

1 HAROLD J. MCELHINNY (CA SBN 66781)
 2 hmcelhinny@mofo.com
 3 MICHAEL A. JACOBS (CA SBN 111664)
 4 mjacobs@mofo.com
 5 JENNIFER LEE TAYLOR (CA SBN 161368)
 6 jtaylor@mofo.com
 7 ALISON M. TUCHER (CA SBN 171363)
 8 atucher@mofo.com
 9 RICHARD S.J. HUNG (CA SBN 197425)
 10 rhung@mofo.com
 11 JASON R. BARTLETT (CA SBN 214530)
 12 jasonbartlett@mofo.com
 13 MORRISON & FOERSTER LLP
 14 425 Market Street
 15 San Francisco, California 94105-2482
 16 Telephone: (415) 268-7000
 17 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

Attorneys for Plaintiff and
 Counterclaim-Defendant APPLE INC.

UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

APPLE INC., a California corporation,

Plaintiff,

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 OPPOSITION TO SAMSUNG'S
 MOTION TO ENFORCE VARIOUS
 COURT ORDERS**

Date: January 19, 2012
 Time: 10:00 a.m.
 Place: Courtroom 5, 4th Floor
 Judge: Hon. Paul S. Grewal

**PUBLIC REDACTED VERSION
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1 **INTRODUCTION**

2 Because Apple has fully complied with all of the Court’s orders regarding production,
3 Samsung’s Motion to Enforce should be denied. Samsung’s motion is based on an overbroad and
4 unsupported reading of its own requests and the Court’s prior orders and is also brought for an
5 improper purpose.

6 **Sketchbooks:** Samsung claims that Apple has failed to produce all relevant sketchbooks,
7 based on its belief that it previously requested and the Court’s orders span dates before 2003.
8 Both are untrue. Samsung’s requests for Apple’s sketchbooks—and the prior related motion
9 practice before this Court—have always concerned the alleged relevance of these sketchbooks to
10 the *asserted design patents*. For this reason, and in view of the September 2003 conception date
11 for the earliest design, Apple previously proposed a January 1, 2003 lower cut-off date for its
12 sketchbook production.

13 Apple openly disclosed this date to Samsung and invited Samsung to propose a different
14 date—but Samsung did not respond. Samsung’s sudden demand now for 2002 sketchbooks, after
15 Apple has completed its sketchbook production, is arbitrary. Samsung’s moving papers confirm
16 this, as they articulate no reason for believing 2002 sketchbooks to be relevant. Apple could not
17 have violated an order with respect to something that Samsung did not previously request, and it
18 should not be forced to repeat the time-consuming and burdensome process of collecting,
19 scanning, reviewing, and producing earlier sketchbooks based on Samsung’s belated demands.

20 [REDACTED] Samsung claims that Apple has violated Court orders allegedly requiring the
21 production of [REDACTED] CAD drawings, prototypes, and models. But
22 Apple has complied with those orders. Apple has produced industrial design models and CAD, as
23 it agreed to do *months ago*, and Samsung has already inspected them. As for the Model 035 CAD
24 files that Samsung claims were not produced on December 30, Samsung simply did not know
25 how to open them, and thus mistakenly believed that they were unavailable.

26 Earlier Court orders made no reference to [REDACTED] because Samsung did not move to
27 compel their production. In any event, [REDACTED]

1 [REDACTED]
2 [REDACTED]

3 **Photograph de-designation:** Samsung claims that Apple has violated an order to de-
4 designate photographs. This, too, is based on a misreading of the Court’s December 22, 2011
5 Order. In that Order, the Court noted that Apple “may maintain its confidentiality designation on
6 only those photos that display details or aspects of the tablet mockups that were not disclosed in
7 the earlier patent filings and that remain proprietary to Apple.” (Order Granting in Part
8 Samsung’s Motion to Compel [Dkt. No. 536] at 3.) Consistent with the Order, Apple informed
9 Samsung that it would redact the details that went beyond what was disclosed in earlier patent
10 filings before de-designating the photographs at issue—namely, scale information. Concurrently
11 with this filing, Apple has produced to Samsung de-designated photographs with the additional
12 scale information redacted.

