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17 UNITED STATES DISTRICT COURT  
18 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

19 APPLE INC., a California corporation,  
20 Plaintiff,  
21 vs.  
22 SAMSUNG ELECTRONICS CO., LTD., a  
23 Korean business entity; SAMSUNG  
24 ELECTRONICS AMERICA, INC., a New  
25 York corporation; SAMSUNG  
TELECOMMUNICATIONS AMERICA,  
26 LLC, a Delaware limited liability company,  
Defendants.

CASE NO. 11-cv-01846-LHK  
**SAMSUNG’S REPLY IN SUPPORT OF  
MOTION FOR JUDGMENT AS A  
MATTER OF LAW, NEW TRIAL,  
AND/OR REMITTITUR**

27  
28

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1 **I. INTRODUCTION**

2 Apple's opposition fails to defeat the grounds Samsung has established for judgment, new  
3 trial or remittitur. This is the rare case where juror misconduct requires new trial because the jury  
4 foreman withheld crucial information at the very moment it was most important that he reveal it.  
5 Apple also fails to refute the evidentiary and legal errors warranting the Court's relief. And review  
6 of the jury's damages awards shows, down to the dollar, the serious errors that require remittitur.

7 **II. THE JURY FOREMAN'S BIAS REQUIRES A HEARING AND NEW TRIAL**

8 As post-trial developments have made clear, jury foreman Velvin Hogan deliberately  
9 concealed information about his prior litigation experience in response to this Court's direct  
10 questioning about that subject. Had he answered truthfully, Samsung could have stricken him and  
11 prevented his introduction of extraneous information into the jury's deliberations. Apple does not  
12 dispute that Samsung learned the key facts that Mr. Hogan withheld only *after* the verdict was  
13 reached. In suggesting that Samsung should have investigated the truthfulness of Mr. Hogan's  
14 answer earlier, Apple invites unprecedented intrusion into juror's affairs. While juror misconduct is  
15 a rare basis to void a jury verdict, this is the rare case in which this Court should grant such remedy.

16 **A. Foreman Hogan Failed To Disclose Material Information During *Voir Dire***

17 This Court asked Mr. Hogan, open-endedly and without limitation of time, "Have you or a  
18 family member or someone very close to you *ever* been involved in a lawsuit, either as a plaintiff, a  
19 defendant, or as a witness?" RT 148:18-21 (emphasis added). In answer to that question, Mr.  
20 Hogan failed to disclose a bitter legal battle in which Seagate sued Mr. Hogan for breach of contract  
21 and Mr. Hogan (according to Mr. Hogan's press statements) sued Seagate for fraud. This omission  
22 cannot be attributed to inadvertence. Samsung is Seagate's largest shareholder, having invested  
23 nearly \$2 billion in a deal that was extensively publicized in the technology sector in which Mr.  
24 Hogan works, and also is a critical strategic partner of Seagate with a deep and well-known corporate  
25 relationship. Dkt. 2013-1, ¶¶5-9. And Mr. Hogan's dispute with Seagate related to a loan for his  
26 house, and culminated in his filing for bankruptcy in order to protect that house—hardly an incident  
27 that is easily forgotten. Dkt. 2012, ¶4.

28 Apple remarkably argues that Mr. Hogan "never failed to answer a question truthfully"



1 because he disclosed one lawsuit and “was never asked if there were other lawsuits.” Opp. 2. But  
2 Apple offers no basis for refusing to take this Court at its word when it asked whether any juror was a  
3 party to *any* lawsuit. And Mr. Hogan’s own post-verdict media statements refute Apple’s  
4 hypothesis: In one interview, he “confirmed” that he “sued Seagate for fraud, Seagate countersued,  
5 and he ultimately declared personal bankruptcy to protect his house.” Dkt. 2012, ¶4. In another,  
6 he stated, contrary to the record, that the Court asked only about litigations “within the last 10 years.”  
7 (Dkt. 2022, ¶8). Mr. Hogan perceived no such 10-year limitation when he disclosed his jury service  
8 going as far back as 1973. RT 191:6-8; 195:14-23 (“one was in ‘73; one was in the mid ‘80s, ‘87, I  
9 think it was; and the other one that was more recent was 1990”).<sup>1</sup> Apple offers no answer to this.  
10 Nor does Apple refute that Mr. Hogan’s own statements reveal a strong motive to withhold  
11 information on *voir dire* in order to improve his chances of being selected for the jury. Mr. Hogan  
12 told the media that serving on this jury was, excepting his family, “the high spot of my career. You  
13 might even say my life.” Dkt. 2013-1, ¶11. He feared he would be stricken and was “very  
14 grateful” he was not. *Id.*, ¶10. And his role on the jury brought him international media attention,  
15 garnering him numerous interviews in which he boasted about single-handedly altering the outcome  
16 of the trial. See Dkt. 2012, 2013-1.

17 **B. Mr. Hogan’s Dishonesty Supports An Inference Of Bias**

18 Mr. Hogan’s deliberate dishonesty during *voir dire* “bespeak[s] a lack of impartiality” that  
19 gives rise to more than a “colorable claim” of bias warranting at a minimum “an investigation” by  
20 this Court, *Dyer v. Calderon*, 151 F.3d 970, 973-74 (9th Cir. 1998) (Kozinski, C.J.) (en banc), and  
21 indeed a new trial based on “intentional nondisclosure,” *United States v. Colombo*, 869 F.2d 149, 151  
22 (2d Cir. 1989). Mr. Hogan’s explanations for his answers are not “plausible,” *Dyer*, 151 F.3d at  
23 975, and he was not “indifferent to service on the jury,” *id.* at 982. An “individual who lies in order  
24 to improve his chances of service has too much of a stake in the matter to be considered indifferent.”  
25 *Id.* Mr. Hogan’s own press statements make clear he was just such an individual. “Whether the  
26 desire to serve is motivated by an overactive sense of civic duty, by a desire to avenge past wrongs,

27 <sup>1</sup> Notably, other prospective jurors disclosed lawsuits as far back as 1986 in response to the same  
28 question by the Court. RT 155:22-23; 156:24-157:6.

1 by the hope of writing a memoir or by some other unknown motive, this excess of zeal introduces the  
 2 kind of unpredictable factor into the jury room that the doctrine of implied bias is meant to keep out.”  
 3 *Id.* at 982-83 (juror whose answers “are willfully evasive or knowingly untrue” is “a juror in name  
 4 only”) (quoting *Clark v. United States*, 289 U.S. 1, 11 (1933) (Cardozo, J.)); *Colombo*, 869 F.2d at  
 5 152 (“willingness to lie”—even if the lie “would not be cause for dismissing the juror”—“exhibit[s]  
 6 an interest strongly suggesting partiality”); *United States v. Perkins*, 748 F.2d 1519, 1531-33 (11th  
 7 Cir. 1984) (that juror did not disclose even a “remote” relationship to a party and participation in non-  
 8 disclosed lawsuits indicated bias).<sup>2</sup>

9 It is no answer, as Apple suggests (Opp. 2), that Mr. Hogan revealed another, unrelated  
 10 lawsuit involving a former employee. To the contrary, a juror is presumptively biased where “she  
 11 told the part truth that was useless, and held back the other part that had significance and value.”  
 12 *Clark*, 289 U.S. at 10-11 (juror “counted off a few [past jobs] and checked herself at the very point  
 13 where the count, if completed, would be likely to bar her from the box”); *see Dyer*, 151 F.3d at 983.

14 Nor is it any answer that, as Apple claims (Opp. 2), honest responses by Mr. Hogan would not  
 15 have resulted in a striking for cause. Challenges both for cause<sup>3</sup> and (if needed) as a peremptory<sup>4</sup>  
 16 are exactly what would have resulted from honest answers. Moreover, Mr. Hogan’s dishonesty is  
 17 not beside the point in analyzing bias: “All of the[] facts, considered as a whole,” must be  
 18 considered in deciding whether there are “serious questions” or “destructive uncertainties” regarding

19 <sup>2</sup> Actual bias, while not required, is also sufficient to require a new trial, and dishonesty during *voir*  
 20 *dire* can support a showing of such bias. *Fields v. Brown*, 503 F.3d 755, 767 (9th Cir. 2007) (en  
 banc) (juror not actually biased where he “did not lie to conceal bias”).

