

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CORDIS CORPORATION,)
)
Plaintiff,)
)
v.) Civ. No. 03-027-SLR
)
BOSTON SCIENTIFIC CORPORATION)
and SCIMED LIFE SYSTEMS, INC.,)
)
Defendants.)

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MEMORANDUM OPINION

Dated: June 3, 2005
Wilmington, Delaware


ROBINSON, Chief Judge

I. INTRODUCTION

On January 13, 2003, plaintiff Cordis Corporation ("Cordis") filed this patent infringement action against defendants Boston Scientific Corporation and Scimed Life Systems, Incorporated (collectively "BSC") alleging infringement of U.S. Patent No. 4,739,762 ("the '762 patent") by BSC's EXPRESS and TAXUS EXPRESS stents. (D.I. 1) On March 5, 2003, BSC answered and counterclaimed against Cordis, alleging that some of Cordis' stents infringed U.S. Patent No. 5,922,021 ("the '021 patent"). (D.I. 26) On August 2, 2004, Cordis filed an amended complaint alleging BSC's LIBERTE stent infringed the '762 patent and U.S. Patent No. 5,895,406 ("the '406 patent"). (D.I. 161) On August 18, 2004, BSC answered the amended complaint. (D.I. 163)

This court has jurisdiction pursuant to 28 U.S.C. § 1331. Pending before the court are the parties' motions for summary judgment with respect to the validity of the '762 patent. (D.I. 218, 229)

II. BACKGROUND

A. The Palmaz Monographs

In 1980, Dr. Palmaz, the inventor of the '762 patent, wrote an "untitled, unpublished document relating to a balloon expandable intraluminal graft" ("the 1980 Monograph") to

distribute to colleagues.¹ (D.I. 231, Ex. 1 at ¶ 3, Ex. 2 at 22-23, Ex. 12 at 320; D.I. 260, Ex. 1 at 870) At the time, he worked at the VA Medical Center in Martinez, California. (D.I. 231, Ex. 1 at ¶ 3) Dr. Palmaz gave a copy of the 1980 Monograph to faculty members at the VA Medical Center during a presentation he did for his supervisors at the Center, including Dr. Stanley Carson, Dr. Stanley Reich and Dr. Reuter.² (D.I. 231, Ex. 6 at 317-18, Ex. 7 at 2812, Ex. 8 at 17, 59, 202; D.I. 260, Ex. 2 at 202) Two radiologists, various department staff members and other people Dr. Palmaz did not know were at his presentation. (Id.)

For the next three years, Dr. Palmaz met with several companies "to interest them in developing and funding research for [his] intraluminal graft." (D.I. 231, Ex. 1 at ¶ 5) Dr.

¹The 1980 Monograph described the development of angioplasty and the drawbacks of the procedure. (D.I. 231, Ex. 3) Specifically, Dr. Palmaz noted that angioplasty worked by stretching the vessel and one of the problems with the procedure was determining an adequate amount of pressure to use that would stretch the vessel without rupturing it. (Id.) The 1980 Monograph proposes placing an "intraluminal tubular structure" into a vessel as an alternative to angioplasty. (Id.) The "wire mesh" tube could expand and resist the "recoil" of the vessel wall. (Id.) The tube would be "mounted in the collapsed state over a modified . . . balloon catheter" for delivery into the vessel. (Id.) The tube would be made of "modern non-thrombogenic vascular prosthetic materials" and have a "fenestrated or a corrugated external surface" to prevent displacement of the tube. (Id.)

²Dr. Palmaz was a resident at the Center. (D.I. 260, Ex. 1 at 873) The 1980 Monograph did not contain a cover page or have Dr. Palmaz's name on it. (D.I. 260, Ex. 1 at 870)

Carson arranged a meeting between Dr. Palmaz and Vascor, a vascular device company, at which Dr. Palmaz gave Vascor a copy of the 1980 Monograph. (D.I. 231, Ex. 6 at 318-19, Ex. 8 at 202-04, Ex. 12 at 326) Vascor was interested in Dr. Palmaz's invention and extended to Dr. Palmaz an agreement letter stating that they would acknowledge him and Dr. Carson as the "originators" of the invention. (D.I. 231, Ex. 6 at 320, Ex. 8 at 205-07) The agreement also stated that Vascor was not committed to keeping the idea or material submitted a secret, however, Dr. Palmaz thought the submission would be kept confidential.³ (D.I. 231, Ex. 6 at 396; D.I. 260, Ex. 3 at 274-75) Vascor, however, did not develop Dr. Palmaz's stent. (D.I. 231, Ex. 6 at 321-22, Ex. 12 at 327) Sometime after extending to Dr. Palmaz the letter agreement, Vascor indicated it was not interested in his invention. (D.I. 231, Ex. 6 at 321-22)

