

## Exhibit B

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8 UNITED STATES DISTRICT COURT  
9 NORTHERN DISTRICT OF CALIFORNIA  
10  
11 SAN JOSE DIVISION

12 APPLE INC.,

13 Plaintiff,

14 v.

15 SAMSUNG ELECTRONICS CO., LTD., A  
16 Korean business entity; SAMSUNG  
17 ELECTRONICS AMERICA, INC., a New York  
18 corporation; SAMSUNG  
TELECOMMUNICATIONS AMERICA, LLC, a  
Delaware limited liability company,

19 Defendants.

Case No. 11-cv-01846-LHK

**EXPERT REPORT OF RUSSELL  
S. WINER**

20  
21 **\*\*CONFIDENTIAL – CONTAINS MATERIAL DESIGNATED AS HIGHLY  
22 CONFIDENTIAL – ATTORNEYS’ EYES ONLY PURSUANT TO A PROTECTIVE  
23 ORDER\*\***  
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1     **I.     QUALIFICATIONS**

2             1.       I am the William Joyce Professor of Marketing and the Chair of the Marketing  
3     Department at the Stern School of Business, New York University (“NYU”). I have been on the  
4     faculty of the Stern School of Business since 2003.

5             2.       Prior to joining NYU, I was on the faculties of the University of California at  
6     Berkeley, Vanderbilt University, and Columbia University. I have also been a visiting faculty  
7     member at M.I.T., Stanford University, the Helsinki School of Economics, the University of  
8     Tokyo, École Nationale des Ponts et Chaussées, Cranfield School of Management (U.K.), and  
9     Henley Management College (U.K.).

10            3.       Since 2009, I have been the Dean of the Department of Business Administration at  
11    the University of the People, a tuition-free, non-profit, online academic institution with a mission  
12    to provide universal access to higher education.

13            4.       I received a B.A. in Economics from Union College and an M.S. and Ph.D. in  
14    Industrial Administration from Carnegie Mellon University.

15            5.       My research, teaching, and consulting work has mainly been focused on consumer  
16    choice, marketing research methodology, marketing planning, advertising, and pricing. I have  
17    authored over 60 papers and published in top marketing and management journals such as  
18    *Journal of Marketing Research*, *Marketing Science*, *Management Science*, and *Journal of*  
19    *Consumer Research*.

20            6.       I have won several awards for teaching and research over the course of my career.  
21    In addition, I am an Inaugural Fellow of the INFORMS Society for Marketing Science (“ISMS”).  
22    Because of my lifetime contributions to the practice and research of marketing, I received the  
23    2011 American Marketing Association/Irwin/McGraw-Hill Distinguished Marketing Educator  
24    Award for Lifetime Achievement in Marketing. From 2007 to 2009, I also served as the  
25    Executive Director of the Marketing Science Institute, a nonprofit organization dedicated to  
26    bridging the gap between marketing science theory and business practice.

27            7.       I have written three books, *Marketing Management*, *Analysis for Marketing*  
28    *Planning*, and *Product Management*, and a research monograph, *Pricing*. I have served two

1 terms as the editor of *Journal of Marketing Research*. I am the past co-editor of *Journal of*  
 2 *Interactive Marketing*. I am also an Associate Editor of *International Journal of Research in*  
 3 *Marketing*, and the co-editor of the *Review of Marketing Science*. I serve on the editorial boards  
 4 of *Journal of Marketing*, the *Journal of Marketing Research*, and *Marketing Science*. A copy of  
 5 my curriculum vitae is attached as Exhibit 1.

6 8. I have also participated in executive education programs around the world and  
 7 served as advisor to a number of startup companies.

8 9. I have studied and consulted on brands and branding over the course of my 35-  
 9 year career in marketing. My textbook *Marketing Management*, which is in its fourth edition and  
 10 is used by leading business schools around the world, includes a chapter focusing on products and  
 11 branding. I have also taught executive education programs on branding, most recently in Mumbai  
 12 in January 2012.

13 10. I have provided testimony as an expert witness in the area of marketing, including  
 14 issues related to brands and branding. A list of my testimony in the past four years is attached as  
 15 Exhibit 2.

## 16 **II. ASSIGNMENT AND COMPENSATION**

17 11. I have been asked by counsel for Apple Inc. (“Apple”) to opine on (i) the value of  
 18 brands generally, (ii) the strength of Apple’s brand specifically, (iii) the importance of design—or  
 19 the look and feel of products—to the strength of Apple’s brand, and (iv) the harm to Apple’s  
 20 brand resulting from Samsung’s misappropriation of Apple’s distinctive designs.

21 12. In arriving at my conclusions, I have relied on certain opinions contained in the  
 22 expert reports of Hal Poret and Kent Van Liere.<sup>1</sup> In addition, I, or Cornerstone Research staff at  
 23 my supervision and direction, have reviewed other materials identified in Exhibit 3 to this report.

24 13. Documents and other information cited in my report (including exhibits) are  
 25 illustrative of information I have relied upon in conducting my analysis. According to the

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27 <sup>1</sup> Expert Report of Hal Poret in Apple Inc. v. Samsung Electronics Co., March 22, 2012  
 28 (“Poret Report”); Expert Report of Kent D. Van Liere, Ph. D., in the Apple Inc. v. Samsung  
 Electronics Co., March 22, 2012 (“Van Liere Report”).

1 schedule set by the Court and/or agreed upon by the parties, I am to provide an expert report on  
 2 March 22, 2012, which I do herein. My analysis of information provided to date is ongoing and,  
 3 if allowed by the Court, I may update and supplement my findings and my report to incorporate  
 4 additional information that I may receive.

5 14. For my work in this matter, I am being compensated at my normal hourly rate of  
 6 \$625 per hour. Staff at Cornerstone Research have assisted me in preparation of this report.  
 7 Their billing rates range from \$230 to \$510.

8 15. In the future, I may receive compensation from Cornerstone Research that reflects  
 9 the work that has been done by Cornerstone Research on this matter. The amount of that  
 10 compensation cannot be quantified at this time. None of my compensation is contingent upon the  
 11 conclusions I reach or on the outcome of this matter.

### 12 **III. APPLE'S ASSERTED TRADE DRESS**

13 16. I understand that the trade dress at issue involves the distinctive shape and  
 14 appearance of certain Apple products. In particular, the original iPhone trade dress (the "Original  
 15 iPhone Trade Dress") includes:

- 16 • a rectangular product with four evenly rounded corners;
- 17 • a flat clear surface covering the front of the product;
- 18 • the appearance of a metallic bezel around the flat clear surface;
- 19 • a display screen under the clear surface;
- 20 • under the clear surface, substantial black borders above and below the display
- 21 screen and narrower black borders on either side of the screen;
- 22 • when the device is on, a matrix of colorful square icons with evenly rounded
- 23 corners within the display screen; and
- 24 • when the device is on, a bottom dock of colorful square icons with evenly
- 25 rounded corners set off from the other icons on the display, which does not
- 26 change as other pages of the user interface are viewed.<sup>2</sup>

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 28 <sup>2</sup> Apple Inc., v. Samsung Electronics Co., Amended Complaint, U.S. District Court,  
 Northern District of California, Case No: 11-cv-01846-LHK ("Amended Complaint") ¶ 57.

17. The iPhone 3G trade dress includes all of the elements of the Original iPhone Trade Dress, plus “when the device is on, a row of small dots on the display screen” (the “iPhone 3G Trade Dress”).<sup>3</sup> The iPhone 4 trade dress includes all of the elements of the Original iPhone Trade Dress and the iPhone 3G Trade Dress except that it does not have a metallic bezel, but does have a thin metallic band around the outside edge of the iPhone 4, which creates a thin rim adjacent to the face of the phone (the “iPhone 4 Trade Dress”).<sup>4</sup> The iPhone 4’s profile is also flatter than the previous versions of the iPhone.

18. The iPhone trade dress (the “iPhone Trade Dress”) includes the elements that are common to all versions of the iPhone, namely:

- a rectangular product with four evenly rounded corners;
- a flat clear surface covering the front of the product;
- a display screen under the clear surface;
- under the clear surface, substantial neutral (black and white) borders above and below the display screen and narrower neutral borders on either side of the screen;
- when the device is on, a matrix of colorful square icons with evenly rounded corners within the display screen; and
- when the device is on, a bottom dock of colorful square icons with evenly rounded corners set off from the other icons on the display, which does not change as other pages of the user interface are viewed.<sup>5</sup>

19. Another Apple product at issue in this case, the iPod touch, builds upon the original iPhone’s appearance and configuration and includes all of the elements of the iPhone Trade Dress.<sup>6</sup>

<sup>3</sup> Amended Complaint ¶¶ 35, 59-60. The iPhone 3G Trade Dress also applies to the iPhone 3GS. See Amended Complaint ¶ 35.

<sup>4</sup> Amended Complaint ¶¶ 37, 61-62.

<sup>5</sup> Amended Complaint ¶¶ 63-64.

<sup>6</sup> Amended Complaint ¶ 41.

20. Apple also owns federal trade dress registrations for its iPhone products. The trade dress registered in U.S. Registration No. 3,470,983 consists of the image shown in the registration, where it is described as follows:

The color(s) black, blue, brown, brown-gray, gray-green, green, orange, red, silver, tan, white and yellow is/are claimed as a feature of the mark. The mark consists of the configuration of a rectangular handheld mobile digital electronic device with rounded silver edges, a black face, and an array of 16 square icons with rounded edges. The top 12 icons appear on a black background, and the bottom 4 appear on a silver background. The first icon depicts the letters "SMS" in green inside a white speech bubble on a green background; the second icon is white with a thin red stripe at the top; the third icon depicts a sunflower with yellow petals, a brown center, and a green stem in front of a blue sky; the fourth icon depicts a camera lens with a black barrel and blue glass on a silver background; the fifth icon depicts a tan television console with brown knobs and a gray-green screen; the sixth icon depicts a white graph line on a blue background; the seventh icon depicts a map with yellow and orange roads, a pin with a red head, and a red-and-blue road sign with the numeral "280" in white; the eighth icon depicts an orange sun on a blue background, with the temperature in white; the ninth icon depicts a white clock with black and red hands and numerals on a black background; the tenth icon depicts three brown-gray circles and one orange circle on a black background with a white border, with the mathematical symbols for addition, subtraction, multiplication, and the equal sign displayed in white on the circles; the eleventh icon depicts a portion of a yellow notepad with blue and red ruling, with brown binding at the top; the twelfth icon depicts three silver gears over a thatched black-and-silver background; the thirteenth icon depicts a white telephone receiver against a green background; the fourteenth icon depicts a white envelope over a blue sky with white clouds; the fifteenth icon depicts a white compass with a white- and-red needle over a blue map; the sixteenth icon depicts the distinctive configuration of applicant's media player device in white over an orange background.<sup>7</sup>

21. The trade dress registered in U.S. Registration No. 3,457,218 consists of the image shown in the registration, which is described as follows:

The mark consists of the configuration of a rectangular handheld mobile digital electronic device with rounded corners. The matter shown in broken lines is not part of the mark.<sup>8</sup>

22. The trade dress registered in U.S. Registration No. 3,475,327 consists of the image shown in the registration, which is described as follows:

<sup>7</sup> Amended Complaint ¶¶ 49, 125, Exhibit 16; APLNDC-Y0000182302-182304.

<sup>8</sup> Amended Complaint ¶¶ 50, 126, Exhibit 17; APLNDC-Y0000182305-182306.



The color(s) gray, silver and black is/are claimed as a feature of the mark. The mark consists of the configuration of a handheld mobile digital electronic device. The material shown in dotted lines, namely, the buttons and openings on the device show the position of the mark in relation to the device and are not considered a part of the mark. The color gray appears as a rectangle at the front, center of the device. The color black appears on the front of the device above and below the gray rectangle and on the curved corners of the device. The color silver appears as the outer border and sides of the device. The color white is shown solely to identify placement of the mark and is not claimed as a part of the mark.<sup>9</sup>

23. In addition to the trade dress associated with the various generations of the iPhone and iPod touch, the trade dress associated with Apple's tablet computers, namely the iPad and the iPad 2, are also at issue. The iPad trade dress (the "iPad Trade Dress") includes:

- a rectangular product with four evenly rounded corners;
- a flat clear surface covering the front of the product;
- the appearance of a metallic rim around the flat clear surface;
- a display screen under the clear surface;
- under the clear surface, substantial neutral (black or white) borders on all sides of the display screen; and
- when the device is on, a matrix of colorful square icons with evenly rounded corners within the display screen.<sup>10</sup>

24. The iPad 2 trade dress (the "iPad 2 Trade Dress") at issue includes all of the elements of the iPad Trade Dress.<sup>11</sup> The overall appearance of the iPad and iPad 2 provides an extremely thin side profile, making the products appear to be relatively flat when placed on the table.

<sup>9</sup> Amended Complaint ¶¶ 51, 127, Exhibit 18; APLNDC-Y0000182307-182308.

<sup>10</sup> Amended Complaint ¶¶ 65-66.

<sup>11</sup> Amended Complaint ¶¶ 65-68.

#### IV. BRANDS ARE AMONG A FIRM'S MOST VALUABLE ASSETS

##### A. What is a Brand?

25. In its essence, a brand is “a person’s gut feeling about a product, service, or company.”<sup>12</sup> Brands have three primary functions vis-à-vis the consumer.<sup>13</sup> Brands provide:

Navigation: Brands help consumers choose from a plethora of choices and can simplify the purchase decision.<sup>14</sup>

Reassurance: Brands communicate the intrinsic attributes of the product or service and reassure consumers that they have made the right choice. Therefore, brands serve an important function by shaping consumers’ expectations of a certain level of quality based on their experiences and knowledge about the brand.<sup>15</sup>

Navigation and reassurance are not unrelated, of course. Expectations about quality, benefits, and value associated with brands help consumers in their purchase decisions, particularly when there is ambiguity or uncertainty in the purchase.<sup>16</sup>

Engagement: Brands use distinctive imagery, language, and associations to encourage consumers to identify with the brand. Therefore, brands engage consumers on the level of senses and emotions. Brands provide prestige and satisfy consumers’ emotional needs.<sup>17</sup> Brands can also be aspirational and help consumers project their self-image.<sup>18</sup>

<sup>12</sup> Marty Neumeier, *The Brand Gap: How to Bridge the Distance Between Business Strategy and Design 2* (Revised ed., Berkeley, CA: Peachpit Press, 2006).

<sup>13</sup> D. Haigh & J. Knowles (2004), “Brand Valuation: What It Means and Why It Matters,” *Intellectual Asset Management*, Supplement No. 1, 18-21. David Haigh is CEO of Brand Finance Plc, one of the world’s leading brand valuation consultancies. See <http://www.brandfinance.com/> and [http://www.brandfinance.com/about/board\\_members/david-haigh](http://www.brandfinance.com/about/board_members/david-haigh); Alina Wheeler, *Designing Brand Identity 2* (3d Ed., Hoboken, NJ: John Wiley & Sons, Inc., 2009).

<sup>14</sup> Russell S. Winer & Ravi Dhar (2011), *Marketing Management* 179 (4th ed., Upper Saddle River, NJ: Pearson Education 2011) (“Winer & Dhar (2011)”).

<sup>15</sup> Winer & Dhar (2011) 179; Tülin Erdem & Joffre Swait, *Brand Equity as a Signaling Phenomenon*, 7 *JOURNAL OF CONSUMER PSYCHOLOGY* 131-157 (1998).

<sup>16</sup> Winer & Dhar (2011) 179; A. V. Muthukrishnan, *Decision Ambiguity and Incumbent Brand Advantage*, 22 *JOURNAL OF CONSUMER RESEARCH*, 98-109 (1995).

<sup>17</sup> Winer & Dhar (2011) 179; A. V. Muthukrishnan, *Decision Ambiguity and Incumbent Brand Advantage*, 22 *JOURNAL OF CONSUMER RESEARCH* 98-109 (1995).

<sup>18</sup> Kevin Lane Keller, *Strategic Brand Management* 8 (3d ed., Upper Saddle River, NJ: Pearson Education, 2008) (“Keller (2008)”).

26. Therefore, a brand is much more than a product. A strong brand differentiates itself from other brands and stands out in the marketplace. This differentiation may stem from tangible aspects of the underlying product (*e.g.*, differences related to product performance) or intangible, emotional, and symbolic aspects of the brand (*e.g.*, differences related to what the brand represents).<sup>19</sup> Companies that have successful brands create strong *brand identity*.

#### **B. Brand Identity**

27. Brand identity is the embodiment of how the company wants its brand to be perceived by the consumer. Companies invest in brand identity because a compelling brand identity makes it easier for consumers to buy the company's products. Brand identity also makes it easier for a company to sell its products and build brand equity through increased recognition, awareness, and customer loyalty.

28. Brand identity can be composed of numerous brand elements. For example, a tagline such as "Think Different" (Apple) is a brand element that is distinctive and memorable to consumers. Distinctive look and feel components are examples of brand elements.

29. A compelling brand identity is one that clarifies and focuses the company's value proposition by building a high level of brand awareness and recognition. An important trigger of brand awareness and recognition is visual identity—identity that is easy to remember and immediately recognizable. The Nike "swoosh" and the Apple logo are examples. Therefore, brand identity strategists manage brand perception by integrating meaning with distinctive visual form. Marketing literature has studied how individuals recognize and interpret sensory stimuli from the clutter of brands to which they are exposed.<sup>20</sup>

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<sup>19</sup> Keller (2008) 5.

<sup>20</sup> P. H. Bloch, *Seeking the Ideal Form: Product Design and Consumer Response*, 59 JOURNAL OF MARKETING 16-29 (1995); M. E. H. Creusen & J. P. L. Schoormans, *The Different Roles of Product Appearance in Consumer Choice*, 22 JOURNAL OF PRODUCT INNOVATION MANAGEMENT 63-81 (2005); J. Josko Brakus, Bernd Schmitt & Lia Zarantonello, *Brand Experience: What Is It? How Is It Measured? Does It Affect Loyalty?*, 73 JOURNAL OF MARKETING 52-68 (2009); Philip Kotler & G. Alexander Rath, *Design – A Powerful but Neglected Strategic Tool*, 5 JOURNAL OF BUSINESS STRATEGY 16-21 (1984); Robert W. Veryzer, Jr., *Aesthetic Response and the Influence of Design Principles on Product Preferences*, 20 ADVANCES IN CONSUMER RESEARCH 224-228 (1993); Robert W. Veryzer, Jr., *A Nonconscious Processing Explanation of Consumer Response to Product Design*, 16

30. Visual identity is, of course, related not only to logos like the Apple logo but also to the product itself and its packaging. Appearance or aesthetics of the product—the physical product form (*e.g.*, shape, symmetry, texture, etc.)—influence consumers’ purchase decisions as well as their evaluation of a particular brand.<sup>21</sup> For example, when given a choice between two products that were equal in price and function, target consumers purchase the one that they deem to be more attractive.<sup>22</sup> Aesthetically pleasing products “provide sensory pleasure and stimulation.”<sup>23</sup> Finally, product appearance communicates symbolic value (*e.g.*, cool, trendy, cheerful, friendly, valuable, and so on).<sup>24</sup>

31. Therefore, companies spend a lot of time and resources in developing brand identity that has a distinctive “look and feel.” Look and feel is what makes elements of brands proprietary and immediately recognizable. The strongest brands have a look and feel that resonates in the mind of the consumer and sets the brand apart from the clutter of the visual environment. Pentagram, one of the world’s leading design consultancies,<sup>25</sup> defines look and feel in the following way: “Look is defined by color, scale, proportion, typography, and motion. Feel is experiential and emotional.”<sup>26</sup> Therefore, look and feel is a very important aspect of *brand*

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PSYCHOLOGY & MARKETING 497-522 (1999); Robert W. Veryzer, Jr. & J. W. Hutchinson, *The Influence of Unity and Prototypicality on Aesthetic Responses to New Product Designs*, 24 JOURNAL OF CONSUMER RESEARCH 374-394 (1998); Mel Yamamoto & David R. Lambert (1994), *The Impact of Product Aesthetics on the Evaluation of Industrial Products*, 11 JOURNAL OF PRODUCT INNOVATION MANAGEMENT 309-324 (1994).

<sup>21</sup> P. H. Bloch, *Seeking the Ideal Form: Product Design and Consumer Response*, 59 JOURNAL OF MARKETING 16-29 (1995). Yamamoto and Lambert show that even for industrial products, appearance has an influence on product preference. See Mel Yamamoto & David R. Lambert, *The Impact of Product Aesthetics on the Evaluation of Industrial Products*, 11 JOURNAL OF PRODUCT INNOVATION MANAGEMENT 309-324 (1994).

<sup>22</sup> M. E. H. Creusen & J. P. L. Schoormans, *The Different Roles of Product Appearance in Consumer Choice*, 22 JOURNAL OF PRODUCT INNOVATION MANAGEMENT 63-81 (2005).

<sup>23</sup> P. H. Bloch, *Seeking the Ideal Form: Product Design and Consumer Response*, 59 JOURNAL OF MARKETING 16-29 (1995); M. E. H. Creusen & J. P. L. Schoormans, *The Different Roles of Product Appearance in Consumer Choice*, 22 JOURNAL OF PRODUCT INNOVATION MANAGEMENT 63-81 (2005).

<sup>24</sup> M. E. H. Creusen & J. P. L. Schoormans, *The Different Roles of Product Appearance in Consumer Choice*, 22 JOURNAL OF PRODUCT INNOVATION MANAGEMENT 63-81 (2005).

<sup>25</sup> <http://www.pentagram.com/work/#/all/all/newest/>.

<sup>26</sup> Alina Wheeler, *Designing Brand Identity* 66 (3d ed. Hoboken, NJ: John Wiley & Sons, Inc. 2009).

1 *image* or how consumers perceive the brand and its connotations. Companies spend enormous  
 2 sums of money developing a brand image that they hope will have strong, positive, and unique  
 3 brand associations in the minds of consumers.<sup>27</sup>

#### 4 **C. Brand Image**

5 32. As noted above, brand image is the perception of the brand and all its connotations  
 6 in consumers' minds. Brand image is formed by associations that consumers have with the  
 7 brand; associations are the means by which consumers feel brands satisfy their needs and are  
 8 often the key sources of brand value.<sup>28</sup> Inherent in brand associations are the perceived meaning  
 9 of the brand in the minds of consumers. The stronger and more unique the brand identity, the  
 10 stronger are the brand associations and the brand image.<sup>29</sup> Brand associations form the building  
 11 blocks of consumers' attitudes or overall evaluations of a brand as well as a brand's image.

12 33. Consumers' attitudes towards the brand, in turn, lead to brand loyalty and brand  
 13 activity. Brand activity involves the extent to which the customers use the brand, talk to others  
 14 about it (*i.e.*, generate "word of mouth"), and seek out brand information.<sup>30</sup> Brand value is  
 15 created when consumers "have a high level of awareness; strong, favorable, and unique brand  
 16 associations; positive brand attitudes; intense brand attachment and loyalty; and high degree of  
 17 brand activity."<sup>31</sup>

18 34. Therefore, brand value—or brand equity as it is known in the marketing  
 19 discipline—is intrinsically tied to brand identity and brand association.<sup>32</sup> The power and value of  
 20 a brand "lies in what customers have learned, felt, seen, and heard about the brand as a result of  
 21 their experiences over time."<sup>33</sup>

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22 <sup>27</sup> Kevin Lane Keller, (1993), *Conceptualizing, Measuring, and Managing Customer-*  
 23 *Based Brand Equity*, 57 JOURNAL OF MARKETING 1-22 (1993) ("Keller (1993)").

24 <sup>28</sup> Kevin Lane Keller & Donald R. Lehmann, *How Do Brands Create Value*, 12  
 25 MARKETING MANAGEMENT 26-31 (2003) ("Keller & Lehmann (2003)").

26 <sup>29</sup> Keller (1993).

27 <sup>30</sup> Keller & Lehmann (2003).

28 <sup>31</sup> Keller & Lehmann (2003).

<sup>32</sup> Marketers use the term brand equity to refer to the value of a brand  
 ([http://www.marketingpower.com/\\_layouts/Dictionary.aspx?dLetter=B](http://www.marketingpower.com/_layouts/Dictionary.aspx?dLetter=B)).

<sup>33</sup> Keller (2008) 48.

35. Unauthorized use of brand identity by a competitor reduces brand equity because it dilutes the distinctiveness of the brand identity (from a company's perspective) and blurs the uniqueness of association (from a consumers' perspective). Imitation of look and feel, for example, attenuates brand association and reduces brand equity.

**D. Benefits of Strong Brands and Brand Equity**

36. The value of a brand is measured by its brand equity. Brand equity depends on how well a company develops its brand identity and concomitantly how strong the brand associations are in consumers' minds. Therefore, brand loyalty, brand awareness, brand associations, and a company's proprietary assets determine brand equity.<sup>34</sup> Of course, the brand's proprietary assets inform each of the other three factors. A valuable brand (a brand whose brand equity is high) confers enormous benefits to the owner of the brand. These benefits include higher brand awareness in the market, increased marketing communication effectiveness, and positive word-of-mouth created by loyal customers.<sup>35</sup> Strong brands also engender prestige and emotional attachment.<sup>36</sup> Therefore, strong brands have a significant effect on the bottom-line of a firm.

37. The profits generated by strong brands provide the firm with resources to make investments in new products and increases their probability of success in the market.<sup>37</sup> In particular, the firm can leverage a strong brand across products (*i.e.*, product line and product category extensions) and markets (*i.e.*, new channels and geographic markets).<sup>38</sup>

<sup>34</sup> David A. Aaker, *Managing Brand Equity* 15-21 (New York, NY: The Free Press, 1991) ("Aaker (1991)").

<sup>35</sup> Winer & Dhar (2011) 179-180; Keller & Lehmann (2003); Steve Hoeffler & Kevin Lane Keller, *The Marketing Advantages of Strong Brands*, 10 BRAND MANAGEMENT 421-445 (2003).

<sup>36</sup> *See, e.g.*, Aaker (1991) 109-113; Keller (1993); Keller & Lehmann (2003).

<sup>37</sup> Aaker (1991) 208-209.

<sup>38</sup> Kevin Lane Keller & David R. Lehmann, *Brands and Branding: Research Findings and Future Priorities*, 25 MARKETING SCIENCE 740-759 (2006).



**V. APPLE'S BRAND IS COMPELLING AND VERY STRONG**

**A. Apple's Compelling Brand Identity**

38. The Apple brand is one of the strongest in the world. This is because Apple has a compelling brand identity. A significant contributor to Apple's compelling brand identity is the look and feel of Apple's products:

Apple manages to celebrate creativity and self-expression while, [sic] anticipating consumers' needs and wants and meeting those needs with solutions that are noteworthy for their ease of use and elegance of design.<sup>39</sup>

39. Apple imbues its products with a look and feel that is an integral element of Apple's brand identity and sets it apart from the rest of its competitors. Numerous articles, technology websites, and marketing and branding consultancies have extolled Apple's look and feel.<sup>40</sup> For example:

Apple's look is always simple and clean and the packaging for the iPad is true to the brand. The art on the cover of the box is a life-size photo of the product inside. No words, no sell copy. Since this is exactly what the customer can't wait to get their hands on, it's the perfect marketing message, building anticipation and making the product the star. The only other art on the package is the Apple logo and the product name on the sides of the box. The product specs (16GB, 3G, etc.) and copyright are hidden on the back at the bottom. Nothing gets in the way of the brand.<sup>41</sup>

<sup>39</sup> "BrandZ Top 100: Most Valuable Global Brands 2010," *Millward Brown Optimor*, at 127.