21 <sup>3</sup> A juror’s hostility and adversity towards a party-associated company *is* sufficient to support a  
 22 challenge for cause, particularly when that adversity also extends to an attorney who is affiliated with  
 23 the party’s counsel. *See, e.g., United States v. Warner*, 498 F.3d 666, 686 (7th Cir. 2007) (juror’s  
 24 undisclosed conviction, which resulted in possible “negative association” with non-party government  
 25 entity affiliated with defendant, “provide[d] ample grounds for dismissal for cause”). In *Image Tech*  
 26 *Servs. Inc v. Eastman Kodak*, 125 F.3d 1195, 1220-21 (9th Cir. 1997), the only case cited by Apple,  
 27 (Opp. 2), the juror honestly disclosed previously dealings with Kodak, and Kodak’s counsel had an  
 28 opportunity to question him about those dealings and then declined to challenge the juror. Although  
 the juror later sent a note describing his “sometimes adversarial relationship with Kodak,” the  
 business relationship between them did not involve anything like a lawsuit that forced the juror into  
 bankruptcy, and the juror reassured the court of his impartiality before verdicts were reached.

<sup>4</sup> Hogan’s dishonesty prevented Samsung from fully examining him and making a fully informed  
 decision as to his qualifications. While Apple claims (Opp. 2) that prejudicing Samsung’s exercise  
 of peremptory strikes is insufficient to warrant a new trial, the law is clear that being dishonest to  
 avoid challenges to service—whether those challenges are for cause or as a peremptory—does  
 constitute bias. *Dyer*, 151 F.3d at 982-83; *Colombo*, 869 F.2d at 152. Apple’s own authority  
 confirms this. *See Robinson v. Monsanto Co.*, 758 F.2d 331, 334 (8th Cir. 1985) (“An evidentiary  
 hearing on a juror’s alleged failure to disclose information during *voir dire* must be granted when the  
 movant has alleged facts which establish a prima facie case that his ‘right to a peremptory challenge  
 (footnote continued)

1 a juror's impartiality. *Green v. White*, 232 F.3d 671, 678 (9th Cir. 2000). And any "[d]oubts  
2 regarding bias must be resolved against the juror," *United States v. Gonzalez*, 214 F.3d 1109, 1114  
3 (9th Cir. 2000), particularly where dishonesty prevented full exploration before trial began.

4 While prejudice need not be proven, *Dyer*, 151 F.3d at 983 n.2, Mr. Hogan's own statements  
5 to the media suffice if such a showing is required. Once inside the jury room, Mr. Hogan acted as a  
6 "de facto technical expert" who touted his high-tech experience to bring the divided jury together.  
7 Dkt. 2013-1, ¶11. Contrary to this Court's instructions (*e.g.*, Dkt. 1893 at Instr. Nos. 24, 26, 27, 31-  
8 33, 49-51), he told other jurors incorrectly that an accused device infringes a utility patent unless it is  
9 "entirely different" (*id.*, ¶15); that a prior art reference could not be invalidating unless that reference  
10 was "interchangeable" (*id.*, ¶14, 16); and that invalidating prior art must be currently in use (*id.*, ¶17).  
11 He thus failed "to listen to the evidence, not to consider extrinsic facts, [and] to follow the judge's  
12 instructions." 151 F.3d at 983.<sup>5</sup>

### 13 C. Samsung Has Not Waived Its Juror Bias Arguments

14 Apple argues (Opp. 1-2) that Samsung waived its juror bias argument by failing to make it  
15 sooner, but Samsung could not reasonably have ascertained Mr. Hogan's dishonesty before the jury's  
16 verdicts. As Samsung has made clear and Apple cannot dispute, Mr. Hogan made public statements  
17 after the verdicts that so clearly favored Apple that the press speculated about their possible financial  
18 ties. Dkt. 2022, ¶4. Only by chance did Samsung discover the suit by Seagate against Mr. Hogan  
19 while it was investigating these *other* potential bias issues reported post-verdict; and because the  
20 court file no longer exists, it was even later that Samsung discovered Mr. Hogan's lawsuit against  
21 Seagate when Mr. Hogan himself disclosed it in an interview. *Id.* ¶¶3-4, 7.

22 Nevertheless, Apple insists that Samsung waived because it "could have" and "should have"  
23 discovered the dishonesty before it actually did so by ordering Mr. Hogan's 1993 bankruptcy file  
24 during *voir dire*. Opp. 2. Even apart from the impracticality of this suggestion (it took a week to  
25 receive the file after it was ordered post-verdict, Dkt. 2022, ¶4), the Court should reject Apple's

26 \_\_\_\_\_  
was prejudicially impaired."").

27 <sup>5</sup> Apple argues (Opp. 3-4) that Samsung is barred under Rule 606(b) from relying on Mr. Hogan's  
statements about jury deliberations. But evidence barred by Rule 606(b) in other contexts is  
28 routinely considered when assessing juror bias. *See, e.g., Fields*, 503 F.3d at 764.

1 untenable suggestion that trial counsel should engage, upon pain of waiver, in scorched-earth, extra-  
 2 judicial investigations into a sitting juror's life, absent any reason to believe that they lied on *voir dire*  
 3 or otherwise warranted such an intrusion upon their privacy. *See Dyer*, 151 F.3d at 978 (“While  
 4 trial is ongoing, lawyers may not conduct the kind of aggressive investigation of jurors they would of  
 5 other witnesses.”); 6/29/12 Hearing Tr. 63:18-64:13 (Dkt. 1166) (“THE COURT: I’m not going to  
 6 give you the jury questionnaires that have been filled out long enough in advance for you all to  
 7 research all these folks.”). The Court asked Mr. Hogan about his prior lawsuits; Samsung was  
 8 entitled to rely on the truthfulness of his answers.

9 Apple’s authorities provide no support for its position. In one case, counsel *actually learned*  
 10 of a juror’s bias pre-verdict but did not object. *United States v. Bolinger*, 837 F.2d 436, 438-39  
 11 (11th Cir. 1988). The court held only that claims of misconduct “must be supported by proof that  
 12 the evidence of misconduct was not discovered until after the verdict was returned,” which is  
 13 precisely what Samsung has shown here. In a second, the court stated that *if* the plaintiffs heard an  
 14 answer in *voir dire* that “they thought to be factually incorrect” and stood silent, they could not  
 15 complain later. *McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 550 n.2 (1984). In the  
 16 last, “the jurors were asked no direct questions” regarding the allegedly withheld information and the  
 17 juror therefore never lied or “deliberately concealed any information.” *Robinson*, 758 F.2d at 334-  
 18 35. Apple thus identifies not a single authority supporting waiver on the facts here.<sup>6</sup> The burden  
 19 of proving waiver is substantial; Apple has not even begun to meet that burden.

### 20 **III. SAMSUNG IS ENTITLED TO JMOL ON APPLE’S DESIGN PATENT INFRINGEMENT CLAIMS**

#### 21 **A. Apple’s Attempt To Re-Write The Infringement Test Lacks Merit**

22 Apple’s attack on the legal standard for design patent infringement underscores the gaps in its  
 23 evidence. *First*, the rule that “design patent infringement requires similarity so great as to deceive  
 24 in purchasing” is not a “false premise” (Opp. 4) but rather the established standard for over a century.  
 25 *Gorham Mfg. Co. v. White*, 81 U.S. 511, 528 (1871) (test is whether “the resemblance is such as to

26 \_\_\_\_\_  
 27 <sup>6</sup> Apple cites one more case in its response to Samsung’s related motion to compel: *Johnson v.*  
 28 *Hill*, 274 F.2d 110, 116 (8th Cir. 1960). Dkt. 2118 at 3. In that case, contrary to the facts here, “at  
 the time of *voir dire* examination appellant’s counsel had information from two sources” that “put  
 him on notice” that an answer given by a juror was not true, but nevertheless “he remained mute and  
 made no request of the court for a further interrogation.” *Id.*

1 deceive such an observer, inducing him to purchase one supposing it to be the other”). Apple’s  
 2 authority confirms this. *Crocs, Inc. v. ITC*, 598 F.3d 1294, 1303-06 (Fed. Cir. 2010) (infringement  
 3 found where accused products were likely to “cause market confusion”). Apple’s experts conceded  
 4 that purchasers would not be confused. RT 1101:11-1102:8; 1103:2-1104:18; 1424:3-1425:22.

