

1 HAROLD J. MCELHINNY (CA SBN 66781)
 hmcclhinny@mofo.com
 2 MICHAEL A. JACOBS (CA SBN 111664)
 mjacobs@mofo.com
 3 RACHEL KREVANS (CA SBN 116421)
 rkrevans@mofo.com
 4 JENNIFER LEE TAYLOR (CA SBN 161368)
 jtaylor@mofo.com
 5 ALISON M. TUCHER (CA SBN 171363)
 atucher@mofo.com
 6 RICHARD S.J. HUNG (CA SBN 197425)
 rhung@mofo.com
 7 JASON R. BARTLETT (CA SBN 214530)
 jasonbartlett@mofo.com
 8 MORRISON & FOERSTER LLP
 425 Market Street
 9 San Francisco, California 94105-2482
 Telephone: (415) 268-7000
 10 Facsimile: (415) 268-7522

WILLIAM F. LEE
 william.lee@wilmerhale.com
 WILMER CUTLER PICKERING
 HALE AND DORR LLP
 60 State Street
 Boston, MA 02109
 Telephone: (617) 526-6000
 Facsimile: (617) 526-5000

MARK D. SELWYN (SBN 244180)
 mark.selwyn@wilmerhale.com
 WILMER CUTLER PICKERING
 HALE AND DORR LLP
 950 Page Mill Road
 Palo Alto, California 94304
 Telephone: (650) 858-6000
 Facsimile: (650) 858-6100

11 Attorneys for Plaintiff and
 12 Counterclaim-Defendant APPLE INC

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

17 APPLE INC., a California corporation,

18 Plaintiff,

19 v.

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

23 Defendants.
 24

Case No. 11-cv-01846-LHK

**APPLE'S OBJECTIONS AND
 RESPONSES REGARDING DAY 4
 EXAMINATION DISCLOSURES**

Trial: August 6, 2012
Time: 9:00 a.m.
Place: Courtroom 8, 4th Floor
Judge: Hon. Lucy H. Koh

1
2 Apple submits the following objections to Samsung's disclosed cross-examination
3 exhibits and materials for Hal Poret, Kent Van Liere, Russell Winer, and Ravin Balakrishnan and
4 responses to Samsung's objections to Apple's direct examination exhibits for these witnesses.

5 **I. APPLE'S OBJECTIONS TO SAMSUNG'S CROSS-EXAMINATION**
6 **MATERIALS SHOULD BE SUSTAINED**

7 **A. Hal Poret**

8 **DX628.** Apple objects to DX628, an Apple trademark application. The Court has already
9 sustained Apple's objection to this exhibit. (Dkt. No. 1519 at 2 ("Sustained. Samsung has not
10 established that it disclosed DX628 in a timely manner.)) As the Court already found, Samsung
11 failed to timely disclose its invalidity and non-infringement contentions concerning this
12 trademark application during discovery. Samsung did not disclose this trademark application in
13 its contention interrogatory responses or its expert reports. The first time this trademark
14 application was disclosed was the April 27, 2012 deposition of Russell Winer, more than a month
15 after the close of fact discovery. (*See id.* at 2.)

16 **SDX3705.109.** Apple objects to SDX3705.109 on the ground that Samsung will be
17 unable to lay a foundation for testimony about this demonstrative. SDX3705.109 depicts several
18 percentages that do not appear anywhere in Mr. Poret's expert report. Presumably, these
19 percentages were calculated by Samsung's lawyers. Mr. Poret will not be able to testify as to
20 what the percentages mean or how they were derived. As such, Samsung will not be able to
21 establish any foundation for testimony about SDX3706.109.

22 **B. Kent Van Liere**

23 **SDX3900.112 & SDX3900.129.** Apple objects to demonstrative exhibits SDX3900.112
24 and SDX3900.129. These demonstratives depict tablets and phones made by companies other
25 than the parties. Samsung will not be able to lay a proper foundation for testimony about any of
26 these products during its cross-examination of Dr. Van Liere. Dr. Van Liere's opinions in this
27 action are concerned with surveying whether people associate Samsung phones with Apple and
28 confuse Samsung tablets with Apple's iPad products; he has not studied or opined on the tablets
and phones depicted in SDX3900.112 and SDX3900.129. Consequently, Dr. Van Liere lacks any

1
2 basis to testify about the tablets and phones depicted in these demonstratives.

