UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.
Petitioner

v.

DSS TECHNOLOGY MANAGEMENT, INC.
Patent Owner

Case IPR2015-00373
Patent 6,128,290

PETITIONER APPLE INC.'S REPLY TO PATENT OWNER'S OPPOSITION TO MOTION TO EXCLUDE

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Patent Trial and Appeal Board
U.S. Patent & Trademark Office
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I. Exhibits 2003-2008, 2011-2014, and 2017 are hearsay.

DSS alleges that Exhibits 2003-2008, 2011-2014, and 2017 are not hearsay because they "serve a non-hearsay purpose" by being offered "for what they describe to a person of ordinary skill in the art ('POSITA'), and not for the truth of the matter asserted therein." (Paper 31, p. 2.) This is not so. DSS and Mr. Dezmelyk simply provide quotes from these Exhibits. (*See e.g.*, DSS 2016, Dezmelyk Decl., ¶¶ 18, 24, 25, 28, 35, 43; *see also* Paper 15, pp. 3, 12.) Thus, they are indeed being offered exactly for the impermissible purpose of proving the truth of the matter asserted therein. The Board should exclude these Exhibits as hearsay.

Moreover, Exhibits 2003-2008, 2012-2014, and 2017 post-date the '290 patent or are entirely undated and therefore cannot "show what one with ordinary skill in the art ***would have known*** about technical features and developments in the pertinent art." *Liberty v. Progressive*, CBM2012-00010, Paper 59, p. 37 (P.T.A.B. Feb. 24, 2014) (emphasis added). Indeed, the viewpoint for the obviousness inquiry is "***at the time the invention was made*** to a person having ordinary skill in the art." 35 U.S.C. § 103(a) (pre-AIA) (emphasis added). Because these post-dated Exhibits do not show what a person of ordinary skill in the art would have known at the time the alleged invention was made, they do not serve a "non-hearsay purpose." Accordingly, the Board should exclude these Exhibits as hearsay.

II. FRE 703 is not a loophole for Exhibits 2003-2008 and 2011-2014.

DSS inappropriately relies on FRE 703 as a mechanism for the admission of Exhibits 2003-2008 and 2011-2014. First, DSS neglects that FRE 703 applies only "[i]f experts in the particular field would reasonably rely on those kinds of facts or data in forming an opinion on the subject…." FRE 703. DSS makes no such allegation. And the necessary supposition that an expert would "reasonably rely" on post-dated or undated documents is dubious at best. Even assuming *arguendo* that an expert would have reasonably relied on these Exhibits, FRE 703 is intended to "emphasize that when an expert reasonably relies on inadmissible information to form an opinion or inference, ***the underlying information is not admissible simply because the opinion or inference is admitted***." FRE 703, Committee Notes on Rules–2000 Amendment (emphasis added).

Second, DSS's Exhibits are admissible "***only if*** their probative value in helping the jury evaluate the opinion ***substantially outweighs*** their prejudicial effect." FRE 703 (emphasis added). Indeed, FRE 703 is intended to "provide[] a ***presumption against*** disclosure to the jury of information used as the basis of an expert's opinion and not admissible for any substantive purpose, when that information is offered by the proponent of the expert." FRE 703, Committee Notes on Rules–2000 Amendment (emphasis added). In its Opposition, DSS baldly asserts that "because these exhibits are probative, they are admissible," without any explanation as to why the Exhibits are probative. (Paper 31, p. 3.) DSS does not

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