Case Nos. 21-1568 (lead), -1569, -1570, -1571, -1573 (member cases)

---

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

---

**UNILOC USA, INC., UNILOC LUXEMBOURG, S.A.,**

*Plaintiffs-Appellants,*

**UNILOC 2017 LLC,**

*Plaintiff,*

v.

**APPLE INC.,**
*Defendant-Appellee*

**ELECTRONIC FRONTIER FOUNDATION,**
*Intervenor-Appellee.*

---

Appeal from the United States District Court for the Northern District of California Nos. 3:18-cv-00358-WHA, 3:18-cv-00360-WHA, 3:18-cv-00363-WHA, 3:18-cv-00365-WHA, 3:18-cv-00372-WHA, Hon. William H. Alsup

---

# CORRECTED RESPONSE BRIEF OF INTERVENOR-APPELLEE ELECTRONIC FRONTIER FOUNDATION

---

Alexandra H. Moss
Aaron Mackey
ELECTRONIC FRONTIER FOUNDATION
815 Eddy Street
San Francisco, CA 94109-7701
Tel: (415) 436-9333
alex@eff.org
amackey@eff.org

*Counsel for Intervenor-Appellee*
*Electronic Frontier Foundation*

## CERTIFICATE OF INTEREST

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

The full name of the party I represent is: Electronic Frontier Foundation

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

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

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 and Aaron Mackey, Electronic Frontier Foundation.

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 USA, Inc. et al v. Apple Inc. No. 3:18-cv-00358-WHA (N.D. Cal.), 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.).

The names of all organizational victims and bankruptcy debtors and trustees:

None.

May 11, 2021

/s/ Aaron Mackey
Aaron Mackey

*Counsel for Intervenor-Appellee*
*Electronic Frontier Foundation*

## TABLE OF CONTENTS


CERTIFICATE OF INTEREST ..... i

TABLE OF AUTHORITIES ..... v

STATEMENT OF RELATED CASES ..... 1

PRELIMINARY STATEMENT ..... 2

STATEMENT OF THE ISSUES ..... 4

STATEMENT OF FACTS ..... 4

SUMMARY OF THE ARGUMENT ..... 7

ARGUMENT ..... 9

I. Standard of Review ..... 9

II. The District Court Exercised Sound Discretion in Refusing to Seal Presumptively Public and Highly Relevant Court Records. ..... 9

A. The District Court Granted Public Access to Third-Party Licensing Information Because It Was Relevant to the Decision-making Process and at the Heart of the Standing Dispute. ..... 10

B. Uniloc Never Established Compelling Reasons to Seal Third Party Licensing Information. ..... 12

1. The Third Party Licensing Table Does Not Contain Trade Secrets. ..... 12

2. Patent Licensing Information Is Not Per Se Sealable. ..... 15

3. Conclusory Assertions of Competitive Harm Cannot Justify Sealing. ..... 18

C. The District Court's Eminently Reasonable Decision Was Not an Abuse of Discretion and Is Uncontroverted by the Record. ..... 19

III. The District Court Exercised Sound Discretion in Denying Uniloc's Sealing Requests for Non-Compliance with Local Rule 79-5. ..... 21

A. Uniloc's Requests Were Overbroad. ..... 21

B. Uniloc Failed to Provide Compelling Reasons to Seal the Fortress Memorandum. ..... 22

1. Uniloc Violated the Local Rules by Submitting a Declaration from its Counsel Rather than Fortress. .....22
2. The Fortress Memorandum Does Not Qualify as a Trade Secret.....24
3. Self-Serving Declarations from Counsel Cannot Establish Facts Without Any Other Supporting Evidence. .....24
4. The Presumption of Public Access Applies to the Judicial Process, Not Judicial Opinions. .....25

C. Uniloc Is Trying to Seal Witness Testimony That Has Been Publicly Disclosed .....26

IV. The Public Has an Overwhelming Interest in Obtaining Access to these Sealed Filings to Deter Other Litigants from Following Uniloc's Example. .....27

A. Uniloc Continues to Ignore the Presumption of Public Access. ..28

B. Uniloc's Omission of Key Facts in Court Submissions Demonstrates the Futility of its Reliance on *Uniloc v. Google*. .29

