

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

HUM INDUSTRIAL TECHNOLOGY, INC.
Petitioner

v.

AMSTED RAIL COMPANY, INC.
Patent Owner

Case IPR2023-00539

Patent No. 9,981,673

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

EXHIBIT INDEX

Ex #	Exhibit Description
2011	Internet Archive Capture of https://www.merriam-webster.com/dictionary/level , dated May 4, 2012, available at https://web.archive.org/web/20120504202949/https://www.merriam-webster.com/dictionary/level , last visited Sept. 29, 2023
2012	Internet Archive Capture of https://www.merriam-webster.com/dictionary/fault , dated May 11, 2012, available at https://web.archive.org/web/20120511011453/https://www.merriam-webster.com/dictionary/fault , last visited Sept. 29, 2023
2157	Exhibit 15 to Declaration of Ryan Miller ISO Opposition to Motion to Stay Pending IPR Hum’s Preliminary Counter-Infringement Contentions dated December 9, 2022
2168 ¹	Declaration of Ryan N. Miller

¹ Exhibit 2168 was originally served on November 9, 2023 as Exhibits 2165 to Petitioner as supplemental evidence in response to Petitioner’s Objections to Evidence (Paper 20, October 26, 2023). Patent Owner inadvertently left this exhibit, plus then marked Exhibit 2163 and 2164 off its subsequently filed exhibit lists. Patent Owner has filed an Updated Exhibit List to correct this error. Exhibits 2166-68 have been reserved on Petitioner to correct the exhibit numbers. They are otherwise identical to the declarations served as supplemental evidence on November 9, 2023.

Patent Owner Amsted Rail Company, Inc. (“PO”) submits this Opposition to Petitioner’s Motion to Exclude Pursuant to 37 C.F.R. §§ 41.155 AND 42.64 (“Motion”). As explained herein, Petitioner’s Motion is inconsistent with the law and PO’s exhibits are both authentic and relevant.

I. ARGUMENT

A. Exhibits 2011 and 2012 are Sufficiently Authenticated

Exhibit 2011 is an archived copy of the website located at URL <https://www.merriam-webster.com/dictionary/level> as it existed on May 4, 2012, and Exhibit 2012 is an archived copy of the website located at URL <https://www.merriam-webster.com/dictionary/fault> as it existed on May 11, 2012, both as captured by the Internet Archive known as the “Wayback Machine”. The Wayback Machine is “an online digital archive of web pages. It is run by the Internet Archive, a nonprofit library in San Francisco, California.” *Mojave Desert Holdings, LLC v. Crocs, Inc.*, 844 F. App’x 343, 346 (Fed. Cir. 2021). The contents of webpages available through the Wayback Machine are now considered “inherently reliable” as “facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” *Analog Devices, Inc. v. Xilinx, Inc.*, IPR2020-01596, Paper 52, at p. 12 (P.T.A.B. Apr. 13, 2022) (citing *Valve Corp. v. Ironburg Inventions Ltd.*, 8 F.4th 1364, 1374-75 (Fed. Cir. 2021)); *see also Keysight Techs., Inc. v. Centripetal Networks, LLC*, IPR2022-01525, Paper 27, at pgs. 19-20

(P.T.A.B. Apr. 15, 2024) (“The Federal Circuit has noted, “[e]xaminers use ‘The Wayback [M]achine’ as a source of information to determine when a Web reference was first made available to the public). Not only are Exhibits 2011 and 2012 inherently reliable as Wayback Machine documents, the Merriam-Webster dictionary captures should be considered generally recognizable as easily navigated “pages that are logically organized to facilitate user inquiry into the relevant subject matter,” *Keysight Techs.* IPR2022-01525, Paper 27, at 23.

