

2012-1600, -1606, 2013-1146

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

APPLE INC.,

Plaintiff-Appellant,

v.

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

Defendants-Cross Appellants.

Appeals from the United States District Court for the
Northern District of California in case no. 11-CV-1846, Judge Lucy H. Koh.

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel of record for Plaintiff-Appellant Apple Inc. certifies as follows:

1. The full name of every party represented by us is:

Apple Inc.

2. The names of the real parties in interest represented by us are:

Not applicable

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the parties represented by us are:

None.

4. The names of all law firms and the partners or associates that appeared for the parties represented by us in the trial court, or are expected to appear in this Court, are:

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
SUPPLEMENTAL STATEMENT OF THE CASE	1
SUPPLEMENTAL STATEMENT OF FACTS	2
SUMMARY OF ARGUMENT	4
ARGUMENT	6
I. The District Court Abused Its Discretion In Unsealing Documents Containing Apple’s Trade Secret Market Research	6
A. Protection Of Trade Secrets Is A Compelling Reason for Sealing	6
B. Apple’s Confidential Market Research Data Are Invaluable Trade Secrets	8
C. The Need To Protect Apple’s Critical Trade Secrets Overcomes The Public’s Minimal Interest In These Documents	11
II. The District Court Erroneously Applied The “Compelling Reasons” Standard To Materials That Are Irrelevant To The Merits, Which Should Be Sealed Due To “Good Cause”	12
CONCLUSION	14
CERTIFICATE OF SERVICE	
CERTIFICATE OF COMPLIANCE	

TABLE OF AUTHORITIES

CASES	Page(s)
<i>Apple Inc. v. Psystar Corp.</i> , 658 F.3d 1150 (9th Cir. 2011)	6
<i>American Standard Inc. v. Pfizer Inc.</i> , 828 F.2d 734 (Fed. Cir. 1987)	7
<i>Apollo Technologies Corp. v. Centrosphere Industrial Corp.</i> , 805 F. Supp. 1157 (D.N.J. 1992).....	8
<i>Bauer Bros. v. Nike, Inc.</i> , No. 09-CV-500, 2012 WL 1899838 (S.D. Cal. May 24, 2012).....	10
<i>Bean v. Pearson Education, Inc.</i> , No. CV 11-8030, 2012 WL 2929631 (D. Ariz. July 18, 2012).....	14
<i>EEOC v. Erection Co.</i> , 900 F.2d 168 (9th Cir. 1990)	6
<i>In re Electronic Arts, Inc.</i> , 298 F. App'x 568 (9th Cir. 2008).....	6, 8
<i>In re Iowa Freedom of Information Council</i> , 724 F.2d 658 (8th Cir. 1983)	7
<i>Jazz Photo Corp. v. United States</i> , 439 F.3d 1344 (Fed. Cir. 2006)	7
<i>Kamakana v. City & County of Honolulu</i> , 447 F.3d 1172 (9th Cir. 2006)	5, 12, 13
<i>McDonnell v. Southwest Airlines Co.</i> , 292 F. App'x 679 (9th Cir. 2008).....	7
<i>MMI, Inc. v. Baja, Inc.</i> , 743 F. Supp. 2d 1101 (D. Ariz. 2010)	11

TABLE OF AUTHORITIES—CONTINUED

	Page(s)
<i>Nixon v. Warner Communications, Inc.</i> , 435 U.S. 589 (1978).....	5, 7
<i>North Atlantic Instruments, Inc. v. Haber</i> , 188 F.3d 38 (2d Cir. 1999)	8
<i>Pintos v. Pacific Creditors Ass’n</i> , 605 F.3d 665 (9th Cir. 2010)	12
<i>Richardson v. Mylan Inc.</i> , No. 09-CV-1041, 2011 WL 837148 (S.D. Cal. Mar. 9, 2011).....	11
<i>TriQuint Semiconductor, Inc. v. Avago Technologies Ltd.</i> , No. CV 09-1531, 2011 WL 6182346 (D. Ariz. Dec. 12, 2011).....	10

RULES

Federal Rule of Civil Procedure 26(c)	14
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OTHER AUTHORITIES

Restatement of Torts (1st ed. 1939).....	8
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SUPPLEMENTAL STATEMENT OF THE CASE

Following the jury's verdict in the underlying case, Apple sought a permanent injunction and enhanced damages for Samsung's adjudicated willful patent infringement and trade dress dilution. In opposing that motion, Samsung submitted various exhibits to the district court, including nine Apple market research and strategy documents. Pursuant to the Local Rules of the Northern District of California, Samsung filed a motion on October 20, 2012 to seal the material designated as confidential by Apple that Samsung had submitted with its opposition. SA24-25. On October 26, 2012, Apple filed a memorandum in support of Samsung's motion that requested, *inter alia*, that the district court seal the nine exhibits containing Apple's confidential market research data that Samsung had filed with its opposition. SA35-36; *see also* SA41-42.¹

On November 29, 2012, the district court denied Samsung's motion to seal with respect to the Apple market research documents. SA7. The court applied the

¹ Apple also requested that the district court seal exhibits to the parties' post-trial briefing containing Apple's detailed financial information. The district court denied Apple's request to seal those materials, adopting the same analysis set forth in its August 9, 2012 order. SA6. Apple's detailed financial information submitted in connection with the parties' post-trial briefing is similar to—and in some instances the same as—the material contained in the exhibits to the parties' pre-trial motions, which is the subject of Apple's earlier appeal (No. 2012-1600). Because the issues relating to the sealing of Apple's detailed financial information are already described in Apple's prior briefing, Apple will not address them here. The district court has indicated that it will reconsider sealing the financial data submitted in connection with the parties' post-trial briefing in light of this Court's resolution of Apple's appeal in No. 2012-1600. SA9.

same “compelling reasons” standard that it had used in its August 9, 2012 order to evaluate the parties’ request to seal exhibits to pre-trial motions and trial exhibits. SA3. The court also adopted the same analysis of Apple’s confidential market research data set forth in its August 9, 2012 order. SA7. As before, the district court concluded that Apple’s market research information should be made public because the court believed, without citing any support, that “similar data” were available elsewhere. *Id.* The district court stayed the unsealing of Apple’s market research information pending the final resolution of this appeal. SA9.

