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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

APPLE INC., A CALIFORNIA CORPORATION,)	C-11-01846 LHK
)	
)	SAN JOSE, CALIFORNIA
PLAINTIFF,)	
)	MAY 12, 2011
VS.)	
)	PAGES 1-52
SAMSUNG ELECTRONICS CO., LTD., A KOREAN BUSINESS ENTITY; SAMSUNG ELECTRONICS AMERICA, INC., A NEW YORK CORPORATION; SAMSUNG TELECOMMUNICATIONS AMERICA, LLC, A DELAWARE LIMITED LIABILITY COMPANY,)	
)	
)	
)	
)	
)	
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)	
DEFENDANTS.)	

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE LUCY H. KOH
UNITED STATES DISTRICT JUDGE

APPEARANCES ON NEXT PAGE

OFFICIAL COURT REPORTER: LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595

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A P P E A R A N C E S :

FOR THE PLAINTIFF: MORRISON & FOERSTER
BY: HAROLD J. MCELHINNY,
MICHAEL A. JACOBS,
JASON R. BARTLETT, AND
GRANT L. KIM
425 MARKET STREET
SAN FRANCISCO, CALIFORNIA 94105

ALSO PRESENT: MAUREEN MCCALL AND JAMES WITT

FOR THE DEFENDANT: QUINN, EMANUEL, URQUHART,
OLIVER & HEDGES
BY: CHARLES K. VERHOEVEN AND
ERIK C. OLSON
50 CALIFORNIA STREET, 22ND FLOOR
SAN FRANCISCO, CALIFORNIA 94111

BY: VICTORIA F. MAROULIS AND
KEVIN P.B. JOHNSON
555 TWIN DOLPHIN DRIVE
SUITE 560
REDWOOD SHORES, CALIFORNIA 94065

1 SAN JOSE, CALIFORNIA

MAY 12, 2011

2 P R O C E E D I N G S

3 (WHEREUPON, COURT CONVENEED AND THE
4 FOLLOWING PROCEEDINGS WERE HELD:)

5 THE CLERK: CALLING CASE NUMBER
6 C-11-01846 LHK, APPLE INCORPORATED VERSUS SAMSUNG
7 ELECTRONICS COMPANY, LIMITED, ET AL.

8 MR. MCELHINNY: GOOD AFTERNOON, YOUR
9 HONOR. HAROLD MCELHINNY, MICHAEL JACOBS,
10 JASON BARTLETT, AND GRANT KIM ON BEHALF OF APPLE.

11 WE'RE ALSO HERE WITH MAUREEN MCCALL,
12 WHO'S THE CHIEF LITIGATION COUNSEL, AND JAMES WITT,
13 WHO'S THE CHIEF HEAD OF PATENT LITIGATION FOR THE
14 COMPANY.

15 THE COURT: OKAY. GOOD AFTERNOON.

16 MR. VERHOEVEN: GOOD AFTERNOON, YOUR
17 HONOR. CHARLES VERHOEVEN, QUINN EMANUEL, ON BEHALF
18 OF THE SAMSUNG DEFENDANTS.

19 WITH ME ARE MY PARTNERS KEVIN JOHNSON,
20 VICTORIA MAREULIS, AND ERIK OLSON.

21 AND FROM SAMSUNG WE HAVE IN THE COURTROOM
22 KAREN NORTON, MICHELLE YANG, AND KEN KOREA.

23 THE COURT: OKAY. GOOD AFTERNOON TO
24 EVERYONE.

25 LET ME MAKE SURE THAT I GOT ALL OF THE

1 NAMES. MR. MCELHINNY, MR. JACOBS, MR. BARTLETT AND
2 MR. KIM ON APPLE'S SIDE.

3 AND WOULD YOU JUST REPEAT ONE MORE TIME?

4 MR. VERHOEVEN: YES, YOUR HONOR.

5 THE COURT: THANK YOU.

6 MR. VERHOEVEN: MY NAME IS
7 CHARLES VERHOEVEN, AND HERE WITH ME ARE MY
8 PARTNERS, KEVIN JOHNSON, AND VICTORIA MAREULIS, AND
9 WE ALSO HAVE FROM QUINN, EMANUEL ERIK OLSON.

10 AND THEN WE HAVE THREE REPRESENTATIVES
11 FROM SAMSUNG HERE, YOUR HONOR, KAREN NORTON,
12 MICHELLE YANG, AND KEN KOREA.

13 THE COURT: OKAY. LET ME START WITH --
14 LET ME START WITH MR. MCELHINNY.

15 MR. MCELHINNY: YES, YOUR HONOR.

16 THE COURT: YOU ALLEGE THAT SAMSUNG HAS
17 BEEN SLAVISHLY COPYING FOR A LONG TIME.

18 HOW COME YOU HAVEN'T SOUGHT ANY
19 PRELIMINARY INJUNCTION, OR HAVE YOU, AGAINST ANY
20 SAMSUNG SMART PHONES BEFORE, OR THESE LAPTOPS
21 BEFORE?

22 MR. MCELHINNY: TWO QUESTIONS. ONE, THE
23 PRODUCTS THAT WE'RE FOCUSSED ON RIGHT NOW IN TERMS
24 OF THE DISCOVERY AND THE POTENTIAL INJUNCTION ARE
25 PRODUCTS THAT HAVE NOT YET BEEN RELEASED.

1 THERE HAVE BEEN EARLIER VERSIONS OF THESE
2 PRODUCTS, WHICH HAVE -- WHICH WE ARE ATTACKING IN
3 THE COMPLAINT.

4 AND THE ANSWER TO THAT, WHICH YOUR HONOR
5 WILL UNDOUBTEDLY HEAR ABOUT WHEN WE GET -- IF
6 THERE'S AN INJUNCTION MOTION WHEN WE GET TO IT IS
7 THAT THE PARTIES ACTUALLY HISTORICALLY HAVE HAD A
8 VERY CLOSE RELATIONSHIP.

9 IT IS PUBLIC INFORMATION THAT APPLE BUYS
10 \$8 MILLION WORTH OF PRODUCTS FROM SAMSUNG.

11 THE PARTIES HAVE BEEN DISCUSSING THIS
12 ISSUE FOR A LONG TIME AT SOME OF THE HIGHEST LEVELS
13 OF THE COMPANY.

14 THE DECISION TO FILE THIS LITIGATION IS
15 ONE THAT WAS NOT TAKEN LIGHTLY.

16 AND IN THIS FILING, BECAUSE DESPITE THE
17 ATTEMPT TO COME TO A -- BETWEEN THESE TWO COMPANIES
18 THAT ARE OTHERWISE SO CLOSE, TO COME TO A
19 RESOLUTION OF WHAT IS A CRITICAL ISSUE HAS BEEN
20 FRUSTRATED BY THIS ONE DIVISION THAT INSISTS ON
21 COPYING OUR PRODUCTS.

22 THE COURT: WELL, YOUR STATEMENT THAT YOU
23 HAVE THIS FAIRLY SIGNIFICANT BUSINESS RELATIONSHIP
24 IS TRUE TODAY, SO TO ME THAT DOESN'T SEEM LIKE IT'S
25 A REASON WHY YOU HAVEN'T PREVIOUSLY GONE AFTER

1 OTHER PRODUCTS THAT YOU'RE SAYING HAVE COPIED
2 APPLE'S.

3 MR. MCELHINNY: THE --

4 THE COURT: RIGHT? UNLESS YOU'RE GOING
5 TO TELL ME THAT SAMSUNG IS NO LONGER GOING TO BE A
6 SUPPLIER TO APPLE, THAT YOU'RE NOT GOING TO HAVE
7 THAT 8 MILLION --

8 MR. MCELHINNY: I'M NOT TELLING YOU THAT,
9 YOUR HONOR.

10 WHAT I'M TELLING YOU IS THAT THERE HAVE
11 BEEN EXTENDED EFFORTS IN TERMS OF MEETINGS AND
12 NEGOTIATIONS AND ATTEMPTS TO RESOLVE THIS PROBLEM
13 SHORT OF LITIGATION.

14 THE COURT: I SEE. BUT TELL ME WHEN THE
15 GALAXY FIRST CAME OUT, THE FIRST SAMSUNG SMART
16 PHONE AND LAPTOP. IT'S BEEN A COUPLE OF YEARS. SO
17 YOU'RE SAYING THAT EFFORTS TO RESOLVE THIS HAVE
18 BEEN ONGOING FOR SEVERAL YEARS?

19 MR. MCELHINNY: I CAN TELL YOU THAT
20 THEY'VE BEEN ONGOING FOR AT LEAST A YEAR.

21 THE COURT: OKAY. HAVE YOU PROVIDED --
22 BECAUSE ONE OF THE CONSIDERATIONS THAT JUDGE CHEN
23 GAVE IN SEMITOOL WAS THE FACT THAT THESE
24 DISCLOSURES WERE BASICALLY REQUESTED A YEAR BEFORE
25 THE LAWSUIT WAS BROUGHT.

1 CAN YOU SAY THAT IN YOUR CASE?

2 MR. MCELHINNY: I CAN SAY --

3 THE COURT: WHEN'S THE FIRST TIME THAT
4 YOU REQUESTED THIS TYPE OF DISCOVERY FROM SAMSUNG?

5 MR. MCELHINNY: WHAT I CAN SAY -- I CAN
6 SAY THAT THE ISSUES OF COPYING AND THE ALLEGATIONS
7 IN THE COMPLAINT AND THE NATURE OF WHAT THE CLAIMS
8 ARE HAS BEEN THE SUBJECT OF DISCUSSIONS.

9 I CANNOT SAY THAT THERE HAVE BEEN
10 SPECIFIC REQUESTS TO GIVE US A SAMPLE OF A
11 COMPLETED TOOL. THAT HAS BEEN TRIGGERED BY THE
12 ANNOUNCEMENTS THAT THESE SPECIFIC ITEMS ARE ABOUT
13 TO ENTER THE MARKETPLACE AND THAT THEY HAVE
14 ANTICIPATED RELEASE DATES.

15 THE COURT: OKAY.

16 MR. MCELHINNY: SO WHAT I WOULD SAY, IN
17 RESPONSE TO -- WHAT I WOULD SAY IN RESPONSE TO
18 JUDGE CHEN IS THE ISSUES --

19 THE COURT: NO. IT SOUNDS LIKE NO.

20 MR. MCELHINNY: NO. ACTUALLY, WHAT I
21 WOULD SAY TO HIM IS THAT THE ISSUES HAVE BEEN
22 SPECIFICALLY ADDRESSED, THEY'VE BEEN SPECIFICALLY
23 IDENTIFIED, THE NATURE OF THE CLAIMS, AND THE FACT
24 THAT THERE IS AN ONGOING DESIGN EFFORT OF THIS NEW
25 GENERATION HAS BEEN DISCUSSED WITH THE HOPE THAT

1 SAMSUNG WOULD AGREE NOT TO COPY, AND THAT WHEN WE
2 SAW THE FIRST PICTURES OF THESE THINGS RELEASED TO
3 THE PUBLIC, WE FOUND OUT THAT WASN'T GOING TO BE
4 THE COURSE THAT SAMSUNG TOOK.

5 THE COURT: OKAY. LET ME ASK -- MY NEXT
6 QUESTION IS THE EVIDENCE OF COPYING, OR DESIGN
7 AROUND, SEEMS TO GO MORE TOWARDS DAMAGES, TOWARDS
8 INTENT.

