

Paper No. 19
Date: August 8, 2024

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FOURSQUARE LABS, INC.,
Petitioner,

v.

BOARDACTIVE CORPORATION,
Patent Owner.

IPR2023-00919

U.S. Patent No. 10,692,108 B1

MOTION TO EXCLUDE
37 C.F.R. § 42.64(c)

Pursuant to 37 C.F.R. §§ 42.62 & 42.64(c), Petitioner, Foursquare Labs, Inc. (hereinafter, “Foursquare”), respectfully moves to exclude Exhibits 2002, 2003, and 2004, in their entireties, as well as any portions of the record relying on these exhibits, including Patent Owner Response (Paper No. 10) pages 56-57 from the proceedings in this *inter partes* review.

I. INTRODUCTION

Patent Owner submitted Exhibits 2002, 2003, and 2004 together with the Patent Owner Response, citing to each of Exhibits 2002 and 2003 in an attempt to discredit the application of Adharapurapu to claim 1. However, each of Exhibits 2002-2004 are inadmissible and should be excluded. As discussed herein, each of these exhibits lacks relevance under Federal Rules 401-403 because both the content of the exhibit and Patent Owner’s arguments which rely on the exhibit are immaterial to the proceeding, and/or the probative value of each exhibit, if any, is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the fact finder, undue delay, or wasting time. Additionally, Exhibits 2003 and 2004 each lack proper authentication, and Exhibit 2004 is not actually presented with respect to any of Patent Owner’s arguments and, therefore, lacks evidentiary value.

Foursquare timely objected to each of these exhibits in its objections filed on February 29, 2024. *See* Paper 11, pp. 1-4. Patent Owner has offered nothing more

in support of these exhibits. For the reasons discussed herein, Foursquare respectfully requests that the Panel exclude each of Exhibits 2002, 2003, and 2004, and any portions of the record relying on them.

II. EXHIBITS 2002-2004 ARE IRRELEVANT TO THE PROCEEDING AND SHOULD BE EXCLUDED.

Exhibit 2002 appears to be a selected portion of a document entitled “The GSM System for Mobile Communication,” concerning GSM technologies in the year 1992. At the outset, Patent Owner’s arguments that rely upon this exhibit do not establish the pertinence of GSM relative to the appropriate dates and technologies of the present proceeding. For example, the date of concern in the present proceeding is the presumed earliest potential filing date of April 10, 2017, nearly 25 years later than Exhibit 2002.

Moreover, Patent Owner has failed to even attempt to establish the relevance within this proceeding of any particular communication technology, including constraint to 1992 GSM. Even if Patent Owner had presented proper basis to consider a 25-year-old designs, Patent Owner omitted any reasoning to constrain these proceedings to GSM technology, further undermining the relevance of Exhibit 2002. Apart from any issue on the merits, Patent Owner argues that Adharapurapu “can be applied in a GSM network,” and attempts to build a rebuttal. Resp., 56. However, whether designs could be applied in a GSM

network does not address Adharapurapu's disclosure of the claimed features. On its face, Patent Owner's position merely addresses one possible technology that "can be applied" without even establishing that it must be applied, nor that it must be applied in the manner it asserts. Thus, mere possibility that one individual architecture could hypothetically be applied does not make any material fact more or less probable than it would be without the evidence. Accordingly, Patent Owner has omitted the necessary basis required for this document to have relevance in the proceeding, and it is rendered inadmissible. FED. R. EVID. 401, 402.

For at least similar reasons, even if the document were relevant, the probative value of Exhibit 2002 is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the fact finder, undue delay, and/or wasting time in this proceeding. FED. R. EVID. 403. As discussed above, Patent Owner has omitted the proper foundation to apply Exhibit 2002 in a manner without unfair prejudice, confusion, misleading, undue delay, and/or waste.

Without any basis to constrain Adharapurapu to one single, hypothetical GSM construct from many years prior, little meaningful value can be derived from this exhibit and it is far more likely that the document will create a false impression and confusion regarding whether any technological hurdle exists, or to delay or waste efforts in combating that false consideration. Accordingly, even if the document

were relevant, the very low probative value of Exhibit 2002 is outweighed by the reasonably high negative effects in this proceeding. *Id.*

Exhibits 2003 appears to be an un-adopted working document concerning mobile communications technology. *See* Ex. 2003, p. 1 (“The present document has not been subject to any approval process by the 3GPP Organizational Partners and shall not be implemented.”). The unapproved and forbidden ‘draft’ status of the document leaves entirely unsupported whether its contents would ever be actually accepted by the technical community, negating the relevance of its statements in this proceeding and similarly negating its probative value even if relevance existed. Accordingly, Exhibit 2003 lacks relevance and/or admissibility under Rules 401, 402 because it explicitly states that it is not approved and “shall not be implemented,” and thus neither has tendency to make a fact more or less probable than it would be without the evidence; nor does it pertain to a fact of consequence in determining this proceeding.

Patent Owner’s allegations that an unidentified previous version somehow remedies this self-depreciated document are unsupported, but are also manifestly false. Namely, Patent Owner’s argument that the “Change History” within Ex. 2003 can remedy the fact that the document itself is self-denied and otherwise cannot be relied upon for its content. There is no record evidence to support whether this unidentified previous version exists, what it would suggest, nor

evidence of the effects of its contents as a whole even presuming no changes to an individual section of such hypothetical document. Still further, there is no record evidence to even suggest that an equivalent section would exist to those relied upon by Patent Owner. And yet, this entire line of Patent Owner's logic relies on the underlying veracity of an un-adopted and expressly refused document even by its "Change History." In other words, Patent Owner improperly relies on the substance of an unreliable document to attempt demonstration of the very thing in question. Thus, Exhibit 2003 is irrelevant to the proceeding as it cannot be taken to make a material fact more or less probable than without it.

