

Estrich Declaration

Exhibit 11

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

APPLE INC., A CALIFORNIA CORPORATION,)	C-11-01846 LHK
)	
)	SAN JOSE, CALIFORNIA
PLAINTIFF,)	
)	AUGUST 20, 2012
VS.)	
)	VOLUME 12
SAMSUNG ELECTRONICS CO., LTD., A KOREAN BUSINESS ENTITY; SAMSUNG ELECTRONICS AMERICA, INC., A NEW YORK CORPORATION; SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, A DELAWARE LIMITED LIABILITY COMPANY,)	PAGES 3712-3940
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DEFENDANTS.)	

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

APPEARANCES ON NEXT PAGE

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

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

FOR PLAINTIFF MORRISON & FOERSTER
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BY: VICTORIA F. MAROULIS
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LOS ANGELES, CALIFORNIA 90017

1 ADDITION, " THAT SEEMS OKAY.

2 WITH REGARD TO TRADE DRESS DILUTION,
3 WHICH WAS NUMBER 55, I'M GOING TO DENY SAMSUNG'S
4 FIRST ARGUMENT. I DON'T BELIEVE THE LANGUAGE THE
5 CLAIM IS MISSING IS ACTUALLY MISSING. IT'S IN THE
6 PRECEDING SENTENCE, AND I DON'T THINK THERE'S
7 ANYTHING MISLEADING ABOUT THE JURY INSTRUCTION
8 ITSELF.

9 NOW, YOU DO ASK THAT AT THE END OF THE
10 INSTRUCTION, THE COURT JUST ADD A SENTENCE SAYING
11 "THESE FACTORS SHOULD BE WEIGHED BY YOU GIVEN THE
12 FACTS AND CIRCUMSTANCES OF THE CASE," I THINK
13 THAT'S REASONABLE. THAT WOULD BE OKAY WITH ME.

14 WITH REGARD TO TRADE DRESS NOTICE AND
15 DAMAGES, I WOULD GRANT THAT. YOU WANT THE CLEAN --
16 COMPLETE INSTRUCTION WITH PART OF THE NINTH CIRCUIT
17 MODEL INSTRUCTION CLARIFYING WHAT STATUTORY NOTICE
18 IS, I'M WONDERING IF APPLE MIGHT BE WILLING TO
19 STIPULATE TO THAT SINCE IT'S MODEL JURY INSTRUCTION
20 LANGUAGE AND IT DOESN'T SEEM PARTICULARLY
21 CONTROVERSIAL.

22 SO HEARING THAT, HOW MUCH TIME DO YOU
23 WANT TO SPEND ON THE HIGH PRIORITY OBJECTIONS AND
24 HOW MUCH TIME DO YOU WANT TO JUST MAKE YOUR RECORD?

25 MR. ZELLER: JUST ONE MOMENT, YOUR HONOR?

1 THE COURT: OKAY.

2 (DISCUSSION OFF THE RECORD BETWEEN
3 DEFENSE COUNSEL.)

4 MR. JOHNSON: YOUR HONOR, I THINK WE'RE
5 GOING TO TALK ABOUT THREE OR FOUR POTENTIALLY.

6 THE COURT: OKAY. ALL RIGHT. CAN YOU
7 TELL ME --

8 MS. MAROULIS: YOUR HONOR, WITH RESPECT
9 TO EXHAUSTION, WITHOUT GIVING UP OUR OBJECTIONS,
10 CAN WE PLEASE INCLUDE, IN THE COURT'S CURRENT
11 INSTRUCTION, THE STATEMENT "WHERE THE SPECIAL
12 ACTIVITIES INCLUDE, FOR EXAMPLE, WHERE A PRODUCT IS
13 DELIVERED."

14 IN OTHER WORDS, WE'RE OBJECTING TO THE
15 INSTRUCTION, BUT IF THE COURT IS INTENDING TO KEEP
16 WHAT IT HAS, IF WE CAN INCLUDE DELIVERY AS ONE OF
17 THE ESSENTIAL ACTIVITIES.

18 THE COURT: OKAY. LET ME HEAR FROM -- IS
19 THERE ANY OBJECTION FROM APPLE ON THAT ONE?

20 MR. SELWYN: YOUR HONOR, THERE IS AN
21 OBJECTION TO THAT. THERE'S NO REASON TO SINGLE OUT
22 THAT SPECIFIC EXAMPLE OF AN ACTIVITY IN THIS LIST.

