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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

|  |   |                      |
|--|---|----------------------|
| APPLE INC., A CALIFORNIA CORPORATION,  | ) | C-11-01846 LHK       |
|  | ) |                      |
|  | ) | SAN JOSE, CALIFORNIA |
| PLAINTIFF,   | ) |                      |
|  | ) | AUGUST 21, 2012      |
| VS.  | ) |                      |
|  | ) | VOLUME 13            |
| 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, | ) | PAGES 3941-4264      |
|  | ) |                      |
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|  | ) |                      |
| DEFENDANTS.  | ) |                      |

TRANSCRIPT OF PROCEEDINGS  
BEFORE THE HONORABLE LUCY H. KOH  
UNITED STATES DISTRICT JUDGE

APPEARANCES ON NEXT PAGE

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR  
CERTIFICATE NUMBER 9595  
IRENE RODRIGUEZ, CSR, CRR  
CERTIFICATE NUMBER 8074

1 A P P E A R A N C E S :

2 FOR PLAINTIFF MORRISON & FOERSTER  
APPLE: BY: HAROLD J. MCELHINNY  
3 MICHAEL A. JACOBS  
RACHEL KREVANS  
4 425 MARKET STREET  
SAN FRANCISCO, CALIFORNIA 94105  
5

6 FOR COUNTERCLAIMANT WILMER, CUTLER, PICKERING,  
APPLE: HALE AND DORR  
7 BY: WILLIAM F. LEE  
60 STATE STREET  
8 BOSTON, MASSACHUSETTS 02109

9 BY: MARK D. SELWYN  
950 PAGE MILL ROAD  
10 PALO ALTO, CALIFORNIA 94304

11 FOR THE DEFENDANT: QUINN, EMANUEL, URQUHART,  
OLIVER & HEDGES  
12 BY: CHARLES K. VERHOEVEN  
50 CALIFORNIA STREET, 22ND FLOOR  
13 SAN FRANCISCO, CALIFORNIA 94111

14 BY: VICTORIA F. MAROULIS  
KEVIN P.B. JOHNSON  
15 555 TWIN DOLPHIN DRIVE  
SUITE 560  
16 REDWOOD SHORES, CALIFORNIA 94065

17 BY: MICHAEL T. ZELLER  
WILLIAM C. PRICE  
18 865 SOUTH FIGUEROA STREET  
10TH FLOOR  
19 LOS ANGELES, CALIFORNIA 90017

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1 SAN JOSE, CALIFORNIA AUGUST 21, 2012

2 P R O C E E D I N G S

3 (WHEREUPON, THE FOLLOWING PROCEEDINGS  
4 WERE HELD OUT OF THE PRESENCE OF THE JURY:)

5 THE COURT: GOOD MORNING AND WELCOME.  
6 THANK YOU. PLEASE TAKE A SEAT.

7 OKAY. ARE THERE ANY OUTSTANDING ISSUES  
8 THAT WE SHOULD HANDLE BEFORE OUR JURY COMES IN?

9 MS. MAROULIS: YOUR HONOR, VERY BRIEFLY.

10 WITH RESPECT TO THE VERDICT FORM THAT WAS  
11 FILED, WE UNDERSTOOD APPLE'S COMMENTS LAST NIGHT TO  
12 SAY THAT THE ACE I9000 AND I9100 SHOULD BE TAKEN  
13 OFF THE VERDICT FORM AND WE SEE THAT IT'S STILL ON,  
14 SO WE'RE JUST WONDERING IF THE COURT SAW APPLE'S  
15 FILING.

16 MR. JACOBS: THAT'S INCORRECT, YOUR  
17 HONOR. WE HAD IT IN MIND TO COME OFF FOR  
18 INDUCEMENT, BECAUSE THE EVIDENCE WAS THAT IT WAS  
19 NOT SOLD THROUGH THE SUBSIDIARIES.

20 BUT OTHERWISE IT SHOULD REMAIN ON.

21 THE COURT: THAT'S WHAT WE DID. WE JUST  
22 TOOK IT OUT OF THE INDUCEMENT QUESTIONS.

23 DOES THAT TAKE CARE OF THE ISSUE,  
24 MS. MAROULIS? SINCE IT WAS IMPOSSIBLE FOR DIRECT  
25 INFRINGEMENT BY STA AND SEA ON THOSE THREE

1 PRODUCTS, THERE COULD BE NO INDUCEMENT. SO --

2 OKAY. DID YOU ALL HAVE ANY OTHER  
3 CHANGES? WE TRIED TO MAKE EVERY SINGLE CHANGE THAT  
4 YOU ALL RECOMMENDED.

5 I MEAN, OBVIOUSLY WE HAVE A LITTLE BIT  
6 MORE TIME ON THE VERDICT FORM. MY GUESS IS IF THEY  
7 START DELIBERATING BY THE END OF TODAY, WE'LL BE  
8 LUCKY. SO IF WE HAD TO MAKE A CHANGE DURING LUNCH,  
9 WE COULD DO THAT. SO IF YOU SEE ANYTHING ELSE, YOU  
10 KNOW, PLEASE LET US KNOW.

11 NOW, WITH THE EXHIBIT LIST, EVERYBODY IS  
12 OKAY WITH THAT, RIGHT? THERE ARE NO OTHER  
13 ADDITIONAL PROBLEMS?

14 MR. JACOBS: WE'RE FINE.

15 THE COURT: OKAY. MS. MAROULIS, IS THAT  
16 OKAY, TOO?

17 MS. MAROULIS: THAT'S FINE.

18 THE COURT: OKAY. AND THEN THE JURY  
19 INSTRUCTIONS, THERE WERE THREE LAST CHANGES THAT WE  
20 MADE THIS MORNING AND WE'RE FILING SOMETHING NOW  
21 THAT JUST EXPLAINS WHAT THEY ARE.

22 ONE IS CORRECTING A TYPO THAT SAMSUNG  
23 FOUND THAT THE WORD "IS" IS MISSING; AND ANOTHER  
24 ONE IS ON, I BELIEVE THE INSTRUCTION ON INDUCEMENT,  
25 TO LIST ALL THREE OF THE SAMSUNG ENTITIES VERSUS

1 JUST DESCRIBING THEM AS SAMSUNG.

2 THE CLERK: AND THERE WAS ANOTHER ONE  
3 THAT MR. JACOBS POINTED OUT TO ME. NUMBER 55 STILL  
4 HAD THE WORD "DISPUTED."

5 THE COURT: RIGHT. SO VERY SHORTLY,  
6 MS. CHAN WILL BRING UP THE FINAL INSTRUCTIONS AND  
7 YOU CAN TAKE A LOOK. BUT THERE HAVE BEEN NO OTHER  
8 SUBSTANTIVE CHANGES OTHER THAN THAT.

9 LATER TODAY I'LL SHOW YOU WHAT OUR JURY  
10 NOTE FORM IS GOING TO LOOK LIKE JUST IN CASE YOU  
11 HAVE COMMENTS ON THAT.

12 SO A COUPLE OF LAST ISSUES. YOU GOT, I  
13 ASSUME, ALL OF THE RULINGS LAST NIGHT; CORRECT?

14 MR. VERHOEVEN: YES, YOUR HONOR.

15 THE COURT: ALL RIGHT. SO MY REQUEST IS  
16 THAT OBVIOUSLY EVERYONE IS GOING TO COMPLY WITH THE  
17 PRETRIAL ORDER AND TRIAL ORDERS, BUT ALSO TO STICK  
18 WITH WHAT'S IN THE SCOPE OF EACH SEGMENT OF YOUR  
19 CLOSING AND REBUTTAL.

20 WE HAD A LITTLE BIT OF AN ISSUE WITH THAT  
21 DURING SOME OF THE CROSS OF SOME OF THE SAMSUNG  
22 WITNESSES DURING THE SAMSUNG REBUTTAL CASE, AND I  
23 JUST DON'T WANT TO HAVE ANY ARGUMENTS THAT IT'S  
24 OUTSIDE THE SCOPE OF WHAT YOUR LIMITED TIME IS LEFT  
25 FOR.

1 THE OTHER THING IS FILING THE EXCLUDED  
2 EXHIBITS. I WOULD LIKE THOSE FILED AFTER THE JURY  
3 HAS FINISHED ITS DELIBERATIONS BECAUSE I DON'T WANT  
4 ANY ISSUES IN THIS CASE. IS THAT --

5 MS. MAROULIS: YOUR HONOR, I NEED TO  
6 CHECK. WE MIGHT HAVE FILED SOME IN THE MIDDLE OF  
7 THE NIGHT JUST TO GET IT READY. IF IT HASN'T BEEN  
8 FILED, I WILL GIVE INSTRUCTIONS NOT TO FILE IT, BUT  
9 IT MAY HAVE BEEN.

10 THE COURT: ALL RIGHT. SO JUST AFTER THE  
11 JURY FINISHES ITS DELIBERATION, THEN YOU CAN FILE  
12 ANYTHING.

13 ALL RIGHT. WHAT ELSE? ANYTHING ELSE  
14 THAT WE SHOULD COVER?

15 MR. VERHOEVEN: NOT FROM HERE.

16 THE COURT: NO?

17 MR. LEE: NO.

18 THE COURT: ALL RIGHT. WELL, THEN, I  
19 GUESS WE'LL BE IN RECESS AND THE FINAL INSTRUCTIONS  
20 WILL BE BROUGHT UP SHORTLY.

21 OKAY. THANK YOU.

22 MR. VERHOEVEN: THANK YOU, YOUR HONOR.

23 MR. MCELHINNY: YOUR HONOR, I'M SORRY. I  
24 JUST WANT TO MAKE SURE WHAT I UNDERSTOOD, ANY  
25 INTENT, IN THE ORIGINAL -- IN THE HOUR THAT I HAD

1 AT THE BEGINNING WAS TO ADDRESS ALL OF THE ISSUES.

2 I MEAN, I'M GOING TO TALK ABOUT ALL OF  
3 THE EVIDENCE THAT WAS IN THE CASE, AND THEN I'M  
4 ONLY RESERVING A VERY SHORT PERIOD OF TIME TO DEAL  
5 WITH --

6 THE COURT: PLEASE TAKE A SEAT.

7 MR. MCELHINNY: I DIDN'T UNDERSTAND THE  
8 FINAL ARGUMENT --

9 THE COURT: WELL, I THOUGHT WE WERE  
10 FOLLOWING THE PATTERN THAT THE CASE FOLLOWED DURING  
11 THE TRIAL, SO APPLE'S AFFIRMATIVE CASE; AND THEN  
12 SAMSUNG'S DEFENSIVE CASE AND SAMSUNG'S AFFIRMATIVE  
13 CASE; THEN APPLE'S REBUTTAL CASE AND DEFENSIVE  
14 CASE; AND THEN SAMSUNG'S REBUTTAL CASE ONLY ON ITS  
15 OWN CASE.

16 MR. MCELHINNY: THAT'S THE ORDER -- I  
17 MEAN, I UNDERSTAND THAT'S THE ORDER OF ARGUMENT.

18 BUT I THOUGHT I WAS -- I MEAN, I INTENDED  
19 TO ADDRESS ALL OF THE EVIDENCE AND THEN JUST SAVE A  
20 VERY SHORT PERIOD OF TIME FOR REBUTTAL FOR ANY  
21 POINTS THAT MR. VERHOEVEN RAISED IN HIS ARGUMENT.

22 I DIDN'T INTEND TO DEAL ONLY WITH  
23 INFRINGEMENT AND THEN DEAL WITH -- IN OTHER WORDS,  
24 TO DIVIDE MY ARGUMENT ENTIRELY.

25 THE COURT: UM-HUM.



1 MR. VERHOEVEN: YOUR HONOR, MY  
2 UNDERSTANDING IS THAT APPLE WOULD GO FIRST, THEY  
3 PRESENT THEIR ADDRESS, BUT THEY WOULDN'T ADDRESS  
4 OUR OFFENSIVE CASE; THEN WE WOULD GO FIRST AND WE  
5 WOULD DEFEND OURSELVES AGAINST THEIR ASSERTIONS AND  
6 PRESENT OUR OFFENSIVE CASE; AND THEN APPLE WOULD BE  
7 ABLE TO REBUT WITH THEIR RESERVED TIME AND DEFEND  
8 THEMSELVES AGAINST OUR OFFENSIVE CASE AND THEN  
9 RAISE THEIR AFFIRMATIVE FRAND DEFENSE AND OTHER  
10 DEFENSES; AND THEN I WOULD STAND UP AND REBUT THE  
11 FRAND DEFENSES, AND THAT'S IT.

12 THAT WAS THE WAY I UNDERSTOOD YOUR HONOR  
13 TO BE STRUCTURING THE CLOSING.

14 THE COURT: YES.

15 (DISCUSSION OFF THE RECORD BETWEEN  
16 PLAINTIFF'S COUNSEL.)

17 MR. MCELHINNY: AND THE ONLY -- I JUST  
18 WANT TO DEAL WITH MY VALIDITY ISSUES IN THE FIRST  
19 BECAUSE ALL THE WITNESSES ARE TOGETHER AND THE  
20 EVIDENCE IS ALL TOGETHER.

21 I'M NOT GOING TO GET INTO FRAND OR ANY OF  
22 THAT STUFF AT ALL.

23 I MEAN, I JUST WANT TO TAKE IT PATENT BY  
24 PATENT AND SHOW INFRINGEMENT AND VALIDITY.

25 MR. VERHOEVEN: THE ISSUE WE -- I'M NOT

1 SURE THAT WE HAVE ANY GREAT DISAGREEMENT.

2 THE ISSUE THAT I'M TALKING ABOUT IS THEM  
3 ADDRESSING OUR AFFIRMATIVE CASE, OUR ASSERTED  
4 PATENTS --

5 MR. MCELHINNY: THAT I'M NOT -- --

6 MR. VERHOEVEN: -- IN ADVANCE BEFORE  
7 REBUTTAL.

8 IF THEY WANT TO TALK ABOUT THE VALIDITY  
9 OF THEIR PATENTS THAT THEY'RE ASSERTING AGAINST US  
10 IN THEIR FIRST ROUND, I HAVE --

11 MR. MCELHINNY: THAT'S EXACTLY WHAT I'M  
12 TALKING ABOUT.

13 THE COURT: ALL RIGHT.

14 MR. VERHOEVEN: BUT ON THE REBUTTAL,  
15 THAT'S LIMITED TO REBUTTING OUR AFFIRMATIVE CASE.

16 THEY CAN'T CIRCLE BACK AND SAY, "OKAY,  
17 LET'S TALK ABOUT APPLE'S AFFIRMATIVE CASE AGAIN."

18 INSTEAD THEY'RE ADDRESSING -- THEY'RE  
19 DEFENDING OUR AFFIRMATIVE CASE.

20 AND SIMILARLY, I WOULD BE LIMITED IN MY  
21 TIME TO ADDRESSING THEIR FIRST RAISED FRAND CASES.

22 MR. MCELHINNY: WE ARE VERY CLOSE, WHICH  
23 IS I -- WE'RE IN COMPLETE AGREEMENT ON THE FIRST  
24 PART, WHICH IS IN MY OPENING, I AM NOT GOING TO  
25 TALK ABOUT SAMSUNG'S AFFIRMATIVE CASE. I'M NOT

1 GOING TO TALK ABOUT THEIR PATENTS. I'M NOT GOING  
2 TO TALK ABOUT ANTITRUST AND I'M NOT GOING TO TALK  
3 ABOUT FRAND.

4 I AM GOING TO RESERVE, I HOPE, 15 MINUTES  
5 OF MY TIME FOR REBUTTAL TO ADDRESS ANY POINTS THAT  
6 MR. VERHOEVEN RAISES ABOUT OUR CASE. THAT'S  
7 TRADITIONAL CLOSING. IF IT WAS ONLY ONE CASE, I  
8 WOULD GO FIRST, HE WOULD GO SECOND, AND THEN I  
9 WOULD GET TO REBUT WHATEVER CLOSING HE MADE AS TO  
10 MY CASE.

11 AND MR. LEE AND I ARE PLANNING TO SPLIT  
12 THE SECOND HOUR SO THAT I HAVE A SHORT REBUTTAL AND  
13 THEN HE'S ADDRESSING THE SECOND CASE.

14 THE COURT: IS THAT ACCEPTABLE TO YOU?

15 MR. VERHOEVEN: WELL, I GUESS THERE'S TWO  
16 COMMENTS I HAVE.

17 ONE IS IF THEY'RE GOING TO TRY TO -- IF  
18 THEY'RE GOING TO SPLIT THEIR CLOSING AN HOUR, AN  
19 HOUR FOR REBUTTAL, I THINK THAT THAT'S JUST NOT  
20 FAIR, YOUR HONOR. I MEAN, A HALF HOUR FOR REBUTTAL  
21 WOULD BE FAIR.

22 BUT THAT'S LIKE DOING MOST OF YOUR CASE  
23 IN REBUTTAL, SO THAT TO ME, YOU KNOW, AN HOUR --  
24 THEY NEVER TOLD US THEY WERE RESERVING AN HOUR.

25 YOU KNOW, THIS IS LIKE IF YOU'RE IN THE

1 FEDERAL CIRCUIT AND YOU ASK TO RESERVE 10 MINUTES  
2 OF YOUR 15 MINUTES FOR REBUTTAL, THEY DON'T LET YOU  
3 DO THAT.

4 MR. MCELHINNY: AGAIN, I'M NOT BEING  
5 CLEAR. IF YOU LOOK AT MY CASE, WHAT I'M TALKING  
6 ABOUT IS DOING AN HOUR AND RESERVING 15 MINUTES FOR  
7 MY REBUTTAL.

8 MR. LEE GETS A FULL CHANCE TO DO HIS  
9 DEFENSE, AND THAT'S -- WE'VE -- INTERNALLY WE'VE  
10 DECIDED 40 TO 45 MINUTES TO DO HIS DEFENSE.

11 THE COURT: IS THAT ACCEPTABLE?

12 MR. MCELHINNY: AND THEN --

13 THE COURT: AND THEN 15 MINUTES OF  
14 REBUTTAL ON THEIR AFFIRMATIVE DEFENSE.

15 MR. VERHOEVEN: IF THAT'S WHAT IT IS, I  
16 DON'T SEE THE PROBLEM THERE.

17 BUT THE ONLY OTHER THING I'D SAY IS THAT  
18 I SIMILARLY -- IF THAT'S THE WAY WE'RE GOING TO DO  
19 IT, WHEN I STAND UP AT THE END, I SHOULDN'T BE  
20 LIMITED TO JUST REBUTTING THE FRAND. I SHOULD BE  
21 ABLE TO GIVE MY LAST WORD ON SOME OF THE ARGUMENTS  
22 THAT THEY MADE AS WELL.

23 MR. MCELHINNY: I AGREE WITH THAT, YOUR  
24 HONOR.

25 MR. VERHOEVEN: AND THAT'LL BE LIMITED.

1 IT WON'T BE OVER HALF OF MY TIME. IT'LL BE A SHORT  
2 PERIOD OF TIME.

3 MR. MCELHINNY: I AGREE WITH THAT.

4 THE COURT: ALL RIGHT.

5 MR. VERHOEVEN: I THINK WE'RE ALL SET.

6 THE COURT: ALL RIGHT. SO IF YOU ALL  
7 HAVE REACHED AGREEMENT, WHICH IT LOOKS LIKE YOU  
8 HAVE, WHICH IS PROBABLY HISTORIC IN THIS CASE, YOU  
9 CAN DO AS YOU WISH.

10 THAT WAS NOT EXACTLY HOW I WAS  
11 ENVISIONING IT. I WAS ENVISIONING IT BEING MORE  
12 CUED TO THE PRESENTATIONS THAT WE DID IN TRIAL.

13 BUT IF YOU'VE REACHED AGREEMENT, THAT'S  
14 TOTALLY FINE.

15 SO IT SOUNDS LIKE YOU'RE GOING TO DO AN  
16 HOUR AND AN HOUR; YOU WANT TO DO A SIMILAR TIME  
17 ALLOCATION, OR --

18 MR. VERHOEVEN: WELL, IT'S HARD FOR ME TO  
19 SAY EXACTLY BECAUSE I'M NOT SURE EXACTLY WHAT -- I  
20 AM RESPONDING IN LARGE PART, SO IT MAY BE LONGER OR  
21 SHORTER. BUT I'M TARGETING ABOUT 20 MINUTES OF  
22 REBUTTAL.

23 THE COURT: OKAY. WELL, YOU JUST LET ME  
24 KNOW -- YOU KNOW, TAKE AS MUCH TIME AS YOU WANT.  
25 AT THIS POINT, YOU BOTH HAVE TWO HOURS AND YOU CAN

1 USE IT HOWEVER YOU WOULD LIKE.

2 MR. VERHOEVEN: THANK YOU.

3 THE COURT: OKAY. SO LET ME GO AND MAKE  
4 SURE THAT WE HAVE THE FINAL JURY INSTRUCTIONS FOR  
5 YOU, AND I NEED EVERYONE TO STAY CONSCIOUS DURING  
6 THE READING OF INSTRUCTIONS, INCLUDING MYSELF, SO  
7 WE ARE GOING TO, JUST KIND OF, WE'RE GOING TO STAND  
8 UP OCCASIONALLY TO MAKE SURE THE BLOOD IS STILL  
9 FLOWING, BECAUSE IT IS QUITE LENGTHY.

10 THE CLERK: IT LOOKS LIKE THE JURY  
11 INSTRUCTIONS HAVE BEEN FILED.

12 THE COURT: OKAY. SO THEY JUST NEED TO  
13 BE COPIED.

14 THE CLERK: THEY'RE WORKING ON THAT.

15 (PAUSE IN PROCEEDINGS.)

16 THE COURT: OKAY. WE'LL BE IN RECESS  
17 UNTIL THE JURY INSTRUCTIONS. THANK YOU.

18 (WHEREUPON, A RECESS WAS TAKEN.)

19 (WHEREUPON, THE FOLLOWING PROCEEDINGS  
20 WERE HELD IN THE PRESENCE OF THE JURY:)

21 THE COURT: ALL RIGHT. PLEASE TAKE A  
22 SEAT. WELCOME BACK. THANK YOU FOR YOUR PATIENCE.

23 JUST IN CASE YOU WERE WONDERING WHY YOU  
24 HAD YESTERDAY OFF, AFTER ALL OF THE EVIDENCE IS  
25 ADMITTED, THERE ARE A LOT OF THINGS THAT WE NEED TO

1 TAKE CARE OF OUTSIDE YOUR PRESENCE, NOT THE LEAST  
2 OF WHICH IS TO PREPARE ALL THE DOCUMENTS THAT  
3 YOU'RE GOING TO RECEIVE TODAY. SO THAT'S WHY WE  
4 DIDN'T GET STARTED WITH THE CLOSINGS YESTERDAY. SO  
5 THANK YOU FOR YOUR UNDERSTANDING AS TO THAT.

6 SO I'M NOW GOING TO READ OUR 84 JURY  
7 INSTRUCTIONS, AND WE ARE JUST GOING TO PERIODICALLY  
8 JUST STAND UP JUST TO MAKE SURE WE'RE STILL ALIVE,  
9 BUT YOU CAN READ ALONG WITH ME, THAT IS YOUR COPY,  
10 YOU CAN TAKE THAT INTO THE JURY DELIBERATION ROOM,  
11 YOU CAN MAKE NOTES ON IT, WHATEVER YOU WISH TO DO.  
12 IT'S ALSO THREE-HOLE PUNCHED, SO YOU CAN INCLUDE IT  
13 IN YOUR BINDER IF YOU WISH.

14 ALL RIGHT. WE'LL START WITH GENERAL  
15 CIVIL INSTRUCTIONS. MEMBERS OF THE JURY, NOW THAT  
16 YOU HAVE HEARD ALL OF THE EVIDENCE, IT IS MY DUTY  
17 TO INSTRUCT YOU AS TO THE LAW OF THE CASE.

18 EACH OF YOU HAS RECEIVED A COPY OF THESE  
19 INSTRUCTIONS THAT YOU MAY TAKE WITH YOU TO THE JURY  
20 ROOM TO CONSULT DURING YOUR DELIBERATIONS.

21 YOU MUST NOT INFER FROM THESE  
22 INSTRUCTIONS OR FROM ANYTHING I MAY SAY OR DO AS  
23 INDICATING THAT I HAVE AN OPINION REGARDING THE  
24 EVIDENCE OR WHAT YOUR VERDICT SHOULD BE.

25 IT IS YOUR DUTY TO FIND THE FACTS FROM

1 ALL THE EVIDENCE IN THE CASE. TO THOSE FACTS YOU  
2 WILL APPLY THE LAW AS I GIVE IT TO YOU.

3 YOU MUST FOLLOW THE LAW AS I GIVE IT TO  
4 YOU, WHETHER YOU AGREE WITH IT OR NOT. AND YOU  
5 MUST NOT BE INFLUENCED BY ANY PERSONAL LIKES OR  
6 DISLIKES, OPINIONS, PREJUDICES, OR SYMPATHY. THAT  
7 MEANS THAT YOU MUST DECIDE THE CASE SOLELY ON THE  
8 EVIDENCE BEFORE YOU. YOU WILL RECALL THAT YOU TOOK  
9 AN OATH TO DO SO.

10 IN FOLLOWING MY INSTRUCTIONS, YOU MUST  
11 FOLLOW ALL OF THEM AND NOT SINGLE OUT SOME AND  
12 IGNORE OTHERS. THEY ARE ALL IMPORTANT.

13 WHEN A PARTY HAS THE BURDEN OF PROOF ON  
14 ANY CLAIM OR DEFENSE BY A PREPONDERANCE OF THE  
15 EVIDENCE, IT MEANS YOU MUST BE PERSUADED BY THE  
16 EVIDENCE THAT THE CLAIM OR DEFENSE IS MORE PROBABLY  
17 TRUE THAN NOT.

18 YOU SHOULD BASE YOUR DECISION ON ALL OF  
19 THE EVIDENCE, REGARDLESS OF WHICH PARTY PRESENTED  
20 IT.

21 INSTRUCTION NUMBER 3. WHEN A PARTY HAS  
22 THE BURDEN OF PROVING ANY CLAIM OR DEFENSE BY CLEAR  
23 AND CONVINCING EVIDENCE, IT MEANS YOU MUST BE  
24 PERSUADED BY THE EVIDENCE THAT THE CLAIM OR DEFENSE  
25 IS HIGHLY PROBABLE. THIS IS A HIGHER STANDARD OF



1 PROOF THAN PROOF BY A PREPONDERANCE OF THE  
2 EVIDENCE.

3 YOU SHOULD BASE YOUR DECISION ON ALL OF  
4 THE EVIDENCE, REGARDLESS OF WHICH PARTY PRESENTED  
5 IT.

6 NUMBER 4. YOU SHOULD DECIDE THE CASE AS  
7 TO EACH PARTY SEPARATELY. UNLESS OTHERWISE STATED,  
8 THE INSTRUCTIONS APPLY TO ALL PARTIES.

9 NUMBER 5. THE TRIAL IS NOW OVER. THE  
10 EVIDENCE YOU ARE TO CONSIDER IN DECIDING WHAT THE  
11 FACTS ARE CONSISTS;

12 THE SWORN TESTIMONY OF ANY WITNESS;

13 THE EXHIBITS WHICH ARE RECEIVED INTO  
14 EVIDENCE; AND,

15 ANY FACTS TO WHICH THE LAWYERS HAVE  
16 AGREED.

17 NUMBER 6. IN REACHING YOUR VERDICT, YOU  
18 CONSIDER ONLY THE TESTIMONY AND EXHIBITS THAT WERE  
19 RECEIVED INTO EVIDENCE. CERTAIN THINGS ARE NOT  
20 EVIDENCE, AND YOU MAY NOT CONSIDER THEM IN DECIDING  
21 WHAT THE FACTS ARE. I WILL LIST THEM FOR YOU.

22 ARGUMENTS AND STATEMENTS BY LAWYERS ARE  
23 NOT EVIDENCE. THE LAWYERS ARE NOT WITNESSES. WHAT  
24 THEY SAID IN THEIR OPENING STATEMENTS AND  
25 THROUGHOUT THE TRIAL, AND WHAT THEY WILL SAY IN

1 THEIR CLOSING ARGUMENTS OR AT OTHER TIMES ARE ALL  
2 INTENDED TO HELP YOU INTERPRET THE EVIDENCE, BUT  
3 THESE ARGUMENTS AND STATEMENTS ARE NOT EVIDENCE.

4 IF THE FACTS AS YOU REMEMBER THEM DIFFER  
5 FROM THE WAY THE LAWYERS HAVE STATED THEM, YOUR  
6 MEMORY OF THEM CONTROLS.

7 QUESTIONS AND OBJECTIONS BY LAWYERS ARE  
8 NOT EVIDENCE. ATTORNEYS HAVE A DUTY TO THEIR  
9 CLIENTS TO OBJECT WHEN THEY BELIEVE A QUESTION IS  
10 IMPROPER UNDER THE RULES OF EVIDENCE. YOU SHOULD  
11 NOT BE INFLUENCED BY THE OBJECTION OR BY THE  
12 COURT'S RULING ON IT.

13 TESTIMONY THAT HAS BEEN EXCLUDED OR  
14 STRICKEN, OR THAT YOU HAVE BEEN INSTRUCTED TO  
15 DISREGARD, IS NOT EVIDENCE AND MUST NOT BE  
16 CONSIDERED. IN ADDITION, SOMETIMES TESTIMONY AND  
17 EXHIBITS ARE RECEIVED ONLY FOR A LIMITED PURPOSE.

18 WHEN I GIVE A LIMITING INSTRUCTION, YOU  
19 MUST FOLLOW IT.

20 ANYTHING YOU MAY HAVE SEEN OR HEARD WHEN  
21 THE COURT WAS NOT IN SESSION IS NOT EVIDENCE. YOU  
22 ARE TO DECIDE THE CASE SOLELY ON THE EVIDENCE  
23 RECEIVE THE AT THE TRIAL.

24 NUMBER 7. SOME EVIDENCE MAY HAVE BEEN  
25 ADMITTED FOR A LIMITED PURPOSE ONLY. YOU MUST

1 CONSIDER IT ONLY FOR THAT LIMITED PURPOSE AND FOR  
2 NO OTHER.

3 NUMBER 8. CERTAIN CHARTS AND SLIDES NOT  
4 RECEIVED IN EVIDENCE HAVE BEEN SHOWN TO YOU IN  
5 ORDER TO HELP EXPLAIN THE CONTENTS OF BOOKS,  
6 RECORDS, DOCUMENTS OR OTHER EVIDENCE IN THE CASE.  
7 THEY ARE NOT THEMSELVES EVIDENCE OR PROOF OF ANY  
8 FACTS.

9 NUMBER 9. CERTAIN CHARTS AND SUMMARIES  
10 HAVE BEEN RECEIVED INTO EVIDENCE TO ILLUSTRATE  
11 INFORMATION BROUGHT OUT IN THE TRIAL. YOU MAY USE  
12 THOSE CHARTS AND SUMMARIES AS EVIDENCE, EVEN THOUGH  
13 THE UNDERLYING DOCUMENTS AND RECORDS ARE NOT HERE.  
14 YOU SHOULD GIVE THEM ONLY SUCH WEIGHT AS YOU THINK  
15 THEY DESERVE.

16 NUMBER 10. EVIDENCE MAY BE DIRECT OR  
17 CIRCUMSTANTIAL. DIRECT EVIDENCE IS DIRECT PROOF OF  
18 A FACT, SUCH AS TESTIMONY BY A WITNESS ABOUT WHAT  
19 THAT WITNESS PERSONALLY SAW OR HEARD OR DID.

20 CIRCUMSTANTIAL EVIDENCE IS PROOF OF ONE  
21 OR MORE FACTS FROM WHICH YOU COULD FIND ANOTHER  
22 FACT. YOU SHOULD CONSIDER BOTH KINDS OF EVIDENCE.  
23 THE LAW MAKES NO DISTINCTION BETWEEN THE WEIGHT TO  
24 BE GIVEN TO EITHER DIRECT OR CIRCUMSTANTIAL  
25 EVIDENCE. IT IS FOR YOU TO DECIDE HOW MUCH WEIGHT

1 TO GIVE TO ANY EVIDENCE.

2 NUMBER 11. IN DECIDING THE FACTS IN THIS  
3 CASE, YOU MAY HAVE TO DECIDE WHICH TESTIMONY TO  
4 BELIEVE AND WHICH TESTIMONY NOT TO BELIEVE. YOU  
5 MAY BELIEVE EVERYTHING A WITNESS SAYS, OR PART OF  
6 IT, OR NONE OF IT. PROOF OF A FACT DOES NOT  
7 NECESSARILY DEPEND ON THE NUMBER OF WITNESSES WHO  
8 TESTIFIED ABOUT IT.

9 IN CONSIDERING THE TESTIMONY OF ANY  
10 WITNESS, YOU MAY TAKE INTO ACCOUNT:

11 THE OPPORTUNITY AND ABILITY OF THE  
12 WITNESS TO SEE OR HEAR OR KNOW THE THINGS TESTIFIED  
13 TO;

14 THE WITNESS'S MEMORY;

15 THE WITNESS'S MANNER WHILE TESTIFYING;

16 THE WITNESS'S INTEREST IN THE OUTCOME OF  
17 THE CASE AND ANY BIAS OR PREJUDICE;

18 WHETHER OTHER EVIDENCE CONTRADICTED THE  
19 WITNESS'S TESTIMONY;

20 THE REASONABLENESS OF THE WITNESS'S  
21 TESTIMONY IN LIGHT OF ALL THE EVIDENCE; AND,

22 ANY OTHER FACTORS THAT BEAR ON  
23 BELIEVABILITY. THE WEIGHT OF THE EVIDENCE AS TO A  
24 FACT DOES NOT NECESSARILY DEPEND ON THE NUMBER OF  
25 WITNESSES WHO TESTIFY ABOUT IT.

1                   NUMBER 12. THE EVIDENCE THAT A WITNESS  
2                   LIED UNDER OATH OR GAVE DIFFERENT TESTIMONY ON A  
3                   PRIOR OCCASION MAY BE CONSIDERED, ALONG WITH ALL  
4                   OTHER EVIDENCE, IN DECIDING WHETHER OR NOT TO  
5                   BELIEVE THE WITNESS AND HOW MUCH WEIGHT TO GIVE TO  
6                   THE TESTIMONY OF THE WITNESS AND FOR NO OTHER  
7                   PURPOSE.

8                   YOU MAY HAVE -- NUMBER 13. YOU MAY HAVE  
9                   TAKEN NOTES DURING THE TRIAL. WHETHER OR NOT YOU  
10                  TOOK NOTES, YOU SHOULD RELY ON YOUR OWN MEMORY OF  
11                  THE EVIDENCE. NOTES ARE ONLY TO ASSIST YOUR  
12                  MEMORY. YOU SHOULD NOT BE OVERLY INFLUENCED BY  
13                  YOUR NOTES OR THOSE OF YOUR FELLOW JURORS.

14                  NUMBER 14. YOU HEARD SOME WITNESSES  
15                  TESTIFY BY DEPOSITION. A DEPOSITION IS THE SWORN  
16                  TESTIMONY OF A WITNESS TAKEN BEFORE TRIAL. THE  
17                  WITNESS IS PLACED UNDER OATH TO TELL THE TRUTH AND  
18                  LAWYERS FOR EACH PARTY MAY ASK QUESTIONS. THE  
19                  QUESTIONS AND ANSWERS ARE RECORDED.

20                  YOU SHOULD CONSIDER DEPOSITION TESTIMONY  
21                  PRESENTED TO YOU IN COURT IN LIEU OF LIVE  
22                  TESTIMONY, INsofar AS POSSIBLE, IN THE SAME WAY AS  
23                  IF THE WITNESS HAD BEEN PRESENT TO TESTIFY.

24                  NUMBER 15. EVIDENCE WAS PRESENTED TO YOU  
25                  IN THE FORM OF ANSWERS OF ONE OF THE PARTIES TO

1 WRITTEN INTERROGATORIES SUBMITTED BY THE OTHER.  
2 THESE ANSWERS WERE GIVEN IN WRITING AND UNDER OATH,  
3 BEFORE THE ACTUAL TRIAL, IN RESPONSE TO QUESTIONS  
4 THAT WERE SUBMITTED IN WRITING UNDER ESTABLISHED  
5 COURT PROCEDURES. YOU SHOULD CONSIDER THE ANSWERS,  
6 INSOFAR AS POSSIBLE, IN THE SAME WAY AS IF THEY  
7 WERE MADE FROM THE WITNESS STAND.

8 NUMBER 16. SOME WITNESSES, BECAUSE OF  
9 EDUCATION OR EXPERIENCE, WERE PERMITTED TO STATE  
10 OPINIONS AND THE REASONS FOR THOSE OPINIONS.

11 OPINION TESTIMONY SHOULD BE JUDGED JUST  
12 LIKE ANY OTHER TESTIMONY. YOU MAY ACCEPT IT OR  
13 REJECT IT, AND GIVE IT AS MUCH WEIGHT AS YOU THINK  
14 IT DESERVES, CONSIDERING THE WITNESS'S EDUCATION  
15 AND EXPERIENCE, THE REASONS GIVEN FOR THE OPINION,  
16 AND ALL THE OTHER EVIDENCE IN THE CASE.

17 NUMBER 17. THE PHYSICAL DEVICES YOU  
18 RECEIVE ARE EVIDENCE IN THIS TRIAL. YOU MAY USE  
19 THEM IN YOUR DELIBERATIONS AND MAY CONNECT TO THE  
20 INTERNET THROUGH THE WEB BROWSER APPLICATION, BUT  
21 MUST NOT ALTER OR MODIFY THE DEVICES IN ANY WAY.

22 SOME OF THE DEVICES HAVE SIM CARDS IN  
23 THEIR PACKAGING. THESE SIM CARDS ARE NOT TO BE  
24 INSERTED INTO THE PHONES.

25 SOME OF THE DEVICES HAVE A MOBILE DATA

1 CONNECTION, AND YOU WILL NOT NEED TO TAKE ANY  
2 ADDITIONAL ACTION TO USE THE WEB BROWSER  
3 APPLICATION.

4 OTHERS MUST FIRST BE CONNECTED TO THE  
5 COURT'S WI-FI NETWORK TO ACCESS THE INTERNET.

6 ONCE CONNECTED, YOU MUST DECLINE ANY  
7 SOFTWARE UPDATE NOTIFICATIONS THAT MAY BE PRESENTED  
8 TO YOU.

9 YOU ALSO MUST NOT DOWNLOAD ANY CONTENT,  
10 SUCH AS APPS, MUSIC, PHOTOGRAPHS OR GAMES TO THE  
11 DEVICES.

12 CONNECTING TO THE INTERNET. TO CONNECT  
13 THE DEVICE TO THE COURT'S WI-FI NETWORK, SELECT  
14 "U.S.D.C. SJ 01" FROM THE LIST OF AVAILABLE  
15 WIRELESS NETWORKS AS DEPICTED BELOW.

16 FROM THE APPLICATIONS MENU, SELECT THE  
17 WEB BROWSER APPLICATION.

18 FROM THE COURT'S WI-FI LOG-IN PAGE,  
19 SCROLL TO THE BOTTOM AND CLICK ON THE BLUE  
20 "CONNECT" BUTTON.

21 DECLINING SYSTEM UPDATE NOTIFICATIONS.  
22 SOME DEVICES MAY DISPLAY A "SYSTEM UPDATE"  
23 NOTIFICATION LIKE THE ONES BELOW.

24 NOW, THERE IS TEXT IN THESE JURY  
25 INSTRUCTIONS THAT I'M NOT GOING TO READ, BUT IT

1 WILL ALL BE PART OF THE RECORD SINCE THE  
2 INSTRUCTIONS WILL BE PART OF THE RECORD.

3 AND THE TEXT, BY THAT I MEAN THE SCREEN  
4 SHOTS OF THE VARIOUS WEBSITE PAGES AND SYSTEM  
5 UPDATE NOTIFICATIONS.

6 IF YOU SEE SUCH A SCREEN, YOU MUST  
7 DECLINE THE REQUEST TO UPDATE THE SYSTEM. SELECT  
8 "INSTALL LATER" OR PRESS THE "HOME" OR "BACK"  
9 BUTTON TO EXIT THE NOTIFICATION SCREEN.

10 NUMBER 18. I WILL NOW AGAIN SUMMARIZE  
11 FOR YOU EACH SIDE'S CONTENTIONS IN THIS CASE. I  
12 WILL THEN TELL YOU WHAT EACH SIDE MUST PROVE TO WIN  
13 ON EACH OF ITS CONTENTIONS.

14 AS I PREVIOUSLY MENTIONED, APPLE SEEKING  
15 MONEY DAMAGES FROM SAMSUNG ELECTRONICS COMPANY,  
16 SEC, SAMSUNG ELECTRONICS AMERICA, INCORPORATED,  
17 SEA, AND SAMSUNG TELECOMMUNICATIONS AMERICA, LLC,  
18 STA, FOR ALLEGEDLY INFRINGING CLAIM 19 OF THE '381  
19 PATENT, CLAIM 8 OF THE '915 PATENT, CLAIM 50 OF THE  
20 '163 PATENT, AND THE D'889, D'087, D'677, AND D'305  
21 PATENTS.

22 APPLE ALSO ARGUES THAT SEC ACTIVELY  
23 INDUCED SEA AND STA TO INFRINGE THE PATENTS.

24 APPLE ALSO CONTENDS THAT SAMSUNG'S  
25 INFRINGEMENT HAS BEEN WILLFUL.



1 SAMSUNG DENIES THAT IT HAS INFRINGED THE  
2 ASSERTED CLAIMS OF APPLE'S PATENTS AND ARGUES THAT,  
3 IN ADDITION, THOSE CLAIMS ARE INVALID. INVALIDITY  
4 IS A DEFENSE TO INFRINGEMENT.

5 SAMSUNG HAS ALSO BROUGHT CLAIMS AGAINST  
6 APPLE FOR PATENT INFRINGEMENT. SAMSUNG SEEKS MONEY  
7 DAMAGES FROM APPLE FOR ALLEGEDLY INFRINGING THE  
8 '941, '516, '711, '460, AND '893 PATENTS BY MAKING,  
9 IMPORTING, USING, SELLING, AND/OR OFFERING FOR SALE  
10 APPLE'S IPHONE, IPAD, AND IPOD PRODUCTS THAT  
11 SAMSUNG ARGUES ARE COVERED BY CLAIMS 10 AND 15 OF  
12 THE '941 PATENT, CLAIMS 15 AND 16 OF THE '516  
13 PATENT, CLAIM 9 OF THE '711 PATENT, CLAIM 1 OF THE  
14 '460 PATENT, AND CLAIM 10 OF THE '893 PATENT.

15 SAMSUNG ALSO CONTENDS THAT APPLE'S  
16 INFRINGEMENT HAS BEEN WILLFUL.

17 APPLE DENIES THAT IT HAS INFRINGED THE  
18 CLAIMS ASSERTED BY SAMSUNG AND ARGUES THAT CLAIMS  
19 ASSERTED BY SAMSUNG ARE INVALID, AND FOR THE '516  
20 AND '941 PATENTS, EXHAUSTED DUE TO SAMSUNG'S  
21 LICENSE TO INTEL AND ALSO UNENFORCEABLE.

22 INVALIDITY, EXHAUSTION, AND  
23 UNENFORCEABILITY ARE DEFENSES TO INFRINGEMENT.

24 APPLE ALSO CONTENDS THAT, BY ASSERTING  
25 ITS "DECLARED ESSENTIAL" PATENTS AGAINST APPLE,

1 SAMSUNG HAS VIOLATED THE ANTITRUST LAWS AND  
2 BREACHED ITS CONTRACTUAL OBLIGATIONS TO TIMELY  
3 DISCLOSE AND THEN LICENSE THESE PATENTS ON FAIR AND  
4 REASONABLE TERMS.

5 FOR EACH PARTY'S PATENT INFRINGEMENT  
6 CLAIMS AGAINST THE OTHER, THE FIRST ISSUE YOU WILL  
7 HAVE TO DECIDE IS WHETHER THE ALLEGED INFRINGER HAS  
8 INFRINGED THE CLAIMS OF THE PATENT HOLDER'S PATENTS  
9 AND WHETHER THOSE PATENTS ARE VALID.

10 IF YOU DECIDE THAT ANY CLAIM OF EITHER  
11 PARTY'S PATENTS HAS BEEN INFRINGED AND IS NOT  
12 INVALID, YOU WILL THEN NEED TO DECIDE ANY MONEY  
13 DAMAGES TO BE AWARDED TO THE PATENT HOLDER TO  
14 COMPENSATE FOR THE INFRINGEMENT.

15 YOU WILL ALSO NEED TO MAKE A FINDING AS  
16 TO WHETHER THE INFRINGEMENT WAS WILLFUL.

17 IF YOU DECIDE THAT ANY INFRINGEMENT WAS  
18 WILLFUL, THAT DECISION SHOULD NOT AFFECT ANY DAMAGE  
19 AWARD YOU GIVE. I WILL TAKE WILLFULNESS INTO  
20 ACCOUNT LATER.

21 TO RESOLVE APPLE'S CLAIMS REGARDING  
22 SAMSUNG'S "DECLARED ESSENTIAL" PATENTS, YOU WILL  
23 NEED TO MAKE A FINDING AS TO WHETHER SAMSUNG  
24 VIOLATED THE ANTITRUST LAWS AND WHETHER SAMSUNG  
25 BREACHED ITS CONTRACTUAL OBLIGATIONS.

1 IF YOU DECIDE THAT SAMSUNG VIOLATED THE  
2 ANTITRUST LAWS OR BREACHED ITS CONTRACTUAL  
3 OBLIGATIONS, YOU WILL THEN NEED TO DECIDE WHAT  
4 MONEY DAMAGES TO AWARD TO APPLE.

5 APPLE ACCUSES SAMSUNG OF DILUTING APPLE'S  
6 REGISTER TRADE DRESS NUMBER 3,470,983. THIS TRADE  
7 DRESS RELATES TO THE IPHONE.

8 APPLE ALSO ACCUSES SAMSUNG OF DILUTING  
9 TWO UNREGISTERED TRADE DRESSES RELATING TO THE  
10 IPHONE.

11 FINALLY, APPLE CLAIMS THAT SAMSUNG HAS  
12 DILUTED AND INFRINGED ITS UNREGISTERED TRADE DRESS  
13 RELATING TO THE IPAD.

14 FOR EACH OF APPLE'S TRADE DRESS DILUTION  
15 AND INFRINGEMENT CLAIMS, THE FIRST ISSUE YOU WILL  
16 HAVE TO DECIDE IS WHETHER THE APPLE TRADE DRESS IS  
17 PROTECTABLE OR VALID. AN ASSERTED TRADE DRESS IS  
18 ONLY PROTECTABLE IF THE TRADE DRESS DESIGN AS A  
19 WHOLE, AS OPPOSED TO ITS INDIVIDUAL FEATURES  
20 STANDING ALONE, IS BOTH DISTINCTIVE AND  
21 NON-FUNCTIONAL.

22 FOR APPLE'S TRADE DRESS DILUTION CLAIMS,  
23 THE NEXT ISSUES YOU WILL DECIDE ARE WHETHER APPLE'S  
24 TRADE DRESS WAS FAMOUS BEFORE SAMSUNG STARTED  
25 SELLING ITS ACCUSED PRODUCTS, AND WHETHER SAMSUNG'S

1 ACCUSED PRODUCTS ARE LIKELY TO CAUSE DILUTION OF  
2 THE ASSERTED APPLE TRADE DRESSES BY IMPAIRING THEIR  
3 DISTINCTIVENESS.

4 APPLE'S TRADE DRESS -- LET ME GET THAT.  
5 APPLE'S TRADE DRESS INFRINGEMENT CLAIM WILL REQUIRE  
6 YOU TO RESOLVE DIFFERENT ISSUES. YOU WILL NEED TO  
7 DETERMINE WHETHER APPLE'S TRADE DRESS HAD ACQUIRED  
8 DISTINCTIVENESS BEFORE SAMSUNG STARTED SELLING ITS  
9 ACCUSE PRODUCTS AND WHETHER SAMSUNG'S ACCUSED  
10 PRODUCTS ARE LIKELY TO CAUSE CONFUSION ABOUT THE  
11 SOURCE OF SAMSUNG'S GOODS.

12 IF YOU DECIDE THAT ANY APPLE TRADE DRESS  
13 IS BOTH PROTECTABLE AND HAS BEEN INFRINGED OR  
14 WILLFULLY DILUTED BY SAMSUNG, YOU WILL THEN NEED TO  
15 DECIDE THE MONEY DAMAGES TO BE AWARDED TO APPLE.

16 SAMSUNG DENIES THAT IT HAS INFRINGED OR  
17 DILUTED ANY APPLE TRADE DRESS AND ARGUES THAT EACH  
18 ASSERTED TRADE DRESS IS NOT PROTECTABLE. IF A  
19 TRADE DRESS IS NOT PROTECTABLE, THAT IS A DEFENSE  
20 TO INFRINGEMENT AND DILUTION.

21 NUMBER 19. WHEN YOU BEGIN YOUR  
22 DELIBERATIONS, YOU SHOULD ELECT ONE MEMBER OF THE  
23 JURY AS YOUR PRESIDING JUROR. THAT PERSON WILL  
24 PRESIDE OVER THE DELIBERATIONS AND SPEAK FOR YOU  
25 HERE IN COURT.

1                   YOU WILL THEN DISCUSS THE CASE WITH YOUR  
2 FELLOW JURORS TO REACH AGREEMENT IF YOU CAN DO SO.  
3 YOUR VERDICT MUST BE UNANIMOUS.

4                   EACH OF YOU MUST DECIDE THE CASE FOR  
5 YOURSELF, BUT YOU SHOULD DO SO ONLY AFTER YOU HAVE  
6 CONSIDERED ALL OF THE EVIDENCE, DISCUSSED IT FULLY  
7 WITH THE OTHER JURORS, AND LISTENED TO THE VIEWS OF  
8 YOUR FELLOW JURORS.

9                   DO NOT HESITATE TO CHANGE YOUR OPINION IF  
10 THE DISCUSSION PERSUADES YOU THAT YOU SHOULD. DO  
11 NOT COME TO A DECISION SIMPLY BECAUSE OTHER JURORS  
12 THINK IT IS RIGHT.

13                   IT IS IMPORTANT THAT YOU ATTEMPT TO REACH  
14 A UNANIMOUS VERDICT BUT, OF COURSE, ONLY IF EACH OF  
15 YOU CAN DO SO AFTER HAVING MADE YOUR OWN  
16 CONSCIENTIOUS DECISION. DO NOT CHANGE AN HONEST  
17 BELIEF ABOUT THE WEIGHT AND EFFECT OF THE EVIDENCE  
18 SIMPLY TO REACH A VERDICT.

19                   NUMBER 20. IF IT BECOMES NECESSARY  
20 DURING YOUR DELIBERATIONS TO COMMUNICATE WITH ME,  
21 YOU MAY SEND A NOTE THROUGH THE BAILIFF, SIGNED BY  
22 YOUR PRESIDING JUROR OR BY ONE OR MORE MEMBERS OF  
23 THE JURY. NO MEMBER OF THE JURY SHOULD EVER  
24 ATTEMPT TO COMMUNICATE WITH ME, EXCEPT BY A SIGNED  
25 WRITING.

1 I WILL COMMUNICATE WITH ANY MEMBER OF THE  
2 JURY ON ANYTHING CONCERNING THE CASE ONLY IN  
3 WRITING, OR HERE IN OPEN COURT.

4 IF YOU SEND OUT A QUESTION, I WILL  
5 CONSULT WITH THE PARTIES BEFORE ANSWERING IT, WHICH  
6 MAY TAKE SOME TIME. YOU MAY CONTINUE YOUR  
7 DELIBERATIONS WHILE WAITING FOR THE ANSWER TO ANY  
8 QUESTION.

9 REMEMBER THAT YOU ARE NOT TO TELL  
10 ANYONE -- INCLUDING ME -- HOW THE JURY STANDS,  
11 NUMERICALLY OR OTHERWISE, UNTIL AFTER YOU HAVE  
12 REACHED A UNANIMOUS VERDICT OR HAVE BEEN  
13 DISCHARGED.

14 DO NOT DISCLOSE ANY VOTE COUNT IN ANY  
15 NOTE TO THE COURT.

16 NUMBER 21. A VERDICT FORM HAS BEEN  
17 PREPARED FOR YOU. AFTER YOU HAVE REACHED UNANIMOUS  
18 AGREEMENT ON A VERDICT, YOUR PRESIDING JUROR WILL  
19 FILL IN THE FORM THAT HAS BEEN GIVEN TO YOU, SIGN  
20 AND DATE IT, AND ADVISE THE COURT THAT YOU ARE  
21 READY TO RETURN TO THE COURTROOM.

22 UTILITY PATENT JURY INSTRUCTIONS, NUMBER  
23 22.

24 BEFORE YOU DECIDE WHETHER APPLE OR  
25 SAMSUNG HAS INFRINGED THE CLAIMS OF THE OTHER

1 SIDE'S UTILITY PATENTS OR WHETHER THE CLAIMS ARE  
2 INVALID, YOU WILL NEED TO UNDERSTAND THE PATENT  
3 CLAIMS. AS I MENTIONED, THE PATENT CLAIMS ARE  
4 NUMBERED SENTENCES AT THE END OF THE PATENT THAT  
5 DESCRIBE THE BOUNDARIES OF THE PATENT'S PROTECTION.

6 IT IS MY JOB AS THE JUDGE TO EXPLAIN TO  
7 YOU THE MEANING OF ANY LANGUAGE IN THE CLAIMS THAT  
8 NEEDS INTERPRETATION.

9 I HAVE INTERPRETED THE MEANING OF SOME OF  
10 THE LANGUAGE IN THE UTILITY PATENT CLAIMS INVOLVED  
11 IN THIS CASE. YOU MUST ACCEPT THOSE  
12 INTERPRETATIONS AS CORRECT. MY INTERPRETATION OF  
13 THE LANGUAGE SHOULD NOT BE TAKEN AS AN INDICATION  
14 THAT I HAVE A VIEW REGARDING THE ISSUES OF  
15 INFRINGEMENT AND INVALIDITY. THE DECISIONS  
16 REGARDING INFRINGEMENT AND INVALIDITY ARE YOURS TO  
17 MAKE.

18 U.S. PATENT NUMBER 7,469,381. THE TERM  
19 "DISPLAYING" MEANS SHOWING OR REVEALING TO THE  
20 VIEWER.

21 THE TERM "ELECTRONIC DOCUMENT" MEANS "A  
22 DOCUMENT STORED IN A DIGITAL FORMAT." AN  
23 "ELECTRONIC DOCUMENT" INCLUDES, BUT IS NOT LIMITED  
24 TO, A WEB PAGE, A DIGITAL IMAGE, A WORD PROCESSOR,  
25 SPREAD SHEET OR PRESENTATION DOCUMENT, OR A LIST OF

1 ITEMS IN A DIGITAL FORMAT. AN ELECTRONIC DOCUMENT  
2 NEED NOT BE STORED IN A SINGLE FILE.

3 AND THE TERM "FIRST DIRECTION" DOES NOT  
4 REQUIRE A STRICTLY LINEAR FINGER MOVEMENT.

5 THE TERM "EDGE OF AN ELECTRONIC DOCUMENT"  
6 HAS ITS PLAIN AND ORDINARY MEANING. AN EDGE OF AN  
7 ELECTRONIC DOCUMENT IS NOT LIMITED TO AN INTERNAL  
8 EDGE AND MAY BE INTERNAL.

9 U.S. PATENT NUMBER 7,844,915. THE TERM  
10 "INVOKES" MEANS CAUSES OR CAUSES A PROCEDURE TO BE  
11 CLEARED OUT.

12 U.S. PATENT NUMBER 7,698,711.

13 THE TERM "APPLET" MEANS AN APPLICATION  
14 DESIGNED TO RUN WITHIN AN APPLICATION MODULE THAT  
15 NEED NOT BE OPERATING SYSTEM-INDEPENDENT."

16 FOR CLAIM LANGUAGE WHICH I HAVE NOT  
17 PROVIDED YOU WITH ANY MEANING, YOU SHOULD APPLY THE  
18 CLAIM LANGUAGE'S PLAIN AND ORDINARY MEANING.

19 NUMBER 23. I WILL NOW INSTRUCT YOU ON  
20 THE RULES YOU MUST FOLLOW IN DECIDING WHETHER  
21 EITHER APPLE OR SAMSUNG, OR BOTH, HAS OVEN THAT THE  
22 OTHER SIDE HAS INFRINGED ONE OR MORE OF THE  
23 ASSERTED CLAIMS OF THE ASSERTED UTILITY PATENTS.

24 TO PROVE INFRINGEMENT OF ANY CLAIM, THE  
25 PATENT HOLDER MUST PERSUADE YOU BY A PREPONDERANCE



1 OF THE EVIDENCE THAT THE ALLEGED INFRINGER HAS  
2 ASSERTED THAT CLAIM.

3 NUMBER 24. A PATENT'S CLAIMS DEFINE WHAT  
4 IS COVERED BY THE PATENT. A PRODUCT OR METHOD  
5 DIRECTLY INFRINGES A PATENT IF IT IS COVERED BY AT  
6 LEAST ONE CLAIM OF THE PATENT.

7 DECIDING WHETHER A CLAIM HAS BEEN  
8 DIRECTLY INFRINGED IS A TWO-STEP PROCESS. THE  
9 FIRST IS TO DECIDE THE MEANING OF THE PATENT CLAIM.  
10 I HAVE ALREADY MADE THIS DECISION, AND I HAVE  
11 ALREADY INSTRUCTED YOU AS TO THE MEANING OF THE  
12 ASSERTED PATENT CLAIMS.

13 THE SECOND STEP IS TO DECIDE WHETHER  
14 SAMSUNG AND/OR APPLE HAS MADE, USED, SOLD, OFFERED  
15 FOR SALE, OR IMPORTED WITHIN THE UNITED STATES A  
16 PRODUCT OR METHOD COVERED BY ANY OF THE ASSERTED  
17 CLAIMS OF THE OTHER SIDE'S UTILITY PATENTS.

18 IF SAMSUNG OR APPLE HAS DONE SO, IT  
19 INFRINGES. YOU, THE JURY, MAKE THIS DECISION.

20 WITH ONE EXCEPTION, YOU MUST CONSIDER  
21 EACH OF THE ASSERTED CLAIMS OF THE PATENTS  
22 INDIVIDUALLY AND DECIDE WHETHER THE ACCUSED SAMSUNG  
23 AND/OR APPLE PRODUCTS OR METHODS INFRINGE THAT  
24 CLAIM.

25 THE ONE EXCEPTION TO CONSIDERING CLAIMS

1 INDIVIDUALLY CONCERNS DEPENDENT CLAIMS. A  
2 DEPENDENT CLAIM INCLUDES ALL OF THE REQUIREMENTS OF  
3 A PARTICULAR INDEPENDENT CLAIM, PLUS ADDITIONAL  
4 REQUIREMENTS OF ITS OWN.

5 AS A RESULT, IF YOU FIND THAT AN  
6 INDEPENDENT CLAIM IS NOT INFRINGED, YOU MUST ALSO  
7 FIND THAT ITS DEPENDENT CLAIMS ARE NOT INFRINGED.

8 ON THE OTHER HAND, IF YOU FIND THAT AN  
9 INDEPENDENT CLAIM HAS BEEN INFRINGED, YOU MUST  
10 STILL SEPARATELY DECIDE WHETHER THE ADDITIONAL  
11 REQUIREMENTS OF ITS DEPENDENT CLAIMS HAVE ALSO BEEN  
12 INFRINGED.

13 YOU HAVE HEARD EVIDENCE ABOUT BOTH SIDES'  
14 COMMERCIAL PRODUCTS. HOWEVER, IN DECIDING THE  
15 ISSUE OF UTILITY PATENT INFRINGEMENT, YOU MAY NOT  
16 COMPARE THE SAMSUNG AND APPLE COMMERCIAL PRODUCTS  
17 TO EACH OTHER. RATHER, YOU MUST COMPARE THE  
18 ACCUSED SAMSUNG PRODUCTS TO THE CLAIMS OF THE APPLE  
19 UTILITY PATENTS, AND THE ACCUSED APPLE PRODUCTS OR  
20 METHODS TO THE CLAIMS OF THE SAMSUNG UTILITY  
21 PATENTS.

22 WHETHER OR NOT SAMSUNG OR APPLE KNEW ITS  
23 PRODUCTS OR METHODS INFRINGED, OR EVEN KNEW OF THE  
24 OTHER SIDE'S PATENTS, DOES NOT MATTER IN  
25 DETERMINING DIRECT INFRINGEMENT.

1           THERE ARE TWO WAYS IN WHICH A PATENT  
2 CLAIM MAY BE DIRECTLY INFRINGED. A CLAIM MAY BY  
3 "LITERALLY" INFRINGED OR IT MAY BE INFRINGED UNDER  
4 THE "DOCTRINE OF EQUIVALENTS." THE FOLLOWING  
5 INSTRUCTIONS WILL PROVIDE MORE DETAIL ON THESE TWO  
6 TYPES OF DIRECT INFRINGEMENT.

7           NUMBER 25. IN DECIDING WHETHER A SALE  
8 HAS TAKEN PLACE "WITHIN THE UNITED STATES," YOU MAY  
9 FIND THE FOLLOWING GUIDELINES HELPFUL TO YOUR  
10 ANALYSIS:

11           THE LOCATION OF THE SALE DEPENDS ON MANY  
12 FACTORS, AND YOU MAY FIND THAT THE SALE OCCURRED IN  
13 SEVERAL PLACES. A SALE OCCURS WHEREVER THE  
14 "ESSENTIAL ACTIVITIES" OF THE SALE TOOK PLACE. THE  
15 ESSENTIAL ACTIVITIES INCLUDE, FOR EXAMPLE,  
16 NEGOTIATING THE CONTRACT AND PERFORMING OBLIGATIONS  
17 UNDER THE CONTRACT.

18           NUMBER 26. TO DECIDE WHETHER EACH  
19 ACCUSED SAMSUNG AND APPLE PRODUCT OR METHOD  
20 LITERALLY INFRINGES A CLAIM OF AN ASSERTED PATENT,  
21 YOU MUST COMPARE THE PRODUCT OR METHOD WITH THE  
22 PATENT CLAIM AND DETERMINE WHETHER EVERY  
23 REQUIREMENT OF THE CLAIM IS INCLUDED IN THAT  
24 PRODUCT OR METHOD. PA

25           IF SO, THE SAMSUNG AND APPLE PRODUCT OR

1 METHOD IN QUESTION LITERALLY INFRINGES THAT CLAIM.

2 IF, HOWEVER, A PARTICULAR SAMSUNG OR  
3 APPLE PRODUCT OR METHOD DOES NOT HAVE EVERY  
4 REQUIREMENT IN THE PATENT CLAIM, THAT PRODUCT OR  
5 METHOD DOES NOT LITERALLY INFRINGE THAT CLAIM. YOU  
6 MUST DECIDE LITERAL INFRINGEMENT FOR EACH ASSERTED  
7 CLAIM SEPARATELY.

8 IF THE PATENT CLAIM USES THE TERM  
9 "COMPRISING," THAT PATENT CLAIM IS TO BE UNDERSTOOD  
10 AS AN OPEN CLAIM. AN OPEN CLAIM IS INFRINGED AS  
11 LONG AS EVERY REQUIREMENT IN THE CLAIM IS PRESENT  
12 IN THE ACCUSED PRODUCT OR METHOD. THE FACT THAT A  
13 PARTICULAR ACCUSED SAMSUNG OR APPLE PRODUCT OR  
14 METHOD ALSO INCLUDES OTHER PARTS OR STEPS WILL NOT  
15 AVOID INFRINGEMENT, AS LONG AS IT HAS EVERY  
16 REQUIREMENT IN THE PATENT CLAIM.

17 NUMBER 27. IF YOU DECIDE THAT AN ACCUSED  
18 SAMSUNG PRODUCT DOES NOT LITERALLY INFRINGE AN  
19 ASSERTED APPLE UTILITY PATENT CLAIM, YOU MUST THEN  
20 DECIDE WHETHER THAT PRODUCT INFRINGES THE ASSERTED  
21 CLAIM UNDER WHAT IS CALLED ITSELF "DOCTRINE OF  
22 EQUIVALENTS."

23 IF YOU DECIDE THAT AN ACCUSED APPLE  
24 PRODUCT OR METHOD DOES NOT LITERALLY INFRINGE CLAIM  
25 1 OF SAMSUNG'S '460 PATENT, YOU MUST THEN DECIDE

1 WHETHER THAT PRODUCT OR METHOD INFRINGES THE  
2 ASSERTED CLAIM UNDER WHAT IS CALLED THE "DOCTRINE  
3 OF EQUIVALENTS."

4 UNDER THE DOCTRINE OF EQUIVALENTS, THE  
5 PRODUCT OR METHOD CAN INFRINGE AN ASSERTED UTILITY  
6 PATENT CLAIM IF IT INCLUDES PARTS OR SOFTWARE  
7 INSTRUCTIONS THAT ARE IDENTICAL OR EQUIVALENT TO  
8 THE REQUIREMENTS OF THE CLAIM.

9 IF THE PRODUCT OR METHOD LACKS A PART OR  
10 SOFTWARE INSTRUCTION THAT IS IDENTICAL OR  
11 EQUIVALENT TO EVEN ONE REQUIREMENT OF THE ASSERTED  
12 UTILITY PATENT CLAIM, THE PRODUCT OR METHOD CANNOT  
13 INFRINGE THE CLAIM UNDER THE DOCTRINE OF  
14 EQUIVALENTS.

15 THUS, IN MAKING YOUR DECISION UNDER THE  
16 DOCTRINE OF EQUIVALENTS, YOU MUST LOOK AT EACH  
17 INDIVIDUAL REQUIREMENT OF THE ASSERTED UTILITY  
18 PATENT CLAIM AND DECIDE WHETHER THE PRODUCT OR  
19 METHOD HAS EITHER A PART OR SOFTWARE INSTRUCTIONS  
20 THAT ARE IDENTICAL OR EQUIVALENT TO THAT INDIVIDUAL  
21 CLAIM REQUIREMENT.

22 A PRODUCT PART OR SOFTWARE INSTRUCTIONS  
23 ARE EQUIVALENT TO A REQUIREMENT OF AN ASSERTED  
24 CLAIM IF A PERSON OF ORDINARY SKILL IN THE FIELD  
25 WOULD THINK THAT THE DIFFERENCES BETWEEN THE PART

1 OR SOFTWARE INSTRUCTIONS AND THE REQUIREMENT WERE  
2 NOT SUBSTANTIAL AS OF THE TIME OF THE ALLEGED  
3 INFRINGEMENT.

4 CHANGES IN TECHNIQUE OR IMPROVEMENTS MADE  
5 POSSIBLE BY TECHNOLOGY DEVELOPED AFTER THE UTILITY  
6 PATENT APPLICATION IS FILED MAY STILL BE EQUIVALENT  
7 FOR THE PURPOSES OF THE DOCTRINE OF EQUIVALENTS, IF  
8 IT STILL MEETS THE OTHER REQUIREMENTS OF THE  
9 DOCTRINE OF EQUIVALENTS SET FORTH IN THIS  
10 INSTRUCTION.

11 ONE WAY TO DECIDE WHETHER ANY DIFFERENCE  
12 BETWEEN A REQUIREMENT OF AN ASSERTED CLAIM AND A  
13 PRODUCT PART OR SOFTWARE INSTRUCTION ARE NOT  
14 SUBSTANTIAL IS TO CONSIDER WHETHER, AS OF THE TIME  
15 OF THE ALLEGED INFRINGEMENT, THE PART OR SOFTWARE  
16 INSTRUCTIONS PERFORMED SUBSTANTIALLY THE SAME  
17 FUNCTION, IN SUBSTANTIALLY THE SAME WAY, TO ACHIEVE  
18 SUBSTANTIALLY THE SAME RESULT AS THE REQUIREMENT IN  
19 THE PATENT CLAIM.

20 IN DECIDING WHETHER ANY DIFFERENCE  
21 BETWEEN A CLAIM REQUIREMENT AND THE PRODUCT OR  
22 METHOD IS NOT SUBSTANTIAL, YOU MAY CONSIDER  
23 WHETHER, AT THE TIME OF THE ALLEGED INFRINGEMENT,  
24 PERSONS OF ORDINARY SKILL IN THE FIELD WOULD HAVE  
25 KNOWN OF THE INTERCHANGEABILITY OF THE PRODUCT OR

1 SOFTWARE INSTRUCTIONS WITH THE CLAIMED REQUIREMENT.

2 THE KNOWN INTERCHANGEABILITY BETWEEN THE  
3 CLAIM REQUIREMENT AND THE PART OR SOFTWARE  
4 INSTRUCTIONS OF THE PRODUCT OR METHOD IS NOT  
5 NECESSARY TO FIND INFRINGEMENT UNDER THE DOCTRINE  
6 OF EQUIVALENTS.

7 HOWEVER, KNOWN INTERCHANGEABILITY MAY  
8 SUPPORT A CONCLUSION THAT THE DIFFERENCE BETWEEN  
9 THE PART OR SOFTWARE INSTRUCTIONS AND THE CLAIM  
10 REQUIREMENT IS NOT SUBSTANTIAL.

11 THE FACT THAT A PART OR SOFTWARE  
12 INSTRUCTIONS OF THE PRODUCT OR METHOD PERFORMS THE  
13 SAME FUNCTION AS THE CLAIM REQUIREMENT IS NOT, BY  
14 ITSELF, SUFFICIENT TO SHOW KNOWN  
15 INTERCHANGEABILITY.

16 NOW IS THE TIME FOR A STAND-UP BREAK, SO  
17 LET'S ALL STAND UP, PLEASE.

18 (PAUSE IN PROCEEDINGS.)

19 THE COURT: EVERYONE STILL BREATHING?  
20 ALL RIGHT. LET'S KEEP GOING.

21 NUMBER 28. IN THIS CASE, SAMSUNG ASSERTS  
22 THAT APPLE INFRINGES CLAIM 1 OF THE '460 PATENT,  
23 WHICH IS KNOWN AS A METHOD CLAIM.

24 METHOD CLAIMS ARE COMMONLY DRAFTED BY  
25 DESCRIBING THE METHOD AS COMPRISING CERTAIN STEPS

1 FOLLOWED BY A LIST OF ACTIONS THAT COMPRISE THE  
2 METHOD THAT IS CLAIMED.

3 AS I'VE ALREADY INSTRUCTED YOU, IF THE  
4 PATENT CLAIM USES THE TERM "COMPRISING," THAT  
5 PATENT CLAIM IS TO BE UNDERSTOOD AS AN OPEN CLAIM.

6 AN OPEN METHOD CLAIM IS INFRINGED AS LONG  
7 AS EVERY STEP IN THE CLAIM IS PERFORMED BY THE  
8 USER.

9 THE FACT THAT THE USER MAY PERFORM  
10 ADDITIONAL STEPS WILL NOT AVOID INFRINGEMENT, AS  
11 LONG AS THE USER PERFORMS EVERY STEP SET FORTH IN  
12 THE METHOD CLAIM.

13 ABSENT LANGUAGE SPECIFYING A SPECIFIC  
14 ORDER IN WHICH THE STEPS ARE TO BE PERFORMED, THE  
15 STEPS NEED NOT BE PERFORMED IN SEQUENTIAL ORDER TO  
16 FIND INFRINGEMENT.

17 NUMBER 29. I WILL NOW INSTRUCT YOU ON  
18 THE RULES YOU MUST FOLLOW IN DECIDING WHETHER EACH  
19 PARTY HAS PROVEN THAT CLAIMS OF THE OTHER SIDE'S  
20 UTILITY PATENTS ARE INVALID. BEFORE DISCUSSING THE  
21 SPECIFIC RULES, I WANT TO REMIND YOU ABOUT THE  
22 STANDARD OF PROOF THAT APPLIES TO THIS DEFENSE. TO  
23 PROVE INVALIDITY OF ANY PATENT CLAIM, THE ALLEGED  
24 INFRINGER MUST PERSUADE YOU BY CLEAR AND CONVINCING  
25 EVIDENCE THAT THE CLAIM IS INVALID.



1                   NUMBER 30. A UTILITY PATENT CLAIM IS  
2                   INVALID IF THE PATENT DOES NOT CONTAIN AN ADEQUATE  
3                   WRITTEN DESCRIPTION OF THE CLAIMED INVENTION. THE  
4                   PURPOSE OF THIS WRITTEN DESCRIPTION REQUIREMENT IS  
5                   TO DEMONSTRATE THAT THE INVENTOR WAS IN POSSESSION  
6                   OF THE INVENTION AT THE TIME THE APPLICATION FOR  
7                   THE PATENT WAS FILED, EVEN THOUGH THE CLAIMS MAY  
8                   HAVE BEEN CHANGED OR NEW CLAIMS ADDED SINCE THAT  
9                   TIME.

10                   THE WRITTEN DESCRIPTION REQUIREMENT IS  
11                   SATISFIED IF A PERSON OF ORDINARY SKILL IN THE  
12                   FIELD, READING THE ORIGINAL PATENT APPLICATION AT  
13                   THE TIME IT WAS FILED, WOULD HAVE RECOGNIZED THAT  
14                   THE PATENT APPLICATION DESCRIBED THE INVENTION AS  
15                   CLAIMED, EVERYONE THOUGH THE DESCRIPTION MAY NOT  
16                   USE THE EXACT WORDS FOUND IN THE CLAIM.

17                   A REQUIREMENT IN A CLAIM NEED NOT BE  
18                   SPECIFICALLY DISCLOSED IN THE PATENT APPLICATION AS  
19                   ORIGINALLY FILED IF A PERSON OF ORDINARY SKILL  
20                   WOULD UNDERSTAND THAT THE MISSING REQUIREMENT IS  
21                   NECESSARILY IMPLIED IN THE PATENT APPLICATION WAS  
22                   ORIGINALLY FILED.

23                   NUMBER 31. A UTILITY PATENT CLAIM IS  
24                   INVALID IF THE CLAIMED INVENTION IS NOT NEW. FOR  
25                   THE CLAIM TO BE INVALID BECAUSE IT IS NOT NEW, ALL

1 OF ITS REQUIREMENTS MUST HAVE EXISTED IN A SINGLE  
2 DEVICE OR METHOD THAT PRE-DATES THE CLAIMED  
3 INVENTION, OR MUST HAVE BEEN DESCRIBED IN A SINGLE  
4 PREVIOUS PUBLICATION OR PATENT THAT PRE-DATES THE  
5 CLAIMED INVENTION.

6 IN PATENT LAW, THESE PREVIOUS DEVICES,  
7 METHOD, PUBLICATIONS OR PATENTS ARE CALLED "PRIOR  
8 ART REFERENCES."

9 IF A PATENT CLAIM IS NOT NEW, WE SAY IT  
10 IS "ANTICIPATED" BY A PRIOR ART REFERENCE.

11 THE DESCRIPTION OF THE WRITTEN REFERENCE  
12 DOES NOT HAVE TO BE IN THE SAME WORD AS THE CLAIM,  
13 BUT ALL OF THE REQUIREMENTS OF THE CLAIM MUST BE  
14 THERE, EITHER STATED OR NECESSARILY IMPLIED, SO  
15 THAT SOMEONE OF ORDINARY SKILL IN THE FIELD,  
16 LOOKING AT THAT ONE REFERENCE, WOULD BE ABLE TO  
17 MAKE AND USE THE CLAIMED INVENTION.

