

1 HAROLD J. MCELHINNY (CA SBN 66781)
 hmcclhinny@mofo.com
 2 MICHAEL A. JACOBS (CA SBN 111664)
 mjacobs@mofo.com
 3 JENNIFER LEE TAYLOR (CA SBN 161368)
 jtaylor@mofo.com
 4 ALISON M. TUCHER (CA SBN 171363)
 atucher@mofo.com
 5 RICHARD S.J. HUNG (CA SBN 197425)
 rhung@mofo.com
 6 JASON R. BARTLETT (CA SBN 214530)
 jasonbartlett@mofo.com
 7 MORRISON & FOERSTER LLP
 425 Market Street
 8 San Francisco, California 94105-2482
 Telephone: (415) 268-7000
 9 Facsimile: (415) 268-7522

WILLIAM F. LEE
 william.lee@wilmerhale.com
 WILMER CUTLER PICKERING
 HALE AND DORR LLP
 60 State Street
 Boston, MA 02109
 Telephone: (617) 526-6000
 Facsimile: (617) 526-5000

MARK D. SELWYN (SBN 244180)
 mark.selwyn@wilmerhale.com
 WILMER CUTLER PICKERING
 HALE AND DORR LLP
 950 Page Mill Road
 Palo Alto, California 94304
 Telephone: (650) 858-6000
 Facsimile: (650) 858-6100

10
 11 Attorneys for Plaintiff and
 Counterclaim-Defendant APPLE INC.

12
 13
 14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN JOSE DIVISION

17 APPLE INC.,
 18 Plaintiff,
 19 v.
 20 SAMSUNG ELECTRONICS CO., LTD., A
 Korean business entity; SAMSUNG
 21 ELECTRONICS AMERICA, INC., a New York
 corporation; SAMSUNG
 22 TELECOMMUNICATIONS AMERICA, LLC, a
 Delaware limited liability company.,
 23 Defendants.
 24

Case No. 11-cv-01846-LHK (PSG)

**DECLARATION OF ERIC R.
 ROBERTS IN SUPPORT OF
 MOTION TO ENFORCE
 JANUARY 27, 2012 ORDER AS TO
 FINANCIAL DOCUMENTS**

Date: April 3, 2012
 Time: 10:00 a.m.
 Place: Courtroom 5, 4th Floor
 Judge: Hon. Paul S. Grewal

25
 26 **SUBMITTED UNDER SEAL**
 27
 28

1 I, Eric R. Roberts, declare as follows:

2 1. I am the Director of Forensic Accounting Services at Morrison & Foerster LLP,
3 and have served in that position since 2006. For the eight years prior to that, I performed the
4 same work and function at Morrison & Foerster but under different titles. I have over 40 years of
5 financial and accounting experience, including 29 years at Deloitte (19 as a partner). I am a
6 Certified Fraud Examiner and I have been certified in financial forensics by the American
7 Institute of CPAs, as well as having been a CPA for over 40 years (currently in inactive status). I
8 have a BS in Business Administration and an MBA from the University of California, Berkeley.

9 2. As a partner at Deloitte, I was responsible for financial statement audits of both
10 large, multinational companies as well as small and startup operations. Many of these clients
11 were in high-technology businesses. After several years as an audit partner, I transferred to the
12 consulting practice, where I led the litigation support and bankruptcy practice in Northern
13 California for 8 years. During that time I testified in many depositions and arbitrations and was
14 accepted in federal and state courts both as an accounting and finance expert and as a damages
15 expert. I also served as an arbitrator in an accounting-related case.

16 3. At Morrison & Foerster, much of my role is to assist attorneys by analyzing and
17 often explaining financial statements and other financial data. I also work on cases involving
18 financial or accounting-related matters brought by the Securities and Exchange Commission
19 Enforcement Division.

20 4. I have reviewed and analyzed a document produced by Samsung to evaluate
21 whether it provided information responsive to the Court's January 27, 2012 Order requiring the
22 production of documents and/or internal Samsung reports relating to, among other things, U.S.
23 and worldwide sales, unit sales, costs, selling prices, and profits by accused product by carrier by
24 quarter. Attached hereto as Exhibit A is a true and correct copy of the Spreadsheet produced by
25 Samsung, bearing Bates number SAMNDCA00323946. I understand that the Spreadsheet is the
26
27
28

1 primary document produced in response to the Court order that contains any information relating
2 to the above-mentioned categories specific to the accused products.¹

3 5. While the Spreadsheet does contain some summary information, it clearly is not
4 sufficient and does not provide the detailed data required by the Court's Order. Nor does it
5 provide the level of detail required by a comprehensive damages analysis. The major reasons
6 supporting my conclusion are summarized below.

