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10 Attorneys for Plaintiff and  
 Counterclaim-Defendant APPLE INC

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

16 APPLE INC., a California corporation,  
 17 Plaintiff,  
 18 v.  
 19 SAMSUNG ELECTRONICS CO., LTD., a  
 Korean business entity; SAMSUNG  
 20 ELECTRONICS AMERICA, INC., a New York  
 corporation; SAMSUNG  
 21 TELECOMMUNICATIONS AMERICA, LLC, a  
 Delaware limited liability company,  
 22 Defendants.  
 23

Case No. 11-cv-01846-LHK

**APPLE'S OPPOSITION TO  
 SAMSUNG'S MOTION TO SEAL  
 PORTIONS OF HEARING  
 TRANSCRIPT (DKT. NO. 855)  
 PURSUANT TO GENERAL  
 ORDER NO. 59**

Date: June 5, 2012  
 Time: 10:00 a.m.  
 Place: Courtroom 5, 4th Floor  
 Judge: Hon. Paul S. Grewal

1           **I.       BACKGROUND FACTS**

2           Samsung’s belated motion asks the Court to seal *111 portions* of the transcript of a  
3 hearing that took place *in open court*. (See Dkt. No. 855, Transcript of Proceedings, *Apple Inc. v.*  
4 *Samsung Elec. Co. et al.*, No. C-11-01846, March 27, 2012 (“Tr.”).) The March 27, 2012 hearing  
5 lasted several hours, and covered three motions. (See Dkt. No. 850.) In addition to the parties’  
6 outside counsel, the hearing was also attended by in-house counsel for each party, and was open  
7 to the public and the press.

8           At the outset of the hearing, counsel for Apple—but not Samsung—alerted the Court that  
9 he might have to discuss or quote from exhibits that had been designated under the Protective  
10 Order. (Tr. at 4:5-9.) The Court’s response was unambiguous. Judge Grewal stated that he had  
11 already discussed “transparency in this case,” and that he was “not going to seal the courtroom.”  
12 (*Id.* at 4:10-16.) The Court instead recommended that the parties “do the best we can.” (*Id.*)  
13 Samsung voiced *no objection* to this decision and *never* requested that the Court close the  
14 courtroom. The Samsung in-house representative and five outside counsel in attendance  
15 consented to a public airing of 142 pages worth of vigorous oral argument.

16           Samsung now asks the Court to redact 111 portions of the transcript of this proceeding.  
17 Ironically, over half of the statements that Samsung wants to seal were made *by Samsung*. (*Id.* at  
18 27:1-7; 30:1-4, 9-12; 31:5-8, 10-12, 18, 20-21; 32:6-8; 33:3-6, 9-11, 15-21, 24-25; 34:1-5, 8-11,  
19 21-25; 35:1-2, 17-19; 36:3-6; 37:11-12, 14-17, 19-24; 38:11-13, 22-23; 39:18-25; 40:1; 45:12-14;  
20 46:2-4, 7-11; 47:8-10, 12-15, 22-23, 25; 48:1, 11-13, 15-19; 49:2-5, 8-12; 55:6-10; 68:5-6, 8-9,  
21 16-19, 22-25; 69:3-8, 71:5-6, 21-24; 73:8-9, 12-13, 17-18; 86:9-13; 88:19-21, 121:24-25; 122:1;  
22 140:2-5.) Given that Samsung voluntarily made these statements in open court—and never  
23 objected to the Apple statements it seeks to redact—Samsung cannot meet its heavy burden of  
24 redacting the public transcript. Samsung never explains why any of the statements it identifies  
25 was sensitive, or how allowing them to remain in a public transcript would harm it.

26           For all of these reasons, the Court should deny Samsung’s after-the-fact request, and  
27 refuse to redact any section of the March 27, 2012 transcript of proceedings.

1           **II.     HEARING TRANSCRIPTS SHOULD NOT BE SEALED UNLESS THERE**  
2           **ARE “COMPELLING REASONS” FOR DOING SO**

3           There is a “strong presumption in favor of access” by the public to court records.

4           *Kamakana v. Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). “A party seeking to seal a judicial  
5           record ... must ‘articulate[] compelling reasons supported by specific factual findings’ that  
6           outweigh the general history of access and the public policies favoring disclosure ...” *Id.* at  
7           1178-79 (citations omitted); *see also TriQuint SemiConductor, Inc. v. Avago Techs. Ltd.*, No. CV-  
8           09-1531-PHX-JAT, 2012 U.S. Dist. Lexis 58227, at \*4 (D. Ariz. Apr. 25, 2012). A party trying  
9           to redact court records must proffer “specific facts as to how the use of [ ] information, as it  
10          appears in the transcript at issue, might ‘become a vehicle for improper purposes.’” *Id.* at \*19.  
11          “[H]ypothesis or conjecture” will not suffice. *Id.*

12          Courts in this Circuit recognize an exception to the “compelling reasons” standard.  
13          Courts considering whether to seal a “discovery document attached to a non-dispositive motion”  
14          often apply a more relaxed “good cause” standard under Rule 26(c). *Kamakana*, 447 F.3d at  
15          1179. *Samsung* suggests that this test applies here. (Mot. at 3.) It does not.

