

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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GLOBUS MEDICAL, INC., Petitioner

v.

DEPUY SYNTHES PRODUCTS, LLC Patent Owner

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Case IPR2015-00099

Patent 8,623,057 B2

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**Petitioner's Request for Rehearing**

**Pursuant to 37 C.F.R. § 42.71(d)**

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**LIST OF EXHIBITS**

Exhibit Numbers	Contents
1017	U.S. Patent Application No. 09/725,737 to Giacomini (file history)
1018	Brief For Appellee – Director of the United States Patent and Trademark Office (Appeal No. 2009-1400) (Giacomini appeal)
1019	U.S. Patent Application No. 10/862,079 to Yamaguchi (file history)
1020	U.S. Patent Application No. 60/581,716 to Panjabi (provisional application)
1021	U.S. Patent Application No. 11/159,471 to Panjabi (file history for U.S. Patent No. 7,931,675)
1022	U.S. Patent Application No. 11/159,471 to Panjabi (patent application for U.S. Patent No. 7,931,675) (highlighted)

Globus Medical, Inc. (“Petitioner”) requests rehearing, under 37 C.F.R. § 42.71(d), of the Board’s Decision (Paper No. 11, May 1, 2015) (“Decision”). Petitioner seeks reconsideration of the Decision not to institute trial for U.S. Patent No. 8,623,057 (“the ‘057 patent”), determining that U.S. Patent No. 7,931,675 (“Panjabi 2005”) does not qualify as prior art under § 102(e) as presented in the Petition, Paper No. 6 (“Petition”) merely because the Petition did not include a copy of the Panjabi provisional application (“Panjabi 2004”).

## **I. INTRODUCTION**

Petitioner filed IPR petitions seeking review of the ‘057 patent to “secure the just, speedy, and inexpensive resolution” of the patentability of the challenged claims. 37 C.F.R. § 42.1(b). In the IPR petitions, Petitioner submitted Panjabi 2005 as prior art under § 102(e). Three IPR petitions are now in jeopardy, not based on the merits, but because the Board requires that provisional applications accompany any assertion of priority. There is no reasonable fact dispute that Panjabi 2004 fully discloses the relied on information in Panjabi 2005.

Lacking an actual fact dispute, the Decision rests solely on the incorrect assumption that Panjabi 2004 must be an exhibit to the Petition for Panjabi 2005 to receive a proper § 102(e) date. The statute and the USPTO’s interpretation are clear that this is not required, yet the Board reaches a contrary conclusion. Under all legal authority, Panjabi 2005 is prior art as of its provisional filing date,

irrespective of Panjabi 2004 being filed with the Petition. This is especially true because the Patent Owner did not challenge the underlying factual basis of Panjabi 2005's priority claim to Panjabi 2004. Petitioner therefore respectfully submits the Board erred as a matter of law by failing to properly determine the filing date of Panjabi 2005 under § 102(e), in accordance with §§ 111 and 119(e)(1).

Further, because Patent Owner did not identify even one passage of Panjabi 2005 not supported by Panjabi 2004, the Board appears to have misapprehended Patent Owner as disputing the priority date of Panjabi 2005. Petitioner respectfully requests the Board take Official Notice of Exhibits 1020 and 1021 to demonstrate no fact dispute could exist. The Board should therefore reconsider its Decision, and institute trial based on the grounds provided in the Petition.

## **II. ARGUMENT**

The Board noted that Panjabi 2005 issued from Appl. No. 11/159,471 filed June 23, 2005, which properly claims priority to Panjabi 2004, provisional Appl. No. 60/581,716 filed June 23, 2004. Decision at 2-3. These facts are not in dispute. After making this determination, the Board nonetheless stated:

For purposes of this decision, we accord June 23, 2005, the filing date of the application that issued as Panjabi, rather than the earlier filing date of the provisional application to which Panjabi claims priority, as the date on which Panjabi is effective as prior art under 35 U.S.C. ¶ 102(e). [Decision at 3.]

