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10  
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 Counterclaim-Defendant APPLE INC.

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

16  
 17  
 18 APPLE INC., a California corporation,

19 Plaintiff,

20 v.

21 SAMSUNG ELECTRONICS CO., LTD., a  
 Korean corporation; SAMSUNG ELECTRONICS  
 22 AMERICA, INC., a New York corporation; and  
 SAMSUNG TELECOMMUNICATIONS  
 23 AMERICA, LLC, a Delaware limited liability  
 company,

24 Defendants.

Case No. 11-cv-01846-LHK (PSG)

**APPLE INC.'S OPPOSITION TO  
 SAMSUNG'S MOTION TO  
 ENFORCE APRIL 12, 2012 ORDER**

Date: June 21, 2012  
 Time: 10:00 a.m.  
 Place: Courtroom 5, 4th Floor  
 Judge: Hon. Paul S. Grewal

25  
 26 **PUBLIC REDACTED VERSION**  
 27  
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1 **I. INTRODUCTION**

2 Honoring both the letter and the spirit of the April 12 Order, Apple produced transcripts,  
3 and produced them six days early to give Samsung extra time to identify potential deponents.  
4 Apple also produced all of the court documents to which it had access under the governing  
5 protective orders — more than 3,800 of them. Apple even moved the International Trade  
6 Commission — unprompted by either this Court or Samsung — to allow its counsel to provide  
7 access to the remaining documents without consent of the producing parties. Apple *continues* to  
8 go beyond the requirements of the Order. Its counsel are preparing redacted versions of the  
9 unproduced court documents, as Samsung requests in its Motion, even though the Order did not  
10 so require. Apple also kept the Court apprised of its efforts to comply in an April 26 Motion for  
11 Clarification (Dkt. No. 885-0) and subsequent Status Update Re Compliance with April 12 Order  
12 (Dkt. No. 903).

13 Samsung, failed to take reasonable steps to avail itself of the relief granted under the  
14 Order by waiting until May 9 to request five depositions that the Court ordered to be finished by  
15 May 10. Samsung demanded that Apple either present witnesses the next day (which it could  
16 not) or agree to ignore the Court’s deadline. Samsung continues to violate the spirit of the Order  
17 by seeking to compel depositions which have *nothing* to do with mitigating prejudice to  
18 Samsung. The deposition transcript excerpts Samsung relies on to support this motion show  
19 plainly that Samsung has suffered no prejudice. Apple therefore requests that Samsung’s motion  
20 be denied and that the discovery phase of this dispute be finally drawn to a close.

21 **II. BACKGROUND**

22 **A. Samsung’s March Motion to Compel and Enforce**

23 In March, Samsung filed a motion challenging Apple’s understanding of the scope of  
24 Apple’s obligation to produce deposition transcripts under the December 22 Order, and seeking to  
25 compel Apple to produce “other documents” from a list of proceedings identified by Samsung as  
26 having a “technological nexus” with the present case. (Samsung’s Motion to Compel Production  
27 of Materials from Related Proceedings and to Enforce December 22, 2011 Court Order, filed  
28 under seal March 7). The Court granted Samsung’s motion in part and ordered that “to mitigate

1 prejudice to Samsung” from late-produced deposition transcripts, Samsung could take up to five  
2 additional depositions. (Dkt. No. 867) The Court continued, “Samsung must complete any  
3 deposition to be taken as a result of this order by May 10, 2012.” (*Id.*) With respect to court  
4 documents, the Court noted Apple’s argument that redacting third-party confidential information  
5 from all materials to be produced would be burdensome. It therefore ordered Apple to produce  
6 *unredacted* court documents from the eight cases Samsung had identified. (*Id.* at 12.)

