

1 UNITED STATES PATENT AND TRADEMARK OFFICE
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3 BEFORE THE PATENT TRIAL AND APPEAL BOARD
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6 ALARM.COM, INCORPORATED
7 Petitioner,
8

9 v.

10 VIVINT, INCORPORATED
11 Patent Owner.
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13 Cases: IPR2015-02003
14 IPR2015-02004
15 IPR2015-01997
16 IPR2015-01995

17 TELEPHONE CONFERENCE

18 Before: CHARLES BOUDREAU, PTAB JUDGE
19 JAMES ARPIN, PTAB JUDGE
20 MICHAEL ZECHER, PTAB JUDGE

21 Date: Wednesday, January 27, 2016

22 Time: 11:00 a.m.

23 Reported by: Ryan K. Black, RPR

24 Veritext Legal Solutions

25 Mid-Atlantic Region

1250 Eye Street NW - Suite 1201

Washington, D.C. 20005

1 A P P E A R A N C E S:

2
3 STERNE KESSLER GOLDSTEIN & FOX P.L.L.C.

4 BY: ROBERT G. STERNE, ESQUIRE

5 JASON D. EISENBERG, ESQUIRE

6 JOSEPH E. MUTSCHELKNAUS, ESQUIRE

7 1100 New York Avenue, NW

8 Suite 1600

9 Washington, D.C. 20005

10 202.371.2600

11 rsterne@skgf.com

12 jasone@skgf.com

13 Representing Patent Owner Vivint, Inc.

14
15 SUGHRUE MION, PLLC

16 BY: BRIAN K. SHELTON, ESQUIRE

17 2100 Pennsylvania Avenue NW

18 Washington, D.C. 20037

19 202.293.7060

20 bshelton@sughrue.com

21 Representing Petitioner Alarm.com, Inc.

22

23

24

25

1 A P P E A R A N C E S (Cont'd):

2

3 CRAVATH, SWAINE & MOORE LLP

4 BY: TEENA-ANN V. SANKOORIKAL, ESQUIRE

5 825 8th Avenue

6 New York, New York 10019

7 212.474.1000

8 tsankoorikal@cravath.com

9 Representing Petitioner Alarm.com, Inc.

10

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12

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1 JUDGE BOUDREAU: Good morning.
2 This is Judge Charles Boudreau, and I have
3 Judges James Arpin and Michael Zecher on the
4 line with me.

5 Do we have counsel for Alarm.com?

6 MR. SHELTON: Yes, Your Honor. This
7 is Brian Shelton for petitioner. And I'm also
8 joined by co-counsel Teena Sankoorikal.

9 JUDGE BOUDREAU: Thank you.

10 And do we also have counsel for
11 Vivint, Incorporated?

12 MR. STERNE: Yes, Your Honor. This is
13 Robert Sterne for patent owner Vivint. And do
14 you want me to identify who's on the call from
15 our side?

16 We have a court reporter, Your Honor.

17 JUDGE BOUDREAU: Yes, please.

18 MR. STERNE: We have Jason
19 Eisenberg, my partner. Also, my partner Joseph
20 Mutschelknaus on the call. And we have the
21 court reporter. And with your consent, we will,
22 of course, provide a transcript of the call for
23 the record.

24 JUDGE BOUDREAU: Yes. Please do.
25 Thank you.

1 All right. Thank you.

2 We received Mr. Mandir's message
3 regarding procedures that would be followed by
4 the Patent Office for processing patent owner's
5 request for Certificate of Correction. And we
6 -- at the outset, I'd like to mention that,
7 under 37 CFR 42.3, the Board takes exclusive
8 jurisdiction over any involved application of
9 patent during a proceeding. And so, going
10 forward, patent owner shouldn't file any papers,
11 including any requests, to any department
12 outside of the PTAB while the case
13 is pending before the Patent Trial and Appeal
14 Board. And, indeed, under 37 CFR 1.323, if a
15 request for a Certificate of Correction relates
16 to a patent involved in any trial before the
17 Patent Trial and Appeal Board, the request must
18 comply with the requirements of this section and
19 be accompanied by a motion in addition to the
20 request itself.

