

1 MARTIN L. FINEMAN (CA State Bar Number 104413)
 DAVIS WRIGHT TREMAINE LLP
 2 505 Montgomery Street, Suite 800
 San Francisco, CA 94111
 3 Telephone: (415) 276-6575
 Facsimile: (415) 276-6599
 4 Email: martinfineman@dwt.com

5
 6 MARTIN B. PAVANE (*admitted pro hac vice*)
 LISA A. FERRARI (*admitted pro hac vice*)
 COZEN O'CONNOR
 7 277 Park Avenue
 New York, New York 10172
 8 Telephone: (212) 883-4900
 Facsimile: (212) 986-0604
 9 Email: mpavane@cozen.com
lferrari@cozen.com

10 *Attorneys for Plaintiff Emblaze, Ltd.*

11
 12 **UNITED STATES DISTRICT COURT**
 13 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
 14 **OAKLAND DIVISION**

15 EMBLAZE LTD.,

16 Plaintiff,

17 v.

18 APPLE INC., a California Corporation,

19 Defendant.

CASE NO. 4:11-cv-01079-SBA

**PLAINTIFF EMBLAZE LTD.'S
 UNOPPOSED MOTION TO AMEND
 PLEADINGS**

HEARING DATE AND TIME:

April 10, 2012 at 1:00 p.m.

The Hon. Sandra Brown Armstrong

22
 23 **PLEASE TAKE NOTICE** that on April 10, 2012, at 1:00 p.m., the undersigned attorneys for
 24 Plaintiff Emblaze Ltd. ("Emblaze") will move before the Honorable Sandra Brown Armstrong, at the
 25 United States District Court, Northern District of California, Oakland Courthouse, 4th Floor,
 26 Courtroom 1, 1301 Clay Street, Oakland, California 94612, for an Order granting Plaintiff Emblaze
 27 Ltd's Unopposed Motion to Amend Pleadings.

CERTIFICATION

The undersigned hereby certifies that the parties met and conferred and that Apple indicated that it does not object to Emblaze’s filing of the proposed First Amended Complaint, but that it reserves its rights with respect to answering or otherwise moving on any ground in response to such amendment.

/s/ Lisa A. Ferrari

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

1 MARTIN L. FINEMAN (CA State Bar Number 104413)
2 DAVIS WRIGHT TREMAINE LLP
3 505 Montgomery Street, Suite 800
4 San Francisco, CA 94111
5 Telephone: (415) 276-6575
6 Facsimile: (415) 276-6599
7 Email: martinfineman@dwt.com

8 MARTIN B. PAVANE (*admitted pro hac vice*)
9 LISA A. FERRARI (*admitted pro hac vice*)
10 COZEN O'CONNOR
11 277 Park Avenue
12 New York, New York 10172
13 Telephone: (212) 883-4900
14 Facsimile: (212) 986-0604
15 Email: mpavane@cozen.com
16 lferrari@cozen.com

17 *Attorneys for Plaintiff Emblaze Ltd.*

18 **UNITED STATES DISTRICT COURT**
19 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**
20 **OAKLAND DIVISION**

21 EMBLAZE LTD.,

22 Plaintiff,

23 v.

24 APPLE INC., a California Corporation,

25 Defendant.

26 CASE NO. 4:11-cv-01079-SBA

27 **MEMORANDUM IN SUPPORT OF**
28 **PLAINTIFF EMBLAZE LTD.'S**
UNOPPOSED MOTION TO AMEND
PLEADINGS

HEARING DATE AND TIME:
April 10, 2012, at 1:00 p.m.

The Hon. Sandra Brown Armstrong

Plaintiff Emblaze Ltd. ("Emblaze") submits this Memorandum in support of Plaintiff Emblaze Ltd.'s Unopposed Motion to Amend Pleadings.

