

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

NETFLIX INC.,
Petitioner,

v.

DIVX, LLC,
Patent Owner.

Case IPR2020-00558
Patent 10,225,588

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

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2004	U.S. Patent No. 9,247,311 [Patent from 12/8/14 Continuation]
2005	Excerpts from U.S. Patent Application No. 14/970,412 File History [412 CON FH]
2006	U.S. Patent No. 9,621,522 [Patent from 12/15/15 Continuation]
2007	Excerpts from U.S. Patent Application No. 15/481,340 File history [340 CON FH]
2008	U.S. Patent No. 10,244,272
2009	U.S. Patent No. 8,806,188 [Braness]
2010	Manning <i>et al.</i> , INTRODUCTION TO INFORMATION RETRIEVAL (2008) (excerpts) [Manning]
2011	US Pat. App. US2009/0290706A1 [Amini]
2012	Declaration of Seth Nielson, Ph.D. [Nielson-Decl.]
2013	Deposition of Patrick McDaniel, Nov. 16, 2020, [McDaniel-Depo.]
2014	Struck <i>et al.</i> , The Elements Of Style, 2005 [Struck & White]
2015	Garner, The Redbook Manual On Legal Style, 2003 [Garner]

2016	Andy Patrizio, Why the DVD Hack Was a Cinch, WIRED, November, 2, 1999, available at https://www.wired.com/1999/11/why-the-dvd-hack-was-a-cinch/ [Patrizio]
2017	About Bruce Schneier, Schneier on Security, available at https://www.schneier.com/blog/about/ [Schneier Blog]
2018	Bruce Schneier, Why Cryptography Is Harder Than It Looks, Counterpane Systems, 1997, available at http://www.firstnetsecurity.com/library/counterpane/whycrypto.pdf [Schneier]
2019	Kevin Henry et. al., An Overview of the Advanced Access Content System (AACs), available at http://cacr.uwaterloo.ca/techreports/2007/cacr2007-25.pdf [Henry]
2020	Free-to-view, Wikipedia, available at https://en.wikipedia.org/wiki/Free-to-view [Free-to-view]
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The Board should deny Petitioner's motion to exclude in its entirety.

I. EXHIBIT 2012 IS ADMISSIBLE.

The challenge to Exhibit 2012 (Dr. Nielson's declaration) should be summarily rejected because it relates to the weight of the evidence, not its admissibility. *Weatherford Int'l, LLC v. Packers Plus Energy Servs. LLC*, IPR2016-01517, Paper 65, 9 (PTAB Apr. 3, 2018) ("Petitioner's arguments with respect to [the declarations] go more to weight of the declarant's testimony rather than admissibility. We do not, therefore exclude [the declarations].").

Petitioner's arguments are also incorrect on the merits, as discussed below.

A. Exhibit 2012 Does Not Apply The Wrong Legal Standard.

Petitioner first argues ¶¶ 78-82 should be excluded for allegedly applying the wrong legal standard. Mot., 2-4. Petitioner misleadingly claims that Dr. Nielson "did not consider whether the prior art teaches the modification of file formats for partial encryption or DRM." Mot., 3. Petitioner's basis is that Dr. Nielson did not consider a single document, Petitioner's *new* Exhibit 1016, in his analysis, which allegedly discloses "how to add DRM information to the standard AVI file format." Ex. 1029, 234:10-14. However, the AVI file format is not one of the file formats disclosed as compatible with Petitioner's Chen reference. *See, e.g.*, Ex. 1006 [Chen] ¶ 119. There is no evidence that AVI could be used in Chen's "HTTP streaming with [the described] features." *Id.* And there is no

evidence that any disclosure in Exhibit 1016 could be applied to Chen. Petitioner in fact *chose* not to have its expert opine on Exhibit 1016 either. Therefore, that Dr. Nielson may not have presumed the POSITA to be aware of “every possible paper ... on the planet,” Ex. 1029, 229:21-23, has no bearing here. As Dr. Nielson explained, “my analysis of the POSITA in my Declaration is correct based on my knowledge of POSITA at that time. I don’t think that [Ex. 1016], even if they were aware of it, would necessarily change my opinion.” Ex. 1029, 229:4-9.

