UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

TWITTER, INC.

Petitioner

v.

VIDSTREAM, LLC

Patent Owner

Case IPR2017-00830
U.S. Patent No. 9,083,997
(Claims 20-35)

PATENT OWNER VIDSTREAM LLC's REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE EVIDENCE

I. Petitioner Has Not Established that Hearsay Exceptions Apply

In its Opposition (Paper 62) ("Opp."), Petitioner does not dispute that the statements challenged by Patent Owner in Exs. 1044, 1046, and 1047 are hearsay. Rather, Petitioner attempts to establish that exceptions apply. Opp. at 7-9. However, Petitioner has failed to meet its burden to provide evidence that all the requirements of the exceptions have been met. *U.S. v. Day*, 789 F.2d 1217, 1221 (6th Cir. 1986) ("The proponent of a hearsay statement bears the burden of proving each element of a given hearsay exception or exclusion.").

Ex. 1044: Petitioner argues that Ex. 1044 is admissible under the hearsay exception set forth in FRE 803(17). However, Petitioner has not provided sufficient evidence that the date on the face of Ex. 1044 meets the requirements of this exception. Instead, Petitioner merely asserts that Microsoft is reputable and is relied upon by members in the scientific and technical communities. Opp. at 7-8. In addition, Petitioner cites two Board decisions that rely on the Microsoft technical dictionary. *Sony Mobile Comms. (USA) Inc. v. B.E. Tech., LLC*, IPR2014-0029, Paper 31, at 9 n.4 (Apr. 6, 2015); *Palo Alto Networks, Inc. v. Finjan, Inc.*, IPR2014-00149, Paper 11 at 8 n.3 (May 16, 2016). However, these cases do not support a conclusion that the date on the face of Ex. 1044 qualifies for a hearsay exception. Neither hearsay nor admissibility are addressed in the cited cases.

Petitioner also asserts that Ex. 1044 is admissible under the "residual" hearsay exception set forth in FRE 807. However, Petitioner has not even attempted to meet its "heavy burden" to show that all the requirements of FRE 807 have been met for Ex. 1044. *U.S. v. Washington*, 106 F.3d 983, 1001-02 (D.C. Cir. 1997) (proponent has a "heavy burden to come forward with indicia of both trustworthiness and probative force" required by FRE 807).

Exs. 1046 and 1047: Petitioner asserts that the FRE 803(18) exception for statements in learned treatises applies to these printouts from a w3schools website. Petitioner fails to establish (1) that the w3schools website is a "treatise, periodical, or pamphlet," or (2) that it was "established as a reliable authority" by an expert's admission or testimony, as required by FRE 803(18). Dr. Olivier's testimony cited by Petitioner establishes only that he used a feature of the website as a tool for displaying code that Dr. Olivier himself generated, not that he considers it a "reliable authority" for information. Ex. 1035, 119:3-5; Ex. 2008, ¶ 60.

Because Petitioner has failed to meet its burden to establish that any hearsay exception applies, the hearsay statements in Exs. 1044, 1046, and 1047 should be excluded.

II. Unauthorized Supplemental Information Is Inadmissible

Petitioner asserts that PO's arguments challenging Exs. 1041-1044 as unauthorized supplemental information are inappropriate because they address

evidence that was not properly within the scope of a reply. Opp. at 3-7. However, the legal basis for exclusion of these exhibits is not that the exhibits exceed the proper scope of a reply under Rule 42.23(b), but that they are inadmissible under Rule 42.123(b). Under the latter rule, supplemental information—"evidence a party intends to support an argument on the merits"—is admissible only if its submission is pre-approved by the Board. *See Handi Quilter, Inc. v. Bernina Int'l AG*, IPR2013-00364, Paper 30 at 2-3 (PTAB June 12, 2014) (supplemental information "may only be filed if a § 123 motion is both authorized and granted"). Arguments that certain exhibits were submitted without authorization and are therefore inadmissible under Rule 42.123(b) are appropriate in a motion to exclude. Indeed, the Board has granted such motions. *Dropbox, Inc. v. Synchronoss Tech., Inc.*, IPR2016-00851, Paper 40 at 22-23 (PTAB Oct. 5, 2017); *Toshiba Corp. v. Optical Devices, LLC*, IPR2014-01447, Paper 34 at 44-47 (PTAB Mar. 9, 2016). While PO's Motion to Exclude does explain that Petitioner's evidence raises new arguments and obviousness combinations beyond the proper scope of a reply, it does so to illustrate that, beyond even that standard, these new exhibits are offered to supplement Petitioner's required showing and are therefore supplemental information that is inadmissible under Rule 42.123(b). The Trial Practice Guide Update and cases cited by Petitioner do not forbid addressing this issue in a motion to exclude and do not limit the Board to deciding admissibility only under the Federal Rules of Evidence.

III. Ex. 1042 Is Irrelevant

The only relevant fact that Petitioner identifies as being addressed by Ex. 1042 is the publication date of Bradford. However, the version of Bradford that Petitioner must establish as prior art is Ex. 1010, which was the version relied upon in the Petition. *See Dropbox*, IPR2016-00851, Paper 40 at 19. Because Ex. 1042 is admittedly different from the later-printed "2015 Version" of Ex. 1010, Ex. 1042 has no bearing on the question of the publication date of Ex. 1010 and should be excluded as irrelevant.

Dated: October 5, 2018

Respectfully submitted,

/Eagle H. Robinson/
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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that on October 5, 2018, a complete copy of Patent Owner VidStream LLC's Reply In Support of its Motion to Exclude Evidence was served on the following:

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