

1 HAROLD J. MCELHINNY (CA SBN 66781)
 hmcclhinny@mofo.com
 2 MICHAEL A. JACOBS (CA SBN 111664)
 mjacobs@mofo.com
 3 JENNIFER LEE TAYLOR (CA SBN 161368)
 jtaylor@mofo.com
 4 ALISON M. TUCHER (CA SBN 171363)
 atucher@mofo.com
 5 RICHARD S.J. HUNG (CA SBN 197425)
 rhung@mofo.com
 6 JASON R. BARTLETT (CA SBN 214530)
 jasonbartlett@mofo.com
 7 MORRISON & FOERSTER LLP
 425 Market Street
 8 San Francisco, California 94105-2482
 Telephone: (415) 268-7000
 9 Facsimile: (415) 268-7522

WILLIAM F. LEE
 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

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

11 Attorneys for Plaintiff and
 12 Counterclaim-Defendant APPLE INC.

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

18 APPLE INC., a California corporation,
 19 Plaintiff,
 20 v.
 21 SAMSUNG ELECTRONICS CO., LTD., a
 22 Korean corporation; SAMSUNG
 23 ELECTRONICS AMERICA, INC., a New
 24 York corporation; and SAMSUNG
 25 TELECOMMUNICATIONS AMERICA,
 26 LLC, a Delaware limited liability company,
 27 Defendants.

Case No. 11-cv-01846-LHK (PSG)

**APPLE'S CORRECTED
 OPPOSITION TO SAMSUNG'S
 MOTION TO SHORTEN TIME**

Judge: Hon. Paul S. Grewal

1 Apple opposes Samsung's Motion to Shorten Time for Briefing and Hearing. Samsung's
2 Motion to Shorten Time, filed at 11:37 p.m. on Monday, December 12, 2011, seeks a briefing
3 schedule that would require Apple to file its opposition to *two* separate discovery motions within
4 48 hours. After failing to make a good-faith effort to satisfy the Court's meet-and-confer
5 requirement, and then misrepresenting to Apple that only one, limited motion would be filed on
6 Monday, Samsung should not be rewarded with a compressed schedule that would prejudice
7 Apple.

8 **Samsung Intentionally Delayed Meeting and Confering.** On Thursday,
9 December 8, 2011, Apple filed a Motion to Compel Production of Documents and Things
10 (Dkt. 467), along with an Administrative Motion for Relief (Dkt. 463) from the "lead trial
11 counsel . . . meet and confer" requirement in Judge Koh's case management order. Apple filed
12 the Administrative Motion because ***Samsung had refused to agree to a meeting of lead counsel***
13 ***to discuss Apple's issues on December 5, 6, or 7, 2011***, and instead had represented that
14 Samsung's lead counsel was unavailable to meet and confer until December 19, 2011. (*See*
15 Declaration of Mia Mazza in Support of Apple's Opposition to Samsung's Motion to Shorten
16 Time, filed herewith ("Mazza Decl."), ¶ 6.) Judge Koh granted Apple's Administrative Motion
17 on December 9, 2011. (Dkt. 472.) This Court then granted Apple's Motion to Shorten Time on
18 the briefing and hearing schedule for its Motion to Compel, setting the hearing on
19 December 16, 2011, with Samsung's opposition brief due on Wednesday, December 14.
20 (Dkt. 477.)

21 On Saturday, December 10, 2011, Samsung's lead counsel was suddenly available to meet
22 and confer on Samsung's own discovery issues. (Mazza Decl., ¶ 3 & Ex. B.) Samsung
23 demanded that Apple's lead counsel meet and confer less than 24 hours later, on Sunday morning,
24 even though Samsung was well aware that Apple's lead counsel had left for Tokyo on Friday,
25 December 9. (*Id.*) Apple advised Samsung that its lead counsel would be arriving back in San
26 Francisco on Tuesday, December 13, 2011, and that he would make himself available on that date
27 starting after noon. (*Id.*)
28

1 Samsung did not respond to this offer. Instead, on Monday morning, December 12, 2011,
2 Samsung advised Apple that it was going to file a discovery motion later that day, and asked
3 Apple whether it would oppose: (1) Samsung's administrative motion for relief from Judge
4 Koh's meet-and-confer requirement and (2) Samsung's motion to shorten time. (Mazza Decl.,
5 ¶ 2 & Ex. A.) In that communication, Samsung represented that it was filing only a motion
6 related to the disclosure of Apple documents to Samsung's expert, Itay Sherman. (*Id.*) Samsung
7 never mentioned that it would be filing a second discovery motion, aimed at a variety of different
8 document production issues. (*Id.*)

9 **Samsung's Schedule is Unnecessarily Compressed and Would Prejudice Apple.**

10 Samsung's current motion is entirely retaliatory. The Court granted Samsung nearly a full
11 week to prepare its opposition to the motion to compel filed by Apple on Thursday,
12 December 8, 2011. Samsung's two motions raise a far broader scope of issues than Apple's
13 motion, and yet Samsung asks this Court to require that Apple respond to Samsung's motions in a
14 fraction of the time. Samsung argues that it had to "match the briefing schedule set by the Court
15 with respect to Apple's motion," but the proposed briefing schedule, which would provide Apple
16 with two days, instead of the six afforded to Samsung, does not come close to "matching" the
17 schedule this Court provided to Samsung. It would be prejudicial to require Apple to prepare and
18 file oppositions to *two separate discovery motions*, each dealing with complex issues of
19 importance, within 48 hours.

