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CO., LTD., SAMSUNG ELECTRONICS

15 AMERICA, INC. and SAMSUNG

TELECOMMUNICATIONS AMERICA, LLC

16 UNITED STATES DISTRICT COURT

17 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

18  
19 APPLE INC., a California corporation,

20 Plaintiff,

21 vs.

22 SAMSUNG ELECTRONICS CO., LTD., a

Korean business entity; SAMSUNG

23 ELECTRONICS AMERICA, INC., a New

York corporation; SAMSUNG

24 TELECOMMUNICATIONS

AMERICA, LLC, a Delaware limited liability

25 company,

26 Defendant.

CASE NO. 11-cv-01846-LHK (PSG)

**SAMSUNG'S MOTION TO STAY AND  
SUSPEND ORDERS DENYING SEALING  
PENDING APPEAL OR,  
ALTERNATIVELY, PENDING  
DECISION BY FEDERAL CIRCUIT ON  
STAY PENDING APPEAL**

Judge: Hon. Lucy H. Koh

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1 **NOTICE OF MOTION**

2 TO ALL PARTIES AND THEIR ATTORNEYS OF RECORD:

3 PLEASE TAKE NOTICE that Defendants Samsung Electronics Co., Ltd., Samsung  
4 Electronics America, Inc., and Samsung Telecommunications America, LLC (collectively  
5 "Samsung") shall and hereby do move the Court, pursuant to Rule 62(c) of the Federal Rules of  
6 Civil Procedure, to stay and suspend its July 17, 2012 Order Denying Sealing Motions and August  
7 9, 2012 Order Granting-in-Part and Denying-in-Part Motions to Seal pending appeal, or, in the  
8 alternative, pending a decision by the United States Court of Appeals for the Federal Circuit on a  
9 motion for stay pending appeal. This motion is based on this notice of motion and supporting  
10 memorandum, and such other written or oral argument as may be presented at or before the time  
11 this motion is taken under submission by the Court.

12 **RELIEF REQUESTED**

13 Samsung seeks an order staying and suspending the Court's July 17, 2012 Order Denying  
14 Sealing Motions and August 9, 2012 Order Granting-in-Part and Denying-in-Part Motions to Seal  
15 pending appeal, or, in the alternative, pending a decision by the United States Court of Appeals for  
16 the Federal Circuit on a motion for stay pending appeal.

17  
18 DATED: August 13, 2012

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20  
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27 LTD., SAMSUNG ELECTRONICS AMERICA,  
28 INC., and SAMSUNG  
TELECOMMUNICATIONS AMERICA, LLC

1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **INTRODUCTION**

3 Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung  
 4 Telecommunications America, LLC (collectively, "Samsung") respectfully submit this  
 5 memorandum in support of their motion, pursuant to Rule 62(c) of the Federal Rules of Civil  
 6 Procedure, to stay and suspend, pending appeal, the Court's July 17, 2012 Order Denying Sealing  
 7 Motions and August 9, 2012 order that denied sealing of documents containing Samsung's most  
 8 sensitive, confidential, and proprietary profit, loss and cost information. (Dkt. Nos. 1256 and 1649.)  
 9 At a minimum, Samsung respectfully requests a stay and suspension of the orders pending the  
 10 Federal Circuit's decision on whether to grant such relief pending appeal. *See, e.g., County of*  
 11 *Sonoma v. Fed. Housing Fin. Agency*, No. C 10-3270, 2011 WL 4536894, at \*2 (N.D. Cal. Sept. 30,  
 12 2011) (granting stay of preliminary injunction until Ninth Circuit resolved motion for stay pending  
 13 appeal). A stay pending appeal is necessary because, as the Ninth Circuit has recognized,  
 14 "[s]ecrecy is a one-way street: Once information is published, it cannot be made secret again." *In re*  
 15 *Copley Press, Inc. v. Ismael Highera-Guerrero*, 518 F.3d 1022, 1025 (9th Cir. 2008) (staying  
 16 sealing order pending appeal); *accord Republic of Philippines v. Westinghouse Elec. Corp.*, 949  
 17 F.2d 653, 663 (3d Cir. 1991) (a trade secret "once disclosed, is lost").

