UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner

v.

QUALCOMM INCORPORATED,
Patent Owner

Case IPR2018-01249
Patent 7,693,002

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64 and the Federal Rules of Evidence, Petitioner, Apple Inc. ("Apple"), moves to exclude Exhibit 2004 (Declaration of Donald Alpert, Ph.D in IPR2015-00148) submitted by Patent Owner, Qualcomm, Inc. ("Qualcomm"). Exhibit 2004 is a declaration offering testimony identified by an unrelated party as expert testimony in an unrelated IPR not involving petitioner to the instant proceeding.

Exhibit 2004 is inadmissible on several grounds. Exhibit 2004 offers testimony which lacks sufficient factual foundation to the present IPR, is inadmissible hearsay in regard to the present IPR, and irrelevant to the facts at issue in the present IPR. Exhibit 2004 should be excluded under the Federal Rules of Evidence (FRE) 402, 702, and 802.

Patent Owner relied on Exhibit 2004 in its Patent Owner Response (Paper 11), filed on April 15, 2019 and its Patent Owner Sur-Reply (Paper 17), filed on August 15, 2019. Subsequently, Petitioner timely objected to Exhibit 2004 in its Notice of Objections served on April 22, 2019. For reasons detailed below, Exhibit 2004 should be excluded.

II. FACTUAL BACKGROUND

Exhibit 2004 is a declaration submitted by Donald Alpert on behalf of Xilinx, Inc. (not Apple) over four years ago in a different *Inter Partes Review* proceeding

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(IPR2015-00148), and in reference to a different patent (U.S. Pat. No. 6,356,122) ("the '122 patent") directed to subject matter in a different technology field (e.g., "a PLL-based clock synthesizer with a programmable input-output phase relationship for generating output frequencies based on a reference clock input" as stated in the FIELD OF THE INVENTION section of the '122 patent). Alpert has not offered testimony in the present IPR. Xilinx is not a party to the present IPR. The '122 patent is not related to the '002 patent. Exhibit 2004 provides no indication that Alpert reviewed or otherwise considered the '002 patent in any way when providing the opinions offered with respect to the '122 patent for which he offered his testimony; nor does Patent Owner provide evidence to the contrary. *See* Ex. 2004, 2. Instead, the opinions expressed in Exhibit 2004 are specific to U.S. Patent 6,356,122 and the facts at issue in IPR2015-00148. Alpert does not apply any of his analysis to the facts of the present IPR.

To illustrate, Alpert acknowledges in Exhibit 2004 that the construction of the term "clock" is "the broadest reasonable interpretation of the term 'clock' **<u>for the '122 patent</u>** . . ." Ex. 2004, 3 (emphasis added). Yet, Patent Owner relies on portions of Alpert's testimony regarding the definition of the term "clock" as used in the '122 patent to support its proposed construction of the term "clock signal" as used in the '002 patent. Further, the Exhibit 2004 analysis of the '122 patent's usage of the term "clock" is simply not relevant to the facts of the present IPR, which

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addresses the ’002 patent; indeed, the ’122 patent has at least ten references to periodic characteristics of its clock (e.g., frequency) whereas the ’002 patent uses the term clock signal with no such references to periodicity at all.

III. EXHIBIT 2004 IS INADMISSIBLE UNDER FRE 702 AS LACKING SUFFICIENT FOUNDATION

The admissibility of expert testimony in IPRs is governed by the Federal Rules of Evidence. *See* 37 C.F.R. § 42.62 (“[T]he Federal Rules of Evidence shall apply to [an IPR] proceeding.”). According to Rule 702, an expert witness must be “qualified as an expert by knowledge, skill, experience, training, or education,” and the testimony must “help the trier of fact to understand the evidence or to determine a fact in issue.” In addition, Rule 702 requires that the expert’s testimony be “based on sufficient facts or data” and “the product of reliable principles and methods”; and the expert must “reliably appl[y] the principles and methods to the facts of the case.” *Id.*

In *Daubert*, the Supreme Court held that scientific expert testimony is admissible only if it is ***both relevant and reliable***. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 597 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (stating that in *Daubert* “this Court focused upon the admissibility of scientific expert testimony. It pointed out that such testimony is admissible only if it is both relevant and reliable.”). In *Kumho*, the Supreme Court clarified that *Daubert* applies “not only to testimony based on ‘scientific’

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