

2012-1600, -1606

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

APPLE INC.,

Plaintiff-Appellant,

v.

SAMSUNG ELECTRONICS CO., LTD.,
SAMSUNG ELECTRONICS AMERICA, INC., and
SAMSUNG TELECOMMUNICATIONS AMERICA, LLC,

Defendants-Cross-Appellants.

Appeal from the United States District Court for the Northern District of
California, Case No. 11-CV-1846, Judge Lucy H. Koh

**BRIEF FOR THE FIRST AMENDMENT COALITION
AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE**

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October 15, 2012

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

APPLE INC. v. SAMSUNG ELECTRONICS CO., LTD. et al.,

Nos. 2012-1600, -1606

CERTIFICATE OF INTEREST

Counsel for the First Amendment Coalition certifies the following:

1. The full name of every party or amicus represented by me is:

First Amendment Coalition

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

First Amendment Coalition

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus curiae represented by me are:

Not applicable. The First Amendment Coalition is a non-profit entity.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court are:

Hughes Hubbard & Reed LLP – William R. Stein; Eric S. Parnes;
Daniel T. Lloyd

October 15, 2012
Date

/s/ William R. Stein
Signature of Counsel

TABLE OF CONTENTS

	Page
STATEMENT OF AMICUS CURIAE	1
STATEMENT OF THE CASE.....	2
STATEMENT OF FACTS	4
SUMMARY OF ARGUMENT	7
ARGUMENT	10
I. The District Court’s Denial Of Apple And Samsung’s Requests To Seal Is Entitled To A High Level Of Deference.....	10
II. The District Court Applied The Correct Legal Standard: Apple And Samsung Must Show “Compelling Reasons” To Justify Sealing A Document.....	14
III. The District Court Did Not Abuse Its Discretion By Concluding That Apple And Samsung Failed To Demonstrate Compelling Reasons To Overcome The Strong Presumption In Favor Of Open Access To Judicial Records.....	19
IV. Apple And Samsung’s Arguments Based On The Purported Existence Of “Trade Secrets” Are Misplaced.....	24
A. Apple And Samsung Failed To Establish The Existence Of Trade Secrets In The Relevant Documents	24
B. The Existence Of A Trade Secret Is Not Sufficient To Satisfy The “Compelling Reasons” Standard.....	27
V. If The Court Concludes That The “Good Cause” Exception Applies To Any Of The Documents, The Court Should Remand.	29
CONCLUSION	29

TABLE OF AUTHORITIES

	Page(s)
CASES	
<i>AMC Tech., LLC v. Cisco Sys.</i> , No. 11-CV-03403, 2012 U.S. Dist. LEXIS 9934 (N.D. Cal. Jan. 27, 2012)	26
<i>Bauer Bros. v. Nike</i> , No. 09cv500-WQH-BGS, 2012 WL 1899838 (S.D. Cal. May 24, 2012)	26
<i>Bean v. John Wiley & Sons, Inc.</i> , No. CV 11-08028-PCT-FJM, 2012 WL 1078662 (D. Ariz. Mar. 30, 2012)	26
<i>Clark v. Bunker</i> , 453 F.2d 1006 (9th Cir. 1972)	24
<i>Cowley v. Pulsifer</i> , 137 Mass. 392 (1884)	13
<i>Doe v. Kamehameha Sch.</i> , 596 F.3d 1036 (9th Cir. 2010)	13
<i>EEOC v. Erection Co.</i> , 900 F.2d 168 (9th Cir.1990)	11
<i>Foltz v. State Farm Mutual Automobile Insurance Co.</i> , 331 F.3d 1122 (9th Cir. 2003)	11, 14
<i>Gannett Co. v. DePasquale</i> , 443 U.S. 368 (1979)	12
<i>Globe Newspaper Co. v. Superior Court</i> , 457 U.S. 596 (1982)	13
<i>Harman v. Apfel</i> , 211 F.3d 1172 (9th Cir. 2000)	11
<i>In re Continental Illinois Sec. Litigation</i> , 732 F.2d 1302 (7th Cir. 1984)	12
<i>In re Electronic Arts, Inc.</i> , 298 F. App'x 568 (9th Cir. 2008)	14
<i>In re Midland Nat. Life Ins. Co. Annuity Sales Practices Litig.</i> , 686 F.3d 1115 (9th Cir. 2012)	<i>passim</i>
<i>In re TS Tech USA Corp.</i> , 551 F.3d 1315 (Fed. Cir. 2008)	10
<i>Kamakana v. City & County of Honolulu</i> , 447 F.3d 1172 (9th Cir. 2006)	<i>passim</i>
<i>Las Vegas Sands, LLC v. Nehme</i> , 632 F.3d 526 (9th Cir. 2011)	29

