Case Nos. 19-1922 (lead), -1923, -1924, -1926 (member cases)

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

UNILOC 2017 LLC, UNILOC USA, INC., AND UNILOC LUXEMBOURG, S.A.,
Plaintiffs-Appellants,

v.

APPLE INC.,
Defendant-Appellee

ELECTRONIC FRONTIER FOUNDATION
Intervenor-Appellee.

Appeal from the United States District Court for the
Northern District of California
No. 3:18-cv-00360-WHA, Judge William H. Alsup

SECOND CORRECTED RESPONSE BRIEF OF INTERVENOR-APPELLEE ELECTRONIC FRONTIER FOUNDATION

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel for Electronic Frontier Foundation certifies that:

1. The full name of the party I represent is:

Electronic Frontier Foundation

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) I represent is: N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party I represent are: None.

4. The names of all law firms and the partners or associates that appeared for the party I represent or are expected to appear in this Court are: Alexandra H. Moss, Electronic Frontier Foundation, San Francisco, California.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal: Uniloc 2017 LLC et al. v. Apple Inc. No. 3:18-cv-00360-WHA (N.D. Cal.), Uniloc 2017 LLC et al. v. Apple Inc. No. 3:18-cv-00363-WHA (N.D. Cal.), Uniloc 2017 LLC et al. v. Apple Inc. No. 3:18-cv-00365-WHA (N.D. Cal.) and Uniloc 2017 LLC et al. v. Apple Inc. No. 3:18-cv-00572-WHA (N.D. Cal.).

October 24, 2019

/s/ Alexandra H. Moss
Alexandra H. Moss
Electronic Frontier Foundation

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STATEMENT OF RELATED CASES

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PRELIMINARY STATEMENT

In this country, court proceedings, including court filings, are *presumptively* open to the public. This openness is a crucial check on the operation, performance, and use of our judicial system. Given the government's role in patent issuance and enforcement, it is also a crucial check on the operation, performance, and use of our patent system. Therefore, when documents concerning the scope of a patent owner's rights become judicial records, litigants should expect that all or most of those documents will be made public under all but the most compelling circumstances.

But when the Electronic Frontier Foundation (EFF) tried to review Apple's motion to dismiss on the public docket in this case, it discovered a staggering amount of material was filed under seal: at least two-thirds of Apple's motion to dismiss (including twelve whole pages and numerous legal citations) was redacted and all attached exhibits were sealed in their entirety. What was available on the record made the substance of the parties' standing dispute incomprehensible. The docket left the public in the dark about the issues and evidence before the District Court and thus unable to evaluate or understand their impact on Uniloc's ownership of the patents-in-suit.

When pressed in the proceedings below, Uniloc offered nothing more than conclusory assertions to try to justify this level of secrecy—and it has done no

better on appeal. The District Court's decision to reject those assertions and deny Uniloc's sealing requests in full was a sound exercise of discretion and correct as a matter of law. That decision should be affirmed and endorsed as a model to empower district courts to protect the public's right of access in patent cases in general and discourage litigants from following Uniloc's example.

STATEMENT OF THE ISSUES

EFF disagrees with Uniloc's statement of the issues on appeal. There are two ultimate issues for this Court to decide:

1. Whether the District Court abused its discretion in denying the parties' administrative sealing motions.
2. Whether the District Court abused its discretion in denying Uniloc's motion for leave to seek reconsideration of the order denying the parties administrative sealing motions.

STATEMENT OF FACTS

A. The Heavily-Redacted and Sealed Filings on Apple's Motion to Dismiss.

Apple moved to dismiss for lack of standing on October 25, 2018. Appx51-52. At that time, EFF attempted to read the motion to understand the issues before the Court, including facts pertaining to Uniloc's ownership of the patents-in-suit and how those facts might affect the development of standing law. But there was virtually nothing on the public record to read: two-thirds of Apple's motion and all

attached exhibits were filed under seal. *See* Appx262-291; Appx295-411. The redactions covered twelve entire pages, *see* Appx269-274; Appx278-287, including numerous legal citations and quotations from judicial opinions. *See* Appx606-615. Even the names of many of these documents were withheld from the public. *See* Appx295-298 (redacting all identifying information concerning Exhibits A, B, C, F, G, J, K, L, M, O, P, Q, R, S, and W).

In support of the requests to seal the parties' memoranda and attachments, Uniloc filed three declarations from its attorney of record in this case. *See* Appx413-416; Appx420-422; Appx502-504. These declarations merely list the exhibits with rote, perfunctory assertions that they "contain sensitive, confidential and proprietary information related to financial data, licensing terms and business plans with respect to various Uniloc entities," and that "disclosure of this extremely sensitive information would create a substantial risk of serious harm to the Uniloc entities." Appx503, Appx422, Appx415. They do not provide further detail about the exhibits, why the information in the exhibits is confidential, or how disclosure could cause competitive harm. *See* Appx31-32.

After seeing the sealed filings and supporting submissions, EFF contacted counsel for both parties on November 28, 2018, stating that the redactions in this case were excessive, and requesting that the documents be re-filed consistent with the public's right of access. *See* Appx768. EFF explained: "We hope that we can

resolve this issue without the need for EFF to intervene formally in the case. If necessary, however, EFF will move to intervene and ask the court to unredact and unseal improperly withheld material." *Id.*

On December 12, 2018, EFF met and conferred with the parties in the hopes of convincing the parties to submit properly redacted filings without the need for judicial intervention. *See id.* After the meeting, EFF wrote to counsel to confirm the discussion that had occurred. The email stated: "As discussed, if the parties are willing to revise the redactions to the documents listed below, we would be happy to review them and consider whether they comply with the Ninth Circuit's sealing requirements and thus whether . . . EFF's intervention is necessary to assert the public's right of access to the court records." *Id.*

After that conference, Uniloc did not revise its sealing request or re-file any of the improperly sealed documents. *See* Appx72. On January 9, 2019—the day before the hearing on Apple's standing motion—it was clear Uniloc was not going to do so. At that point, EFF filed a motion to intervene for the purpose of opposing the parties' sealing motions. *See id.*

The excessive sealing of court records at the time of the hearing on Apple's standing motion prevented the District Court from conducting a full hearing in open court. Counsel for Apple could not even provide a substantive answer to Judge Alsup's very first question "because the briefing was filed under seal."

