

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COMCAST CABLE COMMUNICATIONS, LLC,
Petitioner,

v.

PROMPTU SYSTEMS CORP.,
Patent Owner

Case No. IPR2018-00344
U.S. Pat. No. 7,047,196

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

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I. PRELIMINARY STATEMENT

It is an irrefutable fact that Comcast widely praised the inventiveness of the AgileTV system in the early 2000s when it deployed the AgileTV system within its network and held a license to the application that led to the '196 Patent. Several other industry participants praised the AgileTV system as well. But rather than addressing this evidence on the merits, Comcast seeks to exclude several of Patent Owner's most probative exhibits as hearsay—the most widely misunderstood rule of evidence.

Notably, Comcast does not challenge any of these exhibits as being inauthentic. And Comcast's broad, unspecific objections failed to put Promptu on notice of which statements in the various exhibits Comcast considered to be hearsay in a manner that would have allowed Promptu to cure the alleged deficiencies with supplemental evidence. Regardless, Comcast's arguments rest on a flawed understanding of hearsay, and its motion to exclude should be denied.

II. COMCAST'S OBJECTIONS AND MOTION LACK SUFFICIENT PARTICULARITY

A. Comcast's initial objections were deficient.

Comcast failed to object with the necessary specificity required under the Board's rules, and its motion to exclude should be denied on that basis alone. Objections to evidence “must identify the grounds for the objection with sufficient

particularity to allow correction in the form of supplemental evidence,” and any motion to exclude “must explain the objections.” 37 C.F.R. § 42.64. Yet Comcast’s initial objections (Paper 22) did not identify a single statement that it alleges to be hearsay. Instead, for several exhibits, Comcast simply said “FRE 801-802 (hearsay)” without identifying any objectionable portion of the exhibit (*see, e.g., id.* at 1 for Exhibits 2001 and 2002). For other exhibits, Comcast merely listed a page number of the exhibit without identifying any specific statements (*see, e.g., id.* for Exhibit 2003). These generalized objections failed to provide sufficient notice of which statements, in particular, Comcast believed were hearsay such that Promptu could cure any purported deficiencies with supplemental evidence. 37 C.F.R. § 42.64.

The Board has previously determined that a party’s failure to present sufficient detail in its initial objections warrants denying its motion to exclude, and it should do so again here. *See, e.g., Silicon Labs., Inc. v. Cresta Tech. Corp.*, IPR2015-00626, Paper 65 at 9 (PTAB Aug. 11, 2016) (denying motion to exclude where the party’s initial objections did “not identify any particular portion of the Exhibit nor explain cogently why the Exhibit is not relevant,” violating the sufficient particularity requirements of 37 C.F.R. § 42.64(b)(1)); *see also B/E Aerospace, Inc. v. MAG Aerospace Indus., LLC*, IPR2014-01513, Paper 104 at 15-16 (PTAB March 18, 2016) (denying motion to exclude where “Patent Owner

made general objections based on FREs 402, 403, 701, 702, and 703, but did not mention” the specific paragraph it sought to exclude in its motion, noting that “[t]he lack of an effective objection is sufficient basis to deny this portion of Patent Owner’s Motion.”).

B. Comcast’s Motion to Exclude similarly lacks the required specificity.

Comcast’s Motion to Exclude hurls blanket hearsay objections at ten exhibits spanning 91 pages. But other than calling out a single paragraph in Dr. Chaiken’s declaration (Ex. 2032, addressed below), Comcast fails to identify a single statement from any of the other exhibits that it asserts is hearsay, and its failure to explain its challenges to the exhibits with sufficient particularity warrants denial of its motion. Trial Practice Guide, 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012) (noting that a motion to exclude must, among other requirements, “[e]xplain each objection.”).

