

2012-1600, -1606

**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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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:
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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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INTRODUCTION

Of the thousands of documents involved in this case, Apple seeks on appeal to seal only fourteen exhibits to *pre-trial* motions containing Apple's most closely guarded and competitively sensitive trade secret financial information. No document at issue in Apple's appeal was admitted into evidence at trial, and the jury's verdict in no way depended upon any of these documents. Because these documents did not have any effect on the outcome of the case, disclosure of the competitively sensitive information contained in these documents would not advance the public's understanding of the judicial process. Publicly exposing Apple's trade secret information is an unnecessary toll to exact from Apple for vindicating its patent rights in court.

Unable to articulate a particularized interest in the limited documents subject to this appeal, amici defend the district court's decision by relying on the public's general interest in this case and the rebuttable presumption of access to court documents. Those vague interests were not strong enough for any of these amici to have participated in the proceedings below. Nor are they sufficient to overcome Apple's compelling reasons for sealing, which include competitive harms so great and immediate that Apple strictly limits access—even within its own walls—to the financial information at issue in this appeal. As amici acknowledge, the protection of such trade secret information is a sufficient, well-established justification for

sealing. RC Br.¹ 18; *see also Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) (explaining that the protection of trade secrets is a “compelling reason[]’ sufficient to outweigh the public’s interest in disclosure”). Accordingly, the district court’s order should be reversed, and Apple’s trade secret financial information should be ordered sealed.

ARGUMENT

I. APPLE HAS ESTABLISHED COMPELLING REASONS FOR SEALING ITS TRADE SECRET FINANCIAL INFORMATION

Amici’s arguments only serve to highlight that Apple has established compelling reasons for sealing its trade secret financial information. Amici offer no defense for the district court’s inconsistent treatment of Apple’s evidence of competitive harm, in which the district court found that Apple would suffer competitive harm from disclosure of its supply and production capacity data, as well as the pricing terms of its licensing agreements, but rejected Apple’s identical arguments relating to the detailed profits and costs data that are the subject of this appeal. Apple Br. 30-33. Nor do amici offer more than a conclusory response to

¹ “RC Br.” refers to the brief filed by amici the Reporters Committee for Freedom of the Press, American Society of News Editors, Bloomberg L.P., Dow Jones & Company Inc., Gannett Co. Inc., the New York Times Company, Society of Professional Journalists, and the Washington Post. “FAC Br.” refers to the brief filed by amicus the First Amendment Coalition. “Apple Br.” refers to the corrected brief filed by Plaintiff-Appellant Apple Inc.

Apple's reasoned evidence that its competitors and suppliers would unfairly exploit this information to Apple's detriment. FAC Br. 25.

But what amici do say confirms that Apple would suffer significant competitive harms if its detailed financial information were made publicly available. For example, amici contend that Apple's detailed financial information would "provide powerful tools to many groups" concerned with protecting consumers' interests in Apple's "manufacturing and pricing decisions." FAC Br. 22. Not only is that supposed interest entirely unrelated to the public's understanding of the judicial process, but those "powerful tools" in the hands of consumer interest groups will be wielded just as easily by Apple's suppliers and competitors to exert unfair competitive pressure on Apple. Apple Br. 14, 29-30. Thus, as amici's arguments confirm, the competitive value of Apple's detailed financial information is undeniable, as is the harm to Apple that would result from its disclosure.

Apple goes to great lengths to shield itself from those harms by strictly limiting access—even internally—to the detailed financial information that is the subject of Apple's appeal. Apple Br. 13-14, 29. Within Apple, access is provided to this information only on a "need to know basis" and must be approved by one of Apple's Vice Presidents of Finance. A3628 (¶ 3). Apple revisits the list of employees who have access to this information on a quarterly basis to ensure that it

remains available only to those with a current and continuing need to know. *Id.* Amici's suggestion that the parties are somehow "attempting to stretch trade-secret protections to become conterminous with their own corporate boundaries" (RC Br. 16) therefore misrepresents what is at issue in this appeal. Apple has not made a broad-ranging request to seal documents simply because they contain internal corporate information. Rather, Apple seeks to seal only a handful of documents containing trade secrets that were not admitted at trial and that are not widely known even within Apple. And Apple has made publicly available hundreds of exhibits and numerous briefs and declarations containing Apple's less competitively sensitive internal corporate information. A1498.