Apple timely appealed. SA51-52. The Court consolidated this appeal (No. 2013-1146) with the parties’ prior appeals (Nos. 2012-1600, -1606) from the August 9, 2012 order unsealing certain exhibits to pre-trial motions. ECF No. 81 (Jan. 18, 2013).

SUPPLEMENTAL STATEMENT OF FACTS

Apple conducts regular worldwide customer surveys that provide detailed information concerning how its customers value certain product features, whether they considered products offered by Apple’s competitors, and how satisfied they are with different product features. SA15 (¶¶ 3-4). Apple compiles the results into monthly and quarterly market research reports, which show what product features most influenced customers’ purchasing decisions on a country-by-country basis. *Id.*

Access to these market research reports is tightly controlled within Apple. Each document is stamped confidential and provided only on a “need to know” basis. SA16 (¶ 7). The survey results cannot be circulated outside a small group of Apple executives without the permission of Gregory Joswiak, Apple’s Vice President of iPod, iPhone and iOS Product Marketing. *Id.* And even then, it is almost always the results of individual survey questions—not the entire reports—to which Apple allows broader access. *Id.*

Apple’s customer survey data and marketing strategy analysis is contained in the following exhibits submitted by Samsung in opposition to Apple’s post-trial motion for a permanent injunction and enhanced damages. SA41 (¶¶ 15-16). The district court ordered each of these exhibits unsealed in its entirety. SA7.

Exhibit	Description
Exhibit 6 to the Declaration of John M. Pierce in Support of Samsung’s Opposition to Apple’s Motion for a Permanent Injunction and Enhanced Damages	Summary slide collecting the results of Apple’s October, November, and December 2011 consumer survey data from seven different countries. SA55-56.
Exhibit 10 to the Declaration of Michael Wagner in Support of Samsung’s Opposition to Apple’s Motion for a Permanent Injunction and Damages Enhancement	iPhone Buyer Survey (Q1 2011). SA57-139.
Exhibit 11 to the Declaration of Michael Wagner in Support of Samsung’s Opposition to Apple’s Motion for a Permanent Injunction and Damages Enhancement	iPhone Buyer Survey (Q2 2011). SA140-223.

Exhibit	Description
Exhibit 12 to the Declaration of Michael Wagner in Support of Samsung's Opposition to Apple's Motion for a Permanent Injunction and Damages Enhancement	iPhone Buyer Survey (Q3 2011). SA224-318.
Exhibit 31 to the Declaration of Michael Wagner in Support of Samsung's Opposition to Apple's Motion for a Permanent Injunction and Damages Enhancement	FY'12 marketing strategy presentation containing Apple's market analysis and consumer survey data. SA319-342.
Exhibit 32 to the Declaration of Michael Wagner in Support of Samsung's Opposition to Apple's Motion for a Permanent Injunction and Damages Enhancement	iPhone 4S Early Buyer Survey (Nov. 2011). SA343-385.
Exhibit 38 to the Declaration of Michael Wagner in Support of Samsung's Opposition to Apple's Motion for a Permanent Injunction and Damages Enhancement	US First Time Smartphone Buyer Analysis (Feb. 2012). SA386-406.
Exhibit 72 to the Declaration of Michael Wagner in Support of Samsung's Opposition to Apple's Motion for a Permanent Injunction and Damages Enhancement	iPhone Buyer Survey (Q1 2012). SA407-543.
Exhibit 189 to the Declaration of Michael Wagner in Support of Samsung's Opposition to Apple's Motion for a Permanent Injunction and Damages Enhancement	Summary of Apple's iPhone and iPad consumer survey data (2010-2011). SA544-553; <i>see also</i> SA19 (¶ 13); SA41 (¶ 15).

SUMMARY OF ARGUMENT

The district court's decision to unseal nine documents containing Apple's confidential market research data was an abuse of discretion for two reasons.

First, Apple’s market research is a trade secret, which controlling Ninth Circuit precedent has consistently recognized as a compelling reason for sealing. *Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (“In general, ‘compelling reasons’ sufficient to outweigh the public’s interest in disclosure and justify sealing court records exist when such ‘court files might have become a vehicle for improper purposes,’ such as the use of records to ... release trade secrets.” (quoting *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978))). Although others may collect their own market research, the unique market research that Apple conducts—as well as the conclusions that Apple draws from that data—cannot be replicated by anyone other than Apple and is closely intertwined with Apple’s future product development and marketing strategies. As a result, public disclosure of this information would cause serious competitive injury to Apple, which far outweighs any minimal interest in these materials to facilitate the public’s understanding of this case.

Second, the district court erroneously analyzed whether to unseal Apple’s market research reports in their *entirety* under the Ninth Circuit’s “compelling reasons” standard. However, the vast majority of the information in those reports is not related to the merits of this case and should have been sealed upon a showing of “good cause,” which Apple made here. *Kamakana*, 447 F.3d at 1179-1180.

Because the district court's decision to unseal Apple's market research data cannot be sustained under any standard, Apple respectfully requests that this Court reverse and remand with instructions to order that information sealed. In the alternative, this Court should vacate and remand to allow the district court to consider Apple's request to seal these market research reports under the Ninth Circuit's "good cause" standard applicable to material only tangentially related to the merits.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION IN UNSEALING DOCUMENTS CONTAINING APPLE'S TRADE SECRET MARKET RESEARCH

A. Protection Of Trade Secrets Is A Compelling Reason for Sealing

Protection of trade secrets qualifies as a "compelling reason" that rebuts the presumption of public access to court documents. Corrected Brief for Plaintiff-Appellant Apple Inc. at 20-24 (Sept. 14, 2012). The Ninth Circuit—which is the controlling authority on this issue—has recognized that "[t]he publication of materials that could result in infringement upon trade secrets has long been considered a factor that would overcome this strong presumption [for public access]." *Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1162 (9th Cir. 2011) (citing *EEOC v. Erection Co.*, 900 F.2d 168, 170 (9th Cir. 1990)); *In re Electronic Arts, Inc.*, 298 F. App'x 568, 569-570 (9th Cir. 2008) (nonprecedential) (A4484-4485) (concluding that there were "compelling reasons" to seal documents containing

trade secrets related to licensing terms); *McDonnell v. Southwest Airlines Co.*, 292 F. App'x 679, 680 (9th Cir. 2008) (nonprecedential) (A4487) (affirming finding that “compelling reasons” supported denying public access to “documents contain[ing] trade secrets and confidential procedures and communications”). This Court and others have afforded equally rigorous protections to trade secrets, even denying public access to an entire trial in order to prevent the disclosure of trade secrets. *Jazz Photo Corp. v. United States*, 439 F.3d 1344, 1357-1358 (Fed. Cir. 2006) (upholding district court’s decision to deny public access to a trial and the corresponding record to avoid disclosure of confidential “documents and information relating to [litigant’s] customers, suppliers, manufacturing processes, financial condition, and the quantity and value of its imports”); *In re Iowa Freedom of Info. Council*, 724 F.2d 658, 664 (8th Cir. 1983) (upholding decision to close part of hearing and seal transcript to protect litigant’s trade secrets even though material only related to distribution schedules for products the litigant no longer produced and never actually sold).

