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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

APPLE INC., a California corporation,

Plaintiff,

vs.

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

Defendant.

CASE NO. 11-cv-01846-LHK

REPLY IN SUPPORT OF MOTION TO SHORTEN TIME FOR BRIEFING AND HEARING REGARDING MOTION TO DISSOLVE TAB 10.1 INJUNCTION

Apple does not dispute that the jury has found that Samsung's Galaxy Tab 10.1 does not infringe the D'889 patent and thus has rejected the sole ground upon which Samsung's Galaxy Tab 10.1 was preliminarily enjoined. An extended briefing schedule is not required to determine that an injunction based on a finding of likely infringement of the D'889 cannot stand once there is a finding that there is no such actual infringement. Apple notes that the jury's verdict is "contrary to this Court's prior finding of *likely* infringement, which the Federal Circuit affirmed." Opp. at 3 (emphasis added). That is indeed the point; the jury's verdict demonstrates that Apple's predictions about what the jury would do as to the D'889 were wrong and that the injunction entered on that basis therefore can no longer be maintained.

Apple argues that there is no need to expeditiously dissolve the preliminary injunction because Samsung is not being harmed by it. There is no authority for Apple's remarkable proposition that an injunction, no longer supportable as to its conclusions about likely infringement, can be maintained merely because it supposedly is causing no harm. Further, Apple has sent letters to multiple carriers and downstream customers insisting that *they* are obliged by the preliminary injunction to "immediately remov[e] for sale the Galaxy Tab 10.1 from all physical and online venues under your direction or control" and further asserted that the injunction required them to "ceas[e] immediately" selling or offering to sell "the Galaxy Tab 10.1 tablet computer and any product that is no more than colorably different from it and embodies the '889 patent's design." *See* Reply in Support of Motion For Stay of Preliminary injunction Pending Appeal (Case No. 2012-1506) at 8-9. That claim by Apple was and remains utterly false. *See, e.g., Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1395 (Fed. Cir. 1996) ("Because the appellants were never made parties to the underlying action and thus never had an opportunity to contest the findings of liability in that case, they are not subject to being enjoined or held in contempt with respect to their independent conduct regarding the subject matter of the [underlying] case."); *Paramount Pictures Corp. v. Carol Publishing Group, Inc.*, 25 F. Supp. 2d 372, 374-76 (S.D.N.Y. 1998) (nonparty distributors and retailers were not subject to injunction against publisher and thus were entitled to continue sales of their existing inventory). Prompt relief in the form of dissolving the injunction is more than amply warranted in light of

Apple's efforts to disrupt the business of both Samsung and its retail partners through such misrepresentations about the injunction.

Apple contends that it needs additional time to "consider its options." It fails to identify what those options could be when the current record cannot support the continuance of an injunction. The sole basis for the preliminary injunction was a likely showing of infringement of D'889 – a basis that is now not borne out by the jury's verdict.[1]

Finally, Apple argues that this Court lacks jurisdiction to grant relief in light of the pending Federal Circuit appeal challenging the preliminary injunction. Apple ignores, however, that Samsung has requested relief under Federal Rule of Civil Procedure 62.1. That Rule provides: "If a timely motion is made for relief that the court lacks authority to grant because of an appeal that has been docketed and is pending, the court may . . . state either that it would grant the motion if the court of appeals remands for that purpose or that the motion raises a substantial issue." There can therefore be no dispute that this Court has jurisdiction, at a minimum, to provide an indicative ruling that it is prepared to dissolve the injunction. If the Court believes it lacks jurisdiction to actually dissolve the injunction as of now, Samsung will petition the Federal Circuit for a remand based on the indicative ruling requested here. *Fed. R. Civ. P.* 62.1; *In re DirecTV Early Cancellation Fee Mktg. & Sales Practices Litig.*, 810 F. Supp. 2d 1060, 1066 (C.D. Cal. 2011) (issuing indicative ruling that intervening change in law raised substantial issue); *Sierra Pac. Power Co. v. Hartford Steam Boiler Inspection & Ins. Co.*, 3:04-CV-00034-LRH, 2011 WL 586417 (D. Nev. Feb. 8, 2011) (issuing indicative ruling that the court would alter judgment if the Ninth Circuit were to remand).

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[1] Apple also cannot, for example, dispute that it has not demonstrated likely irreparable harm from any infringement of the '381, '915, or '163 patents. Apple's opposition does not even argue that there is such harm, nor that there is any nexus between the inventions claimed in those patents and demand for the parties' products. In any case, the current injunction, which is based on a finding of likely infringement of the D'889, plainly can no longer be sustained in light of the jury's verdict. To the extent that Apple believes it has other grounds to support the issuance of an injunction post-verdict, it needs to file a noticed motion to seek one. Tellingly, no Galaxy Tab products are among the eight devices that Apple has advised the Court it intends to move against. Dkt. No. 1940.

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Respectfully submitted,

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