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11  
12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14 SAN JOSE DIVISION  
15

16 APPLE INC., a California corporation,

17 Plaintiff,

18 v.

19 SAMSUNG ELECTRONICS CO., LTD., a  
20 Korean corporation; SAMSUNG  
ELECTRONICS AMERICA, INC., a New  
21 York corporation; and SAMSUNG  
TELECOMMUNICATIONS AMERICA,  
22 LLC, a Delaware limited liability company,

23 Defendants.  
24  
25  
26  
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28

Case No. 11-cv-01846-LHK

**APPLE'S OPPOSITION TO  
SAMSUNG'S MOTION FOR JMOL,  
NEW TRIAL, AND/OR  
REMITTITUR  
(FED. R. CIV. P. 50 & 59)**

Date: Dec. 6, 2012  
Time: 1:30 p.m.  
Place: Courtroom 4, 5th Floor  
Judge: Hon. Lucy H. Koh

**TABLE OF CONTENTS**

	<b>Page(s)</b>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
20	
21	
22	
23	
24	
25	
26	
27	
28	
	iii
	1
	1
	1
	2
	2
	3
	4
	4
	4
	4
	5
	6
	7
	7
	8
	9
	10
	10
	11
	13
	15
	16
	17
	18
	18

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF CONTENTS**  
(continued)

		<b>Page</b>
	2. The record supports the jury’s award of Apple’s lost profits.....	20
	3. The record supports the jury’s award of royalties.....	21
	D. Samsung’s “Incorrect Notice Date” Arguments Are Wrong.....	22
	E. Samsung Has Not Shown That It Is Entitled To Remittitur.....	24
	F. Samsung Has Not Accounted For The Stipulation And Order.....	25
VIII.	SAMSUNG IS NOT ENTITLED TO JMOL ON ITS OFFENSIVE CASE.....	25
	A. Substantial Evidence Supports The Jury’s Non-Infringement And Patent Exhaustion Findings For The ’516 And ’941 Patents.....	26
	B. Substantial Evidence Supports The Jury’s Non-Infringement Findings For The ’460, ’893, And ’711 Patents .....	28
IX.	SAMSUNG’S DELIBERATE TRIAL STRATEGY CANNOT IMPLICATE THE “INTERESTS OF JUSTICE” .....	30
	CONCLUSION .....	30

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>CASES</b>	
<i>Alpex Computer Corp. v. Nintendo Co.</i> , 102 F.3d 1214 (Fed Cir. 1997).....	27
<i>Apple Inc. v. Samsung Elecs. Co.</i> , 678 F.3d 1314 (Fed. Cir. 2012).....	6, 7
<i>Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.</i> , 457 F.3d 1062 (9th Cir. 2006).....	8
<i>B &amp; H Mfg. Co., Inc. v. Bright</i> , No. CVF01-6619, 2005 WL 1342815 (E.D. Cal. May 10, 2005).....	10
<i>Best Lock Corp. v. Ilco Unican Corp.</i> , 94 F.3d 1563 (Fed. Cir. 1996).....	6
<i>Braun, Inc. v. Dynamics Corp. of Am.</i> , 975 F.2d 815 (Fed. Cir. 1992).....	4
<i>Brocklesby v. United States</i> , 767 F.2d 1288 (9th Cir. 1985).....	24
<i>Burberry Ltd. v. Euro Moda, Inc.</i> , No. 08 Civ. 5781, 2009 WL 1675080 (S.D.N.Y. June 10, 2009).....	9
<i>Carbice Corp. v. Am. Patents Dev. Corp.</i> , 283 U.S. 27 (1931).....	19
<i>Cecco Mach. Mfg., Ltd. v. Intercole, Inc.</i> , 817 F. Supp. 979 (D. Mass. 1992) .....	23
<i>Chuy v. The Philadelphia Eagles Football Club</i> , 595 F.2d 1265 (3d Cir. 1979).....	17
<i>Clamp Mfg. Co. v. Enco Mfg. Co.</i> , 870 F.2d 512 (9th Cir. 1989).....	9
<i>Conoco, Inc. v. Energy &amp; Envtl. Int’l, L.C.</i> , 460 F.3d 1349 (Fed. Cir. 2006).....	6, 26
<i>Contessa Food Products, Inc. v. Conagra, Inc.</i> , 282 F.3d 1370 (Fed. Cir. 2002).....	5

**TABLE OF AUTHORITIES**

(continued)

	<b>Page</b>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
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17	
18	
19	
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23	
24	
25	
26	
27	
28	

**TABLE OF AUTHORITIES**

(continued)

	<b>Page</b>
1	
2	
3	
4	
5	
6	
7	
8	
9	
10	
11	
12	
13	
14	
15	
16	
17	
18	
19	
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21	
22	
23	
24	
25	
26	
27	
28	
	<i>In re First Alliance Mortgage Co.</i> , 471 F.3d 977 (9th Cir. 2006)..... <i>passim</i>
	<i>In re Geiger</i> , 57 C.C.P.A. 1073 (C.C.P.A. 1970) ..... 7
	<i>Inwood Labs., Inc. v. Ives Labs., Inc.</i> , 456 U.S. 844 (1982). (Mot. at 9 n.9.)..... 8
	<i>Junker v. HDC Corp.</i> , No. C-07-05094, 2008 WL 3385819 (N.D. Cal. July 28, 2008)..... 19
	<i>Kamar Int'l, Inc. v. Russ Berrie &amp; Co.</i> , 752 F.2d 1326 (9th Cir. 1984)..... 19
	<i>Keystone Mfg. Co. v. Jaccard Corp.</i> , No. 03-CV-648S, 2007 WL 655758 (W.D.N.Y. Feb. 26, 2007) ..... 8
	<i>Kohler Co. v. Moen Inc.</i> , 12 F.3d 632 (7th Cir. 1993)..... 8
	<i>Krause v. Dresser Indus., Inc.</i> , 910 F.2d 674 (10th Cir. 1990)..... 17
	<i>L.A. Gear, Inc. v. Thom McAn Shoe Co.</i> , 988 F.2d 1117 (Fed. Cir. 1993)..... 6
	<i>Landes Constr. Co. v. Royal Bank of Canada</i> , 833 F.2d 1365 (9th Cir. 1987)..... 24
	<i>LaserDynamics, Inc. v. Quanta Computer, Inc.</i> , 694 F.3d 51 (Fed. Cir. 2012)..... 15
	<i>Lindy Pen Co. Inc. v. Bic Pen Corp.</i> , 982 F.2d 1400 (9th Cir. 1993)..... 19
	<i>Litecubes, LLC v. N. Light Prods.</i> , 523 F.3d 1353 (Fed. Cir. 2008)..... 15
	<i>Los Angeles Mem'l Coliseum Comm'n v. NFL</i> , 791 F.2d 1356 (9th Cir. 1986)..... 17
	<i>Los Angeles Nut House v. Holiday Hardware Corp.</i> , 825 F.2d 1351 (9th Cir. 1987)..... 12, 13







1  
2  
3  
4  
5  
6  
7  
8  
9  
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12  
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14  
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16  
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19  
20  
21  
22  
23  
24  
25  
26  
27  
28

**TABLE OF AUTHORITIES**  
**(continued)**

**Page**

**STATUTES**

15 U.S.C.

§ 1057(b) .....	7, 8	
§ 1117 .....	18, 20	
§ 1117(a) .....	19	
§ 1125(c)(1) .....	9	
§ 1125(c)(2)(A) .....	9	

35 U.S.C.

§ 102(a) .....	6	
§ 284 .....	19, 20	
§ 289 .....	18, 19	

## INTRODUCTION

Samsung fails to meet the high bar to obtain judgment or new trial on any claim. *DSPT Int'l, Inc. v. Nahum*, 624 F.3d 1213, 1218 (9th Cir. 2010) (“verdict must be upheld if it is supported by substantial evidence” and disturbed only if “evidence permits only one reasonable conclusion,” which is “contrary to the jury’s verdict”); *Molski v. M.J. Cable, Inc.*, 481 F.3d 724, 729 (9th Cir. 2007) (new trial permissible only if “verdict is contrary to the clear weight of the evidence” or “to prevent a miscarriage of justice”). Samsung also falls far short of showing the “grossly excessive or monstrous” damages “clearly not supported by the evidence, or based only on speculation or guesswork” required to disturb the jury’s award. *Energy Transp. Grp., Inc., v. William Demant Holding A/S*, No. 2011-1487, 2012 WL 4840813, at \*11 (Fed. Cir. Oct. 12, 2012) (internal quotation marks omitted).

### I. SAMSUNG’S JUROR MISCONDUCT ALLEGATIONS FAIL

#### A. Mr. Hogan’s Voir Dire Responses Do Not Require A New Trial

##### 1. Samsung waived these objections

Samsung accuses Mr. Hogan of “fail[ing] to answer truthfully during voir dire” by not mentioning a dispute with Seagate in 1993 and a related bankruptcy. (Mot. at 2.) Samsung waived these objections because it knew of or could have discovered the alleged “lies” before the verdict. “[A] defendant cannot learn of juror misconduct during the trial, gamble on a favorable verdict by remaining silent, and then complain in a post-verdict motion that the verdict was prejudicially influenced by that misconduct.” *United States v. Bolinger*, 837 F.2d 436, 438-39 (11th Cir. 1988); *Robinson v. Monsanto Co.*, 758 F.2d 331, 335 (8th Cir. 1985) (objection waived if basis “might have been discovered during voir dire”); see *McDonough Power Equip., Inc. v. Greenwood*, 464 U.S. 548, 550 n.2 (1984) (party cannot attack verdict based on unchallenged voir dire answer that it “thought to be factually incorrect”).

Mr. Hogan disclosed during voir dire that he had “worked for Seagate” (Tr. 191:20-192:2), and Samsung also knew that day that Mr. Hogan failed to disclose that he “declared bankruptcy in 1993.” (Dkt. No. 2022 ¶ 9.) If Samsung’s recent acquisition of a 9.6% stake in Seagate (Dkt. No. 2013-4) were so important that bias toward Seagate could create bias against

1 Samsung, it should have asked Mr. Hogan about Seagate. Had Samsung done so, or ordered the  
2 bankruptcy file—the exact step it took *only after* it received the unfavorable jury verdict—it  
3 could have discovered the Seagate complaint. (Dkt. No. 2022 ¶ 4.) By doing nothing, Samsung  
4 waived its objections. *Robinson*, 758 F.2d at 334-35 (no new trial where juror disclosed  
5 employer and plaintiff failed to ask about dealings between employer and defendant).

## 6 2. Samsung cannot meet the test for a new trial

7 To obtain a new trial, Samsung “must first demonstrate that a juror failed to answer  
8 honestly a material question on voir dire, and then further show that a correct response would  
9 have provided a valid basis for a challenge for cause.” *McDonough*, 464 U.S. at 556; *see id.* at  
10 555-56 (prejudice to “peremptory strike” insufficient). Samsung cannot meet this high bar. Its  
11 theory is that, due to a decades-old dispute with *Seagate*, Mr. Hogan lied to serve on the jury in a  
12 case *where Seagate is not a party* in order to exact revenge by harming a Seagate *shareholder*.  
13 This falls far short of establishing challenge for cause. *See Image Tech. Servs. Inc. v. Eastman*  
14 *Kodak Co.*, 125 F.3d 1195, 1220-21 (9th Cir. 1997) (no cause to challenge juror with “sometimes  
15 adversarial relationship” with defendant).

