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14

15 UNITED STATES DISTRICT COURT

16 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

17 APPLE INC., a California corporation,
18 Plaintiff,

19 vs.

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

24 Defendants.

CASE NO. 11-cv-01846-LHK

**SAMSUNG'S OPPOSITION TO
PLAINTIFF'S MOTION TO EXPEDITE
DISCOVERY**

Date: May 12, 2011
Time: 1:30 p.m.
Courtroom 4, 5th Floor
Judge: Hon. Lucy H. Koh

PUBLIC REDACTED VERSION

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1 Samsung Electronics America, Inc. (“SEA”) and Samsung Telecommunications
2 America, LLC (“STA”) (collectively “Samsung”) respectfully submit this Opposition to Plaintiff
3 Apple, Inc.’s (“Apple”) Motion to Expedite Discovery (D.N. 10) (“Motion to Expedite
4 Discovery”). No Samsung entity has answered or otherwise responded to the Complaint. Each
5 Samsung entity makes a limited special appearance in order to oppose Apple’s Motion to Expedite
6 Discovery and reserves all jurisdictional objections.

7 **MEMORANDUM OF POINTS AND AUTHORITIES**

8 I. Introduction

9 Apple’s Motion to Expedite Discovery essentially asks for this Court’s assistance in
10 performing an end run around the competition in the marketplace. By its motion, Apple seeks
11 wide-ranging discovery into five unreleased products of Samsung, Apple’s avowed competitor in
12 the market for mobile phones and tablet computers. Apple says that it needs this discovery
13 because it suspects these products will infringe its intellectual property. Apple’s claims are
14 specious on their face. For example, Apple’s allegations that reasonable consumers are likely to
15 be confused about the source or origin of Samsung’s phones due to commonplace features such a
16 rectangular shape and display of icons—on screens embedded in the phones, labeled with
17 Samsung’s name—such as a phone (in connection with a phone application) and music notes (in
18 connection with a music application) are implausible. Yet Apple claims, without a shred of
19 supporting evidence, that it would potentially suffer irreparable harm if such products are released
20 into the market. According to Apple, merely raising this specter of irreparable harm entitles it to
21 discovery into these Samsung products before their commercial release, and months before the
22 Rule 26(f) conference of the parties—prior to which discovery is generally not allowed under Rule
23 26(d).

24 The Court should deny Apple’s motion. To be entitled to discovery prior to the Rule
25 26(f) conference, Apple must establish “good cause” for the discovery it seeks. Apple fails to do
26 so. Inconsistent with its irreparable harm assertions, Apple has filed no motion for a preliminary
27 injunction, neither against these unreleased Samsung products, nor against already-released
28 Samsung products. Moreover, courts expressly reject the argument that a plaintiff can seek

1 expedited discovery to decide whether it has enough evidence to seek a preliminary injunction.
2 Further, Apple's requests are too broad to be the subject of expedited discovery. Apple also has
3 identified no proper purpose for the discovery, and it cannot. Irrespective of any liability
4 determination, Apple would not suffer irreparable harm because it could be compensated for any
5 potential infringement with money damages. In addition, Apple asks the Court to expedite the
6 discovery it seeks by three months. Even the case law cited by Apple does not endorse such
7 extreme acceleration of discovery. Finally, Apple's requested discovery would be extraordinarily
8 burdensome on Samsung, not only because it would put Samsung at a severe competitive
9 disadvantage—even Apple views information about unreleased products as trade secrets with
10 which “competitors can anticipate and counter Apple's business strategy,”—but also because
11 actually collecting and producing the requested discovery would be extremely time-consuming
12 and expensive for Samsung.

13 II. Facts

14 On April 15, 2011, Apple sued its avowed competitors, Samsung Electronics Co., Ltd.
15 (“SEC”), SEA and STA, asserting claims of trademark, trade dress, and utility and design patent
16 infringement against numerous Samsung products. (Compl. (D.N. 1).) The same day, the Court
17 issued an initial scheduling order in this case that set the deadline for the conference of the parties
18 pursuant to Rule 26(f) of the Federal Rule of Civil Procedure on August 18, 2011. (D.N. 7.) That
19 deadline was vacated on April 21, 2011 when the case was reassigned to this Court. (Notice of
20 Impending Reassignment to a United States District Court Judge (D.N. 15); D.N. 7.)

21 On April 19, before serving SEA, STA, or SEC with a copy of its complaint, Apple filed
22 its Motion to Expedite Discovery. (D.N. 10.) Apple served SEA and STA with a copy of the
23 complaint and its Motion to Expedite Discovery the following day, but has not yet served SEC
24 with either document.¹ (Certificate of Service (D.N. 14); Amended Certificate of Service (D.N.
25 16); Mot. to Expedite (D.N. 10) at 6.)

