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 13 LLC

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

18 APPLE INC.,
 19
 Plaintiff,
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 v.
 21 SAMSUNG ELECTRONICS CO., LTD., A
 22 Korean business entity; SAMSUNG
 23 ELECTRONICS AMERICA, INC., a New York
 24 corporation; SAMSUNG
 TELECOMMUNICATIONS AMERICA, LLC, a
 Delaware limited liability company,
 25 Defendant.

Case No. 11-cv-01846-LHK (PSG)
**JOINT STATEMENT REGARDING
 USE OF REPRESENTATIVE
 PRODUCTS AT TRIAL**

1 In accordance with the Court's July 19, 2012 Minute Order and Case Management Order,
2 the parties met and conferred regarding the use of representative products at trial. The parties did
3 not reach an agreement on this issue.

4 **Apple's statement**¹: For Apple's utility patents, Apple proposed that 7 devices be deemed
5 representative of the 27 accused products.² The guiding principle was simple – where the exact
6 same infringement and non-infringement arguments had been applied against two products, those
7 products were grouped together for purposes of trial. To further facilitate this narrowing process,
8 Apple even offered to drop its allegations against the accused ThinkFree Office application.

9 Samsung rejected this proposal on the grounds that certain devices purportedly exhibit
10 different behavior than other devices. The only two products specifically named in Samsung's
11 correspondence, however, were the Fascinate and the Galaxy S 4G. The only difference that
12 Samsung ever identified between versions of the Fascinate running different versions of the
13 Android platform related to the now irrelevant ThinkFree Office application. As for the Galaxy S
14 4G, the first difference was again with ThinkFree Office, while the second related to the "blue
15 glow" feature, which was definitively excluded from trial by Judge Grewal's June 19, 2012
16 Clarification Order (Dkt. No. 1106). Accordingly, Samsung has failed to provide Apple with a
17 single substantive reason relating to evidence that will be presented at trial for rejecting this
18 proposal.

19 In discussing the representative products issue and the verdict form, Samsung has also
20 alluded to the theoretical possibility that accused products running different versions of the
21 Android source code might not behave identically. With the exception of the "blue glow"
22 modification excluded by Judge Grewal's Order, Samsung has not identified any concrete

23
24 ¹ Apple was not afforded an opportunity to respond fully to the points raised by Samsung
25 in its separate statement prior to the filing of this joint statement. Apple notes, however, that
26 there appear to be numerous inaccuracies in Samsung's assertions, including its table suggesting
27 that the Gem is not an accused product for the '381 patent (it is accused of infringing in the
28 Contacts list application).

² A copy of Apple's draft stipulation as provided to Samsung is attached hereto as Exhibit
6 to the Declaration of Ketan Patel in Support of Joint Statement Regarding Use of
Representative Products at Trial.

1 examples of a difference that in any way relates to infringement of the patents-in-suit; no such
2 opinion appears in Samsung's expert reports. Moreover, when Samsung was ordered to produce
3 source code for all of the Accused Products, Samsung produced only a single version or sub-
4 version of code for each product. Given Judge Grewal's Order precluding any evidence of
5 "design arounds" and Samsung's choice to produce only one representative version of source
6 code for each product, Samsung will be precluded from arguing that other non-produced versions
7 of the code would perform differently. Apple also notes that Samsung neglected ignored Apple's
8 earlier proposal on stipulating to the use of representative source code.

9 For Apple's design patents, Apple proposed that the parties reuse the exact same
10 groupings of products used by Samsung's design expert Robert Anders. Instead of analyzing
11 every product separately, Mr. Anders relied on representative products, describing the represented
12 devices as "a/k/a" – also known as. For example, he described the "Samsung Galaxy Fascinate"
13 as "a/k/a Showcase i500, Showcase Galaxy S, and Mesmerize." Samsung rejected this proposal
14 on the generic ground that "all of the accused products are different in appearance and each one
15 must be analyzed independently under design patent and trade dress law." Samsung has provided
16 no explanation for rejecting Apple's proposal or its own expert's methodology.

