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 CO., LTD., SAMSUNG ELECTRONICS  
 14 AMERICA, INC. and SAMSUNG  
 TELECOMMUNICATIONS AMERICA, LLC  
 15

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

18 APPLE INC., a California corporation,

19 Plaintiff,

20 vs.

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

24 Defendants.  
 25

CASE NO. 11-cv-01846-LHK

**DECLARATION OF MICHAEL J.  
 WAGNER IN SUPPORT OF SAMSUNG'S  
 MOTION TO STRIKE EXPERT  
 TESTIMONY BASED ON UNDISCLOSED  
 FACTS AND THEORIES**

Date: June 21, 2012

Time: 10:00 a.m.

Place: Courtroom 5, 4th Floor

Judge: Hon. Paul S. Grewal

**PUBLIC REDACTED VERSION**

1 I, Michael Wagner, hereby declare as follows:

2 1. I am currently a Managing Director at LitiNomics, Inc., a financial and economic  
3 consulting firm specializing in the analysis of economic issues that arise in commercial disputes.

4 2. I am a Certified Public Accountant and attorney licensed in the State of California.  
5 I have been a Partner at Price Waterhouse; a Managing Director at Putnam, Hayes & Bartlett; and  
6 a Senior Advisor at CRA International, a publicly traded management consulting firm. I have a  
7 Bachelor of Science in Engineering, which I received from the University of Santa Clara in 1969.  
8 I have a Master in Business Administration, which I received from U.C.L.A. in 1971. I have a  
9 Juris Doctor degree, which I received from Loyola University School of Law at Los Angeles in  
10 1975. Exhibit A is a true and correct copy of my *curriculum vitae*.

11 3. I have specialized in the computation of commercial damages over the last 35 years  
12 of my professional career. I have been qualified and testified at trial as an expert on financial  
13 matters, principally commercial damages, 125 times, including Lanham Act cases and patent cases  
14 (28 times in patent cases). I have testified on financial issues in 34 arbitrations. I also have been  
15 deposed 310 times (98 times in patent cases; more than 10 times in trademark or Lanham Act  
16 cases) on financial issues over my career.

17 4. I have 28 professional publications, the majority of which deals with the  
18 computation of commercial damages (8 deal directly with patent damages). The most significant  
19 publication is the *Litigation Services Handbook*, which I co-edited through its fourth edition. The  
20 book is a collaborative effort of many of the leading experts in the financial area. I am the  
21 founding editor and continued as an editor for over 20 years. The Handbook has been recognized  
22 as authoritative by the Federal Judicial Center in its *Treatise on Scientific Evidence*. The  
23 Treatise's chapter on Economic Damages cites only five additional reference sources for further  
24 guidance to federal judges. The *Litigation Services Handbook* is one of the five reference sources.

25 5. In the above-captioned case, *Apple Inc., vs. Samsung Electronics Co., Ltd., et al.*, I  
26 previously submitted a Declaration of Michael J. Wagner in Support of Samsung's Opposition to  
27 Apple's Motion for a Preliminary Injunction. I have also submitted expert reports, including my  
28 April 16, 2012 Expert Report of Michael J. Wagner; my April 20, 2012 Corrected Expert Report

1 of Michael J. Wagner (“Report”), attached hereto as Exhibit B; and my May 11, 2012  
2 Supplemental Expert Report of Michael J. Wagner.

3 6. I have been asked by counsel for Samsung Electronics Co., Ltd., Samsung  
4 Electronics America, Inc., and Samsung Telecommunications America, LLC (collectively,  
5 “Samsung”) to consider additional documents recently produced by Apple Inc. (“Apple”) and their  
6 potential relevance to the opinions in my earlier reports. I submit this declaration in support of  
7 Samsung’s Motion to Strike Expert Testimony Based on Undisclosed Facts and Theories. If  
8 asked at hearings or trial, I am prepared to testify regarding the matters I discuss in this  
9 declaration.

10 7. I am being compensated at my customary rate for my work on this case. I have  
11 received no other compensation for my work in this litigation. My compensation is in no way  
12 contingent upon the opinions I arrive at or the result of the litigation.

