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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

APPLE INC., a California corporation,

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD., a Korean business entity; SAMSUNG ELECTRONICS AMERICA, INC., a New York corporation; SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, a Delaware limited liability company,

Defendants.

Case No. 11-cv-01846-LHK

APPLE'S RESPONSE TO SAMSUNG'S OBJECTIONS TO APPLE'S OPENING STATEMENT DEMONSTRATIVE EXHIBITS & CHRIS STRINGER EXHIBITS

Trial: **July 30, 2012**
Time: **9:00 a.m.**
Place: **Courtroom 8, 4th Floor**
JUDGE: **HON. LUCY H. KOH**

Apple's opening demonstratives accurately represent the evidence that Apple will introduce at trial. Apple responds to the specific objections to its demonstratives that Samsung raised during the parties' July 28, 2012 meet and confer as follows:

Images of Steve Jobs appearing in Slide Nos. 6, 7, 12, 16, and 29. The images in slides 6, 7 and 12 are from a joint exhibit – 1091 (the MacWorld 2007 video), which Samsung itself relies on in its opening demonstratives (at Samsung slide no. 148). Samsung cannot complain about Apple's use of the same video. The images from JX 1091 do not violate the Court's ruling on Samsung's MIL No. 1, as it is "specifically relevant to the IP rights at issue in the case." (Dkt. No. 1267 at ¶ 12.) The slides depict the public introduction of the iPhone on January 7, 2007, which launched the fame that the iPhone trade dress has acquired. Because they demonstrate Apple's notice of the 200+ patents covering the iPhone -- including the asserted patents, they thus are relevant to willfulness.

Slide 16 is an exhibition by the Patent and Trademark Office highlighting patents listing Steve Jobs as a co-inventor. Among the highlighted patents at the PTO exhibit are at least two patents at issue in this litigation – the D'677 and D'889. The Patent Office exhibit demonstrates praise by others to rebut non-obviousness. For these reasons, and because the distinctive shape and look of the iPhone and its asserted trade dress also were on public display in the shape of the display cases themselves, the exhibit also is specifically relevant to the IP rights at issue and thus consistent with the Court's ruling on MIL No. 1. Finally, Slide 29 is a screenshot from the announcement of the iPad in July 2010. It is relevant to the introduction of the iPad and its acquisition of fame and secondary meaning. It therefore is consistent with the Court's ruling on Samsung's MIL No. 1 for the same reasons.

Objections to newspaper articles and blogs. In every instance, the newspaper articles and blogs quoted in Apple's opening statement are not hearsay, are subject to a hearsay exception, or properly relied upon by Apple's experts in forming their opinions. Experts may rely on all evidence, including potentially inadmissible hearsay evidence, when forming their opinions. Fed. R. Evid. 703. The articles are from reliable major national news sources and prominent online blogs, reporting on Apple and Samsung products.

The newspaper articles and blogs may be offered to show Samsung's conduct, knowledge, or beliefs under Rule 801(c)(2) of the Federal Rules of Civil Procedure. For example, they confirm Samsung's willful infringement of Apple's rights by showing that Samsung knew or should have known that its products were viewed as copies of Apple's products in the marketplace. Evidence of copying also is may be used to prove non-obviousness.

Purportedly improper translations on slides 18, 19, and 67. Samsung's translation objections are not well taken. Samsung never provided its objections to Apple, as the Court instructed, for PX 34. Samsung also has never discussed the exhibit during the parties' meet and confer sessions regarding trial exhibit translations.

As for PX 44 (at slide 67), Samsung disputes whether 확대/축소 means "expansion/reduction" or the more colloquial (and accurate) "zoom-in/zoom out." Samsung prefers the former for one simple reason: Apple's patents use the word "zoom." Samsung ignores that its own manuals translate the term *exactly* as Apple does. *Compare* http://www.samsung.com/sec/support/model/SHW-M110SHKSC-downloads (Galaxy S Korean language manual) at 43 with http://downloadcenter.samsung.com/content/UM/201102/20110224040812289/ ATT_SGH-i897_Captivate_English_User_Manual.pdf (Captivate English manual at 129). Virtually all Samsung manuals use the term "zoom in/out" for this Korean phrase. *See, e.g.*, http://support.t-mobile.com/docs/DOC-1742 (Vibrant manual) at 33.