C. If Uniloc Prevails, Future Litigants Will Follow its Example. ....33

CONCLUSION .....34

CERTIFICATE OF SERVICE .....35

CERTIFICATE OF COMPLIANCE .....36

## TABLE OF AUTHORITIES

**Page(s)**

**Cases**

*Apple Inc. v. Samsung Elecs. Co., Ltd.*, No. 5:11-cv-01846-LHK, 2012 WL 4933287, at *2 (N.D. Cal. Oct. 16, 2012) ..... 15, 16

Baxter Int'l, Inc. v. Abbott Lab'ys, 297 F.3d 544 (7th Cir. 2002) ..... 17

*Camreta v. Greene*, 563 U.S. 692 (2011) ..... 17

*CAP Export, LLC v. Zinus, Inc.*, No. 2020-2087, Federal Circuit May 5, 2021, slip op. ..... 12

*Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, No. 1:96-cv-1718-DFH-TAB, 2007 WL 141923 (S.D. Ind. Jan. 16, 2007) .. 27

*Christian v. Mattel, Inc.*, 286 F.3d 1118 (9th Cir. 2002) ..... 22

*Cinpres Gas Injection Ltd. v. Volkswagen Grp. of Am., Inc.*, No. 12-CV-13000, 2013 WL 11319319 (E.D. Mich. Feb. 14, 2013) ..... 17

*Courthouse News Serv. v. Planet*, 947 F.3d 581 (9th Cir. 2020) ..... 26

DePuy Synthes Prod., Inc. v. Veterinary Orthopedic Implants, Inc., 990 F.3d 1364 (Fed. Cir. 2021) ..... 15, 19

*Estate of Diaz v. City of Anaheim*, 840 F.3d 592 (9th Cir. 2016) ..... 9

*F.T.C. v. Actavis, Inc.*, 570 U.S. 136 (2013) ..... 18

Foltz v. State Farm Mut. Auto. Ins. Co., 331 F.3d 1122 (9th Cir. 2003) ..... 14

Grove v. Wells Fargo Fin. California, Inc., 606 F.3d 577 (9th Cir. 2010) ..... 22

*Harman v. Apfel*, 211 F.3d 1172 (9th Cir. 2000) ..... 9

*Hung Lam v. City of San Jose*,
869 F.3d 1077 (9th Cir. 2017) ..... 9

In re Violation of Rule 28(D),
635 F.3d 1352 (2011) ..... 25

*Kamakana* v. City & Cty. of Honolulu,
447 F.3d 1172 (9th Cir. 2006) ..... 9, 14, 28

Keystone Driller Co. v. Gen. Excavator Co.,
290 U.S. 240 (1933) ..... 12

*Kode v. Carlson*,
596 F.3d 608 (9th Cir. 2010) ..... 9

Mercoid Corp. v. Mid-Continent Inv. Co.,
320 U.S. 661 (1944) ..... 12

Metlife, Inc. v. Fin. Stability Oversight Council,
865 F.3d 661 (D.C. Cir. 2017)..... 12, 25

Nixon v. Warner Commc'ns, Inc.,
435 U.S. 589(1978) ..... 25

Richmond Newspapers, Inc. v. Virginia,
448 U.S. 555 (1980) ..... 11, 25

*Takeda Pharm. U.S.A., Inc. v. Mylan Pharm., Inc.*,
No. cv-19-2216-RGA, 2019 WL 6910264 (D. Del. Dec. 19, 2019) ..... 27

*Uniloc 2017 LLC v. Apple, Inc.*,
964 F.3d 1351 (Fed. Cir. 2020) (..... *passim*

*Uniloc USA, Inc. v. Apple, Inc.*,
No. C 18-00358 WHA, 2020 WL 7122617 (N.D. Cal. Dec. 4, 2020) (..... 6, 10

*Uniloc v. Google*,
No. 4:20-CV-04355-YGR (N.D. Cal.) ..... 29, 30, 31, 32

*Uniloc v. Google*,
No. 4:20-cv-05345-YGR (N.D. Cal.) ..... 26, 29

United States v. Line Material Co.,
333 U.S. 287 (1948) ..... 18

*USB Techs. v. Piodata, Inc.*,
No. CV 19-8369-GW (ASx), 2018 WL 8807790 (C.D. Cal., Dec. 31, 2019) 24

