



1 resolution of this motion after the close of fact discovery,<sup>1</sup> however, Apple alternatively seeks to  
2 compel a second deposition with those Samsung witnesses for whom documents were not  
3 produced within the ten-day or five-day windows.

4 Samsung responds that under the court's rulings of December 22, 2011 and January 27,  
5 2012, which ordered the production of documents according to certain deadlines and no later than  
6 three-days before a deposition,<sup>2</sup> a "three-day rule" is "reasonable under the circumstances of the  
7 expedited case." Samsung argues that the relief Apple seeks is unworkable and that Apple does not  
8 itself abide by its own purported standard for pre-deposition production, such that any remedy  
9 should be reciprocal for both sides.

10 On March 6, 2012, the parties appeared for hearing. Having considered the arguments and  
11 evidence presented, the court grants-in-part Apple's motion to compel.

## 12 I. BACKGROUND

13 Early in the case, the parties agreed that documents from witness files would be produced  
14 no later than five days before the deposition.<sup>3</sup> But for a few isolated incidents in which limited  
15 documents were produced three or four days in advance, Apple contends that it met its obligation  
16 during the October 2011 depositions of Apple's inventors and patent prosecutors. These documents  
17 were all in English. In contrast, Apple offers numerous examples of Samsung producing thousands  
18 of Korean-language documents with far less lead time, or even no lead time at all, prejudicing  
19 Apple's preparation for deposition and prosecution of its case.<sup>4</sup> Examples include:

- 20 • the production of 4,409 Korean-language documents from Samsung witness Ahyeung  
21 Kim's custodial files two days before the deposition, and an additional 3,069 pages on the

22 <sup>1</sup> Apple initially moved for and received a hearing on shortened time. In view of the frequent  
23 requests for shortened-time in this case, the court vacated that hearing and Apple re-noticed the  
24 hearing pursuant to Civ. L.R. 7-2 for March 6, 2012. The court is informed that fact discovery  
25 closes on March 8, 2012.

26 <sup>2</sup> See Docket No. 537 (Order Granting-In-Part and Denying-In-Part Mot. to Compel) ("December  
27 22 Order"); Docket No. 673 (Order Re: Discovery Motions) ("January 27 Order").

28 <sup>3</sup> Samsung does not dispute Apple's representation with respect to this agreement. See Docket No.  
735 at 8 n.5 (Samsung's Opp'n to Mot. to Compel).

<sup>4</sup> See Docket No. 683 ¶ 5 (Mazza Decl.).

1 morning of the deposition, after it had begun;

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- 3 • the production of 5,284 Korean-language documents from Samsung witness Junho Park’s custodial files less than three days before the deposition, and an additional 2,163 pages, totaling 20,135 pages, less than two days before; and
  - 4 • in the case of English-language documents, the production of 5,256 documents, totaling over 35,000 pages, from Samsung witness Tim Sheppard’s custodial files just over three days before the deposition.<sup>5</sup>
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6 More recent examples, cited in Apple’s reply and supplemental filing of March 4, 2012, include:

- 7 • the production of 4,393 documents from Samsung witness Dae Woon Meyong’s custodial files totaling 45,866 pages less than one day before the deposition. Apple notes that Samsung, “to its credit,” agreed to reschedule the deposition to a later date.<sup>6</sup>
  - 8 • the production of 0 documents from Samsung witness Min Cheol Shin’s custodial files even three days before the deposition, but then 1,421 documents totaling 37,156 pages 5 hours before the deposition; and
  - 9 • the production of 1 Korean-language document totaling 27 pages from Samsung witness Seung Hun Yoo’s custodial files 44 days before the deposition, 6,184 Korean-language documents totaling 30,277 pages less than 4 days before the deposition, and then another 688 documents totaling 5,680 pages 5 hours after the deposition started.<sup>7</sup>
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11 According to Apple, it takes an average of five days to process, review, select, and translate  
12 the documents for an average-sized, Korean-language production.<sup>8</sup> Once useable documents are  
13 forwarded to outside counsel, it takes another five days to competently prepare for a deposition,  
14 reflecting the parties’ previous agreement. Apple argues that it has adhered to the five-day rule in  
15 producing English-only documents from its witness files, and that Samsung should not be allowed  
16 to operate at an advantage by giving Apple far less lead-time. Had Samsung complied with the  
17 actual production deadlines provided in the court’s earlier discovery orders, Apple argues that this  
18 motion would be unnecessary.

