UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE LLC

Petitioner,

v.

DDC TECHNOLOGY, LLC,

Patent Owner

U.S. Patent No. 9,811,184

Case No.: IPR2023-00708

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

I. Introduction

Patent Owner's Opposition to Petitioner's Motion to Exclude (Paper 69) ("Opp.") is unpersuasive. Patent Owner ("PO") attempts to draw a distinction between confidentiality and non-use in a mediation agreement where none exists and also attempts to masquerade hearsay as testimony. Petitioner's motion should be granted.

II. Exhibits 2017 and 2020 Should be Excluded

PO attempts to draw a line—where none exists—between confidentiality and non-use in the Texas Alternative Dispute Procedures Act ("TADPA"). *See* Opp., pp. 2-3. Although § 154.073(a) is titled "CONFIDENTIALITY OF CERTAIN RECORDS AND COMMUNICATIONS," it imposes both confidentiality and use restrictions: "[A] communication relating to the subject matter of any civil or criminal dispute made by a participant in an alternative dispute resolution procedure, whether before or after the institution of formal judicial proceedings, is ***confidential***, is not subject to disclosure, and ***may not be used*** as evidence against the participant in any judicial or administrative proceeding." (emphasis added). Thus, when the parties agreed to follow TADPA, §§ 154.053, 154.073 (*See* Ex. 1019) as a condition of the mediation process, the parties agreed to the entirety of TADPA's provisions, including the non-use provisions.

Even assuming a line could be drawn between confidentiality and non-use, PO

violated §154.053(c) by ***disclosing the information in this proceeding*** because the provision states "all matters … during the settlement process, are confidential and may never be disclosed to ***anyone***…." which PO clearly has done. *Id.*, § 154.053(c) (emphasis added).

PO also alleges that Petitioner somehow expressly removed "the allegedly offending information used by DDC in its POPRs from the scope of the mediation agreement in emails on July 24, 2023." Opp., p. 3. But, PO fails to rely on any evidence or law to support this allegation. Instead, PO cites its own briefing at the district court where it makes the same false allegation (Ex. 2069). Merely repeating that same allegation here does not make it true. Petitioner is unaware of any evidence that would support PO's allegation. Exhibits 2017 and 2020, as well as PO's related briefing, should be excluded.

III. Exhibit 2033 ¶¶ 10, 15, and 16 are Hearsay

PO only argues that Ex. 2033 ¶¶ 10 and 15 do not contain hearsay, thereby conceding that ¶ 16 contains hearsay. For ¶¶ 10 and 15, PO argues, citing the *Tratree* case, that Mr. Buckley's statements are testimony based on his personal knowledge. *See* Opp., pp. 5 (citing *Tratree v. BP Pipelines (N.A.) Inc.*, No. CIV.A. H-03-954, 2009 US Dist. LEXIS 43426, at *9 (S.D. Tex. May 22, 2009)). However, *Tratree* does not support PO's argument. First, the statements at issue in *Tratree* were being offered solely as impeachment evidence. Here, and unlike *Tratree*, Mr.

Buckley's statements are being offered for the truth of the matter asserted. *Id.*, at *8-9. Additionally, the testimony there related to facts within a declarant's personal knowledge and "based upon her review of [a] resume." *Id.,* at *9. Here, ¶¶ 10 and 15 are out-of-court statements reflecting conversations which apparently Mr. Buckley did not personally participate in and are being offered by DDC for the truth of the matter asserted. As such, ¶¶ 10 and 15 should be excluded.

PO's reliance on the *Madison* case is similarly misplaced. *See* Opp., p. 5 (citing *Madison One Holdings, LLC v. Punch Int'l, NV*, No. 4:06-cv-3560, 2009 U.S. Dist. LEXIS 27406, at *32-33 (S.D. Tex. Mar. 31, 2009)). In *Madison*, the statement PO references was considered a general conclusion based on personal observations and impressions. *Id.*, at *32-35. Here, however, ¶¶ 10 and 15 relate to specific conversations in which Mr. Buckley apparently did not personally participate, and are much more akin to the statement that was found to be hearsay in *Madison*. *Id.*, at 33 ("In 2002, I heard from GM marketing personnel such as Willem Smit and Ghislain Coppejans that customers found that GM's product line needed upgrading."). Thus, Mr. Buckley's statements in ¶¶ 10 and 15 about specific conversations with MerchSource are hearsay and should be excluded.

IV. Conclusion

For the foregoing reasons, Petitioner respectfully requests that the Board grant Petitioner's motion.

Dated: July 31, 2024

Respectfully submitted,

Michael L. Kiklis_____

Michael L. Kiklis
Reg. No. 38,939
Attorney for Petitioner
Google LLC

CERTIFICATE OF SERVICE

The undersigned certifies service pursuant to 37 C.F.R. §§ 42.6(e) of PETITIONER'S REPLY TO PATENT OWNER'S OPPOSITION TO MOTION TO EXCLUDE by filing this document through the USPTO Patent Trial and Appeal Case Tracking System and by emailing a copy to the following email addresses:

cortneyalexander@kentrisley.com
haller@haller-iplaw.com

Respectfully Submitted,

Dated: July 31, 2024

Michael L. Kiklis_____

Michael L. Kiklis
Reg. No. 38,939
Attorney for Petitioner
Google LLC