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 9 Attorneys for Plaintiff and
 Counterclaim-Defendant APPLE INC.

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 11
 12 UNITED STATES DISTRICT COURT
 13 NORTHERN DISTRICT OF CALIFORNIA
 14 SAN JOSE DIVISION
 15

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

Case No. 11-cv-01846-LHK

**APPLE'S OBJECTIONS TO
 EVIDENCE IN SAMSUNG'S
 REPLY IN SUPPORT OF MOTION
 ON NON-JURY CLAIMS,
 INCLUDING INDEFINITENESS**

Date: Dec. 6, 2012
 Time: 1:30 p.m.
 Place: Courtroom 4, 5th Floor
 Judge: Hon. Lucy H. Koh

1 Pursuant to Civil Local Rule 7-3, Apple objects to deposition testimony and PTO
2 documents that Samsung submitted as Exhibits 3 to 17 to its Reply In Support of Motion on Non-
3 Jury Claims (Dkt. No. 2042). This new “reply” evidence should be stricken because it is not
4 valid rebuttal, violates the Court’s briefing limits, and was not identified in Samsung’s
5 interrogatory responses. Further, Samsung has not laid a foundation for lay testimony on the
6 meaning of Apple’s design patents, which is an issue of law for the Court to decide.

7 **I. SAMSUNG’S NEW EVIDENCE DOES NOT CONSTITUTE VALID REBUTTAL**
8 **AND SHOULD HAVE BEEN INCLUDED WITH SAMSUNG’S OPENING BRIEF**

9 Apple objects to Pierce Reply Declaration Exhibits 3 to 17 (Dkt. Nos. 2042-4 to 2042-18)
10 on the ground that they are impermissible new evidence in reply.

11 “It is well established that new arguments and evidence presented for the first time in
12 Reply are waived,” especially as to issues that “should have been addressed in the opening brief.”
13 *DocuSign, Inc. v. Sertifi, Inc.*, 468 F. Supp. 2d 1305, 1307 (W.D. Wash. 2006) (striking new
14 evidence and argument that should have been included in initial motion) (citation omitted); *see*
15 *Contratto v. Ethicon, Inc.*, 227 F.R.D. 304, 308 n.5 (N.D. Cal. 2005) (striking new evidence
16 because “Defendants’ attempt to introduce new evidence in connection with their reply papers is
17 improper”); *Wallace v. Countrywide Home Loans, Inc* 08-1463, 2009 U.S. Dist. LEXIS 110140,
18 at *17-19 (C.D. Cal. Nov. 23, 2009) (declining to consider new evidence because court “may
19 refuse to consider new evidence submitted for the first time in a reply if the evidence should have
20 been presented with the opening brief”) (citations omitted).

21 Samsung’s Reply violates this rule by arguing, for the first time, that thirteen deposition
22 transcripts of Apple inventors “and other witnesses” show that Apple’s design patents are
23 indefinite. (Dkt. No. 2042 at 3:12-14 & n.1, citing Pierce Reply Decl. Exs. 3 to 15 (Dkt. Nos.
24 2042-4 to 2042-16).) Samsung did not cite this testimony or refer to any of the deponents in its
25 opening brief, despite devoting an entire section to its argument that “Apple’s Design Patents Are
26 Invalid Because They Are Indefinite.” (Dkt. No. 1988 at 5-8.) The deposition testimony does not
27 rebut any specific argument or evidence in Apple’s opposition, which did not refer to any of the
28 deponents. (*See* Dkt. No. 2027 at 4-7.) Rather, this deposition testimony is pre-existing evidence

1 that Samsung inexcusably failed to cite in its opening brief. This failure is especially egregious in
2 view of the Court's Order that briefing limits "will be strictly enforced." (Dkt. No. 1945 at 3.)
3 By shifting arguments and evidence that belonged in its opening brief to its reply, Samsung seeks
4 to expand the page limit for its opening (which was exactly at the limit).¹

5 Samsung's Reply also argues, for the first time, that the "reasonableness of Samsung's
6 invalidity argument" is supported by "the decision of the PTO to grant reexamination of the '381
7 and '915 patents." (Dkt. No. 2042 at 6:22-24, citing Pierce Reply Decl. Exs. 16 and 17.) Once
8 again, Samsung improperly seeks to present new evidence and arguments in its "reply." Samsung
9 argued in its opening brief of September 21, 2012, that its validity defenses "are at least
10 reasonable" (Dkt. No. 1988 at 10:18-20), but failed to cite the communications that the PTO sent
11 over one month earlier, on August 17 and July 30, 2012. (Dkt. No. 2042-17 at 2; Dkt. No. 2042-
12 18 at 2.) Samsung has no valid excuse for this failure, so its new evidence should be stricken.

