, the expansion plate pushes both internal expandable elements 302, 321 through their respective expansion windows 305, 320. *Id.* at 12:33–36.

C. Challenged Claims

The Petition challenges claims 23 and 37, which are reproduced below:

> 23. An intervertebral implant for a human spine, comprising:
>
> a cage element with a superior surface and an inferior surface, wherein the inferior surface of the cage element comprises a first opening and the superior surface of the cage element comprises a second opening;
>
> a first insert, wherein, during use, at least a portion of the first insert is inserted at least partially into the first opening, and wherein the first insert comprises a support surface that, during use, supports at least a portion of a first vertebra below and away from the inferior surface of the cage element and inhibits movement of the first vertebra towards a second vertebra;
>
> a second insert, wherein, during use, at least a portion of the second insert is inserted at least partially into the second opening, and wherein the second insert comprises a support surface that, during use, supports at least a portion of a second vertebra above and away from the superior surface of the cage element and inhibits movement of the second vertebra towards the first vertebra; and
>
> an expansion member that, during use, is inserted in a third opening in the cage element to lower the support surface of the first insert below and away from the inferior surface of the cage element to support at least a portion of the first vertebra below and away from the inferior

surface of the cage element and inhibit movement of the first vertebra towards a second vertebra,

wherein the expansion member when inserted in the third opening raises the support surface of the second insert above and away from the superior surface of the cage element to support at least a portion of the second vertebra above and away from the superior surface of the cage element and inhibit movement of the second vertebra towards the first vertebra.

37. An intervertebral implant for a human spine, comprising:

a first member comprising a first inferior surface and a first superior surface, where the first superior surface comprises a substantially planar surface configured to contact and support a first vertebra of a human spine;

a second member comprising a second inferior surface and a second superior surface, where the second inferior surface comprises a substantially planar surface configured to contact and support a second vertebra of a human spine;

a cage comprising a first opening in a superior surface of the cage and a second opening in an inferior surface of the cage, wherein, during use, the first member is inserted at least partially into the first opening and the second member is inserted at least partially in the second opening; and

an expansion element that, during use, is inserted between the first inferior surface of the first member and the second superior surface of the second member, wherein insertion of the expansion member expands the first and second members relative to one another to increase a separation distance between the first superior surface of the first member and the second inferior surface of the second member, wherein the first superior surface is expanded above the superior surface of the cage and the second inferior surface is expanded below the inferior surface of the cage, such that the distance between the first superior surface and the second inferior surface is greater than the

> distance between the superior surface and the inferior surface of the cage, and wherein the first superior surface supports at least a portion of the first vertebra above the superior surface of the cage and the second inferior surface supports at least a portion of the second vertebra below the inferior surface of the cage.

D. References Relied Upon

The Petition relies on the following references:

Johnson	US 6,595,998 B2	July 22, 2003	Ex. 1004
Biedermann	US 6,176,882 B1	Jan. 23, 2001	Ex. 1005

E. Alleged Grounds of Unpatentability

Petitioner contends that claims 23 and 37 of the '869 patent are unpatentable on the following grounds:

References	Basis	Claim(s) Challenged
Johnson	§ 103	23 and 37
Biedermann	§ 103	37

II. ANALYSIS

A. Claim Construction

In an *inter partes* review, claim terms in an unexpired patent are given their broadest reasonable construction in light of the specification of the patent in which they appear. 37 C.F.R. § 42.100(b). Under the broadest reasonable construction standard, claim terms are given their ordinary and customary meaning, as would be understood by one of ordinary skill in the art in the context of the entire disclosure. *In re Translogic Tech., Inc.*, 504 F.3d 1249, 1257 (Fed. Cir. 2007).

1. The cage limitations

Claim 23 recites "a cage element with a superior surface and an inferior surface, wherein the inferior surface of the cage element comprises a first opening and the superior surface of the cage element comprises a second opening." Claim 37 recites "a cage comprising a first opening in a superior surface of the cage and a second opening in an inferior surface of the cage."

The claim construction section of the Petition does not propose an express construction for these (or any other) limitations. *See* Pet. 6–7. However, in the course of its obviousness arguments, Petitioner asserts that "a cage is a type of interbody implant that may be packed with bone graft and is used to mechanically stabilize the intervertebral region during fusion." *Id.* at 33; *see also* Ex. 1006 ¶ 44.

