

Subject: RE: Micron v. BeSang, IPR2023-00900 - Authorization for Patent Owner's Motion to Strike

Date: Friday, February 16, 2024 at 11:01:51 AM Pacific Standard Time

From: Trials <Trials@USPTO.GOV>

To: Kappos, John <jkappos@omm.com>, Michelle Armond <michelle.armond@armondwilson.com>, Trials <Trials@USPTO.GOV>

CC: Haber, Ben <bhaber@omm.com>, Fink, Tim <tfink@omm.com>, Reinbold, Patric M. <preinbold@omm.com>, Zhou, Vincent <vzhou@omm.com>, #OMM-BESANG-MICRON <OMMBESANGMICRON@omm.com>, Douglas Wilson <doug.wilson@armondwilson.com>, Josepher Li <Josepher.li@armondwilson.com>, Amy Han <amy.han@armondwilson.com>, BeSang IPR <besang-ipr@armondwilson.com>

Counsel,

From the Board –

Patent Owner's request for authorization to file a motion to strike is denied at this time. Patent Owner's concern that Petitioner may improperly seek to supplement the record is premature as Petitioner has not yet relied upon the disputed testimony or exhibits. Patent Owner may address the issues raised in its email in its own filings if it so chooses.

Regards,

Esther Goldschlager
Supervisory Paralegal Specialist
Patent Trial & Appeal Board
U.S. Patent & Trademark Office

From: Kappos, John <jkappos@omm.com>

Sent: Thursday, February 15, 2024 8:29 PM

To: Michelle Armond <michelle.armond@armondwilson.com>; Trials <Trials@USPTO.GOV>

Cc: Haber, Ben <bhaber@omm.com>; Fink, Tim <tfink@omm.com>; Reinbold, Patric M. <preinbold@omm.com>; Zhou, Vincent <vzhou@omm.com>; #OMM-BESANG-MICRON <OMMBESANGMICRON@omm.com>; Douglas Wilson <doug.wilson@armondwilson.com>; Josepher Li <Josepher.li@armondwilson.com>; Amy Han <amy.han@armondwilson.com>; BeSang IPR <besang-ipr@armondwilson.com>

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Dear Honorable Board:

PO's request is not appropriate "before the identified testimony or exhibits are relied upon in a substantive paper." 2/14/2024 Board Email; *see also* CTPG at 80; *Synaptive*, IPR2018-00462, Paper 21 at 1 (2019). Moreover, PO seeks to strike testimony directly responsive to PTAB's request to "explain how a 'stackable add-on layer' is structurally distinguishable from a layer that is sequentially deposited." DI, 9 n.5. In *Guardant* and *Bestway*, the PTAB did not request the disputed evidence. Finally, the testimony is also responsive to PO's cross-examination. Tr. ("Q. ...the difference between what you attribute to patent owner and what you consider...the correct construction of stackable add-on layer is the method of forming the layer, correct? A. *That is one difference.*"). Petitioner simply

asked about the other differences.

PO suggests prejudice, but Petitioner served the disputed exhibits five days before last week's deposition. PO had ample time to consider the disputed exhibits and testimony (elicited per the Board's request), and thus has an opportunity to address the record in its Response. *Rembrandt*, 76 F.4th 1376, 1384 (noting that need to rely on new evidence "may not arise until...the institution decision" and is permissible as long as opposing party given opportunity to respond).

Respectfully submitted,

John Kappos
Counsel for Petitioner

O'Melveny

John Kappos

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From: Michelle Armond <michelle.armond@armondwilson.com>

Sent: Thursday, February 15, 2024 12:04 PM

To: Trials <Trials@USPTO.GOV>

Cc: Kappos, John <jkappos@omm.com>; Haber, Ben <bhaber@omm.com>; Fink, Tim <tfink@omm.com>; Reinbold, Patric M. <preinbold@omm.com>; Zhou, Vincent <vzhou@omm.com>; #OMM-BESANG-MICRON <OMMBESANGMICRON@omm.com>; Douglas Wilson <doug.wilson@armondwilson.com>; Josepher Li <Josepher.li@armondwilson.com>; Amy Han <amy.han@armondwilson.com>; BeSang IPR <besang-ipr@armondwilson.com>

