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GOOGLE INC.

10 UNITED STATES DISTRICT COURT
11 NORTHERN DISTRICT OF CALIFORNIA
12 SAN FRANCISCO DIVISION

14 ORACLE AMERICA, INC.,

15 Plaintiff,

16 v.

17 GOOGLE INC.,

18 Defendant.

Case No. 3:10-cv-03561 WHA

**DEFENDANT GOOGLE INC.'S
MOTION FOR A FINDING OF CIVIL
CONTEMPT AND FOR SANCTIONS**

Date: September 8, 2016 at 8:00 a.m.
Dept.: Courtroom 8, 19th Fl.
Judge: Hon. William Alsup

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NOTICE OF MOTION AND MOTION

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

PLEASE TAKE NOTICE that the motion of defendant Google Inc. (“Google”) for a finding of civil contempt and for sanctions as set forth below will be heard on Thursday, September 8, 2016, at 8:00 a.m. or as soon thereafter as counsel may be heard, before the Honorable William Alsup, in Courtroom 8, 19th Floor, U.S. Courthouse, 450 Golden Gate Avenue, San Francisco, California.

PLEASE TAKE NOTICE that, in accordance with the Court’s June 30, 2016 and July 20, 2016 Orders (ECF 1992, ECF 2009), Rule 37(b)(2) of the Federal Rules of Civil Procedure, and the inherent powers of the Court, defendant Google Inc. (“Google”) hereby moves for entry of an Order:

- (1) finding defendant Oracle America, Inc. and its outside counsel, Orrick Herrington & Sutcliffe LLP, in civil contempt for violation of the Protective Order entered in this action on December 20, 2010;
- (2) awarding Google its reasonable costs and expenses, including attorneys’ fees, incurred as a result of Oracle’s conduct; and
- (3) for such other and further relief as the Court deems just and proper.

This motion is based on this Notice of Motion and Motion; the Memorandum in Support set forth below; the materials submitted concurrently herewith; the record in this matter, including the prior motions, briefs and declarations cited herein; and such other and further papers, evidence and argument as may be submitted in connection with this Motion.

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MEMORANDUM IN SUPPORT OF MOTION FOR SANCTIONS**INTRODUCTION**

1
2
3 On January 14, 2016, Oracle’s counsel Annette Hurst disclosed in open court, during a
4 discovery hearing before Magistrate Judge Ryu at which at least one reporter was present,
5 information of both Google and non-party Apple Inc. (“Apple”) that was produced in
6 discovery and designated as “Highly Confidential – Attorneys’ Eyes Only” under the “Joint
7 Stipulated Protective Order For Litigation Involving Patents, Highly Sensitive Confidential
8 Information And/Or Trade Secrets” entered in this action in December of 2010. ECF 66;
9 ECF 68 (the “Protective Order”). Following Ms. Hurst’s disclosures, Oracle and its counsel
10 consistently refused to cooperate with (or, in some instances, even respond to) Google’s
11 attempts to limit the dissemination of the improperly disclosed information—and instead
12 advanced a series of denials, excuses and purported justifications for the disclosures. Judge
13 Ryu did eventually seal the portions of the January 14 hearing transcript that contain Ms.
14 Hurst’s disclosures. ECF 1444; ECF 1541. But by that time the damage had been done: Ms.
15 Hurst’s disclosures had become widespread global headline news.

16 Scrupulous compliance with protective orders is critical to the integrity of the litigation
17 process. The purpose of a protective order is to facilitate necessary discovery while at the
18 same time assuring that sensitive, highly confidential information produced in discovery
19 remains confidential and does not end up as headline news. In *Beam Sys. v. Checkpoint Sys.*,
20 No. CV95-4068-RMT (AJWx), 1997 U.S. Dist. LEXIS 8812 (C.D. Cal. Feb. 5, 1997),
21 Magistrate Judge Wistrich recognized the importance of protective orders in litigation such as
22 this:

23 The use of protective orders is vital to the efficient litigation of
24 every stage of many intellectual property disputes. If protective orders
25 were not issued to safeguard the confidentiality of trade secrets and
26 other confidential commercial information when warranted by the
27 circumstances, litigants would be forced to choose between fully
28 presenting their claims or defenses (and thereby destroying their trade
secrets through disclosure to competitors or the public), or foregoing
their claims or defenses (in order to keep their trade secrets and other
sensitive information confidential). In addition, if protective orders
were widely believed to be ineffective, the litigation of intellectual
property claims would become even more complex and protracted than

1 the nature of such cases already requires. Among other things,
2 discovery disputes would proliferate, as parties struggled desperately to
3 withhold confidential information from potentially ruinous disclosure
whenever possible.

