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11
12 UNITED STATES DISTRICT COURT
13 NORTHERN DISTRICT OF CALIFORNIA
14 SAN JOSE DIVISION

15
16 APPLE INC., a California corporation,

17 Plaintiff,

18 v.

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

22 Defendants.
23
24

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

**APPLE'S MOTION FOR
ATTORNEYS' FEES**

Date: January 30, 2014
Time: 1:30 p.m.
Place: Courtroom 8, 4th Floor
Judge: Hon. Lucy H. Koh

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that on January 30, 2014, at 1:30 p.m., or as soon thereafter as counsel may be heard before the Honorable Lucy Koh in Courtroom 8 of the above-entitled Court, located at 280 South 1st Street, San Jose, California, Plaintiff Apple will move, and hereby does move, for an award of \$15,736,992 in attorneys' fees against Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, Inc.

This motion is based on this notice of motion and supporting memorandum of points and authorities; supporting declarations filed herewith and exhibits attached thereto; and such other written or oral argument as may be presented at or before the time this motion is taken under submission by the Court. The parties' counsel met and conferred regarding Apple's request, as set out in the accompanying Declaration of Nathan Sabri, but Samsung has not stipulated to Apple's request.

Dated: December 5, 2013

MORRISON & FOERSTER LLP

By: /s/ Rachel Krevans
RACHEL KREVANS

Attorneys for Plaintiff
APPLE INC.

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1 *Societe Civile Succession Richard Guino v. Beseder Inc.*,
 2 No. CV 03-13-10,
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3 *Spalding Labs., Inc. v. Ariz. Biological Control, Inc.*,
 4 No. CV 06-1157,
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5 *Takeda Chem. Indus. v. Mylan Labs.*,
 6 549 F.3d 1381 (Fed. Cir. 2008) 13

7 *TrafficSchool.com, Inc. v. Edriver Inc.*,
 8 653 F.3d 820 (9th Cir. 2011)..... 2

9 **STATUTES**

10 15 U.S.C.
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12 35 U.S.C. § 285 13

13 **OTHER AUTHORITIES**

14 Fed. R. Civ. Proc.
 15 Rule 50 1
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 16 Rule 54 1
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 17 Rule 60 1

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MEMORANDUM OF POINTS AND AUTHORITIES

1
2 Apple brings this motion and the accompanying bill of costs now, because the parties
3 were unable to reach agreement on an extension of time for Apple's Rule 54 filings, and thus
4 Apple must comply with Rule 54's deadlines. Recognizing that the Court will be presented with
5 the parties' Rule 50, 52, 59, and 60 motions in this same time period, Apple will count this
6 motion as part of the 40-page limit the Court set for those motions.

I. INTRODUCTION

7
8 Under any measure, this was an exceptional case. The evidence that Samsung deliberately
9 copied every aspect of Apple's revolutionary iPhone product was overwhelming. Apple
10 prevailed on one or more claims of trade dress dilution or patent infringement against 26 of 28
11 accused products. A jury found that Samsung willfully diluted Apple's protected trade dresses
12 and willfully infringed five of the seven asserted patents. The original trial and partial damages
13 retrial juries awarded Apple \$930 million for Samsung's violation of Apple's IP rights. Apple
14 also scored a complete victory in its defense of Samsung's claims. Given the high stakes in this
15 head-to-head battle of what are now the two leading competitors in the U.S. smartphone market,
16 the case garnered international press attention.

17 Samsung's willful, deliberate, and calculated copying of Apple's iPhone makes this an
18 "exceptional case" under Section 1117(a) of the Lanham Act. The record conclusively
19 establishes that, once the iPhone became a spectacular success and Samsung's smartphones
20 became far less desirable, Samsung made a calculated decision to capture market share by
21 copying the look and features of the iPhone. After a thorough study of the iPhone, Samsung gave
22 126 "Directions for Improvement" to make Samsung's inferior phone in development look and
23 operate like the iPhone. (PX44.) Samsung carried out those directions without making any effort
24 to identify and avoid violating Apple's IP rights. Samsung's efforts to compete against Apple by
25 misappropriating Apple's own IP had their intended effect—Samsung's sales of its infringing and
26 diluting phones has increased its market share dramatically. Given Samsung's blatant disregard
27 of Apple's IP rights, Apple should not be forced to bear the full expense of prosecuting its claims.

