

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

SURPASS TECH INNOVATION LLC,
Patent Owner.

Case No. IPR2015-00887
U.S. Patent No. 7,420,550

**PETITIONERS' REPLY TO PATENT OWNER'S OPPOSITION TO
PETITIONERS' MOTION TO EXCLUDE EVIDENCE**

I. Introduction

Petitioners Samsung Electronics Co., Ltd., Samsung Display Co., Ltd., and Sony Corporation submit this reply to Surpass Tech Innovation LLC's ("Patent Owner") Opposition to Petitioners' Motion to Exclude Evidence ("Opp.") (Paper No. 32), filed on April 18, 2016.

II. Argument

A. Exhibits 2004, 2006, 2007 – Depositions of Thomas Credelle, Michael Marentic, and Dr. Richard Zech – Should Be Excluded

Patent Owner claims that the "relied-upon statements of Mr. Credelle, Mr. Marentic, and Dr. Zech are not 'hearsay'" under FRE 801. Opp. at 2-3. Patent owner's argument lacks merit because Mr. Credelle, Mr. Marentic, and Dr. Zech were *not involved* in the '00887 trial, so none of their testimony was made "while testifying at the current trial or hearing." FRE 801(c)(1); *see also, Toyota Motor Corp. v. Am. Vehicular Sci. LLC*, IPR2013-00417, Paper No. 78, at 11-12 ("testimony in these proceedings ... are not an out of court statement, because they are made *in these proceedings*, i.e., in court") (emphasis added). Patent Owner does not contest that the cited deposition testimony of Mr. Credelle (Mot. at 2), Mr. Marentic (*Id.* at 4-5), and Dr. Zech (*Id.* at 5-6) is being used to prove the truth of the matter asserted, and not as evidence of what an ordinary artisan understood with respect to the technology.

Patent Owner also ignores that no relationship exists between Petitioners and LG Display Co., Ltd., the company *that actually hired* Dr. Zech and Mr. Marentic for the IPR2015-00885 and IPR2015-00913 trials. Dr. Zech and Mr. Marentic were never identified in the '00887 trial as testifying experts, and were *not authorized* in any manner to speak for the Petitioners. *See also, Glendale Fed. Bank, FSB v. U.S.*, 39 Ct. Fed. Cl. 422, 425 (1997) (“[w]hen an expert witness is put forward as a testifying expert at the beginning of trial, the prior deposition testimony of that expert in the same case is an admission against the party that retained him”). Thus, the respective depositions of Dr. Zech (Ex. 2007) and Mr. Marentic (Ex. 2006) cited in the Patent Owner Response are hearsay and should be excluded, because they do not meet any of the hearsay exceptions of FRE 801(d)(2)(A)-(E).

Patent Owner claims that Mr. Credelle’s deposition testimony is admissible under FRE 801(d)(2)(C). Opp. at 5. As noted in *Glendale Fed. Bank*, an expert witness is the classic non-agent under FRE 801(d)(2)(C) and “there may be an issue of the scope of the authorization to speak....” *Glendale*, 39 Ct. Fed. Cl. at 424. Patent Owner speculates on whether Petitioners authorized Mr. Credelle’s testimony on the “subject at issue” in the '550 patent (Opp. at 5) but proffers no supporting proof. *Glendale* counsels that the extent of an expert witness’s “authority” to speak on behalf of his client applies only to statements that are

“made in the context of the instant proceeding.” *Id.* at 425. Applying *Glendale*, Mr. Credelle’s statements were not made in the context of the ’00887 trial, and thus his statements are not authorized and are not admissions by a party-opponent under FRE 801(d)(2)(C). Mr. Credelle’s deposition (Ex. 2005) should be excluded.

Patent Owner’s claim that the Marentic and Zech testimony should be admitted under FRE 804(b)(1) because Petitioners had “the same interest in challenging the patent claims as the other petitioners in the related proceedings” (Opp. at 5-6) ignores the plain text of the rule. FRE 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 Co., Ltd., the party in IPR2015-00885 and IPR2015-00913 who submitted Dr. Zech’s and Mr. Marentic’s direct testimony, is not the same party as any of Petitioners, nor is it a predecessor of any of Petitioners.

Finally, the residual hearsay exception under FRE 807 does not apply. Opp. at 6. Patent Owner has not shown that the testimony it proffers “is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.” FRE 807(a)(3). In its Patent Owner Response, Patent Owner did not submit a declaration from its own expert witness to challenge the institution of trial against the ’550 patent. Patent Owner has not shown how

testimony from unrelated IPR trials is “is more probative than other evidence” that Patent Owner did not even attempt to obtain. Furthermore, Patent Owner asserts that the testimony of Mr. Credelle, Mr. Marentic, and Dr. Zech proves that “even a technical witness adverse to Patent Owner supports Patent Owner’s position.” (Opp. at 6) 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* FRE 807(a)(2).

In sum, Exhibits 2004, 2006, and 2007 are out of court statements, are not entitled to any exception under the hearsay rules, and should be excluded.

B. Exhibit 2005 – Exhibit A of October 30, 2015 Deposition of Tsu-Jae King Liu, Ph.D. in IPR2015-00887 Case Should Be Excluded

Petitioners’ objection to Exhibit A of Dr. Liu’s deposition testimony is timely. Patent Owner asserts that the proper time to object to Exhibit A was during the deposition of Dr. Liu. Patent Owner does not contest that counsel for Patent Owner first *instructed* Dr. Liu to draw the electrical symbol for a resistor (Ex. 2005, p. 8:3-15), and next then *instructed* Dr. Liu to draw a circle around the resistor symbol. *Id.*, p. 8:16-18. Dr. Liu did not draw the entire symbol shown in Exhibit A of Exhibit 2005 in response to a question directed to common electrical symbols for a resistor. Patent Owner does not contest that Dr. Liu testified, at pages 8:5-13:17 of Exhibit 2005, that the symbol appearing on the exhibit is not a commonly used symbol with a commonly understood meaning in the art and

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