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

14 THE APPLE IPOD iTUNES ANTI-TRUST
 LITIGATION.

Case No. C 05-00037 YGR

[CLASS ACTION]

**DEFENDANT’S RESPONSE TO
 PLAINTIFFS’ ADMINISTRATIVE
 MOTION TO SEAL (ECF NO. 763)**

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1 **I. INTRODUCTION**

2 Pursuant to Local Rule 79-5, Apple supports Plaintiffs’ Administrative Motion to File
3 Under Seal Plaintiffs’ Reply Memorandum in Support of its *Daubert* Motion to Exclude Certain
4 Opinion Testimony of Kevin M. Murphy and Robert H. Topel and Exhibit 1 to the Declaration of
5 Bonny E. Sweeney (“Sweeney Declaration”) in support thereof (ECF No. 763, “Administrative
6 Motion”). Specifically, Apple supports sealing the portions set out below of the reply
7 memorandum (ECF No. 763-3) that refer to, summarize, paraphrase, or otherwise relate to
8 information that Apple designated as “Confidential—Attorneys Eyes Only” under the Protective
9 Order (ECF No. 112) and Supplemental Protective Order (ECF No. 395). Apple does not request
10 sealing Exhibit 1 to the Sweeney Declaration. Apple has lodged with the Court redacted portions
11 of the reply memorandum and a proposed order authorizing Plaintiffs to file the same under seal.

12 Apple files this response and the accompanying declaration of David C. Kiernan in
13 support of a narrowly tailored order authorizing sealing the reply memorandum, on the grounds
14 that there are compelling reasons and good cause to protect the confidentiality of sensitive
15 information contained or referred to in the redacted portions of the Reply. The proposed sealing
16 order filed herewith is based on the Protective Order and Supplemental Protective Order and
17 proof that particularized harm to Apple will result if the sensitive information is publicly released.
18 Similar information has been previously sealed in this case. *See* Kiernan Decl. ¶ 3. For the
19 Court’s convenience, the Kiernan declaration attaches declarations in support of previous motions
20 to file under seal, which establish the sealability of such information.

21 **II. STANDARD**

22 Under Federal Rule of Civil Procedure 26(c), this Court has broad discretion to permit
23 sealing of court documents to protect “a trade secret or other confidential research, development,
24 or commercial information.” Fed. R. Civ. P. 26(c)(1)(G). Where the documents are submitted in
25 connection with a dispositive motion, the Ninth Circuit has ruled that documents should be sealed
26 when “compelling reasons” exist for protecting information from public disclosure. *Kamakana v.*
27 *City and County of Honolulu*, 447 F.3d 1172, 1178-79 (9th Cir. 2006). For documents submitted
28 with a non-dispositive motion, a showing of “good cause” under Federal Rule of Civil Procedure

1 26(c) is sufficient. *Id.* at 1179-80.

2 **III. THERE ARE COMPELLING REASONS AND GOOD CAUSE TO SUPPORT**
3 **FILING PORTIONS OF THE REPLY MEMORANDUM UNDER SEAL**

4 As described in the exhibits accompanying the Kiernan Declaration, the portions of
5 Plaintiffs' reply memorandum that Apple requests sealed, contain confidential and commercially
6 sensitive information relating to Apple's pricing policies and alleged overcharges for certain
7 Apple products. Apple keeps information relating to its pricing policies confidential and the
8 public disclosure of information relating to or otherwise disclosing the contents of such policies
9 would cause Apple harm. Kiernan Decl., Ex. 1. The disclosure of such information could give
10 third-parties (including individuals responsible for competitive decision-making) insights into the
11 confidential and sensitive aspects of Apple's pricing policies, allowing these third-parties to
12 potentially gain an unfair advantage in dealings with and against Apple.

13 Additionally, information regarding Apple business decisions or strategy, including iPod
14 pricing decisions and sales strategies at Apple (including any alleged price overcharges for
15 iPods), is highly confidential and commercially sensitive business information. *See* Kiernan
16 Decl., Exs. 2-3. The information was produced to plaintiffs pursuant to the Protective Order. *Id.*
17 This information is non-public information that should remain confidential. *Id.* The public
18 disclosure of information regarding Apple's business and pricing strategies would put Apple at a
19 business disadvantage. *Id.* Similar information has previously been sealed in this case. *See* ECF
20 Nos. 525, 526.

21 Such sensitive pricing and business strategy information should be sealed to protect
22 Apple's competitive advantage in the marketplace. *See Stout v. Hartford Life & Accident Ins. Co.*
23 *et al.*, No. CV 11-6186, 2012 U.S. Dist. LEXIS 172088, at *6-7 (N.D. Cal. Dec. 4, 2012)
24 (granting motion to seal documents containing confidential and proprietary pricing information
25 that could be used by competitors to their advantage); *In re Elec. Arts, Inc. v. U.S. Dist. Court for*
26 *the Northern Dist. of California*, 298 Fed. Appx. 568, 569 (9th Cir. 2008) (district court erred in
27 denying motion to seal portions of contract that contained pricing terms disclosure of which
28 posed harm to petitioner's competitive standing); *Caplan v. CNA Fin. Corp.*, No. 2008 U.S. Dist.

1 LEXIS 119680, at *6-7 (N.D. Cal. Feb. 12, 2008) (granting motion to seal service contract
2 containing pricing information the “disclosure of [which could] permit a competitor to determine
3 the rates charged by [defendant] for services”).

4 **IV. CONCLUSION**

5 For the foregoing reasons, Apple respectfully requests that this Court grant Plaintiffs’
6 Administrative Motion to File Under Seal Portions of Plaintiffs’ Reply Memorandum in Support
7 of Plaintiffs’ *Daubert* Motion to Exclude Certain Opinion Testimony of Kevin M. Murphy and
8 Robert H. Topel consistent with the foregoing.

9 Dated: February 4, 2014

Jones Day

11 By: /s/ David C. Kiernan
12 David C. Kiernan

13 Attorneys for Defendant
14 APPLE INC.

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