

**D'AMATO DECLARATION EX. J  
FILED UNDER SEAL**

1 UNITED STATES DISTRICT COURT  
2 NORTHERN DISTRICT OF CALIFORNIA  
3 SAN JOSE DIVISION  
4

5 APPLE INC., a California )  
6 Corporation, )  
7 Plaintiff, )  
8 vs. ) No. 11-CV-01846-LHK  
9 SAMSUNG ELECTRONICS CO., LTD. , )  
10 a Korean business entity; )  
11 SAMSUNG ELECTRONICS AMERICA, )  
12 INC., a New York corporation; )  
13 SAMSUNG TELECOMMUNICATIONS )  
14 AMERICA, LLC, a Delaware )  
15 limited liability company, )  
16 Defendants, )  
17 )  
18 )  
19 )  
20 )  
21 )  
22 )  
23 )  
24 )  
25 )

26 BE IT REMEMBERED, that on Wednesday,  
27 February 22, 2012, commencing at the hour of 9:12  
28 a.m. thereof, at the offices of Morrison & Foerster,  
29 755 Page Mill Road, Palo Alto, California, before  
30 me, Judie A. Nicholas, a Certified Shorthand  
31 Reporter of the State of California, there  
32 personally appeared.

33 TIMOTHY BENNER,  
34 called as a witness by the Plaintiff, who, being by  
35 me first duly sworn, was thereupon examined and  
36 testified as hereinafter set forth.

Attorneys' Eyes Only

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1 firm represents Apple, Inc. 09:12  
2 MS. CARUSO: Margret Caruso of Quinn 09:12  
3 Emanuel Urquhart & Sullivan. With me is Michelle 09:12  
4 Yang from Samsung. 09:12  
5 THE VIDEOGRAPHER: Thank you. 09:12  
6 Would the reporter please swear in the 09:12  
7 witness. 09:12  
8 TIMOTHY BENNER, 09:12  
9 being first duly sworn, 09:12  
10 was deposed and testified as follows: 09:12  
11 THE VIDEOGRAPHER: Thank you. 09:12  
12 EXAMINATION BY MR. ROBINSON 09:12  
13 MR. ROBINSON: Good morning, Mr. Benner. 09:12  
14 Thank you for being here. 09:12  
15 Could you please state your full name for 09:12  
16 the record. 09:12  
17 A. Timothy John Benner. 09:12  
18 Q. Have you ever been deposed before? 09:12  
19 A. I have not. 09:12  
20 Q. So the procedures are -- it's fairly 09:12  
21 simple, but I just want to review a few of the 09:12  
22 rules. 09:12  
23 The court reporter here is taking down 09:12  
24 everything that we say. I might speak a little 09:12  
25 quickly, in which case she might grumble a little 09:13

1 THE WITNESS: The question I think you're 12:17  
2 asking is, is there more than one. There's one 12:17  
3 survey. 12:17  
4 Q. There's one tracking survey? 12:17  
5 A. That I conduct. 12:17  
6 Q. Thank you. 12:17  
7 And how does that tracking survey work? 12:17  
8 You said it tracks across time; is that right? 12:17  
9 A. Yes. 12:17  
10 Q. Is it the same study that is administered 12:17  
11 at different points in time? 12:17  
12 MS. CARUSO: Objection: Vague. 12:17  
13 THE WITNESS: The survey itself is 12:17  
14 modular. There are elements that are consistent 12:18  
15 across time and then there are pieces that come and 12:18  
16 go as we look at different communication and the 12:18  
17 effectiveness of that communication. 12:18  
18 It's primarily brand focused, but it's 12:18  
19 also looking at monitoring communications, so our 12:18  
20 different ads and some competitive ads -- 12:18  
21 MR. CARUSO: Mr. Robinson, before you go 12:18  
22 on to another topic, I've had this Pavlovian 12:18  
23 response since your client announced lunch. 12:18  
24 MR. ROBINSON: Oh, I'm so sorry, I 12:18  
25 completely forgot. 12:18

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1           Let's take a break for lunch.           12:18