<sup>40</sup> See, e.g., "Apple iPhone CNET Editors' Rating," *CNET*, June 30, 2007 ([http://reviews.cnet.com/smartphones/apple-iphone-16gb-at/4505-6452\\_7-32851722.html?tag=mncol;lst;1](http://reviews.cnet.com/smartphones/apple-iphone-16gb-at/4505-6452_7-32851722.html?tag=mncol;lst;1)); "Apple's iPhone 4 Lives Up to All Expectations," *PC World*, September 9, 2010; "Apple iPod Touch Flash-Based MP3 Player," *PC World*, March 21, 2008 ([http://www.pcworld.com/article/143681/apple\\_ipod\\_touch\\_flashbased\\_mp3\\_player.html](http://www.pcworld.com/article/143681/apple_ipod_touch_flashbased_mp3_player.html)); "Miller: Apple's iPad Pleases, But Is It Essential?" *PC Magazine*, April 5, 2010; "iPad 2 Review," *Engadget*, March 9, 2011 ([www.engadget.com/2011/03/09/ipad-2-review/](http://www.engadget.com/2011/03/09/ipad-2-review/)); "Best Global Brands 2010," *Interbrand*, at 9; "BrandZ Top 100: Most Valuable Global Brands 2010," *Millward Brown Optimor*, at 127.

<sup>41</sup> "Branding in the Package: Lessons from Apple's Master Marketers," *Gianfagna Strategic Marketing*, May 21, 2010 (<http://www.gianfagnamarketing.com/blog/2010/05/21/branding-in-the-package-lessons-from-apples-master-marketers/>).

1           40.     When the iPhone was introduced to the market, it was described as “unique,”  
2     “cool,” and “sexy” by various industry insiders.<sup>42</sup> For example, *PC Magazine* commented on its  
3     first impressions of the iPhone as follows:

4                     The first thing you notice when holding the iPhone is how slim it  
5                     is and how cool it feels in comparison to other smartphones, which  
6                     are boxy and often thick. . . . [T]he iPhone will become the gold  
                      standard in smartphones, and likely give Apple at least a two-year  
                      edge over the competition.”<sup>43</sup>

7           41.     Another article in *PC Magazine* explained that the two reasons the iPhone was  
8     “hot” were the successful publicity conducted by Apple, and, more importantly, the uniqueness of  
9     the iPhone itself:

10                    Clearly, the iPhone is hot, but why? Two reasons, said Jen  
11                    O’Connell, author of “The Cell Phone Decoder Ring,” a book that  
12                    helps readers pick a cell phone. First, O’Connell recognizes the  
13                    power of the publicity machine at Apple, famous these days for its  
14                    Mac notebook computers and iPod music players. “They give just  
15                    enough information for people to freak out over it,” said  
16                    O’Connell, who credits the company as having enough reach to  
                      touch her grandmother in Montana. . . . But O’Connell also  
                      believes the hype around the iPhone is because of its uniqueness.  
                      “This is nothing like anyone else has manufactured before,” she  
                      said. “It looks cool and the way you interact with it is cool. I’m  
                      drooling at the mouth to get one.”<sup>44</sup>

17           42.     *PC Magazine* also said that “[t]he iPhone 3G represents the birth of a new  
18     computing platform. It’s also one very cool phone.”<sup>45</sup>

19           43.     *CNET News.com* commented that “the iPad is, more than any other product the  
20     company has made, the quintessential Apple device.”<sup>46</sup>

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21                    <sup>42</sup> “iPhone Hype Has Gadget Geeks Camping and Drooling,” *PC Magazine*, June 11,  
22                    2007; “Editor’s Letter: Bloggers, Welcome Aboard,” *InfoWorld Daily News*, June 25, 2007;  
23                    “I Tried an iPhone; A Chance Meeting Turns into a Rare Opportunity to Touch and Try This  
                      One-of-a-Kind Apple Creation,” *PC Magazine*, June 28, 2007.

24                    <sup>43</sup> “First Impressions of the Apple iPhone; Steve Jobs Made Some Heady Claims About  
25                    the iPhone Back in January. Does the Actual Device Live Up to What He Told Us to  
                      Expect?” *PC Magazine*, July 2, 2007.

26                    <sup>44</sup> “iPhone Hype Has Gadget Geeks Camping and Drooling,” *PC Magazine*, June 11,  
27                    2007.

28                    <sup>45</sup> “Apple iPhone 3G,” *PC Magazine*, July 11, 2008.

<sup>46</sup> “iPad Unites Apple’s Media and Mobile Ambitions,” *CNET News.com*, January 28,  
                      2010.



1           44.     Industry observers have also commented on the link between Apple and the look  
2 and feel of its various products. For instance, as the author of an article published in *eWEEK*,  
3 described: “My first impression of the iPad when I took it out of the (beautifully packaged) box  
4 and plugged it into my MacBook Pro was that it looked and felt like a really big iPod touch.”<sup>47</sup>

5           45.     Therefore, there is widespread recognition of the fact that the unique look and feel  
6 of the iPhone, the iPad, and the iPod touch makes these products distinctive. This distinctiveness  
7 goes to the heart of Apple’s brand identity.

8           46.     At the core of brand association is the Apple product itself: how it works and how  
9 it looks. According to *Interbrand*, a leading branding consultancy:

10                   Apple is a brand that customers immediately understand. They  
11                   know what they get out of adopting and associating with it. Its  
12                   products are seen as innovative and creative. In contrast to Dell,  
13                   which creates products that lack any consistent visual cues,  
14                   Apple’s design is consistent and distinctive – from the clean, silver  
15                   [sic] or smooth white of its laptops to the pocket-size rectangle of  
16                   its iPod or iPhone.<sup>48</sup>

17           Central to the associations consumers form vis-à-vis Apple is its “painstaking attention to detail”  
18 in developing the look and feel of Apple products.<sup>49</sup>

#### 19           **B.     Apple’s Advertising Strategy**

20           47.     Apple carefully promotes a single vision for the brand through its advertising and  
21 follows a specific strategy. For instance, the primary focus in all Apple advertising is the product  
22 itself. Sissie Twiggs (“Ms. Twiggs”), Apple’s Director of Worldwide Advertising, describes this  
23 as “[t]he product is hero, front and center.”<sup>50</sup> While the advertising can highlight specific features  
24 of the product, nothing upstages the product itself. According to Greg Joswiak (“Mr. Joswiak”),  
25 Apple’s Vice President, iPhone, iPod and iOS Product Marketing, when Apple promotes its

26                   <sup>47</sup> “INSIDE MOBILE Becoming Part of the Apple iPad Generation,” *eWEEK*, April 7,  
27 2010.

28                   <sup>48</sup> “Best Global Brands 2010,” *Interbrand*, at 9.

<sup>49</sup> “Design Thinking and Innovation at Apple,” Harvard Business School Case Study  
No: 9-609-066, revised March 4, 2010, APLNDC-Y0000134928-134940 at APLNDC-  
Y0000134931.

<sup>50</sup> Deposition of Sissie Twiggs on July 27, 2011 (“Twiggs Dep.”) 19:8-11, 97:1-25; *see*  
*also* Deposition of Tamara Whiteside on February 28, 2012 (“Whiteside Dep.”) 33:24-35:4;  
Deposition of Stanley Ng on February 21, 2012 (“Ng Dep.”), 64:3-18, 65:11-16.

1 products, the emphasis is on what the product looks like, its beauty, and its materials.<sup>51</sup> Apple's  
 2 iPhone, iPad, and iPod touch marketing communications specifically identify the "product is  
 3 hero" approach as part of their guiding principles.<sup>52</sup>

4 48. Apple is also selective about the choice of medium in which it advertises its  
 5 products. For example, the iPhone media guidelines specifically advise: that "across all media,  
 6 ensure quality of placement over cost or quantity."<sup>53</sup> Apple's new products are shown publicly  
 7 for the first time at its own product launch presentations. All of this is typically supported by  
 8 various television and print advertising campaigns,<sup>54</sup> outdoor advertising,<sup>55</sup> and online  
 9 advertising.<sup>56</sup> Following the "product is hero" approach, these advertisements prominently  
 10 feature the product and emphasize the appearance of the product. In addition, Apple pursues  
 11 product placement opportunities in feature films, talk shows, prime-time network television, and  
 12 parody news shows.<sup>57</sup> Apple's marketing programs are well integrated and carefully crafted and  
 13 implemented to resonate in the strongest possible way with consumers.

15 <sup>51</sup> Deposition of Greg Joswiak on February 23, 2012 ("Joswiak Dep.") 285:20-287:2.  
 16 Philip Schiller, Apple's Senior Vice President of Worldwide Product Marketing, states that  
 17 "[f]or example, when we create our website, one of the first things you'll see when you go  
 18 look at the iPhone is a beautiful photo of it because how it looks is really tantamount. I think  
 19 it's one of the most important things, that it's beautiful and the design is something unique  
 20 and distinctive, and we will show that." See Deposition of Philip Schiller on February 17,  
 21 2012, 121:16-22; Apple Inc. Schedule 14A filed January 9, 2012, at 16.

22 <sup>52</sup> See, e.g., APLNDC0002155318-2155322, at APLNDC0002155320;  
 23 APLNDC0002155335-2155338, at APLNDC0002155336; APLNDC0002008363-2008405,  
 24 at APLNDC0002008368-69, APLNDC0002008380; APLNDC0001327374-1327415, at  
 25 APLNDC0001327376; APLNDC0001335264-1335280, at APLNDC0001335266;  
 26 APLNDC0002203457-2203482, APLNDC0002203459, APLNDC0002203464; APLNDC-  
 27 Y0000236364-236370 at APLNDC-Y0000236368; APLNDC0001964084-1964099, at  
 28 APLNDC0001964087; APLNDC0002027210-2027226, at APLNDC0002027225.

23 <sup>53</sup> APLNDC-Y0000236364-236370 at APLNDC-Y0000236366.

24 <sup>54</sup> APLNDC0002190486-2190487; Joswiak Dep. 278:16-24, 279:10-13; Twiggs Dep.  
 25 25:3-26:13, 35:24-36:7, 38:5-8, 42:9-19.

26 <sup>55</sup> APLNDC0002190486-2190487 at APLNDC0002190487; APLNDC0001322875-  
 27 1323050; Joswiak Dep. 279:10-13; Twiggs Dep. 38:16-39:24, 40:12-23.

28 <sup>56</sup> Twiggs Dep. 44:10-13, 49:18-21.

<sup>57</sup> Deposition of Suzanne Lindbergh on February 28, 2012 ("Lindbergh Dep.") 15:3-  
 17:5. There are several other forms of marketing activity that Apple engages in such as direct  
 marketing sales, public relations, retail marketing, and marketing on Apple.com. See  
 Whiteside Dep. 27:11-18; Twiggs Dep. 50:7-51:1, 203:15, 204:2-7.

49. Apple's product launch presentations, where Apple's new products are unveiled publicly for the first time, are major worldwide media events.<sup>58</sup> These events feature the products prominently and generate a tremendous amount of buzz and excitement. For example, BMW's Chief Executive Officer, Norbert Reithofer, described the palpable public anticipation for the iPad as follows: "[T]he whole world held its breath before the iPad was announced. That's brand management at its very best."<sup>59</sup>

50. The launch presentation is accompanied by a webpage prominently featuring the product on Apple's website and various in-store promotions and demonstrations at Apple retail stores.<sup>60</sup> Apple then engages in a press tour, during which the company shares the product with selected press members and allows these individuals to test and review the products themselves.<sup>61</sup>

51. As noted above, Apple advertises its products on various television programs.<sup>62</sup> The company targets specific television shows as opposed to targeting specific television networks.<sup>63</sup> The iPhone media guidelines specify that, with respect to television programming, the focus should be on quality programming and environment over ratings.<sup>64</sup> For example, ads for the iPhone have aired during television programs such as *Late Show with David Letterman*, *How I Met Your Mother*, *The Tonight Show with Jay Leno*, *Gossip Girl*, *NCIS*, *Modern Family*, *So You Think You Can Dance?*, *Parks & Recreation*, *30 Rock*, *Vampire Diaries*, *Bones*, *Saturday Night Live*, and *The Simpsons*.<sup>65</sup> The iPad marketing guidelines similarly state that "across all

<sup>58</sup> A Harvard Business School case study describes these product launch events as follows: "Products are not rolled out; they are presented to the public by Apple's management team in periodic extravaganzas . . . ." See "Design Thinking and Innovation at Apple," Harvard Business School Case Study No: 9-609-066, revised March 4, 2010, APLNDC-Y0000134928-134940 at APLNDC-Y0000134937. See also Joswiak Dep. 277:23-278:8.

<sup>59</sup> "World's Most Admired Companies 2010," *Fortune Magazine*, available at <http://money.cnn.com/magazines/fortune/mostadmired/2010/snapshots/670.html>.

<sup>60</sup> Joswiak Dep. 279:7-279:22.

<sup>61</sup> Joswiak Dep. 278:9-15.

<sup>62</sup> See *supra* discussion ¶ 48.

<sup>63</sup> Joswiak Dep. 295:14-16; Schiller Dep. 94:15-95:3; Twiggs Dep. 42:9-44:7; Whiteside Dep. 137:1-138:6.

<sup>64</sup> APLNDC-Y0000236364- 236370 at APLNDC-Y0000236366; see also APLNDC0002155335-2155338 at APLNDC0002155336.

<sup>65</sup> See, e.g., APLNDC0001380378; APLNDC0001380392.

media, the focus should be on quality of the environment/placement over cost/quantity (e.g., focus on quality programming over ratings, position in break/title/page/etc.).”<sup>66</sup> Ads for the iPad have aired during programming such as *Late Night with Jimmy Fallon*, *Glee*, *Modern Family*, *Grey’s Anatomy*, *The Daily Show with Jon Stewart*, *Friday Night Lights*, *Two and a Half Men*, *Hawaii Five-0*, *CSI*, and the NBA Playoffs,<sup>67</sup> and ads for the iPod touch have aired during programming such as *Gossip Girl*, *Monday Night Football* on ESPN, *Vampire Diaries*, *Scrubs*, *Smallville*, *Saturday Night Live*, college football games on ABC, and college basketball games on CBS.<sup>68</sup> Furthermore, Apple’s ad campaign titled “There’s an App for That” won an Effie Award in 2010 for effectiveness in marketing consumer electronics.<sup>69</sup>

52. In its print advertising, Apple similarly follows a careful strategy.<sup>70</sup> The iPhone, iPad, and iPod touch marketing guidelines specify that, with respect to print advertising, only high-quality magazines within genres that are contextually relevant to the product and audience should be targeted.<sup>71</sup> For instance, an internal Apple marketing document for the iPhone demonstrates Apple’s desire for the appropriate quality and context for its ads, explaining how a creative titled “Apps in the city” feels out of place in *Newsweek* but fits in *The New Yorker*, despite the quality of each publication’s reputation.<sup>72</sup> For example, iPhone ads have run in publications such as *The New York Times*, *USA Today*, *The Wall Street Journal*, *Newsweek*, *The New Yorker*, *Time*, *The Economist*, *Sports Illustrated*, *The Week*, *Rolling Stone*, and *Food &*

<sup>66</sup> APLNDC0002145596-APLNDC0002145612, at APLNDC0002145600, APLNDC0002145602.

<sup>67</sup> See, e.g., APLNDC0001380370; APLNDC0001380389; APLNDC-X0000021159.

<sup>68</sup> See, e.g., APLNDC-X0000014538-14543; APLND-X0000014544-14549.

<sup>69</sup> *2010 Effie Awards: Awarding Ideas that Work – The Winners*, 2010, ([http://www.effie.org/downloads/2010\\_Winners\\_List\\_with\\_trophy.pdf](http://www.effie.org/downloads/2010_Winners_List_with_trophy.pdf)).

<sup>70</sup> APLNDC0001335342-1335355.

<sup>71</sup> See APLNDC-Y0000236364-236370 at APLNDC-Y0000236367; APLNDC0002145596-APLNDC0002145612, at APLNDC0002145604; APLNDC0001327374-APLNDC0001327415, at APLNDC0001327412; see also APLNDC0002194282-2194294 at APLNDC0002194286; APLNDC0002155335-2155338 at APLNDC0002155337; Twigg Dep. 25:2-26:13, 31:1-24; APLNDC0002190486-2190487 at APLNDC0002190487; APLNDC0001335342-1335355 at APLNDC0001335347.

<sup>72</sup> APLNDC0001335342-1335355 at APLNDC0001335353.

1 Wine,<sup>73</sup> and iPad ads have run in publications such as *The New York Times*, *The Wall Street*  
 2 *Journal*, *Business Week*, *Fortune*, *Rolling Stone*, *Real Simple*, *Wired*, *Time*, *The Week*,  
 3 *Entertainment Weekly*, *The New Yorker*, and *Paper*.<sup>74</sup> In addition, Apple strategically places its  
 4 magazine advertisements only on back covers or inside the front cover (in the form of a spread),  
 5 which is consistent with its goal of putting the focus on the product.<sup>75</sup> Exhibits 4, 5, and 6 are  
 6 examples of print advertisement copies for different generations of the iPhone, the iPad, and the  
 7 iPod touch. As is evident in these exhibits, the trade dress elements at issue are often clearly  
 8 visible in Apple's advertisements for these products.<sup>76</sup>

9 53. Apple also engages in outdoor advertising. This includes transit stops (such as bus  
 10 shelters or subway stops) and billboards.<sup>77</sup> Apple's strategy is to focus on high-traffic, high-  
 11 visibility spots for all of its outdoor advertising.<sup>78</sup> The iPhone and iPad marketing guidelines  
 12 specify to target top markets with a mix of large-format/mega-site and street-level units.<sup>79</sup> The  
 13 guidelines also recommend to "hand-pick locations as much as possible for clear line-of-site [sic]  
 14 and traffic considerations."<sup>80</sup>

16 <sup>73</sup> See, e.g., APLNDC-X0000019536; APLNDC-X0000015992; APLNDC-  
 17 X0000019858; APLNDC-X0000015016.

18 <sup>74</sup> See, e.g., APLNDC-X0000030612; APLNDC-X0000026718-26736; APLNDC-  
 19 X0000030646.

20 <sup>75</sup> Twiggs Dep. 89:22-25; Whiteside Dep. 52:12-15, 86:20-22, 87:2-5; APLNDC-  
 21 Y0000236364- 236370 at APLNDC-Y0000236367; APLNDC0001327374-1327415 at  
 22 APLNDC0001327412; APLNDC0002194282-2194294 at APLNDC0002194286.

23 <sup>76</sup> Ms. Twiggs states in her deposition that, "Apple as a company comes from the design  
 24 of our products. It's the key to what makes our products distinctive, and that's something that  
 25 we live with every day, fortunately. . . . As I mention all the time, showing our product as  
 26 hero, with the design elements in the center of our advertising, is absolutely critical. And  
 27 probably like anyone with their own product, they like to show their product as it appears in  
 28 the best light possible. And we're fortunate with Apple products in that there are so many  
 gorgeous design elements to them, there's a lot to show off." See Twiggs Dep. 164:17-165:4.

<sup>77</sup> See APLNDC0001322875-1323050 for Apple's permanent billboard locations across  
 the country as of 2012; see also Twiggs Dep. 38:16-39:12.

<sup>78</sup> Twiggs Dep. 39:13-40:23.

<sup>79</sup> See APLNDC-Y0000236364- 236370 at APLNDC-Y0000236367;  
 APLNDC0002145596-APLNDC0002145612, at APLNDC0002145605; see also  
 APLNDC0002155335-2155338 at APLNDC0002155337.

<sup>80</sup> See APLNDC-Y0000236364- 236370 at APLNDC-Y0000236367; see also  
 APLNDC0002155335-2155338 at APLNDC0002155337; Twiggs Dep. 39:13-40:23.



54. In addition, Apple runs online advertisements for its iPhone, iPad, and iPod touch products. Specifically, Apple uses two types of online advertising: search engine marketing (“SEM”) and display advertising.<sup>81</sup> The former category involves keyword advertising,<sup>82</sup> and the latter can take the form of advertisements on websites, but Apple does not do “a whole lot of display advertising.”<sup>83</sup> The iPhone and iPad marketing guidelines specify that “[a]ll sites [for online display. . . must be of high quality.”<sup>84</sup>

55. Lastly, Apple engages in product placement. Product placement involves placement of a firm’s products in different forms of media—such as television, movies, and videogames—where the actors or characters are shown using brand-name products and services.<sup>85</sup> Suzanne Lindbergh (“Ms. Lindbergh”), Director of Buzz Marketing at Apple, states that Apple places its products in talk shows, primetime network television, parody news shows, and feature films.<sup>86</sup> Unlike most companies, Apple has a policy of not paying for product placement.<sup>87</sup> In addition, Apple selectively gives away its products for free to key individuals such as Stephen Colbert.<sup>88</sup>

<sup>81</sup> Twiggs Dep. 44:10-13, 49:18-21.

<sup>82</sup> Twiggs Dep. 44:15-20.

<sup>83</sup> Twiggs Dep. 47:1-3; *see, e.g.*, APLNDC-X000007734; APLNDC-X0000007686.

<sup>84</sup> APLNDC0002145596-APLNDC0002145612, at APLNDC0002145606.

<sup>85</sup> Winer & Dhar (2011) 30.

<sup>86</sup> Lindbergh Dep. 9:20-24, 15:3-17:5.

<sup>87</sup> “Many major marketers pay fees of \$50,000 to \$100,000 and even higher so that their products can make cameo appearances in movies and television, with the exact fee depending on the amount and nature of brand exposure.” *See* Keller (2008) 253. In contrast, Apple will loan the product to the movie or TV program, but will not make a payment. *See* Lindbergh Dep. 47:25-48:11; Joswiak Dep. 284:15-285:3; Whiteside Dep. 30:1-9.

<sup>88</sup> Lindbergh Dep. 48:12-51:7; *The Colbert Report: Tribute to Steve Jobs*, Comedy Central, October 6, 2011 (<http://www.colbertnation.com/the-colbert-report-videos/399182/october-06-2011/tribute-to-steve-jobs>). Ms. Lindbergh uses the term “influencers” to characterize these individuals. In marketing terminology, influencers are those individuals who have an influence over potential buyers. Celebrities such as famous athletes, actors, and television personalities are typically included in this category. *See* American Marketing Association Dictionary, available at [http://www.marketingpower.com/\\_layouts/Dictionary.aspx?dLetter=B](http://www.marketingpower.com/_layouts/Dictionary.aspx?dLetter=B); J. Foxton *Live Buzz Marketing*, CONNECTED MARKETING: THE VIRAL, BUZZ AND WORD OF MOUTH REVOLUTION 24-46 (Justin Kirby and Paul Marsden, eds. Oxford, UK: Elsevier, 2006); S. Curran, *Changing the Game*, CONNECTED MARKETING: THE VIRAL, BUZZ AND WORD OF MOUTH REVOLUTION 129-147 (Justin Kirby and Paul Marsden, eds. Oxford, UK: Elsevier, 2006); S.

1           **C.     Apple's Investments in Advertising**

2           56.     Apple invests enormous amounts of time, money, and effort to develop, promote,  
3     and improve its brand identity. In 2003, Apple spent \$193 million on advertising alone.<sup>89</sup> By the  
4     time Apple introduced the iPhone in 2007, its advertising expenditures increased to \$467  
5     million.<sup>90</sup> Apple's advertising expenses were almost a billion dollars in 2011 (\$933 million),<sup>91</sup>  
6     and Apple is one of the 100 largest advertisers in the U.S.<sup>92</sup> Much of this advertising involves the  
7     products at issue. In its 2008 fiscal year, Apple spent almost \$98 million in the U.S. on iPhone  
8     advertisements.<sup>93</sup> Apple's advertising in the mobile phone market leads all other phone  
9     manufacturers.<sup>94</sup> Apple's U.S. advertising expenses for the iPhone increased to approximately  
10    \$227 million in fiscal year 2011.<sup>95</sup> Since the iPhone's introduction and through the first quarter  
11    of its fiscal year 2012, Apple spent a total of \$747 million in the U.S. on iPhone advertisements.<sup>96</sup>  
12    Similarly, Apple's U.S. advertising expenses for the iPad were approximately \$150 million and  
13    \$308 million in fiscal years 2010 and 2011, respectively.<sup>97</sup> Since the iPad's introduction and  
14    through the first quarter of its fiscal year 2012, Apple spent a total of \$536 million in the U.S. on

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15           Brown, *Buzz Marketing: the Next Chapter*, CONNECTED MARKETING: THE VIRAL, BUZZ AND  
16           WORD OF MOUTH REVOLUTION 208-231 (Justin Kirby and Paul Marsden, eds., Oxford, UK:  
17           Elsevier, 2006). The general idea is that when the influencers use these products in their  
18           personal lives, their followers might notice the products. This can generate buzz, or strong  
19           word-of-mouth, among potential users and lead to increased brand awareness and potentially  
20           sales. See Winer & Dhar (2011) 30; S. Brown, *Buzz Marketing: the Next Chapter*,  
21           CONNECTED MARKETING: THE VIRAL, BUZZ AND WORD OF MOUTH REVOLUTION 208-231  
22           (Justin Kirby & Paul Marsden, eds. Oxford, UK: Elsevier, 2006).

23           <sup>89</sup> Apple Computer, Inc. Form 10-K filed December 19, 2003, at 66.

24           <sup>90</sup> Apple Inc. Form 10-K filed November 15, 2007, at 64, APLNDC-Y0000135409-  
25           135576 at APLNDC-Y0000135476.

26           <sup>91</sup> Apple Inc. Form 10-K filed October 26, 2011, at 50, APLNDC-Y0000135683-  
27           135789 at APLNDC-Y0000135734.

28           <sup>92</sup> "How Steve Jobs' Apple Married Mass Marketing with Unabashed Creativity,"  
          *Advertising Age*, August 29, 2011 (<http://adage.com/article/news/steve-jobs-married-mass-marketing-unabashed-creativity/229487/>), APLNDC-Y0000134910-134911 at APLNDC-  
          Y0000134910.

<sup>93</sup> APLNDC-Y0000051623.

<sup>94</sup> See, e.g., OMD0000039 (phones); OMD0000076 (phones); OMD0000004 (tablets);  
          OMD0000011 (tablets).

<sup>95</sup> APLNDC-Y0000051623.

<sup>96</sup> APLNDC-Y0000051623.

<sup>97</sup> APLNDC-Y0000051623.

iPad advertisements.<sup>98</sup> Apple's heavy investments to develop, promote, and improve its brand identity have a concomitant effect on Apple's brand image and brand awareness in consumers' minds.

#### **D. Third-Party Promotion of Apple's Products**

57. Consumers form associations with the Apple brand not only through Apple's own advertising but also through independent channels. For instance, following their introductions, Apple's iPhone and iPad products received widespread media coverage in the form of product reviews in major newspapers and technology publications and websites. The products were also featured on the covers of popular magazines and in popular media.