5 *Second*, Apple is wrong that the jury need not “factor out functional elements because that is a  
 6 legal issue for the Court.” Opp. 6. It is *precisely because* “factoring out functional elements” is a  
 7 legal requirement that the Court *must* instruct the jury to do so before deciding infringement, yet no  
 8 such instruction was given. Nor is functionality found only where “overall designs” are “dictated by  
 9 function” (*id.*); functional elements *always* must be “factored out” as part of the infringement  
 10 analysis. *Richardson v. Stanley Works*, 597 F.3d 1288, 1292-93 (Fed. Cir. 2010). Apple does not  
 11 dispute that its witnesses admitted that elements of its designs are functional, *Amini Innovation Corp.*  
 12 *v. Anthony Cal., Inc.*, 439 F.3d 1365, 1371 (Fed. Cir. 2006) (element is functional “if it is essential to  
 13 the use or purpose of the article or if it affects the cost or quality of the article”), and Apple’s  
 14 hypothesized “alternatives” are insufficient because Apple failed to show they are equivalent. *PHG*  
 15 *Techs., LLC v. St. John Cos.*, 469 F.3d 1361, 1367 (Fed. Cir. 2006). As Apple offered no proof of  
 16 infringement with unprotected elements factored out, judgment for Samsung is required.<sup>7</sup>

17 *Third*, Apple defends the Court’s instruction that “[m]inor differences should not prevent a  
 18 finding of infringement” (Opp. 5, n.2) but cannot dispute that minor differences that “might not be  
 19 noticeable in the abstract can become significant” in light of prior art. *Egyptian Goddess, Inc. v.*  
 20 *Swisa, Inc.*, 543 F.3d 665, 678 (Fed. Cir. 2008). It is undisputed that Apple’s witnesses also  
 21 admitted that “details are important” in the context of Apple’s non-ornamental designs and that Apple  
 22 itself relied on “little differences” to distinguish its designs from prior art.

23 Applying the correct legal standards, Samsung is entitled to JMOL of non-infringement.

24 **B. The Record Evidence Establishes that Apple’s Design Patents Are Invalid**

25 <sup>7</sup> Apple’s argument that Samsung waived its right to rely on *trial admissions* establishing  
 26 functionality because it did not cite that testimony in its *pre-trial filings* is absurd. Opp. 5. In any  
 27 case, Samsung repeatedly preserved its functionality contentions. *See, e.g.*, Dkt. 1819 (Rule 50(a));  
 28 Dkt. 1090 at 11-15 (claim construction); Dkt. 1859 at 4-5 (objections to jury instructions); RT at  
 3769 (charging conference). Based on Samsung’s functionality contentions, the Court had  
 previously factored out elements of Apple’s designs (*e.g.*, Dkt. 449 at 14-15) and agreed to “provide  
 a supplemental claim construction at the close of evidence addressing any potential functional  
 limitations.” Dkt. 1425 at 2. It ultimately did not do so *despite* Samsung’s contentions.

1 Apple nowhere disputes that, in the aggregate, the functional elements of Apple's designs  
2 render its design patents functional and therefore invalid. Dkt. 1990-03 at 7; Opp. 6. Apple  
3 instead misstates the law, which requires that "[i]n determining whether a design is primarily  
4 functional, the purposes of the *particular elements* of the design necessarily must be considered."  
5 See *PHG Techs.*, 469 F.3d at 1368 n.2. And it wrongly relies on a "rigid and mandatory formula[]"  
6 for obviousness, inconsistent with the Supreme Court's "expansive and flexible approach." See  
7 *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398, 415-19 (2007).

8 Even under the primary/secondary reference framework, Samsung has met the standard for  
9 obviousness. The LG Prada was disclosed publically in "late 2006" (RT 2588:4-6), and Apple's  
10 own early 2007 report lists the Prada as a competitive product already in the market. DX2627.  
11 Section 102(a) does not require sale in the U.S., but that the invention be "known or used by others in  
12 this country," or "described in a printed publication in this or a foreign country," 35 U.S.C. §102(a),  
13 and the Court already ruled that the Prada is admissible as prior art to the D'677 and D'087 patents.  
14 Dkts. 1267, 1563, 1749, 1976, 1852; RT 1043:14-18. As for the D'889, the Federal Circuit's prior  
15 opinion on which Apple relies did not consider the *physical* prior art (only poor quality images), the  
16 035 model, or the deposition testimony of tablet designer Roger Fidler. And Apple's purported  
17 "objective indicia of nonobviousness" (Opp. 7) do not show that the success of its products was tied  
18 to any patented design features, *e.g.*, *Asyst Techs., Inc. v. Emtrak, Inc.*, 544 F.3d 1310, 1316 (Fed.  
19 Cir. 2008); the evidence is, in fact, to the contrary. *E.g.*, PX36.22, PX134.1, PX135.2 (users and  
20 commentators touting functionality of iPhone).

21 Samsung did not waive its double-patenting argument as it moved for judgment on all issues  
22 for which Apple failed to provide sufficient evidence, and for invalidity of the D'677 in light of prior  
23 art (and notably, the D'677 itself lists the D'087 application as prior art). RT 2173:10-17; 2176:22-  
24 2177:5; Dkt. 1819 at 3. Nor is the prohibition on double-patenting limited to "identical designs"  
25 (Opp. 7); the question is whether the designs are "substantially different," *Miller v. Eagle Mfg. Co.*,  
26 151 U.S. 186, 198 (1894), or at least "patentably distinct," *Eli Lilly and Co. v. Teva Parenteral*  
27 *Meds., Inc.*, 689 F.3d 1368, 1376 (Fed. Cir. 2012), and the D'677 and D'087 are not.

#### 28 **IV. SAMSUNG IS ENTITLED TO JMOL ON APPLE'S TRADE DRESS CLAIMS**

1           **Functionality.** Apple does not dispute it must prove non-functionality as to Apple’s  
2 unregistered trade dress; it must also do so as to its registered trade dress given the overwhelming  
3 evidence that rebuts the statutory presumption. *See Talking Rain Beverage Co. v. S. Beach*  
4 *Beverage Co.*, 349 F.3d 601, 603 (9th Cir. 2003). The trade dress consists predominantly of  
5 features Apple’s witnesses admitted are functional (*see* Dkt. 2013 at 9), and that were essential to its  
6 goal of creating “the simplest and purest manifestation” of a smartphone. RT 484:2-23; *see S.F.*  
7 *Mercantile Co. v. Beeba’s Creations, Inc.*, 704 F. Supp. 1005, 1008-09 (C.D. Cal. 1988). Nor does  
8 the evidence establish that Apple’s claimed trade dress “serves no other purpose than identification.”  
9 *Sega Enters., Ltd. v. Accolade, Inc.*, 977 F.2d 1510, 1531 (9th Cir. 1992).

