UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SONOS, INC.
Petitioner

v.

IMPLICIT, LLC
Patent Owner

IPR2018-00766
U.S. Patent No. 8,942,252

PATENT OWNER'S RESPONSE TO MOTION TO EXCLUDE

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I. INTRODUCTION

The Board should deny Sonos's Motion to Exclude. The totality of the evidence shows that Implicit's exhibits are authentic under Federal Rule of Evidence 901, which sets a low bar. Sonos's Motion ignores most of the evidence, which includes computer and source code repository metadata. Implicit also did not improperly incorporate by reference its expert's testimony, and Sonos was fully able to respond to and address that testimony and Implicit's arguments in its Reply. For these reasons, Implicit respectfully requests that Sonos's Motion be denied.

II. IMPLICIT'S EXHIBITS ARE AUTHENTIC UNDER FEDERAL RULE OF EVIDENCE 901

Sonos's sole challenge to Exhibits 2002-2009, 2011-78, and 2083-2088 is based on a lack of authentication under Federal Rule of Evidence 901. The standard to authenticate a document under that Rule is low: "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is." FED. R. EVID. 901(a).

Sonos makes only one argument: "Implicit solely relies on the testimony of Mr. Balassanian – an inventor – to authenticate these exhibits," Mot. at 2, and therefore the Board should exclude those exhibits under *Neste Oil OYG v. REG Synthetic Fuels, LLC*, IPR2013-00578, Paper 52 (PTAB Mar. 12, 2015) and *Microsoft Corp. v. Surfcast, Inc.*, IPR2013-00292, Paper 33 (PTAB Oct. 14, 2014).

Those cases do not apply. In both cases, only the testimony from interested parties (*e.g.*, the inventor) was submitted to establish the dates of the various exhibits (*e.g.*, emails; unsigned, undated notebook entries; and whitepapers). The testimony was therefore circular—the patent owner needed the documents corroborate his testimony but the documents needed his testimony to corroborate the date of the documents. That is not the case here. The corroborating evidence, the documents and source code, are dated; they do not rely on Mr. Balassanian's testimony to establish their date. Mr. Balassanian's testimony is only as Implicit's records custodian to authenticate the exhibits as business records under Federal Rules of Evidence 803(6) and 902(11). *See, e.g.*, Exhibit 2001, ¶¶ 81-166; Balassanian Decl. (Attachment A), ¶¶ 3-12. His testimony is therefore not "circular" as to corroborating the dates of the Exhibits.

Sonos's argument also rests on an incorrect premise. Implicit does not "solely" rely on Mr. Balassanian's testimony to authenticate these exhibits. Mot. at 2. As Sonos has long been aware, Implicit relies on computer metadata from two sources: (1) the timestamps provided by the source code repository system (the "Concurrent Version System" or "CVS"); and (2) the computer file system timestamps. *See* Email Chain (Attachment B), at 2-8. In that regard—and at Sonos's request—Implicit provided the BeComm demo laptop hard drive, *see* Exhibit 2001, ¶¶ 53-59 (discussing demo laptop), and a CD backup of its CVS repository, *see id.*,

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