9 WHY WOULD YOU NEED THAT NOW?

10 MR. MCELHINNY: I -- I -- I WOULD DIVIDE
11 SOME OF THE -- I WOULD DIVIDE SOME OF THE -- I
12 WOULD DIVIDE SOME OF THE ISSUES IN THE SENSE THAT
13 WE DO BELIEVE THAT OUR BEST CASE, IF WE'RE GOING TO
14 MAKE A MOTION FOR PRELIMINARY INJUNCTION, IS TO
15 ACTUALLY SHOW YOU PHYSICAL OBJECTS WILL -- AS
16 OPPOSED TO PICTURES -- WILL MAKE IT MORE EASY FOR
17 THE COURT IN ORDER TO COMPARE THEM TO THE DESIGN
18 PATENTS, TO LOOK AT THE TRADEMARKS, TO LOOK AT THE
19 TRADE DRESS.

20 AND SO THE REQUEST FOR SPECIFIC PHYSICAL
21 OBJECTS IS NOT, I WOULD SAY, RELATED TO INTENT.
22 IT'S RELATED TO DEMONSTRATING THE COPYING THAT IS
23 APPARENTLY GOING TO GO ON HERE.

24 THE DOCUMENTS THAT WE'RE ASKING FOR DO
25 TWO THINGS. ONE, THEY DO, IN FACT, GO -- THEY DO,

1 IN FACT, GO TO INTENT.

2 BUT INTENT IS NOT COMPLETELY LIMITED TO
3 DAMAGES. INTENT IS, IS LIMITED -- IS PART OF THE
4 TRADEMARK THAT GOES TO THE STRENGTHS OF THE
5 TRADEMARK. IT GOES TO THE STRENGTH OF THE TRADE
6 DRESS.

7 THE COURT: BUT IS -- AREN'T THESE MORE
8 THE LOOK AND FEEL OF ORDINARY OBSERVER TESTS?
9 WHETHER THEY COPIED OR NOT JUST DOESN'T SEEM TO
10 PLAY INTO THE LOOK AND FEEL OF THE ORDINARY
11 OBSERVER TEST FOR EITHER THE TRADE DRESS, THE
12 TRADEMARK, OR THE DESIGN PATENT INFRINGEMENT CLAIM.

13 MR. MCELHINNY: YOUR HONOR HAS A LOT OF
14 EXPERIENCE IN THIS AREA, AND SO I'M -- I KNOW YOU
15 KNOW WHAT YOU'RE TALKING ABOUT.

16 BUT ALSO, IN ADDITION, WHAT WE'RE TALKING
17 ABOUT IN TERMS OF THE -- IN SOME CASES YOUR HONOR
18 IS GOING TO BE CALLED UPON TO MAKE A DETERMINATION
19 IN TERMS OF THE STRENGTH OF THE TRADEMARK, OR THE
20 STRENGTH OF THE TRADE DRESS, AND THE
21 DISTINCTIVENESS OF IT.

22 AND TO THE EXTENT THAT WE CAN PRODUCE
23 DOCUMENTS WHICH WE, YOU KNOW, WHICH WE FEEL EXIST,
24 WHICH IS EASY FOR ME TO SAY, BUT TO THE EXTENT THAT
25 YOU FIND DOCUMENTS IN WHICH -- WE GAVE YOU THE ONE

1 EXAMPLE WHERE THE KOREAN DISTRIBUTOR SAYS, YOU
2 KNOW, WE HAD A PRODUCT PLANNED AND NOW WE SEE THE
3 IPAD 2 AND SO WE'RE BACK TO THE DRAWING BOARD.

4 AND THEN WE SEE THE PICTURE OF THE NEW
5 PRODUCT WHICH COMES OUT LOOKING EXACTLY LIKE THE
6 IPAD 2.

7 THAT, WE BELIEVE, IS STRONG EVIDENCE THAT
8 WILL CONVINCING YOUR HONOR ABOUT THE STRENGTH OF OUR
9 MARK AND WHY IT IS THAT SAMSUNG IS UNWILLING TO
10 COME UP WITH A UNIQUE DESIGN, OR UNABLE.

11 THE COURT: ALL RIGHT. LET ME GO TO
12 MR. VERHOEVEN. DID I PRONOUNCE THAT CORRECTLY?

13 MR. VERHOEVEN: THAT'S CORRECT, YOUR
14 HONOR.

15 THE COURT: DO YOU CONCEDE THAT WHAT
16 APPLE HAS REQUESTED, YOU WOULD HAVE TO PRODUCE IN
17 THE NORMAL COURSE OF DISCOVERY?

18 NOW, I'M NOT TALKING ABOUT THE TIMING,
19 BUT ONCE THERE WAS AN OPENING OF DISCOVERY PER RULE
20 26, YOU WOULD HAVE TO PRODUCE THIS STUFF; CORRECT?

21 MR. VERHOEVEN: NOT ALL OF IT, YOUR
22 HONOR.

23 I MEAN, FIRST OF ALL, IT'S IMPOSSIBLE TO
24 PRODUCE SOMETHING THAT DOESN'T EXIST, AND THEY'RE
25 ASKING FOR, AS YOUR HONOR KNOWS, PRODUCTS THAT

1 DON'T EXIST YET.

2 SO IT'S PRODUCTS THAT THEY'RE ASKING FOR
3 THAT AREN'T SCHEDULED TO BE RELEASED FOR SOME TIME
4 IN THE FUTURE.

5 A COMPETITOR IS NOT ENTITLED TO
6 PREAPPROVE ITS OTHER COMPETITOR'S PRODUCTS THROUGH
7 THE VEHICLE OF LITIGATION.

8 A COMPETITOR -- YOU KNOW, IF WE'VE GOT
9 THE GALAXY S FAMILY OF PRODUCTS OUT THERE, YOUR
10 HONOR, THAT'S FAIR GAME.

11 BUT THEY'RE TALKING ABOUT FUTURE PLANS
12 AND FUTURE PRODUCTS.

13 THIS ENTIRE MOTION, I WOULD SUBMIT, IS
14 DESIGNED TO INTERFERE WITH MY CLIENT'S EFFORTS AT
15 PUTTING OUT THESE PRODUCTS, YOUR HONOR.

16 SO THERE IS SOME OF THIS THAT, SETTING
17 ASIDE THE TIMING, I WOULD CONCEDE WOULD BE
18 RELEVANT.

19 BUT WHEN YOU'RE TALKING ABOUT FUTURE
20 PLANS BETWEEN COMPETITORS, THEN YOU CAN GET INTO
21 LITIGATION OVER WHETHER THAT'S RELEVANT, YOU CAN
22 GET INTO DISPUTES OVER BALANCING THE PREJUDICE OF
23 ONE COMPETITOR HAVING TO GIVE UP ITS FUTURE PLANS
24 TO ANOTHER COMPETITOR AND BALANCING THAT AGAINST
25 WHY DO YOU NEED THIS.

1 YOU CAN'T -- YOU CAN'T SUE SOMEBODY FOR
2 INFRINGEMENT THAT HASN'T HAPPENED YET.

3 SO WE'VE GOT A BIG ISSUE, YOUR HONOR,
4 WITH THE REQUEST TO GET FUTURE PRODUCTS.

5 AND, YOUR HONOR, I -- AS TO YOUR -- I
6 DON'T KNOW IF YOU WANT ME TO ADDRESS THE DELAY
7 ISSUE NOW, BUT I WOULD LIKE TO ADDRESS THAT, AND
8 I'VE ALSO PREPARED SOME SLIDES TO HELP US
9 ILLUSTRATE SOME POINTS.

10 WE HAD TO BRIEF THIS VERY QUICKLY, YOUR
11 HONOR, AND THERE ARE ADDITIONAL POINTS THAT AREN'T
12 IN OUR OPPOSITION.

13 IN LIGHT OF THEIR LENGTHY REPLY, I'D LIKE
14 TO ADDRESS THESE AS WELL.

15 THE COURT: HAVE YOU SHOWN THOSE SLIDES
16 TO --

17 MR. VERHOEVEN: I JUST PREPARED THEM THIS
18 MORNING. I'LL GIVE THEM TO THE OTHER SIDE, IF I
19 CAN.

20 THE COURT: WELL, WE CAN TAKE A BREAK AND
21 I'LL CALL ANOTHER CASE IF YOU'D LIKE TO LOOK AT
22 THEM.

23 MR. MCELHINNY: IF YOUR HONOR IS GOING TO
24 LOOK AT THEM, I'D LIKE TO SEE THEM FIRST, YOUR
25 HONOR.

1 THE COURT: WHY DON'T YOU LOOK AT THEM
2 AND SEE IF YOU HAVE AN OBJECTION.

3 WHILE YOU'RE LOOKING, LET ME ASK MY OTHER
4 QUESTIONS.

5 GIVEN THAT THERE'S ALREADY MEDIA REPORTS
6 ABOUT WHAT THE TO BE RELEASED PRODUCTS ARE, HOW CAN
7 YOU SAY THAT'S TRADE SECRET? BECAUSE I'M ASSUMING
8 THAT SAMSUNG HAS PROBABLY HAD SOME ROLE IN CREATING
9 THE BUZZ OF ITS SOON TO BE RELEASED PRODUCTS. HOW
10 IS THAT A TRADE SECRET?

11 MR. VERHOEVEN: YEAH. WHAT YOU'RE
12 GETTING HERE IS A MISMATCH BETWEEN THE DISCOVERY
13 THEY'RE REQUESTING AND WHAT THEY'RE COMPLAINING
14 ABOUT ON THE MERITS IN THEIR MOTION TO EXPEDITE.

15 IN PARTICULAR, YOUR HONOR, ON THE MERITS,
16 THEY SAY THEIR I.P. IS, QUOTE, "A RECTANGULAR
17 PRODUCT SHAPE WITH ALL FOUR CORNERS UNIFORMLY
18 ROUNDED."

19 THEY SAY THAT THEIR I.P. IS "THE DISPLAY
20 OF A COLORFUL GRID OF SQUARE ICONS."

21 OKAY. THESE ARE TRADE DRESS DESIGN
22 PATENT ISSUES.

23 BUT WHAT THEY'RE ASKING FOR, BURIED IN
24 THEIR REQUEST, THAT IS INCREDIBLY BURDENSOME IS A
25 30(B)(6) OMNIBUS DEPOSITION REQUEST OF, QUOTE

1 UNQUOTE, "THE CORPORATION" -- THERE'S THREE
2 DIFFERENT CORPORATIONS HERE -- THAT ASKS FOR THE
3 DESIGN, FUNCTION, AND OPERATION OF FIVE DIFFERENT
4 PRODUCTS.

5 DESIGN, FUNCTION, AND OPERATION, YOUR
6 HONOR, HAVE NOTHING TO DO WITH WHAT DOES THIS THING
7 LOOK LIKE.

8 THEY GO TO, BASICALLY, SO THEY CAN DO A
9 FISHING EXPEDITION -- EXCUSE ME, YOUR HONOR -- AS
10 TO THE FUNCTIONALITY OF THESE PRODUCTS UNDER THE
11 HOOD, WHICH HAS NOTHING TO DO --

12 THE COURT: I DON'T SEE FUNCTION AND
13 OPERATION IN THEIR REQUEST.

14 MR. VERHOEVEN: LET ME GET THAT.

15 THE COURT: IT'S ALL THE -- THE SAMPLE,
16 THE COMMERCIAL PACKAGING, THE INITIAL RELEASE
17 MARKETING AND ANY EVIDENCE OF COPYING OR DESIGN
18 AROUND, AND DESIGN OF THE SHELL AND GRAPHICAL USER
19 INTERFACE.