Appx517. In response, Judge Alsup acknowledged the sealing that was in place and explained that he was "going to respect that for the moment," and therefore "not . . . say anything more because this is a public courtroom." *Id.*

Despite respecting the sealing of the court records as filed, Judge Alsup also stated that "there is no way this deserves to be under seal." *Id.* He emphasized his concern that the requests for secrecy were "machinations that in my view are designed to insulate Uniloc . . . from liability for sanctions probably. But whatever it is, they are machinations; and the world deserves to know that." *Id.*

B. The District Court's Decision to Deny the Parties' Sealing Motions and Uniloc's Motion for Leave to Seek Reconsideration

A week after the hearing, Judge Alsup denied in full the parties' administrative sealing motions because "Plaintiff's supporting declarations . . . fail[] to show a compelling reason to justify sealing." Appx31. The District Court found that "the declarations provide no further explanation why or how public disclosure of this information could cause commercial harm." Appx32. Instead, Uniloc offered only a "generalized assertion of potential competitive harm," that "fail[ed] to outweigh the public's right to learn of the ownership of the patents-in-suit—which grant said owner the right to publicly exclude others." *Id.* In addition, the District Court found the "plaintiffs' requested redactions contain non-sealable material," including "portions of defendant Apple Inc.'s motion that simply quote Federal Circuit law," and "are thus far from 'narrowly tailored' as required by

Civil Local Rule 79-5(b).” Appx32.

After the District Court’s January 17 order, Uniloc contacted EFF, indicating it would re-file the sealed documents in substantially revised form and seek reconsideration of the District Court’s sealing order. *See* Appx771. Before requesting reconsideration, Uniloc sent EFF documents showing the redactions and sealing it would ask the District Court to uphold. *See id.* EFF informed Uniloc that it did not object to a brief stay for the District Court to rule on a motion for reconsideration, but took “no position” on the revised submissions Uniloc was proposing. *See id.* EFF also requested that “any motion to reconsider places all of the documents you shared with EFF on the public docket as exhibits so that the public has immediate access to the information Uniloc now agrees does not need to be sealed.” *Id.*

On January 29, 2019, Uniloc requested a stay of the District Court’s sealing order, which was granted the next day. *See* Appx73. On February 15, 2019. Uniloc filed its motion for leave to seek reconsideration along with its request for reconsideration and accompanying attachments. Shown below are the documents Uniloc asked the District Court to keep sealed in its motion for reconsideration, along with Uniloc’s proffered justification for secrecy with respect to each

document:[1]

Document	**Uniloc's Supporting Submission**
Apple's Motion to Dismiss	"Each phrase includes highly confidential and sensitive financial information of Uniloc, the disclosure of which would cause competitive harm to Uniloc." Appx566.
Declaration of Doug Winnard in Support of Apple's Motion to Dismiss	This is highly confidential and sensitive financial information, the disclosure of which would prove to be a competitive harm for Uniloc." Appx571.
Exhibit A: Conformed Revenue Sharing and Note and Warrant Purchase Agreement	"This information is highly confidential and sensitive financial information of Uniloc and Fortress, the disclosure of which would prove to be a competitive harm to them." Appx567.
Exhibit C: Revenue Sharing and Note and Warrant Purchase Agreement Between Uniloc Fortress	"This information is highly confidential and sensitive financial information of Uniloc and Fortress, the disclosure of which would prove to be a competitive harm to them." Appx569-570.
Exhibit D: Deposition Transcript of Levy	"This information is highly confidential and sensitive financial information of Uniloc and Fortress, the disclosure of which would prove to be a competitive harm to them." Appx570.

[1] Uniloc omits Exhibit DD, an agreement between Uniloc and Microsoft, and Exhibit GG, an agreement between Fortress and Uniloc, from the table in its brief showing documents still at issue on appeal. Uniloc Br. at 18-20. But Uniloc is still challenging the District Court's ruling with respect to those documents, *see* Uniloc Br. at 44-45, and asking this Court to "remand with instructions to seal the documents as proposed in Uniloc's February 15, 2019, motion for leave to file a motion for reconsideration." Uniloc Br. at 57. In that motion, Uniloc asked to seal those Microsoft and Fortress agreements. Appx566. The public's access to these documents is still at issue and before this Court; EFF's brief addresses them accordingly.

Exhibit E: Deposition Transcript of Turner	"This information is highly confidential and sensitive financial information of Uniloc and Fortress, the disclosure of which would prove to be a competitive harm to them." Appx570.
Exhibit G: Uniloc Luxembourg and Uniloc USA's Disclosure Schedules	"The individual amounts are financial records, the disclosure of which could cause competitive harm to Uniloc." Appx570.
Exhibit P: License Agreement between Uniloc 2017 LLC and Uniloc Licensing USA	"The only proposed redactions relate to a confidential, proprietary software platform . . . , the disclosure of which would be a competitive harm for Uniloc." Appx571.
Exhibit S: Note Purchase and Security Agreement between Uniloc 2017 LLC and CF Uniloc Holdings LLC	"This information is highly confidential and sensitive financial information, the disclosure of which would prove to be a competitive harm for Uniloc." Appx571.
Exhibit DD: Settlement and License Agreement Between Microsoft and Uniloc	"This information is highly confidential and sensitive financial information, the disclosure of which would prove to be a competitive harm for Microsoft and Uniloc." Appx572.
Exhibit GG: Head of Agreement between Fortress and Uniloc's CEO	"This document describes, inter alia, Mr. Etchegoyen's responsibilities as the chief executive officer of several of the Uniloc entities, and is in this respect akin to an employment agreement." Appx572.
Apple's Reply	"Each one-to-four-word phrase [that Uniloc seeks to redact in Apple's reply] includes highly confidential and sensitive financial information, the disclosure of which would prove to be a competitive harm to Uniloc and/or Fortress." Appx586-587.

