UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

CISCO SYSTEMS, INC., DISH NETWORK, LLC,
COMCAST CABLE COMMUNICATIONS, LLC,
COX COMMUNICATIONS, INC.,
TIME WARNER CABLE ENTERPRISES LLC,
VERIZON SERVICES CORP., and ARRIS GROUP, INC.,
Petitioner

v.

TQ DELTA, LLC,
Patent Owner

Case IPR2016-01008[1]
Patent 8,238,412 B2

PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE

[1] DISH Network, LLC, who filed a Petition in IPR2017-00253, and Comcast Cable Communications, LLC, Cox Communications, Inc., Time Warner Cable Enterprises LLC, Verizon Services Corp., and ARRIS Group, Inc., who filed a Petition in IPR2017-00419, have been joined in this proceeding.

I. Introduction

Patent Owner's ("TQ Delta") request to exclude admissible evidence should be denied. Exhibits 1103 and 1109 are not hearsay and should be admitted. But even if these exhibits were considered hearsay (and they are not), they should be admitted under the residual exception; and nevertheless the rules permit an expert to rely on the contents of these exhibits in formulating his or her opinions. Accordingly, Exhibits 1103 and 1109 should not be excluded.

II. TQ Delta's Motion to Exclude Exhibits 1103 and 1109 Should be Denied

a. These exhibits are not relied on for the truth of the matter asserted

TQ Delta's position that Exhibits 1103 and 1109 are hearsay is flawed. It is well established that documents offered for what they ***describe***, and not prove the truth of the matter asserted, are not hearsay. *See*, *e.g.*, *Joy Techs., Inc. v. Manbeck*, 751 F. Supp. 225, 233 n. 2 (D.D.C. 1990), *judgement aff'd*, 959 F.2d 226 (Fed. Cir. 1992); *EMC Corp. v. PersonalWeb Techs, LLC et al.*, IPR2013-00087, Paper 69 at 42-43 (PTAB May 15, 2014); *see also*, *REG Synthetic Fuels, LLC v. Neste Oil Oyj* , 841 F.3d 954, 964 (Fed. Cir. 2016) (noting that a statement is not hearsay if "the communication (as opposed to the truth) ha[d] legal significance").

TQ Delta fails to identify any statement in Exhibit 1103 that Petitioner relies on for the truth of the matter asserted. This exhibit is simply cited by Petitioner for

what it describes. That is, Exhibit 1103 is cited by Dr. Kiaei, in his declaration, as describing the fact that even TQ Delta's expert testified that "the terms 'carrier,' 'subcarrier,' 'band,' 'sub-band,' 'bin,' 'channel,' and 'tone' are often used interchangeably," which shows that TQ Delta is taking inconsistent positions, and this exhibit is not relied on for the truth of the statement.

Similarly, Exhibit 1109 is cited by Dr. Kiaei, in his declaration, as descriptive support of figures used to demonstrate compliance with ANSI T1.413 in connection with FCC filings and for the fact that it disclosed Reverb PSD across the frequency spectrum, regardless of whether it was true or not. Also, Exhibit 1109 is relied upon to show that an ordinary artisan would have known that to demonstrate compliance with ANSI T1.413, the modem's Reverb PSD across the frequency spectrum must be shown in FCC filings. It is not hearsay when offered for that purpose.

Thus, these exhibits, which are not used to prove the truth of the matter asserted, cannot be excluded as inadmissible hearsay.

b. The residual exception to hearsay applies to these exhibits

Even if considered hearsay, these exhibits qualify for the residual exception to hearsay under FRE 807. Under FRE 807, a "statement is not excluded by the rule against hearsay" if: "(1) the statement has equivalent circumstantial guarantees of trustworthiness; (2) it is offered as evidence of a material fact; (3) it is more

probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) admitting it will best serve the purposes of these rules and the interests of justice." FRE 807(a). Also (5) "before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the statement." FRE 807(b). Courts are accorded wide discretion in applying the residual hearsay exception under FRE 807. *Doe v. United States*, 976 F.2d 1071, 1076– 77 (7th Cir. 1992), cert. denied 510 U.S. 812 (1993); *United States v. North*, 910 F.2d 843, 909 (D.C. Cir. 1990), cert. denied 500 U.S. 941 (1991).

(1) "the statement has equivalent circumstantial guarantees of trustworthiness"

Regarding Exhibit 1103, the statement cited by Petitioner has circumstantial guarantees of trustworthiness—at least in so far as it pertains to considerations of hearsay—because it is the testimony of TQ Delta's own retained expert, Dr. Short. If his testimony is not truthful, TQ Delta is free to discuss its concerns with Dr. Short and then bring forward any necessary corrections to his testimony. *See* 37 CFR 11.303(a)(3). Moreover, the Board has found that "whether or not testimony is specifically created for a specific IPR or is created for another proceeding, if the declaration is sworn testimony and the witness is available for cross-examination, the testimony bears the same guarantees of trustworthiness." *Apple Inc., v. Virnetx Inc.*., IPR2016-00332, Paper 29 at 82 (PTAB June 22, 2017). Here, Dr. Short

provided sworn testimony as TQ Delta's witness and he was available for cross-examination; therefore, the cited testimony in Exhibit 1103 has circumstantial guarantees of trustworthiness as it pertains to hearsay.

Exhibit 1109 has circumstantial guarantees of trustworthiness since it is a document filed with the FCC, whose rules require those practicing before to submit factually correct information. *See* 47 C.F.R. § 1.17(a) ("In any investigatory or adjudicatory matter within the Commission's jurisdiction…, no person subject to this rule shall … In any written or oral statement of fact, intentionally provide material factual information that is incorrect….").

(2) "it is offered as evidence of a material fact"

The testimony in Exhibit 1103 is offered as evidence of the material fact that even TQ Delta's expert made statements consistent with the opinions of Petitioner's expert and that TQ Delta's attorney argument to the contrary is inconsistent with both experts' statements. Exhibit 1109 is offered as evidence of the material fact that parties testing their ADSL equipment—for example, to show compliance with the ANSI T1.413 standard to the FCC—provided descriptive figures of the devices' Reverb PSD across the frequency spectrum to the FCC.

(3) "it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts"

The testimony in Exhibit 1103 includes the statement of TQ Delta's own expert and is more probative on the positions taken by TQ Delta regarding same

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