Courts have consistently granted such careful protection to trade secrets because their disclosure necessarily results in irreparable harm. *See Am. Standard Inc. v. Pfizer Inc.*, 828 F.2d 734, 741 (Fed. Cir. 1987) (discussing harms of disclosure of confidential business information to competitors and collecting cases); *see also Nixon*, 435 U.S. at 598 (recognizing it is appropriate to seal

“sources of business information that might harm a litigant’s competitive standing”). The substantial harm resulting from disclosure cannot be remedied, because “[a] trade secret once lost is, of course, lost forever.” *N. Atl. Instruments, Inc. v. Haber*, 188 F.3d 38, 49 (2d Cir. 1999) (internal quotation marks omitted). Even the district court in this case recognized the irreparable harm that would result from the disclosure of trade secrets. A4166 (noting that “the parties may be irreparably injured absent a stay” pending appeal of the court’s August 9, 2012 order unsealing certain documents because “what once may have been trade secret no longer will be [if disclosed]”).

B. Apple’s Confidential Market Research Data Are Invaluable Trade Secrets

The district court correctly recognized that the Ninth Circuit has adopted the Restatement of Torts’ broad definition of a “trade secret”:

[A] trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.

SA2 (quoting *Electronic Arts*, 298 Fed. App’x at 569-570 (A4485) (quoting *Restatement (First) of Torts* § 757, cmt. B)). Applying this definition, multiple courts have “found price discount and customer product use and preference information to be trade secrets.” *Apollo Techs. Corp. v. Centrosphere Indus. Corp.*, 805 F. Supp. 1157, 1198 (D.N.J. 1992) (collecting cases).

Apple's confidential market research falls well within the Restatement's broad definition of a trade secret. Apple's market research details the results of surveys Apple conducted in order to gain insight into its customers' purchasing decisions and preferences. SA15 (¶¶ 3-4). As described above (p. 3), Apple employs strict measures to protect its market research from disclosure. SA16 (¶ 7). Though Apple takes extensive precautions to prevent these surveys from falling into the hands of its competitors, the district court concluded that they were not worthy of protection because "[s]urveys about consumer preferences are commonplace, and Apple has not argued convincingly that similar data is not already available to its competitors." SA7. That is incorrect. Apple's competitors lack access to Apple's current customer base and thus cannot replicate the thorough analysis contained in the surveys, learn the preferences and profiles of Apple's customers, or observe trends over time. SA15-16 (¶ 5). Moreover, the district court ignored the fact that the specific *questions* Apple chose to ask and the *conclusions* that Apple has drawn from the responses are not available to its competitors and are at least as valuable as the underlying data, because Apple's competitors could use Apple's analysis of its customers' preferences to gain insight into Apple's future product plans and marketing strategies. SA16 (¶ 6).

Indeed, the district court's own rationale for denying Apple's request to seal confirms the severe competitive harms that Apple would suffer if this information

were publicly disclosed. The court acknowledged the close connection between Apple's market research and its future product development and marketing strategies, finding that "it stands to reason that [Apple's] competitors may infer the most significant results [of Apple's consumer surveys] by simply observing Apple's product releases and marketing campaigns." SA7. But it is one thing for Apple's product releases and market research to provide clues as to the results of Apple's *past* market research. It is quite another to allow Apple's competitors to predict Apple's *future* product releases and marketing strategies by providing access to Apple's current market research. The court ignored that critical difference in dismissing Apple's evidence of the severe competitive harms it would suffer if its current market research were released publicly.

Given these significant harms, courts considering similar cases have consistently found that compelling reasons exist for sealing market analysis information like that found in the nine exhibits Apple seeks to seal here. *See, e.g., TriQuint Semiconductor, Inc. v. Avago Techs. Ltd.*, No. CV 09-1531, 2011 WL 6182346, at *2-4, 6 (D. Ariz. Dec. 12, 2011) (finding compelling reasons to seal market analysis); *Bauer Bros. v. Nike, Inc.*, No. 09-CV-500, 2012 WL 1899838, at *2-4 (S.D. Cal. May 24, 2012) (finding compelling reasons to seal confidential sales and marketing information). The district court abused its discretion in failing to reach the same conclusion here.

C. The Need To Protect Apple's Critical Trade Secrets Overcomes The Public's Minimal Interest In These Documents

The irreparable harm Apple would suffer upon disclosure of its trade secret marketing research reports far outweighs the public's limited interest in this small number of largely irrelevant documents. The public's interest in the merits of this dispute has already been satisfied by the widely-reported three-week jury trial and the public disclosure of literally *thousands* of filed documents. The nine market research documents at issue here would not further advance the public's understanding of the case. In fact, neither party offered these market research documents in their entirety into evidence at trial. And in any event, the wholesale disclosure of these documents—all of which contain *worldwide* customer data—in no way assists the public's understanding of Apple's damages in the *United States*, which is the only damages issue presented in this case.

Moreover, Apple already publicly disclosed certain survey data reflecting its U.S. iPhone and iPad customers' preferences for certain functionalities. SA18-19 (¶ 12); SA41 (¶ 16). Any further disclosure would provide “comparatively little value to the public in terms of enhancing its ‘understanding [of] the judicial process.’” *Richardson v. Mylan Inc.*, No. 09-CV-1041, 2011 WL 837148, at *2 (S.D. Cal. Mar. 9, 2011) (noting that sealed portions of the record “do not include any information vital to understanding the nature of the underlying proceedings”); *see also MMI, Inc. v. Baja, Inc.*, 743 F. Supp. 2d 1101, 1106 (D. Ariz. 2010)

(moving party demonstrated good cause to seal a licensing agreement in a patent infringement case in part because the “public has a diminished need for th[e] document because it is ‘only tangentially related to the underlying cause of action’” (quoting *Kamakana*, 447 F.3d at 1179)). If anything, the public’s interest lies in protecting Apple’s market research as a trade secret, not in needlessly disclosing materials that are irrelevant to the merits of this case.

