

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AEROHIVE NETWORKS, INC.,
Petitioner,

v.

CHRIMAR SYSTEMS, INC.,
Patent Owner.

Case IPR2016-01757 (Patent 8,942,107 B2)
Case IPR2016-01758 (Patent 9,019,838 B2)
Case IPR2016-01759 (Patent 8,902,760 B2)¹

Before KARL D. EASTHOM, GREGG I. ANDERSON, and
ROBERT J. WEINSCHENK, *Administrative Patent Judges*.

WEINSCHENK, *Administrative Patent Judge*.

ORDER
Conduct of the Proceeding
37 C.F.R. § 42.5

¹ We exercise our discretion to issue this Order in each case using a joint caption. Unless otherwise authorized, the parties are not permitted to use a joint caption.

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I. INTRODUCTION

On November 1, 2016, Judges Easthom, Anderson, and Weinschenk held a telephone conference call with counsel for Aerohive Networks, Inc. (“Aerohive”) and counsel for Chrimar Systems, Inc. (“Chrimar”). Also present on the conference call were counsel for AMX, LLC (“AMX”) and counsel for Dell Inc. (“Dell”), who are parties in at least one of several related cases. A court reporter was present for part, but not all, of the conference call. This Order summarizes statements made during the conference call. A partial record also may be found in the court reporter’s transcript, which is to be filed by Chrimar as an exhibit.

II. ANALYSIS

A. *Chrimar’s Preliminary Response*

Aerohive requested that we deem Chrimar to have waived its preliminary response, or, alternatively, that we shorten the deadline for Chrimar to file its preliminary response from December 14, 2016 to November 2, 2016. Aerohive explained that the petitions for *inter partes* review in IPR2016-01757, IPR2016-01758, and IPR2016-01759 (“Petitions”) are substantively identical to the petitions for *inter partes* review in IPR2016-00569, IPR2016-00573, and IPR2016-00574, respectively. Aerohive also explained that it filed motions with each of the Petitions requesting that IPR2016-01757, IPR2016-01758, and IPR2016-01759 be joined with the pending *inter partes* reviews in IPR2016-00569, IPR2016-00573, and IPR2016-00574, respectively (“Motions for Joinder”). Aerohive acknowledged that, unless the Motions for Joinder are granted, the Petitions are barred under 35 U.S.C. § 315(b).

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Aerohive explained that AMX and Chrimar reached a settlement with respect to the challenged patents in IPR2016-00569, IPR2016-00573, and IPR2016-00574. Aerohive further explained that, because AMX and Chrimar are the only parties in IPR2016-00573, the settlement may result in termination of that case.² According to Aerohive, if IPR2016-00573 is terminated before we consider Aerohive's Petitions and Motions for Joinder, the Motion for Joinder in IPR2016-01758 will be moot and the Petition in IPR2016-01758 will be barred under § 315(b). Aerohive argued that, by deeming Chrimar to have waived its preliminary response or by shortening the deadline, we can consider Aerohive's Petitions and Motions for Joinder before IPR2016-00573 is terminated.

Chrimar opposed Aerohive's request. Chrimar explained that it needs until December 14, 2016 to file its preliminary response in order to investigate a potential real party-in-interest issue and to prepare a substantive response to the asserted grounds of unpatentability in Aerohive's Petitions. Chrimar disagreed with Aerohive as to whether the deadline for filing an opposition to Aerohive's Motions for Joinder had passed. According to Chrimar, Aerohive's Motions for Joinder were not authorized, and, thus, the time period for filing an opposition never started.

After considering the respective positions of the parties, we deny Aerohive's request to deem Chrimar to have waived its preliminary response or to shorten the deadline. As discussed above, the reason for Aerohive's request is that, unless we expedite consideration of the Petitions and Motions

² Dell and Chrimar confirmed that no settlement has been reached between them with respect to IPR2016-00569 and IPR2016-00574.

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for Joinder, at least one of the Petitions may be barred under § 315(b). Aerohive, however, could have avoided the § 315(b) bar by filing the Petitions within one year after Chrimar served its complaint alleging infringement of the challenged patents. Further, even if Aerohive preferred to join the cases filed by AMX, Aerohive could have expedited consideration of the Petitions and Motions for Joinder by filing them earlier than just a few days before the deadline in 37 C.F.R. § 42.122(b).³

Aerohive now seeks to avoid the consequences of its delay by asking us to deem Chrimar to have waived its preliminary response or to shorten the deadline. Aerohive did not present any authority indicating that we can, in essence, preclude Chrimar from filing a preliminary response, as provided by 35 U.S.C. § 313. Also, given Aerohive's delay discussed above, we are not persuaded that there is good cause to shorten the deadline for Chrimar to file its preliminary response. Therefore, we deny Aerohive's request.

B. *Aerohive's Motions for Joinder*

During the conference call, we expressed no opinion regarding the merits of Aerohive's Petitions and Motions for Joinder, and we will consider them in due course after Chrimar files its preliminary response.

Nonetheless, we asked the parties whether the schedule in IPR2016-00569, IPR2016-00573, and IPR2016-00574 would need to be modified if we granted any of Aerohive's Petitions and Motions for Joinder. Aerohive, Chrimar, AMX, and Dell each indicated that, if we granted any of

³ Even if, as Aerohive argued, the Motions for Joinder are timely under § 42.122(b), that does not mean that we must expedite consideration of the Petitions and Motions for Joinder by shortening the deadline for Chrimar's preliminary response.

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Aerohive's Petitions and Motions for Joinder, the schedule in IPR2016-00569, IPR2016-00573, and IPR2016-00574 would not require any modifications.

III. ORDER

In consideration of the foregoing, it is hereby:

ORDERED that Aerohive's request to deem Chrimar to have waived its preliminary response, or, alternatively, to shorten the deadline for Chrimar to file its preliminary response is *denied*; and

FURTHER ORDERED that Chrimar may file its preliminary response on or before December 14, 2016.

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