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11 Attorneys for Plaintiff and
 12 Counterclaim-Defendant APPLE INC

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

17 APPLE INC., a California corporation,
 18 Plaintiff,
 19 v.
 20 SAMSUNG ELECTRONICS CO., LTD., a
 Korean business entity; SAMSUNG
 21 ELECTRONICS AMERICA, INC., a New York
 corporation; SAMSUNG
 22 TELECOMMUNICATIONS AMERICA, LLC, a
 Delaware limited liability company,
 23 Defendants.
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Case No. 11-cv-01846-LHK

**APPLE'S RESPONSE TO SAMSUNG'S
 MOTION FOR RECONSIDERATION
 REGARDING OPENING STATEMENT
 SLIDE 29**

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1 Samsung misleadingly characterizes its disclosure of the “home button” application
2 (DX628) as a rebuttal to an opinion Apple offered during expert discovery. Samsung has been on
3 notice of Apple’s theories regarding the distinctiveness of its trade dress since its Amended
4 Complaint, filed on June 16, 2011. (Dkt. No. 75 ¶¶ 36, 47.) Samsung could have and should
5 have disclosed the home button application in response to Apple’s Interrogatory No. 5, served on
6 August 3, 2011, which asked Samsung to identify all documents in support of its contention that
7 Apple’s trade dress lacked distinctiveness. Moreover, Samsung could have and should have
8 produced the home button application after receiving Apple’s response to Samsung’s
9 Interrogatory No 69, timely served on March 10, 2012. Samsung’s explanation for its late
10 disclosure—that it only knew the home button application was relevant after seeing Russell
11 Winer’s expert report—fails. Dr. Winer’s report, dated March 22, 2012, did not disclose any new
12 theories to which the home button application is relevant. Instead, Dr. Winer discussed facts such
13 as the unique appearance of iPhone, iPad, and iPod touch, extensive advertising, and unsolicited
14 third-party publicity. Apple has consistently stated its theories of distinctiveness in its pleadings,
15 written discovery, and expert reports. Moreover, Samsung could have and should have, if this
16 had been truly new then, disclosed this theory in its responsive report. By slipping the home
17 button application into the deposition exhibits of Dr. Winer, Samsung attempted an end run
18 around the rules of discovery and this Court’s schedule. DX628 should be excluded from
19 evidence.

20 Dated: July 30, 2012

MORRISON & FOERSTER LLP

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

24 Attorneys for Plaintiff
25 APPLE INC.
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