

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAP AMERICA, INC.
Petitioner

v.

PI-NET INTERNATIONAL, INC.
Patent Owner

Case CBM2013-00013
Patent 8,037,158

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

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Petitioner SAP America, Inc. files this motion pursuant to 37 C.F.R. § 42.64(c), and according to the Scheduling Order (Paper 16). The Board should exclude Patent Owner Pi-Net International, Inc.'s Exhibits 2014-2016, 2018, and 2019 because they are (1) unauthenticated, (2) hearsay, or (3) both. Additionally, Exhibits 2014-2016, 2018, and 2019 are inadmissible under FRE 401. And Exhibits 2014-2016, 2018, and 2019 lack foundation.

SAP timely objected to these exhibits on January 27, 2014 and February 12, 2014. Because these exhibits are fundamentally flawed and improper, the Board should exclude them.

1. The Arunachalam Declaration's Attempt to Authenticate Documents is not Proper under FRE 901

The Board should exclude Exhibits 2014-2016, 2018, and 2019 because they are not authenticated. It is a fundamental tenant that all evidence must be genuine before it can be weighed by the finder of fact. And Federal Rule of Evidence 901(a) provides that genuineness of evidence is established by authentication.

This rule asserts that to authenticate, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a). A party need only make a prima facie showing of authenticity; however, this hurdle has presented particular difficulty for electronically stored information due to its manipulability and ubiquity as a communications medium. A

court will admit evidence if sufficient proof has been introduced that would enable a reasonable juror to find authenticity or proper identification. *United States v. Tank*, 200 F.3d 627, 630 (9th Cir. 2000). Each piece of evidence must be authenticated in this manner, taking into consideration any unique characteristics.

Here, Pi-Net has failed to properly authenticate Exhibits 2014-2016, 2018, and 2019. Pi-Net's sole attempt to authenticate these exhibits is a single sentence in Dr. Arunachalam's February 5, 2014 declaration: "Each of the above-mentioned exhibits is a true, authentic and correct copy of the corresponding original document, as described above." Paper 38, ¶3. But Dr. Arunachalam has no basis to make such a statement.

A review of the exhibits Dr. Arunachalam attempts to authenticate highlights the problem. All five exhibits are printouts of webpages. For example, Exhibits 2014 and 2016 are from www.webopedia.com. Exhibits 2015 and 2018 are from Wikipedia, a website that anyone can alter at any time. And Exhibit 2019 is from webtrends.about.com.

Like books, webpages may be authenticated under Rule 901(b)(1) by testimony of someone with personal knowledge. But there is no indication Dr. Arunachalam has any personal knowledge about these websites. Conversely, webpage printouts without supporting personal knowledge testimony or an affidavit have been deemed inadmissible. For example, in *In re Homestore.com*,

the court refused to accept a party's attempt to authenticate website printouts detailing financial information *In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 769, 783 (C.D. Cal. 2004). The court reasoned that authenticity could be provided by a person with knowledge of the site, such as a site visitor or an administrator. Because these documents were unsupported by testimony and were not self-authenticating, they did not fulfill the requirements of Rule 901(a). *Id.*

2. The Board should Strike Exhibits 2014-2016, 2018, and 2019 as Hearsay

The Board should strike Exhibits 2014-2016, 2018, and 2019 because they are hearsay and do not fall into a recognized exception.

The rule against admitting hearsay testimony is well-established. *See Fed. R. Evid.* 801. Here, Pi-Net attempts to admit hearsay evidence, contrary to established rules. In particular, Exhibits 2014-2016, 2018, and 2019 are all out-of-court statements used by Pi-Net to support their positions.

In Pi-Net's Corrected Patent Owner Response to the Petition (Paper 34), Pi-Net cites to Exhibit 2016 to support their distinction between the terms "internet" and "world wide web." Paper 36, p. 26. Plainly, Pi-Net is using Exhibit 2016's out-of-court statement for the truth of the matter asserted—that "internet" and "world wide web" are not the same in the context of the claims in question. And Pi-Net improperly uses Exhibit 2014 improperly to support its construction of "Virtual Information Store." *See* Paper 36, pp.42-43. Again, Pi-Net relies explicitly on

www.webopedia.com for the definition of virtual. Using these exhibits violates Rule 802's prohibition against hearsay absent an exception. But no exception under Rule 803 applies here.

Pi-Net also uses Exhibit 2015 improperly to support their construction of "data structure." *See* Paper 36, pp. 32-33. Pi-Net uses this Wikipedia entry to suggest that "[a]n object is a data structure..." *Id.* at 33.

Similarly, Pi-Net uses Exhibit 2018 and 2019 improperly. In its Corrected Response to the Petition, Pi-Net relies on these two exhibits, which are printouts of webpages, for support for their construction of "Web Application". *See* Paper 36, pp.18-19. In fact, Pi-Net explicitly relies on Exhibit 2018's statement that "A web application is any application that uses a web browser as a client" to support their construction. And Pi-Net uses a full paragraph on "What is a client?" from Exhibit 2019 in support of their construction.

Pi-Net's reliance on these documents are improper. Wikipedia is not a reliable source, as it is free to anyone to edit. This is particularly important as the exceptions to hearsay are "proceed[] upon the theory that under appropriate circumstances a hearsay statement may possess circumstantial guarantees of trustworthiness...." *See* Fed. R. Evid. 803, Advisory Committee Notes. Here, there are no hallmarks of trustworthiness as there is no indication who drafted those internet entries, or even if Pi-Net themselves drafted them.

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