**19-1922 (LEAD), -1923, -1925, -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 in Case No. 3:18-cv-00360-WHA before Judge William H. Alsup

---

## CORRECTED REPLY BRIEF OF PLAINTIFFS-APPELLANTS

Aaron S. Jacobs
Prince Lobel Tye LLP
One International Place, Suite 3700
Boston, MA 02110
(617) 456-8000
ajacobs@princelobel.com

October 29, 2019

Counsel for Plaintiffs-Appellants

## CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4, counsel of record for Plaintiff-Appellants Uniloc 2017 LLC, Uniloc USA, Inc., and Uniloc Luxembourg, S.A. (collectively "Uniloc") certifies as follows:

1. The full name of every party represented by us is:

Uniloc 2017 LLC.

Uniloc USA, Inc.

Uniloc Luxembourg, S.A.

2. The names of the real parties in interest represented by us are:

Uniloc 2017 LLC.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the parties represented by us are:

| | |
|---|---|
| Uniloc 2017 LLC: | Uniloc Corporation Pt. Ltd. |
| Uniloc USA, Inc. | None. |
| Uniloc Luxembourg, S.A. | CF Uniloc Holdings LLC. |

4. The names of all law firms and the partners or associates that appeared for the parties represented by us in the trial court, or are expected to appear in this Court, are:

Prince Lobel Tye LLP:

| | |
|---|---|
| Dean Bostock | Robert R. Gilman |
| Michael Ercolini | Paul J. Hayes |
| James J. Foster | Aaron S. Jacobs |
| Kevin Gannon | Daniel McGonagle |

Nelson Bumgardner Albritton PC:

| | |
|---|---|
| Edward R. Nelson III | Anthony Vecchione |
| Shawn Latchford | |

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:

None.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases

**Rules**

## INTRODUCTION

Uniloc seeks on appeal to seal or redact portions of just twenty-three documents. These documents disclose some of the most closely guarded and competitively sensitive financial trade secret information of the Uniloc Appellants and more than one-hundred third-parties. The district court below agreed with Uniloc that "Apple's motion to dismiss for lack of standing did not directly depend upon information regarding the specific dollar amounts, financial terms, and names of the licensees in the various agreements (with Fortress or third-party licensees)." Appx35. So, disclosure of these materials would not advance the public's understanding of the judicial process. And yet, despite uniform precedent to the contrary, the district court still ordered that the documents be publicly exposed. This was a break from that court's own rulings and the consistent rulings of the rest of the Northern District of California, and so was an abuse of discretion.

The Response Briefs of Intervenor EFF and Appellee Apple do not establish otherwise. Rather, they are embodiments of admission by omission: They do not address Uniloc's dispositive arguments, because they cannot.

EFF does not—and cannot—address the district court's admission that the information Uniloc seeks to seal is not relevant. EFF does not—and cannot—dispute public access to judicial records is intended to hold the courts to account, and so irrelevant information is not subject to the "compelling reasons" standard.

Instead, EFF makes a series of misstatements, misinterpretations and errors in its analysis of the caselaw and the record of this appeal.

Apple, in turn, should not be heard to argue in this Court. Apple took no position in the district court below at every stage, despite its right to do so. Substantively, Apple's silence on this Court's ruling in *Apple v. Samsung* (Fed. Cir.) speaks volumes. Indeed, Apple failed to learn from its own history, as in this appeal Apple now effectively argues that it should not have succeeded *Apple v. Samsung* (Fed. Cir.).

Accordingly, the district court's orders should be reversed, and Uniloc and the third-parties' trade secret financial information should be ordered sealed.

## ARGUMENT

### I. EFF failed to address Uniloc's key argument, misstated the law and made a significant number of inattentive mistakes.

#### A. EFF failed to address Uniloc's central argument.

If Uniloc's Principal Brief could be boiled down to one sentence, it is this: The presumption of public access to court-filed documents exists to allow the public to confirm *in a given case* that the court came to the right conclusion *in a particular ruling*. Towards that end, Uniloc quoted on four occasions the district court's admission:

> Apple's motion to dismiss for lack of standing did not directly depend upon information regarding the specific dollar amounts, financial terms, and names of the licensees in the various agreements (with Fortress or third-party licensees).

Appx35; *see* Uniloc's Br. at 17, 26, 27, 37. EFF does not address this dispositive aspect of the district court's decision at all. EFF's failure to refute it—let alone even mention it—is telling as to the weakness of EFF's argument.

### B. Where information is not relevant to understanding a court's decision, it is not subject to the "compelling reason" standard.

There is a presumption that the "compelling reason" standard applies to information to be sealed as to matters that are more than tangentially related to the merits of a case. But, this presumption is rebutted—and the compelling reason standard not applied—where the specific information is not related to the merits of a decision. This is because the point of public access to court records is to hold the courts to account, as opposed to appeasing public curiosity about the litigants. As the Ninth Circuit explained in *Center for Auto Safety v. Chrysler Group, LLC*:

> The 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*."

809 F.3d 1092, 1096 (9th Cir. 2016) (quoting *United States v. Amodeo*, 71 F.3d 1044, 1048 (2d Cir. 1995)) (emphasis added). The Ninth Circuit continued, noting that the same is true in other circuits:

> In the Second Circuit, for example, the weight given to the presumption of access is "governed by the role of the material at issue in the exercise of Article III judicial power and the resultant value of such information to those monitoring the federal courts."