*Whyte v. Schlage Lock Co.*,
101 Cal. App. 4th 1443 (2002) ..... 24

**Other Authorities**

1 Joseph Story, *Commentaries on Equity Jurisprudence* § 98 (W.H. Lyon, Jr. ed., 14th ed. 1918) ..... 12

Bernard Chao, *Seeking Transparency in Waco*, PATENTLYO, (Mar. 19, 2021) . 33

U.S.T.A. § 1(4) ..... 13

**Rules**

N.D. Cal. Civil L. R. 79-5 ..... *passim*

## STATEMENT OF RELATED CASES

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 USA, Inc. et al v. Apple Inc.* No. 3:18-cv-00358-WHA (N.D. Cal.), *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.).

## PRELIMINARY STATEMENT

This case is about the presumption of public access to court records and Uniloc's refusal to comply with it. The presumption of access to court records ensures that members of the public can view and scrutinize the conduct of judges, counsel, and all litigants seeking to resolve legal disputes in federal court. The presumption is designed to enforce itself: by establishing openness as the default and secrecy as the rare exception, the right is designed to ensure that the public has access even when it has no representative in court. This Court has already confirmed that the public has a right of access by default, and the proponent of sealing must prove compelling reasons for secrecy to override that presumption.

Yet, in this second appeal of the district court's denial of its sealing motion, Uniloc once more seeks to turn the presumption on its head and ignore this Court's prior ruling. Uniloc continues to demand secrecy by default while insisting the law requires proof of the public's entitlement to access. Under this flawed interpretation, litigants have no independent duty to respect the public's constitutional and common law rights of access to court records.

Uniloc's disdain for the public's right of access is plain: It ignored this Court's ruling for months. It was not until EFF intervened, once more, that Uniloc made any submissions pursuant to this Court's ruling. The district court did not abuse its discretion in rejecting Uniloc's deficient submissions again.

When given another chance to comply with the Local Rules in connection with Apple's new motion to dismiss, Uniloc again sought to seal more information than the law allows, and once again provided less support than the law requires.

That information, obtained during additional discovery, revealed that Uniloc had previously omitted or misrepresented facts relevant to its standing. Based on the new evidence, the district court changed its mind, and granted Apple's motion to dismiss for lack of standing.

The decision that Uniloc lacked standing gave new significance to the sealed materials remanded for further consideration: they now went to the heart of the standing dispute and the district court's change of mind of standing. Uniloc continued to advocate for secrecy, but failed to provide any new information, explanation, or argument to support its requests. The district court did not abuse its discretion in holding that deficient submissions from a party lacking credibility could not overcome the public's interest in observing, understanding, and trusting the judicial process by which the court overturned its own prior ruling.

This case crystallizes the problem of excessive sealing in patent cases. Litigants are entitled to resolve private disputes in publicly-funded courts, but they are not entitled to do so secretly. To keep secrets in court proceedings, litigants must establish compelling reasons for privileging their private interests over the public's right of access. The Northern District's Local Rules clearly impose these obligations on litigants; they should be taken seriously from the outset.

If Uniloc had done so, this litigation would never have happened. But by trying to seal as much as possible for as long as possible, Uniloc has repeatedly violated the public's right of access, necessitating repeated rounds of motion practice and appeal. Given Uniloc's intransigence, the public will only get the full access to which it is entitled once this Court requires it.

## STATEMENT OF THE ISSUES

1. Whether the district court abused its discretion on remand by finding that Uniloc failed to provide compelling reasons for sealing that could overcome the presumption of public access to judicial records, which was buttressed by the strong public interest in accessing judicial records relevant to the district court's change of decision on standing?

2. Whether the district court abused its discretion by denying Uniloc's new requests to seal court filings, including an entire documentary exhibit, based entirely on conclusory assertions of counsel?

## STATEMENT OF FACTS

On October 25, 2018, Apple moved to dismiss a set of four related Uniloc lawsuits: *Uniloc 2017 LLC v. Apple Inc.,* Case Nos. 3:18-cv-00360, -00363, -00365, and -00572-WHA (N.D. Cal.). Apple's motion and attached exhibits were so heavily sealed as to be unreadable: excessive redactions to the brief spanned whole pages, covering even legal citations, and attached exhibits were sealed in their entirety. After asking the parties to re-file properly sealed documents failed, EFF moved to intervene on behalf of the public's right to access them.

