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 REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE EVIDENCE

I. LACK OF AUTHENTICATION

PO moved to exclude Exs. 1033, 1036, 1037, 1043-1045, and 1047-1050 as lacking authentication. PO Motion to Exclude (Paper 56). Petitioner asserts in its Opposition to the Motion to Exclude (Paper 60) ("Opp.") that these website printouts were either authenticated by the archivist for the Internet Archive or by its own expert, Dr. Houh. *E.g.*, Opp. at 2, 9. However, Petitioner's attempted authentication fails for all of the exhibits because there is insufficient evidence in the record to authenticate them. The attempted authentication additionally fails for deposition exhibits because Petitioner's service of supplemental evidence was untimely.

A. No Sufficient Evidence of Authenticity

Petitioner attempts to rely on declarations by an "archivist for the Internet Archive" to authenticate challenged Exs. 1033, 1043, 1044, 1047, 1048, and 1050. However, the Internet Archive declarations have not been filed and are not in the record in this proceeding. Therefore, there is no evidence in the record to authenticate these exhibits.

Petitioner attempts to authenticate Exs. 1036, 1037, 1045, and 1049 by referring to statements in Dr. Houh's declaration (Ex. 1052) that these are true and correct copies of specified web pages. This is insufficient to authenticate website printouts because Petitioner has not provided evidence that Dr. Houh has personal knowledge of the websites themselves. *See Neste Oil Oyj v. REG Synthetic Fuels,*

LLC, IPR2013-00578, Paper 53 at 4 (March 12, 2015) (website printouts must be authenticated by "someone with knowledge of the website . . . for example a web master").

B. Petitioner's Service of Supplemental Evidence Was Untimely

As discussed in PO's Motion to Exclude, Petitioner failed to cure the lack of authentication objections made against Exs. 1033, 1036, 1037, 1043-1045, and 1047 during the July 24, 2018 deposition of Dr. Olivier, as required by Rule 42.64(a). Paper 56 at 2. Petitioner argues in its Opposition that Rule 42.64(a) is not applicable because it applies only to deposition *testimony*. Opp. at 3. However, by its plain terms this rule is not so limited. It requires providing evidence during the deposition to cure an objection to *any* "deposition evidence," which encompasses deposition exhibits.

Petitioner waited until August 14th, three weeks after the deposition, to serve the Internet Archive declarations on PO. Likewise, Dr. Houh's testimony attempting to authenticate other exhibits was not filed until Petitioner's Reply to the Petition (Paper 50) was filed on August 10th. Therefore, Petitioner's attempts to cure the objections to deposition evidence were untimely and ineffectual.

Even if Petitioner could cure authentication objections by serving supplemental evidence after the deposition was over, its attempt to do so was still untimely. Under Rule 42.64(b)(2), supplemental evidence supporting objected-to

evidence must be served within ten business days of the objection. Petitioner objected to Exs. 1033, 1036, 1037, 1043-1045, and 1047 during the July 24th deposition. The tenth business day after these objections were made was August 7th. Therefore, Petitioner's service of supplemental evidence on August 10th and 14th was untimely.

II. UNAUTHORIZED SUPPLEMENTAL INFORMATION

Petitioner asserts that PO's arguments that Exs. 1033, 1036, 1037, 1043-1045, and 1047-1050 are inadmissible supplemental information are inappropriate because they include arguments that Petitioner's Reply raises new obviousness combinations. Opp. at 4. However, the legal basis for exclusion of these exhibits is not that the exhibits exceed the proper scope of a reply under Rule 42.23(b), but that they are inadmissible under Rule 42.123(b). Under the latter rule, supplemental information—"evidence a party intends to support an argument on the merits"—is admissible only if its submission is pre-approved by the Board. *See Handi Quilter, Inc. v. Bernina Int'l AG*, IPR2013-00364, Paper 30 at 2-3 (PTAB June 12, 2014) (supplemental information "may only be filed if a § 123 motion is both authorized and granted"). Arguments that certain exhibits have been submitted without authorization and are therefore inadmissible under Rule 42.123(b) are appropriate in a motion to exclude. Indeed, the Board has granted such motions. *Dropbox, Inc. v. Synchronoss Tech., Inc.*, IPR2016-00851, Paper 40 at 22-23 (PTAB Oct. 5, 2017);

Toshiba Corp. v. Optical Devices, LLC, IPR2014-01447, Paper 34 at 44-47 (PTAB Mar. 9, 2016). While PO's Motion to Exclude does explain that Petitioner's evidence raises new arguments and obviousness combinations beyond the proper scope of a reply, it does so to illustrate that, beyond even that standard, these new exhibits are offered to supplement Petitioner's required showing and are therefore supplemental information that is inadmissible under Rule 42.123(b).

Contrary to Petitioner's arguments in its Opposition, Petitioner's Reply relies on the new exhibits for more than just rebuttal of PO's Response arguments. As discussed in detail in PO's Response to the Petition, Lahti does not disclose the "predetermined constraints" limitation requiring that video capture parameters are specified by a server. Paper 47 at 1, 8-15. Petitioner's Reply attempted to remedy this deficiency, not by merely rebutting the arguments made in PO's Response, but by attempting to fill Lahti's gaps with these newly cited exhibits. As discussed in PO's Sur-Reply (Paper 57 at 6-13) and Motion to Exclude (Paper 56 at 7-8), Petitioner relied upon Exs. 1043, 1044, 1045, 1047, and 1048 to purportedly supplement what a POSITA would have "understood" from Lahti's passing mention of SDKs. Likewise, Petitioner's Reply relies on Exs. 1033, 1036, 1037, 1049, and 1050 to attempt to remedy Lahti's deficiencies by purportedly demonstrating what a POSITA would have "understood" about mobile handsets available at the time of Lahti. Paper 56 at 2-4; Paper 57 at 5-6.

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