III. EXHIBITS 2001-2003, 2009-2011, 2015, 2021, 2024, AND 2032 (¶ 34) ARE EITHER NOT HEARSAY OR FALL WITHIN A RECOGNIZED EXCEPTION TO HEARSAY

A. Promptu’s Business Records (Exhibits 2001, 2002, and 2003)

Comcast makes blanket assertions of hearsay against three business records of Promptu that Comcast contends “are offered to establish the truth of out-of-court statements contained in these documents.” Paper 37 at 2. Comcast’s hearsay

arguments are baseless, at least because each of these three exhibits meets the hearsay exception for business records.

Federal Rule of Evidence 803(6) provides an exception to the rule against hearsay for business records. “Because of the general trustworthiness of regularly kept records and the need for such evidence in many cases, the business records exception has been construed generously in favor of admissibility.” *Conoco, Inc. v. Dep’t of Energy*, 99 F.3d 387, 391 (Fed. Cir. 1996). Mr. Cook, Promptu’s founder and former-CEO, testified that this exhibit was a business record “kept in the course of the company’s regularly conducted activities, and making such records was the regular practice of those activities.” Exhibit 2042 ¶ 2. Mr. Cook also testified that he recognized these documents and that it was his habit and custom to review these and similar documents during his employment at Promptu. *Id.* ¶¶ 5-7. Nor has Comcast’s motion argued, let alone shown, that anything about Exhibits 2001 and 2002 indicate a lack of trustworthiness. As to Exhibit 2003, which Comcast’s own attorney called “a record of AgileTV” during deposition, Comcast at most argues that Dr. Chaiken could not, more than ten years after he left Promptu, “remember the exact finances of the company.” Exhibit 1025 at 73:10-74:11, 77:24-78:2. A failure to recall specifics twelve years after a business record was created does not show a lack of trustworthiness and, in fact, is the precise justification for the business records exception. Indeed, Dr. Chaiken verified the

veracity of other portions of this document, *see, e.g.*, Exhibit 1025 at 76:8-77:6, further lending credence to the document's trustworthiness.

B. Promptu's Press Releases (Exhibits 2009 and 2021)

Comcast argues that Exhibit 2009 (a draft press release attached to a 2005 Promptu email) constitutes hearsay. Paper 37 at 3. But the document, an email exchange between Promptu employee (Scott Maddux) and Promptu's PR firm, falls within the business record exception to hearsay. Fed. R. Evid. 803(6). Furthermore, the document contains quotes from Promptu's then-CEO, Paul Cook, stating that Promptu was "proud to receive recognition from the speech industry." Ex. 2009 at 2. "[T]he theory of the hearsay rule . . . is that the many possible sources of inaccuracy and untrustworthiness which may lie underneath the bare untested assertion of a witness can best be brought to light and exposed, if they exist, by the test of cross-examination." *In re Epstein*, 32 F.3d 1559, 1565 (Fed. Cir. 1994) (quoting 5 John H. Wigmore, *Evidence in Trials at Common Law* § 1420, at 250). Comcast cross-examined Mr. Cook in this proceeding and elected to forego any questions about this exhibit or these statements. Comcast's motion to exclude Exhibit 2009 should thus be denied.

Comcast challenges Exhibit 2021 (a news article containing a press release) as hearsay. Paper 37 at 3-4. Comcast's motion to exclude this exhibit should be denied because the document contains non-hearsay, relevant evidence. For

example, the exhibit includes statements that are not offered to establish the truth of the matter asserted (e.g., the specific amount of funding obtained), but rather the fact that industry participants and venture firms publicly praised the AgileTV system and publicly touted its value proposition in statements, such as “The cable industry is very focused on solving the challenge of finding ways to help consumers experience the full array of television programming available today. . . . Agile TV’s voice navigation service is the solution.” or “AgileTV’s voice recognition technology offers the industry a cost effective, easy to implement solution that will provide customers with increased value – and it’s just plain cool technology.” These statements are not being offered to establish that AgileTV actually did these things, but rather that these industry participants and venture firms actually said these things about the AgileTV system. *See, e.g., Knorr v. Pearson*, 671 F.2d 1368, 1372-73 (C.C.P.A. 1982) (holding a statement is not hearsay if “the communication (as opposed to the truth) ha[d] legal significance”).

