

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAMSUNG ELECTRONICS CO., LTD.,

Petitioner,

v.

NETLIST, INC.,

Patent Owner

IPR2023-00847

Patent 10,268,608 B2

PETITIONER'S MOTION TO EXCLUDE

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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 EX2016 at 59:4–:18, 104:24–106:4, 123:14–:18, 124:6–:13, 142:15–:24, 143:5–144:2, 151:2–:13, 152:17–:23, 171:15–:21, 174:7–:11, 177:14–:19, 181:9–:15, and 194:18–:21. Petitioner timely objected as discussed below. *See infra* p.9.

II. ARGUMENT

A. Exhibit 2016 should be excluded

The following table summarizes how Patent Owner relied on Exhibit 2016:

Exhibit	Cite(s)	Purpose
EX2016 at 59:4–:18	POR (Paper 20) at 53	Timing of <u>Hiraishi</u> 's input buffers during S4 read leveling
EX2016 at 104:24–106:4	Sur-Reply (Paper 29) at 21	Whether sampling and clocking out are different
EX2016 at 123:14–:18, 124:6–:13	Sur-Reply (Paper 29) at 12	Whether <u>Butt</u> 's master delay circuit 116 provides a free running clock such that the proposed combination with <u>Hiraishi</u> does not perform S4 read leveling “in response to” a module control signal
EX2016 at 142:15–:24, 143:5–144:2	POR (Paper 20) at 76	Whether a memory module has enough space to include the proposed combination involving <u>Hiraishi</u> 's data buffers
EX2016 at 151:2–:13, 152:17–:23, 174:7–:11	POR (Paper 20) at 80–81	Whether the proposed combination involving <u>Hiraishi</u> 's data buffers would increase the overall time and circuitry required

Exhibit	Cite(s)	Purpose
EX2016 at 171:15–:21, 177:14–:19, 181:9–:15	POR (Paper 20) at 60, 78, 79 Sur-Reply (Paper 29) at 20–21	Use of a memory controller to adjust for fly-by delays seen by the memory controller
EX2016 at 181:9–:15	POR (Paper 20) at 79	Use of a FIFO in the proposed combination involving <u>Hiraishi</u>
EX2016 at 194:18–:21	POR (Paper 20) at 60	Use of a module controller for read/write leveling

1. Exhibit 2016 should be excluded as hearsay (FRE 801–02)

Exhibit 2016 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* EX2012, 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).

Finally, the “residual exception” to the hearsay rule in FRE 807 does not apply, which requires “(1) the statement is supported by sufficient guarantees of trustworthiness—after considering the totality of circumstances under which it was made and evidence, if any, corroborating the statement; and (2) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts.” Fed. R. Evid. 807. “The residual exception to the hearsay rule is to be reserved for ‘exceptional cases,’ and is not a ‘broad license on trial judges to admit hearsay statements that do not fall within one of the other exceptions.” *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)). Here, Netlist deposited Dr. Wedig in this proceeding, so Netlist cannot show that his prior deposition (Exhibit 2016) is “more probative on the point for which it is offered than any other evidence **that the proponent can obtain through reasonable efforts.**” Fed. R. Evid. 807 (emphasis added).

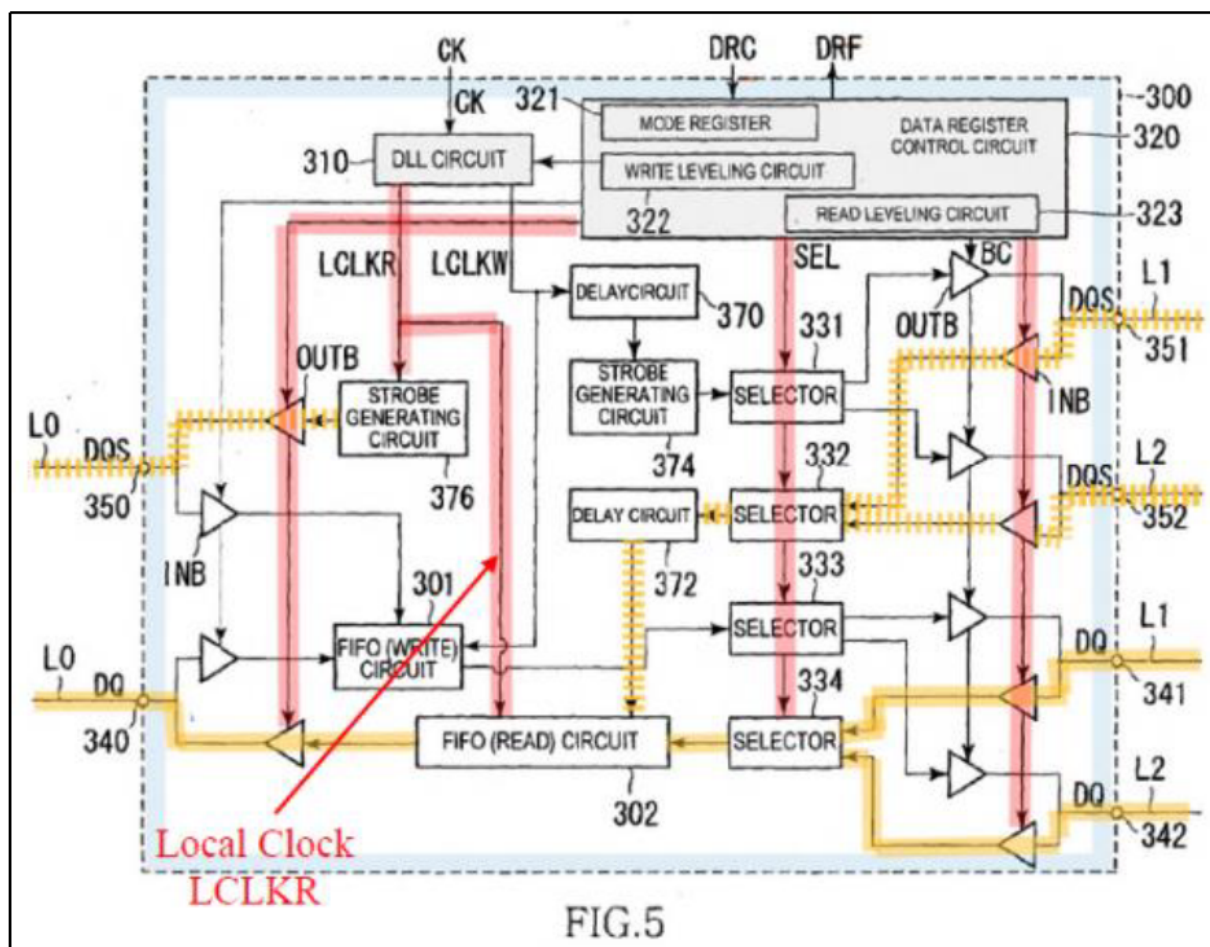
2. Exhibit 2016 should also be excluded under FRE 403

