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

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

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

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

**APPLE INC.’S MOTION FOR  
 ATTORNEYS’ FEES AND COSTS IN  
 CONNECTION WITH MOTION TO  
 COMPEL DEPOSITIONS OF 14 OF  
 SAMSUNG’S PURPORTED “APEX”  
 WITNESSES**

Date: March 27, 2012  
 Time: 10:00 a.m.  
 Place: Courtroom 5, 4th Floor  
 Judge: Hon. Paul S. Grewal

1 **NOTICE OF MOTION AND MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that on March 27, 2012, at 10:00 a.m., or as soon as the matter  
4 may be heard by the Honorable Paul S. Grewal in Courtroom 5, United States District Court for  
5 the Northern District of California, Robert F. Peckham Federal Building, 280 South 1st Street,  
6 San Jose, CA 95113, Apple Inc. (“Apple”) shall and hereby does move the Court for an order  
7 pursuant to Federal Rule of Civil Procedure 37(a)(5)(A) for an award of attorneys’ fees and costs  
8 incurred by Apple in connection with Apple’s Motion to Compel Depositions of 14 of Samsung’s  
9 Purported “Apex” Witnesses, including attorneys’ fees and costs incurred in connection with this  
10 motion for fees and costs.

11 This motion is based on this notice of motion and supporting memorandum of points and  
12 authorities; Apple’s Motion to Compel Depositions of 14 of Samsung’s Purported “Apex”  
13 Witnesses (“Motion to Compel”) filed concurrently herewith; the Declaration of Mia Mazza in  
14 Support of Apple’s Motion To Compel Depositions of 14 of Samsung’s Purported “Apex”  
15 Witnesses (“Mazza Decl.”) and all exhibits thereto; and such other written or oral argument as  
16 may be presented at or before the time this motion is taken under submission by the Court.

17 **RELIEF REQUESTED**

18 Pursuant to Federal Rule of Civil Procedure 37, Civil Local Rule 37-4, and the Court’s  
19 inherent authority, Apple seeks an order requiring Samsung and its attorneys to pay Apple the  
20 attorneys’ fees and expenses Apple has incurred (and will incur) (1) in connection with Apple’s  
21 Motion to Compel Depositions of 14 of Samsung’s Purported “Apex” Witnesses, and (2) in  
22 connection with this motion for fees and costs, if the Court grants Apple’s Motion to Compel  
23 Depositions of 14 of Samsung’s Purported “Apex” Witnesses.

24 In the alternative, if the Court grants in part and denies in part Apple’s Motion to Compel  
25 Depositions of 14 of Samsung’s Purported “Apex” Witnesses, Apple seeks an order requiring  
26 Samsung and its attorneys to pay Apple a portion of the attorneys’ fees and expenses Apple has  
27 incurred (and will incur) (1) in connection with Apple’s Motion to Compel Depositions of 14 of  
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1 Samsung's Purported "Apex" Witnesses, and (2) in connection with this motion for fees and costs,  
2 apportioned as the Court deems appropriate.

3 **STATEMENT OF ISSUES TO BE DECIDED**

4 Whether Samsung and its attorneys must pay Apple the attorneys' fees and expenses  
5 Apple has incurred (and will incur) (1) in connection with Apple's Motion to Compel Depositions  
6 of 14 of Samsung's Purported "Apex" Witnesses, and (2) in connection with this motion for fees  
7 and costs.

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10 Dated: February 16, 2012

MORRISON & FOERSTER LLP

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

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Attorneys for Plaintiff  
APPLE INC.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 Due to Samsung’s refusal to produce 14 high-level Samsung employees for deposition,  
3 Apple was forced to file a motion to compel on February 16, 2012. (*See* Motion to Compel, filed  
4 concurrently herewith.) Apple is entitled to recover its expenses if the Court grants Apple’s  
5 Motion to Compel. Samsung cannot show that any of the exceptions barring such recovery exist.

