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

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

18 APPLE INC., a California corporation,

19 Plaintiff,

20 vs.

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

24 Defendants.  
25

CASE NO. 11-cv-01846-LHK

**DECLARATION OF MICHAEL J.  
WAGNER IN SUPPORT OF SAMSUNG'S  
OPPOSITION TO APPLE'S MOTION  
FOR A PERMANENT INJUNCTION**

**Date: Dec. 6, 2012**

**Time: 9:30 a.m.**

**Courtroom 8, 4th Floor**

**Judge: Hon. Lucy H. Koh**

**PUBLIC REDACTED VERSION**  
**HIGHLY CONFIDENTIAL –**  
**ATTORNEYS' EYES ONLY**

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1 I, Michael J. Wagner, hereby declare as follows:

2 **I. Background**

3 1. I am currently a Managing Director at LitiNomics, Inc., a financial and economic  
4 consulting firm specializing in the analysis of economic issues that arise in commercial disputes.

5 2. I am a Certified Public Accountant and attorney licensed in the State of California.  
6 I have been a Partner at Price Waterhouse; a Managing Director at Putnam, Hayes & Bartlett;  
7 and a Senior Advisor at CRA International, a publicly traded management consulting firm. I  
8 have a Bachelor of Science in Engineering, which I received from the University of Santa Clara  
9 in 1969. I have a Masters in Business Administration, which I received from U.C.L.A. in 1971.  
10 I have a Juris Doctor degree, which I received from Loyola University School of Law at Los  
11 Angeles in 1975. Exhibit 1 is a true and correct copy of my *curriculum vitae*.

12 3. I have specialized in the computation of commercial damages over the last 35 years  
13 of my professional career. I have been qualified and testified at trial as an expert on financial  
14 matters, principally commercial damages, 127 times, including Lanham Act cases and patent  
15 cases (30 times in patent cases). I have testified on financial issues in 35 arbitrations. I also  
16 have been deposed 315 times (102 times in patent cases; more than 10 times in trademark or  
17 Lanham Act cases) on financial issues over my career.

18 4. I have 28 professional publications, the majority of which deals with the  
19 computation of commercial damages (eight deal directly with patent damages). The most  
20 significant publication is the *Litigation Services Handbook*, which I co-edited through its fourth  
21 edition. The book is a collaborative effort of many of the leading experts in the financial area. I  
22 am the founding editor and continued as an editor for over twenty years. The Handbook has  
23 been recognized as authoritative by the Federal Judicial Center in its *Treatise on Scientific*  
24 *Evidence*. The Treatise's chapter on Economic Damages cites only five additional reference  
25 sources for further guidance to federal judges. The *Litigation Services Handbook* is one of the  
26 five reference sources.

1           5.     In the above-captioned case, *Apple Inc. vs. Samsung Electronics Co., Ltd., et al.*, I  
2 previously submitted a Declaration of Michael J. Wagner in Support of Samsung's Opposition to  
3 Apple's Motion for a Preliminary Injunction on August 21, 2011 and a Declaration of Michael J.  
4 Wagner in Support of Samsung's Motion for a Judgment as a Matter of Law, New Trial and/or  
5 Remittitur Pursuant to Federal Rules of Civil Procedure 50 and 59 on September 21, 2012. I  
6 have also submitted expert reports, including my April 16, 2012 Expert Report of Michael J.  
7 Wagner; my April 20, 2012 Corrected Expert Report of Michael J. Wagner; and my May 11,  
8 2012 Supplemental Expert Report of Michael J. Wagner. I also testified at trial on August 16,  
9 2012.

10           6.     I submit this declaration in support of Samsung's Opposition to Apple's Motion for  
11 a Permanent Injunction. If asked at a hearing, I am prepared to testify regarding the matters I  
12 discuss in this declaration.

13           7.     I am being compensated at my customary rate for my work on this case. My  
14 compensation is in no way contingent upon the opinions I arrive at or the result of the litigation.

15           8.     In performing my analysis, I have reviewed Apple's Motion for a Permanent  
16 Injunction and for Damages Enhancements (the "Motion"), the Declaration of Terry Musika in  
17 Support of Apple's Motion for Permanent Injunction (the "Musika Declaration") and Exhibits,  
18 other Declarations filed by Apple, the Court's August 21, 2012 Final Jury Instructions and the  
19 August 24, 2012 Amended Verdict Form (the "Verdict Form"). I have also reviewed trial  
20 transcripts, trial demonstratives and exhibits, as well as publicly available documents discussed  
21 in this declaration.

22           9.     In addition to the review of documents listed above, I have relied on my training as  
23 a Certified Public Accountant and my knowledge and expertise regarding intellectual property  
24 litigation damages.

25           10.    I may supplement this declaration in the event that additional relevant materials are  
26 provided to me, including court filings and declarants' testimony.

1 **II. Overview of Apple’s Assertions of Irreparable Harm**

2 11. I understand that, for a permanent injunction to issue, Apple must demonstrate that  
3 it has suffered an irreparable injury and will be irreparably harmed if an injunction is not  
4 entered.<sup>1</sup>

5 12. Apple has moved to permanently enjoin Samsung from infringing six Apple patents  
6 by selling 26 products or “any other product with a feature or features not more than colorably  
7 different from any of the infringing feature or features in any of the Infringing Products.”<sup>2</sup>  
8 Apple has also moved to permanently enjoin Samsung from diluting Apple’s registered trade  
9 dress and Apple’s unregistered iPhone 3G trade dress by selling the Galaxy S 4G, Galaxy S  
10 Showcase, Fascinate, Mesmerize, Vibrant, or Galaxy S (i9000).<sup>3</sup>

11 13. As described by the Motion, Apple argues that it will be irreparably harmed by lost  
12 sales, lost market share, lost future and downstream sales, damage to its ecosystem due to  
13 network effects, and dilution of its trade dress.

14 14. Apple’s expert, Mr. Terry Musika, opines that Apple and Samsung are competitors  
15 in the smartphone market, that the smartphone market is at a “moment of transition” such that  
16 selling smartphones to first-time purchasers is “of critical importance,” that the accused products  
17 have taken and will take market share from Apple, that sale of the accused products will cause  
18 lost downstream sales, and that a nexus exists between Apple’s intellectual property<sup>4</sup> and  
19

20 <sup>1</sup> *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006) (movant must establish that it has  
21 been irreparably harmed) [Exhibit 3]; *i4i Ltd. P’ship v. Microsoft Corp.*, 598 F.3d 831, 861-62 (Fed. Cir.  
22 2010) (permanent injunction is a prospective remedy) [Exhibit 4]; *LG Elecs. U.S.A., Inc. v. Whirlpool  
Corp.*, 798 F. Supp. 2d 541, 563 (D. Del. 2011) (permanent injunction must prevent irreparable harm)  
[Exhibit 5].

23 <sup>2</sup> Motion, p. vi. The products include the Captivate, Continuum, Droid Charge, Epic 4G, Exhibit 4G,  
24 Fascinate, Galaxy Ace, Galaxy Prevail, Galaxy S, Galaxy S 4G, Galaxy S II (AT&T), Galaxy S II (i9000),  
25 Galaxy Tab, Galaxy Tab 10.1 (Wi-fi), Gem, Indulge, Infuse 4G (Apple refers to this product as the  
“Infuse”), Mesmerize, Nexus S 4G, Replenish, Vibrant, Galaxy S II (T-Mobile), Transform, Galaxy S  
Showcase, Galaxy S II (Epic 4G Touch), Galaxy S II (Skyrocket). Collectively, Apple refers to these  
products as the “Infringing Products.”

26 <sup>3</sup> Motion, pp. vi-vii.

27 <sup>4</sup> The Apple intellectual property at issue includes United States Patents Nos. 7,469,381; 7,884,915;  
28 7,864,163; D618,677, D593,087, D604,305, Apple’s “Unregistered iPhone 3G Trade Dress,” and Apple’s  
Trade Dress Reg. No. 3,470,983 (collectively “Apple’s Asserted Intellectual Property”).

1 consumer purchasing decisions for smartphones. Mr. Musika does not offer an opinion on  
2 irreparable harm as it relates to Samsung's sale of tablet computers.

3 **III. Apple and Mr. Musika Have Not Shown That Any Infringement Is Likely to Cause**  
4 **the Harms They Allege**

5 15. I understand that irreparable harm may not be presumed based on a finding of  
6 infringement; to obtain relief, Apple "must make a clear showing that it is at risk of irreparable  
7 harm, which entails showing a likelihood of substantial and immediate irreparable injury."<sup>5</sup> I  
8 also understand that Apple must also establish "that a sufficiently strong causal nexus relates the  
9 alleged harm to the alleged infringement."<sup>6</sup> I understand that this requirement is not satisfied  
10 "simply because removing an allegedly infringing component would leave a particular feature,  
11 application, or device less valued or inoperable."<sup>7</sup> "The patentee must rather show that the  
12 infringing feature drives consumer demand for the accused product."<sup>8</sup>

13 16. As this Court has previously observed, "smartphones today are comprised of a  
14 multitude of different features."<sup>9</sup> The same is true for tablet computers. Further, both  
15 smartphones and tablet computers may embody many different designs, trademarks, and trade  
16 dresses. Even if Apple could demonstrate that it may lose sales due to the sale of the accused  
17 products, it has not demonstrated any nexus between Apple's Asserted Intellectual Property and  
18 those lost sales.

19 **A. Apple and Mr. Musika Have Not Demonstrated a Causal Nexus Between**  
20 **Consumer Demand for the Accused Products and Apple's Asserted Utility**  
21 **Patents**

22 17. Apple contends that there is a nexus between consumer demand for the accused  
23 products and three of its utility patents. Those patents include U.S. Patents Nos. 7,469,381;  
24 7,884,915; and 7,864,163.

25 <sup>5</sup> *Apple Inc. v. Samsung Elecs.*, No. 2012-1507 slip op. at 6 (Fed. Cir. Oct. 11, 2012). [Exhibit 8]

26 <sup>6</sup> *Apple Inc. v. Samsung Elecs.*, No. 2012-1507 slip op. at 6 (Fed. Cir. Oct. 11, 2012). [Exhibit 8]

27 <sup>7</sup> *Apple Inc. v. Samsung Elecs.*, No. 2012-1507 slip op. at 12 (Fed. Cir. Oct. 11, 2012). [Exhibit 8]

28 <sup>8</sup> *Apple Inc. v. Samsung Elecs.*, No. 2012-1507 slip op. at 9 (Fed. Cir. Oct. 11, 2012). [Exhibit 8]

<sup>9</sup> *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 12-cv-630, at 79 (June 29, 2012). [Exhibit 7]



1           18.     It is my opinion that neither Apple nor Mr. Musika has demonstrated that consumer  
2 demand for the accused products is driven by any of Apple's asserted utility patents. As an initial  
3 matter, I understand that this Court has already found that Apple failed to demonstrate a causal  
4 nexus between its '381 patent and consumer demand for Samsung's products.<sup>10</sup> The Court found  
5 that Apple did not satisfy the likelihood of irreparable harm prong of the test, explaining:<sup>11</sup>

6           While Apple undoubtedly uses the patent and produces goods in the same market,  
7 Apple has neither alleged, nor established, that the '381 patent is either necessary  
8 to, or a core functionality of, the products that it seeks to enjoin. Nor has Apple  
9 shown that consumers' purchasing decisions are based on the existence of a snap  
10 back feature protected by the '381 patent. [...] Accordingly, the fact that the '381  
11 patent is but one patent utilized in the accused products, and does not appear to be  
12 either necessary for the product to function, or a core technology of the product,  
13 weighs against a finding of irreparable harm.

14           19.     This Court also found that Apple had failed to demonstrate a causal nexus between  
15 three additional utility patents and demand for Samsung's Galaxy Nexus smartphone.<sup>12</sup> The  
16 Federal Circuit recently held that a finding of a causal nexus between another Apple utility  
17 patent and demand for the Galaxy Nexus was erroneous.<sup>13</sup> Therefore, in its five attempts, Apple  
18 has failed to prove a causal nexus between its utility patents (including one patent at issue in this  
19 motion) and demand for Samsung's products.

20           20.     Apple contends that a nexus with consumer demand exists because its patents  
21 contribute to a "fun," "simple," and "ease of use" interface. I understand that Apple's three  
22 utility patents do not claim a monopoly on a fun, easy to use, or simple user interface. I  
23 understand that the '163 patent claims a specific method that requires (1) zooming and centering  
24 a first portion of content in response to a first gesture (e.g., a double tap), and (2) centering a  
25 second portion of content in response to a second gesture (e.g., a double tap).<sup>14</sup> Apple's expert  
26 testified that the patent does not claim tap to zoom generally, which was known in the prior art.<sup>15</sup>

27 <sup>10</sup> Order Denying Motion for Preliminary Injunction, December 2, 2011, pp. 63-64.

28 <sup>11</sup> Order Denying Motion for Preliminary Injunction, December 2, 2011, pp. 63-64.

<sup>12</sup> Order Granting Motion for Preliminary Injunction, June 29, 2012, pp. 85-93.

<sup>13</sup> *Apple Inc. v. Samsung Elecs.*, 2012-1507, slip op. (Fed. Cir. Oct. 11, 2012). [Exhibit 8]

<sup>14</sup> Transcript of Proceedings, August 10, 2012, Volume 6, pp. 1856-57 and 1878-79.

<sup>15</sup> Transcript of Proceedings, August 10, 2012, Volume 6, p. 1879.



1 According to Apple’s expert, the ‘915 patent is directed to a specific method for distinguishing  
2 between a one-finger scroll operation and a two-finger gesture operation on a touchscreen.<sup>16</sup>  
3 According to Apple’s expert, the ‘381 patent is directed to providing a bounce-back when a user  
4 scrolls over the edge of a document.<sup>17</sup> It does not claim all methods of indicating when a user  
5 has reached the edge of a document, nor does it claim implementing a bounce-back before a  
6 user’s finger reaches the edge of the display.<sup>18</sup> Apple has not presented any evidence that these  
7 specific functionalities drive consumer demand for Samsung’s devices relative to non-infringing  
8 designs.

9 21. Instead, Apple and Mr. Musika have presented evidence that they contend shows  
10 that the general concepts of “fun,” “ease of use,” or “simplicity” drive demand. [REDACTED]

[REDACTED]

16 [REDACTED] For example, Apple admits that “all of the features  
17 [of the iPhone] contribute to ease of use,”<sup>21</sup> and that “90-plus percent of every feature that we  
18 market, we assume that we’ve – we’ve done our homework and we’ve built ease of use into that  
19 feature.”<sup>22</sup>

20 22. Even the evidence that Apple and Mr. Musika contend shows that fun, ease of use,  
21 or simplicity drive demand is flawed. For example, they rely on a series of surveys from

23 <sup>16</sup> Transcript of Proceedings, August 10, 2012, Volume 6, pp. 1818 & 1857.  
24 <sup>17</sup> Transcript of Proceedings, August 10, 2012, Volume 6, p. 1739.  
25 <sup>18</sup> Transcript of Proceedings, August 10, 2012, Volume 6, pp. 1782-83.

[REDACTED] *See also* Deposition of Steven Sinclair, April 4,  
26 2012, pp. 47-48. [Exhibit 206]

27 <sup>21</sup> Deposition of Steven Sinclair, April 4, 2012, p. 52. [Exhibit 206]  
28 <sup>22</sup> Deposition of Steven Sinclair, April 4, 2012, p. 51. [Exhibit 206]

1 purchasers of iPhones. These surveys do not indicate whether *Samsung* phones were purchased  
2 for ease of use.

3 23. In its motion, Apple asserts that “Samsung’s own documents confirm the  
4 importance to consumer demand of Apple’s iOS utility patents.”<sup>23</sup> However, the document to  
5 which Apple cites makes no such assertions. The statements of value that Apple references from  
6 the Gravity Tank study appear to have been derived from consumers that already owned an  
7 iPhone at the time of the survey. For example, the statement “It’s cool, it’s extraordinary. Like  
8 the world of tomorrow you can enlarge pictures and move them around – it’s magic” is  
9 attributed to an iPhone user in Paris.<sup>24</sup> After-the-fact *assessments* of satisfaction with iPhone  
10 features do not provide evidence of what factors *drove* Samsung consumers to purchase a phone  
11 *in the first place*.

12 24. Evidence Mr. Musika cites simply praises features of the iPhone that Apple  
13 contends are practiced by the patents in suit. I understand, however, that the Federal Circuit  
14 recently rejected the argument that praise for a particular iPhone feature was substantial  
15 evidence that demand for a Samsung phone was driven by Apple’s patents.<sup>25</sup> The similar  
16 evidence of industry praise that Apple cites is therefore similarly not sufficient to establish a  
17 causal nexus.<sup>26</sup> Thus, Apple fails to present even a prima facie case that simplicity, ease of use,  
18 or fun—much less the three utility patents at issue—drove demand for Samsung products.

19 25. Moreover, the studies cited do not show that simplicity, fun, or “ease of use” drives  
20 demand at all. [REDACTED]

21 [REDACTED]  
22 [REDACTED]

23  
24 <sup>23</sup> Motion, p. 8.  
25 <sup>24</sup> Touch Portfolio, Rollout Strategy, Gravity Tank, December 17, 2008, SAMNDCA00191811-987 at  
26 ‘831. [Exhibit 58]  
27 <sup>25</sup> *Apple Inc. v. Samsung Elecs. Co.*, 12-1507, slip op. at 11-12 (Fed. Cir. Oct. 11, 2012). [Exhibit 8]  
28 <sup>26</sup> Musika Exhibits 30, 48, 51 & 68; Musika Dec. ¶¶ 41-43, 46, 51, & 56-57

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[REDACTED]

[REDACTED]

[REDACTED] I understand that none of these are claimed by Apple’s utility patents.

26. Moreover, an April 2009 J.D. Powers and Associates study rated seven phone manufacturers in terms of customer satisfaction with factors such as “Ease of Operation,” “Operating System,” “Features,” and “Physical Design.”<sup>29</sup> This study was duplicated in March 2011.<sup>30</sup> The 2009 study found Samsung scored 784 points and was ranked above the industry average (which scored 781) for “Ease of Operation”.<sup>31</sup> However, by 2011 Samsung only scored 756 points and dropped below the industry average (now at 786).<sup>32</sup> Thus, during the time period Samsung allegedly infringed patents which Mr. Musika claims embody “ease of use,” customers became *less satisfied* with Samsung’s phones in this aspect.

27. Mr. Musika’s argument that Samsung’s efforts to include “visual effects,” “pinch to zoom,” or a “bounce” demonstrates a nexus is flawed.<sup>33</sup> Mr. Musika cites no evidence that any of the features mentioned in these documents are embodied by Apple’s patents. For example, Mr. Musika cites a Samsung study that found that consumers like a “double-tap to zoom” feature.<sup>34</sup> However, Apple’s technical expert testified at trial that Apple’s ‘163 patent did not claim “tap to zoom” because that already existed in the prior art.<sup>35</sup> Nor does either Mr. Musika or Apple provide a comparison between consumer demand for products using these features and

[REDACTED]

[REDACTED]

2009 Wireless Consumer Smartphone Satisfaction Study, Management Report, J.D. Power and Associates, April 2009, SAMNDCA00190144-243 at ‘188-‘191. [Exhibit 55]

<sup>30</sup> 2011 Wireless Smartphone Satisfaction Study, Management Report, J.D. Power and Associates, March, 2011, SAMNDCA10246338-445 at ‘386-‘388. [Exhibit 24]

<sup>31</sup> 2009 Wireless Consumer Smartphone Satisfaction Study, Management Report, J.D. Power and Associates, April 2009, SAMNDCA00190144-243 at ‘188. [Exhibit 55]

<sup>32</sup> 2011 Wireless Smartphone Satisfaction Study, Management Report, J.D. Power and Associates, March, 2011, SAMNDCA10246338-445 at ‘386. [Exhibit 24]

<sup>33</sup> Musika Declaration ¶¶ 49 & 55-56; Musika Exhibits 66-67.

<sup>34</sup> Musika Dec. ¶ 55 (citing PX38).

<sup>35</sup> Transcript of Proceedings, August 10, 2012, Volume 6, pp. 1878-79.

1 products using available design arounds, such as those that I understand Samsung has  
2 implemented.

3 28. I also understand that the Federal Circuit has rejected the argument that the alleged  
4 infringer's subjective appreciation of a patented feature necessarily establishes a nexus to lost  
5 sales or market share.<sup>36</sup> The Federal Circuit stated that "the relevant inquiry focuses on the  
6 objective reasons as to why the patentee lost sales, not on the infringer's subjective beliefs as to  
7 why it gained them (or would be likely to gain them)."<sup>37</sup> Therefore, even assuming there is  
8 evidence that Samsung believed that any of the patented features had value, this does not, by  
9 itself, establish a nexus to lost market share or sales suffered by Apple.

10 29. Finally, Mr. Musika cites a conjoint survey performed by Apple's expert, John  
11 Hauser. Dr. Hauser purports to measure how much consumers would be willing to pay for  
12 "features associated with" Apple's utility patents.<sup>38</sup> Willingness to pay, however, is not the  
13 same as a causal nexus to lost sales or market share. For example, consumers may be willing to  
14 pay for various additional accessories or add-ons when purchasing a car. It does not follow,  
15 however, that because some consumers would be willing to pay some additional amount for an  
16 add-on that the failure to offer that add-on would cause a substantial loss of sales or market  
17 share. Further, I understand that there are flaws and limitations of Mr. Hauser's work that render  
18 it unreliable for determining a causal nexus between consumer demand and Apple's asserted  
19 utility patents.<sup>39</sup>

20 **B. *Apple and Mr. Musika Have Not Demonstrated a Causal Nexus Between***  
21 ***Consumer Demand for the Accused Products and Apple's Asserted Design***  
22 ***Patents and Trade Dress***

23 30. There is no evidence in the record suggesting that Apple's asserted design rights  
24 are a motivating factor for consumers. I understand that none of Apple's Asserted Intellectual

25 <sup>36</sup> *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 678 F.3d 1314, 1328 (Fed. Cir. 2012). [Exhibit 6]

26 <sup>37</sup> *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 678 F.3d 1314, 1328 (Fed. Cir. 2012). [Exhibit 6]

27 <sup>38</sup> Musika Exhibit 64.

28 <sup>39</sup> Declaration of R. Sukumar In Support of Samsung's Opposition To Apple's Motion For A  
Permanent Injunction and For Damages Enhancements, October, 19, 2012. *See also* Declaration of Yoram  
(Jerry) Wind.

1 Property claims the complete design of an entire product. I understand that this Court has held  
2 that the D’087 and D’677 patents only claim a portion of the exterior design,<sup>40</sup> and the D’305  
3 patent does not relate to the exterior design of the products at all but instead only one specific  
4 arrangement of icons on a specific graphical user interface screen. Therefore, evidence related  
5 to consumer’s value of “design” *generally* is of little probative value. Nevertheless, surveys  
6 demonstrate that even design generally does not drive demand for smartphones.

7 31. [REDACTED]

[REDACTED]

15 32. Apple surveys in FY Q1 2011, FY Q2 2011 and FY Q3 2011 all found similar

16 results [REDACTED] In fact, when  
17 listing features and attributes in the iPhone purchase decision by importance among United

21 <sup>40</sup> Order Denying Motion for Preliminary Injunction, December 2, 2011, p. 17.

[REDACTED]

1 States iPhone buyers, appearance and design comes in eighth behind ease of use, battery life,  
2 and value for price paid, among others.<sup>46</sup>

3 33. A 2009 J.D. Power and Associates report on consumer smartphone satisfaction—a  
4 document relied upon by Mr. Musika—assessed the “Physical Design” factor for seven  
5 smartphone manufacturers.<sup>47</sup> This study found the average score for customer satisfaction with  
6 “Physical Design” was 793, a level with which Samsung was on par.<sup>48</sup> By 2011, J.D. Power and  
7 Associates found that customers’ satisfaction with Samsung’s “Physical Design” had eroded to  
8 below the industry average.<sup>49</sup> This decrease in satisfaction occurred over the period during  
9 which Apple and Mr. Musika claim that design drove sales of the accused products—and at a  
10 time when Samsung’s sales rose and is inconsistent with such an assertion.

11 34. The other survey evidence cited by Mr. Musika is also not to the contrary. Mr.  
12 Musika cites surveys that find that “design” generally may be a factor in some consumer decision  
13 making.<sup>50</sup> None of the evidence Apple or Mr. Musika cite, however, addresses whether the  
14 *specific* designs claimed by Apple’s patents or trade dress are a motivating factor for consumers.  
15 For example, Mr. Musika cites a Samsung consumer survey that finds that “exterior design” is a  
16 reason that some consumers gave for their smartphone purchase.<sup>51</sup> That survey considered,  
17 however, only broad factors such as “screen size,” “shape/form,” “color,” and “material/material  
18 quality.”<sup>52</sup> Similarly, Mr. Musika cites a J.D. Powers study that found that some consumers  
19 choose their handset brand based on “*overall* design/style.”<sup>53</sup> These surveys did not inquire

20 \_\_\_\_\_  
21 <sup>46</sup> [REDACTED]

22 <sup>47</sup> 2009 Wireless Consumer Smartphone Satisfaction Study, Management Report, J.D. Power and  
23 Associates, April 2009, SAMNDCA00190144-243 at ‘191. [Exhibit 55] *See also* 2011 Wireless  
24 Smartphone Satisfaction Study, Management Report, J.D. Power and Associates, March, 2011,  
25 SAMNDCA10246338-445 at ‘388. [Exhibit 24]

26 <sup>48</sup> 2009 Wireless Consumer Smartphone Satisfaction Study, Management Report, J.D. Power and  
27 Associates, April 2009, SAMNDCA00190144-243 at ‘191. [Exhibit 55]

28 <sup>49</sup> 2011 Wireless Smartphone Satisfaction Study, Management Report, J.D. Power and Associates,  
March, 2011, SAMNDCA10246338-445 at ‘388. [Exhibit 24]

<sup>50</sup> Musika Exhibit 48; Musika Exhibit 52; Musika Exhibit 53.

<sup>51</sup> Musika Exhibit 48.

<sup>52</sup> Musika Exhibit 48.

<sup>53</sup> Musika Dec. ¶ 46 (emphasis added).

1 whether any consumer purchased a Samsung product because of its use of a specific design  
2 claimed in an Apple patent or trade dress. They therefore provide little insight into whether the  
3 specific intellectual property at issue drives consumer demand.

4 35. Mr. Musika cites a 2008 internal Samsung email that “a sleek product design as  
5 shown by iPhone would be what is considered by product planning and sales as the greatest  
6 appealing factor.”<sup>54</sup> Again, such evidence is not tied to the specific designs in Apple’s patents or  
7 trade dress. I understand, for example, that Apple’s patents and trade dress do not claim a  
8 monopoly on a “sleek product design.” Nor is an email from 2008 from a single Samsung  
9 employee particularly probative of what consumers in 2012 would base purchasing decision on.

10 36. Mr. Musika also cites the deposition testimony of STA Senior Manager of Market  
11 Research, Timothy Brenner.<sup>55</sup> Mr. Brenner testified that “appearance is an aspect of choice in  
12 almost every decision.”<sup>56</sup> The fact that “appearance” as a general concept influences consumer  
13 choice does not demonstrate that the specific Apple’s Asserted Intellectual Property is a basis for  
14 consumer demand. Otherwise, such evidence would arguably establish a nexus for any design  
15 patent.

16 37. The evidence Mr. Musika cites concerning industry praise for the iPhone is  
17 similarly not probative. For example, he cites praise for the original iPhone’s “screen-centric  
18 design”<sup>57</sup> but does not tie the praise to any of the specific design IP at issue. I understand that  
19 Apple’s design patents and trade dress do not claim a monopoly on “screen-centric” designs. I  
20 also understand that the Federal Circuit recently rejected the argument that praise for the iPhone  
21 was substantial evidence that demand for a Samsung phone was driven by that feature.<sup>58</sup>

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25 <sup>54</sup> Musika Declaration, ¶ 43; Musika Exhibit 49.

26 <sup>55</sup> Musika Declaration, ¶ 44.

27 <sup>56</sup> Musika Exhibit 50.

28 <sup>57</sup> Musika Dec. ¶ 46 & Exhibit 51.

<sup>58</sup> *Apple Inc. v. Samsung Elecs. Co.*, 12-1507, slip op. at 11-12 (Fed. Cir. Oct. 11, 2012). [Exhibit 8]



1           38. Mr. Musika also cites praise for the “glossy” and “sleek” exterior design of the  
 2 iPhone 4 and [REDACTED].<sup>59</sup> It is my  
 3 understanding that Apple does not even contend that the iPhone 4 practices the D’087 patent or  
 4 the trade dress that the jury found diluted. Evidence that consumers may purchase the iPhone 4  
 5 because of its overall “glossiness” or “uniform color” is therefore not probative of whether  
 6 Apple’s specific design rights drive demand for Samsung’s products.

7           39. With respect to the D’305 patent, Mr. Musika cites praise for the *iPhone*’s  
 8 graphical user interface generally.<sup>60</sup> I understand, however, that the relevant issue is not what  
 9 drives demand for the iPhone or what third-parties praise about the iPhone.<sup>61</sup> I understand that the  
 10 D’305 patent relates only to only one specific arrangement of icons on a specific graphical user  
 11 interface screen, and not the interface in its entirety. Much of this evidence also predates the  
 12 accused products, diminishing its value.<sup>62</sup> Subjective beliefs about what consumers’ value is not  
 13 sufficient.<sup>63</sup> For example, Mr. Musika cites a presentation by The Boston Consulting Group.<sup>64</sup>  
 14 That presentation praises the user interface of the iPhone generally. It does not address whether  
 15 that user interface drives demand for the iPhone, the importance of the specific interface claimed  
 16 by the D’305 patent, or what drives demand for the accused products.

17           40. Similarly, Mr. Musika cites email from Samsung employees that praises the  
 18 iPhone’s user interface<sup>65</sup> and evidence of the evolution of Samsung’s icon design.<sup>66</sup> However, as  
 19 stated above, the Federal Circuit has held that this type of evidence is of limited value because it

21 <sup>59</sup> Musika Declaration, ¶¶ 41-43. [REDACTED]

22 Musika Exhibit 62.

23 <sup>61</sup> *Apple Inc. v. Samsung Elecs. Co.*, 12-1507, slip op. at 10 (Fed. Cir. Oct. 11, 2012). [Exhibit 8]

24 <sup>62</sup> *Apple Inc. v. Samsung Elecs. Co.*, 12-1507, slip op. at 11-12 (Fed. Cir. Oct. 11, 2012). [Exhibit 8]  
 See also Musika Exhibit 62.

25 <sup>63</sup> *Apple Inc. v. Samsung Elecs. Co.*, 12-1507, slip op. at 11-12 (Fed. Cir. Oct. 11, 2012). [Exhibit 8]  
 See also Musika Exhibit 62

26 <sup>64</sup> Musika Exhibit 58.

27 <sup>65</sup> Musika Exhibits 59, 61 & 63. Notably, Exhibit 59 email instructs its recipients that the writer is “not  
 saying to make a UX that is exactly identical to the iPhone, but [instead] to learn the wisdom of the  
 iPhone.”

28 <sup>66</sup> Musika Exhibit 60.

1 either relates to the iPhone, not the accused products, or “because the relevant inquiry focuses on  
 2 the objective reasons as to why the patentee lost sales, not on the infringer’s subjective [belief] as  
 3 to why it gained them (or would be likely to gain them).”<sup>67</sup> Further, the fact that Samsung’s  
 4 graphical user interface evolved over time neither supports nor rebuts an inference of a causal  
 5 nexus.

6 41. Mr. Musika also cites evidence of what he contends is Samsung’s copying of  
 7 Apple’s graphical user interface.<sup>68</sup> Even if copying were relevant, much of the evidence Apple  
 8 cites tends to refute an inference that Samsung copied the D’305 patent’s design. Notably, Mr.  
 9 Musika’s Exhibit 59 is a Samsung email that instructs its recipients that the writer is “not saying to  
 10 make a UX that is exactly identical to the iPhone, but [instead] to learn the wisdom of the iPhone.”  
 11 Mr. Musika’s Exhibit 60 shows the evolution of a portion of Samsung’s graphical user interface  
 12 over time. One would not expect a gradual evolution to be the result of wholesale copying. In  
 13 another email relied on by Mr. Musika, a Samsung employee instructs, not to copy existing  
 14 products, but rather to “think at least six months ahead.”<sup>69</sup> Similarly, another document that Mr.  
 15 Musika cites states that a “Direction[s] for Improvement” is for Samsung to “Remove a feeling  
 16 that iPhone’s menu icons are copied by differentiating design.”<sup>70</sup> If anything, the document  
 17 demonstrates a belief that sales would be improved by differentiating them from the iPhone, not  
 18 copying it.

19 **C. Sales of the Accused Products Are Driven by Other Factors**

20 42. Apple does not directly address the issue of whether its Asserted Intellectual  
 21 Property caused any consumer to purchase one of the accused products. The evidence indicates  
 22 it is features other than Apple’s Asserted Intellectual Property that drive the demand for the  
 23 accused products.<sup>71</sup>

24 <sup>67</sup> *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 678 F.3d 1314, 1328 (Fed. Cir. 2012). [Exhibit 6]

25 <sup>68</sup> Musika Declaration, ¶ 49.

26 <sup>69</sup> Musika Exhibit 54.

