

Filed on behalf of: Apple Inc., *et al.*

Entered: July 18, 2016

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

v.

GLOBAL TOUCH SOLUTIONS, LLC,
Patent Owner

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

Before JUSTIN BUSCH, LYNN E. PETTIGREW, and
BETH Z. SHAW, *Administrative Patent Judges.*

**PETITIONER'S RESPONSE TO
PATENT OWNER'S MOTION TO EXCLUDE**

I. INTRODUCTION

Patent Owner attempts to avoid a decision on the validity of its patents by doubling down on its complaint about a technicality, a complaint the Board already rejected. It argues that, because Mr. Beard's originally-filed declarations inadvertently omitted a perjury acknowledgment, these declarations should be excluded. But this issue has already been decided—the Board granted Petitioner permission on June 30 to correct Mr. Beard's declarations and add the inadvertently omitted perjury statement, and Petitioner filed the corrected declarations. These corrected declarations include the perjury acknowledgment required by 37 C.F.R. § 1.68 and cure the problems raised by Patent Owner. Instead of abiding by this decision, Patent Owner complains that it was not proper for the Board to allow these corrected declarations without an exhaustive evidentiary record. But Patent Owner's own conduct belies this complaint. Patent Owner had a deposition of Mr. Beard scheduled *four days* after Petitioner provided the corrected declarations, *but it unilaterally cancelled the deposition after receiving Petitioner's corrected declarations*. Patent Owner apparently prefers to argue in its papers that it lacks a sufficient evidentiary record instead of actually questioning Mr. Beard.

II. PATENT OWNER'S CONDUCT DEMONSTRATES THAT IT HAS NO LEGITIMATE CONCERNS ABOUT THE VERACITY OF MR. BEARD'S TESTIMONY.

Patent Owner had the opportunity to depose Mr. Beard on July 7, after receiving all of the corrected declarations. It could have questioned Mr. Beard about the truthfulness of his declarations and about his perjury acknowledgements at that time. *But Patent Owner instead unilaterally cancelled the deposition.*

The parties agreed on June 22 that Patent Owner would depose Mr. Beard, for a second time, on July 7 near his home in Kalispell, Montana.¹ A little over a week after the deposition date was finalized, on June 30, the Board granted Petitioner permission to file corrected declarations. Two days later, on Saturday, July 2, Patent Owner, for the first time, suggested that it was withdrawing its Notice of Deposition of Mr. Beard because, in part, Petitioner had not yet served the corrected declarations. (Ex. 1039, July 2 Kelber E-mail.) Petitioner promptly provided the corrected declarations, over the holiday weekend, to ensure that Patent Owner would have the corrected declarations several days before the scheduled deposition. But Patent Owner nonetheless cancelled the deposition. If

¹ Patent Owner previously deposed Mr. Beard on February 11, 2016 regarding his declarations filed with the petitions. It asked no questions about the lack of a perjury acknowledgment in his declarations.

Patent Owner had legitimate concerns about the veracity of Mr. Beard's testimony or his perjury acknowledgments, it had the opportunity to depose him. It declined.

And this is not the only conduct by Patent Owner that suggests it has no actual concerns about Mr. Beard's testimony. Patent Owner never objected to Mr. Beard's declarations accompanying the petitions, never asked Mr. Beard questions about the lack of perjury acknowledgment during his February 11, 2016 deposition, and never raised any concerns about the veracity of Mr. Beard's testimony or the lack of perjury acknowledgment in its Responses. If Patent Owner was legitimately concerned that Mr. Beard were not being truthful in his declarations, it would have raised those concerns earlier.

III. PATENT OWNER'S MOTION IS MOOT AS TO THE UNCORRECTED DECLARATIONS.

Patent Owner asks the Board to exclude the uncorrected versions of Mr. Beard's declaration, Exhibits 1003 and 1035, because these declarations are allegedly "inadmissible." (Paper No. 34, "Mot." at 2.) This request is moot. The Board granted Petitioner permission to file corrected versions of these declarations on June 30. (Ex. 1038, "Hearing Tr." at 18:20-19:2 ("The Panel is going to allow the petitioners permission to file the corrected expert declarations, adding only the inadvertently omitted penalty of perjury acknowledgment as discussed between the parties.").) Petitioner filed the corrected versions in this proceeding promptly on

July 3. (Exs. 1003 (corrected) and 1035 (corrected).) Patent Owner's concern that the uncorrected declarations were inadmissible has therefore been cured, with the permission of the Board.²

IV. MR. BEARD'S CORRECTED DECLARATIONS ARE ADMISSIBLE.

A. The Corrected Perjury Acknowledgment Complies with 37 C.F.R. § 1.68.

Patent Owner complains that the perjury acknowledgment included in Mr. Beard's corrected declarations is deficient because it includes the statement "such willful false statements may jeopardize the validity of the application or any patent issued thereon." (Mot. at 9-10 (emphasis removed).) This is incorrect. This language follows and *is taken directly from Rule 68*, which states:

Any document to be filed in the Patent and Trademark Office and which is required by any law, rule, or other regulation to be under oath may be subscribed to by a written declaration. *Such declaration may be used in lieu of the oath otherwise required, if, and only if, the declarant is on the same document, warned that willful false statements and the like are punishable by fine or imprisonment, or*

² In addition, Patent Owner never objected to Mr. Beard's seven declarations filed with the petitions or to three of his six reply declarations. Because Patent Owner cannot "identify the objections in the record" that form the basis of a motion to exclude these ten declarations it cannot move to exclude them. 37 C.F.R. § 42.64.

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