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APPLE INC.

Filed

MAY 25 2012

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

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

CV 12 80124 Case No.

LHK
MISC

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 GONZALO
ULLOA 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 GONZALO ULLOA IN SUPPORT OF
APPLE'S EX PARTE APPLICATION FOR SUBPOENA

1 I, Gonzalo Ulloa, an attorney admitted to practice in Spain, declare as follows:
2 1. I am a member (partner) of Gomez-Acebo & Pombo Abogados S.L.P, counsel to
3 Apple Inc.
4 2. I am familiar with the facts set forth in this declaration from personal knowledge
5 and documents I have reviewed.
6 3. I submit this declaration in support of Apple's Ex Parte Application for an Order
7 Pursuant to 28 U.S.C. § 1782 Granting Leave for Discovery for Use In Foreign Proceedings. The
8 application relates to foreign proceedings in Spain before the Community Designs Court in
9 Alicante, in Korea, and in Germany.
10 4. I have filed on Apple's behalf a counterclaim in Case No. 755/2011-C, *Samsung*
11 *Electronics Co., Ltd et al. v. Apple Inc.* in the Community Designs Court in Alicante, Spain.
12 Samsung filed the case on September 8, 2011, and I filed Apple's counterclaim on February 27,
13 2012. Apple's counterclaim alleges that four Samsung tablets, the Galaxy Tab 7.7, Galaxy Tab
14 8.9, Tab 10.1, and Galaxy Tab 10.1N, infringe four of Apple's Registered Community Designs:
15 CDR 181607-1, CDR 1888454-0013, CDR 1888454-0001 and CDR 1222905-0002. The case
16 also alleges unfair competition under the Unfair Competition Act.
17 **Relevant Aspects of Spanish Law**
18 5. In the Spanish proceedings, Apple has alleged two specific acts of unfair
19 competition: acts of imitation (based on association and on undue exploitation of Apple's
20 reputation) and acts of interference ("obstaculización") (based on the dilution and erosion of the
21 singularity and uniqueness of Apple's iPad).
22 6. In order to prove an unfair competition claim based on acts of imitation (under
23 Article 11(2) of the Unfair Competition Act), the plaintiff has to show that the defendant has
24 committed at least one of the grounds of imitation set forth in Article 11(2). One such ground is
25 "imitation sufficient to generate the association on the part of the consumers with regard to the
26 provision." To establish this ground of imitation, the plaintiff must prove three elements: (i) the
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1 existence of an act of imitation (copying) of the third party's commercial provision¹; (ii) the
2 existence of competitive merit² in the imitated material creation; and (iii) the appropriateness of
3 the imitation (copying) to generate the existence of an avoidable risk of association for the
4 consumers with regard to the imitated feature. Alternatively, the plaintiff can prove that the
5 defendant's behaviour constitutes "undue exploitation of the claimant's reputation."

6 7. In order to prove an unfair competition claim based on acts of interference (under
7 Article 4 of the Unfair Competition Act), the plaintiff has to show that the defendant has
8 committed behaviour which is "objectively contrary to the requirements of good faith." Among
9 the acts which are deemed to be contrary to the requirements of good faith are "those acts that,
10 without having an objective justification, negatively affect the competitive position of a third
11 party, and in particular, decrease or have the potential to decrease the value and merit of those
12 elements to which [the plaintiff's competitive] position is linked . . . or have the potential to
13 create an advantage for those who perform them." Massaguer Fuentes "Comentario a la Ley de
14 Competencia Desleal", Published by Civitas, Madrid 1999, p. 156.

15 8. While the direct comparison of the conflicting products is the most basic way for a
16 judge to assess whether an imitation exists, other supplementary pieces of evidence—such as
17 internal documents from the alleged infringer understood that the IP rights-holder's designs and
18 features were important to consumers and that the alleged infringer had considered the IP rights-
19 holder's products in creating their own—can be very persuasive evidence of copying. Similarly,
20 evidence that Samsung has taken inconsistent positions in different litigations or intentionally
21 copied Apple's distinctive features may be highly probative.

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24 ¹ The concept of "commercial provision" includes the products, services, marketing campaigns
25 and other business initiatives (see Supreme Court judgment of 8 October 2007, Law Report
26 2007/5140, and GARCÍA PÉREZ, RAFAEL, Professor of Commercial Law, "Unfair Competition
27 Law", Publisher: Aranzadi, 2008, page 270).

28 ² For these purposes, the imitated product must have "competitive singularity" and enjoy
"sufficient establishment or implementation in circulation" (see the judgment handed down by the
Barcelona Provincial Appellate Court, Section 15, of 11 June 2007 (AC 2007/1575).

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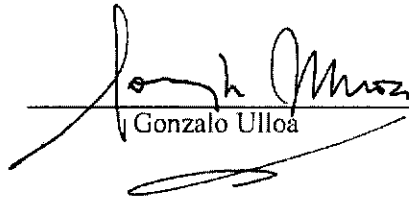
9. American-style discovery is not available under Spanish law. Article 328 of the Spanish Civil procedural law (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil) regulates litigants' access to documents owned or held by the opposing party. Spanish civil procedural law does not allow access to categories of documents, but only to a specific document or set of documents which refer to the subject-matter of the lawsuit and are not at the disposal of the applicant.

10. To protect confidential information the parties may either enter into a confidentiality agreement or request a protective order to be rendered by a Judge. Spanish law allows the parties to a description of the reserved confidential information. See Articles 42 of the TRIPS agreement, Articles 138 (2) and 140(3) of the Spanish Civil procedural law (Ley 1/2000, de 7 de enero, de Enjuiciamiento Civil) and Article 232 of the Constitutional Act on the Judiciary (Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial)

11. Apple requested the declaration of confidentiality of some paragraphs of declarations submitted in support of its counterclaims in Spain.

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

Dated: 25th May, 2012



Gonzalo Ulloa