

EXHIBIT W

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

APPLE INC.,

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD., A
Korean business entity; SAMSUNG
ELECTRONICS AMERICA, INC., a New York
corporation; SAMSUNG
TELECOMMUNICATIONS AMERICA, LLC, a
Delaware limited liability company,

Defendants.

Case No. 11-cv-01846-LHK

**EXPERT REPORT OF RUSSELL
S. WINER**

****CONFIDENTIAL – CONTAINS MATERIAL DESIGNATED AS HIGHLY
CONFIDENTIAL – ATTORNEYS’ EYES ONLY PURSUANT TO A PROTECTIVE
ORDER****

1 **V. APPLE’S BRAND IS COMPELLING AND VERY STRONG**

2 **A. Apple’s Compelling Brand Identity**

3 38. The Apple brand is one of the strongest in the world. This is because Apple has a
4 compelling brand identity. A significant contributor to Apple’s compelling brand identity is the
5 look and feel of Apple’s products:

6 Apple manages to celebrate creativity and self-expression while,
7 [sic] anticipating consumers’ needs and wants and meeting those
8 needs with solutions that are noteworthy for their ease of use and
elegance of design.³⁹

9 39. Apple imbues its products with a look and feel that is an integral element of
10 Apple’s brand identity and sets it apart from the rest of its competitors. Numerous articles,
11 technology websites, and marketing and branding consultancies have extolled Apple’s look and
12 feel.⁴⁰ For example:

13 Apple’s look is always simple and clean and the packaging for the
14 iPad is true to the brand. The art on the cover of the box is a life-
15 size photo of the product inside. No words, no sell copy. Since
16 this is exactly what the customer can’t wait to get their hands on,
17 it’s the perfect marketing message, building anticipation and
making the product the star. The only other art on the package is
18 the Apple logo and the product name on the sides of the box. The
19 product specs (16GB, 3G, etc.) and copyright are hidden on the
back at the bottom. Nothing gets in the way of the brand.⁴¹

20 ³⁹ “BrandZ Top 100: Most Valuable Global Brands 2010,” *Millward Brown Optimor*, at
127.

21 ⁴⁰ See, e.g., “Apple iPhone CNET Editors’ Rating,” *CNET*, June 30, 2007
22 ([http://reviews.cnet.com/smartphones/apple-iphone-16gb-at/4505-6452_7-
32851722.html?tag=mncol;lst;1](http://reviews.cnet.com/smartphones/apple-iphone-16gb-at/4505-6452_7-32851722.html?tag=mncol;lst;1)); “Apple’s iPhone 4 Lives Up to All Expectations,” *PC*
23 *World*, September 9, 2010; “Apple iPod Touch Flash-Based MP3 Player,” *PC World*, March
24 21, 2008
25 (http://www.pcworld.com/article/143681/apple_ipod_touch_flashbased_mp3_player.html);
“Miller: Apple’s iPad Pleases, But Is It Essential?” *PC Magazine*, April 5, 2010; “iPad 2
26 Review,” *Engadget*, March 9, 2011 (www.engadget.com/2011/03/09/ipad-2-review/); “Best
27 Global Brands 2010,” *Interbrand*, at 9; “BrandZ Top 100: Most Valuable Global Brands
28 2010,” *Millward Brown Optimor*, at 127.

⁴¹ “Branding in the Package: Lessons from Apple’s Master Marketers,” *Gianfagna*
Strategic Marketing, May 21, 2010
([http://www.gianfagnamarketing.com/blog/2010/05/21/branding-in-the-package-lessons-
from-apples-master-marketers/](http://www.gianfagnamarketing.com/blog/2010/05/21/branding-in-the-package-lessons-from-apples-master-marketers/)).

1 40. When the iPhone was introduced to the market, it was described as “unique,”
2 “cool,” and “sexy” by various industry insiders.⁴² For example, *PC Magazine* commented on its
3 first impressions of the iPhone as follows:

4 The first thing you notice when holding the iPhone is how slim it
5 is and how cool it feels in comparison to other smartphones, which
6 are boxy and often thick. . . . [T]he iPhone will become the gold
standard in smartphones, and likely give Apple at least a two-year
edge over the competition.”⁴³

7 41. Another article in *PC Magazine* explained that the two reasons the iPhone was
8 “hot” were the successful publicity conducted by Apple, and, more importantly, the uniqueness of
9 the iPhone itself:

10 Clearly, the iPhone is hot, but why? Two reasons, said Jen
11 O’Connell, author of “The Cell Phone Decoder Ring,” a book that
12 helps readers pick a cell phone. First, O’Connell recognizes the
13 power of the publicity machine at Apple, famous these days for its
14 Mac notebook computers and iPod music players. “They give just
15 enough information for people to freak out over it,” said
16 O’Connell, who credits the company as having enough reach to
touch her grandmother in Montana. . . . But O’Connell also
believes the hype around the iPhone is because of its uniqueness.
“This is nothing like anyone else has manufactured before,” she
said. “It looks cool and the way you interact with it is cool. I’m
drooling at the mouth to get one.”⁴⁴

17 42. *PC Magazine* also said that “[t]he iPhone 3G represents the birth of a new
18 computing platform. It’s also one very cool phone.”⁴⁵

19 43. *CNET News.com* commented that “the iPad is, more than any other product the
20 company has made, the quintessential Apple device.”⁴⁶

21
22 ⁴² “iPhone Hype Has Gadget Geeks Camping and Drooling,” *PC Magazine*, June 11,
2007; “Editor’s Letter: Bloggers, Welcome Aboard,” *InfoWorld Daily News*, June 25, 2007;
23 “I Tried an iPhone; A Chance Meeting Turns into a Rare Opportunity to Touch and Try This
One-of-a-Kind Apple Creation,” *PC Magazine*, June 28, 2007.

24 ⁴³ “First Impressions of the Apple iPhone; Steve Jobs Made Some Heady Claims About
25 the iPhone Back in January. Does the Actual Device Live Up to What He Told Us to
Expect?” *PC Magazine*, July 2, 2007.

26 ⁴⁴ “iPhone Hype Has Gadget Geeks Camping and Drooling,” *PC Magazine*, June 11,
2007.

27 ⁴⁵ “Apple iPhone 3G,” *PC Magazine*, July 11, 2008.

28 ⁴⁶ “iPad Unites Apple’s Media and Mobile Ambitions,” *CNET News.com*, January 28,
2010.

1 44. Industry observers have also commented on the link between Apple and the look
2 and feel of its various products. For instance, as the author of an article published in *eWEEK*,
3 described: “My first impression of the iPad when I took it out of the (beautifully packaged) box
4 and plugged it into my MacBook Pro was that it looked and felt like a really big iPod touch.”⁴⁷

5 45. Therefore, there is widespread recognition of the fact that the unique look and feel
6 of the iPhone, the iPad, and the iPod touch makes these products distinctive. This distinctiveness
7 goes to the heart of Apple’s brand identity.

8 46. At the core of brand association is the Apple product itself: how it works and how
9 it looks. According to *Interbrand*, a leading branding consultancy:

10 Apple is a brand that customers immediately understand. They
11 know what they get out of adopting and associating with it. Its
12 products are seen as innovative and creative. In contrast to Dell,
13 which creates products that lack any consistent visual cues,
14 Apple’s design is consistent and distinctive – from the clean, silver
15 [sic] or smooth white of its laptops to the pocket-size rectangle of
16 its iPod or iPhone.⁴⁸

17 Central to the associations consumers form vis-à-vis Apple is its “painstaking attention to detail”
18 in developing the look and feel of Apple products.⁴⁹

19 **B. Apple’s Advertising Strategy**

20 47. Apple carefully promotes a single vision for the brand through its advertising and
21 follows a specific strategy. For instance, the primary focus in all Apple advertising is the product
22 itself. Sissie Twiggs (“Ms. Twiggs”), Apple’s Director of Worldwide Advertising, describes this
23 as “[t]he product is hero, front and center.”⁵⁰ While the advertising can highlight specific features
24 of the product, nothing upstages the product itself. According to Greg Joswiak (“Mr. Joswiak”),
25 Apple’s Vice President, iPhone, iPod and iOS Product Marketing, when Apple promotes its

26 ⁴⁷ “INSIDE MOBILE Becoming Part of the Apple iPad Generation,” *eWEEK*, April 7,
27 2010.

28 ⁴⁸ “Best Global Brands 2010,” *Interbrand*, at 9.

⁴⁹ “Design Thinking and Innovation at Apple,” Harvard Business School Case Study
No: 9-609-066, revised March 4, 2010, APLNDC-Y0000134928-134940 at APLNDC-
Y0000134931.

⁵⁰ Deposition of Sissie Twiggs on July 27, 2011 (“Twiggs Dep.”) 19:8-11, 97:1-25; *see*
also Deposition of Tamara Whiteside on February 28, 2012 (“Whiteside Dep.”) 33:24-35:4;
Deposition of Stanley Ng on February 21, 2012 (“Ng Dep.”), 64:3-18, 65:11-16.

1 products, the emphasis is on what the product looks like, its beauty, and its materials.⁵¹ Apple's
2 iPhone, iPad, and iPod touch marketing communications specifically identify the "product is
3 hero" approach as part of their guiding principles.⁵²

4 48. Apple is also selective about the choice of medium in which it advertises its
5 products. For example, the iPhone media guidelines specifically advise: that "across all media,
6 ensure quality of placement over cost or quantity."⁵³ Apple's new products are shown publicly
7 for the first time at its own product launch presentations. All of this is typically supported by
8 various television and print advertising campaigns,⁵⁴ outdoor advertising,⁵⁵ and online
9 advertising.⁵⁶ Following the "product is hero" approach, these advertisements prominently
10 feature the product and emphasize the appearance of the product. In addition, Apple pursues
11 product placement opportunities in feature films, talk shows, prime-time network television, and
12 parody news shows.⁵⁷ Apple's marketing programs are well integrated and carefully crafted and
13 implemented to resonate in the strongest possible way with consumers.

15 ⁵¹ Deposition of Greg Joswiak on February 23, 2012 ("Joswiak Dep.") 285:20-287:2.
16 Philip Schiller, Apple's Senior Vice President of Worldwide Product Marketing, states that
17 "[f]or example, when we create our website, one of the first things you'll see when you go
18 look at the iPhone is a beautiful photo of it because how it looks is really tantamount. I think
19 it's one of the most important things, that it's beautiful and the design is something unique
20 and distinctive, and we will show that." See Deposition of Philip Schiller on February 17,
21 2012, 121:16-22; Apple Inc. Schedule 14A filed January 9, 2012, at 16.

22 ⁵² See, e.g., APLNDC0002155318-2155322, at APLNDC0002155320;
23 APLNDC0002155335-2155338, at APLNDC0002155336; APLNDC0002008363-2008405,
24 at APLNDC0002008368-69, APLNDC0002008380; APLNDC0001327374-1327415, at
25 APLNDC0001327376; APLNDC0001335264-1335280, at APLNDC0001335266;
26 APLNDC0002203457-2203482, APLNDC0002203459, APLNDC0002203464; APLNDC-
27 Y0000236364-236370 at APLNDC-Y0000236368; APLNDC0001964084-1964099, at
28 APLNDC0001964087; APLNDC0002027210-2027226, at APLNDC0002027225.

⁵³ APLNDC-Y0000236364-236370 at APLNDC-Y0000236366.

⁵⁴ APLNDC0002190486-2190487; Joswiak Dep. 278:16-24, 279:10-13; Twiggs Dep.
29 25:3-26:13, 35:24-36:7, 38:5-8, 42:9-19.

⁵⁵ APLNDC0002190486-2190487 at APLNDC0002190487; APLNDC0001322875-
30 1323050; Joswiak Dep. 279:10-13; Twiggs Dep. 38:16-39:24, 40:12-23.

⁵⁶ Twiggs Dep. 44:10-13, 49:18-21.

⁵⁷ Deposition of Suzanne Lindbergh on February 28, 2012 ("Lindbergh Dep.") 15:3-
31 17:5. There are several other forms of marketing activity that Apple engages in such as direct
32 marketing sales, public relations, retail marketing, and marketing on Apple.com. See
33 Whiteside Dep. 27:11-18; Twiggs Dep. 50:7-51:1, 203:15, 204:2-7.

1 49. Apple’s product launch presentations, where Apple’s new products are unveiled
2 publicly for the first time, are major worldwide media events.⁵⁸ These events feature the products
3 prominently and generate a tremendous amount of buzz and excitement. For example, BMW’s
4 Chief Executive Officer, Norbert Reithofer, described the palpable public anticipation for the
5 iPad as follows: “[T]he whole world held its breath before the iPad was announced. That’s brand
6 management at its very best.”⁵⁹

7 50. The launch presentation is accompanied by a webpage prominently featuring the
8 product on Apple’s website and various in-store promotions and demonstrations at Apple retail
9 stores.⁶⁰ Apple then engages in a press tour, during which the company shares the product with
10 selected press members and allows these individuals to test and review the products themselves.⁶¹

11 51. As noted above, Apple advertises its products on various television programs.⁶²
12 The company targets specific television shows as opposed to targeting specific television
13 networks.⁶³ The iPhone media guidelines specify that, with respect to television programming,
14 the focus should be on quality programming and environment over ratings.⁶⁴ For example, ads
15 for the iPhone have aired during television programs such as *Late Show with David Letterman*,
16 *How I Met Your Mother*, *The Tonight Show with Jay Leno*, *Gossip Girl*, *NCIS*, *Modern Family*,
17 *So You Think You Can Dance?*, *Parks & Recreation*, *30 Rock*, *Vampire Diaries*, *Bones*, *Saturday*
18 *Night Live*, and *The Simpsons*.⁶⁵ The iPad marketing guidelines similarly state that “across all

19 ⁵⁸ A Harvard Business School case study describes these product launch events as
20 follows: “Products are not rolled out; they are presented to the public by Apple’s
21 management team in periodic extravaganzas” See “Design Thinking and Innovation at
22 Apple,” Harvard Business School Case Study No: 9-609-066, revised March 4, 2010,
APLNDC-Y0000134928-134940 at APLNDC-Y0000134937. See also Joswiak Dep. 277:23-
278:8.