13 The scale information in Samsung’s photographs is not part of the public record, and thus
14 Apple could not have violated an order by failing to unredact it and allow public dissemination.
15 Samsung’s demand for production of de-designated versions of photographs showing non-public
16 scale information appears to be driven by its improper desire to use the images in foreign
17 litigation.

18 **Photograph search protocol:** Samsung claims that Apple violated an order to identify
19 which files were searched to find photographs that were submitted to the Patent Office during the
20 prosecution of the D’889 patent. In its moving papers, however, Samsung *concedes* that Apple
21 has already provided the requested information.

22 Samsung’s “motion to enforce” must be seen for what it is: a threadbare attempt to defuse
23 a future sanctions motion against it. Even in the final months of discovery, Samsung’s production
24 has been late, incomplete, and begrudging. (Apple’s Motion to Compel Production [Dkt. No.
25 613-1] at 1-2.) Samsung has produced documents only under court order or threatened sanctions.
26 (See Order Granting in Part Apple’s Motion to Compel [Dkt. No. 537] (explaining that “further
27 failure to comply with the September 28 Order will subject Samsung to sanctions.”) But even
28 then, Samsung has still proceeded to miss court-ordered deadlines. (See Samsung’s Motion to

1 Extend Time for Compliance [Dkt. No. 554-0] (claiming that compliance with December 22,
2 2011 Order was “physically impossible”); Order Denying Samsung’s Motion to Extend Time to
3 Complete Discovery [Dkt. No. 567].) Apple has not violated this Court’s orders—Samsung has.
4 The Court should deny Samsung’s motion.

5 ARGUMENT

6 Samsung seeks an order from the Court directing Apple to “comply in full with all
7 standing discovery orders” by either January 22, 2012 (the date stated in Samsung’s brief) or
8 January 25, 2012 (the date stated in Samsung’s proposed order). Apple has fully complied with
9 the Court’s orders. Samsung’s motion should be denied.

10 I. APPLE HAS NOT VIOLATED THE COURT’S ORDERS TO PRODUCE 11 RELEVANT SKETCHBOOKS.

12 Apple finished producing *all* designer sketchbooks that it could find relating to the patents
13 in suit by December 30, 2011—a day before the deadline set by the Court in its Order of
14 December 22. (Order Granting in Part Samsung’s Motion to Compel [Dkt. No. 536] at 4)
15 (“December 22 Order.”)¹ The produced sketchbooks range in date from 2003 to 2010.
16 Samsung’s theory that Apple violated the Order appears to be based on the assumption that the
17 Court required Apple to produce *all* sketchbooks in its possession, regardless of relevance. The
18 Court did no such thing.

19 **The Court’s Prior Orders:** The Court’s September 13, 2011 preliminary injunction
20 discovery order directed Apple to produce sketchbooks “relating to the four patents at issue in
21 Apple’s preliminary injunction motion.” (Order Granting-In-Part and Denying-In-Part
22 Samsung’s Motion to Compel [Dkt. No. 233] at 2) (“September 13 Order.”) Samsung’s next
23 motion to compel did not seek to expand this universe, but rather noted that the Court had ordered

24
25 ¹ Apple discovered five additional sketchbooks belonging to Apple designer Bart Andre
26 after December 30, and immediately inspected the sketchbooks to identify pages relevant to the
27 asserted designs. (*See* Declaration of Jason R. Bartlett in Support of Apple’s Opposition to
28 Samsung’s Motion to Enforce Various Court Orders (“Bartlett Decl.”) ¶ 2.) Apple produced the
22 unredacted pages of content it identified as relevant, as well as additional redacted pages and
covers, within just a few days of the discovery of these additional sketchbooks, on January 9.
(*Id.*)

1 “Apple to produce all relevant inventor sketchbooks relating to certain” design patents, and
2 requested that the Court enforce that prior order by ordering more fulsome copies of the
3 sketchbooks at issue. (Samsung’s Motion to Compel [ECF No. 487] at 15.) The Court’s
4 December 22 Order granted Samsung’s request in part and ordered production by December 31.
5 (December 22 Order at 4.)

6 There is nothing to suggest that, via its order, the Court was seeking to expand the scope
7 of Apple’s sketchbook production beyond what Samsung requested and irrespective of relevance
8 relevance. (*Id.*) Apple has now produced sketchbooks relating to *all* design patents in suit.
9 (Bartlett Declaration ¶ 2.)

