IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

AMERANTH, INC. Plaintiff, v. (1) PAR TECHNOLOGY CORP., (2) PARTECH, INC. (3) KUDZU INTERACTIVE, INC., (4) LONE TREE TECHNOLOGY, INC. (5) MUNCHAWAY LLC (6) MENUSOFT SYSTEMS CORP., and (7) CASH REGISTER SALES & SERVICE OF HOUSTON, INC. (dba CRS TEXAS), Defendants.	:	Case No. 2:10-cv-294-DF-CE **JURY TRIAL DEMANDED**

AMERANTH'S SURREPLY IN SUPPORT OF OPPOSITION TO DEFENDANT KUDZU INTERACTIVE, INC.'S MOTION TO DISMISS

Kudzu's reply (Dkt. 67) does nothing to correct the infirmities of its motion to dismiss. Supreme Court precedent compels denial based on the present procedural posture and circumstances of the first case.[1] Moreover, Kudzu has not provided any viable theory or authority for invoking collateral estoppel against claims which were not previously asserted.

I. Kudzu's Arguments On *Blonder-Tongue* Ignore The Pertinent Issues

Kudzu's argument that Fifth Circuit law controls over the Supreme Court's *Blonder-Tongue* decision is a thinly-veiled attempt to distract from Kudzu's failure to even acknowledge *Blonder-Tongue* in its opening brief. General Fifth Circuit law on collateral estoppel cannot obviate the primacy of the Supreme Court's *Blonder-Tongue* decision as regards a patentee's opportunity to fully and fairly litigate patent validity.

Neither *Abbott* nor *Pharmacia* involved the aspects of *Blonder-Tongue* which are present in this case. Kudzu's argument that *Pharmacia* requires blind application of collateral estoppel is belied by what the Federal Circuit actually decided in *Pharmacia*. Specifically, the Federal Circuit relied on the first court's denial of JMOL/new trial motions to support its conclusion that a proper *Graham* analysis had been performed and that the jury did not fail to grasp the technical subject matter.[2] Moreover, the record amply demonstrates that the district court in *Pharmacia* was not faced with issues regarding "a full and fair opportunity to litigate" which *Blonder-Tongue* held must be resolved when present. *Id.* The issue before that district court was whether collateral estoppel should apply to a prior determination involving an ordinary adjudication of

[1] At the beginning of its reply, Kudzu indicates that it would withdraw its motion if its motions to sever and transfer are granted. (Dkt. 67 at 1, fn. 1). By page 5, however, Kudzu postures that it "wants to do battle." Kudzu also accuses Ameranth of trying to delay the current case. If Kudzu is really interested in avoiding delay in adjudicating this case, it is baffling why Kudzu would agree to essentially what Ameranth requests, *i.e.*, a tabling of the collateral estoppel issue until the motions in the first case are decided. A new judge in a brand new case in Georgia would undoubtedly not decide the present motion until after Ameranth's motions in the first case are decided by this Court.

[2] *Pharmacia & Upjohn Co. v. Mylan Pharm.*, 170 F.3d 1373, 1379-80 (Fed. Cir. 1999) (citing *Blonder-Tongue*).

invalidity.[3] As is clear from the first *Pharmacia* case (*i.e.*, *Mova* case) in which the patents were adjudicated invalid, none of the issues raised by Ameranth were present in the *Mova* case.[4]

Ameranth has pointed to serious improprieties by Defendants and their expert Dr. Acampora which resulted in jury confusion and irretrievably tainted verdicts including (1) failing to properly apply *Graham*, (2) testifying on validity inconsistent with the Court's claim construction[5] and (3) taking contradictory positions on the TransPad in two different litigations.[6] There was nothing of the kind in *Pharmacia*. These are extraordinary circumstances which invoke the "full and fair opportunity" proviso of *Blonder-Tongue* which precludes application of collateral estoppel until the issues raised by Ameranth are finally resolved.[7] *Pharmacia* recognized that *Blonder-Tongue* requires a "full and fair opportunity to litigate" determination by the court which is being asked to invoke collateral estoppel (which is what Ameranth cited *Pharmacia* for).[8] *Pharmacia* does not stand for the proposition that collateral estoppel is to be applied blindly when such extraordinary circumstances are present.

Kudzu's arguments regarding other factors discussed in *Blonder-Tongue* are meaningless. Ameranth does not base its argument on those factors. Notwithstanding Kudzu's elevated

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[3] *Pharmacia & Upjohn Co. v. Mylan Pharm. Inc.*, 5 F. Supp. 2d 399, 407 (N.D. W.Va. 1998) (no mention of applicability of *Blonder-Tongue* factors as to full and fair opportunity to litigate).

[4] *See Upjohn Co. v. Mova Pharm. Corp.*, 31 F. Supp. 2d 211, 215-16 (D. P.R. 1998).

[5] *See, e.g., DataTreasury Corp. v. Wells Fargo*, C.A. No. 2:06-CV-72-DF, Dkt. 2367 at p. 11 (E.D. Tex. Sept. 27, 2010) ("The opinions of Plaintiff's expert to the contrary at trial were outside of the Court's claim construction and thus as a matter of law cannot support the jury's finding").

[6] *See Cardiac Pacemakers, Inc. v. St. Jude, Inc.*, 2002 WL 1801525, *48-63 (S.D. Ind. July 5, 2002) (Dkt. 62, Exh. 5) (granting new trial based on facts nearly identical to Dr. Acampora's deceit in the *Ameranth v. Menusoft et al.* litigation), *rev'd on other grounds*, 381 F.3d 1371 (Fed. Cir. 2004).

