UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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COMMSCOPE TECHNOLOGIES LLC,
Petitioner,

v.

BELDEN INC.,
Patent Owner.

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Case No. IPR2023-01062
Patent 6,750,095 B2

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PATENT OWNER'S OPPOSITION TO PETITIONER'S MOTION TO EXCLUDE EXHIBIT 2012

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EXHIBIT LIST

EXHIBIT	DESCRIPTION
EX-1010	English language translation of German Patent No. 297,19,866 U1 ("GmbH-866"), and attached Declaration of translator Anthea Heyes
EX-1057	English language translation of German Patent No. 297,19,866 U1 used in prior reexamination of US 6,998,537
EX-1061	Plaintiffs Belden Technologies, Inc.'s and Belden CDT (Canada), Inc's Memorandum in Support of Their Motion for Partial Summary Judgment No. 2: No Patent Invalidity by Anticipation from *Belden Technologies, Inc. v. Superior Essex Inc.*, Case No. 08-0063-SLR, Dkt. 139 (D. Del. Dec. 11, 2009)
EX-1063	Excerpts from Jury Trial Transcript Volume G from *Belden Technologies, Inc. v. Superior Essex Inc.*, Case No. 08-0063-SLR, Dkt. 306 (D. Del. Jun. 27, 2011)
EX-1065	Petitioner's Requests for Production
EX-1076	*Belden v. Superior Essex*, Docket No. 226, Joint Statement of Facts
EX-1077	*Belden v. Superior Essex*, Belden's Supplemental Response to Interrogatories 6, 7, & 23
EX-2012	Belden Technologies, Inc.'s and Belden CDT (Canada) Inc.'s Rebuttal Expert Report of Mark Horenstein Ph.D. Regarding Validity, *Belden Technologies, Inc. v. Superior Essex Inc.*, Case No. 08-0063-SLR (Redacted)
EX-2013	Deposition Transcript of Kenneth Cornelison, July 25, 2024

Patent Owner Belden Inc. ("Patent Owner") opposes Petitioner Commscope Technologies LLC ("Petitioner")'s Motion To Exclude EX-2012 (Paper 35)("Motion"). Only one thing is clear from Petitioner's Motion—Petitioner does not want the fact that Belden's former expert in the *Superior Essex* litigation formed his opinion regarding "twisted pairs" in the GmbH-866 reference based on a previous and different uncertified translation to be part of the record in this IPR proceeding. Desperate to remove exhibit EX-2012 from the record, Petitioner's motion attempts to rehash an issue already decided by the Board, is replete with both legal errors and factual misrepresentations, and should be denied.

I. IN A TWIST OF IRONY, PETITIONER SPECIFICALLY DEMANDED PRODUCTION OF EX-2012 AND NOW MOVES TO EXCLUDE IT.

In compliance with the Board's Order Granting Petitioner's Motion to Compel Production of Routine Discovery (Paper 26), Patent Owner produced thirty-three (33) documents from *Belden Technologies, Inc. v. Superior Essex Inc.*, Case No. 1:08-00063-SLR (D. Del.). One of those documents was specifically identified by Petitioner in its motion papers: "An ***expert report by PO's expert Horenstein***, where Horenstein opines that GmbH-866 refers to 'twisting of the [individual] conductor pairs'."[1] Paper 21 3. Included in the documents produced to Petitioner

[1] All emphasis herein has been added unless otherwise noted.

on May 16, 2024 was "Belden Technologies, Inc.'s And Belden CDT (Canada) Inc.'s Rebuttal Expert Report Of Mark Horenstein Ph.D. Regarding Validity" (the "Horenstein Report"). The Horenstein Report was included as a file named "BELDEN_EX-C - Horenstein Validity Report.pdf" in a sharefile sent to Petitioner, and listed as Exhibit "BELDEN_EX-C" in a "Served Exhibit List" served in conjunction with the production. Thus, Petitioner has been in possession of and well aware of the Horenstein Report and its contents, which it now seeks to exclude, since May 16, 2024, well before it filed its Reply (Paper 29) on July 9, 2024.

Petitioner did not object to or raise issues regarding ***any*** of the documents included in that production, which Patent Owner confirmed complied with the requirements of 37 C.F.R. §45.51(b)(1) in a May 16, 2024 email to the Board. In particular, Petitioner did not object to or otherwise raise any issues regarding the authenticity of or redactions contained within the Horenstein Report. The Horenstein Report was later marked as Exhibit EX-2012 at the deposition of Petitioner's expert, Kenneth Cornelison, on July 25, 2024. EX-2013 5. Patent Owner subsequently reached out to the Board on August 5, 2024 requesting approval to file EX-2012 in conjunction with its Sur-Reply. The Board held a hearing on August 8, 2024, and after considering many of the same arguments and concerns Petitioner now raises for the second time in its motion to exclude, the Board authorized Patent Owner to file EX-2012.

