

**2012-1600, -1606**

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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APPLE INC.,

Plaintiff-Appellant,

v.

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

Defendants-Cross Appellants.

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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**

Counsel for Defendants-Cross Appellants certifies the following:

**1. The full name of every party or amicus represented by me is:**

Samsung Electronics Co., Ltd., Samsung Electronics America, Inc. and Samsung Telecommunications America, LLC

**2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:**

N/A

**3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:**

Samsung Electronics America, Inc. (“SEA”) is a wholly-owned subsidiary of Samsung Electronics Co., Ltd. (“SEC”), a publicly held corporation organized under the laws of the Republic of Korea. SEC is not owned by any parent corporation and no other publicly held corporation owns 10% or more of its stock. No other publicly held corporation owns 10% or more of SEA’s stock. Samsung Telecommunications America, LLC (“STA”) is a wholly-owned subsidiary of SEA. No other publicly held corporation owns 10% or more of STA’s stock.

**4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or are expected to appear in this court are:**

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Respectfully submitted,

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### **STATEMENT OF RELATED CASES**

In addition to these two consolidated appeals, Defendants-Cross Appellants identify the following appeals as related:

*Apple Inc. v. Samsung Elecs. Co.*, No. 2012-1506 (Fed. Cir.).

*Apple, Inc. v. Samsung Elecs. Co.*, No. 2012-1105, 678 F.3d 1314 (Fed. Cir. 2012) (Bryson, J., joined by Prost, J.; opinion concurring in part and dissenting in part by O'Malley, J.).

## PRELIMINARY STATEMENT

This cross-appeal arises from orders of the U.S. District Court for the Northern District of California (Koh, J.) dated July 17 and August 9, 2012, requiring Defendants-Cross Appellants Samsung Electronics Co., Ltd., Samsung Electronics America, Inc. and Samsung Telecommunications America, LLC (collectively, “Samsung”) to file public and unsealed versions of documents containing sensitive financial information. Those orders (which are final and collateral to the merits of the underlying case, and therefore immediately appealable) should be reversed or, at the very least, vacated with respect to the portions of the limited set of documents that are subject to this cross-appeal, as set out in Table 1, *infra*.<sup>1</sup>

The district court denied Samsung’s motions to seal on the ground that Samsung had not put forth “compelling reasons” in support, but this conclusion was erroneous as a matter of law. Far more detailed than the “financial information” that is ordinarily available to the public, the specific cost data, bills of materials, and product-by-product profit information that Samsung seeks to seal are closely guarded secrets throughout the mobile device industry. Release of Samsung’s confidential, trade-secret documents would not benefit the public but

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<sup>1</sup> Plaintiff-Appellant Apple Inc. (“Apple”) has appealed from those orders to the extent they require it to publicly disclose certain financial information. Neither Apple nor Samsung opposes the other’s appeal.

would serve only to injure Samsung's position vis-à-vis both its competitors and its business partners. If the district court's orders are not reversed, those other firms will be able to use their newfound and unearned insight into Samsung's costs, pricing practices, and profit margins to compete with Samsung in a manner that would otherwise be impossible. The result would be to place Samsung at a serious disadvantage in the market, because its competitors and vendors are under no comparable disclosure obligation. This irreparable competitive injury is a "compelling reason" for sealing the documents from public view, as the Ninth Circuit and the Supreme Court have recognized. The district court abused its discretion in reaching the contrary conclusion, particularly given its failure to address the merits of the specific documents subject to Samsung's motions.

The district court erred further by applying the "compelling reasons" standard in the first place. Most of the secret, proprietary documents that Samsung seeks to seal were attached as exhibits to declarations submitted with respect to *non-dispositive* pretrial motions. Unsealing them now would not aid the public's understanding of the resolution of the dispute, and a less stringent "good cause" showing should therefore have been sufficient to obtain sealing of those documents. If the district court's orders are not reversed outright, they should be vacated and the case remanded so that the court may address Samsung's motions under the correct legal standard.

### **JURISDICTIONAL STATEMENT**

The district court had jurisdiction under 15 U.S.C. § 1121 and 28 U.S.C. §§ 1331, 1338, and 1367. The fact that jurisdiction was grounded in part on patent infringement claims “established the path of appeal, giving exclusive jurisdiction in this [C]ourt,” regardless of the substance of the issues that are appealed. *Zenith Elecs. Corp. v. Exzec, Inc.*, 182 F.3d 1340, 1346 (Fed. Cir. 1999) (citing *Abbott Labs. v. Brennan*, 952 F.2d 1346, 1349-50 (Fed. Cir. 1991)).