26 _____
27 ¹ Counsel for Apple has asked counsel for SEA and STA to accept service on behalf of SEC.
28 Counsel for SEA and STA has informed counsel for Apple that it is willing to accept service on
(footnote continued)

1 Relying on “Internet reports” that started appearing in mid-February 2011, Apple’s Motion
 2 to Expedite Discovery claims that “Samsung’s new products are sure to infringe Apple’s
 3 registered trademarks, trade dress, design patents, and utility patents.” (Mot. to Expedite (D.N.
 4 10) at 3-5, 7; Decl. of Jason R. Bartlett In Support of Plaintiff’s Mot. to Expedite (“Bartlett
 5 Expedite Decl.”) (D.N. 11), Exs. 1-9.) According to Apple’s motion, “Without an order
 6 permitting expedited discovery, Apple would be required to wait until Samsung’s new products
 7 are commercially available, and would be forced to suffer the attendant irreparable harm that
 8 comes with sales of infringing products.” (Mot. to Expedite (D.N. 10) at 11.) Although Apple’s
 9 motion alleges that “Samsung’s existing Galaxy products” exemplify “a pattern of practice by
 10 Samsung of copying Apple’s patents, trademarks, trade dress, and other intellectual property in
 11 connection with mobile devices,” Mot. to Expedite (D.N. 10) at 1, the motion offers no evidence
 12 that the prior release of these “existing Galaxy products” to the public caused Apple irreparable
 13 harm. Further, the motion does not detail the alleged irreparable harm Apple would suffer and
 14 does not support these allegations with any evidence in the form of either expert declarations or
 15 testimony from anyone at Apple.

16 By its motion, Apple requests that the Court order the following discovery from SEA and
 17 STA:

- 18 (1) a domestic production model of the Galaxy S2, along with its
 19 commercial packaging and initial release marketing materials;
- 20 (2) a domestic production model of the Galaxy Tab 8.9, along with its
 21 commercial packaging and initial release marketing materials;
- 22 (3) a domestic production model of the Galaxy Tab 10.1, along with its
 23 commercial packaging and initial release marketing materials;
- 24 (4) a domestic production model of the Infuse 4G, along with its
 25 commercial packaging and initial release marketing materials;
- 26 (5) a domestic production model of the 4G LTE (or “Droid Charge”),
 27 along with its commercial packaging and initial release marketing
 28 materials;

27 _____
 28 behalf of SEC in exchange for a 75 day extension for all three Samsung entities to answer or
 otherwise respond to Apple’s complaint. Counsel for Apple has not yet responded to this offer.

1 (6) documents relating to any copying of design elements of, or
2 attempts to design around Apple's intellectual property relating to, the
iPhone 4, iPad, and iPad 2;

3 and

4 (7) a 30(b)(6) deposition in the United States of a Samsung corporate
5 representative regarding the following topics:

6 (a) The design, function and operation of the shells and
graphical user interfaces of the Galaxy S2, Galaxy Tab 8.9,
7 Galaxy Tab 10.1, Infuse 4G, and 4G LTE;

8 (b) Any copying of design elements from the iPhone 4, iPad,
and iPad 2;
9 and

10 (c) Any attempts to design around the iPhone 4, iPad, and iPad
2.

11 (Mot. to Expedite at 9-10.) Apple defines a "domestic production model" as "a final, commercial
12 version of a product to be sold in the United States." (Id. at 9, n.2.) Apple asks that the requested
13 documents and things be produced by May 17, 2011, five days after the scheduled hearing on its
14 motion, and that the requested 30(b)(6) deposition occur on May 19, 2011, two days later.

15 (Proposed Order Granting Pl.'s Mot. to Expedite (D.N. 11-12) at 1-2.)

16 
17  (Decl. of Brian Rosenberg In Support of Samsung's Opp. To Pl.'s Mot. to
18 Expedite Disc. ("Rosenberg Opp. Decl.") at ¶¶ 2, 4, 6, 8; Decl. of Travis Merrill In Support of
19 Samsung's Opp. To Pl.'s Mot. to Expedite Disc. ("Merrill Opp. Decl.") at ¶¶ 3, 5.) Apple's
20 motion contends that the order it requests "will allow Apple to assess the extent to which
21 Samsung's soon-to-be-released products will infringe Apple's intellectual property rights before
22 the products become entrenched in the marketplace." (Mot. to Expedite (D.N. 10) at 1.) Apple
23 has not filed a motion for a temporary restraining order or preliminary injunction against the
24 Galaxy S2, Galaxy Tab 8.9, Galaxy Tab 10.1, Infuse 4G, and 4G in this action, nor against any
25 "existing Galaxy products" currently available to the public.

