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14 AMERICA, INC. and SAMSUNG
TELECOMMUNICATIONS AMERICA, LLC
15

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

18 APPLE INC., a California corporation,

19 Plaintiff,

20 vs.

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

24 Defendants.
25

CASE NO. 11-cv-01846-LHK

**DECLARATION OF MELISSA N. CHAN
IN SUPPORT OF SAMSUNG'S
OPPOSITION TO APPLE'S MOTION TO
COMPEL PRODUCTION OF
DOCUMENTS AND THINGS**

Date: December 16, 2011

Time: 10:00 a.m.

Place: Courtroom 5, 4th Floor

Judge: Hon. Paul S. Grewal

1 I, Melissa N. Chan, declare:

2 1. I am an associate in the law firm of Quinn Emanuel Urquhart & Sullivan, LLP,
3 counsel for Samsung Electronics Co., Ltd., Samsung Electronics America, Inc. and Samsung
4 Telecommunications America, LLC (collectively, "Samsung"). I am licensed to practice law in
5 the State of California. I submit this declaration in support of Samsung's Opposition to Apple's
6 Motion to Compel Production of Documents and Things. I have personal knowledge of the facts
7 set forth in this declaration, except as otherwise noted, and, if called upon as a witness, I could and
8 would testify to the following facts.

9 2. Since October 19, 2011, the parties' non-lead trial counsel have met and conferred
10 via lengthy telephonic conference calls on a weekly basis, except for the week of Thanksgiving.
11 The parties have also exchanged dozens of meet and confer letters during this period.

12 3. During the course of these meet and confer conferences, in the interests of
13 transparency, the parties have agreed to report to each other on a monthly basis regarding the
14 custodians each party searches and the search terms it uses in conducting searches for responsive
15 documents. Exchanging this information on a monthly basis was Samsung's idea. Samsung
16 also has agreed to consider reasonable requests by Apple to apply additional search terms. When
17 Apple has raised specific questions about Samsung's methodology in performing its searches,
18 Samsung has provided detailed written responses outlining the steps it has taken to fulfill its
19 discovery obligations.

20 4. Many, but not all, of the issues raised in Apple's pending motion to compel were
21 discussed during various of the meet and confer sessions and correspondence. During these
22 discussions, Samsung has made clear that it would be producing documents for each of the four
23 categories of documents referenced in Apple's motion. Rather than burden the Court with every
24 single letter and phone call, this declaration summarizes on the pertinent communications.

25 **SAMSUNG'S AGREEMENT TO PRODUCE "APPLE" SEARCH TERM DOCUMENTS,**
26 **CONSUMER SURVEY DOCUMENTS AND SOURCE CODE DOCUMENTS**

27 5. On November 29, 2011, Apple's counsel informed Samsung that it wanted
28 Samsung to substantially complete its production of the following three categories of documents

1 by December 15, 2011:

- 2 (1) source code and other technical documents;
- 3 (2) documents that include the term “Apple” and related terms; and
- 4 (3) survey-related documents referencing “Apple”.

5 6. During the parties’ regularly scheduled meet and confer call the following day, on
6 November 30, 2011, Samsung agreed to use its best efforts to substantially complete its
7 production of the documents Apple requested on an expedited basis, despite the fact that Apple
8 could not articulate any meaningful reason for demanding the expedited production. Attached as
9 Exhibit 1 is a true and correct copy of a letter sent by Samsung’s counsel on December 3, 2011,
10 confirming this conversation.

11 7. On December 5, 2011, Apple stated via letter that “Apple is not required to justify
12 its reasons for needing certain categories of documents on an expedited basis.”

13 8. On December 7, 2011, Samsung sent Apple a letter that reiterated its commitment
14 to providing Apple with the documents it sought in an expeditious and transparent manner, but
15 objected to Apple’s refusal to adequately explain the bases for its demands. In this letter,
16 Samsung articulated its position that Apple’s contemplated motion to compel was unripe in light
17 of the significant commitments Samsung had made. A true and correct copy of this letter (dated
18 December 6, 2011) is attached hereto as Exhibit 2.

19 9. Following the parties’ weekly meet and confer call on December 7, 2011, Apple’s
20 counsel sent a letter describing the written commitment it believed Samsung needed to make in
21 order to “avoid motion practice.” A true and correct copy of this letter is attached hereto as
22 Exhibit 3.

