

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE INC and APPLE INC.,
Petitioner,

v.

SMARTFLASH LLC,
Patent Owner.

Case CBM2015-00029¹
Patent 7,334,720 B2

PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

¹ CBM2015-00125 has been consolidated with this proceeding

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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 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1333, 1335, and 1336.

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

Patent Owner Smartflash LLC timely objected to CBM2015-00029 Exhibits 1302, 1303, 1304, 1305, 1306, 1307, 1308, 1311, 1312, 1313, 1314, 1315, 1316, 1317, 1318, 1319, 1324, 1325, 1326, 1327, 1328, 1329, 1330, 1333, 1335, and 1336 by filing Patent Owner's Objections to Admissibility of Evidence. Paper 14.

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 1302 is Inadmissible Other Evidence of the Content of a Writing, Irrelevant, and Cumulative

Patent Owner moves to exclude Exhibit 1302, (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 1302 for the sole purpose of showing Patent Owner's description of the subject matter of U.S. Patent 7,334,720 ("the '720 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, Paper 5 at 8 (citing Ex. 1302).

Petitioner does not need to cite to Exhibit 1302 to show the subject matter of the '720 Patent, however, because Exhibit 1301, the actual '720 Patent, is in evidence without objection. Under FRE 1004, other evidence of the content of a writing (here the '720 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 '720 Patent is in evidence and is the subject of the trial.

Patent Owner's description of the '720 Patent in Exhibit 1302 is not relevant to any of the issues here. Petitioner's expert, Anthony J. Wechselberger's Declaration, Exhibit 1319, ("Wechselberger Declaration") does not cite Exhibit 1302. The Board's May 28, 2015 *Decision – Institution of Covered Business Method Patent Review 37 C.F.R. § 42.208* ("PTAB Decision"), Paper 5, does not cite Exhibit 1302. Exhibit 1302 does not appear to make a fact of consequence in determining this action more or less probable than it would be without Exhibit

1302. As such, Exhibit 1302 does not pass the test for relevant evidence under FRE 401 and is not admissible per FRE 402.

Even if Exhibit 1302 was found to be relevant, it should also be excluded under FRE 403 as cumulative of Exhibit 1301.

In the related CBMs in the same patent family, such as CBM2014-00102, the Board declined to exclude the same exhibit because “[Patent Owner’s] characterization of the ... patent in prior proceedings are (sic) relevant to the credibility of its characterization of the ... patent in this proceeding.” CBM2014-00102, Paper 52 at 36. There is no credibility issue here, however, that makes Exhibit 1302 relevant. There is nothing about Patent Owner’s characterization of the ‘720 Patent in this proceeding – that claim 14 “does not recite a ‘financial product or service’” in the way Congress intended (Patent Owner’s Preliminary Response, Paper 8 at 5-10) – that is contradicted by Exhibit 1302 such that the credibility of Patent Owner’s characterization is an issue. As such Exhibit 1302 is irrelevant and inadmissible.

B. Exhibits 1305, 1324, 1328, 1329, 1330, 1333, 1335, and 1336 are Uncited and thus are Irrelevant

Neither the Corrected Petition, nor the Wechselberger Declaration, nor the PTAB Decision cite to Exhibit 1305 (Russell Housley and Jan Dolphin, “Metering: A Pre-pay Technique,” Storage and Retrieval for Image and Video Databases V, Conference Volume 3022, 527 (January 15, 1997)), Exhibit 1324 (File History for

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