

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

META PLATFORMS, INC.,

Petitioners

v.

STERLING COMPUTERS CORPORATION,

Patent Owner.

IPR2025-00430

U.S. Patent No. 7,716,217

PETITIONER'S MOTION TO EXCLUDE

TABLE OF CONTENTS

I.	EX2014 SHOULD BE EXCLUDED BECAUSE IT IS UNSUBSTANTIATED ATTORNEY ARGUMENT THAT HAS BEEN IMPROPERLY INCORPORATED BY REFERENCE	1
II.	NUMEROUS PO EXHIBITS SHOULD BE EXCLUDED FOR LACK OF AUTHENTICATION BECAUSE THEIR METADATA DOES NOT CORROBORATE THE INVENTORS' AUTHORSHIP.....	3
A.	EX2004-EX2008 AND EX2010-EX2012 LACK AUTHENTICATING METADATA.....	4
B.	EX2019-EX2023 AND EX2025-EX2027 LACK AUTHENTICATION	5
C.	EX2032-EX2036, EX2038-EX2039, EX2043-EX2045, EX2047- EX2050, EX2054, EX2056-EX2062, EX2065-EX2069, AND EX2073-EX2074 LACK AUTHENTICATING METADATA.....	5
III.	THE INVENTORS' UNCORROBORATED CONCEPTION TESTIMONY SHOULD BE EXCLUDED (EX2003, ¶¶3-14; EX2015, ¶¶10-32, 37-48; EX2030, ¶¶5, 14-15, 20, 22-23, 26-32, 34, 37-43, 45, 61-62; EX2031, ¶¶12, 19, 21, 23-30, 33-37)	6
IV.	JUSTIN MARSTON'S TESTIMONY AS TO A POSITA'S UNDERSTANDING SHOULD BE EXCLUDED BECAUSE HE IS NOT A POSITA (EX2003, ¶¶15-30).....	8
V.	THE INVENTORS' TESTIMONY BASED ON HEARSAY AND/OR LACKING FOUNDATION SHOULD BE EXCLUDED	10
A.	PAUL MARSTON (EX2031, ¶¶19, 24-26).....	10
B.	JUSTIN MARSTON (EX2030, ¶¶58, 59, 62)	11
VI.	EX2047-48, EX2050, AND EX2056-EX2058 SHOULD BE EXCLUDED BECAUSE THEY ARE BASED ON INADMISSIBLE HEARSAY	12
VII.	EX2079-EX2083 SHOULD BE EXCLUDED BECAUSE THEY ARE INADMISSIBLE HEARSAY WEB PAGES.....	12
VIII.	EX2032-EX2039 AND EX2041-EX2078 SHOULD BE EXCLUDED AS IMPROPERLY INCORPORATED BY REFERENCE WITHOUT SUBSTANTIVE DISCUSSION IN PO'S BRIEFING	13
IX.	CONCLUSION.....	14

TABLE OF AUTHORITIES

CASES

<i>Apator Miitors ApS v. Kamstrup A/S</i> , 887 F.3d 1293 (Fed. Cir. 2018)	8
<i>Garmin Int’l, Inc. v. Cardiacsense Ltd.</i> , No. IPR2025-00195, 2025 WL 1484340 (May 23, 2025)	3
<i>Gen. Access Sols., Ltd. v. Sprint Spectrum L.P.</i> , 811 F. App’x 654 (Fed. Cir. 2020)	2
<i>Icon Health & Fitness, Inc. v. Strava, Inc.</i> , 849 F.3d 1034 (Fed. Cir. 2017)	3
<i>Impax Lab’ys Inc. v. Lannett Holdings Inc.</i> , 893 F.3d 1372 (Fed. Cir. 2018)	3
<i>Invitrogen Corp. v. Clontech Lab’ys, Inc.</i> , 429 F.3d 1052 (Fed. Cir. 2005)	3
<i>Ironburg Inventions Ltd. v. Valve Corp.</i> , 64 F.4th 1274 (Fed. Cir. 2023)	14
<i>Kyocera Senco Indus. Tools Inc. v. Int’l Trade Comm’n</i> , 22 F.4th 1369 (Fed. Cir. 2022)	3, 8
<i>Mahurkar v. C.R. Bard, Inc.</i> , 79 F.3d 1572 (Fed. Cir. 1996)	8
<i>Old Rep. Ins. Co. v. Ness, Motley, Loadholt, Richardson & Poole</i> , <i>P.A.</i> , No. 03 C 5238, 2006 WL 3782994 (N.D. Ill. Dec. 21, 2006)	13
<i>Parus Holdings, Inc. v. Google LLC</i> , 70 F.4th 1365 (Fed. Cir. 2023)	2