*Id.* at 1099 (quoting *Amodeo*, 71 F.3d at 1049). Similarly:

> [I]n the First Circuit, the public has a right of access to "materials on which a court relies in determining the litigants' substantive rights" which are "distinguished from those that relate[ ] merely to the judge's role in management of the trial and therefore play no role in the adjudication process."

*Id.* at 1100 (quoting *U.S. v. Kravetz*, 706 F.3d 47, 51 (1st Cir. 2013)).

This Court recognized as much when it applied Ninth Circuit law in *Apple v. Samsung*:

> In light of all of these considerations, we conclude that the particular financial information at issue in these appeals is not necessary to the public's understanding of the case, and that the public therefore has minimal interest in this information.

*Apple Inc. v. Samsung Elecs. Co., Ltd.*, 727 F.3d 1214, 1226 (Fed. Cir. 2013) ("*Apple v. Samsung* (Fed. Cir.)"). And again:

> We recognize the importance of protecting the public's interest in judicial proceedings and of facilitating its understanding of those proceedings. That interest, however, does not extend to mere curiosity about the parties' confidential information where that information is not central to a decision on the merits.

*Id.* at 1228-29.

Interestingly, EFF filed a declaration in support of the intervenors in *Apple v. Samsung* (Fed. Cir.). *Id.* at 1225. The intervenors there recognized the touchstone discussed above, even if EFF here does not. For example, during oral arguments, counsel for the Reporters Committee for Freedom of the Press was asked by the Court:

> Judge Prost: But isn't the public interests we're dealing with here narrower than that? I mean the public interest we're dealing with in terms of balancing the compelling reasons and so forth. It seems to me that public interest historically has been applied to a particular case and the judicial proceedings, and the public's interest in knowing how this particular case was litigated and came out the way it did. It seems to me you're proposing a more expansive view of what the public interest here is.
>
> Leslie: Part of the reason is there are different public interests depending on whether you're trying to apply first amendment right of access or common law right of access. But even in the common law right of access it's typically *the public's interest in knowing how the proceeding runs, how the court makes its determination*.

Oral Arguments at 44:15-45:05, *Apple Inc. v. Samsung Elecs Co., Ltd.*, 2012-1600, available at http://oralarguments.cafc.uscourts.gov/default.aspx?fl=2012-1600-1.mp3 (emphasis added). So too, counsel for the First Amendment Coalition acknowledged:

> Judge Bryson: So, if it would not materially advance the understanding of the judicial process, even though it might materially advance one's knowledge of how Apple and Samsung operate their businesses, it doesn't get disclosed, right?
>
> Stein: *It's not the understanding of judicial process in the abstract; it's the administration of the judicial process in this particular case*.
>
> * * *
>
> Judge Bryson: Ah, judicial process but that is the touchstone right? It is not simply an interest in the companies or an interest in knowing more about the way our financial sector operates, correct?
>
> Stein: Not in the abstract.

*Id.* at 1:02:31-1:04:17 (emphasis added).

So, a party seeking to keep information under seal must establish "compelling reasons" to do so only if the information is needed to understand the given ruling in the given case.[1]

[1] For decades, the compelling reasons standard applied only to information accompanying "dispositive" motions. *See, e.g., Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). For non-dispositive motions, courts applied the "good cause" standard of Federal Rule of Civil Procedure 26(c)(1). *See, e.g., Foltz v. State Farm Mut. Auto. Ins. Co.*, 331 F.3d 1122, 1135 (9th Cir. 2003). This arguably changed in 2016, when a panel of the Ninth Circuit redefined the boundary from "dispositive" to the not-at-all-indefinite "more than tangentially related to the merits of the case" standard. *See Center for Auto Safety*, 809 F.3d at 1096.

As some courts have noted, "because *Auto Safety* was only a panel decision and not *en banc*, prior Ninth Circuit precedent centralizing the inquiry on whether the record is dispositive or non-dispositive was not overruled." *GoDaddy.com, LLC v. RPost Commc'ns Ltd.*, No. CV-14-00126-PHX-JAT, 2016 WL 3068638, at *3 n.2 (D. AZ June 1, 2016). So, it is not clear whether one, the other, or both standards apply in any situation.

Currently, whether Apple's motion to dismiss was "dispositive" or "more than tangentially related to the merits of the case" is debatable. Apple argued that Uniloc did not have the complete right to exclude. But, under *Lone Star Silicon Innovations LLC v. Nana Technology Corp.*, 925 F.3d 1125 (Fed. Cir. 2019), the most Apple could obtain would be the addition of a party. So, the motion was neither "dispositive" nor "more than tangentially related to the merits of the case." Still, because Uniloc and the third-parties do have a compelling interest in keeping the information at issue under seal, Uniloc applied that standard in the court below and in its Principal Brief. *See* Uniloc's Br. at 28-48.

### C. Uniloc established compelling reasons to seal the materials still at issue, both in its initial declarations and through evidence accompanying the motion for leave to file a motion for reconsideration.

Even assuming the compelling reasons standard does apply, Uniloc and the more than one-hundred third-parties meet this mark. *See* Uniloc's Br. at 28-48.

Despite the extensive evidence marshalled by Uniloc, EFF suggests that "Uniloc still does not point to a single concrete, specific, or otherwise non-conclusory statement in any of the declarations supporting its sealing requests." EFF's Resp. at 17. Uniloc respectfully requests that the Court look at the record to determine for itself whether Uniloc's declarations, Appx413-416; Appx502-504; Appx574-588, the dozen third-party declarations, Appx649-686; Appx760-761, and the twenty-three third-party attestations, Appx576-584, ¶¶ 8-10.w.i, constitute "concrete, specific, or otherwise non-conclusory statements." Frankly, it is difficult to discern just what more EFF could have wanted.

