

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

TESLA, INC.,
Petitioner

v.

GRAPHITE CHARGING COMPANY, LLC,
Patent Owner

Case No. IPR2024-00388
U.S. Patent No. 8,291,243

**PATENT OWNER'S REPLY
IN SUPPORT OF ITS 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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<i>Int’l Bus. Machs. v. Intell. Ventures II LLC</i> , IPR2015-00092, Paper 44 (PTAB Apr. 25, 2016).....	2
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TABLE OF EXHIBITS

Exhibit	Description
2001	U.S. Office of Personnel Management, Federal Holidays Overview, <i>available at</i> https://www.opm.gov/policy-data-oversight/pay-leave/federal-holidays/#url=2024 (last visited May 24, 2024)
2002	Unified Patents, Members
2003	<i>Tesla Inc. Annual Income Statement</i> , Wall St. J., https://www.wsj.com/market-data/quotes/TSLA/financials/annual/income-statement (last visited May 21, 2024)
2004	Non-Final Office Action, <i>Ex Parte</i> Reexamination of U.S. Patent No. 8,291,243, Control No. 90/019,303 (Apr. 11, 2024)
2005	Docket Report from May 24, 2024, <i>Graphite Charging Co. LLC v. Tesla, Inc.</i> , Case No. 3:24-cv-02717-VC (N.D. Ca.)
2006	Order Setting Initial Case Management Conference and ADR Deadlines, <i>Graphite Charging Co. LLC v. Tesla, Inc.</i> , Case No. 3:24-cv-02717-VC (N.D. Ca. May 7, 2024)
2007	Affidavit of Ms. Nadiia Loizides in Support of PO’s Motion for <i>Pro Hac Vice</i> Admission
2008	Joint Stipulation and Order Regarding Stay Pending Resolution of Petitions for <i>Inter Partes</i> Review and Mandamus as Amended, <i>Graphite Charging Co. LLC v. Tesla, Inc.</i> , Case No. 3:24-cv-02717-VC (N.D. Ca. May 31, 2024)
2009	Request for <i>Ex Parte</i> Reexamination of U.S. Patent No. 8,291,243, Control No. 90/019,303
2010	Response to Office Action, Ex Parte Reexamination Control No. 90/019,303
2011	Information Disclosure Statement by Applicant, Application No. 90019303
2012	Expert Declaration of Dr. Kirk W. Cameron in Support of Patent Owner’s Response
2013	Deposition of C. Arthur MacCarley, IPR 2024-00387 (Oct. 17, 2024)
2014	Merriam-Webster Online Dictionary (December 1, 2006) (“aggregate”)
2015	Merriam-Webster Online Dictionary (April 25, 2009) (“current”)
2016	Errata Sheet to Dr. Kirk W. Cameron’s 02-11-2025 Deposition

I. PO'S MOTION SHOULD BE GRANTED IN FULL¹

To begin, PO fully complied with 37 C.F.R. § 42.20(c) and the four requirements enumerated in the Board's Consolidated Trial Practice Guide ("CTPG"). *See* CTPG at 79. Nothing more is required under *Veeam Software v. Symantec*, IPR2013-00150, Paper 54, at *32-33 (PTAB July 29, 2014).

Petitioner's criticism of the sections dealing with Ex-1006, Ex-1012, Ex-1013, and Ex-1014 as conclusory (Paper 38 at 1-2) is unwarranted. Petitioner singled out the very last phrase in each of these sections and ignored the preceding paragraphs and pages detailing evidentiary defects of Petitioner's documents. Also, PO dedicated a full paragraph to its hearsay arguments for each of Ex-1006, Ex-1013, Ex-1015, and Ex-1027 and identified portions of Dr. MacCarley's Declaration and Petitioner's Reply relying on them. (Paper 35 at 2, 4, 7, 9, 13.)

A. Ex-1006 (AESO Report) Should Be Excluded in Its Entirety

First, Petitioner has failed to show Ex-1006's authenticity. *Analog* is distinguishable because there the declarant recognized documents retrieved from the Wayback Machine because he had reviewed them as part of his job. *Analog Devs. v. Xilinx, Inc.*, IPR2020-01606, Paper 63, at *7-9 (PTAB Apr. 20, 2022). Similarly, in *Valve* not only the Wayback Machine, but also the patentee's own IDS corroborated the document's publication date. *Valve Corp. v. Ironburg Invs.*,

¹ Capitalized terms should be given the same meaning as in the Motion (Paper 35).

8 F.4th 1364, 1375 (Fed. Cir. 2021). Here, Petitioner provided no such corroborating evidence. Ex-1018 confuses the matter because it purportedly contains multiple archival pages—different from Ex-1006 and captured over different time periods. (*E.g.*, Ex-1018 at 5 & 7 (March 3, 2007; April 12, 2006).)

Further, under *Int’l Bus. Machs.*, authentication of an archival web page by an employee is different from the proof of the publication date. *Int’l Bus. Machs. v. Intell. Ventures II LLC*, IPR2015-00092, Paper 44, at *57-58 (PTAB Apr. 25, 2016). Thus, Petitioner failed to show that Ex-1006 was publicly available at relevant times, which undermines both its authenticity and relevance positions.

Lastly, Petitioner does not dispute that neither Wang nor Dr. MacCarley can authenticate Ex-1006 or that Ex-1006 is inadmissible as confusing.

