UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SHARP CORPORATION, SHARP ELECTRONICS CORPORATION, and SHARP ELECTRONICS MANUFACTURING COMPANY OF AMERICA, INC.,
Petitioners

v.

SURPASS TECH INNOVATION LLC
Patent Owner

Case IPR2015-00021
Patent 7,202,843

PATENT OWNER SURPASS TECH INNOVATION LLC'S REPLY IN SUPPORT OF THE MOTION TO EXCLUDE PETITIONERS' EVIDENCE PURSUANT TO 37 C.F.R. § 42.64(c)

Patent Owner Surpass Tech Innovation LLC's Motion to exclude portions of Petitioners' reply evidence was directed to whether Petitioner's evidence is admissible, not to the weight to be given to the evidence, contrary to Petitioners' Opposition (Paper 35). Concerning this question of admissibility, Petitioners' Opposition fails to identify valid reasons why the disputed portions of Mr. Marentic's Rebuttal Declaration and deposition testimony should not be excluded.

Exhibit 1010 – ¶¶ 42-43 of the Rebuttal Declaration of Michael J. Marentic

Patent Owner sought to exclude ¶¶ 42-43 of Ex. 1010, Mr. Marentic's testimony on the "Level of Skill in the Art," under Fed. R. Evid. 702. Mr. Marentic's standard differs from the standard set forth in the Petition without explanation. Petitioners oppose Patent Owner's motion to exclude, arguing that Mr. Marentic's testimony in ¶¶ 42-43 is based on the witness's experience rather than data and therefore is "proper and reliable under F.R.E. 702." Paper 35 at 2.

To the contrary, Mr. Marentic's testimony is neither consistent nor reliable. In Marentic's Reply Declaration, he testified that "I do not agree that a person with a degree in mathematics or computer science would have the requisite education to design LCD drive electronics." Ex. 1010, ¶ 43. And yet, when asked about Patent Owner's Expert Declarant, William Bohannon, who possesses an undergraduate degree in mathematics (*see* Ex. 2005 at 27), Mr. Marentic testified during deposition that he "believe[s] Mr. Bohannon is an expert in LCD drive." Ex. 2007

at 33:21-22. Mr. Marentic's deposition testimony is in direct conflict with his declaration, thus leaving the Board with no consistent and reliable testimony from Mr. Marentic on the proper standard of a person having ordinary skill in the art in this case. Fed. R. Evid. 702 mandates exclusion of such inconsistent and unreliable evidence, and renders irrelevant the question of whether inconsistent and unreliable testimony should be given any weight. In other words, while inconsistent and unreliable testimony should be given no weight, the weight of the evidence should not immunize the evidence from the threshold question of admissibility.

Petitioners also assert that "Patent Owner does not explain how any of the proposed levels of skill in the art materially affect the anticipation or 'claim construction' analyses in this case." Paper 35 at 2-3. But Petitioners themselves seek to exclude Mr. Bohannon's testimony on claim construction pursuant to F.R.E. 701, 702, and 703. *Id*. at 4-6. They do so despite Mr. Marentic's express testimony that Mr. Bohannon is an expert in the relevant art of LCD driving.

Further, Mr. Marentic's unclear POSITA standard taints all of his testimony in which he applies that standard. For example, Mr. Marentic's rebuttal declaration argues that "[a]ll of the terms of Claims 4, 8 and 9 of the '843 Patent are readily understood by a person of ordinary skill in the art." Ex. 1010, ¶ 46. But the POSITA standard that Mr. Marentic is applying is either wrong (given his admission about Mr. Bohannon's qualifications) or undisclosed. If the lynchpin

standard upon which claim construction hinges is unreliable, his opinions based upon that standard are equally unclear, unreliable, and fail to satisfy F.R.E. 702.

Thus, Mr. Marentic's testimony on the "Level of Skill in the Art" fails to satisfy Fed. R. Evid. 702 and should be excluded. Further, the portions of Petitioners' Reply that apply that standard of "ordinary skill in the art" (*see* Reply at 6:8 and 14:11-13) should also be excluded.

Exhibit 1010 – ¶¶ 92-93 of the Rebuttal Declaration of Michael J. Marentic

Patent Owner also sought to exclude ¶¶ 92-93 of Ex. 1010, directed to Mr. Marentic's reliance on Exs. 1012, 1013, and 1014 for the accuracy of the disclosures contained therein. Petitioners argue that the "content of these Exhibits is not offered 'to prove the truth of the matter asserted, but rather to show their effect on a person of ordinary skill in the art.'" Paper 35 at 6. This is incorrect. In this instance, Mr. Marentic is not relying on these Exhibits "for their effect on one of ordinary skill in the art" but rather to confirm his own interpretation of the terms in dispute in the '843 patent. As Petitioners themselves quoted in their Opposition, Mr. Marentic states that "[t]here are three patents that use the term similar to ***how I understand it***." Paper 35 at 5 (quoting Ex. 2007, 77:8-12) (emphasis added). Moreover, as noted in Patent Owner's Motion, Mr. Marentic confirmed during his deposition that he has no knowledge about who drafted those exhibits, much less the technical background of the drafter(s). *Id*. at 66:8-69:13; 78:1-81:9; 83:12-86:4.

And while the Petitioners ask the Board to "exercise [its] discretion to assign appropriate weight to the evidence," Paper 35 at 7 (citation omitted), this is an improper argument when the issue is inadmissibility. Inadmissible evidence should not be admitted, even where the proper weight given to these Exhibits on the proper construction of the '843 patent terms should be negligible. Accordingly, the Board should exclude this unreliable hearsay.

Exhibit 2007 – 116:12 to 118:3 of Deposition of Michael J. Marentic

Patent Owner sought to exclude page 116, line 12 to page 118, line 3 of Mr. Marentic's deposition testimony submitted as Ex. 2007, as non-responsive to the question asked. Mr. Marentic was asked "Are you aware of any ***driving circuit*** in the '843 patent that does not output two overdriven pixel data per frame?" Ex. 2007 at 116:12-14 (emphasis added). Mr. Marentic responded by identifying disclosures directed to ***driving methods*** without identifying any driving circuits. *Id*. at 116:117-118:3. This testimony, regardless of whether it was consistent with Petitioners' theory of the case (*see* Paper 35 at 8-10) (opposing Patent Owner's Motion to exclude based on weight rather than admissibility), was non-responsive to the question, was timely objected to, and therefore is properly subject to a motion to exclude. 37 C.F.R. § 42.53(f)(8).

The non-responsive nature of Mr. Marentic's answer was subject to cross-examination by Patent Owner's counsel (Ex. 2007 at 118:15-120:17), after which

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