UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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

Petitioner,

v.

SMARTFLASH LLC,

Patent Owner.

_____

Case CBM2014-00194[1]

Patent 8,116,221 B2

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PATENT OWNER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE

[1] CBM2015-00117 has been consolidated with this proceeding.

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I. Introduction

Petitioner's Reply to Patent Owner's Motion to Exclude Evidence ("Pet.'s Rep."), Pap. 41, does not provide valid reasons why exhibits 1003, 1004, 1005, 1006, 1028, and 1039 should not be excluded pursuant to §§ 42.62 and 42.64(c).

II. Argument

A. Ex. 1003 Is Inadmissible

1. Ex. 1003 Does Not Meet Foundation or Reliability Requirements

As predicted, Petitioner relies on *Vibrant Media v. General Electric Company*, IPR2013-00172, Pap. 50 at 42 and *Apple Inc. v. Smartflash LLC*, CBM2014-00102, Pap. 8 at 4, to argue that an expert need not expressly set forth the evidentiary standard used in formulating opinions. Rather than addressing directly PO's argument that for Bloom's testimony to be given weight under 37 CFR § 42.65(a) and to be admissible under FRE 702[2] it must disclose the underlying facts or data on which the opinion is based, must be based on sufficient facts or data, must be the product of reliable principles and methods, and must show that the expert has reliably applied the principles and methods to the facts of the case (PO's Mot. to Exclude, Pap. 34, at 1-4), Petitioner criticizes PO's cross

[2] Petitioner's claim that PO waived objection to Ex. 1003 under §§ 42.64(a), 42.65 and FRE 702 (Pap. 41 at 5) rings hollow; PO objected to Ex. 1003 in its entirety under 37 CFR § 42.65, which, like FRE 702, addresses whether an opinion is based on sufficient facts or data such that it can be deemed reliable. Ex. 2097 at 2.

examination of Bloom. "Smartflash failed to question Dr. Bloom as to any reliable principles and methods that he used to render his opinion." Pap. 41 at 5. Petitioner ignores that the *proponent* of expert testimony bears the burden of proving admissibility. FRE 702, *Committee Notes on Rules – 2000 Amendment* (admissibility of expert testimony governed by principles of Rule 104(a); proponent has burden of establishing pertinent admissibility requirements met by preponderance of the evidence). Petitioner also ignores that Bloom's Declaration, by not disclosing the standard by which he examined evidence, fails to provide assurances that his testimony meets the requisites of § 42.65(a) and FRE 702.

Petitioner further argues that Bloom's attestation that statements set forth in his declaration are correct renders them "more likely true than not true based on evidence known to him" and thus "Dr. Bloom's statements are self-revealing of his satisfaction of the preponderance of evidence standard." Pap. 41 at 5. Petitioner confuses *statements*, such as stating the content of what a particular cited document says, with expert *opinions*. The question here is whether Bloom's expert *opinions* are based on sufficient facts or data, the product of reliable principles and methods, and the result of reliably applying the principles and methods to the facts. Bloom's Declaration is devoid of discussion of the evidentiary standard applied to the underlying facts in arriving at his opinions. The Board cannot assess Bloom's opinion testimony absent disclosure of the standard he used to weigh evidence.

2. Ex. 1003 ¶¶ 23-112 And Ex. 1004-1006 Are Not Relevant

There can be no dispute that ¶¶ 23-112 of the Bloom Dec. are directed to patentability under § 103 and discussions of the Gruse and Stefik references, Exhs. 1004 to 1006. There also can be no dispute that Petitioner proffered the Gruse and Stefik references as grounds for § 103 invalidity. Petition, Pap. 2 at 3. Given that the institution decision did not adopt any § 103 grounds (Pap. 9 at 20), ¶¶ 23-112 and Exhs. 1004-1006 are not relevant to the proceeding as instituted. While Petitioner now claims that the paragraphs and exhibits are "relevant to the § 101 inquiry of patent eligibility" (Pap. 41 at 6-7, 11), that is not why they were proffered. Petitioner's § 101 arguments are in § V(A) of the Petition. § V(A) does not rely on those paragraphs or exhibits. Similarly, Bloom addresses § 101 subject matter ineligibility in § V of his Declaration. Not once in § V does Bloom cite ¶¶ 23-112 or Exhibits 1004 to 1006. Petitioner's argument that ¶¶ 23-112 and Exhs. 1004-1006 are relevant to the § 101 issue is belied by the failure to rely on them in the § 101 sections of the Petition or Bloom Declaration.

3. Ex. 1003 ¶¶ 23-26 and 113-128 Are Inadmissible

Nothing in Pet.'s Rep. establishes Bloom's qualifications to testify on the legal issue of § 101 subject matter. While Petitioner cites Ex. 1003 ¶¶ 5-22 as support for Bloom's "relevant, timely, and substantial industry experience with digital rights management" (Pap. 41 at 7) and criticizes PO for purportedly "not question[ing] the strength and depth of Bloom's industry experience with digital

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