Docket No.: 2212665-00120US7
Filed on behalf of K/S HIMPP
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

K/S HIMPP

Petitioner

v.

III Holdings 4 LLC

Patent Owner.

Case IPR2017-00781
Patent No. 8,654,999

PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE

I. INTRODUCTION

Patent Owner's Motion to Exclude Exhibits 1009, 1011, and 1012 should be denied for at least the reasons set forth herein. In addition, Exhibit 1015 should be admitted for consideration in this proceeding as timely-served and responsive supplemental evidence.

II. THE BOARD SHOULD DENY THE MOTION TO EXCLUDE EXHIBIT 1009 AND SHOULD ADMIT EXHIBIT 1015

Patent Owner's Motion to Exclude Exhibit 1009 should be denied because—although Patent Owner fails to acknowledge the fact in its Motion to Exclude—Petitioner timely served supplemental evidence pursant to 37 C.F.R. §42.64(b)(2) on Patent Owner curing its objections to admissibility.

For evidence other than deposition evidence, first an "objection must identify the grounds for the objection with sufficient particularity to allow correction in the form of supplemental evidence," then, "[t]he party relying on evidence to which an objection is timely served may respond to the objection by serving supplemental evidence within ten business days of service of the objection." 37 C.F.R. §42.64(b)(2). Patent Owner filed its Objection to Exhibit 1009 on August 10, 2017, specifying that "Petitioner has not provide [sic] a translation of the foreign language document in accordance with 37 C.F.R. § 42.63(b) and 37 C.F.R. § 42.2, as further specified in 37 C.F.R. § 1.68 (affidavit) and 28 U.S.C. § 1746 (declaration)." Paper 10, 2.

In response, Petitioner timely served supplemental evidence on Patent Owner on August 24, 2017 curing those objections. *See,* Exhibit 1015, now filed with this Opposition,[1] and Exhibit 1018 (Exhibit 1015 service email to counsel for Patent Owner).

Exhibit 1015, in accordance with 37 C.F.R. § 42.63(b), includes "a translation of the document into English and an affidavit attesting to the accuracy of the translation." Ex. 1015, 10. Pursuant to 37 C.F.R. § 42.2, an "[a]ffidavit means affidavit *or* declaration under § 1.68 of this chapter. A transcript of an *ex parte* deposition or a declaration under 28 U.S.C. 1746 may be used as an affidavit." (emphasis added).

Ex. 1015 satisfies the requirements of 37 C.F.R. § 1.68. Specifically, the declarant in Ex. 1015: (i) is on the same document; (ii) acknowledges that willful false statements and the like are punishable by fine or imprisonment, or both (18

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[1] *See Activision Blizzard, Inc. v. Acceleration Bay, LLC*, Case IPR2015-01951, slip op. at 6–7 (PTAB May 4, 2016) (explaining that authorization to file previously-served supplemental evidence is not required when Patent Owner has filed a motion to exclude and Petitioner is filing an opposition to the motion to exclude to explain how the supplemental evidence cures the objections to admissibility).

U.S.C. 1001); and (iii) sets forth in the body of the declaration that all statements made of the declarant's own knowledge are true and that all statements made on information and belief are believed to be true. Ex. 1015, 10; 37 C.F.R. § 1.68. Accordingly, Ex. 1015—which was timely served on Patent Owner to cure the evidentiary objections filed against Ex. 1009—satisfies all requirements of 37 C.F.R. § 42.63(b) and 37 C.F.R. § 42.2, as further specified in 37 C.F.R. § 1.68. *See, e.g., Becton, Dickinson and Company v. B. Braun Melsungen AG,* Case IPR2017-01588, slip op. at 7-8 (PTAB Dec. 21, 2017) (distinguishing between a declaration *or* an affidavit, as required by 37 C.F.R. § 42.2, when evaluating the sufficiency of an affidavit attesting to the accuracy of a translation).

Patent Owner's present Motion to Exclude identifies the same objections against Exhibit 1009 that were filed in its original objections, but neither addresses Exhibit 1015 at all, nor even alleges that Exhibit 1015 is insufficient in curing those original objections. As a result, Patent Owner's Motion should be denied and Exhibit 1015—which sufficiently cures the objections raised by Patent Owner and was timely served—should be admitted for consideration in this proceeding.

III. THE BOARD SHOULD DENY THE MOTION TO EXCLUDE EXHIBITS 1011 AND 1012

Patent Owner's Motion to Exclude Exhibits 1011 and 1012 should be denied as moot because Exhibits 1011 and 1012 are only used by Dr. Atlas in his Declaration as support for his statements regarding parameter settings and how

they are set. Patent Owner has not challenged the accuracy of these statements by Dr. Atlas and the exhibits are not part of the grounds of unpatentability instituted for *inter partes* review by the Board.

Dated: April 3, 2018

Respectfully submitted,

K/S HIMPP, Petitioner

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