23 ⁵⁹ “World’s Most Admired Companies 2010,” *Fortune Magazine*, available at
<http://money.cnn.com/magazines/fortune/mostadmired/2010/snapshots/670.html>.

24 ⁶⁰ Joswiak Dep. 279:7-279:22.

25 ⁶¹ Joswiak Dep. 278:9-15.

26 ⁶² See *supra* discussion ¶ 48.

27 ⁶³ Joswiak Dep. 295:14-16; Schiller Dep. 94:15-95:3; Twiggs Dep. 42:9-44:7;
Whiteside Dep. 137:1-138:6.

28 ⁶⁴ APLNDC-Y0000236364- 236370 at APLNDC-Y0000236366; see also
APLNDC0002155335-2155338 at APLNDC0002155336.

⁶⁵ See, e.g., APLNDC0001380378; APLNDC0001380392.

1 media, the focus should be on quality of the environment/placement over cost/quantity (e.g.,
2 focus on quality programming over ratings, position in break/title/page/etc.).”⁶⁶ Ads for the iPad
3 have aired during programming such as *Late Night with Jimmy Fallon*, *Glee*, *Modern Family*,
4 *Grey’s Anatomy*, *The Daily Show with Jon Stewart*, *Friday Night Lights*, *Two and a Half Men*,
5 *Hawaii Five-0*, *CSI*, and the NBA Playoffs,⁶⁷ and ads for the iPod touch have aired during
6 programming such as *Gossip Girl*, *Monday Night Football* on ESPN, *Vampire Diaries*, *Scrubs*,
7 *Smallville*, *Saturday Night Live*, college football games on ABC, and college basketball games on
8 CBS.⁶⁸ Furthermore, Apple’s ad campaign titled “There’s an App for That” won an Effie Award
9 in 2010 for effectiveness in marketing consumer electronics.⁶⁹

10 52. In its print advertising, Apple similarly follows a careful strategy.⁷⁰ The iPhone,
11 iPad, and iPod touch marketing guidelines specify that, with respect to print advertising, only
12 high-quality magazines within genres that are contextually relevant to the product and audience
13 should be targeted.⁷¹ For instance, an internal Apple marketing document for the iPhone
14 demonstrates Apple’s desire for the appropriate quality and context for its ads, explaining how a
15 creative titled “Apps in the city” feels out of place in *Newsweek* but fits in *The New Yorker*,
16 despite the quality of each publication’s reputation.⁷² For example, iPhone ads have run in
17 publications such as *The New York Times*, *USA Today*, *The Wall Street Journal*, *Newsweek*, *The*
18 *New Yorker*, *Time*, *The Economist*, *Sports Illustrated*, *The Week*, *Rolling Stone*, and *Food &*
19

20 ⁶⁶ APLNDC0002145596-APLNDC0002145612, at APLNDC0002145600,
21 APLNDC0002145602.

22 ⁶⁷ See, e.g., APLNDC0001380370; APLNDC0001380389; APLNDC-X0000021159.

23 ⁶⁸ See, e.g., APLNDC-X0000014538-14543; APLND-X0000014544-14549.

24 ⁶⁹ *2010 Effie Awards: Awarding Ideas that Work – The Winners*, 2010,
(http://www.effie.org/downloads/2010_Winners_List_with_trophy.pdf).

25 ⁷⁰ APLNDC0001335342-1335355.

26 ⁷¹ See APLNDC-Y0000236364-236370 at APLNDC-Y0000236367;
27 APLNDC0002145596-APLNDC0002145612, at APLNDC0002145604;
28 APLNDC0001327374-APLNDC0001327415, at APLNDC0001327412; see also
APLNDC0002194282-2194294 at APLNDC0002194286; APLNDC0002155335-2155338 at
APLNDC0002155337; Twigg Dep. 25:2-26:13, 31:1-24; APLNDC0002190486-2190487 at
APLNDC0002190487; APLNDC0001335342-1335355 at APLNDC0001335347.

⁷² APLNDC0001335342-1335355 at APLNDC0001335353.

1 Wine,⁷³ and iPad ads have run in publications such as *The New York Times*, *The Wall Street*
2 *Journal*, *Business Week*, *Fortune*, *Rolling Stone*, *Real Simple*, *Wired*, *Time*, *The Week*,
3 *Entertainment Weekly*, *The New Yorker*, and *Paper*.⁷⁴ In addition, Apple strategically places its
4 magazine advertisements only on back covers or inside the front cover (in the form of a spread),
5 which is consistent with its goal of putting the focus on the product.⁷⁵ Exhibits 4, 5, and 6 are
6 examples of print advertisement copies for different generations of the iPhone, the iPad, and the
7 iPod touch. As is evident in these exhibits, the trade dress elements at issue are often clearly
8 visible in Apple's advertisements for these products.⁷⁶

9 53. Apple also engages in outdoor advertising. This includes transit stops (such as bus
10 shelters or subway stops) and billboards.⁷⁷ Apple's strategy is to focus on high-traffic, high-
11 visibility spots for all of its outdoor advertising.⁷⁸ The iPhone and iPad marketing guidelines
12 specify to target top markets with a mix of large-format/mega-site and street-level units.⁷⁹ The
13 guidelines also recommend to "hand-pick locations as much as possible for clear line-of-site [sic]
14 and traffic considerations."⁸⁰

16 ⁷³ See, e.g., APLNDC-X0000019536; APLNDC-X0000015992; APLNDC-
X0000019858; APLNDC-X0000015016.

17 ⁷⁴ See, e.g., APLNDC-X0000030612; APLNDC-X0000026718-26736; APLNDC-
X0000030646.

18 ⁷⁵ Twiggs Dep. 89:22-25; Whiteside Dep. 52:12-15, 86:20-22, 87:2-5; APLNDC-
19 Y0000236364- 236370 at APLNDC-Y0000236367; APLNDC0001327374-1327415 at
APLNDC0001327412; APLNDC0002194282-2194294 at APLNDC0002194286.

20 ⁷⁶ Ms. Twiggs states in her deposition that, "Apple as a company comes from the design
21 of our products. It's the key to what makes our products distinctive, and that's something that
22 we live with every day, fortunately. . . . As I mention all the time, showing our product as
23 hero, with the design elements in the center of our advertising, is absolutely critical. And
probably like anyone with their own product, they like to show their product as it appears in
the best light possible. And we're fortunate with Apple products in that there are so many
gorgeous design elements to them, there's a lot to show off." See Twiggs Dep. 164:17-165:4.

24 ⁷⁷ See APLNDC0001322875-1323050 for Apple's permanent billboard locations across
the country as of 2012; see also Twiggs Dep. 38:16-39:12.

25 ⁷⁸ Twiggs Dep. 39:13-40:23.

26 ⁷⁹ See APLNDC-Y0000236364- 236370 at APLNDC-Y0000236367;
APLNDC0002145596-APLNDC0002145612, at APLNDC0002145605; see also
27 APLNDC0002155335-2155338 at APLNDC0002155337.

28 ⁸⁰ See APLNDC-Y0000236364- 236370 at APLNDC-Y0000236367; see also
APLNDC0002155335-2155338 at APLNDC0002155337; Twiggs Dep. 39:13-40:23.

1 54. In addition, Apple runs online advertisements for its iPhone, iPad, and iPod touch
2 products. Specifically, Apple uses two types of online advertising: search engine marketing
3 (“SEM”) and display advertising.⁸¹ The former category involves keyword advertising,⁸² and the
4 latter can take the form of advertisements on websites, but Apple does not do “a whole lot of
5 display advertising.”⁸³ The iPhone and iPad marketing guidelines specify that “[a]ll sites [for
6 online display. . . must be of high quality.”⁸⁴

7 55. Lastly, Apple engages in product placement. Product placement involves
8 placement of a firm’s products in different forms of media—such as television, movies, and
9 videogames—where the actors or characters are shown using brand-name products and services.⁸⁵
10 Suzanne Lindbergh (“Ms. Lindbergh”), Director of Buzz Marketing at Apple, states that Apple
11 places its products in talk shows, primetime network television, parody news shows, and feature
12 films.⁸⁶ Unlike most companies, Apple has a policy of not paying for product placement.⁸⁷ In
13 addition, Apple selectively gives away its products for free to key individuals such as
14 Stephen Colbert.⁸⁸

15 ⁸¹ Twiggs Dep. 44:10-13, 49:18-21.

16 ⁸² Twiggs Dep. 44:15-20.

17 ⁸³ Twiggs Dep. 47:1-3; *see, e.g.*, APLNDC-X000007734; APLNDC-X0000007686.

18 ⁸⁴ APLNDC0002145596-APLNDC0002145612, at APLNDC0002145606.

19 ⁸⁵ Winer & Dhar (2011) 30.

20 ⁸⁶ Lindbergh Dep. 9:20-24, 15:3-17:5.

21 ⁸⁷ “Many major marketers pay fees of \$50,000 to \$100,000 and even higher so that their
22 products can make cameo appearances in movies and television, with the exact fee depending
23 on the amount and nature of brand exposure.” *See* Keller (2008) 253. In contrast, Apple will
24 loan the product to the movie or TV program, but will not make a payment. *See* Lindbergh
25 Dep. 47:25-48:11; Joswiak Dep. 284:15-285:3; Whiteside Dep. 30:1-9.

26 ⁸⁸ Lindbergh Dep. 48:12-51:7; *The Colbert Report: Tribute to Steve Jobs*, Comedy
27 Central, October 6, 2011 ([http://www.colbertnation.com/the-colbert-report-
28 videos/399182/october-06-2011/tribute-to-steve-jobs](http://www.colbertnation.com/the-colbert-report-videos/399182/october-06-2011/tribute-to-steve-jobs)). Ms. Lindbergh uses the term
“influencers” to characterize these individuals. In marketing terminology, influencers are
those individuals who have an influence over potential buyers. Celebrities such as famous
athletes, actors, and television personalities are typically included in this category. *See*
American Marketing Association Dictionary, available at
http://www.marketingpower.com/_layouts/Dictionary.aspx?dLetter=B; J. Foxtan *Live Buzz
Marketing*, CONNECTED MARKETING: THE VIRAL, BUZZ AND WORD OF MOUTH REVOLUTION
24-46 (Justin Kirby and Paul Marsden, eds. Oxford, UK: Elsevier, 2006); S. Curran,
Changing the Game, CONNECTED MARKETING: THE VIRAL, BUZZ AND WORD OF MOUTH
REVOLUTION 129-147 (Justin Kirby and Paul Marsden, eds. Oxford, UK: Elsevier, 2006); S.

1 **C. Apple’s Investments in Advertising**

2 56. Apple invests enormous amounts of time, money, and effort to develop, promote,
3 and improve its brand identity. In 2003, Apple spent \$193 million on advertising alone.⁸⁹ By the
4 time Apple introduced the iPhone in 2007, its advertising expenditures increased to \$467
5 million.⁹⁰ Apple’s advertising expenses were almost a billion dollars in 2011 (\$933 million),⁹¹
6 and Apple is one of the 100 largest advertisers in the U.S.⁹² Much of this advertising involves the
7 products at issue. In its 2008 fiscal year, Apple spent almost \$98 million in the U.S. on iPhone
8 advertisements.⁹³ Apple’s advertising in the mobile phone market leads all other phone
9 manufacturers.⁹⁴ Apple’s U.S. advertising expenses for the iPhone increased to approximately
10 \$227 million in fiscal year 2011.⁹⁵ Since the iPhone’s introduction and through the first quarter
11 of its fiscal year 2012, Apple spent a total of \$747 million in the U.S. on iPhone advertisements.⁹⁶
12 Similarly, Apple’s U.S. advertising expenses for the iPad were approximately \$150 million and
13 \$308 million in fiscal years 2010 and 2011, respectively.⁹⁷ Since the iPad’s introduction and
14 through the first quarter of its fiscal year 2012, Apple spent a total of \$536 million in the U.S. on

15 Brown, *Buzz Marketing: the Next Chapter*, CONNECTED MARKETING: THE VIRAL, BUZZ AND
16 WORD OF MOUTH REVOLUTION 208-231 (Justin Kirby and Paul Marsden, eds., Oxford, UK:
17 Elsevier, 2006). The general idea is that when the influencers use these products in their
18 personal lives, their followers might notice the products. This can generate buzz, or strong
19 word-of-mouth, among potential users and lead to increased brand awareness and potentially
20 sales. See Winer & Dhar (2011) 30; S. Brown, *Buzz Marketing: the Next Chapter*,
21 CONNECTED MARKETING: THE VIRAL, BUZZ AND WORD OF MOUTH REVOLUTION 208-231
22 (Justin Kirby & Paul Marsden, eds. Oxford, UK: Elsevier, 2006).