This Court has jurisdiction to consider this appeal immediately pursuant to 28 U.S.C. § 1295(a)(1) and the “collateral order” doctrine of *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). To be appealable under *Cohen*, an order “must (1) conclusively determine the disputed question, (2) resolve an important issue completely separate from the merits of the action, and (3) be effectively unreviewable on appeal from a final judgment.” *Sanders Assocs. v. Summagraphics Corp.*, 2 F.3d 394, 395 n.2 (Fed. Cir. 1993) (citing *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). Here, the challenged unsealing orders are final (the district court held out no prospect of reconsideration), unrelated to the merits of the underlying suit, and unreviewable at a later date since disclosure of the documents would moot any appeal. These orders therefore satisfy *Cohen* and are immediately appealable. *See, e.g., In re Copley Press, Inc.*, 518 F.3d 1022, 1025 (9th Cir. 2008) (recognizing that “[s]ecrecy is a one-way street”

and thus hearing immediate appeal of an unsealing order); *Va. Dep't of State Police v. Wash. Post*, 386 F.3d 567, 574 n.4 (4th Cir. 2004) (similar); *SEC v. TheStreet.com*, 273 F.3d 222, 228 (2d Cir. 2001) (similar); *Siedle v. Putnam Invs.*, 147 F.3d 7, 9 (1st Cir. 1998) (“Unsealing orders usually warrant immediate review under the collateral order doctrine.... When, as now, a seal order is granted ... and then revoked, an immediate appeal will lie.”); *In re Reporters Comm. for Freedom of Press*, 773 F.2d 1325, 1330 (D.C. Cir. 1985) (Scalia, J.) (similar).<sup>2</sup>

### **STATEMENT OF THE ISSUES**

1. Whether the district court abused its discretion by declining to seal portions of documents containing Samsung’s confidential and trade-secret financial information despite the undisputed evidence showing that the release of such documents to the public would cause Samsung substantial and irreparable competitive injury.

2. Whether the district court erred as a matter of law by requiring Samsung to demonstrate “compelling reasons” instead of “good cause” to seal portions of documents containing confidential and trade-secret financial

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<sup>2</sup> Were the Court to conclude that the “collateral order” doctrine is inapplicable, Samsung respectfully requests that the Court treat this brief as a petition for a writ of mandamus, *see, e.g., Miller v. Gammie*, 335 F.3d 889, 895 (9th Cir. 2003) (en banc), which the Court should grant for substantially the reasons set forth below.

information that had been submitted in connection with non-dispositive pre-trial filings.

### **STATEMENT OF THE CASE**

Apple filed this lawsuit on April 15, 2011, alleging that Samsung's smartphone and tablet products infringed several of Apple's patents. Samsung filed patent-infringement counterclaims against Apple on June 30, 2011. The case was tried to a jury from July 30 through August 24, 2012.

Between May 17, 2012 and July 13, 2012, the parties filed various pre-trial motions and exhibits, which contained reams of sealed, confidential financial data. The parties filed administrative motions in the district court, seeking to have this information sealed on a permanent basis. On July 17, 2012, the district court denied all of these motions without prejudice, and with leave to file renewed motions (the "July 17 Order"). A1-3.

On July 24, 2012, the parties filed renewed motions to seal pursuant to the July 17 Order. At a hearing on July 27, 2012, the Court provided additional guidance on the types of information it viewed as potentially sealable, and invited the parties to submit revised versions of their renewed motions to seal. A1532-33. Samsung and Apple filed another set of renewed motions on July 30, 2012, covering a narrow subset of the hundreds of documents that had been subject to the parties' initial requests. A4610-15; A4616-24.

On August 9, 2012, the district court issued an order substantially and finally denying the parties' renewed motions to seal (the "August 9 Order" and, together with the July 17 Order, the "Unsealing Orders").<sup>3</sup> A4-32. Apple and Samsung timely filed notices of appeal on August 13, 2012 (A4137-56), and sought stays of the Unsealing Orders pending appeal. This Court consolidated the two appeals.

On August 15, 2012, the district court granted a stay of the August 9 Order pending the filing and resolution of motions to stay in this Court. A4165-67. The parties filed such motions on August 17, 2012 (ECF Nos. 6, 18), and, on September 18, 2012, this Court stayed the Unsealing Orders pending appeal. (ECF No. 39).

## **STATEMENT OF FACTS**

### **A. The Documents Subject To This Cross-Appeal**

Of the various documents that were originally covered by Samsung's sealing motions, only a small subset containing extraordinarily sensitive information is the subject of Samsung's cross-appeal. These twelve documents, summarized in the table below, were attached as exhibits to seven pretrial declarations that were filed in connection with Samsung's motions to exclude certain experts under *Daubert v.*

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<sup>3</sup> The August 9 Order also addressed the parties' motions to seal certain trial exhibits. A6-14, A19-21. That aspect of the Order is not at issue in this appeal, except to the extent that the court's rationale for declining to seal certain financial information in the trial exhibits (A8-9) also applies to the pre-trial motions and exhibits.

*Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), its motion to strike expert testimony based on undisclosed facts and theories, its motions *in limine*, and its motion for summary judgment. Samsung does not seek to seal each of the documents in full, but instead seeks to seal only select portions containing financial data that is far more detailed than that disclosed in securities filings or otherwise made available to competitors, business partners, or the media. *See* A4617. The proposed redactions include fine-grained information concerning sales, costs (including particular amounts associated with materials, manufacturing, research and development, and sales), operating margins, and profits—all broken down to show the figures associated with each of the 32 products that were the targets of Apple’s lawsuit over the last two years. A4617-18.



