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14 AMERICA, INC. and SAMSUNG
TELECOMMUNICATIONS AMERICA, LLC
15

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

18 APPLE INC., a California corporation,

19 Plaintiff,

20 vs.

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

24 Defendants.
25

CASE NO. 11-cv-01846-LHK

**SAMSUNG'S PROFFER OF WITNESS
TESTIMONY AND EXHIBITS**

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(a) U.S. Patent No. 6,498,590.....26

3. 7,864,163 Patent.....26

(a) Design-Around.....26

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STATUTES

35 U.S.C. § 177 9

Federal Rule of Evidence 103(a)(2) 1

1 Pursuant to Federal Rule of Evidence 103(a)(2), Samsung respectfully makes the following
2 proffers of witness testimony and exhibits excluded from trial. The exclusion of this witness
3 testimony and exhibits have affected the substantial rights of Samsung to put forward the full
4 merits of its case.

5
6 A. **Samsung's Proffer of Evidence Regarding the 035 Model**

7 Samsung respectfully seeks to preserve the record regarding the scope of use of trial
8 Exhibit DX-741, Apple's 035 model, which Samsung was precluded from using for the purpose of
9 showing non-infringement during cross examination of Apple's design patent infringement expert,
10 Peter Bressler. During trial, Exhibit DX-741 was admitted into evidence during the testimony of
11 Apple employee Christopher Stringer, a named inventor of the D'889 patent. July 31, 2012 Trial
12 Tr. at 538:1-18. Mr. Stringer confirmed that the 035 model was an embodiment of the D'889
13 patent, testifying that the D'889 patent "represented" the design of the 035 model. *Id.* at 528:12-
14 15. Samsung then sought to use the 035 model during the cross examination of Mr. Bressler, but
15 the Court sustained an objection by Apple that the 035 model had not been properly disclosed as
16 one of Samsung's non-infringement theories. Aug. 6, 2012 Trial Tr. at 1212:15-1223:2; see also
17 Dkt No. 1091-3 (APLPROS0000010190) (pictures of 035 model, stipulated by Apple to be an
18 embodiment).

19 Samsung had a right to test the accuracy and reliability of Mr. Bressler's infringement
20 opinions. If Samsung had been permitted to cross-examine Mr. Bressler, it expects that his
21 testimony would have been highly relevant to the question of non-infringement and lack of
22 willfulness by Samsung. Although Mr. Bressler considered the iPad 2 in forming his opinions, in
23 his deposition, he conceded that he never considered the 035 model in forming his opinions, even
24 though he knew that the 035 model was in Apple's possession. (*See* Ex. A to the Declaration of
25 Brett Arnold ("Arnold Decl.") (April 24, 2012 Dep. of Peter Bressler at 230:11-14; 237:17)).
26 The obvious differences between the 035 model and the iPad 2 are striking, and would have
27 helped illustrate to the jury the significant differences between the accused products and the
28

1 D'889, which the 035 model embodies, and highlighted the different standards Mr. Bressler
2 actually used to analyze infringement versus invalidity.

3
4 **B. Samsung's Proffer of Evidence Regarding the Home Screen Button
Trademark Application**

5 Samsung also submits this brief to support the relevance and admissibility of the file
6 wrapper for the Home Screen Button trademark application (US Serial No. 85065521) that Apple
7 filed with the USPTO on June 17, 2010, listed as DX-628 on Samsung's exhibit list. (Arnold
8 Decl., Ex. C). This document is directly relevant to counter Apple's contentions in this case that
9 the unregistered trade dresses for its iPhone and iPad products do not include the home screen
10 button. Apple has taken this position in a transparent attempt to gain a monopoly right on
11 product configurations that are different and broader than those Apple has ever presented to the
12 marketplace.

13 The Home Screen button trademark application states unequivocally that "the mark
14 consists of the design of Apple's 'Home Screen' button, which is a key component of the trade
15 dress of three different Apple products — the iPhone, the iPod touch, and the iPad digital
16 devices." (Arnold Decl., Ex. C at DX-628.080). The document contains a number of other,
17 similar admissions by Apple that directly contradict the litigation-driven positions Apple has taken
18 in this action that the home button is not a part of any asserted unregistered trade dresses:

- 19
- 20 • "The Home Screen button has been a prominent and unmistakable feature of Apple
21 product design since Apple announced the first version of the iPhone device nearly
22 four and a half years ago, in January 2007." (*Id.* at DX-628.080.)
 - 23 • "Given its distinctive appearance, its promotion as a standalone mark, and the
24 incredible success of the iPhone, iPod touch, and iPad devices, the Home Screen
25 button design is clearly recognized by consumers, and functions as an indicator of
26 origin for Apple's products." (*Id.* at DX-628.081.)
 - 27 • "Apple already owns a federal trademark registration of the iPhone product
28 configuration that claims protection in the Home Screen button (RN 3,470,983).

1 The Trademark Office has therefore already recognized that the appearance of the
2 iPhone device as a whole has achieved secondary meaning, and that the Home
3 Screen button has necessarily achieved secondary meaning as well by being a
4 component of the iPhone trade dress.” (*Id.* at DX-628.081-.082.)

- 5 • “The Home Screen button is also recognized by the public as an indicator of
6 source, because it factors prominently in almost any photograph and video of the
7 product.” (*Id.* at DX-628.085.)

8 In the application, Apple even called out three Samsung products as examples of third
9 party smartphones that lack the “distinctive” Apple home button: the Captivate, Infuse 4G, and
10 Galaxy S 4G products. DX-628.082 & DX-628.168-.170. Apple claimed that because third
11 party phones like these do not include the Apple button, “[c]onsumers will therefore view the
12 design of Apple’s Home Screen button as an indicator of source.” DX-628.082. Yet now
13 Apple accuses all three of those phones of diluting its alleged unregistered iPhone trade dress,
14 after having excised the home screen button from the descriptions of its trade dresses. (Dkt No.
15 1280 at 6.)

16 Apple’s admissions in the trademark application are also relevant to show that:

- 17 • The absence of the “distinctive” home button on Samsung’s Galaxy Tab 10.1,
18 which Apple accuses of infringing its alleged iPad-related trade dresses, eliminates
19 or at a minimum weighs against any likelihood that consumers will confuse a
20 Galaxy Tab 10.1 with the iPad.
- 21 • Any acquired distinctiveness that the iPhone and iPad designs may have is due to
22 the “distinctive” home button, not Apple’s selective trade dress elements. This
23 also rebuts trial testimony from Apple’s secondary meaning survey expert, Hal
24 Poret, that Apple’s alleged trade dress has acquired secondary meaning based on
25 survey results where respondents were shown the iPad with home button visible.
26 R.T., 8/7/2012, at 1578:1-4; 1578:24-1579:4; 1588:18-1590:5.
- 27 • The extent of any actual recognition of Apple’s claimed iPhone and iPad trade
28 dresses, a factor that may be considered by the jury in determining whether such

1 trade dresses are famous for purposes of Apple's claim for trade dress dilution, is a
2 function of the home button.