10 **Apple’s Compliance Efforts:** As part of its collection process, Apple had to identify
11 what sketchbooks it would collect and produce. This was a massive undertaking, and as Apple
12 has previously described to the Court, the final leg of Apple’s sketchbook review and production
13 involved a team of more than 25 individuals working overtime and over weekends during the
14 holiday season to complete production. (Apple’s Opposition to Samsung’s Motion to Extend
15 Time for Compliance [Dkt. No. 565] at 4-5.) It would be nonsensical, fruitless, and burdensome
16 for Apple to additionally collect and process sketchbooks from years before designers were even
17 working on the projects that led to the design patents at issue.

18 Apple has been transparent about its sketchbook production process. Apple disclosed on
19 *November 15* that it used a 2003 date cut-off in connection with Industrial Designer document
20 productions. (*See* Bartlett Decl. Ex. a.) In subsequent meet-and-confer discussions, the parties
21 discussed Apple’s 2003 date cut-off on sketchbooks specifically. (*Id.* Ex. B.) (summarizing
22 correspondence and meet-and-confer regarding lower date cut-off for industrial design document
23 production.) Apple selected this date because it had found no evidence that any industrial
24 designer was working on anything relating to a design patent at issue until the fall of 2003. (*Id.*)
25 As a result, the January 2003 date Apple applied provided a comfortable buffer and should
26 include all relevant sketchbooks.

27 The parties discussed Apple’s 2003 date cut-off on sketchbooks specifically during a
28 meet-and-confer on December 21. (*Id.*) Apple invited Samsung to name a date that it considered

1 early enough, if Samsung believed that Apple's selection of 2003 as the lower cutoff was not
2 sufficiently early. (*Id.*) Samsung refused to do so, instead asked Apple to confirm in writing
3 what date it used as a cut-off for production of sketchbooks. (*Id.*) Apple did so in a letter of
4 December 24, 2011, then proceeded to complete scanning and processing of sketchbooks over the
5 Christmas holiday. (*Id.*) After Apple had completed this process, Samsung arbitrarily declared
6 that it wanted 2002 sketchbooks too. (*Id.*)

7 To this day, Samsung still presents *no* basis for its very belated request for pre-January
8 2003 sketchbooks. Even its motion fails to offer a rationale for why 2002 sketchbooks should be
9 relevant, or an excuse for not making its request earlier.² Samsung's demands are therefore
10 baseless and its reading of the Court's Orders is wrong. Samsung's motion should be denied.

11 **II. APPLE'S PRODUCTION OF FILES RELATING TO THE CONCEPTION**
12 **AND REDUCTION TO PRACTICE OF THE ASSERTED DESIGNS HAS**
13 **BEEN THOROUGH AND IT HAS NOT VIOLATED ANY COURT ORDERS**

