

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COMMSCOPE TECHNOLOGIES LLC.
Petitioner

v.

BELDEN INC.
Patent Owner

Case IPR2023-01061
Patent No. 6,998,537

PETITIONER'S MOTION TO EXCLUDE EXHIBIT 2012

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Petitioner CommScope Technologies LLC (“CommScope” or “Petitioner”) hereby moves to exclude Patent Owner Belden Inc. (“Belden” or “Patent Owner”)’s Exhibit 2012, purported evidence Belden filed for the first time with its sur-reply. CommScope timely objected on August 27, 2024. Paper 35.

Exhibit 2012 appears to be a Belden document that Belden produced (but did not file or seek leave to file) on May 16, 2024 after the Board granted CommScope’s Motion to Compel Routine Discovery. Paper 27. It is partially redacted and entitled “Rebuttal Expert Report of Mark Horenstein, Ph.D.” Belden’s Sur-Reply brief alleges that this “Rebuttal Expert Report” was filed in a prior district court litigation that Belden brought against a third party (Superior Essex). Exhibit 2012 contains many unredacted paragraphs, but Belden cites to only paragraph 334. Paper 34 at 21-22.

I. The Board Should Exclude Exhibit 2012 As Lacking Authentication Under FRE 901

Under Federal Rule of Evidence 901, Belden “must produce evidence sufficient to support a finding that [Exhibit 2012] is what the proponent [Belden] claims it is.” Fed. R. Evid. 901. Belden has produced no such evidence authenticating Exhibit 2012. Therefore, the Board should exclude Exhibit 2012 under Federal Rule of Evidence 901 as lacking authentication.

II. The Board Should Exclude All Uncited Paragraphs In Exhibit 2012

Exhibit 2012 contains numerous unredacted paragraphs that are not cited by Belden. CommScope respectfully requests that the Board exclude the uncited paragraphs as irrelevant under Federal Rules of Evidence 401 and 402, as improper evidence filed with a sur-reply (37 C.F.R. § 42.23(b)), and as inadmissible hearsay (to the extent Belden were to try to rely on the uncited paragraphs).

First, Belden has not cited any of the paragraphs of Exhibit 2012 except for paragraph 334. The Board should exclude these uncited paragraphs pursuant to Federal Rules of Evidence 401 and 402, as irrelevant to this proceeding. Fed. R. Evid. 402 (“Irrelevant evidence is not admissible.”).

Second, the uncited paragraphs violate 37 C.F.R. § 42.23(b): “A sur-reply ... may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness.”); *see also* Patent Trial and Appeal Board Consolidated Trial Practice Guide, Nov. 2019 at 73 (“The sur-reply may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness.”). “This rule ... serves to minimize the possibility of undue prejudice to a party due to the introduction of evidence—particularly new expert opinion testimony—without an adequate opportunity to test the veracity of the witness’s testimony through cross-examination and to otherwise respond to the new evidence in briefing.” *FedEx Corporate Services, Inc. v.*

Roambee Corp., IPR2022-00934, Paper 41 at 9 (PTAB Nov. 3, 2023). The uncited paragraphs of Exhibit 2012 plainly fall within the prohibition. *See also* 37 C.F.R. § 42.53(a) (“[u]ncompelled direct testimony must be submitted in the form of an affidavit”); 37 C.F.R. § 42.51(b)(1)(ii) (providing right to cross-examination for properly submitted affidavit testimony).

Third, to the extent Belden were to try to rely on any of the uncited paragraphs, they would be inadmissible hearsay. “[P]rior testimony from another case, which is not subject to cross-examination by the opposing party, is hearsay if offered for the truth of the matter.” *The Data Company Techs. Inc. v. Bright Data Ltd.*, IPR2022-00135, Paper 51 at 82 (PTAB May 31, 2023). Here, the uncited paragraphs from Exhibit 2012 are from a different proceeding, they are not even testimony (Exhibit 2012 purports to be an expert report, not a declaration or an affidavit), and CommScope did not have the opportunity to cross-examine.

III. The Board Should Also Exclude the Cited Paragraph, Paragraph 334

CommScope recognizes that the Board allowed Belden to file Exhibit 2012 for the limited purpose of citing to the paragraph where its expert in a prior district court case discusses twisted pairs with respect to German Utility Model Patent DE 297 19 866 U1 (“GmbH-866,” Exs. 1010, 1011, 1057). CommScope respectfully maintains its objection that the evidence is improper under 37 C.F.R. § 42.23(b), and respectfully requests that the Board exclude paragraph 334.

“A sur-reply ... may not be accompanied by new evidence other than deposition transcripts of the cross-examination of any reply witness.” 37 C.F.R. § 42.23(b); *see also* Patent Trial and Appeal Board Consolidated Trial Practice Guide, Nov. 2019 at 73. Because paragraph 334 of Exhibit 2012 was filed for the first time with Belden’s sur-reply, and also, because paragraph 334 of Exhibit 2012 is not a declaration or affidavit, CommScope did not have the opportunity to cross-examine the expert making the unsworn statements. *See* 37 C.F.R. § 42.53(a) (“[u]ncompelled direct testimony must be submitted in the form of an affidavit”); 37 C.F.R. § 42.51(b)(1)(ii) (providing right to cross-examination for properly submitted affidavit testimony). Further, Belden has not demonstrated that paragraph 334 of Exhibit 2012 reasonably could not have been obtained earlier or that consideration of it is in the interests of justice. *See* 37 C.F.R. § 42.123(b).

CommScope further moves to exclude paragraph 334 of Ex-2012 as inadmissible hearsay to the extent Belden is relying on the out-of-court statements in that paragraph for the truth of the matter asserted (e.g., that a POSITA would understand the cited portion of the ’866 patent to disclose twisted pairs, rather than twisting cable components about a common axis). Hearsay is inadmissible evidence under the Federal Rules of Evidence. Fed. R. Evid. 802; 37 C.F.R. § 42.62(a).

Respectfully submitted,

Dated: August 29, 2024

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CERTIFICATION OF SERVICE

Pursuant to 37 C.F.R. § 42.6(e) and the agreement of the parties, the undersigned certifies that on August 29, 2024, a true and correct copy of the foregoing *Petitioner's Objections to Evidence* was served via electronic mail upon the following:

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