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 APPLE INC.

10 UNITED STATES DISTRICT COURT
 11 NORTHERN DISTRICT OF CALIFORNIA

13 APPLE INC., a California corporation,

14 Plaintiff,

15 v.

16 SAMSUNG ELECTRONICS CO., LTD., A
 Korean business entity; SAMSUNG
 17 ELECTRONICS AMERICA, INC., a New York
 corporation; SAMSUNG
 18 TELECOMMUNICATIONS AMERICA, LLC, a
 Delaware limited liability company.,

19 Defendants.
 20

Case No. 4:11-cv-01846-LB

**PLAINTIFF'S MOTION TO
 EXPEDITE DISCOVERY**

Date: May 3, 2011

Time: 9:00 a.m.

Place:

Judge:

22 TO DEFENDANTS AND THEIR ATTORNEYS OF RECORD:

23 PLEASE TAKE NOTICE that on May 3 at 9:00 a.m., or as soon thereafter as the matter
 24 may be heard, in the United States District Court for the Northern District of California, Plaintiff
 25 Apple Inc. shall and hereby does move the Court for an order expediting discovery. This motion
 26 is based on this notice of motion and supporting memorandum of points and authorities; the
 27 supporting declaration of Jason R. Bartlett; and such other written or oral argument as may be
 28 presented at or before the time this motion is taken under submission by the Court.

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Dated: April 19, 2011

HAROLD J. MCELHINNY
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By: /s/ Michael A. Jacobs
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APPLE INC.

1 **TABLE OF CONTENTS**

2 **Page**

3 MEMORANDUM OF POINTS AND AUTHORITIES 1

4 FACTUAL BACKGROUND 1

5 ARGUMENT 6

6 I. EXPEDITED DISCOVERY IS NEEDED TO MITIGATE THE RISK OF
7 PREJUDICE..... 6

8 II. SAMSUNG IS BLATANTLY INFRINGING APPLE’S INTELLECTUAL
9 PROPERTY RIGHTS 7

10 III. APPLE’S REQUEST FOR EXPEDITED DISCOVERY SHOULD BE
11 GRANTED..... 9

12 CONCLUSION 13

13

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TABLE OF AUTHORITIES

Page(s)

CASES

Hard Drive Prods., Inc. v. Does 1-118,
No. 11-cv-1567 LB, 2011 WL 1431612 (N.D. Cal. April 14, 2011)..... 10

In re Countrywide Fin. Corp. Deriv. Litig.,
542 F. Supp. 2d 1160 (C.D. Cal. 2008) 10

Interserve, Inc. v. Fusion Garage PTE, Ltd.,
No. 09-cv-05812 JW (PVT), 2010 WL 143665 (N.D. Cal. Jan. 7, 2010) 10

IO Grp., Inc. v. Does 1-65,
No. 10-cv-4377 SC, 2010 WL 4055667 (N.D. Cal. Oct. 15, 2010) 10

KLA-Tencor Corp. v. Murphy,
717 F. Supp. 2d 895 (N.D. Cal. 2010) 12

Semitoool, Inc. v. Tokyo Electron Am., Inc.,
208 F.R.D. 273 (N.D. Cal. 2002)..... 10, 11, 12

Trak, Inc. v. Benner Ski KG,
475 F. Supp. 1076 (D. Mass. 1979) 7

Zynga Game Network Inc. v. Williams,
No. 10-cv-1022 JF (PVT), 2010 WL 2077191 (N.D. Cal. May 20, 2010)..... 11

OTHER AUTHORITIES

Federal Rule of Civil Procedure

 Rule 26(d) 10, 11

 Rule 26(f) 11

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Plaintiff Apple Inc. (“Apple”) moves this Court to allow Apple to take limited expedited
3 discovery of defendants Samsung Electronics America, Inc. and Samsung Telecommunications
4 America, LLC (collectively, “Samsung”) regarding products that Apple believes Samsung intends
5 to introduce imminently to the U.S. market that would infringe Apple’s intellectual property.
6 Samsung’s sales of such infringing products have the potential to cause irreparable harm to
7 Apple. Conversely, compliance with the narrowly tailored discovery requests Apple seeks in this
8 motion will not prejudice Samsung.