18 HERE IS A LIST OF THE WAYS THAT EITHER  
19 PARTY CAN SHOW THAT A PATENT CLAIM WAS NOT NEW:

20 IF THE CLAIMED INVENTION WAS ALREADY  
21 PUBLICLY KNOWN OR PUBLICLY USED BY OTHERS IN THE  
22 UNITED STATES BEFORE THE DATE OF CONCEPTION OF THE  
23 CLAIMED INVENTION:

24 IF THE CLAIMED INVENTION WAS ALREADY  
25 PATENTED OR DESCRIBED IN A PRINTED PUBLICATION

1 ANYWHERE IN THE WORLD BEFORE THE DATE OF CONCEPTION  
2 OF THE CLAIMED INVENTION.

3 A REFERENCE IS A "PRINTED PUBLICATION" IF  
4 IT IS ACCESSIBLE TO THOSE INTERESTED IN THE FIELD,  
5 EVEN IF IT IS DIFFICULT TO FIND;

6 IF THE CLAIMED INVENTION WAS ALREADY MADE  
7 BY SOMEONE ELSE IN THE UNITED STATES BEFORE THE  
8 DATE OF CONCEPTION OF THE CLAIMED INVENTION, IF  
9 THAT OTHER PERSON HAD NOT ABANDONED THE INVENTION  
10 OR KEPT IT SECRET;

11 IF THE PATENT HOLDER AND THE ALLEGED  
12 INFRINGER DISPUTE WHO IS A FIRST INVENTOR, THE  
13 PERSON WHO FIRST CONCEIVED OF THE CLAIMED INVENTION  
14 AND FIRST REDUCED IT TO PRACTICE IS THE FIRST  
15 INVENTOR.

16 IF ONE PERSON CONCEIVED OF THE CLAIMED  
17 INVENTION FIRST, BUT REDUCED TO PRACTICE SECOND,  
18 THAT PERSON IS THE FIRST INVENTOR ONLY IF THAT  
19 PERSON (A) BEGAN TO REDUCE THE CLAIMED INVENTION TO  
20 PRACTICE BEFORE THE OTHER PARTY CONCEIVED OF IT,  
21 AND, (B) CONTINUED TO WORK DILIGENTLY TO REDUCE IT  
22 TO PRACTICE.

23 A CLAIMED INVENTION IS "REDUCED TO  
24 PRACTICE" WHEN IT HAS BEEN TESTED SUFFICIENTLY TO  
25 SHOW THAT IT WILL WORK FOR ITS INTENDED PURPOSE OR

1 WHEN IT IS FULLY DESCRIBED IN A PATENT APPLICATION  
2 FILED WITH THE PTO.

3 IF THE CLAIMED INVENTION WAS ALREADY  
4 DESCRIBED IN ANOTHER ISSUED U.S. PATENT OR  
5 PUBLISHED U.S. PATENT APPLICATION THAT WAS BASED ON  
6 A PATENT APPLICATION FILED BEFORE THE PATENT  
7 HOLDER'S APPLICATION FILING DATE OR THE DATE OF  
8 CONCEPTION OF THE CLAIMED INVENTION.

9 SINCE CERTAIN OF THEM ARE IN DISPUTE, YOU  
10 MUST DETERMINE DATES OF CONCEPTION FOR THE CLAIMED  
11 INVENTIONS AND THE PRIOR INVENTIONS. CONCEPTION IS  
12 THE MENTAL PART OF AN INVENTIVE ACT AND IS PROVEN  
13 WHEN THE INVENTION IS SHOWN IN ITS COMPLETE FORM BY  
14 DRAWINGS, DISCLOSURE TO ANOTHER, OR OTHER FORMS OF  
15 EVIDENCE PRESENTED AT TRIAL.

16 NUMBER 32. A UTILITY PATENT CLAIM IS  
17 INVALID IF THE PATENT APPLICATION WAS NOT FILED  
18 WITHIN THE TIME REQUIRED BY LAW. THIS IS CALLED A  
19 "STATUTORY BAR."

20 FOR A PATENT CLAIM TO BE INVALID BY A  
21 STATUTORY BAR, ALL OF ITS REQUIREMENTS MUST HAVE  
22 BEEN PRESENT IN ONE PRIOR ART PREFERENCE DATED MORE  
23 THAN ONE YEAR BEFORE THE PATENT APPLICATION WAS  
24 FILED. HERE IS A LIST OF WAYS EITHER SIDE CAN SHOW  
25 THAT THE PATENT APPLICATION WAS NOT TIMELY FILED:

1 IF THE CLAIMED INVENTION WAS ALREADY  
2 PATENTED OR DESCRIBED IN A PRINTED PUBLICATION  
3 ANYWHERE IN THE WORLD MORE THAN ONE YEAR BEFORE THE  
4 EFFECTIVE FILING DATE OF THE PATENT APPLICATION. A  
5 REFERENCE IS A "PRINTED PUBLICATION" IF IT IS  
6 ACCESSIBLE TO THOSE INTERESTED IN THE FIELD, EVEN  
7 IF IT IS DIFFICULT TO FIND;

8 IF THE CLAIMED INVENTION WAS ALREADY  
9 OPENLY USED IN THE UNITED STATES MORE THAN ONE YEAR  
10 BEFORE THE EFFECTIVE FILING DATE OF THE PATENT  
11 APPLICATION AND THAT USE WAS NOT PRIMARILY AN  
12 EXPERIMENTAL USE (A) CONTROLLED BY AN INVENTOR AND  
13 (B) TO TEST WHETHER THE INVENTION WORKED FOR ITS  
14 INTENDED PURPOSE;

15 IF A DEVICE OR METHOD USING THE CLAIMED  
16 INVENTION WAS SOLD OR OFFERED FOR SALE IN THE  
17 UNITED STATES, AND THAT CLAIMED INVENTION WAS READY  
18 FOR PATENTING, MORE THAN ONE YEAR BEFORE THE  
19 EFFECTIVE FILING DATE OF THE PATENT APPLICATION;

20 IF THE PATENT HOLDER HAD ALREADY OBTAINED  
21 A PATENT ON THE CLAIMED INVENTION IN A FOREIGN  
22 COUNTRY BEFORE THE FILING THE ORIGINAL U.S.  
23 APPLICATION AND THE FOREIGN APPLICATION WAS FILED  
24 AT LEAST ONE YEAR BEFORE THE U.S. APPLICATION.

25 FOR A CLAIM TO BE INVALID BECAUSE OF A

1 STATUTORY BAR, ALL OF THE CLAIMED REQUIREMENTS MUST  
2 HAVE BEEN EITHER:

3 1. DISCLOSED IN A SINGLE PRIOR ART  
4 REFERENCE;

5 2. IMPLICITLY DISCLOSED IN A REFERENCE  
6 TO ONE SKILLED IN THE FIELD, OR

7 3. MUST HAVE BEEN PRESENT IN THE  
8 REFERENCE WHETHER OR NOT THAT WAS UNDERSTOOD AT THE  
9 TIME.

10 THE DISCLOSURE IN A REFERENCE DOES NOT  
11 HAVE TO BE IN THE SAME WORDS AS THE CLAIM, BUT ALL  
12 OF THE REQUIREMENTS MUST BE THERE, EITHER DESCRIBED  
13 IN ENOUGH DETAIL OR NECESSARILY IMPLIED TO ENABLE  
14 SOMEONE OF ORDINARY SKILL IN THE FIELD LOOKING AT  
15 THE REFERENCE TO MAKE AND USE THE CLAIMED  
16 INVENTION.

17 NUMBER 33. NOT ALL INVENTIONS ARE  
18 PATENTABLE. A UTILITY PATENT CLAIM IS INVALID IF  
19 THE CLAIMED INVENTION WOULD HAVE BEEN OBVIOUS TO A  
20 PERSON OF ORDINARY SKILL IN THE FIELD AT THE TIME  
21 OF THE INVENTION.

22 THIS MEANS THAT EVEN IF ALL OF THE  
23 REQUIREMENTS OF THE CLAIM CANNOT BE FOUND IN A  
24 SINGLE PRIOR ART REFERENCE THAT WOULD ANTICIPATE  
25 THE CLAIM OR CONSTITUTE A STATUTORY BAR TO THAT

1 CLAIM, A PERSON OF ORDINARY SKILL IN THE FIELD WHO  
2 KNEW ABOUT ALL THIS PRIOR ART WOULD HAVE COME UP  
3 WITH THE CLAIMED INVENTION.

4 THE ULTIMATE CONCLUSION OF WHETHER A  
5 CLAIM IS OBVIOUS SHOULD BE BASED UPON YOUR  
6 DETERMINATION OF SEVERAL FACTUAL DECISIONS.

7 FIRST, YOU MUST DECIDE THE LEVEL OF  
8 ORDINARY SKILL IN THE FIELD THAT SOMEONE WOULD HAVE  
9 HAD AT THE TIME THE CLAIMED INVENTION WAS MADE. IN  
10 DECIDING THE LEVEL OF ORDINARY SKILL, YOU SHOULD  
11 CONSIDER ALL THE EVIDENCE INTRODUCED AT TRIAL,  
12 INCLUDING:

13 THE LEVELS OF EDUCATION AND EXPERIENCE OF  
14 PERSONS WORKING IN THE FIELD;

15 THE TYPES OF PROBLEMS ENCOUNTERED IN THE  
16 FIELD; AND,

17 THE SOPHISTICATION OF THE TECHNOLOGY.

18 SECOND, YOU MUST DECIDE THE SCOPE AND  
19 CONTENT OF THE PRIOR ART. THE PARTIES DISAGREE AS  
20 TO WHETHER CERTAIN PRIOR ART REFERENCES SHOULD BE  
21 INCLUDED IN THE PRIOR ART YOU USE TO DECIDE THE  
22 VALIDITY OF THE CLAIMS AT ISSUE.

23 IN ORDER TO BE CONSIDERED AS PRIOR ART TO  
24 A PARTICULAR PATENT AT ISSUE HERE, THESE REFERENCES  
25 MUST BE REASONABLY RELATED TO THE CLAIMED INVENTION

1 OF THAT PATENT. A REFERENCE IS REASONABLY RELATED  
2 IF IT IS IN THE SAME FIELD AS THE CLAIMED INVENTION  
3 OR IS FROM ANOTHER FIELD TO WHICH A PERSON OF  
4 ORDINARY SKILL IN THE FIELD WOULD LOOK TO SOLVE A  
5 KNOWN PROBLEM.

6 THIRD, YOU MUST DECIDE WHAT DIFFERENCES,  
7 IF ANY, EXISTED BETWEEN THE CLAIMED INVENTION AND  
8 THE PRIOR ART.

9 FINALLY, YOU SHOULD CONSIDER ANY OF THE  
10 FOLLOWING FACTORS THAT HAVE BEEN SHOWN BY THE  
11 EVIDENCE:

12 COMMERCIAL SUCCESS OF THE PRODUCT DUE TO  
13 THE MERITS OF THE CLAIMED INVENTION;

14 A LONG-FELT NEED FOR THE SOLUTION  
15 PROVIDED BY THE CLAIMED INVENTION;

16 UNSUCCESSFUL ATTEMPTS BY OTHERS TO FIND  
17 THE SOLUTION PROVIDED BY THE CLAIMED INVENTION;

18 COPYING OF THE CLAIMED INVENTION BY  
19 OTHERS;

20 UNEXPECTED AND SUPERIOR RESULTS FROM THE  
21 CLAIMED INVENTION;

22 ACCEPTANCE BY OTHERS OF THE CLAIMED  
23 INVENTION AS SHOWN BY PRAISE FROM OTHERS IN THE  
24 FIELD OF FROM THE LICENSING OF THE CLAIMED  
25 INVENTION; AND,



1 THE PRESENCE OF ANY FACTORS 1 THROUGH 6  
2 MAY BE CONSIDERED BY YOU AS AN INDICATION THAT THE  
3 CLAIMED INVENTION WOULD HAVE NOT HAVE BEEN OBVIOUS  
4 AT THE TIME THE CLAIMED INVENTION WAS MADE, AND THE  
5 PRESENCE OF FACTOR 7 MAY BE CONSIDERED BY YOU AS AN  
6 INDICATION THAT THE CLAIMED INVENTION WOULD HAVE  
7 BEEN OBVIOUS AT SUCH TIME, ALTHOUGH YOU MAY  
8 CONSIDER ANY EVIDENCE OF THESE FACTORS, THE  
9 RELEVANCE

10 A PATENT CLAIM COMPOSED OF SEVERAL  
11 ELEMENTS IS NOT PROVED OBVIOUS MERELY BY  
12 DEMONSTRATING THAT EACH OF ITS ELEMENTS WAS  
13 INDEPENDENTLY KNOWN IN THE PRIOR ART.

14 IN EVALUATING WHETHER SUCH A CLAIM WOULD  
15 HAVE BEEN OBVIOUS, YOU MAY CONSIDER WHETHER THE  
16 ALLEGED INFRINGER HAS IDENTIFIED A REASON THAT  
17 WOULD HAVE PROMPTED A PERSON OF ORDINARY SKILL IN  
18 THE FIELD TO COMBINE THE ELEMENTS OR CONCEPTS FROM  
19 THE PRIOR ART IN THE SAME WAY AS THE CLAIMED  
20 INVENTION.

21 THERE IS NO SINGLE WAY TO DEFINE THE LINE  
22 BETWEEN TRUE INVENTIVENESS ON THE ONE HAND (WHICH  
23 IS PATENTABLE), AND THE APPLICATION OF COMMON SENSE  
24 AND ORDINARY SKILL TO SOLVE A PROBLEM ON THE OTHER  
25 HAND (WHICH IS NOT PATENTABLE).

1 FOR EXAMPLE, MARKET FORCES OR OTHER  
2 DESIGN INCENTIVES MAY BE WHAT PRODUCED A CHANGE,  
3 RATHER THAN TRUE INVENTIVENESS.

4 YOU MAY CONSIDER WHETHER THE CHANGE WAS  
5 MERELY THE PREDICTABLE RESULT OF USING PRIOR ART  
6 ELEMENTS ACCORDING TO THEIR KNOWN FUNCTIONS, OR  
7 WHETHER IT WAS THE RESULT OF TRUE INVENTIVENESS.

8 YOU MAY ALSO CONSIDER WHETHER THERE IS  
9 SOME TEACHING OR SUGGESTION IN THE PRIOR ART TO  
10 MAKE THE MODIFICATION OR COMBINATION OF ELEMENTS  
11 CLAIMED IN THE PATENT.

12 ALSO, YOU MAY CONSIDER WHETHER THE  
13 INNOVATION APPLIES TO A KNOWN TECHNOLOGY THAT HAD  
14 BEEN USED TO PROVE A SIMILAR DEVICE OR METHOD IN A  
15 SIMILAR WAY.

16 YOU MAY ALSO CONSIDER WHETHER THE CLAIMED  
17 INVENTION WOULD HAVE BEEN OBVIOUS TO TRY, MEANING  
18 THAT THE CLAIMED INNOVATION WAS ONE OF A RELATIVELY  
19 SMALL NUMBER OF POSSIBLE APPROACHES TO THE PROBLEM  
20 WITH ONLY EXPECTATION OF SUCCESS BY THOSE SKILLED  
21 IN THE ART.

22 YOU SHOULD PUT YOURSELF IN THE POSITION  
23 OF A PERSON OF ORDINARY SKILL IN THE FIELD AT THE  
24 TIME THE CLAIMED INVENTION WAS MADE AND YOU SHOULD  
25 NOT CONSIDER WHAT IS KNOWN TODAY OR WHAT IS LEARNED

1 FROM THE TEACHING OF THE PATENT.

2 34. I WILL NOW INSTRUCT YOU ON HOW TO  
3 DECIDE APPLE'S DEFENSE OF PATENT EXHAUSTION. APPLE  
4 CONTENTS THAT SAMSUNG IS BARRED FROM ENFORCING THE  
5 '516 AND '941 PATENTS AGAINST APPLE'S ACCUSED  
6 IPHONE AND IPAD PRODUCTS BECAUSE THEY INCORPORATE  
7 BASEBAND CHIPS THAT INTEL SOLD TO APPLE WITH  
8 AUTHORIZATION FROM SAMSUNG.

9 TO PREVAIL ON THE DEFENSE OF PATENT  
10 EXHAUSTION, APPLE MUST PROVE THAT THE FOLLOWING IS  
11 MORE LIKELY THAN TRUE NOT:

12 FIRST, THAT INTEL WAS AUTHORIZED TO SELL  
13 THE BASEBAND CHIPS UNDER THE TERMS OF THE LICENSE  
14 AGREEMENT BETWEEN SAMSUNG AND INTEL;

15 SECOND, THAT THE SALES WERE MADE IN THE  
16 UNITED STATES. THE LOCATION OF THE SALE DEPENDS ON  
17 MANY FACTORS, AND YOU MAY FIND THAT THE SALE  
18 OCCURRED IN SEVERAL PLACES. A SALE OCCURS WHENEVER  
19 THE ESSENTIAL ACTIVITIES OF THE SALE TAKES PLACE.  
20 THE ESSENTIAL ACTIVITIES INCLUDE, FOR EXAMPLE,  
21 NEGOTIATING THE CONTRACT AND PERFORMING THE  
22 OBLIGATIONS UNDER THE CONTRACT.

23 AND, THIRD, THAT IF THE ACCUSED PRODUCTS  
24 INFRINGE, IT IS BECAUSE THE BASEBAND CHIPS  
25 SUBSTANTIALLY EMBODY THE '516 AND '941 PATENTS. IF

1 THE BASEBAND CHIPS EMBODY THE RELEVANT PATENT IF  
2 THEY INCLUDE ALL OF THE INVENTIVE ASPECTS OF THE  
3 PATENTED DEVICE.

4 APPLE MUST PROVE ALL THREE OF THESE  
5 ELEMENTS TO PREVAIL ON THE DEFENSE OF PATENT  
6 EXHAUSTION. IF APPLE DOES NOT PROVE ANY ONE OF  
7 THESE ELEMENTS, YOU MUST REJECT APPLE'S AFFIRMATIVE  
8 DEFENSE AND FIND FOR SAMSUNG ON THIS ISSUE. IF YOU  
9 FIND THAT APPLE HAS PROVEN ALL THREE ELEMENTS, YOU  
10 MUST FIND FOR APPLE ON THIS ISSUE.

11 NUMBER 35. I WILL INSTRUCT YOU ABOUT THE  
12 MEASURE OF DAMAGES, FOR CLAIMS OF UTILITY PATENTS  
13 INFRINGEMENT. BY INSTRUCTING YOU ON DAMAGES, I AM  
14 NOT SUGGESTING WHICH PARTY SHOULD WIN ON ANY ISSUE.  
15 IF YOU FIND THAT EITHER PARTY INFRINGED ANY VALID  
16 AND ENFORCEABLE CLAIM OF THE OTHER SIDE'S PATENTS,  
17 YOU MUST THEN DETERMINE THE AMOUNT OF MONEY DAMAGES  
18 TO BE AWARDED TO THE PATENT HOLDER TO COMPENSATE IT  
19 FOR THE INFRINGEMENT.

20 THE AMOUNT OF THOSE DAMAGES MUST BE  
21 ADEQUATE TO COMPENSATE THE PATENT HOLDER FOR THE  
22 INFRINGEMENT.

23 A DAMAGES AWARD SHOULD PUT THE PATENT  
24 HOLDER IN APPROXIMATELY THE FINANCIAL POSITION IT  
25 WOULD HAVE BEEN IN HAD THE INFRINGEMENT NOT

1 OCCURRED, BUT IN NO EVENT MAY THE DAMAGES AWARD BE  
2 LESS THAN A REASONABLE ROYALTY. YOU SHOULD KEEP IN  
3 MIND THAT THE DAMAGES YOU AWARD ARE MEANT TO  
4 COMPENSATE THE PATENT HOLDER AND NOT TO PUNISH AN  
5 INFRINGER.

6 EACH PATENT HOLDER HAS THE BURDEN TO  
7 PERSUADE YOU OF THE AMOUNT OF ITS DAMAGES. YOU  
8 SHOULD AWARD ONLY THOSE DAMAGES THAT THE PATENT  
9 HOLDER PROVES IT SUFFERED BY A PREPONDERANCE OF THE  
10 EVIDENCE. WHILE THE PATENT HOLDER IS NOT REQUIRED  
11 TO PROVE ITS DAMAGES WITH MATHEMATICAL PRECISION,  
12 IT MUST PROVE THEM WITH REASONABLE CERTAINTY.  
13 NEITHER PATENT HOLDER IS ENTITLED TO DAMAGES THAT  
14 ARE REMOTE OR SPECULATIVE.

15 NUMBER 36. IN THIS CASE, APPLE SEEKS TO  
16 RECOVER LOST PROFITS FOR SOME OF SAMSUNG'S SALES OF  
17 ALLEGEDLY INFRINGING PRODUCTS, AND A REASONABLE  
18 ROYALTY ON THE REST OF SAMSUNG'S ALLEGEDLY  
19 INFRINGING SALES.

20 SAMSUNG DOES NOT SEEK LOST PROFITS FOR  
21 INFRINGEMENT OF ITS UTILITY PATENTS.

22 TO RECOVER LOST PROFITS FOR INFRINGING  
23 SALES, APPLE MUST SHOW THAT BUT FOR THE  
24 INFRINGEMENT, THERE IS A REASONABLE PROBABILITY  
25 THAT IT WOULD HAVE MADE SALES THAT SAMSUNG

1 ELECTRONICS COMPANY, SAMSUNG ELECTRONICS AMERICA,  
2 AND SAMSUNG TELECOMMUNICATIONS AMERICA MADE OF THE  
3 INFRINGING PRODUCTS.

4 APPLE MUST SHOW THE SHARE OF SAMSUNG'S  
5 SALES THAT IT WOULD HAVE MADE IF THE INFRINGING  
6 PRODUCTS HAD NOT BEEN ON THE MARKET.

7 YOU MUST ALLOCATE THE LOST PROFITS BASED  
8 UPON THE CUSTOMER DEMAND FOR THE PATENTED FEATURES  
9 OF THE INFRINGING PRODUCTS. THAT IS, YOU MUST  
10 DETERMINE WHICH PROFITS DERIVE FROM THE PATENTED  
11 INVENTION THAT SAMSUNG SELLS AND NOT FROM OTHER  
12 FEATURES OF THE INFRINGING PRODUCTS.

13 NUMBER 37. APPLE IS ENTITLED TO LOST  
14 PROFITS IF IT PROVES ALL OF THE FOLLOWING:

15 NUMBER 1. THAT THERE WAS DEMAND FOR THE  
16 PATENTED PRODUCTS;

17 NUMBER 2. THAT THERE WERE NO  
18 NON-INFRINGING SUBSTITUTES FOR EACH OF THE  
19 INFRINGING PRODUCTS, OR, IF THERE WERE, THE NUMBER  
20 OF THE SALES OF EACH PRODUCT MADE BY SAMSUNG  
21 ELECTRONICS COMPANY, SAMSUNG ELECTRONICS AMERICA,  
22 AND SAMSUNG TELECOMMUNICATIONS AMERICA, THAT APPLE  
23 WOULD HAVE MADE DESPITE THE AVAILABILITY OF OTHER  
24 NON-INFRINGING SUBSTITUTES .

25 AN ALTERNATIVE MAY BE CONSIDERED

1 AVAILABLE AS A POTENTIAL SUBSTITUTE EVEN IF IT WAS  
2 NOT ACTUALLY ON SALE DURING THE INFRINGEMENT  
3 PERIOD. FACTORS SUGGESTING THAT THE ALTERNATIVE  
4 WAS AVAILABLE INCLUDE WHETHER THE MATERIAL,  
5 EXPERIENCE, AND KNOW-HOW FOR THE ALLEGED SUBSTITUTE  
6 WERE READILY AVAILABLE. FACTORS SUGGESTING THAT  
7 THE ALTERNATIVE WAS NOT AVAILABLE INCLUDE WHETHER  
8 THE MATERIAL WAS OF SUCH HIGH COST AS TO RENDER THE  
9 ALTERNATIVE UNAVAILABLE, AND WHETHER SAMSUNG HAD TO  
10 DESIGN OR INVENT AROUND THE PATENTED TECHNOLOGY TO  
11 DEVELOP AN ALLEGED SUBSTITUTE;

12 NUMBER 3. THAT APPLE HAD THE  
13 MANUFACTURING AND MARKETING CAPACITY TO MAKE ANY  
14 INFRINGING SALES ACTUALLY MADE BY SAMSUNG  
15 ELECTRONICS COMPANY, SAMSUNG ELECTRONICS AMERICA,  
16 AND SAMSUNG TELECOMMUNICATIONS AMERICA AND FOR  
17 WHICH APPLE SEEKS AN AWARD OF LOST PROFITS; AND,

18 NUMBER 4. THE AMOUNT OF PROFIT THAT  
19 APPLE WOULD HAVE MADE IF SAMSUNG ELECTRONICS  
20 COMPANY, SAMSUNG ELECTRONICS AMERICA, AND SAMSUNG  
21 TELECOMMUNICATIONS AMERICA HAD NOT INFRINGED.

22 NUMBER 38. APPLE MAY CALCULATE ITS LOST  
23 PROFITS ON ANY LOST SALES BY COMPUTING THE LOST  
24 REVENUE FOR SALES IT CLAIMS IT WOULD HAVE MADE, BUT  
25 FOR THE INFRINGEMENT, AND SUBTRACTING FROM THAT

1 FIGURE THE AMOUNT OF ADDITIONAL COSTS OR EXPENSES  
2 IT WOULD HAVE INCURRED IN MAKING THOSE LOST SALES,  
3 SUCH AS COST OF GOODS, SALES COSTS, PACKAGING  
4 COSTS, AND SHIPPING COSTS.

5 NUMBER 39. ONE WAY APPLE MAY PROVE THE  
6 NUMBER OF SALES IT WOULD HAVE MADE IF THE  
7 INFRINGEMENT HAD NOT HAPPENED IS TO PROVE ITS SHARE  
8 OF THE RELEVANT MARKET EXCLUDING INFRINGING  
9 PRODUCTS. YOU MAY AWARD APPLE A SHARE OF PROFITS  
10 EQUAL TO THAT MARKET SHARE.

11 IN DECIDING APPLE'S MARKET SHARE, YOU  
12 MUST DECIDE PRODUCTS ARE IN APPLE'S MARKET.  
13 PRODUCTS ARE IN THE SAME MARKET IF THEY ARE  
14 SUFFICIENTLY SIMILAR TO COMPETE AGAINST EACH OTHER.  
15 TWO PRODUCTS ARE SUFFICIENTLY SIMILAR IF ONE DOES  
16 NOT HAVE A SIGNIFICANTLY HIGHER PRICE THAN OR  
17 POSSESS CHARACTERISTICS SIGNIFICANTLY DIFFERENT  
18 THAN THE OTHER.

19 NUMBER 40. BOTH APPLE AND SAMSUNG SEEK A  
20 REASONABLE ROYALTY FOR THE INFRINGEMENT OF THEIR  
21 RESPECTIVE UTILITY PATENTS.

22 IF APPLE HAS NOT PROVED ITS CLAIM FOR  
23 LOST PROFITS, OR HAS PROVED ITS CLAIM FOR LOST  
24 PROFITS FOR ONLY A PORTION OF THE INFRINGING SALES,  
25 THEN APPLE SHOULD BE AWARDED A REASONABLE ROYALTY



1 FOR ALL INFRINGING SAMSUNG SALES FOR WHICH APPLE  
2 HAS NOT BEEN AWARDED LOST PROFITS DAMAGES.

3 SAMSUNG DOES NOT MAKE A CLAIM FOR LOST  
4 PROFITS. SAMSUNG SHOULD BE AWARDED A REASONABLE  
5 ROYALTY FOR ALL INFRINGING APPLE SALES.

6 41. A ROYALTY IS A PAYMENT MADE TO A  
7 PATENT HOLDER IN EXCHANGE FOR THE RIGHT TO MAKE,  
8 USE OR SELL THE CLAIMED INVENTION. THIS RIGHT IS  
9 CALLED A "LICENSE." A REASONABLE ROYALTY IS THE  
10 PAYMENT FOR THE LICENSE THAT WOULD HAVE RESULTED  
11 FROM A HYPOTHETICAL NEGOTIATION BETWEEN THE PATENT  
12 HOLDER AND THE INFRINGER TAKING PLACE AT THE TIME  
13 WHEN THE INFRINGING ACTIVITY FIRST BEGAN.

14 IN CONSIDERING THE NATURE OF THIS  
15 NEGOTIATION, YOU MUST ASSUME THAT THE PATENT HOLDER  
16 AND THE INFRINGER WOULD HAVE ACTED REASONABLY AND  
17 WOULD HAVE ENTERED INTO A LICENSE AGREEMENT.

18 YOU MUST ALSO ASSUME THAT BOTH PARTIES  
19 BELIEVE THE PATENT WAS VALID AND INFRINGED.

20 YOUR ROLE IS TO DETERMINE WHAT THE RESULT  
21 OF THAT NEGOTIATION WOULD HAVE BEEN. THE TEST FOR  
22 DAMAGES IS WHAT ROYALTY WOULD HAVE RESULTED FROM  
23 THE HYPOTHETICAL NEGOTIATION AND NOT SIMPLY WHAT  
24 EITHER PARTY WOULD HAVE PREFERRED.

25 A ROYALTY CAN BE CALCULATED IN SEVERAL

1 DIFFERENT WAYS AND IT IS FOR YOU TO DETERMINE WHICH  
2 WAY IS THE MOST APPROPRIATE BASED ON THE EVIDENCE  
3 YOU HAVE HEARD. ONE WAY TO CALCULATE A ROYALTY IS  
4 TO DETERMINE WHAT IS CALLED AN "ONGOING ROYALTY."

5 TO CALCULATE AN ONGOING ROYALTY, YOU MUST  
6 FIRST DETERMINE THE "BASE," THAT IS, THE PRODUCT ON  
7 WHICH THE INFRINGER IS TO PAY. YOU THEN NEED TO  
8 MULTIPLY THE REVENUE THE DEFENDANT OBTAINED FROM  
9 THAT BASE BY THE RATE OR PERCENTAGE THAT YOU FIND  
10 WOULD HAVE RESULTED FROM THE HYPOTHETICAL  
11 NEGOTIATION.

12 FOR EXAMPLE, IF THE PATENT COVERS A NAIL,  
13 AND THE NAIL SELLS FOR \$1, AND THE LICENSEE SOLD  
14 200 NAILS, THE BASE REVENUE WOULD BE \$200. IF THE  
15 RATE YOU FIND WOULD HAVE RESULTED FROM THE  
16 HYPOTHETICAL NEGOTIATION IS 1 PERCENT, THEN THE  
17 ROYALTY WOULD BE \$2, OR THE RATE OF .01 TIMES THE  
18 BASE REVENUE OF \$200.

19 IF THE PATENT COVERS ONLY PART OF THE  
20 PRODUCT THAT THE INFRINGER SELLS, THEN THE BASE  
21 WOULD NORMALLY BE ONLY THAT FEATURE OR COMPONENT.  
22 FOR EXAMPLE, IF YOU FIND THAT FOR A \$100 CAR, THE  
23 PATENTED FEATURE IS THE TIRES WHICH SELL FOR \$5,  
24 THE BASE REVENUE WOULD BE \$5 .

25 HOWEVER, IN A CIRCUMSTANCE IN WHICH THE

1 PATENTED FEATURE IS THE REASON THE CUSTOMERS BUY  
2 THE WHOLE PRODUCT, THE BASE REVENUE COULD BE THE  
3 VALUE OF THE WHOLE PRODUCT.

4 A SECOND WAY TO CALCULATE A ROYALTY IS TO  
5 DETERMINE A ONE-TIME LUMP SUM PAYMENT THAT THE  
6 INFRINGER WOULD HAVE PAID AT THE TIME OF THE  
7 HYPOTHETICAL NEGOTIATION FOR A LICENSE COVERING ALL  
8 SALES OF THE LICENSED PRODUCT, BOTH PAST AND  
9 FUTURE. THIS DIFFERS FROM PAYMENT OF AN ONGOING  
10 ROYALTY BECAUSE, WITH AN ONGOING ROYALTY, THE  
11 LICENSEE BASED ON THE REVENUE OF ACTUAL LICENSED  
12 PRODUCTS IT SELLS.

13 WHEN A ONE-TIME LUMP SUM IS PAID, THE  
14 INFRINGER PAYS A SINGLE PRICE FOR THE LICENSE  
15 COVERED BOTH PAST AND FUTURE INFRINGING SALES.

16 NUMBER 1. THE ROYALTIES RECEIVED BY THE  
17 PATENTEE FOR THE LICENSING OF THE PATENT IN SUIT,  
18 PROVING OR TENDING TO PROVE AN ESTABLISHED ROYALTY;

19 NUMBER 2. THE RATES PAID BY THE LICENSEE  
20 FOR THE USE OF THE OTHER PATENTS COMPARABLE TO THE  
21 PATENT IN SUIT;

22 NUMBER 3. THE NATURE AND SCOPE OF THE  
23 LICENSE, AS EXCLUSIVE OR NONEXCLUSIVE, OR AS  
24 RESTRICTED OR NON-RESTRICTED IN TERMS OF TERRITORY  
25 OR WITH RESPECT TO WHOM THE MANUFACTURED PRODUCT

1 MAY BE OLD.

2 THE LICENSOR'S ESTABLISHED POLICY AND  
3 MARKETING PROGRAM TO MAINTAIN HIS OR HER PATENT  
4 MONOPOLY BY NOT LICENSING OTHERS TO USE THE  
5 INVENTION OR BY GRANTING LICENSES UNDER THE SPECIAL  
6 CONDITIONS DESIGNED TO PRESERVE THAT MONOPOLY.

7 NUMBER 5. THE COMMERCIAL RELATIONSHIP  
8 BETWEEN THE LICENSE AND LICENSEE, SUCH AS WHETHER  
9 THEY ARE COMPETITORS IN THE SAME TERRITORY IN THE  
10 SAME LINE OF BUSINESS OR WHETHER THEY ARE THE  
11 INVENTOR AND PROMOTER.

12 NUMBER 6. THE EFFECT OF SELLING THE  
13 PATENTED SPECIALTY IN PROMOTING SALES OF OTHER  
14 PRODUCTS OF THE LICENSEE, THE EXISTING VALUE OF THE  
15 INVENTION TO THE LICENSOR AS A GENERATOR OF SALES  
16 OF HIS NONPATENTED ITEMS, AND THE EXTENT OF SUCH  
17 DERIVATIVE OR CONVOYED SALES;

18 NUMBER 7. THE DURATION OF THE PATENT AND  
19 THE TERMS OF THE LICENSE;

20 8. THE ESTABLISHED PROFITABILITY OF THE  
21 PRODUCT MADE UNDER THE PATENTS, ITS COMMERCIAL  
22 SUCCESS AND ITS CURRENT POPULARITY;

23 9. THE UTILITY AND ADVANTAGES OF THE  
24 PATENTED PROPERTY OVER THE OLD MODES OR DEVICES, IF  
25 ANY, THAT HAVE BEEN USED FOR WORKING OUT SIMILAR

1 RESULTS ;

2 10. THE NATURE OF THE PATENTED  
3 INVENTION, THE CHARACTER OF THE COMMERCIAL  
4 EMBODIMENT OF IT AS OWNED AND PRODUCED BY THE  
5 LICENSOR, AND THE BENEFITS TO THOSE WHO HAVE USED  
6 THE INVENTION;

7 11. THE EXTENT TO WHICH THE INFRINGER  
8 HAS MADE USE OF THE INVENTION AND ANY EVIDENCE  
9 PROBATIVE OF THE VALUE OF THAT USE.

10 12. THE PORTION OF THE PROFIT OR OF THE  
11 SELLING PRICE THAT MAY BE CUSTOMARY IN THE  
12 PARTICULAR BUSINESS OR IN COMPARABLE BUSINESS TO  
13 ALLOW FOR THE USE OF THE INVENTION OR ANALOGOUS  
14 INVENTIONS;

15 13. THE PORTION OF THE REALIZABLE PROFIT  
16 THAT IS SHOULD BE CREDITED TO THE INVENTION AS  
17 DISTINGUISHED FROM NONPATENTED ELEMENTS, THE  
18 MANUFACTURING PROCESS, BUSINESS RISKS, OR  
19 SIGNIFICANT FEATURES OR IMPROVEMENTS ADD BY THE  
20 INFRINGER;

21 14. THE OPINION AND TESTIMONY OF  
22 QUALIFIED EXPERTS;

23 15. THE AMOUNT THAT A LICENSOR, SUCH AS  
24 A PATENTEE, AND A LICENSEE, SUCH AS THE INFRINGER,  
25 WOULD HAVE AGREED UPON AT THE TIME THE INFRINGEMENT

1           BEGAN IF BOTH HAD BEEN REASONABLY AND VOLUNTARILY  
2           TRYING TO REACH AN AGREEMENT; THAT IS, THE AMOUNT  
3           WHICH A PRUDENT LICENSEE, WHO DESIRED AS A BUSINESS  
4           PROPOSITION, TO OBTAIN AND TO MANUFACTURE AND SELL  
5           A PARTICULAR ARTICLE EMBODYING THE PATENTED  
6           INVENTION WOULD HAVE BEEN WILLING TO PAY AS A  
7           ROYALTY AND YET BE ABLE TO MAKE A REASONABLE PROFIT  
8           AND WHICH AMOUNT WOULD HAVE BEEN ACCEPTABLE BY A  
9           PRUDENT PATENTEE WHO IS WILLING TO GRANT A LICENSE.

10                       IT IS UP TO YOU, BASED ON THE EVIDENCE,  
11           TO DECIDE WHAT TYPE OF ROYALTY IS APPROPRIATE IN  
12           THIS CASE.

13                       42.   DAMAGES THAT APPLE MAY BE AWARDED BY  
14           YOU COMMENCE ON THE DATE THAT SAMSUNG ELECTRONICS  
15           COMPANY, SAMSUNG ELECTRONICS AMERICA, AND/OR  
16           SAMSUNG TELECOMMUNICATIONS AMERICA HAS BOTH  
17           INFRINGED AND BEEN NOTIFIED OF THE PATENT OR  
18           PATENTS IT INFRINGED.

19                       IF YOU FIND THAT APPLE SELLS PRODUCTS  
20           THAT INCLUDE THE CLAIMED INVENTIONS, BUT HAS NOT  
21           MARKETED THOSE PRODUCTS WITH PATENT NUMBERS, YOU  
22           MUST DETERMINE THE DATE THAT EACH SAMSUNG ENTITY  
23           RECEIVED ACTUAL WRITTEN NOTICE OF THE PATENTS  
24           AND THE SPECIFIC PRODUCTS ALLEGED TO INFRINGE.

25                       WHILE YOU MAY IDENTIFY AN EARLIER DATE BY

1 WHICH EACH SAMSUNG ENTITY HAD NOTICE OF APPLE'S  
2 CLAIMS OF INFRINGEMENT BASED ON YOUR EVALUATION OF  
3 THE APPLE, APPLE'S LAWSUIT PROVIDED SAMSUNG SUCH  
4 NOTICE FOR THE '381 AND '915 PATENTS NO LATER THAN  
5 APRIL 15TH, 2011, AND FOR THE 16 PATENTS NO LATER  
6 THAN JUNE 16TH, 2011.

7 ON THE OTHER HAND, IF YOU FIND THAT APPLE  
8 DOES NOT SELL PRODUCTS COVERED BY A PATENT, THEN  
9 DAMAGES BEGIN WITHOUT THE REQUIREMENT FOR ACTUAL  
10 NOTICING UNDER THE FOLLOWING CIRCUMSTANCES IS.

11 IF THE PATENT WAS GRANTED BEFORE THE  
12 INFRINGING ACTIVITY BEGAN, DAMAGES SHOULD BE  
13 CALCULATED AS OF THE DATE YOU DETERMINE THAT THE  
14 INFRINGEMENT BEGAN, OR

15 IF THE PATENT WAS GRANTED AFTER THE  
16 INFRINGING ACTIVITIES BEGAN AS DETERMINED BY YOU,  
17 DAMAGES SHOULD BE CALCULATED AS OF THE DATE THE  
18 PATENT ISSUED.

19 WITH RESPECT TO SAMSUNG '460 PATENT, THE  
20 DAMAGES YOU MAY AWARD SAMSUNG FOR ANY INFRINGEMENT  
21 SHOULD BE CALCULATED AS OF AUGUST 18TH, 2009,  
22 BECAUSE SAMSUNG ASSERTING ONLY METHOD CLAIMS FROM  
23 THAT PATENT.

24 WITH RESPECT TO SAMSUNG'S '516, '711,  
25 '893, AND '941 PATENTS, DAMAGES THAT SAMSUNG MAY BE

1       AWARDED COMMENCE ON THE DATE THAT APPLE HAS BOTH  
2       INFRINGED AND BEEN NOTIFIED OF THE PATENT OR  
3       PATENTS IT INFRINGED.

4               IF YOU FIND THAT SAMSUNG SELLS PRODUCTS  
5       THAT INCLUDE ITS CLAIMED INVENTIONS FROM THESE  
6       PATENTS, BUT HAS NOT MARKED THOSE PRODUCT WITH THE  
7       PATENT NUMBERS, YOU MUST DETERMINE THE DATE THAT  
8       APPLE RECEIVED ACTUAL WRITTEN NOTICE OF THE PATENTS  
9       AND THE SPECIFIC PRODUCTS ALLEGED TO INFRINGE.

10              WHILE YOU MAY IDENTIFY AN EARLIER DATE BY  
11       WHICH APPLE HAD NOTICE OF SAMSUNG'S CLAIMS OF  
12       INFRINGEMENT BASED ON YOUR EVALUATION OF THE  
13       EVIDENCE, SAMSUNG'S CLAIMS PROVIDED APPLE SUCH  
14       NOTICE BY NO LATER THAN JUNE 16TH, 2011.

15              ON THE OTHER HAND, IF YOU FIND THAT  
16       SAMSUNG DOES NOT SELL PRODUCTS COVERED BY THE  
17       PATENT, THEN DAMAGES BEGIN WITHOUT THE REQUIREMENT  
18       OF ACTUAL NOTICE UNDER THE FOLLOWING CIRCUMSTANCES:

19              IF THE PATENT WAS GRANTED BEFORE THE  
20       INFRINGEMENT ACTIVITY BEGAN, DAMAGES SHOULD BE  
21       CALCULATED AS OF THE DATE YOU DETERMINE THAT THE  
22       INFRINGEMENT BEGAN; OR,

23              IF THE PATENT WAS GRANTED AFTER THE  
24       INFRINGEMENT ACTIVITIES BEGAN AS DETERMINED BY YOU,  
25       DAMAGES SHOULD BE CALCULATED AS OF THE DATE THE



1 PATENT ISSUED.

2 LET'S TAKE ANOTHER STAND UP BREAK.

3 (PAUSE IN PROCEEDINGS.)

4 THE COURT: ALL RIGHT. LET'S TAKE A  
5 SEAT.

6 NUMBER 43. BEFORE YOU DECIDE WHETHER  
7 SAMSUNG ELECTRONICS COMPANY, SAMSUNG ELECTRONICS  
8 AMERICA, AND/OR SAMSUNG TELECOMMUNICATIONS AMERICA  
9 HAVE INFRINGED ONE OR MORE OF APPLE'S ASSERTED  
10 DESIGN PATENTS, OR WHETHER THE DESIGN PATENTS ARE  
11 INVALID, YOU WILL HAVE TO UNDERSTAND THE DESIGN  
12 PATENT CLAIMS.

13 UNLIKE UTILITY PATENTS, A DESIGN PATENT  
14 CAN ONLY HAVE ONE CLAIM. THAT CLAIM COVERS ALL OF  
15 THE FIGURES IN THE PATENT. IT IS PERMISSIBLE TO  
16 ILLUSTRATE MORE THAN ONE EMBODIMENT OF A DESIGN IN  
17 A SINGLE DESIGN PATENT APPLICATION.

18 EACH DESIGN PATENT CONTAINS MULTIPLE  
19 DRAWINGS TO ILLUSTRATE THE CLAIMED DESIGN. THE  
20 SCOPE OF THE CLAIM ENCOMPASSES THE DESIGN'S VISUAL  
21 APPEARANCE AS A WHOLE. IT DOES NOT COVER A GENERAL  
22 DESIGN CONCEPT, AND IT IS NOT LIMITED TO ISOLATED  
23 FEATURES OF THE DRAWINGS.

24 ALL MATTERS DEPICTED IN SOLID LINES  
25 CONTRIBUTES TO THE OVERALL APPEARANCE OF THE

1 DESIGN.

2 IT IS MY JOB AS A JUDGE TO INTERPRET FOR  
3 YOU WHAT IS CLAIMED BY THE PATENTS. YOU MUST  
4 ACCEPT MY INTERPRETATIONS AS CORRECT. MY  
5 INTERPRETATIONS SHOULD NOT BE TAKEN AS AN  
6 INDICATION THAT I HAVE AN OPINION ONE WAY OR  
7 ANOTHER REGARDING THE ISSUES OF INFRINGEMENT AND  
8 INVALIDITY. THE DECISIONS REGARDING INFRINGEMENT  
9 AND INVALIDITY ARE YOURS TO MAKE.

10 WHEN CONSIDERING THE DESIGN PATENTS, YOU  
11 SHOULD VIEW CERTAIN FEATURES IN THE DRAWINGS IN  
12 THIS WAY:

13 THE D'677 PATENT CLAIMS THE ORNAMENTAL  
14 DESIGN OF AN ELECTRONIC DEVICE AS SHOWN IN FIGURES  
15 1 THROUGH 8. THE BROKEN LINES IN THE D'677 PATENT  
16 CONSTITUTE UNCLAIMED SUBJECT MATTER.

17 THE USE OF SOLID BLOCK SURFACE SHADING IN  
18 THE D'677 PATENT REPRESENTS THE COLOR BLACK. THE  
19 USE OF OBLIQUE LINE SHADING ON THE D'677 PATENT IS  
20 USED TO SHOW A TRANSPARENT, TRANSLUCENT OR HIGHLY  
21 POLISHED OR REFLECTIVE SURFACE.

22 THE D'087 PATENT COVERS -- I'M SORRY --  
23 CLAIMS, EXCUSE ME, THE ORNAMENTAL DESIGN OF AN  
24 ELECTRONIC DEVICE AS SHOWN IN FIGURES 1 THROUGH 14.  
25 THE BROKEN LINES IN THE D'087 PATENT CONSTITUTE

1 UNCLAIMED SUBJECT MATTER.

2           THUS, THE D'087 PATENT CLAIMS THE FRONT  
3 FACE, A BEZEL ENCIRCLING THE FRONT FACE OF THE  
4 PATENTED DESIGN THAT EXTENDED FROM THE FRONT OF THE  
5 PHONE TO ITS SIDES, AND A FLAT CONTOUR OF THE FRONT  
6 FACE, BUT DOES NOT CLAIM THE REST OF THE ARTICLE OF  
7 MANUFACTURE.

8           THE D'889 PATENT CLAIMS THE ORNAMENTAL  
9 DESIGN OF AN ELECTRONIC DEVICE AS SHOWN IN FIGURES  
10 1 THROUGH 9.

11           (PAUSE IN PROCEEDINGS.)

12           THE COURT: THE BROKEN LINES DEPICTING  
13 THE HUMAN FIGURE IN FIGURE 9 DO NOT FORM A PART OF  
14 THE CLAIMED DESIGN.

15           THE OTHER BROKEN LINE ON THE OTHER  
16 FIGURES ARE PART OF THE CLAIMED DESIGN.

17           THE D'889 ALSO INCLUDES OBLIQUE LINE  
18 SHADING ON SEVERAL OF THE FIGURES. THE OBLIQUE  
19 LINE SHADING IN FIGURES 1 THROUGH 3 AND FIGURE 9  
20 DEPICTS A TRANSPARENT, TRANSLUCENT OR HIGHLY  
21 POLISHED OR REFLECTIVE SURFACE FROM THE TOP  
22 PERSPECTIVE OF THE CLAIMED DESIGN, THE TOP VIEW OF  
23 THE CLAIMED DESIGN, AND THE BOTTOM PERSPECTIVE VIEW  
24 OF THE CLAIMED DESIGN.

25           THE D'305 PATENT CLAIMS THE ORNAMENTAL

1 DESIGN FOR A GRAPHICAL USER INTERFACE FOR A DISPLAY  
2 SCREEN OR PORTION THEREOF AS SHOWN IN FIGURES 1  
3 THROUGH 2. THE BROKEN LINE SHOWING OF A DISPLAY  
4 SCREEN IN BOTH VIEWS FORMS NO PART OF THE CLAIMED  
5 DESIGN.

6 NUMBER 44. TO PROVE THAT ANY SAMSUNG  
7 ENTITY INFRINGED ANY OF APPLE'S DESIGN PATENTS,  
8 APPLE MUST PROVE BY A PREPONDERANCE OF THE EVIDENCE  
9 THAT THE SAMSUNG ENTITY HAS INFRINGED THE PATENT.

10 NUMBER 45. I WILL NOW INSTRUCT YOU AS TO  
11 THE RULES YOU MUST FOLLOW WHEN DECIDING WHETHER  
12 APPLE HAS PROVEN THAT ONE OR MORE OF THE SAMSUNG  
13 ENTITIES (SAMSUNG ELECTRONICS AMERICA, SAMSUNG  
14 TELECOMMUNICATIONS AMERICA, AND SAMSUNG ELECTRONICS  
15 COMPANY) HAS DIRECTLY INFRINGE THE D'677, D'087,  
16 D'305 AND/OR D'889 DESIGN PATENTS.

17 AS WITH UTILITY PATENTS, PATENT LAW GIVES  
18 THE OWNER OF A VALID DESIGN PATENT THE RIGHT TO  
19 EXCLUDE OTHERS FROM IMPORTING, MAKING, USING,  
20 OFFERING TO SELL OR SELLING THE PATENTED DESIGNS  
21 WITHIN THE UNITED STATES DURING THE TERM OF THE  
22 PATENT.

23 ANY PERSON OR COMPANY THAT HAS ENGAGED IN  
24 ANY OF THOSE ACTS WITHOUT THE DESIGN PATENT OWNER'S  
25 PERMISSION INFRINGES THE PATENT.

1           IN DECIDING WHETHER A SALE HAS TAKEN  
2           PLACE WITHIN THE UNITED STATES, YOU MAY FIND THE  
3           FOLLOWING GUIDELINES HELPFUL TO YOUR ANALYSIS. THE  
4           LOCATION OF THE SALE DEPENDS ON MANY FACTORS, AND  
5           YOU MAY FIND THAT THE SALE OCCURRED IN SEVERAL  
6           PLACES.

7           A SALE OCCURS WHERE THE ESSENTIAL  
8           ACTIVITIES OF THE SALE TAKE PLACE. THE ESSENTIAL  
9           ACTIVITIES INCLUDE, FOR EXAMPLE, NEGOTIATING THE  
10          CONTRACT AND PERFORMING THE OBLIGATIONS UNDER THE  
11          CONTRACT.

12          APPLE BEARS THE BURDEN OF PROVING BY A  
13          PREPONDERANCE OF THE EVIDENCE THAT EACH DEVICE  
14          INFRINGEMENTS EACH SEPARATE PATENT. THEREFORE, YOU,  
15          THE JURY, MUST DETERMINE THE INFRINGEMENT FOR EACH  
16          PATENT SEPARATELY, CONSIDERING EACH INDIVIDUAL  
17          DEVICE SEPARATELY.

18          NUMBER 46. TO DETERMINE DIRECT  
19          INFRINGEMENT OF A DESIGN PATENT, YOU MUST COMPARE  
20          THE OVERALL APPEARANCES OF THE ACCUSED DESIGN AND  
21          THE CLAIMED DESIGN.

22          IF YOU FIND BY A PREPONDERANCE OF THE  
23          EVIDENCE THAT THE OVERALL APPEARANCE OF AN ACCUSED  
24          SAMSUNG DESIGN IS SUBSTANTIALLY THE SAME AS THE  
25          OVERALL APPEARANCE OF THE CLAIMED APPLE DESIGN

1 PATENT AND THAT THE ACCUSED DESIGN WAS MADE, USED,  
2 SOLD, OFFERED FOR SALE OR IMPORTED WITHIN THE  
3 UNITED STATES, YOU MUST FIND THAT THE ACCUSED  
4 DESIGN INFRINGED THE CLAIMED DESIGN.

5 TWO DESIGNS ARE SUBSTANTIALLY THE SAME  
6 IF, IN THE EYE OF AN ORDINARY OBSERVER, GIVING SUCH  
7 ATTENTION AS A PURCHASER USUALLY GIVES, THE  
8 RESEMBLANCE BETWEEN THE TWO DESIGNS IS SUCH AS TO  
9 DECEIVE SUCH AN OBSERVER, INDUCING HIM TO PURCHASE  
10 ONE SUPPOSING IT TO BE THE OTHER.

11 YOU DO NOT NEED, HOWEVER, TO FIND THAT  
12 ANY PURCHASERS ACTUALLY WERE DECEIVED OR CONFUSED  
13 BY THE APPEARANCE OF THE ACCUSED SAMSUNG PRODUCTS.

14 YOU SHOULD CONSIDER ANY PERCEIVED  
15 SIMILARITIES OR DIFFERENCES BETWEEN THE PATENTED  
16 AND ACCUSED DESIGNS. MINOR DIFFERENCES SHOULD NOT  
17 PREVENT A FINDING OF INFRINGEMENT.

18 THIS DETERMINATION OF WHETHER TWO DESIGNS  
19 ARE SUBSTANTIALLY THE SAME WILL BENEFIT FROM  
20 COMPARING THE TWO DESIGNS WITH PRIOR ART. YOU MUST  
21 FAMILIARIZE YOURSELF WITH THE PRIOR ART ADMITTED AT  
22 TRIAL IN MAKING YOUR DETERMINATION OF WHETHER THERE  
23 HAS BEEN DIRECT INFRINGEMENT.

24 YOU MAY FIND THE FOLLOWING GUIDELINES  
25 HELPFUL TO YOUR ANALYSIS:

1 THE PLACEMENT AND ORNAMENTATION OF A LOGO  
2 MAY ALTER THE OVERALL DESIGN. HOWEVER, THE USE OF  
3 A MARK OR LOGO TO IDENTIFY THE SOURCE OF AN  
4 OTHERWISE INFRINGING DESIGN WILL NOT AVOID  
5 INFRINGEMENT.

6 WHEN THE CLAIMED DESIGN IS VISUALLY CLOSE  
7 TO PRIOR ART DESIGN, SMALL DIFFERENCES BETWEEN THE  
8 ACCUSED DESIGN AND THE CLAIMED DESIGN MAY BE  
9 IMPORTANT IN ANALYZING WHETHER THE OVERALL  
10 APPEARANCES OF THE ACCUSED AND CLAIMED DESIGNS ARE  
11 SUBSTANTIALLY THE SAME.

12 IF THE ACCUSED DESIGN INCLUDES A FEATURE  
13 OF THE CLAIMED DESIGN THAT DEPARTS CONSPICUOUSLY  
14 FROM THE PRIOR ART, YOU MAY FIND THAT FEATURE  
15 IMPORTANT IN ANALYZING WHETHER THE OVERALL  
16 APPEARANCE OF THE ACCUSED AND CLAIMED DESIGNS ARE  
17 SUBSTANTIALLY THE SAME.

18 IF THE ACCUSED DESIGN IS VISUALLY CLOSER  
19 TO THE CLAIMED DESIGN THAN IT IS TO THE CLOSEST  
20 PRIOR ART, YOU MAY FIND THIS COMPARISON IMPORTANT  
21 IN ANALYZING WHETHER THE OVER APPEARANCE OF THE  
22 ACCUSED AND CLAIMED DESIGNS ARE SUBSTANTIALLY THE  
23 SAME.

24 YOU SHOULD NOT CONSIDER THE SIZE OF THE  
25 ACCUSED PRODUCTS IF THE ASSERTED DESIGN PATENT DID

1 SLIGHTLY DIFFERENT NOT SPECIFY THE SIZE OF THE  
2 DESIGN.

3 WHILE THESE GUIDELINES MAY BE HELPFUL,  
4 THE TEST FOR INFRINGEMENT IS WHETHER THE OVERALL  
5 APPEARANCES OF THE ACCUSED DESIGN AND THE CLAIMED  
6 DESIGN ARE SUBSTANTIALLY THE SAME.

7 WHETHER SAMSUNG KNEW ITS PRODUCTS  
8 INFRINGED OR EVEN KNEW OF APPLE DESIGN PATENTS DOES  
9 NOT MATTER IN DETERMINING INFRINGE ACTION.

10 47. IN DECIDING THE ISSUE OF  
11 INFRINGEMENT, YOU MUST COMPARE SAMSUNG'S ACCUSED  
12 PRODUCTS TO THE DESIGN PATENTS. IN ADDITION, YOU  
13 HAVE HEARD EVIDENCE ABOUT CERTAIN APPLE PRODUCTS  
14 AND MODELS. IF YOU DETERMINE THAT ANY OF APPLE'S  
15 PRODUCTS OR MODELS ARE SUBSTANTIALLY THE SAME AS AN  
16 APPLE PATENT DESIGN, AND THAT THE PRODUCT OR MODEL  
17 HAS NO SIGNIFICANT DISTINCTIONS WITH THE DESIGN,  
18 YOU MAY COMPARE THE PRODUCT OR MODEL DIRECTLY TO  
19 THE ACCUSED SAMSUNG PRODUCTS. THIS MAY FACILITATE  
20 IF YOU DETERMINE THAT A PARTICULAR APPLE OR PRODUCT  
21 DOES NOT EMBODY A PATENTED DESIGN, YOU MAY NOT  
22 COMPARE IT TO THE ACCUSED DEVICES.

23 NUMBER 48. I WILL NOW INSTRUCT YOU ON  
24 THE RULES YOU MUST FOLLOW IN DECIDING WHETHER  
25 SAMSUNG HAS PROVEN THAT THE APPLE DESIGN PATENTS



1 ARE INVALID. BEFORE DISCUSSING THE SPECIFIC RULES,  
2 I WANT TO REMIND YOU ABOUT THE STANDARD OF PROOF  
3 THAT APPLIES TO THIS DEFENSE. TO PROVE INVALIDITY  
4 OF ANY DESIGN PATENT, SAMSUNG MUST PERSUADE YOU BY  
5 CLEAR AND CONVINCING EVIDENCE THAT THE DESIGN  
6 PATENT IS INVALID.

7 49. BEFORE I DESCRIBE HOW TO ASSESS  
8 WHETHER APPLE'S DESIGN PATENTS ARE INVALID, I WILL  
9 INSTRUCT YOU ABOUT DOCUMENTS AND THINGS CALLED  
10 "PRIOR ART."

11 IN GENERAL, PRIOR ART INCLUDES THINGS  
12 THAT EXISTED BEFORE THE CLAIMED DESIGN, THAT WERE  
13 PUBLICLY KNOWN IN THIS COUNTRY, OR USED IN A  
14 PUBLICLY ACCESSIBLE WAY IN THIS COUNTRY, OR THAT  
15 WERE PATENTED OR DESCRIBED IN A PUBLICATION IN ANY  
16 COUNTRY.

17 SPECIFICALLY, PRIOR ART INCLUDES ANY OF  
18 THE FOLLOWING ITEMS RECEIVED INTO EVIDENCE DURING  
19 TRIAL:

20 IF THE CLAIMED DESIGN WAS ALREADY  
21 PUBLICLY KNOWN OR PUBLICLY USED BY OTHERS IN THE  
22 UNITED STATES BEFORE THE DATE OF THE INVENTION OF  
23 THE CLAIMED DESIGN;

24 IF THE CLAIMED DESIGN WAS ALREADY  
25 PATENTED OR DESCRIBED IN A PRINTED PUBLICATION

1 ANYWHERE IN THE WORLD BEFORE THE DATE OF INVENTION  
2 OF THE CLAIMED DESIGN. A REFERENCE IS A "PRINTED  
3 PUBLICATION" IF IT IS ACCESSIBLE TO THOSE  
4 INTERESTED IN THE FIELD, EVEN IF IT IS DIFFICULT TO  
5 FIND;

6 IF THE CLAIMED DESIGN WAS ALREADY  
7 DESCRIBED ANOTHER IN U.S. PATENT OR PUBLISHED U.S.  
8 PATENT APPLICATION THAT WAS BASED ON AN APPLICATION  
9 FILED BEFORE THE DATE OF THE INVENTION OF THE  
10 CLAIMED DESIGN;

11 IF THE CLAIMED DESIGN WAS ALREADY MADE BY  
12 SOMEONE ELSE IN THE UNITED STATES BEFORE THE DATE  
13 OF INVENTION, IF THAT OTHER PERSON HAD NOT  
14 ABANDONED, SUPPRESSED OR CONCEALED HIS OR HER  
15 INVENTION.

16 SINCE THE DATE OF INVENTION OF THE D'677  
17 AND D'087 IS IN DISPUTE IN THIS CASE, YOU MUST  
18 DETERMINE WHETHER APPLE AS PROVED THE DATES THESE  
19 DESIGNS WERE INVENTED.

20 THE DATE OF INVENTION OCCURS WHEN THE  
21 INVENTION IS SHOWN IN ITS COMPLETE FORM BY  
22 DRAWINGS, DISCLOSE TO ANOTHER OR OTHER FORMS OF  
23 EVIDENCE PRESENTED AT TRIAL.

24 IF YOU DETERMINE THAT APPLE HAS NOT  
25 PROVED WHEN THE PATENTS WERE INVENTED, YOU MUST

1       ASSUME THAT THE DATE OF THE INVENTION OF THE  
2       PATENTED DESIGNS WAS NOT UNTIL THE FILING DATE OF  
3       THE PATENT.

4               THE APPLE DESIGN PATENTS HAVE THE  
5       FOLLOWING FILING DATES:

6               D'677 PATENT, JANUARY 5, 2007.

7               D'087 PATENT, JANUARY 5, 2007.

8               D'889 PATENT, MARCH 17TH, 2004.

9               D'305 PATENT, JUNE 23RD, 2007.

10              NUMBER 50. A DESIGN PATENT IS INVALID IF  
11       IT IS NOT NEW. IF A DESIGN PATENT IS NOT NEW, WE  
12       SAY IT IS "ANTICIPATED" BY A PRIOR ART REFERENCE.  
13       FOR A CLAIMED DESIGN PATENT TO BE INVALID BECAUSE  
14       IT IS ANTICIPATED, SAMSUNG MUST PROVE BY CLEAR AND  
15       CONVINCING EVIDENCE THAT THERE IS A SINGLE PRIOR  
16       ART REFERENCE THAT IS SUBSTANTIALLY THE SAME AS THE  
17       CLAIMED DESIGN PATENT.

18              THE SAME STANDARD OF SUBSTANTIAL  
19       SIMILARITY THAT APPLIED TO INFRINGEMENT ALSO  
20       APPLIES TO ANTICIPATION. THAT IS, THE SINGLE PRIOR  
21       ART REFERENCE IN THE CLAIMED DESIGN PATENT ARE  
22       SUBSTANTIALLY SAME IF, IN THE EYE OF AN ORDINARY  
23       OBSERVER, GIVING SUCH ATTENTION AS A PURCHASER  
24       USUALLY GIVES, THE RESEMBLANCE BETWEEN THE TWO  
25       DESIGNS IS SUCH AS TO DECEIVE SUCH AN OBSERVER,

1 INDUCING HIM TO PURCHASE ONE SUPPOSING IT TO BE THE  
2 OTHER. YOU SHOULD CONSIDER ANY PERCEIVED  
3 SIMILARITIES OR DIFFERENCES BETWEEN THE CLAIMED  
4 DESIGN AND THE PRIOR ART REFERENCES. MINOR  
5 DIFFERENCES SHOULD NOT PREVENT A FINDING OF  
6 ANTICIPATION.

7 EVEN IF -- THIS IS NUMBER 51. EVEN IF A  
8 DESIGN IS NOT ANTICIPATED BY A SINGLE REFERENCE, IT  
9 MAY STILL BE INVALID IN THE CLAIMED DESIGN WOULD  
10 HAVE BEEN OBVIOUS TO A DESIGNER OF ORDINARY SKILL  
11 IN THE FIELD AT THE TIME THE DESIGN WAS MADE.

12 UNLIKE ANTICIPATION WHICH ALLOWS  
13 CONSIDERATION OF ONLY ONE ITEM OF PRIOR ART,  
14 OBVIOUSNESS MAY BE OWN BY CONSIDERING MORE THAN ONE  
15 ITEM OF PRIOR ART. THE ULTIMATE CONCLUSION OF  
16 WHETHER A CLAIMED DESIGN IS OBVIOUS SHOULD BE BASED  
17 UPON YOUR DETERMINATION OF SEVERAL FACTUAL  
18 DECISIONS.

19 FIRST, YOU MUST DECIDE THE LEVEL OF  
20 ORDINARY SKILL IN THE FIELD OF THE PATENT AT THE  
21 TIME THE CLAIMED DESIGN WAS MADE. IN DECIDING  
22 THIS, YOU SHOULD CONSIDER ALL THE EVIDENCE FROM  
23 TRIAL, INCLUDING:

24 THE LEVELS OF EDUCATION AND EXPERIENCE OF  
25 PERSONS DESIGNING ARTICLES IN THE FIELD;

1                   TYPES OF PROBLEMS ENCOUNTERED IN  
2                   DESIGNING ARTICLES IN THE FIELD; AND,  
3                   THE SOPHISTICATION OF THE FIELD.

4                   SECOND, YOU MUST DETERMINE IF A DESIGNER  
5                   OF ORDINARY SKILL IN THESE DESIGNS WOULD HAVE  
6                   COMBINED THE PRIOR ART REFERENCES OR MODIFIED A  
7                   SINGLE PRIOR ART REFERENCE TO CREATE THE SAME  
8                   OVERALL VISUAL APPEARANCE AS THE CLAIMED DESIGN.

9                   TO DO THIS, YOU MUST CONSIDER WHETHER  
10                  SAMSUNG HAS IDENTIFIED A PRIMARY PRIOR ART  
11                  REFERENCE. A PRIMARY REFERENCE MUST BE AN ACTUAL  
12                  DESIGN WHICH CREATES BASICALLY THE SAME VISUAL  
13                  IMPRESSION AS THE PATENTED DESIGN.

14                  IF YOU IDENTIFY A PRIMARY REFERENCE, YOU  
15                  MUST THEN CONSIDER WHETHER SAMSUNG HAS IDENTIFIED  
16                  ONE OR MORE SECONDARY PRIOR ART REFERENCES.

17                  SECONDARY REFERENCES ARE OTHER REFERENCES  
18                  THAT ARE SO VISUALLY RELATED TO THE PRIMARY  
19                  REFERENCE THAT THE APPEARANCE OF CERTAIN ORNAMENTAL  
20                  FEATURES IN THE OTHER REFERENCES WOULD SUGGEST THE  
21                  APPLICATION OF THOSE FEATURES TO THE PRIMARY  
22                  REFERENCE.

23                  IF YOU FIND THAT THERE ARE ONE OR MORE  
24                  SUCH SECONDARY REFERENCES, YOU MUST DETERMINE IF A  
25                  DESIGNER OF ORDINARY SKILL IN THESE DESIGNS WOULD

1 HAVE COMBINED THESE REFERENCES TO CREATE THE SAME  
2 OVERALL VISUAL APPEARANCE AS THE CLAIMED DESIGN.

3 FINALLY, BEFORE DECIDING THE ISSUE OF  
4 OBVIOUSNESS, YOU MUST CONSIDER OTHER FACTORS THAT  
5 MIGHT SHOW THAT THE DESIGNS WERE NOT OBVIOUS  
6 DESPITE THE PRIOR ART. YOU MAY ONLY CONSIDER THOSE  
7 FACTORS THAT APPLE HAS ESTABLISHED THROUGH EVIDENCE  
8 ADMITTED AT TRIAL. NO ONE FACTOR ALONE IS  
9 DISPOSITIVE:

10 WERE PRODUCTS COVERED BY THE CLAIMED  
11 DESIGN COMMERCIALY SUCCESSFUL DUE TO THE  
12 APPEARANCE OF THE CLAIMED DESIGN?

13 DID OTHERS COPY THE CLAIMED DESIGN?

14 DID THE CLAIMED DESIGN ACHIEVE AN  
15 UNEXPECTEDLY SUPERIOR APPEARANCE OVER THE CLOSEST  
16 PRIOR ART?

17 DID OTHERS IN THE FIELD PRAISE THE  
18 CLAIMED DESIGN OR EXPRESS ADMIRATION FOR THE  
19 CLAIMED DESIGN?

20 THE PRESENCE OF ANY OF THE FACTORS MAY BE  
21 CONSIDERED BY YOU AS AN INDICATION THAT THE CLAIMED  
22 INVENTION WOULD HAVE NOT HAVE BEEN OBVIOUS AT THE  
23 TIME THE CLAIMED INVENTION WAS MADE.

24 ALTHOUGH YOU SHOULD CONSIDER ANY EVIDENCE  
25 OF THESE FACTORS, THE RELEVANCE AND IMPORTANCE OF

1 ANY OF THEM TO YOUR DECISION ON WHETHER THE CLAIMED  
2 INVENTION WOULD HAVE BEEN OBVIOUS IS UP TO YOU.

3 IN DECIDING WHETHER THE CLAIMED DESIGN  
4 WAS OBVIOUS, KEEP IN MIND THAT A DESIGN WITH  
5 SEVERAL FEATURES IS NOT OBVIOUS MERELY BECAUSE EACH  
6 INDIVIDUAL FEATURE WAS PRESENT IN PRIOR ART  
7 DESIGNS. YOU MUST ALWAYS BE CAREFUL NOT TO  
8 DETERMINE OBVIOUSNESS USING THE BENEFIT OF  
9 HINDSIGHT. YOU SHOULD PUT YOURSELF IN THE POSITION  
10 OF A PERSON OF ORDINARY SKILL IN THE FIELD AT THE  
11 TIME THE CLAIM DESIGN WAS MADE AND SHOULD NOT  
12 CONSIDER WHAT IS KNOWN TODAY.

13 NUMBER 52. DESIGN PATENTS PROTECT THE  
14 ORNAMENTAL APPEARANCE, INCLUDING SHAPE OR  
15 CONFIGURATION, OF AN ARTICLE OF MANUFACTURE.

16 IF SAMSUNG PROVES BY CLEAR AND CONVINCING  
17 EVIDENCE THAT THE OVERALL APPEARANCE OF AN APPLE  
18 PATENTED DESIGN IS DICTATED BY HOW THE ARTICLE  
19 CLAIMED IN THE PATENT WORKS, THE PATENT IS INVALID  
20 BECAUSE THE DESIGN IS NOT "ORNAMENTAL."

21 IN OTHER WORDS, THE INVENTOR DID NOT  
22 "DESIGN" ANYTHING BECAUSE IN ORDER TO ACHIEVE THE  
23 FUNCTION OF THE DESIGN, IT HAD TO BE DESIGNED THAT  
24 WAY.

25 WHEN DECIDING THIS, YOU SHOULD KEEP IN

1 MIND THAT DESIGN PATENTS MUST BE FOR ARTICLES OF  
2 MANUFACTURE, WHICH BY DEFINITION HAVE INHERENT  
3 FUNCTIONAL CHARACTERISTICS. IT IS NORMAL THAT  
4 CLAIMED DESIGNS PERFORM SOME FUNCTION. THAT DOES  
5 NOT DISQUALIFY THEM FROM PATENT PROTECTION.

6 IN DETERMINING WHETHER A DESIGN IS  
7 DICTATED BY FUNCTIONALITY, YOU MAY CONSIDER WHETHER  
8 THE PROTECTED DESIGN REPRESENTS THE BEST DESIGN,  
9 WHETHER ALTERNATIVE DESIGNS WOULD ADVERSELY EFFECT  
10 THE UTILITY OF SPECIFIED ARTICLE, WHETHER THERE ARE  
11 ANY CONCOMITANT UTILITY PATENTS, WHETHER THE  
12 ADVERTISING TOUTS PARTICULAR FEATURES OF THE DESIGN  
13 AS HAVING SPECIFIC UTILITY, AND WHETHER THERE ARE  
14 ANY ELEMENTS IN THE DESIGN OR AN OVERALL APPEARANCE  
15 CLEARLY NOT DICTATED BY FUNCTION.

16 WHEN THERE ARE SEVERAL OTHER DESIGNS THAT  
17 ACHIEVE THE FUNCTION OF AN ARTICLE OF MANUFACTURE,  
18 THE DESIGN OF THE ARTICLE IS MORE LIKELY TO SERVE A  
19 PRIMARILY ORNAMENTAL PURPOSE. HOWEVER, THIS MAY  
20 NOT BE TRUE IF THE OTHER DESIGNS ADVERSELY AFFECT  
21 THE UTILITY OF THE ARTICLE.

22 NUMBER 53. I WILL INSTRUCT YOU ABOUT THE  
23 MEASURE OF DAMAGES FOR INFRINGEMENT OF APPLE'S  
24 DESIGN PATENTS. BY INSTRUCTING YOU ON DAMAGES, I  
25 AM NOT SUGGESTING WHICH PARTY SHOULD WIN ON ANY



1 ISSUE.

2 IF YOU FIND THAT SAMSUNG ELECTRONICS  
3 AMERICA, SAMSUNG TELECOMMUNICATIONS AMERICA, AND/OR  
4 SAMSUNG ELECTRONICS COMPANY INFRINGED ANY VALID  
5 APPLE DESIGN PATENT, YOU MUST THEN DETERMINE THE  
6 MONEY DAMAGES TO AWARD APPLE. THE AMOUNT OF THOSE  
7 DAMAGES MUST BE ADEQUATE TO COMPENSATE APPLE FOR  
8 THE INFRINGEMENT. YOU SHOULD KEEP IN MIND THAT THE  
9 DAMAGES YOU AWARD ARE MEANT TO COMPENSATE THE  
10 PATENT HOLDER AND IS NOT TO PUNISH AN INFRINGER.

11 IN RELATION TO DESIGN PATENTS, APPLE CAN  
12 ELECT TO PROVE EITHER ACTUAL DAMAGES, KNOWN AS  
13 COMPENSATORY DAMAGES, OR IT MAY ELECT TO PROVE THE  
14 DEFENDANT'S PROFITS AS ITS MEASURE OF POTENTIAL  
15 RECOVERY WITH RESPECT TO THE SALE OF EACH UNIT OF  
16 AN INFRINGING PRODUCT.

17 AS COMPENSATORY DAMAGES, APPLE MAY PROVE  
18 EITHER ITS OWN LOST PROFITS OR A REASONABLE ROYALTY  
19 FOR THE DESIGN PATENT. APPLE IS NOT ENTITLED TO  
20 RECOVER BOTH COMPENSATORY DAMAGES AND DEFENDANT'S  
21 PROFITS ON THE SAME SALE.

22 APPLE HAS THE BURDEN TO PROVE THAT  
23 APPLE'S CALCULATION OF DAMAGES IS CORRECT BY A  
24 PREPONDERANCE OF THE EVIDENCE. WHILE APPLE IS NOT  
25 REQUIRED TO PROVE ITS DAMAGES WITH MATHEMATICAL

1           PRECISION, IT MUST PROVE THEM WITH REASONABLE  
2           CERTAINTY.   APPLE IS NOT ENTITLED TO DAMAGES THAT  
3           ARE REMOTE OR SPECULATIVE.

