

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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COX COMMUNICATIONS, INC.,  
Petitioner,

v.

AT&T INTELLECTUAL PROPERTY I, L.P. AND  
AT&T INTELLECTUAL PROPERTY II, L.P.,  
Patent Owners.

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Case IPR2015-01187 (Patent 6,993,353 B2)<sup>1</sup>  
Case IPR2015-01227 (Patent 7,907,714 B2)  
Case IPR2015-01273 (Patent 6,487,200 B1)  
Case IPR2015-01536 (Patent 8,855,147 B2)

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**PETITIONER'S OPPOSITION TO PATENT OWNERS' MOTION FOR  
ADDITIONAL DISCOVERY**

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<sup>1</sup> The Board authorized the use of this caption style in its January 7, 2016 Order.

Identical papers are filed in each respective case.

Pursuant to the Board’s Order of January 7, 2016 (Paper 15), Petitioner Cox Communications, Inc. (“Cox”) submits this opposition to Patent Owners’ (“AT&T”) request for additional discovery.

As the Board reminds the Parties in its Order, “a party seeking additional discovery in an *inter partes* review proceeding must show that such additional discovery is “necessary in the interest of justice.” 35 U.S.C. § 316(a)(5); 37 C.F.R. § 42.51(b)(2)(i). AT&T’s requested discovery is based upon mere possibility and speculation, calls for information that has already been generated by other means, and is burdensome to answer. AT&T’s request for additional discovery is *not* necessary in the interest of justice and should be denied.

***I. Possibility and Mere Allegation are the Foundation of AT&T’s Requests***

**A. Cox Vendors**

As to Cox’s vendors Arris, Cisco, and Broadsoft, AT&T argues that it possesses threshold evidence tending to show beyond speculation that something useful will be uncovered by its requested discovery. But when examined, this evidence shows nothing other than that Cox has bought products from these vendors, [REDACTED] In other words, this evidence does nothing to show that there is a likelihood the evidence will show that the vendors are real-parties-in-interest – it is mere speculation followed by a fishing expedition.

Of course, as the PTAB has recognized, “the mere existence of an indemnification agreement does not establish that the indemnitor has the opportunity to control an *inter partes* review.” *Petroleum Geo-Services Inc., et al. v. Westerngeco LLC*, Case IPR2014-00688, Paper 101 at 47 (PTAB Dec. 15, 2015). *See also, Nissan North America, Inc. v. Diamond Coating Tech., LLC*, Case IPR2014- 01546, slip. op. at 7 (PTAB Apr. 21, 2015) (determining that the existence of an indemnification agreement was not sufficient to establish that the unnamed parties were real parties-in-interest to the *inter partes* review proceeding). Indeed, the existence of indemnification obligations “does not demonstrate *beyond speculation* that something useful will be uncovered” regarding potential indemnitors’ “funding, direction, control, or ability to exercise control of” the instant *inter partes* review proceedings. *See Wavemarket Inc. v. Locationet Systems Ltd.*, Case IPR2014-00199, Paper 34 at 6 (PTAB Aug. 11, 2014).

As to Arris, AT&T cites Arris’s 2015 Securities and Exchange Commission (“SEC”) financial disclosure that refers to AT&T’s action against Cox, “*AT&T v. Cox*, C.A. 14cv01106., District of Delaware” (the “Delaware Litigation”). AT&T points to Arris’s notation that “Cox has requested that we provide indemnification,” but AT&T then ignores the rest of the same paragraph, which adds that “[i]n the event of an unfavorable outcome, ARRIS *may* be required to indemnify the MSOs.” Ex. 2027 at 60. (MSO’s are “Multiple System Operators,”

and include cable operators, such as Cox.) Arris's disclosure was filed on November 6, 2016 – up to *six months* after Cox initiated the instant *inter partes* review proceedings, between May 11, 2015 and July 2, 2015. If Arris had committed to providing indemnification and was controlling these IPRs, it certainly would have said so in its SEC filings. Thus, AT&T's own evidence shows that even months after the IPRs had been filed, Arris was still not an active committed indemnitor controlling these *inter partes* review proceedings. AT&T's request to dive into the indemnification relationship is therefore speculative.

