

1 UNITED STATES PATENT AND TRADEMARK OFFICE  
2 BEFORE THE PATENT TRIAL AND APPEAL BOARD

3 FUJITSU NETWORK COMMUNICATIONS, INC.,  
4 Petitioner

5 V.

6 CAPELLA PHOTONICS, INC.

7 Patent Owner

8 CASE NO. IPR2015-00726

9 CASE NO. IPR2015-00727

10 - - - - -

11 Thursday, October 29, 2015

12 1:33 p.m.

13 - - - - -

14 TELECONFERENCE IN THE ABOVE MATTER

15 BEFORE: JAMES A. TARTAL

16 JOSIAH C. COCKS

17 KALYAN K. DESHPANDE

18 Administrative Patent Judges

19 REPORTED BY:

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<p style="text-align: right;">Page 2</p> <p>1 2 APPEARANCES 3 4 MILBANK, TWEED, HADLEY &amp; McCLOY, LLP BY: NATHANIEL BROWAND, ESQUIRE 5 nbrowand@milbank.com and 6 CHRISTOPHER CHALSEN, ESQUIRE cchalsen@milbank.com, ESQUIRE 7 One Chase Manhattan Plaza 47th Floor 8 New York, New York 10005-1413 COUNSEL FOR PETITIONER FUJITSU NETWORK 9 COMMUNICATIONS, INC. 10 11 STERNE, KESSLER, GOLDSTEIN &amp; FOX, P.L.L.C. 12 BY: ROBERT GREENE STERNE, ESQUIRE rsterne@skgf.com and 13 NICHOLAS J. NOWAK, ESQUIRE nnowak@skgf.com and 14 JASON EISENBERG, ESQUIRE jasone-ptab@skgf.com and 15 JONATHAN TUMINARO, ESQUIRE jtminaro-ptab@skgf.com and 16 TYLER DUTTON, ESQUIRE tdutton-ptab@skgf.com 17 1100 New York Avenue, N.W. Washington, D.C. 20005-3934 20 (202) 371-2600 COUNSEL FOR THE PATENT OWNER 21 22 23 24 25</p>	<p style="text-align: right;">Page 4</p> <p>1 side of this discussion. 2 THE COURT REPORTER: Okay. Thank 3 you. 4 (Brief pause.) 5 (The following was taken in the 6 telephonic presence of Judges Tartal, 7 Cocks and Deshpande:) 8 JUDGE TARTAL: Good afternoon. 9 This call is in regards to Fujitsu 10 Network Communications, Incorporated versus 11 Capella Photonics, Incorporated, IPR2015-00726 and 12 00727. With me on the call today are Judges Cocks 13 and Deshpande. 14 And can we begin with counsel for 15 Petitioner, identify who will be on the call? 16 MR. STERNE: Thank you, Your Honor. 17 It's Nathaniel Browand. With me is Christopher 18 Chalsen, on behalf of Petitioner Fujitsu Network 19 Communications. 20 JUDGE TARTAL: Thank you, and 21 welcome. 22 And can we have counsel for Patent 23 Owner identify who will be speaking on the call 24 today? 25 MR. STERNE: Good afternoon, Your</p>
<p style="text-align: right;">Page 3</p> <p>1 (The following was taken out of the 2 telephonic presence of Mr. Broward, Mr. 3 Chalsen, Judges Tartal, Cocks and 4 Deshpande:) 5 MR. STERNE: So I'm Rob Sterne, and 6 I'll be speaking for the Patent Owner. We also 7 have Jason Eisenberg, Nicholas Nowak, Jonathan 8 Tuminaro, and finally but not last but least, 9 Tyler Dutton. So that's our team for Patent 10 Owner. 11 And we'll have others on the call 12 shortly, and we'll get you the judges' names. 13 We're going to want this transcript 14 ASAP, please. 15 (Brief pause.) 16 (The following was taken in the 17 telephonic presence of Mr. Broward, Mr. 18 Chalsen but out of the telephonic presence 19 of Judges Tartal, Cocks and Deshpande:) 20 THE COURT REPORTER: Mr. Browand, 21 do you want a copy of today's transcript? 22 MR. BROWAND: Yes, please, yeah. 23 MR. CHALSEN: Also, this is Chris 24 Chalsen, Mr. Browand's colleague, and I may speak 25 also. Nate will primarily be handling Fujitsu's</p>	<p style="text-align: right;">Page 5</p> <p>1 Honor. This is Robert Sterne from Sterne Kessler 2 representing Patent Owner Capella, and on the call 3 with me today are counsel Jason Eisenberg, Nik -- 4 Nicholas Nowak, Jonathan Tuminaro and Tyler 5 Dutton. 6 And we have a court reporter on the 7 line, Your Honor, that Patent Owner engaged, and 8 we will be providing the Board and the Petitioner 9 with a transcript of this Board call, if you so 10 request. 11 JUDGE TARTAL: Yes, please include 12 as an exhibit the filing for a copy of the 13 transcript of the call. That would be 14 appreciated. 15 MR. STERNE: Not a problem, Your 16 Honor. 17 JUDGE TARTAL: Okay. Petitioner 18 requested the call and so we will turn it over to 19 Petitioner to address the issues that they have. 20 MR. BROWAND: Thank you, Your 21 Honor. 22 I wish we were here under different 23 circumstances. But at this time we would seek the 24 Board's relief and request to, in the first 25 instance, forego cross examination under the</p>