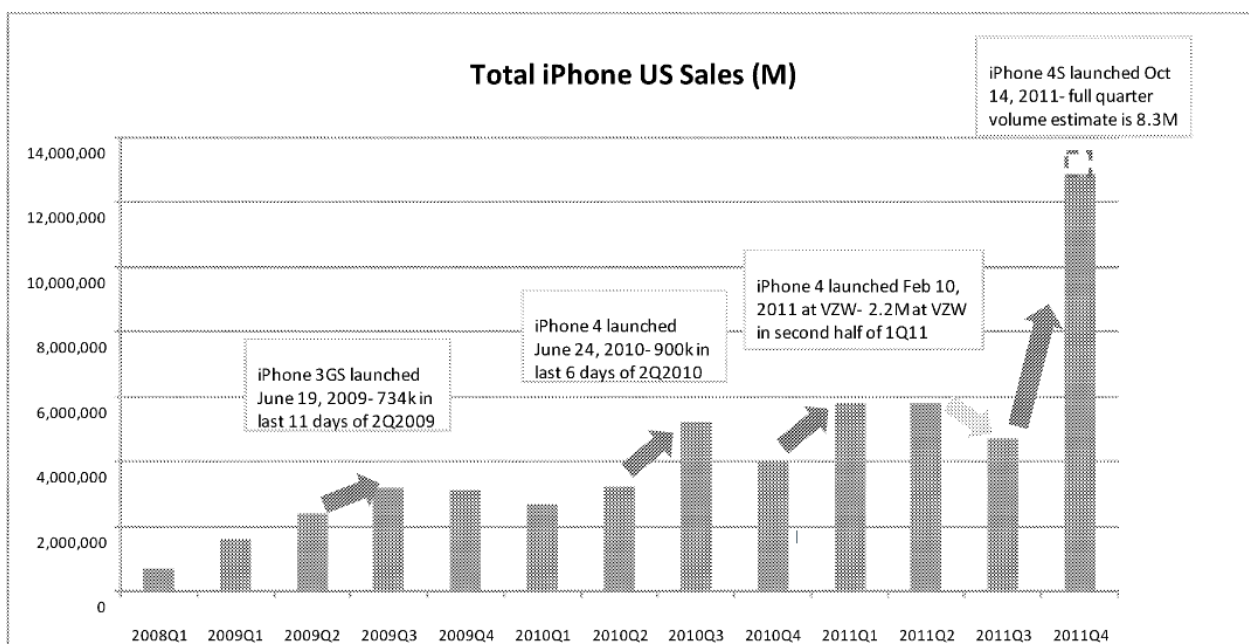
27 <sup>70</sup> Musika Exhibit 56.

28 <sup>71</sup> I note that Mr. Musika’s declaration cites to my deposition testimony in the last preliminary  
 injunction requested by Apple against Samsung. At my deposition, I testified that the reason I bought six  
 iPhone 4S is because of FaceTime. (Deposition of Michael Wagner, September 14, 2011, pp. 61-62.

(footnote continued)

**1. Smartphone Sales Are Driven In Part By Novelty**

43. This Court has already observed that there is evidence that the sale of the iPhone is driven by the novelty of the product,<sup>72</sup> rising with the release of each new model and then declining before a new model is released. Apple’s recent success selling a record number of iPhone 5 handsets confirms this finding. This finding is further confirmed by portions of documents that Mr. Musika relies on but does not attach to his declaration. For example, a Samsung presentation provides the following chart demonstrating spikes in Apple’s sales after each new iPhone release.<sup>73</sup>



44. The same pattern of an initial spike in sales and a subsequent tailing off of sales applies to other manufacturers’ smartphones as well. Apple’s own research in July 2011 noted

[Exhibit 207]) I did not buy the iPhone for any of the Apple intellectual property asserted in this case. I am proof that people buy the iPhone and other smartphones for reasons completely unrelated to the patents that Apple has asserted against Samsung.

<sup>72</sup> Order Denying Motion for Preliminary Injunction, December 2, 2011, p. 34.

<sup>73</sup> “STA Competitive Situation Paradigm Shift,” Samsung, SAMNDCA11547401-470 at ‘415. [Exhibit 54]

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[Redacted]

**2. Consumer Surveys Demonstrate that Consumer Demand For the Accused Products Is Driven By Other Factors**

45. Overwhelming evidence demonstrates that consumer demand for the accused products is driven by factors other than the use of Apple’s Asserted Intellectual Property. A survey, conducted by Deloitte & Touche LLP in mid-2010, concluded that “[a]pproximately 58 percent of consumers who own or plan to purchase a smartphone state that embedded features such as size, quality, camera, and keyboard style, as well as price, have the most influence on their buying decision.”<sup>75</sup>

46. A June 2011 Nielsen survey noted “that touchscreen capability ranks as the most important factor in a smartphone” while other important decision drivers were “Internet access, apps, access to email, design, ease of use and price.”<sup>76</sup> It is important to note that design is only one of six drivers of demand and it is not mentioned first (it is mentioned fourth). Nor does the survey focus on the specific design rights at issue in this case. The variety of features deemed important by the Nielsen survey prompted FierceWireless, a publication that monitors the wireless industry, to make the assessment that “smartphone users want a lot of different things out of their device, which means that smartphone vendors will need to cover all their bases to be successful in the smartphone market.”

47. Smartphone market studies conducted by Apple support the conclusion that Apple’s Asserted Intellectual Property is not a substantial driver of sales of Android devices. A January 2011 Apple study [Redacted]

<sup>74</sup> [Redacted]

<sup>75</sup> “Deloitte’s ‘Revolutions 2010’ Survey: Mobile ‘Apps’ and e-readers Transform Consumer Behavior,” PR Newswire, September 22, 2010, <<http://www.prnewswire.com/newsreleases/deloittes-revolutions-2010-survey-mobile-apps-and-e-readers-transform-consumerbehavior-103516709.html>>. [Exhibit 14]

<sup>76</sup> Dano, Mike, “Are touchscreens the most important feature of smartphones?,” FierceWireless, June 2, 2011, <<http://www.fiercewireless.com/story/are-touchscreens-mostimportant-feature-smartphones/2011-06-02>>. [Exhibit 15]

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[REDACTED]

**3. Neither Reviews, Nor Samsung’s Advertising Emphasize Apple’s Asserted Intellectual Property**

48. Although neither dispositive nor highly probative of the inquiry, reviews of and advertisements for the accused products do not emphasize Apple’s Asserted Intellectual Property as a basis for consumer demand. Notably, the Federal Circuit recently held that news articles that praise a particular smartphone feature are not substantial evidence of consumer demand for that feature.<sup>81</sup> Similarly, Samsung’s advertisements, while relevant, are not dispositive “because the relevant inquiry focuses on the objective reasons as to why the patentee lost sales, not on the infringer’s subjective believe as to why it gained them (or would be likely to gain them).”<sup>82</sup> Samsung’s advertisements therefore do not directly address the reasons why Apple may or may not have lost sales, if any. Nevertheless, to the extent Samsung’s advertisements are relevant, they do not focus on Apple’s Asserted Intellectual Property.

[REDACTED]

<sup>81</sup> *Apple Inc. v. Samsung Elecs. Co.*, 2012-1507, slip op. at 11-12 (Fed. Cir. Oct. 11, 2012). [Exhibit 8]  
<sup>82</sup> *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, 678 F.3d 1314, 1328 (Fed. Cir. 2012). [Exhibit 6]

1           49. Samsung’s mobile offerings are noted for everything from their pre-loaded  
2 applications and their operating system (each runs on an iteration of Google’s Android OS), to  
3 their speed and memory capabilities. Even the evidence Dr. Musika relies on to argue that  
4 Samsung is targeting first-time smartphone purchasers emphasizes features unrelated to Apple’s  
5 Asserted Intellectual Property, like its 4G data speeds,<sup>83</sup> processor speed, and Android  
6 software.<sup>84</sup> I address this evidence with respect to each accused product below.

### 7           **Captivate**

8           50. Samsung’s advertising of the Captivate does not emphasize any of Apple’s  
9 Asserted Intellectual Property. For example, Samsung advertises the phone’s use of Android  
10 2.3, its Super AMOLED 4” touchscreen, its integrated social networking capabilities, and its use  
11 of the text messaging software Swype.<sup>85</sup>

12           51. The listing for the Captivate on Amazon.com similarly touts the Captivate’s use of  
13 the Samsung Social Hub, the use of Android 2.1, the 1GHz processor, the 3G connectivity, the  
14 Super AMOLED display, and the Wireless-N Wi-Fi networking.<sup>86</sup>

15           52. Reviews of the Captivate similarly did not emphasize any of Apple’s Asserted  
16 Intellectual Property. For example, CNet stated that “The good” of the phone was “a gorgeous  
17 Super AMOLED screen, a 1GHz processor, 16GB of onboard memory, and [...] an expansion  
18 slot. The Android 2.1 device also offers great call quality, full wireless options, and a HD video  
19 capture.”<sup>87</sup>

### 20           **Continuum**

21           53. Samsung’s advertising of the Continuum does not emphasize any of Apple’s  
22 Asserted Intellectual Property. For example, Samsung advertises the phone’s “Advanced dual  
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24           <sup>83</sup> Musika Exhibit 10.

25           <sup>84</sup> Musika Exhibit 11.

26           <sup>85</sup> “Samsung Captivate Android Smartphone,” Samsung, <<http://www.samsung.com/us/mobile/cell-phones/SGH-I897ZKAATT>>. [Exhibit 88]

27           <sup>86</sup> “Samsung Captivate Android Phone (AT&T),” Amazon.com, <<http://www.amazon.com/Samsung-Captivate-Android-Phone-AT/dp/B003TLMQG8>>. [Exhibit 89]

28           <sup>87</sup> “Samsung Captivate,” CNet, July 14, 2010, <<http://reviews.cnet.com/smartphones/samsung-captivate-review>>. [Exhibit 90]

1 Super AMOLED displays with dedicated Ticker display,” its “Customizable Ticker  
2 Experience,” its “Android Éclair Browser,” and its “Advanced Widgets.”<sup>88</sup>

3 54. Reviews of the Continuum similarly did not emphasize any of Apple’s Asserted  
4 Intellectual Property. For example, CNet stated that “The good” of the phone was: “The  
5 Samsung Continuum features two displays; the smaller ticker window is a great tool for quickly  
6 accessing information and multitasking. The smartphone also has a 1GHz processor and a 5-  
7 megapixel camera with HD video capture. It offers full wireless options and can be used as a  
8 mobile hot spot.”<sup>89</sup> Similarly, Engadget stated that the Continuum’s “biggest claim to fame  
9 would be the addition of a secondary OLED display below the main.”<sup>90</sup> This meant that “one of  
10 the selling points is that you can access basic phone functionality and information without  
11 having to fiddle with the normal UI or turn on that big, power-sapping primary display.”<sup>91</sup>

### 12 **Droid Charge**

13 55. Samsung’s advertising of the Droid Charge does not emphasize any of Apple’s  
14 Asserted Intellectual Property. For example, Samsung advertises the phone’s “4.3” Super  
15 AMOLED Plus Touch Screen Display,” its “Android 2.2 Platform,” the fact that it is “Loaded  
16 with Multimedia and Entertainment,” and the “Slimmest 4G LTE Smartphone on Verizon’s  
17 lightning fast network.”<sup>92</sup>

18 56. In stride with its other 4G offerings, Samsung highlighted the Droid Charge’s “4.3-  
19 inch Super AMOLED Plus display ...” claiming that their device sets “a new touch screen  
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21 <sup>88</sup> “Samsung Continuum i400 Android Smartphone,” Samsung,  
22 <<http://www.samsung.com/us/mobile/cell-phones/SCH-I400ZKAVZW>> [Exhibit 91]

23 <sup>89</sup> “Samsung Continuum,” CNet, November 23, 2010, <[http://reviews.cnet.com/smartphones/samsung-continuum-verizon-wireless/4505-6452\\_7-34212022.html](http://reviews.cnet.com/smartphones/samsung-continuum-verizon-wireless/4505-6452_7-34212022.html)> [Exhibit 92]

24 <sup>90</sup> Chris Ziegler, “Exclusive: Samsung Continuum for Verizon Has Double the Displays, Double the  
25 Fun,” engadget, September 30, 2010, <<http://www.engadget.com/2010/09/30/exclusive-samsung-continuum-for-verizon-has-double-the-displays/>> [Exhibit 93]

26 <sup>91</sup> Chris Ziegler, “Exclusive: Samsung Continuum for Verizon Has Double the Displays, Double the  
27 Fun,” engadget, September 30, 2010, <<http://www.engadget.com/2010/09/30/exclusive-samsung-continuum-for-verizon-has-double-the-displays/>> [Exhibit 93]

28 <sup>92</sup> “Droid Charge Smartphone,” Samsung, <<http://www.samsung.com/us/mobile/cell-phones/SCH-I510RAAVZW>>. [Exhibit 94]



1 standard for brightness, clarity and outdoor visibility.”<sup>93</sup> In addition, the Charge is equipped  
 2 with both rear- and front-facing cameras, and a “1GHz application processor and HTML 5 Web  
 3 browser maximiz[ing] high-speed 4G LTE connectivity for faster downloads and graphics  
 4 processing.”<sup>94</sup> Additionally, Samsung notes the phone’s Android 2.2 platform, Adobe Flash  
 5 Player compatibility, mobile hotspot capability, the Samsung Media Hub, and “[v]irtual  
 6 QWERTY Keyboard featuring Swype Technology.”<sup>95</sup>

7 57. Reviews of the Droid Charge similarly did not emphasize any of Apple’s Asserted  
 8 Intellectual Property. For example, CNet stated that “The good” of the phone was: “The  
 9 Samsung Droid Charge has a gorgeous Super AMOLED Plus touch screen. Verizon’s 4G LTE  
 10 data speeds are superfast, and the smartphone offers longer battery life than the HTC  
 11 ThunderBolt. Call quality and camera quality are also good.”<sup>96</sup> PCMag.com pointed out that the  
 12 Droid Charge combines fast 4G performance with a Super AMOLED Plus screen.<sup>97</sup> It is also  
 13 noted that the Droid Charge is Wi-Fi enabled and can act as a mobile hotspot.<sup>98</sup> The Charge is  
 14 praised for its voice-enabled, turn-by-turn GPS guidance, its media capabilities, and two  
 15 cameras.<sup>99</sup> Though PCMag.com compares the Droid Charge with the iPhone 4 and HTC Droid  
 16 2, the more relevant comparison, according to the publication, is with Verizon’s other 4G  
 17 Android phone, the HTC Thunderbolt.<sup>100</sup>

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 20 <sup>93</sup> “Verizon Wireless Unleashes DROID Charge By Samsung,” Samsung,  
 <[http://www.samsung.com/us/news/newsPreviewRead.do?news\\_seq=19844](http://www.samsung.com/us/news/newsPreviewRead.do?news_seq=19844)>. [Exhibit 95]

21 <sup>94</sup> “Verizon Wireless Unleashes DROID Charge By Samsung,” Samsung,  
 <[http://www.samsung.com/us/news/newsPreviewRead.do?news\\_seq=19844](http://www.samsung.com/us/news/newsPreviewRead.do?news_seq=19844)>. [Exhibit 95]

22 <sup>95</sup> “Verizon Wireless Unleashes DROID Charge By Samsung,” Samsung,  
 <[http://www.samsung.com/us/news/newsPreviewRead.do?news\\_seq=19844](http://www.samsung.com/us/news/newsPreviewRead.do?news_seq=19844)>. [Exhibit 95]

23 <sup>96</sup> “Samsung Droid Charge,” CNet, May 3, 2011, <[http://reviews.cnet.com/smartphones/samsung-droid-charge-verizon/4505-6452\\_7-34468678.html](http://reviews.cnet.com/smartphones/samsung-droid-charge-verizon/4505-6452_7-34468678.html)>. [Exhibit 96]

24 <sup>97</sup> Lendino, Jamie, “Samsung Droid Charge (Verizon Wireless),” PCMag.com, May 6, 2011,  
 <<http://www.pcmag.com/article/print/264124>>. [Exhibit 97]

25 <sup>98</sup> Lendino, Jamie, “Samsung Droid Charge (Verizon Wireless),” PCMag.com, May 6, 2011,  
 <<http://www.pcmag.com/article/print/264124>>. [Exhibit 97]

26 <sup>99</sup> Lendino, Jamie, “Samsung Droid Charge (Verizon Wireless),” PCMag.com, May 6, 2011,  
 <<http://www.pcmag.com/article/print/264124>>. [Exhibit 97]

27 <sup>100</sup> Lendino, Jamie, “Samsung Droid Charge (Verizon Wireless),” PCMag.com, May 6, 2011,  
 <<http://www.pcmag.com/article/print/264124>>. [Exhibit 97]

1           **Epic 4G**

2           58. Samsung's advertising of the Epic 4G does not emphasize any of Apple's Asserted  
3 Intellectual Property. For example, Samsung advertises the phone's "Android 2.3 Platform,"  
4 "Super AMOLED Touchscreen," "Full Suite of Entertainment On-The-Go," and "Swype Text  
5 Input Technology."<sup>101</sup>

6           59. Reviews of the Epic 4G similarly did not emphasize any of Apple's Asserted  
7 Intellectual Property. For example, CNet stated that "The good" of the phone was: "The  
8 Samsung Epic 4G has a knockout Super AMOLED display, a 1GHz processor, a front-facing  
9 camera, an impressive QWERTY keyboard, a 5.0-megapixel camera with an LED flash, and  
10 supports Sprint's 4G WiMax network. It is capable of acting as a mobile Wi-Fi hot spot for up to  
11 five devices."<sup>102</sup>

12           60. Similarly, the Epic 4G's listing on Amazon.com emphasizes the use of Android  
13 2.1, the Super AMOLED display, the 4G capability, the forward facing VGA camera, and the 1  
14 GHz processor.<sup>103</sup>

15           **Exhibit 4G**

16           61. Samsung's advertising of the Exhibit 4G does not emphasize any of Apple's  
17 Asserted Intellectual Property. For example, Samsung advertises the phone's "Preloaded  
18 Entertainment," "Easy to Use Interface Android 2.3, Gingerbread," "Front-Facing Camera and  
19 Pre-Loaded Qik for Video Chat," and "Multiple Messaging."<sup>104</sup>

20           62. T-Mobile's website for the phone advertises its speed, 3.7" screen, and built-in  
21 camera.<sup>105</sup>

22 \_\_\_\_\_  
23 <sup>101</sup> "Samsung Epic 4G Android Smartphone," Samsung, <<http://www.samsung.com/us/mobile/cell-phones/SPH-D700ZKASPR>>. [Exhibit 98]

24 <sup>102</sup> "Samsung Epic 4G," CNet, August 15, 2010, <<http://reviews.cnet.com/smartphones/samsung-epic-4g-review/>>. [Exhibit 99]

25 <sup>103</sup> "Samsung Epic 4G Android Phone (Sprint)," Amazon.com, <<http://www.amazon.com/Samsung-Epic-Android-Phone-Sprint/dp/B003ZDO2H6>>. [Exhibit 107]

26 <sup>104</sup> "Samsung Exhibit 4G Android Smartphone," <<http://www.samsung.com/us/mobile/cell-phones/SGH-T759ZKBTMB>>. [Exhibit 100]

27 <sup>105</sup> "Samsung Galaxy Exhibit 4G," <<http://prepaid-phones.t-mobile.com/prepaid-phone/Samsung-Exhibit-4G-Prepaid>>. [Exhibit 101]

1           63. Reviews of the Exhibit 4G similarly did not emphasize any of Apple’s Asserted  
2 Intellectual Property. For example, CNet stated that “The good” of the phone was: “The  
3 Samsung Exhibit 4G is a fast, comfortable Android 2.3 Gingerbread handset with two cameras  
4 and a 1GHz processor.”<sup>106</sup> Laptop Magazine describes the “Pros” of the Exhibit 4G as “Runs  
5 Android 2.3 Gingerbread Fast 4G download speeds; Wi-Fi Calling Camera takes clear vivid  
6 pictures ; Long battery life.”<sup>107</sup>

### 7           **Fascinate**

8           64. Samsung’s advertising of the Fascinate does not emphasize any of Apple’s  
9 Asserted Intellectual Property. For example, Samsung advertises the phone’s “Galaxy S with  
10 Android 2.1 OS,” “Super AMOLED touchscreen,” “Instant social networking capabilities,” and  
11 “Faster texting with Swype.”<sup>108</sup>

12           65. The product description for the Fascinate on Amazon.com touts the phone’s 1 GHz  
13 processor, Android 2.1 platform, use of the Samsung Social Hub, the Super AMOLED display,  
14 and the “ultra-fast 7.2 Mbps 3G connectivity.”<sup>109</sup>

15           66. Reviews of the Fascinate similarly did not emphasize any of Apple’s Asserted  
16 Intellectual Property. For example, CNet stated that “The good” of the phone was: “The  
17 Samsung Fascinate offers a gorgeous Super AMOLED touch screen, a 1GHz processor, and a  
18 great multimedia experience. The smartphone can be used as a mobile hot spot.”<sup>110</sup>

### 19           **Galaxy Ace**

20           67. Samsung’s advertising of the Galaxy Ace does not emphasize any of Apple’s  
21 Asserted Intellectual Property. For example, Samsung advertises the phone’s 800 MHz

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23 <sup>106</sup> “Samsung Exhibit 4G,” CNet, June 17, 2011, <[http://reviews.cnet.com/smartphones/samsung-exhibit-4g-black/4505-6452\\_7-34818011.html](http://reviews.cnet.com/smartphones/samsung-exhibit-4g-black/4505-6452_7-34818011.html)>. [Exhibit 102]

24 <sup>107</sup> Sherri L. Smith, “Samsung Exhibit 4G Review,” Laptop Magazine, July 8, 2011,  
<<http://www.laptopmag.com/review/cellphones/samsung-exhibit-4g.aspx>>. [Exhibit 103]

25 <sup>108</sup> “Samsung Fascinate Android Smartphone,” Samsung, <<http://www.samsung.com/us/mobile/cell-phones/SCH-I500RKAVZW>>. [Exhibit 104]

26 <sup>109</sup> “Samsung Fascinate Android Phone (Verizon Wireless),” Amazon.com,  
<<http://www.amazon.com/Samsung-Fascinate-Android-Verizon-Wireless/dp/B0040JHXS4>>. [Exhibit 105]

27 <sup>110</sup> “Samsung Fascinate,” CNet, September 7, 2010, <[http://reviews.cnet.com/smartphones/samsung-fascinate-black-verizon/4505-6452\\_7-34129372.html](http://reviews.cnet.com/smartphones/samsung-fascinate-black-verizon/4505-6452_7-34129372.html)>. [Exhibit 106]

1 processor, 5MP camera, use of Quicktype software, and use of Microsoft Word, Excel, and  
 2 PowerPoint.<sup>111</sup> Notably, Samsung does tout the Galaxy Ace's "sophisticated beauty" and "look  
 3 of success,"<sup>112</sup> but the jury did not find that the Galaxy Ace infringed or diluted Apple's design  
 4 patents or trade dress.<sup>113</sup> The jury only found infringement by the Galaxy Ace of Apple's utility  
 5 patents.<sup>114</sup>

6 68. Reviews of the Galaxy Ace similarly did not emphasize any of Apple's Asserted  
 7 Intellectual Property. For example, Tech Radar stated that the characteristics weighing "For" the  
 8 Ace, included: "Compatible with Google Navigation," "Decent 5MP camera," "Easy to set up  
 9 webmail," "Light and feels good in the hand," and "Good battery life."<sup>115</sup>

### 10 **Galaxy Prevail**

11 69. Samsung's advertising of the Galaxy Ace does not emphasize any of Apple's  
 12 Asserted Intellectual Property. For example, Samsung advertises the phone's "Advanced GPS,"  
 13 "More App Choices through Google Play," "2.0 MP Camera," and the fact that it is the "First  
 14 CDMA Android Device with Boost."<sup>116</sup>

15 70. The product description of the Prevail on Amazon.com touts the phone's 3.2"  
 16 capacitive touchscreen, use of Bluetooth, and use of Android 2.2.<sup>117</sup>

17 71. Reviews of the Fascinate similarly did not emphasize any of Apple's Asserted  
 18 Intellectual Property. For example, PCMag.com noted that the "Pros" of the phone included:  
 19 "Good set of features and performance for the price. Fantastic plan pricing. Free, built-in  
 20

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21 <sup>111</sup> "Become an Ace" Galaxy Family Site, <[http://www.samsung.com/galaxyace/ace\\_overview.html](http://www.samsung.com/galaxyace/ace_overview.html)>.  
 [Exhibit 108]

22 <sup>112</sup> "Become an Ace" Galaxy Family Site, <[http://www.samsung.com/galaxyace/ace\\_overview.html](http://www.samsung.com/galaxyace/ace_overview.html)>.  
 [Exhibit 108]

23 <sup>113</sup> Amended Verdict Form, pp. 6-14.

<sup>114</sup> Amended Verdict Form, pp. 2-4.

24 <sup>115</sup> Luke Johnson, "Samsung Galaxy Ace Review," Tech Radar, March 19, 2011,  
 <<http://www.techradar.com/us/reviews/phones/mobile-phones/samsung-galaxy-ace-930912/review>>.  
 [Exhibit 109]

25 <sup>116</sup> "Samsung Galaxy Prevail," Samsung, <<http://www.samsung.com/us/mobile/cell-phones/SPH-M820ZKABST>>. [Exhibit 110]

26 <sup>117</sup> "Samsung Galaxy Prevail Android Smartphone (Boost Mobile), Amazon.com,  
 27 <<http://www.amazon.com/Samsung-Galaxy-Prevail-Android-Smartphone/dp/B004Z7HYUI>>. [Exhibit  
 28 111]

1 TeleNav GPS. Responsive UI (given the lower-end hardware). Good looking.”<sup>118</sup> Notably,  
 2 however, the jury rejected Apple’s claim that the Prevail diluted Apple’s trade dress, and Apple  
 3 did not allege that it infringed the design patents at issue.<sup>119</sup>

4 **Galaxy S/Galaxy S i9000**

5 72. Samsung’s advertising of the Galaxy S/Galaxy Si9000 does not emphasize any of  
 6 Apple’s Asserted Intellectual Property. For example, upon its launch of the Galaxy S in June  
 7 2010, Samsung pointed to “processor speed; the AMOLED display; and the content”<sup>120</sup> as those  
 8 features that differentiate its Galaxy S line of phones.

9 73. Reviews of the Galaxy S similarly did not emphasize any of Apple’s Asserted  
 10 Intellectual Property. For example, Time Magazine stated “The phone’s best feature is its  
 11 screen: it’s astonishingly bright, even in daylight. It also is thinner and consumes less power than  
 12 traditional LCDs, reducing the Galaxy’s overall weight and thickness.”<sup>121</sup> An article on  
 13 Slashgear noted the Galaxy S’s use of a Super AMOLED screen, 5 megapixel camera and use of  
 14 Android 2.1.<sup>122</sup> A CNet review touted the phone’s “impressive list of features, including a 4-  
 15 inch Super AMOLED touch screen, a 1GHz Hummingbird processor, and a 5-megapixel camera  
 16 with HD video capture. The quad-band smartphone also offers DLNA support, Wi-Fi,  
 17 Bluetooth, and GPS.”<sup>123</sup>

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 20  
 21 <sup>118</sup> “Samsung Galaxy Prevail (Boost Mobile),” PCMag.com, April 19, 2011,  
 <<http://www.pcmag.com/article2/0,2817,2383632,00.asp>>. [Exhibit 112]

22 <sup>119</sup> Amended Verdict Form, pp. 11-12.

23 <sup>120</sup> Michael Miller, “Samsung Unveils Galaxy S Line of Android Phones,” PCMag.com, June 30, 2010,  
 <[http://www.pcmag.com/print\\_article2/0,1217,a=252368,00.asp?hidPrint=true](http://www.pcmag.com/print_article2/0,1217,a=252368,00.asp?hidPrint=true)>. [Exhibit 113]

24 <sup>121</sup> Doug Aamoth, “The Top 10 Everything of 2010, Samsung Galaxy S,” Time, December 9, 2010,  
 <[http://www.time.com/time/specials/packages/article/0,28804,2035319\\_2033840\\_2033837,00.html](http://www.time.com/time/specials/packages/article/0,28804,2035319_2033840_2033837,00.html)>.  
 [Exhibit 114]

25 <sup>122</sup> Chris Davies, “Samsung Galaxy S GT-I9000 Android 2.1 Smartphone Announced,” Slashgear,  
 March 23, 2010, <http://www.slashgear.com/samsung-galaxy-s-gt-i9000-android-2-1-smartphone-announced-2378775/>>. [Exhibit 115]

26 <sup>123</sup> “Samsung Galaxy S i9000,” CNet, October 20, 2010,  
 27 <[http://reviews.cnet.com/smartphones/samsung-galaxy-s-i9000/4505-6452\\_7-34026333.html](http://reviews.cnet.com/smartphones/samsung-galaxy-s-i9000/4505-6452_7-34026333.html)>. [Exhibit  
 116]

1           **Galaxy S 4G**

2           74. Samsung's advertising of the Galaxy S 4G does not emphasize any of Apple's  
3           Asserted Intellectual Property. For example, the headline of Samsung's press release  
4           announcing the Galaxy S 4G reads "Galaxy S 4G from T-Mobile to Offer Blazing-Fast Speeds  
5           and Unparalleled Entertainment Experience Featuring Movies, TV and Video Chat."<sup>124</sup> Backing  
6           this statement was the device's 4G "theoretical peak download speeds of up to 21 Mbps," as  
7           well as "HD TV3 through T-Mobile TV, the ACADEMY AWARD Nominated film  
8           INCEPTION, and T-Mobile Video Chat powered by Qik ..."<sup>125</sup> The phones "slim and sleek  
9           design" is mentioned along with the Super AMOLED touch screen, preloaded Kindle  
10          application, Android 2.2 operating system, Hummingbird processor, 5 megapixel camera,  
11          preinstalled 16GB of memory, and battery.<sup>126</sup>

12          75. Reviews of the Galaxy S 4G similarly did not emphasize any of Apple's Asserted  
13          Intellectual Property. For example, a PCMag.com article discussing the Galaxy S 4G also  
14          expounds on the phone's merits. Adding to the features mentioned above, the Galaxy S 4G is T-  
15          Mobile's first high-speed HSPA+ 21 phone and includes the music syncing application  
16          DoubleTwist with AirSync preloaded.<sup>127</sup> In addition, it comes with "home dock" and "car dock  
17          mode" with GPS and DriveSafe, an application which responds to text messages automatically.  
18          These features prompted the author to postulate that "[i]f the price is good and the Internet  
19          access is fast, the Galaxy S 4G will do just fine on T-Mobile." Summarizing the merits of the  
20          Galaxy S 4G, a PCMag.com review of the phone noted its slim design, the "[g]orgeous screen,"  
21

22           <sup>124</sup> "Galaxy S 4G from T-Mobile to Offer Blazing-Fast Speeds and Unparalleled Entertainment  
23           Experience Featuring Movies, TV and Video Chat," Samsung, February 2, 2011,  
24           <[http://www.samsung.com/us/news/newsPreviewRead.do?news\\_seq=19810](http://www.samsung.com/us/news/newsPreviewRead.do?news_seq=19810)>. [Exhibit 117]

25           <sup>125</sup> "Galaxy S 4G from T-Mobile to Offer Blazing-Fast Speeds and Unparalleled Entertainment  
26           Experience Featuring Movies, TV and Video Chat," Samsung, February 2, 2011,  
27           <[http://www.samsung.com/us/news/newsPreviewRead.do?news\\_seq=19810](http://www.samsung.com/us/news/newsPreviewRead.do?news_seq=19810)>. [Exhibit 117]

28           <sup>126</sup> "Galaxy S 4G from T-Mobile to Offer Blazing-Fast Speeds and Unparalleled Entertainment  
Experience Featuring Movies, TV and Video Chat," Samsung, February 2, 2011,  
<[http://www.samsung.com/us/news/newsPreviewRead.do?news\\_seq=19810](http://www.samsung.com/us/news/newsPreviewRead.do?news_seq=19810)>. [Exhibit 117]

<sup>127</sup> Segan, Sascha, "Samsung Galaxy S 4G: Hands On," PCMag.com, February 14, 2011,  
<[http://www.pcmag.com/print\\_article2/0,1217,a=260606,00.asp?hidPrint=true](http://www.pcmag.com/print_article2/0,1217,a=260606,00.asp?hidPrint=true)>. [Exhibit 118]



1 “[v]ery fast 4G HSPA+ data speeds,” “[e]xcellent music and video,” and “[s]olid battery life.”<sup>128</sup>  
 2 These features, coupled with the Android 2.2.1 operating system, Wi-Fi, and two cameras  
 3 (including one for front-facing video calls), prompted the reviewer to characterize the Galaxy S  
 4 4G as “another powerful Android smartphone.”

