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

14
15 APPLE INC., a California corporation,

16 Plaintiff,

17 v.

18 SAMSUNG ELECTRONICS CO., LTD., a
Korean corporation; SAMSUNG
19 ELECTRONICS AMERICA, INC., a New
York corporation; and SAMSUNG
20 TELECOMMUNICATIONS AMERICA,
LLC, a Delaware limited liability company,

21 Defendants.
22

Case No. 11-cv-01846-LHK

**REPLY IN SUPPORT OF APPLE'S
MOTION FOR JUDGMENT AS A
MATTER OF LAW (RENEWED),
NEW TRIAL, AND AMENDED
JUDGMENT (FRCP 50, 59)**

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

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INTRODUCTION

The evidence at trial proved conclusively that, despite its frequent public denials, Samsung pulled together a task force of designers and engineers to rip off Apple's unique and inventive designs and technology, down to the smallest detail. Because the evidence permits only one reasonable conclusion as to Apple's D'889 and iPad trade dress claims, this Court should award judgment as a matter of law. In the alternative, Apple asks that the Court exercise its discretion to award a new trial on infringement and dilution. Apple's opening brief explains why this Court should award judgment as a matter of law or a new trial on the other claims where the jury favored Samsung, and why the judgment should be amended to include supplemental damages and pre-judgment interest. Samsung's contrary arguments lack merit.

I. APPLE IS ENTITLED TO JUDGMENT THAT SAMSUNG INFRINGED AND DILUTED THE IPAD TRADE DRESS, OR TO A NEW TRIAL ON THIS ISSUE

A. The iPad Trade Dress Is Protectable

The iPad trade dress is protectable because (1) it is not functional and (2) it had acquired secondary meaning before Samsung began selling the Galaxy Tab 10.1 in June 2011. Samsung failed to show that substantial evidence supports the jury's contrary findings.

On functionality, Samsung selects isolated elements of the iPad trade dress that it claims are functional, but points to no evidence that the iPad trade dress is functional in its entirety. This omission is fatal. "The fact that individual elements of the trade dress may be functional does not necessarily mean that the trade dress *as a whole* is functional." *Clicks Billiards, Inc. v. Sixshooters Inc.*, 251 F.3d 1252, 1259 (9th Cir. 2001). The Court correctly determined that no features of Apple's analogous design patents are functional. *See infra*, at 6. The only reasonable conclusion as to the iPad trade dress is that it, too, is non-functional. *See Keystone Mfg. Co. v. Jaccard Corp.*, No. 03-CV-648S, 2007 WL 655758, at *7-8 (W.D.N.Y. Feb. 26, 2007) (design patents may be evidence of a corresponding trade dress's non-functionality).

Samsung argues that Apple's advertisements emphasize the iPad's functionality, which is neither true nor relevant. All six iPad advertisements in the record feature a large colorful photograph of the iPad trade dress. (PX11.) Four have no accompanying text other than the

1 name of the product. Two include in small print the language Samsung cites, but that text does
2 not “tout[] the utilitarian advantages of the design,” as required by the Ninth Circuit’s four-factor
3 functionality test. *Disc Golf Ass’n v. Champion Discs, Inc.*, 158 F.3d 1002, 1006 (9th Cir. 1998).
4 From the text Samsung cites, “thinner” is a reference to the product’s design but not to any
5 utilitarian advantage, while the other language addresses attributes of the product other than its
6 design, such as battery life. (Opp. 1.) Apple’s advertising thus weighs strongly in its favor.

7 Samsung does not dispute Apple’s evidence on the second and third factors – that the iPad
8 trade dress was not designed to yield utilitarian advantage or to be cheaper but to make the iPad
9 “breathtakingly simple [and] beautiful.” (Mot. 15.) Samsung instead offers Mr. Sherman’s
10 testimony as to isolated elements of Apple’s trade dress. (Opp. 1.) Samsung also cites
11 Mr. Bressler and Ms. Kare, whose testimony proves nothing relevant here. (*Id.*) Mr. Bressler
12 acknowledged that performance requires the “cover over the display element” to be “clear,” (Tr.
13 1199:25 – 1200:4.) but that does not mean that the surface of the product from edge to edge must
14 be a flat, clear surface, as with the iPad. Alternatives exist. (PX4 & PX10 (tablets).) Similarly,
15 Dr. Kare agreed that “[g]ood icons communicate clearly and consistently.” (Tr. 1455:24-25.)
16 But good icons need not adopt Apple’s visual language. “You’re only limited by your
17 imagination,” Dr. Kare explained. (Tr. 1399:22-1401:1.)

18 As to the fourth factor – the availability of alternative designs – Samsung misquotes the
19 law. *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 199 F.3d 1009 (9th Cir. 1999), does
20 not say “alternative designs must offer ‘exactly the same features’ as plaintiff’s product.” (Opp.
21 1-2.) It says only that in that case none of the designs did offer such features. *Leatherman*, 199
22 F.3d at 1013-14. Samsung concedes that Apple’s experts testified the alternative designs ““would
23 provide the same functions.”” (Opp. 1.) Samsung introduced no contrary evidence, yet presses
24 its expansive view of “aesthetic functionality,” which this Court has properly rejected. (*E.g.*, Dkt.
25 1159 at 7-8.) Samsung provides no evidence that it would be competitively disadvantaged if
26 Apple’s iPad trade dress were enforced. The Ninth Circuit has “squarely rejected the notion” that
27 features that are attractive to consumers are, for that reason, functional. *Au-Tomotive Gold, Inc.*
28 *v. Volkswagen of Am., Inc.*, 457 F.3d 1062, 1073 (9th Cir. 2006).

1 **On secondary meaning**, Samsung makes four arguments, all unavailing. First, Samsung
2 cites other manufacturer’s tablets with “similar designs,” but offers no evidence that these
3 products had a presence in the market by June 2011 that detracted from consumers identifying the
4 iPad trade dress with Apple.

5 Second, Samsung attempts to impeach Hal Poret’s testimony but mischaracterizes the
6 record. Mr. Poret’s survey did not show “no association of the iPad trade dress with Apple”
7 before June 2011. (Opp. 2.) Mr. Poret explained that his study showed that “the large majority of
8 those respondents [who] said that they came to associate these looks with Apple,” did so “prior to
9 the time that the Samsung products came on the market.” (Tr. 1590:22-25; 1602:7-12.) Samsung
10 is also wrong that Mr. Poret “changed” his methodology “at Apple’s behest” because the results
11 of his first study were too low. (Opp. 2-3.) In the testimony Samsung cites, Mr. Poret rejects
12 Samsung’s premise that his results were too low and testifies to no change in methodology. (Tr.
13 1679:15 – 1680:18 (Q: 50% is “the number you want to get above? A: No.”)