1 III. Argument

2 Apple Does Not Establish “Good Cause” for the Expedited Discovery It Seeks.

3 “Rule 26(d) of the Federal Rules of Civil Procedure generally provides that formal
4 discovery will not commence until after the parties have conferred as required by Rule 26(f).”
5 American LegalNet, Inc. v. Davis., 673 F. Supp. 2d 1063, 1066 (C.D. Cal. 2009). “In the Ninth
6 Circuit, courts use the ‘good cause’ standard to determine whether discovery should be allowed to
7 proceed prior to a Rule 26(f) conference.” Wangson Biotech. Group, Inc. v. Tan Tan Trading
8 Co., Inc., No. C 08-04212 SBA, 2008 WL 4239155, *7 (N.D. Cal. 2008). Under that standard,
9 the moving party must establish that “the need for expedited discovery, in consideration of the
10 administration of justice, outweighs the prejudice to the responding party.” Id.; Magellan Group
11 Inv., LLC v. First Indigenous Depository Co., LLC, No. C 05-01994 JSW, 2005 WL 1629940, *2
12 (N.D. Cal. July 8, 2005). Factors to consider when determining the reasonableness² of expedited
13 discovery include: “(1) whether a preliminary injunction is pending; (2) the breadth of the
14 discovery requests; (3) the purpose for requesting the expedited discovery; (4) the burden on the
15 defendants to comply with the requests; and (5) how far in advance of the typical discovery
16 process the request was made.” Am. LegalNet, 673 F. Supp. 2d at 1067. In view of these factors,
17 Apple’s Motion to Expedite Discovery does not establish “good cause” for the discovery it seeks.

18 A. A Motion for a Preliminary Injunction Is Not Pending.

19 “The majority of courts have held . . . that the fact that there was no pending preliminary
20 injunction motion weighed against allowing plaintiff’s motion for expedited discovery.” Momenta
21 Pharms., Inc. v. Teva Pharms. Indus., Ltd., No. 10-12079-NMG, 2011 WL 673926, *2 (D. Mass.
22 Feb. 11, 2011). As is clear from the Court’s own docket, Apple has not filed a motion for a
23 preliminary injunction in this case.³ Thus, this factor weighs against granting Apple’s Motion.

24
25 ² “Courts have used the terms ‘good cause’ and ‘reasonableness’ interchangeably.” Am.
26 LegalNet, 673 F. Supp. 2d at 1067.

27 ³ Even *if* Apple had moved for a preliminary injunction, “expedited discovery is not
28 automatically granted merely because a party seeks a preliminary injunction.” Am. LegalNet,
673 F. Supp. 2d at 1065-66, 1071 (denying plaintiff’s motion for expedited discovery of
(footnote continued)

1 Further, to the extent Apple contends that it needs this discovery to *decide* whether to file a
 2 motion for a preliminary injunction, such a contention is without merit. Qwest Commc'ns
 3 Int'l, Inc. v. WorldQuest Networks, Inc., 213 F.R.D. 418, 419-21 (D. Colo. 2003) (finding
 4 plaintiff had not established the requisite good cause where plaintiff merely “wishes to conduct
 5 expedited discovery to determine whether to seek preliminary injunctive relief”); El Pollo Loco,
 6 S.A. de C.V. v. El Pollo Loco, Inc., 344 F. Supp. 2d 986, 991 (S.D. Tex. 2004) (finding that there
 7 was no good cause to grant plaintiff’s request for expedited discovery in a trademark infringement
 8 and theft lawsuit in order to “possibly seek injunctive relief in this Court”).

9 B. Apple’s Discovery Requests are Overbroad.

10 “To justify departing from the normal discovery regimen . . . the discovery request should
 11 be ‘limited.’” Bug Juice Brands, Inc. v. Great Lakes Bottling Co., No. 1:10-cv-229, 2010 WL
 12 1418032, *1 (W.D. Mich. April 6, 2010). Contrary to Apple’s claim that “[t]here can be no
 13 question that these requests are narrowly tailored,” Mot. to Expedite at 11, Apple’s discovery
 14 requests are far-reaching. First, Apple seeks not only samples of five of its competitor’s actual
 15 products prior to their commercial release, but an extensive range of documents and other
 16 materials relating to those products, the outer limits of which it is difficult, if not impossible, to
 17 discern. For example, for each of the Galaxy 2, Galaxy Tab 8.9, Galaxy Tab 10.1, Infuse 4G and
 18 4G LTE products, Apple seeks that product’s “initial release marketing materials.” (Mot. to
 19 Expedite (D.N. 10) at 9-10.) Apple does not define “marketing materials,” leaving Samsung only
 20 to guess what that means. Apple does not clarify whether it seeks internal marketing plans or
 21 marketing materials for distributors or end users. It does not explain whether it seeks drafts of
 22 marketing materials or materials that have or will be released to the public. It does not even spell
 23 out whether it seeks only documents or physical objects as well. The possibilities of what

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 27 competitor despite plaintiff’s claims of copyright infringement against competitor and the
 28 pendency of plaintiff’s motion for preliminary injunction to prohibit competitor from using
 plaintiff’s allegedly copyright-protected information).

1 “marketing materials” could mean are legion.⁴ Expedited discovery should not be granted where
2 “[t]he court is hard pressed to define the outer boundary of [the movant’s] requests.” Qwest, 213
3 F.R.D. at 420.

