

1 HAROLD J. MCELHINNY (CA SBN 66781)
 hmcclhinny@mofo.com
 2 MICHAEL A. JACOBS (CA SBN 111664)
 mjacobs@mofo.com
 3 RACHEL KREVANS (CA SBN 116421)
 rkrevans@mofo.com
 4 JENNIFER LEE TAYLOR (CA SBN 161368)
 jtaylor@mofo.com
 5 ALISON M. TUCHER (CA SBN 171363)
 atucher@mofo.com
 6 RICHARD S.J. HUNG (CA SBN 197425)
 rhung@mofo.com
 7 JASON R. BARTLETT (CA SBN 214530)
 jasonbartlett@mofo.com
 8 MORRISON & FOERSTER LLP
 425 Market Street
 9 San Francisco, California 94105-2482
 Telephone: (415) 268-7000
 10 Facsimile: (415) 268-7522

WILLIAM F. LEE
 william.lee@wilmerhale.com
 WILMER CUTLER PICKERING
 HALE AND DORR LLP
 60 State Street
 Boston, MA 02109
 Telephone: (617) 526-6000
 Facsimile: (617) 526-5000

MARK D. SELWYN (SBN 244180)
 mark.selwyn@wilmerhale.com
 WILMER CUTLER PICKERING
 HALE AND DORR LLP
 950 Page Mill Road
 Palo Alto, California 94304
 Telephone: (650) 858-6000
 Facsimile: (650) 858-6100

11
 12 Attorneys for Plaintiff and
 Counterclaim-Defendant APPLE INC.

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

17
 18 APPLE INC., a California corporation,
 19 Plaintiff,

20 v.

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.

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

**APPLE'S OBJECTIONS TO
 SAMSUNG'S SUBMISSION
 IDENTIFYING ATTORNEYS'
 FEES AND COSTS PURSUANT
 TO THE COURT'S JULY 11, 2012
 ORDER**

1 Apple objects to the amount of Samsung’s fee request—\$258,200.50—which is
2 unreasonable and should be substantially reduced:

- 3 • Samsung seeks fees for an excessive numbers of hours, including *150 attorney*
4 *hours* to prepare a motion to enforce and *260 attorney hours* to prepare a
5 sanctions motion, both arising from a motion to compel that took only *ten hours*
6 to prepare. These hours are unjustified and unsupported by the documentation
7 that Samsung acknowledges is required.
- 8 • Samsung seeks fees for tasks that are not subject to a fee award, such as reviewing
9 documents that it would have reviewed for litigation purposes, including
10 thousands of pages of deposition transcripts taken by Samsung’s own counsel in
11 the related ITC action.
- 12 • Samsung fails to support its claim that its claimed rates are “comparable to the
13 rates charged by Apple’s outside counsel.” In fact, the partner rates that Samsung
14 asks the Court to award are *41%* higher than the partner rates that Apple sought
15 when Apple was awarded fees.

16 A party is entitled to only “reasonable” attorneys’ fees. *See, e.g., Toth v. Trans World*
17 *Airlines, Inc.*, 862 F.2d 1381, 1385 (9th Cir. 1988); Fed. R. Civ. P. 37(b)(2)(C). Samsung’s
18 requested fees are not reasonable. Instead, Samsung has improperly turned the Court’s July 11
19 Order—which was explicit that Samsung was not prejudiced, beyond the delay, by the late-
20 produced deposition transcripts—into a carte blanche invitation to seek excessive fees and to
21 publish erroneous and irrelevant attacks on Apple.

22 **I. SAMSUNG’S CLAIMED NUMBER OF HOURS IS UNREASONABLE AND**
23 **UNSUPPORTED.**

24 Samsung seeks fees for *more than 150 hours* of attorney time to prepare its motion to
25 enforce and *more than 260 hours* to prepare its motion for sanctions. (Hutnyan Decl. Ex. 1.)¹

26 ¹ The chart attached to the Hutnyan Declaration claims 152.3 hours for the Motion to
27 Enforce, although the declaration references “more than 130 attorney hours.” (Hutnyan Decl.
28 ¶ 16.) Even if closer to 130 hours, the amount is excessive, for the reasons explained above.

1 That amount of time is unreasonable. Samsung admits that it needed only ten attorney hours to
2 prepare the portion of its motion to compel relating to deposition transcripts of Apple employees.
3 (*Id.* ¶ 10.) It could not reasonably have required *15 times* as many hours to brief the same topic in
4 its motion to enforce, or *more than 26 times* as many hours to do so in its motion for sanctions.