Patent Owner "generally agrees" with Petitioner's apparent position that an ordinary and customary meaning is appropriate for these terms, but contends that the interpretation taken in Petitioner's obviousness analysis is too broad. Prelim. Resp. 8–9. Patent Owner asserts that the ordinary meaning of "cage" is "a structure that encloses or confines an object or thing, typically with at least one surface that provides an opening(s) through which air, light, or smaller objects can pass." *Id.* at 9 (citing Ex. 2016, 155; Ex. 2017, 251). Patent Owner argues that in the embodiments of the '869 patent covered by the challenged claims, cage element 301 "has surface area on all six sides to form a six-sided enclosure around the internal expandable element (302), thereby maintaining a portion of the internal expandable element (302) within the internal void." *Id.* at 10 (citing Ex. 1001, Fig. 12a–12b). Based on the features and operation of embodiments covered by the

challenged claims, Patent Owner proposes that "the 'cage' must form a six-sided enclosure around the internal void where the expandable element is located." Prelim. Resp. 13–14. Patent Owner further argues that

> the cage must have at least some surface area on its superior surface and inferior surfaces to form an enclosure around the internal void for retaining the a portion of internal expandable element inside, while the openings must be in the form of expansion windows in the superior and inferior surfaces of the cage in which a portion of the internal expandable elements must be inserted and maintained during use.

Id. at 14.

We observe that several of the features that Patent Owner includes in its proposed construction for "cage" are already expressly recited in the challenged claims. For example, both claims recite that the cage (or cage element) includes superior and inferior surfaces, each of which has an opening. Accordingly, even if Patent Owner is correct that these features form part of the meaning of a "cage" in the challenged claims, it would be redundant to repeat these characteristics as part of an express construction of "cage."

The aspects of Patent Owner's construction that are not expressly recited in other portions of the challenged claims include that the cage is six-sided and that it retains a portion of the internal expandable elements inside its internal void. In our view, these features do not inhere in the meaning of "cage" but are simply characteristics of certain embodiments described in the '869 patent. "'Although 'it is entirely proper to use the specification to interpret what the patentee meant by a word or phrase in the claim, . . . this is not to be confused with adding an extraneous limitation appearing in the specification, which is improper.'" *In re Paulsen*, 30 F.3d 1475, 1480 (Fed.

Cir. 1994) (quoting *E.I. du Pont de Nemours & Co. v. Phillips Petroleum Co.*, 849 F.2d 1430, 1433 (Fed. Cir. 1988)). The Federal Circuit has repeatedly cautioned that limitations from the specification should not be read into the claims. *See*, *e.g.*, *Phillips v. AWH Corp.*, 415 F.3d 1303, 1323 (Fed. Cir. 2005) ("[A]lthough the specification often describes very specific embodiments of the invention, we have repeatedly warned against confining the claims to those embodiments.").

Based on the current record, the broadest reasonable interpretation of "cage element" in claim 23 and "cage" in claim 37 is "enclosure." *See* Ex. 2016, 155; Ex. 2017, 251. As Patent Owner acknowledges, this is the ordinary and customary meaning of "cage." *See* Prelim. Resp. 9. The Specification of the '869 patent uses the term according to this same ordinary usage. *See Paulsen*, 30 F.3d at 1480 ("[W]hen interpreting a claim, words of the claim are generally given their ordinary and accustomed meaning, unless it appears from the specification or the file history that they were used differently by the inventor."). We note that this meaning does not signify that the cage is entirely enclosed. Indeed, the challenged claims expressly recite that there are at least two openings in the cage.

2. "a first member . . ." and "a second member . . ."

Claim 37 recites "a first member comprising a first inferior surface and a first superior surface, where the first superior surface comprises a substantially planar surface configured to contact and support a first vertebra of a human spine" and "a second member comprising a second inferior surface and a second superior surface, where the second inferior surface comprises a substantially planar surface configured to contact and support a second vertebra of a human spine."

Petitioner argues that these claim terms merely recite intended use and do not structurally distinguish the claimed apparatus. *See* Pet. 29, 47. Therefore, Petitioner contends that the quoted claim language "carries no patentable weight." *Id.* Patent Owner does not address in its Preliminary Response whether these terms constitute limitations that should be given patentable weight.