58. The iPhone was first announced publicly on January 9, 2007.<sup>99</sup> But as early as August 2002, *The New York Times* had reported on rumors of an Apple mobile phone.<sup>100</sup> These rumors continued up until the launch of the iPhone<sup>101</sup> and Apple's actual announcement received widespread media coverage. Major newspapers ran stories about the iPhone, many of which featured images of the device.<sup>102</sup> Television news programs such as *The Today Show* similarly featured stories about the iPhone, prominently displaying images of the device.<sup>103</sup>

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<sup>98</sup> APLNDC-Y0000051623.

<sup>99</sup> "Apple Reinvents the Phone with iPhone," *Apple Inc. Press Release*, January 9, 2007 (<http://www.apple.com/pr/library/2007/01/09Apple-Reinvents-the-Phone-with-iPhone.html>).

<sup>100</sup> "Apple's Chief in the Risky Land of the Handhelds," *N.Y. Times*, August 19, 2002 (<http://www.nytimes.com/2002/08/19/business/apple-s-chief-in-the-risky-land-of-the-handhelds.html?pagewanted=all&src=pm>).

<sup>101</sup> "Apple's Remarkable Comeback Story," *CNNMoney.com*, March 29, 2006 ([http://money.cnn.com/2006/03/29/technology/apple\\_anniversary/index.htm](http://money.cnn.com/2006/03/29/technology/apple_anniversary/index.htm)); "Cool 2 Use: The Gear Hunter: Intelligent Design: Since That First Call, Cell Phones Have Evolved," *Newsday*, April 4, 2006; "Apple Stock Hits New High on Analyst Optimism Over iPod, Possible iPhone," *Associated Press Newswires*, November 21, 2006; "Expert View: We Want the iPhone!" *PC Magazine*, November 29, 2006 (<http://www.pcmag.com/article2/0,2817,2066661,00.asp>).

<sup>102</sup> "Apple Unveils All-in-One iPhone," *S.F. Chronicle*, January 9, 2007; "Apple, Hoping for Another iPod, Introduces Innovative Cellphone," *N.Y. Times*, January 10, 2007 (<http://query.nytimes.com/gst/fullpage.html?res=9C06E1DC1230F933A25752C0A9619C8B63&pagewanted=all>); "Apple Unveils All-in-One iPhone," *USA Today*, January 10, 2007; "Apple Storms Cellphone Field," *Wall St. Journal*, January 10, 2007; "Apple's iPhone: Is It Worth It?" *Wall St. Journal*, January 10, 2007.

<sup>103</sup> *The Today Show*, NBC, No Date, APLNDC-X0000358382.



59. The iPhone continued to be the subject of press in the five-month period between its announcement and release. Nielsen BuzzMetrics reported that the iPhone was “riding an unprecedented wave of pre-launch conversation,” as there were more than 1.79 million unique visitors to the iPhone website in January 2007 coupled with 870,000 searches for the keyword “iPhone.”<sup>104</sup> Survey results released by M: Metrics on June 15, 2007 found that consumer awareness of the iPhone was high, as 64% of American mobile phone users were aware of the product.<sup>105</sup> In addition, an April 2007 survey by ChangeWave Research showed that 26% of those likely to buy an advanced mobile phone in the next three months were planning to purchase the iPhone.<sup>106</sup> Many news articles discussing the iPhone’s upcoming release included photographs of the phone, often turned on to display the device’s homescreen.<sup>107</sup>

60. Much hype surrounded the launch of the iPhone itself. According to news reports, people lined up outside the Apple store on Fifth Avenue in New York at least two days before the product went on sale.<sup>108</sup> In the days leading up to and immediately following its release, the iPhone was the subject of product reviews in major publications.<sup>109</sup>

<sup>104</sup> “Unprecedented Pre-Launch Buzz Sets High Expectations for iPhone Sales and Satisfaction, Nielsen BuzzMetrics Reports,” *Nielsen BuzzMetrics Press Release*, June 25, 2007 (<http://www.marketwire.com/press-release/unprecedented-pre-launch-buzz-sets-high-expectations-iphone-sales-satisfaction-nielsen-745783.htm>).

<sup>105</sup> “M:Metrics: High Awareness, Strong Demand for iPhone Among British and American Mobile Phone Users,” *M:Metrics Press Release via Marketwire News Releases*, June 15, 2007 (<http://finance.boston.com/boston/news/read/2343970/m>).

<sup>106</sup> “Apple iPhone is Top Choice Among Smart-Phone Buyers (Update 1),” *Bloomberg.com*, June 22, 2007 (<http://www.bloomberg.com/apps/news?pid=newsarchive&sid=aVXpexoVPuIg&refer=canada>).

<sup>107</sup> “Apple Buffs Marketing Savvy to a High Shine,” *USA Today*, March 9, 2007 ([http://www.usatoday.com/tech/techinvestor/industry/2007-03-08-apple-marketing\\_N.htm](http://www.usatoday.com/tech/techinvestor/industry/2007-03-08-apple-marketing_N.htm)); “Cellphone Users Set Their Sights on Apple’s iPhone,” *USA Today*, March 16, 2007 ([http://www.usatoday.com/tech/products/2007-03-14-cellphone-contracts-iphone\\_N.htm](http://www.usatoday.com/tech/products/2007-03-14-cellphone-contracts-iphone_N.htm)); “Apple Earnings Only Expected to Grow,” *USA Today*, April 27, 2007 ([http://www.usatoday.com/tech/techinvestor/corporatenews/2007-04-26-apple-profits\\_N.htm](http://www.usatoday.com/tech/techinvestor/corporatenews/2007-04-26-apple-profits_N.htm)); “The Informed Reader,” *Wall St. Journal*, May 28, 2007; “Fever Builds for iPhone (Anxiety Too),” *N.Y. Times*, June 4, 2007 (<http://www.nytimes.com/2007/06/04/technology/04iphone.html>); “iPhone Set for June 29 Debut,” *USA Today*, June 5, 2007.

<sup>108</sup> See, e.g., “Waiting for the Latest in Wizardry,” *N.Y. Times*, June 27, 2007 (<http://www.nytimes.com/2007/06/27/technology/27apple.html>); “iPhone Notebook: People Starting to Fall in Line,” *S.F. Chronicle*, June 28, 2007 (<http://www.sfgate.com/cgi->

61. This media coverage often highlighted the distinctive look and feel of the iPhone. Just a few days after the product was announced, David Pogue of *The New York Times* published a “preview” of the product, stating: “As you’d expect of Apple, the iPhone is gorgeous. Its face is shiny black, rimmed by mirror-finish stainless steel. The back is textured aluminum . . . .”<sup>110</sup> Similarly, *Time* magazine described the iPhone as “a typical piece of Ive<sup>111</sup> design . . . .”<sup>112</sup> *The New York Times* observed that “[t]he iPhone races straight ahead of the pack on aesthetics by looking and feeling gorgeous,”<sup>113</sup> and stated that “Apple is hoping that the distinctive design of the iPhone will disrupt and even re-invent the concept of the mobile handset in the United States and worldwide.”<sup>114</sup>

62. To top off this enormous amount of publicity for the original iPhone, *Time* magazine named the iPhone the “Invention of the Year” for 2007, displaying color images of the phone on the cover of the magazine as well as with the accompanying story, which identified

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bin/article.cgi?f=/c/a/2007/06/28/BUG80QN2E01.DTL&ao=all); “Even Apple’s Co-Founder Is Standing in Line for an iPhone,” *S.F. Chronicle*, June 29, 2007 (<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/29/BAGJNQOEBO4.DTL>); “Gave Up Sleep and Maybe a First-Born, but at Least I Have an iPhone,” *N.Y. Times*, June 30, 2007 (<http://www.nytimes.com/2007/06/30/technology/30phone.html>); “Wait ‘Worth It,’ But Unnecessary,” *S.F. Chronicle*, June 30, 2007 (<http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2007/06/30/MNGSCQOVMT1.DTL>).

<sup>109</sup> “Testing Out the iPhone,” *Wall St. Journal*, June 27, 2007 (<http://online.wsj.com/article/SB118289311361649057.html>); “The iPhone Matches Most of Its Hype,” *N.Y. Times*, June 27, 2007 ([http://www.nytimes.com/2007/06/27/technology/circuits/27pogue.html?\\_r=1](http://www.nytimes.com/2007/06/27/technology/circuits/27pogue.html?_r=1)); “Apple’s iPhone Isn’t Perfect, but It’s Worthy of the Hype,” *USA Today*, June 27, 2007 ([http://www.usatoday.com/tech/columnist/edwardbaig/2007-06-26-iphone-review\\_N.htm?loc=interstitialskip](http://www.usatoday.com/tech/columnist/edwardbaig/2007-06-26-iphone-review_N.htm?loc=interstitialskip)).

<sup>110</sup> “Apple Waves its Wand at the Phone,” *N.Y. Times*, January 11, 2007 (<http://www.nytimes.com/2007/01/11/technology/11pogue.html?pagewanted=all>).

<sup>111</sup> Jonathan Ive is the Senior Vice President of Apple’s Industrial Design group (<http://www.apple.com/pr/bios/jonathan-ive.html>).

<sup>112</sup> “Apple’s New Calling: The iPhone,” *Time*, January 10, 2007 (<http://www.time.com/time/business/article/0,8599,1575743,00.html>).

<sup>113</sup> “Does the iPhone Have ‘It’? Early Signs Are Good,” *N.Y. Times*, June 24, 2007 (<http://www.nytimes.com/2007/06/22/style/22iht-design25.1.6284070.html>).

<sup>114</sup> “Science/Technology: iPhone Launch,” *N.Y. Times*, June 28, 2007.

1 “The iPhone is pretty” as the number one reason that the device “is still the best thing invented  
2 this year.”<sup>115</sup>

3 63. The release of subsequent generations of the iPhone similarly received extensive  
4 media coverage. Crowds lined up outside the Moscone Center in San Francisco in anticipation of  
5 the rumored unveiling of the iPhone 3G at the Apple Worldwide Developer Conference.<sup>116</sup> Major  
6 news sources aired or printed high-profile reviews of the iPhone 3G,<sup>117</sup> and people again lined up  
7 outside Apple stores a day in advance to purchase the device.<sup>118</sup> Similar media coverage  
8 accompanied the announcement and release of the iPhone 3GS<sup>119</sup> and the iPhone 4.<sup>120</sup> The  
9 announcement that the iPhone 4 would be available on Verizon also received significant press.<sup>121</sup>

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11 <sup>115</sup> “Invention of the Year: the iPhone,” *Time*, November 1, 2007  
12 ([http://www.time.com/time/specials/2007/article/0,28804,1677329\\_1678542\\_1677891,00.htm](http://www.time.com/time/specials/2007/article/0,28804,1677329_1678542_1677891,00.htm)  
13 l). *Time* magazine featured the iPhone on its cover again in its June 15, 2009 issue on Twitter.  
14 See *Time*, June 15, 2009.

15 <sup>116</sup> *KGO SF News at 11AM*, ABC 7, June 9, 2008, APLNDC-X0000358416; “Jobs  
16 Expected to Ring in Apple’s New iPhone,” *S.F. Chronicle*, June 9, 2008.

17 <sup>117</sup> *Squawk on the Street*, CNBC, No Date, APLNDC-X0000358459; *All Things Digital*,  
18 Fox Business, No Date, APLNDC-X0000358463; “Apple’s New iPhone 3G: Still Not  
19 Perfect, but Really Close,” *USA Today*, July 10, 2008; “For iPhone, the ‘New Is Relative,’”  
20 *N.Y. Times*, July 9, 2008; “Newer, Faster, Cheaper iPhone 3G,” *Wall St. Journal*, July 9,  
21 2008.

22 <sup>118</sup> *WBZ News at 6*, CBS, No Date, APLNDC-X0000358467; *News 4 Midday*, NBC 4,  
23 No Date, APLNDC-X0000358475; *First @ Four*, NBC 5, No Date, APLNDC-  
24 X0000358478; NBC 4 New York, No Date, APLNDC-X0000358480; *KMBC-TV 9 News*,  
25 ABC, No Date, APLNDC-X0000358484; *SF 7 Morning News*, ABC, July 11, 2008,  
26 APLNDC-X0000358486; CNN, No Date, APLNDC-X0000358505; *Entertainment Tonight*,  
27 KRON, July 11, 2008, APLNDC-X0000358507.

28 <sup>119</sup> See, e.g., “iPhone Stars in Apple Show, Supported by Software,” *N.Y. Times*, June 8,  
2009; “Apple Unveils Faster iPhone with New Features,” *S.F. Chronicle*, June 9, 2009;  
“iPhone 3G S [sic] Cements Apple’s Place at the Top,” *S.F. Chronicle*, June 20, 2009;  
*Evening News with Katie Couric*, CBS, June 8, 2009, APLNDC-X0000358800; *The Kudlow*  
*Report*, CNBC, June 8, 2009, APLNDC-X0000358801; *HLN News*, CNNH, June 8, 2009,  
APLNDC-X0000358805; *FOX 25 News at 5*, Fox Boston, June 8, 2009, APLNDC-  
X0000358809; *KTVU Channel 2 News at 5*, Fox San Francisco, June 8, 2009, APLNDC-  
X0000358811; *ABC 7 Morning News*, ABC San Francisco, June 9, 2009, APLNDC-  
X0000358815; *The Early Show*, CBS, June 9, 2009, APLNDC-X0000358816; *ABC Tech*  
Bytes, ABC, June 18, 2009, APLNDC-X0000358838; *Worldwide Exchange*, CNBC, June 19,  
2009, APLNDC-X0000358864; *Fox Business*, Fox Business Network, June 19, 2009,  
APLNDC-X0000358868; *Nightly Business News*, PBS, June 19, 2009, APLNDC-  
X0000358869; *CBS4 News at 5PM*, Miami – CBS, June 19, 2009, APLNDC-X0000358876;  
*WGN Morning News*, Chicago – CW, June 19, 2009, APLNDC-X0000358877; *American*  
*Morning*, CNN, June 19, 2009, APLNDC-X0000358880.

64. The different generations of the iPhone have also appeared in various forms of popular media. For instance, late-night comedy shows such as *Saturday Night Live*<sup>122</sup> and *Late Night with Conan O'Brien*<sup>123</sup> ran parody skits about the original iPhone; episodes of *The Tonight Show with Jay Leno*<sup>124</sup> and *The Colbert Report*<sup>125</sup> referenced the release of the iPhone 3G; Jimmy Fallon joked about the announcement of the iPhone 3GS on *Late Night with Jimmy Fallon*<sup>126</sup> and interviewed the editor of *Engadget* about that device;<sup>127</sup> and David Letterman referenced the iPhone 4 on an episode of *Late Night with David Letterman*.<sup>128</sup> Various television programs have also included segments that do not explicitly focus on the iPhone yet nonetheless feature the product.<sup>129</sup>

65. In part because of its distinctive look and feel, which includes the trade dress at issue, Apple's iPhone has been among the most commercially successful products in the world. After the first iPhone shipped in June 2007, Apple sold one million units in 74 days.<sup>130</sup> Additionally, within three days of launching the iPhone 3G and iPhone 3GS respectively, Apple sold more than one million units of each.<sup>131</sup> Apple sold more than 1.7 million iPhone 4 units in

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<sup>120</sup> "Apple's iPhone 4 Makes its Official Premiere," *San Francisco Chronicle*, June 8, 2010; "Apple iPhone 4 Review: No, You Can't Touch It," *Time*, June 28, 2010; ABC News, No Date, APLNDC-X0000359801; ABC7, No Date, APLNDC-X0000359813; ABC7, No Date, APLNDC-X0000359816; APLNDC-X0000359879; *What the Tech?*, NBC 10, No Date, APLNDC-X0000359832; CNN, No Date, APLNDC-X0000359930; Fox 5, No Date, APLNDC-X0000359935; "Huge Lines to Pick Up New iPhone," *San Francisco Chronicle*, June 25, 2010.

<sup>121</sup> See, e.g., "Everything You Need to Know About the Verizon iPhone 4," *Time*, January 11, 2011.

<sup>122</sup> *Saturday Night Live*, NBC, No Date, APLNDC-X0000358383.

<sup>123</sup> APLNDC-X0000358381.

<sup>124</sup> APLNDC-X0000358444.

<sup>125</sup> APLNDC-X0000358450.

<sup>126</sup> APLNDC-X0000358806.

<sup>127</sup> APLNDC-X0000358835.

<sup>128</sup> APLNDC-X0000359840.

<sup>129</sup> APLNDC-X0000358408; APLNDC-X0000358621.

<sup>130</sup> "Apple Sells One Millionth iPhone," *Apple Inc. Press Release*, September 10, 2007 (<http://www.apple.com/pr/library/2007/09/10Apple-Sells-One-Millionth-iPhone.html>).

<sup>131</sup> "Apple Sells One Million iPhone 3Gs in First Weekend," *Apple Inc. Press Release*, July 14, 2008 (<http://www.apple.com/pr/library/2008/07/14Apple-Sells-One-Million-iPhone-3Gs-in-First-Weekend.html>); "Apple Sells Over One Million iPhone 3GS Models," *Apple Inc.*

1 the three days following its launch.<sup>132</sup> In fiscal year 2011 alone, Apple recorded more than \$47  
 2 billion in net sales revenue for the iPhone and related products and services.<sup>133</sup>

3 66. An RBC Capital Markets analyst report commented that: “Apple’s iPhone in  
 4 June 2007 disruptively raised the standard for a new kind of smartphone design and user  
 5 experience, breaking sales launch records, sparking competitive responses, and defying accepted  
 6 conventions.”<sup>134</sup>

7 67. Similarly, the announcement that Apple was going to introduce a tablet  
 8 computer<sup>135</sup> and the formal launch of the iPad was extensively covered in the press.<sup>136</sup> Major  
 9 newspapers and magazines—including *The New York Times*, *The Wall Street Journal*, *Chicago*  
 10 *Tribune*, *The Washington Post*, *USA Today*, *Mercury News*, and *Time*—ran reviews of the iPad,  
 11 many of which included photographs of the product.<sup>137</sup>

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12 *Press Release*, June 22, 2009 ([http://www.apple.com/pr/library/2009/06/22Apple-Sells-Over-](http://www.apple.com/pr/library/2009/06/22Apple-Sells-Over-One-Million-iPhone-3GS-Models.html)  
 13 [One-Million-iPhone-3GS-Models.html](http://www.apple.com/pr/library/2009/06/22Apple-Sells-Over-One-Million-iPhone-3GS-Models.html)).

14 <sup>132</sup> “iPhone 4 Sales Top 1.7 Million,” *Apple Inc. Press Release*, June 28, 2010  
 (<http://www.apple.com/pr/library/2010/06/28iPhone-4-Sales-Top-1-7-Million.html>).

15 <sup>133</sup> Apple Inc. Form 10-K filed October 26, 2011, at 30, APLNDC-Y0000135683-  
 135789 at APLNDC-Y0000135714.

16 <sup>134</sup> “Wireless Industry Sizing the Global Smartphone Market,” RBC Capital Markets,  
 November 12, 2008, APL-ITC796-0000458644-458703 at APL-ITC796-0000458649.

17 <sup>135</sup> “With Its Tablet, Apple Blurs Line Between Devices,” *N.Y. Times*, January 27, 2010  
 (<http://www.nytimes.com/2010/01/28/technology/companies/28apple.html>); “Apple Takes  
 18 Big Gamble on New iPad,” *Wall St. Journal*, January 25, 2010  
 (<http://online.wsj.com/article/SB10001424052748704094304575029230041284668.html>);  
 19 WBZ, No Date, APLNDC-X0000359282; *Big Apple*, WSVN, No Date, APLNDC-  
 20 X0000359423; *Top Stories*, CNN, No Date, APLNDC-X0000359585.

21 <sup>136</sup> See, e.g., “The iPad’s Big Day,” *N.Y. Times* blog entry, April 3, 2010  
 (<http://bits.blogs.nytimes.com/2010/04/03/live-blogging-the-ipads-big-day/>); “Buzz Powers  
 22 iPad Launch, but Will It Be Enough?,” *Wall St. Journal*, April 3, 2010; “Fans Snap Up iPads  
 After Waiting Overnight,” *S.F. Chronicle*, April 4, 2010; “For iPad, Lines but No Shortage,”  
 23 *Wall St. Journal*, April 5, 2010; *The iPad Is Here: First Look at New Technology*, ABC  
 Good Morning America, No Date, APLNDC-X0000359615.

24 <sup>137</sup> “Looking at the iPad From Two Angles,” *N.Y. Times*, March 31, 2010  
 (<http://www.nytimes.com/2010/04/01/technology/personaltech/01pogue.html>); “Laptop  
 25 Killer? Pretty Close,” *Wall St. Journal*, April 1, 2010  
 (<http://online.wsj.com/article/SB10001424052702304252704575155982711410678.html>);  
 26 “iPad Envy . . . and Hope,” *Chicago Tribune*, April 2, 2010  
 ([http://articles.chicagotribune.com/2010-04-02/news/ct-edit-ipad-20100402\\_1\\_ipad-apple-](http://articles.chicagotribune.com/2010-04-02/news/ct-edit-ipad-20100402_1_ipad-apple-chief-steve-jobs-tablet)  
 27 [chief-steve-jobs-tablet](http://articles.chicagotribune.com/2010-04-02/news/ct-edit-ipad-20100402_1_ipad-apple-chief-steve-jobs-tablet)); “Apple’s iPad: First Impressions,” *Wash. Post*, April 3, 2010  
 ([http://voices.washingtonpost.com/fasterforward/2010/04/apples\\_ipad\\_first\\_impressions.html](http://voices.washingtonpost.com/fasterforward/2010/04/apples_ipad_first_impressions.html)  
 28 ); Verdict Is in on Apple iPad: It’s a Winner,” *USA Today*, April 2, 2010



68. Major magazines also featured the iPad prominently on their cover pages. For instance, *The Economist* featured an image of Steve Jobs holding the iPad prominently on the cover of the January 28, 2010 issue.<sup>138</sup> And *Newsweek*'s April 5, 2010 issue entitled "What Is So Great About the iPad? Everything." also featured the iPad prominently.<sup>139</sup>

69. Furthermore, countless celebrities have been photographed with an iPad, such that it has become "Hollywood's most buzzed about piece of arm candy."<sup>140</sup> And ABC's hit television comedy *Modern Family* had an episode in which one of the primary stories was a main character's attempts to obtain an iPad the day it was released.<sup>141</sup> Oprah Winfrey also named the iPad one of her "Ultimate Favorite Things."<sup>142</sup>

70. The iPad has also been enormously successful. On the first day of iPad sales alone, Apple sold over 300,000 units.<sup>143</sup> Within a month, Apple had sold one million devices,<sup>144</sup>

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([http://www.usatoday.com/tech/columnist/edwardbaig/2010-03-31-apple-ipad-review\\_N.htm](http://www.usatoday.com/tech/columnist/edwardbaig/2010-03-31-apple-ipad-review_N.htm)); "Curious Customers in Marin Snap Up iPads," *Mercury News*, April 3, 2010 ([http://www.mercurynews.com/ci\\_14817081](http://www.mercurynews.com/ci_14817081)); "Do We Need the iPad?" *Time*, April 1, 2010 (<http://www.time.com/time/magazine/article/0,9171,1977106,00.html>).

<sup>138</sup> The Book of Jobs: Hope, Hype and Apple's iPad, *The Economist*, January 30-February 5, 2010.

<sup>139</sup> *Newsweek*, April 5, 2010 issue titled "What Is So Great About the iPad? Everything."

<sup>140</sup> "Celebrities Who Love the iPad," *Forbes.com*, June 22, 2010 (<http://www.forbes.com/2010/06/22/ipad-cyrus-bieber-technology-celebrities.html>).

<sup>141</sup> "iPad Gets Star Turn in Television Comedy," *Wall St. Journal*, April 2, 2010.

<sup>142</sup> "Oprah's Ultimate Favorite Things 2010," *The Oprah Winfrey Show*, November 19, 2010 (<http://www.oprah.com/oprahshow/Oprahs-Ultimate-Favorite-Things-2010/2>).

<sup>143</sup> Apple Sells Over 300,000 iPads First Day," *Apple Inc. Press Release*, April 5, 2010 (<http://www.apple.com/pr/library/2010/04/05Apple-Sells-Over-300-000-iPads-First-Day.html>).

<sup>144</sup> "Apple Sells One Million iPads," *Apple Inc. Press Release*, May 3, 2010 (<http://www.apple.com/pr/library/2010/05/03Apple-Sells-One-Million-iPads.html>).

and it hit the two million and three million marks within 60 days<sup>145</sup> and in 80 days,<sup>146</sup> respectively. During the first quarter of fiscal year 2012, Apple sold 15.43 million iPads.<sup>147</sup>

### **E. Impact of Advertising on Consumers**

71. Apple's products have been widely advertised through Apple's own advertising as well as through independent channels. Such advertising has a substantial impact on consumers' purchase decisions, as demonstrated by several market research studies by Apple. For instance, a 2010 iPad Buyer Survey study concludes that "[a]ds triggered the desire to own an iPad, while the product features such as being portable/lightweight, Wi-Fi capable, and easy to use were the hooks."<sup>148</sup> In particular, when the surveyed buyers in the U.S. were asked what triggered their decision to acquire an iPad, 44% indicated that they saw the ads and wanted to try the product.<sup>149</sup> Similarly, other iPad Tracking Studies conducted in 2010 show that iPad ads were important in triggering the purchase decisions of U.S. buyers.<sup>150</sup>

72. To summarize: In my opinion, what is noteworthy about Apple's brand identity is that the core strategy focuses on the product itself and its aesthetic presentation to consumers. Apple's brand image is closely tied to the look and feel of the products at issue. This look and feel is distinctive and there is an enormous amount of external validity that it is unique and famous. Therefore, not only have consumers developed brand associations toward the look and

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<sup>145</sup> "Apple Sells Two Million iPads in Less Than 60 Days," *Apple Inc. Press Release*, May 31, 2010 (<http://www.apple.com/pr/library/2010/05/31Apple-Sells-Two-Million-iPads-in-Less-Than-60-Days.html>).

<sup>146</sup> "Apple Sells Three Million iPads in 80 Days," *Apple Inc. Press Release*, June 22, 2010 (<http://www.apple.com/pr/library/2010/06/22Apple-Sells-Three-Million-iPads-in-80-Days.html>).

<sup>147</sup> "Apple Reports First Quarter Results," *Apple Inc. Press Release*, January 24, 2012 (<http://www.apple.com/pr/library/2012/01/24Apple-Reports-First-Quarter-Results.html>).

<sup>148</sup> See APLNDC-Y0000023361-23427 at APLNDC-Y0000023362-23363, APLNDC-Y0000023384.

<sup>149</sup> See APLNDC-Y0000023361-23427 at APLNDC-Y0000023363, APLNDC-Y0000023385.

<sup>150</sup> See APLNDC-Y0000023428-23578, at APLNDC-Y0000023485 (indicating 22% of U.S. buyers were influenced by ads); APLNDC-Y0000023579-23729 at APLNDC-Y0000023636 (indicating 23% of U.S. buyers were influenced by ads); APLNDC-Y0000023730-23907, at APLNDC-Y0000023806 (indicating 24% of U.S. buyers were influenced by the ads).

1 feel of Apple products by experiencing them personally but also by experiencing them via media.  
 2 In my view, the importance of external validity cannot be overstated; they provide additional,  
 3 accretive cues with respect to what makes Apple's look and feel distinctive.

