

UNITED STATES PATENT AND TRADEMARK OFFICE

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**BEFORE THE PATENT TRIAL AND APPEAL BOARD**

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GOOGLE LLC,

Petitioner

v.

WAG ACQUISITION, LLC

Patent Owner

U.S. Pat. No. 9,762,636

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*Inter Partes* Review Case No. IPR2022-01413

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**PATENT OWNER'S OPPOSITION TO PETITIONER'S  
MOTION TO EXCLUDE**

## TABLE OF CONTENTS

INTRODUCTION .....	2
I. GOOGLE FAILS TO SHOW THAT EXHIBITS 2003, 2004, AND 2009 ARE IMPROPER HEARSAY .....	2
II. MR. HOARTY DOES NOT RELY ON THE CHALLENGED EXHIBITS TO REACH HIS CONCLUSIONS .....	5
III. EXHIBIT 2008 AS A REASONED DECISION OF A SISTER TRIBUNAL IS BOTH RELEVANT AND PROBATIVE .....	7
IV. CONCLUSION.....	8

## INTRODUCTION

Petitioner (Google) seeks to exclude as hearsay Exhibits 2003, 2004, and 2009 herein (testimony of other experts concerning the Carmel reference, Exhibit 1003), and portions of Patent Owner's expert's declaration (Exhibit 2002) that cite these exhibits, as allegedly relying upon improper hearsay. Google also seeks to exclude Exhibit 2008 (ITC decision also addressing Carmel) as allegedly irrelevant.

Google has the burden on this motion. 37 C.F.R. § 42.20(c).

Patent Owner's expert, Mr. Hoarty, cited Exhibits 2003, 2004, and 2009 to reflect that others in the field who had considered Carmel reached like conclusions. This goes to the reliability and credibility of Mr. Hoarty's own opinions, set forth at length in his declaration herein, not to the basis on which Patent Owner seeks to prove its positions.

With regard to Exhibit 2008, Google offers no legal support for the proposition that decisions from the ITC should be disregarded in the wholesale manner sought by Google's motion.

### **I. GOOGLE FAILS TO SHOW THAT EXHIBITS 2003, 2004, AND 2009 ARE IMPROPER HEARSAY**

“Hearsay” means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement.” FRE 801(c). The challenged

statements from Exhibits 2003, 2004, and 2009 are not offered to prove the truth of the matter asserted therein, as WAG has submitted and relies on the independent conclusions of its own expert, Mr. Hoarty, for such matters. Rather, the challenged statements are provided for what they describe, and thus are not subject to exclusion under FRE 802. *See TCL Corp. v. Telefonaktiebolaget LM Ericsson*, IPR2015-01602 (PTAB Jan. 25, 2017), Paper 40 at 37 (denying motion to exclude where the challenged exhibits “are offered for what they describe, and not for the truth of the matter asserted.”).

Google’s motion (at 5) refers to Patent Owner’s arguments in an effort to show that the Exhibits 2003, 2004, and 2009 are used to prove the truth of what they assert. However, the motion only points to arguments that invoke Exhibit 2009, a transcript of Amazon’s expert Dr. Jeffay expressing the same conclusions as Mr. Hoarty on the disclosures of Carmel. The arguments, however, are based on Mr. Hoarty’s opinions that are thoroughly corroborated by Exhibit 2009.

The point in the Sur-reply that Google objects to is an argument that addresses inherency, which (as the Sur-reply points out (at 11)) Google itself only raised *for the first time* in its Reply.

The fact that Mr. Hoarty found that others had reached the same conclusions as him is certainly something that Patent Owner is entitled to argue on its own behalf. The referenced bullet points in the Sur-reply are directed at statements by

another expert that *mirror* the conclusions reached by Mr. Hoarty himself as addressed in the POR (a congruence that Mr. Hoarty himself had noted in his declaration).

Such statements constitute permissible argument to rebut a fallacious allegation advanced by Google in its Reply as to the alleged inherency of individual element requests under the HTTP protocol. WAG's technical arguments rely on Mr. Hoarty's testimony, which itself was comprehensive in this regard, and which did *not* rely upon the challenged exhibits to reach the ultimate conclusions therein, as addressed below.

Concerning footnote 10 of the POR, which Google also objects to, WAG does not present the "prior testimony of Dr. Kevin Jeffay" (Motion at 7) as forming a basis for Mr. Hoarty's own opinions, but rather, to support the reasonableness of Mr. Hoarty's analysis, pointing out that Dr. Jeffay's ITC testimony aligns completely with Mr. Hoarty's independent conclusion that both Figures 6A and 6B of Carmel represent "push" embodiments. *See* POR at 33 n.10 ("Patent Owner's expert agrees with the characterization in prior testimony of Dr. Kevin Jeffay....").

WAG submits that it is entitled to point out by way of argument that Mr. Hoarty is by no means alone in his opinions and has thus proffered credible conclusions. The arguments Google objects to are therefore not subject to FRE 802.

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