20 Samsung's stated reasons for needing to have its motions heard on shortened time do not
21 withstand scrutiny. First, Samsung argues that if its motions were not heard on shortened time it
22 would "depriv[e] Samsung of information it needs for its claim construction briefing due on
23 December 22, 2011." (Mot. at 2.) Samsung provides no explanation for this assertion; indeed,
24 Samsung itself admits that almost all of the requests relate to design patents, ***which are not the***
25 ***subject of claim construction briefing at all.*** If Samsung *had* needed the requested documents
26 for claim construction briefing on December 22, surely it would have joined Apple in its attempts
27 to conduct a lead counsel meet and confer during the week of December 5, and it would have then
28 filed a motion, if needed, last week. In any event, Samsung asked Apple to produce a specific set

1 of filings and transcripts from the *Motorola* case for purposes of claim construction, and Apple
2 produced those documents – nearly a thousand documents – on November 23, 2011. (Mazza
3 Decl., ¶ 7.) Samsung informed Apple on December 11, 2011, that it could not locate four items
4 in this production, and Apple has agreed to produce those items as quickly as possible if they
5 were not already produced. (*Id.*)

6 Second, Samsung argues that if its motions were not heard on shortened time it would
7 deprive Samsung of opportunities to conduct “follow-on discovery” that will “allow it to prepare
8 for further depositions and other events in the case.” (Mot. at 2.) This assertion only highlights
9 the fact that Apple has already produced the core documents Samsung needs to defend its case –
10 more than a million pages of documents, alongside numerous physical models, prototypes, CAD
11 files, native source code, and similar items. The documents Samsung seeks *are* “follow-on
12 discovery.” Nevertheless, Apple has already agreed to produce most of the documents and other
13 information sought by Samsung in its “follow-on” requests. (Mazza Decl. ¶ 7.)

14 Third, Samsung argues that if its motions were not heard on shortened time it would
15 “prevent[] Samsung’s expert, Itay Sherman, from seeing confidential documents needed for him
16 to prepare his expert analysis and report.” Samsung and Apple, however, reached impasse on this
17 issue *no later than November 1, 2011*, and yet Samsung failed to file any motion on the issue
18 until now. Samsung’s own delay in raising this issue is not a valid reason to burden Apple with a
19 last-minute scramble to file opposition papers, let alone the additional burden this will place on
20 the Court to review and analyze this issue along with the others already on calendar for the
21 upcoming hearing.¹

22
23 ¹ As a further argument in support of its motions being heard on shortened time, Samsung
24 notes that “the Court is already hearing discovery motions on the date proposed by Samsung.”
25 (Mot. at 2.) The fact that Apple has brought a valid discovery motion (not “motions”) on
26 shortened time, after making an exhaustive, good-faith effort to meet and confer on the relevant
27 issues (as confirmed by Judge Koh’s December 9, 2011, Order), does not provide a basis for
28 Samsung to cram last-minute discovery disputes into the schedule as well. This is particularly the
case here, where Samsung has failed to make a good-faith effort to make its lead counsel
available to meet and confer on the issues raised in its motion, in violation of Judge Koh’s case
management requirements. (*See Apple’s Opposition to Samsung’s Administrative Motion for
Relief from Lead Counsel Meet and Confer Requirement*, filed concurrently herewith on the
morning of December 13, 2011 (Dkt. 484).)

1 Samsung's gamesmanship is compounded by a bait-and-switch on the scope of its motion.
2 On Monday morning, Samsung informed Apple that it would be filing a motion on the parties'
3 dispute relating to *Itay Sherman*. (Mazza Decl. ¶ 2 & Ex. A.) Samsung's filings late Monday
4 night, however, contain a second motion, seeking to compel production of a panoply of various
5 "follow-on" documents and things. Samsung failed to disclose its intent to file this second
6 motion to Apple in its Monday-morning communications. (*Id.*)

7 Responding to Samsung's motions requires time – time from outside counsel and time
8 from Apple to review and approve the representations that will be made in the opposition.
9 Requiring Apple to file its response within a 48-hour period would be prejudicial because it
10 would force Apple to choose between being unnecessarily vague in its response or filing a
11 detailed response that may not be fully vetted. Samsung argues that the parties "have been
12 negotiating these issues for weeks and Apple is already well aware of the basis for [Samsung's]
13 motions." (Mot. at 2.) This is untrue. Apple does not understand why Samsung is filing a
14 motion to compel. Although the parties have been discussing many of the issues in Samsung's
15 motion to compel for several weeks in regular meet-and-confer calls, Apple is not aware of the
16 basis for Samsung's motion, as it has already agreed to produce nearly everything Samsung seeks
17 therein. Regardless, Samsung's insistence that its discovery issues are ripe is inconsistent with its
18 own prior conduct. If the issues were truly well-defined, as Samsung claims, it would have
19 agreed to Apple's repeated requests for a lead trial counsel meet and confer during the week of
20 December 5, 2011, or it would have joined Apple's Administrative Motion for Relief from the
21 lead trial counsel meet-and-confer requirement last week. It did neither.

22 Apple is more than willing to respond to Samsung's motion on shortened time – but this is
23 far too short. Setting a hearing on Samsung's motion during the last week of December or first
24 week of January would allow Apple adequate time to: (1) prepare a response; (2) vet the
25 response with all of the affected individuals; and (3) *moot* most of the issues in Samsung's
26 motion prior to the hearing by *producing* documents and things as Apple has *already agreed* it
27 will do.
28

