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 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

**SAMSUNG’S REPLY MEMORANDUM
 IN SUPPORT OF MOTION TO
 EXCLUDE OPINIONS OF CERTAIN OF
 APPLE’S EXPERTS**

**Date: June 21, 2012
 Time: 1:30 pm
 Place: Courtroom 8, 4th Floor
 Judge: Hon. Lucy H. Koh**

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 27 **PUBLIC REDACTED VERSION**
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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Apple’s Opposition does not tie the “expert” opinions Samsung has challenged to any of
4 the issues before the jury in this case: (1) what specific IP rights do the parties have?, (2) did the
5 other side infringe those rights?, and (3) what damages, if any, is each party entitled to because of
6 any infringement of whatever specific IP rights it has? Most of Apple’s experts obscure these
7 issues and, instead, attempt to turn the trial into a popularity contest between Apple and Samsung
8 conducted in Apple’s home town. *Cf. Apple, Inc. v. Motorola, Inc.*, Case No. 1:11-cv-08540,
9 Order of May 25, 2012 (N.D. Ill.) at 3 (Posner, J.) (“More broadly, I forbid Apple to insinuate to
10 the jury that this case is a popularity contest and that jurors should be predisposed to render a
11 verdict for Apple if they like Apple products or the Apple company or admire Steve Jobs, or if
12 they dislike Motorola or Google. The overall quality of the products involved in the litigation is
13 irrelevant to the legal issues.”) These opinions of Apple’s experts should be excluded.¹

14 **II. ALL OF THE CHALLENGED OPINIONS SHOULD BE EXCLUDED**

15 **A. Musika**

16 **1. Mr. Musika’s Lost Profits Analysis Should Be Excluded**

17 **(a) Mr. Musika fails to account for the law of supply and demand**

18 Mr. Musika’s lost profits analysis is inadmissible because he fails to properly account for
19 the differences between product prices and platforms.² It is black letter law that a lost profits

20 _____
21 ¹ Samsung disagrees with each (and does not concede any) of the arguments set forth in
22 Apple’s opposition, but for space reasons has limited its discussion to Apple’s primary arguments.
23 ² Apple relies on a 19-page declaration by Mr. Musika and a 5-page declaration by Dr.
24 Hauser that can only be characterized as unauthorized and untimely expert reports. The Court’s
25 Scheduling Order allowed only two rounds of expert reports. (Dkt. 187 at 2.) Both experts now
26 express new opinions and explanations in their declarations (*e.g.*, Musika Decl. at ¶¶ 12-29, 41,
27 45, 62, 66; Hauser Decl. at ¶¶ 7-8, 10-12); Samsung had no opportunity to depose them about
28 these new opinions, or to offer any response; and Apple did not seek the Court’s leave to file the
29 declarations. What is more, the declarations constitute a transparent attempt to circumvent the
30 Court’s Order limiting each side to one 25-page opposition (Dkt. 901 at 1:23-24), and a violation
31 of Local Civ. R. 7-5(b) (“[D]eclarations may contain only facts . . . and must avoid conclusions
32 and argument. . . . [A] declaration not in compliance with this rule may be stricken . . .”). These
33 declarations and Apple’s arguments based on them should be stricken, or at very least disregarded.
34 *See, e.g., Truckstop.net LLC v. Sprint Comms. Co.*, 537 F. Supp. 2d 1126 (D. Idaho 2008)
35 (excluding expert declaration where opinions were not in the expert’s report and was untimely);
36 (footnote continued)

1 opinion that does not account for the law of supply and demand is inadmissible. *See BIC Leisure*
2 *Prods., Inc. v. Windsurfing Int'l, Inc.*, 1 F.3d 1214, 1218 (Fed. Cir. 1993) (clear error to award
3 lost profits where numerous competitors vied for sales in the windsurfer market with different
4 average selling prices (“ASP”) and different hull forms); *Crystal Semiconductor Corp. v. TriTech*
5 *Microelects. Int'l, Inc.*, 246 F.3d 1336, 1360 (Fed. Cir. 2001); *Monolithic Power Sys., Inc. v. O2*
6 *Micro Int'l Ltd.*, 476 F. Supp. 2d 1143, 1155-56 (N.D. Cal. 2007).