Even if it were relevant, the probative value of Exhibit 2003 is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the fact finder, undue delay, wasting time, and/or needlessly presenting cumulative evidence in this proceeding. FED. R. EVID. 403. As Exhibit 2003 is not approved and is forbidden from implementation, it would unfairly prejudice Foursquare, confuse the issues of relevant technologies, and mislead, waste, and/or needlessly present information never approved and restricted from adoption.

Exhibit 2004 appears to be out of court testimony having no material bearing on any brief or document in this proceeding and is, therefore, on its face, irrelevant and/or inadmissible. FED. R. EVID. 401, 402. Moreover, written statements within Exhibit 2004 do not address the '108 patent itself, nor the prior art references at

issue. Accordingly, Exhibit 2004 neither has tendency to make a fact more or less probable than it would be without the evidence; nor pertains to a fact of consequence in determining this proceeding. On sur-reply, Patent Owner makes passing mention to a declaration of Craig Bishop in alleging that Exhibit 2003 generally “was publicly available,” but provides no explanation as to why this has any relevance to the proceeding. For example, even taking Patent Owner’s undemonstrated statement for true, Patent Owner fails to even allege that Craig Bishop can establish any personal knowledge that the document is reliable, accurately presents information, or has any meaningful effect on the ordinary artisan at the relevant date—*all taken in light of the document’s own express written forbiddance of implementation*. The unusual circumstance of the document’s self-denial negates the relevance of knowing whether Exhibit 2003 was available, and therefore renders Exhibit 2004 incapable of making a material fact more or less probable than without it in this proceeding. Therefore, Exhibit 2004 is inadmissible as irrelevant.

For similar reasons, even if it has relevance, the probative value of Exhibit 2004 is substantially outweighed by a danger of unfair prejudice, confusing the issues, misleading the fact finder, undue delay, wasting time, and/or needlessly presenting cumulative evidence in this proceeding, at least because Exhibit 2004

does not address the ‘108 patent itself, the prior art references at issue, nor the relevant issues for supporting the other exhibits. FED. R. EVID. 403.

III. EXHIBIT 2003 LACKS SUFFICIENT AUTHENTICATION AND SHOULD BE EXCLUDED.

The unusual nature of the unapproved and forbidden implementation of Exhibit 2003 renders its origins and content in question, beyond self-authentication, and yet it also lacks sufficient independent authentication. FED. R. EVID. 901, 902. Patent Owner’s attempt to rely on testimony outside this proceeding to suggest mere availability of the unreliable document is unhelpful because it fails to address whether the document is intact as it would have been available, whether the document (Ex. 2003) is exactly as it was being addressed by Bishop, and/or is otherwise accurate in relation to this proceeding in any form. Paper 15, pp. 11-12. Patent Owner cannot authenticate a self-forbidden document by simply alleging that other out of court statements exist about publication dates. Neither can Exhibit 2003 be legitimately taken as an extension of an unidentified previous version also lacking sufficient basis. Accordingly, Exhibit 2003 remains unauthenticated and should be excluded.

IV. EXHIBIT 2004 IS IMPROPER TESTIMONY AND/OR HEARSAY AND SHOULD BE EXCLUDED.

Exhibit 2004 constitutes improper opinion because it is not offered as a witness’ perception, nor as a qualified expert based on facts or data of which the

expert has been made properly aware or personally observed, and of the kind that would be reasonably relied-upon. FED. R. EVID. 701-705. Patent Owner has merely stated, without demonstration, that another exhibit was “publically available” based on the out of court statements of Craig Bishop in Exhibit 2004. However, availability is not a relevant issue here. Rather, Bishop’s testimony is improper because it is based neither on personal knowledge, nor on disclosed facts or data.

Moreover, Exhibit 2004 constitutes improper hearsay having no suitable exception because it is, individually and as a whole, an out of court statement not made while the declarant is testifying at the current trial and/or offered for its truth, without suitable exception. FED. R. EVID. 801, 802, 803, 804, 807. This includes statements concerning other documents, and particularly those that are not readily and unequivocally identified, and their sources. Exhibit 2004 is therefore inadmissible hearsay under Rule 802.

Respectfully submitted,

Date: August 8, 2024

/ Steven D. Shipe /

Steven D. Shipe, Reg. No. 71,944
Michael A. Carrillo, Reg. No. 44,595
BARNES & THORNBURG, LLP
555 12th Street, NW
Suite 1200
Washington, D.C. 20006
Tel: 202.408.6924

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Fax: 202.289.1330
steven.shipe@btlaw.com

CERTIFICATE OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e), the undersigned certifies that on this 8th day of August 2024, I caused a true and correct copy of the foregoing MOTION TO EXCLUDE in IPR2023-00919 to be served on Patent Owner via electronic mail at the following addresses of record:

meredith@addyhart.com

ba-4squareiprs@addyhart.com

robert@addyhart.com

gbgulliver@addyhart.com

Date: August 8, 2024

/ Steven D. Shipe /

Steven D. Shipe, Reg. No. 71,944
BARNES & THORNBURG, LLP

555 12th Street, NW
Suite 1200

Washington, D.C. 20006

Tel: 202.408.6924

Fax: 202.289.1330

steven.shipe@btlaw.com