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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

**SAMSUNG'S NOTICE OF MOTION AND
MOTION TO EXCLUDE OPINIONS OF
CERTAIN OF APPLE'S EXPERTS**

Date: June 21, 2012

Time: 1:30 pm

Place: Courtroom 8, 4th Floor

Judge: Hon. Lucy H. Koh

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27 **FILED UNDER SEAL**
28

1 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

2 PLEASE TAKE NOTICE that on June 21, 2012 at 1:30 p.m., or as soon thereafter as
3 counsel may be heard before the Honorable Lucy Koh in Courtroom 8 of the above-entitled Court,
4 located at 280 South 1st Street, San Jose, California, Defendants Samsung Electronics Co., Ltd.,
5 Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC
6 (collectively "Samsung") will, and hereby does, move this Court for an order excluding the
7 testimony of the following expert witnesses designated by Apple: Terry L. Musika, Henry Urbach,
8 Susan Kare, Russell Winer, Dr. Sanjay Sood, Dr. John Hauser, Michael Walker and a portion of
9 the testimony of Richard L. Donaldson (the "experts").

10 PLEASE TAKE FURTHER NOTICE that Samsung requests an evidentiary hearing
11 pursuant to *Fed. R. Evid.* 104 on the admissibility of the testimony of each of the experts prior to
12 any testimony by that expert at trial.

13 This Motion is made pursuant to the Federal Rules of Evidence 403 and 702 and *Daubert*
14 *v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993), on the grounds that the testimony Apple seeks
15 to elicit from these experts is not relevant to any issue in this matter, and is otherwise unreliable,
16 incorrect, and unhelpful.

17 This Motion is based upon this Notice of Motion and Motion, Memorandum of Points and
18 Authorities in support thereof, the Declaration of Joby Martin dated May 17, 2012, all pleadings
19 and papers on file in this action, such other evidence or arguments as may be presented to the
20 Court, and such other matters of which this Court may take judicial notice.

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1 DATED: May 17, 2012

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

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By /s/ Victoria F. Maroulis

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 Apple’s damages expert, Terry L. Musika, writes in his report that “Apple has built a
4 considerable and at times a cult-like following to all things Apple.” That cult-like following
5 apparently includes several experts who are appearing on Apple’s behalf in this case, and may
6 explain why they have cast aside established scientific methods and governing legal principles in
7 favor of slavish adoration of their client and platitudes about its alleged magical and revolutionary
8 products, issues that are of no relevance to the claims and defenses at issue.

9 **II. THE COURT SHOULD EXCLUDE THE OPINIONS OF TERRY L. MUSIKA¹**

10 **A. Mr. Musika’s Lost Profits Analysis Should Be Excluded**

11 **1. Mr. Musika’s lost profits figures should be excluded because he ignores
12 essential factors in the smartphone market**

13 To show entitlement to lost profits, a patentee must reconstruct the market to show,
14 hypothetically, “likely outcomes with infringement factored out of the economic picture.”
15 *Crystal Semiconductor Corp. v. Tritech Microelects. Int’l, Inc.*, 246 F.3d 1336, 1355 (Fed. Cir.
16 2001) (quoting *Grain Processing Corp. v. Am. Maize-Prods.*, 185 F.3d 1341, 1350 (1999)). Such
17 market reconstruction, though hypothetical, requires “sound economic proof of the nature of the
18 market.” *Id.* The hypothetical market must account for how consumers would react to products
19 that have a dissimilar price or significantly different characteristics. *Id.* at 1356; *see also BIC*
20 *Leisure Prods., Inc. v. Windsurfing Int’l, Inc.*, 1 F.3d 1214, 1219 (Fed. Cir. 1993). In *Monolithic*
21 *Power Sys., Inc. v. O2 Micro Int’l Ltd.*, 476 F. Supp. 2d 1143, 1155-56 (N.D. Cal. 2007), this
22 Court ruled that a patent-damages expert must “account for supply and demand” and make
23 allowances for the impact that a change in price would have on demand, or else be excluded.

24 [REDACTED]
25 [REDACTED] It is not reasonable to assume that Samsung’s customers would

26 ¹ The party offering challenged expert testimony has the burden of establishing
27 admissibility. *U.S. v. 87.98 Acres of Land More or Less in the Cty of Merced*, 530 F.3d 899, 904
28 (9th Cir. 2008).

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[REDACTED]

BIC Leisure, 1 F.3d at 1218 (finding clear error in admitting expert testimony that did not account for the price elasticity of demand where patentee’s products sold for 60-80% above the price of the infringer’s).

[REDACTED]

Because many of Samsung’s actual users have chosen Android, any sound consideration of alleged lost profits would have to measure those customer’s willingness to switch to Apple’s iOS rather than substitute a non-accused Android device from Samsung or another manufacturer.