16          *Samsung* is not asking the Court to seal an exhibit to a discovery motion. *Samsung* seeks  
17          redactions to a court record itself, *i.e.*, the transcript of a public Court hearing. Parties trying to  
18          seal transcripts of court proceedings must satisfy the “compelling reasons” test. *See TriQuint*,  
19          2012 U.S. Dist. LEXIS 58227, at \*4; *Platypus Wear, Inc. v U.S. Fidel. & Guaranty Co.*, No. 09-  
20          2839-JLS (WVG), 2010 U.S. Dist. LEXIS 109822, at \*5 (S.D. Cal. Oct. 15, 2010).<sup>1</sup> *Samsung*  
21          accordingly must prove that there are compelling reasons to redact the transcript at issue.

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23          <sup>1</sup> The cases cited by *Samsung* are all inapposite because they do not address the standard  
24          for sealing portions of a hearing transcript. Rather than analyzing the propriety of sealing the  
25          record of an actual judicial proceeding, each of *Samsung*’s cases considers the public’s right to  
26          access extra-judicial materials like exhibits entered at trial or settlement information produced  
27          during discovery. *See Kamakana*, 447 F.3d at 1179 (considering documents attached to non-  
28          dispositive motions); *Phillips v. G.M. Corp.*, 307 F.3d 1206, 1208-09 (9th Cir. 2002) (addressing  
        confidential settlement information); *Valley Broadcasting Co. v. United States*, 798 F.2d 1289  
        (9th Cir. 1986) (considering audio and videotape exhibits used during trial); *Nixon v. Warner*  
        *Comm’ns, Inc.*, 435 U.S. 589, 591 (1978) (addressing tapes admitted into evidence at Watergate-  
        related trial of President Nixon’s advisers).

1           **III.    THERE ARE NO “COMPELLING REASONS” TO REDACT THE**  
2           **MARCH 27 HEARING TRANSCRIPT**

3           **A.     The Public Already Had Access to the Material in Question**

4           Although Samsung ignores this fact, the March 27th hearing took place in open court. *See*  
5 *TriQuint*, 2012 U.S. Dist. LEXIS 58227, at \*7 (“[T]he parties’ requests are somewhat unusual in  
6 that they are seeking to seal portions of a transcript from a proceeding held in open court....  
7 Members of the public were free to observe all or any part of the proceedings, and there is no  
8 indication that members of the public were not present at the proceedings.”). Samsung did not  
9 ask to seal the courtroom, did not object when the Court stated that it would not seal the  
10 courtroom, made no effort to keep the public out of the courtroom, and took no steps to protect  
11 the information in the hearing transcript that it now seeks to redact. There is therefore no basis  
12 for Samsung’s request. *Id.* at \*15 (“[N]either party requested sealing of the proceeding before it  
13 took place nor voiced any concern at the proceeding about the disclosure of any information.”).

14           Samsung’s failure to take any precautionary measures in Court means that Samsung  
15 “already voluntarily ‘let the cat out of the bag,’” and cannot “undo what is already done.”  
16 *TriQuint*, 2012 U.S. Dist. LEXIS 58227, at \*22. The information Samsung is trying to protect  
17 already “became public when the parties placed it on the record in open court....” *Id.*

18           Courts deny motions to seal in these circumstances. “[T]he onus is on the parties to  
19 request sealing of the courtroom *prior* to a hearing that will involve the discussion of allegedly  
20 confidential information.... It does not seem appropriate for the parties to engage in an open  
21 discussion on the record, without asking the Court to restrict public access, then follow the open  
22 discussion with an *ex post facto* application to seal the record.” *Pfizer, Inc. v. Teva Pharms. USA,*  
23 *Inc.*, No. 08-1331, 2010 U.S. Dist. LEXIS 67631, at \*10 (D.N.J. July 7, 2010); *see also Platypus,*  
24 2010 U.S. Dist. LEXIS 109822, at \*6-10 (agreement placed “on the record in open court ... will  
25 not be confidential unless specific, articulable and compelling reasons justifying secrecy are made  
26 known to the Court before (or at least during) the on the record session. Afterwards is generally  
27 too late to make this showing.”); *TriQuint*, 2012 U.S. Dist. LEXIS 58227, at \*7-8.

