

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE INC., and
SAMSUNG ELECTRONICS CO., LTD.,
Petitioners

v.

SUMMIT 6 LLC,
Patent Owner

Case IPR2015-00806
Patent No. 7,765,482

**PETITIONERS' REPLY IN SUPPORT OF THEIR MOTION TO
EXCLUDE**

Google Inc. and Samsung Electronics Co., Ltd. (“Petitioner”) respectfully submit this Reply in Support of their Motion to Exclude (Paper 51) (the “Motion”).

I. Improper Arguments on the Merits.

Patent Owner’s Opposition (Paper 57) (the “Opposition”) repeatedly reargues the merits of the proceeding. For example, Patent Owner argues that an Exhibit “confirm[s] the nexus between the long-felt need and commercial success of Rimfire and the patented technology.” Opposition at 3. This is improper. *Flir Sys., Inc. v. Leak Surveys, Inc.*, IPR2014-00411/434 Paper 113, IPR2015-00065 Paper 71 (P.T.A.B. Sep. 3, 2015) (impermissible to include “continued arguments on the merits as opposed to succinctly addressing issues limited to admissibility of evidence.”). The Board should decline to consider these arguments.

II. Exhibit 2015.

Exhibit 2015 states that any data it contains is unreliable. Specifically, it states “[n]either Future Image nor these third-party providers represent, or endorse the accuracy of any advice, opinion, statement or other information presented in this report” Ex. 2015 at 2. Because of this disclaimer and the lack of underlying data, and because the report is incomplete, Dr. Frazier testified that Exhibit 2015 is unreliable. *See, e.g.*, Ex. 2075 at 25:13-23; 26:6-13; 105:19-23.

Patent Owner argues that because a quotation in Exhibit 2015 is confirmed in another Exhibit, the entirety of the Exhibit is confirmed. But Patent Owner has

pointed to no source data to confirm the conclusions in Exhibit 2015. Nor could it, as Patent Owner's counsel represented during the deposition of Dr. Frazier that the underlying data was not available. Ex. 2075 at 26:14-16. Patent Owner offers a case suggesting that a disclaimer does not render the Exhibit unreliable. The case considered databases, which were "among the sources of information on which ... experts regularly rely...." *Fed. Hous. Fin. Agency v. Nomura Holding Am., Inc.*, 74 F. Supp. 3d 639, 657 (S.D.N.Y. 2015). But Exhibit 2015 characterizes data, rather than presenting raw data as a database would. And Patent Owner has not shown that experts "regularly rely" on this characterization. Indeed, the only marketing expert in this proceeding testified that he would not rely on its characterization. Ex. 2075 at 26:10-13 ("it's difficult for me as a marketing expert to rely on other people's characterization of the data if I don't have the underlying data."). Further, Exhibit 2015 is incomplete, as evidenced by its table of contents, which shows that other companies used, presumably different, image servers. Ex. 2015 at 7-9.

Patent Owner next argues that Exhibit 2015 is not offered to prove the truth of the matter asserted, but rather to prove secondary considerations. Patent Owner cites multiple decisions allegedly supporting this proposition. However, these decisions do not state that *any* evidence of secondary considerations is admissible as non-hearsay. Rather, each discusses advertising statements or industry praise. In contrast, the Opposition itself notes that Exhibit 2015 is used to show "a longfelt,

but unresolved need [or] commercial success of the Rimfire service.” Opposition at

5. Patent Owner offers statements in Exhibit 2015 for their truth, arguing it “establishes ... the [r]eason for [eBay’s] image server purchase.” Opposition at 3.

Patent Owner identifies a hearsay exception under Rule 803(17). But the decision Patent Owner cites found admissible reports “published in trade journals or newspapers *which are accepted as trustworthy....*” *Virginia v. W. Virginia*, 238 U.S. 202, 212 (1915) (emphasis added). Patent Owner has identified no such evidence. Dr. Frazier, the only marketing expert in this proceeding, testified that he had never heard of the future image report or its author and that it is unreliable. Ex. 2075 at 24:24-25:23; 26:6-13; 105:19-23.

III. Exhibits 2044 and 2045.

Patent Owner argues that “Ms. Pate provided data to support [Exhibit 2045].” Opposition at 7. But Ms. Pate did not know who created the presentation. Ex. 1019 at 112:1-3 (“Q. Who created the presentation [Exhibit 2045]? A. I -- someone -- either Jeff Jordan or someone working for Jeff Jordan. It was an eBay presentation.”). Similarly, Patent Owner suggests that because Exhibit 2015 “contains the same illustrations” this corroborates Exhibit 2045. At best, this corroborates only those “same illustrations” not the data presented in Exhibit 2045. And Patent Owner routinely relies on this data to suggest that there was commercial success. *See, e.g.*, Paper 28 at 53.

Similarly, Patent Owner suggests that “Ms. Pate confirmed the source of the data [in Exhibit 2044].” Opposition at 7. In fact, Ms. Pate testified that she did not know who created the Exhibit, when it was created, or if the data was accurate or a projection. Ex. 1019 at 105:18-106:1 (“Q. Who created [Exhibit 2044]? A. I'm not sure. Q. Do you know when it was created? A. I don't know.... It has statistics in it through 2003. Q. Do you know if all these numbers are actual numbers? A. I'm not sure.”). And Ms. Pate also testified that the numbers presented in Exhibit 2044 were not created by eBay. Ex. 1019 at 106:21-24 (“A. No. These numbers were created off the data that came from eBay.”).

Patent Owner suggests that Rule 803(6) allows evidence if the records are from a predecessor. But the *exact* case cited by Patent Owner in fact states “Rule 803(6) allows business records to be admitted if witnesses testify that the records are integrated into a company's records **and relied upon in its day to day operations.**” *United States v. Jakobetz*, 955 F.2d 786, 801 (2d Cir. 1992) (emphasis added, internal citations and quotation marks omitted). Patent Owner has presented no evidence that these Exhibits were relied upon in Summit 6’s day to day operations. Nor could it explain how two presentations, one from eBay, were relied upon in this way. Indeed, under Patent Owner’s interpretation, *anything* stored by a corporation would qualify under the business records exception.

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