After reviewing Uniloc's revised redactions and supporting declarations,

EFF determined that Uniloc was still asking for more secrecy than was justified under the compelling reasons standard. Accordingly, EFF filed a renewed motion to intervene and a motion to oppose Uniloc's request for reconsideration. *See* Appx117.

On May 7, 2019, the District Court denied Uniloc's motion for leave to file a motion for reconsideration as well as Uniloc's accompanying motion to seal. Appx33. The Order "reiterate[d] the prior order denying plaintiff's initial request to seal," on the same ground: "Uniloc's "generalized assertions of potential competitive harm fail to outweigh the public's right to learn of the ownership of the patents-in-suit." Appx34; *see also* Appx36 (rejecting "boilerplate assertion of competitive harm").

The District Court also rejected Uniloc's motion for leave to seek reconsideration, explaining that "the parties should have done it right from the outset rather than over-classifying and then trying to get away with whatever they can on a motion to reconsider." Appx34. In so doing, it rejected Uniloc's excuses for failing to tailor and support its sealing requests initially, explaining that "[t]he Court is unsympathetic to plaintiffs' suggestion that they lacked sufficient time to narrowly tailor the motion to seal, as they could have easily requested additional time to file their supporting declaration," and "have no one to blame but themselves for over-designating information as confidential to begin with."

Appx35 n.2.

Judge Alsup's order granting access is stayed through the pendency of this appeal. Therefore, all of the sealed filings at issue in this case remain on the public docket as originally filed, with large swathes of briefing redacted and all attached exhibits hidden from view. By the time this brief reaches the panel, the public will have been waiting to see those docket entries for more than a year.

SUMMARY OF THE ARGUMENT

The District Court soundly exercised its discretion in refusing to seal presumptively public judicial records and in refusing to reconsider its decision to do so. Both orders should stand.

First, the public has a right to access court proceedings and court documents under the common law and First Amendment. In recognition of that right, the Ninth Circuit applies a strong presumption of public access to court documents like these—dispositive motions and their attachments—and thus puts the burden on the proponent of sealing to prove sufficiently compelling reasons for secrecy exist. The District Court's decision to apply and uphold the strong presumption of public access to judicial records over Uniloc's conclusory assertions was a sound exercise of discretion and correct as a matter of law.

Second, the Northern District of California's Local Rules do not allow litigants countless bites at the apple. Instead, Local Rule 7-9 requires those

requesting reconsideration to raise *new* arguments they could not have presented initially. Because Uniloc's request for reconsideration violates those requirements, the District Court's decision to deny it was not only a sound exercise of discretion, but a necessary application of the governing local rules.

STANDARD OF REVIEW

This case involves procedural issues not unique to patent law, and therefore the procedural law of the United States Court of Appeals for the Ninth Circuit governs. *See Genentech, Inc. v. Amgen, Inc*., 289 F.3d 761, 768 (Fed. Cir. 2002).

The Ninth Circuit reviews a district court's decision to unseal court records for abuse of discretion. *See Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016); *see also In re Violation of Rule 28(D)*, 635 F.3d 1352, 1357–58 (Fed. Cir. 2011) ("The district court's decision to seal a portion of the record is reversible for abuse of discretion."). De novo review of a sealing order is appropriate only if "the district court's decision turns on a legal question." *Id.* (citing *San Jose Mercury News, Inc. v. U.S. Dist. Court—N.D. Cal. (San Jose)*, 187 F.3d 1096, 1100 (9th Cir.1999)).

The Ninth Circuit also reviews a district court's application of local rules for abuse of discretion. *See Genentech, Inc. v. Amgen, Inc.*, 289 F.3d at 768 (citing *Acorn v. City of Phoenix*, 798 F.2d 1260, 1272 (9th Cir. 1986)).

ARGUMENT

I. THE PUBLIC HAS THE RIGHT TO ACCESS THE SEALED COURT FILINGS UNDER THE COMMON LAW AND FIRST AMENDMENT.

A. The Common Law and First Amendment Protect the Public's Right of Access to Court Records.

The public's right to access the sealed filings in this case comes from the common law and the First Amendment. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597–99 (1978) and *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579 (1980); *see also In re Violation of Rule 28(D)*, 635 F.3d at 1356. That right must be protected because "[p]ublic access is essential . . . to achieve the objective of maintaining public confidence in the administration of justice." *Richmond Newspapers*, 448 U.S. at 596-96; *see also Valley Broad. Co. v. U.S. Dist. Court for Dist. of Nevada*, 798 F.2d 1289, 1293 (9th Cir. 1986) ("[C]ourts have recognized that exercise of the right helps the public keep a watchful eye on public institutions . . . and the activities of government.") (citations omitted).

Given the importance of public access, "[t]here is a strong presumption in favor of a common law right of public access to court proceedings." *In re Violation of Rule 28(D)*, 635 F.3d at 1356 (citing *Nixon*, 435 U.S. at 597); *Ctr. for Auto Safety v. Chrysler Grp., LLC*, 809 F.3d s1092, 1096 (9th Cir. 2016) ("Following the Supreme Court's lead, 'we start with a strong presumption in favor of access to court records.'") (citation omitted); *Apple Inc. v. Samsung Elecs. Co., Ltd.*, 727

F.3d 1214, 1221 (Fed. Cir. 2013) ("[T]he Ninth Circuit start[s] with a strong presumption in favor of access to court records.").

