

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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APPLE INC.,  
Petitioner

v.

SMARTFLASH LLC,  
Patent Owner

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Case CBM2014-00106<sup>1</sup>  
Patent 8,033,458 B2

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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, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2025, 2026, 2027, and 2029, 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.

<sup>1</sup> Case CBM2014-00107 has been consolidated with the instant proceeding.

These objections address evidentiary deficiencies in the new material submitted by Patent Owner on February 27, 2015.

The following objections apply to Exhibits 2006, 2007, 2008, 2013, 2014, 2015, 2016, 2017, 2018, 2019, 2020, 2021, 2025, 2026, 2027, and 2029 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 23) 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)"), 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, 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, 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. 364-384<sup>2</sup> 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 20), 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.

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<sup>2</sup> 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.

42.53(d)(5)(ii).

**III. Objections to Exhibits 2014, 2015, 2016, 2017, 2018, 2026, and 2027, And Any Reference to/Reliance Thereon**

Evidence objected to: Exhibits 2014 (“iTunes Store Sets New Record with 25 Billion Songs Sold”), 2015 (“App Store Sales Top \$10 Billion in 2013”), 2016 (“App Store Tops 40 Billion Downloads with Almost Half in 2012”), 2017 (“Apple’s App Store Marks Historic 50 Billionth Download”), 2018 (“First Weekend iPhone Sales Top 10 Million, Set New Record”), 2026 (“In-App Purchase Programming Guide (10/22/2013)”), and 2027 (“Receipt Validation Programming Guide (11/18/2014)”).

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”).

Exhibit 2035, titled “Declaration of Emily E. Toohey In Support Of Patent Owner’s Response,” asserts in paragraphs 3 through 9 that Exhibits 2014, 2015, 2016, 2017, 2018, 2026, and 2027 are “true and correct” copies of materials from Apple’s website. However, Exhibit 2035 provides no indication of the date on which any of these exhibits are purported to be “true and correct” copies and/or the specific source or location of these exhibits or and no evidence has been provided to

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