II. THE DISTRICT COURT ERRONEOUSLY APPLIED THE “COMPELLING REASONS” STANDARD TO MATERIALS THAT ARE IRRELEVANT TO THE MERITS, WHICH SHOULD BE SEALED DUE TO “GOOD CAUSE”

Although “compelling reasons” exist to seal all nine documents at issue, the district court also erred by failing to apply the less stringent “good cause” standard to the portions of those documents containing material that is entirely irrelevant to the merits of this case. Traditionally, the Ninth Circuit has required “compelling reasons” to seal documents attached to dispositive motions because “the resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the public’s understanding of the judicial process and of significant public events.” *Kamakana*, 447 F.3d at 1179-1180 (internal quotation marks omitted). In contrast, documents attached to non-dispositive motions are subject only to the “good cause” standard because those documents “are often unrelated, or only tangentially related, to the underlying cause of action.” SA2 (quoting *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010)).

Though Samsung filed the nine market research documents in their entirety, only a handful of pages from those documents were actually cited in Samsung's post-trial briefing on injunctive relief and enhanced damages. The bulk of the information contained in Apple's market research documents was *not even referenced* in Samsung's post-trial briefing, because it is irrelevant to the merits of the case.²

Nevertheless, the district court erroneously concluded that the “compelling reasons” standard applied to these documents in their *entirety* simply because the documents were attached to briefing on post-trial remedies. SA3. The district court did not acknowledge that large portions of the documents at issue contained immaterial information about Apple consumers located outside the United States. As this information is entirely “unrelated . . . to the underlying cause of action,” the district court should have only required a showing of “good cause” to seal these portions of Apple's market research. *Kamakana*, 447 F.3d at 1179 (internal quotation marks omitted). Applying the “compelling reason” standard to the documents as a whole irrespective of the relevance of the content of those documents leaves parties like Apple at the whim of their opponents, which can—as Samsung did here—simply attach highly-sensitive but irrelevant information to

² Although Apple informed Samsung that it was willing to disclose publicly those portions of its confidential marketing reports actually cited in Samsung's post-trial briefing (SA45, 48-50), the parties were unable to reach agreement.

pleadings without any recourse. Indeed, the mere threat of filing such material could allow litigants to extract a concession from their opponents unfairly.

Apple has plainly shown “good cause” for sealing its market research reports. Federal Rule of Civil Procedure 26(c) provides that a court may for “good cause” bar disclosure of a “trade secret or other confidential research, development, or commercial information.” Courts routinely grant motions to seal under Rule 26(c) when a party has made a particularized showing that court documents contain confidential marketing materials. *See, e.g., Bean v. Pearson Educ., Inc.*, No. CV 11-8030, 2012 WL 2929631, at *2 (D. Ariz. July 18, 2012) (granting motion to seal non-public financial sales and distribution information because it revealed defendants’ “market research” and “profit and sales margins”).

The documents at issue meet this standard because they detail valuable trade secrets and Apple would suffer irreparable harm if they were disclosed to the public. *See supra* pp. 8-10. Apple’s strong interest in protecting its trade secrets far outweighs the public’s minimal interest in materials that are irrelevant to the merits of this case.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court’s November 29, 2012 order to the extent it unsealed Apple’s confidential market research data and remand with instructions to seal that material. In the alternative,

this Court should vacate the November 29, 2012 order and remand so that the district court may apply the Ninth Circuit's "good cause" standard to Apple's request to seal material tangential to the merits of the underlying case.

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Counsel for Plaintiff-Appellant hereby certifies that:

1. Exclusive of the exempted portions, the brief contains 3,328 words as counted by the word processing program used to prepare the brief; and
2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared using Microsoft Office Word 2010 in a proportionally spaced typeface: Times New Roman, font size 14.

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ADDENDUM

ADDENDUM

TABLE OF CONTENTS

Order Granting-in-Part and Denying-in-Part Motion to Seal.....Tab A

TAB A

I. Legal Standard

As this Court has explained in its previous sealing orders in this case, courts have recognized a “general right to inspect and copy public records and documents, including judicial records and documents.” *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 & n.7 (1978). “Unless a particular court record is one ‘traditionally kept secret,’ a ‘strong presumption in favor of access’ is the starting point. *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006) (quoting *Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003)). In order to overcome this strong presumption, a party seeking to seal a judicial record must articulate justifications for sealing that outweigh the public policies favoring disclosure. *See id.* at 1178-79. Because the public’s interest in non-dispositive motions is relatively low, a party seeking to seal a document attached to a non-dispositive motion need only demonstrate “good cause.” *Pintos v. Pac. Creditors Ass’n*, 605 F.3d 665, 678 (9th Cir. 2010) (applying “good cause” standard to all non-dispositive motions, because such motions “‘are often unrelated, or only tangentially related, to the underlying cause of action’” (citing *Kamakana*, 447 F.3d at 1179)).

Conversely, “the resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the interest in ensuring the ‘public’s understanding of the judicial process and of significant public events.’” *Kamakana*, 447 F.3d at 1179 (quoting *Valley Broadcasting Co. v. U.S. Dist. Court for Dist. of Nev.*, 798 F.2d 1289, 1294 (9th Cir. 1986)). Thus, a party seeking to seal a judicial record attached to a dispositive motion or presented at trial must articulate “compelling reasons” in favor of sealing. *See id.* at 1178. “In general, ‘compelling reasons’ . . . exist when such ‘court files might have become a vehicle for improper purposes,’ such as the use of records to . . . release trade secrets.” *Id.* at 1179 (citing *Nixon*, 435 U.S. at 598). The Ninth Circuit has adopted the Restatement’s definition of “trade secret” for purposes of sealing, holding that “[a] ‘trade secret may consist of any formula, pattern, device or compilation of information which is used in one’s business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it.’” *In re Electronic Arts*, 298 Fed. App’x 568, 569-70 (9th Cir. 2008) (quoting *Restatement of Torts* § 757, cmt. b). Additionally, “compelling reasons” may exist if sealing is required to prevent judicial documents from being

1 used “as sources of business information that might harm a litigant's competitive standing.” *Id.* at
2 569 (9th Cir. 2008) (citing *Nixon*, 435 U.S. at 598).