20 MR. VERHOEVEN: BEAR WITH ME JUST A
21 MINUTE, YOUR HONOR.

22 THE COURT: YEAH, PLEASE, GO AHEAD.

23 WHAT DO YOU THINK ABOUT THOSE SLIDES?

24 MR. MCELHINNY: YOUR HONOR, THIS IS
25 OPPOSITION ON THE MERITS TO THE PRELIMINARY

1 INJUNCTION. I DON'T THINK THEY'RE GOING TO BE
2 RELEVANT TO WHAT YOUR HONOR IS TRYING TO DECIDE
3 TODAY.

4 THE COURT: WELL, IF THAT'S YOUR ONLY
5 OBJECTION, I'M GOING TO LOOK AT IT THEN.

6 MR. MCELHINNY: THEN I HAVE NO OBJECTION
7 TO YOU LOOKING AT IT.

8 THE COURT: ALL RIGHT.

9 MR. MCELHINNY: IN THAT SAME --

10 MR. VERHOEVEN: WELL, IF I COULD -- YOU
11 KNOW, I SAID THAT BECAUSE THEY SAY IT ON PAGE 10 OF
12 THEIR OPENING BRIEF, YOUR HONOR. I WASN'T LOOKING
13 AT THE ACTUAL 30(B)(6).

14 BUT IF YOU LOOK AT PAGE 10 OF THEIR
15 OPENING BRIEF, LINE 3, ACTUALLY LINES 1 THROUGH
16 8 --

17 THE COURT: I'M SORRY. CAN YOU REPEAT
18 THAT PAGE, PLEASE?

19 MR. VERHOEVEN: SURE. PAGE 10.

20 THE COURT: OKAY.

21 MR. VERHOEVEN: THEY SAY 30(B)(6)
22 DEPOSITION IN THE UNITED STATES OF THE SAMSUNG
23 CORPORATE REPRESENTATIVE REGARDING THE FOLLOWING
24 TOPICS: TOPIC A ON LINE 3 THROUGH 5, THE DESIGN,
25 FUNCTION, AND OPERATION OF THE SHELLS AND GRAPHICAL

1 USER INTERFACES, AND THEN THEY LIST FIVE PRODUCTS,
2 YOUR HONOR.

3 SO I WAS ASSUMING THAT THAT'S WHAT THEY
4 WANTED, YOUR HONOR, AND THAT WOULD GO -- HAVE
5 NOTHING TO DO WITH WHAT THESE THINGS LOOK LIKE.

6 IT WOULD BE INCREDIBLY BURDENSOME, YOUR
7 HONOR, TO TAKE FIVE DIFFERENT PRODUCTS -- THESE,
8 THESE DIFFERENT PRODUCTS ARE NOT JUST --

9 THE COURT: I'M SORRY. CAN I INTERRUPT
10 YOU?

11 MR. VERHOEVEN: YES.

12 THE COURT: HOW COME YOUR CONCLUSION IS
13 DIFFERENT? IT DOESN'T SAY -- YOUR CONCLUSION, PAGE
14 13, THAT ASKS FOR THE EXPEDITED DISCOVERY DOESN'T
15 SAY FUNCTION AND OPERATION. IT JUST SAYS DESIGN OF
16 THE SHELL AND GRAPHICAL USER INTERFACE.

17 WHY IS THAT DIFFERENT THAN WHAT'S ON PAGE
18 10?

19 MR. MCELHINNY: BECAUSE THE PROPOSED --
20 THE PROPOSED ORDER -- THERE MAY HAVE BEEN A TYPO IN
21 THE PAPERS -- THE PROPOSED ORDER, YOUR HONOR, THAT
22 WE SUBMITTED ASKS FOR THE DESIGN OF THE SHELL AND
23 GRAPHICAL USER INTERFACE.

24 THE COURT: OKAY. SO YOU DON'T WANT
25 FUNCTION AND OPERATION.

1 OKAY. GO AHEAD, PLEASE.

2 MR. VERHOEVEN: SINCE THERE'S NO
3 OBJECTION, COULD I -- MAY I HAND UP THESE SLIDES,
4 YOUR HONOR?

5 THE COURT: YES, PLEASE.

6 (PAUSE IN PROCEEDINGS.)

7 MR. VERHOEVEN: AND AS TO THE ISSUE OF
8 TIME GOING PAST, YOUR HONOR, ON SLIDE 2, WE JUST
9 PUT THE BASIC CASE LAW THAT I'M SURE YOUR HONOR IS
10 AWARE OF.

11 IF YOU WAIT TOO LONG BEFORE YOU FILE A
12 PRELIMINARY INJUNCTION MOTION, YOU CAN'T SHOW
13 IRREPARABLE HARM AS A MATTER OF LAW.

14 AND HERE ON SLIDE 3, YOUR HONOR, WE PUT
15 FORTH THE ACCUSED PRODUCTS AND WHEN THEY WERE
16 RELEASED AND ANNOUNCED, AND YOU'LL SEE, YOUR HONOR,
17 THAT THE GALAXY -- ON SLIDE 3, THE GALAXY S WAS
18 FIRST ANNOUNCED IN MARCH OF 2010, NO PRELIMINARY
19 INJUNCTION.

20 RELEASED IN THE U.S., THE FIRST MODEL IN
21 THE U.S., THE GALAXY S VIBRANT WITH T-MOBILE
22 JULY 15TH, 2010. NO PRELIMINARY INJUNCTION MOTION.

23 THE GALAXY S CAPTIVATE WITH AT&T,
24 JULY 18TH, 2010; THE GALAXY S EPIC 4G WITH AT&T,
25 AUGUST 31, 2010; THE GALAXY S FASCINATE,

1 SEPTEMBER 9, 2010; GALAXY S MESMERIZE WITH U.S.
2 CELLULAR, OCTOBER 27TH, 2010; GALAXY S CONTINUUM,
3 VERIZON, NOVEMBER 11, 2010.

4 WHEN DID THEY SUE? NOT UNTIL APRIL 15TH,
5 2011. NO SEEKING OF A PRELIMINARY INJUNCTION.

6 THESE ARE THE -- THIS IS -- IF YOU READ
7 THEIR MOTION PAPERS, YOUR HONOR, THE THING THAT
8 THEY'RE ACCUSING AND SAYING THAT THEY WANT TO GET
9 EXPEDITED DISCOVERY TO MOVE FOR A PRELIMINARY
10 INJUNCTION ON, YOU CAN SEE THAT THIS SAME BASIS
11 THAT THEY'RE MOVING ON THEIR PAPERS THEY WOULD
12 ARGUE, AND HAVE ARGUED IN THEIR COMPLAINT, AS TO
13 ALL OF THESE PRODUCTS.

14 UNDER BLACK LETTER LAW, THERE'S NO WAY
15 THEY CAN SHOW IRREPARABLE HARM BECAUSE OF THIS
16 DELAY.

17 AND, YOU KNOW, YOUR HONOR, IN THE MOTION
18 PAPERS ON THEIR REPLY, WHAT I READ WAS APPLE
19 SAYING, "YOU GUYS, THE STANDARD ISN'T IRREPARABLE
20 HARM, THE STANDARD IS GOOD CAUSE."

21 OKAY, FINE. WHAT'S YOUR GOOD CAUSE?

22 WELL, THEIR GOOD CAUSE IS THEY WANT TO
23 FILE A PRELIMINARY INJUNCTION MOTION.

24 WELL, IN ORDER FOR THEM TO HAVE ANY
25 COLORABLE BASIS FOR A PRELIMINARY INJUNCTION

1 MOTION, THEY CAN'T HAVE THIS KIND OF DELAY.

2 SO THEY DON'T HAVE GOOD CAUSE HERE, YOUR
3 HONOR. THEY WAITED TOO LONG.

4 AND IF YOU LOOK AT SLIDE 5, FOR EXAMPLE,
5 YOUR HONOR, THERE'S NO WAY THEY'RE GOING TO BE ABLE
6 TO SHOW IRREPARABLE HARM.

7 THE COURT: MAY I ASK YOU A QUESTION?
8 ARE YOU GOING TO ASK FOR EXPEDITED DISCOVERY IN
9 YOUR CASE AGAINST APPLE?

10 MR. VERHOEVEN: WELL, I THINK THESE CASES
11 SHOULD PROCEED ON THE NORMAL COURSE.

12 BUT IF WE'RE GOING TO BE ENGAGING IN
13 EXPEDITED DISCOVERY, THEN WE WOULD ASK FOR
14 RECIPROCAL, A RECIPROCAL TIME FRAME.

15 SO THE ANSWER TO YOUR QUESTION IS NO
16 UNLESS YOU'RE CONVINCED BY APPLE AND THINK THAT WE
17 NEED TO HAVE A FIRE DRILL EXPEDITED DISCOVERY.

18 THEN WE THINK WHAT'S SAUCE FOR THE GOOSE
19 SHOULD BE SAUCE FOR THE GANDER AND THAT, YES, WE
20 SHOULD BE PROCEEDING DOWN THE SAME PATH.

21 BUT WE'RE NOT GOING TO BE FILING -- FOR
22 EXAMPLE, IF YOUR HONOR WERE TO DENY THIS AND SAY,
23 "GUYS, JUST COOPERATE AND DO THE NORMAL SCHEDULE,"
24 WE WOULD NOT BE SEEKING A PRELIMINARY INJUNCTION --
25 OR A PRELIMINARY INJUNCTION OR EXPEDITED DISCOVERY

1 IN OUR CASE.

2 THE COURT: OKAY. LET ME ASK
3 MR. MCELHINNY, ARE YOU PREPARED FOR MUTUAL ASSURED
4 DESTRUCTION? IF I GRANT IT IN YOUR CASE, I MAY
5 GRANT IT IN HIS CASE AND BOTH OF YOU WILL BE DOING
6 A FIRE DRILL NOW WHEN YOU WOULD OTHERWISE HAVE THE
7 NORMAL 90, 120 DAYS TO ACTUALLY GET PREPARED FOR
8 DISCOVERY.

9 MR. MCELHINNY: MAY I OBJECT TO YOUR
10 QUESTION ON THE BASIS THAT IT ASSUMES FACTS NOT IN
11 EVIDENCE YET?

12 THE COURT: OKAY.

13 MR. MCELHINNY: I JUST WANTED TO INFORM
14 THE COURT, IN CASE YOU'RE NOT AWARE,
15 MORRISON & FOERSTER WILL NOT BE REPRESENTING APPLE
16 IN THE CASE THAT'S BEEN FILED.

17 THE COURT: THAT'S RIGHT. WILMER HALE
18 IS.

19 MR. MCELHINNY: AND I'VE BEEN TOLD THAT
20 THERE WILL BE A TIMELY OPPOSITION FILED TO THE --

21 THE COURT: OKAY. THAT WAS ONE OF THE
22 QUESTIONS I WAS GOING TO ASK YOU. I THINK THE
23 OPPOSITION IS DUE ON MONDAY.

24 MR. MCELHINNY: BUT THE ANSWER TO YOUR
25 QUESTION IS YES. YES, WE ARE PREPARED TO LIVE BY

1 EQUAL RULES.

2 MAY I MAKE THREE POINTS, PLEASE?

3 ON THE DELAY ISSUE, JUST EVEN ON THEIR
4 GRAPH, YOUR HONOR, I'D POINT OUT TO YOU THAT THERE
5 IS NO TABLET PICTURED HERE. THERE IS NO TABLET
6 PRODUCT PICTURED IN THIS.