We disagree with Petitioner's position that these claim terms are entitled to no patentable weight. Contrary to Petitioner's assertion, most of the quoted claim language is structural in nature. The final phrase, "configured to contact and support a [first/second] vertebra of a human spine," is functional because it states what the substantially planar surface does, rather than what structure it includes. *See In re Schreiber*, 128 F.3d 1473, 1478 (Fed. Cir. 1997). But functional claim language is not simply disregarded, as Petitioner advocates. As explained in *Schreiber*, a case cited by Petitioner (*see* Pet. 29 n.5), "[a] patent applicant is free to recite features of an apparatus either structurally or functionally." *Schreiber*, 128 F.3d at 1478. Recent Federal Circuit decisions have continued to give patentable weight to claim language similar to the "configured to" phrase at issue here. *See In re Giannelli*, 739 F.3d 1375, 1379–80 (Fed. Cir. 2014); *Aspex Eyewear, Inc. v. Marchon Eyewear*, 672 F.3d 1335, 1349 (Fed. Cir. 2012).

Having determined that the quoted claim terms are entitled to patentable weight, we do not discern any further dispute between the parties regarding the meaning of the terms. *See Wellman, Inc. v. Eastman Chem. Co.*, 642 F.3d 1355, 1361 (Fed. Cir. 2011) ("[C]laim terms need only be construed 'to the extent necessary to resolve the controversy.'") (quoting *Vivid Techs., Inc. v. Am. Sci. & Eng'g, Inc.*, 200 F.3d 795, 803 (Fed. Cir.

1999)). Thus, for purposes of this Decision, we need not provide an express construction for these terms, aside from noting that the terms must be given weight in the patentability analysis.

B. Obviousness Based on Johnson

Petitioner argues that claims 23 and 37 are unpatentable under 35 U.S.C. § 103(a) as obvious over Johnson. Pet. 9–42.

1. Summary of Johnson

Johnson describes an implantable device that uses stacked wafers to provide an axially extending column to distract and support tissue surfaces. Ex. 1004, 4:55–60. Among the uses Johnson discloses for the device are treatment of vertebral compression fractures, replacement of vertebral discs, and as an interbody fusion device. *Id.* at 4:67–5:2. Johnson teaches that "[o]ne method to deliver the wafers is through an inserter that guides the wafers into position and provides the force along the X-axis to slide one wafer under another and provide the lifting force across the height of the column to meet the surgical demands of the procedure." *Id.* at 17:5–9. The inserter can be a fixed tip inserter or a detachable tip inserter. *Id.* at 17:9–10.

Figures 37 and 38 are reproduced below:

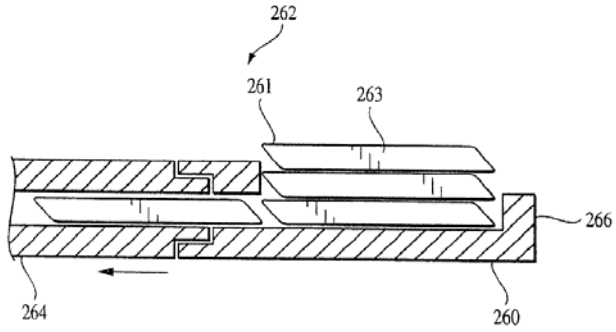


FIG. 37

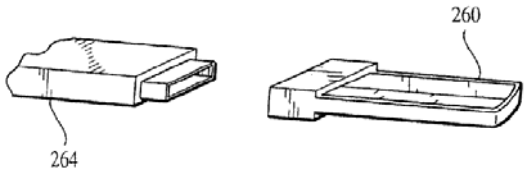


FIG. 38

Figure 37 is a sectional view of a portion of an insertion device, and Figure 38 shows a plan view of the insertion device with tip 260 removed from

main portion 264. *Id.* at 8:20–24, 17:66–18:2.

Johnson describes that "[t]he detachable tip wafer inserter embodiment, as seen in FIG. 37, includes a distal tip 260 of the wafer inserter 262 that is detachable from the main portion 264 of the inserter." *Id.* at 17:47–50. Distal shoulder 266 holds the first wafer in place while the second wafer is inserted under the first. *Id.* at 17:58–60. Wafers 263 are inserted until the desired height or force is attained, and distal tip 260 is then released from main portion 264 and main portion 264 is removed. *Id.* at 17:65–18:2; 21:26–31.

