

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FUJITSU NETWORK COMMUNICATIONS, INC.
Petitioner

v.

CAPELLA PHOTONICS, INC.
Patent Owner

Inter Partes Review Case No. IPR2015-00726
Patent No. RE42,368

**PETITIONER'S MOTION TO FILE SUPPLEMENTAL INFORMATION
UNDER 37 C.F.R. § 42.123(b)**

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U.S. Patent and Trademark Office
P.O. Box 1450
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Pursuant to the conference call held on October 29, 2015 and the Order dated October 30, 2015 (Paper No. 14) that granted authorization to file the present motion, Petitioner Fujitsu Network Communications, Inc. ("FNC") hereby moves to submit Exhibit 1037 Declaration of Joseph E. Ford and Exhibit 1038 Curriculum Vitae of Joseph E. Ford (collectively, Exhibits 1037 and 1038) as supplemental information pursuant to 37 C.F.R. § 42.123(b).

Because FNC did not know that cross-examination of its expert declarant, Timothy Drabik, Ph.D would not occur prior to his sudden and unfortunate death, FNC could not have earlier presented Exhibits 1037 and 1038 and the admission into the record of Exhibits 1037 and 1038 proffered by additional declarant, Joseph Ford, Ph.D, is in the interests of justice. Thus, FNC respectfully requests that this motion be granted.

I. FACTS

On September 11, Patent Owner Capella Photonics, Inc. ("Patent Owner") requested a deposition of Dr. Drabik during the last week of October. Although Dr. Drabik was available in September and Patent Owner could have requested a deposition in September, Patent Owner chose to wait until the end of October.

On September 16, FNC informed Patent Owner that a deposition of Dr. Drabik the last week of October should work. At that time, FNC had no information about Dr. Drabik's condition and fully expected that he would be

available for deposition as requested.

On September 28, FNC learned that Dr. Drabik was sick and informed Patent Owner that same day that the deposition would have to be re-scheduled. At that time, FNC fully expected Dr. Drabik to recover in a timely manner. FNC and Patent Owner discussed the possibility of extending due dates to allow time for Dr. Drabik to recover so Patent Owner could take his deposition before submitting a response to the petition. Patent Owner requested updates about Dr. Drabik's condition every week or two and FNC provided the requested updates.

On October 8, FNC informed Patent Owner that Dr. Drabik had been admitted to the hospital. At that time, based on available information received from a contact of Dr. Drabik's, FNC still expected Dr. Drabik to recover.

On October 11, FNC was surprised to learn that Dr. Drabik had entered a hospice program and shortly thereafter informed counsel for Patent Owner that it did not expect Dr. Drabik would be available for deposition. FNC proposed waiving cross-examination or alternatively obtaining permission to submit substantively identical additional declarations signed by another expert if Patent Owner demanded cross-examination. While waiting for a response from Patent Owner on these proposals, FNC learned that Dr. Drabik passed away.

On October 26, FNC informed Patent Owner that Dr. Drabik had passed away and again sought Patent Owner's position on waiving cross-examination and

the submission of an additional declaration by another expert. After Patent Owner did not agree to these proposals, FNC contacted the Board for guidance on this issue. On the October 29 call, FNC requested permission to file a substantively identical additional declaration, proposed that the additional expert would be made available for deposition thereafter, and offered a reasonable extension of due dates.

II. APPLICABLE STANDARD

A motion to submit supplemental information must generally “show why the supplemental information reasonably could not have been obtained earlier, and that consideration of the supplemental information would be in the interests-of-justice.” 37 C.F.R. § 42.123(b); *see also BioMarin Pharma. Inc. v. Genzyme Therapeutic Prods. Ltd. P'Ship*, IPR2013-00534, Paper 80 (Jan. 7, 2015) (“[W]e waive the requirement of 37 C.F.R. § 42.123(b) that a party show that the supplemental information reasonably could not have been obtained earlier. 37 C.F.R. § 42.5(b) (permitting the Board to waive or suspend a requirement of parts 1, 41, and 42)”).

III. ARGUMENT

A. Due to Dr. Drabik's Sudden Passing, FNC Could Not Have Obtained Exhibits 1037 and 1038 Earlier

FNC could not have obtained the supplemental information earlier because it had no knowledge that Patent Owner would not take cross-examination of Dr. Drabik prior to his sudden and unfortunate death. As explained above, in mid-

September FNC fully expected Dr. Drabik to be available for deposition in late October even though Patent Owner could have deposed Dr. Drabik in September. At the time he became sick, FNC did not know that Dr. Drabik would not recover. While Dr. Drabik was sick, FNC advised Patent Owner about what was known of Dr. Drabik's condition as soon as new information was learned. FNC advised Patent Owner upon learning of Dr. Drabik's passing and FNC promptly sought the present relief. FNC could not have obtained the supplemental information earlier as it had no reason to seek the supplemental information before learning that Dr. Drabik was deceased.

B. Consideration of Exhibits 1037 and 1038 Is in the Interests of Justice

Moreover, consideration of the supplemental information is in the interests-of-justice because it accommodates Patent Owner's demand for cross-examination and there is no prejudice. Exhibit 1037 is substantively identical to Exhibit 1016 Dr. Drabik's declaration, which was submitted at the time of filing the petition. Exhibit 1037 maintains the same paragraph numbers from Exhibit 1016. Following the procedure provided in *Corning Gilbert Inc. v. PPC Broadband, Inc.*, IPR2013-00347, Paper 20 (Jan. 2, 2014), Dr. Ford's qualifications in Exhibit 1037 appear in later paragraphs, and blank spaces are used to occupy the paragraphs that previously expressed the qualifications of Dr. Drabik. Exhibit 1038 further explains the qualifications of Dr. Ford.

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