UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

APPLE INC.,
Petitioner,

v.

REALTIME DATA LLC,
Patent Owner.

Case IPR2016-01738
Patent 8,880,862

PETITIONER'S OPPOSITION TO PATENT OWNER'S

MOTION TO EXCLUDE

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I. Introduction

Patent Owner, Realtime Data, LLC ("Realtime"), filed a motion to exclude Exhibits 1038, 1040, 1043, 1048, and 1049 on December 22, 2017. As discussed below, Petitioner hereby withdraws Exhibits 1040 and 1043.

As to Exhibits 1038, 1048, and 1049, Realtime fails to adequately explain why these exhibits are inadmissible, merely asserting inadmissibility and improperly shifting the burden to Petitioner to explain why Exhibits 1038, 1048, and 1049 are admissible. Realtime, as the moving party, bears the burden to show entitlement to the relief requested by the motion to exclude. 37 C.F.R. § 42.20. Realtime has not done so.

Indeed, relevant evidence is generally admissible. *See* FRE 402. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action. FRE 401. "The Rule's basic standard of relevance thus is a liberal one." *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 587 (1993). Moreover, where necessary, administrative agencies further relax the rules of evidence to account for the skill possessed by administrative judges to handle evidence that may otherwise mislead a jury. *See Peabody Coal Co. v. McCandless*, 255 F.3d 465, 469 (7th Cir. 2001). With this in mind, the PTAB favors inclusion. *See*, *e.g.*, *Liberty Mutual Ins. v. Progressive Casualty Ins.*, CBM2012-00002, Paper 66, pp.

60-61 (PTAB Jan. 23, 2014) ("It is better to have a complete record of the evidence submitted by the parties than to exclude particular pieces."). As discussed in more detail below, Exhibits 1038, 1048, and 1049 are relevant to this proceeding and admissible.

In accordance with 37 C.F.R. §42.64, Petitioner's opposition addresses "the objections in the record in order," starting with the objections to Exhibit 1038. For the reasons discussed below, Patent Owner's Motion to Exclude Exhibits 1038, 1048, and 1049 should be denied.

II. Exhibit 1038 Should Not be Excluded as Hearsay

Exhibit 1038 is issued U.S. Patent No. 6,633,968 to Zwiegincew et al. Realtime contends that Exhibit 1038 "constitutes impermissible hearsay without an applicable exception." Motion to Exclude, p. 1. Realtime is incorrect.

As an initial matter, the substance of Exhibit 1038 is not hearsay. Indeed, the substance of the Zwiegincew patent is being "offered as evidence of what it describes to an ordinary artisan, not for proving the truth of the matters addressed in the document." *Biomarin Pharm. Inc., v. Genzyme Therapeutic Products Ltd. P'ship*, IPR2013-00537, Paper No. 79, p. 25 (P.T.A.B. Feb. 23, 2015); *see also EMC Corp. v. Personal Web Technologies, LLC*, IPR2013-00085, Paper 73, p. 66 (PTAB May 15, 2014).

Moreover, Exhibit 1038 was relied upon by Dr. Neuhauser in formulating his opinion that Zwiegincew's scenario files are operational and useful during operating system boot. *See, e.g.,* Ex. 1003, ¶¶ 63-64, 68, 148-149, 184-186, 202-204; Ex. 1030, ¶¶ 22, 26-28, 38-39, 46; Ex. 1045, ¶ 78. For at least this reason, Exhibit 1038 should not be excluded because, under FRE 703, it is proper for Dr. Neuhauser to rely on facts and/or data, even if otherwise inadmissible, to the extent that (as here) experts in the field would reasonably rely on those kinds of facts or data in forming an opinion on the subject. FRE 703 goes on to state that the proponent of the opinion may disclose otherwise inadmissible facts or data to the jury if their "probative value in helping the jury evaluate the opinion substantially outweighs their prejudicial effect." In this case, Realtime makes no argument that Exhibit 1038 is untrustworthy or inaccurate, and your Honors are certainly well-qualified to evaluate the competing opinions on Zwiegincew in view of Exhibit 1038 without being prejudiced. Indeed, "because the Board is not a lay jury, and has significant experience in evaluating expert testimony, the danger of prejudice in this proceeding is considerably lower than in a conventional district court trial." *SK Innovation Co., Ltd. v. Celgard, LLC*, IPR2014-00679, Paper No. 58, p. 50 (PTAB Sept. 25, 2015). Thus, Exhibit 1038 is proper and should not be excluded. *Id.*, pp. 50-51.

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