17 In view of this record, Apple believes the Court is empowered to direct Samsung to agree
18 to trial of the case on the basis of representative products, as Samsung cannot show good cause
19 why that would be a denial of due process. *See In re Katz Interactive Call Processing Patent*
20 *Litigation*, 639 F.3d 1303, 1310-13 (Fed. Cir. 2011) (no denial of due process where district court
21 had plaintiff proceed on representative claims because plaintiff failed to identify any substantial
22 differences between the permitted representative claims and unasserted claims).

23 The Court said at the July 18 pre-trial conference, "We are not going to go trial on 26
24 products." Tr. at 144:19-20. To address that concern—regardless of whether Samsung agrees to
25 or the Court orders trial on the basis of representative products—Apple is prepared to dismiss
26 without prejudice its claims against three accused products: the Acclaim, Nexus S, and Sidekick.
27 In addition, Apple will not point to the ThinkFree Office application in asserting infringement of
28 the '381 patent.

1 **Samsung’s statement**³: During the pre-trial hearing on July 18, 2012 and in its
2 subsequent order on July 19, the Court requested that the parties try to reach an agreement with
3 respect to a stipulation on representative products to reduce the number of accused products for
4 trial. On July 21, Apple sent Samsung a proposal that grouped certain accused products together
5 without substantially reducing the number of accused products. Samsung carefully reviewed
6 Apple's proposal, but found that the products in Apple's groupings have significant differences
7 with respect to Apple’s infringement claims. Samsung notified Apple of the flaws in its product
8 groupings on July 22.

9 Apple's approach to representative products is unworkable in light of the large number of
10 accused products and the existence of differences between the accused products and even the
11 same products running different versions of software. Apple's proposed groupings represent an
12 improper attempt by Apple to escape its required burden of proof on infringement because they
13 do not account for material differences between accused products. Instead, any approach to
14 categorize representative products into groups must properly account for the differences in
15 functionalities of the accused products. *See, e.g., L&W Inc. v. Shertech, Inc.*, 471 F.3d 1311 (Fed.
16 Cir. 2006) (“The plaintiff, not the accused infringer, has the burden of showing infringement as to
17 all accused products. The accused infringer is not obliged to point out “relevant distinctions”
18 among products. While the patentee’s evidence was sufficiently specific to justify judgment of
19 infringement as to one of the sixteen accused products, there was insufficient evidence to justify
20 an expert’s assertion that the one product was ‘typical.’ A patentee “cannot simply assume that
21 all of the [accused infringer’s] products are like the one [that the expert] tested, and thereby shift
22 to [the accused infringer] the burden to show that this is not the case.”); *Rambus Inc. v. Hynix*
23 *Semiconductor Inc.*, 642 F. Supp. 2d 970, 989-90 (N.D. Cal. 2008) (absent stipulation from
24 defendant that certain products are representative, plaintiff had burden of proving that each
25 accused product infringes every element of asserted claims); *Commissariat a l’Energie Atomique*

26 _____
27 ³ Samsung did not receive Apple’s statement until 11:58 am PDT on July 23, 2012. In
28 light of that delayed receipt, the parties mutually agreed to submit this joint statement after 12 pm
PDT.

1 *v. Samsung Elecs. Co.*, 524 F. Supp. 2d 534, 541 (D. Del. 2007) (“Although a party may not be
 2 required to reverse engineer every module, the party must specify which modules are
 3 representative of a particular series or group, why they are representative and how their particular
 4 properties or components directly infringe each and every element of a claim.”); *see also*
 5 *Egyptian Goddess, Inc. v. Swisa Inc.*, 543 F.3d 665, 676 (Fed. Cir. 2008); *AMF Inc. v. Sleekcraft*
 6 *Boats*, 599 F.2d 341, 348-349 (9th. Cir. 1979).