The Ninth Circuit has emphasized that "[t]he presumption of access is 'based on the need for federal courts, although independent—indeed, particularly because they are independent—to have a measure of accountability and for the public to have confidence in the administration of justice.'" *Ctr. for Auto Safety*, 809 F.3d at 1096 (citation omitted). The presumption of public access must not be taken lightly given the dangers that flow from holding judicial proceedings in secret. *See Richmond Newspapers*, 448 U.S. at 595 ("Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for the law."); *Union Oil Co. of California v. Leavell*, 220 F.3d 562, 567–68 (7th Cir. 2000) ("Any step that withdraws an element of the judicial process from public view makes the ensuing decision look more like fiat, which requires compelling justification.")

That strong presumption of public access applies with full force to the documents at issue here: briefs and exhibits filed with a court and the opinion based on those filings. *See, e.g., Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006) ("We acknowledged explicitly in *San Jose Mercury News*, 187 F.3d at 1102, and later confirmed in *Foltz v. State Farm Mut. Auto. Ins.*

Co., 331 F.3d 1122, 1136 (9th Cir. 2003), that the strong presumption of access to judicial records applies fully to dispositive pleadings, including motions for summary judgment and related attachments.").[2] Accordingly, the District Court was correct to apply the strong presumption of public access to the sealed filings at issue here. *See* Appx31.

Uniloc's key contention—that the District Court should have required the public to prove its interest in the sealed materials and even-handedly balanced that interest against Uniloc's need for secrecy—turns the presumption of public access on its head. *See* Uniloc Br. at 22-23. As a matter of law, the presumption puts the burden on the proponent to justify secrecy. Uniloc has not met that burden.

[2] And it is consistent with the approach of other regional circuits. *See*, *e.g.*, *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 123 (2d Cir. 2006) ("The contested documents—by virtue of having been submitted to the court as supporting material in connection with a motion for summary judgment—are unquestionably judicial documents under the common law."); *Pepsico, Inc. v. Redmond*, 46 F.3d 29, 31 (7th Cir. 1995) ("This circuit has insisted, moreover, that the judicial proceedings held, and evidence taken, on the way to a final decision also are presumptively in the public domain.") (citations omitted).

II. THE DISTRICT COURT'S DECISION TO GRANT PUBLIC ACCESS TO THE SEALED FILINGS OVER UNILOC'S CONCLUSORY ASSERTIONS WAS A SOUND EXERCISE OF DISCRETION.

A. The District Court Correctly Found that Uniloc Failed to Satisfy its Burden as the Proponent of Secrecy.

1. Uniloc Bears the Burden of Showing that Compelling Reasons for Secrecy Exist.

To overcome the strong presumption of public access, the proponent of secrecy must show particularized harm *before* a court may designate a particular word, sentence, paragraph, or document as confidential and withhold it from the public record. *See* Fed. R. Civ. P. 26(c)(1). In the Ninth Circuit, that burden requires showing "compelling reasons" for secrecy when the documents at issue are dispositive court filings. *Kamakana*, 447 F.3d at 1179-80; *Ground Zero Ctr. for Non-Violent Action v. United States Dep't of Navy*, 860 F.3d 1244, 1261 (9th Cir. 2017) (requiring "parties to show 'compelling reasons' to justify sealing documents attached to dispositive motions and other filings that relate to the merits of a case, even when those documents were produced pursuant to a sealing order").

The Ninth Circuit has emphasized that the compelling reasons standard is exacting because of the importance of public access to judicial records which, "[u]nlike private materials unearthed during discovery, . . . are public documents almost by definition." *Kamakana*, 447 F.3d at 1180. Thus, compelling reasons for sealing may exist, for example, where disclosure would become "a vehicle for

improper purposes." *Id.* at 1179. But a litigant's desire to avoid "embarrassment, incrimination, or exposure to further litigation will not, without more, compel the court to seal its records." *Id.* (quoting *Foltz*, 331 F.3d at 1136).

2. Uniloc's Generalized Assertions of Competitive Harm Fail to Show Compelling Reasons for Sealing

The District Court found that Uniloc's "supporting declarations . . . fail[] to show a compelling reason to justify sealing." Appx31. As that Order explains, Uniloc's declarations from counsel simply assert that disclosure would cause competitive harm, but "provide no further explanation regarding why or how public disclosure of this information could cause commercial harm." Appx32.

On appeal, Uniloc still does not point to a single concrete, specific, or otherwise non-conclusory statement in any of the declarations supporting its sealing requests. Nor does it identify any particular error in the District Court's reasoning or application of law. Instead, Uniloc emphasizes "the thirteen third-party declarations and the more than 3500 words of the Uniloc declaration" to argue the District Court's rejection of its generalized assertions was error. Uniloc Br. at 41.

That position is absurd: the number of assertions on the record does not change their conclusory nature or give them more weight. A cursory glance at the statements on which Uniloc relies, *see id.*, makes it easy to see why the District Court characterized them as "generalized" and "boilerplate." Appx35-36. To take

just a few examples:

- **Conformed Revenue Sharing Note and Warrant Purchase Agreement (Ex. A):** "This information is highly confidential and sensitive financial information of Uniloc and Fortress, the disclosure of which would prove to be a competitive harm to them." Uniloc Br. at 38 (citing Appx575-576, ¶¶ 3-3f).
- **Revenue Sharing and Note and Warrant Purchase Agreement (Ex. C):** "This information is highly confidential and sensitive financial information of Uniloc, Fortress, and/or the third-party, the disclosure of which would prove to be a competitive harm to them." Uniloc Br. at 42 (citing Appx584, ¶¶11-11.b).
- **Note Purchase and Security Agreement between Uniloc 2017 and CF Uniloc Holdings (Ex. S):** "This financial information is highly confidential and sensitive, the disclosure of which would prove to be a competitive harm for Uniloc." Uniloc Br. at 44 (citing Appx586, ¶16).
- **The parties' memoranda:** "Each . . . phrase [to be sealed] includes highly confidential and sensitive financial information of Uniloc and/or Fortress, the disclosure of which would cause competitive harm to them." Uniloc Br. at 47 (citing Appx586-587, ¶¶ 17-17.e).