4 Nor should Samsung be burdened with the responsibility of figuring out what Apple means
5 by “marketing materials,” or to search for every document or thing that Samsung thinks might
6 constitute “marketing materials,” especially when Apple’s request is for expedited discovery. See
7 id. at 420, n.1 (noting that requests that might be unobjectionable if propounded after the Rule
8 26(f) conference may be overbroad for the purposes of expedited discovery).

9 [REDACTED]
10 [REDACTED] (Rosenberg Opp. Decl. at ¶ 11; Merrill Opp. Decl. at ¶ 8.) As Apple’s
11 requests are written, *all* of those employees are potential custodians of “marketing materials.” It is
12 too much for Apple to ask that all of these Samsung employees be interviewed, and their
13 documents and things searched for purposes of expedited discovery on the extremely short,
14 extremely accelerated schedule Apple seeks.

15 [REDACTED]
16 [REDACTED]
17 [REDACTED]
18 [REDACTED]
19 [REDACTED]
20 [REDACTED]
21 [REDACTED]
22 [REDACTED]
23 [REDACTED]

24 _____
25 ⁴ Apple’s argument that its requests “are even more limited than the ‘technical specifications,
26 schematics, maintenance manuals, user or operating manuals and documents to show the physical
27 configuration and operation of the [accused product]’ that the court in Semitool ordered to be
28 produced on an expedited basis,” Mot. to Expedite at 12, lacks merit. All of the categories of
documents discussed in Semitool are much more clearly defined than the sweeping category of
“marketing materials” Apple seeks here.

1 [REDACTED]

2 [REDACTED]⁵

3 Second, Apple’s request for “documents relating to any copying of design elements of, or
4 attempts to design around Apple’s intellectual property relating to, the iPhone 4, iPad, and iPad 2”
5 fares no better. (Mot. to Expedite (D.N. 10) at 13.) “[U]se of a broad term such as ‘relate to’
6 provides no basis upon which a party can reasonably determine what documents may or may not
7 be responsive.” Qwest, 213 F.R.D. at 420-21 (quoting W. Res., Inc. v. Union Pac. R.R. Co., 2001
8 WL 1718368, *3 (D. Kan. 2001).) Thus, this request is overbroad on its face. Further, Apple has
9 not defined what “Apple’s intellectual property relating to [] the iPhone 4, iPad, and iPad 2” is,
10 and Samsung is not in a position to define that term for itself. Finally, because there is no reason
11 to believe that Samsung has copied or attempted to design around Apple’s intellectual property,
12 this request essentially asks that Samsung conduct a search that confirms a negative. (Rosenberg
13 Opp. Decl. at ¶ 24; Merrill Opp. Decl. at ¶ 17) Thus, the request demands an exhaustive search of
14 all of Samsung’s documents. (Id.) This request, too, is not “limited.”

15 Finally, Apple seeks a 30(b)(6) deposition of Samsung on a wide variety of topics,
16 including: (1) the design, function and operation of the shell and graphical user interfaces of five
17 different, highly complex Samsung products; (2) alleged copying by Samsung of design elements
18 of three of Apple’s products; and (3) alleged attempts by Samsung to design around three of
19 Apple’s products. (Mot. to Expedite (D.N. 10) at 9-10.) Apple requests this deposition by
20 May 19, a week from the date its motion is to be heard.

21 As a sophisticated manufacturer of high-tech electronics itself, see Compl. at ¶ 13, Apple
22 should know that a multitude of people contribute to the design and creation of mobile phones and

23 _____

24 ⁵ STA, SEA and SEC are separate entities. (Certification of Interested Persons Or Entities
25 (D.N. 22); Rosenberg Opp. Decl. at ¶ 23; Merrill Opp. Decl at ¶ 16). [REDACTED]

26 [REDACTED]
27 [REDACTED]
28 [REDACTED]

1 tablet computers. Simply to identify and interview potential witnesses who could testify on
2 Samsung's behalf about the design, function and operation of the shells and graphical user
3 interfaces of the Galaxy S2, Galaxy 8.9, Galaxy 10.1, Infuse 4G and 4G LTE is a significant
4 undertaking. [REDACTED]

5 [REDACTED]
6 [REDACTED]
7 [REDACTED]
8 [REDACTED]
9 [REDACTED]
10 [REDACTED]
11 [REDACTED]
12 [REDACTED]
13 [REDACTED]
14 [REDACTED]
15 [REDACTED]
16 [REDACTED]

17 [REDACTED] Apple's deposition
18 topics are thus too broad to be the subject of expedited discovery.⁶

19 In sum, the overbreadth of Apple's discovery requests weighs against granting Apple's
20 Motion to Expedite Discovery.

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25 ⁶ Apple cites KLA-Tencor Corp. v. Murphy, 717 F. Supp. 2d 895 (N.D. Cal. 2010), for the
26 proposition that oral depositions are "routinely permitted in these circumstances." (Mot. to
27 Expedite at 12.) That proposition is called into question by another case cited by Apple that
28 disapproves of "a free ranging deposition for which a representative of Defendants may not have
had sufficient time or information with which to prepare." Semitool, Inc. v. Tokyo Electron
Am., Inc., 208 F.R.D. 273, 277 (N.D. Cal. 2002).