Exhibit 2016 should also be excluded because, to the extent it 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 deposited the same witness in this proceeding, *see* EX2012.

Although the patent and the prior art discussed in Exhibit 2016 are related to the patent and prior art in this proceeding, various issues discussed in Exhibit 2016 differ from the issues at issue in this proceeding, making it unfair, confusing, and a waste of time to be considering the citations to Exhibit 2016 above when Netlist had a full opportunity to examine the witness in Exhibit 2012 with respect to the issues actually relevant to this proceeding.

For example, and without limitation, Netlist cites to Exhibit 2016 at 104:24–106:4 to argue that “Petitioner has not established that a **DQS signal** can be used to clock **out** data” from the FIFO in the combination with Hiraishi. Sur-Reply (Paper

29) at 21 (emphasis added). The cited testimony, however, focuses on whether a **clock signal**, such as LCLKR (the solid red line below from DLL Circuit 310 to FIFO Circuit 302), can be used to sample data **into** FIFO Circuit 302 (instead of using the dashed orange line from 372 below). See EX2016 at 93:24–94:5, 103:16–106:4, 219:1–222:3.



EX1005 (Hiraishi), Fig. 5 (annotated to show local clock LCLKR)

IPR2022-00711, Exhibit 1059, at 82–83.

Dr. Wedig explained that because “only the DQS signal” (the dashed orange line above coming from Delay Circuit 372 down to FIFO Circuit 302) knows

“when the value on the [input data] signal is valid,” that means **LCLKR** cannot sample the data **into** FIFO Circuit 302. EX2016 at 104:24–105:4. This testimony, however, is irrelevant to the argument that Netlist raises in this proceeding, which is whether “a DQS signal can be used to **clock out** data.” Sur-Reply (Paper 29) at 21. On that issue, Dr. Wedig in fact testified in IPR2022-00711 (contrary to Netlist’s argument in this IPR) that it would be obvious to use a “delayed strobe [DQS] to **clock out** data from FIFO (Read) Circuit 302.” IPR2022-00711, Exhibit 1003, ¶ 304 (emphasis added).

Netlist also incorrectly argues that the cited testimony confirms that “[s]ampling and clocking out data are two different operations.” Sur-Reply (Paper 29) at 21. Nowhere in the cited testimony did Dr. Wedig distinguish “sampling” from “clocking” out data. To the contrary, he used the terms interchangeably. *See, e.g.*, EX2016 at 105:14–:15 (“[LCLKR] **clocks** [the FIFO] in order to send [data] on to the next point.”), 219:24–:25 (“LCLKR . . . does **clock** the FIFO.”), 221:23–:25 (“[LCLKR] can **sample** the output because it captures . . . a copy of what is in the FIFO . . .”) (emphases added).

