UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

RUIZ FOOD PRODUCTS, INC.,

Petitioner,

v.

MACROPOINT LLC,

Patent Owner.

Case IPR2017-02016
U.S. Patent No. 8,275,358 B1

PATENT OWNER'S REPLY BRIEF
IN SUPPORT OF MOTION TO DISMISS

UPDATED LIST OF EXHIBITS

Exhibit Number	Description
2001	Expert Declaration of David Hilliard Williams
2002	David Hilliard Williams CV
2003	Ruiz Food Products, Inc.'s Initial Invalidity Contentions, Civil Action 6:16-cv-1133
2004	Expert Report of Dr. Stephen B. Heppe dated January 25, 2017, Civil Action 6:16-cv-1133
2005	Ruiz Food Products, Inc.'s Final Election of Asserted Prior Art, Civil Action 6:16-cv-1133
2006	Declaration of Kyle B Fleming, Esq.
2007	Kyle B. Fleming CV
2008	Complaint filed in *FourKites, Inc. v MacroPoint*, LLC, Case No. 1:16-cv-02703-CAB (N.D. Ohio)

Petitioner's Opposition ("Opp.") advances irrelevant differences and unpersuasive arguments to ignore the holding and principles of *Click-to-Call*. The Federal Circuit found the plain language of § 315(b) to clearly and unambiguously express Congress' intent that no dismissal exception exists. The plain language of § 315(a) is equally clear and unambiguous, and the petition should be dismissed.

I. The Federal Circuit's Statements, Framework, And Conclusions From *Click-To-Call* Are Equally Applicable To § 315(a) And Petitioner Fails To Manufacture Any Material Distinction

Petitioner first suggests that *Click-to-Call*'s silence on § 315(a) is a tacit affirmance that there is a dismissal exception to § 315(a). Opp. at 5. But the Federal Circuit did not address § 315(a) because it was not at issue, and the "case or controversy" requirement forbids advisory opinions on legal questions not actually in dispute. U.S. Const. art. III, § 2, cl. 1; *Muskrat v. United States*, 219 U.S. 346, 356 (1911). Suggesting that the Federal Circuit "could have" ruled on §315(a) is constitutionally improper; therefore the lack of an advisory opinion cannot be twisted into an implicit approval of Petitioner's § 315(a) position.

Second is Petitioner's unremarkable observation that the Federal Circuit's decision on § 315(b) relied on the language of § 315(b) not (a). Opp. at 5-7. But "serving" versus "filing" is a difference without distinction. These are different events, but this difference has no substantive impact on the Federal Circuit's holding, which has equal force and veracity if the language of § 315(a) is inserted:

> The statute does not contain any exceptions or exemptions for complaints ~~served~~ [filed] in civil actions that are subsequently dismissed, with or without prejudice.… Simply put, ~~§ 315(b)'s~~ [§315(a)'s] time bar is implicated once a party ~~receives notice through official delivery of a complaint in a civil action~~ [files a civil action challenging the validity of a claim], irrespective of subsequent events.

899 F.3d at 1330 (modification added). There is no dismissal exception anywhere in § 315, and no subsequent event undoes any act—service or filing—once it has occurred. Section 315(a) is no different from (b) on this decisive factor.

Third, Petitioner argues the "dismissal" exception nevertheless should be applied because § 315(a) is a "preclusion" provision whereas § 315(b) is a statute of limitation. Opp. at 7-9. This is a false dichotomy because the result of the two provisions is the same—petitioner cannot seek an IPR. If § 315(a) is "preclusive," then so is § 315(b)—and that was irrelevant in *Click-to-Call*. In any event, neither provision is "preclusive" because neither triggers any claim or issue preclusion. *New Hampshire v. Maine*, 532 U.S. 742, 748 (2001) (claim preclusion forecloses "successive litigation of the very same claim" regardless of the issues); *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008) (issue preclusion forecloses successive litigation of the very same issues regardless of the claim).

After dismissing its declaratory judgment action, FourKites retained its ability to sue MacroPoint again <u>on the same claims</u> and <u>on the same issues</u>—declaratory judgment of patent invalidity. That FourKites and Ruiz cannot file a

different claim before a different tribunal is not legal preclusion because they are free assert the same claims and raise the same issues in another district court action. The lack of § 315 standing bars an IPR filing, but this is not the preclusion discussed by Judge Taranto or by *Jet*. Opp. at 7-8. Applying *Click-to-Call* to § 315(a) is consistent with Judge Taranto's assertion that "[t]he point of a dismissal 'without prejudice' is to preserve, rather than eliminate, the ability of the plaintiff to sue the defendant again on the same claim." 899 F.3d at 1348 (emphasis added).

Petitioner is simply repackaging the *Bonneville/Graves* argument expressly rejected by *Click-to-Call* (and Judge Taranto). This is confirmed by Petitioner's reliance on *Clio USA*, Opp. at 8, which itself was predicated on an application of *Bonneville/Graves* that was rejected by the Federal Circuit in *Click-to-Call*.

II. *Chevron* Applies Because The Board Must Also Give Effect To The Unambiguously Expressed Intent Of Congress

Contrary to Petitioner's argument, Opp. at 9-10, the *Chevron* framework is appropriate because the step one analysis applies to courts and agencies:

> If the intent of Congress is clear, that is the end of the matter; for the court, **as well as the agency, must give effect to the unambiguously expressed intent of Congress**. *Chevron, U.S.A., Inc. v. Nat. Res. Def. Council, Inc.*, 467 U.S. 837, 842–43 (1984) (emphasis added).

Petitioner fastidiously ignores the plain language of the statute and never provides any analysis of the express intent of Congress based on the language of § 315(a). Petitioner simply posits that *Click-to-Call* does not apply and then advances

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