AT&T also cites to a *standard* Arris Corporate Terms and Conditions of Sale document of unidentified origin and context, that states that Arris will defend claims against customers if, among other conditions, "Customer gives ARRIS reasonable assistance in and *sole control* of the defense and all negotiations for its settlement or compromise." Ex. 2028. *First*, this document is presented isolated from any context. AT&T does not represent it to be the agreement entered into with or executed by Cox. *Second*, as described above, Arris itself does not consider itself an active indemnitor in the ongoing proceedings between AT&T and Cox. And, *third*, Cox's counsel alone has been on all filings and appearances in both the Delaware Litigation and the instant *inter partes* review proceedings, which contradicts the notion of the "sole control" that Arris would require under

the cited document. AT&T's evidence again merely shows that AT&T's requested discovery is based only upon possibility and mere allegation.

As to Cisco, AT&T again cites to what *it* calls a "*standard* Terms of Sale" document of unidentified origin or context. This Cisco agreement requires that a customer seeking indemnity "shall" "grant Cisco ***full and exclusive control*** of the defense..." Ex. 2032. Again, *first*, Cox's counsel alone has been on all filings and appearances in the Delaware Litigation and the instant *inter partes* review proceedings, which contradicts the "full and exclusive control" that Cisco would require under the cited Terms of Sale document. *Second*, AT&T's citation to a Cisco indemnification in an *unrelated* matter where Cisco filed a declaratory judgment action to support its indemnitees, in fact is useful to show what "full and exclusive control" means. Ex. 2033. Cisco has filed no such action here as a result of the Delaware Litigation. AT&T's evidence thus again shows that AT&T's requested discovery is based only upon possibility and mere allegation.

Finally, as to Broadsoft, AT&T again cites to a declaratory judgment action Broadsoft filed in an *unrelated* case, involving unrelated parties, supposedly as evidence to show that Broadsoft will defend when there are indemnification demands. Ex. 2036. However, neither the declaratory judgment pleadings AT&T cites, nor AT&T's other offered evidence, identify the terms or reasons that led to Broadsoft filing an action for that particular customer. AT&T offers no evidence

suggesting that Broadsoft is an active indemnitor of Cox in *this* proceeding, or is controlling the instant *inter partes* review proceedings. AT&T's evidence shows that AT&T's requested discovery is based only upon possibility and mere allegation.

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[REDACTED]

**B. Cox Subsidiaries**

Having failed to persuade the Board at least six times that the named petitioner, Cox Communications, Inc., is not the real-party-in-interest (see, IPR2015-01227, Papers 12 and 15; IPR2015-01273, Papers 9 and 17; and IPR2015-01536, Papers 7 and 11), AT&T now seeks discovery relating to the interoperability and corporate organization of all of the Cox regional subsidiaries that AT&T chose to name in the Delaware Litigation, to see how they allocate general administrative and legal fees across the entities, and presumably to see if there is any hay to be made in challenging the real-party-in-interest determination. In other words, AT&T seeks to open a broad collateral attack, against Cox's corporate structure, asking the Board to determine whether Cox Communication, Inc. in fact controls its subsidiaries, as it certified when it identified itself as the real-party-in-interest. In its Motion, AT&T provides no new evidence or argument

beyond what it admits in the Motion it has already briefed. *The Board rejected these arguments six times already* (IPR2015-01227, Papers 13, 16; IPR2015-01273, Papers 14, 19; IPR2015-01536, Papers 8, 13). Enough is enough.

Once again, AT&T alleges that the fact that CoxCom, LLC is listed as a petitioner or real party in interest in other, *unrelated* IPR proceedings, makes it likely that CoxCom, LLC should have been listed as a petitioner or real party-in-interest in the instant proceedings. The Board correctly rejected this allegation, noting that this evidence, “circumstantial” at best, does “not demonstrate necessarily that CoxCom, LLC controls or could exercise control over Cox’s participation in this proceeding, particularly in view of the parent-child relationship between Cox and CoxCom, LLC.” (IPR2015-01227, Paper 13 at 10-12.) The Board “recognize[d] that [while] there may be circumstances that create an exception to Cox’s presumptive control over its wholly-owned subsidiary CoxCom, LLC,” AT&T had not “explained adequately how this case might qualify as such an exception.” *Id.* AT&T still provides no further explanation beyond stubbornly repeating in its Motion that “both cannot be correct.” Of course both can be correct, and the Board has found that the naming of a real party of interest in one case “*does not indicate*” that the party is a real party in interest in a different case. See e.g., *Amazon.com, Inc. et al. v. Cellular Communications Equipment, LLC*, IPR2014-01134, Paper 57 at 7-8 (PTAB Jan. 6, 2016). This proceeding is

not the vehicle for the Board to determine why the real-party-in-interest was differently named in an unrelated proceeding. There is no suggestion that the parent entity is not the controlling entity in *these* proceedings.

