

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 REPLY IN SUPPORT OF ITS MOTION TO EXCLUDE

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

Netlist has not shown that Wedig was “inconsistent” about his understanding of the prior art, Opp’n at 1, because the cited testimony concerned different technical issues, as Samsung’s motion explained (e.g., input vs. output), Mot. at 4–9. Netlist still argues that there was an inconsistency, *see* Opp’n at 3–5, 7–12, but that is precisely why a witness must be “subject to cross-examination” about the prior statement before it can be introduced here, *see* Fed. R. Evid. 801(d)(1), so that any alleged inconsistencies can be addressed by the witness and the subject of further questioning by Samsung. Netlist never did that, *see* Opp’n at 4–5, and instead simply asked Wedig if he is “stand[ing] by [his] testimony about the prior art references that are in common between the ’506 and the ’608 IPRs,” Opp’n at 2 (quoting EX2012, 16:7–:14), without actually crossing Wedig on the prior testimony (listed at Mot. at 1–2), which is insufficient, *see, e.g., Gilmore v. Palestinian Interim Self-Gov’t Auth.*, 843 F.3d 958, 971–72 (D.C. Cir. 2016) (excluding prior testimony because “one-word answer to a compound question” did not constitute “cross-examination” about all of the prior testimony).

Cross examination as required by FRE 801(d)(1) “envision[s] the situation in which the proponent of the statement [Netlist] calls the speaker [Wedig] to the stand [i.e., EX2012, the deposition in this IPR], examines the speaker [Wedig] about the [prior] statement [i.e., from EX2016], and then introduces the statement

itself [from EX2016, which Netlist never did during the deposition here, EX2012], whether by offering a written version or getting the speaker to agree to the substance of a statement recited to him in questioning, and then tenders the witness to the other side [Samsung] for cross-examination [here, redirect by Samsung in EX2012]. It does *not* envision what amounts to sandbagging tactics in which the proponent of the statement [Netlist] calls the speaker [Wedig] but does not [ask] questions on the substance of the statement [like Netlist did here]” 4 Fed. Evid. § 8:37 (4th ed. 2023) (emphasis in original).

If Netlist had bothered to ask Wedig here about his prior testimony, Wedig would have explained that his prior testimony in EX2016 is not “inconsistent” under FRE 801(d)(1)(A) with his current testimony, contrary to Netlist’s arguments, Opp’n at 3–5: (1) Wedig previously testified that Hiraishi’s S4 read leveling in the data buffer involves **more than** just enabling INB, *see* EX2016 at 63:19–69:2, consistent with his testimony here about S4 read leveling, *see* Paper 23 (Reply) at 23–30. (2) Wedig previously testified that Hiraishi teaches performing **both** S4 leveling in the data buffer **and** S5 leveling by the memory controller, *see* EX2016 at 78:8–79:11, consistent with his testimony that other prior art references “don’t have a data buffer” and thus only performed leveling in the memory controller (not the data buffer), *see* EX2016 at 170:25–171:13. (3) Wedig previously explained that in the combination of Hiraishi and Tokuhiro, although

leveling by the data buffer results in “data arriv[ing] to the memory controller without **substantial** fly-by delays,” EX2016 at 178:12–:17 (emphasis added), the memory controller would still perform “some clean-up” in the timing adjustment, without losing the benefit of the combination, EX2012 at 105:12–107:14; EX2016 at 179:22–182:10, consistent with the proposed combination here and the teaching in Hiraishi of performing **both** S4 leveling by the data buffer **and** S5 leveling by the memory controller, see Paper 23 (Reply) at 33–34.

Netlist argues that EX2016 is not hearsay because it is not being offered “for the truth of the matter asserted.” Opp’n at 3. That is incorrect: Netlist is asserting that the prior art should be interpreted a certain way and is offering EX2016 for the truth of that matter, which makes EX2016 hearsay under FRE 801(c)(2).

Nor does FRE 801(d)(2) apply. Netlist argues that Wedig’s testimony should be “regarded as an opposing party statement under FRE 801(d)(2)” because Samsung retained him in IPR2022-00711. Opp’n at 5–7. But Netlist failed to distinguish the case on point cited in Samsung’s motion. See Mot. at 3 (citing *HTC Corp. v. Telefonaktiebolaget LM Ericsson*, 12 F.4th 476, 489–90 (5th Cir. 2021)). Netlist argues that Samsung “did not object” to the cited questions, see Opp’n at 5–7, but that is because Netlist never gave Samsung notice during either deposition that Netlist intended to introduce answers from EX2016 for a different purpose here. If Netlist wanted to use the prior testimony here, then Netlist needed to cross

examine Wedig about that testimony, thus giving notice to Samsung, which Netlist never did as discussed above (pp.1–2). None of the cases cited by Netlist support the absurd theory that because Samsung did not object to “some of the cited testimony” in the **other** proceeding, “the testimony should be treated as a party statement” in **this** proceeding. Opp’n at 6–7.

Netlist also has FRE 106 backwards, *see* Opp’n at 6, since Samsung is not the party seeking to introduce EX2016. 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 EX2016. Thus, only Samsung could use FRE 106, not Netlist.

II. EX2016 lacks probative value (FRE 403)

Netlist does not dispute that Wedig’s prior testimony is from another IPR involving a different patent. *See* Opp’n at 7–12. Thus in addition to the hearsay problems above, any probative value is outweighed by the risk of unfair prejudice or confusion under FRE 403. *See* Mot. at 4–9. The only case cited by Netlist, *Ultratec, Inc. v. CaptionCall, LLC*, 872 F.3d 1267 (Fed. Cir. 2017), did not address hearsay or admissibility under FRE 403, and concerned “testimony...addressing **the same** patents,” 872 F.3d at 1272–1273 (emphasis added), unlike here.

Netlist’s confusing arguments merely highlight why EX2016 is inadmissible under FRE 403. Opp’n at 9–12. For example, Netlist does not dispute that the testimony at EX2016 at 104:24–106:4 is about sampling data **into** the FIFO, not about clocking or sampling data **out** of the FIFO. Mot. at 4–6; Opp’n at 9–10. Netlist argues Wedig previously suggested that “sampling and clocking out data are two different operations,” Opp’n at 9, when in fact Wedig used the terms “clocking [out]” and “sampling [out]” interchangeably, see Mot. at 6, consistent with Netlist’s expert who testified that “when data goes **out**” it is “**sampled**,” IPR2022-00711, EX1046, 65:17–67:3 (emphasis added) (discussing EX1047, 6).

III. 37 C.F.R. § 42.51(b)(1)(iii) concerns discovery, not admissibility

Netlist also relies on 37 C.F.R. § 42.51(b)(1)(iii), see Opp’n at 12, but that rule is about discovery, **not** “admissibility,” 77 Fed. Reg. 48,612, 48,640 (Aug. 14, 2012) (comment 125), and Netlist does not dispute it was “previously served” with EX2016 (since Netlist took that deposition).

IV. EX2016 is also deficient under 37 C.F.R. § 42.53(f)(5)–(6)

Finally, Netlist’s arguments about “errata” are irrelevant to the simple fact that EX2016 fails to comply with 37 C.F.R. § 42.53(f)(5)–(6), see Opp’n at 12–13, as Samsung previously warned told Netlist, see Mot. at 9–10; Paper 21 at 4.

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CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), I certify that on this 30th day of August, 2024, **Petitioner's Reply in Support of Its Motion to Exclude** was served by email on the following counsel for Patent Owner:

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