7 AND IT IS NOT THE LAW THAT IF YOU ISSUE
8 ONE PRODUCT AND YOU DON'T GET SUED, THAT THAT
9 ALLOWS YOU THEN, FOREVER AND EVER, A FREE PASS ON
10 THE COPYRIGHT AND TRADEMARK CLAUSE IN THE
11 UNITED STATES.

12 THAT'S WHAT I WOULD LIKE TO SAY ABOUT
13 DELAY. YOU WILL HEAR THAT ISSUE WHEN AND IF YOU
14 HEAR THE PRELIMINARY INJUNCTION AND YOU WILL BE
15 ABLE TO DECIDE IT.

16 ON THE TRADE SECRET ISSUE, I WOULD LIKE
17 TO CALL TO THE COURT'S ATTENTION A FACT THAT
18 ACTUALLY OCCURRED SINCE THE PLEADING WAS DONE IN
19 THIS CASE.

20 AND IF I MAY APPROACH, WE WERE --

21 THE COURT: WELL, SHOW IT TO
22 MR. VERHOEVEN.

23 DO YOU HAVE ANY OBJECTION?

24 MR. VERHOEVEN: NO, YOUR HONOR.

25 THE COURT: OKAY.

1 MR. MCELHINNY: WE FOUND A BLOG THAT WAS
2 DATED MAY 10TH, 2011 THAT SAYS THAT SAMSUNG HANDED
3 OUT 5,000 SAMPLES OF THE TABLET 10.1 WHICH THEY
4 HAVE TOLD YOU UNDER OATH IS NOT AVAILABLE FOR
5 PRODUCTION. BUT THEY HANDED OUT 5,000 IN
6 SAN FRANCISCO AT THE GOOGLE I/O CONFERENCE.

7 AND, THIRD, I'D JUST LIKE TO MAKE SORT OF
8 AN OVERALL FAIRNESS ISSUE.

9 OBVIOUSLY YOUR HONOR IS AWARE OF THE
10 SIGNIFICANCE OF THIS CASE AND YOU HAVE TALKED ABOUT
11 A GLOBAL WAR.

12 BUT WHAT APPLE CHOSE TO DO, AS A MATTER
13 OF QUITE CLEAR STRATEGY, WAS TO BRING THIS CRITICAL
14 ISSUE -- APPLE'S BRAND IS NUMBER ONE IN THE
15 WORLD -- WE BROUGHT THIS ISSUE TO THIS COURT SO
16 THAT WE COULD GET AN IMMEDIATE, CLEAR, RULING ON
17 THESE ISSUES.

18 SAMSUNG HAS REACTED TO THAT BY MAKING
19 THIS A WORLDWIDE BATTLE. THEY HAVE SUED US IN FIVE
20 COUNTRIES. THEY ARE SEEKING EXPEDITED RELIEF IN
21 OTHER COUNTRIES.

22 IF WE CAN'T GET THAT SAME KIND OF QUICK
23 ADJUDICATION IN THIS COURT, WE ARE AT A TREMENDOUS
24 DISADVANTAGE.

25 THANK YOU.

1 THE COURT: ALL RIGHT. WELL, LET ME ASK
2 YOU, HOW WOULD YOU NARROWLY TAILOR YOUR DISCOVERY?

3 AND I WILL TELL YOU WHAT THINGS ABOUT
4 YOUR REQUEST ARE OF CONCERN: COMMERCIAL PACKAGING,
5 APPLE'S INTELLECTUAL PROPERTY, INITIAL RELEASE
6 MARKETING MATERIALS SEEM OVERBROAD AND VAGUE.

7 TO HAVE ANY 30(B)(6) WHO WOULD HAVE TO
8 HAVE -- WHO WOULD HAVE TO TESTIFY ABOUT INFORMATION
9 KNOWN OR REASONABLY AVAILABLE TO THE ORGANIZATION
10 ON AN EXPEDITED BASIS SEEMS UNREASONABLE.

11 YOUR DEADLINES FOR WHAT YOU WANT SEEM TOO
12 QUICK.

13 SO TELL ME WHAT YOU WOULD DO TO NARROWLY
14 TAILOR THIS, BECAUSE I AGREE WITH SAMSUNG, IT'S
15 UNFAIR TO ASK THEM TO DO A FIRE DRILL TO HAVE TO
16 TRY TO REVIEW ALL OF THEIR DOCUMENTS AND INTERVIEW
17 ALL OF THEIR EMPLOYEES AND COME UP WITH A CORPORATE
18 POSITION ON THAT KIND OF EXPEDITED BASIS.

19 SO WHAT WOULD YOU DO TO NARROWLY TAILOR
20 YOUR REQUEST? WHY CAN'T YOU JUST HAVE AN
21 INDIVIDUAL DEPOSITION INSTEAD OF THE 30(B)(6)?

22 MR. MCELHINNY: THE PROBLEM WITH THE
23 INDIVIDUAL -- I MEAN, I'M PERFECTLY HAPPY TO DO
24 ANYTHING THAT'S REASONABLE, YOUR HONOR.

25 THE PROBLEM WITH THE INDIVIDUAL

1 DEPOSITION IS, WITHOUT DISCLOSING THE CONTENTS OF
2 IT, IT'S FILED UNDER SEAL, YOUR HONOR HAS
3 DECLARATIONS ABOUT THE NUMBER OF PEOPLE IN VARIOUS
4 SAMSUNG ENTITIES WHO ARE -- IF THERE WAS SOME WAY
5 THAT WE COULD GET AN IDENTIFICATION OF A PERSON WHO
6 IS THE KNOWLEDGEABLE PERSON, THEN WE WOULD TAKE
7 THAT AS A PERSONAL DEPOSITION AS OPPOSED TO A
8 30(B)(6). WE WOULD AUTOMATICALLY DO THAT.

9 THE COURT: WELL, LET ME TELL YOU BOTH
10 THAT I'M ACTUALLY INCLINED TO GRANT SOME VERY
11 LIMITED, FOCUSED, EXPEDITED DISCOVERY.

12 I AGREE WITH SAMSUNG THAT ASKING THEM TO
13 GET ALL INFORMATION KNOWN AND REASONABLY AVAILABLE
14 TO THE ORGANIZATION, WHICH IS WHAT'S REQUIRED BY
15 30(B)(6), ON AN EXPEDITED BASIS IS SIMPLY -- IT'S
16 NOT FAIR AND DOABLE.

17 BUT I WOULD BE INCLINED TO GIVE, I DON'T
18 KNOW, 30 DAYS TO PRODUCE ONE, EITHER YOU CAN SAY
19 LATEST ITERATION, CURRENT VERSION, WHETHER IT'S A
20 DRAWING SINCE MOST OF THESE SEEM TO BE ABOUT THE
21 LOOK AND FEEL VERSUS AN ACTUAL SAMPLE OF EACH OF
22 THE PRODUCTS REQUESTED.

23 I DON'T KNOW WHAT YOU MEAN BY COMMERCIAL
24 PACKAGING. IS THAT THE ACTUAL BOX THAT IT COMES
25 IN?

1 MR. MCELHINNY: IT IS, YOUR HONOR.

2 THE COURT: WHAT IS MARKETING MATERIAL?

3 I KNOW YOU SAY THAT'S WHAT YOU GIVE TO
4 DISTRIBUTORS, BUT WHAT IS THAT?

5 MR. MCELHINNY: THE MARKETING MATERIAL IS
6 TWO THINGS. IT'S, ONE, THE PACKAGE INSERT THAT
7 GOES INTO THE BOX; AND, TWO, IT IS THE MARKETING
8 DIRECTIONS WHICH GO TO LARGE BOX CONSUMER STORES OR
9 TO AD AGENCIES IN TERMS OF THE WAY THIS PRODUCT IS
10 GOING TO BE MARKETED.

11 THE COURT: YOU SAID MARKETING DIRECTIONS
12 TO AD AGENCIES AND WHO?

13 MR. MCELHINNY: LARGE BOX CONSUMER
14 STORES.

15 THE COURT: SO WHAT IS THAT, LIKE FRY'S
16 AND BEST BUY?

17 MR. MCELHINNY: IT IS EXACTLY LIKE THAT,
18 YOUR HONOR. WAL-MART.

19 THE COURT: ALL RIGHT. I UNDERSTAND THIS
20 IS -- I MEAN, I UNDERSTAND YOU'RE GOING TO OPPOSE
21 THE MOTION TO RELATE, BUT WHOEVER -- WHICHEVER
22 JUDGE HAS THE OTHER CASE, THIS COULD BE NUCLEAR WAR
23 ON BOTH SIDES BECAUSE I'M INCLINED TO GRANT THE
24 LATEST ITERATION, SAMPLE, OR DRAWING ON EACH OF THE
25 PRODUCTS LISTED; THE CURRENT ITERATION OF THE BOX;

1 THE CURRENT ITERATION OF THE PACKAGE INSERT.

2 NOW, I DON'T KNOW ABOUT MARKETING
3 DIRECTIONS TO AD AGENCIES AND LARGE BOX CONSUMER
4 STORES. THAT'S PROBABLY VERY VOLUMINOUS AND AN
5 OVERLY BROAD DESCRIPTION. THERE MAY BE A SPECIFIC
6 ONE TO EACH SPECIFIC CUSTOMER. THAT'S JUST TOO
7 BROAD.

8 MR. MCELHINNY: ON THE SAMPLE OR DRAWING
9 POINT, JUST TO REMIND THE COURT THAT WE HAVE PATENT
10 CLAIMS, UTILITY PATENT CLAIMS, AS WELL AS TRADEMARK
11 CLAIMS IN THIS CASE.

12 AND SO IF YOUR HONOR IS SAYING THE
13 DRAWING, IF THEY DON'T HAVE A PHYSICAL PRODUCT,
14 THAT WOULD BE FINE.

15 BUT THE PHYSICAL PRODUCT IS MORE
16 IMPORTANT TO US IN ORDER TO BE ABLE TO --

17 THE COURT: WELL, THE LIKELIHOOD THAT
18 YOU'LL GET AN INJUNCTION ON A PATENT CASE IN
19 DISTRICT COURT IS NOT SUPER GREAT, AND THE FACT
20 THAT YOU WOULD GET IT ON A PRELIMINARY BASIS ABSENT
21 CLAIM CONSTRUCTION, ABSENT ANY MERITS REVIEW ON A
22 PATENT CASE I THINK IS PRETTY SLIM.

23 SO IF YOU WANT TO GET INTO THE GUTS OF
24 THESE PRODUCTS, I DON'T THINK THAT'S GOING TO
25 HAPPEN ON A PRELIMINARY INJUNCTION.

1 THE LOOK AND FEEL I THINK IS SOMETHING
2 THAT IS POSSIBLY REVIEWABLE ON AN EXPEDITED
3 PRELIMINARY, YOU KNOW, TIME FRAME.

4 MR. MCELHINNY: MAY I JUST -- AGAIN, I'M
5 TRYING NOT TO ARGUE THE MOTION ON THE MERITS, BUT
6 THESE PATENTS COVER INTERFACES THAT ARE UNIQUELY
7 APPLE. THEY ARE THE ONES THAT COVER THE ABILITY TO
8 EXPAND PICTURES WITH YOUR FINGERS. THEY'RE THE
9 ONES THAT CAUSE SCREENS TO BOUNCE BACK UP.

