UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TCL CORPORATION; TCL COMMUNICATION TECHNOLOGY HOLDINGS, LTD.; TCT MOBILE LIMITED; TCT MOBILE INC.; AND TCT MOBILE (US) INC.,

Petitioners,

v.

TELEFONAKTIEBOLAGET LM ERICSSON,

Patent Owner.

Case IPR2015-01674

U.S. Patent No. RE43,931

PATENT OWNER'S OPPOSITION TO PETITIONERS' MOTION TO EXCLUDE EVIDENCE

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I. Introduction

Petitioners' frivolous attempt to exclude evidence relevant to patentability on scant admissibility grounds should be denied. Exhibits 2005-2010, 2014-2035, 2038-41, 2043-2045, 2047-54 and 2060-2076 are not hearsay and are sufficiently reliable to be admitted. But even if any of these exhibits are considered to be hearsay, an expert is permitted to rely on hearsay in formulating his or her opinions, and there is no basis to exclude any of these exhibits. Thus, Exhibits 2005-2010, 2014-2035, 2038-41, 2043-2045, 2047-54, and 2060-2076 should not be excluded.

II. Petitioners' Motion to Exclude Evidence Should Be Denied

The party moving to exclude evidence bears the burden of proving that the material sought to be excluded is inadmissible under the Federal Rules of Evidence ("FRE"). *Sipnet EU S.R.O. v. Straight Path IP Group, Inc.*, IPR2013-00246, Paper No. 63 at 2 (PTAB Oct. 9, 2014) (*citing* 37 C.F.R. §§ 42.20(c), 42.62(a)). Motions to exclude are disfavored by the Board, because "[t]here is a strong public policy for making all information filed in a non-jury, quasi-judicial administrative proceeding available to the public, especially in an *inter partes* review

which determines the patentability of claims in an issued patent. It is better to have a complete record of the evidence submitted by the parties than to exclude particular pieces." *Nichia Corp. v. Emcore Corp.*, IPR2012-00005, Paper No. 68 at 59 (PTAB Feb. 11, 2014). Here, Petitioners have not met their burden.

A. Ericsson's exhibits based on websites are sufficiently reliable to be admitted.

Petitioners appear to argue that various websites cited as exhibits are unreliable and should be excluded. (Opposition at 6.) Because this argument is not directed to any particular rule of evidence (and none are cited), it cannot support a motion to exclude. *Sipnet EU S.R.O.*, Paper No. 63 at 2 (party moving to exclude must establish that the material sought to be excluded is ***inadmissible under the Federal Rules of Evidence***, *citing* 37 C.F.R. §§ 42.20(c), 42.62(a)). Indeed, Petitioners appear to be simply arguing the sufficiency of this evidence—impermissible at this stage. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. 48765, 48767 (Aug. 14, 2012) ("A motion to exclude …may not challenge the sufficiency of the evidence").

Ericsson assumes that Petitioners may be attempting to argue that these exhibits are not sufficiently authenticated. But if that is the case, the Board has found that circumstantial authentication of similar exhibits can be sufficient to support admission. *See, e.g.*, *SAP America, Inc. v. Laksham Arunachalam*, Paper No. 67 at 33-34 (PTAB Sept. 18, 2014) (admitting a webpage printout from webopedia.com based on circumstantial authentication evidence). Specifically, under FRE 901(b)(4), a party may authenticate evidence using circumstantial evidence in conjunction with the appearance, contents, substance, internal patterns, or other distinctive characteristics of the evidence. Here, Ericsson has provided declarations from Sameer Gokhale (Ex. 2078, filed also as Ex. 1220) directed to, *inter alia*, Exhibits 2005-2006, 2008-2010, 2014-2029, 2035, 2039-2040, 2050, 2053, 2060, 2064-2070, 2075, and 2076 directed to, *inter alia*, Exhibits 2031 and 2045. In this declaration Mr. Gokhale states that the exhibits are true and correct copies of the relevant webpages as they were personally obtained by Mr. Gokhale. Moreover, the documents themselves contain circumstantial evidence supporting their content and authenticity (some detailed in

the Opposition). Given the nature of these documents and the authenticating declarations, the Board should not exclude these exhibits as "unreliable." Rather, the Board can assess their authenticity and assign them appropriate weight.

B. Ericsson's exhibits are not offered to prove the truth of the matter asserted and are not hearsay.

Petitioner's position regarding hearsay is flawed. Documents offered for what they ***describe***, and ***not*** to prove the truth of the matters asserted, are not hearsay. The Board has denied motions to exclude documents in such instances:

> PersonalWeb's hearsay argument regarding Kantor also is unavailing. As EMC notes (Opp. 7), "[p]rior art references are not hearsay because they are offered for what they describe, and not to prove the truth of the matters asserted." *See, e.g.*, *Joy Techs., Inc. v. Manbeck*, 751 F. Supp. 225, 233 n. 2 (D.D.C. 1990), *judgement aff'd*, 959 F.2d 226 (Fed. Cir. 1992); Fed. R. Evid. 801(c) 1997 Adv. Comm. Note ("If the significance of an offered statement lies solely in the fact that it was made, no issue is raised as to the truth of anything asserted, and the statement is not hearsay."). Therefore, Kantor is not hearsay under Federal Rule of Evidence 801(c).

