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APPLE INC.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN JOSE DIVISION

14 THE APPLE IPOD iTUNES ANTI-TRUST
LITIGATION.

Case No. C 05-00037 JW (HRL)

[CLASS ACTION]

16 **DEFENDANT'S RESPONSE TO**
17 **PLAINTIFFS' AMENDED**
18 **ADMINISTRATIVE MOTION TO**
SEAL

19 **Judge:** Honorable Howard R. Lloyd

20 **Date:** January 18, 2011

Time: 10:00 a.m.

21 **Place:** Courtroom 2-5th Floor

22
23 **I. INTRODUCTION**

24 Pursuant to Local Rule 79-5, Apple supports Plaintiffs' Amended Administrative Motion
25 to File Under Seal Portions of Plaintiffs' Opposition to Apple Inc.'s Motion for Protective Order
26 Preventing Deposition of Steve Jobs (Dkt. 404), Portions of the Bernay Declaration and Exhibits
27 1-4 and 6-11 Pursuant to Local Rule 79-5(b) and (c) (Dkt. 402), specifically the portions of that
28 Opposition and Declaration that refer to information that Apple designated as "Confidential—
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1 Attorneys Eyes Only" under the Stipulation and Protective Order Regarding Confidential
2 Information ("Protective Order") entered June 13, 2009 (Dkt. 112), and which the Court
3 previously sealed in Apple's Motion to Dismiss and the declaration of Jeffrey Robbin in support
4 thereof. Dkt. 340.

5 Apple files this response and the accompanying Declaration of Eddy Cue in Support of
6 Defendant's Response to Plaintiffs' Amended Administrative Motion to File Under Seal ("Cue
7 Declaration" or "Cue Decl.") in support of a narrowly tailored order authorizing sealing those
8 documents, on the grounds that there is good cause to protect the confidentiality of that
9 information. The proposed sealing order is based on the Protective Order in this action and proof
10 that particularized injury to defendant will result if the sensitive information is publicly released.

11 **II. STANDARD**

12 Under Federal Rule of Civil Procedure 26(c), this Court has broad discretion to permit
13 sealing of court documents to protect "a trade secret or other confidential research, development,
14 or commercial information." Fed. R. Civ. P. 26(c). Based on this authority, the Ninth Circuit has
15 "carved out an exception to the presumption of access to judicial records for a sealed discovery
16 document [attached] to a non-dispositive motion." *Navarro v. Eskanos & Adler*, No. C-06 02231
17 WHA (EDL), 2007 U.S. Dist. LEXIS 24864, at *6 (N.D. Cal. March 22, 2007) (citing *Kamakana*
18 *v. Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006)).

19 **III. ARGUMENT**

20 **A. There is Good Cause to Support Filing under Seal.**

21 The Cue Declaration establishes good cause to permit filing under seal. It establishes that
22 the redacted portions of Plaintiffs' Opposition to Apple's Motion for Protective Order Preventing
23 the Deposition of Steve Jobs (Dkt. 404) and the Bernay Declaration (Dkt. 405) contain highly
24 confidential and sensitive information that must be kept confidential in order to avoid causing
25 substantial harm to Apple. *See* Cue Decl., ¶ 3-9.

26 The redacted information specifically relates to (1) sensitive contract terms and
27 communications with record labels; (2) updates to Apple's FairPlay digital rights management
28 technology; and (3) decisions by Apple employees regarding Apple's business strategy. *See* Cue

1 Decl., ¶ 3.

2 **1. The Redacted Information Includes Sensitive Contract Terms and**
3 **Highly Confidential Communications with Record Labels.**

4 The redacted portions of pages 4 and 10-11 of Plaintiffs' Opposition to Apple Inc.'s
5 Motion for Protective Order (Dkt. 404) and Exhibits 1 and 6-7 to the Bernay Declaration (Dkt.
6 405) contain highly confidential and commercially sensitive business information, including
7 information regarding sensitive contract terms and communications with record labels. *See* Cue
8 Decl., ¶ 4.

