

UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE PATENT TRIAL AND APPEAL BOARD

MEDIATEK INC. and NXP USA, INC.,

Petitioners,

v.

BELL NORTHERN RESEARCH, LLC,

Patent Owner.

IPR2023-01414
U.S. Patent No. 8,416,862

PATENT OWNER'S MOTION TO EXCLUDE

Mail Stop PATENT BOARD
Patent Trial and Appeal Board
U.S. Patent and Trademark Office
P.O. Box 1450
Alexandria, VA 22313-1450
Submitted Electronically via PTAB E2E

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TABLE OF AUTHORITIES

Cases

Stewart-Warner Corp. v. City of Pontiac,
767 F.2d 1563 (Fed. Cir. 1985) passim

Rules

37 C.F.R. § 42.123 passim
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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64(c), Patent Owner Bell Northern Research LLC (“Patent Owner”) requests that the Board exclude from the record inadmissible exhibits submitted by Petitioner NXP USA Inc. (“Petitioner”), specifically, Exhibits 1025-31. It is not enough for the Board to find that this Motion is moot if the Board does not rely on the inadmissible exhibits in reaching its Final Written Decision. If the exhibits remain in the record, Petitioner may seek to rely on them on appeal to the Federal Circuit, and Patent Owner could be unfairly prejudiced.

II. ARGUMENT

A. The Board Should Exclude Exhibit 1025

The Board should exclude Exhibit 1025 because it was filed belatedly without proper authorization under 37 C.F.R. § 42.123(b), it is irrelevant, unauthenticated, and is cited for inadmissible hearsay.

Exhibit 1025 was filed belatedly without proper authorization. 37 C.F.R. § 42.123(b). Trial was instituted on April 2, 2024. (Paper 11.) Petitioner did not file Exhibit 1025 until October 3, 2024, with its Reply. (Paper 27.) Patent Owner timely objected to Exhibit 1025 as belatedly presented without proper authorization, not authenticated under F.R.E. 901, irrelevant under F.R.E. 401 and 402, confusing and a waste of time under F.R.E. 403, and as hearsay under F.R.E. 801 and 802. (Paper 28 (Oct. 9, 2024).) Petitioner did not provide any evidence to

cure the objections. 37 C.F.R. § 42.64(a). Prior to its Reply, Petitioner did not request authorization to file a motion to submit Exhibit 1025. Nor did Petitioner show why Exhibit 1025 reasonably could not have been obtained earlier, or why consideration of Exhibit 1025 would be in the interests-of-justice. Exhibit 1025 should be excluded on this basis alone.

Exhibit 1025 is irrelevant because it has not been shown to have been a printed publication or publicly available prior to the critical date of the '862 patent. Exhibit 1025 was published on or after December 7, 2016, more than ten years after the critical date of the '862 patent. (EX1025 at 10.) In its Reply, Petitioner fails to present any facts or evidence to indicate that Exhibit 1025 was publicly available prior to the critical date of the '862 patent. In the absence of any competent evidence that Exhibit 1025 was publicly available or otherwise published prior to the critical date, it is not relevant to this proceeding. *See Stewart-Warner Corp. v. City of Pontiac*, 767 F.2d 1563, 1570 (Fed. Cir. 1985).

Exhibit 1025 purports to comprise “excerpts” from the IEEE 802.11-2016 wireless communications standard. Petitioner’s Reply cites Exhibit 1025 for the truth of its assertions regarding the “Very high throughput (VHT) PHY specification,” “HT PHY,” “PPDU format,” and “VHT Sounding Protocol.” (Paper 27 at 22-25.) Petitioner has not shown that any hearsay exception applies under F.R.E. 802. Petitioner’s reliance is impermissible because Patent Owner

cannot cross examine an unidentified declarant on these statements. Exhibit 1025 admittedly comprises only “excerpts” from a standard, and is therefore an unreliable compilation by Petitioner’s counsel. Exhibit 1025 is not and cannot be established as a business record of any entity.

