

1 HAROLD J. MCELHINNY (CA SBN 66781)
 hmcclhinny@mofo.com
 2 MICHAEL A. JACOBS (CA SBN 111664)
 mjacobs@mofo.com
 3 RACHEL KREVANS (CA SBN 116421)
 rkrevans@mofo.com
 4 JENNIFER LEE TAYLOR (CA SBN 161368)
 jtaylor@mofo.com
 5 ALISON M. TUCHER (CA SBN 171363)
 atucher@mofo.com
 6 RICHARD S.J. HUNG (CA SBN 197425)
 rhung@mofo.com
 7 JASON R. BARTLETT (CA SBN 214530)
 jasonbartlett@mofo.com
 8 MORRISON & FOERSTER LLP
 425 Market Street
 San Francisco, California 94105-2482
 9 Telephone: (415) 268-7000
 Facsimile: (415) 268-7522

WILLIAM F. LEE
 william.lee@wilmerhale.com
 WILMER CUTLER PICKERING
 HALE AND DORR LLP
 60 State Street
 Boston, MA 02109
 Telephone: (617) 526-6000
 Facsimile: (617) 526-5000

MARK D. SELWYN (SBN 244180)
 mark.selwyn@wilmerhale.com
 WILMER CUTLER PICKERING
 HALE AND DORR LLP
 950 Page Mill Road
 Palo Alto, California 94304
 Telephone: (650) 858-6000
 Facsimile: (650) 858-6100

11 Attorneys for Plaintiff and
 12 Counterclaim-Defendant APPLE INC.

13 UNITED STATES DISTRICT COURT
 14 NORTHERN DISTRICT OF CALIFORNIA
 15 SAN JOSE DIVISION

16 APPLE INC., a California corporation,

17 Plaintiff,

18 v.

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

23 Defendants.

Case No. 11-cv-01846-LHK

**APPLE'S MOTION TO SEAL
 REGARDING APPLE'S MOTION
 FOR DAMAGES ENHANCEMENTS
 AND PERMANENT INJUNCTION**

1 In accordance with Civil Local Rules 7-11 and 79-5, and General Order No. 62, Apple
2 submits this motion for an order to seal the following documents or portions thereof:

3 1. The confidential, unredacted version of Apple's Motion for Damages
4 Enhancements and Permanent Injunction ("Apple's Motion");

5 2. The confidential, unredacted version of the Declaration of Terry Musika in
6 Support of Apple's Motion ("Musika Decl.");

7 3. Exhibits 2, 6-9, 12-14, 21, 24-26, 37, 48-49, 52, and 62-63 to the Musika Decl.;

8 4. The confidential, unredacted version of the Declaration of Marylee Robinson in
9 Support of Apple's Motion ("Robinson Decl.");

10 5. Exhibits 8 and 30 to the Robinson Decl.

11 As discussed further below, some of the Apple confidential financial information included
12 in the request stated above is identical to information that is presently the subject of Apple's
13 appeal to the Federal Circuit. For the reasons stated below, Apple requests that the Court order
14 the information filed under seal or, if the Court denies Apple's motion to seal, Apple respectfully
15 requests that the Court stay the disclosure of any information until a ruling by the Federal Circuit
16 on the related appeal.

17 **Confidential Samsung Information**

18 Apple's Motion, the Musika Decl., Exhibits 6-9, 12-14, 21, 24-26, 37, 48-49, 52 and 62-
19 63 to the Musika Decl., the Robinson Decl., and Exhibit 30 to the Robinson Decl. contain
20 materials and refer to information that Samsung has designated as confidential under the
21 protective order entered in this case. Apple expects that pursuant to Civil Local Rule 79-5(d),
22 Samsung will file a declaration supporting the filing of these materials under seal.

23 **Confidential IDC Information**

24 Portions of pages 8-9 of the Musika Decl. and Exhibit 2 to the Musika Decl. contain
25 market share data from third-party IDC. Apple previously moved to seal IDC information in the
26 form of a full report and underlying spreadsheet, (Dkt. No. 1495 at 12-13), which the Court
27 granted. (Dkt. No. 1649 at 10). This data includes industry-wide feature phone and smartphone
28 totals for every year from 2004 through 2011, as well as IDC's projections for 2012, 2013, 2014,

1 and 2015, including IDC's projections of the number of new smartphones entering the market for
2 each of those projected years. The data is condensed into a short table, but discloses extensive
3 and important elements of the data from the underlying IDC report. Disclosure of this level of
4 detailed data would eviscerate the demand for sale of the IDC's report from which the data is
5 gleaned, as discussed in Apple's prior motion and supporting declaration, and thus would
6 significantly harm IDC's business. Consistent with the Court's prior order, and for the same
7 reasons discussed in Apple's prior motions to seal, Apple respectfully requests that the Court
8 permit this material to remain under seal.

