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UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

NOKIA OF AMERICA CORPORATION,	)
	)
PETITIONER,	)
	)CASE NO.
ALEXANDER SOTO AND WALTER SOTO,	)IPR2023-00960
	)
PATENT OWNERS.	)
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REPORTER'S REMOTE
TRANSCRIPT OF PROCEEDINGS
APRIL 22, 2024

TECKLA T. CLAY, CSR 13125
OFFICIAL REPORTER PRO TEMPORE

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APPEARANCES:

FOR PETITIONER:

ALSTON AND BIRD

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PTAB JUDGES:

KEVIN C. CROCK

THU A. DANG

JUDGE COX

TRANSCRIPT OF PROCEEDINGS

NOKIA V. SOTO

APRIL 22, 2024

THE COURT: Good day everyone. This is Judge Trock and with me on this call are Judges Dang and Cox. This is regarding IPR2023-00960 involving US patent number 8823754 Nokia America Corporation versus Alexander Soto et. Al. And why don't we start with appearances. Petitioner who's on the line for you today?

MR. STEVENS: Good afternoon, this is Scott Stevens. With me are my colleagues Karlee Wroblewski and Matt Welch all from Alston and Bird on behalf of the petitioner.

THE COURT: Good morning, Mr. Stevens. For patent owner who do we have?

MR. TONG: On behalf of patent owner this is Peter Tong from Russ August and Kabat along with my colleague Irene Lee.

THE COURT: Good day, Mr. Tong.

COURT REPORTER: Excuse me, this is the court reporter Teckla Clay.

THE COURT: This is Judge Trock, we're here today to discuss an order to show cause which was issued in part with the decision granting institution

1 on paper 19 on February 23rd 2024. The discussion
2 regarding the circumstances which involve the order to
3 show cause was discussed in the decision on institution
4 pages 24 through 26.

5 So the order to show cause is issued
6 pursuant to 37CFR42.11E3. And I'd like to hear from
7 both patent owner and petitioner on this issue with
8 respect to a couple of questions. We had your, we got
9 your briefing. We got papers 25 and 26 which were
10 filed by petitioner and patent owner responding to the
11 order to show cause.

12 We read through them but we still have
13 some additional questions that we'd like to cover today
14 as well as to get a further understanding of what
15 happened from counsel from your perspective. So I have
16 4 basic questions I'd like for each of you to address.
17 And I'll give you time to write these down because I
18 know I didn't provide them for you. But here they are.

19 The first is was there a miscommunication
20 or a failure of communication with the Board with
21 respect to the issues that we were, we discussed in the
22 order with regard to the request for a Fintiv denial.

23 Second question is how did this
24 miscommunication or failure to communicate happen if
25 there was one.

1 And number 3, do the counsel believe that
2 they have a continuing obligation to notify the Board
3 when there's a material fact change, especially when
4 there's a claim for relief before the Board.

5 And number 4 if such a miscommunication or
6 failure to communicate did occur, how can we prevent
7 this from happening in the future? So that's how I'd
8 like to sort of frame the discussion today. And I'd
9 like to get the insights from counsel, from both sides
10 as to how this occurred and how you see this and what
11 we can do to prevent something like this from happening
12 in the future if you agree that there was some
13 miscommunication or failure to communicate. So why
14 don't we hear from petitioner first, Mr. Steven.

15 MR. STEVEN: Yes thank you. Yes Scott Steven
16 from Alston and Bird. I'm going to try to answer them
17 in the order that you presented them.

18 So first was there a miscommunication or a
19 failure to communicate with the Board regarding Fintiv
20 issues. It is clear that a material fact occurred
21 after we had filed our last brief. And that was not
22 brought to the Board's attention.

23 Obviously the Board found it on it's own
24 volition as part of the institution decision and had it
25 before it when it relied on that. But in a perfect

1 world one of the parties or both of the parties could
2 have provided that to the Board.

3 So was there a miscommunication? Well the
4 briefing was closed and the parties had made the
5 positions that they had made, but certainly in a more
6 clear world we could have provided that to the Board
7 after the briefing had closed.

8 How did it happen? Again I think the, the
9 joint motion to vacate the trial occurred between the
10 reply brief and the sur-reply brief. And then the
11 order actually taking issue, taking action on that and
12 vacating the trial date occurred at some point in time
13 thereafter, after the briefing was closed.