7 **B. Apple’s Compliance with the Court’s April 12 Order**

8 Apple produced all deposition transcripts required by the Court’s order by April 21,  
9 2012 — six days before the deadline. (Sabri Declaration in Support of Apple’s Oppositions to  
10 Samsung’s Motion for Sanctions and Motion to Enforce (“Sabri Decl.”) ¶ 20.) Samsung claims  
11 that Apple produced 283 transcripts. Absurdly, Samsung reaches that number by counting  
12 transcripts from depositions in the 796 Investigation that Samsung itself took, copies of which it  
13 of course already had. Apple agreed to Samsung’s proposal to immediately “deem” the  
14 transcripts produced in this litigation. (*Id.* Ex. 14). In addition, Apple produced transcripts  
15 overbroadly in an attempt to avoid any possible further dispute —which Samsung now uses  
16 against Apple in both this motion to enforce and its motion for sanctions. Apple produced:

- 17 • Forty-three transcripts from the Nokia 701 investigation (*Id.* Ex. 16) — a case that  
18 Samsung initially included on its list of cases considered to have a technological  
19 nexus but later *dropped* (*Id.* Exs. 9-12);
- 20 • Sixty-six transcripts from the HTC ITC 710 investigation (*Id.* Ex. 16) — a case  
21 which was not included on Samsung’s list of cases alleged to have a technological  
22 nexus, but which Samsung’s counsel, Quinn Emanuel, who also represents HTC,  
23 clearly knew about. (*Id.* Ex. 12). The suit involves data analysis and operating  
24 system-related technologies not at issue in this case. *See Certain Personal Data*  
25 *and Mobile Communications Devices and Related Software*, Inv. No. 337-TA-710,  
26 2011 ITC LEXIS 1668, at \*12-16 (July 15, 2011);
- 27 • Seven transcripts from the QRG district court litigation (Sabri Decl. Ex. 16.). The  
28 QRG case was also omitted from Samsung’s list of technological nexus cases, and

1 with good reason. The asserted QRG patent referred to controlling a water supply  
2 valve in a basin or fountain; Apple only included transcripts from this case in its  
3 production because QRG alleged certain capacitive touch products infringed its  
4 patent (*Id.* Ex. 21.);

- 5 • Twenty-two transcripts from the Elan district court litigation (*Id.*). Apple  
6 previously produced all the Elan transcripts with a technological nexus for  
7 witnesses who testified in this case. Apple’s production after April 12 was limited  
8 to testimony with no technological nexus or from individuals not appearing as  
9 witnesses in this case;
- 10 • Twelve transcripts from the HTC 797 investigation (*Id.*). All of these transcripts  
11 post-dated the January 15 deadline for production of transcripts. None is “prior”  
12 testimony of a witness testifying in this case. Indeed, seven of the 12 transcripts  
13 were created *after the discovery cut-off*;
- 14 • Twenty-eight transcripts from Motorola litigation (*Id.*), none of which is prior  
15 testimony with a technological nexus from a witness testifying in this case; and
- 16 • Nineteen transcripts from the Nokia Delaware litigation — again, none of which  
17 is prior testimony with a technological nexus from a witness testifying in this case.  
18 (*Id.* Ex. 16).

19 After completing its production of transcripts, Apple moved for clarification of the  
20 April 12 Order on April 26. Apple sought to clarify that (1) Apple need not produce court  
21 documents containing confidential third-party information where the relevant protective order or  
22 rule does not permit production, even pursuant to court order, and (2) the five depositions to  
23 which Samsung is entitled must be connected to Apple’s production of transcripts pursuant to the  
24 April 12 Order and the alleged prejudice to Samsung. Apple noted that Samsung had failed to  
25 inform Apple of the depositions it intended to seek under the Order. (Apple’s Motion for  
26 Clarification [Dkt. No. 885] at 5.)

27 Three times—on April 24; April 30; and May 4, 2012 (Sabri Decl. Exs. 25, 26, and 27,  
28 respectively)—Apple wrote Samsung to ask that it identify deponents, warning Samsung that

1 Apple would not ignore the Court’s May 10 deadline. Despite Apple’s three reminders *and*  
2 motion for clarification, Samsung still waited eighteen days after Apple completed production of  
3 transcripts to identify five deponents for the first time. Samsung sent its list to Apple at 12:21AM  
4 on the morning of May 9. (Sabri Decl. Ex. 17.) Samsung demanded that Apple stipulate to  
5 continue depositions through May 18 or else produce all five deponents the next day, May 10.  
6 (*Id.*)