14 Third, Samsung attempts to discount the significance of the iPad’s “impressive sales,” but
15 the case Samsung cites acknowledges that “evidence of sales may have relevance in establishing
16 secondary meaning.” *Continental Lab. Prods. v. Medax Int’l*, 114 F. Supp. 2d 992, 1003 (S.D.
17 Cal. 2000) (cited in Opp. 3).

18 Finally, Samsung argues that Apple’s advertisements featuring images of the iPad do not
19 “direct the consumer’s attention to the specific features of the claimed trade dress,” but by
20 featuring images of the trade dress, of course they do. There is no requirement that an
21 advertisement use words to call out the features of the trade dress; it is enough that an
22 advertisement “feature in some way the trade dress itself.” *First Brands Corp. v. Fred Meyer,*
23 *Inc.*, 809 F.2d 1378, 1383 (9th Cir. 1987); *accord Autodesk, Inc. v. Dassault Systems Solidworks*
24 *Corp.*, 685 F. Supp. 2d 1001, 1015 (N.D. Cal. 2009) (analyzing whether advertising “stress[es] or
25 feature[s]” the trade dress). Through its product-as-hero advertisements, Apple showcases the
26 iPad and its trade dress. *See* PX11 (iPad advertisements); (Tr. 639:8-15; 639:22 (Schiller).)¹

27 ¹ Samsung also urges a “heightened standard” that its cases do not require. (Opp. at 2.)
28 Plaintiff in *Aurora World, Inc. v. Ty, Inc.*, 719 F. Supp. 2d 1115, 1152-55 (C.D. Cal. 2009),
(Footnote continues on next page.)

1 **B. The Tab 10.1 Infringes and Dilutes the iPad Trade Dress**

2 **On infringement**, Samsung refuses to acknowledge that “[t]he law in the Ninth Circuit is
3 clear that ‘post-purchase confusion’ . . . can establish the required likelihood of confusion under
4 the Lanham Act.” *Rearden LLC v. Rearden Commerce, Inc.*, 683 F.3d 1190, 1216 (9th Cir. 2012)
5 (quoting *Karl Storz Endoscopy-America, Inc. v. Surgical Tech., Inc.*, 285 F.3d 848 (9th Cir.
6 2002)). A company that profits from post-sale confusion is “a free-rider.” *Au-Tomotive Gold*, 603
7 F.3d at 1138. Samsung’s argument rests on a single out-of-circuit case and a single sentence
8 from *Rearden*. (Opp. 4.) But in *Rearden*, after the broad statement Samsung quotes, the court
9 goes on to endorse and explain the Ninth Circuit’s post-sale confusion cases. 683 F.3d at 1215-
10 17.

11 Samsung’s attack on Mr. Van Liere’s survey fails because of this error and others.
12 Samsung argues the survey “does not test point of purchase” behavior (Tr. 1704:5-6 (Opp. 3),
13 ignoring that “confusion on the part of potential consumers,” as well as actual consumers, “may
14 be relevant.” *Rearden* , 683 F.3d at 1215. Potential and actual consumers are precisely the
15 universe that Mr. Van Liere surveyed. (Tr. 1691:13-22; 1698:10-22.) Samsung attacks the
16 control on the theory that consumers “immediately recognize” the Nook as “not an iPad” (Opp. 3-
17 4), a charge belied by the fact that almost a quarter of consumers incorrectly identified the Nook
18 as an Apple product. (Tr. 1700:2-1701:21.) Samsung is also wrong to cherry-pick among
19 Mr. Van Liere’s findings on the rate of confusion. Forty-three percent of consumers shown an
20 unbranded Galaxy Tab—as if seen at a “coffee shop” or “on the light rail”—identified it as an
21 iPad or Apple product (19% net of control), supporting a “combined rate” of confusion of twelve
22 percent. (Tr. 1698:10-1701:21.) In light of Apple’s other overwhelming evidence of confusion,
23 these findings are “strong evidence” that consumers are likely to be confused by the Galaxy Tab.
24 *See Grotrian, Helfferich, Schulz, Th. Steinweg Nachf. v. Steinway & Sons*, 365 F. Supp. 707, 716

25 (Footnote continued from previous page.)

26 offered no evidence of its U.S. sales volume, no evidence that its advertising featured the trade
27 dress, and no consumer survey evidence, so it is unsurprising that the court found plaintiff could
28 not establish secondary meaning. And *Wal-Mart Stores, Inc. v. Samara Bros., Inc.*, 529 U.S. 205,
216 (2000), held that a product’s design *is* protectable “upon a showing of secondary meaning.”

1 (S.D.N.Y. 1973), *modified*, 523 F.2d 1331 (2d Cir. 1975).

2 Finally, Samsung cannot avoid the results of its own study into “the reasons customers
3 return” the Tab 10.1 to Best Buy, which found that the “[g]reatest number of customer return[s]
4 were those who purchased thinking it was an Apple iPad2.” (PX59.19.) Best Buy is Samsung’s
5 “largest vendor for the North American [Tab 10.1] WiFi model” (PX59.2), so Samsung’s cases
6 about “a few alleged instances” of confusion are inapposite. And because Samsung knew its
7 copycat tablets were being confused with the popular iPad (*see also* PX56.22 (54% of viewers
8 attributed “Samsung Tab” advertisement to Apple); PX43.2 (Google “demanding distinguishable
9 design”); PX56.30 (iPad “most recognized product”)), Samsung’s refusal to adopt a different
10 product design shows that its infringement and dilution were intentional.

11 ***On dilution***, Apple has established fame. Samsung’s critique that Apple lacked a survey is
12 irrelevant because a party needs no survey evidence where other evidence amply demonstrates
13 that a trade dress is famous. *Burberry Ltd. V. Euro Moda, Inc.*, No. 08 Civ. 5781, 2009 WL
14 1675080, at *12 (S.D.N.Y. June 10, 2009). And Samsung is simply wrong that the iPad
15 advertisements promoted product performance over Apple’s claimed trade dress. (*See* Opp. 6.)
16 Like the print advertisements, the television advertisement on which Samsung relies shows the
17 iPad “as this hero, beautiful product” with a “beautiful design.” (Tr. 645:10-11; 64611-12
18 (Schiller).) Samsung also argues, in direct conflict with the record, that Apple has “no evidence
19 of actual association.” (Opp. 6.) Samsung points to (and mischaracterizes) the testimony of Dr.
20 Winer to support this charge, but it was Mr. Van Liere who conducted the survey. Mr. Van Liere
21 found actual association with Apple’s product, corroborating all the other evidence of likely
22 confusion cited in Apple’s opening brief. (*See supra* at 4, Mot. 17.)