The District Court correctly recognized these are generalized assertions,

devoid of factual support, that do not even purport to explain how disclosure could or would cause harm to Uniloc, Fortress, or any of its third-party licensees. Nor is it apparent why many of the disclosures Uniloc is trying to prevent—for example, of the bare fact that certain of its patent license agreements exist—would cause competitive harm of any kind. Unexplained competitive harm cannot justify sealing public court records.

This Court's decision in *Apple v. Samsung*, 727 F.3d 1214 (Fed. Cir. 2013) does not save Uniloc's argument. To the contrary, that decision confirms the soundness of the District Court's reasoning here. There, a district court abused its discretion in denying sealing requests where the parties had supported them with detailed declarations describing the actual harm disclosure would cause. *See, e.g.*, *id.* at 1222 (describing testimony that explained how "'[d]isclosure of per product revenues, pricing, and costs will permit competitors to undercut Samsung's pricing, and allow business partners to gain leverage against Samsung in business and supply agreement negotiations.'"); (detailing how "[d]isclosure of this information would allow competitors to tailor their product offerings and pricing to undercut Apple. Competitors would be able to determine exactly what price level would make a given product unprofitable to Apple, and target their product offerings at exactly that price.'").

Uniloc offers nothing remotely comparable. Nor does it offer anything that

could support its burden of establishing the basic elements of a trade secret under California law, where the "burden on the trade secret claimant is to provide a level of detail adequate to distinguish the subject information from general knowledge or knowledge of skilled persons in the field." *Raytheon Co. v. Indigo Sys. Corp.*, 895 F.3d 1333, 1340–41 (Fed. Cir. 2018) (citation omitted); *see also MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 522 (9th Cir. 1993) ("[A] plaintiff who seeks relief for misappropriation of trade secrets must identify the trade secrets and carry the burden of showing that they exist.").

Moreover, Uniloc's bare assertions can be disregarded for an additional reason: they come from counsel of record in this case, not any Uniloc employee with personal knowledge of business operations untethered to litigation. *See* Appx413; Appx420; Appx574. An attorney's unsupported assertions are not evidence. *See FastShip, LLC v. United States*, 892 F.3d 1298, 1309 (Fed. Cir. 2018) (rejecting "annotations [that] were prepared by attorneys" because "attorney argument is not evidence") (internal quotations marks and citation omitted); *Sch. Dist. No. 1J, Multnomah Cty., Or. v. ACandS, Inc.*, 5 F.3d 1255, 1262 (9th Cir. 1993) (approving exclusion of affidavits that "were nothing more than an attorney's argument lacking evidentiary support").

3. None of the Information Uniloc is Trying to Keep Secret Qualifies as a "Trade Secret."

The District Court correctly found that none of the material Uniloc is trying to seal is a trade secret. *See* Appx35 ("Plaintiffs have not sufficiently shown that the information at issue constitutes trade secrets."). Nothing in the record supports any other finding.

First, the information at issue is not the type that would fall into the definition of a trade secret. Although Uniloc pays lip service to the Restatement, *see* Uniloc Br. at 29, the Restatement actually states that a trade secret "is *not* simply information as to single or ephemeral events in the conduct of the business." Restatement (First) of Torts § 757 (1939) (cmt. b) (emphasis added). For example, the Restatement specifically excludes "the amount or other terms of a secret bid for a contract," "the security investments made or contemplated," "the date fixed for the announcement of a new policy," and "the salary of certain employees." *Id.*

That is exactly the kind of information Uniloc is trying to seal here: the amounts and other terms of confidential agreements, the amounts of Uniloc's financial obligations and liabilities to lenders, and the identities, dates, and durations of its patent licenses. However confidential, these are not trade secrets.

Second, Uniloc's claims notwithstanding, confidentiality provisions are not enough to establish a trade secret, particularly for purposes of sealing a court

record. Courts generally refuse to treat contractual terms like trade secrets simply because the contracts themselves contain confidentiality provisions. That is because "[c]alling a settlement confidential does not make it a trade secret, any more than calling an executive's salary confidential would require a judge to close proceedings if a dispute erupted about payment (or termination)." *Union Oil,* 220 F.3d at 567–68. As the Seventh Circuit has explained, "[m]any a litigant would prefer that the subject of the case . . . be kept from the curious (including its business rivals and customers), but the tradition that litigation is open to the public is of very long standing . . . . When [litigants] call on the courts, they must accept the openness that goes with subsidized dispute resolution by public (and publicly accountable) officials." *Id.* (citations omitted).

The cases on which Uniloc relies, *see* Uniloc Br. at 32-33, do not say otherwise.[3] Uniloc is trying to prevent public access to the names of its licensees, the duration of their licenses, and the royalty rates.[4] In *Apple v. Samsung,* this

[3] Three include a table summarizing rulings on various sealing requires without any particularized analysis of individual documents or arguments. *See* Uniloc Br. at 32-33 (citing *Arista Networks, Inc. v. Cisco Sys., Inc.*, No. 16-cv-00923-BLF, 2018 WL 2010622 (N.D. Cal. Apr. 30, 2018); *Juicero, Inc. v. iTaste Co.*, No. 17-cv-01921-BLF, 2017 WL 8294276 (N.D. Cal. Jun. 28, 2017); *Transperfect Global, Inc. v. MotionPoint Corp.*, No. C 10-2590-CW, 2014 WL 4950082 (N.D. Cal. Sept. 25, 2014)).