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[EXTERNAL MESSAGE]

Dear Honorable Board:

A motion to strike is appropriate at this time because Patent Owner will be filing Dr. Lee's 2/6 deposition transcript as an exhibit with its response brief tomorrow, Friday 2/16. Petitioners' improper use of redirect at Dr. Lee's deposition to supplement the record outside the procedure established by 37 C.F.R. § 42.123(b) would prejudice Patent Owner if not addressed promptly. *E.g.*, *Guardant Health v. Univ. of Wash.*, IPR2022-01158, Paper 31 at 8 (P.T.A.B. June 23, 2023) ("[I]f we do not strike the testimony now... [moving party] would be even more prejudiced by having to address the issue in its Reply, not knowing whether we may disregard the testimony later in the Final Written Decision.").

The Board has previously authorized motions to strike redirect testimony under similar procedural circumstances. *E.g.*, *Guardant Health*, IPR2022-01158, Paper 31 at 2-3 & n.1 (granting authorization during deposition, and striking testimony based on exhibits that were not "included in, or referenced by" the expert's declaration or "the subject of any questioning during cross-examination"); *Bestway (USA) v. Intex Mktg.*, IPR2020-01405, Paper 45 at 2 (P.T.A.B. Oct. 13, 2021) (granting authorization sought the week after deposition, and transcript was filed with PO's brief).

Respectfully submitted,

Michelle Armond
Counsel for Patent Owner

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From: Trials <Trials@USPTO.GOV>

Date: Wednesday, February 14, 2024 at 1:37 PM

To: Michelle Armond <michelle.armond@armondwilson.com>, Trials <Trials@USPTO.GOV>

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Counsel,

From the Board –

Patent Owner, please provide a brief explanation (no more than 200 words) as to why a motion to strike is appropriate at this time, including why a motion to strike is appropriate or necessary before the identified testimony or exhibits are relied upon in a substantive paper. Petitioner may respond (no more than 200 words) to Patent Owner's explanation.

Regards,

Esther Goldschlager
Supervisory Paralegal Specialist
Patent Trial & Appeal Board
U.S. Patent & Trademark Office

From: Michelle Armond <michelle.armond@armondwilson.com>
Sent: Tuesday, February 13, 2024 11:36 AM
To: Trials <Trials@USPTO.GOV>
Cc: jkappos@omm.com; bhaber@omm.com; tfink@omm.com; preinbold@omm.com; vzhou@omm.com; #OMM-BESANG-MICRON <OMMBESANGMICRON@omm.com>; Douglas Wilson <doug.wilson@armondwilson.com>; Josepher Li <Josepher.li@armondwilson.com>; Amy Han <amy.han@armondwilson.com>; BeSang IPR <besang-ipr@armondwilson.com>
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Dear Honorable Board:

Patent Owner requests authorization to file a motion to strike portions of Petitioners' expert Dr. Jack Lee's redirect testimony and Exhibits 1033 and 1035 from his February 6, 2024 deposition.

On February 6, Patent Owner, through counsel, cross-examined Petitioners' expert, Dr. Jack Lee, during an in-person deposition. On February 1, prior to the deposition, Petitioners' counsel circulated by email several references, stating: "Dr. Lee has identified additional literature relevant to the above matter. In advance of Dr. Lee's deposition on Tuesday, February 6, Dr. Lee has provided the three references attached." Patent Owner objected to this new evidence on February 2.

When cross-examination concluded on February 6, Petitioners' counsel introduced the previously-objected-to deposition exhibits and elicited redirect testimony based on those exhibits.

Petitioner opposes Patent Owner's request for authorization to file the motion and opposes the relief requested in the motion. If a conference call is necessary, the parties are available Wednesday, 2/14, at 2-5 PM EDT or Thursday, 2/15, at 2-5 PM EDT.

(Counsel for Petitioners are copied on this email.)

Best regards,

Michelle Armond
Counsel for Patent Owner BeSang

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