#### 5 **Galaxy S II (AT&T)**

6 76. Samsung’s advertising of the Galaxy S II (AT&T) does not emphasize any of  
 7 Apple’s Asserted Intellectual Property. For example, Samsung advertises the phone’s “4.27”  
 8 Super AMOLED Plus screen,” its ability to show movies using Media Hub, and its  
 9 environmentally friendly Virtual Guide.<sup>129</sup>

10 77. The product description for the Galaxy S II (AT&T) on Amazon.com emphasizes  
 11 its 1.2 GHz processor, the 4.3” Super AMOLED display,” video chat, and use of Samsung’s  
 12 Media Hub.<sup>130</sup>

13 78. Reviews of the Galaxy S II (AT&T) similarly did not emphasize any of Apple’s  
 14 Asserted Intellectual Property. For example, CNet stated that “The good” of the phone was:  
 15 “The Samsung Galaxy S II boasts a beautiful display and a thin design. With a dual-core  
 16 processor, the Gingerbread device delivers fast performance, as well as good battery life.  
 17 Camera quality is excellent.”<sup>131</sup>

#### 18 **Gem**

19 79. Samsung’s advertising of the Gem does not emphasize any of Apple’s Asserted  
 20 Intellectual Property. For example, Samsung advertises the phone’s “Integrated Social Hub,”  
 21  
 22  
 23

24 <sup>128</sup> Lendino, Jamie, “Samsung Galaxy S 4G (T-Mobile),” PCMag.com, March 2, 2011,  
 <[http://www.pcmag.com/print\\_article2/0,1217,a=261303,00.asp?hidPrint=true](http://www.pcmag.com/print_article2/0,1217,a=261303,00.asp?hidPrint=true)>. [Exhibit 119]

25 <sup>129</sup> “Samsung Galaxy S II for AT&T,” Samsung, <<http://www.samsung.com/us/mobile/cell-phones/SGH-I777ZKAATT>>. [Exhibit 120]

26 <sup>130</sup> “Samsung Galaxy S II 4G Android Phone (AT&T),” Amazon.com,  
 <<http://wireless.amazon.com/Samsung-Galaxy-II-Android-Phone/dp/B005PT14FQ>>. [Exhibit 121]

27 <sup>131</sup> “Expert Review: AT&T Galaxy SII,” CNet, <<http://www.samsung.com/us/article/expert-review-at-t-galaxy-sii>>. [Exhibit 122]  
 28



1 “Competitive Pricing,” “Advanced Touchscreen Display w/ Anti-Scratch & Anti-Smudge,” and  
2 Android Éclair OS.”<sup>132</sup>

3 80. U.S. Cellular touts the phone’s use of Android 2.2, its customizable home screen,  
4 its 3.2” touchscreen, and use of Microsoft Exchange.<sup>133</sup>

5 81. Reviews of the Gem similarly did not emphasize any of Apple’s Asserted  
6 Intellectual Property. For example, CNet stated that “The good” of the phone was: “Interesting,  
7 angular design elements give the Samsung Gem personality, and it’s inexpensive.”<sup>134</sup>  
8 PCMag.com stated that the “Pros” of the phone included “Lightweight. Stock Android UI.  
9 Smooth video playback. Loud speakerphone.”<sup>135</sup>

### 10 Indulge

11 82. Samsung’s advertising of the Indulge does not emphasize any of Apple’s Asserted  
12 Intellectual Property. For example, Samsung advertises that it is “Enabled for MetroPCS 4G  
13 LTE High Speed Network,” that it uses the “Android 2.2 Platform,” that it offers “Wi-Fi and  
14 DLNA Connectivity, and 720p Video Recording,” and that it has a “3.5” TFT Display &  
15 QWERTY Keyboard for Quick and Easy Input.”<sup>136</sup>

16 83. Cricket touted the phone’s 3.5” HVGA touchscreen, wifi capability, 3G Real Web  
17 Browsing, 3MP camera, and 1 GHz processor.<sup>137</sup>

18 84. Reviews of the Indulge similarly did not emphasize any of Apple’s Asserted  
19 Intellectual Property. For example, PCMag.com stated that the “Pros” of the phone included  
20 “Fastest, most powerful smartphone on MetroPCS. Full keyboard.”<sup>138</sup>

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21 <sup>132</sup> “Samsung Gem (Generic CDMA) Touchscreen Cell Phone,” Samsung,  
22 <<http://www.samsung.com/us/mobile/cell-phones/SCH-I100ZKAXAR>>. [Exhibit 123]

23 <sup>133</sup> “Samsung Gem,” U.S. Cellular, <<http://www.uscellular.com/uscellular/cell-phones/showPhoneDetails.jsp?productId=prod190043>>. [Exhibit 124]

24 <sup>134</sup> “Samsung Gem SCH-i100,” CNet, April 14, 2011, <[http://reviews.cnet.com/smartphones/samsung-gem-sch-i100/4505-6452\\_7-34480810.html](http://reviews.cnet.com/smartphones/samsung-gem-sch-i100/4505-6452_7-34480810.html)>. [Exhibit 125]

25 <sup>135</sup> “Samsung Gem (U.S. Cellular),” PCMag.com, April 20, 2011,  
<<http://www.pcmag.com/article2/0,2817,2383809,00.asp>>. [Exhibit 126]

26 <sup>136</sup> “Samsung Galaxy Indulge (Metro PCS) QWERTY Cell Phone,” Samsung,  
<<http://www.samsung.com/us/mobile/cell-phones/SCH-R910ZKAMTR>>. [Exhibit 127]

27 <sup>137</sup> “Samsung Indulge,” Cricket Wireless, <<http://www.mycricket.com/cell-phones/details/samsung-indulge-r915>>. [Exhibit 128]

1           **Infuse 4G**

2           85. Samsung's advertising of the Infuse 4G does not emphasize any of Apple's  
3           Asserted Intellectual Property. For example, Samsung advertises that it is "The Nation's  
4           Thinnest 4G Smartphone," that it has a "Large 4.5" SUPER AMOLED Plus Touch Screen  
5           Technology," that it offers a "Full Suite of Entertainment ON-THE-GO Including Media Hub,"  
6           and that it has a "8.0 MP Rear-Facing Camera with LED FLASH & 1.3 MP Front-Facing  
7           Camera."<sup>139</sup> Samsung headlined its Infuse 4G smartphone as the "[b]iggest [y]et [t]hinest ...,"  
8           emphasizing that the device was to "be the nation's thinnest 4G smartphone" with "the largest  
9           display in AT&T's smartphone portfolio ..."<sup>140</sup> Samsung's release also notes the 1.2 GHz  
10          processor, Android 2.2 platform, 8-megapixel camera, and a pre-loaded version of the popular  
11          game Angry Birds.<sup>141</sup> As with the Galaxy S 4G, Samsung also lauded the Infuse 4G's "brilliant  
12          display using Samsung's next-generation Super AMOLED Plus technology."<sup>142</sup>

13          86. Reviews of the Infuse 4G similarly did not emphasize any of Apple's Asserted  
14          Intellectual Property. For example, CNet stated that "The good" of the phone was: "The  
15          Samsung Infuse 4G features a large and vibrant 4.5-inch touch screen that's great for browsing  
16          and videos. The Android smartphone is ultrathin and has an 8-megapixel camera and snappy  
17          performance."<sup>143</sup> PCMag.com also presented an in depth look at the Infuse 4G smartphone. By  
18          way of design, the Infuse 4G was described as "unusually thin, long and wide."<sup>144</sup> The Infuse  
19

20  
21          <sup>138</sup> "Samsung Galaxy Indulge (Metro PCS)," PCMag.com, February 15, 2011,  
22          <<http://www.pcmag.com/article2/0,2817,2380094,00.asp>>. [Exhibit 129]

23          <sup>139</sup> "Samsung Infuse 4G," Samsung, <<http://www.samsung.com/us/mobile/cell-phones/SGH-1997ZKAATT>>. [Exhibit 130]

24          <sup>140</sup> "Biggest Yet Thinnest, SAMSUNG Infuse 4G Debuts May 15," Samsung, May 5, 2011,  
25          <[http://www.samsung.com/us/news/newsPreviewRead.do?news\\_seq=19852](http://www.samsung.com/us/news/newsPreviewRead.do?news_seq=19852)>. [Exhibit 132]

26          <sup>141</sup> "Biggest Yet Thinnest, SAMSUNG Infuse 4G Debuts May 15," Samsung, May 5, 2011,  
27          <[http://www.samsung.com/us/news/newsPreviewRead.do?news\\_seq=19852](http://www.samsung.com/us/news/newsPreviewRead.do?news_seq=19852)>. [Exhibit 132]

28          <sup>142</sup> "Biggest Yet Thinnest, SAMSUNG Infuse 4G Debuts May 15," Samsung, May 5, 2011,  
29          <[http://www.samsung.com/us/news/newsPreviewRead.do?news\\_seq=19852](http://www.samsung.com/us/news/newsPreviewRead.do?news_seq=19852)>. [Exhibit 132]

30          <sup>143</sup> "Samsung Infuse 4G review (AT&T)," CNet, May 12, 2011,  
31          <[http://reviews.cnet.com/smartphones/samsung-infuse-4g-at/4505-6452\\_7-34468418.html](http://reviews.cnet.com/smartphones/samsung-infuse-4g-at/4505-6452_7-34468418.html)>. [Exhibit 131]

32          <sup>144</sup> "AT&T, Samsung Launch Infuse 4G Smartphone," PCMag.com, May 5, 2011,  
33          <<http://www.pcmag.com/article/print/264101>>. [Exhibit 133]

1 4G is described as “faster than most of the other smartphones on the market ...,” includes  
 2 Bluetooth and Wi-Fi, and comes with 2GB of memory that can be upgraded to 32GB.<sup>145</sup> To  
 3 complement its 4G speed, “[t]he infuse also supports HSUPA, a key technology which allows  
 4 for fast upload speeds.”<sup>146</sup> PCMag.com briefly compared this phone to HTC’s Inspire 4G and  
 5 the Motorola Atrix.<sup>147</sup>

6 87. PCMag.com’s official review of the Infuse 4G again points out as its benefits that it  
 7 is “[v]ery thin,” has a “[h]uge, vibrant Super AMOLED Plus screen,” “[s]tellar battery life,” and  
 8 is the “[f]irst truly 4G AT&T phone.”<sup>148</sup> In discussing the design of the phone, PCMag.com  
 9 pointed out that “though it’s razor-thin ...” the Infuse 4G “is long and wide.”<sup>149</sup> Further, the  
 10 “Super AMOLED Plus glass capacitive touch screen looks amazing ...,” and the phone  
 11 “supports HSUPA for faster upload speeds, and ... works as a mobile hotspot ...”<sup>150</sup> The Infuse  
 12 4G software, including Android 2.2, makes for “very responsive ... day-to-day usage.”<sup>151</sup> It is  
 13 also noted that “[t]his is a stellar multimedia machine.”<sup>152</sup> When compared to the iPhone 4,  
 14 PCMag.com noted that Apple’s phone “lacks the Infuse 4G’s larger screen and free voice  
 15 navigation ...”<sup>153</sup>

18 <sup>145</sup> “AT&T, Samsung Launch Infuse 4G Smartphone,” PCMag.com, May 5, 2011,  
 19 <<http://www.pcmag.com/article/print/264101>>. [Exhibit 133]

20 <sup>146</sup> “AT&T, Samsung Launch Infuse 4G Smartphone,” PCMag.com, May 5, 2011,  
 <[http://www.pcmag.com/print\\_article2/0,1217,a=264101,00.asp?hidPrint=true](http://www.pcmag.com/print_article2/0,1217,a=264101,00.asp?hidPrint=true)>. [Exhibit 133]

21 <sup>147</sup> “AT&T, Samsung Launch Infuse 4G Smartphone,” PCMag.com, May 5, 2011,  
 <[http://www.pcmag.com/print\\_article2/0,1217,a=264101,00.asp?hidPrint=true](http://www.pcmag.com/print_article2/0,1217,a=264101,00.asp?hidPrint=true)>. [Exhibit 133]

22 <sup>148</sup> “Samsung Infuse 4G SGH-I997 (AT&T),” PCMag.com, May 17, 2011,  
 <<http://www.pcmag.com/article/print/264503>>. [Exhibit 134]

23 <sup>149</sup> “Samsung Infuse 4G SGH-I997 (AT&T),” PCMag.com, May 17, 2011,  
 <<http://www.pcmag.com/article/print/264503>>. [Exhibit 134]

24 <sup>150</sup> “Samsung Infuse 4G SGH-I997 (AT&T),” PCMag.com, May 17, 2011,  
 <<http://www.pcmag.com/article/print/264503>>. [Exhibit 134]

25 <sup>151</sup> “Samsung Infuse 4G SGH-I997 (AT&T),” PCMag.com, May 17, 2011,  
 <<http://www.pcmag.com/article/print/264503>>. [Exhibit 134]

26 <sup>152</sup> “Samsung Infuse 4G SGH-I997 (AT&T),” PCMag.com, May 17, 2011,  
 <<http://www.pcmag.com/article/print/264503>>. [Exhibit 134]

27 <sup>153</sup> “Samsung Infuse 4G SGH-I997 (AT&T),” PCMag.com, May 17, 2011,  
 <<http://www.pcmag.com/article/print/264503>>. [Exhibit 134]

1           **Mesmerize**

2           88. Samsung’s advertising of the Mesmerize does not emphasize any of Apple’s  
3 Asserted Intellectual Property. For example, Samsung advertises that it uses Android 2.1, has an  
4 “Ultra-slim Design,” has a “4.0” Super AMOLED Touch Screen Display,” and is “Loaded with  
5 Multimedia and Entertainment Features.”<sup>154</sup>

6           89. U.S. Cellular advertises the Mesmerize’s use of a 4.0” Super AMOLED screen, 1  
7 GHz processor, and use of Android 2.3.<sup>155</sup>

8           90. Reviews of the Mesmerize similarly did not emphasize any of Apple’s Asserted  
9 Intellectual Property. For example, CNet stated that “The good” of the phone was: “The  
10 Samsung Mesmerize boasts a beautiful Super AMOLED touch screen and a 1GHz  
11 Hummingbird processor. The smartphone's 5-megapixel camera takes excellent photos and  
12 video.”<sup>156</sup> PCMag.com stated that the “Pros” of the Mesmerize were “Fast. Brilliant screen.  
13 Very good camera and video playback.”<sup>157</sup>

14           **Nexus S 4G**

15           91. Samsung’s advertising of the Nexus S 4G does not emphasize any of Apple’s  
16 Asserted Intellectual Property. For example, Samsung advertises that it is the “First 4G Nexus S  
17 Device,” “Powered by Android 4.1, Jelly Bean,” and “has a “Super AMOLED display and  
18 contoured screen” and “5MP rear-facing camera with flash & front-facing camera.”<sup>158</sup>

19           92. The Nexus S 4G’s Amazon.com listing touts the phone’s 4G speeds, Google Voice  
20 integration, Super AMOLED display, use of Android 2.3, and NFC Reader.<sup>159</sup>

21 \_\_\_\_\_  
22 <sup>154</sup> “Samsung Mesmerize i500 (U.S. Cellular) Android Smartphone,” Samsung,  
<<http://www.samsung.com/us/mobile/cell-phones/SCH-I500RKAUSC>>. [Exhibit 135]

23 <sup>155</sup> “Samsung Mesmerize,” U.S. Cellular, <<http://www.uscellular.com/uscellular/cell-phones/showPhoneDetails.jsp?productId=prod60188>>. [Exhibit 136]

24 <sup>156</sup> “Samsung Mesmerize (U.S. Cellular),” CNet, November 13, 2010, <[http://news.cnet.com/2300-1041\\_3-10005558-10.html](http://news.cnet.com/2300-1041_3-10005558-10.html)>. [Exhibit 137]

25 <sup>157</sup> “Samsung Mesmerize (U.S. Cellular),” PCMag.com, November 15, 2010,  
<<http://www.pcmag.com/article2/0,2817,2372397,00.asp>>. [Exhibit 138]

26 <sup>158</sup> “Nexus S 4G (Sprint) Android Smartphone,” Samsung, <<http://www.samsung.com/us/mobile/cell-phones/SPH-D720ZKASPR>>. [Exhibit 139]

27 <sup>159</sup> “Samsung Nexus S 4G Android Phone (Sprint), Amazon.com,  
<<http://wireless.amazon.com/Samsung-Nexus-Android-Phone-Sprint/dp/B0050DDVUI>>. [Exhibit 140]

1           93. Reviews of the Nexus S 4G similarly did not emphasize any of Apple’s Asserted  
 2 Intellectual Property. For example, CNet stated that “The good” of the phone was: “The  
 3 Samsung Nexus S 4G offers a brilliant display, WiMax support, and agreeable performance. It  
 4 gains a number of usability improvements from the Gingerbread OS, and its straight Google  
 5 interface will appeal to Android purists.”<sup>160</sup> Laptop Magazine listed the “Pros” of the Nexus S  
 6 4G as “Crisp and colorful Super AMOLED display; Can use Sprint number as Google Voice  
 7 number; High-quality Google video calls; Works with Netflix.”<sup>161</sup> The Engadget review  
 8 focused on the phone’s 1 GHz processor, 512 MB of RAM, the curved Super AMOLED display,  
 9 and use of Android 2.3.<sup>162</sup>

### 10           **Replenish**

11           94. Samsung’s advertising of the Replenish does not emphasize any of Apple’s  
 12 Asserted Intellectual Property. For example, Samsung advertises that it allows users to “Stay  
 13 connected with friends, with work, and with the planet,” that it “runs Android,” has Wi-Fi, and  
 14 allows users to “Capture the moment. Share the moment.”<sup>163</sup>

15           95. Reviews of the Replenish similarly did not emphasize any of Apple’s Asserted  
 16 Intellectual Property. For example, CNet stated that “The good” of the phone was: “The  
 17 Samsung Replenish has a tactile QWERTY keyboard, a surprisingly decent camera, and a  
 18 wallet-friendly price. Made from recycled and recyclable material, it’s also easier on the  
 19  
 20  
 21

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22           <sup>160</sup> “Samsung Nexus S 4G review (Sprint),” CNet, May 13, 2011,  
 23 <[http://reviews.cnet.com/smartphones/samsung-nexus-s-4g/4505-6452\\_7-34550462.html](http://reviews.cnet.com/smartphones/samsung-nexus-s-4g/4505-6452_7-34550462.html)>. [Exhibit 141]

24           <sup>161</sup> Mark Spoonauer, “Samsung Nexus S 4G (Sprint) Review, Laptop, May 14, 2011,  
 <<http://www.laptopmag.com/review/cell-phones/samsung-nexus-s-4g.aspx>>. [Exhibit 142]

25           <sup>162</sup> Joshua Topolsky, “Nexus S Review,” Engadget, December 10, 2010,  
 <<http://www.engadget.com/2010/12/10/nexus-s-review/>>. [Exhibit 143]

26           <sup>163</sup> “Samsung Replenish,” Samsung, <http://www.samsung.com/us/mobile/cell-phones/SPH-M580ZKASPR>>. [Exhibit 144]

1 planet.”<sup>164</sup> PCMag.com stated that the “Pros” of the phone were “Good voice quality. Solid  
2 QWERTY keyboard. Eco-friendly. Excellent monthly rates.”<sup>165</sup>

### 3 **Vibrant**

4 96. Samsung’s advertising of the Vibrant does not emphasize any of Apple’s Asserted  
5 Intellectual Property. For example, Samsung advertises that it uses Android 2.2, has a “Super  
6 AMOLED touchscreen,” comes “Preloaded with the movie Avatar,” and has “Instant social  
7 networking capabilities.”<sup>166</sup> Samsung has also touted the Vibrant’s capability of integrating with  
8 Google Mobile Services and using less power resulting in a longer battery life.<sup>167</sup>

9 97. The Product Description on Amazon.com for the Vibrant emphasizes the phone’s  
10 preloaded games and video, 3G network, apps like Google Search and Maps, Super AMOLED  
11 display, and 1GHz processor.<sup>168</sup>

12 98. Reviews of the Vibrant similarly did not emphasize any of Apple’s Asserted  
13 Intellectual Property. Samsung’s T-Mobile version of the Galaxy S, the Vibrant, has been  
14 praised specifically for its “graphical capabilities” by PCMag.com.<sup>169</sup> PCMag.com lists the  
15 “Pros” of the phone as “Fast. 1-GHz processor handles graphics well. Bright screen. PC  
16 syncing options. Great photos and videos. Free, full copy of Sims 3 included.”<sup>170</sup>

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20 <sup>164</sup> “Samsung Replenish review (onyx black, Sprint),” CNet, May 9, 2011,  
<[http://reviews.cnet.com/smartphones/samsung-replenish-onyx-black/4505-6452\\_7-34644198.html](http://reviews.cnet.com/smartphones/samsung-replenish-onyx-black/4505-6452_7-34644198.html)>.  
21 [Exhibit 145]

22 <sup>165</sup> “Samsung Replenish (Boost Mobile),” PCMag.com, January 25, 2012,  
<<http://www.pcmag.com/article2/0,2817,2399191,00.asp>>. [Exhibit 146]

23 <sup>166</sup> “Samsung Vibrant Android Smartphone,” Samsung, <<http://www.samsung.com/us/mobile/cell-phones/SGH-T959ZKATMB>>. [Exhibit 147]

24 <sup>167</sup> “Samsung Vibrant Android Smartphone,” Samsung, <<http://www.samsung.com/us/mobile/cell-phones/SGH-T959ZKATMB>>. [Exhibit 147]

25 <sup>168</sup> “Samsung Vibrant Android Phone (T-Mobile),” Amazon.com, <<http://www.amazon.com/Samsung-Vibrant-Android-Phone-T-Mobile/dp/B003TXSKNE>>. [Exhibit 148]

26 <sup>169</sup> “Samsung Vibrant Launches, Will Be a Top Contender on T-Mobile,” July 15, 2010,  
<<http://www.pcmag.com/article/print/252802>>. [Exhibit 149]

27 <sup>170</sup> “Samsung Vibrant (T-Mobile),” PCMag.com, July 22, 2010,  
<<http://www.pcmag.com/article2/0,2817,2366865,00.asp>>. [Exhibit 150]



1           **Galaxy S II (T-Mobile)**

2           99. Samsung’s advertising of the Galaxy S II (T-Mobile) does not emphasize any of  
3 Apple’s Asserted Intellectual Property. For example, Samsung advertises the 4G speed, the  
4 “4.52” Super AMOLED Plus Screen” the “Green Guide,” and the “Samsung Media Hub.”<sup>171</sup>

5           100. The Amazon.com Product Description for the Galaxy S II (T-Mobile) emphasizes  
6 the phone’s multitasking abilities, dual-core 1.5 GHz processor, 4G speeds, 8 MP camera, 16  
7 GB of memory, Bluetooth 3.0 connectivity, and Super AMOLED display.<sup>172</sup>

8           101. Reviews of the Galaxy S II (T-Mobile) similarly did not emphasize any of Apple’s  
9 Asserted Intellectual Property. For example, CNet stated that “The good” of the phone was:  
10 “The Samsung Galaxy S II supports T-Mobile's faster HSPA+ network and has a dual-core  
11 1.5GHz processor and an NFC chip. The Android Gingerbread smartphone also has a spacious  
12 and vibrant Super AMOLED Plus touch screen, 16GB of internal memory, and great camera  
13 performance.”<sup>173</sup> PCMag.com states that the “Pros” of the phone include “Fast. Large, beautiful  
14 screen. Excellent HSPA+ 42 speeds. Good call quality.”<sup>174</sup> Laptop Magazine stated that the  
15 “Pros” of the phone were “Blazing performance; Gorgeous screen; Excellent 8-MP camera; Fast  
16 4G Data; Long battery life; Loud speaker.”<sup>175</sup>

17           **Transform**

18           102. Samsung’s advertising of the Transform does not emphasize any of Apple’s  
19 Asserted Intellectual Property. For example, Samsung advertises the “3.5” LCD touchscreen  
20 with full, slide out QWERTY,” “Android Éclair 2.1 OS,” 2GB microSD card preinstalled with  
21

22 \_\_\_\_\_  
23 <sup>171</sup> “Samsung Galaxy S II, available at T-Mobile (Titanium),” Samsung,  
<<http://www.samsung.com/us/mobile/cell-phones/SGH-T989ZKBTMB>>. [Exhibit 151]

24 <sup>172</sup> “Samsung Galaxy S II 4G Android Phone (T-Mobile),” Amazon.com,  
<<http://wireless.amazon.com/dp/B005SY5AF8>>. [Exhibit 152]

25 <sup>173</sup> “Samsung Galaxy S II review (black, T-Mobile),” CNet, October 13, 2011,  
<[http://reviews.cnet.com/smartphones/samsung-galaxy-s-ii/4505-6452\\_7-35003061.html](http://reviews.cnet.com/smartphones/samsung-galaxy-s-ii/4505-6452_7-35003061.html)>. [Exhibit 153]

26 <sup>174</sup> “Samsung Galaxy S II (T-Mobile),” PCMag.com, October 13, 2011,  
<<http://www.pcmag.com/article2/0,2817,2394528,00.asp>>. [Exhibit 154]

27 <sup>175</sup> “Samsung Galaxy S II Smartphone (T-Mobile) Review,” Laptop Magazine, October 13, 2011,  
<<http://www.laptopmag.com/review/cell-phones/samsung-galaxy-s2-t-mobile.aspx>>. [Exhibit 155]



1 adaptor inbox,” and “3.2 MP Rear Facing Camera + VGA MP Front Facing Camera and Video  
2 Camera.”<sup>176</sup>

3 103. Amazon.com’s Product Description for the Transform emphasized the phone’s use  
4 of Sprint ID, its 3.5” HVGA touchscreen, slide-out keyboard, and dual cameras.<sup>177</sup>

5 104. Reviews of the Transform similarly did not emphasize any of Apple’s Asserted  
6 Intellectual Property. For example, CNet stated that “The good” of the phone was: “The  
7 Samsung Transform has an attractive design with a front-facing camera. The phone is  
8 comfortable to hold and has excellent call quality.”<sup>178</sup> Notably, although the review praises the  
9 “attractive design,” Apple did not accuse the Transform of infringing any design patents or  
10 diluting any trade dress. Similarly, the Engadget review for the Transform notes its front-facing  
11 camera, the design of the slide-out keyboard, and the use of the “novel carrier feature called  
12 Sprint ID.”<sup>179</sup> PCMag.com listed the “Pros” of the phone as “Punchy voice quality. Sublime  
13 QWERTY keyboard. Useful Sprint ID customizations.”<sup>180</sup>

#### 14 **Galaxy S Showcase**

15 105. Samsung’s advertising of the Galaxy S Showcase does not emphasize any of  
16 Apple’s Asserted Intellectual Property. For example, Samsung advertises the Android 2.2 OS,  
17 “Ultra-slim Design,” “4.0” Super AMOLED Touch Screen Display,” and “Multimedia and  
18 Entertainment Features.”<sup>181</sup>

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21 \_\_\_\_\_  
22 <sup>176</sup> “Samsung Transform QWERTY Cell Phone,” Samsung, <<http://www.samsung.com/us/mobile/cell-phones/SPH-M920ZKASPR>>. [Exhibit 156]

23 <sup>177</sup> “Samsung Transform Android Phone (Sprint),” Amazon.com, <[http://www.amazon.com/Samsung-Transform-Android-Phone-Sprint/dp/B00466HMXC/ref=pd\\_sxp\\_f\\_pt](http://www.amazon.com/Samsung-Transform-Android-Phone-Sprint/dp/B00466HMXC/ref=pd_sxp_f_pt)>. [Exhibit 157]

24 <sup>178</sup> “Samsung Transform,” CNet, October 8, 2010, <[http://reviews.cnet.com/smartphones/samsung-transform-sprint/4505-6452\\_7-34192012.html](http://reviews.cnet.com/smartphones/samsung-transform-sprint/4505-6452_7-34192012.html)>. [Exhibit 158]

25 <sup>179</sup> “Samsung Transform Review,” Engadget, October 15, 2010, <<http://www.engadget.com/2010/10/15/samsung-transform-review/>>. [Exhibit 159]

26 <sup>180</sup> “Samsung Transform (Sprint),” PCMag.com, October 28, 2010, <<http://www.pcmag.com/article2/0,2817,2371567,00.asp>>. [Exhibit 160]

27 <sup>181</sup> “Samsung Showcase (Generic CDMA) a Galaxy S Android Smartphone,” Samsung, <<http://www.samsung.com/us/mobile/cell-phones/SCH-I500RKBXAR>>. [Exhibit 161]

1 106. Similarly, CSpire Wireless advertised the Galaxy S Showcase’s “ultra-bright 4-inch  
2 touch-screen display” and access to the Android Market.<sup>182</sup>

3 107. Reviews of the Galaxy S Showcase similarly did not emphasize any of Apple’s  
4 Asserted Intellectual Property. For example, Phone Arena noted the Showcase’s 4” Super  
5 AMOLED display, the 1 GHz processor, 5 megapixel camera, video recording, Swype  
6 keyboard, Wi-Fi capabilities, Bluetooth, and headset jack.<sup>183</sup>

7 **Galaxy S II (Epic 4G Touch)**

8 108. Samsung’s advertising of the Galaxy S II (Epic 4G Touch) does not emphasize any  
9 of Apple’s Asserted Intellectual Property. For example, Samsung highlights that the Epic 4G  
10 Touch is a faster smartphone due to its “1.2 GHz core processor” and use of a 4G high speed  
11 network.<sup>184</sup> Additionally, Samsung emphasized the Epic 4G Touch’s 4.52” Super AMOLED  
12 display was the “brightest, most colorful screen” on the market.<sup>185</sup>

13 109. The Product Description on Amazon.com for the Epic 4G Touch notes the 1.2 GHz  
14 processor, 4G speeds, Super AMOLED display, 8 MP rear camera, 2 MP front facing camera,  
15 access to the Samsung Media Hub, and enterprise functionality.<sup>186</sup>

16 110. Reviews of the Galaxy S II Epic 4G Touch similarly did not emphasize any of  
17 Apple’s Asserted Intellectual Property. For example, CNet stated that “The good” of the phone  
18 was: “The Samsung Epic 4G Touch boasts a large and bright 4.5-inch Super AMOLED Plus  
19 display. With a dual-core 1.2GHz processor, the Android smartphone is fast and 4G-capable.  
20

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21 <sup>182</sup> “Samsung Galaxy S Showcase,” C Spire Wireless,  
22 <[http://www.cspire.com/shop\\_and\\_learn/devices/product\\_phone\\_detail.jsp?id=prod23560025](http://www.cspire.com/shop_and_learn/devices/product_phone_detail.jsp?id=prod23560025)>. [Exhibit  
162]

23 <sup>183</sup> “Samsung Showcase Will Be Cellular South’s Version of the Galaxy S,” Phone Arena, October 7,  
2010, <[http://www.phonearena.com/news/Samsung-Showcase-will-be-Cellular-Souths-version-of-the-  
Galaxy-S\\_id13826](http://www.phonearena.com/news/Samsung-Showcase-will-be-Cellular-Souths-version-of-the-Galaxy-S_id13826)>. [Exhibit 163]

24 <sup>184</sup> “Samsung Galaxy S® II, available at Sprint (Black),” Samsung,  
25 <<http://www.samsung.com/us/mobile/cell-phones/SPH-D710ZKASPR>>. [Exhibit 164]

26 <sup>185</sup> “Samsung Galaxy S® II, available at Sprint (Black),” Samsung,  
27 <<http://www.samsung.com/us/mobile/cell-phones/SPH-D710ZKASPR>>. [Exhibit 164]

28 <sup>186</sup> “Samsung Galaxy S II Epic Touch 4G Android Phone, Black (Spring), Amazon.com,  
<<http://wireless.amazon.com/Samsung-Galaxy-Epic-Touch-Android/dp/B005LHN47S#sprint4g>>. [Exhibit  
165]

1 Camera quality is also excellent.”<sup>187</sup> PCMag.com stated that the “Pros” of the phone were: “Fast  
2 processor. Terrific screen. Great battery life.”<sup>188</sup> Laptop Magazine stated that the “Pros” of the  
3 phone were: “Large bright screen; Excellent 8-MP camera; Loud speaker; Decent video  
4 calling.”<sup>189</sup>

### 5 **Galaxy S II (Skyrocket)**

6 111. Samsung’s advertising of the Skyrocket does not emphasize any of Apple’s  
7 Asserted Intellectual Property. For example, Samsung advertises the Skyrocket’s 4G LTE  
8 capabilities, the 1.5GHz dual core processor, the Super AMOLED Plus Screen, and Android  
9 2.3.5 Gingerbread operating system.<sup>190</sup>

10 112. Amazon.com’s Product Description for the Skyrocket emphasizes the phone’s 1.5  
11 GHz processor, 4G speeds, Android 2.3 OS, Super AMOLED display, 8 MP camera, front-  
12 facing camera, and access to Samsung’s Media Hub.<sup>191</sup>

13 113. Reviews of the Galaxy S II Skyrocket similarly did not emphasize any of Apple’s  
14 Asserted Intellectual Property. For example, CNet stated that “The good” of the phone was:  
15 “The Samsung Galaxy S II Skyrocket has a beautiful 4.5-inch Super AMOLED Plus display  
16 along with a dual-core 1.5GHz processor, an NFC chip, and support for AT&T’s LTE network.  
17 It ships with Android 2.3 Gingerbread, and has an 8-megapixel camera with 1080p HD video  
18 capture and a 2-megapixel front-facing camera.”<sup>192</sup> Engadget noted the Skyrocket’s larger Super  
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21 <sup>187</sup> “Samsung Epic 4G Touch review (black, Sprint),” CNet, September 15, 2011,  
<[http://reviews.cnet.com/smartphones/samsung-epic-4g-touch/4505-6452\\_7-35003062.html](http://reviews.cnet.com/smartphones/samsung-epic-4g-touch/4505-6452_7-35003062.html)>. [Exhibit  
22 166]

<sup>188</sup> “Samsung Galaxy S II Epic 4G Touch (Sprint),” PCMag.com, September 14, 2011,  
<<http://www.pcmag.com/article2/0,2817,2392897,00.asp>>. [Exhibit 167]

<sup>189</sup> “Samsung Galaxy S II Epic 4G Touch Review,” Laptop Magazine, September 14, 2011,  
<<http://www.laptopmag.com/review/cell-phones/samsung-galaxy-s-ii-epic-4g-touch.aspx>>. [Exhibit 168]

<sup>190</sup> “Samsung Galaxy S II Skyrocket (Black) Android Smartphone,” Samsung,  
<<http://www.samsung.com/us/mobile/cell-phones/SGH-I727MSAATT>>. [Exhibit 169]

<sup>191</sup> “Samsung Galaxy S II Skyrocket 4G Android Phone, Black (AT&T), Amazon.com,  
<<http://wireless.amazon.com/Samsung-Galaxy-Skyrocket-Android-Phone/dp/B0061QPOS0>>. [Exhibit  
26 170]

<sup>192</sup> “Samsung Galaxy S II Skyrocket,” Cnet, November 9, 2011,  
<[http://reviews.cnet.com/smartphones/samsung-galaxy-s-ii/4505-6452\\_7-35055815.html](http://reviews.cnet.com/smartphones/samsung-galaxy-s-ii/4505-6452_7-35055815.html)>. [Exhibit 171]

1 AMOLED display, 4G connectivity, 1 GB of RAM, 1.5 GHz processor, and 8MP camera.<sup>193</sup>  
 2 PCMag.com stated that the “Pros” of the phone were: “Huge, colorful display. Ultra-fast LTE  
 3 data speeds and dual-core CPU. Good camera.”<sup>194</sup>

#### 4 **Galaxy Tab**

5 114. Reviews of the Galaxy Tab similarly did not emphasize any of Apple’s Asserted  
 6 Intellectual Property. For example, CNet described “The Good” of the Galaxy Tab: “Samsung’s  
 7 7-inch Android tablet is a serious contender to the Apple iPad, boasting two cameras, Flash  
 8 compatibility, and a more convenient size.”<sup>195</sup> Similarly, Engadget noted that although the  
 9 Galaxy Tab did not have a Super AMOLED screen, “the 1024 x 600-resolution LCD is still  
 10 stunning” and “the capacitive screen is extremely responsive.”<sup>196</sup> Engadget also found the  
 11 Galaxy Tab’s “crisp display, compact form factor, touch-friendly software...have what it takes  
 12 to win over the average tablet seeker,”<sup>197</sup> while noting the “Tab’s dual cameras are a big  
 13 differentiator against the iPad.”<sup>198</sup>

14 115. Nor does Samsung’s advertising of the Galaxy Tab emphasize any of Apple’s  
 15 Asserted Intellectual Property. For example, a Samsung commercial for the device touts its  
 16 “optimized email environment,” “augmented reality and navigation services with a large  
 17 display,” web browsing, e-reading, and communications solutions.<sup>199</sup>

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21 <sup>193</sup> “Samsung Galaxy S II Skyrocket Review,” Engadget, November 11, 2011,  
 <<http://www.engadget.com/2011/11/11/samsung-galaxy-s-ii-skyrocket-review/>>. [Exhibit 172]  
 22 <sup>194</sup> “Samsung Galaxy S II Skyrocket SGH-I727 (AT&T),” PCMag.com, November 10, 2011,  
 <<http://www.pcmag.com/article2/0,2817,2396096,00.asp>>. [Exhibit 173]  
 23 <sup>195</sup> “Samsung Galaxy Tab,” CNet, October 28, 2010, <[http://reviews.cnet.com/tablets/samsung-galaxy-tab-sprint/4505-3126\\_7-34194814.html](http://reviews.cnet.com/tablets/samsung-galaxy-tab-sprint/4505-3126_7-34194814.html)>. [Exhibit 176]  
 24 <sup>196</sup> “Samsung Galaxy Tab review,” Engadget, November 1, 2010,  
 <[www.engadget.com/2010/11/01/samsung-galaxy-tab-review/](http://www.engadget.com/2010/11/01/samsung-galaxy-tab-review/)>. [Exhibit 177]  
 25 <sup>197</sup> “Samsung Galaxy Tab review,” Engadget, November 1, 2010,  
 <[www.engadget.com/2010/11/01/samsung-galaxy-tab-review/](http://www.engadget.com/2010/11/01/samsung-galaxy-tab-review/)>. [Exhibit 177]  
 26 <sup>198</sup> “Samsung Galaxy Tab review,” Engadget, November 1, 2010,  
 <[www.engadget.com/2010/11/01/samsung-galaxy-tab-review/](http://www.engadget.com/2010/11/01/samsung-galaxy-tab-review/)>. [Exhibit 177]  
 27 <sup>199</sup> Galaxy Tab Commercial, available at <http://www.youtube.com/watch?v=GPfCZC4VHnE>.