The district court denied Uniloc's requests in full on January 17, 2019. Appx38–39. The district court denied Uniloc's motion for reconsideration on May

7, 2019. At that time, it also granted EFF leave to defend its decision if Uniloc appealed. When Uniloc did so, EFF intervened.

On July 7, 2020, this Court issued its decision, largely affirming the District court's decision. *See Uniloc 2017 LLC v. Apple, Inc.*, 964 F.3d 1351 (Fed. Cir. 2020). This Court concluded that the district court "took seriously the presumption of public access and did so in accord with precedent from the Supreme Court and the Ninth Circuit," *id.* at 1363, and "correctly determined [that] Uniloc's original requests fell woefully short." *Id.* at 1359. It therefore found "no abuse of discretion in [the]decision to deny Uniloc's requests to seal its purportedly confidential information and that of its related entities." *Id.* at 1363.

Because unrelated "third parties were not responsible for Uniloc's filing of an overbroad sealing request," the Court remanded Uniloc's requests to seal information of third-party licensees for "particularized determinations as to whether and, if so, to what extent, the materials of each of these [third] parties should be made public." *Id.* at 1364.

This Court's mandate issued on August 17, 2020. EFF hoped the parties would voluntarily re-file unsealed versions of the Uniloc entities' documents and initiate remand proceedings on the third-party materials, but they did not.

EFF became aware of a new motion to dismiss Apple filed on October 22 in a related case: *Uniloc 2017 LLC v. Apple, Inc.*, No. 3:18-cv-00358-WHA (N.D.

Cal.). In this new motion to dismiss, Apple again argued that Uniloc lacked standing when it filed the lawsuit because it had defaulted on a loan from Fortress. Appx519–542.

Again, Apple's motion was heavily redacted and entire exhibits were filed under seal pursuant to Uniloc's confidentiality designations. *E.g.,* Appx532 (redacting practically an entire page of Apple's motion). On October 30, Uniloc filed a declaration from its attorney purporting to provide reasons to seal (1) portions of deposition testimony referencing the names of several Uniloc licensees; (2) one exhibit—the Fortress Investment Memorandum (Exhibit I)—entirely, and (3) portions of Apple's brief discussing that Memorandum. Appx619–625.

On November 12, EFF filed its third motion to intervene, challenging Uniloc's still-pending request to seal third party materials as well as its sealing requests in connection with Apple's new motion to dismiss. Appx626–645. The district court granted Apple's motion on December 4, holding that Uniloc lacked standing to sue at the time it filed. *Uniloc USA, Inc. v. Apple, Inc.*, No. C 18-00358 WHA, 2020 WL 7122617 (N.D. Cal. Dec. 4, 2020) ("*Uniloc II*"). Judge Alsup explained the reason for his change of mind with respect to Uniloc's standing: "the prior order lacked some crucial facts which contributed to a correctable error of law." *Id.* at *6. Some of those facts came from previously omitted sections of a Fortress agreement that contradicted Uniloc's argument for standing.

On December 17, the district court held a hearing on EFF's motion to intervene. Uniloc's counsel tried to argue that Apple's motion "did not directly depend upon information providing the specific dollar amounts, financial terms and the names of the licensees in the various agreements." Appx926. The attempt to elide the distinction between Apple's first and second motion to dismiss fell flat. As Judge Alsup explained, "[t]he reason I said that once before in the earlier motion, long ago, was because someone had pulled the wool over my eyes." *Id*. In its second motion, "Apple did a good job of showing that false information [or] . . . incomplete information was provided to the Judge. And once I saw that, I see how highly relevant this information is." *Id*.

On December 22, 2020, the district court denied Uniloc's motions to seal for a third time. Given the lack of Apple's opposition to Uniloc's sealing motions, the district court granted EFF's motion to intervene, noting that "[w]ithout EFF, the public's right of access will have no advocate." Appx34. "The Court also thank[ed] EFF for its most helpful briefing and willingness to vindicate the public's right of access." Appx35-36.

## SUMMARY OF THE ARGUMENT

Uniloc's appeal seeks to turn fundamental principles governing the public's right of access to federal court records on their head. These fundamental principles require judicial records to be presumptively public. Because secrecy is the

exception in federal court, a party seeking to seal judicial records bears a heavy burden to succeed in its request to close off public access. Yet Uniloc continues to demand secrecy by default and proof of the public's entitlement to access.