23 Because this evidence allows only one reasonable conclusion – that the iPad trade dress is
24 protectable and Samsung has infringed and diluted it – the Court should award judgment as a
25 matter of law in Apple’s favor. Alternatively, the Court should award a new trial on these claims.

1 **II. APPLE IS ENTITLED TO JUDGMENT THAT SAMSUNG INFRINGED THE**
2 **D’889 PATENT, OR TO A NEW TRIAL ON THIS ISSUE**

3 **A. The Evidence Establishes Infringement**

4 Legal and evidentiary errors infect Samsung’s non-infringement argument. (Opp. 6-9.)
5 Samsung begins with a legal error – that the test for design infringement is whether consumers
6 would be “deceived.” (*See infra*, Section II.C.) It continues with evidence of the subjective
7 intent of a designer, which has no probative value in assessing infringement because infringement
8 is assessed from the perspective of the “ordinary observer,” not the inventor. *Egyptian Goddess,*
9 *Inc. v. Swisa, Inc.*, 543 F.3d 665, 677-78 (Fed. Cir. 2008) (en banc). Samsung’s argument also
10 relies on evidence that the Court ruled inadmissible for non-infringement purposes – the 035
11 model. (Dkt. 1889 at 11.) Samsung even faults Apple for introducing expert testimony that “did
12 not factor out any functional aspects of the D’889 design” (Opp. at 8), although the Court
13 correctly determined that Samsung had not “established based on functionality” that the claim
14 construction for Apple’s design patents should exclude features that Samsung claimed were
15 functional. (RT 3763:7-14).

16 Samsung’s remaining non-infringement arguments also fail because they rely on small
17 differences between the Tab 10.1 design and Apple’s D’889 design (Opp. 6-7), contrary to black
18 letter law that ““minor differences . . . cannot, and shall not, prevent a finding of infringement.””
19 (Mot. 22 (quoting *Payless Shoesource, Inc. v Reebok Int’l Ltd.*, 998 F.2d 985, 991 (Fed. Cir.
20 1993).) The two cases Samsung cites actually undermine its position: both base non-infringement
21 holdings on a difference between the accused product and the patented design that was substantial
22 in light of the prior art. (Opp. 7.) In *Smith v. Whitman Saddle*, 148 U.S. 674 (1893), the accused
23 saddle differed from the patented design in that it lacked a “sharp drop of the pommel at the rear,”
24 a feature that the Court explained “seems to constitute what was new and to be material” in that it
25 rendered the entire design patentable. *Id.* at 682. Similarly, in *Egyptian Goddess*, the accused
26 nail buffer closely resembled a prior art product except with regard to its basic shape, leading the
27 court to conclude: “When considering the prior art in the nail buffer field, this difference between
28 the [4-sided] accused design and the [3-sided] patented design cannot be considered minor.” 543

1 F.3d at 683. Both decisions support infringement here because the features that set the D’889
2 apart from the prior art – such as its elegant symmetry and its “transparent, glass-like front
3 surface . . . extending from edge to edge,” *Apple Inc. v. Samsung Elecs Co.*, 678 F.3d 1314, 1331
4 (Fed. Cir. 2012)² – are among the features that the Tab 10.1 copied. In sum, the evidence permits
5 only one reasonable conclusion: the Tab 10.1 infringes the D’889.

6 **B. A Correct Claim Construction Makes Infringement Even Clearer**

7 Samsung acknowledges that “[o]blique line shading must be used to show . . . highly
8 polished or reflective surfaces,” but avoids the logical consequences of this statement. (Opp. 10
9 (quoting MPEP 1503.02 (II)).) If such shading “must be used to show” highly polished or
10 reflective surfaces and such shading is not used in Figure 4 (back of the D’889 design), then the
11 back need not be polished or reflective. And if the back is not required to be polished or
12 reflective in Figure 4, then the back is also not polished or reflective in Figure 2. This result is
13 perfectly consistent with the MPEP. The principle that oblique line shading “must be used to
14 show” a highly polished or reflective surface does not mean that oblique line shading can only be
15 used to show such a surface. Samsung cites Mr. Bressler’s testimony at trial accepting the
16 Court’s claim construction, which proves nothing since “[n]o party may contradict the court’s
17 construction to a jury.” *Exergen Corp. v. Wal-Mart Stores, Inc.*, 575 F.3d 1312, 1321 (Fed. Cir.
18 2009). Samsung also argues that the 035 model has a shiny surface, which is irrelevant because
19 (1) the “appendix showing various photographs” of the 035 model was “cancelled” from the
20 application that became D’889 so that only the drawings define the claimed design (Dkt. 1089-14
21 at APLNDC00032359; Dkt. 1089-15 at APLNDC00032436), and (2) a “shiny” surface is not
22 required even by the Court’s construction.

23 **C. Design Patent Infringement Does Not Require “Deceptive Similarity”**

24 Attempting to defend Jury Instruction No. 46, Samsung cites a “deceptive similarity
25 requirement” that is not in the case law. (Opp. 11.) No appellate court has ever required

26 ² Samsung is mistaken that the Seventh Amendment prevents Apple from relying on this
27 Court’s or the Federal Circuit’s preliminary injunction decision. (*See* Opp. 9.) While the earlier
28 findings may not bind the Court, the facts remain the same so the analysis should as well.

1 evidence that ordinary observers have been deceived by the similarity between the accused and
 2 patented designs. *Gorham Co. v. White*, 81 U.S. 511 (1871), did not. It analyzed infringement by
 3 comparing drawings in the asserted patent and defendant’s patents. *Id.* at 521. *Egyptian Goddess*
 4 did not, it clarified that infringement did not require an accused product to embody the patented
 5 design’s “point of novelty” over the prior art. 543 F.3d at 678. Similarly in Samsung’s other
 6 cases, courts analyzed infringement by comparing the accused products side by side with the
 7 patented designs to assess whether they were substantially similar, and did not require evidence
 8 that purchasers had been deceived. *E.g.*, *Richardson v. Stanley Works, Inc.*, 597 F.3d 1288, 1296
 9 (Fed. Cir. 2010); *Crocs, Inc. v. ITC*, 598 F.3d 1294, 1303-06 (Fed. Cir. 2010); *OddzOnProds. v.*
 10 *Just Toys*, 122 F.3d 1396, 1404-07 (Fed. Cir. 1997).