OTHER AUTHORITIES

37 C.F.R. § 42.6	1, 13
------------------------	-------

37 C.F.R. § 42.62	1
37 C.F.R. § 42.64	1
FRE 401	13
FRE 402	13
FRE 403	10, 14
FRE 702	8, 10
FRE 703	8, 10
FRE 801	10, 11, 12
FRE 901	4, 5, 13

Under 37 C.F.R. §§ 42.62 and 42.64(c), Petitioner moves to exclude certain evidence filed by Patent Owner (“Sterling” or “PO”). Petitioner timely objected to Sterling’s evidence (Papers 16 and 19), and the challenged evidence does not comport with the Federal Rules of Evidence (“FRE”) and/or rules of the Board. 37 C.F.R. § 42.62 (applying FRE to Board proceedings). Petitioner respectfully requests the Board grant this Motion and exclude the challenged evidence.

I. EX2014 Should Be Excluded Because It Is Unsubstantiated Attorney Argument That Has Been Improperly Incorporated By Reference

EX2014 is a thirty-six page claim chart trying to demonstrate conception of the challenged patent by mapping excerpts from EX2004/EX2006 to the asserted claims. PO’s briefing cites EX2014 without discussing it or explaining why it shows conception. PO Response (“POR”), Paper 18, 45; PO Sur-Reply, Paper 31, 1, 3. The declarations of the named inventors (Justin and Paul Marston) do not cite EX2014. EX2003 (J. Marston Decl.); EX2015 (J. Marston Decl. II); EX2030 (J. Marston Decl. III); EX2031 (P. Marston Decl.); *see also* EX1041 (J. Marston Dep.), 311:9-312:19 (attorneys drafted EX2014). PO’s expert does not opine on conception. PO’s Sur-Reply, 14 (stating Dr. Khan “did not review the Conception Documents as part of his assignment”); *see also* EX2001 (Khan Decl.); EX2029 (Khan Decl. II).

Accordingly, EX2014 should be excluded because PO’s reliance on it is improper incorporation by reference. 37 C.F.R. § 42.6(a)(3) (prohibiting incorporation of arguments by reference to other documents). PO cannot flout the

Board’s word limits by relying on a thirty-six page claim chart to show conception, particularly where no witness discusses EX2014. *Gen. Access Sols., Ltd. v. Sprint Spectrum L.P.*, 811 F. App’x 654, 658 (Fed. Cir. 2020) (affirming Board’s exclusion of conception arguments incorporated by reference from claim charts, explaining “GAS had to present a case to establish prior conception of every claim limitation. GAS’s briefing failed to meet this burden”); *see also Parus Holdings, Inc. v. Google LLC*, 70 F.4th 1365, 1369-72 (Fed. Cir. 2023) (“The burden of production cannot be met without some combination of citing the relevant record evidence with specificity and *explaining the significance of the produced material in briefs.*”¹).