16 Samsung also cannot show that Mr. Hogan’s responses were “dishonest.” “Dishonest”  
17 means more than a mistake: “[A]n honest yet mistaken answer to a *voir dire* question rarely  
18 amounts to a constitutional violation; even an intentionally dishonest answer is not fatal, so long  
19 as the falsehood does not bespeak a lack of impartiality.” *Dyer v. Calderon*, 151 F.3d 970, 973  
20 (9th Cir. 1998) (en banc). When asked, “[h]ave you . . . ever been involved in a lawsuit, either as  
21 a plaintiff, a defendant, or as a witness,” Mr. Hogan described a 2008 technology ownership  
22 lawsuit. (Tr. 148:18-150:11.) He was never asked if there were other lawsuits or a bankruptcy,  
23 and hence never failed to answer a question truthfully.

## 24 3. Samsung cannot meet the “extraordinary” test for “implied bias”

25 Samsung asserts that “implied bias” requires a new trial when a juror ““lies materially and  
26 repeatedly”” to ““secure a seat on the jury.”” (Mot. at 2.) Samsung cites *Dyer*, but that case  
27 limited implied bias to “extraordinary” cases, 151 F.3d at 981, and involved extraordinary facts:  
28 a juror who concealed “the killing of her brother in a way that she knew was very similar to the

1 way Dyer was accused of killing his victims” and hid “many other facts that would have  
 2 jeopardized her chances of serving on the *Dyer* jury.” *Id.* at 982. Mr. Hogan’s post-verdict  
 3 comments about serving on a jury in an important case (Mot. at 2) are not remotely similar. Mr.  
 4 Hogan said that he had ““expected to be dismissed”” (Mot. at 2-3) because he “had a tech patent  
 5 to his name” (Dkt. No. 2013-9 at 1)—a fact he disclosed during voir dire (Tr. 163:19-24). These  
 6 comments do not show an attempt to hide facts to get on the jury. Samsung points to Mr.  
 7 Hogan’s comments about intellectual property, but his comments were balanced, not biased.  
 8 “[N]o matter who you are—whether you are Apple, whether you are Samsung, or anybody—if  
 9 you wil[l]fully take the risk to cross the line and start infringing and you get caught, and again I  
 10 emphasi[z]e wil[l]fully, you need to be prepared to pay the cost for that.” (Dkt. No. 2013-13 at 2;  
 11 *see also* Dkt. No. 2013-10 at 1 (“I wanted to be satisfied from my own perspective that *this trial*  
 12 *was fair* and protected copyrights and intellectual property rights, *no matter who they belonged*  
 13 *to*” (emphasis added)); Dkt. No. 2013-12 at 1 (Apple’s damages claim “extraordinarily high” and  
 14 damages should be neither “unreasonable” nor “just a slap on the wrist.”).)

15 **B. Samsung Has Not Shown That The Jury’s Verdict Was Affected By Any**  
 16 **Improper “Extraneous Evidence”**

17 Samsung contends media interviews show Mr. Hogan “told his fellow jurors” about  
 18 “incorrect and extraneous legal standards.” (Mot. at 3.) Samsung is barred from attacking the  
 19 verdict based on evidence of “the jury’s deliberations,” Fed. R. Evid. 606(b), including evidence  
 20 that “jurors misunderstood the applicable law,” *United States v. Span*, 75 F.3d 1383, 1390 n.8  
 21 (9th Cir. 1996). This rule is so fundamental that the Ninth Circuit has denied new trials even  
 22 where, for example, a jury would have acquitted a criminal defendant had it properly understood  
 23 the law. *United States v. Stacey*, 475 F.2d 1119, 1120 (9th Cir. 1973). Because Mr. Hogan’s  
 24 comments involve “legal standards” (Mot. at 3), they do “not constitute extraneous evidence and  
 25 [are] not eligible for consideration under 606(b).” *Hatcher v. County of Alameda*, No. C09-01650,  
 26 2011 WL 4634053, at \*3 (N.D. Cal. Oct. 5, 2011). Samsung suggests Mr. Hogan improperly  
 27 relied on his general technical experience, but such reliance is allowed. *United States v. Budziak*,  
 28 No. 11-10223, 2012 WL 4748704, at \*5 (9th Cir. Oct. 5, 2012) (“computer savvy” jurors’

1 remarks about software “not a legitimate subject of inquiry” under Rule 606(b)). Unlike *Casanas*  
 2 *v. Yates*, Mr. Hogan did not “apply[] his experience to question the law.” No. 08-02991, 2010  
 3 WL 3987333, at \*6 (N.D. Cal. Oct. 12, 2010) (dismissal for cause before Rule 606(b) attached).  
 4 He stated: “My opinion does not matter the current law is what it is today and I swore an[] oath  
 5 to abide by it and I did just that.” (Dkt. No. 2013-16 at 12.)

6 Samsung also cannot meet its burden of showing “by a preponderance of the evidence that  
 7 the outcome would have been different” but for Mr. Hogan’s alleged reliance on his personal  
 8 experience, *Hard v. Burlington Northern Railroad*, 870 F.2d 1454, 1461 (9th Cir. 1989),<sup>1</sup> because  
 9 substantial evidence supports the verdict, as shown below in Sections II to VI.

### 10 C. Samsung’s Attack On The Jury Does Not Require An Evidentiary Hearing

11 Samsung’s request for a hearing “with all jurors” should be denied because its attack on  
 12 the jury is clearly unfounded and inadmissible evidence about jury deliberations “cannot serve to  
 13 require an evidentiary hearing.” *Hatcher*, 2011 WL 4634053, at \*6; *see Morgan v. Woessner*,  
 14 997 F.2d 1244, 1261-62 (9th Cir. 1993) (no hearing because remark about “send[ing] a message”  
 15 inadmissible under Rule 606(b)); *Robinson*, 758 F.2d at 333 (no hearing because no evidence of  
 16 deliberate concealment or probable bias); *United States v. Smith*, 424 F.3d 992, 1011-13 (9th Cir.  
 17 2005) (no hearing because record sufficient to find no bias).

## 18 II. SAMSUNG IS NOT ENTITLED TO EITHER JMOL OR A NEW TRIAL ON 19 APPLE’S DESIGN PATENT INFRINGEMENT CLAIMS.

### 20 A. Substantial Evidence Supports The Finding Of Design Patent Infringement

#### 21 1. Samsung relies on an erroneous legal standard

22 Samsung’s arguments rest on the false premise that design patent infringement requires  
 23 purchaser deception (Mot. at 4-5), but no case so holds. *See, e.g., Braun, Inc. v. Dynamics Corp.*  
 24 *of Am.*, 975 F.2d 815, 821 (Fed. Cir. 1992). Samsung’s straw man regarding “general design  
 25 concepts” also fails, as the Court specifically instructed the jury that a design patent “does not

26 <sup>1</sup> *Hard* is the controlling Ninth Circuit test for civil cases. No “extraneous information” was at  
 27 issue in *Sea Hawk Seafoods, Inc. v. Alyeska Pipeline Serv. Co.*, 206 F.3d 900, 906 (9th Cir. 2000),  
 28 so its formulation of the test (citing criminal cases) was dictum that did not overrule the earlier  
*Hard* case, which *Hatcher* applied. 2011 WL 4634053, at \*5.

1 cover a general design concept.” (Dkt. No. 1903 (JI 43).)

2 The test for design patent infringement is whether, in the eye of an ordinary observer  
3 familiar with the prior art and giving such attention as a purchaser usually gives, the patented and  
4 accused designs are substantially the same. *See, e.g., Egyptian Goddess, Inc. v. Swisa, Inc.*, 543  
5 F.3d 665, 677-78 (Fed. Cir. 2008).<sup>2</sup> Under the Court’s correct construction of the D’305, D’677,  
6 and D’087 patents, substantial evidence supports infringement. Taking the prior art into  
7 consideration, Mr. Bressler and Dr. Kare testified that the infringing phones’ designs are  
8 substantially similar to Apple’s patented designs. (Tr. 1049:6-1064:11 (Bressler on substantial  
9 similarity of Samsung phones and D’677/D’087); Tr. 1371:18-1381:23 (Kare, same re D’305).)

10 Samsung’s argument relies on features in isolation. (Mot. at 5-7.) But the law requires an  
11 analysis of “the *overall* design, not of similarities in ornamental features in isolation.” *Crocs, Inc.*  
12 *v. ITC*, 598 F.3d 1294, 1303 (Fed. Cir. 2010). Samsung recycles its “home screen” argument  
13 (Mot. at 6-7), but Apple did not accuse Samsung’s home screen and infringement requires no  
14 proof of actual deception. Samsung cites *Contessa Food Products, Inc. v. Conagra, Inc.*, 282  
15 F.3d 1370 (Fed. Cir. 2002), but *Contessa* held that the comparison of patent to product is based  
16 on “normal use of the product,” and not only on what appears at time of sale. *Id.* at 1381.

## 17 2. No claimed features in the patented designs are dictated by function

18 Samsung waived many of its functionality contentions—the “rectangular” shape, “curved  
19 corners,” “black” color, “opaque borders,” and “bezel” of the D’087 and D’677, and the  
20 “sufficient space between icons,” “color green,” “images of clock,” the “colorful” aspect of the  
21 “matrix of icons in a grid,” and “square shapes with rounded corners” of the D’305—by not  
22 presenting them as claim construction issues before trial. They were not raised in Samsung’s  
23 claim construction brief (Dkt. No. 1090), in its Rule 50(a) brief (Dkt. No. 1819), in its High

24 \_\_\_\_\_  
25 <sup>2</sup> Contrary to Samsung’s footnote 1, the Court correctly instructed that: “[m]inor differences  
26 should not prevent a finding of infringement” (Dkt. No. 1903 (JI 46)); *see Crocs, Inc. v. ITC*, 598  
27 F.3d 1294, 1303 (Fed. Cir. 2010); the jury should “consider perceived similarities or differences  
28 between the patented and accused designs”; “[w]hen the claimed design is visually close to prior  
art design, small differences . . . may be important”; the infringement test takes prior art into  
account; and the jury “must familiarize yourself with the prior art” in determining “whether there  
has been direct infringement.” (Dkt. No. 1903 (JI 46).)

1 Priority Objections to the jury instructions (Dkt. No. 1859-1860), or at the charging conference  
2 (*see* Tr. 3769:11-3770:14; 3904:3-5; 3906:14-23 (Samsung referring only to prior claim  
3 construction positions). It is too late for Samsung to raise these contentions. *Conoco, Inc. v.*  
4 *Energy & Envtl. Int’l, L.C.*, 460 F.3d 1349, 1359 (Fed. Cir. 2006) (“new claim construction  
5 disputes” waived “if they are raised for the first time after trial”).