4 Because of the important interests at stake, it is essential that
5 protective orders be respected. Carelessness in complying with
6 protective orders, or willful violation of protective orders, impairs their
7 usefulness and interferes with the ability of courts to effectively manage
8 the litigation of intellectual property disputes. Accordingly, violations
of protective orders issued to safeguard the confidentiality of trade
secrets and other confidential information cannot and must not be
tolerated. Not surprisingly, the sanctions that can be imposed for
violating a protective order may be severe.

9 *Beam Sys.*, 1997 U.S. Dist. LEXIS 8812, at *6-7 (internal citation omitted).

10 Judge Wistrich's observations apply with special significance in this case. This has
11 been a highly-publicized matter that has been followed closely by traditional print as well as
12 online business and technical media—and by numerous companies that have business dealings
13 with Google and/or Oracle. As a result of Ms. Hurst's disclosures and Oracle's failure to help
14 remedy the effects of the disclosures, the types of consequences predicted by Judge Wistrich
15 became real. The highly confidential information disclosed by Ms. Hurst became headline
16 news and thereby available to third parties involved in negotiations with both Google and
17 Apple; Google was required to engage in motion practice to minimize any further effects of the
18 disclosures; Apple was required to submit a declaration explaining the confidentiality of the
19 disclosed information; and LG Electronics, a third party, used the disclosures as part of its
20 justification for a motion for protective order.

21 The Protective Order in this case is based on the Court's model protective order for
22 cases such as this,¹ and there are countless other technology disputes of all sizes pending in
23 this District that are governed by similar protective orders. Google believes that the issues
24 relating to Ms. Hurst's disclosures and Oracle's subsequent conduct are therefore important
25 ones that cannot go unaddressed. Google seeks an order finding that Ms. Hurst, Oracle and

26
27 ¹ See Model Protective Order for Litigation Involving Patents, Highly Sensitive
28 Confidential Information and/or Trade Secrets, <http://www.cand.uscourts.gov/model-protective-orders>.

1 Oracle's other outside counsel at Orrick, Herrington & Sutcliffe LLP violated the Protective
2 Order, requiring Oracle and its counsel to reimburse Google for the amounts it spent to address
3 Ms. Hurst's disclosures, and granting such other relief as the Court deems appropriate.

4 **STATEMENT OF FACTS**

5 The facts relevant to this motion are straightforward and not in dispute.

6 At a discovery dispute hearing before Magistrate Judge Ryu on Thursday, January 14,
7 2016, Oracle's counsel Annette Hurst disclosed in open court two types of information that
8 had been produced in discovery and designated as "Highly Confidential – Attorneys' Eyes
9 Only" under the Protective Order, namely: (1) deposition testimony of a Google witness
10 regarding the confidential financial details—both a specific dollar amount and a revenue share
11 percentage—relating to a confidential agreement between Google and third party Apple (the
12 "Apple Confidential Information"); and (2) the amounts of revenue and profits that Oracle
13 claimed Google earned from Android, which were derived from confidential internal Google
14 reports (the "Google Confidential Information"). Jan. 14, 2016 Tr. at 4:10-12, 6:18-20,
15 29:23-25.

16 Ms. Hurst was aware at the time of her disclosures that the Apple Confidential
17 Information was designated as confidential, *id.* at 30:9-10, knew that the proceedings were
18 taking place in open court, and was aware, either at the time of the disclosure or shortly
19 thereafter, while she was still in the courtroom, that at least one member of the press was
20 present. ECF 1442-1 (Hurst Decl.) at 3, ¶ 9. Ms. Hurst has been actively involved in the
21 conduct of discovery in this case since the 2014 proceedings on remand began. As an officer
22 of the court, she was required to know that the Google Confidential Information had also been
23 designated as "Protected Material" under the Protective Order.²

24 At the hearing, Google's counsel raised immediately with Judge Ryu the confidentiality
25

26 ² Prior to the hearing, neither Ms. Hurst nor any of Oracle's other counsel gave notice to
27 Google, in accordance with paragraph 5.2(b) of the Protective Order, that they reasonably
28 expected to use or disclose the confidential Google or Apple information at the hearing. ECF
1438-1 (Bayley Decl.) at 1-2, ¶¶ 2, 4; ECF 1440-1 (Bayley Decl.) at 1, ¶ 2; ECF 1441-1
(Karwande Decl.) at 1, ¶ 2; ECF 1462-1 (Karwande Decl.) at 1, ¶ 2.

