

United States District Court
For the Northern District of California

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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA
SAN JOSE DIVISION

APPLE, INC., a California corporation,)	Case No.: 12-CV-00630-LHK
)	
Plaintiff,)	ORDER DENYING APPLE’S MOTION
v.)	FOR PERMANENT INJUNCTION
)	
SAMSUNG ELECTRONICS CO., LTD, A)	[REDACTED]
Korean corporation; SAMSUNG)	
ELECTRONICS AMERICA, INC., a New York)	
corporation; SAMSUNG)	
TELECOMMUNICATIONS AMERICA, LLC,)	
a Delaware limited liability company)	
)	
Defendants.)	

Apple, Inc. (“Apple”) owns U.S. Patent Nos. 5,946,647 (the “’647 patent”); 8,046,721 (the “’721 patent”); and 8,074,172 (the “’172 patent”), which each cover features that Apple contends are related to the ease of using smartphones. Apple asserted these three patents and two others against Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC (collectively, “Samsung”). On summary judgment, the Court found that Samsung infringed the ’172 patent. A jury then found that Samsung also infringed the ’647 and ’721 patents, and awarded damages for all infringed patents. Apple now moves, based only on these three patents, to enjoin Samsung from making, selling, developing, or advertising infringing features in its products. See ECF No. 1895-4 (“Proposed Order”). Apple’s motion is fully briefed, and the Court heard oral arguments on July 10, 2014. Having considered the parties’

1 arguments, the briefing, the relevant law, and the record in this case, the Court concludes that
 2 Apple has not established that it is entitled to the permanent injunction it seeks. Apple's Motion
 3 for a Permanent Injunction is therefore DENIED.

4 **I. TECHNOLOGICAL BACKGROUND**

5 Because the particular features claimed by the patents-in-suit are relevant to the Court's
 6 conclusions, the Court begins by briefly reviewing the claimed features.

7 The '647 patent, entitled "System and Method for Performing an Action on a Structure in
 8 Computer-Generated Data" and colloquially called the "quick links" patent, discloses "a system
 9 and a method [that] causes a computer to detect and perform actions on structures identified in
 10 computer data." '647 patent Abstract. The application for the '647 patent was filed on February 1,
 11 1996, and the patent issued on August 31, 1999. Asserted claim 9 depends from claim 1. Both
 12 claims recite:

- 13 1. A computer-based system for detecting structures in data and performing
 14 actions on detected structures, comprising:
 15 an input device for receiving data;
 16 an output device for presenting the data;
 17 a memory storing information including program routines including
 18 an analyzer server for detecting structures in the data, and for linking actions
 19 to the detected structures;
 20 a user interface enabling the selection of a detected structure and a linked
 21 action; and
 22 an action processor for performing the selected action linked to the selected
 23 structure; and
 24 a processing unit coupled to the input device, the output device, and the
 25 memory for controlling the execution of the program routines.
- 26 9. The system recited in claim 1, wherein the user interface enables selection of an
 27 action by causing the output device to display a pop-up menu of the linked
 28 actions.

22 *Id.* cls.1, 9. The '647 patent discloses a system and method for recognizing when certain patterns
 23 or "data structures" are present in a data set, and automatically providing optional actions for a user
 24 to perform on the data structures. *See id.* col.2 ll.21-54. For example, the system may scan a
 25 Microsoft Word document and recognize when phone numbers or email addresses appear in the
 26 document. *See id.* col.1 ll.24-35; *see also id.* col.2 ll.42-53. Then, the system may link actions to
 27 these structures and allow the user to select an action. *Id.* As an example, when an e-mail address
 28 is detected in a document, the system may automatically give the user the options to send an e-mail

1 to the identified address or to store the e-mail address in an electronic address book. *Id.* at col.5
2 ll.5-18. As another example, when a phone number is detected in a document, the system may give
3 the user the option to place a call to that phone number or to place the number in an electronic
4 telephone book. *Id.*

5 For infringement of the '647 patent, Apple accused the Messenger (also referred to as
6 "Messaging" by the parties) and Browser applications in the Gingerbread, Ice Cream Sandwich,
7 and Jelly Bean versions of the Android operating system, as implemented on nine accused
8 Samsung products: the Admire, Galaxy Nexus, Galaxy Note, Galaxy Note II, Galaxy S II, Galaxy
9 S II Epic 4G Touch, Galaxy S II Skyrocket, Galaxy S III, and Stratosphere. *See* Tr. at 833:5-8,
10 839:1-6, 841:23-842:14. The jury found that all nine accused products infringe the '647 patent.
11 *See* ECF No. 1884 at 9.

12 The '721 patent, entitled "Unlocking a Device by Performing Gestures on an Unlock
13 Image" and nicknamed the "slide to unlock" patent, is generally directed to devices with touch-
14 sensitive displays that users can unlock by performing certain gestures. *See* '721 patent Abstract.
15 The '721 patent claims priority to an application filed on December 23, 2005, and issued on
16 October 25, 2011. Asserted claim 8 depends from claim 7. Both claims recite:

- 17 7. A portable electronic device, comprising:
18 a touch-sensitive display;
19 memory;
20 one or more processors; and
21 one or more modules stored in the memory and configured for execution by the
22 one or more processors, the one or more modules including instructions:
23 to detect a contact with the touch-sensitive display at a first predefined location
24 corresponding to an unlock image;
25 to continuously move the unlock image on the touch-sensitive display in
26 accordance with movement of the detected contact while continuous contact
27 with the touch-sensitive display is maintained, wherein the unlock image is
28 a graphical, interactive user-interface object with which a user interacts in
order to unlock the device; and
to unlock the hand-held electronic device if the unlock image is moved from the
first predefined location on the touch screen to a predefined unlock region
on the touch-sensitive display.
8. The device of claim 7, further comprising instructions to display visual cues to
communicate a direction of movement of the unlock image required to unlock
the device.

1 *Id.* cls.7, 8. Thus, the patent generally discloses ways to unlock a smartphone by sliding a finger
2 (for example) across the screen to “continuously move” an image to an unlocking position.

3 For infringement of the ’721 patent, Apple accused the touchscreen-based unlocking
4 mechanisms on six accused Samsung products: the Admire, Galaxy Nexus, Galaxy S II, Galaxy S
5 II Epic 4G Touch, Galaxy S II Skyrocket, and Stratosphere. *See* Tr. at 650:14-16, 658:17-659:4.
6 The jury found that the Admire, Galaxy Nexus, and Stratosphere infringe the ’721 patent, but that
7 the Galaxy S II, Galaxy S II Epic 4G Touch, and Galaxy S II Skyrocket did not infringe. *See* ECF
8 No. 1884 at 9.

9 The ’172 patent, entitled “Method, System, and Graphical User Interface for Providing
10 Word Recommendations” and colloquially called the “auto correct” patent, discusses systems for
11 suggesting replacements for text as a user types. *See* ’721 patent Abstract. The application for the
12 ’721 patent was filed on January 5, 2007, and the patent issued on December 6, 2011. Asserted
13 claim 18 recites:

- 14 18. A graphical user interface on a portable electronic device with a keyboard and a
15 touch screen display, comprising:
16 a first area of the touch screen display that displays a current character string
17 being input by a user with the keyboard; and
18 a second area of the touch screen display separate from the first area that
19 displays the current character string or a portion thereof and a suggested
20 replacement character string for the current character string;
21 wherein;
22 the current character string in the first area is replaced with the suggested
23 replacement character string if the user activates a key on the keyboard
24 associated with a delimiter;
25 the current character string in the first area is replaced with the suggested
26 replacement character string if the user performs a gesture on the suggested
27 replacement character string in the second area; and
28 the current character string in the first area is kept if the user performs a gesture
in the second area on the current character string or the portion thereof
displayed in the second area.

23 *Id.* cl.18. The ’172 patent discloses a method, system, and interface for providing word
24 recommendations to users inputting text into a portable communication device and for allowing the
25 user to select the recommended words. *See generally id.* at Abstract.

26 For infringement of the ’172 patent, Apple accused the word recommendation feature of the
27 Messenger application in Android as implemented on seven accused Samsung products: the
28 Admire, Galaxy Nexus, Galaxy Note, Galaxy S II, Galaxy S II Epic 4G Touch, Galaxy S II

1 Skyrocket, and Stratosphere. *See* ECF No. 1884 at 9; ECF No. 1151 at 9, 11 n.3. Before trial, the
2 Court granted summary judgment that the accused products infringe the '172 patent, ECF No. 1151
3 at 14, and the jury awarded damages for that infringement, *see* ECF No. 1884 at 9.

4 **II. PROCEDURAL BACKGROUND**

5 Apple's current motion follows multiple rulings regarding preliminary and permanent
6 injunctions in the two patent lawsuits between Apple and Samsung in this Court, including three
7 opinions from the Federal Circuit. In its March 6, 2014 order denying Apple's request for a
8 permanent injunction in the first lawsuit, this Court summarized the relevant proceedings in both
9 litigations, the appeals to the Federal Circuit regarding injunctions, and the Federal Circuit's
10 guidance regarding the proper analysis for assessing injunctive relief in patent cases. *See* Order
11 Denying Apple's Renewed Mot. for Permanent Injunction at 5-14, *Apple, Inc. v. Samsung Elecs.*
12 *Co.*, No. 11-CV-01846-LHK (N.D. Cal. Mar. 6, 2014) (ECF No. 3015, "1846 Injunction Order").
13 Of particular relevance are the Federal Circuit's opinions in "*Apple I*" (678 F.3d 1314 (Fed. Cir.
14 2012)), "*Apple II*" (695 F.3d 1370 (Fed. Cir. 2012)), and "*Apple III*" (735 F.3d 1352 (Fed. Cir.
15 2013)).¹

16 Apple filed the instant lawsuit on February 8, 2012, alleging that Samsung infringed several
17 Apple patents not asserted in the first lawsuit. On the same day, Apple moved for a preliminary
18 injunction, seeking to enjoin Samsung's accused Galaxy Nexus smartphone based on four asserted
19 patents. *See* ECF No. 10. This Court granted Apple's motion as to the so-called "unified search"
20 patent, No. 8,086,604 (the "'604 patent," which is no longer asserted), but denied Apple's motion
21 as to the other three patents, and entered a preliminary injunction. *See* ECF No. 221. Samsung
22 appealed this Court's ruling as to the '604 patent. On appeal, the Federal Circuit reversed the
23 Court's finding that Samsung's alleged infringement of the '604 patent caused Apple irreparable
24 harm and concluded that "the causal link between the alleged infringement and consumer demand
25 for the Galaxy Nexus is too tenuous to support a finding of irreparable harm." *See Apple II*, 695
26 F.3d at 1376. This Court subsequently dissolved the preliminary injunction. *See* ECF No. 1383.

27 ¹ In the 1846 Injunction Order, the Court referred to *Apple III* as "*Apple IV*." Because the
28 parties now refer to this Federal Circuit decision as "*Apple III*," the Court follows suit.

1 At the summary judgment stage, the Court held that Samsung infringed the '172 patent.
2 ECF No. 1151 at 14. This case then proceeded to trial. On May 5, 2014, a jury returned a verdict
3 that nine of ten accused Samsung products infringed one or both of Apple's '647 and '721 patents.
4 See ECF No. 1884 at 9. Apple sought approximately \$2.1 billion in damages for infringement of
5 all five of its asserted patents, but the jury awarded Apple a total of \$119,625,000.00 for
6 infringement of the three patents at issue. *Id.* at 8. Both parties filed motions for judgment as a
7 matter of law, challenging various portions of the jury's verdict.

8 In accordance with the Court's schedule for post-trial motions and briefing, Apple filed the
9 present motion on May 23, 2014. ECF No. 1895-3 ("Mot."). Samsung filed an Opposition on June
10 6, 2014. ECF No. 1907-3 ("Opp'n"). Apple filed a Reply on June 13, 2014. ECF No. 1918
11 ("Reply"). The Court held a hearing on July 10, 2014.

12 **III. LEGAL STANDARD**

13 The Patent Act provides that in cases of patent infringement a court "may grant injunctions
14 in accordance with the principles of equity to prevent the violation of any right secured by patent,
15 on such terms as the court deems reasonable." 35 U.S.C. § 283. A patentee seeking a permanent
16 injunction must make a four-part showing:

17 (1) that it has suffered an irreparable injury; (2) that remedies available at law, such
18 as monetary damages, are inadequate to compensate for that injury; (3) that,
19 considering the balance of hardships between the plaintiff and defendant, a remedy
in equity is warranted; and (4) that the public interest would not be disserved by a
permanent injunction.