6 Samsung’s arguments also fail on the merits. First, the Court was correct not to instruct  
7 the jury to factor out functional elements because that is a legal issue for the Court. *Richardson v.*  
8 *Stanley Works, Inc.*, 597 F.3d 1288, 1293 (Fed. Cir. 2010). Second, Samsung’s entire  
9 “functionality” argument is based on an incorrect legal standard: that if an element of a design  
10 patent has a function, it is “functional.” But the law requires more: the element must be “dictated  
11 by” function. *See id.* A “design is not dictated solely by its function when alternative designs for  
12 the article of manufacture are available.” *Best Lock Corp. v. Ilco Unican Corp.*, 94 F.3d 1563,  
13 1566 (Fed. Cir. 1996). The evidence at trial, including extensive evidence of alternative designs,  
14 supports the Court’s conclusion that none of the elements Samsung cited is dictated by function.  
15 (Tr. 1090:12-1091:8, 3605:5-19 (Bressler on non-functionality of D’087/D’677); Tr. 1404:16-  
16 1405:12, 3465:21-3474:11 (Kare, same re D’305); PX10, PX148, PX150, PX2277, PX2278  
17 (third party alternative designs); PX163-PX168 (Apple internal alternative phone designs).)  
18 Samsung’s sole design expert, Mr. Sherman, conceded that there were plenty of alternative  
19 designs. (Tr. 2621:19-24 (“[i]n no way did I say that there aren’t alternative designs”).)

#### 20 **B. Substantial Evidence Supports That The Design Patents Are Not Invalid**

21 Samsung argues the functionality of *individual elements* of the designs, but the law  
22 requires proof that the “overall” designs are “dictated by” function, a test Samsung does not even  
23 attempt to meet. *L.A. Gear, Inc. v. Thom McAn Shoe Co.*, 988 F.2d 1117, 1123 (Fed. Cir. 1993).  
24 Samsung’s obviousness arguments ignore the requirement for primary and secondary references,  
25 which Samsung failed to identify. *Apple Inc. v. Samsung Elecs. Co.*, 678 F.3d 1314, 1329-30  
26 (Fed. Cir. 2012). And Samsung cannot rely on the LG Prada phone, as Samsung offered no  
27 evidence that it was released in the U.S. before the patents’ critical date. *See* 35 U.S.C. § 102(a).

28 Under the correct test, substantial evidence supports the jury’s finding that the design



1 patents are not obvious. (Tr. 1340:16-1347:17, 1352:5-10, 3590:15-3606:4 (Bressler  
 2 distinguishing prior art).) The Federal Circuit has already rejected the argument that the TC1000  
 3 and the Fidler mock-up render the D’889 patent obvious. *Apple*, 678 F.3d at 1330-32. Samsung  
 4 also ignores the substantial evidence of objective indicia of nonobviousness: initial skepticism,  
 5 acclaim, commercial success, and copying by Samsung. (*E.g.*, Tr. 508:4-509:4 (design awards);  
 6 PX36.20-.32 (“revolutionary”; “strong, screen-centric design”); PX134.1 (“beautiful”; “initial  
 7 skepticism” of lack of keyboard); PX135.1 (“iPhone is pretty” was number one reason for  
 8 invention of the year award); Tr. 611:6-613:12 (iPhone sold “extremely well”); Tr. 625:1-636:19  
 9 (design is reason for success); PX146.7 (design important to iPhone purchasers); PX3 & PX4  
 10 (timelines showing Samsung’s copying); PX40 (Samsung “hear[s] things like this: ‘Let’s make  
 11 something like the iPhone’”); PX44.122, .127, .131 (Samsung copying iPhone UI and icons).)

12 Finally, Samsung waived its argument that the D’677 is invalid for double-patenting over  
 13 the D’087 as it failed to make the argument in its Rule 50(a) motion. (Dkt. No. 1819.)  
 14 Furthermore, Samsung never sufficiently disclosed this defense, merely asserting without  
 15 explanation that every Apple design patent was invalid for double patenting. (Dkt. No. 949-2 Ex.  
 16 25 at 10-11.) Even if not waived, the D’677 patent is not invalid for double-patenting because the  
 17 D’087 and D’677 do not claim identical designs. *See In re Geiger*, 57 C.C.P.A. 1073, 1078  
 18 (C.C.P.A. 1970) (no double-patenting because “the subject matter claimed in the application  
 19 before us is not identical to the subject matter claimed in the patent”).

### 20 **III. SAMSUNG IS NOT ENTITLED TO JMOL OR A NEW TRIAL ON APPLE’S 21 TRADE DRESS CLAIMS.**

#### 22 **A. Substantial Evidence Supports That The iPhone Trade Dress Is Protectable**

##### 23 **1. Samsung applies incorrect legal standards for functionality**

24 Apple’s registered iPhone 3G Trade Dress is presumed non-functional and valid. 15  
 25 U.S.C. § 1057(b). Samsung fails to address this presumption or identify evidence to rebut it. As  
 26 for Apple’s unregistered trade dress, there was substantial evidence supporting the jury’s decision  
 27 that it is non-functional. As this Court previously recognized, under the ““traditional rule,”” a  
 28 trade dress is functional if it is ““essential to the use or purpose of the article or if it affects the



1 cost or quality of the article.” (Dkt. No. 1159 at 4 (quoting *TrafFix Devices, Inc. v. Mktg.*  
 2 *Displays, Inc.*, 532 U.S. 23, 33 (2001)).) *TrafFix* looks to four factors in assessing functionality,  
 3 *id.*, and the evidence on each supported non-functionality. First, does advertising tout the  
 4 utilitarian advantages of the design? Apple’s did not. (Tr. 654:24-655:1 (Schiller) (“product as  
 5 hero” ads show “visual impact” and do not tout utility).) Second, does the design result from a  
 6 comparatively simple or inexpensive method of manufacture? Apple’s did not. (Tr. at 494:15-  
 7 495:21 (Stringer) (detailing “many” “[p]roduction problems” in manufacturing iPhone).) Third,  
 8 does the design yield a utilitarian advantage? Apple’s did not. (*Id.* at 493:14-15 (Apple chose  
 9 design because “[i]t was the most beautiful”).) Fourth, were alternative designs available? Dr.  
 10 Kare and Mr. Bressler testified that there were. (PX10 (alternative designs); Tr. 1400:6-1401:1  
 11 (Kare on alternative designs).)<sup>3</sup> “[I]n evaluating functionality, the trade dress should be  
 12 considered as a whole rather than as a collection of individual elements,” (Dkt. No. 1159 at 5),  
 13 yet Samsung attempts only to show that individual elements are functional. Samsung argues that  
 14 the iPhone trade dress is unprotectable because it is “beautiful” (Mot. at 9), but the Ninth Circuit  
 15 has squarely rejected this notion. *Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d  
 16 1062, 1072 (9th Cir. 2006). Nor can the iPhone’s beauty support a finding of aesthetic  
 17 functionality, as there is no evidence that protection for the iPhone trade dress would put  
 18 competitors at a “significant non-reputation-related disadvantage.” *TrafFix*, 532 U.S. at 33.<sup>4</sup>

## 19 2. Substantial evidence supports a finding of secondary meaning

20 Courts consider various factors in assessing secondary meaning, including: (1) whether

21 <sup>3</sup> Samsung wrongly argues that evidence of alternative designs is irrelevant under the “essential to  
 22 the use or purpose” or “affects the cost or quality” test of *Inwood Laboratories, Inc. v. Ives*  
 23 *Laboratories, Inc.*, 456 U.S. 844 (1982). (Mot. at 9 n.9.) In fact, the Ninth Circuit specifically  
 24 identified alternative designs as a factor to be considered in applying the *Inwood* test. *See Disc*  
*Golf Ass’n v. Champion Discs, Inc.*, 158 F.3d 1002, 1006 (9th Cir. 1998) (citing *Qualitex Co. v.*  
*Jacobson Prods. Co.*, 514 U.S. 159, 165 (1995), which in turn cites *Inwood*).

25 <sup>4</sup> Samsung’s argument that Apple cannot obtain protection for the same designs under both design  
 26 patent and trade dress law (Mot. at 9) is incorrect. *See Kohler Co. v. Moen Inc.*, 12 F.3d 632, 640  
 27 n.10 (7th Cir. 1993) (“federal trademark protection does not transform the durationally limited  
 28 monopoly of a design patent into a perpetual right” as it “does not create a monopoly in the use of  
 the product’s shape”). Far from voiding trade dress protection, design patents may be evidence of  
 a corresponding trade dress’s non-functionality. *See Keystone Mfg. Co. v. Jaccard Corp.*, No. 03-  
 CV-648S, 2007 WL 655758, at \*7-8 (W.D.N.Y. Feb. 26, 2007).

1 purchasers associate the configuration with plaintiff; (2) the degree and manner of plaintiff's  
 2 advertising; (3) the length and manner of plaintiff's use of the configuration; and (4) whether  
 3 plaintiff's use has been exclusive. *Clamp Mfg. Co. v. Enco Mfg. Co.*, 870 F.2d 512, 517 (9th Cir.  
 4 1989). Apple presented sales numbers, advertising expenditures, and advertisements prominently  
 5 displaying the iPhone design. (PX11 (print and outdoor ads); PX12 & PX127 (TV ads); PX14  
 6 (media clips); PX15 (sales numbers); PX16 (ad spend); Tr. 639:8-640:3 (Schiller re Apple's  
 7 "product as hero" advertising approach).)

8 **B. Substantial Evidence Supports The Finding Of Dilution**

9 Samsung wrongly claims that the record contains "no evidence" of fame before its first  
 10 infringing sales in July 2010. (Mot. at 10-11.) First, surveys are not required to establish fame.  
 11 *See Burberry Ltd. v. Euro Moda, Inc.*, No. 08 Civ. 5781, 2009 WL 1675080, at \*12 (S.D.N.Y.  
 12 June 10, 2009) (finding fame without surveys in part because of "prominent advertising").  
 13 Second, *most* of Apple's fame evidence was before July 2010. (PX11 (print/outdoor ads), PX12  
 14 (TV ads), PX14 (media clips), PX133 & PX135 (press coverage).) Apple also offered  
 15 "Advertising Expenditures (U.S.)" (PX 16), "Cumulative Unit Sales (U.S.)" (PX15), and an  
 16 estimate of advertising expenses as of June 2010 (Tr. 653:24-655:1 (Schiller estimating \$120-130  
 17 million in advertising from October 2009 through June 2010). Samsung similarly distorts the  
 18 record on dilution by overstating its evidence of "similar" third-party smartphones (Mot. at 11),  
 19 including irrelevant phones that post-date Samsung's first release of accused products. (DX712  
 20 ("State of Mobile 2011").) Samsung faults Apple for its alleged failure to offer "empirical  
 21 evidence" and "hard data" showing dilution (Mot. at 11), but the correct test is *likelihood* of  
 22 dilution, not actual dilution, and no such evidence is required. 15 U.S.C. § 1125(c)(1).

23 Samsung's attacks also overlook Apple's evidence of the strength and recognition of its  
 24 iPhone Trade Dress, the similarity of the accused products to the iPhone Trade Dress, Samsung's  
 25 intent to trade on recognition for the iPhone Trade Dress, and actual association of the accused  
 26 products with the iPhone Trade Dress. *See* 15 U.S.C. § 1125(c)(2)(A) (listing factors relevant to  
 27 dilution analysis). (*E.g.*, JX1007, 1010-13, 1015-17, 1019, 1022, 1025, 1027, 1031-35 (accused  
 28 products); PX6 (press reports regarding similarity between iPhone and accused products')

1 designs); Tr. 1521:22-24 (Winer) (“[T]here is a high degree of dilution, and, therefore, blurring  
2 between the trade dresses.”), 1506:16-1507:2 (“Samsung held Apple’s products up as targets and  
3 tried to emulate them.”); Tr. 1695:17-1695:22 (Van Liere reporting net association rates of 38%  
4 and 37% for two different accused products.) Samsung was undisputedly aware of Apple’s  
5 iPhone when it designed its accused products, viewed the iPhone as “a revolution” (PX36.20),  
6 and strove for its products to resemble the iPhone (PX44 (Relative Evaluation Report on S1,  
7 iPhone).) Nothing more is required to support the jury’s finding of willful dilution. *See, e.g., B &*  
8 *H Mfg. Co., Inc. v. Bright*, No. CVF01-6619, 2005 WL 1342815, at \*9 (E.D. Cal. May 10, 2005)  
9 (plaintiff must show defendant “willfully intended to trade on the owner’s reputation or to cause  
10 dilution of the famous mark”). And Apple need only prove willfulness by a preponderance of the  
11 evidence (Dkt. No. 1903 at 93:9-10 (JI 71), not “clear and convincing proof” as Samsung  
12 erroneously asserts (Mot. at 11.)