10           Contrary to Apple’s argument (Opp. 8), the *Disc Golf* factors *support* functionality. Apple’s  
11 advertising *did* tout functional features of its designs, *e.g.*, PX11; and the iPhone design *does* result in  
12 economies in manufacture and use. *E.g.*, RT 1199:25-1200:16 (clear face “absolutely functional”);  
13 680:9-15 (round corners); 674:20-675:24 (large screen); 679:15-20 (black color); 2533:25-2534:15  
14 (familiar icons); DX562.001 (“size and shape/comfort benefits”). Apple claims that alternative  
15 designs exist, but offered no evidence of alternatives “offer[ing] the same functionality,” *Leatherman*  
16 *Tool Group, Inc. v. Cooper Indus., Inc.*, 199 F.3d 1009, 1013 (9th Cir. 1999); *see also Talking Rain*,  
17 349 F.3d at 603. Nor did the Ninth Circuit “squarely reject” (Opp. 8) the notion that trade dress is  
18 unprotectable for aesthetic functionality when it was designed to be aesthetically appealing, as  
19 Apple’s witnesses admit the iPhone was. *E.g.*, RT 484:1-11 (in designing iPhone, Apple sought a  
20 “beautiful object”); 602:8-19 (iPhone is “beautiful and that that alone would be enough to excite  
21 people”); 721:3-7 (similar). *See Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062,  
22 1072 (9th Cir. 2006) (aesthetic functionality considers “whether protection of the feature as a  
23 trademark would impose a significant non-reputation-related competitive disadvantage”). Lacking  
24 any response, Apple ignores its own fatal admissions that consumers regard Apple’s claimed trade  
25 dress as desirable in and of itself, rather than as source-indicators.

26           **Secondary Meaning.** Apple’s survey evidence does *not* establish that consumers primarily  
27 associate the asserted trade dress with *Apple* (the producer) rather than the product. *See Kellogg Co.*  
28 *v. Nat’l Biscuit Co.*, 305 U.S. 111, 118-19 (1938). Nor did Apple prove that its advertising

1 specifically directed consumers to the asserted trade dress. See *First Brands Corp. v. Fred Meyer,*  
2 *Inc.*, 809 F.2d 1378, 1383 (9th Cir. 1987); Dkt. 2053 at 3. Apple presented no evidence that its sales  
3 success is primarily attributable to source-designating functions, rather than to functional capabilities  
4 and/or design. See Dkt. 2053 at 3; see also *Cont'l Lab. Products, Inc. v. Medax Int'l, Inc.*, 114 F.  
5 Supp. 2d 992, 1002-03 (S.D. Cal. 2000). In addition, widespread use of the claimed features by  
6 third parties (see Mot. 11) negates secondary meaning. See, e.g., *Miss World (UK), Ltd. v. Mrs. Am.*  
7 *Pageants, Inc.*, 856 F.2d 1445, 1449 (9th Cir. 1988) (confusion unlikely in “a crowd of marks”).

8 **Dilution.** Apple does not dispute that its expert survey cannot support fame. Apple argues  
9 that its advertising and sales establish fame, but this evidence lacks probative value, including  
10 because much of it relates to the wrong product (the original iPhone, not the iPhone 3G, see PX11,  
11 12, 14-16, 133, 135) and the wrong time period (after Samsung’s alleged first use).

12 Nor did Apple prove likely dilution. First, pervasive use of the claimed design features by  
13 third parties undermines distinctive quality. See, e.g., *Accuride Int'l, Inc. v. Accuride Corp.*, 871  
14 F.2d 1531, 1539 (9th Cir. 1989); 4 MCCARTHY ON TRADEMARKS AND UNFAIR COMP. § 24:87 (4th ed.  
15 2008). Second, because the iPhone was designed predominantly to be functional, the alleged  
16 similarity (Opp. 9) is not probative. Third, Apple’s argument that Samsung’s alleged copying is  
17 relevant to dilution (*id.* 9-10) is baseless. See *Continental*, 114 F. Supp. 2d at 1010. Fourth, no  
18 evidence supports actual association. RT 1716:11-1718:19 (Van Liere’s survey questions skewed  
19 results in Apple’s favor); 1534:14-21 (“no empirical evidence” and “no hard data to show that  
20 Samsung’s actions have diluted Apple’s brand”). Finally, Apple failed to prove willful dilution by  
21 clear and convincing evidence. See, e.g., *CollegeNET, Inc. v. XAP Corp.*, 483 F. Supp. 2d 1058,  
22 1066 (D. Or. 2007). Samsung is entitled to JMOL on the trade dress claims.

## 23 **V. SAMSUNG IS ENTITLED TO JMOL ON APPLE’S UTILITY PATENT CLAIMS**

24 Apple incorrectly claims that the prior art that invalidates these patents has missing claim  
25 elements. Opp. 10-11. As to the '915 patent, DiamondTouch/Fractal Zoom is an integrated touch-  
26 sensitive display, distinguishes between a single input point and two or more input points, and  
27 includes “views associated with the event objects” (RT 2898:19-22; 2900:5-2902:4); and Nomura  
28 plainly includes event objects and views. RT 2905:2-6; 2906:24-2907:18. The '381 patent prior



1 art, Tablecloth and LaunchTile, both detect and respond to a document edge. RT 2862:9-  
 2 2863:21. The LaunchTile and Agnetta prior art to the '163 patent both include structured electronic  
 3 documents that are enlarged and centered (RT 2233:12-22; 2234:3-8; 2913:14-2917:2; 2918:7-  
 4 2919:16), and Robbins meets all limitations. RT 2920:22-2922:6. Finally, because the jury's  
 5 implicit findings that certain Android versions do not infringe the '915 patent are "irreconcilably  
 6 inconsistent" with its findings that the same versions of Android do infringe, at a minimum a new  
 7 trial is required. *See Duhn Oil Tool, Inc. v. Cooper Cameron Corp.*, 818 F. Supp. 2d 1193, 1220-21  
 8 (E.D. Cal. 2011). There is no waiver in these circumstances. *Id.* (new trial despite the parties'  
 9 "opportunity to address the inconsistency by further deliberations before the jury was discharged").

## 10 VI. SAMSUNG IS ENTITLED TO JMOL ON WILLFULNESS

11 While claiming to have adduced "substantial" evidence to support the jury's finding of willful  
 12 patent infringement (Opp. 13-14), Apple relies (with the exception of the '381 patent) exclusively on  
 13 "copying" evidence which, even if true (*but see* Dkt. 2054 at 31-32), would not come close to the  
 14 *clear and convincing* evidence it needs.<sup>8</sup> "To willfully infringe a patent, the patent must exist and  
 15 one must have knowledge of it...." *IpVenture, Inc. v. Cellco P'ship*, 2011 WL 207978, at \*2 (N.D.  
 16 Cal. Jan. 21, 2011) (emphasis in original). "Hence a party cannot be found to have 'willfully'  
 17 infringed a patent of which the party had no knowledge." *Solannex, Inc. v. Miasole*, 2011 WL  
 18 4021558, at \*3 (N.D. Cal. Jan. 4, 2012). Knowledge of Apple products simply does not equate to  
 19 knowledge of Apple patents—and Samsung plainly had no such notice. Indeed, the so-called  
 20 "copying" evidence Apple cites predates the issuance of the '915, '163, and D'677 patents found  
 21 infringed. *Compare* Opp. 14 (citing PX36 & PX38, dated 12/17/08 & 4/17/09) and Dkt. 2027 at 9  
 22 (citing PX40 & PX44, dated 2/11/10 & 3/2/10), with JX1043, JX1044 and JX1046 (D'677, '915 and  
 23 '163 patents issued later—on 6/29/10, 11/30/10 & 1/4/11). Thus, Apple's claimed evidence would  
 24 "prove" willful infringement of patents even before those patents issued. And Apple ignores  
 25 entirely the *reasonableness* of Samsung's defenses, which defeats willfulness as a matter of law.

26 As for the '381 patent (*see* PX52), a PowerPoint referencing that patent does not prove that

27 <sup>8</sup> Apple complains that Samsung "skirt[ed] the page limits for its JMOL motion" by simultaneously  
 28 contesting willfulness in "its motion on non-jury claims." Opp. 13. To the contrary, Samsung  
 expended *greater* pages by raising this issue in both submissions.