14 Do we believe that there's a continuing
15 duty? Frankly to us it was a little unclear what the
16 duties are to the Board after briefing is closed. But
17 given the fact that we were not advancing a Fintiv
18 argument we did not believe that we had any continuing
19 duty to provide any of these issues, additional
20 evidence to the Board on later transpiring effects.

21 And how can he prevent this in the future?
22 I do think some clarity would be warranted here. You
23 know all of us parties and, you know, attorneys
24 representing parties before the Board always struggle
25 with the question of, you know, when are we providing

1 too much. When are we providing something that we
2 think is important, but that the Board might feel is
3 gilding the lily and trying to provide additional
4 evidence. And I think every practitioner struggles
5 with that a bit.

6 But if the Board were to provide clear
7 guidance that when a Fintiv issue is raised it is a
8 material event at a District Court or otherwise that
9 transpires after briefing is closed, I'm sure all
10 parties would be happy to abide by that.

11 I do think that there is, you know,
12 speaking beyond just myself or Alston Bird, I don't
13 think that that's clear as to what's expected of us,
14 whether we be trying to inform you of something that
15 happened too late and you're not interested or just
16 trying to inform you of all material events even after
17 the briefing. I do think clarity on that would be both
18 warranted and helpful. Have I answered your questions
19 Judge Trock.

20 THE COURT: All right. Thank you, Mr. Stevens.
21 I have a couple of follow up questions for you before
22 we get to patent owner just to follow up on this. Is
23 Alston Bird aware of the notice that the patent and
24 trademark office issued on July 29th 2022 with regard
25 to duties of disclosure with respect to proceedings

1 before the Patent Trial and Appeal Board.

2 MR. STEVEN: I'm sure that we look at all of
3 what you publish that is expected of us. Does that
4 date trigger something in my mind as I sit here without
5 looking as to what that is? I'll tell you that date
6 doesn't trigger anything for me. Of course we have a
7 process to see whatever the Board publishes that talks
8 about whatever is expected of practitioners before us.

9 THE COURT: Okay. So if you haven't taken a
10 look at that, I would recommend that you take a look at
11 that because it does provide some of the clarity that
12 you were discussing here that we believe with respect
13 to obligations and information to provide to the Board.

14 The second thing I'd like to discuss with
15 you Mr. Stevens is you make the point that the district
16 court's order occurred after the briefing in this case.
17 I take it you can agree with me that the issue of this
18 consolidation and de-consolidation in the district
19 court with respect to the court's order is a material
20 change with respect to the positions taken by the
21 parties with regard to the pending trial date. Can we
22 agree on that?

23 MR. STEVEN: I can agree with you that it was
24 material to the patent owner's position regarding
25 whether Fintiv applies. That I will agree with you on.

1 THE COURT: Okay. What about the positions that
2 you were taking with respect to the briefing because
3 the petitioner did take positions with respect to the
4 pending trial date; did you not?

5 MR. STEVEN: We did. And in our last paper we
6 talked about the fact that the AT&T case wasn't set to
7 trial until the following year which we thought added
8 additional credence to our positions on Fintiv. I
9 think that's true.

10 I'm sure that we did inform the Court in
11 our briefing of what the trial date was at the moment
12 that it existed, in other words, when we filed the
13 petition, you know, we informed what the trial date was
14 at that moment. And of course that definitely changed
15 over time. Whether that materially effected the
16 position we were advocating on Fintiv, I'm not so sure.

17 THE COURT: Right. I can understand your
18 perspective with regard to the best interest of your
19 client. But what about with regard to the best
20 interest of the Board and the public?

21 MR. STEVEN: I mean obviously the position we
22 were advocating was that a discretionary denial under
23 Fintiv was not warranted for other reasons regardless
24 of the trial date of the Nokia 1 action. You know with
25 that said, do I believe this to be a material event in

1 one's consideration of the Fintiv issues? That, yes I
2 do.

3 I do think that after the Court had
4 decided to de-consolidate and reconsolidate with
5 something else which will have a net effect of pushing
6 the trial off by let's call it at least 18 months, do I
7 think that's material to the Board's consideration of
8 Fintiv? I do.

9 THE COURT: Right. And so that's the point I'd
10 like to bring to your attention. Your petition is
11 referring to a pending trial date of May 2024 and the
12 district court's order vacating that trial date and
13 consolidating the 2 Nokia cases together obviously
14 changes that fact.

15 And so even though we would agree with you
16 that it was the patent owner which was seeking the
17 relief here under Fintiv, the fact that the trial date
18 is no longer May 6th 2024 is materially changed. And 1
19 or both parties could bring that to the Board's could
20 attention; could they not?