1           **Galaxy Tab 10.1 (WiFi)**

2           116. Reviews of the Galaxy Tab 10.1 (WiFi) did not emphasize any of Apple’s Asserted  
3 Intellectual Property. For example, PCMag.com stated that the “Pros” of the Galaxy Tab 10.1  
4 (WiFi) included: “The thinnest tablet currently available. Excellent 10.1-inch HD screen.  
5 Honeycomb 3.1 brings improved multitasking, Flash support, and a higher-quality user  
6 experience. Comes with earbuds—a rarity for a tablet.”<sup>200</sup> Although PCMag.com compares the  
7 design of the Galaxy Tab 10.1 (WiFi) to the iPad 2, the jury did not find that the Galaxy Tab  
8 10.1 (WiFi) infringed any Apple design patent or diluted any Apple trade dress.<sup>201</sup> Similarly,  
9 Laptop Magazine stated that the “Pros” of the Galaxy Tab 10.1 (Wi-Fi) included “Lighter than  
10 the iPad 2; Bright and crisp display; Good battery life; Powerful speakers; Good touch  
11 keyboard.”<sup>202</sup>

12           117. Nor does Samsung’s advertising of the Galaxy Tab 10.1 (WiFi) emphasize any of  
13 Apple’s Asserted Intellectual Property. Samsung’s advertising emphasizes the thinness and  
14 lightness of the device and the high definition screen.<sup>203</sup>

15           118. Even the evidence cited by Mr. Musika demonstrates that Samsung does not rely  
16 on any of Apple’s Asserted Intellectual Property to compete with Apple. For example, Mr.  
17 Musika cites an internal Samsung document where Samsung emphasizes that its strategy for  
18 competing with Apple is to “leverage/maximize carrier marketing support,[and] best mobile  
19 entertainment messaging for GSII” and rely on its “MediaHub, Phone-TV interaction,  
20 Accessories, [and] GSII for end-to-end entertainment.”<sup>204</sup> Another internal Samsung strategy  
21 document cited by Mr. Musika states that the “Galaxy S II Communication Strategy” will  
22 emphasize the Super AMOLED Plus screen, the dual core processor, 4G network, and  
23

24 <sup>200</sup> “Samsung Galaxy Tab 10.1 (Wi-Fi),” PCMag.com, September 15, 2011,  
<<http://www.pcmag.com/article2/0,2817,2386657,00.asp>>. [Exhibit 178]

25 <sup>201</sup> Amended Verdict Form, pp. 7, 10, 14.

26 <sup>202</sup> “Samsung Galaxy Tab 10.1 (Wi-Fi) Review,” Laptop Magazine, June 8, 2011,  
<<http://www.laptopmag.com/review/tablets/samsung-galaxy-tab-10-1-wi-fi.aspx>>. [Exhibit 179]

27 <sup>203</sup> “Galaxy Tab 10.1 (WiFi),” Samsung, <<http://www.samsung.com/uk/consumer/mobile-devices/tablets/tablets/GT-P7510FKDXEU>>. [Exhibit 180]

28 <sup>204</sup> Musika Exhibit 20.

1 entertainment content.<sup>205</sup> Similarly, the GravityTank paper that Mr. Musika points to in support  
 2 of his claims of competition for consumers who had not previously owned an iPhone,<sup>206</sup>  
 3 recommends that for Samsung to succeed, it should focus on “7 Gateway Applications,”<sup>207</sup>  
 4 identified as the “Contacts, Calendar, Photo, Music, Video, Maps/GPS, Widgets.”<sup>208</sup> None of  
 5 these features are related to Apple’s Asserted Intellectual Property.

6 **IV. Apple Is Unlikely to Lose Substantial Market Share or Sales to the Accused Products**

7 119. The level of competition between Samsung’s accused products and Apple’s  
 8 products is overstated throughout Apple’s motion and Mr. Musika’s declaration. In particular,  
 9 Apple and Mr. Musika primarily address whether Samsung and Apple compete generally in the  
 10 smartphone and tablet computer markets. They do not address whether the specific accused  
 11 products compete with or are likely to take market share from Apple. Further, Apple and Mr.  
 12 Musika understate the extent to which the accused products and Apple’s products are  
 13 differentiated as well as the extensive competition with other Android smartphone manufacturers  
 14 that exists in both the smartphone and tablet markets. As a result, Apple and Mr. Musika have  
 15 not established that Apple is likely to lose market share.

16 A. **Mr. Musika Conflates Competition Between Samsung and Apple Generally With**  
 17 **Competition Between Apple Products and the Accused Products**

18 120. Mr. Musika opines that Samsung and Apple are “fierce competitors” in the  
 19 smartphone market. I understand, however, that the relevant inquiry is not whether Apple and  
 20 Samsung are competitors, but instead whether an injunction against selling the specific accused  
 21 products will prevent irreparable harm. I understand that even if an injunction were entered,  
 22 Samsung would remain free to sell other models of smartphones and tablets that would compete  
 23 with Apple’s products. The fact that Apple and Samsung compete generally in the tablet or

24 <sup>205</sup> “iPhone 5 Counter Strategy,” Samsung, March 25, 2011, S-ITC-003351732-759 at ‘759. [Exhibit  
 25 42]

<sup>206</sup> Musika Declaration, ¶ 11.

26 <sup>207</sup> “Touch Portfolio Key Takeaways,” Final Presentation, December 24, 2008, SAMNDCA10805169-  
 175 at ‘175. [Exhibit 19]

27 <sup>208</sup> “Touch Portfolio Key Takeaways,” Final Presentation, December 24, 2008, SAMNDCA10805169-  
 175 at ‘175. [Exhibit 19]

1 smartphone market is, therefore, not highly probative of whether the sale of the specific accused  
2 products will cause irreparable harm to Apple.

3 121. Apple and Mr. Musika’s analysis is divorced from the actual accused products and  
4 more importantly the accused features of the accused products. His analysis assumes that it is  
5 sufficient to refer to Samsung’s historical sales and market share data to identify the impact that  
6 continued sales of the specific accused products will have in the market, including any impact on  
7 Apple. Among the other criticisms that I discuss below, this is a critical assumption to Mr.  
8 Musika’s analysis for which he has failed to provide any evidence.

9 122. For example, Apple and Mr. Musika focus on Samsung’s competitive analysis  
10 documents that acknowledge competition with Apple generally.<sup>209</sup> None of these documents  
11 address competition between Apple products and the specific accused products at issue. The  
12 fact that Samsung has analyzed competition with Apple generally, as well as other smartphone  
13 manufacturers, is not evidence that Apple will be irreparably harmed by the sale of the specific  
14 accused products at issue.

15 123. Further, Apple and Mr. Musika focus on marketing documents discussing  
16 Samsung’s high-end products. The accused smartphones are no longer in the “high-end”  
17 smartphone category following the launch of the Galaxy S III, and instead are sold in lower  
18 segments. The competition between Apple and Samsung is limited in this market segment.

19 [Redacted]  
20 [Redacted]  
21 [Redacted]  
22 [Redacted]

26 <sup>209</sup> Musika Declaration ¶11; Musika Exhibits 5-8.

27 <sup>210</sup> Musika Declaration, p. 5, footnote 10.

[Redacted]



1 **B. Mr. Musika and Apple Overstate the Competition Between Apple and Samsung**  
 2 **in the Smartphone and Tablet Markets**

3 124. Even crediting Apple and Mr. Musika's implicit claim that overall market share  
 4 data were relevant, the sales data do not provide evidence that Samsung has taken substantial  
 5 market share from Apple.

6 **1. The iPhone Continues To Achieve Record Success**

7 125. Apple first released the original iPhone on June 29, 2007. Since that first launch,  
 8 Apple's iPhone line of products has followed a relatively consistent release pattern, at least for  
 9 those devices released on AT&T's network. Since the first launch, Apple has upgraded the  
 10 product on a yearly basis: the iPhone 3G, 3GS, and 4 were released on July 11, 2008, June 19,  
 11 2009, and June 24, 2010 respectively.<sup>211</sup> The Verizon model of the iPhone 4 was first sold on  
 12 February 10, 2011, slightly more than seven months after the iPhone 4 was first released on  
 13 AT&T's network.<sup>212</sup>

14 126. Apple then launched the iPhone 4S on October 14, 2011.<sup>213</sup> Immediately prior to  
 15 launch, Apple "announced pre-orders of its iPhone 4S [had] topped one million in a single day,  
 16 surpassing the previous single day pre-order record of 600,000 held by iPhone 4."<sup>214</sup> A few days  
 17 after sales of the iPhone 4S began, a report issued by investment bank Piper Jaffray on October  
 18 17, 2011 revealed that Apple announced 4 million iPhone 4S units were sold in its 1<sup>st</sup> weekend  
 19 (3 days of sales).<sup>215</sup> A similar report by Deutsche Bank on October 17, 2011 stated that "iPhone  
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22 <sup>211</sup> Sandy Samra, "The History of the iPhone," Bright Hub, May 19, 2011,  
 <<http://www.brighthub.com/mobile/iphone/articles/82615.aspx>>. [Exhibit 16]

23 <sup>212</sup> "Verizon Wireless & Apple Team Up to Deliver iPhone 4 on Verizon," Verizon Wireless, January  
 11, 2011, <<http://news.verizonwireless.com/news/2011/01/pr2011-01-11a.html>>. [Exhibit 17]

24 <sup>213</sup> "Apple Launches iPhone 4S, iOS 5 & iCloud," Apple Press Info, Apple, October 4, 2011,  
 <<http://www.apple.com/pr/library/2011/10/04Apple-Launches-iPhone-4S-iOS-5-iCloud.html>>. [Exhibit  
 25 18]

26 <sup>214</sup> "iPhone 4S Pre-Orders Top One Million in First 24 Hours," Apple Press Info, Apple, October 10,  
 2011, <<http://www.apple.com/pr/library/2011/10/10iPhone-4S-Pre-Orders-Top-One-Million-in-First-24-Hours.html>>. [Exhibit 43]

27 <sup>215</sup> Munster, Gene, "Apple Sells 4m iPhone 4S Units Suggesting Dec. iPhone Growth Ahead of Street,"  
 Piper Jaffray, October 17, 2011, p. 1. [Exhibit 44]

1 demand [was] very robust through [its initial] weekend and calls to outlets across the US and  
2 UK showed long lines, strong demand and frequent stock-outs.”<sup>216</sup>

3 127. Apple’s Quarterly Report for the period ending December 31, 2011—the first  
4 quarter that would have captured iPhone 4S sales since it was launched in mid-October—  
5 discloses worldwide sales of 37.044 million iPhones.<sup>217</sup> In the notes to its financial statements,  
6 Apple claims that “iPhone year-over-year growth reflects strong demand for iPhone in all of the  
7 Company’s operating segments primarily due to the launch of the iPhone 4S in many countries  
8 and expanded distribution with new carriers and resellers.”<sup>218</sup> [REDACTED]

9 [REDACTED]  
10 128. Apple’s sales of the iPhone 4S continued to remain strong in the first quarter of  
11 2012. According to a report released by Canaccord Genuity, “Apple’s latest iPhone was the  
12 best-selling smartphone at Verizon Wireless, AT&T and Sprint in March, continuing a trend that  
13 began when the device first launched last October.”<sup>220</sup> Analysts noted that iPhone sales were  
14 strong enough that “the iPhone [was] outselling all Android phones on Sprint and AT&T,  
15 combined.”<sup>221</sup> The iPhone 4S continued to be the number one selling smartphone in the U.S.  
16 until August 2012 when it lost its top billing to the newly introduced (and not at issue in this  
17 motion) Samsung Galaxy S III—although it retained its number one position at AT&T.<sup>222</sup>  
18 However, industry analysts noted that this slowing in sales was likely not “an indictment on the

19 \_\_\_\_\_  
20 <sup>216</sup> Whitmore, Chris, “EE#261: iPhone 4S is a barnburner,” Deutsche Bank, October 17, 2011, p. 1.  
[Exhibit 45]

21 <sup>217</sup> Apple Form 10-Q for period ending December 31, 2011, p. 25. [Exhibit 46]

22 <sup>218</sup> Apple Form 10-Q for period ending December 31, 2011, p. 26. [Exhibit 46]

23 <sup>219</sup> [REDACTED]

24 Epstein, Zach, “iPhone 4S remains best-selling U.S. smartphone in March, Samsung gains share,”  
25 BGR, April 2, 2012, <<http://www.bgr.com/2012/04/02/iphone-4s-remains-best-selling-u-s-smartphone-in-march-samsung-gains-share/>>. [Exhibit 48]

26 <sup>221</sup> Santo, Michael, “iPhone 4S outselling all Android phones combined at Sprint and AT&T: analyst,”  
27 examiner.com, April 3, 2012, <<http://www.examiner.com/technology-in-national/iphone-4s-outselling-all-android-phones-at-sprint-and-at-t-analyst>>. [Exhibit 49]

28 <sup>222</sup> Hughes, Neil, “Galaxy S III passes Apple’s iPhone 4S, becomes top selling US smartphone,”  
appleinsider.com, September 4, 2012,  
<[http://appleinsider.com/articles/12/09/04/galaxy\\_s\\_iii\\_passes\\_apples\\_iphone\\_4s\\_becomes\\_top\\_selling\\_us\\_smartphone](http://appleinsider.com/articles/12/09/04/galaxy_s_iii_passes_apples_iphone_4s_becomes_top_selling_us_smartphone)>. [Exhibit 192]

1 demand for Apple products, but merely a pause as consumers wait for the next iteration” of the  
2 iPhone which was expected within a week of the article.<sup>223</sup>

3 129. On September 21, 2012, Apple released the iPhone 5.<sup>224</sup> In a September 17, 2012  
4 press release, Apple announced that pre-orders of the iPhone 5 topped two million in just the  
5 first 24 hours.<sup>225</sup> Apple stated that this is “more than double the previous record of one million  
6 held by the iPhone 4S.”<sup>226</sup> A week later, on September 24, 2012, Apple announced that it had  
7 sold five million iPhone 5 units in the three days after its launch.<sup>227</sup> Demand was so strong that  
8 shoppers camped in line for days in front of Apple stores to ensure they would receive an iPhone  
9 5 when it was released.<sup>228</sup> In light of the success, Apple predicted that it would sell 27 million  
10 iPhones in the September quarter and another 46.5 million in the December quarter of 2012.<sup>229</sup>  
11 Demand for the iPhone 5 is so high that it has exceeded Apple’s ability to supply the new  
12 product. Reports indicate that the ship time for a new iPhone 5 is three to four weeks after  
13 ordering.<sup>230</sup>

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16 <sup>223</sup> Cheng, Roger, “Upset! iPhone 4S surrenders U.S. crown to Galaxy S3,” CNet, September 4, 2012, <  
17 [http://news.cnet.com/8301-13579\\_3-57505552-37/upset-iphone-4s-surrenders-u.s-crown-to-galaxy-s3/](http://news.cnet.com/8301-13579_3-57505552-37/upset-iphone-4s-surrenders-u.s-crown-to-galaxy-s3/)>.  
[Exhibit 193]

18 <sup>224</sup> iPhone 5 Pre-Orders Top Two Million in First 24 Hours, Apple Press Info, September 17, 2012,  
19 <[http://www.apple.com/pr/library/2012/09/17iPhone-5-Pre-Orders-Top-Two-Million-in-First-24-](http://www.apple.com/pr/library/2012/09/17iPhone-5-Pre-Orders-Top-Two-Million-in-First-24-Hours.html)  
20 [Hours.html](http://www.apple.com/pr/library/2012/09/17iPhone-5-Pre-Orders-Top-Two-Million-in-First-24-Hours.html)>. [Exhibit 50]

21 <sup>225</sup> iPhone 5 Pre-Orders Top Two Million in First 24 Hours, Apple Press Info, September 17, 2012,  
22 <[http://www.apple.com/pr/library/2012/09/17iPhone-5-Pre-Orders-Top-Two-Million-in-First-24-](http://www.apple.com/pr/library/2012/09/17iPhone-5-Pre-Orders-Top-Two-Million-in-First-24-Hours.html)  
23 [Hours.html](http://www.apple.com/pr/library/2012/09/17iPhone-5-Pre-Orders-Top-Two-Million-in-First-24-Hours.html)>. [Exhibit 50]

24 <sup>226</sup> iPhone 5 Pre-Orders Top Two Million in First 24 Hours, Apple Press Info, September 17, 2012,  
25 <[http://www.apple.com/pr/library/2012/09/17iPhone-5-Pre-Orders-Top-Two-Million-in-First-24-](http://www.apple.com/pr/library/2012/09/17iPhone-5-Pre-Orders-Top-Two-Million-in-First-24-Hours.html)  
26 [Hours.html](http://www.apple.com/pr/library/2012/09/17iPhone-5-Pre-Orders-Top-Two-Million-in-First-24-Hours.html)>. [Exhibit 50]

27 <sup>227</sup> iPhone 5 First Weekend Sales Top Five Million, September. 24, 2012,  
28 <<http://www.apple.com/pr/library/2012/09/24iPhone-5-First-Weekend-Sales-Top-Five-Million.html>>.  
[Exhibit 51]

29 <sup>228</sup> John D. Sutter, How to Wait in an iPhone 5 Line, CNN Tech, September 20, 2012,  
30 <<http://www.cnn.com/2012/09/19/tech/mobile/iphone-5-line-tips/index.html>>. [Exhibit 52]

31 <sup>229</sup> Poornima Gupta & Jennifer Saba, Apple Sells Over 5 Million iPhone 5 Pre-Orders Top Two Million  
32 in First, Supply Constraints Loom, Reuters, Sept. 24 Hours, Apple Press Info, September 17, 2012,  
33 <<http://mobile.reuters.com/article/idUSBRE88N0HL20120924?irpc=932>>. [Exhibit 53]

34 <sup>230</sup> Lance Whitney, Apple Maps SNAFU Isn’t Hurting iPhone 5 Sales, Say Analysts, CNet, October  
35 3, 2012, <[http://news.cnet.com/8301-13579\\_3-57525319-37/apple-maps-snafu-isnt-hurting-iphone-5-sales-](http://news.cnet.com/8301-13579_3-57525319-37/apple-maps-snafu-isnt-hurting-iphone-5-sales-say-analysts/?part=rss&subj=news&tag=title)  
36 [say-analysts/?part=rss&subj=news&tag=title](http://news.cnet.com/8301-13579_3-57525319-37/apple-maps-snafu-isnt-hurting-iphone-5-sales-say-analysts/?part=rss&subj=news&tag=title)>. [Exhibit 20]

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130. With each new device (following the original release), the iPhone's sales are reinvigorated. As Figure 1 shows, the underlying data of which was produced by Apple,

[Redacted text]

[Large redacted block]

131. The limited impact of Samsung's smartphone sales on Apple can be seen when comparing market shares over time. As Figure 2 demonstrates, Apple increased its market share

[Redacted text]

<sup>235</sup> Exhibit 2, Schedule 3.1.

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[Redacted]

[Redacted]. In the last quarter of 2011, Apple  
[Redacted] even in the face of  
competition by the Samsung smartphones accused of infringement in this lawsuit.

[Redacted]

132. Mr. Musika states that “Samsung’s infringing sales have also coincided with losses in Apple’s market share.”<sup>235</sup> Even the evidence Mr. Musika cites, however, attributes this to “consumers pulling back in anticipation of an iPhone 5 introduction” that created “pent-up demand” that will allow Apple “to recover quickly in 4Q12.”<sup>236</sup> Although relevant data is not

<sup>234</sup> Exhibit 2, Schedule 1.1.  
<sup>235</sup> Musika Declaration, ¶ 31.  
<sup>236</sup> Musika Exhibit 28.

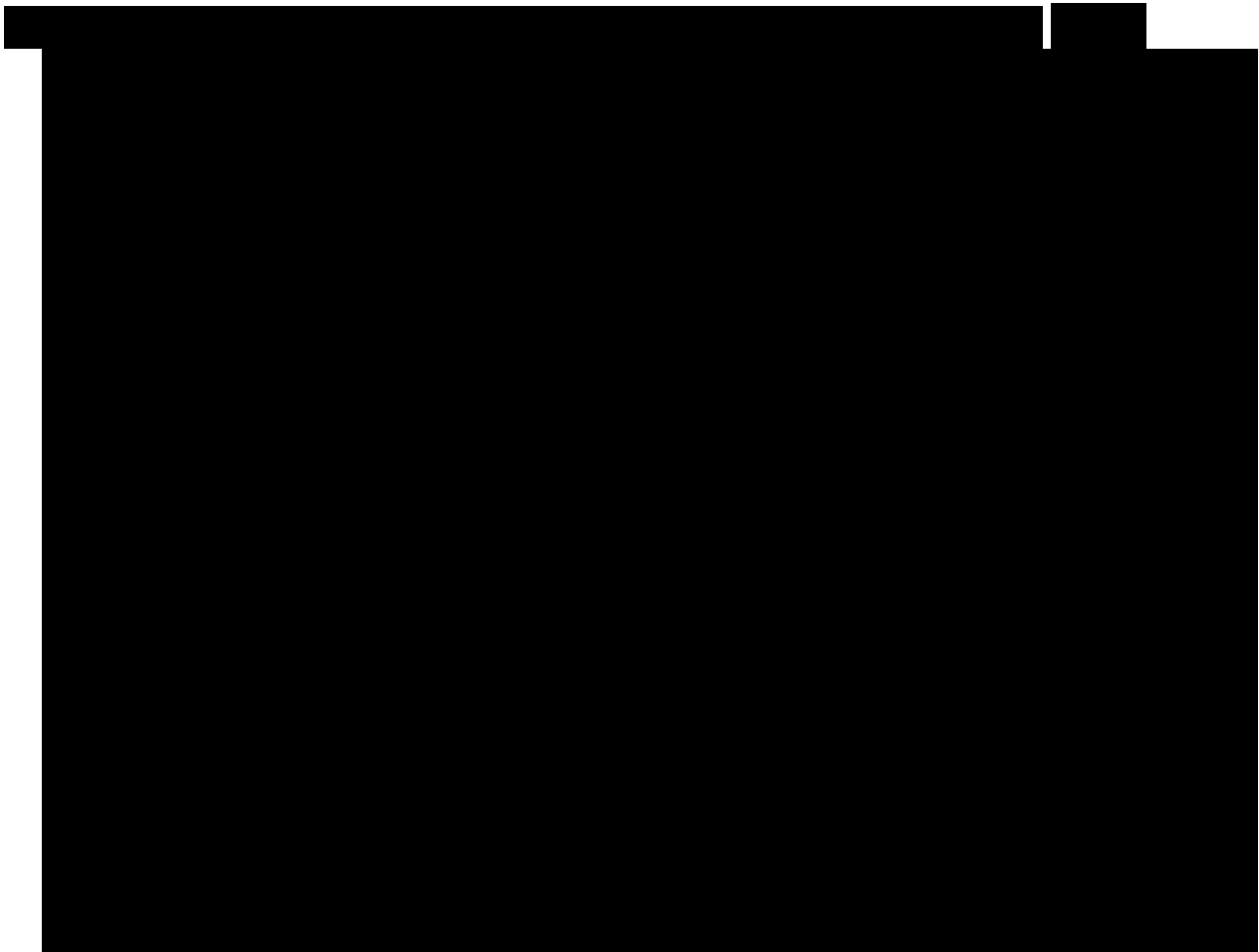
1 yet available, reports of Apple’s record initial sales of the iPhone 5 suggest that a similar spike  
2 in Apple’s smartphone sales has occurred recently.

3 133. The success of the iPhone and limited impact of Samsung on Apple’s iPhone sales  
4 is further demonstrated by Apple’s share of metrics that manufacturers value the most: revenue  
5 and profit. [REDACTED]

6 [REDACTED]  
7 [REDACTED]  
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134. In addition, Apple has increased its share of the most important market metric—

profits. [Redacted]

<sup>237</sup> Exhibit 2, Schedule 2.1.

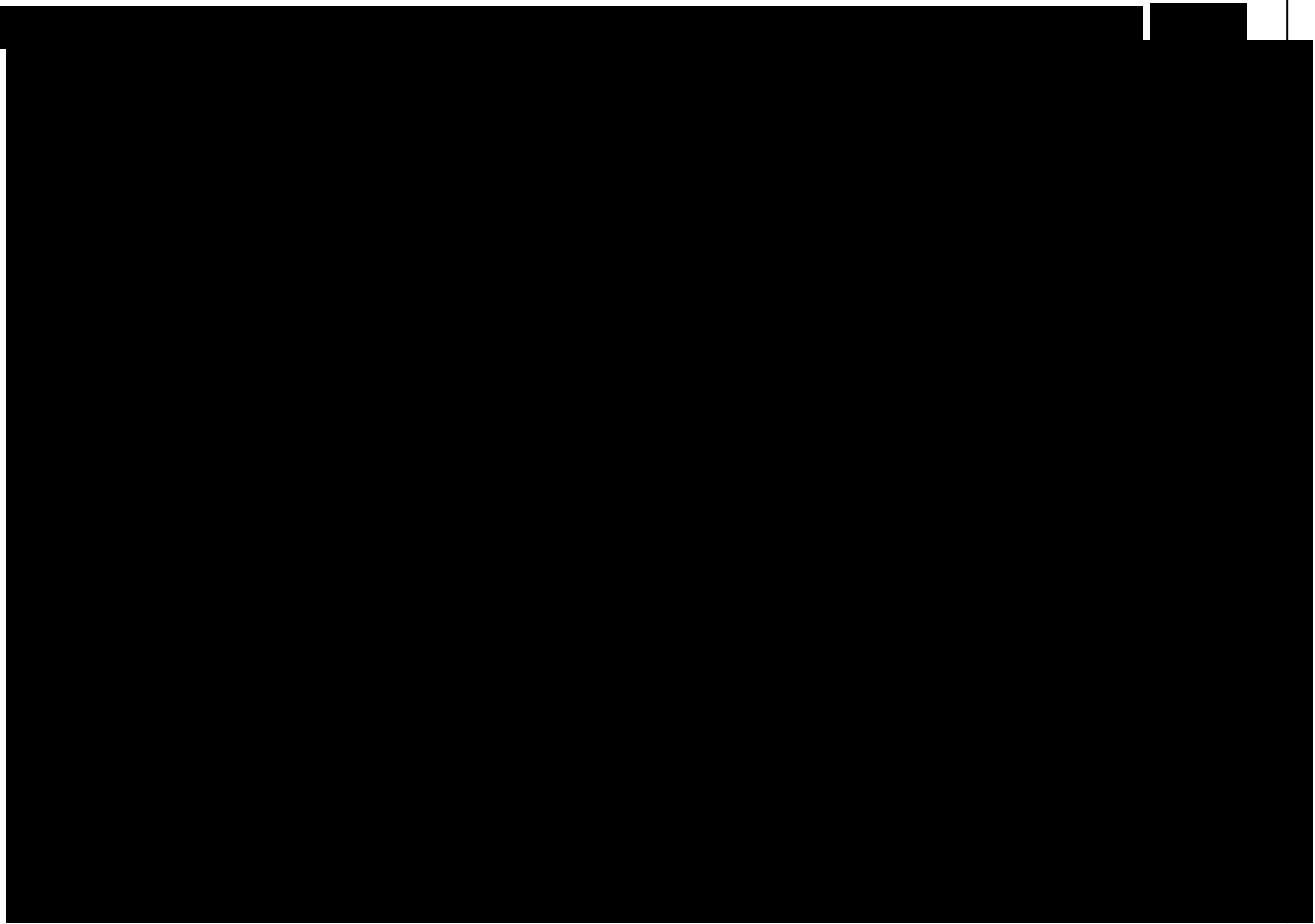
<sup>238</sup> IDC’s data does not include data on manufacturer profit for smartphones. Strategy Analytics produces a report that estimates operating profits by manufacturer for handset manufacturers on a worldwide basis. Although it would be preferable to rely on a data source limited to the U.S. sales of smartphones, the Strategy Analytics report is the most consistent provider of profit data that I have reviewed.

<sup>239</sup> Another source confirms Apple’s nearly 75 percent profit share in Q4 2011. (Dediu, Horace, “First: Apple’s rank in mobile phone profitability and revenues,” Asymco, February 3, 2012, <<http://www.asymco.com/2012/02/03/first-apples-rank-in-mobile-phone-profitability-and-revenues/>>.)

[Exhibit 21]  
<sup>240</sup> Exhibit 2, Schedule 1.3.