9 **Confidential Apple Financial Information**

10 Apple's Motion, the Robinson Decl., and Exhibit 8 to the Robinson Decl. contain product-
11 specific profit information regarding the iPhone. The underlying information contained in these
12 documents is identical to information that Apple previously moved to seal (Dkt. No. 1499). Apple
13 provided a detailed supporting declaration from its Vice President of Worldwide Financial
14 Planning and Analysis, Jim Bean, at that time, providing an extensive factual background why
15 this information reflects trade secrets, is competitively sensitive and needs to remain under
16 seal.(Dkt. No. 1502).

17 The Court previously denied Apple's motion to seal the financial information addressed in
18 this section. The order denying sealing is on appeal to the Federal Circuit, was stayed by this
19 Court, and has also been stayed by the Federal Circuit pending final resolution of the appeal.
20 (Fed. Cir. Case No. 12-1600, Dkt. No. 39-1.) For the reasons stated below, Apple believes
21 sealing is appropriate. To the extent that this Court disagrees, Apple respectfully requests that the
22 Court stay its ruling pending the resolution of Apple's appeal regarding the same information.
23 Repetition of the stay procedure here or at the Federal Circuit would needlessly duplicate filings
24 and proceedings.

25 The proper standard to apply with respect to this non-dispositive motion is a showing of
26 "good cause." *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003);
27 *Philips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002).
28 Nonetheless, the need to protect trade secrets contained in Apple's filings qualifies as a

1 “compelling reason” to seal material, which is sufficient to outweigh the public’s interest in
2 disclosure. *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). In
3 particular, the Ninth Circuit has explained that “[t]he publication of materials that could result in
4 infringement upon trade secrets has long been considered a factor that would overcome this
5 strong presumption [for public access].” *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1162 (9th
6 Cir. 2011) (citing *EEOC v. Erection Co.*, 900 F.2d 168, 170 (9th Cir. 1990)). Courts have
7 similarly found that public access to court documents—and even trials—should be denied if there
8 is a substantial risk that valuable trade secrets will be disclosed. *See, e.g., Jazz Photo Corp. v.*
9 *United States*, 439 F.3d 1344, 1357-1358 (Fed. Cir. 2006) (upholding district court’s decision to
10 deny public access to a trial and the corresponding record to avoid disclosure of confidential
11 “documents and information relating to [litigant’s] customers, suppliers, manufacturing
12 processes, financial condition, and the quantity and value of its imports”). Congress also has
13 endorsed such limitations. *See, e.g.*, 11 U.S.C. § 107; 5 U.S.C. § 552(b)(4).

14 The type of information that Apple seeks to seal—confidential financial information—
15 qualifies as trade secret. Trade secrets, as defined in the Restatement of Torts, include
16 information used in a business that gives an advantage over competitors who do not know or use
17 it. *Restatement (First) of Torts* § 757, cmt. B. Detailed profits information, as discussed in more
18 detail below, are precisely this type of information. *See, e.g., SI Handling Sys., Inc. v. Heisley*,
19 753 F.2d 1244, 1260 (3d Cir. 1985) (concluding that data relating to profit margin constituted
20 trade secrets); *Den-Tal-Ez, Inc. v. Siemens Capital Corp.*, 566 A.2d 1214, 1230 (Pa. Super. Ct.
21 1989) (finding profit margin data protectable as trade secret). For this reason, courts consistently
22 recognize that detailed financial information constitutes a trade secret and a compelling need
23 exists for maintaining its confidentiality. *AMC Tech., LLC v. Cisco Sys.*, 2012 U.S. Dist. LEXIS
24 9934 (N.D. Cal. Jan. 27, 2012) (finding compelling reasons to seal information that would have
25 allowed public to determine profit margins); *TriQuint Semiconductor v. Avago Techs. Ltd.*, 2011
26 U.S. Dist. LEXIS 143942, at *10, 11, 21 (D. Ariz. Dec. 12, 2011) (sealing confidential financial
27 information including market analysis information, cost information, capacity information and
28 profit margins for specific products). The irreparable harm that would result from disclosure of

1 trade secrets is undeniable. *See Am. Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 741 (Fed. Cir.
2 1987) (recognizing harms of disclosure of confidential business information to competitors and
3 collecting cases). Indeed, “[a] trade secret once lost is, of course, lost forever.” *North Atl.*
4 *Instruments, Inc. v. Haber*, 188 F.3d 38, 49 (2d Cir. 1999) (quotation omitted). And vigorous
5 protection of such information is essential to maintaining a competitive business environment.
6 *Rockwell Graphic Sys., Inc. v. DEV Indus. Inc.*, 925 F.2d 174, 180 (7th Cir. 1991).

