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

17 UNITED STATES DISTRICT COURT

18 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

19  
20 APPLE INC., a California corporation,  
21  
22 Plaintiff,  
23  
24 vs.

CASE NO. 11-cv-01846-LHK

**RENEWED ADMINISTRATIVE MOTION  
TO FILE DOCUMENTS UNDER SEAL**

25 SAMSUNG ELECTRONICS CO., LTD., a  
26 Korean business entity; SAMSUNG  
ELECTRONICS AMERICA, INC., a New  
York corporation; SAMSUNG  
TELECOMMUNICATIONS AMERICA,  
LLC, a Delaware limited liability company,  
27  
28 Defendant.

1 Pursuant to Civil Local Rules 7-11 and 79-5, and General Order No. 62, Defendants  
2 Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung  
3 Telecommunications America, LLC (collectively, “Samsung”) hereby bring this renewed  
4 administrative motion for an order to seal certain highly confidential source code references and  
5 financial data.

6 **RELIEF REQUESTED**

7 Samsung requests an order granting Samsung’s motion to seal:

- 8 1. Exhibit 2 to the Declaration of Joby Martin in Support of Samsung’s Opposition to  
9 Apple’s Motion for Rule 37 Sanctions (“Martin Rule 37 Declaration”) (Dkt. No.  
10 801);
- 11 2. Exhibit 3 to the Martin Rule 37 Declaration (Dkt. No. 801);
- 12 3. Exhibit 8 to the Martin Rule 37 Declaration (Dkt. No. 801);
- 13 4. Exhibit 9 to the Martin Rule 37 Declaration (Dkt. No. 801);
- 14 5. Exhibit B to the Declaration of Timothy Sheppard in Support of Samsung’s  
15 Opposition to Apple’s Motion for Rule 37 Sanctions (“Sheppard Rule 37  
16 Declaration”) (Dkt. No. 801);
- 17 6. Exhibit F to the Sheppard Rule 37 Declaration (Dkt. No. 801);
- 18 7. Exhibit C to the Declaration of Christopher Price in Support of Samsung’s  
19 Supplemental Response to Apple’s Motion for Rule 37 Sanctions (“Price Rule 37  
20 Declaration”) (Dkt. No. 857);
- 21 8. Exhibit 6 to the Declaration of Marc Pernick in Support of Apple’s Motion to  
22 Strike Samsung’s Experts Based on Undisclosed Facts and Theories (“Pernick  
23 Motion to Strike Declaration”) (Dkt. No. 939);
- 24 9. Exhibit 34 to the Pernick Motion to Strike Declaration (Dkt. No. 939);
- 25 10. Exhibit A to the Declaration of Terry Musika in Support of Apple’s Opposition to  
26 Samsung’s Motion to Strike Apple’s Experts Based on Undisclosed Facts and  
27 Theories (“Musika Motion to Strike Declaration (Dkt. No. 996);
- 28 11. The Reply Declaration of Marc Pernick in Support of Apple’s Motion to Strike  
Samsung’s Expert Reports Based on Undisclosed Facts and Theories (“Pernick  
Motion to Strike Reply Declaration”) (Dkt. No. 1056);
12. Exhibit 10 to the Pernick Motion to Strike Reply Declaration (Dkt. No. 1056); and
13. Exhibit 11 to the Pernick Motion to Strike Reply Declaration (Dkt. No. 1056).<sup>1</sup>

<sup>1</sup> In its Order, the Court found that other documents included confidential information, such as product code names (Dkt. No. 2222 at 12), licensing royalty rates (*id.* at 13), and certain source code references (*id.* at 27) that may be sealed. While Samsung maintains that “good cause” exists to seal these categories of information, it has determined that some of the documents at issue include information that is now in the public domain. Samsung does not renew its motion to seal information that is no longer non-public.



1 36 (9th Cir. 2003). Unlike the public interest in inspecting documents attached dispositive  
2 pleadings, which creates a “strong presumption in favor of access,” the public need to access  
3 documents “unrelated or only tangentially related to the underlying cause of action” attached to  
4 non-dispositive motions is far weaker. *Kamakana*, 447 F.3d at 1178-79 (quotations omitted). In  
5 this situation, the “usual presumption of the public’s right to access is rebutted.” *Id.* at 1179.  
6 Rule 26(c) permits a court to “protect a party or person from annoyance, embarrassment,  
7 oppression, or undue burden or expense” by, among other things, “requiring that a trade secret *or*  
8 other confidential research, development, or *commercial information* not be revealed or revealed  
9 only in a specified way.” Fed. R. Civ. P. 26(c) (emphasis added).

10 “The most commonly accepted definition of trade secrets,” *Aronson v. Quick Point Pencil*  
11 *Co.*, 440 U.S. 257, 266 (1979), which the Ninth Circuit has applied in the sealing context, *In re*  
12 *Elec. Arts, Inc.*, 298 Fed. App’x 568, 569 (9th Cir. 2008) (unpublished), is found in comment b to  
13 section 757 of the first Restatement of Torts. *Accord, e.g., Union Oil Co. of Cal. v. Fed. Power*  
14 *Comm’n*, 542 F.2d 1036, 1044 (9th Cir. 1976); *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir.  
15 1972). The Restatement defines “trade secret” as “*any* formula, pattern, device or compilation of  
16 information which is used in one’s business, and which gives him *an opportunity* to obtain an  
17 advantage over competitors who do not know or use it.” RESTATEMENT OF TORTS § 757, cmt. b  
18 (1939) (emphasis added). Thus, for example, in *In re Electronic Arts*, the Ninth Circuit stated  
19 that “pricing terms, royalty rates, and guaranteed minimum payment terms ... plainly fall[] within  
20 the definition of ‘trade secrets,’” and held that a district court had abused its discretion in denying  
21 sealing of such information. 298 Fed. App’x at 569. Indeed, such data is both a paradigmatic  
22 trade secret and the precise sort of information that could be used to harm a business’s competitive  
23 standing— both of which suffice to overcome the limited public interest in disclosure and thus to  
24 justify sealing.

