

Case IPR2017-01977  
Patent 8,755,376

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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TELESIGN CORPORATION

Petitioner

v.

TWILIO INC.

Patent Owner

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Patent 8,755,376

IPR Case Number: IPR2017-01977

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**PETITIONER'S REPLY IN SUPPORT OF ITS  
MOTION TO EXCLUDE EVIDENCE**

## **I. INTRODUCTION**

Contrary to Patent Owner's assertion, Petitioner does not seek to exclude a portion of Dr. Negus's opinion because he relies on hearsay from Patent Owner's co-founder that its products practice the challenged claims. Rather, Petitioner seeks to exclude the portion of Dr. Negus's opinion in question because all it does is convey these hearsay statements. Hearsay does not become admissible merely because an expert relays the hearsay through an expert report. As set forth below, Patent Owner is unable to identify anything other than conclusions in Dr. Negus's expert declaration to otherwise support the assertion that Patent Owner's products purportedly practice the challenged claims (as opposed to an actual analysis comparing the products to the claims, which Dr. Negus failed to do). Dr. Negus's opinion is not based on sufficient facts or data, nor is it the product of reliable principles or methods—and as such, the Board should exclude paragraphs 144-149 of his expert declaration, EX2010, under Federal Rule of Evidence 702.

## **II. ARGUMENT**

Critically, Patent Owner devotes just one sentence of its brief to show that Dr. Negus does not just parrot back interested witness Mr. Wolthuis's conclusion that Patent Owner's product practices the challenged claims. Specifically, Patent Owner states in conclusory fashion that in paragraph 147 of his declaration Dr. Negus "independently confirmed" Mr. Wolthuis's hearsay statements that Patent

Owner's product practices the challenged patent. PO Resp. at 2. But Patent Owner is unable to provide any explanation. Nor could it because paragraph 147 does not include any analysis whatsoever. Rather, it makes the bare assertion that Dr. Negus "was able to independently confirm key elements of this description of Mr. Wolthuis . . . ." EX2010 at 62, ¶ 147. This stands in stark contrast to the only case Patent Owner advances in support of its position that Dr. Negus conducted an analysis. In *Xactware Solutions, Inc. v. Eagle View Techs., Inc.*, patent owner provided "extensive evidence of nexus" including an expert declaration "that includes a claim chart detailing where each limitation of the challenged claim is found in its Twister and Render House products." IPR2016-00592, Paper 50 at 27 (P.T.A.B. Aug. 25, 2017). Here, unlike in *Xactware Solutions Inc.*, Dr. Negus provides no analysis of whether Patent Owner's product practices the challenged patents and instead regurgitates the conclusions of Patent Owner's co-founder Mr. Wolthuis. Thus, Dr. Negus' opinion should be excluded under Federal Rule of Evidence 702 because it is not based on sufficient facts or data or the product of reliable principles or methods.<sup>1</sup>

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<sup>1</sup> Patent Owner devotes its brief to the unremarkable proposition that an expert is allowed to rely on facts and data in the form of hearsay testimony. PO Resp. at 1-3. But that is not the issue. The issue is what Dr. Negus did with this hearsay.

Patent Owner asserts that Dr. Negus’s wholesale lack of analysis in concluding that Patent Owner’s product practices the challenged patent goes to the weight Dr. Negus’s conclusion should be given, not its admissibility, citing *Fox Factory, Inc. v. SRAM, LLC*, IPR2017-00118, Paper 59 (PTAB Apr. 2, 2018) and *Flir Sys., Inc. v. Leak Surveys, Inc.* and *Flir Sys., Inc. v. Leak Surveys, Inc.*, IPR 2014-00411, Paper 113 (PTAB Sept. 3, 2015) in support. But neither of these cases held an expert opinion admissible that merely parrots back the out-of-court statements of an interested witness that a product meets the limitations of a patent. In both *Fox Factory, Inc.* and *Flir Sys., Inc.*, the expert had conducted an actual analysis. IPR2017-00118, Paper 59 at 51 (PTAB Apr. 2, 2018); IPR 2014-00411, Paper 113 at 14 (PTAB Sept. 3, 2015).

Lastly, Patent Owner absurdly asserts that “Petitioner does not challenge the accuracy of Dr. Negus’s analysis and opinions, nor does it contest the fact that

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Here, he did not perform an actual analysis of whether Patent Owner’s products meet each and every limitation of the challenged patent. And as such, his opinion should be excluded because it serves to merely pass along hearsay. *Ericsson Inc. v. Intellectual Ventures I LLC*, IPR2014-01149, 2015 Pat. App. LEXIS 12573, \*23 (Paper 68) (PTAB Dec. 9, 2015) (“an expert must do more than merely serve as a conduit for hearsay”).

Patent Owner's products practice the claims." PO Resp. at 4. As detailed in Petitioner's reply in support of its petition, Patent Owner was unable to secure statements from anyone, including both Mr. Wolthuis or Dr. Negus, that its products practice each and every limitation of the challenged claims. Paper 29 at 16-18. So, of course, Petitioner contests that Patent Owner's product practices the challenged claims and the accuracy of Dr. Negus's opinion concluding as much. But it is black letter law that "the accuracy" of Dr. Negus's opinion is not a basis for a motion to exclude under Federal Rule of Evidence 702 and that it why Petitioner did not advance this argument for purposes of the current motion. *See, e.g., Lapsley v. Xtek, Inc.*, 689 F.3d 802, 805 (7th Cir. 2012) ("A Daubert inquiry is not designed to have the district judge take the place of the jury to decide ultimate issues of credibility and accuracy. If the proposed expert testimony meets the Daubert threshold of relevance and reliability, the accuracy of the actual evidence is to be tested before the jury with the familiar tools of vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof.").

### III. CONCLUSION

For the reasons discussed above and in Petitioner's motion to exclude, the Board should exclude paragraphs 144-149 of Dr. Negus's expert declaration EX2010.

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