23 ⁸⁹ Apple Computer, Inc. Form 10-K filed December 19, 2003, at 66.

24 ⁹⁰ Apple Inc. Form 10-K filed November 15, 2007, at 64, APLNDC-Y0000135409-
25 135576 at APLNDC-Y0000135476.

26 ⁹¹ Apple Inc. Form 10-K filed October 26, 2011, at 50, APLNDC-Y0000135683-
27 135789 at APLNDC-Y0000135734.

28 ⁹² “How Steve Jobs’ Apple Married Mass Marketing with Unabashed Creativity,”
29 *Advertising Age*, August 29, 2011 (<http://adage.com/article/news/steve-jobs-married-mass-marketing-unabashed-creativity/229487/>), APLNDC-Y0000134910-134911 at APLNDC-
30 Y0000134910.

31 ⁹³ APLNDC-Y0000051623.

32 ⁹⁴ See, e.g., OMD0000039 (phones); OMD0000076 (phones); OMD0000004 (tablets);
33 OMD0000011 (tablets).

34 ⁹⁵ APLNDC-Y0000051623.

35 ⁹⁶ APLNDC-Y0000051623.

36 ⁹⁷ APLNDC-Y0000051623.

1 iPad advertisements.⁹⁸ Apple's heavy investments to develop, promote, and improve its brand
2 identity have a concomitant effect on Apple's brand image and brand awareness in consumers'
3 minds.

4 **D. Third-Party Promotion of Apple's Products**

5 57. Consumers form associations with the Apple brand not only through Apple's own
6 advertising but also through independent channels. For instance, following their introductions,
7 Apple's iPhone and iPad products received widespread media coverage in the form of product
8 reviews in major newspapers and technology publications and websites. The products were also
9 featured on the covers of popular magazines and in popular media.

10 58. The iPhone was first announced publicly on January 9, 2007.⁹⁹ But as early as
11 August 2002, *The New York Times* had reported on rumors of an Apple mobile phone.¹⁰⁰ These
12 rumors continued up until the launch of the iPhone¹⁰¹ and Apple's actual announcement received
13 widespread media coverage. Major newspapers ran stories about the iPhone, many of which
14 featured images of the device.¹⁰² Television news programs such as *The Today Show* similarly
15 featured stories about the iPhone, prominently displaying images of the device.¹⁰³

17 ⁹⁸ APLNDC-Y0000051623.

18 ⁹⁹ "Apple Reinvents the Phone with iPhone," *Apple Inc. Press Release*, January 9, 2007
(<http://www.apple.com/pr/library/2007/01/09Apple-Reinvents-the-Phone-with-iPhone.html>).

19 ¹⁰⁰ "Apple's Chief in the Risky Land of the Handhelds," *N.Y. Times*, August 19, 2002
(<http://www.nytimes.com/2002/08/19/business/apple-s-chief-in-the-risky-land-of-the-handhelds.html?pagewanted=all&src=pm>).

21 ¹⁰¹ "Apple's Remarkable Comeback Story," *CNNMoney.com*, March 29, 2006
(http://money.cnn.com/2006/03/29/technology/apple_anniversary/index.htm); "Cool 2 Use:
22 The Gear Hunter: Intelligent Design: Since That First Call, Cell Phones Have Evolved,"
Newsday, April 4, 2006; "Apple Stock Hits New High on Analyst Optimism Over iPod,
23 Possible iPhone," *Associated Press Newswires*, November 21, 2006; "Expert View: We Want
the iPhone!" *PC Magazine*, November 29, 2006
24 (<http://www.pcmag.com/article2/0,2817,2066661,00.asp>).

25 ¹⁰² "Apple Unveils All-in-One iPhone," *S.F. Chronicle*, January 9, 2007; "Apple,
Hoping for Another iPod, Introduces Innovative Cellphone," *N.Y. Times*, January 10, 2007
26 (<http://query.nytimes.com/gst/fullpage.html?res=9C06E1DC1230F933A25752C0A9619C8B63&pagewanted=all>); "Apple Unveils All-in-One iPhone," *USA Today*, January 10, 2007;
27 "Apple Storms Cellphone Field," *Wall St. Journal*, January 10, 2007; "Apple's iPhone: Is It
Worth It?" *Wall St. Journal*, January 10, 2007.

28 ¹⁰³ *The Today Show*, NBC, No Date, APLNDC-X0000358382.

1 59. The iPhone continued to be the subject of press in the five-month period between
2 its announcement and release. Nielsen BuzzMetrics reported that the iPhone was “riding an
3 unprecedented wave of pre-launch conversation,” as there were more than 1.79 million unique
4 visitors to the iPhone website in January 2007 coupled with 870,000 searches for the keyword
5 “iPhone.”¹⁰⁴ Survey results released by M: Metrics on June 15, 2007 found that consumer
6 awareness of the iPhone was high, as 64% of American mobile phone users were aware of the
7 product.¹⁰⁵ In addition, an April 2007 survey by ChangeWave Research showed that 26% of
8 those likely to buy an advanced mobile phone in the next three months were planning to purchase
9 the iPhone.¹⁰⁶ Many news articles discussing the iPhone’s upcoming release included
10 photographs of the phone, often turned on to display the device’s homescreen.¹⁰⁷

11 60. Much hype surrounded the launch of the iPhone itself. According to news reports,
12 people lined up outside the Apple store on Fifth Avenue in New York at least two days before the
13 product went on sale.¹⁰⁸ In the days leading up to and immediately following its release, the
14 iPhone was the subject of product reviews in major publications.¹⁰⁹

15 ¹⁰⁴ “Unprecedented Pre-Launch Buzz Sets High Expectations for iPhone Sales and
16 Satisfaction, Nielsen BuzzMetrics Reports,” *Nielsen BuzzMetrics Press Release*, June 25,
17 2007 (<http://www.marketwire.com/press-release/unprecedented-pre-launch-buzz-sets-high-expectations-iphone-sales-satisfaction-nielsen-745783.htm>).

18 ¹⁰⁵ “M:Metrics: High Awareness, Strong Demand for iPhone Among British and
19 American Mobile Phone Users,” *M:Metrics Press Release* via *Marketwire News Releases*,
20 June 15, 2007 (<http://finance.boston.com/boston/news/read/2343970/m>).

21 ¹⁰⁶ “Apple iPhone is Top Choice Among Smart-Phone Buyers (Update 1),”
22 *Bloomberg.com*, June 22, 2007
23 (<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVXpexoVPuIg&refer=canada>).

24 ¹⁰⁷ “Apple Buffs Marketing Savvy to a High Shine,” *USA Today*, March 9, 2007
25 (http://www.usatoday.com/tech/techinvestor/industry/2007-03-08-apple-marketing_N.htm);
26 “Cellphone Users Set Their Sights on Apple’s iPhone,” *USA Today*, March 16, 2007
27 (http://www.usatoday.com/tech/products/2007-03-14-cellphone-contracts-iphone_N.htm);
28 “Apple Earnings Only Expected to Grow,” *USA Today*, April 27, 2007
29 (http://www.usatoday.com/tech/techinvestor/corporatenews/2007-04-26-apple-profits_N.htm); “The Informed Reader,” *Wall St. Journal*, May 28, 2007; “Fever Builds for iPhone (Anxiety Too),” *N.Y. Times*, June 4, 2007
30 (<http://www.nytimes.com/2007/06/04/technology/04iphone.html>); “iPhone Set for June 29 Debut,” *USA Today*, June 5, 2007.

31 ¹⁰⁸ See, e.g., “Waiting for the Latest in Wizardry,” *N.Y. Times*, June 27, 2007
32 (<http://www.nytimes.com/2007/06/27/technology/27apple.html>); “iPhone Notebook: People Starting to Fall in Line,” *S.F. Chronicle*, June 28, 2007 (<http://www.sfgate.com/cgi->

1 61. This media coverage often highlighted the distinctive look and feel of the iPhone.
2 Just a few days after the product was announced, David Pogue of *The New York Times* published
3 a “preview” of the product, stating: “As you’d expect of Apple, the iPhone is gorgeous. Its face
4 is shiny black, rimmed by mirror-finish stainless steel. The back is textured aluminum”¹¹⁰
5 Similarly, *Time* magazine described the iPhone as “a typical piece of Ive¹¹¹ design”¹¹² *The*
6 *New York Times* observed that “[t]he iPhone races straight ahead of the pack on aesthetics by
7 looking and feeling gorgeous,”¹¹³ and stated that “Apple is hoping that the distinctive design of
8 the iPhone will disrupt and even re-invent the concept of the mobile handset in the United States
9 and worldwide.”¹¹⁴

10 62. To top off this enormous amount of publicity for the original iPhone, *Time*
11 magazine named the iPhone the “Invention of the Year” for 2007, displaying color images of the
12 phone on the cover of the magazine as well as with the accompanying story, which identified
13
14
15

16 bin/article.cgi?f=/c/a/2007/06/28/BUG80QN2E01.DTL&ao=all); “Even Apple’s Co-Founder
17 Is Standing in Line for an iPhone,” *S.F. Chronicle*, June 29, 2007 ([http://www.sfgate.com/cgi-](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/29/BAGJNQOEBO4.DTL)
18 [bin/article.cgi?f=/c/a/2007/06/29/BAGJNQOEBO4.DTL](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/29/BAGJNQOEBO4.DTL)); “Gave Up Sleep and Maybe a
19 First-Born, but at Least I Have an iPhone,” *N.Y. Times*, June 30, 2007
(<http://www.nytimes.com/2007/06/30/technology/30phone.html>); “Wait ‘Worth It,’ But
Unnecessary,” *S.F. Chronicle*, June 30, 2007 ([http://www.sfgate.com/cgi-](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/30/MNGSCQOVMT1.DTL)
[bin/article.cgi?f=/c/a/2007/06/30/MNGSCQOVMT1.DTL](http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/30/MNGSCQOVMT1.DTL)).

20 ¹⁰⁹ “Testing Out the iPhone,” *Wall St. Journal*, June 27, 2007
(<http://online.wsj.com/article/SB118289311361649057.html>); “The iPhone Matches Most of
21 Its Hype,” *N.Y. Times*, June 27, 2007
(http://www.nytimes.com/2007/06/27/technology/circuits/27pogue.html?_r=1); “Apple’s
22 iPhone Isn’t Perfect, but It’s Worthy of the Hype,” *USA Today*, June 27, 2007
([http://www.usatoday.com/tech/columnist/edwardbaig/2007-06-26-iphone-](http://www.usatoday.com/tech/columnist/edwardbaig/2007-06-26-iphone-review_N.htm?loc=interstitialskip)
[review_N.htm?loc=interstitialskip](http://www.usatoday.com/tech/columnist/edwardbaig/2007-06-26-iphone-review_N.htm?loc=interstitialskip)).

23 ¹¹⁰ “Apple Waves its Wand at the Phone,” *N.Y. Times*, January 11, 2007
(<http://www.nytimes.com/2007/01/11/technology/11pogue.html?pagewanted=all>).

24 ¹¹¹ Jonathan Ive is the Senior Vice President of Apple’s Industrial Design group
(<http://www.apple.com/pr/bios/jonathan-ive.html>).

25 ¹¹² “Apple’s New Calling: The iPhone,” *Time*, January 10, 2007
(<http://www.time.com/time/business/article/0,8599,1575743,00.html>).

26 ¹¹³ “Does the iPhone Have ‘It’? Early Signs Are Good,” *N.Y. Times*, June 24, 2007
(<http://www.nytimes.com/2007/06/22/style/22iht-design25.1.6284070.html>).

27 ¹¹⁴ “Science/Technology: iPhone Launch,” *N.Y. Times*, June 28, 2007.
28

1 “The iPhone is pretty” as the number one reason that the device “is still the best thing invented
2 this year.”¹¹⁵

3 63. The release of subsequent generations of the iPhone similarly received extensive
4 media coverage. Crowds lined up outside the Moscone Center in San Francisco in anticipation of
5 the rumored unveiling of the iPhone 3G at the Apple Worldwide Developer Conference.¹¹⁶ Major
6 news sources aired or printed high-profile reviews of the iPhone 3G,¹¹⁷ and people again lined up
7 outside Apple stores a day in advance to purchase the device.¹¹⁸ Similar media coverage
8 accompanied the announcement and release of the iPhone 3GS¹¹⁹ and the iPhone 4.¹²⁰ The
9 announcement that the iPhone 4 would be available on Verizon also received significant press.¹²¹

11 ¹¹⁵ “Invention of the Year: the iPhone,” *Time*, November 1, 2007
12 (http://www.time.com/time/specials/2007/article/0,28804,1677329_1678542_1677891,00.htm
13 l). *Time* magazine featured the iPhone on its cover again in its June 15, 2009 issue on Twitter.
14 See *Time*, June 15, 2009.

