

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 REPLY IN SUPPORT OF ITS MOTION TO
EXCLUDE INADMISSIBLE EVIDENCE**

Petitioner has no legal or practical basis to have its dozens of un-used, un-authenticated, and unreliable exhibits admitted into evidence. Indeed, each of Petitioner's arguments has the law woefully backwards.

(1) Petitioner's assertion that it can rely solely on attorney argument to authenticate an Internet publication is contrary to law. For example, Petitioner claims that Exhibits 1019, 1035, 1036, and 1052 should each be considered a periodical and self-authenticating because "it was published by either Electronic Products Magazine or EE Times, both of which are reputable publications." But according to whom? Petitioner offers only attorney argument that either document was actually published by either of these entities, or that either entity is reputable. Even if one assumes that the logos and copyright notices indicate that the documents were published by those entities, that does not automatically make them periodicals absent actual evidence that the websites or publications are themselves reputable periodicals relied upon by persons of ordinary skill. Anyone can put a logo and copyright notice on a website and give it an official sounding name.

(2) Petitioner's belief that it is only relying on these documents for what they "describe," thus making them non-hearsay, is backwards. That is exactly the definition of hearsay—reliance for the "truth of the matter asserted." Petitioner cites to cases for the inapplicable proposition that asserted *prior art references* are

not hearsay because they are only relied upon for their disclosure—i.e., it only matters whether statements in the prior art *exist* and not whether they are *true*. See Pet. Opp. at 2. But that is not how Petitioner is using these exhibits. The challenged exhibits are not being relied upon as prior art, i.e., merely for their disclosure, but rather to affirmatively prove up whether or not something Petitioner says about DSL modems is true.

For example, Petitioner is relying on Exhibit 1019 for the *truth* that the “Motorola CopperGold chip set described in Bowie . . . implements ADSL technology” and Exhibit 1052 for the *truth* that “video streaming was available in the early 1990s.” (Pet. Opp. at 1.) These are affirmative statements that Petitioner was trying to prove as fact, to prove what something *else* in a prior art reference (e.g., Bowie’s reference to Motorola CopperGold chips) allegedly means. If the statements in the exhibits are false, then it renders Petitioner’s conclusions false.

Similarly, with respect to the remaining exhibits, Petitioner alleges that they are relied upon to “describe ADSL technology generally” (Exhibits 1021, 1022, 1029-1031, 1033, 1036, 1038, 1042, 1043), allegedly “accurately characterize the state of the art at the relevant time” (Ex. 1035, 1023-1028, 1040, 1041, 1045, 1047, 1048, 1051), or “corroborate that Bell Telephone developed a video phone in 1964” (Ex. 1002). Each of these also is a black-letter example of relying on an

exhibit for the truth of what it says—that they *in fact* describe actual features of ADSL technology or “*accurately*” (in Petitioner’s own words) characterize the art. As an example, if one of Petitioner’s Internet forum exhibits were to state (incorrectly) that DSL was capable of transmission speeds of 1 trillion Mbps, that would not “accurately” characterize the prior art or “describe ADSL technology.” In other words, to serve the purpose for which Petitioner claims it is relying upon them, the statements in the exhibits must be true. As such, they are hearsay.

(3) Even if the Exhibits could overcome the authenticity and hearsay problems of (1) and (2), Petitioner has still not shown how most of them are relevant. Neither Petitioner nor its expert ever even referenced at least 22 of the exhibits—Petitioner’s apparent theory that it can have an expert just list a multitude of documents as “background” and have them admitted just in case it *might* use them or cite to them is contrary to the letter and spirit of the Federal Rules of Evidence. So too, is Petitioner’s attempt to flip the burden on Patent Owner to provide evidence that the exhibits are *not* relevant or *not* reliable. Petitioner does not dispute that it bears the burden of showing that each exhibit it submits is admissible, including that it is relevant to a specific issue in this IPR. *Banks v. Vilsack*, 958 F. Supp. 2d 78, 82 (D.D.C. 2013) (“The proponent of the evidence bears the burden of establishing that the evidence is relevant.”); *United*

States v. 275.81 Acres of Land, 2013 U.S. Dist. LEXIS 34416, at *22 (W.D. Pa. Mar. 13, 2013) (“The burden of establishing the admissibility and relevance of evidence rests on the proponent.”); *AAMCO Transmissions, Inc. v. Baker*, 591 F. Supp. 2d 788, 793 (E.D. Pa. 2008) (“the proponent of the evidence [] has the burden of establishing its admissibility”). Vaguely having its expert claim that the documents go to “background” is far from sufficient to carry Petitioner’s burden. How exactly are they relevant to background? What portions of the documents? What products or features described in the documents? Petitioner never explains.

(4) Petitioner’s back-up argument that any and all documents listed in an expert declaration automatically overcome hearsay and authenticity deficiencies and become *admissible as exhibits on the record* is also not sustainable. Numerous legal decisions hold the opposite. *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,

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