[REDACTED]

2. Mr. Musika’s lost profits analysis is not tied to the intellectual property rights at issue in this case.

To recover lost profits, “a patent owner must prove a causal relation between the infringement and its loss of profits.” *BIC Leisure*, 1 F.3d at 1218. The burden rests on the patentee to show a reasonable probability that “but for” the infringing activity, the patentee would have made the infringer’s sales. *Water Tech. Corp. v. Calco Ltd.*, 850 F.2d 660, 671 (Fed. Cir. 1988). Mr. Musika fails to meet the but-for test for lost profits because he doesn’t

² [REDACTED]

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[REDACTED]

Mr. Musika's lost profits analysis is fatally flawed because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

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[REDACTED]

[REDACTED] It should be excluded under *Daubert*.

B. Mr. Musika’s Reasonable Royalty Analysis Should Be Excluded

A reasonable royalty is determined from the “hypothetical results of hypothetical negotiations between the patentee and infringer (both hypothetically willing) at the time infringement began.” *Mahurkar v. C.R. Bard, Inc.*, 79 F.3d 1572, 1579 (Fed. Cir. 1996).

1. Mr. Musika’s “income approach” is improper

[REDACTED]

But, according to the Federal Circuit, “the patentee ... must in every case give evidence tending to separate or apportion the defendant’s profits and the patentee’s damages between the patented feature and the unpatented features.” *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1318 (Fed. Cir. 2011) (citing *Garretson v. Clark*, 111 U.S. 120, 121 (1884)). Apple knows well that Mr. Musika’s methodology is improper under *Uniloc*, having prevailed on this very issue before. *See Mirror Worlds, LLC v. Apple, Inc.*, 784 F. Supp. 2d 703, 726 27 (E.D. Tex. 2011) (granting Apple’s JMOL to vacate a jury’s damages award because of the patentee’s failure to apportion as required by *Uniloc*).

[REDACTED]

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[REDACTED]

[REDACTED] That is absurd.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This Court recently excluded

expert opinion for just such a refusal to accept the hypothetical restriction to a license limited to

only the actual claims in suit on the purported basis of an alleged real-world preference to

“license[] on a portfolio basis.” *Oracle Am. Inc. v. Google, Inc.*, 798 F. Supp.2d 1111, 1115

(N.D. Cal. 2012).

[REDACTED]

[REDACTED] Apple itself vacated a jury verdict in

the *Mirror Worlds* case for the same prejudicial mistake, and it should not be permitted to pursue

this approach here.

2. Mr. Musika's “cost approach” is improper

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1 [REDACTED]

2 [REDACTED]

3 A patentee may not base its reasonable royalty analysis on the alleged infringer’s profits.
4 *Radio Steel & Mfg. Co. v. MTD Prods., Inc.*, 788 F.2d 1554, 1557 (Fed. Cir. 1986) (“The
5 determination of a reasonable royalty, however, is based not on the infringer’s profit, but on the
6 royalty to which a willing licensor and a willing licensee would have agreed at the time the
7 infringement began.”). Moreover, the Federal Circuit has made clear that a reasonable royalty
8 may only be based on the technology at issue, not the entire value of the accused products.
9 *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 869 (Fed. Cir. 2010) (“To be admissible, expert
10 testimony opining on a reasonable royalty rate must “carefully tie proof of damages to the claimed
11 invention’s footprint in the market place.”); *Uniloc*, 632 F.3d at 1317 (same); *accord Oracle Am.*,
12 798 F. Supp.2d at 1115-16.⁴

13 Mr. Musika’s “cost approach” to calculating a reasonable royalty is simply a disguised
14 attempt [REDACTED]
15 [REDACTED] It should be excluded.

16 **3. [REDACTED] properly relies on the assumption that**
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 [REDACTED] “Assumptions built into this thought experiment may not be discarded in favor of the

26 _____
27 ⁴ The lone exception is the Entire Market Value rule, [REDACTED]
28 [REDACTED]

1 parties' subjective preferences and history." *Oracle*, 798 F. Supp. 2d at 1115-16 (excluding
2 expert opinion for "fighting the hypothetical"). [REDACTED]

3 [REDACTED]
4 [REDACTED] It should be excluded.

5 Mr. Musika also improperly seeks to rely on a license that he admits "is not a comparable
6 license to any of the Apple Intellectual Property In Suit" to establish a "floor" for a reasonable
7 royalty. (Martin Decl. Ex. 3 at 60-61). "Damages experts cannot use noncomparable licenses,
8 with little relationship to the claimed invention or parties-in-suit, as a basis for calculating
9 reasonable royalties." *Oracle Am. Inc. v. Google, Inc.*, 2012 WL 44485 at *8, (N.D. Cal. Jan. 9,
10 2012).

11 None of Mr. Musika's approaches to calculating a reasonable royalty rate approximate the
12 results of a hypothetical negotiation between willing parties over just the technology at issue.
13 Under no conceivable light are these opinions helpful to the jury. They must all be excluded
14 under *Daubert*.