2           THE VIDEOGRAPHER: The time is 12:18 p.m.,   12:18

3           and we're off record.           12:18

4                       (A lunch break was taken.)           01:23

5                       AFTERNOON SESSION           01:23

6           THE VIDEOGRAPHER: The time is 1:24 p.m.   01:23

7           and we are back on the record.           01:23

8                       (Exhibits 1603 marked           01:23

9                       for identification.)           01:23

10           FURTHER EXAMINATION BY MR. ROBINSON           01:23

11           MR. ROBINSON: Q. Mr. Benner, we're back.   01:23

12           Before the break we were talking about the   01:23

13           tracking studies.           01:24

14           I'm going to hand what you has been           01:24

15           premarked as Exhibit 1603. This is entitled   01:24

16           Samsung Q1 '11 Deep Dive, Continuous Tracking, with   01:24

17           Bates stamp SAMNDCA00352115 through 352182.   01:24

18           Do you recognize Exhibit 1603?           01:24

19           A. Yes.           01:24

20           Q. Is that your name on the bottom of the   01:24

21           first page where it says "Owner"?           01:24

22           A. Yes.           01:24

23           Q. What does that mean?           01:24

24           A. That means I am the designated "Owner" of   01:24

25           this document in terms of whose responsibility it   01:25

1 is to, you know, produce it. 01:25

2 Q. Is this one of the tracking studies that 01:25

3 you referred to earlier in your testimony today? 01:25

4 A. Yes, it is. 01:25

5 Q. Is Exhibit 1603 a true and correct copy of 01:25

6 an STA tracking study? 01:25

7 A. To the best of my knowledge, yes. 01:25

8 Q. Does STA prepare these tracking studies? 01:25

9 MS. CARUSO: Objection: Vague. 01:25

10 THE WITNESS: These studies are prepared 01:25

11 by an outside vendor under my supervision. 01:25

12 MR. ROBINSON: Q. What is the outside 01:25

13 vendor? 01:25

14 A. The outside vendor's name is Hall & 01:25

15 Partners. 01:25

16 Q. How often does STA receive a deliverable 01:25

17 from Hall & Partners in the form of one of these 01:25

18 tracking surveys? 01:25

19 MS. CARUSO: Objection: Vague. 01:25

20 THE WITNESS: These tracking surveys are 01:25

21 every quarter. 01:25

22 MR. ROBINSON: Q. And by "these," are you 01:25

23 referring to the Deep Dive? 01:25

24 A. I am referring to the Deep Dive document, 01:26

25 yes. 01:26

1 Q. Are there other tracking studies provided 01:26  
2 by Hall & Partners -- sorry. Strike that. 01:26  
3 Are there other tracking surveys other 01:26  
4 than the Deep Dive Surveys that STA receives? 01:26  
5 MS. CARUSO: Objection: Vague. 01:26  
6 THE WITNESS: Technically this is not a 01:26  
7 survey, this is a report. There is one survey that 01:26  
8 is done continuously and there are multiple 01:26  
9 reports. 01:26  
10 MR. ROBINSON: Q. Thank you for that 01:26  
11 clarification. 01:26  
12 Is the Deep Dive Report the -- are there 01:26  
13 other reports besides the Deep Dive Report that STA 01:26  
14 receives in connection with this continuous 01:26  
15 tracking? 01:26  
16 A. Yes. 01:26  
17 Q. What are those? 01:26  
18 A. We get weekly reports that are Topline KPI 01:26  
19 studies -- not studies, but reports/monitoring, and 01:26  
20 anything else on a request basis that we would like 01:26  
21 from the data within the reports, or within the 01:27  
22 survey. 01:27  
23 Q. You referred to Topline KPA. What does 01:27  
24 KPA stand for? 01:27  
25 A. KPI. 01:27

