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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
13/672,496	11/08/2012	David FIORELLA	MIC5035USDIV4	7950
27777	7590	03/02/2018	EXAMINER	
JOSEPH F. SHIRTZ JOHNSON & JOHNSON ONE JOHNSON & JOHNSON PLAZA NEW BRUNSWICK, NJ 08933-7003			BERDICHEVSKY, AARTI	
			ART UNIT	PAPER NUMBER
			3763	
			NOTIFICATION DATE	DELIVERY MODE
			03/02/2018	ELECTRONIC

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UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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*Ex parte* DAVID FIORELLA and HENRY WOO

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Appeal 2017-002818  
Application 13/672,496<sup>1</sup>  
Technology Center 3700

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Before LINDA E. HORNER, LYNNE H. BROWNE, and  
BRENT M. DOUGAL, *Administrative Patent Judges*.

HORNER, *Administrative Patent Judge*.

DECISION ON APPEAL

STATEMENT OF THE CASE

Appellant seeks our review under 35 U.S.C. § 134(a) of the Examiner's decision rejecting claims 1–24. Final Office Action (September 1, 2015) (hereinafter “Final Act.”). We have jurisdiction under 35 U.S.C. § 6(b).

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<sup>1</sup> The Cleveland Clinic Foundation (“Appellant”) is the applicant as provided for under 37 C.F.R. § 1.46, and is identified as the real party in interest. Appeal Brief 1 (January 28, 2016) (hereinafter “Br.”). Appellant states that DePuy Synthes Products, Inc., which is an affiliate of Johnson & Johnson, is an exclusive licensee. *Id.*

The claimed subject matter relates to a method of increasing blood flow through an obstructed blood vessel. The method employs an expandable member, including a tubular body made of a mesh having a plurality of interstices, to dislodge, capture, and remove a fragment of the obstruction.

The Examiner found that the prior art discloses the claimed method, including employing an expandable member having a tubular body made of mesh. Appellant challenges the Examiner's finding that the prior art device is a tubular body made of mesh. We find insufficient evidence to support the Examiner's finding. Accordingly, we REVERSE.

#### CLAIMED SUBJECT MATTER

Claim 1 is the sole independent claim and is reproduced below.

1. A method of removing an obstruction from a blood vessel with an expandable member that is attached to a delivery system, the expandable member having a proximal end, a distal end and a tubular body between the proximal end and the distal end, the tubular body being made of a mesh having a plurality of interstices, the method comprising the steps of:

positioning the tubular body of the expandable member radially adjacent to an obstruction within a blood vessel;

expanding the expandable member such that a portion of the tubular body comes into contact with a portion of the obstruction;

dislodging a portion of the obstruction to enhance blood flow through the blood vessel past the obstruction; and

removing the expandable member from the blood vessel while the expandable member retains at least a portion of the obstruction from the blood vessel.

Br. 6 (Claims Appendix).

## REJECTIONS

The Final Office Action includes the following rejections:

1. Claims 1–5, 8, 13–16, 20, and 22–24 stand rejected under pre-AIA 35 U.S.C. § 102(b) as anticipated by Sepetka et al. (US 2005/0033348 A1, published February 10, 2005).
2. Claims 6, 7, 17–19, and 21 stand rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Sepetka.
3. Claims 9–12 stand rejected under pre-AIA 35 U.S.C. § 103(a) as unpatentable over Sepetka and Evans et al. (US 2001/0031981 A1, published October 18, 2001).

## ISSUE

The Examiner found that Sepetka discloses the method of claim 1, including an expandable member (906) having a tubular body made of a mesh having a plurality of interstices. Final Act. 3 (citing Sepetka, Fig. 30 and ¶ 90). The Examiner further identified the claimed “tubular body” in Sepetka with reference to an annotated version of Figure 21 of Sepetka, reproduced below.

