

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LG ELECTRONICS, INC., TOSHIBA CORP.,
VIZIO, INC., HULU, LLC,
CISCO SYSTEMS, INC., AVAYA INC.,
Petitioner,

v.

STRAIGHT PATH IP GROUP, INC.
Patent Owner.

Case IPR2015-00198¹
Patent No. 6,009,469 C1

PETITIONER'S REPLY FOR MOTION TO EXCLUDE EVIDENCE
FOR *INTER PARTES* REVIEW OF U.S. PATENT 6,009,469

¹ IPR2015-01400 has been joined with this proceeding.

Pursuant to 37 C.F.R. 42.24(c) and the Scheduling Order (Paper No. 25), Petitioner respectfully submits the following reply in support of its motion to exclude evidence (Paper No. 48).

I. “MODIFYING WINS SERVER DEFAULTS” DOCUMENTS

Patent Owner attempts to marshal Exhibits 2028 and 2033, two documents titled, “Modifying WINS server defaults,” as evidence of how the WINS prior art functioned (Paper No. 34 at 21). *See also* Exhibit 2038. But those exhibits—with dates ranging from 2005 to 2015—are irrelevant on their face to the functionality of the prior art (or to the knowledge of one of ordinary skill about that art). Remarkably, Patent Owner makes no argument in support of their alleged relevance, and instead contends that its expert’s mere citation to one exhibit is a back door into evidence for both of them.

“[W]hen an expert reasonably relies on inadmissible information to form an opinion or inference, the underlying information is not admissible simply because the opinion or inference is admitted.” Fed. R. Evid. 703 advisory committee’s 2000 Notes. “[A] party cannot call an expert simply as a conduit for introducing hearsay under the guise that the testifying expert used the hearsay as the basis of his testimony.” *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 136 (2d Cir. 2013) (internal citation marks and quotations omitted).

Here, Patent Owner's hearsay documents were never authenticated by its expert. While he cited Exhibit 2028 in his declaration, he did not authenticate it. And the expert made no mention of Exhibit 2033. *See* Exhibit 2038. Importantly, neither Patent Owner nor its expert explains how an internet printout that post-dates the publication of the WINS manual by at least ten years has any relevance to the legacy functionality of WINS, or what one of ordinary skill in the art as of the priority date would have believed was its functionality. *See Brookhill-Wilk 1, LLC v. Intuitive Surgical, Inc.*, 334 F.3d 1294, 1299 (Fed. Cir. 2003). Exhibits 2028 and 2033 are thus irrelevant and inadmissible hearsay.

Because Patent Owner's own expert failed to establish the relevance of these exhibits, Patent Owner seeks to introduce Exhibits 2028 and 2033 through Petitioner's expert. Dr. Bruce Maggs did not rely on either of the internet printouts in forming his opinions. Rule 703 thus does not apply. *See* Exhibit 1002 at 8–10; Exhibit 1041 at 1. Patent Owner was careful to avoid asking Dr. Maggs to authenticate the documents, understanding that he lacked the personal knowledge necessary to do so. But when asked about Exhibit 2028's listed default, maximum, and minimum renewal intervals, Dr. Maggs testified: "I have reason to believe that's not correct." Exhibit 2037 at 150:11–17; *see also* at 150:19–152:3. And of Exhibit 2033's reliability, he testified the "concern I have is that the document [is]

ten years later” than the publication of the WINS manual. *Id.* at 182:6–14; 184:11–12 (referencing concerns “about the date of this document and the fact that it . . . doesn’t list Windows NT 3.5 under the system it applies to.”).

Lacking any basis to introduce Exhibits 2028 and 2033, Patent Owner cites without elaboration to Federal Rule of Evidence 807. But that cite fails for the same reason these exhibits are inadmissible in the first place—being dated at least ten years after the WINS manual was published, the documents lack “circumstantial guarantees of trustworthiness.” Fed. R. Evid. 807(a)(1).

II. DR. HOUH’S DEPOSITION TESTIMONY

Patent Owner claims that Dr. Houh’s deposition testimony—Exhibit 2039—is admissible, claiming that Petitioner had notice and an opportunity to examine him (Paper No. 52 at 2, 6–7). But Cisco Systems, Inc. and Avaya Inc. did not join the separate Samsung proceedings until *after* Dr. Houh was offered as Petitioner’s expert and deposed on May 26, 2015 in those proceedings. *See* Exhibit 2039; *Samsung et al. v. Straight Path IP Group, Inc.*, IPR2014-01366, IPR 2014-01367, IPR2014-01368. Indeed, Patent Owner did not serve the deposition notice on any Petitioner in the present proceeding. *See Samsung et al. v. Straight Path IP Group, Inc.*, IPR2014-01366, Paper No. 21 (PTAB May 18, 2015). And while Cisco and Avaya’s counsel attended Dr. Houh’s deposition, they noted on the record that their motion to join was “pending” and thus they could not ask any questions. *See*

Exhibit 2039 at 5:18–22. Indeed, the Board granted Cisco and Avaya’s motion to join the Samsung proceedings on June 5, 2015—ten days after Dr. Houh’s deposition. Remaining Petitioners here never joined the Samsung proceedings.

III. DICTIONARY EXCERPTS

Patent Owner does not dispute that the dictionary excerpts—Exhibits 2021, 2031, 2034, 2035, and 2036—were published after the ’469 patent’s claimed priority date (Paper No. 52 at 4–6). Accordingly, they are irrelevant to construction of that patent. *See Brookhill-Wilk 1, LLC*, 334 F.3d at 1299 (ruling that the ordinary and customary meaning of disputed terms must be determined from *contemporaneous* authorities).

Patent Owner does not cite a single authority that contradicts *Brookhill-Wilk 1*. Instead, it cites *Vitronics Corporation v. Conceptronic, Inc.* to argue that judges are free to consult dictionaries regardless of when they were published (Paper No. 52 at 5) (citing 90 F.3d 1576, 1585 n.6 (Fed. Cir. 1996)). But in reality, *Vitronics* discusses how intrinsic evidence is more important than extrinsic evidence for claim construction—not how dictionary excerpts published at any point *after* a patent’s priority date somehow remain relevant. In fact, Patent Owner has not cited a single authority—Federal Circuit or otherwise—that holds post-priority dictionaries are relevant. *See Google*, IPR 2014-01031, Paper No. 41 at 10 (citing *Vitronics*); *Sipnet EU S.R.O. v. Straight Path IP Group, Inc.*, IPR2013-00246,

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