

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GUARDIAN ALLIANCE TECHNOLOGIES, INC.
Petitioner,

v.

TYLER MILLER
Patent Owner.

Case IPR2020-00031
Patent 10,043,188 B2

**PATENT OWNER'S OPPOSITION TO
MOTION TO ADMIT EVAN TALLEY PRO HAC VICE**

Patent Owner opposes the *pro hac vice* admission of Evan Talley in this proceeding for the reasons below.

I. MR. TALLEY IS LIKELY A FACT WITNESS ON A CONTESTED ISSUE

Patent Office Rule of Professional Conduct § 11.307 states, in pertinent part:

(a) A practitioner shall not act as advocate at a proceeding before a tribunal in which the practitioner is likely to be a necessary witness unless: (1) The testimony relates to an uncontested issue; (2) The testimony relates to the nature and value of legal services rendered in the case; or (3) Disqualification of the practitioner would work substantial hardship on the client.

Miller's investigation into Ex. 1004 found that every portion of the document, save for the FRAME set, had been archived by the Internet Archive no earlier than August 2019. (POPR at pp. 29-33; Ex. 2002 at ¶¶ 60-80).

After GAT claimed that it had uploaded the wrong document for Ex. 1002, Miller raised this issue as it supported a Motion to Terminate the IPR. During the meet and confer, Mr. Talley indicated that he was involved in the preparation of the document, but he would not provide specific details.

He would subsequently suggest that Miller's team did not understand how the Internet Archive stored documents. (Ex. 2026). However, his "explanation" was plainly contradicted by multiple pieces of evidence including a blog post by Mark Graham, the director of the Internet Archive. (Ex. 2027). Miller responded

to Mr. Talley's assertion, specifically noting that his "evidence" reinforced Miller's position. (Ex. 2028 at 3).

If trial is instituted, then the provenance of Ex. 1004 will be a primary focus of discovery, particularly who assembled Ex. 1004 and how. Based upon his admitted involvement in the creation of Ex, 1004, Mr. Talley will be a fact witness, particularly whether it is comprised of material that was archived by the Internet Archive no earlier than August 2019. The predicates of 11.307 are all present. Miller believes Ex. 1004 is not prior art; GAT continues to assert that it is. Thus, his testimony directly relates to a contested issue and does not relate to the nature and value of legal services. Further, GAT lists four other counsel in the IPR who are presumably capable of representing it, thus there is no hardship to GAT.

Because Mr. Talley is a "likely witness," he may not participate as an advocate in this proceeding.

II. ADDITIONAL FACTORS

The provenance of Ex. 1004 raises an additional concern with respect to Rule § 11.303 Candor toward the tribunal, which states, in pertinent part:

(a) A practitioner shall not knowingly: ... (3) Offer evidence that the practitioner knows to be false. **If a practitioner, the practitioner's client, or a witness called by the practitioner, has offered material evidence and the practitioner comes to know of its falsity, the practitioner shall take reasonable remedial measures, including, if necessary, disclosure to the**

tribunal. A practitioner may refuse to offer evidence that the practitioner reasonably believes is false. ...

(c) The duties stated in paragraphs (a) and (b) of this section continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by § 11.106.

GAT submitted testimony from Kingsley Klosson in conjunction with Ex. 1004. (Ex. 1014). It is Miller's understanding that Mr. Talley was involved with the presentation of Mr. Klosson's testimony. Mr. Klosson states *as fact*: "Ex. 1004 is a collection of screenshots of the Internet Archive (<http://web.archive.org>) crawls or snapshots of the online POBITS user manual and technical reference, *taken on February 1, 2011* (link omitted)." (Ex. 1014, ¶ 11) (emphasis added). This statement was not qualified with a disclaimer (*e.g.*, I believe, I have been told) etc., nor does Mr. Klosson allege that he was an employee of the Internet Archive.

In sharp contrast, the physical evidence from the Internet Archive indicates that Mr. Klosson's testimony is indisputably false, and that with the exception of the empty FRAME set, the content data in Ex. 1004 was archived by the Internet Archive no earlier than August 2019. (POPR at pp. 29-33; Ex. 2002 at ¶¶ 60-80).

Again, when Miller raised concerns with Ex. 1004 in conjunction with the Motion to Terminate, Mr. Talley asserted that Mr. Howell did not understand the operation of the Internet Archive and even suggested pursuing sanctions against Miller. (Ex. 2026). In a letter to lead counsel, the undersigned explained how Mr.

Talley was misreading the very pages that he was citing. (Ex. 2028).

Unfortunately, the JPEG images in Mr. Talley's document have very poor resolution. Nevertheless, the crux of the argument is summarized below.

To the untrained lay observer, the pages of Ex. 1004 will mislead the reader to believe that all of the content displayed was archived in February 2011. But, the Internet Archive does not always archive all of the elements of any given web page at one time, particularly when a FRAME set is involved. Mark Graham explains this in detail, when he introduces the "Timestamps" feature of the "About this Capture" button:

The Timestamps list includes the URLs and date and time difference compared to the current page for the following page elements: images, scripts, CSS and frames. Elements are presented in a descending order. If you put your cursor over a list element on the page, it will be highlighted and if you click on it you will be shown a playback of just that element.... Each web page element has its own URL and Timestamp, indicating the exact date and time it was archived. Page elements may have similar Timestamps but they could also vary significantly for various reasons which depend on the web crawling process. By using the new Timestamps feature, users can easily learn the archive date and time for each element of a page. ...One of the ways a web archive could be confusing is via anachronisms, displaying content from different dates and times than the user expects. For example, when a archived page is played back, it could include some images from the current web, making it look

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