3 **C. Russell Winer**

4 **SDX3917.104.** Apple objects to demonstrative exhibit SDX3917.104 on the ground that
5 it is misleading because it overemphasizes text from the description section of Apple’s U.S.
6 Registration No. 3,470,983 (JX1039). The Trademark Manual of Examining Procedure (TMEP)
7 explains that “[a] description cannot be used to restrict the likely public perception of a mark,”
8 stating that “[a] mark’s meaning is based on the impression actually created by the mark in the
9 minds of consumers.” TMEP § 808.02. Even though the description in a trade dress registration
10 cannot limit the scope of the registered trade dress, Samsung appears to be using the description
11 in JX1039 to narrow Apple’s registered trade dress to something other than the overall
12 appearance of the image provided in the application. Consequently, SDX3917.104 is not
13 probative of any issue in this case, and the risk of misleading the jury substantially outweighs
14 what limited probative value it has.

15 **SDX3917.119.** Apple objects to demonstrative exhibit SDX3917.119 on the ground that
16 it is misleading because it depicts the applications screen of the Droid Charge in a manner that is
17 inconsistent with the version of that product contained on the joint exhibit list – JX1025. The
18 applications screen on JX1025 displays a different graphical user interface than the one depicted
19 in SDX3917.119. Consequently, this demonstrative is not an accurate depiction of the physical
20 record and therefore is not probative of any disputed issues.

21 **D. Ravin Balakrishnan**

22 **DX2556.** Samsung claims that this “impeachment” exhibit, which does not appear on its
23 exhibit list, is source code that was previously made available for inspection. Samsung failed to
24 provide the actual pages of code that it now seeks to ambush Dr. Balakrishnan with, so Apple has
25 been given no notice of its contents, much less an indication of whether this code even comes
26 from the pages that were printed during discovery. Given this lack of transparency, Samsung
27 may be attempting to circumvent Judge Grewal’s 5/4/12 order sanctioning it for failure to
28 produce source code, and preventing it from relying on source code that was not timely produced,
or that may relate to design arounds. (Dkt. No. 898 at 9.) But given Samsung’s hide the ball

1
2 strategy, neither Apple nor the Court will know until Samsung makes use of this exhibit, which
3 raises the specter of exposing the jury to information that has specifically been excluded from this
4 case. Moreover, given that Samsung's expert Jeff Johnson did not cite any Samsung source code
5 in his list of materials considered in forming his non-infringement opinion on the '381 patent
6 (Hung Decl. Ex. A), Samsung cannot have any legitimate non-infringement basis for using this
7 exhibit during Dr. Balakrishnan's examination. Accordingly, it should be excluded on the
8 grounds that it is not relevant, and because the prejudicial nature of this previously excluded
9 information substantially outweighs any probative value.

10 **DX2552.** Despite having moved in limine to exclude the "findings or orders of [other]
11 proceedings" because they "could only serve to mislead and/or confuse the jury," (Dkt. No. 1185-
12 3 at 16), Samsung now seeks to violate the spirit, if not the letter, of both that motion and the
13 Court's order granting it (Dkt. No. 1267 ¶ 14) by introducing as an exhibit Dr. Balakrishnan's
14 declaration from a separate ITC investigation involving HTC Corp. That exhibit, which was not
15 produced and which is not on Samsung's exhibit list, not only includes multiple competing
16 constructions of claim terms that are not at issue in this case, but also proposed constructions that
17 differ from the constructions provided by the Court here. (*See, e.g.*, DX2552 at 13-15
18 (identifying constructions for "electronic document" and almost every other claim term).) This
19 exhibit is deeply confusing and will mislead the jury as to issues in this case, and should be
20 excluded under FRE 403.

21 Moreover, this exhibit also includes a lengthy discussion of the "Glimpse" reference
22 (DX2552 at 19-20) that was specifically excluded by the Court in its Order denying Samsung's
23 motion for leave to amend its invalidity contentions. (Dkt. No. 836 at 8 ("Accordingly,
24 Samsung's motion to supplement its invalidity contentions with the Glimpse reference (Chart G-
25 7) is DENIED.")) The Court previously found that Samsung failed to disclose that reference in a
26 timely manner and rightly excluded it. As it has done deliberately, repeatedly, and flagrantly,
27 Samsung is again attempting an end run around the Court's order and trying to put before the jury
28 evidence that has been excluded. For these reasons, this exhibit should be excluded.

