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Counterclaim-Defendant APPLE INC

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE DIVISION

APPLE INC., a California corporation,

Plaintiff,

v.

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

Defendants.

Case No. 11-cv-01846-LHK

**APPLE'S OFFER OF PROOF  
REGARDING EVIDENCE OF ITS  
IPHONE AND IPAD  
ADVERTISEMENTS**

1 Pursuant to Federal Rule of Evidence 103(a)(2), plaintiff Apple Inc. makes this offer of  
2 proof regarding exhibits PX12, PX13, and PX14, summary exhibits comprising video clips  
3 featuring Apple's iPhone and iPad products. PX12 and PX13 feature Apple advertisements for its  
4 iPhone and iPad products, respectively, that aired within the United States. (Tr. at 643:12–644:2;  
5 646:21–647:4.) PX14 contains clips from television programs featuring iPhone and iPad  
6 products. (*Id.* at 651:11–22.) PX12, PX13, and PX14 each contain two parts: (1) a DVD  
7 containing video clips and (2) an index providing information such as title, date, and file name for  
8 each clip. (*See* PX12; PX13; PX14.) These exhibits are admissible because they are relevant to  
9 Apple's trade dress dilution claims. As discussed below, PX12–PX14 are not needless  
10 presentations of cumulative evidence, and Samsung has never asserted that they are prejudicial,  
11 misleading, confusing, a source of undue delay, or a waste of time. Finally, Philip Schiller,  
12 Apple's Senior Vice President of Worldwide Marketing, testified about exhibits PX12–PX14 and  
13 laid a proper foundation for them to come into evidence. (Tr. at 643:12–644:2; 646:21–647:4;  
14 651:11–22.)

15 Apple offered exhibits PX12–PX14 to prove that its iPhone trade dress and iPad trade  
16 dress are famous, an element of Apple's trade dress dilution claims. *See* 15 U.S.C.  
17 § 1125(c)(2)(A)(i). In assessing fame, courts consider evidence showing “the duration and extent  
18 of advertising and publicity” of the trademark or trade dress. *Playboy Enters. v. Netscape*  
19 *Comm'ns Corp.*, 354 F.3d 1020, 1031 (9th Cir. 2004). To be probative of this factor, however,  
20 the content of the “advertising and publicity” must be “of the mark.” 15 U.S.C.  
21 § 1125(c)(2)(A)(i). *Cf. First Brands Corp. v. Fred Meyer, Inc.*, 809 F.2d 1378, 1383 (9th Cir.  
22 1987) (“Evidence of sales, advertising and promotional activities may be relevant in determining  
23 whether a trade dress has acquired a secondary meaning. However, the advertising and  
24 promotional activities must involve ‘image advertising,’ that is, the ads must feature in some way  
25 the trade dress itself.” (internal citation omitted).)

26 The clips contained in the DVD portions of exhibits PX12–PX14 establish Apple's  
27 advertising of its iPhone and iPad trade dress, and the extensive publicity they have received.  
28 Each of the clips contained in PX12–PX14 prominently features the iPhone or iPad trade dress.

1 Each of these clips differs. Collectively, these clips establish that the iPhone trade dress and iPad  
2 trade dress have been the subject of extensive advertising and publicity and are therefore famous.  
3 *See Jada Toys v. Mattel, Inc.*, 518 F.3d 628, 635 (9th Cir. 2008).

4 Samsung filed written objections to Exhibits PX12–PX14 on July 30. (Dkt. No. 1468  
5 at 4:10-14.) The Court overruled Samsung’s objections, observing that “the advertisements and  
6 television programs are . . . offered to establish fame, an element of [Apple’s] trade dress claim.”  
7 (Dkt. No. 1520 at 4:4–8.) Despite this ruling, Samsung objected again to PX12–PX14 during  
8 trial on August 3, this time asserting that the DVD portions of these exhibits are cumulative.  
9 (Tr. at 647:22-25; 651:23–652:1.) The Court sustained these objections and allowed only the  
10 indices into evidence. (*Id.* at 655:21-25.)

11 The DVDs contained in PX12–PX14 are not cumulative of anything in the record. They  
12 are not cumulative of the indices, which provide only identifying information such as title, date,  
13 and file name, similar to a book’s table of contents. Because the indices do not summarize the  
14 substance of the advertisements or show that the iPhone trade dress and iPad trade dress are  
15 prominently displayed, the DVDs are not cumulative of them.

16 Moreover, the DVDs are not cumulative of PX127 and PX128, the two advertisements  
17 played before the jury. (Tr. at 642:8–643:11; *id.* at 645:14–18.) PX127 and PX128 are each  
18 single advertisements for the iPhone and iPad, respectively. The video clips contained in PX12  
19 and PX13 are not cumulative of the single advertisements contained in PX127 and PX128  
20 because the entire group of ads is probative of “the *extent* of advertising and publicity,” a  
21 “relevant factor” for assessing fame. 15 U.S.C. § 1125(c)(2)(A)(i) (emphasis added). Moreover,  
22 PX14 contains *media clips* featuring the iPhone and iPad, not advertisements. Because PX14  
23 differs substantively from PX127 and PX128, it cannot be cumulative of those exhibits. *Cf.*  
24 *United States v. Cruz-Garcia*, 344 F.3d 951, 956 (9th Cir. 2003) (“[E]vidence clearly was not  
25 cumulative [where] it gave the jury information it learned from no other source.”). Moreover,  
26 since each clip is from different news and entertainment shows, the collection of clips in PX14 is  
27 not itself cumulative.  
28

**CONCLUSION**

Apple respectfully submits this offer of proof concerning PX12, PX13 and PX14.

Dated: August 7, 2012

MORRISON & FOERSTER LLP

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