

1 the Court ordered Apple to post a bond in the amount of \$95,637,141.60 to secure payment of any
2 damages sustained by Samsung if it is later found to have been wrongfully enjoined.¹

3 On July 1, 2012, Samsung filed a Notice of Appeal of the preliminary injunction order to
4 the Federal Circuit. *See* ECF No. 218. Also on July 1, 2012, Samsung filed a Motion to Stay and
5 Suspend the June 29, 2012 Preliminary Injunction Pending Appeal or, Alternatively, Pending
6 Decision by Federal Circuit on Stay Pending Appeal (“Motion to Stay”). *See* ECF No. 219
7 (“Mot.”). Later that day, Apple filed an Opposition to Samsung’s Motion to Stay. *See* ECF No.
8 220 (“Opp’n”). The Court held a hearing on Samsung’s Motion to Stay on July 2, 2012. Having
9 considered the parties’ arguments and the relevant law, the Court hereby DENIES Samsung’s
10 Motion to Stay.

11 I. LEGAL STANDARD

12 Both the court of appeals and the district court have authority to stay an order pending
13 review on appeal, as a function of its “traditional equipment for the administration of justice.”
14 *Nken v. Holder*, 556 U.S. 418, 427 (2009) (quoting *Scripps-Howard Radio v. F.C.C.*, 316 U.S. 4,
15 9-10 (1942)); *see* Fed. R. Civ. P. 62(c) (district court); Fed. R. App. P. 8(a) (appellate court).
16 While the district court has the authority to hold an order in abeyance pending review, “[a] stay is
17 an ‘intrusion into the ordinary processes of administration and judicial review,’ and accordingly ‘is
18 not a matter of right, even if irreparable injury might otherwise result to the appellant.’” *Nken*, 556
19 U.S. at 427 (quoting *Virginia Petroleum Jobbers Ass’n v. Fed. Power Comm’n*, 259 F.2d 921, 925
20 (D.C. Cir. 1958) (per curiam), and *Virginian R. Co. v. United States*, 272 U.S. 658, 672 (1926),
21 respectively).

22 The standard for determining whether to grant a stay pending appeal is similar to the
23 standard for issuing a preliminary injunction. *Tribal Vill. of Akutan v. Hodel*, 859 F.2d 662, 663
24 (9th Cir. 1988); *see Winter v. Natural Res. Def. Council*, 555 U.S. 7, 20 (2008) (laying out four-
25 pronged test for preliminary injunctive relief). For both the appellate court and the district court,

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27 ¹ On June 29, 2012, the Court ordered Apple not to post the bond before July 3, 2012, so the parties
28 could brief a motion to stay, and the Court could hold a hearing on July 2, 2012. At the July 2,
2012 hearing, the Court ordered Apple not to post the bond before the Court ruled on Samsung’s
Motion to Stay.

1 “the factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant
2 has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will
3 be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the
4 other parties interested in the proceeding; and (4) where the public interest lies.” *Hilton v.*
5 *Braunskill*, 481 U.S. 770, 776 (1987); *accord Nken*, 556 U.S. at 425-26; *Humane Soc’y of U.S. v.*
6 *Gutierrez*, 558 F.3d 896, 896 (9th Cir. 2009). Generally speaking, the first two factors of this
7 standard “are the most critical.” *Nken*, 556 U.S. at 434. “It is not enough that the chance of
8 success on the merits be ‘better than negligible.’” *Id.* (quoting *Sofinet v. INS*, 188 F.3d 703, 707
9 (7th Cir. 1999)). “By the same token, simply showing some ‘possibility of irreparable injury’ fails
10 to satisfy the second factor.” *Id.* (quoting *Abbassi v. INS*, 143 F.3d 513, 514 (9th Cir. 1998)).

11 The court need not, however, give equal weight to each of the four factors. *Standard*
12 *Havens Prods. v. Gencor Indus.*, 897 F.2d 511, 512 (Fed. Cir. 1990). Although the Supreme Court
13 has not spoken definitively on the matter, the Ninth Circuit has held that the “sliding scale,” or
14 “serious questions,” approach to deciding motions for preliminary injunction and motions for stay
15 survived *Winter*. See *Leiva-Perez v. Holder*, 640 F.3d 962, 965 (9th Cir. 2011) (treating “*Nken*’s
16 endorsement of *Hilton* as an indication that we should continue to employ the type of ‘continuum’”
17 approach to stay motions, wherein “courts balance the various stay factors once they are
18 established”); *Alliance for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1134-35 (9th Cir. 2011)
19 (holding that the “serious questions” sliding-scale approach for preliminary injunctions survives
20 *Winter v. Natural Resources Defense Council*, 555 U.S. 7 (2008)). Under the Ninth Circuit’s
21 “serious questions” test, a movant seeking a stay “must show that irreparable harm is probable and
22 either: (a) a strong likelihood of success on the merits and that the public interest does not weigh
23 heavily against a stay; or (b) a substantial case on the merits and that the balance of hardships tips
24 sharply in the [movant]’s favor.” *Leiva-Perez*, 640 F.3d at 970; *cf. Alliance for the Wild Rockies*,
25 632 F.3d at 1134-35. Ultimately, whether to grant a stay of a preliminary injunction pending
26 appeal is a matter of equitable discretion, and “[t]he propriety of its issue is dependent upon the
27 circumstances of the particular case.” *Nken*, 556 U.S. at 433 (quoting *Virginian R. Co.*, 272 U.S. at
28

1 672-73). “The party requesting a stay bears the burden of showing that the circumstances justify
2 an exercise of [the court’s] discretion.” *Id.* (citations omitted).

