

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COMCAST CABLE COMMUNICATIONS, LLC
Petitioner

v.

PROMPTU SYSTEMS CORPORATION
Patent Owner

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

**PETITIONER'S REPLY IN SUPPORT OF
MOTION TO EXCLUDE**

Patent Owner attempts to avoid Petitioner's hearsay objections by incorrectly asserting that certain documents are not being offered for the truth of the matter asserted or that they qualify as "business records" or other exceptions to the hearsay rule without meeting the actual requirements for those exceptions. Patent Owner's exhibits are inadmissible under the hearsay rule and should be excluded.

Exhibits 2001, 2002, and 2003: Promptu argues that Exhibits 2001, 2002, and 2003 are "business records" under the exception to the hearsay rule of FRE 803(6). Patent Owner's argument presumes that a document is not hearsay if it is created and maintained by a business, but that is not correct. The Federal Rules entitle the exception "Records of a Regularly Conducted Activity" and limit it only to documents meeting the elements set out in FRE 803(6). For instance, the record must have been "made at or near the time by – or from information transmitted by – someone with knowledge." FRE 803(6)(A). Yet Patent Owner provides no information about how, when, or why these exhibits were made. The rule also requires that the "record was kept in the course of regularly conducted activity" and that making such records "was a regular practice of that activity." FRE 803(6)(B), (C); *see United States v. Ferber*, 966 F. Supp. 90, 98 (D. Mass. 1997) ("there must be some evidence of a business duty to make and regularly maintain records of this type"). Again, Patent Owner's exhibits do not meet these

requirements. For instance, Exhibit 2001 is a draft business plan but Patent Owner does not show it generated and maintained draft business plans as a regularly conducted activity of its business.

Exhibits 2009 and 2021: Exhibit 2009 is an email attaching a draft press release. Promptu asserts without support that it is a “business record” under FRE 803(6) because it relates to AgileTV’s business. Again it fails to establish this exception. “Clearly, there is no across-the-board rule that all emails are admissible as business records.” *In re Oil Spill by the Oil Rig DEEPWATER HORIZON in the Gulf of Mexico, on Apr. 20, 2010*, No. MDL 2179, 2012 WL 85447, at *3 (E.D. La. Jan. 11, 2012). “Were it otherwise, virtually any document found in the files of a business which pertained in any way to the functioning of that business would be admitted willy-nilly as a business record. This is not the law.” *United States v. Ferber*, 966 F. Supp. 90, 99 (D. Mass. 1997) (excluding emails as hearsay because there was “no business duty to make and maintain these E-mail messages”). As to Mr. Cook’s statement that such emails were kept in the course of Promptu’s regularly conducted activities, “if this was sufficient to invoke the business records exception, then all physical mail received by a defendant likewise would be a ‘business record.’ This cannot be the right result.” *In re Oil Spill*, No. MDL 2179, 2012 WL 85447, at *3.

District Courts applying the Federal Rules evaluate multiple factors when determining whether an email meets the business record exception, including whether the proffering party had a policy or imposed a business duty to report or record the information contained in the email and whether it had a policy to use such emails as regular reports or communications. *In re Oil Spill*, No. MDL 2179, 2012 WL 85447, at *3. Patent Owner makes no effort to show that Exhibit 2009 falls within the actual scope of this exception.

Patent Owner argues that Exhibit 2021 is not hearsay by implicitly asserting that it is a “verbal act” with relevance independent of its truth. But this hearsay exception is narrow and only applies to “words that constitute operative legal conduct” such as in a contract. 2 *McCormick On Evid.* § 249 (7th ed.). Patent Owner itself concedes that the exhibit is “offered as evidence of a *material fact* – the secondary considerations of nonobviousness” (Paper 45 at 14, emphasis added); not because the statements in it constitute legal conduct.

Exhibit 2010: This exhibit is an email with several attachments Patent Owner cites for the truth of the matter asserted therein. It makes no real effort to show that the email or attachments were records of regularly conducted activity under FRE 803(6). And while it contends that the document is not offered for the truth of the statements in it, Patent Owner does not explain how the mere existence

of the statements can be relevant to anything in this proceeding (i.e., the fact that the email was sent or that the attachments existed is not relevant).

Exhibits 2011 and 2015: These exhibits are emails from Mr. Cook to all AgileTV employees. Again, Patent Owner fails to address the elements required to establish that an email qualifies as a record of regularly conducted activity under FRE 803(6). Patent Owner also argues that these emails are “present sense impressions” (Paper 45 at 9, 10) but cannot show that the statements in them were made about an event “while or immediately after the declarant perceived it.” FRE 803(1). Statements Mr. Cook composed in broad-distribution emails hours or days after the alleged events are not “present sense impressions.” *See United States v. Green*, 556 F.3d 151, 155 (3d Cir. 2009) (statement 50 minutes after event was not a present sense impression).

His emails also do not qualify as “excited utterances” under FRE 803(2), which only applies to a “statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.” FRE 803(2). Statements made “in a moment of excitement...are thought to be reliable because the declarant, in a state of excitement, is unlikely to muster the reflection necessary for fabrication.” *Brown v. Keane*, 355 F.3d 82, 89-90 (2d Cir. 2004). That the email authors were purportedly excited “with Comcast’s reception of the AgileTV

system” does not constitute a “startling event or condition” and these statements were not made in the “moment of excitement.”

Finally, contrary to Patent Owner’s argument, these emails are cited as evidence to establish the things described in them are true. The statements in the emails have no independent legal significance and are hearsay.

Exhibit 2024: Patent Owner argues that this exhibit is not being relied on for the truth of the matter asserted. But it cites the exhibit to support its allegation that “the AgileTV solution was successfully deployed and tested in the Comcast system.” Paper 20 at 39. It is hearsay cited for the truth of its statements.

Exhibit 2032: In this exhibit, Dr. Chaiken recounts what others supposedly told him. Those statements could only be relevant if taken as true—Dr. Chaiken’s state of mind is irrelevant. Paragraph 34 of his declaration is hearsay.

Residual Exception: Patent Owner attempts to rely on the residual exception to the hearsay rule because it authenticated the exhibits. FRE 807. Its argument confuses the authenticity of documents (whether they are what they purport to be) with the trustworthiness of the statements contained in those documents. *See, e.g., United States v. Ferber*, 966 F. Supp. 90, 98 (D. Mass. 1997) (finding authentic and accurate documents inadmissible). Patent Owner’s exhibits are out-of-court statement with no “equivalent circumstantial guarantees of trustworthiness” as required to invoke FRE 807.

Dated: January 14, 2019

Respectfully submitted,

By: /s/ *James L. Day*

James L. Day

Registration No. 72,681

CERTIFICATE OF SERVICE

I hereby certify that on January 14, 2019, the foregoing **PETITIONER'S
REPLY IN SUPPORT OF MOTION TO EXCLUDE** was served by electronic
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January 14, 2019
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