

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WESTERN DIGITAL CORPORATION
Petitioner

v.

SPEX TECHNOLOGIES, INC.
Patent Owner

Case No. IPR2018-00082
Patent 6,088,802

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

Mail Stop **Patent Board**
Patent Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450

I. PRELIMINARY STATEMENT

Pursuant to this Board's Rules and the Federal Rules of Evidence ("FRE"), Petitioner moves to exclude the following exhibit, which Patent Owner submitted, and to which Petitioner timely objected.

Exhibit No.	Description
2004	Plaintiff SPEX Technologies, Inc. Disclosure of Asserted Claims and Infringement contentions

In accordance with the Trial Practice Guide requirements, Petitioner

- (a) identifies where in the record Petitioner's original objections were made,
- (b) identifies where in the record this exhibit was relied upon by Patent Owner,
- (c) addresses objections to the exhibit in numerical order (as only one exhibit is being challenged), and
- (d) explains the basis and grounds for each objection.

II. EXHIBIT 2004 SHOULD BE EXCLUDED

Petitioner timely objected to Exhibit 2004 as irrelevant under FRE 402 and 37 C.F.R. § 42.62; as unfairly prejudicial, confusing, misleading, and a waste of time under FRE 402; and as hearsay under FRE 801 and 802 and 37 C.F.R. § 42.62. Paper 14 at 2-3. Patent Owner relies on Exhibit 2004 in Patent Owner's Preliminary Response at 8 in support of its argument that the Board should have exercised its discretion to deny the Petition. Paper 6 at 11.

Exhibit 2004 is irrelevant under FRE 402 and 37 C.F.R. § 42.62 because neither it nor its contents are cited or discussed in the patent, file history, or instituted

references. Furthermore, the exhibit discusses subject matter unrelated to this *inter partes* review—allegations of patent infringement are irrelevant to these proceedings—and is dated many years after the priority date of the patent.

Exhibit 2004 should be excluded under FRE 403 because reliance on irrelevant discussions of products accused of infringement is misleading, a waste of time, and risks confusing the issues in this proceeding. Exhibit 2004 is particularly misleading and unfairly prejudicial in this case because Patent Owner’s infringement allegations are not only unproven, they are also incorrect.

Exhibit 2004 should be excluded also because it constitutes hearsay under FRE 801 and 802 and 37 C.F.R. § 42.62. Infringement contentions are out-of-court statements used for the truth of the matter asserted, and Exhibit 2004 contains unsworn representations from Patent Owner regarding products accused of infringement.

III. CONCLUSION

In view of the reasons explained above, Petitioner respectfully requests the Board exclude Exhibit 2004.

Dated: November 30, 2018

Respectfully submitted,

By: /Brian M. Buroker/

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CERTIFICATE OF SERVICE

The undersigned certifies service pursuant to 37 C.F.R. § 42.6(e) on the Patent Owner via e-mail a copy of this Petitioner's Motion to Exclude Evidence on the following counsel of record for Patent Owner:

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DATED: November 30, 2018

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