#### 4 **VI. APPLE'S BRAND EQUITY IS AMONG THE HIGHEST IN THE WORLD**

5 73. According to *Fortune*:

6 What makes Apple so admired? Product, product, product. This  
 7 is the company that changed the way we do everything from buy  
 8 music to design products to engage with the world around us. Its  
 track record for innovation and fierce consumer loyalty translates  
 into tremendous respect across business' highest ranks.<sup>151</sup>

9 74. At the heart of Apple's products is look and feel. Marc Gobé, president of  
 10 Emotional Branding, LLC and former CEO of Brandimage (one of the top branding firms in the  
 11 world), had this to say about Apple:

12 Good design *is* courageous. But apart from its aesthetic value,  
 13 let's not forget that it represents a long-term investment that can  
 14 increase a company's value tenfold and over. Can anyone dispute  
 that...Apple's turnaround is design driven?<sup>152</sup>

15 75. Apple's brand rankings and brand value increased significantly since the  
 16 introduction of the iPhone in 2007, and Apple is now among the top most valuable brands in the  
 17 world. The increase in Apple's brand value has been attributed, in particular, to the successes of  
 18 the iPhone and the iPad.

19 76. According to *Millward Brown Optimor's BrandZ* rankings, Apple was the world's  
 20 most valuable brand in 2011. Since the introduction of the iPhone in 2007, Apple's ranking has  
 21 increased from number 16 to number 1, while its brand value has increased from \$24.7 billion to  
 22 \$153.3 billion.<sup>153</sup> BrandZ has attributed the increase in brand value and ranking to, in part, the  
 23 iPhone and the iPad:

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24 <sup>151</sup> "World's Most Admired Companies 2010," *Fortune*, available at  
 25 <http://money.cnn.com/magazines/fortune/mostadmired/2010/snapshots/670.html>.

26 <sup>152</sup> M. Gobé, *Emotional Branding: The New Paradigm for Connecting Brands to People*  
 119 (New York, NY: Allworth Press, 2009).

27 <sup>153</sup> "BrandZ Top 100: Most Valuable Global Brands 2007," *Millward Brown Optimor*,  
 28 at 10; "BrandZ Top 100: Most Valuable Global Brands 2011," *Millward Brown Optimor*, at  
 13.



[Apple] earned an 84 percent increase in brand value with successful iterations of existing products like the iPhone, creation of the tablet category with iPad, and anticipation of a broadened strategy making the brand a trifecta of cloud computing, software, and innovative, well-designed devices. ... At the start of last year, few people fretted that their lives felt bereft of a digital gadget smaller than their laptop but larger than their mobile phone. By the end of 2010, however, around 18 million of us owned iPads or other tablets. Apple understood that its customers wanted access to data and images anywhere, anytime, in easy-to-view definition with an easy-to-use touch interface. In a span of a few months, the brand met these needs with the iPad and iPhone 4. Apple trusted that its customers would discover uses for these products that would help organize, simplify or complicate, but mostly improve their lives. This cocreation approach resulted in roughly 350,000 Apple apps, and it added value to the product and the brand. ... Apple continued quietly developing a cloud and loudly discovered an empty space in the computing category that it filled with a new device – the iPad.<sup>154</sup>

77. Similarly in 2010, *Millward Brown Optimor* increased its assessment of Apple's brand value by 32 percent from the previous year, while stating that

[T]his increase is a tribute to the company's ability to transform itself from an electronics manufacturer into a brand that is central to people's lives. Apple manages to celebrate creativity and self-expression while, [sic] anticipating consumers' needs and wants and meeting those needs with solutions that are noteworthy for their ease of use and elegance of design. Apple benefited specifically from the popularity of the iPhone, its 100,000 apps, and anticipation for the iPad.<sup>155</sup>

78. From 2007 to 2011, *Interbrand* increased the ranking of Apple's brand from number 33 to number 8. During the same time period, the value of Apple's brand as calculated by *Interbrand* increased from \$11.037 billion to \$33.492 billion.<sup>156</sup> Like *BrandZ*, *Interbrand* linked the success of the iPhone and iPad products to the increase in Apple's brand value and rankings. In 2008, the *Interbrand* report stated:

Can anything slow the ascent of Apple? Its ability to identify new customer needs and deliver products of beautiful simplicity and

<sup>154</sup> "BrandZ Top 100: Most Valuable Global Brands 2011," *Millward Brown Optimor*, at 16, 48, 83.

<sup>155</sup> "BrandZ Top 100: Most Valuable Global Brands 2010," *Millward Brown Optimor*, at 127.

<sup>156</sup> "Best Global Brands 2007," *Interbrand*, (<http://www.interbrand.com/en/best-global-brands/best-global-brands-2008/best-global-brands-2007.aspx>); "Best Global Brands 2011," *Interbrand*, at 20.

desirability continue to put it in a league of its own. The latest iPods, iPhone and MacBook Air strike the perfect balance between coolness and mass appeal . . . .<sup>157</sup>

79. *Interbrand's* 2011 report further underlined the importance of the iPhone and iPad products to the Apple brand:

Setting the bar high in its category and beyond, Apple is the icon for great branding meeting great technology to deliver a unique overall experience, making its giant leap from #17 to #8 in the rankings less than surprising. Consumers continue to follow its product launches with anticipation and are quick to integrate its sleek products into their lifestyles. Continuing its wave of first-to-market products, Apple launched the iPad in 2010 creating the new tablet category in the process. Since its launch, young and old alike have embraced it as a tool, with organizations from education to health to sales coming on board as well. Apple has even implemented the iPad in its innovative retail spaces as a service tool for customers as they wait in line.<sup>158</sup>

80. Apple makes the most of the success of the iPhone and iPad to increase its brand value by using what the company calls "logo lockup." All of Apple's advertisements for the iPhone and iPad feature the Apple icon next to the name of the product in the ad.<sup>159</sup> According to Ms. Twiggs, this technique allows advertisers to "[lock] ... two things together, a logo plus something else [such as a company name or product name]."<sup>160</sup> In this instance, the use of the logo "locks" the iPhone and the iPad to the Apple brand. Ms. Twiggs testified that this technique informs consumers as to the company that makes the featured product and is "one of the branding elements" and in general "an important element" of advertising.<sup>161</sup> Apple also places its logo on the back of the iPhone further encouraging those who view it to associate the iPhone and its distinct look and feel with the Apple brand.<sup>162</sup>

81. To summarize: Apple's trade dress at issue is an integral part of the look and feel that is so important to Apple's brand identity. As I have discussed above, Apple has been

<sup>157</sup> "Best Global Brands 2008," *Interbrand*, at 30.

<sup>158</sup> "Best Global Brands 2011," *Interbrand*, at 20.

<sup>159</sup> Twiggs Dep. 100:2-101:14.

<sup>160</sup> Twiggs Dep. 100:13-19.

<sup>161</sup> Twiggs Dep. 101:7-14.

<sup>162</sup> Deposition of Eric Jue on February 24, 2012 ("Jue Dep."), 132:20-133:8.

extraordinarily successful by making its products' look and feel the fulcrum of its branding strategy. In my opinion, a combination of a high degree of innovation and cutting-edge technology and a unique and distinctive look and feel has been instrumental in the branding and concomitant success of the iPhone, iPad, and iPod Touch products.

## **VII. IMPORTANCE OF THE LOOK AND FEEL OF APPLE PRODUCTS AT ISSUE FOR CONSUMERS**

82. Market research studies conducted or commissioned by Apple provide insights into how the look and feel of Apple's iPhone, iPad, and iPod touch products impact consumers' attitudes toward the Apple brand and their purchase decisions.

83. For example, according to a pre-iPhone launch market study conducted by Apple in May 2007 about the most important reasons to purchase an iPhone, "appearance and design" was the top-ranked reason for those surveyed who were "very/somewhat likely" to purchase an iPhone.<sup>163</sup>

84. In an iPhone Owner study conducted by Apple in the U.S. in March-April 2011, when iPhone 3GS and iPhone 4 owners who had considered Android were asked what convinced them to get an iPhone after considering Android, 32% indicated they "liked the physical appearance and design."<sup>164</sup> According to the same study, of the iPhone 3GS and iPhone 4 owners who bought their phones, 46% of those surveyed in the U.S. indicated "physical appearance and design" as one of the "very important" features in their decision to purchase their iPhones.<sup>165</sup>

85. Similarly, in iPhone Buyer Surveys conducted by Apple during the fourth quarter of Apple's 2010 fiscal year, and the first, second, and third quarters of Apple's 2011 fiscal year, when iPhone 3GS and iPhone 4 buyers were asked to rank the importance of a given list of attributes in their purchase decision, 46% to 50% of those surveyed in the U.S. ranked "attractive appearance and design" as very important (or top box), while 32% to 35% of those surveyed in

<sup>163</sup> APLNDC-Y0000028751-28849 at APLNDC-Y0000028771.

<sup>164</sup> APLNDC-Y0000025024-25147 at APLNDC-Y0000025027, APLNDC-Y0000025060.

<sup>165</sup> APLNDC-Y0000025024-25147 at APLNDC-Y0000025064.

the U.S. ranked “attractive appearance and design” as somewhat important (or second box).<sup>166</sup> In sum, 81% to 82% of those surveyed in the U.S. in these studies ranked “attractive appearance and design” in “top-2 boxes.”<sup>167</sup> The top-2 boxes represent a conventional measure used by companies and in the market research industry.

86. Market research conducted by Apple about the iPod touch also provides support for the importance of the look and feel of the product for consumers. For instance, according to an iPod Buyer Survey conducted by Apple during the second quarter of its 2009 fiscal year, when iPod touch buyers were asked to rank the importance of a given list of attributes in their purchase decision, 42% of those surveyed in the U.S. ranked “attractive appearance” as very important.<sup>168</sup> Another iPod Buyer Survey, conducted by Apple during the fourth quarter of its 2009 fiscal year, similarly shows that when iPod touch buyers were asked to rank the importance of a given list of attributes in their purchase decision, 37 % of those surveyed in the U.S. ranked “attractive appearance” as very important.<sup>169</sup>

#### VIII. APPLE’S TRADE DRESS IS DISTINCTIVE AND FAMOUS

87. I have been asked to consider whether Apple’s iPhone Trade Dress, iPhone 3G Trade Dress, and iPad Trade Dress have acquired distinctiveness among consumers and potential consumers of smartphones and tablets, which I understand to mean that consumers associate these trade dresses with a particular source. In evaluating whether these trade dresses have acquired distinctiveness, I have been instructed to consider the following factors: the extent and manner of

<sup>166</sup> APLNDC-Y0000027256-27340 at APLNDC-Y0000027258, APLNDC-Y0000027277; APLNDC-Y0000027341-27422 at APLNDC-Y0000027343, APLNDC-Y0000027362; APLNDC-Y0000027423-27505 at APLNDC-Y0000027425, APLNDC-Y0000027450; APLNDC-Y0000027506-27599 at APLNDC-Y0000027508, APLNDC-Y0000027572.

<sup>167</sup> APLNDC-Y0000027256-27340 at APLNDC-Y0000027277; APLNDC-Y0000027341-27422 at APLNDC-Y0000027362; APLNDC-Y0000027423-27505 at APLNDC-Y0000027450; APLNDC-Y0000027506-27599 at APLNDC-Y0000027572.

<sup>168</sup> APLNDC-Y0000027807-27941 at APLNDC-Y0000027809, APLNDC-Y0000027866. Also, 79% of those surveyed in the U.S. ranked “attractive appearance” as very important or somewhat important. *See* APLNDC-Y0000027865.

<sup>169</sup> APLNDC-Y0000027942-28097 at APLNDC-Y0000027944, APLNDC-Y0000028014. Also, 75% of those surveyed in the U.S. ranked “attractive appearance” as very important or somewhat important. *See* APLNDC-Y0000028013.

1 Apple's advertising for the iPhone, iPad, and iPod touch; the length and manner of Apple's use of  
 2 the trade dresses; actual recognition of the trade dresses; whether Samsung copied Apple's trade  
 3 dresses; and whether Apple's use of these trade dresses has been exclusive.

4 88. I have also been asked to consider whether Apple's iPhone Trade Dress, iPhone  
 5 3G Trade Dress, and iPad Trade Dress are famous among the general consuming public. In  
 6 assessing whether these trade dresses are famous, I have been instructed to consider the following  
 7 factors: the duration, extent, and geographic reach of advertising and publicity of the trade dress,  
 8 whether advertised or publicized by the owner or third parties; the amount, volume, and  
 9 geographic extent of sales of goods or services offered under the trade dress; and the extent of  
 10 actual recognition of the trade dress. I am not rendering a legal opinion on distinctiveness.  
 11 However, the factors I have been asked to consider are consistent with the type of information I  
 12 would consider in assessing whether a branded product (or a group of branded products) is likely  
 13 to be viewed as having a distinctive look and feel. Similarly, I am not rendering a legal opinion  
 14 with respect to fame. Factors such as advertising, sales, market recognition, competitor reactions,  
 15 and exclusivity are consistent with the types of information that would be informative in  
 16 determining whether the look and feel of a branded product (or a group of branded products) has  
 17 become famous in the marketplace.

18 89. *Advertising.* As discussed above, Apple has invested significant resources in  
 19 advertising the iPhone and iPad products.<sup>170</sup> These advertisements generally focus on the  
 20 products themselves, displaying the elements of the asserted iPhone Trade Dress, iPhone 3G  
 21 Trade Dress, and iPad Trade Dress.<sup>171</sup> Moreover, the iPhone and iPad products have been the  
 22 subject of extensive press coverage, include numerous product reviews, and have appeared in  
 23 popular media, such as television shows and movies.<sup>172</sup>

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25 <sup>170</sup> See *supra* Section V.B-C; ¶¶ 106, 142.

26 <sup>171</sup> See *id.*; see, e.g., APLNDC-X0000363655, APLNDC-X0000007455, APLNDC-  
 27 X0000007699, APLNDC-X0000364248; APLNDC-X0000363682, APLNDC-X0000363702,  
 28 APLNDC-X0000364115, APLNDC-X0000364307, APLNDC-X0000363862; APLNDC-  
 X0000363709.

<sup>172</sup> See *supra* Section V.D.

1           90.     *Sales.* Both the iPhone and iPad have experienced significant success in the  
 2 marketplace.<sup>173</sup> Between late June 2007 and summer 2010, Apple sold 24.9 million original  
 3 iPhone, iPhone 3G, and iPhone 3GS devices,<sup>174</sup> and between April 2010 and before fall 2010, it  
 4 sold 4.3 million iPad tablets in the U.S..<sup>175</sup> Between April 2010 and June 2011, Apple sold  
 5 14.1 million iPad tablets in the U.S..<sup>176</sup> and spent more than \$300 million on advertising the iPad.  
 6 <sup>177</sup>

7           91.     *Actual Recognition.* The surveys from the Poret Report show that 61.0% of  
 8 respondents associate the iPhone Trade Dress with Apple, 68.0% of respondents associate the  
 9 iPhone 3G Trade Dress with Apple, and between 57.3% and 75.2% of respondents associate the  
 10 iPad Trade Dress with Apple.<sup>178</sup> As part of his survey methodology, Mr. Poret also tested  
 11 “control” devices to determine what percentage of people associated those devices with Apple. A  
 12 much smaller percentage of respondents associated the control devices with Apple, namely 3.7%  
 13 of respondents associated the control phone with Apple and between 10.8% and 17% of  
 14 respondents associated the control tablet computer with Apple.<sup>179</sup>

15           92.     *Copying.* As discussed below, Samsung’s internal documents support the  
 16 conclusion that Samsung held up Apple’s iPhone and iPad products as the aspirational models in  
 17 designing its own smartphone and tablet products, and even made changes to its graphical user  
 18 interface specifically to make the icons look more like Apple icons, thus demonstrating  
 19 Samsung’s marketing tactics to create products that looked like Apple products.<sup>180</sup>

22           <sup>173</sup> See *supra* ¶¶ 65-66, 70; see *infra* ¶ 107, 142.

23           <sup>174</sup> See ¶ 107.

24           <sup>175</sup> See *infra* ¶ 142.

25           <sup>176</sup> APLNDC-Y00000051599-51605, at APLNDC-Y00000051600.

26           <sup>177</sup> APLNDC-Y0000051623, Apple Inc. Advertising; Q111 Ad Budget Summary,  
 27 APLNDC00002104534-554, at APLNDC00002104535; Q211 Ad Budget Summary,  
 28 APLNDC0002788581-588, at APLNDC0002788581; Q311 Ad Budget Summary,  
 APLNDC0002033979-987, at APLNDC0002033979.

29           <sup>178</sup> Poret Report at 36, 52, 60-61, 64.

30           <sup>179</sup> Poret Report at 35-36, 52, 65-66.

31           <sup>180</sup> See *infra* ¶¶ 132-138.



1           93.     *Exclusivity.* I understand that Apple has an industrial design expert in the case,  
2 Peter Bressler, who will be opining that no phone looked like the iPhone and no tablet computer  
3 looked like the iPad before the launch of the iPhone and iPad, respectively. Accordingly, I am  
4 not offering a separate opinion on the issue of the exclusivity of Apple's use of the iPhone Trade  
5 Dress, iPhone 3G Trade Dress, or iPad Trade Dress. For purposes of my analysis, I assume that  
6 the relevant trade dresses were substantially exclusively used by Apple when Apple first launched  
7 the iPhone and the iPad.

8           94.     In light of this evidence, it is my opinion that, from a brand marketing perspective,  
9 consumers have formed strong associations with Apple and find the look and feel of the iPhone  
10 and the iPad to be distinctive in the marketplace. It is also incontrovertible that the look and feel  
11 of these products, which is closely tied to Apple, is famous and contributes to the halo  
12 surrounding the tremendous marketing success of the Apple brand.

13           95.     I understand that the statute setting forth the elements of a dilution claim uses the  
14 language "a mark is famous if it is widely recognized by the general consuming public of the  
15 United States." However, the concept of a "general consuming public" does not have meaningful  
16 empirical content from a marketing perspective. This is because companies always target  
17 demographic segments *conditional on* factors such as the relevant industry, the nature of the  
18 market, the nature of the product offering, and the image the brand seeks to create. Brands do not  
19 become successful or famous because companies try to cover every potential consumer in the  
20 market. Indeed, careful targeting and positioning is very important in marketing. There may be  
21 beneficial spillovers from the core segments being targeted to other segments, but these spillovers  
22 only enhance the success and fame of the brand. Of course, a brand cannot credibly have a claim  
23 to fame in the market if it is too narrowly focused in a demographic or geographic niche. For  
24 example, a University of Rochester varsity logo may have great brand resonance to residents in  
25 the Rochester Metropolitan Statistical Area, but that does not give it general fame.

26           96.     It is fairly typical in consumer electronics to focus efforts on a broad spectrum of  
27 the consumers without necessarily targeting "tail" segments such as young children or the elderly.  
28 This is precisely the targeting strategy that Apple and Samsung follow. According to Ms. Twiggs

1 and Ms. Whiteside, Apple's target demographic includes the age 18 to 49 demographic.<sup>181</sup>

2 According to Todd Pendleton ("Mr. Pendleton"), Samsung Telecommunication America, LLC's  
3 ("STA") Chief Marketing Officer for wireless terminals, Samsung's main demographic is 18 to  
4 34 year olds.<sup>182</sup>

5 97. The Poret Report shows that 81% of respondents who were in the 16-24 age group  
6 associated the iPhone Trade Dress and the iPhone 3G Trade Dress with Apple, while 67.9% of  
7 the respondents in the 25-34 age group, and 60.0% of the respondents in the 35-44 age group  
8 associated the trade dresses at issue in this case with Apple.<sup>183</sup> Therefore, from a marketing and  
9 branding perspective, the iPhone and the iPad trade dresses have undoubtedly achieved fame.

#### 10 **IX. SAMSUNG'S INFRINGEMENT OF APPLE'S TRADE DRESS**

11 98. As noted above, a brand can be damaged by a company's unauthorized use of  
12 brand elements that are proprietary to the owner of the brand.<sup>184</sup> I understand that certain of  
13 Apple's claims for relief against Samsung pertain to Samsung's misappropriation of the  
14 distinctive appearance of the iPhone, the iPod touch, and the iPad.<sup>185</sup> I understand that Apple has  
15 asserted that this misappropriation constitutes both trade dress infringement and trade dress  
16 dilution. In this section of my report, I analyze from a marketing perspective whether the look  
17 and feel of the Samsung Galaxy line of smartphones and tablet computer products  
18 misappropriates Apple's proprietary look and feel, taking into consideration certain factors in the  
19 "likelihood of confusion" test. I understand that the likelihood of confusion test is the legal  
20 standard to analyze Apple's trade dress infringement claim for relief against Samsung.

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21  
22  
23 <sup>181</sup> See Twiggs Dep. 29:2-19; Whiteside Dep. 134:5-135:24.

24 <sup>182</sup> Deposition of Todd Pendleton on March 21, 2012 ("Pendleton Rough Dep. Tr."), 37,  
44-45.

25 <sup>183</sup> See Poret Report at 51.

26 <sup>184</sup> See *supra* ¶ 35; see also M. Morrin & J. Jacoby, "Trademark Dilution: Empirical  
Measures for an Elusive Concept," 19 JOURNAL OF PUBLIC POLICY & MARKETING 265-276  
(2000).

27 <sup>185</sup> See *supra* Section IV for a detailed outline of Apple's asserted trade dress. There are  
28 several others claims that Apple asserts against Samsung that are outside the scope of my  
assignment.



1           99. I also understand that likelihood of confusion may be assessed by examining eight  
 2 factors (the “*Sleekcraft* Factors”).<sup>186</sup> While I have not been asked to provide an opinion on the  
 3 likelihood of confusion between Apple’s products and Samsung’s products, the *Sleekcraft* Factors  
 4 mirror the types of information that I, as a marketing expert, would consider in assessing whether  
 5 Samsung’s misappropriation of Apple’s trade dress is likely to affect consumers’ purchasing  
 6 behavior.

7           100. I have been informed that the *Sleekcraft* Factors are:

- 8                   (a) Strength of the mark;
- 9                   (b) Proximity of the goods;
- 10                  (c) Similarity of the marks;
- 11                  (d) Evidence of actual confusion;
- 12                  (e) Marketing channels used;
- 13                  (f) Types of goods and the degree of care likely to be exercised by the  
                       purchaser;
- 14                  (g) Defendant’s intent in selecting the mark; and
- 15                  (h) Likelihood of expansion of the product lines.

16           101. From a marketing perspective, analysis of the above factors pertains not only in  
 17 the context of purchase (or point-of-sale) confusion but also in the context of post-purchase (or  
 18 post-sale) confusion. Consumers constantly use Apple’s iPhone, iPad, and iPod touch products in  
 19 public spaces.<sup>187</sup> As publicly used devices, the iPhone, iPad, and iPod touch trade dress have  
 20 brand image effects on potential consumers who are not immediate point-of-purchase consumers.  
 21 Unlike, say, a brand of detergent, which is bought and then used in one’s home, smartphones,  
 22 tablet computers, and music players are by their nature mobile devices and are regularly seen by  
 23 others. Therefore, brand image and brand associations are not confined to point-of-purchase  
 24 situations. Picture the following scenario, which I call the Imitative Scenario: College freshman  
 25 Jim sees a classmate with a “cool-looking tablet” and tells a friend about it. “Oh, that’s Ellen’s  
 26 new toy,” says the friend, “She bought it at Best Buy. I’ll send you a link.” The friend (who  
 27 knows that it is an iPad) sends a link to Jim (who does not know it is an iPad) and Jim goes onto

28                   <sup>186</sup> See *AMF Inc. v. Sleekcraft Boats*, 599 F.2d 341, 348-349 (9th. Cir. 1979).

<sup>187</sup> See APLNDC-Y0000024549-24798 at APLNDC-Y0000024574, APLNDC-  
 Y0000024576-24579, APLNDC-Y0000024582, and APLNDC-Y0000024585; APLNDC-  
 Y0000025691-25822 at APLNDC-Y0000025782; APLNDC-Y000023361-23427 at  
 APLNDC-Y000023396.

1 the website and ends up buying a Samsung tablet, which looks almost identical to the iPad. Jim's  
 2 younger sister then asks for the same Samsung tablet for Christmas. The Imitative Scenario is a  
 3 direct effect of Samsung's misappropriation of Apple's trade dress: because Samsung has  
 4 misappropriated Apple's trade dress, the distinctiveness of Apple's trade dress is attenuated, and  
 5 consumers no longer necessarily associate the look and feel of the iPhone, iPad, and iPod touch  
 6 solely with Apple.

7 102. There is a further, indirect effect on Apple's brand. As I have shown above, the  
 8 evidence indicates that consumers gravitate to Apple not only because of the innovative features  
 9 of the products at issue but also because the products have distinctive aesthetic appeal. When  
 10 consumers can buy non-Apple products with a similar look and feel, the products at issue lose  
 11 part of their distinctive aesthetic appeal. As I discuss below, this indirect effect has an additional  
 12 detrimental impact on Apple's brand equity.

13 103. Below, I separately analyze the *Sleekcraft* Factors for the iPhone's trade dress and  
 14 the iPad's trade dress.

15 **A. Analysis of *Sleekcraft* Factors—iPhone Trade Dress**

16 *Sleekcraft* Factor 1: Strength of the trade dress<sup>188</sup>

17 104. The iPhone and its subsequent generations embody a distinctive look and feel that  
 18 is recognized by consumers. The same holds true for the iPod touch. Therefore, even though  
 19 there was competition in the marketplace when the products were launched, in each instance—  
 20 iPhone, iPhone 3G, iPhone 3GS, iPhone 4, and iPod touch—Apple created a very recognizable  
 21 look and feel in its products.

22 105. Consumers were made aware of this distinctive look and feel primarily through:  
 23 (1) their exposure to Apple's marketing activities that prominently feature the different  
 24 generations of the iPhone and the iPod touch; (2) their exposure to the products via non-Apple  
 25 sources, such as product reviews, press coverage, and product placements in popular media; and  
 26 (3) their own experiences with the look and feel of the iPhone and iPod touch products, or those

27 <sup>188</sup> Because I have been asked to opine on Apple's trade dress, I analyze Apple's iPhone  
 28 and iPad trade dress, not Apple's trademarks, in terms of the *Sleekcraft* Factors.

1 of their family, friends, neighbors, or colleagues. In this case, there is no question that  
 2 consumers' exposure to the iPhone and the iPod touch products was extensive before the launch  
 3 of the first of Samsung's accused products in summer 2010.<sup>189</sup>

4 106. By summer 2010, Apple had budgeted \$350 million in advertising the iPhone  
 5 product in the U.S.<sup>190</sup> Moreover, the iPhone had been featured in numerous national magazine  
 6 and newspaper articles, including articles in *The New York Times*, *San Francisco Chronicle*, *The*  
 7 *Wall Street Journal*, and *Time* magazine, including many front page articles and cover articles,  
 8 such as when *Time* magazine named the iPhone the "Invention of the Year" for 2007.<sup>191</sup>  
 9 Furthermore, the iPhone has been featured in countless national television programs and movies,  
 10 including *American Idol* and *Gossip Girl*, to name two.<sup>192</sup>

11 107. In addition, as explained above, because the iPhone and iPod touch are mobile  
 12 devices used in public locations, including in parks, airports, cafes, public transit, and restaurants,  
 13 Apple's own sales contribute to brand associations formed by consumers.<sup>193</sup> Before the launch of  
 14 Samsung's accused products in summer 2010, Apple had sold over 24.9 million iPhone devices<sup>194</sup>

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17 <sup>189</sup> See *infra* discussion regarding timeline of release of Apple's iPhone products and  
 Samsung's Galaxy S line of smartphones ¶ 131.