[7] Kudzu's weak assertion that Ameranth says it was denied a full and fair opportunity to litigate by this Court ignores what Ameranth actually says. It is clear that Ameranth takes exception to ***Defendants' misconduct*** in the first case.

[8] Kudzu cited to a bare statement from a treatise for the proposition that courts have not followed *Blonder-Tongue* (Dkt. 67 at 3), but they cite no case refusing to apply *Blonder-Tongue* on the facts present in the *Ameranth v. Menusoft* case, including misconduct of an expert witness.

rhetoric,[9] Ameranth's argument is that a very serious course of deception by Defendants and their expert, Dr. Acampora, precluded Ameranth a full and fair opportunity to litigate the claims asserted in the first case. This Court is currently considering Ameranth's Motion for New Trial and Motions for JMOL in the first case and is thus aware of the reasons Ameranth believes it was denied a full and fair opportunity to litigate validity as required by *Blonder-Tongue*. Kudzu's self-serving pontifications about cross examination entirely miss the point of Ameranth's motions in the first case and its argument here–*e.g.*, cross examination cannot force a duplicitous expert to admit his duplicity.[10] Dr. Acampora took diametrically opposite positions on the exact same device in two different litigations. His tainted testimony on that device, which was central to Defendants' invalidity position in the first case, must therefore be disregarded. Because his deception permeated Defendants' entire case, his remaining testimony must also be disregarded. Defendants' and Dr. Acampora's testimony and argument at trial was infused with allegations regarding the Transpad, all of which were false and all of which were supported by a dishonest expert. The *Blonder-Tongue* dictates were designed to protect a patentee from blind application

[9] Kudzu's accusation that Ameranth "sandbagged the first case in order to hold its big guns at ready for the present suit" (Dkt. 67 at 4) makes no sense, is wrong, and is wholly irrelevant to the flawed verdicts resulting from Defendants' improper conduct in the first case.

[10] Unlike *Wahl v. Vibranetics*, Ameranth does not admit that it "could have done a better job of cross-examining the expert." Dr. Acampora did not answer questions which would have shown his contradictory opinions in the *Papyrus* case. However, that does not change the fact that his opinions were duplicitous and thus unreliable. *See Cardiac Pacemakers*, *supra*. A contradictory opinion on the very same device cannot be "the product of reliable principles and methods" and could not have resulted from "appli[cation of] the principles and methods reliably to the fact of the case." Fed. R. Evid. 702. Moreover, neither *Wahl* nor *Pharmacia* dealt with a dishonest expert who took directly contradictory positions in different cases. Nor did *Pharmacia* mandate application of collateral estoppel where a full and fair opportunity to litigate was not afforded the patentee. *Pharmacia* merely held that where no such showing was made, collateral estoppel was appropriate prior to completion of appeals. That is exactly the statement of the law in Ameranth's opposition (Dkt. 62 at 4-7) which Kudzu tries to ignore. Ameranth is entitled to resolution of its pending JMOLs and Motion for New Trial prior to any invocation of collateral estoppel to the claims asserted in the first case. Such resolution requires a determination of the effect of Defendants' and Dr. Acampora's misconduct on the invalidity verdicts in the first case.

of collateral estoppel in precisely the kind of situation presented in this case.

II. Kudzu's Argument That All Claims Of All Patents Are Invalid Is Baseless

Kudzu devotes all of six lines in its reply (Dkt. 67 at 6) in an attempt to buttress its absurd proposition that claims that were never adjudicated should be declared invalid without even considering what the claims cover. In those six lines, all they offer is further baseless argument about the word "representative"[11] and a case, *Bourns v. U.S.*,[12] that disproves their proposition.

Kudzu failed to tell this Court that the *Bourns* court clearly stated that the issues in the two cases, *i.e.*, the claims, had to be substantively "identical" for estoppel to apply.[13] That is not the case here, where, for example, the patents include independent claims which were not previously litigated. Critically, the decision in *Bourns* was made on ***summary judgment*** based on a detailed comparison of the litigated and non-litigated claims. Kudzu has presented no such detailed comparison to this Court. The reason is clear−Kudzu does not wish to acknowledge the substantial differences between the previously asserted and unasserted claims of the patents. In fact, Kudzu has not even referred to the actual claim language of any claim.

Comparison of the actual language of the asserted and unasserted claims shows just how baseless and extreme Kudzu's argument really is. For illustrative purposes, Ameranth attaches as Exhibit 1 a comparison chart showing claim 1 of the '850 patent (asserted at trial in the first case) versus claim 12 of the '850 patent (not asserted in the first case). The highlighted portions

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[11] Kudzu's focus on the word "representative" in Ameranth's identification of claims to be asserted at trial is misplaced as explained in Ameranth's opposition. (Dkt. 62 at 10-11).

[12] *Bourns, Inc. v. U.S.*, 537 F.2d 486 (Ct. Cl. 1976). Kudzu cited no other authority for its novel proposition that collateral estoppel applies to unadjudicated claims without any adjudication of the differences between the claims. There is no such authority, and as shown herein, *Bourns* does not support their theory either.

[13] 537 F.2d at 492 ("[T]he correct view is believed to be that of the Sixth Circuit in *Westwood Chemical, Inc. v. Molded Fiber Glass Body Co.*, 498 F.2d 1115 (6th Cir. 1974), which held ***collateral estoppel applicable to unadjudicated claims where it was shown that the adjudicated and unadjudicated claims presented identical issues***.") (emphasis added).

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