UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC., SAMSUNG ELECTRONICS CO., LTD., and SAMSUNG ELECTRONICS AMERICA, INC., and GOOGLE, INC.
Petitioner

v.

SMARTFLASH LLC,
Patent Owner

Case CBM2015-00031[1,2]
Patent 8,336,772 B2

Before the Honorable JENNIFER S. BISK, RAMA G. ELLURU, GREGG I. ANDERSON, and MATTHEW R. CLEMENTS, *Administrative Patent Judges*.

PETITIONER APPLE INC.'S OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE UNDER 37 C.F.R. § 42.64(c)

[1] The challenge to claims 5 and 10 based on 35 U.S.C. § 101 in CBM2015-00059 has been consolidated with this proceeding.

[2] The challenge to claims 1, 5, 9, and 10 based on 35 U.S.C. § 101 in CBM2015-00132 has been consolidated with this proceeding.

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In response to Patent Owner's ("PO") Motion to Exclude ("Mot.", Pap. 29), Petitioner respectfully submits 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 here, without resorting to formal exclusion that might later be held reversible error. *See, e.g.*, *S.E.C. v. Guenthner*, 395 F. Supp. 2d 835, 842 n.3 (D. Neb. 2005); *Builders Steel Co. v. Comm'r of Internal Revenue*, 179 F.2d 377, 379 (8th Cir. 1950) (vacating Tax Court decision for exclusion of competent, material evidence); *Donnelly Garment Co. v. Nat'l Labor Relations Bd.*, 123 F.2d 215, 224 (8th Cir. 1941) (NLRB's refusal to receive testimonial evidence was denial of due process). *See also, e.g.*, *Samuel H. Moss, Inc. v. F.T.C.*, 148 F.2d 378, 380 (2d Cir. 1945), *cert. denied*, 326 U.S. 734 (1945) ("Even in criminal trials to a jury it is better, nine times out of ten, to admit, than to exclude, . . . and in such proceedings as these the only conceivable interest that can suffer by admitting any evidence is the time lost, which is seldom as much as that inevitably lost by idle bickering about irrelevancy or incompetence."). But even under strict application of the Rules of Evidence, *cf.* 77 Fed. Reg. 48,612, 48,616 (Aug. 14, 2012) ("42.5(a) and (b) permit administrative patent judges wide latitude in administering the proceedings to balance the ideal of precise rules against the need for flexibility to achieve reasonably fast, inexpensive, and fair proceedings"), Petitioner's evidence here is entirely proper while PO's objections—many of which have

already been rejected by the Board in prior proceedings on related patents—are baseless.

I. The Board Should Not Exclude Exhibit 1202

Petitioner did not rely on Ex. 1202 for "evidence of the content" of the '772 patent (*cf.* Mot. 2), but rather to show that PO's *own characterization* of the subject matter of the '772 patent supports Petitioner's contention—and the Board's conclusion—that the '772 patent relates to a financial activity or transaction and is thus subject to the Board's review as a covered business method patent. *See* Pap. 5 at 10. PO's characterization of the '772 patent in another proceeding is not found in the patent itself; thus, Ex. 1202 is not cumulative of the '772 patent, and FRE 1004 is inapplicable. Indeed, as PO admits, the Board declined to exclude the same exhibit in other proceedings on related patents because the Board found "[Patent Owner's] characterization of the [related] patent in prior proceedings are relevant to the credibility of its characterization of the [] patent in this proceeding." Mot. 3 (citing CBM2014-00102, Pap. 52 at 36); *see also* CBM2014-00106, Pap. 52 at 25; CBM2014-00108, Pap. 50 at 19; CBM2014-00112, Pap. 48 at 24. Contrary to PO's claim that its characterization of the '772 patent is not at issue (Mot. 3), PO disputed the financial nature of the '772 patent here, *see* Pap. 8 at 5-11, and its highly relevant admission to the contrary should not be excluded.

II. The Board Should Not Exclude Exhibits 1224, 1229-30, 1233, Or 1235

PO's assertion that Exs. 1224, 1229-30, 1233, and 1235 are not cited in the Wechselberger Declaration (Mot. 3-4) is simply wrong: all were cited as "Materials Reviewed and Relied Upon," *see* Ex. 1219, App. C, and properly filed with the Petition. *See* 37 C.F.R. § 42.6(c). (Indeed, Petitioner respectfully submits PO would now be objecting if Petitioner had *failed* to provide these cited exhibits.) PO also incorrectly argues that "mere review" of an exhibit by an expert in reaching his opinions does not render an exhibit relevant or admissible because FRE 703 allows experts to rely on facts or data that may not be admissible. Mot. 4. The fact that FRE 703 allows experts to rely on material that may not be admissible does not render all material relied on by experts irrelevant or inadmissible. Indeed, as PO admits, in another proceeding on a related patent, the Board denied PO's request to exclude similar exhibits, finding that "[b]ecause Mr. Wechselberger attests that he reviewed these exhibits in reaching the opinions he expressed in this case, Patent Owner has not shown that they are irrelevant under FRE 401 and 402." Mot. 4 (citing CBM2014-00102, Pap. 52 at 37); *see also* CBM2014-00106, Pap. 52 at 25; CBM2014-00108, Pap. 50 at 19-20; CBM2014-00112, Pap. 48 at 24. To the extent PO's objection is based on imaginings that Petitioner will advance at oral hearing arguments about these documents not presented in previous papers, this is baseless–Petitioner intends to comply fully with the Board's rules (*e.g.*, Trial Prac-

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