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11 UNITED STATES DISTRICT COURT

12 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE

13 APPLE INC., a California corporation,

14 Plaintiff,

15 v.

16 SAMSUNG ELECTRONICS CO., LTD., a
17 Korean Business entity; SAMSUNG
18 ELECTRONICS AMERICA, INC., a New
19 York corporation; SAMSUNG
20 TELECOMMUNICATIONS AMERICA,
21 LLC, a Delaware limited liability company,

22 Defendants.

CASE NO. 11-cv-01846-LHK

**THIRD PARTY REUTERS AMERICA
LLC'S OPPOSITION TO MOTIONS TO
SEAL TRIAL AND PRETRIAL
EVIDENCE**

Date: No hearing set
Time: N/A
Place: Courtroom 1, 5th Floor
Judge: **Hon. Lucy H. Koh**

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1 **I. INTRODUCTION**

2 The parties' third bite at the sealing apple (see Documents 1256, 1269, denying earlier
3 motions) fares no better than their first two. Their conclusory declarations and nebulous
4 assertions of harm from the disclosure of documents they have put forth in the so-called "Patent
5 Trial of the Century" – some of which are already on the Internet – fall far short of meeting the
6 "compelling reasons" standard for sealing. The intense public interest in assessing the parties'
7 competing and hotly-contested claims in this case – which is taking place in a public courtroom
8 before a jury and the watchful eyes of the media, not in private arbitration which the parties could
9 have invoked – far outweighs any reasons the parties have put forth in favor of sealing. This is
10 particularly true in light of the fact that Apple's profit margin on the iPhone and iPad – the most
11 significant item Apple is trying to seal – has already been disclosed without any impact on the
12 company and without any evidence that its Chicken Little predictions about the consequences of
13 unsealing will come home to roost. The parties' motions to seal should be denied.

14 **II. THE STRONG PUBLIC INTEREST IN THIS CASE.**

15 At the risk of stating the obvious, we point out some important facts that the parties, in
16 their zeal to put a lid on documents they are putting forth in a public courtroom that they chose to
17 use in a battle over billions of dollars and the future of the smartphone industry, have studiously
18 attempted to ignore. This is a hotly-contested case, with over 1,500 pleadings (and counting, of
19 course) put forth since it was filed. Business and technology reporters from many media
20 organizations are closely following the case due to the widespread interest in the disputes
21 between Apple and various companies, including Samsung, that use Google's operating system.
22 Mainstream business outlets like the Wall Street Journal, Bloomberg and Reuters tend to focus
23 coverage on the case's strategic impact on the companies, including financial risks for
24 shareholders; publications like *The Recorder* analyze legal tactics; and sites like *The Verge* dig
25 into the technology. Amy Stevens Declaration paragraph 3.

26 Nearly 50 years ago, when some of what is now Silicon Valley still was dotted with prune
27 orchards and smartphones hadn't been invented, the United States Supreme Court spoke of the
28 "profound national commitment to the principle that debate on public issues should be

1 uninhibited, robust, and wide-open.” *New York Times v. Sullivan*, 376 U. S. 254, 270 (1964).
2 The technology, of course, has changed rapidly, but those timeless principles have not. The
3 parties’ attempts to enforce secrecy in this dispute defy both reality and those principles. The
4 dispute unfolding in this courtroom, for better or for worse, is captivating nearly as much
5 attention as the dispute in Montgomery, Alabama which gave rise to the *Sullivan* case. The
6 parties are hardly in a position to complain about the public scrutiny here since the widespread
7 interest in smartphones and tablets accounts for the massive fortunes the parties have amassed
8 and results from the billions of dollars they have spent to advertise the indispensability of these
9 devices to everyday life.

10 **III. THE BURDEN OF OVERCOMING THE STRONG PRESUMPTION IN FAVOR** 11 **OF ACCESS IS ON THE PARTIES PROPOSING SEALING.**

12 **A. The Undisputed Default Rule Is Public Access**

13 Any corporation that values secrecy yet takes its grievances to a public forum and
14 requests far-ranging relief from judge and jury presumably has done so for strategic advantage
15 and consequently has minimal claim “to keep a lid on its own documents.” *Baxter Int’l, Inc. v.*
16 *Abbott Laboratories*, 297 F.3d 544, 547-48 (7th Cir. 2002) (noting that “businesses that fear harm
17 from disclosure required by the rules for the conduct of litigation often agree to arbitrate.”) No
18 party or third party should have any expectation of privacy in this dispute. As the California
19 Supreme Court observed in *NBC Subsidiary*, “[a]n individual or corporate entity involved as a
20 party to a civil case is entitled to a fair trial, not a private one.” 20 Cal.4th 1178, 1211.

21 One week ago, the Ninth Circuit reaffirmed the well-established standards and burdens on
22 motions to seal judicial documents. In *In re Midland Nat’l Life Ins. Co. Annuity Sales Practices*
23 *Litigation*, ___ F.3d ___, 2012 U.S. App. LEXIS 15334, 2012 WL 3024192 (9th Cir. July 25,
24 2012), the Court of Appeals reiterated:

25 The public has a “general right to inspect and copy public records and documents,
26 including judicial records and documents.” *Nixon v. Warner Commc’ns, Inc.*, 435
27 U.S. 589, 597, 98 S. Ct. 1306, 55 L. Ed. 2d 570 (1978) (footnote omitted). This
28 right extends to pretrial documents filed in civil cases. *San Jose Mercury News,*
Inc. v. U.S. Dist. Court, 187 F.3d 1096, 1102 (9th Cir. 1999). If, however, the
documents are among those which have “traditionally been kept secret for
important policy reasons,” such as grand jury transcripts and pre-indictment
warrant materials, they are not subject to the right of public access. *Times Mirror*
Co. v. United States, 873 F.2d 1210, 1219 (9th Cir. 1989).

1
2 Although the common law right of access is not absolute, “we start with a strong
3 presumption in favor of access to court records.” *Foltz*, 331 F.3d at 1135. A party
4 seeking to seal judicial records can overcome the strong presumption of access
5 only by providing “sufficiently compelling reasons” that override the public
6 policies favoring disclosure. *Id.* When ruling on a motion to seal court records, the
7 district court must balance the competing interests of the public and the party
8 seeking to seal judicial records. *Kamakana v. City and County of Honolulu*, 447
9 F.3d 1172, 1179 (9th Cir. 2006). To seal the records, the district court must
10 articulate a factual basis for each compelling reason to seal. *Id.* Compelling
11 reasons must continue to exist to keep judicial records sealed. *Foltz*, 331 F.3d at
12 1136.

