

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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TWITTER, INC.,

Petitioner

- vs. -

VIDSTREAM, LLC,

Patent Owner

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Case IPR2017-00830

Patent 9,083,997

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

**I. Introduction**

Patent Owner's Motion to Exclude ("Motion", Paper 58) does not carry its burden to establish that any of Petitioner's exhibits should be excluded.

First, Patent Owner improperly argues that each of exhibits 1041-1044 is untimely as allegedly "beyond the proper scope of reply." *See, e.g.*, Motion at 1. The Board time and time again holds that a motion to exclude is not the proper vehicle for arguing that evidence is beyond the scope of reply. Indeed, the Trial Practice Guide Update explicitly states: "Nor should a motion to exclude address arguments or evidence that a party believes exceeds the proper scope of reply or sur-reply." Trial Practice Guide Update (available at <https://go.usa.gov/xU7GP>), p. 17. Patent Owner is well aware of the Trial Practice Guide Update (*see* Paper 56), and the Board should not entertain Patent Owner's request to deviate from its procedures.

Patent Owner also argues that Exhibits 1044 and 1046-1047 constitute hearsay. As demonstrated below, these exhibits fall under a hearsay exception, and accordingly, should not be excluded. Patent Owner further states that Exhibit 1042 is irrelevant, but the test for relevance is minimal, and Exhibit 1042 is relevant to the proceeding and should not be excluded.

Finally, Patent Owner argues that Dr. Almeroth's Reply Declaration should be excluded as relying upon inadmissible evidence. But each of the exhibits relied upon by Dr. Almeroth are properly admissible, and further, even if any of the

exhibits were inadmissible, an expert can properly rely on inadmissible evidence under Federal Rule of Evidence 703.

Thus, Patent Owner's Motion to Exclude should be denied in full.

## **II. Patent Owner's Timeliness Arguments are Improper and Incorrect.**

Patent Owner moves to exclude Exhibits 1041-1044 as "Untimely Supplemental Information." Motion at 1-4. But these arguments and objections do not point to any rule of evidence which is allegedly violated. And "the Board has repeatedly stated that a motion to exclude is not the proper vehicle to challenge the scope of a reply." *F5 Networks, Inc. v. Radware, Ltd.*, Case IPR2017-00124, Final Written Decision (PTAB April 23, 2018) (Paper 48).

As the Board has explained, "a motion to exclude deals with the admissibility of evidence under the Federal Rules of Evidence. *See* 37 C.F.R. §§ 42.62 (applying the Federal Rules of Evidence to *inter partes* reviews), 42.64; Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,758 (August 14, 2012) ('Admissibility of evidence is generally governed by the Federal Rules of Evidence.')." *Edwards Lifesciences Corp. v. Boston Scientific Scimed, Inc.*, Case IPR2017-00444, Paper 42, at 11 (PTAB June 28, 2018). The Office Patent Trial Practice Guide explains that parties may submit motions to exclude regarding evidence "believed to be inadmissible." Office Patent Trial Practice Guide, 77 Fed. Reg. at 48,758. And a

motion to exclude “must explain why the evidence is not admissible (*e.g.*, relevance or hearsay).” *Id.* at 48,767.

But Patent Owner’s arguments complaining of “untimely supplemental information” do not show that the evidence is *inadmissible* under any rule of evidence. Multiple prior panels of the Board have determined under similar circumstances that a “motion to exclude evidence *filed for the purpose of striking* or excluding an opponent’s brief and/or *evidence* that a party believes goes beyond what is permitted under 37 CFR § 42.23 *is improper.*” *Palo Alto Networks, Inc. v. Finjan Inc.*, Case IPR2015-01979, Paper 62, 66 (PTAB Mar. 15, 2017) (stating that an “allegation that evidence does not comply with 37 CFR § 42.23 is not a sufficient reason under the Federal Rules of Evidence for making an objection and requesting exclusion of such evidence”); *see also Blackberry Corp. v. Zipit Wireless, Inc.*, Case IPR2014-01508, Paper 49, 40 (PTAB Mar. 29, 2016) (“a motion to exclude is not a proper vehicle for a party to raise the issue of arguments exceeding the permissible scope of a reply”); *Liberty Mutual Ins. Co. v. Progressive Casualty Ins. Co.*, CBM2012-00002, Paper 66 at 62 (PTAB Jan. 23, 2014) (“[w]hile *a motion to exclude* may raise issues related to admissibility of evidence, it is not an opportunity to file a sur-reply, and also *is not a mechanism to argue that a reply* contains new arguments or *relies on evidence* necessary to make out a prima facie case.”); *see also Kyocera Corp. et al. v. Softview LLC.*, IPR2013-00007, Paper 51 at 34 (PTAB

Mar. 27, 2014) (“A *motion to exclude is neither a substantive sur-reply*, nor a proper vehicle for arguing *whether a reply or supporting evidence is of appropriate scope*.”). As Patent Owner’s Motion to Exclude fails to comply with this guidance, the portions of Patent Owner’s Motion to Exclude that allege Exhibits 1041-1044 are untimely should be disregarded.