[4] The Ninth Circuit's unpublished decision *McDonnell* is similarly inapposite. There, the sealed information involved "confidential procedures and communications geared toward investing the cause of [an] airline crash," not basic

Court ordered the sealing of very different (and more obviously competitive) categories of information: (1) "product-specific information concerning such things as costs, sales, profits, and profit margins" and (2) "market research reports." 727 F.3d at 1224, 1228. Those categories of information pertain to product and market strategy, and in that respect are like the "pricing terms" sealed in *In re Elec. Arts, Inc.*, 298 F. App'x 568, 569 (9th Cir. 2008); *see also* Appx35 (distinguishing *Electronic Arts* on the ground that it "did not concern a license agreement in the patent context"). Similarly, the sealed document in *Oracle America, Inc. v. Google Inc.*, No. 3:10-cv-03561-WHA (N.D. Cal. Jan. 10, 2012) was a report that contained "Google's sensitive, non-public financial data, such as costs, revenues, and profits associated with Android," as well as "Google's consideration of and potential financial impact from alternatives to the intellectual property at issue in this lawsuit." Appx857-858.

All of these cases involve information that was sealable because of its relevance to market activities in which Uniloc does not engage. As the District Court explained: "Plaintiffs here have no products to sell and thus their (alleged) risk of competitive harm is entirely distinguishable from that in *Apple*." Appx35.

licensing information. *McDonnell v. Sw. Airlines Co.*, 292 F. App'x 679, 680 (9th Cir. 2008).

B. The Public's Interest in Understanding Uniloc's Ownership Rights and the Development of Standing Law Outweighs Uniloc's Desire to Keep its Patent Licenses Secret.

The District Court soundly exercised its discretion in finding that Uniloc's "generalized assertion of potential competitive harm fails to outweigh the public's right" to access the sealed filings. Appx32.

As an initial matter, Uniloc's failure to establish harm ends the argument. *See In re Violation of Rule 28(D)*, 635 F.3d at 1357–58 ("*If* the party seeking protection meets this burden, the court must *then* balance the public and private interests to determine whether a protective order is warranted.") (internal quotation marks and citation omitted) (emphases added).

But even if Uniloc had met its burden, it could not overcome the public's overwhelming interest in accessing dispositive court filings such as this, which bear directly on legal ownership of the patents-in-suit and the development of standing law in patent cases.

1. The Strong Presumption of Access to Court Records Exists Because the Public's Interest in Seeing Materials Filed with a Court Is So Compelling.

Contrary to Uniloc's assertions, the public interest in the sealed filings does not turn on the particular relevance of the sealed documents or whether the court expressly relied upon them in reaching its decision. *See* Uniloc Br. at 26. At a minimum, the public's interest arises because these are court filings—judicial

records are public documents almost by definition, and the public is entitled to access by default. *Kamakana*, 447 F.3d at 1180; *see also Union Oil*, 220 F.3d at 568 ("[M]ost portions of discovery that are filed and form the basis of judicial action must eventually be released, . . . and it should go without saying that the judge's opinions and orders belong in the public domain.")

The public needs to see documents submitted to a court for consideration—not just those it cites in its final opinion—to verify the factual basis for the court's opinion and have confidence in its fidelity to the record as well as its correctness as a matter of law. More broadly, access to court documents is a crucial means of ensuring governmental accountability and public confidence in the judicial system. Thus, "the courts of this country recognize a *general* right to inspect and copy public records and documents, including judicial records and documents." *Nixon*, 435 U.S. at 597 (emphasis added). As the Supreme Court explained in *Nixon*, the only interest required to invoke this general right of access is "a citizens' desire to keep a watchful eye on the workings of public agencies" or "a newspaper publisher's intention to publish information concerning the operation of government." *Id.* (citations omitted).

Unsurprisingly, no authority supports Uniloc's attempt to avoid this longstanding principle and confine the public interest here to those court records

the parties deem necessary to understanding the court's ruling. *See* Uniloc Br. at 26-27.

To the extent Uniloc relies on this Court's decision in *Apple v. Samsung*, such reliance is unavailing because the public's interest in seeing materials submitted for consideration by a court was not at issue. In *Apple*, "none of the [sealed] documents were introduced into evidence," and therefore "the financial information at issue was not considered by the jury" in assessing damages. *Apple*, 727 F.3d at 1226. Here, by contrast, *all* of the documents were submitted to the District Court for consideration on the issue of standing. That is why the public's interest in seeing them is paramount, regardless of the particular relevance of their contents to the District Court's legal analysis.

That approach is consistent with the Ninth Circuit's view, which applies the strong presumption of public access even to *non-dispositive* motions and their attachments as long as they are "more than tangentially related to the merits" of the case. *Ctr. for Auto Safety*, 809 F.3d at 1098–99 ("[P]ublic access will turn on whether the motion is more than tangentially related to the merits of a case.").

Requiring proof of particular relevance, as Uniloc is asking this Court to do, effectively shifts the burden from the party asking for secrecy to the representative of the public seeking access. In addition to restricting access generally, that approach would put the public and press in the impossible position of having to

establish the relevance of information they cannot see. The proponent of secrecy, which can see the material at issue, should be the one to shoulder that initial burden.