Next, Dr. Palmaz approached Shiley Corporation, also a vascular device company, about developing his stent. (D.I. 231, Ex. 6 at 322, Ex. 12 at 327) Dr. Palmaz presented his 1980 Monograph to Shiley. (Id.) After Dr. Palmaz executed an agreement, in which he agreed Shiley did not have to keep his

³According to Dr. Palmaz, he understood that talking with companies, like Vascor, "was supposed to be done in privacy, and there was an understanding that they would keep your idea confidential. Otherwise, it would be totally unreasonable to make that kind of disclosure to them." (D.I. 260, Ex. 3 at 275)

invention a secret,⁴ Shiley agreed to take a look at Dr. Palmaz's work but, ultimately, decided not to develop Dr. Palmaz's invention. (D.I. 231, Ex. 6 at 323, Ex. 11 at 273, Ex. 12 at 329, Ex. 19)

Shortly thereafter, Dr. Palmaz presented the 1980 Monograph to Cook, Incorporated, a company involved in vascular devices. (D.I. 231, Ex. 6 at 324, Ex. 2 at 329) Cook was not interested, but directed Dr. Palmaz to Werner Schultz, a retired biotechnology technician from Stanford University. (D.I. 231, Ex. 6 at 324, Ex. 8 at 93-94, Ex. 12 at 32-30; D.I. 260, Ex. 2 at 2)) Dr. Palmaz subsequently met with Mr. Schultz and gave him a copy of the 1980 Monograph. (D.I. 231, Ex. 6 at 324-26, Ex. 8 at 95-96; D.I. 260, Ex. 2 at 96) Mr. Schultz gave Dr. Palmaz ideas about how to improve the invention, which Dr. Palmaz incorporated into a revision of the 1980 Monograph. (D.I. 231, Ex. 6 at 326)

On May 18, 1983, Dr. Palmaz revised the 1980 Monograph into an unpublished paper entitled, "Research Project - Expandable Vascular Endoprosthesis" ("the 1983 Monograph"). (D.I. 231, Ex. 1 at ¶ 6) Dr. Palmaz sent a copy of the revision to Mr. Schultz.⁵ (D.I. 231, Ex. 6 at 327) At this time, Dr. Palmaz was

⁴Dr. Palmaz stated that despite this agreement he thought the disclosure of the 1980 Monograph to Shiley would be kept confidential. (D.I. 231, Ex. 11 at 273, 275-77)

⁵Mr. Schultz died before Dr. Palmaz got to speak with him about the 1983 Monograph. (D.I. 231, Ex. 6 at 327)

still at the VA Medical Center in California, but was speaking with the University of Texas Health Science Center in San Antonio, Texas ("UTHSCSA") about future employment. (D.I. 231, Ex. 1 at ¶¶ 6, 7, 8) Dr. Reuter, a colleague working at UTHSCSA who had worked at the VA Medical Center in California, was Dr. Palmaz's contact at UTHSCSA. (D.I. 231, Ex. 1 at ¶ 8) Dr. Reuter was given a copy of the 1983 Monograph, and had also received a copy of the 1980 Monograph. (D.I. 231, Ex. 1 at ¶¶ 8, 10) Once Dr. Palmaz accepted a position at UTHSCSA, Dr. Reuter gave a copy of the 1983 Monograph to Joseph E. Peters, Jr., an employee at UTHSCSA, so that Mr. Peters could equip an animal laboratory for Dr. Palmaz. (D.I. 231, Ex. 1 at ¶ 10; Ex. 2 at 44)

B. The '762 Patent

The '762 patent has been the subject of substantial litigation in this court. In 1998, Cordis sued BSC alleging infringement of the '762 patent by BSC's NIR stent. See Cordis Corp. v. Boston Scientific Corp., 97-550-SLR (D. Del.). During discovery in the 97-550 case, BSC took depositions of Dr. Palmaz, the inventor of the '762 patent, where he was asked about his 1980 and 1983 Monographs ("Palmaz Monographs") which describe his balloon expandable stent. (D.I. 220, Ex. 2) According to the 97-550 pretrial order, BSC intended to assert a statutory bar defense. (97-550-SLR, D.I. 882, Ex. 5 at 3, 884, Ex. 11 at DTXB