I. STATEMENT OF THE ISSUE TO BE DECIDED

Whether, pursuant to Federal Rule of Civil Procedure 15(a)(2) and the Scheduling Order applicable to the action, the Court should grant Emblaze's unopposed motion for leave to file and serve a First Amended Complaint for patent infringement. *See* Exhibits A (red-lined version of

1 [Proposed] First Amended Complaint) and B (non-red-lined version of [Proposed] First Amended
2 Complaint).¹

3 **II. STATEMENT OF FACTS**

4 Plaintiff Emblaze filed a Complaint on July 28, 2010, in the Southern District of New York,
5 alleging infringement by Defendant Apple Inc. (“Apple”) of one or more of claims 9-12, 18-19, and 23
6 of Emblaze’s U.S. Patent No. 6,389,473 (“the ‘473 Patent”) [D.E. 1]; Ferrari Dec. ¶ 2. Apple
7 answered the Complaint on September 10, 2010, and Emblaze filed a reply to counterclaims asserted
8 by Apple on October 1, 2010 [D.E. 7, 11]; Ferrari Dec. ¶ 3. On February 24, 2011, following a motion
9 to transfer filed by Apple, Judge P. Kevin Castel of the Southern District of New York issued a
10 Memorandum and Order transferring the action to the Northern District of California [D.E. 24];
11 Ferrari Dec. ¶ 4. Following an initial Case Management Conference, this Court issued a Scheduling
12 Order on September 21, 2011 [D.E. 68], a copy of which is attached hereto as Exhibit C. The
13 Scheduling Order set a Markman schedule, but did not set dates for the termination of fact discovery,
14 or for expert discovery unrelated to claim construction. The Order set December 15, 2011, as the
15 deadline by which the parties must seek to amend the pleadings or join parties. Ferrari Dec. ¶ 5.

16 Pursuant to the Scheduling Order and Pat. L.R. 3-1 and 3-2, Emblaze served its Infringement
17 Contentions and accompanying document production on October 21, 2011. Consistent with its
18 ongoing investigation, Emblaze asserted infringement of claims 1, 2, 8-14, 21, 23-29, 36-38, and 40-
19 41 of the ‘473 Patent. Ferrari Dec. ¶ 6. Apple served its Invalidity Contentions, responding to
20 Emblaze’s Infringement Contentions, on December 6, 2011. *Id.*

21 In accordance with the Scheduling Order, Emblaze moves for leave to serve and file a First
22 Amended Complaint. Emblaze’s proposed amended pleading does not add any substantive claims to
23 the one count of patent infringement alleged in the original Complaint, but instead, (1) amends the list
24 of claims of the ‘473 Patent that are asserted by Emblaze so as to conform the allegations to what
25 Emblaze has asserted in its Infringement Contentions; (2) amends the products that Emblaze is
26 accusing of infringement so as to conform the allegations of the Complaint to what Emblaze has
27 learned in its ongoing investigation and from discovery thus far; (3) removes certain allegations

28 ¹ All exhibits referenced herein are attached to the accompanying Declaration of Lisa A. Ferrari (“Ferrari Dec.”).
MEMORANDUM IN SUPPORT OF PLAINTIFF -2- Case No. 4:11-CV-01079 SBA
EMBLAZE LTD.’S UNOPPOSED MOTION TO
AMEND PLEADINGS

1 concerning Apple’s presence in the Southern District of New York (no longer relevant now that the
2 action has been transferred to the Northern District of California); (4) updates the firm affiliation of
3 counsel for Emblaze and the change of venue from the Southern District of New York to the Northern
4 District of California; and (5) makes minor editing changes to the text. Ferrari Dec. ¶7.

5 **III. ARGUMENT**

6 **A. LEGAL STANDARD FOR AMENDING PLEADINGS**

7 Rule 15(a)(2) of the Federal Rules of Civil Procedure provides that once a responsive pleading
8 has been filed, a party may amend the pleadings “only by leave of court or by written consent of the
9 adverse party”. As set forth in the rule, leave to amend should be freely given “when justice so
10 requires.” *See id; Foman v. Davis*, 371 U.S. 178, 182 (1962).

11 The policy of Rule 15(a) is “to be applied with extreme liberality.” *Eminence Capital, LLC v.*
12 *Aspeon, Inc.*, 316 F.3d 1048, 1051-52 (9th Cir. 2003) (reversing as abuse of discretion district court’s
13 failure to grant leave to amend). So long as there is not “undue delay, bad faith or dilatory motive on
14 the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue
15 prejudice to the opposing party by virtue of allowance of the amendment, futility of amendment, etc.,
16 leave should, as the rules require, be ‘freely given.’” *Foman*, 371 U.S. at 182.

17 Motions for leave to amend filed within the deadline set by the Scheduling Order are subject to
18 the liberal pleading standards of Rule 15(a), in contrast to motions filed after a Scheduling Order
19 deadline, which must meet the “good cause” standard set forth in Rule 16(b). *Johnson v. County of*
20 *Alameda*, No. C 10-01437 RS, 2011 WL 2610138 (N.D. Cal. July 1, 2011).