3 II. ANALYSIS

4 A. Likelihood of Success on Appeal

5 Samsung argues that a stay should issue pending the Federal Circuit’s ruling on appeal
6 because Samsung has a strong likelihood of success on the merits of its appeal, which at least raises
7 substantial questions. Having reviewed the parties’ briefs and the Court’s preliminary injunction
8 order, the Court is not convinced that Samsung has met its burden of showing a likelihood of
9 success or substantial questions on appeal.

10 1. Infringement of the ’604 Patent

11 Samsung argues that it is likely to establish on appeal that the Galaxy Nexus does not
12 infringe the ’604 Patent for three reasons: (1) there is at least a substantial issue regarding claim
13 construction of the “each” limitation; (2) “People” and “Browser” are not infringing modules under
14 the Court’s construction; and (3) the Court’s infringement finding reads out the claim limitation of
15 “locating information in a network.”

16 Samsung’s first argument is without merit. In construing the claim term “each” in claim 6
17 of the ’604 Patent, the Court carefully considered the claim language, specification, available
18 prosecution history evidence, and the relevant Federal Circuit case law cited by both parties. In the
19 absence of prosecution history evidence contradicting the plain and ordinary meaning of the claim
20 term “each,” as used to modify the claim term “plurality of heuristic modules,” *ResQNet.com, Inc.*
21 *v. Lansa, Inc.*, 346 F.3d 1374, 1382 (Fed. Cir. 2003), is directly on point. As discussed in the PI
22 Order, the two cases on which Samsung relies, *In re Skvorecz*, 580 F.3d 1262 (Fed. Cir. 2009), and
23 *Board of Regents v. BENQ America Corp.*, 533 F.3d 1362 (Fed. Cir. 2008), are readily
24 distinguishable. Samsung has failed to raise a substantial question of law regarding the Court’s
25 claim construction as would warrant issuance of a stay.

26 Nor is the Court persuaded by Samsung’s second non-infringement argument that the
27 “People” and “Browser” modules are not heuristic modules under the Court’s construction of
28 “modules” for purposes of distinguishing the WAIS reference. In analyzing the WAIS system, the

1 Court explained that WAIS failed to disclose the “plurality of heuristic modules” limitation
 2 because “[m]odules are small software programs that are parts of a larger application,’ meaning
 3 they ‘must be part of the application and not some service or server to which the application
 4 connects.’” PI Order at 26 (quoting Polish Reply Decl.² ¶ 73). The Court referred to the ’604
 5 Patent’s specification, which states that “if a search engine is designed for use on the Internet to
 6 locate particular types of web pages, a plug-in module can also be designed to access that search
 7 engine and return results to the information retrieval manager.” ’604 Patent 7:31-35; *see also id.* at
 8 4:22-23. Thus, the specification makes clear that a module accessing or employing a remote
 9 Internet search engine must be a software application residing locally on the apparatus. Applying
 10 that understanding of the ’604 Patent to WAIS, the Court found that WAIS does not employ
 11 different modules to interact with the remote database servers, but rather works by sending an
 12 identical query to each remote database server, and thus does not disclose the “plurality of heuristic
 13 modules” limitation.

14 Samsung asserts, without citation to evidence or law, that “[t]he Quick Search Box works
 15 exactly the same way as WAIS,” arguing that “[i]f the WAIS servers are not ‘modules,’ then
 16 neither are People and Browser.” Mot. at 6. The evidence speaks to the contrary. The People and
 17 Browser functions of Android’s Ice Cream Sandwich are relatively simple programs that search
 18 small, locally stored databases and provide ordered results. The specification contemplates that
 19 such simple programs used for local searches are “modules.” *See* ’604 Patent 4:15-17 (“one
 20 module 22₁ may search the names of files stored on the local storage media 12 and the LAN
 21 storage volumes 8, to find those which match the user input”); *id.* at 4:17-19 (“A second module
 22 22₂ may index and search the contents of files on the local and/or network storage volumes”); *id.* at
 23 4:19-21 (“A third module 22₃ can maintain a list of the files, applications and web sites which were
 24 most recently accessed, and search this list for a match.”). Thus, the Court is not persuaded that its
 25 finding of infringement based on the People and Browser modules is inconsistent with the ground
 26 on which it distinguished WAIS as an allegedly anticipatory reference.

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 28 ² Unless otherwise indicated, all short-form citations to the record conform to the same short-form
 record citations used in the PI Order.