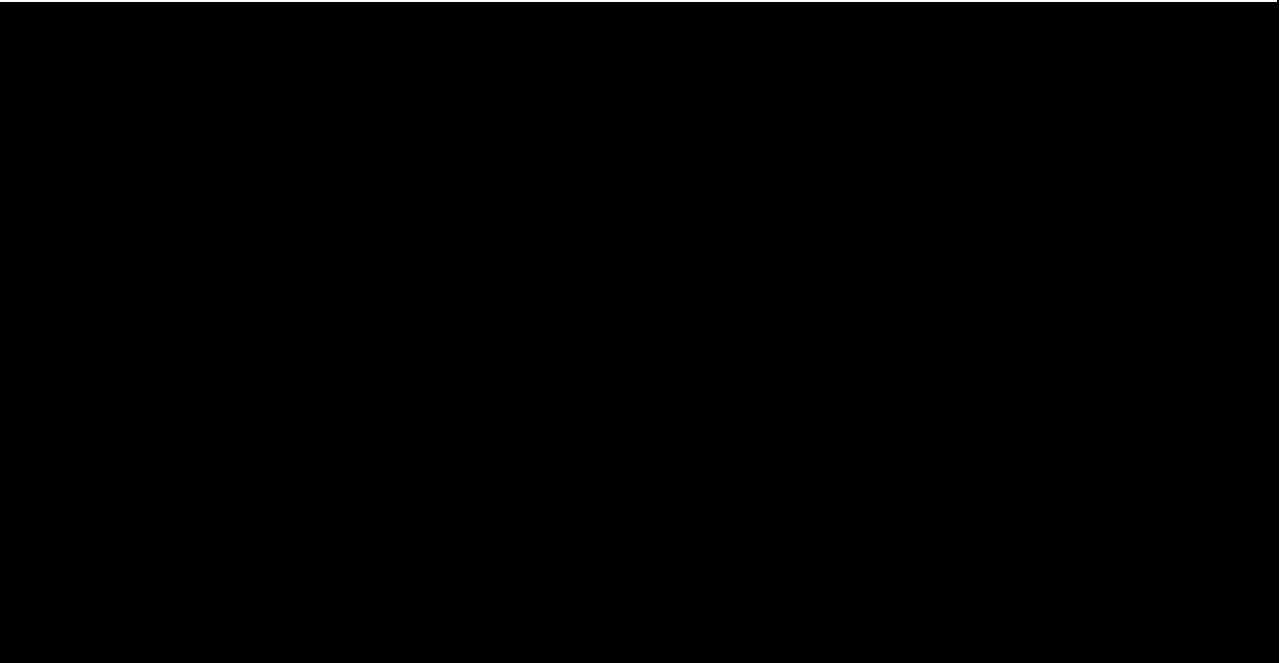
14 Samsung wrongly argues that Apple has violated Court orders by failing to produce
15 documents relating to the conception and reduction to practice of the asserted design patents.
16 Apple has made a full and complete production that is more than adequate to show conception
17 and reduction to practice. Apple has produced all the CAD files that industrial designers created
18 when they were designing the products at issue. (Bartlett Decl. ¶ 4.) Unlike Samsung, Apple has
19 produced all industrial design CAD, including all drafts, for all relevant products (that is, all
20 released generations of iPhone, iPad, and iPod touch). (*Id.*) Apple has produced every sketch
21 related to these products that its industrial designers made while working on these products. (*Id.*)
22 And Apple has produced every model that it could find that the industrial designers made or had
23 made relating to those products. (*Id.*) Samsung began inspection of those models on Friday,
24 January 13, 2012. (*Id.* Ex. G.) The production included [REDACTED] plus assorted

25 ² Samsung's reference to Apple's production of e-mails from 2002 is a red herring. E-
26 mails are produced for many reasons. For example, an e-mail may be a hit for one of Apple's
27 search terms. Samsung does not cite a single e-mail that suggests sketchbooks from 2002 would
28 be relevant. Samsung's failure to point to a single piece of evidence that Apple designers were
working on relevant designs in 2002 means it has no such evidence. Samsung is simply grasping
for an argument to support its late attempt to burden Apple by reopening its sketchbook collection
and production process.

1 partial models and parts. The Court’s prior orders did *not* require Apple to produce [REDACTED]. For
2 the reasons discussed below, no such order should issue now.

3 **A. CAD**

4 Apple began producing CAD files long ago, during the preliminary injunction phase of
5 this case. Apple has produced all the CAD files that industrial designers created when they were
6 designing the products at issue. (Bartlett Decl. ¶ 4.) A portion of a produced CAD file is
7 attached to the Bartlett Declaration as Exhibit B and pictured below. As shown in the example
8 below, CAD alone is more than sufficient to show the relevant details and multiple views of a
9 given design:



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21 Before December 31, Apple produced industrial design CAD files covering all announced
22 generations of iPhone, iPod touch, and iPad, as well as CAD relating to the 035 model that
23 Samsung requested. (Bartlett Decl. ¶ 4.)

24 Samsung’s claim that Apple still has not produced the CAD files relating to the 035 tablet
25 is flat-out false. Apple produced CAD files relating to the 035 tablet by December 31, pursuant
26 to the Court’s Order. (*Id.*) When Samsung reported that it was unable to view the CAD data,
27 Apple immediately began investigating the issue. In the interim, and as a courtesy, Apple’s
28 attorneys prepared PDFs of the CAD files over the weekend and provided them to Samsung as a

1 temporary workaround. (*Id.* Ex. D.) Through its investigation, Apple determined that the
2 relevant CAD files were not corrupted or missing. Instead, Samsung simply did not understand
3 how to open them using the relevant software program (rather than by simple double-clicking on
4 the file). (*Id.* Ex. E.)

