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., 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 No. IPR2016-01021[1]
Patent No. 8,718,158

PATENT OWNER'S MOTION TO EXCLUDE EXHIBITS 1022, 1023, 1024, 1025, and 1028, PORTIONS OF THE TELLADO TESTIMONY (EX. 2013), AND PORTIONS OF THE 2nd TELLADO DECLARATION (EX. 1026) PURSUANT TO 37 C.F.R. § 42.64(c)

[1] DISH Network, L.L.C., who filed a Petition in IPR2017-00255, 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 IPR2017-00417, have been joined in this proceeding.

I. INTRODUCTION

Patent Owner TQ Delta, LLC submits the following motion to exclude. The exhibits in question should be excluded for Petitioner's failure to cite documents that constitute prior art, its untimely introduction of exhibits on Reply that are irrelevant to the substantive issues and not cited in the Reply, rendering them irrelevant, and its expert's failure to retain copies of testing he performed on which he relies.

II. EXHIBITS 1022, 1023, 1024, 1025, AND 1028, PORTIONS OF THE TELLADO TESTIMONY (EX. 2013) AND PORTIONS OF THE SECOND TELLADO DECLARATION (EX. 1026) SHOULD BE EXCLUDED

A. EXHIBIT 1022 SHOULD BE EXCLUDED UNDER AT LEAST FED. R. EVID. 402

Exhibit 1022 is a chapter and some additional pages from a book titled *WiMedia UWB*. Patent Owner timely objected to Exhibit 1025. *See* Paper 25 at 1.

Exhibit 1022 was not included with the Petition and it is not cited or explained in the Reply. It is also not cited in the Second Tellado Declaration (submitted with the Petitioner Reply). Exhibit 1022 should be excluded for this reason alone as irrelevant and untimely under Fed. R. Evid. 402, Fed. R. Evid. 403, 37 C.F.R. § 42.23, and/or 37 C.F.R. § 42.61.

Moreover, Exhibit 1022 should be excluded as irrelevant because it is not prior art and therefore irrelevant to the knowledge of one of ordinary skill in the art as of 1999. Both the book itself and the chapter in question (Ch. 3) bear copyright dates of 2008. *See* Ex. 1022 at 3, 11. Patent Owner timely objected to Exhibit 1025. *See* Paper 25 at 2. There is no evidence that the book or the chapter cited were publicly-available or otherwise constituted prior art as of 1999, the filing date of the '158 patent. *See* Ex. 1001 at cover. In other words, Exhibit 1022 is nine years too late. Exhibit 1022 is irrelevant to show or evidence the knowledge of one of ordinary skill as of the date the invention was made.

The relevant time-frame for patentability is the time of the invention, and no later than the effective filing date. *See Synthon IP, Inc. v. Pfizer, Inc.*, C.A. No. 1:05cv1267, 2007 U.S. Dist. LEXIS 26115, at *15-17 (E.D. Va. Apr. 6, 2007) ("[T]he obviousness inquiry asks whether the subject matter 'would have been obvious [to one of ordinary skill in the art] *at the time the invention was made*.'"), quoting *Alza Corp. v. Mylan Labs., Inc.*, 464 F.3d 1286, 1289 (Fed. Cir. 2006) (emphasis added in *Synthon*); *Walt Disney Prods. v. Fred A. Niles Communs. Ctr., Inc.*, 369 F.2d 230, 234 (7th Cir. 1966) ("The difference between the subject matter sought to be patented and the prior art must be such that the subject matter as a whole would have been obvious to a person having ordinary skill in the art to

which said subject matter pertains, as of the date of the invention."; explaining that the use of knowledge from a later date constituted impermissible hindsight).

Because Exhibit 1022 was nine years too late, it is irrelevant under Fed. R. Evid. 402, and should be excluded.[2]

B. EXHIBIT 1025 SHOULD BE EXCLUDED AS IRRELEVANT UNDER AT LEAST FED. R. EVID. 402

Exhibit 1025 is a thesis from Petitioner's Expert. It should be excluded for multiple reasons. Patent Owner timely objected to Exhibit 1025. *See* Paper 25 at 2.

Petitioner submitted Exhibit 1025 (Tellado thesis) for the first time on Reply. Like Exhibit 1022, the thesis was not cited in either the Petition or the Reply. Exhibit 1025 should be excluded for this reason alone as irrelevant and untimely under F.R.E. 402, F.R.E 403, 37 C.F.R. § 42.23, and/or 37 C.F.R. § 42.61.

Moreover, Exhibit 1025 should be excluded as irrelevant because it is not prior art and therefore irrelevant to the knowledge of one of ordinary skill in the art as of 1999. The only expert testimony offered by Petitioner in this case is offered to show the viewpoint of a person of ordinary skill in the art as of the filing date of

[2] Exhibit 1022 should also be excluded because it is not cited in either the Reply or the Second Tellado Declaration.

November 9, 1999. *See* Ex. 1009 ¶ 7. But, like Exhibit 1022, there is no evidence that the Tellado thesis was publicly accessible as of this filing date. The Tellado thesis itself lists two dates, without explanation—(1) a copyright date of 2000 (Ex. 1025 at 2); and (2) the statement "September 1999" under the author's name. *Id.* at 1. After Patent Owner's objection to Ex. 1025, Petitioner submitted supplemental evidence to allege only that the thesis was "catalogued by the Stanford University Libraries on May 9, 2000 (field 916) and was publicly available from the Stanford University Libraries since this date." Ex. 1035 ¶ 2, at 2.

The proponent of the publication, here Petitioner, bears the burden of producing sufficient proof of dissemination or sufficient proof that the publication was otherwise available and accessible. *See SRI Int'l, Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1194 (Fed. Cir. 2008); *see also Carella v. Starlight Archery & Pro Line Co.*, 804 F.2d 135, 139 (Fed. Cir. 1986) ("[O]ne who wishes to characterize the information, in whatever form it may be, as a 'printed publication' should produce sufficient proof of its dissemination or that it has otherwise been available and accessible to persons concerned with the art to which the document relates . . . .").

To be relevant, a publication must have been publicly accessible as of the effective filing date. In this case, Petitioner has admitted that the relevant date, and indeed the only date on which its expert offers his opinions regarding the

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