9 Accordingly, Apple requests an order requiring Samsung to produce samples of its
10 forthcoming mobile devices and to make available a witness to testify about them on an expedited
11 basis. Such an order will allow Apple to assess the extent to which Samsung’s soon-to-be-
12 released products will infringe Apple’s intellectual property rights before the products become
13 entrenched in the marketplace.

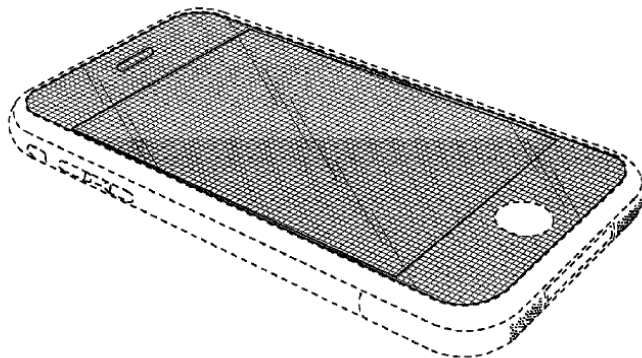
14 **FACTUAL BACKGROUND**

15 On April 15, 2011, Apple sued Defendants Samsung Electronics Co., Ltd., Samsung
16 Electronics America, Inc., and Samsung Telecommunications America, LLC in the above-
17 captioned action for infringement of its trademarks, trade dress, and utility and design patents in
18 the revolutionary iPhone mobile phone and iPad tablet computer. The Samsung products accused
19 in the complaint include, among others, Samsung’s “Galaxy” line of mobile devices. (D.I. 1 at ¶¶
20 54-56.)

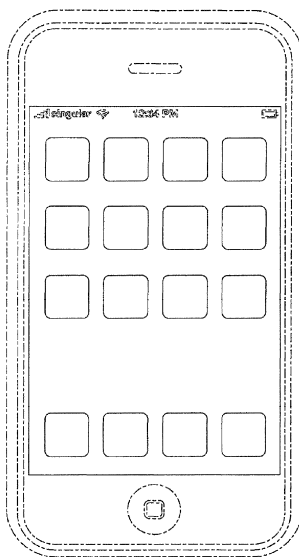
21 Apple’s complaint details a pattern and practice by Samsung of copying Apple’s patents,
22 trademarks, trade dress, and other intellectual property in connection with mobile devices. The
23 Samsung Galaxy series of products accused in the complaint is exemplary. Below are Samsung’s
24 existing Galaxy products set side-by-side with Apple’s design patents. Samsung imitates the
25 rectangular product shape with all four corners uniformly rounded, the screen surface with black
26 borders, the substantial black borders above and below the screen, the metallic surround framing
27 the perimeter of the top surface, the display of a grid of colorful square icons, and the bottom row
28

1 of icons set off from the other icons and that do not change as the other pages of the user interface
2 are viewed.

3 **'D677 Patent**



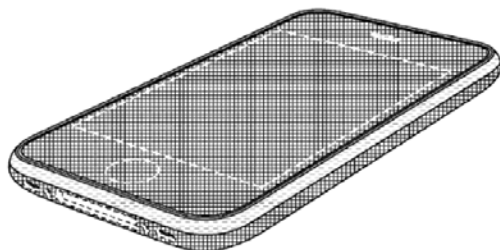
10 **'D790 Patent**



20 FIGURE



21 **'D016 Patent**



1 According to press accounts, Samsung is now ramping up its wholesale misappropriation
2 of Apple's intellectual property. As discussed below, Samsung has announced its intent
3 imminently to introduce new products that appear to be designed to infringe Apple's iPhone and
4 iPad intellectual property. Indeed, it appears that Samsung even *delayed* the introduction of one
5 of its new products to give it additional time to mimic more closely Apple's latest products.