C. Promptu’s Market Research Reports (Exhibit 2010)

Comcast challenges a Promptu email (Exhibit 2010) attaching Promptu’s Market Research Reports as hearsay and double hearsay. Paper 37 at 4. Both allegations lack merit. First, the email and its attachments fall within the business records exception to hearsay overcoming Comcast’s objection. Fed. R. Evid. 803(6). Mr. Cook, Promptu’s founder and former-CEO, testified that this exhibit

was a business record “kept in the ordinary course of the company’s regularly conducted activities, and making such records was the regular practice of those activities.” Exhibit 2042 ¶ 2. Mr. Cook also testified that he received the documents, that he recognized these documents, and that it was his habit and custom to review these and similar documents during his employment at Promptu. *Id.* ¶ 10. Nor has Comcast’s motion argued, let alone shown, that anything about Exhibit 2010 indicates a lack of trustworthiness. Comcast could have elected, but chose not to, ask Mr. Cook about these documents during Comcast’s cross-examination of Mr. Cook.

Second, Comcast confusingly seeks to exclude Promptu’s reliance on some “out of court statements (which are not provided).” Paper 37 at 4. It is unclear which “not provided” statements Comcast seeks to have excluded, as Promptu is not seeking to rely on anything other than Exhibit 2010, which was provided, is a business record, and contains no hearsay. Comcast argues that Promptu is relying on these “not provided” statements to argue that the *users*’ expectations were exceeded. *Id.* While the users’ expectations certainly were exceeded (Exhibit 2010 at 6), the actual statement cited by Promptu was that user acceptance of the AgileTV system “exceeded *our* expectations.” Exhibit 2010 at 6 (emphasis added). The “our” in that sentence refers to *Promptu*’s expectations, not those of unidentified users. Similarly, Comcast’s arguments about additional “not

provided” statements by users of the AgileTV system regarding its compelling features are not hearsay. The market research reports were generated by Promptu in the ordinary course of business and record the results of market research, focus groups, and in-home trials.

D. Promptu’s Business Emails (Exhibits 2011 and 2015)

Comcast challenges two Promptu emails containing statements about Comcast as hearsay. Paper 37 at 4-5. Neither challenge withstands scrutiny.

1. Exhibit 2011

No part of Exhibit 2011 is hearsay. Exhibit 2011 is an email from Dr. Chaiken to Paul Cook, whereby Dr. Chaiken describes an event (a successful demonstration of the AgileTV system) immediately after it occurred. Mr. Cook then forwarded the email to all@agile.tv.

First, the email itself is a business record. Fed. R. Evid. 803(6). Mr. Cook, Promptu’s founder and former-CEO, testified that he had a process “that became a habit of using email to memorialize business-related activity concerning AgileTV” and that his email address was “pcook@agile.tv.” Exhibit 2042 ¶ 4. He further testified that this exhibit was a business record “kept in the ordinary course of the company’s regularly conducted activities, and making such records was the regular practice of those activities.” *Id.* ¶ 2. Mr. Cook also testified that this was an email he sent and that he recognized this document. *Id.* ¶ 11. Dr. Chaiken, the author of

part of this document, testified in his declaration that after he demonstrated the AgileTV system, the Comcast executive actually stated, “I could fall in love with this.” Exhibit 2032 ¶ 19. Comcast cross-examined both Mr. Cook and Dr. Chaiken and elected not to ask any questions about this document.

Second, the event described in the email from Dr. Chaiken qualifies as an exception to hearsay as a present sense impression under Fed. R. Evid. 803(1) because Dr. Chaiken is describing an event made immediately after he perceived it (describing what had transpired earlier that morning before “10:30 EST”) and an excited utterance under Fed. R. Evid. 803(2) because Dr. Chaiken is describing his excitement with Comcast’s reception of the AgileTV system.

