

Case IPR2017-01977
Patent No. 8,755,376

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 REPLY TO PETITIONER'S OPPOSITION TO
MOTION TO EXCLUDE**

I. REPLY ARGUMENTS

A. Exhibits 1017 and 1018 are inadmissible hearsay

Exhibits 1017 and 1018 are both emails from Petitioner's co-founder Stacy Stubblefield and are inadmissible hearsay. Petitioner argues that Exhibit 1018 is not hearsay because it "is offered for the non-hearsay purpose of actual intent." Paper 42 at 3. Petitioner's argument, however, fails to properly apply the rules of hearsay evidence. At best, Petitioner's Reply relies on the statements contained in Exhibit 1018 as facts—relying on the truth of the matter contained in the statements. Troublingly, Petitioner omits from its opposition to the motion to exclude the annotations to Exhibit 1018 from its Reply that confirm that it is only relying on Exhibit 1018 for the truth of those annotated statements. Paper 30 at 24-25. Even now, Petitioner argues that Exhibit 1018 shows the alleged truth of the statements that Petitioner's "main SMS provider is completely down" and that Petitioner was "quickly integrating Twilio in [sic] to cover during the outage," and separately that Petitioner sought to execute an NDA "ASAP." Paper 42 at 3-4. Thus, Petitioner's arguments improperly rely the statements from Exhibit 1018 for their truth.

Petitioner's reliance on *Catalan v. GMAC Mortg. Corp.*, 629 F.3d 676, 694 (7th Cir. 2011), is misplaced. Petitioner argues that this is an analogous case because a "non-hearsay statement that a bank would not approve a loan until

foreclosure issues are resolved ... was admissible to show the bank's intent." Paper 42 at 5. However, in that case, "[a witness] testified that a [bank] loan officer told her that the ... loan applications would not be approved until their foreclosure was removed." *Catalan*, 629 F.3d at 694. Those statements expressly conveyed the bank's intent to deny the loan until the foreclosure was removed, rather than only reciting statements for their truth, such as statements indicating whether the bank denied or approved the loan application. In contrast, none of Ms. Stubblefield's statements found in Exhibit 1018 convey what her intent was.

Petitioner further argues that "other reasons" support finding that certain statements in Exhibit 1018 are not hearsay (*see* Paper 42 at 8-9). The "other reasons" also fail. For "[d]o we have an NDA?," Petitioner does not rely on the statement in its Reply, rendering the "other reasons" irrelevant to the exclusion of the Exhibit. Further, the unrelayed-upon statement is also irrelevant to the case due to the lack of any citation to it and should be excluded under FRE 401-402 and 37 C.F.R. § 42.104(b)(5). For "[i]f no, we'd like to get [an NDA] executed ASAP, if possible," Petitioner contends the statement is a command or request. The quote is not a command or request—it is not telling or asking anyone to do anything. Petitioner does not identify any cases finding similar statements to be commands or requests. Rather, it is a statement that does not fall under any exclusion or

exception to FRE 801.

For Exhibit 1017, neither Petitioner's Reply nor its opposition to the motion to exclude explain what, if anything, Petitioner relies on the Exhibit for such that it constitutes a non-hearsay "admission" under FRE 801(d)(2). Petitioner does not offer the statements in the email in its Reply as evidence of anything—let alone as evidence against Patent Owner.

B. No hearsay exception exists for Exhibit 1018

Petitioner argues that even if Exhibit 1018 is hearsay, it is admissible under the exceptions of FRE 803(3) and/or FRE 807. Paper 42 at 5-8. Regarding FRE 803(3), Petitioner argues that the statements are admissible "to show intent or motive." *Id.* However, FRE 803(3) specifically excludes "a statement of memory or belief to prove the fact remembered." FRE 803(3). As discussed above, Petitioner relies on Ms. Stubblefield's statements that are not directed to her state of mind regarding any intent to enter into the NDA to gain access to Patent Owner's confidential information. Rather, the statements and how Petitioner relies on them are directed to her assertion of certain facts, such as her assertion that the "main SMS provider is down." Exhibit 1018 at 1. The other portion of Exhibit 1018 cited by Petitioner in its opposition on page 6, reflecting a statement by Patent Owner's employee, is not relied on at all in its Reply and is therefore irrelevant to this case and does not save the statements on which Petitioner does

rely. Moreover, there is nothing in Patent Owner employee's statement that reflects Ms. Stubblefield's motives. The statement relates to Petitioner's use of Patent Owner's products. FRE 803(3) provides no valid exception for admitting Exhibit 1018 into evidence.

Further, Petitioner provides no suitable reason for applying the residual exception of FRE 807 to Exhibit 1018. Specifically, Petitioner asserts: (1) the "statements have circumstantial guarantees of trustworthiness;" (2) the exhibit "is offered as evidence of a material fact;" and (3) the exhibit "is more probative on intent than any other evidence that the proponent can obtain through reasonable efforts." Paper 42 at 7. However, as Patent Owner discussed in its Motion to Exclude, Ms. Stubblefield is a co-founder of Petitioner and is currently employed by Petitioner. She is an available declarant who could have provided direct testimony, yet Petitioner chose to rely on hearsay so it could offer up its own interpretation of her statements while avoiding cross-examination. There is no corroborating support for the relied-upon statements. And to the extent any of Petitioner's assertions of Ms. Stubblefield's motives in 2010 have merit, they could have offered direct testimony of Ms. Stubblefield in this proceeding, making her available to Patent Owner for cross-examination. As such, the Exhibit is not more probative than any other evidence easily available to Petitioner and does not

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