Exhibit 1025 lacks sufficient authentication under F.R.E. 901(a). Dr. Wells did not authenticate Exhibit 1025 in his supplemental declaration, but merely echoed Petitioner’s arguments. (EX1030 ¶¶ 74-75.) Petitioner did not produce any declarant who could attest to its authenticity. Nor did Petitioner produce a supplemental declaration in an attempt at authentication. Even assuming, *arguendo*, that the 802.11-2016 standard is publicly available, the fact that Exhibit 1025 comprises only highlighted “excerpts” selected by Petitioner’s counsel confirms that the information in it is not reliable. As such, Petitioner has not satisfied the authentication requirements of F.R.E. 901(a). Exhibit 1025 is also not self-authenticating. F.R.E. 902.

For the above reasons, Exhibit 1025 is also irrelevant under F.R.E. 401 and thus inadmissible under F.R.E. 402, and confusing or a waste of time under F.R.E. 403. Accordingly, the Board should exclude Exhibit 1025.

B. The Board Should Exclude Exhibit 1026

The Board should exclude Exhibit 1026 because it was filed belatedly without proper authorization under 37 C.F.R. § 42.123(b), it is irrelevant,

unauthenticated, and is cited for inadmissible hearsay.

Exhibit 1026 was filed belatedly without proper authorization. 37 C.F.R. § 42.123(b). Trial was instituted on April 2, 2024. (Paper 11.) Petitioner did not file Exhibit 1026 until October 3, 2024, with its Reply. (Paper 27.) Petitioner did not make Patent Owner aware of Exhibit 1026 until September 18, 2024, during the deposition of Patent Owner's expert Dr. Cooklev. (See Paper 27 at 23.) Patent Owner timely objected to Exhibit 1026 during the deposition as belatedly presented without proper authorization, not authenticated under F.R.E. 901, irrelevant under F.R.E. 401 and 402, confusing and a waste of time under F.R.E. 403, and as hearsay under F.R.E. 801 and 802. (EX1024, 35:16-36:1; Paper 28 (Oct. 9, 2024).) Petitioner did not provide any evidence to cure the objection during or after the deposition, nor did the parties stipulate otherwise on the deposition record. 37 C.F.R. § 42.64(a). Prior to either Dr. Cooklev's deposition or its Reply, Petitioner did not request authorization to file a motion to submit Exhibit 1026. Nor did Petitioner show why Exhibit 1026 reasonably could not have been obtained earlier, or why consideration of Exhibit 1026 would be in the interests-of-justice. Exhibit 1026 should be excluded on this basis alone.

Exhibit 1026 is irrelevant because it has not been asserted as a prior art reference in the Petition or to establish the knowledge of a POSITA. In its Reply, Petitioner fails to present any facts or evidence to indicate that Exhibit 1026

teaches any elements of the challenged claims. In the absence of any competent evidence that Exhibit 1026 is relevant to any issues in this proceeding, it should be excluded as irrelevant. *See Stewart-Warner Corp.*, 767 F.2d at 1570.

Exhibit 1026 purports to comprise “excerpts” from the IEEE Standard 802.11, 1999 Ed. (R2003). Petitioner’s Reply cites Exhibit 1026 for the truth of its assertions regarding “the use of preamble sequences.” (Paper 27 at 23.) However, Petitioner has not shown that any hearsay exception applies under F.R.E. 802. Petitioner’s reliance is impermissible because Patent Owner cannot cross examine an unidentified declarant on these statements. Exhibit 1026 admittedly comprises only “excerpts” from a standard, and is therefore an unreliable compilation by Petitioner’s counsel. Exhibit 1026 is not and cannot be established as a business record of any entity.