1 C. Apple Articulates No Proper Purpose for the Expedited Discovery It Seeks.

2 1. Apple's Claim That Introduction of Samsung's Products Into the Market
 3 Will Potentially Cause Apple Irreparable Harm Is Not a Proper Purpose of
Expedited Discovery.

4 Apple bases its Motion to Expedite Discovery on its belief that Samsung's sales of its
 5 unreleased products "have the potential to cause irreparable harm to Apple." (*Id.*) Thus, Apple
 6 argues, "[w]ithout an order permitting expedited discovery, Apple would be required to wait until
 7 Samsung's new products are commercially available, and would be forced to suffer the attendant
 8 irreparable harm that comes with sales of infringing products." (*Id.* at 11.) Though Apple's
 9 Motion to Expedite Discovery is not entirely clear on this point, it appears that Apple seeks
 10 discovery on these products in order to decide whether to seek a preliminary injunction against
 11 them. (Mot. to Expedite (D.N. 10) at 11 ("This motion represents Apple's only opportunity to
 12 obtain information to preserve the status quo").)

13 Apple's potential "irreparable harm" argument is not a proper purpose for expedited
 14 discovery. Another district court has already considered and rejected the argument that the release
 15 of potentially infringing products could pose the risk of irreparable harm:

16 Momenta claims that infringement of its patent is imminent because
 17 Teva is likely to obtain FDA approval and release its product.
 18 Nevertheless, any economic damages that Momenta may suffer as a
 result of Teva introducing its product on the market are readily
 calculable. When that is the case, there is no risk of irreparable harm.

19 Momenta 2011 WL 673926, *2. Given the similarity between Apple's irreparable harm argument
 20 and the argument advanced by the plaintiff in Momenta, the district court's reasoning in that case
 21 is plainly applicable here. Any alleged harm Apple might suffer by the introduction of Samsung's
 22 products into the market can be compensated by money damages. "Monetary damages, no matter
 23 how substantial, are generally not considered irreparable harm as adequate compensatory relief
 24 will be available at a later date." Nanoexa Corp. v. Univ. of Chicago, No. 10-CV-2631-LHK,
 25 2010 WL 3398532, *4 (N.D. Cal. 2010) (Koh, J.) (citing Los Angeles Mem'l Coliseum
 26 Comm'n v. Nat'l Football League, 634 F.2d 1097, 1202 (9th Cir. 1980).

27 Further, even if, for the sake of argument, the Court were to entertain Apple's incorrect
 28 argument that it could be irreparably harmed by the introduction of Samsung's products, the Court

1 should not presume that Apple would be entitled to injunctive relief. eBay Inc. v. MercExchange,
2 L.L.C., 547 U.S. 388, 393-94 (2006); Edge Games, Inc. v. Electronic Arts, Inc., 745 F. Supp.
3 2d 1101, 1117 (N.D. Cal. 2010). Rather, Apple “must . . . establish that it is likely to suffer
4 irreparable harm in the absence of preliminary injunctive relief.” Nanoexa, 2010 WL 3398532 at
5 *5. Apple fails to carry this burden. On the question of “irreparable harm,” Apple offers only
6 cursory – and unsupported – attorney argument. (See Mot. to Expedite (D.N. 10) at 1, 11.) Apple
7 offers the declarations of no fact witnesses, nor expert testimony, to support these allegations.
8 Such “conclusory and speculative allegations are insufficient to prove irreparable harm.”
9 Nanoexa, 2010 WL 3398532 at *5. Further, Apple’s irreparable harm argument is undermined by
10 its own failure to offer any proof that it has been irreparably harmed by entry into the market of
11 “Samsung’s existing Galaxy products,” which Apple claims are “exemplary” of Samsung’s
12 “pattern and practice by Samsung of copying Apple’s patents, trademarks, trade dress, and other
13 intellectual property in connection with mobile devices.”⁷ (Mot. to Expedite at 1.) Thus, Apple
14 “has provided no evidence that entry of a competitor into the market will cause irreparable loss of
15 market share and revenue. Without a risk of irreparable harm, expedited discovery is
16 unwarranted.” Momenta, 2011 WL 673926 at *2 (internal citation omitted).

17 Finally, Apple’s claimed reason for desiring expedited discovery in the first place—to
18 determine whether Samsung “is actively copying Apple’s technology,” Mot. to Expedite at 11—is
19 too speculative to serve as the basis for the rare exception of expedited discovery. For example,
20 the alleged statements by a Samsung executive on which Apple relies for its suspicion that
21 Samsung is “retooling its new Galaxy Tabs to emulate more closely Apple’s proprietary designs
22 and features” refer to the thinness of the Galaxy Tab and that product’s price. (Mot. to Expedite
23 (D.N. 10) at 4 (citing Bartlett Expedite Decl. Ex. 4 (D.N. 11-4)), 11.) Surely, Apple does not have
24 a monopoly on the thinness of mobile devices and competitive pricing. Matsushita Elec. Indus.
25

26
27 ⁷ It is noteworthy that Apple has not accused the Galaxy S2, Galaxy 8.9, Galaxy 10.1, Infuse
28 4G and 4G LTE of any intellectual property violation that it does not assert against existing
Samsung products on the market.

