

1 QUINN EMANUEL URQUHART & SULLIVAN, LLP

Charles K. Verhoeven (Bar No. 170151)

2 [charlesverhoeven@quinnemanuel.com](mailto:charlesverhoeven@quinnemanuel.com)

50 California Street, 22<sup>nd</sup> Floor

3 San Francisco, California 94111

Telephone: (415) 875-6600

4 Facsimile: (415) 875-6700

5 Kevin P.B. Johnson (Bar No. 177129)

[kevinjohnson@quinnemanuel.com](mailto:kevinjohnson@quinnemanuel.com)

6 Victoria F. Maroulis (Bar No. 202603)

[victoriamaroulis@quinnemanuel.com](mailto:victoriamaroulis@quinnemanuel.com)

7 555 Twin Dolphin Drive, 5<sup>th</sup> Floor

Redwood Shores, California 94065-2139

8 Telephone: (650) 801-5000

Facsimile: (650) 801-5100

9 Michael T. Zeller (Bar No. 196417)

10 [michaelzeller@quinnemanuel.com](mailto:michaelzeller@quinnemanuel.com)

865 S. Figueroa St., 10th Floor

11 Los Angeles, California 90017

Telephone: (213) 443-3000

12 Facsimile: (213) 443-3100

13 Attorneys for SAMSUNG ELECTRONICS CO.,

LTD., SAMSUNG ELECTRONICS AMERICA,

14 INC. and SAMSUNG

TELECOMMUNICATIONS AMERICA, LLC

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

19 APPLE INC., a California corporation,

20 Plaintiff,

21 vs.

22 SAMSUNG ELECTRONICS CO., LTD., a

Korean business entity; SAMSUNG

23 ELECTRONICS AMERICA, INC., a New

York corporation; SAMSUNG

24 TELECOMMUNICATIONS AMERICA,

LLC, a Delaware limited liability company,

25 Defendants.

CASE NO. 11-cv-01846-LHK

**SAMSUNG'S NOTICE OF MOTION AND  
MOTION TO STRIKE EXPERT  
TESTIMONY BASED ON UNDISCLOSED  
FACTS AND THEORIES;  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT THEREOF**

**Date:** June 26, 2012

**Time:** 10:00 a.m.

**Place:** Courtroom 5, 4th Floor

**Judge:** Hon. Paul S. Grewal

**FILED UNDER SEAL**

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**NOTICE OF MOTION AND MOTION**

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on Tuesday, June 26, 2012, at 10:00 a.m., or as soon thereafter as the matter may be heard by the Honorable Paul S. Grewal in Courtroom 5, United States District Court for the Northern District of California, Robert F. Peckham Federal Building, 280 South 1st Street, San Jose, CA 95113, Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC (collectively “Samsung”) will, and hereby does, move the Court for an order striking portions of Apple’s expert reports that rely on previously undisclosed facts or that assert new theories of infringement or invalidity.

This Motion is made pursuant to Fed. R. Civ. P. 26 and 37, and Patent Local Rules 3-1 and 3-3, and is made on the grounds that Apple expert reports rely on facts and theories that Apple improperly failed to disclose during discovery, causing prejudice to Samsung in its ability to prepare for trial.

This motion is based on this Notice of Motion, the supporting Memorandum of Points and Authorities, the Declarations of Diane C. Hutnyan, Christopher E. Price, Jeffrey Johnson, and James J. Ward dated May 17, 2012, together with all accompanying exhibits, all pleadings on file in this action, and such other evidence or argument as may be presented at or before the time this Motion is deemed submitted by the Court, and such matters of which this Court may take judicial notice.

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DATED: May 17, 2012

QUINN EMANUEL URQUHART &  
SULLIVAN, LLP

By/s/ Victoria F. Maroulis

Charles K. Verhoeven

Kevin P.B. Johnson

Victoria F. Maroulis

Michael T. Zeller

Attorneys for SAMSUNG ELECTRONICS CO.,  
LTD., SAMSUNG ELECTRONICS AMERICA,  
INC. and SAMSUNG  
TELECOMMUNICATIONS AMERICA, LLC





1 contentions can be changed at will after the close of fact discovery, then parties have every  
2 incentive to invert the discovery process, and delay the assertion of true theories until after fact  
3 discovery closes for strategic gain. This is the exact path Apple chose to follow.

4 Apple's conduct is a clear violation of a host of discovery rules that set out unambiguous  
5 obligations to make discovery an orderly matter. Adherence to these rules is even more critical in  
6 a highly expedited proceeding like this one. Because Apple has violated its discovery obligations  
7 under the applicable Federal Rules of Civil Procedure and the Patent Local Rules, and presented  
8 novel facts from *eight* experts and two entirely new contentions that have never before been  
9 disclosed to Samsung, all to Samsung's extreme prejudice, the Court should strike those portions  
10 of Apple's expert reports that rely on the previously undisclosed facts and purport to assert new  
11 theories regarding invalidity or infringement.

## 12 **II. STATEMENT OF RELEVANT FACTS**

### 13 **A. Apple's Initial Disclosures and Infringement Contentions**

14 Apple was obligated under the Federal Rules, the Patent Local Rules, and the Court's  
15 Scheduling Order to disclose all relevant facts and contentions to Samsung pursuant to the  
16 following schedule:

- 17 • August 26, 2011: Apple serves its infringement contentions
- 18 • March 8, 2012: Fact discovery closes
- 19 • March 22, 2012 and April 16, 2012: Experts serve their reports and rebuttals,  
20 respectively, based on the disclosed facts.

