

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC. and FITBIT, INC.
Petitioner

v.

VALENCELL, INC.
Patent Owner

Case IPR2017-00318¹
U.S. Patent No. 8,886,269

**PETITIONER APPLE INC.’S MOTION TO EXCLUDE EVIDENCE
UNDER 37 C.F.R. § 42.64(c)**

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U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

¹ Case IPR2017-01554 has been joined with this proceeding.

I. Relief Requested

Pursuant to 37 C.F.R. §§ 42.62 and 42.64(c), Petitioner Apple Inc. (“Apple”) moves to exclude from the record inadmissible evidence submitted by Patent Owner Valencell, Inc. (“Valencell”). More specifically, the Board should exclude Exhibits 2152 and 2153. It is not enough for the Board to find that this Motion is moot if the Board does not rely on the inadmissible evidence in reaching its Final Written Decision. If Exhibits 2152 and 2153 remain in the record, Valencell could continue to rely on them on appeal to the Federal Circuit, and Apple would be unfairly forced to address them again.

II. Summary of the Inadmissible Evidence and Late Supplemental Evidence

A. Apple’s Timely Objections to Exhibits 2152 and 2153

On December 29, 2017, Valencell submitted with its Patent Owner’s Reply in Support of its Conditional Motion to Amend (Paper 37) Exhibit 2152 (Analog Devices Datasheet for ADXL311 Rev A) (“Rev A Datasheet”) and Exhibit 2153 (Analog Devices Datasheet for ADXL311 Rev B) (“Rev B Datasheet”). On January 8, 2018, Apple timely filed and served objections to Exhibits 2152 and 2153 under 37 C.F.R. § 42.64(b)(1) within the allowed five business days from service of the evidence.² Apple objected to Exhibits 2152 and 2153 as inadmissible hearsay under FRE 801 and 802 and for lack of authentication under FRE 901.

² Monday, January 1, 2018 was a Federal holiday.

Apple also objected to Exhibit 2153 as prejudicial, confusing, and potentially misleading under FRE 403.

B. Valencell’s Late Service of Supplemental Evidence

Under 37 C.F.R. § 42.64(b)(2), Valencell’s deadline to serve Apple with any Supplemental Evidence was January 23, 2018—ten (10) business days after Apple’s objections.³ On January 24, 2018, *one day after the deadline*, Valencell served Apple via email with Supplemental Evidence related to Exhibits 2152 and 2153. Because this Supplemental Evidence was untimely, *Valencell is precluded from submitting it* in response to this Motion to Exclude. *See e.g., Nuvasive, Inc. v. Warsaw Orthopedic, Inc.*, IPR2013-00206, Paper 23, p. 3 (“...a party need not serve supplemental evidence, but if it will rely on such supplemental evidence, *it need serve the evidence within the required deadline.*” (emphasis added)).

III. The Board should exclude Exhibit 2152 (Rev A Datasheet)

A. Exhibit 2152 is inadmissible hearsay under FRE 801 and 802.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. FRE 801. And hearsay is inadmissible unless subject to an exception. FRE 802. Exhibit 2152 is inadmissible hearsay because it is offered to prove the truth of the matter asserted and no exception applies.

³ January 15, 2018 was the Martin Luther King, Jr. Federal Holiday.

The entirety of Exhibit 2152 constitutes an out-of-court statement. Valencell provides a quote from Exhibit 2152, asserting that “The Rev A Datasheet provides that ‘[t]he ADXL311 is built using the same proven iMEMS process used in over 100 million Analog Devices accelerometers shipped to date...’ Ex. 2152 at p. 1....” (Paper 37, p. 8.) Valencell then asserts “*From this, it is clear that both the Rev A and Rev B of the ADXL311 accelerometer are in fact MEMS (MicroElectroMechanical Systems) devices.*” (*Id.* (emphasis added).) Thus, it could not be any clearer that Valencell is impermissibly offering an out-of-court statement to prove the truth of the matter asserted. This is classic hearsay and no exception applies to Exhibit 2152. Therefore, the Board should exclude Exhibit 2152.

B. Exhibit 2152 is not properly authenticated under FRE 901.

To authenticate an item of evidence, Valencell, as the proponent, must produce evidence sufficient to support a finding that the item is what Valencell claims it is. FRE 901. Valencell has not met this burden, nor is Exhibit 2152 self-authenticating under FRE 902. Therefore, the Board should exclude Exhibit 2152.

FRE 901 “requires authentication of evidence as a condition precedent to admissibility.” *Xactware Solutions, Inc. v. Pictometry Int’l Corp.*, No. IPR2016-00594, Paper 46, p. 11 (P.T.A.B. Aug. 24, 2017) (internal quotations omitted). “This requirement is satisfied by evidence sufficient to support a finding that the

item is what its proponent claims.” *Id.* (internal quotations omitted). Valencell has not provided *any* evidence regarding where Exhibit 2152 was obtained or by whom it was produced.

Thus, Valencell has not met its burden under FRE 901. And Exhibit 2151 is not self-authenticating under FRE 902. Therefore, the Board should exclude Exhibit 2152.

IV. The Board should exclude Exhibit 2153 (Rev B Datasheet)

A. Exhibit 2153 is prejudicial, confusing, and potentially misleading under FRE 403.

Every page of Exhibit 2153 includes a large, inconspicuous watermark that reads “OBSOLETE.” This casts doubt on the veracity and relevance of the entire document. Thus, Exhibit 2153 is prejudicial, confusing, and potentially misleading. Therefore, the Board should exclude Exhibit 2153.

B. Exhibit 2153 is inadmissible hearsay under FRE 801 and 802.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. FRE 801. And hearsay is inadmissible unless subject to an exception. FRE 802. Exhibit 2153 is inadmissible hearsay because it is offered to prove the truth of the matter asserted and no exception applies.

The entirety of Exhibit 2153 constitutes an out-of-court statement. Valencell provides a quote from Exhibit 2153, asserting that “While the Rev B Datasheet provides that ‘[t]he ADXL311 is built using the same proven iMEMS process used

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