4                         NUMBER 54.   IN THIS CASE, APPLE SEEKS  
5           SAMSUNG ELECTRONICS COMPANY'S, SAMSUNG ELECTRONIC  
6           AMERICA'S, AND SAMSUNG TELECOMMUNICATIONS AMERICA'S  
7           PROFITS FROM SALES OF PRODUCTS ALLEGED TO INFRINGE  
8           APPLE'S DESIGN PATENTS.   IF YOU FIND INFRINGEMENT  
9           BY ANY SAMSUNG DEFENDANT AND DO NOT FIND APPLE'S  
10          DESIGN PATENTS ARE INVALID, YOU MAY AWARD APPLE  
11          THAT SAMSUNG DEFENDANT'S TOTAL PROFIT ATTRIBUTABLE  
12          TO THE INFRINGING PRODUCTS.

13                        THE "TOTAL PROFIT" OF SAMSUNG ELECTRONICS  
14          COMPANY, SAMSUNG ELECTRONICS AMERICA AND/OR SAMSUNG  
15          TELECOMMUNICATIONS AMERICA MEANS THE ENTIRE PROFIT  
16          ON THE SALE OF THE ARTICLE TO WHICH THE PATENTED  
17          DESIGN IS APPLIED AND NOT JUST THE PORTION OF  
18          PROFIT ATTRIBUTABLE TO THE DESIGN OR ORNAMENTAL  
19          ASPECTS COVERED BY THE DESIGN.

20                        "TOTAL PROFIT" DOES NOT INCLUDE PROFIT  
21          ATTRIBUTABLE TO OTHER PRODUCTS THAT MAY BE SOLD IN  
22          ASSOCIATION WITH AN INFRINGING ARTICLE EMBODYING  
23          THE PATENTED DESIGN.

24                        IF YOU FIND INFRINGEMENT BY ANY SAMSUNG  
25          DEFENDANT, APPLE IS ENTITLED TO ALL PROFIT EARNED

1 BY THAT DEFENDANT ON SALES OF ARTICLES THAT  
2 INFRINGE APPLE'S DESIGN PATENTS. PROFIT US  
3 DETERMINED BY DEDUCTING CERTAIN EXPENSES FROM GROSS  
4 REVENUE. GROSS REVENUE IS ALL OF THE INFRINGER'S  
5 RECEIPTS FROM THE SALE OF ARTICLES USING ANY DESIGN  
6 FOUND INFRINGED. APPLE HAS THE BURDEN OF PROVING  
7 THE INFRINGING DEFENDANT'S GROSS REVENUE BY A  
8 PREPONDERANCE OF THE EVIDENCE.

9 EXPENSES CAN INCLUDE COSTS INCURRED IN  
10 PRODUCING THE GROSS REVENUE, SUCH AS THE COST OF  
11 THE GOODS. OTHER COSTS MAY BY INCLUDED AS  
12 DEDUCTIBLE EXPENSES IF THEY ARE DIRECTLY  
13 ATTRIBUTABLE TO THE SALE OR MANUFACTURE OF THE  
14 INFRINGING PRODUCTS RESULTING IN THE NEXUS BETWEEN  
15 THE INFRINGING PRODUCTS AND THE EXPENSE. SAMSUNG  
16 HAS THE BURDEN OF PROVING THE DEDUCTIBLE EXPENSES.

17 NUMBER 55. APPLE MAY ALTERNATIVELY  
18 RECOVER COMPENSATORY DAMAGES IN THE FORM OF LOST  
19 PROFITS. AS PREVIOUSLY EXPLAINED, APPLE MAY NOT  
20 RECOVER BOTH SAMSUNG'S PROFITS AND COMPENSATORY  
21 DAMAGES ON EACH SALE OF AN INFRINGING PRODUCT. IN  
22 ASSESSING APPLE'S RIGHT TO RECOVER LOST PROFITS FOR  
23 SAMSUNG ELECTRONICS COMPANY'S, SAMSUNG ELECTRONICS  
24 AMERICA'S AND SAMSUNG TELECOMMUNICATIONS AMERICA'S  
25 INFRINGEMENT OF ITSELF DESIGN PATENT, YOU SHOULD

1 APPLY THE SAME RULES I ALREADY EXPLAINED IN THE  
2 CONTEXT OF LOST PROFITS FOR INFRINGEMENT OF APPLE'S  
3 UTILITY PATENTS. THOSE INSTRUCTIONS ARE SET OUT IN  
4 JURY INSTRUCTIONS NUMBER 36, 37, 38, AND 39.

5 WHENEVER IN THOSE INSTRUCTIONS I REFER TO  
6 APPLE'S UTILITY PATENTS, YOU NOW FOCUS ON APPLE'S  
7 DESIGN PATENTS. WHENEVER IN THOSE INSTRUCTIONS I  
8 REFERRED TO THE PATENTED INVENTION, YOU SHOULD NOW  
9 FOCUS ON THE PATENTED DESIGN. WHENEVER IN THOSE  
10 INSTRUCTIONS I REFERRED TO PATENTED PRODUCTS OR  
11 PRODUCTS COVERED BY A PATENT CLAIM, YOU SHOULD NOW  
12 FOCUS ON PRODUCTS OR ARTICLES THAT USE OR EMBODY  
13 THE PATENTED DESIGN.

14 NUMBER 56. IF APPLE HAS NOT PROVED ITS  
15 CLAIM FOR LOST PROFITS OR HAS NOT PROVED ITS CLAIM  
16 TO SAMSUNG'S PROFITS, THEN APPLE SHOULD BE AWARDED  
17 A REASONABLE ROYALTY FOR ALL INFRINGING SALES BY  
18 SAMSUNG ELECTRONICS AMERICA, SAMSUNG  
19 TELECOMMUNICATIONS AMERICA, AND/OR SAMSUNG  
20 ELECTRONICS COMPANY. IN NO EVENT SHOULD THE  
21 DAMAGES YOU AWARD APPLE FOR DESIGN PATENT  
22 INFRINGEMENT BE LESS THAN A REASONABLE ROYALTY.

23 THE DEFINITION OF A REASONABLE ROYALTY  
24 FOR DESIGN PATENT INFRINGEMENT IS THE SAME AS THE  
25 DEFINITION I EXPLAINED TO YOU IN JURY INSTRUCTION

1 NUMBER 41 FOR UTILITY PATENT INFRINGEMENT.

2 HOWEVER, WHENEVER IN THAT INSTRUCTION I  
3 REFERRED TO THE PATENTED INVENTION OR A UTILITY  
4 PATENT, YOU SHOULD NOW FOCUS ON THE DESIGN PATENTS  
5 OR PATENTED DESIGNS.

6 NUMBER 57. DAMAGES THAT APPLE MAY BE  
7 AWARDED BY YOU COMMENCE ON THE DATE THAT SAMSUNG  
8 ELECTRONICS COMPANIES, SAMSUNG ELECTRONICS AMERICA  
9 AND/OR SAMSUNG TELECOMMUNICATIONS AMERICA HAS BOTH  
10 INFRINGED AND BEEN NOTIFIED OF THE DESIGN PATENT OR  
11 PATENTS IT INFRINGED.

12 IF YOU FIND THAT APPLE SELLS PRODUCTS  
13 THAT INCLUDE THE CLAIMED DESIGNS, BUT HAS NOT  
14 MARKETED THOSE PRODUCTS WITH THE PATENT NUMBERS,  
15 YOU MUST DETERMINE THE DATE THAT EACH SAMSUNG  
16 ENTITY RECEIVED ACTUAL WRITTEN NOTICE OF THE  
17 PATENTS AND THE SPECIFIC PRODUCTS ALLEGED TO  
18 INFRINGE.

19 WHILE YOU MAY IDENTIFY AN EARLIER DATE BY  
20 WHICH EACH SAMSUNG ENTITY HAD NOTICE OF APPLE'S  
21 CLAIMS OF INFRINGEMENT BASED ON YOUR EVALUATION OF  
22 THE EVIDENCE, APPLE'S LAWSUIT PROVIDED SAMSUNG SUCH  
23 NOTICE FOR THE D'677 PATENT BY NO LATER THAN APRIL  
24 15TH, 2011, AND FOR THE D'305, D'889, AND D'087  
25 PATENTS BY NO LATER THAN JUNE 16TH, 2011.

1                   ON THE OTHER HAND, IF YOU FIND THAT APPLE  
2                   DOES NOT SELL PRODUCTS COVERED BY A PATENT, THEN  
3                   DAMAGES BEGIN WITHOUT THE REQUIREMENT FOR ACTUAL  
4                   NOTICE UNDER THE FOLLOWING CIRCUMSTANCES IS:

5                   FOR EACH INFRINGED PATENT THAT WAS  
6                   GRANTED BEFORE THE INFRINGING ACTIVITY BEGAN,  
7                   DAMAGES SHOULD BE CALCULATED AS OF THE DATE YOU  
8                   DETERMINE THAT THE INFRINGEMENT BEGAN;

9                   FOR EACH PATENT THAT WAS GRANTED AFTER  
10                  THE INFRINGING ACTIVITY BEGAN AS DETERMINED BY YOU,  
11                  DAMAGES SHOULD BE CALCULATED AS OF THE DATE THE  
12                  PATENT ISSUED.

13                  LET'S TAKE A QUICK STAND-UP BREAK.

14                  (PAUSE IN PROCEEDINGS.)

15                  THE COURT: ALL RIGHT. THANK YOU.

16                  NUMBER 58. APPLE CLAIMS THAT SAMSUNG  
17                  ELECTRONICS COMPANY ACTIVELY INDUCED ITS  
18                  SUBSIDIARIES IN THE UNITED STATES, SAMSUNG  
19                  TELECOMMUNICATIONS AMERICA AND SAMSUNG ELECTRONICS  
20                  AMERICA, TO INFRINGE APPLE'S UTILITY AND DESIGN  
21                  PATENTS. SAMSUNG CLAIMS THAT APPLE ACTIVELY  
22                  INDUCED THIRD PARTIES TO INFRINGE SAMSUNG'S '460  
23                  PATENT.

24                  IN ORDER FOR THERE TO BE INDUCEMENT OF  
25                  INFRINGEMENT BY EITHER SAMSUNG ELECTRONICS COMPANY

1 OR APPLE, SOMEONE ELSE MUST DIRECTLY INFRINGE THE  
2 ASSERTED PATENT; IF THERE IS NO DIRECT INFRINGEMENT  
3 BY ANYONE, THERE CAN BE NO INDUCED INFRINGEMENT.

4 IN ORDER TO BE ACTIVELY -- I'M SORRY.

5 IN ORDER TO BE LIABLE FOR INDUCEMENT OF  
6 INFRINGEMENT, THE ALLEGED INFRINGER MUST HAVE  
7 INTENTIONALLY TAKEN ACTION THAT ACTUALLY INDUCED  
8 DIRECT INFRINGEMENT BY ANOTHER.

9 HAVE BEEN AWARE OF THE ASSERTED PATENT;  
10 AND,

11 HAVE KNOWN THAT THE ACTS IT WAS CAUSING  
12 WOULD BE INFRINGING.

13 THE KNOWLEDGE AND AWARENESS REQUIREMENTS  
14 FOR INDUCEMENT CAN BE SATISFIED BY SHOWING THAT A  
15 PATENT WAS WILLFULLY BLIND. IF SAMSUNG ELECTRONICS  
16 COMPANY OR APPLE DOES NOT KNOW OF THE EXISTENCE OF  
17 A PATENT IN QUESTION, OR THAT THE ACTS IT WAS  
18 INDUCING WERE INFRINGING, IT CAN BE LIABLE FOR  
19 INDUCEMENT ONLY IF IT ACTUALLY BELIEVED THAT IT WAS  
20 HIGHLY PROBABLE AND ITS ACTIONS WOULD ENCOURAGE  
21 INFRINGEMENT OF A PATENT AND IT TOOK INTENTIONAL  
22 ACTS TO AVOID LEARNING THE TRUTH.

23 IT IS NOT ENOUGH THAT SAMSUNG ELECTRONICS  
24 COMPANY OR APPLE WAS MERELY INDIFFERENT TO THE  
25 POSSIBILITY THAT IT MIGHT ENCOURAGE INFRINGEMENT OF

1 A PATENT NOR IS IT ENOUGH THAT SAMSUNG ELECTRONICS  
2 COMPANY OR APPLE TOOK A RISK THAT WAS SUBSTANTIAL  
3 AND UNJUSTIFIED.

4 IF YOU FIND THAT SAMSUNG ELECTRONICS  
5 COMPANY OR APPLE WAS AWARE OF AN ASSERTED PATENT,  
6 BUT BELIEVED THAT THE ACTS IT ENCOURAGED DID NOT  
7 INFRINGE THAT PATENT, OR THAT THE PATENT WAS  
8 INVALID, SAMSUNG ELECTRONICS COMPANY OR APPLE  
9 CANNOT BE LIABLE FOR INDUCEMENT.

10 NUMBER 59. IN THIS CASE, APPLE AND  
11 SAMSUNG BOTH ARGUE THAT THE OTHER SIDE WILLFULLY  
12 INFRINGED ITS PATENTS.

13 TO PROVE WILLFUL INFRINGEMENT, EACH PARTY  
14 MUST PERSUADE YOU THAT THE OTHER SIDE INFRINGED A  
15 VALID AND ENFORCEABLE CLAIM OF ONE OR MORE OF ITS  
16 PATENTS. THE REQUIREMENTS FOR PROVING SUCH  
17 INFRINGEMENT WERE DISCUSSED IN MY PRIOR  
18 INSTRUCTIONS.

19 IN ADDITION, TO PROVE WILLFUL  
20 INFRINGEMENT, THE PATENT HOLDER MUST PERSUADE YOU  
21 BY CLEAR AND CONVINCING EVIDENCE THAT THE OTHER  
22 SIDE ACTED WITH RECKLESS DISREGARD OF THE PATENT IT  
23 INFRINGED.

24 TO DEMONSTRATE SUCH RECKLESS DISREGARD,  
25 THE PATENT HOLDER MUST PERSUADE YOU THAT THE OTHER



1 SIDE ACTUALLY KNEW, OR IT WAS SO OBVIOUS THAT THE  
2 OTHER SIDE SHOULD HAVE KNOWN, THAT ITS ACTIONS  
3 CONSTITUTED INFRINGEMENT OF A VALID AND ENFORCEABLE  
4 PATENT.

5 IN DECIDING WHETHER SAMSUNG OR APPLE  
6 ACTED WITH RECKLESS DISREGARD FOR ANY PATENT THAT  
7 YOU FIND IS INFRINGED, YOU SHOULD CONSIDER ALL OF  
8 THE FACTS SURROUNDING THE ALLEGED INFRINGEMENT,  
9 INCLUDING, BUT NOT LIMITED TO, THE FOLLOWING  
10 FACTORS:

11 A FACTOR THAT MAY BE CONSIDERED AS  
12 EVIDENCE THAT SAMSUNG OR APPLE WAS NOT WILLFUL IS  
13 WHETHER IT ACTED IN A MANNER CONSISTENT WITH THE  
14 STANDARDS OF COMMERCE FOR ITS INDUSTRY.

15 A FACTOR THAT MAY BE CONSIDERED AS  
16 EVIDENCE THAT SAMSUNG OR APPLE WAS WILLFUL IS  
17 WHETHER IT INTENTIONALLY COPIED A PRODUCT OF THE  
18 OTHER SIDE THAT IS COVERED BY A PATENT.

19 NUMBER 60. APPLE SEEKS DAMAGES AGAINST  
20 SAMSUNG FOR DILUTING APPLE'S REGISTERED TRADE DRESS  
21 NUMBER 3,470,983, UNREGISTERED IPHONE 3G TRADE  
22 DRESS, UNREGISTERED COMBINATION IPHONE TRADE DRESS,  
23 AND UNREGISTERED IPAD/IPAD 2 TRADE DRESS.

24 SAMSUNG DENIES THAT IT DILUTED APPLE'S  
25 ASSERTED TRADE DRESSES AND CONTENDS THE TRADE

1 DRESSES ARE UNPROTECTABLE AND THUS INVALID.

2 APPLE ALSO SEEKING DAMAGES AGAINST  
3 SAMSUNG FOR INFRINGEMENT OF APPLE'S UNREGISTERED  
4 IPAD/IPAD 2 TRADE DRESS. SAMSUNG DENIES THAT IT  
5 INFRINGED APPLE'S ASSERTED IPAD-RELATED TRADE DRESS  
6 AND, AS ALREADY STATED, CONTENDS IT IS  
7 UNPROTECTABLE.

8 HERE ARE THE INSTRUCTIONS YOU MUST FOLLOW  
9 IN DECIDING APPLE'S TRADE DRESS DILUTION AND  
10 INFRINGEMENT CLAIMS.

11 NUMBER 61. TRADE DRESS IS THE  
12 NON-FUNCTIONAL, PHYSICAL DETAIL AND DESIGN OF A  
13 PRODUCT, WHICH IDENTIFIES THE PRODUCT'S SOURCE AND  
14 DISTINGUISHES IT FROM THE PRODUCTS OF OTHERS.

15 TRADE DRESS IS THE PRODUCT'S TOTAL IMAGE  
16 AND OVERALL APPEARANCE, AND MAY INCLUDE FEATURES  
17 SUCH AS SIZE, SHAPE, COLOR, COLOR COMBINATIONS,  
18 TEXTURE OR GRAPHICS. IN OTHER WORDS, TRADE DRESS  
19 IS THE FORM IN WHICH A PERSON PRESENTS A PRODUCT OR  
20 SERVICE TO THE MARKET, ITS MANNER OF DISPLAY.

21 A TRADE DRESS IS NON-FUNCTIONAL IF, TAKEN  
22 AS A WHOLE, THE COLLECTION OF TRADE DRESS ELEMENTS  
23 IS NOT ESSENTIAL TO THE PRODUCT'S USE OR PURPOSE OR  
24 DOES NOT AFFECT THE COST OR QUALITY OF THE PRODUCT  
25 EVEN THOUGH CERTAIN PARTICULAR ELEMENTS OF THE

1 TRADE DRESS MAY BE FUNCTIONAL.

2 TRADE DRESS CONCERNS THE OVERALL VISUAL  
3 IMPRESSION CREATED BY IN THE CONSUMER'S MIND WHEN  
4 VIEWING THE NON-FUNCTIONAL ASPECTS OF THE PRODUCT  
5 AND NOT FROM THE UTILITARIAN OR USEFUL ASPECTS OF  
6 THE PRODUCT.

7 IN CONSIDERING THE IMPACT OF THESE  
8 NON-FUNCTIONAL ASPECTS, WHICH ARE OFTEN A COMPLEX  
9 COMBINATION OF MANY FEATURES, YOU MUST CONSIDER THE  
10 APPEARANCE OF FEATURES TOGETHER, RATHER THAN  
11 SEPARATELY.

12 A PERSON WHO USES THE TRADE DRESS OF  
13 ANOTHER MAY BE LIABLE FOR DAMAGES.

14 NUMBER 62. THE FIRST STEP IN CONSIDERING  
15 APPLE'S CLAIMS THAT SAMSUNG DILUTED AND INFRINGING  
16 CERTAIN OF APPLE'S IPHONE AND IPAD TRADE DRESSES IS  
17 TO DETERMINE WHETHER OR NOT EACH ASSERTED TRADE  
18 DRESS IS PROTECTABLE. YOU NEED TO MAKE THIS  
19 DETERMINATION FOR EACH OF APPLE'S ASSERTED TRADE  
20 DRESSES.

21 YOU MUST FIND THAT AN ASSERTED APPLE  
22 TRADE DRESS IS PROTECTABLE IF THE TRADE DRESS;

23 HAS ACQUIRED DISTINCTIVENESS THROUGH  
24 SECONDARY MEANING; AND,

25 IS NON-FUNCTIONAL.

1                   FOR APPLE'S REGISTERED IPHONE TRADE  
2 DRESS, YOU MUST PRESUME THE TRADE DRESS IS BOTH  
3 DISTINCTIVE AND NON-FUNCTIONAL, AND, THUS,  
4 PROTECTABLE.

5                   SAMSUNG BEARS THE BURDEN OF PROVING BY A  
6 PREPONDERANCE OF THE EVIDENCE THAT APPLE'S  
7 REGISTERED IPHONE TRADE DRESS IS EITHER FUNCTIONAL  
8 OR NOT DISTINCTIVE.

9                   IF YOU FIND THAT SAMSUNG HAS MET ITS  
10 BURDEN, YOU MUST FIND THE TRADE DRESS  
11 UNPROTECTABLE.

12                   OTHERWISE, YOU MUST FIND APPLE'S  
13 REGISTERED IPHONE TRADE DRESS PROTECTABLE.

14                   FOR EACH UNREGISTERED IPHONE TRADE DRESS  
15 AND FOR THE UNREGISTERED IPAD TRADE DRESS, APPLE  
16 BEARS THE BURDEN OF PROVING BY A PREPONDERANCE OF  
17 THE EVIDENCE THAT THE TRADE DRESS IS BOTH  
18 DISTINCTIVE AND NON-FUNCTIONAL. IF YOU FIND THAT  
19 APPLE HAS MET ITS BURDEN, YOU MUST FIND THAT TRADE  
20 DRESS IS PROTECTABLE. OTHERWISE, YOU MUST FIND THE  
21 TRADE DRESS UNPROTECTABLE.

22                   FOR EACH APPLE TRADE DRESS THAT YOU FIND  
23 PROTECTABLE, RESOLVING WHETHER SAMSUNG HAS DILUTED  
24 OR INFRINGED TRADE DRESS WILL REQUIRE YOU TO ASSESS  
25 ADDITIONAL QUESTIONS THAT I WILL EXPLAIN AFTER

1 ADDRESSING PROTECTABILITY MORE FULLY.

2 NUMBER 63. TO BE PROTECTABLE, APPLE'S  
3 TRADE DRESSES MUST HAVE ACQUIRED DISTINCTIVENESS  
4 THROUGH SECONDARY MEANING. A TRADE DRESS REQUIRES  
5 A SECONDARY MEANING WHEN IT HAS BEEN USED IN SUCH A  
6 WAY THAT ITS PRIMARY SIGNIFICANCE IN THE MINDS OF  
7 THE PROSPECTIVE CONSUMERS IS NOT THE PRODUCT  
8 ITSELF, BUT THE IDENTIFICATION OF THE PRODUCT WITH  
9 A SINGLE SOURCE, REGARDLESS OF WHETHER CONSUMERS  
10 KNOW WHO OR WHAT THAT SOURCE IS.

11 FOR EACH ASSERTED APPLE TRADE DRESS, YOU  
12 MUST FIND THAT THE PREPONDERANCE OF THE EVIDENCE  
13 SHOWS THAT A SIGNIFICANT NUMBER OF THE CONSUMING  
14 PUBLIC ASSOCIATES THE TRADE DRESS WITH A SINGLE  
15 SOURCE, IN ORDER TO FIND THAT IT HAS ACQUIRED  
16 SECONDARY MEANING.

17 WHEN YOU ARE DETERMINING WHETHER EACH  
18 TRADE DRESS HAS ACQUIRED A SECONDARY MEANING,  
19 CONSIDER THE FOLLOWING FACTORS:

20 CONSUMER PERCEPTION. WHETHER THE PEOPLE  
21 WHO PURCHASE SMARTPHONES AND TABLET COMPUTERS  
22 ASSOCIATE THE CLAIMED TRADE DRESS WITH APPLE.

23 ADVERTISEMENT. TO WHAT DEGREE AND IN  
24 WHAT MANNER APPLE MAY HAVE ADVERTISED FEATURING THE  
25 CLAIMED TRADE DRESS.

1 DEMONSTRATED SUCCESS. WHETHER APPLE HAS  
2 SUCCESSFULLY USED THE CLAIMED TRADE DRESS TO  
3 INCREASE THE SALES OF ITS PRODUCTS.

4 EXTENT OF USE. THE LENGTH OF TIME AND  
5 MANNER IN WHICH APPLE HAS USED THE CLAIMED TRADE  
6 DRESS.

7 EXCLUSIVITY. WHETHER APPLE'S USE OF THE  
8 CLAIMED TRADE DRESS WAS EXCLUSIVE.

9 COPYING. WHETHER SAMSUNG INTENTIONALLY  
10 COPIED APPLE'S ALLEGED TRADE DRESS.

11 AND ACTUAL CONFUSION. WHETHER SAMSUNG'S  
12 USE OF APPLE'S ALLEGED TRADE DRESS HAS LED TO  
13 ACTUAL CONFUSION AMONG A SIGNIFICANT NUMBER OF  
14 CONSUMERS.

15 THE PRESENCE OR ABSENCE OF ANY PARTICULAR  
16 FACTOR SHOULD NOT NECESSARILY RESOLVE WHETHER THE  
17 ASSERTED TRADE DRESS HAS ACQUIRED SECONDARY  
18 MEANING.

19 APPLE HAS THE BURDEN OF PROVING BY A  
20 PREPONDERANCE OF THE EVIDENCE THAT ITS UNREGISTERED  
21 TRADE DRESSES HAVE ACQUIRED A SECONDARY MEANING.

22 SAMSUNG HAS THE BURDEN OF PROVING BY A  
23 PREPONDERANCE OF THE EVIDENCE THAT APPLE'S  
24 REGISTERED IPHONE TRADE DRESS HAS NOT ACQUIRED  
25 SECONDARY MEANING.

1 THE MERE FACT THAT APPLE IS USING THE  
2 ASSERTED TRADE DRESSES DOES NOT MEAN THAT THEY HAVE  
3 ACQUIRED SECONDARY MEANING. THERE IS NO PARTICULAR  
4 LENGTH OF TIME THAT A TRADE DRESS MUST BE USED  
5 BEFORE IT ACQUIRES A SECONDARY MEANING.

6 NUMBER 64. A PRODUCT IS FUNCTIONAL IF IT  
7 IS ESSENTIAL TO THE PRODUCT'S USE OR PURPOSE, OR IF  
8 IT AFFECTS THE PRODUCT'S COST OR QUALITY.

9 HOWEVER, IF THE FEATURE SERVES NO  
10 PURPOSE, OTHER THAN AS AN ASSURANCE THAT A  
11 PARTICULAR ENTITY MADE, SPONSORED OR ENDORSED THE  
12 PRODUCT, IT IS NON-FUNCTIONAL.

13 A PRODUCT FEATURE IS ALSO NON-FUNCTIONAL  
14 IF ITS SHAPE OR FORM MAKES NO CONTRIBUTION TO THE  
15 PRODUCT'S FUNCTION OR OPERATION.

16 TO DETERMINE WHETHER A PRODUCT'S  
17 PARTICULAR SHAPE OR FUNCTION IS FUNCTIONAL, YOU  
18 SHOULD CONSIDER WHETHER THE DESIGN AS A WHOLE IS  
19 FUNCTIONAL, THAT IS, WHETHER THE WHOLE COLLECTION  
20 OF ELEMENTS MAKING UP THE DESIGN OR FORM ARE  
21 ESSENTIAL TO THE PRODUCT'S USE OR PURPOSE.

22 TO DETERMINE WHETHER A PRODUCT FEATURE IS  
23 FUNCTIONAL, YOU MAY CONSIDER THE FOLLOWING FACTORS:

24 1. THE DESIGN'S UTILITARIAN ADVANTAGE.  
25 IN CONSIDERING THIS FACTOR, YOU MAY EXAMINE WHETHER

1 THE PARTICULAR DESIGN, OR PRODUCT FEATURE, YIELD A  
2 UTILITARIAN ADVANTAGE OVER HOW THE PRODUCT MIGHT BE  
3 WITHOUT THAT PARTICULAR DESIGN OR PRODUCT FEATURE.  
4 IF THERE IS A UTILITARIAN ADVANTAGE FROM HAVING THE  
5 PARTICULAR DESIGN OR FEATURE, THIS WOULD WEIGH IN  
6 FAVOR OF FINDING THE DESIGN OR FEATURE IS  
7 FUNCTIONAL; IF IT SEEMS MERELY ORNAMENTAL,  
8 INCIDENTAL OR ARBITRARY, IT IS MORE LIKELY TO BE  
9 NONFUNCTIONAL.

10 2. AVAILABILITY OF ALTERNATE DESIGNS.  
11 IN CONSIDERING THIS FACTOR, YOU MAY EXAMINE WHETHER  
12 AN ALTERNATIVE DESIGN COULD HAVE BEEN USED, SO THAT  
13 COMPETITION IN THE MARKET FOR THAT TYPE OF PRODUCT  
14 WOULD NOT BE HINDERED BY ALLOWING ONLY ONE PERSON  
15 TO EXCLUSIVELY USE THE PARTICULAR DESIGN OR  
16 CONFIGURATION. FOR THIS TO BE ANSWERED IN  
17 THE AFFIRMATIVE, THE ALTERNATIVES MUST BE MORE THAN  
18 MERELY THEORETICAL OR SPECULATIVE. THEY MUST BE  
19 COMMERCIALY FEASIBLE. THE UNAVAILABILITY OF A  
20 SUFFICIENT NUMBER OF ALTERNATE DESIGNS WEIGHS IN  
21 FAVOR OF FINDING THE DESIGN OR FEATURE IS  
22 FUNCTIONAL; AND,

23 3. ADVERTISING UTILITARIAN ADVANTAGE IN  
24 THE DESIGN. IN CONSIDERING THIS FACTOR, YOU MAY  
25 EXAMINE WHETHER THE PARTICULAR DESIGN OR



1 CONFIGURATION HAS BEEN TOUTED IN ANY ADVERTISING AS  
2 A UTILITARIAN ADVANTAGE, EXPLICITLY OR IMPLICITLY.  
3 IF A SELLER ADVERTISES THE UTILITARIAN ADVANTAGES  
4 OF A PARTICULAR FEATURE OR DESIGN, THIS WEIGHS IN  
5 FAVOR OF FINDING THAT DESIGN OR FEATURE IS  
6 FUNCTIONAL.

7 NUMBER 4. THE DESIGN'S METHOD OF  
8 MANUFACTURE. IN CONSIDERING THIS FACTOR, YOU MAY  
9 EXAMINE WHETHER THE PARTICULAR DESIGN OR FEATURE  
10 RESULT FROM A RELATIVELY SIMPLE OR INEXPENSIVE  
11 METHOD OF MANUFACTURE. IF THE DESIGN OR FEATURE IS  
12 THE RESULT OF A PARTICULARLY ECONOMICAL PRODUCTION  
13 METHOD, THIS WEIGHS IN FAVOR OF FINDING THE DESIGN  
14 OR FEATURE IS FUNCTIONAL. IF THE FEATURE IS  
15 ESSENTIAL TO THE USE OR PURPOSE OF A DEVICE OR  
16 AFFECTS ITS COST OR QUALITY, IT IS MORE LIKELY  
17 FUNCTIONAL.

18 IF YOU FIND THAT THE PREPONDERANCE OF THE  
19 EVIDENCE SHOWS THAT THE TRADE DRESS IS ESSENTIAL TO  
20 THE PRODUCT'S USE OR PURPOSE, OR THAT IT AFFECTS  
21 THE PRODUCT'S COST OR QUALITY, THEN YOU MUST FIND  
22 THE TRADE DRESS FUNCTIONAL AND THUS UNPROTECTABLE.

23 IN ADDITION, IF YOU FIND THAT THE  
24 PREPONDERANCE OF THE EVIDENCE SHOWS THAT LIMITING  
25 APPLE'S COMPETITORS' USE OF THE FEATURE WOULD

1 IMPOSE A SIGNIFICANT NON-REPUTATION-RELATED  
2 COMPETITIVE DISADVANTAGE, THEN YOU MUST FIND THE  
3 TRADE DRESS FUNCTIONAL AND THUS UNPROTECTABLE.

4 HOWEVER, THE FACT THAT THE FEATURE  
5 CONTRIBUTES TO CONSUMER APPEAL AND SALEABILITY OF  
6 THE PRODUCT DOES NOT MEAN THAT THE TRADE DRESS IS  
7 NECESSARILY FUNCTIONAL.

8 APPLE HAS THE BURDEN OF PROVING BY A  
9 PREPONDERANCE OF THE EVIDENCE THAT ITS UNREGISTERED  
10 TRADE DRESSES ARE NON-FUNCTIONAL. SAMSUNG HAS THE  
11 BURDEN OF PROVING BY A PREPONDERANCE OF THE  
12 EVIDENCE THAT THE APPLE'S REGISTERED IPHONE TRADE  
13 DRESS IS FUNCTIONAL.

14 NUMBER 65. APPLE CONTENDS THAT SAMSUNG  
15 HAS DILUTED APPLE'S ASSERTED IPHONE AND IPAD  
16 RELATED TRADE DRESSES. DILUTION MEANS A LESSENING  
17 OF THE CAPACITY OF A FAMOUS TRADE DRESS TO IDENTIFY  
18 AND DISTINGUISH GOODS OR SERVICES, REGARDLESS OF  
19 THE PRESENCE OR ABSENCE OF COMPETITION, ACTUAL OR  
20 LIKELY CONFUSION, MISTAKE, DECEPTION, OR ECONOMIC  
21 INJURY.

22 TO PROVE THIS CLAIM AS TO ANY OF ITS  
23 ASSERTED TRADE DRESSES THAT YOU HAVE FOUND IS  
24 PROTECTABLE, APPLE HAS THE BURDEN OF PROVING EACH  
25 OF THE FOLLOWING ADDITIONAL ELEMENTS BY A

1 PREPONDERANCE OF THE EVIDENCE:

2 THAT THE ASSERTED APPLE TRADE DRESS IS  
3 FAMOUS;

4 THAT SAMSUNG BEGAN SELLING ITS ACCUSED  
5 PRODUCTS IN COMMERCE AFTER APPLE'S ASSERTED TRADE  
6 DRESS BECAME FAMOUS; AND,

7 THAT SAMSUNG'S ACCUSED PRODUCTS ARE  
8 LIKELY TO CAUSE DILUTION OF APPLE'S ASSERTED TRADE  
9 DRESS.

10 FOR ANY APPLE TRADE DRESS THAT YOU HAVE  
11 FOUND IS PROTECTABLE, IF YOU ALSO FIND THAT APPLE  
12 HAS PROVED EACH OF THESE THREE ELEMENTS BY A  
13 PREPONDERANCE OF THE EVIDENCE, YOUR VERDICT ON  
14 DILUTION WITH RESPECT TO THAT TRADE DRESS SHOULD BE  
15 FOR APPLE.

16 IF APPLE HAS FAILED TO PROVE ANY OF THESE  
17 ELEMENTS, YOUR VERDICT DILUTION WITH RESPECT TO  
18 THAT TRADE DRESS SHOULD BE FOR SAMSUNG.

19 A TRADE DRESS -- NUMBER 66. A TRADE  
20 DRESS IS FAMOUS IF IT IS WIDELY RECOGNIZED BY THE  
21 GENERAL CONSUMING PUBLIC OF THE UNITED STATES AS A  
22 DESIGNATION OF SOURCE OF THE GOODS OF THE TRADE  
23 DRESS OWNER.

24 IN DETERMINING WHETHER EACH OF APPLE'S  
25 TRADE DRESSES IS FAMOUS, YOU MAY CONSIDER THE

1 FOLLOWING FACTORS. THESE FACTORS ARE ONLY  
2 SUGGESTIONS AND MAY NOT CONSTITUTE ALL OF THE  
3 POSSIBLE TYPES OF EVIDENCE INDICATING WHETHER AN  
4 ASSERTED TRADE DRESS IS FAMOUS. THE PRESENCE OR  
5 ABSENCE OF ANY ONE PARTICULAR FACTOR ON THIS LIST  
6 SHOULD NOT NECESSARILY DETERMINE WHETHER THE TRADE  
7 DRESS IS FAMOUS.

8 YOU CAN CONSIDER ALL OF THE RELEVANT  
9 EVIDENCE IN MAKING YOUR DETERMINATION ABOUT WHETHER  
10 EACH IPHONE AND IPAD-RELATED TRADE DRESS IS FAMOUS.

11 THE FACTORS YOU MAY CONSIDER ARE:

12 NUMBER 1. THE DURATION, EXTENT AND  
13 GEOGRAPHIC REACH OF ADVERTISING AND PUBLICITY OF  
14 THE TRADE DRESS, WHETHER ADVERTISED OR PUBLICIZED  
15 BY APPLE OR THIRD PARTIES;

16 2. THE AMOUNT, VOLUME AND GEOGRAPHIC  
17 EXTENT OF SALES OF GOODS OFFERED YOUR HONOR THE  
18 TRADE DRESS;

19 3. THE EXTENT OF ACTUAL RECOGNITION OF  
20 THE TRADE DRESS; AND,

21 4. WHETHER THE TRADE DRESS WAS FEDERALLY  
22 REGISTERED.

23 APPLE BEARS THE BURDEN OF PROVING BY A  
24 PREPONDERANCE OF THE EVIDENCE THAT EACH OF ITS  
25 TRADE DRESSES WAS FAMOUS AT THE TIME OF SAMSUNG'S

1 FIRST COMMERCIAL SALES OF ITS ACCUSED PRODUCTS.

2 FOR EACH OF ITS ASSERTED IPHONE-RELATED  
3 TRADE DRESSES, APPLE MUST PROVE BY A PREPONDERANCE  
4 OF THE EVIDENCE THAT THE TRADE DRESS WAS FAMOUS BY  
5 JULY 15TH, 2010, THE DATE SAMSUNG FIRST SOLD A  
6 PRODUCT ACCUSED OF USING THE IPHONE-RELATED TRADE  
7 DRESSES.

8 APPLE MUST PROVE BY A PREPONDERANCE OF  
9 THE EVIDENCE THAT ITS ASSERTED IPAD-RELATED TRADE  
10 DRESS WAS FAMOUS BY JUNE 8TH, 2011, THE DATE  
11 SAMSUNG FIRST SOLD A PRODUCT ACCUSED OF USING THE  
12 IPAD-RELATED TRADE DRESSES.

13 NUMBER 67. DILUTION BY BLURRING IS AN  
14 ASSOCIATION ARISING FROM THE SIMILARITY BETWEEN THE  
15 APPEARANCE OF THE DEFENDANT'S ACCUSED PRODUCTS AND  
16 PLAINTIFF'S TRADE DRESS THAT IMPAIRS THE  
17 DISTINCTIVENESS OF A TRADE DRESS.

18 DILUTION BY BLURRING OCCURS WHEN A TRADE  
19 DRESS PREVIOUSLY ASSOCIATED WITH ONE PRODUCT LOSES  
20 SOME OF ITS CAPACITY TO IDENTIFY AND DISTINGUISH  
21 THAT PRODUCT. IN DETERMINING WHETHER THE  
22 APPEARANCE OF SAMSUNG'S ACCUSED PRODUCTS IS LIKELY  
23 TO CAUSE DILUTION OF EACH ASSERTED APPLE TRADE  
24 DRESS, YOU MAY CONSIDER ALL RELEVANT FACTORS,  
25 INCLUDING THE FOLLOWING:

1                   1. THE DEGREE OF SIMILARITY BETWEEN  
2                   SAMSUNG'S ACCUSED PRODUCTS AND APPLE'S TRADE DRESS;

3                   2. THE DEGREE OF ACQUIRED  
4                   DISTINCTIVENESS OF APPLE'S TRADE DRESS;

5                   3. THE EXTENT TO WHICH APPLE IS ENGAGING  
6                   IN SUBSTANTIALLY EXCLUSIVE USE OF THE TRADE DRESS;

7                   4. THE DEGREE OF RECOGNITION OF APPLE'S  
8                   TRADE DRESS;

9                   5. WHETHER SAMSUNG INTENDED TO CREATE AN  
10                  ASSOCIATION WITH APPLE'S TRADE DRESS; AND,

11                  6. ANY ACTUAL ASSOCIATION BETWEEN  
12                  SAMSUNG'S ACCUSED PRODUCTS AND APPLE'S TRADE DRESS.

13                  THESE FACTORS SHOULD BE WEIGHED BY YOU  
14                  GIVEN THE FACTS AND CIRCUMSTANCES OF THE CASE.

15                  FOR EACH OF APPLE'S ASSERTED TRADE  
16                  DRESSES, APPLE BEARS THE BURDEN OF PROVING BY A  
17                  PREPONDERANCE OF THE EVIDENCE THAT THE ACCUSED  
18                  SAMSUNG PRODUCTS ARE LIKELY TO DILUTE THE TRADE  
19                  DRESS.

20                  NUMBER 68. APPLE ALSO CLAIMS THAT  
21                  SAMSUNG'S GALAXY TAB 10.1 TABLET COMPUTERS INFRINGE  
22                  APPLE'S IPAD-RELATED TRADE DRESS. TO PROVE TRADE  
23                  DRESS INFRINGEMENT, APPLE BEARS THE BURDEN OF  
24                  PROVING BY A PREPONDERANCE OF THE EVIDENCE EACH OF  
25                  THE FOLLOWING ELEMENTS:

1                   NUMBER 1.   APPLE'S IPAD-RELATED TRADE  
2   DRESS IS NON-FUNCTIONAL.   SEE INSTRUCTION NUMBER 64  
3   ABOVE.

4                   NUMBER 2.   APPLE'S IPAD-RELATED TRADE  
5   DRESS HAS ACQUIRED DISTINCTIVENESS THROUGH  
6   SECONDARY MEANING.   SEE INSTRUCTION NUMBER 63  
7   ABOVE.

8                   NUMBER 3.   SAMSUNG USED APPLE'S  
9   IPAD-RELATED TRADE DRESS IN A MANNER THAT IS LIKELY  
10  TO CAUSE CONFUSION AMONG ORDINARY CONSUMERS AS TO  
11  THE SOURCE, SPONSORSHIP, AFFILIATION OR APPROVAL OF  
12  SAMSUNG'S GOODS.

13                  IF YOU FIND THAT APPLE HAS PROVED EACH OF  
14  THESE ELEMENTS, YOUR VERDICT SHOULD BE FOR APPLE.  
15  IF, ON THE OTHER HAND, APPLE HAS FAILED TO PROVE  
16  ANY ONE OF THESE ELEMENTS, YOUR VERDICT SHOULD BE  
17  FOR SAMSUNG.

18                  NUMBER 69.   APPLE MUST PROVE BY A  
19  PREPONDERANCE OF THE EVIDENCE THAT THE ASSERTED  
20  PATENT-RELATED TRADE DRESS ACQUIRED SECONDARY  
21  MEANING BEFORE SAMSUNG FIRST SOLD A PRODUCT THAT  
22  APPLE CLAIMS IS INFRINGING THAT TRADE DRESS.

23                  IF YOU FIND THAT APPLE HAS NOT PROVED BY  
24  A PREPONDERANCE OF THE EVIDENCE THAT THE ASSERTED  
25  IPAD-RELATED TRADE DRESS ACQUIRED SECONDARY MEANING

1 BEFORE JUNE 8TH OF 2011, THEN YOU MUST FIND FOR  
2 SAMSUNG.

3 LET'S TAKE A STAND UP BREAK.

4 (PAUSE IN PROCEEDINGS.)

5 THE COURT: ALL RIGHT. WE HAVE LESS THAN  
6 20 PAGES.

7 NUMBER 70. YOU MUST DECIDE WHETHER  
8 SAMSUNG'S ALLEGED USE OF APPLE'S IPAD/IPAD 2 TRADE  
9 DRESS IN THE SAMSUNG GALAXY TAB 10.1 IS LIKELY TO  
10 CAUSE CONFUSION ABOUT THE SOURCE, SPONSORSHIP,  
11 AFFILIATION, OR APPROVAL OF SAMSUNG'S GALAXY  
12 TAB 10.1.

13 APPLE MUST PROVE BY A PREPONDERANCE OF  
14 THE EVIDENCE THAT A REASONABLY PRUDENT CONSUMER IN  
15 THE MARKET PLACE IS LIKELY TO BE CONFUSED ABOUT THE  
16 SOURCE OF SAMSUNG'S GALAXY TAB 10.1.

17 APPLE MUST SHOW MORE THAN SIMPLY A  
18 POSSIBILITY OF SUCH CONFUSION. APPLE MAY PROVE A  
19 LIKELIHOOD OF CONFUSION BY PROVIDING DIRECT  
20 EVIDENCE OF CONSUMER CONFUSION. EVIDENCE OF  
21 NON-CONSUMER CONFUSION MAY ALSO BE RELEVANT WHETHER  
22 THERE IS CONFUSION ON THE PART OF: POTENTIAL  
23 CUSTOMERS; NON-CONSUMERS WHOSE CONFUSION COULD  
24 CREATE AN INFERENCE THAT CONSUMERS LIKELY TO BE  
25 CONFUSED; AND NON-CONSUMERS WHOSE CONFUSION COULD



1 INFLUENCE CONSUMERS.

2 I WILL SUGGEST SOME FACTORS THAT YOU  
3 SHOULD CONSIDER IN DECIDING WHETHER THERE IS A  
4 LIKELIHOOD OF CONFUSION. THE PRESENCE OR ABSENCE  
5 OF ANY PARTICULAR FACTOR THAT I SUGGEST SHOULD NOT  
6 NECESSARILY RESOLVE WHETHER THERE WAS A LIKELIHOOD  
7 OF CONFUSION, BECAUSE YOU MUST CONSIDER ALL  
8 RELEVANT EVIDENCE IN DETERMINING THIS.

9 AS YOU CONSIDER THE LIKELIHOOD OF  
10 CONFUSION, YOU SHOULD EXAMINE THE FOLLOWING:

11 1. STRENGTH OR WEAKNESS OF APPLE'S  
12 ASSERTED TRADE DRESS. THE MORE THE CONSUMING  
13 PUBLIC RECOGNIZES APPLE'S ASSERTED IPAD/IPAD 2  
14 TRADE DRESS AS AN INDICATION OF ORIGIN OF APPLE'S  
15 GOODS, THE MORE LIKELY IT IS THAT CONSUMERS WOULD  
16 BE CONFUSED ABOUT THE SOURCE OF SAMSUNG'S GOODS IF  
17 SAMSUNG USES A SIMILAR DESIGN OR CONFIGURATION.

18 2. SAMSUNG'S USE OF TRADE DRESS. IF  
19 SAMSUNG AND APPLE USE THEIR DESIGNS ON THE SAME,  
20 RELATED, OR COMPLIMENTARY KINDS OF GOODS, THERE MAY  
21 BE A GREATER LIKELIHOOD OF CONFUSION ABOUT THE  
22 SOURCE OF THE GOODS THAN OTHERWISE.

23 3. SIMILARITY OF APPLE'S AND SAMSUNG'S  
24 DESIGNS. IF THE OVERALL IMPRESSION CREATED BY  
25 APPLE'S ASSERTED IPAD/IPAD 2 TRADE DRESS IN THE

1 MARKETPLACE IS SIMILAR TO THAT CREATED BY SAMSUNG  
2 DESIGNS AND APPEARANCE, THERE IS A GREATER CHANCE  
3 OF LIKELIHOOD OF CONFUSION.

4 4. ACTUAL CONFUSION. IF USE BY SAMSUNG  
5 OF APPLE'S ASSERTED IPAD/IPAD 2 TRADE DRESS HAS LED  
6 TO INSTANCES OF ACTUAL CONFUSION, THIS SUGGESTS A  
7 LIKELIHOOD OF CONFUSION. HOWEVER, ACTUAL CONFUSION  
8 IS NOT REQUIRED FOR A FINDING OF LIKELIHOOD OF  
9 CONFUSION. EVEN IF ACTUAL CONFUSION DID NOT OCCUR,  
10 SAMSUNG'S USE OF THE TRADE DRESSES MAY STILL BE  
11 LIKELY TO CAUSE CONFUSION.

12 AS YOU CONSIDER WHETHER THE DESIGN USED  
13 BY SAMSUNG CREATES FOR CONSUMERS A LIKELIHOOD OF  
14 CONFUSION WITH APPLE'S PRODUCTS, YOU SHOULD WEIGH  
15 ANY INSTANCES OF ACTUAL CONFUSION AGAINST THE  
16 OPPORTUNITIES FOR SUCH CONFUSION. IF THE INSTANCES  
17 OF ACTUAL CONFUSION HAVE BEEN RELATIVELY FREQUENT,  
18 YOU MAY FIND THERE HAS BEEN SUBSTANTIAL ACTUAL  
19 CONFUSION.

20 IF, BY CONTRAST, THERE IS A VERY LARGE  
21 VOLUME OF SALES, BUT ONLY A FEW ISOLATED INSTANCES  
22 OF ACTUAL CONFUSION, YOU MAY FIND THAT THERE HAS  
23 NOT BEEN SUBSTANTIAL ACTUAL CONFUSION.

24 5. SAMSUNG'S INTENT. KNOWING USE BY  
25 SAMSUNG OF APPLE'S ASSERTED IPAD/IPAD 2 TRADE DRESS

1 TO IDENTIFY SIMILAR GOODS MAY SHOW AN INTENT TO  
2 DERIVE BENEFIT FROM THE REPUTATION OF APPLE'S TRADE  
3 DRESS, SUGGESTING AN INTENT TO CAUSE A LIKELIHOOD  
4 OF CONFUSION.

5 ON THE OTHER HAND, EVEN IN THE ABSENCE OF  
6 PROOF THAT SAMSUNG ACTED KNOWINGLY, THE USE OF  
7 APPLE'S TRADE DRESS TO IDENTIFY SIMILAR GOODS MAY  
8 INDICATE A LIKELIHOOD OF CONFUSION.

9 6. MARKETING/ADVERTISING CHANNELS. IF  
10 APPLE'S AND SAMSUNG'S GOODS ARE LIKELY TO BE SOLD  
11 IN THE SAME OR SIMILAR STORES OR OUTLETS, OR  
12 ADVERTISED IN SIMILAR MEDIA, THIS MAY INCREASE THE  
13 LIKELIHOOD OF CONFUSION.

14 7. PURCHASER'S DEGREE OF CARE. THE  
15 MORE SOPHISTICATED THE POTENTIAL BUYERS OF THE  
16 GOODS OR THE MOST COSTLY THE GOODS, THE MORE  
17 CAREFUL AND DISCRIMINATING THE REASONABLY PRUDENT  
18 PURCHASER EXERCISING ORDINARY INDICATION MAY BE.  
19 THEY MAY BE LESS LIKELY CONFUSED BY SIMILARITIES IN  
20 THE APPLE AND SAMSUNG PRODUCTS.

21 NUMBER 71. IF YOU FIND THAT APPLE HAS  
22 PROVEN BY A PREPONDERANCE OF THE EVIDENCE THAT  
23 SAMSUNG ELECTRONICS COMPANY, SAMSUNG ELECTRONICS  
24 AMERICA AND/OR SAMSUNG TELECOMMUNICATIONS HAVE  
25 DILUTED OR INFRINGED UPON ANY OF APPLE'S TRADE

1 DRESSES, THEN THERE ARE TWO FORMS OF MONETARY  
2 RELIEF TO WHICH APPLE MAY BE ENTITLED. APPLE'S  
3 ACTUAL DAMAGES OR EACH SAMSUNG ENTITY'S PROFITS.

4 IN DETERMINING THE AMOUNT OF MONEY TO  
5 AWARD APPLE FOR ITS TRADE DRESS CLAIMS, YOU MUST  
6 DETERMINE THE DATE ON WHICH DAMAGES BEGAN TO  
7 ACCRUE. DAMAGES FOR TRADE DRESS DILUTION AND TRADE  
8 DRESS INFRINGEMENT OF APPLE'S UNREGISTERED TRADE  
9 DRESSES STARTED ON THE DATE THAT THE DILUTING OR  
10 INFRINGING CONDUCT OF AN UNREGISTERED APPLE TRADE  
11 DRESS BEGAN.

12 YOU MAY AWARD APPLE MONEY DAMAGES FOR ALL  
13 VIOLATIONS THAT OCCURRED ON THE DATE THE PRODUCTS  
14 THAT DILUTED OR INFRINGED EACH UNREGISTERED APPLE  
15 TRADE DRESS WERE RELATED AND ANY DATE AFTER THAT.

16 FOR APPLE'S REGISTERED TRADE DRESS CLAIM,  
17 APPLE HAS THE BURDEN OF PROVING BY A PREPONDERANCE  
18 OF THE EVIDENCE THAT THE SAMSUNG ENTITIES HAD  
19 EITHER STATUTORY OR ACTUAL NOTICE THAT THE  
20 PLAINTIFF'S TRADE DRESS WAS REGISTERED.

21 YOU MAY AWARD APPLE MONEY DAMAGES FOR ALL  
22 VIOLATIONS THAT OCCURRED ON THE DATE OF ACTUAL  
23 NOTICE AND ANY DATE AFTER THAT.

24 YOU SHOULD NOT AWARD APPLE MONETARY  
25 RELIEF FOR ANY OF ITS DILUTION CLAIMS UNLESS APPLE

1 PROVES BY A PREPONDERANCE OF THE EVIDENCE THAT  
2 SAMSUNG'S ACTS OF DILUTION WERE WILLFUL. IF YOU  
3 DETERMINE THAT SAMSUNG'S DILUTION WAS NOT WILLFUL,  
4 YOU DO NOT NEED TO ASSESS MONETARY DAMAGES FOR THAT  
5 CLAIM.

6 PROOF OF DAMAGES TO A CERTAINTY IS NOT  
7 REQUIRED. HOWEVER, THE BURDEN IS ON APPLE TO SHOW  
8 ANY DAMAGES TO A REASONABLE CERTAINTY, AND AWARDED  
9 DAMAGES MAY NOT BE SPECULATIVE.

10 IN ORDER FOR APPLE TO RECOVER DAMAGES FOR  
11 REGISTERED TRADE DRESS CLAIMS, APPLE HAS THE BURDEN  
12 OF PROVING BY A PREPONDERANCE OF THE EVIDENCE THAT  
13 EACH SAMSUNG ENTITY HAD EITHER STATUTORY OR ACTUAL  
14 NOTICE THAT APPLE'S TRADE DRESS WAS REGISTERED.

15 EACH SAMSUNG ENTITY HAD STATUTORY NOTICE  
16 IF:

17 1. APPLE DISPLAYED WITH THE TRADE DRESS  
18 THE WORDS "REGISTERED IN U.S. PATENT AND TRADEMARK  
19 OFFICE."

20 2. APPLE DISPLAYED WITH THE TRADE DRESS  
21 THE WORD "U.S. PATENT AND TM OFF."

22 3. APPLE DISPLAYED THE TRADE DRESS WITH  
23 THE LETTER R ENCLOSED WITHIN A CIRCLE, THUS.

24 NUMBER 72. IF YOU FIND FOR APPLE ON ITS  
25 TRADE DRESS INFRINGEMENT AND DILUTION CLAIMS, YOU

1 MUST DETERMINE APPLE'S ACTUAL DAMAGES. APPLE HAS  
2 THE BURDEN OF PROVING BY A PREPONDERANCE OF THE  
3 EVIDENCE THE ACTUAL DAMAGES IT HAS SUFFERED.  
4 DAMAGES MEANS THE AMOUNT OF MONEY WHICH WILL  
5 REASONABLY AND FAIRLY COMPENSATE APPLE FOR ANY  
6 INJURY YOU FIND WAS CAUSED BY ANY SAMSUNG ENTITY  
7 INFRINGEMENT OR VIOLATION OF APPLE'S REGISTERED OR  
8 UNREGISTERED TRADE DRESSES.

9 YOU SHOULD CONSIDER THE PROFITS THAT  
10 APPLE WOULD HAVE EARNED BUT FOR SAMSUNG'S  
11 INFRINGEMENT AND/OR DILUTION. SUCH LOST PROFITS  
12 ARE DETERMINED BY DEDUCTING ALL EXPENSES FROM GROSS  
13 REVENUE.

14 IN ADDITION TO ACTUAL DAMAGES, APPLE IS  
15 ENTITLED TO ANY PROFITS EARNED BY THE SAMSUNG  
16 ENTITIES THAT ARE ATTRIBUTABLE TO WILLFUL  
17 INFRINGEMENT OR WILLFUL DILUTION, WHICH THE  
18 PLAINTIFF PROVES BY A PREPONDERANCE OF THE  
19 EVIDENCE.

20 YOU MAY NOT, HOWEVER, INCLUDE IN ANY  
21 AWARD OF PROFITS ANY AMOUNT THAT YOU TOOK INTO  
22 ACCOUNT IN DETERMINING ACTUAL DAMAGES.

23 PROFIT IS DETERMINED BY DEDUCTING ALL  
24 EXPENSES FROM GROSS REVENUE.

25 GROSS REVENUE IS EACH OF THE SAMSUNG

1 ENTITY'S SALES OF PRODUCTS THAT INFRINGED OR  
2 DILUTED APPLE'S TRADE DRESSES. APPLE HAS THE  
3 BURDEN OF PROVING THE GROSS REVENUES OF EACH  
4 SAMSUNG ENTITY'S SALES OF PRODUCTS THAT INFRINGED  
5 OR DILUTED APPLE'S TRADE DRESSES BY A PREPONDERANCE  
6 OF THE EVIDENCE.

7 EXPENSES ARE ALL OPERATING, OVERHEAD, AND  
8 PRODUCTION COSTS INCURRED IN PRODUCING THE GROSS  
9 REVENUE. EACH SAMSUNG ENTITY HAS THE BURDEN OF  
10 PROVING THE EXPENSES AND THE PORTION OF THE PROFIT  
11 ATTRIBUTABLE TO FACTORS OTHER THAN THE USE OF THE  
12 INFRINGED OR DILUTED TRADE DRESS BY A PREPONDERANCE  
13 OF THE EVIDENCE.

14 UNLESS YOU FIND THAT THE SAMSUNG ENTITIES  
15 HAVE PROVEN THAT A PORTION OF THE PROFIT FROM THE  
16 SALE OF ITS PRODUCTS THAT INFRINGED OR DILUTED ANY  
17 APPLE TRADE DRESS IS ATTRIBUTABLE TO FACTORS OTHER  
18 THAN THE USE OF THE TRADE DRESS, YOU SHALL FIND  
19 THAT THE TOTAL PROFIT IS ATTRIBUTABLE TO THE  
20 INFRINGEMENT OR DILUTION.

21 NUMBER 74. YOU SHOULD AWARD ANY REMEDY  
22 TO WHICH A PARTY HAS PROVEN IT IS ENTITLED WITH  
23 RESPECT TO EACH SALE OF AN ACCUSED SMARTPHONE OR  
24 TABLET, EXCEPT THAT YOU SHOULD NOT AWARD A PARTY  
25 TWICE FOR THE SAME SALE OF ANY ACCUSED SMARTPHONE

1 OR TABLET. THIS MEANS THAT IF YOU AWARD  
2 INFRINGER'S PROFITS UNDER TRADE DRESS OR DESIGN  
3 PATENT INFRINGEMENT FOR THE SALE OF A CERTAIN  
4 NUMBER OF ACCUSED SMARTPHONES OR TABLETS, YOU MAY  
5 NOT ALSO AWARD REASONABLE ROYALTIES OR LOST PROFITS  
6 FOR THOSE SAME SALES.

7 IF YOU AWARD REASONABLE ROYALTIES OR LOST  
8 PROFITS FOR THE SALE OF A CERTAIN NUMBER OF ACCUSED  
9 SMARTPHONES OR TABLETS, YOU MAY NOT AWARD  
10 INFRINGER'S PROFITS AS TO THOSE ACCUSED SMARTPHONES  
11 OR TABLETS.

12 YOU DO NOT HAVE TO USE THE SAME THEORY TO  
13 CALCULATE DAMAGES FOR EVERY SALE, HOWEVER. FOR  
14 EXAMPLE, AN AWARD MAY BE SPLIT BETWEEN LOST PROFITS  
15 FOR SOME SALES AND A REASONABLE ROYALTY FOR THE  
16 REMAINDER OF SALES OF A PRODUCT THAT INFRINGES A  
17 PATENT AND/OR INFRINGES OR DILUTES A TRADE DRESS.

18 FOR ANY SALE WHERE YOU MEASURE DAMAGES BY  
19 A REASONABLE ROYALTY OR LOST PROFITS, YOU MAY  
20 INCLUDE ROYALTY AMOUNTS OR LOST PROFITS FOR EACH  
21 PATENT THAT YOU FIND VALID AND INFRINGED BY THE  
22 SALE.

23 IF A SALE IS AWARDED ONE FORM OF MONETARY  
24 RECOVERY, THAT SAME SALE CANNOT BE AWARDED ANOTHER  
25 FORM OF MONETARY RECOVERY.



1 INSTRUCTION NUMBER 75. I WILL NOW  
2 INSTRUCT YOU ON THE HOW TO DETERMINE WHETHER APPLE  
3 HAS PROVED ITS BREACH OF CONTRACT CLAIM. A BREACH  
4 IS AN UNJUSTIFIED FAILURE TO PERFORM A CONTRACT.

5 SAMSUNG HAS SUBMITTED DECLARATIONS TO  
6 ETSI IN WHICH SAMSUNG IDENTIFIED THE '516 AND '941  
7 PATENTS, OR RELATED PATENTS OR APPLICATIONS, AS  
8 IPR'S THAT IT BELIEVED MAY BE CONSIDERED ESSENTIAL  
9 TO THE UMTS STANDARD.

10 IN THOSE DECLARATIONS, SAMSUNG DECLARED  
11 THAT IT WOULD BE PREPARED TO FRAND IRREVOCABLE  
12 LICENSES UNDER THAT IPR'S ON FAIR, REASONABLE, AND  
13 NON-DISCRIMINATORY, FRAND, TERMS AND CONDITIONS TO  
14 THE EXTENT THE IPR'S REMAIN ESSENTIAL TO THE UMTS  
15 STANDARD.

16 IN ORDER TO DEMONSTRATE BREACH OF THIS  
17 PROVISION, APPLE MUST PROVE THAT ALL OF THE  
18 CONDITIONS FOR PERFORMANCE OF THIS OBLIGATION  
19 OCCURRED, THAT SAMSUNG DID NOT FULFILL THIS  
20 OBLIGATION, THAT APPLE WAS HARMED, AND THAT THIS  
21 HARM WAS CAUSED BY SAMSUNG'S FAILURE TO PERFORM  
22 THIS OBLIGATION.

23 NUMBER 76. THE NOVEMBER 1997 ETSI IPR  
24 POLICY PROVIDES: EACH MEMBER SHALL USE ITS  
25 REASONABLE ENDEAVORS TO TIMELY INFORM ETSI OF

1 ESSENTIAL IPR'S IT BECOMES AWARE OF. IN  
2 PARTICULAR, A MEMBER SUBMITTING A TECHNICAL  
3 PROPOSAL FOR A STANDARD SHALL, ON A BONA FIDE  
4 BASIS, DRAW THE ATTENTION OF ETSI TO ANY MEMBER'S  
5 IPR WHICH MIGHT BE ESSENTIAL IF THAT PROPOSAL IS  
6 ADOPTED.

7 IN ORDER TO DEMONSTRATE BREACH OF THIS  
8 CONTRACT PROVISION, APPLE MUST PROVE THAT ALL OF  
9 THE CONDITIONS FOR PERFORMANCE OF THIS OBLIGATION  
10 OCCURRED, THAT SAMSUNG DID NOT FULFILL THIS  
11 OBLIGATION, THAT APPLE WAS HARMED AND THAT THIS  
12 HARM WAS CAUSED BY SAMSUNG'S FAILURE TO PERFORM  
13 THIS OBLIGATION.

14 NUMBER 77. I WILL NOW INSTRUCT YOU ON  
15 HOW TO DECIDE WHETHER APPLE HAS PROVEN THAT SAMSUNG  
16 HAS VIOLATED THE FEDERAL ANTITRUST LAWS.

17 APPLE ALLEGES THAT IT WAS INJURED BY  
18 SAMSUNG'S UNLAWFUL MONOPOLIZATION OF MARKETS  
19 CONSISTING OF TECHNOLOGIES THAT COMPETED TO PERFORM  
20 FUNCTIONS INCLUDED IN THE UMTS STANDARD BY 3GPP.

21 TO PREVAIL ON THIS CLAIM, APPLE MUST  
22 PROVE EACH OF THE FOLLOWING ELEMENTS BY A  
23 PREPONDERANCE OF THE EVIDENCE:

24 FIRST, THAT THE ALLEGED MARKET IS A  
25 RELEVANT ANTITRUST MARKET;

1 SECOND, THAT SAMSUNG POSSESSED MONOPOLY  
2 POWER IN THAT MARKET;

3 THIRD, THAT SAMSUNG WILLFULLY ACQUIRED  
4 ITS MONOPOLY POWER IN THAT MARKET BY ENGAGED IN  
5 ANTICOMPETITIVE CONDUCT;

6 FOURTH, THAT SAMSUNG'S CONDUCT OCCURRED  
7 IN OR AFFECTED INTERSTATE COMMERCE; AND,

8 FIFTH, THAT APPLE WAS INJURED IN ITS  
9 BUSINESS OR PROPERTY BECAUSE OF SAMSUNG'S  
10 ANTICOMPETITIVE CONDUCT.

11 IF YOU FIND THAT APPLE HAS FAILED TO  
12 PROVE ANY OF THESE ELEMENTS, THEN YOU MUST FIND FOR  
13 SAMSUNG AND AGAINST APPLE ON THIS CLAIM.

14 IF YOU FIND THAT APPLE HAS PROVED EACH OF  
15 THESE ELEMENTS BY A PREPONDERANCE OF THE EVIDENCE,  
16 THEN YOU MUST FIND FOR APPLE AND AGAINST SAMSUNG ON  
17 THIS CLAIM.

18 NUMBER 78. APPLE MUST PROVE BY A  
19 PREPONDERANCE OF THE EVIDENCE THAT SAMSUNG HAD  
20 MONOPOLY POWER IN ONE OR MORE RELEVANT MARKETS.  
21 DEFINING THE RELEVANT MARKET IS ESSENTIAL TO  
22 DETERMINING WHETHER SAMSUNG HAD MONOPOLY POWER  
23 BECAUSE WHETHER A COMPANY HAS MONOPOLY POWER  
24 DEPENDS ON THE CONTOURS OF THE MARKET. THERE ARE  
25 TWO ASPECTS YOU MUST CONSIDER IN DETERMINING

1           WHETHER APPLE HAS MET ITS BURDEN OF PROVING THE  
2           RELEVANT MARKET OR MARKETS.   THE FIRST IS THE  
3           EXISTENCE.

4                   A TECHNOLOGY REFERS TO AN INVENTION OR  
5           PROCESS FOR ACCOMPLISHING SOMETHING AND IS  
6           SOMETIMES COVERED BY A PATENT.   THE BASIC IDEA OF A  
7           RELEVANT TECHNOLOGY MARKET IS THAT THE TECHNOLOGIES  
8           WITHIN IT ARE REASONABLE SUBSTITUTES FOR EACH OTHER  
9           FROM THE USER'S POINT OF VIEW, THAT IS, THE  
10          TECHNOLOGIES COMPETE WITH EACH OTHER.

11                   IN OTHER WORDS, THE RELEVANT TECHNOLOGY  
12          MARKET INCLUDES THE TECHNOLOGIES THAT A CONSUMER  
13          BELIEVES ARE REASONABLY INTERCHANGEABLE OR  
14          REASONABLE SUBSTITUTES FOR EACH OTHER.   THIS IS A  
15          PRACTICAL TEST WITH REFERENCE TO ACTUAL BEHAVIOR OF  
16          USERS AND THE MARKETING EFFORTS OF LICENSORS.  
17          TECHNOLOGIES NEED NOT BE IDENTICAL OR PRECISELY  
18          INTERCHANGEABLE AS LONG AS THEY ARE REASONABLE  
19          SUBSTITUTES.

20                   THE RELEVANT GEOGRAPHIC MARKET IS THE  
21          AREA IN WHICH THE SAMSUNG TECHNOLOGIES FACE  
22          COMPETITION FROM OTHER TECHNOLOGIES TO WHICH  
23          CONSUMERS CAN REASONABLY TURN.   WHEN ANALYZING THE  
24          RELEVANT GEOGRAPHIC MARKET, YOU SHOULD CONSIDER  
25          WHETHER CHANGES IN PRICES OR PRODUCT OFFERINGS IN

1 ONE AREA HAVE SUBSTANTIAL EFFECTS ON PRICES OR  
2 SALES IN ANOTHER AREA, WHICH WOULD TEND TO SHOW  
3 THAT BOTH AREAS ARE IN THE SAME RELEVANT GEOGRAPHIC  
4 MARKET.

5 THE GEOGRAPHIC MARKET MAY BE AS LARGE AS  
6 GLOBAL OR NATIONWIDE OR AS SMALL AS A SINGLE TOWN  
7 OR EVEN SMALLER.

8 IF, AFTER CONSIDERING ALL THE EVIDENCE,  
9 YOU FIND THAT APPLE HAS PROVEN BOTH A RELEVANT  
10 TECHNOLOGY MARKET AND A RELEVANT GEOGRAPHIC MARKET,  
11 THEN YOU MUST FIND THAT APPLE HAS MET THE RELEVANT  
12 MARKET REQUIREMENT AND YOU MUST CONSIDER THE  
13 REMAINING ELEMENTS OF ITS UNLAWFUL MONOPOLIZATION  
14 CLAIMS.

15 IF YOU FIND THAT APPLE HAS FAILED TO  
16 PROVE EITHER A RELEVANT TECHNOLOGY MARKET OR A  
17 RELEVANT GEOGRAPHIC MARKET, THEN YOU MUST FIND FOR  
18 SAMSUNG AND AGAINST APPLE ON APPLE'S UNLAWFUL  
19 MONOPOLIZATION CLAIM.

20 WE HAVE ABOUT SEVEN MORE PAGES. WOULD  
21 YOU LIKE TO TAKE A BREAK NOW OR FINISH?

22 JUROR: PROBABLY FINISH.

23 THE COURT: KEEP GOING? OKAY.

24 NUMBER 79. IF YOU FIND THAT PLAINTIFF  
25 HAS PROVEN A RELEVANT MARKET, THEN YOU SHOULD

1 DETERMINE WHETHER DEFENDANT HAS MONOPOLY POWER IN  
2 THAT MARKET. MONOPOLY POWER IS THE POWER TO PATROL  
3 PRICES AND EXCLUDE COMPETITION IN A RELEVANT  
4 ANTITRUST MARKET.

5 IN DETERMINING WHETHER SAMSUNG HAS  
6 MONOPOLY POWER IN A RELEVANT MARKET, YOU MAY  
7 CONSIDER WHETHER THERE IS DIRECT EVIDENCE THAT  
8 SAMSUNG HAS MONOPOLY POWER.

9 IN ORDER TO PROVIDE DIRECT PROOF OF  
10 MONOPOLY POWER, APPLE HAS THE BURDEN OF PROVING  
11 THAT THE DEFENDANT HAS THE ABILITY TO RAISE OR  
12 MAINTAIN THE PRICES THAT IT CHARGES FOR GOODS OR  
13 SERVICES IN THE RELEVANT MARKET ABOVE COMPETITIVE  
14 LEVELS.

15 APPLE MUST PROVE THAT SAMSUNG HAS THE  
16 POWER TO DO SO BY ITSELF -- THAT IS, WITHOUT THE  
17 ASSISTANCE OF, AND DESPITE COMPETITION FROM, ANY  
18 EXISTING OR POTENTIAL COMPETITORS. APPLE MUST ALSO  
19 PROVE THAT SAMSUNG HAS THE POWER TO MAINTAIN PRICES  
20 ABOVE A COMPETITIVE LEVEL FOR A SIGNIFICANT PERIOD.

21 IF SAMSUNG ATTEMPTED TO MAINTAIN PRICES  
22 ABOVE COMPETITIVE LEVELS BUT WOULD LOSE SO MUCH  
23 BUSINESS TO OTHER COMPETITORS THAT THE PRICE  
24 INCREASE WOULD BECOME UNPROFITABLE AND WOULD HAVE  
25 TO BE WITHDRAWN, THEN SAMSUNG DOES NOT HAVE

1 MONOPOLY POWER.

2 SIMILARLY, APPLE MUST PROVE THAT SAMSUNG  
3 HAS THE ABILITY TO EXCLUDE COMPETITION. FOR  
4 EXAMPLE, IF SAMSUNG ATTEMPTED TO MAINTAIN PRICES  
5 ABOVE COMPETITIVE LEVELS, BUT NEW COMPETITORS COULD  
6 ENTER THE MARKET OR EXISTING COMPETITORS COULD  
7 EXPAND THEIR SALES AND TAKE SO MUCH BUSINESS THAT  
8 THE PRICE INCREASE WOULD BECOME UNPROFITABLE AND  
9 WOULD HAVE TO BE WITHDRAWN, THEN SAMSUNG DOES NOT  
10 HAVE MONOPOLY POWER.

11 THE ABILITY TO EARN HIGH PROFIT MARGINS  
12 OR A HIGH RATE OF RETURN DOES NOT NECESSARILY MEAN  
13 THAT SAMSUNG HAS MONOPOLY POWER. OTHER FACTORS MAY  
14 ENABLE A COMPANY WITHOUT MONOPOLY POWER TO SELL AT  
15 HIGHER PRICES OR EARN HIGHER PROFIT MARGINS THAN  
16 ITS COMPETITORS, SUCH AS THE ABILITY TO OFFER SUPER  
17 PROCEDURE PRODUCTS OR SERVICES.

18 HOWEVER, AN ABILITY TO SELL AT HIGHER  
19 PRICES OR EARN HIGHER PROFIT MARGINS THAN OTHER  
20 COMPANIES FOR SIMILAR GOODS OR SERVICES OVER A LONG  
21 PERIOD OF TIME MAY BE EVIDENCE OF MONOPOLY POWER.

22 BY CONTRAST, EVIDENCE THAT SAMSUNG WOULD  
23 LOSE A SUBSTANTIAL AMOUNT OF SALES IF IT RAISED  
24 PRICES SUBSTANTIALLY, OR THAT SAMSUNG'S PROFIT  
25 MARGINS WERE LOW COMPARED TO ITS COMPETITORS,

1 ERRATIC, AND/OR DECREASING, MIGHT BE EVIDENCE THAT  
2 SAMSUNG DOES NOT HAVE MONOPOLY POWER.

3 IF YOU DO NOT FIND THERE IS DIRECT  
4 EVIDENCE OF MONOPOLY POWER, THERE ARE A NUMBER OF  
5 FACTORS YOU MAY CONSIDER AS INDIRECT EVIDENCE OF  
6 MONOPOLY POWER.

7 THE FIRST FACTOR THAT YOU SHOULD CONSIDER  
8 IS SAMSUNG'S MARKET SHARE. A MARKET SHARE ABOVE 50  
9 PERCENT MAY BE SUFFICIENT TO SUPPORT AN INFERENCE  
10 THAT A DEFENDANT HAS MONOPOLY POWER, BUT IN  
11 CONSIDERING WHETHER A DEFENDANT HAS MONOPOLY POWER,  
12 IT IS ALSO IMPORTANT TO CONSIDER OTHER ASPECTS OF  
13 THE RELEVANT MARKET, SUCH AS MARKET SHARE TRENDS,  
14 THE EXISTENCE OF BARRIERS TO ENTRY, THE ENTRY AND  
15 EXIT BY OTHER COMPANIES, AND THE NUMBER AND SIZE OF  
16 COMPETITORS.

17 ALONG WITH A DEFENDANT'S MARKET SHARE,  
18 THESE FACTORS SHOULD INFORM YOU AS TO WHETHER THE  
19 DEFENDANT HAS MONOPOLY POWER. THE LIKELIHOOD THAT  
20 A COMPANY HAS MONOPOLY POWER IS STRONGER THE HIGHER  
21 THAT COMPANY'S SHARE IS ABOVE 50 PERCENT.