1 Samsung knew or should have known it was valid and infringed. And the PTO's recent rejection of  
 2 all claims of the '381 patent in reexamination (*see* Dkt. 2079-1) forecloses a finding of objective  
 3 willfulness, as a neutral expert has embraced Samsung's view on invalidity. *See Tesco Corp. v.*  
 4 *Weatherford Int'l Inc.*, 750 F. Supp. 2d 780, 817-18 (S.D. Tex. 2010) ("the reexamination  
 5 proceedings are sufficient evidence that the objective prong is not met"); *Pivonka v. Cent. Garden &*  
 6 *Pet Co.*, 2008 WL 486049 at \*2 (D. Colo. Feb. 19, 2008) (even preliminary order of invalidity by  
 7 PTO precludes willfulness); *see also Fujitsu Ltd. v. Belkin Int'l, Inc.*, 2012 WL 4497966, at \*35 (N.D.  
 8 Cal. Sept. 28, 2012) (Koh, J.) (relevant to look to PTO reexamination).

9 **VII. SAMSUNG IS ENTITLED TO JMOL ON APPLE'S CLAIMS OF DIRECT**  
 10 **INFRINGEMENT AND INDUCEMENT**

11 Samsung did not waive (*see* Opp. 15) its argument that Apple lacks evidence of U.S. sales  
 12 supporting SEC's direct infringement. Samsung raised this argument in its oral Rule 50 motion and  
 13 again in writing. RT 2178:11-13; Dkt. 1819 at 1.<sup>9</sup> And Apple points to no evidence of direct  
 14 infringement by SEC, but merely asserts that SEC sells its subsidiaries products—in Korea—which  
 15 ultimately "land in the United States." Opp. 15. This is not sufficient; as in *MEMC Elec.*  
 16 *Materials, Inc. v. Mitsubishi Materials Silicon Corp.*, 420 F.3d 1369 (Fed. Cir. 2005), there was no  
 17 sale under § 271(a) here because "there was no evidence that 'contracting and performance' took  
 18 place in the United States." *Id.* at 1377. In *Litecubes, LLC v. N. Light Prods.*, 523 F.3d 1353 (Fed.  
 19 Cir. 2008), on which Apple relies, the foreign defendant contracted *directly with customers in the*  
 20 *U.S.* and then shipped the products *directly to the customers in the U.S.* *Id.* at 1371. But here,  
 21 there is no evidence that any contractual negotiations or execution of contracts, or any other actions  
 22 to make, use, offer to sell or sell products, occurred in the U.S. Mot. 16-17.

23 Apple's purported evidence of inducement by SEC also falls short. Apple acknowledges  
 24 that the evidence fails to prove awareness by SEC of any patent other than the '381 prior to the filing  
 25 of the complaint, and Apple admits that specific intent to encourage another's infringement is also  
 26 required. Opp. 15. Apple's vague references to SEC's purported "directions" and/or pricing or  
 27 marketing guidance (Opp. 15-16) merely show interactions between corporate entities; they do not

28 <sup>9</sup> As the Court acknowledged, Samsung also moved for judgment on *all issues* for which Apple failed to provide sufficient evidence, which includes this one. RT 2173:10-17; 2176:22-2177:5.

1 rebut the specific evidence that STA and SEA manage and make their own business decisions. Mot.  
 2 17. Moreover, SEC had neither knowledge nor “willful blindness” of infringement, as required  
 3 under § 271(b). *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011) (cited by  
 4 Apple). To the contrary, all the Samsung entities had a good faith belief that their actions were not  
 5 infringing valid patents, and in fact obtained smartphone and tablet design patents over cited Apple  
 6 patents. Dkt. 2054 at 33-35. *See Ecolab, Inc. v. FMC Corp.*, 569 F.3d 1335, 1350-51 (Fed. Cir.  
 7 2009) (no inducement where defendant reasonably believes there would be no infringement).

8 Accordingly, judgment for SEC is required. And because Apple does not dispute that the  
 9 bulk of the jury’s damages awards represents profits made by SEC (Mot. 17) and Apple obtained a  
 10 verdict form that neither breaks out damages by defendant nor identifies profits earned by other  
 11 entities (RT 3853:5-3856:1), a new trial on damages as to remaining claims also is required. *E.g.*,  
 12 *Verizon Servs. Corp. v. Vonage Holdings Corp.*, 503 F.3d 1295, 1310 (Fed. Cir. 2007) (after granting  
 13 new liability trial as to one patent, vacating damages award as to two other patents in light of jury’s  
 14 “single verdict on damages” which did not “break[] down the damages attributable to each patent”).<sup>10</sup>

## 15 **VIII. SAMSUNG IS ENTITLED TO JMOL, NEW TRIAL AND/OR REMITTITUR ON DAMAGES**

### 16 **A. The Court Can And Should Interpret The Damages Verdicts And Correct Errors**

17 Apple does not dispute the validity of Samsung’s explanation of how the jury reached its  
 18 damages awards—an explanation that plainly reveals the need for corrective action by the Court.  
 19 Mot. 17-18; Dkt. 1990-20 (“Wagner Decl.”); *see* Robinson Depo. Tr. at 88:2-8, Estrich Reply Decl.,  
 20 Ex. 13. Instead, Apple insists that “[p]recedent forbids” any consideration of how a jury reached its  
 21 awards. Opp. 17. In fact, precedent dictates that an identifiable error should be corrected where “a  
 22 candid assessment of the jury’s calculations justifies it” and “there is no other plausible explanation  
 23 for the amount calculated by the jury.” *In re First Alliance Mortg. Co.* 471 F.3d 977, 1001 (9th Cir.  
 24 2006); *see id.* at 1003 (courts should not “ben[d] over backwards to find a potentially valid basis in  
 25 the record for the jury verdict”).<sup>11</sup> Apple cites *Los Angeles Mem’l Coliseum Comm’n v. NFL*, 791

26 <sup>10</sup> For the same reasons, and in light of the verdict form’s failure to separately assess damages by  
 27 patent or trade dress, setting aside the liability verdict as to any *one* claim will mandate a new trial on  
 damages as to *all* products relating to that claim. Mot. 17.

28 <sup>11</sup> Nothing in *First Alliance* suggests it is confined to cases where “instructional error and  
 inadmissible evidence” led to an erroneous damages award. Opp. 18.

1 F.2d 1356 (9th Cir. 1986), but nothing in that case “forbids” scrutinizing a damages verdict and the  
 2 Ninth Circuit distinguished it in *First Alliance*, see 471 F.3d at 1001. Federal Circuit authority is  
 3 similar. See, e.g., *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1365, 1336-38 (Fed. Cir. 2009)  
 4 (“working the math backwards strongly suggests that the jury must have used some [improper]  
 5 calculation”). It is proper to examine the bases of a jury’s damages awards, particularly where  
 6 Apple resisted including any detail in the verdicts (see RT 3852:24-3856:10; Dkt. 2054 at 25). See  
 7 *Lighting Ballast Control, LLC v. Philips Elecs. N. Am. Corp.*, 814 F. Supp. 2d 665, 692-93 (N.D.  
 8 Tex. 2011) (construing verdict’s ambiguity against plaintiff after it defeated defendant’s request for  
 9 “some way to tell us [the] type of award”).<sup>12</sup>

10 In addition to misstating when a jury’s damages verdicts should be examined, Apple misstates  
 11 when errors in such verdicts warrant relief. According to Apple, a jury’s damages verdicts are  
 12 immune from scrutiny so long as they fall “within the range encompassed by the record as a whole,”  
 13 and the verdicts here fall within that “range” because they are lower than the damages Apple sought.  
 14 Opp. 17. Yet Apple ignores that courts grant remittitur or new trial not only when a verdict is  
 15 “intrinsically excessive,” but *also* when a court can, by examining a verdict, identify particular  
 16 amounts that are attributable to error. Mot. 24 (citing *Cornell Univ. v. Hewlett Packard Co.*,  
 17 609 F. Supp. 2d 279, 292 (N.D.N.Y. 2009) (Rader, J.)).<sup>13</sup> The jury’s awards here were infected by  
 18 identifiable errors; the Court must take action to correct these erroneous awards.<sup>14</sup>