7 Apple fails to identify any evidence of [REDACTED]
8 [REDACTED] *See BIC Leisure*, 1 F.3d at 1219 (“[D]uring the damages period the
9 sailboard market was not a unitary market in which every competitor sold substantially the same
10 product”) (emphasis added). Mr. Musika cannot justify his failure to account for price elasticity
11 [REDACTED]

12 Apple does not deny that Mr. Musika relies on [REDACTED]
13 [REDACTED]⁴ Apple’s claim that
14 [REDACTED] (Opp. at 3), lacks credibility and is
15 unsupported by any evidence. The testimony Apple cites merely states [REDACTED]

16 Mr. Musika does not say tha [REDACTED]

17 As to his [REDACTED]
18 Apple’s response is that Mr. Musika used a market share analysis. But this has been rejected
19 by the Federal Circuit in these circumstances. *See BIC Leisure*, 1 F.3d at 1218 (reversing a lost
20 profits award that was based on defendant’s market share). Moreover, an analysis of demand by
21 carrier is obviously not the same thing as an analysis of demand by platform because most carriers
22 _____

23 *Trilogy Comms., Inc. v. Times Fiber Comms., Inc.*, 109 F.3d 739, 744-45 (Fed. Cir. 1997)
24 (*accord*). Should the Court decide to consider the declarations, Samsung requests to depose the
25 experts about their new opinions and submit a response by its own experts.

26 ³ The documents cited in the Opposition are [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 offer different platforms. If anything, Mr. Musika’s carrier preference analysis underscores the
2 unreliability of his opinion for failure to do the same analysis for platform preference.

3 (b) **Mr. Musika fails to identify evidence of a causal relation**
4 **between the alleged infringement and lost profits**

5 Mr. Musika acknowledges that Apple must prove the profits it lost because of Samsung’s
6 alleged infringement of the particular IP at issue. *Id.* But Mr. Musika still cites *no evidence of*

7 [REDACTED]
8 [REDACTED]

9 [REDACTED] Evidence of
10 general praise for the look and function of Apple’s products is insufficient to meet its burden to
11 “prove a causal relation between the infringement and its loss of profits.” *Id.*; *see also Apple v.*
12 *Motorola, supra*, at 3 (“Apple will not be permitted to present media articles or equivalent
13 publicity praising features of the iPhone or iPad . . . unless they mention (or can be shown to be
14 referring to) claim elements that Apple alleges Motorola infringes or that Motorola argues were
15 anticipated or obvious and that are actually in dispute.”)

16 2. **Mr. Musika’s Reasonable Royalty Analysis Should Also Be Excluded**

17 (a) **Mr. Musika’s “Income Approach” does not apportion between**
18 **asserted and unasserted IP that is unique to the iPhone and iPad**

19 Mr. Musika’s “Income Approach” is inadmissible because he does no [REDACTED]
20 [REDACTED] Contrary to

21 Apple’s Opposition, the issue is not whether Mr. Musika deducted values attributed to *other*
22 company assets, [REDACTED]

23 [REDACTED] (See Opp. at 6.) Mr. Musika’s fundamental error is a failure to apportion
24 [REDACTED] Tellingly, Apple does not

25 identify [REDACTED]
26 [REDACTED]

27 Apple argues that Mr. Musika’s failure to apportion doesn’t matter because [REDACTED]
28 [REDACTED] But an

1 arbitrary and unsupported fudge factor is no substitute for sound economic analysis. Apple offers
2 no justification for choosing [REDACTED]
3 [REDACTED] Even if Apple could do
4 so, it is absurd to assume that in a hypothetical negotiation Apple could simply command the
5 highest reference-value it could calculate as a royalty. See *Oracle Am. Inc. v. Google, Inc.*, 798 F.
6 Supp. 2d 1111, 1118 (N.D. Cal. 2012) (rejecting “a Soviet-style negotiation”).