<i>LEAP Sys., Inc. v. MoneyTrax, Inc.</i> , 638 F.3d 216 (3d Cir.2011).....	20
<i>Lee v. West Coast Life Ins. Co.</i> , 688 F.3d 1004 (9th Cir. 2012).....	25
<i>Leucadia, Inc. v. Applied Extrusion Techs., Inc.</i> , 998 F.2d 157 (3d Cir. 1993) 13, 28	
<i>Madey v. Duke Univ.</i> , 307 F.3d 1351 (Fed. Cir. 2002)	10
<i>McDonnell v. Southwest Airlines Co.</i> , 292 F. App'x 679 (9th Cir. 2008)	26
<i>Microsoft Corp. v. Motorola Inc.</i> , No. 12-35352, 2012 U.S. App. LEXIS 20359 (9th Cir. Sept. 18, 2012)	11
<i>MMI, Inc. v. Baja, Inc.</i> , 743 F.Supp.2d 1101 (D.Ariz. 2010).....	24
<i>Nixon v. Warner Commc'ns Inc.</i> , 435 U.S. 589 (1978).....	27
<i>Phillips v. Gen. Motors Corp.</i> , 307 F.3d 1206 (9th Cir. 2002)	10, 20
<i>Press-Enter. Co. v. Superior Court</i> , 478 U.S. 1 (1986)	14
<i>Richmond Newspapers, Inc. v. Virginia</i> , 448 U.S. 555 (1980).....	12
<i>Rita v. United States</i> , 551 U.S. 338 (2007).....	23
<i>Romero v. Drummond Co.</i> , 480 F.3d 1234 (11th Cir. 2007).....	28
<i>San Jose Mercury News, Inc. v. U.S. Dist. Court</i> , 187 F.3d 1096 (9th Cir. 1999)	12, 20
<i>Under Seal v. Under Seal</i> , 230 F.3d 1354 (4th Cir. 2000)	20
<i>United States v. Amodeo</i> , 44 F.3d 141 (2d Cir. 1995)	16
<i>United States v. Beard</i> , 475 F. App'x 665 (9th Cir. 2012)	12
<i>United States v. Hinkson</i> , 585 F.3d 1247 (9th Cir. 2009).....	10, 11
<i>United States v. Hubbard</i> , 650 F.2d 293 (D.C. Cir. 1990)	16
<i>Valley Broad Co. v. U.S. Dist. Court</i> , 798 F.2d 1289 (9th Cir. 1986).....	18, 28
STATUTES AND RULES	
Ninth Circuit Rule 36-3	14

OTHER AUTHORITIES

Restatement (First) of Torts § 75724
Restatement (Third) of Unfair Competition § 3925

STATEMENT OF AMICUS CURIAE

The First Amendment Coalition (the “Coalition”) is a non-profit public interest organization dedicated to advancing free speech, freedom of the press, and government transparency. Its members include print and broadcast media organizations, such as the *Los Angeles Times*, *Associated Press*, *Wired.com*, the *San Jose Mercury News*, the *Sacramento Bee*, the *Bakersfield Californian*, and AOL’s Patch network of local news websites in California and other western states. The Coalition and its members believe that access to court records is essential to the protection of the freedom of the press and to ensuring that the public is informed about the workings of its government, including the judiciary. The Coalition wishes to participate in this case as *amicus curiae* to advocate on behalf of the public and the press’ right to access judicial records and to argue in support of affirming the district court’s order.

Pursuant to this Court’s instructions in its September 18, 2012 order denying the Coalition’s motion to intervene, the Coalition now has moved for leave to file this *amicus* brief. Apple does not oppose the Coalition’s motion. The Coalition is authorized to inform the Court that Samsung “takes no position” on the motion.

No party to this case or counsel for a party authored any part of this brief. No person—other than *amicus curiae*, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF THE CASE

On April 15, 2011, Apple sued Samsung in the United States District Court for the Northern District of California, alleging that Samsung's "smartphones" and tablet computers infringe on Apple's patents related to its iPhone and iPad. Samsung filed counterclaims, alleging that the iPhone and iPad infringe on Samsung's patents. The case garnered a huge amount of interest—and concomitant news coverage—not just in the legal and intellectual property communities, but far more widely in the general public, given the ubiquity of smartphones and the wild popularity of the Apple products in particular. After discovery and motions practice, the case was tried to a jury beginning on July 30, 2012. The jury returned a verdict substantially in Apple's favor on August 24, 2012, awarding over \$1 billion in damages to Apple. The district court is currently considering post-verdict motions

This appeal arises not from the trial itself or the underlying patent issues, but rather from an order of the district court granting in part and denying in part motions by Apple and Samsung to seal exhibits that had been filed with that court. Between May and July 2012, Apple and Samsung each filed many pre-trial motions (and oppositions), to which they appended numerous exhibits. For almost every motion, Apple and Samsung also filed administrative motions to seal some

or all of the attached exhibits, and also sought to seal many proposed trial exhibits. Neither party opposed the other party's motions to seal.

On July 17, 2012 non-party Reuters America LLC, one of the many news organizations covering lawsuit, moved to intervene for the limited purpose of opposing the parties' otherwise unopposed motions to seal. The same day, the district court granted Reuters's intervention motion and denied without prejudice all of the pending motions to seal (the "July 17 Order"). In the July 17 Order, the district court reminded the parties of the strong presumption in favor of public access to judicial records, authorized the parties to file renewed motions to seal, and directed the parties to carefully scrutinize the documents before doing so.

On July 24, 2012, Apple and Samsung filed renewed motions to seal; Reuters filed oppositions the next day. On July 30, 2012, Apple and Samsung filed revised versions of their renewed motions to seal. On August 2, 2012, Reuters filed its opposition. On August 9, 2012, the district court issued an order (the "Order"), which Apple and Samsung have appealed as a collateral order.

Apple and Samsung have appealed only as to certain of the district court's rulings declining to seal (in whole or in part) exhibits attached to pre-trial motions. In this appeal, Apple challenges the district court's rulings as to fourteen documents, (*see* Corrected Brief for Plaintiff-Appellant Apple Inc. at 14-17 (filed Sep. 14, 2012) ("Apple Br.")), and Samsung challenges the rulings as to twelve

documents, (*see* Corrected Brief for Defendants-Cross Appellants at 8-10 (filed Oct. 2, 2012) (“Samsung Br.”)). The parties assert that these documents contain financial data that purportedly are competitively sensitive trade secrets.

