HAROLD J. MCELHINNY (CA SBN 66781)
hmcelhinny@mofo.com
MICHAEL A. JACOBS (CA SBN 111664)
mjacobs@mofo.com
RICHARD S.J. HUNG (CA SBN 197425)
rhung@mofo.com
MORRISON & FOERSTER LLP
425 Market Street
San Francisco, California 94105-2482
Telephone: (415) 268-7000
Facsimile: (415) 268-7522

MARK D. SELWYN (SBN 244180)
mark.selwyn@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
950 Page Mill Road
Palo Alto, California 94304
Telephone: (650) 858-6000
Facsimile: (650) 858-6100

WILLIAM F. LEE (*pro hac vice*)
william.lee@wilmerhale.com
WILMER CUTLER PICKERING
HALE AND DORR LLP
60 State Street
Boston, MA 02109
Telephone: (617) 526-6000
Facsimile: (617) 526-5000

Attorneys for Plaintiff
APPLE INC.

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

APPLE INC., a California corporation,

Plaintiff,

v.

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

Defendants.

Case No. 11-cv-01846-LHK

APPLE'S REPLY IN SUPPORT OF ITS MOTION FOR A PRELIMINARY INJUNCTION

Date: October 13, 2011
Time: 1:30 p.m.
Place: Courtroom 8, 4th Floor
Judge: Hon. Lucy H. Koh

PUBLIC REDACTED VERSION

TABLE OF CONTENTS

Page

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

OTHER AUTHORITIES

LIST OF CITATION ABBREVIATIONS

"Balakrishnan Dec." refers to the Declaration of Ravin Balakrishnan, Ph.D. In Support of Apple's Motion for a Preliminary Injunction, filed July 1, 2011 (D.N. 91).

"Balakrishnan Reply Dec." refers to the Reply Declaration of Ravin Balakrishnan, Ph.D. In Support of Apple's Motion for a Preliminary Injunction, submitted with this Reply.

"Bartlett Dec." refers to the Declaration of Jason R. Bartlett In Support of Apple's Motion for a Preliminary Injunction, filed July 1, 2011 (D.N. 88).

"Blevins Dec." refers to the Reply Declaration of Tony Blevins In Support of Apple's Motion for a Preliminary Injunction, submitted with this Reply.

"Bressler Dec." refers to the Reply Declaration of Peter W. Bressler In Support of Apple's Motion for a Preliminary Injunction, submitted with this Reply.

"Ho Dec." refers to the Declaration of Francis Ho In Support of Apple's Motion for a Preliminary Injunction, submitted with this Reply.

"Lutton Dec." refers to the Declaration of Richard J. Lutton, Jr. In Support of Apple's Motion for a Preliminary Injunction, dated June 30, 2011 (filed under seal July 21, 2011 (D.N. 128); redacted public version filed July 21, 2011 (D.N. 129)).

"Lutton Reply Dec." refers to the Reply Declaration of Richard J. Lutton, Jr. In Support of Apple's Motion for a Preliminary Injunction, submitted with this Reply.

"Mot." refers to Apple's Motion for a Preliminary Injunction, filed July 1, 2011 (D.N. 86).

"Musika Dec." refers to the Reply Declaration of Terry Musika In Support of Apple's Motion for a Preliminary Injunction, submitted with this Reply.

"Opp." refers to Samsung's Opposition to Apple's Motion for a Preliminary Injunction, filed under seal October 13, 2011.

"Sherman Dec." refers to the Declaration of Itay Sherman in Support of Samsung's Opposition to Apple's Motion for a Preliminary Injunction, filed August 22, 2011 (D.N. 172).

"Sood Dec." refers to the Reply Declaration of Sanjay Sood In Support of Apple's Motion for a Preliminary Injunction, submitted with this Reply.

"Stringer Dec." refers to the Reply Declaration of Christopher Stringer In Support of Apple's Motion for a Preliminary Injunction, submitted with this Reply.

"Twiggs Dec." refers to the Declaration of Sissie Twiggs In Support of Apple's Motion for a Preliminary Injunction, filed July 1, 2011 (D.N. 89).

"Van Dam Dec." refers to the Declaration of Andries Van Dam, Ph.D., in Support of Samsung's Opposition to Apple's Motion for a Preliminary Injunction, filed August 22, 2011 (D.N. 168).

"Wagner Dec." refers to the Declaration of Michael J. Wagner in Support of Samsung's Opposition to Apple's Motion for a Preliminary Injunction, filed August 22, 2011 (D.N. 173).

"Woodring Dec." refers to the Declaration of Cooper C. Woodring In Support of Apple's Motion for a Preliminary Injunction, filed July 1, 2011 (D.N. 90).

"Woodring Reply Dec." refers to the Reply Declaration of Cooper C. Woodring In Support of Apple's Motion for a Preliminary Injunction, submitted with this Reply.

"Zhang Dec." refers to Declaration of Patrick Zhang in Support of Apple's Motion for a Preliminary Injunction, filed July 1, 2011 (D.N. 87).

When citing to documents filed with this Court, page numbers are taken from the ECF numbers at the top of the page.

INTRODUCTION

Samsung's opposition does nothing to undermine the factual and legal showing supporting Apple's motion. Samsung does not and cannot deny that Apple's iPhone and iPad products are among the most successful and revolutionary consumer products ever introduced, and that the news media, the trade press, and the public have praised these products and attributed their success to their innovative and iconic designs. Apple's obsession with creating an attractive minimalist style and bringing design cachet to mobile communications and mobile computing products is apparent not only to its customers, but to anyone who reads a newspaper or walks down a city street.[1]

No "ordinary observer" could help but be struck by the similarity between Samsung's accused products and the design patents at issue in this motion. As we have shown, an entire world of observers has commented on Samsung's slavish copying and the resulting similarity of Samsung's products with Apple's designs. Samsung's attempts to deconstruct the infringement analysis flies in the face of Federal Circuit authority.

Samsung's attempt to argue non-infringement of the '381 utility patent is similarly weak. Any person reading the '381 patent would understand that movements of a finger on a touch screen in a "first direction" need not be made with a precision that no human digit could achieve, and that the area beyond the edge of an electronic document can be "displayed" as a solid black color. This Court must recognize, as the world does, that Samsung has chosen to mimic the Apple look and feel, without regard for Apple's intellectual property rights, and that this mimicry extends to Apple's user interface inventions.

[1] Samsung's infringement is also apparent to foreign courts. Apple has obtained preliminary injunctions against versions of the Samsung Galaxy S, S II, and Ace smartphones sold in the Netherlands (based upon a European patent related to the '381 patent), and against the version of the Galaxy Tab 10.1, 7.7, and 8.9 sold in Germany (based upon a foreign counterpart to the D'889 patent). In Australia, Samsung agreed not to import, offer for sale, or sell the U.S. version of the Galaxy Tab 10.1 pending resolution of Apple's preliminary injunction application, and then during the preliminary injunction hearing further agreed to remove certain accused features before marketing the Australian Tab 10.1. (Ho Dec. ¶¶ 2-6.)

Thus, as it is forced to, Samsung focuses on invalidity arguments, but here the sheer number of issues Samsung raises demonstrates the underlying truth: Apple's designs and its patents were and are novel. Samsung has no anticipating art, and it will not be able to establish obviousness by clear and convincing evidence.

Finally, as we have shown, the injury that Apple faces if its rights are not enforced will truly be irreparable. Samsung's expert has conceded as much under cross-examination. Injunctive relief is the only way that Apple's intellectual property can be protected, and Samsung's unfair competition prevented.

I. SAMSUNG'S PHONES INFRINGE THE D'087 AND D'677 DESIGN PATENTS.

The impact of Apple's iPhone design on Samsung's designs is evident from a comparison of products released before the Apple design was filed, and those that came after.