20 *eBay Inc. v. MercExchange, L.L.C.*, 547 U.S. 388, 391 (2006). Though injunctions were once
21 issued in patent cases as a matter of course, the U.S. Supreme Court ruled in 2006 that "broad
22 classifications" and "categorical rule[s]" were inappropriate in analyzing whether to grant a
23 permanent injunction. *Id.* at 393. "An injunction is a drastic and extraordinary remedy, which
24 should not be granted as a matter of course." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S.
25 139, 165 (2010).

26 The Court evaluates each of the four *eBay* factors in light of the Federal Circuit's guidance
27 and determines whether, on balance, the principles of equity support issuance of a permanent
28 injunction in this case.

1 IV. DISCUSSION

2 A. Irreparable Harm

3 “[T]o satisfy the irreparable harm factor in a patent infringement suit a patentee must
4 establish both of the following requirements: 1) that absent an injunction, it will suffer irreparable
5 harm, and 2) that a sufficiently strong causal nexus relates the alleged harm to the alleged
6 infringement.” *Apple II*, 695 F.3d at 1374. The Federal Circuit has explained that “the purpose of
7 the causal nexus requirement is to show that the patentee is irreparably harmed *by the infringement*.
8 Without such a showing, it is reasonable to conclude that a patentee will suffer the same harm with
9 or without an injunction, thus undermining the need for injunctive relief in the first place.” *Apple*
10 *III*, 735 F.3d at 1363 (emphasis in original). This test “reflects general tort principles of causation
11 and applies equally to the preliminary and permanent injunction contexts.” *Id.* at 1361.

12 With respect to the first prong of the irreparable harm standard, Apple asserts two forms of
13 irreparable harm. Apple argues that it will suffer irreparable damage to its reputation as an
14 innovator, similar to the harm suffered by the patentee in *Douglas Dynamics, LLC v. Buyers*
15 *Products Co.*, 717 F.3d 1336, 1344-45 (Fed. Cir. 2013). Apple also contends that it will suffer
16 irreparable harm from sales-based losses.

17 With respect to the second prong of the irreparable harm standard, Apple argues that trial
18 evidence demonstrated a causal nexus between the alleged sales-based harm and Samsung’s
19 infringing behavior. Mot. at 12. Apple argues, however, that when reputational harm is alleged,
20 the second prong of the irreparable harm test falls away and no separate proof of causal nexus is
21 required. Reply at 2. Despite *Apple II*’s seemingly unambiguous language (“a patentee must
22 establish both of the following requirements”), Apple argues that in *Douglas Dynamics*, the
23 Federal Circuit “did not require separate proof of a causal nexus—because irreparable harm to the
24 patentee’s reputation *necessarily flows* from infringement[.]” *Id.* (emphasis in original).

25 1. Causal Nexus and Reputational Harm

26 The Court first addresses Apple’s assertions that, under *Douglas Dynamics*, reputational
27 harm is not subject to the “causal nexus” requirement. As set forth below, the Court finds no
28

1 reason to depart from the Federal Circuit’s guidance that a patentee must demonstrate a causal
2 nexus between infringement and any alleged irreparable harm—including injury to reputation.

3 The Federal Circuit has repeatedly stated that the causal nexus inquiry is required to show
4 irreparable harm. In *Apple II*, the Federal Circuit stated that “although the irreparable harm and the
5 causal nexus inquiries may be separated for the ease of analysis, they are *inextricably related*
6 *concepts.*” 695 F.3d at 1374 (emphasis added). In *Apple III*, the Federal Circuit further observed:

7 Apple proposes that because no single equitable factor in the injunction analysis
8 is dispositive, “[a] strong showing of irreparable harm should offset comparatively
9 weak evidence of causal nexus, and vice-versa.” Apple Br. 60. Like Apple’s first
10 argument, this argument seems to be premised on the mistaken notion that the
11 causal nexus is a separate factor from irreparable harm. As we have explained,
12 however, *the causal nexus requirement is part of the irreparable harm factor.*
13 *Without a showing of causal nexus, there is no relevant irreparable harm.* In other
14 words, *there cannot be one without the other.*

15 735 F.3d at 1363 (emphases added). Furthermore, without the causal nexus requirement, a court
16 cannot distinguish “between irreparable harm caused by patent infringement and irreparable harm
17 caused by otherwise lawful competition.” *Id.* at 1361; *see also* Hon. Kathleen O’Malley,
18 *Interesting Times at the Federal Circuit*, 63 Am. U.L. Rev. 949, 956 (2014) (“[W]e have explained
19 – and outlined the contours of the requirement – that there must be some causal nexus between an
20 infringed feature in a product and the consumer demand for that product before a permanent
21 injunction barring that product can issue.”).

22 There is no reason to forego this analysis in the context of reputational harm. Even if harm
23 will be done to Apple’s reputation, Apple is not entitled to an injunction if that harm originates
24 from some source *other than Samsung’s infringing behavior.* For example, it is possible that
25 Apple’s reputation as an “innovator” could be harmed if Samsung’s *noninfringing* features are
26 perceived as innovative, but that would not justify an injunction.

27 Apple argues that the Federal Circuit did not require proof of causal nexus in *Douglas*
28 *Dynamics*, “presumably because that type of reputational harm flows directly from the mere fact of
infringement.” Mot. at 5. In *Douglas Dynamics*, however, the defendant did not challenge the
existence of a causal nexus between the infringing behavior and the alleged harm. Indeed, the
Federal Circuit concluded that the patentee “has suffered irreparable injury *from [defendant’s]*

1 *infringement.*” 717 F.3d at 1345 (emphasis added). Apple mistakenly asserts that the defendant
2 there “argued that the patentee could not prove irreparable harm because the patents ‘cover only
3 some components of the accused snowplow assemblies.’” Reply at 3 (quoting *Douglas Dynamics*,
4 717 F.3d at 1343). Apple relies on language from the *Douglas Dynamics* opinion that did not
5 concern causal nexus. It appears that the “some components” argument to which the Federal
6 Circuit referred did not dispute the *cause* of the alleged harm to the patentee, but rather the *degree*
7 of that harm. See *Douglas Dynamics*, 2012 WL 2375012 at *48 (Defendant Cross-Appellant’s
8 Brief) (“[Patentee] cannot demonstrate that it is suffering significant—much less irreparable—
9 harm from sales of [infringer’s] snowplows.”). Because the issue was not raised, the fact that the
10 Federal Circuit did not explicitly address causal nexus in *Douglas Dynamics* cannot be interpreted
11 as an abrogation of the causal nexus requirement in the context of alleged reputational harm.

12 Later, in *Apple III*, the Federal Circuit implicitly confirmed this interpretation of *Douglas*
13 *Dynamics*, observing that causal nexus was not raised in *Douglas Dynamics*. In *Apple III*, Apple
14 argued that the causal nexus requirement should not be applied in the context of a permanent
15 injunction, citing a number of cases, including *Douglas Dynamics*. 735 F.3d at 1361-62. The
16 Federal Circuit rejected Apple’s argument, listing the cases cited by Apple and observing: “there is
17 no indication that any of the infringers in *those cases* challenged the existence of a causal nexus
18 between their infringement and the patentees’ alleged harm.” *Id.* at 1362 (emphasis added). Apple
19 points to the portion of the *Apple III* opinion where the Federal Circuit distinguished *Douglas*
20 *Dynamics* specifically on the grounds that damage to reputation was “a type of harm not asserted
21 by Apple” in *Apple III*. *Id.* Apple argues that because it *does* assert damage to reputation in the
22 instant case, *Apple III*’s distinction of *Douglas Dynamics* is inapposite. Apple errs, however, in
23 presuming that this is the *only* basis on which *Apple III* distinguishes *Douglas Dynamics*. The
24 language on which Apple relies is from a portion of the Federal Circuit’s opinion that distinguishes
25 *Douglas Dynamics* from the facts in *Apple III* “on other grounds *as well.*” *Id.* (emphasis added).
26 In *Apple III*, the Federal Circuit rejected Apple’s reading of *Douglas Dynamics* for the same reason
27 that the instant Court rejects it today—in *Douglas Dynamics*, causal nexus was never in dispute.
28 Moreover, Apple argues that *Douglas Dynamics* implicitly abrogated the causal nexus requirement,

1 despite the court’s express guidance that causal nexus and irreparable harm “are inextricably
2 related.” It is highly unlikely that the Federal Circuit intended to eliminate an “inextricable”
3 requirement without comment, further analysis, or argument by the parties.

4 Apple’s claim that “the mere fact of infringement” demonstrates irreparable reputational
5 harm also suggests the type of “categorical rule” that the U.S. Supreme Court rejected. *See eBay*,
6 547 U.S. at 393. For injury relating to either lost sales or reputation, Apple must demonstrate that
7 it will suffer irreparable harm if an injunction does not issue, *and* demonstrate that there is a causal
8 nexus between the alleged harm and Samsung’s infringement of Apple’s patents.

9 2. Harm to Apple’s Reputation

10 Apple argues that, absent an injunction, it will suffer the same type of irreparable harm to
11 “reputation and brand” that warranted an injunction in *Douglas Dynamics*. Mot. at 5. Specifically,
12 Apple argues that Samsung’s infringement erodes Apple’s reputation in multiple respects,
13 “including by tainting Apple’s reputation as an innovator, by leading customers and competitors to
14 believe that Apple is not entitled to enforce its patent rights (even when it prevails on its
15 infringement claims), and by disrupting Apple’s attempts to maintain exclusivity over its patented
16 inventions.” *Id.* at 11. Samsung disputes both irreparable harm and causal nexus, and further
17 argues that Apple’s claim for damage to its reputation has been waived by Apple. *See* Opp’n at 8.
18 This Court finds that Apple did not waive its arguments regarding reputational harm, but
19 determines that Apple has not met its burden to show irreparable harm to its reputation or goodwill
20 without an injunction, and has not demonstrated a causal nexus between Samsung’s infringement
21 and any alleged reputational injury.

22 a. Waiver

23 In Apple’s previous motion for a preliminary injunction in this matter, Apple argued that
24 Samsung’s infringement of “key distinguishing features” diluted the “critical distinctiveness of
25 Apple’s products and goodwill associated with those products.” Apple Mot. for Preliminary
26 Injunction (ECF No. 10) at 24. In response to that motion, this Court observed that “[l]oss of
27 goodwill, as well as damage to reputation, can support a finding of irreparable harm.” ECF No.
28 221 at 76 (citing *Celsis In Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012)).

1 However, this Court found that even if Apple could establish a “reputation for innovativeness,” a
2 likelihood of irreparable harm had not been shown at that time because “Apple has presented no
3 evidence explaining how the presence in the market of an infringing product . . . erodes that
4 goodwill.” *Id.* at 77.

5 Despite Apple’s arguments during the preliminary injunction phase, Samsung asserts that
6 Apple has since waived any claim for irreparable harm based on loss of goodwill or damage to
7 Apple’s reputation as an “innovator.” *Opp’n* at 8. Samsung relies on Apple’s alleged failure to
8 include reputational harm in Apple’s response to Samsung’s Interrogatory No. 10, which requested
9 “the complete factual and legal basis” for Apple’s claim to injunctive relief, including “what
10 irreparable injury APPLE has suffered” *Fazio Decl. Ex. 2 (ECF No. 1907-10)* at 65. Even
11 assuming that Apple needed to re-raise its preliminary injunction arguments regarding reputational
12 harm, Samsung’s waiver argument fails because Apple referenced reputational harm in its response
13 to Samsung’s Interrogatory No. 10. Specifically, Apple’s response to Interrogatory No. 10
14 incorporates “by reference as if fully set forth herein all facts and evidence contained or identified
15 in Apple’s Motion for Preliminary Injunction. . . .” *Id.* at 66-67. This incorporation notified
16 Samsung that Apple intended to continue asserting the same type of harm that was alleged during
17 the preliminary injunction phase, including reputational harm.