23 IF YOU WERE TO GO DOWN THAT PATH, THERE
24 ARE OTHER THINGS THAT WE WOULD WANT TO IDENTIFY AS
25 EXAMPLES THAT THE JURY CAN CONSIDER.

1 THE COURT: WELL, THERE ALREADY -- THIS
2 WAS LARGELY FROM YOUR -- FROM APPLE'S INSTRUCTION
3 OF NEGOTIATING A CONTRACT AND PERFORMING
4 OBLIGATIONS UNDER THE CONTRACT, AND I THINK
5 PERFORMING UNDER THE OBLIGATIONS OF THE CONTRACT
6 WOULD INCLUDE DELIVERY.

7 MR. SELWYN: WE AGREE.

8 MS. MAROULIS: THAT'S FINE, YOUR HONOR.

9 THE COURT: SO PERFORMING OBLIGATIONS
10 UNDER THE CONTRACT?

11 MS. MAROULIS: INCLUDING WHERE DELIVERY
12 TAKES PLACE.

13 MR. SELWYN: THAT'S WHERE WE HAVE THE
14 DISAGREEMENT. THERE'S NO POINT IN SINGLING OUT ONE
15 EXAMPLE AMONG MANY THAT CAN BE INCLUDED UNDER THE
16 RUBRIC OF PERFORMING UNDER THE CONTRACT.

17 THE COURT: ALL RIGHT. AND I BELIEVE
18 THAT THERE IS SOME CASE LAW IN SUPPORT OF THIS
19 EXACT LANGUAGE, RIGHT?

20 MR. SELWYN: THERE IS.

21 MS. MAROULIS: YES, YOUR HONOR.

22 THE COURT: ALL RIGHT. SO THAT'S DENIED.
23 NEXT, GO AHEAD, PLEASE.

24 YOU CAN CERTAINLY ARGUE THAT. I MEAN, IT
25 DOES FALL WITHIN PERFORMING THE OBLIGATIONS UNDER

1 THE CONTRACT.

2 OKAY. WHAT ELSE?

3 MR. ZELLER: JUST A FEW POINTS, YOUR
4 HONOR.

5 THE COURT: OKAY.

6 MR. ZELLER: FIRST WITH RESPECT TO THE
7 INSTRUCTION ON FUNCTIONALITY FOR A DESIGN PATENT.

8 THE COURT: 39?

9 MR. ZELLER: YES.

10 THE COURT: OKAY.

11 MR. ZELLER: BUT IT'S ACTUALLY A
12 VARIATION ON SOMETHING THAT WE HAD RAISED.

13 THE COURT WILL RECALL THAT UNDER
14 RICHARDSON, AS WELL AS SOME OTHER FEDERAL CIRCUIT
15 AUTHORITY, THE INFRINGEMENT COMPARISON THAT HAS TO
16 BE DONE BY THE JURY NEEDS TO FACTOR OUT ELEMENTS
17 THAT THEY FIND TO BE FUNCTIONAL, AND SO PROCEEDING
18 FROM THE PREMISE THAT THEY'RE NOT GOING TO BE
19 INSTRUCTED AS TO WHAT IS FUNCTIONAL AND WHAT ISN'T,
20 BUT OF COURSE THAT WILL BE LEFT UP TO THEM TO
21 DETERMINE, WE BELIEVE THEY NEED TO BE INSTRUCTED
22 THAT ANYTHING THAT THEY FIND TO BE FUNCTIONAL UNDER
23 THE COURT'S DEFINITION SHOULD NOT BE CONSIDERED FOR
24 PURPOSES OF THE INFRINGEMENT COMPARISON.

25 AND WE DON'T THINK -- AND WE LOOKED FOR

1 EQUIVALENT LANGUAGE ALONG THOSE LINES AND COULD NOT
2 FIND ANY IN THE INSTRUCTIONS, YOUR HONOR.

3 THE COURT: SO WHAT -- I'M SORRY. TELL
4 ME EXACTLY WHAT WOULD YOU LIKE ADDED TO INSTRUCTION
5 NUMBER 39?

6 MR. ZELLER: THAT FOR ANY ELEMENTS OR
7 FEATURES THAT THE JURY DETERMINES ARE FUNCTIONAL,
8 THAT THE JURY SHOULD FACTOR OUT SIMILARITIES
9 BETWEEN THE ACCUSED PRODUCTS AND THE ASSERTED
10 DESIGN PATENTS FOR PURPOSES OF DETERMINING WHETHER
11 OR NOT THE SIMILARITIES ARE DECEPTIVE.