EFF appears to discount Uniloc's declarations because "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." EFF's Resp. at 20. That is neither the law nor the practice of the Northern District of California. Rather, attorney declarations are the standard evidence used and accepted in support of motions to seal.

For example, the current appeal arises out of Judge Alsup's court. Uniloc cited two exemplary instances in its Principal Brief wherein Judge Alsup sealed licensing information. *See* Uniloc's Br. at 36 (citing *Juniper* and *Oracle*). Both of those rulings were supported solely by declarations from the parties' attorneys. *See* Appx933-936, *Finjan, Inc. v. Juniper Networks, Inc.*, No. 3:17-cv-05659-WHA (N.D. Cal. May 22, 2019), Dkt. No. 418 (Juniper's attorney's declaration); Appx803 (order sealing Juniper's documents); Appx948-950, *Oracle Am., Inc. v. Google Inc.*, No. 3:10-cv-03561-WHA (N.D. Cal. Jan. 10, 2012), Dkt. No. 600 (Google's attorney's declaration); Appx857 (order sealing Google's documents).[2]

The district court's rulings in those two cases make for a further, instructive comparison to the matter at hand. In its motion for leave, Uniloc provided the court below with a fifteen-page, 5000-plus word declaration, *see* Appx574-588; twelve declarations from third-parties, *see* Appx649-686; Appx760-761; and explicit requests from twenty-three third-parties that their information remain

---

[2] The same is true for the rulings of the other dozen judges of the Northern District of California cited in footnotes 10-21 in Uniloc's Principal Brief. *See, e.g.*, Appx945-947, *Abbvie Inc. v. Novartis Vaccines & Diagnostics, Inc.*, No. 17-cv-1815-EMC, Dkt. No. 47-1 (attorney declaration); Appx940-944, *PersonalWeb Techs LLC v. IBM Corp.*, No. 5:16-cv-01226-EJD, Dkt. No. 319-1 (attorney declaration); Appx937-939, *Finjan v. Blue Coat Sys., LLC*, No. 5:15-cv-03295-BLF, Dkt No. 360-1 (attorney declaration). These cited examples included in the Joint Appendix are simply taken in footnote order from 10-12 of Uniloc's Principal Brief; the other instances cited at footnotes 13-21 are similar.

under seal, *see* Appx577-584, ¶¶ 8-10.w.i. And yet, the district court dismissed all of it as "generalized assertions of potential competitive harm . . . ." Appx34. So too, EFF characterizes this evidence as "generalized" and "boilerplate," and therefore insufficient. EFF's Resp. at 17. But, again, Judge Alsup's rulings in *Juniper* and *Oracle* prove otherwise.

In *Juniper*, a partner at Juniper's outside counsel submitted a declaration in support of the motion to seal. Appx934. The following are the only references to Exhibit 7 in that declaration:

| Document | Finjan's Designations of Portions to Be Sealed | Juniper's Designations of Portions to Be Sealed | Juniper's Basis for Sealing |
|---|---|---|---|
| * * * | | | |
| Exhibit 7 to Kastens Declaration | Entire Exhibit | Entire Exhibit | Confidential License Agreement |
| * * * | | | |

10. Additionally, I am informed and believe that Exhibit 7 is a full, unredacted confidential license agreement between Juniper and a third party, which is information that falls within the definition of a "trade secret." *In re Elec. Arts, Inc.*, 298 F. App'x 568, 569 (9th Cir. 2008).

Appx934, Appx936 (highlighting added). Nonetheless, just one week after denying Uniloc's motion for leave, the court below concluded that Juniper's counsel's declaration identified compelling reasons to seal the entire license agreement:

> Juniper declares that Exhibit 7, which consists of a confidential license agreement, constitutes a trade secret . . . . Compelling reasons

> having been shown, Finjan's motion to seal Exhibit 7 in its entirety . . . is GRANTED.

Appx804.

So too, in *Oracle*, an associate at Google's outside counsel submitted a declaration in support of the motion to seal. Appx949. The following shows the only discussion of licensing information in that declaration:

> 3. Exhibit J to the Dearborn Decl. (Dkt. No. 573) is an excerpt from the Expert Report of Dr. Gregory K. Leonard ("the Leonard Report"). The Court previously has granted a request to file the Leonard Report under seal (Dkt. No. 583). The Leonard Report contains information that has been designated HIGHLY CONFIDENTIAL – ATTORNEY'S EYES ONLY pursuant to the stipulated protective order in this case. The report and the underlying documents contain Google's sensitive, non-public financial data, such as costs, revenues, and profits associated with Android. The report and underlying documents also contain non-public information about Google's consideration of and potential financial impact from alternatives to the intellectual property at issue in this lawsuit. Additionally, the report contains non-public information about licensing arrangements with third-parties, which are protected by confidentiality clauses with those third-parties. Google does not make this information available to the public. Public disclosure of this confidential information would cause great and undue harm to Google, and place it at a competitive disadvantage.

*Id*. (highlighting added). Still, the court concluded that Google's counsel's declaration identified compelling reasons to seal the entire exhibit:

> [Exhibit J] contains non-public information about licensing arrangements with third-parties, which are protected by confidentiality clauses with those third-parties. Google does not make this information available to the public. Public disclosure of this confidential information would cause great and undue harm to Google, and place it at a competitive disadvantage.

