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 12 Counterclaim-Defendant APPLE INC.

14 UNITED STATES DISTRICT COURT
 15 NORTHERN DISTRICT OF CALIFORNIA
 16 SAN JOSE DIVISION

18 APPLE INC., a California corporation,
 19 Plaintiff,
 20 v.
 21 SAMSUNG ELECTRONICS CO., LTD., a
 Korean corporation; SAMSUNG ELECTRONICS
 22 AMERICA, INC., a New York corporation; and
 SAMSUNG TELECOMMUNICATIONS
 23 AMERICA, LLC, a Delaware limited liability
 company,
 24 Defendants.
 25

Case No. 11-cv-01846-LHK (PSG)

**APPLE INC.'S REPLY IN SUPPORT
 OF MOTION PURSUANT TO
 RULE 62(C) FOR ENTRY OF
 PRELIMINARY INJUNCTION
 WITHOUT FURTHER HEARING**

26 PUBLIC REDACTED VERSION

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1 **I. INTRODUCTION**

2 Six months ago, this Court found likely irreparable harm from Samsung’s infringement of
3 the D’889 patent. (Dkt. No. 452 at 50.) Expedited review by the Federal Circuit has now
4 affirmed that ruling and established likely success on the merits. This Court directed the parties
5 to limit their briefs to the remaining issues of balance of hardships, public interest, and the
6 amount of a bond, with no new evidence except as to the bond. (Dkt. No. 962 at 2.) Samsung
7 nevertheless reargues irreparable harm and relies on new evidence as to balance of hardships and
8 public interest. This new evidence is improper and, even if considered, would not tip the balance
9 of hardships in Samsung’s favor or outweigh the public interest in enforcing patent rights and
10 discouraging deliberate copying. This Court should enter the requested injunction forthwith.

11 **II. SAMSUNG’S SALE OF INFRINGING TABLETS SHOULD BE ENJOINED**

12 This Court’s Order as reviewed by the Federal Circuit establishes the two essential factors
13 for a preliminary injunction: likely success and irreparable harm. *See Altana Pharma AG v. Teva*
14 *Pharms. USA, Inc.*, 566 F.3d 999, 1005 (Fed Cir. 2009) (“a movant must establish the existence
15 of both of the first two factors to be entitled to a preliminary injunction”); *Hybritech, Inc. v.*
16 *Abbott Labs.*, 849 F.2d 1446, 1457 (Fed Cir. 1988) (balance of hardships is “one of four factors to
17 *be considered* by a district court” but district court is not required “as a prerequisite to awarding
18 preliminary injunctive relief” to “expressly find the existence of this factor”). The record
19 evidence and the Court’s prior findings similarly establish that the remaining two factors—
20 balance of hardships and public interest—also weigh heavily in favor of an injunction.

21 **A. The Balance of Hardships Favors Issuing a Preliminary Injunction**

22 Samsung’s balance of hardships analysis repeats irreparable harm arguments that this
23 Court has already rejected. (*Compare* Dkt. No. 428 at 29-32, *with* Dkt. No. 977-3 at 7-8
24 (sealed).) Samsung contends that its copying of Apple’s iconic design does not harm Apple
25 because “Apple offers no proof that consumers purchase the parties’ respective tablet devices
26 because of design to any material degree.” (Dkt. No. 977-3 at 7.) On the contrary, this Court
27 held that “Apple has established that design is an important driver in demand for tablets,” citing a
28 Samsung survey that “establishes unequivocally that [REDACTED]

1 [REDACTED] (Dkt. No. 452 at 49.) Samsung ignores its own survey,
2 relying instead on surveys about *smartphones*, not tablets (Dkt. No. 977-3 at 7, citing Dkt.
3 No. 179-38, 179-39). Smartphone surveys cannot overcome Samsung’s admission that [REDACTED]

4 [REDACTED]
5 Samsung also repeats its argument that its infringing sales will not harm Apple because
6 Samsung does not compete with Apple for tablet sales. Yet, [REDACTED]

7 [REDACTED]
8 [REDACTED]

9 [REDACTED] After reviewing the evidence, this Court held that “[b]ecause there appear to
10 be fewer players in the tablet market, and the market is growing, it is arguably more likely that
11 market share lost by Apple will be lost to Samsung.” (Dkt. No. 452 at 49 (citing *Robert Bosch*,
12 659 F.3d at 1151).)