#### 13 **IV. SAMSUNG IS NOT ENTITLED TO EITHER JMOL OR A NEW TRIAL ON** 14 **APPLE’S UTILITY PATENT INFRINGEMENT CLAIMS**

##### 15 **A. Substantial Evidence Supports The Validity Of Apple’s Utility Patents**

16 **’915 and ’163 Patents.** Samsung is incorrect that Mr. Gray’s testimony established  
17 invalidity and that there was “no evidence” to the contrary. (Mot. at 12-13.) On claim 8 of  
18 the ’915 patent, each of Mr. Gray’s cited references was missing elements: DiamondTouch with  
19 Fractal Zoom was “not a touch-sensitive display . . . integrated with the data processing system”  
20 (Tr. 3623:7-18 (Singh)); more than two input points in FractalZoom resulted in a scroll rather  
21 than a gesture operation (Tr. 2356:22-2357:5 (Forlines) (“[I]f it’s not a two-finger touch, we set  
22 the application mode to panning mode here.”)); and Mr. Gray failed to show that two limitations  
23 regarding “views associated with the event object” were met (Tr. 3624:21-3625:5 (Singh)). Dr.  
24 Singh rebutted Mr. Gray’s opinion (Tr. 3622:19-3625:9) (“Mr. Gray did not disclose any kind of  
25 view object in any way[.]”). For Han, Mr. Gray summarily asserted that “a film . . . that shows  
26 exactly what the [Han] system does” proved anticipation, without referring to any source code or  
27 showing that any limitation was present. (Tr. 2908:8-2910:5.) The video proved only that the  
28 Han system did not have a touch screen display “integrated with the data processing system.”

1 (Tr. 3627:23-3628:10.) For Nomura, Mr. Gray failed to show that any of the three key technical  
2 features in claim 8—“events, objects, and views”—was present. (Tr. 3625:12-21 (Singh).)

3 As to claim 50 of the '163 patent, Dr. Singh showed that LaunchTile offered no  
4 “structured electronic document” that was being “enlarged and substantially centered,” and the  
5 “Agnetta” patent similarly taught only magnifying and launching a single application tile from an  
6 array of tiles. (Tr. 3615:19-3616:4 (Singh re LaunchTile and Agnetta), 3618:5-3620:10 (Singh re  
7 Agnetta).) Mr. Gray’s conclusory testimony on the Robbins patent did not make a prima facie  
8 case of invalidity (Tr. 2920:1-2922:6) and was rebutted by Dr. Singh (Tr. 3619:4-3620:10) (“Mr.  
9 Gray . . . breezed through a slide . . . all the elements from G to J are just simply not met.”) The  
10 jury also properly rejected Samsung’s obviousness defense. Mr. Gray gave a garbled and  
11 unsupported obviousness opinion on direct, and confirmed on cross that “anticipation is all [he]  
12 spoke to.” (Tr. 2907:20-25, 2924:12-17.)

13 **'381 Patent.** Samsung did not establish the invalidity of claim 19 of the '381 patent. Dr.  
14 Van Dam did not examine the LaunchTile or DiamondTouch TableCloth source code and he  
15 failed to show that either reference had instructions for “detecting an edge” of an electronic  
16 document or “responding” to the detection of an “edge.” (Tr. 2874:6-2875:14 (Van Dam);  
17 3633:23-3634:11 (Balakrishnan). He and Mr. Forlines, who wrote the code, both admitted that  
18 these systems did not translate a document in a second direction “until the area beyond the edge”  
19 was no longer displayed, because the program always returned to its starting point rather than  
20 reversing direction until the edge was reached. (Tr. 2875:15-2876:10 (Van Dam); 2357:21-2358:5  
21 (Forlines).) Dr. Balakrishnan demonstrated that the TableCloth code does “not deal with what  
22 happens in response to an edge” (Tr. 3631:14-3634:19), and the jury could see that it lacked a  
23 single “electronic document.” LaunchTile did not solve the “frozen screen” or “Desert Fog”  
24 problems and did not detect or respond to an “edge” of an electronic document. (Tr. 3634:20-  
25 3636:8 (Balakrishnan).)

26 **B. Substantial Evidence Supports The Jury’s Determinations Of Infringement**

27 **The '915 and '163 Patents.** Samsung’s assertion that Apple showed infringement of the  
28 '915 and '163 patents for only one product is wrong. (Mot. at 13.) All 24 accused products were

1 admitted into evidence and the jurors were able to test their operation against the asserted claims.  
2 (JX1007, 1009-1016, 1019-1020, 1022-1028, 1030-1033, 1036-1037.) Dr. Singh showed videos  
3 of all the accused devices performing the claimed steps and testified that every accused product  
4 infringed. (Tr. 1829-1830 (confirming '915 infringement), 1840-1842 (confirming '163  
5 infringement).) Dr. Singh also testified that he reviewed the source code for every Android  
6 version and that the source code running on each of the products contained infringing  
7 instructions. (Tr. 1830:14-21 (based on analysis of devices and code, 24 products infringe '915  
8 patent), 1840:16-22 ('163 limitations in all enumerated devices), 1868:20-1869:7 (confirming  
9 analysis of code for all 24 products).)

10 Samsung offered no real rebuttal. Mr. Gray testified that the Samsung code did not  
11 “invoke” a scroll or gesture operation because the MotionEvent object did not itself directly call a  
12 scroll or gesture operation (Tr. 2910:18-2912:1 (MotionEvent object “not the causer”)), but he did  
13 not dispute that the determination of a scroll or gesture was caused by the detection of input  
14 points on the touch screen (*see* Tr. 1824:10-1825:8, 1874:8-21), and he relied on the same flawed  
15 claim construction that the Court rejected at summary judgment. (Dkt. No. 1158 at 20.)<sup>5</sup>

16 ***The '915 patent.*** The jury’s finding that the Ace, Intercept, and Replenish did not  
17 infringe the '915 patent does not warrant a new trial on the 21 products the jury found did  
18 infringe. Although Apple believes that the Ace, Intercept and Replenish infringe, possibly those  
19 devices malfunctioned in the jury room (and thus failed to perform scrolling or scaling) or the  
20 jurors tested them on a “mobile” website that did not allow two-finger scaling and therefore  
21 concluded that those particular devices did not infringe. There is no basis for a new trial on any  
22 of the other 21 products. Samsung’s sole cited authority recognizes that, where there are  
23 inconsistent verdicts, “if reasonably possible we resolve the inconsistency in favor of sustaining  
24 the judgment.” *Los Angeles Nut House v. Holiday Hardware Corp.*, 825 F.2d 1351, 1353-54 (9th

25 <sup>5</sup> Mr. Gray asserted that undisclosed Samsung product(s) did not infringe because they could  
26 perform “two-finger scrolling.” (Tr. 2912:2-19.) As Dr. Singh testified, one Samsung product,  
27 the Galaxy Tab 10.1 running Android version 3.1, was capable of performing a combined  
28 scaling/translation “gesture operation” when manipulated with two fingers and thus infringed  
claim 8. (Tr. 1826:2-1827:17, 1862:11-1864:16 (analyzing DX2577 video of Galaxy Tab 10.1);  
PX 29.14 (slide re Android 3.1 source code).)

1 Cir. 1987). In that case, the jury’s answer to a special interrogatory barred the remedy granted by  
2 its general verdict. *Id.* at 1354. Here, in contrast, the jury’s verdicts that 21 out of 24 products  
3 infringed were *not* “irreconcilably inconsistent.” (Mot. at 14.) Moreover, after the jury revised  
4 its initial verdict, the Court asked the parties to confirm “no further inconsistencies” (other than  
5 on patent exhaustion) and whether the jury could be excused; Samsung confirmed and stated that  
6 it had no objection to excusing the jury. (Tr. at 4316-17.) Samsung thus waived any objection to  
7 asserted inconsistencies in the verdict. *See The Home Indem. Co. v. Lane Powell*, 43 F.3d 1322,  
8 1331 (9th Cir. 1995).

9 ***The ’381 patent.*** Dr. Balakrishnan testified that “21 Samsung products infringe claim 19  
10 of the ’381 patent.” (Tr. 1728:6-8.) He showed videos of those products performing the  
11 infringing steps (Tr. 1751:21-1755:21) and confirmed by personally testing all 21 devices and  
12 reviewing the Samsung source code for Android 2.1, 2.2, 2.3 and 3.1—all the Android releases  
13 that Samsung produced in discovery—that all accused products had the required instructions (Tr.  
14 1728:6-1729:10) (confirming source code review). All accused products were in evidence for the  
15 jury to test.

16 Samsung’s only attempted defense was the so-called “hold still” behavior. As Dr.  
17 Balakrishnan testified, that behavior could not be performed reliably or consistently, and did not  
18 change the fact that “the instructions for doing the bounce back . . . continue to exist on those  
19 phones” and the products still perform the infringing steps. (Tr. 1756:9-1757:21.) Samsung is  
20 wrong that the Court previously found the claim to require the electronic document “to *always*  
21 snap back.” (Mot. at 14.) At the preliminary injunction stage, the Court tentatively construed  
22 claim 1, a method claim. (Dkt. No. 452 at 58-60.) That decision does not bear on claim 19,  
23 which is an apparatus claim requiring certain computer instructions.

## 24 **V. SUBSTANTIAL EVIDENCE SUPPORTS THE JURY’S WILLFULNESS FINDINGS**

25 Samsung improperly used its motion on non-jury claims to expand on its attack on the  
26 jury’s willfulness findings, thereby skirting the page limits for its JMOL motion. (*Compare, e.g.,*  
27 Mot. at 16:4-16, with Dkt. No. 1988 at 10-11 (identical language as JMOL, with additions).)  
28 Apple’s opposition to Samsung’s non-jury claims motion responds to these arguments. (Dkt. No.



1 2027 at 8-11.) And as Apple has shown in its enhancement motion (Dkt. No. 1982 at 12),  
2 substantial evidence supports the jury’s willfulness findings, including evidence that Samsung  
3 intended to take Apple’s market share by deliberately copying the iPhone design and features, and  
4 that Samsung lacked a good faith belief that Apple’s patents were invalid or not infringed. (*E.g.*,  
5 PX44 (comparing iPhone and Galaxy S1 features, with “Direction for Improvement” for each  
6 Samsung feature); PX36.20 (report to Samsung that iPhone was considered a “revolution”).)

