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 APPLE INC.

Filed

MAY 25 2012

RICHARD W. WIEKING
 CLERK, U.S. DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE

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UNITED STATES DISTRICT COURT
 NORTHERN DISTRICT OF CALIFORNIA
 SAN JOSE DIVISION

CV 12 80124
 Case No.

LHK
 MS
 SG

In re Ex Parte Application of
 APPLE INC.

Applicant,

For an Order Pursuant to 28 U.S.C. § 1782
 Granting Leave to Obtain Discovery from Quinn
 Emanuel for Use in Foreign Proceedings

DECLARATION OF MATTHIAS KOCH IN SUPPORT OF APPLE'S
 EX PARTE APPLICATION FOR
 AN ORDER PURSUANT TO 28
 U.S.C. § 1782 GRANTING LEAVE
 TO OBTAIN DISCOVERY FROM
 QUINN EMANUEL FOR USE IN
 FOREIGN PROCEEDINGS

DECLARATION OF MATTHIAS KOCH IN SUPPORT OF IN
 SUPPORT OF APPLE'S EX PARTE APPLICATION FOR
 20120525

1 I, MATTHIAS KOCH, an attorney admitted to practice in the Federal Republic of
2 Germany, declare as follows:

3 1. I am a member (partner) of Freshfields Bruckhaus Deringer LLP, counsel to Apple
4 Inc.

5 2. I am familiar with the facts set forth in this declaration from personal knowledge
6 and documents I have reviewed.

7 3. I submit this declaration in support of Apple's Ex Parte Application for an Order
8 Pursuant to 28 U.S.C. § 1782 Granting Leave for Discovery for Use In Foreign Proceedings.
9 The application relates to foreign proceedings in Germany before the Düsseldorf Regional Court
10 in Germany, in Spain and in Korea.

11 4. I have filed on behalf of Apple Inc. two cases in Düsseldorf Regional Court, *Apple*
12 *Inc. v. Samsung Electronics GmbH, et al.*, No. 14c O 293/11 ("the tablets case") and No. 14c O
13 294/11 ("the phones case"). Both cases were filed on November 25, 2011. The tablets case
14 alleges five Samsung tablets¹ infringe three of Apple's Registered Community Designs: CDR
15 1888454-0013, CDR 1888454-0001 and CDR 1222905-0002. The case also alleges unfair
16 competition under the Federal Unfair Competition Act. The phones case alleges ten Samsung
17 phones² infringe four of Apple's Registered Community Designs: CDR 748280-0006, CDR
18 748694-0003, CDR 1236590-0011, and CDR 888920-18. The case also alleges unfair
19 competition under the Federal Unfair Competition Act.

20 **Relevant Aspects of the German Law**

21 5. In order to prove an unfair competition claim under § 4 Nr. 9 (b) of the Federal
22 Unfair Competition Act, the plaintiff has to show that his/her product has acquired "individual
23 character" and that the defendant's actions constitute "unreasonable exploitation of esteem".
24 "Individual character" is an unwritten requirement developed in case law under the Unfair

25 _____
26 ¹ Galaxy Tab 7.7, Galaxy Tab 8.9, Tab 10.1, Galaxy Tab 10.1v and Galaxy Tab 10.1N.

27 ² Galaxy S I, Galaxy S Plus, Galaxy S II, Galaxy Ace, Galaxy Y, Galaxy Note, Galaxy S WiFi
28 4.0, Galaxy S Wifi 5.0, Galaxy R and Wave M.

1 Competition Act and means that the product has to have a design or individual features enabling
2 the relevant public to recognize the product as originating from a certain producer. An
3 "unreasonable exploitation of esteem" occurs when a successful commercial performance (such
4 as designing a product) and the reputation resulting therefrom is exploited by the defendant
5 deliberately.

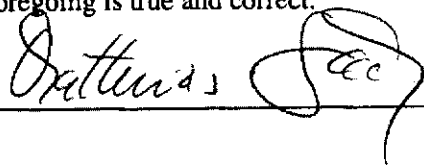
6 6. Evidence that the defendant understood the appeal to consumers of the design and
7 features of plaintiff's products and that the defendant considered Apple's products when creating
8 its own is suitable to show the extent to which similar features of the defendant's product were
9 influenced by the plaintiff's product in order to take advantage of the plaintiff's product's
10 reputation. Such evidence may indicate that the similar features of the defendant's product were
11 influenced by the plaintiff's product in order to take advantage of the reputation of the plaintiff's
12 product. Similarly, evidence that Samsung has taken inconsistent positions in different
13 litigations or intentionally copied Apple's distinctive features may be highly probative.

14 7. American-style discovery is not available under German law. The provisions of
15 our Federal Rules of Civil Procedure regarding the submission of documents in the possession of
16 the parties only allow a party to request a specific document that is in the possession of the other
17 party, but not categories of documents. In other words, unless a party knows what exact
18 document it is looking for, it is not entitled to ask in the abstract for categories of documents.

19 8. To protect confidential information the parties may enter into a confidentiality
20 agreement that specifies who may view confidential information. In the absence of any special
21 provisions in the Federal Rules of Civil Procedure in this regard, the general principles of German
22 Civil Law apply. One of the most important principles is the principle that private parties may
23 enter into any kind of agreement they wish to as long as the matter of the agreement is legal. It is
24 common to enter into confidentiality agreements when sensitive business information is
25 concerned.

26 I declare under penalty of perjury that the foregoing is true and correct.

27 Dated: 25 Aug 2012

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Matthias Koch

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