Filed on behalf of TQ Delta LLC
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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC. and ARRIS GROUP, INC.,
Petitioner,

v.

TQ DELTA, LLC,
Patent Owner.

Case IPR2016-01007[1]
Patent No. 8,432,956 B2

PATENT OWNER'S MOTION TO EXCLUDE INADMISSIBLE EVIDENCE PURSUANT TO 37 C.F.R. § 42.64(c)

[1] ARRIS Group, Inc., who filed a Petition in IPR2017-00422, has been joined in this proceeding.

Pursuant to 37 C.F.R. § 42.64, Patent Owner TQ Delta, LLC ("Patent Owner") hereby moves to exclude certain of Petitioner's exhibits for lack of admissibility under the Federal Rules of Evidence ("FRE").[2] In particular, Patent Owner moves to exclude the following:

Exhibit 1103, Short Declaration in IPR2016-01020: The exhibit is hearsay under FRE 801-802. It does not fall within any of the exceptions of FRE 803. The declaration is not from an expert to this proceeding, and Petitioners have not shown that Mr. Short was unavailable for deposition in connection with this proceeding. If Petitioners had wished to introduce testimony from Mr. Short in this proceeding, they were required to seek his deposition in this proceeding. Expert reports, affidavits, declarations, and deposition transcripts from other proceedings are not admissible. *See, e.g., Kirk v. Raymark Indus., Inc.*, 61 F.3d 147 (3d Cir. 1995) (an expert's deposition in a prior, unrelated case could not be used against party in pending case); *Estate of Miller v. Ford Motor Co.*, No. 2:01-cv-545-FtM-29DNF, 2004 U.S. Dist. LEXIS 29846, at *28 (M.D. Fla. July 22,

[2] Patent Owner does not waive its objections to Petitioner's improper new evidence submitted for the first time on Reply; pursuant to Board guidance this motion only addresses inadmissibility under the Rules of Evidence.

2004) (deposition testimony from employees of a party in a separate lawsuit is not admissible absent a showing of unavailability).

Ex. 1109 (FCC filing by Alcatel) and Ex. 1112: Exhibit 1109 is also hearsay under FRE 801-802. It is being relied upon for the truth of the matter asserted, i.e., that "Alcatel measures PSD based on Reverb" and that it measures "PSD based on Reverb for each upstream individual subchannel—not a single channel." (Ex. 1100, Kiaei Reply Decl. at ¶ 39; Pet. Reply at 28.) It does not fall within any of the exceptions of FRE 803; for example, it is not a public record or report ***of*** a public office or agency, but rather a statement by an unrelated non-party ***to*** a public office or agency. It is well established that third-party pleadings in unrelated proceedings are inadmissible hearsay. *See, e.g., Transunion Risk & Al. Data Sols., Inc. v. MacLachlan*, 2016 U.S. Dist. LEXIS 24569 at *16 n. 6 (S.D. Fla. Feb. 29, 2016) (with respect to "statements in a nonparty's proxy statement filed with the SEC," defendant "correctly notes that the proxy statement is hearsay and [Plaintiff] fails to cite any hearsay exception rendering it admissible."); *Rivera v. Metro Transit Auth.*, 750 F. Supp. 2d 456, 2010 U.S. Dist. LEXIS 120289, *6-7 (S.D.N.Y. 2010) ("An unsworn statement by a non-party in a complaint in another lawsuit is hearsay when offered to prove the truth of that statement. It is not admissible").

Mr. Bader's declaration and the Appendix B submitted therewith (Exhibit 1112) do not cure the hearsay nature of Exhibit 1109. Patent Owner is aware of no legal authority that a third-party's pleadings to an unrelated government agency become non-hearsay simply because they were cited by the agency in that third party's proceeding (e.g., the third-party's hearsay statements do not becomes records "of" the agency). Moreover, the statement in Exhibit 1109 upon which Petitioners rely was not separately made or recognized in the agency order attached to Mr. Bader's declaration. Petitioners do not cite to Appendix B of Exhibit 1112 for any substantive purpose. Accordingly, Appendix B to Exhibit 1112 is not relevant to any issue in this proceeding under FRE 401-402.

Finally, with respect to each of these exhibits, they are not admissible as exhibits on the record merely because they were cited by or relied upon by Petitioners' exhibit. *See* FRE 703. Citing an exhibit in an expert declaration is not a loop-hole for independently admitting an inadmissible exhibit. *See, e.g., Finchum v. Ford Motor Co.*, 57 F.3d 526, 532 (7th Cir. 1995) (fact that expert relied on exhibit "does not automatically mean that the information itself is independently admissible in evidence . . . [Plaintiff] could not have introduced the exhibit into evidence because of the hearsay rule").

Dated: July 5, 2017

/Peter J. McAndrews/

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