1 Corp. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986) (“[C]utting prices in order to increase
 2 business often is the very essence of competition.”). Moreover, it is unreasonable for Apple to
 3 “suspect” that Samsung might be “actively copying Apple’s technology” based on these
 4 statements. Indeed, even if accepted as true, the statements support the conclusion that Samsung
 5 planned to “retool” the Galaxy Tab in order to make it more *distinctive* from Apple’s products, not
 6 more similar. Finally, any efforts by Samsung to make its unreleased products more *functional* –
 7 e.g., thinner – cannot support Apple’s claims. (Mot. to Expedite (D.N. 10) at 11.) “Trademark or
 8 trade dress protection extends only to product features that are nonfunctional.” Disc Golf
 9 Ass’n, Inc. v. Champion Discs, Inc., 158 F.3d 1002, 1006 (9th Cir. 1998). Yet as Apple itself
 10 alleges, “the end result” of its claimed trade dress “is an elegant product that is more accessible,
 11 easier to use, and much less technically intimidating” than competing products. (Compl. (D.N. 1)
 12 at ¶ 27). Although trade dress must be viewed as a whole, “where the whole is nothing other than
 13 the assemblage of functional parts, and where even the arrangement and combination of the parts
 14 is designed to result in superior performance, it is semantic trickery to say that there is still some
 15 sort of separate ‘overall appearance’ which is non-functional.” Leatherman Tool Group, Inc. v.
 16 Cooper Indus., Inc., 199 F.3d 1009, 1013 (9th Cir. 1999).

17 2. Apple’s Cited Cases Do Not Support Its Argument That a Competitor’s
 18 Unreleased Products Are Subject to Expedited Discovery.

19 Apple does not point the Court to a single case where discovery was ordered into
 20 competitors’ unreleased products. Apple primarily relies upon Semitool, 208 F.R.D. 273, for the
 21 proposition that “good cause is frequently found in cases involving claims of infringement and
 22 unfair competition.” (Mot. to Expedite at 10.) While Semitool resulted in the grant of expedited
 23 discovery, Magistrate Judge Chen’s decision in that case was based upon a variety of facts not
 24 present in this case. First, in Semitool, the defendants had conceded the relevance of the requested
 25 discovery. Semitool, 276 F.R.D. at 276. Samsung has made no such concession. Second, the
 26 defendants in Semitool had had notice of the discovery that was sought in the plaintiff’s motion
 27 for over a year. Id. Here, Samsung had no notice of Apple’s requested discovery until Apple
 28 sprang its motion on Samsung. Further, the plaintiff in Semitool sought to move up the discovery

1 schedule by only 3 weeks. Id. at 277. In this case, the Rule 26(f) conference was previously
2 scheduled for August 18, 2011. (Order Setting Initial Case Mgmt. Conference and ADR
3 Deadlines (D.N. 7); see also Notice of Impending Reassignment to a U.S. District Court Judge
4 (D.N. 15).) Assuming that the Court will set a Rule 26(f) conference at a similar time, granting
5 Apple's motion would accelerate discovery by 3 months. Finally, in Semitool, the competitor's
6 product into which the plaintiff sought expedited discovery was already being sold and distributed,
7 whereas here Apple seeks discovery into Samsung's unreleased products. 276 F.R.D. at 274.

8 Apple's other cited cases also are inapposite to the present situation. Zynga Game
9 Network Inc. v. Williams, No. 10-cv-1022 JF (PVT), 2010 WL 2077191 (N.D. Cal. May 20,
10 2010); Hard Drive Prods., Inc. v. Does, No. 11-cv-1567, 2011 WL 1431612 (N.D. Cal. Apr. 14,
11 2011); and IO Grp., Inc. v. Does 1-65, No. 10-cv-4377 SC, 2010 WL 4055667 (N.D. Cal. Oct.
12 15, 2010), all concerned requests for expedited discovery to identify Doe defendants. Apple does
13 not seek discovery for this purpose. In re Countrywide Fin. Corp. Deriv. Litig., 542 F. Supp.
14 2d 1160 (C.D. Cal. 2008), denied the plaintiff's requested discovery on an independent basis, and
15 thus did not reach the question as to whether the plaintiff had established "good cause" for
16 expedited discovery. Interserve, Inc. v. Fusion Garage PTE, Ltd., No. 09-cv-05812 JW (PVT)
17 2010 WL 143665 (N.D. Cal. Jan. 7, 2010), concerned expedited discovery into a product that the
18 plaintiff had reason to believe was merely a rebranded version of a product that the plaintiff and
19 defendant had collaborated in creating. Further, the discovery at issue in Interserve consisted of
20 interrogatories and document requests, not product samples. Here, by contrast, Apple seeks a
21 sneak peek of its competitor's actual unreleased products.