B. Exhibit 2012 Does Not Fail To Disclose Underlying Facts Or Data.

Petitioner next argues ¶¶ 54-77 should be excluded for failing to disclose underlying facts and data. Mot., 4-7. Petitioner is incorrect. Dr. Nielson explained in detail why it was beyond a POSITA’s skill to implement partial frame encryption with scalable video or FEC, utilizing examples, depictions and explanation of the technology. Ex. 2012, ¶¶ 54-77. In fact, while Petitioner’s own expert chose to not challenge Dr. Nielson’s opinion with respect to compatibility of scalable video with partial frame encryption, he did challenge the “assumptions” of Dr. Nielson’s opinion regarding FEC—confirming that Petitioner’s own expert was able to understand the basis of Dr. Nielson’s opinion. Ex. 1031, ¶ 10.

Creating a strawman, Petitioner claims that Dr. Nielson is not “an expert in video encoding.” Mot., 4. This is both misleading and irrelevant. First, Petitioner’s own expert only assessed a POSITA in the field of “video streaming

and media security,” not “encoding.” Ex. 1003, ¶¶ 66-67. Second, Petitioner *never directly asked* Dr. Nielson if he is “an expert in video encoding.” Dr. Nielson testified that his expertise areas in “security, networking and software engineering” are “fuzzy” definitions and not a “precision list.” Ex. 1029, 33:25-34:35:12. Dr. Nielson invited Petitioner’s counsel to inquire about any “specific” area of Dr. Nielson’s expertise, but Petitioner’s counsel declined. *Id.* Petitioner’s gamesmanship should be rejected.

Dr. Nielson is a named inventor on at least three U.S. issued patents relating to security. Ex. 2012, 62. He has taught network security and cybersecurity at UT Austin and John Hopkins University. *Id.*, 61. He is a “Distinguished Scholar and Cybersecurity Fellow at the university’s Robert Strauss Center for International Security and Law.” *Id.*, ¶ 9. He is the recipients of grants from the likes of US Army for development of security projects. *Id.*, ¶ 23. Throughout his twenty years of experience, he has worked with concepts similar to scalability layers. Ex. 1029, 155:2-8. Yet, Petitioner claims that Dr. Nielson is not qualified to opine on security of scalable video coding, relying only on misleading deposition quotes. In particular, Petitioner claims that “Dr. Nielson’s opinions regarding scalable video layers is not based on his pre-existing knowledge or expertise” and must be “based on unspecified materials that he referenced.” Mot., 6-7. Dr. Nielson said no such thing. Rather, Dr. Nielson stated that, in assessing standards and terminology from

the priority date of the patent a decade ago, which change depending even on the version of the same standard, he looked up certain terms and documents because he “typically [does not] have all of the different terms, standards, et cetera memorized in [his] head at any given time” Ex. 1029, 73:6-8.

Petitioner’s misleading attacks on Dr. Nielson ring especially hollow since Petitioner chose not to have its expert challenge Dr. Nielson’s opinions on scalable layers, thus implicitly admitting the correctness of the opinions while resorting to gamesmanship to challenge Dr. Nielson’s knowledge.

II. EXHIBITS 2016-2020 ARE ADMISSIBLE.

Petitioner seeks to exclude Exhibits 2016-2020, which are webpages, articles, and papers. These exhibits are admissible as evidence relied upon by Patent Owner’s expert, irrespective of objections to the exhibits themselves. Specifically, Exhibits 2016-2020 are relied upon by Dr. Nielson in his analysis, and “FRE 703 allows experts to base their opinions on inadmissible facts or data under certain circumstances *and allows for such evidence to be considered by the factfinder* if its probative value substantially outweighs their prejudicial effect.” *Netflix Inc. et al. v. DivX, LLC*, IPR2020-00052, Paper 82, 50 (PTAB Apr. 22, 2021). Petitioner does not attempt to exclude Dr. Nielson’s testimony relying on these exhibits, Mot., 2-7, and has forfeited any argument that he is relying improperly on these Exhibits. *See Wi-LAN v. Sharp Elecs. Corp.*, --- F.3d ----,

2021 U.S. App. LEXIS 9909, *16-18 (Fed. Cir. 2021) (slip op., Apr. 6, 2021) (explaining that expert testimony relying on inadmissible evidence is itself admissible in jury trial unless these points are established).

Therefore, the evidence is admissible regardless of Petitioner's motion to exclude. But Petitioner's arguments are also incorrect for the following reasons.

A. Exhibits 2016-2020 Are Authenticated.

Petitioner first contends Exhibits 2016-2020 have not been authenticated. Mot., 7-10. These exhibits are both authenticated and are self-authenticating.