5 As Samsung acknowledged in a prior submission, “the party requesting fees ‘bears the
6 burden of submitting detailed time records justifying the hours claimed to have been expended.’”
7 (Dkt. No. 921 at 2 (quoting *Chalmers v. City of Los Angeles*, 796 F.2d 1205, 1210 (9th Cir.
8 1986).) Samsung urged the Court to reject Apple’s request for attorneys’ fees because, in its
9 view, Apple had not “describe[d] which tasks each attorney performed, how much time each of
10 the tasks took, or when those tasks were performed.” (*Id.* at 2.)

11 The Hutnyan Declaration contains none of this information. There is no breakdown of
12 tasks performed by each Samsung attorney and no information regarding how much time was
13 spent on those tasks. Samsung provides only a “list of attorney names plus the corresponding
14 number of hours each attorney billed in connection with the motion,” a level of detail that
15 Samsung condemned as “impermissibly vague.” (Dkt. No. 921 at 2.)

16 Samsung’s failure to provide further information makes it impossible to assess whether its
17 fees request is appropriately limited to expenses incurred as a result of the sanctioned conduct.
18 Samsung’s motion for sanctions sought attorneys’ fees for motion practice only “to the extent” its
19 motions related to production of the deposition transcripts that Apple had allegedly withheld.
20 (Hutnyan Decl. ¶ 6(a), (c); Dkt. No. 968 at 18.) But it submits no detailed evidence indicating
21 how much of the work for which it is requesting fees was actually devoted to the transcript issue,
22 as opposed to other issues. Nor does Samsung show that it allocated to that issue a reasonable
23 portion of the hours spent on motion practice. Rather, it either asserts a flat number of generic
24 “attorney hours” relating to the transcript issue (Hutnyan Decl. ¶ 10 (discussing motion to
25 compel), or it does not provide any figures at all on that point (*id.* ¶ 15 (discussing motion to
26 enforce Dec. 22 Order).)

27 Samsung’s request stands in sharp contrast to Apple’s showing in connection with its fees
28 request pursuant to the Court’s April 23 Order, which also was based on work incurred as a result

1 of a failure to produce a single category of documents (Dkt. No. 906). Apple (conservatively)
2 requested fees for only 25% of the hours spent on the motion for which it was entitled to seek
3 fees. (Dkt. No. 906 at 1.) Further, Apple demonstrated that its outside counsel track their time
4 based on individual tasks, which made it possible to identify the time spent on recoverable tasks.
5 (*Id.* ¶ 27.) In contrast, Samsung offers no explanation for how it determined what time to allocate
6 and fails to “properly segregate [] those expenses caused by the failure to obey court orders.”
7 *Toth*, 862 F.2d at 1386. And the unreasonableness of Samsung’s requested fees award is plain
8 when compared to Apple’s request, which sought only \$29,167.00 in fees for that work (and, to
9 date, Samsung has not paid this modest amount). Samsung’s request is more than eight times
10 higher.

11 In place of the required documentation of reasonable fees that Samsung failed to provide,
12 much of the Hutnyan Declaration is devoted to ad hominem attacks on Apple and its counsel.
13 (*See, e.g.*, Hutnyan Decl. ¶¶ 14-15, 23-26.) These attacks go far beyond the findings in the
14 Court’s July 11 Order, which speak for themselves. Even Samsung acknowledges that some of
15 its contentions have nothing to do with the costs reflected in its attorneys’ fees request. (*Id.* ¶¶
16 25-26.) These unsubstantiated attacks are no substitute for the documentation Samsung was
17 required to provide and deserve no credence whatsoever.

18 **II. SAMSUNG’S REQUEST INCLUDES FEES TO WHICH IT IS NOT ENTITLED.**

19 Samsung seeks fees for tasks that go beyond the scope of available remedies. First,
20 Samsung acknowledges that it sought fees for preparing the portion of its motion to compel that
21 related to the deposition transcripts at issue), yet it also seeks fees for the “at least 12 hours” its
22 counsel spent on meeting and conferring with Apple in connection with that motion. (Hutnyan
23 Decl. ¶¶ 6(a), 10; *see also* Dkt. No. 968 at 18.) The Court never authorized payment of such fees.