3 Apart from basic admissibility issues, the home screen button application is important for
4 public policy reasons, as the purpose of the Lanham Act is not to lightly give perpetual monopoly
5 rights, especially those based on anything other than what is actually presented in the marketplace
6 and that has gained a source-identifying status. According to Apple's admission to the U.S.
7 government, the home screen button is an integral source-identifying component of its iPhone and
8 iPad trade dresses, yet Apple is attempting to wield those alleged trade dresses having improperly
9 removed the home screen button from the product configuration. (*See, e.g.*, Amended Complaint
10 at Dkt No. 75 (failing to include the home screen button or Apple logo in the description of its
11 purported common law trade dress for its iPad and iPhone products).)

12
13 C. **Samsung's Proffer of Evidence Regarding Apple's Additional, Unasserted**
14 **Design Patents**

15 The Court's Order on Apple's Motion *in Limine* No. 2 ("MIL 2") excluded evidence of
16 Apple's unasserted design patents that were issued subsequent to its asserted design patents in this
17 case. (Dkt. 1267 at 3). The Court's stated basis for excluding these patents was that
18 subsequently issued patents and "non-prior art" are irrelevant to determining the scope of the
19 asserted patents. (July 18, 2012 Hearing Tr. 129:15-23). Having succeeded in precluding
20 Samsung from introducing these Apple design patents through its MIL 2, Apple then flaunted its
21 victory by repeatedly referencing the "hundreds" of patents that Apple has been issued and that it
22 had to choose from in bringing this lawsuit. Apple did this to emphasize and inflate its design
23 achievements in front of the jury. Because Apple opened the door by referencing its numerous
24 unasserted patents in order to bolster the jury's perception of its accomplishments and the strength
25 of its asserted intellectual property rights, Apple could no longer argue that these patents lack
26 relevance, and the jury should have been permitted to see and evaluate for themselves the
27 numerous design patents that Apple, itself, has now put at issue.

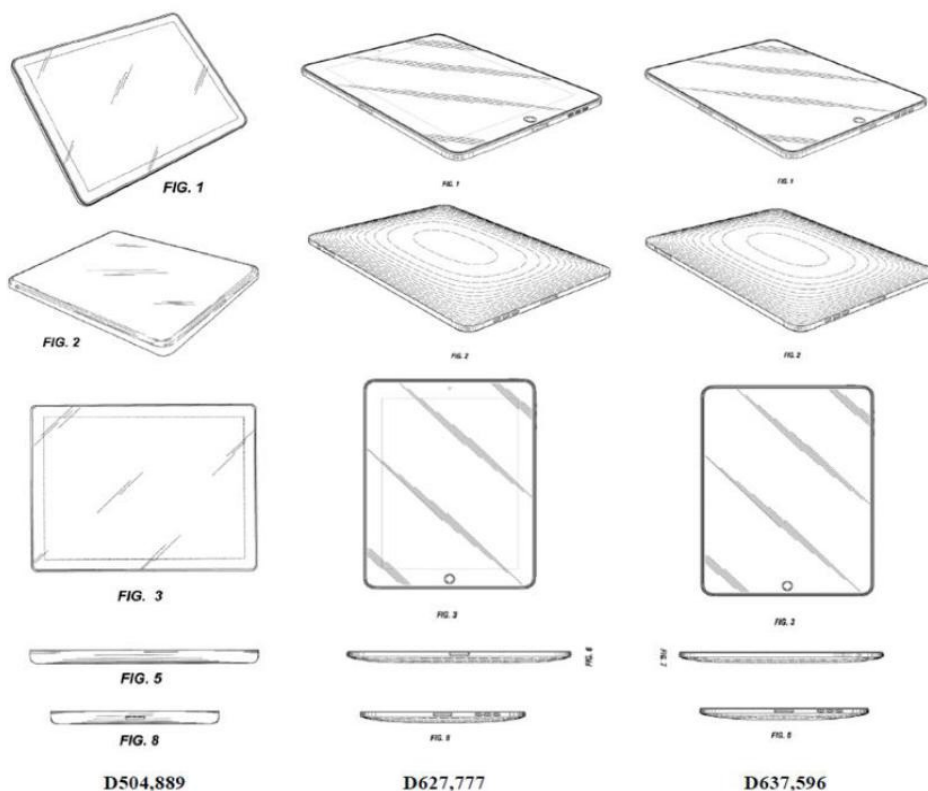
1 In Apple’s opening argument, Apple spoke at length about its “hundreds” of patents, and
 2 how it was only able to choose a select few on which to sue. (R.T, 7/31/2012, at 326:14-327:10
 3 (McElhinny) (emphases added).) Apple’s first witness, Christopher Stringer likewise sought to
 4 increase his design credibility with the jury by mentioning his numerous design patent
 5 achievements – which he described as too numerous for him to even remember the scope. (*Id.* at
 6 471:19-22 (emphasis added).) Having heard extensively about Apple’s hundreds of design
 7 patents, and being left with the impression each claimed something markedly unique, the jurors
 8 should be permitted to see some of those patents, so that they can evaluate for themselves the
 9 proper weight to give to Apple’s claims about its numerous design patent achievements and the
 10 patents at issue in this case. At a minimum, the jury should be permitted to see the following
 11 iPhone- and iPad-related patents:¹



26 _____
 27 ¹ These patents are all attached to the Declaration of Adam Cashman in Support of
 28 Samsung’s Opening Memorandum Regarding Claim Construction (Dkt. 1091), Exs. 23-25; 35-61.

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D889 Compared to Other Apple Design Patents and Applications



Apple’s patents are also relevant to put into perspective Apple’s expansive claims regarding the scope of its “inventions.” As the numerous patents reflect, Apple deemed minor tweaks—thinner borders, a rectangular back element, the presence or absence of small circular features and the shape of the back surface and edges—to be novel inventions in the field, each worthy of representing to the U.S.P.T.O. that they were unique and new designs. This context would help the jury understand the specificity with which Apple itself viewed its designs.

Samsung also submits an offer of proof for the design patent applications for the iPad 2 for the reasons previously given by Samsung in opposition to Apple’s Motion In Limine Number 2. (See Samsung’s Opposition, submitted under seal on July 10, 2012 at Dkt No. 1208 at 5); (iPad 2 design patent application, Trial Exhibit DX-743, Arnold Decl., Ex. Q). In particular, Apple has claimed through its design witness and expert witness at trial that the iPad 2 is an embodiment of the D’889 patent. (R.T., 7/31/2012, at 472:24-473:1; R.T., 8/6/2012, at1047:25-1048:9). Apple’s iPad 2 applications are therefore directly relevant to impeaching Apple's assertion that its

1 iPad products are embodiments of the D'889 patent, which bears directly on several fact issues for
2 the jury, namely infringement and damages.

3 As with the later issued patents described above, these iPad 2 applications include signed
4 oaths by Apple's designers stating that they believe themselves to be the original inventors of what
5 is claimed as a new, original and ornamental design. (*See, e.g.*, Arnold Decl., Ex. Q at APLNDC-
6 Y0000310117-123, 158.) And the iPad 2 applications cite the D'889 patent as prior art over
7 which the applied-for design is said to be new and novel. (*See, e.g., id.* at APLNDC-
8 Y0000310131; *see also* Dkt. 1063-2 (Samsung's Reply ISO MSJ) at 8). Apple should not be
9 permitted to assert these inconsistent positions – namely, that the iPad 2 is both the embodiment
10 of, and also new and original over, the D'889 patent. And Samsung should be afforded the right
11 to put such documents in front of the jury to impeach any Apple factual assertions to the contrary.
12 Samsung would have offered this evidence through Apple's design patent inventors, including
13 Christopher Stringer, as well as Peter Bressler, Apple's design patent expert on issues of
14 infringement and validity.

