

Gresalfi, Chris

From: Gresalfi, Chris
Sent: Friday, March 8, 2024 6:52 PM
To: Brandon R. Theiss; Daniel H. Golub; jwaldrop@kasowitz.com; jdowning@kasowitz.com
Cc: Kang, Robert N.; Shelton, Barry K.; Jensen, Travis; Winston-PayPal-Fintiv
Subject: PayPal v. Fintiv, Case No. IPR2023-00744: Deposition of Kai Johnson - improper answers re prior inconsistent testimony

Counsel,

At his deposition yesterday, Fintiv's expert Kai Johnson improperly refused to answer questions about his prior inconsistent district court testimony on the critical issue in this proceeding—the construction of “unbanked subscriber.” In the district court case, Mr. Johnson testified that, for example, an “unbanked subscriber may **have a bank account**,” and “may **use a bank account with the [mFs] services**.” See e.g. 11/17/2022 Johnson Dep. Tr., 277:19-288:21. Mr. Johnson refused to answer whether he agreed with his 2022 testimony on the meaning of “unbanked subscriber,” and whether he could reconcile his 2022 testimony with the Board's construction in this proceeding. See e.g. 3/7/24 Johnson Dep. Tr. (Rough) at 245:13-249:12. PayPal's questions are plainly relevant in this proceeding: Mr. Johnson's declaration states the primary prior art reference “fails to meet the Board's definition of ‘unbanked subscriber’ because “all the subscribers [in that reference] ... **have or have access to a bank account**.” Ex. 2007 at ¶ 76 (emphasis added).

Mr. Johnson should have been prepared to answer questions about his prior 2022 testimony. PayPal specifically sought authorization to file a preliminary reply to Fintiv's POPR on the basis that Mr. Johnson took inconsistent positions in the district court litigation on the construction and meaning of “unbanked subscriber.” And the Board expressly authorized PayPal to “submit claim construction briefing and deposition transcripts from the district court case” if institution was granted. See Paper No. 9. Fintiv even acknowledged during the conference call with the Board that “it was amenable to PayPal submitting claim construction briefing and deposition transcripts from the district court case.” *Id.* at 3.

PayPal offered Mr. Johnson ample time to read the 11-page section of his prior deposition transcript addressing this term in the remaining 45 minutes of the deposition. See Rough Tr. at 249:13-254:16. Mr. Johnson's refusal to answer any questions without first reading the **entire 390-page transcript** was a blatant and improper delay tactic amounting to an outright refusal to answer. See e.g., *id.* at 253:14-22 (“Q. And so your testimony sitting here today is that you can't answer any questions about unbanked subscriber from page 277 to 288 without reading the entire deposition transcript; is that your testimony?... A. That's what would make sense is making sure that I can understand the context in which this discussion happened.”), 254:10-16 (“Q. Okay. And so you will not answer any questions without reviewing the entire transcript; is that fair?... A. I think that's -- given that we've got a big piece of paper here, I think that's the only thing that I could do with it.”) Consequently, PayPal held open Mr. Johnson's deposition. *Id.* at 254:17-23.

PayPal reserves the right to seek another deposition, compel responses, and to the extent Fintiv attempts to introduce additional testimony from Mr. Johnson, exclude such testimony or seek an additional deposition.

Regards,
Chris

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