22 3. Apple Has Not Shown That the Evidence It Seeks Will Be Lost Before the
23 Normal Discovery Period Begins.

24 A party seeking expedited discovery is expected to show that the evidence sought risks
25 being destroyed before the normal discovery period begins. Wangson, 2008 WL 4239155, at *7.
26 Apple does not even *contend*, much less present evidence, that the discovery it seeks now will no
27 longer be available during the normal course of discovery. In fact, without a preliminary
28 injunction, commercial samples of the products at issue and their marketing materials will become

1 available to Apple—and Apple will not even require this Court’s assistance to get them, since they
 2 will be available to the general public. Thus, Apple will suffer no harm if it must wait to seek the
 3 discovery it desires until the normal discovery period opens.

4 Because Apple identifies no proper purpose for the discovery it seeks, this factor weighs
 5 against granting Apple’s Motion to Expedite Discovery.

6 D. It Would Be Extremely Burdensome on Samsung to Comply With Apple’s
 7 Discovery Requests.

8 Apple’s request that it be permitted access to information concerning five of Samsung’s
 9 unreleased products is outrageous, and, if granted, would severely harm Samsung. Apple
 10 admittedly competes with Samsung in the market for mobile phones and tablet computers.
 11 (Compl. (D.N. 1) at ¶ 4.) Samsung considers information about unreleased products – especially
 12 the products themselves – to be trade secrets. (Rosenberg Opp. Decl. at ¶ 25; Merrill Opp. Decl.
 13 at ¶ 18.) To force Samsung to hand over to its fierce competitor information concerning its
 14 unreleased products would put Samsung at an extraordinary competitive disadvantage, and Apple
 15 knows this. Apple itself believes that information about its own unreleased products is a trade
 16 secret, and fights zealously to prevent disclosure of that information:

17 On December 13, 2004, Apple filed a complaint against “Doe 1, an
 18 unknown individual,” and “Does 2–25,” whom it described as
 19 unidentified persons or entities. The gist of the claim was that one or
 20 more unidentified persons, presumably the defendants, had
 21 “misappropriated and disseminated through web sites confidential
 22 information about an unreleased product....” Such information,
 23 Apple alleged, constitutes a trade secret: It possesses commercial
 24 and competitive value that would be impaired by disclosure in that,
 25 if it is revealed, “competitors can anticipate and counter Apple’s
 26 business strategy, and Apple loses control over the timing and
 27 publicity for its product launches.” Therefore, Apple alleged, it
 28 “undertakes rigorous and extensive measures to safeguard
 information about its unreleased products.”

24 O’Grady v. Superior Court, 139 Cal. App. 4th 1423, 1436 (2006). Apple has gone so far as to
 25 contact local police when it learned that the gadget blog Gizmodo had acquired a prototype of the
 26 unreleased iPhone 4 and published information about it, leading to the raid of a Gizmodo editor’s
 27 home. (Decl. of Erik Olson In Support of Samsung’s Opp. to Pl.’s Mot. to Expedite Disc., Ex. A.)
 28 Considering that Apple regards information about unreleased products to be a trade secret because

1 competitors can use it to “anticipate and counter . . . business strategy,” it is beyond the pale for
2 Apple to request that Samsung throw itself on its sword and hand over information about its
3 unreleased products, much less *samples* of those products. The failure of Apple to cite to any case
4 ordering a party to provide samples of its unreleased products to its competitor on an expedited
5 basis only reinforces this conclusion.⁸ Apple should not be allowed to circumvent the competitive
6 process by gaining advance access to its competitor’s unreleased products through litigation, and
7 Samsung should not be ordered to suffer it.

8 In addition to the severe competitive harm that Samsung would suffer if forced to reveal to
9 Apple the information Apple requests, actually collecting the documents and things Apple seeks,
10 and preparing a 30(b)(6) witness or witnesses on Apple’s deposition topics would pose an
11 extremely heavy burden on Samsung.

12 As an initial matter, Apple’s May 17 deadline for the production of the documents and
13 things it requests is simply unworkable. Because Samsung considers information about its
14 unreleased products to be trade secrets, the internal approval process for disclosing such
15 information voluntarily would take a significant amount of time in and of itself. That would not
16 leave sufficient time to produce the documents and things Apple requests by a May 17 deadline if
17 that approval were granted.

18 [REDACTED]
19 [REDACTED]
20 [REDACTED] Thus, Samsung is simply
21 currently unable to comply with this portion of Apple’s requests.

22 [REDACTED]
23 [REDACTED]
24 _____
25 ⁸ Apple cites Trak Inc. v. Benner Ski KG, 475 F. Supp. 1076 (D.C. Mass. 1979) for the
26 proposition that “it may be less prejudicial to enjoin a defendant that has invested fewer resources
27 in an infringing product than to wait until the defendant has invested more resources in a product,
28 and then later enjoin its use.” (Mot. to Expedite at 7.) However, Trak was decided on a motion
for a preliminary injunction, and has nothing to do with discovery, much less expedited discovery.

