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IPR TELECONFERENCE 6-21-18

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

LG ELECTRONICS, INC., LG ELECTRONICS U.S.A., INC., LG
ELECTRONICS MOBILECOMM U.S.A., LG ELECTRONICS MOBILE
RESEARCH U.S.A. LLC, AND LG ELECTRONICS ALABAMA, INC.

Petitioner

v.

FUNDAMENTAL INNOVATION SYSTEM INT'L, LLC

Patent Owner

IPR2018-00493
IPR2018-00495
IPR2018-00508

Reported by Carrie LaMontagne, CSR

Job No. 143973

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1 IPR TELECONFERENCE 6-21-18
 2
 3 Thursday, June 21, 2018
 4 3:00 p.m.
 5
 6
 7 Telephone proceeding held before the United
 8 States Patent and Trademark Office before Carrie
 9 LaMontagne, a certified shorthand reporter for the
 10 states of California and Oklahoma.
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 2 P R O C E E D I N G S
 3 JUDGE PESLAK: Good afternoon. This is Judge
 4 Peslak. This is a conference call on three IPRs, IPR
 5 2018-0493, IPR 20018-0495, IPR 20018-000508. On the
 6 call with me are Judge Pettigrew, Judge Tornquist, and
 7 Judge Ogden.
 8 For the record the spelling of our names, my name
 9 is Peslak, P, as in Peter, E-S-L-A-K. Judge Pettigrew,
 10 is P, as in Peter, E-T-T-I-G-R-E-W. Judge Tornquist, T,
 11 as in Thomas, O-R-N-Q-U-I-S-T, and Judge Ogden,
 12 O-G-D-E-N.
 13 I understand there's a court reporter. Who
 14 arranged for the court reporter?
 15 MR. HUH: Yes, your Honor. This is
 16 Gregory Huh on behalf of Petitioner LG Electronics, and
 17 we arranged for the court reporter.
 18 JUDGE PESLAK: So we'll ask that you file the
 19 transcript as an exhibit in all three cases as soon as
 20 possible.
 21 MR. HUH: Will do, your Honor.
 22 JUDGE PESLAK: So who is on the line for
 23 Petitioner?
 24 MR. HUH: Yes, on behalf of Petitioner, this
 25 is Gregory Huh and I also have Mr. Adam Fowles.

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 2 A P P E A R A N C E S
 3 (all appearances via telephone):
 4
 5 HAYNES AND BOONE
 6 Attorneys for Petitioner:
 7 2505 N. Plano Road
 8 Richardson, Texas 75082
 9 BY: GREGORY HUH, ESQ.
 10 ADAM FOWLES, ESQ.
 11
 12 IRELL & MANELLA
 13 For Patent Owner:
 14 1800 Avenue of the Stars
 15 Los Angeles, California 90067
 16 BY: ANNITA ZHONG, ESQ.
 17 MICHAEL FLEMING, ESQ.
 18 JASON SHEASBY, ESQ.
 19
 20 BEFORE: FOR THE PATENT TRIAL AND APPEAL BOARD:
 21 JUDGE ARTHUR M. PESLAK
 22 JUDGE LYNNE E. PETTIGREW
 23 JUDGE JON TORNQUIST
 24 JUDGE BRIAN WHITE
 25 JUDGE CHRISTOPHER L. OGDEN

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 2 JUDGE PESLAK: All right. And who is on the
 3 line for the patent owner?
 4 MS. ZHONG: For the patent owner, this is
 5 Annita Zhong, and also with me is Mr. Michael Fleming and
 6 Mr. Jason Sheasby.
 7 JUDGE PESLAK: Okay. Just so the record is
 8 clear, when you begin to speak, please identify
 9 yourself.
 10 The board received an e-mail from Petitioner on
 11 June 12 requesting authorization to file a five-page
 12 reply to Patent Owner's preliminary response in each of
 13 the three identified IPRs. The e-mail indicates that
 14 Patent Owner opposes.
 15 We'll hear from the petitioner first. If your
 16 argument is the same for all three IPRs, there's no need
 17 to repeat it; but if there's something specific for one
 18 of the IPRs, please make that clear on the record.
 19 So starting with the petitioner, can you please
 20 tell us the facts that you contend support a finding of
 21 good cause under 42 CFR, Section 108, Paragraph C to
 22 allow the filing of a reply.
 23 MR. HUH: Yes, your Honor. This is
 24 Gregory Huh on behalf of Petitioner. And under the
 25 circumstances, we believe there are three reasons why

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 2 there is good cause for us to have leave to file a reply
 3 to Patent Owner's preliminary response.
 4 The first reason is that it wasn't foreseen that
 5 Patent Owner would have filed the deposition transcript
 6 of Mr. Garney who was not LG Electronics expert, and LG
 7 Electronics was not a part to the proceeding to which
 8 that transcript pertains.
 9 Had LG Electronics filed this transcript with its
 10 petition, it wouldn't have been able to produce
 11 Mr. Garney for cross-examination during the proceeding.
 12 Therefore, Petitioner could not have submitted this
 13 transcript along with petition at the early stage of the
 14 proceeding.
 15 The second reason why there is good cause is that
 16 although Patent Owner argues that LG Electronics was
 17 provided this transcript during litigation, LG
 18 Electronics' counsel for litigation is different than
 19 the counsel for IPRs in all of these three cases.
 20 And at the time of the filing of the petition, IPR
 21 counsel was not, was not aware of this transcript at all
 22 existing. Moreover, there's a protective order
 23 prohibiting LG Electronics' litigation counsel from
 24 sharing these documents with us and for us to produce
 25 them outside of litigation.