28 This motion addresses Apple's request for attorneys' fees under the Lanham Act. Apple

1 seeks \$15,736,992, which is less than one-third of the fees billed through March 1, 2013—the
 2 date of the last order on motions arising from the first trial. Apportioning only one-third of the
 3 fees incurred to Apple’s intertwined trade dress and design patent claims is conservative, as these
 4 claims were the focus of most of the parties’ attention throughout the case. In fact, *both parties*
 5 spent twice as much time on design/trade dress witnesses as utility patent witnesses at trial.

6 **II. THE COURT SHOULD AWARD APPLE THE FEES ATTRIBUTABLE TO**
 7 **SAMSUNG’S WILLFUL TRADE DRESS DILUTION**

8 Section 1117(a) of the Lanham Act addresses remedies for willful trade dress dilution in
 9 violation of 15 U.S.C. 1125(c), as well as for other Lanham Act violations, including
 10 infringement of registered and unregistered trademarks or trade dress, and false advertising.
 11 15 U.S.C. § 1117(a). The statute permits an award of reasonable attorneys’ fees to the prevailing
 12 party in “exceptional cases.” *Id.* As shown below, Apple is the prevailing party, this case is
 13 exceptional, and Apple should be awarded the reasonable attorneys’ fees it requests.

14 **A. Apple Is The Prevailing Party**

15 The jury’s verdict and damage award clearly make Apple the prevailing party in this case
 16 as a whole and in its Lanham Act claims in particular. (Dkt. No. 1931 at 11-12 (verdict of willful
 17 dilution of Apple’s registered iPhone trade dress and unregistered iPhone 3G trade dress).) A
 18 party need not prevail on all of its claims to be the prevailing party. *See, e.g., San Diego Police*
 19 *Officers’ Ass’n v. San Diego City Emps.’ Ret. Sys.*, 568 F.3d 725, 741 (9th Cir. 2009).

20 **B. This Case Is Exceptional Under The Lanham Act**

21 Although § 1117(a) does not define “exceptional,” the Ninth Circuit has repeatedly held
 22 that exceptional cases include those involving “fraudulent, deliberate or willful” conduct.
 23 *Horphag Research Ltd. v. Garcia*, 475 F.3d 1029, 1039 (9th Cir. 2007) (affirming fee award
 24 under § 1117(a) in trade dress dilution case); *Gracie v. Gracie*, 217 F.3d 1060, 1068 (9th Cir.
 25 2000) (“generally a trademark case is exceptional for purposes of an award of attorneys’ fees
 26 when the infringement can be characterized as malicious, fraudulent, deliberate, or willful”)
 27 (internal quotation marks omitted); *see also TrafficSchool.com, Inc. v. Edriver Inc.*, 653 F.3d 820,
 28 832 (9th Cir. 2011) (court erred by denying exceptional case status based solely on relief awarded

1 to prevailing plaintiff; court instead must “weigh the unlawfulness of defendants’ conduct”).

2 Applying that standard, the Ninth Circuit has affirmed exceptional case findings under
3 § 1117(a) based on jury verdicts of willfulness. *See, e.g., Gracie*, 217 F.3d at 1068 (affirming
4 exceptional case determination based on willful infringement verdict); *Nat’l Prods. v. Gamber-*
5 *Johnson LLC*, 449 Fed. Appx. 638, 639 (9th Cir. 2011) (non-precedential) (affirming
6 “exceptional case[s]” finding based on jury’s finding of deliberate infringement).

7 The Ninth Circuit also has looked more broadly to address a defendant’s wrongful
8 conduct, including “deliberate and calculated” attempts to take advantage of a plaintiff’s IP rights.
9 *Horphag*, 475 F.3d at 1039 (affirming exceptional case finding in trademark dilution case where
10 defendant “made deliberate and calculated attempts to confuse” its product with plaintiff’s); *see*
11 *Lahoti v. Verichack, Inc.*, 636 F.3d 501, 510-11 (9th Cir. 2011) (affirming exceptionality under
12 § 1117(a) in light of pattern and practice of “disregard for . . . trademark rights,” “bad faith” and
13 “abusive litigation practices”).

14 Here exceptionality is established both by the jury’s finding of willful dilution and
15 Samsung’s deliberate and calculated strategy of copying Apple’s iPhone.

16 **1. The jury verdict establishes willfulness**

17 The jury found that Samsung’s dilution of Apple’s registered iPhone trade dress and
18 unregistered iPhone 3G trade dress was willful. (Dkt. No. 1931 at 14.) This Court has ruled that
19 the jury’s finding was supported by substantial evidence in the record, citing evidence “that
20 Samsung viewed the iPhone as revolutionary (PX36.20), and that Samsung attempted to create
21 similar products (PX44).” (Dkt. No. 2220 at 14.)

