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
Patent No. 7,051,147

PATENT OWNER'S RESPONSE TO PETITIONERS' MOTION TO EXCLUDE

Along with this response, Patent Owner files Exhibits 2350 and 2351 which were timely served as supplemental evidence on June 16, 2015. *See* Attachment A.

A. Exhibit 2311

Exhibit 2311 is Admissible Ex. 2311 is a "demonstrative chronology detailing Verrazano development milestones from the date of conception to the constructive reduction to practice as shown in the foregoing exhibits." Patent Owner's Resp., Paper 29 ("POR") at 30-31. Ex. 2311 illustrates—in a way that helps the Board identify and understand—the facts that are independently set forth in the referenced exhibits. All of the exhibits referenced in Ex. 2311 were specifically discussed in Patent Owner's Response, generally with either specific page references (where appropriate), or parentheticals explaining the significance. POR at 30-32. The Board has the discretion to allow the exhibit as a demonstrative under FRE 611(a). Fed. R. Evid. 611(a), 1972 Advisory Committee Notes; *U.S. v. McElroy*, 587 F.3d 73, 81-82 (1st Cir. 2009) ("Our case law permits the use of summary tools to clarify complex testimony and evidence . . . Rule 611(a) testimony and exhibits typically are used as pedagogical devices to clarify and simplify complex testimony or other information and evidence or to assist counsel in the presentation of argument to the court or jury.") (internal quotation marks and citations omitted). Ex. 2311 is merely a helpful and convenient reference in understanding the timeline of events as set forth in the underlying evidence.

The statements in the "Event" column do not "improperly characterize the evidence," (Mot. at 2); in any event, the Board, which has access to the substantive evidence cited, may readily determine this without excluding the entire exhibit.

No Improper Incorporation By Reference "The prohibition against incorporation by reference minimizes the chance that **an argument** would be overlooked . . . incorporation is a pointless imposition on the court's time as it **requires the judges to play archeologist with the record**." Rules of Practice for Trials Before PTAB, Final Rule, 77 Fed. Reg. 48,612, 48,617 (Aug. 14, 2012) (emphasis added). The rule prevents the improper incorporation of arguments, not citations to evidence. 37 C.F.R. § 42.6(a). Petitioners characterization of the "Events" column in Ex. 2311 as argument is proven false by a cursory review. Ex. 2311 is merely a summary demonstrative exhibit, which does the exact opposite of improper incorporation—it illumines the argument in Patent Owner's Response, while saving the Board time by pointing to the exact location of the relevant evidence in the voluminous record.[1]

[1] Petitioners' argument that it is improper incorporation to include specific page citations in Ex. 2311 that are not found in the Patent Owner's Response (Mot. at 2) is unsupported by authority or even explanation, and Patent Owner cannot accordingly respond. To the extent Petitioners introduce such an explanation or authority in their reply, it is improper.

B. Exhibits 2300-2304, 2306-2310, and 2312-2323

1. Documents Referenced in Bianchi Declaration

Rule 803(6) – Business Records Exception Petitioners attack certain exhibits collectively[2] as not meeting the business records exception, apparently based on the premise that they are laboratory notebooks. Of course, they are not all laboratory notebooks; the only exhibits that could be considered such are Exhibits 2313 and 2322.[3] Petitioners' appeal to *Corning*, which relates to lab notebooks, does not apply to the other exhibits. Nor does Petitioners' appeal to *Alpert v. Slatin*—none of the cited exhibits are "reports of scientific research and tests." Rather, these documents were created by Crossroads as it conducted its business—the design and creation of new products. *See* Ex. 2350 ¶ 5.

Petitioners assert that Crossroads has not properly shown the elements of the exception by the testimony of the custodian or other qualified witness. Mot. at 4. Petitioners' arguments are premised on the following implicit requirements: the custodian/witness must (1) personally "create, store, or supervise the creation or storage" of the records (Mot. at 5); (2) be "involved with – or [possess] first-hand or personal knowledge relating to" the creation or storage of the records (*id.)*, (3) have been the records' custodian at the time the records were made (Mot. at 5-6).

---

[2] Exhibits 2303, 2307-09, 2312, 2314, 2316-21, and 2323. Mot. at 6.

[3] Which Petitioners apparently exclude from this particular challenge. Mot. at 6.

Petitioners provide no citations to authority for these underlying premises. This is not surprising, considering that they contradict well-established law.

First, "it is not necessary that a sponsoring witness be employed by the business at the time of the making of each record." *United States v. Evans*, 572 F.2d 455, 490 (5th Cir. 1978); *see also United States v. Scallion*, 533 F.2d 903, 915 (5th Cir. 1976) ("It is argued that some of the witnesses . . . were not employed there at the time the records were made. However, in the case of each record introduced, the present custodian testified that the record was kept in the regular course of the hotel's business"). There is also no requirement that the witness have been personally involved with the creation or storage of the records:

> Under Rule 803(6), a custodian or an otherwise "qualified witness" can lay the evidentiary foundation to ensure the records' trustworthiness. A "qualified witness" is **not required to have "personally participated in or observed the creation of the document,"** *United States v. Moore*, 791 F.2d 566, 574 (7th Cir. 1986), or to have known who actually recorded the information, *see United States v. Dominguez*, 835 F.2d 694, 698 (7th Cir. 1987). There is no requirement that the witness be able to personally attest to its accuracy. *See United States v. Duncan*, 919 F.2d 981, 986 (5th Cir. 1990). The term "qualified witness" is interpreted broadly. It requires only someone who understands the system used to record and maintain the information. *See Moore*, 791 F.2d at 574-75. "The witness 'need only be someone with **knowledge of the procedure** governing the creation and maintenance of the type of

DOCKET ALARM

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.