Second, Ex-1006 is irrelevant hearsay. Petitioner cannot argue both that Ex-1006 is relevant because it “includes data associated with small-size fossil fuel plants” and that it is not hearsay because Petitioner does not rely on Ex-1006’s metrics. (Paper 38 at 2, 4.) Petitioner offered only attorney argument to prove that grid operators would rely on Ex-1006. (*Id.* at 4.) Similar to *Conoco* summaries, Ex-1006 lacks indicia of reliability of commercial publications admissible under Rule 803(17). *Conoco Inc. v. DOE*, 99 F.3d 387, 393 (Fed. Cir. 1996). Indeed, Dr. Cameron testified that a POSITA would not rely on it. (Ex-1025, 297:12-15.)

B. Ex-1012 Should Be Excluded in Its Entirety

Ex-1012 is irrelevant, confusing, and a waste of time. Petitioner now argues that Petition at 78-82 and Ex-1012 both discuss the Alberta electric supply system (Paper 38 at 4), but Ex-1012 was not cited in either the Petition, Reply, or the Declaration. Petitioner did not dispute that Ex-1012 is inadmissible hearsay and instead argued its authenticity. (*Id.* at 4.) Regardless, it failed to show why a document authored by “JEM Energy” should not be considered hearsay or that Ex-1012 was published in 2004 (if ever). *Apple* is distinguishable because there the witnesses authenticated the document because he drafted and distributed it. *Apple Inc. v. MemoryWeb, LLC*, IPR2022-00033, Paper 42, at *5 (PTAB Nov. 22, 2023).

C. Ex-1013 Should Be Excluded in Its Entirety

Wayback Machine’s affiant did not authenticate Ex-1013 in Ex-1018, and Petitioner failed to prove publication through other means. Ex-1013 is irrelevant, confusing, and a waste of time because it was not cited in either the Petition or Reply. Petitioner cannot argue that Ex-1013 is not hearsay because it did not rely on Ex-1013’s metrics and that Ex-1013 is relevant because Dr. MacCarley cited it to show that that AESO data was published every two minutes. (Paper 38 at 5-6.)

D. Ex-1014 Should Be Excluded in Its Entirety

Inter alia, Petitioner failed to show Ex-1014’s publication date—there is no evidence that this version of Ex-1014 was publicly available at relevant times. The XML.com url that Petitioner belatedly cites says that the url was last visited in

May 2025. Petitioner also did not explain how Ex-1014 escapes the rule against hearsay or why it is relevant and not impermissible incorporation by reference.

E. Ex-1015 Should Be Excluded in Its Entirety

Petitioner apparently admitted that Ex-1015 was published in 2022 (Paper 38 at 8), thus it is irrelevant to patentability. Petitioner also failed to address Dr. MacCarley’s mischaracterization of Ex-1015, and thus it failed to disprove that it is confusing and a waste of time. Inexplicably, Petitioner argued that Dr. MacCarley relied on Ex-1015 to show use of peaking units in early 1900s and that it is not hearsay because he did not use it to prove “a historical narrative.” (*Id.* at 8.)

F. Ex-1016 Should Be Excluded in Its Entirety

Petitioner failed to show Ex-1016’s relevance—at best it was impermissibly incorporated by reference into the Petition. PO did not challenge its authenticity.

G. Ex-1017 Should Be Excluded in Its Entirety

Petitioner failed to show Ex-1017’s relevance—at best it was impermissibly incorporated by reference into the Petition. Likewise, Petitioner failed to show Ex-1017’s authenticity—the footer reading “DO NOT COPY OR TRANSMIT” shows that Ex-1017 was not publicly available, and the © 2002 copyright notice may prove the date of creation but not of publication. Petitioner’s arguments—that Dr. MacCarley relied on Ex-1017 to show that a dryer could be configured to operate the heater element when the spot price of electricity was low and that Ex-1017 is not hearsay because he did not rely on particular dryer protocols in it—

cannot be reconciled. (Paper 38 at 10.) Petitioner also failed to show Ex-1017's indicia of trustworthiness sufficient to escape the rule against hearsay.

H. Ex-1018 Should Be Excluded in Its Entirety

Ex-1018 should be excluded for the reasons detailed in the Motion. (Paper 35 at 9-11.) Petitioner provided no separate substantive counterarguments.

I. Certain Portions of Ex-1025 Should Be Excluded

Petitioner provides no separate arguments for Ex-1025, and thus it should be excluded for the reasons explained in the Motion. PO's filing of the errata sheet does not cure Petitioner's failure of its evidentiary obligations and prejudice to PO.

J. Ex-1027 Should Be Excluded in Its Entirety

Petitioner failed to show Ex-1027's authenticity. Among other things, the copyright notice ©2008 is not sufficient to establish a publication date. Again, Petitioner cannot argue that Ex-1027 is relevant because it purportedly shows that users may make power reduction actions and that it is not hearsay because it does not rely on it to prove availability of this function in Ex-1027. (Paper 38 at 11-12.)

K. Certain Portions of the Petition (Paper 2), Dr. MacCarley's Declaration (Ex-1003), and Reply (Paper 28) Should Be Excluded

As detailed in the Motion (Paper 35 at 1-15) and *supra* Parts I.A-J, portions of the Petition, Reply, and Declaration related to inadmissible evidence should also be excluded. Further, Petitioner failed to explain how the probative value of inadmissible portions of the Declaration outweigh prejudice to PO.

Dated: May 19, 2025

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CERTIFICATE OF SERVICE

The undersigned certifies that on May 19, 2025, pursuant to 37 C.F.R. § 42.6(e), a copy of **PATENT OWNER'S MOTION TO EXCLUDE** was served via email (as consented to by counsel) to counsel of record for Petitioner as follows:

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