

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 MOTION TO EXCLUDE EVIDENCE
PURSUANT TO 37 C.F.R. § 42.64**

Pursuant to 37 C.F.R. § 42.64(c), and the Scheduling Order (Paper No. 19) Petitioner Wavemarket d/b/a Location Labs respectfully moves to exclude portions of **Exhibit 2016**, as well as **Exhibits 2017-2019** in their entirety, all proffered with the Patent Owner's Response of August 11, 2014. The Federal Rules of Evidence (FRE) apply to these proceedings according to the provisions of 37 C.F.R. §42.62(a), and these rules form the basis of the objections contained herein. These objections set forth herein were previously raised by service on counsel for Patent Owner on August 15, 2015 ("Petitioner's Evidentiary Objections Pursuant to 37 C.F.R. § 42.64"; **Exhibit 1021** submitted herewith).

I. OBJECTIONS TO EXHIBIT 2016 - DECLARATION OF DR. MANDAYAM

Paragraphs 28 and 32 of the Declaration of Patent Owner's Expert Dr. Madayam ("Mandayam Decl."; **Exhibit 2016**) should be excluded because they serve as an improper conduit to the admission of unauthenticated hearsay. This objection was timely made by Petitioner. *See*, **Exhibit 1021**, p. 4. These paragraphs contain quotations of cherry-picked dictionary definitions contained in **Exhibits 2017-2019**. These Exhibits are unauthenticated hearsay for the reasons explained fully below. It is improper for the Patent Owner to use these paragraphs of the Mandayam Decl. as a backdoor to the admission of unauthenticated hearsay.

Paragraphs 28 and 32 of the Mandayam Decl. proffer a claim construction that is alleged to be "consistent with" the specification of the '970 patent. However, instead of basing its claim construction on the plain language of the claim, consistent with the specification, the Patent Owner seeks to improperly import limitations into the claims from cherry-picked extrinsic dictionary definitions. In reality, the proffered claim constructions are a regurgitation of cited "definitions" provided to Dr. Mandayam. Moreover, the documents are cited for the proposition that the contents thereof were known to those of ordinary skill in the art as of the date of invention associated with the '970 patent. FRE 703 is not intended to serve as a backdoor to the admission of otherwise inadmissible hearsay evidence. *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); 7 Ann. Patent Digest § 44:44 (improper for an expert to testify as to inadmissible facts as a back door approach of getting inadmissible evidence before the trier of fact). Thus, paragraphs 28 and 32 are properly excluded from the Patent Owner's evidence pursuant to at least FRE 802.

II. EXHIBITS 2017-2019

Exhibits 2017, 2018 and 2019, purported to be specialized dictionary definitions of "database" and "engine," constitute impermissible hearsay that does

not fall within any know exception, have not been adequately authenticated, and thus are inadmissible pursuant to at least FRE 901 and 802. These objection were presented by Petitioner in a timely fashion. *See, Exhibit 1021*, pp. 2-3.

Copyright dates and other date information appearing on each of these Exhibits are hearsay because that information is being offered to prove the truth of the matter being asserted; namely, that the contents of the documents were publicly available, or at least represents the views of a person having ordinary skill in the art, *as of those dates*. *Hilgraeve, Inc. v. Symatec Corporation*, 271 F.Supp.2d 964, 974 (E.D. Mich. 2003) ("[p]laintiff correctly notes that the dates imprinted on these documents are hearsay when offered to prove the truth of the matter asserted"). Also, the definitions of "database" and "engine" appearing in the Exhibits are hearsay because they are being offered for the truth of the matter being asserted, as evidenced by the adoption of a claim construction position for these terms that relies heavily on the cited dictionary definitions. **Exhibit 2016**, ¶¶ 28 and 32.

Contrary to the Patent Owner's claims, no known hearsay exceptions are believed to be applicable. The Patent Owner contends that evidentiary objections to pages from "common dictionaries" are not objectionable for hearsay or lack of authentication. *See, "LOCATIONET SYSTEMS, LTD.'S SUPPLEMENTAL EVIDENCE AND RESPONSE TO PETITIONER'S EVIDENTIARY*

OBJECTIONS PURSUANT TO 37 C.F.R. § 42.64," **Exhibit 1022**, pp. 2-4.

However, despite the lack of adequate cited authority for such a sweeping statement, Exhibits 2017-2019 are not taken from *common* dictionaries. Instead, they are taken from less commonly cited *specialized* dictionaries. The authority cited by Patent Owner is inapplicable.

The Patent Owner urges the Board to take judicial notice of the definitions of "database" and "engine" pursuant to FRE 201. **Exhibit 1022**, pp. 4-5.

However, the fundamental requirement for taking judicial notice is that the fact noticed "is not subject to reasonable dispute." FRE 201(a). The definitions of "database" and "engine" are certainly subject to reasonable dispute. Different dictionaries often define the same term in different ways, raising a dispute as to the most appropriate definition. This fact is proven by the Patent Owner's own evidence. **Exhibits 2017** and **2018** contain two different definitions of the term "database" appearing in two different dictionaries. This highlights the subjective nature of dictionary definitions. Also, the issue is the interpretation of "map database" and "map engine for manipulating said map database" in the context of claim 18 of the '970 patent. Dictionary definitions are not drafted in the context of how the terms are used in any particular patent. The Federal Circuit has noted these shortcomings. *Phillips v. AWH Corp.*, 415 F.3d 1303, 1322 (Fed. Cir, 2005) ("Moreover, different dictionaries can contain somewhat different definitions for

Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.