18 Even if this reference was not sufficient to preserve Apple’s claim, Apple also served a
19 “Third Supplemental Response to Interrogatory No. 10,” in which Apple provided “[a]dditional
20 evidence to show Apple’s entitlement to injunctive relief, including the irreparable injury Apple
21 has suffered. . . .” *Id.* at 73. Apple stated that such harm is the subject of various expert opinions,
22 listed in the Supplemental Response and “incorporated by reference.” *Id.* at 74. Apple
23 incorporated by reference the “Declaration of Christopher Vellturo, PH.D., dated February 8, 2012
24 and all exhibits, appendices, errata, and supplementations thereto.” *Id.* That Declaration, provided
25 initially in support of the motion for a preliminary injunction, discloses the “Irreparable Injury Due
26 to Harm to Apple’s Goodwill Resulting from Samsung’s Infringement.” *Vellturo 2012 Decl. (ECF*
27 *Nos. 12-14) ¶¶ 96-98* (discussing the “goodwill Apple has built with end users,” relying on surveys
28 and reports in the popular press). Samsung argues that these paragraphs are merely “conclusory”

1 and are “insufficient to cure Apple’s waiver by failing to raise this theory in response to Samsung’s
2 Interrogatory.” Opp’n at 8 n.10. While Samsung is correct that these paragraphs standing alone do
3 not suffice to prove that Apple will *in fact* suffer irreparable harm, these references were sufficient
4 to preserve the issue. The Court rejects Samsung’s waiver argument.

5 **b. Evidence of Reputational Harm**

6 To demonstrate irreparable reputation-based harm, Apple must first demonstrate that it has
7 goodwill or reputation that could be the subject of damage. Apple argues that it established a
8 reputation among consumers as an “innovator.” Mot. at 6. Dr. Velturo opined that the “distinctive
9 user experience Apple created and nurtured . . . is a critical determinant in the value of the Apple
10 brand,” and cited survey evidence indicating that [REDACTED]

11 [REDACTED] Velturo 2012 Decl. ¶ 96.
12 Dr. Velturo further noted popular press articles ranking Apple first in a list of the world’s most
13 innovative firms. *Id.* ¶ 97. Samsung leaves this contention largely unrebutted. Indeed, Samsung’s
14 counsel acknowledged in his opening statement at trial that “Apple is an amazingly innovative
15 company.” Tr. at 360:1-2. Accordingly, the Court finds that, like the plaintiff in *Douglas*
16 *Dynamics*, Apple has demonstrated an undisputed “reputation as an innovator.” 717 F.3d at 1344.

17 However, Apple must still demonstrate that it will likely suffer irreparable reputational
18 harm absent an injunction, and that there is a causal nexus between that harm and Samsung’s
19 infringement. Apple again relies extensively on *Douglas Dynamics*, arguing that all of the factors
20 discussed by the Federal Circuit in that case are present here as well. Specifically, Apple points to
21 the appearance of Apple’s patented innovations in competing and allegedly inferior products;
22 Apple’s reputation for enforcement of intellectual property rights; and Apple’s general refusal to
23 license its patents. *See* Mot. at 5-11. In *Douglas Dynamics*, the Federal Circuit identified similar
24 facts and concluded the patentee’s reputation would suffer irreparable harm from the infringing
25 behavior. 717 F.3d at 1345. Apple is incorrect, however, in arguing that *Douglas Dynamics*
26 demands a finding of irreparable harm whenever those factors are present.

27 In *Douglas Dynamics*, the district court concluded there was no injury to the patentee’s
28 reputation because “there was no evidence that interested consumers confused the [patentee and

1 infringer].” *Id.* at 1344. The Federal Circuit rejected this finding, concluding that harm to a
 2 company’s reputation can occur “even absent consumer confusion.” *Id.* The factors identified by
 3 the *Douglas Dynamics* court are listed as *examples* of damage to reputation that can exist outside of
 4 the customer confusion context. *Id.* at 1344-45 (“As just one example. . .”). Apple’s
 5 interpretation of *Douglas Dynamics* would essentially create a *per se* rule in cases where the
 6 patentee is an innovative company, forcing a finding of irreparable harm wherever the infringer is a
 7 direct competitor.² This is at odds with the flexible and equitable nature of the irreparable harm
 8 inquiry. *See eBay*, 547 U.S. at 391-92; *Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142,
 9 1149 (Fed. Cir. 2011). In *Douglas Dynamics*, the factors cited by the court were context-specific
 10 examples, and the court’s ultimate conclusion relied on “evidence submitted by [the patentee].”
 11 717 F.3d at 1345. While the factors cited by Apple may form part of the analysis, *Douglas*
 12 *Dynamics* does not alter the need to weigh all relevant evidence in conducting the irreparable harm
 13 inquiry. The Court now turns to Apple’s specific arguments regarding reputational harm.

14 i. Presence of Patented Features in Competing Products

15 Apple argues that its reputation as an innovator is damaged when “customers [find] the
 16 same ‘innovations’ appearing in competitors’ [products],” including products considered less
 17 prestigious and innovative. Mot. at 6 (quoting *Douglas Dynamics*, 717 F.3d at 1345), 9. Apple
 18 argues that the harm to its reputation is “particularly acute” for the ’647 and ’721 patents because
 19 Apple practices those patents in its own products.³ *Id.* at 7. Furthermore, even if Apple does not
 20 currently practice all of the patents at issue, Apple argues that it continues to sell products that
 21 *compete* with infringing Samsung products. *See Trebro Mfg., Inc. v. Firefly Equip., LLC*, 748 F.3d
 22 1159, 1171 (Fed. Cir. 2014) (“[A] party that does not practice the asserted patent may still receive
 23 an injunction when it sells a competing product.”).

24 To establish harm, Apple relies on trial testimony from various witnesses about Apple’s
 25 reputation and the competition between Apple and Samsung. Philip Schiller, Apple’s Senior Vice

26 ² At times, Apple’s argument goes even further, suggesting that “reputational harm flows
 27 directly from the mere fact of infringement,” Mot. at 5, and that “irreparable harm to the patentee’s
 28 reputation *necessarily flows* from infringement,” Reply at 2 (emphasis in original).

³ Samsung disputes that Apple in fact practices the ’647 and ’721 patents. Opp’n at 13.

1 President of Worldwide Marketing, testified that he believes Apple values its reputation for
2 innovation: “I think it’s really important to the very DNA of Apple that we’re an innovator who
3 creates unique differentiations in our products that customers value.” Tr. at 451:8-452:9.
4 Mr. Schiller further stated that Samsung’s alleged infringement and copying of Apple’s intellectual
5 property “diminishes the value that we’re bringing to customers” and “confuses customers about
6 the source of those things, whether Apple is being [an] innovator and doing these things or whether
7 Samsung or someone else is innovating,” and that “[Samsung’s infringement] has caused people to
8 question some of the innovations that we’ve created and Apple’s role as the innovator.” *Id.* at
9 469:15-470:18, 473:25-474:21. Additionally, Apple highlights statements from Samsung’s
10 corporate witnesses, including Dale Sohn, who noted the importance of “know[ing] who my
11 competitors are,” *id.* at 1633:20-25, and Todd Pendleton, who admitted that Samsung has been
12 perceived as a “fast follower” and “not an innovator,” *id.* at 1696:2-1698:11. Apple also points to
13 alleged admissions by Samsung’s damages experts regarding competition. Dr. Judith Chevalier
14 acknowledged that “Apple and Samsung are fierce competitors in this market.” *Id.* at 2433:9-17.
15 Dr. Tülin Erdem testified that certain unaccused features—such as video cameras and GPS—do not
16 differentiate smartphones in consumers’ eyes. *See id.* at 2340:5-22. Finally, Apple cites internal
17 Samsung documents indicating that Samsung considered Apple a major rival. *See* PX216 at 3
18 (Samsung document: “Beating Apple is no longer merely an objective, it is our survival strategy.”);
19 DX431 at 5 (Samsung document: “Overcome Fast Follower Status & Establish Samsung as
20 Challenger Brand to Apple”).

21 Apple further argues that its reputation suffers because its patented innovations have
22 appeared in Samsung products that are perceived as “less prestigious and innovative.” *See* Mot. at
23 9 (quoting *Douglas Dynamics*, 717 F.3d at 1345). As evidence, Apple points to the statements
24 above by Mr. Pendleton regarding perceptions of Samsung as a “fast follower” and “not an
25 innovator.” *Id.* (quoting Tr. at 1696:2-1698:11). Apple asserts that consumers may begin to
26 “associate Apple’s patented features with a company viewed by many as ‘not an innovator.’” *Id.*

27 While Apple has presented significant evidence about the strength of its reputation and the
28 intensity of the parties’ competition, the Court finds that Apple has not satisfied its burden of

1 establishing irreparable reputational harm due to Samsung's infringing use of patented features. A
2 number of factors not present in *Douglas Dynamics* weigh against finding Apple suffered
3 irreparable harm to its reputation stemming from the appearance of Apple's patented features in
4 Samsung's products. First, Apple has provided only limited persuasive evidence of such actual
5 injury. The testimony above tends to show that Apple is recognized for innovation, and that
6 Samsung and Apple are "fierce" competitors. However, this evidence does not indicate that
7 Apple's reputation suffered as a result of Samsung's infringement. While Mr. Schiller testified that
8 Samsung's actions generally harm Apple's brand, this is true of competitors generally, and
9 Mr. Schiller did not link any harm to infringement of the three patented features in question. At
10 oral argument, Apple's counsel did not identify any other evidence of reputational harm. Apple
11 does not provide (for example) any surveys to establish that consumers have begun to question
12 Apple's role as an innovator or have difficulty differentiating Samsung and Apple products due to
13 the infringing features.

14 Second, Samsung argues persuasively that Apple's reputation has proved extremely robust,
15 *see* Opp'n at 11, weakening Apple's claim that it has suffered or will suffer irreparable harm to its
16 reputation from infringement of only three patents. Dr. Chevalier cites evidence that Apple's
17 reputation derives from products and features other than the three patents at issue. *See* Chevalier
18 Decl. (ECF No. 1907-5) ¶ 61 ("[T]here is no evidence that Apple's reputation as an innovator was
19 meaningfully connected to these patents prior to infringement."). Additionally, Apple executives
20 testified that highly publicized problems with its hardware and software have had little or no effect
21 on Apple's reputation. *See* Joswiak 7/9/13 Depo. Tr. (Fazio Decl. Ex. 3, ECF No. 1907-11) at
22 80:17-81:20 (stating that "AntennaGate" did not have "much of an impact on [Apple's] brand at
23 all"); Schiller 7/23/13 Depo. Tr. (Fazio Dec. Ex. 4, ECF No. 1907-12) at 87:24-88:7 (noting that
24 the "long-term effect of Antennagate was negligible"); Tr. at 514:7-20 (Schiller noting that the
25 iPhone did "extremely well" despite highly criticized "Maps" application in iOS 6). While not
26 dispositive, Apple's demonstrably robust reputation makes it less likely to be irreparably harmed
27 by the appearance of Apple's three patented features in Samsung's products.

1 Third, Apple fails to demonstrate harm stemming from consumer association of Apple's
2 patented innovations with Samsung's allegedly "less prestigious" products. In *Douglas Dynamics*,
3 the Federal Circuit noted the risk that consumers would associate the patentee's innovations with
4 less innovative products, and the patentee's reputation as an innovator would suffer as a result. See
5 717 F.3d at 1344-45. Apple asserts that same harm here, disparaging Samsung's perception as a
6 "fast follower" as opposed to an innovator. See Mot. at 9. However, Samsung's expert
7 Dr. Chevalier argues that these statements are taken out of context because this testimony
8 concerned only Samsung's reputation in the past. See Chevalier Decl. ¶ 63. To establish
9 Samsung's reputation as it stands today, Dr. Chevalier points to recent innovations in "large-
10 screened products, [Samsung's] Note product line, products using a stylus, and with respect to near
11 field communication," and to a 2013 survey that "listed Samsung as the second most innovative
12 company (behind only Apple)." *Id.* ¶¶ 63-64. Thus, the record indicates that Samsung's products
13 are also reputable. Apple has not identified specific evidence that Samsung's infringing *products*
14 are perceived as "less prestigious," or that Samsung's products have been marketed as "[Apple's]
15 at half the price." *Douglas Dynamics*, 717 F.3d at 1344, 1345. By contrast, the infringing products
16 in *Douglas Dynamics* were of substantially inferior quality to those sold by the patentee. See *id.* at
17 1348 (Mayer, J., dissenting) ("[S]nowplow distributors viewed Douglas' plows as very high quality
18 products, but saw Buyers' plows as low quality products."); see also *In re: BRCA1- and BRCA2-*
19 *Based Hereditary Cancer Test Patent Litig.*, No. 2:14-MD-2510, 2014 U.S. Dist. LEXIS 31345, at
20 *112 (D. Utah Mar. 10, 2014) (distinguishing *Douglas Dynamics* and denying preliminary
21 injunction where "Plaintiffs here offer no clear evidence suggesting that the public would view
22 Defendant's testing products as less prestigious or innovative.").