11 In sum, the Court should grant judgment as a matter of law or, in the alternative, a new
 12 trial on Apple’s D’889 infringement claim.

13 **III. APPLE IS ENTITLED TO JUDGMENT AS A MATTER OF LAW OR A NEW**
 14 **TRIAL ON ITS REMAINING CLAIMS**

15 On the remaining design, trade dress, and utility patent claims, the Court should grant
 16 judgment as a matter of law in Apple’s favor. In the alternative, for the iPhone combination trade
 17 dress claim or any other claim in which the Court grants a new trial, a new trial should include
 18 accused products as to which this jury failed to find for Apple.

19 **A. All Accused Phones Infringe The D’677 And D’087 Patents And Dilute the**
 20 **iPhone Trade Dresses**

21 Where the jury found some but not all of Samsung’s phones to infringe a design patent or
 22 to dilute an iPhone trade dress, Apple has moved for judgment or a new trial.

23 *On the D’677 and D’087*, Samsung objects that Apple provided no “product-by-product
 24 assessment” of infringement (Opp. 11), but every accused phone is in evidence and a visual
 25 comparison between these devices and the patented design is evidence enough to establish
 26 infringement. *Braun, Inc. v. Dynamics Corp. of Am.* 975 F.2d 815, 821 (Fed. Cir. 1992).
 27 Moreover, Mr. Bressler performed “the same analysis” for each accused phone. (Tr. 1055:12-17;
 28 1062:23-1063:9.) That Mr. Bressler summarized his opinions as to a group of accused products is

1 of no moment.

2 Samsung's specific non-infringement arguments also fail. On the D'677 patent, Samsung
3 holds out the chrome trim on the home button of the Ace as a significant difference, when the
4 patent clearly disclaims the home button area. (JX1043.) On the D'087 patent, Samsung
5 concentrates on minor differences in the bezel of the Galaxy S II phones (AT&T; i9100; Epic 4G
6 Touch; and Skyrocket), rather than their overall similarity in visual impression to the Apple
7 design. And as to the Infuse 4G, Samsung's erroneous focus on manufacturing construction,
8 rather than visual impression, leads it to ignore the visual appearance of a bezel in the Infuse 4G
9 that is substantially similar to the one claimed in the D'087 patent.

10 ***On the iPhone trade dress claims***, Samsung's opposition mostly incorporates by
11 reference arguments that Samsung makes and Apple has responded to elsewhere. (*See* Opp. 12-
12 13; Mot. 16-19.) Samsung's new arguments are without merit. For example, Mr. Van Liere did
13 not admit his survey "may have measured association merely in the same manner that consumers
14 'associate' Burger King and McDonalds." (Opp. 12.) In Samsung's cited testimony, Mr. Van
15 Liere disagreed with that proposition, and explained that *if* his survey "was creating a demand
16 characteristic as [Samsung] suggest[s], then it would be netted out in the control condition." (Tr.
17 1718:13 – 1718:24.)

18 **B. All Accused Phones Infringe the '163 and '915 Patents**

19 Samsung charges that Apple's infringement expert analyzed only one product, when in
20 fact Dr. Singh showed videos of all accused devices performing the claimed steps and testified
21 that each infringed both the '163 (Tr. 1840:23-1842:2.) and '915 patent. (Tr. 1829:12-1830:21.)
22 Samsung cites Mr. Gray, but his testimony provides no reasonable basis for finding non-
23 infringement.

24 ***On the '163 patent***, Samsung relies on Mr. Gray's testimony that the claim term
25 "substantially centered" is ambiguous. (Tr. 2922:7 – 2923:1.) This is a conclusory opinion on
26 the legal question of indefiniteness, not a non-infringement argument. Samsung also relies on
27 muddled testimony in which Mr. Gray refers to "nested boxes" (Tr 2923:2 – 2924:3), but since
28 the "plurality of boxes" claimed in the patent can be adjacent to one another (JX1046 at col. 19,

1 lines 15-16 & Fig. 5A), this testimony is irrelevant. *On the '915 patent*, the Ace, Intercept, and
 2 Replenish run the same versions of code (2.2.1 and 2.2.2) that the jury correctly found infringing
 3 in other products such as the Galaxy S 4G (2.2.1) and Fascinate (2.2.2). (JX1030, JX1009,
 4 JX1024, JX1019, JX1013; Dkt. 1931 at 3; Dkt. 1825-2 at 3.) Samsung relies on Mr. Gray's
 5 testimony that the MotionEvent object does not "cause" scrolling or scaling because it does not
 6 itself directly call the scrolling or scaling operation (Tr. 2101-2012), but that opinion is contrary
 7 to the Court's claim construction (Dkt. 1158 at 18-19), and was properly rejected by the jury on
 8 the other 21 of 24 accused products. As for Samsung's "two-finger scrolling" argument, there is
 9 no evidence that the Ace, Intercept or Replenish phones perform "two finger scrolling" (they do
 10 not). (JX1009; JX1024; JX1030.) In any event, the ability to perform a two-finger "gesture
 11 operation" that combines both scaling and panning does not avoid infringement, as Dr. Singh
 12 explained and the jury correctly concluded with respect to the Galaxy Tab 10.1 running Android
 13 3.1. (Tr. 1862:11-1864:17; Dkt. 1931 at 3 (verdict).)

14 C. Samsung's Infringement And Dilution Was Always Willful

15 Apple agrees that evidence must be clear and convincing to prove willfulness for patent
 16 infringement (see Opp. 14), but the evidence more than meets this standard. Samsung knew or
 17 should have known of Apple's patents and that its products infringed. (*See, e.g.*, JX1091 (public
 18 announcement that Apple had "patented the heck out of" the iPhone); Tr. 2023:11 – 2024:9 (J.W.
 19 Lee admits "in the first meeting [] Apple was talking about Samsung's smartphone infringed
 20 Apple phone's patents and design"); Tr. 2025:22-2026:10 (Design Strategy Team Leader testifies
 21 that Samsung did not pay any attention to Apple's design patents). Samsung knew that it had
 22 copied the iPhone and iPad with its Galaxy phones and tablets, yet it persisted with the infringing
 23 designs. (Tr. 1074:20 – 1075:4 (Samsung Vibrant "shockingly similar" to the iPhone 3G; 1080:4
 24 – 1082:10 ("Tab 10.1 . . . often . . . mistaken . . . for an iPad 2"); 1087:24 – 1090:8; PX59 (
 25 "greatest number of customer return[s]" of the Tab 10.1 at Best Buy "were those who purchased
 26 thinking it was an Apple iPad 2")); PX42 & 43.2 ("Google is demanding distinguishable design
 27 vis-à-vis the iPad for the P3," a code name for the Tab 10.1 per RT 2823:21-2824:2).

