UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GUARDIAN ALLIANCE TECHNOLOGIES, INC.
Petitioner,

v.

TYLER MILLER
Patent Owner.

Case IPR2020-00031
Patent 10,043,188 B2

PATENT OWNER'S OPPOSITION TO MOTION TO CORRECT CLERICAL ERROR

TABLE OF AUTHORITIES

Cases

Statutes

Rules

GAT's motion should be denied because GAT failed to prove a clerical error occurred, and its late action is time barred by 35 U.S.C. § 315(b).

I. GAT'S ERROR IS NOT CLERICAL OR INADVERTENT

Ivantis Inc., v Glaukos Corp.[1] list four non-exclusive factors for evaluating a Motion under 42.104(c), not three. Nearly every factor favors denial here.

A. Factor 1: Discovered Reviewing Miller's Response

"A petitioner who files a petition shortly before the time bar should be well aware of the risks..." *Nuna Baby Essentials, Inc. v. Britax Child Safety, Inc.*, IPR2018-01683, Paper No. 11, p. 8 (P.T.A.B. Dec. 18, 2018).

Despite listing five counsel of record, not one discovered the alleged error: 1) on the day of filing, 2) after receiving a notice that at least one exhibit was defective (*see* Paper No. 5 at 2), or 3) prior to Patent Owner's Preliminary Response ("POPR") more than three months later, in dereliction of their obligations to review filings. GAT's failure favors denial. *Ivantis* at 10-11.

B. Factor 1: Nature of the Error

The proposed replacement of a non-prior art exhibit with an alleged prior art exhibit is an error of law, not a clerical error. *Ivantis* at 10-11. Ivantis' petition expressly referred to AU 199876197 as "the application" (*Ivantis* at 7), but Ivantis also referred to, uploaded, and served the (non-prior art) B2 patent. Despite cite

[1] IPR2018-01180, Paper # 14 (denying substitution of non-prior art exhibit).

checking before filing by the attorney, the error was not caught. *Ivantis* at 9.

GAT alleges it erroneously uploaded and did not rely upon Ex. 1002. The Sigale Declaration in support of its motion includes a screen shot (Ex. 1028, ¶ 9) displaying multiple video files (actually six, five of which are FLV files), as well as a screen shot (Ex. 1028 ¶ 6) showing a *2015 video* titled "Video Prepared to Demonstrate Correspondence Generation," which corresponds precisely to the only feature described in Ward's testimony. Ex. 2025, ¶ 20. Ward does not state a publication date for any IPR exhibit. Ex. 1009. From Miller's view, GAT used Ex. 1002 as a futile attempt to characterize the a software system as prior art. POPR at 12; *cf.* Ex. 1029, p. 1, title, line 1. Miller and the Board are not archaeologists scouring the (litigation) record to divine GAT's intent. *Ivantis* at 13.

C. Factor 1: Adequacy of the Explanation

GAT's explanation is conclusory, inadequate, and warrants denial.

During the meet and confer on this motion, Evan Talley stated that he would be the primary declarant of 2-3 people involved in the process because he was the person that made the alleged error. Ex. 2024, ¶ 24. When deposing declarants was raised, he became defensive. *Id.* GAT presented no testimony from him.

Mr. Sigale asserts a legal conclusion (inadvertent error) without providing the actual facts. *Cf. Ivantis* at 6 (testimony of Fishman/Smith). Sigale "supervised" the IPR from Chicago, without identifying who performed specific tasks or critical

dates. *Cf.* Ex. 1024, ¶ 25. Rather, he hints that GAT, OKC, and his firm acted as a coordinated entity, but GAT is not a defendant, nor is OKC a petitioner. At the very least, Mr. Sigale does not explain: 1) when the IPR drafting began, 2) when folder was created, 3) who put documents in the folder and 4) when, 5) who had a duty to review the content prior to uploading, and 6) why the review failed. "When it came time to" is not a date. *See* Ex. 1028, ¶ 17.

Moreover, the "IPR Directory" does not appear to reflect exhibits actually uploaded. Many of the files listed as exhibits have "last modified" dates in June or August 2019, but the metadata of the files in E2E is October 10, 2019, likely when exhibit footers were added. See e.g., Ex. 2024, ¶¶ 21-23. Thus, it appears there is yet at least one more undisclosed step in Dunlap's process.

D. Factor 4: Impact on the Proceeding Strongly Favors Denial

GAT ignored this factor entirely. Ex. 1002 is conclusively not prior art, and this indisputably affects whether trial might be instituted. *Ivantis* at 14-15. Again, it now appears that Ex. 1002 was modified in 2015. *Cf.* Ex. 2023 (2012 creation). Sigale's Dec. suggests that Ex. 1024 ("Background Assistant Brochure") was last modified in May 2011 undermining its prior art claim. *See* Ex. 1028, ¶ 6, fig.

Further, GAT concedes its motion necessitates a Supplemental Preliminary Response, which places time pressure on the Board and Miller (as well as costs).

E. Factor 3: Prejudice to Miller Strongly Favors Denial

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