15 **C. Mr. Musika's Critique of** [REDACTED]

16 In addressing the disgorgement of an alleged infringer's profits, Samsung is entitled to
17 deduct its costs related to accused products. [REDACTED]

18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED] All of these opinions should be excluded because
24 they are improper attorney argument and a rebuttal report, which was not provided for in the
25 Court's schedule nor the Court's April 23, 2012 order.

26 [REDACTED]
27 [REDACTED] [amounting to Samsung's total revenue] due to Samsung's failure to carry its burden of
28 proof." (*Id.* at 10-11.) These opinions are simply "closing argument" masquerading as an expert

1 opinion. They do not “assist the trier of fact” and fail to satisfy the requirements of Rule 702.
2 *OPS2, LLC v. County of Clark*, 2012 WL 424856, at *5 (D. Nev. 2012); *Rogers v. Raymark*
3 *Indus., Inc.*, 922 F.2d 1426, 1431 (9th Cir. 1991).

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]

11 [REDACTED] That is improper and highly prejudicial. The Court in its
12 role as gatekeeper should exclude Mr. Musika [REDACTED] See
13 *Uniloc*, 632 F.3d at 1320 (“This case provides a good example of the danger of admitting
14 consideration of the entire market value ... The disclosure that a company has made \$19 billion
15 dollars in revenue from an infringing product cannot help but skew the damages horizon for the
16 jury”).

17 **D. [REDACTED] ve an Opinion on Damages. [REDACTED].**
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]

21 [REDACTED] 35 U.S.C. § 287; *Am. Med. Sys., Inc. v. Med. Eng’g Corp.*, 6 F.3d 1523, 1537 (Fed. Cir.
22 1993); *Nike, Inc. v. Walmart Stores, Inc.*, 138 F.3d 1437, 1446 (Fed. Cir. 1998) (marking applies
23 to design patents); *Coach Inc. v. Asia Pac. Trading Co.*, 676 F. Supp. 2d 914, 924 (C.D. Cal.

24 _____
25 ⁵ [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 2009) (where plaintiff sues under both 15 U.S.C. §§ 1114 and 1125(a), “the plain language of
2 § 1117(a) and § 1111 indicates that a plaintiff must meet § 1111’s ‘actual notice requirement’ to
3 recover profits or damages”). [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]

13 [REDACTED] Under these circumstances, if the Court permits Mr. Musika to testify to
14 alleged damages, he should be required [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 **E. The Court Should Again Reject Mr. Musika’s Speculation Regarding Alleged**
18 **Irreparable Harm For Failure to Show Any Nexus**

19 [REDACTED]
20 [REDACTED] (See
21 Dkt. No. 419). The Court already rejected those speculative opinions, emphasizing that Apple
22 failed to show the necessary nexus between alleged harm to Apple and Samsung’s allegedly
23 infringing conduct. (Dkt. No. 449 at 33-34). The Federal Circuit affirmed the necessity of a
24 showing of nexus and Apple’s failure to do so, over Apple’s objections. *Apple v Samsung Elecs.*,
25 No. 12-1105, *Op. Cit.* at 16 (Fed. Cir. May 14, 2012) [REDACTED]
26 [REDACTED]
27 [REDACTED]

1 **III. THE COURT SHOULD EXCLUDE THE OPINIONS OF JOHN HAUSER**

2 John Hauser is an expert hired by Apple [REDACTED]

3 [REDACTED]

4 [REDACTED] [REDACTED]

5 [REDACTED] The purpose of the Hauser report is purportedly to support Mr. Musika’s

6 damages analysis. Dr. Hauser’s opinion should be excluded because (1) he failed to retain and

7 produce raw data on which he relied; and (2) he used utterly unreliable methodology.

8 [REDACTED]

9 [REDACTED]

10 [REDACTED] [REDACTED] [REDACTED] [REDACTED]

11 [REDACTED] [REDACTED] [REDACTED]

12 [REDACTED] [REDACTED] [REDACTED]

13 [REDACTED]

14 [REDACTED]

15 [REDACTED] [REDACTED]

16 When Samsung requested all the notes, videos or other materials that were used in or

17 recorded these 20 interviews, it was told there were none – not a single note, email, script, or

18 recording of even one of these 20 interviews, the foundation of Dr. Hauser’s surveys.⁶ (See

19 Martin Decl. Exs. 13 – 14.) [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED] [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 _____

27 ⁶ [REDACTED]

28 [REDACTED]

1 [REDACTED]
2 [REDACTED]
3 [REDACTED] See
4 *Toys R Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983)
5 (excluding evidence based on survey where expert “conceded that he had no knowledge of what
6 the interviewers actually did in conducting the interviews and that he had no personal knowledge
7 of whether they, in fact, followed the instructions they were given at the briefing session”). Dr.
8 Hauser’s opinions are wholly unreliable because the basis [REDACTED]
9 [REDACTED]

10 What is more, in *Oracle America, Inc. v. Google Inc.*, 2012 WL 850705 (N.D. Cal. March
11 13, 2012), Judge Alsup recently struck survey results as unreliable because the expert did not test
12 features identified as important during pre-interviews. *Id.* at *11 (“focus-group research
13 discovered 39 features that real-world consumers said they would have considered when
14 purchasing a smartphone [but] instead of testing 39 features in his conjoint analysis, [the] Dr. []
15 selected seven features to be studied.”) Here, not only does Dr. Hauser admit [REDACTED]
16 [REDACTED]
17 [REDACTED]

18 [REDACTED] Indeed, one cannot but think that Dr. Hauser
19 deliberately instructed the surveyors not to keep notes to avoid the same criticism in this case as in
20 *Oracle*: that he did not test the all the features the consumers identified as important.

