

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CARDIOCOM, LLC

Petitioner

v.

ROBERT BOSCH HEALTHCARE SYSTEMS, INC.

Patent Owner

CASE IPR2013-00468

Patent No. 7,516,192

**PATENT OWNER'S OPPOSITION TO PETITIONER'S
MOTION TO EXCLUDE EVIDENCE**

Patent Owner Robert Bosch Healthcare Systems, Inc. (“Bosch”) hereby opposes Petitioner Cardiocom, LLC’s (“Cardiocom”) Motion to Exclude Evidence (Paper 57, “Mot.”).

I. INTRODUCTION

Through its motion, Petitioner Cardiocom seeks to deprive the Board of secondary considerations evidence that plays a “critical role in the obviousness analysis.” *Leo Pharm. Prods., Ltd. v. Rea*, 726 F.3d 1346, 1358 (Fed. Cir. 2013). Despite admitting that there was a long-felt need for the claimed inventions of U.S. Patent No. 7,516,192 (“the ’192 patent”) in deposition, Cardiocom’s expert has failed to affirmatively identify *any* secondary considerations evidence demonstrating that the claims of the ’192 patent are obvious. Rather, Cardiocom asks the Board to exclude the substantial evidence of secondary considerations that Bosch and Dr. David have submitted. Notably, Cardiocom does not challenge the reliability and authenticity of the underlying evidence. Instead, Cardiocom raises several technical arguments that are meritless as a matter of law.

First, Cardiocom seeks to exclude Dr. David’s opinions on secondary considerations, premising its argument on the untenable position that secondary considerations evidence requires an “element-by-element” claim chart analysis. With no Federal Circuit law requiring such an analysis—and certainly none cited by Cardiocom—there is no basis for Cardiocom’s requested relief. Moreover,

Cardiocom and Dr. Stone have not identified a single element of the '192 patent claims that is purportedly not related to the secondary considerations evidence.

Second, Cardiocom moves to exclude Bosch's secondary considerations evidence as allegedly inadmissible hearsay. Cardiocom is wrong. The challenged evidence is not hearsay. *See Hynix Semiconductor Inc. v. Rambus Inc.*, No. C-00-20905 RMW, 2009 WL 112834, at *14 (N.D. Cal. Jan. 16, 2009), *aff'd*, 645 F.3d 1336 (Fed. Cir. 2011). And, even if it were, Dr. David is entitled as an expert to rely on hearsay evidence to form his opinions.

II. STATEMENT OF FACTS

Cardiocom submitted its petition in this proceeding on July 24, 2013, accompanied by Dr. Stone's original declaration. Paper 1; Ex. 1008. Neither the petition nor Dr. Stone's declaration contained any discussion of secondary considerations of non-obviousness. *See generally id.* And Dr. Stone has confirmed on numerous occasions that he did not consider any such evidence before concluding that the claims of the '192 patent were obvious:

Q. So you made up your mind that the claims of the '420, '186 and '192 patents were invalid as obvious before you considered any evidence of secondary considerations?

[A.] That's -- that pretty well states the case.

Ex. 2069, 784:15-21; *see also id.* 783:1-15. In fact, Dr. Stone even testified that, had he considered such evidence, his opinions on invalidity may ultimately have

come out the other way. Ex. 2009, 258:6-19.

In response to the petition, Bosch submitted the declaration of Dr. David, wherein he considered and analyzed numerous pieces of secondary considerations evidence demonstrating the non-obviousness of the '192 patent. Dr. David testified as to the existence of at least the following commercial secondary considerations for the '192 patent: (1) the invention's commercial success; (2) long-felt but unresolved needs; (3) praise by others; (4) teaching away by others; and (5) copying of the inventions by others. *See* Ex. 2007 ¶¶ 70-110; *see also* Exs. 2010-2057.

Dr. David testified that a nexus exists between the claims of the '192 patent and the secondary considerations evidence, such as commercial success. *See, e.g.*, Ex. 2007 ¶¶ 73, 88-91, 94-96, 107-110. By way of example, Dr. David testified that the “substantial, long lasting commercial success” of Bosch's products were linked to the scripting features that are “related to the inventions of the '192 patent.” *Id.* ¶ 88. Dr. David similarly testified that the VA requirements that were copied from Bosch's Health Buddy product were “driven by the scripting features of the Bosch '192 patent.” *Id.* ¶ 107.

In reply, Cardiocom and Dr. Stone did not provide any contrary evidence of secondary considerations. Paper 52; Ex. 1022. In fact, Dr. Stone admitted over and over again that there existed secondary considerations of non-obviousness,

including long-felt need and demand. *See, e.g.*, Ex. 2009, 27:1-9, 34:14-35:1, 49:17-20, 59:22-60:1, 76:18-77:5, 90:21-91:24, 103:4-6, 438:22-439:3. Rather than rebutting this evidence of non-obviousness, Cardiocom and Dr. Stone chose only to criticize Dr. David’s opinions and evidence, faulting Dr. David for not conducting an “element-by-element” claim analysis for the secondary considerations evidence. Mot., 4; Ex. 1022 ¶ 63; Ex. 2069, 792:18-793:9. As Dr. Stone admitted at deposition, however, Cardiocom’s “element-by-element” test is cut out of whole cloth as it has no basis in the case law. *See* Ex. 2069, 795:2-21.

III. ARGUMENT

“Objective evidence of nonobviousness is an important component of the obviousness inquiry because ‘evidence of secondary considerations may often be the most probative and cogent evidence in the record. It may often establish that an invention appearing to have been obvious in light of the prior art was not.’”

Transocean Offshore Deepwater Drilling, Inc. v. Maersk Drilling USA, Inc., 699 F.3d 1340, 1349 (Fed. Cir. 2012) (citation omitted). Where properly presented, evidence of secondary considerations must be considered. *Plantronics, Inc. v. Aliph, Inc.*, 724 F.3d 1343, 1355 (Fed. Cir. 2013).

Cardiocom bears the burden of demonstrating obviousness, including the burden of presenting secondary evidence supporting its non-obviousness case in its petition. *Gnosis S.P.A. v. South Alabama Med. Sci. Found.*, Case IPR2013-00116,

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