UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ORACLE CORPORATION,
NETAPP, INC. and
HUAWEI TECHNOLOGIES CO., LTD.

Petitioners,

v.

CROSSROADS SYSTEMS, INC.

Patent Owner.

Case IPR2014-01209

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

PETITIONERS' MOTION TO EXCLUDE

I. RELIEF REQUESTED

Pursuant to 37 C.F.R. § 42.64(c), Petitioners move to exclude all of Exs. 2300-2304, 2306-2311, 2312-2323, 2035-36, 2043¶6, 2044-45, and 2050. Petitioners timely objected to these same exhibits on June 2, 2015. See Ex. 1236.

II. STATEMENT OF REASONS FOR THE RELIEF REQUESTED

This motion is directed to (A) a chronology of events associated with the alleged prior invention (Ex. 2311), (B) the laboratory notebooks and related development documents referenced therein (Ex. 2300-2304, 2306-2310 and 2312-2323), (C) the table purporting to summarize patent licenses (Ex. 2050), (D) the documents relating to sales of routers and bridges (Ex. 2044-45) together with Mr. Bianchi's associated opinion (Ex. 2043 ¶6), and (E) the alleged industry awards (Exs. 2035-36). Each of the requests to exclude and the basis for doing so is addressed below.

A. Exhibit 2311 (Chronology Table)

According to Patent Owner's counsel, "Exhibit 2311 is a chronology that Crossroads' lawyers have put together based on the documents referenced in Exhibit -- or Paragraph 2 of [Bianchi's] declaration [Ex. 2324]." Ex. 1221 at 262. Patent Owner does not offer any declaration of its counsel to identify who prepared the chronology or can attest to its accuracy. Nor does Patent Owner point to any testimony from which the accuracy of the chronology could be determined. The only way to confirm the accuracy of the chronology is to review the individual

documents referenced therein. Because each of the documents referenced in the chronology is inadmissible (see discussion *infra* Section B), the chronology likewise is inadmissible.

Exhibit 2311 also contains hearsay not within any recognized exception. The statements in the "Event" column of the table improperly characterize the evidence. For example, Exhibits 2300 to 2302 purport to demonstrate "conception of access controls and virtual local storage." Ex. 2311 at 1. The statements set forth in the table, however, are unsworn hearsay statements and do not fall within any recognized exception to the hearsay rule.

Further, Exhibit 2311 constitutes an improper attempt to incorporate by reference the arguments set forth therein. The Patent Owner's Response brief spans the entirety of the allotted sixty pages. Paper 29. The chronology set forth at Exhibit. 2311 consists of an additional seven pages and includes arguments in the form of characterizing "Events" as being proven by "Evidence" identified in the table. Patent Owner's Response also fails to reference any specific page citations to Exhibits 2312-2313, 2316- 2320; rather, those citations are provided only in Ex. 2311. For this additional reason Exhibit 2311 constitutes an improper attempt to incorporate by reference arguments into the Patent Owner's response. See 37 C.F.R. § 42.6(a)(3).

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

Patent Owner has the burden of establishing that the exhibits fall within the Rule 803(6) exception to the hearsay rule. *Wojciak v. Nishiyama*, 61 USPQ 2d 1576, 1582 (BPAI 2001). Patent Owner "must establish each of the eight elements necessary to invoke the Rule 803(6) exception":

> A [1] *** report *** or data compilation, in any form, of
> [2] acts, events, conditions, opinions, or diagnoses,
> [3] made at or near the time by, or
> [4] from information transmitted by, a person with knowledge, if
> [5] kept in the course of a regularly conducted business activity, and
> [6] if it was the regular practice of that business activity to make the report *** or data compilation,
> [7] all as shown by the testimony of the custodian or other qualified witness, unless
> [8] the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

Id.

Generally laboratory notebooks and related documentation of prior invention do not qualify as Rule 803(6) records of regularly conducted business activity. As the Board recently noted in *Corning*, "[a]pplicable Federal Circuit and Board precedent declines to invoke a Rule 803(6) exception to laboratory notebook documents . . . ." IPR2013-00043, Paper 97 at 5 (citing *Alpert v. Slatin*, 305 F.2d

891, 895-96 (CCPA 1962)). The Board explained the underlying rationale in *Wojciak v. Nishiyama*, 61 USPQ2d 1576, 1582 (BPAI 2001):

> [A]s applied to laboratory notebooks or information copied therefrom, the discussion generally should take place through the testimony of the individual who recorded information in the notebook.

Alpert v. Slatin similarly observed that:

> Alpert has cited no authority to show that the [business record] rule is properly applicable to reports of scientific research and tests. We know of no authority for such a position and think such application of the rule would be both improper and unrealistic.

305 F.2d at 895-96.

Exhibit 2307 is representative of the documents offered by Patent Owner to show prior invention. Exhibit 2307 has not been authenticated by a person with first hand or personal knowledge of the document's creation. Patent Owner offers only the following generalized statement in the declaration of Brian Bianchi in an improper attempt to authenticate and establish it as an 803(6) business record:

> Exhibits 2307, 2308, 2309, 2312, 2314, 2316, 2317, 2318, 2319, 2320, and 2321 are duplicate copies of Crossroads' business records which were created or modified during the course of the Verrazano project. I am familiar with Crossroads' practices regarding the creation, modification, and keeping of such documents through my employment with Crossroads, both at the time of the Verrazano

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