

Filed on behalf of TQ Delta, LLC

By: Peter J. McAndrews  
McAndrews, Held & Malloy, Ltd.  
500 W. Madison St., 34<sup>th</sup> Floor  
Chicago, IL 60661  
Tel: 312-775-8000  
Fax: 312-775-8100  
E-mail: pmcandrews@mcandrews-ip.com

UNITED STATES PATENT AND TRADEMARK OFFICE

---

BEFORE THE PATENT TRIAL AND APPEAL BOARD

---

CISCO SYSTEMS, INC.,  
Petitioner,  
v.

TQ DELTA, LLC,  
Patent Owner.

---

Case IPR2016-01466  
Patent No. 8,611,404

---

**PATENT OWNER'S REPLY IN  
SUPPORT OF ITS MOTION TO EXCLUDE**

**I. EXHIBIT 1012 SHOULD BE EXCLUDED**

Exhibit 1012 (the declaration of Dr. Kiaei submitted with Petitioner's Reply) should be excluded under Fed. R. Evid. 402 and 403.

**A. Paragraphs 1-3, 8-16, and 25 of Exhibit 1012 Are Not Relevant**

Petitioner takes the position that Paragraphs 1-3, 8-16, and 25 of Exhibit 1012 are relevant to this proceeding even though the Reply does not even cite to those paragraphs. Paper No. 31 at 2-3. As a general matter, it goes without saying that evidence that is not relied upon by a petitioner in its papers is not relevant to the proceeding. *See SK Innovation Co. v. Gelgard, LLC*, IPR2014-00679, Paper No. 58 at p. 49 (P.T.A.B. Sept. 25, 2015) (excluding exhibits under Fed. R. Evid. 402 “[b]ecause Patent Owner did not cite [to the exhibits] in this proceeding”).

Moreover, Petitioner's argument that Paragraphs 1-3 and 15-16 are relevant because they are “responsive to certain assertions made by Dr. Chrissan in his Declaration, thus providing context for his testimony” is a non-starter. *Id.* at 3. If the “context” of Dr. Kiaei's testimony is significant, Petitioner should have cited to Paragraphs 1-3 and 15-16 of Exhibit 1012 in its Reply.

In addition, Petitioner acknowledges that Paragraphs 8-13 “more directly pertain[]” to IPR2016-01760 – and not this proceeding – but still argues that those paragraphs should not be excluded because there is a strong public policy for

making information filed in an administrative proceeding available to the public.

*Id.* Under this logic, however, no exhibit a petitioner files with its papers should ever be excluded from an IPR – no matter how unrelated to the IPR. That cannot be the case. Moreover, excluded exhibits are not removed from the publicly accessible record – they just are not considered by the Board in rendering a final decision. For example, in *Toshiba Corp. v. Optical Devices, LLC*, IPR2014-01447, Paper No. 34, at 43-47 (P.T.A.B. Mar. 9, 2016) the Board excluded Exhibits 1015 and 1016 and stated that it would not consider those exhibits, yet those exhibits can still be accessed by the public on Docket Navigator for that proceeding. As such, Paragraphs 8-13 should be excluded from this proceeding as irrelevant.

Lastly, the cases Petitioner relies on in support of its argument regarding the relevance of Paragraphs 8-13 are inapposite. In *Liberty Mutual*, the party opposing exclusion actually relied on the exhibits being challenged – unlike Petitioner here. *See Liberty Mut. Ins. Co. v. Progressive Cas. Ins. Co.*, CBM2012-00010, Paper No. 35 at 14 (reply citing to challenged Exhibits 1033 and 1034). Moreover, in *CoreLogic* the Board merely said that, because it did not rely on testimony challenged as inadmissible by the petitioner, the petitioner's motion to exclude was moot. The Board did not say that a party can include any testimony it wants as an exhibit – even if the party does not rely on it – just because the Board may end up

not relying on the testimony in its Final Written Decision. *See CoreLogic, Inc. v Boundary Sols., Inc.*, IPR2015-00219, Paper No. 48 at 12 (P.T.A.B. May 19, 2016).