With reference to Figure 30, Johnson describes that the detachable tip wafer inserter can be configured to deploy wafers in opposing columns. *Id.* at 18:20–31. Figure 29 of Johnson is reproduced below:

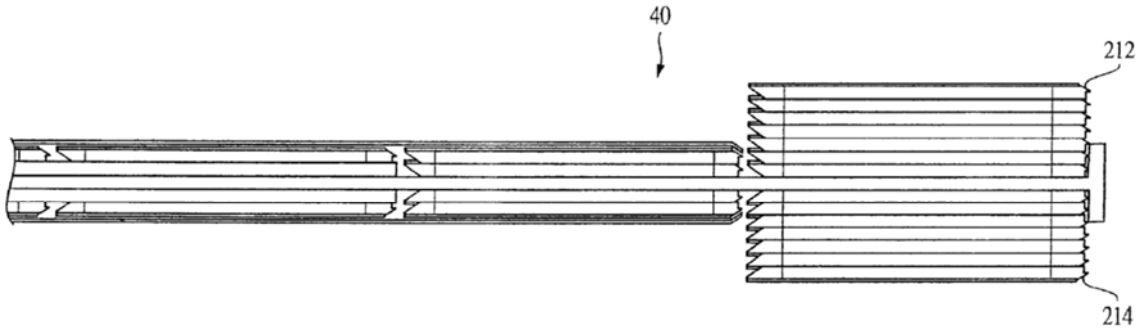


FIG. 29

Figure 29 is a sectional view of a portion of the insertion device shown in Figure 30. *Id.* at 8:1–5. In describing this embodiment, Johnson explains as follows:

> [O]ne column may be built in the positive Z-axis. Thus, if the supporting bone below the distal end of the track begins to yield, a second column in the negative Z-axis can be built by inserting wafers below the track. Once the negative Z-axis column has provided enough support for the wafer inserter, insertion of wafers into the positive Z-axis column can be

resumed.

Id. at 18:22–28. Johnson also describes that, as an alternative to deploying wafers in each direction independently, "wafer deployment may be simultaneous in each direction, in which case a wafer would be added to the wafer columns forming in opposing directions." *Id.* at 15:1–4.

2. Claim 23

Petitioner contends that Johnson teaches all of the elements of claim 23. Reproduced below is Petitioner's annotated version of Johnson's Figures 29 and 37 illustrating how Petitioner correlates the features of Johnson's device to the elements of claim 23:

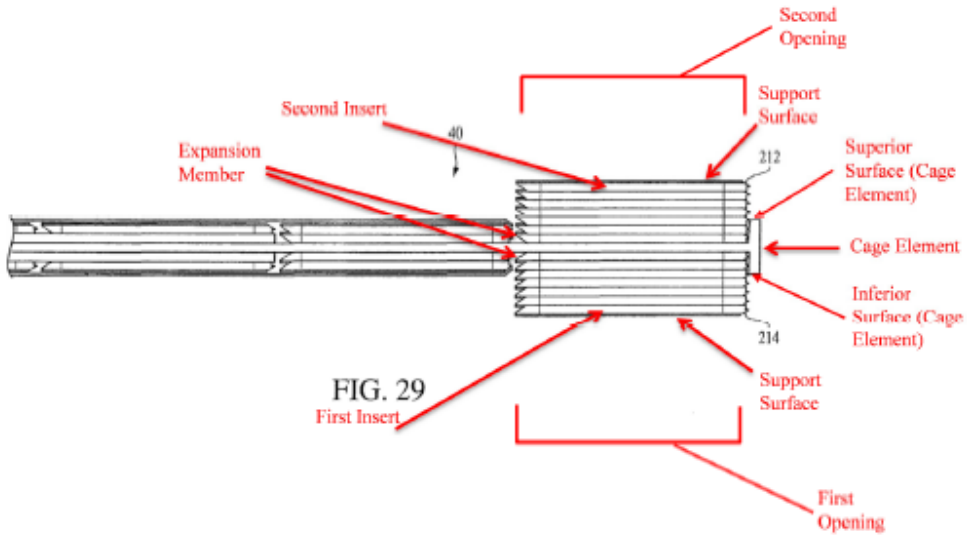
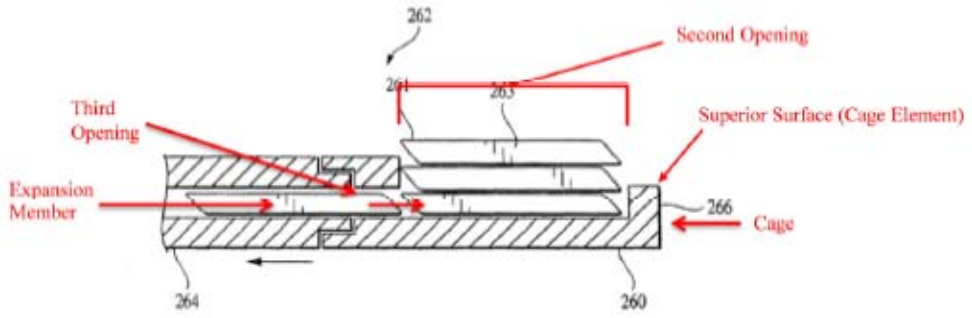


FIG. 29



Pet. 24.

