

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., 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

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Case No. IPR2016-01020<sup>1</sup>  
Patent No. 9,014,243

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**PATENT OWNER REPLY I/S/O MOTION TO EXCLUDE EXS. 1022, 1023,  
1024, 1025, AND 1028, PORTIONS OF EX. 2013, AND PORTIONS OF EX.  
1026 PURSUANT TO 37 C.F.R. § 42.64(c)**

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<sup>1</sup> DISH Network, L.L.C., who filed a Petition in IPR2017-00254, and Comcast Cable Communications, L.L.C., Cox Communications, Inc., Time Warner Cable Enterprises L.L.C., Verizon Services Corp., and ARRIS Group, Inc., who filed a Petition in IPR2017-00418, have been joined in this proceeding.

**I. EXS. 1022, 1023, 1024, 1025, AND 1028, PORTIONS OF EX. 2013 AND PORTIONS OF EX. 1026 SHOULD BE EXCLUDED**

**A. TQ DELTA'S OBJECTION TO EXCLUDE EX. 1022 WAS TIMELY UNDER RULE 42.64**

Ex. 1022 was timely objected to for two reasons. First, TQ Delta's objection was subject to the timing requirements under Rule 42.64(b), not 42.64(a). Rule 42.64(a) governs *deposition testimony* while Rule 42.64(b) governs all other evidence. *See* 77 Fed. Reg. 48612, 48624 (Aug. 14, 2012) ("Section 42.64(a) provides that objections to the admissibility of deposition evidence must be made during a deposition. Section 42.64(b) provides guidance as to objections and supplemental evidence for evidence *other than deposition testimony*." (emphasis added)). Petitioners' reliance on Rule 42.64(a) to argue untimeliness is misplaced. Thus, the timing for objecting *to an exhibit* is governed by Rule 42.64(b)(1), namely, that after trial has been instituted, a party has five business days after service of evidence to assert any objections.

Second, Ex. 1022 cannot be considered *deposition evidence* under Rule 42.64(a) because Ex. 1022 was not properly served until after the deposition. Rule 42.63(e) requires that "[a] current exhibit list must be served whenever evidence is served." Petitioners did not provide TQ Delta with a current exhibit list (Paper 17 at 4) until after Dr. Short's deposition, and thus Ex. 1022 cannot be *deposition*

evidence under Rule 42.64(a). Pursuant to Rule 42.64(b), TQ Delta timely objected. Paper 20 at 1.

**B. EX. 1022 SHOULD BE EXCLUDED**

Ex. 1022 was not cited in the Petition, Institution Decision, Reply, or either of Petitioners' expert's declarations. This alone is sufficient to exclude Ex. 1022 as irrelevant under at least F.R.E. 402 and 403, Rule 42.23, and/or Rule 42.61. *See Apple Inc. v. Smartflash LLC*, CBM2015-00017, Paper 46 at 23 (PTAB March 30, 2016) (excluding under F.R.E. 401 & 402); *SK Innovation Co., LTD. v. Celgard, LLC*, IPR2014-00679, Paper 58 at 49 (PTAB Sept. 25, 2015) (same).

Moreover, because it bears a copyright date (2008) nine years after the filing date (1999), Ex. 1022 should be excluded as irrelevant under F.R.E. 402 as it cannot be considered prior art or informative to one of ordinary skill as of 1999. Petitioners' argument that it nevertheless "provides context and relevant information...at the time the '243 Patent was filed" is nonsensical. Paper 33 at 4.

**C. EX. 1025 SHOULD BE EXCLUDED**

Ex. 1025 is a thesis from Petitioners' expert. It was not cited in the Petition, Institution Decision or Reply. Ex. 1025 should be excluded for this reason alone as irrelevant and untimely under at least under F.R.E. 402, and also F.R.E. 403, Rule 42.23, and/or Rule 42.61. *See Apple*, CBM2015-00017, Paper 46 at 23; *SK Innovation*, IPR2014-00679, Paper 58 at 49.

Ex. 1025 was cited only in the Tellado Reply Declaration, but even there, it was cited only to assert that it was a “true and accurate copy.” Ex. 1026 at ¶ 62. The Board should exclude Ex. 1025 because it was not cited in the Petition or Reply, but only in the Reply declaration. *See Intri-Plex Tech., Inc. v. Saint-Gobain Performance Plastics Rencol Ltd.*, IPR2014-00309, Paper 83 at 13–14 (PTAB March 23, 2014).

Petitioners do not allege that Ex. 1025 was prior art. It is therefore not relevant. Petitioners instead assert that “[w]hether phase scrambling was known to reduce PAR is an issue in this *inter partes* review.” Opposition at 5. But they do not, and cannot contend that Ex. 1025 was prior art to the ’243 patent. Nor does the Second Tellado Declaration assert that phase scrambling was known before the filing of the ’243 patent. Ex. 1025 is too late in time and is irrelevant to the testimony of Tellado, and to this review under F.R.E. 402.

Petitioners assert that “Exhibit 1025 includes a list of references cited by Dr. Tellado that demonstrate that phase scrambling was known to reduce PAR before the ’243 Patent was filed.” Opposition at 5. This attorney argument raises new objections based on hearsay (or double-hearsay), as it requires assumptions regarding the truth of alleged matters asserted in the thesis and cited references.

**D. ALL OR PORTIONS OF ¶¶ 16, 29, 42, 43, AND 52 OF EX. 1026 AND PAGES 46:19–47:16, 49:1–50:13, 51:5–56:23, 57:6–12, AND 61:19–23 OF EX. 2013 SHOULD BE EXCLUDED**

TQ Delta’s objections to the Second Tellado Declaration (Ex. 1026) based on F.R.E. 702 and 705 were timely. TQ Delta could not predict that Tellado had relied on undisclosed testing. TQ Delta could not have known before cross-examination that Tellado was hiding test results. It therefore timely objected to the testimony during cross-examination. Ex. 2013 at 57:25–58:2, 62:13–63:4.

Moreover, contrary to Petitioners’ assertions, Tellado testified that the Matlab script and simulation results for an 18,000 foot loop did in fact form a basis for his opinion that Dr. Short’s (TQ Delta’s expert) Gaussian approximation was “poor.” *See, e.g.*, Ex. 2013 at 46:19–47:8, 51:5–20, 52:25–53:12.

Further, Petitioners’ assertions about what TQ Delta could have done with the test results that Petitioners withheld, should fall on deaf ears. TQ Delta had no way of knowing about the test results, because Petitioners failed to disclose that Tellado had conducted an additional, undisclosed experiment. Indeed, during cross-examination, Tellado suddenly had a lack of memory about the results of the undisclosed tests, including whether he had an electronic or hard copy of the script or simulation results, whether he communicated the same to anyone else, or whether he discarded or deleted the same. *See, e.g.*, Ex. 2013 at 47:9–48:6, 57:6–17, 58:10–14, 59:6–12, 60:3–8, 60:9–20.

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