7 Samsung’s two additional arguments are without merit. The willfulness inquiry is  
8 directed to an infringer’s reckless disregard of a *patent*, not *individual claims*. *See, e.g., i4i Ltd.*  
9 *P’ship v. Microsoft Corp.*, 598 F.3d 831, 860 (Fed. Cir. 2010) (“reasonable jury could have  
10 concluded that Microsoft willfully infringed the ’449 patent”). Thus, the Court instructed the jury,  
11 without objection, to examine whether a party acted “with reckless disregard of the patent it  
12 infringed.” (Dkt. No. 1883 at 72.) Samsung’s cited authority addresses not willfulness, but  
13 whether a patentee had “pursued frivolous infringement claims” justifying attorney’s fees under  
14 Section 285. *Highmark, Inc. v. Allcare Health Mgmt. Sys.*, 687 F.3d 1300, 1306 (Fed. Cir. 2012).

15 Samsung suggests that the evidence that it deliberately copied Apple’s products “did not  
16 even address the patents or rights at issue here,” but concedes that there are a “few exceptions.”  
17 (Mot. at 16.) The exceptions presumably include evidence that Samsung studied and then  
18 implemented the technologies covered by all three utility patents. (PX38.24 (“tap to zoom”  
19 (covered by ’163) “can be used as a design benchmark”); PX36.36 (“two-fingered pinch” (covered  
20 by ’915) and “bounc[ing]” lists (covered by ’381) make iPhone “sexy to use”); Tr. 846 (Denison)  
21 (acknowledging Samsung engineer’s testimony regarding study of iPhone’s “bounce-back  
22 functionality”).) They no doubt also include evidence that Samsung took the same approach to  
23 copying the industrial design of Apple’s iPhone and its GUI, as covered by the D’677, D’087, and  
24 D’305 patents. (*E.g.*, PX3.3 (photo timeline); PX35 (urging icon redesign to more closely  
25 resemble iPhone); PX36.20 (noting that iPhone was “hailed for its beauty”), PX36.31 (conceding  
26 iPhone’s “strong, screen-centric design” with “[o]versized screen” and “[c]onsistent surface”).)

1 **VI. SUBSTANTIAL EVIDENCE SUPPORTS SEC'S DIRECT INFRINGEMENT AND**  
 2 **ACTIVE INDUCEMENT OF INFRINGEMENT**

3 Samsung waived any challenge to SEC's direct infringement by not raising it in its Rule  
 4 50(a) motions. It also loses on the merits. SEC sold phones and tablets directly into the U.S. to  
 5 its subsidiaries, SEA and STA. (*E.g.*, Tr. 2068:14-17 (Musika) ("STA and SEA buy[] product  
 6 from SEC), 2069:14-16 ("SEC sells . . . to . . . STA, and phones . . . land in the United States.");  
 7 Tr. 795:1-4 (Denison) (agreeing that SEC "ships the products to locations in the United States").  
 8 That STA and SEA "were in the United States when they contracted for the accused [devices] and  
 9 the products were delivered directly to the United States" constitutes "substantial evidence to  
 10 support the jury's conclusion" that SEC "sold the accused [devices] within the United  
 11 States." *Litecubes, LLC v. N. Light Prods.*, 523 F.3d 1353, 1371 (Fed. Cir. 2008).

12 The verdict against SEC is independently supported by substantial evidence that it  
 13 actively induced STA and SEA to infringe. SEC knew of at least the '381 patent by August 2010.  
 14 (PX52.14) (Apple presentation listing '381 patent). There is evidence that SEC also knew of  
 15 the '163 and '915 patents in designing the infringing products, as SEC's Mobile Design Group  
 16 head conceded that SEC monitored "UX" patents. (PX202) (DH Chang). SEC undisputedly  
 17 knew of the remaining patents no later than the filing of the complaint. *LaserDynamics, Inc. v.*  
 18 *Quanta Computer, Inc.*, 694 F.3d 51, 60 (Fed. Cir. 2012) (knowledge of patents for inducement  
 19 can be based on filing of complaint). And as explained in Section V above, SEC knew that its  
 20 subsidiaries' sales of smartphones and tablets were infringing.

21 Despite this knowledge, SEC actively aided and abetted its subsidiaries' infringing  
 22 sales. SEC controlled STA's interactions with carriers and stores. (Tr. 796:14-18 (Denison)  
 23 (SEC "directions" to STA); PX59.2 ("Headquarters . . . team personnel" (*i.e.*, SEC) led taskforce  
 24 investigation of Tab returns at Best Buy with STA employees); PX35 (icon designs relayed from  
 25 AT&T to SEC through STA).) SEC set the wholesale prices for the infringing phones and tablets  
 26 sold by STA in the US. (PX204 at 188:9-17 (Sheppard Dep.) ("SEC sets the wholesale price";  
 27 STA does not have "direct responsibility" for this).) SEC's CEO specifically directed STA to  
 28 "Beat Apple" via its sales of infringing products. (PX58; Tr. 810:6-812:25 (Denison re PX58).)



1 Even assuming that SEC lacked actual awareness of one or more of Apple's patents, SEC  
2 acted with "willful blindness." A defendant is willfully blind, and therefore liable for inducement,  
3 even absent actual knowledge of a patent, where it "subjectively believe[s] that there is a high  
4 probability that a fact exists," but "take[s] deliberate actions to avoid learning of that fact."  
5 *Global-Tech Appliances, Inc., v. SEB S.A.*, 131 S. Ct. 2060, 2070 (2011). As in *Global-Tech*,  
6 Apple's patented iPhone and iPad devices were "innovation[s] in the U.S. market" when  
7 Samsung copied them, containing "advanced technology that would be valuable in the U.S.  
8 market." *Id.* at 2071. Given this, like the defendant in *Global-Tech*, SEC had reason to believe  
9 that Apple's iPhone and iPad products were protected by patents. Further, Steve Jobs stated at  
10 the iPhone's launch that Apple had filed for "over 200 patents" to protect its  
11 innovations. (JX1091 at 1:30:24.) Although warned of the need to make its products "noticeably  
12 different" from Apple's (PX42), SEC deliberately ignored the risk of infringement and copied  
13 Apple's products flagrantly. (*E.g.*, PX44 (126-slide presentation concerning ways to copy  
14 iPhone); PX34.37 (noting "easy imitation" of iPhone's "HW"); PX55.15 (side-by-side  
15 comparison of iPhone icons by Samsung's icon designer).) The jury appropriately determined  
16 that SEC induced infringement by SEA and STA.

## 17 **VII. SAMSUNG IS NOT ENTITLED TO JMOL, A NEW TRIAL, OR REMITTITUR** 18 **ON DAMAGES**

### 19 **A. The Damages Verdict Must Be Upheld Because It Is Neither Grossly** 20 **Excessive Nor Unsupportable By The Record As A Whole**

21 To set aside the damages award, Samsung must satisfy a significantly higher standard than  
22 the test for JMOL on liability. The Court "upholds a jury's damages award unless grossly  
23 excessive or monstrous, clearly not supported by the evidence, or based only on speculation or  
24 guesswork." *Energy Transp.*, 2012 WL 4840813, at \*11 (internal quotation marks omitted).  
25 Samsung "must show that the award is, in view of all the evidence, either so outrageously high or  
26 so outrageously low as to be unsupportable as an estimation" of damages. *Id.* (quoting *Rite-Hite*  
27 *Corp. v. Kelley Co.*, 56 F.3d 1538, 1554 (Fed. Cir. 1995) (en banc)). Damages need only be  
28 "within the range encompassed by the record as a whole." *Powell v. Home Depot U.S.A., Inc.*,  
663 F.3d 1221, 1241 (Fed. Cir. 2011).

1 Samsung falls far short of this high burden. The award, \$1,049,393,540, lies closer to the  
2 \$519 million minimum amount proposed by Samsung (DX781.1 (Samsung's profits summary))  
3 than to the \$2.75 billion advocated by Apple (PX25A1 (Summary of Apple's Damages  
4 Calculations)) and finds ample support in the record as a whole. The individual product amounts  
5 found in Question 23 also fall within the range advocated by the parties' experts or, in some cases,  
6 \$155,841,889 below both experts' ranges. (*Compare* Dkt. No. 1931 at 16, *with* DX781.1, *and*  
7 PX25A1.4; *see also* Dkt. No. 2002 at 18:14-19:17) (identifying damages awards that fell a total  
8 of \$155,841,889 below undisputed, minimum amounts Samsung advocated.)

9 **B. This Court Should Not Attempt To "Deconstruct" The Verdict**

10 Samsung asks the Court to set aside the jury's award based on speculation regarding how  
11 the jury calculated its verdict. Using individual breakdowns found solely in Mr. Wagner's  
12 declaration, Samsung argues that the record "lacks sufficient evidence" to support the  
13 deconstructed figures. (Mot. at 18.) Precedent forbids Samsung's deconstruction and speculation  
14 because Samsung's method "encroach[es] upon the jury's proper function under the  
15 Constitution." *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 791 F.2d 1356, 1365 (9th Cir.  
16 1986). "Even a total inadequacy of proof on isolated elements of damages claims submitted to a  
17 jury will not undermine a resulting aggregated verdict which is nevertheless reasonable in light of  
18 the totality of the evidence." *Id.* at 1366. If "the jury's verdicts find substantial support in the  
19 record and lie within the range sustainable by the proof, we will not 'play Monday morning  
20 quarterback' and supplant the jury's evaluation of the complex and conflicting evidence with our  
21 own." *Id.* This Ninth Circuit law applies to the treatment of jury verdicts, which is not an issue  
22 unique to patent law. The consensus across circuit courts likewise forbids courts from  
23 "speculat[ing] as to the jury's calculation methods, as long as the damage amount is supported by  
24 the evidence." *Krause v. Dresser Indus., Inc.*, 910 F.2d 674, 679-80 (10th Cir. 1990); *see also*,  
25 *e.g.*, *Chuy v. The Philadelphia Eagles Football Club*, 595 F.2d 1265, 1279 n.19 (3d Cir. 1979)  
26 ("Of course, it is well accepted that a court will not inquire into the calculation methods employed  
27 by the jury during its deliberations."). Courts have affirmed damages awards even where they  
28 correspond to the penny to a legal theory that the jury *rejected* in its verdict. *Mid-west*

1 *Underground Storage, Inc. v. Porter*, 717 F.2d 493, 501-02 (10th Cir. 1983). The Federal  
 2 Circuit’s jurisprudence is in accord. *See, e.g., Revolution Eyewear, Inc. v. Aspex Eyewear, Inc.*,  
 3 563 F.3d 1358, 1371-72 (Fed. Cir. 2009) (rejecting challenge to damages based on claim that  
 4 verdict was “mathematically impossible” in light of jury’s choice of a 5% royalty and defendants’  
 5 revenues, because record as a whole supported verdict).

6 None of Samsung’s cases holds otherwise. The Federal Circuit in *Lucent Technologies,*  
 7 *Inc. v. Gateway, Inc.*, 580 F.3d 1301 (Fed. Cir. 2009), reviewed all of the evidence before  
 8 determining that “substantial evidence does not support the jury’s verdict of a lump-sum royalty  
 9 payment of \$357,693,056.18.” *Id.* at 1324, 1325-36. Considering the defendants’ alternative  
 10 argument, the Court further held that the record also did not support the use of the entire market  
 11 value of Microsoft’s products to calculate a royalty. *Id.* at 1336-39. Solely as an introduction to  
 12 why this issue was relevant, the Court noted that “working the math backwards strongly suggests  
 13 that the jury must have used some calculation of a rate applied to the entire market value of the  
 14 software.” *Id.* at 1336. The Court never used any hypothetical calculation as a foundation for its  
 15 analysis, and *Lucent* offers no reason to reverse decades of authority and start speculating about a  
 16 jury’s methods. *Telcordia Technologies, Inc. v. Cisco Systems, Inc.*, 612 F.3d 1365 (Fed. Cir.  
 17 2010) dealt solely with whether the district court abused its discretion by “interpreting the verdict  
 18 form” to determine whether it compensated the patent-holder for future infringement, thereby  
 19 precluding an injunction. *Id.* at 1378. *In re First Alliance Mortgage Co.*, 471 F.3d 977 (9th Cir.  
 20 2006) reversed because the jury award was “directly traceable” to an instructional error and  
 21 inadmissible evidence. *Id.* at 1001. Samsung does not and could not make such a contention here.

