Page 1 UNITED STATES PATENT AND TRADEMARK OFFICE 1 BEFORE THE PATENT TRIAL AND APPEAL BOARD 2 FUJITSU NETWORK COMMUNICATIONS, INC., 3 Petitioner V. 4 CAPELLA PHOTONICS, INC. Patent Owner 5 CASE NO. IPR2015-00726 6 CASE NO. IPR2015-00727 7 8 9 Thursday, October 29, 2015 1:33 p.m. 10 11 12 TELECONFERENCE IN THE ABOVE MATTER 13 BEFORE: JAMES A. TARTAL JOSIAH C. COCKS KALYAN K. DESHPANDE 14 Administrative Patent Judges 15 16 REPORTED BY: SUSAN D. GUNELSON, Certified Court Reporter 17 (License No. 30XI00076300), Registered Professional 18 Reporter, Certified Realtime Reporter, Certified LiveNote Reporter and Notary Public of New Jersey, Pennsylvania and Delaware. 19 20 21 22 23 VERITEXT NATIONAL COURT REPORTING COMPANY 24 MID-ATLANTIC REGION 1250 Eye Street, NW, Suite 1201



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Washington, DC 20005

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7 One Chee Manhantan Plaza 7 Jul history 8 New York, New York 10005.1413 COUNSEL FOR PETITIONER FUJITSU NETWORK 10 COMMUNICATIONS, INC. 12 SY: ROBERT GREEAS FIRENE, ESQUIRE 13 NICHOLAS J. NOWAK, ESQUIRE 14 moowak@skgf.com 15 JASON ESISNNERG, ESQUIRE 16 moowak@skgf.com 17 Juliano-pable@skgf.com 18 JUDGE TARTAL: Good afternoon. 18 JUDGE TARTAL: Good afternoon. 19 Ties call is in regards to Fujitsu 10 Network Communications, Incorporated versus 11 Capella Photonics, Incorporated versus 11 Capella Photonics, Incorporated versus 12 O0727. 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, Dec 20005-3934 20 (202) 371-2600 COUNSEL FOR PETITON ESQUIRE 19 JUDGE TARTAL: Thank you, and 20 O727. With me on the call roday are Judges Cocks 21 And can we begin with counsel for 22 June Potentioner Fujitsu Network 23 Owner identify who will be on the call? 24 today? 25 MR. STERNE: Good afternoon. 26 MR. STERNE: Thank you, Your Honor. 27 It's Nathaniel Browand. With me is Christopher 28 Chalsen, on behalf of Petitioner Fujitsu Network 29 JUDGE TARTAL: Thank you, and 29 Welcome. 20 JUDGE TARTAL: Thank you, and 21 welcome. 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. 26 June June June June June June June June	6		5	(The following was taken in the
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STERNE. KESSLER, GOLDSTEIN & FOX. PLL.C. 12 BY: ROBERT GREENE STERNE. ESQUIRE 13 reterness sign-from 14 moved skigf-rom 15 JASON PISENBERG, ESQUIRE 16 jasone-plable-skigf-com 17 jason Pisenberg, ESQUIRE 18 TYLER DITTON, ESQUIRE 19 julman-pable-skigf-com 19 1100 New York Avenue, N.W. Washington, D.C. 2005-3934 20 (202) 371-2600 COUNSEL FOR THE PATENT OWNER 21 Chalsen, Judges Tartal, Cocks and 4 Deshpande:) 22 MR. STERNE: So I'm Rob Sterne, and 4 Deshpande:) 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 Turninaro, 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 2 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 of Mr. Broward, Mr. 19 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 of Mr. Broward, Mr. 19 Tyler Dutton. So that's our team for Patent 10 Owner. 11 And we'll get you the judges' names. 12 (Brief pause.) 13 (The following was taken in the 14 ASAP, please. 15 (Brief pause.) 16 (The following was taken in the 17 telephonic presence of Mr. Broward, Mr. 18 Chalsen on the call 19 thank you, Your Your Honor. 17 It's Nathaniel Browand. With me is Christopher 18 Chalsen, on behalf of Petitioner Fujitsu Network 19 Communications. 10 Welcome. 10 Welcome. 11 Honor. This is Robert Sterne from Sterne Kessler 11 Honor. This is Robert Sterne from Sterne Kessler 12 representing Patent Owner Capella, and on the call 13 with me			9	This call is in regards to Fujitsu