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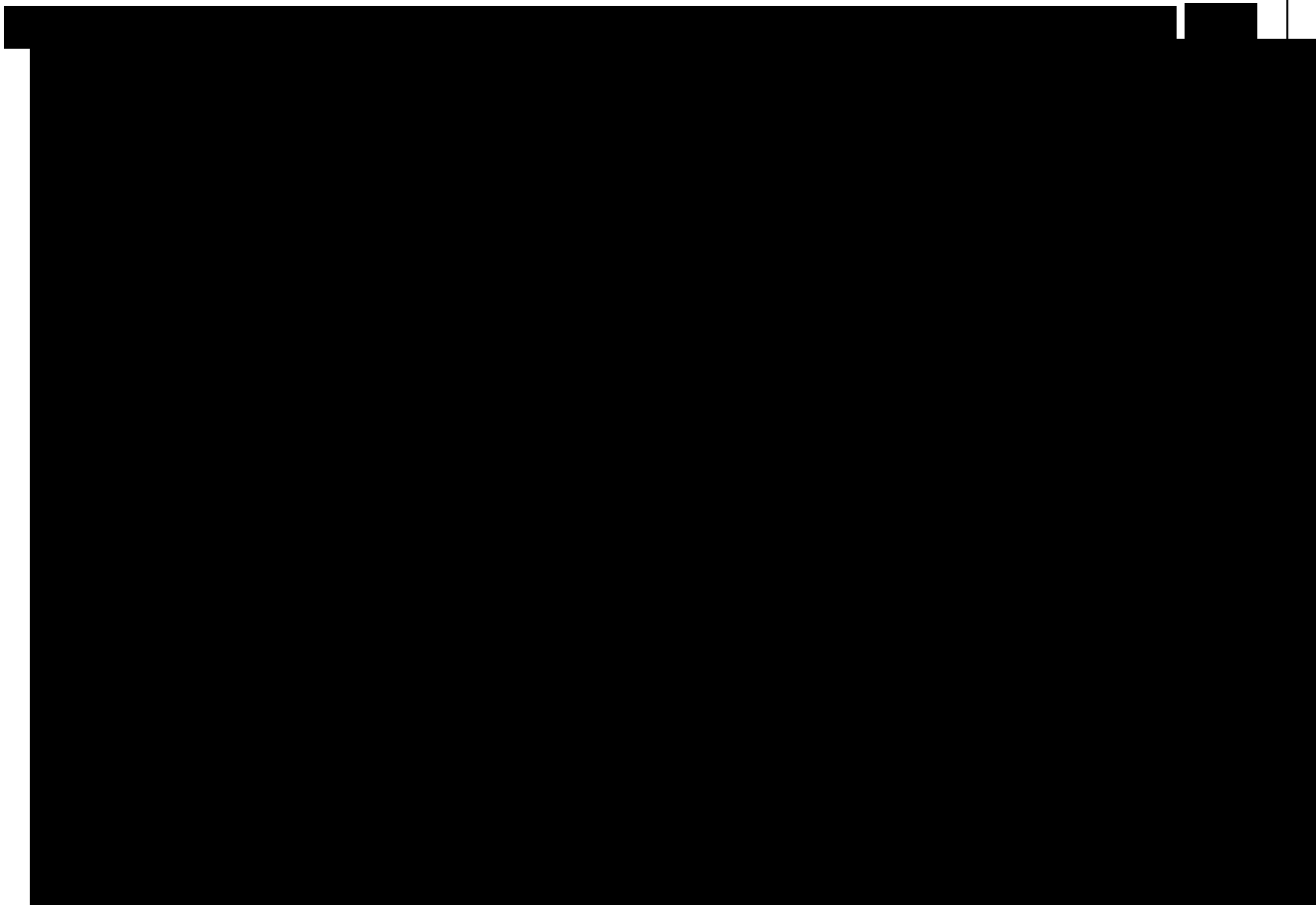
135. The sales data do not provide evidence that Samsung is having a substantial effect on Apple's sales. Throughout this several year period, [REDACTED]

[REDACTED] In light of the record success of the iPhone 5 since its recent launch, it is likely that Apple's share of industry profits will increase [REDACTED]

136. The lack of impact that Samsung has had on Apple's products is further demonstrated by Apple's success in charging consistently high prices for its products relative to its competitors in the face of competition. Figure 5 summarizes average selling prices in the U.S. for all Apple iPhones and Samsung's line of smartphones, compiled by IDC.

<sup>241</sup> Exhibit 2, Schedule 1.3.

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137. Apple’s consistent and continued success in [REDACTED] [REDACTED] provides evidence that Samsung’s sales are not causing irreparable harm to Apple. If Samsung was truly impacting Apple, one would expect either Apple’s market share to drop or its price margin to drop—neither one of which is occurring based on the data that I have reviewed.

**2. The iPad Continues to Achieve Record Success**

138. The negligible impact of the Samsung tablet computers is also demonstrated by Apple’s continuing success with each new iPad release.

139. While Apple did not issue a press release discussing first weekend sales of its iPad 2, media reports indicate that it sold more quickly than its predecessor. Apple’s second-generation

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<sup>242</sup> Exhibit 2, Schedule 2.2.

1 tablet became available in stores on March 11, 2011.<sup>243</sup> A Business Insider article published on  
 2 March 13, 2011 cited Gene Munster of Piper Jaffray as estimating that “Apple sold about 400,000  
 3 to 500,000 iPads [during the first] weekend, vs. 300,000 original iPads during its launch weekend  
 4 ...”<sup>244</sup> A day later, Scott Sutherland of Wedbush Securities said that his firm “would not be  
 5 surprised to see Apple sell closer to 1 million iPad 2’s in the opening weekend.”<sup>245</sup> Nearly a  
 6 month later, an April 6, 2011 eWeek article cited a Digitimes report that stated “[s]ales of iPad 2  
 7 [were] running at a rate faster than its predecessor.”<sup>246</sup>

8 140. Apple released the new iPad into stores on March 16, 2012.<sup>247</sup> Three days later,  
 9 Apple announced that it had sold three million new iPads since its launch.<sup>248</sup> This prompted Philip  
 10 Schiller, Apple’s senior vice president of Worldwide Marketing, to say that “[t]he new iPad is a  
 11 blockbuster with three million sold – the strongest iPad launch yet ...”<sup>249</sup>

12 141. More than a month later, PCMag.com reported that “Apple remain[ed] supply-  
 13 constrained on its new iPad, and [would] remain so for at least part of the [then] current quarter  
 14 ...”<sup>250</sup> Peter Oppenheimer, Apple’s chief financial officer, explained that “[t]he new iPad [was]  
 15 on fire, and [Apple was] selling them as fast as [it could] make them ...”<sup>251</sup>

16 142. As a result, Apple’s iPad sales have grown, even during this litigation:

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 18 <sup>243</sup> iPad 2 Arrives Tomorrow, Apple Press Info, March 10, 2011,

<<https://www.apple.com/pr/library/2011/03/10iPad-2-Arrives-Tomorrow.html>>. [Exhibit 181]

19 <sup>244</sup> SURVEY SAYS: 70% Of iPad 2 Buyers Were First-Time iPad Owners, Business Insider, March 13,  
 20 2011, <<http://www.businessinsider.com/ipad-2-survey-2011-3>>. [Exhibit 184]

<sup>245</sup> Apple iPad 2 sales seen clearing 1 million units, Reuters, March 14, 2011,

<<http://www.reuters.com/article/2011/03/14/us-apple-research-idUSTRE72D30020110314>>. [Exhibit 82]

21 <sup>246</sup> “Apple iPad 2 Selling Faster Than Original: Report,” eWeek, April 6, 2011,

<<http://www.eweek.com/c/a/Mobile-and-Wireless/Apple-iPad-2-Selling-Faster-Than-Original-Report-215840>>. [Exhibit 185]

22 <sup>247</sup> Apple Launches New iPad, Apple Press Info, March 7, 2012,

<<https://www.apple.com/pr/library/2012/03/07Apple-Launches-New-iPad.html>>. [Exhibit 182]

23 <sup>248</sup> New iPad Tops Three Million, Apple Press Info, March 19, 2012,

<<http://www.apple.com/pr/library/2012/03/19New-iPad-Tops-Three-Million.html>>. [Exhibit 187]

24 <sup>249</sup> New iPad Tops Three Million, Apple Press Info, March 19, 2012,

<<http://www.apple.com/pr/library/2012/03/19New-iPad-Tops-Three-Million.html>>. [Exhibit 187]

25 <sup>250</sup> Apple’s New iPad Still in Short Supply, PCMag.com, April 24, 2012,

<<http://www.pcmag.com/article2/0,2817,2403483,00.asp>>. [Exhibit 188]

26 <sup>251</sup> Apple’s New iPad Still in Short Supply, PCMag.com, April 24, 2012,

<<http://www.pcmag.com/article2/0,2817,2403483,00.asp>>. [Exhibit 188]

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143. As can be seen from Apple’s sales data, the release of the accused products appear to have had little or no meaningful effect on Apple’s sales of its iPhone or iPad.

144. Moreover, the new iPad’s record success was accomplished despite strong competition from the older iPad 2, as Apple kept this previous version on the market, but lowered the price, thus creating competition amongst Apple’s *own* models. In fact, a June 6, 2012 Forbes article, citing a Consumer Intelligence Research Partners, LLC report, noted that the iPad 2 appeared to be the biggest competitor for sales of the New iPad.<sup>253</sup> The article also

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<sup>252</sup> Exhibit 2, Schedule 3.2.

<sup>253</sup> Apple’s Biggest Competition For The New iPad: The iPad 2, Forbes, June 7, 2012, <<http://www.forbes.com/sites/alexknapp/2012/06/07/apples-biggest-competition-for-the-new-ipad-the-ipad2/>>. [Exhibit 186]

1 suggested that it appeared that “frugal consumers” were purchasing the lower-priced, older  
2 version of the iPad contributing to the success of overall iPad sales.<sup>254</sup>

3 **C. Apple and Samsung Do Not Compete in a Two Player Market**

4 145. The fact that Apple and Samsung’s market shares in the smartphone and tablet  
5 markets are not highly correlated is likely due in large part to the fact that they do not compete in  
6 two-player markets. Mr. Musika and Apple contend that Apple and Samsung are “direct”  
7 competitors. Notably, however, neither the tablet nor the smartphone markets are two-player  
8 markets. Neither Apple nor Mr. Musika contends otherwise. The fact that this case does not  
9 involve a two-player market means that it is not necessarily the case that any given Samsung  
10 customer would have otherwise purchased an Apple product.

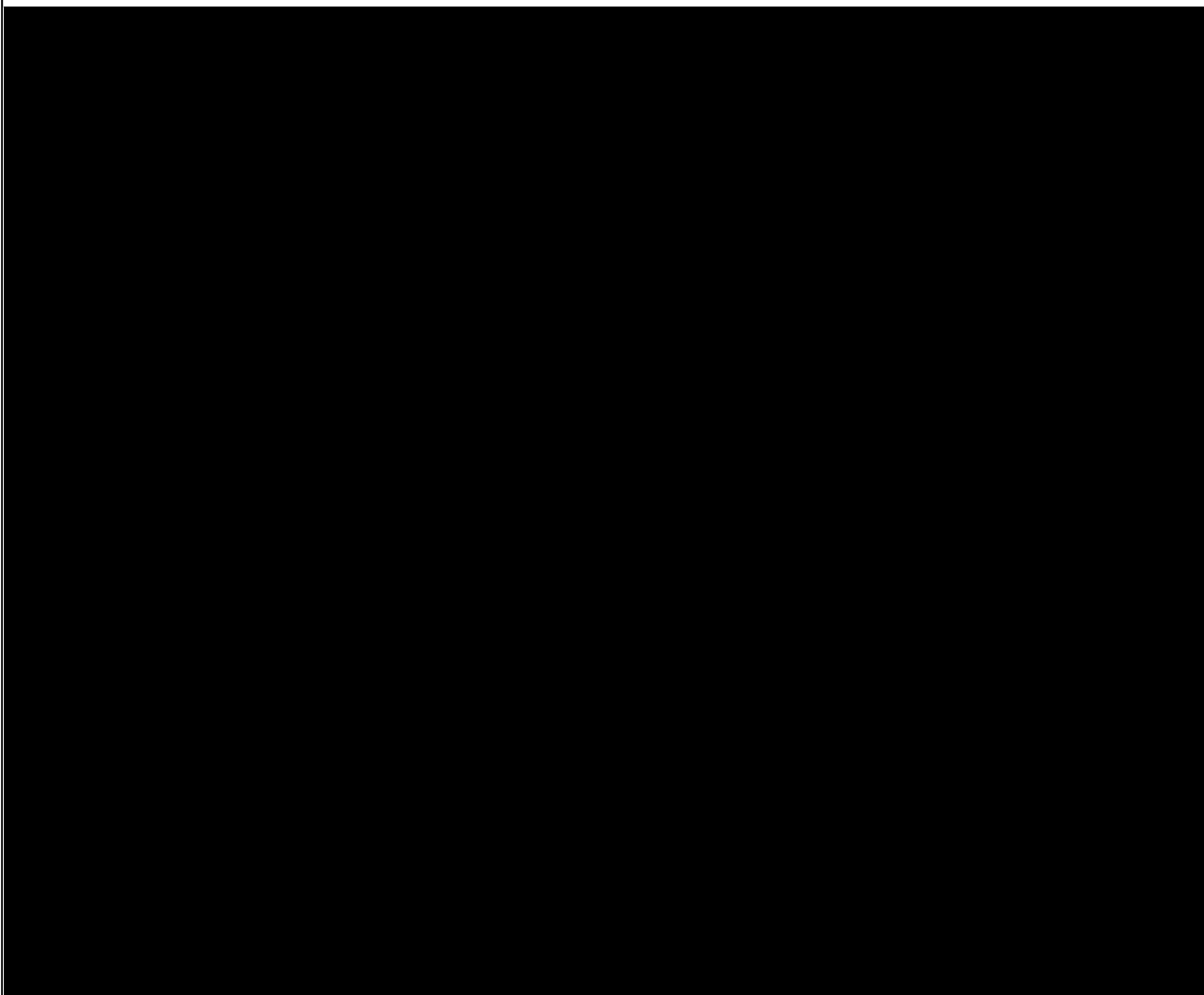
11 **1. The Smartphone Market Has Many Competitors**

12 146. As shown in Figure 7, both Samsung and Apple face serious competition in the  
13 smartphone industry from other manufacturers, including HTC, Nokia, Motorola, LG, Huawei,  
14 and RIM. [REDACTED]

15 [REDACTED] The smartphone industry is therefore not a two-player market.

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25 <sup>254</sup> Apple’s Biggest Competition For The New iPad: The iPad 2, Forbes, June 7, 2012,  
26 <[http://www.forbes.com/sites/alexknapp/2012/06/07/apples-biggest-competition-for-the-new-ipad-the-](http://www.forbes.com/sites/alexknapp/2012/06/07/apples-biggest-competition-for-the-new-ipad-the-ipad2/)  
27 [ipad2/](http://www.forbes.com/sites/alexknapp/2012/06/07/apples-biggest-competition-for-the-new-ipad-the-ipad2/)>. [Exhibit 186]  
28 [REDACTED]

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147. Recent data from comScore further demonstrates that Apple faces competition from numerous other manufacturers in the mobile phone market.<sup>257</sup> The comScore data is based on a survey of 30,000 U.S. mobile subscribers. The survey demonstrates that, despite competition from the accused products, Apple’s mobile phone market share actually grew from May to August this year, even prior to the launch of the iPhone 5.

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<sup>256</sup> Exhibit 2, Schedule 1.1.

<sup>257</sup> comScore Reports August 2012 U.S. Mobile Subscriber Market Share, <[http://www.comscore.com/Press\\_Events/Press\\_Releases/2012/10/comScore\\_Reports\\_August\\_2012\\_U.S.\\_Mobile\\_Subscriber\\_Market\\_Share](http://www.comscore.com/Press_Events/Press_Releases/2012/10/comScore_Reports_August_2012_U.S._Mobile_Subscriber_Market_Share)>. [Exhibit 23]

<b>Top Mobile OEMs</b>			
<b>3 Month Avg. Ending Aug. 2012 vs. 3 Month Avg. Ending May 2012</b>			
<b>Total U.S. Mobile Subscribers (Smartphone &amp; Non-Smartphone) Ages 13+</b>			
<b>Source: comScore MobiLens</b>			
	<b>Share (%) of Mobile Subscribers</b>		
	<b>May-12</b>	<b>Aug-12</b>	<b>Point Change</b>
<i>Total Mobile Subscribers</i>	100.0%	100.0%	N/A
Samsung	25.7%	25.7%	0.0
LG	19.1%	18.2%	-0.9
Apple	15.0%	17.1%	2.1
Motorola	12.0%	11.2%	-0.8
HTC	6.1%	6.3%	0.2

148. That same comScore survey also determined the percentage of smartphone users that used various platforms. The survey found that Apple's share of the smartphone operating system market has grown to 34.3%, and that it faces competition from various other operating systems, including those offered by Google, RIM, Microsoft, and Symbian. Again, this growth was despite anticipation of the launch of the iPhone 5.

<b>Top Smartphone Platforms</b>			
<b>3 Month Avg. Ending Aug. 2012 vs. 3 Month Avg. Ending May 2012</b>			
<b>Total U.S. Smartphone Subscribers Ages 13+</b>			
<b>Source: comScore MobiLens</b>			
	<b>Share (%) of Smartphone Subscribers</b>		
	<b>May-12</b>	<b>Aug-12</b>	<b>Point Change</b>
<i>Total Smartphone Subscribers</i>	100.0%	100.0%	N/A
Google	50.9%	52.6%	1.7
Apple	31.9%	34.3%	2.4
RIM	11.4%	8.3%	-3.1
Microsoft	4.0%	3.6%	-0.4
Symbian	1.1%	0.7%	-0.4

149. The evidence cited by Apple also indicates that Samsung competes with companies other than Apple. For example, Apple and Mr. Musika focus on Samsung's marketing documents concerning Samsung's acknowledging competition with Apple. Those same documents also address Samsung's strategy for competing with other competitors, such as Nokia.<sup>258</sup>

<sup>258</sup> Musika Exhibit 7.



## 2. The Tablet Market Has Many Competitors

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150. Apple relies on this Court’s preliminary injunction ruling from mid-2011 that concluded that Apple was likely to suffer irreparable harm because: “(1) Apple and Samsung were direct competitors, [and] (2) together the two companies held a relatively large market share, with few other competitors in the relevant market.”<sup>259</sup> The underpinnings of this Court’s conclusion have drastically changed. Since that time there have been significant changes in the tablet market that render those findings inapplicable.

151. First, the market data the court relied upon in making its determination was *global* data that did not accurately reflect Samsung’s market share in the U.S. in the first part of 2011.<sup>260</sup> For example, Samsung’s North America market share (U.S. and Canada only) in 2011 ranged from approximately 3.5% to just over 6% on a quarterly basis.<sup>261</sup> This is significantly less than the 12.1%-19.4% quarterly market share for *global* Samsung shipments presented by Apple in support of its previous motion<sup>262</sup> and cited to by the Court in finding the tablet market contained two major competitors—Apple and Samsung—that comprised over 75% of the tablet market.<sup>263</sup>

152. Indeed, since the summer of 2011, when the market data that the Court relied upon for its prior findings was generated, numerous new tablet manufacturers have entered the tablet market and Samsung’s market share has diminished to a minimal amount. In fact, Amazon with its Kindle product line entered the tablet market to great success garnering almost 29% of the overall North American tablet market in Q4 2011 and continued this success in 2012, retaining a 12.2% market share as of Q2.<sup>264</sup> Others have also entered the tablet market, including Barnes & Noble with its Nook<sup>265</sup> media tablet which has had significant success as well.<sup>266</sup> In comparison,

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<sup>259</sup> Order Granting Preliminary Injunction, June 26, 2012, p. 5.

<sup>260</sup> Reply Declaration of Terry L. Musika, CPA in Support of Apple’s Motion for a Preliminary Injunction, September 30, 2011, Exhibit 3

<sup>261</sup> Exhibit 2, Schedule 1.2.

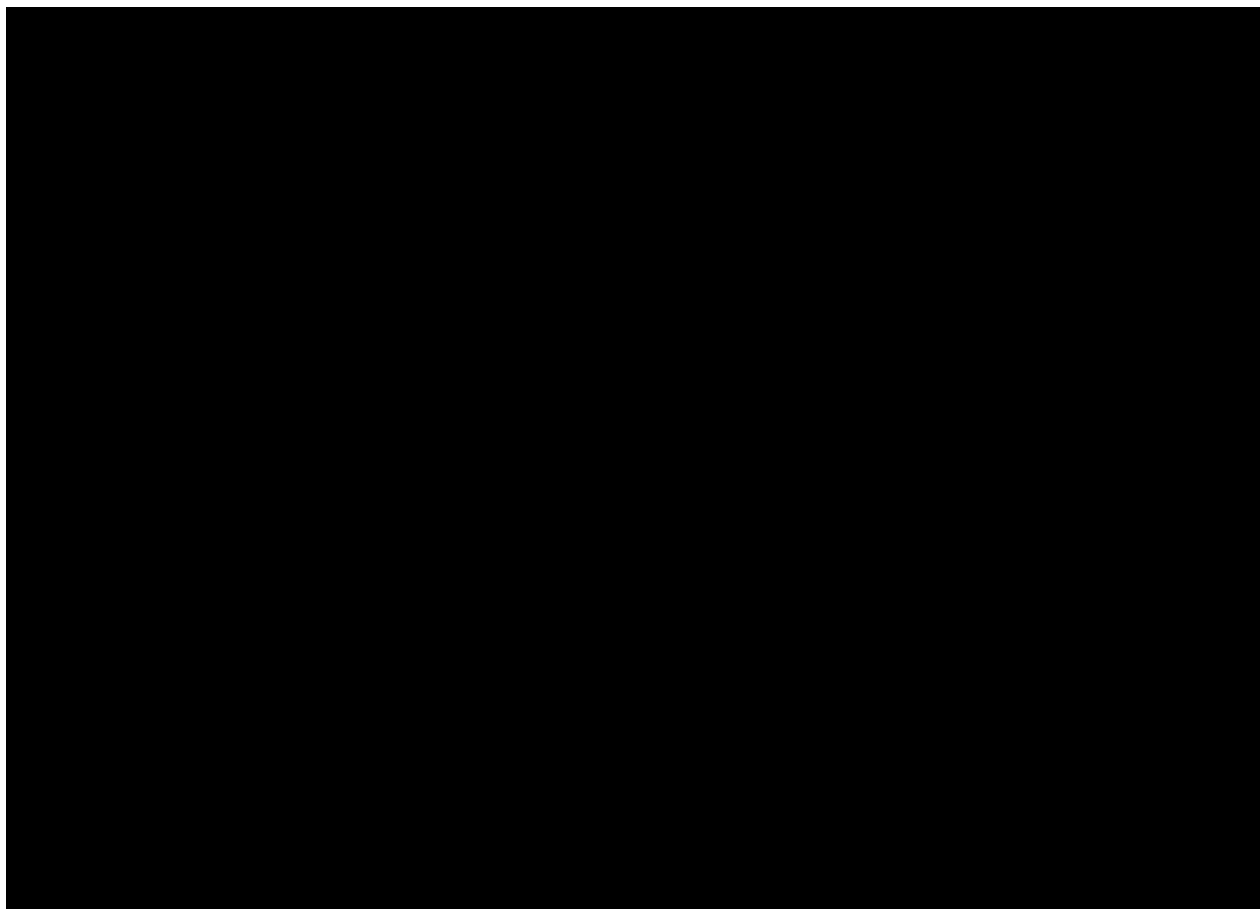
<sup>262</sup> Reply Declaration of Terry L. Musika, CPA in Support of Apple’s Motion for a Preliminary Injunction, September 30, 2011, Exhibit 3.

<sup>263</sup> Order Denying Motion for Preliminary Injunction, December 2, 2011, p. 49.

<sup>264</sup> Exhibit 2, Schedule 1.2.

<sup>265</sup> Strategy Analytics states that “The tablet category refers to a slate-shaped, mobile or portable, casual-computing device, equipped with a finger-operated touchscreen or stylus. This would be typified by the high-profile announcement of the Apple iPad or Amazon Fire. Some products within the category will (footnote continued)

1 as of Q2 2012 (the most recent data available), Samsung’s North American tablet market share  
2 stood at only 4.8%.<sup>267</sup> The Figure below demonstrates the number of new entrants and Samsung’s  
3 minimal share in the relevant tablet market over the 2011 through mid-2012 time period.<sup>268</sup>



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153. Even the evidence Mr. Musika cites demonstrates that it is unlikely that Samsung will take tablet market share from Apple. For example, Mr. Musika cites an Oppenheimer report

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be referred to by the OEMs as slates or hybrids; we will include these as tablets. We include tablets with both WAN and LAN technologies. We do NOT any of the older generation of 'Windows XP Tablet PC Edition' devices. EBook Readers (EBR) are NOT included.” “Global Tablet Vendor Market Share by Region: Q2 2012,” Strategy Analytics, August 2012, Tab 11. [Exhibit 183]

<sup>266</sup> Exhibit 2, Schedule 1.2.

<sup>267</sup> Exhibit 2, Schedule 1.2.

<sup>268</sup> Samsung’s relatively small share of the tablet market is confirmed by the portions of the documents Mr. Musika chose to rely upon but did not attach to his declaration. For example, a Samsung presentation states that in 2011, Apple sold 17.4 million tablets, Amazon sold 5 million, Barnes & Noble sold 1.5 million, and Samsung sold only 1 million. (“STA Competitive Situation Paradigm Shift,” Samsung, SAMNDCA11547401-470 at ‘406. [Exhibit 54]

<sup>269</sup> Exhibit 2, Schedule 1.2.

1 that finds that there are only two “meaningful 2H12 wild-cards” in the tablet market: Google’s  
2 new Nexus 7 tablet and Windows 8 tablets, neither of which are provided by Samsung.<sup>270</sup>

3 154. The number of competitors is also expanding, adding to consumers’ options. For  
4 example, Google teamed with OEM manufacturer ASUS to develop the Nexus 7 tablet, released in  
5 mid-2012 and which kick started Google’s foray into the tablet market.<sup>271</sup> Industry estimates are  
6 that up to one million Nexus 7 units may have been sold in Q3 2012 (Google has not provided  
7 sales data at this point).<sup>272</sup> Additional reports indicate Google is planning on introducing a \$99  
8 Nexus tablet in Q4 2012 and a 32GB Nexus 7 iteration – in addition to today’s 8GB (\$199) and  
9 16GB (\$249) versions.<sup>273</sup> Furthermore, Microsoft is also poised to enter the tablet market with the  
10 Surface being launched on October 19, 2012 with an estimated \$1.5 billion advertising budget.<sup>274</sup>

11 **D. The Market Share for the Accused Products Is Small and Declining**

12 155. Apple’s claim that it will be irreparably harmed by the sale of the accused products  
13 is belied by the fact that the market share of those products is small and declining. Further,  
14 many of those products have been or soon will be discontinued. Apple’s motion and Mr.  
15 Musika’s declaration do not address this market share data for the accused products. Instead,  
16 Apple and Mr. Musika cite evidence and market share data related to Samsung as a whole or  
17 data that includes non-accused products, even though Apple acknowledges that at most eight  
18 accused smartphones remain on the market.<sup>275</sup> Apple and Mr. Musika’s analysis therefore is

21 <sup>270</sup> Musika Exhibit 28.

22 <sup>271</sup> Smith, Chris, “Up to 1 million Nexus 7 tablets sold by Google so far?,” androidauthority.com,  
October 18, 2012, <[www.androidauthority.com/1-million-nexus-7-tablets-sold-google-123963/](http://www.androidauthority.com/1-million-nexus-7-tablets-sold-google-123963/)>. [Exhibit  
209]

23 <sup>272</sup> Smith, Chris, “Up to 1 million Nexus 7 tablets sold by Google so far?,” androidauthority.com,  
October 18, 2012, <[www.androidauthority.com/1-million-nexus-7-tablets-sold-google-123963/](http://www.androidauthority.com/1-million-nexus-7-tablets-sold-google-123963/)>. [Exhibit  
209]

24 <sup>273</sup> Mlot, Stephanie, “Report: Google Prepping \$99 Tablet, 32GB Nexus 7,” PCMag.com, October 17,  
2012, <<http://www.pcmag.com/article2/0,2817,2411064,00.asp>>. [Exhibit 210]

25 <sup>274</sup> Hollister, Sean, “With Surface Looming, Microsoft Fails to Explain Windows 8 vs. Windows RT to  
26 Consumers,” October 17, 2012, <[http://www.theverge.com/2012/10/17/3514556/windows-8-vs-windows-  
27 rt-surface-confused-microsoft-store-employees](http://www.theverge.com/2012/10/17/3514556/windows-8-vs-windows-rt-surface-confused-microsoft-store-employees)>. [Exhibit 211]

28 <sup>275</sup> Declaration of MaryLee Robinson, ¶ 8.

1 admittedly based on products that have not been found to violate any of Apple's Asserted  
2 Intellectual Property Rights and products that are no longer for sale.

3 156. As noted above, the majority of the accused products are no longer being sold by  
4 Samsung. I understand that MaryLee Robinson found that several of the accused smartphones  
5 had been discontinued as of September 2012. The only accused smartphones that Ms. Robinson  
6 found to remain on the market are the Droid Charge, Galaxy Prevail, Galaxy S 4G, Galaxy S II  
7 (AT&T Edition), Galaxy S II (Epic 4G Touch), Galaxy S II (Skyrocket), Galaxy S II (T-Mobile  
8 Edition), and the Galaxy S Showcase.

9 157. I have been informed that Samsung is even discontinuing additional products that  
10 are the subject of Apple's motion.<sup>276</sup> Samsung will continue to sell the Galaxy S II (T-Mobile)  
11 and the Galaxy S II (Epic 4G Touch) beyond the date of the hearing.<sup>277</sup> [REDACTED]

12 [REDACTED]  
13 [REDACTED]  
14 [REDACTED] Mr. Musika therefore  
15 vastly overstates the degree of competition that Apple will face from the accused products.<sup>280</sup>

16 <sup>276</sup> Declaration of Hee-chan Choi In Support of Samsung's Opposition To Apple's Motion For A  
17 Permanent Injunction And Damages Enhancement, And Apple's Motion For Judgment As A Matter of  
18 Law (Renewed), New Trial, And Amended Judgment, October 19, 2012 ("Choi Declaration"). *See also*  
19 Declaration of David Kim In Support of Samsung's Opposition To Apple's Motion For A Permanent  
20 Injunction And Damages Enhancement, And Apple's Motion For Judgment As A Matter of Law  
21 (Renewed), New Trial, And Amended Judgment, October 19, 2012. *See also* Declaration of Corey  
22 Kerstetter in support of Samsung's Opposition to Apple's Motion for a Permanent Injunction and Damages  
23 Enhancement, and Apple's Motion for a Judgment as a Matter of Law (Renewed), New Trial, and  
24 Amended Judgment, October 19, 2012. ("Kerstetter Declaration").

21 <sup>277</sup> Kerstetter Declaration.

22 <sup>278</sup> Kerstetter Declaration.

23 <sup>279</sup> Market share of accused Samsung units is calculated using Samsung projections of 2013 accused  
24 smartphone unit sales and total U.S. smartphone unit sales based on IDC data. [REDACTED]

25 [REDACTED] *See also* "China to Overtake United States in  
26 Smartphone Shipments in 2012, According to IDC," IDC, August 30, 2012,  
27 <<http://www.idc.com/getdoc.jsp?containerId=prUS23668012>>. [Exhibit 196]

28 <sup>280</sup> I further have been informed that Samsung has or will implement design-arounds of these products  
that its technical experts have opined will prevent infringement. (Choi Declaration. *See also* Declaration of  
Tim Rowden In Support of Samsung's Opposition To Apple's Motion For A Permanent Injunction And  
(footnote continued)

1           158. Similarly, Apple and Mr. Musika cite evidence related to Samsung's *past* overall  
 2 market share. This data is clearly not probative of the *future* market share of the accused  
 3 products that will be discontinued. Mr. Musika also relies heavily on internal Samsung  
 4 documents describing the marketing strategy for accused products that will be discontinued.<sup>281</sup>  
 5 Those strategies are irrelevant in light of the discontinuance of those products. Nor does Apple  
 6 or Mr. Musika address the negligible market share of the accused products that will remain on  
 7 the market.

8           159. In sum, the accused products will comprise an extremely small share of the  
 9 smartphone market. It is therefore highly unlikely that Apple is currently or will in the future  
 10 lose market share as a result of the sale of the accused products.

11           **E. Apple's and Mr. Musika's Analysis Understates the Importance of Platform**  
 12           **Competition**

13           160. Mr. Musika and Apple's argument does not take into account the effect of platform  
 14 competition. As I describe in this section, a smartphone's operating system is a top purchase  
 15 consideration, indicating Samsung is competing against other Android manufacturers more than  
 16 with Apple. In addition, a substantial portion of consumers have strong feelings about Apple, so  
 17 a portion of Samsung purchasers would never consider Apple's iPhone. These are both factors  
 18 that minimize any meaningful impact Samsung's sales of the accused products could have on  
 19 Apple's iPhone sales.

20           **1. The Operating System is a Primary Driver of the Purchasing Decision**

21           161. The smartphone purchasing decision often comes down to a choice between the  
 22 open source Android operating system, which runs on a multitude of handsets, and Apple's  
 23 proprietary iOS, which runs exclusively on Apple's products.