- 7 • All accused product models are not included. For example, the Spreadsheet is missing
8 information on at least the following accused products: the Galaxy S II Skyrocket, the
9 Galaxy S II Epic 4G, the Galaxy S II (T-Mobile edition), the Galaxy S II (AT&T edition),
10 and the Galaxy Tab 10.1 LTE.
- 11 • There is no information whatsoever regarding sales by carrier. While some smartphones
12 may only be sold to specific carriers, that information cannot be verified or evaluated from
13 the Spreadsheet.
- 14 • The Total tab shows two different totals. One total, referred to as "Consolidate," does not
15 equal the other total, referred to as "Manufacturing." I refer to this as the problem that
16 "the document does not add down."
- 17 • Amounts on the Total tab do not equal the sum of the 25 product tabs. I refer to this as the
18 problem that "the document does not add across."
- 19 • There is no indication whether some or all of certain sales (HQ Direct sales) are made in
20 or to the U.S.
- 21 • Amounts cannot be reconciled to audited financial statements or to publicly available
22 information because no summary or other data are provided as to sales and expenses of
23 non-accused products.

24 ¹ The Spreadsheet was supplemented by SAMNDCA00325495-503, a true and correct
25 copy of which is attached as Exhibit B, which provided data on two more accused products.
26 However, the supplement simply reclassified information previously included in the Fascinate tab
27 between the Fascinate, Showcase, and Mesmerize models, and did not change any combined
28 totals. Samsung also has not provided an updated document combining the information in the
Spreadsheet and supplemental document and refused to provide the new information in an Excel
spreadsheet.

- 1 • No details are provided as to the detailed composition of costs that are expected and
2 commonly provided in internal and external financial statements and reports, making
3 verification of costs and determinations of fixed and variable amounts impossible.
- 4 • The “expenses” for each phone have plainly been allocated by human judgment on some
5 basis; however, no basis or explanation of expense allocations, such as R&D, is provided
6 and there is no way to determine how this compares to Samsung’s normal business
7 practice.
- 8 • Certain product tabs show negative quantities and negative sales, and in some cases,
9 negative quantities yet positive sales. This is illogical and very difficult to account for in
10 the manner presented in the document.

11 6. Before describing in more detail the deficiencies of the Spreadsheet in relation to
12 the Court order, I provide a general overview of the document. The Spreadsheet is an Excel
13 workbook consisting of 26 separate tabs (or pages) covering the time frame of Q2 2010 through
14 Q4 2011, with total amounts shown for each year.² The first tab is called “Total” and purports to
15 summarize the data contained on the following 25 tabs. Each of those 25 tabs contains data
16 relating to a phone or tablet referred to as an accused product. As indicated above, a number of
17 the accused products are not included on the Spreadsheet nor is there any information regarding
18 carriers.

19 7. Based on my experience in reviewing internal and external financial statements
20 and reports, it is apparent to me that this document was not prepared as a contemporaneous
21 business record, but rather it appears to have been prepared specifically for this litigation at the
22 direction of some attorney or other person associated with this litigation. Further, there is nothing
23 about this document that indicates it was ever utilized by Samsung or provided to U.S. or Korean
24 management.

25
26 ² If the Spreadsheet were to be updated to reflect the information on
27 SAMNDCA00325495, there would be 28 tabs consisting of a total tab and 27 products, but the
28 total amounts of the combined product tabs would not change.

1 8. Each of the 26 tabs is divided into sections. The top section is called
2 “Consolidate” and shows the total quantity and dollar sales as well as the ASP (average sales
3 price) of the following five sections: “STA,” “SEC,” “SECA,”³ “Others,” and “Direct HQ S
4 sales”. The final section is referred to as “Manufacturing”.

5 9. The STA SEC, SECA, and Others sections each include totals by month, quarter,
6 and year for quantity (in units), sales, COGS (cost of goods sold), expenses, and operating profit.
7 STA and SEA are U.S. subsidiaries of Samsung; SECA is a Canadian subsidiary and Others I
8 understand to represent the rest of the world (excluding HQ Direct Sales). The COGS numbers in
9 these sections appear to be based on transfer prices between Samsung in Korea and the
10 subsidiaries and as such the gross margins (not shown but which can be calculated) and operating
11 profits of these sections do not reflect in any way the actual profits and losses to Samsung as a
12 whole from the sale of the products.