15
16 D. **Samsung's Proffer of Evidence Regarding Non-Infringement Theories Related**
17 **to Galaxy S II Phones**

18 Samsung was prevented from offering evidence and testimony, and also from cross-
19 examining Apple's design expert, about the differences between Apple's design patents (D'677
20 and D'087) and any Samsung phones other than the Infuse 4G and the Galaxy S 4G. (R.T.,
21 8/6/2012, at 1038:20-1039:14). These other phones included the Galaxy S II phones (Galaxy S II
22 (AT&T) (JX-1031); Galaxy S II (i9100) (JX-1032); Galaxy S II (T-Mobile) (JX-1033); Galaxy S
23 II (Epic 4G Touch) (JX-1034); Galaxy S II (Skyrocket) (JX-1035), which Apple failed to identify
24 in its infringement contention interrogatory response until March 4, 2012, four days before the
25 close of discovery. (*See* Apple's Am. Obj. and Resp. to Samsung's Interrogatory No. 5 at 8-10,
26 attached as Arnold Decl. Ex. T).

27 If permitted to do so, Samsung would have cross-examined Apple's expert, Mr. Bressler,
28 about these other phones, as well as asking Justin Denison and Jin Soo Kim to testify about

1 differences among the Samsung phones and between them and Apple's iPhones. R.T. 8/6/2012,
2 at 949:20-950:17; 951:25-952:14; 2832:22-2833:1. This testimony would have been highly
3 relevant to Samsung's non-infringement claims.

4
5 E. **Samsung's Proffer of Evidence Regarding the Bloomberg Display Patent**
6 **Application**

7 If permitted to do so, Samsung would have examined witnesses, including Mr. Stringer
8 and Apple expert Mr. Bressler, regarding U.S. Patent Pub. No. 2004/41504 A1 ("D'504
9 Application" (DX678, attached as Ex. K to Arnold Decl.)), which is prior art to the asserted D'889
10 patent. Samsung expects that it would have substantiated the following facts: U.S. Patent
11 Publication No. 2004/0041504 A1 was filed on November 20, 2002 and published on March 4,
12 2004, which was before the D'889 patent was filed, and Mr. Stringer and/or Mr. Bressler
13 understands the D'504 Application to show a continuous, flat front surface from edge to edge in a
14 design that is substantially the same as the D'889 design. Indeed, if Mr. Stringer failed to testify
15 consistently, then Samsung would have been able to impeach him based on his prior testimony to
16 this effect in the related ITC investigation. (Arnold Decl., Ex. S (Stringer ITC 796 Dep. Tr.) at
17 366:21-373:23).

18 F. **Samsung's Proffer of Evidence Regarding the Samsung Design Patents**

19 Samsung offers the following Samsung and Apple patents as evidence relevant to
20 Samsung's rebuttal of allegations of willfulness: D638,815 (DX 558), D558,757, D615,083,
21 D645,435, D652,813, D580,387, and D629,799. Samsung's U.S. D638,815 ("D'815") design
22 patent shows the design of Samsung's Mesmerize, Fascinate and Showcase i500 products that are
23 accused of infringement in this case:
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D'815



Mesmerize



Fascinate



Showcase i500

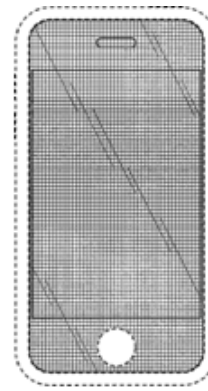
The D'815 patent cites as prior art, on its face, Apple's D558,757 and D615,083 patents, which show designs that are similar to the Apple designs shown in the asserted D618,677 and D593,087 patents at issue in this case:



D'757



D'083



D'677



D'087

Many of Samsung's patents cite Apple design patents as prior art and were issued by the USPTO as new and original designs over those patents. They are thus highly relevant to showing Samsung's lack of willfulness regarding Apple's industrial design-related asserted design patents and trade dresses relating to phones. These patents would have provided evidence corroborating Samsung's understanding of a lack of similarity between its products and the accused designs based on decisions by the U.S. P.T.O. that Samsung's designs were entitled to design patent protection. Each design patent is deemed to disclose a separate design, one which, by definition, is not substantially similar to (i.e., does not infringe) other design patents." *E.g.*, 35 U.S.C. § 177. When the USPTO grants a patent, it is "presumed to have properly done its job." *PowerOasis*,

1 *Inc. v. T-Mobile USA, Inc.*, 522 F.3d 1299, 1304 (Fed. Cir. 2008).) Where – as here – certain of
2 Samsung’s design patents *cite to Apple’s design patents* on their face as prior art, they are highly
3 relevant to Samsung’s lack of willfulness. Introduction of Samsung’s patents would give the jury
4 context for Apple’s arguments that Samsung was “on notice” of the alleged similarity of designs
5 based on such admitted evidence as third-party blog postings no witness had ever seen.

6 Samsung would have substantiated the following facts. The D638,815 design patent was
7 filed on August 31, 2010 and issued on May 31, 2011. (*See Arnold Decl., Ex. D*). The
8 D638,815 patent cites as prior art certain Apple patents, including the D558,757 and D615,083.
9 (*See Arnold Decl., Exs. E-F*). The D645,435 design patent was filed on November 15, 2010 and
10 issued on September 20, 2011. (*See Arnold Decl., Ex. G*). The D652,813 design patent was
11 filed on April 7, 2011 and issued on January 24, 2012. (*See Arnold Decl., Ex. H*). The
12 D638,815 patent cites as prior art certain Apple patents, including the D580,387 and the
13 D629,799. (*See Arnold Decl., Exs. I, J*). Samsung designers and named inventors would have
14 testified that Samsung’s accused products are the result of Samsung’s internal design team work
15 product, not the result of copying Apple’s designs.

