

IPR2021-00970
U.S. Patent No. 9,572,499
PATENT OWNER'S MOTION TO EXCLUDE

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE, INC.,
Petitioner,

v.

ALIVECOR, INC.,
Patent Owner

IPR2021-00970
U.S. Patent No. 9,572,499

PATENT OWNER'S MOTION TO EXCLUDE

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I. INTRODUCTION

Pursuant to 37 C.F.R. §42.64 and the Federal Rules of Evidence, Patent Owner AliveCor Inc. (“AliveCor”) moves to exclude Exhibits 1081 (Stultz ITC expert report), 1082 (Stultz ITC deposition), 1083 (Stultz ITC demonstratives), and 1072-1073 (Stultz ITC hearing testimony), all of which relate to a new expert, Dr. Stultz and other exhibits added on reply. Dr. Stultz is Apple’s expert in the co-pending ITC investigation, but has not given testimony in this proceeding. Despite this, Petitioner relies on Dr. Stultz’s hearsay testimony *given in other proceedings*. AliveCor timely objected to these exhibits on sufficiently particularized grounds. *See* Paper 31.

Exhibits 1072-73; 1081-83 consist of statements made outside the course of this IPR proceeding that petitioner relies upon for their truth and are therefor hearsay. Further, no exception to the rules against hearsay apply here, thus those statements are inadmissible. In addition, both Dr. Stultz’s testimony and Exhibits 1060-68; 1074-80; 1084-85 constitute new evidence that are not properly raised in Reply. Accordingly, AliveCor requests the Board exclude Exhibits 1060-68 and 1072-85.

II. ARGUMENTS

A. Petitioner Offers Dr. Stultz’s Statements For Their Truth

Out-of-court statements offered for their truth are inadmissible hearsay. *See* FED. R. EVID. 801. Here, Petitioner offers for its truth out-of-court statements made

by Dr. Stultz in various documents, all of which relate to the co-pending ITC investigation. Specifically, the exhibits at issue are Dr. Stultz's ITC expert report (Ex. 1081), Dr. Stultz's ITC deposition (Ex. 1082), Dr. Stultz's hearing testimony (Ex. 1072-73), and demonstratives to Dr. Stultz's ITC hearing testimony (Ex. 1083).¹

Specifically, Petitioner relies on Dr. Stultz's ITC testimony to support various positions regarding machine learning. *See* IPR2021-00970, Paper 30 at 18. This is likely because Petitioner's IPR expert, Dr. Chaitman, made several critical admissions on this topic during his cross-examination – specifically, that he had *no expertise whatsoever* in machine learning or any engineering discipline. Ex. 2017 8:4-19 (no engineering experience), 8:20-16 (no design experience) 27:23-28:1, 108:6-109:24 (no experience with machine learning). These admissions leave Petitioner with no credible expert testimony on machine learning. Petitioner attempts instead to rely on Dr. Stultz to support the propositions that: 1) “machine

¹ While AliveCor also cited testimony from Dr. Stultz, in that instance the testimony was an admission of a party opponent and was therefore subject to an exception to the hearsay rule. *See e.g.*, IPR2021-00970, Paper 28 at 20; Ex. 2018 at 62. Accordingly, Petitioner did not object to those exhibits. Petitioner's use of Dr. Stultz's testimony, however, is hearsay subject to no exception.

learning algorithm” is generic functional language (IPR2021-00970, Paper 30 at 18); 2) “machine learning to detect arrhythmia based on heart rate parameters [] was well known” (*Id.*); and 3) to rebut that machine learning is not trusted by clinicians as a “black box” (*id.* at 19).

B. No Hearsay Exception Applies

Dr. Stultz’s statements in Exhibits 1072-73; 1081-83 are not subject to any hearsay exceptions.

As an initial matter, Exhibits 1072-73; 1081-83 do not satisfy any of the conditions that are set forth in Rule 803. FED. R. EVID. 803. Dr. Stultz’s hearsay testimony, for example, is not a present sense impression (Rule 803(1)); an excited utterance (Rule 803(2)); a statement of his then-existing state of mind (Rule 803(3)); a recorded recollection (Rule 803(5)); a record of a regularly conducted activity (Rule 803(6)); or a public record (Rule 803(10)). These are merely illustrative—no hearsay exception enumerated in Rule 803 applies to Dr. Stultz’s ITC testimony.

Likewise, the Rule 804 exceptions do not apply because those exceptions all require a witness to be unavailable. Fed. R. Evid. 804. Under Rule 804, a witness is unavailable if: (1) due to a testifying exemption from court rules or privilege; (2) refusing to testify despite a court order; (3) lack of memory; (4) declarant death or then-existing infirmity, physical illness, or mental illness; (5) or if the declarant’s testimony is not obtainable by process or other reasonable means. *Id.* None of these

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