22 **2. The record establishes that Samsung engaged in a willful, deliberate,
23 and calculated effort to gain market share by copying the iPhone,
including the iPhone trade dress**

24 When Apple introduced the iPhone in 2007, Samsung initially continued to make phones
25 as it always had. (PX3A.1-2.) But Samsung later changed its tune, after it became convinced that
26 the iPhone was phenomenally successful while Samsung’s sales lagged behind. As detailed
27 below, Samsung fought back with a deliberate strategy of copying every aspect of the iPhone—
28 including the whole look of the iPhone, which is the trade dress—without making any effort to

1 avoid Apple's protected IP.

2 Soon after Apple released the iPhone, Samsung's LSI division—which manufactured
3 components for Apple—analyzed the iPhone. Their report ranked the iPhone first in a list of
4 “four key factors that we expect will shape handsets in the coming five years.” (PX34.13.) It
5 also concluded that the iPhone's “[b]eautiful design” and “[e]asy and intuitive UI” were among
6 the key iPhone “[s]uccess [f]actors” and that copying them would be “easy.” (PX34.38.) In
7 2008, Samsung hired consultants to assess the iPhone's impact. The consultants reported that
8 “pundits” and “iPhone users” alike considered the iPhone “a revolution.” (PX36.)

9 Samsung's phone sales fell dramatically as iPhone sales soared. (Dkt. No. 1839 at
10 2044:17-18 (Musika testimony that “Samsung was losing market share during the period prior to
11 2010”).) By February 2010, carriers were pressuring Samsung to “make something like the
12 iPhone.” (PX40.2.) Samsung executives concluded that Samsung was suffering a “crisis of
13 design” and that the difference between the iPhone and the products Samsung had in development
14 was “the difference between heaven and earth.” (PX40.5.)

15 Samsung responded by preparing a 138-page “Relative Evaluation Report,” which
16 contained 126 “Direction[s] for Improvement” to make Samsung's phone like the iPhone.
17 (PX44.) The Relative Evaluation Report compared virtually every aspect of the iPhone with the
18 Samsung phone then in development, each time finding Samsung's phone wanting and each time
19 directing that Samsung's phone be changed to resemble the iPhone. Samsung acted in complete
20 disregard of Apple's IP—*there is not a shred of evidence in the record to suggest that Samsung*
21 *made any effort to determine whether the various iPhone features were protected, much less to*
22 *avoid violating Apple's IP rights.* Instead, Samsung forged ahead and followed the Report's
23 directives to make Samsung's phone like the iPhone in 126 ways. All of those copying directives
24 should be considered—not only those directly related to the IP in suit—as exceptional case
25 findings and fee awards under § 1117(a) look to the totality of a defendant's conduct. *See, e.g.,*
26 *Lahoti*, 636 F.3d at 510-11 (addressing pattern and practice of “disregard for . . . trademark
27 rights,” “bad faith” and “abusive litigation practices”).

28 Samsung's intensive effort produced the Galaxy S i9000, which the press called “very

1 iPhone 3GS-like.” (PX6.) Consistent with the Relative Evaluation Report’s copying directives,
2 the Galaxy S i9000 copied the iPhone industrial design (PX3 (comparing Samsung smartphones
3 before iPhone to Samsung smartphones after iPhone)) and copied the iPhone home screen, down
4 to the shading on the icons (PX44.131 (comparing iPhone icons with “[L]ight used . . . gives a
5 luxurious feel” to GT-i9000 icons in development and concluding “[I]nset effects of light for a
6 softer, more luxurious icon implementation”); PX35 (“iPhones icons to are colorful and vibrant,
7 however they are in contained square which appear more organized and consistent.”). The
8 Galaxy S i9000 also copied numerous iPhone features, including interface features claimed in the
9 patents-in-suit (PX36 (“Lists bounce, icons flutter – the iPhone has a sense of whimsy”); PX38
10 (“Adopt Double-Tap as a supplementary zooming method The UX of iphone can be used as
11 a design benchmark.”); PX44.58 (comparing iPhone “Double Tap” to S1 in development,
12 “Double Tap zoom in/out function needs to be supplemented”); PX46.66 (comparing iPhone
13 “bounce” to Behold3 in development, “Provide a fun visual effect when dragging a web page”);
14 PX57.19 (lack of “Fun, Wow Effect” is “Critical” and concluding “[B]ounce effect is scheduled
15 to be reviewed”); PX186.1 (“there is no latex effect of having the screen follow along and then
16 returning when you are moving past the edge. (Refer to the iPad”); PX195.1 (“With regards to
17 bounce, we used the Mass Spring Damper model which was modeled after the actual physical
18 effect and obtained the bounce effect that is similar to the iPad[.]”).)

