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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
27

Case No. 11-cv-01846-LHK (PSG)

**REPLY DECLARATION OF
MARYLEE ROBINSON IN
SUPPORT OF APPLE'S MOTIONS
FOR A PERMANENT
INJUNCTION, FOR DAMAGES
ENHANCEMENT, FOR
SUPPLEMENTAL DAMAGES AND
FOR PREJUDGMENT INTEREST;
AND JUDGMENT AS A MATTER
OF LAW (RENEWED), NEW
TRIAL, AND AMENDED
JUDGMENT [FRCP 50, 59]**

1 I, Marylee Robinson, hereby declare as follows:

2
3 **I. BACKGROUND**

4 1. I am a Director with Invotex Group, located at 1637 Thames Street, Baltimore,
5 Maryland 21231. I previously submitted a declaration in support of Apple's Motion for Judgment
6 as a Matter of Law (Renewed), New Trial, and Amended Judgment, and Apple's Motion for a
7 Permanent Injunction and for Damages Enhancements. I submit this declaration in further
8 support of those same motions.

9
10 **II. SUPPLEMENTAL DAMAGES CALCULATIONS**

11 2. In Samsung's opposition to Apple's request for supplemental damages, Samsung
12 argues that Apple's \$50.40 per-sale damages rate based on the jury's total damages award
13 "awards Apple supplemental damages based on amounts the jury never awarded as to any of [the]
14 eight products" that remained on sale after June 30, 2012. (Dkt. No. 2053 at 26:22-23.) "For
15 instance," Samsung explains, "Apple's average includes \$143,539,179 the jury awarded on the
16 Fascinate (Dkt. 1931), but the Fascinate is not one of the products for which Apple seeks
17 supplemental damages." (*Id.* at 26:23-25.)

18 3. As discussed in my prior declaration, I calculated supplemental damages based on
19 the jury's verdict as a whole. This approach was more conservative than calculating a per-unit
20 rate based only on the eight specific products. As illustrated in **Exhibit 1** attached hereto, if
21 Apple had calculated supplemental damages using only the eight specific products, as opposed to
22 the entire jury award, the resulting per-unit damages figure would have been \$50.85, instead of
23 \$50.40, resulting in an additional \$1.07 million in supplemental damages.

24 4. I used all the sales data available at the time of my declaration to prepare the
25 projections of future sales of infringing products. As discussed at paragraphs 7 to 12 of my
26 declaration, this calculation was intended to serve as an estimate for all infringing products and
27 not just the eight products that I used for purposes of the projection.

1 5. Samsung has provided a declaration from Mr. Kerstetter which only includes
 2 figures on unit sales for the eight products used in the projections, as well as a subsequently
 3 produced single page with figures for the Galaxy Tab 7.0. I understand that Apple asked for the
 4 underlying documents created in the ordinary course to verify these figures, as well as all
 5 infringing and diluting devices, but Samsung has refused to provide them. Discovery in this case
 6 demonstrates that this information is easily available to Samsung and could be produced. The
 7 failure to do so is a significant concern given the substantial difficulties that Invotex had in
 8 getting accurate financial data from Samsung during discovery in this case. It is a further concern
 9 because I was able to verify that products were being sold by carriers in September in a manner
 10 that is not consistent with Mr. Kerstetter's statement.¹ Finally, Samsung's prior data reflects a
 11 pattern in which, for some products, sales end for a period and then resume later.² Without the
 12 ability to verify using information prepared in the ordinary course of Samsung's business, I
 13 continue to believe that my prior projections are sensible projections of Samsung's sales of
 14 infringing products.

15 6. As an alternative, I have updated my projections and calculations using the figures
 16 provided by Mr. Kerstetter and Samsung. With this information included, my calculation of
 17 supplemental damages through December 31, 2012 is \$101,167,892 (see **Exhibit 2**). The
 18 resulting daily figure would be \$399,196 (see **Exhibit 2.3**). My calculation of prejudgment
 19 interest on the supplemental damages would be \$770,339 (see **Exhibit 3**). Further, the alternative
 20 daily interest accumulated on Apple's supplemental and verdict damages would be \$106,872 (see
 21 **Exhibit 4**).

22
 23
 24 ¹ For example, Mr. Kerstetter states that there were zero unit sales in September 2012 of the Galaxy S 4G, but I
 25 was able to verify that carriers were offering the Galaxy S 4G for sale in September 2012. See paragraph 8,
 footnote 3, of my September 21 declaration, and Exhibit 12 thereto. (See Dkt. No. 1982-71 ¶ 8 & n.3; Dkt. No.
 1982-83.)

26 ² For example, as reflected in Exhibit 2.1 to my September 21 declaration, the Continuum experienced a stop in
 27 sales in February 2011, a restart in sales in March 2011, another stop in sales in October through November
 2011, and another restart in sales in December 2011. Likewise, the Indulge experienced a stop in sales in April
 through June 2011 and a restart in sales in July 2011. (Dkt. No. 1982-73 at 4.)