7 Apple detailed the steps it took to produce Court documents in compliance with the  
8 April 12 Order in its April 26 Motion for Clarification (Dkt. Nos. 885, 887) and subsequent  
9 Status Update Re Compliance with April 12 Order (Dkt. No. 903). Apple has continued its  
10 efforts since its status update, producing unredacted court documents when available. Its counsel  
11 has also redacted remaining unproduced court documents—even though the April 12 Order does  
12 not call for that. (Mazza Declaration in Support of Apple’s Opposition to Samsung’s Motion to  
13 Enforce (“Mazza Decl.”) ¶¶ 12-14.)

14 Several nonparties have objected to or failed to respond to Apple’s requests to produce  
15 unredacted court documents. As noted in Apple’s previous filings, Apple filed a motion with the  
16 ITC seeking permission to produce documents subject to ITC protective orders, as the ITC does  
17 not permit production absent consent, even pursuant to the orders of other courts. (Dkt. No. 887-  
18 0, Mazza Decl. ¶ 15.) On May 7, the Office of Unfair Import Investigations opposed Apple’s  
19 motion, acknowledging that “Apple is ‘between a rock and a hard place’” and asserting that ITC  
20 protective orders without exception prohibit counsel from providing confidential documents to  
21 Apple without consent of the producing parties. (Apple’s Status Update [Dkt. No. 903].) The  
22 ITC has not yet ruled on the motion.

### 23 **III. ARGUMENT**

24 Samsung’s motion to compel five depositions should be denied because (1) Samsung  
25 waited far too long to request the depositions and (2) the depositions Samsung belatedly  
26 requested will not mitigate any prejudice arising from Apple’s production of transcripts in  
27 compliance with the April 12 Order. Samsung’s motion to compel production of redacted Court  
28

1 documents also should be denied because it would impose an unreasonable burden on Apple not  
2 required by the April 12 Order.

3 **A. Samsung's Request for Five Depositions After the Deadline Should be Denied**

4 Samsung unreasonably delayed requesting depositions, and depositions it has requested do  
5 not "mitigate the prejudice to Samsung" as contemplated by the order (Order at 10).

6 **1. Samsung unreasonably delayed requesting depositions under the**  
7 **April 12 Order such that depositions could not be completed by**  
8 **May 10.**

8 The April 12 Order allowed a limited but reasonable window for Samsung to take  
9 additional depositions. Apple was ordered to produce deposition transcripts on a rolling basis  
10 finishing by April 27 and Samsung was ordered to complete any such depositions 13 days later on  
11 May 10. Apple finished its production a week early to give Samsung even more time to review  
12 the transcripts produced. Apple asked Samsung repeatedly to identify deponents and warned that  
13 it would not stipulate to allow any depositions to slip even later into the post-discovery period.  
14 Samsung ignored the warnings and failed to identify *any* deponents until after midnight on  
15 May 9. At that point, there was no reasonable way that Apple could present five witnesses for  
16 deposition by May 10. *Ultratech, Inc. v. Tamarack Scientific Co.*, No. C 03-3235 CRB (JL),  
17 2005 WL 696979, at \*1 (N.D. Cal. 2005) (six-days' notice of deposition not reasonable). Nor  
18 was it reasonable for Samsung to ignore deadlines imposed to prevent discovery from spilling too  
19 far into the post-discovery period, thus jeopardizing the orderly preparation of the case for trial.

20 Samsung claims that it was unable to provide names of deponents earlier because of  
21 Apple's alleged delay in "narrowing" its claims for trial, and because the number of transcripts  
22 produced was large. There is no presumption, let alone a requirement, under the April 12 Order,  
23 that Apple would narrow its claims before depositions were conducted. Indeed, Judge Koh's  
24 order directing the parties to consider narrowing their respective cases issued *after* the April 12  
25 Order. Moreover, Apple filed its final statement narrowing its claims at 6:00 pm on May 7. If  
26 Samsung were merely waiting for that filing, it still could have provided its list of deponents  
27 before May 9.



