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12 Counterclaim-Defendant APPLE INC.

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

16
17 APPLE INC., a California corporation,

18 Plaintiff,

19 v.

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

23 Defendants.
24

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

**APPLE'S REPLY BRIEF IN
SUPPORT OF RULE 37(b)(2)
MOTION RE SAMSUNG'S
VIOLATION OF JANUARY 27, 2012
DAMAGES DISCOVERY ORDER**

Date: April 3, 2012
Time: 10:00 a.m.
Place: Courtroom 5, 4th Floor
Judge: Hon. Paul S. Grewal

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26 SUBMITTED UNDER SEAL
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TABLE OF CONTENTS

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

Page

TABLE OF AUTHORITIES ii

INTRODUCTION 1

ARGUMENT 2

I. SAMSUNG’S NARROW INTERPRETATION OF THE ORDER
CONTRADICTS ITS BROAD ASSURANCES TO THE COURT 2

II. SAMSUNG’S FEBRUARY 3RD PRODUCTION VIOLATED THE
COURT’S ORDER 3

 A. Samsung’s Compliance Should Be Measured By Its Productions As
 Of The February 3 Deadline 3

 B. Samsung’s February 3rd Spreadsheet Was Unreliable for Any
 Purpose 3

III. EVEN IF SAMSUNG’S UNTIMELY PRODUCTIONS WERE
RELEVANT, THEY WOULD NOT CURE SAMSUNG’S VIOLATION
OF THE ORDER 5

 A. The “Revised” Spreadsheets Exacerbate, Rather Than Mitigate The
 Problems 5

 B. The Remaining Documents Do Not Cure Samsung’s Violations 6

IV. SAMSUNG HAS FAILED TO PRODUCE INFORMATION TO
CALCULATE SAMSUNG’S CONSOLIDATED PROFITS FROM
SALES OF ANY ACCUSED PRODUCTS 7

V. SAMSUNG IMPROPERLY REFUSES TO PROVIDE FINANCIAL
INFORMATION ABOUT THREE INFRINGING PRODUCTS 8

VI. SAMSUNG VIOLATED THE ORDER BY WITHHOLDING SPECIFIC
FINANCIAL DOCUMENTS PRODUCED IN THE ORDINARY
COURSE OF BUSINESS 11

VII. SAMSUNG’S VIOLATIONS WARRANT THE SANCTIONS THAT
APPLE SEEKS 13

CONCLUSION 15

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

TABLE OF AUTHORITIES

Page(s)

CASES

Carl Zeiss Vision Int’l GmbH v. Signet Armorlite, Inc.,
No. 07-cv-0894-DMS (POR),
2010 WL 743792 (S.D. Cal. Mar. 2, 2010) 14

Davis v. Nevarez,
No. 3:07-CV-00427-EJL-LMB,
2009 WL 1468705 (D. Idaho May 22, 2009) 14

Fair Housing of Marin v. Combs,
285 F.3d 899 (9th Cir. 2002)..... 13, 14

Lewis v. Ryan,
261 F.R.D. 513 (S.D. Cal. 2009)..... 14

PeerMusic III Ltd. v. LiveUniverse, Inc.,
No. CV 09-6160-GW,
2011 WL 672585 (C.D. Cal. Jan. 26, 2011) 14

Peterson v. AT&T Umbrella Benefit Plan No. 1,
No. C-10-03097 JCS,
2011 U.S. Dist. LEXIS 135285 (N.D. Cal. Nov. 23, 2011)..... 14

U.S. v. Kahaluu Const. Co.,
857 F.2d 600 (9th Cir. 1988)..... 13

Yeti by Molly Ltd. v. Deckers Outdoor Corp.,
259 F.3d 1101 (9th Cir. 2001)..... 14

OTHER AUTHORITIES

Fed. R. Civ. P
Rule 30(b)(6)..... 14
Rule 37(b)(2)..... 9
Rule 37(c)..... 14

INTRODUCTION

1
2 Since Apple filed its Motion, Samsung has compounded its serious violations of the
3 Court's Order. Just as Apple predicted, Samsung produced additional documents and revised
4 versions of its Spreadsheet long after the Court-ordered deadline—each time within 24 hours of a
5 30(b)(6) deposition related to damages, and once on the last day of fact discovery. Indeed,
6 Samsung had so little regard for the February 3rd Spreadsheet it produced to comply with the
7 Order, its own witnesses sought to avoid testifying about it at all. Samsung ultimately *instructed*
8 *its 30(b)(6) witness not to answer questions* about Samsung's manufacturing costs as reflected in
9 that Spreadsheet. Further, Samsung's witnesses confirmed in sworn testimony that neither the
10 February 3rd Spreadsheet nor any of the myriad "correct" spreadsheets produced thereafter were
11 sufficient to calculate Samsung's consolidated profits for the accused products.