19 In August 2010, immediately after Samsung introduced its Galaxy S i9000 and Vibrant
20 smartphones, Apple met with Samsung and explicitly told Samsung to stop copying Apple’s
21 iPhone “patents and designs.” (PX52 (Apple August 2010 presentation); PX201 at 31:15-16;
22 31:18-20; 33:21-24; 37:21-38:05 (testimony of Jun Won Lee that Apple raised Samsung’s
23 infringement of “Apple phone’s patents and design”).) Apple pointed out the similarities between
24 the iPhone design (protected by the trade dress and the D’677, D’087, and D’305 patents) and the
25 Galaxy S i9000’s design. (PX52.17-19; Dkt. No. 1695 at 1958–1962 (testimony of Boris Tekler
26 regarding Apple’s presentation to Samsung in August 2010 which included discussion of
27 similarities of iPhone and Galaxy S i9000).) Yet Samsung continued to introduce phones that
28 copied the iPhone, including the Galaxy S Vibrant, the Galaxy S Fascinate, the Galaxy S

1 Mesmerize, the Galaxy S Showcase, and the Galaxy S 4G. This last product was introduced in
 2 February 2011, six months after the August 2010 meeting, and was sold until at least June 2012.
 3 The jury found it diluted Apple's registered iPhone trade dress and unregistered iPhone 3G trade
 4 dress and infringed every one of Apple's patents-in-suit. This phone alone sold over 1.45 million
 5 units and generated over \$473 million in revenues for Samsung in the U.S. (JX1500).

6 With these and other diluting and infringing products, Samsung flooded the market with
 7 over 21 million copied smartphones during the two years prior to June 30, 2012. Samsung's
 8 strategy of copying the iPhone to boost its smartphone sales succeeded: Between June 2010,
 9 when the first Galaxy S phone was introduced, and June 30, 2012, Samsung's U.S. market share
 10 jumped six-fold from 5% to above 30%. (Dkt. No. 1982-2 ¶ 30.) As Julie Davis testified, 90% of
 11 the dramatic increase in Samsung's U.S. smartphone market share in the third quarter of 2010
 12 was due to sales of infringing phones. (Dkt. No. 2840 at 719:9-721:3 (discussing PDX100.8).)

13 Samsung's market share gain eroded Apple's position as the market leader. Samsung's
 14 successful strategy has been to "blunt" and "undercut" Apple using the Galaxy products to take
 15 the leading position in the U.S. smartphone market. (PX62.11-15.) In February 2012, Samsung
 16 concluded that as a result of its own rapid growth in market share, the U.S. smartphone market
 17 was "becoming a two horse race between Apple & Samsung." (PX60.8.)

18 **C. The Court Should Award Apple's Requested Fees Of \$15,736,992**

19 **1. A fees award is warranted**

20 A district court has discretion as to whether to award fees in an exceptional case.
 21 *Earthquake Sound Corp. v. Bumper Indus.*, 352 F.3d 1210, 1216 (9th Cir. 2003) (reviewing
 22 decision to award fees under § 1117(a) for abuse of discretion). The same factors that render a
 23 case exceptional also support an award of fees. *See, e.g., id.* at 1219 (no abuse of discretion in
 24 awarding fees when court considered "willful, deliberate infringement" of a mark "similar to that
 25 of its competitor"). Indeed, where a jury has returned a willfulness finding, arguments against an
 26 award of fees are "difficult to advance successfully." *Gracie*, 217 F.3d at 1068. That is because
 27 the award of fees to the prevailing party "flows quite naturally from the jury's finding of willful
 28 infringement and the legal standard for 'exceptional cases' under § 1117." *Id.*

1 The Court should award Apple fees in this exceptional case. Awarding fees to Apple
2 “flows quite naturally” from the jury’s willfulness verdict as well as Samsung’s extensive record
3 of willful, deliberate, and calculated decisions to copy the iPhone, in blatant disregard for Apple’s
4 IP, discussed above. Courts routinely award fees, and the Ninth Circuit affirms fee awards under
5 § 1117(a), based on evidence that a defendant’s conduct was willful, deliberate, or calculated.
6 *See, e.g., Gracie*, 217 F.3d at 1068 (affirming district court’s decision to award fees based on
7 willful infringement); *Horphag*, 475 F.3d at 1039 (affirming award of fees for trademark dilution
8 where defendant “made deliberate and calculated attempts to confuse” its product with
9 plaintiff’s); *Nat’l Prods.*, 449 Fed. Appx. at 639 (affirming fees award when sufficient evidence
10 supported jury’s finding of deliberate infringement); *see also Playboy Enters., Inc. v. Baccarat*
11 *Clothing Co.*, 692 F.2d 1272, 1276 (9th Cir. 1982) (reversing denial of fees where defendants
12 were “not innocent infringers,” but “premeditatedly sought” out infringing behavior, and noting
13 that exceptional case fees “[were] specifically directed towards eliminating such blatant
14 activity”).