7 ***Utility Patents***

8 Apple is asserting infringement of 3 utility patents – the '381, '915 and '163 patents –
 9 against approximately 25 Samsung products. Apple has injected further complexity into its case
 10 for the '381 patent by alleging infringement of three different applications that run on the accused
 11 products – Web Browser, Gallery and Contacts. The following chart illustrates the complexity of
 12 Apple’s infringement allegations and the number of potential infringing combinations the jury
 13 will be asked to address.⁴

Samsung Product	'381 Patent (Claim 19) Web Browser Application	'381 Patent (Claim 19) Gallery Application	'381 Patent (Claim 19) Contacts Application	'915 Patent (Claim 8) Web Browser Application	'163 Patent (Claim 50) Web Browser Application
Captivate					
Continuum					
Droid Charge					
Epic 4G					
Exhibit 4G					
Fascinate					
Galaxy Ace					
Galaxy Prevail					
Galaxy S (i9000)					
Galaxy S II					

26 _____
 27 ⁴ This morning (July 23), Apple indicated for the first time that it may be dropping its
 28 infringement allegations against the Acclaim, Nexus S and Sidekick. As the chart demonstrates,
 this will do little to reduce the complexity of Apple’s utility patent infringement claims.

1	Galaxy S 4G				
2	Gem ⁵	NA	NA	NA	
3	Gravity				
4	Indulge				
5	Infuse 4G				
6	Intercept				
7	Mesmerize				
8	Nexus S 4G				
9	Replenish				
10	Transform	NA	NA	NA	
11	Vibrant				
12	Galaxy Tab			NA	
13	Galaxy Tab 10.1			NA	

12 Making matters worse, the '381, '915 and '163 patents all relate to user interface
13 functionalities that are significantly impacted by the version of *software* running on each accused
14 device. In many instances, the different versions of software behave differently with respect to
15 the allegedly infringing features. Although Samsung did not attempt to illustrate this further
16 complication in the chart above, accounting for the different software versions will increase the
17 number of infringement analyses required by the jury. In its representative products proposal,
18 Apple completely ignores this issue and instead groups together various hardware products
19 without any reference to software versions. But because the accused functionality depends on the
20 actual software that runs on the accused products, Apple's approach is inaccurate and deficient.

21
22 For example, Apple has proposed that for the '381 patent, "the Galaxy Tab 10.1 is
23 representative of the Galaxy Tab 7.0". These two products do not behave the same way with
24

25
26 ⁵ Contrary to Apple's claim in footnote 1, the Gem is not an accused product under the
27 '381 patent. It was not identified as a product accused of infringing the '381 patent in Apple's
28 infringement contentions, and Apple never moved for leave to amend its infringement contentions
under the Patent Local Rules. Consequently, the Court should preclude Apple from introducing
the Gem as an accused '381 product at trial. See Patent L.R. 3-1.

1 respect to the accused applications, as Dr. Jeffrey Johnson illustrated in his report. For the
2 Galaxy Tab 7.0, Dr. Johnson observed that the Browser did not exhibit the behavior accused of
3 infringement of the '381 patent. Instead, the user was not able to scroll or pan the webpage
4 beyond the edge, *i.e.*, "hard stop." Ex. 1 (Expert Rep. of J. Johnson) at 24-25, 27-28. Since
5 displaying an area beyond the edge is one of the limitations for the '381 patent, this is a key
6 distinction highly relevant for infringement. Apple's expert Dr. Balakrishnan admitted this
7 functionality was different from the '381 patent. Ex. 2 (Depo. Tr. of R. Balakrishnan, 4/20/2012)
8 at 77:13-78:19.