STATEMENT OF FACTS

The patent litigation between Apple and Samsung that gave rise to this appeal has attracted tremendous attention from the press and the public. As a representative of the Reuters news agency testified:

[b]usiness and technology reporters from many media organizations are closely following this lawsuit due to the widespread interest in the disputes between Apple and various companies, including Samsung Mainstream business outlets like the Wall Street Journal, Bloomberg and Reuters tend to focus coverage on the case’s strategic impact on the companies, including financial risks for shareholders.

Decl. of Amy Stevens in Supp. of Reuters’ Opp. to Motions to Seal Trial and Pretrial Evidence ¶ 3 (Dkt. No. 1556-3) (“Stevens Decl.”).

The district court likewise observed that the “trial is especially unusual in the extraordinary public interest it has generated.” (Order at 6.) It is in the context of that widespread and intense public interest in the litigation that Apple and Samsung sought to seal a significant number of documents that had been filed with the district court.

The parties’ July 30 motions encompassed a host of trial exhibits and exhibits to pre-trial motions. In the August 9 Order, the district court rejected

Apple and Samsung's invitation to apply a "good cause" test for whether to accede to the requests to seal documents, and instead held that under controlling Ninth Circuit authority, the documents in question could be sealed from public access only upon a showing of "compelling reasons" that outweigh the traditional right of open access to judicial records. After carefully balancing Apple and Samsung's private concerns about their competitive interests in keeping the information secret against the public's presumptive right of access and the need for transparency in judicial proceedings, the district court ordered that some exhibits would be sealed, some would be sealed in part, and some would not be sealed. In general, the court sealed:

- information about the parties' production and supply capacities, finding that the parties' interests in confidentiality outweighed the public's interest in accessing the information (Order at 4-5);
- confidential source code, which Reuters did not oppose (*id.* at 8);
- third-party market research and marketing reports (but denied the request to seal Apple's own market research and marketing reports) (*id.* at 8-10);
- terms of licensing agreements between each of the parties and third-parties, reasoning that disclosing the information would create an "asymmetry of information" for the parties in their future negotiations of license deals (*id.* at 10-11).

When the district court came to purportedly sensitive financial data, the court generally denied the requests to seal, on the ground that the parties' had failed to show risk of competitive injury from disclosure of the past financial information. However, the district court did seal documents reflecting the parties' internal analysis and strategy based on such financial data, on the ground that disclosing analysis and strategy could cause future competitive harm. (*Id.* at 5-8.)

On appeal, Apple and Samsung challenge the district court's ruling on a total of twenty-six documents that were filed with the court in connection with pre-trial motions. (Apple Br. at 14-16; Samsung Br. at 8-9). The majority of the documents at issue in this appeal—eleven of Apple's fourteen documents and six of Samsung's twelve documents—were filed in support of or in opposition to Samsung's "*Daubert*" motions to exclude Apple's experts. (Apple Br. at 14-16; Samsung Br. at 8-9.) The documents contain historical financial data analyzed by the parties' damages experts, who ultimately testified at trial. Although the parties stipulated that neither would challenge the testimony of the other's expert for failure to include sufficiently detailed financial information, there is no dispute that the opinions presented by the parties' damages experts were based in part on financial data that Apple and Samsung sought to seal. (Apple Br. at 9.)

Apple and Samsung also attack the district court's order refusing to seal an exhibit filed in support of Samsung's motion to strike expert testimony. (Apple

Br. at 16; Samsung Br. at 10.) That exhibit is an expert report of Samsung's damages expert, whose opinions and trial testimony challenged the methodology and calculations of Apple's damages expert. Another Samsung document at issue was filed in opposition to a Samsung motion *in limine* (Samsung Br. at 10), and appears to relate to a dispute about the admissibility of evidence regarding Samsung's tax accounting.¹ *See* Apple's Opp. to Samsung's Motions in Limine 27-29 (July 10, 2012) (Dkt. No. 1206) (referencing Exhibit 42 to Kanada Decl.).

The remaining documents—two Apple documents and four Samsung documents—were submitted by Apple in opposition to Samsung's motion for summary judgment. (Apple Br. at 17; Samsung Br. at 9-10.)

SUMMARY OF ARGUMENT

The law creates a strong, constitutionally-grounded presumption in favor of public access to judicial records. Private litigants like Apple and Samsung typically prefer to keep their internal documents—including those containing financial information—from the public and the press. Once a private party becomes engaged in the judicial system, however, it is a participant in a public institution that is presumptively open to the public. There are, of course,

1. Because the First Amendment Coalition is not a party below or on appeal, it does not have access to the documents at issue.

exceptions to the presumptive right of public access to documents filed in a federal court proceeding. The principal exception is that a district court has discretion to seal documents when confronted with compelling reasons that outweigh the strong interest in ensuring the public's understanding of the judicial process and significant public events.

Apple and Samsung argue that the district court abused its discretion when it concluded that they had not articulated sufficiently compelling reasons to withhold the documents from public access, but their challenges are based on mischaracterization of the governing law. Apple and Samsung perceive an abuse of discretion in the district court's purported failure to articulate a sufficient basis for *allowing* public access—implying that the party opposing sealing bears the burden to show why the record should not be sealed. This is exactly backwards. Given the strong presumption in favor of public access to judicial records, the party seeking to seal documents has the burden of demonstrating, and the district court has the duty of articulating, clear and compelling reasons for sealing those documents and *denying* public access. Thus, while the record and the district court's opinion provide ample support for affirming the decision below, this Court need not search for support for that result. Unsealed, publicly accessible records are the default position. The district court found that the parties had not shown compelling reasons to do otherwise with respect to the documents at issue, and

amicus is not aware of, and Apple and Samsung have failed to identify, a single precedential decision of the Ninth Circuit that reverses a district court's *denial* of a motion to seal.