Finally, the statements of Comcast’s executives and employees (Charlie Cerino, Mark Francisco, Mark Coblitz, and Jim Poder) are party admissions which are not hearsay. Fed. R. Evid. 801(d)(2)(A). Comcast does not even dispute that these individuals are “Comcast employees.” Paper 37 at 4. Furthermore, these statements are not being offered for the truth of the matter asserted (e.g., that Comcast really “could fall in love with” the AgileTV system or that Comcast actually intended to “make an investment in AgileTV”), but rather that Comcast’s employees said these things and that Dr. Chaiken heard these statements. Notably, Comcast offers nothing in response from any of its former employees contesting that these statements were made.

2. Exhibit 2015

Similarly, no part of Exhibit 2015 is hearsay. Exhibit 2015 is an email sent from Paul Cook to all employees of Promptu on February 13, 2004.

First, the email itself is a business record. Fed. R. Evid. 803(6). Mr. Cook, Promptu's founder and former-CEO, testified that he had a process "that became a habit of using email to memorialize business-related activity concerning AgileTV" and that his email address was "pcook@agile.tv." Exhibit 2042 ¶ 4. He further testified that this exhibit was a business record "kept in the ordinary course of the company's regularly conducted activities, and making such records was the regular practice of those activities." *Id.* ¶ 2. Mr. Cook also testified that this was an email he sent providing a weekly update and that he recognized this document. *Id.* ¶ 14. Comcast cross-examined Mr. Cook and elected not to ask any questions about this document.

Second, the email contains Mr. Cook's description of conversations with Comcast's executives. These statements further qualify as an exception to hearsay as a present sense impression under Fed. R. Evid. 803(1) because Mr. Cook is describing an event made immediately after he perceived it (describing conversations he had with Comcast's executives earlier in the week) and an excited utterance under Fed. R. Evid. 803(2) because Mr. Cook is describing his excitement with Comcast's reception of the AgileTV system while Mr. Cook was

under the excitement of having heard that Comcast would commit to a \$2M investment in Promptu and that they would be “pushing hard” to deploy the AgileTV to “their entire 21,000,000 subscribers.” Exhibit 2015. Further, to the extent the email contains statements made by Comcast’s executives, those are party admissions and not hearsay under Fed. R. Evid. 801(d)(2)(A).

Finally, the statements from Comcast are not offered for the truth of the matter asserted (e.g., that Comcast actually intended to roll out AgileTV to 21,000,000 subscribers, that Comcast “love[d] the new receiver and think[s] it’s really cool,” or that Comcast actually wanted to be the “first commercial deployer” of AgileTV), rather the statements are offered to establish that Comcast actually praised the AgileTV system by making these statements and that these statements were heard by Mr. Cook.

E. Comcast’s Admissions in a News Article (Exhibit 2024)

Comcast challenges Exhibit 2024, a news article stating that “AgileTV’s search service, Promptu, has been in the field with various cable operators . . . including Comcast’s Willowbrook headend for a year and a half.” Paper 37 at 6 (quoting Exhibit 2024). Comcast’s objection to this statement is misplaced, as Promptu is not relying on that statement for the truth of the matter asserted, nor does it need to. Dr. Chaiken testified to the same fact in his declaration (Exhibit 2032 ¶ 28) and stated that the location was actually “Willow Grove” (as opposed to

“Willowbrook”). Exhibit 2032 ¶ 28. Dr. Chaiken should know, as he personally supervised the installation of the AgileTV in Comcast’s cable network as he testified. *Id.* ¶ 29. Promptu even submitted a video showing Dr. Chaiken’s installation of the AgileTV in Comcast’s cable network near Philadelphia¹ with Comcast employees. Exhibit 2025; *see also* Exhibit 1025 at 78:5-80:3.

F. Paragraph 34 of Dr. Chaiken’s Declaration (Exhibit 2032)

Comcast’s final challenge is to the penultimate paragraph of Dr. Chaiken’s declaration. In it, Dr. Chaiken testifies that he has had numerous acquaintances who have confused Comcast’s 2015 voice remote functionality to the AgileTV solution Dr. Chaiken developed and deployed at Comcast in 2005. Exhibit 2032 ¶ 34.