The Board’s consistency in differentiating between motions to exclude and motions to strike was recently memorialized by the Trial Practice Guide Update of August 2018. The Update explicitly states: “Nor should a motion to exclude address arguments or evidence that a party believes exceeds the proper scope of reply or sur-reply.” Trial Practice Guide Update, p. 17. Patent Owner’s Motion to Exclude violates this guidance.

The Trial Practice Guide Update also states: “If a party believes that a brief filed by the opposing party raises new issues, is accompanied by belatedly presented evidence, or otherwise exceeds the proper scope of reply or sur-reply, it may request authorization to file a motion to strike. Alternatively, a party may request authorization for further merits briefing, such as a sur-reply, to address the merits of any newly-raised arguments or evidence.” Trial Practice Guide Update, p. 17. Thus, the Trial Practice Guide Update contemplates a sur-reply to address arguments from a reply on their merits, or a motion to strike to request that arguments in a reply be disregarded. The Trial Practice Guide Update continues to say: “A motion to strike

may be appropriate when a party believes the Board should disregard arguments or late-filed evidence in its entirety, whereas further briefing may be more appropriate when the party wishes to address the proper weight the Board should give to the arguments or evidence.” Trial Practice Guide Update, p. 17.

Patent Owner requested a sur-reply “*consistent with the recent updates to the Board’s Trial Practice Guide*” and was granted a sur-reply “*consistent with the Trial Practice Guide Update.*” Twitter, Inc. v. Vidstream, LLC, Case IPR2017-00830, Paper 56, at 2 (PTAB August 30, 2018) (Order). Patent Owner was fully aware of the Trial Practice Guide Update, and all it contains, including the enumeration of arguments appropriate for its Motion to Exclude. And the Board’s Order of August 30, 2018 in this case required Patent Owner’s sur-reply to be “subject to the limits discussed in the Trial Practice Guide Update, including that the sur-reply *may only respond to arguments* made in Petitioner’s reply brief, comment on reply declaration testimony, or point to cross-examination testimony...” *Id.* at 2-3. Patent Owner did not request a Motion to Strike,<sup>1</sup> and the Board should not tolerate Patent Owner’s end-around its guidance. The Board should not condone

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<sup>1</sup> Requesting one now would be untimely, as the Trial Practice Guide Update states “authorization to file a motion to strike should be requested *within one week of the allegedly improper submission...*” Trial Practice Guide Update, p. 18.

such actions, and therefore, these portions of the Motion to Exclude should be disregarded in their entirety.

Further, Patent Owner has not demonstrated any prejudice that would lead the Board to exclude Exhibits 1041-1044. No prejudice is alleged because no prejudice exists – Patent Owner requested and was granted a full opportunity to respond to Exhibits 1041-1044 in its sur-reply filed September 14, 2018. *See Belden, Inc. v. Berk-tek, Inc.*, 805 F.3d 1064, 1081 (Fed. Cir. 2015).

Thus, Exhibits 1041-1044 should not be excluded as alleged untimely supplemental information.

### **III. Each of the Exhibits Objected to as Containing Hearsay Falls Under an Exception.**

Patent Owner also moves to exclude Exhibits 1044 and 1046-1047 as allegedly containing hearsay. However, each of these documents falls under an exception to the rule against hearsay, and should not be excluded.

Exhibit 1044 falls under an exception to the hearsay rule under FRE 803(17) as a commercial publication, or under the residual exception 807. In a similar situation, the Board has previously held that documents of the Institute of Electrical and Electronics Engineers (IEEE) fell under an exception to the rule against hearsay under FRE 803(17) as a commercial publication. *See Ericsson Inc. v. Intellectual Ventures I LLC*, Case IPR2014-00527, Paper 41, at 10-11 (PTAB May 18, 2015). Like IEEE, Microsoft is a “well-known, reputable publisher of technical

publications” concerning the definition of technical terms. *Id.* And like the Board in IPR2014-00527, the Board here should “take Official Notice that members in the scientific and technical communities who both publish and engage in research rely on the information published” in Microsoft publications, and thus fall under an exception to the hearsay rule as information generally relied upon by the public or by persons in particular occupations. FRE 803(17). Microsoft is a well-known reputable publisher of technical publications concerning the definition of technical terms. The Board frequently relies upon definitions in the fifth edition of the Microsoft Computer Dictionary to establish the meanings of technical terms. *See, e.g., Sony Mobile Comms. (USA) Inc. v. B.E. Technology, LLC*, Case IPR2014-00029, Paper 31, at 9 n. 4 (PTAB April 6, 2015), *Palo Alto Networks, Inc. v. Finjan, Inc.*, Case IPR2016-00149, Paper 11, at 8 n. 3 (PTAB May 16, 2016) (Paper 11). The Board in IPR2014-00527 also found the residual exception of FRE 807 as applicable to the IEEE publication at issue in that case, and likewise, the residual exception should apply here as well. Accordingly, Exhibit 1044 should not be excluded as hearsay.