18 <sup>190</sup> Q110 Ad Budget Summary, APLNDC0002029745-760, at  
 19 APLNDC0002029747; Q210 Ad Budget Summary, APLNDC0002029787-796 at  
 APLNDC0002029789; Q310 Ad Budget Summary, APLNDC0002789782-796, at  
 20 APLNDC0002789784; Q109 Ad Budget Summary, APLNDC0002103760-777; Q209 Ad  
 Budget Summary, APLNDC0002103846-857; Q309 Ad Budget Summary,  
 21 APLNDC0002140130-141; Q409 Ad Budget Summary, APLNDC0002003327-342; Q108  
 Ad Budget Summary, APLNDC0002206433-452; Q208 Ad Budget Summary,  
 22 APLNDC0002788282-301; Q308 Ad Budget Summary, APLNDC0002788514-533; Q408  
 Ad Budget Summary, APLNDC0002103372-388, at APLNDC0002103374; Q307 Ad Budget  
 23 Summary, APLNDC0002206049-065, at APLNDC0002206050; Q407 Ad Budget Summary,  
 APLNDC0002205710-726, at APLNDC0002205711.

24 <sup>191</sup> See *supra* ¶¶ 57-64.

25 <sup>192</sup> See *Twigg Dep.* 42:9-19, 146:1-147:1; APLNDC-X0000014538.

26 <sup>193</sup> See APLNDC-Y0000024549-24798 at APLNDC-Y0000024574, APLNDC-  
 Y0000024576-24579, APLNDC-Y0000024582, and APLNDC-Y0000024585. Mobile  
 phones, by design, can be and are used at various public locations by consumers.

27 <sup>194</sup> APLNDC-Y00000051357-362, at APLNDC-Y00000051359-51362; *see also* Apple  
 28 Inc. Form 10-K, filed October 27, 2009, p. 41, APLNDC-Y0000135577-682 at APLNDC-  
 Y0000135620.

1 and 23.6 million iPod touch devices in the U.S.<sup>195</sup> Apple's internal market research provides  
 2 ample evidence about the public use of these products. For instance, according to the August  
 3 2009 iPod Owner Study, 56% of the surveyed iPod touch owners in the U.S. used the product  
 4 while exercising; 81% used the product while waiting; 51% used the product while walking; 56%  
 5 used the product on an airplane; 37% used the product while commuting; 78% used the product  
 6 once a day or more, and 52 % used the product half an hour or more in one sitting.<sup>196</sup> This type  
 7 of public use serves as another—very effective—means of promotion for the iPhone and the iPod  
 8 touch, similar to word-of-mouth brand activity<sup>197</sup> or the effects of “influencers” using a  
 9 product.<sup>198</sup>

10 108. In sum, consumers' exposure to the iPhone and the iPod touch products, via  
 11 Apple's marketing activities, coverage of the products in popular media, through their personal  
 12 experiences with the products, or their exposure to the products in public spaces, was extensive  
 13 before the launch of the first of Samsung's accused products in summer 2010. The trade dress at  
 14 issue is often clearly displayed in these occasions. In my opinion, after the iPhone launch and  
 15 before the introduction of the first of the accused Samsung products in July 2010, the look and  
 16 feel of the iPhone, iPhone 3G, iPhone 3GS, iPhone 4, and iPod touch products from the  
 17 perspective of the consumers was distinctively “Apple.”

18 109. The Poret Report contains results from a June 2011 survey that shows that the  
 19 distinctive look of the iPhone remained a strong source identifier for Apple nearly a year after  
 20 Samsung released the first of its accused products. 68.0% of respondents who were shown a  
 21 disguised image of an iPhone 3G—with the icons on the face of the phone blurred and the  
 22 “home” button covered with a sticker—still identified it with Apple, iPhone, or a similar Apple-  
 23 related product name. 61.0% of respondents who were shown a similarly disguised image of an  
 24

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25 <sup>195</sup> APLNDC-Y00000051599-605, at APLNDC-Y00000051599, APLNDC-  
 26 Y00000051600.

27 <sup>196</sup> See APLNDC-Y0000024549-24798 at APLNDC-Y0000024574, APLNDC-  
 28 Y0000024576-24579, APLNDC-Y0000024582, and APLNDC-Y0000024585.

<sup>197</sup> See *supra* ¶ 33, 36.

<sup>198</sup> See *supra* note 88.

1 iPhone with the iPhone Trade Dress visible—identified it with Apple, iPhone, or a similar Apple-  
2 related product name.<sup>199</sup>

3 110. The strength of the iPhone Trade Dress has also been recognized by Samsung’s  
4 executives since late 2008. Research conducted by gravitytank on behalf of Samsung in or  
5 around late 2008 indicated that the iPhone “sets the standard for screen centric design” and  
6 “[c]onsumers...see [Samsung touch phones] as derivative of the iPhone.”<sup>200</sup> For example, in  
7 internal documents, Samsung executives have acknowledged that the “[t]he look and feel of a  
8 product matters most”<sup>201</sup> and that “iPhone has become the standard.”<sup>202</sup> As discussed in detail  
9 below,<sup>203</sup> Samsung employees were instructed, through emails or at executive-level meetings, that  
10 “[g]oing forward [Samsung’s] comparison standard is Apple[’s] iPhone” and that Samsung “must  
11 evaluate [its products] based on the iPhone standards . . . .”<sup>204</sup> Similarly, a December 2009  
12 presentation by McKinsey & Company to Samsung titled “Winning in Smartphones – It’s Now or  
13 Never” concluded that Samsung should “[m]atch the iPhone UI within the next 12 months.”<sup>205</sup>

14 *Sleekcraft* Factor 2: Proximity of the goods

15 111. Apple’s iPhone products and Samsung’s Galaxy line of smartphones are similar in  
16 use and in function and directly compete with one another for market share.<sup>206</sup> The relevant

17  
18 <sup>199</sup> Poret Report at 7-11, 45, 52, 57.

19 <sup>200</sup> SAMNDCA00191811-191987 at SAMNDCA00191865 and SAMNDCA00191929.  
20 It is my understanding that the gravitytank study was a precursor to the development of the  
21 Galaxy S line of smartphones.

22 <sup>201</sup> E-mail from Eun Jung Ko Re: Summary of Executive-Level Meeting Supervised by  
23 Head of Division, February 10, 2010, SAMNDCA10247373-10247378 (*See* translation in  
24 Apple’s Appendix of Certified Translations in Support of Opening Expert Reports  
25 (“Translations App’x”).

26 <sup>202</sup> E-mail from Eun Jung Ko of Executive-Level Meeting Supervised by Head of  
27 Division, February 10, 2010, SAMNDCA10247373-10247378 (*See* Translations App’x).

28 <sup>203</sup> *See infra* ¶ 133-137.

<sup>204</sup> Email from Won Cheol Chai Re: Report on CEO’s Directives, January 2, 2010,  
SAMNDCA10907801-10907802.

<sup>205</sup> SAMNDCA10807316-10807387 at SAMNDCA10807358.

<sup>206</sup> For instance, in Apple’s May 2011 iPhone Survey, 31% of the iPhone 3GS and  
iPhone 4 owners surveyed in the U.S. indicated that they considered or seriously considered  
the Samsung branded phones. Note that only individuals who purchased the Apple phones  
were included in the sample; it did not include people who considered an iPhone and ended  
up purchasing a Samsung product. *See* APLNDC-Y0000025024-25147 at APLNDC-

1 products are marketed to the same segments of the population who are prospective (actual, for  
2 repeat purchasers) buyers of mobile phones.

3 112. Internal market research conducted by Apple shows that the mobile phone  
4 products of the two companies generally compete with each other. For instance, in Apple's  
5 iPhone 3G Buyer Surveys—conducted during the fourth quarter of Apple's 2008 fiscal year and  
6 the first and second quarters of Apple's 2009 fiscal year—Samsung was listed among the other  
7 mobile phone brands the iPhone 3G buyers seriously considered.<sup>207</sup> In Apple's iPhone Buyer  
8 Surveys conducted during the third and fourth quarters of Apple's 2009 fiscal year, and the first,  
9 second, and third quarters of Apple's 2010 fiscal year, Samsung was similarly listed among the  
10 other mobile phone brands that the iPhone 3G and iPhone 3GS buyers seriously considered.<sup>208</sup> In  
11 Apple's iPhone Buyer Surveys conducted during the fourth quarter of 2010 and the first and  
12 second quarters of 2011, Samsung was also listed among the other mobile phone brands that the  
13 iPhone 3GS and iPhone 4 buyers seriously considered.<sup>209</sup> In Apple's iPhone Buyer Survey  
14 conducted during the third quarter of 2011, Samsung was again listed among the other  
15 smartphone brands the iPhone 3GS and iPhone 4 buyers seriously considered.<sup>210</sup> In Apple's  
16 iPhone Buyer Surveys conducted during the first and second quarters of 2011, for iPhone buyers

17  
18 Y0000025128. Both Apple and Samsung employees have admitted that Apple and  
19 Samsung's smartphones compete. Greg Joswiak, Apple's Vice President of iPhone, iPod, and  
20 iOS product marketing, identified Samsung among Apple's top competitors in the mobile  
21 phone and smartphone markets. *See* Joswiak Dep. 106:19-24, 107:10-108:6.

22 <sup>207</sup> APLNDC-Y0000026173-26256, at APLNDC-Y0000026175, APLNDC-  
23 Y0000026202; APLNDC-Y0000026257-26347, at APLNDC-Y0000026259, APLNDC-  
24 Y0000026286.

25 <sup>208</sup> APLNDC-Y0000026348-26460, at APLNDC-Y0000026350, APLNDC-  
26 Y0000026385; APLNDC-Y0000026461-26573, at APLNDC-Y0000026463, APLNDC-  
27 Y0000026498; APLNDC-Y0000026574-26686, at APLNDC-Y0000026576, APLNDC-  
28 Y0000026611; APLNDC-Y0000026687-26807, APLNDC-Y0000026689, APLNDC-  
Y0000026724; APLNDC-Y0000027136-27255, at APLNDC-Y0000027138, APLNDC-  
Y0000027172.

<sup>209</sup> APLNDC-Y0000027256-27340 at APLNDC-Y0000027258, APLNDC-  
Y0000027299; APLNDC-Y0000027341-27422 at APLNDC-Y0000027343, APLNDC-  
Y0000027402; APLNDC-Y0000027423-27505 at APLNDC-Y0000027425, APLNDC-  
Y0000027493.

<sup>210</sup> APLNDC-Y0000027506-27599 at APLNDC-Y0000027508, APLNDC-  
Y0000027560.



1 who considered Android phones, Samsung was listed among the Android mobile phone brands  
 2 the iPhone 3GS and iPhone 4 buyers seriously considered.<sup>211</sup> In Apple's iPhone Buyer Survey  
 3 conducted during the third quarter of 2011, for iPhone buyers who considered Android  
 4 smartphones, Samsung was again listed among the Android smartphone brands the iPhone 3GS  
 5 and iPhone 4 buyers seriously considered.<sup>212</sup> Lastly, in Apple's May 2011 iPhone Owner study,  
 6 31% of the iPhone 3GS and iPhone 4 owners surveyed in the U.S. indicated that they considered  
 7 or seriously considered the Samsung-branded phones.<sup>213</sup>

8 113. Product reviews for some of the accused Samsung products compare those  
 9 products directly to Apple products. For example, in a review of the accused Samsung Vibrant  
 10 phone, the reviewer compared the Vibrant directly to the iPhone, in an article titled: "Samsung  
 11 Vibrant Looks Like an iPhone, Has Battery Life to Match."<sup>214</sup> Similarly, in another review, the  
 12 Galaxy S line of smartphone products was described as "a serious rival to Apple's iPhone."<sup>215</sup>  
 13 Another review states that the Samsung Galaxy S "[l]ooks like an iPhone" and notes that the  
 14 "Samsung Galaxy S and iPhone 3G/3GS could very easily have been separated at birth."<sup>216</sup>

15 114. Samsung's internal market research similarly considers the mobile phone products  
 16 of the two companies as competitors. For instance, a market research study conducted or  
 17 commissioned by Samsung includes both Apple and Samsung in its results for unaided brand  
 18 awareness and brand purchase intent for mobile phones.<sup>217</sup>

19 <sup>211</sup> APLNDC-Y0000027341-27422 at APLNDC-Y0000027343, APLNDC-  
 20 Y0000027353; APLNDC-Y0000027423-27505 at APLNDC-Y0000027425, APLNDC-  
 Y0000027436.

21 <sup>212</sup> APLNDC-Y0000027506-27599 at APLNDC-Y0000027508, APLNDC-  
 22 Y0000027519.

23 <sup>213</sup> APLNDC-Y0000025024-25147 at APLNDC-Y0000025128. Note that only  
 individuals who purchased the phones themselves are included in the sample.

24 <sup>214</sup> See, e.g., "Samsung Vibrant Looks Like an iPhone, Has Battery Life to Match,"  
*Wired*, August 16, 2010 ([http://www.wired.com/reviews/2010/08/pr\\_samsung\\_vibrant/](http://www.wired.com/reviews/2010/08/pr_samsung_vibrant/)).

25 <sup>215</sup> See, e.g., "A Galaxy S Sequel with Big-Screen Ambitions," *Wall St. Journal*,  
 September 22, 2011; see also Joswiak Dep. 106:19-108:6.

26 <sup>216</sup> See, e.g., "Samsung Galaxy S Review," *Techradar.com*, July 20, 2011  
 (<http://www.techradar.com/reviews/phones/mobile-phones/samsung-galaxy-s-689293/review>)  
 27 (last visited March 20, 2012).

28 <sup>217</sup> See SAMNDCA00526887-526933 at SAMNDCA00526895, SAMNDCA00526899  
 (See Translations App'x).

1 115. Mr. Pendleton of Samsung stated that “Apple is one of one competitors” and that  
 2 Samsung competes with Apple, HTC, and Motorola in the smartphone market.<sup>218</sup> Mr. Pendleton  
 3 also said that “Apple is the competitor we obviously have our I [sic] on.”<sup>219</sup>

4 116. Moreover, documents created by Samsung in connection with the development of  
 5 the Galaxy line of smartphones indicate that Samsung viewed its smartphone products as direct  
 6 competitors to the iPhone. In addition to the gravitytank analysis, McKinsey & Company report,  
 7 and executive e-mails mentioned above, I have seen a number of documents where Samsung’s  
 8 designers appear to have focused intensely on the iPhone design, to the point that they analyzed  
 9 each icon on the iPhone individually, and made specific recommendations for modifications of  
 10 Samsung’s icons and graphical user interface.<sup>220</sup> It seems clear that Samsung’s own engineers  
 11 and designers viewed the iPhone as the competition.

12 *Sleekcraft* Factor 3: Similarity of the trade dress

13 117. Apple’s iPhone products and the Samsung Galaxy line of smartphones look  
 14 strikingly similar. A side-by-side comparison of the images of the iPhone and Galaxy S as shown  
 15 in the Amended Complaint demonstrates the similarity in the look and feel of these products.<sup>221</sup>

16 118. The survey evidence from the Van Liere Report illustrates the striking similarity  
 17 between the look of Samsung Galaxy line of smartphones and that of the iPhone. Over half of  
 18 respondents (52%) who were shown pictures of a Samsung Galaxy Fascinate phone associated  
 19 the look and design of the Samsung Galaxy Fascinate with an iPhone, or a phone or product  
 20 manufactured by Apple. When the same test was carried out with a Samsung Galaxy S II Epic  
 21 4G Touch phone, over half respondents (51%) also associated the look and design of the  
 22 Samsung Galaxy S II Epic 4G Touch phone with an iPhone, or a phone or product manufactured  
 23 by Apple. As with the Poret Report, Dr. Van Liere also tested a “control” device to determine  
 24 whether it would be associated with Apple. A much smaller percentage of respondents associated  
 25

26 <sup>218</sup> Pendleton Rough Dep. Tr. 34-35.

27 <sup>219</sup> *Id.*

28 <sup>220</sup> See *infra* discussion and notes ¶¶ 132-138.

<sup>221</sup> Amended Complaint ¶¶ 94-95.

1 the control device with Apple. Specifically, 14% of respondents associated the control  
2 smartphone with Apple.<sup>222</sup>

3 119. The similarities between the two product lines are so apparent that they have been  
4 noted by industry observers. When the Galaxy phone was introduced for the first time, many  
5 reviewers discussed the fact that the product was physically very similar to the iPhone. Exhibit 7  
6 includes a sample of such quotes.

7 120. For example, an article from *Wired* noted how much the Galaxy S Vibrant phone  
8 looks like the iPhone:

9 Samsung's latest phone, the Vibrant, has the body of an iPhone and the  
10 brains of an Android. The Vibrant's industrial design *is shockingly*  
11 *similar* to the iPhone 3G: The rounded curves at the corners, the  
12 candybar shape, the glossy, black finish and the chrome-colored  
13 metallic border around the display. The Vibrant even has its volume  
14 and ringer buttons in almost the same spot as the iPhone 3G. ... [T]he  
square icons are, again, very similar in their looks to the iPhone 3G's.  
... [T]here's little to make the phone notable, apart from its striking  
similarity to the iPhone.<sup>223</sup>

15 121. Another reviewer noted how even the icons used in the Samsung Galaxy S  
16 resemble those of the iPhone: "When I saw pictures of the Galaxy S phones from Samsung, I  
17 thought I'd found the perfect successor for shifting off the iPhone. Here was an [sic] phone that  
18 had iPhone-like icons, an iPhone-like look but which would work on networks other than  
19 AT&T."<sup>224</sup>

20 *Sleekcraft* Factor 4: Evidence of actual confusion

21 122. As noted above, the survey evidence from the Van Liere Report indicates that over  
22 half of respondents who were shown pictures of a Samsung Galaxy Fascinate phone or a  
23 Samsung Galaxy S II Epic 4G Touch phone associated the look and design of those phones with

24 \_\_\_\_\_  
25 <sup>222</sup> Van Liere Report at 4-5, 17.

26 <sup>223</sup> "First Look: Samsung Vibrant Rips Off iPhone 3G Design," *Wired*, July 15, 2010  
(<http://www.wired.com/gadgetlab/2010/07/first-look-samsung-vibrant-rips-off-iphone-3g-design/>) (emphasis added).

27 <sup>224</sup> "A Tale of Three Android Phones: Droid 2, Samsung Fascinate & Google Nexus S,"  
28 *Search Engine Land*, January 3, 2011 (<http://searchengineland.com/a-tale-of-three-android-phones-droid-2-samsung-fascinate-google-nexus-s-59870>).

1 an iPhone, or a phone or product manufactured by Apple.<sup>225</sup> I believe that this type of  
 2 association between the Samsung products and Apple demonstrates that consumers may actually  
 3 be confused by the look and feel of Samsung's phones.

4 *Sleekcraft* Factor 5: Marketing channels used

5 123. Samsung's Galaxy line of smartphone products is marketed and sold in the same  
 6 channels as Apple's iPhone products. In fact, Apple's iPhone products are sold side-by-side with  
 7 the Samsung Galaxy products in many retail situations. Samsung's Galaxy smartphones are  
 8 available at cellular phone carriers AT&T, Verizon Wireless, and Sprint.<sup>226</sup> Apple's iPhone is  
 9 also available at AT&T, Verizon Wireless, and Sprint.<sup>227</sup> I personally visited an AT&T store in  
 10 Manhattan where the iPhones and Samsung Galaxy smartphones were displayed in close  
 11 proximity, facilitating direct side-by-side comparisons.<sup>228</sup> In addition, Apple and Samsung

12  
 13 <sup>225</sup> Van Lier Report at 4-5, 17.

14 <sup>226</sup> See, e.g., <http://www.samsung.com/us/mobile/at-t> (AT&T); "AT&T and Samsung  
 15 Mobile Announce Upcoming Availability of the Samsung Captivate, A Galaxy S  
 16 Smartphone," *Samsung Press Release*, June 17, 2010  
 17 ([http://www.samsung.com/us/news/presskitRead.do?page=1&news\\_seq=19570&rdoPeriod=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19570&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Samsung+Mobile+Announce+Upcoming+Availability+of+the+Samsung+Captivate)  
 18 [ALL&from\\_dt=&to\\_dt=&news\\_group=ALL&news\\_type=&news\\_ctgry=&search\\_keyword=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19570&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Samsung+Mobile+Announce+Upcoming+Availability+of+the+Samsung+Captivate)  
 19 [Samsung+Mobile+Announce+Upcoming+Availability+of+the+Samsung+Captivate](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19570&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Samsung+Mobile+Announce+Upcoming+Availability+of+the+Samsung+Captivate));  
 20 "Samsung Captivate," *PhoneArena.com*, July 18, 2010  
 21 ([http://www.phonearena.com/phones/Samsung-Captivate\\_id4676](http://www.phonearena.com/phones/Samsung-Captivate_id4676));  
 22 <http://www.samsung.com/us/mobile/verizon-wireless> (Verizon); ). "Samsung Fascinate, A  
 23 Galaxy S Smartphone, Available on the Verizon Wireless Network," *Samsung Press Release*,  
 No Date  
 24 ([http://www.samsung.com/us/news/presskitRead.do?page=1&news\\_seq=19541&rdoPeriod=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19541&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=fascinate)  
 25 [ALL&from\\_dt=&to\\_dt=&news\\_group=ALL&news\\_type=&news\\_ctgry=&search\\_keyword=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19541&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=fascinate)  
 26 [fascinate](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19541&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=fascinate)); Samsung website showing phones available on Sprint, available at  
 27 <http://www.samsung.com/us/mobile/sprint> (Sprint). The websites for the carriers show both  
 28 Apple's iPhone products and Samsung's Galaxy products available for purchase. See, e.g.,  
<http://www.att.com/shop/wireless> (AT&T); <http://www.sprint.com> (Sprint);  
<http://www.verizonwireless.com> (Verizon).

24 <sup>227</sup> See, e.g., "Apple Launches iPhone 4S, iOS 5 & iCloud," *Apple Inc. Press Release*,  
 25 October 4, 2011, [http://www.apple.com/pr/library/2011/10/04Apple-Launches-iPhone-4S-](http://www.apple.com/pr/library/2011/10/04Apple-Launches-iPhone-4S-iOS-5-iCloud.html)  
 26 [iOS-5-iCloud.html](http://www.apple.com/pr/library/2011/10/04Apple-Launches-iPhone-4S-iOS-5-iCloud.html); "Verizon Wireless & Apple Team Up to Deliver iPhone 4 on Verizon,"  
 27 *Apple Inc. Press Release*, January 11, 2011,  
 28 [http://www.apple.com/pr/library/2011/01/11Verizon-Wireless-Apple-Team-Up-to-Deliver-](http://www.apple.com/pr/library/2011/01/11Verizon-Wireless-Apple-Team-Up-to-Deliver-iPhone-4-on-Verizon.html)  
[iPhone-4-on-Verizon.html](http://www.apple.com/pr/library/2011/01/11Verizon-Wireless-Apple-Team-Up-to-Deliver-iPhone-4-on-Verizon.html); Apple Store iPhone 4S, available at  
[http://store.apple.com/us/browse/home/shop\\_iphone/family/iphone](http://store.apple.com/us/browse/home/shop_iphone/family/iphone).

<sup>228</sup> The iPhone 4S and Samsung Galaxy Note were less than 2 feet apart, whereas the  
 iPhone 4S and the Samsung Galaxy Skyrocket were approximately three feet apart.

1 products can often be displayed side-by-side on the carriers' websites.<sup>229</sup> In-store retailers, such  
 2 as Best Buy, Target, and Walmart, often group together all of their smartphone products,  
 3 including Apple iPhone products and Samsung Galaxy products. Online retailers, such as  
 4 Amazon as well as Best Buy, Radioshack, and Walmart, also feature Samsung's Galaxy line of  
 5 smartphones and Apple's iPhone products.<sup>230</sup>

6 124. Samsung's Galaxy line of smartphones products and Apple's iPhone products are  
 7 also advertised and marketed through similar media. In 2011, Samsung launched a \$67.1 million  
 8 advertising campaign for its Galaxy S II that included online, print newspaper, and television  
 9 advertising components.<sup>231</sup> These various media began reaching consumer audiences in  
 10 February, June, and September 2011, respectively.<sup>232</sup> Of the \$67.1 million spent on the  
 11 campaign, Samsung allocated \$64.5 million toward television commercials airing on a diverse set  
 12 of networks, including ABC Family, Fox, BET, Comedy Central, and TBS.<sup>233</sup> Although a  
 13 competitive analysis describes Samsung's campaign as "targeting everyone," Samsung elected to  
 14 air many of its commercials on many of the same shows as Apple.<sup>234</sup> During the months of  
 15 October, November, and December, Apple and Samsung both featured advertisements for their  
 16

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17 <sup>229</sup> See, e.g., APLNDC0003039043-3039044 at APLNDC0003039043 (AT&T);  
 18 APLNDC0003039085-3039114 at APLNDC0003039085-3039088 (AT&T);  
 19 APLNDC0003039440-3039441 at APLNDC0003039441 (Verizon).

20 <sup>230</sup> See, e.g., APLNDC0003039036-3039037 at APLNDC0003039036 (Amazon);  
 21 APLNDC0003038959-3038964 at APLNDC0003038974 (Amazon), APLNDC0003038974-  
 22 3038981 (Amazon), APLNDC0003039014-3039016 at APLNDC0003039014-3039016  
 23 (Amazon); APLNDC0003039165-3039167 at APLNDC0003039165 (Best Buy);  
 24 APLNDC0003039118-3039119 at APLNDC0003039118 (Best Buy); APLNDC0003039128-  
 25 3039138 at APLNDC0003039128 (Best Buy); APLNDC0003039149-3039164 at  
 26 APLNDC0003039149, APLNDC0003039151, APLNDC0003039152-53,  
 27 APLNDC0003039155, APLNDC0003039157-3039160, APLNDC0003039162 (Best Buy);  
 28 APLNDC0003039187-3039188 at APLNDC0003039187 (Radioshack);  
 APLNDC0003039191-3039192 at APLNDC0003039191 (Radioshack);  
 APLNDC0003039195-3039197 at APLNDC0003039195-3039197 (Radioshack); APLNDC-  
 Y0000151499-151504 at APLNDC-Y0000151499, APLNDC-Y0000151501 (Walmart);  
 APLNDC-Y0000151490-151491 at APLNDC-Y0000151490 (Walmart).

<sup>231</sup> OMD0000039-75 at OMD0000039, OMD0000046.

<sup>232</sup> OMD0000039-75 at OMD0000046.

<sup>233</sup> OMD0000039-75 at OMD0000046.

<sup>234</sup> OMD0000039-75 at OMD0000046.