69) A jury trial on BSC's alleged infringement of the '762 patent was held in 2000, during which BSC chose not to present an invalidity defense although BSC did examine Dr. Palmaz with respect to the Palmaz Monographs. (D.I. 220, Ex. 3)

Upon appeal, the Federal Circuit affirmed in part, reversed in part and remanded the case. Cordis Corp. v. Medtronic AVE, Inc., 339 F.3d 1352 (Fed. Cir. 2003). Consistent with the Federal Circuit's decision, construction of two limitations, "slots formed therein" and "substantially uniform thickness," was revised. In a May 14, 2004 order, the court allowed BSC to submit supplemental reports on the validity of claim 23 of the '762 patent in light of the revised claim construction. (97-550-SLR, D.I. 1228) During the pretrial for the 97-550 case, BSC attempted to assert a statutory bar defense based on the Palmaz Monographs, which defense was not included in its supplemental reports. (D.I. 263, Ex. B at 9) According to BSC, there was newly discovered evidence that led them to believe the '762 patent was invalid due to the Palmaz Monographs.⁶ (Id.) After

⁶BSC fails to assert any witness or piece of evidence that was not available to it prior to the 97-550 trial. (Id.; see also D.I. 231) Likewise, it fails to cite to any deposition testimony that was different than that given by witnesses in the 97-550 case. (D.I. 263 at 7-8) BSC cites one 2004 case in support of its statutory bar defense, but uses it as in accord with a case from 2002 and 1985. (D.I. 231 at 10, 13) Therefore, the case did not change the law to the extent that a statutory bar defense would suddenly become available when it was not before.

hearing BSC's and Cordis' arguments on the issue, the court determined that a new invalidity defense was outside the scope of the remanded 97-550 case. (Id. at 14) The court did not preclude BSC from raising the defense at bar. (Id. at 15) A second jury trial on the '762 patent was held in March 2005. The jury found that the NIR stent infringed the '762 patent and that the patent was valid. (97-550-SLR, D.I. 1366)

In this case, where Cordis contends that BSC's EXPRESS, TAXUS and LIBERTE stents infringe the '762 patent, BSC has again asserted a statutory bar defense, arguing the '762 patent is invalid because the Palmaz Monographs were publicly available more than one year prior to the '762 application date.

III. STANDARD OF REVIEW

A court shall grant summary judgment only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). The moving party bears the burden of proving that no genuine issue of material fact exists. See Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 n.10 (1986). "Facts that could alter the outcome are 'material,' and disputes are 'genuine' if evidence exists from which a rational person could conclude that the position of the person with the burden of

proof on the disputed issue is correct." Horowitz v. Fed. Kemper Life Assurance Co., 57 F.3d 300, 302 n.1 (3d Cir. 1995) (internal citations omitted). If the moving party has demonstrated an absence of material fact, the nonmoving party then "must come forward with 'specific facts showing that there is a genuine issue for trial.'" Matsushita, 475 U.S. at 587 (quoting Fed. R. Civ. P. 56(e)). The court will "view the underlying facts and all reasonable inferences therefrom in the light most favorable to the party opposing the motion." Pa. Coal Ass'n v. Babbitt, 63 F.3d 231, 236 (3d Cir. 1995). The mere existence of some evidence in support of the nonmoving party, however, will not be sufficient for denial of a motion for summary judgment; there must be enough evidence to enable a jury reasonably to find for the nonmoving party on that issue. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986). If the nonmoving party fails to make a sufficient showing on an essential element of its case with respect to which it has the burden of proof, the moving party is entitled to judgment as a matter of law. See Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

IV. DISCUSSION

A. BSC's Motion For Summary Judgment That The Asserted Claims Of The '762 Patent Are Invalid

Under 35 U.S.C. § 102(b), "[a] person shall be entitled to a patent unless the invention was patented or described in a printed publication in this or a foreign country . . . more than

one year prior to the date of the application for patent in the United States." BSC argues that the '762 patent is invalid as anticipated by the Palmaz Monographs, which, according to BSC, were printed publications that were available more than a year prior to Dr. Palmaz filing the application that gave rise to the '762 patent. Cordis argues that the Palmaz Monographs are not printed publications because they were not publicly accessible.