15 ¹¹⁶ *KGO SF News at 11AM*, ABC 7, June 9, 2008, APLNDC-X0000358416; “Jobs
16 Expected to Ring in Apple’s New iPhone,” *S.F. Chronicle*, June 9, 2008.

17 ¹¹⁷ *Squawk on the Street*, CNBC, No Date, APLNDC-X0000358459; *All Things Digital*,
18 Fox Business, No Date, APLNDC-X0000358463; “Apple’s New iPhone 3G: Still Not
19 Perfect, but Really Close,” *USA Today*, July 10, 2008; “For iPhone, the ‘New Is Relative,’”
20 *N.Y. Times*, July 9, 2008; “Newer, Faster, Cheaper iPhone 3G,” *Wall St. Journal*, July 9,
21 2008.

22 ¹¹⁸ *WBZ News at 6*, CBS, No Date, APLNDC-X0000358467; *News 4 Midday*, NBC 4,
23 No Date, APLNDC-X0000358475; *First @ Four*, NBC 5, No Date, APLNDC-
24 X0000358478; NBC 4 New York, No Date, APLNDC-X0000358480; *KMBC-TV 9 News*,
25 ABC, No Date, APLNDC-X0000358484; *SF 7 Morning News*, ABC, July 11, 2008,
26 APLNDC-X0000358486; CNN, No Date, APLNDC-X0000358505; *Entertainment Tonight*,
27 KRON, July 11, 2008, APLNDC-X0000358507.

28 ¹¹⁹ See, e.g., “iPhone Stars in Apple Show, Supported by Software,” *N.Y. Times*, June 8,
2009; “Apple Unveils Faster iPhone with New Features,” *S.F. Chronicle*, June 9, 2009;
“iPhone 3G S [sic] Cements Apple’s Place at the Top,” *S.F. Chronicle*, June 20, 2009;
Evening News with Katie Couric, CBS, June 8, 2009, APLNDC-X0000358800; *The Kudlow*
Report, CNBC, June 8, 2009, APLNDC-X0000358801; *HLN News*, CNNH, June 8, 2009,
APLNDC-X0000358805; *FOX 25 News at 5*, Fox Boston, June 8, 2009, APLNDC-
X0000358809; *KTVU Channel 2 News at 5*, Fox San Francisco, June 8, 2009, APLNDC-
X0000358811; *ABC 7 Morning News*, ABC San Francisco, June 9, 2009, APLNDC-
X0000358815; *The Early Show*, CBS, June 9, 2009, APLNDC-X0000358816; *ABC Tech*
Bytes, ABC, June 18, 2009, APLNDC-X0000358838; *Worldwide Exchange*, CNBC, June 19,
2009, APLNDC-X0000358864; *Fox Business*, Fox Business Network, June 19, 2009,
APLNDC-X0000358868; *Nightly Business News*, PBS, June 19, 2009, APLNDC-
X0000358869; *CBS4 News at 5PM*, Miami – CBS, June 19, 2009, APLNDC-X0000358876;
WGN Morning News, Chicago – CW, June 19, 2009, APLNDC-X0000358877; *American*
Morning, CNN, June 19, 2009, APLNDC-X0000358880.

1 64. The different generations of the iPhone have also appeared in various forms of
2 popular media. For instance, late-night comedy shows such as *Saturday Night Live*¹²² and *Late*
3 *Night with Conan O'Brien*¹²³ ran parody skits about the original iPhone; episodes of *The Tonight*
4 *Show with Jay Leno*¹²⁴ and *The Colbert Report*¹²⁵ referenced the release of the iPhone 3G; Jimmy
5 Fallon joked about the announcement of the iPhone 3GS on *Late Night with Jimmy Fallon*¹²⁶ and
6 interviewed the editor of *Engadget* about that device;¹²⁷ and David Letterman referenced the
7 iPhone 4 on an episode of *Late Night with David Letterman*.¹²⁸ Various television programs have
8 also included segments that do not explicitly focus on the iPhone yet nonetheless feature the
9 product.¹²⁹

10 65. In part because of its distinctive look and feel, which includes the trade dress at
11 issue, Apple's iPhone has been among the most commercially successful products in the world.
12 After the first iPhone shipped in June 2007, Apple sold one million units in 74 days.¹³⁰
13 Additionally, within three days of launching the iPhone 3G and iPhone 3GS respectively, Apple
14 sold more than one million units of each.¹³¹ Apple sold more than 1.7 million iPhone 4 units in

16 ¹²⁰ "Apple's iPhone 4 Makes its Official Premiere," *San Francisco Chronicle*, June 8,
17 2010; "Apple iPhone 4 Review: No, You Can't Touch It," *Time*, June 28, 2010; ABC News,
18 No Date, APLNDC-X0000359801; ABC7, No Date, APLNDC-X0000359813; ABC7, No
19 Date, APLNDC-X0000359816; APLNDC-X0000359879; *What the Tech?*, NBC 10, No Date,
20 APLNDC-X0000359832; CNN, No Date, APLNDC-X0000359930; Fox 5, No Date,
21 APLNDC-X0000359935; "Huge Lines to Pick Up New iPhone," *San Francisco Chronicle*,
22 June 25, 2010.

23 ¹²¹ See, e.g., "Everything You Need to Know About the Verizon iPhone 4," *Time*,
24 January 11, 2011.

25 ¹²² *Saturday Night Live*, NBC, No Date, APLNDC-X0000358383.

26 ¹²³ APLNDC-X0000358381.

27 ¹²⁴ APLNDC-X0000358444.

28 ¹²⁵ APLNDC-X0000358450.

¹²⁶ APLNDC-X0000358806.

¹²⁷ APLNDC-X0000358835.

¹²⁸ APLNDC-X0000359840.

¹²⁹ APLNDC-X0000358408; APLNDC-X0000358621.

¹³⁰ "Apple Sells One Millionth iPhone," *Apple Inc. Press Release*, September 10, 2007
(<http://www.apple.com/pr/library/2007/09/10Apple-Sells-One-Millionth-iPhone.html>).

¹³¹ "Apple Sells One Million iPhone 3Gs in First Weekend," *Apple Inc. Press Release*,
July 14, 2008 (<http://www.apple.com/pr/library/2008/07/14Apple-Sells-One-Million-iPhone-3Gs-in-First-Weekend.html>); "Apple Sells Over One Million iPhone 3GS Models," *Apple Inc.*

1 the three days following its launch.¹³² In fiscal year 2011 alone, Apple recorded more than \$47
2 billion in net sales revenue for the iPhone and related products and services.¹³³

3 66. An RBC Capital Markets analyst report commented that: “Apple’s iPhone in
4 June 2007 disruptively raised the standard for a new kind of smartphone design and user
5 experience, breaking sales launch records, sparking competitive responses, and defying accepted
6 conventions.”¹³⁴

7 67. Similarly, the announcement that Apple was going to introduce a tablet
8 computer¹³⁵ and the formal launch of the iPad was extensively covered in the press.¹³⁶ Major
9 newspapers and magazines—including *The New York Times*, *The Wall Street Journal*, *Chicago*
10 *Tribune*, *The Washington Post*, *USA Today*, *Mercury News*, and *Time*—ran reviews of the iPad,
11 many of which included photographs of the product.¹³⁷

12 *Press Release*, June 22, 2009 ([http://www.apple.com/pr/library/2009/06/22Apple-Sells-Over-](http://www.apple.com/pr/library/2009/06/22Apple-Sells-Over-One-Million-iPhone-3GS-Models.html)
13 [One-Million-iPhone-3GS-Models.html](http://www.apple.com/pr/library/2009/06/22Apple-Sells-Over-One-Million-iPhone-3GS-Models.html)).

14 ¹³² “iPhone 4 Sales Top 1.7 Million,” *Apple Inc. Press Release*, June 28, 2010
(<http://www.apple.com/pr/library/2010/06/28iPhone-4-Sales-Top-1-7-Million.html>).

15 ¹³³ Apple Inc. Form 10-K filed October 26, 2011, at 30, APLNDC-Y0000135683-
16 135789 at APLNDC-Y0000135714.

17 ¹³⁴ “Wireless Industry Sizing the Global Smartphone Market,” RBC Capital Markets,
18 November 12, 2008, APL-ITC796-0000458644-458703 at APL-ITC796-0000458649.

19 ¹³⁵ “With Its Tablet, Apple Blurs Line Between Devices,” *N.Y. Times*, January 27, 2010
(<http://www.nytimes.com/2010/01/28/technology/companies/28apple.html>); “Apple Takes
20 Big Gamble on New iPad,” *Wall St. Journal*, January 25, 2010
(<http://online.wsj.com/article/SB10001424052748704094304575029230041284668.html>);
21 WBZ, No Date, APLNDC-X0000359282; *Big Apple*, WSVN, No Date, APLNDC-
22 X0000359423; *Top Stories*, CNN, No Date, APLNDC-X0000359585.

23 ¹³⁶ See, e.g., “The iPad’s Big Day,” *N.Y. Times* blog entry, April 3, 2010
(<http://bits.blogs.nytimes.com/2010/04/03/live-blogging-the-ipads-big-day/>); “Buzz Powers
24 iPad Launch, but Will It Be Enough?,” *Wall St. Journal*, April 3, 2010; “Fans Snap Up iPads
25 After Waiting Overnight,” *S.F. Chronicle*, April 4, 2010; “For iPad, Lines but No Shortage,”
26 *Wall St. Journal*, April 5, 2010; *The iPad Is Here: First Look at New Technology*, ABC
27 Good Morning America, No Date, APLNDC-X0000359615.

28 ¹³⁷ “Looking at the iPad From Two Angles,” *N.Y. Times*, March 31, 2010
(<http://www.nytimes.com/2010/04/01/technology/personaltech/01pogue.html>); “Laptop
29 Killer? Pretty Close,” *Wall St. Journal*, April 1, 2010
(<http://online.wsj.com/article/SB10001424052702304252704575155982711410678.html>);
30 “iPad Envy . . . and Hope,” *Chicago Tribune*, April 2, 2010
([http://articles.chicagotribune.com/2010-04-02/news/ct-edit-ipad-20100402_1_ipad-apple-
32 chief-steve-jobs-tablet](http://articles.chicagotribune.com/2010-04-02/news/ct-edit-ipad-20100402_1_ipad-apple-
31 chief-steve-jobs-tablet)); “Apple’s iPad: First Impressions,” *Wash. Post*, April 3, 2010
(http://voices.washingtonpost.com/fasterforward/2010/04/apples_ipad_first_impressions.html
33); Verdict Is in on Apple iPad: It’s a Winner,” *USA Today*, April 2, 2010

1 68. Major magazines also featured the iPad prominently on their cover pages. For
2 instance, *The Economist* featured an image of Steve Jobs holding the iPad prominently on the
3 cover of the January 28, 2010 issue.¹³⁸ And *Newsweek*'s April 5, 2010 issue entitled "What Is So
4 Great About the iPad? Everything." also featured the iPad prominently.¹³⁹

5 69. Furthermore, countless celebrities have been photographed with an iPad, such that
6 it has become "Hollywood's most buzzed about piece of arm candy."¹⁴⁰ And ABC's hit
7 television comedy *Modern Family* had an episode in which one of the primary stories was a main
8 character's attempts to obtain an iPad the day it was released.¹⁴¹ Oprah Winfrey also named the
9 iPad one of her "Ultimate Favorite Things."¹⁴²

10 70. The iPad has also been enormously successful. On the first day of iPad sales
11 alone, Apple sold over 300,000 units.¹⁴³ Within a month, Apple had sold one million devices,¹⁴⁴

15 (http://www.usatoday.com/tech/columnist/edwardbaig/2010-03-31-apple-ipad-review_N.htm); "Curious Customers in Marin Snap Up iPads," *Mercury News*, April 3, 2010
16 (http://www.mercurynews.com/ci_14817081); "Do We Need the iPad?" *Time*, April 1, 2010
17 (<http://www.time.com/time/magazine/article/0,9171,1977106,00.html>).

18 ¹³⁸ The Book of Jobs: Hope, Hype and Apple's iPad, *The Economist*, January 30-
19 February 5, 2010.

20 ¹³⁹ *Newsweek*, April 5, 2010 issue titled "What Is So Great About the iPad?
21 Everything."

22 ¹⁴⁰ "Celebrities Who Love the iPad," *Forbes.com*, June 22, 2010
23 (<http://www.forbes.com/2010/06/22/ipad-cyrus-bieber-technology-celebrities.html>).

24 ¹⁴¹ "iPad Gets Star Turn in Television Comedy," *Wall St. Journal*, April 2, 2010.

25 ¹⁴² "Oprah's Ultimate Favorite Things 2010," *The Oprah Winfrey Show*, November 19,
26 2010 (<http://www.oprah.com/oprahshow/Oprahs-Ultimate-Favorite-Things-2010/2>).

27 ¹⁴³ Apple Sells Over 300,000 iPads First Day," *Apple Inc. Press Release*, April 5, 2010
28 (<http://www.apple.com/pr/library/2010/04/05Apple-Sells-Over-300-000-iPads-First-Day.html>).

¹⁴⁴ "Apple Sells One Million iPads," *Apple Inc. Press Release*, May 3, 2010
(<http://www.apple.com/pr/library/2010/05/03Apple-Sells-One-Million-iPads.html>).

