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 IPR2016-01739
Patent 8,880,862

PATENT OWNER REALTIME DATA, LLC D/B/A IXO'S MOTION TO EXCLUDE EVIDENCE PURSUANT TO 37 C.F.R. § 42.64(c)

Pursuant to 37 C.F.R. § 42.64, Patent Owner Realtime moves to exclude Petitioner Apple's Exhibits 1038-1040 and 1044. Apple submitted these exhibits in support of its Reply (Paper 17) and Realtime timely objected (Paper 18) on September 7, 2017.

I. EXHIBIT 1038 SHOULD BE EXCLUDED AS INADMISSIBLE AND IRRELEVANT HEARSAY.

Exhibit 1038 is hearsay and lacks relevance. Apple appears to offer Exhibit 1038 to establish that the Zwiegincew prior art reference (Exhibit 1010) discloses a scenario file operational during a boot cycle.[1] As such, Apple offers Exhibit 1038 to prove the truth of the matter being asserted here regarding the disclosures of Zwiegincew. This constitutes impermissible hearsay without an applicable exception.

Specifically, Apple asserts in its Reply:

> [E]vidence [in Exhibit 1038] shows scenario files, such as [Exhibit 1010] Zwiegincew's, are operational and useful during operating system boot. Thus… a POSITA would have found it obvious to use [Exhibit 1010] Zwiegincew's scenario file for boot and, when used for boot, [Exhibit 1010] Zwiegincew's scenario file is a boot data list that is updated.[2]

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[1] Reply (Paper 17) at 14.

[2] *Id.* (citing Exhibit 1038 at Abstract, 2:65-3:16, 11:59-12:4, 14:20-43).

Apple is therefore offering Exhibit 1038 to prove that Zwiegincew discloses "scenario files" that are useful to manage the boot-up process of an operating system in order to render obvious the challenged claims. But Apple does not provide any evidence to establish that the information cited in Exhibit 1038 refers to the same "scenario files" and "boot" relied upon in Zwiegincew. Nor does Apple establish that the information cited in Exhibit 1038 was publicly available and accessible prior to the earliest priority data of the '862 Patent. No known hearsay exceptions are offered by Apple and indeed, none is applicable pursuant to FRE 802. As such, Exhibit 1038 constitutes inadmissible hearsay that should be excluded.

The Board has excluded similar evidence as being inadmissible hearsay when the evidence constitutes an out-of-court statement offered to prove the truth of a fact in dispute in that proceeding. In *Smart Microwave Sensors GmbH v. Wavetronix LLC*, for example, the Board excluded exhibits as inadmissible hearsay when those exhibits constituted out-of-court statements regarding the disputed publication date of a prior art reference.[3]

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[3] IPR2016-00488, Paper 57 at 27-28, 30-31 (PTAB July 17, 2017); *see also Microsoft Corp. v. Bradium Techs. LLC*, IPR2016-00448, Paper 67 at 2-7 (PTAB July 24, 2017) (excluding as inadmissible hearsay certain exhibits regarding

Exhibit 1038 is also not relevant under FRE 402. The test for relevance requires that evidence tends to make a fact of consequence in the action more or less probable than it would be without the evidence.[4] Here, no evidence exists that Exhibit 1038's "scenario files" and "boot" refer to the same "scenario files" and "boot" on which Apple relies in Zwiegincew. Exhibit 1038 is a continuation-in-part of the application that issued as Zwiegincew.[5] By virtue of it being a continuation-in-part, Exhibit 1038 necessarily "add[s] new matter not disclosed in the said earlier nonprovisional application" issued as Exhibit 1010.[6] Apple has therefore failed to establish that the cited evidence in Exhibit 1038 is relevant to this proceeding. Apple does not establish that the information cited in Exhibit 1038 was publicly available and accessible prior to the earliest priority data of the '862 Patent. Because Exhibit 1038 does not tend to make a fact of consequence in this proceeding more or less probable than it would be without the exhibit, Exhibit 1038 is irrelevant and inadmissible under FRE 401 and 402.

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alleged prior art systems and the state of the industry); *Shimano Inc. v. Globeride, Inc.*, IPR2015-00273, Paper 40 at 26-27 (PTAB June 16, 2016) (similar).

[4] FRE 401.

[5] Exhibit 1038 at cover; Exhibit 1010 at cover.

[6] MPEP 201.08.

II. EXHIBITS 1039 AND 1040 SHOULD BE EXCLUDED BECAUSE APPLE DOES NOT RELY UPON THOSE EXHIBITS IN THIS PROCEEDING.

Exhibits 1039 and 1040 are inadmissible under FRE 402 for failing the test for relevance set forth in FRE 401. Apple identifies Exhibits 1039 and 1040 as "Defendant Apple Inc.'s Invalidity Contentions, Case No. 4:16-cv-02595-JD (N.D. Cal.)" and "Transcript of June 20, 2017 Deposition of Dr. Back," respectively.[7] Apple, however, does not cite to any portions of Exhibits 1039 and 1040 in this proceeding. Nor does Apple explain the significance Exhibits 1039 and 1040 have to any issue here. Exhibits 1039 and 1040 are therefore irrelevant to this proceeding and should be excluded.

The Board has excluded similar evidence as being irrelevant when such evidence is not cited by the offering party or expert declarants. In *Shimano Inc. v. Globeride, Inc.*, for example, the Board excluded 22 exhibits because the offering party did not rely on those exhibits in its filings.[8] Here, Exhibit 1039 and 1040 do

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[7] Reply (Paper 17) at iv.

[8] IPR2015-00273, Paper 40 at 26-28 (PTAB June 16, 2016); *see also Google Inc. v. Performance Price Holdings, LLC*, CBM2016-00049, Paper 37 at 36-40 (Sept. 13, 2017) (excluding as irrelevant three exhibits that were not cited in patent owner's response or by its expert); *Apple Inc. v. Smartfish LLC*, CBM2015-00017,

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