13
14 The central question on the various motions to seal is whether under the unique
15 circumstances of this case the proponents of sealing have met their burdens of providing
16 compelling reasons to seal that outweigh the public policies favoring disclosure. The answer is
17 that the parties have not met that burden.

18
19 **B. “Trade Secrets” Enjoy No Automatic Exemption from the Public’s Right of
20 Access**

21 Both federal and state courts have taken a narrow view of claims of trade secrets in the
22 context of access of court documents and public records, mindful of the “strong presumption of
23 access to court records” enunciated by the Ninth Circuit. *See, e.g., Foltz*, 331 F. 3d at 1135.
24 For example, just this week Judge Seeborg stated that the parties had not justified sealing
25 financial information in a class action involving Facebook.

26 Judge Seeborg in *Fraleley v. Facebook*, Case No. 11-cv-01726-RS, Document 217 at 2:19-
27 25 (N. D. Cal. Aug. 1, 2012) noted that the parties had given lip service to the rules on sealing,
28 but observed, “It is less clear, however, whether in all instances the parties have applied the
principles cited by Facebook with sufficient rigor. Particularly with respect to materials related
to the motion for preliminary approval, the interest of putative class members, and the public in
general, in having full access to all information bearing on the merits of the motion is especially
high. While personal information regarding minors may warrant sealing, it is far from apparent
that any other material would, including relevant financial data and information relating to how
‘Sponsored Stories’ operates.”

Judge Seeborg’s August 1 observations, which echo the rulings and comments this court

1 has made in this case and the rulings Judge Alsup made in the *Oracle v. Google* tussle, are apt.
2 Nothing that the companies want to seal has a scintilla of resemblance to “personal information
3 regarding minors.” The “relevant financial data” in this case should not be sealed.

4 This court, too, has twice in writing and twice orally (on July 18 and July 27) indicated in
5 this case that it would not seal the parties’ financial information given the strong public interest in
6 this case. (Document Nos. 1256, 1269; July 18 Transcript at 87-89.)

7 The California courts, too, have taken a dim view of assertions of trade secrets in the
8 context of access to court records. In *In re Providian Credit Card Cases*, 96 Cal. App. 4th 292
9 (2002), the California Court of Appeal rejected an attempt to seal court documents, rejecting
10 declarations which asserted trade secrets as “conclusionary and lacking in helpful specifics.” (*Id.*
11 at 305.) The declarations rejected there read very much like the ones offered by Apple and
12 Samsung here. *Id.*

13 The Court in *Providian* rejected the declarations asserting trade secrets even though there
14 were no counter-declarations, holding, “in its capacity as the trier of fact, the trial court was not
15 obliged to base his decision on those statements just because there were no counter
16 declarations....As previously noted, given the fact that only defendants knew the contents of the
17 documents, Hearst could not be expected to produce any counter declarations.” (*Id.* at 307.)

18 Apple’s declarations also completely ignore the fact that within the last week the profit
19 margins on its iPhone and iPad were publicly disclosed. (See Declaration of Xinying Valerian
20 filed herewith paragraphs 2, 3, Exs. A, B.) Needless to say, “Public disclosure, that is the
21 absence of secrecy, is fatal to the existence of a trade secret.” *Providian*, 96 Cal. App. 4th at 304.
22 With the profit margin on the iPhone now very much public, it is a simple matter to reverse
23 engineer the other financial information Apple seeks to seal, all of which are the components of a
24 profit margin. And even before last week’s disclosure of the profit margin, much of Apple’s
25 financial information was widely available on the Internet. In short, the assertions made by
26 Apple’s declarant (Bean Declaration paragraph 11) about its so-called secrets have no basis in
27 reality.

28 It also bears observation that Apple’s and Samsung’s interests are not the only ones at

1 stake. When a party “voluntarily injects the data into the decision-making process of
2 government,” as Apple has done by bringing a multi-billion dollar claim in a federal court, there
3 is a strong interest in keeping financial data “open to public scrutiny.” *San Gabriel Tribune v.*
4 *Superior Court*, 143 Cal. App. 3d 762, 778 (1983) [rejecting trade secret assertions in California
5 Public Records Act case].

6 Apple chides Reuters for suggesting that financial information has a second-class trade
7 secret status, citing *In re Electronic Arts*, 298 Fed. Appex. 568 (9th Cir. 2008) and the California
8 UTSA definition of trade secret. (Doc. 1495, pp. 3-4.)

9 Reuters is not suggesting that financial information is *never* recognized as trade secrets.
10 Rather, Reuters’ point is that in light of the question at hand, which is whether to create
11 exceptions in a particular case to the public right of access to the case, we need to distinguish
12 between the different types of “secrets” the companies are claiming. Product-level financial data
13 are qualitatively different from secrets that flow directly from innovation, like source code, as
14 this Court indicated on July 18. (July 18, 2012 Transcript at 87:15-89:20 [“other than some third
15 party source code, I don’t really plan on sealing anything”].)

16 The parties rely on one paragraph of *dicta* from *Nixon v. Warner Communications*, 435
17 U.S. 589, 598 (1978). The key paragraph in *Nixon* reads: “It is uncontested, however, that the
18 right to inspect and copy judicial records is not absolute. Every court has supervisory power over
19 its own records and files, and access has been denied where court files might have become a
20 vehicle for improper purposes. For example, the common-law right of inspection has bowed
21 before the power of a court to insure that its records are not ‘used to gratify private spite or
22 promote public scandal’ through the publication of ‘the painful and sometimes disgusting details
23 of a divorce case.’ [Citations.] Similarly, courts have refused to permit their files to serve as
24 reservoirs of libelous statements for press consumption, [citations], or as sources of business
25 information that might harm a litigant’s competitive standing, *see, e. g., Schmedding v. May*, 85
26 Mich. 1, 5-6, 48 N. W. 201, 202 (1891); *Flexmir, Inc. v. Herman*, 40 A. 2d 799, 800 (N. J. Ch.
27 1945).”

28 The very next paragraph of *Nixon*, however, should give pause to any party that seeks to

1 invoke “trade secret” as a guarantee against public access: “It is difficult to distill from the
2 relatively few judicial decisions a comprehensive definition of what is referred to as the common-
3 law right of access or to identify all the factors to be weighed in determining whether access is
4 appropriate. The few cases that have recognized such a right do agree that the decision as to
5 access is one best left to the sound discretion of the trial court, *a discretion to be exercised in*
6 *light of the relevant facts and circumstances of the particular case.” Nixon*, 435 U.S. at 598-599.
7 (Emphasis added). To the extent that it matters what the Supreme Court was referring to as
8 examples of worrisome disclosure of “business information that might harm a litigant’s
9 competitive standing,” we note that *Schmedding v. May* dealt with “private dealings between
10 private parties” in lawsuits which “may never come to trial or hearing,” and *Flexmir, Inc. v.*
11 *Herman* dealt with theft of “processes, secret formulae, machinery.”