1 of the Apple Confidential Information and asked that Ms. Hurst’s remarks be sealed. Jan. 14,
2 2016 Tr. at 30:2 – 30:7. Rather than acknowledge without qualification that the information
3 was in fact designated confidential and should be sealed, Ms. Hurst first admitted that the
4 information was “in a deposition that’s confidential” but then, in the next breath, interrupted
5 Google’s counsel to state that “There’s been a lot of public reports that Google pays Apple [a
6 certain amount] a year. So, you know --.” *Id.* at 30:9-10, 30:12-13. Ms. Hurst, however, cited
7 no such “public reports” as the basis for her disclosure and had specifically referenced the
8 admittedly confidential deposition transcript as the source of her disclosure. Following Ms.
9 Hurst’s statement, Judge Ryu indicated that she would “take a look at” Google’s request to
10 seal. *Id.* at 30:14-16, 31:2-3.

11 The following Tuesday morning, January 19, Google’s counsel Robert Van Nest sent a
12 letter to Oracle’s counsel Peter Bicks and Ms. Hurst, in which Mr. Van Nest asked Oracle to
13 join Google in a request to seal the portions of the transcript—which had not yet been made
14 available to the public—containing Ms. Hurst’s disclosures, and requested Oracle’s response
15 by noon on January 20. ECF 1438-1 (Bayley Decl.) at 2, ¶ 6; ECF 1440-1 (Bayley Decl.) at
16 1-2, ¶ 5; ECF 1441-1 (Karwande Decl.) at 1, ¶ 4; ECF 1462-1 (Karwande Decl.) at 1-2, ¶ 6.
17 Oracle’s counsel did not respond to the letter. *Id.* That afternoon, Judge Ryu entered an
18 “Order Re New Submission” in which she, inter alia, denied Google’s oral request to seal.
19 ECF 1434 at 2.

20 Late on the afternoon of the next day, January 20, the transcript of the January 14
21 hearing was made available at the public viewing station in the clerk’s office, as ECF 1437.
22 The following day, January 21, articles began appearing that reported the disclosed
23 information as headline news, cited the transcript as the source of the information, and quoted
24 Ms. Hurst’s disclosures regarding the Apple Confidential Information. One of the first such
25 articles specifically noted that “Rumors about how much Google pays Apple to be on the
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1 iPhone have circulated for years, but the companies have never publicly disclosed it.”³

2 On Wednesday, January 20, the day after Judge Ryu’s Order, Google filed a motion for
3 reconsideration and to redact and seal. ECF 1438. Third party Apple filed a declaration in
4 support of Google’s motion, in which Apple confirmed the confidentiality and commercial
5 sensitivity of the Apple Confidential Information and explained the competitive harm that Ms.
6 Hurst’s disclosure would cause. ECF 1439 (Fithian Decl.) at 1-2, ¶¶ 3-6. In accordance with
7 instructions from the clerk’s office, Google re-filed the motion as two separate motions the
8 next day. ECF 1440, 1441. Later that day, Oracle filed a response to Google’s original
9 motion, together with a declaration from Ms. Hurst. ECF 1442, 1442-1.⁴

10 Surprisingly, Oracle’s January 21 response—which was signed by Ms. Hurst and bore
11 the names of five other Orrick attorneys—explicitly stated that “Oracle takes no position on
12 the relief requested.” ECF 1442 at 1. In the response, Oracle and Ms. Hurst did not admit that
13 the disclosed information was confidential and that it should not have been disclosed. Nor did
14 Ms. Hurst or Oracle agree that, based on the Google and Apple declarations, the transcript
15 portions should be sealed to minimize any further harm to Apple and Google. Oracle and Ms.
16 Hurst instead devoted the three-page response to a hodgepodge of excuses and rationalizations
17 for Ms. Hurst’s disclosures. That filing thereby exacerbated the harm at a time when Oracle
18 and Ms. Hurst were on notice of the disclosure and amounted to obstruction of Google’s
19 efforts to remedy Ms. Hurst’s disclosures.

20 Oracle first argued in the January 21 response that Google had waived its right to
21 object, *id.* at 1, a position that Judge Ryu later found to be “without merit.” *See* ECF 1541
22 at 4. Oracle next argued that the disclosures were proper because they were made in the course
23 of an exchange with the Court—ignoring that the disclosures were simultaneously also made

24 ³ Google will refrain from repeating herein the specific disclosures made by Ms. Hurst or
25 identifying the articles that publicized the disclosures—many of which included the disclosed
26 information in their titles. The articles have been previously cited to the Court and can be
provided again under seal if Oracle, in its response to this motion, disputes their content or
timing.

27 ⁴ Oracle also later advised Google that Oracle’s January 21 filing should be considered
28 Oracle’s response to Google’s letter requesting Oracle to join Google in a request to seal the
transcript. ECF 1462-1 (Karwande Decl.) at 2, ¶ 6.

