

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAMSUNG ELECTRONICS CO., LTD., MICRON TECHNOLOGY, INC.,
MICRON SEMICONDUCTOR PRODUCTS, INC., and
MICRON TECHNOLOGY TEXAS LLC,[†]

Petitioner,

v.

NETLIST, INC.,

Patent Owner

IPR2023-00454
Patent 11,093,417 B2

PETITIONER'S MOTION TO EXCLUDE

[†] Micron Technology, Inc., Micron Semiconductor Products, Inc., and Micron Technology Texas LLC filed a motion for joinder and a petition in IPR2023-01141 and have been joined as petitioners to this proceeding.

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c) and the Federal Rules of Evidence (FRE), which apply here, *see* 37 C.F.R. § 42.62, Petitioner hereby moves to exclude Exhibit 2003 at 43:12–:20 and 202:8–204:10, and all of Exhibit 2010. Petitioner timely objected to each of these exhibits as discussed below. *See infra* p.5.

II. ARGUMENT

A. Exhibit 2003 at 43:12–:20 and 202:8–204:10

The following table summarizes how Patent Owner relied on Exhibit 2003:

Exhibit	Cite(s)	Purpose
EX2003 at 43:12–:20 and 202:8–204:10	POR (Paper 22) at 23, 35; Sur-Reply (Paper 32) at 15	Whether <u>Perego</u> discloses “ranks,” and a fixed-width buffer

1. Exhibit 2003 should be excluded as hearsay (FRE 801–02)

Exhibit 2003 should be excluded under FRE 801–02 as hearsay because the proffered statements are testimony from a different proceeding and are being offered for the truth of the matter asserted. *See Asetek Danmark A/S v. CoolIT Sys., Inc.*, IPR2020-00825, Paper 50, at 43–46 (PTAB Oct. 12, 2021) (granting motion to exclude deposition testimony from a related district court proceeding as impermissible hearsay and not meeting any of the hearsay exceptions), *appeal dismissed per stipulation*, No. 2022-1259 (Fed. Cir. Nov. 30, 2022). Netlist is using the transcript for the truth of the matter asserted because, as reflected in the above chart, Netlist is citing the transcript to support substantive, technical points

premised on the truth of the witness's testimony. The testimony in this exhibit was not taken in this IPR, making it hearsay, *see* Fed. R. Evid. 801(c), so the burden is on Netlist to show how this exhibit can be introduced as evidence in this proceeding.

Netlist cannot make the required showing that this exhibit falls into a hearsay exception. Netlist has not shown that the witness providing this prior deposition testimony was "unavailable" in this proceeding. Fed. R. Evid. 804(b). To the contrary, Netlist deposed the same witness in this proceeding, *see* EX2033, but did ***not*** "cross-examin[e] [the witness] about [the] prior statement," so FRE 801(d)(1) does not apply. Nor does FRE 801(d)(2) apply: "Since an expert witness is not subject to the control of the party opponent [i.e., Samsung] with respect to consultation and testimony he or she is hired to give, the expert witness cannot be deemed an agent [i.e., of Samsung]." *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, 12 F.4th 476, 489–90 (5th Cir. 2021) (affirming exclusion of expert testimony from a prior case).

2. Exhibit 2003 is irrelevant and lacks probative value (FRE 401-03)

Exhibit 2003 should also be excluded as irrelevant since it is from another proceeding involving a different patent. Fed. R. Evid. 401–02. To the extent Exhibit 2003 has any relevance, "its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues,

. . . undue delay, [or] wasting time,” Fed. R. Evid. 403, especially given that Patent Owner already deposed the same witness in this proceeding, *see* EX2033, so there is no justification for resorting to prior testimony from a different proceeding involving a different patent.