12 The Court in *Nixon* (a “concededly singular” case which eventually turned on the
13 Presidential Recordings Act, 435 U. S. at 603, 608) took pains to note that in the case “there is no
14 claim that the press was precluded from publishing or utilizing as it saw fit the testimony and
15 exhibits filed in evidence. There simply were no restrictions upon press access to, or publication
16 of, any information in the public domain. Indeed, the press – including reporters of the electronic
17 media – was permitted to listen to the tapes and report on what was heard. Reporters were also
18 furnished transcripts of the tapes, which they were free to comment upon and publish. The
19 contents of the tapes were given wide publicity by all elements of the media. There is no
20 question of a truncated flow of information to the public.” (*Id.* at 609.) Thus, nothing in the
21 *Nixon* case justifies any restriction on public access to the trial exhibits in this case (something
22 which the parties have advocated) or any of the court filings by the parties. If the parties are
23 looking for a Supreme Court case justifying their position, *Nixon* is *not* the one (and there are no
24 others).

25 The parties seem to think that their burden is simply to demonstrate that their sealing
26 requests are confined to specific information that qualifies as trade secrets under the broad
27 Restatement or California Uniform Trade Secrets Act definitions of trade secret. There is no 9th
28 Circuit or other federal appellate case that so holds.

1 *In re Electronic Arts*, an unpublished case not to be considered as precedent, lacks
2 persuasive value because it is materially distinguishable from the case here. The Court of
3 Appeals' decision was clearly confined to the facts before it. (No briefs are available on PACER;
4 the parties submitted rushed letter briefs in the middle of trial.) That decision arose from *Parrish*
5 *v. NFL*, a damages class action by NFL players against the NFL for breach of fiduciary duty in
6 NFL's representation of the players in video game licensing deals. The players claimed that NFL
7 did not do what it was supposed to do to help the players make money from these deals.
8 Plaintiffs sought damages and an accounting. *See Parrish v. National Football League Players*
9 *Ass'n*, Third Amended Complaint for Breach of Contract, Breach of Fiduciary Duty, An
10 Accounting, and Violation of California Business and Professions Code § 17200, Case No. 07-
11 cv-00943-WHA, Doc. 192 (Nov. 27, 2007). The players did not seek injunctive or other
12 equitable relief. Electronic Arts, a video game company, intervened to prevent the district court
13 from allowing the licensing agreement – or parts thereof – to be introduced at trial without
14 redaction or sealing. It was not a patent case and although the licensing agreement was relevant
15 to the plaintiffs' *prima facie* case, there was no apparent public interest at stake in the outcome.

16 **C. The Trial Must Be Open**

17 Reuters starts from the presumption that every exhibit entered into evidence at the trial
18 should be open to the public. There are exceptions to that: For source code and technical
19 schematics, Reuters recognizes that by themselves, outside of the context of expert testimony,
20 they are incomprehensible and therefore by themselves have little value to the public. *See*
21 *Richardson v. Mylan*, 2011 U.S. Dist. LEXIS 23969, *7 (S.D. Cal. Mar. 9, 2011).

22 For everything else, the party must show not only that an exceptionally sensitive piece of
23 information is at issue, but also that it is likely to suffer harm resulting from its disclosure. And
24 clearing those hurdles is not the end of it. The parties must also demonstrate that their interests in
25 maintaining the secrets outweigh the public interest in access. *Kamakana*, 447 F.3d at 1185.

26 Apple prominently cites *Richardson v. Mylan Inc.*, a wrongful death case against a couple
27 of pharmaceutical companies, because it involved redaction of a trial record. That case is not
28 very helpful, however, since the Defendant's motion to seal came *after* a presumably open trial

1 that resulted in a jury verdict in Defendant’s favor. Moreover, the proposed redactions were for
2 employee testimony about “[t]he method and manner by which the [Mylan patch] was invented,
3 is manufactured, and is maintained,” – that is, akin to source code in this case. *Richardson v.*
4 *Mylan Inc.*, 2011 U.S. Dist. LEXIS 23969 * 7 (S.D. Cal. Mar. 9, 2011).

5 **D. Motions in Limine and Daubert Motions Are Subject to the Default**
6 **“Compelling Reasons” Standard When Filed In Connection with Dispositive**
7 **Motions**

8 Exhibits submitted in support of motions in limine and Daubert motions, if those motions
9 are filed in connection with a dispositive motion, are subject to the regular standard of
10 “compelling reasons.” *In re Midland Nat’l Life Ins. Co. Annuity Sales Practices Litigation*, ___
11 F.3d ___, 2012 U.S. App. LEXIS 15334, 2012 WL 3024192 (9th Cir. July 25, 2012) (judicial
12 records attached to Daubert motion were filed “in connection” with pending summary judgment
13 motions); *accord Wong v. Thomson Reuters (Markets) LLC*, 2011 U.S. Dist. LEXIS 125666, *3
14 (N.D. Cal., Oct. 31, 2011, Alsup, J.) (“Motions *in limine* are also part of the trial and must
15 likewise be laid bare absent compelling reasons.”)

16 The parties’ attempt to argue that anything other than a “compelling reasons” standard
17 should apply to any of the material they are trying to seal fails. *Kamakana* (447 F.3d at 1180)
18 makes clear that both trials and trial evidence as well as materials filed in connection with
19 “dispositive motions” are subject to the “compelling reasons” standard. Motions *in limine*, too,
20 are subject to the “compelling reasons” standard because they relate to trials. As the California
21 Supreme Court held in *NBC Subsidiary v. Superior Court*, 20 Cal. 4th 1178, 1219 (1999), after an
22 exhaustive review of the U. S. Supreme Court access authorities, “the closed and sealed hearings
23 concerned, among other things, motions for and arguments of counsel regarding nonsuit and
24 mistrial, evidentiary hearings . . . at which the court heard the testimony of proffered witnesses,
25 and other proceedings addressing the admissibility of testimony and documentary evidence. We
26 are unaware of any authority holding or suggesting that such proceedings have not been
27 historically important, open, and public parts of civil trials.”
28

1 **E. The Parties’ Summary Judgment & Preliminary Injunction Motions Are**
2 **Indisputably Subject to the “Compelling Reasons” Standard**

3 As the Court recently stated in allowing the parties to file renewed motions to seal, “the
4 exceptionally strong public interest in the preliminary injunction proceedings in this case merits
5 imposition of the heightened “compelling reasons” standard that governs the sealing of
6 documents attached to dispositive motions or submitted in trial. *Apple, Inc. v. Samsung Elecs.*
7 *Co.*, 2012 U.S. Dist. LEXIS 99945 (N.D. Cal. July 18, 2012); *accord see Dish Network L.L.C. v.*
8 *Sonicview USA, Inc.*, 2009 U.S. Dist. LEXIS 63429, 2009 WL 2224596, *6 (S.D.Cal. July 23,
9 2009); *Selling Source, LLC v. Red River Ventures, LLC*, 2011 U.S. Dist. LEXIS 49664, 15-16
10 (D. Nev. Apr. 29, 2011).