1 to members of the press (and any members of the public) who were present and to whom
2 Oracle’s counsel was not permitted to disclose confidential information. *Id.* Oracle then
3 argued that Ms. Hurst did not “reasonably expect” in advance of the hearing to make the
4 disclosures, which was irrelevant in light of Ms. Hurst’s awareness, at the time she made the
5 disclosures, that the information was designated confidential. *Id.* Oracle’s fourth argument
6 was the equally irrelevant assertion that the disclosed subject matter had been discussed in the
7 parties’ meet and confer discussions prior to the hearing and that Ms. Hurst’s disclosures
8 should therefore not have been a surprise to Google. *Id.* at 1-3. Finally, Oracle argued that it
9 expected to introduce the disclosed information at trial and/or to discuss it in pretrial motions,
10 that Oracle believed that the information would not be sealed when and if it was so used, and
11 that Google’s motion was therefore “merely a delaying action.” *Id.* at 3.

12 In her declaration filed in support of Oracle’s response, Ms. Hurst acknowledged that,
13 as she was leaving Judge Ryu’s courtroom on January 14, she “observed that a journalist I
14 recognize . . . was present in the courtroom.” ECF 1442-1 at 3, ¶ 9. She also stated that the
15 “only press reports referencing this issue that I have located are dated January 21 . . . and
16 describe Google’s written motion to seal.” *Id.* Ms. Hurst made no mention in her declaration
17 of the fact that the articles published on the afternoon of January 21 had quoted Ms. Hurst’s
18 disclosures and cited specifically to the transcript that Oracle had refused to agree should be
19 sealed.

20 The day after the parties’ January 21 filings, Judge Ryu entered an order sealing the
21 transcript pending resolution of Google’s motions. ECF 1444. Judge Ryu then granted, on
22 January 26, Google’s motion for leave to file a motion for reconsideration as to the Apple
23 Confidential Information. ECF 1450. Three days later, Google filed its motion for
24 reconsideration, together with two additional declarations. ECF 1462; ECF 1462-1; ECF
25 1462-2. Oracle filed a further response to that motion—and a second declaration of Ms.
26 Hurst—on February 4. ECF 1478; ECF 1478-1.

27 In its February 4 filings, signed by Robert Varian on behalf of a group of six Orrick
28 attorneys representing Oracle, Oracle again stated that it “takes no position” on whether the

1 transcript should be sealed. ECF 1478 at 1. Oracle repeated several of the excuses that it first
2 aired in its January 21 filings or variations thereof, including that Ms. Hurst’s disclosures did
3 not violate the Protective Order because they were “orally to the Court in a hearing” and not
4 “in documents disseminated to third parties,” *id.*, that Google was at fault for not orally
5 moving to seal the Google Confidential Information, *id.* at 1-2, 4, and that the disclosures were
6 made “on the fly,” “in connection with searching inquiries by the Court,” *id.* at 2, and “in the
7 course of a free-flowing discussion.” *Id.* at 3. Oracle also argued, citing paragraph 12(b) of
8 the Protective Order but ignoring the other portions of paragraph 12, that it had no obligation
9 under the Protective Order to help remedy the disclosure because it had not “filed or
10 disseminated” any “copies” of any protected material.⁵ *Id.* at 4.

11 On March 31, Judge Ryu entered an order sealing the transcript, finding that Google
12 and Apple had shown good cause for the sealing and that Google had not waived its right to
13 request that the transcript be sealed, had acted diligently, and had narrowly tailored its request.
14 ECF 1541.

15 **ARGUMENT AND CITATION OF AUTHORITIES**

16 As Oracle has acknowledged, ECF 1478 at 4, a finding of civil contempt and the
17 imposition of remedies that are “wholly remedial” and/or necessary to ensure future
18 compliance are appropriate when a violation of a court order is proven by clear and convincing
19 evidence. *Accord, FTC v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir. 1999);
20 *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 778 (9th Cir. 1983) (civil
21 contempt may be compensatory, “to compensate the contemnor’s adversary for the injuries
22 which result from the noncompliance”). The Ninth Circuit has made clear that “there is no
23 good faith exception to the requirement of obedience to a court order.” *In re Dual-Deck Video*
24 *Cassette Recorder Antitrust Lit.*, 10 F.3d 693, 695 (9th Cir. 1993). In this context, moreover,
25

26 ⁵ In its January 21 response and February 4 filings, Oracle did not seek to justify Ms.
27 Hurst’s disclosure of the Apple Confidential Information based on citations to any “public
28 reports” regarding that information. Even if it had, however, the record makes plain that Ms.
Hurst’s disclosure was not based on any public reports; it was based on confidential deposition
testimony.