6 The press follows Samsung's new mobile product plans closely and frequently notes the
7 similarity between Samsung's products and Apple's designs. Apple understands that one product
8 that Samsung intends to introduce imminently is its new tablet computer, dubbed the "Galaxy
9 Tablet 10.1." Samsung exhibited the Galaxy Tablet 10.1 for the first time in February 2011 at an
10 industry conference in Barcelona, Spain. (*See* Declaration of Jason R. Bartlett ("Bartlett Decl.")
11 Ex. 1 (Report titled "LIVE FROM BARCELONA: Check Out The New 10-Inch Samsung
12 Galaxy Tab")). The Internet website Business Insider (whose reporters disclosed that they had
13 been flown in and hosted courtesy of Samsung) reported "live from Barcelona" that:

14 The "Galaxy Tab 10.1," as it's called, is basically an iPad-sized
15 version of the Galaxy Tab. . . . From the front, it looks like an iPad,
just made out of high-end plastic instead of metal

16 (*Id.* at 1.) A few days later, the Internet website "Boy Genius" ran a report titled "Samsung
17 Galaxy Tab 10.1 hands-on," that included images of a sample of the new product. (Bartlett Decl.
18 Ex. 2).



**Samsung New
Galaxy Tab
Product, according
to "Boy Genius"
Internet Report,
February 13, 2011**

1 Samsung's plans to introduce this new product, however, were interrupted, apparently by
2 Apple's own product introduction. On March 2, Apple announced and demonstrated a new
3 generation of its iPad tablet computer, the "iPad 2." (See Bartlett Decl. Ex. 3 (CNNMoney.com
4 article titled "iPad 2: Thinner, faster, and with a Steve Jobs surprise")). Korean media quoted a
5 Samsung representative shortly thereafter as saying that modifications and improvements to
6 Samsung's new Tablet would be made in light of the recently revealed iPad 2. (See Bartlett Decl.
7 Ex. 4 (NBC Bay Area report titled "iPad 2 Sends Galaxy Tab Back to the Drawing Board"); see
8 also Ex. 5 ("Boy Genius" report titled "Samsung considers Galaxy Tab 10.1 overhaul following
9 iPad 2 unveiling")).

10 Samsung appears to be doing exactly that. On March 22, at an industry conference in
11 Orlando, Florida, Samsung unveiled a tablet computer prototype, the "Galaxy Tab 8.9." (See
12 Bartlett Decl. Ex 6 ("Boy Genius" report titled "Samsung announces Galaxy Tab 8.9 Android
13 Honeycomb tablet")). The images carried on the Boy Genius report suggest that this new product
14 will, indeed, copy the iPad 2:



25 **Apple iPad 2**



26 **Samsung New Galaxy Tab**
27 **Product, According to "Boy**
28 **Genius" Internet Report, March**
22, 2011

1 According to Samsung, the release date of the Tab 10.1 in the United States will be June 8, while
2 the release date of the Tab 8.9 will be “early this summer.” (See Bartlett Decl. Ex. 7 (Samsung
3 Mobile Announcements)).

4 Reports also indicate that Samsung is poised to introduce a new mobile phone that mimics
5 Apple’s iPhone mobile phone. One such report published on February 13, 2011 showed
6 prototypes of the new Galaxy S2 phone. (See Bartlett Decl. Ex. 8 (TalkAndroid.com website
7 article titled “Samsung Galaxy S2 i9100 specs, price revealed on UK website”). An image
8 shown on this website is set side-by-side below next to Apple’s current generation iPhone 4
9 mobile phone.



20 **Apple iPhone 4**



21 **Samsung New**
22 **Galaxy S2 Product,**
23 **According to**
24 **“talkandroid.com”**
25 **Internet report**

26 Tellingly, reader “comments” in response to the talkandroid.com post immediately noted the
27 similarity between the products. One user asks rhetorically: “picture looks like iphone 4 with
28 samsung on it?” (*Id.* at 3). Another chided, “That just looks like an iPhone, all the way down to
the icons. C’mon samsung...” (*Id.*).

Today, the ComputerWeekly.com’s “Inspect-a-Gadget” columnist ran a review of the
“hotly anticipated” Galaxy S2. Under the heading “Looks,” the columnist commented

1 This is the saddest part of this review. While the phone doesn't look
2 bad, Samsung for some reason feels they need to copy Apple's
3 products almost exactly . . . the main difference is the fact that the
home button is a rectangle as oppose[d] to the iPhone's circle.
Otherwise, physically, it's kind of difficult to tell them apart.

