UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

Petitioners

v.

NEONODE SMARTPHONE LLC,

Patent Owner

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Case IPR2021-00145

U.S. Patent No. 8,812,993

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

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I. SAMSUNG'S OBJECTIONS

A. Samsung's Motion is Procedurally Deficient

Samsung fails to identify properly the evidence it seeks to exclude. It broadly asserts that various paragraphs of the declarations of Mr. Bystedt and Mr. Bäcklund contain or constitute objectionable material, and then identifies "examples" of objectionable testimony. Samsung's objections, as framed, therefore fail to identify all of the content objected to with sufficient specificity to enable a response. The Board should address Samsung's objections and motion as encompassing only those specific statements identified in this motion. *Corning Inc. v. DSM IP Assets B.V.*, IPR2013-00050, Paper #77, p. 50 ("DSM lists several paragraphs from Dr. Winningham's Petition Declaration as 'example[s]' of evidence it seeks to exclude. . . . We will not engage in guesswork, or scour the record, to determine what other evidence falls within this category.").

B. Purportedly Inadmissible Expert Testimony: Exhibit 2015 – Declaration of Per Bystedt

Samsung asks that the Board exclude references in paragraph 3 of the Bystedt declaration to the Neonode N1 smartphone as "innovative" and "novel." The purported basis is that the cited testimony is opinion testimony outside the bounds of Rule 702 of the Federal Rules of Evidence. The Board should reject Samsung's argument.

Mr. Bystedt's references in paragraph 3 to the N1 device as "innovative" and "novel" are not inadmissible expert opinion testimony. Neonode did not proffer these statements on the ultimate issue of whether the '993 Patent claims are in fact "novel" within the meaning of the Patent Code, but rather to demonstrate the existence of industry praise for the gesture-based interface of the Neonode N1 and N2 smartphones that incorporated the patented functionality. Paper #29, p. 64. Mr. Bystedt's observation that the almost button-less design of the Neonode phones and their gesture-based interface were innovative and novel in 2002 is pertinent to the existence and focus of industry praise. The focus of Mr. Bystedt's testimony is not on whether the Neonode phones were in fact novel or innovative, but rather that they were perceived to be so by the Swedish technology and business community at the time.[1] This is not an inadmissible expert opinion requiring specialized knowledge; rather, it is lay testimony requiring nothing more than what is required by Rule 701. *Omega Patents, LLC v. CalAmp Corp*., 920 F.3d 1337, 1352 (Fed. Cir. 2019) (holding that district court abused its discretion in excluding testimony regarding lay witness's investigation into whether claims

[1] Patent Owner did cite to a portion of paragraph 3 in support of its showing that the Hisatomi reference is not prior art. Paper #29, p. 14. However, this citation is to a portion of paragraph 3 concerning Neonode's presentation of a prototype phone at the March 2002 CeBIT trade show, which does not contain the challenged "novel" or "innovative" language.

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