16
17 **G. Samsung’s Proffer of Testimony of Dale Sohn**

18 Dale Sohn is the President and Chief Executive Officer of Samsung Telecommunications
19 America (“STA”). Samsung expects that Mr. Sohn would have testified regarding his positions
20 and responsibilities at Samsung since he joined the company in 1982. Samsung also expects that
21 Mr. Sohn would have testified regarding the development and growth of Samsung’s
22 telecommunications unit since he joined Samsung in 1982, including strategies implemented to
23 develop and grow the telecommunications unit; Samsung’s commitment to design, research, and
24 development, and the corporate relationship between STA, Samsung Electronics America (“SEA”),
25 and Samsung Electronics Company (“SEC”); STA’s primary roles and responsibilities in the
26 United States related to the telecommunications unit and STA’s business model, including STA’s
27 relationship with mobile carriers and STA’s strategy for the release of phone models; Samsung’s
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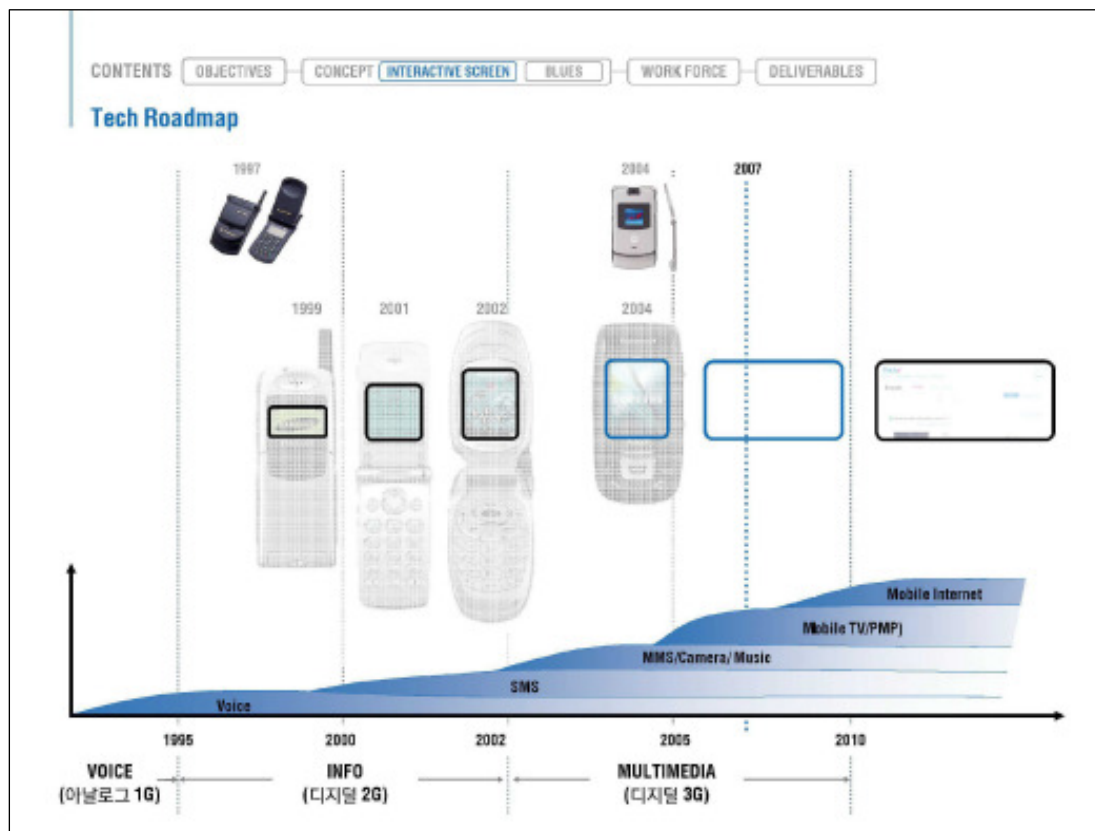
1 competitive strategy and Samsung's supply of components to Apple; and the lack of any Samsung
2 sales of phones in the United States aside from those sold by STA to carriers.

3 Mr. Sohn's testimony would have been relevant to countering allegations of copying and
4 willfulness, along with providing information regarding Samsung's innovative technology and
5 products, and establishing the lack of infringement of the Galaxy Ace, Galaxy S i9000 and Galaxy
6 SII i9100, which were not sold by Samsung in the United States. His testimony, even if brief,
7 also would have rebutted Apple's "empty chair" argument about a lack of Samsung executives and
8 other witnesses testifying.

9
10 H. **Samsung's Proffer of Testimony from Hyoung Shin Park**

11 Hyoung Shin Park is a senior design at Samsung who created the design for Samsung's
12 F700 smartphone (DX 526) in August 2006, months before Apple announced the iPhone in
13 January 2007. Had her testimony not been excluded at trial, Ms. Park would have testified as
14 summarized below and in Samsung's prior offers of proof (Dkt. Nos. 1463,1474, 1664) and as set
15 forth in her sworn witness statement dated May 3, 2012 submitted to the United States
16 International Trade Commission in the Matter of Certain Electronic Digital Media Devices and
17 Components Thereof, Investigation No. 337-TA-796. (See Arnold Decl., Ex. W.)

18 In particular, Ms. Park would have testified that she created the design for the F700 as part
19 of a project known at Samsung as the MPCP project that kick-off in May 2006. Ms. Park was
20 part of a group that included industrial designers, user interface and sound designers and a
21 specialist in colors, materials and finishes, among others, that was selected to come up with a new
22 Samsung mobile phone design. Ms. Park would have also testified that after a series of initial
23 brainstorming sessions, the MPCP group prepared a presentation identified as DX 596 to
24 summarize the design concepts generated during some of those meetings and the marketing
25 position of the products the group was conceptualizing. (See DX 596, Arnold Decl. Ex. N.)
26 She would have testified that the chart shown below from DX 596 was created by the MPCP team
27 to show the evolution of cell phones over time.



15 Ms. Park would have further testified that this chart illustrated a trend observed by the
16 MPCP group that LCD screen sizes on mobile phones were getting larger over time as screen
17 technology improved thus allowing people to use their mobile phones for purposes other than
18 making phone calls. These other purposes included text messaging, playing music, camera
19 functions and viewing media content like videos and mobile television, where they had been used
20 almost exclusively for voice-related activities in the past. Ms. Park would have testified that
21 based on this observed trend the MPCP group decided that the new phone design should include a
22 full-touch large size LCD display screen that would allow users to view a variety of content.

23 Ms. Park would have testified that she and three other designers who participated in the
24 MPCP project sought to create phone designs consistent with this concept and that DX 522 and
25 DX 625 are presentations prepared by the MPCP group showing computer renderings and physical
26 mock-ups of various designs created by Ms. Park and these other designers in July and August
27 2006. (See DX 522 and DX 625, Arnold Decl. Exs. L and O). For example, Ms. Park would
28 have testified that the page below (DX 522.033) shows on the left computer renderings of a design

1 called "Bowl" that she created in collaboration with one of the other MPCP designers and on the
2 right images of some of the inspirations for the "Bowl" design, including a flat body of water, a
3 bowl containing water, and color combinations.