3 As this Court has previously ruled, motions concerning the remedies to be awarded in this
4 case cannot fairly be characterized as “unrelated, or only tangentially related, to the underlying
5 cause of action.” *Kamakana*, 447 F. 3d at 1179. To the contrary, these motions implicate the very
6 core of Apple's claims and Apple's desired relief in bringing suit against Samsung. As evidenced
7 by the plethora of media and general public scrutiny of the preliminary injunction proceedings and
8 the trial, the public has a significant interest in these court filings, and therefore the strong
9 presumption of public access applies. Accordingly, the “compelling reasons” standard applies to
10 Apple’s motion for a permanent injunction, and to documents filed in opposition thereto. Further,
11 a motion for judgment as a matter of law, like trial documents, directly concerns the merits of the
12 case. Accordingly, the “compelling reasons” standard also applies to documents filed in
13 connection with a motion for judgment as a matter of law. As all of the documents Samsung now
14 seeks to seal concern either Apple’s motion for a permanent injunction or Apple’s motion for
15 judgment as a matter of law, all of the documents in this motion are subject to the “compelling
16 reasons” standard.

17 II. ANALYSIS

18 A. Motion Pursuant to Civil Local Rule 79-5(d)

19 Civil Local Rule 79-5(d) governs motions to seal documents designated as confidential by
20 another party. It requires that “the designating party must file with the Court and serve a
21 declaration establishing that the designated information is sealable” within seven days of the
22 motion.

23 Apple has filed a brief, ECF No. 2094, and the Declarations of Cyndi Wheeler, ECF No.
24 2095, and Nathan Sabri, ECF No. 2096, in support of Samsung’s motion to seal. These filings do
25 not seek to seal all of the documents Samsung has identified in its motion. Specifically, Apple
26 does not seek to seal: Samsung’s opposition to Apple’s motion for judgment as a matter of law;
27 Exhibits 7, 13, and 22-43 to the declaration of John Pierce in support of Samsung’s opposition to
28 Apple’s motion for a permanent injunction (“Pierce PI Declaration”); Exhibits 9, 13, 28, 30, 34, 37,

1 54, 71, 92, 93, 183, 191, 195, 197, 198, 206, 207, and 208 to the declaration of Michael Wagner in
2 support of Apple’s motion for a permanent injunction (“Wagner PI Declaration”); and the
3 declarations of Tulin Erden, Yoram Wind, or R. Sukumar in support of Samsung’s opposition to
4 Apple’s motion for a permanent injunction.

5 1. Confidential capacity information

6 Apple seeks to seal several documents on the ground that they contain confidential capacity
7 information. Specifically, Apple seeks to seal: Exhibit 13 to the Pierce Declaration in support of
8 Samsung’s opposition to Apple’s motion for judgment as a matter of law (Pierce JMOL
9 Declaration”); Exhibit C to the Wagner declaration in support of Samsung’s opposition to Apple’s
10 motion for judgment as a matter of law (“Wagner JMOL Declaration”); and portions of Exhibit
11 212 to the Wagner PI Declaration.

12 Apple has previously argued that public disclosure of its capacity information would cause
13 competitive harms, and now argues that the same arguments continue to justify sealing. Apple Br.
14 at 1. As Apple has previously argued, disclosure of this capacity data would allow Apple’s
15 competitors to alter their production schedules, so that they could increase production when Apple
16 is stretched thin or lower their prices when Apple has excess inventory. Decl. of Jim Bean in Supp.
17 of Mot. to Seal Trial Exs. (“Bean Trial Decl.”), ECF No. 1495-2, at ¶ 6. Additionally, this type of
18 information could allow Apple’s suppliers to extract higher prices for component parts when Apple
19 most needs them. *See id.*

20 As this Court has previously ruled, information relating to Apple’s production and supply
21 capacity is a “trade secret” under Ninth Circuit law and is therefore properly sealed. Competitors
22 and suppliers armed with knowledge of Apple’s capacity would be able to alter their business and
23 pricing models to gain an unfair advantage over Apple in such a way that would “harm its
24 competitive standing.” *See Electronic Arts*, 298 Fed. App’x at 569 (citing *Nixon*, 543 U.S. at 598).
25 These factors that led the Court to permit sealing of trial exhibits remain persuasive at this post-
26 trial stage. Accordingly, the Court finds that Apple’s confidential capacity data remains sealable.

27 Exhibit 13 to the Pierce JMOL Declaration consists of a summary of Apple’s damages
28 calculations, introduced at trial as PX25A1. Apple has previously moved to seal this document,

1 and the Court agreed that narrow redactions of capacity data were appropriate. *See* ECF No. 1649
2 (“August 9 Order”) at 7; ECF No. 1691 (proposed redactions); Tr. at 1993:18-19 (approving
3 proposed redactions). Apple now requests only that this exhibit be subject to the same redactions
4 this Court previously approved, which are limited to the confidential capacity information
5 contained therein. *See* Wheeler Decl. at ¶ 2. Accordingly, Samsung’s motion to seal is
6 GRANTED as regards Apple’s proposed redactions to Exhibit 13 to the Pierce JMOL Declaration,
7 and DENIED as to the remainder of the document.

8 Exhibit C to the Wagner JMOL Declaration is an excerpt from the Supplemental Damages
9 Schedules of Terry L. Musika, which was submitted at trial as Exhibit 17.2-S2. This document is
10 an updated version of a document the Court previously considered, then labeled Exhibit 17.2S.
11 Wheeler Decl. ¶ 3. Both the previous and current versions include a section analyzing Apple’s
12 capacity. This Court previously approved redactions to the earlier version of the document that are
13 identical to the redactions Samsung proposes here; both sets of redactions obscure only the
14 confidential capacity data. *See* August 9 Order at 13 (approving redactions). Accordingly,
15 Samsung’s motion is GRANTED as to its proposed redactions to Exhibit C.

