UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SONY CORPORATION, SAMSUNG ELECTRONICS CO., LTD.,
SAMSUNG DISPLAY CO., LTD.
Petitioners

v.

SUPRASS TECH INNOVATION LLC
Patent Owner

Case IPR2015-00863
Patent 7,202,843 B2

PETITIONERS' MOTION TO EXCLUDE EVIDENCE UNDER 37 C.F.R. § 42.64(c)

I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c), Petitioners move to exclude Exhibit 2007 (Transcript of the Deposition of Richard Zech, Ph.D. dated November 13, 2015 in IPR2015-00885) and Paragraph 39 of Exhibit 2022 (Declaration of William K. Bohannon in Response to Petition of Sony Corporation *et al.*).

II. ARGUMENT

The admissibility of exhibits submitted in a PTAB proceeding is governed by the Federal Rules of Evidence. 37 C.F.R. § 42.62(a) ("the Federal Rules of Evidence shall apply to a proceeding").

A. Exhibit 2007 Should be Excluded Under Fed. R. Evid. 802

The deposition testimony of Dr. Zech, Exhibit 2007, should be excluded because the testimony is inadmissible hearsay under Fed. R. Evid. 802. Dr. Zech did not testify on direct at the current trial, *i.e.*, IPR2015-00863, but instead testified in an unrelated trial, in IPR2015-00885, and was cross examined at a deposition in that unrelated trial. Petitioners in this trial are not parties in IPR2015-00885, were not present at the deposition of Dr. Zech, and did not have the opportunity to question Dr. Zech. Petitioners timely objected on this ground in "Petitioner's Objections to Patent Owner's Evidence" ("Petitioners Objections"). Paper No. 22 at 1.

Dr. Zech's deposition testimony is hearsay, as it is being offered by Patent Owner to prove the truth of the matter asserted. *See* Patent Owner Surpass Tech

Innovation LLC's Response Under 37 C.F.R. § 42.120 (Paper 21), page 5, footnote 2, pages 6-7, pages 15-16, page 19 and page 26.

No hearsay exception applies. For example, the former testimony exception of Fed. R. Evid. 804(b)(1) does not apply as neither Petitioners nor any predecessor in interest to Petitioners had an opportunity or similar motive to develop Dr. Zech's testimony by cross examination in IPR2015-00885. Further, the residual exception of Fed. R. Evid. 807 does not apply. Patent Owner primarily relies on the testimony of their own expert, Mr. Bohannon, and does not argue that Dr. Zech's testimony is "more prohibitive on the point for which offered than any other evidence that [Patent Owner] can obtain through reasonable efforts." Fed. R. Evid. 807(a)(3).

B. Paragraph 39 of Exhibit 2022 Should be Excluded Under Fed. R. Evid. 802

Paragraph 39 of Exhibit 2022 (Declaration of William K. Bohannon) should be excluded because Mr. Bohannon relies on inadmissible hearsay, *i.e.*, the deposition testimony of Dr. Zech, discussed above. Petitioners timely objected on this ground in Petitioner's Objections. Paper No. 22 at 3. As discussed above, no hearsay exception applies.

Nor should the Board admit paragraph 39 under Fed. R. Evid. 703 because the relied upon hearsay is not the "kinds of facts or data" on which an expert in this field would reasonably rely in forming an opinion. In paragraph 39, Mr. Bohannon

bases his opinion that the term "hold drive" in the Suzuki prior art reference (Exhibit 1003) is "not commonly known to a person of ordinary skill in the art" on Dr. Zech's testimony that "I'm not sure I know exactly . . . what hold drive means." Exhibit 2007 at 89:10-21. That is, Mr. Bohannon relies on an anecdotal expression of uncertainty by one expert as the basis for his opinion that, in general, those of ordinary skill in the field possess that same uncertainty. Moreover, although Dr. Zech was uncertain as to the exact meaning of "hold drive," he recognized it immediately as "an electrical engineering term." Exhibit 2007 at 89:10-13. Mr. Bohannon is not an electrical engineer. Exhibit 2022 at 26. Petitioners' Expert, Thomas Credelle, is an electrical engineer, and testified that he had an understanding of the meaning of the term "hold drive." *See* Transcript for the Deposition of Thomas Credelle dated October 28, 2015, IPR2015-00863 (Exhibit 2004) at 121:23 – 122:8; Thomas L. Credelle Curriculum Vitae (Exhibit 1015) at 1.

Further, even if Dr. Zech had expressed an affirmative opinion that the term "hold drive" is not commonly known in the field, as opposed to recognizing the term but expressing uncertainty as to its meaning, Mr. Bohannon's reliance on it still would not be admissible under Rule 703. Courts have excluded expert testimony that was based on another expert's inadmissible opinion absent a basis for concluding that the inadmissible opinion was reliable. For example, in *TK-7*

Corp v. Estate of Barbouti, 993 F.2d 722, 732 (10th Cir. 1993), the court affirmed the exclusion of expert testimony where the expert "failed to demonstrate any basis for concluding that another individual's opinion on a subjective financial prediction was reliable, other than the fact that it was the opinion of someone he believed to be an expert who had a financial interest in making an accurate prediction." Mr. Bohannon has not provided any basis for concluding that Dr. Zech's uncertainty is reliable other than that Dr. Zech is an expert.

III. CONCLUSION

For the reasons stated above, Petitioners submit that the Board should exclude Exhibit 2007 and ¶ 39 of Exhibit 2022.

Respectfully submitted,

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