

1 KENNETH STEINTHAL (SBN 268655)
 steinthalk@gtlaw.com
 2 SARAH BARROWS (SBN 253278)
 barrowss@gtlaw.com
 3 GREENBERG TRAUIG, LLP
 4 Embarcadero Center, Suite 3000
 San Francisco, CA 94111-5983
 Telephone: (415) 655-1300
 5 Facsimile: (415) 707-2010

6 James J. DeCarlo (Admitted *Pro Hac Vice*)
 decarloj@gtlaw.com
 7 Michael A. Nicodema (Admitted *Pro Hac Vice*)
 nicodemam@gtlaw.com
 8 GREENBERG TRAUIG, LLP
 9 MetLife Building
 200 Park Avenue, 34th Floor
 10 New York, New York 10166
 Tel.: (212) 801-9200
 11 Fax: (212) 801-6400

12 *Attorneys for Defendant,*
 13 *Apple Inc.*

14
 15 **UNITED STATES DISTRICT COURT**
 16 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 17 **OAKLAND DIVISION**

18
 19 EMBLAZE LTD.,
 20 Plaintiff;
 21 v.
 22 APPLE INC., a California Corporation,
 23 Defendant.

CASE NO. 4:11-CV-01079 SBA
MOTION TO STRIKE EMBLAZE'S
OBJECTION TO REPLY EVIDENCE
SUBMITTED BY APPLE IN CONNECTION
WITH MOTION TO DISMISS FIRST
AMENDED COMPLAINT

HON. SAUNDRA BROWN ARMSTRONG

Hearing Date: September 11, 2012¹
 Time: 1:00 p.m.

26
 27 ¹ A hearing date is set pursuant to Civil L.R. 7-2(b)(1), but Apple does not believe a hearing is necessary as this Motion
 28 To Strike relates to Apple's Motion To Dismiss Emblaze's First Amended Complaint, set to be heard on July 17, 2012
 but now being decided on the papers.

1 Defendant Apple Inc. (“Apple”) by its attorneys, hereby makes this Motion to Strike with
2 the accompanying Proposed Order to strike Emblaze’s Objection to Reply Evidence Submitted By
3 Apple In Connection with Motion to Dismiss First Amended Complaint (“Emblaze Objection” or
4 “Emblaze’s Objection to Reply Evidence “) [D.E. 122].

5 **I.**

6 **A. EMBLAZE’S OBJECTION IS AN IMPERMISSIBLE SUR-REPLY THAT**
7 **VIOLATES CIVIL LOCAL RULE 7-3**

8 Civil L.R. 7-3(d) mandates that no additional memoranda, papers or letters may be filed once
9 a Reply is filed without prior Court approval. Emblaze’s Objection to Reply Evidence does not
10 object to “new evidence” submitted by Apple’s Reply Brief [D.E. 116], but is instead a thinly veiled
11 attempt at a sur-reply that plainly violates Civil L.R. 7-3(d). The “new evidence” Emblaze purports
12 to object to is not “evidence” at all, but rather a quotation in Apple’s Reply from Emblaze’s own
13 Opposition to Apple’s Motion to Dismiss the First Amended Complaint (“Emblaze Opp.”). The
14 quote is a stark admission that Emblaze’s infringement contentions do not accuse Apple’s devices of
15 direct infringement. Reply Brief [D.E. 116] at 2, 4. Apple’s statement regarding the quotation is
16 not “evidence” and is not wrong, as Emblaze contends. Emblaze Objection [D.E. 122] at 2.
17 Further, Apple’s statement does not lack foundation -- it comes directly from Emblaze’s own brief.

18 Even putting aside the fact that there is no new “evidence” objected to in the Emblaze
19 Objection, Civil L.R. 7-3(d)(1) strictly forbids “further argument on the motion” and Emblaze
20 clearly runs afoul of this rule by attempting to argue, albeit confusingly, that “[w]hile Emblaze does
21 not accuse Apple’s devices *per se* of direct infringement, Emblaze does contend that Apple is
22 directly infringing” Emblaze Objection [D.E. 122] at 2 (emphasis in original). Apple’s Motion
23 to Dismiss and Reply have already addressed the shortcomings of Emblaze’s Infringement
24 Contentions and First Amended Complaint. *See e.g.*, Apple Reply [D.E. 116] at 2, 4, 7. Emblaze’s
25 attempt to set forth further argument to the Court on the pending motion to dismiss should be struck.

26 Finally, Emblaze’s attempt to style its argument as a Civil L.R. 7-3(d)(1) objection to new
27 evidence is belied by its own comment that it “had intended to respond to Apple’s statements at oral
28 arguments” but now submits the purported 7-3(d)(1) motion because the oral argument will not be

1 held. Emblaze Objection [D.E. 122] at 2. In other words, because this Court determined there was
2 no need for oral argument, Emblaze now seeks a back-door to attempt to submit further written
3 argument on the pending motion.

4 **B. EMBLAZE'S OBJECTION IS UNTIMELY**

5 There is no question that in addition to being impermissible, Emblaze's motion is also
6 untimely under Civil L.R. 7-3(d)(1). Even if Emblaze were challenging new "evidence", which it is
7 not, objections to new evidence must be filed within seven days of the filing of the Reply brief, or
8 by June 21, 2012 -- instead Emblaze waited nearly a month.

9 Emblaze's request that the Court waive the deadline requirement of Civil L.R. 7-3(d)(1)
10 should not be granted to allow Emblaze to effectively file a sur-reply on the pending motion to
11 dismiss.

12
13 DATED: July 17, 2012

GREENBERG TRAUIG, LLP

14
15
16 By: /s/
17 KENNETH STEINTHAL (SBN 268655)
18 steinthalk@gtlaw.com
19 SARAH BARROWS (SBN 253278)
20 barrowss@gtlaw.com
21 GREENBERG TRAUIG, LLP
22 4 Embarcadero Center, Suite 3000
23 San Francisco, CA 94111-5983
24 Telephone: (415) 655-1300
25 Facsimile: (415) 707-2010

26 James J. DeCarlo (Admitted *Pro Hac Vice*)
27 decarloj@gtlaw.com
28 Michael A. Nicodema (Admitted *Pro Hac*
Vice)
nicodemam@gtlaw.com
GREENBERG TRAUIG, LLP
MetLife Building
200 Park Avenue, 34th Floor
New York, New York 10166
Tel.: (212) 801-9200
Fax: (212) 801-6400

Attorneys for Defendant Apple Inc.