UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC., MICROSOFT CORPORATION, MICROSOFT MOBILE OY, AND MICROSOFT MOBILE INC. (F/K/A/ NOKIA INC.),

Petitioner

v.

EVOLVED WIRELESS LLC,
Patent Owner.

Case IPR2016-01229
Patent 7,881,236

PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION FOR SUBMISSION OF SUPPLEMENTAL INFORMATION UNDER 37 C.F.R. § 42.123(b)

Petitioners submit this Opposition to Patent Owner's Motion for Submission of Supplemental Information (Paper 24, hereinafter the "Motion"). With its Motion, Patent Owner ("PO") attempts to remedy its own failure to submit a proper expert declaration (*see* Paper 16, pp.2-3) by introducing the deposition testimony of an expert that is in no way connected to the Petitioners or to the present IPR. As described in greater detail below, the Board should deny the Motion because: (a) consideration of the proposed supplemental information is not in the interest-of-justice because: (1) the information is not relevant to the present IPR; and (2) submission of the information violates the Federal Rules of Evidence (FRE) 106, 802 and 901, and would unfairly prejudice Petitioners; and (b) the proposed supplemental information reasonably could have been obtained earlier.

I. Consideration of the supplemental information would <u>not</u> be in the interests-of-justice

A. Dr. Villasenor's testimony is not relevant because it applies a different legal framework

Despite PO's insistence that different claim construction standards have "no bearing" on the relevance of testimony, the fact remains that any statements that Dr. Villasenor, Samsung's expert, made regarding his interpretation of the claims in the related district court proceeding do not represent his interpretation under the broadest reasonable interpretation (BRI) standard used in IPR. *See* Motion, p. 4. PO offers no explanation or evidence that Dr. Villasenor's testimony would be the same if he analyzed the claims under BRI rather than the Phillips standard used in

district court. PO's contention that Dr. Villasenor would interpret the claims the same way under both standards is pure speculation, and thus his testimony is irrelevant to the present IPR.

B. Dr. Villasenor's testimony is not "conflicting testimony"

PO also argues that Dr. Villasenor's testimony is relevant because it is "conflicting testimony" on how a skilled artisan would interpret the claim term "if." Motion, p. 3. The Motion states that "[i]n *Ultratec*, the Federal Circuit noted that conflicting testimony would be highly relevant to the Board's analysis." *Id.* at 4 (citing *Ultratec, Inc. v. CaptionCall, LLC,* 2017 U.S. App. LEXIS 16363 at *10 (Fed. Cir. Aug. 28, 2017). The testimony in question in *Ultratec*, however, was district court testimony by an expert that conflicted with testimony by the same expert in a related IPR proceeding. *See Ultratec* at *4-5 (the expert's "trial testimony conflicted with written declarations he made in the IPRs."). Dr. Villasenor has not presented any testimony in the present IPR, so there is nothing with which this district court testimony could "conflict." *See id.* Further, the party that retained Dr. Villasenor in the district court case (Samsung) is not involved in the present IPR. It is thus unclear how Dr. Villasenor's testimony can be "inconsistent" with Petitioners' position in the present IPR (as alleged by PO), when Dr. Villasenor is not representing Petitioners in the district court.

C. PO's submission violates FRE 106, 802 and 901, and would unfairly prejudice Petitioners

As PO admits in its Motion, Petitioners have not had an opportunity to review the full transcript of Dr. Villasenor's deposition. Motion, pp. 4-5. Petitioners have no way of knowing whether there is additional relevant testimony beyond that PO seeks to submit, and, therefore, object to entry of this testimony under FRE 106. Moreover, PO's submission is hearsay and has not been authenticated, and, therefore, its entry further violates FRE 802 and 901. As to the former, both prongs of the hearsay definition are satisfied because: (1) the submission is a partial deposition transcript from another case- not a statement made while testifying in this IPR; and (2) PO offers the submission in evidence to prove the matter asserted in the statement. *See* FRE 801(c). Importantly, in its Motion, PO failed to identify an exclusion or exception to the hearsay rule.

PO also declares that there is no prejudice against Petitioners because Samsung, which is not a party to the present IPR, has had an opportunity to review the full transcript. Samsung's review is no substitute for Petitioners' review of the full transcript, as Samsung does not represent the Petitioners' interests. Nor does a non-party's review overcome Petitioners' objections under FRE 106, 802 and 901.

In addition, as PO again admits Petitioners have had no opportunity to cross-examine Dr. Villasenor on the testimony in the proposed submission. Motion, pp. 4-5. PO explains away this prejudice by concluding, without support or

explanation, that Samsung, who was present at the deposition, "has the exact same incentive as" Petitioners and "asked the same or similar questions that any of the other Petitioners' likely would have asked regarding this claim construction issue." *Id.* at 5. PO does not explain or cite any case law for the proposition that the participation of a non-party (Samsung) in the deposition extinguishes Petitioners' right to cross-examine Dr. Villasenor on the testimony in the proposed submission.

D. Late entry of Dr. Villasenor's testimony at this time does not serve justice because evidence regarding claim construction was available to PO when it filed its Response

PO asserts that Dr. Villasenor's testimony is relevant because it "demonstrates how one of ordinary skill in the art construes claim term 'if' in the '236 patent." Motion, p. 2. As discussed below, however, PO has had ample opportunity to submit evidence of how a skilled artisan would construe the term "if." Even if Dr. Villasenor's testimony addresses this point (which it does not under the standard of this forum), entry of such evidence in lieu of an expert declaration, as noted below, would allow POs to gain an unjust advantage over Petitioners by allowing them to game the system.

II. PO could have obtained evidence regarding a POSITA's interpretation of the claims earlier and submitted it with its PO Response

The Motion asserts that the excerpts from deposition testimony of Dr. John Villasenor, Samsung's expert in the counterpart district court proceeding, "demonstrate[] how one of ordinary skill in the art construes [the] claim term 'if'

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