16 Exhibit 212 to the Wagner PI Declaration is the transcript of the February 23, 2012
17 deposition of Mark Buckley. Apple has identified several portions of the transcript that discuss
18 confidential capacity information. The Court has reviewed the transcripts, and agrees that all of the
19 specific lines Apple has proposed to redact reveal Apple’s confidential capacity information.
20 Accordingly, Samsung’s motion is GRANTED as to the redactions Apple has proposed, and
21 DENIED as to the remainder of the document.

22 2. License agreements

23 Apple also seeks to seal Exhibits 12-1 and 12-2 to the Pierce PI Declaration. These two
24 exhibits consist of full, unredacted license agreements between Apple and third parties, including
25 payment and royalty terms. The Ninth Circuit has held, and this Court has previously ruled, that
26 pricing terms, royalty rates, and minimum payment terms of licensing agreements plainly
27 constitute trade secrets, and thus are sealable. *See Electronic Arts*, 298 Fed. App’x at 569; *see also*
28 August 9 Order at 10-11. Accordingly, these limited terms are sealable, and the motion is

1 GRANTED as to the pricing, royalty, and payment terms of Exhibits 12-1 and 12-2. The rest of
2 the agreements, however, do not pose the same risks to future negotiations. At trial, the parties
3 relied on summaries of license agreements, from which the Court agreed to redact payment and
4 royalty terms only. *See* August 9 Order at 10-11. If the parties wish to keep other terms of their
5 licensing agreements secret, they are free to introduce summaries here, as they did at trial. But the
6 parties may not introduce and rely on complete licenses while keeping the licenses sealed. The
7 public interest in resolution of Apple’s motion for a permanent injunction is significantly greater
8 than it was in resolving a motion to strike, the only context where the Court has permitted the type
9 of sealing permitted here. *See* August 9 Order at 16. Accordingly, the motion is GRANTED as to
10 the pricing and royalty terms, and DENIED as to all other information in the license agreements.

11 3. Confidential financial information

12 Apple seeks to seal a number of documents on the grounds that they contain confidential
13 “individual product model-specific revenue, cost, and margin information,” and “product line-
14 specific sales, cost, and margin information.” Wheeler Decl. at ¶¶ 6, 8. This Court has twice
15 found that such information does not meet the “compelling reasons” standard. *See* August 9 Order
16 at 5-6; ECF No. 2047 at 5-6. Specifically, this Court has noted that Apple has repeatedly failed to
17 articulate exactly *how* it believes dissemination of such information could cause competitive harm,
18 and has observed that Apple has allowed a limited amount of such information to be introduced
19 where it serves Apple’s purposes of justifying a large damages award. Likewise, here, Apple has
20 put this information in issue by seeking a permanent injunction that would prevent the sale of 26
21 Samsung products. Apple would need to make a very strong showing of compelling reasons to
22 justify keeping information under seal in this context. Yet Apple continues to rely on its previous
23 arguments regarding such information, without presenting any new reason why this Court should
24 seal its financial information. *See* Apple Br. at 2-3; Wheeler Decl. at 2-3 (citing declarations
25 submitted on July 30, 2012 in support of previous sealing motions).

26 As Apple has presented no new arguments, the Court will not change its prior ruling that such
27 information is not sealable. Accordingly, Samsung’s motion is DENIED as to Exhibits 2, 47, 83,
28 84, 85, 86, 87, 201, 202, 203, 204, and 212 to the Wagner PI Declaration.

1 4. Apple's consumer research

2 Apple seeks to seal several documents because they contain Apple's confidential consumer
3 research data. As with Apple's financial information, this Court has already considered – and
4 rejected – Apple's arguments that this information meets the “compelling reasons” standard:

5 Apple's desire to protect its own market surveys reporting on its consumers' usage
6 habits, buying preferences, and demographics is not sufficient to meet the
7 “compelling reason” standard required for sealing at this stage. *See Kamakana*, 447
8 F.3d at 1179. While Apple is presumably correct that its consumer base is different
9 than Samsung's, Apple's claim that Samsung could not replicate the analysis
10 contained in these exhibits is not convincing. Surveys about consumer preferences
11 are commonplace, and Apple has not argued convincingly that similar data is not
12 already available to its competitors. Moreover, because Apple claims that these
13 surveys inform its future product and marketing plans, it stands to reason that its
14 competitors may infer the most significant results by simply observing Apple's
15 product releases and marketing campaigns.

16 August 9 Order at 9. Here, as with its claims regarding financial data, Apple has presented no new
17 arguments, but rather has merely pointed to the arguments it made in previous filings, which this
18 Court has already rejected. *See* Apple Br. at 5 (citing a declaration introduced on July 30, 2012 in
19 support of a previous motion to seal). As Apple has presented no new reasons, and the Court sees
20 no material change in circumstances, the Court finds, consistent with its previous rulings, that
21 Apple's internal consumer research does not meet the “compelling reasons” standard, and thus
22 cannot be sealed. Accordingly, Samsung's motion is DENIED as to Exhibit 6 to the Pierce PI
23 Declaration and Exhibits 10-12, 31-32, 72, and 189 to the Wagner PI Declaration.

24 5. Third party consumer research reports

25 Apple also seeks to seal exhibits that contain research performed by third party research
26 firms IDC and Gartner. As this Court has previously explained, IDC's business model revolves
27 around gathering and selling these data and reports, so public disclosure of these exhibits could
28 result in substantial commercial harm. This Court found that if these reports were made publically
available in their entirety, IDC's customers would have no need to purchase them, and thus that
disclosure would not only harm IDC's competitive standing, it would completely destroy it.

August 9 Order at 10. However, Apple also explained that IDC agreed to allow limited use of its

1 data during trial. Thus, the parties were able to rely on limited portions of the reports, without
2 sealing, and without running afoul of their obligations to IDC.

3 The parties can do the same here. Apple is free to seek permission from IDC and Gartner
4 to use any information Apple requires to prove its case, but may not rely on information in seeking
5 a sweeping injunction while keeping it from public view. Accordingly, Samsung's motion is
6 DENIED as to Schedules 2.1 and 2.1 in Exhibit 2, Exhibit 29, and Exhibit 199 to the Wagner PI
7 Declaration.