13 8. In performing my analysis, I or my staff have reviewed the Declaration of Trevor  
14 Darrell, Ph.D., in Support of Samsung’s Motion to Strike Expert Testimony Based on Undisclosed  
15 Facts and Theories (“Darrell Declaration”), and the Declaration of Brian von Herzen, Ph.D., in  
16 Support of Samsung’s Motion to Strike Expert Testimony Based on Undisclosed Facts and  
17 Theories (“von Herzen Declaration”), and the documents cited therein. I or my staff has also  
18 reviewed publicly available documents discussed in this declaration and supporting exhibits, as  
19 well as depositions and documents produced by Apple and Samsung in discovery.

20 9. In addition to the review of documents listed above, I have relied on my training as  
21 a Certified Public Accountant and my knowledge and expertise regarding intellectual property  
22 litigation damages.

23 10. I may supplement this declaration in the event that additional relevant materials are  
24 provided to me, including court filings and declarants’ testimony.

25 Previous Work In This Case

26 11. In my Report, I provided an opinion, *inter alia*, regarding damages resulting from  
27 Samsung’s alleged infringement of Apple’s U.S. Patent No. 6,493,002 (“the ‘002 Patent”), entitled  
28 “Method and Apparatus for Displaying and Accessing Control and Status Information in a

1 Computer System;” U.S. Patent No. 7,469,381 (“the ‘381 Patent”), entitled “List Scrolling and  
2 Document Translation, Scaling and Rotation on a Touch-Screen Display;” U.S. Patent No.  
3 7,844,915 (“the ‘915 Patent”), entitled “Application Programming Interfaces for Scrolling  
4 Operations;” U.S. Patent No. 7,853,891 (“the ‘891 Patent”), entitled “Method and Apparatus for  
5 Displaying a Window for a User Interface;” U.S. Patent No. 7,663,607 (“the ‘607 Patent”),  
6 entitled “Multipoint Touchscreen;” U.S. Patent No. 7,864,163 (“the ‘163 Patent”), entitled  
7 “Portable Electronic Device, Method, and Graphical User Interface for Displaying Structured  
8 Electronic Documents;” and U.S. Patent No. 7,920,129 (“the ‘129 Patent”), entitled “Double-  
9 Sided Touch-Sensitive Panel With Shield And Drive Combined Layer.”

10 12. My opinions addressed the following matters:

- 11 • My disagreements with the opinions expressed by Terry L. Musika in the Expert  
12 Report of Terry L. Musika, CPA (“Musika Report”).
- 13 • Apple’s lack of entitlement to lost profits from alleged lost sales and lost convoyed  
14 sales due to Samsung’s alleged infringement of Apple’s Patents-in-Suit.
- 15 • Samsung’s profits related to its alleged infringement of Apple’s design patents,  
16 trademarks, and trade dress, and the appropriate apportionment of profits to the  
17 intellectual property at issue.
- 18 • The reasonable royalty that is adequate to compensate Apple for Samsung’s alleged  
19 infringement of Apple’s intellectual property. (Ex. B at ¶ 3.)

20 13. In forming my opinions, I reviewed several agreements from Apple in which Apple  
21 is a licensee of technology. (Ex. B at ¶ 392.) I included with my Report a list of these  
22 agreements, a true and correct copy of which is attached hereto as Exhibit C (Tab 3 Schedule 1 of  
23 Volume I of my Report.)

24 14. I opined that these agreements did not provide enough information [REDACTED]  
25 [REDACTED]  
26 [REDACTED]  
27 [REDACTED] (Ex.  
28 B at ¶ 404.)

Apple's Late-Produced Agreements

1  
2 15. Apple's Rule 30(b)(6) witness on certain licensing issues was deposed on February  
3 23, 2012. Fact discovery in this case closed on March 8, 2012.

