UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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COMCAST CABLE COMMUNICATIONS, LLC
Petitioner

v.

PROMPTU SYSTEMS CORPORATION
Patent Owner

_____

Case IPR2018-00344
Patent No. 7,047,196 B2

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PETITIONER'S MOTION TO EXCLUDE EVIDENCE

I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c) and the Federal Rules of Evidence, Petitioner Comcast Cable Communications, LLC hereby moves to exclude inadmissible evidence submitted by Patent Owner in Exhibits 2001, 2002, 2003, 2009, 2010, 2011, 2015, 2021, 2024, and 2032. Petitioner filed timely objections to these exhibits on October 4, 2018 (Paper 22).

The inadmissible documents all relate to Patent Owner's arguments about purported secondary considerations of non-obviousness. Patent Owner attempts to establish the alleged success of its AgileTV product based largely on internal email communications, press releases, and other hearsay statements. Patent Owner's inadmissible hearsay evidence should be excluded.

II. ARGUMENT

Patent Owner's Exhibits 2001-2003, 2009-2011, 2015, 2021, 2024, and 2032 (¶ 34) constitute or contain inadmissible hearsay. FRE 801, 802. The challenged exhibits meet the definition of hearsay under the Federal Rules of Evidence as each contains out-of-court statements that are being offered by Patent Owner for the truth of the matter asserted therein. Indeed, many of the exhibits are not only hearsay, but hearsay within hearsay. *Id*. 801, 805. Because no exceptions to the hearsay rule apply, these exhibits are inadmissible. *Id*. 801-803, 805.

A. Business Plans and Presentations (Exhibits 2001, 2002, and 2003)

Patent Owner cites Exhibits 2001 and 2002 to support its contention that the AgileTV product "addressed a need in the art." Paper 20 at 33-34. Exhibit 2001 is a draft AgileTV business plan presumably prepared by someone affiliated with Patent Owner—no author is identified. Exhibit 2002 is an AgileTV corporate summary attached to an email from an investment banker to several AgileTV representatives. These exhibits are offered not merely to show that the AgileTV business existed but to establish the alleged fact that its product addressed a pre-existing need that had not previously been addressed by others. Paper 20 at 34. Thus, they are offered to establish the truth of out-of-court statements contained in these documents. Patent Owner also cites Exhibit 2002 to support its contention that AgileTV obtained investment funding. Paper 20 at 37-38. Again, the out-of-court statements in the AgileTV executive summary are offered to prove the truth of the matter asserted therein. Both exhibits constitute hearsay that is not subject to any exception, and they are therefore inadmissible. FRE 801-803.

Patent Owner also cites an AgileTV presentation identified as Exhibit 2003 as evidence that it received investment funding. Paper 20 at 37-38; Ex. 2003 at 34. David Chaiken, Patent Owner's former Vice President and Chief Technology Officer, submitted a declaration citing Exhibit 2003 as evidence that AgileTV received investment funding (Ex. 2032 ¶ 26), but admitted during his deposition

that he does not know if the cited information in Exhibit 2003 is accurate. Chaiken Dep. at 75:15-24 (Ex. 1025). Page 34 of Exhibit 2003 therefore stands on its own as an out-of-court statement regarding purported funding that is offered by Patent Owner to prove the truth of the matter stated therein. It is hearsay subject to no exception and should be excluded.

B. Press Releases (Exhibits 2009 and 2021)

Exhibit 2009 is an email attaching a "first draft of the AgileTV Speech Technology award press release …." Ex. 2009 at 1. Patent Owner cites this exhibit to show that it actually received the award described in the draft press release. Paper 20 at 35. Additionally, Patent Owner cites the draft press release—rather than any direct evidence—to suggest the basis for the alleged award. *Id*. Thus, both the email and attached draft press release are out-of-court statements offered by Patent Owner for the truth of the matter asserted therein. FRE 801(c). Exhibit 2009 constitutes hearsay not subject to any exception to the hearsay rule, and it is therefore inadmissible. *Id*. 802.

Exhibit 2021 is an online article containing a press release issued by Patent Owner. It is cited to support Patent Owner's assertion that it obtained investment funding. Paper 20 at 37-38. Thus, it is an out-of-court statement offered to prove the truth of the matter stated therein—it is hearsay. FRE 801(c). Because it is not

subject to any exception to the hearsay rule, Exhibit 2021 is inadmissible and should be excluded. *Id*. 801-803.