1           The volume of transcripts produced after April 12 is a red herring. First, the depositions  
2 that Samsung requested do not genuinely arise from late production of transcripts. As discussed  
3 below, Samsung was already aware of each of the requested witnesses and the scope of their  
4 knowledge well before Apple’s production pursuant to the April 12 Order. The transcript  
5 excerpts Samsung relies on are devoid of any information that would give rise to the need for  
6 depositions. Second, the great majority of deposition transcripts Apple produced were not new to  
7 Samsung’s counsel. The more than eighty transcripts from the 796 investigation were not new  
8 because Samsung is party to that investigation. The 106 transcripts Apple produced from the  
9 HTC and Motorola cases were not new to Samsung’s counsel because the same firm that  
10 represents Samsung here represents — under the direction of the same lead lawyer — the  
11 defendants in those actions.

12                           **2.       The requested depositions are not “tied to the production” of**  
13                           **deposition transcripts.**

14           Samsung claims that the depositions it requests “are reasonably tied to the production of  
15 deposition transcripts.” (Samsung’s Motion to Enforce (“Motion”) at 7.) That claim cannot  
16 withstand scrutiny.

17                           **a.       Andrew Bright**

18           Samsung claims that it needs to depose Andrew Bright because Apple’s transcript  
19 production revealed that he “oversaw earpiece issues with the iPhone 3GS and the overall audio  
20 performance of the iPhone 4.” (Motion at 7.) Samsung asserts that he testified that the “size and  
21 shape of the speaker box affects performance at high and low frequencies.” This, according to  
22 Samsung, makes him “relevant to Samsung’s functionality defense” because any “design choices  
23 made based on acoustics are not properly within the scope of a design patent or Apple’s alleged  
24 trade dress.” Samsung’s argument fails for several reasons.

25           First, the transcripts that are alleged to contain the revealing Andrew Bright testimony are  
26 from the Nokia 701 investigation. As discussed in more detail in Apple’s concurrently filed  
27 opposition to Samsung’s motion for sanctions, Samsung initially included the 701 investigation  
28 on its proposed list of cases alleged to have a technological nexus but dropped it after negotiation.

1 (Sabri Decl. Exs. 9-12.) It therefore was not a violation of the December 22 Order — which  
2 specifically encouraged the parties to come to “agreement” on the cases considered to have a  
3 technological nexus — for Apple not to have produced the Nokia 701 transcripts earlier.

4 Second, Samsung knew of Mr. Bright’s role working on iPhone acoustics months before  
5 Apple’s April transcript production. An Apple witness identified Mr. Bright and his role in a  
6 deposition taken in this case on February 16. (Sabri Decl. Ex. 22 at 25:13-17 (Mr. Bright was a  
7 “principal contact” within the “Acoustics” group “as it pertained to the iPhone 4”.) Thus,  
8 Samsung’s alleged failure to “discover” Mr. Bright’s alleged relevance to the case was not a  
9 result of non-production of transcripts.

10 Third, Mr. Bright testified that he joined Apple in 2009, too late to have been involved in  
11 creating the asserted designs. (Hutnyan Decl. [965-2] Ex. 12 at 57:6-58:7). Apple’s asserted  
12 design patents all arose out of the *original* iPhone project. The asserted designs were created (and  
13 design patents filed) well before Mr. Bright joined Apple. Similarly, Apple’s asserted trade  
14 dresses arise from both the original iPhone and the iPhone 3G, which first shipped in 2008.  
15 Mr. Bright could not have been involved in any “design choices” affecting these asserted trade  
16 dresses.<sup>1</sup>

17 **b. Priya Balasubramaniam**

18 Priya Balasubramaniam was identified as the “manager of the display and touch panel  
19 procurement team” in a deposition taken *in this case* on March 1, 2012, not in any of the  
20 deposition transcripts produced by Apple. (Sabri Decl. Ex. 23 at 32:24-33:6.) The transcript  
21 snippets that Samsung attached to its brief disclose nothing of relevance.

