

Filed: May 13, 2025

Filed on behalf of: Aylo Freesites Ltd

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

AYLO FREESITES LTD,
Petitioner

v.

WELLCOMEMAT, LLC,
Patent Owner

IPR2024-00710¹
U.S. Patent No. 8,307,286

PETITIONER'S MOTION TO EXCLUDE

¹ The Board administratively terminated related proceeding IPR2024-01101, consolidating it with IPR2024-00710. Paper 18.

Aylo Freesites Ltd (“Petitioner”) moves to exclude inadmissible evidence advanced by Patent Owner.

I. EXHIBITS 2018 THROUGH 2021 AND 2041 SHOULD BE EXCLUDED AS IRRELEVANT

The Federal Rules of Evidence apply to IPRs. 37 C.F.R. § 42.62(a). Under Rule 401, “[e]vidence *is relevant if*: (a) it has a tendency to make a fact more or less probable than it would be without the evidence; *and (b) the fact is of consequence in determining the action.*” Fed. R. Evid. 401 (emphasis added). Under Rule 402, “[i]rrelevant evidence is *not admissible.*” Fed. R. Evid. 402 (emphasis added).

Exhibits 2018 and 2041 are of no consequence in determining the outcome of this IPR—neither are cited in any briefing or expert declaration. They are therefore inadmissible and should be excluded. *See, e.g., One World Techs., Inc. v. The Chamberlain Group, Inc.*, IPR2017-00126, Paper 56 (FWD) at 15-17 (Oct. 24, 2018) (excluding under Rule 402, patent owner’s evidence not cited in any patent owner briefing); *Shimano Inc. v. Globeride, Inc.*, IPR2025-00273, Paper 40 at 27-28 (June 16, 2016) (likewise excluding under Rule 402, patent owner’s evidence not cited in any patent owner briefing); *Actifio, Inc. v. Delphix Corp.*, IPR2025-00108, Paper 56 (FWD) at 57-60 (Apr. 29, 2016) (similarly granting a motion to exclude).

Exhibits 2019 through 2021 are likewise not cited in any briefing or otherwise relied upon by Patent Owner. Their sole citation within this IPR is in the “material considered” list of the declaration of Patent Owner’s expert, Dr. Mahon. EX2015, ¶9. However, the Board has maintained that merely citing evidence in a “material considered” list is insufficient to render such evidence relevant or admissible in an PTAB proceeding. *See, e.g., Google Inc. v. Performance Pricing Holdings, LLC*, CBM2016-00050, Paper 33 (FWD) at 46-50 (Sept. 13, 2017) (excluding patent owner’s exhibits that were merely “reviewed” by patent owner’s expert, as “the fact that he reviewed them in forming his opinions ***does not, by itself, transform them into admissible evidence.*** Relevance requires that it [*sic*] ‘any tendency to make a fact more or less probable than it would be without the evidence *and the fact is of consequence in determining the action.*’” (citing Fed. R. Evid. 401) (non-bolded emphasis in original, bolded emphasis added)).

Therefore, Exhibits 2018 through 2021 and 2041 fail the admissibility requirements under Rules 401 and 402, and should be excluded.

II. EXHIBIT 2022 SHOULD BE EXCLUDED AS UNAUTHENTICATED HEARSAY AND ATTORNEY ARGUMENT

Exhibit 2022 is labeled in Patent Owner’s exhibit list as “Vasilevsky and Logan” and appears to be a custom-generated graphic from an unknown source.

This exhibit is at least unauthenticated hearsay, and also potentially attorney argument rather than evidence. This exhibit should therefore be excluded.

With respect to authentication, Patent Owner's briefing provides no explanation as to the source of this exhibit, how the exhibit was generated, or who generated the exhibit. Therefore, this exhibit fails Rule 901, which requires that "the proponent [of evidence] must produce evidence sufficient to support a finding that the item is what the proponent claims it is." Fed. R. Evid. 901(a).

With respect to hearsay, Patent Owner's briefing provides no explanation as to how this exhibit qualifies under any hearsay exception, nor can Patent Owner offer such an explanation given the exhibit's unknown source. Therefore, this exhibit fails Rule 802, which provides that "[h]earsay is not admissible" absent an exception.

Finally, to the extent this exhibit was generated by Patent Owner, it constitutes attorney argument. It is well established that "[a]ttorney argument is not evidence." *Icon Health and Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017) (citing *Gemtron Corp. v. Saint-Gobain Corp.*, 572 F.3d 1371, 1380 (Fed. Cir. 2009); *Nokia of Am. Corp. v. General Access Solutions, Ltd.*, IPR2023-01416, Paper 35 (FWD) at 45 (Apr. 14, 2025) (citing *Icon Health*).

For at least these reasons, Exhibit 2022 should be excluded.

III. EXHIBIT 2041 SHOULD BE EXCLUDED AS UNAUTHENTICATED HEARSAY AND IMPROPER OPINION TESTIMONY

Exhibit 2041 appears to be AI-generated material. This exhibit should likewise be excluded as unauthenticated hearsay under Rule 901 and improper opinion testimony not from an actual witness.

IV. CONCLUSION

For at least the reasons discussed above, Exhibits 2018 through 2022 and 2041 should be excluded.

DATED: May 13, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this date, I caused a true and correct copy of this
Petitioner's Motion to Exclude to be served via electronic service by email at the
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