Apple and Samsung argue that the district court applied an incorrect legal standard by requiring them to show "compelling reasons" to seal the documents at issue. They contend that, because all but six of the documents at issue were attached to non-dispositive motions, the request to seal those documents should have been granted upon a showing of "good cause." This argument, however, elevates form over substance and is contrary to controlling law. The documents at issue were filed in connection with issues that are directly relevant to the underlying litigation, and the trial court found them to be "crucial to the public's understanding" of this important case. In such circumstances, a party must show compelling reasons to overcome the public's presumptive right to access. This Court owes significant deference to the district court's decision that Apple and Samsung have not met that burden.

ARGUMENT

I. The District Court's Denial Of Apple And Samsung's Requests To Seal Is Entitled To A High Level Of Deference.

The Ninth Circuit applies a two-step test when reviewing a lower court's decision to deny a motion to seal.² The first step "is to determine de novo whether the trial court identified the correct legal rule to apply to the relief requested." *United States v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009) (en banc), *vacated in part on other grounds* 611 F.3d 1098 (9th Cir. 2010); *Phillips v. Gen. Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002); *accord Madey v. Duke Univ.*, 307 F.3d 1351, 1358 (Fed. Cir. 2002). Once it has been established that the lower court identified the correct legal rule, the lower court's decision to deny a motion to seal is reviewed for abuse of discretion. *Hinkson*, 585 F.3d at 1262; *In re Midland Nat. Life Ins. Co. Annuity Sales Practices Litig.*, 686 F.3d 1115, 1119 (9th Cir. 2012).

2. This Court has held that, when a "petition does not involve substantive issues of patent law, this court applies the laws of the regional circuit in which the district court sits." *In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2008). Samsung and Apple assert that Ninth Circuit law applies to this appeal. (Apple Br. at 18; Samsung Br. at 15 n.10.) The Reporters Committee for Freedom of the Press, as *amicus*, asserts that this Court is not bound to follow Ninth Circuit law in addressing the District Court's denial of motions to seal. Although there is considerable merit to the Reporters Committee's position, Ninth Circuit precedent clearly requires affirmance of the District Court's decision denying the requests to seal in this case. Accordingly, this brief relies principally on Ninth Circuit law.

“Abuse-of-discretion review is highly deferential to the district court.”

Microsoft Corp. v. Motorola Inc., No. 12-35352, 2012 U.S. App. LEXIS 20359, at *18 (9th Cir. Sept. 18, 2012) (citing *Hinkson*, 585 F.3d at 1261-62). The Ninth Circuit will overturn a lower court’s decision only when its “application of the correct legal standard was (1) illogical, (2) implausible, or (3) without support in inferences that may be drawn from the facts in the record.” *Hinkson*, 585 F.3d at 1262 (internal quotation marks and citations omitted). Indeed, “the decision of a trial court is reversed under the abuse of discretion standard only when the appellate court is convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances.” *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000).

Moreover, where the law creates a strong presumption in favor of a particular result, an appellant must meet a particularly high threshold to establish that a lower court abused its discretion by arriving at that result. *See Kamakana v. City & Cnty. of Honolulu*, 447 F.3d 1172, 1182 (9th Cir. 2006). Such a presumption exists in favor of public access to judicial records. *See id.* at 1178; *Foltz v. State Farm Mutual Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003) (“In this circuit, we start with a strong presumption in favor of access to court records.”).

The public and the press' right to access judicial records is well entrenched in American jurisprudence and reaches back to the earliest days of the Republic. *San Jose Mercury News, Inc. v. U.S. Dist. Court*, 187 F.3d 1096, 1102 (9th Cir. 1999). This right stems directly from the freedoms guaranteed by the First Amendment. *United States v. Beard*, 475 F. App'x 665, 668 (9th Cir. 2012) (stating that defendant had a "First Amendment right" to access judicial records); *see also In re Continental Illinois Sec. Litigation*, 732 F.2d 1302, 1313 (7th Cir. 1984) ("In undertaking a balancing test, we are mindful of the difficulty of weighing the important first amendment interests that cut in favor of disclosure. Therefore, we must be firmly convinced that disclosure is inappropriate if we are to reject demands for access."); *see also Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986) (recognizing that the First Amendment guarantees access to government records in criminal proceedings).

The roots of the right extend even further back into history. The American tradition of open judicial proceedings "is no quirk of history; rather it has long been recognized as an indispensable attribute of an Anglo-American trial." *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 569 (1980). "As early as 1685, Sir John Hawles commented that open proceedings were necessary so that the truth may be discovered in civil as well as criminal matters." *Gannett Co. v. DePasquale*, 443 U.S. 368, 386 n.15 (1979). As Justice Holmes described, "the

trial of causes should take place under the public eye, not because the controversies of one citizen with another are of public concern, but because it is of the highest moment that those who administer justice should always act under the sense of public responsibility, and that every citizen should be able to satisfy himself with his own eyes as to the mode in which a public duty is performed.” *Cowley v. Pulsifer*, 137 Mass. 392, 394 (1884); *see also Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 161 (3d Cir. 1993) (“The existence of this right, which antedates the Constitution and which is applicable in both criminal and civil cases, is now ‘beyond dispute’”). Thus, the Supreme Court has described public access as an “essential” component to the American judicial system that allows “the public to participate in and serve as a check upon the judicial process.” *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 606 (1982). The Ninth Circuit properly has emphasized that, “[i]n this circuit, the common law rights of access to the courts and judicial records are not taken lightly.” *See Doe v. Kamehameha Sch.*, 596 F.3d 1036, 1042 (9th Cir. 2010).