Exhibit 1026 lacks sufficient authentication under F.R.E. 901(a). Dr. Wells did not authenticate Exhibit 1026 in his supplemental declaration, but merely echoed Petitioner’s arguments. (EX1030 ¶ 76.) Petitioner did not produce any declarant who could attest to its authenticity. Nor did Petitioner produce a supplemental declaration in an attempt at authentication. Even assuming, *arguendo*, that the IEEE Standard 802.11, 1999 Ed. (R2003) is publicly available, the fact that Exhibit 1026 comprises only “excerpts” selected by Petitioner’s counsel confirms that the information in it is not reliable. As such, Petitioner has

not satisfied the authentication requirements of F.R.E. 901(a). Exhibit 1026 is also not self-authenticating. F.R.E. 902.

For the above reasons, Exhibit 1026 is also irrelevant under F.R.E. 401 and thus inadmissible under F.R.E. 402, and confusing or a waste of time under F.R.E. 403. Accordingly, the Board should exclude Exhibit 1026.

C. The Board Should Exclude Exhibit 1027

The Board should exclude Exhibit 1027 because it was filed belatedly without proper authorization under 37 C.F.R. § 42.123(b), it is irrelevant, unauthenticated, and is cited for inadmissible hearsay.

Exhibit 1027 was filed belatedly without proper authorization. 37 C.F.R. § 42.123(b). Trial was instituted on April 2, 2024. (Paper 11.) Petitioner did not file Exhibit 1027 until October 3, 2024, with its Reply. (Paper 27.) Petitioner did not make Patent Owner aware of Exhibit 1027 until September 18, 2024, during the deposition of Patent Owner's expert Dr. Cooklev. (See Paper 27 at 23.) Patent Owner timely objected to Exhibit 1027 during the deposition as belatedly presented without proper authorization, not authenticated under F.R.E. 901, irrelevant under F.R.E. 401 and 402, confusing and a waste of time under F.R.E. 403, and as hearsay under F.R.E. 801 and 802. (EX1024, 38:15-25; Paper 28 (Oct. 9, 2024).) Petitioner did not provide any evidence to cure the objection during or after the deposition, nor did the parties stipulate otherwise on the deposition

record. 37 C.F.R. § 42.64(a). Prior to either Dr. Cooklev's deposition or its Reply, Petitioner did not request authorization to file a motion to submit Exhibit 1027. Nor did Petitioner show why Exhibit 1027 reasonably could not have been obtained earlier, or why consideration of Exhibit 1027 would be in the interests-of-justice. Exhibit 1027 should be excluded on this basis alone.

Exhibit 1027 is irrelevant because it has not been asserted as a prior art reference in the Petition or to establish the knowledge of a POSITA. In its Reply, Petitioner fails to present any facts or evidence to indicate that Exhibit 1027 teaches any elements of the challenged claims. In the absence of any competent evidence that Exhibit 1027 is relevant to any issues in this proceeding, it should be excluded as irrelevant. *See Stewart-Warner Corp.*, 767 F.2d at 1570.

Exhibit 1027 purports to comprise "excerpts" from the IEEE Standard 802.11a-1999 supplement to 802.11-1999. Petitioner's Reply cites Exhibit 1027 for the truth of its assertions regarding "the use of preamble sequences." (Paper 27 at 23.) However, Petitioner has not shown that any hearsay exception applies under F.R.E. 802. Petitioner's reliance is impermissible because Patent Owner cannot cross examine an unidentified declarant on these statements. Exhibit 1027 admittedly comprises only "excerpts" from a standard, and is therefore an unreliable compilation by Petitioner's counsel. Exhibit 1027 is not and cannot be established as a business record of any entity.

Exhibit 1027 lacks sufficient authentication under F.R.E. 901(a). Dr. Wells did not authenticate Exhibit 1027 in his supplemental declaration, but merely echoed Petitioner's arguments. (EX1030 ¶ 77.) Petitioner did not produce any declarant who could attest to its authenticity. Nor did Petitioner produce a supplemental declaration in an attempt at authentication. Even assuming, *arguendo*, that the IEEE Standard 802.11a-1999 supplement to 802.11-1999 is publicly available, the fact that Exhibit 1027 comprises only "excerpts" selected by Petitioner's counsel confirms that the information in it is not reliable. As such, Petitioner has not satisfied the authentication requirements of F.R.E. 901(a). Exhibit 1027 is also not self-authenticating. F.R.E. 902.