1 [REDACTED]
2 [REDACTED] Thus, Samsung is also currently unable to comply with this portion of Apple’s requests.

3 Fourth, responding to Apple’s request for “marketing materials” will entail an extensive
4 and expensive search by Samsung. [REDACTED]

5 [REDACTED] (Rosenberg Opp. Decl. at ¶ 11; Merrill Opp. Decl. at ¶ 8.) To
6 collect the electronic records of each such Samsung employee would be extremely burdensome, to
7 say nothing of the time and expense it would take for Samsung’s outside counsel to review the
8 collected documents for relevance and privilege. (Rosenberg Opp. Decl. at ¶ 12; Merrill Opp.
9 Decl. at ¶ 9.) To the extent “marketing materials” also includes physical objects, Samsung would
10 need to interview each of its employees involved in the U.S. marketing of these products to
11 determine where such physical objects are located. (Rosenberg Opp. Decl. at ¶ 13; Merrill Opp.
12 Decl. at ¶ 10.) [REDACTED]

13 (Id.) Collecting these objects on an expedited basis would thus pose an unreasonable burden on
14 Samsung.

15 Fifth, it would be extremely burdensome for Samsung to prepare for a deposition on the
16 “design, function and operation of the shells and graphical user interfaces of the Galaxy S2,
17 Galaxy Tab 8.9, Galaxy Tab 10.1, Infuse 4G, and 4G LTE.” [REDACTED]

18 [REDACTED] (Rosenberg Opp. Decl. at ¶ 14.) Thus,
19 STA would have to potentially interview all of these design employees in order to prepare for a
20 deposition. (Id.) [REDACTED]

21 [REDACTED]

22 [REDACTED]

23 [REDACTED]

24 [REDACTED]

25 [REDACTED]

26 _____

27 ⁹ As noted in footnote 5, supra, it is not a given that SEA or STA could learn the identities of
28 SEC’s design personnel without SEC’s permission.

1 [REDACTED]
2 [REDACTED] (Rosenberg Opp. Decl. at ¶ 15.) After
3 their respective searches, SEA and STA would have to interview the employees identified as a
4 result of those searches. Having done all that, SEA and STA would then have to prepare a person
5 or persons for deposition. It would be unreasonable to expect that Samsung could do all this by
6 May 19, a mere week after the hearing on Apple's motion. The Court should not allow Apple to
7 take a 30(b)(6) deposition of Samsung "before [Samsung] . . . may . . . investigate the facts, and
8 prepare for the interrogation." Avaya, Inc. v. Acumen Telecom Corp., No. 10-cv-03075-CMA-
9 BN, 2011 WL 9293, *2 (D. Colo. Jan. 3, 2011).

10 Finally, there is no reason to believe that Samsung is even in possession of "documents
11 relating to any copying of design elements of, or attempts to design around Apple's intellectual
12 property relating to, the iPhone 4, iPad, and iPad 2." (Rosenberg Opp. Decl. at ¶ 24; Merrill Opp.
13 Decl. at ¶ 17.) It would thus be enormously burdensome for Samsung to search for such
14 documents, since such a search would entail confirming a negative, i.e., a search through every
15 one of Samsung's documents. (Id.)

16 Because Apple's requested discovery would impose an extreme burden upon Samsung,
17 this factor also weighs against granting Apple's Motion to Expedite Discovery.

18 E. Apple's Motion Seeks Extraordinary Acceleration of Discovery.

19 As even Apple admits, its discovery "request is made substantially in advance of the
20 formal start of discovery," as "the Rule 26(f) conference . . . is likely to be months away." (Mot.
21 to Expedite (D.N. 10) at 10, 12.) Prior to the reassignment of this case from Magistrate Judge
22 Beeler to this Court, which vacated the Case Management Conference date, which in turn
23 determined when the Rule 26(f) conference was to occur, the Rule 26(f) conference was scheduled
24 for August 18, 2011. (Order Setting Initial Case Management Conference and ADR Deadlines
25 (D.N. 7); Notice of Impending Reassignment to a U.S. District Judge (D.N. 15).) Here, Apple
26 seeks documents and things from Samsung by May 17, more than 3 months prior to the originally
27 scheduled Case Management Conference. (Proposed Order Granting Pl.'s Mot. to Expedite (D.N.
28 11-12) at 1-2.) That is a far cry from the mere 3 weeks by which the plaintiff sought to accelerate

1 discovery in Semitool, 208 F.R.D. at 276, the case most heavily relied-upon by Apple. Because
2 Apple seeks to accelerate discovery so drastically, this factor weighs against granting Apple's
3 Motion to Expedite Discovery.

4 IV. Conclusion

5 For the foregoing reasons, Apple has not shown requisite good cause to expedite discovery
6 and the Court should DENY Plaintiff's Motion to Expedite Discovery.

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9 DATED: May 5, 2011

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