19 <sup>12</sup> *Revolution Eyewear, Inc. v. Aspex Eyewear, Inc.*, 563 F.3d 1358, 1371 (Fed. Cir. 2009), does not  
 20 reject scrutinizing a damages verdict; the court there affirmed only because the evidence supported  
 21 the award. Apple’s cases from other jurisdictions are likewise factually and legally distinguishable.  
 22 See *Krause v. Dresser Indus., Inc.*, 910 F.2d 674, 679-80 (10th Cir. 1990) (affirming award of  
 23 \$165,000 for employment termination where amount was supported by “ample evidence”); *Midwest*  
 24 *Underground Storage, Inc. v. Porter*, 717 F.2d 493, 501-02 (10th Cir. 1983) (reverse engineering  
 25 verdict before affirming award of \$3,900,000); *Chuy v. The Philadelphia Eagles Football Club*, 595  
 26 F.2d 1265, 1279 n.19 (3d Cir. 1979) (affirming award of \$60,000 in punitive damages for  
 27 mistreatment of injured player).

28 <sup>13</sup> See also *Brown v. Ala. Dep’t of Transp.*, 597 F.3d 1160, 1183 (11th Cir. 2010) (remanding “where  
 the court can identify an error that caused the jury to include in the verdict a quantifiable amount that  
 should be stricken.”); *United States v. Medshares Mgmt. Group, Inc.*, 400 F.3d 428, 458 (6th Cir.  
 2005) (affirming remittitur of improper portion of award although “it was not entirely clear how [the  
 jury] calculated the award of damages”); *Kirsch v. Fleet St, Ltd.*, 148 F.3d 149, 165 (2d Cir. 1998)  
 (“Where the court has identified a specific error . . . the court may set aside the resulting award even  
 if its amount does not shock the conscience.”).

<sup>14</sup> Moreover, the damages opinions on which Apple relies were themselves the product of errors and  
 mistaken assumptions, meaning that relief is required even under Apple’s erroneous standard.  
 Apple cites, first, the “\$2.75 billion” that it requested (Opp. 17), but that request assumed that *every*  
 Samsung product violated *all* of Apple’s claimed rights, RT 2122:16-2123:6, and the jury found that  
 was not the case. Apple also cites the *lower* damages calculated by Samsung’s expert; why Apple  
 believes Samsung’s lower calculations support the jury’s *higher* awards is mysterious. Last, Apple  
 (footnote continued)

1           **B.       Apple Fails To Justify The Jury’s Award Of Samsung’s Profits**

2           Ignoring survey evidence that *at most* 5% of Samsung’s profits were caused by the  
 3 infringement of Apple’s outer casing or GUI design patents (Mot. 19), Apple contends that causation  
 4 is not required for design patent infringement or trade dress dilution. Opp. 19. But Apple does not  
 5 dispute that causation is required under Section 284, or that “in any case involving multi-component  
 6 products,” damages are limited to “the smallest salable patent-practicing unit” unless “demand for the  
 7 entire product is attributable to the patented features.” *LaserDynamics, Inc. v. Quanta*  
 8 *Computer, Inc.*, 694 F.3d 51, 67-68 (Fed. Cir. 2012). These same principles govern under  
 9 Section 289. *Junker v. HDC Corp.*, 2008 WL 3385819, at \*5 (N.D. Cal. July 28, 2008).<sup>15</sup> As the  
 10 cases Apple ignores entirely make clear, the jury’s award of Samsung’s profits from the phones as a  
 11 whole cannot be sustained in light of Apple’s failure to offer any evidence that those are the profits  
 12 from the “article of manufacture” at issue, which is the phones’ outer casings or GUI. *See Bush &*  
 13 *Lane Piano Co. v. Becker Bros.*, 222 F. 902, 905 (2d Cir. 1915); *Bush & Lane Piano Co. v. Becker*  
 14 *Bros.*, 234 F. 79, 81-82 (2d Cir. 1916); *Untermeyer v. Freund*, 58 F. 205 (2d Cir. 1893) (same for  
 15 watch case design).

16           The only patent case Apple cites, *Nike, Inc. v. Wal-Mart Stores*, 138 F.3d 1437, 1442 (Fed.  
 17 Cir. 1998), addressed apportionment, not causation. As for dilution, Apple’s case explains damages  
 18 are awarded “for all injuries *caused* to plaintiff by the wrongful act” and are limited to “sales that are  
 19 attributable to the infringing conduct.” *Lindy Pen Co. Inc. v. Bic Pen Corp.*, 982 F.2d 1400, 1407-  
 20 08 (9th Cir. 1993) (emphasis added); *Nintendo of Am., Inc. v. Dragon Pac. Int’l*, 40 F.3d 1007, 1012  
 21 (9th Cir. 1994) (permitting recovery only of profits from sales “attributable” to the infringing mark).

22           Causation was thus required, and Apple makes no argument that it was proved. No evidence  
 23 shows that Samsung’s alleged infringement or dilution caused the hundreds of millions in damages  
 24 that were awarded. And it is no answer to say that the jury could have reached an even *more*  
 25 excessive result since Apple’s expert’s opinions were even higher, for those opinions reflect the very

26 \_\_\_\_\_  
 27 notes that the amounts awarded by the jury for five products are lower than Samsung’s expert’s  
 28 calculations. Yet those were not “undisputed, minimum amounts” as Apple claims (Opp. 17). *See*  
 Dkt. 2053 at 16-17. To the contrary, the amounts Apple points to are premised on incorrect notice  
 dates (compare DX781.3 with DX781.1) and/or fail to account for causation or apportionment.

<sup>15</sup> *Junker* did not award profits without “proof of causation” (Opp. 19); it concluded that “[p]laintiff  
 (footnote continued)

1 errors Samsung has identified. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S.  
 2 209, 242 (1993) (“When an expert opinion is not supported by sufficient facts to validate it in the  
 3 eyes of the law, or when indisputable record facts contradict or otherwise render the opinion  
 4 unreasonable, it cannot support a jury's verdict.”). Mr. Musika’s “more than \$2.2 billion” number  
 5 (Opp. 19) is premised on incorrect notice dates, a failure to deduct any operating expenses, and a  
 6 failure to account for causation or apportionment. PX25A1.4 and 5;RT 2053:17-2055:2; 2056:17-  
 7 2057:3; 2060:22-2061:11; 3025:1-8. As for the figures from Mr. Wagner, they too are based on  
 8 assumptions, made for purposes of argument only, that were rejected and are erroneous.<sup>16</sup>

### 9 C. Apple Fails To Justify The Jury’s Lost Profits Award

10 Mr. Musika’s *ipse dixit* is not “alone a sufficient basis” for the jury’s lost profits award (Opp.  
 11 20), for speculation by an expert cannot sustain such an award. *WhitServe, LLC v. Computer*  
 12 *Pack., Inc.*, 694 F.3d 10, 33 (Fed. Cir. 2012); *Oiness v. Walgreen Co.*, 88 F.3d 1025, 1032 (Fed. Cir.  
 13 1996). *First*, Apple fails to identify evidence that consumer purchases were driven by a desire for  
 14 the designs and inventions at issue, instead resorting to generic references to “design, user interface,  
 15 and ... touch screen navigation” (Opp. 21) which do not show that Apple would have made  
 16 Samsung’s sales if not for the violations found by the jury. *See Water Tech. Corp. v. Calco Ltd.*,  
 17 850 F.2d 660, 671 (Fed. Cir. 1988). *Second*, there was no evidence that Apple would have made a  
 18 *pro rata* share of sales in light of the significant price differences between the parties’ products.  
 19 *BIC Leisure Prods., Inc. v. Windsurfing Int’l, Inc.*, 1 F.3d 1214, 1219 (Fed. Cir. 1993); *see also*  
 20 *Water Tech.*, 850 F.2d at 673 (reversing lost profits award for lack of causation where price of  
 21 patentee’s products “significantly exceeded” price of infringer’s products). *Third*, Mr. Musika’s  
 22 market share allocation does not account for the lack of evidence that Samsung customers would  
 23 have bought iPhones rather than non-accused Android devices (Opp. 20-21); it incorrectly assumes  
 24 Android purchasers would have switched to the iPhone in proportion to Apple’s market share.