21 MR. STEVEN: They could. I think technically we
22 would have needed to seek permission to have filed
23 that. But yes either party at that point in time could
24 have e-mailed and sought permission to supplement the
25 record with additional evidence.

1 THE COURT: And I think and I take it from your
2 statement, Mr. Stevens, that you are aware you can
3 e-mail the Board and request permission to file a
4 motion, supplement information, give us some
5 information that materially has changed. You're aware
6 you can do that; is that correct?

7 MR. STEVEN: I am.

8 THE COURT: All right. Thank you. Okay patent
9 owner why don't we hear from you on these questions.

10 MR. TONG: Yes, your Honor. Starting with the
11 first question was there a miscommunication with the
12 Board regarding the Fintiv issues. And I'd also like
13 to address the second question how did this happen.

14 I think there was a miscommunication
15 because of the interplay of several conflicting
16 communications. The primary one being the Board's
17 e-mail on December 27th 2023 which set particular
18 deadlines for cutoffs of Fintiv related briefing.

19 So we had interpreted that as the Board
20 not wanting to hear any further arguments regarding
21 things that would effect the parties Fintiv positions
22 after those particular deadlines. And this is in the
23 record at Exhibit 3002. So I believe that would be a
24 miscommunication and how it happened.

25 Do counsel believe they have a continuing

1 obligation to notify the Board of additional events
2 that may affect the party's positions? Yes we do. We
3 have a continuing obligation to notify the Board.
4 Related to that I think there are further questions of
5 what exactly do we have to further disclose when we
6 have already partially made a disclosure. As we noted
7 in our briefing as of the filing of the sur-reply,
8 patent owner's in footnote, in one of their footnotes,
9 I believe footnote 3 notified the Board of the pending
10 motion to reconsolidate the cases.

11 So at that point we believe that we had
12 done our best to try and notify the Board of everything
13 that we could. And given that this was already pointed
14 out to the Board we weren't quite sure whether the
15 Board wanted further updates. And we didn't know if
16 the Board would feel that what we had disclosed was
17 already sufficient in which case we would have believed
18 that we complied with our duty of disclosure. And we
19 didn't want to violate the Board's Fintiv briefing
20 deadline cutoff.

21 So how can we prevent this? That was the
22 last question. And I would agree with opposing counsel
23 in that there's, it's kind of a conflict between the
24 duty of disclosure with ongoing communications as well
25 as that, the Board's e-mail that set the cutoff for

1 Fintiv deadline.

2 And in addition, you know, just what type
3 of things would the Board like the parties to disclose
4 when there's already been at least a partial
5 disclosure? So that's what I think would be most
6 helpful if the Board could issue some type of
7 clarification on that aspect.

8 THE COURT: Okay. Thank you, Mr. Tong. I have
9 the e-mail up that you're referring to with respect to
10 our communication with counsel in regard to briefing.
11 And as I read through it I see the deadlines for the
12 briefs. But I don't see any statement in there saying
13 don't communicate with us with respect to anything
14 else. So --

15 MR. TONG: You're absolutely right, your Honor.

16 THE COURT: I have a different point of view of
17 how you're interpreting. That schedule is basically an
18 informal scheduling order saying when the parties
19 should be filing these particular briefs.

20 But I do appreciate the fact that you
21 indicated that you believe you do have an ongoing
22 obligation to advise the Board of this. So just to
23 give you a little bit of the panel's perspective here
24 so that you can see this from perhaps a different
25 context.

1 The Board has before it, the panel has
2 before it a request for relief and it's a serious one.
3 It's essentially denying institution with respect to
4 Fintiv. And these dates are particularly critical.
5 Where the pending district court trial date is has a
6 significant material effect on how the Board and the
7 panel considers these arguments with respect to Fintiv.

8 And it's an issue that we have to take on
9 many times prior to dealing with the merits of the
10 case. Because if the petition is going to be denied,
11 there's no reason necessarily to go and look at the
12 merits. So this is a real serious concern to the
13 Board.

14 And when parties come to us and give us
15 information with respect to material facts, here's the
16 pending trial date, you can see how close this trial
17 date is to when the final decision is going to be
18 issued or in the case of the other party how far away
19 it is, and so when a date like that changes it has a
20 significant effect on how we go through and analyze
21 these Fintiv factors and come to a decision as to
22 whether we're going to grant that request for relief
23 and deny institution or reject the request for relief.