23 Fourth, as discussed in greater detail below, Apple has licensed [REDACTED] to
24 competing companies in the smartphone market. Apple notes that it "has licensed the [REDACTED]
25 to IBM, Nokia, HTC, and Microsoft, and has licensed the [REDACTED] to IBM and HTC."
26 Mot. at 16. In *Douglas Dynamics*, the patentee had "never licensed the infringed patents," 717
27 F.3d at 1345, so it was reasonable to conclude that an injunction would prevent those features from
28 appearing in competitors' products and eroding the patentee's reputation for innovation. Here,

1 Apple’s claim for irreparable harm to its reputation as an innovator would be undermined by the
 2 presence of the patented features in non-Apple products regardless of an injunction. Consumers
 3 are unlikely to understand that certain features appear in competing products due to licenses as
 4 opposed to unauthorized infringement.

5 Fifth, Apple has not met its burden to establish a causal nexus between the patents at issue
 6 and any alleged harm. Apple must demonstrate that the features that infringe the ’647, ’721, and
 7 ’172 patents in Samsung’s products are a significant factor causing any reputation-based harm. *See*
 8 *Apple I*, 678 F.3d at 1324 (reasoning that if the patented feature does not drive the alleged harm, a
 9 likelihood of irreparable harm cannot be shown). Here, the patents at issue cover three features in
 10 complex smartphones that contain many different patented inventions. *See* Chevalier Decl. ¶ 20;
 11 Tr. at 1372:5-19 (Velluro testimony: “Q. . . . You’ve seen estimates that there are as many as
 12 250,000 patents in a smartphone? . . . A. I’ve seen some estimates like that, yes.”). Apple argues
 13 that *Douglas Dynamics* “enjoined entire snowplow assemblies” even though the patent covered
 14 “only some components of the accused snowplow assemblies.” Reply at 3 (quoting 717 F.3d at
 15 1343). This argument was answered in *Apple III*, where the Federal Circuit observed that where a
 16 product is relatively simple, “the impact that the infringing features had on demand for the products
 17 may never have been in doubt.”⁴ 735 F.3d at 1362. Here, in contrast to *Douglas Dynamics*, there
 18 is considerable disagreement whether any harm to Apple’s reputation as an innovator shares a
 19 causal nexus with the infringing features of Samsung’s products. Dr. Chevalier concluded that
 20 “individual software features rarely impact consumer purchases, and some of the same evidence
 21 suggests that individual software features would not drive Apple’s reputation as an innovator.”
 22 Chevalier Decl. ¶ 62. As noted above, Samsung’s infringement consists of infringing three

23 ⁴ *Apple III* did not specifically identify *Douglas Dynamics* as a “simple” case, but the thrust
 24 of the court’s holding was that “the causal nexus requirement applies regardless of the complexity
 25 of the products. It just may be more easily satisfied (indeed, perhaps even conceded) for relatively
 26 ‘simple’ products.” 735 F.3d at 1362. *Douglas Dynamics* fits into this “simple” category of cases,
 27 in that causal nexus was not challenged. While it is true that the product at issue in *Douglas*
 28 *Dynamics* (a detachable snowplow) is likely more complicated than the “simple” products cited by
 the Federal Circuit in *Apple III* (e.g., windshield wiper blades in *Robert Bosch*, 659 F.3d at 1145,
 and orthopedic nails in *Acumed LLC v. Stryker Corp.*, 551 F.3d 1323, 1326 (Fed. Cir. 2008)), even
 a relatively complicated snowplow assembly stands in stark contrast to the extraordinarily complex
 and multi-featured smartphones at issue here.

1 patented features out of many unaccused hardware and software components in smartphones and
2 tablets. At trial, Mr. Schiller conceded that he did not know if the patent claims at issue were used
3 in Apple's products, or if any industry praise for Apple's products was related to the patented
4 features. *See* Tr. at 485:5-486:2. Moreover, Apple does not contend that it practices the '172
5 patent, and Apple has not tied its reputation to infringement of that invention. Accordingly, Apple
6 has not demonstrated that the inclusion of three infringing features in Samsung's products
7 irreparably damages Apple's reputation.

8 **ii. Reputation for Enforcing Intellectual Property**

9 Next, Apple argues that without an injunction, others might believe Apple "did not enforce
10 its intellectual property rights." Mot. at 9 (quoting *Douglas Dynamics*, 717 F.3d at 1345). Apple
11 relies again on *Douglas Dynamics* to assert that a patentee's reputation is *necessarily* harmed if
12 "customers and business partners" believe the patentee does not enforce its intellectual property
13 rights. *Id.* This misstates *Douglas Dynamics*. While Apple points to its reputation among
14 "customers and business partners," the *Douglas Dynamics* court focused only on the effect that
15 intellectual property enforcement might have on "dealers and distributors" of the patentee's
16 products. 717 F.3d at 1345. *Douglas Dynamics* did not rely on consumers' perceptions of
17 intellectual property enforcement. Apple provides no evidence that smartphone consumers make
18 purchasing decisions based on Apple's reputation for enforcing its intellectual property rights.

19 It is more plausible to suppose Apple's "business partners" are aware of Apple's reputation
20 for enforcement of intellectual property rights. However, Apple cannot demonstrate irreparable
21 harm merely by reciting *Douglas Dynamics* and asserting that the same harm will occur without
22 proof. The *Douglas Dynamics* court relied on evidence established at trial, specifically citing an
23 admission made by the defendant's expert. *Id.* ("Furthermore, as Buyers's expert agreed,
24 Douglas's reputation would be damaged if its dealers and distributors believed it did not enforce its
25 intellectual property rights."). Here, Apple's claims regarding a diminished reputation for patent
26 enforcement are unconvincing. Apple has engaged in vigorous patent litigation in this Court and
27 others throughout the country. *See Apple, Inc. v. Samsung Elecs. Co.*, No. 11-CV-01846-LHK
28 (N.D. Cal.); *Apple Inc. v. Motorola, Inc.*, No. 2012-1548, 2014 WL 1646435 (Fed. Cir. Apr. 25,

1 2014) (asserting '647 patent); *Certain Personal Data and Mobile Communc'ns Devices and*
 2 *Related Software*, Inv. No. 337-TA-710, (USITC July 15, 2011) (asserting '647 patent); *Apple Inc.*
 3 *v. High Tech Computer Corp.*, No. CA 10-166-GMS, 2011 WL 124446 (D. Del. Jan. 14, 2011);
 4 *Apple Inc. v. Motorola Mobility, Inc.*, No. 3:11-CV-00178 (W.D. Wis.). Apple accuses Samsung
 5 of “relentlessly criticiz[ing] Apple for attempting to enforce its patent rights,” and provides
 6 examples of statements to that effect made by Samsung’s counsel to the press. Mot. at 9-10. The
 7 Court finds there is little established risk that any customers or business partners will believe that
 8 Apple does not enforce its patent rights. Apple has not demonstrated any causal nexus between
 9 infringement of the three patents at issue and any perception of Apple’s failure to enforce its
 10 intellectual property rights.

11 iii. Apple’s Licenses

12 Apple argues that its general refusal to license patents favors finding irreparable
 13 reputational harm. *Id.* at 10. In *Douglas Dynamics*, the court concluded that the patentee had
 14 “never licensed the infringed patents . . . so that it could maintain market exclusivity.” 717 F.3d at
 15 1345. That exclusivity “is an intangible asset that is part of a company’s reputation,” the loss of
 16 which irreparably harmed the patentee. *Id.* As noted above, Apple “has licensed the [REDACTED] to
 17 IBM, Nokia, HTC, and Microsoft, and has licensed the [REDACTED] to IBM and HTC.”
 18 Mot. at 16. Apple argues that the circumstances of these licenses diminish their relevance here,
 19 because those licenses occurred in the context of cross-license agreements [REDACTED]
 20 [REDACTED]; were executed before the licensee entered the smartphone
 21 market; or involved litigation settlements. *Id.* at 16-17.

22 These circumstances are relevant in evaluating the evidentiary value of licenses as they
 23 pertain to the sufficiency of money damages in a patent infringement case. In addressing the
 24 adequacy of legal remedies (*eBay* factor 2), this Court previously concluded in the first lawsuit
 25 between the parties (Case No. 11-CV-1846) that “Apple’s past licensing behavior demonstrates a
 26 reluctance to license the utility patents-in-suit to Samsung, and several factors distinguish Apple’s
 27 licenses to IBM, HTC, and Nokia from the present circumstances.” 1846 Injunction Order at 37;
 28 *see also Apple III*, 735 F.3d at 1370 (“these factors are relevant to whether monetary damages will

1 adequately compensate Apple for Samsung’s infringement of the asserted patents”); *Acumed*, 551
2 F.3d at 1328 (“The fact of the grant of previous licenses, the identity of the past licensees, the
3 experience in the market since the licenses were granted, and the identity of the new infringer all
4 may affect the district court’s discretionary decision concerning whether a reasonable royalty from
5 an infringer constitutes damages adequate to compensate for the infringement.”).

6 In evaluating the harm to Apple’s reputation as an innovator, however, these circumstances
7 are less relevant. Apple provides no reason why consumers would be likely to appreciate or care
8 about the licensing origins of the myriad patented features on their smartphones or tablets. *Cf.*
9 *Chevalier Decl.* ¶ 14 (describing features that drive consumer demand for smartphones). For
10 example, if the patented features appear in smartphones from several licensed companies, it is
11 unlikely that consumers will associate those features exclusively with Apple, regardless of the
12 reasons why Apple granted those licenses. Apple cannot argue that Samsung’s use of patented
13 features will damage Apple’s reputation for exclusivity if these features are not in fact exclusive to
14 Apple, due to licenses to competitors. *Cf. Douglas Dynamics*, 717 F.3d at 1345 (observing the
15 patentee had “never” licensed the patents at issue, whether for monetary or non-monetary
16 compensation). Therefore, after affording due consideration to the circumstances around Apple’s
17 licenses, those licenses nevertheless suggest that Apple’s reputation as an innovator among
18 consumers will not be irreparably harmed without an injunction.

19 3. Harm From Lost Sales

20 In addition to reputational harm, Apple contends that it suffered sales-based losses that
21 independently establish irreparable harm and entitlement to a permanent injunction. Apple argues
22 that it has lost market share and downstream sales due to Samsung’s infringement, as this Court
23 found in the first litigation between the parties. Relying on survey data from its expert Dr. John
24 Hauser, Apple then contends that Apple provided direct evidence that consumers value the features
25 claimed in the ’647, ’721, and ’172 patents. Apple also argues that both parties greatly valued the
26 infringing features, and Samsung deliberately copied Apple’s products. Samsung disputes Apple’s
27 characterization of the record, and further claims that Apple suffered no sales-based losses because
28

1 the verdict shows that the jury awarded no lost profits. The Court addresses these arguments in
2 turn.

3 Initially, Apple argues that it lost market share and downstream sales to Samsung, citing as
4 support this Court's ruling in the first lawsuit and certain trial testimony in the instant case. *See*
5 Mot. at 11 (citing *Apple III*, 735 F.3d at 1360). Samsung does not address these arguments.
6 Indeed, as detailed above, it is undisputed that Apple and Samsung compete directly in the market
7 for smartphones and tablets. *See, e.g.*, Tr. at 557:22-558:9 (Schiller testimony); PX216 at 3
8 (Samsung document: "Beating Apple is no longer merely an objective, it is our survival strategy.").
9 It is also undisputed that this competition affects downstream sales because of so-called
10 "ecosystem" effects, where one company's customers will continue to buy that company's
11 products and recommend them to others. *See* Tr. at 448:12-449:4 (Schiller testimony); *see also*
12 1846 Injunction Order at 15 ("Apple has also been harmed by its loss of downstream sales, as
13 network compatibility and brand loyalty cause many consumers to be 'locked in' to either Apple or
14 Samsung after their initial purchase.").

