

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ADVANCED MICRO DEVICES, INC.

Petitioner

v.

AQUILA INNOVATIONS INC.

Patent Owner

Case IPR2019-01526
U.S. Patent No. 6,895,519

PATENT OWNER'S MOTION TO EXCLUDE

In accordance with the Board’s scheduling order, Paper No. 4, and 37 C.F.R. § 42.64(c), Patent Owner Aquila Innovations Inc. (“Aquila”) requests that the Board exclude Exhibit 1005 as unauthenticated under FRE 901. Patent Owner also requests that the Board exclude paragraphs 56-62 of Exhibit 1028 as untimely supplemental evidence.

The Petition asserts that “the Internet Archive Wayback machine captured the Window ACPI document itself as of May 4, 1999 from the Microsoft.com website.” Paper No. 2 at 12, *citing* Ex. 1021. Petitioner relies on Exhibit 1005 as a reference in Ground 2. Paper No. 2 at 2. Patent Owner previously objected to Exhibit 1005 based upon the lack of authentication under FRE 901 and hearsay under FRE 801. Paper No. 16. Petitioner did not timely submit supplemental evidence under 37 C.F.R. § 42.64(b)(2).

Exhibit 1005 is inadmissible under FRE 901 because Petitioner has not presented evidence showing that the document is what Petitioner claims it to be – a document archived by the Wayback machine “as of May 4, 1999.” FRE 901(a); *see also TRW Automotive U.S. LLC v. Magna Electronics Inc.*, Case IPR2014-01347, Paper No. 25, 2016 Pat. App. LEXIS 814, *8 (P.T.A.B. January 6, 2016) (“Thus, we first look to what TRW claimed Exhibit 1005 to be.”). The Petition relies only upon Ex. 1021, the declaration of Christopher Butler, to support Exhibit 1005’s admissibility. The Butler Declaration does not show that the Internet Archive

captured Exhibit 1005 as of “May 4, 1999.” Instead, Mr. Butler testifies that the Wayback Machine generates archive URLs according to the date and time it archives the files located at the URL. Ex. 1021 ¶ 5. Mr. Butler testifies that “Exhibit A” of his declaration “are true and correct copies of the Internet Archive’s records of the .zip files,” but Ex. 1021 does not contain an “Exhibit A.” *Id.* ¶ 6. Ex. 1021 provides no evidence that the purported .zip files actually contained Exhibit 1005. Mr. Butler has no personal knowledge of the contents of the .zip file, and his testimony does not connect the alleged .zip files to their alleged contents. FRE 601. Petitioner has presented no evidence that the Internet Archive actually archived Exhibit 1005 itself as of May 4, 1999, as asserted in the Petition.

Having realized that it failed to authenticate Exhibit 1005, Petitioner attempts to use Dr. Albonesi’s reply declaration to cure the defect. *See* Ex. 1028 ¶¶ 56-62. Petitioner submitted this declaration months after it let its deadline to submit supplemental evidence lapse without any attempt to cure Patent Owner’s objections. *Dropbox, Inc. v. Synchronoss Technologies, Inc.*, Case IPR2016-00850, Paper 41, 2016 Pat. App. LEXIS 13489, *31-32 (P.T.A.B. October 5, 2016) (“Categorizing supplemental evidence as a proper or timely reply to Patent Owner’s arguments [] does not shield Petitioner’s evidence from the requirements that it comply with the rules regarding supplemental evidence.”) Petitioner’s untimely supplemental evidence should be excluded.

Petitioner has not shown that Exhibit 1005 is what Petitioner asserts it is – a document archived by the Wayback Machine as early as May 1999. Patent Owner respectfully requests that the Board exclude Exhibit 1005 under FRE 901(a) and exclude paragraphs 56 to 62 of Exhibit 1028 as untimely supplemental evidence.

Date: November 20, 2020

/Jing H. Cherng/

Jing H. Cherng

Reg. No. 68,144

Counsel for Patent Owner

CERTIFICATE OF SERVICE

It is certified that a copy of the foregoing has been served on Petitioner via electronic mail transmission addressed to the person(s) at the address below:

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