

UNITED STATES PATENT AND TRADEMARK OFFICE

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BEFORE THE PATENT TRIAL AND APPEAL BOARD

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SAMSUNG ELECTRONICS AMERICA, INC. and  
SAMSUNG ELECTRONICS LTD,

Petitioner,

v.

SMARTFLASH LLC,

Patent Owner.

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Case CBM2014-00199

Patent 8,116,221 B2

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

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## **I. Introduction**

Petitioner's Reply to Patent Owner's Motion to Exclude Evidence ("Pet.'s Rep."), Pap. 37, does not provide valid reasons why exhibit 1003 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<sup>1</sup> 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. 30, at 1-4), Petitioner criticizes PO's cross

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<sup>1</sup> Petitioner's claim that PO waived objection to Ex. 1003 under §§ 42.64(a), 42.65 and FRE 702 (Pap. 37 at 4) 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. 2098 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. 37 at 4. 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 the Board 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. 37 at 4. 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 Paragraphs 104-112 Are Inadmissible Under § 42.65(a)**

Nothing in Pet.'s Rep. rebuts the fact that Ex. 1003 ¶¶ 104-112 constitute testimony on United States patent law/patent examination practice. PO did not "mischaracterize" ¶¶ 104-112 as testimony on United States patent law or patent examination practice. Pap. 37 at 5. Paragraphs 104-112 are in a section headed "*Legal Principles*" and relate to "*claim construction*," "*level of ordinary skill in the art*," "*anticipation*," and "*obviousness*." § 42.65(a) is clear that "[t]estimony on United States patent law or patent examination practice will not be admitted." Petitioner provides no authority for its position that such testimony is permissible "factual foundation" or for any exception to § 42.65(a)'s prohibition.

### **III. Conclusion**

Exhibit 1003 should be excluded.

Dated: October 13, 2015

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