**Table 1: Documents and Information Subject to This Appeal<sup>4</sup>**

Document	Confidential/Trade-Secret Information
Exhibit 1 to Martin Declaration in Support of Samsung’s <i>Daubert</i> motion (A4629-36) <sup>5</sup>	Gross and net operating margins on the subject products and estimated values of intangibles.
Exhibit 3 to Martin Declaration in Support of Samsung’s <i>Daubert</i> motion (A4637-4729) <sup>6</sup>	Revenue from sales of the subject products; profits from the subject products; operating profits on certain subject products; profit margin on the subject products; and information about licensing negotiations between the parties.
Exhibit 5 to Martin Declaration in Support of Samsung’s <i>Daubert</i> motion (A4730-53) <sup>7</sup>	Revenue from sales of the subject products; profits from the subject products; cost of goods sold; operating profit margin on the subject products.
Exhibit 10 to Martin Declaration in Support of Samsung’s <i>Daubert</i> motion (A5096-5112)	Profits on each of the subject products between May 2010 and March 2012.
Exhibit A to Musika Declaration in Support of Apple’s Opposition to Samsung’s <i>Daubert</i> motion (A615-859) <sup>8</sup>	Revenues, cost of goods sold, gross profit, gross margin, and gross profit per unit for each of the subject products.

<sup>4</sup> Subject to the exceptions discussed in footnotes 8-9, the appendix citations in this Table refer to versions of each document that highlight the redactions Samsung proposed in the district court.

<sup>5</sup> Samsung no longer seeks to seal A4635.

<sup>6</sup> Samsung no longer seeks to seal A4664-65, A4688 (lines 21, 22), A4689, A4690 (lines 2, 4), and 4725-26.

<sup>7</sup> Samsung no longer seeks to seal A4737 and A4740.

<sup>8</sup> This exhibit is not highlighted. Except for the passages noted in footnote 6 *supra*, Samsung seeks to seal the portions of this exhibit that are highlighted in Exhibit 3 to the Martin Declaration in Support of Samsung’s *Daubert* motion (A4637-4729). Samsung also seeks to seal A785 (*except* the “Reasonable Royalty” column), A789-90, A793 (*except* the “Reasonable Royalty” column),

Document	Confidential/Trade-Secret Information
Exhibit B to Musika Declaration in Support of Apple's Opposition to Samsung's <i>Daubert</i> motion (A860-1007) <sup>9</sup>	Revenues, cost of goods sold, gross profit, gross margin, and gross profit per unit for each of the subject products.
Exhibit F to Musika Declaration in Support of Apple's Opposition to Samsung's Motion for Summary Judgment (A4754-56)	Revenues, cost of goods sold, gross profit, gross margin, and gross profit per unit on the subject smartphone products between the second quarter of 2010 and the first quarter of 2012.
Exhibit G to Musika Declaration in Support of Apple's Opposition to Samsung's Motion for Summary Judgment (A4757-59)	Revenues, cost of goods sold, gross profit, gross margin, and gross profit per unit on the subject tablet computer products between the fourth quarter of 2010 and the first quarter of 2012.
Exhibit O to Maharbiz Declaration in Support of Apple's Opposition to Samsung's Motion for Summary Judgment (A4760-79)	Manufacturing cost of the Samsung P1 tablet computer.

A795-98, A828, A829 (information below the line indicating worldwide revenue), A832 (information below the line indicating worldwide revenue), and A839 (boxes containing Samsung's utility patent market value reference points, and footnotes 3 and 4).

<sup>9</sup> This exhibit is not highlighted. Except for the passages noted in footnote 7 *supra*, Samsung seeks to seal the portions of this exhibit that are highlighted in Exhibit 5 to the Martin Declaration in Support of Samsung's *Daubert* motion (A4730-53). Samsung also seeks to seal A915 (*except* the "Reasonable Royalty" column), A919-22, A923 (*except* the "Reasonable Royalty" column), A925-28, A960, A961 (information below the line indicating worldwide revenue), A964 (information below the line indicating worldwide revenue), A971 (boxes containing Samsung's utility patent market value reference points, and footnotes 3 and 4), A994, and A996-1005.

Document	Confidential/Trade-Secret Information
Exhibit 37 to Bressler Declaration in Support of Apple's Opposition to Samsung's Motion for Summary Judgment (A4780-4867)	Average sales price and market share on the Samsung Acme 16G and Keystone phones, which were not accused.
Exhibit B to Wagner Declaration in Support of Samsung's Reply Memorandum in support of its Motion to Strike (A4868-5091)	Profits after deductible expenses for each of the subject products.
Exhibit 42 to Kanada Declaration in Support of Apple's Opposition to Samsung's Motions <i>in Limine</i> (A5092-95)	Profits after deductible expenses for each of the subject products for the years 2010-2012.