1 contempt consists of disobedience of a court order “by failure to take *all reasonable steps*
2 *within the party’s power* to comply.” *Id.* (emphasis added); *see also Lasar v. Ford Motor Co.*,
3 399 F.3d 1101, 1118 (9th Cir. 2005) (“[t]he power to punish for contempts is inherent in all
4 courts”) (quoting *Ex parte Robinson*, 86 U.S. 505, 510 (1873)).

5 **A. Oracle’s and Its Counsel’s Violations**

6 The facts demonstrate clearly and convincingly that Oracle and its counsel violated the
7 Protective Order in numerous respects.

8 First, Ms. Hurst disclosed publicly—to the members of the media (and any members of
9 the public) present at the January 14 hearing—information that Oracle has acknowledged was
10 produced and designated as “Highly Confidential – Attorneys’ Eyes Only” under the
11 Protective Order.

12 Second, even if Ms. Hurst’s disclosures of the Apple and Google Confidential
13 Information were inadvertent, Ms. Hurst knew, no later than when she left the courtroom that
14 day, that she had disclosed highly confidential, protected information to at least one member of
15 the media. ECF 1442-1 at 3, ¶ 9. She thereafter failed to “immediately” notify Google of that
16 fact, as paragraph 12(a) of the Protective Order requires, or to inform the persons to whom her
17 unauthorized disclosures were made of the terms of the Protective Order or request that those
18 persons execute a Protective Order acknowledgement. Protective Order ¶¶ 12(c), 12(d).

19 Third, Ms. Hurst’s and Oracle’s actions and inactions following the disclosures were
20 contrary to the requirements of the Protective Order that they “use [their] best efforts to
21 retrieve all unauthorized copies of” the disclosed materials. Ms. Hurst and Oracle ignored
22 Google’s January 19 letter requesting that Oracle join Google in asking Judge Ryu to seal the
23 transcript. ECF 1438-1 (Bayley Decl.) at 2, ¶ 6. They thereby prevented Google from filing a
24 joint motion requesting that the transcript be sealed, and the transcript containing the disclosed
25 information became publicly available the next day. Even thereafter, Oracle consistently and
26 steadfastly refused—despite numerous opportunities to do so—to acknowledge that the
27 transcript contained confidential information that should be sealed. Oracle thereby obstructed
28 rather than facilitated mitigation of the disclosures.

1 Ms. Hurst's and Oracle's actions following the January 14 hearing make their conduct
2 especially troublesome. At every turn, Oracle and its counsel failed to act as they should have
3 following Ms. Hurst's disclosures:

- 4
- 5 • At the hearing on January 14, Ms. Hurst could have readily and without
6 qualification acknowledged in response to Google's oral motion and the Court's
7 inquiry that the information was in fact designated as highly confidential and
8 agreed that it should be sealed, which would have been far more likely to result
9 in Judge Ryu sealing the transcript and would have allowed Judge Ryu to
10 caution any members of the public present at the hearing regarding
11 dissemination of the information that Ms. Hurst had disclosed.

12 Ms. Hurst did not do so. Instead, she quibbled and engaged in
13 misdirection about the information, stating that there had been "a lot of public
14 reports" regarding the information she had disclosed based on confidential
15 sworn deposition testimony.

- 16
- 17 • Once Ms. Hurst realized, leaving the hearing, that there was at least one reporter
18 present during her disclosures, she could have cautioned the reporter regarding
19 dissemination of the information she had disclosed and/or advised Google
20 and/or the Court that she was aware that at least one reporter was present.

21 She did not do so. Instead, she kept that information to herself and only
22 shared it for the first time in her declaration filed a week later, on January 21.

- 23
- 24 • Oracle and its counsel could have responded positively to Google's counsel's
25 January 19 letter to Mr. Bicks and Ms. Hurst—sent prior to Judge Ryu's initial
26 ruling denying Google's oral motion to seal and before the transcript became
27 available—requesting that Oracle join Google in its request to seal the
28 transcript.

Oracle did not do so. Instead, Oracle ignored Google's letter altogether

1 and, the next day, the transcript was made available for inspection in the clerk's
2 office following Judge Ryu's initial ruling on Google's oral motion.

- 3
- 4 • Finally, Oracle and its counsel could have agreed to the relief sought in
5 Google's motions to seal the transcript, especially after both Google and Apple
6 had filed declarations confirming the extremely confidential nature of the
7 information.⁶

8 Oracle did not do so. Instead, it twice filed briefs in which it "took no
9 position" on whether the transcript should be sealed and asserted its numerous
10 excuses for Ms. Hurst's disclosures.