II. THE BOARD ALREADY CONSIDERED PETITIONER'S ALLEGATIONS AND AUTHORIZED PATENT OWNER TO FILE EX-2012, WHICH PATENT OWNER USED EXCLUSIVELY FOR THE LIMITED PURPOSE THE BOARD ALLOWED.

Petitioner wants a second bite at the apple and asks the Board to exclude EX-2012. But the Board already heard this issue, and authorized Patent Owner to file EX-2012 for the limited purpose of identifying the specific language in a previous uncertified translation of GmbH-866 in EX-1057 that Patent Owner's former expert in the *Superior Essex* litigation (Dr. Horenstein) based his opinion regarding "twisted pairs" in the GmbH-866 reference on. PO Sur-Reply (Paper 33) 20-21. That is precisely how Patent Owner used EX-2012, and it was well within the Board's discretion under 37 C.F.R. §42.5(b) to authorize Patent Owner to do so.

The Horenstein Report (EX-2012) identifies the specific portion of the uncertified translation of GmbH-866 at issue in the *Superior Essex* litigation (EX-1057) and its particular use of the word "stranding," which Dr. Horenstein relied upon in not challenging that EX-1057 disclosed twisted pairs:

> The '866 Patent discloses stranding of the individual conductors to form each twisted pair, and specifically discloses using "SZ" stranding. ***The '866 Patent states that "the stranding of pair 1 can consist of a so-called helix stranding or an SZ stranding."*** See (translation of the '866 Patent at ¶ 3, p. 3).

EX-2012 ¶334 (underline in original). But as Patent Owner demonstrated in its Sur-Reply, that very language was ***changed*** in the certified translation of GmbH-866 at issue in this IPR (EX-1010). PO Sur-Reply 18-22 (discussing change of wording from "[t]he stranding of ***pair 1***" (*i.e.*, pair 1 itself is stranded) in EX-1057 to "[t]he stranding of ***the pairs 1***" (*i.e.*, the pairs 1 are collectively stranded) in EX-1010).

While Petitioner's Reply repeatedly points out the ultimate ***conclusion*** of Dr. Horenstein's analysis of GmbH-866 in EX-1057, Petitioner's motion now improperly seeks to hide the ***basis*** of that opinion from this proceeding. Reply 12-15. Petitioner's failure to even acknowledge the Horenstein Report in its Reply and its motion now to try and exclude it could not be more transparent—Petitioner does not want EX-2012 in this IPR because it eviscerates Petitioner's unfounded theory that Patent Owner has been disingenuous, as it shows ***why*** Dr. Horenstein did not challenge that GmbH-866 disclosed twisted pairs at that time.

III. THE RECORD CONTAINS MORE THAN SUFFICIENT EVIDENCE TO AUTHENTICATE EX-2012.

Tellingly, while Petitioner alleges EX-2012 lacks authentication, Petitioner provides no evidence or argument that EX-2012 is not what it says it is on its face. Under Fed. R. Evid. 901(b)(4), evidence sufficient to support a finding that an item is what the proponent claims it is includes "distinctive characteristics and the like" such that "[t]he appearance, contents, substance, internal patterns, or other

distinctive characteristics of the item, taken together with all the circumstances" support such a finding. Documents are authenticated by evidence "sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a); *Medtronic, Inc. v. Teleflex Innovations S.A.R.L.*, IPR2020-00132, Paper 127 at 69 (PTAB June 17, 2021) (finding exhibit "authenticated under the low bar required under Federal Rule of Evidence 901"); *see also Fox Factory v. SRAM, LLC,* IPR2016-01876, Paper 59 at 63 (PTAB Apr. 2, 2018) (quoting Fed. R. Evid. 901(a)). "Authenticity is, therefore, not an especially high hurdle for a party to overcome." *Fox Factory*, Paper 59 at 63 (citing *United States v. Patterson,* 277 F.3d 709, 713 (4th Cir. 2002)).

Here, the evidence unquestionably shows that EX-2012 is in fact a true and correct copy of the Horenstein Report. For example, EX-2012 is two hundred twenty (220) pages long, is signed by Dr. Horenstein, and has the format, appearance and substantive content of an expert report on patent validity, including discussion of the '537 Patent at issue in this IPR proceeding, as well as several of the same asserted references.