21 Dkt. No. 187 (Aug. 25, 2011 Scheduling Order); *see* Fed. R. Civ. P. 26(a); Patent Local R. 3-1.

22 These rules exist to ensure that the parties will not be sandbagged with last-minute  
23 disclosures or game-changing alterations in theories of the case. *See* Fed. R. Civ. P. 37(c)(1) (any  
24 party "fail[ing] to provide information . . . as required by Rule 26(a) or (e) . . . is not allowed to  
25 use that information or witness to supply evidence on a motion, at a hearing, or at a trial").  
26 Similarly, Patent Local Rule 3-1 explicitly requires that parties identify all infringement  
27 contentions they intend to assert by no later than 14 days after the Case Management Conference.  
28 The parties cannot change their contentions without seeking leave of Court and showing good

1 cause. *See* Patent Local R. 3-1, 3-3, 3-6 (“Amendment of the Infringement Contentions [] may be  
2 made only by order of the Court upon a timely showing of good cause.”).

3 Apple served its infringement contentions in August 2011. (*See* May 17, 2012 Ward  
4 Declaration (“Ward Dec.”), Ex. A (Apple’s Disclosure of Asserted Claims & Infringement  
5 Contentions, Aug. 26, 2011).) These contentions purported to set forth how Samsung’s devices  
6 allegedly infringe Apple’s patents. (*See id.*, Ex. A, at 2 (listing which “Accused Instrumentalities”  
7 infringe Apple’s asserted patents).) By August 26 of last year, Apple’s disclosures should have  
8 laid out the entirety of its arguments in this case.

9 In addition, Samsung served Apple with detailed requests for production (“RFP”) and  
10 interrogatories. For example, Samsung’s RFPs sought:

- 11 • For each person You intend to rely on as an expert witness, all DOCUMENTS concerning  
12 . . . (d) each and every DOCUMENT the expert has reviewed or relied upon in  
13 formulating his or her opinion and each and every DOCUMENT the expert will assert  
14 supports each of his or her opinions and each fact; and (e) all reports prepared by the  
15 expert. (RFP No. 47.)
- 16 • All DOCUMENTS concerning the infringement or non-infringement of any of the claims  
17 of any of the APPLE IP by any entity or person. (RFP No. 122.)
- 18 • All DOCUMENTS regarding any instrumentalities that APPLE contends or has contended  
19 infringe any of the APPLE IP. (RFP No. 123.)
- 20 • All DOCUMENTS and things relating to APPLE’S analysis, consideration, or evaluation  
21 of whether any SAMSUNG product, device, apparatus, method, process, or system  
22 infringes any of the APPLE IP, including, without limitation, all documents and things  
23 concerning any test, evaluation, or reverse engineering of any SAMSUNG product, device,  
24 apparatus, method, process, or system. (RFP No. 127.)

21 (Ward Dec., Ex. B (Samsung’s First Set of Requests for Production to Apple, Aug. 3, 2011).)

22 Samsung’s Interrogatories were similarly detailed, requiring that Apple:

- 23 • IDENTIFY all facts RELATING TO studies, including formal or informal analysis,  
24 investigation, surveys, focus groups, consumer research, or other information or reports  
25 that relate to, support, or refute YOUR claims in this action, including, for each such study,  
26 when it was commissioned, conducted, and completed, by whom it was conducted, and its  
27 conclusions. (Interrogatory No. 16.)

27 (Ward Dec., Ex. C (Samsung’s First Set of Interrogatories to Apple, Aug. 3, 2011).)

28 Apple’s responses to these and Samsung’s other discovery requests should have disclosed

1 all of the facts upon which Apple’s experts base their opinions. Expert opinions were submitted  
2 *after* the close of fact discovery because they depend on facts disclosed *during* fact discovery.

3 **B. Apple’s Experts Rely on Facts That Were Withheld in Discovery**<sup>1</sup>

4 Apple’s experts rely on a host of facts that were not disclosed during fact discovery,  
5 despite being directly responsive to Samsung’s discovery requests. Many of these facts serve as  
6 the foundation for their opinions. The first time that Samsung saw these materials was when  
7 Apple’s experts used them in their reports or discussed them during their deposition.

8 1. Dr. Michel Maharbiz

9 On March 22, 2012, Apple served Dr. Maharbiz’s report, which contains his infringement  
10 opinions on Apple’s ‘607 patent. [REDACTED]

11 Even though the SEM Reports are responsive to numerous discovery requests (*see, e.g.*,  
12 Ward Dec., Ex. B (RFP Nos. 47(d), 97, 122, 123, 127)), nowhere in any of its disclosures or  
13 discovery responses did Apple ever mention [REDACTED]. Apple also failed to disclose the  
14 [REDACTED] in its Infringement Contentions. Indeed, even as late as March 9, 2012 – one day  
15 after the close of fact discovery and *the date that appears on the* [REDACTED] – Apple served  
16 corrected amended interrogatory responses to Samsung’s Interrogatory Nos. 16 and 18, which still  
17 did not disclose the existence of the [REDACTED]. (Ward Dec., Ex. E (Apple’s Corrected  
18 Amended Objections and Responses to Samsung’s Interrogatory Nos. 4, 6, 7, 16, 17, 18 (dated  
19 March 9, 2012).)

20 2. Mr. Peter Bressler

21 Mr. Bressler’s March 22 report on infringement opines on the [REDACTED]. The devices  
22 that Mr. Bressler and Apple consider to be commercial alternatives are the central thrust of his  
23 \_\_\_\_\_

24 <sup>1</sup> Samsung’s motion is filed in reliance on the eventual formal stipulation of dismissal of  
25 certain claims, pursuant to Apple’s Statement Identifying Claims It Will Assert at Trial. (Dkt. No.  
26 907 (filed May 7, 2012).) Other Apple experts rely on undisclosed materials and assert novel  
27 theories in their reports, but those experts’ opinions are for claims that Apple states that it intends  
28 to “drop.” If, however, Apple does not “drop” those claims, as it has indicated, Samsung reserves  
the right to revise this motion to seek preclusion of any additional report that improperly asserts an  
opinion.

