UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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DATAVANT, INC.

Petitioner

v.

VIGILYTICS LLC

Patent Owner

IPR2024-00382

U.S. Patent No. 9,665,685 B1

PETITIONER'S OPPOSITION TO

PATENT OWNER'S MOTION TO EXCLUDE

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EXHIBIT LIST

Exhibit Number	Description
1026	Correspondence between the Patent Owner and the Board

Datavant, Inc. ("Datavant" or "Petitioner") opposes Vigilytics, LLC's ("Vigilytics" or "Patent Owner") Motion to Exclude Petitioner's Exhibit 1014 from the record of this IPR proceeding. Vigilytics contends that Exhibit 1014 is inadmissible hearsay.

I. INTRODUCTION

Vigilytics seeks to exclude the deposition testimony of its *own* expert from IPR2024-00226 ("Prior Proceeding"), which testimony involves (i) a patent in the same family as the patent challenged in this proceeding and (ii) the same references at issue in this proceeding. Vigilytics' motion should be denied because the exhibit it seeks to exclude is not hearsay (Vigilytics' burden to prove) as that testimony was made on its behalf and for its benefit. Second, even if it could qualify as hearsay, the Board is more capable than a jury of parsing the evidence and should consider Dr. Aviel Rubin's testimony as probative of the issues in this proceeding. Lastly, Vigilytics' motion contradicts its own actions—specifically, Vigilytics already submitted deposition testimony by Datavant's expert from the Prior Proceeding with its Patent Owner Response and sought to include the reply deposition testimony of Datavant's expert with its sur-reply. For these reasons, the Board should deny Vigilytics' motion.

II. THE EXHIBIT VIGILYTICS SEEKS TO EXCLUDE IS NOT HEARSAY

First, it is Vigilytics' burden, not Datavant's burden, to prove Exhibit 1014 is hearsay and address whether any hearsay exception applies. Notably, Vigilytics does not cite to any portions of Datavant's Reply to prove that Exhibit 1014 was offered for the truth of the statements therein. Thus, Vigilytics does not carry its threshold burden.

Second, Exhibit 1014 is not hearsay under Federal Rule of Evidence 801(d). Rule 801(d) provides explanation for when statements do not qualify as hearsay. Exhibit 1014 is not hearsay according to two of those provisions. First, under subsection 801(d)(2)(A), a statement is not hearsay when it is offered against a party opponent and it was made by someone acting in a representative capacity for the party. Exhibit 1014 is the sworn testimony of Dr. Aviel Rubin, who was retained by Vigilytics' counsel (through a power of attorney by Vigilytics submitted in this proceeding), in both this and the Prior Proceeding, to provide opinions on the patentability of the challenged patent and the content of the applied references. *See* EX2001, ¶ 1 (explaining that he was retained by Vigilytics' counsel to offer opinions on patentability); *see also* IPR2054-00226, EX2001, ¶ 1 (same). Exhibit 1014 is being offered to support Datavant's position that Vigilytics' challenged patent is unpatentable as obvious.

Therefore, it is unquestionable that the prior testimony is being offered against Vigilytics. It is also unquestionable that the testimony is that of a party opponent—specifically, it was made by an agent of Vigilytics in the scope of that relationship. Thus, Exhibit 1014 is not hearsay under Rule 801(d)(2)(A).

Exhibit 1014 is also not hearsay pursuant to subsection Rule 801(d)(2)(C). Similarly, this subsection explains that a statement is not hearsay when it is being offered against an opposing party and was made by a person whom the party authorized to make a statement on the subject. As explained above, Exhibit 1014 is being offered against Vigilytics because the statements call into question the patentability of the challenged patent. As also explained above, Dr. Rubin was retained, and authorized, to opine on the common specification of the patents challenged (and common prior art) across the related *inter partes* review proceedings. In Exhibit 1014, Dr. Rubin is offering his opinion concerning the patentability of one of the challenged patents and of the relevant prior art. This is well within the scope of his retainer as described in his declaration. Thus, he was authorized to make the relevant statements on behalf of Vigilytics.

III. EVEN IF IT IS HEARSAY, THE EXHIBIT SHOULD STILL BE CONSIDERED BY THE BOARD

As the Board has recognized, "there is a strong public policy for making all information filed in an administrative proceeding available to the public." *Liberty*

Mut. Ins. Co. v. Progressive Cas. Ins. Co., CBM2012-00010, Paper 59 at 40 (PTAB February 24, 2014). This is particularly true when there is no jury present because "[o]ne who is capable of ruling accurately upon the admissibility of evidence is equally capable of sifting it accurately after it has been received . . . .". *Corning Inc. v. DSM IP Assets B.V.*, IPR2013- 00053, Paper 66 at 19 (PTAB May 1, 2014); *see also Sony Computer Entm't Am. LLC v. Game Controller Tech. LLC*, IPR2013-00634, Paper 32 at 31 (PTAB Apr. 14, 2015). Here, Exhibit 1014 is Dr. Rubin's testimony concerning a related patent (nearly identical specifications) and the same prior art, in a related proceeding involving the same parties, counsel, and panel of Judges. This testimony makes clear Dr. Rubin's opinions are relevant to the issues before the Board in this proceeding.

IV. VIGILYTICS' ACTIONS CONTRADICT ITS MOTION

Vigilytics cited to Dr. Paul Clark's testimony (Datavant's expert) from the Prior Proceeding throughout its Patent Owner Response, thus demonstrating that Vigilytics itself believes that expert testimony from the Prior Proceeding is relevant here. POR, 16-17, 24, 27, 45-46, 48-49, 54, 56-58, 63.

Additionally, Vigilytics' emailed the Board on March 14, 2025 seeking to submit Dr. Clark's reply deposition testimony from the Prior Proceeding in its sur-

reply. EX1026.[1] In that email Vigilytics highlights the similarities of the proceedings by explaining that its "Replies in the subject proceedings [IPR2024-00307, -00311, 00381, and 00382] raise many of the same or similar arguments on the same prior art." *Id*. Vigilytics also explains that "the parties have otherwise permitted cross-use of deposition transcripts across all the related proceedings." *Id*. Moreover, Vigilytics asserts that Dr. Clark's prior testimony informs deliberations on the similar issues involved in these proceedings. Thus, on the one hand, Vigilytics argues that testimony from Datavant's expert in the Prior Proceeding is useful because it informs on similar issues. Yet, on the other hand, Vigilytics argues that testimony from its own expert should be excluded because it is hearsay and not trustworthy. *Id*. The contradictions in Vigilytics' positions should inform the Board's consideration and, ultimately, the denial of the motion.

Notably, in its motion, Vigilytics admits that its motion is a retaliatory act despite its own reliance on deposition testimony from the Prior Proceeding. Motion to Exclude, p. 1, n.1. Specifically, the motion was merely offered as leverage for Vigilytics to try to obtain agreement from Datavant to waive Rule 42.23's preclusion of additional exhibits with a sur-reply. EX1026.

[1] Though the Board has since denied that request, the email is still informative of the dichotomy of Vigilytics' positions.

V. CONCLUSION

Because Dr. Rubin's statements are not hearsay and provide for a more fulsome record, Vigilytics' motion should be denied.

Dated: March 20, 2025

Respectfully submitted,

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Certificate of Service

Pursuant to 37 CFR §§ 42.6(e)(4), the undersigned certifies that on March 20, 2025, a complete and entire copy of this Opposition to Patent Owner's Motion to Exclude was provided by email to the Patent Owner by serving the correspondence email address of record as follows:

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/Justin J. Oliver/