15 **2. Apple’s requested fees are reasonable**

16 **a. Apple incurred over \$60 million in fees for prosecuting its**
17 **claims through the two trials, after discounts and reductions**

18 Apple and its counsel from Morrison & Foerster LLP (“M&F”), who prosecuted its claims
19 against Samsung, have taken numerous steps to ensure that the fees addressed in this motion are
20 reasonable, as detailed in the accompanying declarations of Michael Jacobs and Rachel Krevans.¹
21 Among other things, M&F attorneys carefully review each invoice before sending it to Apple to
22 confirm that it reflects time appropriately charged to Apple and complies with the combination of
23 M&F’s and Apple’s rigorous billing requirements for this case. (Jacobs Decl. ¶ 259.) Apple’s in-
24 house attorneys managed this case to a very disciplined budget. (*Id.* ¶ 258.) For purposes of this
25 motion, Apple included only the fees it incurred for timekeepers who billed more than \$100,000
26

27 ¹ This motion discusses only fees that Apple incurred in prosecuting its claims; no fees
28 from Apple’s successful defense against Samsung’s claims are included.

1 in this case, thereby eliminating fees from timekeepers who provided meaningful work but did
 2 not play a substantial ongoing role in the case. (*Id.* ¶ 60.) Apple made further reductions in the
 3 amounts of fees in connection with this motion to be conservative. (*Id.* ¶ 250.) As a result of all
 4 of these efforts and reductions, the hours underlying the fees at issue are reasonable.

5 The billing rates for the fees at issue also are reasonable, and reflect substantial discounts.
 6 No M&F attorney billing to this matter charged over █████ per hour, and the rest were well below
 7 that number. (*Id.* Ex. A.) The rates are within the ranges of the American Intellectual Property
 8 Law Association Economic Survey and are generally less than the rates that Samsung has paid for
 9 lawyers at Quinn Emanuel with comparable experience. (*Id.* ¶¶ 251-55 & Ex. A.)

10 Applying these parameters, Apple has paid or expects to pay M&F approximately \$60
 11 million for its work on this case through the damages retrial. (Krevans Decl. ¶ 6.) Apple also has
 12 paid or expects to pay approximately \$2 million to Wilmer Hale for its fees in the damages retrial,
 13 again counting only timekeepers who billed more than \$100,000 to the case. (Selwyn Decl. ¶¶ 2,
 14 4.) In total, using these parameters, Apple has incurred over \$60 million in fees for prosecuting
 15 its claims against Samsung.

16 **b. Apple seeks only one-third of the fees billed through March 1,**
 17 **2013, for timekeepers who billed more than \$100,000 for work**
 18 **on Apple's claims against Samsung**

19 Section 1117(a) permits recovery of fees for successful Lanham Act claims or those
 20 “inextricably intertwined” with such claims. *Gracie*, 217 F.3d at 1069. Claims that are “based on
 21 similar factual bases and legal theories are related for the purposes of determining a fee award.”
 22 *Gucci Am., Inc. v. Pieta*, No. CV 04-9626, 2006 U.S. Dist. LEXIS 96694, at *7 (C.D. Cal. July
 23 17, 2006). Work that “involve[s] a common core of facts” “cannot be viewed as a series of
 24 discrete claims.” *Hensley v. Eckerhart*, 461 U.S. 424, 435 (1983).