An appellate court, therefore, should disturb a trial court’s decision *denying* a motion to seal—*i.e.*, a decision to uphold the presumptive and constitutionally-protected public right of access to judicial documents— only under extraordinary circumstances, and only upon a clear and compelling showing that the trial court abused its considerable discretion. *Doe*, 596 F.3d at 1042 (lower court’s decision

that was aligned with the strong presumption in favor of public access did not permit a finding of abuse of discretion). In light of this highly deferential standard of review, it is not surprising that Apple and Samsung have failed to identify a single precedential decision of the Ninth Circuit reversing a district court's denial of a motion to seal.³

II. The District Court Applied The Correct Legal Standard: Apple And Samsung Must Show “Compelling Reasons” To Justify Sealing A Document.

In the Ninth Circuit, district courts are permitted to seal judicial records only when confronted with sufficiently “compelling reasons” that override the strong public policy and presumption favoring disclosure. *Midland*, 686 F.3d at 1119; *Kamakana*, 447 F.3d at 1178; *Foltz*, 331 F.3d at 1135. The Ninth Circuit, however, has articulated one exception to the exacting “compelling reasons”

3. Apple and Samsung cite *In re Electronic Arts, Inc.*, 298 F. App'x 568 (9th Cir. 2008), an unpublished and non-precedential decision in which the Ninth Circuit issued a writ of mandamus directing the district court to seal a document containing trade secrets. (Apple Br. at 21, 27; Samsung Br. at 16, 19, 21.) Besides lacking precedential force, *see* Ninth Circuit Rule 36-3, the decision lacks persuasive value. The opinion provides little clarity about the nature of the information sought to be sealed or the reasoning of the district court in denying the request to seal. In addition, the opinion held that “the district court erred as a matter of law by concluding that [the petitioner] failed to meet the ‘compelling reasons’ standard,” based on the proposition that the district court is required automatically to seal any document containing trade secrets. *In re Electronic Arts*, 298 F. App'x at 570. As discussed below, that proposition is at odds with controlling Ninth Circuit precedent. *See infra*, at 27-28.

standard—where documents have been filed with the court in connection with a matter that is irrelevant or only tangentially relevant to the underlying claims. *See, e.g., Kamakana*, 686 F.3d at 1179. This exception is rooted in the recognition that “[t]he application of a strong presumption of access to sealed records, *not directly relevant to the merits of the case*, would eviscerate the broad power of the district court to fashion protective orders.” *Id.* at 1180 (emphasis added and internal quotations omitted). In these limited circumstances, the proponent of a sealing order must establish “good cause” to withhold the documents from the public. *Id.*

Sealing trial exhibits or exhibits attached to dispositive motions and “related materials,” *see Kamakana*, 447 F.3d at 1179, *always* requires satisfying the “compelling reasons” standard, *Midland*, 686 F.3d at 1119-20. Thus, there can be no reasonable argument that the “compelling reasons” standard does not apply to the six documents at issue that were exhibits to Samsung’s summary judgment motion or Apple’s opposition.

Apple and Samsung argue that the district court committed legal error in applying the “compelling reasons” standard (rather than the “good cause” exception) in analyzing the remaining twenty documents, which were attached to “non-dispositive” *Daubert* or *in limine* motions relating to the admissibility of expert testimony. They imply that the “good cause” exception always applies to exhibits to non-dispositive motions. (Apple Br. at 41-42; Samsung Br. at 26-27.)

In fact, the Ninth Circuit has made clear that the “good cause” exception does *not* automatically apply to documents submitted with non-dispositive motions. *See Midland*, 686 F.3d at 1120. Whether a party seeking to seal a document must show “compelling reasons” or the less stringent “good cause” depends not on the manner in which the document has been submitted to the court, but rather on whether the document is unrelated (or only tangentially related) to the underlying cause of action, and thus irrelevant to the public’s understanding of the case and its disposition. *Kamakana*, 447 F.3d at 1179.⁴ While this may be true for many non-dispositive motions, it is obviously not true for all non-dispositive motions.

The Ninth Circuit’s recent decision in *Midland* illustrates this principle. In that case, the district court ruled that documents submitted in support of a *Daubert* motion would be sealed because the movant had shown “good cause.” *Midland*, 686 F.3d at 1119. The Ninth Circuit reversed, concluding that, even though the records at issue were submitted with a non-dispositive motion, they could, as a

4. The Ninth Circuit is not unique in articulating this rationale for a limited exception to the normally high bar for denying public access to judicial documents. *See, e.g., United States v. Hubbard*, 650 F.2d 293 (D.C. Cir. 1980) (only exception to the presumption of public access is where the documents are essentially irrelevant to the underlying dispute); *United States v. Amodeo*, 44 F.3d 141, 145 (2d Cir. 1995) (heightened standard of review when document is “relevant to the performance of the judicial function and useful in the judicial process...”).

practical matter, be dispositive of pending summary judgment motions, and, therefore, pertained to “central issues bearing on” those motions. *Id.* at 1120.