1 Moreover, although Samsung asserts that WAIS is an anticipatory reference, it has failed to
2 produce a single written document for WAIS that discloses all the limitations of claim 6. As
3 described in the PI Order, while the record contains prior art references describing the WAIS
4 system, each of these references fails to disclose at least one limitation of claim 6, and thus none of
5 these references individually anticipates the invention described in the '604 Patent. *Overview of*
6 *Wide Area Information Servers*, for instance, fails to disclose “a display module configured to
7 display one or more candidate items of information located by the plurality of heuristic modules on
8 the display device.” '604 Patent 8:39-41; *see* Carbonell Decl. Ex. GG. *WAIS, A Sketch Of An*
9 *Overview* fails to disclose heuristic algorithms. *See* Carbonell Decl. Ex. HH. *The Enhanced*
10 *freeWAIS distribution, Edition 0.5, for freeWAIS-sf 2.0*, which provides documentation for
11 developers of WAIS-compatible database servers, fails to disclose the display or interface modules
12 required by claim 6. *See* Carbonell Decl. Ex. JJ. *The MacWAIS User Manual* fails to disclose
13 heuristic algorithms. *See* Carbonell Decl. Ex. KK. Because none of these references individually
14 anticipates claim 6, Samsung relies on a technology historian, Lyle Bickley, who reconstructed a
15 WAIS system for purposes of this litigation. *See generally* Bickley Decl. Mr. Bickley's
16 reconstruction was based on the descriptions in the cited documentation, code that he himself wrote
17 for the reconstruction, and software programs released in 1994 and 1999, respectively. *See id.* ¶ 4
18 (“I also installed freeWAIS-SF version 2.2.12, released on April 16, 1999”); *id.* ¶ 6 (“I built and
19 indexed two searchable text databases”); *id.* ¶ 7 (“I generated a custom synonym file”); *id.* ¶ 8 (“I
20 generated a much smaller test database”); *id.* ¶ 9 (“I installed a WAIS client . . . released October 7,
21 1994”). There is no evidence that the software programs and code used by Mr. Bickley were in
22 existence at the same time or that they were combined in a single apparatus. Mr. Bickley's post-
23 hoc, reconstructed interpretation of how a WAIS system *might* have been constructed does not
24 constitute prior art for purposes of anticipation. Accordingly, because Samsung has failed to
25 adduce a single anticipatory prior art reference, and Samsung has not put forth an obviousness
26 argument with regard to claim 6, Samsung has not raised a substantial question of invalidity based
27 on the WAIS reference. *See generally* Opp'n to Mot. for Prelim. Inj. (“PI Opp'n”) at 10-11. This
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1 obviates the need to differentiate WAIS on the basis of “modules,” further demonstrating that
2 Samsung is unlikely to prevail in its challenge on appeal.

3 Third, Samsung argues that because neither the People nor the Browser module searches
4 data stored remotely, the Quick Search Box does not meet the claim limitation requiring “locating
5 information in a network.” The preamble of claim 6 reads: “An apparatus for locating information
6 in a network, comprising:” ’604 Patent 8:26-27. “Whether to treat a preamble term as a claim
7 limitation is ‘determined on the facts of each case in light of the claim as a whole and the invention
8 described in the patent.’” *Am. Med. Sys., Inc. v. Biolitec, Inc.*, 618 F.3d 1354, 1358 (Fed. Cir.
9 2010) (quoting *Storage Tech. Corp. v. Cisco Sys., Inc.*, 329 F.3d 823, 831 (Fed. Cir. 2003)).
10 “‘Generally, . . . the preamble does not limit the claims.’” *Id.* (quoting *Allen Eng’g Corp. v. Bartell*
11 *Indus., Inc.*, 299 F.3d 1336, 1346 (Fed. Cir. 2002)). Although “a preamble limits the invention if it
12 recites essential structure or steps, or if it is necessary to give life, meaning, and vitality to the
13 claim . . . a preamble is not limiting where a patentee defines a structurally complete invention in
14 the claim body and uses the preamble only to state a purpose or intended use for the invention.”
15 *Catalina Mktg. Int’l, Inc. v. Coolsavings.com, Inc.*, 289 F.3d 801, 808 (Fed. Cir. 2002) (internal
16 quotation marks and citations omitted).

17 In claim 6 of the ’604 Patent, the phrase “locating information in a network” is simply a
18 description of the intended use of the patented apparatus. The phrase does not recite any essential
19 structure and is not necessary to breathe life or vitality into claim 6. Indeed, neither party felt the
20 need to construe “locating information in a network.”³ Thus, the Court determines that “locating
21 information in a network” does not limit claim 6. Furthermore, even if the Court were to accept
22 Samsung’s argument that the preamble is an affirmative limitation requiring that the claimed
23 apparatus search at least one remote source of data, the Quick Search Box would still be infringing.
24 There is no dispute that the Google Search Suggestion module searches the Internet by connecting
25 to a remote Google server. There is also no requirement in claim 6 that the plurality of heuristic
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27 ³ Samsung’s expert’s only argument regarding this preamble phrase was that it supported
28 Samsung’s proposed construction of “storage media accessible by the apparatus” as being not
limited to local storage media. See Carbonell Decl. ¶¶ 87-95.

1 modules perform a search of the network. Thus, even absent proof that the Google module
2 searches using a heuristic algorithm, the Quick Search Box would still meet any limitation
3 requiring “locating information in a network.” Samsung’s preamble argument therefore does not
4 change the Court’s finding of likely infringement based on the People and Browser modules
5 searching locally.

6 In sum, the Court is not persuaded that Samsung has raised any substantial questions
7 concerning infringement or that Samsung has shown a likelihood of success on non-infringement
8 on appeal.