13 Samsung contends that Apple does not “directly compete with the Galaxy Tab 10.1 4G
14 LTE sold through Verizon or U.S. Cellular, undoubtedly because Apple has not made a 4G LTE
15 version of the iPad 2” (Dkt. No. 977-3 at 7). Samsung failed to make this argument in its original
16 opposition to Apple’s preliminary injunction motion, and Samsung cites no evidence that its “4G
17 LTE” model is addressed to an entirely different market. Moreover, as Samsung knows, Apple
18 began selling the third generation iPad, which includes 4G LTE, in March 2012.¹ (*See*
19 <http://www.apple.com/pr/library/2012/03/07Apple-Launches-New-iPad.html>.)

20 Samsung argues that an injunction would cause “great harm” to Samsung by allegedly
21 disrupting “long-term relationships” between carriers and their customers. (Dkt. No. 977-3 at 8.)
22 But Apple’s proposed injunction targets Samsung’s *new* infringing sales only. It does not prevent
23 purchasers from using tablets they have already bought or interfere with existing contracts.

24 _____
25 ¹Apple cites this public product announcement only in case Samsung’s new argument is
26 considered. Samsung also makes the new factual argument that as of December 2011, its tablet
27 market share was much smaller than Apple’s. (Dkt. No. 977-3 at 8 & n.4). Even if this new
28 argument were considered, it would not rebut Apple’s showing that Samsung’s sales are likely to
take away sales from Apple. Indeed, given that Apple has remained the largest seller, Samsung’s
sales are more likely to take away sales from Apple than from any of the other competing
companies.

1 Samsung’s argument actually cuts the other way: an injunction should be granted now, *before*
2 customers enter long-term contracts for Samsung products that result in customer loyalty and
3 “long-term effects that are difficult to calculate and may not be recaptured.” (Dkt. No. 452 at 32.)

4 Samsung also asserts that an injunction should be denied because the Tab 10.1 is [REDACTED]
5 [REDACTED] citing new factual evidence (Dkt. No. 977-3 at 9). Even if this new
6 evidence were considered and assumed to be correct, this would cut in Apple’s favor since it
7 shows that an injunction will cause little, if any, harm to Samsung.² Moreover, the fact that
8 Samsung has already been able to delay entry of a preliminary injunction by one year from its
9 introduction of the Galaxy Tab 10.1 in June 2011 does not mean that Samsung should be allowed
10 to make further infringing sales that will cause further irreparable harm to Apple.

11 The Court’s findings regarding likelihood of success and irreparable harm also bear
12 directly on the balance of hardships. *See, e.g., Illinois Tool Works, Inc. v. Girp-Pak, Inc.*,
13 906 F.2d 679, 683 (Fed. Cir. 1990) (“Because the court must balance the hardships, at least in
14 part in light of its estimate of what is likely to happen at trial, it must consider the movant’s
15 showing of likelihood of success.”). This is particularly true given the evidence of deliberate
16 design copying. *See Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 704 (Fed. Cir. 2008)
17 (“[o]ne who elects to build a business on a product found to infringe cannot be heard to complain
18 if an injunction against a continuing infringement destroys the business so elected”) (citation
19 omitted); *accord Merial Ltd. and Merial SAS v. Cipla Ltd.*, No. 2011-1471, 1472, Slip Op. (Fed.
20 Cir. May 31, 2012) (rejecting on that basis infringer’s argument that small size relative to patent
21 holder should tip balance of hardships in its favor).

22 **B. The Public Interest Favors Issuing a Preliminary Injunction**

23 As this Court has recognized, “the public has an interest in the protection of patent rights.”
24 (Dkt. No. 452 at 65.) “No public interest is served by allowing patent infringement.” *Telebrands*
25 *Direct Response Corp. v. Ovation Commc'ns, Inc.*, 802 F. Supp. 1169, 1179 (D.N.J. 1992). In
26 light of the “public interest in protecting rights secured by valid patents,” analysis should focus on

27 ²Indeed, [REDACTED]
28 [REDACTED]

1 “whether there exists some critical public interest that would be injured by the grant of
2 preliminary relief.” *Hybritech, Inc. v. Abbott Labs.*, 849 F.2d at 1458 (public interest precluded
3 injunction that would stop supply of cancer and hepatitis test kits). “Accordingly, courts have in
4 rare instances exercised their discretion to deny injunctive relief in order to protect the public
5 interest.” *Rite-Hite Corp. v. Kelley Co., Inc.*, 56 F.3d 1538, 1547 (Fed. Cir. 1995);³ *see also*
6 *Apple v. Samsung*, No. 2012-1105, slip op. at 11 (“[W]here the infringement question is not close
7 and likely validity has been shown, the public interest weighs in favor of the patent holder.”)