22 A MARKET SHARE BELOW 50 PERCENT IS  
23 ORDINARILY NOT SUFFICIENT TO SUPPORT A CONCLUSION  
24 THAT A DEFENDANT HAS MONOPOLY POWER. HOWEVER, IF  
25 YOU FIND THAT THE OTHER EVIDENCE DEMONSTRATED THAT



1 SAMSUNG DOES, IN FACT, HAVE MONOPOLY POWER, DESPITE  
2 HAVING A MARKET SHARE BELOW 50 PERCENT, YOU MAY  
3 CONCLUDE THAT SAMSUNG HAS MONOPOLY POWER.

4 YOU MAY ALSO CONSIDER WHETHER THERE ARE  
5 BARRIERS TO ENTRY INTO THE RELEVANT MARKET.  
6 BARRIERS TO ENTRY MAKE IT DIFFICULT FOR NEW  
7 COMPETITORS TO ENTER THE RELEVANT MARKET IN A  
8 MEANINGFUL AND TIMELY WAY.

9 BARRIERS TO ENTRY MIGHT INCLUDE, AMONG  
10 OTHER THINGS, INTELLECTUAL PROPERTY RIGHTS, SUCH AS  
11 PATENTS OR TRADE SECRETS, SPECIALIZED MARKETING  
12 PRACTICES AND THE REPUTATION OF COMPANIES ALREADY  
13 PARTICIPATING IN THE MARKET, OR THE BRAND NAME  
14 RECOGNITION OF THEIR PRODUCTS.

15 EVIDENCE OF LOW OR NO ENTRY BARRIERS MAY  
16 BE EVIDENCE THAT DEFENDANT DOES NOT HAVE MONOPOLY  
17 POWER, REGARDLESS OF DEFENDANT'S MARKET SHARE,  
18 BECAUSE NEW COMPETITORS COULD ENTER EASILY IF THE  
19 DEFENDANT ATTEMPTED TO RAISE PRICES FOR A  
20 SUBSTANTIAL PERIOD OF TIME.

21 BY CONTRAST, EVIDENCE OF HIGH BARRIERS TO  
22 ENTRY ALONG WITH HIGH MARKET SHARE MAY SUPPORT AN  
23 INFERENCE THAT DEFENDANT HAS MONOPOLY POWER.

24 YOU MAY CONSIDER WHETHER SAMSUNG'S  
25 COMPETITORS ARE CAPABLE OF EFFECTIVELY COMPETING.

1                   IN OTHER WORDS, YOU SHOULD CONSIDER  
2                   WHETHER THE FINANCIAL STRENGTH, MARKET SHARES AND  
3                   NUMBER OF COMPETITORS ACT AS A CHECK ON THE  
4                   DEFENDANT'S ABILITY TO PRICE ITS PRODUCTS. IF  
5                   SAMSUNG'S COMPETITORS ARE VIGOROUS OR HAVE LARGE OR  
6                   INCREASING MARKET SHARES, THIS MAY BE EVIDENCE THAT  
7                   SAMSUNG LACKS MONOPOLY POWER.

8                   ON THE OTHER HAND, IF YOU DETERMINE THAT  
9                   SAMSUNG'S COMPETITORS ARE WEAK OR HAVE SMALL OR  
10                  DECLINING MARKET SHARES, THIS MAY SUPPORT AN  
11                  INFERENCE THAT SAMSUNG HAS MONOPOLY POWER.

12                  IF YOU FIND THAT SAMSUNG HAS MONOPOLY  
13                  POWER IN THE RELEVANT MARKET, THEN YOU MUST  
14                  CONSIDER THE REMAINING ELEMENTS OF APPLE'S  
15                  MONOPOLIZATION CLAIM. IF YOU FIND THAT SAMSUNG  
16                  DOES NOT HAVE MONOPOLY POWER, THEN YOU MUST FIND  
17                  FOR SAMSUNG AND AGAINST APPLE ON THIS CLAIM.

18                  NUMBER 80. THE NEXT ELEMENT THAT APPLE  
19                  MUST PROVE IS THAT SAMSUNG WILLFULLY ACQUIRED  
20                  MONOPOLY POWER THROUGH ANTICOMPETITIVE ACTS OR  
21                  PRACTICES. ANTICOMPETITIVE ACTS ARE ACTS OTHER  
22                  THAN COMPETITION ON THE MERITS THAT HAVE THE EFFECT  
23                  OF PREVENTING OR EXCLUDING COMPETITION. HARM TO  
24                  COMPETITION IS TO BE DISTINGUISHED FROM HARM TO A  
25                  SINGLE COMPETITOR OR GROUP OF COMPETITORS, WHICH

1 DOES NOT NECESSARILY CONSTITUTE HARM TO  
2 COMPETITION.

3 IN ADDITION, YOU SHOULD DISTINGUISH THE  
4 ACQUISITION OF MONOPOLY POWER THROUGH  
5 ANTICOMPETITIVE ACTS THROUGH THE ACQUISITION OF  
6 MONOPOLY POWER BY SUPPLYING BETTER TECHNOLOGY,  
7 POSSESSES SUPERIOR BUSINESS SKILLS OR BECAUSE OF  
8 LUCK, WHICH IS NOT UNLAWFUL.

9 MERE POSSESSION OF MONOPOLY POWER, IF  
10 LAWFULLY ACQUIRED, DOES NOT VIOLATE THE ANTITRUST  
11 LAWS. A MONOPOLIST MAY COMPETE AGGRESSIVELY  
12 WITHOUT VIOLATING THE ANTITRUST LAWS AND A  
13 MONOPOLIST MAY CHARGE MONOPOLY PRICES WITHOUT  
14 VIOLATING THE ANTITRUST LAWS. A MONOPOLIST'S  
15 CONDUCT ONLY BECOMES UNLAWFUL WHERE IT INVOLVES  
16 ANTICOMPETITIVE ACTS.

17 THE DIFFERENCE BETWEEN ANTICOMPETITIVE  
18 CONDUCT AND CONDUCT THAT HAS A LEGITIMATE BUSINESS  
19 PURPOSE CAN BE DIFFICULT TO DETERMINE. THIS IS  
20 BECAUSE ALL COMPANIES HAVE A DESIRE TO INCREASE  
21 THEIR PROFITS AND INCREASE THEIR MARKET SHARE.

22 THESE GOALS ARE AN ESSENTIAL PART OF A  
23 COMPETITIVE MARKETPLACE, AND THE ANTITRUST LAWS DO  
24 NOT MAKE THESE GOALS, OR THE ACHIEVEMENT OF THESE  
25 GOALS, UNLAWFUL, AS LONG AS A COMPANY DOES NOT USE

1 ANTICOMPETITIVE MEANS TO ACHIEVE THESE GOALS.

2 IN DETERMINING WHETHER SAMSUNG'S CONDUCT  
3 WAS ANTICOMPETITIVE OR WHETHER IT WAS LEGITIMATE  
4 BUSINESS CONDUCT, YOU SHOULD DETERMINE WHETHER THE  
5 CONDUCT IS CONSISTENT WITH COMPETITION ON THE  
6 MERITS, WHETHER THE CONDUCT PROVIDES BENEFITS TO  
7 CONSUMERS AND WHETHER THE CONDUCT WOULD MAKE  
8 BUSINESS SENSE APART FROM ANY EFFECT IT HAS ON  
9 EXCLUDING COMPETITION OR HARMING COMPETITORS.

10 APPLE ALLEGES THAT SAMSUNG WILLFULLY  
11 ACQUIRED MONOPOLY POWER -- THIS IS INSTRUCTION  
12 NUMBER 81 -- BASED ON ANTICOMPETITIVE BEHAVIOR IN  
13 CONNECTION WITH THE UMTS STANDARD SETTING PROCESS  
14 AT 3GPP. A STANDARD CAN ENHANCE CONSUMER WELFARE  
15 BY ENSURING INTEROPERABILITY OF PRODUCTS AND PRICES  
16 AND MAKING MULTIPLE SOURCES OF SUPPLY AVAILABLE TO  
17 CONSUMERS.

18 THE IDEAL STANDARD-SETTING PROCESS CAN  
19 ALLOW MEMBERS OF A STANDARD SETTING ORGANIZATION TO  
20 MAKE AN OBJECTIVE COMPARISON AMONG COMPETING  
21 TECHNOLOGIES BEFORE A STANDARD IS ADOPTED.

22 BASED ON THE AVAILABLE INFORMATION, A  
23 RATIONAL STANDARD SETTING ORGANIZATION CAN SELECT  
24 THE BEST TECHNOLOGY, CONSIDERING ITS COST AND  
25 PERFORMANCE, AND CAN INCLUDE THAT TECHNOLOGY IN THE

1 STANDARD.

2 TO THE EXTENT THE INDUSTRY HAS INVESTED  
3 IN A STANDARD AND CANNOT EASILY TRANSFER THAT  
4 INVESTMENT TO AN ALTERNATIVE STANDARD, THE PROCESS  
5 OF STANDARDIZATION MAY ELIMINATE ALTERNATIVE  
6 TECHNOLOGIES. WHEN A PATENTED TECHNOLOGY IS  
7 INCORPORATED INTO SUCH A STANDARD, ADOPTION OF THE  
8 STANDARD MAY ELIMINATE ALTERNATIVES TO THE PATENTED  
9 TECHNOLOGY. NONETHELESS, WINNING THE COMPETITION  
10 BETWEEN TECHNOLOGIES TO BE INCLUDED IN THE STANDARD  
11 MAY ENHANCE CONSUMER WELFARE AND NOT BE  
12 ANTICOMPETITIVE, EVERYONE IF THE TECHNOLOGY IS  
13 COVERED BY A PATENT.

14 DISRUPTION OF A STANDARD SETTING PROCESS,  
15 HOWEVER, MAY BE ANTICOMPETITIVE. AS TO APPLE'S  
16 CLAIMS THAT SAMSUNG FAILED TO TIMELY DISCLOSE IPR,  
17 INCLUDING PATENTS AND PATENT APPLICATIONS, THAT MAY  
18 COVER TECHNOLOGY BEING CONSIDERED FOR INCLUSION IN  
19 THE UMTS STANDARD, YOU MAY FIND THAT SAMSUNG  
20 WILLFULLY ACQUIRED OR MAINTAINED MONOPOLY POWER  
21 THROUGH ANTICOMPETITIVE ACTS IF: 1, ETSI MEMBERS  
22 SHARED A CLEARLY DEFINED EXPECTATION THAT MEMBERS  
23 WERE REQUIRED TO TIMELY DISCLOSE IPR THAT  
24 REASONABLY MIGHT COVER TECHNOLOGY BEING CONSIDERED  
25 FOR ADOPTION IN THE UMTS STANDARD; 2, SAMSUNG

1 KNOWINGLY FAILED TO DISCLOSE SUCH IPR IN A TIMELY  
2 FASHION; 3, 3GPP RELIED ON THE REQUIREMENT THAT  
3 SAMSUNG WOULD TIMELY DISCLOSE SUCH INFORMATION WHEN  
4 3GPP ADOPTED THE UMTS STANDARD; AND, 4, SAMSUNG DID  
5 NOT COMPLY WITH THE REQUIREMENT.

6 AS TO APPLE'S CLAIMS THAT DURING THE  
7 STANDARD-SETTING PROCESS SAMSUNG CONCEALED ITS TRUE  
8 INTENTIONS NOT TO MEET THE COMMITMENT IT HAD MADE  
9 TO LICENSE ITS DECLARED ESSENTIAL IPR ON FAIR,  
10 REASONABLE, AND NON-DISCRIMINATORY, FRAND, TERMS,  
11 YOU MAY FIND THAT SAMSUNG WILLFULLY ACQUIRED OR  
12 MAINTAINS MONOPOLY POWER THROUGH ANTICOMPETITIVE  
13 ACTS IF: 1, ETSI MEMBERS SHARED A CLEARLY DEFINED  
14 EXPECTATION THAT PARTICIPANTS WERE BOUND TO LICENSE  
15 THEIR DECLARED-ESSENTIAL IPR ON FRAND TERMS TO  
16 ETSI, ITS MEMBERS, AND ANY ENTITY THAT IMPLEMENTED  
17 THE UMTS STANDARD; 2, SAMSUNG MADE AN INTENTIONALLY  
18 FALSE PROMISE TO COMPLY WITH THIS REQUIREMENT; 3,  
19 ETSI MEMBERS RELIED ON THE REQUIREMENT WHEN THEY  
20 ADOPTED THE STANDARDS WHICH THE DECLARED-ESSENTIAL  
21 IPR MIGHT REASONABLY COVER; AND, 4, SAMSUNG DID NOT  
22 COMPLY WITH THE REQUIREMENT.

23 IN DETERMINING WHETHER ETSI MEMBERS  
24 SHARED SUCH CLEARLY DEFINED EXPECTATIONS, YOU MAY  
25 CONSIDER AMONG OTHER FACTORS; 1, THE EXPECTATIONS

1 OF THE INDIVIDUAL ETSI MEMBERS; 2, ANY BEHAVIOR BY  
2 ETSI MEMBERS WITH RESPECT TO DISCLOSING OR NOT  
3 DISCLOSING SUCH INFORMATION; 3, ORAL INFORMATION  
4 COMMUNICATED OR DISCUSSED AT ETSI MEETINGS OR IN  
5 ETSI MINUTES; 4, ANY WRITTEN RULES THAT ETSI MADE  
6 AVAILABLE TO MEMBERS; 5, CUSTOMS OF THE INDUSTRY;  
7 AND, 6, THE PURPOSE OF THE ETSI.

8 IN DETERMINING WHETHER APPLE HAS PROVED  
9 THAT SAMSUNG WILLFULLY ACQUIRED MONOPOLY POWER, YOU  
10 MAY CONSIDER SAMSUNG'S COURSE OF CONDUCT AS A WHOLE  
11 AND ITS OVERALL EFFECT, RATHER THAN FOCUSING ON A  
12 PARTICULAR ASPECT OF SAMSUNG'S DISCLOSURE OR  
13 LICENSING CONDUCT IN ISOLATION.

14 NUMBER 82. IN DETERMINING WHETHER OR NOT  
15 SAMSUNG WILLFULLY ACQUIRED MONOPOLY POWER IN A  
16 RELEVANT TECHNOLOGY MARKET, YOU MAY CONSIDER ANY  
17 EVIDENCE THAT SAMSUNG INTENDED TO DECEIVE ETSI TO  
18 THE EXTENT IT HELPS TO UNDERSTAND THE LIKELY EFFECT  
19 OF SAMSUNG'S CONDUCT. SPECIFIC INTENT TO  
20 MONOPOLIZE, HOWEVER, IS NOT REQUIRED FOR ONE TO BE  
21 LIABLE FOR MONOPOLIZATION, ONLY THE INTENT TO  
22 COMMIT THE ACTS THAT RESULTED IN MONOPOLIZATION.

23 NUMBER 83. THE FEDERAL ANTITRUST LAWS  
24 APPLY ONLY TO CONDUCT THAT AFFECTS INTERSTATE  
25 COMMERCE. IN THIS CASE, THERE'S NO DISPUTE THAT

1 SAMSUNG'S CONDUCT AFFECTED INTERSTATE COMMERCE.

2 NUMBER 84. IF YOU FIND THAT SAMSUNG HAS  
3 VIOLATED THE FEDERAL ANTITRUST LAWS AS ALLEGED BY  
4 APPLE, YOU MUST THEN DECIDE IF APPLE IS ENTITLED TO  
5 RECOVER DAMAGES FROM SAMSUNG.

6 APPLE IS ENTITLED TO RECOVER DAMAGES FOR  
7 AN INJURY TO ITS BUSINESS OR PROPERTY IF IT CAN  
8 ESTABLISH THREE ELEMENTS OF INJURY AND CAUSATION.

9 FIRST, APPLE MUST PROVE THAT IT WAS, IN  
10 FACT, INJURED AS A RESULT OF SAMSUNG'S ALLEGED  
11 VIOLATION OF THE ANTITRUST LAWS.

12 SECOND, APPLE MUST PROVE THAT SAMSUNG'S  
13 ALLEGED ILLEGAL CONDUCT WAS A MATERIAL CAUSE OF  
14 APPLE'S INJURY. THAT MEANS THAT APPLE MUST PROVE  
15 THAT SAMPLE DAMAGES OCCURRED AS A RESULT OF  
16 SAMSUNG'S ALLEGED ANTITRUST VIOLATION AND NOT SOME  
17 OTHER CAUSE.

18 APPLE IS NOT REQUIRED TO PROVE THAT  
19 SAMSUNG'S ALLEGED ANTITRUST VIOLATION WAS THE SOLE  
20 CAUSE OF ITS INJURY, NOR NEED APPLE ELIMINATE ALL  
21 OTHER POSSIBLE CAUSES OF INJURY.

22 THIRD, APPLE MUST PROVE THAT ITS INJURY  
23 IS THE TYPE OF INJURY THAT THE ANTITRUST LAWS WERE  
24 INTENDED TO PREVENT. IF APPLE'S INJURY WAS CAUSED  
25 BY A REDUCTION IN COMPETITION OR ACTS THAT WOULD



1           OTHERWISE HARM CONSUMERS, THEN APPLE'S INJURY IS AN  
2           ANTITRUST INJURY.   THE COSTS AND EXPENSES IN  
3           DEFENDING AGAINST THE ASSERTION OF DECLARED  
4           ESSENTIAL PATENTS MAY BE AN ANTITRUST.

5                       ON THE OTHER HAND, IF APPLE'S INJURY WAS  
6           CAUSED BY HEIGHTENED COMPETITION, THE COMPETITIVE  
7           PROCESS ITSELF, OR BY ACTS THAT WOULD BENEFIT  
8           CONSUMERS, THEN APPLE'S INJURIES WERE NOT ANTITRUST  
9           JURIES AND APPLE MAY NOT RECOVER DAMAGES FOR THOSE  
10          INJURIES UNDER ANTITRUST LAWS.

11                      IF YOU FIND THAT APPLE HAS SUFFERED  
12          INJURY TO ITS BUSINESS OR PROPERTY, YOU MUST  
13          DETERMINE WHETHER APPLE HAS PROVEN THAT IT IS  
14          ENTITLED TO DAMAGES FOR SUCH INJURY.   THE AMOUNT OF  
15          ANY SUCH DAMAGES IS THE AMOUNT OF DAMAGES THAT  
16          APPLE HAS PROVEN AT TRIAL WITH REASONABLE  
17          CERTAINTY.

18                      ALL RIGHT.   WE ARE -- WE NEED TO TAKE NOW  
19          A 15-MINUTE BREAK, BUT IT'S BASICALLY 11:39, SO I  
20          SUGGEST WE JUST GO TO LUNCH EARLY TODAY AND WE COME  
21          BACK AT 1:00 O'CLOCK.

22                      I HOPE YOU ALL CAN STAY LATE TODAY.  
23          WE'LL BE GOING BEYOND 4:30.   IS THAT ALL RIGHT ?  
24          BECAUSE WE NEED TO FINISH ALL OF THE CLOSINGS  
25          TODAY.

1 ALL RIGHT. PLEASE KEEP AN OPEN MIND.  
2 PLEASE DON'T DISCUSS THE CASE WITH ANYONE. PLEASE  
3 DON'T DO ANY OF YOUR OWN RESEARCH AND DON'T READ  
4 ABOUT THE CASE. WE WILL SEE YOU BACK AT 1:00  
5 O'CLOCK.

6 ALL RIGHT. THANK YOU.

7 (WHEREUPON, THE FOLLOWING PROCEEDINGS  
8 WERE HELD OUT OF THE PRESENCE OF THE JURY:)

9 THE COURT: THE RECORD SHOULD REFLECT THE  
10 JURORS HAVE LEFT THE COURTROOM. PLEASE TAKE A  
11 SEAT.

12 HOW WOULD YOU LIKE TO HANDLE THE BREAKS  
13 THIS AFTERNOON? I'M SORRY WE GOOD DID NOT GET TO  
14 CLOSING ARGUMENTS THIS MORNING.

15 HOW DO YOU WANT TO HANDLE THE BREAKS?

16 MR. MCELHINNY: JUST THE NORMAL WAY.

17 MR. VERHOEVEN: YOUR HONOR, THIS IS  
18 MR. VERHOEVEN. I'LL PROBABLY NEED JUST A FEW  
19 MINUTES JUST TO SET UP IN BETWEEN MR. MCELHINNY'S  
20 FINISHING. SO THAT WOULD BE A GOOD TIME FOR A  
21 BREAK. I'M NOT SURE I'LL NEED ONE FOR THE  
22 REBUTTAL, BUT WHEN WE'RE SWITCHING, I WANT TO GET  
23 SOME PHONES UP HERE AND THAT'LL TAKE A COUPLE  
24 MINUTES.

25 MR. MCELHINNY: I'LL BE GOING ABOUT AN

1 HOUR.

2 THE COURT: I WAS GOING TO SUGGEST WE  
3 TAKE A BREAK AT 3:00. I MEAN, OBVIOUSLY THERE WILL  
4 BE A FEW MINUTES JUST TO SET UP, BUT I DON'T WANT  
5 TO TAKE A WHOLE BREAK AFTER ONLY AN HOUR.

6 MR. VERHOEVEN: YEAH, I WOULD JUST LIKE  
7 MAYBE FIVE MINUTES.

8 THE COURT: YEAH, THAT'S COMPLETELY FINE.  
9 BUT THEN LET'S ROUGHLY, WOULD THAT BE ALL RIGHT TO  
10 PLAN IT AT THE HALFWAY MARK, TWO HOURS, TAKING A  
11 BREAK FROM 3:00 TO 3:15.

12 MR. VERHOEVEN: YES, YOUR HONOR.

13 THE COURT: OKAY. AND THEN WHATEVER FEW  
14 MINUTES YOU ALL NEED TO SET UP TO TRANSMISSION, WE  
15 CAN DO THAT AS WELL. THAT'S FINE.

16 IS THERE ANYTHING ELSE WE NEED TO COVER  
17 THIS MORNING?

18 MR. JACOBS: YOUR HONOR, FOR THE  
19 AVOIDANCE OF DOUBT, WE RENEW ALL PREVIOUSLY  
20 ASSERTED AND PRESERVED OBJECTIONS TO THE JURY  
21 INSTRUCTIONS.

22 MR. JOHNSON: SINCE HE DID IT --

23 (LAUGHTER.)

24 THE COURT: YOU COULD HAVE TAKEN THE  
25 HIGHER ROAD, MR. JOHNSON.

1 MR. JOHNSON: I SHOULD.

2 THE COURT: UNDERSTOOD. EVERYONE'S  
3 OBJECTIONS TO THE JURY INSTRUCTIONS ARE PRESERVED  
4 FOR APPEAL.

5 MS. MAROULIS: ONE MORE QUESTION ABOUT  
6 EXCLUDED EVIDENCE.

7 THE COURT: YES.

8 MS. MAROULIS: WE PREPARED A SHORT  
9 NON-ARGUMENTATIVE ABOUT EXCLUDED EVIDENCE, AND WE  
10 HEARD THE COURT SAY THAT YOU WANT IT FILED AFTER  
11 THE JURY DELIBERATES.

12 IS IT POSSIBLE TO FILE IT NOW UNDER SEAL  
13 AND THEN THE COURT UNSEALS IT LATER, BECAUSE OUR  
14 APPELLATE PEOPLE ARE TELLING US THAT WE NEED TO  
15 FILE IT BEFORE THE JURY RETIRED FOR PURPOSES OF  
16 APPEAL.

17 THE COURT: OH.

18 MS. MAROULIS: BUT WE UNDERSTAND WHAT THE  
19 COURT IS SAYING ABOUT THE JURY.

20 THE COURT: OKAY. I DON'T KNOW IF I WANT  
21 TO GET INTO SEALING ISSUES AT THAT POINT.

22 LET ME THINK ABOUT IT DURING THE BREAK  
23 AND FIGURE OUT HOW TO HANDLE IT. I CERTAINLY DON'T  
24 WANT TO IN ANY WAY NEGATIVELY IMPACT ANYONE'S  
25 APPELLATE RIGHTS, SO WE'LL FIGURE IT OUT.

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MS. MAROULIS: THANK YOU, YOUR HONOR.

THE COURT: OKAY. ALL RIGHT. ANYTHING  
ELSE? NO? OKAY. THANK YOU.

(WHEREUPON, THE LUNCH RECESS WAS TAKEN.)



1 DELIBERATING TODAY, BUT MOST LIKELY YOU WILL START  
2 DELIBERATING TOMORROW AT 9:00 O'CLOCK, AND YOU WILL  
3 BE DELIBERATING ACTUALLY IN THE JURY ROOM THAT'S  
4 ATTACHED TO MY COURTROOM DOWN ON THE FOURTH FLOOR,  
5 AND WE'LL GIVE YOU INFORMATION ABOUT WHERE TO  
6 REPORT TO TOMORROW MORNING.

7 BUT YOU ARE NOT TO DISCUSS THE CASE  
8 UNLESS ALL NINE OF YOU ARE PRESENT IN THE JURY  
9 ROOM.

10 ALL RIGHT. WITH THAT, THE TIME IS NOW  
11 1:05. GO AHEAD, PLEASE.

12 MR. MCELHINNY: THANK YOU.

13 **(WHEREUPON, MR. MCELHINNY GAVE HIS**  
14 **CLOSING ARGUMENT ON BEHALF OF APPLE.)**

15 MR. MCELHINNY: MAY IT PLEASE THE COURT,  
16 LADIES AND GENTLEMEN OF THE JURY.

17 NOW THAT YOU ARE VETERANS, YOU'VE  
18 PROBABLY COME TO REALIZE THAT THERE ARE SOME WEIRD  
19 THINGS ABOUT TRIALS, AND ONE OF THE WEIRDEST THINGS  
20 ABOUT THEM IS WE DON'T TELL YOU WHAT THE CASE IS  
21 ABOUT UNTIL AFTER YOU'VE HEARD ALL THE EVIDENCE.

22 SO YOU SIT HERE FOR THREE WEEKS AND  
23 LISTEN TO EVIDENCE, AND THEN WE TELL YOU WHAT THE  
24 CASE IS ABOUT AND HOPEFULLY YOU BEGIN TO UNDERSTAND  
25 WHY CERTAIN PIECES WERE TOLD TO YOU.

1                   WHEN I FIRST SPOKE TO YOU THREE WEEKS  
2                   AGO, I TOLD YOU THAT IT WAS MY JOB AND IT WAS  
3                   MR. LEE'S JOB TO BRING TO YOU ALL THE EVIDENCE THAT  
4                   YOU WOULD NEED TO DO YOUR JOB SO THAT YOU COULD  
5                   COME TO A JUDGMENT.

6                   THIS IS MY OPPORTUNITY TO REMIND YOU OF  
7                   THE EVIDENCE YOU'VE HEARD AND TO EXPLAIN WHY YOU  
8                   HEARD SOME OF IT AND TO TRY TO HELP YOU PUT IT INTO  
9                   CONTEXT.

10                   CONTEXT, OF COURSE, IS A MATTER OF FOCUS.  
11                   FIRST YOU HAVE TO LOOK AT THE BIG PICTURE, THEN YOU  
12                   HAVE TO FOCUS ON THE DETAILS, AND THEN YOU HAVE TO  
13                   COME TO THE POINT WHERE YOU'RE READY TO MAKE A  
14                   JUDGMENT.

15                   I WOULD LIKE TO START BY MAKING THREE BIG  
16                   PICTURE POINTS.

17                   THE FIRST IS THE DOCUMENTS ARE THE MOST  
18                   VALUABLE KEY TO THE TRUTH FINDING FUNCTION.  
19                   WITNESSES CAN BE MISTAKEN. THEY CAN BE MISTAKEN IN  
20                   GOOD FAITH, THEY CAN BE MISTAKEN IN BAD FAITH.

21                   EXHIBITS THAT ARE CREATED FOR TRIAL ARE  
22                   ALWAYS CREATED FOR A PURPOSE. THEY'RE ALWAYS  
23                   CREATED TO MAKE A POINT AND THEY CAN CONFUSE AND  
24                   THEY CAN MISLEAD.

25                   BUT HISTORICAL DOCUMENTS ARE ALMOST



1 ALWAYS WHERE THE TRUTH LIES. THEY ARE ALMOST  
2 ALWAYS WRITTEN HONESTLY BY PEOPLE WHO, WHEN THEY  
3 WERE WRITING THEM, NEVER DREAMED THAT A JURY WOULD  
4 BE LOOKING AT THEM TWO AND THREE YEARS LATER  
5 SITTING IN A COURTROOM IN SAN JOSE. THAT'S MY  
6 FIRST BIG POINT.

7 SECOND, THIS IS SOMETHING THAT WE  
8 ACTUALLY TEACH YOUNG LAWYERS, AND, YOU KNOW, WE'RE  
9 NOT UNIQUE ABOUT THIS, BUT IF YOU WANT TO FIND OUT  
10 WHAT REALLY HAPPENED, IF YOU WANT TO SEE THE TRUTH,  
11 MAKE A CHRONOLOGY. IN A TRIAL WHERE EVIDENCE COMES  
12 IN THROUGH WITNESSES, IT ISN'T POSSIBLE TO BRING  
13 THE EVIDENCE IN TO CHRONOLOGICAL ORDER. YOU HAVE  
14 TO DO IT ONE WITNESS AT A TIME.

15 BUT WHEN YOU GET IN THE JURY ROOM, YOU  
16 CAN PUT THE DOCUMENTS AND YOU CAN PUT THE TESTIMONY  
17 INTO A CHRONOLOGY, AND THAT, I SUBMIT, IS WHERE YOU  
18 WILL FIND THE TRUTH.

19 LET ME PREVIEW FOR YOU WHAT YOU WILL FIND  
20 WHEN YOU MAKE THE CHRONOLOGY IN THIS CASE.

21 STEVE JOBS STARTED THE IPHONE DEVELOPMENT  
22 PROJECT IN 2003. YOU HEARD FROM SCOTT FORSTALL  
23 ABOUT THE SOFTWARE DEVELOPERS WORKING OVER THREE  
24 YEARS IN THE PURPLE DORM. YOU HEARD FROM CHRIS  
25 STRINGER ABOUT THE NUMBER OF DESIGNS THAT WERE

1 CONSIDERED, AND YOU SAW, YOU HAVE IN EVIDENCE, MANY  
2 OF THE MODELS, SKETCHES, AND CAD DRAWINGS THAT WERE  
3 CONSIDERED, REJECTED, AND REDESIGNED OVER AND OVER  
4 DURING THAT THREE-YEAR PERIOD.

5 YOU HEARD FROM PHIL SCHILLER ABOUT THE  
6 ENORMOUS RISK THAT APPLE TOOK WHEN IT WENT INTO  
7 THIS PROJECT.

8 FROM 2004 TO 2007, WHILE APPLE WAS  
9 SPENDING THOSE YEARS IN RESEARCH AND DEVELOPMENT,  
10 THESE ARE THE PHONES THAT SAMSUNG WAS SELLING.  
11 THIS IS WHAT SAMSUNG'S PHONES LOOKED LIKE BETWEEN  
12 2004 AND 2007.

13 AND THEN, IN JANUARY 2007, STEVE JOBS  
14 SHOCKED THE PHONE WORLD. THE FOUR-YEAR INVESTMENT  
15 HAD PAID OFF. APPLE HAD TURNED OVER ITS FUTURE TO  
16 INVENTORS AND DESIGNERS, AND THEY HAD PRODUCED THE  
17 IPHONE.

18 THE REACTION TO THE IPHONE WAS IMMEDIATE.  
19 THE IPHONE WAS CALLED "GORGEOUS." THE IPHONE MADE  
20 THE COVER OF TIME MAGAZINE. IT WAS NAMED THE  
21 INVENTION OF THE YEAR. IT WAS POSSIBLY THE MOST  
22 FAMOUS PRODUCT IN THE WORLD.

23 BY SEPTEMBER OF 2007, SAMSUNG HAD ALREADY  
24 BEGUN TO ANALYZE THE IPHONE'S EFFECTS ON THE  
25 MARKET. EXHIBIT 34, WHICH YOU'VE SEEN A COUPLE OF

1 TIMES, IS AN EXTREMELY SIGNIFICANT DOCUMENT.

2 AS YOU HEARD, IT IS FROM SAMSUNG'S LSI  
3 DIVISION. THAT'S NOT THE PHONE DIVISION. THIS IS  
4 THE PART OF SAMSUNG THAT GOT APPLE'S CONFIDENTIAL  
5 SEMICONDUCTOR AND PART DESIGNS IN ADVANCE AND  
6 PROMISED APPLE COMPLETE CONFIDENTIALITY.

7 WHY WAS THIS GROUP DOING A COMPETITIVE  
8 ANALYSIS OF THE IPHONE?

9 WHEN YOU LOOK AT PAGE 13 OF THIS  
10 DOCUMENT, YOU WILL SEE A PAGE ABOUT MOBILE PHONE  
11 TRENDS FROM 2007 THROUGH 2012 WHERE SAMSUNG RATED  
12 THE IPHONE AS THE SINGLE MOST IMPORTANT FACTOR.

13 YOU WILL SEE THAT THE IPHONE IS CIRCLED.  
14 I THOUGHT IT WAS PURPLE, BUT I'VE BEEN TOLD THAT  
15 IT'S FUSIA. SO IT'S CIRCLED IN FUSIA.

16 WE DIDN'T DO THIS FOR THIS TRIAL. THIS  
17 IS A HISTORICAL DOCUMENT. SAMSUNG DID THIS IN  
18 2007.

19 ON PAGE 38, UNDER "IPHONE EFFECT  
20 ANALYSIS," SAMSUNG'S DOCUMENT IDENTIFIES THE  
21 FACTORS THAT COULD MAKE THE IPHONE A SUCCESS.

22 AND AMONG THEM LISTS THE EASY AND  
23 INTUITIVE USER INTERFACE AND THE BEAUTIFUL DESIGN.

24 WHY WAS THE SEMICONDUCTOR DIVISION  
25 PUTTING TOGETHER A COMPETITIVE ANALYSIS OF APPLE?

1 WHY WAS THE SEMICONDUCTOR DIVISION INTERESTED IN  
2 SAMSUNG'S BEAUTIFUL -- IN APPLE'S BEAUTIFUL DESIGN?

3 UNFORTUNATELY, WE DON'T KNOW THE ANSWER,  
4 AND WE WON'T KNOW THE ANSWER TO THAT BECAUSE  
5 SAMSUNG DID NOT BRING A WITNESS WHO WAS WILLING OR  
6 ABLE TO TALK ABOUT THIS DOCUMENT.

7 THE FOLLOWING YEAR, IN 2008, SAMSUNG  
8 HIRED A CONSULTING COMPANY TO ASSESS THE IMPACT  
9 THAT THE IPHONE WAS HAVING ON THE SMARTPHONE  
10 MARKET. EXHIBIT 36, PLAINTIFF'S, PX 36 IN YOUR  
11 EXHIBIT LIST IS THEIR REPORT.

12 THIS DOCUMENT, BY THE WAY -- SOME  
13 DOCUMENTS CAME IN FOR LIMITED PURPOSES. THIS  
14 DOCUMENT HAS COME IN FOR THE TRUTH OF EVERYTHING  
15 THAT'S WRITTEN IN IT.

16 LOOK AT PAGE 20. AGAIN, THIS IS NOT A  
17 GRAPHIC THAT SOME LAW FIRM CREATED FOR THIS CASE.  
18 THIS IS A HISTORICAL DOCUMENT. THIS IS WHAT  
19 SAMSUNG WAS THINKING IN 2008. IT CALLS THE IPHONE  
20 A REVOLUTION.

21 IN THE LOWER LEFT-HAND CORNER OF THIS  
22 PAGE, IT QUOTES A JUNE 2007 ARTICLE THAT SAYS "TALK  
23 ABOUT HYPE. IN THE LAST SIX MONTHS, APPLE'S IPHONE  
24 HAS BEEN THE SUBJECT OF 11,000 PRINT ARTICLES, AND  
25 IT TURNS UP ABOUT 69 MILLION HITS ON GOOGLE."

1                   SIX MONTHS BETWEEN THE -- AFTER THE  
2                   ANNOUNCEMENT. THE IPHONE WAS FAMOUS, REMEMBER,  
3                   THAT'S ONE OF THE ISSUES WE'VE BEEN TALKING ABOUT,  
4                   THE IPHONE WAS FAMOUS AS SOON AS IT WAS LAUNCHED.

5                   LET'S LOOK AT THE NEXT PAGE. HERE THE  
6                   CONSULTANTS WERE TALKING ABOUT THE REACTIONS OF  
7                   IPHONE USERS FROM AROUND THE WORLD, WHAT THE REPORT  
8                   CALLED "EXPRESSIONS OF LOVE" AND "EXPRESSIONS OF  
9                   AWE."

10                   ONE USER FROM THE BAY AREA SAID, "THIS  
11                   THING IS WORLD-CHANGING IN TERMS OF PHONES."

12                   WHY DID THESE PEOPLE LOVE THE IPHONE?  
13                   THE REPORT ANSWERS THAT QUESTION AS WELL ON PAGE  
14                   36. IT POINTS OUT THAT THE PHONE WASN'T ONLY EASY,  
15                   IT WAS SEXY TO USE. USERS SAID THAT THE IPHONE WAS  
16                   EASY AND FUN TO USE WITH FUN GESTURES LIKE TWO  
17                   FINGERED PINCH AND WHIMSICAL BOUNCE, THE SPECIAL  
18                   FEATURES THAT ARE AT ISSUE IN THIS CASE, FEATURES  
19                   THAT SAMSUNG WILL TRY TO TELL YOU WERE OBVIOUS AND  
20                   NOT NOVEL, BUT WHICH ARE CALLED OUT IN THEIR OWN  
21                   DOCUMENTS AT THE TIME HISTORICALLY AS BEING THE KEY  
22                   TO THE IPHONE'S SUCCESS.

23                   AND ON PAGE 31, THEY TALKED ABOUT THE  
24                   IPHONE'S STRONG SCREEN-CENTRIC DESIGN HAS COME TO  
25                   EQUAL WHAT'S ON TREND AND COOL. IT'S BEAUTIFUL,

1 IT'S SEXY, IT'S SLICK.

2 IN REAL TIME, NOT TODAY, NOT IN THIS  
3 TRIAL WHEN SO MUCH MONEY IS AT STAKE, BUT IN REAL  
4 TIME, SAMSUNG DID NOT SAY A SINGLE WORD ABOUT THE  
5 DESIGN BEING DICTATED BY FUNCTION. THEY SAID IT  
6 WAS A BEAUTIFUL DESIGN.

7 AND FINALLY, ON PAGE 32, IN WHAT WE KNOW  
8 HAD TO BE DISTURBING NEWS TO SAMSUNG, THEY HAD  
9 CONCLUDED THAT BY 2008, APPLE HAD OVERTAKEN SAMSUNG  
10 AS THE MOST STYLISH BRAND OVERALL.

11 PLAINTIFF'S EXHIBIT 38, 36 DATED DECEMBER  
12 2008.

13 IN MY OPENING, I SHOWED YOU SOME OF THE  
14 PHONES THAT SAMSUNG SOLD BETWEEN FEBRUARY 2007, SO  
15 AFTER THE IPHONE ANNOUNCEMENT, SO BETWEEN FEBRUARY  
16 2007 AND NOVEMBER 2009. THIS WAS DURING THE TIME  
17 WHEN SAMSUNG WAS TRYING TO COMPETE FAIRLY AGAINST  
18 THE IPHONE.

19 BUT AS WE KNOW, THAT DIDN'T WORK.  
20 SAMSUNG SALES CONTINUED TO DECLINE. WE SPOKE ABOUT  
21 THE OMNIA, WHICH YOU SEE HERE, AND THE PUBLIC  
22 REACTION THAT IT RECEIVED.

23 AND WE KNOW THAT IN FEBRUARY 2010,  
24 SAMSUNG HELD AN EXECUTIVE LEVEL MEETING. THE NOTES  
25 OF THAT MEETING ARE PLAINTIFF'S EXHIBIT 40, AND

1 THAT'S WHERE THE HEAD OF THEIR DIVISION SAID THAT  
2 SAMSUNG, IN FEBRUARY 2010, WAS FACING WHAT HE  
3 CALLED "A CRISIS OF DESIGN."

4 SAMSUNG REALIZED HOW FAR IT WAS FALLING  
5 BEHIND TO THE IPHONE. BY ITS OWN ASSESSMENT, IT  
6 CALLED IT A DIFFERENCE BETWEEN HEAVEN AND EARTH.

7 AND SAMSUNG LISTENED TO ITS MOST  
8 IMPORTANT CUSTOMERS, THE TELEPHONE CARRIERS, AND  
9 THEY WERE TELLING SAMSUNG TO MAKE SOMETHING LIKE  
10 THE IPHONE.

11 WE NOW KNOW THAT TWO WEEKS AFTER THIS  
12 MEETING, TWO WEEKS AFTER THIS CRISIS-OF-DESIGN  
13 MEETING, SAMSUNG PEOPLE MET WITH GOOGLE AND GOOGLE  
14 DEMANDED -- THAT'S NOT MY WORDS, THAT'S SAMSUNG'S  
15 WORDS FROM THEIR OWN NOTES, HISTORICAL NOTES  
16 WRITTEN AT THE TIME THAT THEY NEVER THOUGHT WOULD  
17 SEE A COURTROOM -- GOOGLE DEMANDED THAT SAMSUNG  
18 CHANGE THE DESIGNS OF THE GALAXY S PHONES AND THE  
19 TABLETS THEY WERE WORKING ON BECAUSE GOOGLE  
20 RECOGNIZED THAT SAMSUNG WAS COPYING APPLE'S  
21 DESIGNS.

22 BUT AS THIS DOCUMENT ALSO TOLD US,  
23 SAMSUNG'S EXECUTIVES CHOSE TO IGNORE THAT DEMAND  
24 AND TO CONTINUE ON THE PATH OF COPYING.

25 FEBRUARY 2010.

1                   WHAT'S INTERESTING BECAUSE, FRANKLY, I  
2                   DIDN'T KNOW IT UNTIL IT HAPPENED IN THIS COURTROOM,  
3                   WHAT'S INTERESTING IS WHAT HAPPENED NEXT.

4                   YOU REMEMBER THAT SAMSUNG CALLED THIS  
5                   NICE WOMAN, JINYEUN WANG, THE ICON DESIGNER, AND  
6                   SHE CAME HERE AND TESTIFIED, AND SHE SPOKE QUITE  
7                   EMOTIONALLY ABOUT THE HARDSHIP OF THE PERIOD WHEN  
8                   SAMSUNG CALLED IN A TEAM OF DESIGNERS FROM THREE  
9                   PLANTS TO WORK NIGHT AND DAY TO FINISH THE GALAXY  
10                  PHONE.

11                  BUT MOST IMPORTANTLY, I ALMOST -- I  
12                  LITERALLY, LITERALLY ALMOST FELL OUT OF MY CHAIR  
13                  WHEN SHE SAID IT. SHE TOLD US THAT THAT DESIGN  
14                  EFFORT WAS A THREE-MONTH EFFORT. A THREE-MONTH  
15                  EFFORT.

16                  IN THOSE CRITICAL THREE MONTHS, SAMSUNG  
17                  WAS ABLE TO COPY AND INCORPORATE THE RESULTS OF  
18                  APPLE'S FOUR-YEAR INVESTMENT IN HARD WORK AND  
19                  INGENUITY WITHOUT TAKING ANY OF THE RISKS BECAUSE  
20                  THEY WERE COPYING THE WORLD'S MOST SUCCESSFUL  
21                  PRODUCT.

22                  HOW DO WE KNOW THAT? AGAIN, WE KNOW THAT  
23                  FROM SAMSUNG'S OWN DOCUMENTS BECAUSE WE'VE SEEN --  
24                  WE CAN SEE HOW THEY DID IT.

25                  THE MOST FAMILIAR, YOU'VE SEEN IT A



1 MILLION TIMES NOW; EXHIBIT 44. THIS DOCUMENT IS  
2 DATED MARCH 2010, OVER 100 PAGES OF DETAILED  
3 SIDE-BY-SIDE COMPARISONS AND INSTRUCTIONS TO COPY.  
4 THIS IS ONE MONTH AFTER THE CRISIS OF DESIGN  
5 MEETING AND THE MEETING WITH GOOGLE.

6 WHENEVER SAMSUNG TALKS TO YOU, AS THEY  
7 WILL I'M SURE TODAY, ABOUT BENCHMARKING OR SAYS  
8 THAT APPLE BENCHMARKED, JUST LOOK AT THE DATES OF  
9 THE APPLE DOCUMENTS AND HOW FAR AFTER THE  
10 DEVELOPMENT CYCLE THEY ARE AND REMEMBER THIS  
11 DOCUMENT AND COMPARE THEM, PUT THEM NEXT TO EACH  
12 OTHER, WHAT BENCHMARKING LOOKS LIKE AND WHAT  
13 EXHIBIT 44 LOOKS LIKE.

14 AND REMEMBER HOW SAMSUNG USED THE IPHONE  
15 IN ORDER TO TURN THE GT I9000 INTO A COPY.

16 AMONG THE HUNDREDS OF PAGES OF COPYING  
17 DIRECTIONS, SEVERAL ARE DIRECTLY RELATED TO ISSUES  
18 IN THIS CASE.

19 SO, FOR EXAMPLE, ON PAGE 58 OF EXHIBIT  
20 44, THIS PAGE WAS DIRECTED -- DIRECTLY DIRECTED TO  
21 APPLE'S DOUBLE TAP TO ZOOM, ONE OF THE PATENTS IN  
22 THIS CASE, INCORPORATED INTO THE GALAXY PRODUCT.

23 ON PAGE 131, SAMSUNG COPIES THE IPHONE  
24 ICONS AND LAYOUT RIGHT DOWN TO THE LIGHT EFFECT ON  
25 THE ICONS.

1 I WANT TO LOOK AT THIS SPECIFICALLY.  
2 YOU'LL NOTICE NEXT TO THE IPHONE IT SAYS THERE,  
3 "LIGHT USED FOR A THREE DIMENSIONALITY, GIVES A  
4 LUXURIOUS FEEL."

5 WHEN YOU SEE THESE PHONES, WHEN YOU SEE  
6 THE IPHONE, YOU'LL BE ABLE TO SEE AT THE TOP OF THE  
7 ICON, THERE'S A LIGHT EFFECT AT THE TOP OF EACH  
8 ICON. IT GIVES A LUXURIOUS FEEL.

9 ON THEIR OWN PHONE, THE GT I9000, IT  
10 SAYS, "THE MENU ICONS WERE LACKING IN THREE  
11 DIMENSIONAL EFFECT USING LIGHT."

12 AND SO THE DIRECTION FOR IMPROVEMENT WAS  
13 INSERT EFFECTIVE LIGHT FOR SOFTER, MORE LUXURIOUS  
14 FEEL."

15 TAKE WHAT WAS GOOD ABOUT THE APPLE ICONS  
16 AND PUT IT IN YOUR PHONE.

17 SAMSUNG'S LAWYERS LIKE TO POINT TO THE  
18 LAST LINE ON THIS POINT THAT SAYS "REMOVE THE  
19 FEELINGS OF COPYING."

20 AND IT DOES SAY THAT.

21 BUT YOU KNOW WHAT SAMSUNG ACTUALLY DID.  
22 ON THIS SLIDE, YOU CAN SEE THESE ARE THE TWO  
23 DESIGNS FROM PX 44 NEXT TO THE DESIGN OF THE IPHONE  
24 THAT SAMSUNG ACTUALLY RELEASED.

25 YOU REMEMBER WE TALKED ABOUT THIS AND WE

1       SHOWED YOU HOW THE CLOCK ICON, THE PHONE ICON, AND  
2       THE GALLERY ICONS WERE ACTUALLY CHANGED TO LOOK  
3       MORE LIKE THE IPHONE. AND THAT WAS BECAUSE AT THE  
4       VERY TOP OF SAMSUNG'S CORPORATE STRUCTURE, THOSE  
5       EXECUTIVES WERE BOUND AND DETERMINED TO CASH IN ON  
6       THE IPHONE'S SUCCESS.

7               AS A FOOTNOTE, THERE MUST HAVE BEEN SOME  
8       QUESTION ABOUT WHETHER THIS GT I9000 IN THE PICTURE  
9       WAS SOLD IN THE UNITED STATES AS THE  
10      GALAXY S I9000.

11              BUT WHEN YOU LOOK AT THE BOX, IT'S JOINT  
12      EXHIBIT 1007, AT THE GALAXY A I9000, ON THE SIDE  
13      YOU WILL SEE THAT IT SAYS GT I9000. THIS WAS THE  
14      PHONE THEY RELEASED IN THE UNITED STATES.

15              THAT DOCUMENT WAS DATED MARCH 2010.

16              NEXT WE SHOWED YOU THE BEHOLD 3 DOCUMENT  
17      DATED MAY 2010, WHICH IS EXHIBIT 46, WHERE EVEN  
18      MORE CHANGES WERE MADE TO INCORPORATE IPHONE  
19      EFFECTS INTO THE GALAXY PRODUCT.

20              THE RESULT OF SAMSUNG'S THREE-MONTH CRASH  
21      PROJECT, THE GALAXY S I9000, WAS RELATED IN THE  
22      UNITED STATES IN JUNE OF 2010.

23              WE NOW KNOW THAT SAMSUNG GOT EXACTLY WHAT  
24      IT WANTED. SAMSUNG'S SMARTPHONE SALES, WHICH HAD  
25      BEEN SORT OF DOLDERING ALONG, STEADILY DECLINING,

1 SUDDENLY TOOK OFF AFTER THE FIRST IPHONE KNOCK-OFF  
2 WAS INTRODUCED INTO THE PRODUCT MIX.

3 AND SO SAMSUNG PROCEEDED TO RELEASE A  
4 WHOLE SERIES OF IPHONE KNOCK-OFFS, UP THROUGH THE  
5 DAY WHEN APPLE SUED THEM, AND EVEN AFTERWARDS.

6 WE ALSO KNOW NOW THAT IN AUGUST OF 2010,  
7 APPLE CALLED FOUL. IT CALLED SAMSUNG TO A MEETING  
8 TO PUT SAMSUNG ON NOTICE THAT SAMSUNG WAS  
9 INFRINGING APPLE'S PATENTS AND DESIGNS AND TO  
10 INSIST THAT SAMSUNG STOP COPYING.

11 WE ALSO KNOW FROM THE TESTIMONY THAT  
12 SAMSUNG GOT THE MESSAGE. WE BROUGHT YOU BY  
13 DEPOSITION MR. JUNWON LEE, SAMSUNG'S DIRECTOR OF  
14 LICENSING, AND HE SAID AT THAT MEETING APPLE WAS  
15 TALKING ABOUT SAMSUNG'S SMARTPHONE INFRINGED  
16 APPLE'S PHONE PATENTS AND DESIGN, SO THEY WERE  
17 COMPLAINING ABOUT OUR INFRINGEMENT, ABOUT APPLE'S  
18 PATENT AND DESIGNS IN THEIR PHONES.

19 AND, FINALLY, WE KNOW THAT INSTEAD OF  
20 DOING THE RIGHT THING, SAMSUNG CHOSE TO CONTINUE ON  
21 THE COPYING PATH OF ITS OWN AND TAKE US DOWN THE  
22 ROAD THAT HAS LED US TO THIS COURTHOUSE.

23 THAT, LADIES AND GENTLEMEN, IS THE  
24 CHRONOLOGY OF THE CASE BASED ON HISTORICAL  
25 DOCUMENTS. THAT IS WHERE THE TRUTH LINES.

1 THE THIRD BIG PICTURE POINT THAT I WANT  
2 TO MAKE IS THAT FROM THE VERY BEGINNING, SAMSUNG  
3 HAS DISRESPECTED THIS PROCESS.

4 APPLE BROUGHT YOU TWO OF ITS MOST SENIOR  
5 EXECUTIVES, MR. SCHILLER AND MR. FORSTALL, TO  
6 TESTIFY ABOUT APPLE'S HISTORY AND ITS CLAIMS. THEY  
7 WERE WILLING TO FACE CROSS-EXAMINATION.

8 NO SAMSUNG EXECUTIVE WAS WILLING TO COME  
9 HERE FROM KOREA AND TO ANSWER QUESTIONS UNDER OATH.

10 INSTEAD OF WITNESSES, THEY SENT YOU  
11 LAWYERS. SAMSUNG DID NOT CALL ITS MOST IMPORTANT  
12 DESIGNERS AND INVENTORS EVEN THOUGH WE KNOW THEY  
13 WERE HERE PHYSICALLY PRESENT IN SAN JOSE. THEY DID  
14 NOT CALL MINHYOUK LEE, THE MAN WHO ACTUALLY  
15 DESIGNED THE FIRST GALAXY PHONE. HE WAS JUST DOWN  
16 THE STREET, BUT HE DID NOT WANT TO SIT IN THAT  
17 CHAIR AND FACE YOU.

18 HE CERTAINLY DID NOT WANT TO TALK TO ME  
19 WHILE HE WAS UNDER OATH.

20 THAT DOESN'T MAKE HIM UNUSUAL. THERE'S A  
21 LOT OF PEOPLE THAT DON'T WANT TO TALK TO ME UNDER  
22 OATH. BUT HE DIDN'T WANT TO COME HERE AND DO THAT.

23 SAMSUNG ALSO DID NOT CALL THE INVENTORS  
24 ON ITS OWN PATENTS. MR. LEE WILL TALK ABOUT THAT  
25 LATER.

1                   INSTEAD, THEY SENT YOU LAWYERS.

2                   SAMSUNG DID NOT BRING A SINGLE WITNESS  
3 WHO ADMITTED EVER SEEING, MUCH LESS WRITING, ANY OF  
4 THE MANY COPYING DOCUMENTS WE SHOWED YOU.

5                   SAMSUNG HAD A CHANCE TO DEFEND ITSELF IN  
6 THIS CASE. INSTEAD, THEY SENT YOU LAWYERS.

7                   BUT LET'S CONSIDER WHO SAMSUNG DID BRING  
8 TO THIS TRIAL. THEY BROUGHT YOU JUSTIN DENISON,  
9 WHO TESTIFIED UNDER OATH THAT SAMSUNG DESIGNERS  
10 NEVER REFERRED TO APPLE PRODUCTS DURING THE DESIGN  
11 PROCESS.

12                   THEY BROUGHT YOU JINYEUN WANG, WHO  
13 TESTIFIED THAT SHE HAD NEVER REFERRED TO APPLE  
14 ICONS IN DESIGNING THE GALAXY S.

15                   BUT THEN IT TURNED OUT THAT SHE WAS  
16 ACTUALLY PART OF SAMSUNG'S LITIGATION TEAM, WORKING  
17 WITH ITS LAWYERS, AND THAT HER FILE DID CONTAIN  
18 SEVERAL APPLE DOCUMENTS, INCLUDING, AS YOU SEE  
19 HERE, THE APPLE IPHONE HUMAN INTERFACE GUIDELINES,  
20 A DOCUMENT THAT SHE OBTAINED IN 2008.

21                   AND THEN THE OTHER WITNESS, VERY  
22 INTERESTING WITNESS, WHO IS JIN SOO KIM, THE MAN  
23 WHO DESIGNED THE TABLET AND WHO TESTIFIED THAT EVEN  
24 THOUGH EXECUTIVES AT SAMSUNG KNEW HIS DESIGNS WERE  
25 PROBLEMATIC, AND EVEN THOUGH GOOGLE WANTED THE

1       DESIGNS CHANGED BECAUSE THEY WERE COPIES OF APPLE  
2       DESIGNS, THAT THOSE SAME EXECUTIVES NEVER BOTHERED  
3       TO TELL MR. KIM.

4               AND SO HE KEPT ON USING THOSE DESIGNS IN  
5       SAMSUNG PHONES.

6               IF YOU BELIEVE MR. KIM, THEN SAMSUNG HAS  
7       ADMITTED TO YOU THAT THE DECISION TO COPY WAS  
8       INTENTIONAL AND WILLFUL ON THE PART OF ITS HIGHEST  
9       EXECUTIVES. THEY NEVER TOLD THEIR DESIGNERS TO  
10       STOP. THEY NEVER TOLD THEM TO BE CAREFUL.

11               SO THESE ARE THE THREE BIG-PICTURE POINTS  
12       THAT I'D LIKE TO LEAVE YOU WITH:

13               TRUST THE DOCUMENTS;

14               FIND THE TRUTH IN THE CHRONOLOGY; AND,

15               RECOGNIZE THAT IF YOU'RE GOING TO INSIST  
16       ON EVIDENCE RATHER THAN ATTORNEY ARGUMENT, YOU  
17       HEARD NO DEFENSE FROM SAMSUNG.

18               NOW I'M GOING TO TALK ABOUT THE DETAILS  
19       OF APPLE'S INTELLECTUAL PROPERTY RIGHTS AND HOW  
20       THEY'VE BEEN VIOLATED.

21               WE ARE, AS I'M SURE YOU ARE AWARE FROM  
22       LISTENING PATIENTLY TO THE INSTRUCTIONS, ASSERTED  
23       DESIGN PATENTS, TRADE DRESS, AND UTILITY PATENTS IN  
24       THIS CASE.

25               LET'S START WITH THE DESIGN PATENTS. ON

1 THOSE PATENTS, YOU'RE GOING TO BE ASKED TO DECIDE  
2 TWO QUESTIONS: INFRINGEMENT AND VALIDITY.

3 THE TEST FOR INFRINGEMENT OF DESIGN  
4 PATENTS, WHICH JUDGE KOH JUST GAVE YOU, IS ACTUALLY  
5 PRETTY STRAIGHTFORWARD. INFRINGEMENT HAS OCCURRED,  
6 QUOTE, "IF THE OVERALL APPEARANCE OF A SAMSUNG  
7 DESIGN IS SUBSTANTIALLY THE SAME AS THE OVERALL  
8 APPEARANCE OF THE CLAIMED APPLE DESIGN PATENT."

9 AN IMPORTANT POINT. WE'RE TALKING ABOUT  
10 COMPARING DESIGN TO DESIGN. YOU WILL HAVE THE  
11 ACCUSED PHONES AND TABLETS IN THE JURY ROOM AND YOU  
12 SHOULD COMPARE THEM ONE BY ONE TO THE DRAWINGS IN  
13 THE PATENTS.

14 WE THINK YOU WILL CONCLUDE THAT THEY ARE  
15 MORE THAN SUBSTANTIALLY SIMILAR TO THE PATENTED  
16 DESIGNS.

17 LET ME NOTE, HOWEVER, AND THIS IS AGAIN A  
18 LITTLE SOMETHING THAT WAS A LITTLE UNUSUAL IN THE  
19 TRIAL HERE, NOT ALL OF THE ACCUSED PHONES ARE  
20 ACCUSED OF INFRINGING DESIGN PATENTS. SOME OF THE  
21 PHONES ARE APPARENTLY USED OF INFRINGING JUST THE  
22 UTILITY PATENTS.

23 SO THERE WERE A COUPLE OF CASES WHERE A  
24 PHONE WAS HANDED OUT FOR YOU TO COMPARE THAT WAS  
25 NOT ACCUSED OF A DESIGN PATENT. SO YOU NEED TO



1 MAKE SURE THAT THE YOU'RE COMPARING TO THE PATENT  
2 IS THE ONE THAT WAS ACTUALLY ACCUSED OF THE DESIGN  
3 PATENT SO THAT YOU'RE COMPARING THE DESIGN PATENT  
4 DRAWINGS TO THE ACTUAL PHONES THAT WE HAVE ACCUSED.

5 YOU WILL FIND A CHART, OUR CHART, THAT  
6 SETS OUT WHICH PHONES INFRINGE WHICH PATENTS AT  
7 EXHIBIT 25-A1. I'LL TALK ABOUT THAT EXHIBIT A LOT,  
8 BUT IT'S 25-A1, AND ON PAGE 3, THAT'S WHERE YOU  
9 HAVE OUR CHART OF WHICH PRODUCTS WE ACCUSE OF  
10 INFRINGING WHICH PATENTS.

11 SO LET'S LOOK AT THE ACCUSED PHONES.  
12 THIS IS THE GALAXY, THE SAMSUNG GALAXY S 4G  
13 COMPARED TO THE D'66 -- '677 PATENT.

14 AND THESE ARE ALL OF THE SAMSUNG PHONES  
15 THAT WE ACCUSE OF INFRINGING THE D'677 PATENT. YOU  
16 WILL HAVE THE OPPORTUNITY TO TAKE THOSE ONE BY ONE  
17 AND DETERMINE IF, IN YOUR VIEW, THE DESIGNS ARE  
18 SUBSTANTIALLY SIMILAR.

19 THIS IS THE GALAXY S 4G COMPARED TO THE  
20 D'087 PATENT. AND THESE ARE THE -- ALL OF THE  
21 PHONES THAT WE HAVE ACCUSED OF INFRINGING THE D'087  
22 PATENT.

23 FINALLY, THE TABLET AND THE D'889 PATENT.  
24 A COUPLE OF KEY, WHAT WE THINK ARE KEY POINTS THAT  
25 YOU HEARD THIS MORNING IN THE INSTRUCTIONS.

1 JUDGE KOH TOLD US THAT MINOR DIFFERENCES  
2 SHOULD NOT PREVENT A FINDING OF INFRINGEMENT.

3 SHE ALSO TOLD US THAT THE USE OF A MARK  
4 OR A LABEL TO IDENTIFY THE COURSE OF AN OTHERWISE  
5 INFRINGING DESIGN WILL NOT AVOID INFRINGEMENT.

6 SO THE SAMSUNG BRAND NAME ON THE PHONE IS  
7 NOT A DEFENSE.

8 AND FINALLY, JUDGE KOH TOLD US THAT WHEN  
9 YOU ARE COMPARING TWO DESIGNS, IF -- AND THIS IS A  
10 QUOTE -- "THE RESEMBLANCE BETWEEN THE TWO DESIGNS  
11 IS SUCH AS TO DECEIVE SUCH AN OBSERVER, INDUCING  
12 HIM TO PURCHASE ONE SUPPOSING IT TO BE THE OTHER,  
13 THEN THEY ARE SUBSTANTIALLY SIMILAR."

14 LET'S FOCUS ON THAT LANGUAGE FOR A  
15 MOMENT. THIS TEST DOES NOT REQUIRE US TO PROVE  
16 THAT CONSUMERS ARE OR WERE ACTUALLY CONFUSED.  
17 WE'RE GOING TO TALK ABOUT CONFUSION LATER WHEN WE  
18 GET TO TRADE DRESS, BUT HERE IN DESIGN PATENTS, ALL  
19 WE NEED TO PROVE IS THAT THE RESEMBLANCE BETWEEN  
20 THE TWO DESIGNS IS DECEPTIVE.

21 IN INSTRUCTION 46, JUDGE KOH EXPLICITLY  
22 TOLD US, "YOU DO NOT NEED, HOWEVER, TO FIND THAT  
23 ANY PURCHASERS ACTUALLY WERE DECEIVED OR CONFUSED  
24 BY THE APPEARANCE OF THE SAMSUNG PRODUCTS."

25 AGAIN, IMPORTANT TO KEEP IN MIND. ALL

1 THE ARGUMENTS THAT SAMSUNG MADE ABOUT THE SAMSUNG  
2 BRAND, ABOUT BOOTING UP THE DEVICES, ABOUT MOVING  
3 THROUGH THE VARIOUS SCREENS, ALL THAT STUFF IS  
4 IRRELEVANT TO DESIGN PATENTS BECAUSE IN DESIGN  
5 PATENTS, THE KEY ISSUE IS WHETHER THE DESIGNS  
6 THEMSELVES ARE SUBSTANTIALLY SIMILAR.

7 THAT IS WHY OUR EXPERTS, MR. BRESSLER AND  
8 DR. KARE, TESTIFIED THAT THE OVERALL VISUAL  
9 IMPRESSION OF THE ACCUSED PRODUCTS IS SO SIMILAR  
10 AND THAT IT IS DECEPTIVE AND THAT IS WHY IT IS SO  
11 IMPORTANT TO REMEMBER THAT SAMSUNG NEVER CALLED A  
12 WITNESS, EXPERT OR OTHERWISE, NO SAMSUNG WITNESS  
13 EVER SAT IN THAT CHAIR AND SAID "THESE DESIGNS ARE  
14 NOT SIMILAR."

15 JUDGE KOH CONCLUDES WITH THE ULTIMATE  
16 INSTRUCTION THAT SAYS, "WHILE THESE GUIDELINES MAY  
17 BE HELPFUL, THE TEST FOR INFRINGEMENT IS WHETHER  
18 THE OVERALL APPEARANCES OF THE ACCUSED DESIGN AND  
19 THE CLAIMED DESIGN ARE SUBSTANTIALLY THE SAME."

20 IN CROSS-EXAMINATION OF OUR WITNESSES,  
21 WHEN THEY TRIED TO CONTEST INFRINGEMENT, SAMSUNG'S  
22 LAWYERS FOCUSED ON TINY DETAILS THAT NO ORDINARY  
23 OBSERVER WOULD EVER NOTICE. SO WE TALKED ABOUT THE  
24 DIFFERENCE BETWEEN CORNERS WITH A RADIUS OF 10  
25 MILLIMETER VERSUS 13 MILLIMETERS, A DIFFERENCE

1 PRACTICALLY INVISIBLE TO THE HUMAN EYE.

2 WE TALKED ABOUT A MILLIMETER OR TWO  
3 DIFFERENCE IN THE WIDTH OF THE BEZEL AT THE BOTTOM  
4 VERSUS THE TOP.

5 AND, FINALLY, WE TALKED ABOUT WHETHER YOU  
6 CAN FEEL, NOT WHETHER YOU CAN SEE, BUT WHETHER YOU  
7 COULD FEEL THE EDGE OF THE GLASS WITH THE FINGER.

8 THE TEST IS OVERALL VISUAL APPEARANCE,  
9 NOT THESE MINOR DIFFERENCES.

10 THE MINOR DIFFERENCES HAVE NO EFFECT ON  
11 THE VISUAL APPEARANCE OF THESE PRODUCTS.

12 ON TABLETS, SAMSUNG'S ONLY ARGUMENT WAS  
13 THAT A MINOR DIFFERENCE ON THE BACK, TWO PIECES OF  
14 MATERIAL INSTEAD OF ONE, CHANGES THE OVERALL VISUAL  
15 IMPRESSION.

16 BUT IT DOESN'T. THE FRONTS ARE  
17 IDENTICAL.

18 SAMSUNG WILL REMIND YOU THAT CHRIS  
19 STRINGER, OUR DESIGNER WHO WE BROUGHT, HAD A DESIGN  
20 VISION, HE TESTIFIED ABOUT THIS QUITE PROUDLY, THAT  
21 THE BACK OF THE DEVICE BE ONE SEAMLESS PIECE OF  
22 MATERIAL, AND THAT'S ABSOLUTELY TRUE.

23 BUT THAT'S NOT THE TEST.

24 THE TEST IS NOT WHAT INSPIRED THE  
25 DESIGNER. THE TEST IS THE OVERALL VISUAL

1 IMPRESSION OF THE PATENTED DESIGN.

2 THIS CASE IS ABOUT INFRINGING OUR  
3 PATENTS. IT'S NOT ABOUT INFRINGING CHRIS  
4 STRINGER'S INSPIRATION.

5 SWITCHING TO THE D'305 PATENT, WHICH IS  
6 THE ICON, THE TEST FOR INFRINGEMENT IS EXACTLY THE  
7 SAME. AND THIS ONE IS EASY. JUST LOOK AT THE  
8 SCREENS.

9 AND, OF COURSE, WE DO HAVE SAMSUNG'S  
10 WELL-DOCUMENTED COPYING. THEY SAT WITH THE IPHONE  
11 AND WENT FEATURE BY FEATURE COPYING THE SMALLEST  
12 DETAIL.

13 THEY ASKED THEMSELVES, HOW DOES OUR APP  
14 SCREEN COMPARE TO THE IPHONE HOME SCREEN? AND THEY  
15 CHANGED THEIR ORIGINAL DESIGN INTO AN IPHONE LOOK  
16 ALIKE.

17 A LITTLE PRACTICAL PIECE OF ADVICE. YOU  
18 WILL HAVE THESE PHONES, THE SAMSUNG PHONES IN THE  
19 JURY ROOM, AND WHEN YOU WANT TO LOOK AT THIS ISSUE,  
20 THE WAY TO NAVIGATE ON A SAMSUNG PHONE IS YOU TURN  
21 IT ON, AND THAT WILL BRING UP THE HOME SCREEN. AND  
22 THEN WHEN YOU GET TO THE HOME SCREEN, IF YOU TOUCH  
23 THE BLUE BUTTON WITH THE FOUR WHITE DOTS DOWN IN  
24 THE CORNER, THAT WILL BRING UP THE APP SCREEN AND  
25 IT'S THE APP SCREEN THAT WE ARE ACCUSING AND YOU

1 CAN COMPARE THAT TO THE PATENT.

2 WE ARE NOT ACCUSING THE HOME SCREEN.

3 IT'S THE APP SCREEN THAT WE HAVE ACCUSED.

4 IN ADDITION TO DECIDING INFRINGEMENT, YOU  
5 WILL NEED TO DECIDE WHETHER OR NOT SAMSUNG HAS  
6 PROVEN BY CLEAR AND CONVINCING EVIDENCE, A HIGHER  
7 LEVEL OF PROOF, THAT THE APPLE PATENTS ARE INVALID.

8 SAMSUNG WANTS TO CONVINCEN YOU THE PATENT  
9 AND TRADEMARK OFFICE WAS WRONG WHEN IT APPROVED OUR  
10 PATENTS AND ALLOWED THEM TO ISSUE.

11 SAMSUNG HAS MADE TWO ARGUMENTS. THEY SAY  
12 THAT OUR PATENTS ARE INVALID BECAUSE THEY ARE  
13 FUNCTIONAL, AND BECAUSE THEY ARE OBVIOUS. I'M  
14 GOING TO DESCRIBE -- I'M GOING TO DISCUSS THESE  
15 SEPARATELY.

16 SAMSUNG, IN MY VIEW, SAMSUNG'S  
17 FUNCTIONALITY DEFENSE IS A WORD GAME. SAMSUNG  
18 OFFERED A LOT OF TESTIMONY ABOUT HOW PHONES HAVE A  
19 FUNCTION, HOW ROUNDED CORNERS WON'T GET CAUGHT ON  
20 YOUR POCKETS, AND HOW YOU PUSH ON ICONS.

21 BUT NONE OF THAT TESTIMONY HAS ANYTHING  
22 TO DO WITH THE ACTUAL LEGAL TEST FOR VALIDITY.  
23 THIS IS WHAT JUDGE KOH TOLD US THE LEGAL TEST FOR  
24 FUNCTIONALITY IS. SAMSUNG HAS TO PROVE BY CLEAR  
25 AND CONVINCING EVIDENCE THAT THE OVERALL APPEARANCE

1 OF AN APPLE PATENTED DESIGN IS DICTATED BY HOW,  
2 DICTATED BY HOW THE ARTICLE CLAIMED IN THE PATENT  
3 WORKS. OVERALL APPEARANCE DICTATED BY LAW THE  
4 ARTICLE WORKS.

5 NONE OF SAMSUNG'S ARGUMENTS OR EVIDENCE  
6 ABOUT FUNCTIONALITY MEET THIS IS TEST. THEY NEVER  
7 TALKED ABOUT THE OVERALL DESIGN.

8 SAMSUNG'S EXPERT, MR. ITAY SHERMAN, ONLY  
9 TESTIFIED ABOUT INDIVIDUAL ELEMENTS OF THE IPHONE  
10 AND IPAD DESIGNS. HE NEVER MENTIONED OVERALL  
11 APPEARANCE, AND HE NEVER SAID ANY ELEMENT WAS  
12 DICTATED BY THE WAY THE ARTICLE WORKED.

13 THERE ARE, AS YOU KNOW, PLENTY OF  
14 PERFECTLY FUNCTIONAL ALTERNATIVE DESIGNS. EVERY  
15 SMARTPHONE DOES NOT HAVE TO LOOK LIKE AN IPHONE.  
16 HERE ARE EXAMPLES OF PERFECTLY FUNCTIONAL PHONES.  
17 THEY ALL WORK. THEY ALL LOOK COMPLETELY DIFFERENT  
18 BECAUSE DESIGN OF A IPHONE IS A MATTER OF  
19 CREATIVITY.

20 WHEN IT COMES TO THE D'305 PATENT ON THE  
21 DISPLAY SCREEN DESIGN, NO SAMSUNG EXPERT TESTIFIED  
22 TO ANY OPINION WHATSOEVER REGARDING THE VALIDITY OF  
23 THIS PATENT.

24 ON THE OTHER HAND, WE BROUGHT YOU  
25 DR. SUSAN KARE, WHO IS ONE OF THE MOST RESPECTED





1 IS A LITTLE BIT CONVOLUTED. IT'S A LITTLE BIT  
2 TRICKY. IT HAS A LEGAL PART AND A NON-LEGAL PART.

3 THE LEGAL PART IS THE SPECIFIC PROCESS  
4 THAT JUDGE KOH DESCRIBED FOR YOU. IT'S IN YOUR  
5 INSTRUCTIONS.

6 THE NON-LEGAL PART IS A SET OF WHAT ARE  
7 CALLED OTHER FACTORS THAT YOU MUST CONSIDER WHEN  
8 YOU CONSIDER THE QUESTION OF OBVIOUSNESS.

9 THE LEGAL TEST REQUIRES YOU TO LOOK AT  
10 THE EVIDENCE THROUGH THE EYES OF A DESIGNER OF  
11 ORDINARY SKILL IN THE ART.

12 THEN, TAKING THAT ADVANTAGE POINT, AS  
13 JUDGE KOH EXPLAINED, IT REQUIRES YOU TO DECIDE  
14 WHETHER THERE IS ANY PRIOR ART DESIGN THAT WOULD  
15 SERVE AS WHAT THE LAW CALLS A PRIMARY REFERENCE,  
16 AND A PRIMARY REFERENCE WOULD BE A PIECE OF ART  
17 THAT CREATES BASICALLY THE SAME VISUAL IMPRESSION  
18 AS THE PATENTED DESIGN.

19 NEXT, THIS DESIGNER OF ORDINARY SKILL IS  
20 SUPPOSED TO DETERMINE WHETHER THERE ARE ANY  
21 SECONDARY REFERENCES WHICH ARE OTHER DESIGNS THAT  
22 ARE -- AND AGAIN, THIS IS A LEGAL TERM -- SO  
23 VISUALLY RELATED TO THE PRIMARY REFERENCE THAT THE  
24 APPEARANCE OF CERTAIN ORNAMENTAL FEATURES IN THE  
25 OTHER REFERENCE WOULD SUGGEST THE APPLICATION OF

1 THOSE FEATURES TO THE PRIMARY REFERENCE.

2 IN MY LANGUAGE, WHAT THIS MEANS IS YOU  
3 HAVE TO FIND ANOTHER PIECE OF ART THAT IS SO CLOSE  
4 IN APPEARANCE THAT A DESIGNER WOULD SEE, IN THE  
5 SECOND DESIGN, A REASON TO COMBINE THE TWO.

6 LET'S LOOK AT THE EVIDENCE THAT SAMSUNG  
7 OFFERED TO TRY TO MEET THIS LEGAL TEST.

8 FIRST, WHEN YOU LOOK AT YOUR NOTES, YOU  
9 WILL SEE, AS I MENTIONED EARLIER, THAT NO WITNESS,  
10 NO WITNESS TESTIFIED THAT THE ICON DESIGN, THE '305  
11 PATENT, WAS OBVIOUS. THERE WAS NO TESTIMONY  
12 WHATSOEVER ABOUT PRIOR ART TO THAT PATENT.