The Board erred that the Petition must (1) include a copy of Panjabi 2004 and (2) show how Panjabi 2004 compares with Panjabi 2005. The statute, Federal Circuit precedent, and USPTO interpretations make clear that the § 102(e) filing date of Panjabi 2005 is June 23, 2004, the filing date of Panjabi 2004.

**A. 35 U.S.C. § 102(e) and § 119(e) Compel that the Filing Date of Panjabi 2005 is June 23, 2004**

As required by statute, Panjabi 2005 qualifies as prior art under § 102(e). Section 119(e)(1) requires that a non-provisional application is treated as though it is filed on the date of the provisional application to which it properly claims priority. 35 U.S.C. § 119(e)(1). This is exactly the situation with Panjabi 2005, which claimed priority to a June 23, 2004 provisional application. Section 119 confirms that the correct § 102(e) priority date for Panjabi 2005 is its provisional filing date:

An application for patent filed under section 111(a) ... for an invention disclosed in the manner provided by the first paragraph of section 112 of this title in a provisional application filed under section 111(b) of this title ... shall have the same effect, as to such invention, as though filed on the date of the provisional application filed under section 111(b) of this title, if the application for patent filed under section 111(a) ... is filed not later than 12 months after the date on which the provisional application was filed ....

35 U.S.C. § 119(e)(1). Despite this clear statutory language, the Board ruled that the Panjabi 2005 § 102(e) date was its non-provisional application date (June 23,

2005), rather than the statutorily mandated provisional filing date (June 23, 2004).

The Board concluded that “the effective date of Panjabi as prior art under § 102(e) is the date on which an application in Panjabi’s priority chain was filed that discloses the information relied upon to prove unpatentability of the challenged claims.” Decision at 3. The information “**relied upon**” is in Panjabi 2005, which is fully supported by Panjabi 2004. Section 119 specifies that the Panjabi 2005 § 102(e) date is the Panjabi 2004 filing date -- June 23, 2004; Panjabi 2005 **shall have the same effect** as if filed on the date of Panjabi 2004. *See* § 119(e)(1).

**B. Under Federal Circuit Law, A Patent Is Entitled To Its Provisional Filing Date When Not Rebutted**

The Board did not follow Federal Circuit precedent. The Board quotes *In re Giacomini*: “[u]nder 35 U.S.C. § 102(e), ‘an applicant is not entitled to a patent if another’s patent discloses the same invention, which was carried forward from an earlier U.S. provisional application or U.S. non-provisional application.’” Decision at 3 (quoting *In re Giacomini*, 612 F.3d 1380, 1383 (Fed. Cir. 2010)). The Board, however, erroneously concludes that, for purposes of an IPR petition, a § 102(e) reference is not entitled to its provisional application filing date **unless** the petition (1) includes a copy of the provisional application and (2) shows parallel support in the provisional application. Yet, like the relevant statutory authority, the Federal Circuit does not require such an analysis or submission. The Federal Circuit held: “Because the Board correctly rejected Giacomini’s application under 35 U.S.C. §

102(e) on the basis that the invention was described in a patent claiming priority to a U.S. provisional application filed before Giacomini's filing date, this court affirms." *In re Giacomini*, 612 F.3d at 1385.

The background of *Giacomini* confirms that there was no substantive evidence about the Tran provisional application until the Board decision, which only then identified two lines from the provisional application. During prosecution, the Examiner rejected the claims based on Tran, **relying solely on § 102(e)**, without identifying parallel support in the Tran provisional:

Claims 1,8,11,12,15,22-24,27-28 and 31-32 are rejected under 35 U.S.C. § 102(e) as being anticipated by Tran et al [Tran, 7,039,683 B1] or admitted prior art.

Exhibit 1017 at 135 (Giacomini Non-Final Rej. 04/27/2007). Applicant argued against the Ground 2 Tran rejection in its Appeal Brief as follows:

**Ground 2: 35 U.S.C. 102 Rejection of Claims 1, 8, 11, 12, 15, 22-24, 27-28, and 31-32**

Claims 1, 8, 11, 12, 15, 22-24, 27-28, and 31-32 have been rejected under 35 U.S.C. 102(e) as being anticipated by V. Tran et al., U.S. Patent 7,039,683 B1 (hereinafter "**Tran**"). The applicants respectfully traverse.