21 As set forth below, the liberal pleading standards of Rule 15(a) should be applied, and
22 Emblaze’s motion to amend granted.

23 **B. THERE IS NO BAD FAITH, UNDUE DELAY, OR PREJUDICE TO APPLE,**
24 **AND THE AMENDMENT IS NOT FUTILE**

25 Emblaze has not acted in bad faith or unduly delayed seeking to amend its Complaint, and
26 Apple will not be prejudiced by allowing the amendment. Indeed, having been provided with a copy
27 of Emblaze’s proposed amended pleading, Apple indicated that it does not oppose Emblaze’s motion
28 to amend.

1 Based on its ongoing investigation, Emblaze has determined that Apple infringes certain claims
2 of the '473 Patent (claims 1-2, 8, 13-14, 21, 24-29, 36-38, and 40-41) that were not identified in
3 Emblaze's original Complaint. Additionally, Emblaze has decided not to pursue certain other claims
4 (claims 18-19) of the '473 Patent, which were asserted in Emblaze's original Complaint.

5 Apple has been aware of the claims being asserted by Emblaze since Emblaze served its
6 Infringement Contentions on October 21, 2011. Not only do Emblaze's Infringement Contentions list
7 those claims of the '473 Patent that Emblaze is asserting, but the contentions set forth in detail how
8 Apple's HTTP Live Streaming infringes those claims. Thus, proceeding in good faith, Emblaze seeks
9 to conform the amended pleading to the allegations Emblaze set forth in its Infringement Contentions.
10 Apple has already responded to Emblaze's contentions, in Invalidity Contentions served on December
11 6, 2011, and will not be prejudiced by this amendment to the pleading.

12 The other changes to the proposed First Amended Complaint similarly do not add claims or
13 alter the issues in dispute. The proposed amended pleading updates the list of products accused of
14 infringement. As with the identification of patent claims, Apple will not suffer any prejudice because
15 it has been on notice of this updated product list since the filing of Emblaze's infringement contentions
16 and Apple's responses to discovery. The remaining amendments to the Complaint simply update or
17 edit various information such as attorney information and the venue for the action; the changes are not
18 made in bad faith and will in no way prejudice Apple.

19 Additionally, fact discovery is still in its early stages. No depositions have been taken. The
20 first deadline for claim construction proceedings is not until January 12, 2012, at which time the
21 parties must exchange proposed claims for construction. *See* Exhibit C [D.E. 68] (copy of Scheduling
22 Order). The deadline to complete fact discovery has not yet been scheduled. There is, in short, no
23 prejudice to Apple in allowing the proposed pleading. Also, Emblaze has not unduly delayed in
24 seeking this amendment, as demonstrated by the fact that this motion has been filed within a
25 reasonable time after the filing of Emblaze's Infringement Contentions and within the deadline set
26 forth in the Court's Scheduling Order. *See id.*

27 Last, Emblaze's motion to amend pleadings is not futile, as it sets forth a short and plain
28 statement of Emblaze's claim for patent infringement. *See* Fed.R.Civ.P. 8(a)(2).

1 In view of the foregoing, justice requires that Emblaze be given leave to serve and file its
2 amended pleading.

3 **IV. CONCLUSION**

4 For the foregoing reasons, Plaintiff Emblaze Ltd.'s motion to amend its Complaint should be
5 granted.

6 Respectfully submitted,

7
8 DATED: December 15, 2011

COZEN O'CONNOR

9 By: /s Lisa A. Ferrari
Lisa A. Ferrari

10 Martin B. Pavane (admitted pro hac vice)
11 Lisa A. Ferrari (admitted pro hac vice)
12 277 Park Avenue
New York, New York 10172
13 Telephone: (212) 883-4900
Facsimile: (212) 986-0604
14 Email: mpavane@cozen.com
lferrari@cozen.com

15
16 MARTIN L. FINEMAN (CA State Bar No. 104413)
DAVIS WRIGHT TREMAINE LLP
17 505 Montgomery Street, Suite 800
San Francisco, CA 94111
18 Telephone: (415) 276-6575
Facsimile: (415) 276-6599

19 *Attorneys for Plaintiff Emblaze Ltd.*
20
21
22
23
24
25
26
27
28