8 Samsung has not identified any such “critical public interest.” As noted above, the
9 alleged public interest in avoiding disruption of carrier relationships with customers is irrelevant
10 because Apple’s injunction is limited to *new* Samsung sales only. Samsung cites *In re Qwest*
11 *Communications International, Inc. Securities Litigation*, 231 F. Supp. 2d 1066 (D. Colo. 2002)
12 for the proposition that “[t]he public has a strong interest in seeing stability in established long-
13 term commercial relationships” (Dkt. No. 977-3 at 10), but the interests noted in that case
14 “include[d] threats to the value of holdings of Qwest shareholders, to the employment of Qwest’s
15 many thousands of employees, and possibly to telecommunications services provided to a very
16 large number of people.” 231 F. Supp. 2d at 1070.⁴ There is no evidence that any comparable
17 interests would be affected by the tablet injunction sought here.

18 Samsung relies on Justice Kennedy’s concurring remarks in *eBay Inc. v. Mercexchange*,
19 *L.L.C.*, 547 U.S. 388 (2006) but crops them in a way that obscures their meaning. Justice
20 Kennedy noted that “[a]n industry has developed in which firms use patents not as a basis for
21

22 ³Samsung cites *3M Unitek Corp. v. Ormco Co.*, 96 F. Supp. 2d 1042, 1052 (C.D. Cal.
23 2000), which confirms that “[t]ypically, courts have found the public interest is served in cases
24 involving cutting edge medical treatments and other products which if removed from the market
25 would harm the general public.”

26 ⁴None of Samsung’s cited cases support its argument that the public interest precludes an
27 injunction here. *3M Unitek Corp.*, discussed above, found no impact on public interest from an
28 injunction affecting ceramic braces. *Pentair Water Pool and Spa, Inc. v. Hayward Indus., Inc.*,
No. 11-CV-459-F, 2012 WL 194403, at *9 (E.D.N.C. Jan. 23, 2012) noted that “‘examples of
such critical public interests include cases involving national security and public health and safety
(e.g., a vaccine, new cure or other vital medications).’” *Bard Peripheral Vascular v. W.L. Gore
& Assocs.*, 670 F.3d 1171, 1192 (Fed. Cir. 2012) noted that the district court had granted an
ongoing royalty in lieu of permanent injunction “finding that it was in the public interest to allow
competition in the medical device arena” but did not review or discuss the basis for that decision.

1 producing and selling goods but, instead, primarily for producing licens[e] fees” and that an
2 injunction “can be employed as a bargaining tool to charge exorbitant fees to companies that seek
3 to buy licenses to practice the patent.” *Id.* at 396. In that context, he stated:

4 When the patented invention is but a small component of the
5 product the companies seek to produce *and the threat of an*
6 *injunction is employed simply for undue leverage in negotiations,*
7 *legal damages may well be sufficient to compensate for the*
8 *infringement* and an injunction may not serve the public interest.

9 *Id.* at 396-97 (emphasis added). The highlighted portion, omitted by Samsung, shows that Justice
10 Kennedy’s comments have no application here.

11 Samsung’s other public interest arguments are based on the premise that Apple does not
12 sell a 4G LTE iPad. As noted above, that assertion is both outside the record and false.

13 **III. THIS COURT HAS JURISDICTION TO AMEND ITS PRELIMINARY** 14 **INJUNCTION ORDER BEFORE THE FEDERAL CIRCUIT ISSUES THE** 15 **MANDATE**

16 The Court’s May 21 Order Granting Motion to Shorten Time invites the parties “to further
17 brief whether this Court has jurisdiction to amend the preliminary injunction order prior to the
18 issuance of the mandate from the Federal Circuit.” (Dkt. No. 962 at 2.) On point Ninth Circuit
19 authority—*U.S. v. El-O-Pathic Pharm.*, 192 F.2d 62 (9th Cir. 1951)—answers that question
20 affirmatively. Samsung has offered no contrary authority,⁵ and Apple is aware of none.

21 The question presented here, as in *El-O-Pathic*, is whether a district court has jurisdiction
22 to enter a preliminary injunction consistent with a court of appeals’ decision before the court of
23 appeals issues its mandate. The Ninth Circuit held in *El-O-Pathic* that (1) the district has such

24 ⁵None of Samsung’s cited cases involved a motion for or modification of an injunction
25 after a ruling on the merits by the court of appeals and before the mandate issued. *See*
26 *McClatchy*, 686 F.2d 731 (district court entered amended judgment adjudicating new issue);
27 *Dillard v. City of Foley*, 926 F. Supp. 1053, 1075 (M.D. Ala. 1995) (denying motion to modify
28 consent decree subject to pending appeal that was based on “arguments already advanced by the
movants and considered and rejected by the court”); *Barringer v. Griffes*, 810 F. Supp. 119 (D.
Vt. 1992) (after upholding collection of motor vehicle use tax, court denied request to enjoin tax
while ruling was on appeal); *Int’l Assoc. of Machinists and Aerospace Workers v. E. Air Lines,*
Inc., 847 F.2d 1014 (2d Cir. 1988) (holding district court did not have authority to enter
injunction based on new evidence while merits of case pending on appeal); *Coastal Corp. v.*
Texas E. Corp., 869 F.2d 817 (5th Cir. 1989) (district court lacked authority to dissolve appealed
injunction based on new evidence).