As another example of why Exhibit 2016 should be excluded under FRE 403, Netlist cites Exhibit 2016 at 59:4–:18 to support its argument that “the timing adjustment for **INB** based on S-4 read leveling does not disclose a delay circuit for delaying a signaling through a data path.” POR (Paper 20) at 53–54 (emphasis

added). But the testimony in Exhibit 2016 was about more than just INB, it was about adjusting the timing of “INB *and the like*,” EX2016 at 59:6, as Dr. Wedig explained elsewhere in Exhibit 2016, *see* EX2016 at 63:19–69:2, making Netlist’s reliance on Exhibit 2016 in this IPR unfair and confusing. Indeed, in this IPR, Dr. Wedig explained that the timing adjustment performed by Hiraishi’s data buffer includes using *the FIFO* to “delay[] the data and strobe signals,” *see, e.g.*, EX1003, ¶ 240 (citing Hiraishi, EX1005, ¶¶[0130], [0151]), contrary to Netlist’s unfair and confusing argument about INB alone based on Exhibit 2016.

As another example of why Exhibit 2016 should be excluded under FRE 403, Netlist cites to Exhibit 2016 at 123:14–:18 and 124:6–:13 to argue that the proposed combination with Hiraishi does not perform S4 read leveling “‘in response to’ . . . module control signals[.]” Sur-Reply (Paper 29) at 12. Specifically, Netlist argues Petitioner cannot establish that Hiraishi’s LCLKR/LCLKW constitutes “module control signals” because the cited testimony in Exhibit 2016 allegedly admitted that “Butt’s master delay circuit 116 provides a free running clock,” and thus “Hiraishi’s LCLKR/LCLKW signals are also free running, continuous clocks.” *Id.*

But in this proceeding, the claimed “module control signal[s]” are mapped to “DRC” in Hiraishi, *see, e.g.*, Pet. (Paper 1) at 20, 32, 37, 39, 44, so it is unfair and confusing under FRE 403 for Netlist to be citing to testimony in Exhibit 2016

about Butt and LCLKR/LCLKW. Netlist cites to “Pet. 36,” see Sur-Reply (Paper 29) at 12, but that page of the Petition in this IPR does not mention “module control signals,” or Hiraishi’s LCLKR/LCLKW, or Butt’s master delay circuit 116, creating further confusion and unfairness from Netlist’s citation to Exhibit 2016 at 123:14–:18 and 124:6–:13.

As another example of why Exhibit 2016 should be excluded under FRE 403, Netlist cites to Exhibit 2016 at 142:15–:24, 143:5–144:2, 151:2–:13, 152:17–:23, and 174:7–:11 to argue that the proposed combination for Ground 2 here involving Hiraishi’s data buffers would result in “an *increase* in the overall time and circuitry required.” POR (Paper 20) at 76, 80–81. But that is a confusing and unfair characterization of Dr. Wedig’s testimony in Exhibit 2016, which repeatedly emphasized that any modifications would be “nothing significant” because the “circuitry in Hiraishi’s data buffer” “already ha[s] a control circuit” and the logic blocks needed to implement any added delay functionalities. EX2016 at 151:2–152:23. As for “an increase in the overall time,” Netlist relies on Dr. Wedig’s testimony that the combination would require Hiraishi’s data buffers to communicate signals with the memory controller or the module controller. POR (Paper 20) at 80–81. But the testimony in Exhibit 2016 was not related to the *amount of time* it would take for such communications. See EX2016 at 151:2–:13, 152:17–:23, and 174:7–:11. Thus it is unfair and confusing for Exhibit 2016 to be

used in this IPR for those issues.

Under FRE 403, Exhibit 2016 should be excluded for at least the reasons above, and there is no unfairness because Netlist can still rely on Exhibit 2012, which is the deposition of Dr. Wedig in this IPR.

3. Exhibit 2016 is deficient under 37 C.F.R. § 42.53(f)(5)–(6)

Exhibit 2016 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 have an opportunity to review and make any corrections, if necessary,” EX2016 at 224:15–:18, 228:8–:9, 230:1–:8, and then the witness read his transcript, made corrections, and signed the corrected transcript, which was then served on Patent Owner on January 30, 2023 (long before the Patent Owner Response was filed in this IPR on March 29, 2024). But Exhibit 2016 lacks this errata and signature, *see* EX2016 at 226, and thus is defective under 37 C.F.R. § 42.53(f)(5). Indeed, the required “certificate” by the court reporter, *see* EX2016 at 228:8–:9, 230:1–:8, confirms that the witness did **not** “refuse[] to read or sign the transcript,” 37 C.F.R. § 42.53(f)(6)(vii).

B. Samsung timely objected (37 C.F.R. § 42.64(b)(1))

Samsung timely objected to Exhibit 2016, which was served on March 29,

2024, along with Patent Owner’s Response (Paper 20). Petitioner timely served objections on April 5, 2024, *see* Paper 21 at 4, “within five business days of service of evidence to which the objection is directed,” 37 C.F.R. § 42.64(b)(1).

III. CONCLUSION

For the foregoing reasons, Samsung respectfully requests that the Board exclude EX2016 at 59:4–:18, 104:24–106:4, 123:14–:18, 124:6–:13, 142:15–:24, 143:5–144:2, 151:2–:13, 152:17–:23, 171:15–:21, 174:7–:11, 177:14–:19, 181:9–:15, and 194:18–:21.

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I certify that on this 16th day of August, 2024, **Petitioner's Motion to Exclude** was served by email on the following counsel for Patent Owner:

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