28 Samsung fails to rebut Apple's evidence of "deliberate copying," which is "strong

1 evidence of willful infringement.” (Dkt. 2002 at 29 (quoting *L.A. Gear v. Thom McAn Shoe Co.*,
 2 988 F.2d 1117, 1127 (Fed. Cir. 1993)); *see also K-Tec Inc. v. Vita-Mix Corp.*, 104 U.S.P.Q. 2d
 3 1408, 1418 (Fed. Cir. 2012).) Instead, Samsung attempts to obscure the law, offering that
 4 “copying differs from infringement.” (Opp. 14.) But if “evidence of copying is ‘of no import on
 5 the question of whether the claims of an issued patent are infringed,’” it is relevant “to *Seagate’s*
 6 second prong, as it may show what the accused infringer knew or should have known about the
 7 likelihood of its infringement.” *Depuy Spine, Inc. v. Medtronic Sofamor Danek, Inc.*, 567 F.3d
 8 1314, 1336 (Fed. Cir. 2009) (quoting *Allen Eng’g Corp. v. Bartell Indus., Inc.*, 299 F.3d 1336,
 9 1351 (Fed. Cir. 2002)).

10 Samsung’s cases do not address trade dress claims, where a preponderance of the
 11 evidence suffices to prove willfulness. *B & H Mfg. Co. v. Bright*, No. CVF016619AWISMS,
 12 2005 WL 1342815, at *8-9 (E.D. Cal. May 10, 2005); Dkt. 1903 at 93. For Apple’s unregistered
 13 trade dress, the only notice that Apple was required to prove was that Samsung had seen the
 14 Apple products, and it certainly did, in the course of copying them. (*See also* Dkt. 418 (Lutton), ¶
 15 14; PX52.17-19 (“Samsung Copying iPhone”).)

16 **D. SEC Is Liable Directly And For Inducing Patent Infringement**

17 Where the jury found Samsung had infringed Apple’s patents, it properly found SEC
 18 liable for that infringement both directly and on a theory of inducement. (Dkt. 1931 at 2-8.)
 19 Apple’s motion for judgment as a matter of law or, in the alternative, for a new trial would extend
 20 SEC’s liability on both theories to an additional patent (the D’889) and to additional products for
 21 the D’087, ’163, and ’915 patents when they are found to be infringing. (Mot. 2, 4.) Samsung’s
 22 arguments against such liability are unavailing.

23 Samsung is liable as a direct infringer and for inducing infringement, because it
 24 intentionally participated in the sale of its products in the U.S. market. (Dkt. 1849 at 31, 73 (Jury
 25 Instr’s) and cases cited therein.) SEC designs and manufactures the products, ships them to two
 26 locations in the United States, and gives its wholly owned subsidiaries, who sell the phones to
 27 carriers in the United States, “directions.” (Tr. 791:20 – 796:18 (Denison).) For example, SEC
 28 sets the price at which its products are sold to carriers (Tr. 2029:22 - 2030:8 (Benner).) and

1 investigates why customers return its products to U.S. retailers (PX59.2). Apple also proved that
2 Samsung knew or was willfully blind to the fact that Apple had patented the designs and
3 technology Samsung was copying. *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060,
4 2070 (2011); PX59.10-11; Dkt. 2050 at 24. The evidence permits only one conclusion – that
5 Samsung is liable as a direct infringer and for inducing its subsidiaries' infringement.

6 **E. Apple's Damages Award Should Not Be Reduced If The Court Disaggregates**
7 **And Adjusts Damages On Product-Specific Grounds**

8 Citing *Dimick v. Schiedt*, 293 U.S. 474 (1935), Samsung argues that Apple's conditional
9 request for increased damages on five products for which the jury awarded amounts lower than
10 those calculated by either party's expert violates the rule against *additur*. But Samsung's
11 argument is contrary to longstanding precedent upholding "an exception to *Dimick* where the jury
12 has found the underlying liability and there is no genuine issue as to the correct amount of
13 damages." *United States EEOC v. Massey Yardley Chrysler Plymouth, Inc.*, 117 F.3d 1244,
14 1252-53 (11th Cir. 1997) (court erred in failing to increase compensatory award of six months
15 back pay when "nothing in the record" justified "cutting off back pay after six months"); *see also*
16 *Roman v. Western Mfg.*, 691 F.3d 686, 702 (5th Cir. 2012) (district court properly increased
17 compensatory jury award from \$15,000 to \$168,804.22 because "jury had no valid basis in
18 evidence for its \$15,000 sum, as opposed to the full measure of medical costs"). As these cases
19 show, Samsung is also incorrect in asserting that this exception applies only to nominal damages.

20 Accordingly, if the Court reviews the damages award on a product-by-product basis,³ the
21 Court should offset any remittitur by the additional damages to which Apple is entitled as a
22 matter of law. No reasonable jury could have awarded less than what Samsung's own expert
23 calculated for the five products at issue; he calculated Samsung's profits using *all* of Samsung's
24 direct and indirect cost deductions and the latest possible notice dates. He thus identified the

25 ³ Samsung cites no precedent to justify product-level parsing of the damages award. *Earl*
26 *v. Bouchard Transp. Co., Inc.*, 917 F.2d 1320 (2d Cir. 1990), and *Akermanis v. Sea-Land Serv.*,
27 688 F.2d 898 (2d Cir. 1982), are distinguishable because, *inter alia*, they involve judicial attempts
28 to adjust liability determinations rather than damages. *See* 917 F.2d at 1321 (seaman's claim for
maintenance and cure); 688 F.2d at 902 (increase in contributory negligence percentage).

