

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC., MOTOROLA MOBILITY LLC, and
TOSHIBA AMERICA INFORMATION SYSTEMS, INC.,
Petitioners

v.

GLOBAL TOUCH SOLUTIONS, LLC
Patent Owner

Case IPR2015-01173
Patent No. 7,329,970 B2

PATENT OWNER'S MOTION TO EXCLUDE

I. STATEMENT OF PRECISE RELIEF REQUESTED

Patent Owner Global Touch Solutions, LLC (“PO” herein) moves to exclude Exhibits 1003, filed May 11, 2015 and Exhibit 1003(Corrected) filed on July 3, 2016, Exhibit 1035 served on counsel and Exhibit 1035 (Corrected) filed on July 3, 2016, well after, and in response to, Patent Owner’s Objection to Evidence dated June 8, 2016.

Exhibit 1035, the Reply Declaration of Paul Beard should be excluded. It lacks any sort of representation that the statements presented are true or even believed to be true. It is simple hearsay. Further, Exhibit 1035 lacks an original signature, a requirement of the Rules applicable herein, including 37 C.F.R. §1.68, and corresponding evidentiary requirements of the Federal Rules. The documents that are Exhibits 1003 and 1035 are nothing more than hearsay, and inadmissible. Exhibits 1003 (corrected) and 1035 (corrected) served and filed as supplemental evidence, fail to cure the deficiencies of the objected to evidence, and should be excluded as well.

II. ARGUMENT IN SUPPORT OF THE REQUESTED RELIEF

A. Exhibit 1035 is not admissible

PO submits that the governing law on the question of the inadmissible character of Petitioners’ Exhibit 1035 is beyond dispute. Testimony that is

not compelled, and the “Reply Declaration of Beard” that is Exhibit 1035 was not compelled, must be submitted in the form of an affidavit. 37 C.F.R. §42.53(a). Testimony that is not submitted in compliance with this Rule is inadmissible. *Lowe’s Home Centers, LLC v. Reddy*, 2016 WL 1275315 *8 (PTAB) and *Coalition for Affordable Drugs IX, LLC v. Bristol Myers Squibb, Co.*, 2016 WL 1082935 fn.5 (“Uncompelled direct testimony “must be submitted in the form of an affidavit” otherwise it is not admissible”) citing 37 C.F.R. §42.53(a), 42.61(a).

Further, Exhibit 1035 lacks an original signature. As can be readily ascertained by comparing the signature on Exhibit 1035 with the signature on the “Reply Declaration of Beard” filed in companion IPRs 2015-01171, 2015-01172, 2015-01173, 2015-01174, 2015-01175 and 2015-01603 it is clear that rather than providing an original signature on these documents, someone (could be the witness, could be counsel, could be someone acting on behalf of Petitioners) caused an electronic reproduction of a graphic image to be attach to the document. 37 C.F.R. § 1.4 (d) requires all documents that have to be signed to reflect the person’s “original handwritten signature personally signed...by that person”. While not controlling in an IPR, Federal Rule of Civil Procedure 26(b) includes a parallel provision for expert reports, which are not dissimilar from the type

of expert Declarations submitted in this IPR. The requirement for an original signature is present for the same type of credibility and reliability issues met by an original signature and jurat, both missing in the Reply Declaration of Beard, Exhibit 1035. Clearly, the Reply Declaration of Beard, does not meet the requirements of the Rules. Having timely objected to the Exhibit during the deposition, exclusion on this basis is requested as well.

B. The Supplemental Evidence Filed July 3, 2016 Is Inadmissible

PO notes that none of the Declarations submitted by Petitioners in the series of IPRs between PO and Petitioners (IPRs 2015-01171, 2015-01172, 2015-01173, 2015-01174, 2015-01175 and 2015-1603) bear an original signature or a jurat or statement certifying their reliability. While not all of those Declarations were in fact objected to, the decision of PO previously to not object to these inadmissible documents is moot – on July 3, 2016 Petitioners replaced them with new Exhibits to which PO objects. These Declarations are indicated as “(Corrected).” The Board has discretion to decline to consider any document not admissible. Patent Owner urges the Board to decline to consider such clearly inadmissible documents as the Beard Declarations and the Reply Declarations of Beard in each of the identified IPRs. PO identifies the following grounds for objection:

1) There is no Board Order or other indication that would permit the filing of new Declarations at this point in time. While there was a conference call with the Board during which the Board indicated it would permit the filing of “replacement Declarations” (the transcript of that call is Exhibit 1038) the Board has not issued an Order or indicated in what way or on what basis such “replacement Declarations” may be made. Thus, the Declarations are either too late or premature.

2) The Exhibits are not in compliance with Rule 53. Rule 53 requires that uncompelled testimony be by affidavit. Neither Exhibit 1003 (Corrected) nor Exhibit 1035 (Corrected) is an affidavit, and are thus inadmissible.

3) The Exhibits are not “replacement Declarations.” While they purport to be “corrected” Declarations, they are simply the same Declarations signed some time ago. They have each been provided with an additional page dated much later than the original Declaration, with a form of jurat that is neither that required for an Affidavit nor that required by 37 C.F.R. §1.68. They are quite simply neither fish nor fowl, and so inadmissible.

4) The format of the exhibits is contrary to the Rules and Practice. They are not Affidavits. They both reflect a page added weeks or months

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