Petitioner’s reliance on *Comcast Cable Comms., LLC v. Rovi Guides, Inc.*, IPR2017-00941, Paper 70 at p. 56 (PTAB Sept. 7, 2018) and *Neste Oil Oyj v. REG Synthetic Fuels, LLC*, IPR2013-00578, Paper 53 at p. 4 (PTAB March 12, 2015) as requiring separate evidence of authentication that the content of the web pages were in existence on the archived date is misplaced, as both cases were decided before 1) *Valve Corp.*, which confirmed the trend of district courts taking judicial notice of Wayback machine captures due to their inherent accuracy, and 2) the PTAB’s reliance on *Valve Corp.* in *Analog Devices, Inc.* and *Keysight Techs., Inc.* “District courts have taken judicial notice of the contents of webpages available through the Wayback Machine as facts that can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” *Valve Corp.* 8 F.4th at 1374-1375.

While Petitioner alleges insufficient evidence to establish that these Exhibits accurately represent *the content* of the Merriam-Webster dictionary citation, “[t]o the extent there is any dispute that these Exhibits are authentic Wayback Machine documents,” this can easily be confirmed by the Board through a “direct comparison with documents [in the Exhibits] with documents obtained from the Wayback Machine via the links [in the POR Exhibit Description]”. *Analogue Devices*, IPR2020-01596, Paper 52, at p. 12 (Board confirming authenticity of Wayback Machine documents via links in the expert declaration), (citing FRE 901(b)(3)); *see also* Exhibit 2168² (identifying each document, its location, and declaring that it was a true and correct copy under FRE(b)(1)). Moreover, *the date of the content* within the website capture is authenticated via the (inherently reliable) captured date referenced directly within the Wayback Machine’s URL. The captured website itself

² Petitioner referenced, but did not file, originally labeled Exhibit 2165, now Exhibit 2168, in its Motion to Exclude while also unfairly characterizing the evidence provided in Exhibit 2168. *See* Paper 44, at 1-2. Therefore, Patent Owner is submitting Exhibit 2168 with this Opposition and believes the Board can and should evaluate the sufficiency of the evidence provided in Exhibit 2168 for itself, in view of Patent Owner’s arguments presented herein.

includes a copyright date of 2012 from Merriam-Webster, Inc., a source and website that this Board accepts as an inherently reliable basis for determining definitions. *See* Paper 10 (citing Merriam-Webster’s online dictionary definition of “heuristic”). Dictionary definitions are routinely considered evidence, and “the assignment of a publication date in the copyright line” of this type of publication that is “a well-known, reputable compiler and publisher ... is evidence of date of publication and public accessibility.” *Ericsson Inc. v. Intellectual Ventures I LLC*, IPR2014-00527, Paper 41 at p. 11 (PTAB May 18, 2015) (Board taking Official Notice that members of scientific communities rely on information published in the copyright line of IEEE publications, that the copyright line is more probative on the point for which it is offered than a librarian’s declaration, and that it best serves the purpose of the Federal Rules of Evidence and the interests of justice). Petitioner has also not shown that the definitions in Exhibits 2011 and 2012 have changed significantly over time, or that the Exhibits should be afforded a different publication date. *Instradent Usa, Inc. v. Nobel Biocare Servs. Ag*, IPR2015-01786, Paper 106 at p.20 (PTAB. Feb. 15, 2017) (“The Court presumes the date a document bears to be the date of its publication, unless proof by extrinsic evidence is offered that the date of publication is other than the date the document bears.”). Notably, the USPTO expects examiners to “use ‘The Wayback machine’ as a source of information to determine when a Web reference was first made available to the public.” USPTO “America Invents Act

(AIA) Frequently Asked Questions”, Question: FITF1058, available at <https://www.uspto.gov/patents/laws/america-invents-act-aia/america-invents-act-aia-frequently-asked> (last visited May 8, 2024).