1 and it hit the two million and three million marks within 60 days¹⁴⁵ and in 80 days,¹⁴⁶
2 respectively. During the first quarter of fiscal year 2012, Apple sold 15.43 million iPads.¹⁴⁷

3 **E. Impact of Advertising on Consumers**

4 71. Apple's products have been widely advertised through Apple's own advertising as
5 well as through independent channels. Such advertising has a substantial impact on consumers'
6 purchase decisions, as demonstrated by several market research studies by Apple. For instance, a
7 2010 iPad Buyer Survey study concludes that "[a]ds triggered the desire to own an iPad, while the
8 product features such as being portable/lightweight, Wi-Fi capable, and easy to use were the
9 hooks."¹⁴⁸ In particular, when the surveyed buyers in the U.S. were asked what triggered their
10 decision to acquire an iPad, 44% indicated that they saw the ads and wanted to try the product.¹⁴⁹
11 Similarly, other iPad Tracking Studies conducted in 2010 show that iPad ads were important in
12 triggering the purchase decisions of U.S. buyers.¹⁵⁰

13 72. To summarize: In my opinion, what is noteworthy about Apple's brand identity is
14 that the core strategy focuses on the product itself and its aesthetic presentation to consumers.
15 Apple's brand image is closely tied to the look and feel of the products at issue. This look and
16 feel is distinctive and there is an enormous amount of external validity that it is unique and
17 famous. Therefore, not only have consumers developed brand associations toward the look and
18

19 ¹⁴⁵ "Apple Sells Two Million iPads in Less Than 60 Days," *Apple Inc. Press Release*,
20 May 31, 2010 (<http://www.apple.com/pr/library/2010/05/31Apple-Sells-Two-Million-iPads-in-Less-Than-60-Days.html>).

21 ¹⁴⁶ "Apple Sells Three Million iPads in 80 Days," *Apple Inc. Press Release*, June 22,
22 2010 (<http://www.apple.com/pr/library/2010/06/22Apple-Sells-Three-Million-iPads-in-80-Days.html>).

23 ¹⁴⁷ "Apple Reports First Quarter Results," *Apple Inc. Press Release*, January 24, 2012
(<http://www.apple.com/pr/library/2012/01/24Apple-Reports-First-Quarter-Results.html>).

24 ¹⁴⁸ See APLNDC-Y0000023361-23427 at APLNDC-Y0000023362-23363, APLNDC-
Y0000023384.

25 ¹⁴⁹ See APLNDC-Y0000023361-23427 at APLNDC-Y0000023363, APLNDC-
Y0000023385.

26 ¹⁵⁰ See APLNDC-Y0000023428-23578, at APLNDC-Y0000023485 (indicating 22% of
27 U.S. buyers were influenced by ads); APLNDC-Y0000023579-23729 at APLNDC-
Y0000023636 (indicating 23% of U.S. buyers were influenced by ads); APLNDC-
28 Y0000023730-23907, at APLNDC-Y0000023806 (indicating 24% of U.S. buyers were
influenced by the ads).

1 feel of Apple products by experiencing them personally but also by experiencing them via media.
2 In my view, the importance of external validity cannot be overstated; they provide additional,
3 accretive cues with respect to what makes Apple's look and feel distinctive.

4 **VI. APPLE'S BRAND EQUITY IS AMONG THE HIGHEST IN THE WORLD**

5 73. According to *Fortune*:

6 What makes Apple so admired? Product, product, product. This
7 is the company that changed the way we do everything from buy
8 music to design products to engage with the world around us. Its
9 track record for innovation and fierce consumer loyalty translates
10 into tremendous respect across business' highest ranks.¹⁵¹

11 74. At the heart of Apple's products is look and feel. Marc Gobé, president of
12 Emotional Branding, LLC and former CEO of Brandimage (one of the top branding firms in the
13 world), had this to say about Apple:

14 Good design *is* courageous. But apart from its aesthetic value,
15 let's not forget that it represents a long-term investment that can
16 increase a company's value tenfold and over. Can anyone dispute
17 that...Apple's turnaround is design driven?¹⁵²

18 75. Apple's brand rankings and brand value increased significantly since the
19 introduction of the iPhone in 2007, and Apple is now among the top most valuable brands in the
20 world. The increase in Apple's brand value has been attributed, in particular, to the successes of
21 the iPhone and the iPad.

22 76. According to *Millward Brown Optimor's BrandZ* rankings, Apple was the world's
23 most valuable brand in 2011. Since the introduction of the iPhone in 2007, Apple's ranking has
24 increased from number 16 to number 1, while its brand value has increased from \$24.7 billion to
25 \$153.3 billion.¹⁵³ BrandZ has attributed the increase in brand value and ranking to, in part, the
26 iPhone and the iPad:

27 ¹⁵¹ "World's Most Admired Companies 2010," *Fortune*, available at
28 <http://money.cnn.com/magazines/fortune/mostadmired/2010/snapshots/670.html>.

¹⁵² M. Gobé, *Emotional Branding: The New Paradigm for Connecting Brands to People* 119 (New York, NY: Allworth Press, 2009).

¹⁵³ "BrandZ Top 100: Most Valuable Global Brands 2007," *Millward Brown Optimor*, at 10; "BrandZ Top 100: Most Valuable Global Brands 2011," *Millward Brown Optimor*, at 13.

1 [Apple] earned an 84 percent increase in brand value with
2 successful iterations of existing products like the iPhone, creation
3 of the tablet category with iPad, and anticipation of a broadened
4 strategy making the brand a trifecta of cloud computing, software,
5 and innovative, well-designed devices. ... At the start of last year,
6 few people fretted that their lives felt bereft of a digital gadget
7 smaller than their laptop but larger than their mobile phone. By
8 the end of 2010, however, around 18 million of us owned iPads or
9 other tablets. Apple understood that its customers wanted access
10 to data and images anywhere, anytime, in easy-to-view definition
11 with an easy-to-use touch interface. In a span of a few months, the
12 brand met these needs with the iPad and iPhone 4. Apple trusted
13 that its customers would discover uses for these products that
14 would help organize, simplify or complicate, but mostly improve
15 their lives. This cocreation approach resulted in roughly 350,000
16 Apple apps, and it added value to the product and the brand. ...
17 Apple continued quietly developing a cloud and loudly discovered
18 an empty space in the computing category that it filled with a new
19 device – the iPad.¹⁵⁴

20 77. Similarly in 2010, *Millward Brown Optimor* increased its assessment of Apple’s
21 brand value by 32 percent from the previous year, while stating that

22 [T]his increase is a tribute to the company’s ability to transform
23 itself from an electronics manufacturer into a brand that is central
24 to people’s lives. Apple manages to celebrate creativity and self-
25 expression while, [sic] anticipating consumers’ needs and wants
26 and meeting those needs with solutions that are noteworthy for
27 their ease of use and elegance of design. Apple benefited
28 specifically from the popularity of the iPhone, its 100,000 apps,
and anticipation for the iPad.¹⁵⁵

78. From 2007 to 2011, *Interbrand* increased the ranking of Apple’s brand from
number 33 to number 8. During the same time period, the value of Apple’s brand as calculated
by *Interbrand* increased from \$11.037 billion to \$33.492 billion.¹⁵⁶ Like *BrandZ*, *Interbrand*
linked the success of the iPhone and iPad products to the increase in Apple’s brand value and
rankings. In 2008, the *Interbrand* report stated:

Can anything slow the ascent of Apple? Its ability to identify new
customer needs and deliver products of beautiful simplicity and

¹⁵⁴ “BrandZ Top 100: Most Valuable Global Brands 2011,” *Millward Brown Optimor*,
at 16, 48, 83.

¹⁵⁵ “BrandZ Top 100: Most Valuable Global Brands 2010,” *Millward Brown Optimor*,
at 127.

¹⁵⁶ “Best Global Brands 2007,” *Interbrand*, (<http://www.interbrand.com/en/best-global-brands/best-global-brands-2008/best-global-brands-2007.aspx>); “Best Global Brands 2011,”
Interbrand, at 20.

1 desirability continue to put it in a league of its own. The latest
2 iPods, iPhone and MacBook Air strike the perfect balance between
coolness and mass appeal¹⁵⁷

3 79. *Interbrand's* 2011 report further underlined the importance of the iPhone and iPad
4 products to the Apple brand:

5 Setting the bar high in its category and beyond, Apple is the icon
6 for great branding meeting great technology to deliver a unique
overall experience, making its giant leap from #17 to #8 in the
7 rankings less than surprising. Consumers continue to follow its
product launches with anticipation and are quick to integrate its
8 sleek products into their lifestyles. Continuing its wave of first-to-
market products, Apple launched the iPad in 2010 creating the
9 new tablet category in the process. Since its launch, young and
old alike have embraced it as a tool, with organizations from
10 education to health to sales coming on board as well. Apple has
even implemented the iPad in its innovative retail spaces as a
11 service tool for customers as they wait in line.¹⁵⁸

12 80. Apple makes the most of the success of the iPhone and iPad to increase its brand
13 value by using what the company calls “logo lockup.” All of Apple’s advertisements for the
14 iPhone and iPad feature the Apple icon next to the name of the product in the ad.¹⁵⁹ According to
15 Ms. Twiggs, this technique allows advertisers to “[lock] . . . two things together, a logo plus
16 something else [such as a company name or product name].”¹⁶⁰ In this instance, the use of the
17 logo “locks” the iPhone and the iPad to the Apple brand. Ms. Twiggs testified that this technique
18 informs consumers as to the company that makes the featured product and is “one of the branding
19 elements” and in general “an important element” of advertising.¹⁶¹ Apple also places its logo on
20 the back of the iPhone further encouraging those who view it to associate the iPhone and its
21 distinct look and feel with the Apple brand.¹⁶²

22 81. To summarize: Apple’s trade dress at issue is an integral part of the look and feel
23 that is so important to Apple’s brand identity. As I have discussed above, Apple has been

24
25 ¹⁵⁷ “Best Global Brands 2008,” *Interbrand*, at 30.

26 ¹⁵⁸ “Best Global Brands 2011,” *Interbrand*, at 20.

27 ¹⁵⁹ Twiggs Dep. 100:2-101:14.

28 ¹⁶⁰ Twiggs Dep. 100:13-19.

¹⁶¹ Twiggs Dep. 101:7-14.

¹⁶² Deposition of Eric Jue on February 24, 2012 (“Jue Dep.”), 132:20-133:8.

1 extraordinarily successful by making its products' look and feel the fulcrum of its branding
2 strategy. In my opinion, a combination of a high degree of innovation and cutting-edge
3 technology and a unique and distinctive look and feel has been instrumental in the branding and
4 concomitant success of the iPhone, iPad, and iPod Touch products.

5 **VII. IMPORTANCE OF THE LOOK AND FEEL OF APPLE PRODUCTS AT ISSUE**
6 **FOR CONSUMERS**

7 82. Market research studies conducted or commissioned by Apple provide insights
8 into how the look and feel of Apple's iPhone, iPad, and iPod touch products impact consumers'
9 attitudes toward the Apple brand and their purchase decisions.

10 83. For example, according to a pre-iPhone launch market study conducted by Apple
11 in May 2007 about the most important reasons to purchase an iPhone, "appearance and design"
12 was the top-ranked reason for those surveyed who were "very/somewhat likely" to purchase an
13 iPhone.¹⁶³

14 84. In an iPhone Owner study conducted by Apple in the U.S. in March-April 2011,
15 when iPhone 3GS and iPhone 4 owners who had considered Android were asked what convinced
16 them to get an iPhone after considering Android, 32% indicated they "liked the physical
17 appearance and design."¹⁶⁴ According to the same study, of the iPhone 3GS and iPhone 4 owners
18 who bought their phones, 46% of those surveyed in the U.S. indicated "physical appearance and
19 design" as one of the "very important" features in their decision to purchase their iPhones.¹⁶⁵

20 85. Similarly, in iPhone Buyer Surveys conducted by Apple during the fourth quarter
21 of Apple's 2010 fiscal year, and the first, second, and third quarters of Apple's 2011 fiscal year,
22 when iPhone 3GS and iPhone 4 buyers were asked to rank the importance of a given list of
23 attributes in their purchase decision, 46% to 50% of those surveyed in the U.S. ranked "attractive
24 appearance and design" as very important (or top box), while 32% to 35% of those surveyed in
25

26 ¹⁶³ APLNDC-Y0000028751-28849 at APLNDC-Y0000028771.

27 ¹⁶⁴ APLNDC-Y0000025024-25147 at APLNDC-Y0000025027, APLNDC-
28 Y0000025060.

¹⁶⁵ APLNDC-Y0000025024-25147 at APLNDC-Y0000025064.

