

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner

v.

SMARTFLASH LLC,
Patent Owner

Case CBM2014-00102¹
Patent 8,118,221 B2

Before the Honorable JENNIFER S. BISK, RAMA G. ELLURU, JEREMY M. PLENZLER, and MATTHEW R. CLEMENTS, *Administrative Patent Judges*.

**PETITIONER APPLE INC.'S OBJECTIONS TO PATENT OWNER
SMARTFLASH, LLC'S EXHIBITS**

Pursuant to 37 C.F.R. § 42.64(b)(1), the undersigned, on behalf of and acting in a representative capacity for Petitioner Apple Inc. (“Petitioner”), hereby submits the following objections to Patent Owner Smartflash, LLC’s (“Patent Owner”) Exhibits 2006, 2007, 2008, 2013, 2015, 2019, 2020, 2021, 2025, and 2028, and any reference thereto/reliance thereon, without limitation. Petitioner’s objections below apply the Federal Rules of Evidence (“F.R.E.”) as required by 37 C.F.R § 42.62.

These objections address evidentiary deficiencies in the new material submitted

¹ Case CBM2014-00103 has been consolidated with the instant proceeding.

by Patent Owner on February 27, 2015.

The following objections apply to Exhibits 2006, 2007, 2008, 2013, 2015, 2019, 2020, 2021, 2025, and 2028 as they are actually presented by Patent Owner, in the context of Patent Owner's February 27, 2015 Patent Owner's Response to Petition (Paper 26) and not in the context of any other substantive argument on the merits of the instituted grounds in this proceeding. Petitioner expressly objects to any other purported use of these Exhibits, including as substantive evidence in this proceeding, which would be untimely and improper under the applicable rules, and Petitioner expressly asserts, reserves and does not waive any other objections that would be applicable in such a context.

I. Objections to Exhibits 2006, 2007, 2008, 2013, 2019, 2020, and 2021, And Any Reference to/Reliance Thereon

Evidence objected to: Exhibits 2006 ("US Patent No. 4,531,020"), 2007 ("In-App Purchase Programming Guide – 2012"), 2008 ("In-App Purchase Programming Guide – 2013"), 2013 ("Receipt Validation Programming Guide (9/18/2013)"), 2015 ("App Store Sales Top 10 Billion in 2013"); 2019 ("US Patent Publication No. 2003/0120541"), 2020 ("File History 10/028,013"), and 2021 ("Wechselberger Deposition Notes").

Grounds for objection: F.R.E. 901 ("Authenticating or Identifying Evidence"); F.R.E. 1002 ("Requirement of the Original"); F.R.E. 1003 ("Admissibility of Duplicates"); F.R.E. 401 ("Test for Relevant Evidence"); F.R.E. 402 ("General

Admissibility of Relevant Evidence”); F.R.E. 403 (“Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons”); and 37 C.F.R. § 42.61 (“Admissibility”).

Apple objects to the use of Exhibits 2006, 2007, 2008, 2013, 2015, 2019, 2020, and 2021, under F.R.E. 901, 1002, 1003, and 37 C.F.R. § 42.61 because Patent Owner fails to provide the authentication required for these documents.

Apple further objects to the use of Exhibits 2006, 2007, 2008, 2013, 2015, 2019, 2020, and 2021, under F.R.E. 401, 402, and 403, and 37 C.F.R. § 42.61 because neither Patent Owner’s Response nor the Declaration of Jonathan Katz, Ph.D. in support of Patent Owner’s Response to Petition substantively cites to any of these documents. Accordingly, these Exhibits do not appear to make any fact of consequence in determining this action more or less probable than it would be without them and are thus irrelevant and not admissible (F.R.E. 401, 402); permitting reference to/reliance on these documents in any future submissions of Patent Owner would also be impermissible, misleading, irrelevant, and unfairly prejudicial to Petitioner (F.R.E. 402, 403); and to the extent Patent Owner attempts to rely on or submit these aforementioned Exhibits in the future as evidence in support of new substantive positions, doing so would be untimely, in violation of the applicable rules governing this proceeding, and unfairly prejudicial to Apple (F.R.E. 403).

II. Objections to Exhibit 2025, And Any Reference to/Reliance Thereon

Evidence objected to: Exhibits 2025 (“Wechselberger Deposition Transcript, December 10, 2014 - December 11, 2014”).

Grounds for objection: 37 C.F.R. § 42.61 (“Admissibility”); 37 C.F.R. § 42.64 (“Objection; Motion to Exclude; Motion in Limine”); and 37 C.F.R. § 42.53(d)(5)(ii) (“Scope and content”).

Exhibit 2025 appears to be the compiled transcript from the deposition of Anthony Wechselberger, taken in this action on December 10 and 11, 2014. Apple hereby expressly repeats and incorporates by reference all of its objections stated on the record in that deposition, and affirmatively maintains all such objections.

Apple further objects to pp. 364-384² of Exhibit 2025, which is the subject of Apple’s Motion to Strike Portions of the Deposition Transcript of Anthony Wechselberger Concerning Petitioner’s Products and For Costs. As further detailed in Apple’s Motion to Strike (Paper 21), this portion of the deposition transcript involved questioning by Patent Owner’s counsel that was outside the scope of Mr. Wechselberger’s declaration—including questions and answers about the operation of Apple’s products and related secondary considerations—in violation of 37 C.F.R. § 42.53(d)(5)(ii). *See also* 37 C.F.R. § 42.61; 37 C.F.R. § 42.64.

² These page numbers refer to those found at the bottom of each page of Exhibit 2025, as assigned by Smartflash. Pages 364-384 correspond to 358:1-378:4 in the original 12/11/2014 transcript of the deposition of Mr. Wechselberger.

III. Objections to Exhibit 2028, And Any Reference to/Reliance Thereon

Evidence objected to: Exhibit 2028 (“Katz Declaration 102”).

Grounds for objection: F.R.E. 702 (“Testimony by Expert Witnesses”); F.R.E. 401 (“Test for Relevant Evidence”); F.R.E. 402 (“General Admissibility of Relevant Evidence”); F.R.E. 403 (“Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons”).

Apple objects to the use of Exhibit 2028 under F.R.E. 702. Exhibit 2028 is the Declaration of Jonathan Katz Ph.D. in support of Patent Owner’s Response to Petition. Exhibit 2028 purports to provide expert testimony in this matter, but fails to establish that Dr. Katz was a person of ordinary skill at the relevant time. Because he was not a person of ordinary skill at the relevant time period, his testimony would not help the trier of fact under F.R.E. 702. Dr. Katz provides the following definition of one of ordinary skill in the art:

I believe that one of ordinary skill in the art would have had a bachelor’s degree in electrical engineering or its equivalent, or at least 5 years of experience in manufacturing or engineering, with significant exposure to the digital content distribution and/or ecommerce industries. *See* Ex. 2028 at ¶ 9.

Dr. Katz also states that he would “qualify as an expert in the area of data storage and access systems such that I am qualified to opine on what those of ordinary skill in the art would have understood at *the time of the filing of the patent* and what

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