12 While Samsung now assures the Court that its subsequent productions were designed to
13 provide Apple with additional information, its witnesses tell a radically different story.
14 Samsung's sworn 30(b)(6) testimony is that the February 28th spreadsheet was intended to
15 *reduce*, not expand, the detail provided to Apple because a Samsung Vice President
16 (Jaehwang Sim) unilaterally decided that Apple was not entitled to so much internal financial
17 information. According to this same witness, the March 8th version was prepared to *remove*
18 profits—[REDACTED] in profits—from its prior calculations by adding profits earned by
19 Samsung subsidiaries into the "Cost of Goods Sold" line—the same line about which Samsung
20 instructed its witness not to answer questions. These last minute modifications announced on the
21 eve of Samsung's 30(b)(6) damages depositions represented exactly the kind of unfair surprise
22 that Apple predicted and sought to avoid by its motion to compel that led to the Order.

23 Samsung has essentially helped itself to an extrajudicial cap on Apple's damages award,
24 reducing its exposure by potentially [REDACTED]. Samsung's willful disregard
25 of the Order has severely prejudiced Apple. The Court should award the mitigating sanctions
26 Apple has requested.

1 reward Samsung’s bait and switch tactics. The Court should enforce the Order by reference to the
2 broad promises that Samsung made in arguing that Apple’s motion was “moot.”

3 **II. SAMSUNG’S FEBRUARY 3RD PRODUCTION VIOLATED THE COURT’S**
4 **ORDER**

5 **A. Samsung’s Compliance Should Be Measured By Its Productions As Of The**
6 **February 3 Deadline**

7 Apple’s Motion predicted exactly what has come to pass: “Apple will be further
8 prejudiced if Samsung produces new, corrected, or additional information at some future
9 point. . . . Apple will have to address a constantly moving target if Samsung again doles out only
10 the information that it wants to give, on a schedule of its own choosing.” (Mot. at 16.) Samsung
11 did precisely that—producing new financial spreadsheets on February 28th (on the eve of the
12 deposition of STA’s controller Tim Sheppard) and then yet again on March 8 (the last day of
13 discovery, and while Apple’s attorney was in flight to Korea to take two 30(b)(6) depositions on
14 damages issues). Further, on each date, Samsung produced an additional spreadsheet for
15 “Practicing Products” that more than doubles the number of models included in the February 3rd
16 Spreadsheet (although Samsung still fails to provide information on all accused products, as
17 shown in Section V, *infra*). (Dkt. No. 801-22 ¶¶ 8, 11, 30 & Exs. E-F.)

18 Samsung’s subsequent productions did not cure, and in fact exacerbated, the problems
19 with the February 3rd Spreadsheet, as shown in Section III.A, below. But those productions are
20 irrelevant to whether Samsung violated the Order, which required Samsung to complete its
21 responsive production by February 3. Samsung understood its obligation and earlier insisted to
22 Apple in writing that the February 3rd Spreadsheet was accurate and gave Apple everything it
23 needed. (Dkt. No. 759-4 ¶ 23, Ex. 1.) Even now, Samsung erroneously claims that “Apple has
24 had since early February virtually all the financial information necessary to calculate financial
25 damages.” (Opp. at 23.) Samsung’s compliance should be measured by its grossly inadequate
26 production at the Court-ordered deadline.

27 **B. Samsung’s February 3rd Spreadsheet Was Unreliable for Any Purpose**

28 Samsung concedes many of the errors, omissions, and inconsistencies in the February 3rd
Spreadsheet that Apple identified. (*See* Mot. at 12-13; Dkt. No. 759-5 ¶¶ 5-20.) For example,

1 Samsung admits that the Spreadsheet: neither “adds across” nor “adds down”; does not provide a
2 basis to determine which sales were made from which carriers; includes numerous examples of
3 negative sales and positive cost of goods sold that are explained only by a witness’s conjecture;
4 and includes incomplete information concerning the Galaxy Tab 7.0. (Dkt. No. 801-22 ¶¶ 15-19,
5 26-28; Dkt. No. 801-9 ¶ 5; *see also* Roberts Reply Decl. ¶¶ 6-14 (identifying concessions).)

6 We now know the reasons for these problems: Despite the fact that it was produced in
7 response to the Court’s Order, the February 3rd Spreadsheet (and each new version that was
8 created) was prepared with essentially no supervision and no effort to verify its accuracy.
9 Samsung admits that the Spreadsheet was not created in the ordinary course of business or in the
10 format of any other financial document regularly used at Samsung. (Olson Reply Decl. Ex. I
11 at 39:4-40:3; *see id.* Ex. D at 18:10-19:5.) Yet it was prepared by a low-level employee in
12 Samsung’s finance department based on cursory instructions that Samsung Vice President
13 Jaehwang Sim received from Samsung’s counsel. (*Id.* Ex. D at 14:9-15:5, 18:22-19:10, 23:4-23,
14 53:6-55:17.) Thereafter, the Spreadsheet received “[a]t most, perhaps an hour” of Mr. Sim’s
15 review, which he limited strictly to the formatting—not the substance—of the document.² (*Id.*
16 at 53:18-22, 54:4-7, 70:22-71:7.) Only three people (other than Samsung’s counsel) had actually
17 seen the February 3rd Spreadsheet (and each additional version) before it was produced. (*Id.*
18 at 14:9-15:11, 26:1-22.) Not surprisingly, Mr. Sim testified at his 30(b)(6) deposition that he was
19 unable to verify that this Spreadsheet was complete and accurate. (*Id.* at 56:8-17.)

