

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WHATSAPP, INC. AND FACEBOOK, INC.
Petitioners

v.

TRIPLAY, INC.
Patent Owner

Inter Partes Review No. 2015-00740
U.S. Patent No. 8,332,475

**PETITIONERS' RESPONSE TO PATENT OWNER'S
MOTION FOR OBSERVATIONS**

Petitioners WhatsApp, Inc. and Facebook, Inc. ("Petitioners") hereby submit this Response to the Patent Owner's Motion for Observations. Petitioners respond to each of Patent Owner's observations in the order they appear in the Motion for Observations filed by Patent Owner on April 20, 2016. But first, as Petitioners will explain below, the Motion for Observations should be disregarded as improper.

Patent Owner's "Motion for Observations" is Improper

On April 5, 2016, the Petitioners timely filed their reply in support of the petition ("Petitioner's Reply" or "Reply") and a supporting reply declaration of Mr. Klausner ("Reply Declaration") (Ex. 1013). *See* Paper 39; Ex. 1013. The Patent Owner subsequently took a deposition of Mr. Klausner on April 13, 2016. *See* Ex. 2010. The Patent Owner devoted the deposition to asking whether statements and citations in the Reply Declaration were contained in Mr. Klausner's original declaration in support of the Petition ("Original Declaration") (Ex. 1002). *See* Ex. 2010. The Patent Owner did not seek testimony about the substance of Mr. Klausner's analysis or question him about any other subject that would be proper for cross-examination.

Whether or not content from Mr. Klausner's reply declaration was contained in his original declaration can be determined by simply comparing the two documents. But the Patent Owner needed to take Mr. Klausner's deposition on April 13 to provide a pretext for the present Motion for Observations, which is

essentially a disguised motion to exclude statements in Mr. Klausner's reply declaration as allegedly being outside the scope of reply. *See Trial Practice Guide*, 77 Fed. Reg. 48,756, 48,768 (Aug. 14, 2012) ("An observation . . . is not an opportunity to raise new issues, re-argue issues, or pursue objections") (emphasis added). Petitioners' counsel objected to these questions at the April 13 deposition. *See, e.g., Ex. 2010, 24:5-6.*

The Board should also disregard the Motion for Observations because it seeks to evade the page limits set forth by the Board's order of April 19. *See Paper 42.* More specifically, on April 18, 2016, the Patent Owner sent an email to the Board indicating that it believes that Petitioner's Reply and the Reply Declaration exceed the scope of a proper reply. *Id.*, at 1. The next day, the Board issued an Order authorizing the Patent Owner to "file a two-page submission that identifies arguments and evidence in the Reply and in Petitioner's Exhibits, filed contemporaneously therewith, that Patent Owner contends exceeds the proper scope of a reply" (hereafter "Two-Page Submission"). *Id.* The Patent Owner filed its Two-Page Submission on April 26, 2016. Paper 49. The Petitioner's response is due on May 3, 2016.

On April 20, after the Board had already authorized the "two-page submission" for the purpose of addressing the issue of scope, the Patent Owner filed its Motion for Observations. Paper 45. Reminiscent of its purported cross-

examination of Mr. Klausner on April 13, the Patent Owner's Motion for Observations attempts to argue that certain paragraphs from Mr. Klausner's reply declaration (Ex. 1013) are beyond the proper scope of a reply and does not address the testimony substantively. *See id.* Notably, the Patent Owner does not quote, but rather paraphrases in its own words statements from the Reply Declaration it contends to be outside the proper scope. *See id.* The Motion for Observations is thus simply an attempt to inject lengthy substantive arguments about scope that were not authorized by the April 19 Order authorizing the "two-page submission," and thus, should be disregarded.

Nevertheless, in the event the Board intends to consider the improper Motion for Observations, the Petitioners respond below.

Responses to Observations

Response to Observation #1:

Patent Owner's observation is an improper attempt to expand on point 1 of its Two-Page Submission (Paper 49), and should therefore be disregarded. *Trial Practice Guide*, 77 Fed. Reg. 48,756, 48,768 (Aug. 14, 2012) ("An observation . . . is not an opportunity to raise new issues, re-argue issues, or pursue objections") (emphasis added). Further, the cited cross-examination testimony is irrelevant because the issue of proper scope is a procedural issue that is not the proper subject of expert testimony.

In any event, the statement made in ¶ 29 of the Reply Declaration (Ex. 1013) did not exceed the proper scope of a reply declaration. The cited statement was *responsive* to the following statement from the Declaration of Rajeev Surati, Ph.D. (“Surati Declaration”) (Ex. 2002), at ¶ 113:

[T]he CSS style sheets disclosed in Tittel are *not “a predefined user interface,” and are therefore not a “template”* as that term is construed by Mr. Klausner. . . . CSS style sheets neither *create the elements being displayed* nor enable the ability to change any of the elements in an HTML file. In fact, CSS cannot display anything without an HTML document input. A POSITA would understand that *a “predefined user interface,” . . . has to include a visually displayed interface* consisting of actual data elements of interest and not just the fonts or colors to apply to the elements in an HTML document. (Emphasis added.)

Response to Observation #2:

Patent Owner's observation is an improper attempt to expand on point 3 of its Two-Page Submission (Paper 49), and should therefore be disregarded. *Trial Practice Guide* at 48,768. Further, the cited cross-examination testimony is irrelevant because the issue of proper scope is a procedural issue that is not the proper subject of expert testimony. In any event, the statement made in ¶ 30 of the Reply Declaration (Ex. 1013) was *responsive* to the following statement from the Surati Declaration (Ex. 2002), at ¶ 113:

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