1 90. *Sales.* Both the iPhone and iPad have experienced significant success in the
2 marketplace.¹⁷³ Between late June 2007 and summer 2010, Apple sold 24.9 million original
3 iPhone, iPhone 3G, and iPhone 3GS devices,¹⁷⁴ and between April 2010 and before fall 2010, it
4 sold 4.3 million iPad tablets in the U.S..¹⁷⁵ Between April 2010 and June 2011, Apple sold
5 14.1 million iPad tablets in the U.S.¹⁷⁶ and spent more than \$300 million on advertising the iPad.
6 ¹⁷⁷

7 91. *Actual Recognition.* The surveys from the Poret Report show that 61.0% of
8 respondents associate the iPhone Trade Dress with Apple, 68.0% of respondents associate the
9 iPhone 3G Trade Dress with Apple, and between 57.3% and 75.2% of respondents associate the
10 iPad Trade Dress with Apple.¹⁷⁸ As part of his survey methodology, Mr. Poret also tested
11 “control” devices to determine what percentage of people associated those devices with Apple. A
12 much smaller percentage of respondents associated the control devices with Apple, namely 3.7%
13 of respondents associated the control phone with Apple and between 10.8% and 17% of
14 respondents associated the control tablet computer with Apple.¹⁷⁹

15 92. *Copying.* As discussed below, Samsung’s internal documents support the
16 conclusion that Samsung held up Apple’s iPhone and iPad products as the aspirational models in
17 designing its own smartphone and tablet products, and even made changes to its graphical user
18 interface specifically to make the icons look more like Apple icons, thus demonstrating
19 Samsung’s marketing tactics to create products that looked like Apple products.¹⁸⁰

22 ¹⁷³ See *supra* ¶¶ 65-66, 70; see *infra* ¶ 107, 142.

23 ¹⁷⁴ See ¶ 107.

24 ¹⁷⁵ See *infra* ¶ 142.

25 ¹⁷⁶ APLNDC-Y00000051599-51605, at APLNDC-Y00000051600.

26 ¹⁷⁷ APLNDC-Y0000051623, Apple Inc. Advertising; Q111 Ad Budget Summary,
27 APLNDC00002104534-554, at APLNDC00002104535; Q211 Ad Budget Summary,
28 APLNDC0002788581-588, at APLNDC0002788581; Q311 Ad Budget Summary,
APLNDC0002033979-987, at APLNDC0002033979.

¹⁷⁸ Poret Report at 36, 52, 60-61, 64.

¹⁷⁹ Poret Report at 35-36, 52, 65-66.

¹⁸⁰ See *infra* ¶¶ 132-138.

1 93. *Exclusivity.* I understand that Apple has an industrial design expert in the case,
2 Peter Bressler, who will be opining that no phone looked like the iPhone and no tablet computer
3 looked like the iPad before the launch of the iPhone and iPad, respectively. Accordingly, I am
4 not offering a separate opinion on the issue of the exclusivity of Apple’s use of the iPhone Trade
5 Dress, iPhone 3G Trade Dress, or iPad Trade Dress. For purposes of my analysis, I assume that
6 the relevant trade dresses were substantially exclusively used by Apple when Apple first launched
7 the iPhone and the iPad.

8 94. In light of this evidence, it is my opinion that, from a brand marketing perspective,
9 consumers have formed strong associations with Apple and find the look and feel of the iPhone
10 and the iPad to be distinctive in the marketplace. It is also incontrovertible that the look and feel
11 of these products, which is closely tied to Apple, is famous and contributes to the halo
12 surrounding the tremendous marketing success of the Apple brand.

13 95. I understand that the statute setting forth the elements of a dilution claim uses the
14 language “a mark is famous if it is widely recognized by the general consuming public of the
15 United States.” However, the concept of a “general consuming public” does not have meaningful
16 empirical content from a marketing perspective. This is because companies always target
17 demographic segments *conditional on* factors such as the relevant industry, the nature of the
18 market, the nature of the product offering, and the image the brand seeks to create. Brands do not
19 become successful or famous because companies try to cover every potential consumer in the
20 market. Indeed, careful targeting and positioning is very important in marketing. There may be
21 beneficial spillovers from the core segments being targeted to other segments, but these spillovers
22 only enhance the success and fame of the brand. Of course, a brand cannot credibly have a claim
23 to fame in the market if it is too narrowly focused in a demographic or geographic niche. For
24 example, a University of Rochester varsity logo may have great brand resonance to residents in
25 the Rochester Metropolitan Statistical Area, but that does not give it general fame.

26 96. It is fairly typical in consumer electronics to focus efforts on a broad spectrum of
27 the consumers without necessarily targeting “tail” segments such as young children or the elderly.
28 This is precisely the targeting strategy that Apple and Samsung follow. According to Ms. Twiggs

1 and Ms. Whiteside, Apple’s target demographic includes the age 18 to 49 demographic.¹⁸¹
2 According to Todd Pendleton (“Mr. Pendleton”), Samsung Telecommunication America, LLC’s
3 (“STA”) Chief Marketing Officer for wireless terminals, Samsung’s main demographic is 18 to
4 34 year olds.¹⁸²

5 97. The Poret Report shows that 81% of respondents who were in the 16-24 age group
6 associated the iPhone Trade Dress and the iPhone 3G Trade Dress with Apple, while 67.9% of
7 the respondents in the 25-34 age group, and 60.0% of the respondents in the 35-44 age group
8 associated the trade dresses at issue in this case with Apple.¹⁸³ Therefore, from a marketing and
9 branding perspective, the iPhone and the iPad trade dresses have undoubtedly achieved fame.

10 **IX. SAMSUNG’S INFRINGEMENT OF APPLE’S TRADE DRESS**

11 98. As noted above, a brand can be damaged by a company’s unauthorized use of
12 brand elements that are proprietary to the owner of the brand.¹⁸⁴ I understand that certain of
13 Apple’s claims for relief against Samsung pertain to Samsung’s misappropriation of the
14 distinctive appearance of the iPhone, the iPod touch, and the iPad.¹⁸⁵ I understand that Apple has
15 asserted that this misappropriation constitutes both trade dress infringement and trade dress
16 dilution. In this section of my report, I analyze from a marketing perspective whether the look
17 and feel of the Samsung Galaxy line of smartphones and tablet computer products
18 misappropriates Apple’s proprietary look and feel, taking into consideration certain factors in the
19 “likelihood of confusion” test. I understand that the likelihood of confusion test is the legal
20 standard to analyze Apple’s trade dress infringement claim for relief against Samsung.

21
22
23 ¹⁸¹ See Twiggs Dep. 29:2-19; Whiteside Dep. 134:5-135:24.

24 ¹⁸² Deposition of Todd Pendleton on March 21, 2012 (“Pendleton Rough Dep. Tr.”), 37,
44-45.

25 ¹⁸³ See Poret Report at 51.

26 ¹⁸⁴ See *supra* ¶ 35; see also M. Morrin & J. Jacoby, “Trademark Dilution: Empirical
Measures for an Elusive Concept,” 19 JOURNAL OF PUBLIC POLICY & MARKETING 265-276
(2000).

27 ¹⁸⁵ See *supra* Section IV for a detailed outline of Apple’s asserted trade dress. There are
28 several others claims that Apple asserts against Samsung that are outside the scope of my
assignment.

1 iPhone with the iPhone Trade Dress visible—identified it with Apple, iPhone, or a similar Apple-
2 related product name.¹⁹⁹

3 110. The strength of the iPhone Trade Dress has also been recognized by Samsung’s
4 executives since late 2008. Research conducted by gravitytank on behalf of Samsung in or
5 around late 2008 indicated that the iPhone “sets the standard for screen centric design” and
6 “[c]onsumers...see [Samsung touch phones] as derivative of the iPhone.”²⁰⁰ For example, in
7 internal documents, Samsung executives have acknowledged that the “[t]he look and feel of a
8 product matters most”²⁰¹ and that “iPhone has become the standard.”²⁰² As discussed in detail
9 below,²⁰³ Samsung employees were instructed, through emails or at executive-level meetings, that
10 “[g]oing forward [Samsung’s] comparison standard is Apple[’s] iPhone” and that Samsung “must
11 evaluate [its products] based on the iPhone standards”²⁰⁴ Similarly, a December 2009
12 presentation by McKinsey & Company to Samsung titled “Winning in Smartphones – It’s Now or
13 Never” concluded that Samsung should “[m]atch the iPhone UI within the next 12 months.”²⁰⁵

14 *Sleekcraft* Factor 2: Proximity of the goods

15 111. Apple’s iPhone products and Samsung’s Galaxy line of smartphones are similar in
16 use and in function and directly compete with one another for market share.²⁰⁶ The relevant

17
18 ¹⁹⁹ Poret Report at 7-11, 45, 52, 57.

19 ²⁰⁰ SAMNDCA00191811-191987 at SAMNDCA00191865 and SAMNDCA00191929.
It is my understanding that the gravitytank study was a precursor to the development of the
Galaxy S line of smartphones.

20 ²⁰¹ E-mail from Eun Jung Ko Re: Summary of Executive-Level Meeting Supervised by
21 Head of Division, February 10, 2010, SAMNDCA10247373-10247378 (*See* translation in
Apple’s Appendix of Certified Translations in Support of Opening Expert Reports
22 (“Translations App’x”).

23 ²⁰² E-mail from Eun Jung Ko of Executive-Level Meeting Supervised by Head of
Division, February 10, 2010, SAMNDCA10247373-10247378 (*See* Translations App’x).

24 ²⁰³ *See infra* ¶ 133-137.

25 ²⁰⁴ Email from Won Cheol Chai Re: Report on CEO’s Directives, January 2, 2010,
SAMNDCA10907801-10907802.

26 ²⁰⁵ SAMNDCA10807316-10807387 at SAMNDCA10807358.

27 ²⁰⁶ For instance, in Apple’s May 2011 iPhone Survey, 31% of the iPhone 3GS and
iPhone 4 owners surveyed in the U.S. indicated that they considered or seriously considered
the Samsung branded phones. Note that only individuals who purchased the Apple phones
were included in the sample; it did not include people who considered an iPhone and ended
28 up purchasing a Samsung product. *See* APLNDC-Y0000025024-25147 at APLNDC-

1 products are marketed to the same segments of the population who are prospective (actual, for
2 repeat purchasers) buyers of mobile phones.

3 112. Internal market research conducted by Apple shows that the mobile phone
4 products of the two companies generally compete with each other. For instance, in Apple's
5 iPhone 3G Buyer Surveys—conducted during the fourth quarter of Apple's 2008 fiscal year and
6 the first and second quarters of Apple's 2009 fiscal year—Samsung was listed among the other
7 mobile phone brands the iPhone 3G buyers seriously considered.²⁰⁷ In Apple's iPhone Buyer
8 Surveys conducted during the third and fourth quarters of Apple's 2009 fiscal year, and the first,
9 second, and third quarters of Apple's 2010 fiscal year, Samsung was similarly listed among the
10 other mobile phone brands that the iPhone 3G and iPhone 3GS buyers seriously considered.²⁰⁸ In
11 Apple's iPhone Buyer Surveys conducted during the fourth quarter of 2010 and the first and
12 second quarters of 2011, Samsung was also listed among the other mobile phone brands that the
13 iPhone 3GS and iPhone 4 buyers seriously considered.²⁰⁹ In Apple's iPhone Buyer Survey
14 conducted during the third quarter of 2011, Samsung was again listed among the other
15 smartphone brands the iPhone 3GS and iPhone 4 buyers seriously considered.²¹⁰ In Apple's
16 iPhone Buyer Surveys conducted during the first and second quarters of 2011, for iPhone buyers
17

18 Y0000025128. Both Apple and Samsung employees have admitted that Apple and
19 Samsung's smartphones compete. Greg Joswiak, Apple's Vice President of iPhone, iPod, and
20 iOS product marketing, identified Samsung among Apple's top competitors in the mobile
21 phone and smartphone markets. *See* Joswiak Dep. 106:19-24, 107:10-108:6.

22 ²⁰⁷ APLNDC-Y0000026173-26256, at APLNDC-Y0000026175, APLNDC-
23 Y0000026202; APLNDC-Y0000026257-26347, at APLNDC-Y0000026259, APLNDC-
24 Y0000026286.

25 ²⁰⁸ APLNDC-Y0000026348-26460, at APLNDC-Y0000026350, APLNDC-
26 Y0000026385; APLNDC-Y0000026461-26573, at APLNDC-Y0000026463, APLNDC-
27 Y0000026498; APLNDC-Y0000026574-26686, at APLNDC-Y0000026576, APLNDC-
28 Y0000026611; APLNDC-Y0000026687-26807, APLNDC-Y0000026689, APLNDC-
Y0000026724; APLNDC-Y0000027136-27255, at APLNDC-Y0000027138, APLNDC-
Y0000027172.

²⁰⁹ APLNDC-Y0000027256-27340 at APLNDC-Y0000027258, APLNDC-
Y0000027299; APLNDC-Y0000027341-27422 at APLNDC-Y0000027343, APLNDC-
Y0000027402; APLNDC-Y0000027423-27505 at APLNDC-Y0000027425, APLNDC-
Y0000027493.

²¹⁰ APLNDC-Y0000027506-27599 at APLNDC-Y0000027508, APLNDC-
Y0000027560.