9 The redacted contract terms and communications with record labels are highly
10 confidential and should not be publicly disclosed. *See* Cue Decl., ¶ 5. Apple's contracts with
11 record labels are subject to confidentiality provisions and were produced to plaintiffs pursuant to
12 the Protective Order. *Id.* Similarly, Apple's communications with the record labels contain
13 highly confidential, commercially sensitive business information and were produced to plaintiffs
14 pursuant to the Protective Order. *Id.* The public disclosure of this highly confidential
15 information would cause substantial harm to Apple. *Id.*

16 **2. The Redactions Include Highly Confidential Information Regarding**
17 **Updates to FairPlay.**

18 The redactions on Pages 4-8 of Plaintiffs' Opposition to Apple Inc.'s Motion for Protective
19 Order (Dkt. 404) and Page 1 and Exhibits 2, 4, 5, 6, 7, 8, 9, 10, and 11 to the Bernay Declaration
20 (Dkt. 405) include highly confidential and commercially sensitive business information, including
21 information regarding updates to Apple's FairPlay digital rights management technology. *See*
22 Cue Decl., ¶ 6.

23 The redacted information regarding updates to FairPlay is highly confidential and should
24 not be publicly disclosed. *See* Cue Decl., ¶ 7. FairPlay's technology is a highly protected trade
25 secret, and Apple uses physical and electronic controls to protect it. *Id.* The efficacy of FairPlay
26 is dependent on the confidentiality of information regarding its operation and maintenance. *Id.*
27 Only a few Apple employees have access to and work on FairPlay technology, and they work in a
28 restricted area at Apple's headquarters. *Id.* The public disclosure of this highly confidential

1 information would cause substantial harm to Apple. *Id.*

2 For these reasons, the Court has previously granted Apple's motions to file under seal
3 information relating to updates to FairPlay. On March 12, 2010, the Court issued an order to seal
4 descriptions of updates to FairPlay in the declaration of Jeffrey Robbin in support of Apple's
5 Motion to Dismiss or Alternatively, for Summary Judgment and the documents attached thereto,
6 and Apple's Motion to Dismiss (Dkt. 340). The Court also granted motions to seal similar
7 information in Plaintiffs' Opposition (Dkt. 353) and Apple's Reply (Dkt. 361).

8 **3. The Redactions Include Highly Confidential and Commercially**
9 **Sensitive Information Relating to Key Business Decisions at Apple.**

10 The redactions on Pages i, 1, 3, 6-9, and 11-12 of Plaintiffs' Opposition to Apple Inc.'s
11 Motion for Protective Order (Dkt. 404) and Page 2 and Exhibits 2, 4, 5, 6,7, 8, 9, 10, and 11 to the
12 Bernay Declaration (Dkt. 405) contain highly confidential and commercially sensitive business
13 information, including information relating to business decisions or strategies at Apple. *See* Cue
14 Decl., ¶ 8.

15 The redacted information relating to business decisions and strategy is highly confidential
16 and should not be publicly disclosed. *See* Cue Decl., ¶ 9. The information was produced to
17 plaintiffs pursuant to the Protective Order. The information produced to plaintiffs is non-public
18 information from a public company that should remain confidential. Harm to Apple would result
19 from the public disclosure of the redacted information contained in these documents. The public
20 disclosure of information regarding Apple's business strategies would put Apple at a significant
21 business disadvantage.

22 **IV. CONCLUSION**

23 Defendant respectfully requests that this Court grant Plaintiffs' Amended Administrative
24 Motion to File Under Seal Portions of Plaintiffs' Opposition to Apple Inc.'s Motion for the
25 Protective Order Preventing the Deposition of Steve Jobs, Portions of the Bernay Declaration and
26 Exhibits 1-4 and 6-11 Pursuant to Local Rule 79-5(b) and (c).

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Dated: December 23, 2010

Jones Day

By: /s/Michael Scott
Michael Scott

Attorneys for Defendant
APPLE INC.