

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,

Petitioner,

v.

SMARTFLASH LLC,

Patent Owner.

Case CBM2015-00031
Patent 8,336,772 B2

PATENT OWNER'S OBJECTIONS TO ADMISSIBILITY OF EVIDENCE

Pursuant to 37 C.F.R. § 42.64, Patent Owner hereby objects to the admissibility of certain evidence submitted with Petitioner's Corrected Petition, Paper 5, ("Corrected Petition"). Patent Owner's objections are based on the Federal Rules of Evidence and the Board Rules and are set forth with particularity below.

Exhibit 1202

Patent Owner objects to the admissibility of Exhibit 1202 on grounds that it is cumulative evidence and irrelevant. The Corrected Petition cites to Exhibit 1202 for the sole purpose of showing Patent Owner's characterization of the '772 Patent as relating to "a portable data carrier for storing data and managing access to the data via payment information and/or use status rules" and covering a computer network that "serves data and manages access to data by, for example, validating payment information." Corrected Petition at 10 (citing Ex. 1202). Petitioner's expert, Anthony J. Wechselberger's Declaration, Exhibit 1219, ("Wechselberger Declaration") does not cite to Exhibit 1202. Petitioner does not need to cite to Exhibit 1202 to characterize what the '772 Patent relates to when Exhibit 1201, the actual '772 Patent, is in evidence. Under FRE 1004, other evidence of the content of a writing (here the '772 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 apply given that the '772 Patent is in evidence

and is the subject of the trial. The PTAB should also exclude Exhibit 1202 under FRE 403 as cumulative of Exhibit 1201.

Moreover, Patent Owner's characterization of the '772 Patent in its First Amended Complaint is not relevant to any of the issues here. Being irrelevant evidence, Exhibit 1202 is not admissible per FRE 402.

Exhibits 1205, 1224, 1229, 1230, 1233, 1235

Neither the Corrected Petition, nor the Wechselberger Declaration (Ex. 1219), nor the PTAB's May 28, 2015 *Decision – Institution of Covered Business Method Patent Review 37 C.F.R. § 42.208* ("PTAB Decision") cite Exhibits 1205, 1224, 1229, 1230, 1233, or 1235. As such, these exhibits do not appear to make a fact of consequence in determining this action more or less probable than it would be without them. As such, Exhibits 1205, 1224, 1229, 1230, 1233, and 1235 do not pass the test for relevant evidence under FRE 401 and are thus not admissible per FRE 402.

Exhibits 1203, 1204, 1206, 1207, 1208, 1211, 1212, 1213, 1216, 1218, 1225, 1226, 1227, 1228

Neither the Corrected Petition nor the Wechselberger Declaration cite Exhibits 1203, 1204, 1206, 1207, 1208, 1211, 1212, 1213, 1216, 1218, 1225, 1226, 1227, or 1228 as potentially invalidating prior art, either alone or in combination with any other reference. The PTAB Decision did not base any of its analysis on

Exhibits 1203, 1204, 1206, 1207, 1208, 1211, 1212, 1213, 1216, 1218, 1225, 1226, 1227, or 1228. Thus, these exhibits do not appear to make *a fact of consequence in determining this action* more or less probable than it would be without these exhibits. As such, Exhibits 1203, 1204, 1206, 1207, 1208, 1211, 1212, 1213, 1216, 1218, 1225, 1226, 1227, and 1228 do not pass the test for relevant evidence under FRE 401 and are thus not admissible per FRE 402.

Exhibits 1214, 1215, 1217, 1236

The PTAB Decision did not adopt any of the proposed invalidity grounds asserted based on Exhibits 1214, 1215, 1217, and 1236. Thus, these exhibits do not appear to make *a fact of consequence in determining this action* more or less probable than it would be without them. As such, Exhibits 1214, 1215, 1217, and 1236 do not pass the test for relevant evidence under FRE 401 and are thus not admissible per FRE 402.

Exhibit 1219

Patent Owner objects to Exhibit 1219, the Wechselberger Declaration, in its entirety as the Wechselberger Declaration does not state the relative evidentiary weight (e.g., substantial evidence versus preponderance of the evidence) used in arriving at his conclusions. The Board cannot assess under FRE 702 whether Mr. Wechselberger's opinion testimony 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 against which he measured the evidence in arriving at his opinions.

Additionally, the Wechselberger Declaration does not prove that Mr. Wechselberger is an expert whose testimony is relevant to the issue of what is taught and/or suggested by the cited references. While Mr. Wechselberger may opine that he was “one of ordinary skill in the art,” he does not, however, state that he is an expert in the types of methods and systems defined by the challenged claims nor does he provide proof that he is an expert. Thus, Mr. Wechselberger has not proven that his opinions are proper expert opinions upon which the PTAB can rely as opposed to inadmissible lay opinions. FRE 701 and 702.

The Wechselberger Declaration is further objected to to the extent that any paragraph relies upon an exhibit that is objected to herein for the reasons set forth in those objections. Any paragraph in the Wechselberger Declaration that relies upon any exhibit not relied upon by the PTAB to institute this proceeding is further objected to as not being relevant and therefore being inadmissible under FRE 401 and 402.

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