EX2014 should also be excluded because it is unauthenticated and unsubstantiated attorney argument, not evidence. EX1041 (J. Marston Dep.), 311:9-312:19 (confirming attorneys drafted EX2014). EX2014 repeatedly makes claims about how a “skilled artisan” would understand the claim language or EX2004/EX2006. EX2014, 2 (“A skilled artisan would understand that these algorithms are implemented using software”), 6 (“A skilled artisan would understand from the documentation between September 4, 2004, and June 7, 2005, that . . . data captured through the software/algorithms for monitoring user actions is provided to relevance algorithms data captured through the software/algorithms”);

¹ All emphasis added, unless indicated otherwise.

see also id., 3-6, 9-10, 13-17, 20, 31-32. This is not evidence that is properly before the Board. *Garmin Int’l, Inc. v. Cardiacsense Ltd.*, No. IPR2025-00195, 2025 WL 1484340, at *9 (May 23, 2025) (citing *Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017)) (“The assertions of Patent Owner’s counsel about what a POSA would ‘understand’ are not evidence.”); *Kyocera Senco Indus. Tools Inc. v. Int’l Trade Comm’n*, 22 F.4th 1369, 1376-77 (Fed. Cir. 2022) (“To offer expert testimony from the perspective of a skilled artisan . . . a witness must at least have ordinary skill in the art.”). EX2014 improperly seeks to connect technical evidence—excerpts from EX2004 and EX2006—to claim language, without an authenticating witness who qualifies as a POSITA and stands behind that analysis to support conception. *Invitrogen Corp. v. Clontech Lab’ys, Inc.*, 429 F.3d 1052, 1068-69 (Fed. Cir. 2005) (“Unsubstantiated attorney argument regarding the meaning of technical evidence is no substitute for competent, substantiated expert testimony. . . . Nowhere does Clontech point to expert testimony explaining what Roth’s notebook entries mean.”); *see also Impax Lab’ys Inc. v. Lannett Holdings Inc.*, 893 F.3d 1372, 1380 (Fed. Cir. 2018) (“Lannett’s contentions are without any evidentiary support beyond its attorney arguments concerning factual issues.”).

II. Numerous PO Exhibits Should Be Excluded For Lack of Authentication Because Their Metadata Does Not Corroborate the Inventors’ Authorship

PO submitted numerous exhibits to support its inventors’ story about

conception and diligence, yet many of those exhibits either lack metadata or include metadata showing someone other than the Marstons authored them. Because the metadata does not show the Marstons authored them, the exhibits should be excluded for lack of authentication. FRE 901.

A. EX2004-EX2008 and EX2010-EX2012 Lack Authenticating Metadata

Justin Marston describes EX2004 and EX2006 as “conception documents” and claims to have created them. EX2030, ¶5; EX2015, ¶¶10, 13, 22. EX2005 and EX2007-EX2008, and EX2010-EX2012 are different versions of these conception documents. EX2003, ¶11. Because the Marstons cannot authenticate these documents, they should be excluded. FRE 901.

The metadata from EX2004 and EX2006 does not corroborate that either Justin Marston or Paul Marston created them—rather, it merely reflects that EX2004/EX2006 were in Justin Marston’s possession as the “custodian,” meaning they were on his computer. EX2015, ¶15 (“As custodian of the document, I maintained the document on my computer in my BlueSpace files.”). For example, the metadata for EX2004 and EX2006 lists “.” as the “author.” EX2004, 35; EX2006, 61. Moreover, the “metadata slip sheet” submitted at the end of EX2004 does not match the metadata screenshots submitted in Justin Marston’s declaration (EX2003) or EX2019. EX2003, ¶6 (metadata for EX2004); *see also* EX2019 (metadata for EX2004). For example, EX2003 includes a screenshot of metadata for

EX2004 reflecting that “Bal”—an unknown individual who is not Justin Marston—last saved that document, which is on “Revision number 88” with a “Total editing time” of “154:56:00.” EX2003, ¶6. Other versions of these conception documents—EX2005, EX2007, EX2008, EX2010, EX2011, and EX2012—similarly list “.” as the author. That neither inventor is included in the metadata is telling, given the metadata for other documents shows “Marston” as the author. For example, EX2009 and EX2013 are purportedly loose documents with calculations for “importance” and “cognate” values, and their “author” metadata lists “Marston,” calling into question why versions of PO’s conception documents do not show the same.