(Ho Dec. Ex. HH.) Samsung attempts to divert the Court's attention from the overall look of its products by focusing on minute differences, while disregarding all design elements that allegedly perform some function. (Opp. at 11.) The law requires exactly the opposite: "The Court should compare the overall designs to see if an ordinary observer would conclude that they are substantially the same . . . [T]he ordinary observer test, whether applied for infringement or invalidity, and the obviousness test . . . focus on the *overall designs*." *Int'l Seaway Trading*

Corp. v. Walgreens Corp., 589 F.3d 1223, 1240-41 (Fed. Cir. 2009) (emphasis in original).[2] When the overall designs are compared, there is no question that they are substantially similar.

In assessing infringement, the only elements to be excluded from the comparison of overall designs are those that are "purely functional," *i.e.*, dictated by function. *See e.g.*, *Richardson v. Stanley Works, Inc.*, 597 F.3d 1288, 1294 (Fed. Cir. 2010) (excluding the flat face of a hammer from infringement analysis because it was dictated by function). "To qualify for protection, a design must present an aesthetically pleasing appearance that is not dictated by function alone." *Bonito Boats, Inc. v. Thunder Craft Boats, Inc.*, 489 U.S. 141, 148 (1989); *see also L.A. Gear*, 988 F.2d. at 1123 ("[T]he design … is deemed to be functional when the appearance of the claimed design is 'dictated by' the use or purpose of the article.").

Samsung does not even mention, let alone attempt to meet the "dictated by function" test. (Opp. at 9-11.) To rebut Samsung's claim that the elements are "functional," Apple submits numerous examples of alternative designs that perform each of the functions highlighted by Samsung, as illustrated in the exhibits to the accompanying reply declarations of Cooper C. Woodring and Peter W. Bressler. These examples establish that no element of the Apple designs is dictated by function. *See Best Lock Corp. v. Ilco Unican*, 94 F. 3d. 1563, 1566 (Fed. Cir. 1996) ("A design is not dictated solely by its function when alternative designs … are available."). Smartphones can be rendered quite differently—as they have been in designs used or patented by Samsung—and still perform the same functions, as shown below:

[2] Samsung argues about the size of photos and products. However, where a design patent does not claim the actual size of a product's design, an accused product cannot escape infringement by being larger or smaller than the commercial embodiment of the patented design. *See Sun Hill Indus. v. Easter Unlimited*, 48 F.3d 1193, 1196-97 (Fed. Cir. 1995) (error to rely on size in infringement analysis). Likewise, Samsung's argument that labeling products with SAMSUNG or a carrier name or logo defeats Apple's infringement claim is unavailing. (Opp. at 13.) *See L.A. Gear v. Thom McAn*, 988 F.2d 1117, 1126 (Fed. Cir. 1993) (design patent law does not allow "avoidance of infringement by labeling").

(Woodring Reply Dec. ¶¶ 38-54; Bressler Dec. ¶¶ 87-97.)

[redacted]

In sum, no element of Apple's iPhone design should be excluded from the infringement comparison, because none is dictated by function. When the overall designs are compared, Samsung's products look substantially the same as Apple's designs.

II. THE D'087 AND D'677 PATENTS ARE VALID.

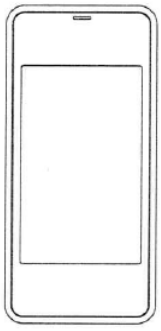
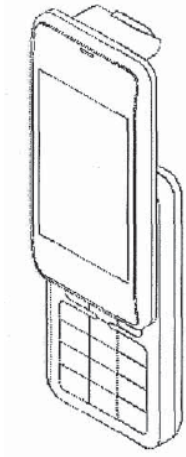
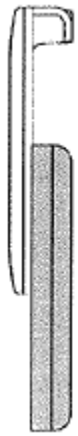
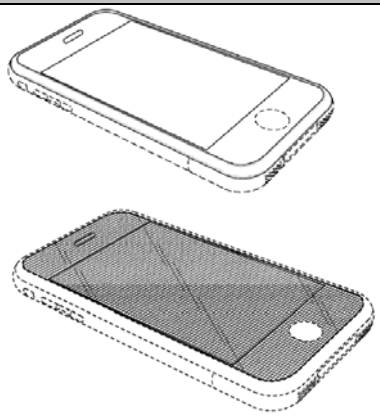
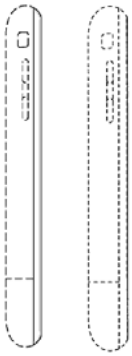
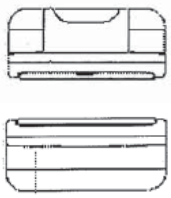
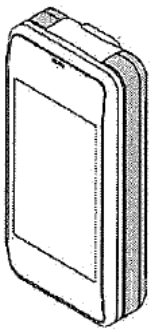
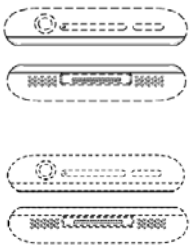
To defeat Apple's motion, Samsung must "come forward with evidence of invalidity, just as it would be [required to] at trial." *Titan Tire Corp. v. Case New Holland, Inc.*, 566 F.3d 1372, 1376-79 (Fed. Cir. 2009). Apple "then has the burden of responding with contrary evidence, which of course may include analysis and argument." *Id.* The Court determines if Samsung has shown that it is likely to prevail on invalidity when the evidence is "view[ed] . . . in light of the burdens and presumptions that will inhere at trial." *Astra Zeneca LP v. Apotex, Inc.*, 633 F.3d 1042, 1050. Samsung has not carried its burden.

A. The D'087 and D'677 Patents Are Not Anticipated.

To establish that Apple's designs were anticipated, Samsung must demonstrate that a single prior art reference is substantially the same as Apple's design. *Int'l Seaway*, 589 F.3d at

1239-1240. Samsung's only "evidence" on this point is a deposition statement by Apple's expert that the front of the JP 1241638 patent (the "Sharp design") is "substantially similar" to Apple's designs. (Opp. at 8.) However, whether the front of a reference is substantially similar is not the test when the designs include side views showing that the profile of the Sharp design is *not* substantially similar to the profile of the Apple designs. *See Contessa Food Prods. v. Conagra*, 282 F.3d 1370, 1381-1382 (Fed. Cir. 2002) (all design views must be compared to determine substantial similarity); *Door-Master Corp. v. Yorktowne, Inc.*, 256 F.3d 1308, 1314 (Fed. Cir. 2001) (jury could find no anticipation due to differences in rear panels of prior art and claimed design, even if front panels "look very similar").

Not only did Samsung hide all but one view of the Sharp design from Apple's expert at his deposition, its Opposition also failed to include the entirety of the Sharp design, which includes 14 figures. Significant portions of the Sharp design omitted by Samsung are shown below:

Samsung's Opposition	Additional Views of the Sharp JPN No. 1241638		Apple's 'D087 and 'D677 Design Patents	
				
				

Side and perspective views of the Sharp design reveal that it (1) has a "cambered," not flat, front surface; (2) has a thicker nonuniform "bezel" with a different profile; (3) has a smaller speaker opening placed much higher up; and (4) lacks a translucent and black-colored front surface. (Woodring Reply Dec. ¶¶ 102-109.; Bressler Dec. ¶ 62; Ho Dec. Ex. P (Woodring Dep. at 212:4-213:3).) The Sharp design differs from the Apple designs in several key respects.