20 Samsung’s attempt to rehabilitate the deficient Spreadsheet through Mr. Sheppard’s
21 declaration fails. Mr. Sheppard previously refused to testify about the February 3rd Spreadsheet,
22 disclaiming any knowledge of who prepared it and whether the SEC financial information it
23 contained was accurate. (Olson Reply Decl. Ex. I at 15:22-24, 39:23-40:6, 88:10-17; *see id.*

24 _____
25 ² Samsung’s position that it need not review the February 3rd Spreadsheet because it is a
26 “pure extract” from its audited system of records misses the mark. (Olson Reply Decl. Ex. I
27 at 144:12-18; *see also* Dkt. No. 801-22 ¶ 34.) As shown in Section III.A *infra*, Samsung
28 repeatedly manipulated the data in the spreadsheets it produced to Apple in order to hide detail
and remove about ██████████ in profits from the bottom line. Even if this had not occurred,
Samsung’s defense would be illogical. The fact that the accounting database as a whole may be
accurate does not mean that a particular extract need not be reviewed for accuracy.

1 Exs. E, F (notifying Apple that Mr. Sheppard would not testify about the Spreadsheet).) Having
2 no personal knowledge regarding the SEC information in the Spreadsheet, Mr. Sheppard’s
3 declaration relies on information he obtained from GiHo Ro. (Dkt. No. 801-22 ¶ 5.) But
4 according to Samsung’s sworn 30(b)(6) testimony, Mr. Ro played no role in preparing the
5 Spreadsheet, and lacked the “expertise” to “be at a level to be able to review” the SEC financial
6 information it contained. (Olson Reply Decl. Ex. D at 15:7-11, 26:12-22.)

7 The facts stack up conclusively against Samsung. The February 3rd Spreadsheet is the
8 only meaningful document provided in a timely manner in response to the Order.³ It was
9 inaccurate and incomplete, the product of minimal effort and essentially no review, and cannot be
10 used to determine Samsung’s consolidated profits. Samsung violated the Court Order. The only
11 issue is what should be done about it.

12 **III. EVEN IF SAMSUNG’S UNTIMELY PRODUCTIONS WERE RELEVANT, THEY**
13 **WOULD NOT CURE SAMSUNG’S VIOLATION OF THE ORDER**

14 **A. The “Revised” Spreadsheets Exacerbate, Rather Than Mitigate The Problems**

15 Samsung contends that it “revised the February spreadsheet on several occasions to
16 provide Apple with greater clarity, detail, and accuracy.” (Opp. at 8.) Samsung’s sworn 30(b)(6)
17 witness about the Spreadsheets, Mr. Sim, told a very different story.

18 Mr. Sim testified that the February 28th Spreadsheet was created to *remove* detail relating
19 to Cost of Goods Sold and other categories of information contained in the February 3rd
20 Spreadsheet because *he decided Apple should not have it*. (Olson Reply Decl. Ex. D at 92:10-
21 93:13.) According to Mr. Sim, the first spreadsheet included too much information about
22 Samsung’s internal operations, and he took it upon himself to compress the more detailed
23 information on “Material Costs” and “Manufacturing Costs” into a single, generic “Cost of Goods
24 Sold” line. (*Id.* at 92:10-94:4.) To make matters worse, when questioned about the more detailed
25 information contained in the February 3rd Spreadsheet, Mr. Sim refused to testify about it. (*Id.*
26 at 94:5-96:15.) Thereafter, Samsung’s counsel twice instructed Mr. Sim not to answer questions

27 ³ Samsung also produced on February 3 several financial statements for STA and SEA but
28 as Apple showed and Samsung ignores, those documents did not provide product-level detail,
allow apportionment to accused products, or tie to the Spreadsheet. (Mot. at 6 n.1.)

1 about these categories or how they were calculated. In other words, Samsung refused to provide
2 testimony regarding how Samsung calculates the cost of making the infringing products sold in
3 the United States, as reflected on the very Spreadsheet that Samsung produced in response to the
4 Court’s Order. (*Id.* at 99:15-100:25, 131:9-132:10.)

5 Mr. Sim testified that a subsequent revision—the March 8th Spreadsheet—was created to
6 *remove the profits* earned by several of Samsung’s Chinese subsidiaries and add them to the Cost
7 of Goods Sold, the very line about which Mr. Sim was instructed not to answer. (Olson Reply
8 Decl. Ex. D at 35:13-36:25.) Through this change, Samsung unilaterally sought to remove over
9 ██████████ in profits from the case and bury it in the highly-summarized Cost of Goods
10 Sold line about which its witnesses refused to testify. (*Id.* at 35:13-36:25, 92:10-93:13, 99:15-
11 100:7; *see* Roberts Reply Decl. ¶ 25.)⁴ There is no basis in accounting that would justify
12 removing these profits and adding them to the Cost of Goods Sold. (*See* Roberts Reply Decl.
13 ¶ 25.) Mr. Sim did not offer any accounting explanation, and instead relied on a legal instruction
14 from his counsel to explain this change. (Olson Reply Decl. Ex. D at 183:15-185:2.)

