UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

WAVEMARKET, INC. D/B/A LOCATION LABS
Petitioner

v.

LOCATIONET SYSTEMS, LTD.
Patent Owner

Case IPR2014-00199
Patent 6,771,970

Petitioner's Reply to Patent Owner's Opposition to Motion to Exclude Evidence Pursuant to 37 C.F.R. § 42.64

Pursuant to 37 C.F.R. §§ 42.23-24, and the Scheduling Order (Paper No. 19) Petitioner Wavemarket d/b/a Location Labs respectfully offers the following Reply to Patent Owner's Opposition to Motion to Exclude Evidence filed January 13, 2015 ("Opp."). The Opp. contains no unambiguous assertions of material facts.

I. EXHIBITS 2017-2019 ARE UNAUTHENTICATED HEARSAY

PO admits that Exhibits 2017-2019 ("Exhibits"), and the copyright dates appearing thereon, are offered to show that the contents of the documents were "publically available before the relevant time frame" (Opp., p. 12), but inconsistently argues that they are not offered for the truth of the matter asserted. PO has offered no evidence that the documents were actually "published" or otherwise available to the public, and offers no authority for the proposition that copyright notices are adequate evidence of public availability. As explained in Petitioner's Motion to Exclude Evidence filed December 30, 2014 ("ME"), neither the Declaration of Yue Li, nor anything else of record, provides any factual basis for the claim that the Exhibits were "publicly available before the relevant time frame."

PO alleges that the Exhibits are admissible as "pages from common dictionaries." Opp., pp. 2 and 7. The only authority cited for this sweeping proposition is *Freight Train Adver., LLC v. Chi. Rail Link, LLC*. This decision does not appear to have been published as a precedential opinion. Additionally,

the Court qualified its conclusory assertion by stating "regardless, the Court has not relied upon [the Exhibit] in its analysis." (fn.4, p. 4). A copy of this unpublished, non-precedential, non-binding opinion is attached as **Exhibit 1023**. Furthermore, as Petitioner previously argued, the dictionaries cited by PO are not "common dictionaries," they are ***specialized*** dictionaries. ME, p. 5.

PO argues that the Board should take judicial notice of the dictionary definitions contained in the Exhibits, yet fails to cite any precedent for doing so in the context of construing a claim term. The only patent case cited, *Vitronics*, 90 F.3d 1576, does not involve, or even comment on, taking ***judicial notice*** of dictionary definitions. PO also incorrectly alleges that the "Petitioner does not challenge the accuracy of the noticed facts." Opp., p.11. Petitioner has made its disagreement abundantly clear. *See, e.g.*, ME, pp. 5-6.

Contrary to the contentions of the PO, Dr. Mandayam's declaration and cross-examination testimony do not establish the cited dictionaries as "reliable authority" to qualify for the learned treatise exception. Dr. Mandayam did not testify that he personally selected the cited dictionaries, rather was ***provided*** with them, and does not even know who selected them. Exhibit 1019, p. 64, ll. 9-21. PO cites no authority finding that a dictionary definition qualifies under the learned treatise exception.

The PO's arguments regarding the "Ancient Documents" exception are unavailing. Authentication is a prerequisite for this exclusion. However, the Exhibits are not properly authenticated, ME, p. 8.

First, PO provides no basis for the assertion that the cited dictionaries are "commonly" or generally relied upon for purposes of the commercial publications exception. This argument is apparently premised by characterizing the cited dictionaries as "common" dictionaries, a premise disputed by Petitioner. Second, PO does not squarely address the fundamental proposition that dictionaries are simply not "commercial publications" (*i.e*, compilations of data, lists, directories). PO cites no authority finding that dictionaries qualify under this exception.

To qualify under the "Ancient Documents" exception, the document must be one "whose authenticity is established." ME, p. 8. For the reasons previously explained, the authenticity of Exhibit 2019 has not been established, thus this Exhibit does not qualify for this exception to the hearsay rule.

Finally, with regard to the residual exception to the hearsay rule, PO argues that extrinsic evidence is more probative than any other evidence with respect to the meanings of the disputed terms, citing *Atofina v. Great lakes Chem. Corp.,* 441 F.3d 991, 996 (Fed. Cir. 2006). *Atofina* in no way supports PO's argument, it supports Petitioner's position. *Id.* at 996 ("[o]ur primary focus in determining the

ordinary and customary meaning of a claim limitation is to consider the intrinsic evidence of record").

II. THE DECLARATION OF DR. MANDAYAM CANNOT SERVE AS A CONDUIT TO THE ADMISSION OF OTHERWISE INADMISSIBLE EVIDENCE

Paragraphs 28 and 32 of the Mandayam Decl. (**Exhibit 2016**) contain *verbatim* quotations of the definitions of "database" and "engine" appearing in the Exhibits. This is not "opinion" testimony as alleged by PO, thus PO's arguments are misplaced. It is improper for the Patent Owner to use these paragraphs as a backdoor to the admission of unauthenticated hearsay (the dictionary definitions reproduced in paragraphs 28 and 32). *Louis Vuitton Malletier v. Dooney & Bourke, Inc*., 525 F. Supp.2d 558, 666 (S.D. N.Y. 2007) (expert testimony cannot act as a conduit for introduction of hearsay).

III. CONCLUSION

For at least the reasons noted above and already of record, portions of Exhibit 2016, and Exhibits 2017-1019, should be excluded from evidence.

Dated: January 20, 2015

Respectfully submitted,
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