1 Making matters worse, this is not a case in which “a witness giving testimony at an open  
2 proceeding [ ] unexpectedly blurt[ed] out information that is highly sensitive and confidential,  
3 leaving a party no method to limit any harm that may result from the disclosure other than  
4 seeking redaction of the injurious portion of the transcript.” *TriQuint*, 2012 U.S. Dist. LEXIS  
5 58227, at \*13; *Pfizer*, 2010 U.S. Dist. LEXIS 67631, at \*10-11. As noted, half of the statements  
6 that Samsung is trying to seal were made *by Samsung itself*. Samsung thus cannot complain of  
7 “any inadvertent or unexpected statements made ... at the [ ] proceeding.” *TriQuint*, 2012 U.S.  
8 Dist. LEXIS 58227, at \*15.

9 For these reasons, Samsung’s contention that “[t]he lines” it highlights “discuss or refer to  
10 the contents of documents that contain confidential and commercially sensitive information”  
11 makes no sense. (*See* Mot. at 3:18-21.) Samsung allowed all the statements at issue to be made  
12 in open court with no safeguards in place. Samsung’s after-the-fact request comes far too late.

### 13 **B. Samsung Has Made No Particularized Showings of Harm**

14 Samsung’s motion also fails because Samsung has not shown how keeping the entire  
15 transcript of the March 27th hearing in the public record would injure it. A party attempting to  
16 seal the transcript of a court hearing “must articulate compelling reasons supported by specific  
17 factual findings” that support its proposed redactions. *TriQuint*, 2012 U.S. Dist. LEXIS 58227,  
18 at \*4 (quoting *Kamakana*, 447 F.3d at 1178-79). Samsung did not even try to do this.

19 Samsung simply provides a chart of the portions of the hearing that it would like to excise,  
20 and asserts that it “has established good cause to permit sealing portions of the Transcript.”  
21 (Mot. at 3:15-16.) Conclusory efforts like these do not establish that allowing public access will  
22 result in harm. *See TriQuint*, 2012 U.S. Dist. LEXIS 58227, at \*18-19 (“TriQuint does not [ ]  
23 provide any specific facts as to how the use of this information, as it appears in the transcript at  
24 issue, might ‘become a vehicle for improper purposes.’); *Platypus*, 2010 U.S. Dist. LEXIS  
25 109822, at \*8 (“Defendant has not presented the Court with any facts by which it could conclude  
26 that public availability of the transcript will result in ‘improper use of the (transcript) for  
27 scandalous or libelous purposes or infringement of trade secrets.’”); *Pfizer*, 2010 U.S. Dist.  
28 LEXIS 67631, at \*13-15 (“Plaintiffs’ motion is not supported by a brief or particularized

1 argument, and it is unexplained how the disclosure of this type of information could result in a  
2 specific and serious injury.”).

3 Samsung likely decided not to attempt to show how continued public disclosure would  
4 injure it because such an effort would have been fruitless. The parties’ discussions at the  
5 March 27th hearing regarding the documents and testimony at issue were at a high level of  
6 generality. Indeed, during oral argument, Samsung emphasized over a dozen times that the  
7 materials upon which the proposed redactions are based were just “very general comments” or  
8 “very broad statements.” (See Tr. at 30:5-8; 33:12; 34:7-8; 35:6; 36:16; 38:18; 40:2; 40:4-5;  
9 45:13-14; 45:21-23; 46:1-2; 46:22-25; 47:1-2; 47:4-5; 47:10.) Samsung’s request to now seal  
10 over 100 sections of the transcript from the hearing flies in the face of these admissions.

11 Samsung has not “provide[d] [any] ‘articulable facts’ on which the Court could base a  
12 decision to seal portions of the record.” *TriQuint*, 2012 U.S. Dist. LEXIS 58227, at \*18.

13 **IV. CONCLUSION**

14 The Court unequivocally stated at the March 27, 2012 hearing that the courtroom would  
15 not be sealed. Samsung did not object to that decision, and the hearing proceeded in open court.  
16 Samsung offers no compelling reasons now to justify its attempt at an end-run around that ruling.

17 Dated: May 11, 2012

MORRISON & FOERSTER LLP

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20 By: /s/ Richard S.J. Hung  
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