"The statutory phrase 'printed publication' has been interpreted to mean that, before the critical date, the reference must have been sufficiently accessible to the public interested in the art; dissemination and public accessibility are the keys to the legal determination whether a prior art reference was 'published.'" ⁷ In re Cronyn, 890 F.2d 897, 1160 (Fed. Cir. 1986). Whether something is a "printed publication" is determined on a case by case basis, requiring inquiry into the facts and circumstances of the references' disclosure to the public. In re Klopfenstein, 380 F.3d 1345, 1350 (Fed. Cir. 2004).

A court should also consider whether or not the "printed publication" was the subject of confidentiality agreements or whether the disclosing party had "a reasonable expectation that

⁷The relevant "public" consists of those individuals who would be interested in the invention, or the relevant art. Cooper Cameron Corp. v. Kvaerner Oilfield Products, Inc., 291 F.3d 1317, 1324 (Fed. Cir. 2002).

the information [would] not be copied." In re Klopfenstein, 380 F.3d at 1351. "Professional or behavioral norms [that] entitle a party to a reasonable expectation that the information displayed will not be copied" can also be evidence that something is not a "printed publication." Id. On the other hand, "evidence of business practice that was sufficient to prove [a document] was widely available and accessible to the interested public" can be sufficient to prove that the document was publicly accessible. Cosntant v. Advanced Micro-Devices, Inc., 848 F.2d 1560, 1569 (Fed. Cir. 1988).

Dr. Palmaz distributed the 1980 Monograph as a handout to his colleagues at the VA Medical Center during a presentation. There is no evidence that this was a public presentation, analogous to a presentation at a conference. See, e.g., Mass. Inst. of Tech. v. AB Fortia, 774 F.2d 1104, 1108-09 (Fed. Cir. 1985). The presentation and distribution was of an internal character, and there is no evidence that those of interest could have found the document, much less gained access to it. See Donald S. Chisum, Chisum On Patents § 3.04[2] (2002). There is no evidence that Dr. Palmaz's intent was anything other than getting feedback to further his research, nor evidence that he expected anything less than full confidentiality from these colleagues.

Dr. Palmaz also distributed the 1980 Monograph to three companies in an effort to attract funding and a co-developer. In Garrett Corp. v. United States, 422 F.2d 874, 878 (Ct. Cl. 1970), the court stated that "distribution to commercial companies without restriction on use clearly" constitutes publication. In that case, 80 copies of an unclassified, unrestricted government report were distributed to government agencies and private companies. Id. The report was made available to government contractors upon request free of charge. Id. In this case, there is no evidence that either Vascor, Shiley or Cook would have distributed, or in fact did distribute, the 1980 Monograph outside of the company. Furthermore, Dr. Palmaz has testified that he expected the companies to keep the monograph confidential, as it was his perception that confidentiality was an industry practice. Absent some indication that these companies would have freely distributed the monograph, the court declines to find that the monograph was accessible to those interested, solely because it was given to the companies.

The 1983 Monograph was given to three people, two of whom were employed at UTHSCSA. Dr. Palmaz's intent again was to further his research and facilitate his employment at UTHSCSA, neither of which evidences an intent to make his invention publicly accessible. There is no evidence that Dr. Palmaz's disclosure made the monograph accessible to anyone other than

those at UTHSCSA or Mr. Schultz. Nor is it evident that anyone at UTHSCSA could access the monograph, as opposed to limited access by Dr. Reuter and Mr. Peters. Like his distribution at the VA Medical Center, Dr. Palmaz's distribution to UTHSCSA was an internal disclosure. Even assuming that those of interest could have found out about the 1983 Monograph, there is no indication that UTHSCSA would have freely distributed the 1983 Monograph. Therefore, BSC's motion for summary judgment is denied, as the Palmaz Monographs are not prior art under § 102(b).

B. Cordis' Motion For Summary Judgment That The Asserted Claims Of The '762 Patent Are Not Invalid

Assuming for the purposes of argument that the Palmaz Monographs are prior art, Cordis argues that BSC is precluded from asserting them as invalidating prior art in this case.⁸ Specifically, Cordis contends that issue preclusion prevents BSC from asserting its invalidity defense, because the jury in the 97-550 case found the '762 patent to be valid.⁹ BSC contends

⁸Cordis also argues that BSC's experts are applying the wrong invalidity standard in their discussions of enablement and written description. After reviewing the expert reports of Dr. Moore, Dr. Goldberg and Dr. Benet, the court concludes that these experts are not applying an incorrect standard. The experts address whether or not the '762 patent enables and/or describes a drug-eluting stent. To the extent that Cordis claims that drug-eluting stents are covered by the '762 patent, the experts' analysis is appropriate.