7 Apple’s attempt to limit the apportionment requirement to “the entire market value rule” is
8 a red-herring.⁵ A patentee “*must in every case* give evidence tending to separate or apportion”
9 damages between the allegedly infringed features and other sources of value. *Uniloc USA, Inc. v.*
10 *Microsoft Corp.*, 632 F.3d 1292, 1318 (Fed. Cir. 2011) (emphasis added). Mr. Musika’s failure
11 to do so requires the exclusion of his Income Approach. See *Oracle*, 798 F. Supp. 2d at 1115.⁶

12 (b) [REDACTED]
13 [REDACTED]

14 Samsung’s objection to Mr. Musika’s “Cost Approach” is that he assumes – without a
15 shred of evidence – that, in every instance, Samsung [REDACTED]
16 [REDACTED] Apple’s response that a cost approach can be admissible if
17 properly applied misses the point. An expert is not entitled to testify based on an assumption
18 without any factual foundation. In effect, Mr. Musika again fails to recognize that the IP asserted
19 by Apple in this case is, if anything, only a minuscule portion of Samsung’s complex products,
20 and to “separate or apportion” the value of the specific IP in this case from the total profit
21 Samsung earns on the accused products. *Uniloc USA*, 632 F.3d at 1318.
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25 [REDACTED]
26 [REDACTED]
27 The Entire Market Value Rule, as understood by the Federal Circuit, is not an issue of [REDACTED]
28 [REDACTED] See *Uniloc*, 632 F.3d at 1318.

⁶ That *Oracle* involved software patents (Opp. at 6-7) is a distinction without a difference.

1 (c) [REDACTED]
2 [REDACTED]

3 In *Oracle*, the Court noted that the plaintiff’s expert improperly “fought the hypothetical”
4 by refusing to calculate the value of a license “tailored to the amount and type of alleged
5 infringement that actually occurred.” *Oracle Am.*, 798 F. Supp. 2d at 1117. The same law
6 *Georgia-Pacific* analysis it is proper to “consider” [REDACTED]
7 [REDACTED] (Opp. at 8.) Had Mr. Musika properly
8 apportioned the value of the asserted IP in this case, he could then have considered [REDACTED]
9 [REDACTED] along with the other *Georgia-Pacific* factors. Instead, Mr. Musika uses
10 [REDACTED] as an excuse to “fight the hypothetical” and ignore “the amount and type of
11 alleged infringement” that actually occurred, by improperly attributing [REDACTED]
12 [REDACTED] *Oracle Am.*, 798 F. Supp. 2d at 1117.

13 (d) **Only comparable licenses are probative**

14 Apple does not dispute that Mr. Musika opines that the [REDACTED] is not a
15 comparable license to any of the Apple Intellectual Property In Suit.” (Martin Decl. Ex. 3,
16 Musika Rpt. at 60.) Accordingly, the license has no probative value in determining the amount of
17 a reasonable royalty, and the license and Mr. Musika’s opinion in reliance on it should be
18 excluded. *See, e.g., ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010)
19 (vacating a damage award based on non-comparable licenses); *Lucent Techs., Inc. v. Gateway,*
20 *Inc.*, 580 F.3d 1301, 1329 (Fed. Cir. 2009) (“[Patentee] had the burden to prove that the licenses
21 were sufficiently comparable”).

22 3. **Mr. Musika’s Critique o [REDACTED] Is Unsupported,**
23 **Unanchored and Highly Prejudicial**

24 Apple apparently believes that because Mr. Musika is an accountant, he should be allowed
25 to tell the jury: [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

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[REDACTED]

As an initial matter, Mr. Musika should not be permitted to offer legal opinion directed to the applicable legal standards or whether Samsung has met them – both with respect to [REDACTED]. See, e.g., *Nationwide Transp. Fin. v. Cass Info. Sys., Inc.*, 523 F.3d 1051, 1058-59 (9th Cir. 2008) (upholding exclusion of expert testimony that discussed applicable laws, applied them to the facts in the case, and arrived at conclusions); *Aguilar v. Int’l Longshoremen’s Union Local No. 10*, 966 F.2d 443, 447 (9th Cir. 1992) (*accord*).

Apple argues that Mr. Musika [REDACTED]

[REDACTED] Nonsense. What Mr. Musika actually does is opine that [REDACTED]. But it is for the Court and/or the jury to decide [REDACTED], not Mr. Musika.