21 Dr. Hauser employed the same strange methodology with respect to the pre-tests. [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 _____
25 7 [REDACTED]
26 [REDACTED]
27 [REDACTED] “inappropriately focused
28 consumers on artificially-selected features.” *Oracle*, 2012 WL 850705, at *10.

1 [REDACTED] Apple again insists that no notes or other records exist concerning respondents’
 2 answers, other than a one page summary. (Martin Decl. Ex. 11 at 44.) In other words, Dr.
 3 Hauser once again asks the Court and Samsung to believe that not a single note, e-mail, or memo
 4 was generated concerning the alleged 20 pre-tests. (*Id.* at 43; Exs. 16-17.)

5 [REDACTED]
 6 [REDACTED] This too is independent grounds to
 7 exclude Dr. Hauser’s surveys and his corresponding opinions. See *Universal City Studios, Inc. v.*
 8 *Nintendo Co., Ltd.*, 746 F.2d 112, 118 (2d Cir. 1984) (“[T]he survey utilized an improper universe
 9 in that it was conducted among individuals who had already purchased or leased Donkey Kong
 10 machines rather than those who were contemplating a purchase or lease.”); *Dreyfus Fund Inc. v.*
 11 *Royal Bank of Canada*, 525 F. Supp. 1108, 1116 (S.D.N.Y. 1981).

12 [REDACTED]
 13 [REDACTED]
 14 [REDACTED] The table below illustrates this flaw with respect to the '607 patent:

Patent	Description of the Patented Feature in the Hauser Survey	Description of the Patented Feature by Apple’s Technical Expert	Disparity
'607	<p data-bbox="358 1150 732 1276">“Whether the smartphone accurately carries out what you intend to do when you touch the screen.”⁹</p> <p data-bbox="358 1308 732 1402">“Whether the tablet is capable of reliably performing a full range of multi-touch operations.”¹⁰</p> <p data-bbox="358 1434 732 1587">For a combination without the patented feature, the animation presented to respondents displays “Intended contact not recognized” multiple times, and the</p>	[REDACTED]	No connection between the touchscreen “reliably” doing what “you intend” and the '607 patent.

23 _____
 24 ⁸ Samsung does not accept the descriptions provided by Apple’s experts, but has used them
 25 here to show that Dr. Hauser’s survey descriptions do not even comport with Apple’s
 26 descriptions of the patented features. A complete illustration of the disparities between Apple’s
 27 technical experts and the descriptions in Dr. Hauser’s surveys are included in Exhibit 18 to the
 28 Martin Declaration.

⁹ [REDACTED]
¹⁰ [REDACTED]

1 stores, [REDACTED]
2 [REDACTED] In flowery terms, he explains [REDACTED]
3 [REDACTED]
4 [REDACTED]
5 [REDACTED]
6 [REDACTED]

7 [REDACTED] Whether or not this is true, it is not relevant to any issue in this case, which
8 requires Apple to prove the validity of its trademark and trade dress rights, and Samsung's
9 infringement. [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]

15 Nor do Mr. Urbach's opinions satisfy the reliability requirement for admissibility. Rather
16 than base his opinions on any scientific methodology, [REDACTED]

17 _____
18 [REDACTED]

19 Before being retained by Apple in this matter, Mr. Urbach wrote an essay on the design of
20 Apple's retail stores, entitled *Gardens of Earthly Delights*, describing them as "[q]uasi-religious in
21 almost every respect, . . . chapels for the Information Age." (Martin Decl. Ex. 22 at APLNDC-
22 Y0000151235.) Mr. Urbach, who refers to former CEO Steve Jobs as "St. Eve" (*Id.* at APLNDC-
23 Y0000151235), believes that [REDACTED]

24 *See Daubert v. Merrill Dow Pharms., Inc.*, 509 U.S. 579, 591-92 (1993); *ZF Meritor LLC*
25 *v. Eaton Corp.*, 646 F. Supp. 2d 663, 665-66, (D. Del. 2009) (holding that an expert's opinion
26 must "fit the facts of the case"); *Johnson Elec. N. Am., Inc. v. Mabuchi Motor Am., Corp.*, 103 F.
27 Supp. 2d 268, 280 (S.D.N.Y. 2000) ("[T]he testimony must not only be reliable, but must be
28 relevant in that it 'fits' the facts of the case."). "Expert testimony which does not relate to any
issue in the case is not relevant, and ergo, non-helpful." *Daubert*, 509 U.S. at 591. The Court
should "exclude scientific expert testimony under the second prong of the *Daubert* standard unless
it is 'convinced that it speaks clearly and directly to an issue in dispute in the case.'" *Jones v.*
U.S., 933 F. Supp. 894, 900 (N.D. Cal. 1996) (quoting *Daubert*, 43 F.3d at 1321 n. 17).