13 10. The HQ Direct Sales section contains quantity and sales information but no data
14 on any costs. As such, there is no way to determine the profitability of these product sales, even
15 in a summary fashion. In addition, there is no explanation of what these sales are and how they
16 may differ from sales made by the North American subsidiaries or sales in the rest of the world
17 (Others) or whether some or all of these sales should be included as U.S. sales.

18 11. The final section called “Manufacturing” contains line item information for
19 quantity, sales, COGS, with subtotals for material cost and for manufacturing expense, GA
20 (general and administrative expense), sales expense, R&D expense, operating profit, and
21 operating profit percentage. It is unclear whether this section is meant to show Samsung’s
22 worldwide operations relating to the accused products or instead includes only sales made by
23 Samsung in Korea to its foreign subsidiaries (and any direct sales from Korea to customers) and
24 costs incurred (or allocated) in Korea. In either event, as I describe in more detail, the
25

26
27 ³ Samsung Telecommunications America, Samsung Electronics America, and Samsung
28 Electronics Canada.

1 “Manufacturing” amounts are inconsistent with the total amounts of the Consolidate section of
2 the Spreadsheet.

3 12. This makes obvious that one serious issue with the Spreadsheet is that it does not
4 add down, or “foot.” In other words, the quantity and the sales amounts in the Manufacturing
5 section do not agree with the totals in the Consolidate section. For instance, Consolidate units
6 sold in 2010 and 2011 combined total 61,290,703 while Manufacturing for that same period totals
7 63,890,646, a difference of over 2.5 million units. Likewise, combined Consolidate sales for
8 2010 and 2011 total \$24,113,250,373 while Manufacturing sales for that same period total
9 \$22,583,330,974, a difference of over \$1.5 billion. As a result, an outside observer cannot have
10 any confidence in the total sales or other amounts reported by Samsung on the Spreadsheet.

11 13. A similar serious issue is that the sum of the 25 product tabs does not agree with
12 the amounts shown on the Total tab for virtually every line item. Put another way, the
13 Spreadsheet does not add across. In fact, when combining 2010 and 2011, not one line agrees to
14 what purports to be the sum of the 25 tabs supporting the Total tab. For instance, for the two
15 combined years, the 25 detail tabs total 60,313,183 units, and \$23,777,691,298 in sales which is
16 977,520 fewer units and \$335,289,075 lower sales than the amount shown on the Total tab. It is a
17 fundamental principle of accounting that proper accounting documents both “add down” and “add
18 across” when presenting financial information. This failure to add accurately seriously
19 undermines the confidence that any outsider observer would have in the document.

20 14. Samsung has produced audited financial statements for STA for 2010⁴ and earlier,
21 but none for 2011. It is impossible to reconcile 2010 STA sales in total from the audited
22 statements to the STA amounts included on the Spreadsheet. For instance, the audited statements
23 show sales of \$8.925 billion while the Total tab shows STA sales for the accused products at
24 \$2.090 billion, or 23.4% of the total. Even accounting for the 0.5% increase in gross margin of
25 the accused products compared to other STA sales, it is unclear how the accused sales amounting

26 _____
27 ⁴ See, e.g., SAMNDCA00322209-38, a true and correct copy of which is attached hereto
28 as Exhibit C.

1 to less than 25% of total sales could account for over 75% of STA's operating profit.⁵ Likewise,
2 there is not enough data to reconcile the audited SEA financial statements with the Spreadsheet.
3 This leads directly into another serious issue with the Spreadsheet: the allocation of expenses.

4 15. How expenses are allocated to products can significantly impact their profitability.
5 In my experience it is highly unusual for companies to directly relate general and administrative
6 expenses and certain sales costs to specific products. It is my understanding that STA's controller
7 has confirmed in a deposition that STA does not directly relate such expenses to any accused
8 products. (*See* Olson Decl. Ex. 9 at 65:18-67:5; 73:13-74:18.) In some situations companies will
9 allocate these costs on a rational and consistent basis for management review and related
10 purposes. The Spreadsheet Samsung has provided does allocate highly summarized expenses (in
11 the STA and SEA sections) and highly summarized G&A expense and sales expense (in the
12 Manufacturing section) to individual products, impacting the profitability of each of the accused
13 products. But there is no explanation of what these expenses are composed of and whether, how,
14 and to what degree the expenses are allocated. Without detailed information supporting the types
15 of expenses, it is impossible to give any credit to the "operating profit" numbers provided on the
16 Spreadsheet. Furthermore, the fact that this document is prepared not for management but for
17 litigation creates an even greater risk that the document is not an accurate picture of Samsung's
18 financial activity.

