UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner,

v.

SMARTFLASH LLC,
Patent Owner.

Case CBM2015-00015
Patent 8,118,221 B2

PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

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I. Statement of Precise Relief Requested

Pursuant to 37 C.F.R. §§ 42.62 and 42.64(c), Patent Owner Smartflash LLC moves to exclude Exhibits 1202, 1203, 1204, 1205, 1206, 1207, 1210, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1223, 1227, 1228, 1229, 1231, 1232, and 1233.

II. Patent Owner Smartflash Timely Objected to Petitioner's Exhibits

Patent Owner Smartflash LLC timely objected to CBM2015-00015 Exhibits 1202, 1203, 1204, 1205, 1206, 1207, 1210, 1212, 1213, 1214, 1215, 1216, 1217, 1218, 1219, 1220, 1221, 1223, 1227, 1228, 1229, 1231, 1232, and 1233 by serving Patent Owner's Objections to Admissibility of Evidence on April 24, 2015. Exhibit 2099.

III. Argument

Pursuant to 37 C.F.R. § 42.64(c), the Federal Rules of Evidence apply in Covered Business Method Review proceedings.

A. Exhibit 1202 is Inadmissible Other Evidence of the Content of a Writing, Irrelevant, and Cumulative

Patent Owner moves to exclude Exhibit 1202, (Plaintiff's First Amended Complaint) on grounds that it is: inadmissible other evidence of the content of a writing under FRE 1004; inadmissible under FRE 402 because it fails the test for relevance set forth in FRE 401; and, even if relevant, is cumulative evidence under FRE 403.

Petitioner cites Exhibit 1202 for the sole purpose of showing Patent Owner's description of the subject matter of U.S. Patent 8,118,221 ("the '221 Patent") as "cover[ing] a portable data carrier for storing data and managing access to the data via payment information and/or use status rules" and "cover[ing] a computer network … that serves data and manages access to data by, for example, validating payment information." Corrected Petition at 11 (citing Ex. 1202 ¶ 17). Petitioner does not need to cite to Exhibit 1202 to show the subject matter of the '221 Patent, however, because Exhibit 1201, the actual '221 Patent, is in evidence without objection. Under FRE 1004, other evidence of the content of a writing (here the '221 Patent) is admissible if the original is lost, cannot be obtained, has not been produced, or the writing is not closely related to a controlling issue. None of those conditions apply here, given that the '221 Patent is in evidence and is the subject of the trial.

Patent Owner's description of the '221 Patent in Exhibit 1202 is not relevant to any of the issues here. Petitioner's expert, Anthony J. Wechselberger's Declaration, Exhibit 1221, ("Wechselberger Declaration") does not cite Exhibit 1202. The Board's April 10, 2015 *Decision – Institution of Covered Business Method Patent Review and Denying Motion for Joinder 37 C.F.R. § 42.208, 37 C.F.R. § 42.222(b)* ("PTAB Decision"), Paper 23, does not cite Exhibit 1202. Exhibit 1202 does not appear to make a fact of consequence in determining this

action more or less probable than it would be without Exhibit 1202. As such, Exhibit 1202 does not pass the test for relevant evidence under FRE 401 and is not admissible per FRE 402.

Even if Exhibit 1202 was found to be relevant, it should also be excluded under FRE 403 as cumulative of Exhibit 1201.

In the related CBM2014-00102, the Board declined to exclude the same exhibit because "[Patent Owner's] characterization of the '221 patent in prior proceedings are (sic) relevant to the credibility of its characterization of the '221 patent in this proceeding." CBM2014-00102, Paper 52 at 36. There is no credibility issue here, however, that makes Exhibit 1202 relevant. There is nothing about Patent Owner's characterization of the '221 Patent in this proceeding – that representative claim 32 "does not recite a 'financial product or service'" in the way Congress intended (Patent Owner's Preliminary Response, Paper 19 at 5-10) – that is contradicted by Exhibit 1202 such that the credibility of Patent Owner's characterization is an issue. As such Exhibit 1202 is irrelevant and inadmissible.

B. Exhibits 1203, 1204, 1227, 1228, and 1229 are Uncited and thus are Irrelevant

Neither the Corrected Petition, nor the Wechselberger Declaration, nor the PTAB Decision cite to Exhibit 1203 (File History for U.S. Patent No. 8,061,598), Exhibit 1204 (File History for U.S. Patent No. 8,336,772), Exhibit 1227 (File History for U.S. Patent No. 7,334,720), Exhibit 1228 (File History for U.S. Patent

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