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[REDACTED]

Mr. Urbach's methodology not only is unscientific and novel, but is based solely on his say so, rather than any objectively verifiable data. [REDACTED]

[REDACTED]

[REDACTED] “[N]othing in either

15 [REDACTED]

1 *Daubert* or the *Federal Rules of Evidence* requires a district court to admit opinion evidence that is
2 connected to existing data only by the *ipse dixit* of the expert." *DSU Med. Corp. v. JMS Co., Ltd.*,
3 296 F. Supp. 2d 1140, 1147 (N.D. Cal. 2003) (quoting *General Elec. Co. v. Joiner*, 522 U.S. 136,
4 147, 118 S. Ct. 512, 139 L. Ed. 2d 508 (1997)).¹⁸

5 Mr. Urbach also failed to consider other reasons for the findings he offers. For example,
6 he offers an opinion on museum worthiness of Apple products in comparison to others, but admits
7 he did not even investigate the extent to which other products appear in museum collections. He
8 opines that [REDACTED]

9 [REDACTED]
10 [REDACTED]).

11 When an expert ignores key facts or data contradicting his conclusions, the resulting opinion is
12 inadmissible because it is unreliable. *See, e.g., In re Bextra and Celebrix Mktg. Sales Practices*
13 *and Prod. Liab. Litig.*, 524 F. Supp. 2d 1166, 1181, 1184 (N.D. Cal. 2007) (finding an expert
14 opinion unreliable and inadmissible because the expert ignored evidence contradicting her
15 conclusions); *Reeves v. Commonwealth Edison Co.*, 2008 WL 239030, at *5-7 (N.D. Ill. 2008)
16 (precluding expert's opinions because he ignored key facts).

17 Finally, Mr. Urbach lacks the qualifications to serve as an expert on Apple's "design
18 excellence" or its public appreciation.¹⁹ [REDACTED]

19
20
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]

25 This kind of uncorroborated evidence cannot substitute for
26 rigorous survey or formal interviews, which Mr. Urbach acknowledged he did not conduct,
because they were not consistent with his approach.

27 ¹⁹ A witness may be qualified as an expert "by knowledge, skill, experience, training, or
28 education." Fed. R. Evid. 702. The party offering the expert's opinions has the burden to prove
such qualifications. *Gable v. Nat'l Broadcasting Co.*, 727 F. Supp. 2d 815, 833 (C.D. Cal. 2010)
(footnote continued)

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[REDACTED]

[REDACTED] His devotion to Apple and ability to wax eloquently about its products and retail stores does not make up for his lack of relevant qualifications.²⁰

V. THE COURT SHOULD EXCLUDE THE TESTIMONY OF SUSAN KARE

Susan Kare describes herself as [REDACTED]

[REDACTED] The problem with her opinions on substantial similarity, likelihood of confusion, and “possible”

(citing *U.S. v. 87.98 Acres of Land More or Less in the County of Merced*, 530 F.3d 899, 904-05 (9th Cir. 2008) and *Baker v. Urban Outfitters, Inc.*, 254 F. Supp. 2d 346, 353 (S.D.N.Y. 2003)).

²⁰ Moreover, even if Mr. Urbach could qualify as an expert in something, “not every opinion offered by an expert is an expert opinion. Rule 702 ‘does not afford the expert unlimited license to testify ... without first relating that testimony to some “specialized knowledge” on the expert’s part...’. Put another way, an expert’s opinion ‘must be an “expert” opinion (that is, an opinion informed by the witness’ expertise) rather than simply an opinion broached by a purported expert.’” *Textron Inc. By & Through Homelite Div. v. Barber-Colman Co.*, 903 F. Supp. 1570, 1575 (W.D.N.C. 1995) (citing *U.S. v. Johnson*, 54 F.3d 1150, 1157 (4th Cir. 1995) and *U.S. v. Benson*, 941 F.2d 598, 604 (7th Cir. 1991)). Mr. Urbach has admitted he has no experience in product design, or marketing, and therefore any opinions he could offer would be beyond his area of expertise. See *U.S. v. Chang*, 207 F.3d 1169, 1172-1173 (9th Cir. 2000) (district court did not abuse its discretion in precluding expert from testifying regarding matters beyond scope of expertise); *Nimely v. City of New York*, 414 F.3d 381, 399, n.13 (2d Cir. 2005) (holding that “because a witness qualifies as an expert with respect to certain matters or areas of knowledge, it by no means follows that he or she is qualified to express expert opinions as to other fields”).

