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11 UNITED STATES DISTRICT COURT
 12 NORTHERN DISTRICT OF CALIFORNIA
 13 OAKLAND DIVISION

15 **THE APPLE IPOD ITUNES ANTI-
 16 TRUST LITIGATION**

Lead Case No. C-05-0037-YGR
 [CLASS ACTION]

**DEFENDANT’S RESPONSE TO
 PLAINTIFFS’ ADMINISTRATIVE
 MOTION TO SEAL**

28

1 **I. INTRODUCTION**

2 Pursuant to Local Rule 79-5, Apple Inc. files this statement and the Declaration of Amir
3 Amiri in support of Plaintiffs’ Administrative Motion to File Under Seal Portions of Plaintiffs’
4 *Daubert* Motion to Exclude Certain Opinion Testimony of Kevin M. Murphy and Robert H.
5 Topel and Exhibits 1-10 to the Sweeney Declaration in support thereof (ECF No. 737,
6 “Administrative Motion”). Specifically, Apple requests the Court grant Plaintiffs leave to file
7 under seal the portions of Plaintiffs’ motion and the exhibits filed in support thereof that refer to
8 information that Apple designated as “Confidential—Attorneys Eyes Only” under the Stipulation
9 and Protective Order Regarding Confidential Information (“Protective Order”) entered June 13,
10 2007 (ECF No. 112). Apple files this statement and the accompanying Amiri Declaration in
11 support of a narrowly tailored order authorizing sealing those documents, on the grounds that
12 there are compelling reasons and good cause to protect the confidentiality of documents relating
13 to Apple’s pricing data and business strategy. The proposed sealing order is based on the
14 Protective Order in this action and proof that particularized injury to Apple will result if the
15 sensitive information is publically released.

16 The Court previously sealed similar documents in connection with Plaintiffs’ Motion
17 Regarding Schedule for Class Certification (ECF No. 491), Plaintiffs’ Renewed Motion for Class
18 Certification (ECF No. 525) and Apple’s Opposition to Plaintiffs’ Renewed Motion for Class
19 Certification (ECF No. 526). The Amiri Declaration attaches as exhibits declarations from Apple
20 employees that the Court previously relied on in determining the sealability of Apple documents
21 in those orders.¹

22 **II. STANDARD**

23 Under Federal Rule of Civil Procedure 26(c), this Court has broad discretion to permit
24 sealing of court documents to protect “a trade secret or other confidential research, development,
25

26 ¹ The nature of the material at issue in the previously filed declarations is
27 indistinguishable from the types of documents and data at issue in the Plaintiffs’ present motion
28 and Apple’s pending Administrative Motion to File Under Seal Portions of its Motion for
Summary Judgment and to Exclude the Expert Testimony of Roger G. Noll (ECF No. 740) and
exhibits filed in support thereof.

1 or commercial information.” Fed. R. Civ. P. 26(c)(1)(G). Where the documents are submitted in
2 connection with a dispositive motion, the Ninth Circuit has ruled that documents should be sealed
3 when “compelling reasons” exist for protecting information from public disclosure. *Kamakana v.*
4 *City and County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006). For documents submitted
5 with a non-dispositive motion, a showing of “good cause” under Federal Rule of Civil Procedure
6 26(c) is sufficient. *Id.* at 1179-80.

7 **III. APPLE’S CONFIDENTIAL INFORMATION MEETS BOTH THE “GOOD**
8 **CAUSE” AND “COMPELLING REASONS” STANDARDS FOR SEALING**
9 **DOCUMENTS**

10 As described in the exhibits accompanying the Amiri Declaration, the sealed portions of
11 Plaintiffs’ motion and exhibits thereto contain confidential and commercially sensitive
12 information relating to Apple’s pricing policies and business strategies. Apple keeps the sealed
13 information confidential and the public disclosure of this information would cause Apple harm by
14 giving third-parties (including individuals responsible for competitive decision-making) insights
15 into the confidential and sensitive aspects of Apple’s strategies, competitive positions, and pricing
16 policies, allowing these third-parties to potentially gain an unfair advantage in dealings with and
17 against Apple.

18 For example, information regarding iPod sales and pricing, including reseller pricing
19 programs (including any alleged price overcharges therein) is highly confidential and
20 commercially sensitive business information. *See* Amiri Decl., Ex. 1 at ¶ 2. The information was
21 produced to Plaintiffs pursuant to the Protective Order. *Id.* at ¶ 3. This information is non-public
22 information that should remain confidential. *Id.* The public disclosure of this information would
23 put Apple at a business disadvantage. *Id.* Similar information has previously been sealed in this
24 case. *See* ECF Nos. 491, 526.

25 Additionally, information regarding Apple business decisions or strategy, including iPod
26 pricing decisions and sales strategies at Apple (including any alleged price overcharges for
27 iPods), is highly confidential and commercially sensitive business information. *See* Amiri Decl.,
28 Ex. 2 at ¶ 2. The information was produced to plaintiffs pursuant to the Protective Order. *Id.* at ¶

1 3. This information is non-public information that should remain confidential. *Id.* The public
2 disclosure of information regarding Apple’s business and pricing strategies would put Apple at a
3 business disadvantage. *Id.* Similar information has previously been sealed in this case. *See* ECF
4 Nos. 525, 526.

5 Such sensitive pricing and business strategy information should be sealed to protect
6 Apple’s competitive advantage in the marketplace. *See Stout v. Hartford Life & Accident Ins. Co.*
7 *et al.*, No. CV 11-6186, 2012 U.S. Dist. LEXIS 172088, at *6-7 (N.D. Cal. Dec. 4, 2012)
8 (granting motion to seal documents containing confidential and proprietary pricing information
9 that could be used by competitors to their advantage); *In re Elec. Arts, Inc. v. U.S. Dist. Court for*
10 *the Northern Dist. of California*, 298 Fed. Appx. 568, 569 (9th Cir. 2008) (district court erred in
11 denying motion to seal portions of contract that contained pricing terms disclosure of which
12 posed harm to petitioner’s competitive standing); *Caplan v. CNA Fin. Corp.*, No. 2008 U.S. Dist.
13 LEXIS 119680, at *6-7 (N.D. Cal. Feb. 12, 2008) (granting motion to seal service contract
14 containing pricing information the “disclosure of [which could] permit a competitor to determine
15 the rates charged by [defendant] for services”).

16 **IV. CONCLUSION**

17 For the foregoing reasons, Apple respectfully requests that this Court grant Plaintiffs’
18 Administrative Motion to File Under Seal Portions of Plaintiffs’ *Daubert* Motion to Exclude
19 Certain Opinion Testimony of Kevin M. Murphy and Robert H. Topel and Exhibits 1-10 to the
20 Sweeney Declaration in support thereof.

21 Dated: December 24, 2013

Respectfully submitted,

Jones Day

24 By: /s/ David C. Kiernan

25 David C. Kiernan

26 Counsel for Defendant
27 APPLE INC.