4 16. I understand that, on or about April 4, 2012, [REDACTED]  
5 [REDACTED]  
6 [REDACTED]

7 17. Although I received the [REDACTED] just 10 days before my initial Report  
8 was finalized, I did not have the opportunity to discuss it with Samsung's technical experts before  
9 submitting my Report. Having reviewed the von Herzen Declaration, which concludes that [REDACTED]  
10 [REDACTED]

11 [REDACTED] I have further considered the probative value of the  
12 [REDACTED].

13 18. I understand that, on or about May 30, 2012, Apple produced a [REDACTED]  
14 [REDACTED]  
15 [REDACTED] (APLNDC-WH0000728173), and a [REDACTED]  
16 [REDACTED] (APLNDC-WH0000728153).

17 19. The [REDACTED] was produced after the completion of all my  
18 reports in this case. Therefore, I did not have the opportunity to review it or to discuss it with  
19 Samsung's technical experts before submitting any of my reports. Having reviewed the von  
20 Herzen Declaration, which concludes that [REDACTED]  
21 [REDACTED] I

22 have now considered the probative value of the [REDACTED] [REDACTED].

23 20. I understand that media reports<sup>1</sup> and drafts and emails<sup>2</sup> from Apple's production in  
24 this case indicate that Apple entered into another [REDACTED] separate and apart from  
25  
26

27 <sup>1</sup> "Apple Made A Deal With The Devil (No, Worse: A Patent Troll)," at  
28 <http://techcrunch.com/2011/12/09/apple-made-a-deal-with-the-devil-no-worse-a-patentroll/>;  
(footnote continued)

1 the [REDACTED] hat Apple produced on May 30. In this agreement, Apple [REDACTED]  
2 [REDACTED] Although Apple has produced a draft of  
3 this agreement (in which certain fundamental elements, such as price, are not included), it has not  
4 produced the final version. Therefore, I did not have the opportunity to review it or to discuss it  
5 with Samsung’s technical experts before submitting my report.

6 21. Nonetheless, having reviewed the Darrell Declaration, which concludes that [REDACTED]  
7 [REDACTED]  
8 [REDACTED], I have now considered the probative value of this  
9 unproduced [REDACTED].

10 22. In addition, the draft of the [REDACTED] that Apple has produced states that  
11 a [REDACTED]  
12 [REDACTED]  
13 [REDACTED] (APL7940018045114.) I understand that Apple has not produced this  
14 [REDACTED]. Therefore, I have not had the opportunity to review it and  
15 consider its impact of my damages analysis.

16 The [REDACTED] Is Probative of the Reasonable Royalty Allegedly Due Apple

17 23. In the [REDACTED]  
18 [REDACTED]  
19 [REDACTED]  
20 [REDACTED]  
21 [REDACTED]

22 [REDACTED]<sup>3</sup> For the purposes of the Agreement, the [REDACTED] [REDACTED]  
23 \_\_\_\_\_

24 “Apple partners with patent troll Digitude Innovations — and wow, what a deal,” at  
25 <http://venturebeat.com/2011/12/10/apples-patents-digitude-innovations/>.  
26 [REDACTED]<sup>2</sup>, APL7940018045114; email from [REDACTED], APL7940018045111, and attachment,  
27 APL7940018046927.  
28 [REDACTED]<sup>3</sup> [REDACTED]  
[REDACTED] APLNDC-WH0000723595-611 at ‘595-’597.

1 [REDACTED] <sup>4</sup> [REDACTED]

2 [REDACTED] <sup>5</sup>

3 24. Dr. Brian von Herzen, Ph.D., a technical expert retained by Samsung, reviewed the  
4 [REDACTED] Patent and concluded that [REDACTED]  
5 [REDACTED].<sup>6</sup> In addition, the  
6 '607 Patent cites the [REDACTED] Patent as a reference.

7 25. It is my opinion that the [REDACTED] is sufficiently comparable to a  
8 hypothetical license to the '607 and '129 Patents to provide data relevant to the amount of a  
9 reasonable royalty. Based on Dr. von Herzen's analysis, the [REDACTED] and the '607 and '129  
10 Patents are technically comparable. The [REDACTED]  
11 [REDACTED] In addition, the license grant is limited to  
12 the comparable technology, [REDACTED].

