Apple Inc. v. Samsung Electronics Co. Ltd. et al Doc. 799 Att. 2

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

APPLE'S COMBINED REPLY IN SUPPORT OF ITS MOTION TO COMPEL DEPOSITIONS OF SAMSUNG'S PURPORTED "APEX" WITNESSES AND OPPOSITION TO SAMSUNG'S MOTION FOR A PROTECTIVE ORDER

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

REDACTED PUBLIC VERSION

Dockets.Justia.com

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

I. INTRODUCTION 1

II. BACKGROUND 1

III. LEGAL STANDARDS 2

IV. ARGUMENT 2

A. Samsung Fails To Show That Any Of These Witnesses Should Be Withheld From Discovery 2

B. Samsung Is Not Entitled To Withhold Witnesses Who Have Knowledge That [REDACTED] In Developing The Accused Products 4

1. [REDACTED] 4

2. [REDACTED] 10

3. [REDACTED] 12

4. [REDACTED] 15

C. Samsung Is Not Entitled To Withhold Samsung Employees Knowledgeable About Apple's Damages Claims 16

D. The Testimony Apple Seeks Is Not Available Through Other Means 18

E. Samsung Fails To Support Its Claim That Apple Has "Abused The Discovery Process" 19

F. Nothing In The Parties' Meet-And-Confer History Warrants Denying Apple's Motion Or Granting Samsung's 20

G. Apple's Response To The Court's Query In Its March 9, 2012 Order Regarding Samsung's Choice To Move For A Protective Order After Apple Moved To Compel Depositions Of The Same Witnesses 21

V. CONCLUSION 22

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

Page(s)

CASES

Affinity Labs of Texas v. Apple, Inc.,
No. C09-4436 CW (JL),
2011 U.S. Dist. LEXIS 53649 (N.D. Cal. May 9, 2011) 10

Doble v. Mega Life and Health Ins. Co.,
No. C 09-1611,
2010 U.S. Dist. LEXIS 56190 (N.D. Cal. May 18, 2010) 5

Dobson v. Twin City Fire Ins. Co.,
No. SACV 11-192-DOC,
2011 U.S. Dist. LEXIS 143042 (C.D. Cal. Dec. 12, 2011) 2

First Nat'l Mortg. Co. v. Fed. Realty Inv. Trust,
No. C03-02013 RMW (RS),
2007 U.S. Dist. LEXIS 88625 (N.D. Cal. Nov. 19, 2007)........ 9

First United Methodist Church of San Jose v. Atlantic Mut. Ins. Co.,
No. C-95-2243 DLJ,
1995 U.S. Dist. LEXIS 22469 (N.D. Cal. Sept. 19, 1995) 8

Google Inc. v. Am. Blind & Wallpaper Factory,
No. C-95-2243 DLJ,
2006 U.S. Dist. LEXIS 67284 (N.D. Cal Sept. 6, 2006) 9

Hardin v. Wal-Mart Stores, Inc.,
No. 08-CV-0617 AWI BAM,
2011 U.S. Dist. LEXIS 147446 (E.D. Cal. Dec. 22, 2011)........ 3

In re Chase Bank USA, N.A. "Check Loan Contract Litig.,"
No. 3:09-md-2032 MMC (JSC),
2011 U.S. Dist. LEXIS 127259 (N.D. Cal. Nov. 3, 2011)........ 10, 18

In re Google Litig.,
No. C 08-03172 RMW (PSG),
2011 U.S. Dist. LEXIS 120905 (N.D. Cal. Oct. 19, 2011)........ 3

In re Nat'l W. Life Ins. Deferred Annuities Litig.,
No. 05-CV-1018-AJB (WVG),
2011 U.S. Dist. LEXIS 37746 (S.D. Cal. Apr. 6, 2011)........ 4

Kennedy v. Jackson Nat'l Life Ins. Co.,
No. C. 07-0371 CW (MEJ),
2010 U.S. Dist. LEXIS 47866 (N.D. Cal. Apr. 22, 2010) 3, 9

Rolscreen Co. v. Pella Prods. of St. Louis, Inc.,
145 F.R.D. 92 (S.D. Iowa 1992) 3

Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.,
203 F.R.D. 98 (S.D.N.Y. 2001) 11, 14

