

EXHIBIT G

REDACTED VERSION

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

APPLE INC., a California
corporation,

Plaintiff,

vs.

Case No. 11-CV-01846-LHK

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.

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CONFIDENTIAL
ATTORNEYS' EYES ONLY
OUTSIDE COUNSEL
VIDEOTAPED DEPOSITION OF MICHAEL J. WAGNER, CPA
San Francisco, California
Wednesday, September 14, 2011

Reported by:
LORRIE L. MARCHANT, CSR No. 10523, RPR, CRR, CCRR, CLR
JOB NO. 41962

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September 14, 2011

9:33 a.m.

Videotaped Deposition of MICHAEL J.
WAGNER, held at the offices of
Morrison & Foerster, LLP, 425 Market
Street, 34th Floor, San Francisco,
California, before Lorrie L. Marchant,
a Certified Shorthand Reporter,
Registered Professional Reporter,
Certified Realtime Reporter,
California Certified Realtime Reporter
and Certified LiveNote Reporter.

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A P P E A R A N C E S :

FOR THE PLAINTIFF APPLE INC. :

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ALSO PRESENT:

Sean McGrath, Videographer

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1 MR. OVERSON: We'll mark this as 162.

2 (Marked for identification purposes,
3 Exhibit 162.)

4 BY MR. OVERSON:

5 Q. So I believe 162 is the document that you're
6 quoting on paragraph 84 of your report.

7 A. It is.

8 Q. Okay. And if you look on the second page of
9 the article, which is entitled "Are touchscreens the
10 most important feature of smartphones?" And it says,
11 It's from FierceWireless, the wireless industry's daily
12 monitor. And the date is June 2nd, 2011.

13 But on page 2, there's a paragraph that has the
14 word "now" at the beginning.

15 A. It does. And I think that's the paragraph that
16 I quote for everything I have in paragraph 84.

17 Q. Okay. And the last sentence states, quote, I
18 think the conclusion to draw from this is that
19 smartphone users want a lot of different things out of
20 their device, which means that smartphone vendors will
21 need to cover all their bases to be successful in the
22 smartphone market.

23 You quoted that -- at least the end of that
24 sentence in your report; true?

25 A. I did.

1 Q. And you would agree with that statement?

2 A. I wouldn't have put it in my declaration if
3 I -- I disagreed with it. I do agree with it, yes.

4 Q. So one of the bases that a smartphone vendor
5 has to cover to be successful is design; true?

6 A. I think that's correct.

7 Q. If a smartphone maker doesn't have a [sic]
8 attractive design, they will have a hard time competing
9 in the marketplace; true?

10 MR. ANDERSON: Objection. Incomplete
11 hypothetical.

12 THE WITNESS: I'd need more information to know
13 to answer that question.

14 BY MR. OVERSON:

15 Q. Well, just from your own paragraph, design is
16 one of the decision drivers on purchases for
17 smartphones; true?

18 A. It is.

19 Q. And a maker of smartphones will have to cover
20 that base, that base being the design, in order to be
21 competitive; true?

22 A. If -- if they are off the scale on the other
23 features and those are the features that a consumer
24 buys, that consumer could probably care less about the
25 design. But in some circumstances, someone -- another

1 consumer may put a higher emphasis on design. In that
2 case, then they would need to have a good design.

3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
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21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]

1 author talks about the six drivers of the market?

2 MR. ANDERSON: Objection. Misrepresents the
3 document.

4 THE WITNESS: Well, in the middle of the third
5 paragraph on the second page, it starts, With the second
6 most important characteristic of smartphones is a
7 toss-up among Internet access, apps, access to e-mail,
8 design, ease of use and price.

9 BY MR. OVERSON:

10 Q. And then the first characteristic was the
11 touchscreen; right?

12 A. Yes.

13 Q. Yeah. Okay.

14 So would you agree that Apple and Samsung are
15 competing in -- in all of those seven areas that we --
16 that this author discusses?

17 A. Those and other areas, yes.

18 Q. And if you assume that Samsung has copied
19 Apple's designs of the iPhone and the iPad, then the
20 design element of the competition has been taken out of
21 the -- it's been taken out of the competition; right?