15 Given that Apple is entitled to recover Samsung’s consolidated profits, the March 8th
16 Spreadsheet represents a transparent attempt by Samsung to lower its damages in this case. That
17 Spreadsheet was therefore anything but a good-faith attempt by Samsung to “cure” its prior
18 violations of the Order. Moreover, this manipulation belies Samsung’s assertion that the
19 information contained in the spreadsheets is a “pure extract” of the information in the system of
20 record. (*See* Olson Reply Decl. Ex. I at 144:12-18); Dkt. No. 801-22 ¶ 34.)

21 **B. The Remaining Documents Do Not Cure Samsung’s Violations**

22 Samsung points to the scattershot of other documents produced before and after the
23 Court’s Order but these documents are a poor shadow of any reasonable effort to comply.
24 Samsung’s production of over 3,500 pages of financial information on March 8th—the last day of
25 fact discovery—reflects a studied disregard for its obligations. (*See* Olson Reply Decl. ¶ 4,
26

27 ⁴ Samsung made no mention of this manipulation of the prior data when it produced the
28 March 8th Spreadsheet. (Olson Reply Decl. Exs. G, H.)

1 Exs. G, H.) Samsung admits that all but one of these documents were subject to the Order. (*See*
2 Dkt. No. 801-9 ¶¶ 14-15.) Moreover, Apple had repeatedly requested these documents by name
3 even before the Court-ordered deadline. (Dkt. No. 749-4 at Exs. 10, 11, 13, 15, 16.)

4 Further, nearly all the documents address STA’s financial information. (*See* Olson Reply
5 Decl. ¶¶ 2-5.) Even if Samsung had produced complete information about STA (which it did
6 not), that information would reflect only a small fraction of Samsung’s total profits from the
7 accused products. (*See id.* ¶¶ 2-7; Roberts Reply Decl. ¶¶ 33-34; *see also* Mot. at 7.) STA is just
8 the sales arm of Samsung in the U.S. (*See* Dkt. No. 801-22 ¶ 17.) But there is no question that
9 all the manufacturing costs, all the research and development costs, and nearly all the marketing
10 costs are located in SEC, the Korean parent, and its manufacturing subsidiaries. (Roberts Reply
11 Decl. ¶ 22.) STA earns a minimal artificial profit, designed purely as a tax construct to limit what
12 is paid to the IRS, and the remaining profits are recognized abroad. (*Id.* ¶¶ 17, 33; Olson Reply
13 Decl. Ex. I at 123:5-18, 125:12-126:22.) Apple is entitled to Samsung’s “total profits” from
14 infringing sales of the accused products, and as Samsung admits, STA’s financial documents do
15 not show that. (Dkt. No. 801-22 ¶¶ 17-18; Roberts Reply Decl. ¶¶ 11, 32-35; *see also* Olson
16 Reply Decl. ¶ 5.)

17 Finally, while Samsung may have produced many pages of documents, it has not
18 produced a comprehensive set of SEC documents for all periods during which infringement was
19 occurring. (*See* Olson Reply Decl. ¶¶ 2-7.) Cost of Goods Sold, Operating Expenses, and
20 Operating Profits cannot be estimated based on individual *ad hoc* productions.

21 **IV. SAMSUNG HAS FAILED TO PRODUCE INFORMATION TO CALCULATE**
22 **SAMSUNG’S CONSOLIDATED PROFITS FROM SALES OF ANY ACCUSED**
23 **PRODUCTS**

24 Samsung’s witnesses confirmed that neither the February 3rd Spreadsheet nor any other
25 spreadsheet prepared to replace it can be used to calculate Samsung’s consolidated profits.
26 (Olson Reply Decl. Ex. D at 151:4-152:12; *see* Roberts Reply Decl. ¶ 19.) The February 3rd
27 Spreadsheet does not provide financial information from which to calculate the consolidated
28 profit earned by all Samsung entities. The information on the “top” of the Spreadsheet (labeled
“Sales”) and the information on the “bottom” (labeled “Manufacturing”) are prepared on different

1 bases. (*See* Dkt. No. 801-22 ¶ 17; Roberts Reply Decl. ¶¶ 15-20, 23.) As a result, the quantities,
2 sales and other financial information do not match and you cannot “add down.” (Roberts Reply
3 Decl. ¶¶ 15-20, 23.) This means that data does not exist on the Spreadsheet to determine
4 consolidated profits because sales (to third parties) on the Consolidate section cannot be tied
5 directly to the cost of goods sold in the Manufacturing section. Without synching the cost of the
6 products sold to customers with the revenue from those sales, consolidated profitability for the
7 accused products cannot be determined. (*Id.* ¶ 23.) The same is true of every spreadsheet
8 produced by Samsung on February 3, February 28 and March 8. (*Id.* ¶¶ 5-14.)