⁹Cordis also argues that claim preclusion prevents BSC from bringing an invalidity defense. However, the Federal Circuit has

that the issues and claims in the present case are not the same as those litigated in the 97-550 case.¹⁰

The party invoking issue preclusion must demonstrate that four factors are met: "(1) the issue sought to be precluded [is] the same as that involved in the prior action; 2) that issue [was] actually litigated; 3) it [was] determined by a final and valid judgment; and 4) the determination was essential to the prior judgment.'" Burlington Northern Railroad Co. v. Hyundai Merchant Marine Co., Ltd., 63 F.3d 1227, 1231 (3d Cir. 1995) (quoting In re Graham, 973 F.2d 1089, 1097 (3d Cir. 1992)).

stated that an assertion of invalidity by an alleged infringer is not a "claim" but a defense to the claim of infringement. Foster v. Hallco Manufacturing Co., Inc., 947 F.2d 469, 479 (Fed. Cir. 1991). "An essential fact of a patent infringement claim is the structure of the device . . . at issue"; therefore, for claim preclusion to apply, the accused devices must be "essentially the same." Id.; see also Robert L. Harmon, Patents and the Federal Circuit 962 (4th ed. 1999). In this case, Cordis has not proven that the NIR stent is the same as the EXPRESS, TAXUS or LIBERTE stents.

¹⁰BSC also argues that Cordis waived its defense because it did not plead issue or claim preclusion in its answer to BSC's counter-claims as required by Federal Rule of Civil Procedure 8(c). The Third Circuit has recognized exceptions to Rule 8(c) when a defendant "raised the issue at a pragmatically sufficient time, and [the plaintiff] was not prejudiced in its ability to respond.'" Charpentier v. Godsil, 937 F.2d 859, 864 (3d Cir. 1991) (quoting Lucas v. United States, 807 F.2d 414, 418 (5th Cir. 1986)). The court finds that BSC has not been prejudiced by Cordis' failure to plead preclusion in its answer because Cordis alerted BSC to its intent to move to preclude BSC's arguments at the pretrial for the 97-550 case. (D.I. 263, Ex. B at 11) BSC had an opportunity to respond both at the pretrial and while briefing dispositive motions in this case. (Id. at 11-12)

Even if all the criteria are satisfied, application of the doctrine is "subject to [an] overriding fairness determination by the trial judge." Burlington, 63 F.3d at 1231. The party resisting issue preclusion should be "permitted to demonstrate . . . that he did not have 'a fair opportunity procedurally, substantively and evidentially to pursue his claim the first time.'" Blonder-Tongue Laboratories, Inc. v. Univ. of Ill. Found., 402 U.S. 313, 333 (1971) (quoting Eisel v. Columbia Packing Co., 181 F. Supp. 298, 301 (D. Mass. 1960)).

1. Same Issue

The Supreme Court has recognized that a finding of invalidity in one suit can be the basis for issue preclusion in a subsequent suit. See Blonder-Tongue Laboratories, Inc., 402 U.S. 313 (1970). BSC argues that validity in this case does not present the same issue because its statutory bar defense was not in the 97-550 case. BSC, however, was a party to the 97-550 case and, as such, had the opportunity to bring its statutory bar defense. BSC cannot now avoid preclusion by bringing forth evidence that was available to it prior to the first 97-550 trial. See Stevenson v. Sears, Roebuck & Co., 713 F.2d 705, 711 n.4 (Fed. Cir. 1983); Restatement (Second) of Judgments § 27 cmt. c (1982).

Under federal law, each claim defines a separate invention and the validity of dependent claims is not affected by the

validity of the claims from which they depend. See 35 U.S.C. § 282 (2004); Honeywell Int'l Inc. v. Hamilton Sunstrand Corp., 370 F.3d 1131, 1148 (2004). Nevertheless, finding an independent claim valid necessarily means the dependent claims are valid. Hartness Int'l, Inc. v. Simplimatic Eng'g Co., 819 F.2d 1100, 1107-08 (Fed. Cir. 1987). Therefore, the finding of validity in the 97-550 case will have a preclusive effect with respect to claim 23 and the claims that depend from it. However, the validity of claims 1, 9 and 12 are a different issue than that litigated in the 97-550 case and BSC is not precluded from asserting their invalidity, consistent with the other pretrial decisions of the court.