11 **IV. THE PUBLIC INTEREST FAR OUTWEIGHS THE PARTIES’ PREFERENCE**
12 **FOR SECRECY.**

13 Apple, in its “Proposed Reply” brief submitted around the time of the July 27 hearing,
14 complains that “Reuters does not explain how the level of fine detail covered in Apple’s
15 proposed redactions and sealing requests is of any value to the general public in terms of
16 understanding the judicial process, the parties’ respective positions on the motions which they
17 were offered to support, or the Court’s orders.” (Doc. 1412-1, p. 3:28-4:3.)

18 Ironically, that sentence sums up just how wrongly the parties, particularly Apple, have
19 conceived of their burdens with respect to secrecy issues. The public is not required to justify the
20 public interest in every piece of information that the parties seek to conceal. Nor is that the task
21 of the Court. When the Court ordered the parties to lodge the unredacted documents, it did so in
22 order to assess whether the parties have met their burdens to overcome the presumption of
23 openness, not in order to perform a redaction-by-redaction assessment of the public interest. The
24 burden is on the proponents of sealing to justify why their corporate needs for secrecy trumps the
25 public’s right of access. *See Kamakana*, 447 F.3d at 1181 (“Under our precedent, the City was
26 required to present ‘articulable facts’ identifying the interests favoring continued secrecy, . . . and
27 to show that these specific interests overcame the presumption of access by outweighing the
28 ‘public interest in understanding the judicial process.’” (internal citations omitted)).

 That the entire burden to justify sealing is placed squarely on the proponent of sealing

1 reflects that no one can be expected to articulate and encapsulate the amorphous and diverse
2 public interest in any given case. Reuters does not accept a burden that is not legally on it –
3 particularly when the case involves:

- 4 • 1500+ docket filings in 15 months, not counting the tandem case 12-CV-00630
- 5 • Multiple patents and products, and numerous types of potential relief (extremely
6 broad preliminary and permanent injunctions, damages, reasonable royalties,
7 treble damages, disgorgement of profits, accounting, corrective advertising).
- 8 • A slew of motions to seal that describe the documents at issue in extremely vague
9 terms. Apple is the worse of the two. (E.g., Apple has referred to “third party
10 market research” in past iterations of its motion to seal, when in its most recent
11 filing it finally said it was talking about “a research report from IDC” and the
12 underlying data spreadsheet from IDC).
- 13 • A slew of motions to seal, on the eve of trial, that fail to supply sufficiently
14 specific declarations from the appropriate company personnel (again, Apple is the
15 main culprit).
- 16 • Deep-pocketed litigants who agree on secrecy and demand multiple bites at the
17 apple despite not having met their burdens the first or second time around.

18 The “public interest in understanding the judicial process” does not turn on “the level of
19 fine detail covered in Apple’s proposed redactions and sealing requests.” Simply put, there are
20 two aspects to the public interest that give it great weight. One, the public has the right to know
21 the evidence that is presented to judge and jury, in order to understand the judicial process. That
22 principle underlies the general policy toward openness in judicial proceedings.

23 Two, unique to this case– and perhaps to a few others like *Microsoft v. Motorola* in the
24 Western District of Washington and *Apple v. Motorola* in the Northern District of Illinois – the
25 especially strong public interest stems from the fact that here the titans of high-tech have brought
26 massive lawsuits that have the potential to have significant, broad impact on the lives of the
27 public. See generally, Declaration of Julie P. Samuels of Electronic Frontier Foundation ¶¶ 3-7;
28 Amy Stevens Decl. filed herewith [veteran of over 20 years in journalism explains public interest

1 in this case]. The number of media outlets covering the case and the need for an overflow room
2 are undisputed facts of which the Court may take judicial notice.

3 If any exhibits that are sufficiently relevant to be introduced into evidence at any
4 dispositive stage are sealed, then the public will not know the evidentiary bases for the jury's and
5 judge's decisionmaking. To deprive the public of that right would require a showing not only
6 that a company considers the material to be highly sensitive, but that harm to the company's
7 legitimate interests would follow and that such harm outweighs the public's interest. The parties
8 cannot make that showing.

9 That is even more true here, where Apple alleges not only infringement, but willful
10 infringement, and seeks extremely broad injunctive relief and various types of monetary relief.
11 As the Court has recognized, injunctive relief could significant affect the products available to
12 consumers, given that Apple and Samsung are the market leaders in smartphones and tablets.
13 Indeed, there has already been a directly traceable link between what is available on the market to
14 consumers and the parties' redacted evidence on preliminary injunction filings in this case and
15 the related case, 12-CV-000630. The Galaxy Nexus smartphone is still available in stores,
16 because the Federal Circuit has stayed the Court's injunction pending Samsung's appeal, but the
17 sale of Galaxy Tab 10.1 has been at least partially enjoined. These appellate rulings rely on the
18 fact-finding at the trial level. Why the Court issued preliminary injunctions on these products,
19 but not other at-issue products such as the Galaxy S 4G phone, will not be fully understood
20 without access to the evidence submitted to the Court.

21 The same questions that Judge Posner raised in *Apple v. Motorola* apply here.

22 Apple is not a "small company"; its market capitalization exceeds that of Google
23 and Microsoft combined. To suggest that it has suffered loss of market share,
24 brand recognition, or customer goodwill as a result of Motorola's alleged
25 infringement of the patent claims still [*65] in play in this case is wild conjecture.
And until about a week ago Apple had not suggested in this litigation that the
losses it allegedly suffered or will suffer from the alleged infringement "defy
attempts at valuation." . . .

26 . . . Because there are such substantial grounds for skepticism concerning the
27 harm that Apple is likely to incur from continued infringement, cf. *Lucent*
28 *Technologies, Inc. v. Gateway, Inc.*, supra, 580 F.3d at 1333, it would not be
proper even to consider ordering an injunction without evidence that would
enable me to compare the costs and benefits of an injunction with the costs and
benefits of the substitute equitable remedy of a compulsory license with a

1 reasonable royalty, that is, a running (ongoing) royalty.

2 *Apple, Inc. v. Motorola, Inc.*, 2012 U.S. Dist. LEXIS 89960, 64-66 (N.D. Ill. June 22, 2012).