For the above reasons, Exhibit 1027 is also irrelevant under F.R.E. 401 and thus inadmissible under F.R.E. 402, and confusing or a waste of time under F.R.E. 403. Accordingly, the Board should exclude Exhibit 1027.

D. The Board Should Exclude Exhibit 1028

The Board should exclude Exhibit 1028 because it was filed belatedly without proper authorization under 37 C.F.R. § 42.123(b), it is irrelevant, unauthenticated, and is cited for inadmissible hearsay.

Exhibit 1028 was filed belatedly without proper authorization. 37 C.F.R. § 42.123(b). Trial was instituted on April 2, 2024. (Paper 11.) Petitioner did not file Exhibit 1028 until October 3, 2024, with its Reply. (Paper 27.) Petitioner did

not make Patent Owner aware of Exhibit 1028 until September 18, 2024, during the deposition of Patent Owner's expert Dr. Cooklev. (Paper 27 at 23.) Patent Owner timely objected to Exhibit 1028 during the deposition as belatedly presented without proper authorization, not authenticated under F.R.E. 901, irrelevant under F.R.E. 401 and 402, confusing and a waste of time under F.R.E. 403, and as hearsay under F.R.E. 801 and 802. (EX1024, 43:19-44:8; Paper 28 (Oct. 9, 2024).) Petitioner did not provide any evidence to cure the objection during or after the deposition, nor did the parties stipulate otherwise on the deposition record. 37 C.F.R. § 42.64(a). Prior to either Dr. Cooklev's deposition or its Reply, Petitioner did not request authorization to file a motion to submit Exhibit 1028. Nor did Petitioner show why Exhibit 1028 reasonably could not have been obtained earlier, or why consideration of Exhibit 1028 would be in the interests-of-justice. Exhibit 1028 should be excluded on this basis alone.

Exhibit 1028 is irrelevant because it has not been asserted as a prior art reference in the Petition or to establish the knowledge of a POSITA. In its Reply, Petitioner fails to present any facts or evidence to indicate that Exhibit 1028 teaches any elements of the challenged claims. In the absence of any competent evidence that Exhibit 1028 is relevant to any issues in this proceeding, it should be excluded as irrelevant. *See Stewart-Warner Corp.*, 767 F.2d at 1570.

Exhibit 1028 purports to be a copy of Wwise Proposal: High throughput

extension to the 802.11 Standard (2004), by Singh, et al. Petitioner's Reply cites Exhibit 1028 for the truth of its assertions regarding "the use of preamble sequences." (Paper 27 at 23.) However, Petitioner has not shown that any hearsay exception applies under F.R.E. 802. Petitioner's reliance is impermissible because Patent Owner cannot cross examine an unidentified declarant on these statements. Exhibit 1028 is not and cannot be established as a business record of any entity.

Exhibit 1028 lacks sufficient authentication under F.R.E. 901(a). Dr. Wells did not authenticate Exhibit 1028 in his supplemental declaration, but merely echoed Petitioner's arguments. (EX1030 ¶ 78.) Petitioner did not produce any declarant who could attest to its authenticity. Nor did Petitioner produce a supplemental declaration in an attempt at authentication. As such, Petitioner has not satisfied the authentication requirements of F.R.E. 901(a). Exhibit 1028 is also not self-authenticating. F.R.E. 902.

For the above reasons, Exhibit 1028 is also irrelevant under F.R.E. 401 and thus inadmissible under F.R.E. 402, and confusing or a waste of time under F.R.E. 403. Accordingly, the Board should exclude Exhibit 1028.