24 And there is no other way for us around
25 this. It is an obligation on our part to consider this

1 request that's been put in front of us by the patent
2 owner. So the Board, the district court issued it's
3 order on consolidation January 30th and we issued our
4 decision on February 23rd. That's a time span of
5 several weeks there. Several weeks in which we heard
6 nothing from either side when both sides have to be
7 aware that this issue is before us and that the panel
8 and the Board is considering whether or not this case
9 is going to go forward. And it relies in material part
10 on that trial date.

11 And it's difficult to see how both parties
12 could not realize that. That when the district court
13 vacates a pending trial date and both parties have
14 referred to that trial date in their briefing to the
15 Board and now it's no longer in existence, it may have
16 been correct when you provided the information to the
17 Board but it is no longer correct after the district
18 court issued that order on January 30th, that is at
19 least in my view when the parties should have realized
20 we need to bring this to the Board's attention.

21 This trial date that we've been briefing
22 is no longer correct, it's no longer true. And we
23 can't have the Board relying on that as if it is
24 because something has changed, something material has
25 changed. Now whether or not there's a briefing

1 schedule, there's still, in our view there's an ongoing
2 obligation to advise the Board of the change in
3 material facts especially in a case like this where
4 there's a claim for relief which depends on those
5 facts.

6 That's our view and that's why I wanted to
7 have this conference call so that we could hear from
8 the parties, we could hear from counsel, we could get
9 some understanding as to how this occurred and perhaps
10 get some insight from counsel as to what would be
11 beneficial for them to get an understanding so that
12 it's not just in this case but in any other case.

13 Because as you probably are well aware
14 Fintiv is a recurring issue before the Board and
15 doesn't appear as if it's going to go away any time
16 soon. So there may very well be circumstances just
17 like this occurring in other cases as we go forward.

18 So I would like to hear in particular if
19 there are, if there is a mechanism that you believe
20 would be effective not only in this case but in other
21 cases as well where we could provide this insight as to
22 how the panel and the Board view the materiality of
23 this situation.

24 And how we can make it clearer to counsel
25 that we want you to come forward and we want you to

1 contact us to provide us with the information when
2 there's a situation like this where there's a pending
3 claim for relief that relies on a material fact and
4 that fact has changed, so that we can get all of this
5 information in front of us and make the correct
6 decision. Because I think at the end of the day that's
7 what everybody wants. That's what petitioner wants,
8 that's what the patent owner wants is for us to make
9 the right decision.

10 And the best way to help us make that
11 right decision is to give us the correct information
12 and not have us trying to make a decision on
13 information which is no longer correct. So petitioner
14 would you like to address those remarks?

15 MR. STEVEN: I will. Again this is Scott
16 Stevens for petitioner. I agree with everything you
17 said. Let me again apologize for the fact that nobody
18 brought this to the Board's attention. I do think,
19 speaking for us or the other side, I don't think there
20 was an attempt to mislead you or intentionally not tell
21 you what was going on.

22 But we certainly do appreciate that we
23 could have been better. We could have provided this to
24 you. As far as how to publish this, I don't know
25 whether the answer is through some sort of an order or

1 through rulemaking, but I do think it would be helpful
2 to folks like me to have more clear guidance on this
3 expectation to erase that tension that sometimes we
4 fear we're telling you things that you don't want to
5 know.

6 You know if there could be some rulemaking
7 where examples were provided sort of like this case
8 where subsequent to the close of briefing there is a
9 change in the trial calendar that that is something
10 that you expect and, you know, demand that parties make
11 you aware of on their own volition. I think that would
12 be very helpful to me.

13 THE COURT: Okay thank you, Mr. Stevens. Patent
14 owner, Mr. Tong?

15 MR. TONG: Yes, your Honor. I think it would
16 help if in the e-mails that authorize further Fintiv
17 briefing if those could make clearer that the Board is
18 interested in continuing updates even after the
19 deadlines. That was probably our biggest holdup, not
20 wanting to appear to be in violation or not wanting to
21 appear to be pestering and annoying the Board with
22 further ongoing developments after the Board has made
23 clear that there is some sort of briefing cutoff.

24 While we appreciate that this Board of US
25 Patent Office wants to make the right decision with all

1 of the facts, there are certain courts that I have
2 practiced before where there have been just ongoing
3 developments and facts in all sorts of cases. And the
4 judge in those cases sometimes says, okay well we can't
5 have briefing going on forever. I'm going to consider
6 all the facts up to a certain date. I want you to, you
7 know, submit your briefing, your final briefing before
8 then. And that's what I'm going to make my ruling on.