3 Product financial data, market surveys, and licensing terms, which are necessary for
4 determinations about the remedies in this case, have enormous public relevance. How to
5 properly remedy infringement, in a high-tech world when one device can have hundreds of
6 patented features, is a legitimate question for anyone interested in high tech and intellectual
7 property rights – not just industry observers but individuals and companies who find themselves
8 on the receiving end of licensing demands or infringement complaints.. Samuels Decl. ¶ 5.
9 Financial data regarding the products relate directly to consumer interests in access to products.
10 Id. ¶ 6. Increased transparency in licensing data is crucial to increasing the education of
11 policymakers and the public about the scope and costs of modern software patent litigation, not
12 just to the parties, but to society as a whole. See id. ¶ 7; see also Declaration of Patent Professors
13 ¶¶ 2-6. These issues are important for Reuters’ readers, important for all the investors who have
14 a direct or indirect stake in these large public companies, important for people in the high tech
15 industries, and important for consumers. See Stevens Decl. ¶ 3-9, Samuels Decl. ¶¶ 4-7.

16 This case is different from all the cases on which the parties rely. Almost all of the cases
17 involved just the companies asserting trade secrets, or two corporate litigants in agreement on
18 secrecy, without the intervention of third parties requesting public access. Many of those cases
19 involved smaller companies, for whom it would be easier to accept at face value their claims that
20 competitive harms would result from disclosure of confidential information. None of those cases
21 involved the most valuable company in the world suing another humongous consumer electronics
22 company over millions of products and billions of dollars. See Amy Stevens Decl. filed
23 herewith.

24 While proponents of sealing here, and in all of the cited cases, professed fear of
25 competitive harms from disclosure, such concerns must also be viewed in a real-world context.
26 All trade secret cases and IP cases are about competition. This case is about Apple and Samsung
27 waging global competition through offensive and defensive uses of their patent arsenals in
28 courtroom battles around the world. See Colleen V. Chien, *From Arms Race to Marketplace:*

1 *The Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L. J.
2 297, 334 (reviewing the mixed success of defensive patenting as a deterrent to litigation and
3 noting that there is a significant volume of high-tech patent suits between large companies).
4 Although the pros and cons of our patent system are not directly on trial, that is another reason
5 this case matters. The public has a right to know the workings of public institutions, whether it
6 be the courts or the PTO. See Samuels Decl. ¶ 4 (noting that EFF works to protect the
7 important public interests in intellectual property litigation through “oversight of the litigation
8 process: monitoring how parties actually wield intellectual property law in court cases as a sword
9 to stave off competition.”). And because the parties have chosen to wage a very public battle to
10 the bitter end, they cannot insist on the boundaries that exist within their own corporate
11 campuses. When a party “voluntarily injects the data into the decision-making process of
12 government,” as Apple has done by bringing a multi-billion dollar claim in a federal court, there
13 is a strong public interest in keeping financial data “open to public scrutiny.” *San Gabriel*
14 *Tribune v. Superior Court* (1983) 143 Cal. App. 3d 762, 778 [rejecting trade secret assertions in
15 California Public Records Act case]. See also Samuels Decl. ¶¶ 6-7 (discussing the public
16 interest in the financial data that surfaces in patent litigation)

17 “This matter may be a private dispute, but it has wide-ranging public consequences.”
18 Samuels Decl. ¶ 7. The parties have acknowledged that much. “As this Court has
19 acknowledged, this is a case with genuine and substantial commercial and public interest and
20 with enormous potential commercial impact.” Declaration of John B. Quinn ¶ 9 (Doc. 1533).
21 See also Apple’s Response to Declaration of John B. Quinn (Doc. 1539, p. 7) (asserting that “As
22 the Supreme Court long ago recognized, ‘every case of public interest is almost, as a matter of
23 necessity, brought to the attention of all the intelligent people in the vicinity, and scarcely any
24 one can be found among those best fitted for jurors who has not read or heard of it,”) Although
25 the parties are quick to invoke the public interest when it suits their ends, we must not forget that
26 Apple’s and Samsung’s interests are not the only ones at stake.

1 **V. AS TO MOST CATEGORIES OF EVIDENCE AT ISSUE, THE PARTIES HAVE**
2 **NOT SHOWN ANY NEED FOR SECRECY THAT OVERRIDES THE PUBLIC**
3 **POLICIES FAVORING ACCESS¹**

4 **A. Capacity, costs, prices, product-specific revenues, unit sales, profits, profit**
5 **margins (Proponents: Apple and Samsung)**

6 Apple has not established that the product information that it is trying to seal is different
7 from what it has publicly disclosed in earnings reports, or that the difference is significant enough
8 to overcome the presumptive public interest in seeing any product information that is relevant to
9 Apple's case (see Valerian Decl., Ex. C, 3rd Quarter 2012 results from Apple's website). Nor
10 has either party explained the difference between some of the financial information they wish to
11 seal in their trial exhibits, from that which they are willing to disclose. What is "product-specific
12 unit sales and revenue," which Apple proposes to seal (in Motion to Seal Trial Exhibits, Doc.
13 1495, 7:9-1) and "unit sales," as opposed to "number of units sold by product line, price data,
14 sources of revenue (search engines, accessories, specific products)", which the parties claim they
15 are now willing to disclose (see Joint Motion, Doc. 1414, p. 10:6-10:11)?

16 Apple's declarations also completely ignore the fact that within the last week the profit
17 margins on its iPhone and iPad for quarters up to March 2012 were publicly disclosed. (See
18 Declaration of Xinying Valerian filed herewith paragraph 4 and Exhibit 2;
19 [http://www.appleinsider.com/articles/12/07/27/apples_iphone_twice_as_profitable_per_unit_than](http://www.appleinsider.com/articles/12/07/27/apples_iphone_twice_as_profitable_per_unit_than_ipad.html)
20 [_ipad.html](http://www.appleinsider.com/articles/12/07/27/apples_iphone_twice_as_profitable_per_unit_than_ipad.html).) Needless to say, "Public disclosure, that is the absence of secrecy, is fatal to the
21 existence of a trade secret." *Providian*, 96 Cal. App. 4th at 304. With the profit margins on the
22 iPhone and iPad now very much public, it is a simple matter to reverse engineer the other
23 financial information Apple seeks to seal, all of which are the components of a profit margin.
24 Apple's own declarant, Mr. Bean, states on July 30 (apparently in ignorance of the disclosure that
25 transpired a few days before): "Margins alone would allow competitors to approximate Apple's
26 cost, as they could simply research Apple's prices or publicly available total revenue information,
27 and calculate Apple's cost using that information in combination with the highly confidential

28 ¹ Apple's and Samsung's Motions to Seal Trial Exhibits (Docs. 1414, 1488, 1495) and
second batch of Renewed Motions to Seal Documents from Prior Motions (Docs. 1490, 1499)

1 margin information.” In short, the assertions made by Apple’s declarant about its so-called
2 secrets have no basis in reality.