E. The Board Should Exclude Exhibit 1029

The Board should exclude Exhibit 1029 because it was filed belatedly without proper authorization under 37 C.F.R. § 42.123(b), it is irrelevant, unauthenticated, and is cited for inadmissible hearsay.

Exhibit 1029 was filed belatedly without proper authorization. 37 C.F.R. § 42.123(b). Trial was instituted on April 2, 2024. (Paper 11.) Petitioner did not file Exhibit 1029 until October 3, 2024, with its Reply. (Paper 27.) Petitioner did not make Patent Owner aware of Exhibit 1029 until September 18, 2024, during the deposition of Patent Owner's expert Dr. Cooklev. (See Paper 27 at 23.) Patent Owner timely objected to Exhibit 1029 during the deposition as belatedly presented without proper authorization, not authenticated under F.R.E. 901, irrelevant under F.R.E. 401 and 402, confusing and a waste of time under F.R.E. 403, and as hearsay under F.R.E. 801 and 802. (EX1024, 45:23-46:8; Paper 28 (Oct. 9, 2024).) Petitioner did not provide any evidence to cure the objection during or after the deposition, nor did the parties stipulate otherwise on the deposition record. 37 C.F.R. § 42.64(a). Prior to either Dr. Cooklev's deposition or its Reply, Petitioner did not request authorization to file a motion to submit Exhibit 1029. Nor did Petitioner show why Exhibit 1029 reasonably could not have been obtained earlier, or why consideration of Exhibit 1029 would be in the interests-of-justice. Exhibit 1029 should be excluded on this basis alone.

Exhibit 1029 is irrelevant because it has not been asserted as a prior art reference in the Petition or to establish the knowledge of a POSITA. In its Reply, Petitioner fails to present any facts or evidence to indicate that Exhibit 1029 teaches any elements of the challenged claims. In the absence of any competent

evidence that Exhibit 1029 is relevant to any issues in this proceeding, it should be excluded as irrelevant. *See Stewart-Warner Corp.*, 767 F.2d at 1570.

Exhibit 1029 purports to be a copy of TGn Sync Proposal Technical Specification (2005) by Mujtaba, et al. Petitioner's Reply cites Exhibit 1029 for the truth of its assertions regarding "the use of preamble sequences." (Paper 27 at 23.) However, Petitioner has not shown that any hearsay exception applies under F.R.E. 802. Petitioner's reliance is impermissible because Patent Owner cannot cross examine an unidentified declarant on these statements. Exhibit 1029 is not and cannot be established as a business record of any entity.

Exhibit 1029 lacks sufficient authentication under F.R.E. 901(a). Dr. Wells did not authenticate Exhibit 1029 in his supplemental declaration, but merely echoed Petitioner's arguments. (EX1029 ¶ 79.) Petitioner did not produce any declarant who could attest to its authenticity. Nor did Petitioner produce a supplemental declaration in an attempt at authentication. As such, Petitioner has not satisfied the authentication requirements of F.R.E. 901(a). Exhibit 1029 is also not self-authenticating. F.R.E. 902.

For the above reasons, Exhibit 1029 is also irrelevant under F.R.E. 401 and thus inadmissible under F.R.E. 402, and confusing or a waste of time under F.R.E. 403. Accordingly, the Board should exclude Exhibit 1029.

F. The Board Should Exclude Exhibit 1030

The Board should exclude Exhibit 1030, the Supplemental Declaration of Petitioner's expert Dr. Wells, as untimely, irrelevant, prejudicial to Patent Owner, having a tendency to confuse the issues before the Board, and contrary to the standard for the expert testimony and IPR statutes. As such, Exhibit 1030 violates F.R.E. 401, 402, 403 and 702. Patent Owner timely objected to Exhibit 1030 as irrelevant under F.R.E. 401 and 402, confusing and a waste of time under F.R.E. 403, and as hearsay under F.R.E. 801 and 802. (Paper 28 (Oct. 9, 2024).) Petitioner did not provide any evidence to cure the objections. 37 C.F.R. § 42.64(a).