Even worse, Mr. Musika makes this determination by imposing standards on Samsung not found in the law. Mr. Musika opines that [REDACTED]

[REDACTED] But this is not an audit; it is a lawsuit. Apple has not cited a single case which require [REDACTED]. Even if these standards were relevant, Mr. Musika fails to identify: [REDACTED]

[REDACTED]

1 In the hopes of obtaining [REDACTED], Apple simply wants Mr. Musika to
2 [REDACTED] – even though Apple admits
3 Samsung has now produced every document asked of it – on the basis of [REDACTED]
4 [REDACTED]
5 [REDACTED] He should not be permitted to do so.

6 **4. Mr. Musika Failed to Disclose the Basis for His Opinions Calculating**
7 **Pre-Suit Damages**

8 Mr. Musika’s report fails to identify any evidence indicating when Samsung was on notice
9 of Apple’s patents or trade dress before this case. (Martin Decl. Ex. 3 at 26.) In the absence of
10 such evidence, pre-complaint damages are not allowed.⁷ Apple now cryptically states that [REDACTED]
11 [REDACTED] (Opp. at 10.) But Apple does
12 not say [REDACTED]

13 [REDACTED] And Mr. Musika has still not disclosed [REDACTED] to Samsung in violation of
14 Fed. R. Civ. P. 26(a)(2)(B). Apple and Mr. Musika have improperly prejudiced Samsung by
15 depriving it of the opportunity to evaluate, test or challenge Mr. Musika’s opinions on damages
16 periods. Accordingly if Mr. Musika is allowed to testify, the Court should limit his opinion to the
17 amount of post-notice damages calculated in his report.⁸

18 **B. Hauser**

19 **1. Dr. Hauser’s Survey Results Are Unreliable**

20 The following facts are now undisputed: (a) Dr. Hauser used [REDACTED]
21 [REDACTED] to design his surveys (Martin Decl. Ex. 11, Hauser Rpt. at ¶ 35); (b) Dr. Hauser instructed
22 the interviewers [REDACTED] (Reply Declaration of Joby Martin In Support of

23 _____
24 ⁷ [REDACTED]. The only evidence of pre-filing notice
25 Apple’s attempted technical argument that this issue is more properly addressed by summary
26 judgment is irrelevant. Mr. Musika has to have a basis for his opinions and he fails to provide
27 one here.

28 ⁸ With respect to Mr. Musika’s opinions on irreparable harm, Apple agrees they should be
heard only “in connection with [the Court’s] evaluation of a permanent injunction *after trial*.”
(Opp. at 10 (emphasis added).) Accordingly, the Court should preclude Mr. Musika from opining
on irreparable harm *at trial*.

1 Samsung's Motion to Exclude Opinions of Certain of Apple's Experts ("Reply Martin Decl.") Ex.
2 1, Hauser Tr. at 74:17-21); (c) Dr. Hauser did not [REDACTED] (Martin Decl. Ex. 11 at ¶
3 36); (d) Dr. Hauser did not [REDACTED]
4 [REDACTED] Reply Martin Decl. Ex. 1 at 56:15-19, 67:21-68:7); (e) Dr.
5 Hauser has no idea whether the interviewers actually followed his instructions (*id.* at 18:3-9, 20:3-
6 24); (f) Dr. Hauser has no idea what [REDACTED] (*id.* at 41:17-
7 19); and (g) Dr. Hauser has no idea whether his surveys [REDACTED]
8 [REDACTED] (*Id.* at 109:8-25.)

9 Nonetheless, Apple cries "no foul" because it provided Samsung with all the data
10 necessary to replicate Dr. Hauser's surveys. (Opp. at 11.) Apple misses the point. Dr. Hauser
11 claims he identified [REDACTED]
12 [REDACTED] and that these [REDACTED] Yet,
13 Dr. Hauser admits he does not have a shred of evidence to support these claims because he has no
14 records of the IDIs.⁹ (Martin Decl. Ex. 11 at ¶ 35; Reply Martin Decl. Ex. 1 at 44:17-45:18).
15 Thus, as Judge Alsup held in *Oracle America, Inc. v. Google Inc.*, 2012 WL 850705 at *10-11
16 (N.D. Cal. March 13, 2012), Dr. Hauser's opinions should be excluded because there is no proof
17 he tested even [REDACTED] 0