B. The D'087 and D'677 Patents Are Not Obvious.

To prove obviousness, Samsung must "find a single reference, 'a something in existence, the design characteristics of which are *basically the same* as the claimed design.'" *Durling v. Spectrum Furniture Co., Inc.*, 101 F.3d 100, 103 (Fed. Cir. 1996); *see In re Harvey*, 12 F.3d 1061, 1063 (Fed. Cir. 1993) (where major modifications would be required, the prior reference "cannot qualify as a basic design"). If a basic reference is identified, secondary references can then be considered to construct a piece of "prior art" for purposes of comparison to the patented design. "Once that piece of prior art has been constructed, obviousness, like anticipation, requires application of the ordinary observer test" and a "focus on the *overall designs*."[3] *Int'l Seaway*, 589 F.3d at 1240-1241 (emphasis in original).

Samsung does the opposite of the required analysis, merely pointing to a pool of alleged prior art references that it claims encompasses various elements of the Apple designs. (Opp. at 8-9.) All but three of Samsung's references clearly post-date the invention dates for the Apple designs, and are thus not "prior" art.[4] As explained below, none of the three other references

---

[3] Moreover, actual designs, not design concepts such as "rounded corners," "rectangular shape," "rim," and "bezel," must be compared. *Durling*, 101 F.3d at 104 ("As we have explained in the past, however, the focus in a design patent obviousness inquiry should be on visual appearances rather than design concepts.").

[4] The rules for priority are the same for design patents and utility patents. 35 U.S.C. § 171. Many of the designs cited by Samsung are not prior to the corroborated invention date for the two design patents (no later than April 20, 2006) and one is not even prior to the application date (January 5, 2007). [redacted] The LG Prada smartphone was announced in September 2006, and the Samsung KR 30-2006-0050769 design patent application was filed in December 2006. Samsung's expert declaration is similarly rife with post-invention art, including Korean registration KR 30-041857 (published in July 2006), the Softbank 825SH phone (released in 2008), and JP 1280315 (issued September 2006). (*See* Sherman Dec. ¶¶ 20-21, 24-25, 99.)

qualifies as a "basic reference" because none is "basically the same as" either of the Apple designs. (Woodring Reply Dec. ¶¶ 112-113, 118-121; Bressler Dec. ¶¶ 60, 71.)

The LG Chocolate Phone: The LG Chocolate is not a basic reference for either of Apple's designs. It does not have a centered display screen with balanced borders above and below the screen. Its display screen is aligned closer to the top of the design, rather than the center. The side borders to the right and left of the screen are also wider. Moreover, the top and bottom edges are not straight. There is also substantial ornamentation in the form of a large metal button with a metallic-appearing rim and red marking, which is surrounded by a number of smaller red buttons on the front surface below the display screen. It also lacks a bezel like that of the D'087 design. (*See* Woodring Reply Dec. ¶¶ 112-113; Bressler Dec. ¶ 65.)

The JP 1241383 Reference: JP 1241383 also is not a basic reference for Apple's designs. It appears to have an inset display screen surrounded by a large thick bezel. Large lozenge- and circle-shaped buttons extend from the left side of the design and thus are visible from the front. There is no translucent black surface as claimed in Apple's D'677 design, and one of the three major elements in the D'087 design is missing: the distinctive speaker slot. It also fails to disclose the thin bezel of the D'087 patent. (Woodring Reply Dec. ¶¶ 120-121; Bressler Dec. ¶ 69.)

The JP 1009317 Reference: Nor is the JP 1009317 design a basic reference for Apple's designs. It does not have a bezel as found in the D'087 patent. The borders above and below the display screen do not appear to be balanced and thus the frame appears to be asymmetric. The top and bottom edges also curve from the center toward the sides. The design does not have a continuous clear black front surface as claimed in the D'677 patent. (Woodring Reply Dec. ¶¶ 118-119; Bressler Dec. ¶ 68.)

In short, none of Samsung's references is an appropriate starting place for the obviousness analysis because none is "basically the same" as either of the Apple designs.

C. The iPhone's Commercial Success.

"Secondary considerations 'can be the most probative evidence of non-obviousness in the record, and enables the . . . court to avert the trap of hindsight.'" *Crocs, Inc. v. ITC*, 598 F.3d

1294, 1310-11 (Fed. Cir. 2010) (finding a design patent non-obvious partially due to the commercial success of the product that embodied the design). The incredible reaction to the revolutionary and distinctive "look" of the iPhone confirms the novelty of Apple's patented designs. (*See* Zhang Dec. ¶¶ 32-37 & Exs. 27-32.) Given the overwhelming evidence of the commercial success of the iPhone and widespread acclaim for its design, Samsung cannot demonstrate that Apple's designs were obvious.

III. SAMSUNG'S GALAXY TAB 10.1 INFRINGES THE D'889 PATENT.

Just as a picture is worth a thousand words, the lack of pictures in Samsung's Opposition speaks volumes. Samsung's only comparative tablet illustration depicts *the back* of the D'889 patent, the iPad and iPad2, and the Galaxy Tab 10.1, where product names and logos appear. (Opp. at 18.) The "focus [is] on the *overall designs*," however, not on a single view of the designs. *Int'l Seaway*, 589 F.3d at 1240-41 (emphasis in original). And logos are irrelevant. *See L.A. Gear*, 988 F.2d. at 1126. Notwithstanding minor differences in thickness, screen aspect ratio, and a silver accent at one rear edge of the Samsung product, the overall effect is that the designs are substantially the same to an ordinary observer. (Woodring Reply Dec. ¶ 8.)

(Ho Ex. II.)

IV. THE D'889 PATENT IS VALID.

A. The Design Is Not Functional.

Again, Samsung errs in its functionality analysis, creatively arguing that Apple's designs are "so basic that [they are] primarily utilitarian" and the result of "natural evolution." (Opp. at 1-

4, 16.) Samsung ignores the myriad alternate designs that are available, as set forth in the Woodring, Bressler, and Stringer declarations. (Woodring Reply Dec. ¶ 41; Bressler Dec. ¶¶ 79-84; Stringer Dec. ¶¶ 26-40.) Samsung also fails to account for the nature of minimalist design, which is explained further in the Bressler Declaration. (Bressler Dec. ¶¶ 23-31.) Samsung made and sold a very different looking touchscreen tablet before the iPad 2 was released:

(Ho Dec. Ex. HH.)

B. The D'889 Patent Design Is Not Obvious.

Once again, Samsung fails to identify a basic reference to show that the design patent is obvious. Without a basic reference, the D'889 patent cannot be obvious, no matter how many pieces of prior art Samsung puts forward. *See* Part II(B), *supra*. The prior art references that Samsung discusses in any detail—the HP Compaq TC1000 Portable Computer and two Knight-Ridder portable digital newspaper mockups—are significantly different from the D'889 patent and cannot constitute a basic reference.

1. The HP Compaq TC1000 Portable Computer.

The TC1000 has a thick three-layered frame around the edge that extends onto the front surface. The opaque silver frame around the front surface is noticeably wider from the front view. In addition, two silver and black colored masks surround the display screen. The front surface

also includes a number of graphical icons. The edges and back surface of the TC1000 have a complicated arrangement of slots, ports, hatches, and buttons, and it has a thicker form factor. (Woodring Reply Dec. ¶ 95; Bressler Dec. ¶¶ 55.)

2. Knight-Ridder Portable Digital Newspaper Mockups.

The 1981 mockup appears to have an asymmetrical wide opaque frame surrounding the display. Thus, the entire front surface is not clear. Moreover, the mockup has square corners and a different side profile. The 1994 mockup has a raised plastic asymmetrical frame surrounding an inset display. The back surface has a raised door with four screws and the edges have several notches and ports. (Woodring Reply Dec. ¶¶ 86-87; Bressler Dec. ¶¶ 44-45.)[5]

None of these references is basically the same as Apple's design, and the other references are even further afield. (Woodring Reply Dec. ¶¶ 88-94; Bressler Dec. ¶¶ 47-54.) Samsung's conclusory assertion that a pool of references "disclose[s] all of the elements Apple claims in the D'889 patent and render[s] it obvious" (Opp. at 15) fails to meet the *Titan Tire* test.