1 minimum damages – the compensation “floor” – for the alleged infringement. Because Samsung
2 failed to identify any evidence that might have justified lower damages, the award Samsung itself
3 calculated for these five products would not constitute impermissible *additur*, but would instead
4 correct the verdict to award undisputed damages.⁴

5 **IV. APPLE IS ENTITLED TO JMOL THAT SAMSUNG’S PATENTS ARE INVALID.**

6 **’893 Patent.** Samsung argues that the LG patent “has no bearing on the obviousness of
7 switching to the camera mode” (Opp. 17), but the evidence demonstrates otherwise. The LG
8 patent discloses “mode switching” (PX112.4 & Fig. 3), and Dr. Dourish testified that it would
9 have been obvious to switch between a photographing mode and a stored image displayed mode.
10 (Tr. 3217:3-3218:14 (“[T]hrough the discussion of mode switching, it makes clear if you have
11 those modes, you have to be able to switch amongst them ...”).) He also explained that it would
12 have been obvious to display the last-viewed image because “there’s ... only a finite number of
13 choices you can make for which image should be on the screen.” (Tr. 3218:1-14.) Dr. Yang did
14 not rebut *any* of Dr. Dourish’s obviousness opinions. (See Tr. 3666:4-19.)

15 **’711 Patent.** Samsung objects that Apple relies on unauthenticated and hearsay evidence
16 (Opp. 17), but the *admitted evidence*—including sales data, press releases, and a user manual—
17 clearly demonstrates that the K700i was on sale and publicly available in 2004. (PX113; PX116;
18 PX117; Tr. 3234:21-3238:2 (Givargis) (all admitted without objection).) Samsung also contends
19 that neither the K700i nor Wang *by itself* discloses using an “Applet for multitasking music on a
20 single processor” (Opp. 17-18), but Dr. Givargis explained that applets “were well known prior to
21 2005” and would have been *obvious* to use for a “music background play object” in a mobile
22 phone. (Tr. 3244:20-3248:14.) In any event, claim 9 contains no “single processor” requirement
23 as Samsung suggests. (See JX1071.9.)

24
25
26 ⁴ Samsung cites inapposite cases on this issue. *In re First Alliance Mortg. Co.*, 417 F.3d
27 977, 1002 (9th Cir. 2006), involves a legally erroneous expert calculation, which the jury was not
28 bound to accept, while *Novak v. Gramm*, 469 F.2d 430, 432-33 (8th Cir. 1972), is a wrongful
death suit involving an expert’s valuation of a young mother’s life.

1 **'460 Patent.** Contrary to Samsung's assertion (Opp. 18), Apple proved that the prior art
 2 teaches sending an email displaying a photo. As Dr. Srivastava explained, Yoshida describes "a
 3 device ... able to send an e-mail image" (Tr. 3313:12-3315:4), and Yoshida plainly discloses
 4 attaching a displayed image to an email. (PX120 at 6:38-44, 17:60-67, 20:29-37 & Figs. 4, 10.)

5 **'516 Patent.** Samsung contends that Hatta was "Apple's only prior art reference" (Opp.
 6 18), but Apple relied on Hatta *combined with* the admitted prior art ("APA") in the '516 patent.
 7 The APA discloses HARQ channels (JX1073, Fig. 5 ("E-DPDCH")), and Hatta teaches the '516
 8 patent's alleged solution of "unequal scaling." (PX100.23, Fig. 5.) As Dr. Kim explained, this
 9 combination renders claims 15 and 16 obvious. (Tr. 3426:5-3427:20.)

10 **'941 Patent.** Samsung argues that Agarwal addresses only satellite systems (Opp. 18),
 11 but Agarwal *also* discloses "wireless terrestrial" systems (PX97.21, 7:25-30), which indisputably
 12 include mobile communication systems. (Tr. 3454:17-3455:1 (Knightly).) Dr. Knightly
 13 explained how Agarwal discloses the one-bit field, serial number, and length indicator claimed by
 14 the '941 patent. (Tr. 3455:23-2459:2.) Although Samsung now argues that Agarwal does not
 15 teach those elements (Opp. 18), it failed to present evidence responding to Dr. Knightly's analysis
 16 at trial.

17 **V. APPLE IS ENTITLED TO JMOL OR A NEW TRIAL ON ITS BREACH OF**
 18 **CONTRACT AND ANTITRUST COUNTERCLAIMS**

19 **A. Samsung Breached Its Contractual Obligations Under The ETSI IPR Policy**

20 Samsung first argues that Apple failed to establish Samsung's ETSI obligations under
 21 French law (Opp. 18-19), but Apple was not required to call a French law expert to testify before
 22 the jury. Rather, the Court properly determined the content of French law, *see* Fed. R. Civ. P.
 23 44.1, based on the *undisputed* jury instructions submitted jointly by the parties. (Dkt. 1693 at 29-
 24 30.) Samsung therefore waived any argument that Apple failed to prove French law. *See* Fed. R.
 25 Civ. P. 51 But even if Samsung were correct that Apple failed to prove foreign law (which it is
 26 not), that is no basis for dismissal because, where foreign law is not proven, "it is presumed to be
 27 the same as the law of the forum." *San Rafael Compania Naviera v. Am. Smelting & Refining*
 28 *Co.*, 327 F.2d 581, 587 (9th Cir. 1964).

1 Samsung next contends that Apple failed to prove that Samsung breached the ETSI IPR
2 Policy by failing to timely disclose its Korean patent applications. (Opp. 19-20.) Samsung
3 attempts to distort its disclosure obligation by arguing that there is no “bright-line rule” requiring
4 disclosure before adoption of the relevant standard. (Opp. 19.) As another court recently found
5 in interpreting the same provision, however, Clause 4.1 is clear (PX74.2): “By using the terms
6 ‘might’ and ‘if,’ the policy clearly requires members to make efforts to disclose intellectual
7 property rights *before* a standard is adopted.” *Apple Inc. v. Motorola Mobility, Inc.*, No. 11-cv-
8 178 (W.D. Wis. Aug. 10, 2012) (“*Apple v. Motorola*”); Dkt. 194 at 43. Samsung plainly violated
9 that obligation by deliberately failing to disclose its applications until *after* its related technical
10 proposals had been adopted into the standard—facts that Samsung does not dispute. The conduct
11 of *other* ETSI members is irrelevant to *Samsung’s* breach, especially because there was no
12 evidence that any other member had made a technical proposal and then withheld its IPR until
13 after its proposal was adopted. (Tr. 3654:23-3655:1 (Teece).) Furthermore, contrary to
14 Samsung’s argument (Opp. 19-20), its Korean applications were “IPR” because they were no
15 longer confidential once Samsung publicly submitted their subject matter to ETSI. (*See Apple*
16 *Br. 23.*)⁵

17 Samsung further contends that Apple failed to prove causation or damages. (Opp. 20.)
18 On the contrary, Apple established that it was harmed by Samsung’s late disclosure because it
19 “led to a choice of technology that may not have been chosen but for [Samsung’s] conduct” (Tr.
20 3579:2-6 (Ordoover)) and Samsung based its assertion of its purportedly standard-essential patents
21 on that choice. (Tr. 2743:10-15 (Williams) (infringement contentions based on compliance with
22 standard).) As this Court has previously held, that is sufficient to establish causation because
23 Samsung’s concealment of its IPR biased the standard-selection process that led to this litigation
24 and proximately caused Apple’s litigation expenses. (*See* Dkt. 1158 at 40 (where holdup arises
25 from “failure to disclose essential patents to ETSI” and “failure to license on FRAND terms,”

26 ⁵ Samsung’s failure to oppose Apple’s arguments on this point acts as a waiver. *See Apple v.*
27 *Motorola* at 45 (“By failing to respond to Apple’s contention that the specific patent applications
28 at issue in this case were not confidential, Motorola has waived any arguments in opposition.”).