24           162. As a comprehensive Computerworld OS comparison article pointed out, "[i]f  
 25 you're in the market for a new smartphone, choosing which one to buy has as much to do with

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26 Damages Enhancement, And Apple's Motion For Judgment As A Matter of Law (Renewed), New Trial,  
 27 And Amended Judgment, October 19, 2012 ("Rowden Declaration").)

28 <sup>281</sup> Musika Declaration, ¶ 16 and Musika Exhibit 20.

1 the operating system that runs the phone as with the hardware itself.”<sup>282</sup> According to the same  
2 article, the three top platforms are iOS, Android, and Microsoft’s Windows Phone 7.  
3 Ultimately, the author concludes, “any one of these platforms will serve you well,” each catering  
4 to the preference of a certain audience. For the Android OS, the article notes that: “[f]or its  
5 features, customization options and openness, Android has no peer.”

6 163. A March 2012 article notes that smartphone OS competition was down to iOS and  
7 Android, with other platforms, such as Blackberry and Windows Phone, thought to be vying for  
8 third place.<sup>283</sup>

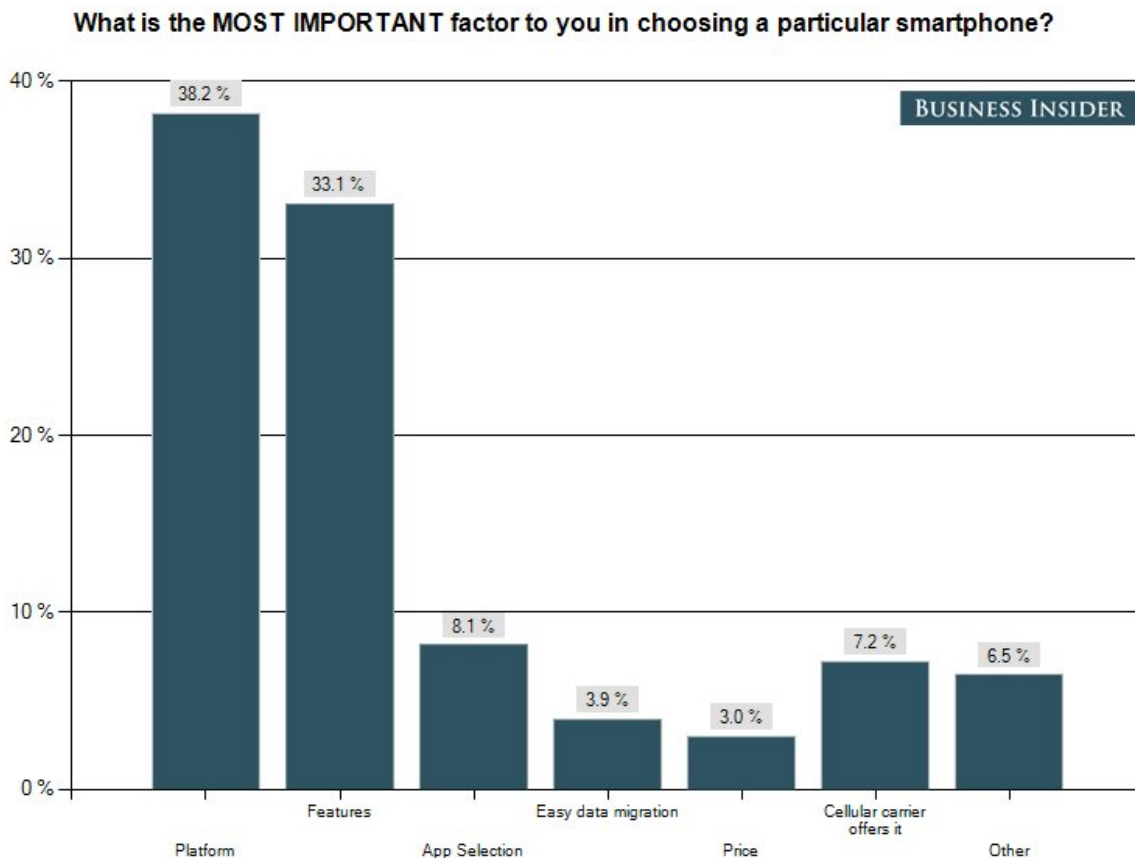
9 164. In a Business Insider survey that received over 2000 responses from Android and  
10 iOS smartphone users, approximately 38 percent of respondents indicated that “Platform” was  
11 the most important factor and another 50 percent replied that “Platform” was one of the “other”  
12 factors considered in choosing a smartphone:

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21 <sup>282</sup> Gralla, Preston, “Smartphone OS shootout: Android vs. iOS vs. Windows Phone,” Computerworld,  
22 March 17, 2011, <[http://www.computerworld.com/s/article/9214206/Smartphone\\_OS\\_shootout\\_Android\\_vs.\\_iOS\\_vs.\\_Windows\\_Phone\\_?taxonomyName=Mobile+and+Wireless&taxonomyId=15](http://www.computerworld.com/s/article/9214206/Smartphone_OS_shootout_Android_vs._iOS_vs._Windows_Phone_?taxonomyName=Mobile+and+Wireless&taxonomyId=15)>. [Exhibit 25]

23 <sup>283</sup> Lunden, Ingrid, “Nielsen: As U.S. Nears Smartphone Majority, It’s A Two-Horse Race Between  
24 Android and Apple’s iOS,” March 29, 2012, <<http://techcrunch.com/2012/03/29/nielsen-as-u-s-nears-smartphone-majority-its-a-two-horse-race-between-android-and-apples-ios/>>. [Exhibit 26]

1 **Figure 9: Business Insider Survey Results – Most Important Factor**<sup>284</sup>

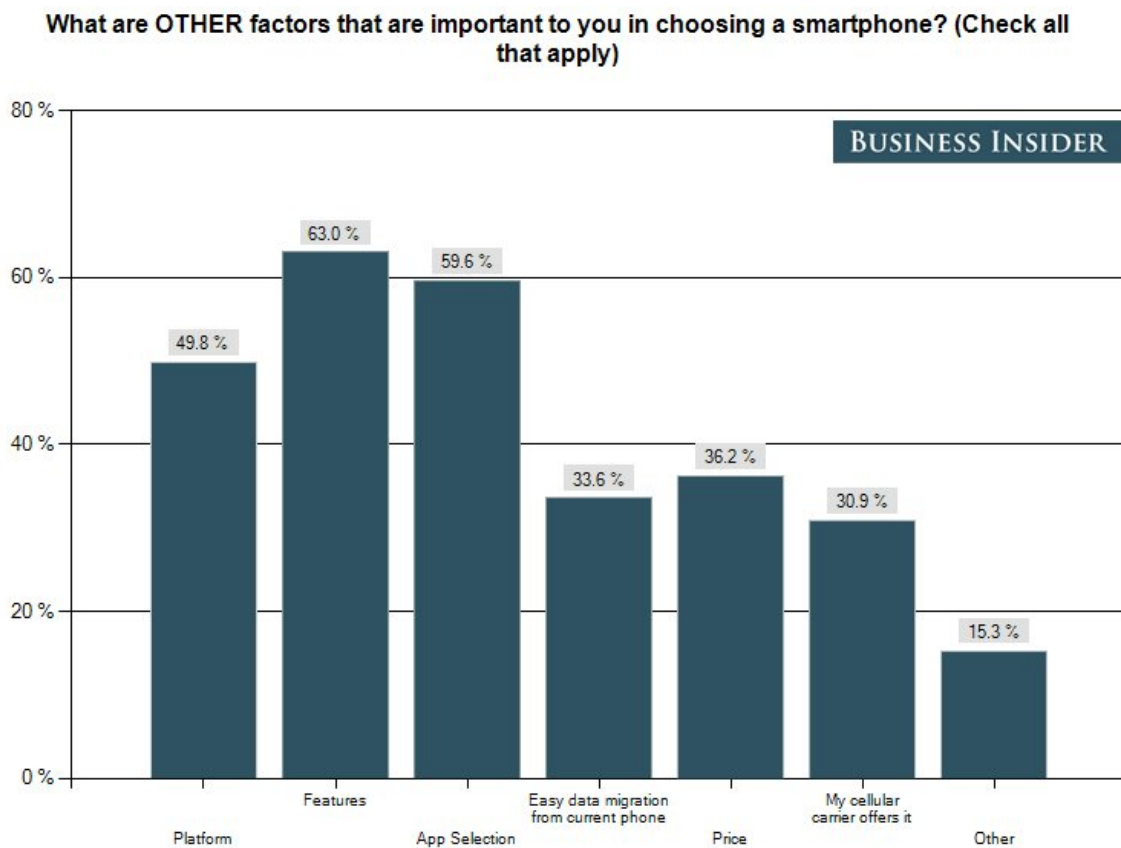


24 <sup>284</sup> Blodget, Henry and Leah Goldman, “The Truth About Smartphones: Our Exclusive Survey on  
 25 iPhone vs. Android,” Business Insider, April 18, 2011, Figure 8,  
 26 <[http://www.businessinsider.com/smartphone-survey-results-2011-4#most-smartphone-buyers-say-  
 platform-and-features-are-the-most-important-factors-that-make-them-buy-a-particular-smartphone-8](http://www.businessinsider.com/smartphone-survey-results-2011-4#most-smartphone-buyers-say-platform-and-features-are-the-most-important-factors-that-make-them-buy-a-particular-smartphone-8)> and  
 27 <[http://www.businessinsider.com/smartphone-survey-results-2011-4#other-factors-that-matter-include-  
 features-platform-app-selection-price-ease-of-migrating-data-from-ones-current-platform-and-availability-  
 at-ones-mobile-carrier-9](http://www.businessinsider.com/smartphone-survey-results-2011-4#other-factors-that-matter-include-features-platform-app-selection-price-ease-of-migrating-data-from-ones-current-platform-and-availability-at-ones-mobile-carrier-9)>. [Exhibit 27]

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1 **Figure 10: Business Insider Survey Results – Other Factors**<sup>285</sup>



16 165. Even the evidence that Mr. Musika cites supports this conclusion. For example,

17 Mr. Musika relies on a PCMag.com article that describes the smartphone industry as a “battle

18 between Android and iOS.”<sup>286</sup> Similarly, Mr. Musika cites a Nielsen Company blog entry that

19 smartphone users prefer to stick with the same operating system when they purchase their next

20 smartphone.<sup>287</sup> This simply confirms that the primary competition is between operating systems,

21 not between Samsung and Apple.

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23 <sup>285</sup> Blodget, Henry and Leah Goldman, “The Truth About Smartphones: Our Exclusive Survey on

24 iPhone vs. Android,” Business Insider, April 18, 2011, Figure 9,

25 <[http://www.businessinsider.com/smartphone-survey-results-2011-4#most-smartphone-buyers-say-](http://www.businessinsider.com/smartphone-survey-results-2011-4#most-smartphone-buyers-say-platform-and-features-are-the-most-important-factors-that-make-them-buy-a-particular-smartphone-8)

26 <[http://www.businessinsider.com/smartphone-survey-results-2011-4#other-factors-that-matter-include-](http://www.businessinsider.com/smartphone-survey-results-2011-4#other-factors-that-matter-include-features-platform-app-selection-price-ease-of-migrating-data-from-ones-current-platform-and-availability-at-ones-mobile-carrier-9)

27 <[features-platform-app-selection-price-ease-of-migrating-data-from-ones-current-platform-and-availability-](http://www.businessinsider.com/smartphone-survey-results-2011-4#other-factors-that-matter-include-features-platform-app-selection-price-ease-of-migrating-data-from-ones-current-platform-and-availability-at-ones-mobile-carrier-9)

28 <[at-ones-mobile-carrier-9](http://www.businessinsider.com/smartphone-survey-results-2011-4#other-factors-that-matter-include-features-platform-app-selection-price-ease-of-migrating-data-from-ones-current-platform-and-availability-at-ones-mobile-carrier-9)>. [Exhibit 27]

<sup>286</sup> Musika Exhibit 19.

<sup>287</sup> Musika Exhibit 38.



1 166. One explanation for consumers' preference for Android is that Android operators  
2 and manufacturers have spent significant advertising dollars on Android, which serves to elevate  
3 the importance of the Android platform to smartphone consumers. For example, an Apple  
4 presentation [REDACTED]

5 [REDACTED]  
6 167. A July 2011 presentation confirms [REDACTED]  
7 [REDACTED]  
8 [REDACTED]  
9 [REDACTED]  
10 [REDACTED]

11 168. This level of advertising for the platform, along with the Google brand, helps to  
12 create a branded platform that can compete with Apple's platform. The resulting preference for  
13 the Android platform means that many of the customers that select an Android tablet or  
14 smartphone would not consider a tablet or smartphone with a different operating system (such as  
15 the Apple's iOS).

16 **2. Many Android Customers Would Never Purchase an iPhone or iPad**

17 169. The importance of platform competition is further demonstrated by consumers'  
18 strong preferences when it comes to Apple. In the same Business Insider Survey discussed  
19 above, one of the questions asked Android users "[w]hat might make you buy an iPhone  
20 instead?" Of the four responses provided, more than 55 percent of the survey respondents  
21 selected "Nothing: I hate Apple," indicating that they would not buy an iPhone instead of their  
22 Android smartphone.<sup>291</sup>

23 \_\_\_\_\_  
24 <sup>288</sup> [REDACTED]  
25 [REDACTED]  
26 [REDACTED]

27 Blodget, Henry and Leah Goldman, "The Truth About Smartphones: Our Exclusive Survey on  
28 iPhone vs. Android," Business Insider, April 18, 2011, Figure 7,  
(footnote continued)

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170.

[Redacted text block]

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171. As demonstrated by these surveys, a substantial portion of consumers have strong preferences either for or against Apple, meaning that many of the customers that select an Android smartphone would not consider an iPhone as an alternative. This is another factor that Apple and Mr. Musika’s analysis does not take into account.

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<<http://www.businessinsider.com/smartphone-survey-results-2011-4#among-android-users-most-say-they-will-never-buy-an-iphone-because-they-hate-apple-most-of-the-rest-say-they-would-buy-an-iphone-if-it-worked-better-with-non-apple-products-and-theres-the-risk-of-the-closed-system-that-apple-is-selling-7>>.  
[Exhibit 27]

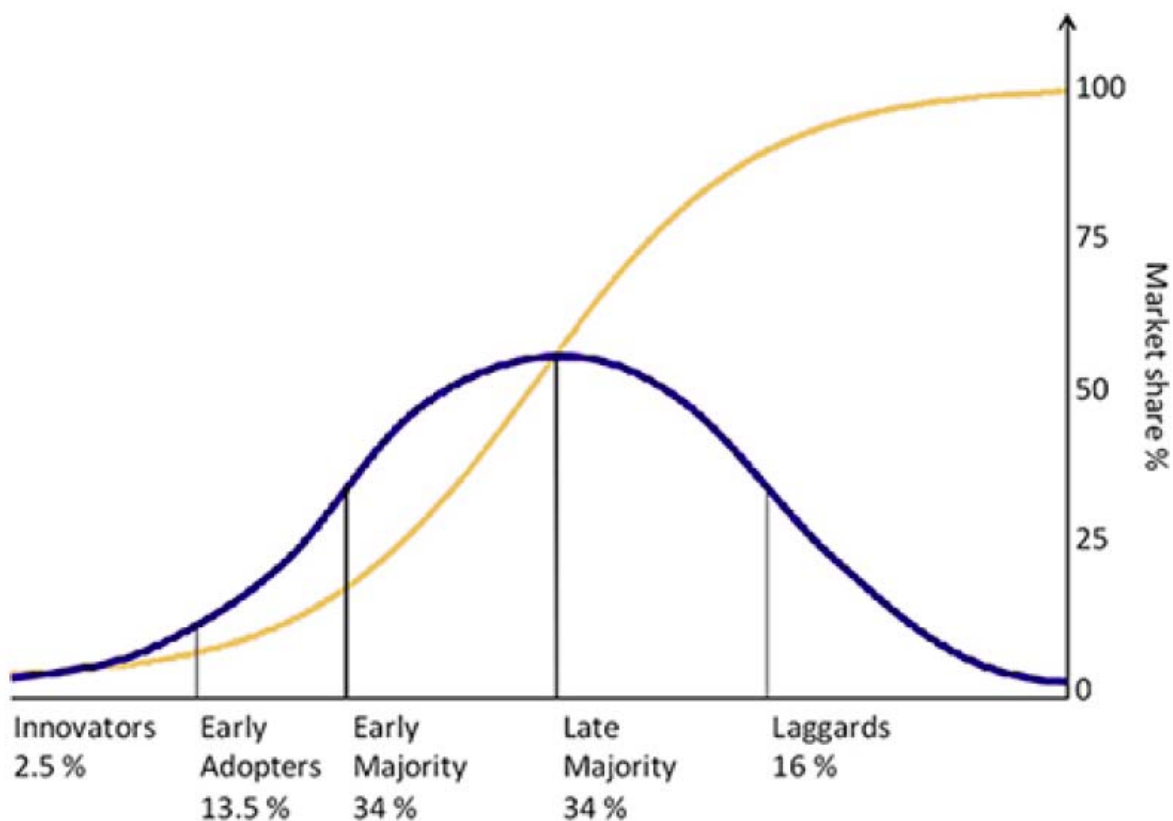
<sup>292</sup> [Redacted text block]

F. *Apple and Mr. Musika Overstate the Degree to Which the Accused Products and Apple Products Compete For Late Adopters*

172. Apple and Mr. Musika place considerable reliance on their contention that “the smartphone marketplace is at a critical juncture” where “large numbers of first-time customers will be purchasing a smartphone platform over the next 12-18 months.”<sup>293</sup>

173. What neither Apple nor Mr. Musika explain is that innovators, early adopters and early majority users of smartphones have already chosen their platform and preferred manufacturer of smartphones. What is left are the late majority and laggards, better known as late adopters of technology. These segments can be seen in the Rodgers adoption curve.

Figure 12: Adoption Curve by Segment<sup>294</sup>



174. These types of users are not the type of users who will purchase the high end of a technology. It is more likely they will buy at the low end because they do not sufficiently value


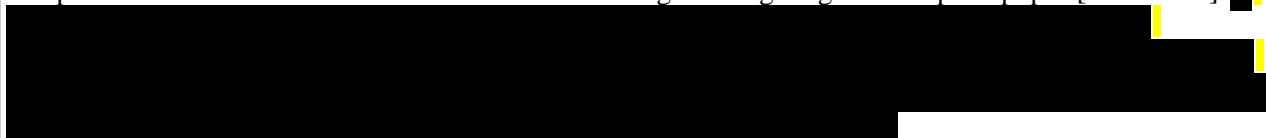
<sup>293</sup> Musika Declaration, p. 8.

<sup>294</sup> “The Challenge of Targeting Late Adopters, pp. 2-4, August 8, 2011, <<http://uxmatters.com/mt/archives/2011/08/the-challenge-of-targeting-late-adopters.php>>. [Exhibit 33]

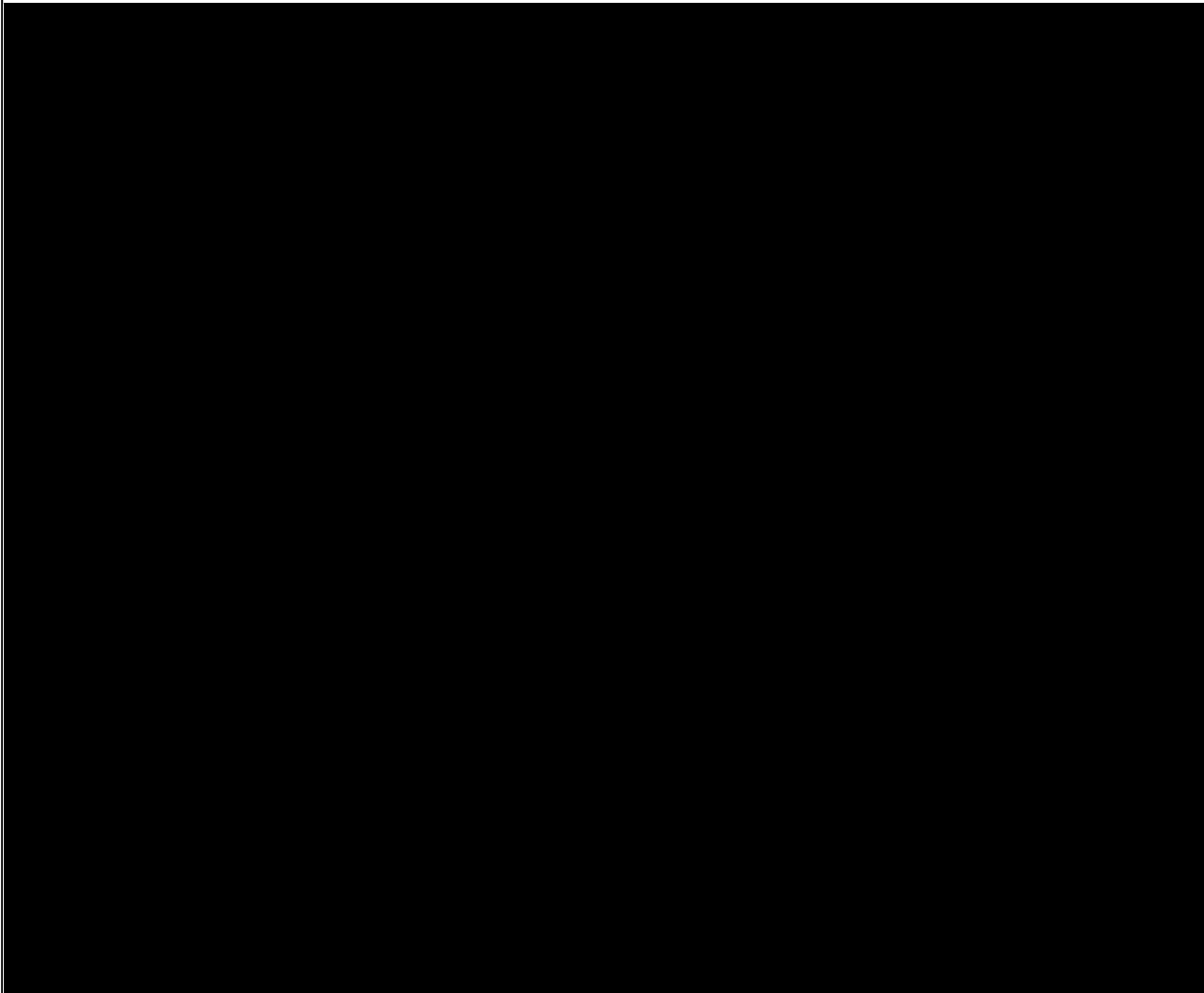
1 the expensive features that are in the high end smartphones. In particular, their lack of needing  
2 or wanting a smartphone to date suggests that on average, they are less interested in the features  
3 offered by a smartphone.

4 175. The reality is that high end smartphones with high prices, like the iPhone 4S and  
5 iPhone 5, will not be the products that these users will most likely purchase. These purchasers  
6 are far more likely to purchase lower priced and lower functioning smartphones consistent with  
7 a profile that this group tends to include people who earn less than \$55,000 annually.<sup>295</sup>

8 176. Consistent with this theory, recent research also recognizes that the next wave of  
9 smartphone customers have different characteristics than the earlier adopters who already  
10 purchased smartphones such as the iPhone. A February 2012 report by the 3<sup>rd</sup> party research  
11 firm comScore (produced by Apple) identifies the profile of the fastest growing segments among  
12 smartphone users:

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25 <sup>295</sup> “The Challenge of Targeting Late Adopters, p. 2, August 8, 2011,  
26 <<http://uxmatters.com/mt/archives/2011/08/the-challenge-of-targeting-late-adopters.php>>. [Exhibit 33]   
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177. This report concludes that “traditional late adopter segments are the ones climbing aboard the smartphone bandwagon with the most vigor,” while noting that these growing segments “tend to be more cost conscious segments.”<sup>297</sup>

178. A July 2012 Business Insider article also notes the importance of cost to first time smartphone buyers’ purchasing behavior. Citing to ComScore data, this article concluded that

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296 [Redacted]

1 “the price diversity of Android devices helps ease sticker shock for first-time smartphone  
2 owners” which has led to Android’s popularity among first time smartphone buyers.<sup>298</sup>

3 179. Additionally, The NPD Group (a market research company) reported on Q2 2012  
4 U.S. smartphone sales and found that pre-paid phones were a significant driver in the market. In  
5 reporting an overall smartphone unit sales increase of nine percent, NPD noted that “all growth  
6 was driven by increases in pre-paid smartphone sales.”<sup>299</sup> NPD further reported that in Q2 2012,  
7 33 percent of smartphone buyers had average household incomes of less than \$35,000,<sup>300</sup> (an  
8 increase over the 24 percent for this group reported in Q2 2011), consistent with the emergence  
9 of the lower income, late adopter segment. Moreover, of this growing pre-paid smartphone  
10 segment, 71 percent had an average income less than \$35,000<sup>301</sup> suggesting that that lower  
11 upfront phone acquisition costs along with lower cost monthly service plans are important to the  
12 smartphone late adopter segment.

13 180. Finally, the parties’ own studies confirm this price sensitivity. A September 2011

14 Samsung strategy [REDACTED]

15 [REDACTED]  
16 Apple’s findings are the same, [REDACTED]

17  
18  
19 <sup>298</sup> Cocotas, Alex, “BII CHART OF THE DAY: First-Time Smartphone Buyers Overwhelmingly  
20 Prefer Android,” July 27, 2012, <<http://www.businessinsider.com/first-time-smartphone-buyers-overwhelmingly-prefer-android-2012-7>>. [Exhibit 35]

21 <sup>299</sup> “The NPD Group: Rise in Smartphone Purchases Driven Entirely by Pre-Paid Phones,” The NPD  
22 Group, August 8, 2012, <[www.npd.com/wps/portal/npd/us/news/press-releases/pr\\_120808!/ut/p/c5/04\\_SB8K8xLLM9MSSzPy8xBz9CP0os3g3b1NTS98QY0N\\_P08zA09jc19Dt2A3Y09Lc\\_1I\\_ShznPIBZvoF2YGKAJ7fGjI!](http://www.npd.com/wps/portal/npd/us/news/press-releases/pr_120808!/ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3g3b1NTS98QY0N_P08zA09jc19Dt2A3Y09Lc_1I_ShznPIBZvoF2YGKAJ7fGjI!/)>. [Exhibit 36]

23 <sup>300</sup> “The NPD Group: Rise in Smartphone Purchases Driven Entirely by Pre-Paid Phones,” The NPD  
24 Group, August 8, 2012, <[www.npd.com/wps/portal/npd/us/news/press-releases/pr\\_120808!/ut/p/c5/04\\_SB8K8xLLM9MSSzPy8xBz9CP0os3g3b1NTS98QY0N\\_P08zA09jc19Dt2A3Y09Lc\\_1I\\_ShznPIBZvoF2YGKAJ7fGjI!](http://www.npd.com/wps/portal/npd/us/news/press-releases/pr_120808!/ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3g3b1NTS98QY0N_P08zA09jc19Dt2A3Y09Lc_1I_ShznPIBZvoF2YGKAJ7fGjI!/)>. [Exhibit 36]

25 <sup>301</sup> “The NPD Group: Rise in Smartphone Purchases Driven Entirely by Pre-Paid Phones,” The NPD  
26 Group, August 8, 2012, <[www.npd.com/wps/portal/npd/us/news/press-releases/pr\\_120808!/ut/p/c5/04\\_SB8K8xLLM9MSSzPy8xBz9CP0os3g3b1NTS98QY0N\\_P08zA09jc19Dt2A3Y09Lc\\_1I\\_ShznPIBZvoF2YGKAJ7fGjI!](http://www.npd.com/wps/portal/npd/us/news/press-releases/pr_120808!/ut/p/c5/04_SB8K8xLLM9MSSzPy8xBz9CP0os3g3b1NTS98QY0N_P08zA09jc19Dt2A3Y09Lc_1I_ShznPIBZvoF2YGKAJ7fGjI!/)>. [Exhibit 36]

27 <sup>302</sup> [REDACTED]  
28 [REDACTED]

1 [REDACTED]

2 [REDACTED]

3 181. Mr. Musika's analysis fails to address the fact that once a technology has reached

4 50% penetration – which numerous market observers report smartphone ownership in the U.S.

5 has in fact reached<sup>304</sup> – not only are the late adopters the ones who are going to purchase

6 smartphones, the growth rate for such purchases slows down rapidly.<sup>305</sup> As a September 2012

7 Business Insider article states, “[t]he number of new smartphone users added in the U.S. each

8 year in the future will be fewer than the number added in the past couple of years.”<sup>306</sup> This

9 article notes that these customers “will have less disposable income and spending power than the

10 110+ million [U.S. customers] who already have smartphones”<sup>307</sup> and concludes that this means

11 these late adopters are likely to “buy cheaper smartphones and spend less money on apps...than

12 existing smartphone users.”<sup>308</sup> This information highlights Musika's overstatement of any

13 potential impact to Apple of future sales of the accused devices at issue.

14 **G. Apple Does Not Have the Capacity to Meet Any More Demand**

15 182. As I described in my expert report, “there is overwhelming evidence, provided by

16 both public documentation as well as Apple's own analyses, that Apple did suffer real supply

17 constraints, despite the availability of Samsung's accused products, with respect to its iPhone

18 <sup>303</sup> [REDACTED]

19 [REDACTED]

20 Dediu, Horace, “Positioning Lumia, ASYMCO, September 6, 2012, <[www.asymco.com/2012/09/06/positioning-lumia](http://www.asymco.com/2012/09/06/positioning-lumia)>. [Exhibit 39] See also Farago, Peter, “iOS and Android Adoption Explodes Internationally, August 27, 2012, <<http://blog.flurry.com/bid/88867/iOS-and-Android-Adoption-Explodes-Internationally>>. [Exhibit 40]

21 <sup>305</sup> Blodget, Henry, “Actually, The US Smartphone Revolution Has Entered the Late Innings,” Business

22 Insider, September 13, 2012, <<http://www.businessinsider.com/us-smartphone-market-2012-9>>. [Exhibit 41]

23 <sup>306</sup> Blodget, Henry, “Actually, The US Smartphone Revolution Has Entered the Late Innings,” Business

24 Insider, September 13, 2012, <<http://www.businessinsider.com/us-smartphone-market-2012-9>>. [Exhibit 41]

25 <sup>307</sup> Blodget, Henry, “Actually, The US Smartphone Revolution Has Entered the Late Innings,” Business

26 Insider, September 13, 2012, <<http://www.businessinsider.com/us-smartphone-market-2012-9>>. [Exhibit 41]

27 <sup>308</sup> Blodget, Henry, “Actually, The US Smartphone Revolution Has Entered the Late Innings,” Business

28 Insider, September 13, 2012, <<http://www.businessinsider.com/us-smartphone-market-2012-9>>. [Exhibit 41]



1 and iPad line of products.”<sup>309</sup> Apple’s supply constraints continued for the release of the iPhone  
2 4S and iPhone 5.

3 183. Apple announced the iPhone 4S on October 4, 2011<sup>310</sup> and began accepting pre-  
4 orders five days later.<sup>311</sup> One week later, the Huffington Post stated that demand was so great  
5 that on October 13 “two of the three [iPhone 4S] carriers were reportedly sold out of their stock.  
6 This shortage [wasn’t] a huge shock, considering that the 4S sold over 1 million units in its first  
7 24 hours of presale, almost doubling the previous record of 600,000 held by the iPhone 4.”<sup>312</sup>  
8 On November 17, the Wall Street Journal reported that “[m]ore than a month after the Apple  
9 iPhone 4S went on sale, the three largest U.S. wireless carriers [were] still struggling to keep up  
10 with customer demand for it.”<sup>313</sup> For example, AT&T’s president of emerging devices  
11 explained that the carrier was “having some supply issues in the sense that demand’s huge ...”<sup>314</sup>

12 184. Apple released its iPhone 5 on September 21, 2012.<sup>315</sup> Due to the overwhelming  
13 response, Apple announced that “[d]emand for iPhone 5 exceeded the initial supply and while  
14 the majority of pre-orders [had] been shipped to customers, many [were] scheduled to be  
15 shipped in October.”<sup>316</sup> Apple CEO Tim Cook also made clear that Apple had “sold out of [its]

16 <sup>309</sup> Corrected Expert Report of Michael J Wagner, April 20, 2012, p. 80.

