

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC. and GOOGLE INC.,
Petitioners,

v.

SMARTFLASH LLC,
Patent Owner.

Case CBM2015-00029¹
Patent 7,334,720 B2

**PATENT OWNER'S REPLY IN SUPPORT OF
MOTION TO EXCLUDE EVIDENCE**

¹ CBM2015-00125 has been consolidated with this proceeding.

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I. INTRODUCTION

Patent Owner understands that “the Board, sitting as a non-jury tribunal with administrative expertise, is well-positioned to determine and assign appropriate weight to the evidence presented in this trial, without resorting to formal exclusion that might later be held reversible error.” *Liberty Mutual Insurance Co. v. Progressive Casualty Insurance Co.*, CBM2012-00002, Paper 66, Final Written Decision (PTAB January 23, 2014)(citing *S.E.C. v. Guenthner*, 395 F. Supp. 2d 835, 842 n.3 (D. Neb. 2005)). At the same time, the Federal Rules of Evidence apply (37 CFR § 42.62(a)) and it is within the Board’s authority to manage the record by ruling on the admissibility of evidence based on the trial as instituted so that in the event of an appeal under 35 U.S.C. § 142, a proper record exists that can be transmitted to the United States Court of Appeals for the Federal Circuit pursuant to 35 U.S.C. § 143.

II. ARGUMENT

A. The Board Should Exclude Exhibit 1302

Ex. 1302 does not contain a “highly relevant admission” (Paper 32 at 2), but instead says nothing more than the patent itself in Ex. 1301 at 1:6-9 (“This invention ... relates to a portable data carrier for storing and paying for data...”) and 1:51-53 (“reading payment information,” “validating the payment information”). Ex. 1302 therefore is inadmissible other evidence of the content of

a writing under FRE 1004, cumulative under FRE 403, and irrelevant under FRE 401, 402.

B. The Board Should Exclude Exhibits 1305, 1324, 1329-30, 1333, and 1335-36

Petitioner concedes Ex. 1305 and 1336 were not relied on and it will not oppose exclusion. Pap. 32 at 4, n.2. Ex. 1324, 1329-30, 1333, and 1335 are not cited in any substantive way that would make them relevant. As Petitioner acknowledges, the exhibits merely were cited in “Materials Reviewed and Relied Upon” by Mr. Wechselberger. Pap. 32 at 3. These exhibits therefore are not relevant and not admissible. FRE 401, 402.

C. The Board Should Exclude Exhibits 1303, 1306-08, 1311, 1314, 1316-18, 1325, 1326 and 1328²

Exhibits 1303, 1306-08, 1311, 1314, 1316-18, 1325, 1326 and 1328 were not alleged to be invalidating prior art and should be excluded. FRE 401, 402.

D. The Board Should Exclude Exhibits 1304, 1312, 1313, 1315, and 1327

Exhibits 1304, 1312, 1313, 1315, and 1327 were originally alleged to be invalidating prior art under 35 U.S.C. § 103 (Pap. 11 at 2-3), but CBM review in

² Patent Owner’s Motion characterizes Exhibit 1328 as an “Uncited Exhibit.” As Petitioner’s Opposition notes (Pap. 32 at 3), it is cited by Mr. Wechselberger. It is not, however, alleged to be invalidating prior art and thus falls into the “Unasserted Exhibit” category.

this case was instituted on claims 3 and 5 of the ‘720 Patent on 35 U.S.C. § 101 grounds only. No other grounds were authorized. Pap. 11 at 19. These exhibits therefore should no longer be in evidence. FRE 401, 402.

E. The Board Should Exclude Exhibit 1319

The Board cannot assess under FRE 702 whether Mr. Wechselberger’s opinion testimony is “based on sufficient facts or data,” is “the product of reliable principles and methods,” or if Mr. Wechselberger “reliably applied the principles and methods to the facts of the case” given that Mr. Wechselberger did not disclose the standard (substantial evidence or preponderance of the evidence) against which he measured the quantum of evidence in arriving at his opinions. As such, there is no basis to admit his expert testimony.³ Moreover, given that this proceeding was instituted on § 101 patent eligibility grounds only, Mr. Wechselberger’s testimony is inadmissible testimony on United States patent law. 37 CFR § 42.65(a).

III. CONCLUSION

Patent Owner respectfully requests that the Board exclude the exhibits.

³ Patent Owner acknowledges that FRE 602 is inapplicable to expert witnesses (Pap. 32 at 9). However, Mr. Wechselberger never states that he is an expert in the types of methods and systems defined by the challenged claims.

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