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 CO., LTD.,
Petitioner

v.

SMARTFLASH LLC,
Patent Owner

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Case CBM2014-00199
Patent 8,118,221

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**PETITIONER'S REPLY IN SUPPORT OF MOTION TO EXCLUDE EVIDENCE UNDER 37 C.F.R. § 42.64(c)**

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**TABLE OF CONTENTS**

**I. INTRODUCTION ....................................................................................1**

**II. ARGUMENT.........................................................................................1**

**A. The Subject Deposition Excerpts Lack Proper Foundation .............1**

**B. The Subject Deposition Excerpts Are Outside the Scope .................4**

**C. The Subject Deposition Excerpts Are Irrelevant...............................5**

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# I. INTRODUCTION

In opposing Samsung's (Petitioner's) Motion to Exclude, Smartflash (Patent Owner) continues to allege that Dr. Bloom is biased because "similarity between his employer's products and the claims of the patent would provide Dr. Bloom with a motivation to be biased against the claims being found to be statutory subject matter under 35 U.S.C. § 101." Paper 38 (citing Papers 20/21, at 6). Yet, Smartflash has failed show that Dr. Bloom was aware of any similarity (even assuming that such similarity exists) between his employer's products and the subject patent at the time that Dr. Bloom rendered his declaration, a necessary condition for the alleged bias. *See* Paper 38. Thus, Smartflash has not established the alleged bias. *Id*. According, the subject portions from the deposition transcript should be excluded, as requested by Samsung.

# II. ARGUMENT

## A. The Subject Deposition Excerpts Lack Proper Foundation

In opposing Samsung's motion (Papers 34/35), Smartflash concedes that Dr. Bloom "has not been advanced as an expert with regard to subscription-based business practice of a third-party company." *See* Paper 38 at 3. Yet, Smartflash insists that "Dr. Bloom is currently employed by such 'third-party company' and its 'subscription-based business practices' are both within Dr. Bloom's job responsibilities and relevant to the patent claims." *Id.*



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The insistence is unfounded. Consistent with Smartflash's concession (that Dr. Bloom has not been advanced as not been advanced as an expert with regard to subscription-based business practice of a third-party company), Dr. Bloom also testified under oath he does not know potentially relevant details of his employer's business practice.

> Q. Does SiriusXM have a lot of subscribers?
>
> A. I don't know how many they have.
>
> Q. More than a million?
>
> A. I don't know.
>
> Exhibit 2056: 174:19-22.[1]

While insisting that "all of the factual foundation necessary for Smartflash's cross examination inquiry into Dr. Bloom's knowledge of [a third-pary company's] product is set forth in his direct testimony in his declaration," Smartflash conflates an "[i]nquiry into how the third-party company's products handle condidtional access" with the subscription-based business practice of the third party. Paper 38

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[1] Because of Dr. Bloom's apparent lack of personal knowledge of such subscription-based business practice of the third-party company, treating the content of the subject deposition excerpts as lay witness opinion would be equally improper.

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at 3. Without more, Smartflash then asserts that it "is entitled to have the Board consider Dr. Bloom's responses to the inquiry and how any similarity between Dr. Bloom's employer's products and the claims of the patent would provide Dr. Bloom with a motivation to be biased against the claims being found to be statutory subject matter under 35 U.S.C. § 101." *Id.*

Smartflash's analysis is flawed at least because Smartflash failed to provide any foundation for the entire line of questioning, a line of questioning that the PTAB previously struck down in its consideration of the list of excluded motions[2]. Aside from Dr. Bloom's apparent lack of knowledge about the subscription-based business practice of a third party company, Dr. Bloom also testified under oath that he did not consider his employer's products in relationship to the patent claims at issue.

> Q. In preparing your report, did you consider whether [a third-party company]'s system that enables limited use of paid for and/or licensed content is covered by any of the claims for which you provided an opinion?
>
> A. No, I didn't consider that.

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[2] *See* Paper 13 (dismissing Smartflash's contention that "an accused infringer who pleads in the alternative that the challenged claims are unpatentable under § 101, a question of law, is taking an inconsistent position with its non-infringement position.").



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