9 So with that kind of understanding of, you
10 know, the expectations of other courts, if the Board's
11 e-mail would include a line at the end saying something
12 along the lines of, Board expects the parties, not,
13 perhaps not expects, but the Board welcomes and
14 encourages the parties to continue to reach out and
15 provide updates about subsequent events that may
16 materially impact the Fintiv analysis.

17 I think that would help encourage the
18 parties to provide those rather than discourage the
19 parties from being afraid of violating the, either the
20 Board's deadlines or appearing to be pestering and
21 annoying whenever something, whenever there's a further
22 development in their favor.

23 THE COURT: I appreciate that, Mr. Tong. And
24 we're well aware of this tension. And I can appreciate
25 the difficulty of figuring out what the correct balance

1 is. And we would agree with you that there comes a
2 point at which argument does need to stop. And perhaps
3 there's a distinction to be made between facts and
4 argument that yes the trial date has changed and then
5 give us that information with respect to that fact that
6 the trial date has changed.

7 But then as you can see each party would
8 want to argue that point too, right. Because now that
9 the trial date has changed here's our additional
10 arguments with respect to Fintiv. We agree with you
11 that there does come a point that the argument with
12 respect to the issues and the facts has to stop so that
13 we can make a decision on a (inaudible) record.

14 But with respect to the facts that may be
15 a little bit different we maybe able to provide those
16 facts and make that correct without having to add in
17 additional argument. But your point is well taken.

18 And this is really helpful to get the
19 perspective of counsel who has to deal with these cases
20 on a regular basis as to how we can make this clearer
21 for you and so that there are no miscommunications and
22 we can clarify the situation and clarify the record so
23 that we're in a position to make the best decision
24 possible for, for the case.

25 So I thank you for this input. It's been

1 very helpful and insightful. Petitioner is there
2 anything else you'd like to add before we close out
3 today?

4 MR. STEVEN: This is Scott Stevens, no we don't.
5 Thank you for your time.

6 THE COURT: Okay. Patent owner, anything
7 further from you?

8 MR. TONG: In the interest of disclosure I would
9 like to provide a few updates to the Board. As your
10 Honors are aware there are certain related cases
11 between both the Soto brothers and Nokia. The parties
12 are currently in ongoing discussions as to the best way
13 to inform the Board about how there maybe further
14 updates and developments.

15 The parties are meeting and conferring to
16 propose the best way to do that. But the Board should
17 expect to hear from the parties on those issues.
18 Additionally there's a related AT&T case. And there's
19 an IPR that is pending. I wanted to let the Board know
20 that the underlying district court case has settled in
21 principle and that the parties have signed a binding
22 term sheet.

23 THE COURT: Okay thank you very much. Do you
24 have that case number?

25 MR. TONG: Yes. That would be IPR2024-00712.

1 THE COURT: Thank you very much, Mr. Tong.

2 MR. TONG: Yeah so we will be working with AT&T
3 to provide an update and a notice to the panel in that
4 case as well.

5 THE COURT: Okay. Thank you, Mr. Tong. All
6 right. Hold on one second. Let me check with my
7 colleagues and see if there's anything further. Okay
8 counsel there will be nothing further from us. So
9 unless anything, petitioner or patent owner have
10 anything else to add we are, we're adjourned and we're
11 off the record. So thank you for your time today.

12

13 (The proceedings concluded at 10:31 a.m.)

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2 UNITED STATES PATENT AND TRADEMARK OFFICE
3 BEFORE THE PATENT TRIAL AND APPEAL BOARD
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5 NOKIA OF AMERICA CORPORATION,)
6)
7 PETITIONER,)
8)CASE NO.
9 ALEXANDER SOTO AND WALTER SOTO,)IPR2023-00960
10)
11 PATENT OWNERS.)
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13 _____)

14 I, TECKLA CLAY, CSR NO. 13125, OFFICIAL
15 REPORTER OF THE SUPERIOR COURT OF THE STATE OF
16 CALIFORNIA, FOR THE COUNTY OF LOS ANGELES, DO HEREBY
17 CERTIFY THAT THE FOREGOING PAGES, 1 THROUGH 23
18 COMPRISE A FULL, TRUE AND CORRECT REMOTE TRANSCRIPT OF
19 THE PROCEEDINGS TAKEN IN THE ABOVE ENTITLED CAUSE ON
20 APRIL 22, 2024 DATED THIS 23RD DAY OF MAY 2024.

21 

22 TECKLA CLAY, CSR NO. 13125
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[& - aware]

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[aware - conflict]

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