8 6. Stay

9 Apple has requested that this Court stay any portion of its Order denying sealing. The
10 Federal Circuit has stayed this Court's August 9 Order denying Apple's request to seal its
11 confidential financial information and internal market research. Though the documents at issue in
12 the present motion are not the same documents considered in the August 9 Order, they are largely
13 subject to the same analysis. Thus, the outcome of the appeal of the August 9 Order bears on the
14 present Order. If the present Order were to have immediate effect, it would undermine the stay that
15 the Federal Circuit has imposed pending its resolution of the issue.

16 Federal Rule of Civil Procedure 62(c) vests the power to stay an order pending appeal with
17 the district court. *See* Fed. R. Civ. P. 62(c). For both the appellate court and the district court "the
18 factors regulating the issuance of a stay are generally the same: (1) whether the stay applicant has
19 made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be
20 irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other
21 [parties' interest] in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*,
22 481 U.S. 770, 776 (1987). Deciding whether to grant a stay of an order pending an appeal is an
23 equitable inquiry. Each factor in the analysis need not be given equal weight. *Standard Havens*
24 *Prods. v. Gencor Indus.*, 897 F.2d 511, 512 (Fed. Cir. 1990). "When harm to applicant is great
25 enough, a court will not require 'a strong showing' that applicant is 'likely to succeed on the
26 merits.'" *Id.* (citing *Hilton*, 481 U.S. at 776).

27 Although this Court does not believe that the partial denial of the parties' sealing request
28 was erroneous either in the August 9 Order or in this Order, this Court nonetheless recognizes that

1 should the Federal Circuit disagree, the parties will be deprived of any remedy if this Court does
2 not stay its Order. When the information is publicly filed, what once may have been trade secret
3 no longer will be. Thus, the parties may be irreparably injured absent a stay. In contrast, the
4 public interest, which favors disclosure of relevant information in order to understand the
5 proceedings, is not unduly harmed by a short stay.

6 Accordingly, the Court GRANTS Apple's request to stay disclosure of documents
7 identified as confidential financial information (Exhibits 2, 47, 83, 84, 85, 86, 87, 201, 202, 203,
8 204, and 212 to the Wagner PI Declaration) and Apple's internal proprietary market research
9 (Exhibit 6 to the Pierce PI Declaration and Exhibits 10-12, 31-32, 38, 72, and 189 to the Wagner PI
10 Declaration). The Court's denial of Apple's request to seal these documents is without prejudice as
11 to Apple's refile after resolution of the issue by the Federal Circuit. As Apple's appeal of this
12 Court's August 9 sealing order addresses only these two categories of confidential financial
13 information, the Stay applies only to these documents, and not to any other document this Court
14 declines to seal in this Order. The stay will be in effect pending the Federal Circuit's resolution of
15 Apple's appeal on this issue.

16 **B. Samsung's Requests to Seal Third Party Information**

17 In addition to seeking to seal information designated as confidential by Apple, Samsung
18 seeks to seal several documents that contain confidential information from third parties.

19 First, Samsung seeks to redact the "Payments" column from Exhibit 24 to the Pierce JMOL
20 Declaration. Exhibit 24 is a summary of licensing agreements Samsung and Apple have made with
21 third parties, marked as DX 630. As explained above, the Court agrees that the payment terms of
22 licensing agreements meet the "compelling reasons" standard. Accordingly, Samsung's motion is
23 GRANTED as to the "Payments" column of Exhibit 24 to the Pierce JMOL Declaration.

24 Second, Samsung seeks to seal Exhibits 183, 197, and 198 to the Wagner PI Declaration, on
25 the ground that they contain market share data that Samsung purchased from Strategy Analytics, a
26 third-party research firm. But as explained above, the parties have previously worked to obtain
27 permission to use whatever limited portions of third-party reports they actually needed to prove
28 their cases. Though of course disclosure of the full reports could harm Strategy Analytics, the

1 appropriate way to prevent this harm is for the parties to submit only the data that is essential to
2 their cases – not to ask the Court to consider it while keeping it from the public. Accordingly,
3 Samsung’s motion to seal Exhibits 183, 197, and 198 to the Wagner PI Declaration is DENIED.

4 C. Samsung’s Requests to Seal Confidential Samsung Information

5 Finally, Samsung seeks to seal several types of its own confidential information. This
6 information can be divided into three categories: (1) unreleased products and future strategies; (2)
7 detailed financial information; and (3) source code.

8 1. Unreleased Products and Future Strategies

9 First, Samsung seeks to seal information “about unreleased products and future business
10 plans.” Mot. at 4. In its August 9 Order, this Court granted Samsung’s motion to seal information
11 about future product strategy and future revenue projections, noting that “because this adjudication
12 is concerned with Samsung’s past and current conduct, information related to Samsung’s future is
13 of limited value to the public. Moreover, such information has the potential to cause Samsung
14 significant competitive harm.” August 9 Order at 17-18. Information about Samsung’s unreleased
15 products and future strategies continues to risk “harm [to Samsung’s] competitive standing,” as
16 competitors could use the information to position themselves to undercut Samsung. *See Electronic*
17 *Arts*, 298 Fed. App’x at 569. Accordingly, the Court finds that such information continues to meet
18 the “compelling reasons” standard, and is sealable.

19 Portions of Samsung’s Opposition to Apple’s Motion for a Permanent Injunction and Damages
20 Enhancement contain information about Samsung’s unreleased products and future sales
21 projections. Samsung has proposed very limited redactions to that motion, which remove only
22 specific information about Samsung’s future plans. Accordingly, the Court GRANTS Samsung’s
23 motion with respect to the proposed redactions on pages 13-14 and 22 of Samsung’s opposition to
24 Apple’s permanent injunction motion.

25 Samsung has similarly proposed redactions to the Declaration of Hee-Chan Choi and Exhibit 1
26 thereto. The proposed redactions are limited to specific products that will be discontinued or
27 released on specific dates in the future. The same is true of the proposed redactions in paragraphs
28 3, 4, 7, 8, 10, and 13 of the Declaration of Corey Kerstetter, and the proposed redactions in Exhibit

1 1 thereto. Finally, Samsung has proposed redactions to the Declaration of San Lucente, similarly
2 limited to portions that discuss an unreleased Samsung product. Accordingly, all the information
3 Samsung proposes to redact from these three declarations falls into the category of Samsung's
4 future business plans, and is properly sealable for the reasons explained above. Therefore,
5 Samsung's motion is GRANTED as to the proposed redactions to the Choi Declaration and Exhibit
6 1 thereto, to the Kertstetter Declaration and Exhibit 1 thereto, and to the Lucente Declaration.

