IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ELM 3DS INNOVATIONS, LLC, Plaintiff, v. SAMSUNG ELECTRONICS CO., LTD., et al. Defendants.	C.A. No. 14-1430-LPS-CJB JURY TRIAL DEMANDED
ELM 3DS INNOVATIONS, LLC, Plaintiff, v. MICRON TECHNOLOGY, INC., et al., Defendants.	C.A. No. 14-1431-LPS-CJB JURY TRIAL DEMANDED
ELM 3DS INNOVATIONS LLC, Plaintiff, v. SK HYNIX INC., et al., Defendants.	C.A. No. 14-1432-LPS-CJB JURY TRIAL DEMANDED

DEFENDANTS' MOTION FOR AN EXPEDITED SCHEDULE AND LEAVE TO FILE ITS SUMMARY JUDGMENT MOTION ON INDEFINITENESS OF THE "LOW STRESS" TERMS

Per Paragraph 16 of the May 9, 2018 Amended Scheduling Order (D.I. 179 in C.A. 14-1432),[1] Defendants SK hynix Inc.; SK hynix America Inc.; SK hynix Semiconductor Manufacturing America Inc.; SK Hynix Memory Solution Inc.; Samsung Electronics Co., Ltd.;

[1] For ease of reference, all docket citations in this motion are to C.A. 14-1432.

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Samsung Semiconductor, Inc.; Samsung Electronics America, Inc.; Samsung Austin Semiconductor, LLC; Micron Technology, Inc.; Micron Semiconductor Products, Inc.; and Micron Consumer Products Group, Inc. (collectively, "Defendants") respectfully seek leave of Court to file an early summary judgment motion that the "low stress" terms discussed in the Court's *Markman* opinion are indefinite, and further seek an abbreviated schedule (including fact and expert discovery) to expedite resolution of this potentially case-dispositive issue.

In its *Markman* opinion, the Court rejected all proposed and alternative claim constructions for the "low stress" terms offered by the parties, and recognized that "[b]ecause the claims are limited to a particular type of stress, measured at a specific place," the terms could not be given their plain and ordinary meaning, as Elm proposed. (D.I. 258 at 16). But the Court also indicated that it could not determine, based on the current record, whether the "low stress" limitations rendered the claims indefinite, noting Defendants are permitted to re-raise the issue at summary judgment or trial. (*Id*. at 17).

By this motion, Defendants propose an expedited schedule to quickly fill out that record and resolve this issue in the shorter term, months earlier than under the current schedule. If the summary judgment motion is ultimately granted, it would be case dispositive and invalidate all asserted claims. But even if it is denied, the parties and the Court will benefit greatly by addressing the "low stress" terms now. Delaying resolution of this issue until the currently scheduled summary judgment phase (starting summer of 2021) or trial (currently unscheduled) could necessitate expert reports and summary judgment motions with hypothetical alternatives or lead to requests for additional post-summary judgment expert reports and discovery (perhaps on the eve of or during trial).

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Moreover, Defendants do not currently request any changes to the rest of the schedule to accommodate the proposed motion. Rather, Defendants request a quicker parallel schedule to decide just one potentially case-dispositive motion, with the issue being ripe for the Court's decision later this year, around the time fact discovery on all other issues is scheduled to close.

For these reasons, Defendants' Motion should be granted.

I. SUMMARY OF FACTS

As part of the *Markman* process, the parties asked the Court to resolve a dispute concerning various "low stress" terms found in each of the twelve asserted patents in this case.[2] Defendants argued the claims are indefinite because a person of ordinary skill would not know what type of stress to measure, where to measure stress, how to measure stress, or when to measure that stress. (D.I. 236 at 32, 39-42).[3] Plaintiff, on the other hand, argued that the stress terms with the 5×10^8 dynes/cm^2 numerical limitation should be given their plain and ordinary meaning, and the stress terms without a numerical limitation should be construed to mean "having a stress of less than 8×10^8 dynes/cm^2." (D.I. 258 at 13-14). During the *Markman* hearing the Court expressed concerns about the "low stress" terms: "You're saying don't tell the jury anything about any of this. And your argument seems to be because manufacturers understand how to do this, but you don't even

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[2] There are 67 claims that contain a "low stress" term. (D.I. 258 at 13-14). There are 30 additional claims that contain a substrate/semiconductor layer "substantially flexible" term that the Court construed as including "a sufficiently low tensile stress dielectric material" limitation. *Id.* at 6. Finally, there are two additional claims that contain a dice/die "substantially flexible" term that, as Defendants explained in their Motion for Clarification Under L.R. 7.1.5, should also be construed to include a "low stress" limitation consistent with the Federal Circuit's construction. *Id.* at 6-7; D.I. 262. All the remaining asserted claims are dependent on one of these claims. Thus, Defendants' proposed summary judgment motion could be dispositive of all asserted claims.