Travelers Rental Co. v. Ford Motor Co.,
116 F.R.D. 140 (D. Mass. 1987) 8

OTHER AUTHORITIES

Fed. R. Civ. P.
26.......... 3
37(a)(5)(B) 21
37(a)(5)(C) 21
37(d)(1)(A)(i)37(d)(2).......... 21

I. INTRODUCTION

Samsung's briefs confirm that its opposition to Apple's depositions has nothing to do with the apex doctrine and everything to do with shielding culpable witnesses from examination under oath. Apple's motion demonstrated that four of the six witnesses who remain in dispute were intimately involved in—indeed responsible for— [REDACTED] and features. These witnesses participated in high-level strategy decisions to [REDACTED] [REDACTED] that strategy. The documents and deposition testimony in Apple's Motion to Compel tie each of these witnesses to these key issues. Further discovery obtained after Apple filed its motion reinforces the importance of these witnesses to this case.

Rather than confront that evidence and testimony, Samsung relies on the witnesses' titles and cookie-cutter declarations asserting that the witnesses do not conduct the "day-to-day" work of designing or marketing Samsung's accused products. Samsung misses the point entirely. Lower-level employees don't make the decisions to copy Apple's products and cannot testify *why* those decisions are made. These witnesses do. Apple is entitled to their testimony.

Moreover, Samsung turns a blind eye to the fact that two of the four copying witnesses—Gee Sung Choi, the President of SEC, and Jong-Kyun ("JK") Shin, the Head of Mobile Communications—have played key roles not only in their current positions but also in prior positions during the critical period when Samsung first responded to Apple's launch of the iPhone. Samsung does not and cannot show that these witnesses are properly withheld from discovery when it fails even to acknowledge these witnesses' prior positions, either in its briefs or in the witnesses' declarations.

The other two witnesses at issue have key knowledge about Apple's damages claims. They report to SEC—the Korean parent company of STA—about STA's sales of the accused products. Unlike lower-level witnesses, these two have unique knowledge about SEC's calculations of the accused products' profitability.

II. BACKGROUND

On February 16, Apple filed a Motion to Compel Depositions of 14 of Samsung's Purported "Apex" Witnesses (Dkt. No. 736-2) ("Motion to Compel"). Samsung filed a Motion

for Protective Order as to 10 of the same witnesses on February 22 (Dkt. No. 754-2) ("MPO") and an opposition to Apple's Motion to Compel on March 6 (Dkt. No. 773-3) ("Opposition"). This memorandum serves as both Apple's opposition to Samsung's MPO and its reply in support of Apple's Motion to Compel.

Apple's Motion to Compel describes the meet and confer process leading to that motion. (Dkt. No. 736-2 at 2-3.) Samsung erroneously contends that Apple has not compromised about any of Samsung's 23 claimed "apex" witnesses. (*See*, *e.g.*, Dkt. No. 754-2 at 2-4, 19-20; Dkt. No. 754-12 ¶ 8; Dkt. No. 773-3 at 14; Dkt. No. 773-4 ¶ 2.) In fact, Apple dropped six of those witnesses before filing its Motion to Compel. (Declaration of Mia Mazza in Support of Apple's Combined Reply In Support of Its Motion To Compel Deposition of Samsung's Purported "Apex" Witnesses And Opposition To Samsung's Motion For A Protective Order ("Mazza Reply Decl.") ¶¶ 3-9, Exs. 1-4; *see also* Dkt. No. 736-3 ¶ 9.) Recently, in the spirit of compromise and in light of case developments and additional information Apple gained through depositions, Apple withdrew its deposition notices for Jaewan Chi, Heonbae Kim, and Dong Jin Koh. (Mazza Reply Decl. ¶ 47.) As a result, and because Samsung recently agreed to schedule Seungho Ahn, there are now only six witnesses in dispute.

III. LEGAL STANDARDS

Apple's Motion to Compel includes a detailed discussion of the legal standards that determine when a party may resist an "apex" deposition. (*See* Dkt. No. 736-2 at 4-7.) Samsung does not dispute Apple's statement of the standards. (Dkt. No. 773-3 at 4.)

