

EXHIBIT 1
FILED UNDER SEAL

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LTD., SAMSUNG ELECTRONICS AMERICA,
16 INC. and SAMSUNG
TELECOMMUNICATIONS AMERICA, LLC

17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

19
20 APPLE INC., a California corporation,
21 Plaintiff,

22 vs.

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

27 Defendants.
28

CASE NO. 11-cv-01846-LHK

**[PROPOSED] REPLY IN SUPPORT OF
SAMSUNG'S ADMINISTRATIVE
MOTION FOR RELIEF FROM APRIL 29,
2013 CASE MANAGEMENT ORDER**

Place: Courtroom 4, 5th Floor
Judge: Hon. Lucy H. Koh

1 Apple apparently expects the Court to believe that its new 393-page expert report on
 2 damages (including over 200 exhibits) simply replicated Mr. Musika’s methodologies, based on
 3 nothing more than its own say so.¹ We have been down this road before. Apple previously
 4 assured the Court that it would introduce evidence establishing its purported notice dates. Yet, the
 5 evidence was nowhere to be found. The fact is that, despite the Court’s repeated warnings (*see*,
 6 *e.g.*, Dkt. No. 2320(“CMC Tr.”), at 53:10-14 (The Court: “[N]othing is going to change. If it
 7 does change, then I’m going to vacate the trial date and I will just set a CMC after Apple II goes to
 8 trial.”), Apple’s Opposition confirms that its new expert report has *changed* the damages period,
 9 *changed* the first sale dates, includes ■ “*alternative calculations*” of damages not undertaken by
 10 Mr. Musika or presented to the jury, and incorporates *dozens* of new documents and new
 11 testimony nowhere to be found in any of Mr. Musika’s reports. The Court set a trial for
 12 November of this year and Samsung agreed to a compressed schedule solely on the basis of
 13 Apple’s representations that it “understand[s] the Court’s direction.” (*Id.* at 52:1). Samsung
 14 would never have agreed to this schedule, or to forego additional discovery, had it known that
 15 Apple would serve a convoluted new report with ■
 16 ■ Apple has pulled a “bait and switch” on both the Court and Samsung. To avoid
 17 prejudicing Samsung, Apple must be held to the Court’s orders and its prior representations.

18 1. ■ Apple argues that “Mr.
 19 Musika previously prepared the same revenue-based calculations as Ms. Davis has now prepared,
 20 and testified to Samsung’s total revenues at trial.” (Opp’n at 2:27-28.) Apple conveniently misses
 21 the point. Apple is limited to the same damages theories Mr. Musika presented *at trial*. (CMC Tr.
 22 at 67:20-21 (“You can -- you can present less [damages theories] if you want to, but you cannot
 23 present more.”).) Apple does not dispute that Mr. Musika did not present a damages theory at trial
 24 based on Samsung’s revenues, yet ■ (See, *e.g.*, Dkt. No.
 25 2326, Alden Dec., Ex. 2 at Ex. 17-PT.)

26
 27 ¹ Apple points out that the report is 393-pages long with exhibits, but “only” 111 pages of
 28 text. This is a distinction without a difference because Samsung must respond to it all.

1 2. [REDACTED] Apple argues that
2 Ms. Davis’s calculations of Samsung’s per-product “incremental profit” do not represent a
3 “change in methodology.” (Opp’n at 3:13.) Again, Apple is being disingenuous. While Mr.
4 Musika made one calculation of what Ms. Davis calls Samsung’s “incremental profit” for all
5 Samsung products (including unaccused products), he did not do so on a per-product basis, nor did
6 he present any damages figures to the jury based on this calculation. Ms. Davis’s damages
7 calculations based on Samsung’s purported “incremental profit” for [REDACTED]
8 [REDACTED] are *entirely new, never seen before*. Apple does not dispute this.

9 3. [REDACTED] Apple admits that
10 it has “moved” the design around periods used in Mr. Musika’s lost profits analysis. (Opp’n at
11 3:14-16.) At the CMC, Samsung requested that it have “an opportunity to present to the jury
12 different damages period based on the design around availability.” (CMC Tr. at 81:14-16.) Apple
13 vociferously opposed (*Id.* at 81:17-23) and the Court denied Samsung’s request. Yet now, Apple
14 itself openly concedes it has changed the damages period. Apple fails to explain why it has not
15 violated two different orders: the Court’s order that there be “no new damages period” (*id.* at
16 41:21-22), and the Court’s pre-trial order precluding Apple from doing exactly what it proposes to
17 do now. (Mot. at n. 2, citing Dkt. No. 1690 at 2.) There is no legitimate reason for Apple to
18 change the design around periods and it has not identified one.

19 4. [REDACTED] Apple admits that Ms. Davis has prepared “*alternative*
20 calculations using different start dates” because Apple intends to belatedly challenge an
21 extensively-litigated prior Court order and it anticipates a “possible dispute” that it refuses to
22 identify or describe. (Opp’n at 3:23-25.) Yet, Apple does not dispute that these are [REDACTED]
23 [REDACTED] that do not simply respond to the new notice dates.

24 5. [REDACTED] Tellingly, Apple still
25 refuses to clearly state that Ms. Davis’s will not offer an opinion on irreparable harm or whether
26 Samsung satisfied its burden of proof at trial, despite the Court’s *Daubert* order. (Dkt. No. 1157
27 at 13.) Apple simply quotes Ms. Davis’s report, which vaguely says she “understands” she will
28 not offer an irreparable harm opinion *unless the Federal Circuit rules first* (Opp’n at 3:28-4:2),

1 and that she “will not testify to burdens of proof.” (*Id.* at 4:5-6.) Apple’s carefully crafted
2 representations highlight its gamesmanship.

3 6. The Davis Report relies on new evidence and testimony: Apple does not dispute
4 that Ms. Davis relies on Mr. Roberts’ declaration. Nor does Apple dispute that Mr. Musika did
5 not refer to or rely on this declaration, it was not presented to the jury, and Samsung had no
6 opportunity to depose or cross-examine Mr. Roberts. The fact that Mr. Musika was “aware” of the
7 declaration is irrelevant. Likewise, Apple does not dispute that Ms. Davis belatedly addresses
8 testimony to which Apple chose not to respond at trial and that she refers to dozens of documents
9 that Mr. Musika did not testify about, and which are directed to liability issues, not damages.

10 Apple’s strategy is transparent: get the Court and Samsung to agree to a new compressed
11 schedule and page limitations based on a representation that its supplemental damages report
12 would simply adjust for the new notice dates, and then dump on Samsung a report which Apple
13 admits has [REDACTED]

14 [REDACTED]
15 There is no way Samsung would have agreed to a compressed schedule, foregone additional
16 discovery, and severely narrowed *Daubert* motions and motions to strike had it known this was
17 how Apple intended to “comply” with the Court’s orders. Because Apple has flagrantly violated
18 the Court’s CMC Order and severely prejudiced Samsung, the Court should vacate all deadlines
19 and set a new case management conference on further proceedings, including a deadline for Apple
20 to comply with the limitations on a new expert report previously set by the Court.

21 DATED: July 8, 2013

Respectfully submitted,

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