As shown above, Petitioner argues that Johnson's detachable tip 260 corresponds to the claimed "cage element." Pet. 13. Petitioner points out that in the embodiment in which Johnson deploys wafers in opposing columns, as shown in Figures 29 and 30, detachable tip 260 has openings in its superior and inferior surfaces. *Id.*

Patent Owner disputes that Johnson discloses a "cage element" as recited in claim 23. Prelim. Resp. 20–21. Patent Owner's argument is based on its proposed construction of "cage element" as requiring a six-sided enclosure that maintains at least a portion of the internal expandable element within the interior of the cage. *See id.* As discussed in Section II.A.1., however, we do not adopt Patent Owner's construction of this term and instead construe "cage element" to mean "enclosure." Applying that construction, we agree with Petitioner that Johnson's detachable tip 260 constitutes a cage element, because it encloses a wafer and holds it in place until another wafer is inserted. Ex. 1004, 17:58–60, Fig. 37. To the extent that Patent Owner argues that Johnson's detachable tip 260 lacks a superior or inferior surface (*see* Prelim. Resp. 20), we disagree. Petitioner's annotated figures above identify surfaces of detachable tip 260 that are superior and inferior surfaces. *See also* Ex. 1004, Fig. 38.

Petitioner points to the lower-most wafer in Johnson's wafer column as the claimed "first insert" and the upper-most wafer in the column as the "second insert." Pet. 17–18, 24. According to Petitioner, Johnson discloses that during use, the wafer inserter is positioned within the surgical site and wafers are deployed until a column of sufficient height is created. *Id.* at 18. Thus, "the first and second member followed by each subsequent wafer would traverse, or be inserted at least partially through the first and second

opening in the cage." *Id.* Petitioner further asserts that the proximal opening in the detachable tip 260 constitutes the claimed "third opening" and a wafer deployed through that opening following the first and second members is an "expansion element." *Id.* at 21–22. Petitioner also refers to Johnson's disclosure that wafers can be deployed simultaneously in each direction, and that wafers can have a chevron shape to simultaneously distract the upper and lower bodies. *Id.* at 22 (citing Ex. 1004, 14:47–15:4, 6:9–15, 28–31).

Patent Owner argues that Petitioner fails to show how Johnson discloses that "during use, at least a portion of the [first/second] insert is inserted at least partially into the [first/second] opening." Prelim. Resp. 22. According to Patent Owner, this limitation of claim 23 is absent from Johnson's device because "the upper-most and lower-most wafers of the column are pushed entirely out of the detachable inserter tip." *Id.* at 23. Patent Owner's argument is not persuasive because Johnson's deployment of the upper-most and lower-most wafers from inside detachable tip 260 through openings at the top and bottom of tip 260 satisfies the limitation quoted above. Passing entirely through an opening necessarily involves "at least partial[]" insertion. Patent Owner does not identify, and we do not find, any requirement in claim 23 that a portion of the first and second inserts must be maintained within the first and second openings, respectively. *See* Prelim. Resp. 23.

Based on the current record, Petitioner has demonstrated a reasonable likelihood that it will prevail in showing that claim 23 would have been obvious in view of Johnson.

3. Claim 37

Petitioner provides a detailed explanation of how each limitation of claim 37 is disclosed in Johnson. *See* Pet. 25–42. Patent Owner's arguments regarding claim 37 are the same as for claim 23. *See* Prelim. Resp. 19–23. For the same reasons discussed above, Patent Owner's arguments are not persuasive. Based on the current record, Petitioner has demonstrated a reasonable likelihood that it will prevail in showing that claim 37 would have been obvious in view of Johnson.

C. Obviousness Based on Biedermann

Petitioner argues that claim 37 is unpatentable under 35 U.S.C. § 103(a) as obvious in view of Biedermann. Pet. 42–59.