11 The conduct of Oracle and its counsel meets neither the "best efforts" standard of
12 paragraph 12 of the Protective Order nor the Ninth Circuit's "all reasonable steps within the
13 party's power" standard. The Protective Order contemplates inadvertent violations, and
14 imposes an obligation to correct such violations. Even if Ms. Hurst's disclosures were
15 inadvertent, her and Oracle's conduct thereafter was not.

16 **B. Oracle's Excuses**

17 The excuses Oracle has advanced for its and Ms. Hurst's actions and inactions are not
18 consistent with acceptable professional conduct before this Court and would reduce protective
19 orders to irrelevant inconveniences. Oracle's excuses, if accepted, would permit an attorney in
20 possession of other parties' highly confidential information that is subject to a protective order
21 to: (1) disclose that information in open court without any prior notice to the Court or
22 opposing counsel or any identification of the information as confidential, regardless of who is
23 present in the courtroom; (2) keep to himself or herself actual knowledge that a person not
24 authorized to receive the information was present for the disclosure; and (3) ignore or refuse to

25 ⁶ Oracle has never challenged the propriety of the designations of the disclosed information
26 as "Highly Confidential" or Google's and Apple's declarations regarding the confidentiality of
27 the information. And the parties have been permitted by both Judge Alsup and Judge Ryu to file
28 such information under seal in this action after making such showings. *See, e.g.*, ECF 1374; ECF
1375 (J. Alsup Order); ECF 1388; ECF 1394 at 3 (J. Ryu Order); Apr. 19, 2016 Tr. at 7:15-17 (J.
Alsup).

1 join in reasonable efforts to minimize the effects of the disclosure and limit the availability to
2 the media and to the public of the improperly disclosed information. Such conduct would
3 jeopardize the efficacy of the protective orders under which discovery is conducted in
4 countless cases such as this, both in this District and elsewhere.

5 Oracle's excuses—both individually and collectively—also do not mitigate against a
6 finding of contempt. While Oracle asserts that Ms. Hurst's disclosures were permitted because
7 she made them to Judge Ryu, Ms. Hurst also at the same time disclosed the information
8 publicly. That is most assuredly not permitted under the Protective Order and violates
9 section 7—both paragraph 7.1 and paragraph 7.3—of the Order.⁷ Disclosures of confidential
10 information in open court are not immune from scrutiny, and counsel in cases such as this must
11 be aware at all times whether she or he is about to disclose protected confidential information.
12 There are numerous mechanisms available through which counsel may communicate (and, in
13 this case, have communicated) relevant facts to the Court and still maintain the confidentiality
14 of the information, including requesting a sidebar conference, making a written rather than oral
15 submission, tendering a transcript or document to the Court without orally revealing its
16 contents, or even requesting that the courtroom be temporarily cleared of members of the press
17 and public. Ms. Hurst availed herself of none of these familiar mechanisms.⁸

18 Similarly, Oracle's claim that the information would likely become public at trial or in
19 connection with pretrial motions, ECF 1442 at 3, is not a reasonable justification (and was
20 incorrect). A party cannot unilaterally justify disclosure of confidential information based on

21 _____
22 ⁷ Paragraph 7.1 of the Protective Order provides, in part, that "Protected Material may be
23 disclosed only to the categories of persons . . . described in this Order," and paragraph 7.3
24 identifies the categories of persons to whom information or materials designated "Highly
Confidential – Attorneys' Eyes Only" may be disclosed. The listed categories do not include
reporters or members of the public.

25 ⁸ The Protective Order contains specific provisions regarding reasonably expected uses of
26 Protected Material at a hearing. Protective Order ¶ 5.2(b). For purposes of this motion, Google
27 accepts Ms. Hurst's attestations that she did not expect in advance of the hearing to disclose the
28 information she in fact disclosed—but notes that Oracle argues at the same time that Google
should not have been "surprised" about the disclosures, and that the subject matter of the
disclosures was "the known subject matter of the dispute coming into the hearing." ECF 1442
at 1-2.

1 its speculation or belief that the information will “likely” later be made public.⁹ Such a
 2 presumptuous and speculative argument deprives the Court of its role in determining whether
 3 highly confidential party and third party information should in fact be made public over the
 4 objection of the disclosing parties. *See, e.g., United States v. Bazaarvoice, Inc.*, No. 13-cv-
 5 00133-WHO, 2014 U.S. Dist. LEXIS 3244, at *5 (N.D. Cal. Jan. 8, 2014) (sealing exhibits
 6 used at trial that “contain[ed] pricing and competitive information that could cause damage to
 7 the third parties if made public.”). It also deprives the party that designated the information as
 8 Protected Material (and any third parties whose information is disclosed) of the protection to
 9 which they are entitled under the Protective Order and the opportunity to be heard before their
 10 confidential information is made public.

