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CO., LTD., SAMSUNG ELECTRONICS  
14 AMERICA, INC. and SAMSUNG  
TELECOMMUNICATIONS AMERICA, LLC  
15

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

18 APPLE INC., a California corporation,  
19 Plaintiff,  
20 vs.  
21 SAMSUNG ELECTRONICS CO., LTD., a  
Korean business entity; SAMSUNG  
22 ELECTRONICS AMERICA, INC., a New  
York corporation; SAMSUNG  
23 TELECOMMUNICATIONS AMERICA,  
LLC, a Delaware limited liability company,  
24 Defendants.  
25

CASE NO. 11-cv-01846-LHK

**DECLARATION OF MICHAEL J.  
WAGNER IN SUPPORT OF SAMSUNG'S  
MOTION FOR JUDGMENT AS A  
MATTER OF LAW, NEW TRIAL  
AND/OR REMITTITUR PURSUANT TO  
FEDERAL RULES OF CIVIL  
PROCEDURE 50 AND 59**

**Date: December 6, 2012  
Time: 9:30 a.m.  
Place: Courtroom 8, 4th Floor  
Judge: Hon. Lucy H. Koh**

1 I, Michael J. Wagner, hereby declare as follows:

2 BACKGROUND

3 1. I am currently a Managing Director at LitiNomics, Inc., a financial and economic  
4 consulting firm specializing in the analysis of economic issues that arise in commercial disputes.

5 2. I am a Certified Public Accountant and attorney licensed in the State of California.  
6 I have been a Partner at Price Waterhouse; a Managing Director at Putnam, Hayes & Bartlett; and  
7 a Senior Advisor at CRA International, a publicly traded management consulting firm. I have a  
8 Bachelor of Science in Engineering, which I received from the University of Santa Clara in 1969.  
9 I have a Masters in Business Administration, which I received from U.C.L.A. in 1971. I have a  
10 Juris Doctor degree, which I received from Loyola University School of Law at Los Angeles in  
11 1975. Exhibit A is a true and correct copy of my *curriculum vitae*.

12 3. I have specialized in the computation of commercial damages over the last 35 years  
13 of my professional career. I have been qualified and testified at trial as an expert on financial  
14 matters, principally commercial damages, 127 times, including Lanham Act cases and patent cases  
15 (30 times in patent cases). I have testified on financial issues in 34 arbitrations. I also have been  
16 deposed 314 times (101 times in patent cases; more than 10 times in trademark or Lanham Act  
17 cases) on financial issues over my career.

18 4. I have 28 professional publications, the majority of which deals with the  
19 computation of commercial damages (8 deal directly with patent damages). The most significant  
20 publication is the *Litigation Services Handbook*, which I co-edited through its fourth edition. The  
21 book is a collaborative effort of many of the leading experts in the financial area. I am the  
22 founding editor and continued as an editor for over 20 years. The Handbook has been recognized  
23 as authoritative by the Federal Judicial Center in its *Treatise on Scientific Evidence*. The  
24 Treatise's chapter on Economic Damages cites only five additional reference sources for further  
25 guidance to federal judges. The *Litigation Services Handbook* is one of the five reference sources.

26 5. In the above-captioned case, *Apple Inc. vs. Samsung Electronics Co., Ltd., et al.*, I  
27 previously submitted a Declaration of Michael J. Wagner in Support of Samsung's Opposition to  
28 Apple's Motion for a Preliminary Injunction. I have also submitted expert reports, including my

1 April 16, 2012 Expert Report of Michael J. Wagner; my April 20, 2012 Corrected Expert Report  
2 of Michael J. Wagner; and my May 11, 2012 Supplemental Expert Report of Michael J. Wagner.  
3 I also testified at trial.

4 6. I submit this declaration in support of Samsung's Motion pursuant to Federal Rules  
5 of Civil Procedure 50 and 59. If asked at a hearing or trial, I am prepared to testify regarding the  
6 matters I discuss in this declaration.