1 litigation costs “stem directly” from such conduct).)

2 Finally, Samsung maintains that that it complied with its FRAND obligations. (Opp. 20-
3 21.) But Samsung’s offer of a 2.4% royalty on the *entire sales price* of Apple’s accused products
4 is *per se* unfair and unreasonable because, among other reasons, it would compensate Samsung
5 for “many other features” unrelated to Samsung’s patents (Tr. 3537:12-3538:6 (Donaldson))—a
6 fact that Samsung does not dispute. Instead, Samsung points to “licensing rates in the industry”
7 and “Samsung’s past licensing practices.” (Opp. 21.) Dr. Teece’s testimony that Samsung’s
8 offer “was in the range of rates” observed from other companies (Tr. 3646:21-3647:2), however,
9 did not consider that those other licenses were not comparable in technological or economic
10 terms. *See Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327-29 (Fed. Cir. 2009)
11 (rejecting evidence that licenses were comparable where “[t]he testimony provides no analysis of
12 those license agreements, other than, for example, noting the agreement was a cross-license of a
13 large patent portfolio and the amount paid” and rejecting argument that describing licensed
14 portfolios as “PC-related” established requisite comparability). Similarly, Dr. Teece’s testimony
15 that a negotiation “could have resulted” in a cross-license with “the rate going away and possibly
16 just a balancing payment” (Tr. 3646:21-3647:2) is irrelevant to the reasonableness of the offer
17 that Samsung actually made. Moreover, Samsung’s unilateral 2.4% offer—which it made only
18 *after* suing Apple and has never agreed to modify—was not a good-faith negotiation and did not
19 satisfy its obligation “to grant irrevocable licenses on [FRAND] terms.” (PX74.3.)

20 **B. Samsung Violated Section 2 Of The Sherman Act**

21 Samsung argues that Apple failed to prove a relevant market because there was no
22 evidence of technical alternatives that “a buyer could switch to if necessary.” (Opp. 22.) But
23 Drs. Kim and Knightly testified that there existed alternative technologies (Apple Br. 25), which
24 could have been used had Samsung’s proposals been rejected. Dr. Ordover was entitled to rely
25 on that testimony in his market analysis. *See, e.g., Southland Sod Farms v. Stover Seed Co.*, 108
26 F.3d 1134, 1142 (9th Cir. 1997) (“The fact that Engelke’s opinions are based on data collected by
27 others is immaterial; Federal Rule of Evidence 703 expressly allows such opinion testimony.”).

28 Next, Samsung concedes that the evidence supports Apple’s theory of monopoly power so

1 long as “every standards-essential patent holder is a monopolist,” and argues only that this is “an
2 absurd result.” (Opp. 23.) There is no absurdity: “the incorporation of a patent into a
3 standard ... makes the scope of the relevant market congruent with that of the patent.” *Broadcom*
4 *Corp. v. Qualcomm Inc.*, 501 F. 3d 297, 315 (3d Cir. 2007). Although Apple disputes that
5 Samsung has any truly essential asserted patents--and the jury properly concluded that it did not--
6 Samsung's claims of essentiality give Samsung the power to exclude competition or demand
7 supracompetitive licensing terms in the relevant technology markets (i.e., the markets that include
8 the technologies that Samsung claims are covered by its patents). *See id.*; Mot. 25.

9 Finally, Samsung is wrong that Apple may not recover its litigation expenses as damages,
10 as the Court has previously ruled. (*See* Dkt. 1158 at 40 (“[L]itigation expenses may establish
11 damages for an antitrust claim.”).)

12 **VI. APPLE IS ENTITLED TO SUPPLEMENTAL DAMAGES AND PREJUDGMENT** 13 **INTEREST**

14 *Supplemental damages.* Samsung cannot dispute that Apple is entitled to damages
15 through final judgment for Samsung's continuing infringement. Samsung purports to deconstruct
16 the award, and then asserts that (1) some components of the award are not subject to
17 supplementation, and (2) Apple's calculation is inconsistent with Samsung's assumptions
18 regarding the jury's methodology. Samsung's arguments are contrary to law.

19 *First*, Samsung did not attempt to rebut or distinguish the cases Apple cited holding that
20 supplemental damages awards should extend the jury's existing verdict without revisiting or
21 reevaluating its methods or conclusions. (Mot. 27-28.) Those cases prohibit speculation about
22 how the jury calculated damages so long as the damages are supported in the record as a whole.
23 (*See also* Dkt. 2050 at 26.9-27.5.) Here, the record amply supports the jury's \$1.05 billion award,
24 and thus Apple's reasonable calculation based on the award. Because Apple properly extends the
25 jury's verdict forward in time, Apple's method poses no Seventh Amendment problem.

26 *Second*, even if the Court were to attempt to deconstruct the jury's damages methodology,
27 supplemental damages are not barred on the bases Samsung identifies. Courts have expressly
28 rejected Samsung's argument that infringer's profits cannot be awarded post-verdict as

1 supplemental damages. *E.g.*, *Padco, Inc. v. Newell Cos.*, No. 85-C-1325, 1988 WL 187504, at
2 *2-3 (E.D. Wis. July 27, 1988); *see also* 35 U.S.C. § 289 (“Nothing in this section shall prevent,
3 lessen, or impeach any other remedy which an owner of an infringed patent has under the
4 provisions of this title” except trebling.). Likewise, Samsung’s argument that extending lost
5 profits or royalties would be inconsistent with the methodology of Apple’s damages expert misses
6 the mark because “[s]upplemental damages are calculated consistent with the damages awarded
7 in the jury verdict.” *Presidio Components Inc. v. Am. Tech. Ceramics Corp.*, No. 08-CV-335,
8 2010 WL 3070370, at *1-2 (S.D. Cal. Aug. 5, 2010). Courts and parties cannot know, nor try to
9 guess, what methods the jury used in calculating damages.