10 Many more examples of different non-infringing behaviors observed in the accused
11 devices are set forth in Dr. Johnson's report. *See, e.g.*, Ex. 1 (Expert Rep. of J. Johnson) at ¶ 74 at
12 27. Apple's expert recognized the possibility of variations in functionality present in different
13 versions of software and, when asked at his deposition, specifically limited his infringement
14 opinions not only to the specific version of software, but to the specific code running on the
15 device he inspected. *See, e.g.*, Ex. 3 (Depo Tr. of R. Balakrishnan, 7/12/2012 at 24:25-25:8;
16 26:8-23; 27:15-28:13). Thus, even Apple's own expert is unwilling to make generalizations
17 about the behavior of the accused products and versions of software running on those products.
18

19 With respect to the '163 patent, there are material differences in the way that the Web
20 Browser applications of different hardware and software combinations react to a "first gesture"
21 and a "second gesture" at a location on an allegedly infringing web page. An examination of
22 Apple's own infringement charts reveals that some accused devices may center in only one
23 dimension in response to these gestures, while other devices do not center in either dimension.
24 Apple's proposed groupings do not account for these material differences. For example, Apple
25 proposes grouping the Samsung Galaxy S II and the Samsung Vibrant into representative
26 category 4(a). But, the video exhibits offered by Apple's own expert, Dr. Singh reveal that the
27
28

1 behavior of these two products differs greatly in response to the first gesture. *See* Ex. 4 (Expert
2 Rep. of K. Singh) at Ex. 11 (video exhibit alleging infringement against a Galaxy S II variant) &
3 Ex. 13 (video exhibit alleging infringement against a Vibrant device). Because the ability of
4 these devices to "substantially" center in response to these gestures is at issue, Samsung simply
5 cannot agree to any proposal that removes Apple's burden to satisfy the explicit claim language
6 with respect to each hardware/software combination.⁶
7

8 For the '915 patent, Apple proposes that the "Galaxy S II (AT&T) is representative of the
9 Acclaim, Captivate, Continuum, Droid Charge, Exhibit 4G, Fascinate, Galaxy Ace, Galaxy S
10 (i9000), Galaxy S II (i9100), Galaxy S II (T-Mobile), Galaxy S 4G, Gem, Indulge, Infuse 4G,
11 Intercept, Mesmerize, Sidekick, Transform, and Vibrant;" and that the "Nexus S 4G is
12 representative of the Epic 4G, Galaxy Prevail, Nexus S, and Replenish." However, without
13 specifying the version of Android installed on a particular accused device, Samsung cannot
14 stipulate that the devices Apple proposes, the Galaxy S II (AT&T) and the Nexus S 4G, are in
15 fact representative of the other devices listed in Apple's proposal.
16

17 While Samsung is in favor of efforts to streamline the trial, Apple cannot attempt to avoid
18 its required burden of proof on infringement by lumping together products that contain different
19 behaviors, including those that admittedly do not infringe. Samsung has already suggested to
20 Apple that an approach that more accurately reflects the actual behavior of devices is to include
21 both the accused device and a description of the software running on the accused device. While
22 Apple may complain this approach requires more effort and does not make the case simple to try,
23 Apple was the party that chose patents that depend on the software as well as the hardware, and
24

25 ⁶ One of the named inventors on the '163 Patent specifically testified that with respect to
26 Apple's own implementation of the patented software, the software was "refine[d] . . . over a
27 period of time" Ex. 5 (Williamson Depo. Trans. at 159:20-25). It is unreasonable for Apple
28 to contend that different versions of Android software practice the '163 patent in the same way
when its own inventors admit that its own software has been modified over time.

1 chose to assert its patents on 25-30 devices. In order to simplify the case, rather than attempting
2 to group together products with admittedly different behaviors, Apple needs to reduce the number
3 of accused products.

