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.

SURPASS TECH INNOVATION LLC,
Patent Owner.

Case IPR2015-00863
Patent 7,202,843

PATENT OWNER SURPASS TECH INNOVATION LLC'S OPPOSITION TO PETITIONERS' MOTION TO EXCLUDE EVIDENCE

I. Introduction

Petitioners' Motion to Exclude Evidence ("Petitioners' Motion") (Paper 30) seeks to exclude two specific exhibits or portions thereof from the record in this case against U.S. Patent No. 7,202,843 ("the '843 patent"):

Exhibit	**Description**
2007	Transcript for the Deposition of Richard Zech, Ph.D. dated November 13, 2015, in IPR2015-00885
¶ 39 of Ex. 2022	Declaration of William K. Bohannon

None of this evidence should be excluded from this case for the reasons explained below.

II. Exhibit 2007 is Admissible as Sworn Testimony

Exhibit 2007 listed above constitutes the sworn deposition testimony of a technical witness tendered by petitioner LG Display Co., Ltd. ("LG") in IPR2015-00885 against the '843 patent. There, petitioner LG touted the technical prowess of its technical witness, yet Dr. Zech gave testimony that contradicted Mr. Credelle's testimony and conclusions in this matter.

Petitioners' Motion moves to exclude Exhibit 2007 as hearsay under Fed. R. Evid. 802. But the relied-upon testimony of Dr. Zech is not "hearsay" under Fed. R. Evid. 801, just as a signed and sworn declaration of a witness's own testimony

does not constitute inadmissible hearsay. "Hearsay" is defined under the Federal Rules of Evidence as a "statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Fed. R. Evid. 801. The statements of Dr. Zech that Petitioners wish to exclude were his own opinions, based on his understanding of LCD-related technology, delivered while testifying on cross-examination and under oath. Dr. Zech was testifying to his own technical opinions, just as if he had issued a signed and sworn declaration as to his statements for submission as evidence in this case. In other words, his relied-upon testimony as contained in Exhibit 2007 included his statements, offered into evidence to prove (*inter alia*) the truth of those statements.

Petitioners' Motion treats the sworn deposition testimony of Dr. Zech as somehow a lower pedigree than direct testimony provided in the form of a declaration. But under the Board's regulations, the deposition transcript of Exhibit 2007 is appropriate evidence under 37 C.F.R. § 42.53(a), which states that "all other testimony [other than uncompelled direct testimony] … must be in the form of a deposition transcript."

Indeed, Exhibit 2007 does not constitute an "out-of-court" statement any more than a witness's declaration prepared, signed, and filed as an exhibit. In response to Patent Owner's filing of Exhibit 2007, Petitioners failed to take appropriate steps to cross-examine the testimony of Dr. Zech in this proceeding.

Specifically, Petitioners made no attempt to cross-examine Dr. Zech by deposition, and did not seek or include any declaration from him to either recant or explain away the testimony that Petitioners now seek to exclude. Petitioners state in their Motion that they "did not have the opportunity to question Dr. Zech." Motion at 2. But Petitioners have made no showing anywhere in this case that Dr. Zech was unavailable for cross-examination on Exhibit 2007. Petitioners certainly never contacted the undersigned Patent Owner's counsel to set up a deposition of Dr. Zech. Petitioners' statement that they had no "opportunity" to cross-examine Dr. Zech is simply unfounded.

Petitioners then go so far as to say that "Dr. Zech did not testify on direct at the current trial" (Motion at 2), but Petitioners' decision not to rely on Dr. Zech's testimony does not preclude Patent Owner from relying on Dr. Zech's testimony in this case. Indeed, the Board's own Office Patent Trial Practice Guide acknowledges that patent owners may submit witness testimonial evidence that is not prepared specifically for the case in which it is submitted. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. 48756, 48764 (Aug. 14, 2012) ("The preliminary response may present evidence other than new testimonial evidence … .").

At a minimum, even assuming Petitioners are correct that Dr. Zech was unavailable for cross-examination by Petitioners on Exhibit 2007 (which has not

been established), Dr. Zech's testimony should be admitted as an exception to hearsay under Fed. R. Evid. 804(b)(1), as Petitioners had the same interest in challenging the claims of the '843 patent as petitioner LG Display Co., Ltd. in the related proceedings. Moreover, contrary to Petitioners' Motion, the residual exception under Fed. R. Evid. 807 should apply in this situation, as sworn testimony from an expert of a related petitioner has "equivalent circumstantial guarantees of trustworthiness," was subject to redirect examination by petitioner LG Display Co., Ltd., and the statements are offered as evidence of a material fact and are more probative on the point for which they are offered (*i.e.* even a technical witness adverse to Patent Owner supports Patent Owner's position) than any other evidence that the proponent can obtain through reasonable efforts. In the interest of justice, Dr. Zech's statements should be admitted.

The Board should further deny Petitioners' Motion as a matter of policy. Petitioners seek to insulate Dr. Zech's testimony in IPR2015-00885 from the current case, even though the challenged patent and claims overlap, and the standards of a person of ordinary skill in the art should be consistent. Granting Petitioners' Motion would create a slippery slope, where parties would be able to introduce widely diverging evidence across separate cases, and then argue that the evidence from other cases is "out-of-court." This sort of gamesmanship would hinder rather than promote the Board's fact-finding. It is far better for the Board to

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