12 THE COURT: OKAY.

13 MR. ZELLER: IN OTHER WORDS, THE
14 APPLICATION OF THE INFRINGEMENT STANDARD.

15 THE COURT: SORRY, BUT CAN YOU GIVE ME
16 THAT AGAIN? FOR ANY ELEMENTS OR FEATURES THE JURY
17 DETERMINES ARE FUNCTIONAL, THE JURY SHOULD FACTOR
18 OUT ANY SIMILARITIES -- CAN YOU GO AHEAD?

19 MR. ZELLER: BASED ON -- OR ANY
20 SIMILARITIES BETWEEN THE ACCUSED DEVICE AND THE
21 DESIGN PATENT BASED UPON THOSE ELEMENTS OR
22 FEATURES.

23 THE COURT: PATENT BASED UPON THOSE
24 ELEMENTS OR FEATURES.

25 OKAY. LET ME HEAR FROM APPLE. WHAT'S

1 YOUR VIEW ON THAT PARTICULAR LANGUAGE?

2 MR. JACOBS: WELL, I THINK, FIRST OF ALL,
3 WE'RE IN THE WRONG INSTRUCTION, YOUR HONOR.

4 I BELIEVE THAT 39 IS ON INVALIDITY, LACK
5 OF ORNAMENTALITY.

6 THE COURT: WELL, THE LACK OF
7 ORNAMENTALITY, IT DOES INCLUDE A LOT OF
8 FUNCTIONAL -- UNFORTUNATELY, THAT IS WHERE WE PUT A
9 LOT OF FUNCTIONAL DISCUSSION.

10 MR. JACOBS: SO I THINK THAT THE OTHER --
11 THE FUNDAMENTAL PROBLEM WITH IT IS THAT THE
12 PRINCIPLE THAT SAMSUNG WOULD LIKE TO RELY ON COMES
13 OUT OF A LINE OF CASES THAT JUST DOES NOT APPLY TO
14 OUR SITUATION HERE.

15 IT'S VERY CLEAR UNDER EGYPTIAN GODDESS
16 THAT YOU LOOK AT THE DESIGN AS A WHOLE AND YOU HAVE
17 AN ORDINARY OBSERVER TEST LOOKING AT THE DESIGN AS
18 A WHOLE AND YOU DON'T TRY TO ELIMINATE --

19 THE COURT: OKAY. I UNDERSTAND WHERE
20 YOU'RE GOING. ALL RIGHT. LET ME JUST TAKE THAT
21 UNDER SUBMISSION. OKAY?

22 MR. JACOBS: THANK YOU, YOUR HONOR.

23 THE COURT: ALL RIGHT. GO AHEAD. WHAT
24 ELSE?

25 MR. ZELLER: A SECOND ISSUE, YOUR HONOR,

1 IS WE WOULD ASK FOR CLARIFICATION OF THE
2 OBVIOUSNESS INSTRUCTION.

3 THE COURT: ALL RIGHT. LET ME ASK YOU
4 ONE MORE QUESTION ON 39.

5 MR. ZELLER: SURE.

6 THE COURT: DID YOU STILL WANT THE PGH
7 TECHNOLOGIES FACTORS IN THERE? OR NOT?

8 MR. ZELLER: YES.

9 THE COURT: OBVIOUSLY YOU'D RATHER HAVE
10 YOUR SUGGESTED LANGUAGE.

11 MR. ZELLER: YES, YOUR HONOR.

12 THE COURT: BUT LET ME HEAR --

13 MR. ZELLER: THE ANSWER TO THE QUESTIONS
14 ARE YES TO BOTH.

15 THE COURT: OKAY.

16 MR. ZELLER: WITH RESPECT TO INSTRUCTION
17 NUMBER 38 ON OBVIOUSNESS --

18 THE COURT: OKAY.

19 MR. ZELLER: -- WE WOULD ASK THAT IT BE
20 CLARIFIED THAT OBVIOUSNESS CAN BE DETERMINED OR
21 FOUND BASED NOT JUST SIMPLY ON A COMBINATION OF
22 REFERENCES, BUT ON A SINGLE REFERENCE.

