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 REPLY IN SUPPORT OF MOTION TO EXCLUDE

Patent Owner Aquila Innovations Inc. ("Aquila") submits this Reply in support of its Motion to Exclude Petitioner Advanced Micro Devices, Inc.'s ("Petitioner") Exhibit 1005 and paragraphs 56-62 of Petitioner's Exhibit 1028.

Petitioner bears the burden to authenticate the evidence it submits and relies on in petitioning for *inter partes* review. *See* Fed. R. Evid. 901(a). Petitioner did not submit evidence sufficient to support a finding that Exhibit 1005 is what Petitioner claims it is – a document archived by the Wayback Machine "as of May 4, 1999." *See* Petition at 12.

The only evidence submitted by Petitioner to purportedly authenticate Exhibit 1005 was the Declaration of Christopher Butler (Ex. 1021).[1] Mr. Butler's declaration was deficient and did not authenticate Exhibit 1005. Mr. Butler

[1] Petitioner also now points to a statement in Dr. Albonesi's declaration submitted in conjunction with the Petition in an effort to argue that it authenticated Exhibit 1005. *See* Opposition at 1-2 (citing Ex. 1003, ¶ 43). But Dr. Albonesi's statement that "Windows ACPI … is a white paper published by Microsoft" is also not sufficient to authenticate Exhibit 1005 as what Petitioner claims it to be – a document archived by the Wayback Machine "as of May 4, 1999." Furthermore, Petitioner has not shown that Dr. Albonesi has personal knowledge of this statement. Fed. R. Evid. 602.

testified as to the Internet Archive's (Wayback Machine) generation of archive URLs according to the date and time it archives the files located at the URL. Ex. 1021 ¶ 5. Mr. Butler stated that "[a]ttached hereto as Exhibit A are true and accurate copies of printouts of the Internet Archive's records of the .zip files" for seven different URLs. *Id.* at ¶ 6. Yet, as Petitioner concedes, Mr. Butler *did not* attach any "Exhibit A." *See* Opposition (Paper 32) at 2 n.1. Petitioner now admits that the boilerplate declaration it submitted from Mr. Butler was deficient. *Id*. ("This is a typographical error that is a vestige of the Internet Archive's Wayback Machine's boilerplate affidavit language"). *See Sam's Riverside, Inc. v. Intercon Sols., Inc*., 790 F. Supp. 2d 965, 981 (S.D. Iowa 2011) ("none of the Contested Screen Shots are attached to the Butler Affidavit; therefore, the Butler Affidavit does not authenticate any of the Contested Screen Shots.").

Petitioner attempts to justify the missing "Exhibit A" by arguing it would be "impractical" for such an exhibit to be included as a printout. Opposition at 2, n.1. But Petitioner refutes its own "impracticality" argument by including "printouts" of archived webpages in its untimely supplemental evidence, *see* Ex. 1028 at ¶¶ 57-60, and in opposing this motion, *see* Opposition at 3.[2] But Petitioner's belated

[2] Aquila objects to the screenshot printouts in the Opposition as untimely new evidence that lack foundation, are unauthenticated, and are inadmissible hearsay.

attempts to supplement the record, while inadequate to authenticate Exhibit 1005, are not permitted by the rules. Critical here, Petitioner *did not* serve supplemental evidence within ten business days of service of Aquila's objections. *See* 37 C.F.R. § 42.64(b)(2).

Conceding that Exhibit 1021 was inadequate to authenticate Exhibit 1005, Petitioner relies on untimely evidence submitted for the first time in conjunction with its Reply. *See* Opposition at 2. After failing to respond to Aquila's objection as authorized under the rules, and after realizing that the Butler (and Albonesi) declarations were insufficient, Petitioner attempted to cure its evidentiary problem by filing untimely evidence in paragraphs 56-62 of Dr. Albonesi's reply declaration. *See* Ex. 1028 at ¶¶ 56-62. But paragraphs 56-62 of Dr. Albonesi's reply declaration must be excluded as untimely.

In *Toshiba Corp. v. Optical Devices*, LLC, IPR2014-01446, Paper 31, 2016 Pat. App. LEXIS 1107, *42-48 (P.T.A.B. Mar. 9, 2016), *aff'd*, 689 F. App'x 976, 976 (Fed. Cir. 2017), the Board excluded untimely evidence submitted by the petitioner in circumstances akin to those here. The petitioner submitted new evidence including a webpage link to a downloadable data sheet and an Internet Archive screenshot, not pursuant to 37 C.F.R. § 42.64(b) in response to the patent owner's evidentiary objections nor under 37 C.F.R. § 42.123(b) as supplemental information, but with its reply. *Id.* at *43-44. In opposing the patent owner's

motion to exclude, the petitioner argued that the exhibits were submitted, under 37 C.F.R. § 42.23, in response to patent owner's arguments in its response. *Id.* at *44 The Board held that the petitioner's reliance on 37 C.F.R. § 42.23 was "misplaced" because that section "does not authorize or otherwise provide a means for supplementing the evidence of record[,]" *id* at *44-45, and underscored that there are rules regarding the submission of supplemental evidence or supplemental information, and the petitioner did not follow those rules. *Id.* at *45-47.

Here, as in *Toshiba*, Petitioner cannot save Exhibit 1005 by using the untimely "evidence" of paragraphs 56-62 of Exhibit 1028. Petitioner argues paragraphs 56-62 are merely "rebuttal evidence" "to respond to arguments raised by PO in its response brief." *See* Opposition at 5. Petitioner does not explain why it did not submit that evidence as supplemental evidence in response to patent owner's evidentiary objections. Petitioner's untimely supplemental evidence must be excluded. *See Toshiba*, 2016 Pat. App. LEXIS 1107, *42-28; *see also 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.").

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