15 The Federal Circuit observed that "[w]here two companies are in competition against one
16 another, the patentee suffers the harm—often irreparable—of being forced to compete against
17 products that incorporate and infringe its own patented inventions." *Douglas Dynamics*, 717 F.3d
18 at 1345.⁵ Here, the record establishes that the competition between Apple and Samsung was
19 "fierce." Tr. at 2433:9-17 (Chevalier testimony). Indeed, evidence established that Apple was
20 Samsung's "largest smartphone competitor" in the U.S. market. PX3002 (DiCarlo deposition, ECF
21 No. 1920 at 3). The presence of direct competition between Apple and Samsung in the smartphone
22 market weighs in favor of finding irreparable harm. *See Presidio Components, Inc. v. Am.*

23 ⁵ Apple erroneously relies on this quote from *Douglas Dynamics* to support an argument for
24 harm to Apple's reputation for innovation. While the Federal Circuit concluded that the patentee
25 had suffered reputation-based harm, that was not the only type of harm identified. Rather than
26 establishing any particular type of irreparable harm, the *Douglas Dynamics* opinion's "direct
27 competition" analysis appears to bear on the question of irreparable harm more generally, or with
28 respect to sales-based losses. *See, e.g., Trebro*, 748 F.3d at 1171 ("Trebro and FireFly are direct
competitors selling competing products in this market. Thus the record strongly shows a
probability for direct harm."); *Broadcom Corp. v. Qualcomm Inc.*, 543 F.3d 683, 703 (Fed. Cir.
2008) ("Qualcomm has previously conceded. . . indirect competition. . . . Thus, Broadcom
provided evidence of irreparable harm.").

1 *Technical Ceramics Corp.*, 702 F.3d 1351, 1363 (Fed. Cir. 2012) (“Direct competition in the same
2 market is certainly one factor suggesting strongly the potential for irreparable harm . . .”).
3 However, Apple must still provide specific evidence of causal nexus between any such harm and
4 Samsung’s infringement.

5 **a. Evidence of Consumer Demand**

6 To show that consumers value the infringing features, Apple relies on a conjoint study from
7 Dr. Hauser and faults Samsung for not offering comparable survey data of its own. Samsung
8 responds that Apple’s conjoint survey is flawed, based on rebuttal opinions from its experts
9 Dr. David Reibstein and Dr. Erdem. *See* Reibstein Decl. (ECF No. 1907-7); Erdem Decl. (ECF
10 No. 1907-6).

11 In the first lawsuit between these parties (Case No. 11-CV-1846), the Court analyzed a
12 similar conjoint survey from Dr. Hauser that purported to show demand for the patented features in
13 that case. *See* 1846 Injunction Order at 16. Following the Federal Circuit’s guidance in *Apple III*,
14 this Court evaluated Dr. Hauser’s survey in combination with Apple’s additional evidence
15 regarding copying and ease of use, for purposes of determining whether to enter a permanent
16 injunction. The Court identified numerous potential flaws with that conjoint analysis, finding that
17 the survey could not account for actual market prices, provided little information about the
18 significance of any price increases supposedly attributable to the patented features, and inflated the
19 value of the patents by overemphasizing the relevant features while inadequately presenting
20 noninfringing alternatives. *See generally id.* at 16-29. As a result, the Court concluded that
21 “Dr. Hauser’s survey results simply do not allow the Court to determine whether the patented
22 features meet [the] test” for causal nexus. *Id.* at 29.

23 In the instant case, the Court previously reviewed Dr. Hauser’s current survey (as disclosed
24 in his expert report) in the context of a *Daubert* challenge by Samsung. *See* ECF No. 1326. The
25 Court summarized Dr. Hauser’s methodology in the instant case and compared it to Dr. Hauser’s
26 survey in the first lawsuit between the parties (Case No. 11-CV-1846). The Court noted that his
27 methods in the instant case were “identical” with respect to his analysis of “willingness to pay” in
28 the first lawsuit, but different in that Dr. Hauser added a second set of survey options in the instant

1 case to measure the number of Samsung customers who would not have purchased Samsung
2 products without the patented features. *See id.* at 24-27. In the current litigation, the Court
3 declined to exclude Dr. Hauser’s testimony under Federal Rule of Evidence 702, partly because
4 Samsung failed to brief the issue of the accuracy of the survey’s descriptions of the asserted
5 patents. *See id.* at 36.

6 Against this background in both lawsuits regarding Dr. Hauser’s conjoint survey
7 techniques, Apple’s instant motion makes only cursory arguments about how the conjoint survey
8 evidence demonstrates causal nexus. Apple devotes only two paragraphs in its opening brief to
9 Dr. Hauser’s conjoint study, one of which targets Samsung’s lack of comparable survey evidence.
10 *See Mot.* at 12-13. On the other hand, Samsung points to extensive critiques of Apple’s conjoint
11 study by two of its experts, both at trial and in declarations submitted for purposes of this motion.

12 At trial, Dr. Reibstein testified that Dr. Hauser’s conjoint study was flawed because the
13 study “omitted the major factors and major drivers of sales.” Tr. at 2071:15-2072:10. Dr.
14 Reibstein testified that none of the patented technologies appeared in an independent review of
15 online smartphone advertising. *See id.* at 2073:4-2074:11; *see also* Reibstein Decl. ¶¶ 53-55.
16 Dr. Reibstein also testified that he performed an independent “pretest” in which he screened
17 another set of participants “in the same way that Professor Hauser did,” but also tested for
18 participant confusion as to Dr. Hauser’s questions, and found that each participant expressed
19 confusion about at least one patented feature. Tr. at 2080:3-2086:19; *see also* Reibstein Decl.
20 ¶¶ 34, 45-47 (describing pretest). Dr. Reibstein opined that the conjoint study produced
21 nonsensical results, such as the conclusion that the patented word correction feature (corresponding
22 to the ’172 patent) was worth about \$102 on a phone that cost \$149. *Id.* at 2100:17-2101:16. Dr.
23 Reibstein acknowledges that these dollar figures corresponding to willingness to pay are “not
24 strictly additive” because the aggregate willingness to pay may be “either higher or lower than the
25 sum of the willingness to pay estimates for the individual features,” but maintains that these results
26 are “unreasonably large.” Reibstein Decl. ¶ 92 n.130. Additionally, Dr. Reibstein and Samsung’s
27 technical experts testified that the descriptions of the patented features in Apple’s conjoint study
28 overstated the scope of the claimed features and improperly included noninfringing alternatives.

1 *See id.* ¶¶ 13-24, 53 (“Professor Hauser’s conjoint surveys here did not include numerous features
2 that Samsung prominently highlighted to consumers.”); Tr. at 1798:9-1801:14 (Jeffay testimony on
3 survey description of the ’647 patent), 1978:15-1982:1 (Greenberg testimony on survey description
4 of the ’721 patent), 2029:8-2031:2 (Wigdor testimony on survey description of the ’172 patent).

5 Apple insists that conjoint studies are generally reliable and widely used, and that Samsung
6 should have tested Dr. Hauser’s results with Samsung’s own conjoint studies. *See Reply* at 8.
7 Apple further notes that Dr. Reibstein admitted at trial that he could not explain why certain
8 participants in his pretest were “confused” about descriptions of patented features in Dr. Hauser’s
9 survey. *See Tr.* at 2136:10-20; *Reply* at 8. Dr. Reibstein also admitted that he did not disclose
10 statistical validity tests for his pretest. *See Tr.* at 2142:10-2143:10. These admissions cast some
11 doubt on Dr. Reibstein’s pretest and conclusions regarding confusion. Moreover, during the
12 preliminary injunction proceedings in the instant case, Samsung’s expert Michael Wagner
13 criticized Apple for *not* putting forth “conjoint analyses” to quantify customer demand for the
14 infringing features. Wagner Decl. (ECF No. 131) ¶ 116 (“Apple has put forth no surveys, conjoint
15 analyses, or hedonic regressions to prove this critical link.”); *see also Tr.* at 2488:14-2490:20
16 (Chevalier testimony: “Q. So just so the jury has the chronology down, we have Mr. Wagner on
17 behalf of Samsung suggesting that a conjoint analysis can be used, correct? A. Well, among other
18 things.”).

19 Apple also argues that Samsung’s alternative consumer studies were unreliable. *See Reply*
20 at 8. The Court agrees that Samsung’s alternative studies were not convincing. Dr. Chevalier
21 conducted a “sentence-counting” exercise that involved taking online reviews of smartphones,
22 converting them to individual sentences, and counting the number of references to patented and
23 unpatented features. *See Tr.* at 2375:14-2380:3. From the results, she concluded that the “top
24 drivers of smartphone purchases” are unpatented features such as phone carrier, price, and battery
25 life. *Id.* at 2379:19-2380:3. Dr. Erdem performed an “eye-tracking” study where she “tracked the
26 movements of the eyes of consumers” as they viewed a mimicked shopping website for
27 smartphones. *Id.* at 2295:6-2298:13. Dr. Erdem concluded that “major attributes” affected
28 consumer choices, not “minor attributes.” *Id.* at 2304:5-19.

1 its patented features claimed in the '647 and '721 patents as critical elements of an Apple user's
2 unique experience." *Id.* at 14.

3 The Federal Circuit has previously observed, in connection with Apple's allegations of
4 copying by Samsung, that: "While the evidence that Samsung's employees believed it to be
5 important to incorporate the patented feature into Samsung's products is certainly relevant to the
6 issue of nexus between the patent and market harm, it is not dispositive. That is because the
7 relevant inquiry focuses on the objective reasons as to why the patentee lost sales, not on the
8 infringer's subjective beliefs as to why it gained them (or would be likely to gain them)." *Apple I*,
9 678 F.3d at 1327-28; *see also Apple III*, 735 F.3d at 1367 ("Apple's evidence of copying by
10 Samsung may be relevant, but it is insufficient by itself to establish the requisite causal nexus.").
11 Thus, the parties' subjective beliefs about what drives consumer demand are relevant to causal
12 nexus, but do not independently satisfy the inquiry.

13 Turning to Apple's specific allegations, Apple first claims that Samsung's internal pre-
14 litigation documents reveal Samsung's valuation of the infringing features. For the '647 patent,
15 Apple cites an internal Samsung report that shows iPhone screens and notes the "[n]eed to improve
16 usability by providing Links for memo contents" (PX146 at 37); an internal Samsung document
17 that copied a figure from the publication of one of the '647 patent's inventors (PX107 at 52); and
18 Samsung's user manuals (PX233 at 362; PX237 at 823). Regarding the '721 patent, Apple points
19 to other internal Samsung documents showing that Samsung tried to create unlocking designs
20 based on the iPhone (*e.g.*, PX119; PX121); testimony from Samsung engineer Youngmi Kim
21 regarding the value of designs for unlocking (Tr. at 1729:3-11); and Samsung e-mails noting that
22 certain carriers disapproved of the noninfringing "circle lock" alternative (PX181 at 5). Moreover,
23 the jury found that Samsung willfully infringed the '721 patent. ECF No. 1884 at 7. As to the
24 '172 patent,⁶ Apple refers to feedback documents indicating that some users criticized certain
25 Samsung keyboard and word-correction designs (PX168 at 4; PX169 at 4; PX219 at 104).

26
27 ⁶ For purposes of this litigation, Apple does not claim that it practices the '172 patent, and
28 does not claim that Samsung copied any features from the '172 patent.

1 Apple's cited evidence indicates that Samsung paid close attention to, and tried to
2 incorporate, certain iPhone features. While indicative of copying by Samsung, this evidence alone
3 does not establish that the infringing features drove customer demand for Samsung's smartphones
4 and tablets. *See Apple III*, 735 F.3d at 1367. Some of the cited Samsung documents show that
5 Samsung valued numerous other noninfringing features. For example, Apple refers to one page
6 from a Samsung manual as an example of Samsung instructing customers on how to use a feature
7 that infringes the '647 patent. PX233. However, that manual is over 1300 pages and describes
8 dozens of unaccused features. Thus, the existence of instructions for an individual feature does not
9 necessarily show that the feature drives demand.

10 Next, Apple argues that Samsung continued to use the infringing features in Samsung
11 products, despite receiving notice of the '647, '721, and '172 patents and the filing of this lawsuit.
12 According to Apple, "Samsung's unwillingness to remove the infringing features from its products
13 only further reinforces the value of, and consumer demand for, Apple's patented inventions." Mot.
14 at 14. While Samsung has continued to sell infringing products following the start of this
15 litigation, Samsung might have had other reasons for doing so. Samsung has maintained that it did
16 not need to remove any features because it reasonably believed that it did not infringe any valid
17 patents. Before, during, and after trial, Samsung vigorously contested validity and infringement of
18 all three patents at issue here. Moreover, as explained above, Samsung's subjective beliefs are not
19 dispositive of causal nexus. As this Court found before, "though evidence that Samsung attempted
20 to copy certain Apple features may offer some limited support for Apple's theory, it does not
21 establish that those features actually drove consumer demand." *Apple, Inc. v. Samsung Elecs. Co.*,
22 909 F. Supp. 2d 1147, 1156 (N.D. Cal. 2012).