19 16. In addition to failing to provide information as to the composition of expenses,
20 G&A expense, and sales expense, the Spreadsheet fails to provide composition information for
21 manufacturing expense. Without data as to the composition of all of these expense categories, it
22 is virtually impossible for a damages expert to determine which costs are fixed and which are
23 variable. In my experience, the determination of the types and amount of costs which are fixed
24 and variable is a significant input into a damage calculation.

25 17. The manufacturing section also allocates over \$1.4 billion of R&D expenses to
26 individual accused products. It is impossible to tell from the Spreadsheet the reason or the basis

27 ⁵ Determined after eliminating research and development revenue and expense.
28

1 for this allocation. This figure is higher than expected when viewed in light of the sales of the
2 products and in comparison to other smartphone manufacturers. Samsung has not produced
3 anything by which to verify how this number was derived, what additions may be inappropriate,
4 or how it was allocated to specific products.

5 18. The foregoing issues regarding the method and basis of allocation also calls into
6 question the operating profits for STA and SEA as set forth on the Spreadsheet. Given testimony
7 that Samsung's U.S. subsidiaries carefully monitor profitability to be in conformity with transfer
8 pricing rules and agreements with the IRS, it is difficult to understand the claimed operating
9 losses on accused products in 2011 for STA (losses of over \$24 million) and SEA (losses of over
10 \$7 million). This suggests an effort to disproportionately allocate expenses to the accused
11 products and thereby artificially lower STA's profits on the accused products. Absent the
12 documents supporting these allocations, there is no way for Apple or its experts to verify the
13 expenses claimed.

14 19. In addition to the above points, there are a number of other issues calling into
15 question the veracity of the Spreadsheet. Each of the following suggests that the document is an
16 unreliable collection of financial data from Samsung's information systems:

- 17 • The Galaxy Tab 7.0 was introduced in the fall of 2010 but no sales are shown on the
18 Galaxy 7.0 tab until Q4 2010.
- 19 • The Acclaim tab shows negative sales in units and dollars for Q3 2011 and negative cost
20 of sales for certain periods even though there are positive sales and cost of sales in
21 subsequent periods.
- 22 • The Continuum tab shows sales of 62 units in December 2011 but sales of over \$1.6
23 million with an ASP of over \$27 thousand.
- 24 • The Exhibit 4G tab shows a negative gross margin for all quarters it was sold during 2011.
- 25 • The Galaxy S 4G tab shows a negative gross margin in Q4 2011 compared to a 9.11%
26 gross margin in the preceding quarter.
- 27 • The Indulge tab shows negative unit sales of 51 units in Q2 2011 but over \$3.8 million in
28 negative sales, an ASP of over \$75 thousand.

- 1 • The Intercept tab shows sales of \$17 thousand and negative \$1.4 million in August and
2 September 2011 but shows no units sold. For Q3 2011 it shows a negative ASP of \$547
3 in spite of never showing a positive ASP over \$250 in prior periods.
- 4 • The Nexus S 4G tab shows 23,020 units sold in Q3 2011 for negative sales of \$5.2 million
5 but shows over 80 thousand units sold for almost \$20 million the next quarter.
- 6 • The Replenish tab shows negative units and sales for November 2011 of 20 units and
7 negative sales of over \$1.4 million resulting in a negative ASP of over \$73 thousand per
8 unit. In December, the Spreadsheet shows 198 negative units and over \$1.7 million of
9 negative sales resulting in an ASP of negative \$8,792.
- 10 • The Transform tab shows no units but negative \$345 thousand in sales in Q4 2011.
- 11 • The Vibrant tab shows negative units of 118, 122, and 62 in July through September 2011
12 but sales in excess of \$812 thousand for that quarter.

13 20. As a result of the foregoing, it is impossible to determine how the Spreadsheet was
14 prepared and whether there is verifiable support for numbers included on it. This, of course, calls
15 into question its reliability for any purpose, including the preparation of a comprehensive damage
16 calculation.