23 AND A COUPLE OF POINTS I WOULD ELABORATE
24 ON, YOUR HONOR.

25 THE COURT: HOW IS THAT DIFFERENT THAN

1 APPLICATION, WOULD REALLY MAKE IT DIFFICULT FOR THE
2 JURY.

3 THE COURT: RIGHT. I'M NOT GOING TO DO
4 THAT.

5 OKAY. WHAT ELSE?

6 MS. MAROULIS: STILL ON '381, THERE IS A
7 PRODUCT CALLED GEM. IN THEIR INFRINGEMENT
8 CONTENTIONS, APPLE DID NOT ACCUSE GEM, AND I'M
9 GOING TO HAND TO THE COURT AND COUNSEL APPLE'S
10 INFRINGEMENT CONTENTIONS, EXHIBIT 20, WHERE YOU CAN
11 SEE --

12 MAY I APPROACH, YOUR HONOR?

13 THE COURT: YES, PLEASE.

14 MS. MAROULIS: -- GEM WAS LISTED AS N/A
15 WITH RESPECT TO '381.

16 MR. JACOBS: YOUR HONOR RULED ON PHONES
17 SOME MONTHS AGO NOW AND SAMSUNG DID NOT MOVE ON THE
18 GEM. SAMSUNG'S EXPERT WROTE A REPORT ON THE GEM
19 EXPLAINING WHY THE GEM DID NOT INFRINGE.

20 SAMSUNG THEN HAD A FURTHER DISCUSSION
21 WITH THE COURT ABOUT THE PHONES ISSUE AND DID NOT
22 RAISE THE GEM.

23 SO NOW WE ARE AT THE END OF TRIAL, THERE
24 WAS NO MOTION ON THE GEM, WE PUT ON OUR PROOF ON
25 THE GEM, IT'S TOO LATE NOW TO SAY IT WASN'T IN THE

1 INFRINGEMENT CONTENTIONS.

2 I WOULD NOTE THAT ONE OF THE PHONES WAS
3 RULED OUT BECAUSE WE FLIPPED THE ORDER OF THE TERMS
4 AND WE DIDN'T COME BACK TO THE COURT ON THAT AND
5 ASK FOR RECONSIDERATION. IT WAS --

6 THE COURT: WHICH PHONE WAS THAT?

7 MR. JACOBS: SHOWCASE. I THINK WE SAID
8 THE SHOWCASE, THE GALAXY S SHOWCASE, AND IT'S THE
9 SHOWCASE GALAXY S. THE COURT SAID WE HADN'T PUT IN
10 OUR INFRINGEMENT CONTENTIONS. WE MOVED ON.

11 NOW FOR SAMSUNG TO COME IN AT THE LAST
12 MINUTE AND SAY, "WE FORGOT TO MOVE ON THIS, BUT
13 IT'S OUT OF THE CASE," THAT'S QUITE UNFAIR.

14 MS. MAROULIS: WE ACTUALLY MOVED FOR J MOL
15 AND I THINK WE PREVIOUSLY OBJECTED TO THAT, SO THIS
16 IS DEFINITELY NOT THE FIRST TIME THAT COUNSEL IS
17 HEARING ABOUT IT.

18 THE COURT: WELL, I GUESS WHAT'S
19 CONFUSING TO ME IS IF THESE ARE THE INFRINGEMENT
20 CONTENTIONS, GEM IS ON HERE.

21 MS. MAROULIS: NOT WITH RESPECT TO '381,
22 YOUR HONOR. IT SAYS N/A.

23 THE COURT: OH, I SEE WHAT YOU'RE SAYING.
24 I THINK IT'S UNTIMELY FOR THIS REQUEST.

25 OKAY. GO AHEAD. WHAT'S NEXT?

1 MS. MAROULIS: YOUR HONOR, CAN WE SKIP A
2 LITTLE BIT, THERE'S A PRETTY SIMPLE ISSUE, BEFORE
3 WE GET TO DAMAGES, WHICH IS WAIVER, WHICH IS THE
4 VERY LAST PORTION OF THE VERDICT FORM.