18 For the same reasons, Dr. Hauser's deliberate failure to maintain and produce pre-test
19 records warrants excluding his opinions. Without any record of the pre-test interviews, there is
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21
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23 ⁹ In other litigation, Dr. Hauser properly instructed interviewers to make detailed records of
24 consumer responses during IDIs. *See* Reply Martin Decl. Ex. 2, *Schwab v. Philip Morris USA,*
25 *Inc.*, No. 1:04-01945 (E.D.N.Y), Dkt. 980-10 at 24-25 (Summary of Expert Opinions of Dr.
26 Wayne S. Desarbo Concerning the July 14, 2006 Response of John R. Hauser) (Because Dr.
27 Hauser excluded attributes consumers identified as important to their purchase decision, Dr.
28 Hauser's survey was "a nonsensical academic exercise that bears little resemblance to how
[consumers] [make] purchase [decisions] in the real world.")

¹⁰ Apple attempts to distinguish *Oracle* on the basis that it had "different controls and
reach[es] different outcomes," but fails to explain what these "controls" and "outcomes" are or
their significance. (Opp. at 13:14-15; *accord* Hauser Decl. at 2:21-22.)

1 no proof that Dr. Hauser properly addressed the concerns raised by respondents therein, nor can
2 Samsung test Dr. Hauser's claim that respondents understood the surveys.¹¹

3 **2. Dr. Hauser Surveyed the Wrong Population**

4 By limiting his surveys to individuals who had previously purchased Samsung
5 smartphones and tablets, Dr. Hauser's population necessarily had disproportionately high purchase
6 probabilities. See Reply Martin Decl. Ex. 3, Ofek *et al.*, "How Much Does the Market Value an
7 Improvement in a Product Attribute?," *Marketing Science*, 2002, Vol. 21, No. 4, 398-411 at 398
8 ("customers should be differentially weighted based on their probability of purchasing the []
9 product"). This inevitably caused Dr. Hauser's estimates of willingness to pay for attribute
10 improvements to be skewed and overstated.¹²

11 **3. Dr. Hauser Did Not Test the Patented Features**

12 Apple fails to address the inconsistencies between the patented features and Dr. Hauser's
13 surveys' descriptions of those features. (Reply Martin Decl. Ex. 4.) As just one example,
14 Apple's expert [REDACTED]
15 [REDACTED] et the survey description plainly states just that. *Id.*
16 Additionally, [REDACTED] the non-infringing
17 alternative presented to respondents was a touchscreen that is definitively less reliable. *Id.*
18 These and other inconsistencies cause Dr. Hauser's results to be irrelevant to any damages
19 analysis.

22 ¹¹ Apple attempts to distinguish *Toys R Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp.
23 1189, 1205 (E.D.N.Y. 1983) on the basis that it dealt with the expert's knowledge of the actual
24 survey responses, as opposed to the responses to in-depth or pre-test interviews. Given that Dr.
25 Hauser relied on the interviews to "help [] write the survey[s]," this is a distinction without a
26 difference. (Reply Martin Decl. Ex. 1 at 85:18 -86:19.)

25 ¹² Apple's citation to *Icon Enters. Int'l, Inc. v. Am Prods. Co.* is inapplicable because Dr.
26 Hauser's surveys were not conducted according to accepted principles. 2004 WL 5644805, at
27 *21 (C.D. Cal. Oct. 7, 2004). Similarly, *Hawley Prods. Co. v. U.S. Trunk Co.*, 259 F.2d 69, 77
28 (1st Cir. 1958) does not justify surveying the wrong population. Because it is Apple's burden to
demonstrate that the surveys were conducted in accordance with accepted principles and it has not
done so, the survey results should be excluded. *M2 Software, Inc. v. Madacy Entmt.*, 421 F.3d
1073, 1087 (9th Cir. 2005).

