

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 REPLY IN SUPPORT OF ITS 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. Exhibit 2003 at 43:12–:20 and 202:8–204:10 is inadmissible

A. FRE 106 is inapplicable to EX2003

Netlist argues EX2003 at 43:12–:20 and 202:8–204:10 is admissible under FRE 106 given “[Samsung]’s reliance on a portion of the exhibit.” Paper 36 (“Opp’n”) at 1. That has it backwards, since Samsung is not the party seeking to introduce EX2003. FRE 106 “applies only to the narrow circumstances in which a party [i.e., Netlist] has created a misimpression about the statement and the adverse party [i.e., Samsung] proffers a statement that in fact corrects the misrepresentation.” Fed. R. Evid. 106 advisory committee’s note to 2023 amendment. Here, *Netlist* is the party that created a misimpression by trying to introduce Dr. Wolfe’s testimony (EX2003) from another IPR. *See* Paper 6 at 17–18, 22–23, 33–34; Paper 22 at 23, 35. In response, Samsung objected to EX2003, *see* Paper 13 at 4, but Samsung also cited additional testimony from EX2003 to correct that misimpression in the event EX2003 was not later excluded in response to Samsung’s earlier objection, *see* Paper 27 at 17. Only Samsung could use FRE 106 under these circumstances — not Netlist. And once the Board excludes EX2003, Samsung’s citations to EX2003 need not be considered.

B. EX2003 should be excluded as hearsay (FRE 801–02)

Netlist introduced EX2003 to prove the truth of the matter asserted (i.e., what Perego teaches), *see* Paper 22 at 23, 35; Paper 32 at 15, as Netlist concedes when it argues that EX2003 “undermines Petitioner’s theory” about what “Perego

suggests . . . to a POSITA,” Opp’n at 2. That makes EX2003 hearsay under FRE 801(c)(2). Netlist does not contend that Dr. Wolfe was “subject to cross-examination about [EX2003],” so FRE 801(d)(1) does not apply. It is not enough that “Dr. Wolfe was questioned about the same Perego passage [in this IPR].” Opp’n at 2. If Netlist wanted to introduce EX2003 from another IPR, then it needed to cross examine Dr. Wolfe with EX2003 in this IPR — which Netlist could have done but did not, *see* EX2033 — to give Dr. Wolfe an opportunity in this IPR to explain any alleged inconsistency, and to give Samsung an opportunity in this IPR to ask follow-up questions.

In any event, Dr. Wolfe’s prior testimony in EX2003 is not “inconsistent” under FRE 801(d)(1)(A) with his current testimony, as shown by the portions of EX2003 that Netlist omitted. *Compare* Opp’n at 2–3, 4–5, *with* EX2003 at 204:12–:21 (“Perego does not use the specific word [‘rank’] even though he clearly discloses the concept [of rank].”), 79:17–82:3, 82:14–84:13; *see also* Paper 27 at 17 (citing EX2033 at 71:5–73:7, 160:16–161:14, 176:6–178:6). Had Netlist presented Dr. Wolfe with EX2003 in this IPR as required, Dr. Wolfe would have had the opportunity to explain how there was no inconsistency at all.

Nor does FRE 801(d)(2) apply. Netlist failed to address the case on point cited in Samsung’s motion. *Compare* Opp’n at 3, *with* Mot. at 2 (citing *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, 12 F.4th 476, 489–90 (5th Cir. 2021)).

C. 37 C.F.R. § 42.51(b)(1)(iii) is not an evidentiary rule and does not permit the admission of EX2003

Netlist also relies on 37 C.F.R. § 42.51(b)(1)(iii), *see* Opp’n at 3–4, but that is a rule about **discovery**, not a rule governing **admissibility**. Netlist never requested (nor moved to compel) any discovery in this IPR concerning Dr. Wolfe. And, as discussed above, Dr. Wolfe’s testimony is not “inconsistent.”

