UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

LENOVO (UNITED STATES) INC. and
MOTOROLA MOBILITY LLC,
Petitioners

v.

THETA IP, LLC
Patent Owner

IPR2023-00697
Patent No. 10,129,825 B2

**PETITIONERS' REPLY TO
OPPOSITION TO MOTION TO EXCLUDE EVIDENCE**

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I. INTRODUCTION

For the reasons below, Patent Owner ("PO") fails to show Exhibits ("Exs." or "Ex.") 2002, 2003, and 2004 (magazine articles), 2017 and 2018 (IPR reports), and 2020 (Wikipedia entry) are relevant, authenticated, and admissible. Thus, the Board should grant Petitioners' motion to exclude the exhibits as evidence.

II. Patent Owner fails to show that Exhibits 2002, 2003, and 2004 are relevant, non-hearsay, or admissible hearsay.

In its opposition, PO belatedly attempts to re-characterize Exhibits 2002, 2003, and 2004. PO states that Exs. 2002–2004 were provided for various purposes including "background story," "to rebut any hindsight-derived aspersions that [the patented subject matter was] somehow obvious at the time," "the level of skill in the art as of 2003," and "evidence of non-obviousness." Paper 27 at 1. But PO never advanced any colorable non-obviousness argument involving Exs. 2002, 2003, and 2004. *See* Paper 15 at 5-9. Paradoxically, PO admits that it failed to advance a non-obviousness argument, supposedly "because Petitioners only asserted anticipation." Paper 27 at 3. Petitioner of course did assert an obviousness ground, which the Board instituted. Paper 1 at 50-56; Paper 10 at 7, 40. PO simply chose not to make any cognizable non-obviousness argument with Exs. 2002, 2003, or 2004. PO also never explained how the exhibits evidence the level of skill in 2003, (*see* Paper 15 at 5-9), nor could it given that Exs. 2002 and 2004 were

published over a decade later. PO cannot offer evidence for arguments not made or for irrelevant "background story."

With no other legitimate purpose, these exhibits can only be offered for the truth of what they assert, which, according to PO, is that "Professor Tsividis was and is a widely known and respected teacher," and to "discuss and praise" him. Paper 27 at 2, 3. Such evidence is not probative of any material fact in dispute. Accordingly, PO fails to show Exs. 2002–2004 are relevant.

Patent Owner states that Exs. 2002–2004 are not hearsay because they are offered as evidence of non-obviousness. Paper 27 at 3. Because Patent Owner has not actually argued non-obviousness based on these exhibits or offered them as relevant to any other issue, they can only have been offered for the truth of what they assert. Thus, these exhibits are hearsay. Patent Owner does not argue the applicability of any exception to the rule against hearsay. Accordingly, Patent Owner has failed to show Exs. 2002–2004 are admissible hearsay.

III. Patent Owner fails to show that Exhibits 2017 and 2018 are authentic, relevant, non-hearsay, or admissible hearsay.

PO argues Exs. 2017–2018 are somehow authenticated through the testimony of Dr. Baker because "he did not dispute the veracity of information in EX2017 and EX2018" when they were provided to him. Paper 27 at 4. PO does not allege that Dr. Baker was a custodian of Ex. 2017 or 2018 or that he has any

personal knowledge of how the data shown therein was compiled or maintained. Dr. Baker could not possibly authenticate these exhibits. Thus, any testimony (or lack thereof) by Dr. Baker is irrelevant to the question of authentication.

PO argues that "Petitioners have identified no basis to doubt the trustworthiness or authenticity of the Board's records referenced in the compilation." Paper 27 at 5. The authentication requirement has never been contingent on a "basis to doubt" and Petitioners bear no burden to supply such a basis. Further, PO obtained Exs. 2017–2018 from a third-party website, not from the Board.

At most, PO states that Exs. 2017–2018 "come from the Lex Machina legal analytics platform generally relied on by those in the legal industry." Paper 27 at 5. But merely identifying the third-party website from which Exs. 2017–2018 were retrieved and arguing that it is "generally relied on," without any evidence, is not sufficient for authentication. Thus, PO fails to authenticate Exs. 2017–2018.

PO also does not dispute that the exhibits are inadmissible hearsay. PO reiterates that it offers Exs. 2017-2018 as evidence that Dr. Baker is supposedly a "serial declarant." Paper 27 at 4. In other words, PO offers Exs. 2017–2018 for the truth of what they assert—that Dr. Baker has declared in other proceedings. PO otherwise fails to identify any exception that would make such hearsay admissible.

IV. Patent Owner fails to show that Exhibit 2020 is authentic, non-hearsay, or admissible hearsay.

PO argues that "Theta's expert Professor Larson testified about the operation of a diode detector" and "Petitioners could have asked, but chose not to cross-examine Professor Larson on this point." Paper 27 at 5. PO never alleges, however, that Dr. Larson was a custodian of the Wikipedia entry contained in Ex. 2020, or that Dr. Larson had any personal knowledge of how the Wikipedia entry was maintained. In fact, Dr. Larson does not even cite Ex. 2020. *See* Ex. 2015. At best, Dr. Larson testified about a phrase or term appearing in Ex. 2020, which does not remotely approach proper authentication. Accordingly, PO fails to authenticate Ex. 2020.

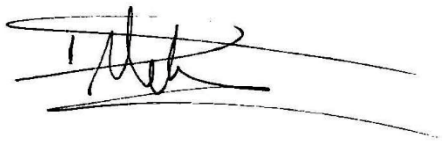
PO also fails to demonstrate that the unauthenticated exhibit is not hearsay. PO claims that Ex. 2020 "is submitted only and entirely as background information for the Board" and "is not hearsay, including because it is not offered for the truth of any statement on the webpage—but only to show that this type of diode detector is known." Paper 27 at 6. Were Ex. 2020 submitted only as evidence that the webpage exists, it would indeed be non-hearsay. But PO introduced Ex. 2020 *only* as evidence of *how a diode detector supposedly works*, stating that "a detector needs an input that is band-pass filtered around a desired signal, and would require that receiver input filter to be re-tuned in order to measure another signal" and

citing the exhibit. Paper 15 at 37. PO does not otherwise cite Ex. 2020. Ex. 2020 was therefore offered solely for the truth of the information contained therein, despite PO's attempted reclassification, and is hearsay. PO otherwise fails to identify any exception that would make such hearsay admissible.

V. CONCLUSION

Based on the foregoing, Petitioners request the Motion to Exclude Evidence be granted with respect to Exs. 2002, 2003, 2004, 2017, 2018, and 2020.

Respectfully submitted,



Dated: July 16, 2024

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6, the undersigned hereby certifies that this "PETITIONERS' REPLY TO OPPOSITION TO MOTION TO EXCLUDE EVIDENCE" was served by filing this document through the Patent Trial and Appeal Case Tracking System (P-TACTS) and via e-mail to the following attorneys of record for the Patent Owner listed below:

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