5 **B. Sketchbooks**

6 In addition to CAD, as described above in greater detail, Apple produced before
7 December 31 every sketch that it could locate related to every design patent at issue. (*See infra*
8 Section I.)

9 **C. Models**

10 Apple has produced *all industrial design models* for Samsung’s inspection. (Bartlett Decl.
11 Ex. F.) A photograph of one design model is pictured below as an exemplar:



20 Samsung began inspecting the models on Friday, January 13. (Bartlett Decl. Ex. G.)

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]

1 Apple has also agreed to produce any still-working prototypes that it has been able to
2 identify, although it has only identified a limited number. (*Id.* Ex. B.) Apple has canvassed
3 individuals working on touch hardware, design, operating system software, core driver software,
4 and product design to identify any working prototypes, and has asked that Samsung do the same.
5 (*Id.* ¶ 8). Samsung has not responded. (*Id.*)

6 The only items that Apple has *not* agreed to produce are the many non-working prototypes
7 and parts and pieces. (*Id.*) Many Apple engineers have old dead parts sitting in desk drawers, on
8 shelves, or in boxes. (*Id.*) To attempt to gather up all of those old pieces of hardware and present
9 them to Samsung for inspection would be a massive waste of time and effort, particularly in view
10 of the other materials Apple has produced. Given Apple’s substantial production of design
11 documents, as discussed above, including production of all relevant CAD, sketchbooks, models,
12 and its agreement to produce working prototypes, the burden of collecting, transporting, and
13 presenting for inspection non-working prototype pieces and parts far outweighs any potential
14 relevance. (*Id.*)

15 [REDACTED]

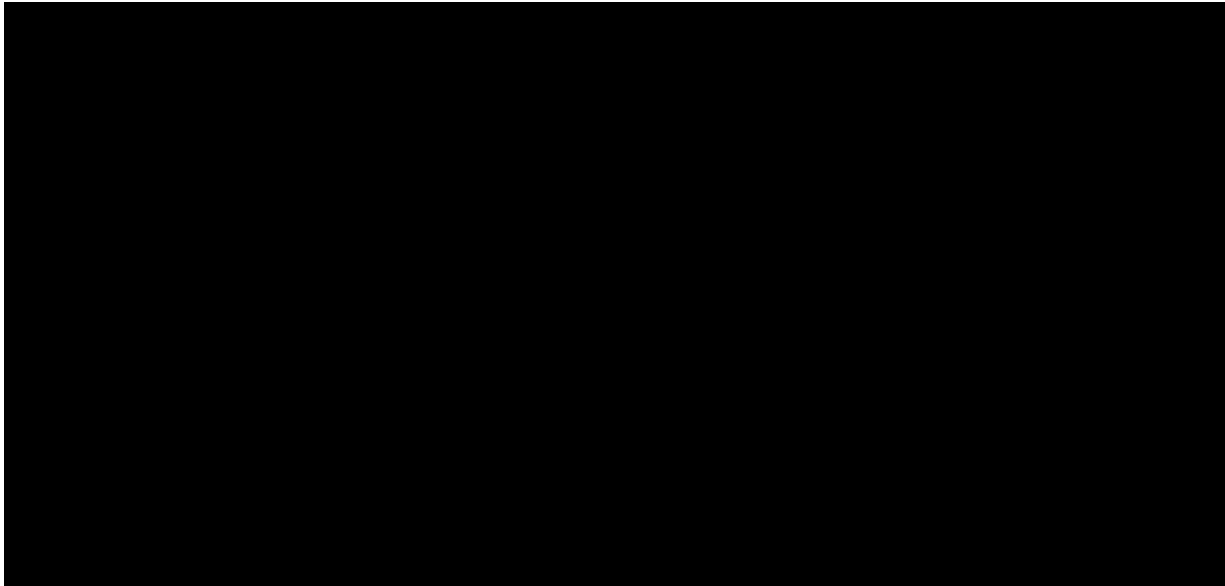
16 Apple acknowledges that industrial design CAD files, sketchbooks, and design models
17 pertaining to the asserted design patents are relevant to conception and reduction to practice of
18 Apple’s asserted designs. [REDACTED] are not relevant, however. [REDACTED]

19 [REDACTED]

20 [REDACTED]

21 [REDACTED]

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(*Id.* Ex. H.)