Appx858. Indeed, the district court *copied the text directly from the attorney's declaration into his order*. *Compare* Appx949 *with* Appx858.

There is no daylight between the attorney declaration in *Finjan*, the attorney declaration in *Oracle*, and the first-instance attorney declarations in this matter. *See* Appx413-416; Appx502-504. For example, focusing just on Uniloc's original declaration to seal Exhibit A:

> 4. Based on my review, the highlighted portions of Apple's Motion to Dismiss, the highlighted portions of the Declaration of Doug Winnard, Exhibits A-G, J-M, O-S and W, and Appendix A contain information not publicly available and whose disclosure would cause Uniloc competitive harm. Specifically, the Uniloc plaintiffs are private companies and these documents contain sensitive, confidential and proprietary information related to financial data, licensing terms and business plans with respect to various Uniloc entities. This information qualifies for protection under Federal Rule of Civil Procedure 26(c), and disclosure of this extremely sensitive information would create a substantial risk of serious harm to the Uniloc entities.
>
> 5. Exhibits A-C should be sealed in their entirety because they contain sensitive, confidential and proprietary information related to financial data, licensing terms and business plans of various Uniloc entities.

* * *

> 14. The information and documents cited by Apple disclose aspects of Uniloc's businesses and business plans. The information and documents cited by Apple also discloses a variety of financial and licensing terms. Uniloc has invested substantial time and resources into its businesses, business plans and licenses. Uniloc believes that this confidential information gives Uniloc an advantage over its competitors, as well as in its ability to conduct its business. Public disclosure of the details of the information used in Apple's Motion to Dismiss would cause significant competitive harm to Uniloc.

Appx413-416 (highlighting added); *compare id. with* Appx936, *and* Appx949. The other exemplary declarations approved by other judges of the Northern

District of California are similar. *See, e.g.*, Appx945-947 (Novartis's counsel's declaration); Appx832 (granting motion); Appx940-944 (IBM's counsel's declaration); Appx827 (granting motion); Appx937-939 (Blue Coat's counsel's declaration); Appx824 (granting motion). Quite simply, Uniloc's pre-ruling declarations are at least as detailed and specific as those accepted in the cases cited in footnotes 10-21 of Uniloc's Principal Brief. And, this does not account for the other evidence Uniloc marshalled.

In all events, as judge after judge has recognized, "[t]he Ninth Circuit has held, and [the Northern District of California] has previously ruled, that pricing terms, royalty rates, and minimum payment terms of licensing agreements *plainly constitute trade secrets and thus are sealable.*" *Apple Inc. v. Samsung Elecs. Co., Ltd.*, No. 11-cv-01846-LHK, 2012 WL 5988570, at *4 (N.D. Cal. Nov. 29, 2012) ("*Apple v. Samsung* (N.D. Cal. November Order)") (emphasis added). Indeed, while Uniloc cited no fewer than twenty of instances of the Northern District of California sealing license information, *see* Uniloc's Br. at 33-36 & nn.10-21, *EFF did not cite a single case to the contrary*. EFF's silence again speaks volumes. *See generally* EFF's Resp. at 22-23 & nn.3-4.

Finally, even Apple—despite its nominal opposition—now admits that Uniloc established compelling reasons to seal the materials at issue: "The redactions of financial and pricing information that Uniloc now proposes . . . are

narrowly tailored and supported by a particularized showing of competitive harm." Apple's Resp. at 8.

### D. EFF misunderstood *Apple v. Samsung* (Fed. Cir.).

EFF attempts to distinguish this Court's dispositive ruling in *Apple v. Samsung* (Fed. Cir.). But, EFF misread the line of rulings in that appeal.

EFF argues that "[i]n *Apple v. Samsung*, this 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.'" EFF's Resp. at 22-23 (quoting *Apple v. Samsung* (Fed. Cir.), 727 F.3d at 1224, 1228). And, EFF is correct as to the categories of information at issue on appeal. But, as Uniloc explained in detail in its Principal Brief, this is because the district court had already concluded that the licensing materials Apple and Samsung sought to seal were plainly sealable. Uniloc's Br. at 48-51; *Apple v. Samsung* (N.D. Cal. November Order), 2012 WL 5988570, at *4 (sealing licenses); *Apple Inc. v. Samsung Elecs. Co., Ltd.*, No. 11-cv-01846-LHK, 2012 WL 3283478, at *6 (N.D. Cal. Aug. 9, 2012) ("*Apple v. Samsung* (N.D. Cal. August Order") (sealing licenses). So, the materials at issue in this appeal would have already been sealed by the district court in *Apple v. Samsung*. EFF does not—and cannot—refute this point.

EFF next argues that *Apple v. Samsung* (Fed. Cir.) is unavailing because the materials this Court considered were not introduced as evidence. EFF's Resp. at 26. But, again, this ignores the district court's rulings. Its rulings sealing documents—including licensing information—covered exhibits which *had* been filed during motions practice or *would be used* during trial. *Apple v. Samsung* (N.D. Cal. August Order), 2012 WL 3283478, at *1, *6; *see* Uniloc's Br. at 48-51, 54-55. Again, EFF does not—and cannot— refute this point.

In *Apple v. Samsung*, this Court concluded that the district court abused its discretion by refusing to seal a certain set of documents. Yet, even that district court recognized that "pricing terms, royalty rates, and minimum payment terms of licensing agreements plainly constitute trade secrets, and thus are sealable." *Apple v. Samsung* (N.D. Cal. November Order), 2012 WL 5988570, at *4. Thus, the district court's decision in the instant appeal is an even more obvious abuse of discretion than this Court addressed in *Apple v. Samsung*.