1 report, and form the basis for any opinion that Apple’s products [REDACTED]. Samsung’s RFP  
2 No. 127 sought “[a]ll DOCUMENTS and things relating to APPLE’S analysis, consideration, or  
3 evaluation of whether any SAMSUNG product, device, apparatus, method, process, or system  
4 infringes any of the APPLE IP, including, without limitation, all documents and things concerning  
5 any test, evaluation, or reverse engineering of any SAMSUNG product, device, apparatus, method,  
6 process, or system. (Ward Dec., Ex. B.) Yet Apple never disclosed numerous devices during  
7 discovery that Mr. Bressler considered to be adequate for comparison, including:

- 8 • [REDACTED]

9 Apple never disclosed any of these devices to Samsung, nor did it amend any of its  
10 discovery responses in order to provide a proper basis for its expert’s opinion.

11 In addition, Interrogatory No. 72 required Apple to state fully and in detail all facts  
12 supporting its contention of design patent infringement. (Ward Dec., Ex. G (Samsung’s Fourth  
13 Set of Interrogatories to Apple, Feb. 7, 2012).) [REDACTED].

14 3. Dr. Susan Kare

15 Apple retained Dr. Kare to opine on possible alternative designs to Apple’s design patents.  
16 [REDACTED] Samsung’s interrogatories clearly requested that Apple “fully and in detail [state]  
17 all facts that support YOUR contention as to the non-functionality of any claimed feature, element,  
18 or combination of features and elements.” (Ward Dec., Ex. G (Interrogatory No. 68).) Yet Apple  
19 never produced or disclosed any of the following devices that Dr. Kare relies upon:

- 20 • [REDACTED]

21 (Ward Dec., Ex. I at ¶ 53, 54 and 62.) Dr. Kare also discusses Samsung icons that Apple  
22 has never before identified as being subject to a trademark or trade dress claim. [REDACTED]  
23 Samsung’s Interrogatory Nos. 70-71 requested that Apple, for all Apple trade dress and Apple  
24 trademarks “state fully and in detail all facts that support YOUR contention that SAMSUNG is  
25 diluting or has diluted such trade dress,” as well as “all facts that support YOUR contention that  
26 the SAMSUNG product or product packaging is likely to cause confusion, cause mistake, or  
27 deceive consumers as to the affiliation, connection, or association of SAMSUNG with APPLE, or  
28 as to origin, sponsorship, or approval by APPLE of SAMSUNG’S goods, services or commercial

1 activities.” (Ward Dec., Ex. G.) Apple never identified any of these icons as being disputed, and  
2 indeed never noted them at all until Dr. Kare’s report.

3 4. Dr. Sanjay Sood

4 Dr. Sood’s report expresses opinions [REDACTED]. To support his opinions, Dr. Sood  
5 relies heavily on surveys he conducted concerning consumer purchases of basic household items,  
6 such as tape dispensers and wall clocks. [REDACTED] Yet Apple has *never* produced either the  
7 questions in the survey questionnaires or the questionnaires themselves. [REDACTED]. Without  
8 the survey questionnaires and responses, Samsung is greatly prejudiced in its ability to challenge  
9 Dr. Sood's opinions regarding [REDACTED] and his application of those opinions to the products  
10 at issue in this lawsuit.

11 Apple’s disclosures and discovery responses do not identify these materials, nor did Apple  
12 ever inform Samsung that its expert would rely on them.

13 5. Dr. Tony Givargis

14 Dr. Givargis’s March 22 [REDACTED]. Yet, this document was never listed anywhere in  
15 Apple’s Invalidity Contentions on the ‘711 patent, despite the fact that the contentions list many  
16 other materials [REDACTED].

17 6. Dr. Ravin Balakrishnan

18 The ‘381 patent covers the “bounceback” feature, where the screen appears to “bounce”  
19 when a user attempts to scroll past the edge of the viewable area of an electronic document on the  
20 display. (Ward Dec., Ex. P (Balakrishnan Report, March 22, 2012, at ¶ 45).) Dr. Balakrishnan  
21 examined 27 Samsung products to determine whether they infringed the ‘381 patent. Dr.  
22 Balakrishnan’s product examination was one of the primary bases for his conclusions as to  
23 whether Samsung’s products infringed the ‘381 patent, and the only physical inspection of devices  
24 that took place. (*Id.* at ¶¶ 14-19.) Apple has refused to make these devices available for  
25 inspection. [REDACTED] In response to Samsung’s request for inspection of the examined  
26 products, Apple has provided only version numbers of the Android OS [REDACTED] running on  
27 the inspected devices, which is an insufficient basis by itself to determine how the accused  
28 “bounceback” functionality behaves on the actual devices Dr. Balakrishnan relied upon.

1 [REDACTED] However, the Samsung Galaxy S (i9000), running the same version of Android,  
2 does not exhibit the same functionality. (See May 17, 2012 Declaration of Jeffrey Johnson, at ¶¶  
3 4-7.)