Amici likewise are mistaken in stating that much of the information that is the subject of Apple's appeal is "already widely available to the public." FAC Br. 26. Indeed, this argument is inconsistent with the purported basis for amici's participation in this appeal since amici would have no interest in unsealing these documents if the information contained in them were already publicly available. Nor is it possible to reconcile this assertion with amici's claim to be at a disadvantage for having never seen the documents at issue. *Id.* at 19.

At most, high-level summaries of Apple's financial information are publicly available, including those exhibits that Apple offered into evidence to explain its damages theory in this case. Apple Br. 9, 33; A3741-3763. But those high-level

summaries, which aggregate several years of data for entire product lines to provide an estimated range of Apple's profit margins (*e.g.*, A3711; A3713-3714), are vastly different from the quarterly product- and model-specific financial data to which amici demand public access. As a result, the fact that some high-level financial data are publicly available does not diminish Apple's interest in maintaining the confidentiality of the more granular financial data contained in the documents subject to this appeal. If anything (as discussed below at page 9), the information that Apple has already made publicly available extinguishes the public's interest in obtaining any further details that have no bearing on how the jury decided this case.

The detailed financial information in the documents Apple seeks to seal meet all the requirements for trade secret protection. *See Restatement (First) of Torts* § 757, cmt. b (“A trade secret may consist of any . . . 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.”); *see also* Apple Br. 29-33. And contrary to amici's suggestion (FAC Br. 24-25), the district court did not hold otherwise or make any “factual” determinations subject to clear error review.

Apple's detailed financial information is indisputably a trade secret, which provides a “compelling reason” for sealing judicial documents. *Kamakana*, 447

F.3d at 1179 (“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))); *see also* Apple Br. 21-26. Indeed, amici agree that “[d]emonstrable trade secrets can in appropriate circumstances provide a compelling reason for a court to seal documents, and this principle has echoed through intellectual property cases.” RC Br. 18. As discussed below at pages 7-10, the public has no countervailing interest in the narrow set of documents Apple seeks to seal, and there is no reason for the Court to deviate from the well-established rule that the protection of trade secrets is a sufficient justification for sealing.

Amici attempt to reframe the narrow issue presented by this appeal into the broader question of whether the protection of trade secrets “automatically” requires sealing. FAC Br. 27-28. But the Court is not presented with such abstract questions here. The only issue before the Court is whether the district court abused its discretion in unsealing fourteen documents that contain Apple’s most closely guarded and competitively sensitive trade secrets—none of which was offered into evidence at trial or otherwise affected the jury’s decision. The answer to that narrow question is plainly yes, and the Court need go no further in deciding this appeal.

II. APPLE’S DETAILED FINANCIAL INFORMATION WILL NOT ASSIST THE PUBLIC’S UNDERSTANDING OF THE JUDICIAL PROCESS

There is no countervailing public interest in these particular documents that outweighs Apple’s compelling reasons for sealing. Amici’s broad generalizations concerning the public’s interest in the parties, this case, and the patent system as a whole cannot disguise the fact that they have offered no reason why the fourteen particular documents Apple seeks to seal would aid the public’s understanding of the judicial process. And although amici claim that “the participation of amici in this appeal belie[s] the parties’ position that the public has no interest in these documents” (FAC Br. 19), none of these amici considered these materials important enough to have participated in the proceedings below. Indeed, the only organization that advocated unsealing in the district court—Reuters America LLC—has chosen *not* to participate in this appeal concerning only a limited set of documents, thus highlighting the weakness of the public’s interest in these documents.