22 To justify this deposition, Samsung relies on the testimony of Dan Roskes in the HTC 710  
23 investigation, which was taken by a Quinn Emanuel attorney. Mr. Roskes said exactly *two words*  
24 about Ms. Balasubramaniam, testifying that she is responsible for “LCD procurement.” (Hutnyan  
25 Ex. 13, Roskes at 58:10-12). If Samsung had wanted to investigate LCD procurement, it had  
26

27 \_\_\_\_\_  
28 <sup>1</sup> Apple’s May 7 filing stated that Apple was no longer asserting the iPhone 4 trade dress.

1 many opportunities to do so during the discovery period. Samsung did not, however, because  
2 LCD procurement has nothing to do with any of Apple's asserted claims.

3 Samsung argues that Ms. Balasubramaniam's knowledge "of the choice to use certain  
4 LCD displays" is relevant because "the rationale for choosing a certain display may concern a  
5 functional rather than ornamental purpose." (Motion at 8.) This rationale fails because Apple has  
6 not asserted particular LCD displays as an element of its asserted designs. Even if it had, the  
7 witnesses knowledgeable of the effect of those choices on design would be the designers whom  
8 Samsung has already deposed. It makes no sense to depose a "procurement" employee to probe  
9 the rationale of the designers in selecting a particular industrial design.

10 The remaining transcript excerpts Samsung relies on are no more relevant. One witness  
11 testified that he consulted with Ms. Balasubramaniam about "master supply agreements."  
12 (Hutnyan Ex. 14 at 15:19-24.). Master supply agreements have nothing to do with the alleged  
13 "functionality" of Apple's design patents and trade dress. Samsung has never asked *any* Apple  
14 witness in this case about master supply agreements. Another deponent consulted with  
15 Ms. Balasubramaniam about components in the iPod nano media player. (*Id.* Ex. 15 at 11:18-  
16 12:18.) The iPod nano is not at issue in this case at all.

17 **c. Saku Hieta**

18 Samsung struggles but fails to manufacture some meaningful nexus between Mr. Hieta  
19 and the transcripts produced by Apple. There is nothing new in those transcripts that warrants a  
20 deposition of Mr. Hieta. Rather, this particular request appears to be driven by Samsung's  
21 apparent regret that it did not prioritize Mr. Hieta as a witness during fact discovery, even though  
22 his identity and responsibilities were plainly evident to Samsung at the time. Samsung should not  
23 be permitted to use the opportunity for limited, remedial depositions afforded by the Court's April  
24 12 Order to correct its own perceived litigation error.

25 Samsung does not suggest that Mr. Hieta's name appears in the transcripts recently  
26 produced by Apple; there is no testimony from him, or about him. Samsung therefore strains to  
27 create a subject-matter nexus: it argues that testimony in the transcripts reveals information about  
28 Apple's "sourcing of baseband chipsets," specifically Apple's supplier for certain chipsets. (*See*

1 Hutnyan Decl. Ex. 16, Sanguinetti Dep. 48:4-14.) In response to this, Samsung claims that it  
2 needs to depose Mr. Hieta, Apple’s senior manager of procurement. Yet the identity and supplier  
3 of the baseband chipsets incorporated into Apple’s iPhone 3G, iPhone 3GS, and iPad products  
4 has long been in the factual record in this case and disclosed to Samsung. As Samsung  
5 acknowledges, Mr. Hieta himself provided this very information in a January 21, 2012  
6 declaration. (Dkt. No. 660-04.) Apple also disclosed this information as early as *October 2011*  
7 in response to interrogatories, four months before the close of fact discovery. (Mazza Decl.  
8 Ex. 1.) Accordingly, Samsung’s requested deposition of Mr. Hieta would in no way serve the  
9 remedial purpose of the Court’s April 12, 2012 Order.

10 Moreover, Samsung cannot possibly argue that the Sanguinetti transcript—the only  
11 transcript Samsung identified in its attempt to justify its request to depose Mr. Hieta—was  
12 untimely produced. Mr. Sanguinetti’s deposition took place on March 16, 2012, two months *after*  
13 the January 15, 2012 deadline to comply with the Court’s initial order to produce transcripts and  
14 eight days after the close of fact discovery in this case. (Hutnyan Decl. Ex. 16 at 1.)