13 The [REDACTED] Is Probative of the Reasonable Royalty Allegedly Due Apple

14 26. In the [REDACTED], [REDACTED]  
15 [REDACTED]  
16 [REDACTED]  
17 [REDACTED].<sup>7</sup> The  
18 [REDACTED] comprise all [REDACTED] patents and patent applications, including [REDACTED]

24 <sup>4</sup> [REDACTED]  
25 [REDACTED] APLNDC-WH0000723595-611 at '596.

26 [REDACTED] APLNDC-WH0000723595-611 at '599.  
27 von Herzen Declaration at ¶ 33.

28 <sup>7</sup> [REDACTED] APLNDC-WH0000728173-184 at '173-'174.

1 [REDACTED].<sup>8</sup> In consideration of  
2 these rights, [REDACTED].<sup>9</sup>

3 27. Dr. von Herzen reviewed the [REDACTED] and concluded “[REDACTED]  
4 [REDACTED]  
5 [REDACTED]  
6 [REDACTED]  
7 [REDACTED]  
8 [REDACTED]”<sup>10</sup>

9 28. It is my opinion that the [REDACTED] is sufficiently comparable to a  
10 hypothetical license to the ‘607 and ‘129 Patents to provide data relevant to the amount of a  
11 reasonable royalty allegedly due Apple. Based on Dr. von Herzen’s analysis, the [REDACTED]  
12 [REDACTED] and the ‘607 and ‘129 Patents are technically comparable. The [REDACTED]  
13 [REDACTED]  
14 [REDACTED] [REDACTED]  
15 [REDACTED]  
16 [REDACTED].

17 The Unproduced [REDACTED] Agreement Is Potentially Probative  
18 of the Reasonable Royalty Allegedly Due Apple

19 29. [REDACTED]  
20 [REDACTED]  
21 [REDACTED]  
22 [REDACTED]

23  
24  
25 <sup>8</sup> [REDACTED]  
26 [REDACTED] September 2, 2010, APLNDC-WH0000728173-184 at ‘173.  
27 [REDACTED], APLNDC-WH0000728173-184 at ‘176.  
28 von Herzen Declaration at ¶ 31.

1 30. Dr. Trevor Darrell, Ph.D., a technical expert retained by Samsung, reviewed the  
2 [REDACTED]  
3 [REDACTED]. Dr. Darrell concluded that the  
4 [REDACTED]  
5 [REDACTED].<sup>11</sup>

6 31. Based on Dr. Darrell's review, it appears that the unproduced [REDACTED] agreement,  
7 or related agreements, [REDACTED]  
8 [REDACTED]. Therefore, the unproduced [REDACTED] agreement may be sufficiently comparable  
9 to a hypothetical license to the '002 and '891 Patents to provide data relevant to the amount of a  
10 reasonable royalty. If the unproduced [REDACTED] agreement had been produced, Samsung could  
11 have explored it further, along with other agreements between Apple and [REDACTED]. For example,  
12 the [REDACTED]  
13 [REDACTED]  
14 [REDACTED].<sup>12</sup>

15 Conclusions

16 32. After reviewing the facts and documents discussed in this declaration in the context  
17 of my other opinions, I have determined that the [REDACTED] are  
18 relevant and informative data points tending to show the amount of a reasonable royalty for  
19 Apple's '607 and '129 Patents. Further, the unproduced [REDACTED] agreement may also be relevant  
20 to the amount of a reasonable royalty allegedly due Apple.

21 33. At least the [REDACTED] are further evidence supporting  
22 my disagreements with the opinions expressed in the Musika Report and my conclusions  
23 regarding a reasonable royalty that is adequate to compensate Apple for Samsung's alleged  
24 infringement of the '607 and '129 Patents.

25  
26 \_\_\_\_\_  
27 <sup>11</sup> Darrell Declaration at ¶ 33.  
28 <sup>12</sup> [REDACTED]  
[REDACTED] APLNDC-WH0000728153-172 at '156, '169.