21 MR. STERNE: Your Honor, this is
22 Robert Sterne speaking. We will absolutely
23 address why we did what we did and why we did
24 not come to the Board first, because we're very
25 aware of what you just cited to us. But I would

1 like to make clear at the beginning of the call
2 that we request that this discussion today be
3 limited to the Certificate of Correction issue
4 before us and not be used as a backdoor to
5 expand the discussion to the preliminary
6 responses or to the petitions. Because our
7 position, Your Honor, is the sole issue here is
8 the propriety of the filing of the Certificates
9 of Correction, and nothing more or less.

10 MR. SHELTON: Your Honor, this is
11 Brian Shelton for the petitioner. I mean,
12 our concern here is that these Certificates
13 of Correction were filed, and there was,
14 previously, an effort by the patent owner
15 to notify the Board and request a call.
16 But they withdrew that request, and then
17 they proceeded to file these Certificates of
18 Correction, and the first time we see them is
19 in the preliminary response. So our concern is
20 that there has been some change to the claim
21 language and we're not given an opportunity to
22 address that.

23 So to that extent, I think it does
24 involve some discussion of the preliminary
25 responses.

1 JUDGE BOUDREAU: This is Judge
2 Boudreau. Before we go down that road too far,
3 let me just find out from petitioner whether you
4 would agree that these are typographical,
5 clerical or errors of a minor nature, such
6 that we may go ahead and enter the Certificate
7 of Correction?

8 MR. SHELTON: Not in all cases, Your
9 Honor. I mean, there are instances where terms
10 are being removed from the claim language, where
11 terms are being materially changed.

12 In our view, these are not the
13 sort of minor typographical changes that are
14 contemplated for a Certification of Correction.
15 That's the issue that we have with this. We
16 looked at the claims as they were written on the
17 face of the patent when we applied our prior
18 art, and now there have been some material
19 changes, in our view. And we're not sure how
20 the Court would like to address that, but we
21 would like the opportunity to do so.

22 MR. STERNE: Your Honor, --

23 JUDGE BOUDREAU: Granted, these are
24 not just spelling mistakes, for instance, but
25 from our preliminary review of the Certificates

1 of Correction, it appears that they were
2 correcting antecedent basis issues and the like.

3 Are there particular corrections that
4 you are pointing to, Mr. Shelton?

5 MR. SHELTON: Yes, Your Honor. One of
6 them would be in IPR2015-2003, which would be
7 the '654 patent, Claims 16 and 24, the claim,
8 as written, was a server message generator and
9 communication, and that has been changed to,
10 removed by the generator. And we had
11 interpreted the claim one way, and they've come
12 in with a different interpretation. And so the
13 concern we have is, now that we've filed a
14 petition addressing, again, as the claim was
15 written, and then we tried to comprehend what
16 the claim should properly mean, but they've come
17 in with a different interpretation, and so now
18 the record's unclear.

19 I mean, that's one example. But there
20 are other instances of, for example, on the one
21 '123 patent, which is the IPR2015-1995. They've
22 changed the message where it used to read, a
23 single message profile, has now been changed
24 to, message profile. Again, we applied our
25 understanding of a single message profile in our

1 application of prior art. And there are other
2 instances. There's another instance where, for
3 example, the limitation of a table was changed
4 to a memory.

5 So our concern, primarily, is that
6 the record at this point is unclear. And if
7 the Board would allow us to, we would like the
8 opportunity to make a submission stating our
9 position as to how the art we applied meets the
10 language that they're trying to change.

11 JUDGE BOUDREAU: Would patent owner
12 have any objection to Mr. Shelton's request?

13 MR. STERNE: Yes, we do, Your Honor.
14 I mean, that's exactly what I said at the
15 beginning of this conversation. This is
16 backdoor, used to change the petition that
17 they filed.

