

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CANON U.S.A., INC.
Petitioner

v.

CELLSPIN SOFT, INC.
Patent Owner

U.S. Patent No. 9,258,698
Inter Partes Review No. 2019-00127¹

**PETITIONER'S MOTION TO STRIKE
NEW ARGUMENTS AND EVIDENCE SUBMITTED IN
PATENT OWNER'S SUR-REPLY (PAPER 29)**

¹ GoPro, Inc., Garmin International, Inc., and Garmin USA, Inc. were joined as parties to this proceeding. Paper 27.

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I. INTRODUCTION

Pursuant to the Board's December 20, 2019 Order (Paper 36), Petitioner Canon U.S.A., Inc. ("Petitioner" or "Canon") hereby respectfully moves to strike (a) Exhibits 2025-2033, which Patent Owner Cellspin Soft, Inc. ("Patent Owner" or "Cellspin") belatedly submitted with its sur-reply filed on December 3, 2019 (Paper 29), and (b) arguments in the sur-reply that are based on this untimely evidence.²

In its Patent Owner Response filed July 22, 2019, Cellspin advanced several impermissibly narrow claim construction positions based on extrinsic testimony from its expert, Dr. Michael Foley. Paper 17 at 12-23. For example, Cellspin argued that the term "paired wireless connection" should include the requirements of "encrypted data exchange" and a link that can be "disconnected and reconnected without having to repeat pairing and authentication," based on Dr. Foley's argument that these were features of Bluetooth pairing. *Id.* at 16. In its Petitioner's Reply, Canon explained why Cellspin's claim construction positions were improper and unsupported. Paper 24 at 3-9. For example, Canon explained

² As set forth in Canon's Notice of Basis for Relief (Paper 33), Exhibits 2024 and 2025 were identified on Cellspin's amended exhibit list (Paper 30), but Cellspin did not file the exhibits at the time and has not filed them as of January 3, 2020. Because Cellspin failed to timely file Exhibits 2024 and 2025, it has waived any right to rely upon them. Canon further seeks to strike Exhibit 2025 on the grounds set forth in this motion.

that Cellspin's construction for the term "paired wireless connection" was improper because (1) the claims and specification of the '698 patent are not limited to Bluetooth, (2) Dr. Foley had cherry-picked two *optional* features from *one version* of the Bluetooth specification and read them into the claims, and (3) Dr. Foley had failed to analyze other pairing technologies or other versions of the Bluetooth specification. *Id.* at 3-7. Canon supported these arguments with cross-examination testimony from Dr. Foley, who conceded that his opinions were based on optional features found in a single version of the Bluetooth specification. *Id.*

In the face of these arguments and damaging testimony, Cellspin sought a do-over in its sur-reply. Cellspin submitted a new 54-page declaration from Dr. Foley setting out extensive new opinions and evidence in an effort to repair Cellspin's deficient claim construction positions. Exhibit 2026 at 14-34. Dr. Foley attempted to explain away or contextualize the parts of his deposition testimony that Canon had cited to explain why Cellspin's claim construction positions were improper. *Id.* Dr. Foley also addressed technologies other than Bluetooth, such as Wi-Fi and Zigbee, citing new technical documents spanning hundreds of pages. *Id.* at 15-17; Exs. 2027-2033. Cellspin then incorporated Dr. Foley's new opinions into its sur-reply—oftentimes verbatim—to argue that its original constructions were proper. Paper 29 at 3-9.

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