Exhibits 1046 and 1047 also fall under an exception to the hearsay rule as statements in a treatise that were called to the attention of Dr. Almeroth in his direct examination. Fed. R. Evid. 803(18). The w3schools website was established as a reliable authority by the testimony of Patent Owner’s expert, Dr. Olivier (see Ex.



1035, 119:3-5; Ex. 2008, ¶ 60). Thus, Exhibits 1046 and 1047 should not be excluded as hearsay. Further, the residual exception of Rule 807 applies to Exhibits 1046 and 1047 as well.

Accordingly, because each of the Exhibits objected to as allegedly containing hearsay falls under an exception to the rule against hearsay, Exhibits 1044 and 1046-1047 should not be excluded.

#### **IV. Patent Owner's Relevancy Arguments Fail to Carry its Burden.**

Patent Owner argues that Exhibit 1042 should be excluded as irrelevant. But as acknowledged by Patent Owner, the question of whether a document is a printed publication is “based on underlying factual determinations.” *See* Sur-Reply at 5, *quoting SRI Intern., Inc. v. Internet Sec. Sys., Inc.*, 511 F.3d 1186, 1192 (Fed. Cir. 2008). Thus, the question is: does Exhibit 1042, which was submitted to demonstrate the publication of the Bradford reference, tend to make any relevant assertion of fact, such as the publication date of Bradford, more or less probable? The affirmative answer is clear, of course, and Exhibit 1042 is therefore relevant to the proceeding and Exhibit 1042 should not be excluded.

Patent Owner further moves to exclude portions of Dr. Almeroth's Reply Declaration (Exhibit 1036) as irrelevant, allegedly because those portions “rely on exhibits” that are allegedly “irrelevant and inadmissible.” Patent Owner points to paragraphs of Dr. Almeroth's declaration that discuss Exhibits 1044 and 1046-1047.

But as explained above, each of these exhibits is properly admissible, and thus, Patent Owner's request to the Board to exclude these portions of Dr. Almeroth's Reply Declaration is unpersuasive.

Further, Federal Rule of Evidence 703 states that an expert "may base an opinion on facts...that the expert has been made aware of" even if inadmissible if "their probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." Fed. R. Evid. 703. Here, there is no prejudicial effect suffered by Dr. Almeroth's statements, and Patent Owner has not alleged any. Patent Owner had the opportunity to cross-examine Dr. Almeroth regarding the statements alleged as irrelevant, questioned Dr. Almeroth on objected-to exhibits (*see, e.g.*, Ex. 2014 at 57:24-58:3 (discussing Ex. 1044)), and further had the opportunity to substantively respond in its sur-reply. The probative value of Dr. Almeroth's testimony, providing the understanding of a person of ordinary skill in the art of technical concepts introduced by Patent Owner and/or highly relevant to the '997 Patent's patentability, accordingly substantially outweighs the pure lack of prejudicial effect, and therefore, Dr. Almeroth's testimony in the identified paragraphs is properly admissible and not irrelevant.

## **V. Conclusion**

Because Patent Owner has unambiguously used its Motion to Exclude for an improper purpose, and because Patent Owner has not demonstrated that it is entitled to the relief that it seeks, Patent Owner's Motion to Exclude should be denied in full.

Respectfully submitted,

September 28, 2018

/David L. McCombs/

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Registration No. 32,271

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Twitter, Inc.	§	IPR2017-00830
Petitioner	§	
	§	U.S. Patent No. 9,083,997
	§	
	§	

**CERTIFICATE OF SERVICE**

The undersigned certifies, in accordance with 37 C.F.R. § 42.6, that service was made on the counsel of record for Vidstream LLC as detailed below.

*Date of service* September 28, 2018

*Manner of service* Electronic mail to  
eagle.robinson@nortonrosefulbright.com;  
eric.hall@nortonrosefulbright.com;  
eric.green@nortonrosefulbright.com.

*Documents served* Petitioner Twitter, Inc.'s Opposition to Patent Owner's  
Motion to Exclude

*Persons served* Eagle Robinson  
Eric Hall  
Eric Green

/Raghav Bajaj/  
Raghav Bajaj  
Counsel for Petitioner  
Registration No. 66,630