1 **C. Urbach**

2 Apple identifies no legally sound reasoning to admit the testimony of Mr. Urbach, a
3 museum curator who happens to be a huge Apple fan, but who has never designed any product, let
4 alone an electronic. Apple does not dispute that Mr. Urbach’s opinions have no relevance to
5 trade dress or dilution. Nor does Apple explain the relevance of Mr. Urbach’s opinion that Apple
6 has achieved “design excellence.” The only issue to which Mr. Urbach’s opinion on public
7 appreciation could be relevant is secondary considerations of non-obviousness. (Opp. at 15-16.)
8 But this after-the-fact-rationalization has nothing to do with Mr. Urbach’s opinion. Nowhere in
9 his report does he ever mention secondary considerations of non-obviousness, or the legal
10 principles that govern.¹³ And although this is a design patent invalidity issue, Mr. Urbach
11 testified that he was not “retained to provide an expert opinion about any topic relating to an
12 Apple patent of any kind,” and did not review any of Apple’s patents in forming his opinions.
13 (Reply Martin Decl. Ex. 5, Urbach Tr. at 78-79.) Either Mr. Urbach was correct that he did not
14 offer an opinion about patent invalidity, in which case his opinions are irrelevant, or he rendered
15 his opinions without examining the patents, in which case his opinion should be excluded because
16 secondary considerations must be tied to the patented features of the device. *U.S. Surgical Corp.*
17 *v. Ethicon, Inc.*, 103 F.3d 1554, 1565 (Fed. Cir. 1997). Having failed to review the asserted
18 patents, Mr. Urbach did not tie his commentary to their features. Rather, he offered irrelevant
19 opinions considering the products as a whole, including features not covered by the patented
20 designs, such as the materials and finishing, the home button, and their different back designs.

21 Complete lack of relevance aside, Apple cannot dispute any of Mr. Urbach’s deposition
22 admissions that his public appreciation opinion is nothing more than *ipse dixit* and ignores all of
23 the technological factors beyond design that account for Apple’s success.¹⁴ Even an expert who
24

25 ¹³ The case Apple cites points to “commercial success” as a secondary consideration, not
26 public appreciation, so the opinion is not relevant even to this topic.

27 ¹⁴ The best Apple can come up with is Mr. Urbach’s reference to the “tremendous
28 consensus” regarding the supposed excellence of Apple’s design. (Opp. at 17.) But even that
assertion proved to be hyperbole, as he admitted the statement was based on a single conversation
“years ago” with the chief design curator at MOMA in New York, who said she wanted to collect
(footnote continued)

1 relies entirely on his “background and experience” cannot simply make unsupported assertions
2 and ask the jury to accept them because he is “an expert in the field.” (Reply Martin Decl. Ex. 5
3 at 126:4-8.) Under the authorities cited in the moving papers (Mot. at 15-16), which Apple does
4 not distinguish, Apple should not be permitted to present this type of unreliable testimony.

5 **D. Kare**

6 Apple does not dispute that Susan Kare purports to opine on substantial similarity and
7 likelihood of confusion without being given or otherwise applying the legal standards that govern
8 these inquiries. Instead, Apple argues that she should be able to offer opinions that use operative
9 legal terms of art, but are not based on the proper legal standard. (Opp. at 18.) This would leave
10 the jury hard-pressed to reject the expert’s use of the legal language, even if instructed otherwise,
11 and is exactly the type of confusing and unreliable opinion *Daubert* intended for courts to exclude,
12 as Apple itself has argued. *See* Dkt. 940-1 at 2 (citing cases for the proposition that “[i]ncorrect
13 statements of law are no more admissible through ‘experts’ than are falsifiable scientific
14 theories”.) To be clear, Samsung is not arguing that Dr. Kare should offer legal conclusions.
15 But if she opines on the legal factors of Apple’s claims, she must do so using the proper legal
16 tests, as Apple has argued against Samsung. *Id.* (“Expert testimony that fails to follow the
17 proper legal standard is irrelevant and based on an unreliable methodology, and therefore must be
18 excluded.”)

19 There is no dispute that Dr. Kare seeks to opine on substantial similarity, even though she
20 did not follow the law—*i.e.*, assess the ordinary observer perception in view of the prior art and
21 excluding functional elements—and lacks the qualifications to opine about the ordinary observer.
22 (Mot. at 18.) Apple cannot now claim that this is harmless, because it has sought to exclude
23 Samsung’s expert Sam Lucente on this very basis. *See* Dkt. 940-1 at 11 (seeking exclusion
24 because Mr. Lucente “has no specialized expertise in what an ‘ordinary observer’ would think”.)
25
26

27 Apple products, and the fact that a handful of museums may own Apple products. (Reply Martin
28 Decl. Ex. 5 at 102-108.)