C. The iPad's Unexpected Commercial Success.

As explained in Apple's opening papers, the iPad was an instant success with phenomenal sales. (Mot. at 30.) Significantly, the critical acclaim upon arrival of the Apple iPad is in sharp contrast with pre-launch skepticism by industry experts:

> Like a moth to a hot trend, Apple (AAPL) will fly into the netbook flame and get burned. The company will unveil a 10-inch touch-screen tablet computer sometime this year, say analysts. Not only does Apple want to showcase its design prowess, the company desperately needs a new hit to revitalize its computer line-up. . . . [B]eyond the core fan base, Apple will discover what other PC makers have known for a while: Consumers find big tablets hard to swallow.

---

[5] Samsung's suggestion that Apple improperly failed to disclose the Knight-Ridder mockup to the Patent Office (Opp. at 14) is ludicrous. Even if Samsung had demonstrated that the mockup was material to patentability, there would still be no showing of intent. The Knight-Ridder inventor Fidler testified that he worked with the two to four employees of a Colorado "Apple media lab" in 1994-95 in connection with an unsuccessful attempt to provide newspaper content for the Apple Newton. (Ho Dec. Ex. Y (Fidler Dep. 174:16-180:10; 187:22-197:19).) Samsung offers no evidence that any of these unidentified Apple employees was involved in hardware design, had any memory of Fidler's mockup, or even worked for Apple when the D'889 patent was filed ten years later.

(Ho Dec. Ex. AA.) Others shared this skeptical view. (Ho Dec. Exs. BB-DD.) Many of the design features that drove demand for the iPad are found in the iPad2, which embodies the D'889 patent. (Ho Dec. Ex. O.) Initial skepticism from industry experts is a powerful indicator of non-obviousness. *Transocean Offshore Deepwater Drilling, Inc. v. Maersk Containers USA, Inc.*, 617 F.3d 1296, 1304 (Fed. Cir. 2010) (reversing summary judgment of obviousness because district court failed to consider evidence of industry skepticism).[6]

V. SAMSUNG INFRINGES THE '381 PATENT.

Samsung's contrived non-infringement arguments on the '381 utility patent are easily rejected. Under the plain language of the patent claims, in light of the specification and common sense, translating or moving a document in a "first direction" by scrolling on a touch screen does not require that a human finger or stylus move in precisely straight lines without variation. (Opp. at 27.) The patent specification is clear that it is directed to the field of "devices with touch-screen displays" ('381 patent at 1:45-46), and aims to solve problems with prior devices by providing a user interface based on "finger contacts and gestures on the touch-sensitive display." (*Id.* at 2:49-50.) Nothing in the patent specification suggests that the invention requires superhuman precision in finger movements. (*See* Balakrishnan Dec. ¶¶ 43-47.)

Patent law requires that claim interpretation be linked in a common-sense fashion to the technology and techniques described in the specification. *Lisle Corp. v. AJ Mfg. Co.*, 398 F.3d 1306, 1314 (Fed. Cir. 2005) (rejecting "a hyper-technical reading of the limitation that requires" something the claimed tool is "incapable of performing" in favor of "a common-sense meaning of that claim limitation"). Because the '381 patent is directed to detection of a moving finger or handheld object on a touch screen, a person of ordinary skill would understand that the movements detected are those that are typically made and are capable of being made by a human

[6] Samsung erroneously contends that the D'889 patent is indefinite and non-enabling (Opp. at 16 n.4). Samsung relies solely on testimony from Chris Stringer, an industrial designer who is not a patent attorney, as to whether he could "explain" the legal significance of certain differences between patent figures. Stringer's testimony does not establish the invalidity of the patent, and the design of the D'889 patent is readily apparent when all of the figures are considered.

finger or handheld stylus rather than those beyond the precision of human-controlled movement. Samsung's overly narrow interpretation of the claims cannot be squared with the specification and defies common sense.

Samsung's argument that the area beyond an edge of a document is not "displayed" if it is shown to the user as a black expanse, is similarly unavailing and contradicted by its own expert. Without any support from the claims or from the specification, Samsung redefines the claim term "display" (in the sense of showing or revealing something to the viewer) as "active display" and then further transforms "active display" to mean "illuminated pixel." (Opp. at 26.) Samsung then asserts that the Tab 10.1's admitted showing of a black area beyond the edge of an electronic document is not "displaying" because the black pixels are turned off. Samsung's interpretation is flatly inconsistent with the patent specification and claims. The specification's key example of this functionality is Figure 8C, in which "an area . . . beyond the bottom and right edges of the [document] is displayed." ('381 patent at 29:57-58.) In the figure, the area beyond the edge of the document is displayed as "black and thus is visually distinct from the white background of the document." ('381 patent at 29:61-62; *see also* Figure 8C.) Any remaining doubt on this point is resolved by the claims. Claim 1 requires that "the area beyond the edge of a document" be displayed, and dependent Claim 13 adds that "the area beyond the edge of the document is *black*, gray, a solid color, or white." Thus, there can be no question that the patent claims, properly construed, encompass the display *in black* of the area beyond the edge of the document. (*See* Balakrishnan Dec. ¶¶ 48-52.) Samsung's expert acknowledged that any other interpretation of the claims would be contrary to their plain meaning. (Ho Dec. Ex. S (Johnson Dep. 112:19-20; 125:13-21).)

VI. THE '381 PATENT IS VALID.

Samsung's invalidity arguments on the '381 utility patent are not persuasive. An accurate analysis of the Apple conception and priority dates, and an accurate evaluation of the pertinent prior art references, demonstrate that Samsung is not likely to prove by clear and convincing evidence that the '381 patent is invalid.

Samsung cites three references: (1) the LaunchTile program prototype (and the code for its XNav twin); (2) the Lira WO '458 patent and its U.S. counterpart; and (3) the Van den Hoven WO '702 publication. None of these anticipates the '381 patent or renders it obvious.

A. LaunchTile Does Not Invalidate the '381 Patent.

Samsung points to several pieces of evidence about the supposed "prior art" LaunchTile system. None of this evidence invalidates the '381 patent claims. First, Samsung points to videotapes of LaunchTile demonstrations in 2005. (*See* Opp. at 20.) As LauchTile's inventor Dr. Bederson acknowledged at his deposition, however, the videotapes do not display LaunchTile performing the steps upon which Samsung now relies. (Ho Dec. Ex. T (Bederson Dep. 198:6-25).) Samsung also relies on Bederson's testimony that he performed live demonstrations of LaunchTile in 2005 (Opp. at 20), but Samsung has introduced no evidence of what was demonstrated in 2005, and Bederson does not remember. (*Id*. (Bederson Dep. 160:18-23) ("I don't recall the specific details of what was or was not shown to any specific individual.))

Samsung points to source code for a related product, XNav, which Bederson sent to Microsoft in 2005. (Opp. at 20.) The disclosure of source code, however, cannot constitute a "public use" under section 102(b). *Motionless Keyboard Co. v. Microsoft Corp.*, 486 F.3d 1376, 1385 (Fed. Cir. 2007) (finding no public use where "disclosures visually displayed the keyboard design without putting it into use" according to its "intended purpose"). Nor does the source code qualify as a "printed publication" under section 102. *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 865-866 (Fed. Cir. 2010) (user manual not a publication unless it is accessible to public).

Recognizing the limits of the contemporaneous evidence, Samsung relies on two demonstrations conducted *in 2011* by its retained expert: one illustrating particular scenarios using LaunchTile to navigate an email list, and another depicting the "zone view" of LaunchTile. (Van Dam Dec. ¶¶ 48-69 & Ex. 2.) Neither demonstration invalidates the '381 claims.