23 Apple also argues that its own use of the patented features in its products and
24 advertisements demonstrates that the features are important to consumers. *See* Mot. at 14-15.
25 Apple identifies only evidence relating to the '647 and '721 patents. For the '647 patent, Apple
26 cites a few lines of testimony from Apple engineer Thomas Deniau, who described his work on
27 "data detectors" and stated that "[m]ost of Apple's products use data detectors." Tr. at 791:15-18.
28 However, Mr. Deniau was not presented as an expert witness and did not directly equate asserted

1 claim 9 of the '647 patent with “data detectors.” Moreover, his testimony that most Apple products
2 use this feature does not establish that data detectors drive consumer demand. For example, most
3 of Apple’s products also use batteries, but that does not mean that batteries drive demand for those
4 products. *See Apple II*, 695 F.3d at 1376 (noting laptop battery as an example of a necessary
5 feature that does not drive demand). For the '721 patent, Apple cites testimony from Apple Vice
6 President Gregory Christie and Senior Vice President of Worldwide Marketing Philip Schiller, who
7 noted that Apple has featured “slide-to-unlock” in its marketing efforts. *See Tr.* at 600:23-601:15
8 (Christie, saying he personally considered slide-to-unlock “pretty important”), 432:20-433:18
9 (Schiller, describing decision to feature slide-to-unlock at beginning of advertisement). This
10 testimony is probative of the value of the slide-to-unlock feature, but as with Apple’s other
11 evidence, it does not demonstrate demand by consumers for Samsung’s infringing products.

12 **c. Lost Profits**

13 Samsung argues that Apple cannot show irreparable harm from lost sales because the jury’s
14 damages verdict implicitly rejected Apple’s claim for lost profits. Samsung’s theory is that the jury
15 must have rejected Apple’s demands for lost profits and chosen a lump sum royalty instead
16 because it awarded only a small percentage of what Apple requested. Samsung also makes the
17 related argument that Dr. Velluro “effectively conceded” a lack of causal nexus for the '172 and
18 '721 patents because he did not seek diminished-demand lost profits. *Opp’n* at 7-8.

19 Samsung invites the Court to deconstruct the verdict to determine whether the jury awarded
20 lost profits to Apple, which may provide information about harm due to lost sales. The parties
21 dispute whether such an exercise is appropriate for purposes of this motion. “[W]hen equitable
22 claims are joined with legal claims and have factual questions in common, the judge’s
23 determination of the equitable claims can not deprive the litigants of their right to a jury trial on
24 factual questions.” *Therma-Tru Corp. v. Peachtree Doors Inc.*, 44 F.3d 988, 994-95 (Fed. Cir.
25 1995) (characterizing *Beacon Theatres, Inc. v. Westover*, 359 U.S. 500, 510-11 (1959)). If the jury
26 in fact rejected Apple’s claims for lost profits, the Court would be bound by that factual
27 determination for the purposes of determining equitable relief, such as a permanent injunction.
28

1 Apple argues that the jury’s verdict is not binding on the question of lost sales harm
2 because the verdict did not explicitly reject Apple’s lost profits claims, and that the Court is not
3 permitted as a matter of law to “deconstruct” the jury’s findings. Reply at 6. However, the jury’s
4 factual findings need not be explicit in order to be binding. The *Therma-Tru* court overturned the
5 district court’s judgment based on the need to avoid “conflict with the *implied* findings underlying
6 the jury verdicts[.]” 44 F.3d at 995 (emphasis added); *see also Miller v. Fairchild Indus., Inc.*, 885
7 F.2d 498, 507 (9th Cir. 1989) (“the Seventh Amendment requires the trial judge to follow the
8 jury’s implicit or explicit factual determinations”). Apple cites to *Telcordia Technologies, Inc. v.*
9 *Cisco Systems, Inc.*, 612 F.3d 1365 (Fed. Cir. 2010), claiming that “parties cannot read findings
10 into [a] jury verdict ‘in the absence of an express statement in the verdict.’” Reply at 6 (quoting
11 *Telcordia*, 612 F.3d at 1378). This twists the holding in *Telcordia*, where the Federal Circuit held:
12 “District courts have broad discretion to interpret an ambiguous verdict form, because district
13 courts witness and participate directly in the jury trial process. The district court was in a position
14 to assess whether the verdict figure represented past infringement as well as ongoing
15 infringement.” 612 F.3d at 1378. The *Telcordia* trial court interpreted the jury’s verdict, and the
16 language quoted by Apple merely reflects the Federal Circuit’s unwillingness to overturn that
17 interpretation on appeal. *Id.* (“In the absence of an express statement in the verdict, this court
18 cannot determine whether the jury compensated Telcordia for all of Cisco’s infringing activities . . .
19 the district court did not abuse its discretion in interpreting the verdict form.”). Apple’s two other
20 cases are inapposite because they addressed deconstruction or “reverse engineering” of a jury
21 verdict, but in the context of a motion for judgment as a matter of law, not the binding effect of a
22 jury verdict on a court’s fact finding for the purposes of equitable relief. *See Yeti by Molly, Ltd. v.*
23 *Deckers Outdoor Corp.*, 259 F.3d 1101, 1107-08 (9th Cir. 2001); *DDR Holdings, LLC v.*
24 *Hotels.com, L.P.*, 954 F. Supp. 2d 509, 530 (E.D. Tex. 2013).

25 While it may be legally permissible to dissect the verdict under certain circumstances, the
26 Court declines Samsung’s invitation to do so here for purposes of evaluating lost sales harm.
27 Samsung insists that the jury awarded a lump-sum royalty to compensate Apple for all future
28 infringement based on calculations by its expert Dr. Chevalier. Dr. Chevalier claims that the jury’s

1 allocation of damages between the '647, '721, and '172 patents and between the accused products
2 for each patent, and the fact that the jury did not grant a uniform per-unit royalty for all products,
3 demonstrates a lump-sum verdict. *See* Chevalier Decl. ¶ 67. She also claims that the fact that the
4 jury reallocated the total damages number when calculating damages for the Galaxy S II products
5 further indicates a lump sum. *See id.* ¶ 68. However, Dr. Chevalier's analysis is speculative at
6 best. The verdict form did not require the jury to denote which damages theories it applied. *See*
7 ECF No. 1884 at 9-10. Moreover, Dr. Chevalier's analysis assumes that the jury applied the same
8 theory to all products for all patents. Apple also notes that the jury could have chosen not to award
9 lost profits because it could not ascertain them with reasonable certainty, and not because Apple
10 did not actually lose sales to Samsung. Apple's expert Dr. Vellturo also submits a declaration
11 contesting Dr. Chevalier's conclusion that the jury awarded a lump sum. *See* Vellturo Decl. (ECF
12 No. 1919-4) ¶ 17 ("It is not possible to state definitively how the jury arrived at its damages award
13 of \$119.625 million.").

14 Moreover, even if Samsung's hypothesis about a lump-sum royalty were correct, such a
15 finding does not dispose of the irreparable harm inquiry. Samsung asserts that "there can be no
16 irreparable harm due to lost sales because there are no lost sales." Opp'n at 4. This misstates the
17 law. As Apple notes, a jury finding of lost profits is not a prerequisite for finding irreparable harm.
18 *See Mytee Prods., Inc. v. Harris Research, Inc.*, 439 F. App'x 882, 887 (Fed. Cir. 2011) ("We have
19 never held, however, that in order to establish irreparable harm a patentee must demonstrate that it
20 is entitled to lost profits."); *see also Apple*, 909 F. Supp. 2d at 1159-60 ("The fact that the jury was
21 able to put a number on the harm Apple has suffered in terms of sales already lost directly to
22 Samsung does not necessarily mean that those damages captured the full extent of Apple's harm.
23 Indeed, if this were the case, no Court would ever award both damages and an injunction for the
24 same infringement, but Courts do so routinely."). Where lost sales did not form either an explicit
25 or implicit part of the jury's verdict, the Court would not be barred from finding lost sales for the
26 purposes of fashioning equitable relief. *See i4i Ltd. P'ship v. Microsoft Corp.*, 598 F.3d 831, 861
27 (Fed. Cir. 2010), *aff'd*, 131 S. Ct. 2238 (2011) (affirming permanent injunction based on lost
28 market share where the jury awarded royalty damages). Irrespective of a jury's factual finding

1 with respect to lost sales, a court might still find irreparable harm that stems from sources other
2 than lost sales. *See Mytee Prods.*, 439 F. App'x 882 at 888 (finding irreparable harm to patentee
3 because “the market share enjoyed by [the patentee’s] franchisees would be threatened by the
4 presence of a competitor using the same technology.”); *Douglas Dynamics*, 717 F.3d at 1344-45
5 (finding irreparable harm to patentee’s reputation from infringement). Furthermore, a factual
6 finding that Apple did not lose sales *in the past* does not necessarily mean that Apple will not lose
7 sales *in the future*.

8 However, the Court need not deconstruct the verdict as Samsung proposes, for Apple has
9 not shown the requisite irreparable harm, as discussed above. After considering all of Apple’s
10 evidence in combination, *see Apple III*, 735 F.3d at 1368, the Court concludes that Apple has failed
11 to demonstrate irreparable harm due to lost sales, nor any causal nexus between Samsung’s
12 infringement and the alleged harm.

13 **4. Summary of Irreparable Harm**

14 After careful examination of all the evidence, the Court concludes that Apple fails to prove
15 that “the infringing feature[s] drive[] consumer demand for the accused product[s].” *Apple II*, 695
16 F.3d at 1375. Apple’s argument that the causal nexus requirement does not apply to reputational
17 harm overextends *Douglas Dynamics* and contravenes the Federal Circuit’s guidance on
18 irreparable harm. Apple has not demonstrated that it will suffer irreparable harm to its reputation
19 or goodwill as an innovator without an injunction. Nor has Apple shown that it will suffer lost
20 sales specifically due to Samsung’s infringement of the three patents at issue. For these reasons,
21 the irreparable harm factor favors Samsung and disfavors an injunction.

22 **B. Adequacy of Legal Remedies**

23 “This factor requires a patentee to demonstrate that ‘remedies available at law, such as
24 monetary damages, are inadequate to compensate’ the patentee for the irreparable harm it has
25 suffered.” *Apple III*, 735 F.3d at 1368 (quoting *eBay*, 547 U.S. at 391).

26 **1. Whether Alleged Harms Can be Quantified**

27 First, the parties disagree about whether it is possible to measure monetary damages for
28 Apple’s alleged lost sales and reputational injuries. As to reputational harm, Samsung accuses

1 Apple of relying only on attorney argument, and cites Dr. Erdem’s declaration, which states that
2 there are accepted industry techniques for assigning monetary values to “brand equity.” *See* Erdem
3 Decl. ¶¶ 41-43. In response, Apple cites cases that have found money damages inadequate to
4 remedy reputation-related harms. *See* Reply at 10. In *Douglas Dynamics*, the court found damages
5 inadequate “for at least the reputation loss Douglas has suffered from Buyers’s infringement,” in
6 light of evidence regarding the parties’ relative market share. 717 F.3d at 1345. In *Southern Snow*
7 *Manufacturing Co. v. SnowWizard Holdings, Inc.*, a district court followed *Douglas Dynamics* and
8 found legal remedies inadequate for “reputation loss” that the patentee had shown was the result of
9 the infringement in question. No. 06-9170, 2014 WL 1652436, at *7 (E.D. La. Apr. 24, 2014).
10 Similarly, in *Halo Electronics, Inc. v. Pulse Electronics, Inc.*, another district court determined that
11 the patentee established irreparable harm to its reputation, and then found “the loss of customer
12 goodwill cannot be compensated by a reasonable royalty payment.” No. 2:07-cv-00331, 2013 WL
13 3043668, at *7-8 (D. Nev. June 17, 2013). However, these cases share a common denominator: in
14 each case, the patentee provided evidence to support the court’s conclusion. By contrast, in the
15 instant case, Apple offers no evidence that its alleged reputational harm cannot be remedied.