17 <sup>310</sup> Apple Launches iPhone 4S, iOS 5 & iCloud, Apple Press Info, October 4, 2011,  
18 <<http://www.apple.com/pr/library/2011/10/04Apple-Launches-iPhone-4S-iOS-5-iCloud.html>>. [Exhibit  
18] 18]

19 <sup>311</sup> iPhone 4S Pre-Orders Top One Million in First 24 Hours, Apple Press Info, October 10, 2011,  
20 <[http://www.apple.com/pr/library/2011/10/10iPhone-4S-Pre-Orders-Top-One-Million-in-First-24-](http://www.apple.com/pr/library/2011/10/10iPhone-4S-Pre-Orders-Top-One-Million-in-First-24-Hours.html)  
21 <[Hours.html](http://www.apple.com/pr/library/2011/10/10iPhone-4S-Pre-Orders-Top-One-Million-in-First-24-Hours.html)>. [Exhibit 43]

22 <sup>312</sup> iPhone 4S Release: 13 Things You Need To Know About The New Gadget (PHOTOS), Huffington  
23 Post, October 14, 2011, <[http://www.huffingtonpost.com/2011/10/14/iphone-4s-release-features-apple-](http://www.huffingtonpost.com/2011/10/14/iphone-4s-release-features-apple-iphone-4s_n_1010616.html?view=print&comm_ref=false)  
24 <[iphone-4s\\_n\\_1010616.html?view=print&comm\\_ref=false](http://www.huffingtonpost.com/2011/10/14/iphone-4s-release-features-apple-iphone-4s_n_1010616.html?view=print&comm_ref=false)>. [Exhibit 56]

25 <sup>313</sup> Would-Be iPhone Customers Still Facing Weeks-Long Waits, Wall Street Journal, November 17,  
26 2011, <[http://blogs.wsj.com/digits/2011/11/17/would-be-iphone-customers-still-facing-weeks-long-](http://blogs.wsj.com/digits/2011/11/17/would-be-iphone-customers-still-facing-weeks-long-waits/)  
27 <[waits/](http://blogs.wsj.com/digits/2011/11/17/would-be-iphone-customers-still-facing-weeks-long-waits/)>. [Exhibit 57]

28 <sup>314</sup> Would-Be iPhone Customers Still Facing Weeks-Long Waits, Wall Street Journal, November 17,  
29 2011, <[http://blogs.wsj.com/digits/2011/11/17/would-be-iphone-customers-still-facing-weeks-long-](http://blogs.wsj.com/digits/2011/11/17/would-be-iphone-customers-still-facing-weeks-long-waits/)  
30 <[waits/](http://blogs.wsj.com/digits/2011/11/17/would-be-iphone-customers-still-facing-weeks-long-waits/)>. [Exhibit 57]

31 <sup>315</sup> iPhone 5 First Weekend Sales Top Five Million, Apple Press Info, September 24, 2012,  
32 <<http://www.apple.com/pr/library/2012/09/24iPhone-5-First-Weekend-Sales-Top-Five-Million.html>>.  
33 [Exhibit 51]

34 <sup>316</sup> iPhone 5 First Weekend Sales Top Five Million, Apple Press Info, September 24, 2012,  
35 <<http://www.apple.com/pr/library/2012/09/24iPhone-5-First-Weekend-Sales-Top-Five-Million.html>>.  
36 [Exhibit 51]

1 initial supply ...”<sup>317</sup> and industry analysts noted that “sales [of the iPhone 5] could have  
 2 potentially been much higher if not for supply constraints.”<sup>318</sup> These problems have been  
 3 exacerbated by labor disputes at Foxconn, Apple’s supplier.<sup>319</sup> Foxconn has stopped production  
 4 of the iPhone at least twice in late September and early October due to protests from its  
 5 workers.<sup>320</sup> These shortages are likely to continue as Apple releases the iPhone 5 in additional  
 6 countries (including 70 in December alone) and carriers around the world.<sup>321</sup> On October 8, the  
 7 Wall Street Journal reported that potential shortages in NAND flash memory used to store data  
 8 in iPhones may lead to further constraints on Apple’s output.<sup>322</sup>

9 **V. Apple’s Down Stream Sales and Ecosystem Will Not Be Irreparably Harmed**

10 185. Mr. Musika contends that not only will Apple lose current sales of its products, it  
 11 will also lose future sales of other Apple products because purchasers of the accused products  
 12 will not become loyal apple customers and will lose search engine revenue.<sup>323</sup> Apple further  
 13 argues in its motion that the value of the “Apple platform” will be reduced due to network  
 14 effects.<sup>324</sup> For the reasons stated below, I disagree that these harms are likely to result absent a  
 15 permanent injunction.

17 <sup>317</sup> iPhone 5 First Weekend Sales Top Five Million, Apple Press Info, September 24, 2012,  
 18 <<http://www.apple.com/pr/library/2012/09/24iPhone-5-First-Weekend-Sales-Top-Five-Million.html>>.  
 [Exhibit 51] See also Poonima Gupta & Jennifer Saba, Apple Sells Over 5 Million iPhone 5, Supply  
 19 Constraints Loom, Reuters, Sept. 24, 2012, <[http://www.reuters.com/article/2012/09/24/us-apple-iphone-](http://www.reuters.com/article/2012/09/24/us-apple-iphone-idUSBRE88N0HL20120924)  
 idUSBRE88N0HL20120924>. [Exhibit 53]

20 <sup>318</sup> Poonima Gupta & Jennifer Saba, Apple Sells Over 5 Million iPhone 5, Supply Constraints Loom,  
 Reuters, Sept. 24, 2012, <[http://www.reuters.com/article/2012/09/24/us-apple-iphone-](http://www.reuters.com/article/2012/09/24/us-apple-iphone-idUSBRE88N0HL20120924)  
 21 idUSBRE88N0HL20120924>. [Exhibit 53]

22 <sup>319</sup> Foxconn Labor Disputes Disrupt iPhone Output for 2nd Time, Bloomberg News, October 7, 2012,  
 <[http://www.bloomberg.com/news/2012-10-07/foxconn-labor-disputes-disrupt-iphone-output-for-2nd-](http://www.bloomberg.com/news/2012-10-07/foxconn-labor-disputes-disrupt-iphone-output-for-2nd-time.html)  
 23 time.html>. [Exhibit 59]

24 <sup>320</sup> Foxconn Labor Disputes Disrupt iPhone Output for 2nd Time, Bloomberg News, October 7, 2012,  
 <[http://www.bloomberg.com/news/2012-10-07/foxconn-labor-disputes-disrupt-iphone-output-for-2nd-](http://www.bloomberg.com/news/2012-10-07/foxconn-labor-disputes-disrupt-iphone-output-for-2nd-time.html)  
 25 time.html>. [Exhibit 59]

26 <sup>321</sup> iPhone 5 Sales Around the World and Discounted iPhone 5 in the U.S., MacOrg, September 30,  
 2012, <<http://www.macorg.net/iphone-5-sales-world-discounted-iphone-5-u-s/>>. [Exhibit 60]

27 <sup>322</sup> Yun-Hee Kim, Why There May Be an iPhone 5 Shortage, Wall Street Journal, October 8, 2012,  
 <<http://blogs.wsj.com/digits/2012/10/08/why-there-may-be-an-iphone-5-shortage/>>. [Exhibit 61]

28 <sup>323</sup> Musika Declaration, ¶¶ 38-39.

<sup>324</sup> Motion, p. 5.

1           A.     *Apple's Claimed Harm to Its Ecosystem and Downstream Sales is Derivative of Its Claimed Harm to Market Share and Lost Sales*

2           186. Sale of the accused Samsung products cannot cause substantial harm to the Apple  
3 ecosystem if Apple does not lose sales to those products. Apple's claim of damage to its  
4 ecosystem is therefore derivative of and dependent on its claim of damage through lost sales. As  
5 described above, Apple and Mr. Musika overstate the likelihood and number of sales that Apple  
6 is likely to lose from competition with the accused products. Samsung has discontinued the sale  
7 of all but three of the accused products, and Apple substantially overstates the degree of  
8 competition with even those three products.

9           B.     *Apple Substantially Overstates Potential Harm Derived By Network Effects*

10          187. Apple states that one of the irreparable harms to Apple relates to network effects  
11 because "customer demand of a given smartphone platform increases as the number of other  
12 users on the platform increases."<sup>325</sup> In support, Apple cites to the Court's previous ruling on  
13 Apple's motion for a preliminary injunction on different patents in a different case.<sup>326</sup> In that  
14 ruling, this Court found Apple's "network effects" theory to be only "plausible."<sup>327</sup>

15          188. Apple also cites to Mr. Musika's conclusory statements that *iPhone* consumers are  
16 more likely to purchase other Apple Products.<sup>328</sup> However, Mr. Musika fails to provide any  
17 analysis and support for his proposition. Mr. Musika simply cites to the unsubstantiated  
18 statements of Apple's Chip Lutton that there "*could* have impacts" (emphasis added) on the  
19 "vitality" of Apple's platform.<sup>329</sup> Moreover, the relevant population of users to look at is the  
20 *purchasers of the accused* products (including those who are first time smartphone buyers) and  
21 *their* behaviors—which Mr. Musika and Apple have not done. There is no reason to assume that  
22 consumers who would otherwise purchase an accused Samsung product would have the same  
23 characteristics as historic iPhone purchasers. In fact, Apple's own research indicates that the  
24 profile of smartphone purchasers varies based on carrier and device manufacture. Apple noted

25           <sup>325</sup> Motion, p. 5.

26           <sup>326</sup> Motion, p. 5.

27           <sup>327</sup> Order Granting Motion for Preliminary Injunction, June 29, 2012, p. 76.

28           <sup>328</sup> Motion, p. 5.

<sup>329</sup> Musika Declaration, p. 14.

1 in a February 2012 presentation [REDACTED]  
 2 [REDACTED]  
 3 [REDACTED]  
 4 [REDACTED]

5 189. Mr. Musika does refer to an Apple employee's testimony alleging "harm to the iOS  
 6 ecosystem" through loss of "application developer mind share and attention."<sup>333</sup> However, this  
 7 statement lacks support, as the data suggests the opposite. According to an article by  
 8 Investopedia which cites to data from "Piper Jaffray, a U.S. investment banking firm, Android  
 9 developers earn just 7% of what iOS Apple Store earns for its developers."<sup>334</sup> The article also  
 10 explains that "[t]he app developers still choose iOS first for launching any app because they see  
 11 more profit potential" and because of this, "[t]he general trend has been to make the app for  
 12 Apple and if it becomes popular and successful, then go for an Android version."<sup>335</sup> A June  
 13 2012 article from Flurry Analytics, confirms app developers continue to first build new apps for  
 14 iOS, reporting 69% of new mobile developer projects were for Apple.<sup>336</sup> The article further  
 15 states that "the difference in revenue generated per active user is 4 times greater on iOS than  
 16

17 [REDACTED]  
 18 [REDACTED]  
 19 [REDACTED]  
 20 [REDACTED]

Musika Declaration, p. 14.

21 <sup>334</sup> "Android Vs. iPhone: The Economics of Apps," Investopedia,  
 22 <<http://www.investopedia.com/financial-edge/0112/Android-Vs-iPhone-The-Economics-Of-Apps.aspx#axzz1qsqh8ijN>>. [Exhibit 62] See also Munster, Gene and Douglas J. Clinton, et al., "A Tale of Two App Stores: Android Market vs. Apple's App Store," Piper Jaffray, November 21, 2011, p. 3. [Exhibit 63]

23 <sup>335</sup> "Android Vs. iPhone: The Economics of Apps," Investopedia,  
 24 <<http://www.investopedia.com/financial-edge/0112/Android-Vs-iPhone-The-Economics-Of-Apps.aspx#axzz1qsqh8ijN>>. [Exhibit 62] See also Munster, Gene and Douglas J. Clinton, et al., "A Tale of Two App Stores: Android Market Vs. Apple's App Store," Piper Jaffray, November 21, 2011, p. 3. [Exhibit 63]

25 <sup>336</sup> Fargo, Peter, "App Developers Signal Apple Allegiance Ahead of WWDC and Google I/O," Flurry  
 26 Analytics, <<http://blog.flurry.com/bid/85911/App-Developers-Signal-Apple-Allegiance-Ahead-of-WWDC-and-Google-I-O>>. [Exhibit 64]  
 27  
 28

1 Android,”<sup>337</sup> noting that “developers run businesses, and businesses seek out markets where  
2 revenue opportunities are highest and the cost of building and distributing is lowest”<sup>338</sup> – which  
3 is why the Apple App store (and platform) is more attractive. This is not surprising as Android  
4 users are much less willing to pay for an app with the Online Publishers Association reporting in  
5 August 2012 that 70% of iPhone users buy apps versus only 34% of Android users.<sup>339</sup> Thus,  
6 Google Play (formerly the Android Market) continues to present an inferior opportunity for app  
7 developers to generate revenue and profits from their work. Moreover, this highlights the lack  
8 of support for Apple’s claims of a hypothetical future loss of developer mindshare resulting in a  
9 reduction in the demand for the Apple platform—the data simply does not support any claim  
10 that developers are losing interest in developing for the Apple platform. Rather, the converse is  
11 true—they continue to prefer to develop for the Apple platform

12 190. Apple has largely presented no additional evidence to support its network effects  
13 theory other than a citation to the opinion in a completely different case. Nor has Apple fully  
14 articulated a network effects theory in its brief or in Mr. Musika’s declaration. It is therefore not  
15 clear in what manner Apple contends that its ecosystem benefits from network effects and will  
16 suffer harm by the future sale of those few products Samsung continues to sell.

17 191. Nevertheless, I respectfully disagree that network effects on the Apple ecosystem  
18 mean that sale of the accused products will cause irreparable harm to Apple. As a starting point,  
19 any future harm to Apple’s ecosystem can potentially exist only if the purchaser of the accused  
20 Samsung product would have otherwise purchased an Apple product. For the reasons,  
21 previously stated, Apple has not shown that a substantial number of purchasers of the accused  
22 products would otherwise purchase Apple products, if for no other reason than the accused

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23  
24 <sup>337</sup> Fargo, Peter, “App Developers Signal Apple Allegiance Ahead of WWDC and Google I/O,” Flurry  
Analytics, <[http://blog.flurry.com/bid/85911/App-Developers-Signal-Apple-Allegiance-Ahead-of-WWDC-  
and-Google-I-O](http://blog.flurry.com/bid/85911/App-Developers-Signal-Apple-Allegiance-Ahead-of-WWDC-and-Google-I-O)>. [Exhibit 64]

25 <sup>338</sup> Fargo, Peter, “App Developers Signal Apple Allegiance Ahead of WWDC and Google I/O,” Flurry  
Analytics, <[http://blog.flurry.com/bid/85911/App-Developers-Signal-Apple-Allegiance-Ahead-of-WWDC-  
and-Google-I-O](http://blog.flurry.com/bid/85911/App-Developers-Signal-Apple-Allegiance-Ahead-of-WWDC-and-Google-I-O)>. [Exhibit 64]

26  
27 <sup>339</sup> “A Portrait of Today’s Smartphone User,” Online Publishers Association (in partnership with Frank  
N. Magid Associates, Inc.), August 2012, p. 30. [Exhibit 65]

1 products have been largely discontinued. Therefore, even if Apple had articulated or identified  
 2 some aspect of its ecosystem that benefited from network effects, which it has not, an injunction  
 3 would not be necessary to prevent harm to that ecosystem.

4 192. Apple and Mr. Musika further overstate the impact the accused products may have  
 5 on downstream revenue by relying on worldwide data instead of U.S. data. For example, Mr.  
 6 Musika cites evidence concerning Apple's worldwide search engine royalty revenue.<sup>340</sup> This  
 7 data is not particularly probative of the impact that an injunction on only the sale of the accused  
 8 products in the United States will have on Apple's search revenue.

9 **C. Apple Inflates the Impact of Platform Loyalty On Downstream Sales**

10 193. Apple argues that it will lose unquantifiable future smartphone and tablet sales  
 11 because purchasers of the accused products will develop brand and platform loyalty. I disagree.

12 194. Apple cites no evidence in support of this theory. Apple cites the Court's  
 13 preliminary injunction opinion in this case and in the unrelated *Apple v. Samsung*, 12-630 (N.D.  
 14 Cal.), case.<sup>341</sup> I understand that neither of those opinions constitutes evidence. The only  
 15 evidence in the record that Apple cites is Mr. Musika's declaration. Mr. Musika's declaration  
 16 simply states "Apple's past and future loss of market share includes lost sales relating to other  
 17 Apple products that were not included in the jury's damage award, but nevertheless are part of  
 18 the established product relationship that Apple enjoys based on Apple's customer loyalty. These  
 19 losses are derivative of the lost sales within the broader Apple ecosystem."<sup>342</sup> That statement is  
 20 entirely conclusory. Mr. Musika cites nothing to support that opinion and provides no analysis  
 21 of the facts which lead him to that opinion.

22 195. As stated, Samsung has or will discontinue the bulk of the accused products.<sup>343</sup> An  
 23 injunction is therefore not necessary to prevent the public from developing brand or platform  
 24 loyalty based on the purchase of those products.

25  
 26 <sup>340</sup> Musika Declaration ¶ 39 & Musika Exhibit 47.

<sup>341</sup> Motion, p. 5.

<sup>342</sup> Musika Declaration, ¶ 38.

<sup>343</sup> Kerstetter Declaration.



1           196. Further, the data that I have reviewed on platform loyalty suggest that the  
2 percentage of Android users that intend to re-purchase Android is significantly lower and in-line  
3 with Android's market share. These data also confirm that Apple's users report a significantly  
4 higher percentage of intention to re-purchase than do Android users. Seventy to 71 percent of  
5 Android users and some 80 to 89 percent of iPhone users would stick with that platform for their  
6 next purchase.<sup>344</sup> Another article found that Android loyalty was much lower. This November  
7 28, 2011 article cited to a study that found only "six of ten Android users" (60 percent) would  
8 stick with the Android operating system with their next purchase.<sup>345</sup>

9           197. According to research which cites a study by UBS, "some 31% of Android users  
10 are likely to move to Apple for their next handset."<sup>346</sup> Other recent research by Piper Jaffray  
11 analysts published in October 2011 concludes that "Apple has built brand loyalty not enjoyed by  
12 the Android platform."<sup>347</sup> Piper Jaffray's analysis concluded that its survey data and analysis  
13 suggests that "only 47% of Android users expect to buy another Android device vs. 94% of  
14 iPhone users who expect to buy another iPhone."<sup>348</sup>

15           198. An Apple marketing study from July 2011 indicates that, even among iPhone  
16 purchasers, [REDACTED]

17  
18  
19  
20  
21 <sup>344</sup> Kellog, Don, "iPhone vs Android," nielsenwire, June 4, 2010,  
<[http://blog.nielsen.com/nielsenwire/online\\_mobile/iphone-vs-android/](http://blog.nielsen.com/nielsenwire/online_mobile/iphone-vs-android/)>. [Exhibit 66] See also "Android  
22 Soars, But iPhone Still Most Desired as Smartphones Grab 25% of U.S. Mobile Market," nielsenwire,  
August 2, 2010, <[http://blog.nielsen.com/nielsenwire/online\\_mobile/android-soars-but-iphone-still-most-  
23 desired-as-smartphones-grab-25-of-u-s-mobile-market](http://blog.nielsen.com/nielsenwire/online_mobile/android-soars-but-iphone-still-most-desired-as-smartphones-grab-25-of-u-s-mobile-market)>. [Exhibit 67]

24 <sup>345</sup> Woollacott, Emma, "iPhone Users Most Loyal (Now, There's a Surprise)," TG Daily, November 28,  
2011, <<http://www.tgdaily.com/mobility-features/59873-iphone-users-most-loyal-now-theres-a-surprise>>.  
[Exhibit 68]

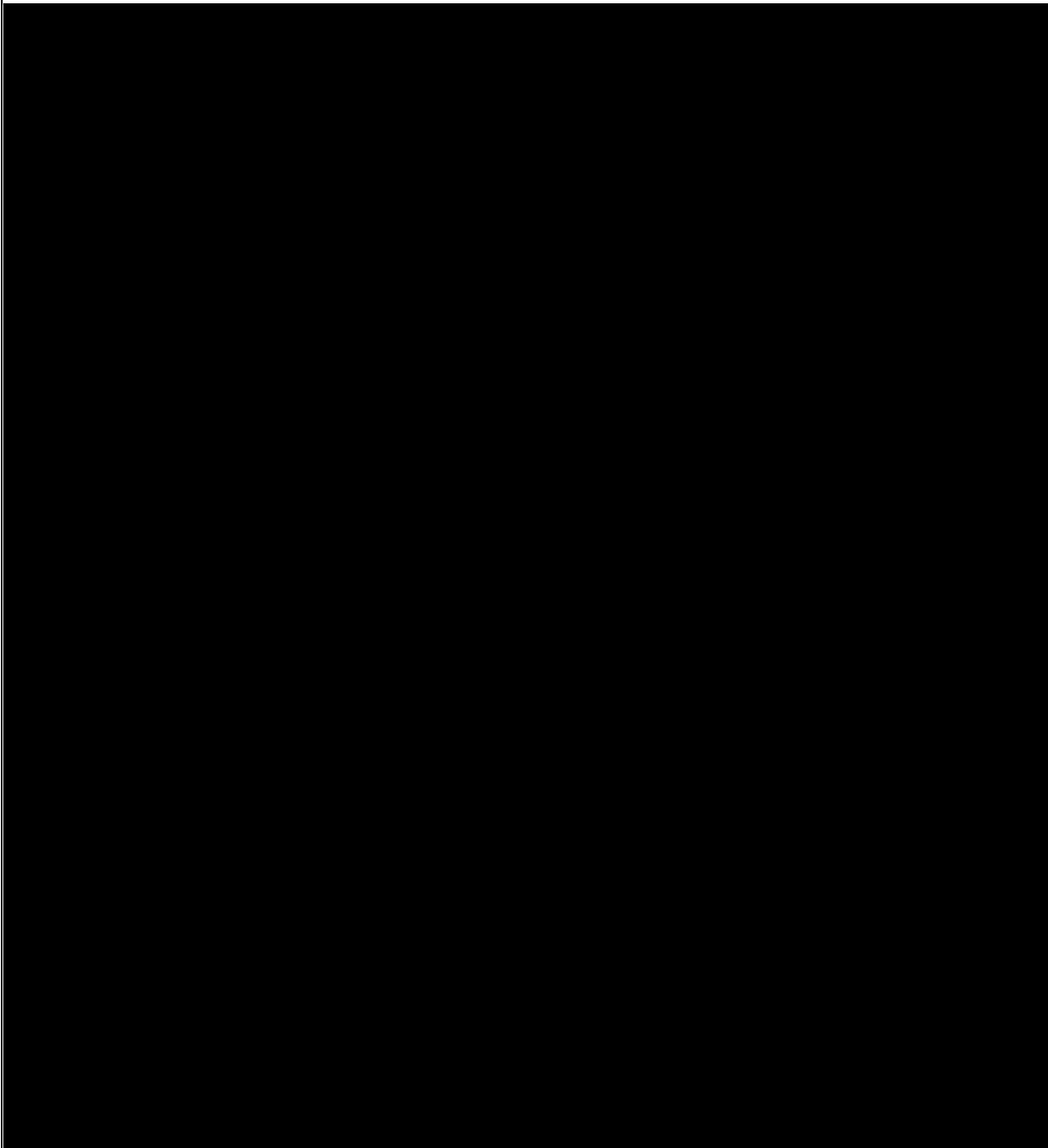
25 <sup>346</sup> Rogers, James, "Apple's iPhone Hooks Users," MainStreet.com, September 26, 2011,  
<<http://www.mainstreet.com/article/smart-spending/technology/apples-iphone-hooks-users>>. [Exhibit 69]

26 <sup>347</sup> Munster, Gene and Andrew H. Murphy, "Healthy Lines, Online Pre-Orders, Survey Data Suggest  
Strong iPhone 4S Launch," Piper Jaffray, October 14, 2011, p. 1. [Exhibit 70]

27 <sup>348</sup> Munster, Gene and Andrew H. Murphy, "Healthy Lines, Online Pre-Orders, Survey Data Suggest  
Strong iPhone 4S Launch," Piper Jaffray, October 14, 2011, p. 1. [Exhibit 70]



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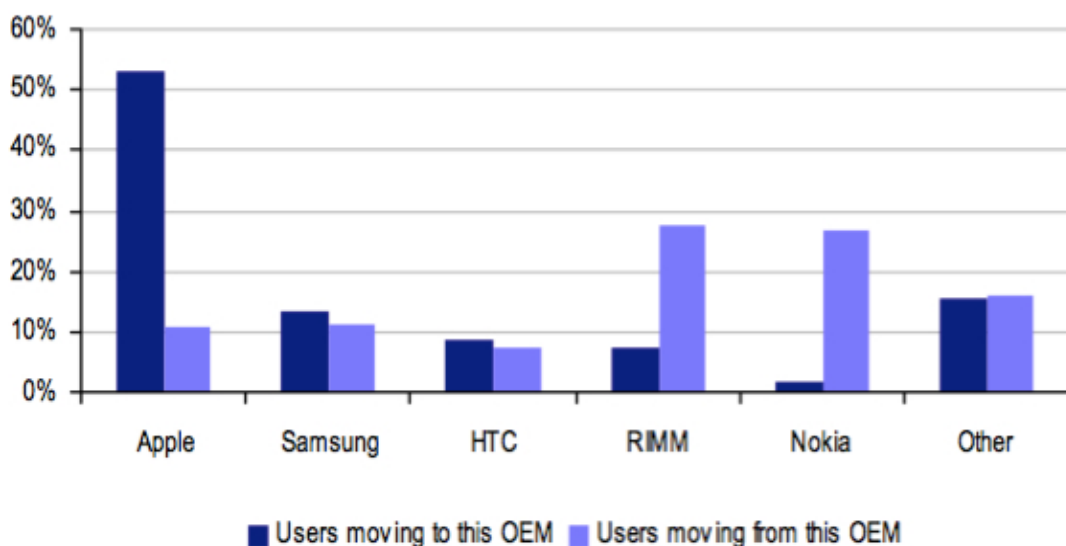


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[Redacted text block with four lines]

201. Figure 15, from an article dated September 2011, demonstrates that consumers are moving to Apple from other smartphone vendors by a percentage far greater than its competitors.

**Figure 15: Percentage of Smartphone Users Moving To/From Manufacturers**<sup>353</sup>

**Chart 7: Of respondents moving to new handset OEM were from and to?**



Source: UBS

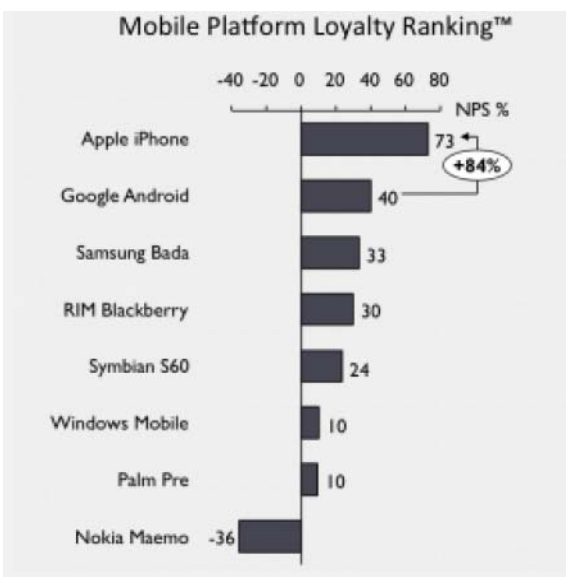
202. Another survey indicating that consumers are significantly more loyal to Apple's products than Android products in the U.S. smartphone market is a 2010 summary report published by Zokem (now Arbitron Mobile). The mobile market research firm found that "that iPhone scores 84% higher in loyalty ratings than the nearest competitor, Google Android."<sup>354</sup> Dr. Hannu Verkasalo, the CEO of Zokem, noted that "the figures suggest clearly that iPhone is the top performing platform in terms of user loyalty, and therefore, it is an increasingly likely

<sup>353</sup> Paczkowski, John, "Apple's iPhone Has an 89 Percent Retention Rate," September 23, 2011, <<http://allthingsd.com/20110923/apples-iphone-has-a-89-percent-retention-rate/>>. [Exhibit 73]

<sup>354</sup> "In the US Market, iPhone Outperforms Other Mobile Platforms In User Loyalty By a Wide Margin, Android Is Second, Blackberry Fourth," Zokem, January 18, 2011, <<http://www.zokem.com/2011/01/in-the-us-market-iphone-outperforms-other-mobile-platforms-in-user-loyalty-by-a-wide-margin-android-is-second-blackberry-fourth/>>. [Exhibit 74]

1 pick for a repurchase ...”<sup>355</sup> Included in the Zokem report were figures that illustrate iPhone’s  
 2 consumer loyalty. Figure 16 shows Apple’s loyalty ranking relative to other operating systems.  
 3 Net Promoter Score (NPS) “[measures] the loyalty that people have towards the phone.  
 4 Generically [an] NPS score higher than 60% is considered good.” Apple was the only company  
 5 to meet or exceed that benchmark.

6 **Figure 16: Industry Estimate of Platform Loyalty**



17 203. The report also measured mobile platform churn, or “the likelihood to shift to a  
 18 competing platform during the next 12 months ...” This metric is shown graphically in Figure  
 19 17. Again, the iPhone was subject to the lowest churn, indicating the lowest likelihood to shift  
 20 to a competing platform within the next year.

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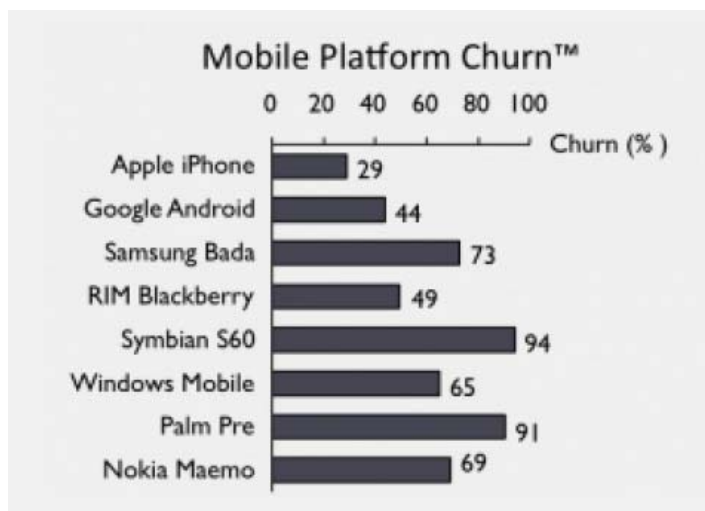
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26 <sup>355</sup> “In the US Market, iPhone Outperforms Other Mobile Platforms In User Loyalty By a Wide  
 27 Margin, Android Is Second, Blackberry Fourth,” Zokem, January 18, 2011,  
 28 <<http://www.zokem.com/2011/01/in-the-us-market-iphone-outperforms-other-mobile-platforms-in-user-loyalty-by-a-wide-margin-android-is-second-blackberry-fourth/>>. [Exhibit 74]

1 **Figure 17: Industry Estimate of Platform Churn**



10

11 204. These data suggest that Android's users report a re-purchase rate that is in the range

12 of Android's market share. Based on the data discussed above, it appears that platform loyalty is

13 not as significant an effect for the Android platform and would not have the impact that Apple

14 claims that it would have. This result is intuitive given that many consumers choose Android

15 due to it being an open platform with several choices, so those consumers are unlikely to be

16 "locked-in" to any single manufacturer or platform.

17 **D. *Apple and Mr. Musika Inflate the Impact of Platform Loyalty On Sales of Other Apple Products***

18 205. Apple and Mr. Musika argue that the alleged harm due to any platform loyalty and

19 network effects extends beyond smartphone/tablet sales because "it may 'lose sales of tag-along

20 products like apps, other Apple devices such as desktops, laptops and iPods and future models of

21 Apple smartphones.'"<sup>356</sup> [REDACTED]

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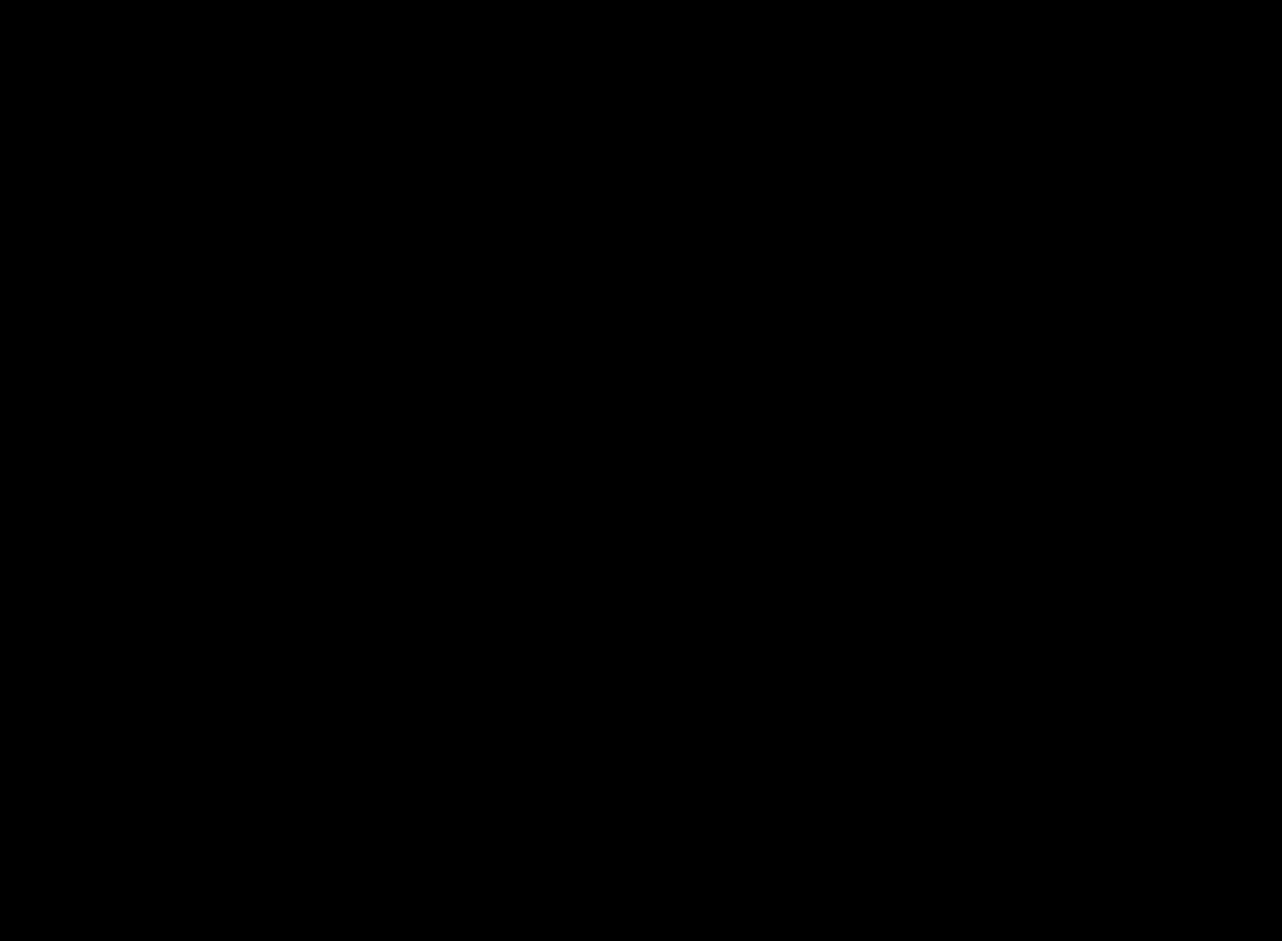
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26 <sup>356</sup> Motion, p. 4.