### E. Uniloc properly sought reconsideration of the district court's January 17, 2019 ruling.

EFF's argument regarding motions for reconsideration under the Local Rule 7-9(b) is unavailing. *See* EFF's Resp. at 31.

EFF moved to intervene after the briefing was completed and just one day before oral arguments on the substantive motion to dismiss. The district court's January 17, 2019, Order on Motions to File Under Seal issued before Uniloc even

had the chance to respond to EFF's motion. That Order led to a different result than seen in at least one other district court, where the same documents were accepted under seal with respect to a nearly identical motion. *See* Uniloc's Br. at 1 & n.2. Indeed, that Order contravened the same judge's rulings in identical situations in other cases, *compare* Appx31-32 *with* Appx803-804, *and* Appx857-858, not to mention the uniform rulings of other judges of the Northern District of California, *see* Uniloc's Pr. Br. at 34-36 & nn.10-21. It was therefore proper to address the Order by way of a motion for reconsideration.

Further, the Order prompted Uniloc and non-party Fortress to re-review the materials the parties sought to seal. Taking these into account, Uniloc and Fortress identified those portions of the matters submitted under seal that could be made public without (significant) damage to their trade secrets. Uniloc's counsel also reached out to more than one-hundred third-parties whose confidential and proprietary information will otherwise be disclosed. Appx576-584, ¶¶ 5-9.w.i. Responses from those third-parties poured in for the next four months and beyond. Appx773. Even if Uniloc had sought more time, there would not have been enough to collect all of the third-parties' responses before the district court ruled. Reconsideration was therefore appropriate because the Court did not have the benefit of information from these non-parties and third-parties. *See, e.g., Apple Inc. v. Samsung Elecs. Co., Ltd.*, No. 11-cv-01846-LHK, 2012 WL 694745, at *1-2

(N.D. Cal. Mar. 1, 2012) ("*Apple v. Samsung* (N.D. Cal. March Order)") (granting motion for reconsideration of denial of sealing motion after further submissions demonstrated that information, if publicly disclosed, would put party at competitive business disadvantage).

Finally, it is the standard practice of the Northern District of California to give a party seeking to file information under seal a second (and third, and fourth) chance to narrow its request, when the initial request is overbroad. Uniloc's Br. at 49 n.22 (citing cases); *see also infra* § II.B.

### F. This Court should apply Ninth Circuit law, not dictate new law to that Circuit.

EFF's closing argument is one of policy. *See* EFF's Resp. at 33. Whatever the merits of EFF's academic position might be, where, "as here, an appeal does not involve substantive issues of patent law," the Federal Circuit applies the law of the regional circuit, *Apple v. Samsung* (Fed. Cir.), 727 F.3d at 1220, it does not rewrite it.

### G. EFF made a number of misstatements and inattentive errors.

Finally, beyond the issues noted above, EFF's Response includes several other overstatements, misstatements, and plain errors. In isolation, they are not worth mentioning. But, together, they suggest broader issues with EFF's approach to this matter and its arguments.

EFF included a table at pages 8-9 of its Brief, apparently in response to the table in Uniloc's Principal Brief at pages 18-20 summarizing the documents still at issue. As to Uniloc's table, EFF wrote:

> 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.

EFF's Resp. at 8 n.1. This is incorrect. References to Exhibits DD and GG are found in Uniloc's table on page 19 of Uniloc's Principal Brief (highlighting added):

| Document | Description |
|---|---|
| Apple Inc.'s Reply in Support of Motion to Dismiss | Redactions to financial terms. Appx727-748; *compare id. with* Appx465-485 (redacted by Apple). |
| Declaration of Doug Winnard in Support of Apple Inc.'s Reply | Redactions to financial terms. Appx749-752; *compare id. with* Appx486-488 (redacted by Apple). |
| Winnard MtD Reply Decl. Ex. DD: Settlement and License Agreement between Microsoft and Uniloc | Redactions to financial terms. Appx772-774; *compare id. with* Appx494-496 (sealed). |
| Winnard MtD Reply Decl. Ex. GG: Heads of Agreement between Fortress and Crag S. Uniloc's CEO | Redactions to financial terms. Appx775-779; *compare id. with* Appx497-501 (sealed). |

This is a small point, but also one that is demonstrably wrong if one simply looks at the pages EFF cited.

EFF's table purports to show "Uniloc's proffered justification for secrecy with respect to each document." EFF's Resp. at 7-8. This is a mischaracterization at best. For example, as to Exhibit A, EFF wrote:

| Document | Uniloc's Supporting Submission |
|---|---|
| * * * | |
| 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." Appx564. |

EFF's Resp. at 8. It is true that the quoted sentence appears on the cited page of Uniloc's motion for leave. But, that is not nearly all Uniloc had to say. Rather, with respect to Exhibit A, Uniloc's motion for leave included:

- Three pages of argument. Appx567-569.
- Citations to eight licensees who disclosed their identities, but who insisted on maintaining the confidentiality of their license payments. Appx577-579, ¶¶ 8-8.h; Appx649-652 (Allscripts Healthcare Solutions, Inc. declaration); Appx653-655 (Avid Technology, Inc. declaration); Appx656-659 (Cerner Health Services, Inc. declaration); Appx660-661 (NEC Corporation of America declaration); Appx760-761 (Microsoft Corp. declaration).
- Citations to twenty-three licensees who insisted that all information about them remain confidential. Appx579-584, ¶¶ 9-9.w.i (attestations from licensees); Appx662-665 (confidential declaration); Appx666-668 (confidential declaration); Appx669-672 (redacted declaration); Appx673-675 (confidential declaration); Appx676-678 (confidential letter); Appx679-680 (confidential declaration); Appx681-683 (confidential declaration); Appx684-687 (confidential declaration).