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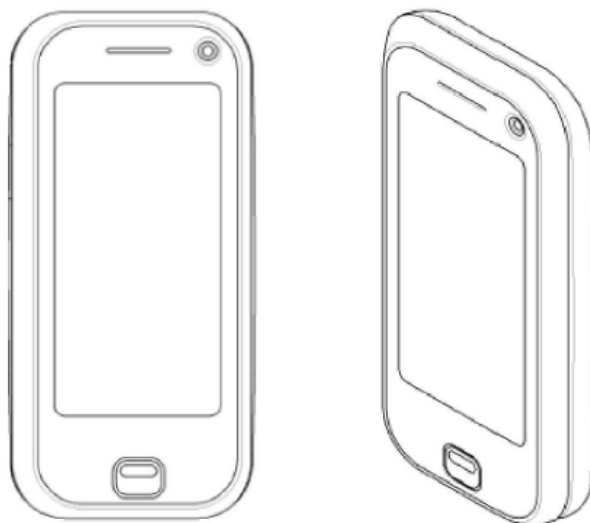


Ms. Park would have testified that the page below (DX 522.045) shows a photograph of a mock-up of a design she created called "Q Bowl" and that the mock-up shown in the photograph was completed by August 2006. The Q in Q Bowl stood for QWERTY, which is the type of slider keyboard used in her design, and "Bowl" stood for her inspiration for the "Bowl" design. Ms. Park would have also testified as to the functional reasons for many of the elements incorporated in her Q Bowl design, including the rectangular shape of the device and LCD display screen, the four rounded corners, the clear flat front surface, the black borders surrounding the display that are narrow on the sides and wider above and below the display, the oblong-shaped receiver opening at the top of the front face of the device and bezel surrounding the front face. Ms. Park would also have identified designs created by the other designers participating in the MPCP project that are shown in DX 522 and DX 625, including designs with these same elements. Ms. Park would also have testified that Samsung's F700, shown below, is a Samsung smartphone based on her Q Bowl design that was released by Samsung in 2007.

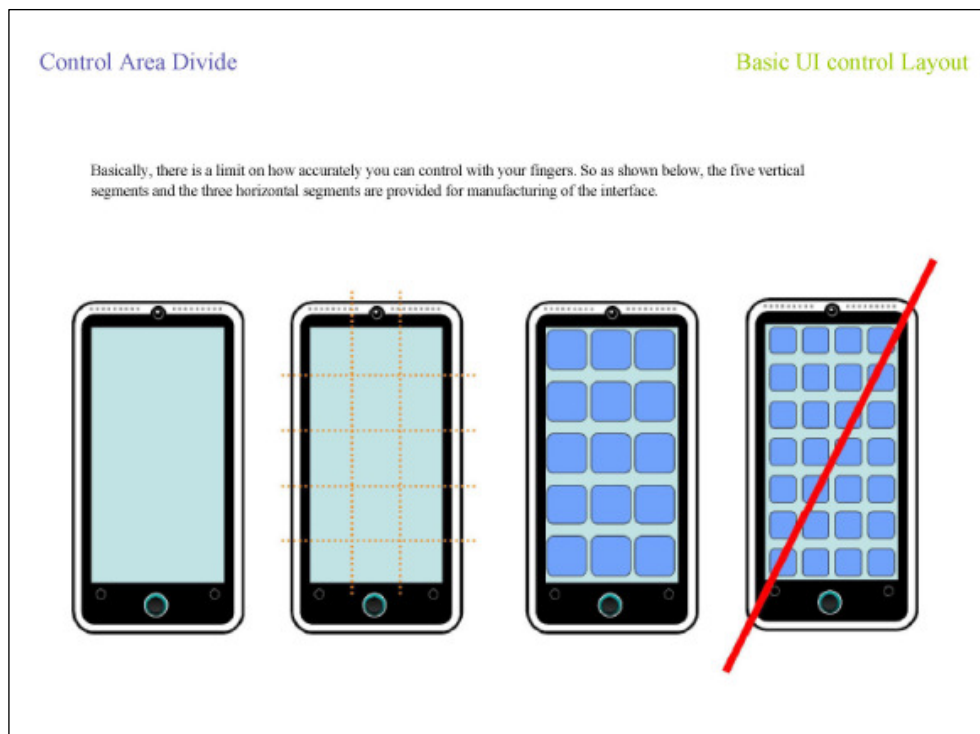
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Ms. Park would have further testified that DX 1086 is a design patent issued by the Korea Intellectual Property Office for her Q Bowl design and that the date of the application for this design patent is December 20, 2006, prior to Apple's announcement of the iPhone in January 2007. (See DX 1086, Arnold Decl. Ex. P).



Ms. Park's testimony would have made clear that she first saw the iPhone on the internet shortly after Apple publicly announced it in January 2007, months after she had completed her Q Bowl design in August 2006. She would also have made clear that her Q Bowl design and the F700 that was based on it were not copied from the iPhone.



Ms. Park would have also testified that while she and the other three industrial designers were working on external phone designs as part of the MPCP project, user interface designers were working on a user interface to be used with the touch screen mobile phones with large LCD display screens envisioned by the MPCP group. The internal Samsung name for this user interface was IReen which stood for interactive screen and intelligent screen. IReen is specifically referenced in the MPCP presentation identified as DX 596. Ms. Park would have identified DX 566 as a presentation dated September 14, 2006 regarding the IReen user interface developed in connection with the MPCP project. (See DX 566, Arnold Decl. Ex. M.) Ms. Park would have also identified the images from DX 566 shown below as Samsung's plan for a user interface for a full-touch LCD display made up of rounded rectangle icons arranged in a grid layout of a dimension comfortable for human fingers to touch and activate. She would have testified that the grid layout shown in the figure on the right with the redline through it was rejected because it limited how accurately the user could control the touch screen with his or her finger, given the dimensions of the screen, which was more narrow than the iPhone screen.

1 Ms. Park's testimony, as summarized above, in Samsung's prior offers of proof and in Ex.
2 W to the accompany Arnold Declaration, is relevant to a host of issues in this case, including the
3 following:

- 4 • The functionality of the designs claimed in the D '087, D '677 and D '305 design
5 patents and Apple's claimed iPhone trade dresses, including the functionality of the
6 rectangular shape of the device and LCD display screen, the four rounded corners,
7 that clear flat front surface, the black borders surrounding the display that are
8 narrow on the sides and wider above and below the display, the oblong-shaped
9 receiver opening at the top of the front face of the device, the bezel surrounding the
10 front face and a graphical user interface made up of rounded rectangle icons in a
11 grid layout.
- 12 • To rebut Apple's allegations of willful infringement of the design patents-in-suit
13 and the alleged iPhone trade dresses as well as its claims that Samsung copied the
14 iPhone's external design and graphical user interface. For example, to support its
15 allegations of copying and willful infringement, Apple showed the jury during
16 opening statement a demonstrative exhibit purporting to show Samsung
17 smartphones before and after Apple announced the iPhone in January 2007. (See
18 Arnold Decl., Ex. X.) The demonstrative showed the F700 with a date of
19 December 2007, creating the false impression that the F700 was copied from the
20 iPhone. Had she not been precluded from testifying, Samsung would introduce
21 Ms. Park's testimony concerning the design of the F700, including the renderings
22 and mock-up completed by August 2006 and the design patent application filed in
23 December 2006, to rebut Apple's purported evidence of willful infringement and
24 copying.
- 25 • Rebutting Apple's claims of willfulness is relevant to issues relating to damages for
26 patent infringement and trade dress dilution and infringement, among other things.
27 (See Dkt. No. 1849, Final Jury Instruction Nos. 45, 46, 58, 60.)

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- 1 • Rebutting Apple's claims of copying is relevant to the issue of secondary meaning
- 2 and thus the protectability of Apple's alleged iPhone trade dresses, among other
- 3 things. (See Dkt. No. 1849, Final Jury Instruction No. 50.)
- 4 • To rebut allegations by Apple that Samsung intended to create an association with
- 5 Apple's alleged trade dress which in turn is relevant to Apple's claim for dilution of
- 6 Apple's alleged iPhone trade dresses. (See Dkt. No. 1849, Final Jury Instruction
- 7 No. 55.)
- 8 • Obviousness of the design patents-in-suit.
- 9 • Invalidity of the design patents-in-suit.