[3] Micron and Samsung proposed in the alternative a construction that was not joined by SK hynix. (D.I. 236 at 42-47).

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want me to tell the jury that that is fair game to look to. *So I guess I'm a little lost on how this term could be definite*." (D.I. 241, Hearing Tr. 53:3-8).

Ultimately, the Court could not determine "at this stage of the case" whether the claims were indefinite, but gave Defendants "an opportunity to renew their indefiniteness argument at the summary judgment stage." (D.I. 258 at 16-17). The Court further rejected Elm's proposed constructions (including its "plain and ordinary meaning" proposal),[4] finding that the patents were limited to a particular type of stress, measured at a specific place and time, but it could not determine, based on the current record, what that particular stress was or how it should be measured. (*Id.*)

Shortly after the Court issued its *Markman* opinion, Defendants contacted Elm seeking agreement on an expedited schedule to address the indefiniteness issue. To start that discussion, Defendants proposed the following schedule, with an expedited period of limited fact and expert discovery relating to the "low stress" terms followed by a hearing sometime late this year (Ex. A):

Event	**Deadline**
Deadline for fact discovery on "low stress" indefiniteness	July 17, 2020
Opening expert reports on "low stress" indefiniteness	August 7, 2020
Responsive expert reports on "low stress" indefiniteness	August 28, 2020
Deadline for Expert discovery on "low stress" indefiniteness	September 18, 2020
Case dispositive motion on indefiniteness on "low stress" terms	October 2, 2020
Response to motion	October 16, 2020
Reply in support of motion	October 23, 2020
Hearing, subject to Court availability	TBD (November 6, 2020)

Importantly, Defendants' proposed expedited schedule would run parallel to the existing schedule, minimizing (if not eliminating) any perceived prejudice to Elm. The parties stipulated to the current schedule on March 24, 2020. As shown below, that schedule has a fact discovery

[4] The Court also rejected Micron's and Samsung's alternative construction.

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cutoff of October 26, 2020, around the same time Defendants propose a hearing on the "low stress" terms in the parallel track (D.I. 255):[5]

Event	Extended Deadline
Substantial completion of document production; exchange of privilege logs	6/29/2020
Deadline to serve interrogatories, requests for admission, and Rule 30(b)(6) deposition notices	7/23/2020
Deadline to serve all other fact deposition notices	9/10/2020
Fact discovery closes	10/26/2020
Elm elects no more than 36 total claims and provides final infringement contentions	11/16/2020
Defendants' responses to contention interrogatories related to infringement	12/7/2020
Defendants elect no more than 36 prior art references and provide final invalidity contentions	12/15/2020
Elm's responses to contention interrogatories related to invalidity	1/5/2021
Opening expert reports	2/8/2021
Responsive expert reports	3/9/2021
Expert discovery closes	4/26/2021
Case dispositive and Daubert motions	5/24/2021
Responses to case dispositive and Daubert motions	6/14/2021
Replies to case dispositive and Daubert motions	6/21/2021
Hearing on pending dispositive and Daubert motions	TBD
Rule 16 Conference	TBD
Deadline for Elm to provide a draft pretrial order to all other parties	30 days before the pretrial order is to be filed with the Court
Deadline for all other parties to provide Elm and each other party with their responses to Elm's draft order	14 days before the pretrial order is to be filed with the Court

[5] The parties' stipulation extended the previous schedule by roughly three months to account for the difficulties encountered by the COVID-19 crisis. As explained in the letter accompanying that stipulation, Defendants felt a five-month extension to the schedule was "a more realistic assessment of the delay that will be caused by the complications of COVID-19," but agreed to the three-month extension after Elm rejected Defendants' initial proposal, with the understanding that they "may request a further extension if it becomes necessary." (D.I. 256). In other words, an additional two-month extension to the current schedule may be necessary depending on the COVID-19 situation, irrespective of Defendants' proposed motion.

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