15 Finally, although it is a frank admission of its motives for including Mr. Hieta on its  
16 deposition list, Samsung is wrong that it “push[ed]” to depose Mr. Hieta or “timely noticed” his  
17 deposition during discovery. Instead, it served an eleventh-hour deposition notice on February  
18 27, 2012, just before the close of fact discovery, thereby failing to provide Apple with reasonable  
19 notice. (Mazza Decl. ¶ 3). At the time, Samsung was also requesting additional deposition time  
20 with Tony Blevins, a Vice President at Apple who had already been deposed on supply chain  
21 issues, including sourcing for Apple’s products. (*Id.*; *id.* Ex. 2 at 21:9-21; 37:5-38:13; 39:21-  
22 40:7; 41:23-42:4; 45:3-45:11; 50:3-51:24; 52:16-54:15.) Given the tardiness of Samsung’s  
23 requests, the limited fact discovery window remaining, and the substantial overlap in relevant job  
24 responsibilities between Mr. Blevins and Mr. Hieta, Apple offered to designate Mr. Blevins’ prior  
25 testimony as 30(b)(6) testimony and to present him for an additional half day of 30(b)(6)  
26 testimony, in exchange for Samsung’s agreement to withdraw its Hieta notice. (*Id.* Ex. 3.)  
27 Apple’s position then and now is that a deposition of Mr. Hieta would be unreasonably  
28 duplicative. (*Id.*) Even though the parties were pressed against the discovery deadline, Samsung

1 failed to even respond to the offer for more than a week. (*Id.* ¶ 6.) Apple nevertheless made  
2 Mr. Blevins available for additional testimony on April 3, 2012. (Mazza Decl. ¶ 7.) Any claim  
3 that Apple somehow prevented Samsung from bringing the issue to the Court’s attention before  
4 the close of discovery is therefore unfounded. Accordingly, to the extent that Samsung suffered  
5 any prejudice from its inability to depose Mr. Hieta (a dubious claim given the depositions of  
6 Mr. Blevins), Samsung has only its own lack of diligence to blame, not Apple’s production of  
7 transcripts.

8 **d. Richard Howarth**

9 Samsung has spent 13 hours on the record deposing Richard Howarth about his role  
10 designing the iPhone, in this case and in the 796 ITC investigation. Samsung fails to identify a  
11 *single fact* about him or his work in any of the transcripts produced. Samsung vaguely alleges  
12 that “the deposition transcripts Apple belatedly produced provide new information within the  
13 scope of Mr. Howarth’s knowledge.” (Motion at 10.) In support of this, Samsung cites  
14 transcripts from the depositions of Stephen Lemay and Achim Pantfoerder in the Nokia 701  
15 investigation — the investigation that Samsung dropped from its list of cases alleged to have a  
16 technological nexus. Neither of the transcripts even mentions the industrial design department in  
17 which Mr. Howarth works, let alone Mr. Howarth himself. (Hutnyan Exs. 17 & 18.) All of the  
18 testimony of Mr. Lemay that Samsung cites relates to software, not hardware, and, more  
19 specifically, to the user interface elements associated with the “magnification loupe” of the virtual  
20 keyboard at issue in that case. (*Id.* Ex. 17.) As for the Pantfoerder deposition, the most that can  
21 be said is that it relates to the iPhone — nothing in the transcript discusses industrial design or  
22 Mr. Howarth.

23 **e. Emilie Kim**

24 As an initial matter, Samsung’s argument with respect to Ms. Kim stems from an  
25 erroneous factual premise: while Samsung suggests that it did not depose Ms. Kim in her  
26 personal capacity (Mot. at 10), this simply is not the case. Apple designated Ms. Kim as a  
27 30(b)(6) witness on February 23, and the deposition was scheduled for March 7. (Mazza Decl.  
28 Ex. 5.) The day before this deposition, Samsung noticed Ms. Kim’s individual deposition to take

1 place on that same March 7 date. (*Id.* Ex. 6.) Indeed, at Ms. Kim’s deposition, Samsung marked  
2 as deposition exhibits both its 30(b)(6) notice and Ms. Kim’s personal deposition notice. (*Id.*  
3 Ex. 7 at 6:25-7:23) Accordingly, Ms. Kim was deposed both as a 30(b)(6) designee and in her  
4 individual capacity on March 7, but Samsung’s counsel nonetheless concluded this deposition  
5 after approximately two hours, confirming that he had no more questions. (*Id.* at 65:20-21.)