13 **II. SAMSUNG FAILED TO IDENTIFY ITS NEW EVIDENCE IN ITS RESPONSES**
14 **TO APPLE'S CONTENTION INTERROGATORIES**

15 Apple also objects to Samsung's new evidence because Samsung failed to identify it in
16 response to interrogatories asking Samsung to "explain the factual and legal bases" for Samsung's
17 invalidity defenses. As Apple noted in its opposition to Samsung's motion, Samsung responded
18 to Apple's interrogatories by asserting that Apple's design patents were "indefinite," but gave no
19 explanation of any kind. (*See* Dkt. No. 2027 at 4:10-14; Dkt. No. 2027-5 at 10:23-25, 11:24-26,
20 12:26-28, 15:1-3.) In its Reply, Samsung refers to its vague contention that "substantially
21 centered" is indefinite (Dkt. No. 2042 at 2:16-17), but cites no evidence that it timely disclosed
22 the factual and legal bases for its indefiniteness defenses to any of Apple's design patents. Thus,
23 Samsung should not "be permitted to argue, through fact witnesses or otherwise, for invalidity of
24 design patents," based on indefiniteness evidence and theories that it failed to disclose in timely
25 responses to Apple's interrogatories. (*See* Dkt. No. 1545 at 10:13-14.)

26 _____
27 ¹ Samsung has also violated the Court's Order that "[a]ny citations to the record must include the
28 relevant testimony or exhibit language" (Dkt. No. 1945 at 3:10-11), by citing all 13 depositions in
a single footnote that does not explain their content (Dkt. No. 2042 at 3:12-14 & n.1).

1 **III. SAMSUNG’S NEW EVIDENCE LACKS SUFFICIENT FOUNDATION**

2 Apple further objects to Samsung’s new deposition testimony because Samsung has not
 3 shown that the lay witnesses are qualified to construe design patents, which is an issue of law for
 4 this Court to decide. Foundation is critical because much of the testimony relates to issues that
 5 are legal rather than technical in nature, such as the meaning of certain types of lines in
 6 interpreting a design patent. (*See, e.g.*, Dkt. No. 2042-8 (dotted lines); Dkt. No. 2042-11 (dotted
 7 lines); Dkt. No. 2042-12 (diagonal lines); Dkt. No. 2042-13 (broken lines and diagonal lines).)
 8 This is an area addressed by special regulations and rules that most industrial designers do not
 9 know. Accordingly, Apple repeatedly objected that these questions lacked foundation and called
 10 for a legal conclusion and for speculation.² Even if the witnesses might be able to testify to their
 11 own lay understanding, this would not show indefiniteness because this is a matter of law for the
 12 Court. *See Praxair, Inc. v. ATMI, Inc.*, 543 F.3d 1306, 1321 (Fed. Cir. 2008) (expert’s inability
 13 “to reach a single consistent construction” of a term in a utility patent did not prove the patent
 14 invalid, “since indefiniteness is a legal rather than a factual question”) (citation omitted).

15 In addition, the deposition excerpts submitted by Samsung do not lay a foundation as to
 16 why Kurt Dammermann—who is not a named inventor of any of the design patents and left
 17 Apple in 2006—would have knowledge of Apple’s design patents. (Dkt. No. 2042-6.)

18 **CONCLUSION**

19 For the foregoing reasons, Pierce Reply Declaration Exhibits 3 to 17 should be stricken.

20 Dated: October 19, 2012

MORRISON & FOERSTER LLP

21 By: /s/ Michael A. Jacobs

Michael A. Jacobs

22 Attorneys for Plaintiff
 23 APPLE INC.

24 ² *See, e.g.*, Dkt. No. 2042-4 at 105:25-106:1, 106:8-11, 106:17-19; Dkt. No. 2042-6 at 234:11-
 25 12; Dkt. No. 2042-7 at 156:10-14; Dkt. No. 2042-8 at 94:3-4, 94:18-20, 95:1-2, 95:17-19, 96:3-5,
 26 96:24-97:1, 97:8-10, 97:22-24, 97:25-98:1, 98:9-10, 98:18-20; Dkt. No. 2042-9 at 39:8; Dkt. No.
 2042-10 at 14:7-9, 14:17-19; Dkt. No. 2042-11 at 98:17-19, 99:17-18, 99:24-25, 100:6-7, 100:13,
 101:25-102:1, 102:7, 103:4, 103:10-11, 115:20-22, 116:2-4, 116:2-4, 117:12-14, 117:22-24,
 27 120:7-9, 120:14-16, 110:24-121:1, 123:6-8, 124:6-7, 124:21-23; Dkt. No. 2042-12 at 74:2-4,
 75:13; Dkt. No. 2042-13 at 53:20-21, 54:6, 54:13-14, 55:22-56:1, 56:7, 56:23-24, 92:5-6, 92:22-
 28 24, 93:6, 93:17, 93:23, 94:2, 94:10, 94:17, 94:25, 107:23-24, 108:23-24, 110:22, 111:3, 111:9.