- References to more than 65 paragraphs and sub-paragraphs of a declaration on behalf of Uniloc. Appx575-584.

Separately, EFF complains "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." EFF's Resp. at 11. This is incorrect. Uniloc's motion for reconsideration put the revised redactions on the public record. For example, the document about which EFF cites to more than any other as an example of Uniloc's supposed malfeasance is Apple's motion to dismiss. *See, e.g.*, EFF's Resp. at 2, 3, 5-6, 35. Apple (not Uniloc) originally redacted perhaps one-half of the motion to dismiss.[3] But, Uniloc retrenched those redactions, such that there are now only nine redactions of one to three words each, covering financial information. *See* Appx731-750; Appx575, ¶¶ 2-2.e. This revised version has been on the public record since February 15, 2019. Appx54, Dkt No. 167-4.

The final error worth mentioning is that EFF asserts that Uniloc and Apple "settled" the "case" at issue on appeal. EFF states "[n]ow that the case has settled, the public needs access to the sealed filings . . . ." EFF's Resp. at 27. And later, EFF states "especially now that the parties have voluntarily settled this case . . . ."

---

[3] Uniloc did not see the motion until 10:30 p.m. on Friday, October 25, 2018.

*Id*. at 28. This is incorrect. There are four cases between the parties on appeal, not one. And, the parties have not settled any of them.

## II. Apple cannot change its position on appeal, and its arguments are in direct contravention of the position it took in *Apple v. Samsung*.

### A. Apple took no position in the court below, and Apple informed this Court that it would take no position here, so Apple cannot make any new arguments before this Court.

In the court below, Apple took no position as to any of the motions to seal and Uniloc's motion for leave to file a motion for reconsideration. As such, Apple cannot raise new arguments on appeal in this Court. *See, e.g., Golden Bridge Tech., Inc. v. Nokia, Inc.*, 527 F.3d 1318, 1322 (Fed. Cir. 2008); *Sage Prods., Inc. v. Devon Indus., Inc.*, 126 F.3d 1420, 1426 (Fed. Cir. 1997).

Apple suggests that it could not have opposed the administrative motions to seal. *See* Apple's Resp. at 3 n.1. As the party that submitted Uniloc's confidential information with Apple's motion to dismiss and subsequent reply, Apple was required to file administrative motions to file under seal "in conformance with Civil L.R. 7-11." L.R. 79-5(d)(1). However, nothing prohibited Apple from filing those administrative motions under protest, or even opposing them. But, Apple purposefully took no position. Appx256 ("Apple takes no position as to whether these materials should indeed be sealed."); Appx459 ("Apple takes no position as to whether these materials should indeed be sealed.").

Separately, Apple could have opposed the motion to seal that *Uniloc* filed accompanying Uniloc's opposition to the motion to dismiss. *See* Appx417-419. So too, Apple could have opposed the motion to seal that *Uniloc* filed accompanying Uniloc's motion leave. *See* Appx530-536. But, Apple purposefully took no position.

Apple states that it took no position as to Uniloc's motion for leave to file a motion for reconsideration because "Local Rule 7-9(d) does not permit responses to this kind of motion." Apple's Resp. at 5 n.2. This is incorrect. L.R. 7-9(d) states that "no response *need* be filed," but responses are certainly permitted. *See, e.g.*, *United States v. Singulex, Inc.*, No. 4:16-CV-05241-KAW, 2019 WL 1981192, at *2 (N.D. Cal. May 3, 2019) ("[T]he Court DENIES Plaintiff's motion to strike [Defendant's opposition to Plaintiff's Local Rule 7-9(d) motion] on the grounds that, while the language in Civil Local Rule 7-9(d) does not require that the opposing party file a response, it does not prohibit the filing of one."); *Johnson v. United Cont'l Holdings, Inc.*, No. C-12-2730 MMC, 2013 WL 2252030, at *1 (N.D. Cal. May 22, 2013) ("Defendants, although not required to do so, have filed opposition to each motion. Having read and considered the parties' respective written submissions, the Court rules as follows.") (citation and footnotes omitted); *Aristocrat Techs. v. Int'l Game Tech.*, No. C-06-03717 RMW, 2009 WL 1702055, at *1 (N.D. Cal. June 17, 2009) ("Although Civil L.R. 7-9(d) provides that no

response need be filed concerning a motion for leave to file a motion for reconsideration unless the judge so orders, [defendant] did file a response directed to the merits of the motions. Since both parties have now briefed the merits of the motions, the court finds that it can rule on the motions without the filing of further papers or holding a hearing."). So, Apple could have, but purposefully did not, oppose Uniloc's motion for reconsideration.

Beyond the Local Rules, pursuant to the Protective Order in these cases, Apple could have challenged the confidentiality designation of Uniloc's materials at any time. Appx22 § 13(a); *see generally* Appx22-23 (detailing the confidentiality-challenge procedures). For example, Apple could have challenged the designations in parallel with its motion to dismiss and the accompanying administrative motion to seal. But, Apple purposefully did not.

