

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 REPLY TO PATENT OWNER'S
OPPOSITION TO MOTION TO EXCLUDE EVIDENCE**

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Petitioner SAP America, Inc. files this Reply to Patent Owner's Opposition to Motion to Exclude pursuant to 37 C.F.R. § 42.64(c), and according to the Scheduling Order (Paper 10). The Board should reject Patent Owner's arguments about the admissibility of Exhibits 2014-2106, 2018, and 2019 because they rely on inapposite case law and are inadmissible.

1. Exhibits 2014-2016, 2018, and 2019 are not properly authenticated.

The Board should exclude Exhibits 2014-2106, 2018, and 2019 because they are not authenticated as explained in SAP's motion to exclude. *See* Paper 47.

In its opposition, Patent Owner makes three incorrect assertions as to why Exhibits 2014-2106, 2018, and 2019 are authentic. First, Pi-Net argues that they these documents are authentic because of circumstantial indicia of authenticity. *See* Paper 50, pgs. 1-3. Second, that Dr. Arunachalam has properly provided evidence sufficient to show that the documents are what Pi-Net claims them to be. *See* Paper 50, pg. 3. Third, that these exhibits are self-authenticating. These arguments are without merit.

Pi-Net's first argument—that "printouts of electronic information have long been held to be admissible—relies on a faulty premise. *See* Paper 50, pg. 1. The issue here is not whether printouts can be admissible, but whether *these* printouts are admissible. And the cases Pi-Net relies on do not support their broad proposition that any printouts of any webpages, as Pi-Net seemingly argues here,

are admissible. Importantly, SAP does not argue that properly authenticated electronic information is inadmissible, but rather that Exhibits 2014-2106, 2018, and 2019 are not properly authenticated and are therefore inadmissible.

Lorraine v. Markel American Insurance Co., 241 F.R.D. 534, 576–583 (D. Md. 2007), the case Pi-Net cites for its broad proposition, actually supports SAP’s position. In that case, the court analyzed the various ways in which electronic records could be authenticated. *Id.* In particular, the court noted that electronic evidence could be authenticated by “hash values” (or “hash marks”), examining metadata, public records, by describing a process or system that produces accurate results per Fed. R. Evid. 901(b)(9), or the myriad official records authorized by Rule 902. None of these apply here. Pi-Net does not provide any hash values, metadata, or describe a process or system that produced accurate results. And none of these exhibits are the type of records contemplated by Rule 902.

Instead, Pi-Net relies incorrectly on two cases that found webpage printouts authenticated because of circumstantial evidence. Notably, Pi-Net’s sole support for these so-called circumstantial indicia of authenticity is that Pi-Net itself provided dates and web addresses. *See* Paper 50, pg. 3. But these two “indicia” do not “overcome the presumption that the information [] discovered on the internet is inherently untrustworthy. *See St. Clair v. Johnny’s Oyster & Shrimp, Inc.*, 76 F. Supp. 2d 773, 775 (S.D. Tex. 1999).

These exhibits are printouts of webpages. And Pi-Net's sole attempt to authenticate these exhibits is a single sentence in Dr. Arunachalam's February 26, 2014 declaration: "Each of the above-mentioned exhibits is a true, authentic and correct copy of the corresponding original document, as described above." But Dr. Arunachalam has no basis to make such a statement. Now Pi-Net argues that Dr. Arunachalam need not have personal knowledge but instead Pi-Net merely needs to only produce evidence sufficient to support a finding. *See* Paper 50, pg. 3.

This, however, confuses the ways in which a document can be authenticated. Dr. Arunchalam *may* authenticate if based on personal knowledge, or Pi-Net could use other evidence if it is sufficient. What Pi-Net cannot do is shoestring in the other indicia to support Dr. Arunchalam's statement that the exhibits are "true, authentic, and a correct copy of the original document." Simply put, Dr. Arunchalam has no support for that statement.

Finally, Pi-Net argues that Exhibits 2014-2106, 2018, and 2019 are self-authenticating because of copyright and trademark symbols. *See* Paper 50, pg 3. For this proposition, Pi-Net relies on *Alexander v. CareSource*, 576 F.3d 551 (6th Circuit). But that case dealt with using a document printed on the opponent's own letterhead. *Id.* at 561. *Alexander* does not stand for the broad proposition that anything with a "TM" or "©" symbol is self-authenticating and nothing in Fed. R. Evid. 902(7) supports such a position. Pi-Net cites to nothing to support a finding

that random printouts from alleged third-party websites are self-authenticating because someone put “TM” or “©” on the page.

Moreover, Patent Owner’s assertion that these exhibits are not hearsay because they show the “effect on a person of ordinary skill in the art” is incorrect. *See* Paper 50, pg. 4. Patent Owner’s own statement in their opposition is that it cited to these exhibits “in order to establish what the Exhibits actually teach....” *Id.* Pi-Net’s reliance on *Neev v. Abbott Med. Optics, Inc.*, 09-CIV-146, 2012 WL 1066797 (D. Del. Mar. 26, 2012) does not provide them any support. That case analyzed whether statements about the general state of the art at the time of the invention would be admissible.

Here, Pi-Net uses the exhibits as factual support for their positions. For example, in its Corrected Response to the Petition, Pi-Net cites to Wikipedia (Exhibit 2018) for what the term “Web application” means. *See* Paper 36, pg. 18. Pi-Net does not cite Wikipedia for the effect that description has on persons of ordinary skill in the art, contrary to its assertion now. Instead, Pi-Net is plainly using the Wikipedia entry as factual support. This is hearsay and improper.

2. Conclusion

For the reasons stated in this Reply and in its original Motion to Exclude, SAP asks the Board in its role as gatekeeper to prevent Pi-Net from relying on

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