UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Google LLC,
Petitioner,

v.

WAG Acquisition, L.L.C.,
Patent Owner.

IPR2022-01413

U.S. Patent No. 9,762,636 B2

PETITIONER'S REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE PURSUANT TO 37 C.F.R. § 42.64

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Other Authorities

I. INTRODUCTION

PO's Opposition (Paper No. 26 ("Opp.")) to Google's Motion to Exclude (Paper No. 25 ("Motion")) attempts to recharacterize PO's and Mr. Hoarty's reliance on Exhibits 2003, 2004, and 2009 as for reasons unrelated to the truth of the statements. But PO's Patent Owner Response (Paper No. 10 ("POR")), Sur-Reply (Paper No. 16), and Mr. Hoarty's Declaration (Exhibit 2002) belie PO's recasting. When PO and Mr. Hoarty cite these exhibits, they do so as purported evidence of the truth of the matter asserted—that a person of ordinary skill in the art would interpret Carmel (Exhibit 1003) in a particular way. (*See, e.g.*, Sur-Reply at 11-13 (citing Exhibit 2009); POR at 33 n.10.)

Exhibits 2003, 2004, and 2009 constitute expert testimony from experts not involved in this proceeding whom Google *never* had the opportunity to cross-examine. Like the excluded expert testimony in the cases cited by Google—cases PO does not mention, let alone distinguish on any grounds—these exhibits should be excluded. (*See* Motion at 5-8.)

The intention of the Federal Rules of Evidence regarding hearsay is to exclude such out-of-court statements when they are offered for the truth of the statements, as they are here. Even if PO and Mr. Hoarty are allegedly relying on these exhibits for "corroboration" or to show that other experts have "express[ed] the same

conclusions as Mr. Hoarty on the disclosures of Carmel" (*see* Opp. at 3), to be "corroborat[ory,]" the statements must be taken as true.

With respect to Exhibit 2008, which Google objects to under Federal Rules of Evidence ("FRE") 401 and 403, PO states in a conclusory fashion that the ITC Initial Determination is "relevant," and does not refute Google's distinctions between the analysis in the Initial Determination and here. (*See* Opp. at 7-8.)

For these reasons, and as explained further below, Google respectfully requests that the Board grant Google's Motion and exclude Exhibits 2003, 2004, 2008, and 2009 from this IPR.

II. THE ENTIRETY OF EXHIBITS 2003, 2004, AND 2009 ARE INADMISSIBLE HEARSAY

Exhibits 2003, 2004, and 2009 are in their entirety the types of exhibits that the Board has previously excluded from IPRs—they are deposition transcripts, declarations, and hearing transcripts that constitute expert testimony from other cases involving other parties and are from experts that Google did not have an opportunity to cross-examine. As explained in Google's Motion (at 5-8), and unrefuted by PO, the Board has previously excluded expert evidence as hearsay under similar circumstances. *See The Data Co. Techs. Inc. v. Bright Data, Ltd.*, IPR2022-00135, Paper 51, 82 (P.T.A.B. May 31, 2023) ("We agree with [p]etitioner that prior testimony from another case, which is not subject to cross-examination by

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