3 Apple attempts to show that disclosure of just one category of data to competitors could
4 be harmful. But even before last week’s disclosure of the profit margin, much of Apple’s
5 financial information was widely available on the Internet. The parade of horrors erected by
6 Apple is only theoretical, because the reality is that not only competitors but an entire industry
7 devoted to such analytics already approximate Apple’s cost and already keep tabs on Apple’s
8 prices and revenues. See, e.g., Reuters’ Opp., July 25, 2012, Olson Decl. ¶ 3, Ex. B (Dkt. 1331)
9 (iSuppli bill-of-materials teardowns on latest iPhone); Valerian Decl. ¶¶ 3-5, Exs. B and D (same
10 for latest iPad).

11 Despite the fact that close estimates of Apple’s financials have been available all along,
12 and despite Apple’s disclosure of various actual financials, Apple continues to insist that the
13 hypothetical, feared disclosure “could” lead to calculations of its costs and so on. Bean Decl. ¶ 8.
14 However, due to the information already available, and Apple’s guidance on its earnings calls,
15 analysts downgraded Apple stock based on concerns about narrowing margins. As a result of the
16 information already available, the release of actual margins information from past quarters did
17 not seem to negatively impact the stock price. Apple has not presented any real evidence that the
18 one-off disclosure of past data due to litigation would result in “an economic boon to Apple’s
19 competitors.” Bean ¶ 8.

20 Apple’s insistence that such things as “capacity” are trade secrets ignores the fact that its
21 capacity in the past at various times does not necessarily reveal its capacity in the future. The
22 California Court of Appeal’s decision in *Uribe v. Howie*, 19 Cal. App. 3d 194 (1971) is
23 instructive. There, the court rejected an argument that pesticide spray reports were trade secrets,
24 observing, “The reports at issue here reveal only a past decision, based on transitory conditions,
25 as to the mixture and quantity of pesticide to be used. It appears from the evidence that various
26 compounds in various intensities could be used to combat a given pest, depending upon the
27 weather conditions, present and future, the condition of the crop to be sprayed and the soil upon
28 which it is growing, and intensity of the insect population. Since the nature of the compound and

1 the intensity of its application are being varied on the basis of these other factors, the mixture and
2 dosage elements cannot be said to have the continuity of use envisioned by the Restatement
3 definition.” (*Id.* at 209.) The court went on to require disclosure of the reports at issue (*id.* at
4 211) and to find, in a Public Records Act case involving a balancing of interests similar to that at
5 issue here, that “disclosure best serves the public interest.” (*Id.* at 213.) The same conclusion
6 follows here given the fast-changing nature of the industry and the transitory nature of the
7 records at issue.

8 The “substantial and unfair advantage” only exists in a hypothetical world in which there
9 is not already a lot of information that is already factored into competitive decisionmaking.
10 Some of that information comes from third party analysts, but some come from Apple’s own
11 guidance. As noted in Reuters’s July 25 opposition, for example, Apple disclosed in its earnings
12 call on July 24 that sales of the iPhone have slowed because many customers are apparently
13 waiting for the next version to be rolled out. Unless Apple’s guidance has been completely
14 wrong (or the analytics industry disappeared leaving a large black hole, or Apple converted to a
15 privately held company, or any other purely hypothetical scenarios transpire) it is difficult to see
16 how the addition of past financial data would “wreak havoc” for Apple, as its counsel claimed at
17 the last hearing. “Hypothesis or conjecture” is not enough. *Hagestad v. Tragesser*, 49 F.3d
18 1430, 1434 (9th Cir. 1995). Nor is hyperbole.

19 Apple also fails to explain why past data is still relevant if Apple is rolling out new
20 products periodically, continues to change designs or features, and remains in control of product
21 roll-out. If Apple determined that past design prototypes for its products could be disclosed on
22 July 26 in its filings (notwithstanding the inevitable rumors that some designs might presage
23 future products in the pipeline), why not other company information from the past? See Valerian
24 Decl. ¶ 6, Ex. E (article regarding July 26 disclosure of dozens of Apple’s past prototype
25 designs).

26 In support of their cursory arguments regarding the public’s supposed lack of interest,
27 Apple and Samsung do not cite any case that squarely found that the public’s interest in the
28 litigants’ financial information was outweighed by the litigants’ interest in keeping such

1 information under wrap.

2 Rather, the parties quote misleadingly from *Network Appliance*, Magistrate Judge
3 Laporte’s decision, to give the impression that courts have previously ruled that the public has
4 little interest in costs, product line information, and profit margins. See Joint Motion, Doc. 1414,
5 p. 6:18-27; Samsung’s Motion, Doc. 1490, 4:25-5:1; Apple’s Motion, Doc. 1499, p. 5:1-5:9. The
6 full quotation from Magistrate Judge Laporte’s *Network Appliance, Inc.* decision is: “The
7 portions of the document that NetApp requests the Court to seal contain *highly technical portions*
8 *of Mr. Brandt's report* that would do little to aid the public's understanding of the judicial
9 process, but have the potential to cause significant harm to NetApp’s competitive and financial
10 position within its industry” (emphasis added) (referring to “detailed information about
11 proprietary procedures, the SnapMirror replication mechanism and Data ONTAP source code.”).
12 The other case that both parties cite, *Richardson v. Mylan*, dealt exclusively with technical
13 information as well.

14 Samsung counsel Victoria Maroulis’ statement at the July 27, 2012 hearing that “the
15 public doesn’t understand the financial information anyway” is not only wrong, but misses the
16 point. The consuming and investing public is able to understand the manufacturer costs for a
17 product and the profit margin on a product. But the test is not whether an ordinary member of the
18 public grasps a particular data point, because we know most of the public is not going to directly
19 access any of this information. The question is whether there is a public interest on the whole to
20 all information relevant enough to be in an exhibit, based on the claims and the types of relief at
21 issue in the case. This case is about Samsung allegedly copying the very specific products of
22 Apple and thereby stealing market share and profits away from Apple. Product-level financial
23 information is essential to understanding any decision regarding the willfulness of infringement
24 and what remedies are appropriate.

25 **B. Source Code And Technical Information (Proponents: Apple And Samsung)**

26 Reuters does not oppose the sealing of actual source code, technical schematics and
27 similar technical information (but it would oppose the sealing of testimony referencing such
28 content without reproducing the content).

