

# Exhibit 5

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
TYLER DIVISION**

FRACTUS, S.A.,

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD.;

*et al.*

Defendants.

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Civil Action No. 6:09-cv-00203

**SAMSUNG'S MOTION TO SEAL CERTAIN TRIAL EXHIBITS**

## **I. INTRODUCTION**

In response to the Court's Order at Dkt. No. 1153, Samsung hereby moves for an order sealing from the public the following trial exhibits containing Samsung's sensitive, highly confidential, business information: PX 45, PX 244, PX 386, PX 416, DX 109, DX 134, DX 151, DX 154, DX 155, and DX 182. These ten exhibits represent a small subset of the admitted exhibits containing Samsung's confidential information.<sup>1</sup> The exhibits Samsung seeks to seal include documents containing financial data that is extraordinarily sensitive and far more detailed than that disclosed in securities filings or otherwise made publicly available to competitors, suppliers, or any "third-party document retrieval company." The specific data at issue includes product-by-product sales, cost, and profit information that are closely guarded secrets throughout the mobile device industry. The exhibits identified herein also contain sensitive business planning documents, detailed technical specifications and design and testing criteria unable to be ascertained via reverse engineering, and licenses entered into by Samsung. Disclosure of this narrow set of highly confidential information would not further the public interest in accessing judicial records but instead would serve only to injure Samsung's position with regard to its competitors and its suppliers. Without a sealing order, those firms would be able to compete against Samsung in a manner that would otherwise be impossible. This in turn would place Samsung at a serious disadvantage in the market, as its competitors are under no reciprocal disclosure obligation. Accordingly, Samsung respectfully requests that the Court grant this motion to seal certain trial exhibits as set forth below.

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<sup>1</sup> Samsung understands the Court's Order of December 3, 2012, Dkt. No. 1153, to relate only to admitted trial exhibits. As to exhibits identified on pre-trial exhibit lists, but not admitted at trial, Samsung's interest in maintaining confidentiality clearly outweighs any possible public interest in accessing them.

## II. ARGUMENT AND AUTHORITIES

During the discovery phase of this case, the parties produced confidential documents pursuant to the Protective Order entered on January 6, 2010. Dkt. No. 266. Under the Protective Order, “[t]o the extent that Protected Information or information contained therein are used in depositions, at hearings, or *at trial* such documents or information shall remain subject to the provisions of this Order . . . .” *Id.* at ¶ 9 (emphasis added). Samsung now seeks to seal only a subset of the documents afforded the protections of the Protective Order.

Although the public has a common law right to inspect and copy court records, this right is not absolute. *Motorola, Inc. v. Analog Devices, Inc.*, No. 1:03-CV-131, 2003 WL 25778434, at \*1 (E.D. Tex. June 6, 2003) (citing *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597-98 (1978)). The purpose of the right to access to judicial records is “to promote trustworthiness of the judicial process, to curb judicial abuses, and to provide the public with a more complete understanding of the judicial system, including a better perception of its fairness.” *S.E.C. v. Van Waeyenberghe*, 990 F.2d 845, 849 (5th Cir. 1993). Courts possess discretion to seal specific records in judicial proceedings. *Motorola, Inc.*, 2003 WL 25778434, at \*1. The Fifth Circuit requires a district court, when exercising its discretion to seal records, to balance the public’s common law right of access against the interests favoring nondisclosure. *S.E.C.*, 990 F.2d at 848. Courts have consistently sealed judicial records “where court files might have become a vehicle for improper purposes.” *Motorola, Inc.*, 2003 WL 25778434, at \*1 (citing *Nixon*, 435 U.S. at 598). The collection of trade secret information for competitive reasons is such an improper purpose.

The ten documents at issue here fall into four categories: (1) financial; (2) business plans; (3) technical; and (4) licensing, each of which is addressed below.