1 As for likelihood of confusion, here too there is no dispute that Dr. Kare did not consider
2 or apply the governing legal principles. While an expert may offer relevant testimony on those
3 *Sleekcraft* factors within their area of expertise, it is improper to opine on the ultimate conclusion
4 that likelihood of confusion exists, based solely on an incomplete assessment of a single factor,
5 which is precisely what Dr. Kare has done. An opinion that is so far removed from the relevant
6 legal standards will only confuse the jury and unduly prejudice Samsung.

7 Finally, the Court should exclude [REDACTED]
8 [REDACTED] To the
9 extent Dr. Kare is doing no more than simply repeating other evidence in the case about which she
10 has no personal knowledge, [REDACTED] the jury can assess that
11 evidence equally well. Dr. Kare has no expertise that would justify admitting her speculation
12 [REDACTED]

13 **E. Winer**

14 Apple cannot address, and therefore ignores, Samsung’s principal objection to Dr. Winer’s
15 proffered opinions – that he is giving what amounts to a closing argument to the jury on the
16 likelihood of confusion and dilution factors. Nowhere does Apple address or attempt to
17 distinguish the cases Samsung cites that prohibit precisely this kind of testimony. (Mot. at 19-
18 20.) Nor does Apple dispute that Dr. Winer simply summarizes and repeats the opinions of other
19 experts in fields where he has no expertise. While Apple contends that this criticism
20 “oversimplifies and mischaracterizes Dr. Winer’s report” (Opp. at 20), it never explains how.
21 Instead, Apple argues points Samsung does not make. For example, Samsung does not contend
22 that an expert offering an otherwise relevant and reliable opinion cannot rely on other expert
23 opinion, press materials, or client documents. (*Id.*) But the expert cannot do so where, as here,
24 he is simply summarizing opinions of others in areas in which he himself would not be qualified to
25 testify, and is presenting legal arguments that should be made by counsel.

26 Apple argues that Dr. Winer’s discussion of “broad branding principles” will be helpful to
27 the jury. But as Samsung explained, Dr. Winer acknowledges [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 [REDACTED] Even if marketing expert testimony [REDACTED] could be admissible in an appropriate case,
3 this is not such a case, because the testimony has no relationship to the particular trade dress that is
4 the subject of Apple's claims. Admitting the testimony would only confuse the jury. Moreover,
5 any possible relevance is outweighed by the considerations of Rule 403 of the Federal Rules of
6 Evidence—a point Apple does not even attempt to dispute.¹⁵

7 **F. Sood**

8 Apple does not dispute that Dr. Sanjay Sood's opinions that (1) "design" is important in
9 consumer choice, and (2) consumers who are asked why they bought a particular product might
10 not identify "design" as the reason, are based solely on surveys of students at one university
11 questioned about photographs of tape dispensers, blenders, CD alarm clocks, desk lamps, and wall
12 clocks. Neither Apple nor Dr. Sood offer *any* explanation how the results of those surveys could
13 be scientifically extrapolated to all consumers of all goods, let alone potential purchasers of smart
14 phones and tablet computers. Indeed, Dr. Sood admitted that he made no attempt to study smart
15 phones, tablet computers, or their purchasers. (Reply Martin Decl. Ex. 6, Sood Tr. at 39:2-14;
16 83:6-9; 103:6-12.) Unlike *Fortune Dynamic, Inc. v. Victoria's Secret Stores Brand Mgmt.*, 618
17 F.3d 1025, 1036-38 (9th Cir. 2010), where the survey was conducted specifically for the litigation
18 and targeted purchasers or future purchasers of one of the *types of products at issue* and showed
19 them *the products at issue*, Apple has conceded that Dr. Sood's "studies were not conducted in
20 connection with the lawsuit for which the expert was retained." (Opp. to Samsung's Mot. to
21 Strike, Dkt. 996-4 at 12.) Dr. Sood's "broad" opinions based on surveys of an improper sample
22 about products that are not even in the same category as the products at issue, and which were not
23 conducted for the purpose of this case, should be excluded because they are not tied to the specific
24 intellectual property rights at issue. (*See* Mot. at 14 n.14.)