1 respective smartphones on *CSI*, *Vampire Diaries*, *The Office*, and *Saturday Night Live*.<sup>235</sup> Not  
 2 only did Samsung's campaign include many of the same television audiences as Apple's iPhone  
 3 campaign, some of its television messages directly targeted the hype surrounding Apple's  
 4 device.<sup>236</sup> Some of the television commercials that aired during this time period specifically  
 5 questioned the brand loyalty of potential iPhone customers and suggested that the "*next big*  
 6 *thing*," Samsung's Galaxy S II, is already available.<sup>237</sup>

7 125. Mr. Pendleton, Samsung's Chief Marketing Officer for wireless, stated that  
 8 Samsung runs national campaigns for its smartphone and tablet products.<sup>238</sup>

9 *Sleekcraft* Factor 6: Types of goods and the degree of care likely to be exercised  
 10 by the purchaser

11 126. The degree of care exercised by the purchaser is a function of several factors: the  
 12 price of the goods, the degree of sophistication of the consumers, and the purchase channel  
 13 involved (*e.g.*, web, carrier store, independent big-box retailer, aftermarket channels such as  
 14 eBay, etc.).

15 127. While some of the iPhone models and Samsung Galaxy smartphones are relatively  
 16 expensive products in terms of retail price, like most smartphones, they generally are sold as part  
 17 of a contract with a wireless service provider such as Verizon, AT&T or Sprint.<sup>239</sup> The price a  
 18 consumer pays for a phone is heavily subsidized by the service provider. In some instances, the  
 19 products are free with a locked-in carrier contract commitment. For example, the iPhone 3GS,

20 <sup>235</sup> OMD0000039-75 at OMD0000046; APLNDC0002010255-2010279 at  
 21 APLNDC0002010265-2010267.

22 <sup>236</sup> OMD0000039-75 at OMD0000046.

23 <sup>237</sup> "The Next Big Thing - Samsung Galaxy S II (90 sec commercial)," uploaded by  
 24 samsungmobileusa on November 22, 2011, available at  
 25 <http://www.youtube.com/watch?v=X4VHzNEWIqA&feature=relmfu>.

26 <sup>238</sup> See, *e.g.*, Pendleton Rough Dep. Tr. 26-28, 32, 36-37.

27 <sup>239</sup> For example, see the discussion about low-end iPhones, their pricing, and wireless  
 28 service provider contracts in Schiller Dep. 366:6-367:12, and Joswiak Dep. 243:2-244:23. In  
 general, most mobile phones sold in the U.S. are sold as part of a contract with a wireless  
 service provider. In January 2011, *Consumer Reports* magazine reported that more than 90  
 percent of its survey respondents' phones were serviced under a contract. See "No-Contract  
 Options Multiply," *Consumer Reports*, January 2011  
 (<http://www.consumerreports.org/cro/magazine-archive/2011/january/electronics/best-cell-plans-and-providers/no-contract-cell-phones/index.htm>).



1 currently the low-end iPhone on the market, is available to AT&T customers signing up for a  
 2 two-year contract at no cost.<sup>240</sup> Therefore, there is wide variation with respect to the degree of  
 3 care vis-à-vis the price factor.

4 128. Smartphones are becoming ubiquitous and rapidly replacing older-generation  
 5 phones.<sup>241</sup> Therefore, there is also likely to be wide variation in the sophistication of consumers.  
 6 Some are likely to exercise great care while selecting a product, carefully examining the features  
 7 of the product, its technical performance, and so on. Others are likely to be more impulsive.  
 8 Similarly, consumers who are led to purchase by the Imitative Scenario described above are less  
 9 likely to exercise the same degree of care as a sophisticated consumer so long as the infringing  
 10 product approximates the look and feel of the original.

11 129. Lastly, and as discussed above, there is variation in the purchase channels, with  
 12 concomitant effects on the degree of care exercised in those channels. For example, a smartphone  
 13 buyer at a carrier store with attentive staff may have a more involved shopping experience than a  
 14 consumer under the Imitative Scenario who routinely buys products from a particular website  
 15 where smartphone offerings are displayed side-by-side or where a particular smartphone is being  
 16 promoted prominently.

17 130. In sum, while some consumers of smartphone products will be careful in their  
 18 purchasing decisions, perhaps even doing advance research or consulting with clerks in retail  
 19 stores about their choices, it cannot be said that all consumers, or even the majority of consumers,  
 20 will take the same amount of care in their purchasing decisions. This is particularly true for  
 21 products that are given away for free or at low cost with a carrier contract, and products that are  
 22 sold online or through mass market retailers like Target and Walmart.

23 *Sleekcraft* Factor 7: Defendant's intent in selecting the trade dress

24  
 25 <sup>240</sup> Joswiak Dep. 243:2-244:23.

26 <sup>241</sup> The NPD Group, a leading market research company, reported that the share of U.S.  
 27 mobile phone handset sales that were smartphones reached 59 percent in the third quarter of  
 28 2011, an increase of 13 percentage points since the third quarter of 2010. "As Smartphone  
 Prices Fall, Retailers Are Leaving Money on the Table," *NPD Group*, November 14, 2011  
 ([https://www.npd.com/wps/portal/npd/us/news/pressreleases/pr\\_111114a](https://www.npd.com/wps/portal/npd/us/news/pressreleases/pr_111114a)).

131. Samsung could not have been unaware of the iPhone Trade Dress and the iPhone 3G Trade Dress before its introduction of the Galaxy line of smartphones in the U.S. and it appears to have consciously adopted elements of Apple's trade dress. In January 2007, Apple unveiled its iPhone and made it available for purchase in June 2007.<sup>242</sup> In June 2008, Apple introduced the iPhone 3G, and made it available for purchase in July 2008.<sup>243</sup> Apple introduced and released for purchase the iPhone 3GS in June of 2009.<sup>244</sup> Finally, in June 2010, Apple announced and made available the iPhone 4 for purchase.<sup>245</sup> As discussed above, each iPhone product was extensively covered in the media, and reviewed by prominent publications both online and in print. Samsung did not unveil its Galaxy S line of phones until March 2010.<sup>246</sup> The first version of the phone for the U.S. market was announced in June 2010 and made available for purchase in July 2010.<sup>247</sup>

132. The look and feel of Samsung's phones was unlike the iPhone until the release of the Galaxy line of smartphones. Early Samsung smartphones almost always featured a keypad. For instance, the early Samsung MM-A800, released in May 2005, featured a sliding design which included a front display screen with navigation controls; releasing the front revealed the "ample keypad."<sup>248</sup> The Samsung SCH-i730, released in July 2005, featured an innovative touch

<sup>242</sup> "Apple Reinvents the Phone with iPhone," *Apple Inc. Press Release*, January 9, 2007 (<http://www.apple.com/pr/library/2007/01/09Apple-Reinvents-the-Phone-with-iPhone.html>).

<sup>243</sup> "Apple Introduces the New iPhone 3G," *Apple Inc. Press Release*, June 9, 2008 (<http://www.apple.com/pr/library/2008/06/09Apple-Introduces-the-New-iPhone-3G.html>).

<sup>244</sup> "Apple Announces the New iPhone 3GS—The Fastest, Most Powerful iPhone Yet," *Apple Inc. Press Release*, June 8, 2009 (<http://www.apple.com/pr/library/2009/06/08Apple-Announces-the-New-iPhone-3GS-The-Fastest-Most-Powerful-iPhone-Yet.html>).

<sup>245</sup> "Apple Presents iPhone 4," *Apple Inc. Press Release*, June 7, 2010 (<http://www.apple.com/pr/library/2010/06/07Apple-Presents-iPhone-4.html>).

<sup>246</sup> "Samsung Galaxy S Keynote & Samsung Mobile Unpacked at CTIA Wireless 2010," *Samsung Press Release*, March 31, 2010 ([http://www.samsung.com/us/news/newsRead.do?news\\_seq=18436&page=1](http://www.samsung.com/us/news/newsRead.do?news_seq=18436&page=1)).

<sup>247</sup> "AT&T and Samsung Mobile Announce Upcoming Availability of the Samsung Captivate, a Galaxy S Smartphone," *Samsung Press Release*, June 22, 2010 ([http://www.samsung.com/us/news/presskitRead.do?page=1&news\\_seq=19514&rdoPeriod=ALL&from\\_dt=&to\\_dt=&news\\_group=ALL&news\\_type=&news\\_ctgry=&search\\_keyword=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19514&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=);)); PhoneArena.com Samsung Captivate page, available at [http://www.phonearena.com/phones/Samsung-Captivate\\_id4676](http://www.phonearena.com/phones/Samsung-Captivate_id4676)).

<sup>248</sup> "Samsung MM-A800," *CNET News.com*, 2005 ([http://reviews.cnet.com/Samsung\\_MM-A800/4505-6454\\_7-31313308.html](http://reviews.cnet.com/Samsung_MM-A800/4505-6454_7-31313308.html)).

1 screen but, like the MM-A800, hid a keyboard behind the screen.<sup>249</sup> The popular BlackJack line  
 2 of smartphones also featured prominent keypads. The original BlackJack, released in 2006,  
 3 hosted a 2.25 inch screen, a variety of navigation keys including “two soft keys, a shortcut to the  
 4 Today screen, a back button, Talk and End keys, and a four-way directional toggle,” and a full  
 5 QWERTY keyboard.<sup>250</sup> A year later, the BlackJack II was released featuring a sleeker version of  
 6 the same appearance.<sup>251</sup> In April 2008, after the release of the iPhone but prior to the introduction  
 7 of the Galaxy line of phones, Samsung introduced the Access. The appearance, described as  
 8 “angular” and “ordinary,” included a large 2.25 inch display, a navigation array, a four-way  
 9 toggle, a keypad, as well as other navigation buttons.<sup>252</sup>

10 133. After the introduction of the iPhone, Samsung recognized that the iPhone set the  
 11 “industry standard.”<sup>253</sup> In an email to UX Executives, dated March 2, 2010, Sungsik Lee of  
 12 Samsung stated that “CEO Gee Sung Choi strongly criticized Samsung UX’s mindset of ‘clinging  
 13 to the past generation.’”<sup>254</sup> Lee further stated that “[t]his is being interpreted as an instruction to  
 14 think about and decide all matters from the perspective of the user. (Not suppliers or providers...) The  
 15 most representative example is obviously the iPhone.”<sup>255</sup> Sungsik Lee emphasized that  
 16 Samsung must “learn the wisdom of the iPhone” and “recognize that [Apple has] already set the

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19 <sup>249</sup> “Samsung SCH-i730,” *CNET News.com*, 2005 ([http://reviews.cnet.com/4505-6452\\_7-31313312.html](http://reviews.cnet.com/4505-6452_7-31313312.html)).

20 <sup>250</sup> “Samsung BlackJack SGH-i607,” *CNET News.com*, November 13, 2006  
 21 ([http://reviews.cnet.com/smartphones/samsung-blackjack-sgh-i607/4505-6452\\_7-32143267.html](http://reviews.cnet.com/smartphones/samsung-blackjack-sgh-i607/4505-6452_7-32143267.html)).

22 <sup>251</sup> “Samsung BlackJack II Review,” *CNET News.com*, December 6, 2007  
 23 ([http://reviews.cnet.com/smartphones/samsung-blackjack-ii-black/4505-6452\\_7-32717959.html](http://reviews.cnet.com/smartphones/samsung-blackjack-ii-black/4505-6452_7-32717959.html)).

24 <sup>252</sup> “Samsung Access SGH-A827,” *CNET News.com*, May 9, 2008  
 25 ([http://reviews.cnet.com/cell-phones/samsung-access-sgh-a827/4505-6454\\_7-32909896.html](http://reviews.cnet.com/cell-phones/samsung-access-sgh-a827/4505-6454_7-32909896.html)).

26 <sup>253</sup> E-mail from Sungsik Lee Re: To UX Executives..., March 2, 2010,  
 27 SAMNDCA10247549-10247552 (See Translations App’x).

28 <sup>254</sup> E-mail from Sungsik Lee Re: To UX Executives..., March 2, 2010,  
 SAMNDCA10247549-10247552 (See Translations App’x).

<sup>255</sup> E-mail from Sungsik Lee Re: To UX Executives..., March 2, 2010,  
 SAMNDCA10247549-10247552 (See Translations App’x).

1 industry standard . . . .”<sup>256</sup> In another email titled “Report on CEO’s Directives,” Samsung  
 2 employees were instructed that “[g]oing forward our comparison standard is Apple’s iPhone. In  
 3 cases of High End products we must evaluate them based on the iPhone standards . . . .”<sup>257</sup>

4 134. In an executive-level meeting held on February 10, 2010, the head of Mobile  
 5 Communications Division at Samsung stated that the “iPhone has become the standard” and  
 6 explained that when “both consumers and the industry” consider UX, a Samsung product, “they  
 7 weigh it against the iPhone.”<sup>258</sup> He further stated that when the UX is compared with the iPhone,  
 8 “it’s a difference between Heaven and Earth.”<sup>259</sup> At the same meeting, the division head  
 9 expressed concern that “[i]nfluential figures outside the company come across the iPhone, and  
 10 they point out that ‘Samsung is dozing off’” and advised the product designers at Samsung that  
 11 “[t]he look and feel of a product matters most.”<sup>260</sup>

12 135. Numerous Samsung internal documents indicate Samsung’s efforts to incorporate  
 13 certain features of the iPhone, including the iPhone Trade Dress and packaging, into its own  
 14 products. A Samsung document titled “Design Preference Study” noted that “American  
 15 consumers are influenced greatly by iPhone design” and that “[t]he rounded shape design has  
 16 been recognized as a [p]remium and better design due to the influence of the iPhone [s]eries in  
 17 the last three years.”<sup>261</sup> The study also noted that “[s]ince the iPhone was introduced, trendy  
 18 consumers have started to consider its angular and square shaped design as trendy . . . .”<sup>262</sup>

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19 <sup>256</sup> E-mail from Sungsik Lee Re: To UX Executives..., March 2, 2010,  
 20 SAMNDCA10247549-10247552 (*See* Translations App’x).

21 <sup>257</sup> Email from Won Cheol Chai Re: Report on CEO’s Directives, January 2, 2010,  
 22 SAMNDCA10907800-10907802 (*See* Translations App’x).

23 <sup>258</sup> E-mail from Eun Jung Ko Re: Summary of Executive-Level Meeting Supervised by  
 24 Head of Division, February 10, 2010, SAMNDCA10247373-10247378 (*See* Translations  
 25 App’x); E-mail from Sungsik Lee Re: To UX Executives, March 2, 2010,  
 26 SAMNDCA10247549-10247552 (*See* Translations App’x).

27 <sup>259</sup> E-mail from Eun Jung Ko Re: Summary of Executive-Level Meeting Supervised by  
 28 Head of Division, February 10, 2010, SAMNDCA10247373-10247378 (*See* Translations  
 App’x).

<sup>260</sup> E-mail from Eun Jung Ko Re: Summary of Executive-Level Meeting Supervised by  
 Head of Division, February 10, 2010, SAMNDCA10247373-10247378 (*See* Translations  
 App’x).

<sup>261</sup> SAMNDCA00533129-533159 at SAMNDCA00533135 (*See* Translations App’x).

<sup>262</sup> SAMNDCA00533129-533159 at SAMNDCA00533135 (*See* Translations App’x).

Another Samsung internal document beginning with “instructions from the CEO” instructed Samsung employees to “improve UX, referring to iPhone 3GS,” because “[t]here is a big difference in letter size, font, and clarity compared to iPhone 3GS,” “[l]etter size is weird,” and the existing “[i]cons have too much space and are strange.”<sup>263</sup> Similarly, an email, dated March 17, 2010, instructed Samsung employees to “[p]roceed with iPhone/Droid type” for packaging.<sup>264</sup> In another internal email, dated May 5, 2010, Cheol Hwan Lee, Executive Vice President of Development (Mobile), instructed his colleagues to:

Take each of the products that have been released [including iPhone 3GS, iPhone 4, and iPad] and are expected to be released by Apple compare them with our company’s anticipated products, and perform a concrete study of each on their component differences, specification differences, as well as performance, characteristics, and functions for each part (for example, LCD, memory, design, etc.), then formulate response plans, and report back.<sup>265</sup>

136. In addition, several Samsung presentations compare the Samsung products and the iPhone and indicate improvements to the former drawn directly from that comparison. For example, in a side-by-side comparison of the iPhone and S1 (a Samsung product), a product engineering team at Samsung stated that the “Graphical UI [user interface] of the menu icons are monotonous,” and that the iPhone “maximizes a 3 dimensional effect utilizing light and the curve of icon frames is smooth.”<sup>266</sup> The engineering team proposed that, in order to improve their product, they also must make use of “effects of light” and “make the edge curve more smooth,” but that they should “[r]emove a feeling that iPhone’s menu icons are copied by differentiating design.”<sup>267</sup> Another example is a Samsung presentation discussing recommendations to improve the Galaxy S product line based on the direct comparison of Galaxy S devices with competing smartphones, including the iPhone 4.<sup>268</sup>

<sup>263</sup> SAMNDCA10249770-10249776 at SAMNDCA10249770 (*See* Translations App’x).

<sup>264</sup> E-mail from Kim Ah-young Re: October 3/17 Report Result, March 17, 2010, SAMNDCA00507826-507827 (*See* Translations App’x).

<sup>265</sup> E-mail from Taemoon Roh Re: Regarding Apple Comparison, May 9, 2010, SAMNDCA10911088-10911093 (*See* Translations App’x).

<sup>266</sup> SAMNDCA00203880-204010 at SAMNDCA00204010 (*See* Translations App’x).

<sup>267</sup> SAMNDCA00203880-204010 at SAMNDCA00204010 (*See* Translations App’x).

<sup>268</sup> SAMNDCA00238432-238443.

137. Moreover, in Samsung's Competitor Analysis presentations, the iPhone is described as "a delight to the eye as well as a highly usable device."<sup>269</sup> These presentations contain Samsung's comparison of "design and layout" features (such as main menu icons, main menu layout, list screen layout, secondary icons, music screens, and browser look) on its phones sold before the introduction of the Galaxy S product line, with those of its competitors, including the iPhone.<sup>270</sup> The following iPhone features were included: "[b]ottom docking area of four icons suggests that these are the most used/important apps or features;" "[b]lack background helps colourful icons stand out;" "[i]cons are all-rounded-corner square elements which include a cartoon image or icon;" and "[u]se of multiple colours suggests a fairly open colour palette."<sup>271</sup>

138. Therefore, these internal Samsung documents show that the iPhone was held out as the aspirational model to Samsung designers and engineers, and that Samsung designers and engineers had an incentive to copy the iPhone trade dress.

*Sleekcraft* Factor 8: Likelihood of expansion of the product lines

139. Because Apple and Samsung products already compete in the smartphone market, *Sleekcraft* Factor 8 is not informative for the purposes of my analysis.

**B. Analysis of *Sleekcraft* Factors—iPad Trade Dress**

*Sleekcraft* Factor 1: Strength of the trade dress

140. Apple's iPad Trade Dress is inherently distinctive. The tablet computers that existed before the iPad had very dissimilar look and feel.<sup>272</sup> Apple created a look and feel in its iPad products that was completely different—commentators have said that Apple created a

<sup>269</sup> SAMNDCA00228887-228933 at SAMNDCA00228894.

<sup>270</sup> SAMNDCA00228887-228933; SAMNDCA00228934-228980; SAMNDCA00229011-229108.

<sup>271</sup> SAMNDCA00228934-228980 at SAMNDCA00228952, SAMNDCA00228969.

<sup>272</sup> "Tablet PC Brings the Simplicity of Pen and Paper to Computing," *Microsoft Press Release*, November 13, 2000 (<http://www.microsoft.com/presspass/features/2000/nov00/11-13tabletpc.msp>); "HP Compaq Tablet PC TC1000 Review," *CNET Reviews*, November 5, 2002 ([http://reviews.cnet.com/laptops/hp-compaq-tablet-pc/4505-3121\\_7-20627295.html#reviewPage1](http://reviews.cnet.com/laptops/hp-compaq-tablet-pc/4505-3121_7-20627295.html#reviewPage1)); "Lenovo ThinkPad X61 Tablet PC Review," *TabletPCReview.com*, June 12, 2007 (<http://www.tabletpcreview.com/default.asp?newsID=868>); *see also supra* discussion in ¶ 162-163.



category with the iPad.<sup>273</sup> According to Samsung's own internal market research, when a sample of consumers was asked to provide reasons for purchasing an iPad in a survey without any aid, 30% of those considering a Galaxy Tab said "iPad is category leader" as one of the top reasons.<sup>274</sup>

141. As noted above, consumers form brand associations through: (1) their exposure to Apple's marketing activities which prominently feature the iPad products, (2) their exposure to the iPad products via non-Apple sources, such as product reviews, press coverage, and product placements in popular media; and (3) their own experiences with iPad's look and feel, or those of their family, friends, neighbors, or colleagues. Consumers had extensive exposure to the iPad product before the launch of Samsung's first accused tablet device in November 2010.<sup>275</sup>

142. By the end of Apple's fiscal year 2010, Apple had already invested \$149.5 million in advertising the iPad.<sup>276</sup> By the end of Apple's fiscal year 2011, Apple had spent approximately \$457 million on advertising the iPad.<sup>277</sup> Moreover, the iPad had been featured in various national magazine and newspaper articles, including articles in *The New York Times*, *The Wall Street Journal*, *Chicago Tribune*, *The Washington Post*, *USA Today*, *Mercury News*, *Los Angeles Times*, and *Time*, including many front page articles and cover articles, such as stories in *The Economist* and *Newsweek*.<sup>278</sup> Furthermore, the iPad has been featured in a wide variety of national television programs and movies, including *Modern Family*, to name just one.<sup>279</sup>

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<sup>273</sup> See, e.g., "Verdict Is in on Apple iPad: It's a Winner," *USA Today*, April 2, 2010 ([http://www.usatoday.com/tech/columnist/edwardbaig/2010-03-31-apple-ipad-review\\_N.htm](http://www.usatoday.com/tech/columnist/edwardbaig/2010-03-31-apple-ipad-review_N.htm)); "Laptop Killer? Pretty Close," *Wall St. Journal*, April 1, 2010 (<http://online.wsj.com/article/SB10001424052702304252704575155982711410678.html>); "Looking at the iPad From Two Angles," *N.Y. Times*, March 31, 2010 (<http://www.nytimes.com/2010/04/01/technology/personaltech/01pogue.html>); "As New iPad Debut Nears, Some See Decline of PCs," *N.Y. Times*, March 5, 2012 (<http://www.nytimes.com/2012/03/06/technology/as-new-ipad-debut-nears-some-see-decline-of-pcs.html>).

<sup>274</sup> See SAMNDCA00526887-526933 at SAMNDCA00526918 (See Translations App'x).

<sup>275</sup> See ¶ 161 for a discussion of a timeline of product announcements and introductions relevant to Apple and Samsung tablet computers.

<sup>276</sup> See APLNDC-Y0000051623.

<sup>277</sup> See APLNDC-Y0000051623.

<sup>278</sup> See *supra* ¶¶ 67-69.

<sup>279</sup> See Lindbergh Dep. 59:6-60:5.

143. In addition, as explained above, the iPad is a mobile device used in public locations. For instance, according to an iPad Buying Process survey conducted by Apple, 71% (76%) of the iPad buyers who purchased their iPad at a Best Buy (Apple Retail Store) used or intended to use their iPads at a hotel or airport when traveling; 62% (66%) of the iPad buyers who purchased their iPad at a Best Buy (Apple Retail Store) used or intended to use their iPads at public facilities such as a library; 48% (53%) of the iPad buyers who purchased their iPad at a Best Buy (Apple Retail Store) used or intended to use their iPads at the office; and 38% (41%) of the iPad buyers who purchased their iPad at a Best Buy (Apple Retail Store) used or intended to use their iPads in public outdoor places such as a park.<sup>280</sup> As a result, Apple's sales of iPad devices contribute to brand associations formed by consumers. Another iPad Buyer Survey also provided consistent results with 79% of the iPad buyers using or intending to use their iPads at a hotel or airport when traveling, 62% at public facilities, 44% at the office, and 43% at outdoor public spaces.<sup>281</sup> Before the launch of the first accused Galaxy Tab in November 2010, Apple had sold over 4.3 million iPad tablets in the U.S.<sup>282</sup> By the end of June 2011, Apple had sold approximately 14.1 million iPads in the U.S.<sup>283</sup> As mentioned above in connection with the iPhone, this type of public use serves as another—very effective—means of promotion for the iPad.

144. As with the iPhone, surveys conducted in June/July 2011 show that the distinctive look of the iPad had become widely associated with Apple prior to November 2010, the time at which Samsung released the first of its accused tablets. 57.3% of respondents who were shown a head-on image of a disguised iPad—with blurred icons and the “home” button covered with a sticker—still identified it with Apple, iPad, or similar Apple-related product name. Similarly,

<sup>280</sup> See APL-ITC796-0000489304-489435 at APL-ITC796-0000489396. Individuals surveyed purchased their iPads after the launch of the product and through April, 14, 2010. The presentation is dated May 2010. See APL-ITC796-0000489304-489435 at APL-ITC796-0000489305-489306. Numbers in parentheses represent the breakdown for survey respondents who purchased their iPads at an Apple Retail Store.

<sup>281</sup> See APLNDC0001651734-1651806 at APLNDC0001651776. The presentation is dated August 2010. See APLNDC0001651734-1651806 at APLNDC0001651735.

<sup>282</sup> APLNDC-Y00000051599-605, at APLNDC-Y00000051600.

<sup>283</sup> APLNDC-Y00000051599-605, at APLNDC-Y00000051600.

1 75.2% of respondents who were shown an angled view of an iPad, with or without blurred icons,  
 2 identified it with Apple or Apple products.<sup>284</sup> A significantly smaller percentage of respondents  
 3 who were shown a “control” tablet (with and without similar blurring) identified it with Apple or  
 4 Apple products. Specifically, 17% of the respondent shown a head-on image of the control tablet  
 5 identified it with Apple, iPad, or a similar Apple related product name, as did 10.8% of  
 6 respondents who saw an angled view of the control tablet.

7 145. The strength of the trade dress has also been recognized by Samsung’s executives.  
 8 Internal Samsung documents show that Samsung’s executives viewed the iPad as the industry  
 9 standard in tablet computers.<sup>285</sup> I discuss below how Samsung compared its tablets to the iPad,  
 10 and how improvements to the Samsung’s products were drawn directly from that comparison.<sup>286</sup>

11 146. In my opinion, there can be no question that after the iPad launch and before the  
 12 introduction of the first of the accused Samsung Galaxy Tab products in late 2010 (and before the  
 13 introduction of the Galaxy Tab 10.1 in June 2011), the look and feel of the iPad trade dress was  
 14 distinctively “Apple.” As with the iPhone and the iPod touch, the iPad had, by that point, become  
 15 one of the most recognizable products in the U.S. given Apple’s carefully placed advertisements  
 16 and extensive brand activity.

17 *Sleekcraft* Factor 2: Proximity of the goods

18 147. Apple’s iPad and iPad 2 products and Samsung’s Galaxy line of tablet computers  
 19 are similar in use and in function and directly compete with one another for market share. The  
 20 relevant products are marketed to the same segments of the population who are prospective  
 21 (actual, for repeat purchasers) buyers of tablet computers.

22 148. Internal market research conducted by Samsung and Apple also shows that the  
 23 tablet computer products of the two companies generally compete with each other. For instance,

24 \_\_\_\_\_  
 25 <sup>284</sup> Poret Report at 22-25, 33-34, 46, 60-61, 64-68.