24 Second, although Samsung requested fees for its “review of the documents that Apple
25 produced from December 22 through the present” (Hutnyan Decl. ¶ 6(b)), Samsung should not be
26 awarded fees for that task. The purpose of a motion to compel is to obtain discovery that a party
27 seeks for litigation. Rule 37 does not allow a party to shift its fees for reviewing the discovery its
28 motion sought to obtain, even if the party moved for enforcement of a court order. To the

1 contrary, Rule 37(b)(2) provides for only attorneys' fees "caused by the failure" to obey a court
2 order. Fed. R. Civ. P. 37(b)(2)(C). Samsung's fees incurred to review Apple's production of
3 transcripts—and all other documents "produced from December 22 through the present"—were
4 not caused by any failure to obey a court order; Samsung would have reviewed them in any event.
5 Because "[r]eview and analysis of documents produced in discovery occurs in the normal course
6 of litigation," an award of fees for such work "would not serve the purpose behind the discovery
7 rules." *SOC-SMG, Inc. v. Christian & Timbers, LLC*, No. 3:08-CV-00392-ECR-VPC, 2010 U.S.
8 Dist. LEXIS 50062, at *12-13 (D. Nev. May 20, 2010) (denying fees for work related to
9 addressing "belated production of highly-relevant documents").

10 Moreover, the transcripts that Apple produced included depositions from the related ITC
11 action in which Samsung was a party and was represented by the same outside counsel.
12 Independent of the limits on recovery under Rule 37, Samsung has absolutely no basis to charge
13 Apple for its counsel's review of transcripts for depositions that they took in the related action.

14 Samsung makes clear that it is seeking fees for its counsel's review of documents,
15 including review of "283 partial and complete employee deposition transcripts, which amounted
16 to over 34,000 pages of deposition testimony," produced after the Court granted Samsung's
17 motion to enforce in April 2012. (Hutnyan Decl. ¶¶ 4-5, 6(b).) But although Samsung bears the
18 burden of justifying and documenting its requested fees, it never identifies how much time it
19 spent reviewing the transcripts. Given that Samsung's sanctions motion and its fee request touted
20 the large number of transcripts and transcript pages that were produced after the Court's April
21 2012 order, and given its inflated request for hours, the Court should assume that a large number
22 of Samsung's claimed hours are unrecoverable review of the transcripts.

23 **III. SAMSUNG FAILS TO JUSTIFY ITS CLAIMED RATES.**

24 An attorneys' fees request must be supported by "evidence in the record [] indicat[ing]
25 that the rates claimed were reasonable or that they were comparable with prevailing rates in the
26 community." *Toth*, 862 F.3d at 1386. Samsung seeks compensation at an hourly rate of \$821 for
27
28

1 partners and \$448 for associates.² Samsung contends that these rates are “comparable to the rates
2 charged by Apple’s outside counsel.” (*Id.* ¶ 42.) This is untrue; the partner rates of Samsung’s
3 counsel are 41% higher than the partner rates in Apple’s fees request. (Dkt. No. 906 ¶ 24 & Ex.
4 1.) Samsung’s associate rates are likewise significantly higher than those requested by Apple’s
5 counsel. (*Id.*) Under these circumstances, Samsung fails to show that its counsel’s rates are
6 reasonable.³

7 **IV. SAMSUNG’S FEES ARE PARTICULARLY UNREASONABLE IN LIGHT OF**
8 **THE PROVEN UNIMPORTANCE OF THE DEPOSITION TRANSCRIPTS AT**
9 **ISSUE.**

10 In approving a fee award, the Court expressly noted the absence of any evidence that
11 Samsung had been prejudiced (Dkt. No. 1213 at 10), even though Samsung had claimed that it
12 was deprived “of any ability to develop lines of deposition questioning based on admissions or
13 facts contained in the transcripts” that were the basis of the Court’s July 11 Order. (Dkt. No.
14 1088-2 at 9.) Samsung’s representations have since proven untrue, and the lack of prejudice has
15 been confirmed. During the five depositions that the Court allowed Samsung to take as a remedy
16 for the late-produced transcripts, Samsung asked no questions whatsoever based on the transcripts
17 and marked none as exhibits. (Bartlett Decl. Exs. 1 - 5.)

18 An award to Samsung of over \$250,000 in attorneys’ fees would be particularly
19 unreasonable in these circumstances.
20
21
22
23
24

25 ² Confusingly, the Hutnyan Declaration references the “median” rates of Samsung’s
26 counsel (Hutnyan Decl. ¶ 43), but its attached chart describes those same rates as the “average”
27 (*id.* Ex. 1).

28 ³ Samsung also references a survey (Hutnyan Decl. ¶ 41) but fails to provide any data
from that survey.

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

Dated: July 25, 2012

MORRISON & FOERSTER LLP

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

Attorneys for Plaintiff
APPLE INC.