IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

ELM 3DS INNOVATIONS, LLC, a Delaware limited liability company, Plaintiff, v. SAMSUNG ELECTRONICS CO., LTD., a Korean business entity, SAMSUNG SEMICONDUCTOR, INC., a California corporation, SAMSUNG ELECTRONICS AMERICA, INC., a New York corporation, and SAMSUNG AUSTIN SEMICONDUCTOR, LLC, a Delaware limited liability company, Defendants.	C.A. No. 14-1430-LPS REDACTED - PUBLIC VERSION

LETTER TO THE HONORABLE JENNIFER L. HALL FROM ADAM W. POFF REGARDING DEFENDANTS' RESPONSE TO PLAINTIFF'S MAY 19, 2020 DISCOVERY LETTER (D.I. 280)

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Dated: May 22, 2020
Redacted Version: June 1, 2020

Dear Judge Hall:

In what has now become a needlessly time-consuming pattern, Elm once again burdens this Court with a non-dispute. As with Elm's February 13 letter (D.I. 254), the issues raised in Elm's May 19 letter are moot and Elm's request for relief should respectfully be denied.

Elm's sole request for relief is for Samsung to identify data necessary to complete the chart Elm proposed in Exhibit 30. Had Elm presented this chart to Samsung during the meet and confer process, Samsung would have readily agreed to work with Elm to complete it and finalize a representative products agreement. While there have been hiccups along the way—as there will be for any process involving thousands of potentially relevant products sold across decades and by several corporate entities—Samsung has been forthright at all times and has diligently worked to address any inaccuracies or incompleteness it or Elm has discovered. The Court should be unmoved by Elm's hollow claims to the contrary, which are completely unfounded. The record instead demonstrates Samsung's good faith efforts to meet Elm's incessant demands.

Samsung has already made substantial progress toward completing a slightly modified version of Exhibit 30,[1] and agrees to complete this chart by June 19,[2] mooting any need for the Court's assistance—and underscoring the inappropriateness of Elm's practice of making serial demands, threatening motion practice, and approaching the Court prematurely.

Representative Products Agreement. Elm's letter presents a one-sided version of the events that led to this letter briefing, overblowing the length of time it has taken to reach a representative products agreement and ignoring Elm's own role in prolonging that process. Since the start of this case, Samsung has worked with Elm in good faith to reach an agreement. *See* D.I. 89 (identifying three technical factors by which to group accused products). The stay of the litigation pending *inter partes* review proceedings before the P.T.A.B., and the Federal Circuit appeals of those proceedings, delayed progress from February 2017 to August 2019. The appeals resulted in claim constructions that significantly refocused the scope of the case on relevant products having a substrate that is 50 microns thick or less. *See Samsung Elecs. Co. v. Elm 3DS Innovations, LLC*, 925 F.3d 1373, 1376-80 (Fed. Cir. 2019).

The progress the parties had made to that point was largely erased when Elm's new counsel (engaged in the midst of the appeals) proposed an entirely new—and unworkable—approach in March 2020, based solely on process node and revenue. That approach, however, would have inappropriately lumped together materially different products, with entirely different technical characteristics, as representative of one another—which made no sense. Exh. B; Exh. C.

While Samsung repeatedly explained the need to group products by technical similarities relevant to the patents' claims and Samsung's defenses, Elm refused to accept such a proposal

[1] The parties conferred on May 20, and Elm agreed that "product type" is not necessary for the chart. Exh. A. Samsung respectfully submits that the image sensor products and ***downstream*** product inventory are likewise unnecessary. *See infra*.

[2] Defendants initially proposed a five-month extension due to COVID-19, but Elm refused and only agreed to three months. D.I. 263. Defendants noted that five months was more realistic and that further extensions may be necessary, given the circumstances. *See* D.I. 264.

unless Samsung also agreed to reveal its non-infringement positions—a request that had no connection to the parties' discussions[3] and that sought disclosure of contentions and expert opinions well before the deadlines imposed by the Court. Exh. E. Elm then further conditioned its acceptance on Samsung identifying where in its documents the relevant technical information relating to the product groupings could be found and correlating that information to the accused products. Exh. F. Not once did Elm propose a chart as in Exhibit 30, instead waiting until it filed its letter with the Court to make such a proposal. Elm's tactics are not consistent with its obligation to make good faith efforts to resolve discovery matters. D.I. 111 at 10.

Despite Elm's unreasonable demands, and in the face of the global COVID-19 pandemic, Samsung has made more than a good faith attempt to both fulfill its discovery obligations and work toward a representative products agreement. Over the past two months alone, Samsung has made ***eight*** productions of over 6,000 documents and 150,000 pages of materials, with six of those productions directed to the representative products issue.[4] Exh. G Ideally, some of these productions could have been made earlier, but security protocols, the change in scope of the accused products, the age of many of the products, the number of individuals involved, and COVID-19 stay-at-home restrictions required additional time to navigate.