22 MR. ANDERSON: Objection. Incomplete
23 hypothetical. Assumes facts not in evidence.

24 THE WITNESS: I don't know if I'd agree with
25 that statement, that it's taken out.

1 BY MR. OVERSON:

2 Q. Well, if they're competing on these seven
3 characteristics of smartphones and they're copying the
4 design, which I think you have to assume for your study,
5 that means they're not competing on design anymore;
6 right?

7 MR. ANDERSON: Same objection. Also vague.

8 THE WITNESS: Only if you ask me to assume that
9 the -- the design patents at issue in this case cover
10 100 percent of the design of a phone, then the answer
11 would be, yes. But I didn't believe that was the case.

12 BY MR. OVERSON:

13 Q. And you haven't looked at the design patents;
14 correct?

15 A. I have not.

16 Q. Okay.

17 A. Just the way you've described them in your
18 pleadings.

19 Q. Let's assume that -- that the overall design of
20 the phone is covered by those patents. And so the
21 overall design of the phone is -- if -- if Samsung is
22 copying the overall design of the phone, then that
23 element of the competition is no longer there; true?

24 MR. ANDERSON: Objection. Vague. Incomplete
25 hypothetical. Assumes facts not in evidence.

1 THE WITNESS: If you ask me to assume what you
2 said in your hypothetical, yes.

3 BY MR. OVERSON:

4 Q. And that means that to win over customers,
5 Apple would have to beat Samsung in the other six areas;
6 right?

7 MR. ANDERSON: Same objections.

8 THE WITNESS: Falling on your previous
9 hypothetical by definition, yes.

10 BY MR. OVERSON:

11 Q. And some customers will believe that design is
12 an important factor in their decision; right?

13 MR. ANDERSON: Objection. Lacks foundation.
14 Incomplete hypothetical. Assumes facts not in evidence.

15 THE WITNESS: Some will. But based on the
16 evidence I've seen in this case, that some is very few.

17 BY MR. OVERSON:

18 Q. Okay. If -- if design is taken out of the
19 competition between Samsung and Apple, Apple will lose
20 some customers because they won't have the
21 differentiated design; correct?

22 MR. ANDERSON: Same objections.

23 THE WITNESS: That's a possibility, but not
24 necessarily.

25 ///

1 BY MR. OVERSON:

2 Q. So what if a customer values design as one of
3 the main factors, but not the primary factor? And let
4 me give you a hypothetical. Maybe someone loves the
5 design of the phone, but wants to use an open source
6 Android system. And those are both fact -- both
7 important factors. Okay.

8 If you take the design element out of the
9 competition, then the customer would be more likely to
10 buy the Samsung phone; right?

11 MR. ANDERSON: Objection. Incomplete
12 hypothetical. Vague.

13 THE WITNESS: Well, by definition, based on
14 your hypothetical, he'll buy the Samsung because he
15 wants open source operating system. So regardless of
16 the design, based on your criteria in your hypothetical,
17 he's going to buy Samsung.

18 BY MR. OVERSON:

19 Q. Well, if Apple has the design that the customer
20 wants and Samsung does not, then he might buy the Apple
21 for the design; right?

22 MR. ANDERSON: Objection. Incomplete
23 hypothetical. Vague.

24 THE WITNESS: I hate to try to restate your
25 hypothetical, but if you're asking me there's two things

1 that are driving this customer to make a purchase
2 decision. One is the design of the phone, and one is
3 they would like to have their phone have an open source
4 operating system.

5 And the only way they can get the design is if
6 the Apple phone was the only one offering that design.
7 And the only way they can get open source is Samsung or
8 one of Samsung's other competitors, I don't know what
9 that -- that -- that customer is going to do. He's
10 going to have a quandary. It may be a coin flip.

11 So maybe some they would lose and some they
12 wouldn't. But they'd have to make, then, a decision
13 which is more important to them, the design or the open
14 source operating system.

15 BY MR. OVERSON:

16 Q. But if the -- the Samsung phone has the same
17 design as the Apple phone, then they don't have to make
18 that decision that way; right?

19 A. I agree with that question.

20 Q. I want to make sure I understand your position.
21 I think I do.

22 But earlier you were saying that if design is
23 not the primary driver of the market, then Samsung
24 having the same design would not have an effect on
25 Apple's -- sales, was it?