4 (Bartlett Decl. Ex. 9). The columnist also noted that this copying is part of a pattern for Samsung,
5 writing "Samsung did this with the original Galaxy S resembling the iPhone 3GS . . ." (*Id.*)

6 To Apple's knowledge, Samsung has not announced the release date of the S2 in the
7 United States. Internet reports suggest that the release will be in the coming months.

8 Service of a copy of the complaint and this motion on Samsung Electronics America,
9 Inc.'s and Samsung Telecommunications America, LLC's registered service agents was initiated
10 on April 19, and is expected to be completed by April 20. (Bartlett Decl. ¶ 14). Apple has not
11 yet served Samsung Electronics Co., Ltd., which is a Korean entity. Samsung's counsel has not
12 yet appeared. Accordingly, Apple has not yet been able to confer with Samsung regarding
13 Apple's discovery requests. Once Samsung's counsel has appeared, Apple will meet and confer
14 with Samsung regarding whether it will agree to provide the documents and testimony requested
15 here on an expedited basis. Apple will report to the Court on the outcome of those discussions as
16 soon as practicable.

17 ARGUMENT

18 Samsung's relentless copying of Apple's intellectual property must be stopped. Apple
19 conceived, created, perfected, made, and promoted two lines of revolutionary mobile products at
20 tremendous expense. If Internet reports about Samsung's new product line are to be believed,
21 Samsung is engaged in what can only be characterized as a willful campaign to free ride on that
22 investment by ripping off Apple's registered trademarks, trade dress, design patents, and utility
23 patents.

24 I. EXPEDITED DISCOVERY IS NEEDED TO MITIGATE THE RISK OF 25 PREJUDICE

26 Time is of the essence. If discovery is delayed, Samsung's infringing products may
27 become established in the marketplace during the period of delay. That would harm both parties.
28 Apple would be harmed because it would suffer continued violations of its exclusive rights and

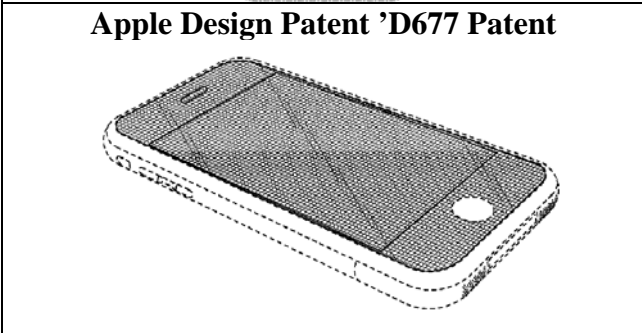
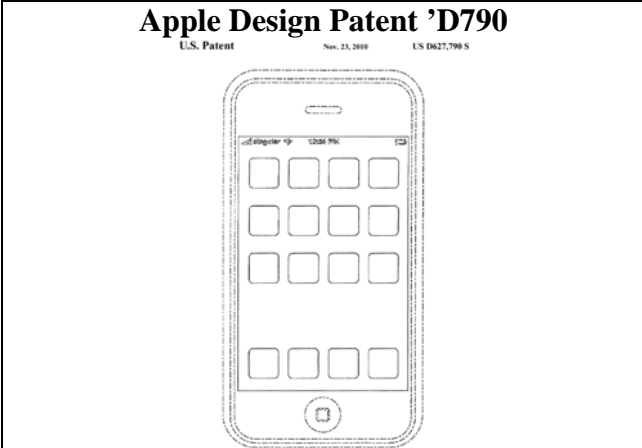
1 erosion of its valuable distinctiveness in the market. Expedited discovery now will enable Apple
2 to take early action to stop the infringing activity before it becomes pervasive and established.

3 Expediting these proceedings would inure to the benefit of Samsung as well. Courts have
4 recognized that it may be less prejudicial to enjoin a defendant that has invested fewer resources
5 in an infringing product than to wait until the defendant has invested more resources in a product,
6 and then later enjoin its use. *See, e.g., Trak, Inc. v. Benner Ski KG*, 475 F. Supp. 1076, 1078 (D.
7 Mass. 1979) (holding that enjoining defendant at commencement of sales campaign would “nip[]
8 the operation in the bud” whereas denial of preliminary relief would result in defendant’s
9 entrenchment, “making permanent relief more problematical”). Thus, there is no cause to delay
10 discovery, and ample cause to expedite it.