10 THEY ARE NOT SOFTWARE. I MEAN, THEY ARE,
11 BUT YOU CAN TELL WHETHER THERE IS A -- WHETHER
12 THERE'S AN INFRINGEMENT SIMPLY BY OPERATING THE
13 DEVICE.

14 AND WHEN PEOPLE OPERATE THESE DEVICES,
15 THEY SAY, "THIS IS AN APPLE APPLICATION."

16 AND WE WOULD LIKE THE OPPORTUNITY TO BE
17 ABLE -- I'M JUST AFRAID THAT IF YOU SAY "SAMPLE" OR
18 "DRAWING," WE'RE GOING TO BE IN A FIGHT WITH YOUR
19 HONOR ABOUT WHETHER OR NOT WE'VE GOTTEN SOMETHING
20 THAT HELPS US AND WE'RE GOING TO BE BACK AGAIN, NOT
21 WITH YOUR HONOR, BUT WITH A MAGISTRATE JUDGE.

22 MR. VERHOEVEN: YOUR HONOR, MAY I ADDRESS
23 THAT PLEASE?

24 THERE HAS BEEN NO IDENTIFICATION ON THIS
25 MOTION OF ANY PATENT THAT THEY NEED EXPEDITED

1 DISCOVERY FOR. THERE'S BEEN NO IDENTIFICATION OF
2 CLAIMS. THERE'S BEEN NO CLAIM CONSTRUCTION.

3 IT -- AS YOUR HONOR NOTED, IT WOULD BE
4 VIRTUALLY IMPOSSIBLE TO PRODUCE WITNESSES THAT TALK
5 ABOUT THE GUTS OF THESE PRODUCTS THAT AREN'T EVEN
6 FINISHED YET THAT THEY'RE SEEKING.

7 SO WE WOULD STRENUOUSLY OBJECT TO ANY
8 DISCOVERY ALONG THOSE LINES.

9 AND, YOUR HONOR, ALSO, IF I COULD GO BACK
10 REALLY BRIEFLY TO THE -- BECAUSE I DO THINK THE
11 REASON THAT THEY'RE SAYING THEY HAVE GOOD CAUSE,
12 YOUR HONOR, IS BECAUSE THEY SAY THEY WANT TO DO A
13 PRELIMINARY INJUNCTION MOTION.

14 BUT IF YOU LOOK AT THE SLIDES, NOT JUST
15 THE DELAY, YOUR HONOR, BUT WE'VE GOT HERE ON SLIDE
16 8, THEY CLAIM THAT THEIR TRADE DRESS AND THEIR
17 DESIGN PATENT COVERS RECTANGULAR SHAPES WITH
18 ROUNDED EDGES.

19 EVERY CELL PHONE, SMART PHONE MAKER ON
20 THE MARKET HAS RECTANGULAR PHONES WITH ROUNDED
21 EDGES. THOSE ARE NOT UNIQUE TO APPLE. THEY'RE
22 STANDARD.

23 IF YOU LOOK AT SLIDE 8, THEY SAY THAT
24 THEIR TRADE DRESS AND THEIR DESIGN PATENT CLAIMS
25 ARE A STACK OF ICONS.

1 ALL YOU HAVE TO DO IS LOOK AT ALL OF
2 THESE PHONES ON THE MARKET TODAY, YOUR HONOR, PALM
3 PRE, HTC TOUCH, MOTOROLA ATRIX, RIM BLACKBERRY,
4 NOKIA 5800, LG AXIS, SONY ERICSSON XPERIA, THEY ALL
5 HAVE THAT, YOUR HONOR.

6 THESE ARE FUNCTIONAL -- THEY ARE NOT
7 PROTECTABLE, YOUR HONOR, THEY ARE FUNCTIONAL, AND
8 THEY'RE NOT UNIQUE TO APPLE.

9 THERE IS NO WAY THEY CAN EVER PREVAIL ON
10 A PRELIMINARY INJUNCTION MOTION BASED ON THE MERITS
11 THAT THEY'VE PUT FORTH IN THEIR MOVING PAPER.

12 IT IS INCREDIBLY FUTILE, THEY WOULD NEVER
13 WIN, AND TO MAKE US JUMP THROUGH HOOPS, GIVE ONE OF
14 OUR BIGGEST COMPETITORS ADVANCE NOTICE OF UPCOMING
15 PRODUCTS BALANCED AGAINST THE FACT THAT THERE'S
16 JUST NO WAY THEY COULD GET A PRELIMINARY
17 INJUNCTION, THAT IS NOT GOOD CAUSE AND THE
18 PREJUDICE TO US SEVERELY OUTWEIGHS THAT.

19 YOU KNOW, THESE PRODUCTS, THESE SMART
20 PHONE PRODUCTS, YOUR HONOR, THEY HAVE A SHELF LIFE
21 OF LESS THAN SIX MONTHS. THERE'S CONSTANTLY NEW
22 PRODUCTS COMING OUT.

23 WHAT APPLE IS DOING, IF YOU GRANT THIS,
24 YOUR HONOR, IS INTERFERING WITH OUR ABILITY TO
25 RELEASE PRODUCTS BEFORE WE'VE EVEN RELEASED THEM

1 WITHOUT INTERFERENCE WITH OUR BIGGEST COMPETITOR,
2 AND WHAT'S THE JUSTIFICATION FOR THAT, YOUR HONOR?

3 YOU KNOW, THE -- OH, A RECTANGLE.

4 THAT'S --

5 THE COURT: I HAVE TO SAY THE PRODUCTS
6 LOOK AWFULLY SIMILAR, MR. VERHOEVEN.

7 MR. MCELHINNY: YOUR HONOR, ON THE SAMPLE
8 ISSUE, ALL I'M SAYING IS IF THEY HAD 5,000 TO GIVE
9 AWAY IN SAN FRANCISCO LAST WEEK, THEY CAN GIVE US
10 ONE.

11 THE COURT: WHY DIDN'T YOU GET ONE?

12 MR. MCELHINNY: BECAUSE WE NEED ONE
13 THAT'S PRODUCED FROM THEM SO THEY CAN AUTHENTICATE
14 IT SO WE CAN SUBMIT IT INTO EVIDENCE, SO THAT WE
15 CAN SUBMIT IT.

16 THEY GAVE AWAY 500 -- ACTUALLY, THAT'S
17 NOT TRUE. THEY GAVE AWAY 5,000 OF THE PHONES.
18 THEY FLEW PEOPLE FROM THE UNITED STATES TO
19 BARCELONA AND GAVE AWAY 5,000 OF THE PHONES.

20 THE COURT: ALL RIGHT. WELL, LET'S -- I
21 WILL CONSIDER THIS FURTHER, BUT I'M STILL INCLINED
22 TO GRANT VERY LIMITED DISCOVERY TO BE PRODUCED
23 WITHIN 30 DAYS, A SAMPLE OF THE PRODUCTS THAT HAVE
24 BEEN REQUESTED, THE PACKAGE OR THE BOX -- AND I
25 JUST MEAN CURRENT ITERATIONS. I DON'T THINK YOU

1 NEED EVERY ITERATION SINCE THE BEGINNING, JUST
2 CURRENT -- THE PACKAGE INSERT, AND I STILL DON'T
3 KNOW WHAT YOU MEAN BY MARKETING DIRECTIONS TO AD
4 AGENCIES.

5 WHAT DO YOU EXPECT TO FIND THERE? THAT
6 THEY'RE GOING TO SAY -- WHAT DO YOU EXPECT TO FIND
7 THERE?

8 MR. MCELHINNY: I EXPECT TO FIND ADS THAT
9 MIMIC THE APPLE ADS. THAT'S WHAT I EXPECT TO FIND,
10 THAT THE PRESENTATION MIMICS THE WAY THAT APPLE HAS
11 BEEN PRESENTING ITS PRODUCTS. THAT'S WHAT I EXPECT
12 TO FIND.

13 THE COURT: AND WHAT DOES THAT GO TO?
14 THE TRADE DRESS?

15 MR. MCELHINNY: IT GOES TO -- THANK YOU
16 FOR THAT.

17 WITH MY STAFF -- WITH MY HELPERS HERE, I
18 WAS POINTED OUT THAT IN THE NINTH CIRCUIT, YOUR
19 HONOR, IN AMF INC. VERSUS SLEEKCRAFT, WHICH IS ONE
20 OF THE KEY CASES, LISTS THE EIGHT ELEMENTS THAT GO
21 TO CONFUSION, AND NUMBER SEVEN IS DEFENDANT'S
22 INTENT IN SELECTING THE MARK.

23 WE INTEND TO PROVE TO YOUR HONOR -- I
24 MEAN, MR. VERHOEVEN IS FREE TO ARGUE TO YOUR HONOR,
25 HE'S FREE TO ARGUE TO THE WORLD THAT APPLE'S MARKS

1 ARE NOT DISTINCT, AND WE'LL WORRY ABOUT WHETHER OR
2 NOT HE WILL SUCCEED ON THAT.

3 BUT WE INTEND TO DEMONSTRATE TO YOUR
4 HONOR THAT UNLIKE EVERY -- UNLIKE THE PHONE
5 MANUFACTURERS AND TABLET MANUFACTURERS WHO ARE
6 COMPETING FAIRLY, SAMSUNG IS INTENTIONALLY
7 ATTEMPTING TO MIMIC AND COPY APPLE IN ORDER TO, A,
8 TAKE ADVANTAGE OF OUR MARKET POSITION; AND, B, IN
9 ORDER TO DILUTE OUR TRADEMARK.

10 THE COURT: LET ME ASK -- LET ME ASK,
11 MR. VERHOEVEN, IS THERE -- I GUESS ARE THERE -- I
12 DON'T KNOW WHAT WOULD BE THE TERM FOR MARKETING
13 MATERIAL FOR A SMART PHONE.

14 MR. MCELHINNY: MAY I PROPOSE THAT --

15 THE COURT: WHAT WOULD THAT BE CALLED?

16 MR. MCELHINNY: MAY I PROPOSE TO YOUR
17 HONOR THAT WHAT I WOULD LIKE TO DO IS GET -- I CAN
18 GET YOU BETTER LANGUAGE FROM SOMEONE WHO'S ACTUALLY
19 INVOLVED IN THIS MARKETING AND I CAN FAX IT TO YOU
20 AND TO MR. VERHOEVEN LATER THIS AFTERNOON.

21 OR -- I'LL TELL YOU THIS. IF YOUR
22 HONOR -- EVEN IF YOU PUT YOUR -- I MEAN, IF YOU
23 JUST SAY MARKETING MATERIALS THAT DEMONSTRATE THE
24 NATURE OF THE MARKETING --

25 THE COURT: THAT'S TOO BROAD. THAT'S TOO

1 VAGUE. I WON'T ADOPT THAT.

2 I MEAN, NORMALLY MR. VERHOEVEN WOULD HAVE
3 90 TO 120 DAYS TO GET ALL THIS ORGANIZED. YOU'RE
4 ASKING HIM TO DO IT IN 30. IT'S GOT TO BE
5 REASONABLE.

6 MR. MCELHINNY: WHAT I WANT -- WHAT I
7 WANT IS THE PACKAGE OF MATERIALS THAT IS PREPARED
8 THAT IS UNIQUE TO THIS PRODUCT, WHICH IS ALREADY --
9 THEY WOULD HAVE IT TOGETHER IN ONE PLACE, THEY DO
10 HAVE IT TOGETHER IN ONE PLACE, THAT DESCRIBES HOW
11 THE PRODUCT IS TO BE MARKETED.

