

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'S RESPONSE TO PETITIONER'S MOTION FOR
OBSERVATIONS REGARDING THE CROSS-EXAMINATION
TESTIMONY OF DR. GODMAR BACK**

Pursuant to the Board's Order (Paper 36), Patent Owner Realtime responds to Petitioner Apple's Motion for Observations (Paper 49).

Realtime objects to Apple's observations because they violate the Office Trial Practice Guide.¹ First, Observations 1 through 3 improperly use Dr. Back's November 2, 2017 cross-examination testimony to address subsequent Realtime briefing and testimony, filed on December 2, 2017. Second, each Observation includes a header that is argumentative. Third, Observations 4, 9, 10, and 12 raise new arguments. Fourth, Observation 1 is three pages and includes six subparagraphs and is thus excessively long.

Realtime further objects to Observations 4, 7, 8, 11, 12, and 15 because they impermissibly seek to place the burden of persuasion on Realtime regarding the contingent motion to amend.

RESPONSE TO OBSERVATION 1

Ex. 1046 at 45:18-46:16. The cited testimony is not relevant because Dr. Back was discussing the teachings of the '862 Patent itself, not the prior art references. And this observation takes Dr. Back's testimony out of context. At 44:19-45:3 and 47:1-6 of Ex. 1046, Dr. Back testified that he did not offer an

¹ 77 Fed. Reg. at 48767-68 (Aug. 14, 2012).

opinion in his declarations on whether the “second memory” in Amended Claim 174 is volatile or non-volatile memory.

Ex. 1046 at 47:21-48:6 and 50:10-51:1. The cited testimony is not relevant because Dr. Back was discussing the teachings of the ‘862 Patent itself, not the prior art references. And this observation takes Dr. Back’s testimony out of context. At 51:9-12 of Ex. 1046, Dr. Back testified that he did not offer an opinion in his declarations on whether the cache 13 in the ‘862 specification is volatile or non-volatile memory.

Ex. 1046 at 58:9-59:1. This observation takes Dr. Back’s testimony out of context. The whole quotation is provided below:

Q: Okay. So setting that aside, your reference to Doctor Neuhauser’s declaration, I’d like to know whether it’s your opinion that flash memory was expensive on a per bit basis at the time of invention relative to volatile memory.

THE WITNESS: I think that an in depth price analysis of memory was outside the scope of my assignment. However, as I mentioned earlier, *in the context of the specification of the ‘862 patent*, a person of ordinary skill would probably be discouraged from the use of non-volatile memory for a number of reasons, one of which is the higher price of the memory. (Ex. 1046 at 58:9-59:1 (emphasis added).)

Ex. 1046 at 60:12-21. The cited testimony is not relevant because it does not relate to the price of RAM versus flash memory. And this observation

mischaracterizes the referenced “statement by Dr. Neuhauser.” At 57:9-22 of Ex. 1046, Dr. Back discussed footnote 8 of his June 14, 2017 Declaration (Ex. 2008), which cites to paragraph 44 of Neuhauser’s First Declaration (Ex. 1003). Dr. Neuhauser’s paragraph 44 refers to the price of flash memory to hard-disk drive, not flash memory to RAM. (Ex. 1003 at ¶ 44.)

Ex. 1046 at 64:5-15. The cited testimony is not relevant because Dr. Back was discussing the teachings of the ‘862 Patent itself, not the prior art references.

Ex. 1046 at 65:18-66:3, 66:5-67:2, 68:13-69:2, and 117:20-118:9. The cited testimony is not relevant because Dr. Back was discussing the teachings of the ‘862 Patent itself, not the prior art references.

RESPONSE TO OBSERVATION 2

Ex. 1046 at 76:22-78:15, 81:12-82:2, and 82:4-83:8. This observation mischaracterizes Dr. Back’s testimony. At 79:3-18 of Ex. 1046, Dr. Back testified that his opinion on “preloading” in the current IPR is not different from or narrower than that in the IPR2016-0365 proceeding.

RESPONSE TO OBSERVATION 3

Ex. 1046 at 138:13-22, 130:1-132:2, 120:13-121:11. This observation mischaracterizes Dr. Back’s testimony regarding when the claimed “preloading” starts and ends. At 114:7-21 of Ex. 1046, Dr. Back testified:

Q: Okay. Is it your opinion that the preloading process can be performed during the boot process?

THE WITNESS: So the paragraph states that the preloading process may be completed prior to the commencement of the boot process, *which implies that it has to start before the boot process*. And it says that it can be continued after the boot process begins, and then the two may be performed simultaneously. *I don't think that is equivalent to what you were asking in your question*. (Emphasis added. See also *id.* at 121:13-122:10.)

RESPONSE TO OBSERVATION 4

Ex. 1046 at 145:8-146:12, 148:2-8, and 149:15-150:4. The cited testimony is not relevant because, at the time of Dr. Back's November 2, 2017 testimony (Ex. 1046), Apple had never argued that Settsu's function definition file would be used to load and initialize some OS modules prior to others, to allow specific processes to occur faster during boot. Also, this observation mischaracterizes Dr. Back's testimony. The cited testimony was discussing the specific combination proposed by Apple and Dr. Neuhauser.

RESPONSE TO OBSERVATION 5

Ex. 1047 at 112:19-113:4 and 113:6-13. This observation fails to provide the full context of Dr. Back's testimony. At 113:15-114:11 of Ex. 1047, Dr. Back testified a POSITA would not have understood Kroeker's request for data must occur during the boot process. At 117:9-118:8 and 119:5-120:13 of Ex. 1047, Dr. Back explained that Kroeker's prefetching is not relevant to Apple's cost and

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