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TELECOMMUNICATIONS AMERICA, LLC  
15

16 UNITED STATES DISTRICT COURT  
17 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION  
18

19 APPLE INC., a California corporation,

20 Plaintiff,

21 vs.

22 SAMSUNG ELECTRONICS CO., LTD., a  
Korean business entity; SAMSUNG  
23 ELECTRONICS AMERICA, INC., a New  
York corporation; SAMSUNG  
24 TELECOMMUNICATIONS AMERICA,  
LLC, a Delaware limited liability company,

25 Defendants.  
26

CASE NO. 11-cv-01846-LHK

**SAMSUNG'S REPLY BRIEF RE  
PROFFER OF WITNESS TESTIMONY  
AND EXHIBITS**

1                    **Samsung’s Reply to Apple’s Objections and Response to Proffer of Evidence**

2                    Although Apple is ambiguous about what it seeks to accomplish through its “objections  
3 and response” to Samsung’s proffer, to the extent Apple is asking the Court to strike Samsung’s  
4 proffer or otherwise limit Samsung’s right to preserve for appeal its objections to the Court’s  
5 adverse rulings, Apple’s request has no merit and should be rejected.

6                    Apple argues that “Samsung’s proffer is an inappropriate attempt to augment the record  
7 with evidence that it failed to produce in a timely manner, and for which it was properly  
8 sanctioned.” Dkt. 1949 at 14. Apple both mischaracterizes Samsung’s proffer of evidence and  
9 misapprehends the very purpose of an offer of proof under Rule 103(a)(2). Samsung is not trying  
10 to “augment the record with evidence” at all. Rather, Samsung is *preserving for appellate review*  
11 the evidence that it contends was improperly excluded from the trial, which is “the point of an  
12 offer of proof.” *U.S. v. Boulware*, 558 F.3d 971, 975-76 (9th Cir. 2009). Apple’s misguided  
13 rhetoric fails.

14                    In a similar vein, Apple argues that Samsung’s proffer of evidence is “improper” because  
15 certain evidence was not excluded on an “evidentiary basis,” but rather because Samsung  
16 allegedly did not timely disclose the evidence in discovery. *See, e.g.*, Dkt. 1949 at 1, 4, 5.  
17 According to Apple, Samsung’s proffer as to evidence excluded as a discovery or disclosure  
18 matter “goes far beyond what Rule 103(a)(2) contemplates.” Dkt. 1949 at 1. But Rule  
19 103(a)(2) draws no such distinction based on the reasons *why* evidence was excluded. It states  
20 that “[a] party may claim error in *a ruling to admit or exclude evidence* only if the error affects a  
21 substantial right of the party and . . . *if the ruling excludes evidence*, a party informs the court of its  
22 substance by an offer of proof, unless the substance was apparent from the context.” Fed. R.  
23 Evid. 103(a)(2) (emphasis added). Indeed, elsewhere, Apple itself states that the evidence  
24 Samsung proffers was “excluded.” *See, e.g.*, Dkt. 1949 at 8 (“Magistrate Judge Grewal properly  
25 excluded all of the above evidence and analysis because it was untimely disclosed.”). Thus,  
26 under the express language of Rule 103(a)(2), Samsung is entitled to preserve its appellate rights  
27 as to evidence that was excluded by a ruling of the Court, no matter the basis for the ruling.  
28 Precedent is in accord as well. *See, e.g., Dead Oak Estates, Inc. v. Kupka*, 2011 WL 7145993, \*8

1 (9th Cir. BAP Dec. 16, 2011) (district court properly considered offer of proof regarding evidence  
2 excluded because it was not disclosed in pretrial order); *Johnson v. Acevedo*, 572 F.3d 398, 401  
3 (7th Cir. 2009) (evaluating impact of evidence preserved through offer of proof made after the  
4 evidence was excluded for not having been disclosed in discovery); *cf. United States v.*  
5 *Rettenberger*, 344 F.3d 702, 706 (7th Cir. 2003) (by failing to make offer of proof in trial court,  
6 defendant waived appellate challenge to evidence that was excluded because it was not disclosed  
7 before trial).<sup>1</sup>

8 Apple also raises several untimely challenges to the substance of the evidentiary issues  
9 Samsung raised. For example, Apple argues that certain evidence Samsung proffers would have  
10 been irrelevant (Dkt. 1949 at 10, 11); was properly excluded under Rule 403 (*id.* at 9, 12); or is  
11 hearsay (*id.* at 14, 19). While Samsung disputes Apple’s arguments and looks forward to  
12 addressing the merits of the evidentiary issues it raises on appeal, Samsung’s offer of proof under  
13 Rule 103(a)(2) was made *to preserve Samsung’s arguments for appeal* as to ruling that this Court  
14 made during trial. It is not the forum to address the merits of these evidentiary issues, and  
15 Apple’s attempt to do so is misplaced. If anything, to the extent Apple’s “response” to  
16 Samsung’s proffer has any bearing on the evidentiary issues Samsung raises, it serves only to  
17 show that such evidence was material and controverted and should have been presented to the jury.  
18 As to much of Samsung’s excluded evidence, Apple makes a belated so-called “counter-proffer”  
19 of evidence it claims it would have submitted in response to Samsung’s excluded evidence. *See,*  
20 *e.g.*, Dkt. 1949 at 2, 3, 6, 12. Far from showing that Samsung’s proffer of evidence is improper

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23 <sup>1</sup> In any case, even if (contrary to fact and law) Samsung’s proffer of evidence did exceed  
24 the scope of what Rule 103(a)(2) “contemplates,” Apple has no basis for relief in the form of  
25 striking or otherwise limiting Samsung’s proffer since it does not and cannot articulate any  
26 prejudice to the creation of a full appellate record. *See U.S. Aviation Underwriters, Inc. v.*  
27 *Aerospatiale, Societe Nationale Industrielle, S.A.*, 2006 WL 6049471, \*1 (D. Ariz. Feb. 09, 2006)  
28 (“The Court will not strike the remaining Offers of Proof” where “[o]ne of the reasons Plaintiffs  
cite for filing the Offers of Proof is to create a record for appeal,” and “Defendants will not be  
prejudiced at trial by allowing the Offers of Proof to remain in the Court file for possible use on  
appeal.”).

1 or meritless, Apple’s “counter-proffers” only serves to confirm that the evidence Samsung proffers  
2 raises substantial disputed issues of fact that should have been evaluated by the jury.

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