12 THE COURT: PACKAGE OF MATERIALS UNIQUE
13 TO PRODUCT THAT DESCRIBES HOW PRODUCT IS TO BE
14 MARKETED? THAT JUST SOUNDS TOO BROAD TO ME.

15 MR. VERHOEVEN: I DON'T HAVE ANY IDEA
16 WHAT THAT MEANS.

17 THE COURT: I REALLY DON'T EITHER.

18 MR. VERHOEVEN: YOUR HONOR --

19 THE COURT: ANYWAY, I'M REALLY SORRY, I
20 HAVE TWO OTHER CASES THAT HAVE BEEN PATIENTLY
21 WAITING.

22 MR. MCELHINNY: I KNOW.

23 THE COURT: WE NEED TO MOVE ON WITH THIS.

24 MR. VERHOEVEN: YOUR HONOR, MAY I SAY ONE
25 THING VERY BRIEFLY?

1 THE COURT: YES.

2 MR. VERHOEVEN: IF WE'RE GOING TO HAVE
3 EXPEDITED DISCOVERY FOR THE EXPRESS PURPOSE OF THEM
4 FILING A MOTION FOR PRELIMINARY INJUNCTION, WHICH
5 WE OPPOSE, YOUR HONOR, BUT IF THAT'S WHAT'S GOING
6 TO HAPPEN, IN ALL FAIRNESS, SHOULDN'T THAT
7 DISCOVERY BE RECIPROCAL?

8 AND I WOULD REQUEST -- I DON'T KNOW
9 WHETHER WE WOULD GO TO THE MAGISTRATE BECAUSE I
10 KNOW THE MAGISTRATE'S BEEN ASSIGNED, BUT THERE ARE
11 THINGS THAT WE FAIRLY SHOULD BE ENTITLED TO GET,
12 THROUGH DISCOVERY, TO OPPOSE A PRELIMINARY
13 INJUNCTION, SUCH AS ANY EVIDENCE THEY HAVE OF ANY
14 CONFUSION, OR LACK OF CONFUSION, BETWEEN THESE
15 PRODUCTS AND APPLE PRODUCTS; ANY DOCUMENTS
16 CONCERNING GOOD WILL; LOSS OF GOOD WILL; MARKET
17 SHARE; REPUTATION TO APPLE THROUGH THE INTRODUCTION
18 OF THESE.

19 IF THEY'VE DONE RESEARCH SURVEYS OR
20 STUDIES RELATING TO LIKELIHOOD OF CONFUSION, WE
21 WOULD BE ENTITLED TO THOSE IF WE WERE TO FAIRLY
22 OPPOSE A PRELIMINARY INJUNCTION MOTION.

23 THE COURT: WHAT'S YOUR RESPONSE TO THAT?

24 MR. MCELHINNY: MY RESPONSE TO THAT, YOUR
25 HONOR, IS THAT THE RULES SET OUT THE BASIS FOR

1 THIS.

2 THERE'S BEEN NO REQUEST -- I MEAN, WE
3 FILED THREE BRIEFS HERE. THERE'S BEEN NO REQUEST.

4 THE WAY DISCOVERY STARTS IN THIS
5 DISTRICT, WHICH IS A MEET AND CONFER ABOUT WHAT
6 THEY REASONABLY NEED, IF THEY'RE GOING TO NEED IT
7 TO OPPOSE AN INJUNCTION AND IF IT'S REASONABLE AND
8 IF YOUR HONOR IS GOING TO GIVE IT TO THEM, WE'LL
9 RESOLVE THAT.

10 I HAVE SAID NOW TWICE THAT WE'RE WILLING
11 TO LIVE BY THE RULES THAT YOU SET FOR US, BECAUSE
12 WE WANT AN INJUNCTION HERE AND WE'RE NOT GOING TO
13 GET AN INJUNCTION HERE IF WE'RE NOT RECIPROCAL IN
14 DISCOVERY. I UNDERSTAND THAT.

15 THE COURT: OKAY. SO I'M HEARING THAT
16 YOU ARE WILLING, THEN, TO AGREE TO SOME EXPEDITED
17 PRODUCTION OF YOUR OWN.

18 MR. MCELHINNY: YES. THE ANSWER TO THAT
19 IS YES, AS YOUR HONOR STATES IT.

20 CAN I SUGGEST, ON THE DEPOSITION ISSUE --

21 THE COURT: YES.

22 MR. MCELHINNY: -- THAT WE WILL ACCEPT
23 THEIR GOOD FAITH IF THEY GIVE US A PERSON THAT
24 THEY'RE GOING TO CERTIFY AS, YOU KNOW,
25 KNOWLEDGEABLE ON THESE AREAS, WE WILL TAKE IT AS A

1 PERSONAL DEPOSITION. WE WILL NOT REQUIRE THEM TO
2 PRODUCE A 30 -- A 30(B)(6) AND A SEARCH --

3 THE COURT: I WON'T GIVE YOU A 30(B)(6).
4 THAT'S NOT FAIR TO MAKE THEM GO THROUGH THE WHOLE
5 COMPANY ON THIS EXPEDITED --

6 MR. MCELHINNY: I UNDERSTAND THAT.
7 THAT'S WHAT I'M SAYING. I'M AGREEING WITH YOUR
8 HONOR. THAT'S --

9 MR. VERHOEVEN: YOUR HONOR, THERE IS
10 ABSOLUTELY NO REASON, IF THIS IS ALL ABOUT DESIGN,
11 ORNAMENTAL PATENT, DESIGN PATENTS AND TRADE DRESS
12 THAT THEY NEED TO TALK TO SOMEBODY ABOUT IT.

13 IF THEY HAVE THE PRODUCTS, THEY CAN LOOK
14 AT WHAT THE PRODUCTS LOOK LIKE. THEY DON'T NEED A
15 DEPOSITION IN ORDER TO MAKE THEIR ASSESSMENT,
16 NUMBER ONE.

17 AND NUMBER TWO, THERE IS NO SINGLE PERSON
18 IN THIS GIANT ORGANIZATION WITH ALL OF THESE
19 PHONES. IF YOU TAKE -- I DON'T KNOW IF I GOT THIS
20 ACROSS AS CLEARLY AS I SHOULD HAVE, BUT IF YOU TAKE
21 A LOOK AT THE PRODUCTS THEY'RE ASKING FOR, THAT'S
22 NOT -- THOSE PRODUCTS ARE DIFFERENT FOR DIFFERENT
23 CARRIERS BECAUSE IT'S A VERY COMPLEX PRODUCT, AND
24 YOU -- IF YOU LOOKED AT MY SLIDE, FOR EXAMPLE, ON
25 SLIDE -- I'LL BE VERY BRIEF, YOUR HONOR, SLIDE 2,

1 YOU'LL SEE THAT THE -- THAT YOU CAN SEE -- YOU CAN
2 TELL JUST BY LOOKING AT IT THAT THE GALAXY S IS
3 DIFFERENT FOR EACH DIFFERENT CARRIER.

4 SO IT'S VERY COMPLICATED IF YOU START
5 GETTING BEYOND WHAT YOU'VE JUST LIMITED IT TO, YOUR
6 HONOR, AND IT WILL -- IT WOULDN'T DO ANYBODY ANY
7 GOOD TO HAVE A CONFUSED, SCATTERSHOT DEPOSITION ON
8 SUCH AN EXPEDITED FASHION WHEN THEY'VE WAITED FOR
9 OVER A YEAR TO EVEN FILE THIS CASE SINCE THE
10 GALAXY S WAS OUT, YOUR HONOR.

11 WHY CAN'T THEY JUST DO DISCOVERY IN THE
12 NORMAL COURSE AND GET THAT INFORMATION, YOUR HONOR?

13 IF THEY GET THE PRODUCT AND THEY SAY,
14 "OKAY, WE CAN SEE THIS PRODUCT IS THE SAME, WE
15 THINK WE CAN FILE A MOTION FOR PRELIMINARY
16 INJUNCTION," THEN FILE IT.

17 BUT THEY DON'T NEED TO HAVE EXTENSIVE
18 DEPOSITION DISCOVERY.

19 THE COURT: WHAT DO YOU NEED A DEPOSITION
20 FOR? IF THIS IS REALLY ORDINARY, THE ORDINARY
21 OBSERVER TEST, LOOK AND FEEL, WHY DO YOU NEED A
22 DEPOSITION? IT'S EITHER GOING TO LOOK LIKE IT OR
23 IT'S NOT, RIGHT?

24 MR. MCELHINNY: WE NEED IT --

25 THE COURT: WHY? FOR INTENT?

1 MR. MCELHINNY: IT'S PARTIALLY FOR
2 INTENT.

3 ALSO, YOUR HONOR SAW IN THE BRIEF THE
4 SEMANTIC POSITION TAKEN ABOUT WHETHER DESIGNS WERE
5 FINAL, AND YOUR HONOR CLEARLY REACTED TO THAT AND
6 THAT'S WHY YOU ORDERED THE CURRENT PRODUCT.

7 BUT UNLESS WE HAVE SOMEBODY WHO SAYS THIS
8 IS WHAT'S GOING TO THE MARKET, THEN WE RUN THE RISK
9 THAT WE'RE DOING SOMETHING AND WHEN WE GET IN FRONT
10 OF YOUR HONOR, IT TURNS OUT THAT IT'S NOT AND WE'VE
11 WASTED YOUR HONOR'S TIME AND OUR TIME AND ALL THE
12 REST OF THIS.

13 THE COURT: I'M SAYING PRODUCE THE LATEST
14 ITERATION, CURRENT VERSION. I'M ASSUMING -- HE'S
15 AN OFFICER OF THE COURT. IF HE PRODUCES SOMETHING
16 THAT HE SAYS IS THE LATEST ITERATION, CURRENT
17 VERSION, I'M ASSUMING THAT'S THE CASE.

18 WHY DO YOU NEED A WITNESS TO TESTIFY THAT
19 THAT IS THE LATEST VERSION?

20 MR. MCELHINNY: WELL, IF YOUR HONOR IS --
21 IF YOUR HONOR -- IF YOUR HONOR IS GOING TO TAKE A
22 SUBMISSION IN RESPONSE TO YOUR ORDER AS AN
23 EVIDENTIARY ADMISSION, THEN I DON'T NEED SOMEBODY
24 TO SAY THAT IT'S FINAL.

25 BUT THAT'S NOT WHAT HAPPENED IN THESE

1 PAPERS. BUT THAT'S -- THE POINT IS THAT --

2 THE COURT: WELL, I THINK THEY'RE GOING
3 TO SAY IT'S NOT THE FINAL BECAUSE SOME OF THE DATES
4 ARE NOT COMING FOR SOME TIME.

5 SO -- ANYWAY, IF THE BEST YOU CAN GIVE ME
6 FOR WHY YOU NEED AN INDIVIDUAL DEPOSITION IS TO SAY
7 THAT THESE ARE THE FINAL PRODUCTS, THEN IT'S DENIED
8 UNLESS YOU CAN GIVE ME SOMETHING ELSE WHY YOU NEED
9 A PERSON AND WHY YOU CAN'T JUST LOOK AT IT FROM THE
10 SAMPLE OF THE BOX --

11 MR. MCELHINNY: I'M SORRY. WE WANT TO
12 KNOW IF THEY ATTEMPTED TO DESIGN AROUND OUR DESIGN;
13 WE WANT TO KNOW WHETHER OR NOT THEY PAID ANY
14 ATTENTION AT ALL TO THE TRADEMARK LAWS; IF THEY
15 LOOKED AT OUR DESIGNS; IF THEY TOOK THEM INTO
16 CONSIDERATION; IF THEY ARE MAKING ANY ATTEMPT AT
17 ALL TO COMPLY WITH THE LAWS IN THIS COUNTRY.

