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

REPLY IN SUPPORT OF PETITIONER'S MOTION TO EXCLUDE EVIDENCE UNDER 37 C.F.R. § 42.62(c)

I. INTRODUCTION

Petitioners, Sony Corporation, Samsung Electronics Co., Ltd. and Samsung Display Co., Ltd., submit this reply to Patent Owner's opposition to Petitioner's Motion to Exclude Evidence (Paper 32) ("PO Opp.").

A. Exhibit 2007- Deposition Transcript of Dr. Zech

Patent Owner urges the Board to consider the cross-examination of an expert who testified on direct in another proceeding as though the cross-examination constitutes a "signed and sworn affidavit" submitted in this proceeding. The Patent Owner misapplies 37 C.F.R. 42.53 (a) to support its position. While 37 C.F.R. 42.53 (a) states "all other testimony [other than uncompelled direct testimony] … must be in the form of a deposition transcript," 37 C.F.R. 42.53(d) requires that "[p]rior to the taking of deposition testimony, all parties to the proceeding must agree on the time and place for taking testimony." Sony was not a party to the proceeding in which Dr. Zech's testimony was taken, and thus was not given any notice or opportunity to participate in the deposition of Dr. Zech.

Patent Owner asserts that "petitioners failed to take the appropriate steps to cross-examine the testimony of Dr. Zech in the proceeding." PO Opp. at 2. To the contrary, Petitioners had no right or occasion to cross-examine Dr. Zech because Dr. Zech never testified on direct in this proceeding. Patent Owner never submitted an affidavit (or declaration) of Dr. Zech in this proceeding as required

by 37 C.F.R. 42.53 (a). *See* 37 C.F.R. 42.53 (a) ("uncompelled direct testimony must be submitted in the form of an affidavit")

The Patent Owner also points to the Office Patent Trial Practice Guide, 77 Fed. Reg. 48756, 48764 (Aug. 14, 2012), and argues that "patent owners may submit witness testimonial evidence that is not prepared specifically for the case in which it is submitted." PO Opp. at 3. Patent Owner cites to the sentence of 77 Fed. Reg. 48756, 48764 that states: "The preliminary response may present evidence other than new testimonial evidence to demonstrate that no review should be instituted." (Emphasis added). This sentence does not apply for two reasons. First, Dr. Zech's testimony was not submitted with Patent Owner's preliminary response. Second, even if Dr. Zech's testimony had been submitted with the preliminary response, it would not have been immunized from exclusion under the Federal Rules of Evidence. The sentence on which Patent Owner relies is not a loophole for patent owners to dump inadmissible evidence into the record.

Further, the Patent Owner's position that a deposition transcript from a prior proceeding is automatically admissible is contrary to Fed. R. Evid. 804(b). This rule admits prior testimony as a "hearsay exception" under certain narrow circumstances—only if the former testimony is offered against a party who had, or whose predecessor in interest had, an "an opportunity and similar motive to develop it by direct, cross, or redirect examination." Thus, if these circumstances

are not present, prior testimony is inadmissible hearsay under the Federal Rules of Evidence.

The Patent Owner's position that Dr. Zech's testimony should be admitted under Fed. R. Evid. 804(b)(1) because Petitioners had "the same interest in challenging the claims of the '843 patent as petitioner LG Display Co., Ltd." (Opp. at 4) blatantly ignores the text of the rule. As discussed above, Fed. R. Evid. 804(b) requires that the party against whom the former testimony is now offered, or its predecessor, have had an opportunity and similar motive to develop the former testimony. LG Display, the party in IPR2015-00885 who submitted Dr. Zech's direct testimony, is not the same party as any of Petitioners, nor is it a predecessor of any of Petitioners.

Further, the residual exception, Fed. R. Evid. 807, does not apply. The statements made by Dr. Zech lack "equivalent trustworthiness," as LG Display did not have the same motive to develop Dr. Zech's testimony as Petitioners would have had. Patent Owner relies on Dr. Zech's transcript to prove, *inter alia*, that "Suzuki's definition of 'hold drive' is equally applicable to passive matrix LCD technical". Patent Owner's Response (Paper 21) at 26-27. However, Suzuki is not a prior art reference in IPR2015-00885. The prior art reference at issue in IPR2015-00885, Korean Patent Pub. No. 2000-00736673 ("Lee"), does not even mention the term "hold drive." Nor was the term "hold drive" mentioned in the

IPR2015-00885 petition. Further, Patent Owner has not shown that the testimony is more probative than other evidence on the point for which it is offered. Patent Owner asserts that Dr. Zech's testimony prove that "even a technical witness adverse to Patent Owner supports Patent Owner's position." (Opp. at 4) However, if this is what the evidence is being offered to prove, then the evidence is not offered to prove a material fact and the residual exception should not apply. *See* Fed. R. Evid. 807(a)(2).

B. Paragraph 39 of Exhibit 2022 – Mr. Bohannon

Patent Owner argues that Petitioners' argument goes to the weight of Mr. Bohannon's testimony rather than its admissibility. However, this is a mischaracterization of Petitioners' argument. Although Petitioners demonstrated that Mr. Bohannon's opinion in Paragraph 39 should be given little to no weight, Petitioners' argued that his opinion should be excluded because the relied upon hearsay, *i.e.* the deposition testimony of Dr. Zech, is not the "kinds of facts or data" on which an expert in this field would reasonably rely in forming an opinion of this type. *See* Fed. R. Evid. 703, 803.

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