The 102(e) filing date of Tran is 29 December 2000, which is **after** the filing date of the present application (29 November 2000), and, therefore, it is a invalid prior art reference.

For this reason, the applicants respectfully submit that the rejection is traversed.

Exhibit 1017 at 107 (Giacomini App. Br. 05/22/2007). The Examiner's Answer to Appeal Brief responded to applicants' argument as follows:



**Rejection claim 1,8,11,12,15,22-24,27-28, and 31-32 under 102 Rejections:**

(Tran reference)

A. Appellant argues that Tran et al is not prior art since it is alleged that the 102 (e) filing data of Tran et al is 29 December 2000. However this ignores Tran et al's priority claim under 35 U.S.C. § 119(e) which is 25 September 2000 which "*is its earliest effective U.S. filing date, taking into consideration any proper benefit claims to prior U.S. applications under 35 U.S.C. 119 (e) or 120 if the prior application(s) properly supports the subject matter used to make the rejection in compliance with 35 U.S.C. 112, first paragraph*" (MPEP 706.02 (f)). Hence Tran et al qualifies as prior art. Therefore the rejection under 35 U.S.C. § 102(e) should be sustained.

Exhibit 1017 at 74 (Giacomini Examiner Ans. to App. Br. 10/17/2007). The Examiner, like the Petitioner in this proceeding, did not provide a copy of the Tran provisional or other supporting analysis under § 102(e).

The Board affirmed the Examiner's Tran 102(e) rejection. The Board, **not the Examiner**, quotes two lines of the Tran provisional application:

5. Provisional Application No. 60/234,996, from which Tran claims priority under 35 U.S.C. § 119(e), discloses that "[a]nticipating requests for electronic information . . . is generally performed based on one ore [sic] more criteria, e.g., past requests for information . . . ." (p. 3, ll. 20-21).

Exhibit 1017 at 55 (Giacomini Bd. Decision 04/17/2009). The *Giacomini* Board ruled that because applicant did not argue lack of support in the Tran provisional, Tran qualified as prior art under § 102(e) as of its provisional filing date:

Appellants argue that Tran does not qualify as prior art because “[t]he 102(e) filing date of Tran is 29 December 2000, which is after the filing date of the present application (29 November 2000)” (Br. 15).

The Examiner correctly points out, however, that Tran claims domestic priority under 35 U.S.C. § 119(e) from a provisional application filed 25 September 2000, which is prior to the filing date of the present application (Ans. 10). Tran therefore does qualify as prior art, based on the filing date of the provisional application.

Appellants make no argument in the Brief that the provisional application does not support the subject matter relied upon to make the § 102(e) rejection in compliance with § 112, first paragraph. *See Ex parte Yamaguchi*, 88 USPQ2d 1606 (BPAI 2008) (precedential).

Appellants have therefore failed to carry their burden of establishing that Examiner erred in applying Tran against the claimed invention.

Exhibit 1017 at 58 (Giacomini Bd. Decision 04/17/2009). The *Giacomini* Board decision implies that, for a § 102(e) rejection, certain relied upon subject matter in a patent might not be supported by its provisional application back to the provisional date, but the question of support is not considered without a factual dispute. Because the Appellants in *Giacomini* made no factual dispute, the Board concluded that the Examiner properly applied Tran against the claimed invention.

In the matter at hand, the same facts exist. Patent Owner did not argue that Panjabi 2004 fails to support the subject matter relied upon to prove unpatentability. As discussed below, Patent Owner cannot argue lack of support because Panjabi 2004 fully supports the subject matter relied upon to prove

unpatentability. The effective date of Panjabi 2005 as prior art, therefore, is the filing date of Panjabi 2004, which precedes the filing date of the '057 patent.