1 Q. Sorry, KPI? 01:27

2 A. Key Performance Index. 01:27

3 Q. And you mentioned that you receive weekly 01:27

4 reports. 01:27

5 Do the Deep Dive reports contain the 01:27

6 information that you would receive in the weekly 01:27

7 reports? 01:27

8 A. Yes. They are basically -- the data 01:27

9 that's given on a weekly basis is 01:27

10 contained/summarized in these reports. 01:27

11 Q. You also mentioned that you receive other 01:27

12 reports on request. Can you name a few of those, 01:27

13 an example? 01:27

14 A. Typically they're not reports, they're 01:27

15 just looking at a particular data cut, usually in 01:27

16 response to a question from out of this document. 01:27

17 Q. Can you think -- are they named anything 01:27

18 in particular? 01:28

19 A. No. They're usually just data. 01:28

20 Q. Are they large documents, or like one, 01:28

21 two-page things? 01:28

22 A. Sometimes it's two sentences. 01:28

23 Q. How much does STA pay to receive the Deep 01:28

24 Dive reports from Hall & Partners? 01:28

25 A. The cost has changed over time. 01:28



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1 THE WITNESS: It's just a highlight of 01:43  
2 those particular elements or those personalities to 01:43  
3 draw attention to it. 01:43  
4 MR. ROBINSON: Q. Do you see where it 01:43  
5 says "Significant drivers of MPSA for Samsung"? 01:43  
6 A. Yes. 01:43  
7 Q. What does MPSA refer to? 01:44  
8 A. It's an acronym which we use for one of 01:44  
9 KP -- key performance indexes which stands for most 01:44  
10 preferred single answer. 01:44  
11 Q. And what does that mean, in just sort of 01:44  
12 survey terms? 01:44  
13 A. In English, it means the answer to the 01:44  
14 question. The question is actually in the text at 01:44  
15 the bottom of the page. 01:44  
16 Q. I see? 01:44  
17 A. Now we'd like you to -- it's not, 01:44  
18 actually. 01:44  
19 I'll find it. It's here. It's the answer 01:44  
20 to a specific question. 01:44  
21 "Among all of the mobile phone brands that 01:44  
22 you aware of, which brand do you prefer the most." 01:44  
23 Q. What's the Bates number of the page you 01:44  
24 just read from? 01:44  
25 A. It is page number 7, SAMNDCA00352121. 01:44

1 Q. Thank you. 01:45

2 Why does STA consider the items shown in 01:45

3 the blue box on page 12 that we were looking at 01:45

4 previously to be significant drivers of MPSA for 01:45

5 Samsung? 01:45

6 A. That's slightly misleading in what it 01:45

7 says.) They're significantly associated with the 01:45

8 personality characteristics that are most 01:45

9 correlated to most preferred single answer. 01:45

10 Does that make sense? 01:45

11 Q. Could you maybe say that in more regular 01:45

12 terms? 01:45

13 MS. CARUSO: Objection. 01:45

14 THE WITNESS: I don't know if I can. It's 01:45

15 a lot of statistical analysis. 01:45

16 MR. ROBINSON: Q. Sure. 01:45

17 A. That basically says that these personality 01:45

18 indices co-vary with MPSA. There's no causal 01:46

19 relationship, it just means they're correlated, 01:46

20 they seem to move together. 01:46

21 Q. I see. 01:46

22 Could I have you turn please to page 26 of 01:46

23 this report Bates SAMNDCA00352140. 01:46

24 A. 352140. 01:46

25 Q. 352140? 01:46

1 A. Okay. 01:46

2 Q. Down at the bottom it looks like the 01:47

3 question being asked was, "Have you seen this 01:47

4 advertising on television in the past 7 to 5 days," 01:47

5 do you see that? 01:47

6 A. Yes. 01:47

7 Q. Is that the question? 01:47

8 A. It's actually 5 to 7 days. 01:47

9 Q. Oh, I'm sorry, 5 to 7 days. 01:47

10 And then above the charts we see a legend 01:47

11 with a blue box and an A next to it, and it 01:47

12 attributed back to Samsung/Galaxy/Tab; below that 01:47

13 the letter B with a green box saying attributed 01:47

14 back to Apple/iPad/iPhone, and underneath there are 01:47

15 various charts. 01:47

16 Focusing on the chart above the 01:47

17 Samsung/Galaxy/Tab, what is being depicted in that 01:47

18 chart? 01:47

19 A. This is the -- during the period of the 01:47

20 survey, looking AT consumers who recognized still 01:47

21 photos of the particular Samsung Galaxy Tab ad 01:48

22 which is in the bottom here, so they're presented a 01:48

23 photo which shows basically stills of the different 01:48

24 ads and they're asked if they recognize it or not. 01:48

25 If they say yes, they're asked, "Do you 01:48

1 remember what brand this was for," and then it says 01:48  
2 that 18 percent said it was for either Samsung, 01:48  
3 Galaxy or Tab and 46 percent said Apple, iPad or 01:48  
4 iPhone. 01:48

5 Q. And that's a significant difference at the 01:48  
6 95 percent confidence level, right? 01:48

7 A. Correct. 01:48

8 Q. What this is saying is essentially nearly 01:48  
9 half of those who saw the still photo of the 01:48  
10 Samsung Galaxy Tab thought they were actually 01:48  
11 looking at an Apple advertisement? 01:48

