UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

SAMSUNG ELECTRONICS AMERICA, INC. and
SAMSUNG ELECTRONICS CO., LTD.,
Petitioner

v.

SMARTFLASH LLC,
Patent Owner

CBM2014-00194
U.S. Patent 8,118,221

PETITIONER'S MOTION TO EXCLUDE EVIDENCE

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I. INTRODUCTION

Pursuant to 37 C.F.R. § 42.64 and the Federal Rules of Evidence, SAMSUNG ELECTRONICS AMERICA, INC. and SAMSUNG ELECTRONICS CO., LTD. ("Samsung"), moves to exclude portions of Exhibit 2056 and Exhibit 2057 (Deposition Transcripts of Dr. Jeffrey Bloom) as submitted by Patent Owner, SMARTFLASH LLC ("Smartflash") in connection with Patent Owner's Response in CBM2014-00194.

Smartflash failed to produce its own expert witness in this proceeding. Instead, Smartflash deposed Samsung's expert witness, Dr. Bloom. During the deposition, Smartflash attempted to solicit testimony that would be inadmissible on three grounds. First, Smartflash sought testimony from Dr. Bloom that is irrelevant to the determination of patent claim validity, as mandated to the Board by the Congress. Second, Smartflash failed to provide sufficient factual foundation for the testimony being solicited. Third, Smartflash sought to solicit testimony outside the scope as warranted by Samsung's direct examination of Dr. Bloom. This solicited testimony should be excluded from this proceeding as inadmissible under the Federal Rules of Evidence.

II. Legal Standard

The admissibility of expert testimony in IPRs and CBMs is governed by the Federal Rules of Evidence. *See* 37 C.F.R. § 42.62 ("[T]he Federal Rules of

Evidence shall apply to [an IPR or CBM] proceeding."). According to Rule 402, "[i]rrelevant evidence is not admissible." Evidence is only relevant if it has a "tendency to make a fact more or less probable than it would be without the evidence" and "the fact is of consequence in determining the action." Rule 401.

According to Rule 702, an expert witness must be "qualified as an expert by knowledge, skill, experience, training, or education," and the testimony must "help the trier of fact to understand the evidence or to determine a fact in issue." In addition, Rule 702 requires that the expert's testimony be "based on sufficient facts or data" and "the product of reliable principles and methods"; and the expert must "reliably appl[y] the principles and methods to the facts of the case." *Id*.

In *Daubert*, the Supreme Court held that scientific expert testimony is admissible only if it is ***both relevant and reliable***. *See Daubert v. Merrell Dow Pharms., Inc*., 509 U.S. 579, 597 (1993); *see also Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (stating that in *Daubert* "this Court focused upon the admissibility of scientific expert testimony. It pointed out that such testimony is admissible only if it is both relevant and reliable."). In *Kumho*, the Supreme Court extended its holding in *Daubert* to apply "not only to testimony based on 'scientific' knowledge, but also to testimony based on 'technical' and 'other specialized' knowledge." 526 U.S. at 141.

In determining whether an expert's testimony is admissible, the Board must make the following determinations: (1) the expert is qualified to provide the testimony; (2) the expert's testimony is relevant; and (3) the expert's testimony is based on sufficient facts or data and is reliable. If any of these requirements is not met, the expert's proposed evidence and opinions should be excluded under Rule 702, Rule 402, and the Supreme Court's holdings in Daubert and Kumho.

Further, under Rule 611(b), the scope of cross-examination "should be limited to the subject matter of the direct examination and matters affecting the credibility of the witness." If the expert's testimony solicited in cross-examination is outside the subject matter of the direct examination and does not have bearing on the expert's credibility, it should be excluded under Rule 611(b).

III. Argument

Samsung objected to portions of Exhibits 2056 and 2057 in its Notice of Objections served on June 8, 2015 as well as during the deposition on May 20, 2015. Smartflash relied on Exhibits 2056 and 2057 in its Response to Petition (Papers 20 and 21), filed on June 1, 2015[1]. For reasons detailed below, the

[1]Smartflash also relied on portions of Exhibit 2057 to which Samsung objected in its Notice of Objections served on June 8, 2015 as well as during the deposition on May 20, 2015. The Board ordered such portions of Exhibit 2057 under seal. *See* Paper 27.

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