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Attorneys for Plaintiff and
Counterclaim-Defendant Apple Inc.

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION**

APPLE INC., a California corporation,

Plaintiff,

vs.

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

Defendants.

Civil Action No. 11-CV-01846-LHK

**APPLE INC.'S UNOPPOSED MOTION
FOR LEAVE TO AMEND ITS ANSWER,
DEFENSES, AND COUNTERCLAIMS IN
REPLY TO SAMSUNG'S
COUNTERCLAIMS**

Hearing: TBD
Time: TBD

1 SAMSUNG ELECTRONICS CO., LTD., a
2 Korean business entity, SAMSUNG
3 ELECTRONICS AMERICA, INC., a New
4 York corporation, and SAMSUNG
5 TELECOMMUNICATIONS AMERICA,
6 LLC, a Delaware limited liability company, a
7 California corporation,

8 Counterclaim-Plaintiffs,

9 v.

10 APPLE INC., a California corporation,

11 Counterclaim-Defendant.

12 INTRODUCTION

13 On October 18, 2011, the Court entered an Order dismissing certain of Apple's
14 counterclaims with leave to amend "to cure the deficiencies indentified" in the Order.¹ Pursuant
15 to Federal Rule of Civil Procedure 15(a), Apple moves for leave to Amend its Answer, Defenses,
16 and Counterclaims in Reply to Samsung's Counterclaims (the "Amended Counterclaims in
17 Reply") to the extent allegations in the proposed Amended Counterclaims in Reply exceed the
18 scope of the leave to amend specified in the Court's October 18 Order.² The proposed Amended
19 Counterclaims in Reply include allegations that reflect recently-obtained information and events
20 that have occurred since Apple filed its initial counterclaims.
21

22 Apple is moving to amend well before the deadline of November 14, 2011, for
23 amendments to pleadings in the Case Management Order and before Samsung has even
24 answered. Samsung cannot show any prejudice from allegations that go beyond the scope of the
25

26 ¹ See Court's October 18, 2011 Order Granting in Part, and Denying in Part, Motion to Dismiss and Strike at 15.

27 ² A copy of Apple's proposed Amended Counterclaims in Reply is attached hereto as Exhibit 1. On October 27,
28 2011, Apple provided Samsung a copy of its proposed Amended Counterclaims in Reply and requested Samsung's
consent. Samsung indicated on October 28, 2011 that it has no objection.

1 leave the Court has specified, or any other basis to deny leave to amend under Rule 15(a). The
2 Court should grant Apple’s motion for leave to amend.

3 **PROCEDURAL BACKGROUND**

4 On April 15, 2011, Apple sued Samsung for patent, trademark, and trade dress
5 infringement. On April 27, Samsung separately brought suit against Apple for alleged
6 infringement of certain of its patents, including patents that Samsung has declared essential to
7 the Universal Mobil Telecommunications Standard (“UMTS”). On July 1, Samsung voluntarily
8 dismissed its complaint, recasting its patent claims as counterclaims to Apple’s complaint. On
9 July 21, Apple filed its Answer, Defenses, and Counterclaims in Reply to Samsung’s
10 Counterclaims (“Counterclaims in Reply”).
11

12 On August 15, 2011, Samsung moved to dismiss certain of Apple’s Counterclaims in
13 Reply. On October 14, 2011, Apple notified the Court and Samsung that Apple intended to file
14 amended counterclaims, and provided Samsung with a copy of the proposed amended pleading
15 on October 18. Later that day, the Court entered an Order granting in part, and denying in part,
16 Samsung’s motion to dismiss, and granting Apple leave to amend “to cure the deficiencies
17 indentified” in the Order.
18

19 **APPLE’S PROPOSED AMENDMENTS**

20 Apple’s proposed Amended Counterclaims in Reply not only address the Court’s October
21 18 Order, but also add new allegations based on recently-obtained information and events
22 occurring since Apple filed its initial counterclaims including, among other things: (1)
23 Samsung’s license agreement with Intel Corporation (“Intel”) and Qualcomm, Inc.
24 (“Qualcomm”) – suppliers to Apple of allegedly infringing chipsets that are incorporated into
25 Apple’s end products, which preclude Samsung from asserting the patents in suit against Apple.
26
27