7 7. I am being compensated at my customary rate for my work on this case. My  
8 compensation is in no way contingent upon the opinions I arrive at or the result of the litigation.

9 8. In performing my analysis, I have reviewed the Court's August 21, 2012 Final Jury  
10 Instructions and the August 24, 2012 Amended Verdict Form (the "Verdict Form"). I have also  
11 reviewed trial transcripts, trial demonstratives and exhibits, as well as publicly available  
12 documents discussed in this declaration.

13 9. In addition to the review of documents listed above, I have relied on my training as  
14 a Certified Public Accountant and my knowledge and expertise regarding intellectual property  
15 litigation damages.

16 10. I may supplement this declaration in the event that additional relevant materials are  
17 provided to me, including court filings and declarants' testimony.

18 VERDICT ANALYSIS

19 11. I have compared the dollar amounts in Question 23 of the Verdict Form with  
20 Apple's claimed damages in this case as presented in trial testimony and exhibits, including  
21 Apple's trial exhibit PX25A1. I note the following.

22 12. For each of the 11 Samsung devices for which the jury awarded damages and found  
23 infringement of one or more Apple design patents but no trade dress violation, the jury awarded  
24 exactly 40% of Mr. Musika's claimed figure for Samsung's profits in PX25A1.5. This is shown  
25 in the following table:

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28

Product	Samsung's Profits Sought by Apple in PX25A1.5	40% of Samsung's Profits Sought by Apple in PX25A1.5	Jury Award
Captivate	\$202,100,404	\$80,840,162	\$80,840,162
Continuum	\$40,997,793	\$16,399,117	\$16,399,117
Droid Charge	\$126,682,172	\$50,672,869	\$50,672,869
Epic 4G	\$325,452,234	\$130,180,894	\$130,180,894
Galaxy S II 2 (AT&T)	\$101,235,891	\$40,494,356	\$40,494,356
Galaxy S II (T-Mobile)	\$209,479,270	\$83,791,708	\$83,791,708
Galaxy S II (Epic 4G Touch)	\$250,817,469	\$100,326,988	\$100,326,988
Galaxy S II (Skyrocket)	\$80,683,895	\$32,273,558	\$32,273,558
Gem	\$10,188,963	\$4,075,585	\$4,075,585
Indulge	\$40,027,960	\$16,011,184	\$16,011,184
Infuse 4G	\$111,982,436	\$44,792,974	\$44,792,974
<b>TOTAL</b>	<b>\$1,499,648,487</b>	<b>\$599,859,395</b>	<b>\$599,859,395</b>

13. For each of the five Samsung phones for which the jury awarded Apple damages and found infringement of one or more design patents and trade dress dilution, the jury awarded exactly the amount of lost profits claimed by Apple plus 40% of Samsung's profits, as calculated by Mr. Musika in PX25A1.4. This is shown in the following table:

Product	Lost Profits Sought by Apple in PX25A1.4	Samsung's Profits Sought by Apple in PX25A1.4	40% of Samsung's Profits Sought by Apple in PX25A1.4	Lost Profits plus 40% of Samsung's Profits Sought by Apple in PX25A1.4	Jury Award
Fascinate	47,703,423	\$239,589,391	\$95,835,756	\$143,539,179	\$143,539,179
Galaxy S 4G	\$13,856,419	\$148,720,623	\$59,488,249	\$73,344,668	\$73,344,668
Galaxy S Showcase	\$850,630	\$52,878,789	\$21,151,516	\$22,002,146	\$22,002,146