## 22 **C. Samsung’s “Hypothetical Award Components” Do Not Warrant Relief**

### 23 **1. The record supports the jury’s award of Samsung’s profits**

24 Samsung deconstructs the verdict and argues that \$948 million is an unsupported award of  
 25 Samsung’s profits on 16 products. Even if the Court were to deconstruct the verdict, that  
 26 argument is specious. Federal statutes provide for an award of defendant’s profits for design  
 27 patent infringement (35 U.S.C. § 289) and willful trade dress dilution (15 U.S.C. § 1117).  
 28 Controlling precedent permits such awards if the jury finds liability and reasonable proof of

1 defendants' profits—nothing more is required. *See, e.g., Nike Inc. v. Wal-Mart Stores*, 138 F.3d  
2 1437, 1442 (Fed. Cir. 1998) (design); *Nintendo of Am., Inc. v. Dragon Pac. Int'l*, 40 F.3d 1007,  
3 1012 (9th Cir. 1994) (Lanham Act). No additional “causation” requirement applies, and none of  
4 Samsung’s cited cases supports its position. *E.g., Carbice Corp. v. Am. Patents Dev. Corp.*, 283  
5 U.S. 27, 33 (1931) (not addressing damages at all); *ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d  
6 860, 869 (Fed. Cir. 2010) (addressing reasonable royalties under 35 U.S.C. § 284); *Junker v.*  
7 *HDC Corp.*, No. C-07-05094, 2008 WL 3385819, at \*5 (N.D. Cal. July 28, 2008) (awarding  
8 defendant’s profits without requiring proof of causation).

9 Substantial evidence supports the verdict. Mr. Musika testified that the jury should award  
10 Apple more than \$2.2 billion dollars in Samsung’s profits for the products found to infringe  
11 Apple’s design patents or trade dress. (PX25A1.5; Dkt. No. 1990-20 ¶¶ 12-13.) Mr. Wagner  
12 placed Samsung’s profits between \$519 million and \$1.086 billion. (DX781.01, .03). He  
13 admitted that using “Mr. Musika's calculation of Samsung's profitability” and the “start dates”  
14 advocated by Samsung, \$1.396 billion is the “correct number” for Samsung’s profits. (Tr.  
15 3065:6-16.) Thus, Samsung’s hypothetical \$948 million in Samsung profits falls “within the  
16 range encompassed by the record as a whole.” *Powell*, 663 F.3d at 1241.

17 Samsung’s remaining arguments conflict with controlling law. The Federal Circuit  
18 rejected “apportionment” under § 289. *Nike*, 138 F.3d at 1442. For trade dress infringement,  
19 Samsung bore the burden of proving that “sales were demonstratively not attributable” to its  
20 dilution. *Nintendo*, 40 F.3d at 1012; *Lindy Pen Co. Inc. v. Bic Pen Corp.*, 982 F.2d 1400, 1408  
21 (9th Cir. 1993). For both claims, Samsung bore the burden of showing that any proposed cost  
22 deductions were directly tied to the infringing sales. 15 U.S.C. § 1117(a); Dkt. No. 1903 at 72 (JI  
23 54); *Kamar Int'l, Inc. v. Russ Berrie & Co.*, 752 F.2d 1326, 1332 (9th Cir. 1984) (allowing  
24 overhead deduction only when infringer demonstrates it was of actual direct assistance in  
25 infringing product’s production or sale).

26 In light of this authority, Samsung’s analysis of the record must be rejected. First,  
27 because Samsung bore the burden of proof, the jury was free to reject Samsung’s evidence and  
28 award up to \$2.2 billion. The jury awarded less than half this amount. Second, Mr. Musika gave

1 the jury sufficient reason to question the veracity and size of the non-manufacturing costs  
2 Samsung sought to deduct. (Tr. 2062:7-2066:22 (testifying that some Samsung’s expenses lacked  
3 even indirect relationship to infringing sales, and Samsung’s information did not tie to reliable  
4 source, was not used to run business, included multiple errors, was repeatedly withheld, and was  
5 questioned by Court ).) Moreover, Samsung’s “apportionment” evidence was irrelevant, sparse,  
6 and woefully inadequate to compel a 95% reduction in Samsung’s profits. The verdict cannot be  
7 reversed or remitted based on Samsung’s bare assertion that the jury had to make every deduction  
8 that Samsung requested.

9 **2. The record supports the jury’s award of Apple’s lost profits**

10 Samsung claims that \$91 million of the jury’s award reflects Apple’s lost profits on five  
11 products. The Court should not divide the award in that way, but if it does, the record fully  
12 supports Samsung’s proposed amount. Federal statutes provide for an award of lost profits for  
13 patent infringement (35 U.S.C. § 284) and willful trade dress dilution (15 U.S.C. § 1117), and  
14 Mr. Musika testified to lost profits exceeding \$488 million overall (Tr. 2075:1-16). Mr. Musika’s  
15 damages summary includes \$91 million specifically for the five products for which Samsung  
16 alleges that lost profits were awarded. (PX25A1.4; Dkt. No. 1990-20 ¶ 13). This alone provides  
17 a sufficient basis for the supposed \$91 million lost profits award.

18 Samsung argues that the jury could not conclude that the iPhone and Samsung products  
19 compete as potential substitutes because of alleged price differences. The Court previously  
20 rejected this challenge, (Dkt. No. 1157 at 10-11 (“*BIC Leisure*, however, does not require a  
21 separate price elasticity study where the parties are clearly direct competitors, as is the case  
22 here.”)), and the evidence contradicts it. (*E.g.*, Tr. 656:18-657:2 (Schiller confirming competition  
23 between Apple and Samsung); 1510:5-11 (Winer) (“products do compete and compete heavily”).)  
24 Certainly, disputed evidence regarding price differences that Mr. Musika already took into  
25 account does not satisfy Samsung’s burden. (Tr. 2133:7-2135:22 (Musika re price differences).)

26 Samsung next argues that the jury could only conclude that virtually all Samsung’s  
27 customers would have purchased other Android smartphones if Samsung’s infringing products  
28 were not available. Samsung points to evidence that some customers chose Android phones over

1 Apple, but Mr. Musika acknowledged that and on that basis allocated the majority of the market  
2 to companies other than Apple. (PX25A1.8-.9.) In fact, Mr. Musika allocated only “2 million  
3 out of that 22 million” in infringing sales as Apple’s lost profits. (Tr. 2084:1-2085:9.) There was  
4 also ample evidence that design, user interface, and Apple’s proprietary touch screen navigation  
5 technology affect consumer demand, including testimony from Stringer, Schiller, Benner, Musika,  
6 Hauser and Wagner and numerous internal Apple and Samsung documents and surveys. (*See* Dkt.  
7 No. 1982 at 7-9 (discussing in detail exhibits and testimony showing that Apple’s designs and  
8 navigation technology drive consumer demand for smartphones).)

9 Nor can Samsung show that the record lacked evidence of Apple’s capacity to make  
10 iPhones. Two pages of PX25A1 set out data showing Apple’s capacity during the relevant  
11 periods, and these pages and Mr. Musika’s testimony that “Apple . . . did have the ability to make  
12 those [2 million incremental] sales” establish that Apple could have sold more iPhone 4 *and*  
13 *iPhone 3GS* models during the relevant period. (PX25A1.14-15; Tr. 2085:10-2086:3 (Musika),  
14 2097:13-17 (identifying capacity analysis).) Samsung’s argument that Apple could not sell the  
15 *iPhone 4* for four out of 24 months does not show that Apple could not make the comparatively  
16 small number of iPhones needed during the relevant period.

17 Samsung’s final argument is that Mr. Musika’s calculations lacked sufficient detail to  
18 adjust the lost profits by some undefined combinations of patents, periods, or products.  
19 Samsung’s only cited case, *Wechsler v. Macke Int’l Trade, Inc.*, 486 F.3d 1286, 1294 (Fed. Cir.  
20 2007), disallowed lost profits because the patentee *was not selling any competing product* when  
21 the defendant infringed, and does not apply.

### 22 3. The record supports the jury’s award of royalties

23 Samsung’s final attack on hypothetical elements of the verdict is its claim that the \$9.1  
24 million in reasonable royalties supposedly awarded for five products is improper because  
25 Mr. Musika’s reasonable royalty opinions lack sufficient detail. Samsung wrongly assumes that  
26 the jury awarded Apple \$7.14 per unit for the utility patents and \$24 for design claims for these  
27 products, but this theory bears no relationship to the jury’s actual verdict. When the amounts  
28 awarded by product are divided by the unit sales for the five products Samsung includes, the



1 resulting royalties range between \$1.58 to \$3.57 per unit, 50% or less than the rates Mr. Musika  
2 proposed. (*Compare* Dkt. No. 1931, question 23, with JX1500’s unit sales; PX25A1.5; Dkt. No.  
3 1990-20 ¶ 14.) Much higher royalty rates were supported both by his testimony (Tr. 2087:3-  
4 2093:22) (Musika re reasonable royalties) and a table that summarized his methods, the relevant  
5 royalty ranges he derived from three different economic methodologies, and the rates he offered.  
6 (PX25A1.16.) The alleged \$9 million award is not outrageously high, and must be upheld.  
7 *Spectralytics, Inc. v. Cordis Corp.*, 649 F.3d 1336, 1345 (Fed. Cir. 2011).

8 **D. Samsung’s “Incorrect Notice Date” Arguments Are Wrong**

9 Samsung wrongly asserts that it is entitled to a new trial because “the jury calculated  
10 Samsung’s profits and Apple’s damages based on Mr. Musika’s use of an incorrect notice date.”  
11 (Mot. at 24.) First, *Samsung’s own expert* testified that applying *his* view of the appropriate  
12 notice dates, damages of “\$1.396 billion” for Samsung’s profits were appropriate if the jury  
13 accepted Mr. Musika’s calculation of Samsung’s profitability. (Tr. 3064:14-3066:16 (Wagner).)  
14 Second, Samsung assumes that the alleged 40% reduction from Musika’s number relates solely to  
15 disputes over costs (*see* Mot. at 18), but any adjustment made by the jury could have accounted  
16 for notice, costs, or both. Wagner’s present declaration reinforces this. He claims that Musika’s  
17 numbers “adjusted for notice” total to \$1,093,071,655 (Dkt. No. 1990-20 at Schedule 1B, col. [g]  
18 (adding \$866,328,487 and \$266,743,168)), which is more than the jury’s entire award and \$100  
19 million more than what Samsung alleges is attributable to Samsung’s profits. Thus, the evidence  
20 supports the jury’s award whether the jury accepted Samsung’s or Apple’s position on notice.