<p style="text-align: right;">Page 6</p> <p>1 circumstances of Petitioner's declarant's sudden 2 and untimely death. We've made the offer to 3 Patent Owner as a mutual labor of cross 4 examination of each side's expert in connection 5 with the case. That's our initial request, Your 6 Honor.</p> <p>7 As a secondary request, we believe 8 that it's appropriate under the circumstances, and 9 I'd like to explain sort of the factual background 10 leading up to this, but we would believe it 11 appropriate for Petitioner to submit substitute 12 declarations and if necessary, substitute petition 13 to reference the -- the new declaration.</p> <p>14 We would propose to submit them in 15 accordance with the authority in Corning Gilbert V 16 PPC Broadband, which is IPR2013-347 paper number 17 20. There's a procedure that's outlined there for 18 substitute petitions when the declarant becomes 19 unavailable. So if it's all right with Your Honor 20 I'd like to sort of explain the circumstances 21 under which our declarant became unavailable.</p> <p>22 I'd like to make clear that 23 throughout the entire time Petitioner advised 24 Patent Owner about the -- what we knew of 25 Dr. Drabik's condition. As soon as we learned new</p>	<p style="text-align: right;">Page 8</p> <p>1 deposition would have to be rescheduled. At that 2 time on September 28th Petitioner fully expected 3 that Dr. Drabik would recover in a timely manner 4 and that he would be able to sit for a deposition.</p> <p>5 Petitioner and Patent Owner 6 discussed the possibility of extending due date 7 one at that time to allow for Dr. Drabik to 8 recover so Petitioner could take his deposition 9 before submitting responses to the petition. The 10 Patent Owner requested that we provide updates to 11 them regarding Dr. Drabik's conditions every week 12 or two and Petitioner did exactly that.</p> <p>13 On October 8th Petitioner informed 14 Patent Owner that Dr. Drabik had been admitted to 15 the hospital. At that time, based on the 16 information we had received from a contact of 17 Dr. Drabik, Petitioner fully expected that 18 Dr. Drabik would still recover.</p> <p>19 On October 15th, Petitioner called 20 counsel for Patent Owner and informed them that we 21 did not expect Dr. Drabik would be available for 22 deposition. We asked whether -- at that time on 23 the call we asked whether Patent Owner would agree 24 to forego cross examination and as an alternative, 25 Petitioner proposed obtaining permission from the</p>
<p style="text-align: right;">Page 7</p> <p>1 information, we passed that along. And the 2 sequence of relevant events is as follows: 3 On the FNC's IPRs were instituted 4 on August 24th, 2015.</p> <p>5 On September 11th, Patent Owner 6 requested a deposition of Dr. Drabik for the last 7 week of October. We -- although Dr. Drabik would 8 have been available for a deposition in September, 9 Patent Owner could have requested that, but Patent 10 Owner chose to wait until the end of October.</p> <p>11 On September 16th, Your Honor, 12 Petitioner informed Patent Owner that a deposition 13 of Dr. Drabik the last week of October should 14 work, and at that time Petitioner had no 15 information about Dr. Drabik's condition and we 16 fully expected that he would be available for 17 deposition as requested.</p> <p>18 On September 24th, Dr. Drabik 19 signed a declaration in two other IPRs. It was 20 IPR2015-01958 and IPR2015-01961, and I mention 21 that simply to show that Dr. Drabik was available 22 to perform work at that time.</p> <p>23 On September 28th we learned -- 24 Petitioner learned that Dr. Drabik was sick. We 25 informed the Patent Owner that same day that the</p>	<p style="text-align: right;">Page 9</p> <p>1 Board to submit substitute declarations signed by 2 another expert if Patent Owner demanded having -- 3 taking cross examination. Counsel for Patent 4 Owner at the time told us that they would consider 5 these issues and provide us with responses.</p> <p>6 We waited, and while we were 7 waiting for a response from Patent Owner, 8 Petitioner learned that unfortunately and suddenly 9 Dr. Drabik passed away.</p> <p>10 On October 26th, Petitioner 11 informed Patent Owner that Dr. Drabik had passed 12 away, and we reiterated our request to forego 13 cross examination or obtain permission to submit 14 substitute declarations by another expert in 15 accordance with the authority in the Corning IPR.</p> <p>16 On October 27th Petitioner and 17 Patent Owner had a meet and confer to discuss 18 these issues and to seek the Board's guidance.</p> <p>19 We again offered Petitioner to 20 forego cross examination and we extended the 21 offering that Petitioner would agree to forego 22 cross examination if Patent Owner would agree to 23 forego cross examination.</p> <p>24 We also reiterated our request to 25 obtain permission to submit substitute</p>