IV. ARGUMENT

A. Samsung Fails To Show That Any Of These Witnesses Should Be Withheld From Discovery

Samsung's MPO and Opposition elevate form over substance. Samsung argues that these are "apex" witnesses simply because they "hold the title of Executive Vice President or higher[.]" (Dkt. No. 754-2 at 9.) But courts do not infer apex status based solely on title. *See Dobson v. Twin City Fire Ins. Co.,* No. SACV 11-192-DOC (MLGx), 2011 U.S. Dist. LEXIS 143042, at *16 (C.D. Cal. Dec. 12, 2011) (court refused to infer that Vice President of Claims was "an apex

witness based solely on his title as Vice President of Claims").[1] The "mere incantation of [a witness's] status" and a "claim of limited knowledge cannot be a basis for insulating [a witness] from appropriate discovery." *See Rolscreen Co. v. Pella Prods. of St. Louis, Inc.*, 145 F.R.D. 92, 97 (S.D. Iowa 1992); *In re Google Litig.*, No. C 08-03172 RMW (PSG), 2011 U.S. Dist. LEXIS 120905, at *10 (N.D. Cal. Oct. 19, 2011) ("A claimed lack of knowledge, by itself, is insufficient to preclude a deposition."). Although Samsung asserts that depositions of these witnesses would cause "significant disruption to Samsung's business (Dkt. No. 773-3 at 1), it fails to establish that the depositions would, in fact, severally burden or harass Samsung. *See* Fed. R. Civ. P. 26; *cf. Kennedy*, No. C 07-0371 CW (MEJ), 2010 U.S. Dist. LEXIS 47866, at *7. Samsung's MPO should be denied, and Apple's Motion to Compel granted, for these reasons alone.

Samsung also relies on the design and copying witnesses' asserted lack of "day-to-day" responsibilities for developing the accused products. (*See*, *e.g.*, Dkt. No. 754-2 at 6, 10, 12-13.) But Apple does not seek to depose them about quotidian tasks. As discussed in more detail below, these are the witnesses who are responsible for the very Samsung policies at issue in this case, and they are the ones with knowledge about the creation and enforcement of those policies.

As to the two damages witnesses, Samsung never addresses the crucial link between STA's finances and SEC's accounting for the profitability of STA's sales. As discussed below, these two witnesses have unique knowledge about that key issue.

Finally, Samsung fails to confront the full range of documents and testimony tying these witnesses to key issues in the case. Samsung ignores much of the evidence and testimony that Apple cited in its Motion to Compel, and fails to discuss any of the relevant documents and testimony that have come to light since Apple filed its motion. Moreover, Samsung has not produced any documents sourced to these witnesses, so only Samsung has access to documents

[1] None of Samsung's cited cases stand for the proposition that *any* executive with the title of "Vice President" is an apex witness. Samsung cites *Hardin v. Wal-Mart Stores, Inc.*, No. 08-CV-0617 AWI BAM, 2011 U.S. Dist. LEXIS 147446, at * 7 (E.D. Cal. Dec. 22, 2011), for the proposition that "*an* Executive Vice President 'is a busy, high-ranking executive' subject to the apex doctrine." (Dkt. No. 754-2 at 9 n.6 (emphasis added).) The court made no categorical determination. Rather, it merely applied apex deposition doctrine to the specific Wal-Mart Executive Vice-President at issue.

that may demonstrate their full roles and knowledge.

Nonetheless, even the limited evidence Samsung has produced to date regarding these witnesses shows that they have unique, firsthand knowledge of facts and events central to the litigation.

B. Samsung Is Not Entitled To Withhold Witnesses Who Have Knowledge That [REDACTED] In Developing The Accused Products

As set forth in Apple's Motion to Compel, Samsung [REDACTED] (Dkt. No. 736-2 at 8-14.) Apple is entitled to depose the witnesses who [REDACTED] *See, e.g., In re Nat'l W. Life Ins. Deferred Annuities Litig.,* No. 05-CV-1018-AJB (WVG), 2011 U.S. Dist. LEXIS 37746, at *7 (S.D. Cal. Apr. 6, 2011) (allowing deposition of executives closely involved in details and "possible prime architects" of financial instrument at issue); *DR Sys.,* 2009 U.S. Dist. LEXIS 83755, at *9 (allowing deposition of apex witness who had discussed important letter with CFO and did not direct CFO to investigate letter's allegation of patent infringement).

As Apple showed, those witnesses include Gee Sung Choi, the President of SEC, and Jong-Kyun ("JK") Shin, the Head of Mobile Communications—both of whom have played key roles not only in their current positions but also in prior positions that Samsung fails even to acknowledge.