1. Summary of Biedermann

Biedermann relates to an intervertebral implant that is inserted to stabilize the intervertebral region after removal of an intervertebral disk. Ex. 1005, 1:8–11. Figures 1, 7, and 8 of Biedermann are reproduced below:

FIG.1

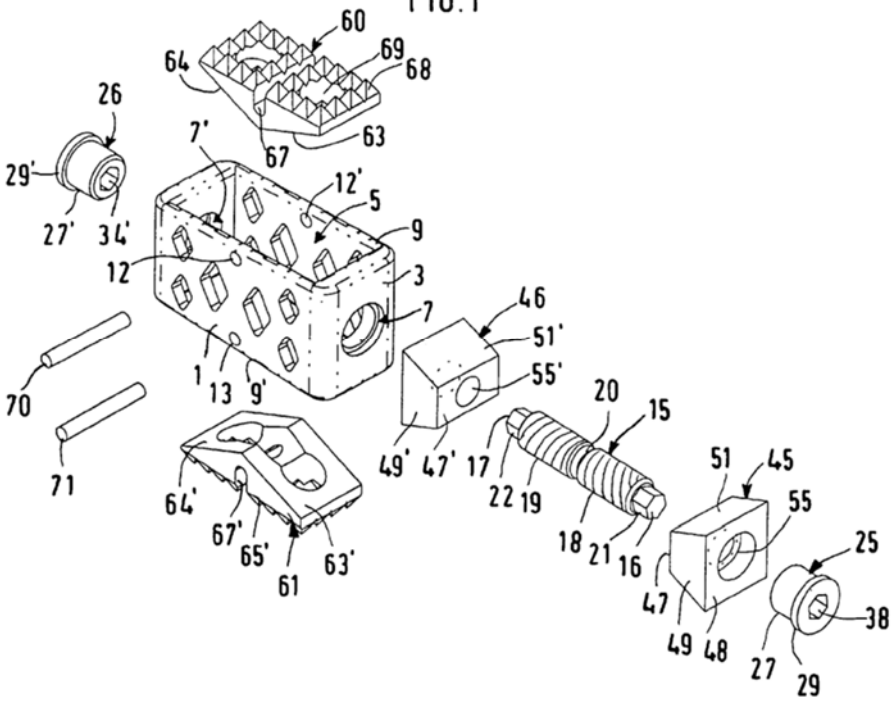


FIG.7

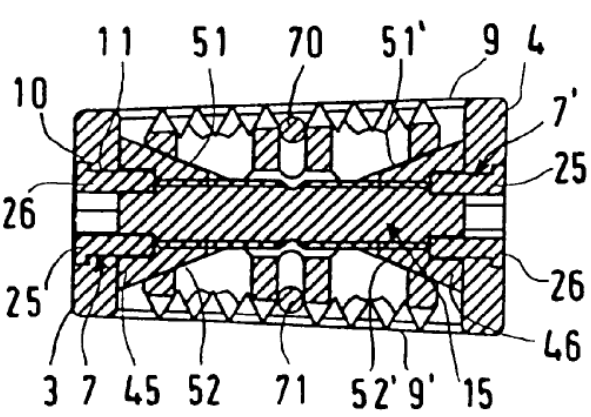


FIG.8

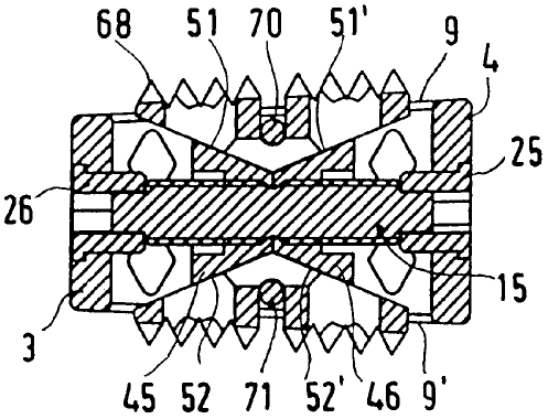


Figure 1 is an exploded representation of the implant. *Id.* at 2:9–10. Figures 7 and 8 are cross-sectional views of the implant with the teeth in retracted and projecting positions, respectively. *Id.* at 2:17–22.