10

11 I. **Samsung's Proffer of Evidence Regarding the Next Big Thing Television Ad**
12 **Campaign**

13 Samsung also submits an offer of proof for its Next Big Thing television campaign, which
14 is trial exhibit DX-629. (Arnold Decl., Ex. R.) The exhibit consists of short, 30-second
15 television advertisements for Samsung Galaxy S II phones in which the Samsung phones are
16 compared and contrasted in various scenes with the Apple iPhone, sometimes implicitly and other
17 times more explicitly. The ads are relevant to lack of confusion and lack of dilution as they show
18 how Samsung's advertising was aimed at making explicit *distinctions* for the public between
19 Samsung's products and Apple's. The ads are also relevant to show Samsung's lack of intent to
20 confuse anyone about the designs of its products. Part of the point of the campaign was to show
21 the superiority of Samsung's designs compared to Apple's. The advertisements would have been
22 offered through Justin Denison, who is the chief strategy officer at Samsung Telecommunications
23 America and who has first-hand knowledge of Samsung's strategy and airing of the
24 advertisements and could authenticate them.

25

26 J. **Samsung's Proffer of Testimony of Gregory Joswiak.**

27 Mr. Joswiak is Apple's Vice President of iPod, iPhone, and iOS product marketing. If
28 permitted, Samsung would have been able to present deposition testimony from Mr. Joswiak

1 regarding Apple not being aware of any data or evidence regarding consumer confusion as to
2 Apple and Samsung's smartphones (Joswiak Tr. 238:1-238:10; *see also* Joswiak Tr. 236:22 -
3 237:3; 238:25 - 239:15). (Arnold Decl, Ex. B.) Apple's objection should not have been
4 sustained. Evidence of real world deception — or lack thereof — is applicable to the design
5 patent infringement analysis and trade dress issues. Based on Apple's own claims of
6 embodiment, evidence regarding actual confusion is highly probative of whether Apple's phone
7 designs and Samsung's phone designs are so similar that "a purchase . . . would be deceived by the
8 similarity between the claimed and accused designs, 'inducing him to purchase one supposing it to
9 be the other.'" *Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 683 (Fed. Cir. 2008) (en
10 banc).

11
12 K. **Samsung's Proffer of Evidence Regarding Offer Rates for LTE Patent**
13 **Portfolios.**

14 UMTS and LTE are telecommunications standards developed by ETSI. Hutnyan Decl.,
15 Ex. 16 (DX-618). LTE is a transitional standard commonly referred to as "4G" and is based on
16 the same wideband CDMA technology as UMTS. Many companies that have a patent portfolio
17 declared essential to UMTS also have a portfolio declared essential to LTE. *Id.* at DX-618.003.
18 Most companies have not announced royalty rates for their UMTS-essential portfolios; however, a
19 number of companies have announced a public offer rate to their LTE-essential portfolios. *Id.* at
20 DX618.001-002.

21 On July 14, the Court excluded Samsung from introducing into evidence the offer rates for
22 LTE patent portfolios published by members of ETSI. Dkt. 1749, at 4. Samsung's expert
23 David Teece opined that LTE licensing rates, as rates for similar telecommunications standards,
24 were relevant to the determination of licensing rates for UMTS. Hutnyan Decl. Ex. 14 (Teece
25 Expert Report, dated March 22, 2012, at ¶ 128). Dr. Teece testified that LTE was relevant
26 because it is an upgrade from UMTS and understood it to be designed with backwards-
27 compatibility. Hutnyan Decl., Ex. 15 (Teece 4/19 Dep. Tr. at 142:20-143:23.) This evidence
28 was thus relevant as a reference point to determining industry-accepted rates for UMTS licenses.

1 Dr. Teece would have made clear the difference between the two standards in his testimony. It
2 was for the jury to weigh whether LTE licensing rates were comparable to UMTS rates.
3 “Questions about what facts are most relevant or reliable to calculating a reasonable royalty are for
4 the jury.” *i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 856 (Fed. Cir. 2010).

5 The Court’s exclusion of LTE offer rates excluded a large portion of the expected
6 testimony of Samsung’s telecommunications industry licensing expert Eric Stasik. In his article
7 on Royalty Rates for LTE Standards, Mr. Stasik sets forth a series of published LTE royalty rates
8 on which Dr. Teece intended to rely. Hutnyan Decl. Ex. 16 (DX-618 at 1). Mr. Stasik
9 concluded that “the licensing situation confronting LTE is not so very much different than the
10 situation which first confronted GSM and UMTS/W-CDMA.” *Id.* at 4. LTE is a standard
11 developed by ETSI, the same standards-setting body that promulgated UMTS, and represents an
12 upgrade to UMTS. *Id.* at 1. As a practical matter, Stasik states, “nearly all handsets which
13 employ the LTE standard will--for some time--also include GSM/GPRS/EDGE/W-CDMA
14 capability.” *Id.* at 4. In Mr. Stasik's expert report in this case, he opined that there is “no reason
15 in my opinion why the LTE standard should command different levels of royalties than W-
16 CDMA.” Hutnyan Decl. Ex. 17 (Stasik Expert Report, dated March 16, 2012, at ¶ 29).
17 Additionally, in addressing Motorola's identical 2.25% offer with regard to a license to GPRS
18 patents and LTE patents, Stasik also opines that “[i]t is reasonable to expect that most other
19 licensors will follow a similar practice offering the same headline royalty rate for GSM, GPRS,
20 UMTS, and LTE. *Id.* at 30. Mr. Stasik would have confirmed the relevance of LTE on the
21 stand.

22 Even if this evidence is not relevant to a reasonable royalty rate analysis under the
23 *Georgia-Pacific* factors, it is relevant to the reasonability of Samsung’s July 25, 2011 license offer
24 to Apple, which Apple claims is outside industry norms and not FRAND. The proffered
25 evidence regarding LTE rates demonstrates that Samsung’s offer was well within accepted
26 industry practice.

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1 L. **Samsung Proffer of Evidence Regarding Its Defense Against Apple Utility**
2 **Patents 7,469,381, 7,844,915 and 7,864,163.**

3 1. **7,469,381 Patent**

4 (a) **Blue Glow Design-Around**

5 If Samsung were permitted to submit evidence of the “blue glow” design around, this
6 evidence would have rebutted and limited the scope of Apple’s assertions of infringement.
7 Moreover, it would have provided additional evidence of smaller damages because of the ease of
8 the design around. The design around displays a blue glow effect at the border of all electronic
9 documents if a user attempts to scroll past the edge.

10 The excluded evidence further prevented Samsung from demonstrating the deficiencies in
11 Apple’s analysis regarding variations within similar versions of Android. The excluded evidence
12 would have demonstrated that, despite Apple’s blanket statements that the Android source code
13 analyzed by its expert was “representative” of an entire range of devices, different devices using
14 the same version of Android can have different functionality with regard to viewing electronic
15 documents. Therefore, the excluded evidence would also have demonstrated the insufficiency of
16 Apple’s infringement analysis.