1 jurisdiction under Federal Rule of Civil Procedure 62(c), and (2) the district court is the proper
2 place to seek that relief. *El-O-Pathic* controls here.

3 On its face, Rule 62(c) provides broad authority to this Court to grant injunctive relief
4 while an appeal from denial of an injunction is pending. Fed. R. Civ. P. 62(c) (“the court may
5 suspend, modify, restore, or grant an injunction”) (emphasis added). Samsung relies on
6 precedent tracing Rule 62(c) authority to the district court’s inherent power “to preserve the status
7 quo.” (See Dkt. No. 977-3 at 3 (quoting *McClatchy Newspapers v. Central Valley Typographical*
8 *Union No. 46*, 686 F.2d 731, 734 (9th Cir. 1982).) In exercising that power, the district court
9 “may not finally adjudicate substantial rights directly involved in the appeal.” *Id.* at 735,
10 quoting *Newton v. Consolidated Gas Co.*, 258 U.S. 165, 177 (1922). As explained in *Natural*
11 *Resources Defense Council v. Southwest Marine*, the “amended judgment” issued by the district
12 court in *McClatchy* was invalid because it “altered the status of the case on appeal.” 242 F.3d
13 1163, 1167 (9th Cir. 2001). The *Southwest Marine* court distinguished *McClatchy* because the
14 district court’s post-judgment modifications to its injunction “did not materially alter the status of
15 the consolidated appeal.” *Id.*

16 The same was true in *El-O-Pathic* and is true here. Temporary injunctive relief consistent
17 with the court of appeals decision but before issue of the mandate does not “alter[] the status of
18 the case on appeal” but rather supports the efficacy of the court of appeals’ decision by
19 preventing irreparable harm consistent with that decision.

20 Samsung argues that “*El-O-Pathic* is . . . consistent with all other authority that Rule 62(c)
21 is strictly limited to orders necessary to preserve the status quo.” (Dkt. No. 977-3 at 5.) That
22 assertion overstates the significance of the “status quo” requirement. The injunction sought in *El-*
23 *O-Pathic* was a prohibition on ongoing sales of misbranded drugs. The district court had denied
24 that relief but the Ninth Circuit reversed. When the plaintiff sought immediate issuance of the
25 mandate, the Ninth Circuit did “not find it desirable that the mandate issue forthwith in view of
26 the fact that the time for filing petition for rehearing has not expired” but directed the plaintiff to
27 the district court to obtain a temporary injunction on sales under Rule 62(c) (192 F.2d at 79).
28 That injunction changed the status quo no less than the injunction on sales of an infringing

1 product sought here. Neither order is inconsistent with preserving the status quo within the
2 meaning of the Rule 62(c) precedent. They do not “alter[] the status of the case on appeal,” but
3 rather preserve the efficacy of the court of appeals’ decision. Indeed, in *Newton*, the seminal case
4 for the doctrine at issue, the Supreme Court affirmed the district court’s substantive modification
5 of its injunction to impound excess sales revenues while the appeal was pending. 258 U.S. at
6 173, 177 (modification treated “as attempt to preserve the status quo in order that this court might
7 finally and completely dispose of the whole matter”).

8 Samsung’s attempt to distinguish *El-O-Pathic* on the basis that it reversed and remanded
9 for entry of an injunction rather than, as here, vacating and remanding for further proceedings is
10 also unavailing. No less than the reversal of the district court’s ruling in *El-O-Pathic*, the Federal
11 Circuit’s reversal of this Court’s ruling on likelihood of success on Apple’s claim for
12 infringement of the D’889 patent and remand for further proceedings consistent with that ruling
13 changes the status of the case in a way that makes preliminary injunctive relief appropriate. Just
14 as here, the ruling of the Ninth Circuit panel in *El-O-Pathic* was subject to a possible petition for
15 rehearing and no mandate had issued. And just as in *El-O-Pathic*, preliminary injunctive relief
16 consistent with the court of appeals’ ruling is warranted here to prevent further irreparable harm
17 before issuance of the mandate.

18 **IV. APPLE IS PREPARED TO POST AN APPROPRIATE BOND**

19 Samsung’s bond request is grossly inflated. [REDACTED]

20 [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 **V. CONCLUSION**

26 For all the reasons discussed above, the Court should enter the requested preliminary
27 injunction forthwith.

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Dated: May 31, 2012

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