25 Apple also concedes that it has refused to produce the written questionnaires from these
26 surveys, arguing they were not the subject of any discovery request. But Fed. R. Civ. P.

27 ¹⁵ Indeed, Apple does not explain for any of its "experts" why their opinions should not be
28 excluded under Rule 403 as unduly prejudicial, confusing, or cumulative.

1 26(a)(2)(B)(ii) requires that an expert report must contain “the facts or data considered by” the
2 expert in forming his opinion. There is no question that Dr. Sood considered these questionnaires
3 and the results in forming his opinions. Indeed, Dr. Sood agreed in deposition to provide them
4 (Reply Martin Decl. Ex. 6 at 89:11-90:4), but Apple thereafter intervened. (Martin Decl., Ex. 29.)
5 Because Dr. Sood’s opinions are not based upon any data concerning smartphones or computer
6 tablets, and Apple has withheld the data they are based upon, his opinions should be excluded.

7 **G. Walker**

8 Apple does not contest that Dr. Walker never established that the patent applications that
9 Samsung was prosecuting contained a single claim essential to an ETSI standard.¹⁶ (Opp. at 23.)
10 Instead, Apple contends that this analysis was unnecessary because Samsung’s declared essential
11 patents claim priority to the declared applications. But this is *Apple’s* contention, not Dr.
12 Walker’s. Dr. Walker never asserted that the mere fact that a declared essential patent claims
13 priority to an earlier application establishes that the earlier application should have been declared
14 to ETSI. Instead, he agreed that you would “have to look at the claim[s] of that IPR to see what
15 the claims cover.” (Reply Martin Decl. Ex. 7, Walker Tr. at 73:4-19.) Dr. Walker’s failure to
16 determine what claims were in Samsung’s patent applications renders his analysis unreliable.

17 Similarly, while Apple may contend that Samsung was required to declare confidential IPR
18 to ETSI, Dr. Walker has a different opinion. Dr. Walker opined that ETSI members are not
19 required to declare confidential IPR to ETSI. (*Id.* at 71:16-72:3;135:10-20.) Given Dr. Walker’s
20 own premise, Dr. Walker could not conclude that Samsung violated a duty to disclose without
21 assessing whether the priority applications were confidential. As such, his opinions are
22 inadmissible.

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26 ¹⁶ Apple’s argument regarding whether senior management or others at Samsung only
27 needed to be aware that IPR “might be essential” is a red herring. (*See* Opp. at 24.) Without
28 reviewing the patent applications, Dr. Walker could not make any assessment of whether anybody
at Samsung could have determined that those applications “might be essential,” were likely
essential, or were actually essential to an ETSI standard.

1 **H. Donaldson**

2 Mr. Donaldson’s testimony simply advocates Apple’s interpretation of the Intel License
3 Agreement to the jury. For example, Mr. Donaldson asserts [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED] These legal conclusions cannot be converted into
9 admissible expert testimony simply by couching them as the conclusions that would be reached by
10 a “patent license negotiator.”¹⁷ Mr. Donaldson’s legal opinions should be excluded.¹⁸

11
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17 The only conceivably appropriate subject matter in the context of a license agreement would be testimony establishing “extrinsic evidence of trade practice and custom.” *Sparton Corp. v. U.S.*, 77 Fed. Cl. 1, 8 (2007). But that is not the subject of Mr. Donaldson’s testimony and, “[i]n the absence of specialized trade usage, expert testimony regarding proper contract interpretation is inadmissible.” *Id.* Apple cites *Metro Bus. Mgmt., Inc. v. Allstate Ins. Co.*, 2009 WL 4119270, at *10 (C.D. Cal. Nov. 23, 2009), where the court admitted testimony regarding factual issues pertaining to insurance policy forms. Mr. Donaldson does not offer testimony regarding any facts pertaining to the Intel License Agreement.

18 Apple complains that Eric Stasik offers similar opinions. The section of Mr. Stasik’s report regarding the Intel License Agreement was submitted in rebuttal to Mr. Donaldson’s inappropriate and erroneous proposed testimony. Samsung will not offer Mr. Stasik’s testimony on the Intel License Agreement if Mr. Donaldson’s opinions are excluded.