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 CBM2015-00015
Patent 8,118,221 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 2049, 2050, and 2058, 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 by Patent Owner on June 24, 2015.

The following objections apply to Exhibits 2049, 2050, and 2058 as they are actually presented by Patent Owner, in the context of Patent Owner's June 24, 2015 Patent Owner's Response (Paper 33) 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 2049, 2050, and 2058, And Any Reference to/Reliance Thereon

Evidence objected to: Exhibits 2049 ("Report and Recommendation (on Defendants' 101 SJ Motions)"), 2050 ("Order Adopting Report and Recommendation (on Defendants' 101 SJ Motions)"), and 2058 ("Memorandum Opinion and Order (on Defendants' Motions for Stay Pending the Outcome of CBMs)").

Grounds for objection: 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 2049, 2050, and 2058 under F.R.E. 401, 402, and 403, and 37 C.F.R. § 42.61. Patent Owner's Response relies on Exhibits 2049, 2050, and 2058 to urge the Board to adopt the District Court's non-final findings and ruling on patent eligibility (on different claims than the claim instituted on § 101 grounds in this proceeding) instead of independently determining the eligibility of the instituted claims. *See, e.g.*, Paper 33 at 2, 11-12, 21-22. However, the District Court's non-final findings and ruling on patent eligibility are not binding on the Board. *See SAP Am., Inc. v. Versata Dev. Grp., Inc.*, No. CBM2012-00001, Paper 36 at 19-20 (P.T.A.B. Jan. 9, 2013). Further, the District Court's Orders were based on claim constructions that differ from the Board's constructions in this proceeding and do not control here, *see, e.g.*, Paper 9 at 19 n.7; Paper 23 at 9-10, and the Board applies a preponderance of the evidence standard. *Cf. Rockstar Consortium US LP, Inc. v. Samsung Elecs. Co., Ltd.*, Nos. 2:13-cv-894, 2:13-cv-900, 2014 WL 1998053, at *3 (E.D. Tex. May 15, 2014) (Gilstrap, J.). In addition, the District Court's denial of a stay in the litigation has no bearing on the patentability of the instituted claims. 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).

Respectfully submitted, July 1, 2015

By:/J. Steven Baughman/

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of PETITIONER APPLE INC.'S OBJECTIONS TO PATENT OWNER SMARTFLASH LLC'S EXHIBITS was served on July 1, 2015, to the following Counsel for Patent Owner via e-mail, pursuant to the parties' agreement concerning service:

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