1. [REDACTED]

Gee Sung Choi, who has been President and CEO of SEC since 2009, has been and remains [REDACTED]

.[2]

Samsung's MPO and Opposition and Mr. Choi's declaration are conspicuously silent about the role he played at Samsung before becoming CEO in 2009. As set forth in Apple's Motion to Compel, when the iPhone was introduced in 2007, Mr. Choi was the President of Samsung's Telecommunications Division, which was responsible for Samsung's mobile phones. *See* http://www.samsung.com/hk_en/aboutsamsung/management/boardofdirectors.html. Samsung cannot prevail when it does not even acknowledge Mr. Choi's prior position, much less attempt to explain how he lacks unique knowledge from being in that position at that critical time.

In his prior position, Mr. Choi played a key role in Samsung's response to the introduction of the iPhone. As discussed in Apple's Motion to Compel, in 2007, Samsung adopted

[2] Samsung largely relies on *Doble v. Mega Life and Health Ins. Co.*, No. C 09-1611, 2010 U.S. Dist. LEXIS 56190 (N.D. Cal. May 18, 2010), for the proposition that "attending high-level business meetings" does not confer unique knowledge sufficient to justify a deposition. (Dkt. No. 754-2 at 10.) But the *Doble* court said nothing about attendance at meetings. Instead, the court held that "a CEO's telling his staff to try harder or to stop trying is not the level of personal involvement which would justify deposition of the CEO. This kind of generalized motivational admonition is pure high-level management," and therefore not enough to compel the CEO's deposition. *Doble*, 2010 U.S. Dist. LEXIS 56190, at *8. is a far cry from the "generalized motivational admonition" at issue in *Doble*.

Mr. Choi has unique knowledge about [redacted]

Apple is not seeking to depose Vice-Chairman Yun or Chairman Lee, It is seeking to depose Mr. Choi, as the executive responsible for

Newly-produced documents confirm the importance of Mr. Choi's role in responding to the iPhone after it was released.

Moreover, Mr. Choi continued to participate in important decisions concerning Samsung's infringing products after becoming Samsung's CEO. As described in Apple's Motion to Compel,

Contrary to Samsung's assertion, this document does not merely show a CEO who is "responsible for the direction of the company in *all matters*." (Dkt. No. 773-3 at 6.) Instead, as Apple showed and Samsung does not contest, it shows that

Nor does Samsung rebut the significance of the email sent

Samsung's recently-produced documents confirm that Mr. Choi remains as CEO. Samsung recently produced

[3] The email goes on to state: (Mazza Reply Decl. Ex. 31 at SAMNDCA10247549; *see id.* ¶ 37.)

[4] Samsung fails to support its assertion that his counsel objected because it required Mr. Lee to speculate about Mr. Choi's intentions. (Mazza Reply Decl. 38 at 65:24-68:1.) (*Id.* at 67:16-68:1.) Rather than cite or attach the deposition testimony, Samsung relies on an attorney declaration stating "I am informed and believe that Mr. Lee . . . confirmed that the contents of the email were his words, not those of Mr. Choi. (Dkt. No. 773-4 ¶ 8.) That is no showing at all.

A recently-produced email

Mr. Choi also is An email While others may have implemented his orders, [5]

[5] *See First United Methodist Church of San Jose v. Atlantic Mut. Ins. Co.*, No. C-95-2243 DLJ, 1995 U.S. Dist. LEXIS 22469, at *8 (N.D. Cal. Sept. 19, 1995) (plaintiff "should be

(Footnote continues on next page.)

defeat Samsung's efforts to withhold his testimony. *See, e.g.*, *Kennedy v. Jackson Nat'l Life Ins. Co.,* No. C. 07-0371 CW (MEJ), 2010 U.S. Dist. LEXIS 47866, at *7 (N.D. Cal. Apr. 22, 2010) (allowing deposition of CEO identified as "main decision-maker."); *Google Inc. v. Am. Blind*, No. C-95-2243 DLJ, 2006 U.S. Dist. LEXIS 67284, at *9-10 (N.D. Cal Sept. 6, 2006) (allowing CEO deposition based on involvement in policy accused of giving rise to trademark infringement).

Apple has tried to gather the relevant testimony from lower-level employees who Samsung asserts are more knowledgeable about designing and developing the accused products. However, recent depositions only reinforce the need to depose Mr. Choi, as other employees continue to disavow the very knowledge Samsung claims they possess. *See, e.g.*, *First Nat'l Mortg. Co. v. Fed. Realty Inv. Trust*, No. C03-02013 RMW (RS), 2007 U.S. Dist.