16 As to lost sales, Samsung notes that courts in other contexts have found that monetary
17 remedies can adequately compensate harm due to lost revenues. Samsung also claims that the fact
18 that Apple’s damages expert Dr. Vellturo was able to estimate damages for downstream sales and
19 ecosystem effects shows that any such harm is quantifiable. *See* Opp’n at 16. Samsung’s
20 arguments are unpersuasive. Samsung does not tie the facts of the cases it cites to the
21 circumstances here. Samsung’s contention that Apple’s request for damages precludes injunctive
22 relief suggests that damages and an injunction can never be awarded simultaneously—a
23 proposition that has been rejected. *See Apple*, 909 F. Supp. 2d at 1160. This also contradicts
24 Samsung’s earlier argument that Apple cannot demonstrate irreparable harm due to lost sales
25 unless the jury awards lost profits, which requires the jury to place a number on such harm. *Cf.*
26 ECF No. 221 at 78 n.9 (noting inherent tension between showing likelihood, but also
27 incalculability, of lost market share). Here, Apple has cited evidence tending to show that lost
28 market share and downstream sales may be difficult to quantify. *See* Tr. at 448:8-449:4 (Schiller

1 testimony on ecosystem effects). Dr. Vellturo has explained that he was not able to completely
 2 quantify ecosystem effects in his damages models. *See* Vellturo Decl. ¶ 22. Additionally, this
 3 Court has previously found that Apple’s alleged lost sales would be hard to quantify and remedy
 4 with damages. *See* ECF No. 221 at 70 (noting that loss of market share to Samsung “would be
 5 difficult to quantify or recapture”); 1846 Injunction Order at 37 (finding Apple’s alleged lost sales
 6 “difficult to quantify”).

7 Accordingly, the Court determines that Apple has not shown that its supposed reputational
 8 injury cannot be compensated by damages, but Apple has shown that its alleged lost sales harm
 9 would be difficult to calculate and remedy.

10 2. Apple’s Licenses

11 Samsung points out that Apple previously offered to license the asserted patents to
 12 Samsung and other competitors, and argues that this activity demonstrates that money damages are
 13 adequate. *See* Opp’n at 16-18. A patentee’s willingness to license its technology is relevant to the
 14 adequacy of legal remedies. *See ActiveVideo Networks, Inc. v. Verizon Commc’ns, Inc.*, 694 F.3d
 15 1312, 1339 (Fed. Cir. 2012). However, the Federal Circuit has cautioned that evaluation of a
 16 patent owner’s licensing efforts must account for “any relevant differences from the current
 17 situation,” such as whether the licensees were Apple’s competitors in the smartphone market, and
 18 whether the licenses involved agreements to settle litigation. *Apple III*, 735 F.3d at 1370.

19 As explained above, Apple granted rights to [REDACTED] to competitors in the
 20 smartphone market, licensing the [REDACTED] to Nokia and HTC, and the [REDACTED] to
 21 HTC.⁷ *See* ECF Nos. 1895-12 (HTC), 443-19 (Nokia). In the prior litigation, Samsung used these
 22 same licenses as evidence that Apple was willing to license the asserted patents in that case, and
 23 was therefore willing to accept monetary compensation for those inventions. This Court stated:

24 Both the Nokia and HTC agreements resulted from litigation settlements.
 25 Moreover, the Nokia license “was a ‘provisional license’ for a limited ‘standstill’
 26 period, and the HTC agreement excluded HTC products that were ‘clones’ of
 Apple’s products.” Because of these special conditions, the Nokia-Apple and HTC-

27 ⁷ Apple preemptively addressed two additional licenses of [REDACTED] to IBM and
 28 Microsoft. *See* Mot. at 16. Samsung does not rely on those licenses in its Opposition, so the Court
 does not address them.

1 Apple licenses provide little insight into whether Apple would be willing to provide
2 Samsung unencumbered access to the patented features for money. Therefore, the
3 Court holds that Apple's other licenses do not support a finding that damages are an
4 adequate remedy.

5 1846 Injunction Order at 36 (citations omitted). Samsung does not argue that any of this analysis
6 has changed for [REDACTED], and acknowledges this Court's finding that the
7 litigation settlement context of those two licenses "diminishes their probative value." Opp'n at 18.
8 At oral argument, Samsung's counsel confirmed that this Court's prior analysis (with which
9 Samsung disagrees) would be the same in this case. See July 10, 2014 Hearing Tr. (ECF No. 1949)
10 at 73-74. Furthermore, Samsung's expert Dr. Chevalier acknowledged at trial that "Apple is, in
11 general, very reluctant to license their intellectual property." Tr. at 2433:9-17. The Court finds no
12 reason to depart from its previous analysis of the same licenses.

13 Samsung also contends that Apple offered to license the '647 patent to Samsung in August
14 2010, prior to this litigation, when Apple presented a slideshow that listed the '647 patent and
15 stated: "Samsung needs a license to continue to use Apple patents in infringing smartphones."
16 PX132 at 15, 23. In response, Apple notes that the same presentation stated that "Apple has not
17 authorized the use of any of these patents" (*id.* at 10), and there is no other evidence that Apple
18 presented licensing terms to Samsung, or that Apple would have included the '647 patent among
19 other patents identified. In *Apple III*, the Federal Circuit noted that any offers by Apple to license
20 asserted patents to Samsung "may be quite relevant to the injunction analysis." 735 F.3d at 1370
21 n.7. Here, the Court finds that Apple's presentation provides some indication that Apple might
22 have been willing to license Samsung, but did not amount to a formal licensing offer. Apple's
23 references to a "license" and "Samsung's choice to use Android *without a license*" (PX132 at 2
24 (emphasis added)) suggest that Apple might have been willing to discuss licenses to at least some
25 of its intellectual property. The presentation is also labeled "Provided for Information and
26 Business Settlement Purposes Only." However, Apple did not identify license terms or specific
27 patents for licensing to Samsung. The presentation is also consistent with a demand to cease and
28 desist from infringement. Even to the extent that the August 2010 presentation reveals some
willingness by Apple to negotiate a license, this does not outweigh the additional evidence and this
Court's prior findings that Apple is reluctant to license its patents.

3. Summary of Adequacy of Monetary Remedies

The Court concludes that damages for Apple’s alleged irreparable harm in connection with alleged lost sales are difficult to quantify. As the Court determined in the 1846 Injunction Order, Apple’s past licensing behavior demonstrates a reluctance to license Apple’s patents to Samsung, and several factors distinguish Apple’s licenses to HTC and Nokia from the present circumstances. Moreover, Samsung has not established that Apple offered to license the ’647 patent to Samsung in August 2010.

However, this determination does not overcome Apple’s failure to demonstrate a causal nexus between its alleged harm and Samsung’s infringement. As before, the Court will not issue a permanent injunction based on irreparable harm that Samsung’s infringement did not cause, even if monetary remedies will not compensate Apple for that irreparable harm. *See* 1846 Injunction Order at 37. Apple bears the burden of showing that legal remedies are inadequate to compensate for the specific alleged irreparable harm. *See eBay*, 547 U.S. at 391 (listing as the first two factors a patentee must show for an injunction “(1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for *that injury*”) (emphasis added); *Apple III*, 735 F.3d at 1371 (“Of course, if, on remand, Apple cannot demonstrate that demand for Samsung’s products is driven by the infringing features, then Apple’s reliance on lost market share and downstream sales to demonstrate the inadequacy of damages will be substantially undermined.”). To award an injunction to Apple in these circumstances would ignore the Federal Circuit’s warning that a patentee may not “leverage its patent for competitive gain beyond that which the inventive contribution and value of the patent warrant.” *Id.* at 1361 (quoting *Apple II*, 695 F.3d at 1375) (internal quotation mark omitted). The Court ultimately finds that—despite Apple’s apparent unwillingness to license the patents-in-suit to Samsung—monetary remedies would more appropriately remedy Samsung’s infringement than would an injunction. Accordingly, the second *eBay* factor favors Samsung.

C. Balance of Hardships

The balance of hardships factor “assesses the relative effect of granting or denying an injunction on the parties.” *i4i*, 598 F.3d at 862. An injunction “may deter future harm, but it may

1 not punish.” *Hynix Semiconductor Inc. v. Rambus Inc.*, 609 F. Supp. 2d 951, 969 (N.D. Cal. 2009).
 2 Here, Samsung’s admissions at trial about the ease of removing or designing around the infringing
 3 features, combined with the relatively narrow scope of, and sunset provision in, Apple’s requested
 4 injunction, show that Samsung will not face any hardship from the injunction. Accordingly, the
 5 balance of hardships favors Apple and the entry of an injunction.

6 The parties focus their arguments on Samsung’s likely hardships in light of the scope of
 7 Apple’s proposed injunction. In the first lawsuit between these parties (Case No. 11-CV-1846),
 8 Apple sought an “extremely broad” injunction that would “prevent the sale of 26 specific
 9 products.” *Apple*, 909 F. Supp. 2d at 1162. Here, however, Apple seeks a narrower injunction
 10 against only “Infringing Features,” defined as:

11 (1) for the ’647 patent, the data detection/linking feature accused at trial as
 12 implemented in Samsung’s Admire, Galaxy Nexus, Galaxy Note, Galaxy Note II,
 13 Galaxy S II, Galaxy S II Epic 4G Touch, Galaxy S II Skyrocket, Galaxy S III, and
 Stratosphere products;

14 (2) for the ’721 patent, the slide-to-unlock feature accused at trial as implemented in
 Samsung’s Admire, Galaxy Nexus, and Stratosphere products; and

15 (3) for the ’172 patent, the autocorrect feature accused at trial as implemented in
 16 Samsung’s Admire, Galaxy Nexus, Galaxy Note, Galaxy S II, Galaxy S II Epic 4G
 Touch, Galaxy S II Skyrocket, and Stratosphere products.

17 Proposed Order at 1. The injunction would apply only to activities involving the “software or code
 18 capable of implementing any Infringing Feature,” and not smartphone or tablet products in their
 19 entirety. *Id.* at 2. Additionally, the injunction includes a 30-day “sunset provision” to delay its
 20 effect: “the enforcement of this Permanent Injunction shall be stayed until thirty (30) days after
 21 entry of this Order.” *Id.* Apple claims that the injunction is narrowly tailored to avoid “seeking to
 22 bar entire product lines from the marketplace.” Mot. at 17.

23 Given the scope of Apple’s proposed order, Apple claims that Samsung faces no hardship
 24 at all because Samsung said that it can easily remove or design around the infringing features. *Id.*
 25 at 17-18. The Court agrees with Apple. At trial, Samsung’s witnesses repeatedly told the jury that
 26 design-arounds would be simple or already exist. For the ’172 patent’s “slide-to-unlock”
 27 invention, Samsung explained that it already has alternatives such as the “puzzle” and “ripple”
 28 unlock interfaces, and is “selling lots of these phones without using any Apple slide to unlock

1 feature.” Tr. at 399:22-400:18. As to the ’721 patent’s “autocorrect” feature, Samsung represented
2 at trial that Samsung has already developed a “non-infringing keyboard” that has “since been
3 installed on many Samsung phones” and has been “an option on five of the phones that Apple
4 accuses in this case.” *Id.* at 384:8-14. Regarding the ’647 patent, Google engineer Dianne
5 Hackborn said that “it shouldn’t take more than a day” to remove the accused pop-up menu, *id.* at
6 1587:25-1588:11, and Samsung’s expert Dr. Kevin Jeffay agreed that such a change would take
7 “on the order of a day,” *id.* at 1797:21-1798:8. Then, at closing argument, Samsung’s counsel
8 addressed the amount of time needed to design around the asserted patents for purposes of
9 estimating damages, and told the jury: “And we wouldn’t need four months. You know, we’re
10 talking about Samsung, one of the, you know, greatest, largest, most important technology
11 companies in the world. They could do these changes, if they had to do it, in one month.” *Id.* at
12 3336:2-5.

13 Additionally, Apple claims that the one-month sunset provision further limits any hardship
14 to Samsung because the delay matches the time that Samsung told the jury it would need to
15 implement design-arounds. *See* Mot. at 19; Tr. at 3336:2-8. The Federal Circuit has observed that
16 “a delayed injunction may be more likely to prevent only infringing *features* rather than the sale of
17 entire *products*, because the defendant would have time to implement a noninfringing alternative.”
18 *Apple III*, 735 F.3d at 1363; *see also Broadcom Corp. v. Emulex Corp.*, 732 F.3d 1325, 1339 (Fed.
19 Cir. 2013) (affirming injunction with 18-month sunset period); *Broadcom Corp. v. Qualcomm,*
20 *Inc.*, 543 F.3d 683, 704 (Fed. Cir. 2008) (same, for 20-month sunset period). Thus, the sunset
21 period in Apple’s proposed injunction further limits any possible hardship to Samsung.