1 A. Yes.

2 Q. So what if design is number two out of five
3 factors? You're saying that means it doesn't have any
4 effect?

5 MR. ANDERSON: Objection. Incomplete
6 hypothetical. Misstates witness testimony.

7 THE WITNESS: No, I can't be that strong.

8 BY MR. OVERSON:

9 Q. Okay. What do you mean by "primary driver" of
10 the customer's decision, then?

11 A. That it really is one of the features of the
12 phone that is going to sway the ultimate decision of
13 what phone to purchase.

14 Q. Okay. So it could be one of the features as
15 opposed to the primary feature?

16 A. Yes. I mean, often it's not a binary decision,
17 that there is just one feature, like in that survey that
18 we discussed earlier in my deposition, that you have to
19 just answer with one answer, with one feature, or one
20 function. It's normally more complicated than that.
21 And then it's a balancing of them as to how the ultimate
22 decision is made.

23 Q. Okay. So if design is one of the main factors,
24 then -- then copying the Apple design, in fact, would be
25 hurting Apple; right?

1 But the game is also being played on the design
2 front; right? That's one of the areas that these
3 companies compete in?

4 MR. ANDERSON: Objection. Vague.

5 THE WITNESS: I agree with that. Otherwise,
6 none of us would be sitting in this room.

7 BY MR. OVERSON:

8 Q. And the loyalty of Apple's customers is, in
9 part, based on Apple's ability to continue to produce
10 distinctive designs; true?

11 MR. ANDERSON: Objection. Assumes facts not in
12 evidence. Argumentative.

13 THE WITNESS: To some extent, yes.

14 BY MR. OVERSON:

15 Q. Okay. In your declaration, at paragraph 20, at
16 the end of the paragraph, you're talking about consumers
17 who are paying hundreds of dollars for the iPad and the
18 iPhone.

19 And then in paragraph 22 you mention, on the
20 last line, that this type of consumer -- I think you
21 mean the more affluent and well-educated consumer,
22 coupled with a powerful brand like Apple is not likely a
23 recipe for product confusion, especially in a
24 marketplace that has long been characterized by a
25 diverse product offering.

1 Q. It goes up to Q4, 2010.

2 A. Correct.

3 Q. So you don't have any more recent data than
4 that?

5 A. I don't. If I did you would have seen it in my
6 declaration.

7 Q. Okay. Can you turn to paragraph 52 of your
8 declaration, please.

9 A. Yes.

10 Q. In paragraph 52 you're talking about a Retrevo
11 study and state that, not every tablet consumer is in
12 the market for an iPad. For that reason, it could very
13 well be the case that increases in market share earned
14 by other tablet manufacturers are simply sales to
15 consumer segment outside of that to which Apple sells.

16 So you're -- you're -- I think what you're
17 saying is some people may want, for example, a Android
18 operating system on their tablet; is that --

19 A. That's one possibility, yes.

20 Q. Okay. Have you ever seen -- let me ask you
21 this: What tablets have you looked at?

22 A. Personally?

23 Q. Yes.

24 A. I've seen the iPad 2, and I've seen the Samsung
25 10.1. I think those are the only two I've ever touched

1 myself. But not in connection with my work on this
2 case.

3 Q. Have you seen any tablet made by another
4 manufacturer?

5 A. I believe I've seen some other ones --

6 Q. Okay.

7 A. -- like on an airplane.

8 Q. And do you recall whether they looked more --
9 do they look different from what the Samsung Tablet 10.1
10 looks like?

11 A. I'm not remembering it enough to answer your
12 question.

13 Q. The Retrevo study, I see that on page 22 you
14 have a pie chart where 21 percent answered the question,
15 Are you planning to buy a tablet this year? And, Yes,
16 an Android tablet.

17 And is that -- I mean, that -- those are people
18 who have seen the GALAXY Tab 10.1; right?

19 MR. ANDERSON: Objection. Lacks foundation.

20 THE WITNESS: I have no idea what the
21 respondents to this survey know or don't know. I have
22 not seen the survey questionnaire or how it was
23 conducted.

24 I do recall looking at the information where I
25 took this from that the results are statistically

1 significant. But how the survey was designed and what
2 was asked, I don't know.

3 BY MR. OVERSON:

4 Q. It could be that people are saying, Yes, an
5 Android tablet because they've seen the design of
6 Samsung's tablet and they liked it; right?