First, Dr. Wells improperly made his Supplemental Declaration in Support of Petition for Inter Partes Review and not in support of Petitioner's Reply. (See Ex1030, Cover.) Therefore, it should be excluded as untimely and irrelevant. See *Stewart-Warner Corp.*, 767 F.2d at 1570.

Second, paragraphs 74-79 of Exhibit 1030 incorporate inadmissible hearsay and therefore comprise hearsay within hearsay. Specifically, in ¶¶ 74-75, the Supplemental Declaration purports to cite Exhibit 1025 for the truth of the matter therein. In ¶ 76, the Supplemental Declaration purports to cite Exhibit 1026 for the truth of the matter therein. In ¶ 77, the Supplemental Declaration purports to cite Exhibit 1027 for the truth of the matter therein. In ¶ 78, the Supplemental Declaration purports to cite Exhibit 1028 for the truth of the matter therein. In ¶

79, the Supplemental Declaration purports to cite Exhibit 1029 for the truth of the matter therein. As set forth above, Exhibits 1025-1029 are all improper hearsay, and Petitioner has not shown that any hearsay exception applies under F.R.E. 802. Nor has Petitioner shown that any hearsay exception applies to paragraphs 74-79 of the Supplemental Declaration. Therefore, at least paragraphs 74-79 of Exhibit 1030 should be excluded as impermissible hearsay within hearsay.

For the above reasons, Exhibit 1030 is also irrelevant under F.R.E. 401 and thus inadmissible under F.R.E. 402, and confusing or a waste of time under F.R.E. 403. Accordingly, the Board should exclude Exhibit 1030, in whole or in part.

G. The Board Should Exclude Exhibit 1031

The Board should exclude Exhibit 1031 because it was filed belatedly without proper authorization under 37 C.F.R. § 42.123(b), irrelevant under F.R.E. 401 and thus inadmissible under F.R.E. 402, or as being confusing or a waste of time under F.R.E. 403. Petitioner has not relied on Exhibit 1031 for any fact that is of consequence in determining this action.

Trial was instituted on April 2, 2024. (Paper 11.) Petitioner did not file Exhibit 1031 until October 3, 2024, with its Reply. (Paper 27.) Patent Owner timely objected to Exhibit 1031 as irrelevant under F.R.E. 401 and 402, and as being confusing or a waste of time under F.R.E. 403. (Paper 28 (Oct. 9, 2024).) Petitioner did not provide any evidence to cure the objections. 37 C.F.R. §

42.64(a). Prior to its Reply, Petitioner did not request authorization to file a motion to submit Exhibit 1031. Nor did Petitioner show why Exhibit 1031 reasonably could not have been obtained earlier, or why consideration of Exhibit 1031 would be in the interests-of-justice. Exhibit 1031 should be excluded on this basis alone.

Exhibit 1031 is irrelevant because Petitioner has not relied on it for any fact that is of consequence in determining this action. For example, Petitioner purports to rely on Exhibit 1031 to assert that Dr. Cooklev “applied two criteria for determining whether a signal was a ‘preamble sequence,’” (Paper 27 at 7), but does not explain how this statement is relevant to any issues in this proceeding. Therefore, it should be excluded as irrelevant. *See Stewart-Warner Corp.*, 767 F.2d at 1570.

For the above reasons, Exhibit 1031 is also irrelevant under F.R.E. 401 and thus inadmissible under F.R.E. 402, and confusing or a waste of time under F.R.E. 403. Accordingly, the Board should exclude Exhibit 1031.

III. CONCLUSION

For the foregoing reasons, Patent Owner respectfully requests that this Motion be granted.

Dated: December 11, 2024

/ Jason Shapiro /

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was served electronically by electronic mail on December 11, 2024 the following counsel of record:

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