Exhibit 2016 is self-authenticating because it is an article from a periodical (WIRED magazine), as can be seen on the top of its pages and the URL at the bottom. F.R.E. 902(6); *see Cisco Sys., Inc. v. Centripetal Networks, Inc.*, IPR2018-01436, Paper 40, 68 (PTAB Jan. 23, 2020) (declaration providing evidence of source of exhibits “along with the distinctive characteristics of the exhibits themselves (including dates, titles, publication names, etc.” sufficient to authenticate documents); *Cisco*, IPR2018-01436, Paper 40, 68 n.22 (noting slideshow from American Banker and article published on Gartner “are printed material purporting to be from news sources, which are self-authenticating under Rule 902(6)"); *Netflix*, IPR2020-00052, Paper 82, 49 (“We find [articles from *The Tech* and *IBL News*] authentic”).

Exhibits 2018-2019 are technical papers. Petitioner “has presented nothing

to cast doubt upon the validity or authenticity of the disputed exhibit[s].” *Pass & Seymour, Inc. v. Hubbell, Inc.*, 532 F. Supp. 2d 418, 438 (N.D.N.Y. 2007) (admitting “trade materials” as self-authenticating partly on this basis). The Board cites such failures in denying motions to exclude. *E.g.*, *Samsung Elecs. Co. v. IXI IP, LLC*, IPR2015-01443, Paper 27, 36 (PTAB Dec. 21, 2016) (denying motion to exclude technical articles filed with reply because movant “fails to provide evidence that these documents are not, on their face, what they appear to be,” and finding them authenticated based on trade “marks, an ISBN number, a copyright notice, and date and contact information”).

Exhibit 2018 also satisfies F.R.E. 901(b)(8), as an “ancient document” copyrighted in 1997, more than 20 years before being offered now as evidence, with nothing about its condition alleged to cast doubt on its authenticity, and on its face found in a place where, if authentic, it would be: the records of Counterpane Systems. *See EMC*, IPR2013-00085, Paper 73, 47-48. Exhibit 2018 further is self-authenticating as an item bearing a trade inscription indicating its origin from Counterpane Systems. Ex. 2018, 1. *See, e.g., EMC Corp. v. PersonalWeb Techs., LLC*, IPR2013-00084, Paper 64, 50-51 (PTAB May 15, 2014) (exhibits self-authenticating under FRE 902(7) based on LexisNexis(R), Usenet, and Smitel trade inscriptions); *Milton H. Greene Archives, Inc. v. BPI Comm’ns, Inc.*, 378 F. Supp. 2d 1189, 1195 (C.D. Cal. 2005) (books “self-authenticating as items bearing

trade inscriptions” under 902(7)), *aff’d*, 320 Fed. Appx. 572 (9th Cir. 2009) (per curiam); *Pass & Seymour*, 532 F. Supp. 2d at 438 (same, citing *Woolsey v. NTSB*, 993 F.2d 516, 520-21 (5th Cir. 1993)); *U.S. v. Chan*, 680 F. Supp. 521, 526 (E.D.N.Y. 1988) (self-authentication “because the hotel records bear printed and embossed trade inscriptions indicating their origin”).

Exhibit 2019 has indicia of reliability regarding its status as an accurate copy of a paper made public by University of Waterloo. *See Funai Elec. Co., Ltd et al. v. Gold Charm Ltd.*, IPR2015-01468, Paper 40, 52 (PTAB Dec. 27, 2016) (authenticating exhibit based on “author’s e-mail address, author’s Stanford University address, FAX number, copyright date, etc.”); *Netflix*, IPR2020-00052, Paper 82, 50 (authenticating student thesis as “self-authenticating as it bears indicia of reliability”). Exhibit 2019 bears the University’s name and address, the authors’ names and University email addresses. Ex. 2019, 1. Moreover, Exhibit 2019 was downloaded directly from the University of Waterloo. Ex. 2021, ¶ 8.