The '381 patent is directed to a particular problem: how a user interface program addresses the situation where a user scrolls to the edge of a document. The prior art showed two possible solutions: (1) not permitting the user to "overscroll," i.e., scroll past the edge of an electronic document; and (2) permitting the user to continue scrolling past the edge of the

document, without limitation. (*See* Balakrishnan Dec. ¶¶ 14-23.) Both methods could be confusing to users. The first method could lead a user to mistakenly conclude that the program had crashed, as it would no longer respond to the scroll command. The second method, which Bederson referred to as "Desert Fog," could be disorienting to users as they scroll into empty areas with no meaningful content. (Ho Dec. Ex. T (Bederson Dep. 204:19-207:5) ("[s]ometimes you can navigate to a place where there is no content. If there is no content, then you're kind of in a place that essentially—typically—represented with an empty screen. And that was a concern because that would make a user feel disoriented since there is nothing on the screen.").)

As the inventor of the '381 testified, and as use of Apple's iPhones and iPads and the accused products demonstrates, an advantage of the patented method is that the user knows when he has scrolled beyond the edge of the document and no more content can be displayed by continuing to scroll further. And then, on the user's moving his finger away from the screen, the document scrolls back so that the content of the document, rather than the area beyond the edge of the document, is displayed. (Ho Dec. Ex. W (Ording Dep. 32:17-35:4; 39:16-40:17; 42:20-46:17).)

LaunchTile does not practice the claimed invention; indeed, as explained below, (1) its "zone view" application practices the prior art method of preventing the user from scrolling beyond the edge of the document; and (2) its email application permits the user to scroll into a "Desert Fog." Thus, LaunchTile *teaches away* from the invention claimed in the '381 patent *by practicing both of the prior art methods*.

The Zone View of the LaunchTile "World": Users who scroll through the electronic document containing the "World" of LaunchTile are not permitted to "overscroll" beyond the "edge" of the tiles to display an area beyond the array of tiles. (Balakrishnan Dec. ¶ 22 & Fig. 5; Balakrishnan Dec. Ex. A (Video); Ho Dec. Ex. T (Bederson Dep. 148:25-149:4).) As a result, no area can be displayed beyond the boundary edge of the array of tiles, and the array of tiles does not translate back in the opposite direction after showing an area beyond the edge when the user's finger is removed from the touch screen. In other words, if the user keeps scrolling up, down, to the left or to the right in LaunchTile, he will not see an area beyond the edge of the electronic

document that contains the 36 tiles, and will have no way of knowing whether he has reached the edge of the array of tiles or if the touch screen is simply not responding. (*Id.*) The 6x6 LaunchTile view therefore does not practice the claimed invention; it practices the first prior art method of simply precluding the user from scrolling past the end of an electronic document.

In its Opposition, Samsung has tried to define away this fundamental difference between LaunchTile and the '381 patent by asserting that the *internal* grid lines *within* the "World" of LaunchTile, like the internal lines that accentuate squares within a checkerboard, can be treated as if they were the *external* boundary lines that define the *"edge"* of the electronic document. (Opp. at 22.) Samsung's videos purporting to show the LaunchTile application involve zooming in and viewing only the "internal" tiles of the 6x6 LaunchTile array, much like looking at a few internal squares on a checkerboard through a magnifying glass. Moving the magnifying glass over a few of the internal squares can show different "portions" of those squares, but it does not show the area beyond the "edge" of the checkerboard, let alone return the viewer to the checkerboard if he crosses the edge.

The Email "Application": Using LaunchTile's email "application" (which is a mock-up, not a real email program (Ho Dec. Ex. T (Bederson Dep. 216:16-217:8)), it is possible to scroll up or down indefinitely beyond the list of emails to display a vast expanse of an area apparently beyond the edge of the email list that is displayed in white. (*See* Balakrishnan Dec. ¶¶ 22, 26 & Fig. 6; Ho Dec. Ex. T (Bederson Dep. 84:20-86:21).) Lifting one's finger from the screen does *not* cause the screen to scroll back to stop displaying the white area and to show only the content inside the edge of the electronic document. Thus, the LaunchTile email program practices the second "Desert Fog" prior art method.

Samsung's effort to demonstrate that the email application practices the patent requires a sleight of hand: while scrolling down the list it is possible to stop the list slightly out of alignment, lift the stylus, and have the list auto-align with a moveable blue highlighted bar. (Van Dam Dec. ¶ 61; Balakrishnan Dec. ¶¶ 18, 22, 25 & Fig. 1.) The list moves back or forward less than the width of a row. This minimal auto-alignment behavior occurs whenever the rows are out of alignment with the blue highlight bar, which doubles as an email selection tool.

(Balakrishnan Dec. ¶ 25; Ho Dec. Ex. T (Bederson Dep. 78:17-79:18).) The translation of the list in the second direction is not responding to "an edge of the electronic document being reached" (as required by the claims). Rather, its purpose is to make it easier for users to select a desired email by auto-aligning the cursor to the highlight bar. (Balakrishnan Dec. ¶¶ 22, 25 & Exs. B-C (Videos).) Therefore, the LaunchTile application fails to anticipate the '381 patent claims and does not make them obvious.[7]

In addition, Samsung has failed to establish that the LaunchTile device was actually used in 2005 in the manner now depicted. The most that the video demonstrations made in 2011 can do is show that the LaunchTile device was *capable* of performing in the manner now described. The recent demonstrations do not constitute evidence that LaunchTile *was* actually used in this manner before the patent was filed. *Poly-America, L.P. v. GSE Lining Tech., Inc.*, 383 F.3d 1303, 1306-1309 (Fed. Cir. 2004) (cautioning against the use of hindsight to establish prior use, where a device is "capable of performing the claimed method" it was not "originally designed to do"); *see also In re Kollar*, 286 F.3d 1326, 1332 (Fed. Cir. 2002) ("[A] process . . . consists of a series of acts or steps . . . . It consists of doing something, and therefore has to be carried out or performed."). Samsung must establish that someone "actually performed all of the patented steps before the critical date." *Plumtree Software, Inc. v. Datamize, LLC*, 473 F.3d 1152, 1163 (Fed. Cir. 2006). Samsung has failed to make this showing.

B. Lira Does Not Invalidate the '381 Patent.

The Lira WO '458 patent and its U.S. counterpart (U.S. Patent No. 7,872,640) disclose a variation of the LaunchTile auto-alignment technique. The Lira patents describe a method for zooming in on documents such as web pages on a small screen, reconfiguring the web page into

[7] Contrary to Samsung's contention, Dr. Balakrishnan did not "agree[] that LaunchTile anticipated the claims." (Opp. at 23 n.9.) Balakrishnan had not offered any testimony about LaunchTile before his deposition, and made it clear he could not provide opinions about it without additional opportunity for review. (*See, e.g.*, Ho Dec. Ex. V (Balakrishnan Dep. 279:23-280:11) ("I cannot make that determination, just looking at this on the fly"); *id.* at 285:1-8 ("that might be an electronic document vis-à-vis the claims. It might not be. I would have to study that in detail"); (*id.* at 330:4-7 ("Q: Doesn't that meet claim limitation seven? . . . I think I would have to study that in detail.").)

columns, and then zooming in and scrolling through and across those newly configured columns. To allow ease of viewing, the screen will scroll forward to center on the next column, or back to center on the previous column, depending upon whether the scrolling motion has moved beyond a threshold amount. For example, if the scrolling is more than half way to the next column it might continue scrolling forward to center on the next column, and if it is less than half way it could scroll back to center on the previous column. (Balakrishnan Reply Dec. ¶¶ 20, 34-35 & Ex. D (WO 03/081458 "Lira" at Fig. 14B & p. 15, ll. 18-31).)