11 C. The Damage to Google

12 The issues presented by Oracle’s and its counsel’s conduct are not academic ones.

13 Both Apple and Google filed declarations in support of Google’s motions to seal the
 14 portions of the transcript containing Ms. Hurst’s disclosures, which Judge Ryu found
 15 established good cause to grant the motions. ECF 1541 at 3-4 (finding good cause as to
 16 Google Confidential Information), 5 (finding good cause as to Apple Confidential
 17 Information). As those declarations explained regarding the Apple Confidential Information:

18 5. Disclosing this information to the public would pose a serious risk
 19 of competitive harm to Apple. Companies engaging in free-market competition
 20 ordinarily compete without perfect knowledge of their competitors’ or business
 21 partners’ financial status and business models. Maintaining the confidentiality of
 22 this information allows Apple to remain competitive in fast-moving markets,
 which ultimately benefits the public. If this information is disclosed, for example,
 third parties seeking to negotiate terms of a business relationship with Apple
 might leverage this information against Apple, thereby forcing Apple into an
 uneven bargaining position in future negotiations. . . .

23 6. In addition, competitors could potentially use this information to
 24 undercut Apple’s business model and negotiation strategies.

25 ECF 1439 (Fithian Decl.) at 2, ¶¶ 5, 6.

27 ⁹ The Apple Confidential Information that Ms. Hurst disclosed did not become public at
 28 trial—which confirms that Oracle’s speculation was incorrect.

1 3. Google considers [the Apple Confidential Information] to be
2 extremely confidential and commercially sensitive and has always treated it as
3 such. This information is subject to stringent confidentiality requirements
4 contained within the relevant agreement. Indeed, Google places strict limits on
5 who has access to the terms of this agreement to ensure its confidentiality is
retained. Also, Google does not disclose this information to the public. Public
disclosure of this information could severely and adversely impact Google's
ability to negotiate, among other things, similar terms with other third parties in
connection with similar agreements now or in the future.

6 ECF 1462-2 (Hwang Decl.) at 1, ¶ 3. Google filed similar declarations regarding the Google
7 Confidential Information. *See* ECF 1438-1 (Bayley Decl.) at 1, ¶¶ 2-3, ECF 1441-1
8 (Karwande Decl.) at 1, ¶¶ 2-3. As a result of Oracle's actions and inactions, the highly
9 confidential information disclosed by Ms. Hurst became headline news and available to third
10 parties involved in negotiations with both Google and Apple, thus making a reality the
11 concerns outlined in these declarations.

12 In addition, even though discovery in this action was largely complete at the time of
13 Ms. Hurst's disclosures, her disclosures were cited by a third party, LG Electronics, Inc.
14 ("LGE"), in a request for a protective order filed after the disclosures were made and
15 publicized. In its letter motion of February 12, 2016 addressed to Judge Ryu, LGE argued that
16 its motion was justified, at least in part, by Oracle's disclosure of "highly sensitive competitive
17 information of Apple Inc. in open court that was promptly published in the national business
18 press." ECF 1503 at 3. LGE's request confirms both the attention paid by third parties to this
19 action, the significance third parties attach to the importance of protective orders governing
20 disclosure of their confidential information, and the importance and sensitivity of this type of
21 confidential information.

22 Google was damaged, and forced to expend resources, as a result of the disclosures and
23 Oracle's subsequent failure to mitigate the effects of its counsel's actions. Because of Oracle's
24 refusal to join Google's request that the January 14 transcript be sealed—which could in and of
25 itself have prevented the articles based on the transcript from appearing—Google was required
26 to file: (1) its January 20 motion for reconsideration and to redact and seal, together with the
27 declaration of Edward Bayley in support thereof, ECF 1438; ECF 1438-1; (2) its separate
28 January 21 motions for leave to file a motion for reconsideration and to redact and seal, ECF

1 1440; ECF 1441, and the declarations of Edward Bayley and Maya Karwande in support
2 thereof, ECF 1440-1; ECF 1441-1; (3) its January 29 motion for reconsideration and the
3 declarations of Renny Hwang and Maya Karwande in support thereof, ECF 1450; ECF 1450-1;
4 ECF 1450-2; (4) its February 8 reply brief in support of its motion for reconsideration, ECF
5 1489; (5) its February 11 reply brief in support of its motion to redact and seal, ECF 1501; (6)
6 its response to the Court's initial order regarding LGE's request for a protective order, ECF
7 1497, and its portion of the joint LGE letter to Judge Ryu, ECF 1503; (7) its January 27 and
8 June 29 precis letters regarding this motion, ECF 1457; ECF 1991; and (8) this motion.