As in *Midland*, most of the documents at issue in this case were submitted in connection with *Daubert* motions bearing on the admissibility of expert testimony pertaining to central issues in the case. The majority of the documents were submitted with Samsung’s motion to exclude opinions of Apple’s experts or with Apple’s opposition to that motion. In its opposition, Apple insisted that Samsung’s motion was an attempt to “deprive Apple of a jury trial over a factual dispute” and presented “factual disputes that are not properly the subject of a *Daubert* motion.” Apple’s Opp. to Samsung’s Mot. to Exclude Opinions of Certain of Apple’s Experts at 1, 10 (May 31, 2012) (Dkt. No. 991-3). Clearly, Apple believed these motions to bear on dispositive issues, just as the Ninth Circuit recognized that the *Daubert* motions in *Midland* pertained to potentially dispositive issues. Indeed, “[t]o turn the issue around, if a magistrate judge had ruled on the *Daubert* motion and excluded” the testimony of either party’s damages expert (or significant portions thereof), that party “surely would have challenged the order as dispositive and subject to de novo review by a district court judge.” *Midland*, 688 F.3d at 1120.

The district court concluded that the admissibility of this evidence “has become crucial to the public’s understanding of the proceedings,” and that it could

not apply the “good cause” exception. (Order at 12.) This conclusion was correct. *See Midland*, 686 F.3d at 1120; *Kamakana*, 447 F.3d at 1179; *see also Valley Broad. Co. v. United States Dist. Court*, 798 F.2d 1289, 1295 (9th Cir. 1986) (stressing the “strong presumption” in favor of public access where the materials were essential to the public’s understanding of the dispute).

Apple and Samsung suggest that the district court was wrong to invoke the public’s general interest in evidentiary issues—as opposed to a specific public interest in the individual documents at issue—to justify applying the “compelling reasons” standard. (Apple Br. at 34, 38; Samsung Br. at 27-28.) This argument depends on a mischaracterization of the district court’s decision. The court did not find that there was a public interest in the evidentiary issues standing alone, but rather that the public has an interest in understanding the proceedings and that the evidentiary issues are crucial to that understanding.

Apple and Samsung once again have it backwards. The law imposes a purposefully difficult burden—*i.e.*, establishing sufficient “compelling reasons”—on parties seeking to deny public access to judicial records. A party should not be able to avoid that burden by simply declaring that the public has no interest in the particular records at issue. Yet that is exactly what Apple and Samsung seek to do through their unsupported assertion that the public has no particular interest in the documents at issue. Reuters’ intervention in the district court and the participation

of *amici* in this appeal belie the parties' position that the public has no interest in these documents.

More generally, however, the public and the press find themselves at a disadvantage in asserting their interest because they do not have access to the documents. The public and press cannot be made to bear the burden of providing a particularized explanation of how individual documents they have never seen are relevant to the underlying action or the public's understanding of the dispute. But the district court *is* in a position to make that determination. After careful review of the documents the parties seek to seal, and based on its uniquely well-developed understanding of the underlying litigation, the district court concluded that the information is crucial to the public's understanding of this case. This Court has no basis to disturb that finding, and should affirm the district court's application of the "compelling reasons" standard.

III. The District Court Did Not Abuse Its Discretion By Concluding That Apple And Samsung Failed To Demonstrate Compelling Reasons To Overcome The Strong Presumption In Favor Of Open Access To Judicial Records.

A party moving to seal documents must show "that compelling reasons supported by specific factual findings . . . outweigh the general history of access and the public policies favoring disclosure." *Kamakana*, 447 F.3d at 1178-79.

Moreover, the "compelling reason" articulated by the party seeking to deny the public's access to judicial records must be specific and factual, and may not take

the form of mere hypothetical conjecture or blanket assertions. *Kamakana*, 447 F.3d at 1179; *see also LEAP Sys., Inc. v. MoneyTrax, Inc.*, 638 F.3d 216, 222 (3d Cir. 2011). The burden of satisfying this standard lies solely on the party seeking to deny public access. *Phillips*, 307 F.3d at 1213.

Apple and Samsung argue that the district court abused its discretion when it found that they failed to demonstrate “compelling reasons” to overcome the strong presumption in favor of public access. (Apple Br. at 33-35; Samsung Br. at 15-25) The district court, however, undertook a careful review of the dozens of documents that Apple and Samsung sought to seal. (Order at 5-6, 12-16, 19-21.) The court appropriately balanced the parties’ private interest in secrecy against the strong, constitutionally-protected presumption in favor of public access. *See Kamakana*, 447 F.3d at 1179 (“the court must conscientiously balance the competing interests of the public and the party who seeks to keep certain judicial records secret”) (internal quotation omitted); *see also San Jose Mercury News*, 187 F.3d at 1102 (the presumption in favor of public access can only be overcome by a “sufficiently important countervailing interest”); *Under Seal v. Under Seal*, 230 F.3d 1354, 1356 (4th Cir. 2000) (requiring court to weigh public and private interests).

For documents where it appeared that public access presented a real and present risk of competitive harm—such as those containing production and supply capacity information, source code, or strategic analysis—the district court found

that the parties had shown sufficiently compelling reasons to keep the documents from public view. (Order at 5-6, 12-16, 19-21.) However, for the twenty-six documents at issue, which contain historical financial data, the court found that the parties had shown no real risk of competitive harm, and thus no compelling reason to restrict public access. (*Id.*)

On the other side of the scale, the district court found, based on its detailed knowledge of the documents and the nature of the litigation, that the public had a strong interest in the financial information in question because the documents were submitted in connection with disputes about the admissibility of evidence that had “become crucial to the public’s understanding of the proceedings.” (*Id.* at 12.)

