

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FUJITSU NETWORK COMMUNICATIONS, INC.,
Petitioner,

v.

CAPELLA PHOTONICS, INC.,
Patent Owner.

Case IPR2015-00726
Patent RE42,368 E

Before JOSIAH C. COCKS, KALYAN K. DESHPANDE and
JAMES A. TARTAL, *Administrative Patent Judges*.

COCKS, *Administrative Patent Judge*.

DECISION
Denying Request for Rehearing
37 C.F.R. § 42.71

1. Introduction

Patent Owner, Capella Photonics, Inc. (“Capella” or “Patent Owner”), seeks rehearing of our Decision (Paper 19) granting the Motion of Petitioner, Fujitsu Network Communication, Inc. (“Fujitsu” or “Petitioner”), to file supplemental information under 37 C.F.R. § 42.123(b). Paper 21 (“Request for Rehearing” or “Req. Reh’g.”). For the reasons set forth below, Capella’s Request for Rehearing is DENIED.

2. Discussion

When rehearing a decision on a motion, the Board will review the decision for an abuse of discretion. 37 C.F.R. § 42.71(b). The party requesting rehearing has the burden of showing that the decision from which rehearing is sought should be modified, and “[t]he request must specifically identify all matters the party believes the Board misapprehended or overlooked.” 37 C.F.R. § 42.71(d). Here, Capella contends the following in its Request for Rehearing:

First, the Board’s decision granting Fujitsu’s motion to submit supplemental information is not supported by substantial evidence. *Second*, the Board misapprehended or overlooked that substantive content was added to Dr. Ford’s declaration. *Third*, the Board’s continued reliance on Dr. Drabik’s declaration, where cross-examination is impossible, violates the rules of discovery, the rules of evidence, and curtails due process.

Req. Reh’g 1.

None of the matters raised by Capella merit a modification of our Decision granting Fujitsu’s Motion. With respect to the first matter, Capella contends that the consideration set forth in rule 123(b) as to whether supplemental information “reasonably could not have been obtained earlier” mandates omission of Dr. Ford’s Declaration. Paper 19, 2. In that respect, Cappella is of the view that irrespective of any of the considerations involved here, e.g., the rapid health deterioration and

death of Dr. Drabick, Fujitsu could have obtained Dr. Ford's Declaration earlier. We are not persuaded that Capella's reading of that aspect of rule 123(b), so as to preclude consideration of Dr. Ford's Declaration given the particular involved circumstances, is correct. Indeed, we do not discern that it gives suitable deference to the "*reasonably* could not have been obtained earlier" aspect of the rule. Nevertheless, even if Cappella's view is the correct one, our rules also set forth that: "The Board may waive or suspend a requirement of parts 1, 41, and 42 and may place conditions on the waiver or suspension." *See* 37 C.F.R. § 42.5(b). Given the circumstances surrounding the presentation of Dr. Ford's Declaration here, we do not require the omission of Dr. Ford's Declaration based on the above-noted premise on which Capella relies.

With respect to the second matter, Capella simply reiterates an argument that it made in its Opposition to Fujitsu's Motion. In our Decision, we were cognizant that paragraph 155 of Dr. Ford's Declaration (Ex. 1037) was not identical to paragraph 155 of Dr. Drabik's Declaration (Ex. 1016). In viewing the differences, however, we concluded that the changes were not substantive in nature, and instead simply encompassed expression of content that previously had been incorporated by reference. That Capella may disagree with our conclusion in that respect, does not show that we misapprehended or overlooked any matter in so reaching that conclusion. Moreover, although Capella generally contends that the expression of the material in paragraph 155 of Dr. Ford's Declaration presents a new "rationale" applied to the combination of Bouevitch and Sparks that is an "attempt to remedy a deficiency in Dr. Drabik's original declaration," Cappella does not explain what the new rationale is or what deficiency allegedly now has been remedied. *See* Req. Reh'g 3–4.

Lastly, Cappella once again contends that it is prejudiced if Dr. Drabik's Declaration simply remains as an exhibit in the proceeding because of "the Board's continued reliance on Dr. Drabik's declaration, where cross-examination is impossible." Req. Reh'g 1. That contention is misplaced. Capella does not articulate what "continued reliance" it believes Dr. Drabick's Declaration will receive. As we indicated in our Decision, although the panel relied on Dr. Drabick's Declaration in instituting trial, "going forward, the panel will not consider the content of that Declaration as a part of any Final Written Decision." Paper 19, 4–5. Capella also does not explain the meaning of the following representation that it makes: "The Board's reliance on Dr. Drabik's declaration for deciding institution is merely incidental—not a justification to keep it in the record." Req. Reh'g 5. At this time, the panel believes that clarity of record is sufficient justification for maintaining Dr. Drabick's Declaration as a document in the record, but one which will receive no further substantive consideration.

3. Order

It is

ORDERED that Capella's Request for Rehearing is *denied*.

IPR2015-00726
Patent RE42,368 E

For PETITIONER:

Christopher E. Chalsen
Lawrence T. Kass
Nathaniel T. Browand
Suraj K. Balusu
MILBANK, TWEED, HADLEY & MCCLOY LLP
cchalsen@milbank.com
lkass@milbank.com
nbrowand@milbank.com
sbalusu@milbank.com

For PATENT OWNER:

Jason D. Eisenberg
Robert Greene Sterne
Jon E. Wright
Jonathan Tuminaro
STERNE, KESSLER, GOLDSTEIN & FOX P.L.L.C.
jasone-PTAB@skgf.com
rsterne-PTAB@skgf.com
jwright-PTAB@skgf.com
jtuminar-PTAB@skgf.com

rvb