<p style="text-align: right;">Page 10</p> <p>1 declaration. And on the call, Patent Owner did 2 not agree to those offers. 3       So at this time we have identified 4 a substitute expert who we would believe would be 5 able to come up to speed quickly on the matter and 6 we would request the Board's permission to, if in 7 fact, Patent Owner does not agree to forego cross 8 examination, we would in fact seek the Board's 9 permission to file substitute declarations that 10 would be identical to those on -- already on file 11 by Dr. Drabik, in accordance with the procedure 12 outlined in the Corning IPR, and we would propose 13 to do that within two weeks. I guess 14 November 12th would be the date. 15       And after that filing, we would 16 make the substitute expert available for 17 deposition at a mutually convenient time and we 18 would be willing to agree to a reasonable 19 extension of due date one to accommodate the 20 Patent Owner. 21       So I'm happy to address any 22 questions, or if you want to turn it over to the 23 Patent Owner. 24       JUDGE TARTAL: Thank you, Counsel. 25       I think it would be helpful to hear</p>	<p style="text-align: right;">Page 12</p> <p>1 deposition of the original declarant in a modified 2 schedule. 3       Here we cannot do that. So saying 4 that this case is controlled, as I believe my 5 opponent has said several times, by that Board 6 panel decision is not accurate. 7       As you are aware, Dr. Drabik did 8 pass away on October 26th. Unfortunately, his 9 passing came after he signed and submitted 10 declarations on behalf of Petitioner but before we 11 had, as Patent Owner, an opportunity to dispose -- 12 to depose him. 13       Regardless of the tragic nature of 14 these circumstances, we submit that the current 15 situation could have been entirely avoided but for 16 the actions of Petitioner. And let me explain, 17 'cause I realize that's quite a charge. 18       We have reason to believe that 19 Petitioner was aware at least as in early 20 September that Dr. Drabik would most likely never 21 be in a position to be deposed and that despite 22 knowing this, Petitioner failed to make us aware 23 and do anything to make sure that we had an 24 opportunity to depose him before he passed on 25 October 26th, less than a month before Capella's</p>
<p style="text-align: right;">Page 11</p> <p>1 from counsel for Patent Owner at this point. So 2 let's hear their views at this point. 3       MR. STERNE: Thank you, Your Honor. 4 This is Robert Sterne. 5       This is an unfortunate 6 circumstance, obviously, and we do not want to 7 take any advantage of this. But I think it's 8 important for the Board to realize that we have 9 been attacked in multiple IPRs. Our Patent Owner 10 is a small company from the Silicon Valley, and we 11 have been attacked by the some of the largest 12 companies in electronics in the world. And we're 13 trying to defend our patent rights, we're trying 14 to adequately deal with the charges that have been 15 made on the record, and we submit to Your Honor, 16 and I will explain this in more detail in a 17 moment, that the Corning case that has been 18 referred to repeatedly by my opponent is not 19 controlling here in -- either in the facts or in 20 terms of the result obtained. 21       In that case, the deponent was 22 sick. They tried to get an 18-month trial date. 23 That was turned down by Judge Jameson Lee in paper 24 number 18, and then they moved on to a possible 25 substitution. They ended up having to take the</p>	<p style="text-align: right;">Page 13</p> <p>1 Patent Owner responses are due on November 24. 2       We believe that this really 3 constitutes negligence, not Dr. Drabik's untimely 4 passing but that steps could have been taken to 5 allow us to take his deposition earlier. And -- 6       JUDGE TARTAL: Let me just 7 interrupt you, and in terms of, I understand that 8 there are circumstances surrounding, you know, 9 what exactly transpired in the past, but at this 10 point in the proceeding, we need to determine how 11 to go forward. 12       And in order to do that, it would 13 be particularly helpful to know what Patent 14 Owner's position is on the two proposals that 15 Petitioner has set forward, the first being a 16 waiver of cross examination, and the second being 17 a request for a substitute declaration, and 18 obviously if Patent Owner has an alternative 19 proposal, you're welcome to -- welcome to address 20 that as well. 21       MR. STERNE: Yeah, Your Honor. I 22 would very much like to address that. And I'd 23 also like to address the issue of expungement of 24 the dec. 25       So let's start, if we may, with the</p>