EMC Corp. v. PersonalWeb Techs, LLC et al., IPR2013-00087, Paper 69 at 42-43 (PTAB May 15, 2014). In contrast to this clear statement from the Board, Petitioners were unable to support their position with any decisions from the Board, citing only to obscure court decisions cherry-picked for persuasive-sounding parentheticals.

As in *EMC Corp.*, Exhibits 2005-2010, 2014-2024, 2026, 2039-2041, 2054, 2060, 2064-2073, and 2075-2076 are cited simply for what they describe, not for the truth of any statement or matter asserted in any exhibit:

- Exhibits 2005-2010 are cited as descriptive support for the notion that cell phones in 1997 typically used a keypad interface, not for the truth of the statement in any particular exhibit (*see* Patent Owner Response ("POR") at 3);
- Exhibits 2014-2024 and 2040-2041 are cited as descriptive support for the timeline on page 5 of the POR illustrating when contact-sensitive interfaces became widely-used, not for the truth of the statement in any particular exhibit;

- Exhibit 2026 is cited by Mr. Ward as descriptive support for the size estimate given for the Palm Pilot screen, not for the truth of any statement asserted in the document itself (Ex. 2057, ¶ 38);
- Exhibits 2034 and 2054[1] and 2039 are cited as sources for description of the ongoing challenges with scrolling techniques (POR at 44);
- Exhibit 2060 is cited by Mr. Ward as descriptive support to illustrate the typical components in a mobile phone in 1997 (Ex. 2057, ¶ 87);
- Exhibit 2064 is cited by Mr. Ward as descriptive support for the size and specifications of a particular processor (Ex. 2057, ¶ 42);
- Exhibits 2065 and 2067-2069 are cited by Mr. Ward as descriptive support for discussing the development of Apple's scroll wheel (Ex. 2057, ¶¶ 104-105) and Exhibits 2065-2069

[1] Exhibit 2054 is a replacement of Exhibit 2034 and thus used for the same reason.

are cited as describing generally the features considered valuable in the hand-held industry (POR at 6);

- Exhibit 2073 is cited by Mr. Ward as descriptive support for discussing the considerations associated with power consumption and battery technology in mobile phone design (Ex. 2057, ¶ 43);
- Exhibit 2075 and 2076 are cited as providing descriptive support for typical mobile phone circuit boards in the 1990s and early 2000s (POR at 7).

As detailed above, Exhibits 2005-2010, 2014-2024, 2026, 2039-2041, 2054, 2060, 2064-2073, and 2075-2076 are not used to prove the truth of the matter being asserted. Thus, these exhibits cannot be excluded as inadmissible hearsay.

Moreover, even if these exhibits are considered to constitute hearsay, it is still permissible for Ericsson's expert, Mr. Ward, to rely on them. *See, e.g.*, *SK Innovation Co., LTD. v. Celgard, LLC*, IPR2014-00679, Paper No. 58 at 50 (PTAB Sept. 25, 2015) (refusing to exclude exhibits on the basis of hearsay because FRE 703 permits experts to

rely on otherwise inadmissible evidence if the probative value substantially outweighs its prejudicial effect, noting "because the Board is not a lay jury, and has significant experience in evaluating expert testimony, the danger of prejudice in this proceeding is considerably lower than in a conventional district court trial"); *see also* FRE 703.

C. Petitioners improperly attempt to argue the merits of the case through their motion to exclude.

Because Petitioners' alleged evidentiary arguments are a thinly veiled attack on the sufficiency and weight of the evidence itself, they can independently be denied. Specifically, these "challenges" are actually arguments that go to the merits of Ericsson's POR—not evidentiary objections—and therefore are not a proper basis for excluding documents under the FRE. *See* Office Patent Trial Practice Guide, 77 Fed. Reg. 48765, 48767 (Aug. 14, 2012) ("A motion to exclude …may not challenge the sufficiency of the evidence"). *See also Fresenius Med. Care Holdings, Inc. v. Baxter Int'l Inc.*, No. 03-1431, 2006 WL 1330001, at *3 (N.D. Cal. May 15, 2006) (denying a motion to strike because the true basis of the challenge was "a legal argument going to the merits of Fresenius' invalidity claim—not an evidentiary

objection—and therefore is not a proper basis for excluding the document outright under the Federal Rules of Evidence").

Furthermore, the Board has also expressly stated that "[a] motion to exclude should focus on evidentiary issues, not substantive matters or the weight of the evidence." *QSC Audio Products, LLC v. Crest Audio, Inc.*, IPR2014-00129, Paper No. 17 at 3 (PTAB June 12, 2014). Because Petitioners' purported "evidentiary arguments" are nothing but substantive arguments on whether or not Ericsson's exhibits are persuasive, the motion to exclude should be denied.

III. Conclusion

For the foregoing reasons, Ericsson respectfully requests that the Board deny Petitioners' motion to exclude evidence.

Respectfully submitted,
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Dated: November 25, 2016

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies service of PATENT OWNER'S OPPOSITION TO PETITIONERS' MOTION TO EXCLUDE EVIDENCE on the counsel of record for the Petitioners by filing this document through the PTAB E2E System as well as delivering a copy via electronic mail to the following addresses:

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