13 SECOND, YOU WILL RECALL THAT MR. SHERMAN,  
14 THE ONLY EXPERT SAMSUNG CALLED ON THE OBVIOUSNESS  
15 QUESTION, WAS NOT EVEN AN INDUSTRIAL DESIGNER.  
16 THEY BROUGHT YOU AN ELECTRICAL ENGINEER TO TRY TO  
17 TALK TO YOU ABOUT DESIGN.

18 BUT MOST IMPORTANT, I'M SURE YOU ARE  
19 AWARE NOW HAVING HEARD THESE TERMS, YOU NEVER HEARD  
20 A WORD FROM MR. SHERMAN ABOUT ANYTHING BEING A  
21 PRIMARY REFERENCE. YOU NEVER HEARD HIM MENTION A  
22 SECONDARY REFERENCE. HE NEVER USED THOSE TERMS.  
23 HE NEVER CARRIED OUT THAT TEST.

24 HE SHOWED YOU FOUR DESIGNS OF PHONES AND  
25 TWO TABLETS, BUT HE NEVER TOLD YOU THAT ANY ONE OF

1 THOSE DESIGNS MET THE LEGAL DEFINITION OF A PRIMARY  
2 REFERENCE.

3 YOU HAVE NO WAY OF KNOWING THAT WITHOUT  
4 EVIDENCE UNLESS YOU'RE GUESSING.

5 THERE HAS BEEN A COMPLETE FAILURE OF  
6 PROOF ON THAT ISSUE.

7 AND THE REASON IS CLEAR. SAMSUNG HAS NOT  
8 BEEN ABLE TO FIND A PRIOR ART DESIGN THAT HAS A  
9 FLAT, EDGE TO EDGE FRONT FACE LIKE THE APPLE IPHONE  
10 DESIGN. IT HAS NOT BEEN ABLE TO FIND A PRIOR  
11 DESIGN THAT CREATES THE SAME OVERALL VISUAL  
12 IMPRESSION AS THE D'677 AND THE D'087 PATENTS.

13 NONE OF THE FOUR PHONES THAT SAMSUNG  
14 SHOWED US MEETS THAT TEST. TWO OF THESE PHONES ARE  
15 NOT EVERYONE PRIOR ART.

16 AGAIN, AN IMPORTANT POINT. LET ME  
17 JUST -- I'LL SAY IT AND THEN WHEN WE TIE IT TO THE  
18 EVIDENCE, YOU'LL SEE WHY IT HAPPENED.

19 CHRIS STRINGER, WHEN HE WAS TESTIFYING,  
20 TESTIFIED THAT APPLE CONCEIVED OF THE TWO IPHONE  
21 PATENTS ON APRIL 20TH, 2006, EARLIER THAN THE  
22 FILING DATE.

23 SO HE TESTIFIED THAT HE GOT THE IDEA ON  
24 APRIL 20TH, 2006, AND MOREOVER, WE MOVED INTO  
25 EVIDENCE PLAINTIFF'S EXHIBIT 162 WHICH WERE DATED

1 CAD DRAWINGS OF THE DESIGNS IN ORDER TO PROVE THAT  
2 EARLIER DATE, APRIL 20TH, 2006.

3 THE KR'547, THE KOREAN PATENT DESIGN  
4 HERE, WASN'T PUBLISHED UNTIL JUNE 26TH, 2006.  
5 THAT'S AFTER THE APPLE INVENTION DATE, SO IT CANNOT  
6 BE PRIOR ART.

7 BUT EVEN IF IT WAS, IT DOESN'T LOOK  
8 ANYTHING LIKE THE IPHONE PATENTS. THERE IS NO  
9 EDGE-TO-EDGE CONTINUOUS MATERIAL ON THE FRONT FACE.  
10 IT'S NOT BLACK. IT'S NOT TRANSPARENT. IT HAS NO  
11 BEZEL. AND ALL OF THE PROPORTIONS ARE DIFFERENT.  
12 THE PHONE AND THE SCREEN ARE ALMOST SQUARE.

13 THE LG PRADA CANNOT BE PRIOR ART BECAUSE  
14 THERE IS NO EVIDENCE, AND YOU'LL SEE THIS IN THE  
15 DETAIL IN YOUR INSTRUCTION, BUT THERE'S NO EVIDENCE  
16 THAT THIS PHONE WAS EVER DISPLAYED OR SOLD IN THE  
17 UNITED STATES, WHICH IS THE LEGAL REQUIREMENT FOR  
18 IT TO BE PRIOR ART.

19 MR. SHERMAN TRIED TO DODGE THAT ISSUE BY  
20 SAYING IT WAS DISCLOSED IN 2006, BUT HE NEVER SAID  
21 THAT THAT HAPPENED IN THE UNITED STATES.

22 AND, AGAIN, EVEN IF IT HAD BEEN, IT'S  
23 VERY DIFFERENT FROM THE IPHONE. THERE IS NO  
24 EDGE-TO-EDGE GLASS. THERE'S NO BEZEL. THE SCREEN  
25 ISN'T CENTERED. AND IT HAS A LONG, SHINY PHYSICAL

1           BUTTON STICKING UP WITH FROM THE FRONT FACE.

2                       AS FOR THE JP'638, WE KNOW THAT IT WAS  
3 NOT FLAT. ITS DESIGN WAS AT THE OTHER END OF THE  
4 SPECTRUM FROM THE IPHONE. IT CLEARLY IS NOT BLACK,  
5 AND IT DOESN'T HAVE THE CONTINUOUS EDGE-TO-EDGE  
6 SURFACE.

7                       FINALLY, THEY SHOWED US THE JP'383, BUT  
8 IT HAS NO BEZEL, IT'S NOT BLACK, AND IT DOESN'T  
9 HAVE THE CONTINUOUS FRONT SURFACE EDGE TO EDGE,  
10 WHICH IS THE DEFINING CHAIR CHARACTERISTIC OF THE  
11 IPHONE, AND THERE ARE NO SIDE BORDERS AROUND THE  
12 SCREEN.

13                      IT SHOULD BE CLEAR TO YOU WHY NO REAL  
14 DESIGNER WAS WILLING TO COME TO THIS TRIAL AND  
15 TESTIFY UNDER OATH THAT ANY OF THESE REFERENCES WAS  
16 A PRIMARY REFERENCE AS THE LAW REQUIRES.

17                      THE SAME ANALYSIS HOLDS TRUE FOR THE  
18 D'889 PATENT. SAMSUNG SHOWED YOU A VIDEO, A VIDEO  
19 OF THE FIDLER TABLET AND HOPED THAT YOU WOULD FIND  
20 THAT THAT WAS CLEAR AND CONVINCING EVIDENCE OF  
21 INVALIDITY.

22                      BUT, AGAIN, MR. SHERMAN WAS NOT WILLING  
23 TO TELL YOU THAT THAT WAS A PRIMARY REFERENCE.

24                      WE BROUGHT, WE BROUGHT THIS ACTUAL  
25 REPLICAS OF FIDLER SO THAT YOU COULD SEE THAT WHAT

1 YOU CAN'T SEE FROM THE VIDEO, THAT IT WAS A  
2 TRADITIONAL PICTURE FRAME DESIGN. IT CERTAINLY  
3 DOESN'T HAVE AN ALL GLASS FACE THAT THE WORLD HAS  
4 FOUND SO DISTINCTIVE IN THE APPLE TABLET DESIGN.

5 THE OTHER TABLET, THE TC1000, COULD NOT  
6 BE MORE DIFFERENT.

7 AND, AGAIN, EVEN MR. SHERMAN WAS  
8 UNWILLING TO CALL THIS A PRIMARY REFERENCE.

9 AND AS JUDGE KOH TELLS YOU IN YOUR  
10 INSTRUCTIONS, WITHOUT A PRIMARY REFERENCE, YOU  
11 CANNOT HOLD A PATENTED DESIGN OBVIOUS.

12 THE SECOND -- THAT'S THE LEGAL PART I  
13 TOLD YOU ABOUT.

14 THE SECOND PART OF THE OBVIOUSNESS TEST  
15 IS WHAT THE LAW CALLS THE OTHER FACTORS YOU  
16 CONSIDER. THESE FACTORS ARE, FOR ME, A LITTLE BIT  
17 EASIER TO GET MY HANDS AROUND BECAUSE THEY'RE REAL  
18 WORLD FACTORS THAT YOU CAN LOOK AT TO VALIDATE THE  
19 DECISION THAT YOU'RE ASKED TO MAKE.

20 HOW DID THE REAL WORLD ACTUALLY REACT TO  
21 APPLE'S INVENTIONS? DID IT IGNORE THEM? OR DID IT  
22 RECOGNIZE THEM AS SOMETHING NEW?

23 HERE THOSE OTHER FACTORS ALL CONFIRM IN  
24 AN OVERWHELMING FASHION THAT APPLE'S DESIGNS WERE  
25 NEW. ON THE INITIAL -- ON THE ISSUE OF INITIAL

1 SKEPTICISM, IT'S A LONG TIME AGO, THREE WEEK AGO,  
2 BUT YOU MAY REMEMBER THAT PHIL SCHILLER CAME HERE  
3 AND TESTIFIED THAT WHEN THEY FIRST SAW IT, BOTH THE  
4 EXECUTIVES OF MICROSOFT AND PALM PREDICTED THAT THE  
5 IPHONE WOULD FAIL.

6 YOU ALSO KNOW, HOWEVER, THAT A CLAIM FOR  
7 THE DESIGN WAS OVERWHELMING. I ALREADY SHOWED YOU  
8 EVIDENCE OF THE MEDIA PHRASING THE IPHONE DESIGN.  
9 IT WAS DEEMED GORGEOUS AND BEAUTIFUL.

10 AND AS YOU MAY RECALL, THE PATENT AND  
11 TRADEMARK OFFICE ITSELF CREATED AN EXHIBIT OF  
12 IPHONES THAT RECENTLY GOT MOVED TO THE SMITHSONIAN.

13 THE SAME IS TRUE FOR COMMERCIAL SUCCESS.  
14 APPLE SELLS MILLIONS OF IPHONES AND IPADS EVERY  
15 YEAR.

16 HAVE I MENTIONED THAT SAMSUNG COPIED THE  
17 DESIGN? I THINK I MAY HAVE SAID THAT.

18 EVERYONE, EVEN SAMSUNG, THOUGHT THAT THE  
19 IPHONE CHANGED THE WORLD. AN OBVIOUS DESIGN IS NOT  
20 CALLED REVOLUTIONARY BY THE DESIGNER'S BIGGEST  
21 COMPETITOR. IT DOESN'T GET NAMED INVENTION OF THE  
22 YEAR OR INSPIRE AN EXHIBIT AT THE PTO.

23 SAMSUNG WAS THE IPHONE'S BIGGEST FAN.  
24 THEY KNEW A GOOD THING WHEN THEY SAW IT. THEY  
25 TRIED TO COMPETE WITH IT. AND WHEN THEY COULDN'T,





1 THIS CASE COVERING ITS IPHONE AND ITS IPAD DESIGNS.

2 THE ELEMENTS OF EACH OF THOSE TRADE  
3 DRESSES ARE LISTED IN YOUR JUROR NOTEBOOKS SO I  
4 WON'T TAKE THE TIME TO READ THEM HERE.

5 THE FIRST OF THE TRADE DRESSES ON THE  
6 LEFT HAS BEEN REGISTERED AT THE U.S. PTO. THERE IS  
7 A VERBAL DESCRIPTION IN THE REGISTRATION  
8 CERTIFICATE, BUT IT IS THE PICTURE THAT IS THE  
9 TRADE DRESS, NOT THE WORDS.

10 TO MAKE IT WORSE, THE PTO'S -- THE TITLE  
11 ON THE REGISTRATION SAYS TRADEMARK REGISTRATION,  
12 BUT THAT'S HOW THEY REGISTER TRADE DRESSES. SO  
13 EVEN -- WE DON'T HAVE TRADEMARKS IN THIS CASE.  
14 THERE'S TWO OTHER THINGS WE DON'T HAVE IN THIS  
15 CASE. WE HAVE EVERYTHING ELSE IN THIS CASE, BUT WE  
16 DON'T HAVE TRADEMARK.

17 FIRST, AS THE JUDGE TOLD US, YOU MUST  
18 DETERMINE WHETHER APPLE'S TRADE DRESS IS  
19 PROTECTABLE. TWO-PART TEST. IT'S PROTECTABLE IF  
20 IT'S NON-FUNCTIONAL AND IF IT HAS WHAT THE LAW  
21 CALLS SECONDARY MEANING.

22 FOR APPLE'S REGISTERED TRADE DRESS,  
23 BECAUSE IT HAS BEEN REVIEWED BY THE PTO, THE BURDEN  
24 OF PROOF IS ON SAMSUNG. SAMSUNG HAS TO PROVE THAT  
25 THE DESIGN WAS FUNCTIONAL OR THAT IT LACKED

1 SECONDARY MEANING IN ORDER TO INVALIDATE OUR  
2 INTELLECTUAL PROPERTY.

3 FOR THE UNREGISTERED TRADE DRESSES, WE  
4 HAVE TO PROVE THE OTHER SIDE OF THAT COIN. WE HAVE  
5 TO PROVE THAT THE DESIGNS ARE NOT FUNCTIONAL AND  
6 THAT THEY HAVE SECONDARY MEANING.

7 WE'RE ALL TOGETHER ON THIS SO FAR? IS  
8 THAT RIGHT? OKAY.

9 THE TEST IS THE SAME DEPENDING --  
10 IRRESPECTIVE OF WHO HAS TO PROVE IT.

11 TRADE DRESS IS NOT FUNCTIONAL IF -- AND  
12 THIS IS A KEY PHRASE -- IF TAKEN AS A WHOLE, SO  
13 YOU'RE LOOKING AT THE ENTIRE TRADE DRESS, IF TAKEN  
14 AS A WHOLE, THE COLLECTION OF TRADE DRESS ELEMENTS  
15 IS NOT ESSENTIAL TO THE PRODUCT'S USE OR PURPOSE OR  
16 DOES NOT AFFECT THE TOTAL COST OR QUALITY OF THE  
17 PRODUCT, EVEN IF CERTAIN PARTICULAR ELEMENTS OF THE  
18 TRADE DRESS MAY BE FUNCTIONAL.

19 YOU SEE WHERE I'M GOING WITH THAT RIGHT  
20 AWAY. ALL OF THE ELEMENTS HERE WENT TO ELEMENTS,  
21 WENT TO WHETHER A CORNER DID THIS, WHETHER A  
22 PICTURE DID THIS, WHETHER A COLOR WAS IMPORTANT.

23 BUT THE TEST GOES TO THE ENTIRE TRADE  
24 DRESS AS A WHOLE, AND SAMSUNG -- WHOEVER HAS THE  
25 BURDEN OF PROOF HAD TO PROVE THE TRADE DRESS AS A

1           WHOLE WAS NOT FUNCTIONAL.

2                       THE ALTERNATIVE DESIGNS THAT YOU HAVE  
3           SEEN FOR THE IPHONE AND THE IPAD, AS WELL AS ALL  
4           THE DIFFERENT PHONE PICTURES, ALL THE MODELS THAT  
5           APPLE LOOKED AT BEFORE THEY CHOSE THIS, THE  
6           PHYSICAL MODELS THAT WERE IN EVIDENCE THAT  
7           MR. STRINGER BROUGHT TO COURT DEMONSTRATE THAT THE  
8           SPECIFIC DESIGN OF THE IPHONE AND THE IPAD IS NOT  
9           ESSENTIAL TO THE PRODUCT'S USE OR PURPOSE.

10                      NO ONE CAN SAY THAT THERE IS ONLY ONE WAY  
11           TO DESIGN A TABLET OR THAT THERE IS ONLY ONE WAY TO  
12           DESIGN A SMARTPHONE.

13                      AND THERE IS NO RECORD WHATSOEVER THAT  
14           APPLE'S DESIGNS WERE DRIVEN BY COST.    IN FACT, YOU  
15           HEARD MR. STRINGER TESTIFIED THAT APPLE'S DESIGNS  
16           WERE DRIVEN SOLELY BY THE DESIRE, AS HE PUT IT,  
17           QUOTE, "TO CREATE SOMETHING THAT SEEMED SO  
18           WONDERFUL THAT YOU CAN'T IMAGINE HOW YOU WOULD  
19           FOLLOW IT."

20                      THAT WAS NOT A COST-BASED OR COST-DRIVEN  
21           DESIGN PROCESS THAT HE TESTIFIED ABOUT.

22                      WE THINK THERE CAN BE NO QUESTION THAT  
23           THE IPHONE AND THE IPAD TRADE DRESS HAVE SECONDARY  
24           MEANING.   THESE APPEARANCES ARE INDELIBLY  
25           ASSOCIATED WITH APPLE.   YOU HEARD THAT FROM

1 MR. SCHILLER; YOU HEARD THAT FROM APPLE'S SURVEY  
2 EXPERT, THAT'S WHY WE BROUGHT THE SURVEY EXPERTS,  
3 MR. PORET; AND YOU HEARD THAT FROM APPLE'S  
4 MARKETING EXPERT, DR. WINER.

5 IF YOU FIND THAT APPLE'S IPAD TRADE DRESS  
6 IS PROTECTABLE, YOU WILL NEED TO DESIGN IF THE  
7 GALAXY -- SAMSUNG'S GALAXY TAB 10.1 PRODUCT  
8 INFRINGES IT.

9 WE HAVE -- THERE'S TWO DIFFERENT CLAIMS,  
10 INFRINGEMENT AND DILUTION. THE INFRINGEMENT CLAIM  
11 IS ALLEGED ONLY AGAINST THE TABLET.

12 THE TEST FOR INFRINGEMENT IS WHETHER OR  
13 NOT SAMSUNG'S GALAXY TAB 10.1 IS LIKELY TO CAUSE  
14 CONSUMERS TO BE CONFUSED AS TO THE SOURCE OF THE  
15 PRODUCT.

16 SO THIS IS WHERE WE'RE APPLYING A  
17 DIFFERENT TEST THAN IN THE DESIGN PATENTS. FOR THE  
18 DESIGN PATENTS, WE HAD TO PROVE THAT THERE WAS  
19 SIMILARITY. HERE WE HAVE TO PROVE WHAT THE LAW  
20 CALLS A LIKELIHOOD OF CONFUSION, AND WE THINK WE  
21 SHOWED THAT TO YOU.

22 IF YOU REMEMBER PLAINTIFF'S EXHIBIT 59,  
23 THIS WAS THE EVIDENCE THAT THE PURCHASERS OF THE  
24 GALAXY TABS AT BEST BUY MISTAKENLY PURCHASED THEM  
25 THINKING THAT THEY WERE IPADS AND RETURNED THEM

1 WHEN THEY REALIZED THAT THEY WERE NOT.

2 THIS -- AGAIN, THIS IS WHY I KEEP TALKING  
3 ABOUT HISTORICAL DOCUMENTS. THIS IS A HISTORICAL  
4 DOCUMENT. THIS ACTUALLY HAPPENED. IT'S NOT  
5 CONJECTURE. IT'S NOT LAWYER'S ARGUMENT. THIS  
6 HAPPENED IN THE REAL WORLD. IT'S NOT HYPOTHETICAL.  
7 WE KNOW THERE WAS CONFUSION.

8 MOREOVER, SAMSUNG KNEW THAT THIS WOULD  
9 HAPPEN BECAUSE, AS YOU WILL RECALL, ITS VERY OWN  
10 SURVEYS SHOWED THAT OVER HALF OF THE PEOPLE WHO  
11 RESPONDED TO A SURVEY AFTER WATCHING AN AD FOR THE  
12 GALAXY TAB TELEVISION COMMERCIAL SAID THEY THOUGHT  
13 THE APPLE -- THAT THE AD WAS FOR APPLE, NOT  
14 SAMSUNG.

15 THE MARKET WAS CONFUSED AT THE TIME THESE  
16 PRODUCTS CAME OUT.

17 SAMSUNG HAS TALKED A LOT ABOUT CONFUSION  
18 AT THE POINT OF SALE, BUT THAT'S NOT, AS YOU HEARD,  
19 THE ONLY PLACE WHERE CONFUSION CAN HAPPEN.

20 MR. SCHILLER TALKED ABOUT CONFUSING  
21 DRIVING BY SIGNS ON THE FREEWAY. YOU CAN'T TELL  
22 WHOSE COMPANY IS ADVERTISING, AND WE SAW THE TYPE  
23 OF CONFUSION THAT WAS REPORTED IN THIS MAGAZINE  
24 WHERE THE AUTHOR STATED, "IN MY HANDS-ON TESTING,  
25 THE TAB 10.1 ACHIEVED PERHAPS THE BEST DESIGN

1 COMPLIMENT AN ANDROID TABLET COULD HOPE FOR, OFTEN  
2 BEING MISTAKEN BY PASSERS-BY, INCLUDING APPLE IPAD  
3 USERS, FOR AN IPAD 2."

4 WE BELIEVE THAT WE HAVE GIVEN YOU AMPLE  
5 EVIDENCE TO FIND, FROM REAL WORLD EXPERIENCE, THAT  
6 THERE WAS CONFUSION AND THAT, THEREFORE, SAMSUNG  
7 INFRINGED THE IPAD TRADE DRESS.

8 AGAIN, IF YOU FIND THAT OUR TRADE DRESSES  
9 ARE PROTECTABLE, WE WOULD NEED YOU TO DECIDE IF  
10 SAMSUNG'S GALAXY PHONES AND THE GALAXY TAB 10.1  
11 PRODUCTS DILUTE THEM. WE HAVE THE INFRINGEMENT  
12 CLAIM AND WE HAVE THE DILUTION CLAIM.

13 THE TEST FOR TRADE DRESS DILUTION IS  
14 WHETHER THE IPHONE AND IPAD -- TRADE DRESSES ARE  
15 FAMOUS AND WHETHER THE SAMSUNG PRODUCTS ARE LIKELY  
16 TO DILUTE THE DISTINCTIVENESS OF THE TRADE DRESS.

17 IN OTHER WORDS, ARE THE SAMSUNG PRODUCTS  
18 LIKELY TO CAUSE THE APPLE PRODUCTS TO BE LESS  
19 UNIQUELY ASSOCIATED WITH APPLE?

20 WE SUBMIT THERE'S NO QUESTION ABOUT  
21 WHETHER THE PRODUCTS ARE FAMOUS. AS WE SAW, AND  
22 I'VE SHOWN YOU TWICE ALREADY, SAMSUNG'S OWN  
23 DOCUMENTS MAKE THAT POINT FOR US. THE GRAVITY TANK  
24 STUDY THAT COLLECTED ALL THE PRESS REPORTS AND HITS  
25 PROVED THAT THESE PRODUCTS WERE FAMOUS.

1 AS FOR THE IPAD, WE SHOWED YOU A WALL  
2 STREET JOURNAL ARTICLE THAT SAID THAT THE IPAD WAS  
3 A LAPTOP KILLER AND A GAME CHANGER. THESE PRODUCTS  
4 WERE FAMOUS.

5 AS FOR DILUTION, YOU WILL HAVE THESE  
6 PRODUCTS, YOU CAN SEE FOR YOURSELF THE SIMILARITY  
7 OF DESIGN. IF YOU COMPARE THE GALAXY PRODUCTS TO  
8 THE IPHONE AND IPAD, YOU CANNOT HELP BUT REACH THE  
9 CONCLUSION THAT SAMSUNG'S DESIGNS ARE SO SIMILAR TO  
10 THE APPLE DESIGNS THAT THEY ARE LIKELY TO CAUSE  
11 APPLE'S DESIGNS TO BE VIEWED AS LESS THAN UNIQUE IN  
12 THE MARKETPLACE.

13 HERE IS WHERE THERE'S A DIFFERENCE  
14 BETWEEN US, AND IT'S IMPORTANT HERE. THE CRITICAL  
15 IMPORTANT THING ABOUT DILUTION WHERE OUR EVIDENCE  
16 DIFFERS IS THE ISSUE OF TIMING.

17 AS JUDGE KOH TOLD YOU, WHEN YOU'RE  
18 LOOKING AT DILUTION, YOU'RE LOOKING AT DILUTION AS  
19 OF THE DATE THE PRODUCTS CAME INTO THE MARKET. SO  
20 WE HAD TO PROVE THAT THEY WERE FAMOUS BEFORE THEY  
21 CAME INTO THE MARKET AND THAT THE DILUTION OCCURRED  
22 WHEN -- AT THE TIME THE PRODUCTS CAME INTO THE  
23 MARKET.

24 THAT'S WHY THE ADVERTISING WAS SO  
25 IMPORTANT, BECAUSE IT WAS THE FIRST TIME -- YOU

1 REMEMBER THAT MR. SHEPPARD GOT ON THE STAND AND HE  
2 SAID, WELL, THERE WAS CONFUSION BECAUSE EVERYBODY  
3 KNEW ABOUT THE APPLE PRODUCTS AND THIS WAS THE  
4 FIRST TIME THEY WERE SEEING THE SAMSUNG AD.

5 WELL, THAT IS THE DILUTION, BECAUSE THAT  
6 WAS HAPPENING AT THE TIME THEY WERE INTRODUCING  
7 THEIR PRODUCT INTO THE MARKET.

8 SAMSUNG PUT ON THE BIG SCREEN AND SAID,  
9 OH, LOOK, EVERYBODY USES THESE DESIGNS.

10 BUT IF YOU LOOK AT THE DATES, THEY'RE  
11 SHOWING YOU WHAT'S HAPPENING TODAY. THEY'RE  
12 SHOWING YOU THE EFFECT OF THEIR TORT. THEY LED THE  
13 WAY. THEY INTRODUCED THE COPYING DESIGNS AND  
14 OTHERS HAVE FOLLOWED THEM.

15 BUT IF YOU APPLY THE TEST AT THE CORRECT  
16 LEGAL TIME, YOU WILL SEE THAT IT WAS SAMSUNG THAT  
17 DILUTED WHAT, AT THE TIME, WAS OUR WORLD FAMOUS  
18 DESIGNS.

19 I HAD TWO SORT OF EYE-OPENING MOMENTS IN  
20 THE TRIAL. ONE I TOLD YOU ABOUT, THIS THREE-MONTH  
21 CRASH DESIGN.

22 THE OTHER ONE WAS MR. DENISON WHEN HE  
23 STOOD THERE AND HE SAID SAMSUNG SPENT A BILLION  
24 DOLLARS LAST YEAR, A BILLION DOLLARS JUST ON  
25 MARKETING ITS PRODUCTS IN THE UNITED STATES.



1            THAT IS THE DEFINITION OF DILUTION.    THEY  
2            HAVE SPENT A BILLION DOLLARS MIMICKING OUR  
3            DESIGNING AND HOLDING IT OUT TO THE WORLD SO THAT  
4            THE APPLE DESIGN IS NO LONGER SEEN AS UNIQUE.

5            UTILITY PATENTS.    STILL WITH ME?    I DON'T  
6            HAVE -- I CAN'T TELL YOU TO STAND UP AND TAKE A  
7            BREAK.    DO THAT IN YOUR HEAD, BUT PAY ATTENTION,  
8            TOO, AT THE SAME TIME.

9            THE UTILITY PATENT CLAIMS.

10            WHILE SAMSUNG WAS COPYING THE OUTSIDE OF  
11            THE IPHONE, IT WAS ALSO BUSY COPYING THE USER  
12            INTERFACE AND THE INNER WORKINGS OF THE IPHONE.  
13            LIKE DESIGN PATENTS, UTILITY PATENTS PRESENT TWO  
14            ISSUES:    INFRINGEMENT AND VALIDITY.

15            WE HAVE ACCUSED ALL THREE SAMSUNG  
16            COMPANIES OF DIRECT INFRINGEMENT.

17            JUDGE KOH GAVE US THE TEST FOR DIRECT  
18            INFRINGEMENT.    FIRST, THE INFRINGER MUST MAKE, USE  
19            OR SELL THE ACCUSED PRODUCTS IN THE UNITED STATES.  
20            ALL THREE OF THESE COMPANIES SOLD PRODUCTS INTO THE  
21            UNITED STATES.    SEC SELLS TO ITS AMERICAN  
22            SUBSIDIARIES IN THE UNITED STATES AND THEY SELL TO  
23            CARRIERS AND CUSTOMERS IN THE UNITED STATES .

24            SECOND, THE ACCUSED DEVICES MUST MEET  
25            EVERY ELEMENT OF THE ALLEGED PATENT CLAIM.

1           LET'S START WITH THE '381 PATENT, THE  
2           BOUNCEBACK PATENT. PROFESSOR BALAKRISHNAN  
3           EXPLAINED HOW SAMSUNG'S PRODUCTS INFRINGE. HE  
4           ANALYZED THE PERFORMANCE OF 21 ACCUSED PRODUCTS.  
5           HE THEN LOOKED AT ALL OF THE RELEVANT CODE THAT  
6           SAMSUNG PROVIDED FOR EACH OF THE FOUR MAJOR  
7           VERSIONS OF THE ANDROID OPERATING SYSTEM THAT RUN  
8           ON THE ACCUSED DEVICES.

9           NO SAMSUNG EXPERT, NO SAMSUNG WITNESS  
10          TESTIFIED THAT SAMSUNG IS NOT USING THE BOUNCEBACK  
11          FEATURE. NO ONE CAME HERE AND DENIED IT.

12          NEXT UP, THE '163 PATENT, THE DOUBLE TAP  
13          TO ZOOM.

14          PROFESSOR SINGH EXPLAINED HOW SAMSUNG'S  
15          PRODUCTS INFRINGE. DR. SINGH STUDIED 24 ACCUSED  
16          PRODUCTS AND ALL FOUR RELEASES OF SAMSUNG'S SOURCE  
17          CODE IN GREAT DETAIL AND PROVIDED THEIR BEHAVIOR  
18          ACROSS ALL SOURCE CODE VERSIONS PROVIDED BY  
19          SAMSUNG.

20          HE DEMONSTRATED THAT FOR YOU AND HE READ  
21          THE SOURCE CODE.

22          AGAIN, SAMSUNG NEVER PUT UP A  
23          NON-INFRINGEMENT DEFENSE.

24          FINALLY, ON THE '915 SCROLL VERSUS  
25          GESTURE PATENT, DR. SINGH DEMONSTRATED AND

1 EXPLAINED IN DETAIL HOW SAMSUNG'S PRODUCTS  
2 INFRINGE. DR. SINGH EXAMINED THE CODE FOR ALL 24  
3 PRODUCTS AND EXPLAINED HOW AN EVENT OBJECT CAUSES  
4 SCROLL OR GESTURE IN EACH PRODUCT.

5 SO WHAT DOES SAMSUNG SAY? ONCE AGAIN,  
6 SAMSUNG CLAIMS THAT EACH OF THESE PATENTS IS  
7 INVALID.

8 SAMSUNG RAISES TWO INVALIDITY DEFENSES:  
9 ANTICIPATION AND OBVIOUSNESS.

10 FOR ANTICIPATION, SAMSUNG HAD TO FIND  
11 EVERY CLAIM LIMITATION IN A SINGLE PIECE OF PRIOR  
12 ART. ESSENTIALLY SAMSUNG HAS TO SHOW THAT A SINGLE  
13 PIECE OF PRIOR ART WOULD HAVE INFRINGED EACH OF  
14 THESE PATENTS.

15 FOR OBVIOUSNESS, SAMSUNG HAD TO SHOW THAT  
16 ONE OR MORE PIECES OF PRIOR ART, THAT IT WOULD HAVE  
17 BEEN OBVIOUS TO A PERSON OF ORDINARY SKILL IN THE  
18 ART TO COMBINE WOULD GET YOU TO THE APPLE INVENTION  
19 WITHOUT USING HINDSIGHT, WITHOUT USING WHAT YOU  
20 KNOW NOW AND SAYING, OH, YES, I CAN FIND THOSE  
21 PIECES IN VARIOUS PLACES.

22 SAMSUNG NEVER MADE THIS SHOWING.  
23 CERTAINLY IT DID NOT MAKE A CLEAR AND CONVINCING  
24 SHOWING, WHICH WAS THEIR BURDEN.

25 LET ME TALK ABOUT SOME OF THE KEY ISSUES

1 ABOUT SAMSUNG'S PRIOR ART.

2 SAMSUNG ASSERTS THAT. SO SAME PIECES OF  
3 ARE RELATE TO MORE THAN ONE OF APPLE'S PATENTS.  
4 NONE OF THESE REFERENCES INVALIDATES ANY OF APPLE'S  
5 PATENTS BECAUSE EACH IS MISSING MULTIPLE CLAIM  
6 LIMITATIONS.

7 FIRST WE SAW THE DIAMONDTOUCH. BUT IF  
8 YOU RECALL, YOU DIDN'T ACTUALLY SEE THE  
9 DIAMONDTOUCH. WHEN SAMSUNG WAS PUTTING ON THEIR  
10 EVIDENCE, YOU SAW PICTURES OF THE DIAMONDTOUCH PUT  
11 ON THE WALL. IT WASN'T UNTIL MR. JACOBS MADE THEM  
12 BRING THE THING OUT OF THE CLOSET THERE THAT YOU  
13 ACTUALLY SAW THE DIAMONDTOUCH, AND AS SOON AS YOU  
14 SEE THE DIAMONDTOUCH, YOU REALIZE THAT IT DOES NOT  
15 HAVE AN INTEGRATED TOUCHSCREEN DISPLAY AND IT  
16 DOESN'T HAVE MANY OF THE OTHER LIMITATIONS OF THE  
17 '915 AND THE '381 PATENT. THESE ARE -- ON THE  
18 SCREEN HERE, THESE ARE THE VARIOUS LIMITATIONS THAT  
19 ARE MISSING FROM THE DIAMONDTOUCH.

20 IT REALLY IS DIFFICULT TO IMAGINE HOLDING  
21 THE DIAMONDTOUCH IN YOUR HAND AND MAKING A PHONE  
22 CALL.

23 THE SECOND PIECE OF ART THEY SHOWED YOU  
24 WAS THE LAUNCHTILE, BUT AS DR. BALAKRISHNAN  
25 EXPLAINED, THE LAUNCHTILE DOESN'T SOLVE THE FROZEN

1 SCREEN OR DESERT FOG PROBLEMS THAT THE '381 AND  
2 '163 PATENTS SOLVED.

3 DR. BALAKRISHNAN STUDIED THE SOURCE CODE  
4 AND TESTIFIED THAT IT DOESN'T DO ANYTHING, QUOTE,  
5 AND THIS IS ONE OF THE LIMITATIONS OF THE PATENT,  
6 SAYS, "THE PATENT HAS TO REACT," QUOTE, "IN  
7 RESPONSE TO THE EDGE OF A DOCUMENT BEING REACHED."

8 THAT'S THE WHOLE NATURE OF THE INVENTION  
9 WAS THAT IT TELLS YOU WHEN YOU GOT TO THE EDGE OF  
10 THE DOCUMENT AND IT HAS TO BE IN THE SOURCE CODE.

11 SAMSUNG'S EXPERT, DR. VAN DAM, ADMITTED  
12 THAT HE HAD NEVER LOOKED AT THE SOURCE CODE.

13 DR. SINGH ALSO TESTIFIED AND SHOWED YOU VIDEOS  
14 PROVING THAT THE LAUNCHTILE DOES NOT ENLARGE THE  
15 STRUCTURED ELECTRONIC DOCUMENT. INSTEAD, IT  
16 LAUNCHES APPLICATIONS. YOU DON'T GET THE ZOOM  
17 FUNCTION. YOU SIMPLY GET A DIFFERENT PROGRAM.

18 FOR THE '915 PATENT, SAMSUNG ALSO  
19 MENTIONED THE NOMURA JAPANESE PATENT APPLICATION,  
20 BUT NOMURA FAILED TO DISCLOSE KEY ASPECTS OF THE  
21 '915 PATENT. THERE WERE NO EVENTS, NO OBJECTS, NO  
22 VIEWS, AND NO INVALIDITY.

23 AND THEN THEY SHOWED US THE HAN VIDEO,  
24 WHICH IS AN INTERESTING VIDEO, BUT YOU HAVE NO IDEA  
25 HOW THE HAN VIDEO WORKS. WE NEVER SAW THE

1 SOFTWARE. WE DON'T KNOW WHAT THE SOFTWARE DOES OR  
2 DOESN'T DO.

3 AGAIN, A COMPLETE FAILURE OF PROOF.

4 IN INVALIDITY AND IN UTILITY PATENTS, WE  
5 LOOK TO THE SAME OTHER FACTORS THAT WE LOOKED FOR  
6 DESIGN PATENTS, A WAY OF VALIDATING THIS DECISION.

7 AND, AGAIN, THEY'RE ALL PRESENT HERE.

8 GOING BACK TO THAT 2008 SURVEY, YOU SAW  
9 ON PAGE 36 WHERE IT SPECIFICALLY MENTIONED THE TWO  
10 FINGER PINCH AND THE BOUNCING LISTS. THIS IS  
11 SAMSUNG ITSELF RECOGNIZING THE NOVELTY OF APPLE'S  
12 INVENTION.

13 I'M NOT GOING TO REPEAT THEM ALL, BUT  
14 EACH OF THE OTHER FACTORS SUPPORTS THE CONCLUSION  
15 THAT THE PTO WAS ABSOLUTELY RIGHT WHEN IT  
16 RECOGNIZED APPLE'S INVENTIONS.

17 TO SUM UP, WE BELIEVE THAT WE HAVE  
18 DEMONSTRATED THAT SAMSUNG HAS VIOLATED EACH AND  
19 EVERY ONE OF OUR VALID INTELLECTUAL PROPERTY  
20 RIGHTS.

21 AND THAT, IF YOU AGREE WITH US THAT FAR,  
22 WOULD BRING YOU TO THE ISSUE OF DAMAGES.

23 SAMSUNG MAKES FUN OF OUR DAMAGES CLAIM.  
24 THEY MAKE FUN OF US FOR ASKING FOR BILLIONS OF  
25 DOLLARS.

1                   BUT THERE ARE TWO FACTORS THAT ARE  
2                   DRIVING THE DAMAGES NUMBERS IN THIS CASE. THE  
3                   FIRST FACTOR IS THAT SAMSUNG HAS SOLD 22.7 MILLION  
4                   INFRINGEMENT PHONES AND TABLETS IN THE UNITED STATES  
5                   BETWEEN JUNE 2010 AND TODAY.

6                   THE SECOND FACTOR IS THAT SAMSUNG'S  
7                   INFRINGEMENT SALES HAVE GENERATED \$8.160 BILLION IN  
8                   REVENUE FOR SAMSUNG. THE DAMAGES IN THIS CASE  
9                   SHOULD BE LARGE BECAUSE THE INFRINGEMENT HAS BEEN  
10                  MASSIVE.

11                  THESE NUMBERS ARE NOT IN DISPUTE. THEY  
12                  COME DIRECTLY FROM THE PARTY'S JOINT EXHIBIT, JX  
13                  1500. OUR DAMAGES EXPERT, MR. MUSIKA, WALKED YOU  
14                  THROUGH HOW TO VERIFY THAT CALCULATION YOURSELVES.

15                  THE JOB WE'RE ASKING YOU TO DO IS TO  
16                  CALCULATE HOW MUCH OF THAT \$8.16 BILLION APPLE  
17                  SHOULD RECEIVE AS DAMAGES.

18                  TO DO THAT, AS MR. MUSIKA EXPLAINED, YOU  
19                  WILL NEED TO PLACE THESE 22.7 MILLION INFRINGEMENT  
20                  SMARTPHONES AND TABLETS INTO ONE OF THREE BUCKETS.

21                  THE FIRST CATEGORY THAT I WANT TO TALK  
22                  ABOUT IS SAMSUNG'S PROFITS. THIS REMEDY, YOU WOULD  
23                  AWARD US SAMSUNG'S PROFITS IF YOU CONCLUDED THAT  
24                  SAMSUNG HAD INFRINGED APPLE'S TRADE DRESS OR ITS  
25                  DESIGN PATENT CLAIMS.

1 SAMSUNG HAS SUGGESTED, OR MAYBE I'M JUST  
2 SENSITIVE, BUT IT SOUNDED TO ME LIKE SAMSUNG WAS  
3 SUGGESTING THAT DESIGN PATENTS ARE NOT IMPORTANT.

4 BUT AS YOU HAVE NOW BEEN TOLD, CONGRESS  
5 HAS DECIDED THAT BECAUSE OF THE IMPORTANCE OF THIS  
6 PARTICULAR FORM OF INTELLECTUAL PROPERTY, THAT AN  
7 INFRINGER MUST GIVE BACK ALL OF THE PROFITS EARNED  
8 FROM THE SALES THAT INFRINGED SOMEONE ELSE'S TRADE  
9 DRESS OR PATENT DESIGN. THE PAYMENT OF SAMSUNG'S  
10 PROFITS TO APPLE IS PAYMENT BACK OF THE UNJUST  
11 ENRICHMENT THAT SAMSUNG GOT BY USING APPLE'S I.P.  
12 WITHOUT PERMISSION.

13 AND, AS JUDGE KOH JUST TOLD YOU, CONGRESS  
14 AWARDS THE ENTIRE PROFIT ON A PRODUCT, NOT JUST  
15 PART OF THAT PRODUCT. PROFIT.

16 AT THE OUTSET, THERE ARE TWO QUESTIONS  
17 THAT YOU NEED TO ANSWER BEFORE YOU DECIDE HOW MUCH  
18 OF SAMSUNG'S INFRINGING PROFITS YOU SHOULD AWARD  
19 APPLE.

20 THE FIRST IS THIS QUESTION OF WHAT WE  
21 CALL NOTICE, AND THE SECOND IS THIS QUESTION OF HOW  
22 MUCH, IF ANY, OF SAMSUNG'S INDIRECT COSTS SHOULD BE  
23 SUBTRACTED FROM THE GROSS REVENUE NUMBER.

24 LET'S TALK ABOUT NOTICE. THE QUESTION IS  
25 WHEN DID APPLE GIVE SAMSUNG NOTICE OF INFRINGEMENT.



1 EVERYTHING HAS AN EXCEPTION. EVERYTHING HAS A  
2 SEPARATE RULE, UNFORTUNATELY, IN THIS CASE. BUT  
3 THE FIRST THING YOU NEED TO KNOW ABOUT THE NOTICE  
4 ISSUE IS THAT YOU'LL SEE IN THE INSTRUCTIONS, THIS  
5 IS IN INSTRUCTION 71 OF THE INSTRUCTIONS THE JUDGE  
6 GAVE YOU, THE NOTICE ISSUE DOES NOT APPLY TO CLAIMS  
7 FOR UNREGISTERED TRADE DRESS. IF YOU FIND THAT  
8 SAMSUNG INFRINGED OUR UN -- OR DILUTED OUR  
9 UNREGISTERED TRADE DRESSES, EVERY INFRINGING CLAIM  
10 OR DILUTING SALE MUST BE INCLUDED IN THE DAMAGES  
11 CLAIM.

12 FOR DESIGN PATENTS AND REGISTERED TRADE  
13 DRESS, THE QUESTION THEN IS WHEN DID APPLE GIVE  
14 SAMSUNG NOTICE OF INFRINGEMENT?

15 AS JUDGE KOH HAS INSTRUCTED YOU, NOTICE  
16 OCCURS NO LATER THAN THE DATE THAT WE FILED SUIT,  
17 BUT WE WERE ENTITLED TO PROVE THAT APPLE GAVE  
18 SAMSUNG NOTICE BEFORE WE FILED SUIT.

19 HERE WE BELIEVE THAT WE GAVE SAMSUNG  
20 NOTICE IN AUGUST OF 2010.

21 BORIS TEKSLER, WHO WAS APPLE'S DIRECTOR  
22 OF PATENTS AND LICENSING, TESTIFIED ABOUT THE  
23 PRESENTATION THAT APPLE MADE TO SAMSUNG ON  
24 AUGUST 4TH, 2010. THIS PRESENTATION TOLD SAMSUNG  
25 IN NO UNCERTAIN TERMS THAT IT WAS COPYING APPLE'S

1 PATENTS AND DESIGNS. AND AS WE ALREADY SAW,  
2 SAMSUNG'S DIRECTOR OF LICENSING IN KOREA, JUNWON  
3 LEE, TESTIFIED THAT SAMSUNG HAD GOTTEN THAT NOTICE.

4 THUS, IN OUR VIEW, WE BELIEVE THAT YOU  
5 SHOULD CALCULATE DAMAGES BASED ON DESIGN PATENT  
6 INFRINGEMENT BEGINNING IN AUGUST OF 2010.

7 NEXT IS THE COST DEDUCTION ISSUE. THE  
8 QUESTION IS WHETHER OR NOT YOU SHOULD DEDUCT  
9 SAMSUNG'S INDIRECT COSTS FROM ITS GROSS REVENUES,  
10 GROSS PROFITS.

11 ON THIS ISSUE, SAMSUNG HAS THE BURDEN OF  
12 PROOF. SAMSUNG CAN ONLY DEDUCT COSTS THAT IT  
13 PROVED WERE DIRECTLY ATTRIBUTABLE TO THE ACCUSED  
14 PRODUCTS. THAT'S THE LANGUAGE YOU'LL FIND IN YOUR  
15 INSTRUCTION. THEY HAD TO PROVE THAT THE COSTS THEY  
16 WANT TO DEDUCT WERE DIRECTLY ATTRIBUTABLE TO THE  
17 ACCUSED PRODUCTS.

18 AS YOU WILL RECALL, MR. MUSIKA DID NOT  
19 DEDUCT THOSE COSTS, AND THERE WERE VERY MANY  
20 REASONS WHY HE DID NOT AND WHICH WE THINK YOU  
21 SHOULD NOT CONSIDER SAMSUNG FOR INDIRECT COSTS.

22 FIRST, AS YOU'LL REMEMBER, SAMSUNG  
23 REFUSED TO GIVE US OR EVEN -- REFUSED TO GIVE THEIR  
24 OWN EXPERT ANY DOCUMENTATION OF THE SO-CALLED  
25 INDIRECT COSTS UNTIL THE VERY LAST MINUTE.

1 SAMSUNG'S EXPERT, MR. WAGNER, HAD TO RELY ON  
2 INFORMATION HE WAS GIVEN THE NIGHT BEFORE HIS  
3 EXPERT REPORT WAS DUE.

4 SECOND, SAMSUNG PRODUCED NINE DIFFERENT  
5 VERSIONS OF THE FINANCIAL SPREADSHEET THAT IT  
6 ULTIMATELY OFFERED AS EVIDENCE OF ITS INDIRECT  
7 COSTS.

8 THIRD, MR. MUSIKA, WHO, AS YOU RECALL, IS  
9 A FORMER FRAUD INVESTIGATOR, A BANKRUPTCY COURT  
10 FRAUD INVESTIGATOR, A KPMG PARTNER, ANALYZED  
11 SAMSUNG'S DATA AND CONCLUDED THAT IT WAS NOT  
12 RELIABLE.

13 EVEN SAMSUNG'S EXPERT COULD NOT TIE HIS  
14 NUMBERS BACK TO A RELIABLE SOURCE.

15 FOURTH, AS THEY ADMIT, AND THIS GOES BACK  
16 TO MY HISTORICAL DOCUMENT POINT, SAMSUNG MADE UP  
17 THIS, WROTE OUT THIS COST ALLOCATION THAT THEY WANT  
18 YOU TO ACCEPT, THIS SPREADSHEET SOLELY FOR THE  
19 PURPOSES OF THIS LITIGATION.

20 REMEMBER THEY MADE A BIG POINT ABOUT  
21 TESTIFYING THAT IT HAD TO BE RIGHT BECAUSE THEY  
22 STORE ALL THEIR NUMBERS ON AN S.A.P. SYSTEM.

23 BUT WHEN YOU LOOK AT THE EXHIBIT, THE  
24 NUMBER OF THE EXHIBIT THEY'RE OFFERING YOU IS  
25 SIMPLY AN EXCEL SPREADSHEET. WE HAVE NO IDEA, YOU

1 HAVE NO IDEA WHO CREATED IT OR THE BASIS FOR THE  
2 NUMBERS IN IT.

3 AND, FINALLY, INDIRECT COST ALLOCATIONS  
4 WERE COMPLETELY UNEXPLAINED.

5 SO BASED ON ALL OF THESE FACTORS, WE  
6 THINK SAMSUNG HAS FAILED TO PROVE THAT ANY OF THE  
7 INDIRECT COSTS THAT IT'S CLAIMING SHOULD BE  
8 ALLOCATED TO THE INFRINGING PRODUCTS.

9 ONCE YOU RESOLVE THESE TWO QUESTIONS,  
10 NOTICE AND DEDUCTION OF PROFITS, THERE ARE ONLY  
11 FOUR POSSIBLE OUTCOMES FOR CALCULATING SAMSUNG'S  
12 PROFITS.

13 BOTH EXPERTS ACTUALLY AGREE ON THESE  
14 NUMBERS. THEY DISAGREE ON THOSE TWO FACTORS, BUT  
15 THEY AGREE ON THESE NUMBERS.

16 AGAIN, NOTHING IS EASY. I'M SORRY.

17 BUT IF YOU FIND UNREGISTERED TRADE DRESS  
18 VIOLATIONS, OR THAT APPLE GAVE SAMSUNG NOTICE ON  
19 AUGUST 4TH, 2010, SO IF YOU AGREE WITH BOTH OF OUR  
20 SUPPOSITIONS, AND THAT APPLE FAILED TO MEET ITS  
21 BURDEN OF PROOF ON INDIRECT COSTS, THEN YOU SHOULD  
22 AWARD \$2.241 BILLION OF SAMSUNG'S PROFITS TO APPLE.

23 ANOTHER FOOTNOTE. IN A MINUTE I'M GOING  
24 TO TALK ABOUT APPLE'S LOST PROFITS. SAMSUNG'S  
25 PROFITS NUMBER THAT I JUST TALKED ABOUT DOES NOT

1 REFLECT THE TWO MILLION UNITS THAT I'M GOING TO  
2 TALK ABOUT THERE.

3 IF YOU DECIDE NOT TO AWARD APPLE LOST  
4 PROFITS, THEN YOU WOULD NEED TO INCLUDE THOSE 2  
5 MILLION UNITS IN YOUR AWARD OF SAMSUNG PROFITS HERE  
6 AND THAT WOULD INCREASE THE NUMBER TO \$2.481  
7 BILLION.

8 OBVIOUSLY, GIVEN THAT CHOICE, WE PREFER  
9 OUR LOST PROFITS BECAUSE OUR PROFIT MARGIN PER  
10 PHONE IS HIGHER.

11 THE SECOND OPTION IS IF YOU FIND THAT  
12 THERE'S BEEN NO TRADE DRESS VIOLATION, IF YOU FIND  
13 FOR SAMSUNG ON THE ISSUE OF NOTICE, SO IF YOU START  
14 DAMAGES AS OF THE DATE OF THE LAWSUIT, BUT IF YOU  
15 REJECT THEIR POSITION ON THE ISSUE OF INDIRECT  
16 COSTS, THEN THE NUMBER IS 1.396 BILLION IN PROFITS.

17 THE THIRD OPTION IS IF YOU FIND FOR APPLE  
18 ON UNREGISTERED TRADE DRESS OR NOTICE, BUT FIND FOR  
19 SAMSUNG ON THE AMOUNT OF INDIRECT COSTS, THEN THE  
20 NUMBER IS 1.086 BILLION OF DOLLARS TO APPLE.

21 AND, FINALLY, IF YOU FIND FOR SAMSUNG ON  
22 BOTH OF THEIR POSITIONS, BOTH NOTICE AND INDIRECT  
23 COSTS, THEN THE AWARD IS 519 MILLION OF PROFITS TO  
24 APPLE.

25 THAT IS THE MINIMUM AMOUNT THAT YOU

1 SHOULD AWARD IF YOU FIND IN OUR FAVOR ON DESIGN  
2 LIABILITY.

3 ON THE QUESTION OF DAMAGES FOR UTILITY  
4 PATENTS, WE ARE CLAIMING OUR LOST PROFITS ON 2  
5 MILLION UNITS OF SALES. MR. MUSIKA CONSIDERED ALL  
6 OF THE FACTORS THAT THE COURT HAS INSTRUCTED YOU TO  
7 CONSIDER BEFORE AWARDING THIS TYPE OF REMEDY AND  
8 FOUND THAT THEY WERE MET.

9 HE MADE CONSERVATIVE ASSUMPTIONS TO  
10 ASSURE HIMSELF THAT APPLE REALLY WOULD HAVE MADE AN  
11 ADDITIONAL 2 MILLION SALES DURING THE TWO YEARS  
12 THAT SAMSUNG WAS SELLING ITS 22 MILLION INFRINGING  
13 PHONES.

14 HE REVIEWED APPLE'S CAPACITY INFORMATION  
15 AND ASSURED YOU THAT APPLE HAD THE CAPACITY TO MAKE  
16 THE ADDITIONAL 2 MILLION SALES DURING THE LIMITED  
17 TIME PERIODS IN WHICH THEY WOULD HAVE OCCURRED.

18 AGAIN, HIS WORK PAPERS ARE PART OF THAT  
19 EXHIBIT THAT I MENTIONED TO YOU, PX 25-A1, AND HIS  
20 WORK PAGES ON THIS CAPACITY ISSUE ARE AT PAGES 14  
21 AND 15.

22 IF YOU AGREE THAT APPLE SHOULD RECOVER  
23 ITS LOST PROFITS FOR THE UTILITY PATENTS, THE  
24 NUMBER IS \$488 MILLION IN LOST PROFITS.

25 AND THE FINAL BUCKET WAS REASONABLE

1 ROYALTY. THIS SERVES AS THE FLOOR ON DAMAGES FOR  
2 ANY SALES THAT YOU CHOSE NOT TO INCLUDE IN A  
3 CALCULATION OF LOST PROFITS. BECAUSE APPLE HAS  
4 BEEN VERY CAREFUL NOT TO DOUBLE COUNT DAMAGES, AND  
5 MOST OF THE PHONES AND TABLETS FALL INTO ONE  
6 PROFITS OR ANOTHER PROFITS BUCKET, WE WERE ONLY  
7 SEEKING \$20 MILLION IN REASONABLE ROYALTY DAMAGES.

8 IF YOU DON'T AWARD ANY SAMSUNG PROFITS OR  
9 LOST PROFITS AT ALL TO APPLE, BUT IF YOU FIND  
10 LIABLE ON ALL 22 MILLION UNITS SOLD, THE DAMAGES  
11 FIGURE WOULD BE APPROXIMATELY \$494 MILLION.

12 YOU WHEN LOOK -- FIRST OF ALL, WE  
13 CERTAINLY HOPE YOU GET TO THE DAMAGES ISSUE, BUT  
14 WHEN YOU LOOK TO THE DAMAGES ISSUE, WE HOPE THAT  
15 YOU WILL LOOK AT EXHIBITS PX 25-A1 AND JX 1500.  
16 THESE ARE THE EXHIBITS IN WHICH MR. MUSIKA LAID OUT  
17 ALL OF THE NUMBERS NECESSARY TO CALCULATE DAMAGES  
18 FOR ANY FINDING OF LIABILITY YOU MAY DECIDE TO  
19 MAKE.

20 WHEN YOU READ THE VERDICT FORM, YOU WILL  
21 SEE THAT IT ASKS YOU TO STATE YOUR DAMAGES AWARD ON  
22 A TOTAL BASIS, AND ALSO ON A PRODUCT-BY-PRODUCT  
23 BASIS.

24 IF YOU CHOSE TO ACCEPT AND TO CREDIT  
25 MR. MUSIKA'S TESTIMONY, YOU WILL FIND THAT

1 CALCULATION IS ALREADY DONE AT PAGE 4 OF PX 25-A1.

2 IF YOU NEED TO CALCULATE DAMAGES BY SOME  
3 OTHER METHOD, YOU WILL FIND THE NUMBERS YOU NEED IN  
4 THE TWO EXHIBITS THAT I'VE MENTIONED.

5 AT THIS POINT, I THINK I'VE COVERED  
6 EVERYTHING EXCEPT FOR TWO REMAINING QUESTIONS, BUT  
7 BOTH OF THESE ARE IMPORTANT.

8 I EXPLAINED TO YOU WHAT THE LAW IS ON  
9 DIRECT INFRINGEMENT. ALL THREE SAMSUNG COMPANIES  
10 CELL PHONES AND TABLETS TO CUSTOMERS IN THE  
11 UNITED STATES AND THAT IS DIRECT INFRINGEMENT.

12 ANOTHER FOOTNOTE. THERE ARE THREE PHONES  
13 THAT MR. DENISON TOLD YOU THAT THE SUBSIDIARIES  
14 DIDN'T SELL, THE I9000, THE I9100 AND THE ACE, AND  
15 SO THEY RAISE AN INDEPENDENT QUESTION OF WHETHER OR  
16 NOT THEY'VE BEEN SOLD IN THE UNITED STATES.

17 WHAT I WANTED TO REMIND YOU WAS THAT  
18 MR. DENISON TESTIFIED THAT THESE ARE GLOBAL  
19 VERSIONS. THEY'RE GLOBAL VERSIONS.

20 AND IF YOU TURN THEM ON, ON TWO OF THEM  
21 YOU WILL FIND OUT THAT THE LANGUAGE OPTION COMES UP  
22 AND SAYS ENGLISH, UNITED STATES AND THE THIRD ONE  
23 SAYS ENGLISH, CLEARLY INTENDED FOR SALE IN THIS  
24 COUNTRY.

25 WE HAVE ALSO ACCUSED SEC, THE KOREAN



1 COMPANY, OF WHAT'S CALLED INDUCING THE  
2 INFRINGEMENT.

3 SEC CAUSES ITS SUBSIDIARIES IN THE  
4 UNITED STATES TO SELL INFRINGING PHONES AND  
5 TABLETS. JUDGE KOH WAS SET OUT THE TEST FOR  
6 INDUCEMENT IN INSTRUCTION 58. WE ARE CONFIDENT  
7 THAT WHEN YOU EXAMINE THE EVIDENCE, YOU WILL  
8 CONCLUDE THAT SEC KNEW THAT THESE PRODUCTS WERE  
9 INFRINGING AND DIRECTED ITS SUBSIDIARIES TO MAKE  
10 SALES.

11 AS YOU MAY RECALL, SEC EVEN SETS THE  
12 PRICE AT WHICH ITS AMERICAN SUBSIDIARIES SELL THE  
13 PHONES AND TABLETS TO CARRIERS IN THE  
14 UNITED STATES.

15 THE FINAL QUESTION IS, FOR US, VERY  
16 IMPORTANT, AND THAT IS THE QUESTION THAT IF YOU  
17 FIND INFRINGEMENT, WHETHER OR NOT THESE COMPANIES  
18 ACTED WILLFULLY.

19 UNDER JUDGE KOH'S INSTRUCTIONS, THEY  
20 ACTED WILLFULLY IF THEY ACTED WITH RECKLESS  
21 DISREGARD OF APPLE'S PATENTS AND TRADE DRESS RIGHTS  
22 THAT THEY INFRINGED.

23 WHEN YOU, AND WE HOPE YOU WILL, ADDRESS  
24 THE ISSUE OF RECKLESS DISREGARD, THINK OF THE  
25 COPYING DOCUMENTS, THINK ABOUT THE MEETING WITH

1           GOOGLE, THINK ABOUT SAMSUNG BLOWING OFF ANY ATTEMPT  
2           TO NEGOTIATE A RESOLUTION AND FIND THAT THEIR  
3           INFRINGEMENT IS WILLFUL.

4                        THE COURT:    OKAY.    TIME IS NOW 2:23.

5                        WHY DON'T WE TAKE A STAND-UP BREAK.    IF  
6           ANYONE NEEDS ANY WATER OR IF YOU NEED TO GET ANY  
7           DRINKS FROM THE JURY ROOM, PLEASE FEEL FREE TO DO  
8           SO.

9                               (PAUSE IN PROCEEDINGS.)

10                       THE COURT:    ALL RIGHT.    WELCOME BACK.  
11           PLEASE TAKE A SEAT.

12                       ALL RIGHT.    IT'S 2:35.    PLEASE GO AHEAD.

13                       MR. VERHOEVEN:    THANK YOU, YOUR HONOR.

14                               **(WHEREUPON, MR. VERHOEVEN GAVE HIS**  
15           **CLOSING ARGUMENT ON BEHALF OF SAMSUNG.)**

16                       MR. VERHOEVEN:    GOOD AFTERNOON, LADIES  
17           AND GENTLEMEN OF THE JURY.

18                       APPLE'S LARGEST CLAIMS IN THIS CASE ARE  
19           ITS DESIGN PATENTS.    APPLE IS CLAIMING AND ASKING  
20           YOU TO AWARD IT OVER \$2 BILLION BASED ON  
21           INFRINGEMENT OF ITS DESIGN PATENTS.

22                       NOW, MR. MCELHINNY MENTIONED IN HIS  
23           CLOSING ARGUMENT THAT TODAY, THIS MORNING, YOU WERE  
24           TOLD WHAT THE TESTS WERE AND THE RULES YOU NEED TO  
25           APPLY.

1 WELL, ONE OF THOSE RULES THAT YOU WERE  
2 TOLD ABOUT WAS THE TEST FOR INFRINGEMENT OF DESIGN  
3 PATENTS.

4 MR. FISHER, CAN WE PUT THAT UP ON THE  
5 SCREEN.

6 THIS IS THE TEST, IT'S JURY INSTRUCTION  
7 NUMBER 46. AND I'LL JUST READ IT. "TWO DESIGNS  
8 ARE SUBSTANTIALLY THE SAME IF, IN THE EYE OF AN  
9 ORDINARY OBSERVER, GIVING SUCH ATTENTION AS A  
10 PURCHASER USUALLY GIVES, THE RESEMBLANCE BETWEEN  
11 THE TWO DESIGNS IS SUCH AS TO DECEIVE SUCH AN  
12 OBSERVER, INDUCING HIM TO PURCHASE ONE SUPPOSING IT  
13 TO BE THE OTHER."

14 NOW, YOU'D THINK THAT IF APPLE WAS GOING  
15 TO COME IN HERE AND ASK FOR OVER \$2 BILLION IN  
16 DAMAGES, THAT MIGHT HAVE USED ALL THE MONEY FOR THE  
17 LAWYERS AND THE EXPERTS TO HAVE AN EXPERT COME IN  
18 AND SAY, "I'VE INVESTIGATED WHETHER PEOPLE ARE  
19 DECEIVED."

20 THAT THEY WOULD HAVE AN EXPERT TO COME IN  
21 AND SAY, "I DID A STUDY IN EVALUATING WHETHER  
22 PEOPLE WERE DECEIVED OR CONFUSED."

23 THAT THEY'D HAVE AN EXPERT THAT ACTUALLY  
24 SPOKE TO PEOPLE AND DID A SYSTEMATIC ANALYSIS.

25 BUT YOU DON'T. WHAT DID WE HAVE TODAY,

1 OR OVER THIS TRIAL. WE HAD MR. BRESSLER, HE DIDN'T  
2 DO ANY STUDIES. HE DIDN'T TALK TO PEOPLE TO SEE IF  
3 THEY WOULD BE DECEIVED. I DIDN'T APPLY THIS  
4 STANDARD.

5 YOU HAD DR. KARE. SHE JUST LOOKED AT THE  
6 IMAGES. SHE DIDN'T DO ANY ANALYSIS AS TO WHETHER  
7 THERE WAS ANY DECEPTION. SHE SAID SHE COULDN'T  
8 EVEN TESTIFY ABOUT WHEN I ASKED HER.

9 THE ONLY SURVEY THAT CAME IN THAT EVEN  
10 HAD ANYTHING TO DO WITH DECEPTION OR CONFUSION WAS  
11 MR. VAN LIERE. BUT HE DIDN'T DO A TEST TO SEE IF  
12 CONSUMERS WOULD BE DECEIVED WHEN THEY'RE PURCHASING  
13 ONE PRODUCT INDUCING THEM TO BELIEVE IT'S ANOTHER.  
14 HE DIDN'T DO A TEST, HE DIDN'T DO A SURVEY FOR  
15 POINT-OF-SALE CONFUSION. HE HAD DONE A LOT OF  
16 THOSE, BUT THE LAWYERS TOLD HIM NOT TO. THEY ASKED  
17 HIM TO DO A TEST HE HAD NEVER DONE BEFORE, WHICH  
18 WAS LOOKING AT PEOPLE AFTER A PURCHASE HAS BEEN  
19 MADE.

20 AND THIS WAS THE, THIS WAS THE PRODUCT  
21 THAT HE USED AS THE CONTROL, THE NOOK, WHICH  
22 OBVIOUSLY IS DIFFERENT. THAT'S THE SUM AND  
23 SUBSTANCE OF WHAT THEY BROUGHT BEFORE YOU.

24 BUT YET THEY'RE ASKING YOU TO AWARD THEM  
25 \$2 BILLION UNDER THIS TEST.

1 I SUBMIT THE REASON APPLE DIDN'T PROVIDE  
2 ANY EVIDENCE OF DECEPTION OR CONFUSION IS BECAUSE  
3 THEY KNOW THERE ISN'T ANY. THERE WAS NO CONFUSION,  
4 NO DECEIT, NO CONSUMER HARM PROVEN, APPLE IS HERE  
5 ASKING FOR WHAT IT'S NOT ENTITLED TO.

6 IT'S HERE ASKING YOU TO PREVENT A  
7 SECOND -- ITS LARGEST COMPETITOR FROM GIVING  
8 CONSUMERS WHAT THEY WANT, SMARTPHONES WITH BIG  
9 SCREENS.

10 WHY IS APPLE BRINGING THIS CASE? BECAUSE  
11 A FEW OF ITS PATENTS ARE INFRINGED WHEN BOTH  
12 COMPANIES HAVE LITERALLY THOUSANDS OF PATENTS THAT  
13 THEY CAN ASSERT AGAINST EACH OTHER? NO, THAT'S NOT  
14 WHY APPLE IS DOING THIS.

15 THE REAL REASON APPLE IS BRINGING THIS  
16 CASE IS BECAUSE RATHER THAN COMPETING IN THE MARKET  
17 PLACE, APPLE IS SEEKING A COMPETITIVE EDGE THROUGH  
18 THE COURTROOM.

19 JUST LOOK AT THIS CASE. APPLE IS  
20 ASSERTING CLAIMS AGAINST OVER 20 PRODUCTS WITH ALL  
21 KINDS OF VARIOUS DIFFERENT THEORIES. IT'S ASKING  
22 FOR WELL OVER \$2.7 BILLION. IT'S SEEKING TO BLOCK  
23 ITS BIGGEST AND MOST SERIOUS CONTENDER FROM EVEN  
24 ATTENDING THE GAME .

25 THIS IS AN IMPORTANT POINT. LOOK OUT

1           HERE IN THE PEWS. DO YOU SEE ALL THOSE REPORTERS?  
2           WHY ARE THEY HERE? THEY'RE HERE, LADIES AND  
3           GENTLEMEN, IF YOU GO APPLE'S WAY, IT COULD CHANGE  
4           THE WAY DECISIONS WORK IN THIS COUNTRY. IT'S A  
5           VERY IMPORTANT DECISION YOU HAVE TO MAKE. IS THIS  
6           COUNTRY GOING TO HAVE VIGOROUS COMPETITION BETWEEN  
7           COMPETITORS, OR IS IT GOING TO TURN INTO A COUNTRY  
8           WITH GIANT CONGLOMERATES ARMED WITH PATENT ARSENALS  
9           THAT BLOCK PATENT COMPETITION?

10                   THINK ABOUT SILICON VALLEY AND THE WAY IT  
11           USED TO BE BACK IN THE DAY WITH ITS GROVES OF  
12           ORCHARDS. NOW THERE'S TENS OF THOUSANDS OF TECH  
13           JOBS. WHY DID THAT HAPPEN? IT HAPPENED BECAUSE OF  
14           FREE COMPETITION.

15                   YOUR DECISION COULD CHANGE ALL THAT.

16                   CONSUMERS DESERVE A CHOICE. SURE, APPLE  
17           HAS GREAT PRODUCTS. WE DON'T DENY THAT.

18                   BUT CONSUMER DESERVE A CHOICE BETWEEN A  
19           LOT OF GREAT PRODUCTS. COMPETITION IS WHAT HAS  
20           BUILT THIS COUNTRY AND WE CAN SEE IT FOR OURSELVES  
21           HERE IN SILICON VALLEY.

22                   IT'S NOT AGAINST THE LAW IN THIS COUNTRY  
23           TO BE INSPIRED BY YOUR COMPETITION. IT'S NOT  
24           AGAINST THE LAW TO DO COMPETITIVE ANALYSES. IT'S  
25           NOT AGAINST THE LAW TO LOOK AT WHAT THEY'RE DOING

1 AND SAY, "HOW CAN WE DO BETTER?"

2 THEN ABOUT IT. JUST THINK ABOUT WALKING  
3 INTO A BEST BUY STORE. YOU KNOW TO THE TV SECTION.  
4 ALL OF TV'S LOOK THE SAME. THEY'RE ALL BOXES.  
5 THEY'RE ALL FLAT SCREEN. THEY ALL HAVE MINIMALIST  
6 DESIGN.

7 REMEMBER IN THE OLD DAYS TV'S HAD KNOBS  
8 ON THEM AND YOU TURNED THE DIAL LIKE THIS AND THEY  
9 LOOKED DIFFERENT.

10 NOW THEY ALL LOOK THE SAME. THEY'RE  
11 SQUARE AND THERE ARE NO BUTTONS. WHY? BECAUSE  
12 TECHNOLOGY CHANGED. REMOTE CONTROLS CAME ALONG.  
13 LCD'S CAME ALONG. PLASMA SCREENS CAME ALONG.

14 AND WHAT HAPPENED? FORM FOLLOWED  
15 FUNCTION.

16 NOW, THINK ABOUT TURNING TO THE  
17 SMARTPHONE SECTION OF THE BEST BUY. IT'S THE SAME  
18 THING THERE, TOO. ALL THE SMARTPHONES ARE  
19 RECTANGULAR WITH VERY LARGE SCREENS. THINK ABOUT  
20 IT.

21 REMEMBER BACK WHEN, BEFORE THERE WERE  
22 SMARTPHONES, WHEN THEY WERE -- WHEN PHONES WERE  
23 JUST USED FOR MAKING PHONE CALLS? IT HAD MAYBE A  
24 TINY LITTLE SCREEN AND IT HAD THE OLD MA BELL TOUCH  
25 TONE KEYPAD ON IT, THE REDUCED KEYPAD?

1                   WHY WERE THE PHONES ALL DESIGNED LIKE  
2                   THAT BACK THEN? BECAUSE PEOPLE JUST USED THEM TO  
3                   MAKE PHONE CALLS.

4                   THEN TECHNOLOGY ADVANCED. WHAT HAPPENED?  
5                   WELL, TECHNOLOGY ENABLED YOU TO SEND E-MAILS AND  
6                   TEXTS ON YOUR MOBILE DEVICE. AND THERE WAS A  
7                   COMPANY CALLED RESEARCH IN MOTION THAT RELEASED A  
8                   PRODUCT CALLED THE BLACKBERRY THAT HAD A FULL  
9                   KEYBOARD JUST LIKE YOU HAD ON THE OLD TYPEWRITER.  
10                  IT'S CALLED A QWERTY KEYBOARD, AND IT WAS EXTREMELY  
11                  SUCCESSFUL. WHY? BECAUSE IT WANTED TO SEND  
12                  E-MAILS AND IT WAS A LOT EASIER TO SEND E-MAILS  
13                  WITH A FULL KEYBOARD THAN WITH THAT OLD KEYBOARD.  
14                  AND GUESS WHAT? BLACKBERRY WAS INCREDIBLY  
15                  SUCCESSFUL.

16                  WHAT HAPPENED WITH THE COMPETITION?  
17                  EVERY SINGLE ONE OF THEM CAME OUT WITH A FULL  
18                  KEYBOARD MOBILE PHONE? ARE THEY ILLEGAL COPYISTS?  
19                  NO. THEY'RE FOLLOWING THE TECHNOLOGY. FORM  
20                  FOLLOWS FUNCTION.

21                  NOW, THINK ABOUT SMARTPHONES. YOU CAN DO  
22                  A LOT MORE WITH A SMARTPHONE THAN E-MAIL AND  
23                  PHONES, AND PHONE CALLS. YOU CAN PLAY VIDEO GAMES.  
24                  YOU CAN TALK TO YOUR FAMILY ON FACE TIME OR OTHER  
25                  TYPES OF APPLICATIONS.



1           YOU CAN SURF THE INTERNET. YOU CAN GO  
2 WATCH MOVIES. THEY'RE INCREDIBLE DEVICES. THEY'RE  
3 LIKE HAVING A PHONE, A COMPUTER, LET'S SEE, A  
4 PHONE, A COMPUTER, A VIDEO GAME CONSOLE, JUST ABOUT  
5 EVERYTHING IN SOMETHING YOU CAN PUT IN YOUR POCKET.

6           NOW, GUESS WHAT? FORM FOLLOWED FUNCTION  
7 HERE, TOO. THINK ABOUT IT.

8           IF YOU'RE A CONSUMER AND YOU CAN WATCH  
9 MOVIES ON YOUR SMARTPHONE OR PLAY VIDEO GAMES ON  
10 YOUR SMARTPHONE, ARE YOU GOING TO WANT A TWO-INCH  
11 SCREEN OR ARE YOU GOING TO WANT A FOUR-INCH SCREEN?

12          THE ANSWER IS YOU'RE GOING TO WANT THE BIGGEST  
13 SCREEN YOU CAN POSSIBLY HAVE. CONSUMERS WANT THAT.

14          BUT THERE'S A LIMIT. AND WHAT'S THE  
15 LIMIT? FUNCTIONAL LIMIT. IF IT'S GOING TO BE A  
16 SMARTPHONE, IT HAS TO BE IN A SIZE THAT FITS IN  
17 YOUR POCKET.

18          SO GUESS WHAT? EVERY SINGLE SMARTPHONE  
19 HAS A RECTANGULAR SHAPE, ROUNDED CORNERS, AND ABOUT  
20 90 PERCENT OF THE REAL ESTATE OF THE FRONT OF THAT  
21 PHONE IS THE SCREEN.

22          IS THAT BECAUSE PEOPLE ARE COPYING EACH  
23 OTHER? NO. IT'S BECAUSE TECHNOLOGY ADVANCED AND  
24 FORM IS FOLLOWING FUNCTION.

25          CAN WE PUT UP SDX 5010.130? THIS IS WHAT

1 YOU SEE WHEN YOU GO INTO THE BEST BUY STORE. ALL  
2 OF THE PHONES HAVE THESE LARGE SCREENS, AND THEY'RE  
3 ALL RECTANGULAR. THERE'S NOTHING NEFARIOUS ABOUT  
4 THIS. IT'S THE WAY THE TECHNOLOGY HAS EVOLVED.

5 NOW, APPLE IS HERE SEEKING \$2 BILLION IN  
6 DAMAGES FROM SAMSUNG FOR ALLEGED ORNAMENTATION ON  
7 THAT LITTLE 10 PERCENT AROUND THE SCREEN.

8 ACCORDING TO APPLE, THE WAY IT'S  
9 INTERPRETING ITS PATENTS, IT'S ENTITLED TO HAVE A  
10 MONOPOLY ON A ROUNDED RECTANGLE WITH A LARGE  
11 SCREEN. IT'S AMAZING, REALLY.