1
2 **II. SAMSUNG’S OBJECTIONS TO APPLE’S DIRECT EXAMINATION**
3 **MATERIALS SHOULD BE OVERRULED**

4 **A. Hal Poret**

5 **PDX30.** Samsung asserts an improper categorical objection to the demonstrative slides
6 contained in PDX30, arguing that their use of the word “recognition” is misleading. First,
7 “recognition” is not a legal term of art; rather, it is a term that Mr. Poret will use to explain his
8 analysis to the jury. In particular, Mr. Poret will testify that he tested whether people *recognized*
9 Apple as the source of the iPhone and iPad trade dress. Second, Mr. Poret will testify that his
10 survey results – based on an appropriate universe of respondents who purchased a mobile phone
11 within the past 12 months or are likely to purchase a mobile phone in the next 12 months – show
12 that Apple’s trade dress has acquired secondary meaning. Whether these survey results are
13 relevant to the general population and thus probative of the fame of Apple’s trade dress is a
14 question for the jury. Nothing in PDX30 misleads the jury or confuses the issues.

15 **B. Kent Van Liere¹**

16 **PDX31.2 & PDX31.3.** Samsung objects that the word “dilution” in PDX31.2 and
17 PDX31.3 should be excluded because Apple did not disclose in its interrogatory responses or in
18 Dr. Van Liere’s report that his likelihood of confusion survey results are relevant to Apple’s
19 dilution claims. But the relevance of such survey results to Apple’s dilution claims are a *matter*
20 *of law*; as the Court has noted in its ruling on Apple’s *Daubert* motion, “[A] showing that
21 confusion is likely may evidence an association between products.” (Dkt. No. 1157 at 6.) That
22 such evidence is relevant is not a contention or expert opinion that should have been disclosed
23 according to the Court’s procedural schedule. Samsung’s objection is no more than a *motion in*
24 *limine* in disguise and thus should be overruled.

25 **C. Russell Winer**

26 **PDX28.25.** Samsung’s objections to PDX28.25 should be overruled. A testifying expert

27 _____
28 ¹ At 2:19 a.m., counsel for Samsung informed Apple it would not be briefing its objection
that the image of the Nook Color in PDX31 is misleading. Apple has not responded to that
objection in writing, but reserves its responses should Samsung raise this objection in court.

1
2 may rely on the report of a nontestifying expert if the report consists of facts and data on which
3 experts in the field would reasonably reply in forming an opinion. The expert is “not required to
4 testify only upon data the expert has personally gathered or tested.” *02 Micro Intern. Ltd. v.*
5 *Monolithic Power Systems, Inc.*, 420 F. Supp. 2d 1070, 1088-89 (N.D. Cal. 2006) (admitting
6 testimony of testifying expert based on “testing [that] was performed according to methods
7 commonly accepted in the industry”).

8 Dr. Winer can properly testify about consumer surveys regarding confusion and dilution
9 because he has conducted research surveys in the past, including online surveys for the purposes
10 of litigation. As a marketing expert, he is knowledgeable about the appropriate survey
11 methodology and often reviews surveys of this kind. Moreover, surveys regarding confusion and
12 dilution are appropriate subjects for expert testimony. These surveys are also highly probative of
13 issues regarding trade dress infringement and dilution, and this probative value outweighs any
14 risk of prejudice. Finally, Dr. Winer has personal knowledge of the survey evidence underlying
15 PDX28.25, and Apple will be able to lay a proper foundation for his testimony.

16 **PDX28.27.** Samsung’s objections to PDX28.27 should be overruled. That demonstrative
17 exhibit reflects the deposition testimony of Sangeun Lee and an underlying document. PDX28.27
18 is highly probative of trade dress infringement and dilution for the iPad and iPad 2 because it
19 shows actual confusion between the Galaxy Tab 10.1 and the iPad. The fact that PDX28.27
20 disputes Samsung’s contentions regarding the absence of confusion and dilution does not make it
21 highly prejudicial.

22 Apple had no obligation to disclose deposition testimony of Samsung own witnesses in
23 response to any of Samsung’s discovery requests and Samsung failed to cite to any of their
24 discovery requests that allegedly asks for such disclosure. Samsung cannot rely on an overly
25 broad request for “all facts” as warranting such a disclosure. *See In re eBay Seller Antitrust*
26 *Litigation*, No. C 07-1882 JF (RS), 2008 WL 5212170, at *2, (N.D. Cal. Dec. 11, 2008).
27 Nevertheless, Sangeun Lee’s February 24, 2012 deposition testimony was cited in Dr. Winer’s
28 expert report and that same testimony is quoted in PDX28.27. (Hung Decl. Ex. B ¶157.)

Additionally, Mr. Lee’s testimony directly relates to PX59. The Court previously overruled

1
2 Samsung's objection to the use of PX59 and held that it is "relevant at least to damages and is not
3 unduly prejudicial under FRE 403." (Dkt. No. 1563 at 3.)