18 Samsung is likely to succeed on appeal for two reasons. First, the Court erred as a matter of  
 19 law by applying a heightened "compelling reasons" standard in assessing the merits of Samsung's  
 20 motion to seal the documents attached to non-dispositive motions. As the August 9, 2012 order  
 21 recognizes, "the public's interest in non-dispositive motions is relatively low" (Dkt. No. 1649, at 2),  
 22 and a showing of "good cause" is therefore sufficient to justify sealing a majority of the documents  
 23 in question (which pertain only to non-dispositive motions).

24 Second, even if the "compelling reasons" standard applied to all the documents at issue,  
 25 courts routinely seal documents in the precise, narrow categories of financial information that  
 26 Samsung sought to seal. The Court erred in concluding that Samsung would not be injured by the  
 27 disclosure of its highly confidential financial information and that Samsung had failed to meet the  
 28 "compelling reasons" standard.

1 Because of the immediate effect of the Court's orders, Samsung's appeal will be moot if  
 2 enforcement is not stayed pending appeal. *See* Local Rule 79-5(e); General Order 62. Absent a  
 3 stay, Samsung will have no way to protect its most confidential information or seek appellate  
 4 review of the Court's orders. The only way to preserve the status quo and to maintain the  
 5 confidentiality of Samsung's information until the resolution of the appeal is to stay enforcement of  
 6 the Court's orders.

### 7 **FACTUAL STATEMENT**

#### 8 **A. Original Motions to Seal, and the Court's July 17, 2012 Order**

9 Samsung and Apple filed administrative motions to seal confidential information contained  
 10 in or attached to various motions, including the parties' motions for summary judgment, *Daubert*  
 11 motions, and motions *in limine*. *See* Dkt. Nos. 1236, 1233, 1208, 1206, 1201, 1186, 1185, 1184,  
 12 1183, 1179, 1140, 1139, 1125, 1122, 1090, 1089, 1069, 1063, 1061, 1060, 1059, 1052, 1023, 1024,  
 13 1022, 1020, 1013, 1007, 1004, 997, 991, 930, 927, 925, and 847. On July 17, 2012, the Court  
 14 denied these motions without prejudice, and permitted the parties to file renewed motions to seal  
 15 within seven days. The Court advised the parties that it would apply the "compelling reasons"  
 16 standard and that "only documents of exceptionally sensitive information that truly deserve  
 17 protection will be allowed to be redacted or kept from the public." Dkt. No. 1256, at 2-3. The  
 18 parties filed renewed motions to seal on July 24, 2012. At a hearing on those motions on July 27,  
 19 2012, the Court provided additional guidance on the type of information it believed was sealable.  
 20 The Court invited the parties to submit revised motions based on those standards by July 30, 2012.

#### 21 **B. Renewed Motions to Seal, and the Court's August 9, 2012 Order**

22 On July 30, 2012, Samsung and Apple filed renewed motion to seal documents subject to  
 23 the Court's July 17, 2012 Order. The parties moved to seal a narrow subset of the hundreds of  
 24 documents at issue in the Court's July 17 order. On August 9, 2012, the Court granted the request to  
 25 seal Apple's capacity information, but denied sealing of the parties' cost, profit, unit sales, revenue,  
 26 and profit margin information. Dkt. No. 1649 at 21.

### C. Samsung's Notice of Appeal

Samsung has filed a notice of appeal to the Federal Circuit, and now seeks to stay and suspend the sealing orders pending that appeal, or at least until the Federal Circuit can rule on a motion for stay pending appeal.

## ARGUMENT

The factors governing the issuance of a stay pending appeal are: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987). Each factor, however, need not be given equal weight. *See Providence Journal Co. v. Federal Bureau of Investigation*, 595 F.2d 889, 890 (1st Cir.1979) (granting stay pending appeal). "To obtain a stay, pending appeal, a movant must establish a strong likelihood of success on the merits, or, failing that, nonetheless demonstrate a substantial case on the merits provided that the harm factors militate in its favor." *Merial Ltd. v. Cipla Ltd.*, 426 Fed. App'x 915, 915 (Fed. Cir. 2011) (unpublished) (citing *Hilton v. Braunskill*, 481 U.S. 770, 778 (1987)).