9 Samsung’s production of other documents also is insufficient. As discussed in
10 Section III.B, *supra*, Samsung has not provided comprehensive documents demonstrating SEC’s
11 financial information, which Apple needs to ascertain the consolidated profits for any accused
12 products. (*See* Olson Reply Decl. ¶¶ 2-7.)

13 Of course, Samsung itself can do this (and does it each quarter to prepare its public
14 consolidated financial statements) using the information from its system of record. (*See* Roberts
15 Reply Decl. ¶ 20; Olson Reply Decl. Ex. D at 151:4-17.) Yet according to Samsung’s 30(b)(6)
16 witness, Samsung chose not to produce that information in response to the Order because Apple
17 supposedly did not ask for it in the right way. (Olson Reply Decl. Ex. D at 151:20-152:24.) That
18 is absurd. One of the driving reasons behind Apple’s January motion to compel was to provide
19 Apple with the means to calculate Samsung’s consolidated profits, which are absolutely essential
20 to Apple’s damages case. (*See* Dkt. No. 613-1 at 22; Dkt. No. 759-4 Ex. 8 at 154:17-25.)

21 **V. SAMSUNG IMPROPERLY REFUSES TO PROVIDE FINANCIAL**
22 **INFORMATION ABOUT THREE INFRINGING PRODUCTS**

23 Samsung admits that it has withheld relevant financial information for two Galaxy S II
24 models (the Galaxy S II Epic 4G Touch and Galaxy S II Skyrocket) and the Galaxy Tab 10.1
25 LTE. (Opp. at 15-16.) Samsung’s unilateral decision to withhold that information is contrary to
26 the scope of Apple’s discovery requests, the plain language of Apple’s Amended Complaint and
27 Infringement Contentions, and Samsung’s own website description of its Galaxy S II phones and
28 Galaxy Tab 10.1 tablet, and is a further violation of the Court’s Order.

1 Apple’s damages discovery requests encompassed all iterations of the Galaxy S II phones
2 and Galaxy Tab 10.1 tablets. For example, Apple requested financial information for “each of the
3 Products at Issue on a product-by-product basis,” and defined “Products at Issue” to include “the
4 Galaxy S II (aka Galaxy S 2) phones,” the “Galaxy Tab 10.1” tablet, and “any similar products,
5 and any products that Apple accuses of infringing its intellectual property in this litigation.”
6 (Decl. of Grant Kim in Supp. of Apple’s Reply (“Kim Decl.”) Ex. 1 at 1-2, 9-12; *see also, e.g.*,
7 Dkt. No. 613-1 at lii-cvii (reciting Apple’s Requests for Production Nos. 218, 252, 254, 256-57,
8 260-67, 293, and 461-62).) Apple’s definition of “Products at Issue” was consistent with its
9 Amended Complaint of June 16, 2011, which alleged that the Galaxy S II and the Galaxy Tab
10 10.1 infringe Apple’s intellectual property. (Dkt. No. 75 ¶¶ 83, 87, 92, 98, 102-03.)

11 Samsung did not object to Apple’s document requests on the ground that it did not
12 understand the meaning of “Galaxy S II” or “Galaxy Tab 10.1.” Moreover, Samsung has
13 produced *thousands of documents* that refer to the specific models that Samsung now contends
14 are *outside* the scope of Apple’s document requests, but no financial information. (Kim Decl.
15 ¶¶ 14-17, Exs. 13-15.)

16 Samsung admits that Apple’s August 26, 2011 Addendum to its Infringement Contentions
17 identified the “Galaxy S II” phone as an “Accused Instrumentality,” and that “Galaxy S II”
18 includes both the “Galaxy S II (T-Mobile edition)” and the “Galaxy S II (AT&T edition).”
19 (Opp. at 15-16.) It nevertheless contends that Apple’s Infringement Contentions did not include
20 Sprint’s “Galaxy S II Epic 4G Touch” and AT&T’s “Galaxy S II Skyrocket,” because these are
21 not Galaxy S II models, the plain language of their names notwithstanding. (*Id.* (“Galaxy S
22 II . . . accounts for two of the five devices—the Galaxy S II (T-Mobile edition) and the Galaxy S
23 II (AT&T edition)”)). Samsung’s argument is refuted by its own website, which uses “Galaxy S
24 II” to refer to *all* four models equally. Samsung’s “Explore the Galaxy S II” webpage proclaims:

25 The Samsung Galaxy S™ II unleashes ground-breaking smartphone
26 technology to deliver a mobile experience like nothing that's come
27 before. Experience the new Samsung Galaxy S II. Available at
28 Sprint, T-Mobile, AT&T (4G), AT&T (4G LTE) and U.S. Cellular.