23 10. On December 8, 2011, Samsung’s counsel responded to Apple’s December 7, 2011
24 letter, stating that Samsung would substantially complete production of the documents Apple
25 sought to expedite by near-term dates certain. Samsung’s written commitment was essentially
26 identical to the commitment demanded by Apple, with minor adjustments to conform to the
27 parties’ prior meet and confer discussions and minor extensions to the timeline set forth by Apple
28 in order to make the undertaking more feasible. A true and correct copy of this email is attached

1 hereto as Exhibit 4. Apple did not respond to this correspondence. Later that same day, Apple
2 filed its Motion to Compel Production of Documents and Things (hereafter “Motion to Compel”)
3 regarding the materials Samsung had already agreed to produce.

4 **SAMSUNG’S AGREEMENT TO PRODUCE CAD FILES, SKETCHBOOKS AND**
5 **MODELS**

6 11. On December 6, 2011, Apple demanded for the first time that Samsung produce
7 sketchbooks and physical models created in connection with the design of all Galaxy phone and
8 tablet products, regardless of where sold, by December 23, 2011.

9 12. On December 6, 2011, Apple also demanded for the first time that Samsung
10 produce CAD files created in connection with the design of those Galaxy products by December
11 31, 2011.

12 13. On December 8, 2011, Samsung’s counsel confirmed that it would make its best
13 efforts to substantially complete production of these three categories of design documents by
14 January 6, 2011. A true and correct copy of this email is attached hereto as Exhibit 4.

15 **THE OBJECTIONABLE ASPECTS OF APPLE’S DEMANDS**

16 14. *Source Code and Technical Documents.* Apple’s demand for source code and
17 related technical documents has evolved and expanded over the past several weeks, such that
18 Apple’s demands have presented a moving target. Apple’s demands are also overbroad in
19 several respects. And finally, Apple has ignored that Samsung already offered to make certain
20 key source code regarding the accused functionalities available for inspection at Apple’s
21 convenience.

22 15. Attached hereto as Exhibit 5 is a true and correct copy of a November 9, 2011
23 letter from Apple’s counsel to Samsung’s counsel demanding that Samsung “immediately collect
24 and produce” at least sixteen different categories of documents relating to “source code and other
25 technical documents.” Among these categories, Apple’s counsel requested source code, related
26 configuration files, and version history information for six different features in the Samsung
27 products at issue as well as six additional applications in their entirety. Apple further requested
28 documents such as “all requests for quotations,” “all bills of materials,” “all qualification

1 documentation,” and “all testing data.” Apple did not limit these requests for source code or
2 documents and things to the functionalities it accuses of infringing its intellectual property.
3 Apple’s requests therefore sought production of a large number of documents and things related to
4 product features and components that are not accused of infringing any patents or other intellectual
5 property right asserted in this case; Samsung thus expressed serious concerns regarding the
6 requests’ overbreadth and relevance. Moreover, Apple stated that the documents it sought were
7 responsive to, *inter alia*, Apple Requests for Production, Set Six, Nos. 223-250, despite the fact
8 that Samsung’s responses to these requests were not due until November 30, 2011. In Apple’s
9 November 9, 2011 letter, Apple did not specifically request expedited production of these
10 documents or provide any reason why it needed immediate production of these documents.

11 16. During the parties’ meet and confer call on November 16, 2011, Samsung
12 continued to question the scope of Apple’s broad demands for technical documents, but assured
13 Apple that it would be producing source code relating to the accused products, and also asked that
14 Apple do the same for the Apple accused products. In fact, I am informed and believe that
15 Samsung’s counsel had already offered to make available for inspection certain source code
16 relevant to its Patent Local Rule 3-4 disclosures and sufficient to show operation of the features
17 accused of infringement.

18 17. During the parties’ November 30, 2011 meet and confer call, Samsung’s counsel
19 asked Apple’s counsel to explain its urgency in obtaining this source code. Apple’s counsel
20 stated that source code relating to the accused products was relevant to upcoming claim
21 construction briefing. Samsung’s counsel explained to Apple’s counsel that it would be
22 improper as a legal matter to use the source code for this purpose, especially if to make sure the
23 construction it advances “reads onto” the accused devices. Apple’s counsel was unable to
24 respond to this argument and could not provide any other basis for demanding immediate
25 production of all of the categories of documents described in its letters. Instead, Apple’s counsel
26 then stated that it did not have to give any justification. Because at the time of the meet and
27 confer, Samsung’s counsel was still in the process of gathering and organizing additional
28 responsive source code, Samsung’s counsel could not, in good faith, give a date certain by which

1 such a voluminous production could be completed. Samsung did, however, provide concrete
2 assurances that it would work diligently to substantially complete production of source code for
3 the accused functionalities by December 15, 2011. Samsung believed, based on Apple's
4 representations during the November 30, 2011 meet and confer call, that this was the commitment
5 Apple was seeking from Samsung. These discussions were memorialized by Samsung's counsel
6 in a letter dated December 3, 2011 (attached as Exhibit 1).