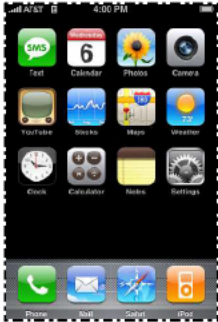
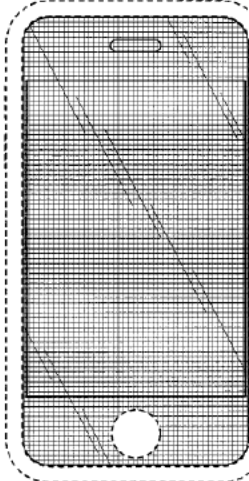
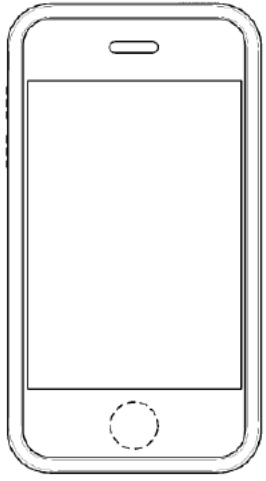
25 Apple's trade dress and design patent claims are inextricably intertwined and involve a
 26 common core of facts. Apple's unregistered iPhone 3G trade dress has the following elements:

- 27 • a rectangular product with four evenly rounded corners;
- 28 • a flat clear surface covering the front of the product;
- the appearance of a metallic bezel around the flat clear surface;

- 1 • a display screen under the clear surface;
- 2 • under the clear surface, substantial black borders above and below the display screen and narrower black borders on either side of the screen;
- 3 • when the device is on, a row of small dots on the display screen;
- 4 • when the device is on, a matrix of colorful square icons with evenly rounded corners within the display screen; and
- 5 • 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.

6 (Dkt. No. 75 ¶ 59.) Apple’s registered iPhone trade dress includes a picture and a description of
 7 the icons.

8 These trade dresses are precisely what is captured by Apple’s design patents at issue:

11 Registered Trade Dress	D’305 patent	D’677 patent	D’087 patent
12 	13 	14 	15 

16 Apple’s design experts and percipient witnesses testified fluidly about both Apple’s
 17 design patent and trade dress claims. For example, Apple’s expert Peter Bressler testified at trial
 18 about the D’087 and D’677 design patents as well as the elements of the iPhone trade dress “that
 19 relate primarily to the industrial design of the device itself.” (Dkt. No. 1611 at 1091:15-24
 20 (discussing PDX26.18, elements of iPhone trade dress).) Similarly, Apple’s expert Susan Kare
 21 testified about the D’305 patent as well as the elements of the iPhone trade dress that also relate
 22 to the iPhone home screen and icons. (Dkt. No. 1612 at 1389:11-18 (discussing D’305 patent and
 23 Apple’s registered iPhone trade dress).) Christopher Stringer, who is named as an inventor on the

1 D'087 and D'677 patents, testified about Apple's design process and investment in design, which
2 is highly relevant to Apple's trade dress claims. Thus, the work Apple's counsel performed
3 relating to designs was relevant to Apple's trade dress claims, although it also related to other
4 design IP. Apple may, therefore, recover for all its fees related to iPhone trade dress and design.

5 In a case of this magnitude, with various claims with differing degrees of overlap, courts
6 may apportion fees based on a high-level consideration of the percentage of the case involving the
7 Lanham Act claims or those inextricably bound to them. *See* McCarthy on Trademarks § 30:103
8 (“When there is an overlap in the attorneys’ work expended between the ‘exceptional’ Lanham
9 Act claims and nonattorney’s fee recoverable claims, it is appropriate for the court to reduce a
10 total attorney’s fee amount by a percentage which represents work on the non-Lanham Act
11 claims.”). This is especially true when courts consider “voluminous fee application[s].” *Gates v.*
12 *Deukmejian*, 987 F.2d 1392, 1399 (9th Cir. 1992). In those cases, the court need not perform an
13 “hour-by-hour analysis of the fee request.” *Id.* Instead, “across-the-board percentage cuts” may
14 be used to reduce unrecoverable fees. *See id.* Determining an “exact percentage” of the fees
15 attributable to Lanham Act claims is unnecessary so long as there is “some attempt,” even if
16 “imprecise[],” to account for the unrecoverable fees. *Gracie*, 217 F.3d at 1069 (emphasis added).