B. EX2019-EX2023 and EX2025-EX2027 Lack Authentication

PO submits EX2019-EX2023 and EX2025-EX2027 as “additional metadata” for EX2004-EX2008 and EX2010-EX2012. POR, 45. Yet, PO offers no testimony to authenticate these documents or confirm they are what PO purports them to be. Indeed, none of its witnesses cite or discuss EX2019-EX2023 or EX2025-EX2027. Thus, they should be excluded for lack of authentication under FRE 901.

C. EX2032-EX2036, EX2038-EX2039, EX2043-EX2045, EX2047-EX2050, EX2054, EX2056-EX2062, EX2065-EX2069, and EX2073-EX2074 Lack Authenticating Metadata

These exhibits similarly cannot be authenticated because they either lack metadata or their metadata does not confirm that either of the Marstons authored or edited them. For example, several of these exhibits merely list “.” as their “author.”

See EX2032, 90; EX2033, 76; EX2034, 98; EX2035, 95; EX2036, 97; EX2049, 9; EX2054, 45; EX2059, 90; EX2060, 92; EX2061, 95; EX2062, 98; EX2065, 100; EX2066, 97; EX2067, 97; EX2068, 98; EX2069, 97; EX2073, 87; EX2074, 95. Certain exhibits leave the “author” entry blank. *See* EX2038, 2; EX2039, 2. Other exhibits list third parties as the author. *See* EX2047, 7 (“Morton-Jones”); EX2048, 5 (“Rick Turner”); EX2050, 3 (“Tim Couper”); EX2056, 2 (“Jon Fernyhough”); EX2057, 5 (“Jon Fernyhough”); EX2058, 7 (“Jon Fernyhough”). And EX2043-EX2045 do not contain a metadata slipsheet at all, despite many of PO’s other conception documents including one. EX2043, 95; EX2044, 95; EX2045, 95. Curiously, several exhibits—EX2034, EX2049, EX2050, and EX2059-EX2062, and EX2065-EX2069—indicate they were “last saved by” an unspecified “Marston,” but the remaining exhibits discussed in this section omit that field entirely. At bottom, the metadata for these exhibits does not corroborate that they were authored or edited by either Marston inventor, such that they should be excluded.

III. The Inventors’ Uncorroborated Conception Testimony Should Be Excluded (EX2003, ¶¶3-14; EX2015, ¶¶10-32, 37-48; EX2030, ¶¶5, 14-15, 20, 22-23, 26-32, 34, 37-43, 45, 61-62; EX2031, ¶¶12, 19, 21, 23-30, 33-37)

The Marstons are self-interested and biased, such that their testimony trying to establish conception based on the exhibits in Section II—including trying to authenticate them—should be disregarded when the metadata does not support their claims. PO is paying these witnesses \$500/hr for their testimony in this proceeding.

EX1041, 271:3-272:5; EX1042, 152:1-5. And further casting doubt on the credibility of Justin Marston's testimony, he provided inconsistent testimony regarding another exhibit in this proceeding (EX2014), first testifying that he created that document in the pending IPR matter involving X, Inc., but then testifying here that PO's lawyers prepared it. *Compare* EX1041, 311:9-19 *with* EX1043, 200:18-201:13. As another example, Justin Marston claims to have worked as the BlueSpace CEO in 2005 and 2006 (EX2030, ¶¶19, 25, 36, 49, 53), yet his public LinkedIn profile—submitted in the X IPR—states that he “briefly gave up the CEO role around 2003, but took it up again in the Summer of 2006.” IPR2025-00299, EX1051.

The Marstons' conception testimony relies on the exhibits above as evidence of their “continued work on mathematics for the relevance model”—because those exhibits should be excluded for lack of authentication, the Marstons' testimony based on those documents should also be excluded. EX2003, ¶¶3-14; EX2015, ¶¶10-32 (elaborating on discussion of conception documents), 37-48 (same); EX2030, ¶¶5, 14–15, 20, 27-29, 32, 34, 37-38; EX2031, ¶¶12, 19, 25. Justin Marston provided additional testimony based on other documents purportedly related to conception, including EX2032-EX2036, EX2038-EX2039, EX2043-EX2045, EX2049-EX2050, EX2054, EX2056-2058, EX2065-EX2069, and EX2073-EX2074. EX2030, ¶¶22-23, 26, 30-31, 39-43, 45, 61-62. Similarly, Paul Marston provided additional testimony discussing certain documents to support conception. EX2031,