12 A. No, that's not correct. They were not 01:48  
13 looking at a photo of the Galaxy Tab, they were 01:48  
14 looking at a photo which showed six different 01:48  
15 scenes of the communication, the advertisement for 01:49  
16 the Galaxy Tab. Not all of them had product in the 01:49  
17 different images. 01:49

18 Q. Those who saw -- is it at photo array what 01:49  
19 they see? What do they see? 01:49

20 A. They see six different images of different 01:49  
21 scenes within the advertisement. 01:49

22 Q. And, looking at that display, then nearly 01:49  
23 half of those responded to this survey question 01:49  
24 saying that they thought what they were seeing was 01:49  
25 an Apple advertisement; is that right? 01:49

1 A. What they were looking at -- they were not 01:49  
2 looking at the display at this point. They're 01:49  
3 relying on the recall of the advertisement and 01:49  
4 saying they thought that the advertisement in 01:49  
5 question was either an Apple iPad or iPhone 01:49  
6 advertisement. 01:49

7 Q. So, yes, in response to this prompt then, 01:49  
8 looking at -- having looked at the display of the 01:50  
9 Samsung Galaxy Tab still photo advertisement 01:50  
10 images, nearly half of the respondents said they 01:50  
11 thought they had seen an Apple advertisement? 01:50

12 A. What they thought, they said, was it was 01:50  
13 an advertisement for the Apple brand. 01:50

14 In this case, this was done at a time when 01:50  
15 the Galaxy Tab had just been introduced and the 01:50  
16 iPad had been in the market for some time, and this 01:50  
17 is -- the sample that we're looking at here is a 01:50  
18 smaller sample, so there is more variation in 01:50  
19 there. 01:50

20 Q. What was the sample size? 01:50

21 A. For the people who recognized the 01:50  
22 Galaxy -- the Samsung Tab ad, 448. 01:50

23 Q. But this result shows, does it not, that 01:51  
24 the misattribution back to Apple was significant at 01:51  
25 the 95 percent confidence level, right? 01:51

1 A. Yes. 01:51

2 Q. Did STA consider it a problem that the 01:51

3 Galaxy Tab advertisement was being misattributed to 01:51

4 Apple? 01:51

5 A. The -- as the statement here says, the 01:51

6 linkage to Samsung has improved, but the Galaxy Tab 01:51

7 execution -- misattribution was declined -- I'm 01:51

8 sorry, this is looking at Galaxy 2. Strike -- I 01:51

9 can't say strike that. 01:51

10 But, yes, we considered it a problem 01:51

11 because this communication should have been for the 01:51

12 Galaxy Tab. However, the execution was not being 01:51

13 attributed correctly to Samsung. 01:51

14 Q. What did STA do, if anything, about the 01:51

15 misattribution that was occurring between the 01:52

16 Galaxy Tab and the Apple iPad? 01:52

17 MS. CARUSO: Objection: Beyond the scope; 01:52

18 lacks foundation. 01:52

19 THE WITNESS: In this case, this was -- 01:52

20 Samsung was breaking into the tablet market which 01:52

21 was firmly established for a period of time by 01:52

22 Apple being the only product available. I can't 01:52

23 remember exactly how many months that, basically, 01:52

24 stronghold held. 01:52

25 For the Galaxy, the first Galaxy Tab ad 01:52

1 there was a great deal of misattribution. For the 01:52  
2 second Galaxy Tab ad, that misattribution dropped 01:52  
3 as awareness of Samsung's Tabs grew, so looking 01:52  
4 back and improving the communication to make sure 01:52  
5 that it was distinctive from Apple and identifiable 01:52  
6 as Samsung. 01:52

7 Q. Didn't the advertising change as well -- 01:52  
8 the style of the advertising change as between the 01:53  
9 Galaxy Tab and Galaxy Tab 2, right? 01:53

10 MS. CARUSO: Objection: Assumes facts not 01:53  
11 in evidence; vague. 01:53

12 THE WITNESS: Can you specify more exactly 01:53  
13 what you're asking? 01:53

14 MR. ROBINSON: Q. The misattribution that 01:53  
15 occurred between the Samsung Galaxy Tab 01:53  
16 advertisement and I guess misattributed to Apple, 01:53  
17 that was because the advertisements were confusing, 01:53  
18 they were similar, the Samsung advertisements and 01:53  
19 Apple advertisements? 01:53