1 (Kim Decl. ¶ 4, Ex. 2.) The webpage includes photos and information for all of the U.S. carrier
2 models, including the Sprint “Galaxy S II Epic 4G Touch” and the AT&T “Galaxy S II
3 Skyrocket.”⁵ (*Id.*) The photos show that all of the Galaxy S II models include the same “Galaxy
4 S II” logo on the back, *without* any additional words such as “Epic 4G Touch” or “Skyrocket.”
5 (*Id.* ¶¶ 5-7, Exs. 3-6.) Thus, Samsung clearly considers “Galaxy S II” to cover all of these U.S.
6 carrier models, including the “Galaxy S II Epic 4G Touch” and “Galaxy S II Skyrocket.”

7 The same is true as to the Galaxy tablet. Apple’s August 26, 2011 Infringement
8 Contentions identified the “Galaxy Tab 10.1” as an “Accused Instrumentality.” (Dkt. No. 801-5
9 at 4.) Samsung does not dispute that “Galaxy Tab 10.1” includes the Wi-Fi only version of this
10 product, but contends that it does not include the “Galaxy Tab 10.1 LTE.” Yet, Samsung’s
11 “Explore Galaxy Tabs” webpage includes photos and descriptions of both products, which it
12 refers to as “Galaxy Tab 10.1 (Wi-Fi Only)” and “Galaxy Tab 10.1 (Verizon 4G LTE).” (Kim
13 Decl. Ex. 8.) As indicated by the webpage description, these are the same product except that one
14 connects to the Internet through “Wi-Fi Only,” and the other can also connect over a 4G LTE
15 cellular network. (*Id.* ¶ 9, Ex. 8.)

16 Samsung argues that Apple’s August 26, 2011 Infringement Contentions were insufficient
17 because Apple never mentioned the “specific names and/or model numbers” of these products.
18 (Opp. at 15 n.50.) Yet, as Samsung acknowledges, Patent Local Rule 3-1(b) requires accused
19 products to be identified “by name or model number, if known.” (*Id.*) Apple identified the
20 products by the names known to Apple at that time (which was before the Galaxy S II was
21 released in the U.S.), and that Samsung actually uses—the “Galaxy S II” and “Galaxy Tab 10.1.”

22 Samsung also argues that Apple’s March 4, 2012 amendment of its response to Samsung’s
23 Interrogatory No. 5 shows that the two Galaxy S II models were not at issue. (Opp. at 15-16.)

24 ⁵ Samsung’s webpage also includes information about the U.S. Cellular “Galaxy S II,”
25 which was just released on March 1, 2012. Apple does not fault Samsung for failing to produce
26 financial data for a product that had not been released when this Motion was filed. However, the
27 Sprint “Galaxy S II Epic 4G Touch” and the AT&T “Galaxy S II Skyrocket” were released many
28 months ago, on September 16 and November 6, 2011, respectively. That was before and
immediately after the release of the AT&T and T-Mobile editions of the Galaxy S II on October 2
and October 16, 2011, respectively. (Kim Decl. ¶ 13, Ex. 12.)

1 That amendment, however, simply updated Apple’s response in a manner consistent with Apple’s
2 Amended Complaint (served June 16, 2011), its Addendum to Infringement Contentions (served
3 August 26, 2011), and its numerous discovery requests (served in August, October, and
4 November 2011, and in January and February 2012 (*see* Kim Decl. ¶¶ 2-3)). Apple’s initial
5 interrogatory response, served September 12, 2011, did not include the Galaxy S II variants
6 because none had yet been released in the U.S. (Kim Decl. Ex. 9.) After Samsung released these
7 various models, Apple amended its response on March 4 and March 8, 2012, to confirm which
8 variants of the Galaxy S II it accuses of infringing its design patents (Dkt. No. 801-7 Ex. 3) and
9 utility patents (Kim Decl. Ex. 10). These amendments do not change the fact that Apple had
10 *already* accused the Galaxy S II of infringement many months earlier.⁶

11 Finally, it bears emphasis that the two Galaxy S II models that Samsung concedes are in
12 the case—the T-Mobile and AT&T editions—have similar, but not identical, specifications. For
13 example, the T-Mobile Galaxy S II has a slightly larger screen, 4.52 inches instead of the 4.3 inch
14 screen of the AT&T Galaxy S II. (Kim Decl. ¶ 12, Ex. 11.) Thus, Samsung uses “Galaxy S II” to
15 cover a group of related products with similar, but not identical specifications. The Sprint
16 “Galaxy S II Epic 4G Touch” and AT&T “Galaxy S II Skyrocket” are members of this same
17 Galaxy S II family. (*See id.* Ex. 12 at 4, 9-10 (identifying U.S. variants of Galaxy S II).)