Dr. Chaiken’s testimony is not hearsay and is admissible to show that he heard people compare the AgileTV solution with Comcast’s speech recognition functionality. Regardless of whether those people actually confused the Comcast’s functionality with the AgileTV solution, Dr. Chaiken’s testimony is offered to

¹ Willow Grove is a town in the Upper Moreland Township of Pennsylvania and is a suburb of Philadelphia. *See, e.g.*, <https://www.uppermoreland.org/>. The video of the installation shows that the installation occurred in “Upper Moreland Township.” Exhibit 2025, Part 5 at 00:39.

establish the mere fact that he heard people compare his work from 2005 to Comcast's work in 2015. This fact provides strong circumstantial evidence that Comcast (in 2015) copied the work Promptu had completed for Comcast (in 2005).

G. Comcast's motion to exclude should be denied because its challenges go, at most, to the weight of the evidence that the Board is well-positioned to evaluate.

Each of Comcast's objections on the basis of hearsay lack merit because either the evidence is offered for a non-hearsay basis or the evidence qualifies under an exception to hearsay, as explained above.

To the extent the Board disagrees as to any specific exhibit, each of the challenged exhibits should be considered under the residual exception. Fed. R. Evid. 807. The residual exception of hearsay permits the consideration of hearsay evidence when (1) the statement has circumstantial guarantees of trustworthiness, (2) it is offered as evidence of a material fact, (3) it is more probative than any other evidence, and (4) admitting it will best serve the interests of justice. Fed. R. Evid. 807. Further, the residual exception requires that the proponent give an adverse party reasonable notice of the intent to rely upon the evidence so the party has a fair opportunity to respond.

Each of these elements is satisfied here. First, Comcast does not object to any of Promptu's exhibits as being inauthentic, nor can it, as most of them are self-authenticating business records of Promptu. The fact that Comcast does not dispute

the authenticity of these documents, many of which from a decade ago, gives credence to their trustworthiness. Second, each of these is offered as evidence of a material fact – the secondary considerations of nonobviousness of the invention described and claimed in the '196 Patent and of the AgileTV system. Third, each of these exhibits, dated in the early 2000s, are far more probative than the modern-day recollection of the declarants reflecting upon activities and statements from over a decade ago. Fourth, considering these documents will best serve the interests of justice. Comcast's objections at most go to the weight that should be assigned to the unrebutted evidence presented by Promptu. "[T]he Board, sitting as a non-jury tribunal with administrative expertise, is well-positioned to determine and assign appropriate weight to the evidence presented." *Corning Inc. v. DSM IP Assets B.V.*, IPR2013-00053, Paper 66 at 19 (PTAB May 1, 2014). Thus, in *inter partes* review proceedings, "the better course is to have a complete record of the evidence to facilitate public access as well as appellate review." *Id.*; *Liberty Mut. Ins. Co. v. Progressive Cas. Inc. Co.*, CBM2012-00010, Paper 59 at 40 (PTAB Feb. 24, 2014) ("there is a strong public policy for making all information filed in an administrative proceeding available to the public"). It is notable that Comcast offers no evidence in rebuttal that contradicts anything in any of these challenged exhibits.

Finally, the requirement of notice under Fed. R. Evid. 807(b) was satisfied because Promptu cited each of these exhibits in its Patent Owner Response and provided the exhibits to Comcast in September 2018. Many of the exhibits were either the subject of testimony by Mr. Cook and Dr. Chaiken or the exhibits contain (and/or corroborate) statements by Mr. Cook or Dr. Chaiken. Comcast confronted these declarants by cross-examination and therefore had an opportunity to test the declarant regarding the veracity of these exhibits and the statements therein.

IV. CONCLUSION

The Board should deny Petitioner's motion to exclude Exhibits 2001-2003, 2009-2011, 2015, 2021, 2024, and 2032 (§ 34).

Respectfully submitted,

Dated: January 9, 2019

By: /Jacob A. Schroeder/
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CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing
**PATENT OWNER'S OPPOSITION TO PETITIONER'S MOTION TO
EXCLUDE** was served by email on January 9, 2019, on Petitioner's counsel of
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