21 Second, Apple can recover damages for Samsung’s violations of Apple’s unregistered  
22 trade dress regardless of the date on which it gave Samsung notice. *GTFM, Inc. v. Solid*  
23 *Clothing, Inc.*, 215 F. Supp. 2d 273, 306 (S.D.N.Y. 2002); *see also* McCarthy on Trademarks  
24 § 19:144 (4th ed. 2012). Thus, the argument is moot for the five products found to dilute it.

25 Third, ample evidence supports the August 4, 2010, notice date. Samsung was fully  
26 aware of Apple’s complaints by that time. Apple’s written presentation repeatedly identifies  
27 Samsung’s use of Apple’s utility patents, including the ’381 and other “user interface” patents,  
28 and accused Samsung of copying Apple’s designs, including side-by-side comparisons of the

1 industrial design of iPhone 3GS (which embodies the D'677, D'305 and D'087 patents and  
2 Apple's trade dress) and the Galaxy S product, and of the products' user interfaces. (PX52.14-18  
3 (presentation); Tr. 1958:25-1962:19 (Tekslar on August 2010 presentation).) Samsung's director  
4 of licensing, who attended the meeting, admitted that the parties discussed Samsung's  
5 infringement of "Apple phone's patents and design." (PX201 at 31:15-16; 31:18-20; 33:21-24;  
6 37:21-38:05 (JW Lee Dep.)) Nothing more, including more specificity about individual or later-  
7 issued patents, was required. *Minks v. Polaris Indus., Inc.*, 546 F.3d 1364, 1376-77 (Fed. Cir.  
8 2008) (trier of fact must take into account history of parties' relationship in determining whether  
9 communication was "sufficiently specific" to give rise to actual notice); *Cecco Mach. Mfg., Ltd. v.*  
10 *Intercole, Inc.*, 817 F. Supp. 979 (D. Mass. 1992) (actual notice does not require identifying  
11 patent by number where plaintiff notified adversary he had patent on given item and defendant  
12 was infringing that patent). Samsung's claim that the jury had to conclude that Samsung lacked  
13 notice of Apple's allegations until the lawsuit was filed is inconsistent with this record.

14 Finally, Samsung misstates the law when it claims that the Court can throw out the verdict  
15 so long as the jury "may have" relied on the August 4, 2010, notice date. (Mot. at 24.) As noted  
16 above, a jury's damage award must be sustained unless the amount is "grossly excessive or  
17 monstrous, clearly not supported by the evidence or based only on speculation or guesswork."  
18 *Energy Transp.*, 2012 WL 4840813, at \*11 (internal quotation marks omitted). Because the  
19 \$1.05 billion is supported based on an alternative theory, the Court must affirm the verdict. In  
20 *Energy Transportation*, the patentee's damages expert improperly relied on the "25% rule" for  
21 one calculation of damages. *Id.* The Court nonetheless *affirmed* the jury verdict because "[t]he  
22 jury did not adopt either expert's damages analysis wholesale," and "this court perceives that the  
23 record supports the jury's award with substantial evidence." *Id.* at \*12. In *Revolution Eyewear*,  
24 the Federal Circuit similarly affirmed a jury verdict, despite arguments that it was  
25 "mathematically impossible" to square the jury's award with the plaintiff's evidence on  
26 defendant's revenue. 563 F.3d at 1371. Whether or not the jury relied on plaintiff's number, the  
27 verdict as a whole was supported by substantial evidence and could not be disturbed. *Id.*

28 Samsung's cited cases do not hold otherwise. In *First Alliance*, the jury received an



1 incorrect instruction *and* erroneously admitted evidence as to one legal theory. 471 F.3d at 1002.  
2 No such error occurred here. The court’s statement in *Brocklesby v. United States*, 767 F.2d 1288  
3 (9th Cir. 1985), that “the judgment must be reversed if any of the three theories [of liability on  
4 which the jury was instructed] is legally defective,” *id.* at 1294, clearly does not apply here, as  
5 Samsung makes no showing that any of Apple’s liability claims was “legally defective,” instead  
6 asserting that there were not sufficient facts to support one of multiple damages theories. This  
7 challenge does not justify the Court’s intervention if the record as a whole supports the damages.  
8 *See, e.g., Landes Constr. Co. v. Royal Bank of Canada*, 833 F.2d 1365, 1373 (9th Cir. 1987)  
9 (general verdict returned after hearing alternative calculations of damages upheld if substantial  
10 evidence exists for any one calculation.”).

11 **E. Samsung Has Not Shown That It Is Entitled To Remittitur**

12 As Samsung acknowledges (Mot. at 24), the proper amount of a remittitur is “the  
13 maximum amount sustainable by the proof.” *D&S Redi-Mix v. Sierra Redi-Mix & Contracting*  
14 *Co.*, 692 F.2d 1245, 1249 (9th Cir. 1982). Further, remittitur is only permissible if the jury’s  
15 award is “monstrous.” *Revolution Eyewear*, 563 F.3d at 1372. Samsung must therefore show  
16 that the verdict *as a whole* is monstrous and more than the maximum sustainable by the evidence.  
17 *Oiness v. Walgreen Co.*, 88 F.3d 1025, 1030 (Fed. Cir. 1996) (“This court has adopted the  
18 ‘maximum recovery rule’ which requires this court to remit the damage award to the highest  
19 amount the jury could ‘properly have awarded based on the relevant evidence.’”). Further, the  
20 “court cannot ‘correct’ a damages figure by extrapolating” new damage figures not found on the  
21 verdict form; doing so would deprive Apple of its constitutional right to a jury. *Energy Transp.*,  
22 2012 WL 4840813, at \*36. Samsung never attempts to satisfy this standard.

23 The evidence as a whole supports awards well in excess of the verdict. *See* § VII.A, *supra*.  
24 Further, Samsung’s argument that the damages award should be reduced due to failures of proof  
25 with respect to Apple’s lost profits or Samsung’s profits fails, as explained above. *See* § VII.B,  
26 *supra*. Samsung’s effort to reduce the award “to reflect correct notice dates” (Mot. at 25) fails  
27 because the jury awarded Apple less than the maximum supported by the evidence, even if  
28 Samsung were correct as to the appropriate notice dates, and Samsung’s argument relies entirely

1 on a *post hoc* extrapolation and recalculation of damages. *See* § VII.C, *supra*.

2 Finally, Samsung claims that the jury's award of \$57 million for the Galaxy Prevail is  
3 unsupported because Mr. Musika's "lost profits" number for the Prevail was \$8.5 million. (Mot.  
4 at 26.) But Samsung ignores that Mr. Musika accounted for nearly all of the Galaxy Prevail units  
5 through a calculation of *Samsung's* profits. (PX25A1.5 (including \$143 million for Samsung's  
6 profits).) Having determined that the Prevail infringed the utility patents but not the trade dress or  
7 design patents, the jury needed to award a different type of damages for the Prevail units Mr.  
8 Musika had assigned to Samsung profits, and could reasonably award Apple's lost profits instead.  
9 The evidence was that (1) Apple's profit margin was approximately \$244 per phone (Tr. 2075:1-7  
10 (\$488.8 million in Apple's lost profits for 2 million units)); (2) it would take Samsung between 1  
11 and 8 months to design around Apple's patents (Tr. 2084:11-19); (3) Samsung sold 1.2 million  
12 Prevail phones in Q2 2011 and Q3 2011 (JX1500.1); and (4) Apple's market share in those time  
13 periods was between 22.5% and 29.0% (PX25A1.8). Based on these facts, there was sufficient  
14 evidence to support Apple's lost profits damages of \$65 million or more for the Prevail (1.2  
15 million x \$244 x 22.5%). Mr. Musika explained to the jury how to do such a revised calculation  
16 (Tr. 2162:11-2163:12), and Apple reminded them in closing (Tr. 4131:24-4132:4).

17 **F. Samsung Has Not Accounted For The Stipulation And Order**

18 Samsung makes several arguments challenging the lack of specificity in Mr. Musika's  
19 calculations. All must be rejected because Samsung ignores the stipulation and order precluding  
20 such challenges. (*See* Dkt. No. 1597 ¶¶ 1, 2, 6 & 14; *see also* Dkt. No. 1649). Thus, to the extent  
21 Samsung's arguments regarding Samsung's profits (Mot. at 19:15-20:21), price elasticity (*id.* at  
22 21:1-6), lost profits calculations (*id.* at 22:3-16), and reasonable royalty rates (*id.* at 22:18-23:5)  
23 are based on lack of specificity of the evidence, these arguments have been waived.

24 **VIII. SAMSUNG IS NOT ENTITLED TO JMOL ON ITS OFFENSIVE CASE**

25 For Samsung's patents, substantial evidence supports the jury's findings of non-  
26 infringement and patent exhaustion.<sup>6</sup> The jury was also free to reject the testimony of Samsung's

27 <sup>6</sup> Samsung conceded that Apple's accused products do not infringe the '516, '941, '893, and '711  
28 patents under the doctrine of equivalents. (Tr. 3261:21-3262:1.)

1 experts as not credible and to find that Samsung failed to meet its burden of proving infringement.  
2 *See Winarto v. Toshiba Am. Elecs. Components, Inc.*, 274 F.3d 1276, 1283 (9th Cir. 2001) (“In  
3 ruling on a motion for JMOL, the court is not to make credibility determinations or weigh the  
4 evidence and should view all inferences in the light most favorable to the nonmoving party.”).

5 **A. Substantial Evidence Supports The Jury’s Non-Infringement And Patent**  
6 **Exhaustion Findings For The ’516 And ’941 Patents**

7 Samsung’s only challenge to the jury’s non-infringement findings is a belated attempt to  
8 raise claim construction arguments for “total transmit power” in the ’516 patent and “an entire  
9 SDU” in the ’941 patent. (Mot. at 26-28.) These arguments come too late, since Samsung never  
10 sought a construction for *any* term in these patents and never objected to the Court’s instruction  
11 that the jury should apply the claim language’s “plain and ordinary meaning” for terms that had  
12 not been construed (Dkt. No. 1693 at 10 (undisputed jury instruction)). *See Conoco, Inc. v.*  
13 *Energy & Envtl. Int’l, L.C.*, 460 F.3d 1349, 1359 (Fed. Cir. 2006) (“[L]itigants waive their right  
14 to present new claim construction disputes if they are raised for the first time after trial.”).

15 Samsung’s request for a judgment of infringement also fails on the merits, as explained below.

16 **’516 Patent.** Substantial evidence shows that Apple’s accused products do not satisfy the  
17 “total transmit power” limitations. Samsung improperly focuses on the *embodiments* disclosed in  
18 the ’516 patent, while infringement requires comparing the accused products to the *claims* of the  
19 patent. Here, as Samsung’s expert Dr. Williams testified, the asserted claims refer to only two  
20 channels. (JX1073.27 (claim 15); Tr. 2766:14-23 (Williams) (agreeing that “the channels” in  
21 claim 15 “refers to the first and second channel”).) The evidence showed that Apple’s products,  
22 in contrast, calculate the total transmit power of all five physical channels (JX1083.25; PX208  
23 (“this is the transmit power of *all* physical channels”)), and Dr. Kim explained that this difference  
24 resulted in no infringement. (Tr. 3418:18-3419:2 (“Apple product does not obtain the total  
25 transmit power by adding two channels, but it actually adds five channels”), 3421:8-3422:20.)  
26 The jury therefore had ample evidence from which to find that Apple’s products do not infringe.