Finally, after purposefully taking no position in the court below as to any of the matters in this appeal, Apple informed this Court that Apple would take no position on appeal. Every party is required to file a docketing statement with this Court. The docketing statement form includes a field in which a party must identify the "Relief sought on appeal." Going back to at least 2015, in every single appeal from a district court in which Apple was the prevailing party—in other words, where Apple solely sought affirmance—Apple consistently and specifically asked this Court to "affirm" the district courts. Appx951 ("Apple respectfully

requests *affirmance* of the district court's judgment on the pleadings."); Appx954 ("*Affirmance* of judgment."); Appx958 ("*Affirm* the judgment of the District Court"); Appx961 ("*Affirmance* of the district court's judgment of invalidity"); Appx965 ("*Affirmance* of summary judgment"); Appx968 ("That the Court *affirm* the District Court's order of non-infringement in favor of Apple Inc."); Appx972 ("Appellee seeks *affirmance* of summary judgment of non-infringement"); Appx976 ("Apple seeks *affirmance* of the district court's award of costs to Apple"); Appx979 ("*Affirmance* of the district court's invalidity ruling"); Appx983 ("Apple respectfully requests *affirmance* of the district court's judgment of non-infringement . . . and affirmance of the district court's costs award in favor of Apple"); Appx987 ("*Affirmance*") (all emphasis added). In short, when Apple wants an affirmance, it tells this Court as much using that word in its docketing statement. In the current appeal, however, Apple did not do so: "Apple does not seek relief from the district court's order." 19-1922, Dkt. No. 9.

Apple took no position in the court below and informed this Court that Apple would take no position on appeal. Apple may not now, at the last minute and for the first time on appeal, be heard to argue in this matter.

### B. Apple failed to address *Apple v. Samsung* (Fed. Cir.).

This Court's ruling in *Apple v. Samsung* (Fed. Cir.) was so central to Uniloc's argument on appeal that Uniloc cited it twenty-seven times in its Principal

Brief. That ruling is, presumably, well known to Apple. And yet, Apple does not make a single mention of this Court's ruling in its Response.[4] As will be discussed below, Apple apparently did not learn from its own history.

Apple's Response focuses heavily on the point that, in Uniloc's motion for leave, "Uniloc proposed to withdraw 'on the order of ***95%***' of its original redactions." Apple's Resp. at 6 (emphasis by Apple); *see also id.* at 7. Apple further argues that "by withdrawing '95%' of its original requests, Uniloc effectively concedes that these requests were not narrowly tailored," *id.* at 9, and as such, Apple argues that it was appropriate to deny Uniloc's motion in its entirety, *id.* at 10-11.

Apple next argues that the district court properly refused to reconsider Uniloc's request that the materials be sealed: "As the District Court held, nothing prevented Uniloc from presenting the facts and legal arguments necessary to support its requests to seal the first time around." *Id.* at 13. And further: "The District Court rightly concluded that Uniloc could and should have complied with

---

[4] Apple's only citation to any of the *Apple v. Samsung* opinions is Apple's acknowledgement—in Uniloc's favor—that "pricing terms, royalty rates, and minimum payment terms of licensing agreements plainly constitute trade secrets, and thus are sealable." Apple's Resp. at 16 (quoting *Apple v. Samsung* (N.D. Cal. November Order)).

the local sealing rule in the first instance, and thus appropriately denied Uniloc leave." *Id.* at 15. And finally:

> What's more, the court's decision makes practical sense: If litigants were permitted to behave as Uniloc has done here—submitting grossly overbroad sealing requests, and narrowly tailoring those requests only later, if caught—parties would have little incentive to comply with the rules in the first place.

*Id.* at 16. In short, Apple argues that Uniloc should be punished because, in the first instance, Uniloc overdesignated the materials to be sealed.

Apple's new position on appeal ignores the record of Apple's appeal in *Apple v. Samsung*. Uniloc previously laid out some of the procedural posture of that case, *see* Uniloc's Br. at 48-51, but Apple's new position calls for a bit more.

In the lead up to the *Apple v. Samsung* trial, Apple and Samsung filed more than thirty motions to seal. *See Apple Inc. v. Samsung Elecs. Co., Ltd.*, No. 11-cv-01846-LHK, 2012 WL 2913669, at *1 (N.D. Cal. July 17, 2012) ("*Apple v. Samsung* (N.D. Cal. July Order)") (listing motions). Apple, in particular, originally sought to seal in excess of 250 documents. *See* Appx1002-1003. On July 17, 2012, the district court denied this wave of motions without prejudice: "[I]t appears that the parties have overdesignated confidential documents . . . ." *Apple v. Samsung* (N.D. Cal. July Order), 2012 WL 2913669, at *2. Nonetheless, the district court granted Apple the opportunity that Apple would deny Uniloc:

"The parties may file renewed motions to seal within one week of the date of this Order." *Id.*

On July 24, 2012, Apple filed a Renewed Motion to Seal, Appx1005-1006, followed on July 27, 2012, by a Corrected Renewed Motion to Seal, Appx1002-1003. In this second wave, Apple reduced the number of documents it sought to seal:

> Mindful of the Court's direction to carefully scrutinize any documents it seeks to seal, Apple is withdrawing all claims of confidentiality on approximately 200 exhibits and thirty briefs and declarations, including nearly all full expert reports implicated by the July 17 Order. Apple is only seeking to keep sealed thirty documents (two of which have been filed several times in

Appx1003 (highlighting added). Apple also agreed to unseal briefs, reports and declarations that it previously sought to keep confidential. Appx1004.