17 Additionally, the excluded evidence would have conserved judicial resources by
18 simultaneously confirming the non-infringement of Samsung’s design around during this trial
19 rather than during any post-trial proceedings.

20 The inability to present evidence of the blue glow has substantially prejudiced Samsung’s
21 ability to present an accurate representation of its products functionality and falsely suggests to the
22 jury that, in the event the jury finds past infringement, that infringement continues to the present.

23 (i) **Physical Devices and Source Code**

24 Specifically, Samsung would have submitted the following physical device samples to
25 demonstrate the blue glow functionality: Epic 4G (Android version 2.3.5) *See* Hutnyan Decl., Ex.
26 1 (Expert Report of Jeffrey Johnson, Ph.D. Regarding Non-Infringement of U.S. Patent No.
27 7,469,381 (“Johnson Rebuttal Report”); Galaxy Prevail (Android version 2.3.5) (*Id.*); Galaxy S 4G
28

1 (Android version 2.3.6) (*Id.*); Galaxy Tab 10.1 (4G LTE) (Android version 3.2) (AS236, JX
2 1038); and any physical device samples Samsung discovered upon inspection that contained blue
3 glow. Samsung would also have created videos based on these physical device samples.
4 Moreover, Samsung would have submitted blue glow source code from the following devices
5 Galaxy Tab 10.1, Galaxy S II, Exhibit 4G, Epic 4G, including SAMNDCA-C00000613-1391;
6 SAMNDCA-C00001450-1526; SAMNDCA-C00001528-1908; SAMNDCA-C00001911-2265;
7 SAMNDCA-C00002358-2476; SAMNDCA-C00002481-2529; SAMNDCA-C00002559-2899;
8 SAMNDCA-C00002901-2975; SAMNDCA-C00003054-3555; SAMNDCA-C00003597-4086;
9 SAMNDCA-C00004088-4416; SAMNDCA-C00004451-4524; SAMNDCA-C00007811-8031.
10 Hutnyan Decl., Ex. 2 (Samsung blue glow source code).

11 In addition, expert Dr. Jeffrey Johnson would have testified to the non-infringement and
12 ease of implementation relating to blue glow as outlined in his April 16, 2012 expert report.
13 Hutnyan Decl., Ex. 1 (Expert Report of Jeffrey Johnson, Ph.D. Regarding Non-Infringement of
14 U.S. Patent No. 7,469,381, pp. 21-25 ¶¶ 63-71, pp. 27-29 ¶¶ 74-75, pp. 40-41 ¶¶ 123-127; Expert
15 Report of Jeffrey Johnson, Ph.D. Regarding Non-Infringement of U.S. Patent No. 7,469,381, Ex.
16 6; Expert Report of Jeffrey Johnson, Ph.D. Regarding Non-Infringement of U.S. Patent No.
17 7,469,381, Ex. 7; Expert Report of Jeffrey Johnson, Ph.D. Regarding Non-Infringement of U.S.
18 Patent No. 7,469,381, Ex. 10). *See also* Hutnyan Decl., Ex. 3 (Depo. Tr. of J. Johnson 4/26/2012
19 at 54:9-60:22; 56:13-57:24; 59:16-60:22; 64:2-10; 69:25-70:16; 132:20-134:9; 149:7-19; 203:25-
20 204:12; 222:1-225:14).

21 Samsung would have submitted the following physical device samples to demonstrate the
22 differing functionality even within like versions of the Android operating system: Galaxy S i9000
23 (Android version 2.3.4) (Declaration of Jeffrey Johnson in Support of Samsung's Motion to Strike
24 Expert Testimony Based on Undisclosed Facts and Theories (Dkt. 934-6)); Galaxy S II SGH-I777
25 (Android version 2.3.4) (Dkt. 934-6).

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1 (ii) **Fact Witnesses**

2 Samsung would also have offered fact witnesses Ioi Lam, Wookyun Kho, Sun Young Yi
3 and Jaewoo Park regarding the implementation of blue glow. *See* Hutnyan Decl., Exs. 4, 5, 6,
4 and 7 (Depo. Tr. of W. Kho 1/12/12 at 119:16-121:19; Depo. Tr. of I. Lam 3/8/12 at 116:24-
5 118:16; Depo. Tr. of W. Kho 3/4/12 at 200:23-211:16; Depo. Tr. of S. Yi 2/8/12 at 111:25-
6 113:4.)

7 Ioi Lam would have testified that he has seen versions of Android that indicate the end of a
8 page by stopping the page with no effect, whereas other versions indicate the same by displaying
9 either a blue or an orange glow at the edge of the page. *See* Hutnyan Decl., Ex. 5 (Depo. Tr. of I.
10 Lam. 3/8/12 at 116:24-118:16.

11 Wookyun Kho would have testified that the bounce effect in some Samsung projects had
12 been replaced with the blue glow effect and was still referred to internally as the “bounce effect”
13 despite the change. *See* Hutnyan Decl., Ex. 4 (Depo. Tr. of W. Kho 1/12/12 at 119:16-120:5).
14 He also would have testified that he was personally involved in writing software for the blue glow
15 effect and that the Samsung Effect team began working on the blue glow effect before the Galaxy
16 Nexus was publicly sold in 2010. (*Id.* at 120:6-4). Further, Mr. Kho would have testified that
17 the edge glow effect was contained in the Android Gingerbread native code. (*Id.* at 12-19.) Mr.
18 Kho would have also testified about the “EdgeGlow” effect that was originally created by Google.
19 *See* Hutnyan Decl., Ex. 6 (Depo. Tr. of W. Kho 3/4/12 at 203:1-7).

20 Sun Young Yi similarly would have testified that she was aware of the blue glow design
21 around and that the feature had been included in Samsung phones. *See* Hutnyan Decl., Ex. 7
22 (Depo. Tr. of S. Yi 2/8/12 at 111:25-113:4.)

23
24 (iii) **Interrogatory Responses**

25 If permitted, Samsung would have submitted Samsung’s Supplemental Responses to
26 Apple’s Interrogatory No. 16, 3/8/2012. *See* (Hutnyan Decl., Ex. 8 (Samsung’s Supplemental
27 Responses to Apple’s Interrogatory No. 16 dated 3/8/2012).) The Supplemental Responses to
28 Apple’s Interrogatory No. 16 state that the blue glow, edge glow and yellow glow effects are

1 possible design arounds for the ‘381 patent and identify blue glow source code produced by
2 Samsung on January 23, 2012, the date of the design around implementation, and the Samsung
3 employees responsible for implementing the design around – Wookyun Kho, Kihyung Nam,
4 Dooju Byu, Jaegwan Shin and Seunghwan Han. *Id.*

5
6 (iv) **Video of Blue Glow**

7 Samsung further would have played, and sought to have admitted into evidence, PX66
8 (plaintiff’s demonstrative submitted for Karan Singh) which contains a video that demonstrates
9 the blue glow functionality implemented in released Samsung devices. *See* Hutnyan Decl., Ex. 9
10 (PX66.) Samsung also would have played the original and complete version of DX2557 which
11 is a video of Joint Exhibit 1038 which contains the blue glow design around. *See* Hutnyan Decl.,
12 Ex. 10 (DX2557).