4 7. Terry Musika

5 (a) Licensing Information

6 Apple's damages expert, Terry Musika, relies on Apple's production of licensing  
7 information to opine on Apple's reasonable royalty damages. Mr. Musika also relies on Apple  
8 licensing information in his rebuttal report, to criticize the reasonable royalty rate conclusions of  
9 Samsung's damages expert, Dr. Vincent O'Brien. (Ward Dec., Ex. T (Musika Report, March 22,  
10 2012, at ¶¶ 169-80); Ex. U (Musika Rebuttal Report, Apr. 16, 2012, at ¶ 29, 43-45, 69-69).) Yet  
11 Apple failed to timely produce the licensing information which underlies Mr. Musika's opinions;  
12 obstructed Samsung's discovery efforts into Apple's licensing practices; and cherry picked the  
13 licensing information that Mr. Musika relies on.

14 Samsung made extraordinary efforts to obtain all relevant licensing agreements from  
15 Apple. Samsung's RFPs required the production of, among other things:

- 16 • "All DOCUMENTS relating to or evidencing any Licenses, or the negotiation  
17 thereof, relating to the APPLE ACCUSED PRODUCTS or the technology claimed  
or disclosed by the SAMSUNG PATENTS-IN-SUIT."
- 18 • "All licenses in which You have received or conveyed rights under a patent relating  
19 to the APPLE ACCUSED PRODUCTS." (Ward Dec., Ex. B (RFP No. 9); *id.*  
20 (RFP No. 11).)<sup>2</sup>

21 [REDACTED] This was the version of the licensing chart available to Samsung when it  
22 deposed Apple's Rule 30(b)(6) witness on certain licensing issues and royalty payments, Mark  
23 Buckley, on February 23. [REDACTED]

---

24  
25 <sup>2</sup> Samsung also served Interrogatory No. 6, which requires identification of "any and all  
26 persons to whom YOU have ever licensed or offered to license, or persons who have requested to  
27 license, or to whom YOU have granted or offered to grant any other rights under the patent, trade  
28 dress, or trademark, including the status of those requests and offers, whether continuing,  
successful, or terminated, and identify (by Bates number) all DOCUMENTS RELATED to any  
such license, offer, request, or other grant of rights." (Ward Dec., Ex. C (Interrogatory No. 6).)

1 Despite repeated requests, Apple refused to make its Rule 30(b)(6) licensing witness  
2 available to address these late produced, inconsistent, and ambiguous charts. (Price Dec., at ¶ 4,  
3 Exs. B at 2, E at 3, F at 3.)

4 By its own admission, Apple has also refused to produce [REDACTED] even though Mr.  
5 Musika relies on one such license in his reasonable royalty analysis.<sup>3</sup>

6 [REDACTED] it is also clear that Apple has failed to make a full production of patent  
7 licenses related to the Accused Products. [REDACTED]

8 Even with these grossly belated disclosures, however, Apple’s production is still  
9 incomplete. According to media accounts, Apple entered into patent license agreements with Cliff  
10 Island LLC and/or Digtude Innovations, transferring up to a dozen patents from Apple to  
11 Digtude. This includes at least two feature patents related to the Accused Products, U.S. Patent  
12 No. 6,208,879 (Mobile Information Terminal Equipment and Portable Electronic Apparatus) and  
13 U.S. Patent No. 6,456,841 (Mobile Communication Apparatus Notifying User Of Reproduction  
14 Waiting Information Effectively).<sup>4</sup> [REDACTED]

15 (b) Manufacturing Capacity

16 Mr. Musika also relies on [REDACTED] prepared by Mark Buckley, Apple’s Rule  
17 30(b)(6) witness on manufacturing capacity. [REDACTED] (Ward Dec., Ex. T, at Exhibit 3, at  
18 45 (citing [REDACTED], listed as exhibits 15 and 16 to Mark Buckley Deposition).)  
19 [REDACTED] Apple has not produced these materials, nor has their underlying factual basis  
20 been disclosed to Samsung.

21 8. Russell Winer

22 In Sections VII through X of his March 22, 2012 report, Dr. Winer offers numerous  
23 opinions on Apple’s trade dress, including fame and distinctiveness (Sections VII and VIII),  
24

25 <sup>3</sup> [REDACTED] These licenses are attached to the Price Declaration as Exs. FF and GG.

26 <sup>4</sup> “Apple Made A Deal With The Devil (No, Worse: A Patent Troll)”, accessed on May 10,  
27 2012 at <http://techcrunch.com/2011/12/09/apple-made-a-deal-with-the-devil-no-worse-a-patent-troll/>;  
28 “Apple partners with patent troll Digtude Innovations — and wow, what a deal”, accessed  
on May 10, 2012, at <http://venturebeat.com/2011/12/10/apples-patents-digtude-innovations/>.

1 likelihood of infringement (Section IX) and likelihood of dilution (Section X). But the opinions  
2 he offers are based on facts and theories that were not disclosed in response to Samsung's  
3 contention interrogatories on these very same issues.

4 For example, Interrogatory No. 71 sought all "facts that support YOUR contention that the  
5 SAMSUNG product or product packaging is likely to cause confusion, cause mistake, or deceive  
6 consumers as to the affiliation, connection, or association of SAMSUNG with APPLE, or as to  
7 origin, sponsorship, or approval by APPLE of SAMSUNG'S goods, services or commercial  
8 activities." (Ward Dec., Ex. G.) Although Apple's responses never disclosed that it would do so,  
9 Dr. Winer advanced the following theories and alleged facts to support his opinions on trade dress  
10 infringement:

