

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner

v.

CHESTNUT HILL SOUND INC.,
Patent Owner

Case IPR2016-00794
Patent 8,090,309

PETITIONER'S MOTION TO EXCLUDE

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I. INTRODUCTION

With its Preliminary Patent Owner Response (“PPOR”) and its Patent Owner Response (“POR”), Patent Owner submitted several exhibits that are inadmissible for the basis relied on by Patent Owner, under the Federal Rules of Evidence (“FRE”). As described below, several of Patent Owner’s exhibits violate the FRE’s prohibition on hearsay (*see* FRE 802) and fail to meet the basic requirements of authenticity (*see* FRE 901). For at least the reasons discussed below, the Board should exclude the Patent Owner’s Exhibits 2004, 2008, 2009, 2014, 2015, and 2016 from the present IPR as inadmissible under the FRE.

II. ARGUMENT

A. Exhibit 2004 is inadmissible hearsay and lacks authentication

The Board should exclude Exhibit 2004 as inadmissible because the statements cited by Patent Owner therein are hearsay to which no valid exception applies, and because Patent Owner has failed to provide any evidence authenticating the document.¹

¹ Petitioner previously objected to Exhibit 2004 on these grounds in its Objection to Evidence filed October 7, 2016. *See* Paper 7, pp. 1-2. Patent Owner was timely served with these objections and did not respond.

1. The cited statements within Exhibit 2004 are inadmissible hearsay

Patent Owner describes Exhibit 2004 as three documents filed with a brief in support of a preliminary injunction motion in a district court case between Patent Owner and Petitioner. *See* PPOR, p. 10. Documents within Exhibit 2004 appear to be the same two press releases submitted as Exhibits 2015 and 2016 (discussed below at Section II.E), so the same arguments against admissibility discussed with respect to those Exhibits also apply here. Exhibit 2004 also includes what looks to be a presentation prepared by an entity called “Multinational Sound, Inc.” *See* Ex. 2004, pp. 2, 5, 21. All three documents appear to be related to Patent Owner’s George™ product. In its PPOR, Patent Owner cites Exhibit 2004 as evidence that the George™ product won various awards after being launched in 2007. *See* PPOR, p. 10 (citing Ex. 2004). For example, the PPOR cites Exhibit 2004 as support for its claim that the George™ product “won a Best of Show award at the Macworld tradeshow, a ‘Play of the Year’ award from Macworld Magazine, and PC Magazine’s Editor’s Choice Award, all shortly after its launch in 2007.” PPOR, p. 10 (citing, generally, Ex. 2004). Patent Owner thus offers the statements in Exhibit 2004 for their truth to support its contention that the George™ won awards. *See id.* Further, none of the statements in Exhibit 2004 were made while testifying in the current proceeding, and are thus out of court statements. *See id.* Accordingly, the statements regarding the awards won by the George™ product

from Exhibit 2004 are out of court statements offered for their truth, and are thus hearsay. *See* FRE 801.

Further, none of these statements fall under any proper hearsay exception, and Patent Owner has made no argument that any exception applies that would render the statements admissible. *See* FRE 803. To the extent Patent Owner argues that the two press releases within the Exhibit are business records, these press releases are identical to Exhibits 2015 and 2016, and thus the same arguments presented above with respect to those exhibits applies. *See* Section I.E, *supra*. With respect to the marketing presentation included in Exhibit 2004, as previously discussed the presentation appears to have been prepared by an entity called “Multinational Sound, Inc.” *See* Ex. 2004, p. 21. Patent Owner thus cannot credibly argue that the business record exception applies to this document, because it is apparent on its face that it was prepared by “Multinational Sound, Inc.,” and not by employees or representatives of Chestnut Hill with knowledge of the act, event, condition, opinion, or diagnosis, recorded as required by the business record exception. *See id.*

In addition, Patent Owner has not shown that the residual exception under FRE 807 applies. Indeed, Patent Owner cannot credibly argue that the statements in Exhibit 2004 have equivalent circumstantial guarantees of trustworthiness as that of testimony from these same declarants if Petitioners had an opportunity for

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