22 Samsung does not attempt to rebut Apple’s arguments regarding ease of design-arounds.
23 Nor does Samsung dispute that it could accomplish all relevant design-arounds within the sunset
24 period. In light of these repeated admissions, Samsung fails to demonstrate that it would suffer any
25 hardship. *See, e.g., Douglas Dynamics*, 717 F.3d at 1345 (“If indeed Buyers had a non-infringing
26 alternative which it could easily deliver to the market, then the balance of hardships would suggest
27 that Buyers should halt infringement and pursue a lawful course of market conduct.”); *Brocade,*
28 2013 WL 140039, at *5 (“A10’s witnesses also stated at trial that A10 could easily design around

1 Brocade’s patented claims. The hardship A10 would suffer, therefore, is minimal.”); *Halo Elecs.*,
2 2013 WL 3043668, at *10 (finding little hardship to defendant that “testified at trial that it could
3 switch to a different, non-infringing design to meet its customers’ needs”).

4 Despite these admissions, Samsung asserts that the injunction “lacks specificity, is overly
5 broad and extends beyond the permissible scope of an injunction under Federal Circuit case law.”
6 Opp’n at 19. These arguments are unpersuasive. Apple’s proposed injunction targets only specific
7 features, not entire products. Other courts have applied similar injunctions. *See, e.g., i4i*, 598 F.3d
8 at 862 (affirming finding that infringer’s hardship was minimal because the injunction affected
9 only “one of thousands of features”); *Brocade*, 2013 WL 140039, at *5 (holding that an injunction
10 against practice of features that “do not drive demand” was not overly burdensome).

11 Samsung also claims the injunction is “not limited to the specific adjudicated software at
12 trial such as, for [the] ’647 patent, the Messenger and Browser applications.” Opp’n at 19.
13 Samsung is correct that Apple’s proposed injunction lists only the features accused at trial “and/or
14 any feature not more than colorably different” without mention of specific applications. However,
15 Samsung has failed to show why this omission renders Apple’s proposed injunction overly broad.
16 Apple has limited the scope of the injunction to use of infringing features as accused at trial.
17 Moreover, focusing on specific features rather than existing applications may reasonably prevent
18 future infringement. *See Streck, Inc. v. Research & Diagnostic Sys., Inc.*, 665 F.3d 1269, 1293
19 (Fed. Cir. 2012) (holding that an injunction against “otherwise infringing the asserted claims” was
20 not overly broad); *Signtech USA, Ltd. v. Vutek, Inc.*, 174 F.3d 1352, 1359 (Fed. Cir. 1999) (holding
21 injunction against “any further infringement” was not overly broad).

22 Samsung also fears that Apple will initiate contempt proceedings and force Samsung to
23 demonstrate that future products are “colorably different.” Opp’n at 19. However, the “not more
24 than colorably different” provision is standard in injunctions. *See TiVo Inc. v. EchoStar Corp.*, 646
25 F.3d 869, 882 (Fed. Cir. 2011) (“Thus, the party seeking to enforce the injunction must prove both
26 that the newly accused product is not more than colorably different from the product found to
27 infringe and that the newly accused product actually infringes.”). Therefore, Samsung fails to
28

1 identify any likely hardship specific to Apple’s proposed order, only the general inconvenience and
2 uncertainty that results from any injunction.

3 Samsung additionally argues that beyond the use of specific features, the injunction
4 improperly prevents Samsung from “implementing,” “advertising,” or providing “assistance” for
5 its infringing features. Opp’n at 19. However, an injunction need not be limited only to the sale of
6 infringing products. *See NLRB v. Express Pub’g Co*, 312 U.S. 426, 435 (1941) (“A federal court
7 has broad power to restrain acts which are of the same type or class as unlawful acts which the
8 court has found to have been committed or whose commission in the future, unless enjoined, may
9 fairly be anticipated from the defendant’s conduct in the past.”); *Broadcom Corp. v. Emulex Corp.*,
10 2012 U.S. Dist. LEXIS 129524, at *30 (C.D. Cal. Mar. 16, 2012) (“The Court rejects the notion
11 that the injunction must be limited to the type of conduct which was found to infringe; namely,
12 selling infringing devices.”). Samsung has admitted that it can easily remove or design around the
13 infringing features, and has not shown that it faces any hardship refraining from related advertising
14 or other activity. Samsung argues that Apple’s proposed injunction would disrupt Samsung’s
15 contractual relationship with carriers and consumers. Opp’n at 19. However, Apple represents that
16 its proposed injunction would not apply to end users or others not acting in concert with Samsung.
17 *See Reply at 14*. Moreover, this Court has previously held that third-party retailers “assumed the
18 risk of this type of disruption” and “should not be protected . . . when they have been benefitting
19 from Samsung’s infringement.” *See Apple*, 909 F. Supp. 2d at 1161-62; *see also Telebrands Direct*
20 *Response Corp. v. Ovation Commc’ns, Inc.*, 802 F. Supp. 1169, 1179 (D.N.J. 1992).

21 Finally, Samsung argues that Apple’s proposed injunction “includes no carve-out for
22 repairs.” Opp’n at 19. However, Apple represents that the proposed injunction does not enjoin
23 repairs for products already included in the jury’s damages award, and that Apple would be
24 “willing to make clear that the injunction does not preclude Samsung from performing repairs on
25 those devices.” Reply at 15. Based on these representations, Samsung’s objection appears moot.

26 As to Apple’s hardships, Apple contends that “Apple has been forced to compete against
27 products that contain its own patented technologies.” Mot. at 17. The Federal Circuit has held that
28 requiring a patentee to “compete against its own patented invention . . . places a substantial

1 hardship” on the patentee, for purposes of the balance of hardships factor. *Robert Bosch*, 659 F.3d
2 at 1156; *see also Sealant Sys. Int’l v. TEK Global S.R.L.*, No. 5:11-CV-00774-PSG, 2014 U.S. Dist.
3 LEXIS 31528, at *102 (N.D. Cal. Mar. 7, 2014) (“AMI faces substantial hardship because it must
4 compete with its own patented invention in the marketplace.”). As noted above, it is undisputed
5 that Apple and Samsung have been “fierce” direct competitors in the smartphone market. While
6 Apple’s likely hardship from Samsung’s continued infringement does not rise to the level of
7 irreparable harm, *see Apple II*, 695 F.3d at 1375 (noting that causal nexus requires “that the
8 infringing feature drives consumer demand for the accused product”), Samsung faces no hardship,
9 as explained above.

10 Samsung repeatedly told the jury that designing around the asserted claims of the three
11 patents at issue would be easy and fast. In light of those admissions, and the narrow tailoring of,
12 and sunset provision in, the requested injunction, Samsung has failed to articulate any hardship. As
13 the Federal Circuit has held, if the infringer “had a non-infringing alternative which it could easily
14 deliver to the market, then the balance of hardships would suggest that [the infringer] should halt
15 infringement and pursue a lawful course of market conduct.” *Douglas Dynamics*, 717 F.3d at
16 1345. For the above reasons, the balance of hardships favors Apple.

17 **D. Public Interest**

18 “This factor requires a plaintiff to demonstrate that ‘the public interest would not be
19 disserved by a permanent injunction.’” *Apple III*, 735 F.3d at 1371 (quoting *eBay*, 547 U.S. at
20 391). Courts have recognized that “the touchstone of the public interest factor is whether an
21 injunction, both in scope and effect, strikes a workable balance between protecting the patentee’s
22 rights and protecting the public from the injunction’s adverse effects.” *i4i*, 598 F.3d at 863.

23 Apple repeats its argument from the parties’ prior lawsuit that an injunction will promote
24 the public’s interest in enforcing patents against a direct competitor, and will benefit the public by
25 “encouraging investment in innovation.” Mot. at 19. As before, the Court agrees with Apple that
26 the public interest does favor the enforcement of patent rights to promote the “encouragement of
27 investment-based risk.” *Sanofi-Synthelabo v. Apotex, Inc.*, 470 F.3d 1368, 1383 (Fed. Cir. 2006);
28 *see also Apple*, 909 F. Supp. 2d at 1162 (quoting *id.*); *Douglas Dynamics*, 717 F.3d at 1346

1 (finding public interest disserved by an infringer “competing in the marketplace using a
2 competitor’s patented technology”). However, as the Federal Circuit observed, “the public’s
3 interest in enforcing patent rights must also be weighed with other aspects of the public interest.”
4 *Apple III*, 735 F.3d at 1372 (citing *ActiveVideo*, 694 F.3d at 1341).

5 Samsung claims that an injunction will “depriv[e] the public of product choices created by a
6 thriving level of competition.” Opp’n at 20. The Federal Circuit has stated that it is appropriate to
7 “consider the scope of Apple’s requested injunction relative to the scope of the patented features
8 and the prospect that an injunction would have the effect of depriving the public of access to a
9 large number of non-infringing features.” *Apple III*, 735 F.3d at 1372-73. In *Apple III*, Apple
10 sought broadly to enjoin sales of over two-dozen products. *Id.* at 1372. Here, as explained above,
11 Apple’s proposed injunction is narrower and targets only “software and code” for the “Infringing
12 Features” accused at trial. Thus, there is substantially less risk that the injunction will deprive the
13 public of access to “a large number of non-infringing features,” particularly given Samsung’s
14 representations about the ease and speed of designing around the patents at issue.

15 Samsung claims that enjoining the accused features may at least temporarily restrict
16 consumers’ choices of smartphones or smartphone features. However, any such effect would be
17 minimal because of Apple’s proposed sunset provision and Samsung’s repeated representations at
18 trial about the ease and speed with which Samsung could implement design-arounds. Moreover, as
19 this Court noted in connection with the much broader permanent injunction that Apple previously
20 requested, “[c]onsumers will have substantial choice of products, even if an injunction were to
21 issue. Apple and Samsung, despite being direct competitors, are not the only suppliers of mobile
22 phones in the market, nor are Samsung’s infringing phones the only phones Samsung offers.”
23 *Apple*, 909 F. Supp. 2d at 1162. Furthermore, Apple predicts that an injunction will promote
24 product diversity by forcing Samsung to design around the patents. *See* Mot. at 20. Samsung itself
25 stated repeatedly at trial that Samsung could offer multiple design-arounds in lieu of Apple’s
26 patented features. *See* Tr. at 3336:2-5. Thus, an injunction may prompt introduction of new
27 alternatives to the patented features.
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United States District Court
For the Northern District of California

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As before, Samsung argues that an injunction would create an administrative burden on the Court, as it would require the Court’s continuing supervision to enforce. *See* Opp’n at 20. This is likely true, though on its own, it does not carry significant weight. *See Apple*, 909 F. Supp. 2d at 1163. Moreover, the relatively narrow scope of Apple’s proposed injunction reduces the likelihood of burdensome enforcement efforts. Balancing all of the considerations that the parties have identified, the Court concludes that the public interest factor favors Apple.

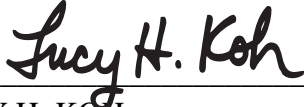
E. Summary

Weighing all of the factors, the Court concludes that the principles of equity do not support a permanent injunction here. First and most importantly, Apple has not satisfied its burden of demonstrating irreparable harm and linking that harm to Samsung’s exploitation of any of Apple’s three infringed patents. Apple has not established that it suffered significant harm in the form of either lost sales or reputational injury. Moreover, Apple has not shown that it suffered any of these alleged harms *because* Samsung infringed Apple’s patents. The Federal Circuit has cautioned that the plaintiff must demonstrate a causal nexus between its supposed harm (including reputational harm) and the specific infringement at issue. Apple has not demonstrated that the patented inventions drive consumer demand for the infringing products.

Furthermore, the balance of the remaining *eBay* factors do not warrant an injunction here. Apple has not demonstrated that money damages are inadequate compensation for the infringement in this case. Although the public interest factor favors Apple and Apple’s narrowly tailored injunction request tilts the balance of hardships in Apple’s favor, the Court determines that these factors do not overcome the lack of irreparable harm. Apple’s motion is DENIED.

IT IS SO ORDERED.

Dated: August 27, 2014



LUCY H. KOH
United States District Judge