10 *Third*, Samsung’s suggestion that Apple’s calculation should be rejected because it does
11 not use actual sales data for Samsung products is not credible, given that Samsung has only
12 disclosed partial data, and that just before this brief was due, when Apple had no opportunity to
13 test its reliability. (Hung. Decl. Ex. 20-22.) Apple’s projected sales were conservative because
14 they excluded any sales of the other 18 of 26 infringing products after June 30, 2012. (*See* Dkt.
15 1982-71 ¶ 11.) Even from the selective and self-serving disclosures in Samsung’s opposition, it
16 is clear that Samsung continued to sell numerous products after June 30, 2012. (Dkt. 2060; Ex.
17 1.) Moreover, even Samsung’s new data (and projections through the entry of judgment based on
18 it) produces supplemental damages totaling more than \$100 million, which confirms the
19 reasonableness of Apple’s request for \$121 million. (*See* Reply Robinson Decl. ¶ 6.)⁶

20 Samsung’s other criticisms are similarly disingenuous. Samsung suggests that Apple’s
21 per-unit damages amount of \$50.40 (calculated by dividing the total verdict by the number of
22 infringing units) is too high because it includes products like the Fascinate that Samsung no
23 longer sells. But if Apple had calculated a per-unit damages amount based solely on the eight
24 products used in its supplemental damages calculation, the per unit amount (and thus the total

25
26 ⁶ If supplemental damages are awarded based on Samsung’s newly-produced claimed
27 sales data, prejudgment interest on the verdict would remain the same at \$48,969,088, while
28 interest on the supplemental damages portion would decrease from about \$899,201 to \$770,339.
(*Compare* Dkt. 1982-71 ¶¶ 19-20, *with* Reply Robinson Decl. ¶ 6.)

1 supplemental damages) would have been *higher*. (See Reply Robinson Decl. ¶ 3.) Samsung also
2 wrongly criticizes Apple for failing to consider the effect of new products or supposedly non-
3 infringing variations of the eight products, although Apple’s model of supplemental damages took
4 into account the likelihood of reduced demand, and thus reduced sales. (See Dkt. 1982-74; Ex.
5 3.2.) And Samsung attempts to limit the award to post-verdict infringement, although the
6 limitations on information available meant the jury was not asked to and did not compensate
7 Apple for sales after June 30, 2012. Pre-verdict supplemental damages – beginning after the “the
8 last date for which [the patentee] was able to present evidence of [infringing] sales to the jury –
9 are proper. *Hynix Semiconductor, Inc. v. Rambus, Inc.*, 609 F. Supp. 2d 951, 959-65, 987 (N.D.
10 Cal. 2009); see also *Metso Minerals, Inc. v. Powerscreen Int’l Distrib. Ltd.*, 833 F. Supp. 2d 333,
11 349-351 (E.D.N.Y. 2011).

12 *Finally*, the Court should reject Samsung’s attempt to postpone an award of supplemental
13 damages until after final judgment and appeal. The Court has all the information it needs to
14 fashion appropriate post-verdict relief, and waiting until later to award supplemental damages will
15 needlessly drag out the proceedings.

16 ***Pre-judgment interest.*** Samsung’s calculation of prejudgment interest of only \$248,023
17 on a \$1.05 billion judgment is not plausible on its face. Samsung fails to identify any evidence
18 that Apple could have borrowed \$1.05 billion at the historically low rate – about two tenths of
19 one percent – that Samsung identifies in its opposition. (See Opp. 30.) Apple’s request for
20 prejudgment interest using the compounded prime rate better reflects actual borrowing costs for
21 businesses during the relevant period and, as courts have frequently recognized, the prime rate “is
22 appropriate for calculating prejudgment interest in a patent case.” *Fresenius Med. Care Holdings*
23 *v. Baxter Int’l, Inc.*, No. C 03-1431, 2008 WL 928535, at *3 (N.D. Cal. Apr. 4, 2008).

24 Samsung’s argument that the Court should deconstruct the jury’s verdict and award
25 prejudgment interest on only portions of it finds no support in the case law. *Beatrice Foods Co.*
26 *v. New England Printing & Lithographing Co.*, 923 F.2d 1576 (Fed. Cir. 1991), upheld a
27 prejudgment interest award to the full extent of the assessed damages, declining only to affirm
28 prejudgment interest for amounts that reflected the trebling of that award. *Id.* at 1578-81. Here,

1 Apple has not sought prejudgment interest on any enhancement of its damages. *Oiness v.*
2 *Walgreen Co.*, 88 F.3d 1025 (Fed. Cir. 1996), is similarly inapposite because *Oiness* involved two
3 separate awards, one for past damages where the Federal Circuit said prejudgment interest on the
4 entire award was appropriate, and one for projected future damages, a remedy Apple has not
5 sought. (*See id.* at 11033.) “Interest compensates the patent owner for the use of its money
6 between the date of injury and the date of judgment,” the *Oiness* court explained, a principle that
7 supports awarding prejudgment interest on all of the damages in this case. As noted above with
8 respect to supplemental damages, any deconstruction of the jury award is contrary to Federal
9 Circuit precedent.

10 Samsung is also wrong that the Ninth Circuit awards prejudgment interest in Lanham Act
11 cases only where counterfeiting is at issue. In this Circuit and elsewhere, courts have discretion
12 to award prejudgment interest for other types of Lanham Act violations. *See Clamp Mfg. Co.,*
13 *Inc. v. Enco Mfg. Co., Inc.*, 870 F.2d 512 (9th Cir. 1989) (affirming award of prejudgment interest
14 in non-counterfeiting Lanham Act case); *Cyclone USA, Inc. v. LL & C Dealer Serv., LLC*, No.
15 CV 03-992, 2010 WL 2132378, at *1 (C.D. Cal. May 24, 2010) (awarding prejudgment interest
16 for trademark infringement and other Lanham Act violations because “prejudgment interest
17 should be presumptively available” for violations of federal law).

18 Finally, Apple’s request for prejudgment interest is not premature. Apple’s request is
19 consistent with the schedule ordered by the Court, which will have all the information it requires
20 to calculate and award interest on the final amount of the judgment.

21 CONCLUSION

22 For the foregoing reasons and as set forth in Apple’s opening brief, Apple requests that
23 the Court award judgment as a matter of law or, in the alternative, a new trial as to certain claims,
24 together with supplemental damages and prejudgment interest.

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