UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

COMMSCOPE TECHNOLOGIES LLC,
Petitioner,

v.

BELDEN INC.,
Patent Owner.

Case No. IPR2023-01061
Patent 6,998,537 B2

PATENT OWNER'S OPPOSITION TO PETITIONER'S MOTION REQUESTING AUTHORIZATION TO FILE SUPPLEMENTAL EVIDENCE

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Patent Owner Belden Inc. ("PO") opposes Petitioner Commscope Technologies LLC ("Petitioner")'s Motion Requesting Authorization To File Supplemental Evidence (Paper 44) ("Motion").

I. PETITIONER FAILED TO ADDRESS WHY IT DID NOT PROVIDE THE ALLEGED "CERTIFICATION" WITH ITS OPPOSITION TO PO'S MOTION TO EXCLUDE EX-1055.

As PO's motion to exclude EX-1055 established: i) PO timely and repeatedly objected to Petitioner's failure to certify the Yanagita translation in EX-1055, ii) Petitioner even acknowledged PO's objections in its Reply, iii) the parties engaged in extensive briefing on the issue in relation to PO's motion to exclude EX-1055 for the very reason that Petitioner failed to certify EX-1055, and iv) an oral hearing was conducted with the Board on these issues. Papers 37 and 40. But at no time during this proceeding did Petitioner ever attempt to provide supplemental evidence to remedy this issue, or even suggest that it might want to do so. As the Board correctly noted in authorizing Petitioner to file its motion, Petitioner did not seek authorization to file supplemental evidence during extensive briefing on this very issue in relation to PO's motion to exclude EX-1055. Nor did Petitioner even mention that it was seeking such an alleged "certification" at the oral hearing.

Petitioner's tongue-in-cheek response to the Board's inquiry as to why Petitioner failed to provide the alleged "certification" with its opposition to PO's motion to exclude EX-1055 is that "it did not have it then." Motion 3. But Petitioner

tellingly fails to disclose when it first sought the alleged "certification," nor does it explain why it did not even mention the possibility of such a "certification" in its opposition to PO's motion to exclude, or why, if in fact Petitioner had "recently asked Morningside" for the alleged "certification" prior to the oral hearing, it did not notify the Board and PO at the hearing. Motion 2.

Instead, on the evening of September 24, 2024—the day after the oral hearing—Petitioner provided a brand new one-page "certification" dated the day of the hearing from an individual who did not even draft the translation in EX-1055. That individual, Mr. Frank McGee, is apparently not the individual who originally translated Yanagita in EX-1055 (that translator remains unknown), and he is different than the individual who translated and certified the Yanagita translation in EX-1012, Mr. Warren Smith. It is undisputed that the translations in EX-1012 and EX-1055 are ***different***. *See* PO Motion To Exclude (Paper 37) at 3. Those differences alone call into question the accuracy and authenticity of both translations, and certainly raise questions as to the timing (*i.e.*, what does "recently asked Morningside" mean), the circumstances surrounding, and the process by which Mr. McGee conducted his alleged "certification" of a translation that he did not even author. These open questions demand additional discovery and briefing.

Petitioner's reliance on a single case, *Norman Int'l*, is misguided. *Norman Int'l Inc. v. Andrew J. Testamentary Trust*, IPR2014-00283, Paper 52 (PTAB June

18, 2015). First, in *Norman Int'l* the translation subject to the patent owner's motion to exclude was one that the ***patent owner*** itself commissioned. *Id*. at 13. Patent owner in *Norman Int'l* was not contesting the accuracy of that translation, as PO has here, but instead was challenging the petitioner's failure to file a certification for patent owner's own translation. *Id*. Second, the Board in *Norman Int'l* determined that 37 C.F.R. § 42.61(b) "does ***not*** obviate the requirement of an affidavit attesting to the accuracy of a foreign document under § 42.63(b)," directly contradicting Petitioner's allegations here. *Id*. (emphasis added). 37 C.F.R. § 42.61(b) relates to whether records of the Office require certification for admissibility, ***not*** whether translations of foreign documents require certification, which they do.