1 who considered Android phones, Samsung was listed among the Android mobile phone brands
2 the iPhone 3GS and iPhone 4 buyers seriously considered.²¹¹ In Apple's iPhone Buyer Survey
3 conducted during the third quarter of 2011, for iPhone buyers who considered Android
4 smartphones, Samsung was again listed among the Android smartphone brands the iPhone 3GS
5 and iPhone 4 buyers seriously considered.²¹² Lastly, in Apple's May 2011 iPhone Owner study,
6 31% of the iPhone 3GS and iPhone 4 owners surveyed in the U.S. indicated that they considered
7 or seriously considered the Samsung-branded phones.²¹³

8 113. Product reviews for some of the accused Samsung products compare those
9 products directly to Apple products. For example, in a review of the accused Samsung Vibrant
10 phone, the reviewer compared the Vibrant directly to the iPhone, in an article titled: "Samsung
11 Vibrant Looks Like an iPhone, Has Battery Life to Match."²¹⁴ Similarly, in another review, the
12 Galaxy S line of smartphone products was described as "a serious rival to Apple's iPhone."²¹⁵
13 Another review states that the Samsung Galaxy S "[l]ooks like an iPhone" and notes that the
14 "Samsung Galaxy S and iPhone 3G/3GS could very easily have been separated at birth."²¹⁶

15 114. Samsung's internal market research similarly considers the mobile phone products
16 of the two companies as competitors. For instance, a market research study conducted or
17 commissioned by Samsung includes both Apple and Samsung in its results for unaided brand
18 awareness and brand purchase intent for mobile phones.²¹⁷

19 ²¹¹ APLNDC-Y0000027341-27422 at APLNDC-Y0000027343, APLNDC-
20 Y0000027353; APLNDC-Y0000027423-27505 at APLNDC-Y0000027425, APLNDC-
Y0000027436.

21 ²¹² APLNDC-Y0000027506-27599 at APLNDC-Y0000027508, APLNDC-
Y0000027519.

22 ²¹³ APLNDC-Y0000025024-25147 at APLNDC-Y0000025128. Note that only
23 individuals who purchased the phones themselves are included in the sample.

24 ²¹⁴ See, e.g., "Samsung Vibrant Looks Like an iPhone, Has Battery Life to Match,"
Wired, August 16, 2010 (http://www.wired.com/reviews/2010/08/pr_samsung_vibrant/).

25 ²¹⁵ See, e.g., "A Galaxy S Sequel with Big-Screen Ambitions," *Wall St. Journal*,
September 22, 2011; see also Joswiak Dep. 106:19-108:6.

26 ²¹⁶ See, e.g., "Samsung Galaxy S Review," *Techradar.com*, July 20, 2011
27 (<http://www.techradar.com/reviews/phones/mobile-phones/samsung-galaxy-s-689293/review>)
(last visited March 20, 2012).

28 ²¹⁷ See SAMNDCA00526887-526933 at SAMNDCA00526895, SAMNDCA00526899
(See Translations App'x).

1 115. Mr. Pendleton of Samsung stated that “Apple is one of one competitors” and that
2 Samsung competes with Apple, HTC, and Motorola in the smartphone market.²¹⁸ Mr. Pendleton
3 also said that “Apple is the competitor we obviously have our I [sic] on.”²¹⁹

4 116. Moreover, documents created by Samsung in connection with the development of
5 the Galaxy line of smartphones indicate that Samsung viewed its smartphone products as direct
6 competitors to the iPhone. In addition to the gravitytank analysis, McKinsey & Company report,
7 and executive e-mails mentioned above, I have seen a number of documents where Samsung’s
8 designers appear to have focused intensely on the iPhone design, to the point that they analyzed
9 each icon on the iPhone individually, and made specific recommendations for modifications of
10 Samsung’s icons and graphical user interface.²²⁰ It seems clear that Samsung’s own engineers
11 and designers viewed the iPhone as the competition.

12 *Sleekcraft* Factor 3: Similarity of the trade dress

13 117. Apple’s iPhone products and the Samsung Galaxy line of smartphones look
14 strikingly similar. A side-by-side comparison of the images of the iPhone and Galaxy S as shown
15 in the Amended Complaint demonstrates the similarity in the look and feel of these products.²²¹

16 118. The survey evidence from the Van Liere Report illustrates the striking similarity
17 between the look of Samsung Galaxy line of smartphones and that of the iPhone. Over half of
18 respondents (52%) who were shown pictures of a Samsung Galaxy Fascinate phone associated
19 the look and design of the Samsung Galaxy Fascinate with an iPhone, or a phone or product
20 manufactured by Apple. When the same test was carried out with a Samsung Galaxy S II Epic
21 4G Touch phone, over half respondents (51%) also associated the look and design of the
22 Samsung Galaxy S II Epic 4G Touch phone with an iPhone, or a phone or product manufactured
23 by Apple. As with the Poret Report, Dr. Van Liere also tested a “control” device to determine
24 whether it would be associated with Apple. A much smaller percentage of respondents associated
25

26 ²¹⁸ Pendleton Rough Dep. Tr. 34-35.

27 ²¹⁹ *Id.*

28 ²²⁰ See *infra* discussion and notes ¶¶ 132-138.

²²¹ Amended Complaint ¶¶ 94-95.

1 an iPhone, or a phone or product manufactured by Apple.²²⁵ I believe that this type of
2 association between the Samsung products and Apple demonstrates that consumers may actually
3 be confused by the look and feel of Samsung's phones.

4 *Sleekcraft* Factor 5: Marketing channels used

5 123. Samsung's Galaxy line of smartphone products is marketed and sold in the same
6 channels as Apple's iPhone products. In fact, Apple's iPhone products are sold side-by-side with
7 the Samsung Galaxy products in many retail situations. Samsung's Galaxy smartphones are
8 available at cellular phone carriers AT&T, Verizon Wireless, and Sprint.²²⁶ Apple's iPhone is
9 also available at AT&T, Verizon Wireless, and Sprint.²²⁷ I personally visited an AT&T store in
10 Manhattan where the iPhones and Samsung Galaxy smartphones were displayed in close
11 proximity, facilitating direct side-by-side comparisons.²²⁸ In addition, Apple and Samsung

13 ²²⁵ Van Liere Report at 4-5, 17.

14 ²²⁶ See, e.g., <http://www.samsung.com/us/mobile/at-t> (AT&T); "AT&T and Samsung
15 Mobile Announce Upcoming Availability of the Samsung Captivate, A Galaxy S
16 Smartphone," *Samsung Press Release*, June 17, 2010
(http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19570&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Samsung+Mobile+Announce+Upcoming+Availability+of+the+Samsung+Captivate);
17 "Samsung Captivate," *PhoneArena.com*, July 18, 2010
(http://www.phonearena.com/phones/Samsung-Captivate_id4676);
18 <http://www.samsung.com/us/mobile/verizon-wireless> (Verizon);). "Samsung Fascinate, A
19 Galaxy S Smartphone, Available on the Verizon Wireless Network," *Samsung Press Release*,
No Date
(http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19541&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=fascinate); Samsung website showing phones available on Sprint, available at
20 <http://www.samsung.com/us/mobile/sprint> (Sprint). The websites for the carriers show both
21 Apple's iPhone products and Samsung's Galaxy products available for purchase. See, e.g.,
22 <http://www.att.com/shop/wireless> (AT&T); <http://www.sprint.com> (Sprint);
23 <http://www.verizonwireless.com> (Verizon).

24 ²²⁷ See, e.g., "Apple Launches iPhone 4S, iOS 5 & iCloud," *Apple Inc. Press Release*,
October 4, 2011, [http://www.apple.com/pr/library/2011/10/04Apple-Launches-iPhone-4S-
iOS-5-iCloud.html](http://www.apple.com/pr/library/2011/10/04Apple-Launches-iPhone-4S-iOS-5-iCloud.html); "Verizon Wireless & Apple Team Up to Deliver iPhone 4 on Verizon,"
25 *Apple Inc. Press Release*, January 11, 2011,
26 [http://www.apple.com/pr/library/2011/01/11Verizon-Wireless-Apple-Team-Up-to-Deliver-
iPhone-4-on-Verizon.html](http://www.apple.com/pr/library/2011/01/11Verizon-Wireless-Apple-Team-Up-to-Deliver-iPhone-4-on-Verizon.html); Apple Store iPhone 4S, available at
27 http://store.apple.com/us/browse/home/shop_iphone/family/iphone.

28 ²²⁸ The iPhone 4S and Samsung Galaxy Note were less than 2 feet apart, whereas the
iPhone 4S and the Samsung Galaxy Skyrocket were approximately three feet apart.

1 products can often be displayed side-by-side on the carriers' websites.²²⁹ In-store retailers, such
2 as Best Buy, Target, and Walmart, often group together all of their smartphone products,
3 including Apple iPhone products and Samsung Galaxy products. Online retailers, such as
4 Amazon as well as Best Buy, Radioshack, and Walmart, also feature Samsung's Galaxy line of
5 smartphones and Apple's iPhone products.²³⁰

6 124. Samsung's Galaxy line of smartphones products and Apple's iPhone products are
7 also advertised and marketed through similar media. In 2011, Samsung launched a \$67.1 million
8 advertising campaign for its Galaxy S II that included online, print newspaper, and television
9 advertising components.²³¹ These various media began reaching consumer audiences in
10 February, June, and September 2011, respectively.²³² Of the \$67.1 million spent on the
11 campaign, Samsung allocated \$64.5 million toward television commercials airing on a diverse set
12 of networks, including ABC Family, Fox, BET, Comedy Central, and TBS.²³³ Although a
13 competitive analysis describes Samsung's campaign as "targeting everyone," Samsung elected to
14 air many of its commercials on many of the same shows as Apple.²³⁴ During the months of
15 October, November, and December, Apple and Samsung both featured advertisements for their
16

17 ²²⁹ See, e.g., APLNDC0003039043-3039044 at APLNDC0003039043 (AT&T);
18 APLNDC0003039085-3039114 at APLNDC0003039085-3039088 (AT&T);
19 APLNDC0003039440-3039441 at APLNDC0003039441 (Verizon).

20 ²³⁰ See, e.g., APLNDC0003039036-3039037 at APLNDC0003039036 (Amazon);
21 APLNDC0003038959-3038964 at APLNDC0003038974 (Amazon), APLNDC0003038974-
22 3038981 (Amazon), APLNDC0003039014-3039016 at APLNDC0003039014-3039016
23 (Amazon); APLNDC0003039165-3039167 at APLNDC0003039165 (Best Buy);
24 APLNDC0003039118-3039119 at APLNDC0003039118 (Best Buy); APLNDC0003039128-
25 3039138 at APLNDC0003039128 (Best Buy); APLNDC0003039149-3039164 at
26 APLNDC0003039149, APLNDC0003039151, APLNDC0003039152-53,
27 APLNDC0003039155, APLNDC0003039157-3039160, APLNDC0003039162 (Best Buy);
28 APLNDC0003039187-3039188 at APLNDC0003039187 (Radioshack);
APLNDC0003039191-3039192 at APLNDC0003039191 (Radioshack);
APLNDC0003039195-3039197 at APLNDC0003039195-3039197 (Radioshack); APLNDC-
Y0000151499-151504 at APLNDC-Y0000151499, APLNDC-Y0000151501 (Walmart);
APLNDC-Y0000151490-151491 at APLNDC-Y0000151490 (Walmart).

²³¹ OMD0000039-75 at OMD0000039, OMD0000046.

²³² OMD0000039-75 at OMD0000046.

²³³ OMD0000039-75 at OMD0000046.

²³⁴ OMD0000039-75 at OMD0000046.

1 category with the iPad.²⁷³ According to Samsung's own internal market research, when a sample
2 of consumers was asked to provide reasons for purchasing an iPad in a survey without any aid,
3 30% of those considering a Galaxy Tab said "iPad is category leader" as one of the top reasons.²⁷⁴

4 141. As noted above, consumers form brand associations through: (1) their exposure to
5 Apple's marketing activities which prominently feature the iPad products, (2) their exposure to
6 the iPad products via non-Apple sources, such as product reviews, press coverage, and product
7 placements in popular media; and (3) their own experiences with iPad's look and feel, or those of
8 their family, friends, neighbors, or colleagues. Consumers had extensive exposure to the iPad
9 product before the launch of Samsung's first accused tablet device in November 2010.²⁷⁵

10 142. By the end of Apple's fiscal year 2010, Apple had already invested \$149.5 million
11 in advertising the iPad.²⁷⁶ By the end of Apple's fiscal year 2011, Apple had spent approximately
12 \$457 million on advertising the iPad.²⁷⁷ Moreover, the iPad had been featured in various national
13 magazine and newspaper articles, including articles in *The New York Times*, *The Wall Street*
14 *Journal*, *Chicago Tribune*, *The Washington Post*, *USA Today*, *Mercury News*, *Los Angeles Times*,
15 and *Time*, including many front page articles and cover articles, such as stories in *The Economist*
16 and *Newsweek*.²⁷⁸ Furthermore, the iPad has been featured in a wide variety of national television
17 programs and movies, including *Modern Family*, to name just one.²⁷⁹

19 ²⁷³ See, e.g., "Verdict Is in on Apple iPad: It's a Winner," *USA Today*, April 2, 2010
20 ([http://www.usatoday.com/tech/columnist/edwardbaig/2010-03-31-apple-ipad-
review_N.htm](http://www.usatoday.com/tech/columnist/edwardbaig/2010-03-31-apple-ipad-review_N.htm)); "Laptop Killer? Pretty Close," *Wall St. Journal*, April 1, 2010
21 (<http://online.wsj.com/article/SB10001424052702304252704575155982711410678.html>);
22 "Looking at the iPad From Two Angles," *N.Y. Times*, March 31, 2010
23 (<http://www.nytimes.com/2010/04/01/technology/personaltech/01pogue.html>); "As New iPad
Debut Nears, Some See Decline of PCs," *N.Y. Times*, March 5, 2012
24 ([http://www.nytimes.com/2012/03/06/technology/as-new-ipad-debut-nears-some-see-decline-
of-pcs.html](http://www.nytimes.com/2012/03/06/technology/as-new-ipad-debut-nears-some-see-decline-of-pcs.html)).