The Lira patents do not address what happens when the user scrolls to an edge of an electronic document. Moreover, they do not disclose or suggest that an area beyond the edge of the electronic document would be displayed. (Balakrishnan Reply Dec. ¶¶ 22, 34-37.) They do not provide any solutions to the problem of the user not knowing when he has scrolled to the edge of an electronic document and whether or not the touch screen device is working properly when he has in fact scrolled to the edge and the screen stops responding. As a result, these prior art references do not disclose the claimed invention of the '381 patent.

C. Van den Hoven Does Not Invalidate the '381 Patent.

Van den Hoven discloses scrolling through a set of images, such as thumbnails, in an up or down direction, with the speed and direction being responsive to the user's input. (*See* Balkrishnan Reply Dec. Ex. E (WO01 029702 "Van Den Hoven" at Fig. 2).) An image can then be selected and dragged to a display area for viewing a larger image. The patent says nothing about displaying different portions of an electronic document, displaying or not displaying an area beyond the edge of the document, or translating documents in a first direction and then in a second direction to stop showing the area beyond the edge of the document. (*Id.* ¶¶ 22, 38-42.)

D. Samsung Will Not Prove that the '381 Patent is Unenforceable.

Samsung asserts in a footnote and in the Godici Declaration that Apple engaged in inequitable conduct by failing to disclose the Van den Hoven reference during prosecution of the '381 patent. For the reasons discussed above and in the Balakrishnan Reply Declaration (*id.* ¶¶ 38-42), the Van den Hoven reference is not material to patentability. Van den Hoven is at most cumulative to the Collins reference, which like Van den Hoven discloses automated reverse

scrolling and which was the subject of an Examiner Interview prior to allowance. Samsung's declarants Van Dam and Godici did not even read the Collins reference before smearing Apple's attorneys with unfounded accusations of inequitable conduct. (*See* Ho Dec. Ex. X (Van Dam Dep. 21:16-22:6); Ho Dec. Ex. U (Godici Dep. 63:10-16).) Samsung has not even made a *prima facie* case of inequitable conduct, let alone a persuasive one, under *Therasense, Inc. v. Becton, Dickinson & Co.*, 99 U.S.P.Q.2d (BNA) 1065 (Fed. Cir. 2011).

VII. A PRELIMINARY INJUNCTION IS NECESSARY TO PREVENT IRREPARABLE HARM.

Samsung's own evidence and the admissions of its expert confirm that Apple has shown an urgent need to stop Samsung from selling copycat products that will cause irreparable harm to Apple's distinctive designs, market share, and customer goodwill.

A. Samsung's Sale of Copycat Products Will Cause Irreparable Harm by Eroding the Distinctiveness of Apple's Protected Designs.

Apple submitted evidence that the media praised the iPhone and iPad for their "amazing," "sleek," "beautiful," and "seriously different" designs, and criticized Samsung for "shockingly similar" designs to those products. (Mot. at 8, 22; Zhang Dec. Exs. 1-4, 27-32.) That uncontroverted evidence demonstrates the irreparable harm that Apple faces from Samsung's sale of infringing products. By flooding the market with look-alike products, Samsung threatens to genericize Apple's distinctive designs, depriving Apple of a significant competitive advantage.

Samsung's own expert, economist Michael Wagner, confirmed the importance of Apple's distinctive designs in driving demand. Wagner admitted that design is "one of six drivers of demand." (Ho Dec. Ex. D (Wagner Dep. 28:14-29:22).) He further admitted that Apple is "known as a company that pays particular attention to design," and that "Apple's iPhone and iPad products are distinctive." (*Id.* at Dep. 37:5-8, 38:24-39:2).) Indeed, Wagner repeatedly acknowledged that Apple's highly valuable brand was built on the distinctiveness of its products.[8]

[8] Samsung's expert admitted that "Apple's extensive marketing efforts have created one of the most valuable brands worldwide"; you need "a distinctive set of products" in order "to really have a large value to your brand"; Apple's reputation as "an innovator in the area of design

(Footnote continues on next page.)

Similarly, Wagner acknowledged that Apple uses advertisements that "clearly focus on design" or "show off" the design as "a featured element," "associat[ing] the design with the Apple brand." (*Id.* at 41:18-42:6, 46:7-10, 47:10-12, 40:24-41:1, 44:9-14, 45:11-46:2, 47:13-15).)

Contrary to its expert's crucial admissions, Samsung argues that few customers buy the iPhone because of its distinctive design. [redacted] As explained by Dr. Sanjay Sood—who, unlike economist Wagner, is an expert on the effect of design on consumer decision making—design is important in making purchase decisions, but is rarely identified as the *primary* reason; indeed, consumers often do not realize how important product design is to their decision. (Sood Dec. ¶¶ 2-5, 11-33.)

Wagner tried without success to neutralize his admissions by asserting that design does not "drive[] the majority" of smartphone purchases, citing a [redacted]

The [redacted] the Nielsen survey cited by Samsung's expert, and Sood's research all show that design is an important factor driving smartphone and tablet

---

(Footnote continued from previous page.)

helped to increase its sales"; and Apple "built up the value of its brand" by "advertising the products' distinctiveness" (Ho Dec. Ex. D (Wagner Dep. at 39:12-15; 52:8-19, 72:18-24); Wagner Dec. ¶ 21; *see* Ho Exs. F-G (Wagner Dep. Exs. 169, 170).)

purchases. (Ho Dec. Ex. A (SAMNDCA00521309, SAMNDCA00521318, SAMNDCA00025031); Ho Dec. Ex. E (Wagner Dep. Ex. 162); Sood Dec. ¶¶ 13-33).) [redacted]

The distinctive design of Apple's iPhone and iPad differentiate them from competing products. (*See* Sood Dec. ¶¶ 36-37; Ho Dec. Ex. D (Wagner Dep. 39:12-15, 72:25-73:2).) [redacted] "product as hero" advertisements that, as Samsung's expert admitted, "focus on" or "show off" the design and "associate the design with the Apple brand." (*See* Sood Dec.¶¶ 36-37; Ho Dec. Ex. D (Wagner Dep. 41:18-42:6, 46:7-10, 47:10-12; 40:24-41:1, 44:9-14, 45:11-46:2, 47:13-15); Mot. at 30-31; Twiggs Dec. ¶¶ 2-8, Exs. 1, 2, 4, 6, 11-18; Ho Dec. Ex. EE (Twiggs Dep. 199:4-207:5); Ho Exs. FF-GG (Twiggs Dep. Exs. 45-46).) Samsung's sales of its infringing products threaten to erode the distinctiveness of Apple's designs, harm Apple's reputation as an innovator, and diminish the value of its brand and related goodwill. (Lutton Reply Dec. ¶ 28; Sood Dec. ¶¶ 35-41.)

Apple's brand is a valuable form of goodwill, as Samsung's expert agrees. (Ho Dec. Ex. D (Wagner Dep. 39:12-21); *see also* Musika Dec. ¶¶ 27-28.) Samsung's infringement impermissibly free-rides on Apple's distinctive patented designs. As Wagner admitted, the owner of a design patent embodied in its products "can advertise the design and have the confidence that that advertisement will benefit them because they can exclude others from using the design"; but "if a company is advertising a design and other companies are copying the same design," that advertising may be "benefitting the company that . . . copied it." (Ho Dec. Ex. D (Wagner Dep. 78:4-13, 79:23-80:5).)

Legally and factually, the harm to Apple's brand is irreparable and cannot be remedied by money. (Musika Dec. ¶¶ 27-28.) *See Maxim Integrated Prods., Inc. v. Quintana*, 654 F. Supp. 2d 1024, 1035 (N.D. Cal. 2009) (irreparable harm found in loss of control over reputation, loss of trade, and loss of goodwill); *Marche Design, LLC v. TwinPro Int'l Holdings, Ltd.*, No. 08-cv-2108, 2009 U.S. Dist. LEXIS 600, at *8-9 (D. Kan. Jan. 6, 2009) (irreparable harm where

defendant's copying of the trade dress design of plaintiffs' audio speakers rendered plaintiffs "unable to deliver on their promise of exclusivity to their clients").