11 **II. SAMSUNG IS BLATANTLY INFRINGING APPLE’S INTELLECTUAL**
12 **PROPERTY RIGHTS**

13 If the Internet reports cited above are accurate, Samsung’s new products are sure to
14 infringe Apple’s registered trademarks, trade dress, design patents, and utility patents. Advance
15 images indicate that Samsung’s products will mimic Apple’s protected designs in the iPhone and
16 iPad. A sample of Apple’s design patents and trademark registrations asserted in the complaint
17 are set forth below next to a picture of Samsung’s forthcoming Galaxy S2:
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The overlap between Samsung’s new products and Apple’s intellectual property is unmistakable. Samsung imitates the rectangular product shape with rounded corners, the flat screen surface with black borders above and below the screen, the metallic surround, the display of a grid of colorful square icons, the bottom row of icons set off from the other icons, and even the green “phone” icon in the lower left corner of the device having a white handset tilted left 45 degrees – itself a registered Apple trademark.

In addition to infringing Apple’s design rights, it is highly likely that Samsung’s new products will infringe the Apple utility patents. For example, Apple has asserted two patents

1 covering fundamental technologies used in many high-end mobile device touch interfaces.¹ The
2 patents relate to detecting a user’s touch, interpreting it, and performing various actions in
3 response such as selecting, scrolling, pinching and zooming. Apple cannot confirm the extent of
4 infringement until the devices are actually available to Apple in their final form. Given
5 Samsung’s past conduct and the copycat products it has sold to date, however, Apple believes that
6 Samsung will continue to infringe the patents that Apple has asserted in this suit.

7 **III. APPLE’S REQUEST FOR EXPEDITED DISCOVERY SHOULD BE**
8 **GRANTED**

9 In this expedited motion, Apple’s requests:

- 10 (1) a domestic production model² of the Galaxy S2, along with its commercial
11 packaging and initial release marketing materials;
- 12 (2) a domestic production model of the Galaxy Tab 8.9, along with its commercial
13 packaging and initial release marketing materials;
- 14 (3) a domestic production model of the Galaxy Tab 10.1, along with its
15 commercial packaging and initial release marketing materials;
- 16 (4) a domestic production model of the Infuse 4G, along with its commercial
17 packaging and initial release marketing materials;
- 18 (5) a domestic production model of the 4G LTE (or “Droid Charge”), along with
19 its commercial packaging and initial release marketing materials;
- 20 (6) documents relating to any copying of design elements of, or attempts to design
21 around Apple’s intellectual property relating to, the iPhone 4, iPad, and iPad 2;
22 and

23 ¹ See, e.g., U.S. Patent No. 7,812,828, titled “Ellipse Fitting for Multi-Touch Surfaces,”
24 claiming an “[a]pparatus and methods . . . for simultaneously tracking multiple finger and palm
25 contacts as hands approach, touch, and slide across a proximity-sensing, multi-touch surface,”
26 and U.S. Patent No. 7,844,915, titled “Application Programming Interfaces for Scrolling
Operations, claiming “[a] machine implemented method for scrolling on a touch-sensitive display
or a device . . .” Internet reports indicate that both the Galaxy Tab 8.9 and 10.1 will employ a
“multi-touch display.” (Bartlett Decl. Exs. 10-11.)

27 ² By “domestic production model,” Apple means a final, commercial version of a product
28 to be sold in the United States.

1 (7) a 30(b)(6) deposition in the United States of a Samsung corporate
2 representative regarding the following topics:

3 (a) The design, function and operation of the shells and graphical user
4 interfaces of the Galaxy S2, Galaxy Tab 8.9, Galaxy Tab 10.1, Infuse 4G,
5 and 4G LTE;

6 (b) Any copying of design elements from the iPhone 4, iPad, and iPad 2;
7 and

8 (c) Any attempts to design around the iPhone 4, iPad, and iPad 2.

9 These requests are narrowly tailored. Samsung will suffer no undue burden in responding to
10 them. As set forth in the Proposed Order accompanying this motion, Apple requests that
11 Samsung produce documents within two weeks of the anticipated date of the order, and that the
12 deposition be held two days later on May 19. If expedited discovery is not ordered, then no
13 discovery will begin until after the Rule 26(f) conference, which is likely to be months away.