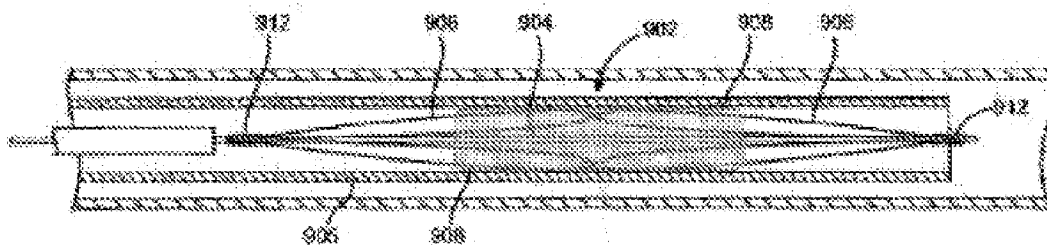


FIG. 21 tubular body

Ans. 2–3. The figure above shows device 902 of Sepetka disposed in a collapsed configuration within delivery catheter 905, along with an

annotation added by the Examiner of a shaded box placed over the portion of the device the Examiner finds to be a “tubular body.” *Id.*

Appellant argues that Sepetka’s device 902 does not anticipate claim 1 because it does not include a tubular body made of a mesh, and, in fact, explicitly discloses that the invention does not use mesh-like structures having a predetermined geometry. Br. 4.

The question presented by this appeal is whether Sepetka discloses an expandable member having a “tubular body being made of a mesh having a plurality of interstices.”

#### ANALYSIS

Sepetka discloses a device 902 for removing an obstruction. Sepetka ¶ 83, Fig. 21. Device 902 includes a main element 904 and strands 906 that may be wound helically, interwoven, or interlocked with main element 904. *Id.* Main element 904 is naturally biased toward the expanded position and may form coils 907. *Id.* ¶ 84. Strands 906 are flexible and deform as element 904 expands. *Id.* ¶ 85. As shown in Figure 21, strands 906 form two loops 908 that interlock at the midpoint of the expandable portion of element 904. *Id.*

Sepetka describes that strands 906 and loops 908 are shown “in an exaggerated state” in the collapsed position of Figure 21 “for clarity.” *Id.* ¶ 85. Sepetka explains that strands 906 are “relatively small and flexible” and “do not take up much space in the lumen of the delivery catheter” as compared to conventional wires, but that this feature cannot be appreciated in the “exaggerated depiction” of Figure 21. *Id.* Once the device emerges from delivery catheter 905, strands 906 are relatively free of main element

904, and become entangled with the obstruction during rotation of the main element. *Id.* ¶ 89; Fig. 22.

The Examiner's reliance on the depiction of the placement and configuration of strands 906 in Figure 21 as forming a "tubular body" is suspect. As noted above, Sepetka describes that strands 906 are shown in an "exaggerated state" in this Figure for clarity. As we understand Sepetka, strands 906 would not necessarily bow outwardly from main element 904 within delivery catheter 905 as depicted in Figure 21. As such, it is not evident from this Figure, when viewed with the accompanying description, whether the "tubular body" identified by the Examiner would be found in Sepetka's device.

    Sepetka further describes:

    Another aspect of the present invention is that the strand 906 and element 904 may engage one another at locations dependent upon the permitted expansion of the main element 904 within the vessel. As such, the present invention provides advantages over conventional mesh-like structures having a predetermined geometry since these structures may not perform adequately under a variety of different size restrictions in an obstruction.

*Id.* ¶ 90. Thus, Sepetka describes a device 902 formed by main element 904 and strands 906, where the device does not have a predetermined geometry.

The language of claim 1, however, calls for a mesh with a predetermined geometry: the claim recites "a tubular body." The claim language further recites the step of expanding the expandable member "such that a portion of the tubular body comes into contact with a portion of the obstruction." As clearly depicted in Figure 22 of Sepetka, strands 906 do not form a tubular body once the device 902 emerges from delivery catheter

905 and main element 904 is allowed to expand. As such, the “tubular body” identified by the Examiner in Figure 21 no longer exists during expansion of device 902 and, thus, a portion of a tubular body does not come into contact with a portion of the obstruction.

For these reasons, the Examiner’s finding that Sepetka anticipates claim 1 is not supported by a preponderance of the evidence. As such, we do not sustain the rejection of claim 1 and its dependent claims 2–5, 8, 13–16, 20, and 22–24 as anticipated by Sepetka.

The remaining rejections under 35 U.S.C. § 103(a) based on unpatentability over Sepetka alone, or in combination with Evans, rely on the same deficient finding as to the disclosure of a “tubular body” in Sepetka. Final Act. 5–6.

#### DECISION

The decision of the Examiner rejecting claims 1–24 is reversed.

REVERSED