1 (see e.g., Amended CR ¶¶ 20-22, 209, Exhibit 1). Apple received the Samsung-Intel agreement
2 on September 15, 2011, and the Samsung-Qualcomm agreement on October 18, 2011, after
3 Apple had been requesting the agreements for over four and five months respectively through
4 formal discovery and other approaches. (2) Samsung’s offer of a license to its declared-essential
5 patents on terms that are manifestly not fair, reasonable, and non-discriminatory (“FRAND”),
6 which did not occur until several months after Apple filed its current Counterclaims in Reply
7 (see e.g., Amended CR ¶77, Exhibit 1). (3) A recent decision of The District Court of The
8 Hague in the Netherlands holding that Samsung’s attempt to enjoin Apple’s sales of its products
9 based on declared essential patents was manifestly inappropriate given that Samsung had failed
10 to offer FRAND license terms to Apple (see Amended CR ¶¶ 49, 78, Exhibit 1). (4) The
11 European Commission’s recent decision to open an investigation into whether Samsung’s
12 conduct with respect to its patents declared essential to the UMTS telecommunications standard
13 violates the EU competition laws (see Amended CR ¶ 4, Exhibit 1).
14
15

16 Finally, Apple has added allegations to its “Authority to Practice and/or
17 Unenforceability” defense based largely on the recently-obtained information relating to
18 Samsung’s license agreements with chipset suppliers. (see Amended CR at pp. 25-26, Exhibit
19 1).
20

21 ARGUMENT

22 I. The Court Should Grant Apple Leave to Amend

23 A party may amend its pleadings with leave of the court, which should be freely given
24 when justice so requires. Fed. R. Civ. P. 15(a). Rule 15(a) reflects a “strong policy permitting
25 amendment.” *SAP Aktiengesellschaft v. I2 Tech., Inc.*, 250 F.R.D. 472, 473 (N.D. Cal 2008)
26 (granting motion to amend), (quoting *Bowles v. Reade*, 198 F.3d 752, 757 (9th Cir. 1999)). The
27

1 Ninth Circuit has held that courts should grant leave to amend with “extreme liberality.”
2 *Eminence Capital, LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). And the non-
3 movant bears the burden to prove any basis for denying the amendment. *Eminence Capital*, 316
4 F.3d at 1052.

5
6 In determining whether to grant leave to amend, “it is the consideration of prejudice to
7 the opposing party that carries the greatest weight,” *Eminence Capital*, 316 F.3d at 1052, and
8 “[t]he party opposing amendment bears the burden of showing prejudice.” *Am. Small Bus.*
9 *League v. Johnson*, 2010 WL 3490223, *5 (N.D. Cal. Sept. 3, 2010). Absent a showing of
10 prejudice, courts deny leave to amend only on a strong showing of one of the remaining factors
11 relevant under Rule 15(a) -- undue delay, bad faith or dilatory motive, or futility of amendment.
12 *See Eminence*, 316 F.3d at 1052 (“Absent prejudice, or a strong showing of any of the remaining
13 factors, there exists a *presumption* [to permit amendment] under Rule 15(a).”). “In assessing
14 these factors, all inferences should be made in favor of granting the motion.” *Am. Small Bus.*
15 *League*, 2010 WL 3490223 at 4.

16
17 Here, Apple’s proposed amendment will plainly not prejudice Samsung. The case is at
18 an early stage. Apple will be filing amended counterclaims to respond to the Court’s October 18
19 Order in any event, and Samsung has not answered. Only limited discovery has occurred, and
20 there have been no depositions. Under these circumstances, Samsung cannot show prejudice
21 from the additional proposed amendments beyond the leave to amend that the Court specified in
22 its Order. *See, e.g., SAP Aktiengesellschaft*, 250 F.R.D. at 472 (finding that plaintiff had
23 “argued persuasively that defendant will *not* be prejudiced, because plaintiff’s request comes at
24 an early stage in the proceedings before much, if any, discovery, specific to this case, has been
25 undertaken by defendant”).
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1 Apple is moving for leave to amend well before the November 14, 2011 deadline for
2 amendments to pleadings. *See* Minute Order and Case Management Order at p. 2; *see also Am.*
3 *Small Bus. League*, 2010 WL 3490223 at 5 (finding no undue delay when motion for leave to
4 amend was timely under the case management deadline). Moreover, Apple seeks leave to amend
5 beyond the scope specified in the Court’s Order for good reason – to reflect events subsequent to
6 its initial filing, and to incorporate recently-obtained information. Indeed, “[t]he underlying
7 purpose of Rule 15 is to facilitate decision on the merits rather than on the pleadings or
8 technicalities.” *ABM Industries, Inc. v. Zurich American Ins. Co.*, 237 F.R.D. 225, 227 (N.D.
9 Cal. 2006) (granting motion to amend allowing plaintiff to add new claim and “recently-
10 developed factual allegations”).
11

12
13 **CONCLUSION**

14 Apple respectfully requests that the Court grant Apple leave to file its First Amended
15 Counterclaims in Reply, in the form annexed to the accompanying Notice of Motion.
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1 Dated: October 28, 2011

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20 Counterclaim-Defendant Apple Inc.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the above and foregoing document has been served on October 28, 2011, to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Civil Local Rule 5.4. Any other counsel of record will be served by electronic mail, facsimile and/or overnight delivery.

/s/ Mark D. Selwyn
Mark D. Selwyn