The *Giacomini* Applicant appealed to the Federal Circuit, where the Federal Circuit affirmed the Tran 102(e) rejection. *In re Giacomini*, 612 F.3d 1380 (Fed. Cir. 2010). During the *Giacomini* appeal, the USPTO Director squarely embraced the same position Petitioner now advances for Panjabi 2005:

Given the plain language of § 102(e)(2), § 119(e)(1) and § 111(b)(8), **in determining a reference's § 102(e) prior art date the USPTO is required to credit a patent reference with a proper claim to an earlier filed provisional application.**

Exhibit 1018 at 22 (*Giacomini* Director Br.) (emphasis added). The USPTO's position is clear, and specifically rejects<sup>1</sup> this Board's Decision that misapplies § 102(e) for Panjabi 2005 in this proceeding.

As the USPTO correctly noted in 1995, "As long as the requirements of 35 U.S.C. 119(e) are satisfied, **a patent granted on a 35 U.S.C. 111(a) application which claimed the benefit of the filing date of a provisional application has a 35 U.S.C. 102(e) prior art effect as of the filing date of the provisional application ....**" Changes To Implement 20-Year Patent Term and Provisional Applications, 60 FR 20195, 20197, 20206 (April 25, 1995 (Response to Comment 14))....

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<sup>1</sup> Petitioner's position, the same as argued by the USPTO Director in *Giacomini*, "is the only reasonable one." Exhibit 1018 at 18 (*Giacomini* Director Br.).

Exhibit 1018 at 33 (Giacomini Director Br.) (emphasis added).

**C. Under USPTO Precedent, A Patent Is Entitled To Its Provisional Filing Date When Not Rebutted**

The Board has not followed its own precedent because it misapplied *Ex parte Yamaguchi*, 88 USPQ2d 1606 (BPAI 2008) (precedential). As explained below, during prosecution of the Yamaguchi application, the Examiner did not compare the subject matter of the 102(e) prior art patent with its provisional application. The facts of *Ex parte Yamaguchi* reveal how a § 102(e) prior art reference supports unpatentability. In *Ex parte Yamaguchi*, the Examiner issued a rejection based on the Narayanan patent. The rejection specified:

3. Claims 9-23 are rejected under 35 U. S. C. 102(e) as being anticipated by Narayanan et al. (US Pat. 6,596,618, herein after Narayanan).

Exhibit 1019 at 86 (Yamaguchi Non-Final Rej. 10/13/2005). The Applicant responded, arguing:

To begin with, Narayanan et al. is not a proper reference based upon the present record. Narayanan et al. has a filing date of December 7, 2001 whereas the subject application bears an effective filing date prior thereto. While a provisional application is noted in Narayanan et al., there is no showing on the record as to what that provisional application contains. Unless it can be shown on the record that the provisional application shows that which is claimed in the subject application, there is no proper rejection of record.

Exhibit 1019 at 79 (Yamaguchi Rem. 10/31/2005). The final rejection stated:

4. Applicant argues that Narayanan et al. has a filing date of December 7, 2001. Note that this application claims benefit of 60/254,437, filed on December 8, 2000. Therefore, the effective filing day is the filing date of the provisional application (See MPEP 2136.03 (III)).

Exhibit 1019 at 67 (Yamaguchi Final Rej. 01/12/2006). In its Appeal Brief, Applicant argued there was no showing that the provisional supported the cited patent, noting that “the provisional application may be for cream cheese.” The entire argument is reproduced below.

Narayanan et al. is not a proper reference based upon the present record. Narayanan et al. has a filing date of December 7, 2001 whereas the subject application bears an effective filing date prior thereto. While a provisional application is noted in Narayanan et al., there is no showing on the record as to what that provisional application contains. The examiner cites M.P.E.P 2136.03 (III) as a basis for proper citation of Narayanan et al. To begin with, the M.P.E.P is not the law and has no such standing. Furthermore, even referring to the noted M.P.E.P. section, the examiner has conveniently failed to note that that section further requires that the provisional application “properly supports the subject matter relied upon to make the rejection in compliance with 35 U.S.C. 112, first paragraph”. There is no such showing on the record. As far as applicants are aware, the provisional application may be for cream cheese. It follows that, on the present record, Narayanan et al. is not an available reference.