- 11 • Consumers' post-sale personal experiences with and public exposure to Apple  
12 products. (Ward Dec., Ex. W (Winer Report at ¶¶ 101, 105, 107, 108, 141 and  
13 143).)
- 14 • [REDACTED]
- 15 • Competition between Samsung and Apple products for the same market share, in  
16 connection with the second *Sleekcraft* factor. (*Id.* at ¶¶ 96, 111, 112, 114-116, 147-  
17 151.)
- 18 • Alleged instances of consumer confusion, in connection with the third and fourth  
19 *Sleekcraft* factors (*Id.* at ¶¶ 154 and 157.)
- 20 • Marketing and sale of Samsung and Apple products in the same channels, including  
21 retail stores where both Samsung and Apple products are sold, and the relative  
22 placement of Apple and Samsung products in stores and on websites, in connection  
23 with the second and fifth *Sleekcraft* factors. (*Id.* at ¶¶ 123, 124, 158 and 159.)
- 24 • Product price and the sophistication of and degree of care exercised by consumers,  
25 in connection with the sixth *Sleekcraft* factor. (*Id.* at ¶¶ 127-130 and 160.)
- 26 • Details regarding the look of Samsung phones and tablets prior to the release of the  
27 Galaxy line of smartphones and tablets, and internal Samsung documents  
28 referencing the iPhone and iPad, in connection with the seventh *Sleekcraft* factor.  
(*Id.* at ¶¶ 132 -138 and 163-165.)

24 Similarly, although Interrogatory No. 70 required Apple to identify all facts that supported  
25 its "contention that SAMSUNG is diluting or has diluted such trade dress," Dr. Winer puts forth  
26 facts and theories that were never disclosed to support his opinions on trade dress dilution:

- 27 • Consumers' post-sale interactions with Apple products, in connection with second  
28 and fourth likelihood of dilution factor. (*Id.* at ¶¶ 171 and 181.)



- 1 • [REDACTED]
- 2 • Alleged instances of consumer confusion, in connection with the sixth likelihood of
- 3 dilution factor. (*Id.* at ¶ 185.)

4 Finally, Dr. Winer offers facts and theories to support his opinions regarding consumer  
5 recognition and fame of the trade dress, including [REDACTED]. (*Id.* at ¶ 92.) Yet Apple never  
6 disclosed these facts or theories, despite the clear language of Samsung’s Interrogatory No. 69,  
7 which requested “the date on which YOU contend such trade dress and trademark became famous  
8 and acquired secondary meaning and state fully and in detail all facts that support YOUR  
9 contention that such trade dress and trademark became famous and acquired secondary meaning as  
10 of that date.” (Ward Dec., Ex. G.)

11 **C. Apple’s Experts Assert Undisclosed Theories on Infringement**

12 In addition to citing undisclosed facts as support for their opinions, Apple’s experts have  
13 asserted entirely novel positions on the alleged patent infringement of Samsung’s products and the  
14 supposed invalidity of Samsung’s patents, presenting opinions that never appeared in its August  
15 26, 2011 Infringement Contentions or its October 10, 2011 Invalidity Contentions.

16 1. Dr. Michel Maharbiz

17 Apple is asserting claim 8 of the ‘607 patent against Samsung. (*See* Dkt. No. 907 (Apple’s  
18 Statement Identifying Claims It Will Assert at Trial, at 2).) This claim requires a “virtual ground  
19 charge amplifier.” In its Infringement Contentions for claim 8, Apple merely asserted that “the  
20 specific circuit elements performing this [virtual ground charge amplifier] function will be  
21 identified in discovery.” (Ward Dec., Ex. A (Ex. 17).) During the course of discovery and to this  
22 day, Apple has never sought leave to amend its Infringement Contentions to identify any circuitry  
23 that corresponds to the “virtual ground charge amplifier” limitation in claim 8.

24 [REDACTED] The Atmel documentation and deposition testimony Dr. Maharbiz relies  
25 upon were not contained in Apple’s contention disclosures and Apple never sought leave to amend  
26 its Infringement Contentions to identify the Atmel documentation or testimony.

27 2. Dr. Tony Givargis

28 [REDACTED]

1 In short, Apple’s experts have asserted opinions based on facts that were never disclosed in  
2 seven months of discovery.

3 **III. ARGUMENT AND CITATION OF AUTHORITY**

4 **A. Apple’s Nondisclosure of Critical Facts Violates the Federal Rules of Civil**  
5 **Procedure and the Case Management Order**

6 Apple’s failure to produce or disclose facts upon which its experts rely, and its failure to  
7 adhere to its announced theories on infringement and invalidity, violate the Federal Rules of Civil  
8 Procedure, the Patent Local Rules, and the Court’s Scheduling Order. *See, e.g.*, Fed. R. Civ. P.  
9 26(a)(1)(A)(ii); Fed. R. Civ. P. 26(e).

10 It is axiomatic that any nondisclosure of facts is a violation of the Federal Rules of Civil  
11 Procedure. *See, e.g.*, Fed. R. Civ. P. 26(a)(1)(A)(ii); Fed. R. Civ. P. 26(e). A party that “fails to  
12 provide information . . . as required by Rule 26(a) or (e) . . . is not allowed to use that information  
13 or witness to supply evidence on a motion, at a hearing, or at a trial.” Fed. R. Civ. P. 37(c)(1).  
14 Failure to obey a Case Management Order is also improper when the Order requires the parties to  
15 complete fact discovery and disclosure of all infringement theories by a date certain (*i.e.*, the fact  
16 discovery cutoff date) especially in a case like this one where Apple has insisted on an expedited  
17 schedule. *See Von Brimer v. Whirlpool Corp.*, 536 F.2d 838, 843 (9th Cir. 1976) (finding that  
18 district court properly excluded evidence under Fed. R. Civ. P. 37(b)(2) for failure to comply with  
19 pre-trial orders); *Guifu Li v. A Perfect Day Franchise, Inc.*, 2012 WL 929784, at \*18-19 (N.D.  
20 Cal. Mar. 19, 2012) (precluding parties from introducing at trial documents requested during the  
21 course of discovery that were not produced by the discovery cut-off date). Indeed, courts do not  
22 hesitate to punish a party that sandbags their opponent with new and undisclosed facts by  
23 precluding the offending party from using the challenged portions of a report, or even by striking  
24 the an entire report, irrespective of its importance. *See, e.g., Yeti by Molly, Ltd. v. Deckers*  
25 *Outdoor Corp.*, 259 F.3d 1101, 1106 (9th Cir. 2001) (it was not an abuse of discretion to exclude  
26 an improperly disclosed expert report, even where “the district court made it much more difficult,  
27 perhaps impossible for [the sanctioned party] to rebut [the other party’s] damages calculations”).