Notwithstanding Samsung's efforts in moving the parties closer to a representative products agreement, it was not until May 11—***less than two weeks ago***—that Elm first proposed a workable approach to grouping products based on technical similarities; an approach that is not so different from what Elm now presents in its letter brief. Exh. H. Samsung preliminarily agreed to that approach on May 13 and confirmed its agreement on May 18. Exh. I; Exh. J. But Elm pressed forward with its letter regardless and presented, for the first time, the completion of Exhibit 30 as requested relief. Samsung stands by its agreement of May 18, and remains willing to continue to negotiate in good faith a fair and accurate representative products agreement with Elm—including by completing a slightly revised version of the chart in Exhibit 30 by June 19.[5]

The required refinements to the chart are minor. *First*, Elm's chart includes image sensor products, which are technically different than memory products and may require a different approach to grouping them. The parties have never met and conferred on how to group these products, and while Samsung is confident that the parties can work toward an agreement, Samsung respectfully submits that it is improper to simply lump them together with the memory

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[3] Elm has consistently threatened motion practice as a companion to its demands, even when its demands were patently unreasonable. For instance, Elm initially threatened motion practice when Samsung declined to produce unrelated product cost information from a different case. Exh. D. Yet, after Samsung orally confirmed the irrelevance of the products, Elm fell silent.

[4] Elm acknowledged during the parties' recent meet and confers that it did not fully understand or comprehend Samsung's productions. Exh. F.

[5] Elm included many items in Exhibit 30 that it never raised during the parties' meet and confers. For instance, Exhibit 30 includes image sensor products, but the parties have not even begun to discuss how to group image sensor products, because they are technically different than the memory products. *See infra*. (Nor had Elm raised product types or downstream product inventory as gating items until the filing of its letter.) Samsung nevertheless is willing to work with Elm on how best to group image sensor products. Exh. A.

products in the chart. *Second*, the chart should not include ***downstream*** product inventory[6] because this criteria does not distinguish representative products from one another and, yet again, Elm never raised this as a potential criteria for selecting representative products until the filing of its letter.[7] In fact, Elm's letter is the ***first*** request for Samsung's inventory of downstream products in this case.

With those minor modifications—*i.e.*, excluding image sensor products, downstream products inventory, and product type—Samsung agrees to complete the chart in Exhibit 30 by June 19 for the correct list of memory products. This moots Elm's request for relief for those products.

Newly-Identified Products. Elm incorrectly suggests that Samsung's identification of new products is part of a "pattern of delay," and that Samsung somehow deliberately overlooked these products and misled the Court in the process. These allegations are categorically false.

The process of identifying accused products here is complex and involves many steps and several employees, as reflected by the attached declaration of Youngok Hyung (Exh. M). Given the nature of the technology, Samsung (not the Plaintiff, Elm, as is typical) first had to check certain databases to ***manually*** identify all memory products, whether standalone or included in downstream products, sold worldwide. Exh. M ¶¶ 5-6. Then, it had to ***manually*** search another database to determine whether the products are stacked, *id.* ¶ 7, and yet another set of databases to determine the thickness of each stacked chip in each memory product. *Id.* ¶¶ 8-20. To complicate matters, many of the products at issue are obsolete and locating data for them is particularly difficult, especially with organizational changes and employee turnover through the years. *Id.* ¶ 23. And this process had to be repeated once the parties agreed to modify the scope of accused products in January 2020 for not only products sold in the U.S., but products sold worldwide. Exh. K; Exh. M ¶ 21. Despite those challenges, Samsung has been diligent and responsive throughout, disclosing any issues promptly.[8] Exh. M ¶¶ 22, 24.

And, that continued here. As soon as Samsung realized that certain products were not included in its list, Elm was promptly informed of the error and Samsung immediately acted to correct it, collecting relevant data on those products in Korea and the United States, all during the global pandemic. Exh. L. There is simply no truth to Elm's allegations that Samsung has deliberately misled Elm or the Court in any way.[9] Samsung is taking all steps to cure that oversight, and agrees to substantially complete its collection of data for these new products by June 19. Samsung, therefore, respectfully requests that Elm's motion be denied.

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[6] Elm seeks information about Samsung's ***downstream*** product inventory, but apparently has made no attempt to purchase those downstream products itself. *See, e.g.*, *Invensas Corp. v. Renesas Elecs. Corp.*, 287 F.R.D. 273, 285 (D. Del. 2012).

[7] Elm agreed to drop "product type" from the chart. *See* n.1, *supra*.

[8] Elm has had its own issues. For example, although Elm was notified on March 30 that the image sensor with product code S5K3H1G was not a stacked product, and therefore not relevant, Elm still included it in Exhibit 30 as an accused product.

[9] Elm incorrectly suggests that Samsung misled the Court in prior briefing, stating, for example, that Samsung misrepresented that it had produced "all worldwide sales." There was no deception, however, as Samsung did in fact produce all worldwide sales for the accused products identified at that time and will, of course, update that data for the new products.

Respectfully submitted,

/s/ *Adam W. Poff*

Adam W. Poff (No. 3990)

Attachments

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