17 Apple has conservatively allocated as recoverable under the Lanham Act only one-third of
18 fees billed through March 1, 2013, for timekeepers who billed more than \$100,000 for work on
19 Apple's claims against Samsung. Broadly, Apple's offensive case was split across three
20 substantive areas: phone design (which included patents on the iPhone design as well as iPhone
21 trade dress rights), tablet design, and utility patents. (Krevans Decl. ¶ 8.) But throughout the
22 case, the parties' litigation of Apple's claims against Samsung focused a disproportionate amount
23 of time on the design issues. (*Id.* ¶¶ 9-11.) Apple's Amended Complaint devoted a substantial
24 amount of attention to Samsung's copying of Apple's designs, including numerous side-by-side
25 design comparisons and discussion of Samsung's copying. (Dkt. No. 75.) Samsung's 22-page
26 trial brief devoted over nine pages to Apple's designs; by contrast, it spent just two-and-a-half
27 pages on utility patents. (Dkt. No. 1322 at 3-15.) Both parties served many more expert reports
28 relating to design/trade dress issues than to utility patents—nine design/trade dress experts

1 compared to six utility patent experts for Apple; and eight design/trade dress and five utility
2 patent experts for Samsung. (Krevans Decl. ¶ 10.) Apple’s trial brief devoted the vast majority
3 of its fourteen-page discussion of Samsung’s violation of Apple’s intellectual property rights to
4 Apple’s designs/trade dress, with only two pages on utility patents. (Dkt. No. 1323 at 3-15.)

5 Consistent with this focus, at trial, Apple presented seven witnesses who were entirely or
6 predominantly relevant to design issues (including trade dress), and three specific to its utility
7 patents. (Krevans Decl. ¶ 11.) In addition to Mr. Bressler, Ms. Kare, and Mr. Stringer, who as
8 noted above, discussed both trade dress and design patent issues, some of these witnesses
9 addressed issues related solely or primarily to trade dress. Dr. Russell Winer testified “on the
10 distinctiveness and fame of the Apple trade dress elements, and . . . the infringement and dilution
11 [of] the Apple brands.” (Dkt. No. 1612 at 1497:17-22.) Hal Poret testified about consumer
12 surveys he designed and conducted “to determine whether or not the iPhone and the iPad trade
13 dress have acquired secondary meaning.” (*Id.* at 1577:17-20.) Kent van Liere also testified about
14 two trade dress-related surveys, one that measured “the extent to which consumers associate the
15 look and the design of Samsung Galaxy phones with iPhone” and one that measured consumer
16 confusion regarding tablets. (Dkt. No. 1695 at 1691:13-22.) And a significant portion of the
17 testimony of Phil Schiller, Apple’s Senior Vice President of Worldwide Marketing, was devoted
18 to the marketing, advertising, and fame of Apple’s brand and designs, as well as the harm to
19 Apple from Samsung’s dilution of the Apple brand. (Dkt. No. 1610 at 597-611, 618-665.)

20 Perhaps the best evidence of the importance of the design and trade dress issues, in a trial
21 where time was the parties’ most precious commodity, was how much time each side chose to
22 spend on these issues. Totaling the trial time that each side spent on the design/trade dress
23 witnesses and utility patent witnesses, *each party* spent twice as much time on design/trade dress
24 as it did on utility patents. (Krevans Decl. ¶¶ 11-12.)

25 Based on all of these facts, allocating one-third of fees to Apple’s successful Lanham Act
26 claims is eminently reasonable. In *Fifty-Six Hope Road Music, Ltd. v. A.V.E.L.A., Inc.*, 915 F.
27 Supp. 2d 1179 (D. Nev. 2013), the district court awarded fees under § 1117(a) using a similar
28 methodology to that advanced here by Apple. Although that plaintiff’s successful Lanham Act

1 claim was only one of five asserted claims, the court rejected defendant's proposal to simply
2 award one-fifth of the fees as not a "fair apportionment." *Id.* at 1189. The court reasoned that
3 "[m]ost of the fees related to discovery and much of the other work" would have been incurred
4 whether there was a single, or many, claims. *Id.* Taking into consideration the "relative time and
5 resources devoted to the various claims," the court apportioned *sixty percent* of plaintiff's hours
6 to the Lanham Act claim through summary judgment. *Id.* After summary judgment, when only
7 the Lanham Act and a state unfair competition claim remained, the court allocated *seventy*
8 *percent* of the hours to the Lanham Act claim, noting that a "fifty-fifty split" would be unfair. *Id.*
9 at 1189-90.

10 Like *Fifty-Six Hope Road*, other courts in this circuit have apportioned a similar, or even
11 significantly higher, percentage of fees for Lanham Act claims when other claims were asserted
12 than the one-third that Apple seeks here. *See, e.g., Spalding Labs., Inc. v. Ariz. Biological*
13 *Control, Inc.*, No. CV 06-1157, 2008 U.S. Dist. LEXIS 56100, at *16-17 (C.D. Cal. May 29,
14 2008) (reducing fees by 10% when Lanham Act claim was one of nine claims); *Societe Civile*
15 *Succession Richard Guino v. Beseder Inc.*, No. CV 03-13-10, 2007 U.S. Dist. LEXIS 83782, at
16 *43-44 (D. Ariz. Oct. 30, 2007) (awarding one-third of fees when Lanham Act claim was one of
17 three claims).