9 2. Validity of the ’604 Patent

10 Samsung argues that it is likely to establish on appeal that the ’604 Patent is invalid as
11 anticipated by U.S. Patent No. 6,324,534 to Neal (“Neal”). Samsung raised only two references in
12 its brief in opposition to Apple’s motion for preliminary injunction: WAIS and Legall. *See* PI
13 Opp’n at 10-11. Although Samsung’s expert, Dr. Jaime Carbonell, opined on the Neal prior art
14 reference in his declaration in support of Samsung’s opposition to Apple’s motion for preliminary
15 injunction, Samsung in its opposition brief neither mentioned Neal nor cited to the portions of Dr.
16 Carbonell’s declaration discussing the Neal reference, and therefore the Court deemed any
17 invalidity argument with respect to the Neal reference waived.⁴ The Court set strict briefing limits
18 on the preliminary injunction motion, allowing Apple’s opening brief and Samsung’s opposition
19 brief each to exceed the page limit set in Civil Local Rule 7-2(b) by eight pages. *See* ECF No. 38.
20 Expert declarations are to serve as evidence in support of arguments raised in a party’s brief, not as
21 means for circumventing briefing page limits. The Court took at face value Samsung’s decision
22 not to argue the Neal reference in its opposition brief and does not look favorably upon Samsung’s
23 endeavor now to re-litigate the merits of the ’604 Patent’s validity based on what is effectively new
24 prior art. Because the Federal Circuit is unlikely to consider a prior art reference for the first time
25 on appeal, the Court is doubtful that Samsung can show a likelihood of success on appeal based on

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27 ⁴ Dr. Carbonell also discussed a fourth prior art reference with respect to the ’604 Patent,
28 “MetaCrawler,” *see* Carbonell Decl. ¶¶ 174-184, but Samsung did not cite the MetaCrawler
reference in its opposition brief, and thus the Court deemed the argument waived. Samsung does
not now cite MetaCrawler as a basis for its Motion to Stay.

1 the Neal reference. *See In re Brimonidine Patent Litig.*, 643 F.3d 1366, 1373 (Fed. Cir. 2011) (no
2 clear error where defendant failed to call district court’s attention to evidence on which defendant
3 later relied on appeal); *H.H. Robertson, Co. v. United Steel Deck, Inc.*, 820 F.2d 384, 389 (Fed. Cir.
4 1987) (“[Defendants] argue that because this reference had first been offered to the district court it
5 is not in fact presented for the first time on appeal. But this reference, although placed in the
6 record by the district court, was not the subject of testimony or any other form of evaluation by that
7 court. Initial consideration of evidence is not the appellate role.”).

8 In any event, upon review of the Neal reference itself, Samsung’s and Apple’s expert
9 declarations, and the parties’ Stay briefs, the Court determines that Samsung is unlikely to prove by
10 clear and convincing evidence at trial that the Neal reference anticipates claim 6 of the ’604 Patent.
11 At trial, Samsung would have the burden of proving invalidity by “clear and convincing evidence.”
12 35 U.S.C. § 282; *Enzo Biochem, Inc. v. Gen-Probe Inc.*, 424 F.3d 1276, 1281 (Fed. Cir. 2005)
13 (citation omitted). Samsung’s expert testified during his deposition that Neal Figure 2 depicts the
14 use of multiple algorithms. Polish Reply Decl. Ex. 2 [Carbonell Dep.] at 242:14-243:7.
15 Samsung’s expert contends that this explicit disclosure of multiple algorithms would also disclose
16 the use of multiple “modules” to a person having ordinary skill in the art. Carbonell Decl. ¶ 167;
17 Polish Reply Decl. Ex. 2 at 241:3-15, 242:14-244:18. Apple’s expert disagrees, explaining that
18 multiple algorithms can be implemented in a single module and that the Neal reference therefore
19 would not disclose the use of multiple modules to a person having ordinary skill in the art. *See*
20 Polish Reply Decl. ¶¶ 86-87. In the face of the presumption of validity that the ’604 Patent enjoys,
21 these directly competing expert declarations, the absence of any other evidence in support of
22 anticipation, and the burdens that would inhere at trial, the Court concludes that Samsung has not
23 raised a substantial question of invalidity based on the Neal reference. Accordingly, the Court is
24 not persuaded that Samsung has raised a substantial question or shown a likelihood of prevailing
25 on the merits of its invalidity arguments on appeal.

26 3. Irreparable Harm Attributable to Infringement of the ’604 Patent

27 Samsung also argues that it is likely to succeed on appeal because: (1) the Court’s finding
28 that Apple will suffer irreparable harm was based on legally insufficient evidence that Samsung

1 and Apple are competitors; (2) the Court’s Order is inconsistent with the Federal Circuit’s directive
2 that market share losses must be substantial; and (3) the Court’s causation finding as to the ’604
3 Patent was erroneous, or at a minimum raises substantial questions. In particular, Samsung argues
4 that Apple has not presented any evidence that any Galaxy Nexus customers would have purchased
5 a different phone, let alone an iPhone, if the Galaxy Nexus omitted the Quick Search Box. Mot. at
6 4. Furthermore, in light of the Galaxy Nexus’s meager sales figures, any such loss in sales would
7 be only a miniscule fraction of the entire smartphone market and would fall far short of
8 demonstrating loss of “substantial” market share.