14 Federal Rule of Civil Procedure 26(d) notes that early discovery may be permitted by
15 court order, and “[i]n the Ninth Circuit, courts use the ‘good cause’ standard to determine whether
16 discovery should be allowed to proceed prior to a Rule 26(f) conference.” *Interserve, Inc. v.*
17 *Fusion Garage PTE, Ltd.*, No. 09-cv-05812 JW (PVT), 2010 WL 143665, at *2 (N.D. Cal. Jan. 7,
18 2010) (internal citation omitted); *see also Hard Drive Prods., Inc. v. Does 1-118*, No. 11-cv-1567
19 LB, 2011 WL 1431612, at *2 (N.D. Cal. April 14, 2011) (same); *IO Grp., Inc. v. Does 1-65*, No.
20 10-cv-4377 SC, 2010 WL 4055667, at *2 (N.D. Cal. Oct. 15, 2010) (same); *In re Countrywide*
21 *Fin. Corp. Deriv. Litig.*, 542 F. Supp. 2d 1160, 1179 (C.D. Cal. 2008) (same).

22 “Good cause may be found where the need for expedited discovery, in consideration of
23 the administration of justice, outweighs the prejudice to the responding party.” *Semitoool, Inc. v.*
24 *Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 276 (N.D. Cal. 2002); *Zynga Game Network Inc. v.*
25 *Williams*, No. 10-cv-1022 JF (PVT), 2010 WL 2077191, at *2 (N.D. Cal. May 20, 2010) (citing
26 *Semitoool*). “[C]ourts have recognized that good cause is frequently found in cases involving
27 claims of infringement and unfair competition.” *Semitoool*, 208 F.R.D. at 276; *see also*
28 *Zynga*, 2010 WL 2077191, at *2; Advisory Committee Notes to the 1993 amendments to Rule

1 26(d) (Discovery before the Rule 26(f) conference “will be appropriate in some cases, such as
2 those involving requests for a preliminary injunction or motions challenging personal
3 jurisdiction”).

4 Factors to consider in determining good cause include (1) the purpose of the requested
5 early discovery; (2) whether the discovery requests are narrowly tailored; (3) whether the
6 discovery burdens the defendants; (4) whether the defendants are able to respond to the requests
7 in an expedited manner; and (5) how far in advance of the formal start of discovery the request is
8 made. *See Semitool*, 208 F.R.D. at 276-77.

9 Regarding the first factor, Apple’s request falls squarely in the exception to the standard
10 discovery rule contemplated by Rule 26(d) for cases involving claims of infringement and
11 requests for a preliminary injunction. The discovery that Apple requests, as in *Semitool*, is
12 “core . . . to the underlying case,” and is information which “w[ould] be produced in the normal
13 course of discovery.” *Semitool*, 208 F.R.D. at 276. The Samsung products, packaging and
14 related marketing materials are likely the best evidence of Samsung’s infringement of Apple’s
15 intellectual property. Moreover, Apple requires the actual products themselves to evaluate the
16 functionality of Samsung’s products’ interfaces, including inspection of the application icons
17 used in these products. Apple also has ample basis to suspect that Samsung is actively copying
18 Apple’s technology. For instance, Apple intends to explore through discovery whether, as
19 Samsung’s executive seemed to suggest and subsequent product announcements appear to
20 confirm, Samsung is retooling its new Galaxy Tabs to emulate more closely Apple’s proprietary
21 designs and features.

22 Without an order permitting expedited discovery, Apple would be required to wait until
23 Samsung’s new products are commercially available, and would be forced to suffer the attendant
24 irreparable harm that comes with sales of infringing products. This motion represents Apple’s
25 only opportunity to obtain information to preserve the status quo, and to develop the record
26 before it is too late.

