

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TELESIGN CORPORATION
Patent Owner,

v.

TWILIO INC.
Patent Owner

Case IPR2017-01977
Patent 8,755,376

**PATENT OWNER'S OPPOSITION TO
PETITIONER'S MOTION TO EXCLUDE**

I. INTRODUCTION

Patent Owner hereby opposes Petitioner's Motion to Exclude paragraphs 144–149 of EX2010 (Declaration of Patent Owner's expert, Dr. Negus). Paper 37. In forming his opinions, Dr. Negus relied on an interview with Mr. John Wolthuis, one of the co-inventors of the '376 Patent and a Product Architect for the practicing products, to better understand the technology behind the practicing product and how the invention came about. EX2010, ¶¶144–148. Petitioner moves to exclude Dr. Negus's expert opinions on the basis that Dr. Negus relied on hearsay from Mr. Wolthuis. *See* Paper 37 at 4. However, Federal Rule of Evidence 703 permits an expert to testify to an opinion that is based on otherwise inadmissible facts or data. FRE 703; *Williams v. Illinois*, 132 S. Ct. 2221, 2242 (2012). Petitioner fails to carry its burden to explain why Dr. Negus cannot rely on “facts or data in the case that the expert has been made aware of or personally observed” as explicitly permitted by Federal Rule of Evidence 703. *See Laird Techs. v. Graftech Int'l Holdings, Inc.*, IPR2014-00023, Paper 49 at 36–37 (March 25, 2015).

II. DR. NEGUS'S TESTIMONY (EXHIBIT 2010) SHOULD NOT BE EXCLUDED

The Federal Rules of Evidence explicitly state that experts may rely on inadmissible facts or data. FRE 703 (“If experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject,

they need not be admissible for the opinion to be admitted.”). Under Federal Rule of Evidence 703, “[a]n expert may base an opinion on facts or data in the case that the expert has been made aware of or personally observed.” Thus, the mere fact that Dr. Negus’s opinions at paragraphs 144–149 rely on an interview with Mr. Wolthuis does not render his opinions inadmissible. Instead, Petitioner must carry the burden to show that the facts Dr. Negus relied upon are not the kinds of facts or data that an expert in this field would reasonably rely on. Petitioner failed to carry that burden.

Petitioner’s Motion to Exclude does not address whether an expert would reasonably rely on an interview with an engineer and architect of a product to understand the features of the product. Dr. Negus found Mr. Wolthuis, one of the co-inventors of the ‘376 Patent and a Product Architect for the practicing products, to be a “knowledgeable and reliable source” for how Patent Owner’s products worked. EX2010, ¶ 145. Mr. John Wolthuis was an engineer and Product Architect who was heavily involved in the design and technical implementation of the practicing product. It is logical and reasonable for Dr. Negus to rely on Mr. Wolthuis’s technical knowledge of the practicing product to better understand how the practicing product works. Dr. Negus also independently confirmed Mr. Wolthuis’s description of the products by examining publicly-available information regarding the products. *Id.*, ¶147. Petitioner makes no allegation that the

information Mr. Wolthuis provided to Dr. Negus is for any reason unreliable.

The Board has previously held that an expert's reliance on a WebEx with Patent Owner's engineers was proper to establish nexus between practicing products and the challenged patent. *Xactware Soln's, Inc. v. Eagle View Techs., Inc.*, IPR2016-00592, Paper 50 at 26–29 (PTAB Aug. 25, 2017). The same is true as to Dr. Negus's reliance on a discussion with Mr. Wolthuis who was the Product Architect for Patent Owner's practicing products. EX2010, ¶¶ 144–149.

To the extent Patent Owner challenges Dr. Negus's understanding of the products based on information received from Mr. Wolthuis, Dr. Negus is more than qualified to understand the technology in dispute and the technical features of the practicing products. EX2010 at ¶¶ 6–26. With this expertise, Dr. Negus is more than qualified to opine that Patent Owner's Programmable Messaging and Voice products practice the challenged claims. *Id.* at ¶¶ 144–149.

Petitioner's allegation that Patent Owner is performing an “end-run” around the rule against hearsay presumes that this tribunal cannot discern between hearsay and Dr. Negus's expert opinions. *Coleman Cable, LLC et al. v. Simon Nicholas Richmond*, IPR2014-00935, Paper 65 at 13 (PTAB Dec. 21, 2015) (“The Board is comprised of a tribunal of judges of competent legal knowledge and scientific ability. There is no jury to impress, convince, or confuse in our proceedings.

Moreover, we are capable of assigning the weight to be given evidence.”); *Williams v. Illinois*, 567 U.S. 50, 69 (2012) (“When the judge sits as the trier of fact, it is presumed that the judge will understand the limited reason for the disclosure of the underlying inadmissible information and will not rely on that information for any improper purpose.”).

Ultimately, Petitioner’s objections are directed to the weight of Dr. Negus’s declaration, not its admissibility. *See Fox Factory, Inc. v. SRAM, LLC*, IPR2017-00118, Paper 59 at 62 (PTAB Apr. 2, 2018) (holding a declarant had sufficient experience in the industry to offer the challenged opinions and “Patent Owner’s arguments go more to the weight we should give his testimony rather than its admissibility.”); *Flir Sys., Inc. v. Leak Surveys, Inc.*, IPR 2014-00411, Paper 113 at 4 (PTAB Sept. 3, 2015) (“[a] motion to exclude is not a vehicle for addressing the weight to be given evidence.”); *id.* at 13–14 (“Petitioner’s basis for exclusion in reality goes to the weight we are asked to assign Dr. Hausler’s testimony.”). Notably, Petitioner does not challenge the accuracy of Dr. Negus’s analysis and opinions, nor does it contest the fact that Patent Owner’s products practice the claims.

III. CONCLUSION

For the reasons stated above, Petitioner’s motion to exclude Dr. Negus’s opinions should be denied.

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