2. Issue Was Actually Litigated

The validity of claim 23 of the '762 patent was litigated in the 97-550-SLR case. (97-550-SLR, D.I. 1366)

3. Valid And Final Judgment

Judgment against BSC was entered on March 31, 2005. (D.I. 1375) Although the court has not decided the post-trial motions, even before an "end judgment" a court may regard a judgment as final if the decision was "adequately deliberated and firm" or "procedurally firm." Id. at cmt. g. There are a number of factors to be considered in this regard: (1) whether the prior decision was adequately deliberated and firm; (2) whether the parties were fully heard; and (3) whether the decision is subject

to appeal or was in fact appealed. Greenleaf v. Garlock, Inc., 174 F.3d 352, 358 (3d Cir. 1999).¹¹

In this case, the parties were fully heard on the issue of invalidity, as there have been two jury trials, an appeal, and countless briefs on the issue. BSC was represented by counsel throughout these proceedings, counsel that fiercely contested the validity of claim 23 of the '762 patent in the second 97-550 trial. The jury's verdict was firm and reasonably deliberated; there is no indication otherwise. As such, the court concludes that a jury verdict is "procedurally firm" and can be considered a final judgment for issue preclusion purposes. See Greenleaf v. Garlock, Inc., 174 F.3d 352, 357-59.

4. Determination Was Essential To The Prior Judgment

In determining the validity of the '762 patent, the jury would have had to consider whether claim 23 of the '762 patent was valid.

5. BSC's Opportunity To Litigate

BSC argues that it did not have an opportunity to litigate the invalidity of the '762 patent because the court prevented it from bringing its statutory bar defense on remand. The court disagrees.

¹¹There is a fourth factor, i.e., "whether the court supported its decision with a reasoned opinion," that does not apply in this case because it ended with a jury verdict. Greenleaf, 174 F.3d at 359.

In this case, BSC failed to bring its statutory bar defense in 2000 for the first 97-550 trial, even though Cordis produced the Palmaz Monographs during discovery and made Dr. Palmaz available for numerous depositions. Upon remand, the claim construction of the '762 patent changed and the scope of claim 23 changed. In May 2004, the court allowed BSC to supplement the record on the issue of invalidity in light of this new claim construction. (97-550-SLR, D.I. 1228) Expert discovery for the second 97-550 trial closed prior to the pretrial, when BSC raised its statutory bar defense. This defense could have been raised as early as 1999, as BSC had access to both the Palmaz Monographs and Dr. Palmaz. Therefore, contrary to the court's statements at the 2005 pretrial, it is appropriate to preclude BSC's statutory bar defense in this case, given BSC's failure to timely raise the defense for either the 2000 or 2005 trials in the 97-550 case and given the absence of any newly discovered evidence in this regard. Because the requirements for issue preclusion have been satisfied, Cordis' motion for summary judgment is granted with respect to claims 19, 22 and 23.

V. CONCLUSION

For the reasons stated, BSC's motion for summary judgment that the asserted claims of the '762 patent are invalid is denied. Cordis' motion for summary judgment that the asserted claims of the '762 patent are not invalid is granted in part and

denied in part. An order consistent with this memorandum opinion shall issue.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CORDIS CORPORATION,)
)
 Plaintiff,)
)
 v.) Civ. No. 03-027-SLR
)
 BOSTON SCIENTIFIC CORPORATION)
 and SCIMED LIFE SYSTEMS, INC.,)
)
 Defendants.)

O R D E R

At Wilmington this *3d* day of June, 2005, consistent with
the memorandum opinion issued this same date;

IT IS ORDERED that:

1. BSC's motion for summary judgment that the asserted claims of the '762 patent are invalid (D.I. 229) is denied.
2. Cordis' motion for summary judgment that the asserted claims of the '762 patent are not invalid (D.I. 218) is granted as to the asserted claims being invalidated by the Palmaz Monographs.
3. Cordis' motion for summary judgment that the asserted claims of the '762 patent are not invalid (D.I. 218) is denied as to the asserted claims being obvious or not enabled.



United States District Judge