18 I mean, look, let's start at the
19 beginning. First of all, I would like to
20 address the Board's concern, which I think is
21 appropriate. Of course, whether I think it's
22 appropriate or not is irrelevant to the Board.
23 But our position, Your Honor, is we were very
24 careful in what we did here. We're only dealing
25 with typographical and clerical changes, of

1 which, by the way, petitioner was aware of
2 in their petition, because they raised it.

3 Now, I want to bring to the Board's
4 attention why we did not come to you first,
5 and --

6 JUDGE BOUDREAU: Wait. Because,
7 Mr. Sterne, you opened the door here by failing
8 to follow our procedures.

9 MR. STERNE: Well, Your Honor, in
10 all due respect, I would disagree. We carefully
11 reviewed other panel decisions here, as well as
12 the statute. And I would like to point out
13 three panel decisions that we think are relevant
14 here.

15 The first one is International Flavors
16 & Fragrances versus ZoomEssence, Inc., which is
17 IPR2015-01418, and, Your Honors, in Paper Number
18 8 at Page 3, which is an October 21, 2015,
19 ruling from the Board, quote, therefore,
20 the grant and issuance of the Certificate of
21 Correction; i.e., outside of the declared
22 interference for instituted trial, does not
23 require a motion to the Board. And there the
24 panel cited, as you did, 37 CFR, Section 1.323,
25 in its entirety.

1 And in a second case, Your Honors,
2 in Pharmacosmos A/S versus Luitpold
3 Pharmaceuticals, which is IPR2015-01490, Paper
4 Number 8 at Pages 2 to 3, of October 14th of
5 last year, 2015, there is a discussion
6 authorizing for request for a Certificate of
7 Correction and granting a motion for the
8 request, without questioning whether the motion
9 is necessary when trial has not been instituted.

10 And here what is going on is, trial
11 has not been instituted, as these cases point
12 out, and, therefore, the Certificate of
13 Correction is not within the jurisdiction,
14 according to these other panels, of the Board
15 until the trial institution decision is made.

16 I give you another example: ASML
17 Netherlands B.V. versus Energetiq Technology,
18 Inc., which is IPR2015-01375 at Paper 11, Pages
19 1 to 2, on October 14th, 2015. There the Board
20 interpreted an authorization for a request for
21 Certificate of Correction, and, again, it dealt
22 with the issue of the fact that trial had not
23 been instituted.

24 So we did not want to burden this
25 Board with this issue, because, as we said

1 earlier, these only go to typographical and
2 clerical errors. The reality here --

3 JUDGE BOUDREAU: In each of those
4 cases, Mr. Sterne, the patent owner did come to
5 the Board first, didn't they?

6 MR. STERNE: Yes, they did, Your
7 Honor. But in those cases, the Board pointed
8 out that it was not a trial yet, and, therefore,
9 there was no need for this permission to be
10 granted, because --

11 JUDGE BOUDREAU: But we do have
12 jurisdiction under Section 42.3, even before any
13 trial is granted.

14 MR. STERNE: So the trial has not been
15 instituted here. So, therefore, if you look at
16 37.323, it specifically -- I mean, excuse me,
17 37 CFR 1.322, it says, if a request relates to
18 a patent involved in a trial before the Patent
19 Trial and Appeal Board, the request must comply
20 with the requirements of this section and be
21 accompanied by a motion under 42.20 of this
22 title.

23 So what we're saying is, under
24 37 CFR, Section 42.2, it defines a trial to mean
25 a contested case instituted by the Board based

1 on a petition. So our interpretation of these
2 panel decisions, Your Honor, is that until
3 a trial is instituted, this Certificate of
4 Correction is outside of the Board's concern.
5 Because the Patent Office has the necessary
6 provisions in their rules that specifically say
7 that the Certificate of Correction will not be
8 granted and not be issued if the claim scope is
9 changed by the Certificate of Correction.