Product	Lost Profits Sought by Apple in PX25A1.4	Samsung's Profits Sought by Apple in PX25A1.4	40% of Samsung's Profits Sought by Apple in PX25A1.4	Lost Profits plus 40% of Samsung's Profits Sought by Apple in PX25A1.4	Jury Award
(i500)					
Mesmerize	\$9,667,526	\$108,640,214	\$43,456,086	\$53,123,612	\$53,123,612
Vibrant	\$19,054,281	\$176,549,189	\$70,619,676	\$89,673,957	\$89,673,957
<b>TOTAL</b>	<b>\$91,132,279</b>	<b>\$726,378,206</b>	<b>\$290,551,283</b>	<b>\$381,683,562</b>	<b>\$381,683,562</b>

14. Seven Samsung devices were found to infringe only utility patents. For five of these devices, the jury awarded exactly half the royalty calculated by Mr. Musika in PX25A1.5, as shown in the following table:

Product	Royalty Sought by Apple in PX25A1.5	50% of Royalty Sought by Apple in PX25A1.5	Jury Award
Exhibit 4G	\$2,163,641	\$1,081,820	\$1,081,820
Galaxy Tab	\$3,933,382	\$1,966,691	\$1,966,691
Nexus S 4G	\$3,656,594	\$1,828,297	\$1,828,297
Replenish	\$6,700,512	\$3,350,256	\$3,350,256
Transform	\$1,906,120	\$953,060	\$953,060
<b>TOTAL</b>	<b>\$18,360,249</b>	<b>\$9,180,124</b>	<b>\$9,180,124</b>

15. The Galaxy Prevail was found to infringe only utility patents. The jury's award of \$57,867,383 for the Galaxy Prevail is 40% of what Apple claimed for Samsung's profits in PX25A1.5, as shown in the table below:

Product	Samsung's Profits Sought by Apple in PX25A1.5	40% of Samsung's Profits Sought by Apple in PX25A1.5	Jury Award
Galaxy Prevail	\$144,668,457	\$57,867,383	\$57,867,383



1           23.     Mr. Musika testified regarding the adjustment of his calculation of Samsung's  
2 profits to a later notice date than he assumed, while still crediting his opinion on Samsung's  
3 profitability. (August 13, 2012 Tr. at 2073:21-2074:19.) Specifically, Mr. Musika testified:

4           Q.     Now, with respect to your calculation of Samsung's profits, if the jury  
5 ultimately decides that damages calculation should start at a later date than  
6 the one you used, have you given them enough information that they could  
7 adjust their calculation?

8           A.     Yes.

9           Q.     And where is that information?

10          A.     The information is in two places. One would be the joint exhibit 1500,  
11 which we talked about a little bit earlier, which really is the sum of all the  
12 22 million units and the \$8 billion. So we have – you have a chronological,  
13 basically – you remember how I talked about that being hard to read  
14 because it had individual columns for each quarter? So if the date moves,  
15 you would simply go in along that schedule and say – draw a line and say,  
16 well, okay, infringement is not going to start in June of 2010. It's going to  
17 start at a later date. Draw a line, and all the units that were sold before then  
18 would come out of the calculation. You would multiply that revenue times  
19 the 35.5 percent and subtract that from the \$2.2 billion number.

20 (*Id.* at 2073:21-2074:19.)

21          24.     I note that JX1500 gives quarterly figures for Samsung's revenue. Both April 15,  
22 2011, and June 16, 2011, fall within the second quarter of 2011.

23          25.     I used Mr. Musika's proposed method to adjust for a later notice date by  
24 subtracting from JX1500 sales up to and including the quarter I have been asked to assume  
25 Samsung first received notice of Apple's design patents and trade dress, namely the second quarter  
26 of 2011. This resulted in a \$3.34 billion reduction in the total revenue for the five phones found  
27 to infringe one or more design patents and dilute trade dress, and the 11 phones found to infringe  
28 one or more design patents but not to dilute trade dress. This is illustrated in the following table:

<b>Product</b>	<b>Total Revenues in JX1500</b>	<b>Total Revenues in JX1500 thru Q2'11</b>
Captivate	\$525,000,000	\$457,000,000
Continuum	\$112,000,000	\$89,000,000
Droid Charge	\$395,000,000	\$241,000,000
Epic 4G	\$855,000,000	\$758,000,000
Fascinate	\$619,000,000	\$601,000,000
Galaxy S 4G	\$473,000,000	\$242,000,000
Galaxy S II 2 (AT&T)	\$240,000,000	\$0
Galaxy S II (T-Mobile)	\$561,000,000	\$0
Galaxy S II (Epic 4G Touch)	\$764,000,000	\$0
Galaxy S II (Skyrocket)	\$289,000,000	\$0
Galaxy S Showcase (i500)	\$148,000,000	\$64,000,000
Gem	\$64,000,000	\$46,000,000
Indulge	\$98,000,000	\$55,000,000
Infuse 4G	\$417,000,000	\$138,000,000
Mesmerize	\$296,000,000	\$205,000,000
Vibrant	\$444,000,000	\$444,000,000
<b>TOTAL</b>	<b>\$6,300,000,000</b>	<b>\$3,340,000,000</b>

#### REMITTITUR

26. If Apple is not entitled to the \$91,132,279 of the verdict representing Apple's lost profits for the five Samsung phones found to infringe one or more design patents and dilute trade dress, and instead is awarded 40% of Mr. Musika's claimed figure for Samsung's profits for these phones, the jury award would be reduced by \$70,034,295 to \$311,649,267. In calculating the amount of this reduction for factoring out lost profits, I used PX25A1.5, which is Mr. Musika's



1 calculation of Samsung's profits in the event the jury did not award lost profits. A summary of  
 2 my calculations to arrive at the reduction is shown in the table below:

(a) Product	(b) Jury Award	(c) Samsung's Profits Sought by Apple in PX25A1.5	(d) 40% of Samsung's Profits Sought by Apple in PX25A1.5	Difference Between (b) and (d)
Fascinate	\$143,539,179	\$267,735,061	\$107,094,024	\$36,445,155
Galaxy S 4G	\$73,344,668	\$155,204,780	\$62,081,912	\$11,262,756
Galaxy S Showcase (i500)	\$22,002,146	\$53,518,267	\$21,407,307	\$594,839
Mesmerize	\$53,123,612	\$114,099,746	\$45,639,898	\$7,483,714
Vibrant	\$89,673,957	\$188,565,314	\$75,426,126	\$14,247,831
<b>TOTAL</b>	<b>\$381,683,562</b>	<b>\$779,123,168</b>	<b>\$311,649,267</b>	<b>\$70,034,295</b>

13 27. If Apple is not entitled to damages on the 11 phones found to infringe one or more  
 14 design patents but not to dilute trade dress from the June 2010 and August 4, 2010 dates assumed  
 15 by Mr. Musika, but instead is awarded 40% of Mr. Musika's calculation of Samsung's profits  
 16 adjusted for notice based on the filing of the complaint (for the D'677 patent) and the amended  
 17 complaint (for the D'087 and D'305 patents), the award on these 11 phones would be reduced by  
 18 \$253,328,000 to \$346,531,395. This is shown in the following table:

Product	Jury Award	40% of Samsung's Profits Sought by Apple in PX25A1.5 Adjusted for Notice	Difference
Captivate	\$80,840,162	\$15,946,162	\$64,894,000
Continuum	\$16,399,117	\$3,761,117	\$12,638,000
Droid Charge	\$50,672,869	\$16,450,869	\$34,222,000
Epic 4G	\$130,180,894	\$22,544,894	\$107,636,000
Galaxy S II 2 (AT&T)	\$40,494,356	\$40,494,356	\$0
Galaxy S II (T-Mobile)	\$83,791,708	\$83,791,708	\$0
Galaxy S II (Epic 4G	\$100,326,988	\$100,326,988	\$0

