

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WHATSAPP INC. and FACEBOOK, INC.

Petitioner

v.

TRIPLAY, INC.

Patent Owner

IPR2015-00740

Patent 8,332,475 B2

PATENT OWNER'S OBJECTIONS TO EVIDENCE
SUBMITTED IN THE PETITION

Pursuant to 37 C.F.R. § 42.64(b)(1), TriPlay, Inc. (“Patent Owner”) hereby objects to Exhibit 1002 “Declaration of David Klausner” (“the Klausner Declaration”) submitted on behalf of WhatsApp Inc. and Facebook, Inc. (collectively, “Petitioner”) in their Petition filed on February 14, 2015 (Paper _). The Patent Owner objects to the Klausner Declaration under Federal Rule of Evidence 702 because there is nothing in the record establishing that Mr. Klausner is qualified to opine as to the knowledge of a person of ordinary skill in the art at the time of the ‘475 patent.

Federal Rule of Evidence 702 applies to this proceeding and thus the Board is tasked with the “gate keeping” function of insuring that expert evidence admitted is helpful to the fact finder. *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993). In patent proceedings, validity and infringement issues are analyzed from the perspective of a person of ordinary skill in the art and thus an expert opinion from a person who does not qualify as a person of ordinary skill in the art is not helpful and is routinely excluded. *See, e.g., Sundance, Inc. v. Demonte Fabrication*, 550 F.3d 1356, 1360 (Fed. Cir. 2009); *Precision Fabrications Group, Inc. v. Tietex Int’l, Ltd.*, No. 1:13-cv-645, 2015 WL 224942, at *4 (M.D.N.C. Jan. 15, 2015); *Morpho Detection, Inc. v. Smiths Detection, Inc.*, No. 2:11-cv-498, 2012 WL 6004085, at *2 (E.D. Va. Nov. 30, 2012); *Hypertherm*,

Inc. v. Am. Tournch Tip Co., No. 05-cv-373-JD, 2009 WL 530064, at *4 (D.N.H. Feb. 27, 2009).

Mr. Klausner offers several opinions from the perspective of a person of ordinary skill in the art. For example, at paragraph 107, Mr. Klausner opines that:

[i]t would have been obvious to one ordinary skill in the art to adapt the teachings of Druyan and Tittel to Coulombe, with no change in their respective functions, predictably resulting in the messaging system of Coulombe in which messages received by the SIP Proxy/Registrar 12 included HTML messages that include a style sheet file (“template”) identified by its URL (“unique identifier”).

But the above opinion as well as Mr. Klausner’s other opinions from the perspective of a person of ordinary skill in the art are not helpful to the trier of fact because there is nothing in the record establishing that Mr. Klausner is qualified to opine as to the knowledge of a person of ordinary skill in the art at the time of the ‘475 patent (or, at present, for that matter).

Here, the ‘475 patent relates to the “field of electronic messaging, and, in particular, to cross-platform messaging” (‘475 patent, col. 1:5-6) and the Coulombe reference relied upon by Mr. Klausner as his primary reference relates to “interoperability between terminal devices using session initiation protocol (SIP) messages” (Coulombe, ¶ 1). But Mr. Klausner is not qualified to opine as to the knowledge of a person of ordinary skill in the art in messaging systems of the type described in the ‘475 patent or in Coulombe. His resume details extensive expertise in a number of hardware and software projects, but there is not a single

reference to Mr. Klausner having developed and implemented a messaging system. (WhatsApp Inc.’s Exhibit 1002, pg. 098-102). Indeed, the only “experience” regarding the technology at issue set forth in the Klausner Declaration is that “[s]pecific computer-related technologies that [Mr. Klausner] worked with include . . . web technologies (such as . . . messaging)” (*Id.*, ¶ 2, pg. 1). That does not qualify Mr. Klausner to opine as to the knowledge of a person of ordinary skill in the art.

At a minimum, as a person of ordinary skill in the art would have had at least two years of experience designing and implementing messaging systems between user devices. There is nothing in the record establishing that Mr. Klausner meets that minimum qualification, and Patent Owner lodges its objection to the Klausner Declaration on that basis.

Respectfully submitted,

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