1 copying, however, is that they are completely divorced from the law that governs these issues.

2 [REDACTED]

3 [REDACTED] *but her report does not describe any legal*

4 *principles nor cite to any legal authorities.*

5 With regard to substantial similarity, the law requires that any functional aspects of the
6 design are removed from the analysis, because design patents only protect ornamental aspects of
7 the design. *Richardson v. Stanley Works, Inc.*, 597 F.3d 1288, 1293-94 (Fed. Cir. 2010). A trade
8 dress can be “aesthetically functional” where the aesthetics of the trade dress itself drives
9 consumer demand for the product.” *TrafFix Devices, Inc. v. Marketing Displays, Inc.*, 532 U.S.
10 23, 33 (2001). [REDACTED]

11 [REDACTED]

12 Nor did she consider [REDACTED]

13 [REDACTED]

14 [REDACTED] which also is required before evaluating substantial

15 similarity. *See Egyptian Goddess, Inc. v. Swisa, Inc.*, 543 F.3d 665, 678 (Fed. Cir. 2008)

16 (whether designs are substantially the same is determined from the perspective of a hypothetical
17 “ordinary observer,” who is assumed to have familiarity with all relevant prior art and who
18 considers the accused design “giving such attention as a purchaser usually gives”).

19 Ms. Kare did not consider (or have the expertise to evaluate) how the ordinary observer
20 would perceive the Apple products or the Samsung accused products.²¹ [REDACTED]

21 [REDACTED]

22 [REDACTED]

23
24 ²¹ An ordinary observer is “a person who is either a purchase of, or sufficiently interested in,
25 the item that displays the patented designs and who has the capability of making a reasonably
26 discerning decision when observing the accused item’s design whether the accused item is
27 substantially the same as the item claimed in the design patent.” *Arminak & Assocs., Inc. v. Saint*
28 *Gobain Calmar, Inc.*, 501 F.3d 1314, 1323 (Fed. Cir. 2007); *Dreamworks Production Group, Inc.*
v. SKG Studio, 142 F.3d 1127, 1129 (9th Cir. 1998) (“The test for likelihood of confusion is
whether a ‘reasonably prudent consumer’ in the marketplace is likely to be confused as to the
origin of the good . . .”).

1 [REDACTED]

2 [REDACTED] In

3 short, Ms. Kare did not consider the factors required for a design patent infringement analysis.

4 Ms. Kare’s likelihood of confusion opinion is equally untethered to the governing legal
5 principles. While “similarity in appearance” is but one of eight factors that must be considered in
6 evaluating likelihood of confusion in the trademark and trade dress context, *AMF v. Sleekcraft*
7 *Boats*, 599 F.2d 341, 349 (9th Cir. 1979), [REDACTED]

8 [REDACTED]

9 [REDACTED] She acknowledged, for example, that she was not asked about
10 sophistication of the purchasers. (*Id.* at 183:15-18)

11 Finally, Ms. Kare’s opinion that [REDACTED]

12 [REDACTED]

13 [REDACTED]

14 [REDACTED] *OPS2*, 2012 WL 424856, at *5 (excluding expert
15 testimony containing “recitations of facts of the case”). [REDACTED]

16 [REDACTED]

17 [REDACTED]

18 **VI. THE COURT SHOULD EXCLUDE THE TESTIMONY OF RUSSELL WINER**

19 Russell Winer is a marketing expert whose opinions read like a closing argument Apple
20 would make to the jury on the issues of trade dress infringement and dilution. Rather than apply
21 any particular marketing expertise or the results of his own surveys or other work product,
22 Professor Winer simply acts as a summary witness, reciting argumentative conclusions based upon
23 surveys conducted by other experts designated by Apple, press stories, and various Apple internal
24 documents. Based on these materials, Professor Winer [REDACTED]

25 [REDACTED]

26 [REDACTED]

27 This sort of “closing argument” masquerading as an expert opinion does not “assist the
28 trier of fact” and fails to satisfy the requirements of Rule 702. *OPS2, supra* 2012 WL 424856, at

1 *5 (excluding opinion testimony that “offers nothing more than what defense counsel could argue
2 during closing arguments”). As the Ninth Circuit has held, “a party is not entitled to have an
3 expert testify solely because that witness can eloquently summarize the evidence. That job
4 belongs to counsel.” *Rogers, supra*, 922 F.2d at 1431. The jury is perfectly capable of
5 considering the facts presented at trial, and counsel’s arguments regarding how those facts relate
6 to the relevant legal factors for likelihood of confusion or dilution, and making up its own mind
7 about whether Apple has proven its claims. Professor Winer’s opinions are therefore not helpful
8 and should be excluded. *Hendrix v. Evenflo Company, Inc.*, 255 F.R.D. 568,579 (N.D. Fla. 2009)
9 (expert should not be permitted to testify about lay matters which a jury is capable of
10 understanding and deciding without the expert’s help). “Otherwise, there is a risk the trier of fact
11 will give the expert testimony undue weight on account of its special status.” *Id.*²²