27 [REDACTED]

28 [REDACTED]

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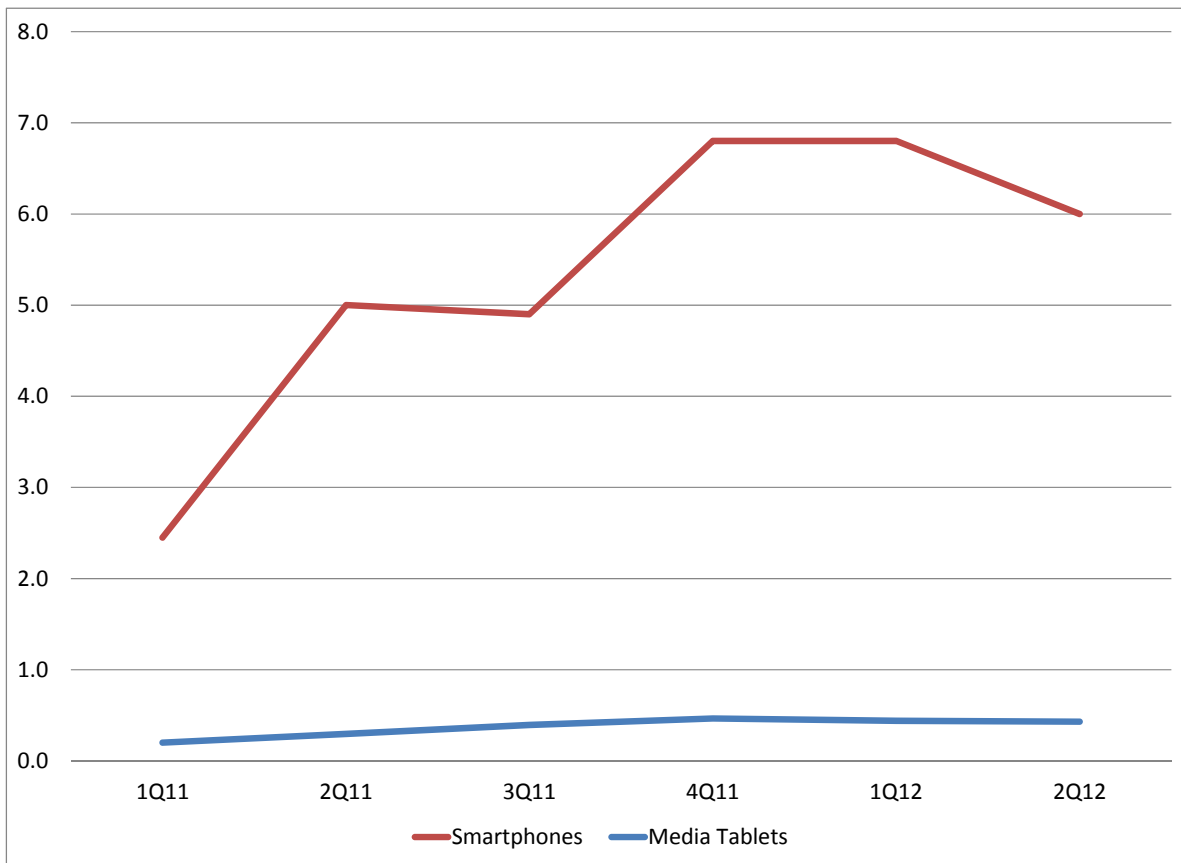
206. Apple’s argument does not hold up beyond theory. A December 2011 report from Martiz Research indicates that of customers who own an Android smartphone and are in the market for a tablet, only 19 percent preferred the Galaxy Tab compared to 41 percent who preferred the iPad while 15 percent preferred the Kindle Fire.<sup>359</sup> This is consistent with Samsung sales data, which show, despite its increase in overall smartphone sales, Samsung’s North American tablet sales have been small, garnering only 4.8 percent market share in Q2 2012 with only 430,000 units sold according to Strategy Analytics.<sup>360</sup>

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<sup>358</sup> [Redacted]

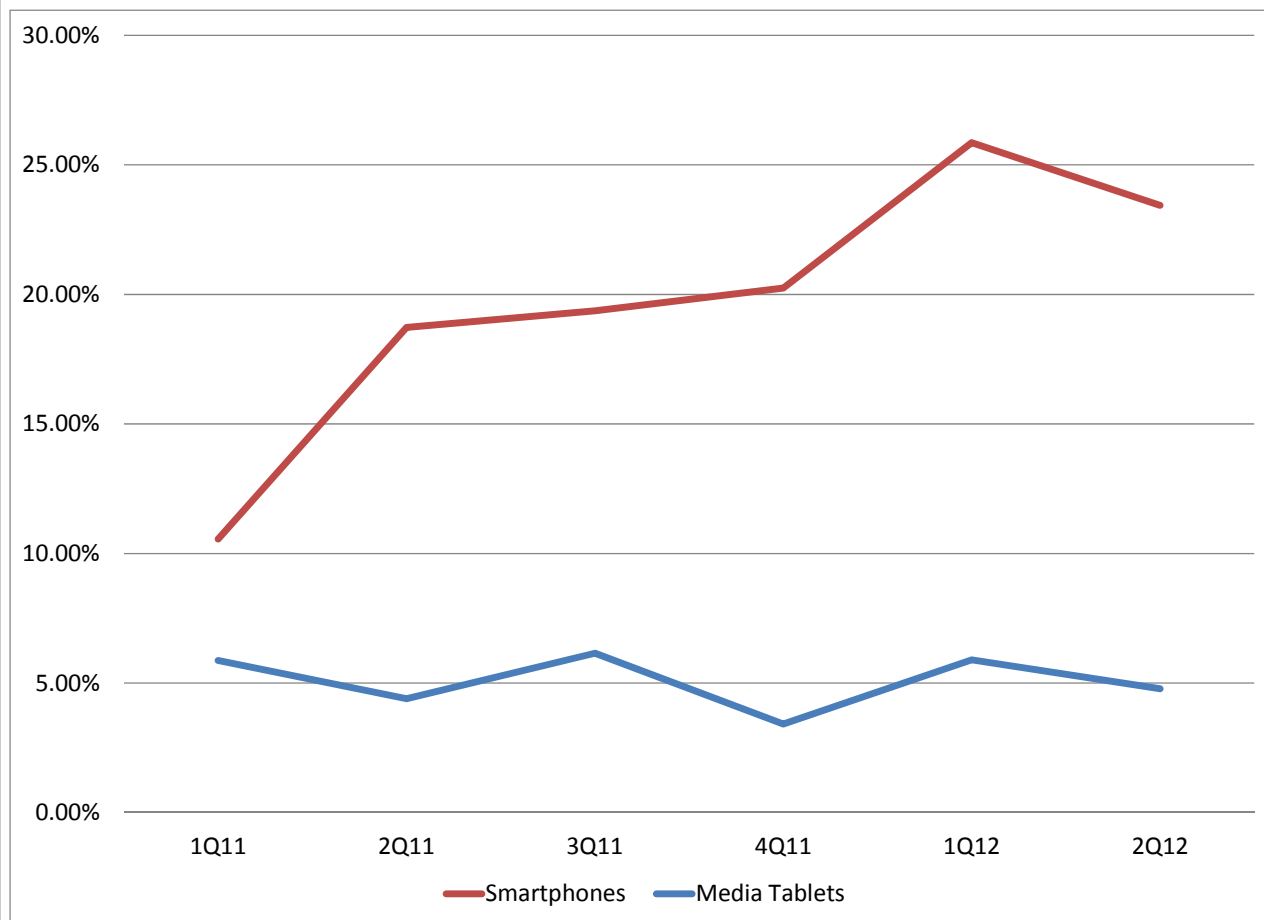
<sup>359</sup> “Holiday Tablet Poll Highlights,” Maritz Research, December 2011, <<http://www.maritzresearch.com/shared-content/Maritz-Poll/2011/~//media/Files/MaritzResearch/Case-Studies/Tablet-Poll-Topline-Report-122011.ashx>>, p. 3. [Exhibit 75]  
<sup>360</sup> Exhibit 2, Schedules 1.2.

1 **Figure 19: Comparison of Samsung’s North America Shipments of Smartphones and Media**  
 2 **Tablets (units – in millions)**<sup>361</sup>



361 Exhibit 2, Schedule 1.1 and 1.2.

1 **Figure 20: Comparison of Samsung's North America Unit Share of Smartphones and Media**  
 2 **Tablets**<sup>362</sup>

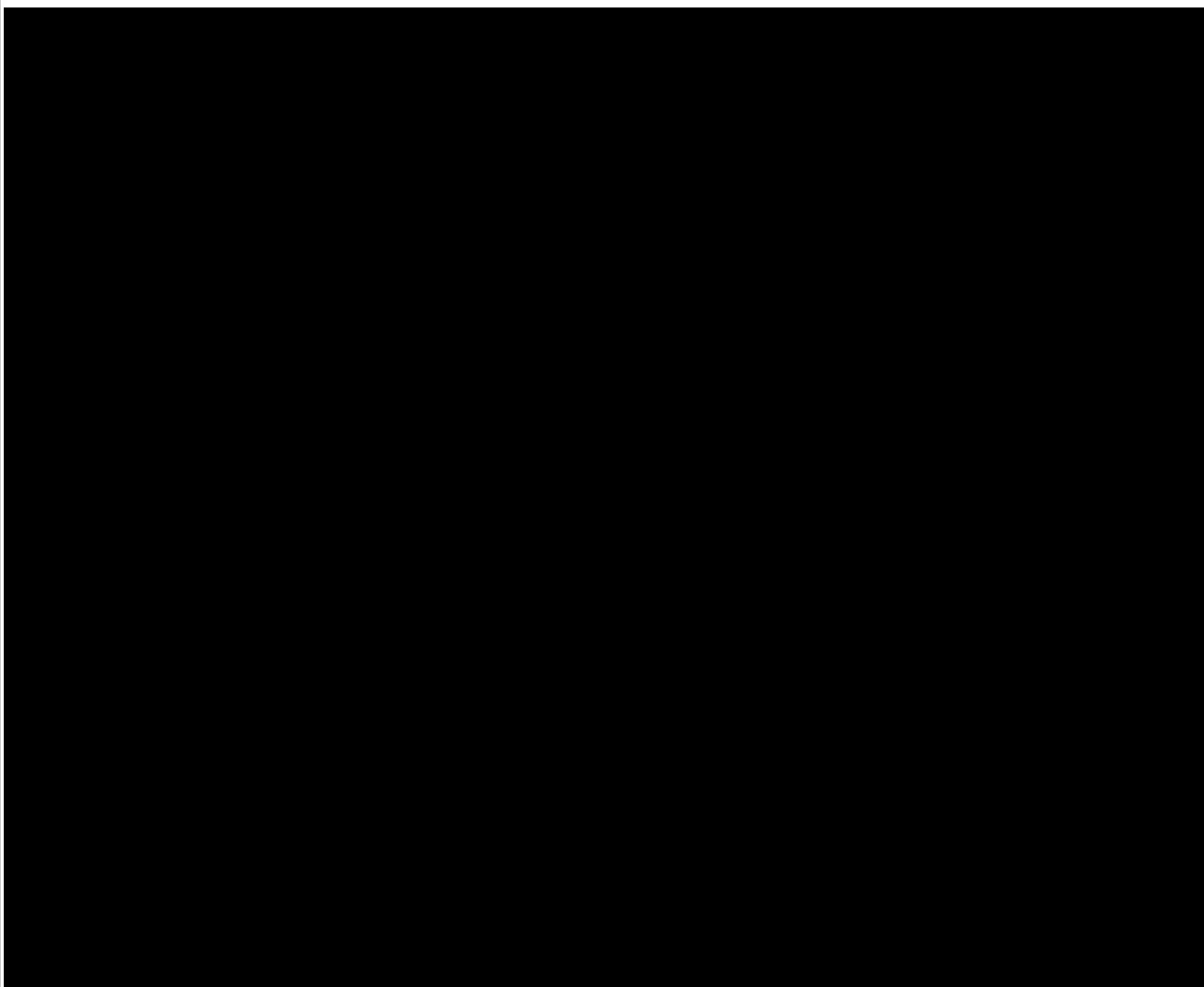


17 207. The limited importance of platform and network effects to purchases of products  
 18 other than smartphones is also demonstrated by continued success of the iPad and the recent  
 19 success of the Kindle Fire. As displayed in Figure 21, Apple has maintained a dominant share  
 20 of the tablet market, even while holding a significantly lower share of smartphone sales as  
 21 displayed in Figure 2 and Figure 3. The Amazon Kindle entered the market in Q4 2012 and  
 22 immediately jumped to a significant market position as seen below. Although it gave up some  
 23 of these gains in the first part of 2012, it still maintained a market share more than double that of  
 24 Samsung, despite Amazon not offering a smartphone.

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27 <sup>362</sup> Exhibit 2, Schedule 1.1 and 1.2.



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208. The success of the Amazon Kindle is strong evidence against Apple’s downstream sales arguments. In terms of the operating system interface, one review of the Kindle Fire notes that the “tablet runs on a version of Android so heavily customized that it might be considered a stretch to call it an Android tablet as far as the average user is concerned.”<sup>364</sup> Another review notes that “it is not a pure Android tablet. The Kindle Fire is built on a proprietary Amazon tablet OS that is based on Android. It is a fork of the Android OS that is Android-ish.”<sup>365</sup> Even though it uses a version of the Android operating system, transferring apps from a smartphone to

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<sup>363</sup> Exhibit 2, Schedule 1.2.

<sup>364</sup> Bohn, Dieter, “Amazon Kindle Fire redirects all Android Market requests to Amazon App Store,” December 16, 2011, <<http://www.theverge.com/2011/12/16/2642039/amazon-kindle-fire-redirects-all-android-market-requests-to-amazon>>. [Exhibit 76]

<sup>365</sup> Bradley, Tony, “Kindle Fire Creates Dilemma for Android,” PCWorld, November 11, 2011, <[http://www.pcworld.com/businesscenter/article/243614/kindle\\_fire\\_creates\\_dilemma\\_for\\_android.html](http://www.pcworld.com/businesscenter/article/243614/kindle_fire_creates_dilemma_for_android.html)>. [Exhibit 77]

1 the Kindle Fire is complex, and is not possible for every app (e.g., “official Google apps that  
 2 require logins won’t work,” such as Gmail).<sup>366</sup> Although Amazon has its own app marketplace  
 3 and customized version of the Android OS, many of the most popular apps for Android tablets,  
 4 such as Google Maps, Translate, Drive, Earth, Calendar, Wallet, Gmail, Chrome, YouTube,  
 5 Instagram, FireFox, Groupon, Adobe PhotoShop Touch, and many games are not available on  
 6 the Kindle Fire.<sup>367</sup> Despite this, the Kindle Fire has been a very successful product in its limited  
 7 time on the market.

8 209. Finally, a recent study has found that when purchasing a tablet, consumers do not  
 9 look to what type of operating system their smartphone is. An August 2012 comScore study  
 10 noted that Android and Kindle Fire owners were most concerned with price when choosing a  
 11 tablet.<sup>368</sup> Furthermore, the study found that “consumers did not place strong importance on  
 12 having the same operating system across their tablet and smartphone, with this factor falling  
 13 outside of the top five consideration factors for iPad, Kindle Fire and the average tablet  
 14 owner.”<sup>369</sup>

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17 <sup>366</sup> Segan, Sascha, “How to Run Almost Any Android App On the Kindle Fire,” PCmag.com,  
 18 November 15, 2011, <<http://www.pcmag.com/article/print/290473>>. [Exhibit 78] With the initial release  
 19 of the Kindle Fire, users could access the separate Amazon App Store, but could not access the Android  
 20 Market from the device and were instead automatically re-directed to the Amazon App Store when  
 21 browsing. This redirect was lifted with a December 2011 update; however, the ability to install apps from  
 22 the Android Market was still restricted and access could only be used for browsing. (Bohn, Dieter,  
 “Amazon Kindle Fire redirects all Android Market requests to Amazon App Store,” December 16, 2011,  
 <<http://www.theverge.com/2011/12/16/2642039/amazon-kindle-fire-redirects-all-android-market-requests-to-amazon>>. [Exhibit 76] See also Welch, Chris, “Kindle Fire gets Android Market browser access, but  
 just for looking,” December 21, 2011, <<http://www.theverge.com/2011/12/21/2652726/kindle-fire-browse-android-market-website>>. [Exhibit 79])

23 <sup>367</sup> Brent Rose, “7 Great Android Apps You Can’t Get on the Kindle Fire,” Gizmodo, September 7,  
 2012, <<http://gizmodo.com/5941148/7-great-android-apps-you-cant-get-on-the-kindle-fire>>. [Exhibit 80]

24 <sup>368</sup> “Why Buy a Tablet? Selection of Apps, Price and Device Brand Most Important Factors in  
 Purchase Decision,” comScore, August 6, 2012,  
 25 <[http://www.comscore.com/Press\\_Events/Press\\_Releases/2012/8/comScore\\_Introduces\\_TabLens](http://www.comscore.com/Press_Events/Press_Releases/2012/8/comScore_Introduces_TabLens)>.  
 [Exhibit 194]

26 <sup>369</sup> “Why Buy a Tablet? Selection of Apps, Price and Device Brand Most Important Factors in  
 Purchase Decision,” comScore, August 6, 2012,  
 27 <[http://www.comscore.com/Press\\_Events/Press\\_Releases/2012/8/comScore\\_Introduces\\_TabLens](http://www.comscore.com/Press_Events/Press_Releases/2012/8/comScore_Introduces_TabLens)>.  
 [Exhibit 194]

1           210. The above information shows that consumers base their tablet purchase decision on  
2 factors other than what type of smartphone they own, contrary to Apple's argument about lost  
3 derivative sales.

4 **VI. Apple's Trade Dress Is Not Likely to Be Diluted**

5           211. Apple and Mr. Musika assert that an injunction is necessary to prevent its trade  
6 dress from being diluted.<sup>370</sup> I disagree.

7           212. Apple admits in its motion that it no longer practices any of the trade dress that the  
8 jury found to be diluted because it will soon stop selling the iPhone 3GS.<sup>371</sup> Apple does not  
9 state or present evidence that it ever intends to resume using that trade dress or selling the  
10 iPhone 3GS. Any loss of distinctiveness of that trade dress therefore cannot cause harm to  
11 Apple. Further, should any loss of distinctiveness occur, it will likely be at least in part the  
12 result of the fact that Apple is no longer using or advertising this trade dress.

13           213. Apple states in its motion that, although it will no longer be selling the iPhone 3GS,  
14 it will continue to provide replacement phones that do so, and used iPhone 3GS's will be  
15 available for resale on the secondary market.<sup>372</sup> Apple does not contend, however, that it will  
16 directly derive any revenue from the replacement of damaged iPhone 3GS's or that consumers  
17 will in any way be relying on the distinctiveness of that trade dress when making purchasing  
18 decisions.<sup>373</sup> In short, there is no revenue to Apple that is contingent on the distinctiveness of  
19 the iPhone 3GS trade dress.

20           214. Apple argues that "the trade dress of the iPhones that Apple currently offers  
21 incorporate many elements of the trade dress found to be diluted."<sup>374</sup> But it fails to provide any  
22 linkage whatsoever between Samsung's sales and the erosion of the distinctiveness of the trade  
23 dress of its current products. Nor is it my understanding that Apple may be harmed by dilution  
24

25 <sup>370</sup> Motion, pp. 6, 26. Musika Declaration, ¶¶ 7-8.

26 <sup>371</sup> Motion, p. 6.

27 <sup>372</sup> Motion, p. 6.

28 <sup>373</sup> *See absence of discussion* Motion, p. 6.

<sup>374</sup> Motion, p. 6.

1 of its iPhone 4 trade dress. The jury found that Apple's Unregistered Combination iPhone Trade  
2 Dress was not protectable.<sup>375</sup> This is the only trade dress that Apple claimed was practiced by  
3 the iPhone 4.<sup>376</sup>

4 215. Indeed, the very distinctiveness that Apple describes in its Motion is a reason that  
5 the distinctiveness of that trade dress of those products would not be eroded. According to its  
6 motion, Apple engaged in "extensive advertising of the iPhone 3G and 3Gs phones"<sup>377</sup> and spent  
7 approximately \$400 million in advertising "for the products that used the relevant trade dress  
8 between 2007 and 2010."<sup>378</sup>

9 216. Further, Apple fails to explain why its contention that the iPhone 3GS trade dress is  
10 closely associated with Apple will result in irreparable harm to Apple if the accused products are  
11 sold. The only evidence cited by Apple is the conclusory declaration of Phil Schiller.<sup>379</sup> Mr.  
12 Schiller's declaration simply expresses his unexplained and unsupported opinion that "what is so  
13 special about Apple is eroded."<sup>380</sup> Notably absent in Apple's Motion is any evidence or analysis  
14 of any confusion by purchasers of the accused products. Apple has not presented any survey of  
15 customers that shows that any purchaser of an accused product was confused about the  
16 manufacturer of that product. There is therefore no basis to conclude that any person observing  
17 an accused product would believe it is an Apple product.

18 217. The distinctiveness that Apple's products have would serve to prevent the type of  
19 consumer confusion that could lead to irreparable harm, especially considering the sophisticated  
20 nature of consumers that are paying hundreds of dollars for the iPhone and iPad and often  
21 entering into multiple-year contracts with a cellular provider.

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24 <sup>375</sup> Amended Verdict Form, p. 10.

25 <sup>376</sup> Exhibit 11 to Apple's Notice of Filing of Juror Notebook, pp. 109-111.

26 <sup>377</sup> Motion, p. 6.

27 <sup>378</sup> Motion, p. 27.

28 <sup>379</sup> Motion, p. 6.

<sup>380</sup> Declaration of Philip W. Schiller in Support of Apple's Motion for a Permanent Injunction, August  
28, 2012, p. 5.

1 **VII. Apple’s “Brand” Is Not Likely To Be Harmed**

2 218. Apple contends that sale of the accused products that use the iPhone 3GS trade  
3 dress will “injure Apple’s brand equity.” I disagree. Apple makes this argument despite the fact  
4 that it will soon cease selling any products that use the iPhone 3GS trade dress.

5 219. As an initial matter, Apple’s only support for this argument is Dr. Winer’s  
6 declaration. Dr. Winer’s declaration, however, fails to provide any evidence of damage to  
7 Apple’s brand. Instead, Dr. Winer presents a purely theoretical account of how damage to  
8 Apple’s brand *could* occur. For example, Dr. Winer opines that the accused products reduce  
9 Apple’s “coolness.”<sup>381</sup> But he presents no evidence that any consumer thinks Apple is less  
10 “cool” as a result of any of the accused products.

11 220. Dr. Winer also contends that “[i]f consumers associate the diluting and infringing  
12 Samsung products with Apple, to the extent the products provide a different consumer  
13 experience than Apple products, the consistent nature of the ‘Apple’ user experience will be  
14 diminished.”<sup>382</sup> (emphasis added) But, as stated above, Apple has presented little evidence that  
15 consumers associate the accused products with Apple. At trial, Dr. Winer, testified that he had  
16 no empirical evidence or data to show that Samsung’s actions had diluted Apple’s brand and that  
17 he had no empirical evidence that Apple had lost any market share.<sup>383</sup>

18 221. It’s no secret that Apple’s extensive marketing efforts have created one of the most  
19 valuable brands worldwide. In fact, a mid-2011 Financial Times Special Report on the BrandZ  
20 Top 100 Most Valuable Brands study noted that this year Apple has passed Google as the top  
21 brand in the world.<sup>384</sup> When discussing the drivers behind Apple’s growth, the CEO of  
22 Millward Brown Optimor, the company that compiles the BrandZ rankings, was quoted as

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24 <sup>381</sup> Declaration of Russell Winer, September 20, 2012, ¶ 9. (“Winer Declaration”)

25 <sup>382</sup> Winer Declaration, ¶ 11

26 <sup>383</sup> Transcript Proceedings, August 7, 2012, Volume 5, pp. 1534-35.

27 <sup>384</sup> Lucas, Louise, and Barney Jopson, “Analysis: Big names fly high despite the gloom,” Financial  
28 Times, May 18, 2011. [Exhibit 174] “The BrandZ Top 100 is the only ranking based on a brand valuation  
methodology that is grounded in quantitative customer research and in-depth financial analysis.” The  
“study values market-facing brands, that is brands that directly generate revenues and profits through the  
sale of goods and services to customers.”

1 saying “Apple had such a big hit with the iPhone 4 and the iPad, and that has contributed to its  
2 extraordinary growth.”<sup>385</sup>

3 222. The demographics of Apple’s customers also rebut any claim that Apple’s brand  
4 may be harmed by the sale of the accused products. A recently published study conducted by  
5 the Pew Internet & American Life Project confirms that “[s]martphone adoption is highest  
6 among the affluent and well-educated ...”<sup>386</sup> The same study also found that tablet computers  
7 are much more prevalent among smartphone owners than in the general population.<sup>387</sup> This type  
8 of consumer, coupled with a powerful brand like Apple, is not likely a recipe for product  
9 confusion, especially in a marketplace that has long been characterized by a diverse product  
10 offering.

11 223. The strength of Apple’s brand, and the negligible effect that Samsung’s devices  
12 have exerted on that strength, is displayed quite clearly by the atmosphere surrounding the  
13 release of the iPad 2 and the iPhone for Verizon. The second version of Apple’s tablet was  
14 released on the afternoon of March 11, 2011, “and was greeted by the now-familiar lines of  
15 buyers outside Apple stores,” as described by an Associated Press article.<sup>388</sup> This flurry of  
16 consumer demand left sales estimates at close to one million iPad 2s sold on the first weekend  
17 alone.<sup>389</sup> It took the first iPad 28 days to amass such sales.<sup>390</sup> As described above, the iPhone 5  
18 has also recently enjoyed record breaking sales.

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21 <sup>385</sup> Lucas, Louise, and Barney Jopson, “Global Brands: Big names fly high despite the gloom,”  
Financial Times, May 18, 2011. [Exhibit 174]

22 <sup>386</sup> Smith, Aaron, “35% of American adults own a smartphone,” Pew Internet, July 11, 2011, p. 2,  
<<http://pewinternet.org/Reports/2011/Smartphones.aspx>>. [Exhibit 175]

23 <sup>387</sup> Smith, Aaron, “35% of American adults own a smartphone,” Pew Internet, July 11, 2011, p. 11,  
<<http://pewinternet.org/Reports/2011/Smartphones.aspx>>. [Exhibit 175]

24 <sup>388</sup> “Apple fans line up to buy first batch of iPad 2s,” The Associated Press, March 11, 2011,  
25 <<http://www.washingtonpost.com/wpdyn/content/article/2011/03/11/AR2011031101539.html>>. [Exhibit  
81]

26 <sup>389</sup> “Apple iPad 2 sales seen clearing 1 million units,” Reuters, March 14, 2011,  
<<http://www.reuters.com/article/2011/03/14/us-apple-research-idUSTRE72D30020110314>>. [Exhibit 82]

27 <sup>390</sup> “Apple iPad 2 sales seen clearing 1 million units,” Reuters, March 14, 2011,  
28 <<http://www.reuters.com/article/2011/03/14/us-apple-research-idUSTRE72D30020110314>>. [Exhibit 82]

1           224. Similarly, as described above, contrary to Apple's claim of damage to its brand,  
 2 Apple has been successful in charging consistently high prices for its products relative to its  
 3 competitors, likely due at least in part to the strength of its brand. Figure 5, above, summarizes  
 4 average selling prices in the U.S. for Apple's iPhone and Samsung's smartphones. As can be  
 5 seen from the figure, [REDACTED]

6 [REDACTED]  
 7 **VIII. Even if Apple Could Demonstrate that the Accused Products Will Cause Lost Sales,  
 8 Any Harm to Apple Could Be Quantified**

9           225. In my opinion, any lost sales to Apple would be measurable and could adequately  
 10 be corrected with monetary damages. Lost profits as a result of lost sales is a common,  
 11 acceptable and measureable damage calculation. I have calculated lost profit damages on  
 12 numerous occasions in my 35-year career, and Apple has not provided any convincing reasoning  
 13 to support why damages would not be calculable in this litigation. Even if Apple could prove  
 14 that some Samsung customers made their decision to purchase the accused products based on the  
 15 features enabled by the four Apple patents, this number of customers can be calculated through  
 16 the use of surveys, conjoint analysis, or hedonic regression.

17           226. Indeed, Mr. Musika offers no explanation for his statement that lost future sales  
 18 cannot be quantified in this case.<sup>391</sup> An experienced damage expert can use studies that have  
 19 been conducted about customer loyalty and churn to calculate how many of these customers will  
 20 be repeat customers at both Samsung and Apple. Apple has demonstrated the ability to gather  
 21 the data that would be needed for these types of surveys, and it has the ability to retain survey  
 22 experts to gather data that could be relied on if the data is not already in the record. Further,  
 23 Apple presented a lost profits calculation to the jury, and as I explained in my September 21<sup>st</sup>  
 24 declaration, the jury awarded lost profits on five products and did not award lost profits on the

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 26  
 27 <sup>391</sup> Musika Declaration, ¶ 60.  
 28

1 other accused products.<sup>392</sup> Based on Apple's own lost profits theory that Samsung would be out  
2 of the market for a limited design around period, which has already elapsed, and then return to  
3 the market and achieve the sales that it did make,<sup>393</sup> Apple does not have any further claim to  
4 lost profits than what was awarded by the jury.

5 227. If Apple has lost any conveyed sales related to its lost sales, there will be evidence  
6 of the types of purchases Apple customers normally make, in what quantities, at what prices, and  
7 at what profit to Apple. [REDACTED]

8 [REDACTED]  
9 [REDACTED] These data, as well as supplemental data that could be gathered  
10 from the types of surveys frequently conducted by Apple, could be used to calculate the lost  
11 profits on conveyed sales related to lost iPhone sales. These are types of analyses that  
12 experienced damage experts perform all the time.

13 228. In conclusion, it is my opinion that Apple has not and will not be irreparably  
14 harmed absent an injunction against the sale of the accused products. If it is determined that  
15 Apple would lose sales, any harm to Apple, whether in the form of lost sales or the other types  
16 of harm, could be quantified.

17 **IX. The Appropriate Bond Would be \$32,550,725**

18 229. I have been asked to calculate the profit that Samsung would earn on its forecasted  
19 sales of the accused products following the hearing on December 6<sup>th</sup>. I understand that, after  
20

21  
22 <sup>392</sup> Declaration of Michael J. Wagner in Support of Samsung's Motion for a Judgment as a Matter of  
23 Law, New Trial and/or Remittitur Pursuant to Federal Rules of Civil Procedure 50 and 59, September 21,  
2012, pp. 3-5.

24 <sup>393</sup> August 13, 2012 Tr. at 2084:1-19.  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED]  
28 [REDACTED]



1 December 7th, Samsung expects that it will sell the Galaxy S II Epic 4G Touch and the Galaxy  
2 S II (T-Mobile).<sup>396</sup>

3 230. The Kerstetter Declaration provided Samsung's forecast for sales of these two  
4 smartphones for the last three weeks of December 2012 and the first six months of 2013.<sup>397</sup>

5 [REDACTED]  
6 [REDACTED]  
7 231. The Kerstetter Declaration also provided data on the consolidated profit that  
8 Samsung earned on its actual sales of the smartphones in the third quarter of 2012. I use  
9 Samsung's consolidated operating profit to estimate the profit that Samsung would earn on its  
10 forecasted sales of the accused products. [REDACTED]

11 [REDACTED]  
12 [REDACTED]  
13 232. Multiplying the forecasted units by the profit per unit, I calculate the profit that  
14 Samsung would earn on its forecasted sales of the accused products following the hearing on  
15 December 6<sup>th</sup> as follows:<sup>398</sup>

16 [REDACTED]  
17 [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]  
23 [REDACTED]

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26 <sup>396</sup> Kerstetter Declaration.

27 <sup>397</sup> Kerstetter Declaration.

28 <sup>398</sup> Exhibit 2, Schedule 4.1.

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I declare under penalty of perjury under the laws of the United States of America  
that the foregoing is true and correct.

Executed on October 19, 2012, at Mountain View, California.



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Michael J. Wagner