26 <sup>285</sup> For instance, minutes from a Samsung meeting indicate that “Apple has already set  
 27 the market price (WiFi \$499/3G \$629). We may differentiate but cannot go above [Apple’s]  
 price” and that the attendees realized that Samsung must “emphasize ... graphic [sic] to  
 compete with iPad 3.” See SAMNDCA10403697-10403698 at SAMNDCA10403697.

28 <sup>286</sup> SAMNDCA10244604-10244639 at SAMNDCA10244608; SAMNDCA00203268-  
 203420 at SAMNDCA00203401. See *infra* ¶¶ 164-165.

1 a draft of the U.S. Tablet Market Update presentation by Apple contains two pie charts depicting  
 2 market share of competitors in the U.S. tablet market based on IDC data in the first and second  
 3 quarters of 2011. Both Apple and Samsung are listed among competitors.<sup>287</sup>

4 149. In addition, Samsung's internal marketing research includes Apple as the main  
 5 competition for its Galaxy line of tablet computers. For instance, a Samsung market research  
 6 document entitled *Samsung Q4 '10 Deep Dive* has a section entitled "How Does the Galaxy Tab  
 7 Compare to the iPad?"<sup>288</sup>

8 150. Samsung's executives have acknowledged that the iPad and the Galaxy Tab 10.1  
 9 compete head-to-head. After the March 2011 product announcement for the iPad 2, Don-Joo Lee,  
 10 the Executive Vice President of Samsung's mobile division, was quoted as saying that Samsung  
 11 would have "to improve the parts [of the forthcoming Galaxy Tab 10.1] that are inadequate,"  
 12 further noting that "Apple made [the iPad 2] very thin."<sup>289</sup>

13 151. Thus, the Samsung products are perceived as directly competing.<sup>290</sup> For instance,  
 14 *The Wall Street Journal* refers to the products as competitors, noting that "Apple's hot-selling  
 15 iPad now has its first credible *competitor* in the nascent market for multitouch consumer tablet  
 16 computers: the Samsung Galaxy Tab."<sup>291</sup> This is also evident from the comparison of the Apple

18 <sup>287</sup> APLNDC0001430158-1430196 at APLNDC0001430167; APLNDC0001430175.

19 <sup>288</sup> See SAMNDCA00526887-526933 at SAMNDCA00526914-526923 (See  
 Translations App'x).

20 <sup>289</sup> "Samsung Considers Galaxy Tab 10.1 Overhaul Following iPad 2 Unveiling," *Boy*  
*Genius Review*, March 4, 2011; see also "iPad 2 Sends Galaxy Tab Back to the Drawing  
 21 Board," *NBCBayArea.com*, May 5, 2011.

22 <sup>290</sup> See, e.g., "It's a Tablet. It's Gorgeous. It's Costly.," *N.Y. Times*, November 10,  
 2010 (<http://www.nytimes.com/2010/11/11/technology/personaltech/11pogue.html>);  
 23 "Samsung's Galaxy Tab Is iPad's First Real Rival," *Wall St. Journal*, November 11, 2010  
 (<http://online.wsj.com/article/SB10001424052748703805004575606580224319038.html>);  
 24 "Appeal of iPad 2 Is a Matter of Emotions," *N.Y. Times*, March 9, 2011  
 (<http://www.nytimes.com/2011/03/10/technology/personaltech/10pogue.html>); "A Slender  
 25 Tablet with Widescreen Ambitions," *Wall St. Journal*, June 15, 2011  
 (<http://allthingsd.com/20110614/a-slender-tablet-with-widescreen-ambitions/>); see also  
 26 Deposition of Michael Tchao ("Tchao Dep.") on February 21, 2012, 158:8-20.

27 <sup>291</sup> "Samsung's Galaxy Tab Is iPad's First Real Rival," *Wall St. Journal*, November 11,  
 2010  
 28 (<http://online.wsj.com/article/SB10001424052748703805004575606580224319038.html>)  
 (emphasis added).

products and Samsung products in product reviews. A product review called the products “rivals,” noting that “the iPad 2 actually costs less than its comparably equipped Android rivals, like the Xoom and the Samsung Galaxy Tab.”<sup>292</sup> Referring to Samsung’s Galaxy Tab as a “viable alternative” to the iPad, a product review attempts to answer its own question of “how do the Samsung Galaxy Tab 10.1 and iPad 2 really differ?”<sup>293</sup> A review in *The New York Times* sets forth a number of comparisons.<sup>294</sup>

*Sleekcraft* Factor 3: Similarity of the trade dress

152. Apple’s iPad and iPad 2 products and the Samsung Galaxy line of tablet computers look strikingly similar. A side-by-side comparison of the images of the Apple and Samsung tablets shown in the Amended Complaint demonstrates the similarity in the look and feel of these products.<sup>295</sup>

153. As in the case of the iPhone, the survey evidence from the Van Liere Report illustrates the similarity between the look of Samsung Galaxy 10.1 tablet and that of the iPad. When shown a video of a Samsung Galaxy 10.1 tablet, 43% of respondents indicated that the tablet was an iPad or Apple product.<sup>296</sup> On the other hand, only 24% of respondents indicated that the “control” tablet was an iPad or Apple product.

154. There is also some anecdotal evidence regarding consumers’ confusion between the Apple and Samsung tablets, illustrating the striking similarity between the Apple and Samsung tablets. For example, during his deposition, Sangeun Lee (“Mr. Lee”), head of Samsung’s North America quality issues within the Global CS Team, testified that Samsung received reports that “customers confuse the Galaxy Tab 10.1 for the iPad 2 when they purchase the Galaxy Tab 10.1.”<sup>297</sup> Similarly, a Samsung marketing presentation, dated February 2011,

<sup>292</sup> “Appeal of iPad 2 Is a Matter of Emotions,” *N.Y. Times*, March 9, 2011 (<http://www.nytimes.com/2011/03/10/technology/personaltech/10pogue.html>).

<sup>293</sup> “A Slender Tablet with Widescreen Ambitions,” *Wall St. Journal*, June 15, 2011 (<http://allthingsd.com/20110614/a-slender-tablet-with-widescreen-ambitions/>).

<sup>294</sup> “It’s a Tablet. It’s Gorgeous. It’s Costly.,” *N.Y. Times*, November 10, 2010 (<http://www.nytimes.com/2010/11/11/technology/personaltech/11pogue.html>).

<sup>295</sup> Amended Complaint ¶¶ 44, 94, 99, 101.

<sup>296</sup> Van Liere Report at 3, 9, 12.

<sup>297</sup> Deposition of Sangeun Lee on February 24, 2012 (“Lee Dep.”) 12:25-13:10.

1 stated that “[o]ver half of consumers who recognize the Samsung sponsored Tab TVC [TV  
 2 commercial] thought it was for Apple, while only 16% thought it was for Samsung.”<sup>298</sup> In  
 3 addition, during a court hearing, when asked by the judge if she could identify which tablet was  
 4 an iPad and which tablet was a Galaxy Tab, Samsung’s lead counsel, Kathleen Sullivan, said  
 5 “[n]ot at this distance your honor,’ . . . approximately 10 feet from the bench.”<sup>299</sup>

6 155. The similarities between the two product lines are so apparent that they have been  
 7 heavily noted by industry observers as well. When the Galaxy Tab tablet was introduced, many  
 8 reviewers discussed the fact that it was physically very similar to the iPad. Exhibit 8 contains a  
 9 sample of quotes from various sources. For example, *eWeek* noted that “if mimicry is flattery, the  
 10 Galaxy Tab has compliments galore for the iPad. . . . Looking like an unlikely offspring between  
 11 the iPad and the iPhone 4, the Tab has an iPad-like front fascia as well as a camera-equipped back  
 12 cover similar to the not-yet-released white iPhone. . . . Even the dock connector very closely  
 13 mimics Apple’s standard pinout.”<sup>300</sup> A *PC Magazine* review of the Galaxy Tab 10.1 stated that  
 14 “[m]ost laymen could easily mistake [the Galaxy Tab 10.1] for an iPad 2.”<sup>301</sup> A *PCWorld* article  
 15 stated that the products are so similar, it is hard to tell them apart: “In my hands-on testing, the  
 16 Tab 10.1 achieved perhaps the best design compliment an Android tablet could hope for—often  
 17 being mistaken by passers-by (including Apple iPad users) for an iPad 2. The confusion is  
 18 understandable when you see and hold the Tab 10.1 for the first time.”<sup>302</sup>

19 *Sleekcraft* Factor 4: Evidence of actual confusion

20 <sup>298</sup> SAMNDCA00526887-526933 at SAMNDCA00526893 (*See* Translations App’x).

21 <sup>299</sup> “US Judge: Samsung’s Products Infringe on Apple Design Patents,” *ArsTechnica*,  
 22 No Date (<http://arstechnica.com/apple/news/2011/10/samsung-may-face-us-injunction.ars>);  
 23 “Apple Must Show Patents Valid in Samsung Case: Judge,” *Reuters*, October 14, 2011  
 ([http://www.reuters.com/article/2011/10/14/us-apple-samsung-lawsuit-](http://www.reuters.com/article/2011/10/14/us-apple-samsung-lawsuit-idUSTRE79C79C20111014)  
 24 [idUSTRE79C79C20111014](http://www.reuters.com/article/2011/10/14/us-apple-samsung-lawsuit-idUSTRE79C79C20111014)).

25 <sup>300</sup> “Samsung Galaxy Tab Nods to Apple iPad but Goes Own Way: iFixit,” *eWeek*,  
 November 12, 2010.

26 <sup>301</sup> “Unboxing the Samsung Galaxy Tab 10.1; It Doesn’t Run Android 3.1 Yet, But the  
 New Samsung Tablet Gives the iPad 2 A Run for Its Money,” *PC Magazine*, May 10, 2011.

27 <sup>302</sup> “Samsung Galaxy Tab 10.1 Wi-Fi: A Worthy Rival to the iPad 2,” *PCWorld*, June 8,  
 28 2011  
 ([http://www.pcworld.com/article/229763/samsung\\_galaxy\\_tab\\_101\\_wifi\\_a\\_worthy\\_rival\\_to\\_](http://www.pcworld.com/article/229763/samsung_galaxy_tab_101_wifi_a_worthy_rival_to_the_ipad_2.html)  
[the\\_ipad\\_2.html](http://www.pcworld.com/article/229763/samsung_galaxy_tab_101_wifi_a_worthy_rival_to_the_ipad_2.html)).



156. As discussed above, the survey evidence from the Van Liere Report demonstrates consumers' confusion between Samsung's Galaxy Tab 10.1 and Apple's iPad products. Based on a post-sale confusion study, after netting out the respondents who indicated that the "control" tablet was an iPad or Apple product, Dr. Van Liere finds that almost 1 in 5 respondents, who were shown a video of a Samsung Galaxy 10.1 tablet, indicated that the tablet was an iPad or Apple product.<sup>303</sup> Before netting out the respondents who indicated that the "control" tablet was an iPad or an Apple product, Dr. Van Liere's survey results show that nearly 2 in 5 respondents who were shown a video of a Samsung Galaxy 10.1 tablet indicated that the tablet was an iPad or Apple product.

157. There is anecdotal evidence regarding consumers' confusion between Samsung's Galaxy Tab 10.1 and Apple's iPad 2. During his deposition, Mr. Lee testified that Samsung received reports that "customers confuse the Galaxy Tab 10.1 for the iPad 2 when they purchase the Galaxy Tab 10.1."<sup>304</sup> During a "Task Force" study conducted by his team, a Best Buy employee informed them that consumers confused the Galaxy Tab 10.1 and the iPad.<sup>305</sup> Mr. Lee stated that he was aware of reports discussing the fact that consumers returned the Galaxy Tab 10.1 in exchange for an iPad.<sup>306</sup> In summarizing a comment from another report, Mr. Lee testified, "[i]t says here the reason for purchasing P4 [Galaxy Tab 10.1] is—in many cases was because they thought it was the iPad. And most of them do not know well about the product they purchased..."<sup>307</sup> In addition, a Samsung marketing presentation, dated February 2011, states "[o]ver half of consumers who recognize the Samsung sponsored Tab TVC [TV commercial] thought it was for Apple, while only 16% thought it was for Samsung."<sup>308</sup>

*Sleekcraft* Factor 5: Marketing channels used

<sup>303</sup> Van Liere Report at 3, 9, 11.

<sup>304</sup> Deposition of Sangeun Lee on February 24, 2012 ("Lee Dep.") 12:25-13:10.

<sup>305</sup> Lee Dep. 18:4-19, 21:3-4, 33:22-35:23.

<sup>306</sup> Lee Dep. 36:5-12.

<sup>307</sup> Lee Dep. 47:24-48:2.

<sup>308</sup> SAMNDCA00526887-526933 at SAMNDCA00526893 (*See* Translations App'x).

158. Samsung's Galaxy tablet computer products and Apple's iPad products are sold side-by-side in many of the same retail situations. For instance, AT&T and Verizon Wireless both sell Apple's iPad products and Samsung's Galaxy Tab products.<sup>309</sup> I personally visited an AT&T store in Manhattan, where the brands were being displayed less than 3 feet apart. Each of these carriers also features the two product lines on their websites.<sup>310</sup> Similarly, retailers such as Best Buy feature both Samsung and Apple tablets in their stores. Online retailers, such as Amazon as well as Best Buy, Walmart, and Target, also offer both Apple's iPad products and Samsung's Galaxy Tab products on their websites.<sup>311</sup> Moreover, many of these websites allow side-by-side comparisons of the two companies' products.<sup>312</sup>

159. In January 2011, Samsung launched its second major advertising campaign for the Galaxy Tab.<sup>313</sup> Over the course of 2011, Samsung's Galaxy Tab and Galaxy Tab 10.1 campaigns were estimated to have spent \$90.1 million on television ads, \$14.7 million on print ads, and \$6.1

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<sup>309</sup> "AT&T to Expand Tablet Portfolio with Samsung Galaxy Tab," *Samsung Press Release*, September 16, 2010 ([http://www.samsung.com/us/news/newsPreviewRead.do?news\\_seq=19688](http://www.samsung.com/us/news/newsPreviewRead.do?news_seq=19688)); "Verizon Wireless Puts Samsung Galaxy Tab in Store in November," *Samsung Press Release*, No Date ([http://www.samsung.com/us/news/presskitRead.do?page=1&news\\_seq=19747&rdoPeriod=ALL&from\\_dt=&to\\_dt=&news\\_group=ALL&news\\_type=&news\\_ctgry=&search\\_keyword=Verizon+Wireless+Puts+Samsung+](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19747&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Verizon+Wireless+Puts+Samsung+)); "Apple Launches iPad," *Apple Inc. Press Release*, January 27, 2010 (<http://www.apple.com/pr/library/2010/01/27Apple-Launches-iPad.html>); "Apple Launches iPad 2," *Apple Inc. Press Release*, March 2, 2011 (<http://www.apple.com/pr/library/2011/03/02Apple-Launches-iPad-2.html>).

<sup>310</sup> See, e.g., APLNDC0003039047-3039048 at APLNDC0003039047 (AT&T); APLNDC0003039061- at APLNDC0003039061 (AT&T); APLNDC0003039447-3039449 at APLNDC0003039448 (Verizon).

<sup>311</sup> See, e.g., APLNDC0003038965-APLNDC0003038973 at APLNDC0003038965 (Amazon); APLNDC0003039005-APLNDC0003039007 at APLNDC0003039005 (Amazon); APLNDC0003039120-3039123 at APLNDC0003039120-3039123 (Best Buy); APLNDC0003039145-3039148 at APLNDC0003039145-3039147 (Best Buy); APLNDC0003039174-3039176 at APLNDC0003039174 (Best Buy); APLNDC0003039181-3039182 at APLNDC0003039181 (Radioshack); APLNDC0003039183-3039184 at APLNDC0003039183 (Radioshack); APLNDC0003039408-3039411 (Target); APLNDC0003039419-3039423 at APLNDC0003039419 (Target); APLNDC0003039426-APLNDC000303430 at APLNDC0003039429 (Target).

<sup>312</sup> See, e.g., APLNDC0003039174-3039176 at APLNDC0003039174 (Best Buy); APLNDC0003039434-3039436 at APLNDC0003039434.

<sup>313</sup> OMD0000004-10 at OMD0000007.

1 million on online advertisements.<sup>314</sup> As was the case with Samsung's Galaxy S II campaign,  
 2 Samsung targeted many of its tablet advertisements at the same media Apple used to advertise its  
 3 iPad.<sup>315</sup> For instance, during the month of January, both Apple and Samsung advertised their  
 4 tablet devices on *American Idol*, *The Late Late Show with Craig Ferguson*, *Two and a Half Men*,  
 5 and *Criminal Minds*.<sup>316</sup> Furthermore, throughout the year, Samsung selected many of the same  
 6 print media avenues used by Apple. For example, beginning in January 2011 and extending  
 7 through the end of the year, advertisements for the Galaxy Tab and Tab 10.1 appeared in *Sports*  
 8 *Illustrated*, *The Wall Street Journal*, *Rolling Stone*, *Time*, *Men's Health*, *The New York Times*,  
 9 and *Wired*.<sup>317</sup> Starting as early as January for newspaper media and March for magazine media,  
 10 Apple ran ads for competing products throughout the year in those same sources.<sup>318</sup>

11 *Sleekcraft* Factor 6: Types of goods and the degree of care likely to be exercised  
 12 by the purchaser

13 160. As with smartphones, the degree of care exercised by the purchaser is a function of  
 14 several factors: the price of the goods, the degree of sophistication of the consumers, and the  
 15 purchase channel involved (*e.g.*, web, carrier store, independent big-box retailer, aftermarket  
 16 channels such as eBay, etc.). Therefore, the same variances are at play here—the products are  
 17 bought by both careful consumers and not-so-careful consumers.<sup>319</sup>

18 *Sleekcraft* Factor 7: Defendant's intent in selecting the trade dress

20 <sup>314</sup> OMD0000004-10 at OMD0000007.

21 <sup>315</sup> Todd Pendleton, STA's Chief Marketing Officer for wireless, stated that Samsung  
 22 runs national campaigns for its smartphone and tablet products. *See, e.g.*, Pendleton Rough  
 Dep. Tr. 26-28, 32, 37-38.

23 <sup>316</sup> OMD0000004-10 at OMD0000007; APLNDC-X0000022178; APLNDC-  
 X0000022180; APLNDC-X0000022181.

24 <sup>317</sup> OMD0000004-10 at OMD0000007; APLNDC0001545034-1545040 at  
 APLNDC0001545036; APLNDC0002113085-2113091 at APLNDC0002113088.

25 <sup>318</sup> APLNDC-X0000037753-37780 at APLNDC-X0000037753-37755;  
 26 APLNDC0002034107-2034131 at APLNDC0002034120-2034121; APLNDC-  
 27 X0000048915-48924 at APLNDC-X0000048915-48916; APLNDC-X0000039288-39293 at  
 APLNDC-X0000039288-39290.

28 <sup>319</sup> There is some tempering of price variation because tablets generally do not sell at  
 heavily subsidized prices because of carrier contracts.

1           161. Like the Galaxy S line of phones, the Samsung Galaxy Tab products were  
 2 announced and introduced after Apple unveiled the iPad in January 2010.<sup>320</sup> Samsung's first  
 3 Android tablet, the Galaxy Tab, was unveiled in September 2010, and made available for  
 4 purchase in the U.S. in November 2010.<sup>321</sup> The iPad 2 was announced and released in March  
 5 2011, whereas the Galaxy Tab 10.1 was introduced in the U.S. in late March 2011, and made  
 6 available for sale in the U.S. in June 2011.<sup>322</sup>

7           162. Before the introduction of the iPad, no other tablet computer product in the market  
 8 looked like the iPad. For example, the Microsoft Tablet PC unveiled in 2000 did not have a flat  
 9 clear surface covering the front, under which was a display screen. One could use Microsoft  
 10 Tablet PC with a special stylus pen, but it was not a touch-sensitive device.<sup>323</sup> Compaq

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12           <sup>320</sup> "Apple Launches iPad," *Apple Inc. Press Release*, January 27, 2010  
 13 (<http://www.apple.com/pr/library/2010/01/27Apple-Launches-iPad.html>).

14           <sup>321</sup> "Samsung Mobile Expands Galaxy Product Portfolio with Launch of Samsung  
 15 Galaxy Tab," *Samsung Press Release*, September 16, 2010  
 16 ([http://www.samsung.com/us/news/presskitRead.do?page=1&news\\_seq=19537&rdoPeriod=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19537&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Samsung+Mobile+Expands+Galaxy+Product+Portfolio+)  
 17 [ALL&from\\_dt=&to\\_dt=&news\\_group=ALL&news\\_type=&news\\_ctgry=&search\\_keyword=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19537&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Samsung+Mobile+Expands+Galaxy+Product+Portfolio+)  
 18 [Samsung+Mobile+Expands+Galaxy+Product+Portfolio+"\);](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19537&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Samsung+Mobile+Expands+Galaxy+Product+Portfolio+) "Verizon Wireless Puts Samsung  
 19 Galaxy Tab in Stores in November," *Samsung Press Release*, No Date  
 20 ([http://www.samsung.com/us/news/presskitRead.do?page=5&news\\_seq=19747&rdoPeriod=](http://www.samsung.com/us/news/presskitRead.do?page=5&news_seq=19747&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy+tab)  
 21 [ALL&from\\_dt=&to\\_dt=&news\\_group=ALL&news\\_type=&news\\_ctgry=&search\\_keyword=](http://www.samsung.com/us/news/presskitRead.do?page=5&news_seq=19747&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy+tab)  
 22 [galaxy+tab](http://www.samsung.com/us/news/presskitRead.do?page=5&news_seq=19747&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy+tab)).

23           <sup>322</sup> "Apple Launches iPad 2," *Apple Inc. Press Release*, March 2, 2011  
 24 (<http://www.apple.com/pr/library/2011/03/02Apple-Launches-iPad-2.html>); "Samsung  
 25 Unveils Galaxy Tab 10.1 and Galaxy Tab 8.9, World's Thinnest Mobile Tablets," *Samsung*  
 26 *Press Release*, March 22, 2011  
 27 ([http://www.samsung.com/us/news/presskitRead.do?page=1&news\\_seq=19835&rdoPeriod=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19835&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy+tab+10.1)  
 28 [ALL&from\\_dt=&to\\_dt=&news\\_group=ALL&news\\_type=&news\\_ctgry=&search\\_keyword=](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19835&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy+tab+10.1)  
 29 [galaxy+tab+10.1](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=19835&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy+tab+10.1)); "Samsung Galaxy Tab 10.1, World's Thinnest Mobile Tablet, Makes  
 30 Official Landing in U.S." *Samsung Press Release*, June 2, 2011  
 31 ([http://www.samsung.com/us/news/presskitRead.do?page=7&news\\_seq=19857&rdoPeriod=](http://www.samsung.com/us/news/presskitRead.do?page=7&news_seq=19857&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy)  
 32 [ALL&from\\_dt=&to\\_dt=&news\\_group=ALL&news\\_type=&news\\_ctgry=&search\\_keyword=](http://www.samsung.com/us/news/presskitRead.do?page=7&news_seq=19857&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy)  
 33 [galaxy](http://www.samsung.com/us/news/presskitRead.do?page=7&news_seq=19857&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy)). The Galaxy Tab 10.1 was unveiled on February 13, 2011. Samsung announced the  
 34 new tablet in partnership with Vodafone Group ("Samsung Expands the Samsung Galaxy Tab  
 35 Range with a 10.1" Entertainment Powerhouse," *Samsung Press Release*, February 13, 2011  
 36 ([http://www.samsung.com/us/news/presskitRead.do?page=9&news\\_seq=19817&rdoPeriod=](http://www.samsung.com/us/news/presskitRead.do?page=9&news_seq=19817&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy)  
 37 [ALL&from\\_dt=&to\\_dt=&news\\_group=ALL&news\\_type=&news\\_ctgry=&search\\_keyword=](http://www.samsung.com/us/news/presskitRead.do?page=9&news_seq=19817&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy)  
 38 [galaxy](http://www.samsung.com/us/news/presskitRead.do?page=9&news_seq=19817&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=galaxy))).

39           <sup>323</sup> "Tablet PC Brings the Simplicity of Pen and Paper to Computing," *Microsoft Press*  
 40 *Release*, November 13, 2000 ([http://www.microsoft.com/presspass/features/2000/nov00/11-](http://www.microsoft.com/presspass/features/2000/nov00/11-13tabletpc.mspx)  
 41 [13tabletpc.mspx](http://www.microsoft.com/presspass/features/2000/nov00/11-13tabletpc.mspx)).

1 introduced a tablet called the Compaq TC1000 in 2002. The product was a hybrid tablet that  
 2 included a detachable keyboard as well as a writing stylus pen.<sup>324</sup> In 2007, the Lenovo X61  
 3 Tablet PC was introduced. It had a touchscreen and could be used with either a finger or a stylus,  
 4 but it was attached to a full sized keyboard. The product was more similar to a laptop with a  
 5 touch-sensitive monitor that could be rotated than a standalone tablet.<sup>325</sup>

6 163. Before Apple's introduction of the iPad in 2010, Samsung's tablet products looked  
 7 very different from its Galaxy Tabs. For example, the Samsung Q1 tablet, introduced in 2006,  
 8 looked very different from the Galaxy Tab or the iPad.<sup>326</sup> The Q1, which has been described as  
 9 looking similar to a "pumped-up Sony PSP," featured a touch screen that could be maneuvered by  
 10 finger or stylus and housed handwriting recognition software. It had a built-in virtual keyboard  
 11 for typing.<sup>327</sup> To the left of the screen was a flat-headed joystick and on the right was a circular  
 12 control with four buttons.<sup>328</sup> A later version of the Q1, released in May 2007, featured a split  
 13 QWERTY keyboard to the sides of the screen.<sup>329</sup>

14 164. Much as Samsung compared its phones to the iPhone, it also compared its tablets  
 15 to the iPad. For example, in a side-by-side comparison of the iPad 2 with a P5 (a Samsung tablet)  
 16 it was stated that iPad 2 icons are "big and the gap between the applications are ideal" while P5  
 17 icons are "too small and too close to each other . . . ."<sup>330</sup> Another side-by-side comparison is a

18 <sup>324</sup> "HP Compaq Tablet PC TC1000 Review," *CNET Reviews*, November 5, 2002  
 19 ([http://reviews.cnet.com/laptops/hp-compaq-tablet-pc/4505-3121\\_7-20627295.html#reviewPage1](http://reviews.cnet.com/laptops/hp-compaq-tablet-pc/4505-3121_7-20627295.html#reviewPage1)).

20 <sup>325</sup> "Lenovo ThinkPad X61 Tablet PC Review," *TabletPCReview.com*, June 12, 2007  
 21 (<http://www.tabletpcreview.com/default.asp?newsID=868>).

22 <sup>326</sup> "Samsung Q1 Review," *PC Magazine*, May 1, 2006  
 23 (<http://www.pcmag.com/article2/0,2817,1955884,00.asp>).

24 <sup>327</sup> "Samsung Q1," *PC Magazine*, May 1, 2006  
 25 (<http://www.pcmag.com/article2/0,2817,1955884,00.asp>).