Threaded spindle 15 is inserted into coaxial bores 7, 7′ in front wall 3 and back wall 4. *Id.* at 2:39–40, 56–57. Wedge members 45, 46 are provided on threaded portions 18, 19 of spindle 15. *Id.* at 3:32–34. Engagement members 60, 61 are placed on the top and bottom faces of wedge members 45, 46. *Id.* at 3:57–67. The surfaces of engagement members 60, 61 comprise teeth 68. *Id.* at 4:6–8. Biederman explains that "[i]n operation first the wedge members 45, 46 are brought into the position shown in FIG. 7" in which engagement members 60, 61 take their "lowermost position wherein the teeth 68 do not project beyond the edge of the implant. The implant can therefore easily be inserted into the area between the vertebrae." *Id.* at 4:37–45. "After having correctly positioned the implant between the vertebrae the two wedge members 45, 46 are moved towards each other by rotating the threaded spindle 15 . . . until the teeth

project beyond the edge of the implant to thereby clutch the vertebrae." *Id.* at 4:46–54.

2. Analysis

Claim 37 recites a first member having a first superior surface that "comprises a ***substantially planar surface*** configured to contact and support a first vertebra of a human spine."

Petitioner's initial position is that this limitation should be given no patentable weight. *See* Pet. 47. For the reasons discussed in Section II.A.2., we disagree with Petitioner's initial position. In the alternative, Petitioner argues that Biedermann's engagement member 60 corresponds to the "first member" and that it has a substantially rectangular contour facing toward the vertebral body. *See id.* at 48 (citing Ex. 1005, 3:57–4:11). According to Petitioner, a skilled artisan "would have understood that the surface formed on the contour of the rectangle is a substantially planar surface, including texture to enhance contact with the superior and inferior bone surfaces." *Id.* (citing Ex. 1006 ¶ 34).

The evidence does not support Petitioner's assertion that the upper surface of Biedermann's engagement member 60 is a "substantially planar surface," as recited in claim 37. The entire upper surface of engagement member 60 is occupied by teeth 68, which are depicted as forming a jagged, spiked surface. *See* Ex. 1005, 4:6–8, Figs. 1, 4, 8. Petitioner does not offer a claim construction that explains how such a jagged surface could be considered to be "substantially planar." Moreover, Petitioner does not present any evidence or argument as to why it would have been obvious to modify the spiked surface of engagement member 60 in Biedermann to instead have a substantially planar surface.

Accordingly, Petitioner has not demonstrated a reasonable likelihood that it will prevail in showing that claim 37 would have been obvious in view of Biedermann.

D. Patent Owner's Argument Under § 325(d)

Patent Owner argues that we should decline to institute pursuant to 35 U.S.C. § 325(d), which gives the Board authority to reject a petition that presents the same or substantially the same prior art or arguments as were previously presented to the Office. *See* Prelim. Resp. 14–17.

Johnson and Biedermann were disclosed during the prosecution of the '869 patent and are listed among the References Cited in the '869 patent. *See* Ex. 1001; Pet. 7–8, Prelim. Resp. 15. We note that a large number of references were cited during prosecution of the '869 patent, such that the listing of References Cited runs five pages long. *See* Ex. 1001. Patent Owner asserts that Biedermann was applied in rejecting claims during the prosecution of a related patent, but Patent Owner does not identify any portion of the prosecution history of the '869 patent in which Johnson or Biedermann were discussed or applied. *See* Prelim. Resp. 14–17.

Under § 325(d), "the Director may take into account whether, and reject the petition . . . because, the same or substantially the same prior art or arguments previously were presented to the Office." The permissive language in the statute signals that we are not required to reject a petition simply because it relies on art that was cited to the Office previously, and we decline to do so in this case.

III. CONCLUSION

For the foregoing reasons, upon review of Petitioner's analysis and supporting evidence, as well as the arguments presented in the Preliminary

Response, we conclude that Petitioner has demonstrated a reasonable likelihood that it will prevail with respect to its obviousness challenge to claims 23 and 37 based on Johnson. We further conclude that Petitioner has not demonstrated a reasonable likelihood that it will prevail in its obviousness challenge to claim 37 based on Biedermann.

At this stage in the proceeding, we have not made a final determination as to the patentability of any challenged claims.

IV. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that pursuant to 35 U.S.C. § 314(a), an *inter partes* review is instituted as to claims 23 and 37 of the '869 patent on the following ground:

Claims 23 and 37 as unpatentable under 35 U.S.C. § 103(a) over Johnson;

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; and

FURTHER ORDERED that the trial is limited to the ground identified above.

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