

1 KARL OLSON (SBN 104760)
 2 kolson@rocklawcal.com
 3 XINYING VALERIAN (SBN 254890)
 4 xvalerian@rocklawcal.com
 5 RAM, OLSON, CEREGHINO & KOPCZYNSKI LLP
 6 555 Montgomery Street, Suite 820
 7 San Francisco, California 94111
 8 Telephone: (415) 433-4949
 9 Facsimile: (415) 433-7311

10 *Attorneys for Third-Party REUTERS AMERICA LLC*

11 UNITED STATES DISTRICT COURT

12 NORTHERN DISTRICT OF CALIFORNIA, SAN JOSE

13 APPLE INC., a California corporation,

14 Plaintiff,

15 v.

16 SAMSUNG ELECTRONICS CO., LTD., a
 17 Korean Business entity; SAMSUNG
 18 ELECTRONICS AMERICA, INC., a New
 19 York corporation; SAMSUNG
 20 TELECOMMUNICATIONS AMERICA,
 21 LLC, a Delaware limited liability company,

22 Defendants.

CASE NO. 11-cv-01846-LHK

**THIRD PARTY REUTERS AMERICA
 LLC'S OPPOSITION TO VARIOUS
 THIRD PARTY MOTIONS TO SEAL**

Date: July 27, 2012
 Time: 3:00 p.m.
 Place: Courtroom 1, 5th Floor
 Judge: **Hon. Lucy H. Koh**

23 **I. INTRODUCTION**

24 Various third parties have filed administrative motions to seal, primarily based upon the
 25 claim that they have license agreements with either Apple or Samsung (or both) whose terms
 26 should remain confidential. Well-settled rules govern the disposition of these motions and, we
 27 respectfully submit, call for their denial.

28 **II. NON-PARTY RELIANCE UPON PROTECTIVE ORDER OR
 CONFIDENTIALITY AGREEMENT IS UNREASONABLE AND NOT A
 COMPELLING REASON TO SEAL.**

First, as the Ninth Circuit explained in *Kamakana v. City and County of Honolulu*, 447
 F.3d 1172, 1183 (9th Cir. 2006), “we have held that a non-party’s reliance on a blanket protective
 order is unreasonable and is not a ‘compelling reason’ that rebuts the presumption of access.”
 Thus, even if the third parties negotiated contracts with Apple or Samsung providing for

1 confidentiality, those agreements cannot and do not control in the arena of a public courtroom.
2 “[T]he claimed reliance on the order is not a ‘compelling reason’ that rebuts the presumption of
3 access.” (*Id.* at 1183; *see also Littlejohn v. BIC Corporation*, 851 F.2d 673, 676 (3rd Cir. 1988).

4 **III. ALLEGED CONFIDENTIALITY IS NOT WITHOUT MORE A TRADE SECRET**
5 **AND NOT A COMPELLING REASON TO SEAL.**

6 Second, talismanic incantations that information is a trade secret are not enough to meet
7 the “compelling reasons” standard required to rebut the presumption of openness. As the Third
8 Circuit explained in *Littlejohn v. BIC Corporation*, 851 F.2d 673, 685, “documents do not
9 contain trade secrets merely because they are confidential.” Thus, the mere fact that a line from
10 an expert’s exhibit may contain a financial term from a licensing arrangement that a third party
11 would prefer to keep under wraps is not enough to meet the “compelling reasons” standard
12 required for sealing.

13 As the Third Circuit in *Littlejohn* explained, in terms entirely consistent with the Ninth
14 Circuit’s *Kamakana* decision, “The presumption of public access to evidentiary materials is
15 strong.” (851 F.2d at 684.) In that case, the district court rejected arguments that portions of the
16 judicial record contained trade secret or confidential business information (*id.* at 685), and the
17 Third Circuit affirmed. (*Id.* at 685.) The Third Circuit explained: “The affidavit does support
18 BIC’s contention that the documents contain confidential information which might injure its
19 commercial standing. But documents do not contain trade secrets merely because they are
20 confidential. [Citation.] Under these circumstances, we cannot find that the district court’s
21 finding of fact is clearly erroneous.” (*Ibid.*)

22 In *Littlejohn*, the Third Circuit drew the line where this Court drew it on July 18 in telling
23 the parties that while “third party source code” might merit sealing, the rest of the trial would be
24 open and no other sealing would be allowed. (July 18 Transcript at 87-89.) The Third Circuit
25 explained, “Further, non-trade secret but confidential business information is not entitled to the
26 same level of protection from disclosure as trade secret information. A private interest in secrecy
27 has not been weighed heavily once the information has been used at trial....” (851 F.2d at 685.)
28 The Third Circuit rejected an argument, identical to the one asserted by Apple, Samsung and the

1 third parties here, that “disclosure ‘would work a clearly defined and serious injury to its
2 interests.’ The injury that BIC describes is an adverse effect on its disposable lighter sales by
3 competitive use of the information and a potential loss in its capital stock value.” (*Ibid.*) The
4 Court explained that the presumption of openness is “not overcome by the proprietary interest of
5 present stockholders in not losing stock value or the interests of upper-level management in
6 escaping embarrassment.” (*Ibid.*)

7 The same conclusion follows here as to assertions by such behemoth companies as Nokia
8 and IBM. These companies have not demonstrated that “a clearly defined and serious injury” is
9 likely to result from disclosure of license terms. (851 F.2d at 685.) Their license terms may or
10 may not be confidential but they are not trade secrets like the so-called “secret formula of Coke”
11 so often used to describe that term.