[Redacted text block consisting of multiple lines of blacked-out content]

Apple has already made a more than adequate production of materials relating to conception and reduction to practice of its asserted designs. In this late stage of discovery, the parties have much more pressing issues to focus on than whatever marginal information might be gleaned from [redacted].

III. APPLE HAS NOT VIOLATED ANY COURT ORDER REGARDING DE-DESIGNATION OF MODEL 035 PHOTOGRAPHS

Samsung claims that Apple has violated an order to de-designate photographs, but this misrepresents the Court’s December 22, 2011 Order.

1 As Samsung admits in its Motion, the Court noted in its Order that Apple “may maintain
2 its confidentiality designation on only those photos that display details or aspects of the tablet
3 mockups that were not disclosed in the earlier patent filings and that remain proprietary to
4 Apple.” (Order Granting in Part Samsung’s Motion to Compel [Dkt. No. 536] at 3.) Consistent
5 with this Order, Apple informed Samsung that it would redact the details that went beyond what
6 was disclosed in earlier patent filings before de-designating the photographs at issue—namely,
7 scale information. (Bartlett Decl. Ex. B.) Apple also informed Samsung that if it wished to take
8 photographs that did *not* include such additional information, Apple would not designate such
9 photographs as confidential. (*Id.*)

10 Samsung derides Apple’s position as a “waste” and “meritless objection,” but fails to
11 dispute the key point—the photographs submitted to the PTO do not contain any scale
12 information.³ Unlike Samsung’s photographs, the photographs submitted to the PTO do not
13 contain rulers. Unlike Samsung’s photographs, the model in the photographs submitted to the
14 PTO is not set side-by-side with an iPad 2. Concurrently with this opposition, Apple has
15 produced to Samsung de-designated photos that omit scale information and that are consistent
16 with the photographs submitted to the PTO. (*Id.* Ex. I.)

17 **IV. APPLE HAS NOT VIOLATED ANY ORDER TO IDENTIFY WHAT FILES**
18 **WERE SEARCHED**

19 The Court’s Order of November 16 required Apple to “identify specifically which
20 custodians’ files were searched, any search terms that were used, and the time frame included in
21 those searches.” (Order Granting-in-Part Samsung’s Motion to Compel Apple to Produce
22 Documents and Things [Dkt. No. 398] at 2-3.) The purpose of this Order was to provide
23 Samsung the opportunity to suggest additional locations to search. (*Id.*)

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26 ³ Samsung’s Motion to Enforce mentions that one photograph provided to the USPTO
27 shows a person holding the model. (Motion at 9.) An image of an individual of unknown size
28 holding a tablet does not provide precise scale information on the level of rulers or side-by-side
products.

1 Samsung's own brief concedes that Apple has already identified what files it searched to
2 find photographs submitted to the USPTO during the prosecution of the D'889 patent. (Motion at
3 10.) On November 28, 2011, Apple wrote Samsung to identify which custodian files were
4 searched, the absence of search terms used, and the lack of timeframe restrictions:

5 Apple's outside prosecuting attorney, Tracy Durkin of Sterne,
6 Kessler, Goldstein & Fox. Sterne Kessler received from Beyer
7 Weaver, the firm of Apple's former prosecuting agent Quin
8 Hoellwarth, the entire file that Beyer Weaver possessed relating to
9 the prosecution of the D'889 Patent. Ms. Durkin searched both
10 electronic and paper files relating to the D'889 Patent. Apple
11 acquired from Ms. Durkin the best copies of the photographs that
12 were present in the file. Original photographs were not found.

13 Steve Beyer of the Beyer Law Group, formerly of the Beyer
14 Weaver firm. Mr. Beyer checked both hard copy and electronic
15 document repositories relating to the D'889 Patent. Mr. Beyer
16 confirmed that his firm has previously transferred its whole file to
17 Sterne Kessler at Apple's request.