18 **VI. SAMSUNG VIOLATED THE ORDER BY WITHHOLDING SPECIFIC**
19 **FINANCIAL DOCUMENTS PRODUCED IN THE ORDINARY COURSE OF**
20 **BUSINESS**

21 Samsung fails to justify its refusal to produce particular financial documents that Apple
22 seeks. Samsung asserts that it withheld costed BOMs because Apple only requested and
23 Samsung only promised to provide BOMs in the “technical” sense, not the “financial” or “costed”
24 sense. (Opp. at 20.) The record flatly contradicts Samsung’s position. Apple’s proposed order
25 sought the production of “costed bills of materials” (Mot. App. A at 8) and Apple’s counsel

26 ⁶ The unsigned stipulation that Samsung cites in a footnote also does not change Apple’s
27 prior identification of the Galaxy S II as an infringing product. (Opp. at 16 n.53.) That
28 stipulation sought not just to add but also “to clarify the inclusion of” models already in the case,
and it was never signed in any event. (Dkt. No. 801-4 Ex. 4.)

1 specifically argued at the hearing that Apple needed them to get a “comprehensive view of the
2 income and costs structure of Samsung’s mobile phone group down to [that] level of granularity.”
3 (Dkt. No. 759-4 Ex. 8 at 155:25-156:4.) Samsung’s counsel responded that the “bills of
4 materials” Apple’s counsel “identified” were “overkill by a large margin when there are summary
5 financial documents at companies this large,” but nevertheless promised to produce them. (*Id.*
6 at 167:16-18, 168:22-169:3.) There is no question that Samsung understood the request was for
7 “financial” documents, and that Samsung promised and then refused to produce costed BOMs.

8 Samsung asserts it withheld “PUMI” reports prepared by STA and SEC to approve
9 quarterly financial plans in the U.S. because they only contain forecasts of profitability, and not
10 actual profitability results. This also is incorrect. The few PUMI reports that Apple has obtained
11 contain Samsung’s material cost information and a report on the actual operating profits specific
12 to the accused products. (Roberts Reply Decl. ¶¶ 22, 29.) Equally important, in contrast to the
13 unaudited spreadsheets produced by Samsung specifically for this litigation (reviewed by Mr. Sim
14 for less than an hour), the PUMI reports reflect a comprehensive quarterly report that requires the
15 review and signatures of over 20 Samsung employees. (*Id.*)

16 Finally, Apple requires a more detailed extraction of financial data from Samsung’s
17 system of record—without modification this time—to verify the accuracy of Samsung’s
18 production. Although Mr. Sheppard’s declaration claims that Apple’s request for this level of
19 detail “shows a fundamental misunderstanding of the way large businesses maintain their
20 financial data,” Mr. Sheppard testified at his 30(b)(6) deposition that he himself asked to see this
21 level of detail in order to validate the STA data in the February 28th Spreadsheet. (Olson Reply
22 Decl. Ex. I at 72:13-22.) Apple seeks the same level of detail that Mr. Sheppard used—that is, at
23 the level of Samsung’s chart of accounts as reflected in the Global Consolidated Packaging
24 System (“GCPS”). (*Id.* at 72:13-22, 142:1-10, 145:13-22; *see* Dkt. No. 801-9 Ex. 9 (GCPS
25 report).) Apple further is entitled to financial information from Samsung’s system of records in a
26 manner sufficient for Apple to calculate Samsung’s consolidated profits, as for example, in a
27 form in which both the sales and manufacturing sections of the document are prepared on a
28 consistent basis. As we have seen, anything less allows Samsung to move profits around

1 artificially and escape a full reckoning for its infringement of Apple’s intellectual property.

2 **VII. SAMSUNG’S VIOLATIONS WARRANT THE SANCTIONS THAT APPLE**
3 **SEEKS**

4 As shown above and in Apple’s Motion, Apple indisputably has been prejudiced by
5 Samsung’s failure to comply with the Court’s Order by the February 3rd deadline, and by its
6 continuing refusal to produce the documents and information Apple needs to assess consolidated
7 gross profits and operating profits.

8 Apple’s requested sanctions are narrowly tailored to address the specific harms Samsung
9 caused. In February, Samsung repeatedly claimed that it gave Apple everything it was entitled to
10 and that its production had no errors. (*See, e.g.*, Dkt. No. 759-4 Ex. 18; Mot. at 7.) Samsung
11 should have to live within its own claims. Apple should have access to the documents and
12 information that it needs to test Samsung’s profit figures and to prove consolidated profits.
13 Samsung should not be able to cross-examine Apple’s experts about their reports, which—
14 because of Samsung’s violations—were prepared without access to the information that Apple
15 needs. Samsung was well aware of the deadlines for expert reports and discovery when it
16 produced its original Spreadsheet. Samsung cannot withhold evidence and then use the absence
17 of that evidence as a basis for cross-examining the damages experts who were whipsawed by
18 Samsung’s misconduct. Finally, Samsung should not be allowed to benefit from its misconduct
19 by using its discovery violations as a means to delay the trial in this case.