Finally, and notwithstanding Uniloc's contentions, *see* Uniloc Br. at 26-27, the public needs to know more than simply whether Uniloc paid more or less than the amount triggering its default to Fortress. There is no reason to assume the size of Uniloc's deficiency was irrelevant to the District Court's determination of its significance on Uniloc's default (and thus its standing to sue). After all, the size of Uniloc's default could well bear on the likelihood that this event would trigger the default provision in its agreement with Fortress. At the very least, the public should be able to decide for itself whether the amount of Uniloc's non-payment affects the District Court's standing decision.

Now that the case has settled, the public needs access to the sealed filings not only to verify the correctness of the decision in this case, but also to ensure the veracity of the parties' submissions in future cases. Uniloc is a high-volume patent litigant; various Uniloc entities have filed hundreds of patent suits in U.S. district courts.[5] *See* Malathi Nayak, *Google, Amazon, Apple Are Targets of Uniloc Lawsuit Blitz*, Bloomberg Law, Nov. 23, 2018, available at: https://news.bloomberglaw.com/ip-law/google-amazon-apple-are-targets-of-

[5] A PACER search conducted on September 19, 2019 for cases with "Uniloc" in the title returned over 500 results.

uniloc-lawsuit-blitz).

The public thus has a powerful interest in accessing the sealed filings in full—including the numerical amounts Uniloc is trying so hard to conceal.

2. The Public Has a Powerful Interest in Seeing Patent License Documents When Disputes Concerning their Terms Go to Public Courts for Resolution.

The public also has a specific interest in access to confidential patent license provisions when they concern disputes that the parties have submitted to a court for resolution. When confidential agreements, including patent licenses, come up in patent cases, courts must be able to discuss the relevant licensing and assignment provisions openly in oral arguments and judicial opinions.

This Court has repeatedly questioned the propriety of sealing entire license agreements when parties have sought to do so in cases concerning their terms or provisions. *See Diamond Coating Techs., LLC v. Hyundai Motor Am.*, 823 F.3d 615, 618 n.1 (Fed. Cir. 2016) (noting that the parties had "designated the entire PATA and Ancillary Agreement as confidential" but that "during oral argument, Diamond agreed to waive any claim of confidentiality at the court's request"); *In re Violation of Rule 28(D)*, 635 F.3d 1352, 1356 (Fed. Cir. 2011) (sanctioning parties for sealing legal citations and questioning propriety of sealing entire license agreement); *see also Sanofi-Aventis v. Sandoz, Inc.*, No. 2010-1338, Oral Arg. at 2:55-3:07 (Fed. Cir. Dec. 6, 2010) ("You marked all parts of this agreement as

confidential. I don't see how we can possibly have an argument or write an opinion about this case if these materials are treated as confidential.").

It should be equally skeptical here.

3. The Public Needs Access to Learn Who Owns the Patents-in-Suit and How Standing Law is Developing in District Courts.

Granting the public access to patent licenses when they become court records is important given the role such licenses play in patent law. The public must have access to patent licenses where, as here, their terms are submitted to courts, for example, as evidence of damages in the form of a reasonable or comparable royalty. The public can and should be able to see court records disclosing information in patent licenses when they are filed. As the District Court noted, "patent holders tend to demand in litigation a vastly bloated figure in 'reasonabl[e] royalties' compared to what they have earned in actual licenses of the same or comparable patents. There is a public need to police this litigation gimmick via more public access." Appx34. The same is true for gimmicks surrounding patent ownership. After all, "[a] patent holder should know what he owns, and the public should know what he does not." *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 731 (2002).

It is not enough to give the public access to a judicial opinion without the records on which it rests. As scholars have explained, "[m]erely accessing judicial

decisions is often insufficient to advance the public interest in judicial transparency." Chao, Bernard H. and Silver, Derigan, A., *A Case Study in Patent Litigation Transparency*, 2014 Journal of Dispute Resolution 83, 90 available at: https://ssrn.com/abstract=2334417.

For one, "since most patent cases settle, there are frequently no court rulings that reveal the positions the parties took." *Id.* Moreover, "patent owners often seek to vacate any adverse rulings after settlement . . . to avoid collateral estoppel when asserting the patents in the future." *Id.* Put simply, "knowing more about litigated patents benefits the public because they will be asserted again," but "[u]nfortunately, when courts seal patent litigation filings, the public never sees these benefits." *Id.*

Here, and especially now that the parties have voluntarily settled this case, open access to filings on the court docket is the only way to ensure Uniloc does not deviate from the representations made here in future litigation. That, in turn, serves the public's interest in avoiding unnecessarily duplicative litigation and enforcing the rules of collateral or judicial estoppel.

III. THE DISTRICT COURT CORRECTLY DENIED UNILOC'S REQUEST FOR LEAVE TO FILE A MOTION FOR RECONSIDERATION PURSUANT TO THE NORTHERN DISTRICT OF CALIFORNIA'S CIVIL LOCAL RULE 7-9.

A. The Northern District of California's Local Rules Preclude Uniloc's Motion for Reconsideration and Accompanying Submissions.

The District Court's decision to deny Uniloc leave to seek reconsideration of its sealing order follows directly from the Northern District of California's Local Rule 7-9 governing such motions.

According to Local Rule 7-9, the moving party must establish at least one of the following to support a request for reconsideration

> **(1)** That at the time of the motion for leave, a material difference in fact or law exists from that which was presented to the Court before entry of the interlocutory order for which reconsideration is sought. The party also must show that in the exercise of reasonable diligence the party applying for reconsideration did not know such fact or law at the time of the interlocutory order; or
> **(2)** The emergence of new material facts or a change of law occurring after the time of such order; or
> **(3)** A manifest failure by the Court to consider material facts or dispositive legal arguments which were presented to the Court before such interlocutory order.

L.R. 7-9(b)

Uniloc did not make any effort to satisfy this requirement in its motion. *See* Appx553 (The Court's order "came as a surprise," and "prompted Uniloc and non-party Fortress to review the materials the parties sought to seal").