5 WAIVER IS AN EQUITABLE ISSUE, AND YOUR
6 HONOR DID NOT ISSUE JURY INSTRUCTIONS ON WAIVER
7 BECAUSE IT IS AN EQUITABLE ISSUE AND SHOULD NOT GO
8 BEFORE THE JURY. SO WE RESPECTFULLY REQUEST THAT
9 IT BE REMOVED FROM THE VERDICT FORM.

10 THE COURT: LET ME ASK, AND I APOLOGIZE
11 IF THIS WAS A MISTAKE, BUT THE PRELIMINARY
12 INSTRUCTIONS, WE TALKED ABOUT THE SUMMARY OF
13 CONTENTIONS AND ACTUALLY INCLUDED ANTITRUST, PATENT
14 EXHAUSTION, WAIVER, AND BREACH OF CONTRACT.

15 SO IT WAS IN THAT PRELIMINARY --

16 MS. MAROULIS: WE'VE ALWAYS MAINTAINED,
17 SAMSUNG HAS ALWAYS MAINTAINED THAT ESTOPPEL AND
18 WAIVER SHOULD NOT BE BEFORE THE JURY, BUT BECAUSE
19 WE WERE NEGOTIATING JURY INSTRUCTIONS. WE PROPOSED
20 COMPETING LANGUAGE SO THAT IF THE COURT DECIDED IT
21 DOES GO, THERE'S SOMETHING FOR THE JURY TO LOOK AT.

22 BUT THE COURT IS NOT SENDING THIS ISSUE
23 TO THE JURY, SO IT WOULD NOT BE USEFUL TO HAVE THIS
24 IN THE JURY VERDICT FORM.

25 MR. SELWYN: YOUR HONOR, IT WAS IN THE

1 PRELIMINARY JURY INSTRUCTIONS, YOU'RE QUITE RIGHT.

2 IN THE BROADCOM CASE, WHICH IS BASED ON
3 SIMILAR STANDARD SETTING AS THIS ONE, THE COURT
4 ALSO SOUGHT AN ADVISORY VERDICT ON THE WAIVER
5 ISSUE.

6 WE BELIEVE, CONSISTENT WITH THE
7 PRELIMINARY INSTRUCTIONS, IT SHOULD GO TO THE JURY.

8 THE COURT: YOU KNOW, I ACTUALLY DON'T
9 WANT ANY ADVISORY VERDICTS.

10 AND I RECOGNIZE I DID INCLUDE IT IN THE
11 PRELIMINARY. I DON'T HAVE A WAIVER INSTRUCTION IN
12 THIS FINAL SET.

13 I THINK I'M GOING TO TAKE IT OUT. OKAY?

14 MS. MAROULIS: THANK YOU, YOUR HONOR.

15 THE COURT: ALL RIGHT. WHAT ELSE?

16 MS. MAROULIS: RETURNING BACK TO THE
17 BEGINNING OF THE FORM, AGAIN, BECAUSE WE'RE LODGING
18 OUR OBJECTIONS, WE PROPOSE TO INCLUDE VERSION,
19 ANDROID VERSION ON DIFFERENT PHONES THAT ACTUALLY
20 ARE IN THE CASE. WE SEE THAT IT'S NOT IN THERE AND
21 WE RESPECTFULLY REQUEST THAT IT BE INCLUDED.

22 THE COURT: OKAY. THAT'S DENIED.

23 WHAT'S NEXT?

24 MS. MAROULIS: WE'RE MOVING ON TO THE
25 DAMAGES SECTION, AND WITH RESPECT TO DAMAGES, AS

1 YOUR HONOR NOTED, IT'S A COMPLICATED ISSUE, AND ONE
2 THING THAT WE NEED TO ADD TO THE EXISTING DAMAGES
3 CHART -- AND I WAS TRYING TO SCRATCH IT OUT BUT
4 DIDN'T HAVE A CHANCE TO FULLY FIGURE OUT HOW TO DO
5 IT -- BUT THERE ARE THREE DIFFERENT THEORIES ON
6 WHICH APPLE IS SEEKING DAMAGES, AND SAMSUNG
7 INDICATED IN ITS PRETRIAL SUBMISSIONS AND ITS JMOLS
8 THAT THERE ARE INFIRMITIES WITH EACH OF THEM.