26 <sup>328</sup> "Samsung Q1," *PC Magazine*, May 1, 2006  
 27 (<http://www.pcmag.com/article2/0,2817,1955884,00.asp>).

28 <sup>329</sup> "Samsung Unveils the Q1 Ultra, the Next Stage in the Evolution of Ultra Mobile  
 Personal Computing," *Samsung Press Release*, May 7, 2007  
 ([http://www.samsung.com/us/news/presskitRead.do?page=1&news\\_seq=3692&rdoPeriod=ALL&from\\_dt=&to\\_dt=&news\\_group=ALL&news\\_type=&news\\_ctgry=&search\\_keyword=Q1+ultra](http://www.samsung.com/us/news/presskitRead.do?page=1&news_seq=3692&rdoPeriod=ALL&from_dt=&to_dt=&news_group=ALL&news_type=&news_ctgry=&search_keyword=Q1+ultra)); "Q1 Ultra Premium UMPC," *Samsung Marketing Material*  
 ([http://www.samsung.com/us/pdf/UMPC\\_LR.pdf](http://www.samsung.com/us/pdf/UMPC_LR.pdf)).

<sup>330</sup> SAMNDCA10244604-10244639 at SAMNDCA10244608.

1 presentation summarizing a workshop conducted by HumanCentric (a product design service  
 2 company) and Samsung, comparing “key applications” (such as home, calendar, contacts, etc.) on  
 3 the Samsung P1 (another Samsung tablet) to those on the iPad. In order to improve a weakness of  
 4 P1—that P1 “menu and home screens are separate areas, which can cause confusion to a new  
 5 user”—it was suggested that “the simplicity of the iPad is good to emulate.”<sup>331</sup>

6 165. Therefore, these internal Samsung documents show that the iPad was held out as  
 7 the aspirational model to Samsung designers and engineers.

8 *Sleekcraft* Factor 8: Likelihood of expansion of the product lines

9 166. Because Apple and Samsung products already compete in the tablet computer  
 10 market, *Sleekcraft* Factor 8 is not informative for the purposes of my analysis.

11 **X. SAMSUNG’S MISAPPROPRIATION OF APPLE’S TRADE DRESS DILUTES**  
 12 **AND HARMS APPLE’S BRAND**

13 167. In this section, I assess how Samsung’s misappropriation of Apple’s proprietary  
 14 look and feel harms Apple’s brand. I first analyze how Samsung’s misappropriation dilutes the  
 15 distinctiveness of Apple’s iPhone Trade Dress and iPhone 3G Trade Dress and, separately, the  
 16 iPad Trade Dress. I then analyze how Samsung’s misappropriation harms Apple’s brand.

17 168. I understand that “dilution by blurring” is the legal standard to be used to analyze  
 18 one of Apple’s claims for relief against Samsung that pertain to the trade dress claims at issue. I  
 19 also understand that dilution by blurring may be assessed by examining six factors set out by the  
 20 Trademark Dilution Revision Act of 2006.<sup>332</sup> As with the *Sleekcraft* Factors discussed above,  
 21 while I have not been asked to provide a legal opinion on whether Samsung’s products dilute  
 22 Apple’s distinctive trade dress, these factors reflect the type of information that I, as a marketing  
 23 expert, would consider in assessing whether Samsung’s misappropriation of Apple’s trade dress is  
 24 likely to affect consumers’ perceptions of Apple’s brand and their purchasing behavior.

25 169. The blurring factors are:

27 <sup>331</sup> SAMNDCA00203268-203420 at SAMNDCA00203301.

28 <sup>332</sup> 15 U.S.C. § 1125(c)(2)(B).



- (i) The degree of similarity between the trade dresses;
- (ii) The degree of inherent or acquired distinctiveness of the famous trade dress;
- (iii) The extent to which the owner of the famous trade dress is engaging in substantially exclusive use of the trade dress;
- (iv) The degree of recognition of the famous trade dress;
- (v) Whether the junior user of the trade dress intended to create an association with the famous trade dress; and
- (vi) Any actual association between the trade dresses.

**A. Samsung's Misappropriation of Apple's iPhone Trade Dress and iPhone 3G Trade Dress Dilutes the Distinctiveness of Apple's iPhone Trade Dress and iPhone 3G Trade Dress**

Dilution Factor 1: Similarity of the Trade Dresses

170. As discussed above, Samsung's Galaxy line of smartphones closely resembles Apple's iPhone Trade Dress and iPhone 3G Trade Dress, as embodied in Apple's iPhone products.<sup>333</sup>

Dilution Factors 2 & 4: Degree of Acquired Distinctiveness and Recognition of the Trade Dress

171. A brand's distinctive design can become part of a consumer's perception of that brand. The designs of Apple's iPhone products, as shown in the iPhone Trade Dress and iPhone 3G Trade Dress, are unique and distinctive and thus memorable for consumers. These brand perceptions—both on the part of users and non-users (because they are mobile devices that are used publicly)—are confirmed by consumers' repeated interactions with Apple's distinctive designs, and make Apple's iPhone Trade Dress and iPhone 3G Trade Dress recognizable. The marketing literature addresses how distinctive designs reduce consumer confusion in the clutter of brands in the marketplace and make a brand recognizable.

172. Furthermore, the surveys from the Poret Report show that people associate the look of the iPhone Trade Dress and the iPhone 3G Trade Dress with Apple.<sup>334</sup> Those survey results, in combination with Apple's extensive promotion and sales of iPhone products and third-party press regarding the iPhone products, as discussed above,<sup>335</sup> cause me to believe that there is

<sup>333</sup> See *supra* ¶¶ 117-120.

<sup>334</sup> Poret Report at 35, 52.

<sup>335</sup> See *supra* ¶¶ 47-70.

1 an extremely high degree of recognition for the iPhone Trade Dress and the iPhone 3G Trade  
 2 Dress among consumers in the U.S. Separately, Dr. Van Liere's survey shows that a significant  
 3 percentage of people associate the look of the Samsung Galaxy phones with Apple iPhones or  
 4 products made by Apple,<sup>336</sup> which also supports the conclusion that the look and feel of the  
 5 iPhone is recognizable as a source identifier. If it were not recognizable as a source identifier, I  
 6 would not expect consumers to associate the look-alike Samsung products with Apple. These  
 7 surveys, taken together with the evidence noted above—the amount and nature of Apple's iPhone  
 8 advertising, the volume of iPhone sales, anecdotal evidence from consumers and industry  
 9 observers pertaining to the iPhone's look and feel, widespread media attention—strongly suggest  
 10 from a marketing perspective that the iPhone look and feel is highly recognizable.<sup>337</sup>

#### 11 Dilution Factor 3: Substantially Exclusive Use of the Trade Dress

12 173. As mentioned above, I understand that Apple has an industrial design expert in the  
 13 case, Peter Bressler, who will be opining that no phone looked like the iPhone before the launch  
 14 of the iPhone. For purposes of my analysis, I assume that the relevant trade dresses were  
 15 substantially exclusively used by Apple when Apple first launched the iPhone.

#### 16 Dilution Factor 5: Intent of Junior User to Create Association with the Famous 17 Trade Dress

18 174. Samsung's internal documents, discussed above, show that Samsung viewed the  
 19 iPhone as the model for a smartphone and intended to create an association with the iPhone  
 20 because it used iPhone devices as models in its development of the Galaxy smartphones.<sup>338</sup>

#### 21 Dilution Factor 6: Actual Association

22 175. Press articles reviewing the Galaxy smartphone products make it clear that the  
 23 reviewers associate the look and feel of the Galaxy smartphone products with the iPhone.  
 24 Specifically, an article from *Wired* noted:

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26 <sup>336</sup> Van Liere Report at 4-5.

27 <sup>337</sup> My opinion is restricted to a marketing perspective vis-à-vis the iPhone. I am not  
 28 rendering an opinion on the fame of the trade dress from a legal perspective.

<sup>338</sup> See *supra* ¶¶ 132-138.

1 Samsung's latest phone, the Vibrant, has the body of an iPhone and the  
 2 brains of an Android. The Vibrant's industrial design *is shockingly*  
 3 *similar* to the iPhone 3G: The rounded curves at the corners, the  
 4 candybar shape, the glossy, black finish and the chrome-colored  
 5 metallic border around the display. The Vibrant even has its volume  
 6 and ringer buttons in almost the same spot as the iPhone 3G. . . . [T]he  
 7 square icons are, again, very similar in their looks to the iPhone 3G's. .  
 8 . . [T]here's little to make the phone notable, apart from its striking  
 9 similarity to the iPhone.<sup>339</sup>

10 176. Another reviewer noted how even the icons used in the Samsung Galaxy S  
 11 resemble those of the iPhone: "When I saw pictures of the Galaxy S phones from Samsung, I  
 12 thought I'd found the perfect successor for shifting off the iPhone. Here was an [sic] phone that  
 13 had iPhone-like icons, an iPhone-like look but which would work on networks other than  
 14 AT&T."<sup>340</sup>

15 177. If even expert reviewers of smartphone products associate the Galaxy smartphone  
 16 products with Apple, it is not surprising that consumers reach the same conclusion, and associate  
 17 the design of the Galaxy smartphone products with Apple. As discussed above, Dr. Van Liere's  
 18 survey shows that a significant percentage of people associate the look of the Samsung Galaxy  
 19 phones with Apple iPhones or products made by Apple. Specifically, 52% of respondents who  
 20 were shown pictures of a Samsung Galaxy Fascinate phone associated the look and design of the  
 21 Samsung Galaxy Fascinate with an iPhone, or a phone or product manufactured by Apple. When  
 22 the same test was carried out with a Samsung Galaxy S II Epic 4G Touch phone, 51% of  
 23 respondents associated the look and design of the Samsung Galaxy S II Epic 4G Touch phone  
 24 with an iPhone, or a phone or product manufactured by Apple.<sup>341</sup>

25 178. When distinctiveness cues get muddled, as has happened here, brand perception  
 26 suffers. Samsung's phones at issue, by appropriating Apple's trade dress, muddy the  
 27

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28 <sup>339</sup> "First Look: Samsung Vibrant Rips Off iPhone 3G Design," *Wired*, July 15, 2010  
 (http://www.wired.com/gadgetlab/2010/07/first-look-samsung-vibrant-rips-off-iphone-3g-  
 design/) (emphasis added).

<sup>340</sup> "A Tale of Three Android Phones: Droid 2, Samsung Fascinate & Google Nexus S,"  
*Search Engine Land*, January 3, 2011 (http://searchengineland.com/a-tale-of-three-android-  
 phones-droid-2-samsung-fascinate-google-nexus-s-59870).

<sup>341</sup> Van Liere Report at 4-5, 17.

1 distinctiveness cues that are inherent in the iPhone Trade Dress and iPhone 3G Trade Dress. As  
 2 Mr. Joswiak notes:

3 [N]o one made a successful copy of the iPod and it remained very  
 4 distinctive as far as the gold standard for music players. The iPhone,  
 5 in the smartphone market, was copied, and as a result, instead of it  
 6 having that same luxury, if you will, that the iPod had of being very  
 7 distinctive and alone in the way it looks and what it does, as a  
 8 marketing professional, the intuition is that some of the differences  
 there are there – it's just too easy for a customer to think they're  
 getting something very similar to an iPhone, and they buy an  
 alternative.<sup>342</sup>

9 179. It is noteworthy that Samsung's misappropriation happens both at the level of the  
 10 constituent elements of the trade dress (*e.g.*, a matrix of colorful square icons with evenly  
 11 rounded corners within the display screen when the device is turned on) and the overall look and  
 12 feel that the consumer perceives. The effects on consumers' brand perceptions is accretive: here,  
 13 we have a case where Samsung mimics not only the constituent elements of the trade dress but  
 14 also the overall look and feel by its choice of which elements to appropriate (for example, one can  
 15 imagine an alternative where the colorful icons were misappropriated but the overall shape was  
 16 different from that of the iPhone). Given the evidence that I have discussed above showing the  
 17 striking similarity of Samsung's products at issue and the iPhone, iPhone 3G, and iPhone 3GS,  
 18 the accretive effect magnifies the diminution of the distinctiveness of the iPhone Trade Dress and  
 19 iPhone 3G Trade Dress.

20 **B. Samsung's Misappropriation of Apple's iPad Trade Dress Dilutes**  
 21 **Distinctiveness of Apple's iPad Trade Dress**

22 Dilution Factor 1: Similarity of the Trade Dresses

23 180. As discussed above, Samsung's Galaxy tablets closely resemble Apple's iPad  
 24 Trade Dress, as embodied in Apple's iPad and iPad 2 products.<sup>343</sup>

25 Dilution Factors 2 & 4: Degree of Acquired Distinctiveness and Recognition of  
 26 the Trade Dress

27 <sup>342</sup> Joswiak Dep. 274:8-20.

28 <sup>343</sup> See *supra* ¶¶ 152-155.

181. A brand's distinctive look and feel can become part of a consumer's perception of that brand. The designs of Apple's iPad products, as shown in the iPad Trade Dress, are unique and distinctive and thus memorable for consumers. These brand perceptions—both on the part of users and non-users (because they are mobile devices that are used publicly)—are confirmed by consumers' repeated interactions with Apple's distinctive designs, and make Apple's iPad Trade Dress recognizable. A distinctive look and feel reduces consumer confusion amidst the clutter of brands in the marketplace and makes a brand recognizable.

182. As discussed above, the Poret Report shows that people associate the look of the iPad Trade Dress with Apple, and that the iPad Trade Dress has a high degree of recognition.<sup>344</sup> Those survey results, in combination with Apple's extensive promotion and sales of iPad products and third-party press regarding the iPad products, as discussed above,<sup>345</sup> cause me to believe that there is a high degree of recognition for the iPad among consumers in the U.S. Separately, Dr. Van Liere's survey shows that a significant number of people associate the look of the Samsung Galaxy 10.1 tablet with Apple iPads or products made by Apple,<sup>346</sup> which also supports the conclusion that the look and feel of the iPad serves to identify the source of the product. As noted above, if the overall look and feel of the iPad was not recognizable as a source identifier, I would not expect consumers to associate the Samsung products with Apple. These surveys, taken together with the evidence noted above—the amount and nature of Apple's iPad advertising, the volume of iPad sales, anecdotal evidence from consumers and industry observers pertaining to the iPad's look and feel, and media attention—strongly suggest from a marketing perspective that the iPad look and feel is famous.<sup>347</sup>

### Dilution Factor 3: Substantially Exclusive Use of the Trade Dress

183. As mentioned above, I understand that Apple has an industrial design expert in the case, Peter Bressler, who will be opining that no tablet computer looked like the iPad prior to the

<sup>344</sup> Poret Report at 36, 61, 66.

<sup>345</sup> *See supra* ¶¶ 47-55.

<sup>346</sup> Van Liere Report at 3.

<sup>347</sup> My opinion is restricted to a marketing perspective vis-à-vis the iPhone. I am not rendering an opinion on the fame of the trade dress from a legal perspective.

1 launch of the iPad. For purposes of my analysis, I assume that the relevant trade dress was  
 2 substantially exclusively used by Apple when Apple first launched the iPad.

3  
 4 Dilution Factor 5: Intent of Junior User to Create Association with the Famous  
 Trade Dress

5 184. Samsung's internal documents, discussed above, show that Samsung viewed the  
 6 iPad as the model for a tablet, and intended to create an association with the iPad because it used  
 7 the iPad devices as models in its development of the Galaxy Tab devices.<sup>348</sup>

8 Dilution Factor 6: Actual Association

9 185. As discussed above, Samsung has received reports that customers have confused  
 10 the Galaxy Tab 10.1 for the iPad 2 when purchasing the Galaxy Tab 10.1.<sup>349</sup> Moreover, an  
 11 internal Samsung marketing presentation states that many consumers who viewed a Samsung  
 12 television commercial for the Galaxy Tab mistakenly thought the ad had been an Apple ad.<sup>350</sup>  
 13 These instances of actual confusion relating to the source of Samsung's Galaxy Tab products and  
 14 advertisements support the conclusion that consumers associate Samsung's Galaxy Tab products  
 15 with the iPad Trade Dress, as embodied in the iPad and iPad 2 products.

16 186. In addition, Dr. Van Liere's survey shows that a significant percentage of people  
 17 confuse the look of the Samsung Galaxy 10.1 with Apple iPads or products made by Apple.<sup>351</sup>  
 18 Specifically, 43% of respondents who were shown a video of someone using a Samsung Galaxy  
 19 Tab 10.1 tablet confused the product for an iPad, or a product manufactured by Apple.  
 20 Consumers who *confuse* a Samsung product with Apple are clearly *drawing an association*  
 21 between that product and Apple and are thereby misappropriating the look and feel of the Apple  
 22 products.

23 187. A *PCWorld* article stated that the products are so similar, it is hard to tell them  
 24 apart: "In my hands-on testing, the Tab 10.1 achieved perhaps the best design compliment an  
 25

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26 <sup>348</sup> See *supra* ¶¶ 164-165.

27 <sup>349</sup> See *supra* ¶ 157.

28 <sup>350</sup> See *id.*

<sup>351</sup> Van Liere Report at 3, 9.



1 Android tablet could hope for—often being mistaken by passers-by (including Apple iPad users)  
 2 for an iPad 2. The confusion is understandable when you see and hold the Tab 10.1 for the first  
 3 time.”<sup>352</sup>

4 188. In sum, Samsung’s misappropriation of Apple’s iPad Trade Dress follows a  
 5 similar trajectory as its misappropriation of the iPhone Trade Dress and iPhone 3G Trade Dress  
 6 and has similar effects vis-à-vis reducing the distinctiveness of the iPad’s look and feel. When  
 7 distinctiveness cues get muddled, as has happened here, brand perception suffers. Samsung’s  
 8 tablet computers, by misappropriating Apple’s trade dress, muddy the distinctiveness cues that  
 9 are inherent in the iPad Trade Dress.

10 **C. Diluting the Distinctiveness of Apple’s iPhone Trade Dress, iPhone 3G Trade**  
 11 **Dress, and iPad Trade Dress Harms Apple’s Brand**

12 189. The value of a brand depends critically on the brand’s image and the underlying  
 13 brand associations in the minds of consumers. Samsung’s marketing strategy with respect to the  
 14 products at issue influence purchasing behavior. Specifically, the effect of Samsung’s  
 15 misappropriation of Apple’s trade dress reduces the distinctiveness of Apple’s trade dress, as  
 16 described above. From a marketing perspective, this reduces the strength of Apple’s brand  
 17 because consumers’ brand associations with respect to the Apple brand are weakened.

18 190. As a conceptual matter, the sources of harm to Apple’s brand image are twofold:  
 19 the first source of harm is Samsung’s general marketing strategy and tactics for the products at  
 20 issue that involve diminishing the distinctiveness of Apple’s trade dress; the second source of  
 21 harm occurs via actual consumer experience of Samsung’s knockoff products. As a practical  
 22 matter, these two sources of harm work together to affect Apple’s brand image.

23 191. An example of the first source of harm is the weakening of Apple’s “coolness”  
 24 factor that is inherent in the look and feel of the Apple products at issue. Many consumers buy an  
 25 iPhone or an iPad, in part, because of their aesthetic appeal—they look “cool.” Consumers like

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26 <sup>352</sup> “Samsung Galaxy Tab 10.1 Wi-Fi: A Worthy Rival to the iPad 2,” *PCWorld*, June 8,  
 27 2011  
 28 ([http://www.pcworld.com/article/229763/samsung\\_galaxy\\_tab\\_101\\_wifi\\_a\\_worthy\\_rival\\_to\\_the\\_ipad\\_2.html](http://www.pcworld.com/article/229763/samsung_galaxy_tab_101_wifi_a_worthy_rival_to_the_ipad_2.html)).

1 using these products and consumers like being seen using these products. When other consumers  
 2 buy imitative, knock-off products, the iPhone loses part of its distinctive “coolness.” Of course,  
 3 coolness is an example, and the loss of distinctiveness goes beyond the attenuation of the  
 4 coolness factor. The entire spectrum of brand associations that consumers of the products at issue  
 5 have vis-à-vis the Apple brand is affected. Weakened brand associations also reduce the  
 6 emotional attachment consumers have to a brand; emotional attachment, so important in Apple’s  
 7 marketing, is also a very important driver of Apple’s brand image. In essence, then, Samsung’s  
 8 misappropriation of Apple’s brand image has an *affective* influence on consumers’ brand  
 9 associations and this erodes Apple’s brand image.

10 192. An eroded brand image inevitably leads to detrimental effects on Apple’s brand  
 11 equity. Strong brands provide enormous benefits to firms that own them. Therefore, when  
 12 brands are harmed, the benefits to the firm that positively affect its bottom line—which include  
 13 higher brand awareness, greater customer loyalty, increased marketing communication  
 14 effectiveness, and positive word-of-mouth created by loyal customers<sup>353</sup>—are impacted. Reduced  
 15 brand awareness and lower brand loyalty increases a company’s marketing costs and/or decreases  
 16 a company’s sales. Lower brand loyalty also leads to fewer recommendations by consumers, and  
 17 negative word-of-mouth. An eroded brand image also means that the brand no longer commands  
 18 the same brand image premium. An eroded brand image may also affect the firm’s ability to  
 19 invest in new products and engage in product expansions. It is noteworthy that an eroded brand  
 20 image not only impacts the current sales of the infringed products and other branded products  
 21 (including but not limited to related or ancillary products) but may also result in potential future  
 22 lost sales of infringed products and other branded products.<sup>354</sup>

23  
 24 <sup>353</sup> Winer & Dhar (2011) 179-180; Keller & Lehmann (2003); Steve Hoeffler & Kevin  
 Lane Keller, *The Marketing Advantages of Strong Brands*, BRAND MANAGEMENT 10, 421-445  
 25 (2003).

26 <sup>354</sup> It should be noted that sales of the Apple products at issue are typically accompanied  
 by sales of various related and ancillary products. For example, according to a 2010 iPad  
 Usage study, iPad buyers were “heavy users of the App store and iTunes.” See APLNDC-  
 27 Y0000025823-25934 at APLNDC-Y0000025900-25903, APLNDC-Y0000025905. The  
 same study also shows that in the survey sample, “roughly 4 in every 5 purchased a case for  
 28 their iPad.” See APLNDC-Y0000025823-25934 at APLNDC-Y0000025924. In addition,

193. There is an additional effect of Samsung's misappropriation of Apple's trade dress. By appropriating elements of Apple's brand image, Samsung's Galaxy line of smartphones and tablet products may effectively become unauthorized "extensions" of the high-quality Apple brand in consumers' minds. In essence, this creates the second source of harm discussed above.

194. Apple's relevant products are generally offered at premium price points. In contrast, I understand that head-to-head opening prices for the Samsung products at issue tend to be released at lower price points than those Apple products. Because lower price may signal lower quality,<sup>355</sup> this can have a detrimental effect on Apple's brand image. To the extent that Samsung's products are experienced differently than Apple's by consumers, the differentiated and distinctive nature of the "Apple" user experience is diminished. In general, a consistent "Apple" user experience is very important to Apple and is an important part of its success in the marketplace. For example, Babbage, the Science and Technology blog of *The Economist* wrote:

[Former Apple CEO Steve Jobs] used Apple's quarterly earnings call to rubbish Google's claim that its mobile operating system, Android, is far more open than Apple's. Some apps developed on Android will only work on certain Android-powered phones and not others, he said. The result is a nightmare for consumers and developers, *whereas Apple offers a simpler and more consistent experience.*<sup>356</sup>

195. Industry observers agree on the uniqueness and consistency of Apple's user experience. For instance, according to a UBS Investment Research report, "through its focus on

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Arthur Rangel ("Mr. Rangel"), Director of Market Research and Analysis at Apple, explained during his deposition that iPhone or iPad buyers may also decide to purchase other Apple products such as a Mac computer. Specifically, Mr. Rangel testified that "in many ways Samsung has affected sales of iPhones or iPads that could lead to [fewer] sales of ...Macs [Apple computers]." See Deposition of Arthur Rangel on March 2, 2012, 10:16-18, 186:3-6.

<sup>355</sup> A. R. Rao & K. B. Monroe, *The Effect of Price, Brand Name, and Store Name on Buyers' Perceptions of Product Quality: An Integrated Review*, 26 JOURNAL OF MARKETING RESEARCH 351-357 (1989); A. Wolinsky, "Prices as Signals of Product Quality," 50 REVIEW OF ECONOMIC STUDIES 647-658 (1983).

<sup>356</sup> "Smartphone Makers Clash," *The Economist* blog *Babbage*, October 20, 2010 ([http://www.economist.com/blogs/babbage/2010/10/smart-phone\\_makers\\_clash](http://www.economist.com/blogs/babbage/2010/10/smart-phone_makers_clash)) (emphasis added).

1 design, its own distribution through retail stores and its software/hardware ecosystems, Apple is  
2 providing unique user experiences that are unrivaled in the digital appliance marketplace.”<sup>357</sup>

3 196. The diminution of the distinctiveness of the “Apple” user experience also hurts  
4 Apple’s brand image and brand equity. The harm to the equity of the brand can be intensified  
5 depending on the brand architecture strategy of the firm. Two main strategies are the “branded  
6 house” strategy (where most or all of the brands bear the company name) and the “house of  
7 brands” strategy (where the company name is usually not present and each individual product has  
8 its own, stand-alone brand).<sup>358</sup> In a branded house strategy, followed by the likes of Visa, Virgin,  
9 and Apple, the exposure to the brand in one context helps the brand’s visibility and enhances  
10 consumers’ awareness of the brand in other contexts. Thus, while this strategy can strengthen the  
11 brand associations, it can also amplify the potential harm to equity of the brand. Thus, harm to  
12 Apple’s brand from Samsung’s misappropriation may be amplified by the fact that Apple follows  
13 a branded house strategy.

#### 14 **XI. SUPPLEMENTATION**

15 197. If permitted by the court, I may supplement or amend this report if additional facts  
16 and information become available in discovery. In particular, I understand that Samsung’s  
17 experts may serve expert reports concerning one or more of the issues addressed in this report.  
18 Therefore, I may supplement or amend my report and opinions in response to opinions and  
19 assertions made by Samsung’s experts.

#### 20 **XII. EXHIBITS TO BE USED**

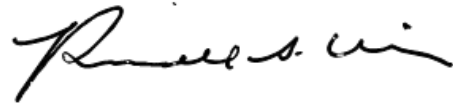
21 198. I anticipate using as Exhibits during trial certain documents and things referenced  
22 or cited in this report or accompanying this report. I also anticipate using other demonstrative  
23 Exhibits or materials at trial.

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25 <sup>357</sup> “AAPL: A Closer Look at the Potential iPhone Ecosystem,” UBS Investment  
26 Research, December 12, 2006, APL-ITC796-0000058721-58736 at APL-ITC796-  
0000058722.

27 <sup>358</sup> Winer & Dhar (2011) 179-180; David A. Aaker & Erich Joachimsthaler, *The Brand*  
28 *Relationship Spectrum: The Key to the Brand Architecture Challenge*, CALIFORNIA  
MANAGEMENT REVIEW 42, 8-23 (2000).

1 I declare under penalty of perjury under the laws of the United States of America that the  
2 foregoing is true and correct and that this Declaration was executed on March 22, 2012, in New  
3 York, New York.

4  
5  
6   
7

8 \_\_\_\_\_  
Russell S. Winer