UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner

v.

REALTIME DATA, LLC D/B/A/ IXO,
Patent Owner

Case IPR2016-01738
Patent 8,880,862

PATENT OWNER REALTIME DATA, LLC D/B/A IXO'S REPLY TO PETITIONER'S OPPOSITION TO PATENT OWNER'S MOTION TO EXCLUDE PURSUANT TO 37 C.F.R. § 42.64

I. Exhibit 1038 Comprises Inadmissible, Irrelevant Hearsay.

Apple argues that Exhibit 1038 is not hearsay because Apple offers it for what it describes to an ordinary artisan, and not to prove the truth of the matters asserted in the document.[1] The record shows otherwise. Apple and Dr. Neuhauser rely on Exhibit 1038 to prove Zwiegincew's "scenario files" are "operational and useful during operating system boot."[2] This is the very matter addressed in the document. And Dr. Neuhauser conceded at deposition that Exhibit 1038 is not prior art to the '862 Patent and relates, at best, to the understanding of an ordinary artisan *after* the relevant February 2000 timeframe:

> Q. And the [Ex. 1038] Zwiegincew '968, in fact, is not prior art, right?
> A. That's correct.
> Q. So whatever the [Ex. 1038] Zwiegincew '968 reference may have taught one of ordinary skill in the art would not be relevant to any kind of determination of obviousness as to the '862 patent, right?
> [A.] Well, the best I can say is it does tell you something about [inventor] Zwiegincew's thinking, but the thinking, as far as I can tell, might have been after the fact of February 2000.[3]

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[1] Opp'n to Mot. at 2 (internal quotations omitted).

[2] Reply (Paper 24) at 10-11; Neuhauser Dec. (Ex. 1043) at ¶ 78.

[3] Nov. 21, 2017 Neuhauser Tr. (Ex. 2026) at 164:21-165:9 (objection omitted); *see also id.* at 166:22-167:1, 168:8-12; Sept. 27, 2017 Neuhauser Tr. (Ex. 2024) at

This same testimony also shows that Exhibit 1038 is irrelevant. Because Dr. Neuhauser acknowledges that Exhibit 1038 isn't prior art and doesn't describe the understanding of a POSITA during the relevant timeframe, this exhibit doesn't make a fact in this proceeding more or less probable.[4] Indeed, this admission illustrates that Exhibit 1038 does not support Dr. Neuhauser's opinions, despite Apple's contention to the contrary.

The Board has excluded similar evidence in other proceedings, and should do so here. For instance, the Board in *Microsoft v. Bradium Technology* rejected the argument that a valuation summary was being offered to show the occurrence and timing of acquisition discussions between the parties—not the truth of what said in the exhibit, i.e., that the technology had any particular worth.[5]

103:3-12, 106:5-11 (testifying Zwiegincew doesn't talk about using scenario files in the context of booting an operating system like Settsu's).

[4] *See* Opp'n to Mot. at 6; *but see* Ex. 2026 at 164:21-65:9; 168:8-12.

[5] IPR2016-00448, Paper No. 67 at 3 (PTAB July 24, 2017). Contrary to Apple's assertion, Exhibit 1038 doesn't qualify under the residual hearsay exception because the Zwiegincew reference (Ex. 1010) is more probative on what the prior art teaches than Exhibit 1038.

II. Exhibits 1048 and 1049 Comprise Inadmissible, Irrelevant Hearsay.

In support of its argument that Exhibits 1048 and 1049 are relevant and admissible, Apple asserts that Dr. Neuhauser relied on Exhibits 1048 and 1049 "in formulating his opinion that cost would have motivated a POSITA to use RAM over flash memory," citing nine paragraphs of his last declaration.[6] This is untrue. Dr. Neuhauser never refers to these exhibits in his declaration nor to any data purportedly described in them.[7] Instead, Dr. Neuhauser relied only on Dye for his opinion regarding the cost differential between RAM and flash memory. He affirmed this at deposition:

> ***Q. Throughout your two declarations, the only citation that you have to external evidence about the relative cost of flash and RAM as of around February 2000 is this reference to Dye [Ex. 1008], right?***
> [A] That's – let me just look at one thing here.
> (Witness peruses document.)
> ***[A.] Yes, I think that's correct.***
> . . .
> ***Q. All right. In your declarations, you didn't undertake a systematic analysis of the literature in the late '90s and early 2000s to specifically identify the cost difference between flash and RAM on a per-megabyte basis, true?***

[6] Opp'n to Mot. at 9.

[7] *See, e.g.*, Ex. 1043 at ¶¶ 4, 25; *see also* Ex. 1003 at ¶ 4; Ex. 1030 at ¶ 4.

A. That's not in my declaration, that's correct.[8]

Hence, Dr. Neuhauser's testimony confirms the irrelevance of Exhibits 1048 and 1049. And Apple's misrepresentation of Dr. Neuhauser's opinion is sanctionable, including via an order excluding evidence, as set forth under 37 C.F.R. § 42.12.

Apple also argues that Exhibits 1048 and 1049 are not hearsay because they prove the existence of a cost difference between RAM and flash memory during the relevant timeframe.[9] But again, Apple offers these exhibits to prove the truth of the matters asserted within them, and they thus comprise inadmissible hearsay. Apple's fallback assertions that Exhibits 1048 and 1049 fall into a hearsay exception similarly lack merit.[10] That a document provides purported financial data for a particular time period does not render it a "market report" under FRE 803(17), as Apple avers. And the record contains no evidence that persons of ordinary skill in the art relied upon either exhibit. Exhibit 1048, moreover, does not

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[8] Ex. 2026 at 76:16-77:15 (objection omitted); *see also id.* at 141:8-12 ("Q. In your declarations you say, based on Dye only, that the price differential as of February 2000 was significantly in favor of RAM, such that it was significantly less for RAM, true? A. That's correct.")

[9] Opp'n to Mot. at 9.

[10] *Id.* at 10-11.

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