Filed on behalf of TQ Delta LLC
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UNITED STATES PATENT AND TRADEMARK OFFICE
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BEFORE THE PATENT TRIAL AND APPEAL BOARD
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CISCO SYSTEMS, INC. and ARRIS GROUP, INC.,
Petitioner,

v.

TQ DELTA, LLC,
Patent Owner.
_____

Case IPR2016-01007[1]
Patent No. 8,432,956 B2
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**PATENT OWNER'S REPLY IN SUPPORT OF ITS MOTION TO
EXCLUDE INADMISSIBLE EVIDENCE**

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

Petitioners do not dispute that Exhibits 1103 and 1109 are—if relied upon for the truth of the matter asserted—hearsay. Petitioners' only arguments are that they purportedly are just relying on Exhibits 1103 and 1109 for what they "describe," or that they should be admitted under the residual hearsay exception. Both arguments are frivolous and nonsensical as applied to these exhibits.

Exhibit 1103, Short Declaration in IPR2016-01020: Contrary to Petitioners' argument, they are very much relying on the Short declaration for the truth of the matter asserted—that it allegedly shows that "the terms 'carrier,' 'subcarrier,' 'band,' 'sub-band,' 'bin,' 'channel,' and 'tone' are often used interchangeably." Ex. 1100, Kiaei Decl. at ¶ 6. If that statement is true, according to Dr. Kiaei, it allegedly proves in turn that the concept of a "subfrequency" in the asserted Milbrandt reference "would be understood to be equivalent and interchangeable with the term 'subchannel.'" *Id.* This is squarely a case of a statement being used for the truth of the matter asserted. The Short Declaration is not being used to show the mental state of any witness or the mere fact that something was disclosed in the prior art—it is being used to prove that these terms are *in fact* all the same thing.

Nor does the exhibit fall within the residual exception of Rule 807. At the very least it is not evidence of a "material" fact. Dr. Short never testified in his

prior declaration that Milbrandt's "subfrequency" is the same thing as the claimed "subchannel"—which is the actual material fact Petitioners must prove. Indeed, he did not even address whether the concept of a "subfrequency" is the same thing as a "subchannel"—he only commented on the very different terms "carrier,' 'subcarrier,' 'band,' 'sub-band,' 'bin,' 'channel,' and 'tone'." Even if any or all of these terms are interchangeable, that is utterly irrelevant to Milbrandt's use of the term "sub-frequency."

Moreover, Petitioners' claim that Dr. Short's testimony is somehow "more probative on the point for which it is offered than <u>any other evidence that the proponent can obtain through reasonable efforts</u>" (Pet. Reply at pp. 5-6) is belied by all of the other testimony Petitioners offered on this same irrelevant point. Petitioners offered the declaration testimony of Dr. Kiaei and citations from several other patents or publications on this issue. *See* Ex. 1100, Kiaei Decl. at ¶ 8 ("I also note that other references evidence that the terms . . . are used interchangeably . . ."). Further, Petitioners nowhere alleged that they could not have taken reasonable efforts to depose Dr. Short in this proceeding.

Ex. 1109 (FCC filing by Alcatel) and App. B to Ex. 1112: Exhibit 1109 is also hearsay under FRE 801-802. It is also unquestionably being relied upon for the truth of the matters asserted, i.e., that (1) "Alcatel measures PSD based on

Reverb," (2) that Alcatel "recognizes the importance of 'demonstrat[ing] compliance with the requisite ANSI T1.413 . . . standard," and (3) that "[t]o demonstrate compliance, Alcatel measures PSD based on Reverb." Ex. 1100, Kiaei Decl. at ¶ 39. Now, in their Reply to Patent Owner's Motion to Exclude, Petitioners also argue that it is being relied upon for the truth of whether Alcatel measures "Reverb PSD across the frequency spectrum." *See* Reply at 3. Dr. Kiaei, in turn, concludes from this exhibit the alleged truth of another fact in dispute—that a "POSITA would have measured the PSD based on REVERB to understand the changes over the frequency spectrum." *See* Ex. 1100, Kiaei Decl. at ¶ 40. In other words, Petitioners argues that if these statements are true, they support Petitioners' position. Importantly, only if it <u>does not matter whether or not the statements are true</u> could the statements constitute admissible non-hearsay.

Nor does Exhibit 1109 fall within the residual exception of Rule 807. It also does not constitute evidence of a "material" fact. The "material fact" that Petitioners must prove is that it would have been obvious to add to Milbrandt the ability to measure, and then also transmit or receive in a test message, power level per subchannel based on a Reverb signal. Nowhere do Petitioners claim that Exhibit 1109 discloses doing so, or that it provides any reason for doing so. They only rely on Exhibit 1109 for redundant disclosure of what ANSI T1.413 and

Milbrandt already disclose—to just "measure PSD based on REVERB" and to satisfy "compliance with the ANSI T1.413 standard." Importantly, the ANSI T1.413 only discloses ***measuring*** (not transmitting) an ***aggregate*** (not per subchannel) PSD for the whole frequency band. *See* Ex. 2001, Chrissan Decl. at 53 ("The sections of the ANSI T1.413 standard that Cisco cites merely describe 'measuring[ing] the aggregate received upstream power' based on a R-REVERB1."); *see also* Exhibit 1109. Exhibit 1109 does not show anything different—it naturally discloses the exact same thing as the ANSI T1.413 standard because, as it states, it complies with that standard. *See* Ex. 1109 at Fig. 5.6. Indeed, Petitioners never specifically allege that Exhibit 1109 shows measuring separate PSD values for each subchannel, much less transmitting those values— only that Exhibit 1109 allegedly measures PSD "across the frequency spectrum."[2] *See* Reply at p. 3. As such, Exhibit 1109 is no more probative on any material

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[2] To the extent that Petitioners do assert that Ex. 1109 shows that ANSI T1.413 measures PSD "per subchannel," this is also addressed in Patent Owner's listing of improper new reply evidence. *See* Paper 21. Patent Owner raised, in connection with its Response, the fact in "Cisco does not provide any support (including any citation to any specific disclosure in ANSI T1.413) that ANSI T1.413's PSD is measured on a per-subchannel basis." Ex. 2001, Chrissan Decl. at ¶ 53.

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