18 AND THAT IS COMPLETELY RELEVANT EVIDENCE
19 AS TO WHAT'S GOING ON WITH THE ATTEMPT TO USE OUR
20 TRADEMARKS.

21 MR. VERHOEVEN: YOUR HONOR, I DON'T KNOW
22 HOW TO BEGIN TO EVEN THINK ABOUT WHO WE'RE GOING TO
23 PUT UP TO SAY, "DID YOU COMPLY WITH THE LAWS OF
24 THIS COUNTRY?" I MEAN, THAT'S COMPLETELY VAGUE.

25 THEY'VE GOT -- IF YOUR HONOR GIVES THEM

1 THE PRODUCT, THEY'VE GOT THE PRODUCT.

2 THEIR ONLY CLAIM ON THIS MOTION THAT I'VE
3 READ IS ORNAMENTAL DESIGN PATENTS AND TRADE DRESS.

4 THAT'S WHAT IT LOOKS LIKE. IT'S NOT HOW
5 IT FUNCTIONS. IT'S WHAT IT LOOKS LIKE.

6 AND SO THERE'S NO REASON FOR THEM TO NEED
7 TO GO UNDER THE GUTS OF THIS AND START TALKING TO
8 TECHNICAL PEOPLE ON AN EXPEDITED BASIS WITH VERY
9 COMPLICATED PRODUCTS.

10 AND LET'S NOT FORGET, THESE ARE MOST
11 LIKELY GOING TO BE FOLKS THAT RESIDE IN KOREA THAT
12 PROBABLY WILL NEED TO HAVE TRANSLATORS, AND IF
13 THEY'RE ASKING TO HAVE THEM SHIPPED UP IN FIVE DAYS
14 TO THE UNITED STATES SO THEY CAN DEPOSE THEM, IT'S
15 RIDICULOUS.

16 MR. MCELHINNY: JUST IN TERMS OF OUR GOOD
17 FAITH TO NARROW THIS, YOUR HONOR, THIS IS WHY --
18 THIS IS EXACTLY HOW WE ENDED UP AT A 30(B)(6),
19 BECAUSE IF YOU WALK AWAY FROM A 30(B)(6), THEN YOU
20 GET THE ARGUMENT THAT THERE IS NO INDIVIDUAL AND
21 THE ONE THAT YOU TRIED TO PICK IS THE WRONG ONE, ET
22 CETERA, ET CETERA.

23 BUT JUST TO GO BACK TO THE EVIDENCE
24 THAT'S BEFORE YOU, THERE IS EVIDENCE IN THIS RECORD
25 THAT SAMSUNG ENGAGED IN AN EXPLICIT REDESIGN OF A

1 PRODUCT AS A RESULT OF THE RELEASE OF THE IPAD 2.

2 THAT EVIDENCE OF WHAT THEY DID,
3 PARTICULARLY IF IT SHOWS THAT THEY MADE CHANGES IN
4 ORDER TO GET CLOSER TO THE TRADEMARK OF THE IPAD 2,
5 IS DIRECT EVIDENCE OF INTENT.

6 THE COURT: SO THEN WHY DO YOU NEED MORE
7 EVIDENCE OF COPYING AND INTENT? IF YOU ALREADY
8 HAVE IT, THEN WHY DO YOU NEED AN INDIVIDUAL
9 DEPOSITION TO GET MORE EVIDENCE OF INTENT TO COPY?

10 MR. MCELHINNY: BECAUSE THEY HAVE ARGUED
11 IN THEIR PAPERS THAT WHAT -- THAT THE CHANGES WENT
12 TO PRICE, THEY WENT TO THINNESS, THAT THEY DID NOT
13 GO TO GRAPHICAL USER INTERFACES.

14 THEY ARE NOT ADMITTING THAT THEY COPIED
15 OUR TRADEMARKS.

16 THE COURT: AND DO YOU THINK ANY
17 INDIVIDUAL THAT THEY HAVE PREPPED FOR DEPOSITION IS
18 GOING TO ADMIT THAT?

19 MR. MCELHINNY: I BELIEVE IF WE GET THE
20 DOCUMENTS --

21 THE COURT: I MEAN, COME ON. HE'S GOING
22 TO PREP THEM NOT TO ADMIT THAT.

23 MR. MCELHINNY: YOUR HONOR, THERE'S A
24 COUPLE OF THINGS THAT'LL HAPPEN.

25 ONE, IF WE GET THE DOCUMENTS, WE'LL HAVE

1 THE QUESTIONS TO ASK, AND IN ANY EVENT, WE'LL BE
2 ABLE TO ASK THE QUESTIONS.

3 AND IF HE DENIES IT UNDER OATH AND THEN
4 IN THE NORMAL COURSE WE GET THE DOCUMENTS, THEN
5 THERE WILL BE REPERCUSSIONS FROM YOUR HONOR AND
6 THAT'S A PERFECTLY LEGITIMATE -- I MEAN, HE'S GOING
7 TO HAVE TO SAY SOMETHING, AND WHAT HE SAYS UNDER
8 OATH IS GOING TO BE VERY VALUABLE AND I ASSUME HE
9 WILL TELL THE TRUTH UNDER OATH.

10 THE COURT: LET ME GO TO A COUPLE OTHER
11 QUESTIONS.

12 FIRST OF ALL, I GRANTED SAMSUNG'S MOTION
13 TO FILE UNDER SEAL, BUT IT DOESN'T LOOK LIKE YOU'VE
14 ACTUALLY FILED THE DOCUMENTS UNDER SEAL OR FILED
15 THE REDACTED VERSION OF YOUR OPPOSITION BRIEF. ARE
16 YOU PLANNING TO DO THAT?

17 MR. OLSON: WE'LL DO THAT THIS AFTERNOON,
18 YOUR HONOR.

19 THE COURT: ALL RIGHT. THANK YOU.

20 THE MOTION FOR RELATED CASE WAS FILED TWO
21 WEEKS AFTER THE COMPLAINT WAS FILED.

22 NOW, I KNOW YOU ASKED FOR A STIPULATION
23 FROM THE OTHER SIDE, I GUESS FROM WILMER, HALE ON
24 MAY 6TH, BUT WHY WAS THERE THE DELAY? DID YOU
25 INITIALLY NOT THINK THESE CASES WERE RELATED? OR

1 WHY WAS IT FILED TWO WEEKS LATER? BECAUSE NORMALLY
2 YOU FILE A MOTION OF RELATED CASE WHEN YOU FILE THE
3 COMPLAINT.

4 MS. MAREULIS: YOUR HONOR, WHEN WE FILED
5 THE COMPLAINT ON APRIL 27TH, WE CHECKED THE BOX ON
6 THE CIVIL COVER SHEET THAT THE CASES WERE RELATED,
7 AND AS SOON AS WE COULD, WHICH WAS SEVERAL DAYS
8 LATER, MAY 6TH, WE APPROACHED -- ACTUALLY, WE FIRST
9 APPROACHED COUNSEL IN THIS CASE, AND THEN WE WERE
10 INFORMED THAT A DIFFERENT COUNSEL WAS GOING TO BE
11 REPRESENTING APPLE IN THAT CASE AND WE APPROACHED
12 THEM.

13 SO I DON'T HAVE MY E-MAIL IN FRONT OF ME,
14 BUT THE EARLIER E-MAIL WAS BEFORE MAY 6TH.

15 THE COURT: I SEE. WHAT ABOUT THE
16 PROTECTIVE ORDER?

17 AT THIS POINT, I HAVEN'T MADE A FINAL
18 DECISION, BUT I'M INCLINED TO ORDER THE LATEST
19 ITERATION, CURRENT VERSION OF A SAMPLE OF THE
20 PACKAGE WITH THE BOX AND THE PACKAGE INSERT.

21 I'M NOT CONVINCED ON THE INDIVIDUAL
22 DEPOSITION. I WOULD DENY A 30(B)(6) DEPOSITION.

23 AND WHAT I'M HEARING ON THE MARKETING IS
24 STILL TOO VAGUE.

25 SO THAT'S WHERE I WOULD TENTATIVE LY

1 RULE, BUT I'D LIKE TO THINK ABOUT THIS A LITTLE BIT
2 FURTHER.

3 WHAT'S GOING TO HAPPEN WITH THE
4 PROTECTIVE ORDER? ARE YOU SATISFIED WITH LOCAL
5 RULE 2-2, THE INTERIM PROTECTIVE ORDER? BECAUSE I
6 WANT MAXIMUM PROTECTION, BUT I DO REALIZE HOW
7 SIGNIFICANT THIS IS TO SAMSUNG.

8 IF YOU DON'T WANT ANY IN-HOUSE COUNSEL AT
9 ALL TO REVIEW THIS, I THINK THAT WOULD BE HIGHLY
10 APPROPRIATE.

11 I MEAN, YOU'RE NOT GOING TO FIGHT ON
12 THAT, ARE YOU? THIS IS THE CROWN JEWEL.

13 ARE YOU GOING TO -- I JUST WANT TO FIGURE
14 OUT WHAT THE PROTECTIVE ORDER IS GOING TO BE.

15 MR. MCELHINNY: WE'RE WILLING TO -- I'M
16 SORRY. WE'RE WILLING TO ACCEPT THE LOCAL RULE
17 DEFAULT.

18 THE COURT: WELL, THE LOCAL RULE DEFAULT
19 KIND OF LEAVES IT UP TO YOU AS TO, YOU KNOW, THE
20 PROSECUTION BAR, AND LEAVES IT UP TO YOU AS TO
21 WHETHER IN-HOUSE COUNSEL GETS TO SEE IT OR NOT.

22 AND SINCE THIS IS NOT TYPICAL, I WOULD
23 AGREE WITH WHATEVER SAMSUNG WANTED ON PREVENTING
24 ALL IN-HOUSE COUNSEL AT APPLE FROM REVIEWING THIS.
25 THERE'S NO REASON THAT THEY SHOULD SEE THIS.

1 AND IF YOU WANTED A VERY TIGHT
2 PROSECUTION BAR, I THINK THAT'S COMPLETELY
3 REASONABLE.

4 I MEAN, WHAT YOU'RE ASKING FOR IS NOT THE
5 TYPICAL DISCOVERY TIMING OR --

6 MR. MCELHINNY: I --

7 THE COURT: -- REQUEST.

8 MR. VERHOEVEN: WE ABSOLUTELY WOULD
9 REQUEST THAT.

10 MR. MCELHINNY: THE ONLY HESITANCE I HAD
11 WAS I JUST DON'T THINK IT SHOULD APPLY TO, TO
12 PEOPLE -- TO THINGS THAT THEY'VE ALREADY RELEASED
13 TO THE PUBLIC. THAT'S THE ONLY -- IF IT HASN'T
14 BEEN RELEASED, THEN OF COURSE.