The court explained:

[T]he financial information that Apple seeks to seal is essential to each party’s damages calculations. For this trial in particular, which involves claims of up to \$2.5 billion in damages, this [financial] data is extremely important to the public’s understanding of the eventual outcome, which has the potential for wide ranging ripple effects. Indeed this trial is especially unusual in the extraordinary public interest it has generated. Thus, the public has a substantial interest in full disclosure of this information.

(*Id.* at 6; *see also id.* at 17.)

The district court also had the benefit of evidence that news media have a strong interest in financial information underlying the parties’ damages

calculations and theories.⁵ For example, a Reuters representative testified that major media outlets were closely following “the case’s strategic impact on the companies, including financial risks for shareholders.” Stephens Decl. ¶ 11. A representative of the Electronic Frontier Foundation (“EFF”) explained that “financial data and market surveys surrounding the phones and tablets that so many American consumers use and rely on everyday is relevant to protecting consumer interests. The financial data surrounding their development, sale, and production provide powerful tools to many groups, including EFF, who work diligently to ensure those consumers’ interests are taken into account in manufacturing and pricing decisions.” Decl. of Julie Samuels in Supp. of Reuters’ Opp. to Motions to Seal Trial and Pretrial Evidence ¶ 11 (Dkt. No. 1556-2).

The record makes clear that the district court appropriately and conscientiously exercised its discretion in balancing the significant public interests in access against the alleged harms that Apple and Samsung asserted. In light of the highly deferential standard of review applicable to a decision not to seal documents (*see* section I, *supra*), this Court should affirm.

5. Apple makes much of the parties’ stipulation not to use at trial the “more detailed financial information” contained in the documents at issue. (Apple. Br. at 30.) A private agreement, however, weighs little against the public’s presumed right of access.

Apple and Samsung both argue, however, that the district court abused its discretion because *the district court* failed to articulate sufficient reasons for refusing to seal the documents or to identify a sufficient public interest in obtaining access to those documents.⁶ (Apple Br. at 33-35; Samsung Br. at 16-22.) The Ninth Circuit has characterized this kind of argument as “upside down”: “The judge need not document compelling reasons to unseal; rather the proponent of sealing bears the burden with respect to sealing. A failure to meet that burden means that the default posture of public access prevails.” *Kamakana*, 447 F.3d at 1182. As the Ninth Circuit pointed out in *Kamakana*, the district court must articulate and document the compelling reasons when it decides to *seal* documents. But “it makes little sense” to “require the same specificity where the court is simply effectuating the presumption of public access by *unsealing* documents.” *Id.*

6. Samsung also complains that the district court abused its discretion by not articulating its analysis for each of Samsung’s documents individually. (Samsung Br. at 22.) The district court presented its rationale in the context of its discussion of specific categories of Apple documents and its conclusions as to specific documents in tabular form “for the sake of efficiency,” noting that “[a]ll rulings are consistent with the rationale articulated above.” (Order at 6, 12-16, 18-21.) The district court’s decision to not separately recite its analysis for each document was entirely within its discretion. *See Rita v. United States*, 551 U.S. 338, 356 (2007) (“Sometimes a judicial opinion responds to every argument, sometimes it does not ... the law leaves much, in this respect, to the judge’s own professional judgment.”).

IV. Apple and Samsung's Arguments Based On The Purported Existence Of "Trade Secrets" Are Misplaced.

Apple and Samsung both argue that the documents at issue contain "trade secrets," and that the existence of "trade secrets" in a document automatically provides a sufficiently "compelling reason" to overcome the presumptive public right of access. (Apple Br. at 20-35; Samsung Br. at 16-25.) The parties are wrong.

A. Apple And Samsung Failed To Establish The Existence Of Trade Secrets In The Relevant Documents.

Apple and Samsung failed to carry their burden of establishing that the information at issue constituted "trade secrets." The Ninth Circuit follows the Restatement of Torts definition of "trade secrets." *Clark v. Bunker*, 453 F.2d 1006, 1009 (9th Cir.1972); *MMI, Inc. v. Baja, Inc.*, 743 F.Supp.2d 1101, 1106 (D.Ariz. 2010). The Restatement defines a "trade secret" as a "formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it." Restatement (First) of Torts § 757 cmt. B.

The district court found that "Apple has failed to convince the Court that profit, profit margin, cost, and/or unit sales data would lead to the competitive harms that Apple claims in its briefing." (Order at 5.) The court explained that: (1) Apple's arguments about competitive harm from public disclosure erroneously

assumed that its products were perfectly interchangeable with competitors' products such that Apple would be forced to match competitors' prices; (2) Apple had not shown that its competitors could match Apple's prices; and (3) Apple had failed to articulate a basis to conclude that disclosure of *past* profit and unit sales data would harm Apple's ability to compete in the future. (*Id.*) The district court applied the same analysis to reach the same conclusions with respect to Samsung's documents. (*Id.* at 21.) If disclosure of information does not cause competitive harm, the information does not qualify as a trade secret. *Clark*, 452 F.2d at 1009 (citing Restatement).

Apple and Samsung bear a heavy burden on appeal of showing that these findings of fact were clearly erroneous. *See* Restatement (Third) of Unfair Competition § 39 cmt D ("The existence of a trade secret is properly considered a question of fact to be decided by the judge or jury as fact-finder."); *Lee v. West Coast Life Ins. Co.*, 688 F.3d 1004, 1009 (9th Cir. 2012) ("this court reviews the district court's finding of fact for clear error..."). Yet they challenge the district court's conclusions with no more than vague speculation and hypothetical scenarios of potential competitive disadvantages they might suffer should the public gain access to the information. (*See* Apple Br. at 20-35; Samsung Br. at 16-25.)

