DOCKET NO.: 2211726-00143
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

UNIFIED PATENTS INC.
Petitioner

v.

BLACKBIRD TECH LLC d/b/a BLACKBIRD TECHNOLOGIES
Patent Owner

IPR2017-01525
Patent 7,174,362

REPLY TO PATENT OWNER'S PRELIMINARY RESPONSE

AS AUTHORIZED ON OCTOBER 11, 2017

Petitioner files this Reply to address Patent Owner's statements in the Patent Owner Preliminary Response ("POPR") regarding Petitioner's withdrawal of Exhibit 1011 ("voluntary responses").

I. BACKGROUND

Petitioner submitted voluntary responses akin to those submitted in numerous prior proceedings. They addressed, especially early in the implementation of the IPR proceedings, Petitioner's relationship with its members. Petitioner began providing such voluntary responses in the spirit of transparency and after it was raised with the Board in *Clouding IP* and *Dragon IP*. (IPR2013-00586, Paper 15; IPR2014-01252, Paper 23). Here, Patent Owner sought a deposition of Mr. Jakel, Petitioner's CEO, prior to the POPR, based on his signature on the voluntary responses.

Patent Owner offered no other reason for the deposition and did not raise any evidence or information challenging the relationship between Petitioner and its members. Petitioner sought to avoid an expensive, burdensome, premature deposition of Mr. Jakel; instead, Petitioner offered other reasonable forms of discovery, such as responding to RFPs, additional interrogatories, and/or providing a deposition transcript of Mr. Jakel on the same issue from IPR2014-01252, and asked Petitioner to suggest alternative, narrowly tailored, less burdensome discovery. Patent Owner refused.

Because Patent Owner would not accept any other discovery short of a deposition on short notice, as the Board permitted in *Digital Stream* (IPR2016-01749, Paper 16), Petitioner requested that the voluntary responses be withdrawn. (Paper 7). On September 7, 2017, the Board granted Petitioner's request. (Paper 8). Notwithstanding the withdrawal, all facts in Petitioner's voluntary responses remain true. Expunging the voluntary responses leaves Patent Owner with the proper burden and the Parties in the position to negotiate appropriate discovery, if necessary.

II. PETITIONER'S RESPONSE TO PATENT OWNER'S STATEMENTS

Patent Owner's argument that a negative inference should be drawn by Petitioner's withdrawal of its voluntary responses is unwarranted and misleading. *See, e.g.*, POPR at p. 55, l. 8-10; p. 56, l. 5-7, 11-15; p. 58, l. 3-6. First, as Petitioner expressed numerous times during meet and confers, the request to expunge the voluntary responses was a result of Patent Owner choosing not to pursue other less burdensome discovery. Petitioner also noted that the burden (regarding discovery and real-party-in-interest ("RPI")) was on Patent Owner, that a certification and not the voluntary responses was all that was required under the rules, and that Patent Owner had provided nothing to contradict Petitioner's RPI certification. Third, there is no reason to question the veracity of the voluntary responses, as Petitioner maintains that all facts therein are true and remains willing to consider narrowly tailored requests concerning them.

Patent Owner further states that "[a]ny presumption afforded to Petitioner Patents on its real party-in-interest certification is now lost" due to the withdrawal of the voluntary responses. *Id*. at p. 58, l. 3-6. It is far from clear how Patent Owner can assert that anything "is now lost" by the withdrawal of a voluntary paper not required by the rules.

Patent Owner's statements that Petitioner was not willing to provide meaningful discovery regarding RPI are incorrect. *Id.,* at p. 51, l. 11-17; p. 55, l. 8-10; p. 56, l. 5-7, 11-15; and p. 58, l. 3-6. To the contrary, Petitioner offered discovery that they chose not to pursue. For example, Blackbird bases its RPI arguments in part on a letter it received from defendants to a district court litigation. But Blackbird failed to mention this letter in any meet and confer and never requested discovery on the issue. Indeed, the POPR was the first time Petitioner learned of the letter.

Patent Owner insinuates that Petitioner only offered self-serving discovery. *Id*. at p. 56, n. 8. Again, this misrepresentation ignores Petitioner's offer for Patent Owner to suggest reasonable discovery tailored to a relevant issue. The reality is that Patent Owner chose not to pursue discovery and now, despite the lack of evidence, suggests a negative inference on Petitioner. Petitioner remains open to providing discovery on RPI consistent with the Rules.

Respectfully Submitted,
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