The likelihood of success and irreparable injury prongs are accorded more weight than the balance of hardships and the public interest. *See In re Cyclobenzaprine Hydrochloride Extended-Release Capsule Patent Litig.*, 449 Fed. App'x 35, 36 (Fed. Cir. 2011); *Standard Havens Prods., Inc. v. Gencor Indus., Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990) ("When harm to applicant is great enough, a court will not require 'a strong showing' that applicant is 'likely to succeed on the merits.'"); *E.I. DuPont de Nemours & Co. v. Phillips Petroleum Co.*, 835 F.2d 277, 278 (Fed. Cir. 1987) ("In considering whether to grant a stay pending appeal, this court assesses movant's chances for success on appeal and weighs the equities as they affect the parties and the public."); *accord County of Sonoma*, 2011 WL 4536894, at \*1.

Here, Samsung not only has a strong likelihood of success on appeal since the Court applied an incorrect standard and erred in holding that highly confidential financial information is not sealable, but absent a stay, the immediate enforcement of the order will cause Samsung significant

1 harm, while causing no injury to Apple, which is also appealing the Court's orders, or to the public,  
 2 which will receive sufficient information to understand the parties' claims and defenses during the  
 3 course of trial. A stay would simply postpone disclosure for a limited period of time until the  
 4 Federal Circuit has had an opportunity to rule on Samsung's appeal. A stay pending appeal is  
 5 therefore warranted.

6 **I. SAMSUNG HAS A STRONG LIKELIHOOD OF SUCCESS ON APPEAL**

7 **A. The Court Applied The Wrong Standard to Non-Dispositive Motions**

8 Based on existing Ninth Circuit precedent, Samsung understood that documents attached to  
 9 non-dispositive motions, including the parties' *Daubert* motions and motions *in limine*, would be  
 10 sealed as long as Samsung established "good-cause" to permit sealing. Although the Court has  
 11 recognized that "the public's interest in non-dispositive motions is relatively low," requiring only a  
 12 showing of "good cause," the Court incorrectly applied the higher "compelling reasons" standard to  
 13 most of the documents that are at issue. Dkt. No. 1649, at 2. The Court reasoned that since the  
 14 motions address the admissibility of evidence at trial, they should be judged by the "compelling  
 15 reasons" standard. Dkt. No. 1649, at 12. This is contrary to law and policy.

16 The "strong presumption" of public access to judicial records was adopted "because the  
 17 resolution of a dispute on the merits, whether by trial or summary judgment, is at the heart of the  
 18 interest in ensuring the public's understanding of the judicial process and of significant public  
 19 events." *Kamakana v. City & County of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (citation  
 20 and internal quotation marks omitted); *accord Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d  
 21 1122, 1138 (9th Cir. 2003) (noting that "summary judgment adjudicates substantive rights and  
 22 serves as a substitute for trial") (*quoting Rushford v. The New Yorker Magazine*, 846 F.2d 249, 252  
 23 (4th Cir. 1988)). The justification for the "compelling reasons" standard is thus grounded in the  
 24 public's substantial interest in the end result of a case—whether by summary judgment or through  
 25 trial.

26 In contrast, the public has relatively little interest in the resolution of a non-dispositive  
 27 motion that does not go to the heart of a case. There is still less legitimate public interest in  
 28 disclosure of documents exchanged during discovery and evidence that is not admissible at trial.