7 18. Following the November 30, 2011 meet and confer, Samsung's counsel also
8 prepared a detailed response to Apple's letters concerning source code and other technical
9 documents. Attached hereto as Exhibit 6 is a true and correct copy of the December 2, 2011
10 letter from Samsung's counsel. In this letter, Samsung reiterated its commitment to producing
11 for inspection source code relating to the accused functionalities for the accused products on an
12 expedited basis, despite Apple's failure to justify its demands for expedited treatment. However,
13 Samsung's counsel expressed serious concern regarding Apple's demands for source code relating
14 generally to several applications not tailored to the specific functionality accused in those
15 applications. Samsung also requested a meet and confer on all of the "technical documents"—
16 including "requests for quotations," "qualification documents," and "bills of materials" among
17 many other broad categories—since Apple had not provided explanation of how such categories
18 were relevant to the issues in the case.

19 19. In its letter dated December 5, 2011 (attached hereto as Exhibit 7), Apple failed to
20 address any of Samsung's questions or concerns and demanded "**Samsung's substantial**
21 **completion of its *entire* production of source code and other technical documents by**
22 **December 15.**" (emphases in original).

23 20. The very next day, Apple changed the scope of its demands. Attached hereto as
24 Exhibit 8 is a true and correct copy of Apple's counsel's December 6, 2011 letter to Samsung's
25 counsel. Apple first agreed that it was willing to "defer production" for the technical documents
26 "until after the parties have further met and conferred on this issue." However, the letter added
27 several *new* categories of source code (Nos. 8, 9 and 10) for which it demanded that Samsung
28 complete production by December 15, 2011. This letter also reiterated Apple's position that it

1 “is not required to justify its reasons for needing certain categories of documents on an expedited
2 basis.” Despite the fact that Apple had changed the scope of its demands, Samsung stated on
3 December 8, 2011, that it would seek to satisfy Apple’s latest demands by December 31, 2011.
4 Apple did not respond.

5 21. I am personally involved in preparing for and attending most (if not all) of the meet
6 and confer calls between the parties. To the best of my knowledge, to date, the parties have not
7 yet met and conferred regarding the relevance or scope of any non-source code documents sought
8 in Requests for Production Nos. 193, 225, 226, 227, 229, 230, 231, 233, 234, 235, 240, 243, 244,
9 or 245, which are all listed in Apple’s Motion to Compel.

10 22. To the best of my knowledge, to date, the parties have not yet completed their meet
11 and confer regarding the relevance or scope of the source code sought in Requests for Production
12 Nos. 200, 223, 224, 228, 232, 241, and 242. While Samsung has agreed to produce source code
13 relating to the accused functionalities of the accused products, the parties have not yet met and
14 conferred regarding the breadth of Apple’s source code requests. For example, on November 9,
15 2011, Apple specifically requested source code relating to six applications (TouchWiz, Browser,
16 Camera, Contacts Gallery, and Maps) (*see* Exhibit 5), but Samsung objected that the request was
17 not targeted to the functionalities accused of infringement (*see* Exhibit 6). Moreover, none of the
18 requests for production at issue in Apple’s Motion to Compel specifically requests source code for
19 the Maps application. These are all issues that the parties still have yet to try to resolve during
20 meet and confer.

21 23. ***Surveys and Documents Referencing Apple.*** Apple’s demand for survey
22 documents and documents referencing Apple also has expanded over the past several weeks,
23 making it difficult for Samsung to determine exactly what Apple wants. Apple first claimed that
24 its demands are governed by the Court’s September 28, 2011 Order (Dkt. No. 267). However,
25 Samsung has argued that what Apple seeks is beyond the scope of the Court’s Order, and Apple
26 subsequently backed off of its position. As discussed below, Apple’s demands are overbroad and
27 unduly burdensome to Samsung. Nevertheless, the parties had already reached an agreement
28 regarding the search and production of such documents prior to Apple’s motion.

1 24. During the parties' prior meet and confer conferences in November, the parties
2 discussed an agreement whereby each party would search for and produce documents resulting
3 from the search of the opposing party's name as well as the names of the opposing party's accused
4 products. While Samsung has told Apple that the "Apple" term search has resulted in too many
5 false hits, in the interests of compromise, Samsung was willing to reach agreement with Apple
6 regarding the reciprocal search and production of such search results in each party's designers'
7 files. Samsung has already produced relevant documents resulting from this search with respect
8 to several of the custodians.