9 FOR IT TO BE PROPERLY REVIEWED, TO THE
10 EXTENT THERE'S A REVIEW OF THESE, WE NEED TO
11 IDENTIFY WHICH DAMAGES THEORIES APPLE IS SEEKING
12 DAMAGES ON AND WHAT THE JURORS WOULD AWARD, IF
13 ANYTHING.

14 SO ONE WAY TO DO IT WOULD BE TO ADD
15 COLUMNS TO THE EXISTING CHART, WHICH IS REASONABLE
16 ROYALTY PROFITS AND LOST PROFITS; OR POTENTIAL
17 ALTERNATIVE, WHAT WE SUGGEST IN OUR VERDICT FORM IS
18 TO ASK AN INTERROGATORY, WHICH IS "OF THE NUMBER
19 THAT YOU GAVE, WHAT IS THE BREAKDOWN BETWEEN THE
20 THREE DIFFERENT THEORIES?" TO HAVE THAT IN THE
21 RECORD AND TO UNDERSTAND WHAT THE JURY DID.

22 THE SECOND ISSUE WITH THIS IS THAT IT
23 DOESN'T TIE PRODUCTS TO THE PATENT. THERE ARE SOME
24 PRODUCTS ON WHICH APPLE IS SEEKING MULTIPLE
25 THEORIES AND MULTIPLE PATENTS AND ACCUSING THEM OF

1 DIFFERENT I.P.

2 SO IDEALLY WE'D LIKE TO HAVE A CHART OR
3 SOME FORM THAT ADDRESSES ALL OF THESE ISSUES SO THE
4 RECORD IS CLEAR.

5 AND WE IDENTIFIED ISSUES THAT WE HAVE
6 WITH IT, BUT HAVE NOT YET PROPOSED A SOLUTION.
7 THIS IS ONE PLACE WHERE POTENTIALLY IF WE CAN HAVE
8 A FEW HOURS TO BRAINSTORM AND SUGGEST SOMETHING TO
9 THE COURT, IT MIGHT BE USEFUL.

10 THE COURT: I DON'T WANT A MATRIX THAT'S
11 SO COMPLICATED. TO HAVE SEVEN PATENTS AND FOUR
12 TRADE DRESSES BROKEN DOWN BY THIS MANY NUMBER OF
13 PRODUCTS I THINK WOULD BE OVERCOMPLICATED.

14 MS. MAROULIS: WE DO NEED TO INDICATE
15 BOTH WHICH ENTITY THE DAMAGES ARE BEING SOUGHT FROM
16 AND WHICH THEORY OF DAMAGES IS BEING RELIED ON,
17 BECAUSE THEY ALL HAVE DIFFERENT LEGAL FRAMEWORK,
18 AND TO THE EXTENT THAT THE JURY GETS IT WRONG OR
19 DOES NOT APPLY THE CORRECT THEORY OR WHERE WE
20 BELIEVE THE THEORY HAS NOT BEEN SUFFICIENTLY
21 PROVEN, WE NEED THAT RECORD.

22 THE COURT: WELL, WOULDN'T THAT BE
23 REFLECTED IN THE EARLIER PAGES? BECAUSE THE
24 EARLIER PAGES ARE REQUIRING REQUIREMENTS BY
25 PRODUCT, BY PATENT, BY DEFENDANT.

1 SO I'M HOPING THAT THE FIRST 17 PAGES,
2 FROM THE FIRST 17 PAGES AND THE FINAL NUMBER, IF
3 THE JURY PICKS A NUMBER, THAT YOU CAN SORT OF WORK
4 BACKWARDS AND FIGURE OUT WHICH I.P. WAS ACTUALLY
5 FOUND VALID AND INFRINGED, WHICH PRODUCT, WHICH
6 ENTITY.

7 MR. JACOBS: THIS IS A MATTER OF FINDING
8 A HAPPY MEDIUM, YOUR HONOR, AND OVER DETAIL GIVES
9 RISE TO CLAIMS OF ERROR, TOO, BECAUSE IF THE JURY
10 DOES THINGS AT A VERY GRANULAR LEVEL THAT PRESENT
11 INCONSISTENCIES, THEN IT JUMPS OUT.

