Filed on behalf of Patent Owner Network-1 Security Solutions, Inc.

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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AVAYA INC., DELL INC., SONY CORP. OF AMERICA, and
HEWLETT-PACKARD CO.
Petitioners

v.

NETWORK-1 SECURITY SOLUTIONS, INC.
Patent Owner

Case IPR2013-00071[1]
Patent 6,218,930
Administrative Patent Judges Joni Y. Chang, Justin T. Arbes, and Glenn J. Perry

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PATENT OWNER'S REPLY TO PETITIONER'S OPPOSITION TO MOTION TO EXCLUDE PURSUANT TO 37 C.F.R. § 42.64(c)

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[1] IPR2013-00385 and IPR2013-00495 have been joined with this proceeding.

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In its Opposition, Avaya (1) relies on untimely new evidence that should be expunged, (2) attempts to divert the Board's attention from the sole issue raised in Network-1's motion (whether the Mercer Report is inadmissible hearsay) based on flawed arguments, and (3) fails to rebut Network-1's showing that the Mercer Report is inadmissible hearsay. Network-1 addresses (1) through (3) in turn.

I. Avaya's new evidence is untimely and should be expunged.

In opposing this motion, Avaya attempts to introduce into the record six new exhibits: AV 1048–1053. This is procedurally improper, and these new exhibits should be expunged from the record, for two reasons.

First, attempting to introduce new exhibits at this stage of the proceedings violates 37 C.F.R. §42.64(b)(2):

> *Supplemental evidence*. The party relying on evidence to which an objection is timely served may respond to the objection by serving supplemental evidence within ten business days of service of the objection.

37 C.F.R. §42.64(b)(2) (emphasis added). Network-1 timely served its objection to the Mercer Report on October 29, 2013. Accordingly, if Avaya intended to rely on any supplemental evidence (AV 1048–1053) to respond to Network-1's objection, it was required to serve such evidence by November 5, 2013. It did not.

Second, attempting to introduce these new exhibits just a few weeks before oral argument violates the Scheduling Order. The due date for Motions to Exclude

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was December 11, 2013. Paper 69. Avaya's untimely evidence prevents Network-1 from objecting to and bringing a Motion to Exclude such evidence.

Accordingly, these exhibits should be expunged from the record.

II. Avaya's attempt to divert the Board's attention from the sole issue in this motion is irrelevant and flawed.

Most of Avaya's brief attempts to divert the Board's attention from the issue presented in Network-1's motion – whether the Mercer Report is admissible. The issue is *not* whether Network-1 complied with its disclosure obligations. If this issue were properly briefed, Network-1 would demonstrate that it has. Moreover there are two critical flaws with Avaya's diversion:

Flaw 1: Avaya argues that the entire 145 page Mercer Report should be introduced as evidence solely based on footnote 287 of the report. If the footnote were admissible, that would not make the entire 145-page report admissible.

Flaw 2: The Deptula transcript does not include any "relevant information that is inconsistent with a position advanced" by Network-1. 37 CFR §42.51(b)(1)(iii). The quoted footnote (287) makes two points: Deptula is not aware (1) that he or Merlot received recognition or praise for the '930 Patent, and (2) of anyone who expressed surprise for the ideas in the '930 Patent. Opp. 4. These points, which are at best marginally relevant, are not inconsistent with any positions advanced by Network-1. Network-1 never asserted that (a) Deptula or Merlot received recognition or praise for the '930 Patent, or (b) Deptula was aware

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of anyone who expressed surprised for the ideas expressed in the '930 Patent.

III. The Mercer Report is inadmissible hearsay.

In its Motion, Network-1 demonstrated that the Mercer report is (a) inadmissible hearsay under Rules 801 and 802, and (b) inadmissible hearsay within hearsay under Rule 805. Avaya makes two arguments in response. Both fail.

A. The Mercer Report is not admissible under Rule 807.

Avaya contends that the Mercer Report is admissible under Rule 807. This contention fails from the outset because the Report cannot even satisfy the first requirement of admissibility under Rule 807: that "the statement has equivalent circumstantial guarantees of trustworthiness." Fed. R. Evid. 807 (emphasis added). Avaya makes two arguments in its attempt to support this requirement:

(1) that the report was "lodged in a case against Patent Owner." Opp. 6. This argument does not make sense. Every time a court excludes a document as hearsay, that document was filed or lodged in a case. Lodging or filing a document with a court does not transform hearsay into non-hearsay. Moreover, case law confirms that lodged or filed expert reports are excluded as hearsay. *See Kuryakyn Holdings, Inc. v. Just in Time Distrib. Co.*, 2013 U.S. Dist. LEXIS 160940, *9 n.3 (W.D. Wis., Nov. 12, 2013) ("The court will not admit either side's expert reports because they constitute hearsay."); *Redondo Constr., Co. v. Izquierdo*, 929 F. Supp. 2d 14, 19 (D.P.R. 2013) ("Expert reports are inadmissible hearsay.").

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(2) that the cited footnote is "sworn deposition testimony." *Id*. This argument fails for two reasons. *First*, this argument only relates to a single footnote (287) from the entire 145-page report. That one footnote includes sworn deposition testimony cannot serve as a guarantee of trustworthiness for the other 145 pages. *Second*, deposition transcripts are excluded as inadmissible hearsay, especially those from another proceeding. Avaya does not cite any authority for its argument – because the authority is directly to the contrary. *See Planet Goalie, Inc. v. Monkeysports, Inc.,* 2013 U.S. Dist. LEXIS 57499,14 (C.D. Cal. Apr. 22, 2013) (holding that "deposition testimony [of a non-party] is hearsay" and therefore not "admissible evidence"); *Marshak v. Treadwell*, 58 F. Supp. 2d 551, 570 (D.N.J. 1999) ("Charlie Thomas was neither a party nor a witness in the instant litigation and his deposition transcript from a prior lawsuit was therefore objectionable, on its face, as hearsay.").

B. The Deptula quote is not an admission of a party opponent.

Avaya attempts to overcome the second layer of hearsay with a flawed contention that "the Deptula Transcript constitutes non-hearsay as an admission by a party opponent." Opp. 7 (citing Fed. R. Evid. 801(d)(2)(C)-(D)).

First, to be non-hearsay under Rule 801(d)(2)(C), the statement must be "made by a person whom the party authorized to make a statement on the subject." Fed. R. Evid. 801(d)(2)(C). Avaya's speculation that Deptula was "likely …

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