Having failed to demonstrate how these materials would aid the public’s understanding of the outcome of this trial, amici rely heavily on the rebuttable presumption of public access to judicial records. FAC Br. 12-13; RC Br. 5-6. But the general interests underlying the presumption of public access would not be served by unsealing these particular documents, which contain no briefs or declarations and consist of excerpts and exhibits to the parties’ expert reports, as

well as one exhibit to an expert declaration. Apple Br. 14-17. Public access to judicial records facilitates “the public’s understanding of the judicial process,” *Valley Broad. Co. v. U.S. Dist. Court*, 798 F.2d 1289, 1294 (9th Cir. 1986), and allows “the public to participate in and serve as a check upon the judicial process,” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). Those interests would not—and could not—be served by allowing public access to the detailed financial information that Apple seeks to seal, which was not offered into evidence at trial and did not play any part in the jury’s verdict.

Because none of these materials was offered at trial, the district court and amici are mistaken in stating that this detailed financial information is “essential to each party’s damages calculations.” A9; FAC Br. 21. The parties proved otherwise by trying this case to verdict without ever putting this information in front of the jury.² Likewise, amici incorrectly suggest that the mere fact that the parties’ experts considered this information implies the public has an interest in its disclosure. FAC Br. 6. Experts routinely consider reams of financial data produced in discovery that may inform their opinions, but the public lacks a presumptive right of access to such information unless it is attached to a dispositive

² Amici incorrectly suggest that the parties have entered into a “private agreement” to preclude public access to these few documents. FAC Br. 22 n.5; *see also* RC Br. 12. They have not. In any event, the parties are free to decide how to present their case, and the public’s right of access cannot compel more disclosure than the parties themselves believe necessary to prove their case.

motion or introduced at trial. *See Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) (no presumption of public access to discovery materials attached to non-dispositive motions because “[a]pplying the presumption of access in such a circumstance would undermine a district court’s power to fashion effective protective orders”). Regardless of what materials the parties’ experts considered before trial, the public’s understanding of the judicial process would not be aided by disclosure of information that the parties did not offer into evidence at trial.

The public’s interest in the fourteen documents that are the subject of Apple’s appeal is especially weak when viewed in light of the thousands of other documents concerning this case that are already publicly available. As amici acknowledge, this case involves “heaps of documents.” RC Br. 14; *see also id.* at 13-14 (“More than 1,500 pleadings have been submitted since the case commenced.”). The vast majority of those materials are publicly available, including documents describing the evidence of damages that Apple actually presented at trial. *E.g.*, A3741-3763. Any additional disclosure of information that was ultimately not presented at trial would not assist the public’s understanding of the judicial process and cannot outweigh Apple’s compelling reasons for sealing.

With nothing to counter Apple’s compelling reasons for sealing, amici incorrectly accuse Apple of attempting to flip the burden of proof by arguing the

lack of any public interest in these documents. FAC Br. 8, 18. But as amici recognize elsewhere, the presumption of public access is not absolute and the decision whether to seal judicial records instead depends upon a balancing of private and public interests. *Id.* at 20; RC Br. 11. Apple’s interest in protecting its trade secret financial information is a compelling reason for sealing. Because neither the district court nor amici have articulated—or can articulate—a countervailing public interest in these particular documents, the balance here overwhelming favors sealing.

III. THE DISTRICT COURT ERRONEOUSLY HELD APPLE TO THE “COMPELLING REASONS” STANDARD FOR EXHIBITS TO NON-DISPOSITIVE MOTIONS THAT ARE SEALABLE FOR “GOOD CAUSE”

With no countervailing public interest in these particular documents, the protection of Apple’s trade secret financial information is unquestionably a compelling reason for sealing. But even putting aside Apple’s compelling reasons for sealing, twelve of the fourteen documents at issue in Apple’s appeal were exhibits to non-dispositive motions (Apple Br. 14-17), which should have been sealed upon a mere showing of “good cause.” *Kamakana*, 447 F.3d at 1180 (“A ‘good cause’ showing under Rule 26(c) will suffice to keep sealed records attached to non-dispositive motions.”). Amici concede that the “good cause” standard is applicable to “many non-dispositive motions.” FAC Br. 16. There is no reason for

deviating from that general rule for the twelve documents submitted with the parties' pretrial evidentiary motions that are the subject of Apple's appeal.