(Footnote continued from previous page.)

permitted to depose [apex witness] as to the motives for" decisions made); *Travelers Rental Co. v. Ford Motor Co.*, 116 F.R.D. 140, 142 (D. Mass. 1987) (compelling depositions of four high-level Ford executives "[w]hen the motives behind corporate action are at issue, an opposing party usually has to depose those officers and employees who in fact approved and administered the particular action").

LEXIS 88625, at *7 (N.D. Cal. Nov. 19, 2007) (less intrusive discovery methods exhausted where plaintiff already deposed lower-level employees); *In re Chase Bank USA, N.A. "Check Loan Contract Litig.,"* No. 3:09-md-2032 MMC (JSC), 2011 U.S. Dist. LEXIS 127259, at *12 (N.D. Cal. Nov. 3, 2011) (other methods exhausted where apex witness directly involved in key decision and may have had information unknown to others or different recollections).

Finally, Samsung's reliance on *Affinity Labs of Texas v. Apple, Inc.*, No. C09-4436 CW (JL), 2011 U.S. Dist. LEXIS 53649 (N.D. Cal. May 9, 2011) is completely misplaced. (*See* Dkt. No. 773-3 at 6-7.) There, plaintiff Affinity was a non-practicing entity that did "not even try to contend that Mr. Jobs has any knowledge of Affinity, its patents, the inventors of those patents, or infringement by Apple products." 2011 U.S. Dist. LEXIS 53649, at *44. Instead, it sought to depose Mr. Jobs about broad public statements about Apple's products, such as "[t]he App store is a grand slam," and other Apple witnesses had already provided detailed testimony regarding those statements. *Id.* at *12-17, *20-26. In contrast, as detailed above, Apple does not seek Mr. Choi's deposition because of broad public statements but because of his involvement in [REDACTED] Samsung's copycat products.

2. [REDACTED]

Just as Samsung ignores [REDACTED]

Again, Samsung cannot show it is entitled to withhold witnesses when it fails to acknowledge those witnesses' actual role. The Court should order Mr. Shin to appear for deposition on that ground alone.

Samsung's short response to Apple's Motion to Compel is that Mr. Shin oversees many different divisions and is "far removed from the design and engineering processes." (Dkt. No. 773-3 at 7.) Yet the evidence shows that [REDACTED]

Apple's Motion to Compel describes numerous documents

Samsung's own evidence also refutes its assertion that [6] (Dkt. No. 754-2 at 11.) In addition to the evidence just discussed, in February 2010—just five months before Samsung released its infringing Galaxy S smartphones— (Dkt. No. 736-3 at Ex. 9.)

[6] Although, as shown above, Mr. Shin has more than knowledge gained from high-level meetings, courts have found apex depositions appropriate even where witnesses possess precisely that type of information. *See, e.g.*, *Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98, 103 (S.D.N.Y. 2001) (allowing deposition of Sony Corporation CEO who participated in relevant board of directors and executive committee meetings, and in business strategy discussions).

Apple tried to seek information about this comment from other deponents; however,

Recently-produced documents reflect Mr. Shin's

In contrast to Samsung's assertion that Mr. Shin made only high-level and general comments, an email from May 2010

3.

Won-Pyo Hong

He is in a position to

As shown by Apple's Motion to Compel, [redacted]

Samsung ignores these facts entirely. Instead, Samsung addresses only one of Apple's assertions regarding Mr. Hong, claiming that it is "sheer conjecture" that, given [redacted] (*See* Dkt. No. 773-3 at 8.) Notably, Samsung does not deny his involvement, and Mr. Hong's declaration is silent on this issue.

Recent deposition testimony confirms that [redacted]

Samsung's MPO does not disclaim [redacted]

[7] Samsung also states that (Dkt. No. 754-2 at 13.) Once again, even if this were the extent of Mr. Hong's knowledge—which it is not—it would not protect him from deposition. *See Six W. Retail Acquisition*, 203 F.R.D. at 103 (allowing deposition of CEO who not only participated in high-level meetings but also "fielded several reports from senior members of Sony's management team" providing information about merger at issue). Furthermore, Samsung seems to argue that attendance at "high-level meetings"—even high-level meetings where critical strategy decisions are made—never justifies a deposition. But such a rule would insulate high-level meetings from discovery altogether, which is both illogical and unsupported.

