

IPR2015-00806

U.S. 7,765,482

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

GOOGLE INC., and
SAMSUNG ELECTRONICS CO., LTD.,
Petitioners

v.

SUMMIT 6 LLC,
Patent Owner

Case: IPR2015-00806
Patent 7,765,482

PETITIONERS' MOTION TO EXCLUDE EVIDENCE

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I. Statement of Relief Requested

Google Inc. and Samsung Electronics Co., Ltd. (“Petitioner”) respectfully request that the Board exclude all or part of Exhibits 2015, 2044, 2045, 2050, 2051, 2058, 2073, and 2074.

II. Legal Standards

Pursuant to the AIA Trial Practice Guide, “[a] motion to exclude evidence must: (a) identify where in the record the objection originally was made; (b) identify where in the record the evidence sought to be excluded was relied upon by an opponent; (c) address objections to exhibits in numerical order; and (d) explain each objection.” Office Patent Trial Practice Guide, 77 Fed. Reg. 48,756, 48,767 (Aug. 14, 2012).

III. Exhibit 2015 - Market Study, “Image Servers - Early Adopter Case Studies,” (Tony Henning and Future Image, Inc., 2001)

Patent Owner relies on Exhibit 2015 in its Response to the Petition (Paper 28) (“Response”) in support of its alleged Secondary Considerations of Non-Obviousness. *See, e.g.*, Paper 28 at pp. 45, 49-51, 57, and 59. Petitioner Objected to this Exhibit on September 23, 2015. Paper 21 at 10-11 (Fed. R. Evid. 403, 802, 1002, and 1006).

First, Exhibit 2015 should be excluded under Rule 403 because “its probative value is substantially outweighed by a danger of one or more of ... unfair prejudice [and] confusing the issues.” Exhibit 2015 states at its outset that any data

presented is unreliable. Specifically, it states “[n]either Future Image nor these third-party providers represent, or endorse the accuracy of any advice, opinion, statement or other information presented in this report” Ex. 2015 at 2. Indeed, Exhibit 2015 includes a disclaimer that “[y]ou rely upon and use this report, including opinion, advice, statements, or any other information presented here, at your own risk” *Id.* Thus, Exhibit 2015 presents data that it admits is unreliable. Furthermore, Summit 6’s witnesses testified that the testimonials discussed in the Exhibit are from iPIX employees. Exs. 1019 at 114:23-25 and 2051 at ¶ 36. These iPIX employees had a vested interest in presenting iPIX and its software in the most favorable light rather than the most accurate light. Thus, any probative value of Exhibit 2015 is outweighed by the risk of unfair prejudice or confusing the issues.

Second, Patent Owner presents Exhibit 2015 for the truth of the information presented in the Exhibit. Exhibit 2015 is hearsay and there is no applicable exception. Patent Owner may argue that Exhibit 2015 qualifies under the business records exception to hearsay under Rule 803(6). However, Patent Owner presents no testimony that this document meets the requirements of the business records exception: (A) that the document “was made at or near the time by — or from information transmitted by — someone with knowledge,” (B) that the document “was kept in the course of a regularly conducted activity of a business,” (C) that

“making the record was a regular practice of that activity,” (D) that “all these conditions are shown by the testimony of the custodian or another qualified witness,” and (E) that “the opponent does not show that the source of information or the method or circumstances of preparation indicate a lack of trustworthiness.” Fed. R. Evid. 803(6). Summit 6’s testimony that this document is a true and correct copy is not sufficient to establish that any hearsay exception applies. *See* Ex. 2051, ¶ 36. Further, the last element is plainly unmet, because, as discussed above, the Exhibit states that the information it presents should not be relied upon.

Third, in multiple places Exhibit 2015 includes hearsay within hearsay. For example, Exhibit 2015 repeatedly discusses the state of mind of eBay or eBay management. *See, e.g.*, Ex. 2015 at 11 (“eBay management is confident that Rimfire has achieved the key goal of improving the ‘velocity of trade’”). As discussed above, there is no applicable exception for this hearsay within hearsay.

Fourth, Exhibit 2015 presents summaries of data, but it does not present any raw data. Rule 1006 requires that a summary, chart, or calculation is permissible only if “the originals or duplicates [are made] available for examination or copying, or both, by other parties at a reasonable time and place.” Patent Owner cannot make this raw data available. *See* Ex. 2075, Frazier Dep. at 26:14-16 (Q. ... [I]f we had the underlying data we would have provided it to you.”). Further, this data is required to fully understand the document. Indeed, Dr. Frazier testified that

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