9 The Court disagrees with Samsung’s contention that the Court erroneously applied the legal
10 standards governing a finding of irreparable harm. Admittedly, Apple has not come forward with
11 direct evidence that specific Galaxy Nexus customers would have purchased an iPhone but for the
12 Quick Search Box feature on the allegedly infringing Samsung device. But the Federal Circuit has
13 not required proof of specific lost customers. *See i4i Ltd. P’ship v. Microsoft Corp.*, 598 F.3d 831,
14 862 (Fed. Cir. 2010). Samsung also argues that, unlike the typical plaintiff claiming irreparable
15 harm, Apple’s iPhone has continued to perform well in the market, and Apple’s U.S. and
16 worldwide market shares have even continued to grow since the release of the Galaxy Nexus,
17 perhaps because the iPhone 4S was also released around the same time as the Galaxy Nexus.⁵ *See*
18 *Vellturo Reply Decl.* Figs. 2 & 3; *see id.* Ex. 19 at 1; *Wagner Decl.* Figs. 2 & 3. That Apple does
19 not face catastrophic harm, however, does not foreclose a finding of irreparable harm. The Court
20 considered and weighed Samsung’s evidence alongside Apple’s evidence, viewing the totality of
21 the evidence in context. The record contains evidence that, while Apple’s U.S. market share in unit
22 shipments may have continued to grow from the third to fourth quarters of 2011, even after release
23 of the Galaxy Nexus on December 15, 2011, Apple’s U.S. market share fell by several percentage
24 points in the first quarter of 2012 – i.e., the three months after the Galaxy Nexus was released –
25 while Samsung’s U.S. market share grew by roughly the same percentage points. *See Vellturo*
26 *Reply Decl.* Fig. 3. The record also contains evidence that, while Apple’s worldwide market share

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28 ⁵ The iPhone 4S was released in the U.S. on October 14, 2011. The Galaxy Nexus was released in
the U.S. on December 15, 2011. *See Wagner Decl.* Fig. 2.

1 in unit shipments may have grown from 18.6% in the first quarter of 2011 to 24.2% in the first
 2 quarter of 2012, Samsung's worldwide market share in unit shipments grew even more
 3 dramatically during that time period, rising from 11.3% in the first quarter of 2011 to 29.1% in the
 4 first quarter of 2012. Velturo Reply Decl. Ex. 19. This market share data must be viewed
 5 alongside Samsung's own internal strategic documents, which reveal that a centerpiece of
 6 Samsung's business strategy is to "[redacted]," which [redacted]
 7 [redacted], and which [redacted]
 8 [redacted]. See Velturo Reply Decl. Ex. 44; *id.* Ex. 35 at
 9 SAMNDCA00258729, *697; *id.* Ex. 53 at S-ITC-500047403; *id.* Ex. 57 at S-ITC-500057724. In
 10 short, the Court did not rely on a lone, unsubstantiated assertion that Apple and Samsung are direct
 11 competitors. Rather, viewing the record as a whole, the Court found that Apple had shown a clear
 12 likelihood that Samsung has and will continue to take market share from Apple, and moreover that
 13 it is doing so with a product that likely infringes four of Apple's likely valid patents.

14 The Court was further persuaded by the evidence in the record that Apple's risk of lost
 15 market share and loss of downstream purchases to Samsung would be substantial and difficult to
 16 calculate. The evidence reviewed by the Court establishes that Samsung's Galaxy line of phones
 17 competes head to head with the iPhone for first-time smartphone buyers during this critical
 18 juncture in the market. Both neutral, third-party industry observers and Samsung predict that most
 19 U.S. consumers who have not yet switched from a feature phone to a smartphone will do so in the
 20 next twelve to twenty-four months. See, e.g., Velturo Decl. ¶¶ 18-19 & Attach. D; *id.* Ex. 33 at 1;
 21 Velturo Reply Decl. Exs. 35, 40. The evidence in the record supports a finding that both Apple
 22 and Samsung view first-time purchasers as critical to the race to capture market share because
 23 consumers are more likely to "stick" with the same operating system, both in making future
 24 smartphone purchases, and in making downstream purchases, such as apps, downloads, and tablets.
 25 Because this case is not scheduled to go to trial until March 31, 2014, see ECF No. 160, injunctive
 26 relief obtained after trial would be too late. Furthermore, unlike many of the cases cited by
 27 Samsung, there is no evidence here that Apple has ever shown willingness to license the '604
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1 Patent to a competitor in the smartphone market.⁶ Nor is there evidence that Apple unduly delayed
 2 in bringing suit to enforce and to enjoin Samsung's infringement of the '604 Patent. The Galaxy
 3 Nexus was not released in the U.S. until December 15, 2011, and the '604 Patent did not issue until
 4 December 27, 2011. Apple filed this action and its preliminary injunction motion on February 8,
 5 2012, just over six weeks from the '604 Patent's issuance, and just under eight weeks of the Galaxy
 6 Nexus's launch in the U.S. market. This is not evidence of unreasonable delay.

