UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DISH NETWORK L.L.C.
Petitioner

v.

TQ DELTA LLC
Patent Owner

Case IPR2016-01470
Patent 8,611,404

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

I. INTRODUCTION

Patent Owner TQ Delta's Motion to Exclude ("Motion") should be denied for the reasons that follow.

II. EXHIBITS 1019, 1035, 1036 AND 1052 ARE ADMISSIBLE

The above exhibits are ***authentic*** under FRE 901. Each is considered a periodical and is self-authenticating because it was published by either Electronic Products Magazine or EE Times, both of which are reputable publications. The fact that the articles were found online is irrelevant. The cases that Patent Owner cites to on page 1 of its Motion, which hold that "print-outs from the Internet" are not self-authenticating, are not applicable here because the Internet print-outs in those cases (a) were not published online by any reputable publication, and (b) would not have been considered a self-authenticating periodical even if published in physical form.

Regardless, exhibits 1019, 1035, 1036 and 1052 have distinctive characteristics that sufficiently authenticate webpages. FRE 901(b)(4). The standard for admissibility under FRE 901 is "slight." *United States v. Turner*, 718 F.3d 226, 232 (3d Cir. 2013). Distinctive characteristics include "dates, websites, trademarks, copyright notices, and URL links" indicating the document is what it purports to be. *SAP America, Inc. v. Lakshmi Arunachalam*, IPR2013-00195, Paper 60 at 22 (PTAB Sept. 18, 2014). Exhibit 1019 bears Electronic Products Magazine's logo, copyright notice and the date the article was posted to the

website. Exhibits 1035, 1036 and 1052 each bear the EE Times URL and logo, a copyright notice, the date and time the article was posted to the website, and a retrieval date. Patent Owner provides no showing these characteristics are untrustworthy. *See SDI Techs., Inc. v. Bose Corp.*, IPR2013-00350, Paper 36, at 16-18 (PTAB Nov. 7, 2014).

Patent Owner also suggests that exhibits 1019, 1035, 1036 and 1052 are ***hearsay***. (Motion, 3.) But, as just discussed, these exhibits are self-authenticating periodicals and therefore not hearsay. The exhibits are also "offered for what they *describe*, and *not* to prove the truth of the matter asserted;" as a result, they cannot be considered hearsay. *EMC Corp. v. PersonalWeb Techs, LLC et al.*, IPR2013-00087, Paper 69 at 42-43 (PTAB May 15, 2014) (holding that "prior art references are not hearsay because they are offered for what they *describe*, and *not* to prove the truth of the matters asserted") (citing *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)). For example, exhibit 1019 is cited by Petitioner's expert to corroborate that the Motorola CopperGold chip set described in Bowie (Ex. 1004, 3:44-47) implements ADSL technology. (Ex. 1002, ¶ 127.) Exhibit 1052 is cited to corroborate that video streaming was available in the early 1990s. (Ex. 1002, ¶ 168.) Exhibit 1036 is cited in the technology tutorial section of Petitioner's expert declaration to describe ADSL technology generally. (Ex. 1002, ¶ 76.) And, exhibit 1035 is listed

solely in the "materials considered" section of the Petitioner's expert declaration because they are relevant "references [that] accurately characterize the state of the art at the relevant time" and were considered by Petitioner's expert as part of preparing his declaration. (Ex. 1002, ¶ 24.)

Regardless, even if these exhibits were considered hearsay, experts in *inter partes* review proceedings may rely on hearsay in their declarations. Fed. R. Evid. 703; *Nestle Healthcare Nutrition, Inc. v. Steuben Foods, Inc.*, Case IPR2015-00249, Paper 76 at 13-14 (P.T.A.B. June 2, 2016) (agreeing that hearsay evidence relied upon by expert is admissible because "Federal Rule of Evidence 703 permits an expert to base an opinion on facts or data in the case that an expert has been made aware of it experts in the field would reasonably have relied on such facts or data in forming an opinion"); *Brose N. Am., Inc. and Brose Fahrzeugteile GmBH & Co. Kg, Hallstadt v. Uusi, LLC*, Case IPR2014-00417, Paper 49 at 26 (P.T.A.B. July 20, 2015) ("… an expert may rely upon evidence regardless of whether the evidence is admissible…"). For these reasons, Patent Owner's hearsay argument has no merit.

III. EXHIBITS 1021-1031, 1033, 1038-1043, 1045-1048 AND 1051 ARE ADMISSIBLE.

These exhibits are not hearsay. They are offered for what they describe, and not to prove the truth of the matter asserted; and, as a result, they cannot be considered hearsay. *SeeEMC Corp.* at 42-43 (PTAB May 15, 2014). For example,

exhibits 1021, 1022, 1029-1031, 1033, 1038, 1042 and 1043 are merely cited in the technology tutorial section of Petitioner's expert declaration to describe ADSL technology generally. (*See, e.g.*, Ex. 1002, ¶¶ 51, 52, 67, 77, 86, 93, page 47.) Exhibit 1046 is cited by Petitioner's expert to simply corroborate that Bell Telephone developed a video phone in 1964. (Ex. 1002, ¶ 176.) Exhibits 1023-1028, 1040, 1041, 1045, 1047, 1048 and 1051 are listed solely in the "materials considered" section of the Petitioner's expert declaration because they are relevant "references [that] accurately characterize the state of the art at the relevant time" and were considered by Petitioner's expert as part of preparing his declaration. (Ex. 1002, ¶ 25.) Regardless, even if these exhibits are considered hearsay (a position to which Petitioner does not acquiesce), as just discussed, Petitioner's expert is still permitted to rely upon the above-mentioned exhibits regardless of their admissibility. Fed. R. Evid. 703; *see also Brose N. Am.*, Case IPR2014-00417, Paper 49 at 26. Therefore, Patent Owner's arguments with respect to these exhibits have no merit.

For at least these reasons, Patent Owner's Motion to Exclude the exhibits listed herein should be denied.

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