17 21. I have been informed that Apple attorneys located certain financial documents that
18 Samsung produced in the parallel ITC action after Apple filed its motion to compel. I conducted
19 a review of these documents to determine if a comprehensive production of these documents
20 would provide important information for testing the information in the Spreadsheet referred to
21 above or for calculating an appropriate amount of damages for this case.

22 22. Attached hereto as Exhibit D is a true and correct copy of an STA Monthly
23 Closing Report, prepared for or by STA financial management, bearing Bates number S-ITC-
24 500036295. Only a handful of these were produced.⁶ This document is an Excel workbook
25 containing 12 tabs. While it does not contain all of the detail Apple is requesting, the document

26 _____
27 ⁶ For instance, Apple was able to locate in Samsung's ITC productions closing reports for
28 only four months of 2010.

1 does contain additional detail that would be useful in analyzing profitability and damages for the
2 accused products.

3 23. For instance, the document contains sales by STA division and for STA as a whole
4 (QAP tab) as well as Smartphone sales (Smart Sales tab). A comprehensive production on this
5 basis could be used to verify and test Samsung assertions regarding sales in dollars and units that
6 are included in the single Spreadsheet referred to above.

7 24. The document also contains sales by phone model (Basic Model (Pkg) tab).
8 Again, this is the type of information that could be analyzed and tested by damage experts to
9 determine whether all accused products were accounted for as well as the relationship of
10 accessory sales to unit sales.

11 25. Sales by carrier also is a tab (2011 WT sales by Carrier). Apple had specifically
12 requested information for sales to carriers but, as discussed above, that information was excluded
13 from the Spreadsheet.

14 26. Several of the tabs include expenses in far more detail than are shown on the
15 Spreadsheet. In particular, this new document shows allocations of these expenses to the WT
16 division (which includes phones and certain tablets – see WT PL tab). This detail provides
17 substantially more insight into the type of expenses that Samsung is including in its analysis and
18 the additional detail is important to a damages expert when assessing which expenses should be
19 allocated to an accused product and which expenses reflect fixed and variable costs.

20 27. Another type of document produced in the ITC action contains descriptions and
21 details STA expense general ledger accounts. Attached hereto as Exhibit E is a true and correct
22 copy of STA's expense general ledger accounts, bearing Bates numbers S-ITC-500000702-726.
23 While those documents show a limited number of expenses and are far from complete, they are
24 the types of documents damages experts could use to analyze and test expenses and their
25 allocations. Only a few of these documents were produced in the ITC action (and none in this
26 action).

27 28. Finally, I have been informed that Samsung produced a limited number of GCPS
28 (Global Consolidation Package System) documents for STA. Attached hereto as Exhibit F is a

1 true and correct copy of such a GCPS documents, bearing Bates numbers S-ITC-500021629-
2 21678. These appear to show STA's financial statements and detailed listing of (general ledger)
3 expense accounts. This is the type of information that can be used to test, among other things,
4 which expenses are fixed or variable and whether they should or should not be allocated to the
5 accused products in assessing the product's profitability. These types of documents, which are
6 prepared on a routine basis and provided to Samsung management, also provide an important
7 means by which to test whether the Spreadsheet is accurate or complete with respect to the
8 revenues, costs, and expenses that have been included.

9 29. In order to complete a comprehensive damage analysis, Apple and its experts need
10 a full set of the documents and equivalent reports provided to management for STA. But in
11 addition to that, they need equivalent reports and information for SEA and for Korea (or those
12 costs included in the "Manufacturing" section of the Spreadsheet). This is particularly true
13 because the expenses shown in the "Manufacturing" section dwarf the expenses of STA and SEA
14 combined. In addition, the not-yet-produced costed bills of materials, which exist at the point of
15 manufacture, remain essential for understanding the total costs and profitability of the accused
16 products.

17 I declare under penalty of perjury that the foregoing is true and correct. Executed this
18 28th day of February, 2012 at San Francisco, California.

19 /s/ Eric R. Roberts
20 Eric R. Roberts

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

ATTESTATION OF E-FILED SIGNATURE

I, Michael A. Jacobs, am the ECF User whose ID and password are being used to file this Declaration. In compliance with General Order 45, X.B., I hereby attest that Eric R. Roberts has concurred in this filing.

Dated: February 28, 2012

/s/ Michael A. Jacobs
Michael A. Jacobs