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 2 expectation of success in the combination of Shiga and
 3 the Dougherty reference, which is a primary reference in
 4 all of these proceedings that were filed by Petitioner
 5 LG Electronics.
 6 JUDGE PESLAK: Counsel, I think you're
 7 deviating from the issue here, which is good cause.
 8 You're getting into the merits.
 9 MR. HUH: Yes. And the point is, your Honor,
 10 that what Patent Owner has done is they've omitted
 11 relevant testimony from Mr. Garney that provides proper
 12 context to evaluate that testimony and recognize that,
 13 in fact, it doesn't stick for the proposition that they
 14 actually assert that it stands for.
 15 So we believe that in order to give the board a
 16 full appreciation of what Mr. Garney's testimony stands
 17 for and to allow the board to properly weigh that
 18 evidence as it pertains to the claims and the prior art,
 19 which is how Patent Owner had argued in their POPR, we
 20 would ask that we have an opportunity to file a reply to
 21 address the arguments raised by Patent Owner in
 22 connection with Mr. Garney's testimony.
 23 For those three reasons, your Honor, we think that
 24 there are distinct reasons why we should, in fact, have
 25 an opportunity here to address the testimony of

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 2 So we could not have filed Mr. Garney's testimony
 3 at the petition stage since we didn't have it in hand
 4 and we were not aware of it. For that reason there's
 5 good cause, and we should actually have an opportunity
 6 now to reply to the filed transcript by Patent Owner.
 7 Third, and I think probably most importantly, is
 8 that it would inform the board's analysis and put proper
 9 context from Mr. Garney's testimony. And this is
 10 important because when you put Mr. Garney's testimony in
 11 context, it shows that Mr. Garney was talking about an
 12 SE1 signal occurring after enumeration, whereas in the
 13 context of the claims of the patent, they require
 14 without enumeration.
 15 What that means is that the claims as the SE1
 16 states are occurring before enumeration, and this is the
 17 same context for Shiga. Shiga provides an SE1 signal,
 18 which is Exhibit 1008, and that signal occurs before
 19 enumeration. The petition never argued that the SE1
 20 signal would be utilized after enumeration, which means
 21 that Mr. Garney's testimony, which pertains to events
 22 occurring after enumeration, has no bearing.
 23 I also want to note that because Shiga itself does,
 24 in fact, provide an SE1 signal followed by USB
 25 communication, it demonstrates that there's an

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 2 Mr. Garney.
 3 JUDGE PESLAK: Okay. Patent Owner.
 4 MS. ZHONG: This is Annita Zhong. I'm going to
 5 be arguing on behalf of Patent Owner.
 6 What I have heard is an evolving story. In the
 7 e-mail to the board the petitioner said they should be
 8 allowed to file a reply because Mr. Garney's testimony
 9 is hearsay. Now they have totally abandoned that
 10 argument because they -- I think they realized that
 11 the objection to evidence should not occur -- does not occur
 12 until ten days after institution. So the argument to
 13 the evidence itself on hearsay ground is basically
 14 premature.
 15 Second of all, regarding the good cause or more
 16 likely its foreseeability, I would say it's totally
 17 foreseeable based on their own argument, which is, I
 18 quote -- using IPR2018-508 as an example, page 23 to 24,
 19 they say SE1 should be used because its obvious
 20 beneficial predictable results. They say SE1 should be
 21 used because its suitable for USB signaling. They say
 22 SE1 should be because it's logical and [indiscernible].
 23 In response to those arguments it is foreseeable
 24 that Patent Owner is going to raise to counter each of
 25 those points. And Mr. Garney's testimony directly

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 2 undermines those points, so it's fair -- it's
 3 foreseeable that Patent Owner is going to raise such
 4 testimony by another neutral expert.
 5 JUDGE PESLAK: What were you just reading
 6 from?
 7 MS. ZHONG: I'm reading from the petition,
 8 page 23 and 24 of IPR2018-00508 petition.
 9 MR. HUH: To be clear -- this is Gregory Huh,
 10 Petitioner never argued that the SE1 signal will be
 11 occurring after enumeration and that's exactly what
 12 Mr. Garney's testimony pertains to.
 13 MS. ZHONG: Well, first of all, this is wading
 14 into the merits of the argument. Second of all, their
 15 petition never says that SE1 is going to occur before or
 16 after enumeration. That never appeared --
 17 JUDGE PESLAK: We're all getting too far into
 18 the merits. Can you get back to why Patent Owner
 19 doesn't believe there's good cause here.
 20 MS. ZHONG: Okay. Regarding the second, to
 21 say that they are not aware of the Garney testimony,
 22 that is just false. It was provided to them. They
 23 don't deny that LG is in possession of that transcript
 24 two to three weeks before filing it, and that transcript
 25 is not sealed. So I don't see what prevents the LG IPR