¶¶12 (EX2004, EX2047, EX2049), 19 (EX2047), 21 (EX2054), 23-30 (EX2049, EX2056-EX2062), 33-37 (EX2065-EX2069). Given the Marstons are inventors, PO must submit “evidence ‘*in addition to [the inventor’s] own statements and documents,*’ corroborating the inventor’s testimony.” *Apator Miitors ApS v. Kamstrup A/S*, 887 F.3d 1293, 1295 (Fed. Cir. 2018) (citing *Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572, 1577 (Fed. Cir. 1996)). But, as discussed above in Section II, the metadata for numerous PO exhibits—including EX2004-EX2008, EX2010-EX2012, EX2032-EX2036, EX2038-EX2039, EX2043-EX2045, EX2049-EX2050, and EX2073-EX2074—does not independently support the Marstons’ testimony (including because it does not identify either of them as an author of these documents). Thus, their opinions based on those documents cannot be corroborated and should be excluded.

IV. Justin Marston’s Testimony as to a POSITA’s Understanding Should Be Excluded Because He Is Not a POSITA (EX2003, ¶¶15-30)

Justin Marston offers several opinions that purport to explain how a person of ordinary skill in the art (“POSITA”) would have understood certain disclosures and/or claim language in the ’217 patent. EX2003, ¶¶15-30. But Justin Marston is not himself a POSITA, such that he is not a qualified expert and cannot offer opinions from the perspective of a POSITA. FRE 702-703; *Kyocera*, 22 F.4th at 1376-77 (“To offer expert testimony from the perspective of a skilled artisan in a patent case . . . a witness must at least have ordinary skill in the art. Without that

skill, the witness' opinions are neither relevant nor reliable.”).

Under all definitions of a POSITA, Justin Marston does not qualify:

- Petitioner's expert defined the level of ordinary skill as requiring “a Bachelor of Science degree in Electrical Engineering, Computer Engineering, Computer Science, or a similar field, plus two to three years of work experience in systems estimating relevance for various types of content.” EX1003, ¶21; Paper 14 (Institution Decision), 8 (adopting Petitioner's definition of POSITA).
- PO's expert offered a more restrictive definition, requiring “a bachelor's degree in electrical or computer science/engineering, or a related field, with at least six years of experience in the design or implementation of content management and analysis systems or a masters degree in electrical or computer science/engineering, or a related field, with at least two years of experience in the design or implementation of content management and analysis systems.” EX2001, ¶14.
- Justin Marston's declaration stated that a POSITA “would have knowledge of implementing the model in software in addition to having a background in the technology of the patent.” EX2003, ¶16.

Justin Marston does not satisfy any of these definitions, as he lacks a relevant degree and software experience. EX1041, 28:14-22, 195:11-17, 330:14-18, 332:1-18; EX1042, 20:11-21:2. Although his declaration states that by the time he created EX2004 he had “several years of experience working in software development (including over three years of experience working for BlueSpace),” (EX2015 ¶10),

he clarified at his deposition that he was not a software developer and did not do any “actual coding” for BlueSpace’s products. EX1041, 195:11-17, 315:15-316:8 (agreeing “neither of you [the Marstons] really had the software experience to be able to develop this content relevance technology”).

This testimony should be excluded under FRE 702/703 and as irrelevant and unduly prejudicial under FRE 401-403.

V. The Inventors’ Testimony Based on Hearsay and/or Lacking Foundation Should Be Excluded

Several passages from the inventors’ declarations should be excluded for lack of foundation and/or because they are premised on inadmissible hearsay, including out-of-court conversations with third parties. FRE 801.