12 BUT, LADIES AND GENTLEMEN, YOU ARE THE  
13 ORDINARY OBSERVER IN THIS CASE. YOU'RE THE ONES  
14 WHO ARE GOING TO MAKE THE DECISION. YOU DON'T NEED  
15 A PAID EXPERT TO TELL YOU. IS ANYONE REALLY  
16 DECEIVED BY SAMSUNG'S DEVICES INTO THINKING THEY'RE  
17 BUYING AN APPLE DESIGN?

18 THE FACT IS, MEMBERS OF THE JURY,  
19 CONSUMERS MAKE CHOICES, NOT MISTAKES. THESE ARE  
20 EXPENSIVE PRODUCTS. THEY'RE HEAVILY RESEARCHED BY  
21 CONSUMERS BEFORE THEY BUY THEM. THERE'S NO  
22 DECEPTION AND THERE'S NO CONFUSION AND APPLE HAS NO  
23 CREDIBLE EVIDENCE OF IT.

24 AND WITH THAT, I'D LIKE TO TURN AND GO  
25 THROUGH THE EVIDENCE.

1                   NOW, CAN WE PUT BACK UP THE STANDARD,  
2                   JUST SO WE HAVE IT THERE, SLIDE 7.

3                   NOW, MR. MCELHINNY WAS TALKING AT THE  
4                   START OF HIS OPENING, OR HIS CLOSING ARGUMENT ABOUT  
5                   CATEGORIES OF EVIDENCE AND WHICH ONES HE THINKS ARE  
6                   IMPORTANT AND HE URGES YOU TO PAY ATTENTION TO. DO  
7                   YOU REMEMBER THAT?

8                   WELL, HE LEFT OUT ONE THAT I THINK IS  
9                   REALLY IMPORTANT, AND THAT IS CROSS-EXAMINATION.  
10                  WHEN YOU HAVE A PAID EXPERT WHO'S ON APPLE'S SIDE,  
11                  IF HE MAKES ADMISSIONS THAT ARE FAVORABLE TO  
12                  SAMSUNG, THAT IS VERY CREDIBLE EVIDENCE, PERHAPS  
13                  THE MOST CREDIBLE EVIDENCE YOU'RE GOING TO SEE.

14                  AND ANOTHER THING THAT I'VE GOT A LITTLE  
15                  BIT DIFFERENT STYLE THAN MR. MCELHINNY, YOU HEARD  
16                  HIM CHARACTERIZE WHAT PEOPLE SAID, SO AND SO SAID  
17                  THIS. SO AND SO SAID THAT. WE DON'T KNOW IF THEY  
18                  DID OR NOT. THAT'S JUST LAWYER ARGUMENT.

19                  WHAT I'M GOING TO DO IS I'M GOING TO SHOW  
20                  YOU WHAT THEY ACTUALLY SAID. I'LL PUT UP THE  
21                  TRANSCRIPT SO THERE'S NO MISTAKE.

22                  "SO HERE WE HAVE THE TEST, TWO DESIGNS  
23                  ARE SUBSTANTIALLY THE SAME IF, IN THE EYE OF AN  
24                  ORDINARY OBSERVER, GIVING SUCH ATTENTION AS A  
25                  PURCHASER USUALLY GIVES, THE RESEMBLANCE BETWEEN

1 THE TWO DESIGNS IS SUCH AS TO DECEIVE SUCH AN  
2 OBSERVER, INDUCING HIM TO PURCHASE ONE SUPPOSING IT  
3 TO BE THE OTHER."

4 NOW, LET'S TURN TO THE '087 AND THE '677  
5 PATENTS, DO YOU REMEMBER THOSE, THE PHONE DESIGN  
6 PATENTS, ONE IS THE BLACK FLAT SCREEN, AND THE  
7 OTHER ONE IS THE FLAT SCREEN WITH THE BEZEL, AND  
8 LET'S SEE WHAT THE TESTIMONY OF APPLE'S SOLE EXPERT  
9 ON THESE PATENTS WAS.

10 MR. BRESSLER.

11 "QUESTION: GIVEN THE ENVIRONMENT IN  
12 WHICH THESE PHONES ARE BEING SOLD AND THE DEGREE OF  
13 ADVERTISING BRANDING, YOU DON'T KNOW WHETHER  
14 ANYBODY WOULD EVER BE DECEIVED INTO THINKING THEY  
15 WERE BUYING A SAMSUNG PHONE WHEN THEY WERE BUYING  
16 AN APPLE PHONE OR VICE-VERSA; ISN'T THAT TRUE,  
17 SIR?"

18 MR. BRESSLER, HE KNEW THIS WAS AN  
19 IMPORTANT QUESTION. HE THOUGHT ABOUT IT, AND HE  
20 ASKED, "CAN WE HAVE IT READ BACK? COULD YOU REPEAT  
21 IT AGAIN.

22 SO I HAD THE REPORTER READ IT AGAIN SO  
23 YOU COULD LISTEN VERY CAREFULLY.

24 AND HE SAID "YES."

25 YES, HE DOES NOT KNOW WHETHER ANYBODY

1 WOULD EVER BE DECEIVED INTO THINKING THEY WERE  
2 BUYING A SAMSUNG PHONE WHEN THEY WERE BUYING AN  
3 APPLE PHONE OR VICE-VERSA. THAT'S THE EVIDENCE.  
4 THAT'S THE EVIDENCE APPLIED TO THE STANDARD.  
5 THAT'S NOT ME CHARACTERIZING WHAT SOMEBODY SAID.

6 AND HE SAID MORE. I ASKED HIM, "PLEASE  
7 TELL ME, IN YOUR EXPERT OPINION, DO YOU BELIEVE  
8 THAT CONSUMERS GET CONFUSED DURING THE COURSE OF  
9 THEIR PURCHASING DECISIONS AND CONFUSE APPLE  
10 DEVICES WITH SAMSUNG DEVICES OR VICE-VERSA?

11 "ANSWER: I DO NOT KNOW IF THEY GET  
12 CONFUSED."

13 NOW, ONE OF THE INSTRUCTIONS YOU GOT  
14 TODAY WAS ABOUT BURDEN OF PROOF. THIS IS APPLE'S  
15 BURDEN OF PROOF. THEY HAVE TO PROVE TO YOU, WITH  
16 THEIR EVIDENCE, THAT CONSUMERS WERE BEING DECEIVED  
17 UNDER THIS STANDARD, THERE'S A LIKELIHOOD OF  
18 DECEPTION. AND THIS IS THEIR EVIDENCE.

19 THIS DOESN'T MEET THEIR BURDEN OF PROOF.

20 I ASKED HIM AGAIN, "YOU DON'T KNOW  
21 WHETHER CONSUMERS HAVE BEEN CONFUSED AT ANY TIME  
22 WHEN PURCHASING APPLE DEVICES OR SAMSUNG DEVICES  
23 INTO THINKING THEY WERE DEVICES FROM THE OTHER  
24 MANUFACTURER; CORRECT?

25 "ANSWER: I BELIEVE THAT'S CORRECT."

1           BUT HE WANTED TO BE CAREFUL, I'M SORRY,  
2           COULD YOU REPEAT THE QUESTION?

3           SO WE READ IT TO HIM AGAIN AND THEN HE  
4           VERIFIED, YEP, "THAT'S CORRECT."

5           SO HE TWICE HEARD THE QUESTION AND  
6           CONFIRMED THAT HE DOESN'T KNOW WHETHER CONSUMERS  
7           HAVE BEEN CONFUSED AT ANY TIME IN PURCHASING APPLE  
8           DEVICES OR SAMSUNG DEVICES INTO THINKING THEY'RE  
9           DEVICES FROM THE OTHER MANUFACTURER.

10           I ASKED HIM, "SMARTPHONE CONSUMERS  
11           EVALUATE DIFFERENT MODELS, COMPARE THEM TO ONE  
12           ANOTHER, EVEN BEFORE GOING INTO THE STORE; RIGHT?

13           "ANSWER:    YES.

14           "QUESTION:   SMARTPHONE CONSUMERS CONSIDER  
15           A NUMBER OF FACTORS, SUCH AS PRICE, PERFORMANCE, AS  
16           WELL AS APPEARANCE; RIGHT?

17           "ANSWER:    I GUESS.

18           "QUESTION:   DO YOU BELIEVE THAT'S TRUE?

19           "ANSWER:    I SUSPECT THEY DO.

20           "QUESTION:   YOU WOULD EXPECT THAT IF THE  
21           PURCHASER WAS ENTERING INTO A MULTI-YEAR CONTRACT,  
22           THEY WOULD KNOW WHAT BRAND OF PHONE THEY WERE  
23           BUYING; RIGHT?

24           "ANSWER:    YES.

25           "QUESTION:   YOU BELIEVE, BY THE END OF

1 THE SMARTPHONE PURCHASING PROCESS, THE ORDINARY  
2 CONSUMER WOULD HAVE TO KNOW WHICH PHONE THEY WERE  
3 BUYING; RIGHT?

4 "ANSWER: YES."

5 THAT'S IT. THEY CAN'T MEET THE STANDARD.  
6 HE'S ADMITTED IT.

7 NOW, LET'S GO ON AND LOOK AT ANOTHER JURY  
8 INSTRUCTION.

9 MR. FISHER, CAN WE PUT UP JURY  
10 INSTRUCTION 50? IT'S ON PAGE 67.

11 AND WE'LL TALK A LITTLE BIT ABOUT  
12 ANTICIPATION, AND CAN WE BLOW OUT THE SECOND  
13 PARAGRAPH SO IT'S BIGGER?

14 AND THE JUDGE READ THIS TO YOU THIS  
15 MORNING.

16 BY THE WAY, ANTICIPATION HAS TO DO WITH  
17 WHETHER THE PRIOR ART DESIGN PATENTS THAT I SHOWED  
18 YOU AT THE TRIAL INVALIDATE, INVALIDATE THESE TWO  
19 APPLE DESIGN PATENTS.

20 AND JUDGE KOH READ TO YOU, "THE SAME  
21 STANDARD OF SUBSTANTIAL SIMILARITY THAT APPLIED TO  
22 INFRINGEMENT ALSO APPLIES TO ANTICIPATION. THAT  
23 IS, THE SINGLE PRIOR ART REFERENCE AND THE CLAIMED  
24 DESIGN PATENT ARE SUBSTANTIALLY THE SAME IF, IN THE  
25 EYE OF AN ORDINARY OBSERVER, GIVING SUCH ATTENTION

1 AS A PURCHASER USUALLY GIVES, THE RESEMBLANCE  
2 BETWEEN THE TWO DESIGNS IS SUCH AS TO DECEIVE SUCH  
3 AN OBSERVER, INDUCING HIM TO PURCHASE ONE SUPPOSING  
4 IT TO BE THE OTHER."

5 NOW, IF YOU GO TO SLIDE 14.

6 SO THE POINT IS IT'S THE SAME TEST FOR  
7 INFRINGEMENT AS IT IS FOR INVALIDITY. YOU HAVE TO  
8 APPLY IT EQUALLY. IT'S THE SAME TEST.

9 NOW, YOU REMEMBER I SHOWED YOU THESE  
10 PRIOR ART PHONES COMPARING THE D'087. THEY ALL ARE  
11 RECTANGLES. THEY ALL HAVE ROUNDED CORNERS. SOME  
12 OF THEM HAVE THE LOZENGE SLIGHTLY DIFFERENT PLACES,  
13 BUT THE LOZENGE, THEY ALL HAVE THESE BIG SCREENS  
14 THAT MAKE UP, TAKE UP MOST OF THE SPACE ON THE  
15 PHONE. THEY ALL HAVE THESE NARROW LATERAL BORDERS  
16 AND THE WIDER TOP AND BOTTOM BORDERS.

17 NOW, THERE'S ONE OTHER JURY INSTRUCTION I  
18 WANT TO SHOW YOU BEFORE I GO INTO THE DETAILS OF  
19 MR. BRESSLER'S TESTIMONY.

20 CAN WE GO TO SLIDE 13.

21 THE COURT INSTRUCTED YOU THAT "WHEN THE  
22 CLAIMED DESIGN," IN THIS CASE THE '087 CLAIMED  
23 DESIGN PATENT OR '677 DESIGN PATENT, "WHEN THE  
24 CLAIMED DESIGN IS VISUALLY CLOSE TO PRIOR ART  
25 DESIGN, SMALL DIFFERENCES BETWEEN THE ACCUSED



1 DESIGN AND THE CLAIMED DESIGN MAY BE IMPORTANT."

2 WELL, LET'S LOOK HERE. THESE ARE  
3 OBVIOUSLY SIMILAR. SO WHAT WE NEED TO LOOK FOR IF  
4 WE'RE GOING TO DO THIS INFRINGEMENT ANALYSIS IS  
5 NOT, OH, WELL, WAS IT SORT OF THE SAME, ROUND,  
6 RECTANGLE, ROUNDED CORNERS. YOU CAN'T DO THAT.  
7 THAT'S WHAT ALL THE PRIOR ART HAS. YOU HAVE TO  
8 LOOK FOR THE SMALL DIFFERENCES.

9 WHEN THE CLAIMED DESIGN IS VISUALLY CLOSE  
10 TO THE PRIOR ART DESIGN, SMALL DIFFERENCES BETWEEN  
11 THE ACCUSED DESIGN AND THE CLAIMED DESIGN MAY BE  
12 IMPORTANT IN ANALYZING WHETHER THE OVERALL  
13 APPEARANCE BETWEEN THE ACCUSED AND CLAIMED DESIGNS  
14 ARE SUBSTANTIALLY THE SAME.

15 YOU'LL RECALL MR. BRESSLER AGREED WITH  
16 THAT. WELL, DETAILS ARE IMPORTANT IN A DESIGN  
17 PATENT, AREN'T THEY? YOU SAID SO ON DIRECT?

18 AND HE ANSWERED YES, THEY ARE.

19 NOW, WHAT DOES THIS SHOW ABOUT THE  
20 DIFFERENCES THAT THE ONLY APPLE DESIGNER WHO CAME  
21 TO TESTIFY MADE THESE '087 AND '677 PATENTS UNIQUE.

22 FIRST DIFFERENCE THAT MR. STRINGER SAID,  
23 IT WAS IMPORTANT THAT THE BEZEL GO CONTINUOUSLY AND  
24 UNIFORMLY AROUND THE RIM OF THE PHONE, RIGHT?

25 ANSWER: YES.

1                   AND MR. BRESSLER ADMITTED THAT, TOO. I  
2                   ASKED HIM, "AND THAT'S IMPORTANT, RIGHT, THAT'S  
3                   IMPORTANT, THE ABSENCE OF A BEZEL TAKES YOU OUT OF  
4                   SUBSTANTIAL SIMILARITY, DOESN'T IT?

5                   "ANSWER: IN THE '087 PATENT, IT DOES."

6                   AND WHAT DOES THE EVIDENCE SHOW, LADIES  
7                   AND GENTLEMEN?

8                   WELL, LET'S TAKE THE INFUSE 4G. IT  
9                   DOESN'T HAVE A BEZEL AT ALL. SO HERE WE HAVE  
10                  MR. BRESSLER SAYING IF IT DOESN'T HAVE A BEZEL, IT  
11                  DOESN'T INFRINGE, AND HE SAYS THAT FOR THE PRIOR  
12                  ART. THAT'S WHERE HE SAYS IT.

13                  FOR THIS, HE SAYS, OH, IT STILL DOES  
14                  INFRINGE EVEN THOUGH IT DOESN'T HAVE A BEZEL. DO  
15                  YOU REMEMBER THAT?

16                  CLEARLY THE INFUSE HAS NO BEZEL.  
17                  MR. STRINGER SAYS THAT'S A DIFFERENTIATING ASPECT  
18                  OF OUR DESIGN. IT'S NOT IN THE ACCUSED -- MANY OF  
19                  THE ACCUSED PRODUCTS.

20                  CAN WE GO TO SLIDE 26?

21                  MR. STRINGER ALSO SAID, NOT ONLY WAS IT  
22                  IMPORTANT TO HAVE A BEZEL THAT GOES CONTINUOUSLY  
23                  AND UNIFORMLY AROUND THE RIM OF THE PHONE, HE SAID  
24                  IT WAS IMPORTANT THAT THE BEZEL BE OF UNIFORM  
25                  THICKNESS.

1 I SAID.

2 "QUESTION: AND WAS IT ALSO IMPORTANT  
3 THAT THE BEZEL BE OF UNIFORM THICKNESS; CORRECT?

4 "ANSWER: YES.

5 YOU CAN PLAINLY SEE, BOTH IN THE INITIAL  
6 IPHONE, WHICH YOU'LL HAVE A PHYSICAL EXAMPLE OF,  
7 AND IN THE '087 DESIGN PATENT, THE BEZEL IS  
8 COMPLETELY UNIFORM ALL THE WAY AROUND THE  
9 CIRCUMFERENCE OF THE PHONE. THAT WAS AN IMPORTANT  
10 DESIGN CONSIDERATION.

11 WHAT DOES THE EVIDENCE SHOW? THE  
12 GALAXY S 4G, YOU CAN PLAINLY SEE, DOES NOT HAVE A  
13 UNIFORM THICKNESS. IT VARIES AS YOU TURN THE PHONE  
14 AROUND. THAT'S A COMPLETELY DIFFERENT TYPE OF  
15 DESIGN STYLE.

16 WHEN YOU'VE GOT PRIOR ART THAT SHOWS VERY  
17 SIMILAR DESIGNS, THESE DIFFERENCES MATTER.

18 LET'S GO TO SLIDE 29.

19 MR. STRINGER SAID, AS TO THE '677 PATENT,  
20 I ASKED HIM, "IN FACT, YOU WANTED TO CREATE A  
21 PRODUCT THAT EMBODIED THE SIMPLEST OF ICONS, AND  
22 ONE KEY IMAGE WAS THAT OF A DARK, OILY POND. IS  
23 THAT RIGHT?

24 "ANSWER: YES.

25 "QUESTION: THAT WAS YOUR DESIGN GOAL;

1 RIGHT?

2 "ANSWER: THAT WAS ONE --

3 "QUESTION: GO AHEAD.

4 "ANSWER: THAT WAS ONE DESCRIPTION OF A  
5 DESIGN GOAL, YES.

6 "QUESTION: YOU DIDN'T WANT TO MULTIPLE  
7 BUTTONS THE PHONE OF THE PHONE; CORRECT?

8 "ANSWER: CORRECT.

9 "QUESTION: YOU WANTED IT TO BE AS SIMPLE  
10 AS POSSIBLE?

11 "ANSWER: YES."

12 WHAT DOES THE EVIDENCE SHOW ABOUT THE  
13 ACCUSED PHONES? WELL, THEY'VE GOT FOUR VERY  
14 CONSPICUOUS BUTTONS AT THE BOTTOM, THE MENU KEY,  
15 THE HOME KEY, THE BACK KEY, THE SEARCH KEY.

16 NOTABLY ABSENT IS THE ICONIC AND  
17 UBIQUITOUS APPLE HOME SCREEN BUTTON.

18 THEY ALSO HAVE -- YOU CAN'T SEE IT IN  
19 THIS IMAGE, BUT THERE'S THE BRAND SAME SAMSUNG, THE  
20 BRAND NAME AT&T, MULTIPLE SENSORS ACROSS THE TOP OF  
21 THE PHONE.

22 MR. BRESSLER ADMITTED, "THE ORDINARY  
23 OBSERVER IS GOING TO LOOK AT THAT AND UNDERSTAND  
24 THAT'S COMMUNICATING A HOUSE AND IF THEY TOUCH IT,  
25 THEY CAN GO TO THE HOME SCREEN; RIGHT?

1 "ANSWER: THAT'S TRUE IN HOW THE PHONE  
2 OPERATES, THAT'S CORRECT.

3 "QUESTION: SO THE USER IS GOING TO KNOW  
4 THAT, THEY'RE GOING TO SEE IT, THEY'RE GOING TO  
5 UNDERSTAND IT; RIGHT?

6 "ANSWER: YES.

7 "QUESTION: AND THE SAME THING IS TRUE  
8 WITH THE MENU BUTTON; RIGHT?

9 "ANSWER: YES.

10 I ASKED HIM.

11 "QUESTION: WHEN YOU CONDUCTED YOUR  
12 ANALYSIS OF THE INFUSE 4G, DID YOU ACTUALLY USE ANY  
13 OF THESE BUTTONS?

14 "ANSWER: IN TERMS OF MY ANALYSIS OF THE  
15 DESIGN PATENTS, NO."

16 SO NOT ONLY DID HE NOT CONDUCT ANY  
17 RESEARCH, SURVEYS, SPEAK TO ANYBODY ABOUT WHETHER  
18 THEY WERE DECEIVED, THESE FOUR BUTTONS WHICH ARE  
19 PLAINLY DIFFERENTIATING ON THE FRONT OF THIS PHONE,  
20 HE DIDN'T EVEN TEST THEM OUT OR ANALYZE THEM.  
21 THAT'S NOT CREDIBLE TESTIMONY, I WOULD SUBMIT,  
22 MEMBERS OF THE JURY.

23 WHAT DID MR. STRINGER SAY ABOUT THESE  
24 BUTTONS? WELL, I ASKED HIM, "WHY DIDN'T APPLE PUT  
25 FOUR BUTTONS AT THE BOTTOM OF ITS IPHONES?"

1 "ANSWER: BECAUSE WE BELIEVED THE EASIEST  
2 DESIGN FOR THE IPHONE IS A SINGLE HOME BUTTON UNDER  
3 THE SCREEN.

4 "QUESTION: AND THAT SINGLE HOME BUTTON  
5 THE SCREEN IS ON EVERY IPHONE AND IPAD PRODUCT THAT  
6 HAS EVER BEEN RELEASED; CORRECT?

7 "ANSWER: THE HOME BUTTON IS ON EVERY  
8 IPHONE AND IPAD."

9 MR. BRESSLER DECIDED JUST TO IGNORE IT.  
10 WE'RE GOING TO IGNORE THIS FACT THAT THESE ACCUSED  
11 PHONES HAVE THIS DIFFERENTIATION OF THESE FOUR  
12 CONSPICUOUS BUTTONS AT THE BOTTOM.

13 ONE QUICK LOOK, THAT'S AN ANDROID PHONE,  
14 THAT'S NOT AN IPHONE.

15 BUT HE JUST IGNORES IT.

16 ANOTHER EXAMPLE, I ASKED MR. STRINGER,  
17 "IN YOUR VIEW, ONE IMPORTANT DESIGN ASPECT OF THE  
18 '087 PATENT, AND THE INITIAL IPHONE, WAS THAT IT  
19 HAD FOUR EVENLY RADIUS CORNERS; CORRECT?

20 "ANSWER: YES."

21 THAT'S REFERRING TO THE CORNERS AND ALL  
22 AROUND THE PHONE THERE. THEY ALL HAVE TO HAVE THE  
23 SAME RADIUS. THAT'S AN IMPORTANT DESIGN POINT.

24 WELL, SAMSUNG GALAXY S 4G, TAKE A LOOK AT  
25 IT. THE RADIUS ON THE TOP TWO CORNERS OF THE PHONE

1 ARE COMPLETELY DIFFERENT THAN THE RADII ON THE  
2 BOTTOM.

3 AND I ASKED MR. BRESSLER ABOUT THAT.  
4 "WHEN YOU DID YOUR ANALYSIS, YOU MADE NO EFFORT TO  
5 ASCERTAIN WHETHER THE ACCUSED PHONES HAD EQUAL  
6 RADII, DID YOU, SIR?

7 "ANSWER: I DID NOT.

8 "QUESTION: DO YOU DISPUTE THAT THE RADII  
9 ON THE TOP OF THE -- THE TOP TWO ROUNDED CORNERS OF  
10 THE SAMSUNG GALAXY S 4G ARE DIFFERENT FROM THE  
11 RADII ON THE BOTTOM ROUNDED CORNERS?

12 "ANSWER: I COULDN'T DISPUTE YOUR  
13 MEASUREMENT BECAUSE I HAVEN'T TAKEN THEM."

14 SO THE ONLY PERSON MR. BRESSLER SPOKE TO,  
15 THE ONLY PERSON WAS MR. STRINGER. WHEN I ASKED  
16 MR. STRINGER, WHAT ARE THE IMPORTANT DESIGN  
17 ELEMENTS, THIS IS ONE OF THEM THAT HE LISTED.  
18 PRESUMABLY HE LISTED THEM TO MR. BRESSLER. BUT  
19 MR. BRESSLER COULDN'T BE BOTHERED TO EVERYONE  
20 MEASURE THE RADII ON THE ACCUSED PHONES.

21 ANOTHER IMPORTANT DESIGN ATTRIBUTE THAT  
22 MR. STRINGER TALKED ABOUT FOR THE '087 AND '677  
23 PATENTS WAS THE COMPLETELY FLAT FRONT SURFACE. I  
24 ASKED HIM, "ANOTHER DESIGN ASPECT -- OR AN ASPECT  
25 OF THE DESIGN IN THE '087 PATENT THAT WAS IMPORTANT

1 TO YOU AND YOUR TEAM AS DESIGNERS WAS THAT THE  
2 FRONT SURFACE, FOR EXAMPLE, IF YOU LOOK AT FIGURE  
3 16 OR FIGURE 15, YOU CAN SEE IT, THE FRONT SURFACE  
4 WAS COMPLETELY FLAT ALL THE WAY ACROSS THE FRONT.  
5 THAT WAS AN IMPORTANT DESIGN ELEMENT; RIGHT?

6 "ANSWER: YES."

7 AND I CLARIFIED, "THIS RIM WAS  
8 INTENTIONALLY DESIGNED TO BE NOMINALLY FLUSH WITH  
9 THE GLASS; IS THAT RIGHT?

10 "ANSWER: YES.

11 "QUESTION: SOMETHING THAT DISTINGUISHED  
12 IT FROM OTHER DESIGNS PREVIOUSLY; RIGHT?

13 "ANSWER: THIS WAS OUR DESIGN."

14 WHAT DOES THE EVIDENCE SHOW? ON THE  
15 ACCUSED PHONES, THEY ARE DEMONSTRABLY NOT  
16 COMPLETELY FLAT ACROSS THE FRONT SURFACE.

17 LOOK AT THE GALAXY S. GALAXY S 4G. AND  
18 YOU'LL HAVE THESE. YOU CAN LOOK AT THEM FOR  
19 YOURSELVES. YOU DON'T HAVE TO LOOK AT SLIDES AND  
20 TRY TO FIGURE IT OUT. YOU CAN SEE THAT THEY'RE NOT  
21 FLAT.

22 AND IT ACTUALLY COSTS MORE TO DO IT THIS  
23 WAY, AND IT ALSO MAKES THE PHONE LESS -- IT MAKES  
24 IT EASIER TO SCRATCH THE GLASS WHEN YOU DO IT  
25 APPLE'S WAY. THIS ISN'T JUST SOME TRIVIAL, MINOR



1           THING.    DETAILS MATTER WHEN YOU'RE TALKING ABOUT  
2           DESIGN.

3                        I ASKED MR. BRESSLER, "SIR, WOULD YOU  
4           AGREE THAT THE SAMSUNG GALAXY S 4G IS NOT FLAT ALL  
5           THE WAY ACROSS?    IN FACT, THE BEZEL PROTRUDES ABOVE  
6           THE GLASS?

7                        "ANSWER:    ABOUT A HALF A MEMBERS OF THE  
8           JURY, YES.    QUESTION AND THAT'S IMPORTANT, ISN'T  
9           IT?

10                      "ANSWER:    I BELIEVE IT WAS IMPORTANT TO  
11           MR. STRINGER."

12                      WELL, THAT'S THE ONLY GUY WHO TALKED TO  
13           YOU ABOUT THESE DESIGN PATENTS.    IT WAS IMPORTANT  
14           TO MR. STRINGER, BUT MR. BRESSLER IGNORED IT.

15                      WELL, I TAKE THAT BACK.    HE IGNORED IT  
16           FOR INFRINGEMENT.

17                      WHAT DID HE SAY WHEN HE WAS DEFENDING  
18           THESE PATENTS AGAINST THE PRIOR ART ON INVALIDITY  
19           GROUNDS?    REMEMBER, YOU HAVE TO USE THE SAME  
20           STANDARD.

21                      HE USED THIS SLIDE.    HE WAS LOOKING AT  
22           THE SIDE VIEW OF THE JP'638 AND HE SAID, LOOK,  
23           THERE'S A LITTLE BIT OF CONTOURING AT THE VERY TOP  
24           AND BOTTOM OF THAT FRONT FACE.    AND HE DIDN'T SAY,  
25           WHEN HE WAS TALKING ABOUT VALIDITY, THAT THAT WAS

1 JUST A MINOR DIFFERENCE.

2 HERE'S WHAT HE SAID: "ON THE JP 683  
3 PATENT, 26.87, COULD YOU PLEASE SUMMARIZE FOR THE  
4 JURY THE DIFFERENCES BETWEEN THIS DESIGN AND THE  
5 '677 AND THE '087 PATENTS?

6 "ANSWER: YES. I BELIEVE THE '638 PATENT  
7 IS SUBSTANTIALLY DIFFERENT FROM EITHER OF THOSE TWO  
8 PATENTS MOST DRAMATICALLY BECAUSE THE FRONT FACE IS  
9 NOT FLAT, WHICH CREATES AN EXTRAORDINARILY  
10 DIFFERENT OVERALL IMPRESSION."

11 SO WHEN HE WAS TALKING ABOUT VALIDITY,  
12 BEING A LITTLE BIT NOT FLAT IS EXTRAORDINARILY  
13 DIFFERENT.

14 WHEN HE'S TALKING ABOUT INFRINGEMENT,  
15 DOESN'T MATTER.

16 THAT'S NOT CREDIBLE TESTIMONY.

17 MR. STRINGER ALSO TESTIFIED ABOUT THE  
18 LOZENGE.

19 "QUESTION: IT WAS IMPORTANT TO YOU, AS  
20 THE DESIGN TEAM, THAT THAT LOZENGE SHAPED DESIGN  
21 ELEMENT BE CENTERED VERTICALLY ON THE PHONE; RIGHT?

22 AND THEN HE SAID CENTERED, AND THERE WAS  
23 SOME QUESTION ABOUT CENTERED VERTICALLY MEANT, HE  
24 SAID IT'S CENTERED BOTH WAYS, YES. HE SAID THAT'S  
25 IMPORTANT.

1           OKAY. THAT'S ANOTHER IMPORTANT DESIGN  
2           ELEMENT THAT MR. STRINGER IDENTIFIED.

3           LET'S LOOK AT THE EVIDENCE. THE GALAXY S  
4           4G. IT'S NOT CENTERED. IT'S MUCH CLOSER TO THE  
5           TOP OF THIS AREA OF THE PHONE. IT'S NOT CENTERED  
6           HORIZONTALLY. OR EXCUSE ME, VERTICALLY. IF YOU  
7           PULL IT OUT, YOU CAN SEE IT'S A COMPLETELY  
8           DIFFERENT SHAPE. IT'S LONGER, THINNER, HAS A ROW  
9           OF DOTS.

10           LOOK AT THE INFUSE. SAME THING. YOU'RE  
11           GOING TO GET A CHANCE TO LOOK AT THESE PHONES AND  
12           YOU CAN SEE IS CLEARLY. BUT THE SPEAKER SLOT IS  
13           CLEARLY NOT CENTERED LIKE THIS IS AND IT'S CLEARLY  
14           A DIFFERENT SHAPE WITH TWO ROWS OF DOTS IN IT.

15           SO, AGAIN, ANOTHER DESIGN PRINCIPLE,  
16           ANOTHER DESIGN PRINCIPLE IDENTIFIED WITH THE ONLY  
17           DESIGN INVENTOR THAT CAME HERE AS MAKING HIS DESIGN  
18           UNIQUE THAT'S NOT FOUND.

19           IN FACT, MEMBERS OF THE JURY, EVERY  
20           SINGLE DESIGN ELEMENT THAT MR. STRINGER SAID TO ME  
21           DIFFERENTIATED HIS DESIGN FROM THE PRIOR ART IS NOT  
22           PRESENT IN THE ACCUSED PRODUCTS.

23           THE ONLY WAY YOU'RE GOING TO FIND  
24           SUBSTANTIAL SIMILARITY IS IF YOU THINK HAVING A  
25           RECTANGLE WITH ROUNDED CORNERS AND A BIG SCREEN AND

1 A LOZENGE, WITHOUT ANYTHING MORE, IS INFRINGEMENT.

2 BUT IF YOU DO THAT, YOU HAVE TO APPLY THE  
3 SAME STANDARD WITH THE PRIOR ART, WHICH MEANS THESE  
4 PATENTS ARE INVALID.

5 NOW I'D LIKE TO SWITCH TO THE '889 DESIGN  
6 PATENT BRIEFLY. MR. BRESSLER ALSO TALKED ABOUT  
7 THAT DESIGN.

8 CAN WE GO TO SLIDE 70.

9 THIS IS THE '889. WHAT THEY CALL THE  
10 TABLET DESIGN PATENT.

11 AND IF WE LOOK AT THE ART, WE CAN SEE,  
12 YOU APPLY THE SAME TEST I JUST WENT THROUGH, THE  
13 PRIOR ART, ALSO IS A LARGE RECTANGLE WITH A LARGE  
14 SCREEN, NARROW EQUAL BORDERS AROUND IT, AT LEAST ON  
15 THE COMPACT, FLAT BACK.

16 SO THE GENERAL DESIGN ELEMENTS ARE ALL  
17 THERE IN THE PRIOR ART. SO YOU NEED TO LOOK AT THE  
18 SPECIFICS, THE SPECIFIC THINGS THAT MAKE THE '889  
19 UNIQUE.

20 AND, AGAIN, THE ONLY PERSON WHO COULD  
21 TELL US THAT WHO APPEARED AT THIS TRIAL WAS  
22 MR. STRINGER, AND WHAT DID HE SAY?

23 "QUESTION: NOW, WITH RESPECT TO THE '889  
24 DESIGN PATENT, ISN'T IT CORRECT THAT THE DESIGN  
25 TEAMS' OBJECTIVES WERE TO REDUCE THE PRODUCT TO

1 WHAT WAS ESSENTIALLY A SINGLE, SEAMLESS VESSEL,  
2 WHICH WAS THE REAR HOUSING?

3 "ANSWER: THAT WAS THE INSPIRATION, THAT  
4 WAS THE INSPIRATION OF THIS DESIGN, YES."

5 "QUESTION: AND ANOTHER IMPORTANT DESIGN  
6 GOAL WAS TO HAVE JUST ONE GAP IN THE PRODUCT  
7 BETWEEN THE BACK HOUSING AND WHAT YOU REFER TO AS  
8 THE CLEAR GLASS BEZEL THAT EXTENDS ALL THE WAY  
9 ACROSS THE FRONT; RIGHT?

10 "ANSWER: YES."

11 JUST ONE GAP. AN IMPORTANT DESIGN GOAL  
12 OF THE '889, JUST ONE GAP.

13 NOW, YOU REMEMBER THE 035 MODEL. I  
14 SHOWED THIS TO MR. STRINGER, AND HE ADMITTED THAT  
15 THIS WAS THE ACTUAL MODEL THAT THEY USED TO DRAW  
16 THE PICTURES FOR THE '889 PATENT.

17 IF WE CAN GO TO SLIDE 76.

18 THESE ARE PHOTOGRAPHS, DX 740, OF THIS  
19 RIGHT HERE, THE 035 MODEL.

20 THEY WERE SUBMITTED TO THE PATENT OFFICE,  
21 AND YOU CAN SEE THE PHOTOGRAPHS MATCH UP DIRECTLY  
22 TO THE PICTURES IN THE '889 PATENT. AND YOU CAN  
23 SEE WHEN YOU TAKE THIS BACK TO THE JURY ROOM, YOU  
24 CAN SEE WHAT MR. STRINGER IS TALKING ABOUT .

25 THERE'S NOTHING ON THE BACK. IT'S SHINY.

1 NO SEAMS, NOTHING. AND THERE'S ONE, ONE SEAM HERE  
2 ON THE FRONT. THAT'S WHAT HE'S TALKING ABOUT.

3 NOW, LET'S TALK ABOUT THE ACCUSED GALAXY  
4 TABLET.

5 CAN WE GO TO SLIDE 77.

6 HERE IT IS. IT'S HARD TO SEE FROM HERE,  
7 BUT IT'S CLEARLY GOT -- IT DOESN'T HAVE A HOUSING  
8 ON THE BACK WITH JUST ONE PIECE, JUST LIKE ON THE  
9 SLIDE HERE. IT'S GOT A MULTIPLE PIECE HOUSING.  
10 IT'S CLEARLY DIFFERENT DESIGN ON THE BACK. AND YOU  
11 CAN TAKE THIS BACK IN THE ROOM AND YOU CAN CHECK IT  
12 OUT.

13 BUT THE INSPIRATION FOR THE '889 DOES NOT  
14 EVEN EXIST ON THESE ACCUSED PRODUCTS.

15 LET'S GO TO SLIDE 81, PLEASE, MR. FISHER.

16 ANOTHER DISTINGUISHING FEATURE OF THE  
17 '889 IS GOT THESE OBLIQUE LINE SHADINGS HERE ON THE  
18 BACK, AND THE COURT INSTRUCTED YOU AS TO WHAT THAT  
19 MEANS.

20 IF WE CAN SHOW JURY INSTRUCTION 43 FROM  
21 PAGE 59.

22 AND HIGHLIGHT, YEAH, THE PARAGRAPH '889  
23 PATENT.

24 AND, MR. FISHER, IF YOU COULD HIGHLIGHT  
25 WHAT I'M READING, I'M GOING TO START WITH THE

1 OBLIQUE LINE SHADING. "THE OBLIQUE LINE SHADING OF  
2 FIGURES 1 THROUGH 3 AND FIGURE 9 DEPICTS A  
3 TRANSPARENT, TRANSLUCENT OR HIGHLY POLISHED OR  
4 REFLECTIVE SURFACE," AND IT SAYS, "FROM THE TOP  
5 PERSPECTIVE VIEW OF THE CLAIMED DESIGN, THE TOP  
6 VIEW OF THE CLAIMED DESIGN, AND THE BOTTOM  
7 PERSPECTIVE VIEW OF THE CLAIMED DESIGN."

8 THE JUDGE HAS INSTRUCTED YOU AS TO THE  
9 MEANING OF THIS DESIGN PATENT AND HAS SAID THAT  
10 THAT OBLIQUE LINE SHADING DEPICTS A TRANSPARENT,  
11 TRANSLUCENT OR HIGHLY POLISHED OR REFLECTIVE  
12 SURFACE ON THE BOTTOM PERSPECTIVE VIEW OF THE  
13 CLAIMED DESIGN.

14 COULD WE GO TO SLIDE 82.

15 AND MR. BRESSLER DOESN'T DISPUTE THIS.  
16 "AND WHEN YOU FORMED YOUR OPINIONS FOR THE '889  
17 PATENT, YOU KNEW THAT OBLIQUE LINE SHADING MUST BE  
18 USED TO SHOW TRANSPARENT, TRANSLUCENT AND HIGHLY  
19 POLISHED SURFACES; RIGHT?

20 "ANSWER: YES.

21 "QUESTION: SO WHAT THIS IS TELLING US IS  
22 THAT THE BACK OF THE '889 PATENT IS A SHINY  
23 SURFACE.

24 "ANSWER: I BELIEVE SO."

25 OKAY. YOU CAN SEE IT WITH YOUR OWN EYES.

1 THIS IS NOT A SHINY SURFACE. THIS IS A MATTE  
2 SURFACE. SO ANOTHER DIFFERENTIATING FACTOR. I  
3 SHOWED THAT TO MR. BRESSLER.

4 I SAID, "OKAY. WHEN YOU HOLD THIS UP AND  
5 LOOK AT IT, CAN YOU SEE YOUR REFLECTION IN IT, SIR?"

6 "ANSWER: NO, I CAN'T SEE MY REFLECTION."

7 REMEMBER HE WAS SAYING IT WAS REFLECTIVE.  
8 I ASKED HIM TO LOOK AT IT. HE SAYS, NO, I CAN'T  
9 SEE MY REFLECTION.

10 "QUESTION: BUT YOU'RE SAYING IT'S  
11 REFLECTIVE?"

12 "ANSWER: I CAN SEE LIGHTS REFLECTING OFF  
13 OF IT.

14 "QUESTION: WELL, YOU CAN SEE LIGHT  
15 REFLECTING ON ANY SURFACE, CAN'T YOU, SIR?"

16 AND HE ADMITTED, PRETTY MUCH. SEEING  
17 LIGHT REFLECTED OFF OF THIS DOES NOT MEAN IT'S A  
18 SHINY SURFACE. IT DOESN'T MEAN IT'S A REFLECTIVE  
19 SURFACE. WE ALL KNOW WHAT REFLECTIVE MEANS. THIS  
20 SURFACE IS REFLECTIVE. THIS SURFACE IS NOT.

21 YOU'RE THE ORDINARY OBSERVER AND YOU CAN  
22 DECIDE.

23 NOW, I'D LIKE TO TURN TO THE LAST OF THE  
24 PATENTS, APPLE'S D'305 PATENT .

25 CAN WE GO TO SLIDE 93.



1                   NOW, IMPORTANTLY, THE D'305 PATENT  
2                   ACTUALLY CLAIMS, IT DOESN'T JUST CLAIM ELECTRONIC  
3                   DEVICE OR SOMETHING LIKE THAT. IT SPECIFICALLY  
4                   CLAIMS A GRAPHICAL USER INTERFACE.

5                   WHAT IS A GRAPHICAL USER INTERFACE?  
6                   WELL, THAT'S SOMETHING THAT YOU USE TO INTERFACE  
7                   WITH THE COMPUTER OR A SMARTPHONE.

8                   THE SAME TEST APPLIES HERE. "TWO DESIGNS  
9                   ARE SUBSTANTIALLY THE SAME IF, IN THE EYE OF AN  
10                  ORDINARY OBSERVER, GIVING SUCH ATTENTION AS A  
11                  PURCHASER USUALLY GIVES, THE RESEMBLANCE BETWEEN  
12                  THE TWO DESIGNS IS SUCH AS TO DECEIVE SUCH AN  
13                  OBSERVER, INDUCING HIM TO PURCHASE ONE SUPPOSING IT  
14                  TO BE THE OTHER."

15                  NOW, YOU REMEMBER DR. PORET CAME AND  
16                  TESTIFIED ABOUT THAT. IF WE CAN SWITCH TO THE  
17                  ELMO. AND YOU ALSO REMEMBER THAT APPLE IS NOT  
18                  ACCUSING THE HOME SCREEN ON ANY OF THESE PHONES AS  
19                  BEING SUBSTANTIALLY SIMILAR TO THESE PRODUCTS.  
20                  THEY'RE ACCUSING THE APPLICATION SCREEN.

21                  AND REMEMBER I TOOK THIS PHONE, FOR THE  
22                  RECORD, THIS IS JOINT TRIAL EXHIBIT NUMBER 1025, I  
23                  THINK DR. KARE CALLED IT THE CHIN PHONE. I TURNED  
24                  IT ON TO SEE WHAT AN ORDINARY OBSERVER WOULD SEE TO  
25                  GET TO THAT HOME SCREEN -- TO GET TO THAT

1 APPLICATION SCREEN.

2 WHAT DO THEY SEE? SAMSUNG. STILL  
3 SAMSUNG. DROID. I DON'T HAVE THE MICROPHONE THIS  
4 TIME SO YOU CAN'T HEAR THE NOISE. SO YOU SEE  
5 SAMSUNG FOR A LONG TIME AND THEN YOU SEE DROID,  
6 SHORT FOR ANDROID, AND THEN YOU SEE THIS SCREEN.  
7 THAT'S NOT THE ACCUSED SCREEN.

8 SO THEY HAVE TO GO AND UNLOCK THE PHONE  
9 AND THEY GET TO THIS SCREEN. WELL, THAT'S NOT AN  
10 ACCUSED SCREEN, EITHER.

11 THE ONLY WAY THEY EVEN GET TO THIS SCREEN  
12 IS THAT APPLE IS SAYING IT'S GOING TO DECEIVE  
13 PEOPLE INTO PURCHASING ONE PRODUCT VERSUS THE OTHER  
14 IS IF THEY HIT THE APPLICATION MENU. IT TAKES THAT  
15 MANY STEPS TO GET TO THIS SCREEN. DO YOU REMEMBER  
16 THAT?

17 AND AFTER I PLAYED THAT, OR TURNED ON  
18 THAT PHONE FOR DR. KARE -- CAN WE GO TO SLIDE 96 --  
19 I ASKED HER.

20 "QUESTION: BY THE TIME THAT THE CONSUMER  
21 TURNS ON THE PHONE, SEES THE SAMSUNG NAME  
22 PROMINENTLY DISPLAYED, SEES THE DROID ADVERTISEMENT  
23 AND ANIMATION, WOULDN'T YOU AGREE THAT NO CONSUMER  
24 WOULD BE CONFUSED AS TO WHICH PHONE THEY HAVE BY  
25 THAT TIME?"

1 LET'S USE OUR COMMON SENSE.

2 WHAT DID DR. KARE SAY? "I CAN'T AGREE  
3 BECAUSE I HAVEN'T -- I DON'T -- I DON'T KNOW ABOUT  
4 CONSUMER BEHAVIOR STARTING -- I DON'T KNOW ABOUT  
5 THE QUESTION YOU'RE ASKING ME. THAT'S OUTSIDE MY  
6 FOCUS."

7 JUST FOR THIS ICON DESIGN PATENT, APPLE  
8 IS SEEKING OVER \$2 BILLION. THE STANDARD IS, IS  
9 THERE DECEPTION? THIS IS THEIR EXPERT TO SUPPORT  
10 THEIR REQUEST FOR OVER \$2 BILLION AND SHE SAID SHE  
11 DOESN'T KNOW.

12 NOW, I HEARD COUNSEL FOR APPLE SAY TO YOU  
13 ALL THAT DR. KARE TESTIFIED -- LET ME CHECK MY  
14 NOTES -- HE SAID DR. KARE TESTIFIED THAT THE ICONS  
15 IN THE D 035 HAD NO FUNCTIONAL LIMITATIONS, THAT'S  
16 WHAT HE SAID ACCORDING TO MY NOTES.

17 SO LET'S SEE WHAT SHE ACTUALLY SAID.  
18 THIS IS THE DANGER OF CHARACTERIZING TESTIMONY  
19 RATHER THAN SHOWING IT.

20 CAN WE GO TO PAGE 98?

21 "QUESTION: IS IT FAIR TO SAY THAT YOU  
22 DIDN'T INVESTIGATE THE FUNCTIONALITY OF THE ICONS  
23 AND HOW THEY WORK AND HOW A USER WOULD INTERACT  
24 WITH THEM AS PART OF YOUR ANALYSIS?

25 "ANSWER: YES."

1                    THAT'S WHAT SHE ACTUALLY SAID.

2                    "QUESTION:    AND YOU DIDN'T COMPARE -- YOU  
3 DIDN'T CONSIDER, AS PART OF YOUR ANALYSIS FOR YOUR  
4 EXPERT OPINION, HOW A USER INTERACTS WITH THOSE  
5 ICONS WAS PART OF YOUR ANALYSIS, DID YOU?

6                    "ANSWER:    NO."

7                    SO, IN FACT, DR. KARE DIDN'T -- EVEN  
8 THOUGH IT'S A GRAPHICAL USER INTERFACE WHICH IS  
9 OBVIOUSLY FUNCTIONAL, DR. KARE DIDN'T INVESTIGATE  
10 IT AT ALL.    ALL SHE DID WAS SHE CAME AND SHE SHOWED  
11 YOU PICTURES AND SAID, THEY LOOK -- THE OVERALL  
12 IMPRESSION IS SIMILAR.    SHE DIDN'T PROVE THAT  
13 ANYONE WOULD BE DECEIVED OR CONFUSED IN ANY WAY.

14                    LET'S LOOK AT HER PICTURES.    REMEMBER,  
15 SHE SPENT TIME ON THIS FASCINATE SCREEN AND THEN  
16 SHOWED A WHOLE BUNCH OF OTHER PICTURES WITHOUT  
17 ANALYZING THEM.    SO LET'S LOOK AT THE ONE, THE ONE  
18 SCREEN FROM AN ACCUSED PHONE THAT SHE ACTUALLY  
19 ANALYZED.

20                    ALL RIGHT.    AND LET'S LOOK AT IT FROM THE  
21 FASCINATE SIDE FIRST AND ASK THE QUESTION -- WELL,  
22 LET ME BACK UP.    YOU ALL KNOW THAT EACH OF THESE  
23 ICON S IS ASSOCIATED WITH AN APPLICATION PROGRAM.  
24 THAT'S BECAUSE IT'S A GRAPHICAL USER INTERFACE.  
25 THAT MEANS IF YOU HIT ONE OF THESE BUTTONS, AN

1 APPLICATION IS GOING TO LOAD.

2 SO LET'S ASK THE QUESTION, ON THE  
3 FASCINATE SCREEN THAT SHE'S USING, HOW MANY  
4 APPLICATIONS DON'T EVEN EXIST ON THE '305?

5 WELL, I PUT RED BOXES OVER THEM. SO 12  
6 OUT OF THE 20 APPLICATION ICONS ON THE FASCINATE  
7 SIMPLY DO NOT EXIST ON THE DESIGN '305 PATENT.

8 DR. KARE'S ONLY OPINION, SHE DIDN'T LOOK  
9 AT PRIOR ART LIKE SHE WAS SUPPOSED TO, SHE SAID SHE  
10 DIDN'T LOOK AT FUNCTIONALITY. HER ONLY OPINION  
11 WAS, WELL, THE OVERALL IMPRESSION WAS THE SAME.

12 OKAY. LET'S TALK ABOUT OVERALL  
13 IMPRESSION.

14 60 PERCENT OF THE REAL ESTATE FOR THESE  
15 APPLICATION ICONS DOES NOT EXIST ON THE '305, 60  
16 PERCENT DIFFERENCE. THAT'S NOT OVERALL IMPRESSION  
17 OF IT BEING THE SAME.

18 LET'S LOOK AT IT FROM THE OTHER ANGLE.  
19 LET'S ASK THE QUESTION, LOOKING AT DESIGN '305  
20 PATENT, HOW MANY APPLICATION ICONS FROM THE D'305  
21 CANNOT BE FOUND? FORGET ABOUT SUBSTANTIAL  
22 SIMILARITY, JUST AREN'T THERE ON THE FASCINATE?

23 ONE, TWO, THREE, FOUR, FIVE, SIX, SEVEN.  
24 SEVEN OF THOSE D'305 APPLICATION ICONS DO NOT EXIST  
25 ON THE FASCINATE. THAT'S OVER 40 PERCENT OF THE

1 REAL ESTATE, ICON REAL ESTATE ON THE D'305 DOES NOT  
2 EVEN EXIST ON THE FASCINATE. THAT'S NOT OVERALL  
3 IMPRESSION BEING THE SAME. THAT'S A BIG  
4 DIFFERENCE.

5 NOW, LET'S LOOK AT -- LET'S LOOK AT THE  
6 APPLICATION ICONS, WHETHER THERE'S AN OVERLAP.  
7 THERE'S SEVEN OF THEM, AND I'VE HIGHLIGHTED THEM  
8 WITH BOXES HERE.

9 I ASKED DR. KARE ABOUT FIVE OF THOSE AND  
10 LET'S SEE WHAT SHE SAID. FIRST, THE TEXT MESSAGES  
11 ICONS, SMS VERSUS THE MESSAGING ICON SPEECH BOX  
12 WITH THE SMILY FACE THERE.

13 "QUESTION: DR. KARE, YOU'RE NOT  
14 TESTIFYING TO THIS JURY THAT THIS SMS ICON IS  
15 SUBSTANTIALLY SIMILAR TO THIS OTHER ICON THAT SAYS  
16 MESSAGES, ARE YOU?

17 "ANSWER: NO.

18 "QUESTION: IT'S NOT SUBSTANTIALLY  
19 SIMILAR, IS IT?

20 "ANSWER: NO.

21 LET'S GO TO THE NEXT ICON. THE CALENDAR  
22 ICON, I'VE HIGHLIGHTED IT HERE AND OVER HERE. YOU  
23 CAN SEE FOR YOURSELVES IT'S NOT SUBSTANTIALLY  
24 SIMILAR. AND DR. KARE AGREES.

25 "QUESTION: THAT CALENDAR ICON IS NOT

1 SUBSTANTIALLY SIMILAR TO THE CALENDAR ICON ON THE  
2 D'3055 THE; RIGHT?

3 "ANSWER: NO.

4 GO TO THE NEXT ONE, THE FLOWER, THE TWO  
5 FLOWER ICONS, I ASKED HER.

6 "QUESTION: IT'S OBVIOUSLY A DIFFERENT  
7 IMAGE THAN THE PICTURE OF THE FLOWER ON THE D'305;  
8 RIGHT?

9 "ANSWER: YES."

10 IT'S OBVIOUSLY A DIFFERENT IMAGE. THAT'S  
11 NOT SUBSTANTIALLY SIMILAR.

12 LET'S GO TO THE NEXT ONE. THE  
13 CALCULATOR. YOU CAN SEE IT ON THE D'305, YOU CAN  
14 SEE IT RIGHT HERE ON THE FASCINATE, CLEARLY  
15 DIFFERENT. I ASKED DR. KARE, "DR. KARE, WOULD YOU  
16 AGREE WITH ME THAT THE CALCULATOR ICON IN THE  
17 FASCINATE IS NOT SUBSTANTIALLY SIMILAR TO THE  
18 CALCULATOR ICON IN THE D'305?

19 "ANSWER: YES."

20 LET'S GO TO THE NEXT ONE. THE SETTINGS  
21 ICON, HERE YOU CAN SEE THE D'305, SEVERAL GEARS AND  
22 A LARGE RECTANGLE. HERE ON FASCINATE YOU SEE NO  
23 BACKGROUND AND A TINY GEAR.

24 "QUESTION: WOULD YOU AGREE WITH ME THAT  
25 THE GEAR IN THE TOP LEFT QUADRANT OF THE FASCINATE

1 DEPICTED ON THE PX 14.7 IS NOT SUBSTANTIALLY  
2 SIMILAR TO THE SETTINGS ICON IN THE D'305?

3 "ANSWER: NO.

4 "QUESTION: YOU WOULD AGREE WITH ME.

5 "ANSWER: YES.

6 "QUESTION: IT'S NOT SUBSTANTIALLY  
7 SIMILAR, IS IT?

8 "ANSWER: NO."

9 SO WE JUST WENT THROUGH FIVE OF THE SEVEN  
10 APPLICATION ICONS, THERE'S ONLY SEVEN APPLICATION  
11 ICONS THAT CORRESPOND, AND WE JUST WENT THROUGH  
12 FIVE OF THOSE ICONS AND DR. KARE HERSELF SAYS  
13 THEY'RE NOT SUBSTANTIALLY SIMILAR.

14 WHAT DOES THAT LEAVE US WITH? TWO ICONS.  
15 OUT OF 36 TOTAL ICONS, THERE'S ONLY 2 ICONS THAT  
16 DR. KARE SAYS ARE SIMILAR, THE IPHONE AND THE  
17 CLOCK.

18 OUT OF 36 ICONS, YET SHE TESTIFIES TO YOU  
19 THAT THE OVERALL IMPRESSION OF THE D'305 AND  
20 FASCINATE ARE THE SAME, 2 OUT OF 36.

21 I WOULD SUBMIT THE VAST MAJORITY OF THE  
22 ICONS ARE SUBSTANTIALLY DIFFERENT.

23 AND LET'S NOT THINK THAT YOU CAN PATENT A  
24 COLORFUL ROW, A COLORFUL MATRIX OF ICONS.

25 I ASKED DR. KARE ABOUT THAT.



1 CAN WE GO TO SLIDE 116.

2 "QUESTION: YOU'RE NOT TELLING THE JURY  
3 THAT APPLE OWNS THE RIGHT TO HAVE A COLORFUL MATRIX  
4 OF ICONS, ARE YOU?

5 "ANSWER: NO.

6 "QUESTION: AND YOU'RE NOT TELLING THE  
7 JURY THAT APPLE OWNS THE EXCLUSIVE RIGHT TO HAVE  
8 THE ICONS ARRANGED IN ROWS AND COLUMNS IN A GRID  
9 MATRIX, ARE YOU?

10 "ANSWER: NO."

11 I ASKED HER ABOUT THE PHONE.

12 "QUESTION: DO YOU BELIEVE THAT APPLE  
13 OWNS THE IMAGE OF THE OLD RETRO PHONE RECEIVER?

14 "ANSWER: I DON'T KNOW.

15 "QUESTION: APPLE DOESN'T OWN THE COLOR  
16 GREEN FOR GO, DOES IT?

17 "ANSWER: NO. I DON'T -- I DON'T KNOW,  
18 BUT I WOULD ASSUME NO."

19 WELL, THE ONLY THING LEFT IS THE CLOCK  
20 AND YOU CAN SEE ONE IS BLACK AND ONE IS BLUE. THE  
21 ONLY WAY THEY COULD POSSIBLY BE SIMILAR IS IF APPLE  
22 OWNED THE IMAGE OF THE CLOCK.

23 I ASKED DR. KARE ABOUT THAT.

24 "QUESTION: YOU ALSO POINT TO THIS CLOCK  
25 ICON. THIS IS A PICTURE OF THE FRONT FACE OF A

1 CLOCK; RIGHT?

2 "ANSWER: YES.

3 "QUESTION: AND WHEN YOU HIT THE CLOCK  
4 ICON, YOU LAUNCH THE CLOCK APPLICATION; RIGHT?

5 "ANSWER: YES. YES.

6 "QUESTION: APPLE DOESN'T OWN THE PICTURE  
7 OF THE CLOCK, DOES IT?

8 "ANSWER: I DON'T KNOW."

9 THAT IS THE SUM AND SUBSTANCE OF THE  
10 TESTIMONY THAT APPLE PRESENTED TO YOU FOR THIS  
11 D'305 PATENT WHERE THEY ARE ASKING FOR OVER 2 --  
12 JUST ON THIS PATENT -- \$2 BILLION.

13 NOW LET'S MOVE ON TO TRADE DRESS QUICKLY.  
14 AND FIRST, VERY BRIEFLY, THE COURT INSTRUCTED YOU  
15 AS TO TRADE DRESS AS TO THE IPAD WHERE TRADE DRESS  
16 INFRINGEMENT IS ALLEGED, THE TEST IS LIKELIHOOD OF  
17 CONFUSION, WHETHER OR NOT THERE'S GOING TO BE  
18 CONFUSION.

19 AND THEN THERE'S ALSO THE DILUTION CLAIM.

20 WHO DID APPLE CALL AS ITS EXPERT FOR THE  
21 TRADE DRESS CLAIMS? WELL, IT CALLED DR. RUSSELL  
22 WINER. AND WHAT DID HE SAY ABOUT WHETHER THERE'S  
23 DILUTION? LET'S SEE. I'M NOT GOING TO  
24 CHARACTERIZE IT. I'M GOING TO READ IT.

25 "QUESTION: DR. WINER, YOU HAVE NO

1           EMPIRICAL EVIDENCE TO SHOW THAT SAMSUNG'S ACTIONS  
2           HAVE DILUTED APPLE'S BRAND; RIGHT?

3                         "ANSWER:   CORRECT.

4                         "QUESTION:   AND YOU HAVE NO HARD DATA TO  
5           SHOW THAT SAMSUNG'S ACTIONS HAVE DILUTED APPLE'S  
6           BRAND; RIGHT?

7                         "ANSWER:   I WAS NOT ASKED TO DO THAT."

8                         HE'S THEIR EXPERT WHO IS HERE TO PROVE  
9           DILUTION.   AND THIS IS HIS TESTIMONY ON  
10          CROSS-EXAMINATION, NOT ON DIRECT EXAMINATION, ON  
11          CROSS-EXAMINATION.   HE ADMITTED THAT HE HAD NO  
12          EVIDENCE OF DILUTION.

13                         SAMSUNG (SIC) IS ALSO ASKING FOR \$2  
14          BILLION JUST IF YOU FIND THE TRADE DRESS VIOLATION,  
15          AND THAT'S WHAT THEIR -- THAT'S THE STRENGTH OF  
16          THEIR EVIDENCE.

17                         REMEMBER, I ALSO PLAYED AND TOOK THE  
18          TABLET AND I PLAYED THIS, TURNED THIS ON FOR HIM,  
19          BECAUSE YOU HAVE TO GET TO THE APPLICATION SCREEN  
20          ON THE TABLET, TOO.   YOU HAVE TO TURN IT ON -- PUT  
21          THIS ON AUTO FOCUS FOR ME.   MAYBE I CAN GET A  
22          LITTLE HELP.

23                         WHAT DO YOU SEE?   WELL, YOU SEE GALAXY  
24          TAB, SAMSUNG GALAXY TAB 10.1 FOR A LONG TIME.   AND  
25          THEN AN APP FOR VERIZON.   AND THEN IT'S LOCKED, SO

1 THE USER NOW HAS SEEN ALL OF THAT, STILL HASN'T  
2 GOTTEN TO THE APPLICATION SCREEN, HAS TO UNLOCK  
3 IT -- WHAT WERE THE INSTRUCTIONS, YOUR HONOR, ABOUT  
4 SYSTEM UPDATE?

5 THE COURT: IT'S NO, I THINK.

6 MR. VERHOEVEN: IT DOESN'T HAVE NO. ALL  
7 RIGHT. THANK YOU.

8 AND THEN YOU SEE THE HOME SCREEN.

9 WELL, THAT'S NOT ACCUSED, EITHER. SO NOW  
10 YOU HAVE TO FIGURE OUT, HOW ARE YOU GOING TO GET TO  
11 THE APP?

12 WELL, IF YOU'VE NEVER PLAYED WITH THIS  
13 BEFORE, IF YOU'RE A CONSUMER IN THE STORE, YOU HAVE  
14 TO LOOK AROUND FOR A BIT, BECAUSE IT'S WAY UP THERE  
15 ON THE TOP? DO YOU SEE IT? IT'S WAY UP THERE.  
16 YOU HIT IT AND THEN YOU GET IT.

17 THAT'S THE SCREEN THEY'RE SAYING  
18 INFRINGES THEIR TRADE DRESS.

19 SO THE CONSUMER HAS TO SEE THE SAMSUNG  
20 GALAXY LOGO WHILE THEY'RE BOOTING UP AND HAS TO  
21 MANIPULATE THEMSELVES THROUGH IT.

22 I SHOWED THAT TO MR. WINER AND I ASKED  
23 HIM -- IF YOU GO TO SLIDE 126 --

24 "QUESTION: SO IT'S YOUR TESTIMONY TO  
25 THIS JURY THAT CONSUMERS, USING THE DEGREE OF CARE

1 THAT THEY WOULD NORMALLY USE, TURNING ON THIS  
2 PHONE, SEEING THE SAMSUNG, SEEING THE SWIRL THAT  
3 TURNS INTO THE SAMSUNG, SEEING IT GLOW TWO TIMES,  
4 HAVING TO NAVIGATE BEYOND THE HOME SCREEN TO THE  
5 APPLICATION SCREEN, THAT THOSE CONSUMERS WOULD BE  
6 CONFUSED AND WOULDN'T KNOW THAT THIS IS A SAMSUNG  
7 SOURCED PRODUCT? IS THAT YOUR TESTIMONY?"

8 AND HE HAD TO ADMIT, NO, THAT'S NOT MY  
9 TESTIMONY.

10 WHY? BECAUSE IT'S OBVIOUS. ANY CONSUMER  
11 WHO GOES IN AND WANTS TO BUY ONE OF THESE THINGS IS  
12 GOING TO KNOW THEY'RE GETTING A SAMSUNG PRODUCT.  
13 THEY'RE NOT GOING TO FINALLY GET TO THE APPLICATION  
14 SCREEN AND SAY, OH, THAT LOOKS A LOT LIKE APPLE.  
15 MAYBE THIS IS AN APPLE PRODUCT. IT JUST ISN'T  
16 CREDIBLE TO SUGGEST THAT.

17 NOW, I'D LIKE TO TURN NOW TO COUNSEL FOR  
18 APPLE'S REPEATED ACCUSATIONS THAT SAMSUNG IS  
19 NOTHING BUT A COPY ISSUE AN ORDER. I'D LIKE TO  
20 TALK A LITTLE BIT ABOUT WHAT THEY'RE DOING WHEN  
21 THEY MAKE THOSE ACCUSATIONS.

22 SO IF WE COULD PUT UP SLIDE 136, AND THIS  
23 IS FROM THE OPENING.

24 SIMILAR TO THE SLIDE YOU SAW FROM COUNSEL  
25 FOR APPLE THIS MORNING SUGGESTING, OR TRYING TO

1 SUGGEST TO YOU THAT SAMSUNG HAD COMPLETELY  
2 DIFFERENT DESIGNS AND DECIDED TO COPY LATER.

3 I SUBMIT TO YOU THAT THAT'S AN  
4 INTENTIONAL ATTEMPT TO MISLEAD THE JURY.

5 CAN WE GET THE BOARD? CAN EVERYONE SEE  
6 THE SCREEN, TOO? ALL RIGHT.

7 WHAT PHONES ARE THEY SHOWING? WELL, THE  
8 I7 FINAL SET OF INSTRUCTIONS FINAL SET OF  
9 INSTRUCTIONS, I730, I830 AND THE BLACKJACK.

10 REMEMBER HOW I TOLD YOU IN OPENING THAT  
11 SAMSUNG'S BUSINESS MODEL IS DIFFERENT FROM APPLE'S.  
12 APPLE HAS A BUSINESS MODEL WHERE THEY HAVE ONE  
13 PHONE, THAT'S IT, AND THEY CHANGE IT ONCE A YEAR.

14 SAMSUNG'S BUSINESS MODEL IS THEY HAVE ALL  
15 KINDS OF DIFFERENT PHONES FOR ALL KINDS OF  
16 DIFFERENT PEOPLE.

17 WELL, THESE ARE SOME OF THEIR ALL KINDS  
18 OF DIFFERENT PHONES. THE I700, IT'S RIGHT HERE,  
19 I700. IT'S A BAR-TYPE PHONE.

20 THE BLACKJACK, THE BLACKJACK IS RIGHT  
21 HERE. IT'S ALSO A BAR-TYPE PHONE.

22 THE I830, THE I830 IS A SLIDER TYPE  
23 PHONE.

24 THESE AREN'T EVEN THE SAME CATEGORY OF  
25 DESIGN AS THE OTHER SAMSUNG PHONES HERE WHICH

1 COUNSEL FOR APPLE DIDN'T TELL YOU ABOUT.

2 THIS HERE, MEMBERS OF THE JURY, THIS IS  
3 WHEN THE IPHONE WAS RELEASED, OKAY? THERE'S NO  
4 QUESTION, SAMSUNG HAD RECTANGULAR PHONES WITH  
5 ROUNDED SCREENS, OR EXCUSE ME, ROUNDED CORNERS,  
6 LARGE SCREENS AND MINIMALIST DESIGN BEFORE THE  
7 IPHONE EVEN CAME OUT.

8 WELL, WHAT APPLE'S COUNSEL IS DOING IS  
9 THEY'RE INTENTIONALLY IGNORING THESE PHONES AND  
10 POINTING TO A COMPLETELY DIFFERENT CATEGORY OF  
11 PHONES. THESE ARE THE TOUCHSCREEN SMARTPHONES.  
12 THESE ARE THE BAR-TYPE AND SLIDER TYPE PHONES.

13 IT'S A SHELL GAME. THEY'RE POINTING TO  
14 THESE PHONES BEFORE AND THESE PHONES AFTER AND  
15 PRETENDING THAT THESE PHONES NEVER EXISTED.

16 IS THAT FAIR? NO, IT'S NOT FAIR.

17 DOES THAT SHOW COPYING? NO, IT DOESN'T  
18 SHOW COPYING.

19 WHAT DID THE EVIDENCE SHOW? MR. BENSON  
20 CAME, CHIEF STRATEGY OFFICER FOR SAMSUNG. COUNSEL  
21 FOR APPLE SAID, OH, WE DIDN'T BRING ANY EXECUTIVES.  
22 WELL, HERE'S ONE. HE SAID, "WE WANT COMERS TO HEAR  
23 OUR MESSAGE, UNDERSTAND THAT OUR MESSAGE IS OURS  
24 AND GO OUT AND BUY OUR DEVICE" WHEN HE WAS ASKED  
25 ABOUT COPYING.

1 WE BROUGHT YOU MR. KIM FROM KOREA. HE  
2 TESTIFIED THAT HE PERSONALLY DESIGNED THESE PHONES  
3 OVER HERE ON THE SCREEN.

4 AND HE WAS ASKED.

5 "QUESTION: MR. KIM, IN DOING THE WORK  
6 THAT YOU DID IN DESIGNING TABLETS FOR SAMSUNG AND  
7 SMARTPHONES FOR SAMSUNG, AT ANY TIME DID YOU COPY  
8 THE WORK OF ANY OTHER SMARTPHONE MANUFACTURER?

9 "ANSWER: I HAVE NOT."

10 MR. KIM FURTHER TESTIFIED.

11 "QUESTION: WHEN DID SAMSUNG BEGIN  
12 WORKING ON THE GALAXY TAB 10.1 PROJECT?

13 "ANSWER: THAT WOULD BE OCTOBER 2009.

14 "QUESTION: AND WHEN DID YOU PERSONALLY  
15 BEGIN WORKING ON THAT PROJECT?

16 "ANSWER: SAME TIME, OCTOBER OF 2009.

17 "QUESTION: AND CAN YOU TELL US WHETHER  
18 THAT WAS BEFORE OR AFTER APPLE ANNOUNCED THE IPAD?

19 "ANSWER: THAT WOULD BE BEFORE."

20 MORE TESTIMONY. I'M NOT CHARACTERIZING.  
21 YOU CAN READ IT FOR YOURSELF.

22 HE WAS SHOWN THIS DOCUMENT, DX 900 AND HE  
23 IDENTIFIED THAT WAS THE OVERALL REVIEW OF THE SIZES  
24 CONCERNING THE GALAXY TAB 10.1, BASICALLY  
25 DISCUSSING THE DISPLAY SIZE, AND ALSO THE BORDER



1 AREA SIZE.

2 "QUESTION: AND IS THIS DATED BEFORE  
3 APPLE ANNOUNCED THE IPAD?

4 "ANSWER: YES, THAT'S CORRECT."

5 HERE IT IS. TAKE A LOOK AT IT. THIS  
6 DOCUMENT WAS CREATED INTERNALLY WITHIN SAMSUNG, THE  
7 DEVELOPMENT OF THE TAB 10.1, BEFORE ANYONE KNEW THE  
8 IPAD EXISTED. AND THEY SAID HE'S A COPY ISSUE AND  
9 ORDER.

10 LET'S LOOK AT THE CHRONOLOGY. OCTOBER  
11 2009, THE DEVELOPMENT STARTED ACCORDING TO MR. KIM.  
12 THAT PROTOTYPE E-MAIL WE JUST SHOWED YOU THAT HAS  
13 THE PICTURE, BEFORE THE IPAD WAS ANNOUNCED.

14 YOU KNOW HOW SECRETIVE APPLE IS. NOBODY  
15 KNOWS WHAT THEY'RE WORKING ON UNTIL THEY ANNOUNCE  
16 IT.

17 THE IDEA THAT THIS WAS A COPY OF THE IPAD  
18 MAKES NO SENSE BECAUSE THIS WAS DEVELOPED BEFORE  
19 THE IPAD.

20 NOW, ON CROSS-EXAMINATION, THIS WAS  
21 APPLE'S CHANCE TO SHOW THAT THIS MAN WAS A COPYIST.  
22 THIS IS APPLE'S CHANCE TO SHOW HIM THE COPYING  
23 DOCUMENTS.

24 WHAT DID THEY DO? THEY SHOWED HIM THE  
25 P3 -- DOCUMENTS CONCERNING THE P3 AND THE P1.

1 DO YOU REMEMBER THAT GOOGLE, GOOGLE  
2 RECOMMENDATION THEY KEEP TALKING ABOUT, GOOGLE  
3 WANTS YOU TO CHANGE IT, THE ONE MR. KIM DIDN'T KNOW  
4 ABOUT?

5 WELL, HE TESTIFIED -- I THINK YOU TOLD US  
6 THE P1 IS THE GALAXY 7? IS THAT CORRECT?

7 SIR, IS IT YOUR UNDERSTANDING THAT THERE  
8 ARE ANY DESIGN CLAIMS REGARDING THE GALAXY 7  
9 PRODUCT?

10 NO.

11 THIS IS THE GALAXY 7. THIS IS THE  
12 PRODUCT THAT THAT GOOGLE DOCUMENT WAS TALKING  
13 ABOUT. IT'S NOT EVEN AN ACCUSED PRODUCT IN THE  
14 DESIGN CASE. THEY'RE TALKING ABOUT APPLES AND  
15 ORANGES AND THEY'RE TRYING TO CONFUSE YOU BY TAKING  
16 A DOCUMENT THAT HAS SOMETHING THAT THEY LIKE, BUT  
17 IT'S ABOUT A PRODUCT THAT'S NOT EVEN IN THIS CASE.

18 THAT'S ALL THEY'VE GOT.

19 WHAT ABOUT MS. WANG? WE ASKED HER WHEN  
20 SHE CAME, WE BROUGHT HER HERE, SHE WAS THE DESIGNER  
21 OF THE ICONS, WE BROUGHT HER HERE TO TALK TO YOU  
22 AND EVALUATE.

23 "QUESTION: WERE YOU AND THE TEAM THAT  
24 YOU LEAD RESPONSIBLE FOR DESIGNING THE ICON AND THE  
25 LAYOUT OF THE ICONS ON THE MENU PAGE FOR THE GALAXY

1 PHONES?

2 "ANSWER: YES, THAT'S CORRECT.

3 "QUESTION: IN DOING THAT, DID YOU COPY  
4 ANY APPLE ICONS OR THE LAYOUT OF THE APPLE  
5 APPLICATION PAGE?

6 "ANSWER: NOT AT ALL."

7 SHE WAS SHOWN, I DON'T KNOW IF YOU CAN  
8 SEE IT DOWN HERE, THE GALAXY S I9000, SDX 3972.12  
9 AND ASKED ABOUT THE PHONE ICON.

10 "QUESTION: LET'S TAKE A LOOK AT AN  
11 ICON."

12 I'M GOING TO SKIP AHEAD.

13 "ARE YOU THE ONE THAT SELECTED THIS ICON  
14 FOR USE ON THE GALAXY PHONE?

15 "ANSWER: YES, THAT'S CORRECT."

16 THIS IS THE ONLY ICON THAT DR. KARE SAYS  
17 WAS SUBSTANTIALLY SIMILAR. SHE SAYS SHE DEVELOPED  
18 IT. SO HERE WE GO, SHOW COPYING. THEY HAVE THEIR  
19 CHANCE.

20 WE ASKED HER, WHY DID YOU CHOOSE THIS  
21 ONE?

22 "WELL, I DESIGNED IT AS SUCH BECAUSE IT'S  
23 A PHONE, SO I DESIGNED IT AS A PHONE. THE SAME  
24 GOES WITH THE CLOCK, AND ALSO THE CAMERA."

25 OF COURSE. ICONS ARE METAPHORS.

1 WE ASKED HER.

2 "QUESTION: WHAT OTHER ICONS HAVE YOU  
3 USED FOR THE PHONES AND WHAT WAS YOUR EXPERIENCE  
4 WITH THEM?

