

Filed: May 27, 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 REPLY IN SUPPORT OF ITS
MOTION TO EXCLUDE**

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

Patent Owner's Opposition (Paper 35, "Opp.") is unavailing and only reinforces that exclusion of Exhibits 2018-2022 and 2041 is warranted.²

I. PATENT OWNER DOES NOT DISPUTE THAT EXHIBITS 2018-2021 AND 2041 ARE IRRELEVANT

With respect to Exhibits 2018-2021 and 2041, Patent Owner acknowledges these exhibits were "not relied upon in Patent Owner's papers" and are therefore irrelevant. Opp., 8. But Patent Owner nonetheless argues that, given the lack of reliance, "there is no reason to exclude them."

Patent Owner's argument is in direct odds with Rule 402, which states that "[i]rrelevant evidence is *not admissible*." Fed. R. Evid. 402 (emphasis added). And the Board has often excluded such unused evidence. *One World Techs., Inc. v. The Chamberlain Group, Inc.*, IPR2017-00126, Paper 56 (FWD) at 15-17 (Oct. 24, 2018); *Shimano Inc. v. Globeride, Inc.*, IPR2025-00273, Paper 40 at 27-28 (June 16, 2016); *Actifio, Inc. v. Delphix Corp.*, IPR2025-00108, Paper 56 (FWD) at 57-60 (Apr. 29, 2016); *Google Inc. v. Performance Pricing Holdings, LLC*, CBM2016-00050, Paper 33 (FWD) at 46-50 (Sept. 13, 2017).

The same relief is warranted here.

² Petitioner timely objected to Exhibits 2018-2022 and 2041. Paper 25, 1-3.

II. PATENT OWNER CANNOT SHOW EXHIBIT 2022 IS NOT UNAUTHENTICATED HEARSAY AND ATTORNEY ARGUMENT

In its Opposition, Patent Owner attempts an after-the-fact authentication of Exhibit 2022. Such effort is unsuccessful, and Exhibit 2022 should be excluded.

First, Patent Owner argues that Exhibit 2022 was submitted by Patent Owner's expert, Dr. Mahon, in his declaration. Opp., 2-7. That Dr. Mahon reproduces the graphic in Exhibit 2022 in his declaration and relies on it is not in dispute.³ But that is beside the point. The subject graphic in Exhibit 2022 is not merely embedded inline within Dr. Mahon's declaration or attached as an appendix thereto—Patent Owner inexplicably submitted this graphic as its own standalone exhibit. Dr. Mahon's citation to and reliance on this exhibit provides no indication as to the exhibit's origins and authorship.

Second, while Patent Owner attempts to rely on Dr. Mahon's declaration and deposition testimony to rehabilitate the authenticity of Exhibit 2022 (Opp., 4-5), this attempt likewise fails. Dr. Mahon did **not** testify that he generated the subject graphic (or otherwise that he is the source and author of the graphic), but merely

³ To be clear, Petitioner is not seeking to exclude the portions of Dr. Mahon's declaration which rely on Exhibit 2022. Petitioner is merely seeking to exclude the exhibit itself.

testified that the graphic represents his “understanding of what’s in the petitioner’s proposed combination” and that he relies on the graphic (*id.*, quoting EX1024, 178:8-15). Therefore, the authenticity and source of Exhibit 2022 remains in question despite Dr. Mahon’s testimony.

Third, Patent Owner’s own characterization of Exhibit 2022 as a “demonstrative” (Opp., 5 n.3) actually reinforces why exclusion of this exhibit is necessary. The Board has made clear that demonstratives do ***not*** constitute evidence. Trial Practice Guide (Nov. 2019), 84. To the extent a demonstrative is filed in the record as permitted by the Board, such demonstrative must be clearly marked with an indication that is merely a demonstrative and not evidence. *Id.* But not only was the Exhibit 2022 demonstrative not authorized for filing as a demonstrative, it also lacks the required marking identifying it as a demonstrative.

Fourth, while Patent Owner had an open opportunity in its Opposition to affirmatively clarify the origin of authorship of Exhibit 2022, Patent Owner has declined to do so and merely refers indirectly to Dr. Mahon’s testimony, further clouding such details.

Fifth, to the extent Dr. Mahon authored Exhibit 2022 (as Patent Owner indirectly suggests in its Opposition but declines to actually state), such exhibit thereby constitutes uncompelled direct testimony which “must be submitted in the form of an affidavit.” 37 C.F.R. § 42.53(a). Exhibit 2022 is not an affidavit.

Finally, Patent Owner's Opposition attempts to backdoor in arguments concerning the substance of Exhibit 2022. Such arguments are improper in the context of a motion to exclude, which merely analyzes the admissibility of evidence, rather than its weight.

III. CONCLUSION

Exhibits 2018 through 2022 and 2041 should be excluded.

DATED: May 27, 2025

Respectfully submitted,

By: /Frank M. Gasparo/
Frank M. Gasparo (Reg. No. 44,700)
Attorney for Petitioner
Venable LLP
151 West 42nd Street, 49th Floor
New York, NY 10036
T 212-370-6273
F 212-307-5598
fmgasparo@Venable.com

CERTIFICATE OF SERVICE

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

jim@carmichaelip.com

schreiner@carmichaelip.com

stevemcbride@carmichaelip.com

mitch@carmichaelip.com

susan@carmichaelip.com

WellcomeMatIPR@Carmichaelip.com

DATED: May 27, 2025

Respectfully submitted,

By: /Frank M. Gasparo/
Frank M. Gasparo (Reg. No. 44,700)
Attorney for Petitioner
Venable LLP
151 West 42nd Street, 49th Floor
New York, NY 10036
T 212-370-6273
F 212-307-5598
fmgasparo@Venable.com