9 In view of the above, Oracle and its counsel should be ordered to reimburse Google for
10 the attorneys' fees and costs necessitated by their violations of the Protective Order, including
11 all fees incurred not just for this motion, but also for the filings that were necessary to reclaim
12 protection of the confidential information or were otherwise necessitated by the disclosures.
13 Such relief has regularly been awarded in similar cases. *See, e.g., Bradford Techs., Inc. v.*
14 *NCV Software.com*, No. C 11-04621 EDL, 2013 U.S. Dist. LEXIS 1592, at *22-24 (N.D. Cal.
15 Jan. 3, 2013) (award of costs and fees for protective order breach "justified under both the
16 Court's contempt power as well as Federal Rule of Civil Procedure 37(b)(2)(C)."); *Harmston*
17 *v. City & Cty. of S.F.*, No. C 07-01186 SI, 2008 U.S. Dist. LEXIS 9622, at *8-9 (N.D. Cal. Jan.
18 29, 2008) (awarding attorneys' fees and costs for protective order violation under civil
19 contempt power); *Colaprico v. Sun Microsystems, Inc.*, No. 90-20610 SW, 1994 U.S. Dist.
20 LEXIS 21853, at *10-12 (N.D. Cal. Aug. 22, 1994) (using court's inherent contempt authority
21 to award attorneys' fees and costs for breach of protective order).¹⁰

22 Such a sanction is warranted here. Ms. Hurst disclosed both party and non-party

23 ¹⁰ *See also, e.g., Falstaff Brewing Corp.*, 702 F.2d at 784 ("failure to obey the protective
24 discovery order exposed counsel and Falstaff to liability under Rule 37(b)(2) for the resulting
25 costs and attorney's fees."); *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, No. 5:11-cv-01846-LHK
26 (PSG), 2014 U.S. Dist. LEXIS 11778, *52 (N.D. Cal. Jan. 29, 2014) (awarding attorneys' fees
27 under Rule 37(b) for disclosure that occurred because of inadvertent failure in redaction); *Life*
28 *Techs. Corp. v. Biosearch Techs., Inc.*, No. C-12-00852-WHA (JCS), 2012 U.S. Dist. LEXIS
63974, *40 (N.D. Cal. May 7, 2012) (ordering payment of fees and costs for violation of local
patent rule that limited disclosure of confidential information until a protective order is issued by
the Court because Rule 37(b)(2) "require[s] [a] Court to order an offending to party to pay the
reasonable attorney fees and costs caused by its failure.").

1 confidential information, and Oracle and its counsel have taken a cavalier attitude toward their
2 Protective Order obligations. *Beam Sys.*, 1997 U.S. Dist. LEXIS 8812, at *7 (ordering
3 payment of attorneys’ fees for violation of a protective order, noting that “violations of
4 protective orders issued to safeguard the confidentiality of trade secrets and other confidential
5 information cannot and must not be tolerated.”). While courts in other similar situations have
6 imposed additional and more severe sanctions, including disqualification of counsel and/or
7 restrictions on counsel’s access to confidential information, *see, e.g., Systemic Formulas, Inc.*
8 *v. Kim*, No. 1:07-CV-159 TC, 2009 U.S. Dist. LEXIS 119502, at *6 (D. Utah 2009); *Beam*
9 *Sys.*, 1997 U.S. Dist. LEXIS 8812, at *6; *Life Techs. Corp.*, 2012 U.S. Dist. LEXIS 63974,
10 Google leaves to the Court consideration of other remedies or relief that may be appropriate
11 given the current status of this action.

12 CONCLUSION

13 Ms. Hurst’s disclosures and Oracle’s and its counsel’s subsequent actions reveal a
14 profound disregard for this Court’s Protective Order and for other parties’ confidential
15 information. Oracle’s and its counsel’s conduct is inconsistent with the important policy
16 considerations that protective orders serve—facilitating discovery while protecting confidential
17 information so as to avoid needless disputes and improper exploitation of that information.
18 Google and third party Apple were harmed by Oracle’s counsel’s disclosure regarding the
19 terms of a significant and confidential commercial agreement, and Google was harmed by
20 Oracle’s counsel’s disclosure of Google’s confidential internal financial information.

21 Consistent with the foregoing authorities, Oracle and its counsel should be found to
22 have violated the Protective Order; Google should be awarded its fees and costs, in an amount
23 to be established following the Court’s ruling on this motion; and the Court should grant such
24 other or further relief as it deems appropriate.

25 KING & SPALDING LLP

26
27 By: /s/ Bruce W. Baber
Bruce W. Baber

28 Counsel for Defendant GOOGLE INC.