**B. Paragraphs 4-7, 17-21, and 23-24 of Exhibit 1012 Are Not Relevant**

As an initial matter, Petitioner mistakenly argues that Patent Owner failed to explain how and why the “newness” of the evidence found at Paragraphs 4-7, 17-21, and 23-24 renders it irrelevant. Paper No. 31 at 4. As stated in Patent Owner’s Motion, “[r]eple evidence . . . must be responsive and not merely new evidence that could have been presented earlier to support” the petition. Paper No. 25 at 3-4. For the many reasons provided in Patent Owner’s Motion, Paragraphs 4-7, 17-21, and 23-24 of Exhibit 1012 constitute such improper “new evidence,” and, thus, those paragraphs are not relevant to this proceeding. *See* 77 Fed. Reg. 48612, 48620; 77 Fed. Reg. 48,756, 48,767; 37 C.F.R. 42.23(b); *The Scotts Company LLC v. Encap, LLC*, IPR2013-00110, Paper No. 79 at 5-6 (P.T.A.B. June 24, 2014) (declarations submitted with reply that included material that supported petition considered untimely); *Baxter Healthcare Corp. v. Millennium Biologix, LLC*, IPR2013-00590, Paper No. 40, at 3 (refusing to consider evidence that did “not merely rebut points made in Patent Owner’s Response” but was “instead new evidence that could have been presented earlier”).

Moreover, Petitioner's only response to Patent Owner's argument that the testimony found in Paragraphs 4-7, 17-21, and 23-24 of Exhibit 1012 should have been submitted with the Petition is a non sequitur quotation from a Federal Circuit case that "[t]he purpose of the trial in an inter parties review proceeding is to give the parties an opportunity to build a record by introducing evidence." *See* Paper No. 31 at 4. That quote does not explain why Paragraphs 4-7, 17-21, and 23-24 should not have been submitted with the Petition. Moreover, nothing in that quote suggests that Petitioner can fill gaps in its Petition by introducing new evidence at any time it wants to in the proceeding – especially when Patent Owner does not have an opportunity to reply to that new evidence.

At pages 4-5 of its Opposition, Petitioner purports to provide reasons why Paragraphs 4-7, Paragraphs 17-18, Paragraphs 19-21, and Paragraphs 23-24 are relevant. *See* Paper No. 31 at 4-5. In doing so, however, Petitioner just repeats a variation of the generic statement that "Dr. Kiaei's testimony at Paragraphs X is relevant to TQ Delta's argument regarding Y" and that "This testimony evidences what persons of ordinary skill in the art understood at the time."<sup>1</sup> *See id.* at 4-5.

---

<sup>1</sup> Petitioner supports its argument with the following quote: "The law is well established that the Board will not exclude evidence that is proffered to show what a [person of ordinary skill in the art] would have known about the relevant field of

# Explore Litigation Insights

Docket Alarm provides insights to develop a more informed litigation strategy and the peace of mind of knowing you're on top of things.

## Real-Time Litigation Alerts



Keep your litigation team up-to-date with **real-time alerts** and advanced team management tools built for the enterprise, all while greatly reducing PACER spend.

Our comprehensive service means we can handle Federal, State, and Administrative courts across the country.

## Advanced Docket Research



With over 230 million records, Docket Alarm's cloud-native docket research platform finds what other services can't. Coverage includes Federal, State, plus PTAB, TTAB, ITC and NLRB decisions, all in one place.

Identify arguments that have been successful in the past with full text, pinpoint searching. Link to case law cited within any court document via Fastcase.

## Analytics At Your Fingertips



Learn what happened the last time a particular judge, opposing counsel or company faced cases similar to yours.

Advanced out-of-the-box PTAB and TTAB analytics are always at your fingertips.

## API

Docket Alarm offers a powerful API (application programming interface) to developers that want to integrate case filings into their apps.

## LAW FIRMS

Build custom dashboards for your attorneys and clients with live data direct from the court.

Automate many repetitive legal tasks like conflict checks, document management, and marketing.

## FINANCIAL INSTITUTIONS

Litigation and bankruptcy checks for companies and debtors.

## E-DISCOVERY AND LEGAL VENDORS

Sync your system to PACER to automate legal marketing.