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 IPR2014-01209
Patent No. 7,051,147

_____

**PATENT OWNER'S REPLY IN SUPPORT OF ITS MOTION TO
EXCLUDE EVIDENCE CITED BY PETITIONERS**

Patent Owner respectfully submits this Reply in support of its Motion to Exclude (Paper 60, "Motion" or Mot.").

A. Ex 1218: Levy Testimony (93:20-96:4): Petitioners cite Ex. 1218 at 93:20-96:4 for the proposition that *Bergsten* "sufficiently identifies hosts devices because there is only a single host attached to each 'host interface,'" which according to Petitioners, Dr. Levy allegedly conceded. Paper 44 ("Reply") at 14. Patent Owner objected because *inter alia* "for routing purposes" was vague and confusing. Mot. at 3-4. Petitioners attempt to address Patent Owner's objection with respect to the use of "for routing purposes" by arguing that the phrase was clarified. Paper 65 ("Opp.") at 1-2. However, Patent Owner would point out that Petitioners' clarification does not actually support the initial proposition for which the objectionable testimony was cited in the Reply. That is, Dr. Levy does not say that a host interface ID identifies the host, only that "responding on that interface would be responding to the correct host". Ex. 1218 at 95:5-6. Petitioners do not dispute Patent Owner's observation that Dr. Levy discussed routing of messages to the proper interface, which does not require identifying what may be attached to the interface. Mot. at 4

Turning to Petitioners' assertions with respect to Ex. 1218 at 95:13-22, Petitioners do not actually address Patent Owner's objections to this testimony, but simply assert that the "witness did not have any difficulty in responding to the question." Opp. at 2. The issue is not whether the deponent had difficulty in answering the question but, rather, whether the questions are vague (Mot. at 4-5) and, further,

whether Petitioners mischaracterized Dr. Levy's testimony (Mot. at 5-7), neither of which is addressed by Petitioners. In any case, Dr. Levy explicitly denied the very statement that Petitioners claim he supports. Ex. 1218 at 92:17-20 (Dr. Levy explaining that "the host interface ID does not identify the host"). *See also* Mot. at 5-6 (citing Ex. 1218 at 92:8-20; 93:9-15, 94:15-22, 95:7-12).

As such, Patent Owner respectfully requests that the objection to the testimony at Ex. 1218, 93:20-96:4 be sustained or additional testimony considered under FRE 106, as requested in the Motion. See *Zhongshan Broad Ocean Motor Co., Ltd., et al. v. Nidec Motor Corp.*, IPR2014-01121, Paper 42 at 3 (Sept. 10, 2015) (citing FRE 106).

B.   Ex 1220: Middleton Testimony: Petitioners' Opposition simply reiterates Petitioners' mischaracterizations of Middleton's testimony from the Reply. While Mr. Middleton agreed that he could not "testify as to **any specific** technical reason" (54:6-9), he provided multiple reasons Crossroads could not test its software. *See e.g.,* Ex. 1220 at 106:13-107:15. Mr. Middleton repeatedly confirmed that Crossroads could not have tested the access controls, under any conditions, until Verrazano was complete. *See* Mot. at 7 (citing Ex. 1220 at 52:3-12, 106:13-107:15, 108:5-15, 113:7-14 ,115:14-17). The testimony should be excluded for the reasons set forth in the Motion at 3-6.

C. Ex. 1009, 1224, 1225, 1226: In response to these objections, Petitioners note that a district court's claim construction order or an expert declaration regarding claim construction may be relevant to the broadest reasonable interpretation. Opp. at 7.

This argument is inapposite because exhibits 1009, 1224, 1225, and 1226 are neither. Exhibits 1009, 1224 and 1225 are preliminary infringement statements and should be excluded for the reasons set forth in the Motion at 6-7.

Further, with respect to Exhibit 1226, Petitioners have completely failed to establish the relevance of the user guide for the ProtecTIER software from Diligent Technologies (not Overland). Instead, Petitioners unhelpfully "note" that Patent Owner did not contest "that the accused Overland 9500D actually operated in the manner described." Opp. at 7. Disregarding the fact that there is no competent evidence to actually contest (or that Patent Owner even has a mechanism for contesting, as Petitioners chose not to provide an expert declaration), the real issue is the relevance of this software guide. How this software (never referenced in the preliminary infringement contentions) may have operated is simply irrelevant; and, thus, Exhibit 1226 should be excluded for the reasons set forth in the Motion at 12-14.

D. Ex. 1008: Petitioners assert that Patent Owner "objects to [Ex. 1008] on the basis that the translation certificate was not initially made under the penalty of perjury," implying that a translation certificate—albeit a defective one—had been properly filed. Opp. at 8. The issue is that the Petition was filed **without** a translation certificate at all. Mot. at 11. Then, after failing to comply with the rules, Petitioners attempted an end-run around them by filing, without authorization, a substitute Ex. 1008 on July 30, 2014. *Id.* The translation certificate that accompanied the improperly filed "substitute" Ex. 1008 was fatally defective. *Id.*

Petitioners cite *Metrics, Inc. v. Senju Pharm,* for the proposition that the "Board **found** that a party may cure an objection to the certificate of translation by serving supplemental evidence" Opp. at 8-9 (citing *Metrics, Inc. v. Senju Pharm*, IPR2014-01041, Paper 19 at 19-20) (PTAB Feb. 19, 2015) (emphasis added). This is incorrect. *Metrics* merely lays out the objection procedure, but notes that the issue would ultimately be resolved at the Final Written Decision. *Id.* at 20. *Metrics* settled before the Board actually ruled on whether the party could cure the objection. *Metrics,* IPR2014-01041, Paper 39.

Petitioners try to divert attention from their noncompliance by attempting to shift the burden to Patent Owner, claiming that Patent Owner failed to show prejudice or inaccuracies in the translation. Opp. at 9-10. This overlooks that the Petitioners— who first failed to comply with rules regarding filing a translation certificate with the Petition and then attempted to inappropriately file a defective translation certificate without permission—"[have] not demonstrated an extraordinary situation such that wavier of a rule is justified." *See Square, Inc. v REM Holdings 3, LLC*, IPR2014-00312, Paper 58 at 36 (PTAB Jul. 7, 2015). In fact, the Board has found that situations like the present case – where a Petitioner attempts to fix an initial failure to file a translation certificate by submitting a later obtained certificate – do not warrant a waiver of the rules. According to the Board, compliance with 37 C.F.R. § 42.63(b) is mandatory and requires that an affidavit of translation be filed with the petition. *Zhongshan*, IPR2014-01121, Paper 25 at 5 (PTAB Feb. 24, 2015). "The distinction

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.

fastcase®
Smarter legal research.