6 If a motion to compel is granted, “the court *must*, after giving an opportunity to be heard,  
7 require the party or deponent whose conduct necessitated the motion, the party or attorney  
8 advising that conduct, or both to pay the movant’s reasonable expenses incurred in making the  
9 motion, including attorney’s fees.” Fed. R. Civ. P. 37(a)(5)(A) (emphasis added); *see also*  
10 Civ. L. R. 37-4. Rule 37(a)(5)(A) provides exceptions to this mandatory rule only if the opposing  
11 party can establish “(i) the movant filed the motion before attempting in good faith to obtain the  
12 disclosure or discovery without court action; (ii) the opposing party’s nondisclosure, response, or  
13 objection was substantially justified; or (iii) other circumstances make an award of expenses  
14 unjust.” Fed. R. Civ. P. 37(a)(5)(A). A losing party’s discovery conduct will not be substantially  
15 justified unless “it is a response to a ‘genuine dispute, or if reasonable people could differ as to  
16 the appropriateness of the contested action.’” *Devaney v. Continental Am. Ins. Co.*, 989 F.2d  
17 1154, 1163 (11th Cir. 1993), quoting *Pierce v. Underwood*, 487 U.S. 552, 565 (1988); *see also*  
18 Adv. Comm. Notes to 1970 Amend. to former Fed. R. Civ. P. 37(a)(4) (losing party bears burden  
19 to demonstrate substantial justification); *Rodriguez v. Simmons*, No. 2:09-cv-02195-KSN, 2011  
20 WL 1322003, at \*8 (E.D. Cal. Apr. 4, 2011) (bad faith not required).

21 The prevailing party also is entitled to reimbursement of the expenses incurred in  
22 connection with preparing a motion for fees and costs. *Matlink, Inc. v. Home Depot U.S.A.,*  
23 *Inc.*, No. 07cv1994-DMS (BLM), 2008 WL 8504767, at \*6 (S.D. Cal. Oct. 27, 2008), *citing*  
24 *Anderson v. Dir., Office of Workers Comp. Programs*, 91 F.3d 1322, 1325 (9th Cir. 1996)  
25 (compensation for time spent litigating fee petition “must be included in calculating a reasonable  
26 fee because uncompensated time spent on petitioning for a fee automatically diminishes the value  
27 of the fee eventually received”).

1 Samsung cannot establish that any of the exceptions barring recovery of fees and costs  
2 exist. First, as discussed in detail in the Mazza Declaration, Apple filed the Motion to Compel  
3 only after “attempting in good faith to obtain the [depositions] without court action[.]” Fed. R.  
4 Civ. P. 37(a)(5)(A)(i). (See Mazza Decl. ¶¶ 4–11 & Exs. 4–7.) In fact, Samsung only agreed to  
5 reduce the number of witnesses that it refused to produce from 17 down to 14 after Apple’s  
6 counsel sent Samsung 15 pages of correspondence and the parties’ lead counsel conferred in  
7 person on two separate occasions ending on February 14, 2012. (*Id.*)

8 Second, Samsung lacks any justification—let alone a “*substantial* justification”—for its  
9 refusal to produce the 14 “apex” witnesses for deposition. 37(a)(5)(A)(ii). As further detailed in  
10 Apple’s motion to compel, there is substantial evidence that the witnesses at issue in the Motion  
11 to Compel were intimately involved with key issues in this case that go to the heart of the dispute  
12 between the parties. The “apex” witnesses were in a position to have unique knowledge of facts  
13 and events central to Apple’s case. Samsung has *never* had a colorable argument that the apex  
14 deposition doctrine shields such witnesses from deposition. Thus, Samsung’s failure to make the  
15 witnesses available for deposition was not “a response to a genuine dispute,” and “reasonable  
16 people could [not] differ as to the appropriateness of the contested action.” *Devaney*, 989 F.2d at  
17 1163.

18 Third, and finally, Samsung can point to no “other circumstances mak[ing] an award of  
19 expenses unjust.” Fed. R. Civ. P. 37(a)(5)(A)(iii).

20 Accordingly, if the Court grants Apple’s motion to compel, Rule 37(a)(5)(A) mandates an  
21 award of Apple’s attorneys’ fees and costs. If the Court grants in part and denies in part the  
22 motion to compel, Apple respectfully requests an award of a portion of Apple’s attorneys’ fees  
23 and costs, apportioned as the Court deems appropriate. See Fed. R. Civ. P. 37(a)(5)(C).

24 In light of the fact that Apple will continue to incur fees in connection with the Motion to  
25 Compel through the time of hearing and in connection with this motion for fees, and due to the  
26 exigencies of Apple’s having to prepare the Motion to Compel, Apple asks that the Court permit  
27 Apple to file a supporting declaration detailing the fees incurred in connection with the Motion to  
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1 Compel within two weeks after the Court issues an order granting Apple's motion to compel, if  
2 any.

3 **CONCLUSION**

4 For the reasons discussed above, if the Court grants Apple's Motion to Compel, the Court  
5 should issue an order directing Samsung and Samsung's attorneys to pay Apple's fees and costs  
6 incurred in connection with the Motion to Compel and this motion for fees and costs.

7  
8 Dated: February 16, 2012

MORRISON & FOERSTER LLP

9  
10 By:  /s/ Michael A. Jacobs  
Michael A. Jacobs

11 Attorneys for Plaintiff  
12 APPLE INC.

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