28 Unsurprisingly, improper expert disclosures are prejudicial and harmful, turning discovery

1 into a game of “blind man’s bluff.” Failure to disclose an expert witness or provide the required  
2 information can result in exclusion of the expert witness “unless the failure was substantially  
3 justified or is harmless.” Fed. R. Civ. P. 37(c)(1); *Dominguez v. Excel Mfg., Inc.*, 2010 WL  
4 5300863, at \*5 (N.D. Cal. Dec. 20, 2010). Rules 37(b) and (d) apply these preclusive sanctions  
5 equally where a party has failed to sufficiently answer interrogatories. Fed. R. Civ. P.  
6 37(b)(2)(A), 37(d)(1). In addition, the Court’s Case Management Order required Apple to submit  
7 its Initial Disclosures and Infringement Contentions on August 26, 2011, and complete all fact  
8 discovery by March 8, 2012. Failure to comply with a Case Management Order may result in  
9 Rule 37 sanctions. *See Von Brimer*, 536 F.2d at 843; *Guifu Li*, 2012 WL 929784, at \*18-19.

10 During the seven months of discovery in this case, Apple has failed to identify, produce, or  
11 disclose many materials relied upon by its experts, including facts, witnesses, documents, or  
12 things. Instead, Apple waited until the deadline for its expert reports – well after the close of fact  
13 discovery – to ambush Samsung with new evidence and studies that it has concealed for strategic  
14 gain. Because of Apple’s gamesmanship, Samsung has had no meaningful opportunity to  
15 investigate or respond to these improperly assertions of undisclosed facts, so any opinion that  
16 relies on them should be stricken.

17 For example, the portions of Dr. Maharbiz’s report that rely on [REDACTED] are entirely  
18 improper and illustrate why opinions based on undisclosed facts should be stricken. Not only did  
19 Apple fail to disclose that its expert would rely on such reports, it failed to disclose the very  
20 existence of these [REDACTED], the underlying facts, and the results. These Reports were  
21 generated by a third-party, [REDACTED]. Samsung and its expert, however, never had an  
22 opportunity to inspect the site where the testing took place, the Samsung devices that were  
23 allegedly tested, the equipment used during testing, whether such equipment was properly  
24 calibrated, etc. Nor did Samsung have an opportunity to depose the author(s) of the  
25 [REDACTED] or the individuals that conducted the tests to determine if they were properly  
26 qualified and performed the testing with proper equipment and under proper conditions. The  
27 nondisclosure of the [REDACTED] evidences a complete disregard for Rule 26 obligations, and  
28 places Samsung at a substantial disadvantage by having no meaningful opportunity to test the

1 validity of those Reports.

2       The [REDACTED] and all of the underlying facts and analyses are clearly responsive to at  
3 least Samsung RFP No. 127, which seeks “[a]ll DOCUMENTS and things relating to APPLE’S  
4 analysis, consideration, or evaluation of whether any SAMSUNG product, device, apparatus,  
5 method, process, or system infringes any of the APPLE IP, including, without limitation, all  
6 documents and things concerning any test, evaluation, or reverse engineering of any SAMSUNG  
7 product, device, apparatus, method, process, or system.” (Ward Dec., Ex. B.) The [REDACTED]  
8 and all of the underlying facts and analyses are also responsive to Samsung’s Interrogatory No. 16,  
9 which sought information concerning any infringement analysis conducted on Samsung’s  
10 products. (*See* Ward Dec., Ex. C.) The Court’s Case Management Order established March 8,  
11 2012 as the deadline for the completion of fact discovery, and the fact that Apple’s consultant  
12 conveniently dated the Reports March 9 does not alter Apple’s disclosure obligation. Apple  
13 should have disclosed the [REDACTED] as part of fact discovery in accordance with the Federal  
14 Rules of Civil Procedure and the Court’s Case Management Order.

15       A complete response to RFP No. 127 or compliance with Rule 26(e) would have mandated  
16 disclosure of the undisclosed materials relied upon by Apple’s other experts as well. Mr. Bressler,  
17 for example, relies on examples of “alternative devices” to substantiate his opinions. (*See* Ward  
18 Dec., Ex. F, at 16-47 (conducting comparative analysis).) As such, these materials should have  
19 been disclosed well before the close of discovery. Apple’s failure to do so was improper, and  
20 those portions of the reports that rely on these alternatives should be stricken, as should those  
21 similarly offending portions of the expert reports identified in Part II.B. *See, e.g., Avago Techs.*  
22 *Gen. IP Ltd. v. Elan Microelectronics Corp.*, 2007 WL 2433386 (N.D. Cal. Aug. 22, 2007)  
23 (striking portions of an expert report that “did not merely use [an] undisclosed reference to explain  
24 other invalidating prior art, but also relied on the undisclosed reference itself”).

25       Finally, Apple’s refusal to timely and completely produce its licensing agreements is  
26 frankly outrageous, and the haphazard, late, and inconsistent character of Apple’s licensing  
27 disclosures violate discovery rules. Apple’s flagrant discovery abuse has deprived Samsung of its  
28 ability to properly formulate its position on damages and rebut Mr. Musika’s opinions.