7 Finally, the Court found sufficient evidence in the record of demand for the '604 Patented
 8 feature in particular, both in the form of consumer demand for the Siri feature on the iPhone, and in
 9 the form of Android developer documents and third-party reviews touting the Quick Search Box
 10 for its unified search functionality. *See, e.g.*, Polish Reply Decl. Ex. 1 at 1; Vellturo Reply Decl.
 11 Ex. 10 at 2 (third-party review observing that Quick Search Box "adds a whole new layer of
 12 functionality" that helps Android phones "win new customers, even ones with iPhones"). Viewing
 13 the record as a whole, the Court was persuaded that Apple had shown the requisite causal nexus
 14 between Samsung's alleged infringement of the '604 Patent and Apple's alleged irreparable harm.
 15 *See* PI Order at 96. On this record, the Court is not convinced that Samsung has a strong likelihood
 16 of success on appeal.⁷

17 ⁶ Samsung's sole evidence of Apple's willingness to license the '604 Patent is Apple's [REDACTED]
 18 [REDACTED]
 19 [REDACTED] Furthermore, this [REDACTED] predates the application date and
 20 issuance of the '604 Patent, as well as predates the issuance of the parent to the '604 Patent, U.S.
 21 Patent No. 6,847,959 ("the '959 Patent"). The '604 Patent did not issue until December 27, 2011,
 22 and the '959 Patent did not issue until January 25, 2005. The Court notes that in its PI Order, it
 23 inadvertently cited to the wrong exhibit, citing to a [REDACTED]
 24 [REDACTED], *see* Posner Decl. Ex. S, rather than the relevant [REDACTED].
 25 *See* PI Order at 95. The misstatement in the Court's PI
 26 Order does not in any way affect the Court's analysis.

27 ⁷ Because of the highly individualized nature of preliminary injunctive relief, the cases on which
 28 Samsung relies, both in its PI Opposition and its Motion for Stay, are distinguishable. For
 29 example, *Abbott Labs. v. Andrx Pharms., Inc.*, 452 F.3d 1331, 1348 (Fed. Cir. 2006), held simply
 30 that "where a patentee has not shown a likelihood of success on the merits, and where the patentee
 31 has not clearly established that monetary damages could not suffice but the defendant has not
 32 established that monetary damages do suffice, we cannot say that the irreparable harm prong of the
 33 analysis favors either party." *Abbott Labs.*, 452 F.3d at 1348. Two major differences render
 34 *Illinois Tool Works, Inc. v. Grip-Pak, Inc.*, 906 F.2d 679, 682-83 (Fed. Cir. 1990), distinguishable.
 35 There, the patentee had *not* shown a likelihood of success on the merits, and the district court

1 Samsung argues that, even if it has not shown a strong likelihood of success on appeal, it
 2 has raised at a minimum “substantial questions” regarding the Court’s application of the irreparable
 3 harm standard. The Court fully acknowledges that the precise irreparable harm showing required
 4 to obtain an injunction in a patent case has been less than crystal clear in the years since *eBay Inc.*
 5 *v. MercExchange, L.L.C.*, 547 U.S. 388 (2006). Although *eBay* was decided in 2006 and
 6 seemingly buried the “presumption” of irreparable harm that historically inhered to any patentee
 7 who established a likelihood of success on the merits of infringement and validity, it has taken
 8 some time for the lower courts handling patent disputes to sort out the full ramifications of this
 9 tectonic shift in the basic framework for awarding injunctive relief. Not until October 2011, in
 10 fact, did the Federal Circuit definitively proclaim dead the presumption of irreparable harm in the
 11 context of injunctive relief. *See Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1149 (Fed.
 12 Cir. 2011). However, even in *Robert Bosch*, the Federal Circuit expressed reluctance to eschew a
 13 long tradition of presumptive irreparable harm in patent cases:

14 [E]ven though a successful patent infringement plaintiff can no longer rely on
 15 presumptions or other short-cuts to support a request for a permanent injunction, it
 16 does not follow that courts should entirely ignore the fundamental nature of patents
 17 as property rights granting the owner the right to exclude. Indeed, this right has its
 18 roots in the Constitution, as the Intellectual Property Clause of the Constitution
 19 itself refers to inventors’ “*exclusive* Right to their respective . . . Discoveries.” U.S.
 20 Const. art. I § 8, cl. 8 (emphasis added). Although the Supreme Court disapproved
 21 of this court’s absolute reliance on the patentee’s right to exclude as a basis for our
 22 prior rule favoring injunctions, that does not mean that the nature of patent rights
 23 has no place in the appropriate equitable analysis. While the patentee’s right to
 24 exclude alone cannot justify an injunction, it should not be ignored either.

25 The abolition of categorical rules and the district court's inherent discretion to
 26 fashion equitable relief, moreover, also do not mandate that district courts must act
 27 on a clean slate. “Discretion is not whim, and limiting discretion according to legal
 28 standards helps promote the basic principle of justice that like cases should be

24 further found that the patent holder had already licensed its patent to another company,
 25 undermining its claim that monetary damages could not adequately compensate for any alleged
 26 infringement. *See also Generac Power Sys., Inc. v. Kohler Co.*, 807 F. Supp. 2d 791, 805 (E.D.
 27 Wis. 2011) (no showing of likelihood of success on the merits, and no evidence of actual or future
 28 losses); *McDavid Knee Guard, Inc. v. Nike USA, Inc.*, 683 F. Supp. 2d 740, 749-50 (N.D. Ill. 2010)
 (no showing of likelihood of success on the merits, and no evidence of lost profits or lost market
 share beyond conclusory affidavits). Although *Automated Merchandising Sys., Inc. v. Crane Co.*,
 357 Fed. App’x 297 (Fed. Cir. 2009) (unpublished), seems to come closest to supporting
 Samsung’s position, it is an unpublished opinion.

