

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAMSUNG ELECTRONICS LTD, SAMSUNG ELECTRONICS
AMERICA, INC., and APPLE INC.,

Petitioner,

v.

SMARTFLASH LLC,

Patent Owner.

Case CBM2014-00192¹

Patent 8,033,458 B2

PATENT OWNER'S MOTION TO EXCLUDE EVIDENCE

¹ CBM2015-00119 has been consolidated with this proceeding.

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I. Statement of Precise Relief Requested

Pursuant to 37 C.F.R. §§ 42.62 and 42.64(c), Patent Owner Smartflash LLC moves to exclude Exhibits 1003, 1004, 1005, 1006, 1028, and 1039.

II. Patent Owner Smartflash Timely Objected to Petitioner's Exhibits

Patent Owner Smartflash LLC timely objected to CBM2014-00192 Exhibits 1003, 1004, 1005, 1006, 1028, and 1039 by serving Patent Owner's Objections to Admissibility of Evidence on April 15, 2015. Exhibit 2095.

III. Argument

Pursuant to 37 C.F.R. § 42.64(c), the Federal Rules of Evidence ("FRE") apply in Covered Business Method Review proceedings.

A. Exhibit 1003 Is Inadmissible

1. Exhibit 1003 Lacks Foundation And Is Unreliable

Petitioner relies on Exhibit 1003 on pages 3, 7, 9, 10, 22, 24, 25-29, 31, 32, 34, 38, 40, 41, 43, 46, 47, 50, 53, 54, 56, 58, 60, and 61 of the Petition (Paper 2) and pages 5, 6, 8, 9, 11, and 13-18 of Petitioner's Reply (Paper 28). Patent Owner moves to exclude Exhibit 1003, Declaration of Dr. Jeffrey A. Bloom ("Bloom Declaration"), on grounds that it lacks foundation and is unreliable because it fails to meet the foundation and reliability requirements of 37 CFR § 42.65(a) and FRE 702.

37 CFR § 42.65(a) provides:

§ 42.65 Expert testimony; tests and data.

(a) ***Expert testimony that does not disclose the underlying facts or data on which the opinion is based is entitled to little or no weight.*** Testimony on United States patent law or patent examination practice will not be admitted.

37 CFR § 42.65(a) (emphasis added). FRE 702 provides:

RULE 702. TESTIMONY BY EXPERT WITNESSES

A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:

- (a) The expert’s scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
- (b) The testimony is based on sufficient facts or data;
- (c) The testimony is the product of reliable principles and methods; and
- (d) The expert has reliably applied the principles and methods to the facts of the case.

FRE 702.

Patent Owner moves to exclude the Bloom Declaration because it does not disclose the underlying facts or data on which the opinions contained are based as required by 37 CFR § 42.65(a), given that it does not state the relative evidentiary weight (e.g., substantial evidence versus preponderance of the evidence) used by Dr. Bloom in arriving at his conclusions. “A finding is supported by substantial evidence if a reasonable mind might accept the evidence to support the finding.” *Q. I. Press Controls, B.V. v. Lee*, 752 F.3d 1371, 1378-1379 (Fed. Cir. 2014)(citing *Consol. Edison Co. v. NLRB*, 305 U.S. 197, 229, 59 S. Ct. 206, 83 L. Ed. 126

(1938)). Proof by a “preponderance of the evidence” means “that it is more likely than not.” See, *O2 Micro Int'l Ltd. v. Beyond Innovation Tech. Co.*, 449 Fed. Appx. 923, 928 (Fed. Cir. 2011).

Petitioner has cited, and likely will cite again, *Apple Inc. v. Smartflash LLC*, CBM2014-00102, Paper 8 at 4, and *Vibrant Media v. General Electric Company*, IPR2013-00172, Paper 50 at 42, for the proposition that an expert need not expressly set forth the evidentiary standard used in formulating opinions. See, Petitioner’s Reply to Patent Owner’s Response, Paper 28, at 4-5. In particular, Petitioner will likely rely on the Board’s conclusion in *Vibrant Media* that “it is within [the Board’s] discretion to assign the appropriate weight to be accorded to evidence based on whether the expert testimony discloses the underlying facts or data on which the opinion is based.” Petitioner’s Reply, Paper 28 at 5 (citing *Vibrant Media*, Paper 50 at 42). The Board’s conclusion in *Vibrant Media*, however, ignores that under FRE 702, the admissibility of expert testimony requires a finding not only that “the testimony is based on sufficient facts or data” (FRE 702(b)), but also that “the testimony is the product of reliable principles and methods” (FRE 702(c)) and that “the expert has reliably applied the principles and methods to the facts of the case” (FRE 702(d)).

Here, the Board cannot assess under FRE 702 whether Dr. Bloom’s opinion testimony is “based on sufficient facts or data,” is “the product of reliable

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