1 The rules governing discovery are clear: facts must be disclosed if they are to be relied  
2 upon by experts, and failure to disclose facts properly and timely warrants remedial action by the  
3 Court. Here, any opinion based on undisclosed facts meets that standard, and the Court should  
4 excise the offending portions of Apple’s expert reports or strike them entirely.

5 **B. Apple’s Untimely Assertion of New Infringement Contentions Violates the**  
6 **Patent Local Rules, the Federal Rules of Civil Procedure, and the Court’s**  
7 **Case Management Order**

8 The Patent Local Rules provide for a “streamlined mechanism to replace the series of  
9 interrogatories that accused infringers would likely have propounded in its absence. These rules  
10 require parties to crystallize their theories of the case early in litigation and to adhere to those  
11 theories once they have been disclosed. They provide structure to discovery and enable the parties  
12 to move efficiently toward claim construction and the eventual resolution of their dispute.” *DCG*  
13 *Sys. v. Checkpoint Techs., LLC*, 2012 WL 1309161 (N.D. Cal. Apr. 16, 2012) (Grewal, M.J.)  
14 (internal quotation omitted); *MEMC Elec. Materials v. Mitsubishi Materials Silicon Corp.*, 2004  
15 WL 5363616, at \*4 (N.D. Cal. Mar. 2, 2004) (internal quotations omitted). “The overriding  
16 principle of the Patent Local Rules is that they are designed to make the parties more efficient, to  
17 streamline the litigation process, and to articulate with specificity the claims and theory of a  
18 plaintiff’s infringement claims.” *InterTrust Techs. Corp. v. Microsoft Corp.*, 2003 WL 23120174,  
19 at \*2 (N.D. Cal. Dec. 1, 2003). The Patent Local Rules “requir[e] both the plaintiff and the  
20 defendant in patent cases to provide early notice of their infringement and invalidity contentions,  
21 and to proceed with diligence in amending those contentions when new information comes to light  
22 in the course of discovery.” *O2 Micro Int’l Ltd v. Monolithic Power Sys., Inc.*, 467 F.3d 1355,  
23 1365-66 (Fed. Cir. 2006). Any deviation from the announced infringement and invalidity  
24 contentions without an appropriate amendment under Rule 3-7 “deprives [the opposing party] of  
25 the notice to which it [is] entitled.” *Volterra Semiconductor Corp. v. Primarion, Inc.*, 796 F.  
26 Supp. 2d 1025, 1043 (N.D. Cal. 2011).

27 Here, Dr. Maharbiz sets forth an entirely new and undisclosed infringement theory for  
28 claim 8 of the ‘607 patent based on Atmel documentation and testimony that was not disclosed in

1 Apple's Infringement Contentions. Apple never sought leave to amend its Infringement  
2 Contentions pursuant to Patent Local Rule 3-6 to include this theory. Accordingly, all portions of  
3 Dr. Maharbiz's expert report relating to this new theory of infringement should be stricken  
4 pursuant to Patent Local Rule 3-1. Likewise, Dr. Maharbiz relies on a new interpretation of a  
5 claim element and offers previously undisclosed support for this new interpretation. Additionally,  
6 Dr. Givargis spends substantial time discussing "MP3 Modes" and "Springboard" and Dr. Winer  
7 provides an entirely new explanation for the secondary meaning of Apple's products – yet these  
8 theories were clearly responsive to Samsung's interrogatories. *See supra* Part II.C.

9 This Court has consistently stricken infringement theories and claims asserted for the first  
10 time in expert reports. *See, e.g., Monolithic Power Sys., Inc. v. O2 Micro Int'l Ltd.*, 2009 WL  
11 3353306, at \*3 (N.D. Cal. Oct. 16, 2009) (striking newly asserted claims that were first raised  
12 outside the discovery period and without leave of the Court); *Informatica Corp. v. Bus. Objects*  
13 *Data Integration, Inc.*, 2006 WL 463549, at \*14 (N.D. Cal. Feb. 23, 2006) (striking new  
14 infringement claims because the standard for amendment of contentions was not met). It should  
15 do so here as well.

16 C. **Apple's Failure to Comply with the Federal Rules of Civil Procedure, the**  
17 **Patent Local Rules, and the Court's Scheduling Order Is Neither Harmless,**  
18 **Nor Justified**

19 Failure to provide the disclosures mandated by Fed. R. Civ. P. 26 can result in exclusion of  
20 the expert witness "unless the failure was substantially justified or is harmless." Fed. R. Civ. P.  
21 37(c)(1); *Dominguez*, 2010 U.S. Dist. LEXIS 137582, at \*5. Rules 37(b) and (d) apply these  
22 preclusive sanctions equally where a party has failed to sufficiently answer interrogatories. Fed.  
23 R. Civ. P. 37(b)(2)(A), 37(d)(1). The burden of proving an excuse is on the party facing sanctions.  
24 *See Yeti*, 259 F.3d at 1107. The four factors courts consider in evaluating harmlessness and  
25 justification are: "(1) prejudice or surprise to the party against whom the evidence is offered; (2)  
26 the ability of that party to cure the prejudice; (3) the likelihood of disruption of the trial; and (4)  
27 bad faith or willfulness involved in not timely disclosing the evidence." *Dominguez*, 2010 U.S.  
28 Dist. LEXIS 137582 at \*5. Because all of these factors support Samsung's motion, the portions of

1 Apple's experts' reports which rely upon and cite undisclosed facts or which assert novel  
2 infringement or invalidity theories should be stricken.