1 decided alike.” *eBay*, 547 U.S. at 395, (Roberts, J., concurring). In this area, as
2 others, “a page of history is worth a volume of logic” when “it comes to discerning
and applying those standards.” *Id.* (quoting *New York Trust Co. v. Eisner*, 256 U.S.
3 345, 349 (1921) (Holmes, J.)).

4 *Id.* at 1149-50 (some internal citations omitted). The Federal Circuit went on to identify two
5 categories of cases, explaining that the teachings of history are “particularly apt” in the first
6 category of “traditional cases,” “where the patentee and adjudged infringer both practice the
7 patented technology,” but may be less so in “certain cases arising now,” which the Court will call
8 “non-traditional cases,” for lack of a better phrase. *Id.* at 1150. Such “non-traditional cases”
9 include: (1) cases ““in which firms use patents not as a basis for producing and selling goods but,
10 instead, primarily for obtaining licensing fees;” (2) “[w]hen the patented invention is but a small
11 component of the product;” and (3) “those involving ‘the burgeoning number of patents over
12 business methods.’” *Id.* (quoting *eBay*, 547 U.S. at 396-97 (Kennedy, J., concurring)). The
13 implication of *Robert Bosch* is that the patentee’s right to exclude weighs more heavily in a
“traditional case,” and less so in a “non-traditional case.”

14 The difficulty with the Federal Circuit’s categorization of cases, as illustrated by the facts
15 presented here, is that the so-called “traditional cases” and the “non-traditional cases” are not
16 mutually exclusive. As discussed in the Court’s PI order and above, the overwhelming evidence
17 establishes that Apple and Samsung are clearly direct competitors in the smartphone market, and
18 Apple has shown that both the Galaxy Nexus and the iPhone 4S likely incorporate the features
19 claimed by the ’604 Patent, albeit in different forms (the Google Quick Search Box on the Galaxy
20 Nexus, and Siri on the iPhone 4S). At the same time, however, the Court is not blind to the fact
21 that smartphones are extraordinarily complex consumer products, comprised of hundreds, if not
22 thousands, of discrete individual components. The Federal Circuit only recently announced a rule
23 that a patentee must show “some causal nexus” between the infringement and the alleged harm “as
24 part of the showing of irreparable harm.” *Apple v. Samsung*, 678 F.3d 1314, 1324 (Fed. Cir. 2012).
25 Under *Apple*, “a likelihood of irreparable harm cannot be shown if sales would be lost regardless of
26 the infringing conduct.” *Id.* The Federal Circuit was careful, however, not to require “customer
27 survey evidence or other proof of what Apple calls ‘consumer motivation’” as “a prerequisite to a
28

1 finding of irreparable harm.” *Id.* at 1324 n.3. There appears to remain an open question, not yet
2 addressed by the Federal Circuit, as to what kinds of proof apart from direct consumer survey
3 evidence may satisfy the requisite causal nexus showing.

4 In light of this open question and the fact that the Federal Circuit has only just recently
5 established a causal nexus requirement for preliminary injunctive relief, the Court appreciates why
6 Samsung believes it has raised “serious questions” going to the merits of the Court’s irreparable
7 harm nexus analysis. The questions raised here regarding the precise contours of the “causal
8 nexus” requirement for irreparable harm are important ones. Nonetheless, even assuming that
9 Samsung has raised “serious questions” on the merits of Apple’s irreparable harm claim, Samsung
10 has not established that the balance of hardships tips *sharply* in its favor, as discussed further
11 below. The Ninth Circuit’s “serious questions” sliding scale approach requires a showing of both
12 prongs. Thus, even under the “serious questions” standard, Samsung has not met its burden.

13 **B. Irreparable Injury and Balance of the Equities**

14 Even assuming Samsung has established “a substantial case on the merits,” or has raised
15 serious questions on the merits, the Court finds that Samsung has not shown that “the balance of
16 hardships tips *sharply* in [its] favor.” *Leiva-Perez*, 640 F.3d at 970 (emphasis added); *see Standard*
17 *Havens*, 897 F.2d at 513. Such a showing is met when the movant establishes that “without a stay
18 it is likely to suffer irreparable harm in the form of employee layoffs, immediate insolvency, and,
19 possibly, extinction.” *Standard Havens*, 897 F.2d at 515.

20 Samsung has not come close to making this showing of “catastrophic and irreparable” harm
21 in the absence of a stay. *Id.* at 516. Samsung argues that its business relationships, goodwill, and
22 reputation will be irreparably harmed by enjoining sales of the Galaxy Nexus. Samsung has
23 already committed to supply a certain number of Galaxy Nexus phones to third-party carriers and
24 retail vendors, and Samsung argues that enjoining sales of the Galaxy Nexus will “negatively
25 impact [Samsung’s] longstanding relationships and goodwill with vendors.” Decl. of Paul Chapple
26 (“Chapple Decl.”) ¶ 7. Samsung offers two examples in particular, both concerning “Back-to-
27 School” promotions featuring the Galaxy Nexus at a particular price point. *See id.* ¶¶ 4-5.
28 According to the declaration of Paul Chapple, Samsung’s Vice President of Sales, Samsung and its

1 business partners have already invested sunk costs in preparing for these promotions and will be
2 harmed if forced to reconfigure their promotional campaigns. *Id.*