19 Samsung does not dispute its belated pattern of production for certain depositions, but  
20 emphasizes the numerous occasions in which it has produced the bulk of documents well in  
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23 <sup>5</sup> According to Apple, many of Tim Sheppard’s documents were illegible; Samsung did not provide legible copies until the night before the deposition. *Id.* ¶ 7.

24 <sup>6</sup> Docket No. 756-1 ¶ 6 (Mazza Reply Decl.). In another instance involving a belated, voluminous document production for Samsung witness Woogyun Kho, Apple notes that it had to “fight for weeks” before Samsung agreed to offer Kho for a second day of deposition. *Id.* ¶ 28.

25 <sup>7</sup> See Docket No. 766-1 ¶¶ 3-9 (Supp. Mazza Decl.).

26 <sup>8</sup> Docket No. 683 ¶¶ 9-12.

1 advance of at least the purported “three day rule.”<sup>9</sup> Samsung attributes the late instances to  
2 technical glitches or late-discovered documents. Samsung also emphasizes that Apple’s  
3 representation of the productions for Ahyoung Kim and Junho Park, which serve as Apple’s most  
4 egregious examples, is not entirely accurate.<sup>10</sup> Samsung contends that Apple has produced  
5 documents in less than the three-day window in numerous instances, including one occasion in  
6 which Apple produced “highly relevant” documents after the deposition concluded, and another in  
7 which Apple produced 17,000 pages of documents the day before the deposition.<sup>11</sup> According to  
8 Samsung, not until January 10, 2012 did Apple first request the production of Korean-language  
9 documents on a ten day advance schedule.<sup>12</sup> Samsung contends that it sought to discuss a workable  
10 compromise during meet and confer, but that Apple was not responsive and never raised the five-  
11 day, English language request until this motion.<sup>13</sup> Because Samsung has largely complied with the  
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14 <sup>9</sup> Samsung specifically concedes that it “narrowly missed” the three-day deadline for production  
15 with respect to six depositions – those of Ahyoung Kim, Junho Park, Juho Lee, Gert-Jan Van  
16 Lieshout, Jae Seung Yoon, and Seong Hun Kim – but otherwise has completed document  
17 production at least three days in advance. *See* Docket No. 735-3 ¶ 3 (Binder Decl.). *See also*  
18 Docket No. 735 at 4 (Samsung’s Opp’n to Mot. To Compel). Moreover, Samsung offered to  
19 postpone the deposition of Junho Park due to the document production problem, but Apple  
20 declined. Apple responds that it has no record of Samsung having offered to postpone Junho Park’s  
21 deposition. *See* Docket No. 756-1 ¶ 27.

22 <sup>10</sup> For Ahyoung Kim, Samsung states that it produced a substantial portion of production, totaling  
23 thousands of documents, in October 2011, months before Kim’s January 2012 deposition. Docket  
24 No. 735-3 ¶ 3. For Junho Park, Samsung states that it produced documents “just shy” of the three  
25 day mark due to “technical glitches.” Docket No. 735-1 ¶ 12.

26 <sup>11</sup> Docket No. 735-2 ¶¶ 4-7 (Martin Decl.). Apple responds in kind to Samsung’s examples. In four  
27 of the five cases of production that came one or two days late, Apple states that it produced  
28 “literally a handful of documents” late, which Apple highlighted for Samsung, and to which  
Samsung responded with a letter reserving all rights to call the witnesses for further deposition.  
Moreover, Apple states that these witnesses were later called for deposition in the ITC action, and  
Samsung did not request additional time. As to the single production of 17,000 pages late, Apple  
explains that it notified Samsung immediately upon learning that an error had resulted in the  
documents not being produced, provided a hard copy of the production shortly thereafter, and has  
not stated that it will not make the witnesses available for additional deposition time related to the  
late-produced documents. *See* Docket No. 756 at 8 (Apple’s Reply in Support of Mot. to Compel);  
Docket No. 756-1 ¶¶ 17-24.

<sup>12</sup> Docket No. 735-1 ¶ 9 (Kassabian Decl.).

<sup>13</sup> *Id.* ¶ 11.

1 “three-day rule” and is making every effort to provide responsive discovery on the compressed  
2 schedule, Samsung urges that Apple’s motion should be denied.