20 MS. CARUSO: Objection: Calls for a legal 01:53  
21 conclusion; mischaracterizes the record; assumes 01:53  
22 facts not in evidence; vague. 01:53

23 THE WITNESS: I take issue with your 01:53  
24 statement of it's confusing, the way it was said 01:53  
25 similarly confusing. The issue wasn't that it was 01:53

1 confusing, the issue was that the iPad had been 01:53  
2 very firmly established in the marketplace, and so 01:53  
3 when people saw an ad on TV that had a large 01:53  
4 tablet-like display, the immediate reaction is it 01:54  
5 must be an iPad. 01:54

6 This is at a time when -- breaking into 01:54  
7 the market, so it's actually not unexpected to see 01:54  
8 that, because very few people that Samsung was 01:54  
9 making these products, and growing that awareness, 01:54  
10 changing from one to the next, is the natural 01:54  
11 progression of trying to break in and make people 01:54  
12 become more aware of Samsung as a tablet 01:54  
13 manufacturer. 01:54

14 Q. Does STA disagree that the misattribution 01:54  
15 occurred because the Galaxy Tab looked similar to 01:54  
16 the Apple iPad? 01:54

17 MS. CARUSO: Objection: Beyond the scope; 01:54  
18 lacks foundation. 01:54

19 THE WITNESS: I'm sorry, could you say it 01:54  
20 again? 01:54

21 MR. ROBINSON: Q. Could we have that 01:54  
22 question read back, please. 01:54

23 THE REPORTER: Question: "Does STA 01:54  
24 disagree that the misattribution occurred because 01:54  
25 the Galaxy Tab looked similar to the Apple iPad?" 01:54



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1 MS. CARUSO: Objection: Beyond the scope; 01:55  
2 lacks foundation; mischaracterizes the record. 01:55  
3 THE WITNESS: Could you rephrase the 01:55  
4 question. I'm confused by the "Does STA disagree." 01:55  
5 The negative phrasing of the question is throwing 01:55  
6 me off. I'm not sure what you're asking. 01:55  
7 MR. ROBINSON: Q. Do you agree that the 01:55  
8 Galaxy Tab looks similar to the Apple iPad? 01:55  
9 A. In this case, this Galaxy Tab does not. 01:55  
10 Q. Why is that? 01:55  
11 A. It's half the size. 01:55  
12 (Exhibit No. 1604-1613 01:55  
13 marked for identification.) 01:55  
14 Q. I think -- I want to show you a bunch of 01:55  
15 other documents. I'm not going to ask you detailed 01:55  
16 questions about them. 01:55  
17 What I'm going to ask is do you recognize 01:55  
18 this documents, do they have your name on them, and 01:55  
19 are they true and correct copies of the documents 01:56  
20 that they are. They have been premarked as 01:56  
21 Exhibits 1604 through 1613, and I'll place this 01:56  
22 enormous stack in front of you, and -- counsel, 01:56  
23 here's your copy. And I think we can probably take 01:56  
24 this in two phases if we wanted to go through it 01:56  
25 more quickly. 01:56

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1 MS. CARUSO: Objection: Lacks foundation; 02:34  
2 calls for speculation. 02:34

3 THE WITNESS: It would be the strategy 02:34  
4 group. 02:34

5 MR. ROBINSON: Q. Who is involved with 02:34  
6 the strategy group? 02:34

7 A. As mentioned earlier, Justin Denison and 02:34  
8 his team. 02:34

9 Q. Thank you. 02:34

10 I have no further questions at this time, 02:34  
11 subject to the same reservations and the same 02:34  
12 objection by counsel -- 02:34

13 MS. CARUSO: Yes. This time we're getting 02:34  
14 out of here. 02:34

15 THE VIDEOGRAPHER: This marks the end of 02:34  
16 Disk Number 2 of 2, and concludes today's 02:34  
17 deposition of Timothy Benner. The time is 02:34  
18 2:35 p.m., and we are off the record. 02:34

19 (The deposition adjourned  
20 at 2:35 p.m.)

21 --oOo--

22

23 Signed under penalty of perjury:

24

25

\_\_\_\_\_  
Timothy Benner