The Wayback Machine captures may, therefore, be used as accurate and reliable representations of the content of the Merriam-Webster Dictionary on the specific dates captured, and the totality of the evidence described above is sufficient to authenticate Exhibits 2011 and 2012 under FRE 901. FRE 901(b) sets forth “examples only” of evidence that satisfies the authentication requirement, but includes testimony of a witness with knowledge (FRE 901(b)(1)), comparison by the Trier of Fact (FRE 901(b)(3)), both of which are applicable to Exhibits 2011 and 2012. Authentication of evidence “is a low bar, requiring only a rational basis that the exhibits are what they are asserted to be.” *Costar Realty Information, Inc., v. Clantech, Inc.*, IPR2022-00799, Paper 77, p. 54 (Nov. 21, 2023) (denying a motion to exclude exhibits, including web pages and internet archives, as lacking authentication and hearsay). PO has provided at least a rational basis for authentication of these Exhibits.

B. Patent Owner Requests that the Board Take Official Notice of Exhibits 2011 and 2012

A court may judicially notice a fact that is not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy

cannot reasonably be questioned.” Fed. R. Evid. 201(b)(2). If a fact satisfies that standard, “[t]he court ... must take judicial notice if a party requests it and the court is supplied with the necessary information.” Fed. R. Evid. 201(c)(2) (emphasis added). This Board may take “official notice” in the same manner as “judicial notice”. 37 CFR § 42.62. For the reasons set forth in Section A above that demonstrate that the Exhibits 2011 and 2012 can be accurately and readily determined from sources whose accuracy cannot be reasonably questioned, PO requests that the Board take official notice of the definitions set forth in the Wayback Machine captures of Exhibits 2011 and 2012 as inherently reliable reproductions of Merriam-Webster dictionary definitions that existed on the dates set forth in the captured dates.³

³ To the extent it would assist the Board in properly deciding the validity questions on the merits, counsel for PO offers to request a declaration or notarized affidavit from an administrator of the Internet Archive, a service offered for authenticating printouts. As a non-profit with limited resources for processing requests for such affidavits, Internet Archive requests the seeking of judicial notice first. *See* “Internet Archive: Legal: Requests”, available at <https://archive.org/legal> (last visited May 8, 2024).

C. Exhibit 2157 Is Relevant And Admissible

Under FRE 401(a), evidence is relevant if “it has any tendency to make a fact more or less probable than it would be without the evidence.” Exhibit 2157 is relevant to the question of *validity*, rather than infringement, in this proceeding because it provides evidence of secondary considerations of non-obviousness tied to the novel elements of the claims at issue. It is an admission against interest (an exception to the hearsay rule according to FRE 804(b)(3)), where Petitioner admits infringement as to “elements that are identified as present in the Accused Instrumentalities.” Exhibit 2157, p. 15. And Petitioner is incorrect that this Exhibit “contains no admission of infringement” just because it may also include a blanket denial of infringement. In fact, by stating that the system “is capable of” a claim limitation listed in the chart, Petitioner admits infringement of that particular limitation. (*See, e.g.*, claims 1(a), 2, 6, and 7). An admission of infringement is ultimately direct evidence of copying, which is a “... form of flattering praise for inventive features, and thus ... tends to show nonobviousness.” *WBIP, LLC v. Kohler Co.*, 829 F.3d 1317, 1336 (Fed. Cir. 2016). In other words, Exhibit 2157 has a tendency to make non-obviousness more probable than it would be without the Exhibit and should therefore *not* be excluded under FRE 402.

II. CONCLUSION

For the reasons described above PO respectfully requests that Petitioner's Motion to Exclude be denied, and if the Board deems appropriate, that the Board take official notice of the definitions set forth in the Wayback Machine captures of Exhibits 2011 and 2012.

Respectfully submitted,

Dated: May 9, 2024

By: /Ryan N. Miller/
Ryan N. Miller
Reg. No. 68,262
Counsel for Patent Owner
Amsted Rail Company, Inc.

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. §42.6(e), I certify that on this 9th day of May, 2024, a copy of Patent Owner's Opposition To Petitioner's Motion To Exclude was served by electronic mail on Petitioner's counsel, lead and back-up, as follows:

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Counsel for Petitioner has consented to service of all documents via electronic email. *See* Petition, Paper 1 at 2.

Dated: May 9, 2024

By: / Ryan N. Miller /

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