AT&T also again alleges that a draft stipulation (Ex. 2007) exchanged between counsel in the Delaware Litigation (but never filed) proves that “CoxCom, LLC directs the action of the other defendants in the Delaware Litigation.” The Board also previously rejected this allegation, noting that “there could have been any number of reasons for Cox to have entered into such a stipulation.” (IPR2015-01227, Paper 13 at 11.) The “any number of reasons” could include, for example, a joint effort by the opposing parties to simplify an action in which over thirty Defendants had been named by the Plaintiff. The Board further noted that AT&T did not “explain adequately how these stipulations indicate that CoxCom, LLC exercises control over Cox’s actions in the present [IPR] matter.” *Id.* Indeed, to be clear, the draft stipulation does *not* say that CoxCom, LLC controlled the regional subsidiaries, but only that it controlled the *activities* accused of infringement by the other Cox entities in that case. (See, Ex. 2007 at 3: “CoxCom, LLC directs the actions taken by the Dismissed Cox Defendants that are alleged in this case of being *those that result in patent infringement liability*.” Of course, AT&T does not accuse the IPR filings to be acts of patent infringement.

Despite all of the flaws in AT&T's evidence, AT&T nevertheless seeks discovery "to determine whether there is any overlap between Petitioner and CoxCom, LLC," which might help it argue that there is an improper legal blurring of the lines of corporate separation between the two entities. The Board rejected this allegation, noting that AT&T's argument amounted to mere "speculation or conjecture." (IPR2015-01227, Paper 13 at 12; Paper 16 at 3-7.)

AT&T's request for the employment agreement between Cox's in-house counsel, Stephanie Allen-Wang, and the "Cox Entities" is equally absurd, Req. 12, given that the Board has already rejected AT&T's argument as one that "simply supports the fact that Ms. Allen-Wang serves as Intellectual Property counsel in various entities within Cox's corporate structure." *Id.* at 5. And, the same argument applies to AT&T's request for the engagement letters and invoices sent to Cox by its primary outside counsel. The fact that Cox and CoxCom, LLC are represented by the same counsel does not provide the "specific factual reasons beyond speculation" necessary to grant discovery into the relationships between the various entities and Cox, or with Cox's lead counsel.

For all of the above reasons, AT&T's requested discovery fails to meet the first *Garmin* factor. Even in light of this failure Cox attaches the engagement letter (Ex. 1022) and one representative invoice (Ex. 1023) related to the instant proceedings, redacted to show the addressee is Cox Communications, Inc., the

petitioner here, because these documents alone should conclusively put an end to AT&T's fishing expedition into the relationships between Counsel for Petitioner, all Cox entities, and the instant proceedings.

## ***II. AT&T Also Seeks Information Already Generated by Other Means***

AT&T argues that it has no ability to generate equivalent discovery – specifically as it relates to Cox's supply agreements with Arris, Cisco, and Broadsoft – because “the information sought is not available for AT&T to discover in the Delaware Litigation because it is stayed.” This argument is simply wrong because, as AT&T fully knows and fails to mention, the Delaware Litigation was stayed on September 24, 2015, *after* the agreements that AT&T seeks to discover in these *inter partes* proceedings were produced by Cox in the Delaware Litigation. Ex. 1020; Ex. 1021. AT&T's requests relating to Arris, Cisco, and Broadsoft thus seek information that, contrary to AT&T's assertions, is neither solely in Cox's possession nor unable to be exactly generated by other means<sup>2</sup>. For these reasons, AT&T's requested discovery fails to meet the third *Garmin* factor.

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<sup>2</sup> To avoid any ambiguity, Cox hereby grants AT&T's designated counsel in the instant proceedings access to 1106-COX-000055153, 1106-COX-000055235, and 1106-COX-000055435, already produced in the Delaware Litigation, if that counsel agrees to abide by all terms of the Delaware protective order.

### ***III. AT&T's Requests are Overly Burdensome***

AT&T's proposed discovery requests also are not narrowly tailored, are duplicative of discovery already produced in the Delaware Litigation, and compliance therewith would burden Cox. First, the agreements sought by Requests 1, 3, and 5 have already been produced to AT&T in the Delaware Litigation. Requesting that Cox again produce these documents again is irresponsible and represents an unjustified and undue burden on Cox. Requests 2, 4, and 6 seek "communications between [Arris, Cisco, and Broadsoft] and Petitioner, CoxCom, LLC or other Cox Entities" relating to several topics of communication. AT&T is effectively seeking every email between Cox and its three suppliers related to the accusations made against Cox in the Delaware Litigation, seeking to breach any common interest privilege the suppliers and Cox might enjoy. Moreover, searching for and identifying all such e-mail communications and redacting privileged and work-product information would burden human resources and make it difficult to meet the expedited schedule of the instant proceedings. *See Garmin* at 7; *see also* Changes to Implement Inter Partes Review Proceedings, Post-Grant Review Proceedings, and Transitional Program for Covered Business Methods, Fed. Reg. 48,680, 48,719 (Aug. 14, 2012) (explaining the interest of justice standard is consistent with the considerations of 35 U.S.C. § 316(b) including the efficient administration of the Board, and the

Board's ability to complete timely trials).