24 ²⁷⁴ See SAMNDCA00526887-526933 at SAMNDCA00526918 (See Translations
App'x).

25 ²⁷⁵ See ¶ 161 for a discussion of a timeline of product announcements and introductions
26 relevant to Apple and Samsung tablet computers.

26 ²⁷⁶ See APLNDC-Y0000051623.

27 ²⁷⁷ See APLNDC-Y0000051623.

27 ²⁷⁸ See *supra* ¶¶ 67-69.

28 ²⁷⁹ See Lindbergh Dep. 59:6-60:5.

1 143. In addition, as explained above, the iPad is a mobile device used in public
2 locations. For instance, according to an iPad Buying Process survey conducted by Apple, 71%
3 (76%) of the iPad buyers who purchased their iPad at a Best Buy (Apple Retail Store) used or
4 intended to use their iPads at a hotel or airport when traveling; 62% (66%) of the iPad buyers who
5 purchased their iPad at a Best Buy (Apple Retail Store) used or intended to use their iPads at
6 public facilities such as a library; 48% (53%) of the iPad buyers who purchased their iPad at a
7 Best Buy (Apple Retail Store) used or intended to use their iPads at the office; and 38% (41%) of
8 the iPad buyers who purchased their iPad at a Best Buy (Apple Retail Store) used or intended to
9 use their iPads in public outdoor places such as a park.²⁸⁰ As a result, Apple’s sales of iPad
10 devices contribute to brand associations formed by consumers. Another iPad Buyer Survey also
11 provided consistent results with 79% of the iPad buyers using or intending to use their iPads at a
12 hotel or airport when traveling, 62% at public facilities, 44% at the office, and 43% at outdoor
13 public spaces.²⁸¹ Before the launch of the first accused Galaxy Tab in November 2010, Apple
14 had sold over 4.3 million iPad tablets in the U.S.²⁸² By the end of June 2011, Apple had sold
15 approximately 14.1 million iPads in the U.S.²⁸³ As mentioned above in connection with the
16 iPhone, this type of public use serves as another—very effective—means of promotion for the
17 iPad.

18 144. As with the iPhone, surveys conducted in June/July 2011 show that the distinctive
19 look of the iPad had become widely associated with Apple prior to November 2010, the time at
20 which Samsung released the first of its accused tablets. 57.3% of respondents who were shown a
21 head-on image of a disguised iPad—with blurred icons and the “home” button covered with a
22 sticker—still identified it with Apple, iPad, or similar Apple-related product name. Similarly,

23 ²⁸⁰ See APL-ITC796-0000489304-489435 at APL-ITC796-0000489396. Individuals
24 surveyed purchased their iPads after the launch of the product and through April, 14, 2010.
25 The presentation is dated May 2010. See APL-ITC796-0000489304-489435 at APL-ITC796-
0000489305-489306. Numbers in parentheses represent the breakdown for survey
26 respondents who purchased their iPads at an Apple Retail Store.

27 ²⁸¹ See APLNDC0001651734-1651806 at APLNDC0001651776. The presentation is
dated August 2010. See APLNDC0001651734-1651806 at APLNDC0001651735.

28 ²⁸² APLNDC-Y00000051599-605, at APLNDC-Y00000051600.

²⁸³ APLNDC-Y00000051599-605, at APLNDC-Y00000051600.

1 75.2% of respondents who were shown an angled view of an iPad, with or without blurred icons,
2 identified it with Apple or Apple products.²⁸⁴ A significantly smaller percentage of respondents
3 who were shown a “control” tablet (with and without similar blurring) identified it with Apple or
4 Apple products. Specifically, 17% of the respondent shown a head-on image of the control tablet
5 identified it with Apple, iPad, or a similar Apple related product name, as did 10.8% of
6 respondents who saw an angled view of the control tablet.

7 145. The strength of the trade dress has also been recognized by Samsung’s executives.
8 Internal Samsung documents show that Samsung’s executives viewed the iPad as the industry
9 standard in tablet computers.²⁸⁵ I discuss below how Samsung compared its tablets to the iPad,
10 and how improvements to the Samsung’s products were drawn directly from that comparison.²⁸⁶

11 146. In my opinion, there can be no question that after the iPad launch and before the
12 introduction of the first of the accused Samsung Galaxy Tab products in late 2010 (and before the
13 introduction of the Galaxy Tab 10.1 in June 2011), the look and feel of the iPad trade dress was
14 distinctively “Apple.” As with the iPhone and the iPod touch, the iPad had, by that point, become
15 one of the most recognizable products in the U.S. given Apple’s carefully placed advertisements
16 and extensive brand activity.

17 *Sleekcraft* Factor 2: Proximity of the goods

18 147. Apple’s iPad and iPad 2 products and Samsung’s Galaxy line of tablet computers
19 are similar in use and in function and directly compete with one another for market share. The
20 relevant products are marketed to the same segments of the population who are prospective
21 (actual, for repeat purchasers) buyers of tablet computers.

22 148. Internal market research conducted by Samsung and Apple also shows that the
23 tablet computer products of the two companies generally compete with each other. For instance,

24 _____
25 ²⁸⁴ Poret Report at 22-25, 33-34, 46, 60-61, 64-68.

26 ²⁸⁵ For instance, minutes from a Samsung meeting indicate that “Apple has already set
27 the market price (WiFi \$499/3G \$629). We may differentiate but cannot go above [Apple’s]
28 price” and that the attendees realized that Samsung must “emphasize ... graphic [sic] to
compete with iPad 3.” See SAMNDCA10403697-10403698 at SAMNDCA10403697.

²⁸⁶ SAMNDCA10244604-10244639 at SAMNDCA10244608; SAMNDCA00203268-
203420 at SAMNDCA00203401. See *infra* ¶¶ 164-165.

1 a draft of the U.S. Tablet Market Update presentation by Apple contains two pie charts depicting
2 market share of competitors in the U.S. tablet market based on IDC data in the first and second
3 quarters of 2011. Both Apple and Samsung are listed among competitors.²⁸⁷

4 149. In addition, Samsung's internal marketing research includes Apple as the main
5 competition for its Galaxy line of tablet computers. For instance, a Samsung market research
6 document entitled *Samsung Q4 '10 Deep Dive* has a section entitled "How Does the Galaxy Tab
7 Compare to the iPad?"²⁸⁸

8 150. Samsung's executives have acknowledged that the iPad and the Galaxy Tab 10.1
9 compete head-to-head. After the March 2011 product announcement for the iPad 2, Don-Joo Lee,
10 the Executive Vice President of Samsung's mobile division, was quoted as saying that Samsung
11 would have "to improve the parts [of the forthcoming Galaxy Tab 10.1] that are inadequate,"
12 further noting that "Apple made [the iPad 2] very thin."²⁸⁹

13 151. Thus, the Samsung products are perceived as directly competing.²⁹⁰ For instance,
14 *The Wall Street Journal* refers to the products as competitors, noting that "Apple's hot-selling
15 iPad now has its first credible *competitor* in the nascent market for multitouch consumer tablet
16 computers: the Samsung Galaxy Tab."²⁹¹ This is also evident from the comparison of the Apple

18 ²⁸⁷ APLNDC0001430158-1430196 at APLNDC0001430167; APLNDC0001430175.

19 ²⁸⁸ See SAMNDCA00526887-526933 at SAMNDCA00526914-526923 (See
Translations App'x).

20 ²⁸⁹ "Samsung Considers Galaxy Tab 10.1 Overhaul Following iPad 2 Unveiling," *Boy*
Genius Review, March 4, 2011; see also "iPad 2 Sends Galaxy Tab Back to the Drawing
21 Board," *NBCBayArea.com*, May 5, 2011.

22 ²⁹⁰ See, e.g., "It's a Tablet. It's Gorgeous. It's Costly.," *N.Y. Times*, November 10,
2010 (<http://www.nytimes.com/2010/11/11/technology/personaltech/11pogue.html>);
23 "Samsung's Galaxy Tab Is iPad's First Real Rival," *Wall St. Journal*, November 11, 2010
(<http://online.wsj.com/article/SB10001424052748703805004575606580224319038.html>);
24 "Appeal of iPad 2 Is a Matter of Emotions," *N.Y. Times*, March 9, 2011
(<http://www.nytimes.com/2011/03/10/technology/personaltech/10pogue.html>); "A Slender
25 Tablet with Widescreen Ambitions," *Wall St. Journal*, June 15, 2011
(<http://allthingsd.com/20110614/a-slender-tablet-with-widescreen-ambitions/>); see also
26 Deposition of Michael Tchao ("Tchao Dep.") on February 21, 2012, 158:8-20.

27 ²⁹¹ "Samsung's Galaxy Tab Is iPad's First Real Rival," *Wall St. Journal*, November 11,
2010
(<http://online.wsj.com/article/SB10001424052748703805004575606580224319038.html>)
28 (emphasis added).

1 158. Samsung's Galaxy tablet computer products and Apple's iPad products are sold
2 side-by-side in many of the same retail situations. For instance, AT&T and Verizon Wireless
3 both sell Apple's iPad products and Samsung's Galaxy Tab products.³⁰⁹ I personally visited an
4 AT&T store in Manhattan, where the brands were being displayed less than 3 feet apart. Each of
5 these carriers also features the two product lines on their websites.³¹⁰ Similarly, retailers such as
6 Best Buy feature both Samsung and Apple tablets in their stores. Online retailers, such as
7 Amazon as well as Best Buy, Walmart, and Target, also offer both Apple's iPad products and
8 Samsung's Galaxy Tab products on their websites.³¹¹ Moreover, many of these websites allow
9 side-by-side comparisons of the two companies' products.³¹²

10 159. In January 2011, Samsung launched its second major advertising campaign for the
11 Galaxy Tab.³¹³ Over the course of 2011, Samsung's Galaxy Tab and Galaxy Tab 10.1 campaigns
12 were estimated to have spent \$90.1 million on television ads, \$14.7 million on print ads, and \$6.1
13

14
15 ³⁰⁹ "AT&T to Expand Tablet Portfolio with Samsung Galaxy Tab," *Samsung Press*
16 *Release*, September 16, 2010
(http://www.samsung.com/us/news/newsPreviewRead.do?news_seq=19688); "Verizon
17 Wireless Puts Samsung Galaxy Tab in Store in November," *Samsung Press Release*, No Date
([http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19747&rdoPeriod=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19747&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Verizon+Wireless+Puts+Samsung+)
18 [ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19747&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Verizon+Wireless+Puts+Samsung+)
19 [Verizon+Wireless+Puts+Samsung+](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19747&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Verizon+Wireless+Puts+Samsung+)); "Apple Launches iPad," *Apple Inc. Press Release*,
January 27, 2010 (<http://www.apple.com/pr/library/2010/01/27Apple-Launches-iPad.html>);
"Apple Launches iPad 2," *Apple Inc. Press Release*, March 2, 2011
(<http://www.apple.com/pr/library/2011/03/02Apple-Launches-iPad-2.html>).

20 ³¹⁰ See, e.g., APLNDC0003039047-3039048 at APLNDC0003039047 (AT&T);
21 APLNDC0003039061- at APLNDC0003039061 (AT&T); APLNDC0003039447-3039449 at
APLNDC0003039448 (Verizon).

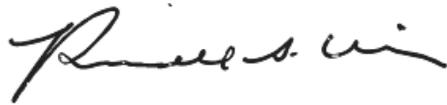
22 ³¹¹ See, e.g., APLNDC0003038965-APLNDC0003038973 at APLNDC0003038965
(Amazon); APLNDC0003039005-APLNDC0003039007 at APLNDC0003039005 (Amazon);
23 APLNDC0003039120-3039123 at APLNDC0003039120-3039123 (Best Buy);
APLNDC0003039145-3039148 at APLNDC0003039145-3039147 (Best Buy);
24 APLNDC0003039174-3039176 at APLNDC0003039174 (Best Buy); APLNDC0003039181-
3039182 at APLNDC0003039181 (Radioshack); APLNDC0003039183-3039184 at
25 APLNDC0003039183 (Radioshack); APLNDC0003039408-3039411 (Target);
APLNDC0003039419-3039423 at APLNDC0003039419 (Target); APLNDC0003039426-
26 APLNDC000303430 at APLNDC0003039429 (Target).

27 ³¹² See, e.g., APLNDC0003039174-3039176 at APLNDC0003039174 (Best Buy);
APLNDC0003039434-3039436 at APLNDC0003039434.

28 ³¹³ OMD0000004-10 at OMD0000007.

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I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that this Declaration was executed on March 22, 2012, in New York, New York.



Russell S. Winer