A. Paul Marston (EX2031, ¶¶19, 24-26)

Paragraph 19 and 24-26 of EX2031 contain hearsay and should be excluded. For example, Paragraph 19 refers to an out-of-court conversation between Paul Marston and Mr. Tony Morton-Jones, who provided feedback on Paul Marston’s formulas. EX2031, ¶19 (“I asked him to review for me the formulas that I had prepared.”). Paul Marston tries to rely on the truth-of-the-matter asserted in that conversation to claim that “Tony Morton-Jones did not prepare any of the formulas in the draft (or final) provisional patent application.” *Id.*; FRE 801. Without a non-hearsay foundation for these claims, they should be excluded.

Paragraph 24 of Paul Marston’s declaration, incorporated into paragraphs 25

and 26, refers to a conversation with Justin Marston as the basis for his “understanding” that Jon Fernyhough “did not contribute to any of the inventions.” EX2031, ¶¶24-26. Paul Marston never spoke directly with Mr. Fernyhough. EX1042, 102:5-103:4 (“[A]ll of that stuff was really handled between Justin and Jon Fernyhough. I didn’t know the man. I never met him.”). Thus, his testimony lacks a non-hearsay foundation for these claims and they should be excluded.

B. Justin Marston (EX2030, ¶¶58, 59, 62)

Paragraph 58 of EX2030 should be excluded as based on hearsay. Justin Marston’s discussion of EX2047—including his discussion of the metadata showing it was “Last Saved by” Tony Morton-Jones—is premised on an out-of-court conversation with Paul Marston discussing an additional out-of-court conversation between Paul Marston and Mr. Morton-Jones. EX2030, ¶58 (“I understand that this is because Paul Marston asked his friend, Tony Morton-Jones, to review the formulas.”). Justin Marston admitted he never “interact[ed] directly with Mr. Jones.” EX1043, 178:13-16. He relies on the truth of this double hearsay to say “Tony Morton-Jones did not prepare any of the formulas himself; he was only commenting on the formulas that Paul Marston created.” EX2030, ¶58; FRE 801.

Paragraphs 59 and 62 of EX2030 lack foundation. Justin Marston conclusorily asserts that Mr. Rick Turner and Mr. Tim Couper “did not contribute ... to the inventions set forth in the provisional patent application filed on January 13, 2006.”

EX2030, ¶¶59, 62. Not only does Justin Marston provide no basis for this claim, but it also contradicts the metadata for EX2048 and EX2050 listing Mr. Turner and Mr. Couper, respectively, as the “author.” EX2048, 5; EX2050, 3. Justin Marston’s conclusory claims should be excluded for lack of foundation.

VI. EX2047-48, EX2050, and EX2056-EX2058 Should Be Excluded Because They Are Based on Inadmissible Hearsay

EX2047-48, EX2050, and EX2056-EX2058 should be excluded because they are based on the same inadmissible hearsay discussed in the inventors’ declarations. EX2030, ¶¶58 (discussing EX2047), 59 (discussing EX2048), 62 (discussing EX2050); EX2031, ¶¶19 (discussing EX2047), 24 (discussing EX2056), 25 (discussing EX2057), 26 (discussing EX2058).

VII. EX2079-EX2083 Should Be Excluded Because They Are Inadmissible Hearsay Web Pages

EX2079-EX2083 are webpages allegedly about products attributed to X and Petitioner, which PO cites to argue secondary considerations of non-obviousness. POR, 57-59. Because PO relies on these webpages to show the features of X and Petitioner products, they are out-of-court statements asserted for the truth of the matter asserted. Thus, they constitute inadmissible hearsay, without any exception that would render them admissible. FRE 801. Moreover, only EX2082 and EX2083 even purport to be about Petitioner, and PO has not established that any of these exhibits relate to the patented technology. Accordingly, they are irrelevant under

FRE 401–403. These exhibits should also be excluded for lack of authentication—PO offers no witness citing them or vouching for their authenticity. FRE 901.