7 Samsung has also requested to seal excerpts from the Wagner PI Declaration, along with
8 Exhibits 2, 37, 195, and 207 thereto on the ground that they contain information about Samsung's
9 future business plans.¹ Samsung has not clearly specified which portions of these documents it
10 seeks to seal on the basis of future business and strategy information. However, the Court has
11 reviewed the documents, and finds that the passages Samsung has proposed to redact on pages 60
12 and 94 of the Wagner PI Declaration clearly contain information about Samsung's future business
13 strategies, as does Schedule 4.2 of Exhibit 2 thereto. The Court sees no information beyond the
14 passages just identified that deserve sealing under the "compelling reasons" standard.
15 Accordingly, only the redactions on pages 60 and 94 and Schedule 4.2 of Exh. 2 may be sealed on
16 this basis. Samsung's motion is GRANTED as to these three pages, and DENIED with prejudice
17 as to the remainder of the Wanger PI Declaration and Exhibit 2 thereto.

18 Exhibits 37 and 195 are lengthy documents consisting of a series of internal Samsung
19 presentations. Samsung has not proposed redactions to these documents, but rather appears to be
20 seeking to seal them in their entirety. Though the documents do contain some strategy
21 information, the Court does not see that they contain much, if any, information directed at future
22 plans, rather than strategies for time periods that have already passed. And to the extent that they
23 do contain strategies relevant to Samsung's future actions, they are vastly overdesignated.

24 Exhibit 207 is the transcript of the deposition of Michael Wagner. Again, Samsung has
25 proposed no redactions, but rather apparently seeks to seal the entire transcript. As much of the
26 deposition discusses the contents of Mr. Wagner's declaration, some of which this Court has

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28 ¹ Samsung's request to seal Exhibits 2, 37, 195, and 207 also mentions confidential financial information. This basis will be addressed separately below.

1 already ruled may be sealed, the transcript may contain some sealable information. However,
2 much of the information is not sealable. Thus it, too, is overdesignated.

3 This Court has advised the parties multiple times that, as Judge Alsup advised counsel in
4 *Oracle America v. Google, Inc.*, 10-CV-03561-WHA, at ECF No. 540, “unless they identify a
5 limited amount of exceptionally sensitive information that truly deserves protection, the motions
6 will be denied outright.” *Id.* Here, Samsung has not identified a limited amount of sensitive future
7 strategy information in Exhibits 37, 195, or 207. Accordingly, Samsung’s motion to seal these
8 three exhibits on the basis that they contain sensitive strategy and future planning information is
9 DENIED without prejudice.

10 2. Financial Information

11 Samsung also seeks to seal “recent detailed sales information that breaks down sales by
12 product and specific time periods.” Mot. at 4. As explained above in the discussion of information
13 Apple sought to seal, this Court has twice found that such information does not meet the
14 “compelling reasons” standard. Like Apple, Samsung has failed to provide any new arguments for
15 why this information should be sealable. Accordingly, for the reasons explained above, the Court
16 finds that product-specific sales information is not sealable. Samsung’s motion is DENIED
17 without prejudice as to the documents it seeks to seal on these grounds: the Wagner JMOL
18 Declaration, Exhibit B thereto, Exhibit 2 to the Kirstetter Declaration, and Samsung’s opposition to
19 Apple’s motion for judgment as a matter of law.

20 Samsung further seeks to seal portions of the Wagner PI Declaration, along with Exhibits 2, 37,
21 195, and 207 thereto (the same documents identified above as containing strategy and future
22 business planning information) because they contain “confidential financial information.”
23 Samsung has made no attempt to specify what it believes is confidential about the financial
24 information in these documents. *See* Mot. at 5. The Court will not find that the information is
25 sealable under the “compelling reasons” standard simply because Samsung has labeled it as
26 confidential in a motion to seal. To the extent that Samsung intends it to be sealable for the same
27 reason as the product-specific sales information, the Court has already found such information not
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United States District Court
For the Northern District of California

1 to be sealable. Samsung has provided no other explanation for its request. Accordingly,
2 Samsung’s motion as to these documents is DENIED without prejudice.

3 3. Source Code

4 Finally, Samsung seeks to seal Samsung’s source code algorithms and descriptions of the
5 operation of that source code. Mot. at 5. Specifically, Samsung seeks to seal portions of the
6 Declaration of Stephen Gray and Exhibit 2 thereto. Courts have been clear that confidential source
7 code is a trade secret. *See Agency Solutions.Com, LLC v. TriZetto Group, Inc.*, 819 F. Supp. 2d
8 1001, 1017 (E.D. Cal. 2011). Accordingly, as this Court has ruled in its previous sealing Orders,
9 source code meets the “compelling reasons” standard, and is sealable.

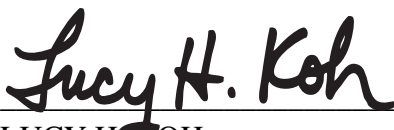
10 Samsung has identified certain limited portions of the Gray declaration that do indeed
11 reveal and discuss Samsung’s source code. Further, Exhibit 2 consists entirely of source code for
12 Samsung’s Web Browser application. This information is clearly sealable under the standards
13 discussed above. Accordingly, Samsung’s motion is GRANTED as to the proposed redactions to
14 the Gray declaration and Exhibit 2 thereto.

15 **III. CONCLUSION**

16 For the reasons stated above, Samsung’s motion to seal confidential Apple material is
17 GRANTED in part and DENIED in part. Pursuant to Apple’s request, the denial as to documents
18 identified as confidential financial information (Exhibits 2, 47, 83, 84, 85, 86, 87, 201, 202, 203,
19 204, and 212 to the Wagner PI Declaration) and Apple’s internal proprietary market research
20 (Exhibit 6 to the Pierce PI Declaration and Exhibits 10-12, 31-32, 38, 72, and 189 to the Wagner PI
21 Declaration) is stayed, pending resolution of Apple’s appeal of this issue to the Federal Circuit.
22 Samsung’s motion to seal its own confidential material is GRANTED in part and DENIED in part.

23 **IT IS SO ORDERED.**

24 Dated: November 29, 2012



LUCY H. KOH
United States District Judge