12 Beyond his summary testimony on infringement and dilution, Professor Winer offers
13 completely irrelevant [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED] Apart from being entirely
17 duplicative of the opinions of another expert designated by Apple, Sanjay Sood, these opinions are
18 not relevant to any issue in the case. The question on Apple’s trade dress claims is whether Apple
19 has valid trade dress rights based on the particular aspects it has claimed, and, if so, whether
20 Samsung has infringed or diluted that trade dress. Professor Winer acknowledges that [REDACTED]

21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 _____
25 ²² Professor Winer lacks any specialized expertise to opine on [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 [REDACTED]
2 is simply not relevant to Apple’s trade dress claims, and will only confuse the jury.

3 Even if Professor Winer’s opinions otherwise satisfied the requirements of Rule 702 and
4 *Daubert*, and they do not, the Court should exclude his testimony under Federal Rule of Evidence
5 403, as any probative value it might have is substantially outweighed by the danger of unfair
6 prejudice, confusion of the issues, misleading the jury, or needless presentation of cumulative
7 evidence.²³ Professor Winer’s opinions are cumulative of the opinions of other experts Apple has
8 designated, including [REDACTED]

9 [REDACTED]
10 [REDACTED]
11 [REDACTED] *See United States v. Alisal Water Corp.*, 431 F.3d 643, 660 (9th Cir.
12 2005) (affirming exclusion of cumulative expert testimony). Moreover, because Professor Winer
13 simply summarizes other testimony, but with imprimatur of an expert, or otherwise offers opinions
14 on matters that are wholly irrelevant, his opinions are likely to confuse and mislead the jury, and
15 unfairly prejudice Samsung. They should be excluded under Rule 403.²⁴

16 **VII. THE COURT SHOULD EXCLUDE THE OPINIONS OF DR. SANJAY SOOD**

17 Dr. Sanjay Sood is an expert hired by Apple to opine that [REDACTED]
18 [REDACTED]
19 [REDACTED]

20 _____
21 ²³ “It is particularly appropriate for the trial judge carefully to weigh the potential for
22 confusion in the balance when expert testimony is proffered. Jurors may well assume that an
23 expert, unlike an ordinary mortal, will offer an authoritative view on the issues addressed; if what
24 an expert has to say is instead tangential to the real issues, the jury may follow the ‘expert’ down
25 the garden path and thus focus unduly on the expert’s issues to the detriment of the issues that are
26 in fact controlling.” *Rogers*, 922 F.2d at 1431. “Simply put, expert testimony may be assigned
27 talismanic significance in the eyes of lay jurors, and, therefore, the district courts must take care to
28 weigh the value of such evidence against its potential to mislead or confuse.” *United States v.*
Frazier, 387 F.3d 1244, 1263 (11th Cir. 2004).

²⁴ Samsung expressly seeks exclusion for each of the experts addressed in this motion under
Rule 403, in addition to Rule 702, as in each case, even if relevant, any minimal relevance is
substantially outweighed by the likelihood of jury confusion, and severe prejudice to Samsung.

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[REDACTED]

[REDACTED]

[REDACTED] However, *none* of these opinions are tied to the patents or trade dress at issue in this case or *any* of the accused products in this case. As noted above in the discussion of the opinions of Mr. Urbach, expert opinions that are not tied to the matters before the fact finder are not helpful to the jury and should be excluded.

Moreover, Dr. Sood bases opinions (1) and (3) on consumer surveys that he had conducted. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] That alone is sufficient reason to exclude Dr. Sood’s opinions.²⁵ Finally, Dr. Sood’s survey-based opinions must be excluded

[REDACTED]

[REDACTED]

VIII. THE COURT SHOULD EXCLUDE THE OPINIONS OF MICHAEL WALKER

Dr. Michael Walker is an expert hired by Apple to support its FRAND defense. Apple relies on Dr. Walker, who has been involved at the ETSI standards body since 1988 and until

²⁵ *Universal City Studios, Inc. v. Nintendo Co., Ltd.*, 746 F.2d 112, 118 (2d Cir. 1984) (affirming summary judgment despite contrary survey because “the survey utilized an improper universe in that it was conducted among individuals who had already purchased or leased Donkey Kong machines rather than those who were contemplating a purchase or lease.”) *citing American Footwear Corp. v. General Footwear Co.*, 609 F.2d 655, 661 n. 4 (2d Cir. 1979); *Dreyfus Fund Inc. v. Royal Bank of Canada*, 525 F.Supp. 1108, 1116 (S.D.N.Y. 1981).