4.

As with other witnesses, Samsung resists Mr. Cho's deposition on the irrelevant ground that he "had little or no direct involvement in the design or development of the products at issue." (Dkt. No. 773-3 at 10.) Samsung ignores Apple's showing that

Additional documents

C. Samsung Is Not Entitled To Withhold Samsung Employees Knowledgeable About Apple's Damages Claims

Apple cannot prove up complete damages from Samsung without the key information on Samsung Telecommunications America's ("STA's") sales, sales strategies, marketing plans, projections, and profits that can provide.

Apple's Motion to Compel explains the vital connection among (Dkt. No. 736-2 at 14-15.) As other STA witnesses have explained. (*See id*. at 14.) (*Id.*)

Joseph Cheong. Despite Apple's need to understand how STA makes business decisions based on the profitability information of the accused products, Apple has been unable to depose any witness who can specifically address this issue. (*See* Dkt. No. 736-3 Ex. 5.)

(*See id*. Ex. 44 (showing that

Thus, Samsung's assertion that Apple has already deposed STA employees who had "superior personal knowledge of the Samsung product and STA finances" is plainly wrong. (Dkt. No. 754-2 at 7.) Similarly, Samsung's claim that deposing Mr. Cheong would "subject virtually all senior financial officers to depositions" (Dkt. No. 773-3 at 11) is without merit, as only Mr. Cheong possesses the specialized knowledge as a conduit between SEC and STA's finances. Samsung cannot simply deny Apple this information, which is necessary to calculate Apple's damages.

Dale Sohn. Samsung also claims that deposing Mr. Sohn is unnecessary because he only assesses sales and marketing information "during high-level meetings with other senior executives." (Dkt. No. 754-2 at 17.) Yet in an email recently produced in the ITC action,

Thus, contrary to Samsung's Motion, (Dkt. No. 754-2 at 17.)

Samsung ignores that As Apple explains in its Motion to Compel, but Samsung ignores, , which directly corresponds to Apple's allegations of infringement. (*See* Dkt. No. 736-2 at 14-15 (citing Dkt. No. 736-3 Ex. 39).)[8]

[8]

and has the knowledge to respond to these directly relevant questions about how Samsung strategically positioned itself to infringe Apple's intellectual property.

D. The Testimony Apple Seeks Is Not Available Through Other Means

Samsung's argument about exhaustion of other means to garner testimony is based on its false premise that Apple is only seeking testimony about the daily tasks of product development. Samsung flatly ignores that Apple seeks testimony about That testimony is not available from lower-level employees. Indeed, as shown above in the discussions of specific witnesses, lower-level deponents have disclaimed knowledge on key issues such as while at the same time identifying these witnesses as people who would have knowledge about these issues. Apple need not depose additional lower-level employees who Samsung contends have day-to-day product responsibilities before Samsung produces witnesses who have knowledge about *See*, *e.g.*, *In re Chase Bank*, 2011 U.S. Dist. LEXIS 127259, at *12 (other methods exhausted where apex witness directly involved in key decision and may have had information unknown to others or different recollections). Apple also has shown that lower-level employees could not testify about the damages issues identified above.

Samsung's suggestion that Rule 30(b)(6) depositions "moot any possible basis" for these depositions also is off base. (Dkt. No. 773-3 at 13-14.) Samsung has produced 30(b)(6) deponents who have been grossly unprepared to testify as to their designated topics. For example,

Samsung has no basis to withhold witnesses with unique knowledge about Samsung's strategies and policies at issue in the litigation or to force Apple to first depose even more witnesses who do not have that knowledge.

E. Samsung Fails To Support Its Claim That Apple Has "Abused The Discovery Process"

Samsung's Opposition to Apple's Motion to Compel asserts that "Apple does not deserve access to Samsung's senior executives" because "Apple has abused the discovery process by coming unprepared and wasting witnesses' time asking needless and harassing questions." (Dkt. No. 773-3 at 1.)[10] Despite the serious nature of that accusation and the relief that Samsung asks the Court to impose for it, Samsung's supports it only with an attorney declaration made *on information and belief* about how Apple conducted two depositions. (Dkt. No. 773-3 at 2-3; Dkt. No. 773-4 ¶¶ 7-8.) That inadequate showing speaks volumes about how Samsung is conducting this litigation in general, and its inability to prove on the merits that these witnesses should be

---

[9] Samsung asserts that it has designated more 30(b)(6) witnesses than Apple claimed in its Motion. (Dkt. No. 773-3 at 13.) Between the time Apple's Motion was filed and the time Samsung's Opposition was filed, Samsung designated 17 additional Rule 30(b)(6) witnesses. (*See* Mazza Reply Decl. ¶ 46.)

