UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner

v.

SMARTFLASH LLC,
Patent Owner

Case CBM2015-00032
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 FIRST SET OF OBJECTIONS TO PATENT OWNER SMARTFLASH LLC'S EXHIBITS

Pursuant to 37 C.F.R. § 42.64(b)(1), the undersigned, on behalf of and acting in a representative capacity for Petitioner Apple Inc. ("Petitioner"), hereby submits the following objections to Patent Owner Smartflash LLC's ("Patent Owner") Exhibits 2001, 2002, 2044, 2045, 2046, and 2047 and any reference to/reliance on the foregoing without limitation. Petitioner's objections below apply the Federal Rules of Evidence ("F.R.E.") as required by 37 C.F.R § 42.62.

The following objections apply to Exhibits 2001, 2002, 2044, 2045, 2046, and 2047 as they are actually presented by Patent Owner, in the context of Patent

Owner's March 6, 2015 Preliminary Response (Paper 8) and not in the context of any other substantive argument on the merits of the instituted grounds in this proceeding. Petitioner expressly objects to any other purported use of these Exhibits, including as substantive evidence in this proceeding, which would be untimely and improper under the applicable rules, and Petitioner expressly asserts, reserves and does not waive any other objections that would be applicable in such a context.

I. Objections to Exhibits 2001 and 2002, and Any Reference to/Reliance Thereon

Evidence objected to: Exhibits 2001 ("Congressional Record – House, June 23, 2011, H4480-4505") and 2002 ("Congressional Record – Senate, Sep. 8, 2011, S5402-5443").

Grounds for objection: F.R.E. 901 ("Authenticating or Identifying Evidence"); F.R.E. 1002 ("Requirement of the Original"); F.R.E. 1003 ("Admissibility of Duplicates"); and 37 C.F.R. § 42.61 ("Admissibility").

Apple objects to the use of Exhibits 2001 and 2002 under F.R.E. 901, 1002, 1003, and 37 C.F.R. § 42.61 because Patent Owner fails to provide the authentication required for these documents.

II. Objections to Exhibits 2044, 2045, 2046, and 2047, and Any Reference to/Reliance Thereon

Evidence objected to: 2044 ("Declaration of Anthony Wechselberger in

CBM2014-00110"), 2045 ("Declaration of Anthony Wechselberger in CBM2014-00111"), 2046 ("Patent Owner's Preliminary Response in CBM2014-00110"), and 2047 ("Patent Owner's Preliminary Response in CBM2014-00111").

Grounds for objection: F.R.E. 901 ("Authenticating or Identifying Evidence"); F.R.E. 1002 ("Requirement of the Original"); F.R.E. 1003 ("Admissibility of Duplicates"); F.R.E. 401 ("Test for Relevant Evidence"); F.R.E. 402 ("General Admissibility of Relevant Evidence"); F.R.E. 403 ("Excluding Relevant Evidence for Prejudice, Confusion, Waste of Time, or Other Reasons"); and 37 C.F.R. § 42.61 ("Admissibility").

Apple objects to the use of Exhibits 2044, 2045, 2046, and 2047, under F.R.E. 901, 1002, 1003, and 37 C.F.R. § 42.61 because Patent Owner fails to provide the authentication required for these documents.

Apple further objects to the use of Exhibits 2044, 2045, 2046, and 2047, under F.R.E. 401, 402, and 403, and 37 C.F.R. § 42.61. Patent Owner purports to rely on these Exhibits from other proceedings only to support its assertion that the testimony of Apple's expert, Anthony Wechselberger, is entitled "to little or no weight" because he "did not include any reference to the standard of evidence" in his Declaration for *this* proceeding, even though Patent Owner objected to his declarations in earlier proceedings (*i.e.*, Exhibits 2044 and 2045) for the same reasons (*see* Exhibits 2046 and 2047). *See* Pap. 8 at 14-15. However, whether Mr.

Wechselberger applied a particular standard in another proceeding is not relevant to this proceeding. Further, "[e]xperts are not required to recite or apply the preponderance of the evidence standard expressly in order for the expert testimony to be accorded weight." *See* IPR2013-00172, Pap. 50 at 42. Because the recitation or omission of the evidentiary standard from Mr. Wechselberger's declarations (in this and other proceedings) is irrelevant to any issue in this proceeding, Exhibits 2044, 2045, 2046, and 2047 do not appear to make any fact of consequence in determining this action more or less probable than it would be without them and are thus irrelevant and not admissible (F.R.E. 401, 402); permitting reference to/reliance on these documents in any future submissions of Patent Owner would also be impermissible, misleading, irrelevant, and unfairly prejudicial to Petitioner (F.R.E. 402, 403); and to the extent Patent Owner attempts to rely on or submit these aforementioned Exhibits in the future as evidence in support of new substantive positions, doing so would be untimely, in violation of the applicable rules governing this proceeding, and unfairly prejudicial to Apple (F.R.E. 403).

Respectfully submitted, June 11, 2015

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