27 **’941 Patent.** Substantial evidence demonstrates that Apple’s accused products do not  
28 meet the “entire SDU” limitations. Again, Samsung improperly compares Apple’s products to

1 the *embodiments* disclosed in the '941 patent. (Mot. at 27-28.) Samsung also ignores the  
2 prosecution history in which Samsung disclaimed the “exact match” scenario that it now contends  
3 the claims cover. (JX1060.22-.23, .28-.29 (amendment and remarks); Tr. 3449:23-3453:5  
4 (Knightly).) *See Alpex Computer Corp. v. Nintendo Co.*, 102 F.3d 1214, 1221 (Fed Cir. 1997)  
5 (“[P]ositions taken before the PTO may bar an inconsistent position on claim construction.”).  
6 When Apple’s products are properly compared to the asserted *claims*, as Dr. Knightly did at trial,  
7 it is clear that Apple’s products do not have the “one-bit field” indicating “whether the PDU  
8 contains an entire SDU” that claims 10 and 15 require. (Tr. 3464:11-16 (Knightly) (“[Apple’s  
9 products] don’t have the one bit field that’s in the claim”); *see* Tr. 3446:21-3449:4, 3453:6-10  
10 (Knightly).) The jury’s non-infringement finding is thus supported by substantial evidence.

11 **Patent Exhaustion.** Substantial evidence also supports the jury’s finding that Samsung’s  
12 rights in the '516 and '941 patents were exhausted. Samsung’s challenges to that verdict fail.

13 *First*, Apple proved that Intel’s sales to Apple were authorized by Samsung. The  
14 Samsung-Intel license authorized Intel to sell chipsets “indirectly” (PX81.11, .23),<sup>7</sup> which  
15 includes the authority to sell through a subsidiary. (Tr. 3543:12-24 (Donaldson) (“indirectly”  
16 includes “right to sell” through “a number of subsidiaries”).<sup>8</sup> Apple further proved that the  
17 chipset sales were indirect sales made by Intel Corporation through its sales subsidiary Intel  
18 Americas. (PX78 (invoices from Intel Americas); Tr. 3170:1-4 (Blevins) (“Intel Americas is a  
19 sales subsidiary of Intel whose function it is to send invoices and collect payments for Intel  
20 products.”).) It is irrelevant whether Intel Americas was separately sublicensed.

21 *Second*, Apple proved that the relevant sales occurred in the United States. (PX78  
22 (invoices showing that buyer, seller, and payment were in the United States).) Samsung does not

23 <sup>7</sup> Samsung’s reliance on *Management Systems Associates, Inc. v. McDonnell Douglas Corp.*, 762  
24 F.2d 1161 (4th Cir. 1985), is misplaced. In that case, the jury considered an exhibit containing  
25 damages calculations that were based on a faulty construction of a contract. *Id.* at 1173-78. The  
26 court based its reversal primarily on the improper admission of that exhibit into evidence and  
27 noted that the jury instructions were deficient for implicitly incorporating those faulty  
28 constructions. *Id.* at 1177-78. Here, in contrast, the agreement itself was submitted to the jury  
and the jury was asked to determine whether it authorized Intel’s sales to Apple.

<sup>8</sup> Contrary to Samsung’s assertion (Mot. at 28), none of Dr. Ahn’s deposition testimony played at  
trial discussed the Samsung-Intel license. (*See Selwyn Decl.*, Ex. 1.)

1 dispute this evidence. Instead, Samsung contends that a U.S. sale requires delivery in the United  
 2 States (Mot. at 28), but the Federal Circuit has held that the location of the “essential activities”—  
 3 including ordering, payment, and/or performance of the sales contract—may establish that a sale  
 4 took place at one or more particular locations, even if delivery occurred elsewhere.<sup>9</sup> *See, e.g.,*  
 5 *MEMC Elec. Materials, Inc. v. Mitsubishi Materials Silicon Corp.*, 420 F.3d 1369, 1375-77 (Fed.  
 6 Cir. 2005) (finding that a sale occurred in Japan where the ordering, payment, and shipping  
 7 instructions were in Japan, despite delivery in Texas); *N. Am. Philips Corp. v. Am. Vending Sales,*  
 8 *Inc.*, 35 F.3d 1576, 1579 (Fed. Cir. 1994) (stating that a sale may occur in several locations,  
 9 including the “places of contracting and performance,” and rejecting that a sale occurs only  
 10 “where the goods change hands”).

11 *Finally*, although Samsung does not challenge the sufficiency of the evidence that the  
 12 Intel chipsets substantially embodied the patents, it argues that the jury’s exhaustion finding is  
 13 inconsistent with the non-infringement finding. But there is no inconsistency: a product may  
 14 “substantially embody” a patent without infringing. *See Quanta Computer, Inc. v. LG Elecs., Inc.*,  
 15 553 U.S. 617, 621, 630-35 (2008) (finding exhaustion from sale of non-infringing chips that  
 16 substantially embodied patent).

17 **B. Substantial Evidence Supports The Jury’s Non-Infringement Findings For**  
 18 **The ’460, ’893, And ’711 Patents**

19 **’460 Patent.** Substantial evidence supports the jury’s finding that Apple does not infringe  
 20 the ’460 patent for multiple reasons. *First*, Samsung argues that Apple’s application programs—  
 21 called “apps”—are the claimed “modes” and “sub-modes” (Mot. at 29), but Samsung’s expert Dr.  
 22 Yang conceded that “application programs and modes are different.” (Tr. 2482:15-2483:2.)  
 23 Apple’s witnesses similarly explained that “apps are quite different from modes.” (Tr. 3196:15-  
 24 3197:5 (Dourish); *see also* Tr. 3181:2-8 (E. Kim); Tr. 3297:4-7, 3304:12-3306:4 (Srivastava); Tr.  
 25 3232:9-3233:8 (Givargis).) *Second*, the Court properly instructed the jury that no particular order

26 <sup>9</sup> At the jury charge conference, Samsung’s counsel agreed with the “essential activities”  
 27 language (Tr. 3767:8-17 (“if the Court is intending to keep what it has, if we can include delivery  
 28 as one of the essential activities”)), and further agreed that “performing under the obligations of  
 the contract would include delivery” (Tr. 3768:1-8).

1 of steps was required “absent [claim] language specifying a specific order.” (Dkt. No. 1903 at  
2 41.) Here, the plain meaning of the claim language—including the phrase “displaying *other*  
3 images”—requires step C to be performed after step B. (JX1069.19 (claim 1); Tr. 3297:10-  
4 3299:19 (Srivastava).) As Dr. Srivastava testified—and Samsung does not dispute (Mot. at 29)—  
5 “Apple products simply cannot do . . . element C after element B.” (Tr. 3299:20-3300:24.) *Third*,  
6 Dr. Yang conceded that Apple’s iOS 5 products do not literally have “scroll keys” (Tr. 2394:12-  
7 14), and substantial evidence showed that “swiping” is not equivalent to using “scroll keys.” (Tr.  
8 3181:25-3183:10 (E. Kim); Tr. 3300:25-3304:9 (Srivastava) (explaining differences in function,  
9 way, and result).) Prosecution history estoppel also bars Samsung from asserting equivalents  
10 because Samsung added “scroll keys” during prosecution to overcome prior art (JX1066.180,  
11 .183). *See Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 734 (2002).

12 **’893 Patent.** Substantial evidence supports the jury’s non-infringement finding because,  
13 as discussed above, the “apps” used in Apple’s products are not the “modes” claimed by  
14 Samsung’s patents. (Tr. 3197:23-3200:12 (Dourish); Tr. 2482:15-2483:2 (Yang) (“[A]pplication  
15 programs and modes are different.”).) In addition, Apple’s products do not meet the “irrespective  
16 of a duration” limitation because “there are a number of circumstances under which when you  
17 switch from the camera app to the photo app you are not going to be presented with the same  
18 image that you were viewing before you left.” (Tr. 3200:13-3202:14 (Dourish); *see also* Tr.  
19 3178:12-3180:18 (E. Kim) (describing circumstances).)

20 **’711 Patent.** Substantial evidence supports the jury’s non-infringement finding because,  
21 for the same reasons explained above, the “apps” used in Apple’s products are not the “MP3  
22 mode” claimed in the ’711 patent. (Tr. 3232:9-3233:8 (Givargis); Tr. 2482:15-2483:2 (Yang)  
23 (“[A]pplication programs and modes are different.”).) Moreover, Dr. Yang failed to identify “an  
24 application module including at least one applet” in Apple’s source code (Tr. 2479:4-8 (“I just  
25 can’t recall exactly which one they are.”); *see* Tr. 2476:1-2479:23), and there was no evidence  
26 that Apple’s products contain that claim element. On the contrary, Dr. Givargis testified that  
27 Apple’s products “do not use applets.” (Tr. 3228:19-3229:4; *see also* Tr. 3229:5-3232:8.)  
28



1 **IX. SAMSUNG’S DELIBERATE TRIAL STRATEGY CANNOT IMPLICATE THE**  
2 **“INTERESTS OF JUSTICE”**

3 This Court did not “prevent[] Samsung from presenting a full and fair case.” (Mot. at 30.)  
4 Samsung made a strategic decision to reject a separate trial on its counterclaims and to proceed  
5 instead with a single trial under the established time limitations. (July 24, 2012 Hr’g Tr. 45:20-  
6 46:4, 47:23-48:7, 49:10-12 (Court offers separate trial if Samsung thinks limits “are prejudicial”;  
7 Samsung responds: “Our choice is parity. . . . We’ll do the case within the time limits.”); Dkt.  
8 No. 1329 at 2 (confirming trial limits and noting Samsung’s rejection of separate trial).) Samsung  
9 then made strategic choices about how to use its allotted time, including “a strategic decision to  
10 spend more time to cross-examine Apple witnesses” than Apple used “to present its affirmative  
11 case” (Tr. 3250:22-3252:2) and not to call certain witnesses. The Court followed Ninth Circuit  
12 precedent in allowing each side to comment on the other’s failure to call witnesses. (Dkt. No.  
13 1721 at 1-2 (citing *Food Machinery & Chem. Corp. v. Meader*, 294 F.2d 377, 384 (9th Cir.  
14 1961).) Samsung cites no contrary authority.

15 Nor does Samsung establish unequal treatment. Samsung points to rulings excluding  
16 theories and evidence not timely disclosed during discovery, but the Court applied the same rule  
17 to Apple (*e.g.*, Tr. 942:20-943:13, 1254:20-22). The Court also required both sides to lay  
18 sufficient foundation for witness testimony. (*E.g.*, Tr. 2484:21-2485:3 (sustaining Samsung’s  
19 foundation objection).) The examples Samsung cites (Mot. at 30:21-23) simply reflect its failures  
20 to establish that a witness knew anything about the topic or exhibit (Tr. 524:15-525:19, 527:3-12)  
21 and, in contrast, Apple’s appropriate questions about witnesses’ personal knowledge (Tr. 2832:1-  
22 19), documents with stipulated authenticity that witnesses had considered (*e.g.*, Tr. 1406:11-  
23 1410:8; *see also* Dkt. No. 1205 (stipulation)), or topics for which Samsung had opened the door  
24 (Tr. 987:21-992:12). Apple’s advertisements were relevant to secondary meaning and fame  
25 analyses (Dkt. No. 1903 at 83, 87), but Samsung’s proffered advertisement was not relevant. In  
26 sum, Samsung received a fair trial; it simply does not like the result.

27 **CONCLUSION**

28 Samsung’s motion for JMOL, new trial, or remittitur should be denied.

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Dated: October 19, 2012

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