3. Exhibit 2003 is deficient under 37 C.F.R. § 42.53(f)(5)–(6)

Exhibit 2003 is further deficient under 37 C.F.R. § 42.53(f)(5)–(6). Under 37 C.F.R. § 42.53(f)(5), “the witness shall read and sign (in the form of an affidavit) a transcript of the deposition,” absent certain exceptions that do not apply here. The witness here did in fact request a copy of the transcript “to be able to review [and] make corrections, if appropriate,” EX2003 at 231:9–:10, and then the witness read his transcript, made corrections, and signed the corrected transcript, which was then served on Patent Owner on August 9, 2023. But Exhibit 2003 lacks this errata and signature, *see* EX2003 at 232, and thus is defective under 37 C.F.R. § 42.53(f)(5). Indeed, the required “certificate” by the court reporter, *see* EX2003 at 233, confirms that the witness did not “refuse[] to read or sign the transcript,” 37 C.F.R. § 42.53(f)(6)(vii).

B. Exhibit 2010

The following table summarizes how Patent Owner relied on Exhibit 2010:

Exhibit	Cite(s)	Purpose
EX2010	POR (Paper 22) at 51; Sur-Reply (Paper 32) at 24	Difference between centralized buffer and distributed buffers

1. Exhibit 2010 is irrelevant and lacks probative value (FRE 401–03)

Exhibit 2010 should be excluded as irrelevant and lacking probative value under FRE 401–03 because it is extrinsic evidence from 2014 about the DDR4 standard, long after the alleged priority date of January 19, 2005. Obviousness must be determined as of “the time the invention was made,” not 10 years later. *See* 35 U.S.C. § 103(a) (pre-AIA). Netlist cites this exhibit in connection with a discussion about data buffers. However, because the cited exhibit is so long after the priority date of ’417 Patent, there is no basis to believe it has any probative value to the issues in this IPR, and any minimal probative value would be “substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, . . . [and] wasting time.” Fed. R. Evid. 403.

2. Exhibit 2010 should be excluded as hearsay (FRE 801–02) and lacking authentication (FRE 901)

Exhibit 2010 should also be excluded under the rule against hearsay and for lacking authentication. This exhibit was authored by a third party (“Douglas Malech” at the company “IDT”) and offered for the truth of the matter asserted to support Netlist’s assertions regarding whether a POSITA would combine Perego and Ellsberry given the alleged differences between centralized and distributed data buffers. *See* POR at 51; Sur-Reply at 24. Thus, it meets the definition of hearsay in FRE 801(c) and does not qualify for any exceptions to the rule against

hearsay. Furthermore, Netlist (as the “proponent” of this exhibit) has failed to “produce evidence sufficient to support a finding that” Exhibit 2010 is authentic. Fed. R. Evid. 901.

C. Samsung timely objected to these exhibits (37 C.F.R. § 42.64(b)(1))

Samsung timely objected to both of these exhibits. Exhibits 2003 and 2010 were served on May 9, 2023, along with Patent Owner’s Preliminary Response (Paper 6). Petitioner timely served objections on August 16, 2023, see Paper 13 at 4, 11, “within ten business days of the institution of the trial” on August 2,¹ 2023, 37 C.F.R. § 42.64(b)(1).

III. CONCLUSION

For the foregoing reasons, Samsung respectfully requests that the Board exclude Exhibit 2003 at 43:12–:20 and 202:8–204:10, and all of Exhibit 2010.

Dated: April 10, 2024

/Eliot D. Williams/
Eliot D. Williams, Reg. #50,822

¹ The Institution Decision (Paper 11) incorrectly lists a date of August 1, 2023. The Institution Decision was actually filed and served on August 2, 2023, as correctly shown in PTACTS, <<https://ptacts.uspto.gov/ptacts/ui/case-viewer/16695020/IPR2023-00454/aia-review-info>>, <<https://ptacts.uspto.gov/ptacts/ui/my-docket/notifications>>.

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I certify that on this 10th day of April, 2024,

Petitioner's Motion to Exclude was served by email on the following counsel for
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