18 Quin Hoellwarth, formerly of the Beyer Weaver firm and now an
19 in-house patent agent at Apple. Mr. Hoellwarth did not take any
20 files related to the prosecution of the D'889 Patent with him to
21 Apple. Nonetheless, Mr. Hoellwarth searched his own paper files,
22 emails, and local electronic drives. As noted above, Mr.
23 Hoellwarth's former firm sent its entire file for the D'889 Patent to
24 Tracy Durkin at Sterne Kessler. Mr. Hoellwarth did not possess
25 original photographs or any copies that were better than the copies
26 provided by Ms. Durkin.

27 Apple's legal department. Mr. Hoellwarth also searched Apple
28 legal department paper files and servers.

Publicly available files stored by the USPTO.

The above searches were manual, were intended to search in each
location previously known potentially to have contained the files,
and accordingly did not rely on any automated date restrictions or
search terms.”

(Bartlett Decl. Ex. J.) Samsung's claim, in the face of this letter, that Apple has not identified
which files were searched and violated the Court's order requiring such disclosure is simply
untrue.

Samsung's remaining argument relies on a selective and misleading quotation of a portion
of the deposition of Tracy Durkin, an outside patent prosecution attorney. Ms. Durkin, a nonparty
witness, was asked what steps she took to review documents in response to Samsung's subpoena.

1 (Motion at 10 n.32.) She noted, correctly, that she is outside the jurisdiction of the Court and, as
2 a nonparty witness, was under no obligation to affirmatively search for documents responsive to
3 Samsung’s invalid subpoena. (*Id.*) But Ms. Durkin’s comments do not detract from the adequacy
4 of her collection and production efforts, on Apple’s behalf, of any relevant documents in her
5 possession.

6 Samsung claims, *without any citation or support*, that it has identified relevant CDs that
7 were not searched and asks the Court to order immediate production as these may contain “the
8 photos submitted to the PTO.” (*E.g.*, Motion at 12-13.) The only support Apple has found for
9 Samsung’s claim is a statement in Ms. Durkin’s more recent deposition in a related action in the
10 U.S. International Trade Commission. Ms. Durkin states that she has a CD in the files her firm
11 received from Apple’s prior patent prosecution firm. (Bartlett Decl. Ex. K at 265:8-268:13.)
12 Ms. Durkin also testified that there are no images of the item shown in the D’889 prosecution on
13 the CD, and indeed, she *does not believe there are photographs of any kind on the CD.* (*Id.* at
14 268:4-13.)

15 Samsung’s continued obsession with Apple’s efforts to search for the 035 photographs is
16 bizarre and unproductive.⁴ Apple has already produced the highest quality photographs it was
17 able to locate, and has confirmed as such in writing—both in a letter and in a stipulation signed
18 by Apple’s co-lead counsel. (Bartlett Decl. Ex. J.) Apple has produced *the model itself* for
19 inspection and allowed Samsung to take its own photographs. (*See* Samsung’s Motion to Compel
20 [Dkt. No. 487-0] at 10) (acknowledging that Samsung inspected various Apple tablet models and
21 took photographs of those items). Apple has produced concurrently with this filing de-designated
22 photographs showing the details that were visible in the public USPTO filings. (Bartlett Decl. Ex.
23 I.) Apple has also agreed to let Samsung take high-quality photographs that reproduce images
24 submitted to the PTO and confirmed that Apple would not designate such photographs as

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26 ⁴ Apple has noted for Samsung and the Court that the previously-taken 035 photographs
27 are of limited, if any, relevance, given the file history of the D’889 patent. (*See* Apple’s
28 Opposition to Samsung’s Motion to Compel [Dkt. No. 502-3] at 9-10.) The photographs are *not*
part of the prosecution history, but were attached in an appendix that the Examiner struck from
the application. (*Id.*)

1 confidential under the protective order. (*Id.* Ex. B.) At this point, it is not clear what possible
2 need Samsung has for additional photographs of the 035 model or additional detail on Apple's
3 searches. Samsung's groundless and moot motion is an unnecessary burden on Apple and the
4 Court and should be denied.

5 **CONCLUSION**

6 For the reasons set forth above, the Court should deny Samsung's motion.

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Dated: January 17, 2012

MORRISON & FOERSTER LLP

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

Attorneys for Plaintiff
APPLE INC.