UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

DATAVANT, INC.,
Petitioner

v.

VIGILYTICS LLC,
Patent Owner

Case IPR2024-00381
Patent 10,886,012 B1

PATENT OWNER'S MOTION TO EXCLUDE

TABLE OF CONTENTS

I. INTRODUCTION 1

II. ARGUMENT 2

A. Datavant Offers Dr. Rubin's Statements From Outside This Proceeding for Their Truth, Contrary to the Rule Against Hearsay 2

B. No Hearsay Exception Applies 2

III. CONCLUSION 5

I. INTRODUCTION

Pursuant to 37 C.F.R. §42.64 and the Federal Rules of Evidence, Patent Owner Vigilytics LLC ("Vigilytics") moves to exclude Exhibit 1014 from the present proceeding. Exhibit 1014, which Petitioner Datavant, Inc. ("Datavant") submitted with its Petitioner's Reply brief (Paper 18), is the deposition transcript of Vigilytics' expert, Dr. Aviel Rubin, from IPR2024-00226 involving a different Vigilytics patent challenged by Datavant. Datavant separately deposed Dr. Rubin on his declaration in the present proceeding and submitted the transcript of that deposition as Exhibit 1025 with its Petitioner's Reply. Datavant thus relies in its Reply on two separate deposition transcripts—one from IPR2024-00226 (EX1014) and one from the present proceeding (EX1025). Dr. Rubin's testimony from the former proceeding, however, is inadmissible hearsay, and Datavant's reliance on it is inequitable and improper under the circumstances.[1] Vigilytics timely objected to

[1] Before filing this Motion, Vigilytics contacted Datavant's counsel to explain that Vigilytics would not pursue a motion to exclude if Datavant would agree not to oppose Vigilytics' corresponding use of an additional deposition transcript of Datavant's witness from IPR2024-00226 in Vigilytics' upcoming Sur-Reply in this proceeding. Datavant would not agree to Vigilytics' corresponding use of an additional transcript, however.

Exhibit 1014 on this basis. *See* Paper 19. Accordingly, Vigilytics respectfully moves the Board to exclude Exhibit 1014.

II. ARGUMENT

A. Datavant Offers Dr. Rubin's Statements From Outside This Proceeding for Their Truth, Contrary to the Rule Against Hearsay

Statements from another trial or proceeding offered for their truth are inadmissible hearsay. *See* FED. R. EVID. 801 ("'Hearsay' means a statement that: (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."), 802 ("Hearsay is not admissible"). Here, Datavant offers for its truth statements made by Dr. Rubin during his deposition in IPR2024-00226, which occurred outside the context of the present proceeding. EX1014. Datavant's Reply relies on Dr. Rubin's testimony from IPR2024-00226 throughout its arguments to support various positions regarding alleged obviousness of the claims challenged in the present proceeding based on the Evenhaim, Settimi, Dick, Landi, and Murphy references. *See* Paper 18 (throughout). This testimony unquestionably did nor originate from the "current trial or hearing," and Datavant's reliance on the testimony is not merely for impeachment or other purposes; rather, they are offered for their truth in support of Datavant's substantive arguments.

B. No Hearsay Exception Applies

Dr. Rubin's statements in Exhibit 1014 do not satisfy any of the hearsay exceptions set forth in Rule 803. FED. R. EVID. 803. Dr. Rubin's deposition testimony, for example, is not a present sense impression (Rule 803(1)); an excited utterance (Rule 803(2)); a statement of his then-existing state of mind (Rule 803(3)); a recorded recollection (Rule 803(5)); a record of a regularly conducted activity (Rule 803(6)); or a public record (Rule 803(10)). These are merely examples—no hearsay exception enumerated in Rule 803 applies to Dr. Rubin's testimony from IPR2024-00226.

Likewise, the Rule 804 exceptions do not apply because those exceptions all require a witness to be unavailable. FED. R. EVID. 804. Under Rule 804, a witness is unavailable if: (1) due to a testifying exemption from court rules or privilege; (2) refusing to testify despite a court order; (3) lack of memory; (4) declarant death or then-existing infirmity, physical illness, or mental illness; (5) or if the declarant's testimony is not obtainable by process or other reasonable means. *Id.* None of these circumstances applies here. On the contrary, Vigilytics affirmatively made Dr. Rubin available for deposition in this proceeding, and Datavant in fact deposed Dr. Rubin in this proceeding. *See* EX1025. Datavant nonetheless chose to submit an additional transcript from Dr. Rubin containing testimony made outside the "current trial or hearing."

Rule 807 (the residual hearsay exception) does not apply either because it requires the statement to: (1) have equivalent circumstantial guarantees of trustworthiness; (2) be offered as evidence of a material fact; (3) be more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and (4) be in the interests of justice to admit. FED. R. EVID. 807. The Board has held that the exercise of the residual exception "is to be reserved for 'exceptional cases' and is not 'a broad license on trial judges to admit hearsay statements that do not fall within one of the other exceptions.'" *Neste Oil OYJ v. REG Synthetic Fuels, LLC*, IPR2013-00578 (Paper 52), at 9 (PTAB March 12, 2015) (quoting *Conoco, Inc. v. Dep't of Energy*, 99 F.3d 387, 392 (Fed. Cir. 1996)).

This is not an exceptional case, especially where, as here, Datavant already deposed Dr. Rubin in this proceeding and submitted a separate transcript of that deposition. More, while Vigilytics generally favors ensuring the Board may consider all potentially relevant evidence, it would be inequitable and not in the interests of justice for Datavant to be permitted to rely on an additional deposition transcript of Vigilytics' expert from outside this proceeding while Datavant simultaneously opposes Vigilytics' proposed use of an additional deposition transcript of Datavant's witness from the same proceeding with its upcoming Sur-Reply.

III. CONCLUSION

For each of the foregoing reasons, Vigilytics respectfully requests that the Board exclude Exhibit 1014 under FRE 801 and 802.

Respectfully submitted,

Dated: March 13, 2025

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CERTIFICATE OF SERVICE

Pursuant to 37 CFR §§ 42.6(e)(4), the undersigned certifies that on March 13, 2025, a complete and entire copy of this Patent Owner's Motion to Exclude was provided by email to the Petitioner by serving the correspondence email address of record as follows:

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