Moreover, both Apple and Samsung ignore the fact that much of the supposedly “harmful” information in the documents is already widely available to the public. As a result of the underlying patent dispute, hundreds, if not thousands, of documents containing Apple and Samsung financial information—including, for example, the profit margins and component costs for Apple’s iPhone and iPad—have already become part of the public record. *See* Reuters’ Opp. Mot. to Seal Trial and Pretrial Evidence at 4 (filed Aug. 2, 2012) (Dkt. No. 1556); Stephens Decl. ¶ 11.

For this reason, the cases cited by Apple and Samsung relating to classifying information as trade secrets miss the mark. In those cases, the courts stressed that the information treated as trade secrets had not in any way been disclosed to the public. *See, e.g., McDonnell v. Southwest Airlines Co.*, 292 F.App’x 679, 680 (9th Cir. 2008) (dealing with confidential accident reports that had not been disclosed to the public); *Bauer Bros. v. Nike*, No. 09cv500-WQH-BGS, 2012 WL 1899838, *3-4 (S.D. Cal. May 24, 2012) (dealing, in part, with confidential shoe prototypes that had not been revealed to the public); *AMC Tech., LLC v. Cisco Sys.*, No. 11-CV-03403, 2012 U.S. Dist. LEXIS 9934, at *2 (N.D. Cal. Jan. 27, 2012)(sealing documents based on concern of specifically identified customer learning “trade secret” pricing information); *Bean v. John Wiley & Sons, Inc.*, No. CV 11-08028-

PCT-FJM, 2012 WL 1078662, *5-6 (D. Ariz. Mar. 30, 2012) (making specific finding regarding secrecy of the information at issue).

On the basis of its careful review of the documents, the evidence, and the parties' submissions, the district court concluded that some of the documents Apple and Samsung sought to seal contained trade secrets and that some of the documents did not. Apple and Samsung have proffered nothing that warrants overturning these factual findings.

B. The Existence Of A Trade Secret Is Not Sufficient To Satisfy The “Compelling Reasons” Standard.

Even if the district court had erred in concluding that the documents at issue do not contain trade secrets, Apple and Samsung are incorrect that the court was required to seal those documents on that basis alone. (Apple Br. 20-27; Samsung Br. 15-22.) The Ninth Circuit does not require district courts automatically to seal documents containing trade secrets or any other category of documents. Rather, it requires district courts to balance the competing interests favoring and disfavoring public access under the applicable legal standards. *See, e.g., Kamakana*, 447 F.3d at 1179 (“the [district] court must conscientiously balance the competing interest of the public and the party who seeks to keep certain judicial records secret.”) (internal quotation omitted); *see also Nixon v. Warner Commc’ns Inc.*, 435 U.S. 599 (1978) (The decision whether to seal documents is “best left to the sound

discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case.”).

Although true trade secrets are imbued with weighty private interests supporting non-disclosure, neither Apple nor Samsung cite to a single authority holding that a court *must* seal documents containing a party’s trade secrets. Indeed, most of the authorities cited by Apple and Samsung hold that the alleged existence of trade secrets is a factor to balance against the public’s presumptive right of access. *See, e.g., Valley Broad.*, 798 F.2d at 1294; *Romero v. Drummond Co.*, 480 F.3d 1234,1246 (11th Cir. 2007) (“A party’s privacy or proprietary interest in information *sometimes* overcomes the interest of the public in accessing the information.”) (emphasis added); *Leucadia*, 998 F.2d at 166 (the “presence of trade secrets in court records weighs against the right of access”).

Moreover, even assuming (contrary to fact) that some or all of the twenty-six documents at issue had contained trade secrets, the district court surely acted within its discretion in “conscientiously balancing” the competing interests favoring and disfavoring public access, and in finding that Apple and Samsung had failed to meet their burdens of overcoming the strong presumption in favor of public access. *See supra*, at 19-22.

V. If The Court Concludes That The “Good Cause” Exception Applies To Any Of The Documents, The Court Should Remand.

Apple and Samsung have urged not only that this Court rule that the district court should have applied the “good cause” standard to their motions to seal, but also that this Court should itself apply that standard and decide that the motions should have been granted. Such relief is inappropriate. If the Court concludes that the district court applied the wrong legal standard in its detailed, fact-intensive analysis of the documents, the appropriate relief would be to remand to the district, which has far more familiarity with the lengthy and complex record in this case, to allow it to apply the correct standard. *See Las Vegas Sands, LLC v. Nehme*, 632 F.3d 526, 534 (9th Cir. 2011).

CONCLUSION

For the foregoing reasons, the district court’s order should be affirmed.

Dated: October 15, 2012

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32 (a)(7)(C), I hereby certify that this brief is printed in Time New Roman 14-point type face and complies with the volume limitation found in Federal Rule of Appellate Procedure 32 (a)(7)(B) for a brief produced with a proportionally-spaced font. Without counting the items excluded from the type-volume limitation, the length of this brief is 6,878 words.

/s/ Daniel T. Lloyd

Daniel T. Lloyd

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury that on this 15th day of October 2012, a copy of the accompanying “BRIEF FOR THE FIRST AMENDMENT COALITION AS AMICUS CURIAE IN SUPPORT OF AFFIRMANCE,” was filed with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to any of the following counsel registered as CM/ECF users at the time of filing:

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Additionally, a copy of the Motion will be mailed to the above counsel on this date via United States mail (postage prepaid, first class mail).

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