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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,  
LLC, a Delaware limited liability company,

24 Defendants.  
25

CASE NO. 11-cv-01846-LHK

**SAMSUNG'S OPPOSITION TO APPLE'S  
MOTION TO AUGMENT THE RECORD**

Date: October 13, 2011

Time: 1:30 p.m.

Place: Courtroom 8, 4<sup>th</sup> Floor

Judge: Hon. Lucy H. Koh

1           On September 30, 2011, the Court issued an order stating that it would “not accept any  
2 further briefing from either party” on Apple’s motion for a preliminary injunction. (Dkt No. 276  
3 at 2.) Indeed, even though Apple improperly included non-rebuttal evidence and arguments in its  
4 reply brief, Samsung complied with the order, submitting a 3-page objection brief that did not  
5 submit any new evidence or arguments into the record. (Dkt No. 294.) Nevertheless, Apple  
6 seeks once again to supplement the record with even more late evidence. While Apple tries to  
7 excuse its lateness by the fact the Samsung supplemented its production after Apple’s reply, that  
8 does not allow Apple to have unlimited opportunities to reargue its case. Apple itself produced a  
9 number of highly relevant documents after its discovery deadline, and even after Samsung’s  
10 opposition brief deadline, including in response to Samsung’s Motion to Compel. (See Dkt No.  
11 233 (Order Granting-in-Part Samsung’s Motion to Compel).) As just one example, Apple’s reply  
12 brief relied on evidence that Apple withheld from Samsung for more than a month after Samsung  
13 filed its opposition brief. (See Dkt No. 294 at 3.)

14           Worse still, Apple seeks to augment the record with the very same type of documents that  
15 it admittedly did not provide to Samsung. Samsung timely produced tens of thousands of pages  
16 of documents in just a few short weeks in response to Apple’s more than 60 requests for  
17 production. These documents included over a thousand emails. Nevertheless, Apple  
18 complained that Samsung had not produced enough emails from its designers, so Samsung located  
19 and produced even more. In contrast, Apple failed to even *search* its designers’ emails during  
20 preliminary injunction discovery, claiming that the Court’s July 18, 2011 order (Dkt No. 115)  
21 allowed it to narrowly tailor its search efforts in this inappropriate way despite Samsung’s  
22 multiple requests for these documents. Apple’s motion is thus not only an open violation of the  
23 Court’s September 30 order, it directly contradicts Apple’s own conduct during preliminary  
24 injunction discovery.

25           In addition to presenting untimely evidence, Apple has also submitted another round of  
26 arguments in direct defiance of the Court’s September 30 order. The parties were expressly  
27 forbidden from doing this, and for this reason Samsung will not address the new evidence and  
28 arguments raised in Apple’s motion unless the Court grants it leave to file a sur-reply.

1           Therefore, to the extent the Court grants the relief that Apple requests, Samsung  
2 respectfully asks that the Court offer reciprocal relief to Samsung, allowing it to also augment the  
3 record with newly discovered evidence, including rebuttal evidence to Apple’s improperly  
4 submitted declarations in its reply brief, and to file a sur-reply.   Otherwise, Apple will have had  
5 three opportunities to add evidence into the record to support its motion for a preliminary  
6 injunction — two of which have come in just the last two weeks — with Samsung having had a  
7 single opportunity to offer its own evidence in its August 22 opposition papers.   That would be  
8 contrary to law.   Under this Circuit’s precedent, a non-movant has the right to respond to new  
9 evidence allowed into the record.   *See Provenz v. Miller*, 102 F.3d 1478, 1483 (9th Cir. 1996).

10           Samsung therefore respectfully requests that the Court deny Apple’s motion to augment  
11 the record and strike Apple’s new arguments.   In the alternative, if the Court grants Apple the  
12 relief it seeks, Samsung respectfully requests leave to also augment the record with new evidence  
13 and to file a sur-reply.

14  
15  
16 DATED: October 12, 2011

Respectfully submitted,  
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