15 BUT IF IT'S BEEN RELEASED TO THE PUBLIC,
16 THEN I JUST DON'T UNDERSTAND THE NEED FOR THAT.

17 BUT --

18 MR. VERHOEVEN: YOUR HONOR, MY
19 UNDERSTANDING IS THEY'RE ASKING -- THEY'VE GOT ALL
20 THESE PRODUCTS THAT THEY SAY ARE PUBLIC. THEY'RE
21 NOT MOVING FOR A P.I. ON THOSE.

22 WHAT I'M UNDERSTANDING IS THEY'RE ASKING
23 FOR OUR, OUR NON-RELEASED PRODUCTS IN THE FUTURE.
24 OBVIOUSLY THEY'RE NOT RELEASED.

25 SO WHAT -- UNTIL THEY ARE, THEN OBVIOUSLY

1 THAT WOULD NEED TO BE HIGHLY PROTECTED.

2 MR. MCELHINNY: TO BE CLEAR, I'M AGREEING
3 WITH YOUR HONOR. ANYTHING THAT HAS NOT BEEN
4 RELEASED I THINK SHOULD BE PROTECTED AT THE HIGHEST
5 LEVEL. I HAVE NO PROBLEM WITH THAT.

6 THE COURT: AND IT'S GOING TO BE OUTSIDE
7 COUNSEL EYES ONLY.

8 MR. MCELHINNY: YES, YOUR HONOR. I AGREE
9 WITH THAT.

10 THE COURT: YEAH.

11 MR. MCELHINNY: BUT WHAT I'M SAYING IS
12 YOU HAVE -- WHILE HE TOLD YOU THINGS WERE NOT
13 RELEASED, THE FACT IS THAT THEY ARE, IN FACT,
14 RELEASING SOME PRODUCTS, AND FOR THOSE I JUST DON'T
15 THINK THAT THOSE ARE IN THE SAME LEAGUE.

16 THE QUESTION IS WHETHER IT'S BEEN
17 RELEASED OR NOT, AND I'LL TAKE THEIR WORD FOR IT
18 WHETHER IT HAS BEEN OR NOT.

19 THE COURT: WELL, IF YOU KNOW THAT IT'S
20 BEEN RELEASED AND YOU'VE GOT IT, WHY CAN'T THAT BE
21 WHAT YOUR IN-HOUSE COUNSEL LOOKS AT? WHY DO YOU
22 HAVE TO SHOW THEM ANYTHING THAT SAMSUNG PRODUCES
23 PURSUANT TO YOUR EXPEDITED DISCOVERY REQUEST? IF
24 YOU'VE GOT IT, THEN YOU'VE GOT IT.

25 MR. MCELHINNY: BECAUSE YOUR HONOR'S

1 ORDER, AT LEAST YOUR TENTATIVE ORDER, WHICH IS VERY
2 HELPFUL, GOES TO THE CURRENT, FINAL, MOST CURRENT
3 ITERATION OF THE PRODUCT, AND I DON'T WANT TO HAVE
4 TO LITIGATE THAT WHAT THEY'VE RELEASED IN
5 SAN FRANCISCO LAST WEEK WAS AN EARLIER VERSION.

6 MR. VERHOEVEN: THIS IS EXACTLY WHY IT
7 MAKES NO SENSE TO ORDER THIS DISCOVERY, BECAUSE
8 THESE PRODUCTS AREN'T FINAL, YOUR HONOR, AND THEY
9 MAY CHANGE.

10 SO WE'RE GOING THROUGH THIS ENTIRE
11 EXERCISE ON SOMETHING THAT'S NOT FINAL. THEY'RE
12 FUTURE PRODUCTS.

13 THEY'VE GOT THE FINAL PRODUCTS AND
14 THEY'VE DECIDED THEY'RE NOT MOVING FOR A P.I. ON
15 THOSE, APPARENTLY, BECAUSE THEY WAITED TOO LONG.

16 THE COURT: I STILL DON'T UNDERSTAND.
17 YOU'RE SAYING YOU MIGHT BE ABLE TO GET YOUR HANDS
18 ON WHAT YOU THINK WAS RELEASED AT A GOOGLE
19 CONFERENCE IN SAN FRANCISCO.

20 IF YOU HAVE THAT, THEN OBVIOUSLY THAT
21 WASN'T PRODUCED BY SAMSUNG DIRECTLY TO YOU PURSUANT
22 TO THE EXPEDITED DISCOVERY ORDER AND YOU CAN SHOW
23 THAT TO IN-HOUSE COUNSEL.

24 BUT I DON'T SEE WHY --

25 MR. MCELHINNY: I SEE.

1 THE COURT: -- YOU WOULD NEED TO SHOW
2 WHATEVER --

3 MR. MCELHINNY: I AGREE.

4 THE COURT: -- WAS PRODUCED TO YOUR
5 IN-HOUSE COUNSEL.

6 MR. MCELHINNY: I AGREE.

7 THE COURT: IF YOU'VE ALREADY GOT IT,
8 YOU'VE GOT IT, RIGHT?

9 MR. MCELHINNY: I AGREE WITH YOUR HONOR.
10 I MISUNDERSTOOD. I AGREE WITH YOUR
11 HONOR.

12 THE COURT: ALL RIGHT. OKAY. WELL,
13 THAT'S STILL MY -- YOU KNOW, I -- THIS IS WHAT I'M
14 GOING TO DO: I'M GOING TO GO AHEAD AND I THINK --
15 I DON'T WANT TO BE OVERWHELMED WITH PAPER, SO I
16 THINK WE NEED TO SET A FURTHER CMC OR SOMETHING,
17 BECAUSE OTHERWISE I THINK A LOT OF INTERIM MOTIONS
18 WILL PROBABLY BE FILED.

19 SO AT THIS POINT I WOULD GO AHEAD AND
20 ORDER THAT ONE SAMPLE, THE PACKAGE AND THE PACKAGE
21 INSERT, BE PRODUCED WITHIN 30 DAYS PURSUANT TO THE
22 PATENT LOCAL RULE 2-2'S INTERIM MODEL PROTECTIVE
23 ORDER, WITH NO IN-HOUSE COUNSEL REVIEW AT ALL AND
24 THE PATENT PROSECUTION BAR AS STRICT AS SAMSUNG
25 WANTS; NO INDIVIDUAL DEPOSITION OR 30(B)(6); AND NO

1 MARKETING MATERIALS.

2 NOW, IF SOMETHING CHANGES, I GUESS YOU
3 COULD COME BACK AND ASK.

4 AT THIS POINT, I DON'T THINK THAT
5 SAMSUNG'S REQUEST FOR MUTUAL DISCOVERY IS RIPE, BUT
6 YOU CAN PURSUE THAT FOR SOME TYPE OF RECIPROCAL
7 DISCOVERY.

8 AND WHY DON'T WE SET A TIME, LIKE A
9 FURTHER CMC MAYBE -- OR I GUESS WE CAN JUST WAIT
10 AND SEE WHAT, IF ANYTHING, GETS FILED AND THEN
11 WE'LL SET IT THEN. BUT I JUST ANTICIPATE THAT
12 THERE MAY BE ISSUES.

13 MR. MCELHINNY: MAY I --

14 THE COURT: OKAY?

15 MR. MCELHINNY: MAY I INQUIRE, YOUR
16 HONOR?

17 THE COURT: YES.

18 MR. MCELHINNY: AGAIN, I'M IN THE SAME
19 MINDSET THAT I DON'T KNOW OF ANY OTHER ISSUES.

20 THE COURT: YES.

21 MR. MCELHINNY: BUT WE GOT AN ORDER
22 ASSIGNING DISCOVERY MATTERS IN THIS CASE TO
23 MAGISTRATE JUDGE GREWAL.

24 THE COURT: WELL, SINCE I'VE ISSUED THIS
25 ORDER, IF THERE'S ANY FOLLOW-UP REGARDING THIS

1 ORDER, IT SHOULD COME TO ME.

2 MR. MCELHINNY: THANK YOU, YOUR HONOR.

3 THE COURT: OKAY. IS THERE ANYTHING
4 FURTHER?

5 MR. MCELHINNY: NOTHING, YOUR HONOR.

6 THE COURT: MR. VERHOEVEN?

7 MR. VERHOEVEN: SO ON THE RECIPROCAL
8 ISSUE, I TAKE IT THEN THAT WE SHOULD DIRECT THAT TO
9 YOUR HONOR AS WELL IF WE --

10 THE COURT: THAT'S FINE.

11 MR. VERHOEVEN: IF WE MEET AND CONFER --
12 OBVIOUSLY WE'LL MEET AND CONFER, YOUR HONOR, AND IF
13 WE'RE UNABLE TO REACH IT, WE'LL -- IF IT APPEARS TO
14 US THAT THEY'RE PURSUING THE IDEA OF A PRELIMINARY
15 INJUNCTION, WE WOULD WANT THAT DISCOVERY AS PART --
16 PRIOR TO THE MOTION PRACTICE ON THAT.

17 SO WE MAY HAVE TO FILE SOMETHING ON AN
18 EXPEDITED SCHEDULE WITH YOUR HONOR IF WE CAN'T WORK
19 IT OUT.

20 THE COURT: THAT'S FINE. AND LET ME JUST
21 SAY TO COUNSEL FOR APPLE, I'M NOT GOING TO BE HAPPY
22 IF YOU'RE NOT GOING TO SAY WHAT'S GOOD FOR THE
23 GOOSE IS NOT GOOD FOR THE GANDER. OKAY?

24 SO IF I'VE GRANTED YOU THIS EXPEDITED
25 DISCOVERY AND THEN YOU END UP BEING EXTREMELY

1 UNREASONABLE ON THE RECIPROCAL DISCOVERY THAT'S
2 REASONABLY REQUESTED, I'M NOT GOING TO BE VERY
3 HAPPY WITH THAT.

4 SO I'M HOPING THAT THERE WILL BE NO NEED
5 FOR MOTION PRACTICE, THAT YOU MAY BE ABLE TO
6 STIPULATE TO SOMETHING.

7 MR. VERHOEVEN: THANK YOU, YOUR HONOR.

8 THE COURT: OKAY? ALL RIGHT. BUT THAT
9 SHOULD COME HERE.

10 THANK YOU.

11 MR. VERHOEVEN: THANK YOU, YOUR HONOR.

12 MR. MCELHINNY: THANK YOU, YOUR HONOR.

13 MR. OLSON: YOUR HONOR, MAY I APPROACH
14 THE COURT REPORTER TO ASK FOR A TRANSCRIPT?

15 THE COURT: OH, OKAY.

16 (WHEREUPON, THE PROCEEDINGS IN THIS
17 MATTER WERE CONCLUDED.)

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CERTIFICATE OF REPORTER

I, THE UNDERSIGNED OFFICIAL COURT
REPORTER OF THE UNITED STATES DISTRICT COURT FOR
THE NORTHERN DISTRICT OF CALIFORNIA, 280 SOUTH
FIRST STREET, SAN JOSE, CALIFORNIA, DO HEREBY
CERTIFY:

THAT THE FOREGOING TRANSCRIPT,
CERTIFICATE INCLUSIVE, CONSTITUTES A TRUE, FULL AND
CORRECT TRANSCRIPT OF MY SHORTHAND NOTES TAKEN AS
SUCH OFFICIAL COURT REPORTER OF THE PROCEEDINGS
HEREINBEFORE ENTITLED AND REDUCED BY COMPUTER-AIDED
TRANSCRIPTION TO THE BEST OF MY ABILITY.

/s/

LEE-ANNE SHORTRIDGE, CSR, CRR
CERTIFICATE NUMBER 9595