The district court heard arguments on the motions to seal at the pretrial conference on July 27, 2012, and directed the parties to try again. Appx990, Appx991-992. So, on July 30, 2012, Apple filed yet another revised motion to seal. Appx997-998. In this third wave, Apple changed the number of documents again:

> A1575-1576. On July 30, 2012, Apple moved to seal 46 specific trial exhibits (of the nearly 500 on the parties' individual and joint exhibit lists) and 31 exhibits to prior motions filed in the case—only a small fraction of the exhibits filed previously—as well as one brief and declaration. A1626; A1633-1641; A3604; A3609-3620.

Appx992 (highlighting added); *see also* Appx998, Appx999-1001 (listing documents).

On August 6, 2012, Apple changed the number and scope of documents it sought to file under seal for the fourth time:

> On August 6, 2012, in an attempt further to narrow the scope of confidential material that might need to be sealed at trial, Apple and Samsung filed a joint stipulation in which the parties agreed, among other things, to make publicly available certain financial data underlying Apple's damages calculations, including

Appx993 (highlighting added).

On August 9, 2012, the district court granted-in-part and denied-in-part the parties' fourth wave of motions to seal. Judge Koh sealed information regarding production and supply capacities, source code, third-party market research reports, and the terms of licensing agreements. *Apple v. Samsung* (N.D. Cal. August Order), 2012 WL 3283478, at *6. But, she denied the motions as to the parties' product-specific profits, profit margins, unit sales, revenues, and costs, and Apple's proprietary market research reports and customer surveys. *See generally id.*

On appeal, Apple focused on just fourteen exhibits to pre-trial motions:

> those exhibits was never entered into evidence, Apple ***does not*** appeal the district court's denial of Apple's request to seal marketing research reports. Instead, Apple focuses this appeal on the 14 exhibits to pre-trial motions containing its confidential financial information for which the threat of imminent release—and the irreparable harm to Apple—is the greatest.

Appx996 (highlighting added).

In light of this history, Apple's current failure to address this Court's ruling in *Apple v. Samsung* is striking. Apple chastises Uniloc for withdrawing about of 95% of the original redactions and requests to seal. Apple argues that Uniloc's original overdesignation, alone, is grounds to deny Uniloc's requests to seal all of the information. And, Apple argues that Uniloc had no right to seek reconsideration after the district court's initial order.

Yet, Apple had no fewer than four chances to revise its redactions and requests to seal in the course of *Apple v. Samsung*. Apple began by seeking to seal in excess of 250 exhibits, briefs and declarations. Apple reduced this to "46 trial exhibits . . . and 31 exhibits to prior motions filed in the case—*only a small fraction of the exhibits filed previously*—as well as one brief and a declaration." Appx992 (emphasis added); *compare id. with* Apple's Resp. at 6, 7, 16. Then, Apple reduced this number even further, Appx993, before its fourth iterative request was denied-in-part by the district court. Apple then appealed as to only

some of the to-be-unsealed materials. Apple did—and worse—that for which Apple now reproves Uniloc. *See also Apple v. Samsung* (N.D. Cal. March Order), 2012 WL 694745, at *1-2 (granting Apple's motion for reconsideration and sealing an exhibit after Apple augmented the record).

Imagine that on July 17, 2012, the district court in *Apple v. Samsung* had simply denied Apple's motions to seal 250+ documents, briefs and exhibits due to overdesignation, rather than giving Apple two hearings and three more chances. It is difficult to believe that Apple of 2012 would have simply accepted Apple of 2019's argument that the appropriate punishment for overdesignation is blanket denial. It is also difficult to believe that Apple of 2012 would not have sought reconsideration, based upon a significantly reduced set of sealings and redactions. Indeed, one would assume that Apple of 2012 would have vehemently disagreed with Apple of 2019's statement that "[i]f litigants were permitted to behave as Uniloc has done here—submitting grossly overbroad sealing requests, and narrowly tailoring those requests only later, if caught—parties would have little incentive to comply with the rules in the first place." Apple's Resp. at 16. After all, that is exactly what Apple of 2012 did. *Compare id. with* Appx992. And then, after its fourth-iterative-motion was denied-in-part, Apple of 2012 successfully appealed to this Court. Apple of 2019 should not be heard to object to the path that Apple of 2012 took.

## CONCLUSION

For the foregoing reasons, and as stated in Uniloc's Principal Brief, this Court should reverse the district court's January 17, 2019, and May 7, 2019, orders to the extent that they denied Apple and Uniloc's motions to seal. This Court should remand with instructions to seal the documents as proposed in Uniloc's February 15, 2019, motion for leave to file a motion for reconsideration. Indeed, even Apple admits that these documents should be sealed. Apple's Resp. at 16.

In the alternative, the Court should vacate the district court's orders as to sealing the documents and remand for further proceedings under the correct legal standards.

October 29, 2019

Respectfully submitted,

Uniloc 2017 LLC, UNILOC USA, INC. and UNILOC LUXEMBOURG, S.A.,

by their attorneys,

*/s/ Aaron S. Jacobs*

Aaron S. Jacobs
Prince Lobel Tye LLP
One International Place, Suite 3700
Boston, MA 02110
(617) 456-8000
ajacobs@princelobel.com

## CERTIFICATE OF SERVICE

I certify that on October 29, 2019, a copy of this document was filed electronically.

This filing was served electronically to all parties by operation of the Court's electronic filing system.

*/s/ Aaron S. Jacobs*

Aaron S. Jacobs

## CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a). This brief contains 6306 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2013 in 14-point Times New Roman type style.

*/s/ Aaron S. Jacobs*

Aaron S. Jacobs