10 The last thing we are trying to do
11 here is change claim scope. We just want to
12 remove these typographical and clerical errors
13 from the claim, because these claims are
14 in litigation, and we, for very appropriate
15 reasons, must deal with these issues, but we
16 want to deal with these issues now before the
17 trial is instituted, if it is instituted.

18 So, again, we're not trying to do
19 anything improper. We're not trying to burden
20 the Board with needless work. We were using
21 the provisions in the Office Rules, as we
22 interpreted them and as supported by other
23 panels. So we would submit, Your Honors,
24 that we've done nothing wrong by filing these
25 Certificate of Corrections, and, that, as I said

1 before, the protection for the process lies
2 in the fact that if they are not granted and
3 issued, because they have expanded the scope of
4 the claims, then everything has been taken care
5 of.

6 JUDGE BOUDREAU: Well, let us hear
7 from petitioner's counsel.

8 MR. SHELTON: Your Honor, first I want
9 to address that we're not asking to supplement
10 anything in our petition. We're not looking to
11 bring in new prior art or expand the arguments.
12 We simply want the opportunity to address the
13 change in the claim language that patent owner
14 has introduced to explain why the art we have
15 applied would cover that change. And, again,
16 we disagree with the patent owner's
17 characterization of these changes as being minor
18 typographical corrections. They have changed
19 the scope. They've taken terms out of the
20 claim. They've changed claim terms from
21 singular to plural. They've made changes. And
22 we simply want to preserve the integrity of the
23 record and have the opportunity to have our
24 position on how these changes affect the art
25 being applied.

1 JUDGE BOUDREAU: All right. Thank
2 you, Mr. Shelton. I'm going to just put you on
3 hold for a minute.

4 MR. SHELTON: Thanks.

5 JUDGE BOUDREAU: I'm going to confer
6 with the panel.

7 (Brief pause in proceeding.)

8 JUDGE BOUDREAU: Okay. This is Judge
9 Boudreau.

10 At the outset, Mr. Sterne, we
11 believe that you're incorrect in your reading.
12 Section 42.3 states that the Board may exercise
13 exclusive jurisdiction within the Office over
14 every involved application and patent during the
15 proceeding, as the Board may order. And Section
16 42.3 defines proceedings to include a proceeding
17 meaning a trial or preliminary proceedings, and
18 preliminary proceedings begins with the filing
19 of the petition for instituting trial.

20 And so we are going to authorize
21 the petitioner to file a sur-reply, no longer
22 than five pages, limited to the issue of
23 consideration of the Certificate of Correction.
24 And, in the meantime, the request for
25 Certificate of Correction will be stayed within

1 the office pending our decision. We conclude
2 that if the changes that are proposed are minor,
3 then there should be no effect on petition.
4 If they're not minor, they may affect the
5 consideration of the petition, and, as
6 petitioner here is likely aware, Inter Partes
7 Review may be based only on patentability
8 challenges under Sections 102 and 103, not
9 Section 112. So to the extent that petitions
10 raise the indefiniteness arguments here, that is
11 not a proper basis for request for Inter Partes
12 Review. And if we determine that we can't
13 construe a particular claim so as to determine
14 what's not anticipated or obvious, then we'll
15 need to consider what that would prevent us from
16 instituting.

17 MR. STERNE: Your Honor, may I make a
18 request of the Board for clarification or for
19 understanding?

20 So, again, to go back to your point
21 about 42.3, again, we are looking at other panel
22 decisions. And, Your Honor, I would suggest
23 that there is ambiguity here on whether the
24 Board assumes jurisdiction over this issue prior
25 to institution of trial. So it would be helpful

1 for all of us for there to be some discussion
2 at the Board level on this issue, because it's
3 not as clear as, perhaps, you think it is based
4 on our research.

5 So, you know, I -- I -- again, I
6 wanted to -- you know, I just wanted to bring
7 to your attention one more case in this regard,
8 which is the ZoomEssence case, which is
9 IPR2015-01418, and, particularly, Paper Number
10 8, Page 3, on October 21 of this past year. I
11 would like you to consider that after the call.

