

Filed on behalf of TQ Delta, LLC

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DISH NETWORK, L.L.C.,
Petitioner,
v.

TQ DELTA, LLC,
Patent Owner

Case IPR2016-01470
Patent No. 8,611,404

**PATENT OWNER'S MOTION TO EXCLUDE
INADMISSIBLE EVIDENCE**

Pursuant to 37 C.F.R. § 42.64, Patent Owner TQ Delta, LLC (“Patent Owner” or “TQ Delta”) hereby moves to exclude certain of Petitioner’s evidence for lack of admissibility under the Federal Rules of Evidence (“FRE”). Patent Owner objected on the record to each of these exhibits on the evidentiary bases described below in its 2/24/17 Objections to Evidence (Paper 17).

(1) Exhibits 1019 (internet article purporting to be from Electronic Products Magazine Digital Edition) and Exs.1035-36, 1052 (internet articles purporting to be from EE Times): Petitioner has not provided any evidence that these exhibits are authentic under FRE 901. The exhibits do not fall within any of the self-authenticating exceptions of FRE 902; they are not newspapers or periodicals, but rather are print-outs from the Internet. *See, e.g., Adobe Sys. v. Christenson*, 2011 U.S. Dist. LEXIS 16977, *26 (D. Nev. Feb. 7, 2011) (“Courts do not treat printouts from internet websites as self-authenticating or admit them without foundation or authentication.”); *In re Homestore.com., Inc. v. Securities Litigation*, 347 F.Supp.2d 769, 782-783 (C.D. Cal. 2004 (“Printouts from a web site do not bear the indicia of reliability demanded for other self-authenticating documents under Fed.R.Evid. 902. To be authenticated, some statement or affidavit from someone with knowledge is required; for example, Homestore's web master or someone else with personal knowledge would be sufficient.”) Here,

Petitioner offered no evidence—only bare, conclusory attorney argument—that these documents are from “reputable publications” or even real printouts from the Electronic Products Magazine or EE Times. See Paper 18, 3/10/17 Petitioner’s Response to Patent Owner’s Objections to Evidence at 2.

Moreover, these documents are not admissible as *exhibits on the record* merely because they were cited by or relied upon by Petitioners’ expert. See FRE 703. Citing an exhibit in an expert declaration is not a loop-hole for avoiding the rules of evidence and getting in an exhibit that is otherwise inadmissible. See, e.g., *Finchum v. Ford Motor Co.*, 57 F.3d 526, 532 (7th Cir. 1995) (fact that expert relied on exhibit “does not automatically mean that the information itself is independently admissible in evidence . . . the [Plaintiff] could not have introduced the exhibit into evidence because of the hearsay rule”); *Boim v. Holy Land Found. for Relief & Dev.*, 549 F.3d 685, 703 (7th Cir. 2008) (“a judge must take care that the expert is not being used as a vehicle for circumventing the rule against hearsay”); *United States v. Rodriguez*, 125 F. Supp. 3d 1216, 1252 (D.N.M. 2015) (“The expert may not, however, simply transmit . . . hearsay [or other inadmissible evidence] to the jury.”).

Here, just because Petitioner’s expert may have relied upon an exhibit does not mean that the Board should consider such hearsay or unauthenticated exhibits

in makings its determination. Any contrary approach would render motions to exclude—and the requirement for admissible evidence in the first place—meaningless if a party can so easily circumvent inadmissibility. And in any event, Petitioner's expert never alleged (much less showed) that these documents are of the type that “experts in the particular field would reasonably rely on,” necessarily for him to even be permitted to rely upon them. FRE 703.

(2) Exs. 1021-1030 (ADSL Forum technical reports), Exs. 1031, 1039 (PowerPoint presentations), Ex. 1038 (document titled “Mixed Signal Circuits and Systems”), Ex. 1043 (document purporting to be ETSI TS 102 250-2 V2.5.1 Technical Specification), Ex. 1047 (document purporting to be a white paper): Petitioner has not provided evidence that any of these exhibits are authentic under FRE 901, and the exhibits do not fall within any of the self-authenticating exceptions of FRE 902. Indeed, Petitioner made no effort to prove that these exhibits are real, accurate, or come from reputable sources. In addition, the exhibits are hearsay under FRE 801-802 and do not fall within any of the exceptions of FRE 803—they are not periodicals or treatises.

Importantly, Petitioner *does not dispute* that these documents lack authenticity and constitute hearsay. *See* Paper 18, 3/10/17 Petitioner's Response to Patent Owner's Objections to Evidence at p. 3. Rather, Petitioner (incorrectly)

asserts only that its expert is “permitted to rely upon the above-mentioned exhibits regardless of their admissibility,” which allegedly defeats Patent Owner’s objections. *See id.* As discussed above, however, Petitioner’s expert reliance on the documents does not make them admissible *as exhibits on the record* and therefore proper for the Board to consider. *See supra*, citing cases.

(3) Ex. 1033 (website printout from kitz.co.uk), Exs. 1041-42, 1046, 1051 (miscellaneous website printouts): Each of these documents is merely a website printout from a miscellaneous website, without any evidence that the information contained is accurate or that the websites are reputable. As such, these documents are not authentic under FRE 901. The exhibits do not fall within any of the self-authenticating exceptions of FRE 902. *See, e.g., Adobe*, 2011 U.S. Dist. LEXIS 16977, *26; *In re Homestore.com., Inc.*, 347 F.Supp.2d at 782-783. Additionally, the exhibits are hearsay under FRE 801-802. These miscellaneous Internet print-outs do not fall within any of the exceptions of FRE 803. *See Jackson*, 208 F.3d at 637; *St. Clair*, 76 F. Supp. 2d at 775. Petitioner does not dispute that these documents are unauthenticated and hearsay. *See Paper 18 at 3.* And the fact that these documents were relied upon by Petitioner’s expert again does not make them *admissible*. *See supra*.

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