Moreover, one of the *Superior Essex* documents that—unlike the Horenstein Report—Petitioner ***did*** choose to file and rely on confirms that EX-2012 is in fact the Horenstein Report. Exhibit EX-1076, which is publicly available docket number 226 from the *Superior Essex* District of Delaware litigation, refers to at least six

statements in the Horenstein Report, each of which are contained within EX-2012, further confirming EX-2012 is a true and correct copy of the Horenstein Report. For example, in one instance EX-1076 cites "Belden Technologies, Inc.'s And Belden CDT (Canada) Inc.'s Rebuttal Expert Report Of Mark Horenstein, PH.D. [sic] Regarding Validity at p. 137 (disclosing only 'substantially flat configurable dilectric [sic] pair separator' and 'foamed polymer' as the disputed elements)." EX-1076 at marked pages 18-19 (Superior Essex's Position on Statement No. 19). Looking at page 137 of EX-2012, paragraph 318 reads "For example, as discussed in greater detail below, the '629 Patent fails to disclose at least the "substantially flat configurable dielectric pair separator" recited in claim elements 19(b) and (d), as well as the 'foamed polymer' recited in claim element 19(d)." (emphasis omitted). Additional examples in EX-1076 confirming that EX-2012 is a true and correct copy of the Horenstein Report include:

EX-1076 (*Superior Essex* Dkt. No. 226 Referencing The Horenstein Report)	**EX-2012 (Horenstein Report)**
Marked p. 16 (Superior Essex's Position on Statement No. 17 quoting the Horenstein Report at page 119)	p. 119, ¶279 (containing the language quoted in EX-1076)
Marked p. 16 (Belden's Position on Statement 17 and citing the Horenstein Report at ¶353)	pp. 155-156, ¶353 (discussing the failure of the combination of the '645 Patent and the '563 Patent to disclose the claimed limitation as referred to in EX-1076)
Marked pp. 18-19 (Belden's Position regarding Statement No. 19 and the "limitations of Claim 19 of the '537 Patent:	pp. 136-138, ¶¶318-319 (discussing Claim 19 of the '537 Patent: … "wherein the substantially flat

EX-1076 (*Superior Essex* Dkt. No. 226 Referencing The Horenstein Report)	EX-2012 (Horenstein Report)
… 'wherein the substantially flat configurable dielectric separator includes a foamed polymer,'" and citing the Horenstein Report at ¶¶318-319)	configurable dielectric separator includes a foamed polymer")
Marked pp. 18-19 (Superior Essex's Position regarding Statement No. 19 and the "limitations of Claim 19 of the '537 Patent: … 'wherein the substantially flat configurable dielectric separator includes a foamed polymer,'" and citing the Horenstein Report at p. 137	p. 137, ¶318 (discussing the "substantially flat configurable dielectric pair separator" and "foamed polymer" claim elements)
Marked p. 23 (Belden's Position regarding Statement No. 28, referring to "commercial success," and citing the Horenstein Report at ¶¶124, 163, 216, 256, 297, and 342)	p. 109, ¶¶256 (referring to "commercial success of the '095 inventions"), 297 (referring to "commercial success of the '537 inventions") (¶¶124, 163, 216, and 342 have been redacted in their entireties)

IV. PETITIONER'S ALLEGATIONS REGARDING REDACTIONS, HEARSAY, AND PREJUDICE WITH REGARD TO EX-2012 ARE LEGALLY AND FACTUALLY WRONG.

Petitioner now complains about redactions in EX-2012, but Petitioner's own Requests For Production specifically ***suggested and agreed*** to them:

> To the extent a requested document contains confidential information of Superior Essex or any non-party to the Superior Essex Litigation, such confidential information may be redacted. To the extent a requested document contains confidential information of Belden in any sections regarding objective evidence of nonobviousness, such confidential information may be redacted.

EX-1065 3, n. 1. Patent Owner did just that, and produced all relevant information

as required by the Board. Paper 26 6-7. Petitioner neither questioned the authenticity of the Horenstein Report nor took issue with any of the redactions following its production.