As a Senior Manager in Samsung's Mobile Communications division explained to the court below, public disclosure of the documents that are involved in this cross-appeal would cause great harm to Samsung's competitive position on at least two fronts. *First*, competitors with access to Samsung's per-product revenue, pricing, and cost information would be able to undercut its pricing strategy and thus gain an advantage in the competitive smartphone and tablet marketplaces. A4607-08, A4618. *Second*, access to the above documents would bestow Samsung's suppliers with knowledge of Samsung's other costs and its profit margins, giving them leverage to demand a greater share of its revenue. *Id.* These effects would be all the more pronounced because (apart from Apple), none of Samsung's competitors or business partners will have been subject to any disclosure obligation comparable to that imposed by the district court. The court's

orders would thus create massive information asymmetries between Samsung and its suppliers and competitors.

Because of this risk of massive and irreparable competitive harm, Samsung places great importance on ensuring that its confidential, trade-secret financial data remains out of the public eye. Access within Samsung is limited to a small group of employees in the company's finance and accounting divisions, on a strict "need-to-know" basis. A4617. Both digital and hard copies of Samsung's financial documents are subject to intensive security measures to prevent them being surreptitiously or accidentally removed from its facilities. A4569-70. The documents at issue here were produced under the district court's strict protective order for use in this litigation only. A4528-65; A4618.

**B. The District Court's Unsealing Orders**

Two of the district court's orders regarding sealing are at issue in this appeal. In the July 17 Order, the district court acknowledged that the Ninth Circuit had created a "two tiered approach" to sealing, such that a "good cause" standard applies to materials attached to non-dispositive motions but a "compelling interest" standard applies to materials attached to dispositive motions. A2 (citing *Kamakana v. City and Cnty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006)). The court nevertheless did not distinguish between the type of motions at issue, instead stating that "it appears that the parties have overdesignated confidential

documents and are seeking to seal information that is not truly sealable under the ‘compelling reasons’ standard.” A3. The district court directed the parties “to carefully scrutinize the documents [they] seek to seal” and file renewed motions. A3.

In the August 9 Order, the district court ruled on the parties’ renewed motions, denying them in substantial part. The district court acknowledged that Apple sought “to seal documents attached to non-dispositive motions that govern the admissibility of evidence at trial,” but ruled that it would apply the “compelling interest” standard to these documents because “the admissibility of evidence is such a closely contested issue in this trial.” A15. The district court largely declined to seal Apple’s confidential financial data, concluding that *Apple* had failed to “articulate[] facts that support a ‘compelling reason’” sufficient to overcome what it saw as the public’s “substantial interest in full disclosure.” A8-9; *see also* A15-19 (ruling on Apple’s requests to seal pre-trial filings based on “the Court’s earlier discussion” regarding trial exhibits) .

The court then denied *Samsung’s* separate renewed motion to seal portions of pre-trial filings without offering any analysis specific to the materials that Samsung had sought to seal or the arguments that Samsung had presented in support. The court instead referred to its prior discussion with respect to Apple’s motion. *See* A21 (“In general, the financial information that Samsung seeks to seal

is quite similar to the information that Apple had moved to seal, and accordingly the Court's rulings will be consistent ...."); A22-24 (ruling on Samsung's requests to seal).

These appeals followed.

### **SUMMARY OF ARGUMENT**

The district court's orders requiring disclosure of Samsung's confidential, trade-secret financial information are unfounded, legally erroneous, and an abuse of discretion. They should be reversed or vacated for either of two reasons.

*First*, it is undisputed that the portions of the documents that Samsung seeks to seal contain closely-held, trade-secret financial data, the release of which would grant Samsung's competitors and business partners a window into its costs, profit margins, and pricing strategies. Disclosure of these documents would give Samsung's competitors the ability to undercut it on price, while simultaneously harming Samsung's negotiation posture with respect to its vendors. Prevention of such competitive injuries is routinely found to constitute a "compelling reason" sufficient to justify sealing, and the district court abused its discretion in reaching the contrary conclusion.

*Second*, the district court erred as a matter of law by applying a heightened "compelling reasons" standard to Samsung's motions to seal. That standard typically applies when a party seeks to seal trial evidence or materials submitted in

connection with a dispositive motion (*e.g.*, one for summary judgment) because courts recognize a public right of access to documents that form the basis of the court's resolution of a dispute and its ultimate judgment. But this presumption of access disappears when the motion to seal concerns exhibits attached to a non-dispositive motion (such as one *in limine* or to exclude an expert witness), the resolution of which will not directly determine the outcome of the case. Governing Ninth Circuit law (which applies here) accordingly provides that materials submitted in connection with non-dispositive motions may be sealed upon a showing of "good cause." The district court failed to heed this rule, applying the "compelling reasons" standard even to materials that were filed only in connection with non-dispositive motions. This legal error at the very least necessitates vacatur and remand, so that the materials associated with the non-dispositive motions may be evaluated under the correct standard.