9 25. However, on November 15, 2011, Apple's counsel significantly expanded the
10 scope of its request, asking instead that Samsung should search designers and engineers who
11 worked on the products at issue, employees responsible for marketing those products, and
12 employees responsible for developing the infringing features—thus adding dozens of additional
13 custodians to be searched and including employees who never worked on any accused feature of
14 the products at issue.

15 26. Also on November 16, 2011, Apple's counsel wrote Samsung's counsel, further
16 requesting that Samsung produce an expanded scope of survey documents, including survey
17 documents that reference Apple or the Apple products in the U.S., Korea or any other location
18 anywhere in the world, without limitation to the products at issue in this litigation.

19 27. During the parties' November 16, 2011 meet and confer session, Apple
20 acknowledged that the searches requested in its letters of November 15, 2011 and November 16,
21 2011 were broader than previous requests. To that end, Apple's counsel apologized that it
22 seemed like Apple's requests were "a moving target." Samsung's counsel agreed to consider
23 these requests. Apple agreed that it would run the "Samsung" searches, but did not agree to
24 search for or produce any surveys conducted globally that mention "Samsung" or the Samsung
25 products at issue. Samsung's counsel memorialized this discussion in its November 20, 2011
26 letter (attached hereto as Exhibit 9).

27 28. During the parties' regularly scheduled discovery meet and confer conference on
28 November 30, 2011, Apple threatened a motion to compel unless Samsung agreed to

1 “substantially complete” production of these documents by December 15, 2011. Apple,
2 however, refused to meet and confer regarding the urgency of such demands, nor did Apple agree
3 to produce its own documents for these categories by the same date. Nonetheless, on December
4 3, 2011 and again on December 4, 2011, Samsung agreed to use its best efforts to complete
5 substantial production of these documents before December 15, 2011.

6 29. However, on December 5, 2011, Apple presented new rules: that Samsung would
7 also be required to provide “a written disclosure” identifying not only Samsung’s search terms and
8 custodians, but also Samsung’s counsel’s work product regarding its “specific steps” taken to
9 search for and produce documents.

10 30. Only two days later, Apple retracted that demand. Samsung thus stated on
11 December 8, 2011, after evaluating the status and challenges of its document collection process,
12 that it would seek to satisfy Apple’s latest demands by December 31, 2011. Apple did not
13 respond.

14 31. *CAD Files, Sketchbooks and Models.* On December 6, 2011—just two days
15 before it filed its Motion to Compel—Apple sent a letter to Samsung insisting that it immediately
16 produce all sketchbooks and physical models for all Galaxy phone and tablet products, whether for
17 a final design or an alternative design that was not used, by December 23, 2011. This letter also
18 demanded CAD files relating to the same by December 31, 2011.

19 32. Although Samsung has already produced design history documents, including
20 numerous CAD files, as detailed in the Declaration of Sara Jenkins filed herewith, Samsung
21 agreed to make its best efforts to produce these design history documents on an expedited basis,
22 since at least a subset of the request would be relevant to Apple’s claims in this litigation. A true
23 and correct copy of this email is attached hereto as Exhibit 4. Apple did not respond to this
24 correspondence.

25 33. However, not all Galaxy phone and tablet products are at issue in this litigation, let
26 alone accused of infringement of any of Apple’s design patents or alleged trade dress. Therefore,
27 Apple’s request for “all Galaxy phone and tablet products, regardless of where sold” is overly
28 broad and seeks information irrelevant to this litigation.

1 **APPLE'S FAILURE TO COMMIT TO COMPLETE PRODUCTION OF THE SAME**
2 **CATEGORIES OF DOCUMENTS**

3 34. During multiple prior meet and confer conferences, Samsung has requested, and the
4 parties have met and conferred, regarding at least four categories of documents: (i) the source code
5 and other technical documents relating to the accused Apple products; (ii) Apple surveys that
6 mention "Samsung" or the Samsung products at issue; (iii) the results from a search of "Samsung"
7 or the Samsung products at issue in the custodial files of the designers and engineers who worked
8 on the Apple products at issue, employees responsible for marketing those products, and
9 employees responsible for developing the infringing features; or (iv) the design history documents,
10 including the sketchbooks, for the Apple products at issue. As of the date of this declaration,
11 Apple has not committed to a date certain to complete its production of such documents.