25 \_\_\_\_\_  
 has made the requisite showing” under the entire market value rule. *Id.* at \*5.

26 <sup>16</sup> Mr. Wagner’s upper range of \$1.086 million incorporates Mr. Musika’s incorrect notice  
 27 assumptions and makes no adjustment for causation or apportionment. *See* DX781.003 (calculating  
 28 profits based on date of first sale). Apple concedes the \$1.396 billion and \$1.093 billion figures it  
 seeks to attribute to Mr. Wagner are premised on Mr. Musika’s calculation of Samsung’s profitability  
 (Opp. 19 and 22), which the jury plainly rejected when it awarded only 40% of Mr. Musika’s claimed  
 Samsung profitability figures across the board.

1 *Fourth*, the two pages Apple cites from PX25A1, and Mr. Musika’s mere say so, fall far short of the  
 2 proof necessary to show that Apple had capacity to manufacture 2 million more iPhones, as Apple’s  
 3 lost profits claim assumed. Nor does this evidence overcome Apple’s admission that it lacked  
 4 capacity to manufacture additional iPhone 4s for five months during the damages period. Even if  
 5 Apple had capacity to manufacture additional iPhone 3GSs (and Apple fails to show that it did), there  
 6 is no evidence consumers would have bought the outdated iPhone 3GS instead of a more current  
 7 market alternative. *Finally*, Apple does not dispute that Mr. Musika’s lost profits numbers wrongly  
 8 assumed that *every* accused product infringed *all* of Apple’s claimed rights—assumptions that are  
 9 contrary to the jury’s verdict and therefore undermine the opinions based on them. Mot. 22, n.19.

10 **D. Apple Points To No Evidence Supporting The Jury’s Royalty Award**

11 The sum total of the evidence to which Apple points to support the jury’s royalty award is Mr.  
 12 Musika’s conclusory testimony and one page that he prepared. Opp. 22. Federal Circuit authority  
 13 rejects a royalty award that is “conclusory” and “speculative.” *WhitServe*, 694 F.3d at 33. It is no  
 14 answer for Apple to say that the jury awarded only half of royalty rates that were themselves  
 15 unsupported, and Apple simply ignores that the jury improperly applied the same 50% reduction to  
 16 all five products even though it decided infringement differently as to each.<sup>17</sup>

17 **E. Apple’s Incorrect Notice Date Requires A New Trial Or Remittitur**

18 Apple heavily relies on a presentation Apple gave to Samsung. Opp. 22-23. But  
 19 Mr. Teksler admitted that presentation failed to identify any asserted design patents or trade dress  
 20 and, as to asserted utility patents, identified only the ’381 patent. RT 1966:12-19; 1967:18; 1968:2-  
 21 11. Apple did not identify a single design patent to Samsung prior to filing suit (RT 2008:11-18),  
 22 and accused only the Galaxy S. PX52.17. Mr. Musika’s opinions plainly were premised on  
 23 erroneous notice date assumptions, and Apple does not dispute that these false assumptions inflated  
 24 the revenue that Mr. Musika used to calculate Samsung’s profits by more than \$3.3 billion.<sup>18</sup>

25 <sup>17</sup> In *Spectralytics, Inc. v. Cordis Corp.*, 649 F.3d 1336, 1346-47 (Fed. Cir. 2011), which Apple cites,  
 26 the record included sales figures, profit margins, an indemnification agreement and an asset sale to  
 support a *Georgia-Pacific* analysis. No such evidence supported such an analysis here.

27 <sup>18</sup> In *Minks v. Polaris Indus., Inc.*, 546 F.3d 1364, 1376-77 (Fed. Cir. 2008), cited by Apple, the  
 28 defendant knew of the specific patent-in-suit and the plaintiff communicated that a specific  
 component would infringe the patent. And in *Cecco Mach. Mfg. Ltd. v. Intercole, Inc.*, 817 F. Supp.  
 979, 985 (D. Mass. 1992), the court acknowledged authorities holding that “actual notice of  
 (footnote continued)

1 Nevertheless, Apple insists no relief is required—even as it relies on Mr. Musika’s inflated  
 2 opinions throughout its opposition to justify the jury’s verdicts. But Apple simply ignores the  
 3 Federal Circuit’s instruction that a new trial is required where, as here, “a jury may have relied on an  
 4 impermissible basis in reaching its verdict,” *Litton Sys., Inc. v. Honeywell, Inc.*, 140 F.3d 1449, 1465  
 5 (Fed. Cir. 1998)), and it offers no compelling answer to the Ninth Circuit’s instruction in *First*  
 6 *Alliance* that a new trial and/or remittitur is required where “one of the figures used” by jury to  
 7 determine damages is erroneous, 471 F.3d at 1001-03.<sup>19</sup> Apple’s cases are not to the contrary.<sup>20</sup>

8 Apple speculates that the jury’s award of 40% of Mr. Musika’s claimed Samsung profit  
 9 figures “could have accounted for notice” (Opp. 22), but the record demonstrates otherwise. *First*,  
 10 the jury applied the same 60% reduction even when there was no erroneous notice date that needed  
 11 correcting (*i.e.*, where the products were first sold *after* the filing of the amended complaint).  
 12 *Compare* Wagner Decl., ¶12 with JX1500 (Galaxy S II (AT&T), Galaxy S II (T-Mobile), Galaxy S II  
 13 (Epic 4G Touch) & Galaxy S II (Skyrocket)). *Second*, adjusting Mr. Musika’s profit figures to  
 14 account for correct notice dates *does not come close* to the amount the jury awarded for any of  
 15 products, whereas reducing Mr. Musika’s claimed profit amounts by 60% to account for operating  
 16 expenses results in the *exact* amounts awarded by the jury (or, as to products found to dilute trade  
 17 dress, the *exact* amounts awarded by the jury minus Mr. Musika’s lost profits calculations).  
 18 *Compare* Wagner Decl., Ex. B, Schedule 1-B, column g, with Wagner Decl., ¶¶12-13. *See First*  
 19 *Alliance*, 471 F.3d at 1002 (determining jury’s methodology based on mathematical results “to the  
 20 dollar”). *Third*, for eight products<sup>21</sup> the jury’s award is *higher* than the amount Mr. Musika claimed

21 \_\_\_\_\_  
 22 infringement must include the same information required for actual marking of the invention,” a  
 23 requirement since confirmed by Federal Circuit authority that Apple simply ignores.

23 While Apple notes that instructional and evidentiary errors undermined “one legal theory” that  
 24 went to the jury in *First Alliance* (Opp. 23-24), it ignores that a “legal theory” that went to the jury,  
 25 premised on earlier notice dates than are sustainable, has been undermined here as well. Apple also  
 26 offers no persuasive response to *Broklesby v. United States*, 767 F.2d 1288 (9th Cir. 1985), as nothing  
 27 in that opinion restricts its application to impermissible *liability* theories; it was “legally defective”  
 28 here (*id.* at 1294) for the jury to base its damages award on the August 4, 2010 notice date.

25 In *Energy Transp. Group, Inc. v. William Demant Holding A/S*, 2012 WL 4840813, at \*11-12  
 26 (Fed. Cir. Oct. 12, 2012), the damages award *was not* premised on an impermissible “25% rule” and  
 27 was supported by the overall analysis conducted by the expert. In *Revolution Eyewear*, the question  
 28 was support for the jury’s royalty calculation, not whether the verdict was infected by a legal error.  
 563 F.3d at 1371. And in *Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1373 (9th  
 Cir. 1987), where the challenging party (unlike Samsung) “failed to make a timely request for a  
 special verdict,” a new trial was not required because the defendant failed to show that presenting the  
 erroneous damages theory was prejudicial, which Samsung has shown here. *Id.* at 1373.