### **STANDARD OF REVIEW**

This Court reviews a district court's decision regarding the sealing of documents for abuse of discretion. *In re Violation of Rule 28(d)*, 635 F.3d 1352, 1358 (Fed. Cir. 2011); *accord Kamakana*, 447 F.3d at 1178 n.3. An abuse of discretion occurs where the district court "ma[kes] a clear error of judgment in weighing relevant factors or exercise[s] its discretion based upon an error of law or clearly erroneous factual findings." *Innogenetics, N.V. v. Abbott Labs.*, 512 F.3d

1363, 1379 (Fed. Cir. 2008) (citation and internal quotation marks omitted). “To the extent the court’s decision is based upon an issue of law, [the Court] review[s] that issue *de novo*.” *Sciele Pharma Inc. v. Lupin Ltd.*, 684 F.3d 1253, 1259 (Fed. Cir. 2012).

## ARGUMENT

### **I. THE DISTRICT COURT ABUSED ITS DISCRETION IN ORDERING THE UNSEALING OF SAMSUNG’S CONFIDENTIAL DOCUMENTS CONTAINING TRADE SECRETS**

Under Ninth Circuit authority,<sup>10</sup> the standard applicable to a motion to seal varies based on the stage of the proceedings. A party must show “good cause” to seal documents submitted in connection with a non-dispositive motion, as “those documents are often ‘unrelated, or only tangentially related, to the underlying cause of action.’” *Kamakana*, 447 F.3d at 1179-80 (citation omitted). Documents submitted in connection with a dispositive motion (or at trial), however, may be sealed only for “compelling reasons” 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.’” *Id.* at 1179 (citation omitted).

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<sup>10</sup> In resolving a “procedural matter that [is] not unique to patent issues,” this Court applies the law of the regional Court of Appeals—here, the Ninth Circuit. *In re Regents of Univ. of Cal.*, 101 F.3d 1386, 1390 n.2 (Fed. Cir. 1996).



For the reasons discussed in Part II, *infra*, the “good cause” standard is applicable to many of the documents at issue here. But even assuming *arguendo* that the “compelling reasons” standard applies to all of Samsung’s sealing requests, the district court abused its discretion by failing to find that such reasons exist on this record. The documents at issue undisputedly contain sensitive, confidential, and trade-secret information, and their release would cause immense harm to Samsung’s competitive standing.

**A. Samsung Presented Compelling Reasons To Seal The Confidential Financial Information In The Documents At Issue**

The Ninth Circuit has held that “compelling reasons” for sealing exist whenever the release of particular “court files *might have become* a vehicle for improper purposes,’ such as the use of records to gratify private spite, promote public scandal, circulate libelous statements, or *release trade secrets.*” *Kamakana*, 447 F.3d at 1179 (quoting *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 598 (1978)) (emphasis added); *see also Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1162 (9th Cir. 2011) (“publication of materials that could result in infringement upon trade secrets has long been a factor that would overcome” presumption of public access). “The most commonly accepted definition of trade secrets,” *Aronson v. Quick Point Pencil Co.*, 440 U.S. 257, 266 (1979), which the Ninth Circuit has applied in the sealing context, *In re Elec. Arts, Inc.*, 298 Fed. App’x 568, 569 (9th Cir. 2008) (unpublished), is found in comment b to section 757 of

the first Restatement of Torts. *Accord, e.g., Union Oil Co. of Cal. v. Fed. Power Comm'n*, 542 F.2d 1036, 1044 (9th Cir. 1976); *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir. 1972). The Restatement defines “trade secret” as “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.” RESTATEMENT OF TORTS § 757, cmt. b (1939) (emphasis added). To determine whether a given piece of information is a trade secret, the Restatement suggests considering factors such as:

(1) the extent to which the information is known outside of [the holder’s] business; (2) the extent to which it is known by employees and others involved in his business; (3) the extent of measures taken by him to guard the secrecy of the information; (4) the value of the information to him and to his competitors; (5) the amount of effort or money expended by him in developing the information; (6) the ease or difficulty with which the information could be properly acquired or duplicated by others.

*Id.*<sup>11</sup>

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<sup>11</sup> Though it differs in certain respects, the more recent Restatement (Third) of Unfair Competition § 39 (1995) is consistent with the first Restatement regarding the basic definition of “trade secret”: “A trade secret is any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable and secret to afford an actual or potential economic advantage over others.” The Third Restatement further contemplates that “[a] trade secret can also relate to other aspects of business operations such as pricing and marketing techniques or the identity and requirements of customers.” *Id.* cmt. d. A trade secret warrants protection so long as it “provide[s] an actual *or potential* economic advantage over others who do not possess the information. *The advantage,*

These considerations are broad enough to cover all data that “relate[s] to the sale of goods or to other operations in the business,” including information as mundane as a “list of customers” or “a method of bookkeeping or other office management.” *Id.* Thus, for example, in *In re Electronic Arts*, the Ninth Circuit stated that “pricing terms, royalty rates, and guaranteed minimum payment terms ... plainly fall[] within the definition of ‘trade secrets,’” and held that a district court had abused its discretion in denying sealing of such information. 298 Fed. App’x at 569. Indeed, such data is both a paradigmatic trade secret and the precise sort of information that could be used to harm a business’s competitive standing—both of which suffice to overcome the limited public interest in disclosure and thus to justify sealing.