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TYLER DUTTON, ESQUIRE thottor-pale*skyf.com 1100 New York Avenue, N.W. Weshington, D.C. 20005-3934 (202) 371-2600 COUNSEL FOR THE PATENT OWNER 21 22 23 24 25 26 27 28 28 29 29 20 21 22 23 24 25 25 26 27 28 28 29 29 29 20 20 20 21 Welcome. 22 22 23 24 25 25 26 27 28 28 29 29 20 20 20 20 21 Welcome. 22 22 23 24 25 25 25 26 27 28 28 29 29 20 20 20 20 20 21 Welcome. 22 22 23 24 25 25 26 27 28 28 29 29 20 20 20 20 21 Welcome. 21 22 23 24 25 25 26 27 28 28 29 29 20 20 20 20 21 Welcome. 21 22 23 24 25 25 26 27 28 28 29 29 20 20 20 21 Welcome. 21 24 25 25 26 27 28 28 29 29 29 20 20 21 Welcome. 21 20 20 21 Welcome. 21 21 Welcome. 22 21 And can we have counsel for Patent doay? 25 25 26 27 28 29 29 20 21 24 25 25 26 27 28 29 29 20 20 21 Welcome. 21 21 22 23 24 25 25 26 27 28 29 29 20 20 21 Welcome. 21 21 22 23 24 25 25 26 27 28 28 29 29 20 20 21 Welcome. 21 21 22 23 24 25 25 26 27 28 29 29 20 20 21 Welcome. 21 21 22 23 24 25 25 26 27 28 28 29 29 20 21 Welcome. 21 21 22 23 24 25 25 26 27 28 29 28 29 29 20 21 21 22 21 23 24 25 25 21 24 25 25 26 27 28 29 29 20 21 21 22 21 23 24 25 25 21 24 25 25 26 27 28 28 29 29 20 21 21 22 21 23 24 25 25 21 24 25 25 21 24 25 25 26 27 28 28 29 29 29 20 21 21 22 21 23 24 25 25 21 24 25 25 21 24 25 25 26 27 28 28 29 29 29 20 21 21 22 21 23 24 25 21 24 25 25 21 24 25 25 21 24 25 25 21 24 25 25 21 24 25 25 21 24 25 25 21 24 25 21 24 25 25 21 24 25 25 21 24 25 25 21 24 25 25 21 24 25 25 21 24 25 25 21 24 25 25 21 24 25 25 21 24 25 21 24 25 25 21 24 25 25 21 24 25 25 24 26 27 26 27 21 24 25 21 24 25 21 24 25 21 24 25 21 24 25 21 24 25 21 24 25 21 24 25 21 24 25 21 24 25 21 24 25 21 24 25 25 24 26 27 24 27 27 24 27 27 24 27 27 27 28 28 28 28 28 29 29 29 29 20 20 21 21 21 21 21 21 21 21 21 21 22 21 21	17			*
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		Chalsen, Mr. Browand's colleague, and I may speak		Board's relief and request to, in the first
25 also. Nate will primarily be handling Fujitsu's 25 instance, forego cross examination under the	44			-



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

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

24

23 forego cross examination.

25 obtain permission to submit substitute

We also reiterated our request to

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

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. 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.

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. 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

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25 The opportunity to cross-examine Page 15 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. 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. 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. We submit the Board's ultimate

25 legal conclusions in this case will turn on

25 that the parties now find themselves in. As a Page 17 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 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

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