Similarly, Requests 7 – 12 seeking extensive identifications, agreements, and communications between or involving all Cox entities and suppliers can only be read as an effort by AT&T to breach internal work product and common interest privileges. Production would require extensive use of human resources to review and redact privileged information. It can hardly be said that these requests are reasonably calibrated to lead to the discovery of “useful” information. No basis beyond mere possibility and allegation exists in AT&T's Motion to justify intrusion into the attorney-client relationship.

#### ***IV. Conclusion***

Because AT&T's discovery requests are based upon mere possibility and speculation, call for information that has already been generated by other means, and are burdensome to answer, Cox respectfully requests that the Board deny AT&T's proposed discovery set forth in Exhibit 2038. In its Order, the Board invited Cox to propose alternative discovery requests, which are set forth in red-line form in Ex. 1024. For the same reasons detailed above, Cox does not concede that AT&T is entitled to the alternative discovery set forth in Exhibit 1024.

Dated: January 20, 2016

Respectfully submitted,

By: /Steven M. Bauer/  
Steven M. Bauer, Reg. No. 31,481

### List of Exhibits

<b>Exhibit</b>	<b>Description</b>
1001	USPN 7,907,714 (the “‘714 patent”) (patent under Inter Partes Review)
1002	The file history for the ‘714 patent
1003	USPN 5,629,978 to Blumhardt et al. (“Blumhardt”)
1004	USPN 5,903,845 to Buhrmann et al. (“Buhrmann”)
1005	USPN 6,031,904 to An et al. (“An”)
1006	U.S. Patent Appl. No. 60/028,760 to An et al. (“An Provisional”)
1007	USPN 6,335,927 to Elliott et al. (“Elliott”)
1008	USPN 5,757,899 to Boulware et al. (“Boulware”)
1009	USPN 5,754,636 to Bayless et al. (“Bayless”)
1010	USPN 5,883,946 to Beck et al. (“Beck”)
1011	Supplemental Declaration of Terry L. Vieth Pursuant to 37 C.F.R. § 1.131, for U.S. Patent Appl. No. 09/050,986
1012	Second Supplemental Declaration of Terry L. Vieth Pursuant to 37 C.F.R. § 1.131, for U.S. Patent Appl. No. 10/761,382
1013	Third Supplemental Declaration of Terry L. Vieth Pursuant to 37 C.F.R. § 1.131, for U.S. Patent Appl. No. 10/761,382
1014	Declaration of Professor Nader Mir, Ph.D. in Support of Request for Inter Partes Review of the ‘714 Patent
1015	Declaration of Scott W. Bertulli in Support of Motion for Admission Pro Hac Vice
1016	<Reserved>
1017	<Reserved>
1018	<Reserved>
1019	<Reserved>
1020	Cox Email notice to AT&T of Production in the Delaware Litigation – July 30, 2015
1021	Cox Email notice to AT&T of Production in the Delaware

<b>Exhibit</b>	<b>Description</b>
	Litigation – August 14, 2015
1022	Engagement Letter between Counsel for Petitioner and Cox Communications, Inc. [Redacted]
1023	Representative Invoice from Counsel for Petitioner to Cox Communications, Inc. [Redacted]
1024	Petitioner’s Alternative Proposed Discovery Requests in Red-Line of Patent Owners’ Proposal

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

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**CERTIFICATE OF SERVICE UNDER 37 C.F.R. § 42.6(e) AND 42.105(a)**

Dear Sir:

Pursuant to 37 C.F.R. § 42.6(e) and 42.105(a), I hereby certify that on January 20, 2016, I caused a complete copy of the Petitioner's Opposition to Patent Owners' Motion for Additional Discovery, Petitioner's Exhibit List, and Exhibits 1020-1024, to be served on the Patent Owner of the subject *Inter Partes* Reviews at the correspondence address of record as follows:

By EXPRESS MAIL® to:

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