D. EX2003 is irrelevant and lacks probative value (FRE 401–03)

Netlist does not dispute that Dr. Wolfe’s prior testimony is from another IPR involving a different patent. *See* Opp’n at 4. This, combined with the fact that Netlist failed to give Dr. Wolfe an opportunity in this IPR to explain his prior testimony and that no actual inconsistency exists (as discussed above), shows that the challenged testimony is irrelevant under FRE 401–02 and that any probative value is outweighed by the risk of unfair prejudice or confusion under FRE 403.

E. EX2003 is also deficient under 37 C.F.R. § 42.53(f)(5)–(6)

Netlist does not dispute that EX2003 is also deficient under 37 C.F.R. § 42.53(f)(5)–(6). *See* Opp’n at 5–6. Netlist attempts to correct this deficiency by submitting a supplement, but this submission is untimely under 37 C.F.R. § 42.64(b)(2) (“within ten business days”). Samsung timely objected to EX2003 on August 16, 2023, *see* Paper 13 at 4, and Netlist offers no justification for waiting nearly eight months to try to supplement EX2003, *see* Opp’n at 5–6. The Board should expunge Netlist’s untimely submission of a “replacement” EX2003

on April 17, 2024. *See* 37 C.F.R. § 42.7(a) (“The Board may expunge any paper . . . that is not authorized”).

II. Exhibit 2010 is inadmissible

A. EX2010 is irrelevant and lacks probative value (FRE 401–03)

There is no evidence supporting Netlist’s assertion that EX2010 was “published by Samsung.” Opp’n at 6. To the contrary, EX2010 was published by “Douglas Malech” at “IDT.” *See* EX2010 at 1. EX2010 includes a Samsung logo merely to indicate that IDT’s products are compatible with Samsung’s modules.

Netlist does not dispute that EX2010 was published by IDT nearly 10 years after the alleged priority date, and Netlist does not rebut Samsung’s argument that this temporal gap renders EX2010 irrelevant and lacking in probative value. *See* Opp’n at 7. Netlist instead leads with whataboutism by attacking Samsung’s reliance on EX1070, *see id.*, which fails to rebut Samsung’s argument about EX2010, and is misplaced given that Netlist never objected to EX1070 and both experts have relied on portions of EX1070 as relevant and probative (and consistent with EX1069 published by the same author years before the 417 Patent). *See, e.g.*, Paper 22 at 4; EX1095 at 150:6–:9, 163:15–:22; EX1003, ¶¶ 128–30. In contrast, Netlist’s expert offered no testimony regarding EX2010, *see* EX2024, and the record is devoid of any evidence indicating that it is relevant or probative. Netlist’s secondary attempt to demonstrate EX2010’s alleged relevance is based

solely on speculative attorney argument about DDR4, rather than DDR2 (the relevant standard asserted as prior art in this IPR), and fails to address the 10-year temporal gap. *See* Opp’n at 7–8.

B. EX2010 should be excluded as hearsay (FRE 801–02)

EX2010 is hearsay because the author is “Douglas Malech” of “IDT,” not Samsung. *See* EX2010 at 1. This is also confirmed by the disclaimer at the end: “DISCLAIMER [IDT] and its subsidiaries reserve the right to modify the products and/or specifications described herein at any time and at IDT’s sole discretion.” *Id.* at 7. As explained above, the Samsung logo in EX2010 merely reflects that IDT’s products are compatible with Samsung’s memory modules, not that Samsung authored EX2010. Netlist admits EX2010 came from IDT’s website (now Renesas), not from Samsung. *See* Opp’n at 9; Paper 22 at p.vi.

FRE 807 does not apply. *See, e.g., Neste Oil Oyj v. REG Synthetic Fuels, LLC*, IPR2013-00578, Paper 53, at 10 (PTAB Mar. 12, 2015) (citing *Conoco, Inc. v. Dep’t of Energy*, 99 F.3d 387, 392 (Fed. Cir. 1996)). EX2010 is from 10 years after the relevant date and thus is **not** “more probative . . . than any other evidence that [Netlist] can obtain through reasonable efforts.” Opp’n at 9 (quoting FRE 807(a)(2)).

Dated: April 24, 2024

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I certify that on this 24th day of April, 2024,

Petitioner's Reply in Support of Its Motion to Exclude was served by email on the following counsel for Patent Owner and Micron:

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