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14 INC. and SAMSUNG

TELECOMMUNICATIONS AMERICA, LLC

15

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

18 APPLE INC., a California corporation,

19 Plaintiff,

20 vs.

21 SAMSUNG ELECTRONICS CO., LTD., a

Korean business entity; SAMSUNG

22 ELECTRONICS AMERICA, INC., a New

York corporation; SAMSUNG

23 TELECOMMUNICATIONS AMERICA,

24 LLC, a Delaware limited liability company,

25 Defendant.

26

27 FILED UNDER SEAL

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CASE NO. 11-cv-01846-LHK

**DECLARATION OF MARK TUNG IN
SUPPORT OF SAMSUNG'S
CONDITIONAL MOTION FOR RELIEF
FROM NONDISPOSITIVE PRETRIAL
ORDER OF MAGISTRATE JUDGE**

1 I, Mark Tung, declare as follows:

2 1. I am an associate in the law firm of Quinn Emanuel Urquhart & Sullivan, LLP,
3 counsel for Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung
4 Telecommunications America, LLC (collectively, "Samsung"). I submit this declaration in
5 support of Samsung's Conditional Motion for Relief from Nondispositive Pretrial Order of
6 Magistrate Judge. I have personal knowledge of the facts set forth in this declaration and, if called
7 upon as a witness, I could and would testify to such facts under oath.

8 2. Attached hereto as Exhibit 1 is a true and correct copy of excerpts from the
9 transcript for the April 24, 2012 hearing on Apple's Rule 37(b) Motion Based On Samsung's
10 Violation of the Court's December 22, 2011 Order Regarding Source Code. During the hearing,
11 counsel for Apple admitted that Samsung's December 30, 2011 production of source code
12 included source code for the blue glow function, as implemented in the Galaxy S II product.

13 3. The Court's Order cites to statements from Samsung's counsel that Samsung did not
14 produce source code for the blue glow function prior to January 23, 2012. These statements
15 referred to Samsung's January 23 production of generic, stand-alone blue glow source code—
16 source code which is not tied to a particular product, but consists of the base version which
17 Samsung implemented into the accused products. The generic blue glow source code produced on
18 January 23, 2012 is substantially identical to the blue glow source code that Samsung produced on
19 December 30 in compliance with the Court's Order.

20 4. Following the hearing, Samsung conducted a detailed review of its December 30,
21 2011 production of source code. Samsung compared this source code to the generic version of
22 blue glow source code produced on January 23, 2012. As a result of this review, Samsung
23 confirmed that the blue glow source code is present in the versions of source code produced on
24 December 30, 2011 for at least four products running four different versions of the Android
25 operating system: the Galaxy S II (Android Gingerbread 2.3.5), Exhibit 4G (Android Gingerbread
26 2.3.3), Epic 4G (Android Gingerbread 2.3.6), and Galaxy Tab 10.1 (Android Honeycomb 3.1).
27 Source code files for these products, as they appear on the source code review computer at Quinn
28 Emanuel's Redwood Shores office, are date-stamped December 20, 2011.

1 5. I am informed that Apple's experts requested printouts of Samsung's timely
2 production of blue glow source code on January 6, 2012, and received Bates-stamped printouts of
3 the code on January 9, 2012. Attached hereto as Exhibit 2 is a true and correct copy of a letter
4 from Samsung's counsel to Apple's counsel, dated January 9, 2012, accompanying the delivery of
5 these printouts.

6 6. Samsung believes that the Court's May 4 Order does not preclude Samsung from
7 introducing evidence of the blue glow source code that was produced prior to the December 31,
8 2011 deadline. Apple has indicated, however, that it interprets the Order in this way. For
9 instance, during the deposition of Michael J. Wagner, Samsung's damages expert, Apple instructed
10 Mr. Wagner to assume that "based on [the May 4] order, Samsung would not be allowed to
11 produce evidence regarding any actual implementation of blue glow at trial." Attached hereto as
12 Exhibit 3 is a true and correct copy of excerpts from the May 12, 2012 deposition of Michael
13 Wagner.

14 7. Apple has conducted extensive discovery concerning the blue glow function. For
15 instance, Apple served Interrogatory No. 16, seeking various information about blue glow and
16 other design-arounds. Samsung timely responded to this interrogatory in detail. Attached hereto
17 as Exhibit 4 is a true and correct copy of Samsung's Supplemental Objections and Responses to
18 Apple's Seventh Set of Interrogatories (No. 16).

19 8. On February 3, 2012, Samsung produced for Apple's inspection physical devices
20 that contained the blue glow functionality. This production occurred well before the close of
21 discovery and in compliance with the deadline set by the Court's January 27, 2012 Order for
22 production of physical samples of the accused products.

23 9. In addition to interrogatory responses and physical devices, Apple obtained
24 deposition testimony from each of the Samsung employees responsible for or knowledgeable
25 about the features alleged to infringe the '381 patent, as well as the blue glow function—including
26 at least Qi Ling, Wookyun Kho, Ioi Lam, Jaegwan Shin, Dooju Byun and Kihyung Nam.
27 Samsung produced numerous documents from the files of these and/or other custodians related to
28 Samsung's development and implementation of the blue glow function.

1 10. Attached hereto as Exhibit 5 is a true and correct copy of excerpts from the
2 February 1, 2012 deposition transcript of Qi Ling, a Samsung witness, in which Apple's counsel
3 questioned Mr. Ling about the blue glow functionality.

4 11. Attached hereto as Exhibit 6 is a true and correct copy of excerpts from the January
5 12, 2012 deposition transcript of Wookyun Kho, a Samsung witness, in which Apple's counsel
6 questioned Mr. Kho about the blue glow functionality.

7 12. Attached hereto as Exhibit 7 is a true and correct copy of excerpts from the March
8 8, 2012 deposition transcript of Ioi Lam, a Samsung witness, in which Apple's counsel questioned
9 Mr. Lam about the blue glow functionality.

10 13. Attached hereto as Exhibit 8 is a true and correct copy of excerpts from the January
11 27, 2012 deposition transcript of Jaegwan Shin, a Samsung witness, in which Apple's counsel
12 questioned Mr. Shin about the blue glow functionality.

13 14. Attached hereto as Exhibit 9 is a true and correct copy of excerpts from the April
14 26, 2012 deposition transcript of Dr. Jeffrey Johnson, a Samsung expert witness, in which Apple's
15 counsel questioned Dr. Johnson extensively about the blue glow functionality as it is implemented
16 in numerous accused products and applications.

17 15. Attached hereto as Exhibit 10 is a true and correct copy of a proposed stipulation
18 that Apple's counsel sent to Samsung's counsel on February 26, 2012. This proposed stipulation
19 provided that the version of source code for each accused product produced by Samsung by
20 December 31, 2011 is representative of all later versions of that product. Apple expressly
21 acknowledged, however, that "Samsung's representation does not apply to Apple's allegation that
22 Samsung's accused products infringe U.S. Patent No. 7,469,381."

23 16. Attached hereto as Exhibit 11 is a true and correct copy of excerpts from the
24 August 16, 2011 deposition transcript of Apple's infringement expert, Dr. Ravin Balakrishnan.
25 **Dr. Balakrishnan was able offer testimony, after simply looking at the Samsung phone marked as**
26 **deposition Exhibit 20, that the '381 patent was infringed. After inspecting a Galaxy Tab 10.1**
27 **product that contained the blue glow function, Dr. Balakrishnan testified that it did not meet all of**
28 **the claim limitations of the '381 patent.**