Objections to slides 18 and 19 as purportedly misleading and argumentative. Slides 18 and 19 are accurate excerpts from a Samsung presentation presented under the heading "Samsung's Response to the iPhone." They are not argumentative and contain only verbatim excerpts from PX 34. For example, "HW portion: Easily copied" is a direct and unedited bullet from the presentation. The same is true for "iPhone Effect Analysis," "Easy and intuitive UI that covers all user classes, including male, female, old and young," and "Beautiful design." Only one quote is truncated, but that was done to omit extraneous text ("Excluding those for use in completely low-priced smartphone markets and business targets (business use e-mail solution installed))" deleted, but "we will have to compete with the iPhone in whatever way" retained). The original document consists of short statements that Apple faithfully reproduces.

Reference to the Galaxy S i9000 on slides 26 and 49. This Court has already denied Samsung's motion to exclude evidence of the Galaxy S i9000. (Dkt. No. 1267 at 2 ("Samsung's motion to exclude evidence related to the Galaxy S (i9000) . . . is denied.").) Samsung is free to argue at trial that the i9000 does not infringe Apple's intellectual property rights, but it is in the case and a proper subject of Apple's opening statement.

References to PX 44 on slides 33, 34, 35, 36, 37 and 67. The Court may recall PX 44 from the July 18, 2012 hearing. The Court agreed that this 132-page presentation, which has 126 side-by-side images suggesting ways in which the Galaxy S should be altered to match the iPhone (and confirming the extent of Samsung's copying), should not be sealed. Specific pages (*e.g.*, page 58, which discusses double-tapping to zoom in and out) relate specifically to the intellectual property in this case. *See also* page 126 (discussing "strong impression that iPhone's icon concept was copied"). Generally, the presentation is strong evidence that Samsung's infringement of the '381, '915, and '163 patents was no accident. PX 44 and the slides that depict pages from this presentation do not violate the Court's ruling on Samsung's MIL #1, as they do not relate to the "Apple Brand" or constitute evidence confirming that "Samsung shared confidential business information" of Apple's with its smartphone division. (Dkt. No. 1267 at 3.)

Justin Denison's testimony on slides 41 and 42. Mr. Denison was Samsung's corporate designee on the topic of Samsung's "imitation, copying, or emulation of any Apple product" during the preliminary injunction phase. Thus, the quoted testimony was well within the appropriate scope. Mr. Denison testified that he spent a full "10 to 12 hours" conferring with 17 individuals—including 13 hardware and software designers—to prepare for his testimony. These included the lead designer on the Galaxy S product and no fewer than five programmers for the "bounce" function common to the accused products. Mr. Denison also testified that he spent another "two to three full days in discussions with the Quinn Emanuel attorneys." (Bartlett Decl. Ex. 1 at 33:13-34:15.) Mr. Denison ultimately testified, under oath, that "in all cases I specifically asked [these individuals] if they had considered or studied or drawn direct comparisons or what have you versus the relevant Apple products, whether it be tablet or smart phone in each case, and in each case the designers said that they had not." (*Id*. at 135:10-17.) In

view of Mr. Denison's extensive preparation, Samsung's claim that he "lacked foundation" is simply false. Samsung's remaining objection, that the excerpted testimony is misleading, is equally meritless. The testimony was a direct response to a specific question and properly within the scope of his designation and investigation.

Images of the Olympic torch on slides 55-62. Having the same photo on both phones ensures that the focus remains on the functionality and not on the content of the photo. By contrast, having different photos would be distracting to and might mislead the jury. Because Samsung deliberately copied the '381 patent's rubberbanding feature, any similarity in these videos -- far from being implied -- is intentional on Samsung's part.