[10] Samsung made this argument only in opposing Apple's Motion to Compel, and not as part of its MPO.

protected from deposition in particular. Samsung's argument should be rejected out of hand.

To the extent that the Court has any concerns about Apple's conduct of the two depositions that Samsung identified, there is no merit to Samsung's accusations. Apple's substantive arguments in this memorandum repeatedly cite Don-Joo Lee's deposition testimony showing [REDACTED] The other deponent, Sungsik Lee, is the one [REDACTED] (*See* Section B.1, *supra.*) The Court need only review the few pages of his deposition testimony concerning that email—which Samsung failed to submit—to understand that Apple was not responsible for any problems at that deposition. (Mazza Reply Decl. Ex. 39 at 58-68.)

F. Nothing In The Parties' Meet-And-Confer History Warrants Denying Apple's Motion Or Granting Samsung's

Apple more than satisfied its meet and confer obligations about Samsung's 23 claimed apex witnesses before filing its Motion to Compel. (Dkt. No. 736-2 at 2-3; *see* Dkt. No. 736-3 ¶¶ 3-10, Exs. 1-7.)

Unable to show that Apple failed to meet and confer about the issues, Samsung makes the false accusation that Apple refused to compromise. (Dkt. No. 754-2 at 19-20.) Samsung ignores that, before filing its Motion to Compel on February 16, 2012, Apple took six witnesses off the table, reducing the number of disputed "apex" depositions from 23 to 18 (between February 5 through 13), and then from 15 to 14 (on February 14). (Mazza Reply Decl. ¶¶ 3-9, Exs. 1-4; *see also* Dkt. No. 736-3 ¶ 9.) Regardless, having claimed apex protection for a broad range of 23 employees, Samsung turned the "apex" rule on its head and should not be heard to complain that Apple insisted on pressing its valid grounds to pursue discovery.

G. Apple's Response To The Court's Query In Its March 9, 2012 Order Regarding Samsung's Choice To Move For A Protective Order After Apple Moved To Compel Depositions Of The Same Witnesses

In its March 9, 2012 Order, the Court inquired as to whether Samsung needed to move for protection after Apple moved to compel. Samsung's motion was unnecessary. Where, as here, a party has filed a motion to compel depositions, there is no need for the opposing party to file a motion for a protective order as to those same depositions. In these circumstances, the party filing the protective order motion may be doing so to obtain the strategic advantage of having the last word in a reply brief.

Under Rule 37(a), if a court denies a motion to compel in whole or in part, "the court may issue any protective order authorized under Rule 26(c)." Fed. R. Civ. P. 37(a)(5)(B)-(C). Accordingly, once Apple filed its Motion to Compel as to Samsung's "apex" witnesses, Samsung had no need to file its MPO as to those same witnesses.

Apple notes that, under Rules 37(d)(1) and (2), a court may order sanctions if "a party or a party's officer, director, or managing agent—or a person designated under Rule 30(b)(6) or 31(a)(4)" fails to appear for a properly-noticed deposition, unless the party "has a pending motion for a protective order under Rule 26(c)." Fed. R. Civ. P. 37(d)(1)(A)(i), 37(d)(2). Rules 37(d)(1) and (2) do not speak to the circumstances in which the party seeking the deposition has filed a motion to compel. However, where a motion to compel is pending, it is unlikely that a party would be deemed not to have appeared at a deposition that is the subject of the motion to compel. Further, in a case like this, where the parties are actively engaged in meeting and conferring about scheduling depositions and what depositions should take place, and any discovery motion must be raised at a lead counsel meet and confer before it is filed, a party would not be required to appear at deposition unless the parties had agreed on the deposition date (or a motion to compel had been granted). Thus, Rules 37(d)(1) and (2) did not require Samsung to file its MPO.

//

//

V. CONCLUSION

Samsung's Motion for Protective Order should be denied and Apple's Motion to Compel should be granted as to the six witnesses who remain in dispute.

Dated: March 12, 2012

MORRISON & FOERSTER LLP

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

Attorneys for Plaintiff
APPLE INC.