18 By seeking only one-third of its fees from timekeepers who billed more than \$100,000,
19 Apple ensures that it is not recovering fees for its unsuccessful claims concerning the unregistered
20 combination iPhone trade dress or for tablet design. First, the only differences between the
21 unregistered iPhone 3G trade dress on which Apple did prevail and the combination iPhone trade
22 dress is that the latter lacks two of the iPhone 3G trade dress elements (a metallic bezel around
23 the flat clear surface and a row of small dots on the display screen) and also covers "neutral
24 (black or white) borders" rather than the black borders covered by the 3G trade dress. (*Compare*
25 *Dkt. No. 75* ¶ 59 (iPhone 3G trade dress), *with id.* ¶ 63 (combination trade dress).) Thus, the
26 same work would have been required to address the iPhone 3G trade dress even if the
27 combination trade dress had not been at issue. The only possible additional work required by
28 having the combination trade dress in the case was whatever might have been required to address

1 “neutral (black or white) borders” in addition to “black borders.” Apple’s request for only one-
2 third of fees from timekeepers who billed more than \$100,000 ensures that any such minimal fees
3 are not included in its request.

4 Second, phone design by the nature of the complaint was far more the focus of the trial
5 than was tablet design: 19 of the 28 accused products in the first trial were phones accused of
6 infringing Apple’s phone design rights, while only three of accused products were tablets accused
7 of infringing Apple’s tablet design rights. Moreover, almost all of Apple’s damages request at the
8 first trial was for infringement by accused phones rather than tablets. Of the \$2.75 billion Apple
9 requested at the first trial, only \$80.97 million—just 2.9%—was for Samsung’s tablets. (*See*
10 PX25A1.4.) Asking for only one-third of fees from timekeepers who billed more than \$100,000
11 ensures that fees related to tablet design are not included in the fees request.

12 Applying the parameters discussed in the prior section, M&F billed Apple \$47,210,976
13 for timekeepers who billed more than \$100,000 in this case for their time through March 1, 2013,
14 when the Court issued its last order on motions from the first trial. (Krevans Decl. ¶ 3.) One-
15 third of that total is \$15,736,992, which Apple requests as its fee award under the Lanham Act.²

16 **III. CONCLUSION**

17 For the reasons stated above, Apple respectfully requests that the Court find this case
18 exceptional and award Apple \$15,736,992 in attorneys’ fees pursuant to 15 U.S.C. § 1117(a).

19 ² Courts have awarded fees comparable to and far higher than Apple’s request. For
20 example, a \$105.7 million award in a copyright case was upheld on appeal. *Mattel, Inc. v. MGA*
21 *Entm’t, Inc.*, No. CV 04-9049, 2011 U.S. Dist. LEXIS 85998 (C.D. Cal. Aug. 4, 2011), *aff’d*, 705
22 F.3d 1108 (9th Cir. 2013). The Federal Circuit upheld an award of \$16.8 million for attorney fees
23 in a patent case. *Takeda Chem. Indus. v. Mylan Labs.*, 549 F.3d 1381, 1391 (Fed. Cir. 2008); *see*
24 *also Bard Peripheral Vascular, Inc. v. W.L. Gore & Assocs.*, No. CV 03-0597, 2009 U.S. Dist.
25 LEXIS 131813, at *41 (D. Ariz. Mar. 31, 2009) (awarding \$19 million in fees in patent case).

26 The Patent Act also permits attorneys’ fees in “exceptional cases.” 35 U.S.C. § 285.
27 Exceptionality may be based on “litigation misconduct; vexatious, unjustified, and otherwise bad
28 faith litigation; a frivolous suit; or willful infringement.” *Monolithic Power Sys. v. O2 Micro Int’l*
Ltd., 726 F.3d 1359, 1366 (Fed. Cir. 2013). Considered together, Samsung’s misconduct during
litigation, the jury’s finding of willful infringement on five of Apple’s seven asserted patent
claims, and other aspects of Samsung’s litigation tactics render this case “exceptional” within the
meaning of § 285. Apple separately addresses Samsung’s litigation misconduct as a ground for
an exceptional case finding under § 285 in proceedings currently before Judge Grewal. (*See* Dkt.
No. 2838-2.) Apple also preserves its right to seek fees on other grounds under § 285, including
in the event that the Court’s finding of no objective willfulness is reversed.

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