12 AND WE THINK THIS IS TOO SPECIFIC. WE
13 OBJECT TO THIS LEVEL OF SPECIFICITY IN QUESTION 25,
14 FOR EXAMPLE.

15 BUT TO GO ANY DEEPER WOULD REALLY PRESENT
16 VERY SERIOUS PROBLEMS.

17 MS. MAROULIS: YOUR HONOR, TO ILLUSTRATE
18 AN ISSUE THAT WE MIGHT HAVE IF WE DON'T IDENTIFY
19 THE THEORIES, FOR EXAMPLE, PROFITS ARE NOT
20 APPROPRIATE FOR UTILITY PATENTS. IF THE JURY IS TO
21 INCLUDE PROFITS IN THE UTILITY PATENT
22 DETERMINATION, THAT IS NOT PROPER.

23 THE COURT: UM-HUM.

24 MR. JACOBS: THE JURY WILL GIVE US
25 AMOUNTS, AND THAT'S ALL THAT WE SHOULD ASK THEM TO

1 DO.

2 THE COURT: AS YOU MIGHT IMAGINE, THIS
3 WAS THE PAGE THAT TOOK THE MOST TIME TO FIGURE OUT.

4 MS. MAROULIS: YES.

5 THE COURT: AND IT IS COMPLICATED.

6 BUT OVERALL, I THINK THAT THIS MAY BE THE
7 BEST WAY TO DO IT, ASSUMING THAT THE JURY IS GOING
8 TO FOLLOW THE JURY INSTRUCTIONS AND NOT DO ANYTHING
9 INAPPROPRIATE IN AWARDING IMPROPER DAMAGES FOR ANY
10 PARTICULAR CLAIM AND NOT GIVING DOUBLE RECOVERY.

11 MR. JACOBS: YOUR HONOR --

12 MS. MAROULIS: WOULD YOUR HONOR CONSIDER
13 INCLUDING FORMER QUESTION 23 FROM THE SAMSUNG FORM,
14 WHICH IS -- SAY, "IF YOU FIND ANY DAMAGES, CAN YOU
15 SEPARATE IT BY ENTITY?" IT'S A YES OR NO QUESTION.

16 MR. JACOBS: AND THE PROBLEM THERE IS
17 THAT MR. WAGNER, FROM THE ACCOUNTING PERSPECTIVE,
18 TESTIFIED THERE REALLY WAS NO BASIS TO DO THAT.

19 MS. MAROULIS: YOUR HONOR, WE'RE NOT
20 GOING TO ARGUE ABOUT THE TESTIMONY HERE.

21 MR. WAGNER PROVIDED A ROADMAP FOR THE JURY.

22 BUT THE POINT IS THAT IF YOU CAN'T FIND
23 DAMAGES ATTRIBUTABLE JUST TO ONE SINGLE ENTITY, IF
24 YOU ASSUME THREE DIFFERENT DEFENDANTS, THAT
25 DEFENDANTS HAVE AN OPPORTUNITY TO KNOW WHAT DAMAGES

1 ARE AWARDED AGAINST THEM.

2 MR. JACOBS: NO PREJUDICE HERE, YOUR
3 HONOR. IT'S A CONSOLIDATED ENTITY, CONSOLIDATED
4 BALANCE SHEETS, CONSOLIDATED FINANCIALS, CONTROLLED
5 BY SAMSUNG ELECTRONICS FOR BOTH ENTITIES, VERY
6 CLOSE CONTROL. THAT WAS TESTIFIED TO.

7 THE COURT: WELL, I'M ALSO HOPING THAT
8 PAGES 1 THROUGH 17 WILL ALSO HELP IN INFORMING AS
9 WELL, BECAUSE IT COULD BE THAT THE JURY FINDS ONE
10 OR MORE OF THESE ENTITIES NOT LIABLE AT ALL BASED
11 ON THE EVIDENCE, WHICH WAS REALLY GEARED MORE
12 TOWARDS SEC ANYWAY.

13 LET ME ASK YOU, WITH REGARD TO HOW I
14 SHOULD HANDLE THE TRADE DRESS CLAIMS AGAINST THE
15 TABLETS, I GUESS I SHOULD THEN JUST DIVIDE UP --

16 MS. MAROULIS: YES, YOUR HONOR, THAT WAS
17 ONE OF THE ISSUES THAT WE NOTED IN QUESTION 19.

18 THERE WAS A TAB TRADE DRESS THAT REALLY
19 PROBABLY SHOULDN'T BE THERE BECAUSE YOU'RE ALREADY
20 ASKING QUESTION 18 OF THE TAB TRADE DRESS.

