UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.
Petitioner

v.

DSS TECHNOLOGY MANAGEMENT, INC.
Patent Owner

Case IPR2015-00369
Patent 6,128,290

PETITIONER APPLE INC.'S MOTION TO EXCLUDE

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I. Relief Requested

Petitioner Apple Inc. ("Apple") asks the Board to exclude from the record inadmissible exhibits submitted by Patent Owner DSS Technology Management, Inc. ("DSS"). More specifically, the Board should exclude Exhibits 2003–2008, 2011–2014, and 2017. It is not enough for the Board to find that this Motion is moot if the Board does not rely on the inadmissible exhibits in reaching its Final Written Decision. If the exhibits remain in the record, DSS could continue to rely on them on appeal to the Federal Circuit, and Apple would be unfairly forced to face them again.

II. The Board should exclude Exhibit 2003.

Mr. Dezmelyk quotes Exhibit 2003, suggesting that a "low duty cycle" is "usually between 0.1% and 10%, depending on the band and the intended usage." (DSS 2016, Dezmelyk Decl. ¶ 18.) Apple timely objected to Exhibit 2003 as inadmissible hearsay without any applicable exception (FRE 801) and irrelevant (FRE 401). (Paper 18, p. 2.) The Board should exclude Exhibit 2003 for at least these reasons.

A. Exhibit 2003 is hearsay.

Hearsay is an out-of-court statement offered to prove the truth of the matter asserted. FRE 801. The statement in the Dormer article quoted by Mr. Dezmelyk was made outside of this proceeding and is an out-of-court statement. Yet Mr.

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Dezmelyk asserts the quotation from the Dormer article for its truth—that a "low duty cycle" is "usually between 0.1% and 10%, depending on the band and the intended usage." This is classic hearsay and no exception applies to this article. Therefore, the Board should exclude Exhibit 2003.

B. Exhibit 2003 is irrelevant.

Evidence is relevant and admissible only if (1) it has any tendency to make a fact more or less probable than it would be without the evidence, and (2) the fact is of consequence in determining the action. FRE 401. Because Exhibit 2003 is not relevant, it is inadmissible.

First, the '290 patent was filed on October 14, 1997. So even assuming *arguendo* that the Dormer article was published in 2008 based on the listed copyright date—which Apple does not concede—Dormer was published eleven years after the '290 patent's filing date. In the rapidly changing wireless communication field, it is inappropriate to assume that the quotation from Exhibit 2003 would have been applicable eleven years earlier. Exhibit 2003 is not remotely contemporaneous with the '290 patent and, as such, is not relevant for defining "low duty cycle." *See Stewart-Warner Corp. v. City of Pontiac*, 767 F.2d 1563, 1570 (Fed. Cir. 1985) (citing *In re Farrenkopf*, 713 F.2d 714, 720 (Fed. Cir. 1983)) (recognizing that development by others may be pertinent, but noting that "the evidence presented was of activities occurring well after the filing date" and "was

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