UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ORACLE CORPORATION
and NETAPP, INC.

Petitioners,

v.

CROSSROADS SYSTEMS, INC.

Patent Owner.

Case IPR2014-01207

U.S. Patent No. 7,051,147

REPLY IN SUPPORT OF
PETITIONERS' MOTION TO EXCLUDE

I. Exhibit 2311 (Chronology Table)

Patent Owner argues that Ex.2311 is "merely a summary demonstrative exhibit." Paper 64 at 2. However, Ex. 2311 includes assertions that are nowhere contained in the Patent Owner Response. For instance, Patent Owner's response nowhere alleges that the "conception of access controls and virtual local storage" occurred on March 22, 1997, as alleged in Ex. 2311. *See* Ex. 2311 at 1, Paper 29 at 21-22. As another example, the response does not lay out the chronology of events considered to be most relevant to the conception and diligence. *See id.* That chronology of events is set forth only in Exhibit 2311. For these reasons Ex. 2311 incorporates by reference assertions not contained in the Patent Owner's response, in contravention of 37 C.F.R. § 42.6(a)(3).

Patent Owner does not respond to Petitioners' argument that Exhibit 2311 contains hearsay outside any recognized exception. Rule 1006 permits use of summaries but does not exempt summaries from the hearsay rules. *BP Amoco Chem. Co. v. Flint Hills Res., LLC*, 2009 U.S. Dist. LEXIS 131268, *4.

II. Exhibits 2300-2304, 2306-2310 and 2312-2323 (Documents Offered to Show Prior Invention)

Patent Owner fails to identify any testimony of a person with personal knowledge of Crossroad's record-keeping practices in 1997, the year in which the documents were created and initially stored as alleged business records. Even in

the case cited by Patent Owner the proponent offered the testimony of a witness with first-hand knowledge of the business' record keeping practices at the time in question. *BetterBags, Inc. v. Redi Bag USA LLC*, C.A. No. H-09-3093, 2011 U.S. Dist. LEXIS 130525, at *21-23 (S.D. Tex. Nov. 10, 2011). The testimony proffered by Crossroads cannot establish that Exhibits 2300-2304, 2306-2310 or 2312-2323 are business records under Rule 803(6).

Patent Owner does not respond to Petitioner's argument that **Exhibits 2303 and 2323** are letters from patent counsel and thus cannot be said to be records of business activity regularly conducted by Crossroads. Paper 64 at 6. Like laboratory notebooks discussed in *Alpert v. Slatin*, letters from counsel concerning a patent application cannot be said to be records of Crossroads' regularly conducted business activity. 305 F.2d 891, 895-96 (CCPA 1962).

With regard to **Exhibits 2307 and 2308**, Patent Owner does not contest that the documents were prepared by the president of a company named Infinity CommStor, LLC or that the record contains no evidence demonstrating the role of Infinity CommStor or its relationship, if any, with Crossroads. See Paper 64 at 8. Patent Owner merely responds that Petitioner did not sufficiently specify its authenticity objection. *Id.* To the contrary, Petitioner specifically stated that "the exhibits have not been properly authenticated (FRE 901)." Ex. 1236 at 6.

Patent Owner does not point to any citations in the Response to **Exhibits 2312 or 2316- 2320**. Paper 64 at 8-9. Rather, those citations are provided only in Ex. 2311. Accordingly, use of these exhibits would constitute an improper incorporation by reference. See 37 C.F.R. § 42.6(a)(3).

With respect to **Exhibits 2301, 2302, 2304, 2306 and 2310** (trial and deposition transcripts from the *Chaparral/Pathlight* litigation) Patent Owner identifies no evidence that any of the witnesses are actually unavailable, which is a requirement of Rule 804. *See* Paper 64 at 11-13. The closest Patent Owner comes is an assertion that Mr. Peterman could not remember certain facts. Paper 64 at 11. The precedents cited by Patent Owner are inapposite, as they involve cases in which the unavailability of the declarant was demonstrated. *See Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1184 (3d Cir. 1978); *Horne v. Owens-Corning Fiberglas Corp.*, 4 F.3d 276, 282-283 (4th Cir. 1993). Moreover, the patent at issue in this IPR did not even exist at the time the earlier testimony was taken. It therefore could not be said that the previous litigant had a "like motive to cross-examine about the ***same matters*** as the present party would have," as suggested by *Lloyd v. American Export Lines, Inc.*, 580 F.2d 1179, 1187 (3d Cir. 1978) (emphasis added). In the *Chaparral/Pathlight* litigation the patent was different, the claimed subject matter was different, and the proof required to demonstrate

conception and diligence was thus necessarily different. The prior testimony was not concerning the "same matter" as required by *Lloyd*.

Turning to **Exhibit 2313,** Patent Owner's Response fails to provide any page citations to Exhibit 2313. Paper 64 at 14. Ex. 2313 should be excluded because use of this exhibit now would be improper incorporation by reference.

III. Exhibit 2050 (Schedule of License Agreements)

Patent Owner does not dispute that it failed to identify any testimony attesting to the accuracy of the information set forth in the last two columns of Exhibit 2050. Accordingly, Exhibit 2050 cannot be admitted as a summary under FRE 1006 or otherwise. *BP Amoco Chem. Co. v. Flint Hills Res., LLC*, 2009 U.S. Dist. LEXIS 131268, *4 (After meeting the threshold "voluminous and inconvenient" requirement, the proponent of a summary must establish that there is a proper foundation as to the admissibility of the material that is summarized. **Additionally, the proponent must demonstrate that the summary is accurate**.) (internal citations omitted, emphasis added).

IV. Exhibits 2044-45 (Sales Information) and Ex. 2043 (Bianchi Declaration) ¶6

Patent Owner does not dispute that Mr. Bianchi admitted that **neither Exhibit 2044 nor Exhibit 2045** were prepared in the ordinary course of Crossroads' business. *Id.* at 163:24-164:10. Patent Owner also does not contest that, although these exhibits are presented as evidence of a sales trend which

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