Exhibits 2017 and 2020 can be authenticated under F.R.E. 901(b)(4) “using circumstantial evidence in conjunction with the appearance, contents, substance, internal patterns, or other distinctive characteristics of the evidence.” *SAP Am., Inc. v. Arunachalam*, IPR2013-00194, Paper 67, 34 (PTAB Sept. 18, 2014). Printouts of webpages have been determined to be authenticated when “the proponent declared that they were true and correct copies of pages on the internet

and the printouts included on the bottom their web addresses and the dates printed.” *Premier Nutrition, Inc. v. Organic Food Bar, Inc.*, 2008 U.S. Dist. LEXIS 78353, *14 (C.D. Cal. Mar. 27, 2008); *Perfect 10, Inc. v. Cybernet Ventures, Inc.*, 213 F. Supp. 2d 1146, 1154 (C.D. Cal. 2002) *aff’d*, 327 F. App’x 723 (9th Cir. 2009); *see also SAP*, IPR2013-00194, Paper 67, 34. Each of Exhibits 2017 and 2020 include the web address at the bottom and date printed at the top.

Petitioner claims the courts have established that webpages are unreliable, but “authentication is a low bar, requiring only a rational basis that [an exhibit] is what it is asserted to be.” *Advanced Micro Devs., Inc. v. Aquila Innovations, Inc.*, IPR2019-01526, Paper 37, 99 (PTAB Mar. 10, 2021). The Board routinely denies motions to exclude website exhibits in IPR. *See, e.g., id.*, 99-101. Petitioner’s nonbinding, decades-old district court cases merely reflect the infancy of the Internet. Its lead case, *St. Clair v. Johnny’s Oyster & Shrimp, Inc.*, characterizes “this so-called Web” as “one large catalyst for rumor, innuendo, and misinformation.” 76 F. Supp. 2d 773, 774-75 (S.D. Tex. Dec. 17, 1999). Its *Wady* case relies on *St. Clair*. Its *Homestore.com* case relies on the same outdated view. Thus, while *St. Clair* found government online information **not** self-authenticating, 76 F. Supp. 2d at 774-76, current law establishes websites can be reliable enough to be self-authenticating. *See, e.g., F.R.E. 902(5)* (government webpages).

These exhibits have also been authenticated by a supplemental exhibit in the

form of Declaration of Parham Hendifar. Ex. 2021.¹ The Board has rejected the “position that a witness cannot authenticate a document, unless the witness is the author of the document.” *EMC Corp. v. PersonalWeb Techs., LLC*, IPR2013-00085, Paper 73, 61 (PTAB May 15, 2014).² Petitioner further argues the Hendifar Declaration is deficient because “reliance on text from the exhibits ... or from the websites ... would be inadmissible hearsay.” Mot., 10. The Board has held, however, that reliance on dates and copyright notices does not “constitute hearsay, because these dates are not assertions of a publication.” *Apple, Inc. v. VirnetX, Inc.*, IPR2017-00337, Paper 31, 50 (PTAB May 30, 2018) (“Rather, they constitute evidence helping to identify the documents and include circumstantial evidence”) (citing *Seabery N. Am. Inc. v. Lincoln Glob., Inc.*, IPR2016-00840, Paper 60, 5-6 & n.2 (PTAB Oct. 2, 2017)).

¹ Petitioner filed objections to the supplemental exhibit (Paper 20), which was improper. See *Valeo N.A., Inc. v. Magna Elecs., Inc.*, IPR2014-01208, Paper 49, 11 (PTAB Dec. 21, 2015).

² Notably, Petitioner has authenticated its own evidence in this case the same way. For example, Petitioner’s Exhibit 1032 is a declaration by a librarian to “authenticate” articles indexed in libraries even though the witness lacks personal knowledge regarding the articles. See Ex. 1032 [Mullins Decl.] ¶¶ 6, 36-51.

B. Exhibits 2016-2020 Are Not Inadmissible Hearsay.³

Petitioner argues Exhibits 2016-2020 are excludible under F.R.E. 801(c) and 802 as inadmissible hearsay. Mot., 10-11. Notably, Petitioner’s expert, despite submitting a reply declaration on the topic, has not challenged the contents of any of these Exhibits. Petitioner’s procedural challenge is also misplaced.