(1) **Financial Documents:** PX 45, DX 109, DX 134 and DX 154 contain Samsung's highly confidential and proprietary revenues, unit sales, pricing, cost and profit information on a product-by-product basis. Financial information at this level of detail was not discussed in open court. This Court and others in this Circuit have routinely found exhibits of this nature to merit protection. *E.g., Pozen Inc. v. Par Pharmaceutical, Inc.*, Case No. 6:08-cv-00437, Dkt. No. 395, (E.D. Tex. Nov. 16, 2010) (sealing 48 trial exhibits characterized by plaintiff as confidential or proprietary information including competitive strategies, plans, research and development and financial reports); *Ironclad, L.P. v. Poly-America, Inc.*, No. 3:98-CV-2600, 2000 WL 1400762, \*15 (N.D. Tex. July 22, 2000) (sealing trial exhibits containing "sensitive cost structure analysis" used to show damages in a trademark infringement action despite their being revealed in open court to members of the public); *Cooper Tire and Rubber Co. v. Farese*, No. 3:02CV210, 2009 WL 514071, at \*1 (N.D. Miss. Feb. 27, 2009) (sealing "sensitive financial documents").

PX 45 contains revenue, pricing, cost and profit information for each of Samsung's 56 accused phones,<sup>2</sup> and DX 109 contains this information for 140 of Samsung's *unaccused* phones. DX 134 contains Samsung's antenna costs on an invoice-by-invoice basis for each accused phone. DX 154 contains unit sales data on a quarterly basis for each accused phone. The release of these exhibits would grant Samsung's competitors and suppliers a window into the sales, costs, profit margins, and pricing strategies of Samsung's mobile phone business. Public disclosure of the exhibits would cause great harm to Samsung's competitive position on two fronts. First, competitors with access to Samsung's per-product revenue, pricing, and cost information would be able to undercut Samsung's pricing strategy and thus gain an advantage in the highly-competitive mobile phone marketplaces. Second, access to the aforementioned documents

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<sup>2</sup> Similar information for HTC and Kyocera, who settled on the first scheduled day of trial, is also included in this exhibit.

would provide Samsung's suppliers with knowledge of Samsung's other costs and its profit margins, giving them leverage to demand a greater share of its revenue. These effects would be all the more pronounced because none of Samsung's competitors or suppliers will have been subject to any reciprocal disclosure obligation.

Disclosure of these exhibits would thus create significant information asymmetries between Samsung and its suppliers and competitors. Release of these trial exhibits would be a windfall to Samsung's vendors, buyers, and competitors, who would gain unearned insight into Samsung's pricing strategies and negotiation positions—insight that they could then use to Samsung's substantial detriment. Indeed, the only entities with a real interest in poring over Samsung's highly-sensitive financial information are its suppliers and competitors—and that interest is certainly not a legitimate one.

(2) **Business Plans:** PX 244 is a business plan for Samsung's development of the radio frequency aspects of its LTE mobile phone products. The document includes information and analysis regarding technology research and development, project time lines, costs, the competition, and the patent landscape. PX 244 was referenced at trial solely in connection with its identification of a Fractus patent, a fact already of record in the transcript. *E.g.*, TT 5/18/12 a.m.. 53:20-54:15. PX 416 is a business plan for a Samsung phone that includes sensitive information such as, costs and profits, a market analysis, competitor product comparisons, and a product development timeline. This document was also cited only briefly during the trial testimony for the proposition that it identifies internal antennas as an important feature. TT 5/19/11 a.m., 119:4-18. Like financial information, business plans such as PX 244 and PX 416 warrant protection from disclosure to competitors and suppliers to prevent unearned insight into Samsung's business that can be used to harm Samsung's competitive position. *See Nixon*, 435

U.S. at 598 (“courts have refused to permit their files to serve . . . as sources of business information that might harm a litigant’s competitive standing.”); *Pozen, supra*.

(3) **Technical Documents:** PX 386 and DX 182 are each 2,000-page compilations of the technical specification documents for each of the accused antennas. Each document within the exhibit contains the electrical, mechanical, and reliability specifications and data for a given antenna. PX 386 and DX 182 are comprised largely of the same documents from Samsung’s production in the case, one exhibit having been compiled by Fractus and the other by Samsung. In addition to containing a trove of technical data, PX 386 and DX 182 lay bare the specific design, performance and testing criteria that Samsung uses to evaluate its suppliers’ competing antennas for its mobile phone business. Samsung’s various antenna suppliers are also identified in the exhibits. As with Samsung’s financial data and business plans, the disclosure of this information to the public would put Samsung at an unfair disadvantage in its business, particularly in connection with its competitive bidding procedures for new antennas. Suppliers would be able to see the competitive landscape from Samsung’s perspective and could use information regarding their competitors’ products and capabilities as leverage in future dealings with Samsung to drive up Samsung’s costs.