6 Now, three months later, Samsung seeks additional deposition time with Ms. Kim,  
7 purportedly because Ms. Kim has “knowledge reasonably related to subjects revealed in the  
8 transcripts” produced by Apple pursuant to the Court’s April 12 Order. However, the transcripts  
9 produced by Apple revealed nothing about Ms. Kim or her knowledge; indeed, Samsung’s motion  
10 does not even suggest that Ms. Kim’s name appears in any of the produced transcripts. While  
11 Samsung claims that the transcripts discuss features of the Camera and Photos apps about which  
12 Ms. Kim is knowledgeable, including swiping gestures purportedly relevant to the ’460 patent  
13 (*see* Mot. at 10), Samsung does not identify a single question relating to swiping and/or gestures  
14 that it could not equally well have asked Ms. Kim three months ago.

15 In reality, Samsung’s request for a second deposition with Ms. Kim is no more than a  
16 belated attempt to seek discovery to support a late-developed and untimely infringement theory,  
17 wholly unrelated to the recently produced transcripts. As set forth in Apple’s pending Motion to  
18 Strike Certain Portions of Samsung’s Expert Reports (Dkt. 939-1 at 12-13), on March 22 (two  
19 weeks after Ms. Kim’s deposition), Samsung disclosed in the opening report of its expert,  
20 Dr. Yang, a new infringement theory [REDACTED]  
21 [REDACTED]. This theory is nowhere in Samsung’s Infringement  
22 Contentions, and for this reason Apple has moved to strike it. Samsung did not ask Ms. Kim *any*  
23 questions about swiping or gestures when it had the opportunity, and its attempt to use the  
24 Court’s April 12 Order to remedy this failure should be rejected, as any further deposition time  
25 with Ms. Kim would serve only to award Samsung discovery it could have sought during the  
26 discovery period.

1           **B.     Apple Has Already Produced Materials Covered by the April 12 Order in**  
2           **Redacted Form to the Extent Possible and Sought Consent from Third**  
3           **Parties to Produce Documents.**

4           Samsung seeks an order directing Apple (a) to produce in redacted form documents  
5 implicated by the April 12 Order, (b) to confer with Samsung regarding which documents need to  
6 be produced in unredacted or partially unredacted form, and (c) to seek consent to remove  
7 specific redactions immediately. (Motion at 12.) Samsung’s motion should be denied because  
8 Apple has already complied with the April 12 Order and Samsung’s proposal would place an  
9 undue burden on Apple.

10           Appropriately, Samsung does not request that Apple be compelled to produce all  
11 documents covered by the April 12 Order in “unredacted” form in violation of protective orders  
12 issued in other matters. As discussed in Apple’s Motion for Clarification and supporting  
13 declaration [Dkt. Nos. 885 and 887] such a request would have been unreasonable because Apple  
14 does not control documents which its counsel is legally bound not to provide to Apple. *Nissei*  
15 *America, Inc. v. Cincinnati Milacron, Inc.*, 95 F.R.D. 471, 475 (N.D. Ill. 1982) (plaintiffs “need  
16 not produce [material] that is subject to [the ITC] protective order since it is not available to  
17 plaintiffs or within their possession, custody, or control within the contemplation of Rule 33(a) or  
18 Rule 34(a) of the Federal Rules.”); *see also* Fed. R. Civ. P. 34(a)(1); *U.S. v. Int’l Union of Petrol.*  
19 *& Indus. Workers*, 870 F.2d 1450, 1452 (9th Cir. 1989) (“control” within meaning of Rule 34  
20 defined as “legal right to obtain documents upon demand”). Apple has already sought consent to  
21 produce unredacted documents — including filing a motion with the ITC to allow such  
22 production. Unless Apple obtains consent, however, Apple’s outside counsel cannot even  
23 provide copies of the relevant documents to Apple where certain protective orders or court rules  
24 prohibit. Therefore:

- 25           • Apple has already produced all court documents from the Nokia Delaware case,  
26           the Motorola Wisconsin (10-cv-00661) case, and the HTC ITC (337-TA-797)  
27           investigation unredacted. (Mazza Decl. ¶ 11.)