3 1. Samsung Suffered Significant Prejudice from Apple's Conduct

4 Apple's patent licensing agreements are highly relevant to the *Georgia-Pacific* analysis.  
5 *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1326-32 (Fed. Cir. 2009). The Federal  
6 Circuit has increasingly emphasized the importance of a full and rigorous evaluation of a party's  
7 licensing agreements and practices to determining a reasonable royalty. In *Lucent Technologies*,  
8 580 F.3d at 1329, the court rejected a damages award based on a reasonable royalty rate analysis  
9 because the plaintiff failed to prove that the licenses underlying the analysis were "sufficiently  
10 comparable." In *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860 (Fed. Cir. 2010), the Federal  
11 Circuit held that evidence of royalty rates from licenses that lacked a relationship to the claimed  
12 invention could not form the basis of a reasonable royalty calculation. The following year, the  
13 Federal Circuit rejected the "25% rule," holding that "there must be a basis in fact to associate the  
14 royalty rates used in prior licenses to the particular hypothetical negotiations at issue in the case."  
15 *Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1317 (Fed. Cir. 2011).

16 Here, Apple's haphazard, inconsistent, untimely and incomplete production of licensing  
17 information – producing eight different versions of its [REDACTED]; failing to produce, timely  
18 or at all, all relevant licenses; and refusing to make its Rule 30(b)(6) licensing witness available  
19 for further deposition – has impaired Samsung's ability to undertake a full analysis of Apple's  
20 comparable licenses and licensing practices. It has also allowed Apple to "cherry pick" the data  
21 relied on by Mr. Musika, allowing him to rely on patent and non-patent licenses beneficial to  
22 Apple, while shielding a fair and full inquiry into Apple's licensing agreements and strategies.

23 Regarding the other experts, had Apple properly amended its contention disclosures,  
24 Samsung would not have been deprived of its right to conduct directed discovery and prepare for  
25 trial with knowledge of Apple's theory of the case. Instead, Apple has strategically used new  
26 materials and shifted its contentions to gain a competitive edge. "There is a necessary element of  
27 gamesmanship which applies in discovery, but parties must act in the spirit of discovery. The  
28 parties' mutual knowledge of all the relevant facts is a prerequisite for proper litigation." *Ash v.*

1 *Ford Motor Co.*, 2008 WL 1745545 (N.D. Miss. Apr. 11, 2008) (citing *Dollar v. Long Mfg., N. C.,*  
2 *Inc.*, 561 F.2d 613, 616 (5th Cir. 1977)).

3 2. Samsung Is Unable to Cure the Prejudice Caused by Apple's Conduct

4 At this point in the case, Samsung can do nothing to cure the prejudice caused by Apple's  
5 concealment of facts and changing positions on infringement and invalidity. Samsung cannot now  
6 commission new expert reports to rebut Apple's alleged findings. Furthermore, as explained  
7 above, Samsung cannot now take discovery to verify the accuracy, reliability, and validity of the  
8 new facts and analyses contained within Apple's expert reports. Nor can Samsung effectively  
9 alter its strategy, at this late date, to correspond to Apple's entirely new infringement and  
10 invalidity contentions.

11 3. Likelihood of Disruption of the Trial

12 At Apple's request, this case is proceeding under an accelerated schedule, with dispositive  
13 motions due on May 17, and trial set to begin on July 30. Discovery is complete and it is simply  
14 too late for Samsung to take full discovery on undisclosed facts, conduct any of its own tests or  
15 analyses based on these new materials, incorporate information learned into its experts' opinions  
16 and trial strategy, and prepare supplemental expert reports. Apple has known that the trial date  
17 could not be disrupted, and failed to disclose its facts and contentions knowing Samsung would  
18 not have the opportunity to respond. That the trial date cannot be changed emphasizes why there  
19 is no way for Samsung to cure the prejudice caused by Apple's late disclosures.

20 4. Apple's Failure to Disclose Was Willful

21 Apple's failure to substantively respond to Samsung's discovery requests can only be  
22 construed as purposeful concealment of critical evidence in bad faith. The undisclosed facts upon  
23 which Apple relies are not new, and most have been available for some time. For example, Apple  
24 concealed the very existence of the SEM Reports – allegedly completed one day after the close of  
25 fact discovery – that Dr. Maharbiz relies upon in his report, despite every opportunity and  
26 obligation to disclose them even after the cutoff. Indeed Apple has produced hundreds of  
27 thousands of pages after the cutoff. Mr. Musika relied on licensing agreements that Apple has  
28 readily available in its licensing database, and on representations that Apple's production of patent



1 licensing information was complete, when in fact it was not. Apple’s failure to disclose much of  
2 the basis for its experts’ reports, as well as its decision to make last-minute changes regarding  
3 infringement and invalidity theories were clearly “willful.”

4 **IV. CONCLUSION**

5 For the forgoing reasons, at least those portions of Apple’s expert reports that rely on  
6 undisclosed facts or assert novel theories, which are listed with particularity in Samsung’s  
7 accompanying Proposed Order, are improper, prejudicial, and should be stricken.

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10 DATED: May 17, 2012

Respectfully submitted,  
  
QUINN EMANUEL URQUHART &  
SULLIVAN, LLP

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By/s/ Victoria F. Maroulis  
\_\_\_\_\_  
Charles K. Verhoeven  
Kevin P.B. Johnson  
Victoria F. Maroulis  
Michael T. Zeller

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Attorneys for SAMSUNG ELECTRONICS CO.,  
LTD., SAMSUNG ELECTRONICS AMERICA,  
INC. and SAMSUNG  
TELECOMMUNICATIONS AMERICA, LLC

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