12 35. **Source Code.** During the parties' meet and confer conferences on November 9,
13 November 16, and November 30, and again by letter on December 2, Samsung's counsel
14 requested Apple's position on whether it would be producing source code and other technical
15 documents relating to the Apple accused products. A true and correct copy of the December 2,
16 2011 letter is attached as Exhibit 6. On December 6, 2011, Apple's counsel admitted that it had
17 not yet produced in this litigation the source code relating to the Apple products which infringe
18 Samsung's utility patents. Apple's counsel provided no reasonable basis for Apple's decision to
19 withhold production of relevant source code responsive to Samsung's requests, nor did Apple's
20 counsel make any commitment to produce these materials by a near-term date certain.

21 36. **Survey Documents.** On November 30, 2011 and December 3, 2011, Samsung
22 requested that Apple agree to commit to a date certain regarding the completion of the production
23 of consumer surveys or consumer research or other marketing of Apple products that mention
24 Samsung or Samsung's products, and cited the requests for production covering such documents.
25 Attached as Exhibit 1 is a true and correct copy of Samsung's counsel's December 3, 2011 letter.
26 Apple refused to commit to substantially complete its production of such documents by any
27 particular date, let alone on an expedited basis.

1 37. **“Samsung” and Samsung Product Searches.** On November 15, 2011, and
2 November 20, 2011, Apple stated that it would search for “Samsung” or any aliases used by Apple
3 for Samsung amongst the custodial files of the designers and engineers who worked on the Apple
4 products at issue, employees responsible for marketing those products, and employees responsible
5 for developing the infringing features. On November 30, 2011 and again on December 5, 2011,
6 Apple confirmed its promise to conduct those searches as well as searches for the names of the
7 Samsung accused products in the custodians’ files. However, Apple did not commit to produce
8 such documents by December 15, 2011, or to any date certain, and refused to make any such
9 commitment.

10 38. **Design History Documents.** As detailed in the Declaration of Diane Hutnyan,
11 filed December 12, 2011, Samsung has repeatedly asked Apple for its design sketchbooks, and the
12 parties have engaged in multiple meet and confer conferences on Apple’s sketchbook production.
13 At the December 7, 2011 meet and confer conference, Apple represented that it would produce the
14 sketchbooks, but refused to commit to a date certain for production.

15 39. Attached as Exhibit 10 is a true and correct copy of Samsung’s Second
16 Supplemental Objections and Responses to Apple’s Interrogatories to Defendants Relating to
17 Apple’s Motion for a Preliminary Injunction – Set Two (Nos. 10-11), dated November 21, 2011,
18 in which Samsung cites numerous designers’ documents that have been produced in this litigation.

19 40. Attached as Exhibit 11 is a true and correct copy of Samsung’s Supplemental
20 Objections and Responses to Apple’s Interrogatories to Defendants Relating to Apple’s Motion
21 for a Preliminary Injunction – Set Two (Nos. 10-14), dated October 12, 2011, in which Samsung
22 cites numerous surveys and marketing documents that have been produced in this litigation.

23 41. On November 22-23, 2011, right before the Thanksgiving holiday, Apple served 9
24 deposition notices. On December 6, 2011, Apple served another 28 notices of deposition.
25 None of these depositions have been scheduled yet, although Samsung is in the process of
26 proposing dates for them.

27 42. On December 7, 2011, Samsung served 49 notices for the depositions of Apple
28 designers and engineers that we are informed and believe may have knowledge of the accused

1 Apple products, as well as sales and marketing personnel that we are informed and believe are
2 responsible for selling the accused Apple products. Those depositions are noticed for dates
3 beginning near the end of December 2011 through January 2012.

4 I declare under penalty of perjury under the laws of the United States that the foregoing is
5 true and correct.

6 Executed in Redwood Shores, California on December 14, 2011.

7

8

By /s/ Melissa N. Chan

9

Melissa N. Chan

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Charles K. Verhoeven

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Kevin P.B. Johnson

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Victoria F. Maroulis

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Michael T. Zeller

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Attorneys for SAMSUNG ELECTRONICS CO.,

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LTD., SAMSUNG ELECTRONICS AMERICA,

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INC., and SAMSUNG

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TELECOMMUNICATIONS AMERICA, LLC.

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General Order 45 Attestation

I, Victoria F. Maroulis, am the ECF user whose ID and password are being used to file this Declaration. In compliance with General Order 45(X)(B), I hereby attest that Melissa N. Chan has concurred in this filing.

/s/ Victoria Maroulis