5 SHE SAYS, "WELL, WE HAVE TRIED QUITE A  
6 FEW DIFFERENT ICONS AND THERE WERE EVEN CERTAIN  
7 DIRECTIVES COMING FROM UP ABOVE TELLING US TO COME  
8 UP WITH SOMETHING OF A DESIGN THAT'S MORE  
9 SOPHISTICATED, SOMETHING THAT LOOKS MORE LIKE A  
10 SMARTPHONE.

11 "SO WE TRIED DIFFERENT ICONS. FOR  
12 EXAMPLE, WE TRIED AN ICON THAT LOOKED LIKE A CELL  
13 PHONE WITH AN ANTENNA, AND THEN WE ALSO TRIED AN  
14 ICON THAT LOOKED MORE LIKE A SMARTPHONE.

15 "BUT WHAT HAPPENED WAS THAT THE PEOPLE  
16 WOULD ACTUALLY MISTAKE THESE ICONS. SOME PEOPLE  
17 THOUGHT THIS WAS A GAME OR MAYBE A PDA OR EVEN A  
18 CALCULATOR. SO WE HAD SOME PROBLEMS."

19 SO THE REASON THEY STAYED WITH THE PHONE  
20 ICON IS BECAUSE WHEN THEY TRIED TO DO A SMARTPHONE  
21 ICON OR A PDA TYPE ICON, IT CONFUSED PEOPLE.

22 WE FURTHER ASKED HER, "DO YOU HAVE A NAME  
23 THAT YOU USE FOR THIS PARTICULAR TYPE OF ICON FOR A  
24 PHONE?

25 "ANSWER: IN OUR DESIGN TEAM, WE CALLED

1 IT A DUMBBELL ICON.

2 "QUESTION: HOW LONG HAS SAMSUNG USED  
3 THIS DUMBBELL STYLE ICON ON THE PHONES?

4 "ANSWER: THAT ICON WAS IN USE EVEN  
5 BEFORE I JOINED THE COMPANY IN 2002. AND THIS WAS  
6 USED BY SAMSUNG. I'M SAYING THAT THE DUMBBELL  
7 SHAPE HAS BEEN USED IN SAMSUNG EVEN PRIOR TO 2002."

8 WELL, THERE WAS NO IPHONE IN 2002. LOOK  
9 AT THE CHRONOLOGY. MS. WANG, WHO CHOSE THAT ICON,  
10 TESTIFIED THAT SAMSUNG WAS USING THAT ICON  
11 INTERNALLY, SORT OF A DUMBBELL ICON, WHEN SHE  
12 ARRIVED IN 2002.

13 YET APPLE IS SAYING, OH, SHE'S A COPYIST,  
14 SHE SAW APPLE DO IT AND COPIED IT.

15 THE EVIDENCE DOESN'T ADD UP.

16 AND, AGAIN, THEY HAD THEIR CHANCE TO  
17 CROSS HER AND WHAT DID THEY DO?

18 THEY SHOWED HER THIS DOCUMENT, PX 55.  
19 AND INTIMATED THAT THIS WAS A COPYING DOCUMENT.

20 WELL, IT TURNS OUT THAT THE DOCUMENT THEY  
21 SHOWED HER -- WELL, I'LL JUST READ THE.

22 "QUESTION: SO FAR AS YOU'RE AWARE, ARE  
23 THESE EVEN, THESE BADA PHONES, ARE THEY ACCUSED IN  
24 THIS CASE. DO THEY HAVE ANYTHING TO DO WITH THIS  
25 CASE SO FAR AS YOU'RE AWARE?

1 "ANSWER: NO."

2 THEY'RE DOING IT AGAIN. THEY'RE TAKING  
3 SOMETHING FROM A FOREIGN PHONE AND THEY'RE PUTTING  
4 IT HERE IN THE U.S. AND CONTENDING IT WAS ONE OF  
5 THE ACCUSED PHONES.

6 WHAT WAS THE OTHER THING THEY DID? THEY  
7 SHOWED HER A DOCUMENT WHERE SHE HAD COMPARED HER  
8 ICONS WITH -- OR APPLE ICONS WITH THE GALAXY ICONS  
9 AND SUGGESTED THIS IS EVIDENCE THAT YOU COPIED ON  
10 CROSS-EXAMINATION.

11 WHAT THEY DIDN'T TELL YOU, MEMBERS OF THE  
12 JURY, SO WE HAD TO TELL YOU ON REDIRECT, WAS THIS  
13 DOCUMENT IS DATED APRIL 22, 2011, A YEAR AFTER THE  
14 GALAXY S IS RELEASED TO THE PUBLIC, AND THE REASON  
15 SHE CREATED THIS DOCUMENT WAS BECAUSE APPLE HAD  
16 SUED SAMSUNG AND SHE, BEING IN CHARGE OF ICONS, WAS  
17 ASKED TO PUT TOGETHER THE DOCUMENT.

18 THAT DOESN'T SHOW COPYING. THAT SHOWS  
19 THE COMPANY TRYING TO FIGURE OUT WHAT'S GOING ON.

20 JUST ONE SECOND, YOUR HONOR, CAN I CHECK  
21 MY TIME?

22 THE COURT: PLEASE, GO AHEAD. YOU'RE  
23 ABOUT AN HOUR AND SEVEN MINUTES.

24 MR. VERHOEVEN: THANK YOU, YOUR HONOR.  
25 LET'S GO TO SLIDE 159.

1                   NOW, WE'VE SEEN THIS DOCUMENT, THIS IS PX  
2                   34, OVER AND OVER, IN THE OPENING STATEMENT.

3                   THIS DOCUMENT, AGAIN, IS AN EXAMPLE OF  
4                   APPLE MIXING AND MATCHING. SAMSUNG IS A LARGE  
5                   COMPANY. IT HAS MANY DIVISIONS. DO YOU REMEMBER  
6                   HEARING THAT OVER 20 PERCENT OF THE IPHONE  
7                   COMPONENTS COST COMPRISED OF SAMSUNG'S PARTS FROM  
8                   SAMSUNG'S COMPONENT DIVISION? THIS DOCUMENT ISN'T  
9                   EVEN FROM SAMSUNG'S DESIGN GROUP. IT'S NOT EVEN  
10                  FROM SAMSUNG'S PHONE GROUP. THIS DOCUMENT IS FROM  
11                  SYSTEM LSI.

12                  MR. DENISON WAS ASKED:

13                  "QUESTION: WHAT IS THE DIVISION OF  
14                  SAMSUNG THAT MAKES THE APPLICATIONS PROCESSOR  
15                  THAT'S THEN SUPPLIED TO APPLE TO BE THE PROCESSOR  
16                  FOR THE PHONE?

17                  "ANSWER: THAT'S THE, WHAT WE CALL THE  
18                  SYSTEM LSI DIVISION WITHIN SAMSUNG SEMICONDUCTORS."

19                  THAT'S A WHOLE DIFFERENT COMPANY.

20                  ALL RIGHT. YET, THEY'RE USING THIS  
21                  DOCUMENT, THEY'RE MIXING AND MATCHING, THEY'RE  
22                  TAKING A DOCUMENT FROM A COMPLETELY DIFFERENT PART  
23                  OF THE COMPANY AND PRETENDING IT'S A PHONE DOCUMENT  
24                  AND THEN TAKING A SNIPPET OUT OF THAT DOCUMENT TO  
25                  SAY, OH, THAT'S PROOF OF COPYING BY THE DESIGN

1 GROUP WITHIN THE PHONES.

2 THEY SHOWED YOU THIS IN THE OPENING  
3 STATEMENT, COUNSEL FOR APPLE SHOWED YOU THIS. THEY  
4 SAID, SEE, IT SAYS HARDWARE PORTION, IMITATION.  
5 AH, EVIDENCE OF COPYING.

6 WELL, GUESS WHAT? LET'S PUT THIS  
7 DOCUMENT IN CONTEXT. THIS WAS THE COMPONENT GROUP.  
8 THESE WERE GUYS WHO MAKE THE CHIPS THAT GO INTO  
9 PHONES FOR ALL KINDS OF DIFFERENT COMPANIES, AND  
10 THEY'RE LOOKING AT THE IPHONE EFFECT ANALYSIS ON  
11 THEIR COMPONENT BUSINESS. THIS ISN'T TALKING ABOUT  
12 DESIGNING PHONES.

13 AND THEY'RE SAYING, WHAT IS THE EFFECT?  
14 WHAT'S THE IPHONE EFFECT? SIMULATE ENHANCING AND  
15 UPGRADING HARDWARE PERFORMANCE FOR OTHER  
16 COMPETITORS' SMARTPHONES.

17 THEY'RE NOT EVEN TALKING ABOUT SAMSUNG  
18 SMARTPHONES. THEY'RE TALKING ABOUT SELLING THEM TO  
19 OTHER COMPETITORS THAT MAKE SMARTPHONES THAT  
20 COMPETE WITH THE IPHONE. THAT'S WHERE THEY'RE  
21 SAYING EASY IMITATION. THEY'RE SAYING THE  
22 COMPONENT PARTS, THEY'RE EASY TO PUT TOGETHER LIKE  
23 THAT. IT HAS NOTHING TO DO WITH DESIGN. IT HAS  
24 NOTHING TO DO WITH ICONS.

25 LOOK AT WHAT WE'RE TALKING ABOUT, FLASH



1 MOTION, MEMORY, PROXIMITY, AND LIGHT SENSORS.

2 AGAIN, IT'S A SHELL GAME. COUNSEL FOR  
3 APPLE IS TRYING TO MISLEAD YOU. THERE IS NO BAD  
4 INTENT AND THERE IS NO COPYING.

5 LET'S GO TO SLIDE 163.

6 NOW, COUNSEL FOR APPLE POOH-POOH'D MY  
7 STATEMENT THAT BENCHMARKING IS COMMON, SUGGESTING  
8 THAT BENCHMARKING IS NOT WHAT'S GOING ON OVER AT  
9 SAMSUNG.

10 BUT LET'S LOOK AT WHAT APPLE'S INTERNAL  
11 DOCUMENTS SHOW ABOUT WHAT APPLE DOES. THIS IS A  
12 NOVEMBER 18TH, 2008 E-MAIL.

13 AND IT'S AN APPLE E-MAIL FROM 2008. AND  
14 IT SAYS, I ADDED TWO LATEST DEVICES FROM SONY  
15 ERICSSON AND LG. WE NOW HAVE A FINAL LIST OF  
16 LATEST AND GREATEST MODELS FROM EVERY MAJOR  
17 SMARTPHONE VENDOR, RESEARCH IN MOTION, HTC, NOKIA,  
18 SAMSUNG, MOTOROLA, SENIOR E AND LG. WE ARE NOT IN  
19 THE PROCESS OF PURCHASING THESE DEVICES. ONCE THEY  
20 ARRIVE, WE WILL START VERIFYING THEIR FEATURE SET  
21 IN EACH AREA AND THEN START PERFORMANCE  
22 BENCHMARKING AGAINST THE IPHONE.

23 "ONCE WE GET THESE DEVICES AND HAVE  
24 PERFORMANCE METRICS FINALIZED, HOOMAN'S TEAM WILL  
25 ALLOCATE SOME BANDWIDTH TO HELP TEST THESE DEVICES.

1 EACH FUNCTIONAL TEAM WILL NEED TO ANALYZE THE AREA  
2 THAT WE ARE LAGGING COMPETITION."

3 THERE'S NOTHING WRONG WITH THAT. THERE'S  
4 NOTHING WRONG WITH THAT WHEN SAMSUNG DOES IT, AND  
5 THERE'S NOTHING WRONG WITH IT WHEN APPLE DOES IT.

6 EVERY MAJOR TECH COMPETITOR DOES IT.  
7 THEY DO TEAR-DOWNS AND THEY SAY, ARE WE BEATING  
8 THEM HERE? ARE THEY BEATING US THERE? ARE WE  
9 BEATING THEM HERE? ARE WE BEATING THEM THERE?

10 AND THEN YOU TRY TO ADJUST TO BE  
11 COMPETITIVE. YOU MAKE CHANGES TO BE COMPETITIVE.  
12 THERE'S NOTHING WRONG WITH THAT.

13 MR. STRINGER, ONE OF THE THINGS THAT YOU  
14 ALSO DO AS AN INDUSTRIAL DESIGNER IS YOU PAY  
15 ATTENTION TO MOBILE PHONES AND SMARTPHONES  
16 MANUFACTURED AND SOLD BY YOUR COMPETITORS, DON'T  
17 YOU?

18 "ANSWER: ON OCCASION WE PAY SOME  
19 ATTENTION.

20 "QUESTION: YOU ACTUALLY GET COMPETITIVE  
21 ANALYSES DONE AND REVIEW THOSE OF YOUR COMPETITION,  
22 DON'T YOU?

23 "ANSWER: THERE IS A COMPETITIVE ANALYSIS  
24 EXERCISE THAT'S PERFORMED BY OUR PRODUCT DESIGN."

25 IT'S A SYSTEMATIC THING THAT APPLE

1 ACTUALLY DOES.

2 AND MR. STRINGER HIMSELF DOES IT. DO YOU  
3 REMEMBER THIS E-MAIL, DX 687 I SHOWED HIM WHEN I  
4 WAS CROSS-EXAMINING HIM.

5 HE SAID TO THAT, TO PAUL FROM THAT GROUP,  
6 I NEED YOUR LATEST SUMMARY OF OUR ENEMIES FOR AN  
7 I.D. BRAINSTORM ON FRIDAY. AND HE GETS IT, AND ONE  
8 OF THOSE ENTITIES IS THE GALAXY TAB TEAR-DOWN, ONE  
9 OF THE ACCUSED PRODUCTS IN THIS CASE.

10 APPLE'S INSPIRED BY OTHERS, JUST LIKE  
11 EVERY COMPETITOR IS.

12 REMEMBER, WITH THE INITIAL IPHONE DESIGN,  
13 APPLE WAS INSPIRED BY THE FUNCTIONAL ASPECTS OF THE  
14 SONY STYLE CHAPPY. THERE'S NOTHING WRONG WITH  
15 THAT.

16 AND APPLE PERFORMS ITS OWN TEAR-DOWNS OF  
17 THE VERY ACCUSED PRODUCTS IN THIS CASE. THIS IS AN  
18 APPLE DOCUMENT WE'RE LOOKING AT, DX 2519. MINI  
19 TEAR DOWN, SAMSUNG GALAXY S. THIS IS ONE OF THE  
20 PAGES OF THESE DOCUMENTS.

21 THEY TAKE THEM APART METICULOUSLY, THEY  
22 TAKE PICTURES OF THEM. THE SAME THING WITH THE  
23 GALAXY SAMSUNG 10.1, TAKE APART DOCUMENT, THIS IS  
24 AN APPLE DOCUMENT, DX 717. THERE'S JUST ONE PAGE  
25 OF A MULTI PAGE ANALYSIS. THEY'VE TAKEN THE THING

1 COMPLETELY APART AND SEPARATED ALL THE PARTS AND  
2 LABELED THEM.

3 DOES THAT MEAN THEY'RE COPYISTS? DOES  
4 THAT MEAN WE CAN SUE THEM? COMPETITIVE  
5 BENCHMARKING IS NORMAL PRACTICE, AND WHAT'S GOING  
6 ON HERE IS THIS IS ANOTHER EFFORT BY COUNSEL FOR  
7 APPLE TO MISLEAD YOU INTO THINKING, BECAUSE YOU'RE  
8 NOT IN THIS INDUSTRY, THAT THERE'S SOMETHING WRONG  
9 WITH THAT.

10 IN FACT, THEY'RE STILL DOING IT TODAY.  
11 THIS IS AN APPLE JANUARY 24TH, 2011 E-MAIL FROM  
12 EDDY CUE TO THE HEAD OF APPLE, TIM COOK, CEO, SCOTT  
13 FORSTALL.

14 YOU SAW BOTH THOSE GUYS TESTIFY. THEY'RE  
15 TALKING ABOUT AN ARTICLE, WHY JUST DUMP THE IPAD.  
16 HYPOTHETICAL, SIZE MATTERS.

17 AND APPARENTLY THEY ASKED SOMEONE TO LOOK  
18 INTO THAT AND SEE WHETHER OR NOT SIZE DOES MATTER.

19 AND HE SAYS, HAVING USED THE SAMSUNG  
20 GALAXY, I TEND TO AGREE WITH MANY OF THE COMMENTS  
21 BELOW, EXCEPT ACTUALLY MOVING OFF THE IPAD, I  
22 BELIEVE THERE WILL BE A SEVEN INCH MARKET AND WE  
23 SHOULD DO ONE.

24 THAT'S THIS. NOT ACCUSED. APPLE DOESN'T  
25 MAKE SOMETHING LIKE THIS. BUT THEY LOOKED AT

1 SAMSUNG'S SEVEN INCH TAB, THEY EVALUATED IT, THEY  
2 SAID WE SHOULD DO THAT. WE SHOULD COPY SAMSUNG.

3 SO WHEN YOU LOOK AT THE EVIDENCE HERE,  
4 CAREFULLY LOOK AT IT, AND YOU PUT IT IN CONTEXT  
5 INSTEAD OF MIXING AND MATCHING FROM DIFFERENT  
6 DIVISIONS, OR USING DOCUMENTS FROM PHONES THAT  
7 AREN'T EVEN ACCUSED, IF YOU LOOK AT THE ACTUAL  
8 RELIABLE EVIDENCE, THE COPYING CLAIMS FAIL.

9 SAMSUNG'S A GOOD CORPORATE CITIZEN, AND  
10 ALL IT WANTS TO DO IS MAKE PRODUCTS THAT CONSUMERS  
11 WANT.

12 WE LOOKED EARLIER IN MY CLOSING AT WHAT  
13 MATTERS IN THIS CASE, WHICH IS WHETHER THERE'S  
14 INFRINGEMENT OF THESE DESIGN PATENTS. ALL THIS  
15 COPYING NONSENSE IS HAND WAVING BY APPLE.

16 WHY? BECAUSE THEY DON'T HAVE ANY  
17 EVIDENCE OF DECEPTION. THEY DON'T HAVE ANY  
18 EVIDENCE OF CONFUSION. AND THEY KNOW THAT, JUST  
19 LIKE I KNOW, YOU WILL KNOW THAT NO ONE IS EVER  
20 GOING TO BE CONFUSED WHEN THEY GO TO A VERY  
21 EXPENSIVE SMARTPHONE WITH MULTI-YEAR CONTRACTS,  
22 NOBODY IS GOING TO BE CONFUSED.

23 NOW LET'S TURN TO THE UTILITY PATENTS  
24 THAT APPLE HAS ASSERTED, AND I WON'T SPEND AS MUCH  
25 TIME ON THOSE AS.

1 JUST ONE SECOND, YOUR HONOR.

2 (PAUSE IN PROCEEDINGS.)

3 MR. VERHOEVEN: THANK YOU, YOUR HONOR.

4 LET'S GO TO APPLE'S UTILITY PATENTS.

5 APPLE ASSERTS THREE PATENTS IN THIS CASE. AND I  
6 THINK THAT COUNSEL FOR APPLE TOLD YOU THIS ALREADY,  
7 BUT I'LL REITERATE. THIS, AGAIN, IS APPLE'S BURDEN  
8 OF PROOF, AND THE STANDARD FOR UTILITY PATENTS IS  
9 DIFFERENT FROM THE STANDARD FOR A DESIGN PATENT.  
10 FOR A UTILITY PATENT, YOU HAVE WRITTEN CLAIM  
11 LANGUAGE, NOT A PICTURE.

12 AND THE TEST IS THAT YOU MUST COMPARE THE  
13 PRODUCT WITH THE PATENT CLAIM AND DETERMINE WHETHER  
14 EVERY REQUIREMENT OF THE CLAIM IS INCLUDED IN THAT  
15 PRODUCT OR METHOD.

16 IF, HOWEVER, A PARTICULAR SAMSUNG OR  
17 APPLE PRODUCT, DO YOU SEE THAT, PARTICULAR, THAT'S  
18 A PRODUCT-BY-PRODUCT COMPARISON, YOU CAN'T JUST  
19 THROW A BUNCH OF IMAGES ON THE SCREEN AND SAY  
20 THEY'RE ALL THE SAME. YOUR JOB, AND THEIR JOB, IS  
21 TO PROVE TO YOU THIS, WAS TO TAKE EACH PRODUCT  
22 SEPARATELY THAT'S ACCUSED, OVER 20 DIFFERENT  
23 PRODUCTS, AND DO THIS ELEMENT-BY-ELEMENT ANALYSIS,  
24 A PARTICULAR SAMSUNG OR APPLE PRODUCT OR METHOD  
25 DOES NOT HAVE EVERY REQUIREMENT IN THE PATENT

1 CLAIM, THAT PRODUCT OR METHOD DOES NOT LITERALLY  
2 INFRINGE THAT CLAIM.

3 YOU MUST DECIDE THE LITERAL INFRINGEMENT  
4 FOR EACH ASSERTED CLAIM SEPARATELY. THAT'S A VERY  
5 IMPORTANT INSTRUCTION BECAUSE IF YOU RECALL, ALL  
6 APPLE'S WITNESSES DID WAS THEY TOOK ONE PRODUCT AND  
7 THEY WALKED VERY QUICKLY THROUGH A CLAIM AND THEN  
8 WHAT DID THEY DO? THEY FLASHED ON THE SCREEN  
9 SOMETIMES TEN, SOMETIMES FIVE DEMONSTRATIVES, WHICH  
10 AREN'T EVEN EVIDENCE, THEY DON'T EVEN GO BACK INTO  
11 THE JURY ROOM, AND SAID, OH, THESE ARE ALL THE  
12 SAME. TRUST ME.

13 IT'S THEIR BURDEN, YOU'LL SEE WHEN YOU  
14 SEE THE JURY VERDICT FORM, YOU'RE GOING TO BE  
15 ASKED, YOU'RE GOING TO BE ASKED, IS THERE  
16 INFRINGEMENT SEPARATELY FOR EACH ONE OF THOSE  
17 PRODUCTS.

18 APPLE HAS NOT MET ITS BURDEN. YOU CAN'T  
19 MEET YOUR BURDEN OF PROVING INFRINGEMENT AND ASKING  
20 FOR HUNDREDS OF MILLIONS OF DOLLARS WHEN ALL YOU DO  
21 IS FLASH ON THE SCREEN A DEMONSTRATIVE AND DON'T  
22 INTRODUCE ANY EVIDENCE OR ANALYSIS.

23 BUT THAT'S WHAT HAPPENED FOR EACH ONE OF  
24 THEIR ASSERTED PATENTS. THEY HAVEN'T MET THEIR  
25 BURDEN.

1 IT'S NOT ENOUGH TO SAY, WELL, FOR  
2 EXAMPLE, ON THIS ONE, IT BOUNCES SO, THEREFORE, IT  
3 INFRINGES.

4 MR. BALAKRISHNAN ADMITTED ON  
5 CROSS-EXAMINATION, "AREN'T THERE BOUNCE EFFECTS  
6 THAT ARE NOT COVERED BY CLAIM 19?

7 "ANSWER: JUST GENERALLY OUT THERE?

8 "QUESTION: YES.

9 "ANSWER: SURE, YOU CAN HAVE ALL KINDS OF  
10 THINGS THAT BOUNCE THAT DON'T --

11 "QUESTION: ALL RIGHT.

12 "ANSWER: -- THAT DON'T MEET THE ELEMENTS  
13 OF CLAIM 19."

14 SO SIMPLY SHOWING YOU, OH, IT BOUNCES, HE  
15 EVEN ADMITS, THAT DOESN'T INFRINGE. THAT'S NOT  
16 NECESSARILY INFRINGING. THAT WAS THERE BEFOREHAND.  
17 YOU NEED TO DO AN ELEMENT-BY-ELEMENT ANALYSIS.

18 DR. BALAKRISHNAN DID NOT DO THAT. YOU'LL  
19 HAVE TO GO BACK IN THE JURY ROOM WITHOUT ANY  
20 INFORMATION. THAT TRANSLATES INTO THEY DIDN'T MEET  
21 THEIR BURDEN.

22 LET'S GO QUICKLY TO WHETHER THESE PATENTS  
23 ARE VALID. THE COURT INSTRUCTED A UTILITY PATENT  
24 IS INVALID IF THE CLAIMS INVENTION IS NOT NEW. NOT  
25 ALL INVENTIONS ARE PATENTABLE. A UTILITY PATENT IS



1           INVALID IF THE CLAIMS INVENTION WOULD HAVE BEEN  
2           OBVIOUS TO A PERSON OF ORDINARY SKILL IN THE FIELD  
3           AT THE TIME OF THE INVENTION.

4                       WELL, HERE WE'VE GOT CLEAR EVIDENCE OF  
5           INVALIDITY OF THIS BOUNCEBACK PATENT.

6                       FOR EXAMPLE, THE TABLECLOTH FROM 2005 ON  
7           THE DIAMONDTOUCH, THIS WAS NEVER PRESENTED TO THE  
8           PATENT OFFICE. THE PATENT OFFICE DIDN'T KNOW ABOUT  
9           THIS WHEN IT ISSUED THIS PATENT.

10                      WHEN YOU LOOK AT THIS EVIDENCE, I ASK YOU  
11           TO ASK YOURSELF THE QUESTION, IF THE PATENT OFFICE  
12           KNEW ABOUT THIS PRIOR ART, WOULD THEY HAVE LET THIS  
13           PATENT ISSUE?

14                      I THINK YOU'LL SEE THAT THE ANSWER IS NO.  
15           CAN WE PLAY TABLECLOTH.

16                      (WHEREUPON, A VIDEOTAPE WAS PLAYED IN  
17           OPEN COURT OFF THE RECORD.)

18                      MR. VERHOEVEN: WE'VE SEEN IT SEVERAL  
19           TIMES. AND LET'S GO TO THE NEXT SLIDE, PLEASE.

20                      AND UNLIKE WHAT APPLE DID WITH ITS  
21           INFRINGEMENT CLAIMS, WE CAREFULLY WENT THROUGH AND  
22           SHOWED YOU THE ELEMENTS OF THE ASSERTED CLAIM WERE  
23           MET BY THIS PRIOR ART. WE SHOWED THAT IT WAS A  
24           DEVICE -- IN FACT, COUNSEL FOR APPLE SHOWED YOU THE  
25           DEVICE, THE COMPUTER AND THE PROJECTOR AND THE

1 SCREEN. IT HAD A TOUCHSCREEN DISPLAY AND PROCESSOR  
2 AND MEMORY.

3 WE SHOWED YOU THE INSTRUCTIONS FOR  
4 DISPLAYING A FIRST PORTION. WE HIGHLIGHTED THAT.

5 WE SHOWED YOU THE INSTRUCTIONS FOR  
6 TRANSLATING THE DOCUMENT INTO A SECOND PORTION, AND  
7 WE HIGHLIGHTED IT.

8 WE SHOWED YOU THE INSTRUCTIONS FOR  
9 DISPLAYING AN AREA BEYOND THE EDGE, AND WE SHOWED  
10 YOU THE INSTRUCTIONS FOR TRANSLATING THE ELECTRONIC  
11 DOCUMENT IN A SECOND DIRECTION.

12 IF THE PATENT HAD KNOWN ABOUT TABLECLOTH  
13 RUNNING ON DIAMONDTOUCH, THEY WOULD NOT, THEY WOULD  
14 NOT HAVE ALLOWED THIS PATENT TO ISSUE.

15 WE ALSO SHOWED -- CAN WE GO TO SLIDE 227?

16 WE ALSO SHOWED YOU ANOTHER PIECE OF PRIOR  
17 ART, THE LAUNCHTILE FROM 2004, WHICH WAS RUNNING ON  
18 THE H-P IPAD. CAN WE PLAY THAT ONE?

19 (WHEREUPON, A VIDEOTAPE WAS PLAYED IN  
20 OPEN COURT OFF THE RECORD.)

21 MR. VERHOEVEN: AND DO YOU REMEMBER WE  
22 CALLED LIVE WITNESSES WHO DEVELOPED THIS AND HE  
23 TESTIFIED EXACTLY HOW THIS WORKED. IF YOU WENT TOO  
24 FAR, IT WOULD SNAP OVER TO THE OTHER SIDE. BUT IF  
25 YOU WENT WITHIN A CERTAIN PARAMETER, IT WOULD

1 BOUNCE BACK. AND I DON'T HAVE TIME NOW, BUT WE DID  
2 COMPARE THIS TO ALL THE TESTIMONY ELEMENTS OF THE  
3 CLAIM AND SHOWED YOU THAT THIS ALSO RENDERED THE  
4 PATENT INVALID.

5 AND AS YOU CAN SEE FROM THE EVIDENCE, THE  
6 LAUNCHTILE PROGRAM WAS PRIOR ART, PRE-DATES THE  
7 APPLICATION FOR THE '381 PATENT.

8 SOMEBODY ELSE DID IT BEFORE. YOU CAN'T  
9 GET A PATENT IF SOMEBODY ELSE DOES IT BEFORE.

10 THEN WITH RESPECT TO THE '915 PATENT,  
11 THIS IS THE SCROLLING PATENT. AGAIN, ALL THE --  
12 YOU WERE SHOWN ONE PHONE, ANALYSIS OF ONE PHONE,  
13 BUT THERE'S OVER 20 ASSERTED PHONES IN THIS CASE.

14 AND FOR THOSE OTHER PHONES, WHAT DID YOU  
15 SEE? JUST THIS. JUST A DEMONSTRATIVE, ALL OF THEM  
16 GOING AT THE SAME TIME AND YOU CAN'T EVEN WATCH  
17 THEM ALL. THAT WAS THE EXTENT OF THE EVIDENCE.

18 REMEMBER THE JUDGE'S INSTRUCTION. FOR  
19 EACH ACCUSED DEVICE EXAMINE FOR EACH CLAIM, THE  
20 PLAINTIFF, APPLE, HAS TO PROVE TO YOU, IT'S THEIR  
21 BURDEN, THAT EACH AND EVERY ELEMENT IS MET.

22 FLASHING A BUNCH OF PHONES ON A  
23 DEMONSTRATIVE SCREEN, WHICH ISN'T EVEN EVIDENCE,  
24 DOES NOT MEET THAT BURDEN.

25 IS THAT IMPORTANT? YES, IT'S IMPORTANT.

1                   WHY? WELL, LET'S SEE WHAT MR. SINGH,  
2 APPLE'S EXPERT SAID ABOUT IT.

3                   "THAT CONCEPT ALONE, SCROLL, THE '915  
4 INVENTORS DIDN'T INVENT SCROLLING. THAT'S FAIR,  
5 ISN'T IT?

6                   "ANSWER: THAT'S FAIR.

7                   "QUESTION: THE INVENTORS OF THE '915  
8 PATENT, THEY DIDN'T INVENT A GESTURE, A SCALE, A  
9 ZOOM, OR DETECTING THOSE ON THE DEVICES WE'RE  
10 TALKING ABOUT. ISN'T THAT FAIR, SIR?

11                   "ANSWER: ABSOLUTELY NOT. THE CONCEPT OF  
12 SCALING GOES BACK TO THE ANCIENT GREEKS."

13                   THAT'S ALL THEY SHOWED YOU. THEY SHOWED  
14 YOU SCROLLING AND GESTURING INSTEAD OF SHOWING YOU  
15 EACH OF THOSE ELEMENTS AND WHETHER THOSE ELEMENTS  
16 ARE INFRINGED. BUT THAT'S NOT ENOUGH. EVERY ONE  
17 THEIR OWN EXPERT ADMITS THOSE BASIC FEATURES WERE  
18 ALREADY THERE.

19                   ON CROSS-EXAMINATION, WE DID -- WE  
20 FOCUSED ON THE CLAIM AND WE SHOWED YOU CLAIM 8D,  
21 WHICH IS THE ELEMENT THAT'S REQUIRED FOR  
22 INFRINGEMENT. AND IN 8D, IT SAYS, DETERMINING  
23 WHETHER THE EVENT OBJECT INVOKES A SCROLL OR  
24 GESTURE OPERATION BY DISTINGUISHING BETWEEN, BY  
25 DISTINGUISHING BETWEEN, SO YOU'RE DETERMINING

1           WHETHER IT'S A SCROLL OR IT'S A GESTURE, AND HOW DO  
2           YOU DO IT, BY DISTINGUISHING BETWEEN A SINGLE  
3           INPUT, ONE FINGER, APPLIED -- OOPS -- A SINGLE  
4           INPUT AND WHETHER IT'S TWO INPUTS, A GESTURE.

5                         AND WE ASKED MR. DEFRANCO, IF YOU  
6           REMEMBER HIM, ASKED MR. SINGH, "BUT AS YOU SAID,  
7           IT'S THE ALL-IMPORTANT TEST IN THE CLAIM AS TO  
8           WHETHER IT'S A ONE-FINGER SCROLL VERSUS A  
9           TWO-FINGER GESTURE. THAT'S WHAT THIS INVENTION IS  
10          ABOUT. FAIR?

11                         "ANSWER: SURE."

12                         AND WE SHOWED THAT ON THE ACCUSED  
13          PRODUCTS, TWO FINGERS, YOU'RE SCROLLING. THERE'S  
14          NO DETERMINATION. IT SCROLLS WITH TWO FINGERS.

15                         LET'S GO BACK TO THE CLAIM.

16                         THE CLAIM REQUIRES -- THIS IS HOW THEY  
17          GOT AROUND THE PRIOR ART -- DETERMINING WHETHER  
18          IT'S A SCROLL OR GESTURE BY DISTINGUISHING BETWEEN  
19          ONE FINGER AND TWO FINGERS.

20                         THE ACCUSED PHONES DON'T DO IT.

21                         SO IN ADDITION TO THE COMPLETE ABSENCE OF  
22          PROOF, THERE'S ALSO NO INFRINGEMENT.

23                         YOUR HONOR, I'M BEING INFORMED I SHOULD  
24          ASK FOR A BREAK BECAUSE I'M GOING LONG AND I NEED  
25          TO ORGANIZE MYSELF. IS THAT OKAY? IT'S 3:00

1 O'CLOCK, 4:00 O'CLOCK.

2 THE COURT: OKAY. IT'S 4:00 -- I HAVE  
3 4:02. OKAY. YOU'VE BEEN GOING ONE HOUR AND 28  
4 MINUTES.

5 ALL RIGHT. WHY DON'T WE TAKE LIKE A  
6 TEN-MINUTE BREAK AND IF YOU NEED TO GET ANY WATER  
7 OR ANYTHING TO DRINK, OKAY?

8 (WHEREUPON, A RECESS WAS TAKEN.)

9 THE COURT: WELCOME BACK. PLEASE TAKE A  
10 SEAT.

11 ALL RIGHT. THE TIME IS NOW 4:14. GO  
12 AHEAD, PLEASE.

13 MR. VERHOEVEN: MR. FISHER, CAN WE GO TO  
14 SLIDE 159. I'D LIKE TO TALK ABOUT SAMSUNG PATENT  
15 ITSELF, AND I'LL TALK ABOUT THEM, AND THEN I'LL  
16 TALK ABOUT APPLE'S CLAIMS FOR DAMAGES. WHOOPS,  
17 259.

18 FIRST I WANT TO START WITH SAMSUNG'S HIGH  
19 SPEED DATA PATENTS. YOU HEARD DR. WILLIAMS WAS OUR  
20 WITNESS ON THE HIGH SPEED DATA PATENTS AND HE  
21 EXPLAINED, IN GREAT DETAIL, WHY HIS OPINION APPLE  
22 INFRINGES, AND I'LL START WITH THE '516 PATENT.

23 REMEMBER, HE WENT THROUGH THE 3GPP  
24 STANDARD, THE INTEL, MR. PALTIAN'S TESTIMONY, INTEL  
25 SPECIFICATION, AND SOURCE CODE.

1           WHEN APPLE FIRST RELEASED ITS IPHONE, IT  
2           WAS ONLY 2G. AFTER A COUPLE YEARS LATER, THE  
3           EVIDENCE SHOWS APPLE RELEASED ITS FIRST 3G PHONE.  
4           APPLE WAS SO PROUD OF THE FACT THAT IT WAS 3G, IT  
5           NAMED IT THE IPHONE 3G.

6           DURING HIS OPENING, YOU HEARD MR. LEE SAY  
7           THAT APPLE'S PATENTS ARE OLD TECHNOLOGY THAT APPLE  
8           DOESN'T USE.

9           THAT'S JUST NOT TRUE. SAMSUNG'S PATENTS  
10          ALLOW PHONES TO SURF THE INTERNET, ACCEPTED  
11          PICTURES AND WATCH VIDEO. THAT'S NOT OLD OR  
12          OUTDATED. IT'S CUTTING EDGE. YOU HEARD THE  
13          TESTIMONY FROM MR. PALTIAN. HE TESTIFIED THAT HE  
14          PROGRAMMED THE CHIPS TO COMPLY WITH 3GPP STANDARD.

15          DR. WILLIAMS WENT THROUGH THE STANDARD  
16          AND EXPLAINED TO YOU HOW IT READ ON THE CLAIMS.

17          HE ALSO WENT INTO, WE'RE GOING TO PUT  
18          THIS, IN THE INTEREST OF TIME, BECAUSE SOME OF THIS  
19          IS CONFIDENTIAL, YOUR HONOR, AT LEAST FOR  
20          DR. WILLIAMS, THE INTEL STUFF, WE'RE NOT GOING TO  
21          PUT IT ON THE BIG SCREEN.

22          THE COURT: THAT'S FINE.

23          MR. VERHOEVEN: IT'S JUST ON THE SMALL  
24          SCREEN, MEMBERS OF THE JURY .

25          DR. WILLIAMS ALSO SHOWED YOU HOW THE

1 CHIPS THAT WERE USED IN THE APPLE PHONES REDUCED  
2 THE POWER OF THE ENHANCED DATA CHANNEL. HE WENT  
3 THROUGH IN GREAT DETAIL SHOWING YOU THE ACTUAL  
4 SPECIFICATION, THE INPUTS AND THE GATE CONTROLS ON  
5 THOSE CHIPS.

6 HE ALSO SHOWED YOU HOW THE CHIPS HAVE A  
7 CONTROLLER, CHANNEL GENERATORS AND GAIN SCALE UNIT.

8 AND REMEMBER, HE EVEN WENT THROUGH AND  
9 EXPLAINED THE SOURCE CODE AND THE FUNCTIONS IN THE  
10 SOURCE CODE TO SHOW YOU HOW ALL OF THE ELEMENTS OF  
11 THE PATENT ARE MET.

12 NOW, APPLE'S EXPERT WITNESS, DR. KIM,  
13 CAME TO TESTIFY ABOUT IT AND REMEMBER ON  
14 CROSS-EXAMINATION, I SAID, "YOU DIDN'T ADDRESS ANY  
15 OF THE INTEL DOCUMENTS, DID YOU?"

16 "ANSWER: NO.

17 "QUESTION: AND YOU DIDN'T ADDRESS THE  
18 INTEL SOURCE CODE, DID YOU?"

19 "ANSWER: NO.

20 "QUESTION: YOU DON'T DISPUTE THE  
21 ACCURACY OF DR. WILLIAMS' DESCRIPTION OF HOW THOSE  
22 DOCUMENTS SHOW THE OPERATION OF THE CHIP, DO YOU,  
23 SIR?"

24 "ANSWER: HE SAYS I DON'T DISPUTE.  
25 THAT'S THE EVIDENCE.



1                   NOW, ON DIRECT, MR. KIM, WHEN MR. LEE WAS  
2                   CROSS-EXAMINING HIM, MADE THIS DISTINCTION YOU'RE  
3                   SEEING ON THIS PART, PDX 35.15, SUGGESTING ON THE  
4                   LEFT THAT THE '516 PATENT ONLY HAD TWO CHANNELS AND  
5                   THAT THE 3GPP STANDARD HAD MULTIPLE.

6                   BUT ALL YOU NEED TO DO, MEMBERS OF THE  
7                   JURY, TO DISPENSE WITH THAT ARGUMENT IS LOOK AT THE  
8                   PATENT. HERE IS FIGURE 6 ON THE LEFT, FIGURE 6 OF  
9                   THE '516 PATENT AND WE'VE PUT COLOR CODING ON THERE  
10                  AND YOU CAN SEE FOR YOUR VERY OWN EYES THAT THE  
11                  ILLUSTRATION OF THE SOLUTION OF THE '516 PATENT  
12                  ISN'T LIMITED TO TWO CHANNELS.

13                  IT HAS MULTIPLE CHANNELS AND THE  
14                  DEPICTION ON THE RIGHT, WHICH IS JUST A  
15                  DEMONSTRATIVE CREATED BY LITIGATION COUNSEL, DOES  
16                  NOT ACCURATELY REFLECT THE SOLUTION SET FORTH IN  
17                  THE PATENT.

18                  APPLE HAS MADE SOME INVALIDITY ARGUMENTS  
19                  WITH RESPECT TO THE PATENT AS WELL.

20                  THEY'RE NOT EVEN ARGUING ANTICIPATION,  
21                  THAT THERE'S A SINGLE REFERENCE THAT ANTICIPATES.  
22                  THEY'RE ARGUING OBVIOUSNESS. AND THEY CITE TO THIS  
23                  HATTA PREFERENCE. BUT HATTA DOESN'T SHOW  
24                  OBVIOUSNESS, IT SHOWS THE OPPOSITE, AND WHAT YOU  
25                  CAN SEE IS WHAT'S GOING ON IN THE PRIOR ART IS THE

1 SAME THING THAT'S GOING ON IN FIGURE 5 OF THE PRIOR  
2 ART, AND THAT'S THE PROBLEM.

3 THE PROBLEM WAS REDUCING THE POWER IN THE  
4 VOICE CHANNEL AND YOU WOULD GET DROPPED CALLS.

5 THIS IS EXACTLY WHAT THE PRIOR ART  
6 THEY'RE CITING FOR THE SOLUTION IS. COMBINING A  
7 PROBLEM WITH A PROBLEM DOESN'T GIVE YOU A SOLUTION.  
8 THE INNOVATION IS NOT DISCLOSED.

9 MOVING TO THE '941, DR. WILLIAMS ALSO  
10 SHOWED YOU HIS OPINIONS EXTENSIVELY WITH RESPECT TO  
11 INFRINGEMENT BY APPLE'S PRODUCTS OF THE '941. YOU  
12 SAW THE 3G STANDARD, HIS ANALYSIS OF THAT. HIS  
13 ANALYSIS OF MR. ZORN'S TESTIMONY WHICH WE PLAYED  
14 FOR YOU, THE INTEL DESIGN DESCRIPTION, THE SOURCE  
15 CODE.

16 HE WALKED YOU THROUGH THE TECHNICAL  
17 DOCUMENTATION. AS WE CAN SEE HERE, YOU REMEMBER WE  
18 HIGHLIGHTED THE TECHNICAL DOCUMENTATION AND HE  
19 WALKED YOU THROUGH IT AGAINST THE CLAIMS ON THE  
20 TRANSMIT SIDE. HE WALKED YOU THROUGH THE CLAIMS ON  
21 THE RECEIVE SIDE. AND HE EVEN WENT INTO SOURCE  
22 CODE AGAIN AND EXPLAINED TO YOU THE SOURCE CODE  
23 FUNCTIONS THAT SHOWED EXACTLY HOW THIS OPERATED IN  
24 ACCORDANCE WITH THE ELEMENTS OF THE CLAIMED  
25 INNOVATION.

1 DR. EDWARD KNIGHTLY WAS APPLE'S EXPERT ON  
2 THIS PATENT, AND HE ALSO DID NOT DISPUTE THE  
3 ACCURACY OF DR. WILLIAMS' DESCRIPTIONS OF HOW THE  
4 INTEL SPECIFICATIONS AND CHIPS WORKED.

5 THE ARGUMENT WAS MADE, WELL, WE'VE GOT  
6 THE SINGLE SMILY FACE, AND DOUBLE SMILY FACE AND  
7 SOMEHOW WHEN YOU USE THE DOUBLE SMILY FACE, YOU'RE  
8 NOT INFRINGING.

9 BUT NO ONE PROVED TO YOU THAT APPLE NEVER  
10 USES THE SINGLE SMILY FACE WHICH IS AN EXACT FIT.  
11 AND YOU REMEMBER HE TESTIFIED THAT IF YOU INFRINGE  
12 SOME OF THE TIME, YOU STILL INFRINGE.

13 WE ALSO PRESENTED EVIDENCE TO YOU FROM  
14 DR. YANG FROM HARVARD, YOU REMEMBER HIM, HE CAME  
15 AND TESTIFIED ABOUT SAMSUNG'S THREE FEATURE  
16 PATENTS, THE CAMERA PHONE, THE BOOKMARKING AND THE  
17 MUSIC BACKGROUND PATENT.

18 HE WALKED THROUGH AND EXPLAINED EACH OF  
19 APPLE'S ACCUSED PRODUCTS AND HOW THEY MET EACH  
20 LIMITATION.

21 I DON'T HAVE TIME TO GO THROUGH ALL OF  
22 THAT WITH YOU, OTHERWISE THIS WOULD BE A MUCH  
23 LONGER CLOSING SUMMATION.

24 BUT YOU'LL RECALL HIS TESTIMONY AND THE  
25 EVIDENCE WE PRESENTED WITH DR. YANG AS WELL.

1                   NOW, THE REMAINING TIME I HAVE I'D LIKE  
2 TO ADDRESS THE ISSUE OF DAMAGES.

3                   WE DON'T THINK THAT SAMSUNG SHOULD HAVE  
4 TO PAY ANY DAMAGES. WE DON'T THINK WE'RE LIABLE.

5                   BUT WE HAVE TO ADDRESS THE ISSUE OF  
6 DAMAGES BECAUSE THIS IS OUR ONLY CHANCE. IF YOU  
7 DISAGREE WITH US, WE NEED TO AT LEAST BE ABLE TO  
8 EXPLAIN TO YOU WHY WE THINK THAT MR. MUSIKA'S  
9 DAMAGES NUMBERS ARE RIDICULOUS.

10                   SO PLEASE DO NOT, JUST BECAUSE I'M  
11 TALKING ABOUT DAMAGES, IMPLY OR INFER THAT I IN ANY  
12 WAY THINK DAMAGES ARE DUE. I DON'T.

13                   BUT YOU MIGHT DISAGREE, AND IF YOU DO,  
14 YOU NEED TO HEAR WHAT I HAVE TO SAY ABOUT IT.

15                   NOW, FIRST POINT. DR. MUSIKA, 2.75  
16 BILLION DOLLARS? REALLY? WHAT DOES IT TAKE TO GET  
17 A DAMAGE EXPERT TO SAY YOU'RE ENTITLED TO \$2.75  
18 BILLION?

19                   LET'S GO TO SLIDE -- I CAN'T EVEN READ  
20 IT -- 396. IT TAKES 1.1 MILLION -- \$1,750,000.  
21 THAT'S HOW MUCH HE WAS PAID, MEMBERS OF THE JURY,  
22 FOR HIS OPINION. \$1 ,750,000. AND WHAT DID HE DO  
23 FOR THAT \$1,750,000? HE IGNORED COSTS. HE  
24 CALCULATED THE REVENUES, BUT HE IGNORED COSTS.

25                   YOU NEVER DO THAT. ANY ACCOUNTING 101,

1 IF YOU'RE TRYING TO CALCULATE PROFITS, YOU HAVE TO  
2 TAKE OUT COSTS OF GOODS SOLD, YOU HAVE TO TAKE OUT  
3 OPERATING EXPENSES, SALES EXPENSES, MARKETING, R&D,  
4 GENERAL ADMINISTRATIVE.

5 BUT HE DIDN'T DO IT.

6 DO YOU REMEMBER DR., OR MR. WAGNER  
7 TESTIFIED TO CRITIQUE MR. MUSIKA'S TESTIMONY. HE  
8 WAS ASKED, "LET ME ASK YOU, DID MR. MUSIKA, IN  
9 MISCALCULATION, DEDUCT THESE EXPENSES, SALES,  
10 MARKETING, R&D?

11 "ANSWER: NOT ONE PENNY.

12 "QUESTION: SO NOT A PENNY OF  
13 ADVERTISING?

14 "ANSWER: NO.

15 "QUESTION: NOT A PENNY OF RESEARCH AND  
16 DEVELOPMENT?

17 "ANSWER: NO."

18 THAT'S NOT PROFITS. THAT'S NOT EVEN  
19 CLOSE TO PROFITS. THAT'S NOT REASONABLE IN ANY  
20 WAY. IT'S A RIDICULOUS NUMBER.

21 IN FACT, APPLE'S PUBLIC FINANCIAL  
22 STATEMENTS DEDUCT THESE COSTS, APPLE'S PUBLIC  
23 FINANCIAL STATEMENTS DEDUCT THESE COSTS. AND  
24 SAMSUNG'S PUBLIC FINANCIAL STATEMENTS DEDUCT THESE  
25 COSTS.

1                   THESE STATEMENTS ARE AUDITED BY OUTSIDE  
2                   AUDITORS TO MAKE SURE THEY'RE ACCURATE AND WHAT THE  
3                   COMPANY'S PROFITS REALLY ARE.

4                   BUT MR. MUSIKA IGNORES THEM.

5                   SO WHAT DO WE HAVE? WELL, WE HAVE  
6                   APPLE'S AUDITED STATEMENTS, SAMSUNG'S AUDITED  
7                   STATEMENTS, MR. WAGNER'S CALCULATIONS, MR. MUSIKA'S  
8                   CALCULATIONS.

9                   COST OF SALES, DO YOU DEDUCT THAT TO GET  
10                  PROFITS? APPLE DOES. SAMSUNG DOES, MR. WAGNER  
11                  DID. MR. MUSIKA DIDN'T.

12                  DO YOU DEDUCT ADVERTISING COSTS? APPLE'S  
13                  AUDITED STATEMENTS DO. SAMSUNG'S AUDITED  
14                  STATEMENTS DO. MR. WAGNER DID. MR. MUSIKA DIDN'T.

15                  RESEARCH AND DEVELOPMENT COSTS. APPLE  
16                  AUDITED STATEMENTS DEDUCTED THEM. SAMSUNG'S  
17                  AUDITED STATEMENTS DEDUCTED THEM. MR. WAGNER  
18                  DEDUCTED THEM. MR. MUSIKA DID NOT.

19                  DEDUCTING ALLOCATED OPERATING COSTS.  
20                  APPLE DOES IT. SAMSUNG DOES IT IN THEIR AUDITED  
21                  STATEMENTS. MR. WAGNER PROPERLY DID IT.  
22                  MR. MUSIKA DID NOT.

23                  WE PUT THESE AUDITED PUBLIC FINANCIAL  
24                  STATEMENTS IN EVIDENCE, SO YOU CAN REVIEW THEM FOR  
25                  YOURSELF. APPLE DEDUCTS THESE EXPENSES BEFORE IT

1 PAYS TAXES AND SO DOES SAMSUNG.

2 THE ONLY ONE WHO IGNORED THESE BILLIONS,  
3 THESE ARE BILLIONS OF DOLLARS IN COSTS, DIRECTLY  
4 RELATED TO EXPENSES, IS MR. MUSIKA. YOU'RE WRONG  
5 TO DO SO.

6 HERE YOU SEE, THIS IS MR. MUSIKA'S  
7 OPINION ON TOTAL PROFITS, 35.5 PERCENT, WHEN  
8 SAMSUNG'S AUDITED FINANCIAL STATEMENTS  
9 COMPANY-WIDE, 10 PERCENT.

10 SAMSUNG AUDITED FINANCIAL STATEMENTS FROM  
11 THE TELECOM, THE PHONE SEGMENT, 15 PERCENT.

12 WHAT DID MR. WAGNER DO? HE GOT 12  
13 PERCENT.

14 WHAT DID MR. MUSIKA DO? 35.5 PERCENT.  
15 IT'S JUST NOT REASONABLE. IT'S TOO HIGH. IT CAN'T  
16 BE RECONCILED WITH THE COMPANY'S FINANCIAL  
17 STATEMENTS.

18 YOU CAN LOOK AT THE EVIDENCE YOURSELF AND  
19 SEE.

20 MR. WAGNER'S -- BY THE WAY, YOU WERE  
21 SHOWN A PRODUCT-BY-PRODUCT CALCULATION OF PROFITS  
22 AND TOLD YOU SHOULD LOOK THERE FOR MR. MUSIKA'S  
23 CALCULATION.

24 WELL, WE SUGGEST YOU LOOK AT MR. WAGNER'S  
25 CALCULATION BECAUSE HE'S THE ONE WHO ACTUALLY

1 DEDUCTED COSTS AND YOU CAN FIND THAT AT DX 781.  
2 THAT'S WHERE IT IS.

3 NOW, MR. MUSIKA TALKED ABOUT BUT-FOR  
4 CAUSATION. IN OTHER WORDS, HE'S SAYING, WELL, YOU  
5 SHOULD AWARD THESE GIANT AMOUNTS OF MONEY TO APPLE  
6 BECAUSE, ACCORDING TO HIM, PEOPLE ARE GOING TO DROP  
7 THEIR, GET RID OF THEIR SAMSUNG PHONE IF THEY CAN'T  
8 HAVE A LITTLE BOUNCEBACK FEATURE, EVEN THOUGH THEY  
9 CAN STILL PLAY MOVIES AND VIDEO GAMES, USE THE  
10 INTERNET, IN FACT, HAVE FEATURES THAT AREN'T EVEN  
11 AVAILABLE ON APPLE PHONES, LIKE FLASH MEMORY, LIKE  
12 THE FACT THAT YOU CAN REMOVE THE BATTERY, WHICH YOU  
13 CAN'T DO IN AN APPLE PHONE, HE'S SAYING, WELL, YOU  
14 WOULDN'T STAY. YOU'D MOVE TO APPLE BECAUSE, JUST  
15 BECAUSE OF THE LITTLE BOUNCEBACK.

16 THAT'S NOT CREDIBLE.

17 AND THE EVIDENCE SHOWS IT'S NOT CREDIBLE.  
18 LET'S TALK ABOUT THE DESIGN. APPLE'S OWN SURVEYS  
19 CONFIRM THAT DESIGN COLOR IS ONLY A SMALL  
20 PERCENTAGE, 1 PERCENT OF THE REASON FOR PURCHASE.  
21 YET MR. MUSIKA, HIS OPINION DEPENDS ON THE  
22 ASSUMPTION THAT THERE'S 100 PERCENT OF THE PEOPLE  
23 THAT WILL SWITCH OVER TO APPLE JUST BECAUSE OF THE  
24 DESIGN.

25 IT'S NOT CREDIBLE.



1           THERE ARE PLENTY OF -- THERE ARE PLENTY  
2           OF OTHER NON-INFRINGING PRODUCTS MADE BY SAMSUNG  
3           AND OTHER COMPETING MANUFACTURERS IN THE  
4           MARKETPLACE.

5           IF WE GO TO SLIDE 408, YOU CAN SEE FOR  
6           YOURSELVES, IF SAMSUNG'S OUT, YOU CAN GET THE  
7           MOTOROLA DROID, YOU CAN GET THE HTC EVO, LG  
8           OPTIMUS, ALL KINDS OF DIFFERENT CHOICES.

9           MOST LIKELY, IF SOMEONE WAS GOING TO MAKE  
10          A MOVE, IF THEY'VE ALREADY CHOSEN NOT TO GET AN  
11          APPLE PHONE, THEY'LL PROBABLY GO TO ANOTHER ANDROID  
12          PHONE.

13          SO THE NOTION THAT BUT-FOR THIS ALLEGED  
14          INFRINGEMENT, 100 PERCENT OF THE PEOPLE USING  
15          SAMSUNG PHONES WILL GO TO APPLE PHONES DOESN'T MAKE  
16          ANY SENSE. PEOPLE BUY PHONES TO PLAY GAMES, TO USE  
17          THE CAMERAS, TO WATCH VIDEOS, TO SURF THE WEB.  
18          THAT'S WHY PEOPLE BUY SMARTPHONES, NOT BECAUSE THEY  
19          HAVE ROUNDED CORNERS, NOT BECAUSE THERE'S A  
20          BOUNCEBACK FEATURE.

21          LOOK AT THIS SURVEY THAT MR. WAGNER PUT  
22          IN. THIS SURVEY SHOWS THE VAST SHORT OF ANDROID  
23          BUYERS IN THIS COUNTRY, 75 PERCENT, WOULD NOT  
24          EVERYONE CONSIDER BUYING AN IPHONE.

25          IN FACT, IN THE NEXT SLIDE, YOU'LL SEE

1 THAT THE BIGGEST REASON FOR BUYING ANDROID WAS  
2 BECAUSE THEY WANTED TO STAY WITH A PARTICULAR  
3 CARRIER. IT HAS NOTHING TO DO WITH TRIVIAL LITTLE  
4 U/I FEATURES LIKE BOUNCEBACK.

5 IN THE END, IF WE CAN GO TO SLIDE 419,  
6 YOU NEED TO USE YOUR COMMON SENSE. ALL RIGHT?  
7 THIS IS WHAT APPLE IS SEEKING. THIS IS WHAT  
8 MR. MUSIKA, WHO WAS PAID \$1.7 MILLION, SAYS SHOULD  
9 BE THE DAMAGES.

10 LOOK AT, IN COMPARISON, THE CLAIMS THAT  
11 APPLE SAYS ARE RIDICULOUS, APPLE SAYS THEY'RE  
12 INCREDIBLY TOO HIGH, THE DAMAGES CLAIMS THAT  
13 SAMSUNG IS MAKING.

14 WELL, IF 22 MILLION IS RIDICULOUS AND TOO  
15 HIGH, WHAT'S 2.7 BILLION?

16 IF 290 MILLION FOR STANDARD ESSENTIAL,  
17 CRITICAL, HARD CORE DATA, HIGH SPEED DATA  
18 TRANSMISSION PATENTS IS RIDICULOUS, HOW ABOUT 2.7  
19 BILLION FOR AN ICON DESIGN PATENT? 2.7 BILLION FOR  
20 ICONS? THAT'S WHAT THEY'RE ASKING YOU FOR.

21 MEMBERS OF THE JURY, YOU HEARD FROM  
22 DR. O'BRIEN, WHO IS SAMSUNG'S DAMAGES EXPERT, AND  
23 HE TOLD YOU WHAT HE THOUGHT THE DAMAGES SHOULD BE  
24 FOR SAMSUNG FOR APPLE'S INFRINGEMENT.

25 FOR THE IPHONE, 13,872,430; IPAD 2 3G,

1 5,058,083; IPAD TOUCH, 3,913,171. THAT COMES TO A  
2 TOTAL OF 22,84,684.

3 THOSE ARE REASONABLE NUMBERS. APPLE'S  
4 NUMBERS ARE NOT REASONABLE.

5 APPLE DIDN'T INVENT TOUCHSCREEN  
6 TECHNOLOGY. APPLE DIDN'T INVENT SQUARE SMARTPHONES  
7 ARE ROUNDED CORNERS AND LARGE SCREENS. THE  
8 INTELLECTUAL PROPERTY APPLE IS ASSERTING IS NOT  
9 WORTH THE MONEY THEY'RE ASKING FOR. WE HOPE YOU  
10 NEVER GET THERE, BUT IF YOU DO, WE'VE GOT TO USE  
11 OUR COMMON SENSE.

12 I'LL RESERVE THE REST OF MY TIME, YOUR  
13 HONOR.

14 THE COURT: OKAY. IT IS NOW 4:31.

15 GO AHEAD AND TAKE JUST A MINUTE TO STAND  
16 UP IF YOU LIKE AND STRETCH WHILE WE GET SET UP  
17 HERE.

18 (PAUSE IN PROCEEDINGS.)

19 THE COURT: OKAY. YOU READY? ALL RIGHT.  
20 PLEASE TAKE A SEAT.

21 APPLE, YOU HAVE 41 MINUTES LEFT.

22 MR. LEE: 31?

23 THE COURT: 41.

24 MR. LEE: THANK YOU.

25 THE COURT: IT'S 4:32. GO AHEAD, PLEASE.

1 (WHEREUPON, MR. LEE GAVE HIS REBUTTAL  
2 CLOSING ARGUMENT ON BEHALF OF SAMSUNG.)

3 MR. LEE: GOOD AFTERNOON, LADIES AND  
4 GENTLEMEN. I GET YOU AT THE END OF A LONG DAY WHEN  
5 YOU'VE HEARD AN AWFUL LOT, AND I REALIZE IT'S BEEN  
6 THE END OF A LONG DAY AND WE'VE HEARD A LOT, SO I  
7 WOULD ASK YOU TO HANG IN THERE WITH ME BECAUSE THIS  
8 IS MY ONE CHANCE TO GET TO ADDRESS YOU.

9 AND I WANT TO START WHERE I DID IN OUR  
10 OPENING, WHICH IS BY THANKING YOU FOR YOUR TIME AND  
11 ATTENTION. THIS HAS BEEN A LONG FOUR WEEKS.  
12 THERE'S BEEN A LOT OF INFORMATION SENT YOUR WAY,  
13 AND WE KNOW THAT YOUR JURY SERVICE HAS IMPOSED  
14 SUBSTANTIAL BURDENS UPON YOU. FOR ALL OF APPLE'S  
15 LAWYERS, FOR APPLE, AND FOR ME PERSONALLY, I WANT  
16 TO SAY THANK YOU.

17 NOW, I SAT THROUGH MR. VERHOEVEN'S  
18 CLOSING AND I HEARD RIDICULOUS, SHELL GAME, MISLED,  
19 MISREPRESENT.

20 THAT'S WHAT WE DID TO YOU OVER THE LAST  
21 FOUR WEEKS.

22 I'VE BEEN DOING THIS FOR 37 YEARS, AND I  
23 HEARD THAT MORE TODAY THAN I HAVE AT ANY OTHER  
24 POINT IN MY CAREER.

25 THE BEST I CAN DO IS SAY THIS TO YOU.

1 YOU'VE BEEN WITH US FOR FOUR WEEKS. YOU'VE GOT TO  
2 SEE THE WITNESSES GET ON THE STAND. YOU'VE GOT TO  
3 HEAR OUR QUESTIONS. YOU'VE GOT TO JUDGE THE  
4 HISTORICAL DOCUMENTS, AS MR. MCELHINNY SAID, NOT  
5 WHAT SOMEONE SAYS TODAY.

6 YOU MAKE YOUR OWN JUDGMENT AS TO WHO SHOT  
7 FAIR AND SQUARE WITH YOU. YOU HAVE TO MAKE YOUR  
8 OWN JUDGMENT AS TO WHO SHOT STRAIGHT, AND WE'RE  
9 PREPARED TO TRUST YOU. THERE'S NO GROUP OF PEOPLE  
10 IN THE WORLD WE'D RATHER HAVE DECIDE THAT ISSUE  
11 THAN YOU.

12 NOW, AMONG TRIAL LAWYERS THERE'S AN OLD  
13 SAYING. IF YOU HAVE THE FACTS, POUND ON THE FACTS.  
14 IF YOU HAVE THE LAW, POUND ON THE LAW. IF YOU HAVE  
15 NEITHER, ATTACK THE OTHER CLIENT, ATTACK THE  
16 WITNESSES, AND ATTACK THE OTHER LAWYERS.

17 AND THAT'S WHAT SAMSUNG HAS DONE.

18 AND I'M GOING TO SAY THREE THINGS TO YOU  
19 RIGHT AT THE OUTSET, THREE THINGS THAT I THOUGHT  
20 WERE STARTLING FROM SAMSUNG'S CLOSING.

21 THE FIRST IS THIS IS ALL ABOUT  
22 COMPETITION AND APPLE'S UNWILLINGNESS TO COMPETE IN  
23 THE MARKET PLACE. I'M GOING TO COME BACK TO THAT  
24 BECAUSE NOTHING COULD BE FURTHER FROM THE TRUTH.  
25 IT IS STARTLING THAT THEY WOULD SAY SO AND IT IS

1           WRONG.

2                       NO ONE HAS TOLD SAMSUNG TO GET OUT OF THE  
3           MARKETPLACE. NO ONE IS TRYING TO STOP THEM FROM  
4           SELLING SMARTPHONES. ALL WE'RE SAYING IS MAKE YOUR  
5           OWN. MAKE YOUR OWN DESIGNS. MAKE YOUR OWN PHONES.  
6           COMPETE ON YOUR OWN INNOVATIONS.

7                       THIS IDEA THAT THIS IS ALL ABOUT OUR  
8           EFFORT TO STOP COMPETITION IN AMERICA IS INTENDED  
9           TO FRIGHTEN THE FOLKS IN THE AUDIENCE AND TO  
10          FRIGHTEN YOU, AND IT'S NOT TRUE.

11                      MR. VERHOEVEN, IF YOU WERE TO BELIEVE  
12          MR. VERHOEVEN, WE MIGHT AS WELL TAKE ALL OF THE  
13          PATENT LAWS, ALL OF THE TRADE DRESS LAWS THAT HER  
14          HONOR SPENT TWO AND A HALF HOURS INSTRUCTING YOU ON  
15          THIS MORNING AND THROW THEM OUT THE WINDOW.

16                      BUT WE CAN'T. WE CAN'T BECAUSE OUR  
17          CONSTITUTION SAYS WE'RE GOING TO HAVE THEM AND  
18          WE'RE GOING TO HAVE THEM PROTECT YOU -- TO PROTECT  
19          INVESTMENT AND INNOVATION AND INVENTION.

20                      MR. VERHOEVEN CLICKED OFF A SERIES OF  
21          INNOVATIONS AND SAID FORM FOLLOWS FUNCTION. DO YOU  
22          REMEMBER THAT? I THINK I'VE GOT THE LIST RIGHT.  
23          TELEVISIONS, MICROPROCESSORS, COMPUTERS, CELL  
24          PHONES. A LOT OF THAT WORK DONE RIGHT HERE IN THE  
25          VALLEY.

1 WELL, LADIES AND GENTLEMEN, EVERY SINGLE  
2 ONE OF THOSE INVENTIONS WAS PROTECTED BY A PATENT,  
3 MULTIPLE PATENTS. WHY? BECAUSE THE INVESTMENT OF  
4 THE PEOPLE WHO DID THE WORK NEEDED TO BE PROTECTED  
5 FOR SOME PERIOD OF TIME OR WE'RE NOT GOING TO HAVE  
6 ANY INVENTIONS AT ALL.

7 EVERY SINGLE ONE OF THEM WAS PROTECTED.  
8 DID FORM FOLLOW FUNCTION? YES. AFTER THE PATENTS  
9 EXPIRED.

10 AND EVERY SINGLE ONE OF THOSE FOLKS WAS  
11 PROTECTED FOR THE PERIOD OF THEIR PATENT BY OUR  
12 CONSTITUTION AND OUR LAWS BECAUSE IF WE DON'T, WE  
13 WON'T HAVE PEOPLE LIKE APPLE SPENDING FIVE YEARS IN  
14 A ROOM COMING UP WITH A PHONE THAT REVOLUTIONIZED  
15 THE MARKETPLACE.

16 NOW, THE SECOND STARTLING THING IS THIS:  
17 HOW MANY TIMES DID YOU HEAR MR. VERHOEVEN TALK  
18 ABOUT \$2.7 BILLION.

19 WELL, HERE'S A NUMBER THAT THEY DON'T  
20 WANT TO TALK ABOUT. THEY COPIED OUR PRODUCTS AND  
21 THEY MADE \$8 BILLION. WHAT THEY'RE SAYING TO YOU  
22 IS WE WANT YOU TO LET US KEEP ALL \$8 BILLION. WE  
23 DON'T WANT TO PAY A PENNY, NOT A PENNY, FOR THE  
24 PRIVILEGE OF HAVING TAKEN YOUR INTELLECTUAL  
25 PROPERTY .

1                    THAT'S THE NUMBER, THE NUMBER FOR YOU TO  
2                    FOCUS ON IS 8 BILLION. AND THE QUESTION OF DO THEY  
3                    GET A GET-OUT-OF-JAIL CARD FOR FREE?

4                    AND THE THIRD IS THIS, AND I'M GOING TO  
5                    USE HIS DIAGRAM.

6                    MR. MCELHINNY TOLD YOU THAT IT'S VERY  
7                    IMPORTANT TO DISTINGUISH BETWEEN HISTORICAL  
8                    DOCUMENTS AND WHAT LAWYERS MADE -- LAWYERS MADE IT  
9                    RIGHT-SIDE UP, OKAY.

10                   MR. VERHOEVEN FOCUSED YOU ON THESE  
11                   MOCKUPS. TWO I THINK THIS IS. THEY FORGOT TO TELL  
12                   YOU THAT MOST OF THESE PHONES ARE SLIDER PHONES, DO  
13                   YOU REMEMBER THE SLIDER PHONES WHERE YOU SLIDE THE  
14                   PHONE OUT AND THERE'S A LITTLE KEYBOARD?

15                   WELL, YOU CAN'T SEE THAT. WHY? BECAUSE  
16                   THIS IS SOMETHING -- THIS IS NOT A HISTORICAL  
17                   DOCUMENT. THIS IS SOMETHING THE LAWYERS MADE.

18                   WHAT HAPPENS IF YOU LOOK AT THE  
19                   HISTORICAL DOCUMENTS? IT'S WHAT MR. MCELHINNY TOOK  
20                   YOU THROUGH TODAY.

21                   AND, LADIES AND GENTLEMEN, JUST ASK  
22                   YOURSELF THIS QUESTION: IF SAMSUNG HAD ALL OF  
23                   THIS, AS THEY JUST TOLD YOU, WHY WAS THERE A CRISIS  
24                   IN DESIGN? WHY WAS THERE A DIFFERENCE BETWEEN  
25                   HEAVEN AND EARTH? WAS, IN 2010, DID THEY BRING



1 PEOPLE FROM THREE DIFFERENT PLANTS ALL OVER KOREA  
2 AND IN THREE MONTHS, IN THREE MONTHS, COPIED  
3 IPHONE?

4 THERE'S A REALLY FUNDAMENTAL FACTOR THAT  
5 GETS LOST IN ALL THESE ACCUSATIONS ABOUT  
6 MR. MCELHINNY AND I MISLEADING YOU, ABOUT  
7 RIDICULOUS CLAIMS.

8 APPLE TOOK FIVE YEARS TO BRING THIS  
9 REVOLUTION TO US. SAMSUNG TOOK THREE MONTHS TO  
10 COPY IT.

11 THAT'S TRUTH AND THAT'S SIMPLE, CLEAR,  
12 AND NOT DISPUTED.

13 NOW, I'M GOING TO BRIEFLY ADDRESS FOR YOU  
14 THE CLAIMS THAT SAMSUNG HAS BROUGHT AGAINST APPLE.  
15 BY MY WATCH, THEY DEVOTED ABOUT FIVE MINUTES OF THE  
16 CLOSINGS TO THOSE PATENTS.

17 BUT I'M GOING TO START BY REMINDING YOU  
18 OF THE QUESTION THAT I POSED TO YOU IN OUR OPENING.  
19 WHEN DID SAMSUNG FIRST ACCUSE APPLE OF INFRINGING  
20 ITS PATENTS AND WHY THEN?

21 BECAUSE WE KNOW THAT SAMSUNG NEVER SAID A  
22 WORD ABOUT THESE PATENTS UNTIL APPLE SAID "STOP  
23 COPYING."

24 NOW, WHAT SAMSUNG SAID TO YOU IN ITS  
25 OPENING IS "WE WERE BEING GOOD BUSINESS PARTNERS .

1 WE HAD THIS BIG RELATIONSHIP WITH APPLE. WE DIDN'T  
2 WANT TO UPSET THEM BY TELLING THEM THAT WE HAD  
3 PATENTS."

4 LADIES AND GENTLEMEN, YOU NOW KNOW THAT  
5 IS NOT TRUE.

6 WE BROUGHT MR. DENISON TO YOU. DO YOU  
7 REMEMBER THAT? THIS IDEA THAT THEY BROUGHT HIM? I  
8 BROUGHT HIM TO YOU AND WE PUT HIM ON THE STAND  
9 ADVERSELY.

10 MR. DENISON ACTUALLY SUGGESTED TO YOU  
11 THAT APPLE NEEDED COMPONENTS BECAUSE IT NEEDED  
12 SAMSUNG'S TECHNOLOGY, AND I'LL PUT THAT ON THE  
13 SCREENS.

14 BUT WHEN HE WENT ON CROSS-EXAMINATION,  
15 WHAT DID HE SAY? HE TOLD YOU THE HONEST TRUTH.  
16 ACTUALLY, IT WAS APPLE'S CONFIDENTIAL INFORMATION,  
17 APPLE'S DESIGNS THAT GAVE IT TO SAMSUNG SO THEY  
18 COULD MAKE COMPONENTS FOR APPLE.

19 WHEN MR. VERHOEVEN SAYS IT'S THIS LSI  
20 SYSTEMS, IT'S A DIFFERENT PART OF SAMSUNG. HE'S A  
21 WONDERFUL LAWYER, BUT I DON'T GET IT. IT'S PART OF  
22 THE SAME COMPANY.

23 AND LET'S LOOK AT WHAT HAPPENED.

24 EXHIBIT 34 IS DATED SEPTEMBER 2007. IT  
25 IS FOUR MONTHS AFTER THE IPHONE HAS COME ON THE

1 MARKET. AND WHAT DOES IT SHOW? IT SHOWS THAT  
2 SAMSUNG WAS EVALUATING HOW EASY IT WOULD BE TO COPY  
3 THE IPHONE.

4 MR. MCELHINNY SHOWED YOU SOME PAGES.  
5 I'LL SHOW YOU ONE THAT MR. VERHOEVEN DIDN'T, PAGE  
6 37.

7 "HW PORTION: EASY IMITATION."

8 NOW, MR. PRICE BROUGHT OUT THE FACT THAT  
9 HW MEANS HARDWARE. IT DOES, THE HARDWARE THAT  
10 THEY'RE MAKING FOR US.

11 AND WHAT ARE THEY TELLING FOLKS? EASY TO  
12 IMITATE.

13 WHAT REALLY HAPPENED HERE IS THIS:  
14 SAMSUNG TRIED TO COMPETE WITH ITS OWN DESIGNS, THE  
15 ONES THAT WERE ON THIS CHART, IN 2007, 2008, AND  
16 2009.

17 IN 2010, IT KNEW IT COULDN'T ANY MORE AND  
18 IT HAD A CRISIS IN DESIGN AND IT KNEW IT NEEDED TO  
19 DO SOMETHING AND IT DID IT IN THREE MONTHS.

20 BUT IT ALSO KNEW THAT ALL THE BUSINESS  
21 THAT APPLE WAS GIVING TO IT WAS CRITICALLY  
22 IMPORTANT, AND IF THEY SAID ANYTHING TO APPLE ABOUT  
23 ITS INTELLECTUAL PROPERTY, THEY'D HAVE A PROBLEM.

24 THEY WANTED TO FLY BELOW THE RADAR. THEY  
25 WANTED TO FLY BELOW THE RADAR SO THEY COULD AMBUSH

1 THEIR PARTNER WITH A KNOCK-OFF PHONE, AND THAT'S  
2 WHAT THEY DID.

3 AND WHEN APPLE SAID STOP COPYING, WHICH  
4 IS WHAT ANY OF US WOULD HAVE DONE, WHAT DID THEY  
5 DO? THEY DUSTED OFF THESE PATENTS.

6 AND WE HAVE PROVEN TO YOU WHAT I SAID WE  
7 WOULD PROVE TO YOU IN OUR OPENING. YOU NOW KNOW  
8 THAT THESE PATENTS DESCRIBE OLD TECHNOLOGY THAT  
9 APPLE DOESN'T USE.

10 YOU ACTUALLY NOW KNOW THAT THEY DESCRIBE  
11 OLD TECHNOLOGY THAT SAMSUNG DOES NOT EVEN USE.

12 THINK ABOUT IT, LADIES AND GENTLEMEN, WE  
13 SPENT TWO DAYS AT THE END THINKING ABOUT THESE  
14 PATENTS. THERE IS NO EVIDENCE THAT SAMSUNG USES  
15 ANY OF THEM.