The documents at issue here, which synthesize Samsung’s confidential and proprietary per-product revenue, pricing, and cost information, fall squarely in the realm of trade secrets. They are not publicly available, and the information they contain is walled off even from the vast majority of Samsung’s employees. A4617.<sup>12</sup> The exhibits are extremely valuable to Samsung, as their data guides the

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*however, need not be great.” Id. cmt. e (emphasis added). One of the most relevant sources of information about the value and secrecy of a piece of information for which protection is sought is the extent to which the holder of a secret takes precautions to maintain its secrecy. Id. cmt. g.*

<sup>12</sup> Certain of Samsung’s raw financial data was admitted at trial with respect to damages. The documents at issue on appeal differ materially from this

company's pricing, distribution, financial planning, and other business decisions. *See* A4607-08; A4617-19. Conversely, their release would be a windfall to Samsung's vendors, buyers, and competitors, who would gain unearned insight into Samsung's pricing strategies and negotiation positions—insight that they could then use to Samsung's substantial detriment. A4618. The documents contain trade secrets, a fact that alone is sufficient to establish “compelling reasons” for sealing the selected portions. *Kamakana*, 447 F.3d at 1179; *In re Elec. Arts*, 298 Fed. App'x at 569-70.

Even if the technical definition of trade secrets were not met, the same essential considerations would support reversal of the district court's orders. “Compelling reasons” exist where the documents to be sealed are “sources of business information that *might harm a litigant's competitive standing.*” *Nixon*, 435 U.S. at 598 (emphasis added). The documents in question easily satisfy this standard. For instance, a competitor could use Samsung's pricing and profit information to price its products at a level that Samsung would be unable profitably to match, thus forcing Samsung either to lose customers or to sell its products at a loss. A4607-08; A4618. Per-product profit data would furthermore

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trial evidence, as they contain syntheses of the raw data, and thus are substantially more accessible and understandable than any information in the public record. The documents at issue on appeal therefore could be more readily used against Samsung by its competitors and partners than any information presently available to the public.

inform Samsung's competitors as to which of its products are performing best and worst, allowing them to target such product lines specifically in its advertising campaigns and marketing strategies. Samsung's vendors and clients would be able to do much the same thing in reverse, using their newfound knowledge of Samsung's costs and profit margins as leverage to negotiate better terms than they would otherwise have been able to credibly demand. *Id.* These harms are neither speculative nor uncertain, and avoiding this demonstrable competitive injury is a "compelling reason" sufficient to justify sealing the information at issue on appeal.<sup>13</sup>

Courts in the Ninth Circuit consistently find that the risk of harm from the release of just this sort of information is sufficient to meet the "compelling reasons" test. For instance, one court recently concluded that a company had established "compelling reasons" by showing that competitors could use its production data, revenue information, and "sales and production numbers" to calibrate their pricing and distribution methods so as to undercut the defendant in the market. *Bean v. John Wiley & Sons, Inc.*, No. CV 11-08028-PCT-FJM, 2012 WL 1078662, \*5-6 (D. Ariz. Mar. 30, 2012). Another court recently concluded

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<sup>13</sup> If these predictable harms are nonetheless somewhat uncertain in extent, it is because rigorous analysis is prevented by the fact that Samsung's suppliers and competitors closely guard *their* price, cost, and profit data. Confidentiality is the industry standard, and breaking that standard here would uniquely injure Samsung while granting the rest of the market an informational windfall.

that detailed financial data concerning revenue and the costs of merchandise, royalty, promotional, and personnel is sealable where a company's competitors could use the information to replicate its business practices. *Bauer Bros. LLC v. Nike, Inc.*, No. 09cv500-WQH-BGS, 2012 WL 1899838, \*3-4 (S.D. Cal. May 24, 2012); *see also, e.g., In re Elec. Arts*, 298 Fed. App'x at 569 (a contract's "pricing terms, royalty rates, and guaranteed minimum payment terms" were the "precise sort of information" that is subject to sealing for the purpose of protecting a litigant's competitive standing); *TriQuint Semiconductor, Inc. v. Avago Techs., Ltd.*, No. CV 09-1531-PHX-JAT, 2011 WL 6182346, \*3-7 (D. Ariz. Dec. 13, 2011) (release of documents showing, *inter alia*, sales volumes, market analysis, capital expenditures, cost, and manufacturing capacity would cause competitive harm and thus met the "compelling reasons" standard); *Richardson v. Mylan Inc.*, No. 09-CV-1041-JM (WVG), 2011 WL 837148, \*2 (S.D. Cal. Mar. 9, 2011) (sealing "commercially sensitive information" that is "of comparatively little value to the general public in terms of enhancing its understanding [of] the judicial process") (alteration in original; internal quotation marks omitted); *Network Appliance, Inc. v. Sun Microsystems Inc.*, No. C-07-06053 EDL, 2010 WL 841274, \*3 (N.D. Cal. Mar. 10, 2010) (sealing material that would "do little to aid the public's understanding of the judicial process, but have the potential to cause

significant harm to [a party's] competitive and financial position within its industry"). The same reasoning applies here.