## 3 II. DISCUSSION

4 The court’s earlier rulings referencing prioritized document production no later than three  
5 days in advance of a deposition provided nothing more than a “drop dead” deadline for production  
6 that otherwise risked arriving after the scheduled deposition to which it was relevant. Until the  
7 filing of this motion, neither party moved to set a requirement for longer lead-time.<sup>14</sup> Accordingly,  
8 the so-called “three-day rule” urged by Samsung is not a rule at all, but a minimum requirement  
9 that applies only to the document production covered by the December 22 and January 27 orders.<sup>15</sup>  
10 The court finds Apple’s demonstration of a pattern of last-minute document production by  
11 Samsung to be troubling in its consistency. Samsung’s own evidence shows that it has produced  
12 documents with less than three days’ advance timing in 6 out of 25 depositions in February and  
13 early March, and with less than five days’ advance timing in at least 15 out of 25 depositions.<sup>16</sup>  
14 Apple’s evidence shows that most of these productions involved hundreds and often thousands of  
15 pages of material in Korean.<sup>17</sup>

16 The court finds equally troubling the failure of the parties to establish protocols in a case of  
17 this magnitude and complexity for the exchange of foreign-language documents, or for  
18 contingency arrangements when a production becomes substantially delayed. One need not  
19 subscribe to Apple’s 10-day and 5-day proposed rules – although Samsung does not dispute these  
20 time frames are appropriate for competent deposition preparation – to recognize that there is a  
21 point after which the production of thousands of pages of documents for deposition is likely to

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23 <sup>14</sup> The court notes that Apple first raised the issue that it was having a problem with last-minute,  
24 high-volume document productions from Samsung at the January 19, 2012 hearing on other  
25 discovery motions then before the court. Because the court did not have a motion or any briefing  
26 before it on the issue, it declined to entertain any argument on the matter at that time.

27 <sup>15</sup> To the extent that there is overlap between material subject to these orders and the purported  
28 “document dumps” that are the subject of this motion, those failing to meet the three-day-in-  
advance requirement are in violation of the December 22 and January 27 orders.

<sup>16</sup> See Docket No. 774-3 at 2 (Martin Dec. in Support of Samsung’s Sur-Reply).

<sup>17</sup> See Docket No. 766-2 (Supp. Mazza Decl.), Ex. A-1.

1 result in prejudice. As Apple noted at the hearing, the deposition may be the only opportunity to  
2 authenticate documents and determine their potential value and admissibility for trial.

3 In light of the repeated, late productions by Samsung and the volume of material involved,  
4 the court finds Apple's request for additional deposition time to be warranted. Without a more  
5 specific showing of prejudice as to each witness, however, Apple asks too much in seeking to re-  
6 depose "any witnesses for whom Korean-language documents were substantially produced less  
7 than ten days before the deposition, or for whom English documents were substantially produced  
8 less than five days before the deposition." Instead, Apple may identify no more than ten Samsung  
9 witnesses, out of those listed in the briefing on this motion, for whom a substantial portion of  
10 custodial documents were produced with insufficient time to process and translate in advance of  
11 the deposition. Apple may take no more than 25 hours to depose all ten witnesses. As discussed at  
12 the hearing, these 25 hours count against the 250-hour limit set by Judge Koh. Samsung must make  
13 the identified persons available in conformity with the order as set out below.<sup>18</sup>

14 **III. ORDER**

15 Samsung shall make available the witnesses identified by Apple, not to exceed ten  
16 witnesses for a total of 25 hours or fewer, in Korea or in this district. As further discussed at the  
17 hearing, no less than 72 hours in advance of the scheduled deposition, Apple shall provide  
18 Samsung with a list of the topics it intends to cover at the follow-up depositions. These depositions  
19 shall be completed no later than March 31.

20 **IT IS SO ORDERED.**

21 Dated: 5/8/2012

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23 PAUL S. GREWAL  
24 United States Magistrate Judge

25 <sup>18</sup> At the hearing, Samsung's counsel argued that the remedy should be reciprocal. The court has no  
26 motion from Samsung before it. To the extent that Samsung is attempting to pursue a non-judicial  
27 remedy from Apple before consuming the court's time, the court strongly encourages Apple to  
28 extend the same opportunity to Samsung in those instances in which Apple has produced a  
substantial volume of documents shortly before, or after, a deposition. In particular, the court draws  
Apple's attention to its representation with respect to Apple witness Richard Dinh: "Apple has not  
stated that it will not make the witness available for additional deposition time related to the late-  
produced documents." Docket No. 756 at 8 (Apple's Reply in Support of Mot. to Compel).