Moreover, the detailed technical information contained in PX 386 and DX 182 far exceeds what was relevant to the case, and the exhibits were referenced only in passing at trial as documents considered by the experts. TT 5/18/11 a.m., 136:6-24, 147:17-21; TT 5/18/11 p.m., 44:17-24, TT 5/19/11 p.m., 66:14-67:2. If these exhibits are sealed, other unsealed exhibits discussed in more detail at trial, *e.g.*, PX 387 and 388, would still provide the public with a clear understanding of the technical data and information that formed the basis for Fractus’ expert’s infringement opinions. No legitimate public interest would be served by releasing the additional

technical and business data contained in PX 386 and DX 182 to the public. *See Jochims v. Isuzu Motors, Ltd.*, 151 F.R.D. 338, 341 (S.D. Iowa 1993) (in a products liability case, sealing confidential engineering specifications introduced as exhibits at a public trial, explaining: “The 29 protected documents introduced as exhibits at trial consisted of Isuzu internal engineering standards, confidential information regarding advertising expenditures, and test reports relating to the design and development of the Trooper. . . . Depriving these documents of their confidential status would be inimical to Isuzu's competitive interests.”).

(4) **Licenses:** DX 151 and DX 155 are two patent licenses that Samsung entered into with third parties. Samsung, like its competitors, closely guards the terms of its licenses, including sensitive, non-public financial information such as the royalty rate and/or payments Samsung makes, the licensed products and technology, and the term of the license, among other confidential terms and conditions. If such information were made public, future potential licensing partners would no doubt try to use it to their advantage during their negotiations with Samsung. The licenses themselves include provisions restricting the disclosure of the terms of the licenses.

Neither DX 151 nor DX 155 was referenced at trial. Because of the highly confidential nature of licenses to both Samsung and the licensors, had these licenses been discussed at trial the courtroom would likely have been sealed. *See* TT 5/19/11 a.m., 95, 132 (sealing courtroom during testimony regarding licenses). Because of the sensitive nature of the licenses and the absence of any relationship of those licenses to the trial, no legitimate public purpose would be served by granting access to these licenses.

### **III. CONCLUSION**

Samsung's need for secrecy, and the role that robust protection of highly-sensitive confidential information plays in maintaining a fair and competitive market, far outweigh the common law right of access to these particular court records. Access to Samsung's confidential business and technical documents would not serve the purpose of the common law right to access because the documents themselves do not reveal anything about the judicial process, the judicial system, or the actual court proceedings. Rather, these documents relate solely to the businesses of Samsung, namely, detailed per-product revenue, pricing, and cost information; technical and business details far beyond what was discussed at or relevant to the trial; and licenses that were not even referenced at trial. Disclosure would cause the kind of competitive harm the Protective Order entered in this case was designed to prevent. Rather than satisfy the purpose for the common law right to access court records, public availability of this narrow set of Samsung's confidential business documents would become a vehicle for improper purposes because it would allow competitors to obtain information that Samsung normally would not disclose to others without imposing a duty to maintain its confidentiality. Samsung, therefore, respectfully requests that the Court seal the following ten trial exhibits:

<b>Trial Exhibit Number</b>	<b>Description</b>
PX 45	Accused phone sales, costs, profits on a per-product basis
PX 386	Samsung antenna specifications for accused phones
DX 109	Unaccused phone sales, costs, profits on a per-product basis
DX 134	Antenna costs on a per-invoice basis
DX 151	Samsung license
DX 154	Accused phone sales on a per-product basis
DX 155	Samsung license
DX 182	Samsung antenna specifications for accused phones

PX 244	Samsung business plan
PX 416	Samsung business plan

Dated: December 7, 2012

Respectfully submitted,

/s/ Michael J. Barta, with permission by  
Michael E. Jones

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**CERTIFICATE OF SERVICE**

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on December 7, 2012. Any other counsel of record will be served by first class U.S. mail on this same date.

*/s/ Michael E. Jones* \_\_\_\_\_

**CERTIFICATE OF CONFERENCE**

The undersigned hereby certifies that on December 6<sup>th</sup> and 7<sup>th</sup>, 2012 counsel for Defendants complied with the meet and confer requirement in Local Rule CV-7(h). **This motion is unopposed.**

*/s/ Michael E. Jones* \_\_\_\_\_