Patent Owner presents these documents as printed publications which “legitimately serve to document the knowledge that skilled artisans would bring to bear in reading the prior art identified as producing obviousness.” *Ariosa Diagnostics v. Verinata Health*, 805 F.3d 1359, 1365 (Fed. Cir. 2015). As the Board has explained, “[t]he substance of a printed publication generally is not hearsay.” *Caterpillar Inc., v. Wirtgen Am.*, IPR2017-02187, Paper 42, 16-17 (PTAB May 21, 2019) (citing *Biomarin Pharm. Inc., v. Genzyme Therapeutic Prods. Ltd. P’ship*, IPR2013-00537, Paper 79, 25 (PTAB Feb. 23, 2015)); *see also 33Across, Inc., v. Liqwid*, IPR2018-01480, Paper 54, 89-90 (PTAB Feb. 7, 2020); *Equistar Chems. v. ExxonMobil Chem. Pats.*, IPR2017-01534, Paper 64, 65 (PTAB Dec. 7, 2018). To analyze patentability based on Petitioner’s printed publications

³ Petitioner’s section title here, as well as in Section IV.C (Mot., 14), asserts these exhibits “[l]ack [r]elevance,” but the Motion elucidates no challenge, and cites no rule, based on relevance. Mot., 10-11.

offered as evidence of knowledge of POSITA to *argue* unpatentability, while excluding Patent Owner’s printed publications offered to *refute* that same knowledge, would be unfair and improper. FRE 102.

Petitioner contends that these exhibits have not been “shown to be prior art.” Mot., 10. These exhibits demonstrate general state of the field around the time of invention. *See Funai*, IPR2015-01468, Paper 40, 52 (refusing to exclude exhibit used for “non-hearsay purpose of using relevant statements made that generally exhibit the state of the art..., in support of [expert]’s opinion and to challenge [opponent]’s testimony.”). Petitioner claims that Exhibit 2017 is dated “December 3, 2020.” However, Exhibit 2017 is merely the biography of the author of Exhibit 2018, which has a 1997 copyright mark. That the author’s biography is dated more recently is irrelevant. Similarly, Exhibit 2020 is a Wikipedia page that discusses certain systems, such as free-to-view, which are general information in the field, and in any event cite to references around the time of the invention. Ex. 2020, 3.

C. Exhibits 2016-2020 Are Not Offered As Opinion Testimony.

Petitioner argues Exhibits 2016-2020 are excludible under FRE 701/602 as containing improper opinion evidence. Mot., 6. Those rules, however, apply to witness testimony. FRE 701 (“Opinion Testimony by Lay Witnesses”), 602 (“A witness may testify to a matter only if...”). These exhibits are not testimony: they are not made by witnesses to this proceeding, do not contain testimony, and are not

offered as such, but are offered as admissible evidence of the POSITA's beliefs. Nor does Petitioner cite to any authority for excluding such nontestimonial evidence as if it were testimonial. *Netflix*, IPR2020-00052, Paper 82, 50 ("We agree with Patent Owner that Exhibit 2080 is not testimonial evidence.").

III. EXHIBIT 2025 IS ADMISSIBLE.

Exhibit 2025 is a Request for Comments (RFC) issued by the Internet Engineering Task Force (IETF) and was introduced at the deposition of Petitioner's expert, Ex. 2026, and is a part of the deposition transcript. As will be discussed, Petitioner's arguments lack merit, and this evidence is admissible.

A. Exhibit 2025 Is Not Prohibited New Evidence.

Petitioner insists Exhibit 2025 is excludible under 37 C.F.R. §42.23(b), but fails to cite any case granting a motion to exclude deposition exhibits as improper new exhibits. Patent Owner's research has not found any such decision. Petitioner argues Exhibits 2025 should be excluded because it was filed with the sur-reply and is not a transcript. Mot., 12-13. Exhibit 2025, however, was introduced and used during deposition of Petitioner's expert. Ex. 2026, 21:9-26:14. Conforming to federal practice, "transcripts" includes exhibits to the deposition. *See* Fed. R. of Civ. P. 30(f)(2)(A) (specifying that "Documents and tangible things produced for inspection during a deposition must, on a party's request, be marked for identification and attached to the deposition."; *compare, e.g.,* Fed. R. of Civ. P.

30(f)(1), (3). Since Exhibit 2025 was “used in conducting Dr. [McDaniel]’s deposition[] and the complete deposition transcript[] [is] in the record,” “it is proper to maintain [it] in the record” to “keep[] a complete record”. *Intex Recreation Corp. v. Team Worldwide Corp.*, IPR2018-00872, Paper 133, 64-65 (PTAB Sept. 11, 2019) (exhibit nos. omitted). That *Intex* was decided before 37 C.F.R. § 42.23(b) was amended is of no consequence. The amendment was expressly drafted “to conform to the [then-]current standard [PTAB] practice of providing sur-replies to principal briefs”. 85 FR 79120 (Dec., 9, 2020).