**B. The District Court's Rationales For Unsealing Rest On Flawed Or Inapplicable Assumptions**

As mentioned above, in denying sealing, the district court did not address Samsung's interests or arguments *at all*. The August 9 Order begins by rejecting *Apple's* arguments for sealing its information (A8-9), but with respect to *Samsung's* motions states without analysis that "the financial information that Samsung seeks to seal is quite similar to the information that Apple had moved to seal" (A21). In assuming that the release of Samsung's confidential financial documents would have the same effect on Samsung that the release of Apple's data would have on Apple, the district court ignored the fact that Apple and Samsung are different companies with different lines of business, different suppliers, and different customers. None of the district court's three rationales for denying *Apple's* motion is persuasive with respect to Samsung.

*First*, the court stated that Apple had relied on an assumption that its products are "perfectly interchangeable with those of its competitors, such that Apple would be forced to exactly match its competitors' prices," which the court rejected as unfounded. A8. But in fact the competitive harm that Samsung will suffer upon release of the documents in question does *not* depend on any such assumption. The tablet and smartphone markets are crowded, and entrants

compete in terms of both price and overall product quality. Disclosure of Samsung's pricing practices would enable its competitors to, for instance, set a less-costly product's price at a level below Samsung's cost, in order to lure away phone and tablet buyers who make choices based primarily on price. A4607-08; A4618. The products need not be "perfectly interchangeable" for this unfair use of unequal information to succeed, so the alleged assumption is not in fact a necessary one.<sup>14</sup> Moreover, the court's rejection of its own invented assumption focuses only on *competitors*, and thus ignores the injuries that Samsung will suffer as a result of its impaired negotiating position vis-à-vis its *business partners*.

*Second*, the district court's assertion that "predatory pricing schemes are rarely tried, and even more rarely successful" (A8 (quoting *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 589 (1986))), is inapposite. *Matsushita* involved an alleged conspiracy by several Japanese electronics manufacturers to predatorily fix prices in order to drive American firms out of the market. 475 U.S. at 577-78. The court defined "predatory pricing" to mean "pricing below some appropriate measure of cost"—in essence, pricing products at

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<sup>14</sup> To the extent that "interchangeability" is a pertinent consideration, it bears mention that Samsung's products (which run on the widely available Android operating system) are closer cousins to its competitors' than are Apple's products (which run on its own proprietary iOS platform). Even if the iPhone and iPad are meaningfully distinct from other smartphones and tablets, it does not follow that *Samsung's* Android products are not essentially fungible with others in that market segment.



a level one's competitors cannot match in order to force them out of the market, with the goal of reaping monopoly profits at a later date. *Id.* at 584 & n.8. Such a scheme is unlikely to succeed (and is thus rarely attempted) because the predator must make a substantial investment in the form of accepting significant business losses for an extended period of time, with only the speculative hope of recovering them once it achieves market dominance. *See id.* at 589. This case does not fit that mold: the competitive injury that Samsung will suffer does not depend on an attempt at "predatory pricing" in the sense considered by the Court in *Matsushita*. A competitor need not drive Samsung out of the market to gain an unfair advantage, and could succeed merely by claiming new customers or forcing Samsung to lower the prices on its highest-margin products. By the same token, a competitor need not set its prices below its own cost in order to gain market share; it may be able to undercut Samsung while continuing to turn a profit. The considerations that make a trade conspiracy unlikely do not apply in the case of a competitor's ability to take advantage of confidential information. (And, again, the district court's argument focuses only on Apple's competitors, ignoring the effects on Samsung's relationships with its business partners.) *Matsushita* has no application here.

*Third*, the district court was mistaken to suggest that past financial data cannot "meaningfully predict ... *future* business plans." A9. But Samsung's

business strategy and pricing structures are not limited to the life spans of specific products. Public access to Samsung's documents would provide its competitors and business partners with an invaluable window into previously confidential strategies and tactics, and would impair Samsung's ability to retain continuity in those areas moving forward. In short, release of these documents would harm Samsung's interests even if they do not precisely predict the future.

The only entities with a real interest in poring over Samsung's trade-secret information are its suppliers and competitors—and that interest is not a legitimate one. Samsung's need for secrecy, and indeed the public interest in the role that robust trade-secrets protection plays in maintaining a fair and competitive market, far outweigh whatever limited public value the release of Samsung's private financial information might hold. Compelling reasons to seal the per-product revenue, pricing, and cost information in question therefore exist, and the district court abused its discretion in denying Samsung's motions. The Unsealing Orders should be reversed.