12 Indeed, their attempt to seal such information is similar to Apple’s assertion that the
13 margin on iPhone products can be sealed: that information cannot be deemed a secret since
14 Apple’s own expert has publicly filed a declaration disclosing both Apple’s \$33 billion in
15 revenues from the sale of iPhone products over a two-year period *and* its margins (49 to 58
16 percent) on the sale of iPhones. (Document 1372, ¶ 6; see Ex. A hereto.) This kind of
17 information is not sealable.

18 **IV. INSUFFICIENT SHOWING THAT TERMS ARE CURRENT, AND** 19 **INSUFFICIENT SHOWING OF HARM.**

20 Third, the parties and third parties have failed to show, amid their conclusory recitations
21 of harm, that their license terms, or the portions they want to seal, are truly current. As the Third
22 Circuit explained in *Leucadia v. Applied Extrusion Technologies Inc.*, 998 F.2d 157, 167 (3rd Cir.
23 1993), “In determining whether any document or portion thereof merits protection from
24 disclosure, the district court should be guided by our prior advice that continued sealing must be
25 based on ‘*current evidence* to show how public dissemination of the pertinent materials *now*
26 would cause the competitive harm they claim.”¹ Whatever amount of money that companies

27
28 ¹ Interdigital seeks to seal a Patent License Agreement between it and Samsung which was entered into in 2008. (Document 1134 at 3:7-9.) Four years are light years in the technology field.

1 received in the past from license agreements that may or may not be in effect now do not merit
2 sealing.

3 It also bears mention that the redactions sought by third parties would seem to disclose
4 only total numbers and not more sensitive information. Thus, even if competitors were able to
5 look at such information they would probably not glean the competitive advantage feared by the
6 third parties since they would not necessarily be able to compare apples to apples.

7 **V. CLOSING THE COURTROOM, AS ONE THIRD PARTY SUGGESTS, WOULD
8 BE IMPERMISSIBLE.**

9 One third party, Interdigital, has gone so far as to request that the courtroom be closed
10 during any discussion of its license agreement (Document 1334 at 4:22). This request should be
11 summarily denied.

12 To put things in perspective, we quote the Seventh Circuit in *Hicklin Engineering, L. C. v.*
13 *R. J. Bartell*, 439 F.3d 346 (9th Cir. 2006):

14 “What happens in federal courts is presumptively open to public scrutiny. Judges
15 deliberate in private but issue public decisions after public arguments based on
16 public records. The political branches of government claim legitimacy by
17 election, judges by reason. Any step that withdraws an element of the judicial
18 process from public view makes the ensuing decision look more like fiat and
19 requires rigorous justification. The Supreme Court issues public opinions in all
20 cases, even those said to involve state secrets. *See New York Times Co. v. United
21 States*, 403 U. S. 713 (1971). A district court issued public opinions in a case
22 dealing with construction plans for hydrogen bombs. *United States v. Progressive,
23 Inc.*, 467 F. Supp. 990 (W. D. Wis. 1979).”

24 If decisions about state secrets and hydrogen bombs are rendered in public, so should the
25 presentation of evidence about a license agreement.

26 **VI. CONCLUSION**

27 The California Supreme Court in *NBC Subsidiary v. Superior Court*, 20 Cal. 4th 1178,
28 1211 (1999), observed, “[A] trial court is a public governmental institution. Litigants certainly
anticipate, upon submitting their disputes for resolution in a public court, before a state-appointed
or publicly elected judge, that the proceedings in their case will be adjudicated in public. . . .’ [a]n
individual or corporate entity involved as a party to a civil case is entitled to a fair trial, not a
private one.” That observation holds true not just as to the multi-billion-dollar tussle between
Apple and Samsung, but as to the third parties who do business with them. The parties have

1 invoked a U. S. District court to resolve their dispute, and by doing so they act with full
2 knowledge that they and those with whom they do business cannot insist upon confidentiality.

3 The third parties' reliance upon agreements they may have made with Apple or Samsung
4 for confidentiality is not a compelling reason to seal, and their license terms do not rise to the
5 level of trade secrets meriting sealing. The third party motions should be denied.

6 Dated: July 26, 2012

By: /s/ **Karl Olson**
Karl Olson (SBN 104760)
RAM, OLSON, CEREGHINO & KOPCZYNSKI
555 Montgomery Street, Suite 820
San Francisco, CA 94111
Tel: 415-433-4949; Fax: 415-433-7311
Email: kolson@rocklawcal.com

Attorneys for Reuters America LLC

11
12 N:\docs\1273-02\OppThirdPartyMotsSeal3.doc
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28