Petitioner also incorrectly claims that it was deprived of the opportunity to “present competing evidence, direct testimony.” Mot., 13. Not so. Petitioner was able to present testimony in exactly the same manner as Patent Owner for Exhibit 2025: deposition of Petitioner’s own expert. Petitioner **chose** to not ask any questions from its expert regarding this exhibit on re-direct. Ex. 2026, 27:3-4. Petitioner’s newly found concern about fairness is selective and self-serving, as Petitioner filed **15 new exhibits** with its Reply. It cites multiple new untimely exhibits to meet its prima facie case of obviousness-thus forcing Patent Owner to introduce Exhibit 2025 at Dr. McDaniel’s deposition. PO Sur-Reply, 11-12.

B. Exhibit 2025 Is Authenticated.

Petitioner argues Exhibit 2025 is not authenticated. Mot., 13-14. Petitioner “present[s] nothing to cast doubt upon the validity or authenticity of the disputed

exhibit.” *Pass & Seymour*, 532 F. Supp. 2d at 438. In fact, Petitioner’s own expert authenticated Exhibit 2025 at his deposition by identifying it, and testified that he “[doesn’t] have any reason to doubt it.” Ex. 2026, 22:25-23:1; 23:15-17. Exhibit 2025 has indicia of reliability regarding its status as an accurate copy of a RFC document made public by the Internet Engineering Task Force. F.R.E. 901(b)(4). As Dr. McDaniels testified, the IETF “is the guiding organization which defines standards for internet protocols”. Ex. 2026, 23:7-9. Exhibit 2025 bears the date of publication, the names and institutions of the authors, and the name of the working group on the first page and a full copyright statement on page 51. Furthermore, this exhibit is authenticated by Mr. Hendifar’s declaration. Ex. 2028; *supra* § II.A.

C. Exhibit 2025 Is Not Inadmissible Hearsay.

Petitioner argues Exhibit 2025 is excludible as hearsay. Mot., 14-15. The Board has previously found that RFCs issued by the IETF are not inadmissible hearsay. *Apple*, IPR2017-00337, Paper 31, 48-51 (RFC exhibits “qualify under the business records or residual exceptions to the rule against hearsay.... Patent Owner fails to show that ...its source—i.e., RFC 2401 and RFC 2543— indicate a lack of trustworthiness, as required under FRE 803(6)(E).”). The Board should find the same here. Furthermore, Exhibit 2025 is offered for the “non-hearsay purpose of using relevant statements that generally exhibit the state of the art.” *Funai*, IPR2015-01468, Paper 40, 52. Specifically, it demonstrates that a POSITA would

not have considered Dr. McDaniel's "simple" solution, as it would contradict the POSITA's understanding of the standards. Sur-Reply, 14-15.

D. Exhibit 2025 Is Not Offered As Opinion Testimony.

Petitioner argues Exhibit 2025 is improper opinion testimony under FRE 701/602. Mot., 15. But as in Section II.C, these rules apply to opinion testimony, and Exhibit 2025 is not being offered as either opinion or testimony.

Moreover, Petitioner failed to timely object to Exhibit 2025 as allegedly containing improper opinion, and thus failed to preserve such an objection. Petitioner objected to Exhibit 2025 under 37 C.F.R. § 42.64(b). Paper 41, 1. That Rule expressly applies only "[f]or evidence other than deposition evidence." These exhibits are introduced as deposition evidence, so Rule 42.64(b) expressly does not apply. The Practice Guide and rules are absolutely clear that "*[a] party wishing to challenge the admissibility of deposition evidence must make an objection during the deposition.*" 37 C.F.R. § 42.64(a) (emphasis added); CTPG, 78. But Petitioner did not make an objection for improper opinion during deposition. Ex. 2026 [McDaniel Sec. Dep.] 22:8-10. Instead, it waited nearly three weeks to file objections, solely under Rule 42.64(b) which expressly does not apply to deposition evidence. Paper 41, 8. Therefore, Petitioner did not make a timely improper opinion objection. Exclusion must therefore be denied.

Respectfully submitted,

/ Kenneth J. Weatherwax /

Kenneth J. Weatherwax, Reg. No. 54,528
Lowenstein & Weatherwax LLP

Date: April 30, 2021

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the following documents were served by electronic service, by consent between the parties, on the date signed below:

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

EXHIBITS 2021, 2028

The names and address of the parties being served are as follows:

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Respectfully submitted,

/ Jason Linger /

Date: April 30, 2021