B. Samsung's Sale of Copycat Products Will Cause Irreparable Harm

1. Samsung's sales will cause lost market share, lost profits on current and future Apple products, and lost customer goodwill.

Samsung does not dispute that "Samsung's market share has grown" and that Samsung is Apple's "avowed competitor" and aims to "aggressively challenge" Apple in the smartphone and tablet markets. (*See* Mot. at 31-32 (citing D.N. 44 at 1, Bartlett Dec. Exs. 45-47, Opp. at 29.)

Samsung's witnesses confirm these facts. [redacted] Samsung's expert, Michael Wagner, admitted that (1) Apple, Samsung, and HTC "are now scrapping for the top spot in the smartphone market" (Ho Dec. Ex. D (Wagner Dep. 152:13-19)); (2) Samsung is "Apple's principal competitor in the tablet market" (*id.* at 182:25-183:3); and (3) Samsung's Galaxy smartphones and tablets are "key competitors" of Apple's iPhone and iPad products (*id.* at 126:10-14, 149:10-150:4). [redacted]

Despite admitting its products compete, Samsung contends its sales do not take away any sales or market share from Apple. (Opp. at 29-30.) This argument defies common sense, [redacted]

[redacted]

Wagner also admitted that Samsung eroded Apple's share of the tablet market. In the last quarter of 2010, an earlier version of Samsung's Galaxy Tab took 17% of the global market, contributing substantially to the reduction of Apple's share from 93% to 73%. (Ho Ex. D (Wagner Dep. 180:11-181:21; Ho Dec. Ex. N (Dep. Ex. 185).) [redacted]

Wagner's deposition testimony, and Musika's analysis, refute Samsung's "no harm" argument. Wagner admitted that Apple "probably suffered some damages" and could "have even stronger sales than what they've had were it not for Samsung products." (Ho Dec. Ex. D (Wagner Dep. at 100:23-101:13).) He also admitted that because Apple had "a lesser share of the market," it missed out on "more sales than [it was] getting before because the market is growing." (*Id.* at 174:14-19.) Wagner identified several types of harm:

1. Apple's lost sales of its competing product (*id*. at 88:7-10);

2. Apple's lost sales of tag-along or "convoyed" items, such as iTunes music and software applications ("apps") that are used by that product (*id*. at 63:14-64:14, 88:14-18).

3. Apple's lost sales of other Apple products that complement the initial product. For example, when Wagner bought his iPhone 4, he bought five additional iPhones for his wife and four children, so they "can communicate easier and use FaceTime," a video calling system that works only with Apple products such as the iPhone, iPad, and iMac (*id*. at 61:11-62:8, 46:21-48:17; 89:5-13).

4. Apple's lost sales of future products, such as the iPhone 6 or 8 (*id.* at 91:7-12, 94:18- 95:4, 95:9-17). "Apple has the highest loyalty of any brand," so customers who buy an Apple product will likely "stick with Apple over time" (*id.* at 60:4-10).

[9] [redacted]

[10] Wagner did not know Samsung's market share during this period, but admitted that the Android market share included Samsung's Galaxy Tab, and that "Samsung is Apple's principal competitor in the tablet market." (Ho Dec. Ex. D (Wagner Dep. 179:12-21, 182:25-183:3).)

[redacted]

Samsung contends its sales do not harm Apple because Samsung customers are loyal to smartphones and tablets that operate on the Android platform, rather than Apple's platform. (Opp. at 30 (if injunction issued, Samsung customers will likely "switch to another Android device").) But as Wagner admitted, 60% of U.S. mobile phone users have phones with less-sophisticated or no operating systems. (Ho Dec. Ex. D (Wagner Dep. 59:6-17).) [redacted]

Moreover, the 60% of mobile phone users who do not own smartphones are predicted to convert to smartphones over the next 3-5 years. (Ho Dec. Ex. D (Wagner Dep. 153:11-156:17) & Ho Dec. Ex. L (Wagner Dep. Ex. 183).) [redacted]

Unless enjoined, Samsung's sales of infringing devices will cause lost sales of both current Apple products and future products to customers who otherwise would have been loyal to Apple.

2. Money cannot fully remedy the harm to Apple.

Samsung contends the harm due to Samsung's taking away of market share, sales, and customers can be quantified and adequately remedied by damages based on the "sales figures" for the challenged products or a "reasonable royalty." (Opp. at 34; Wagner Dec. ¶ 100.) [redacted]

[redacted]

Once again, Samsung's own expert defeats its position. Wagner admitted Samsung's sales may cause lost future sales of successor products to customers who would have been loyal to Apple, as well as lost sales of tag-along items and other related items. Wagner alleged he could quantify this harm, but admitted it depends on unknown future events, including (1) "what the market looks like two years from now when the two-year contract expires"; (2) whether Apple is able to maintain customer loyalty at the same level, which is "unknown"; and (3) the outcome of "the real competition" between the Apple and Android platforms. (Ho Dec. Ex. D (Wagner Dep. 91:20-22, 92:2-5; 95:24-96:1).) [redacted] *See Broadcom Corp. v. Qualcomm, Inc.*, 543 F.3d 683, 703-04 (Fed. Cir. 2008) (difficulty in estimating monetary damages reinforces inadequacy of remedy). [redacted] Wagner agreed that customer loyalty is a form of goodwill, noting the "classic definition" of goodwill as "the expectation of future patronage." (Ho Dec. Ex. D (Wagner Depo. 210:12-15); *see also* Musika Dec. ¶¶ 27-28.) "Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm." *Stuhlbarg Int'l Sales Co. v. John D. Brush & Co.*, 240 F.3d 832, 841 (9th Cir. 2001); *LimoStars, Inc. v. N.J. Car & Limo, Inc.*, 2011 U.S. Dist. LEXIS 87771, at *47 (D. Ariz. Aug. 8, 2011) (loss of "new customers who might otherwise have become repeat customers generating revenue far into the future" is irreparable harm).

Samsung's sales also threaten harm to Apple's reputation, which is another harm that is hard to quantify. Samsung and Apple are "neck and neck" in global smartphone sales. (Ho Dec. Ex. D (Wagner Depo. 181:1-12).) Apple's reputation would suffer if Samsung became the top seller, as Wagner admits. "Being number one in sales" enhances brand value. (*Id.* 51:17-52:3.)

"[W]hen you're the leading seller in the world, it's easier to keep people focused on you for further development of software apps than if you're not number one." (*Id.* 196:2-8; *see* Lutton Reply Dec. ¶¶ 26-27.) [redacted]

3. Apple does not lack "capacity."

Samsung argues its infringing sales cannot harm Apple because Apple lacks capacity to meet demand, citing "supply constraints" for the iPhone 4 when it was first introduced in June 2010. (Opp. at 32, citing Ex. MM at 26, 38, 50.) [redacted]

C. Samsung Fails To Rebut Irreparable Harm.

1. Apple promptly sought a preliminary injunction against Samsung's new round of infringing products.

Samsung's argument that Apple delayed in seeking a preliminary injunction is refuted by the release dates of the products at issue: June 8, 2011 (Galaxy Tab 10.1); May 14 and 15, 2011 (Droid Charge and Infuse 4G); and February 23, 2011 (Galaxy S 4G). (Mot. at 33 n.9.) The Tab 10.1, Charge, and Infuse *were not even on the market* when Apple filed this lawsuit on April 15, 2011, and the Galaxy S 4G had been on the market for *only two months*. Upon filing this suit, Apple promptly moved for expedited discovery to obtain samples of Samsung's unreleased products. (D.N. 10) Apple filed this motion on July 1, just three weeks after the Tab 10.1 was released on June 8.