<p style="text-align: right;">Page 14</p> <p>1 Federal Rules of Evidence, which as we all know  2 apply to post-grant proceedings as to PTAB as  3 indicated by 37 CFR section 42.62 Alpha, 62A.  4 The Board had indicated that  5 parties should treat evidentiary issues in  6 post-grant proceedings, quote, Just as they would  7 in a case pending before a U.S. District Court,  8 keeping in mind the applicability of the USPTO  9 duty of candor in 37 CFR 4211, and this comes from  10 IPR 213-2 -- excuse me, 213-00285 paper 15,  11 page 2.  12 Here, without an opportunity to  13 cross-examine Dr. Drabik, his declaration  14 constitutes hearsay pursuant to Federal Rule 802.  15 The only hearsay exception that is arguably  16 relevant here is exception 804(b)(1), the  17 exception regarding former testimony, and that  18 question does not apply.  19 Rule 804(b)(1) indicates that if  20 the opportunity to cross-examine is lacking, as it  21 is here, the prior testimony must be excluded if  22 the opposing party has not been given a meaningful  23 opportunity to cross-examine if it wishes to do  24 so.  25 The opportunity to cross-examine</p>	<p style="text-align: right;">Page 16</p> <p>1 critical questions of fact and opinion set forth  2 by Dr. Drabik in his declaration. So as a matter  3 of due process, Capella needs to be -- to have an  4 opportunity to cross-examine Dr. Drabik.  5 Now, we were never provided,  6 obviously, with an opportunity to cross-examine  7 him, despite the fact that he signed his  8 declaration nearly eight and a half months prior  9 to his death. In addition, institution occurred  10 on August 24th, eight weeks prior to his death.  11 There is no reason under the circumstances that  12 Petitioner could not have proactively offered  13 Dr. Drabik for deposition at any point during that  14 time. Nor is there any reason that Petitioner  15 could not have offered Dr. Drabik for deposition  16 as soon as it learned he was ill and might not be  17 able to testify.  18 It was Capella instead who, without  19 any knowledge of Dr. Drabik's condition, had to  20 press Petitioner for information as to his  21 availability. And it is Petitioner who simply  22 dragged the issue out until Dr. Drabik's passing.  23 In short, Petitioner can point to nothing that  24 shows it made any effort to avoid the situation  25 that the parties now find themselves in. As a</p>
<p style="text-align: right;">Page 15</p> <p>1 requirement is generally satisfied when the  2 defense is given a full and fair opportunity to  3 probe and expose the infirmities of testimony  4 through cross examination, thereby calling to the  5 attention of the fact finder the reason for giving  6 significant weight to the witness testimony. And  7 I can provide case law on this point, if you so  8 request.  9 Now, we -- we assert, Your Honors,  10 that there is a due process violation here.  11 Regardless of the hearsay rule as a matter of due  12 process, Capella has a fundamental right as Patent  13 Owner to defend their patent in -- and should be  14 allowed to cross-examine witnesses who give  15 adverse testimony in these proceedings.  16 In the Supreme Court case of  17 Goldberg -- Goldberg versus Kelly, a 1970 Supreme  18 Court case, the Supreme Court says, quote, In  19 almost every setting where important decisions  20 turn on questions of fact, due process requires an  21 opportunity to confront and cross-examine adverse  22 witnesses. And this is found at 397 US 254 at  23 page 269.  24 We submit the Board's ultimate  25 legal conclusions in this case will turn on</p>	<p style="text-align: right;">Page 17</p> <p>1 result, Capella asserts that Dr. Drabik's  2 declaration should be expunged as hearsay as well  3 as to avoid a violation of Capella's due process  4 rights.  5 So that's our position first, Your  6 Honor, about the declaration itself.  7 Now, even if Dr. Drabik's  8 declarations are expunged, there is no prejudice  9 to Fujitsu. In addition to the two IPRs at issue  10 here, Fujitsu is Petitioner in four other  11 proceedings, four other proceedings against the  12 '368 and '678 patents.  13 On September 4, 2015, Fujitsu was  14 joined as a Petitioner in IPRs initiated by Cisco  15 and on September 25, 2015 Fujitsu and others filed  16 additional IPR petitions against the '368 patent  17 and the '678 patents.  18 Now, we need, if there is a  19 substitute expert, Your Honor, we must have the  20 opportunity to depose that expert. And this  21 raises all kinds of complicated questions because,  22 first of all, we don't know if there's -- if the  23 substitute declaration is going to be the same as  24 the original declaration. It gives the Petitioner  25 the opportunity to now make changes to their</p>



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