20 Samsung does not take issue with any of Apple’s specific sanctions requests and instead
21 argues generally that “such harsh and potentially case-dispositive sanctions should be imposed
22 only under ‘extreme circumstances’ in which a party violated a discovery order willfully, in bad
23 faith, or through fault” and would be manifestly unjust here. (Opp. at 22.) Samsung ignores that
24 “extreme circumstances” or “bad faith” are required only when case dispositive sanctions are at
25 issue. *See, e.g., Fair Housing of Marin v. Combs*, 285 F.3d 899, 905 (9th Cir. 2002) (requested
26 sanction was default judgment); *U.S. v. Kahaluu Const. Co.*, 857 F.2d 600, 603 (9th Cir. 1988)
27 (“Dismissal and default judgment are authorized only in extreme circumstances. So, too, are
28 orders taking the plaintiff’s allegations as established and awarding judgment to the plaintiff on

1 that basis.”). The evidentiary sanctions requested by Apple are not case dispositive. They relate
2 solely to Apple’s damages, not Samsung’s liability.

3 Even if “extreme circumstances” were required, the very cases cited by Samsung hold that
4 the “bad faith” standard is met by “[d]isobedient conduct not shown to be outside the litigant’s
5 control.” *Fair Housing*, 285 F.3d at 905 (9th Cir. 2002); *see also*, *Lewis v. Ryan*, 261 F.R.D. 513,
6 518 (S.D. Cal. 2009). Samsung’s disobedient conduct evidenced extraordinary disregard for the
7 Court’s Order—including by producing a single, error-ridden Spreadsheet to comply with the
8 Order, and subsequently revising it to withhold information that a Samsung executive decided
9 Apple should not have and to manipulate data [REDACTED]
10 Indeed, Samsung refused even to allow its witnesses to testify about the very Spreadsheet that
11 supposedly evidenced Samsung’s compliance.

12 Rather than requiring extreme circumstances, courts may issue the types of evidentiary
13 sanctions that Apple seeks unless the failure to provide discovery was either “substantially
14 justified or harmless.” *Lewis v. Ryan*, 261 F.R.D. 513, 522 (S.D. Cal. 2009); *Peterson v. AT&T*
15 *Umbrella Benefit Plan No. 1*, No. C-10-03097 JCS, 2011 U.S. Dist. LEXIS 135285, at *19 (N.D.
16 Cal. Nov. 23, 2011); *see also* *Yeti by Molly Ltd. v. Deckers Outdoor Corp.*, 259 F.3d 1101, 1105-
17 06 (9th Cir. 2001) (noting that “harshness” of Rule 37(c) sanctions excluding expert testimony is
18 ameliorated by exception permitting testimony if failure to disclose information is “substantially
19 justified or harmless”). Samsung never comes close to showing that either exception applies.

20 Courts routinely award evidentiary sanctions where, as here, a party failed to produce
21 documents required by a court order. *See, e.g.*, *Carl Zeiss Vision Int’l GmbH v. Signet Armorlite,*
22 *Inc.*, No. 07-cv-0894-DMS (POR), 2010 WL 743792, at*6-7 (S.D. Cal. Mar. 2, 2010) (precluding
23 party from relying on financial data that was not produced until end of discovery, after party’s
24 Rule 30(b)(6) designee had been deposed); *Davis v. Nevarez*, No. 3:07-CV-00427-EJL-LMB,
25 2009 WL 1468705, at *4 (D. Idaho May 22, 2009) (“it is entirely appropriate and justified to
26 strictly limit any testimony or statements . . . to those statements that have been produced in
27 discovery”); *PeerMusic III Ltd. v. LiveUniverse, Inc.*, No. CV 09-6160-GW (PLAx), 2011 WL
28 672585, at *9 (C.D. Cal. Jan. 26, 2011) (“preventing defendants from relying on evidence or

1 information that they have withheld from plaintiffs in discovery is ‘an appropriate sanction,
2 reasonably related to the subject of the discovery that was frustrated by sanctionable conduct’’).

3 Nor does Samsung show that imposition of sanctions would be manifestly unjust.
4 Samsung complains about the timing of Apple’s Motion but it was Samsung’s choice to withhold
5 the information. Samsung has no basis to shift blame to Apple, particularly because Apple
6 repeatedly identified the problems with the February 3rd Spreadsheet, asked for additional
7 information, and met and conferred with Samsung about the issue. (Dkt. No. 759-4 Exs. 13-18.)
8 Samsung also claims that Apple has failed to comply with the Court’s February 3rd deadline, but
9 Apple’s purported conduct is not at issue. Had Apple done anything even remotely as egregious
10 as Samsung has, Samsung could have filed a motion of its own. It did not. Finally, Samsung’s
11 claim that Apple has not been prejudiced has been refuted in spades.

12 Samsung has flaunted the Court’s Order and unilaterally determined what information
13 Apple should have. If sanctions do not issue, Samsung will continue to act as if the Court’s
14 Orders do not matter and Apple will continue to suffer prejudice caused by Samsung’s violations.

15 CONCLUSION

16 For the foregoing reasons, Apple requests that the Court grant Apple’s motion and issue
17 the requested orders.

18 Dated: March 20, 2012

MORRISON & FOERSTER LLP

19
20 By: /s/ Michael A. Jacobs
Michael A. Jacobs

21 Attorneys for Plaintiff
22 APPLE INC.