UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GRÜNENTHAL GMBH,
Petitioner

v.

ANTECIP BIOVENTURES II LLC,
Patent Owner

Case PGR2019-00028
U.S. Patent No. 10,052,338

PATENT OWNER'S REPLY IN FURTHER SUPPORT OF MOTION TO EXCLUDE

DATED: April 17, 2020

Respectfully submitted,

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I. Exhibit 1004 (Poree Declaration)

Petitioner does not identify any testimony by Dr. Poree that would suffice for showing the non-patent references his testimony relies upon are documents that "experts in the particular field would reasonably rely … in forming an opinion on the subject." Rule 703, Fed. R. Evid. Since the non-patent references are not otherwise admissible, all of Dr. Poree's obviousness opinions based on them should be excluded under Rule 702(b) and 703.

II. Hearsay dates appearing on non-patent references (Exs. 1006-1010)

Patent Owner does not contest the point that the dates appearing on the face of the five non-patent references are hearsay. Patent Owner contends instead that the hearsay dates are admissible as exceptions to the rule against hearsay. Patent Owner cites three Board decisions for support, but none is designated "precedential." Indeed, there are just as many Board decisions that go the other way and find date information on a non-patent reference to be inadmissible hearsay. *E.g.*, *Apple, Inc. v. DSS Tech. Mgmt., Inc.*, Case IPR2015-00369, slip op. at 6–13 (PTAB Aug. 12, 2015) (Paper 14); *Standard Innovation Corp. v. Lelo, Inc.*, Case IPR2014–00148, slip op. at 13–16 (PTAB Apr. 23, 2015) (Paper 41); *ServiceNow, Inc. v. Hewlett-Packard Co.*, Case IPR2015-00716, slip op. at 16 (PTAB Aug. 26, 2015) (Paper 13). Federal courts agree that "dates imprinted on ... documents are hearsay when offered to prove the truth of the matter asserted, that is, that [the non-patent invalidity reference] was accessible to the public as of the

date set forth on the documents." *Hilgraeve, Inc. v. Symantec Corp*., 271 F. Supp. 2d 964, 974 (E.D. Mich. 2003). "Dates on letters or other documents, when offered to prove the truth of the date, are inadmissible hearsay unless an exception applies or the date can be proven by other means." *Insight Tech., Inc. v. SureFire, LLC*, No. CIV. 04-CV-74-JD, 2007 WL 3244092, at *6 (D.N.H. Nov. 1, 2007). Petitioner contends the applicable exceptions in this case are the "market reports" exception of Rule 803(17), the "learned treatise" exception of Rule 803(18), and the "catch-all" or "residual" exception of Rule 807. None of these exceptions apply to the facts at issue here.

The "market reports" exception is inapposite because the date information at issue is not part of a compilation or listing of publication or copyright dates. Rule 803(17) is directed to lists and compilations, such as "newspaper market reports, telephone directories, and city directories." Fed. R. Evid. 803 (Advisory Committee Notes, 1972 Proposed Rules, Note to Paragraph (17)). The exception is based on the trustworthiness of these types of compilations. "The basis of trustworthiness is general reliance by the public or by a particular segment of it, and the motivation of the compiler to foster reliance by being accurate." *Id*. There is no evidence of any such reliance or motivation in this case. *See Conoco Inc. v. Dep't of Energy*, 99 F.3d 387, 393 (Fed. Cir. 1996).

The "learned treatise" exception is inapposite because the dates inscribed on

the non-patent references at issue are not the subject matter being substantively addressed therein. The rationale for the exception is that "the treatise is written primarily and impartially for professionals, subject to scrutiny and exposure for inaccuracy, with the reputation of the writer at stake." *Id.* (Note to Paragraph (18)). The exception is thus for the substantive analysis put forth in the treatise, not for the date information appearing on its cover.

The "catch-all" or "residual" exception of Rule 807 is likewise inapposite. "The residual exception to the hearsay rule is to be reserved for 'exceptional cases,' and is not 'a broad license on trial judges to admit hearsay statements that do not fall within one of the other exceptions.'" *Standard Innovation,* Case IPR2014–00148, slip op. at 15 (Paper 41) (*quoting Conoco Inc.*, 99 F.3d at 392). It should not be applied where, as here, the proponent provides only "conclusory assertion[s] … [of] equivalent circumstantial guarantees of trustworthiness." *Id.* Petitioner's argument that the dates are trustworthy because they appear on the documents is circular, and its admission that such dates are the best evidence of public accessibility is a damaging admission that should no go overlooked.

III. Improper Reply evidence (Exs. 1040, 1043, 1044, 1045, 1046)

Petitioner's argument, distilled, is that a petitioner may withhold from its petition the evidence and argument required to support a legal conclusion of "printed publication" status, and that it may present that evidence for the first time with its reply. Petitioner provides this statement from *Hulu* as support: "if the

patent owner challenges a reference's status as a printed publication, a petitioner may submit a supporting declaration with its reply to further support its argument that a reference qualifies as a printed publication." (Opp'n, 7 (*citing Hulu, LLC v. Sound View Innovations, LLC*, Case IPR2018-01039, slip op. at 15 (PTAB Dec. 20, 2019) (precedential) (Paper 29).) This is not the sweeping endorsement of trial by ambush that Petitioner would have the Board believe. Read in context with the rest of the opinion, it is clear that *Hulu* provides no cover for presenting the first and only substantive evidence and argument in support of printed publication status in the reply.

Petitioner asserted nothing but non-patent references in its Petition. It supplied no declaration evidence, except the expert's irrelevant hindsight observation that a POSA would think some (but not all) were "published" on the date indicated. (Ex. 1004, ¶¶ 40, 46, 50.) This does nothing to inform as to how or whether a POSA could have located each reference before the priority date, assuming the requisite amount of interest and a reasonable amount of diligence. And Petitioner provided no argument in the Petition itself as to whether it was contending printed publication status by dissemination, availability, or some combination. Patent Owner noted the deficiency in the Patent Owner Response. A proper reply would have tried to explain why the Petition evidence and argument, such as they were, were sufficient. Neither *Hulu*, nor 37 C.F.R. § 42.23(b), nor any

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