25 The documents at issue here, which include per-product revenue, pricing, cost, and  
26 financial information, fall squarely in the realm of trade secrets. For instance, Exhibits B and F to  
27 the Sheppard Rule 37 Declaration includes product-specific sales, costs of goods sold, expenses,  
28 and profits data for all accused products for each month between 2007 and 2011. (Declaration of

1 Hankil Kang (“Kang Decl.”) ¶ 16.) Exhibit C to the Price Rule 37 Declaration synthesizes this  
2 data and presents it in a format that those with little accounting or financial experience could use  
3 to gain valuable insight into Samsung’s pricing strategies. (*Id.* ¶ 17.) The exhibits are extremely  
4 valuable to Samsung, because the data guide the company’s pricing, distribution, financial  
5 planning, and other business decisions. (*Id.* ¶ 5.) Conversely, their release would be a windfall  
6 to Samsung’s vendors, buyers, and competitors, could use insight about Samsung’s financial data  
7 to its substantial detriment. (*Id.* ¶¶ 7-10.) The documents contain trade secrets, a fact that alone  
8 is sufficient to establish “compelling reasons”—and, *a fortiori*, “good cause”—for sealing the  
9 selected portions. *Kamakana*, 447 F.3d at 1179; *In re Elec. Arts*, 298 Fed. App’x at 569-70.

10 Even if the technical definition of trade secrets were not met, the documents should  
11 nonetheless be sealed as they clearly meet Rule 26’s definition of confidential “commercial  
12 information” and Samsung has made particularized showings sufficient to meet the “good cause”  
13 standard for each document at issue. (Kang Decl. ¶¶ 12-21.) For instance, a competitor could  
14 use Samsung’s profit information to determine Samsung’s pricing “floor” and price its products at  
15 a level Samsung would not be able to profitably match. (*Id.* ¶ 8.) Per-product profit data would  
16 also inform Samsung’s competitors as to which of its products are performing best and worst,  
17 allowing them to target such product lines in marketing campaigns. (*Id.*) Samsung’s vendors  
18 would be able to use Samsung’s profit margins to negotiate better prices for components they  
19 provide while clients would be able to use the same information to negotiate better prices for  
20 Samsung’s smart phones and tablets. (*Id.* ¶¶ 9-11.)

21 It is for this reason that courts in the Ninth Circuit consistently seal confidential financial  
22 information even under the more stringent “compelling reasons” standard. *See, e.g., Bean v. John*  
23 *Wiley & Sons, Inc.*, No. CV 11-08028-PCT-FJM, 2012 WL 1078662, \*5-6 (D. Ariz. Mar. 30,  
24 2012); *Bauer Bros. LLC v. Nike, Inc.*, No. 09cv500-WQH-BGS, 2012 WL 1899838, \*3-4 (S.D.  
25 Cal. May 24, 2012); *TriQuint Semiconductor, Inc. v. Avago Techs., Ltd.*, No. CV 09-1531-PHX-  
26 JAT, 2011 WL 6182346, \*3-7 (D. Ariz. Dec. 13, 2011). The Court should find the confidential  
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28

1 financial information at issue here sealable for the same reasons.<sup>4</sup>

2           Should the Court find that confidential financial information at issue here may not be  
3 sealed, the Court should deny Samsung's motion without prejudice to it re-filing a renewed  
4 motion to seal should the Federal Circuit disagree with this Court's reasoning in the pending  
5 appeal from the Court's August 9, 2012 and July 17, 2012 Orders. Both Apple and Samsung  
6 have sought "review of this Court's decision on the sealability of precisely this type of  
7 information" (Dkt. No. 2210 at 4) and at least one of the documents at issue here—Exhibit C to  
8 the Price Rule 37 Declaration—is identical to a document as issue on appeal. Others are "largely  
9 subject to the same analysis." (Dkt. No. 2168 at 8.) "Thus, the outcome of the appeal of the  
10 August 9 Order bears on the present" motion." (*Id.*)

11 **II. "GOOD CAUSE" EXISTS TO SEAL CONFIDENTIAL SOURCE CODE**  
12 **REFERENCES**

13           The Court has already found that Exhibit 6 to the Pernick Motion to Strike Declaration  
14 contains confidential source code references that may be sealed. (Dkt. No. 2222 at 24.) Various  
15 portions of the document include third-party MERL's confidential references. (*See, e.g.*, Ex. 6 to  
16 Permick at 1, 6-10, 12-13.) Samsung expects that MERL will submit a declaration along with  
17 proposed redactions narrowly tailored to protect source code references.

18 **CONCLUSION**

19           For the foregoing reasons, Samsung respectfully requests that the Court grant this renewed  
20 administrative motion to file under seal.

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27 <sup>4</sup> The specific portions Samsung requests be sealed are identified in the Kang Declaration at  
28 ¶¶ 12-21.

1 DATED: February 15, 2012

Respectfully submitted,

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By /s/ Victoria F. Maroulis

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