27 Regarding the second factor, Apple requests expedited production of only a limited
28 number of products, packaging, and documents, in addition to a deposition on the design of those

1 products. There can be no question that these requests are narrowly tailored to the specific issue
2 at hand – the potential infringement by Samsung’s upcoming products. Apple’s requests are even
3 more limited than the “technical specifications, schematics, maintenance manuals, user or
4 operating manuals and documents to show the physical configuration and operation of the
5 [accused product]” that the court in *Semitoool* ordered be produced on an expedited basis.
6 *Semitoool*, 208 F.R.D. at 276. The requested corporate deposition topics are also narrow in scope
7 and designed solely to assist Apple in determining the extent of Samsung’s infringement.
8 Because depositions are also routinely permitted in these circumstances, the Court should permit
9 Apple to propound this limited discovery. *See, e.g., KLA-Tencor Corp. v. Murphy*, 717 F. Supp.
10 2d 895, 898 (N.D. Cal. 2010) (noting that the court had “granted plaintiff leave to take expedited
11 discovery, including oral depositions of the individual defendants” in connection with a motion
12 for preliminary injunction).

13 Regarding the third and fourth factors, Samsung will not be burdened by the early
14 production of discovery, and is certainly capable of responding to these requests in an expedited
15 manner. As described above, Samsung has already announced and publicly demonstrated the
16 products that are the subject of this motion, and is in sole possession of these products. Because
17 of the narrow scope of the requested discovery, whatever logistical issues Samsung may
18 encounter in collecting samples of products which are scheduled to go on sale in the near future
19 would be minimal, and certainly outweighed by the potential harm to Apple. Likewise, the
20 burden to Samsung in having to prepare a corporate representative on the design of products that
21 have featured so prominently in the news over the past two months would be negligible.
22 Accordingly, these factors also weigh in favor of expedited discovery. *See, e.g., Interserve*, 2010
23 WL 143665, at *2 (permitting expedited discovery regarding the imminent release of a tablet
24 computer device because “the administration of justice outweigh[ed] the prejudice to the
25 responding party,” including any “logistical inconvenience”).

26 Finally, though Apple’s request is made substantially in advance of the formal start of
27 discovery, the circumstances here justify expediting the requested discovery. The critical nature
28 of the limited number of documents and products requested, as well as the lack of any real burden

1 or prejudice to Samsung in producing those materials and making a witness available to testify
2 regarding them, counsel for the granting of Apple’s motion.

3 **CONCLUSION**

4 For the foregoing reasons, Apple respectfully requests that the Court order Samsung to
5 produce the following on an expedited basis:

6 (1) a domestic production model of the Galaxy S2, along with its commercial packaging
7 and initial release marketing materials;

8 (2) a domestic production model of the Galaxy Tab 8.9, along with its commercial
9 packaging and initial release marketing materials;

10 (3) a domestic production model of the Galaxy Tab 10.1, along with its commercial
11 packaging and initial release marketing materials;

12 (4) a domestic production model of the Infuse 4G, along with its commercial packaging
13 and initial release marketing materials;

14 (5) a domestic production model of the 4G LTE (or “Droid Charge”), along with its
15 commercial packaging and initial release marketing materials;

16 (6) documents relating to any copying of design elements of, or attempts to design around
17 Apple’s intellectual property relating to, the iPhone 4, iPad, and iPad 2; and

18 (7) a 30(b)(6) corporate witness in the United States regarding the following topics:

19 (a) The design of the shell and graphical user interface of the Galaxy S2, Galaxy
20 Tab 8.9, Galaxy Tab 10.1, Infuse 4G, and 4G LTE;

21 (b) Any copying of design elements from the iPhone 4, iPad, and iPad 2; and

22 (c) Any attempts to design around the iPhone 4, iPad, and iPad 2.
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Dated: April 19, 2011

HAROLD J. MCELHINNY
MICHAEL A. JACOBS
JENNIFER LEE TAYLOR
JASON R. BARTLETT
MORRISON & FOERSTER LLP

By: /s/ Michael A. Jacobs
MICHAEL A. JACOBS

Attorneys for Plaintiff
APPLE INC.

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ECF ATTESTATION

I, JASON R. BARTLETT, am the ECF User whose ID and password are being used to file the following document: PLAINTIFF'S MOTION TO EXPEDITE DISCOVERY. In compliance with General Order 45, X.B., I hereby attest that Michael Jacobs has concurred in this filing.

Dated: April 19, 2011

**JASON R. BARTLETT
MORRISON & FOERSTER LLP**

By: /s/ Jason R. Bartlett
JASON R. BARTLETT