1 **C. Information Relating To Licensing Agreements (Proponents: Apple And 3rd**
2 **Parties, Dolby, Ericsson, IBM, Intel, Interdigital, Microsoft, Motorola**
3 **Mobility, Nokia, Philips, Qualcomm, Research In Motion, Siemens, Toshiba)**

4 Reuters believes that if Apple and Samsung find it necessary to submit specific licenses or
5 license terms to the consideration of the judge or jury for factfinding, that such information
6 should remain unsealed. If there is a public interest in understanding how our patent system
7 works, then certainly patent licensing is an essential and large part of how the system works. It is
8 important to understanding injunctive relief and claims of irreparable harm – royalties are
9 indirect evidence of compensation offsetting harm. They are also potentially important to
10 understanding damages, as royalties are one measure of damages.²

11 Reuters recognizes that third parties have interests that must be weighed. It appears that
12 every major, and some minor, players in patent licensing has appeared in this action to assert its
13 interest in secrecy. On the one hand, in the aggregate the uniform preference of the third parties
14 in keeping licensing terms under wraps could outweigh the public interest in disclosure. On the
15 other hand, across-the-board disclosure (as opposed to piecemeal disclosure) would increase
16 everyone’s access to information and minimize the competitive disadvantage caused by
17 piecemeal “leaks.” Therefore, if licensing terms are presented to the jury and judge and the fact-
18 finding takes licensing terms into account, then the Court should find that the public interest
19 overall favors across-the-board disclosure.

20 In addition to Apple, third parties representing much of the world of technology patent
21 licensing have moved the court to seal licensing terms, ranging from entire license agreements in
22 some cases to specific terms such as pricing, duration, and scope of patent in other cases. They
23 intervened after Samsung sent each of them a letter outlining the Ninth Circuit’s “compelling
24 reasons” standard, indicating that Samsung “has not identified any compelling reasons, under that
25 standard, to warrant a request for sealing of these documents” and inviting them to try to make
26 their own showings. *See, e.g.*, Emergency Motion by Nonparty Motorola Mobility LLC to Seal

27 ² A reasonable royalty is a form of damages when awarded in the damages phase of an
28 infringement litigation, though it usually is a form of equitable relief, when it is imposed, in lieu
of an injunction, to prevent future harm to the patentee. *Apple, Inc. v. Motorola, Inc.*, 2012 U.S.
Dist. LEXIS 89960, *32-33 (N.D. Ill. June 22, 2012).

1 Exhibits, Close Courtroom, and Seal Portions of Transcript (Dkt. 1400, 7/26/2012) and
2 Declaration of Thomas V. Miller, Ex. A (Dkt. 1400-1).

3 Thirteen parties, by our count, have intervened in favor of secrecy in licensing terms.
4 After the Court's July 27, 2012 hearing, some but not all of them submitted supplemental
5 declarations and/or briefs.

6 With respect to IBM and Qualcomm, their motions to seal are moot, because the licensing
7 terms involving them were disclosed in each of their initial filings. On July 30, 2012, IBM
8 sought unsuccessfully to obtain a prior restraint order from Magistrate Judge Grewal enjoining
9 Reuter's publication of its licensing terms.

10 Although the specificity of the third parties' supporting declarations vary, their unified
11 position is that they all fear competitive harm in the event of disclosure. They contend that
12 competitors would obtain negotiating advantages from what they consider to be information
13 asymmetry, or one negotiating party having information about the other side's licensing history
14 that it would not ordinarily have.

15 But none of the parties has addressed head-on the "elephant in the room" questions: (a) If
16 information asymmetry in patent negotiations is the concern, don't some of them already stand to
17 gain at the expense of others from the IBM and Qualcomm disclosures that have already been
18 made, and (b) if some of the key terms they seek to conceal from the public, but are relevant to
19 this case, are disclosed in an exacting and even-handed manner, what information asymmetry
20 would there still be, and what real competitive harm would follow?

21 Reuters urges the court to consider the strong public interest in transparency in licensing
22 terms, as attested to in the joint declaration of Professors Colleen Chien, Brian Love, Michael
23 Risch, John Allison, and David Schwartz filed herewith. See Declaration of Patent Professors In
24 Support of Reuters' Opposition to Motions to Seal Trial and Pretrial Evidence. As explained in
25 more detail in their declaration, "the lack of a transparency about patent licenses is a well-
26 recognized problem." *Id.* ¶ 4. "The lack of information about the value of arms-length patent
27 transactions creates arbitrage opportunities for those who have access to proprietary data, while
28 shutting out the public, scholars, and others." *Id.* ¶ 5. Among other market inefficiencies, the

1 lack of licensing data prevents accurate determinations of patent damages. *Id.*

2 As the professors' declaration makes clear, "making licensing data more widely available
3 can help reduce these market inefficiencies by providing credible, comparable, information to
4 parties, scholars, and courts wrestling with the difficult question of what a patent is worth." *Id.* ¶

5 6. The valuation information in the licensing agreements is not only at the heart of damages
6 calculations in this case, but is also desperately needed to enhance our understanding of how the
7 patent system is actually operating and how to improve it.

8 Reuters proposes that if Apple and Samsung find it necessary to enter specific license
9 terms into evidence for fact-finding, that the information that is actually relevant to the fact-
10 finding remain unsealed. Thus, it would seem that pricing terms, as well as some very high-level
11 description of the patents or products to which the prices correspond, must remain unsealed.

12 **D. Proprietary Market Research (Proponent: Apple)**

13 Surprisingly, Apple has *enlarged* the scope of the proposed sealing for the "market
14 research category" to include not just material generated by third parties, but its own market
15 research. Previously, Apple requested sealing of "third-party confidential research from Apple's
16 business partners that would severely impact the market for the third-party's research reports."
17 (Renewed Motion to Seal, Dkt. 1317, p. 2.) Apple had failed to describe what the research
18 reports were – apparently attempting to protect the identities of the third parties – instead vaguely
19 referring to third-party market research companies," and relying solely on a vague declaration,
20 not from the third parties, but from an attorney at Morrison & Foerster (Sabri Declaration, Dkt.
21 1317-3). Now, Apple has finally admitted that the third party market research refers to a report
22 and a data spreadsheet generated by IDC, a well-known telecommunications/Internet research
23 firm whose reports are widely used by industry analysts. And now, Apple seeks to seal not only
24 the IDC materials (in two exhibits, DX 536 and DX 537) in their entirety, but also seeks to seal
25 fourteen exhibits consisting of Apple's *own buyer surveys*.