- 1           • Apple has produced all court documents from the HTC Delaware case (10-cv-  
2           00167) unredacted, except for four documents that contain Google CBI for which  
3           Google has refused to provide consent.
- 4           • Apple has produced all court documents from the Elan (N.D. Cal. Case No. 09-  
5           cv-01531 and ITC Inv. No. 337-TA-714) cases unredacted, except for certain  
6           docket entries containing Elan CBI for which Elan has refused to provide consent.  
7           (*Id.* ¶ 13.)
- 8           • Apple has produced all court documents from the Motorola Wisconsin/Illinois  
9           (Case No. 11-cv-8540, formerly W.D. Wis. 10-cv-00662) and ITC 750 (Inv. No.  
10          337-TA-750) matters unredacted, except for certain documents that contain the  
11          CBI of nonparties who have not provided consent upon request. (*Id.* ¶ 14.)

12           Samsung requests that the Court order Apple to produce immediately in redacted form all  
13 documents that Apple has not yet produced. The April 12 Order requires only production of  
14 *unredacted* documents, and now is not the time to require Apple to produce more. Several of the  
15 nine cases on Samsung's list are ongoing. It is not reasonable to request that Apple constantly  
16 monitor ongoing litigation for new filings, continuously send out letters to numerous third-parties,  
17 and be always preparing redacted copies just in case the third-parties object. As for existing court  
18 documents, although it has not been and should not be ordered to do so, Apple has already  
19 prepared redacted versions.

- 20           • Apple produced redacted versions of the four documents HTC Delaware case (10-  
21           cv-00167) documents for which Google refused consent. (*Id.* ¶ 12.)
- 22           • Counsel for Apple in the *Elan* matters has prepared and provided to Elan redacted  
23           versions of all remaining documents in the Elan matters to allow Elan's counsel to  
24           confirm that the redactions are acceptable, and has given Elan's counsel until June  
25           11 to review them. Apple will make any modifications to the redactions that Elan  
26           requests and then produce the remainder. (*Id.* ¶ 13.)
- 27           • Likewise, counsel for Apple in the *Motorola* matters has prepared proposed  
28           redacted versions of all remaining documents. Counsel has written again to each



1 of the third parties who have ignored Apple’s previous request for consent.

2 Unless otherwise instructed, counsel will provide the redacted versions to  
3 Samsung. (*Id.* ¶ 14.)

4 Samsung requests that the Court order Apple to “confer” with Samsung regarding which  
5 documents need to be produced in unredacted form. This request is ironic because Apple already  
6 attempted to engage Samsung in such a negotiation shortly after the April 12 Order issued, but  
7 Samsung refused. As explained in Apple’s motion for clarification, Apple informed Samsung  
8 that other protective orders and rules prohibited Apple from producing all unredacted court  
9 documents without consent. Apple asked to confer with Samsung regarding which nonpublic  
10 items Samsung truly needed so that Apple could narrow its requests of third parties. (Mazza  
11 Declaration in Support of Motion for Clarification [Dkt. No. 887-0] ¶ 18.) Samsung flatly  
12 rejected this request. (*Id.* ¶ Ex. 3 [Dkt. No. 887-10] at 3 (rejecting Apple’s request that Samsung  
13 identify nonpublic items it wanted to receive).) Now, there is little additional effort to be saved  
14 through such a conference. Apple has already done all it can by producing *all* unredacted court  
15 documents it is able to produce, has pressed *all* other parties for consent where such consent is  
16 required, and has even filed a motion before the ITC. (Mazza Decl. ¶¶ 11-15.)

17 In sum, the document production remedy that Samsung seeks is both unwarranted and  
18 unnecessary.

19 **IV. CONCLUSION**

20 Samsung’s motion should be denied.  
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Dated: June 5, 2012

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