7 A. That is possible.

8 Q. Okay. On paragraph 54 you talk about rare --
9 some -- one of the rare delays of Apple having to do
10 with the product -- having to do with the deliveries of
11 iPad 2s.

12 Are you with me?

13 A. I am.

14 Q. Okay. Do you have any evidence that there are
15 any delays with iPad 2s today?

16 A. I don't.

17 Q. As far as you know, you can walk in the store
18 and buy one?

19 A. I'm pretty sure you can, because I think people
20 are waiting for the iPad 3 at this point. So I think
21 there's probably plenty of iPad 2s.

22 Q. Do you have any information about when iPad 3
23 is coming out?

24 A. I have seen rumors.

25 Q. If you look at paragraph 57, you state that,

1 Further supporting the proposition that Apple would not
2 suffer irreparable harm if Samsung's products at issue
3 were found to infringe is that Apple did not appear to
4 suffer irreparable harm (or any demonstrable harm) when
5 previous versions of the Samsung's products at issue
6 were released into the market. Since Samsung's products
7 were launched, sales of the corresponding iPhone and
8 iPad have continued to increase.

9 So you're not saying that because sales
10 increased there was no harm, are you?

11 A. Asked and answered. I am not.

12 Q. You're not.

13 Okay. I guess I don't understand, if that's
14 not your point, what is the point of this paragraph?

15 A. Well --

16 Q. I don't mean to be argumentative. I'm just
17 trying to get -- I'm trying to understand, you're
18 pointing to the fact that sales are increasing, but it's
19 a growing market. We've gone over that. And Apple
20 could definitely be harmed by Samsung's infringing
21 products that we're assuming to infringe while still
22 increasing their sales; right?

23 A. I agree with everything you said.

24 Q. So is it that you're saying there could be
25 harm, but it's not irreparable?

1 MR. ANDERSON: Yes, I do.

2 MR. OVERSON: Okay. Shall we do that first
3 before we talk about confidentiality?

4 MR. ANDERSON: Okay.

5 EXAMINATION BY MR. ANDERSON

6 BY MR. ANDERSON:

7 Q. Mr. Wagner, do you understand the word "design"
8 to encompass functional design?

9 THE WITNESS: Among other things, yes.

10 MR. ANDERSON: So you understand the word
11 "design" to include elements that are not merely
12 ornamental; is that correct?

13 THE WITNESS: That's my understanding.

14 MR. ANDERSON: No further questions.

15 MR. OVERSON: Do you wish to change any of your
16 earlier answers today in light of your understanding of
17 "design"?

18 THE WITNESS: I do not.

19 MR. OVERSON: Okay. I have no further
20 questions.

21 Okay. There was an issue we talked about off
22 the record, and that is confidentiality.

23 For the Apple side we are designating the
24 transcript confidential to the extent -- because there
25 are some -- highly confidential, because there's some

1 And, likewise, we will redact out the Apple
2 confidential information, of which there was some in the
3 declaration and which there was some in other exhibits,
4 I noted, before we share a transcript.

5 MR. OVERSON: Okay. And we'll exchange -- when
6 we give it to our clients, we'll exchange with each
7 other so with know what we did.

8 MR. ANDERSON: That's agreeable.

9 MR. OVERSON: Okay. Thank you.

10 THE VIDEOGRAPHER: This marks the end of
11 Volume I, Disk 4, and concludes the deposition of
12 Michael Wagner. The time is 5:43 p.m. and we are off
13 the record.

14 (Deposition concluded at 5:43 p.m.)

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MICHAEL J. WAGNER

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Subscribed and sworn to
before me this day
of 2011.

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CERTIFICATE

STATE OF CALIFORNIA)

: SS

COUNTY OF SONOMA)

I, Lorrie L. Marchant, a Certified Shorthand Reporter, a Registered Professional Reporter, a Certified Realtime Reporter, and a Certified Realtime Professional within and for the State of California, do hereby certify:

That MICHAEL J. WAGNER, the witness whose deposition is herein set forth, was duly sworn/affirmed by me and that such deposition is a true record of the testimony given by such witness.

I further certify that I am not related to any of the parties to this action by blood or marriage and that I am in no way interested in the outcome of this matter.

In witness whereof, I have hereunto set my hand this 14th day of September, 2011.

LORRIE L. MARCHANT, CSR, RPR, CRR, CLR, CCRR
CSR No. 10523