1 Courts are therefore more willing to seal non-dispositive motions and inadmissible evidence from  
 2 public disclosure, and accordingly apply a lower "good cause" standard when determining whether  
 3 to seal such information. *See Kamakana*, 447 F. 3d at 1179-80; *Foltz*, 331 F.3d at 1138; *Phillips v.*  
 4 *General Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002). Courts have "'carved out an exception  
 5 to the presumption of access' to judicial records for a 'sealed discovery document [attached] to a  
 6 non-dispositive motion.'" *Kamakana*, 447 F.3d at 1179 (internal citations omitted). The public has  
 7 less of an interest in "records attached only to non-dispositive motions." *Id.* Non-dispositive pre-  
 8 trial motions that address the admissibility of evidence and testimony at trial are considerably less  
 9 important to the public than the evidence actually introduced at trial. *Cf. United States v. McVeigh*,  
 10 119 F.3d 806, 813 (10th Cir. 1997) (the public's right of access "does not extend to the evidence  
 11 actually ruled inadmissible").

12         Given that the parties have entered into a stipulation to reduce the amount of confidential  
 13 information at trial based on the Court's numerous instructions, *see, e.g.*, July 18, 2012 Hearing  
 14 Transcript, at 86:6-89:25; July 24, 2012 Hearing Transcript, at 54:25-56:5, 59:8-61:12; July 27,  
 15 2012 Hearing Transcript, at 6:4-23:17; June 29, 2012 Hearing Transcript, at 80:1-81:22, the  
 16 information Samsung seeks to seal will not be introduced at trial. *See* Dkt. No. 1597. The Court  
 17 has adopted the pertinent provisions of this stipulation. Dkt. No. 1649, at 2 n.1. The parties'  
 18 stipulation demonstrates that, far from being critical to the public's understanding of the parties'  
 19 claims and defenses, the information at issue here is unrelated to trial.

20         Since most of the documents Samsung moved to seal were attached to non-dispositive  
 21 motions, the Court should have applied the "good cause" standard to those documents, which  
 22 Samsung has met through its showing that its most sensitive cost, profit, loss and profit margin  
 23 information is kept confidential within Samsung, is shared with very few persons within Samsung  
 24 on a need-to-know basis, is never disclosed to the public, and would benefit competitors to  
 25 Samsung's disadvantage if revealed. *See* Dkt. No. 1490 (Ro Decl. ¶¶ 4-26). The Court erred as a  
 26 matter of law in applying the "compelling reasons" standard, and its decision is likely to be reversed  
 27 on appeal.



**B. Samsung Established Both Good Cause and Compelling Reasons For Sealing Its Precise Revenue and Cost Information**

Even if the "compelling reasons" standard did apply to all of the documents that Samsung sought to seal, Samsung's motions should nevertheless have been granted, because Samsung established "compelling reasons" for the sealing of its most sensitive cost, profit, and loss information, consistent with applicable precedent. Courts applying the "compelling reasons" standard have consistently found that information of the precise type that is here at issue should be sealed. *See, e.g., Bean v. John Wiley & Sons, Inc.*, No. CV 11-08028-PCT-FJM, 2012 WL 1078662, at \*6-7 (D. Ariz. Mar. 30, 2012) (production information and "precise revenue information results" and "exact sales and production numbers" which could be used by competitors to calibrate their pricing and distribution methods to undercut defendant also provide compelling reasons for sealing); *Bauer Bros. LLC v. Nike, Inc.*, No. 09cv500-WQH-BGS, 2012 WL 1899838, at \*3-4 (S.D. Cal. May 24, 2012) (revenues per product, revenue reductions, merchandise costs, royalty costs, promotional costs, personnel costs, and costs of goods sold are sealable when a company's business competitors could use the information to replicate the company's business practices). The harm that will result from the disclosure of the detailed financial information at issue here is not speculative; as Samsung established through the declarations of GiHo Ro in support of its motions to seal, competitors will be able to use Samsung's comparable profit, loss, and cost information to Samsung's disadvantage. *See, e.g.,* Dkt. No. 1490, at 2-9.

Apple does not dispute that disclosure of such information would cause Samsung substantial harm; indeed, it filed (and has appealed the denials of) motions to seal exactly the same sort of information about its own finances. Specifically, the disclosure of Samsung's most confidential information to all of its competitors, vendors, suppliers, and customers would create information asymmetry and thus unduly alter Samsung's bargaining power and pricing strategy. Both parties agree that disclosure of the sensitive information that is at issue will cause significant and wholly unnecessary injury, sufficient to satisfy the "compelling reasons" standard.