Indeed, the Ninth Circuit's rationale for applying a less demanding standard to documents submitted with non-dispositive motions—which are “often ‘unrelated, or only tangentially related, to the underlying cause of action,’” *Kamakana*, 477 F.3d at 1179 (quoting *Foltz*, 331 F.3d at 1135)—aligns perfectly with the documents at issue in this appeal. None of the detailed financial information contained in those documents was discussed by the parties' experts at trial or played any part in the jury's resolution of the case. At most, this material is “tangentially related” to the outcome of this case.

Amici cannot avoid the “good cause” standard by suggesting that this Court is not bound to apply Ninth Circuit law to this “substantive” legal question. RC Br. 6-8. This Court applies the law of the regional circuit not merely to “procedural” matters, but rather to any issues that are not unique to patent law. *E.g.*, *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d 51, 66 (Fed. Cir. 2012) (applying law of the regional circuit to standard for new trial motions, evidentiary rulings, and summary judgment motions); *Wi-LAN, Inc. v. Kilpatrick Townsend & Stockton LLP*, 684 F.3d 1364, 1368 (Fed. Cir. 2012) (applying law of the regional circuit to questions concerning applicability of attorney-client

privilege). The standard for sealing documents is undeniably an issue not unique to patent law to which this Court applies the law of the regional circuit.

Amici's reliance on *In re Midland National Life Insurance Co. Annuity Sales Practices Litigation*, 686 F.3d 1115, 1120 (9th Cir. 2012), is misplaced. In *Midland*, unlike this case, the parties' *Daubert* motions were so closely intertwined with the merits that "the same judicial records were also filed in connection with summary judgment proceedings" and the parties themselves described the *Daubert* proceedings as "potential[ly] case dispositive." *Id.* Here, by contrast, the district court applied the "compelling reasons" standard to the parties' exhibits to non-dispositive motions not because it believed those motions were intertwined with the merits but rather because "the admissibility of evidence is such a closely contested issue in this trial." A15. But whether "closely contested" or not, the evidentiary issues in this case were tangential to the underlying merits, which is the only relevant question for determining whether the "good cause" standard applies.³

Moreover, contrary to amici's suggestion (FAC Br. 17), the fact that Apple opposed Samsung's *Daubert* motion for attempting to "deprive Apple of a jury

³ A small amount of the material submitted with the non-dispositive motions overlaps with the detailed financial information attached to Apple's Opposition to Samsung's Motion for Summary Judgment. Apple Br. 35 n.6. To the extent that the Court concludes there were not "compelling reasons" for sealing the exhibits submitted in connection with summary judgment, any non-duplicative financial information contained in the exhibits to the non-dispositive motions should still be sealed for "good cause."

trial over a factual dispute” and for presenting “factual disputes that are not properly the subject of a *Daubert* motion” does not make Samsung’s motion dispositive. Rather, Apple’s opposition demonstrated that Samsung’s *Daubert* motion was meritless, and the district court correctly denied Samsung’s motion to preserve any factual issues for the jury.

Because compelling reasons exist for sealing Apple’s trade secret financial information, no further consideration by the district court is necessary, even though the district court should have applied the less demanding “good cause” standard to the parties’ exhibits to non-dispositive motions. Nevertheless, if the Court determines that Apple has failed to demonstrate compelling reasons for sealing, it should remand to the district court for application of the “good cause” standard to the exhibits attached to the parties’ non-dispositive motions.

CONCLUSION

This Court should reverse the district court’s August 9, 2012 order to the extent it denied Apple’s motions to seal and order sealed all exhibits to pretrial motions detailing Apple’s trade secret financial information that were the subject of that motion. In the alternative, the Court should vacate the order and remand for further proceedings under the correct legal standard.

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1. The brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because exclusive of the exempted portions it contains 3,072 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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