Petitioner also wrongly alleged that paragraph 334 of EX-2012 is hearsay under Fed. R. Evid. 802, asserting that it is being offered for the truth of the matter asserted. Motion 4. But that is most definitely ***not*** what Patent Owner is using EX-2012 for. Rather, paragraph 334 of EX-2012 is used exclusively to show the specific language within the uncertified translation of GmbH-866 in EX-1057 that Dr. Horenstein based his opinion about twisted pairs in GmbH-866 on, ***not*** that a POSITA would understand that particular language to mean anything. Accordingly, EX-2012 is ***not*** being offered for the truth of the matter asserted, and it is ***not*** hearsay.[2]

[2] Petitioner's motion to exclude EX-2012 oddly distinguishes between paragraph 334 and all of the other paragraphs in the Horenstein Report. Petitioner baldly, and incorrectly, asserts that all of the uncited paragraphs in EX-2012 are hearsay. Motion 3. But given that Patent Owner has not cited to any paragraph other than paragraph 334, none of the other paragraphs could possibly have been offered for the truth of the matter asserted. Moreover, because Patent Owner only relied on EX-

Again, Petitioner itself specifically demanded production of the Horenstein Report. The Horenstein Report was obtained from Belden's former counsel in the *Superior Essex* litigation and produced on May 16, 2024. There is no prejudice here. Petitioner did not object to any of the redactions or otherwise question its authenticity at that time. But—tellingly—after having reviewed the Horenstein Report, Petitioner did not cite to or rely on it in any way in its Reply, even though Petitioner did rely on and cite to several ***other*** documents from the *Superior Essex* litigation that reiterate Dr. Horenstein's ultimate conclusion about twisted pairs in the previous uncertified translation of GmbH-866 in EX-1057. Reply 13 (citing EX-1061, EX-1063, EX-1076, and EX-1077). But—***critically***—those other documents cited by Petitioner ***fail to provide the basis for his opinion regarding EX-1057***, as only the Horenstein Report provides.

Petitioner wants to have its cake and eat it too, citing Dr. Horenstein's ultimate

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2012 for the limited purpose of showing the language on which Dr. Horenstein relied in forming his opinion about twisted pairs in the uncertified GmbH-866 translation in EX-1057— which the Board has already found to be a proper use of EX-2012 in authorizing Patent Owner to file EX-2012—there is no reason to treat any paragraphs in EX-2012 differently.

conclusions regarding twisted pairs in the uncertified translation of GmbH-866 in EX-1057, while excluding the basis for those conclusions, as EX-2012 provides. The evidence of record confirms the authenticity of the Horenstein Report (EX-2012), it properly provides the full evidentiary picture regarding the basis for Dr. Horenstein's opinions about twisted pairs in the uncertified GmbH-866 translation (EX-1057) (the ***only*** purpose for which EX-2012 is used, as authorized by the Board), and there is simply no reason to exclude it. In fact, the only undue prejudice here would be if EX-2012 were excluded, thereby allowing Petitioner to rely on Dr. Horenstein's ultimate conclusion about twisted pairs in the uncertified GmbH-866 translation (EX-1057) by unilaterally cherry-picking statements from the produced *Superior Essex* materials without also offering the basis for Dr. Horenstein's opinions as only EX-2012 provides.

Moreover, it is in the interest of justice for the Board have the full evidentiary record and to know the language on which Dr. Horenstein based his opinion regarding twisted pairs in the uncertified GmbH-866 translation in EX-1057, in order to see how that language changed in the certified GmbH-866 translation in EX-1010 on which Dr. Eldering opines. Petitioner repeatedly relies on Dr. Horenstein's ultimate conclusion, but desperately wants to hide the basis for that opinion from the Board and delete it from the record. The Board should not allow it and deny Petitioner's motion to exclude.

V. PETITIONER'S OBJECTION TO EX-2012 WAS UNTIMELY.

37 C.F.R. §42.64(b)(1) requires that, "[o]nce a trial has been instituted, any objection ***must be filed within five business days of service of evidence*** to which the objection is directed." *New U Life Corp. v. Axcess Global Sciences, LLC*, IPR2019-01141, Paper 24 at 3-5 (PTAB August 26, 2020) (denying motion to exclude and finding objections filed six weeks after service of evidence untimely under 37 C.F.R. §42.64(b)(1)). Petitioner was served the Horenstein Report on May 16, 2024, and did not object or raise any issue in relation to the Horenstein Report until August 27, 2024, over three months later. Paper 34. Petitioner's objection is therefore untimely and its motion to exclude should be denied.

Date: September 5, 2024

Respectfully submitted,

/ Thomas Hoehner /

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing **PATENT OWNER'S OPPOSITION TO PETITIONER'S MOTION TO EXCLUDE EX-2012** was served pursuant to 37 C.F.R. § 42.6(e) via electronic mail on September 5, 2024, on the following:

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