VIII. EX2032-EX2039 and EX2041-EX2078 Should Be Excluded as Improperly Incorporated By Reference Without Substantive Discussion in PO’s Briefing

The Board should exclude EX2032-2039 and EX2041-EX2078 because PO improperly incorporates them by reference. *See* 37 C.F.R. § 42.6(a)(3); FRE 401, 402. PO cites these exhibits three times—without substantively discussing any in its POR or Sur-Reply—as “additional documentation relating to diligence.” POR, 5-6, 49 (“EX2032 through EX2078 (corroborating documentation).”); PO’s Sur-Reply, 14 (listing exhibits by month).

EX2041 and EX2042 are particularly problematic. EX2041 is a list of BlueSpace documents, and EX2042 is a privilege log—neither of these lists are evidence. *See, e.g., Old Rep. Ins. Co. v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, No. 03 C 5238, 2006 WL 3782994, at *13 (N.D. Ill. Dec. 21, 2006) (“[T]he privilege log itself is not evidence.”). PO relies on EX2041 and EX2042 to demonstrate Justin Marston’s activities during the critical period, confirming it improperly incorporates their contents by reference. POR, 49-50; PO’s Sur-Reply, 11, 13, 15-16; 37 C.F.R. § 42.6(a)(3). Moreover, PO offers no witness testimony explaining how EX2041 or EX2042 were created, meaning they should also be excluded for lack of authentication under FRE 901. Indeed, based on deposition

testimony from Justin Marston, EX2041 and EX2042 appear to have been created by PO's counsel. *See* EX2030, ¶¶10, 19, 25, 36, 49–50, 53, 54-55; EX1041, 232:11-234:15, 269:1-20 (agreeing PO's counsel likely created EX2042); 275:4-276:6 (describing that PO's counsel wanted to “represent” Justin Marston's activities).

PO's reliance on EX2042 is also prejudicial given that Petitioner could not explore the contents of those documents. Petitioner sought to obtain access to the documents listed in EX2042, with the Board instructing the parties to follow a similar order issued in the co-pending IPR involving X that denied access to the underlying documents; Petitioner accordingly stipulated to being bound by that order. Paper 24. Because Petitioner has not been able to explore its contents, EX2042 and any passages relying on it should be excluded as both irrelevant and unduly prejudicial under FRE 401-403. EX2030, ¶¶10, 19, 25, 36, 49, 53; *Ironburg Inventions Ltd. v. Valve Corp.*, 64 F.4th 1274, 1294 (Fed. Cir. 2023) (“[T]he district court did not abuse its discretion by excluding witness testimony at trial after the proponent of the testimony had prohibited the same witness from providing such testimony at his deposition, instead asserting privilege”). Because these exhibits are not properly relied upon, they are irrelevant and the Board should exclude them.

IX. Conclusion

For the foregoing reasons, the following evidence should be excluded:
(1) EX2014 (claim chart); **(2)** conception documents lacking authenticating

metadata (EX2004-EX2008 and EX2010-EX2012, EX2019-EX2023 and EX2025-EX2027, EX2032-EX2036, EX2038-EX2039, EX2043-EX2045, EX2047-EX2050, EX2054, EX2056-EX2062, EX2065-EX2069, and EX2073-EX2074) and related inventor testimony (EX2003, ¶¶3-14; EX2015, ¶¶10-32, 37-48; EX2030, ¶¶5, 14-15, 20, 22-23, 26-32, 34, 37-43, 45, and 61-62; EX2031, ¶¶12, 19, 21, 23-30, 33-37); **(3)** inventor testimony from Justin Marston from perspective of POSITA (EX2003, ¶¶15-30); **(4)** inventor testimony and exhibits based on hearsay and/or lacking authentication (EX2030, ¶¶58-59, 62; EX2031, ¶¶19, 24-26; EX2047-EX2048, EX2050, and EX2056-EX2058); **(5)** hearsay and non-authenticated web pages (EX2079-EX2083); and **(6)** exhibits that are improperly incorporated by reference and/or lack authentication (EX2032-EX2039 and EX2041-EX2078).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on April 22, 2026 true and correct copies of the foregoing PETITIONER'S MOTION TO EXCLUDE was served via electronic mail upon the following counsel of record for Patent Owner:

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