7 Apple takes extensive steps to protect the secrecy of its critical financial information.
8 Even within Apple, very few people have access to this information. Access is on a “need to
9 know” basis and must be approved in advance by one of Apple’s Vice Presidents of Finance.
10 (Dkt. No. 1502 ¶ 3.) The list of approved individuals is reviewed quarterly and revised to ensure
11 that employees who no longer require access do not receive that information. (*Id.*) On the very
12 rare occasions Apple must disclose its nonpublic financial information to those outside Apple, it
13 marks such information “confidential” and distributes it only subject to highly restrictive
14 nondisclosure agreements or protective orders. (*Id.*)

15 Apple goes to such lengths because the financial information that Apple seeks to keep
16 confidential is competitively sensitive and derives enormous value from the fact that it is not
17 shared with the general public or others who could derive economic benefit from this data –
18 Apple’s competitors and suppliers. (Dkt. No. 1502 at ¶¶ 4-8.) Apple’s competitors could use
19 profits and margins data to undercut Apple’s prices by determining the products for which Apple
20 has substantial profits, low costs, and wide margins and thus would be most susceptible to a price
21 cut. (*Id.* at ¶ 7.) Competitors’ products—particularly if released with pricing designed to take
22 advantage of unfair knowledge of Apple’s bottom line—will substantially affect demand for
23 Apple’s products. Competitors could use the information to develop a slightly less advanced
24 smartphone or tablet and sell that product successfully at a price strategically below Apple’s
25 margins. The facts of this case substantiate this risk, as Samsung may be in a position to undercut
26 Apple’s prices for smartphones and tablets, having already economized on design costs by free-
27 riding off Apple’s innovation. Moreover, Apple’s suppliers could use quarterly profits, costs, and
28

1 margins data to determine when Apple has the lowest margins and is thus more vulnerable to a
2 cost increase. (*Id.* at ¶ 8.)

3 Apple’s confidential financial data constitute invaluable trade secrets, and a compelling
4 need exists for maintaining their confidentiality. *See, e.g., Jazz Photo*, 439 F.3d at 1357-1358
5 (affirming order denying competitor access to a trial to avoid disclosure of confidential
6 “documents and information relating to [litigant’s] customers, suppliers, manufacturing
7 processes, financial condition, and the quantity and value of its imports”); *TriQuint*
8 *Semiconductor*, 2011 WL 6182346, at *2-4, 6-7 (sealing confidential financial information
9 including market analysis information, cost information, capacity information, and profit margins
10 for specific products). In light of the great volume of information already disclosed, there is no
11 public need for disclosure of Apple’s narrowly identified trade secret information. Any further
12 disclosure would provide “comparatively little value to the public in terms of enhancing its
13 ‘understanding [of] the judicial process.’” *Richardson v. Mylan Inc.*, 2011 WL 837148, at *2
14 (S.D. Cal. Mar. 9, 2011) (noting that sealed portions of record “do not include any information
15 vital to understanding the nature of the underlying proceedings”); *see also MMI, Inc. v. Baja, Inc.*,
16 743 F. Supp. 2d 1101, 1106 (D. Ariz. 2010) (moving party demonstrated good cause to seal
17 licensing agreement in patent infringement case in part since “public has a diminished need for
18 th[e] document because it is ‘only tangentially related to the underlying cause of action’” (*quoting*
19 *Kamakana*, 447 F.3d at 1179)).

20 Apple therefore respectfully requests that it be permitted to file the financial information
21 at issue under seal.

22 The relief requested in this motion is narrowly tailored to protect only information that is
23 exceptionally sensitive and meets the “compelling reasons” standard.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Dated: September 21, 2012

MORRISON & FOERSTER LLP

By: /s/ Michael A. Jacobs
MICHAEL A. JACOBS

Attorneys for Plaintiff
APPLE INC.