²⁶ *See, e.g., Rust Environment & Infrastructure, Inc. v. Teunissen*, 131 F.3d 1210, 1218 (7th Cir. 1997) (affirming district court discounting evidence based on survey where survey “did not require recording of verbatim responses”); *Toys R Us, Inc. v. Canarsie Kiddie Shop, Inc.*, 559 F. Supp. 1189, 1205 (E.D.N.Y. 1983) (excluding evidence based on survey where expert “conceded that he had no knowledge of what the interviewers actually did in conducting the interviews and that he had no personal knowledge of whether they, in fact, followed the instructions they were given at the briefing session”).

1 recently served as the Chairman of its Board, to support its contention that “Samsung failed to
2 timely disclose its allegedly essential patents in accordance with the requirements of the ETSI IPR
3 Policy.” (Dkt. 381 at ¶ 183.) Although it is undisputed that Samsung did disclose applications
4 in the families of all the declared essential patents-in-suit to ETSI, Dr. Walker asserts [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED] Because these opinions
9 are speculative and unsupported by any factual analysis, they should be excluded.

10 For Samsung to have been obligated to disclose the priority applications underlying the
11 declared essential patents-in-suit to ETSI before the alleged Freeze Date, Samsung must have b [REDACTED]

12 [REDACTED]

13 [REDACTED] An IPR within the meaning of the ETSI IPR Policy includes patents
14 and patent applications, but as Dr. Walker agreed, [REDACTED]

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 Accordingly, for Dr. Walker’s opinions to have any reliable basis at all, it was up to him to
25 show that each of the priority applications were not confidential and contained at least one claim
26 that should have led Samsung to conclude the IPR was essential or likely to become essential to an
27 ETSI standard, as well as Samsung's awareness of that fact. *Cf. Rambus Inc. v. Infineon Techs.*
28 *Ag*, 318 F.3d 1081, 1102-03 (Fed. Cir. 2003) (reversing the district court’s denial JMOL where,

1 under the SSO's Rules, a SSO member had an obligation to disclose IPR with claims that
2 objectively read on the standards under consideration). But Dr. Walker never even attempted to
3 do so, admitting during his deposition that he:

- 4 • [REDACTED]
- 5 [REDACTED]
- 6 • [REDACTED]
- 7 [REDACTED]
- 8 • [REDACTED]
- 9 [REDACTED]
- 10 [REDACTED]
- 11 • [REDACTED]
- 12 [REDACTED]

13 Because Dr. Walker's opinions fail to meet the requirements of Rule 702(b), they should
14 be excluded.²⁸ See *Major League Baseball Props., Inc. v. Calvino, Inc.*, 542 F. 3d 290, 311 (2d
15 Cir. 2008); Fed. R. Ev. 702(b) (testimony of an expert must be "based on sufficient facts or data").

16 ²⁷Dr. Walker's testimony concerning his analysis of the '516 patent-in-suit is instructive:
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]
24 [REDACTED]
25 [REDACTED]
26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 **IX. THE COURT SHOULD EXCLUDE THE LEGAL OPINION OF RICHARD L. DONALDSON**

2 Richard L. Donaldson is an attorney whose opinions are offered by Apple in support of its
3 FRAND defense. [REDACTED]

4 [REDACTED]
5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]

9 [REDACTED] *CLRB Hanson Indus., LLC v. Google Inc.*, 2008 WL 2079200, at *3 (N.D. Cal. May
10 14, 2008) (“Under California law, interpretation of the language of a contract is a question of law,
11 to be determined exclusively by the court”). This is not a proper subject of expert testimony.
12 *OPS2*, 2012 WL 424856, at *4.²⁹

13 DATED: May 17, 2012

QUINN EMANUEL URQUHART &
SULLIVAN, LLP

14 By /s/ Victoria F. Maroulis

15 Victoria F. Maroulis
16 Attorneys for SAMSUNG ELECTRONICS
17 CO., LTD., SAMSUNG ELECTRONICS
18 AMERICA, INC., and SAMSUNG
19 TELECOMMUNICATIONS AMERICA, LLC

20 ²⁸ Dr. Walker also lacks the requisite expertise and experience for his opinions, admitting
21 he: 1) has no knowledge of the timeliness of the IPR disclosures of any major ETSI member; 2)
22 is unaware of any concerns ever having been expressed within ETSI concerning timeliness of IPR
23 disclosures; 3) is unaware of ETSI ever having specified any consequences for failure to timely
24 disclose an IPR; 4) is not aware of any data collected on this subject; 5) is not aware of anyone
25 including Samsung ever having been accused of failing to timely disclose; and, 6) did not
26 familiarize himself with any industry research studies analyzing the timeliness of patent
27 disclosures as part of his preparation for this case. (Martin Decl. Ex. 30 at 271:24-272:2, 272:14-
28 275:9, 277:6-12, 313:13-314:18.)

29 ²⁹ Apple does not argue that the Agreement is ambiguous such that extrinsic evidence
30 should be admitted to aid in interpreting the Agreement. However, even if Apple made such an
31 argument, [REDACTED]
32 [REDACTED] He could not
33 offer any facts pertinent to interpreting the Agreement.