Purportedly manipulated images of the phones at issue on slides 26, 59-62, 69-72, and 75-78. The Court previously denied Samsung's motion in limine No. 7, which sought to exclude altered, resized photographs. (Dkt. No. 1267.) Samsung's continued objections to photographs are unnecessary because the jury will not have to rely on photographs. It will have the physical products to consider and compare during trial and deliberations. (*See* July 18, 2012 Hearing Tr. at 127:23-128:1 ("I'm hoping that if you're actually going to introduce actual products that this shouldn't really be an issue, right? Just do the actual – the real deal.").) Finally, while Apple's photographs accurately depict the products in this case, size does not matter for the purposes of Apple's design patent infringement claims. The relative size of the accused Samsung products as compared to Apple products does not affect the analysis of design patent infringement. *See Sun Hill Indus. v. Easter Unlimited*, 48 F.3d 1193, 1196-97 (Fed. Cir. 1995).

Purported misstatement of law on slide 85. 35 U.S.C. §§ 284, 289 and 15 U.S.C. § 1117(a) permit recovery of each of these elements of damages. As Apple's expert Terry Musika will testify, Apple seeks a recovery of lost profits for some sales, Samsung's profits for others (that violate design claims), and a reasonable royalty for a small number of sales that infringe only the utility patents. Apple does not seek all three remedies with respect to the same sale. The slide therefore accurately reflects the evidence that the jury will hear and the damages law for patents and trade dress.

The testimony of Dr. Ahn on slides 92 and 98. Samsung objects to the testimony of Dr.

Seung-Ho Ahn (slides 92 and 98) as out of context and misleading. As an initial matter, this testimony is taken from designations to which Samsung did not object. In any event, there is nothing misleading about the testimony, as both the questions and the answers make explicitly clear that the witness is solely speaking as to his own personal knowledge and actions. Moreover, Dr. Ahn is a high-ranking executive at Samsung—at his deposition, he testified that he is the head of the Samsung IP [Intellectual Property] Center, and that the IP Center has responsibility for a range of IP-related matter, including licensing. He testified:

Q: Mr.Ahn, are you the highest ranking licensing executive at Samsung?

A:. Yes.

(Bartlett Decl. Ex. 2 at 23:25-26:2.)

The cited testimony is a fair representation of Dr. Ahn's testimony, and, to the extent Samsung contends otherwise, it may counter-designate other testimony or call Dr. Ahn live at trial.

Slides 99-102. Contrary to Samsung's objection, there is nothing in slides 99-102 to suggest that Samsung is accusing third party applications of infringement. Rather, these slides simply show exemplary apps in Apple's App Store. As the slides that immediately follow make clear (slides 103-107), Apple is using this series of slides to illustrate the distinction between "apps" and the claimed "modes" of the '460 and '893 patents.

Video on slide 106. Samsung identifies no basis for its objection to slide 106. In any event, this animation is a demonstrative that fairly represents the operation of the accused Apple products.

* * * * *

Samsung's non-objection to Christopher Stringer exhibits and demonstratives. When providing its opening slides, Apple also disclosed 27 exhibits and 6 demonstratives for its first witness, Chris Stringer. After the parties met and conferred, Samsung sent an e-mail confirming its objections -- but raised none as to Mr. Stringer's exhibits. Any such objections are therefore waived under the Court's schedule.

Regardless, and contrary to Samsung's prior objections, PX1-4, 162 and 164 are not

"improper compilations" because of Samsung's alleged lack of access to the underlying information. Samsung cannot dispute that it had multiple opportunities to (and did) inspect all of the devices and CAD files in these compilations. While Samsung also has suggested that PX3-4 are somehow "misleading" and "prejudicial," Samsung identified no basis for its position during the parties' meet and confer. Finally, PX157, an industry award, is not hearsay because it is a matter of public record reflecting recognition for Apple's designs. It also cannot violate the Court's ruling on MIL 1 because it is neither related to the "Apple's Brand" nor evidence confirming Samsung's leakage of information to its smartphone division.

Dated: July 29, 2012

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