

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAMSUNG ELECTRONICS CO., LTD.,
SAMSUNG ELECTRONICS AMERICA, INC. AND
APPLE INC.

Petitioners

v.

NEONODE SMARTPHONE LLC
Patent Owner.

Case No. IPR2021-00145
U.S. Patent No. 8,812,993

**PETITIONERS SAMSUNG ELECTRONICS CO. LTD AND
SAMSUNG ELECTRONICS AMERICA, INC.'S
MOTION TO EXCLUDE EVIDENCE
PURSUANT TO 37 C.F.R. § 42.64(c)**

I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c), Petitioners Samsung Electronics Co. Ltd. and Samsung Electronics America, Inc. (“Samsung-Petitioners”),¹ hereby move to exclude portions of Exhibits 2015 (“Bystedt Declaration”) and 2016 (“Bäcklund Declaration”). Exhibits 2015 and 2016 were submitted by Neonode Smartphone LLC (“Patent Owner” or “Neonode”) in support of its Patent Owner Response (Paper 29). Patent Owner filed its Response on September 22, 2021, and Samsung-Petitioners timely served its objections to the evidence on September 29, 2021 (Paper 30).² Patent Owner did not serve supplemental evidence in response to Petitioner’s objections.

¹ Due to a confidentiality dispute regarding Exhibits 2015 and 2016 at the time of the objections regarding material not to be disclosed to Apple, the objections were filed only by Samsung-Petitioners.

² Objections were served within five (5) business days of evidence proffered with Patent Owner’s Response. *See* 37 C.F.R. § 42.64(b)(1).

The identified portions of Exhibits 2015 and 2016 should be excluded as improper expert opinions and/or inadmissible hearsay. *See* Federal Rules of Evidence³ (“FRE”) 702 and 801.

II. Improper Expert Opinions

A. Exhibit 2015 – Declaration of Per Bystedt

Paragraphs 3 and 5 of the Bystedt Declaration constitute improper expert opinions and should be excluded. Patent Owner’s response relies on these statements at pages 14, 64, 66 (Paper 29), and Patent Owner’s Sur-reply relies on the statements at page 26 (Ex. 2028). Mr. Bystedt offered unsupported, improper opinions regarding the ultimate issues of novelty and conception. For example, ¶ 3 of the Bystedt Declaration refers to the N1 device as “innovative” and “novel,” without providing any associated analysis. Likewise, ¶ 5 of the Bystedt declaration asserts that “[Neonode] conceived of the gesture-based user interface.” Ex. 2015 at ¶ 5. Neither Mr. Bystedt nor Neonode produced any documents that allegedly supports or could have otherwise informed Mr. Bystedt’s opinion. Ex. 2015 at ¶ 3 (“I saw numerous articles . . . on the Internet, in Swedish and international magazines, and in the business press”). Mr. Bystedt’s opinions rest entirely on his

³ The Federal Rules of Evidence apply to these proceedings according to the provisions of 37 C.F.R. § 42.62(a).

own knowledge and understanding that are not supported in his declaration.

Likewise, Mr. Bystedt asserts in ¶ 11 that Neonode “enjoyed substantial commercial success” without providing any analysis or corroborating evidence. Mr. Bystedt acknowledged that he did not review any documents or numbers related to these statements. *See* Ex. 1055 (Bystedt Deposition) at 18:2-7 (“I – I don’t remember exactly. But I would say, my guess, and it’s a guess . . .”), 18:20-19:3 (“[A]s I recollect, again I haven’t checked the numbers. . . I don’t have the books . . . That’s my memory. But it – you know, it’s a memory.”). His conclusion as to Neonode’s alleged commercial success lacks any examination beyond his own unverifiable opinion.

Mr. Bystedt does not possess any scientific, technical, or specialized knowledge that would support his conclusions. Patent Owner’s Response relies on these statements at page 63. Paper 29. Neonode did not identify or seek to qualify Mr. Bystedt as an expert in any field or specialty, and Mr. Bystedt has not claimed any specific knowledge or specialty. That alone, should preclude the opinions offered in these paragraphs. But Mr. Bystedt also confirmed that he did not perform any technical or financial analyses prior to submitting his declaration. Ex. 1055 (Bystedt Deposition) at 10:20-11:1 (“Q: Did you perform any kind of financial analysis related to the declaration that you provided in this proceeding? A: No. I don’t – really understand that question either, what that should have been,

but no, I haven't.”), 11:7-14 (“Q: Did you perform any type of technical analysis related to the patent at issue in this proceeding as it would relate to the statements made in your declaration? A: I – I don't really understand. But I – in general, I made no specific preparations for the declaration.”). This complete failure of analysis prevents these opinions under FRE 702.

Because Mr. Bystedt's opinions as to the ultimate issues of novelty, conception, and commercial success are not based on any particular knowledge or expertise and lack sufficient analysis and facts in the record, ¶¶ 3, 5, and 11 of the Bystedt Declaration should be excluded.

III. Hearsay

A. Exhibit 2015 – Declaration of Per Bystedt

The statements in ¶¶ 5 and 9 of the Bystedt Declaration constitute inadmissible hearsay offered to prove the truth of the matter being asserted not subject to any valid exception and should be excluded. Patent Owner's Response relies on these statements at pages 14, 66. Paper 29.

In ¶ 9, Mr. Bystedt's declaration invokes uncorroborated, third-party statements to prove the matter at issue; the alleged existence of “Industry Respect” for the N1 product. Mr. Bystedt's own words acknowledge his reliance on alleged statements made by another. Mr. Bystedt concludes that “Samsung's management was extremely impressed by the Neonode N1,” and relies on statements by Mr.

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