<sup>21</sup> The Captivate, Continuum, Droid Charge, Epic 4G, Gem, Fascinate, Mesmerize and Vibrant.



1 as profits *after* correcting for notice, showing that notice corrections cannot explain the awards.  
 2 Compare Wagner Decl., Ex. B, Schedule 1-B, column b *with* column g.<sup>22</sup>

3 **F. Apple’s Arguments Against Remittitur Fail**

4 Citing *Energy Transp.*, Apple argues that “the ‘court cannot “correct” a damages figure by  
 5 extrapolating’ new damage figures not found on the verdict form.” Opp. 24. This confuses JMOL  
 6 and remittitur. *Energy Transp.* involved a requested reduction in damages based on a JMOL ruling  
 7 of partial non-infringement. While the Federal Circuit could not “extrapolate” a lower amount, the  
 8 “[d]efendant could have sought remittitur from the district court.” 2012 WL 4840813, at \*12-13.

9 Apple’s Prevail arguments fare no better. *First*, the lost profits analysis Apple posits does  
 10 *not* lead precisely to the number actually awarded—unlike 40% of Samsung’s profits as calculated by  
 11 Mr. Musika, which Apple does not deny constitutes an impermissible remedy here. *Second*, to the  
 12 extent there were a basis for any lost profits award (and there is none), Mr. Musika presented the jury  
 13 with an \$8.5 million lost profits number for the Prevail, PX25A1.4, and there was no evidence to  
 14 support a higher number. *Third*, Mr. Musika *never* explained to the jury how to make a revised lost  
 15 profits calculation if design patents were not infringed and trade dress were not diluted (RT 2122:3-  
 16 2123:6), and it was impossible for the jury to do so without knowing the not-in-evidence design-  
 17 around periods for each utility patent found to have been infringed. RT 2083:10-2084:19. *Finally*,  
 18 Apple’s alternative theory is contrary to Mr. Musika’s own testimony. Mr. Musika testified that a  
 19 “limiting factor” in his lost profits calculation was “the percentage of users [shown in PX25A1.13]  
 20 that would switch carriers,” RT 2097:3-5, yet Apple’s alternative theory omits this step. Had Apple  
 21 included it, Apple’s alternative theory could at most yield \$17 million in lost profits for the Prevail  
 22 (1.2 million x \$244 x 22.5% x 26%) – \$40 million less than the jury’s actual award.

23  
 24 <sup>22</sup> Apple argues the jury may have corrected for notice *and* adjusted Mr. Musika’s costs (Opp. 22),  
 25 but this assumes the jury deducted *fewer* costs than Mr. Musika. There is no basis in evidence for  
 26 that assumption, for Mr. Musika did not deduct *a single dollar* in operating expenses and conceded  
 27 that Samsung was entitled to deduct all costs of goods sold. RT 2053:17-2055:2, 2056:17-2057:3,  
 28 2060:22-2061:11, 3025:1-8. Apple also argues that it can recover damages on its unregistered trade  
 dress claim regardless of notice issues (Opp. 22), but the jury’s uniform award of 40% of Samsung’s  
 alleged profits clearly was for design patent infringement. Dkt. 2054 at 25. In any case, Apple’s  
 argument that the award of 40% of Samsung’s alleged profits for these five phones was for a claim  
 that does not require notice, if credited, serves to confirm that the jury’s across the board 60%  
 reduction can only be explained as an adjustment for operating expenses, not notice dates.

1           **G. The Parties’ Stipulation Does Not Apply To Samsung’s Post-Trial Arguments**

2           Apple mischaracterizes (Opp. 25) the parties’ stipulation on limited use of non-sealed  
3 financial exhibits. The parties in fact agreed to forego only challenges *to summaries of sales and*  
4 *revenues*, with the express caveat that this “is not a waiver of any claims or defenses or claims for  
5 relief.” Dkt. 1597 at 1-2. The stipulation is irrelevant to this motion.

6           **IX. SAMSUNG IS ENTITLED TO JMOL ON ITS OFFENSIVE CASE**

7           **Features Patents.** For the ’460, ’893, and ’711 patents, Apple repeats (Opp. 26-27) its  
8 flawed non-infringement arguments: that apps and modes are somehow irreconcilable. Undisputed  
9 evidence shows that its apps have the claimed modes; to the extent the jury accepted Apple’s  
10 proposed construction of “mode,” it improperly usurped the Court’s claim construction  
11 role. Similarly, for the ’893 patent, the un rebutted evidence shows that Apple’s devices return to a  
12 last-viewed photo “irrespective of a duration”; Apple exclusively points to other scenarios that do not  
13 depend on the lapse of time—such as running out of battery power—again asking the jury to usurp  
14 the Court’s claim construction role. Finally, as to the ’711 patent, the evidence shows that Apple’s  
15 products have the claimed applet. RT 2433:8-11; DX645.

16           **Exhaustion.** Apple has not met its burden of showing an authorized sale under the Intel  
17 contract.<sup>23</sup> Apple’s evidence, consisting solely of Donaldson’s testimony, failed to address any  
18 specific clauses of the expired Intel contract, including those requiring an affirmative act to  
19 sublicense subsidiaries in order to sell “indirectly” through them. PX81.23; *Intel Corp. v.*  
20 *Broadcom Corp.*, 173 F. Supp. 2d 201, 222 (D. Del. 2001) (right to sublicense subsidiaries not self-  
21 executing). Apple offered no evidence of any affirmative act by Intel to license any subsidiary under  
22 the contract; any involvement—direct or indirect—by Intel in the transaction; or any “essential  
23 activities” of Intel Americas’ in the U.S. The invoices Apple introduced at trial (PX78) demonstrate  
24 at best that while payment may have been made in the U.S., Apple took delivery of the foreign-  
25 manufactured chips in China; there was no evidence the chips originated in or ever passed through  
26 the U.S. while the contract was in force. Apple introduced no evidence of any underlying supply

27 <sup>23</sup> Samsung properly relies on testimony Apple lodged as PX218. Dkt. 1887 at 2, 1887-11.  
28

1 agreement, let alone one that was negotiated in or controlled from the U.S.<sup>24</sup>

2 *Quanta Computer, Inc. v. LG Elecs., Inc.*, 553 U.S. 617 (2008), is inapposite. That case

3 holds that for a device to “substantially embod[y]” *a method claim* for exhaustion purposes, it must

4 “carry out *all the inventive processes* when combined, according to their design, with standard

5 components.” *Id.* at 634 (emphasis added). Here, *apparatus* claims, not method claims, are in

6 issue and Apple itself argued that the asserted Samsung patent claims are substantially embodied by

7 the Intel chip. RT 361:12-22 (“[The baseband processor] is the device that actually performs what

8 Samsung says is infringing, the Intel chip.”). Apple did not dispute the operation of the Intel chip or

9 rely on any aspect of its own products other than that chip in arguing noninfringement. Dkt. 1832 at

10 7-8. If, as the jury found, Apple’s products do not infringe, then the Intel chips do not substantially

11 embody the patents and the verdict of exhaustion cannot stand. On the other hand, if the Court

12 correctly finds that Apple infringes the asserted standards patents, exhaustion still would not apply

13 given the complete lack of evidence of any authorized U.S. sale by Intel Corp. under that agreement.

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DATED: November 9, 2012

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27 <sup>24</sup> In *MEMC Elec. Materials, Inc. v. Mitsubishi Materials Silicon Corp.*, 420 F.3d 1369, 1375 (Fed.  
 28 Cir. 2005), on which Apple relies, the court’s finding of a non-U.S. sale turned in part on plaintiff’s  
 similar inability to prove that negotiations occurred in the U.S.