## **II. THE DISTRICT COURT APPLIED THE WRONG LEGAL STANDARD IN DENYING SAMSUNG'S MOTIONS TO SEAL**

Even if the district court had been correct to conclude that "compelling reasons" do not exist here, it nevertheless erred as a matter of law by applying that heightened standard to *all* of the documents that are subject to this appeal. The Ninth Circuit recognizes a "strong presumption" of access to judicial records

relating to “the resolution of a dispute on the merits,” which it implements through a requirement that a party demonstrate that “compelling reasons” exist to seal such information or documents. *See Kamakana*, 447 F.3d at 1179. This presumption, however, does not apply to judicial records that are “unrelated, or only tangentially related” to a party’s claims, and thus documents submitted in connection with non-dispositive motions may be sealed upon a showing of good cause. *Id.* at 1179-80 (internal quotation marks omitted); *accord Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135-36 (9th Cir. 2003); *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002). And there is still less legitimate interest in public disclosure of evidence and information that is *not* admitted at trial. *Cf. United States v. McVeigh*, 119 F.3d 806, 813 (10th Cir. 1997) (the public’s right of access “does not extend to ... evidence actually ruled inadmissible”).<sup>15</sup>

The legal standard a court should apply thus depends on the nature of the information that is covered by a motion to seal: Admitted evidence and exhibits to

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<sup>15</sup> The Ninth Circuit has recently reaffirmed that the controlling consideration in determining whether to seal a given exhibit is not the label applied to the motion to which it is attached, but whether the motion itself is effectively dispositive. *See In re Midland Nat’l Life Ins. Co Annuity Sales Practices Litig.*, 686 F.3d 1115, 1119-20 (9th Cir. 2012). Thus a *Daubert* motion may be considered “dispositive” for sealing purposes if its resolution will effectively resolve a summary judgment motion. *Id.* The *Daubert* motion relevant to the sealing motions here had no effect on summary judgment, and thus the district court should have applied to the “good cause” standard to materials Samsung sought to be sealed in connection with that filing.

dispositive motions are presumptively public and are thus sealable on a demonstration of “compelling reasons,” but documents that will not be pertinent to the underlying causes of action may be sealed upon a lesser, “good cause” showing. *Kamakana*, 447 F.3d at 1179-80.

In this case, most of the documents that were subject to Samsung’s motions to seal related to non-dispositive pre-trial motions. None of the documents in question were introduced into evidence at trial, and thus their disclosure would not aid public understanding of the judgment. The public has little or no interest in access to these documents, and the justification for the presumption of openness and a heightened standard of proof is largely absent. The question whether to grant Samsung’s motions to seal materials submitted in connection with non-dispositive motions should have been evaluated under a “good cause” standard (*see Kamakana*, 447 F.3d at 1179)—a standard that is amply met here given the sensitive information at issue and its potential for misuse (*see supra*, Part I.A)—and the district court erred in applying a heightened standard to these materials.

The district court attempted to justify its application of a “compelling reasons” standard on the ground that some of the covered documents related to the “closely contested issue” of “the admissibility of evidence.” A15. This misses the mark. The “contest” regarding admissibility of evidence took place outside the view of the jury, and the documents at issue were never admitted at trial. The mere

fact that the parties contested an issue does not justify imposition of a higher standard of proof. The presumption of openness is grounded specifically in the public's interest in understanding the *outcome of a case*, and that interest does not exist in connection with a non-dispositive pretrial motion concerning (for instance) the admissibility of evidence. See *Kamakana*, 447 F.3d at 1179; *McVeigh*, 119 F.3d at 813.

The district court also suggested that the public had an interest in the financial information the parties sought to seal because it was “essential to each party’s damages calculations.” A9. But the documents subject to this appeal were not admitted into evidence at trial as proof of damages and thus the jury did not rely upon them in reaching its verdict. Thus, the Unsealing Orders should be reversed or at the very least vacated and remanded for application of the correct legal standard.

### **CONCLUSION**

The Court should reverse the Unsealing Orders. In the alternative, the Court should vacate the Unsealing Orders and remand the matter to the district court for consideration under the correct legal standard.

Dated: October 1, 2012

Respectfully submitted,

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**ORAL ARGUMENT STATEMENT**

Pursuant to Fed. R. App. P. 34(a), (f), Defendants-Cross Appellants state that they do not believe oral argument is necessary to decide this appeal and hereby consent to submission of the case for decision on the briefs.

**PROOF OF SERVICE**

The undersigned hereby certifies that on December 11, 2012, I electronically filed the foregoing CORRECTED BRIEF FOR DEFENDANTS-CROSS APPELLANTS with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

/s/ William B. Adams  
William B. Adams



**CERTIFICATE OF COMPLIANCE**

The undersigned hereby certifies that the foregoing Corrected Brief for Defendants-Cross Appellants complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B). The word-processing system used to prepare the document, excluding Table of Contents, Table of Authorities, and the Certificate of Interest, calculates that it contains the following number of words: 6,706.

/s/ William B. Adams  
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