1 The Court erred by applying the "compelling reasons" standard to the majority of the  
 2 documents Samsung sought to seal and concluding that Samsung failed to meet the "compelling  
 3 reasons" standard. Samsung is thus likely to succeed on the merits of its appeal.

4 **II. SAMSUNG WILL BE IRREPARABLY HARMED IF THE ORDERS ARE NOT**  
 5 **STAYED PENDING APPEAL, WHEREAS, APPLE AND THE PUBLIC WILL NOT**  
 6 **BE INJURED AT ALL**

7 Denial of a stay pending appeal will cause substantial and irreparable injury to Samsung's  
 8 interest, with no counterbalancing benefit to the public. Absent a stay, Samsung's highly  
 9 confidential information will be filed publicly by August 16, 2012—thereby ringing a bell that  
 10 cannot be un-rung. This will deprive Samsung the right to seek review of the Court's orders.

11 On the other hand, there is no indication that a stay pending appeal would result in  
 12 substantial harm to Apple or to the public. Granting the stay would merely maintain the status quo  
 13 pending appellate review. Apple will not be harmed by the status quo; it too has moved to stay  
 14 enforcement of the Court's orders, and indeed does not oppose the underlying motions to seal. And  
 15 as explained above, neither Apple nor the public has a substantial interest in evidence that will not  
 16 be introduced at trial. Finally, even if there were a legitimate public interest in such information, it  
 17 would not be furthered by requiring release *now* rather than after the Federal Circuit has fully  
 18 considered the parties' appeals.

19 The balance of interests tips in favor of protecting Samsung from harm by preserving the  
 20 status quo pending appeal. *See Prometheus Radio Project v. FCC*, No. 03-338, 2003 WL  
 21 22052896, at \*1 (3d Cir. Sept. 3, 2003) ("Given the magnitude of this matter and the public's  
 22 interest in reaching the proper resolution, a stay is warranted pending thorough and efficient judicial  
 23 review."). The standard for a grant of a stay pending appeal has accordingly been met, and the  
 24 Court should grant Samsung's motion.

25 **CONCLUSION**

26 The Court should stay its July 17, 2012 Order Denying Sealing Motions and August 9, 2012  
 27 Order Granting-in-Part and Denying-in-Part Motions to Seal pending appeal or, alternatively,  
 28 pending the Federal Circuit's ruling on a motion for a stay pending appeal.

1 DATED: August 13, 2012

Respectfully submitted,

2 QUINN EMANUEL URQUHART &  
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4 By /s/ Victoria F. Maroulis

5 Charles K. Verhoeven

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10 AMERICA, INC. and SAMSUNG

11 TELECOMMUNICATIONS AMERICA, LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE DIVISION

APPLE INC., a California corporation,

Plaintiff,

vs.

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

Defendants.

CASE NO. 11-cv-01846-LHK-PSG

**[PROPOSED] ORDER GRANTING  
SAMSUNG'S MOTION TO STAY THE  
COURT'S JULY 17, 2012 AND AUGUST 9,  
2012 ORDERS**

Samsung Electronics Co., Ltd., Samsung Electronics America, Inc., and Samsung Telecommunications America, LLC (collectively, "Samsung") have filed a notice of appeal to the United States Court of Appeals for the Federal Circuit from the July 17, 2012 Order Denying Sealing Motions (Dkt. No. 1256) and each and every part thereof, and the August 9, 2012 Order Granting-In-Part and Denying-In-Part Motions to Seal (Dkt. No. 1649) and each and every part thereof.

Samsung has also filed a motion to stay the Court's orders pending appeal.

Accordingly, for good cause shown, Samsung's motion to stay is hereby **GRANTED**.

**IT IS SO ORDERED.**

DATED: \_\_\_\_\_, 2012

Honorable Luch H. Koh  
United States District Judge