26 **1. Buyer surveys conducted by Apple should not be sealed because they 27 do not qualify as trade secrets.**

28 Apple claims that the buyer surveys are on the whole not relevant to the merits and that

1 Samsung has been overinclusive in its selection of trial exhibits. Yet Apple admits that the buyer
2 surveys it has conducted provide insight into its customers' purchasing decisions and preferences.
3 (Motion to Seal Confidential Trial Exhibits, Dkt. 1495, p. 10; Joswiak Decl. ¶¶ 3-.) Such
4 information is essential for determining whether Apple suffers any irreparable harm absent an
5 injunction. See Order Denying Motion for Preliminary Injunction, Dec. 2, 2011, Doc. 452 (a
6 section with many redactions in which the Court discusses what drives purchasing decisions).
7 Apple cannot seal information that would go to the heart of its request for an injunction,
8 especially when the information is generated by Apple itself and does not affect a third-party
9 researcher.

10 Even more astounding is that Apple seeks to seal buyer surveys that are Samsung's trial
11 exhibits, when Apple has disclosed at least a similar study – an “iPhone Owner Study” labeled
12 “Apple Market Research & Analysis, May 2011” – in its unredacted filings on July 26. See
13 Valerian Decl. ¶ 7, Ex. F (Wall Street Journal, “Turns Out Apple Conducts Market Research
14 After All,” July 26, 2012). That study discusses the surveyed preferences of Apple iPhone
15 customers in multiple countries, including China, Japan, the U.K., France, Germany and South
16 Korea. Despite that, Apple's Mr. Joswiak flatly declares that competitors do not have access to
17 any surveys of Apple customers, that competitors can only speculate about customer preferences,
18 and “they do not know how the preferences of customers in, for example, Japan differ from those
19 in Australia, Korea, France or the United States.” Joswiak Decl. ¶ 5 (Dkt. 1503). Not only does
20 Apple ignore the disclosures that have been made already, it fails to consider the likelihood that
21 competitors and other research firms may in fact conduct their own surveys and obtain the same
22 data about Apple customers. Again, Apple's position here is contrary to reality. *See Apple, Inc.*
23 *v. Psystar Corp.*, 2012 U.S. Dist. LEXIS 148, *4 (Jan. 3, 2012, Alsup, J.) (denying motion to seal
24 technical information that was already in fact out in the public due to accurate “reverse
25 engineering,” and rejecting Apple's argument that “trade secret protection will still exist if Apple
26 is not the source of that publicly available information, and has not endorsed or confirmed any of
27 that information.”).

28 **2. IDC Market Research Report And Underlying Spreadsheet (DX 526
and DX 537)**

1 Apple has not made any credible showing of the need for secrecy as to the IDC market
2 research contained in Samsung's trial exhibits. It continues to rely on past declarations by an
3 outside counsel declarant who states that he "understand[s] that Apple is contractually obligated
4 to defend the interests of third parties who sell Apple their proprietary consumer and market
5 studies. . ." (Sabri Decl. ¶ 3, Dkt. 1408-2). It is well-established that the existence of a
6 confidentiality agreement between two parties is not a "compelling reason" to seal a document.
7 *See, e.g., Nav N Go KFT v. Mio Technology USA, Ltd*, 2008 U.S. Dist. LEXIS 96178, *3 (D.
8 Nev. Nov. 14, 2008) (the "existence of a contractual confidentiality provision, standing alone,
9 cannot constitute a 'compelling reason'" to seal a licensing agreement). Moreover, Apple fails to
10 describe the report with any specificity.³ Presumably, at issue is a past report on smartphone
11 and/or tablet market. If so, Apple fails to address just how release of *past market research by*
12 *IDC* would hurt IDC's business, when IDC publishes new and updated market research on a
13 monthly and quarterly basis. See Valerian Decl. ¶ 8, Ex. G (IDC Press Release, "Strong Demand
14 for Smartphones in Second Quarter Continues to Drive the Worldwide Mobile Phone Market,
15 According to IDC," July 26, 2012). It might even help IDC to give away a past report as a
16 sampler in order to entice future purchases.

17 **E. Business Plans (Proponent: Samsung)**

18 Samsung states that it wishes to seal those pages of trial exhibits relating to its future
19 business plans that are not shown to the jury and not entered into evidence (Dkt. 1488, p. 7).
20 Reuters' position is that any exhibit that is entered into evidence at trial must be public,
21 regardless if only a small portion was "shown" to the jury in open court. Reuters does not oppose
22 Samsung's request to the extent it is limited to pages not entered into evidence.

23
24
25
26 _____
27 ³ Reuters does not have any sufficiently helpful description of the IDC report or
28 spreadsheet to directly rebut Apple's assertion that they are "largely irrelevant to the issues to be
decided in this litigation." (Reuters does not have Samsung's Exhibit List.) However, if Apple
has not managed to exclude this evidence in motions *in limine*, this evidence is presumably
relevant.

1 **VI. EXHIBITS FROM PRIOR MOTIONS: MOTIONS IN LIMINE, DAUBERT**
2 **MOTIONS, SUMMARY JUDGMENT AND PRELIMINARY INJUNCTION**
3 **MOTIONS ARE ALL SUBJECT TO THE COMPELLING REASONS**
4 **STANDARD AND THE PARTIES HAVE NOT SHOWN COMPELLING**
5 **REASONS TO SEAL.**

6 The parties' attempt to argue that anything other than a "compelling reasons" standard
7 should apply to any of the material they are trying to seal fails. *Kamakana* makes clear that both
8 trials and trial evidence as well as materials filed in connection with "dispositive motions" are
9 subject to the "compelling reasons" standard. (447 F.3d at 1179-1180.) Motions *in limine*, too,
10 are subject to the "compelling reasons" standard because they relate to trials. As the California
11 Supreme Court held in *NBC Subsidiary v. Superior Court*, 20 Cal. 4th 1178, 1219 (1999), after an
12 exhaustive review of the U. S. Supreme Court access authorities, "the closed and sealed hearings
13 concerned, among other things, motions for and arguments of counsel regarding nonsuit and
14 mistrial, evidentiary hearings . . . at which the court heard the testimony of proffered witnesses,
15 and other proceedings addressing the admissibility of testimony and documentary evidence. We
16 are unaware of any authority holding or suggesting that such proceedings have not been
17 historically important, open, and public parts of civil trials."

18 For reasons set forth above, the parties have not shown compelling reasons to seal any of
19 the material filed in connection with motions *in limine*, *Daubert* motions, summary judgment or
20 preliminary injunction papers.

21 **VII. CONCLUSION**

22 The parties are well-aware of the applicable standard and their heavy burden. Although
23 they have increased the specificity of some of their declarations in their second and third tries,
24 they have not demonstrated a real and significant risk of concrete harm from disclosure of market
25 research and financial information that would outweigh the public interest in access. Apple and
26 Samsung have had more than adequate opportunity to make their record on secrecy issues. Their
27 motions should be denied and the Court should not give them yet another bite at the apple. The

28 ///

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