4 ***Design Patent and Trade Dress Claims***

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1 Similarly, Apple’s proposal to try its trade dress and design patent infringement claims
2 using representative products is misguided and would deprive Samsung of its right to defend
3 itself against Apple’s claims based on key differences between the accused and purportedly
4 representative products, including differences in materials, finishes, colors, user interface
5 appearance, time periods in which they were sold, price, and the channels of trade in which the
6 products were sold and marketed. Trade dress is evaluated as a whole and in the context in which
7 it is used, sold and marketed. Differences among accused products related to color, finishes,
8 material, user interface and the like impact a consumer’s perception of the trade dress when
9 viewed in context, and bear directly on the jury’s assessment of whether confusion is likely.
10 Moreover, because not all of the accused products are available through the same retail channels,
11 whether this factor in the *Sleekcraft* analysis favors Apple or Samsung may differ among the
12 accused devices in the eyes of the jury. *See AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-349
13 (9th. Cir. 1979). In addition, variations in the degree of competition within and between the
14 various carrier channels makes the dilution analysis different for each of the accused products,
15 *see, e.g.*, 15 U.S.C. § 1125(c)(B) (naming “the extent to which the owner of the famous mark is
16 engaging in substantially exclusive use of the mark” as a factor in dilution analysis), and
17 differences in the time periods in which the products were sold are relevant to the critical issue of
18 fame, on which Apple bears the burden. These differences are therefore critical to Apple’s trade
19 dress claims because they bear directly on the likelihood of confusion and dilution issues. Those
20 differences cannot be glossed over with the jury merely because Apple would prefer a process
21 that is easier for Apple and far less fair to Samsung than actually narrowing the number of
22 accused devices and actually carrying its burden of proof at trial.

23 The same is true of Apple’s design patent infringement claims. Apple’s position ignores
24 the differences among the graphic user interfaces of the products accused of infringing the D’305
25 patent. And even with respect to the D’677 and D’087 patents, the Federal Circuit has made clear
26 that “when the claimed design is close to the prior art designs, small differences between the
27 accused design and the claimed design are likely to be important to the eye of the hypothetical
28 ordinary observer.” *Egyptian Goddess, Inc. v. Swisa Inc.*, 543 F.3d 665, 676 (Fed. Cir. 2008).

1 That is particularly so in connection with Apple’s industrial design patents, which do not claim
2 the entire device, such that differences in the ornamentation visible on the front of the products
3 may well be “important” to the eye of the hypothetical ordinary observer. *See id.* Just as
4 Samsung has the right to argue that the differences between each of its accused products and the
5 asserted design patents – large or small – prevent a finding of infringement, that right may not be
6 abrogated simply because Apple has refused to reduce the number of accused products to a
7 number that may reasonably be tried within the confines of the upcoming trial.

8 Apple argues that it should be permitted to try its design patent and trade dress claims
9 using representative products because Samsung’s expert Robert Anders analyzed the Galaxy S4G
10 together with the Vibrant, and the Fascinate together with the Mesmerize and Showcase. That
11 argument is unavailing for several reasons. First, Mr. Anders did not address the D’305 graphic
12 user interface patent at all, so it obviously cannot provide any support for Apple’s groundless
13 efforts to lump the interfaces together. Indeed, Apple’s submission here fails to provide any basis
14 at all for doing so. Second, Mr. Anders was not advocating grouping products, but rather
15 submitted a report in rebuttal to the opinion by Apple’s expert Peter Bressler, who analyzed the
16 Samsung Fascinate together with the Samsung Mesmerize and Showcase phones. Third, Apple is
17 not even using the same products as purported “representatives” that Mr. Anders analyzed.
18 Finally, Mr. Anders explicitly did not offer an opinion with respect to all of the *Sleekcraft* factors
19 relevant to trade dress infringement, and his analysis of products was focused on similarity or
20 dissimilarity of appearance. His analysis therefore provides no support for Apple’s demand that
21 products be lumped together for all purposes, despite the differences in sales and marketing
22 channels, price, degree of competition and other relevant factors between devices. As set forth
23 above, those crucial facts and circumstances differ between devices, and Apple cannot be
24 permitted to prevent Samsung from defending itself against Apple’s claims based on the full
25 range of factors provided for under governing law.

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Dated: July 23, 2012

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ATTESTATION OF E-FILED SIGNATURE

I, Victoria F. Maroulis, am the EF user whose ID and password are being used to file this Joint Statement. In compliance with General Order 45(X)(B), I hereby attest that Michael A. Jacobs has concurred in this filing.

DATE: July 23, 2012

/s/ Victoria Maroulis

Victoria Maroulis