Samsung cites no case finding that such a short "delay" negates irreparable harm. Indeed, the primary case on which Samsung relies stated a delay of *seventeen months* "may not have been enough, standing alone, to demonstrate the absence of irreparable harm." *High Tech Med.*

Instrumentation, Inc. v. New Image Indus., Inc., 49 F.3d 1551, 1557 (Fed. Cir. 1995). The court ultimately found no irreparable harm due to a *combination of factors*, including "the absence of any indication that money damages would be unavailable to remedy any loss," and plaintiff's "inactivity in the market," meaning it did not "run the risk of losses of sales or goodwill." *Id.* at 1556-57. Similarly, *Novozymes A/S v. Danisco A/S*, No. 10-cv-251, 2010 WL 3783682, *3 (W.D. Wis. Sept. 24, 2010), does not support Samsung, as that case rested on plaintiffs' failure to show a threat of *additional* harm, besides the harm *already incurred* in the two years before the patent issued, when defendant's sales were "perfectly legal." Both cases are inapposite in view of Apple's showing of irreparable harm.

Samsung's argument that the "delay" period should be calculated from its release of older products in 2010 is refuted by *Rexnord* and *Whistler*, both of which hold that delay begins from the release of the products for which an injunction is sought. (*See* Mot. at 33.) Samsung relies on *Calmar, Inc. v. Emson Research, Inc.*, 838 F. Supp. 453, 454-56 (C.D. Cal. 1993), which mentioned continual sales of similar products, but that case did not identify the release date of the product at issue, which may already have been on the market for a year or more.

In any event, acceptance of Samsung's unfounded argument that the delay period began when its older products were released would not rebut Apple's showing of irreparable harm. When Samsung released its first round of infringing products in July 2010, Apple immediately objected and then tried to negotiate a resolution. (Mot. at 33 n.10; Lutton Dec. ¶¶ 2-9; Lutton Reply Dec. ¶¶ 6-22.) Samsung admits "settlement negotiations can excuse reasonable delay in seeking a preliminary injunction," [redacted]

2. Apple's focus on four recently released Samsung products does not rebut its showing of irreparable harm.

Samsung accuses Apple of "gamesmanship" by seeking a preliminary injunction against four recently released Samsung products, and not other products. (Opp. at 37.) As Samsung has admitted, mobile devices "have a shelf life . . . like cabbage" of "six months to a year max." (Ho Dec. Ex. R (6/17/11 Hrg. Tr. at 32).) [redacted] Apple's focus on Samsung's most recent models reflects that reality.

3. Apple's limited licenses do not rebut its showing of irreparable harm.

[redacted]

[11] Apple's decision not to seek preliminary relief against Motorola, Nokia, and HTC does not rebut irreparable harm. Those cases, involving different defendants, products, and intellectual property—for example, no design patents are at issue—have no relevance except to confirm Apple's vigorous enforcement of its intellectual property rights.

[12] Samsung refers to Exhibit "OO," but evidently intended to refer to Exhibit QQ. Apple objects to evidence of Rule 408 settlement offers and submits rebuttal evidence only in the event that the Court decides to consider such evidence.

[redacted] Prior licenses are "but one factor for the district court to consider" in assessing irreparable harm. *Acumed*, 551 F.3d at 1328. "Adding a new competitor to the market may create an irreparable harm that the prior licenses did not." *Id.* at 1329. [redacted]

VIII. THE BALANCE OF EQUITIES FAVORS APPLE.

Samsung complains it would be harmed by a preliminary injunction, but "[o]ne who elects to build a business on a product found to infringe cannot be heard to complain if an injunction against a continuing infringement destroys the business so elected." *Telebrands Direct Response Corp. v. Ovation Commc'ns, Inc.*, 802 F. Supp. 1169, 1179 (D.N.J. 1992) (quoting *Windsurfing Int'l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12 (Fed. Cir. 1986).) Samsung admits copying is relevant to a preliminary injunction, but asserts Apple has not shown "copying or willful

infringement."[13] (Opp. at 39.) Samsung's product designs are too similar to Apple's, however, for this to be mere coincidence. (*See* Mot. at 7-8.) Samsung redesigned its Galaxy Tab 10.1 to make it closer to the iPad 2 design, resulting in what one commentator called the "best design compliment an Android tablet could hope for, often being mistaken by bypassers, including Apple iPad users, for an iPad 2."[14] While Samsung has refused to produce evidence of the decision process that led to its look-alike designs, the snippets it produced are highly revealing.

[redacted] (Lutton Reply Dec. ¶¶ 7, 9-12) Samsung nevertheless chose to release multiple new infringing products despite Apple's objections, and thus has no basis to complain about the alleged "hardship" a preliminary injunction motion would impose. Moreover, a preliminary injunction would be limited to certain Samsung products, and Samsung could presumably remove the infringing "bounce-back" feature and modify its designs.

IX. THE PUBLIC INTEREST FAVORS INNOVATION, NOT COPYING.

Samsung contends the "public interest" favors "competition" because Apple has not shown "Samsung is infringing a valid patent." (Opp. at 39.) Apple has shown likely success, however, and no public interest is served by *unlawful* competition. On the contrary, the public interest favors "rewarding inventors for their creative genius and protecting their intellectual

---

[13] On September 28, 2011, Magistrate Judge Grewal ordered Samsung to produce all documents from Samsung's designers that reference the Apple products that Apple alleges embody features claimed in the asserted patents. (D.N. 267 at 3.) The Order states that Samsung placed those documents at issue by arguing in its Opposition that Apple had offered no evidence of deliberate copying. (*Id*.)

[14] Ho Ex. D (Wagner Dep. 118:4-119:1, 121:20-122:7, 128:22-25) & Ho Dec. Ex. K (Wagner Dep. Ex. 177;) *see* Ho Dec. Ex. H (Wagner Dep. Ex. 173 (Galaxy Tab 10.1 "looks like an iPad")); Ho Ex. I (Wagner Dep. Ex. 175 (Tab 10.1 takes "another page from the iPad 2's school of sexy tablet building")); Ho Dec. Ex. J (Wagner Dep. Ex. 176 (Tab 10.1 "looks very similar to the iPad 2").)

property rights from infringers," because "such protection encourages the innovation that leads to new products." *Telebrands*, 802 F. Supp. at 1179.

Samsung argues the interest in competition is "especially acute" because there are other makers of Android devices. (Opp. at 40.) This argument shows why the public interest *favors* a preliminary injunction. An injunction against selling the accused Samsung devices will not materially limit competition because consumers will be able to buy Android devices from others.[15] In contrast, unabated infringing sales will cause irreparable harm by sending a message to the industry that it is "open season" on patented designs and features in which Apple has invested hundreds of millions of dollars to develop and promote.

CONCLUSION

Apple has demonstrated likelihood of success on the merits, met every criteria for injunctive relief, and has shown an urgent need to prevent further irreparable harm from Samsung's continued sale of infringing products. The requested injunction should issue.

Dated: September 30, 2011

MORRISON & FOERSTER LLP

By: */s/ Michael A. Jacobs*
Michael A. Jacobs

Attorneys for Plaintiff
APPLE INC.

[15] Samsung has made no showing of an acute public necessity for the infringing devices at issue in this motion. This case does not involve, for example, a pharmaceutical that would impact public health if sales were enjoined. Samsung does not and cannot dispute that other smartphones and tablets, including those running on "4G" networks, are currently being sold in the U.S.

ATTESTATION OF E-FILED SIGNATURE

I, JASON R. BARTLETT, am the ECF User whose ID and password are being used to file this Reply in support of Apple's Motion for a Preliminary Injunction. In compliance with General Order 45, X.B., I hereby attest that Michael A. Jacobs has concurred in this filing.

Dated: September 30, 2011 By: */s/ Jason R. Bartlett*
Jason R. Bartlett