II. PETITIONER'S TACTICAL GAMESMANSHIP PROVIDING THE ALLEGED "CERTIFICATION" AFTER THE RECORD WAS CLOSED UNFAIRLY PREJUDICES PO AND SHOULD NOT BE ALLOWED.

As the Board made clear at the oral hearing, the record is closed. For that reason alone, Petitioner's request is improper, untimely, and unfairly prejudicial to PO. Since the filing of the Petition, Petitioner has been aware that a certification of the translation in EX-1055 was required under 37 C.F.R. 42.63(b), as evidenced by Petitioner's filing of the required certifications for the translations in EX-1010 and EX-1012. For EX-1055, Petitioner therefore knowingly ignored 37 C.F.R. § 42.63(b) despite ample opportunity to provide such certification.

Additionally, PO timely objected to Petitioner's failure to provide such certification as early as its Preliminary Response, which Petitioner acknowledged. *See* PO Reply To Motion To Exclude (Paper 40) at 1-4 (citing *Square, Inc. v. REM Holdings 3, LLC,* IPR2014-00312, Paper 58 at 35-36 (PTAB July 7, 2015) and *Dropbox, Inc. v. Synchronoss Techs., Inc.*, IPR2016-00850, Paper 41 at 18 (PTAB October 5, 2016), both cases, which Petitioner failed to distinguish, recognizing the sufficiency of pre-institution objections). Accordingly, Petitioner cannot provide any rational explanation as to why it did not reasonably obtain a certification of EX-1055 earlier, as required under 37 C.F.R. § 42.63(b). Nor can Petitioner demonstrate that it is in the interest of justice to allow its filing now, given that Petitioner knew the requirement at the time the Petitions were filed, and was further and repeatedly put on notice of the deficiency by PO since September 21, 2023.

Rewarding Petitioner for its undue delay and allowing it to supplement the closed record with the alleged new "certification" would unfairly prejudice PO as it cannot conduct discovery on the new "certification," including deposing Mr. McGee and retaining its own Japanese language expert to opine on the now dueling certifications of differing translations, nor can PO argue the merits based on that discovery. *TD Ameritrade Holding Corp. v. Trading Techs. Int'l, Inc.*, CBM2014-00131, Paper 27 at 2-3 (PTAB Jan. 22, 2015) (finding cross examination of affidavit testimony in relation to an English translation authorized under routine discovery,

37 C.F.R. § 42.51(b)(1)). Given Petitioner's undue delay, none of this is possible.

Additionally, allowing Petitioner to belatedly introduce new evidence now, after the record is closed and briefing and oral argument are complete, would violate the Administrative Procedure Act ("APA") by failing to provide PO with proper notice and the opportunity to supply evidence in response. *Dell v. Acceleron*, LLC, 818 F.3d 1293, 1301 (Fed. Cir. 2016) (reversing Board's Decision based on the APA where Petitioner raised an issue for the first time at oral argument, preventing PO from supplying evidence in response).

Petitioner tacitly admits PO is unfairly prejudiced by Petitioner's late ambush tactics, speculating on six alleged reasons why such prejudice is "*de minimis*." Motion 4-5. None have merit: i) PO did not depose previous translators because there was no need to as there is with the latest alleged "certification," ii) that different translators from the same translator agency (Morningside) drafted the certification is frankly meaningless, iii-v) that PO was required to file an IDS disclosing the alleged translation in previous Patent Office proceedings that did not require certified translations does not excuse Petitioner's failure here, with Petitioner's only cited case standing for the proposition that 37 C.F.R. § 42.61(b) does ***not*** apply, and vi) Petitioner's own expert admitted on cross-examination that the translations in EX-1012 and EX-1055 are ***different***. *See* PO Motion To Exclude (Paper 37) at 3.

Petitioner's untimely request to reopen the record should be denied.

Date: October 25, 2024

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing **PATENT OWNER'S OPPOSITION TO PETITIONER'S MOTION REQUESTING AUTHORIZATION TO FILE SUPPLEMENTAL EVIDENCE** was served pursuant to 37 C.F.R. § 42.6(e) via electronic mail on October 25, 2024, on the following:

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