13
14 (b) **Criticism of Apple’s Expert Witness**

15 If permitted, Samsung would also have put into evidence the criticism of Apple’s expert
16 witness, Ravin Balakrishnan Ph.D., in the 337-TA-750 investigation between Motorola and Apple
17 before the International Trade Commission. *See* Hutnyan Decl., Ex. 11 (Inv. No. 337-TA-750
18 Initial Determination at 159.) In his Jan. 13, 2012 Initial Determination, Administrative Law
19 Judge Essex noted that Dr. Balakrishnan’s opinion “is inconsistent” and that “it is also difficult to
20 reconcile [his] testimony . . . with his earlier testimony . . .” (*Id.*) The ALJ determined that
21 these inconsistencies “undermine[d] Dr. Balakrishnan’s credibility” and led the ALJ “to give less
22 weigh to [Dr. Balakrishnan’s] testimony because it appears to offer one opinion to defeat
23 indefiniteness and another to fend off anticipation.” (*Id.*)

24 The inability to properly impeach Dr. Balakrishnan regarding his prior inconsistencies has
25 substantially prejudiced Samsung by preventing the jury from accurately assessing the reliability
26 of Dr. Balakrishnan’s testimony and his methods.

1 (c) **U.S. Patent No. 6,498,590**

2 If permitted, Samsung would have used U.S. Patent No. 6,498,590 ('590 patent) (DX2649)
3 to show the '590 patent inventors' beliefs that the DiamondTouch screen was a touchscreen and
4 not merely a touch-sensitive surface as proper impeachment evidence. See Hutnyan Decl., Ex.
5 12 (DX2649). The plain language of the '590 patent demonstrates that the patentees viewed the
6 claimed screen to be a touchscreen. (See *id.* at Fig. 1; col. 1:10-29; col. 2:34-39). The '590
7 patent also makes clear that the claimed touchscreen may be resistive, capacitive, acoustic or
8 infrared. (*Id.* at col. 1:16-17). This evidence would have directly rebutted Apple's argument
9 that the DiamondTouch prior art device did not contain a touchscreen as required by the claims of
10 the '381 patent.

11 The inability to impeach Apple's argument regarding whether the display on the
12 DiamondTouch system is a "touchscreen" has substantially prejudiced Samsung by preventing a
13 complete and accurate rebuttal of Apple's assertions. The patent demonstrates the inventor's and
14 the patent office's view that the claimed device – the DiamondTouch system – contains a
15 touchscreen.

16 Moreover, Samsung would have used this document to rebut Apple's argument that the
17 touchscreen display is not integrated with the "data processing system." The patent refers to
18 DiamondTouch as a touchscreen system.

19
20 (d) **Order Granting Request for Ex Parte Reexamination**

21 If permitted, Samsung would have used DX2652, the Order Granting Request for Ex Parte
22 Reexamination of the '381 patent to show the existence of a substantial question regarding the
23 validity of at least claim 1 and likely claims 2-20 which had not been decided in a previous
24 examination. See Hutnyan Decl., Ex. 11 (DX2652.011). The Court's refusal to allow DX2652
25 into evidence has substantially prejudiced Samsung by preventing the jury from properly
26 evaluating the patent office's opinions regarding the validity of the '381 patent.

1 2. **7,844,915 Patent**

2 (a) **U.S. Patent No. 6,498,590**

3 If permitted, Samsung would have used U.S. Patent No. 6,498,590 ('590 patent) (DX2649)
4 to show the '590 patent inventors' beliefs that the DiamondTouch screen was a touchscreen and
5 not merely a touch-sensitive surface. *See* Hutnyan Decl., Ex. 12 (DX2649). The plain language
6 of the '590 patent demonstrates that the patentees viewed the claimed screen to be a touchscreen.
7 *See id.* at Fig. 1; col. 1:10-29; col. 2:34-39. The '590 patent also makes clear that the claimed
8 touchscreen may be resistive, capacitive, acoustic or infrared. *Id.* at col. 1:16-17. This evidence
9 would have directly rebutted Apple's argument that the DiamondTouch prior art device did not
10 contain a touchscreen as required by the claims of the '915 patent.

11 The inability to impeach Apple's argument regarding whether the display on the
12 DiamondTouch system is a "touchscreen" or "integrated" has substantially prejudiced Samsung by
13 preventing a complete and accurate rebuttal of Apple's assertions. The patent demonstrates the
14 inventor's and the patent office's view that the claimed device – the DiamondTouch system –
15 contains a touchscreen.

16
17 3. **7,864,163 Patent**

18 (a) **Design-Around**

19 If Samsung were permitted to submit evidence of the '163 patent's design arounds, this
20 evidence would have rebutted and limited the scope of Apple's assertions of infringement.
21 Moreover, it would have provided additional evidence of smaller damages because of the ease of
22 the design around.

23 The excluded evidence further prevented Samsung from demonstrating the deficiencies in
24 Apple's analysis regarding variations within similar versions of Android. The excluded evidence
25 would have demonstrated that, despite Apple's blanket statements that the Android source code
26 analyzed by its expert was "representative" of an entire range of devices, different devices using
27 the same version of Android can have different functionality with regard to viewing electronic
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1 documents. Therefore, the excluded evidence would also have demonstrated the insufficiency of
2 Apple's infringement analysis.

3 Additionally, the excluded evidence would have conserved judicial resources by
4 simultaneously confirming the non-infringement of Samsung's design around during this trial
5 rather than during any post-trial proceedings.

6 The inability to present evidence regarding the possible '163 design arounds has
7 substantially prejudiced Samsung's ability to present an accurate representation of its products
8 functionality and falsely suggests to the jury that, in the event the jury finds past infringement, that
9 infringement continues to the present.

10 If permitted, Samsung would have submitted Samsung's Supplemental Responses to
11 Apple's Interrogatory No. 16, 3/8/2012. *See* Hutnyan Decl., Ex. 8 (Samsung's Supplemental
12 Responses to Apple's Interrogatory No. 16 dated 3/8/2012). The Supplemental Responses to
13 Apple's Interrogatory No. 16 describe how the '163 patent may be designed around by not
14 enlarging or translating a web page to substantially center a first box, not expanding the first box
15 so that the width of the first box is substantially the same as the width of the touch screen display,
16 not resizing text in an enlarged first box to meet or exceed a predetermined minimum text size on
17 the touch screen display, and not translating a web page so as to substantially center a second box
18 on the touch screen display while a first box is enlarged. *Id.* at 8. Samsung's Interrogatory
19 Responses further would have described how the '163 patent may be designed around when, upon
20 a "second" gesture from the user, either (1) the structured electronic document returns to its
21 original size; and/or (2) no further actions are performed. *Id.* This evidence further states that
22 Samsung has modified or is modifying the functionality of its products including its Galaxy Attain
23 4G, Galaxy Tab 10.1, Epic 4G, Galaxy S II Epic 4G Touch, and Galaxy S II Skyrocket devices.
24 *Id.*

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1 DATED: August 21, 2012

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