<b>Product</b>	<b>Jury Award</b>	<b>40% of Samsung's Profits Sought by Apple in PX25A1.5 Adjusted for Notice</b>	<b>Difference</b>
Touch)			
Galaxy S II (Skyrocket)	\$32,273,558	\$32,273,558	\$0
Gem	\$4,075,585	(\$2,456,415)	\$6,532,000
Indulge	\$16,011,184	\$8,201,184	\$7,810,000
Infuse 4G	\$44,792,974	\$25,196,974	\$19,596,000
<b>TOTAL</b>	<b>\$599,859,395</b>	<b>\$346,531,395</b>	<b>\$253,328,000</b>

28. If Apple is not entitled to lost profits damages on the five phones found to infringe one or more design patents and dilute trade dress, and is not entitled to damages from the June 2010 date assumed by Mr. Musika, but instead is awarded 40% of Mr. Musika's calculation of Samsung's profits adjusted for notice dates based on the filing of the complaint (for the D'677 patent and trade dress) and the amended complaint (for the D'087 and D'305 patents), the award on these five phones would be further reduced by \$220,952,000 to \$90,697,267, as shown in the following table:

<b>Product</b>	<b>Jury Award</b>	<b>40% of Samsung's Profits Sought by Apple in PX25A1.5 Adjusted for Notice</b>	<b>Difference</b>
Fascinate	\$143,539,179	\$21,752,024	\$121,787,155
Galaxy S 4G	\$73,344,668	\$27,717,912	\$45,626,756
Galaxy S Showcase (i500)	\$22,002,146	\$12,319,307	\$9,682,839
Mesmerize	\$53,123,612	\$16,529,898	\$36,593,714
Vibrant	\$89,673,957	\$12,378,126	\$77,295,831
<b>Less lost profits per para. 26</b>	<b>\$70,034,295</b>		
<b>TOTAL</b>	<b>\$311,649,267</b>	<b>\$90,697,267</b>	<b>\$220,952,000</b>

1           29.     If Apple is entitled to 5% of the award on the 11 phones found to infringe one or  
2 more design patents but not dilute trade dress, adjusted for Samsung's notice dates as calculated in  
3 paragraph 27 above, 5% of \$346,531,395 is \$17,326,570.

4           30.     If Apple is entitled to 5% of the award on five phones found to infringe one or  
5 more design patents and dilute trade dress, removing lost profits and adjusted for Samsung's  
6 notice dates as calculated in paragraph 28 above, 5% of \$90,697,267 is \$4,534,863.

7           31.     The below table is a summary of all the reductions discussed in paragraphs 26 to 30  
8 above.

Product(s)	Amount Before Reduction	Reason for Reduction	Amount of Reduction	Amount Remaining
11 Phones (Design Patent Only)	\$599,859,395	Correct Notice Dates	\$253,328,000	\$346,531,395
11 Phones (After Adjustment for Correct Notice Dates)	\$346,531,395	Profits Attributable to IP (5%)	\$329,204,825	\$17,326,570
5 Phones (Design Patent & Trade Dress)	\$381,683,562	No Lost Profits	\$70,034,295	\$311,649,267
5 Phones (After Adjustment for No Lost Profits)	\$311,649,267	Correct Notice Dates	\$220,952,000	\$90,697,267
5 Phones (After Adjustment for No Lost Profits and Correct Notice Dates)	\$90,697,267	Profits Attributable to IP (5%)	\$86,162,404	\$4,534,863
Prevail (Utility Patents Only)	\$57,867,383	No Basis for Award of Samsung's Profits	\$57,867,383	\$0

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22           32.     Attached as Exhibit B is a true and correct copy of the back-up worksheets showing  
23 the calculations undertaken to arrive at each of the reductions discussed above.

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I declare under penalty of perjury of the laws of the United States of America that the foregoing is true and correct. Executed in Santa Clara County, California on September 21, 2012.



By: \_\_\_\_\_  
Michael J. Wagner