4 **D. Ravin Balakrishnan**

5 **PX46.**² This internal Samsung document, which clearly demonstrates Samsung's copying
6 of the "bounce back" feature disclosed in the '381 patent, is directly related to the IP at issue in
7 this case. In addition, because Apple has alleged willful infringement (Dkt. No. 75 at ¶ 193),
8 evidence of copying is directly relevant to that analysis. *See, e.g., Stryker Corp. v. Intermedics*
9 *Orthopedics, Inc.*, 96 F.3d 1409, 1414 (Fed. Cir. 1996) (noting that whether an infringer
10 "intentionally copies the ideas of another" is relevant to determining willfulness, and recognizing
11 "copying to be a factor [in] deciding the question of willfulness"). Furthermore, Samsung has
12 long since been specifically aware of Apple's intent to rely on this document to support its
13 willfulness contentions. (*See Hung Decl. Ex. C at 9* (identifying PX46, Bates-stamped
14 SAMNDCA00508318, as relevant to Apple's willfulness allegations regarding the asserted utility
15 patents).) Regardless, copying also is relevant to secondary considerations of non-obviousness.

16 This document also is specifically cited and discussed at paragraph 52 of his March 22,
17 2012 expert report. ("As just one example, in the document titled "Behold3 Usability Evaluation
18 Results" (SAMNDCA00508318 – 508411), Samsung evaluated its Behold3 phone against
19 Apple's iPhone. (SAMNDCA00508331[)]" (*See Hung Decl. Ex. E at 13.*)

20 Dr. Balakrishnan will offer technical analysis of Samsung's evaluation of the "bounce
21 back" software functionality, which is exactly the type of testimony contemplated under FRE 702
22 and 703. He will also opine that Samsung copied this functionality from Apple based on the
23 admissions and technical analysis of software features contained in this document. Again, this
24 kind of technical analysis is the type of information a human computer interface expert would
25 reasonably rely upon to determine whether Samsung copied Apple. This document is highly
26 probative of Samsung's intent to copy the "bounce back" feature, and is therefore relevant under

27 _____
28 ² To Apple's prejudice, Samsung's counsel changed its objections to this exhibit at 2:19
a.m.

1
2 FRE 402.

3 Moreover, Samsung should not be rewarded for its failure to satisfy its discovery
4 obligations. Apple requested a corporate designee to testify to this document's "author(s); its
5 authenticity . . . for whom and for which groups, teams, or leads the evaluation was created."
6 (Hung Decl. Ex. D.) Samsung never provided any such designee. Samsung's improper attempts
7 to keep this document out of evidence should be rejected. Apple also notes that this document is
8 not hearsay, as it is a party admission under FRE 801(d)(2).

9 Finally, the Court has already overruled Samsung's objections to similar exhibits for other
10 experts such as Susan Kare. (*See* Dkt. No. 1520 at 3 (overruling objection to PX44 because
11 internal Samsung documents are admissible as party admissions, relevant to Apple's claims, and
12 admissible).)

13 **PDX27.33.** Dr. Balakrishnan's presentation identifies the accused Samsung products by
14 name and provides the exhibit numbers for the underlying products any time that videos of those
15 devices are played. Samsung contends that PDX27.33 is misleading because the Android version
16 of those products is not identified, despite the fact that the jury will have all of the accused
17 products in evidence when determining the question of infringement.

18 The Court has already denied Samsung's Motion in Limine No. 6 ("to exclude
19 generalizations regarding the operation of accused Samsung products"), which specifically
20 addressed this issue. (*See* Dkt. No. 1267 ¶ 16.) Although Dr. Balakrishnan makes no sweeping
21 "generalizations" as imagined by Samsung, his use of any representative Android source code
22 would be an issue of Samsung's own making. Apple repeatedly requested the production of all
23 the source code for the accused Samsung products. Judge Grewal found that Samsung failed to
24 satisfy its discovery obligations by only producing a single "release-version source code that
25 Samsung deemed most relevant" for individual products and granted Apple's motion for
26 sanctions. (Dkt. No. 898 at 5, 9.) Samsung cannot claim that Apple is somehow misleading the
27 jury by not displaying an Android version when it was Samsung that made differing Android
28 versions irrelevant to this case by failing to produce them during discovery. Samsung's objection
should be overruled because to find otherwise would reward Samsung for its discovery violations.

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

Dated: August 6, 2012

MORRISON & FOERSTER LLP

By: /s/ Michael A. Jacobs
Michael A. Jacobs

Attorneys for Plaintiff
APPLE INC.