21 MR. JACOBS: AND THEN WHAT YOUR HONOR
22 COULD --

23 THE COURT: ALTHOUGH 18 IS DILUTION AND
24 21 AND 22 ARE INFRINGEMENT. THAT'S WHY IT'S BROKEN
25 OUT DIFFERENTLY.

1 MS. MAROULIS: 19 IS FOR DILUTION.

2 MR. JACOBS: BUT I DO THINK IF WE DO AN
3 18 STYLE BREAKOUT --

4 THE COURT: NO, 19 IS INDUCEMENT. SO THE
5 WAY IT'S WORKED OUT IS ON PAGE 10, 12 AND 13 ARE
6 GOING TO, IS THIS PROTECTABLE? AND THEN 14 SAYS IS
7 THIS FAMOUS?

8 AND THEN 15 SAYS, "IF YOU FIND IT
9 PROTECTABLE AND FAMOUS, THEN HAS THERE BEEN
10 DILUTION OF THE REGISTERED PHONE DRESS?"

11 AND THEN THE NEXT QUESTION IS, "HAS THERE
12 BEEN DILUTION OF THE UNREGISTERED IPHONE 3 DRESS?"

13 AND THEN THE NEXT QUESTION IS, "HAS THERE
14 BEEN DILUTION OF THE UNREGISTERED COMBINATION PHONE
15 DRESS?" AND THEN IT GOES TO THE PATENT.

16 AND THEN AFTER THAT, WE GO TO INDUCEMENT
17 AND WILLFULNESS AND THEN TRADE DRESS AND
18 INFRINGEMENT. SO THAT'S HOW IT'S ORGANIZED.

19 MR. JACOBS: UNDERSTOOD.

20 THE COURT: I'LL FIGURE OUT SOME WAY TO
21 SPLIT UP THESE TABS.

22 MR. JACOBS: I THINK IF YOU SPLIT OUT THE
23 TABS, YOU CAN MAKE THE REST OF THE CHART TWO
24 COLUMNS AND HAVE TWO COLUMNS FOR THE TABS, OR THREE
25 COLUMNS WITH A SHADED BOX FOR THE TABS.

1 A COUPLE OF THINGS ON OUR END, YOUR
2 HONOR.

3 MS. MAROULIS: I'M NOT DONE.

4 WITH RESPECT TO TRADE DRESS, THERE WERE A
5 COUPLE OF PREDICATE QUESTIONS WE INCLUDED IN THE
6 VERDICT FORM AS TO DAMAGES. WE BELIEVE THEY'RE
7 APPROPRIATE.

8 FOR EXAMPLE, YOU HAVE TO SHOW ACTUAL HARM
9 FOR THE SPECIFIC TRADE DRESS DAMAGES, AND THAT WAS
10 FORMER QUESTION 17 ON OUR FORM.

11 AND SIMILARITY, YOU NEED TO SHOW ACTUAL
12 CONFUSION WITH INTENT TO DECEIVE. AGAIN, THIS IS A
13 PREDICATE FOR DILUTION DAMAGES.

14 SO WE RESPECTFULLY REQUEST THAT THEY BE
15 PUT BACK IF POSSIBLE, RECOGNIZING THAT THE FORM
16 IS -- HAS TO HAVE SOME LIMITATIONS, BUT BECAUSE
17 THOSE ARE PREDICATE FOR DAMAGES, WE THINK IT'S
18 NECESSARY FOR TRADE DRESS.

19 THE COURT: I'M GOING TO ASSUME A JURY IS
20 GOING TO FOLLOW JURY INSTRUCTIONS AND MAKE THE
21 REQUIRED FINDINGS BEFORE THEY MAKE ANY LIABILITY
22 DETERMINATION IN AWARDING DAMAGES. OKAY?

23 MS. MAROULIS: AND FINALLY, YOUR HONOR,
24 WITH RESPECT TO TRADE DRESS INDUCEMENT, SAMSUNG
25 BELIEVES THAT THERE'S NO SUCH THEORY UNDER NINTH

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

/S/

LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

DATED: AUGUST 20, 2012