1 **III. ENHANCEMENT DAMAGES**

2 **A. Model Reflecting the Benefit of Samsung's Increase in Market Share from the**
3 **Products that Violated Apple's Trade Dress**

4 7. Samsung argues that the model described in Paragraphs 25-30 and Exhibits 7-8 of
5 my September 21, 2012 declaration overstates the harm that Samsung's sale of the trade-dress
6 diluting products has caused to Apple. I disagree with those arguments. My calculations include
7 a number of conservative assumptions that tend to understate Apple's harm.

8 8. Most significant among those is the 50% reduction in Apple's share of available
9 units that I used to be conservative and to account for other factors that may affect the rate at
10 which Apple would have acquired sales. This adjustment, which was not used in any prior model,
11 is sufficient to account for differences in carrier preferences, operating system preferences, price
12 or other market considerations as calculated in Mr. Musika's previously disclosed model of
13 Apple's lost profits used at trial. In the absence of this 50% adjustment, the model suggests that
14 Apple would have lost more than \$1.4 billion in lost profits.

15 9. Another conservative assumption is the use of unadjusted market share for Apple
16 in the calculation. This understates the number of units captured by Apple as compared to a
17 traditional *Mor-Flo* analysis and correspondingly reduces the lost profits calculated in the model.
18 On average, using a traditional *Mor-Flo* analysis would have increased Apple's market share
19 from 30% to 37% from Q3-2010 to Q2-2012.

20 10. Samsung claims that the model failed to account for Apple's capacity. That is
21 incorrect. Before submitting my original declaration, I checked my final unit sales figures against
22 the capacity calculations prepared by Mr. Musika and used at trial, which showed more than
23 sufficient inventory and manufacturing capacity to account for the unit sales included in the
24 model.

25 11. Samsung claims the model does not account for non-infringing and non-diluting
26 units of Samsung's smartphones. That is incorrect. First, the revenue and lost profits calculations
27 reflected in Exhibits 7 and 8 of my September 21 declaration do not include any unit sales other
28 than infringing or diluting units. Second, by using the percent reduction described in paragraph

1 27 of my September 21 declaration, which was applied only to infringing and diluting units, I
2 effectively assumed that Samsung would retain all of its sales of non-infringing and non-diluting
3 smartphones. Thus, the model assumes that Samsung's non-infringing and non-diluting
4 smartphones would contribute substantially to increases in Samsung's market share after 2010.

5 12. Samsung claims that I failed to account for the impact of hypothetical changes to
6 products to design-around Apple's patents as considered by Mr. Musika. The model differs from
7 Mr. Musika's analysis for two reasons. First, the model I presented seeks to account for what
8 Samsung did do beginning in 2010 and through 2012, and it is my understanding that, with very
9 limited exceptions involving two of the utility patents, Samsung did not implement alternative
10 designs or features that sought to avoid Apple's intellectual property. Second, the model attempts
11 to account for the "head start" or benefit that Samsung obtained by substantially increasing its
12 market share following introduction of the products that violated the trade dress, design patents
13 and utility patents. The introduction of a hypothetical design-around after the diluting and
14 infringing phones were in the marketplace would not impact those downstream benefits and thus
15 would not reduce the harm suffered by Apple.

16 13. Samsung claims that the model captures sales for which Apple has already been
17 awarded lost profits as a part of the \$1,049,343,540 jury award. I disagree. First, it is not
18 possible to know with certainty how many units sold by Samsung the jury included in an Apple's
19 lost profits calculation. Moreover, if Samsung is correct in its hypothesis that the jury awarded
20 \$91 million in lost profits, that award would correspond to less than 300,000 lost unit sales. My
21 model predicts Apple would have lost over \$700 million in lost profits corresponding to over 2
22 million unit sales attributable to Samsung's dilution, while I understand Apple is only seeking
23 \$400 million in enhancement damages under the Lanham Act. The model reflects an analysis of
24 incremental gains to Samsung and incremental harm to Apple from gains in Samsung's market
25 share beyond the original 5% that existed in the second quarter of 2010.

26 14. In light of the multiple conservative adjustments included in the model, the relative
27 rate at which Apple captures sales not made by Samsung in this model is very similar to Mr.
28 Musika's prior analysis. Apple captures approximately 12% in Mr. Musika's analysis as reflected

1 on page 40 of his March 22 expert report, and approximately 10% in the model included with my
2 September 21 declaration. The methods differ but the results are complementary and consistent.

3 15. After reviewing the criticisms stated by Samsung, I continue to conclude that the
4 model reflected in my prior declaration provides an appropriate analysis of the benefit that
5 Samsung received and the harm Apple experienced based on the “head-start” Samsung received
6 by substantially increasing its market share by selling products that violated the Lanham Act, as
7 found by the jury. Market share increases have substantial positive effects on the sales of follow
8 on products by the same company and a corresponding negative effect on other competitors. That
9 was certainly the case in the present circumstances as reflected in the model. The jury’s verdict
10 does not compensate Apple for this harm.

11

12 I declare under penalty of perjury that the foregoing is true and correct and that this
13 Declaration was executed this 9th day of November 2012, at Baltimore, Maryland.

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MARYLEE P. ROBINSON

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