3 As an initial matter, the Court notes that Samsung did not raise this argument or provide
4 any evidence that it would suffer hardship in the face of an injunction in opposing Apple's
5 preliminary injunction motion. In any event, the Court is not persuaded that this belated evidence
6 of potential harm to Samsung's business relationships in the absence of a stay outweighs the
7 likelihood of harm to Apple in the absence of an injunction. Both Samsung and its business
8 partners assumed the risk of facing disruptions to their business practices by building their
9 promotional schemes on a product that has been the subject of a pending preliminary injunction
10 motion since February 8, 2012. *See Windsurfing Int'l, Inc. v. AMF, Inc.*, 782 F.2d 995, 1003 n.12
11 (Fed. Cir. 1986) ("One who elects to build a business on a product found to infringe cannot be
12 heard to complain if an injunction against continuing infringement destroys the business so
13 elected."). While Samsung placed emphasis at the July 2, 2012 hearing on the unique harm it will
14 suffer in the coming weeks, as compared to Apple's ongoing irreparable harm, the harms identified
15 by Samsung in the coming weeks or months are no more than the expected harms that accompany
16 any enjoined business. Samsung has presented no evidence or argument of an extraordinary harm
17 that it will suffer in the absence of a stay, as was the case in *Standard Havens*.

18 In light of Samsung's weak showing of harm in the absence of a stay, compared with
19 Apple's clear showing of irreparable harm in the absence of an injunction, the Court concludes that
20 the balance of equities tips in Apple's favor. To the extent Samsung will be injured by its
21 exclusion from the two "Back-to-School" promotions that will be affected by the injunction, at the
22 July 2, 2012 hearing, Apple cited to compelling evidence (already in the record) that the
23 demographic target of those promotions is one of the key customer bases that forms the backbone
24 of Samsung's [REDACTED] campaign. Therefore, the Court finds that granting a stay and allowing
25 Samsung to proceed with those planned promotions would only exacerbate Apple's irreparable
26 harm. Furthermore, Samsung's very argument at the hearing that it would be irreparably harmed
27 by lost Galaxy Nexus sales to Apple, due to the strength of Apple's platform stickiness and brand
28 loyalty among its customers, undermines the position it has maintained during this litigation that

1 Galaxy Nexus customers are unlikely to buy Apple products in Samsung's stead. Samsung's
2 argument instead supports Apple's position that the Galaxy Nexus is taking sales away from
3 Apple.

4 Finally, while the Court acknowledges the damage incurred by Samsung if it later turns out
5 to have been wrongfully enjoined, this risk is precisely the rationale for requiring Apple to post a
6 bond of over \$95 million in order for the injunction to take effect. *See Costandi v. AAMCO*
7 *Automatic Transmissions, Inc.*, 456 F.2d 941, 943 (9th Cir. 1972); *CytoSport, Inc. v. Vital Pharms.,*
8 *Inc.*, 617 F. Supp. 2d 1051, 1085 (E.D. Cal. 2009). The Court set the bond at the amount of
9 Samsung's own estimated lost profits, which is exactly the amount of bond requested by Samsung.
10 *See* PI Order at 100. The bond provides protection to Samsung from the potential harm if the
11 injunction was wrongly issued. Thus, the Court finds that Samsung has not shown that it will
12 likely be irreparably harmed absent a stay, nor has it shown that the balance of equities tips sharply
13 in its favor.

14 C. Public Interest

15 Samsung argues that, “[i]f a stay is not granted, irreparable consequences will ripple
16 downstream from Samsung to vendors and customers who have formed plans and expectations
17 around the Galaxy Nexus.” Mot. at 9. In addition to disrupting third-parties’ businesses, as
18 discussed above, Samsung argues that enjoining sales of the Galaxy Nexus will harm certain
19 “techie” consumers who value the pure Android operating system offered in the Galaxy Nexus, and
20 who will be unable to find any close substitute within the same price point as the Galaxy Nexus.
21 Mot. at 9; Chapple Decl. ¶ 8. Finally, Samsung argues that “a temporary stay would protect the
22 public’s interest in orderly preservation of the status quo.” Mot. at 10.

23 As previously explained in the order granting the preliminary injunction, the balance of the
24 hardships and the public interest weigh in favor of the injunction. Samsung’s motion does not
25 change this analysis or convince the Court that the preliminary injunction should be stayed.
26 Although some consumers may be disappointed that they cannot purchase the Galaxy Nexus, the
27 Galaxy Nexus, as Samsung itself has repeatedly insisted, is not Samsung’s only smartphone
28 product on the market. In light of Apple’s strong showing of likely success on the merits, the

1 Court finds that the public interest here “is best served by enforcing patents that are likely valid and
2 infringed.” *Abbott Labs.*, 452 F.3d at 1348.

3 As explained above, Samsung has not shown a likelihood of success on the merits of its
4 appeal. Weighing the remaining equitable factors, the Court finds that a stay of the preliminary
5 injunction of the Galaxy Nexus would not lead to an equitable result. *See Standard Havens*, 897
6 F.2d at 513 (citations omitted) (The court “assesses movant’s chances for success on appeal and
7 weighs the equities as they affect the parties and the public.”).

8 **III. CONCLUSION**

9 For the foregoing reasons, Samsung’s Motion to Stay is DENIED.

10 **IT IS SO ORDERED.**

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12 Dated: July 3, 2012

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14 LUCY H. KOH
15 United States District Judge

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United States District Court
For the Northern District of California