16 YOU NOW KNOW THAT NONE OF THE 13  
17 INVENTORS WERE WILLING TO GET IN THAT CHAIR AND BE  
18 CROSS-EXAMINED.

19 YOU NOW KNOW THAT FOR TWO OF THEM, THEY  
20 BROKE THE ETSI RULES ON NONDISCLOSURE, THE VERY  
21 ONES THAT HER HONOR INSTRUCTED YOU ON TODAY, AND  
22 YOU NOW KNOW THAT THEY BROKE THE RULES  
23 INTENTIONALLY.

24 IN FACT, YOU NOW KNOW THAT THEY BROKE  
25 THEM BECAUSE TO PLAY BY THE RULES WOULD BE STUPID.

1 THE ONLY THING THAT COULD BE MORE STUPID  
2 IS FOR APPLE TO STAND BY, WHEN SOMEONE HAS BROKEN  
3 THE RULES, TAKE AN \$8 BILLION OF REVENUE AND SAY,  
4 "GO. THAT'S FINE."

5 THAT'S NOT THE WAY OUR SYSTEM WORKS.

6 NOW, MR. VERHOEVEN DEVOTED APPROXIMATELY  
7 A MINUTE TO THE PATENTS THAT DR. YANG TESTIFIED  
8 ABOUT.

9 DR. YANG WAS THE ONLY WITNESS YOU HEARD  
10 FROM, YOU'LL RECALL. HE HAD NOT EVER HEARD OF THE  
11 PATENTS BEFORE THIS CASE. HE HAD NEVER SPOKEN TO  
12 THE INVENTORS. HE HAD NEVER LOOKED AT ANY OF THEIR  
13 DOCUMENTS, AND YOU'LL RECALL HE COULDN'T EVEN  
14 IDENTIFY WHERE THE MODE BUTTON WAS WHEN WE ASKED  
15 HIM ON CROSS-EXAMINATION.

16 NONE OF THE SIX INVENTORS CAME TO  
17 TESTIFY, EVEN THOUGH THREE OF THEM CAME TO VISIT  
18 THE COURTROOM WHILE THEY WERE IN SAN JOSE.

19 AND HERE'S WHY: THEY'RE ASKING YOU TO  
20 DECIDE THAT WE INFRINGE THE '460 PATENT. YET  
21 DR. -- MR. OH, THEIR OWN INVENTOR, HE DIDN'T KNOW  
22 WHAT IT MEANS. YET HE WANTS -- THEY WANT YOU TO  
23 AWARD THEM MILLIONS OF DOLLARS OF DAMAGES. NO  
24 APPLE INVENTOR STOOD HERE AND TOLD YOU THAT HE  
25 DIDN'T KNOW WHAT HE INVENTED. BUT DR. OH DID, AND

1 SO DID DR. PARK.

2 NOW, AS I SAID, THE BEST INDICATION THAT  
3 THESE INVENTIONS ARE OLD IS THAT SAMSUNG DOESN'T  
4 CLAIM TO USE THEM.

5 BUT AN EVEN BETTER INDICATION IS THIS,  
6 LADIES AND GENTLEMEN: WHEN SAMSUNG WANTED TO  
7 DESIGN THESE FEATURES, CAMERA FEATURES, PHOTO  
8 FEATURES, ATTACH E-MAILS INTO ITS CELL PHONES, DID  
9 THEY CALL UP THE INVENTORS AND SAY, HEY, YOU'VE GOT  
10 THIS GREAT PATENT, TELL ME HOW TO DO THIS? DID  
11 THEY GO BACK AT THE PATENTS? NO.

12 INSTEAD, AS YOU KNOW FROM EXHIBIT 44,  
13 WHAT THEY DID IS LOOKED AT THE IPHONE.

14 NOW, THIS IS NOT BENCHMARKING, LADIES AND  
15 GENTLEMEN. THE DOCUMENT MR. VERHOEVEN SHOWED YOU  
16 IS AFTER SAMSUNG CAME TO MARKET, AFTER THEY HAD  
17 COPIED THE IPHONE OR THE IPAD, AND AFTER WE WENT  
18 AND LOOKED AT WHAT THEY HAD DONE TO COPY US.

19 THIS IS BEFORE THEY CAME TO MARKET. THIS  
20 IS 100 PAGES OF SIDE-BY-SIDE COMPARISON WHERE  
21 THEY'RE SAYING WE'RE GOING TO COPY THE IPHONE.

22 BUT ONE THING WE KNOW THEY DIDN'T DO IS  
23 ASK THE INVENTORS OF THEIR OWN PATENTS, CAN YOU  
24 HELP US OUT HERE? AND THE REASON IS THEY COULDN'T.

25 NOW, REALLY QUICKLY, BECAUSE SAMSUNG

1 HASN'T ADDRESSED IT, I'M GOING TO SHOW YOU WHY EACH  
2 OF THESE PATENTS IS NOT INFRINGED SO YOU HAVE A  
3 BASIS FOR YOUR DECISION.

4 ON THE '711 PATENT, I'M GOING TO PUT  
5 CLAIM 9 ON THE SCREEN, IT REQUIRES AN APPLETS. YOU  
6 MAY REMEMBER THAT THERE'S BEEN AN AWFUL LOT THAT'S  
7 COME YOUR WAY, BUT IT REQUIRES AN APPLETS.

8 HER HONOR HAS DEFINED WHAT AN APPLETS  
9 MEANS AND IT'S IN YOUR CLAIM CONSTRUCTION  
10 MATERIALS.

11 IT'S AN APPLICATION DESIGNED TO RUN  
12 WITHIN AN APPLICATION MODULE THAT NEED NOT BE  
13 OPERATING SYSTEM INDEPENDENT.

14 THIS ONE IS PRETTY SIMPLE. DR. YANG  
15 COULD NEVER IDENTIFY THE SOFTWARE CODE. JUST NOT.

16 DR. GIVARGIS, WHO SPENT DAYS REVIEWING  
17 THE CODE, SAID IT'S NOT THERE.

18 THERE IS NO INFRINGEMENT BECAUSE THERE IS  
19 NO APPLETS.

20 DR. YANG COULDN'T IDENTIFY IT FOR YOU  
21 BECAUSE IT'S NOT THERE, AND DR. GIVARGIS TOLD YOU  
22 IT WASN'T.

23 NOW, REMEMBER WHAT MR. VERHOEVEN SAID  
24 ABOUT THE IMPORTANCE OF CROSS-EXAMINATION. I AGREE  
25 WITH HIM. THEY DIDN'T ASK DR. GIVARGIS A SINGLE

1 QUESTION ON THE DEVICE.

2 THE '893 PATENT IS OLD TECHNOLOGY THAT  
3 DEALS WITH MODES AND MODE SWITCHING. THIS IS THE  
4 ONE WHERE DR. YANG COULDN'T QUITE REMEMBER WHERE  
5 THE MODE BUTTON IS.

6 ALL YOU NEED TO KNOW ARE TWO THINGS:  
7 CLAIM 10, WHICH IS THE ONLY ASSERTED CLAIM, HAS  
8 MODES AND MODE SWITCHING ALL OVER IT. I'VE  
9 HIGHLIGHTED IT FOR YOU ON THE SCREEN.

10 WHAT SAMSUNG SAYS INFRINGES IS OUR APPS.  
11 OKAY? NOT MODES. THERE ARE -- THERE ARE AIRPLANE  
12 MODES, THERE'S SILENT MODES ON THE IPHONE. THAT'S  
13 NOT WHAT THEY CLAIM IS INFRINGING.

14 THEY SAY IT'S APPS, NOT MODES.

15 WHAT DOES DR. YANG ADMIT ON  
16 CROSS-EXAMINATION? AND I'M SHOWING YOU HIS ACTUAL  
17 TESTIMONY, JUST AS MR. VERHOEVEN ASKED ME TO DO,  
18 "SO, YES, APPLICATION PROGRAMS AND MODES ARE  
19 DIFFERENT."

20 INCIDENTALLY, YOU'VE HEARD ABOUT THE  
21 DOCTRINE OF EQUIVALENTS THIS MORNING. THERE'S NO  
22 DOCTRINE OF EQUIVALENTS CLAIM ON ANY OF THESE  
23 PATENTS EXCEPT ON THE ONE ISSUE.

24 PROFESSOR DOURISH, PROFESSOR SRIVASTAVA,  
25 PROFESSOR GIVARGIS, EMILIE KIM ALL CAME HERE AND



1 TOLD YOU THAT MODES AND APPS ARE DIFFERENT.

2 YOU HAD THREE EXPERTS FROM US, ONE  
3 ENGINEER, AND THEIR EXPERT SAY THEY'RE DIFFERENT.

4 THE SAME IS TRUE OF THE '460 PATENT.  
5 THIS IS THE THREE CORE FUNCTION. DO YOU REMEMBER  
6 DR. YANG TALKING ABOUT THE THREE CORE FUNCTIONS?

7 BUT WHAT HE DIDN'T TELL YOU ON DIRECT WAS  
8 THAT THE PATENT OFFICE HAD SAID THESE THREE CORE  
9 FUNCTIONS HAD BEEN DONE BY OTHERS BEFORE, AND I'M  
10 GOING TO PUT ON THE SCREEN THE CROSS-EXAMINATION  
11 RIGHT NOW OF DR. YANG WHERE HE SAID, YEAH, THE  
12 PATENT OFFICE SAID THOSE THREE CORE FUNCTIONS HAD  
13 BEEN DONE BEFORE.

14 BUT MOST IMPORTANTLY, THIS IS ALL ABOUT  
15 MODES AND APPS AGAIN. THIS IS ALL ABOUT THE OLD  
16 FM/AM MODE AND NOT ABOUT THE APPS.

17 HERE'S THE CLAIM. IT IS REplete WITH  
18 MODES AND SUB-MODES AND THE SWITCHING.

19 AGAIN, DR. SRIVASTAVA HAD TAKEN THE TIME,  
20 18 HOURS, TO GO THROUGH THE SOURCE CODE. EMILIE  
21 KIM HAD HELPED DESIGN THE PRODUCT. THEY TOLD YOU  
22 THAT THERE WERE APPS, NOT MODES.

23 HOW DID DR. YANG RESPOND? HONESTLY, WITH  
24 A WATERFALL OF WORDS. BUT WHEN YOU SORT THROUGH  
25 THE WATERFALL OF WORDS, APPLICATION PROGRAMS AND

1 MODES ARE DIFFERENT.

2 NOW, WE ALSO PRESENTED YOU WITH THE PRIOR  
3 ART THAT WOULD RENDER EACH OF THESE THREE PATENTS  
4 INVALID.

5 IN THE INTERESTS OF TIME, I'M NOT GOING  
6 TO GO THROUGH THEM NOW. YOU HAVE THE PROOF BEFORE  
7 YOU.

8 BUT I WANT TO POINT OUT ONE IMPORTANT  
9 THING. HER HONOR'S INSTRUCTION NUMBER 20 HAS  
10 SOMETHING CALLED OTHER CONSIDERATIONS, AND I'D  
11 ENCOURAGE YOU TO LOOK AT IT. IT TALKS ABOUT REAL  
12 WORLD FACTORS. THIS IS THE PLACE WHERE THE LAW IS  
13 NOT SO IMPRACTICAL THAT IT'S DIVORCED FROM WHAT WE  
14 DO EVERY DAY. THESE ARE THE REAL WORLD FACTORS  
15 THAT SAY IS THERE REALLY AN INVENTION HERE? IF  
16 IT'S BEEN PRAISED BY OTHERS, IT'S PROBABLY AN  
17 INVENTION. IF IT'S BEEN COMMERCIALY SUCCESSFUL,  
18 IT'S PROBABLY AN INVENTION. IF THERE ARE  
19 UNEXPECTED SUPERIOR RESULTS, IT'S PROBABLY AN  
20 INVENTION.

21 THE DIFFERENCE BETWEEN APPLE PATENTS,  
22 WHICH SAMSUNG HAS TAKEN TWO HOURS TO BELITTLE  
23 TODAY, AND THESE FIVE PATENTS THAT HAVE NEVER EVEN  
24 RESULTED IN A SAMSUNG PRODUCT AS FAR AS WE KNOW, IS  
25 THIS: THE APPLE PRODUCTS THAT HAVE THESE PATENTS

1 ARE COMMERCIALY SUCCESSFUL AND THEY'VE BEEN  
2 PRAISED BY OTHERS AND THEY HAD UNEXPECTED RESULTS  
3 AND THEY'VE BEEN COPIED BY THEM.

4 THE SAMSUNG PATENTS HAVE NOT BEEN PRAISED  
5 BY ANYONE, THEY HAVEN'T BEEN USED BY ANYONE, THEY  
6 HAVEN'T BEEN COMMERCIALY SUCCESSFUL, AND THERE IS  
7 NO UNEXPECTED RESULTS.

8 NOW, I WANT TO SAY JUST TWO LAST THINGS  
9 ON THESE FEATURE PATENTS, AND I WILL MOVE QUICKLY  
10 TO THE DECLARED ESSENTIAL PATENTS, AND THAT'S THIS:

11 FIRST, THERE'S MR. O'BRIEN, WHO CLAIMS  
12 THEY'RE OWED \$2.8 MILLION FOR THESE PATENTS.

13 BUT MR. WAGNER TESTIFIED RIGHT BEFORE  
14 HIM, DO YOU REMEMBER MR. WAGNER, HE SAID FOR THE  
15 APPLE PATENTS THAT INCLUDE THESE INVENTIONS,  
16 APPLE'S INVENTIONS IN THE IPHONE AND THE IPAD, WE  
17 SHOULD GET \$27,000. \$27,000. THEY PAID MORE TODAY  
18 FOR THEIR LAWYERS THAN THEY'RE SAYING IT WOULD COST  
19 TO DESIGN AROUND.

20 HOW CAN YOU TRUST THAT?

21 THE SECOND IS THEY SAY THAT WE'RE WILLFUL  
22 INFRINGERS. WE DIDN'T KNOW ABOUT THE PATENTS. OUR  
23 DESIGNERS DIDN'T KNOW ABOUT THE PATENTS. THERE'S  
24 NO EVIDENCE THAT WE COPIED, BUT WE'RE WILLFUL  
25 INFRINGERS.

1                   YOU SAW MR. MCELHINNY MARCH THROUGH ALL  
2                   OF THE COPYING DOCUMENTS TODAY AND THEY SAY THEY'RE  
3                   NOT.

4                   DOES THAT MAKE SENSE? WHO'S OFFERING YOU  
5                   THE CONTENTIONS THAT THEY MAKE NO SENSE?

6                   SO LET'S GO TO THE DECLARED ESSENTIAL  
7                   PATENTS, WHICH I'M GOING TO DO NOW BECAUSE THESE  
8                   ARE IMPORTANT NOT BECAUSE THEY'RE IMPORTANT  
9                   PATENTS, THEY'RE IMPORTANT BECAUSE THEY ARE THE  
10                  BASIS FOR THE MISCONDUCT BY SAMSUNG BEFORE THE  
11                  STANDARD SETTING BODY, MISCONDUCT THAT THEY HAVE  
12                  BROUGHT NO EVIDENCE TO YOU, OTHER THAN ATTACKING  
13                  THE WITNESSES LIKE DR. WALKER, MR. DONALDSON.  
14                  THAT'S ALL THAT THEY HAVE DONE.

15                  NOW, NONE OF THE INVENTORS CAME TO  
16                  TESTIFY. I'LL PUT ON THE SCREEN, JUST TO REMIND  
17                  YOU HOW MANY THERE WERE. THE ONLY TWO PEOPLE YOU  
18                  HEARD FROM WERE DR. WILLIAMS, WHO HAD NEVER HEARD  
19                  OF THE ALTERNATIVE E-BIT, AND WHO'S BEEN PAID A  
20                  MILLION DOLLARS A YEAR FOR THE LAST TWO YEARS TO  
21                  TESTIFY. AND HE WAS TESTIFYING FOR SEVEN COMPANIES  
22                  AGAINST APPLE IN TEN DIFFERENT CASES.

23                  NOW, I WANT YOU TO THINK ABOUT  
24                  DR. WILLIAMS MILLION DOLLARS ABOUT WHAT THEY JUST  
25                  SAID ABOUT MR. MUSIKA. I'M GOING TO DEFEND

1 MR. MUSIKA FOR A SECOND. HIS 1.7 MILLION WAS TO  
2 BUILD THE PROGRAM AND THE COMPUTER MODEL THAT  
3 ALLOWED THEM TO PRODUCE THE DOCUMENT THAT'S IN YOUR  
4 NOTEBOOK. IT WASN'T ABOUT SITTING THERE FOR HOURS,  
5 HIS HOURLY RATE LIKE DR. WILLIAMS. SO IT'S OKAY IF  
6 DR. WILLIAMS GETS PAID A MILLION DOLLARS, BUT NOT  
7 OKAY TO GET PAID TO DEVELOP A MODEL.

8 NOW, I'M GOING TO SAY TWO THINGS TO YOU.  
9 I'M NOT GOING TO GO THROUGH THE NON-INFRINGEMENT  
10 DEFENSES BECAUSE THE NON-INFRINGEMENT SERVICES WE  
11 THINK WERE CLEAR AND THERE WAS NO  
12 CROSS-EXAMINATION.

13 YOU NOTICE THAT MR. VERHOEVEN TRIED TO  
14 MAKE THE INFRINGEMENT CASE JUST NOW ON THE '516  
15 PATENT. DID HE COMPARE THE CLAIM TO WHAT WAS  
16 HAPPENING? OR DID HE TRY TO COMPARE A DRAWING TO  
17 WHAT WAS HAPPENING? DO YOU REMEMBER THAT? HE'S  
18 COMPARING A DRAWING, NOT THE CLAIM.

19 HER HONOR TOLD YOU TODAY THAT YOU CAN'T  
20 DO THAT.

21 FOR THE REASON THAT IS DR. KIM AND  
22 DR. KNIGHTLY TESTIFIED, WITH VIRTUALLY NO  
23 CROSS-EXAMINATION, THERE IS NO INFRINGEMENT.

24 BUT THERE ARE TWO BIGGER PROBLEMS TO  
25 THESE PATENTS, AND I THINK THESE TWO PROBLEMS ARE

1 GOING TO SHOW YOU, THEY'RE GOING TO HELP BE THE TIE  
2 BREAKER ON THE ISSUE OF WHO ARE YOU GOING TO TRUST.

3 THE FIRST IS PATENT EXHAUSTION. NOW,  
4 PATENT EXHAUSTION YOU PROBABLY THINK IS WHAT YOU  
5 HAVE AFTER FOUR WEEKS, RIGHT? THIS IS A DIFFERENT  
6 CONCEPT. THIS CONCEPT IS YOU CAN'T GIVE A LICENSE  
7 TO SOMEONE TO SELL AND THEN GO SUE THEIR CUSTOMER.

8 THAT'S JUST NOT RIGHT. YOU CAN'T TELL  
9 SOMEONE, INTEL, YOU CAN GO AHEAD AND SELL TO APPLE,  
10 YOU'RE AUTHORIZED TO DO IT, BUT THEN APPLE, WE'RE  
11 GOING TO SUE YOU.

12 PATENT EXHAUSTION SAYS YOU CAN'T DO THAT.

13 NOW, WHEN YOU HEARD MR. WILLIAMS'  
14 TESTIMONY, YOU MIGHT HAVE THOUGHT, THIS IS ALL  
15 ABOUT INTEL. WHY ISN'T INTEL A DEFENDANT? WHY IS  
16 APPLE THE DEFENDANT? THIS IS ALL ABOUT A CHIP  
17 INTEL DESIGNED, INTEL HAD MADE, AND INTEL SOLD TO  
18 APPLE.

19 THERE'S A SIMPLE REASON. INTEL HAS A  
20 LICENSE.

21 AND AS HER HONOR HAS EXPLAINED TO YOU,  
22 THERE'S ONLY THREE THINGS THAT YOU NEED TO FIND TO  
23 KILL THESE PATENTS FOREVER. THE FIRST IS THAT  
24 INTEL WAS AUTHORIZED TO SELL BASEBAND CHIPS TO  
25 APPLE. YOU HAVE BEFORE YOU THE LICENSE AGREEMENT,

1 AND DR. -- MR. DONALDSON TOLD YOU, IT'S PX 65 -- PX  
2 81 -- THAT THERE'S A LICENSE.

3 WHAT'S THE SECOND THING? APPLE HAS TO  
4 PROVE THAT THERE WAS A SALE IN THE UNITED STATES.

5 WELL, YOU KNOW, INTEL IS DOWN THE ROAD,  
6 RIGHT? APPLE IS DOWN THE ROAD. MR. BLEVINS CAME  
7 HERE AND SHOWED YOU THE INVOICE. ISSUED OUT OF  
8 CALIFORNIA. PAYMENT TO CHICAGO.

9 AND YET SAMSUNG WANTS YOU TO THINK THIS  
10 IS NOT A UNITED STATES TRANSACTION.

11 THE THIRD THING WE HAVE TO PROVE IS THAT  
12 THE ACCUSED PRODUCTS INFRINGE BECAUSE THEY INCLUDE  
13 THE CHIP. WELL, IF DR. WILLIAMS IS CORRECT, THEN  
14 THIS IS SATISFIED AND THE PATENT'S EXHAUSTED.

15 THIS IS NOT JUST A TECHNICAL DEFENSE.  
16 THIS ALSO IS PART OF OUR PATENT LAWS. IT'S A PART  
17 OF OUR PATENT LAW THAT IS SAYS IF YOU HAVE AN  
18 INVENTION THAT'S PROTECTED, THERE ARE LIMITS TO THE  
19 PROTECTION AND YOU CANNOT GO OUT AND TRY TO DOUBLE  
20 DIP. AND THAT'S WHAT THESE FOLKS ARE DOING.  
21 THEY'RE TRYING TO DOUBLE DIP TO THE TUNE OF \$399  
22 MILLION.

23 NOW, THERE ARE A LOT OF THINGS IN LIFE  
24 THAT CAN BE RIDICULOUS. I THINK THAT'S ONE OF  
25 THEM.

1                   NOW LET ME TALK ABOUT THE REAL HEART, AND  
2                   I THINK THE REAL TIE BREAKER IN THIS CASE, BECAUSE  
3                   YOU'RE GOING TO HAVE TO DECIDE WHO LIVES BY THE  
4                   RULES IN THIS CASE AND WHO HASN'T LIVED BY THE  
5                   RULES AND THE FOLKS THAT HAVEN'T LIVED BY THE RULES  
6                   ARE SAMSUNG.

7                   SAMSUNG HAS NOT LIVED BY THE ETSI RULES,  
8                   AND THERE'S NO DISPUTE.

9                   LET ME SHOW YOU THE DISCLOSURE TIMELINE  
10                  FOR THE '941 PATENT.

11                  LADIES AND GENTLEMEN, THIS IS WHAT  
12                  DR. WALKER TESTIFIED ABOUT. THE PATTERN WAS  
13                  SIMPLE. FILE A PATENT APPLICATION, SUBMIT A  
14                  PROPOSAL, GET IT ADOPTED, AND DON'T DISCLOSE FOR  
15                  YEARS.

16                  NOW, MR. VERHOEVEN MAY GET UP AND SHOW  
17                  YOU ANOTHER SLIDE WHERE HE STICKS IN THE U.S.  
18                  APPLICATION DATE. THAT'S COMPLETELY IRRELEVANT.  
19                  THE QUESTION IS, DID -- SINCE THEY'RE A EUROPEAN  
20                  ORGANIZATION, WORLDWIDE, DID THEY HAVE IT? DID  
21                  THEY NOT DISCLOSE IT?

22                  THE ANSWER IS DR. WALKER TOLD YOU YES.

23                  AND HE TOLD YOU -- IF WE CAN GO TO THE  
24                  NEXT SLIDE -- THAT FOR THE '516, THEY DID IT AGAIN

25                  .



1                   NOW, LADIES AND GENTLEMEN, HERE'S WHAT  
2                   THEY WERE DOING. THEY HAD ENGINEERS WHO NEVER  
3                   DESIGNED A PRODUCT, ENGINEERS WHOSE SOLE JOB WAS TO  
4                   GO TO THE STANDARDS MEETING, ENGINEERS WHOSE SOLE  
5                   JOB WAS TO WORK WITH PATENT LAWYERS AT THOSE  
6                   MEETINGS TO TRY TO GET, TO TRY THEIR BEST TO GET  
7                   PATENTS ON THE STANDARDS. THEY WERE EVEN REWARDED  
8                   FOR GETTING PATENTS IN THE STANDARDS.

9                   DR. TEECE, THEIR ONLY WITNESS ON THIS  
10                  ISSUE, COULD NOT DISPUTE THESE TIMELINES AND YOU  
11                  HEARD HIS TESTIMONY.

12                  THIS, LADIES AND GENTLEMEN, WAS A BREACH  
13                  OF SECTION 4.1 OF ETSI'S RULES.

14                  THOSE RULES REQUIRE YOU, IF YOU'RE MAKING  
15                  A PROPOSAL, TO DISCLOSE ANY PATENTS OR PATENT  
16                  APPLICATIONS THAT YOU HAVE. IT REQUIRES IT SO THAT  
17                  THERE WILL BE NO HOLD-UP.

18                  BUT THE REALLY CRITICAL POINT NOW, WHICH  
19                  WILL HELP YOU JUDGE THE COMPANIES, APPLE AND  
20                  SAMSUNG, IS THIS WAS NOT A COINCIDENCE. I'VE TOLD  
21                  YOU HOW THEY GOT THE ENGINEERS THERE. I TOLD YOU  
22                  WHO THE ENGINEERS WERE AND I TOLD YOU HOW THEY GOT  
23                  THE PATENTS.

24                  BUT THE NONDISCLOSURE, THE UNDISPUTED  
25                  NONDISCLOSURE WAS A CORPORATE STRATEGY BECAUSE, TO

1 QUOTE MR. JUNWON LEE, TO DISCLOSE WOULD HAVE BEEN  
2 STUPID. STUPID, LADIES AND GENTLEMEN. STUPID TO  
3 PLAY BY THE RULES.

4 THIS IS NOT A -- THIS IS ONE OF THE  
5 HIGHEST RANKING EXECUTIVES AT SAMSUNG. HE ISN'T  
6 OUT THERE SITTING OUT ON HIS OWN. YOU JUDGE WHAT  
7 IT SAYS ABOUT THE CORPORATE CULTURE AT THE COMPANY.

8 NOW, WHAT DOES SAMSUNG SAY TO YOU? WELL,  
9 IT SAYS, THESE WERE ALL CONFIDENTIAL. BUT IT'S  
10 DR. WALKER WHO EXPLAINED NOTHING IS CONFIDENTIAL  
11 UNLESS YOU REQUEST CONFIDENCE AND SAMSUNG DIDN'T.

12 BUT THE MOST UNBELIEVABLE THING THEY SAID  
13 TO YOU IS THIS, THEY RECALLED DR. TEECE, AND  
14 DR. TEECE PUT ON THE SCREEN SDX 5004.001, DO YOU  
15 REMEMBER THAT, AND HE SAID, OH, THIS SHOWS  
16 EVERYBODY DELAYS.

17 DR. TEECE HAS NEVER BEEN TO AN ETSI  
18 MEETING, NEVER PARTICIPATED IN A WORKING GROUP AND  
19 HAD NO INVOLVEMENT AT ETSI.

20 HE FORGOT TO TELL YOU THAT UNTIL CROSS.

21 HERE'S THE OTHER THING HE FORGOT TO TELL  
22 YOU. HE HAS NO IDEA WHEN THESE PATENTS WERE FILED  
23 OR ISSUED. THIS CHART INCLUDES PATENTS THAT WERE  
24 FILED AFTER THE PROPOSAL WAS FIXED. THIS INCLUDES  
25 PATENTS THAT WERE ACQUIRED AFTER THE STANDARD WAS

1           FIXED. NO ONE COULD DISCLOSE THEM BECAUSE THEY  
2           DIDN'T EXIST.

3                        YET HE WANTS YOU TO BELIEVE THAT THIS IS  
4           AN EXCUSE.

5                        I CALL THIS TESTIMONY THE "EVERYBODY ELSE  
6           IS BAD" EXCUSE. IT'S LIKE WHEN YOUR KID COMES HOME  
7           AND SAYS I DIDN'T DO MY HOMEWORK, BUT NOBODY ELSE  
8           IS DOING IT.

9                        EVERYBODY ELSE ISN'T BAD. EVERYBODY ELSE  
10          ISN'T BREAKING THE RULES.

11                      AND THEY BROKE THE RULE A SECOND TIME.  
12          THEY SAID THAT WHEN THEIR PATENTS BECAME PUBLIC,  
13          THEY WOULD LICENSE THE WORLD, ALL OF YOU, ALL OF  
14          US, ON FRAND TERMS, FAIR, REASONABLE, AND  
15          NON-DISCRIMINATORY TERMS. THEY PROMISED THAT.

16                      THAT WAS THEIR COMPLIANCE WITH RULE 6.1  
17          OF ETSI.

18                      BUT THEY DIDN'T. THEY MADE A DEMAND TO  
19          APPLE OF 2.4 PERCENT OF APPLE'S ENTIRE SELLING  
20          PRICE, BUT ONLY AFTER THEY GOT CAUGHT COPYING.

21                      IT WASN'T FAIR BECAUSE IT'S BASED UPON  
22          THE ENTIRE SELLING PRICE. IT WASN'T  
23          NON-DISCRIMINATORY BECAUSE THEY HAD NEVER GOTTEN IT  
24          FROM ANYBODY ELSE, AND IT WASN'T REASONABLE BECAUSE  
25          SAMSUNG HAS NEVER BEEN PAID A PENNY, NOT ONE RED

1 CENT VERTICALLY, FOR ANY OF ITS DECLARED ESSENTIAL  
2 PATENTS.

3 THESE BREACHES OF THE RULES HAVE REAL  
4 LIFE CONSEQUENCES. THEY MAKE -- IT'S A BREACH OF  
5 CONTRACT BY SAMSUNG. IT IS ALSO, AS PROFESSOR  
6 ORDOVER TOLD YOU, A VIOLATION OF OUR ANTITRUST  
7 LAWS.

8 NOW, WE'RE NOT ASKING FOR A LOT FROM YOU  
9 ON THE ANTITRUST CLAIM. ALL WE'RE ASKING FOR IS  
10 \$350,000, WHICH IS WHAT WE HAD TO PAY PROFESSOR KIM  
11 AND DR. KNIGHTLY TO DEFEND AGAINST THE ANTITRUST  
12 CLAIMS.

13 BUT, LADIES AND GENTLEMEN, IT DOESN'T  
14 MAKE THE PRINCIPLE ANY LESS IMPORTANT. YOU CAN'T  
15 COME IN AND WALK OVER OUR ANTITRUST LAWS. YOU  
16 CAN'T COME IN AND INTENTIONALLY LIE TO A STANDARD  
17 SETTING BODY AND THEN JUST GET A GET-OUT-OF-JAIL  
18 FREE CARD.

19 NOW, WHAT IS SAMSUNG'S RESPONSE TO ALL  
20 THIS? MR. MCELHINNY AND I ARE GOING TO ADDRESS  
21 THAT NOW. I'M GOING TO ADDRESS THE FIRST PART TO  
22 GO BACK TO THIS COMPETITION.

23 THEIR RESPONSE OVER AND OVER AGAIN IS  
24 IT'S ALL ABOUT COMPETITION. APPLE IS TRYING TO  
25 MONOPOLIZE THE MARKET. APPLE IS CLAIMING TO OWN

1 THE COLOR GREEN. APPLE IS CLAIMING TO OWN THE  
2 DEPICTION OF A MA BELL PHONE. APPLE DOESN'T WANT  
3 TO COMPETE.

4 MAKE NO MISTAKE ABOUT IT. APPLE WANTS TO  
5 COMPETE. DO YOU THINK THAT TWO GUYS WITH AN IDEA  
6 STARTED A COMPANY THAT GREW INTO APPLE TODAY  
7 BECAUSE THEY DIDN'T WANT TO COMPETE? APPLE WANTS  
8 TO COMPETE FAIRLY AND SQUARELY WITH INNOVATIONS AND  
9 INVENTIONS AND PRODUCTS.

10 AND THAT'S WHAT THEY HAVE DONE. WE ASKED  
11 MR. DENISON, YOU'LL RECALL, IF THERE WAS A  
12 DIFFERENCE BETWEEN FAIR AND SQUARE COMPETITION AND  
13 UNFAIR COMPETITION. AND THERE IS. AND THAT'S WHAT  
14 I WANT YOU TO KEEP IN MIND WHEN YOU'RE SITTING BACK  
15 IN THE JURY ROOM, WHAT'S THE DIFFERENCE BETWEEN  
16 FAIR AND SQUARE COMPETITION AND UNFAIR COMPETITION?

17 TAKING SOMEONE ELSE'S INTELLECTUAL  
18 PROPERTY IS NOT FAIR AND SQUARE. HAVING THREE  
19 MONTHS OF EXTENDED EFFORT TO COPY SOMEONE ELSE'S  
20 PRODUCT IS THE NO FAIR AND SQUARE.

21 INTENTIONALLY CONCEALING PATENTS IS NOT  
22 FAIR AND SQUARE.

23 ONE OF THE MARVELOUS PARTS OF OUR SYSTEM,  
24 IT'S A 300 YEAR OLD SYSTEM, IS IT BRINGS 9 FOLKS  
25 LIKE YOU TOGETHER WHO CAN BRING YOUR COLLECTIVE

1 WISDOM AND JUDGMENT TO BEAR ON THE ISSUES BEFORE  
2 YOU.

3 AND AS YOU CONSIDER THOSE ISSUES, I'M  
4 GOING TO ASK YOU ONE LAST THING. USE THAT COMMON  
5 SENSE. WE ALL KNOW THAT WHEN SOMEONE IS CAUGHT  
6 DOING SOMETHING THEY SHOULDN'T, SOME PEOPLE REACT  
7 BY SAYING, TOSSING ACCUSATIONS AT OTHERS, BLAMING  
8 OTHERS. THAT'S WHAT'S HAPPENED HERE.

9 SAMSUNG'S RESPONSE TO THE REVELATION OF  
10 ITS THREE MONTH COPYING EFFORT IS THIS:  
11 MR. DENISON, WE DIDN'T COPY. WE KNOW THAT'S NOT  
12 TRUE.

13 WELL, IF WE DID COPY, YOU DON'T HAVE ANY  
14 INVENTIONS. THE RULE HAS TOLD US THAT'S NOT TRUE.

15 BUT IF YOU DO HAVE INVENTIONS, YOU COPIED  
16 OURS, AND WE KNOW THAT'S NOT TRUE.

17 SO THE LAST THING I'LL ASK YOU IS THIS --  
18 AND I'M GOING TO GIVE THE FLOOR FOR THE LAST FEW  
19 MINUTES TO MR. MCELHINNY -- USE YOUR COMMON SENSE.

20 COMPETITION AND INNOVATION HAS BEEN  
21 ACCOMPLISHED IN THIS FIELD NOT BY LAWYERS TOSSING  
22 ACCUSATIONS, BUT BY REAL SCIENTISTS AND INNOVATORS.  
23 DON'T LET SOMEONE GET A GET-OUT-OF-JAIL FREE CARD .  
24 DON'T LET SOMEONE TAKE \$8 BILLION FROM US BECAUSE  
25 THEY'RE ACCUSING US OF MISLEADING YOU.

1                   AND WITH THAT, I'M GOING TO TURN IT BACK  
2                   OVER TO MR. MCELHINNY FOR WHATEVER TIME WE HAVE  
3                   LEFT.

4                   THE COURT:   YOU'VE GOT SIX MINUTES.

5                   MR. MCELHINNY:   OH, MY GOD, I'M BACK.  
6                   THREE QUICK POINTS.  ONE, THE JURY INSTRUCTIONS ON  
7                   TRADE DRESS AND DESIGN POINTS TELL YOU QUITE  
8                   CLEARLY IT'S ALL ABOUT OVERALL IMPRESSION.  IT'S  
9                   NOT INDIVIDUAL ICONS, IT'S NOT THIS PIECE, IT'S  
10                  NOT -- IT'S WHAT THE OVERALL PART LOOKS LIKE.

11                  TWO, THIS MODEL, THE 035 MODEL, THE JUDGE  
12                  WILL GIVE YOU A LIST OF ALL OF THE EXHIBITS THAT  
13                  ARE IN EVIDENCE WITH THE LIMITING INSTRUCTION AND  
14                  THIS MODEL IS EXHIBITS DX 740 AND DX 741.  AND NEXT  
15                  TO THAT YOU WILL READ THE JUDGE'S INSTRUCTION, DO  
16                  NOT CONSIDER FOR NON-INFRINGEMENT OR INVALIDITY.

17                  WHY WAS THE HONEST LAWYER FROM SAMSUNG  
18                  WAVING THIS AROUND AT YOU WHEN HE KNEW THAT WAS THE  
19                  JUDGE'S INSTRUCTION?

20                  3.  I CAN'T HELP IT.  I AM AN ABSOLUTE  
21                  SLAVE TO CHRONOLOGY.  CAN I HAVE DX 900 UP, PLEASE?

22                  THEY BROUGHT THIS DOCUMENT.  THEY DIDN'T  
23                  BRING THE CAD DRAWING WHICH WOULD SHOW US WHAT IT  
24                  ACTUALLY LOOKED LIKE.  THEY BROUGHT THIS DOCUMENT.  
25                  YOU CAN'T TELL FROM THIS DOCUMENT WHETHER OR NOT

1 IT'S AN ALL FLAT GLASS FACE OR WHETHER IT'S A  
2 PICTURE FRAME LIKE EVERYBODY ELSE WAS MAKING AT  
3 THIS TIME.

4 WHAT YOU CAN TELL IS THAT IT WAS NARROW  
5 ON THE TOP AND IT WAS BROAD ON THE BOTTOM, AND WHEN  
6 YOU LOOK, YOU CAN SEE THE WHITE BASE ALL THE WAY  
7 AROUND IT BECAUSE THE FACE WAS SMALLER THAN THE  
8 BACK. THAT WAS THE DESIGN THEY WERE WORKING ON.

9 THEN, AS THEY SAID, THEY CAME OUT WITH  
10 THE SEVEN. GOOGLE SAID EVEN THIS, WE DON'T EVEN  
11 ACCUSE THIS BECAUSE WE'VE BEEN SO CAREFUL, BUT  
12 GOOGLE SAID, THIS LOOKS TOO MUCH LIKE APPLE.

13 SO WHAT DID THEY DO? THEY CAME OUT WITH  
14 THE 10.1 WHICH WE DID ACCUSE BECAUSE IT IS AN  
15 IDENTICAL CLONE. THAT IS WHAT THE CHRONOLOGY TELLS  
16 YOU ABOUT WHAT SAMSUNG HAS BEEN DOING IN THIS CASE.

17 IF YOU RENDER JUDGMENT FOR APPLE IN THIS  
18 CASE, YOU WILL HAVE REAFFIRMED THE AMERICAN PATENT  
19 SYSTEM. PEOPLE IN THIS VALLEY WILL CONTINUE TO  
20 INVEST. THEY WILL MAKE INVESTMENTS. THEY WILL  
21 HIRE PEOPLE. THEY WILL TAKE CHANCES BECAUSE THEY  
22 KNOW THAT THOSE INVESTMENTS WILL BE PROTECTED.

23 IF YOU AWARD US THE DAMAGES WE'RE  
24 SEEKING, YOU WILL HAVE UPENDED SAMSUNG'S CYNICAL  
25 GAME PLAYING, THE WAY THAT YOU SEND PEOPLE TO



1 PATENT THE DISCLOSURES THAT PEOPLE ARE MAKING AT  
2 STANDARDS BODIES, THE WAY THAT YOU COPY OTHER  
3 PEOPLE'S STUFF, YOU WILL HAVE TAKEN THE PROFIT AWAY  
4 FROM THAT AND YOU WILL HAVE TAUGHT SAMSUNG AND  
5 EVERYONE ELSE WHO IS ATTEMPTING TO GO DOWN THAT  
6 ROAD THAT THAT IS NOT THE WAY THAT WE SHOULD BE  
7 DOING COMPETITION.

8 YOU WILL -- THEY'RE RIGHT. THE WORLD IS  
9 WATCHING AND THE NINE OF YOU HAVE THE POWER. YOU  
10 WILL, WITH YOUR DECISION, DETERMINE THE RULES OF  
11 COMPETITION FOR A LONG TIME TO COME IN THIS  
12 COUNTRY, AND YOU GET TO DECIDE WHETHER WE'LL BE THE  
13 PEOPLE WHO FOLLOW THE RULES AND MAKE THE  
14 INVESTMENTS AND REAP THOSE INVESTMENTS OR THE  
15 PEOPLE WHO STEAL THEM.

16 THERE ARE TWO WAYS THAT SAMSUNG CAN WIN  
17 THIS CASE. OBVIOUSLY IF YOU COME BACK AND SAY,  
18 SORRY, APPLE, YOUR PATENTS ARE NO GOOD, THEY'RE  
19 INVALID, ALL OF THEM, YOU RULE FOR SAMSUNG AND  
20 SAMSUNG WINS THE CASE.

21 BUT THE OTHER WAY SAMSUNG WINS IS IF YOU  
22 COMPROMISE ON DAMAGES. THIS IS A COMPANY THAT  
23 SPENT A BILLION DOLLARS ON ADVERTISING. ALL OF A  
24 SUDDEN, I DON'T KNOW IF YOU'VE NOTICED AROUND THIS  
25 COURTHOUSE, ALL OF A SUDDEN THERE ARE SAMSUNG ADS

1 EVERYWHERE YOU LOOK. THERE ARE SAMSUNG ADS ON  
2 EVERY GIANT'S GAME I HAPPEN TO NOTICE. A BILLION  
3 DOLLARS.

4 THEY WILL NOT CHANGE THEIR WAY OF  
5 OPERATING IF YOU SLAP THEM ON THE WRIST.

6 BILL AND I TOLD YOU AT THE BEGINNING OF  
7 THIS CASE THAT WE WOULD BRING YOU EVIDENCE. WE  
8 BROUGHT YOU DOCUMENTS. WE'VE DONE EVERYTHING WE  
9 CAN TO GIVE YOU THE INFORMATION YOU NEED TO MAKE  
10 YOUR JUDGMENT. WE TRUST YOU AND ON BEHALF OF MY  
11 CLIENT AND ALL OF US WHO HAVE SAT AT OUR TABLE, WE  
12 WANT TO THANK YOU VERY MUCH FOR THE TIME THAT  
13 YOU'VE GIVEN US.

14 THE COURT: ALL RIGHT. YOU HAVE TWO  
15 MINUTES LEFT.

16 MR. MCELHINNY: WELL, THEN, IN THAT  
17 CASE --

18 (LAUGHTER.)

19 MR. LEE: WE'LL CEDE THAT, TOO, WITH THE  
20 OTHER THREE MINUTES.

21 THE COURT: ALL RIGHT. IT'S 5:10. ALL  
22 RIGHT. GO AHEAD.

23 MR. VERHOEVEN: YOUR HONOR, MAY I? YOUR  
24 HONOR?

25 THE COURT: YES. YOU HAVE 14 MINUTES

1 LEFT, AND IT'S 5:10. REBUTTAL.

2 (WHEREUPON, MR. VERHOEVEN GAVE HIS  
3 REBUTTAL CLOSING ARGUMENT ON BEHALF OF SAMSUNG.)

4 MR. VERHOEVEN: THANK YOU, YOUR HONOR.

5 LET ME ADDRESS MR. LEE'S CLAIMS,  
6 ACCUSATIONS REALLY, THAT SAMSUNG ENGINEERS,  
7 ENGINEERS THAT WEREN'T CALLED, ENGINEERS WHOSE  
8 DEPOSITIONS THEY DIDN'T PLAY, LET ME ADDRESS HIS  
9 ACCUSATION THAT THEY INTENTIONALLY DECEIVED PEOPLE  
10 AT ETSI.

11 THERE'S NO EVIDENCE OF THAT WHATSOEVER.  
12 LET'S LOOK AT WHAT THE EVIDENCE IS. CAN WE GO TO  
13 SLIDE 300.

14 NOW, SECTION 4.1 IS THE SECTION THAT  
15 MR. LEE POINTED TO IN SAYING THERE'S BEEN SOME SORT  
16 OF BREACH OF ETSI POLICY.

17 EACH MEMBER SHALL USE ITS REASONABLE  
18 ENDEAVORS TO TIMELY INFORM ETSI OF ESSENTIAL IPR'S  
19 IT BECOMES AWARE OF. IPR IS A DEFINED TERM. IPR  
20 SHALL MEAN ANY INTELLECTUAL PROPERTY RIGHT  
21 CONFERRED BY STATUTE, LAW, INCLUDING APPLICATIONS  
22 THEREFORE OTHER THAN TRADEMARKS. AND IT SAYS FOR  
23 THE AVOIDANCE OF DOUBT, RIGHTS RELATING TO GET-UP,  
24 CONFIDENTIAL INFORMATION, TRADE SECRETS OR THE LIKE  
25 ARE EXCLUDED FROM THE DEFINITION OF IPR.

1           THOSE KOREAN APPLICATIONS THAT HE'S  
2           POINTING TO ARE CONFIDENTIAL.   THERE'S NO DUTY  
3           UNDER THE STATUTE TO DISCLOSE CONFIDENTIAL  
4           INFORMATION, IT EXPRESSLY SAYS IT RIGHT THERE.

5           MR. LEE DIDN'T SHOW YOU THAT.

6           LET'S GO TO SLIDE 292.

7           HERE WE HAVE THE DISCLOSURE OF IPR'S.  
8           THAT'S THE PROVISION THEY SAY WE VIOLATED.

9           EACH MEMBER SHALL USE REASONABLE  
10          ENDEAVORS TO DO WHAT?   TO TIMELY INFORM ETSI, AND  
11          THEY'RE SUPPOSED TO DO SO ON A BONA FIDE BASIS.

12          WHAT DOES BONA FIDE MEAN?   IT MEANS IF  
13          YOU KNOW YOU HAVE IPR, YOU CAN'T INTENTIONALLY  
14          WITHHOLD IT.   WE CAN LOOK TO THE GUIDELINES FOR THE  
15          ETSI POLICY, EXHIBIT 613, PAGE 8 THROUGH 9.   THE  
16          IMPORTANCE OF TIMELY DISCLOSURE OF ESSENTIAL IPR,  
17          THIS IS TELLING YOU ABOUT THIS, OKAY, IT SAYS, NOTE  
18          ONE, DEFINITION FOR TIMELINESS OR TIMELY CANNOT BE  
19          AGREED BECAUSE SUCH DEFINITIONS WOULD CONSTITUTE A  
20          CHANGE TO THE POLICY.

21          THIS SECTION DOES NOT SAY, MEMBERS OF THE  
22          JURY, THAT YOU BREACH THE, THE ETSI POLICIES IF YOU  
23          FAIL TO DISCLOSE CONFIDENTIAL INFORMATION BEFORE A  
24          STANDARD IS ADOPTED.

25          WHERE IN THIS SECTION DOES IT SAY BEFORE

1 THE STANDARD IS ADOPTED? IT SAYS, IN PARTICULAR, A  
2 MEMBER SUBMITTING A TECHNICAL PROPOSAL FOR A  
3 STANDARD OR TECHNICAL SPECIFICATION SHALL, ON A  
4 BONA FIDE BASIS, DRAW THE ATTENTION TO ETSI OF THAT  
5 MEMBER'S IPR WHICH MIGHT BE ESSENTIAL IF THAT  
6 PROPOSAL IS ADOPTED.

7 IT DOESN'T SAY BEFORE IT'S ADOPTED. IT  
8 SAYS YOU NEED TO DO IT WHEN YOU FIGURE IT OUT.

9 IF YOU HAVE AN APPLICATION, YOU DON'T  
10 EVEN KNOW IF IT'S GOING TO BE GRANTED. YOU DON'T  
11 KNOW IF IT'S ESSENTIAL. YOU DON'T KNOW WHAT YOUR  
12 CLAIMS ARE GOING TO BE. YOU HAVE NO IDEA.

13 BUT IF YOU DO GET A PATENT GRANTED AND  
14 YOU DO KNOW ON A BONA FIDE BASIS THAT IT'S  
15 ESSENTIAL, THEN AT THAT POINT YOU HAVE A DUTY THAT  
16 KICKS IN, AND YOU CAN SEE IT RIGHT HERE. NOTE 2,  
17 INTENTIONAL DELAY. INTENTIONAL DELAY HAS ARISEN  
18 WHEN IT IS DEMONSTRATED THAT AN ETSI MEMBER HAS  
19 DELIBERATELY WITHHELD IPR DISCLOSURES SIGNIFICANTLY  
20 BEYOND WHAT WOULD BE EXPECTED FOR NORMAL  
21 CONSIDERATIONS OF TIMELINESS.

22 INTENTIONAL DELAY, NOT DELAY, INTENTIONAL  
23 DELAY, WHERE PROVEN SHOULD BE TREATED AS A BREACH  
24 OF THE IPR POLICY, CLAUSE 4.

25 NOW, IF YOU REMEMBER I ASKED DR. WALKER,

1 WHO WAS THE ONLY WITNESS THEY HAD COME TESTIFY  
2 ABOUT THAT, WHETHER HE HAD AN OPINION AS TO  
3 WHETHER -- I HEARD MR. LEE REPEATEDLY SAY THESE  
4 ENGINEERS, THESE SAMSUNG ENGINEERS WHO THEY DIDN'T  
5 CALL, WHOSE DEPOSITIONS THEY DIDN'T PLAY, HE  
6 REPEATEDLY SAID THEY INTENTIONALLY BREACHED. THEY  
7 INTENTIONALLY DELAYED. THAT'S NOT EVIDENCE.  
8 THAT'S ATTORNEY ARGUMENT.

9 WHAT DID THEIR ONLY EXPERT ON THIS SAY?

10 "QUESTION: YOU'RE NOT OFFERING AN  
11 OPINION HERE TODAY THAT SAMSUNG DELIBERATELY OR  
12 INTENTIONALLY DELAYED, ARE YOU, SIR?

13 "ANSWER: I HAVE NOT USED THOSE WORDS,  
14 NO.

15 "QUESTION: AND YOU'RE NOT OFFERING THAT  
16 OPINION, ARE YOU, SIR?

17 "ANSWER: NO, I AM NOT."

18 YET MR. LEE GETS UP AND SAYS, "THEY  
19 INTENTIONALLY DELAYED."

20 NO EVIDENCE. IN FACT, THE ONLY PERSON  
21 THEY CALLED SAID, NO, HE HAS NO OPINION THEY  
22 INTENTIONALLY DELAYED.

23 AND IF YOU LOOK AT THESE GUIDELINES IN  
24 CONNECTION WITH THE AGREEMENT, YOU CAN SEE VERY  
25 CLEARLY THAT THAT IS WHAT WOULD BE CONSIDERED A

1 BREACH. INTENTIONAL DELAY BEYOND WHAT COULD BE  
2 REASONABLY EXPECTED. THERE'S NOTHING IN THERE THAT  
3 SAYS YOU BREACH IF YOU DON'T DISCLOSE BEFORE  
4 SOMETHING IS ADOPTED.

5 NOW, APPLE IS A MEMBER OF ETSI, TOO.  
6 APPLE HAS ENGINEERS THAT GO TO ETSI MEETINGS, TOO.  
7 THEY DIDN'T CALL A SINGLE ONE OF THEIR ENGINEERS TO  
8 TALK ABOUT, WELL, WHEN ARE YOU SUPPOSED TO DISCLOSE  
9 UNDER ETSI? WHAT'S OUR EXPERIENCE OF WHEN YOU  
10 DISCLOSE UNDER ETSI?

11 AND THE REASON IS CLEAR. IF WE GO TO  
12 SLIDE 291.

13 NOBODY DOES IT. NOBODY DOES IT. APPLE  
14 DOESN'T DO IT. HTC DOESN'T DO IN IT. NOKIA  
15 DOESN'T DO IT. THAT'S NOT BECAUSE IT'S WRONG.  
16 IT'S BECAUSE IT'S NOT REQUIRED. IT'S BECAUSE IF  
17 YOU FILE FOR SOMETHING, YOU DON'T KNOW WHAT IT'S  
18 GOING TO END UP BEING. YOU DON'T KNOW IF IT'S  
19 GOING TO BE MATERIAL OR NOT. DOESN'T MAKE ANY  
20 SENSE TO REQUIRE THAT.

21 YOU SAW THE CHRONOLOGY THAT MR. LEE PUT  
22 UP OF THE DISCLOSURE CHRONOLOGY, AND HE WAS -- THE  
23 DISCLOSURES, HE SAID, IN HIS CHRONOLOGY SHOULD HAVE  
24 BEEN MADE IN THESE THINGS CALLED WORKING GROUPS  
25 WHERE THESE ENGINEERS GO. HE SAID THEY

1 INTENTIONALLY BREACHED THAT BY NOT DISCLOSING THESE  
2 CONFIDENTIAL APPLICATIONS IN THESE WORKING GROUPS.

3 WELL, THEIR OWN EXPERT -- GO TO SLIDE  
4 303 -- REMEMBER I ASKED HIM, YOU USED TO GO TO  
5 WORKING GROUP MEETINGS WHEN YOU WERE, BEFORE YOU  
6 GOT ELEVATED TO MANAGEMENT. HE SAID, YEAH, HE WENT  
7 A WHOLE BUNCH OF THEM. YEAH.

8 AND I SAID, "IN ALL OF THOSE MEETINGS  
9 WHERE YOU ATTENDED AS A MEMBER OF THE WORKING  
10 GROUP, NEVER ONCE DID ANYBODY RAISE THEIR HAND AND  
11 SAY, HEY, I'VE GOT ESSENTIAL IPR. CORRECT?

12 "ANSWER: THAT IS CORRECT."

13 THERE'S NO EVIDENCE THAT ANYBODY, ANYBODY  
14 DOES WHAT APPLE IS NOW SAYING IS A REQUIREMENT IN  
15 THEIR BREACH. THEY COULD HAVE BROUGHT THEIR OWN  
16 WITNESSES WHO ATTEND ETSI MEETINGS TO TELL YOU  
17 OTHERWISE. THEY DIDN'T. WHY NOT? BECAUSE THAT'S  
18 NOT THE WAY IT WORKS AT ETSI.

19 FINALLY, LET'S GO TO SECTION 306 --  
20 SORRY -- SLIDE 306.

21 '305. I APOLOGIZE. ETSI HAS A PROVISION  
22 FOR BREACH, SECTION 14, VIOLATION OF POLICY.

23 ANY VIOLATION OF THE POLICY BY A MEMBER  
24 SHALL BE DEEMED A BREACH BY THAT MEMBER OF ITS  
25 OBLIGATIONS TO ETSI. THE ETSI GENERAL ASSEMBLY



1 SHALL HAVE THE AUTHORITY TO DECIDE THE ACTION TO BE  
2 TAKEN, IF ANY, AGAINST THE MEMBER IN BREACH IN  
3 ACCORDANCE WITH ETSI STATUTES.

4 I ASKED DR. WALKER, "YOU HAVE NO OPINION  
5 AS TO WHETHER OR NOT, UNDER SECTION 14, SAMSUNG  
6 VIOLATED THE ETSI POLICY; CORRECT?"

7 "ANSWER: CORRECT."

8 SO MR. LEE GETS UP AND SAYS THIS IS A  
9 BREACH OF THEIR DUTIES TO ETSI AND YOU SHOULD NOT  
10 ALLOW THEIR PATENTS TO BE ENFORCEABLE BECAUSE THEY  
11 INTENTIONALLY WITHHELD.

12 BUT THERE'S NO EVIDENCE. ALL YOU HAVE IS  
13 LAWYER ARGUMENT. THEY DIDN'T CALL ANYBODY ON  
14 INTENT. AND THE ONLY PERSON THEY DID CALL,  
15 DR. WALKER, WHO'S A NICE GUY, BUT HE ADMITTED,  
16 THERE ISN'T ANY BREACH HERE.

17 NOW, MR. LEE ALSO TALKED ABOUT, SUGGESTED  
18 THAT SAMSUNG WASN'T NEGOTIATING ON FAIR AND  
19 REASONABLE AND NON-DISCRIMINATORY WAY WITH APPLE.  
20 WELL, YOU SAW THE EVIDENCE. SAMSUNG MADE AN OFFER,  
21 AND THE UNDISPUTED EVIDENCE WAS APPLE REFUSED TO  
22 EVEN SIT DOWN AND TALK ABOUT IT.

23 AND WHAT -- THE UNDISPUTED EVIDENCE IS  
24 THAT SAMSUNG MADE A GENERAL FRAND DECLARATION IN  
25 THE '90S, WAY BEFORE, THEY SAID, LOOK, IF ANY OF

1 OUR IPR DOES BECOME ESSENTIAL, WE'LL LICENSE IT ON  
2 FAIR TERMS.

3 AND THE EVIDENCE SHOWS THAT SAMSUNG HAS  
4 LICENSED NUMEROUS MAJOR PEOPLE IN THIS SPACE ON  
5 FAIR AND REASONABLE TERMS.

6 THERE'S NO EVIDENCE THAT SAMSUNG HAS  
7 VIOLATED THE POLICIES OF ETSI CONCERNING FRAND.

8 SLIDE 310, PLEASE.

9 IN FACT, DR. WALKER, APPLE'S EXPERT, DOES  
10 NOT HAVE THAT OPINION.

11 "QUESTION: NOW, UNDER THIS FRAND  
12 PROVISION, WHAT DOES THE PATENT OWNER GET?

13 "ANSWER: WELL THE PATENT OWNER GETS, IF  
14 HE HAS FRAND ON IPR WHICH IS ESSENTIAL TO WORKING  
15 WITH THAT STANDARD, THEN ANYBODY WHO WISHES TO  
16 IMPLEMENT THE STANDARD IS REQUIRED TO COME AND GET  
17 A LICENSE UNDER FRAND TERMS FROM THE OWNER OF THAT  
18 IPR."

19 IF APPLE WANTED A LICENSE ON FRAND TERMS,  
20 THEY WERE SUPPOSED TO COME TO US UNDER THEIR OWN  
21 EXPERT AND COME AND SAY, "WE HAVE A LICENSE?"

22 NEVER DID. THEY JUST RELEASED THE PHONE  
23 WITHOUT EVEN TALKING TO US. WE MADE AN OFFER TO  
24 THEM. THEY DIDN'T RESPOND.

25 I ASKED DR. WALKER, "NOW, YOU TALKED A

1 LITTLE BIT ABOUT FRAND. ISN'T IT TRUE, SIR, YOU  
2 HAVE NO OPINION TO PRESENT TO THIS JURY WITH  
3 RESPECT TO WHETHER SAMSUNG HAS MADE A FRAND OFFER  
4 OR NOT?

5 "ANSWER: I'M DEALING WITH DISCLOSURE AT  
6 THE MOMENT, YES?

7 "QUESTION: SO THE ANSWER IS YES?

8 "ANSWER: YES."

9 SO THEIR OWN EXPERT SAYS THERE'S NO  
10 INTENTIONAL DELAY, THERE'S NO VIOLATION OF POLICY,  
11 AND THERE'S NO VIOLATION OF THE FRAND OFFER.

12 IT'S ATTORNEY ARGUMENT WITHOUT EVIDENCE.

13 CAN YOU GO TO SLIDE 313.

14 VERY BRIEFLY ON THE EXHAUSTION ARGUMENT.

15 IT REQUIRES THAT THE PRODUCTS BE SOLD IN THE  
16 UNITED STATES. HERE THE UNDISPUTED EVIDENCE SHOWS  
17 THAT INTEL CHIPS WERE MADE AND DESIGNED IN GERMANY,  
18 DELIVERED FOR ASSEMBLY TO CHINA. APPLE MAKES ITS  
19 PHONES IN CHINA. THAT'S WHERE THE CHIPS GET  
20 INTEGRATED. YOU CAN'T SUE SOMEONE FOR PATENT  
21 INFRINGEMENT IN THE UNITED STATES FOR ACTIVITIES IN  
22 CHINA, MEMBERS OF THE JURY. WHEN THEY GET BROUGHT  
23 INTO THE UNITED STATES, THAT'S WHERE THE  
24 INFRINGEMENT OCCURS .

25 IN SUMMARY, I HEARD MR. LEE SAY



1 THE COURT: ALL RIGHT. ALL RIGHT. WELL,  
2 THANK YOU TO EVERYONE.

3 SO --

4 THE CLERK: READY TO SWEAR IN THE  
5 MARSHAL.

6 THE COURT: OKAY. WE'RE SWEARING IN OUR  
7 BAILIFF, TO BASICALLY EVERY DAY WHILE YOU'RE  
8 DELIBERATING, A BAILIFF WILL BE STANDING WATCH OUT,  
9 AND IF YOU NEED ANYTHING, YOU KNOCK ON THE DOOR AND  
10 THE BAILIFF WILL BE ABLE TO HAND NOTES BACK AND  
11 FORTH AND WHATNOT.

12 (MARSHAL SWORN.)

13 THE MARSHAL: I DO.

14 THE CLERK: THANK YOU.

15 THE COURT: OKAY. SO LET ME JUST QUICKLY  
16 TELL YOU WHAT YOU ARE GOING TO RECEIVE. YOU ARE  
17 GOING TO RECEIVE A VERDICT FORM. YOU ARE GOING TO  
18 RECEIVE SOME NOTE PAPER. IF YOU WANT TO  
19 COMMUNICATE WITH ANYONE, YOU MUST DO IT IN WRITING,  
20 SO YOU WRITE ON HERE WHAT YOUR QUESTION IS OR  
21 WHATEVER THE DATE, TIME. ANYONE ON THE JURY CAN  
22 SUBMIT ONE OF THESE NOTES, SIGN IT, AND THEN AS  
23 WE'VE SAID, WE'LL GET BACK TO YOU PROBABLY WRITE AN  
24 ANSWER BACK WITH THE DATE AND TIME AND THAT WILL BE  
25 OUR WAY OF COMMUNICATING.

1 SO PLEASE DON'T COMMUNICATE WITH  
2 MS. PARKER-BROWN OR WITH THE BAILIFF OR WITH ANYONE  
3 ELSE. IT HAS TO BE DONE IN WRITING. OKAY?

4 NOW, YOU'RE ALSO GOING TO RECEIVE THE  
5 EXHIBIT LIST. THERE ARE THREE OR FOUR COPIES HERE.  
6 AND YOU'RE GOING TO RECEIVE THREE COPIES. YOU'RE  
7 GOING TO RECEIVE ALL OF THE EXHIBITS THAT HAVE BEEN  
8 ADMITTED INTO EVIDENCE DURING THE TRIAL. THEY'RE  
9 GOING TO BE ON CARTS AND IN BINDERS AND IN RED  
10 WELLS.

11 ALSO IN THE JURY ROOM THERE'S GOING TO BE  
12 A SORT OF ELMO TYPE PROJECTOR AND A TV SO THAT YOU  
13 CAN SHARE AND LOOK AT ALL OF THE EVIDENCE TOGETHER  
14 SIMULTANEOUSLY USING THAT EQUIPMENT.

15 SO WE WILL BE ADJOURNING FOR THE DAY. IF  
16 YOU WOULD COME BACK, PLEASE, AT 9:00 O'CLOCK TO THE  
17 FOURTH FLOOR, YOU'LL BE DELIBERATING IN A LARGER  
18 JURY DELIBERATION ROOM STARTING TOMORROW.

19 OKAY? SO, AGAIN, PLEASE DON'T DISCUSS  
20 THE CASE WITH ANYONE, PLEASE DON'T READ ABOUT THE  
21 CASE OR DO ANY INVESTIGATION ABOUT THE CASE.  
22 YOU'LL BEGIN DELIBERATING TOMORROW AT 9:00 A.M.,  
23 AND IF YOU WOULD, PLEASE, JUST GO AHEAD AND LEAVE  
24 YOUR JURY BINDERS IN THE JURY ROOM.

25 JUROR: THIS JURY ROOM (INDICATING).

1 THE COURT: THIS JURY ROOM, UNLESS --  
2 THAT'S EASIER, RIGHT? DO YOU WANT THEM TO TAKE IT  
3 DOWN?

4 THE CLERK: I CAN GO DOWN WITH THEM NOW  
5 AND SHOW THEM WHERE IT IS.

6 THE COURT: MAYBE THAT WILL BE BETTER.  
7 SHE CAN SHOW YOU WHERE OUR ROOM IS AND WHERE YOU  
8 SHOULD GO STARTING IN THE MORNING. OKAY? BUT  
9 WE'LL MOVE ALL THE DRINKS AND SNACKS AND THAT KIND  
10 OF STUFF FOR YOU.

11 ALL RIGHT. SO THANK YOU FOR YOUR  
12 PATIENCE AND YOUR SERVICE. IT WAS A LONG DAY  
13 TODAY. WE APPRECIATE YOUR TIME.

14 (WHEREUPON, THE FOLLOWING PROCEEDINGS  
15 WERE HELD OUT OF THE PRESENCE OF THE JURY:)

16 THE COURT: THANK YOU. ALL RIGHT. THE  
17 RECORD SHOULD REFLECT THE JURORS HAVE LEFT THE  
18 COURTROOM. I JUST HAVE A FEW QUICK -- OH, PLEASE,  
19 TAKE A SEAT -- HOUSEKEEPING MATTERS. ARE YOU ALL  
20 PLANNING TO STAY NEARBY? HOW MUCH TIME WILL YOU  
21 NEED TO GET TO THE COURTHOUSE IF THERE'S A JURY  
22 NOTE?

23 MR. JACOBS: WE'RE AT YOUR SERVICE, YOUR  
24 HONOR. WHATEVER YOU WOULD LIKE IN TERMS OF OUR  
25 AVAILABILITY, WE WILL MAKE HAPPEN.

1 MR. VERHOEVEN: THEY'RE AT THE FAIRMONT,  
2 WE'RE AT THE MARRIOTT.

3 THE COURT: OKAY. SO WHAT WE SHOULD  
4 PROBABLY DO IS WE'LL NOTIFY YOU RIGHT AWAY WHAT THE  
5 NOTE IS, AND THEN PROBABLY THEN JUST GET TOGETHER  
6 IN COURT AND COME TO AN AGREEMENT AS TO WHAT ANSWER  
7 YOU WANT TO SEND BACK TO THE JURY.

8 MR. VERHOEVEN: WOULD YOU LIKE US TO STAY  
9 IN COURT?

10 THE COURT: NO, NO, JUST MAKE SURE  
11 MS. PARKER-BROWN HAS A WAY TO CONTACT YOU AS  
12 QUICKLY AS POSSIBLE, WHOEVER YOU WANT TO CONTACT  
13 SHOULD THAT HAPPEN.

14 MR. LEE: YOUR HONOR, JUST TO REMIND YOU  
15 OF THE CONVERSATION WE HAD OFF THE RECORD, I HAVE  
16 THIS OTHER TRIAL THAT STARTED TODAY, SO I'M GOING  
17 TO LEAVE AND MR. SELWYN FROM OUR OFFICE WILL BE  
18 HERE.

19 THE COURT: OKAY. SO IF YOU WOULD,  
20 PLEASE, AT THE END, AND YOU CAN EITHER JUST SEND IT  
21 TO LHK CRD, THE E-MAIL, AS TO WHO YOU WANT US TO  
22 CONTACT IF THERE'S A JURY NOTE AND THEN THE BEST  
23 WAY TO CONTACT THOSE PEOPLE, AND THEN WE'LL MAKE  
24 SURE THAT WHEN WE DO THE CONTACT VIA E-MAIL OR IF  
25 YOU WANT IT VIA PHONE CALL, THAT WE CONTACT THE



1 PEOPLE THAT YOU WANT US TO CONTACT IF ANYTHING  
2 HAPPENS.

3 OKAY? GO AHEAD AND FILE THE EXHIBITS  
4 THAT YOU WANT TO FILE TODAY UNDER SEAL AND THEN AS  
5 SOON AS THE DELIBERATION IS DONE, WE'LL UNSEAL IT  
6 ALL. OKAY.

7 MS. MAROULIS: THANK YOU, YOUR HONOR.  
8 JUST TO CLARIFY, SOME EXHIBITS WERE ALREADY FILED  
9 IN THE MIDDLE OF THE NIGHT BEFORE WE KNEW THAT.

10 THE COURT: THAT'S FINE.

11 MS. MAROULIS: BUT THE PROFFER IS GOING  
12 TO BE FILED NOW UNDER SEAL. THANK YOU.

13 THE COURT: THAT'S FINE. WHAT ELSE DO WE  
14 HAVE TO HANDLE?

15 IN THE EVENT, I DOUBT ECF WILL HOPEFULLY  
16 NOT COME DOWN LIKE IT DID AT THE END OF JUNE, BUT  
17 IF YOU'D LIKE, WE WILL ALSO BE ECF, JUST FILING  
18 NOTICES THAT THE JURY HAS LEFT FOR THE DAY, THAT  
19 THERE'S A NOTE, SO YOU'LL GET THOSE E-MAIL  
20 NOTIFICATIONS.

21 WHAT ELSE? IS THERE ANY OTHER  
22 HOUSEKEEPING OR COORDINATION WE NEED TO DO?

23 MS. PARKER-BROWN NOW HAS ALL OF THE  
24 ORIGINAL EXHIBITS? THE ROGUE PHONE WAS RELOCATED,  
25 THAT'S GOOD.

1 ANYTHING ELSE? SHE'S GOT EVERYTHING?

2 SO WE'LL GO AHEAD AND LOCK THAT UP IN  
3 THEIR NEW JURY ROOM.

4 MS. MAROULIS: YOUR HONOR, WHAT ARE THE  
5 HOURS OF DELIBERATION? IS IT 9:00 TO 4:30?

6 THE COURT: 9:00 TO 4:30, AND, YOU KNOW,  
7 THEY'LL PROBABLY TAKE LUNCH NOON TO 1:00. WE'RE  
8 ACTUALLY -- STARTING TOMORROW, WE'RE GOING TO  
9 PROVIDE THEM LUNCH, SO THEY CAN WORK THROUGH LUNCH  
10 IF THEY WISH.

11 MR. JACOBS: WE JUST NEED TO FIGURE OUT  
12 THE MECHANICS OF GETTING THAT ELMO SET UP. MAYBE  
13 WE CAN CONSULT WITH MS. PARKER-BROWN.

14 THE COURT: YES. SO IF YOUR TECHNICAL  
15 FOLKS WANT TO DO IT TODAY.

16 MR. JACOBS: YES, THAT WOULD BE GREAT.

17 THE COURT: THAT'S FINE. LET'S WAIT  
18 UNTIL THE JURY LEAVES, I DON'T THINK THEY'RE GOING  
19 TO BE THERE VERY LONG, AND THEN AS SOON AS THEY  
20 LEAVE, YOU'RE WELCOME TO COME AND SET IT UP.

21 MR. JOHNSON: I THINK THE EXHIBITS ARE  
22 ALMOST COMPLETE. THE ONLY THING THAT'S MISSING  
23 THAT WE HAVE TO SUPPLY IS THE INTEL SOURCE CODE  
24 THAT'S UNDER CERTAIN RESTRICTIONS, WHICH WE WILL --  
25 OH, THE COURT HAS IT I'M TOLD.

1 THE COURT: OH, IT'S IN THERE. OKAY.  
2 ALL RIGHT. WHAT ELSE? I MEAN, I'M SURE WE'LL HAVE  
3 TO DO SOME COORDINATION AT THE END ABOUT WHAT'S  
4 GOING TO HAPPEN WITH ALL THE ORIGINAL EXHIBITS.

5 MS. KREVANS: YOUR HONOR, BEFORE THOSE  
6 CARTS GO AHEAD, I THINK WE NEED TO PUT BACK THE  
7 THINGS THAT WE'VE USED TODAY, THE PHYSICAL  
8 EXHIBITS, AND BOTH PARTIES WILL PUT THEM BACK IN  
9 THERE, AND THEN I THINK WE'RE DONE.

10 THE COURT: ALL RIGHT. THAT'S FINE.

11 THEN JUST PLEASE SEND TO LHK CRD THE  
12 INFORMATION THAT YOU HAVE FOR YOUR CONTACT.

13 LET'S JUST TAKE A ONE MINUTE BREAK. LET  
14 ME SEE IF THERE'S ANYTHING ELSE. OKAY?

15 DO YOU WANT TO SEE THE THINGS THAT ARE  
16 GOING BACK TO THE JURY ROOM, THE THINGS THAT I  
17 MENTIONED? JUST THREE COPIES OF THE REFORMATTED  
18 FINAL EXHIBIT LIST, THE BLANK JURY NOTES, AND THE  
19 VERDICT FORM?

20 MS. MAROULIS: YES.

21 THE COURT: WHY DON'T YOU TAKE A LOOK  
22 BEFORE THEY GO BACK?

23 (PAUSE IN PROCEEDINGS.)

24 THE COURT: ALL RIGHT. THANK YOU ALL  
25 VERY MUCH. LET ME KNOW IF YOU HAVE ANY --

1 I'LL PUT THIS ON THE RECORD. YOU CAN GO  
2 AHEAD AND TAKE A SEAT. SORRY.

3 I JUST WANT TO PUT ON THE RECORD THAT  
4 THEY'VE APPROVED WHAT'S GOING BACK THERE.

5 (PAUSE IN PROCEEDINGS.)

6 THE COURT: OKAY. LET ME JUST, PLEASE,  
7 BEFORE WE ADJOURN FOR THE DAY, JUST PLACE ON THE  
8 RECORD THAT BOTH PARTIES HAVE REVIEWED THE VERDICT  
9 FORM, THREE COPIES OF THE REFORMATTED FINAL EXHIBIT  
10 LIST, AND THE JURY -- THE BLANK JURY NOTE FORMS.

11 MS. MAROULIS, HAVE YOU APPROVED THOSE?

12 MS. MAROULIS: I LOOKED AT THEM, YEAH.

13 THE COURT: OKAY. AND MR. JACOBS, YOU  
14 APPROVED THEM AS WELL?

15 MR. JACOBS: YES, YOUR HONOR, THEY'RE  
16 APPROVED.

17 THE COURT: OKAY. SO THOSE WILL BE THE  
18 ONES THAT GO INTO THE JURY ROOM. THAT RED WELL  
19 WILL GO IN TOMORROW MORNING.

20 OKAY. THANK YOU ALL. WE'LL LET YOU KNOW  
21 IF WE HEAR ANYTHING.

22 MR. VERHOEVEN: THANK YOU, YOUR HONOR.

23 MR. MCELHINNY: THANK YOU, YOUR HONOR.

24 (WHEREUPON, THE EVENING RECESS WAS  
25 TAKEN.)

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CERTIFICATE OF REPORTERS

WE, THE UNDERSIGNED OFFICIAL COURT REPORTERS OF THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY CERTIFY:

THAT THE FOREGOING TRANSCRIPT, CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND CORRECT TRANSCRIPT OF OUR SHORTHAND NOTES TAKEN AS SUCH OFFICIAL COURT REPORTERS OF THE PROCEEDINGS HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED TRANSCRIPTION TO THE BEST OF OUR ABILITY.

/S/

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LEE-ANNE SHORTRIDGE, CSR, CRR  
CERTIFICATE NUMBER 9595

/S/

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IRENE RODRIGUEZ, CSR, CRR  
CERTIFICATE NUMBER 8074

DATED: AUGUST 21, 2012