Nor did Uniloc heed Rule 7-9(c)'s prohibition against repetition of arguments. *Compare* L.R. 7-9(c) ("No motion for leave to file a motion for reconsideration may repeat any oral or written argument made by the applying party in support of or in opposition to the interlocutory order which the party now seeks to have reconsidered. Any party who violates this restriction shall be subject to appropriate sanctions.") *with* Appx552 (repeating boilerplate assertions that "[t]he confidentiality of this information is vital to these third parties and to Uniloc," and "[d]isclosure of it would severely impact all of these entities' abilities to compete").

In light of these violations, the District Court's decision to deny Uniloc's request for reconsideration was a necessary application of its own local rules. As this Court has held, "district courts must generally follow their own local rules." *Drone Techs., Inc. v. Parrot S.A.*, 838 F.3d 1283, 1298 (Fed. Cir. 2016). The District Court's decision to do so here should stand.

Uniloc's attempt to excuse its failure to provide narrowly-tailored sealing requests or sufficient support in the first instance fares no better on appeal than it did in the District Court. After all, Uniloc has "no one but itself] to blame for over-designating information as confidential to begin with." Appx35 n.2. In short, Uniloc could and should have filed the narrowest redactions possible in the first instance and supported them with the justification required by law.

The fact that Uniloc has submitted (or intends to submit) less heavily-redacted versions of the sealed filings elsewhere on the docket does not matter: Uniloc is still seeking more secrecy than the law allows with less support than it requires. If anything, the fact that Uniloc continues to reduce the amount of material it is seeking to seal confirms that its requests are overbroad and that its conclusory assertions of competitive harm are unfounded.

B. Affirming the District Court's Decision to Deny Leave Will Improve Transparency and Efficiency in Patent Cases.

Affirming the District Court's denial of leave will have benefits for the public that extend beyond this case by empowering district courts to resolve sealing disputes efficiently while preserving the public's right of access.

Excessive secrecy is a problem plaguing dockets of patent cases across this country. The Northern District of California just one example. Appx35 n.2 ("Because of the frequently overbroad requests to seal arising in patent litigation today, this Court must now deal with these burdensome motions to seal on a regular basis."). But it is not alone. *See* Evan Hansen, *Why Secrecy in Patent Cases Is Out of Control — and What to Do About It*, Medium (April 30, 2013), https://medium.com/your-digital-rights/112b7784d0a; Dan Levine, *Microsoft vs. Google Trial Raises Concerns over Secrecy*, Reuters (Nov. 2, 2012, 2:18 PM), http://www.reuters.com/article/2012/11/02/net-us-microsoft-google-secrecy-idUSBRE8A106Y20121102) ("Legal experts are increasingly troubled by the level

of secrecy that has become commonplace in intellectual property cases where overburdened judges often pay scant attention to the issue."). Unfortunately, many courts fail to evaluate sealing motions with rigor—especially in patent cases, where research shows it is "far easier to seal court records than what the law suggests." Chao and Silver, at 95.

To deal with that problem, district courts should not have to repeatedly evaluate overbroad sealing requests until the proponent finally supplies something justifiable. They should be able to do what the Northern District of California's Local Rules allow: refuse to reconsider sealing orders simply because the proponent of secrecy wants another bite at the apple.

An affirmance will encourage district courts to follow Judge Alsup's approach and reject sealing requests that are overbroad and devoid of factual support. At the same time, it will deter litigants from following Uniloc's example in trying to get away with as much secrecy as possible for as long as possible. That approach imposes real costs on the court system, which has to do more work to accommodate a party's escalating efforts. And it imposes real costs on the public, which at best, has to expend time and resources to fight for belated access, and at worst, never gets access at all. Litigants—not court personnel or the public—should bear the additional costs their requests for secrecy impose.

This case demonstrates the harm that excessive secrecy does to the public's

ability to inspect court dockets, get timely information about the development of case law, and see firsthand the judicial system in operation. The excessive sealing of court filings prevented the public from understanding the facts and law at issue in Apple's motion to dismiss, and at the hearing, prevented the District Court from engaging substantively with counsel given the restrictions on discussing sealed filings in open court. *See* Appx517 ("I'm going to respect [Uniloc's sealing requests] for the moment, but I want everyone here to know there is no way this deserves to be under seal."). And they continue to prevent the public from accessing numerous entries for dispositive filings on the court docket in this case.

It is too late for the District Court to hold a substantive hearing in open court. But this Court can grant the public access to the sealed filings on the docket by affirming the District Court's decisions now. Doing so will vindicate the public's right of access in this case while helping ensure that litigants and courts alike to do the same in future cases.

CONCLUSION

The District Court properly exercised its discretion in denying the parties' administrative sealing motions in full and in denying Uniloc's motion for leave to seek reconsideration of that denial. For the foregoing reasons, EFF respectfully requests the Court affirm the District Court's decisions and grant the public access

to the sealed filings at last.

October 24, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 24, 2019, I caused the foregoing to be served by electronic means via the Court's CM/ECF system on all counsel registered to receive electronic notices.

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CERTIFICATE OF COMPLIANCE

I hereby certify as follows:

1. The foregoing Second Corrected Response Brief of Intervenor-Appellee Electronic Frontier Foundation complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B). The brief is printed in proportionally spaced 14-point type, and there are 7,934 words in the brief according to the word count of the word-processing system used to prepare the brief (excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii), that is, the tables of contents and citations, and certificates of counsel, and by Fed. Cir. R. 32(b), that is, the certificate of interest, the statement of related cases, and the addendum in an initial brief of an appellant).

2. The brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5), and with the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft® Word for Mac 1997-2004 in 14-point Times New Roman font.

October 24, 2019

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