12 Secondly, with regard to the sur-reply
13 that petitioner has skillfully obtained, again,
14 no problem there, but we would suggest to the
15 Board that it only be limited to the language of
16 the Certificate and not be allowed to go beyond
17 that. And, also, the Board should be aware
18 that, in the petition, a lot of these clerical
19 error issues were raised by the petitioner in
20 their petition. They're aware of these. And
21 the point is, they've already addressed these in
22 their petitions. It should not -- the sur-reply
23 should not be a vehicle to expand the petition.

24 So those are the cautions that we
25 would like to propose to the Board about the

1 scope of this sur-reply, not just the issue
2 about 112, but also about re-litigating issues
3 that have already been presented in the
4 petition.

5 We did not, Your Honor, address any of
6 these issues in our POPR. I mean, that was not
7 the basis of our POPR. We were not arguing
8 these claims in the POPR. So, again, we don't
9 think this should be used as a backdoor
10 to expand the record in terms of the second
11 petition.

12 MR. SHELTON: Your Honor, speaking
13 for petitioner, we do not intend to go beyond
14 the specific corrections when we present our
15 discussion in the sur-reply. That's all we've
16 asked to address, and that's all we intend to.

17 JUDGE BOUDREAU: Thank you. And we
18 will make that clear in our order that the
19 petitioner isn't to go beyond the scope of the
20 Certificate of Correction.

21 MR. SHELTON: Your Honor, one other
22 question. Now, these four patents that we're
23 talking about today, there are other petitions
24 that we identified in our e-mail to the Board
25 that I believe patent owner has yet to file

1 their preliminary response, but certainly we'll
2 have the same issues come up. So our question
3 would be, how would the Board like us to proceed
4 with those? Should we file the same sur-reply
5 in those proceedings, as well?

6 That's the question we have for the
7 other patents for which no preliminary response
8 has been filed yet.

9 JUDGE BOUDREAU: Yes, that sounds
10 reasonable.

11 MR. SHELTON: Okay.

12 MR. STERNE: Your Honor,
13 clarification: If they are being permitted
14 to file a five-page sur-reply, do we get a
15 five-page response to that?

16 JUDGE BOUDREAU: No.

17 MR. STERNE: No?

18 JUDGE BOUDREAU: Nothing is authorized
19 at this point, other than the five-page
20 sur-reply.

21 MR. STERNE: Well, how do we defend
22 our side, then?

23 JUDGE BOUDREAU: Well, you've already
24 had your opportunity to present your position in
25 your preliminary response.

1 Mr. Sterne, I'd also ask you, in any
2 of those decisions that you cited earlier, were
3 any of those precedential? Were any of those
4 binding on the Board?

5 MR. STERNE: No, Your Honor. As we
6 all know, there's very, very few of those to
7 date on this. And there's been no precedential
8 decisions on this point of law, to date, that
9 we're aware of. And we did some pretty
10 intensive research on this subject.

11 JUDGE BOUDREAU: All right. Thank
12 you.

13 MR. SHELTON: Lastly, one point from
14 petitioner, Your Honor. In terms of timing,
15 when would the Board want the petitioner to
16 submit the sur-reply?

17 JUDGE BOUDREAU: Within seven days.
18 One week.

19 MR. SHELTON: Okay.

20 JUDGE BOUDREAU: All right. Thank you
21 all.

22 MR. SHELTON: Thank you.

23 (Proceeding concluded -- 11:28 a.m.)
24
25

C E R T I F I C A T E

I do hereby certify that the aforesaid testimony was taken before me, pursuant to notice, at the time and place indicated; that said deponent was by me duly sworn to tell the truth, the whole truth, and nothing but the truth; that the testimony of said deponent was correctly recorded in machine shorthand by me and thereafter transcribed under my supervision with computer-aided transcription; that the deposition is a true and correct record of the testimony given by the witness; and that I am neither of counsel nor kin to any party in said action, nor interested in the outcome thereof.

WITNESS my hand and official seal this 26th day of January 2016.



Ryan K. Black

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