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 2 counsel receiving that and reviewing that. But in any
 3 event, the petition is filed on behalf of LG, and LG was
 4 in possession of that transcript before.
 5 So the third point is we feel that just by arguing
 6 the merits on the phone just now, the petitioner has
 7 achieved what they could not have done under general
 8 plastics. Basically, what they have noticed is they
 9 found the board's prior position in IPR2018-00111 and
 10 they realize the gap in the petition, the logic, so
 11 they're trying to make new arguments, and they already
 12 did that by arguing to your Honors the alleged
 13 differences between the Garney testimony and what their
 14 petition is.
 15 Those differences -- the alleged difference of what
 16 they are actually arguing does not appear in the
 17 petition, and so basically they've already achieved
 18 that, what they could not do with general plastics,
 19 which is by or through a petition, and to make new
 20 arguments and make it better.
 21 We find that's totally prejudicial for the patent
 22 owner. And I don't know what the remedy is right now
 23 because the cat is out of the bag, and I don't know how
 24 that is going to influence your Honor's positions from
 25 this point onward because you've heard it. And I don't

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 2 know whether you would have thought -- now you're going
 3 to look for that difference even though it has nothing
 4 to do with their petition. Never raised it.
 5 Third of all, if your Honor wants to hear why it is
 6 not hearsay, I'm happy to talk about it. But it was
 7 also explained why it was not hearsay in our POPR, in
 8 the IPR2018-00508.
 9 JUDGE PESLAK: Okay. I don't think that's
 10 necessary.
 11 MR. HUH: Your Honor, this is Gregory Huh. If
 12 I may respond on a few points.
 13 JUDGE PESLAK: Just to clarify the record.
 14 Don't get into the merits, please.
 15 MR. HUH: Yes, your Honor.
 16 So with respect to the hearsay, that was our first
 17 point that we raised in our initial discussion was the
 18 hearsay issue, we did not abandon that as Counsel has
 19 argued.
 20 Second, with respect to us not being aware, the
 21 fact is that we were not aware. IPR counsel was not
 22 aware. Even now we don't have possession of that
 23 testimony. We reached out to litigation counsel a few
 24 days ago and we asked for the testimony to be given to
 25 us. They said it was subject to protective order and

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 2 they could not give it us to. This is a fact.
 3 We could not have raised any arguments pertaining
 4 to this testimony of Mr. Garney at the petition stage.
 5 We were not aware even, and now we cannot obtain the
 6 full transcript. And what we would ask is that if
 7 actually Patent Owner does have it, we would ask that --
 8 and if Patent Owner has authority to file it, that they
 9 would file the full transcript and can get the record,
 10 that the board has full knowledge of everything in
 11 regard to this prior event, not a partial snippet of the
 12 record. We then we would have an opportunity to
 13 actually provide context for the board.
 14 We think it's reasonable that the board have
 15 context and understand what Patent Owner is arguing, how
 16 they are pulling out specific quotes that don't stand
 17 for propositions that they're making.
 18 MS. ZHONG: Your Honor, this is Annita Zhong.
 19 MR. HUH: Okay. Give us a couple minutes
 20 here.
 21 (Pause in the proceedings.)
 22 JUDGE PESLAK: Counsel, this is Judge Peslak
 23 back again. We're going to take these matters under
 24 advisement. So if you can get us the transcript as soon
 25 as possible, and we can review what both of you have

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 2 said today and make our decision in all three cases.
 3 MS. ZHONG: This is Annita Zhong on behalf of
 4 Fundamental. I just want to point out one more fact.
 5 JUDGE PESLAK: We don't really need anything
 6 else. Thank you.
 7 MR. HUH: Thank you, your Honor. We
 8 appreciate it.
 9 MS. ZHONG: Thank you, your Honor.
 10 JUDGE PESLAK: Thank you.
 11 (Deposition concluded at 3:17 p.m.)
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 2 REPORTER'S CERTIFICATE
 3
 4 I, Carrie LaMontagne, Certified Shorthand
 5 Reporter within and for the States of California and
 6 Oklahoma, License Nos. 13393 and 1976, respectively, do
 7 hereby certify that the foregoing proceeding was
 8 reported by me on 21st June, 2018, and was thereafter
 9 transcribed with computer-aided transcription; that the
 10 foregoing is a full, complete, and true record of said
 11 proceedings.
 12 I further certify that I am not of counsel or
 13 attorney for either or any of the parties in the
 14 foregoing proceedings and caption named or in any way
 15 interested in the outcome of the cause in said caption.
 16 IN WITNESS WHEREOF, I have hereunto set my
 17 hand and official seal this 21st day of June, 2018.
 18
 19 _____
 20 CARRIE LAMONTAGNE, CSR
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