Exhibit 1019 at 54 (Yamaguchi App. Br. 02/23/2006). The Examiner’s Answer duplicated the previous rejection. For the first time, **and only in the context of appeal**, the Examiner further responded to applicant’s Narayanan 102(e) argument noting only that provisional application is available via PAIR and “clearly show

[sic] the same subject matter as applied from the Narayanan et al. patent in the art rejections of the present application.” Exhibit 1019 at 47 (Yamaguchi Examiner Ans. Br. 04/11/2006). The Examiner also noted Applicant did not argue “inconsistencies with patent subject matter relied upon to make the rejections.” Exhibit 1019 at 47 (Yamaguchi Examiner Ans. Br. 04/11/2006). Applicant’s Reply Brief, argued that the existing “record” did not support the Narayanan rejection:

It follows from the above discussion that, in order for a provisional application to be applicable under the present Rules, it is necessary first for the examiner to furnish the provisional application and second to show how the provisional application is applicable to the rejection since the provisional application does not necessarily track the patent claiming priority therefrom. Neither has been provided in the present record. Furthermore, a cursory review of the provisional application will immediately indicate that it does not identically track the Narayanan et al. patent. Accordingly, a proper rejection herein must be based upon the provisional application and not on the issued patent and this has not been done.

Exhibit 1019 at 37 (Yamaguchi Reply Br. 05/01/2006).

The Board ultimately affirmed the rejection explaining that “the pivotal issue before us is whether Appellants have shown that the Examiner erred in relying on Narayanan as prior art under § 102(e)” and further noting that “Appellants have not disputed the Examiner’s factual findings relied upon in the disclosure of the Narayanan patent apart from disputing its qualification as prior art.” *Ex parte Yamaguchi*, 88 USPQ2d at 1608. Notably, the Examiner made no

“factual findings” during prosecution. Like in *In re Giacomini* and *Ex parte Yamaguchi*, Patent Owner does not raise a factual dispute as to the contents of Panjabi 2004. As a result, there is no basis on which to deny Panjabi 2005 the § 102(e) priority date of Panjabi 2004, which predates the ‘057 patent filing date.

**D. The Board Misapprehended Patent Owner’s “Priority Date Issue” About Panjabi 2005**

Despite Patent Owner not disputing support in Panjabi 2004, the Board endeavored to resolve a “priority date issue.” This misapprehends Patent Owner’s carefully framed argument because Patent Owner could not reasonably dispute the contents of Panjabi 2004: “Globus has failed to provide the Board with the necessary showing to establish that the prior art date for Panjabi under 35 U.S.C. § 102(e) is the date of the Panjabi provisional application.” Prelim. Resp. at 10. Just as in *In re Giacomini* and *Ex parte Yamaguchi*, a § 102(e) reference is entitled to its provisional date, absent a fact dispute about support in the provisional.

Petitioner respectfully requests that the Board take Official Notice of Panjabi 2004 since it is nearly identical to Panjabi 2005. Exhibit 1020 at 5-51 (Panjabi 2004), 40-51 (hand-illustrated Figs. 1-13); *see also* Exhibit 1021 (Panjabi 2005 application); Exhibit 1022 at 5-51 (highlighting differences between Panjabi 2005 and Panjabi 2004). By taking Official Notice of Panjabi 2004, the Board can confirm that Patent Owner is unable to raise a meaningful fact dispute about support in Panjabi 2004. In other words, while not required to resolve the priority

date in light of the statutory language, Federal Circuit precedent, and USPTO precedent outlined above, taking Official Notice demonstrates that Patent Owner cannot dispute any continuity of disclosure.

Further, the pre-institution threshold of a *prima facie* case was met:

Senator Jon Kyl remarked that the “reasonable likelihood” threshold imposed by 35 U.S.C. § 314(a) ... effectively requires the petitioner to present a *prima facie* case justifying a rejection of the claims in the patent.” 157 Cong. Rec. S1375 (daily ed. Mar. 8, 2011).