C. Market Research Reports (Exhibit 2010)

Exhibit 2010 is an internal AgileTV email attaching documents "summarizing various aspects of usability and market research" regarding its television product. The email and attachments are hearsay. Moreover, Patent Owner cites Exhibit 2010 to show that "user acceptance of the AgileTV system exceeded expectations." Paper 20 at 36. Thus, it is the users' out-of-court statements (which are not provided) that Patent Owner seeks to establish as true. This is hearsay within hearsay. FRE 801(c), 802, 805. Similarly, Patent Owner cites Exhibit 2010 to support the contention that "users found that compelling features of the AgileTV service included its voice scanning, voice seeking, and ease of use and convenience of its voice navigation." Paper 20 at 36. Again, the document is offered to prove the truth of out-of-court statements (not provided) by unidentified users. It is hearsay within hearsay and subject to no exception to the hearsay rule. FRE 801-803, 805. Exhibit 2010 is therefore inadmissible.

D. Internal AgileTV Emails Regarding Comcast (Exhibits 2011 and 2015)

Exhibit 2011 is an email from AgileTV's then-CEO Paul Cook to "All Employees." Mr. Cook's email forwards an email from Mr. Chaiken purporting to recount statements made by certain Comcast employees. Ex. 2011 at 1. The

exhibit is proffered by Patent Owner to show Comcast's interest in the AgileTV product. Paper 20 at 36-37. To the extent this document is even arguably relevant, it is for the truth of the out-of-court statements contained in the forwarded Chaiken email. It is hearsay subject to no exception to the hearsay rule and is therefore inadmissible.

Exhibit 2015 is another email from Mr. Cook to "All Employees." In the email, Mr. Cook purports to recount conversations with certain Comcast employees. Ex. 2015 at 1. Patent Owner cites this exhibit to support its contention that "Comcast expressed an intent to invest in AgileTV and deploy the AgileTV solution for Comcast's 21 million subscribers." Paper 20 at 37. Exhibit 2015 therefore contains Mr. Cook's out-of-court statements recounting alleged out-of-court statements by others offered to prove the truth of those statements. The email is hearsay and is not subject to any exception to the hearsay rule. FRE 801(c), 803. It is inadmissible. *Id*. 802.

E. Article Regarding Comcast (Ex. 2024)

Exhibit 2024 is an online article entitled "A Voice in the Navigation Wilderness." Patent Owner cites the article to support its assertion that "the AgileTV solution was successfully deployed and tested in the Comcast system." Paper 20 at 39. The article (which does not identify an author) primarily discusses AgileTV and its then-contemplated trial with a small cable company called

Sunflower Broadband, but also states that "AgileTV's search service, Promptu, has been in the field with various cable operators … including Comcast's Willowbrook headend for a year and half …." Ex. 2024 at 1. This statement is not attributed to anyone at Comcast—indeed, no Comcast representatives are mentioned or quoted in the article. The article is an out-of-court statement offered to prove the truth of the matter asserted therein. It is hearsay, and it is not subject to any exception to the hearsay rule. FRE 801-803. Exhibit 2024 is inadmissible.

F. Chaiken Declaration (Exhibit 2032)

Exhibit 2032 is the declaration of Patent Owner's former CTO David Chaiken. Ex. 2032 ¶ 3. In Paragraph 34, Mr. Chaiken testifies as follows:

> After Comcast released its speech recognition functionality in 2015, acquaintances of mine who were aware of the scope of my work at AgileTV told me they confused Comcast's functionality with the AgileTV solution I had developed and deployed in 2005 in connection with my employment at AgileTV.

Id. ¶ 34. Patent Owner cites this testimony in support of its argument that Comcast "copied the claimed invention." Paper 20 at 39-40. The purported statements by Mr. Chaiken's "acquaintances" could arguably be relevant only if accepted as true (and even then they do not evidence copying and are irrelevant). Mr. Chaiken's testimony is therefore inadmissible hearsay because he purports to recount out-of-court statements by unidentified "acquaintances" offered to prove the truth of the

matter asserted in those statements. FRE 801(c), 802. Mr. Chaiken's hearsay testimony in Paragraph 34 is not subject to any exception to the hearsay rule and is therefore inadmissible. FRE 802, 803.

III. CONCLUSION

For the reasons stated above, Petitioner respectfully requests that the Board grant this motion and exclude Patent Owner's inadmissible evidence.

Dated: December 28, 2018

Respectfully submitted,

By: /s/ *James L. Day*

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CERTIFICATE OF SERVICE

I hereby certify that on December 28, 2018, the foregoing **PETITIONER'S MOTION TO EXCLUDE EVIDENCE** was served by electronic mail:

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