

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TWITTER, INC.

Petitioner

v.

VIDSTREAM, LLC

Patent Owner

Case IPR2017-01133
U.S. Patent No. 8,601,506
(Claims 1, 4-8, 11, 13-15, 23-26, and 29-30)

**PATENT OWNER VidSTREAM LLC's OPPOSITION TO
PETITIONER'S MOTION TO EXCLUDE EVIDENCE**

I. INTRODUCTION

Petitioner moved to exclude Exhibits 2003-2007 as allegedly containing inadmissible hearsay. Paper 54 (“Motion to Exclude”). These Exhibits are web pages describing features of certain Nokia phones that were available around the 2006 time frame, when the Lahti reference (Ex. 1006) was published. The Exhibits are not hearsay because they are relied upon, not to establish the truth of the matters asserted therein (i.e., that the phones had the described features), but to establish how Lahti’s disclosure would have been understood by a POSITA. Therefore, Petitioner’s Motion to Exclude should be denied.

II. ARGUMENT

A. Applicable Law

A statement is hearsay only if it is relied upon “to prove the truth of the matter asserted in the statement.” Fed. R. Evid. (“FRE”) § 801(c). Statements that are relied upon for other purposes are not hearsay and are not subject to exclusion under FRE § 802. For example, several courts and the Board have recognized that statements in prior art references that are relied upon for their effect on a POSITA or to establish the state of knowledge in the art are not hearsay. *E.g., Neev v. Abbot Med. Optics, Inc.*, No. 09-146, 2012 WL 1066797, at *14 (D. Del. Mar. 26, 2012) (“Statements in a reference offered for their effect on one of ordinary skill in the art are not hearsay.”); *Abbot Labs. v. Diamedix Corp.*, 969 F. Supp. 1064, 1067 n.1

(N.D. Ill. 1997) (prior art document was not hearsay because it was being offered for “the effect its existence had on the knowledge base of those in the field of art”); *Biomarin Pharm. Inc. v. Genzyme Therapeutic Prods. Ltd.*, IPR2013-00537, Paper 79 at 25 (PTAB Feb. 23, 2015) (prior art document was not hearsay because it was “offered as evidence of what it describes to an ordinary artisan”). In addition, the Board has held that technical documents describing properties of commercially available products and being relied upon for the purpose of interpreting the disclosure of an asserted prior art reference were not hearsay because the documents were being “offered simply as evidence of what [they] described, not for proving the truth of the matters addressed in the document[s].” *Luye Pharma Grp. Ltd. v. Alkermes Pharma Ireland Ltd.*, IPR2016-01096, Paper 74 at 34-35 (PTAB Nov. 28, 2017) (quoting *Joy Techs., Inc. v. Manbeck*, 751 F. Supp. 225, 233 n.2 (D.D.C. 1990)).

B. The Challenged Exhibits Are Not Hearsay

1. Exhibits 2003 and 2004

Exhibits 2003 and 2004 are relied upon for the non-hearsay purposes of establishing the knowledge base of a POSITA and for their effect on how a POSITA would interpret Lahti. One of the primary issues addressed in Patent Owner’s Response to the Petition (“POR”) (Paper 47) is Petitioner’s failure to establish that Lahti discloses the “predetermined constraints” limitation required by all of the

Challenged Claims. *E.g.*, POR at 1, 8-9. This limitation generally requires that a server system provides instructions for a device to capture video in accordance with predetermined constraints. *E.g.*, '506 Patent, claim 1. Petitioner alleged that the MobiCon application disclosed in Lahti meets this limitation because Lahti describes specific parameters of a video captured using the application. Petition at 27 (Paper 1). However, Patent Owner demonstrated in the POR that this was incorrect and provided evidence, including Exhibits 2003 and 2004, to show that a POSITA would not have interpreted Lahti as disclosing the “predetermined constraints” limitation. POR at 15-17, 19-22.

More specifically, Exhibits 2003 and 2004, which were publicly available on the internet at least as early as February 5, 2006 and May 30, 2006, respectively (Ex. 2002, ¶¶ 16, 17), are introduced in the POR as showing that “publications contemporaneous with Lahti suggest the video parameters enumerated in Lahti were standard parameters used by camera phones in the 2006 timeframe to capture video data.” POR at 15-16. The video capture parameters described for the Nokia 6270 model (Exhibit 2003) and the Nokia E50 model (Exhibit 2004) are then cited, which are the same as the parameters described in Lahti. *Id.* at 16-17. The effect of these descriptions on a POSITA is stated in the POR as follows: “*a POSITA would have understood* the parameters listed in Lahti are the default parameters for the Nokia 6630 (and a number of other Nokia camera phones available at that time).” *Id.* at 22

(emphasis added). This fact is in turn relied upon to establish Patent Owner’s ultimate conclusion regarding the interpretation of Lahti: “[A] POSITA reviewing Lahti *would not have viewed Lahti as disclosing* that the MobiCon application actually governed video capture parameters.” *Id.* (emphasis added); *see also id.* at 16 (“These facts provide a strong basis for concluding that Lahti’s MobiCon application did *not* impact or control the parameters by which video data was captured.”).

Thus, Exhibits 2003 and 2004 are relied upon, not for the truth of the matters asserted therein, but for what they describe to a POSITA and for how those descriptions would have affected a POSITA’s understanding of what Lahti disclosed. This is a permissible, non-hearsay use of the Exhibits. *See, e.g., Neev*, 2012 WL 1066797, at *14 (“Statements in a reference offered for their effect on one of ordinary skill in the art are not hearsay.”).

Neither of the cases cited by Petitioner in its Motion to Exclude is to the contrary. *See Microsoft Corp. v. Bradium Techs. LLC*, IPR2016-00449, Paper 65 at 2-7 (PTAB July 26, 2017); *Google Inc. v. Meiresonne*, IPR2014-01188, Paper 38 at 10 (PTAB Jan. 20, 2016). In neither case was the excluded evidence relied upon for what it described to a POSITA or for its effect on how a POSITA would understand the teachings of a prior art reference. Rather, in *Microsoft* the evidence excluded as hearsay included statements relied upon for a variety of purposes, such as to establish

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