*Ford Motor Company v. Paice LLC*, Case IPR2014-01415, Paper No. 10 at 11, fn. 9 (PTAB Mar. 12, 2015). Petitioner met this threshold because Panjabi 2005 is entitled to its provisional filing date under § 119(e)(1), and thus qualifies as prior art under § 102(e). Patent Owner wrongly argues that Petitioner must compare relied on portions of Panjabi 2005 with Panjabi 2004. Prelim. Resp. at 9-10. First, in *Dynamic Drinkware*, the Board instituted trial without the necessity of the provisional application as an exhibit. *Dynamic Drinkware LLC v. Nat’l Graphics, Inc.*, Case IPR2013-00131, Paper No. 42 at 7 (PTAB Sept. 12 2014). Second, in *Dynamic Drinkware*, a post-institution priority dispute was raised, and petitioner tried, but failed to prove support in the provisional application. Third, as resolved in *In re Giacomini* and *Ex parte Yamaguchi*, a specific dispute about the contents of the provisional application must be made. Since no fact dispute exists, the filing date of Panjabi 2005 is June 23, 2004.



**E. The USPTO Found Panjabi 2005 Is Supported By Panjabi 2004**

The Board's misapprehension of Patent Owner's argument further conflicts with a prior determination by the USPTO. The USPTO already considered that Panjabi 2004 supports Panjabi 2005 during prosecution. The Board can take Official Notice of the Panjabi file history, where during prosecution, the Examiner accepted that Panjabi 2005 was supported by Panjabi 2004. Exhibit 1021 at 200-201 (Panjabi FH Remarks 02/23/2010), 172 (Panjabi FH IDS 05/11/2010). The record also reflects that the Examiner did not propound a single rejection against Panjabi 2005 based on the Jahng '210 patent, a parent of the challenged Jahng '057 patent. Therefore, the USPTO has confirmed that the effective priority date is June 23, 2004 because Panjabi 2004 supports Panjabi 2005. *PowerOasis, Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299, 1304 (Fed. Cir. 2008) (determining deference should be afforded to a PTO "determination regarding the priority date ... with respect to any reference") (emphasis in original).

While Petitioner did not provide Exhibits 1020-1021, the documents confirm why Patent Owner could not raise a fact dispute. Moreover, the Board can elect to take Official Notice of documents like patent applications to resolve ambiguity. *Merial Lt'd v. Virbac*, Case IPR2014-01279, Paper No. 13 at 13-14 (PTAB Jan. 22, 2015) (electing *sua sponte* "to take official notice of the patent application because

its accuracy is immediately capable of verification given that it is a public record of the European Patent Office”) (citing 37 C.F.R. § 42.62(c); Fed. R. Evid. 201(b)).

#### **F. Panjabi 2005 Predates The CIP Applications Of The ‘057 Patent**

Because Petitioner has demonstrated that Panjabi 2005 qualifies as prior art to the ‘057 patent, a trial should be instituted. Even though the ‘057 patent claims priority to earlier-filed CIP applications, a *prima facie* case of unpatentability has been established. Patent Owner nevertheless argues that its CIP applications ultimately predate Panjabi 2005 back to 2003. Prelim. Resp. at 13-16. The Federal Circuit decision in *PowerOasis* is controlling here. In the context of CIP applications, once a challenger established intervening prior art to the challenged claims, the patent owner must “come forward with evidence to prove entitlement to claim priority to an earlier filing date.” *PowerOasis*, 522 F.3d at 1305-1306.

Because Petitioner established a *prima facie* case of unpatentability, Patent Owner must now establish that its CIP ancestral applications support the challenged claims. Since Patent Owner has presented no evidence at this stage of the proceeding of priority support in the CIPs, institution is warranted.

### **III. CONCLUSION**

Petitioner respectfully requests that the Board reconsider its determination that Panjabi 2005 does not qualify as prior art. Based upon the statutory grounds of § 102(e), § 119(e)(1) and § 111(b)(8), Panjabi 2005 has a filing date of June 23, 2004.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that, on May 22, 2015, a copy of this

**PETITIONER'S REQUEST FOR REHEARING PURSUANT TO 37 C.F.R. §**

**42.71(D)** has been served upon the following counsel for Patent Owner DePuy

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