UNITED STATES PATENT AND TRADEMARK OFFICE
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BEFORE THE PATENT TRIAL AND APPEAL BOARD
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APPLE INC.,
TWITTER, INC., AND YELP INC.,
Petitioners,

v.

EVOLUTIONARY INTELLIGENCE, LLC,
Patent Owner
_____

Inter Partes Review No. IPR2014-00086
Inter Partes Review No. IPR2014-00812[1]

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**PETITIONERS' OPPOSITION TO
PATENT OWNER'S MOTION TO EXCLUDE**

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[1] Per the Board's Order (Paper 16 at 4), Petitioner Apple identifies this as a

consolidated filing on behalf of Petitioners.

I. Introduction

Patent Owner's Motion to Exclude is procedurally improper as Patent Owner never objected to the evidence it seeks to exclude. *See* Paper No. 34 ("Motion"). Patent Owner's substantive arguments lack merit, are primarily based on its mischaracterization of Dr. Houh's testimony, and fail to raise any cognizable basis for excluding the evidence. Patent Owner's motion should be denied.

II. Patent Owner Failed to Timely Object to Dr. Houh's Declaration

A motion to exclude is an opportunity for a party to raise evidentiary objections to the admissibility of evidence submitted during a trial. *See* IPR2013-00071, Paper 75 at 4. It "is not an opportunity to file a sur-reply, and also is not a mechanism to argue that a reply contains new arguments or relies on evidence necessary to make out a prima facie case." CBM2012-00002, Paper 66 at 62. Such a motion "may only raise issues related to the admissibility of evidence (e.g., hearsay), not the credibility of witnesses or sufficiency of the evidence." IPR2013-00071, Paper 75 at 4; *see also* 37 C.F.R. § 42.64(c); Trial Practice Guide, 77 Fed. Reg. 48756, 48767 (Aug. 14, 2012).

The Board's rules are unequivocal as to the requirements to preserve an objection to the admissibility of evidence – a party must both timely raise an objection to the evidence and in that objection "identify the grounds for the objection with sufficient particularity to allow correction in the form of

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supplemental evidence." 37 C.F.R § 42.64(a)-(b). The party also must, in its motion to exclude, identify where in the record the objection to the evidence was made. 37 C.F.R. § 42.64(c). As Patent Owner did neither, its motion must be denied.

Petitioner filed and served a copy of Dr. Houh's Supplemental Declaration on Patent Owner's counsel on October 27, 2014, giving Patent Owner until November 3, 2014 to raise an objection. 37 C.F.R. § 42.64(b)(1) ("Any objection to evidence . . . [o]nce trial has been instituted [] must be served *within five business days of service of evidence* to which the objection is directed."). Because Patent Owner never objected to Dr. Houh's supplemental declaration, Patent Owner's motion to exclude necessarily fails to "preserve any objection." 37 C.F.R. § 42.64(c). As such, the motion to exclude is improper and must be denied.

III. Patent Owner's Objections Are Meritless and Should Be Denied

Even if considered on the merits, Patent Owner's motion should be denied. Patent Owner challenges the admissibility of ¶ 29 of Exhibit 1009, raising four arguments: (a) it is improper rebuttal evidence, (b) it lacks foundation, (c) it is based on an incorrect claim construction standard, and (d) it is not relevant to the

issues before the Board.[2] As shown below, none of these arguments have merit.

A. Paragraph 29 Is Proper Rebuttal Evidence

Patent Owner argues that ¶ 29 of Ex. 1009 constitutes "new evidence on reply [and] violates 37 C.F.R. 42.123, which requires supplemental information be submitted within one month of institution of an IPR." Motion at 2-3. Patent Owner is wrong.

First, ¶ 29 of Ex. 1009 directly rebuts Patent Owner's claim construction arguments made in its Response to the Petition, which is the very purpose of a Reply. *See Microsoft Corp. v. Surfcast, Inc.*, IPR2013-00292, Paper 93, at 59 (Oct. 14, 2014) (finding that evidence "directly responsive to [Patent Owner]'s claim construction arguments" is admissible on reply). In the Institution Decision, the Board construed "container" as requiring "a logically defined data enclosure." Dec. at 9. In its Response, Patent Owner proposed two other constructions for

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[2] In its motion, Patent Owner has not specifically identified the relief it seeks. *See* Motion at 2-5. To the extent that it is requesting the Board to exclude Dr. Houh's *entire* Supplemental Declaration, that request is improper because Patent Owner's complaints relate to a single offending paragraph. Even if ¶ 29 were improper (which it is not), that would not justify excluding the entire declaration.

"container." Patent Owner asserted that the phrase "logically defined data enclosure" meant "defined using a software mechanism." Ex. 2006 at ¶¶ 34-35. Patent Owner then argued that Gibbs did not disclose a "container" based on a narrower construction for "container"; namely that the only way a container can encapsulate other containers is by "includ[ing] the logical description of another container." Resp. at 38-40. In ¶ 29, Dr. Houh explains that one of ordinary skill would have understood a that a "software mechanism" covers a broad range of software-based techniques. Ex. 1009 at ¶ 29. Dr. Houh explains that even under Patent Owner's expert's construction, the phrase "logically defined data enclosure" is not as narrow as Patent Owner contends when discussing Gibbs. Dr. Houh's testimony directly responds to contentions made by Patent Owner and its expert, and therefore ¶ 29 is proper rebuttal evidence.

Second, Patent Owner's argument that ¶ 29 constitutes "new evidence" is improper in the context of a motion to exclude. The Board has explained that "[c]hallenging evidence as being improper reply evidence through a motion to exclude is [] disfavored." *Corning Inc. v. DSM IP Assets B.V.*, IPR2013-00047, Paper 84, at 7 n. 3 (May 1, 2014). "While a motion to exclude may raise issues related to admissibility of evidence," it is typically "not a mechanism to argue that a reply contains new arguments or relies on evidence necessary to make out a prima facie case." *Liberty Mutual Ins. Co. v. Progressive Casualty Ins. Co.*,

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