The district court's decision to deny Uniloc's sealing requests was a sound exercise of discretion. It denied Uniloc's sealing motion based largely on the public's overwhelming interest in understanding the new standing decision and scrutinizing its factual basis. The district court did not err in denying Uniloc's requests so that the public could understand and scrutinize the judicial process.

On the merits of Uniloc's argument, it offers nothing to justify piercing the deferential standard of review this Court applies to the district court's order. Uniloc devotes much of its brief to relitigating issues already decided by the district court and affirmed by this Court. Uniloc still fails to grasp that invoking the talisman of trade secrecy does not justify sealing court records without more. Instead, parties must provide evidence and articulate *how* disclosure would be harmful. Twice, the district court has held that Uniloc has failed to meet this standard.

Further, despite having multiple opportunities, Uniloc provided no new evidence or argument to supports its request to override the public's presumptive right of access to judicial records. Uniloc repeatedly argues that the district court was unreasonable in not reaching the secrecy outcome—based on a stale record—that it prefers. But the only party acting unreasonably is Uniloc, which has steadfastly refused to comply with local rules, Ninth Circuit law, and this Court's 2020 decision.

## ARGUMENT

### I. Standard of Review

A district court's order granting or denying a motion to seal judicial records is reviewed under an abuse of discretion standard. *Kamakana v. City & Cty. Of Honolulu*, 447 F.3d 1172, 1178 n.3 (9th Cir. 2006). Under this standard, an appellate court looks "only to whether the district court's conclusion 'was outside of a broad range of permissible conclusions.'" *Hung Lam v. City of San Jose*, 869 F.3d 1077, 1085 (9th Cir. 2017) (quoting *Kode v. Carlson*, 596 F.3d 608, 613 (9th Cir. 2010)).

This standard requires an affirmance unless the court is "'convinced firmly that the reviewed decision lies beyond the pale of reasonable justification under the circumstances.'" *Estate of Diaz v. City of Anaheim*, 840 F.3d 592, 601 (9th Cir. 2016) (quoting *Harman v. Apfel*, 211 F.3d 1172, 1175 (9th Cir. 2000)). In the Ninth Circuit, a district court's unsealing order is not an abuse of discretion unless it is illogical, implausible, or unsupported by the record. *See, e.g.*, *Perry v. Brown*, 667 F.3d 1078, 1084 (9th Cir. 2012) (citing *U.S. v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009)).

### II. The District Court Exercised Sound Discretion in Refusing to Seal Presumptively Public and Highly Relevant Court Records.

Denying Uniloc's motions to seal was a sound exercise of discretion. The district court conscientiously weighed Uniloc's submissions in support of sealing,

and concluded they were insufficient to overcome the public's strong interest in access. That decision was eminently reasonable and remains uncontroverted.

### A. The District Court Granted Public Access to Third-Party Licensing Information Because It Was Relevant to the Decision-making Process and at the Heart of the Standing Dispute.

The district court concluded that access to the third-party licensing materials would promote the public's interest in understanding the judicial process. That includes the process that led the district court to change its decision on Uniloc's standing and grant Apple's second motion to dismiss. Appx34-35.

The question of Uniloc's standing turned on the effects of its failure to meet monetization goals for third-party licensing revenue. *See Uniloc II*, 2020 WL 7122617, at *2. Uniloc's failure to meet those goals "released the sole limit on Fortress's broad sublicensable rights in the asserted patents, divesting the Unilocs of standing to sue." *Id*. The standing determination relied substantially on the information in the third-party license table that established Uniloc's failure to meets its revenue goals.

Uniloc makes much of the district court's discussion of the public nature of the patent system. *See, e.g.*, App. Br. 39–40. That is a strawman. The district court's emphatic discussion was a message to Uniloc to stop treating federal judges like private arbitrators and start recognizing the public implications of patent litigation. *See* Appx31 (noting that "[f]ederal courts are public tribunals, not

private mediators," and "the grant of a patent is a matter involving public rights") (internal quotation marks and citation omitted.) But it was not the basis of the decision to grant public access.

The basis of that decision was the relationship between the license table and the substance of the standing dispute. The District Court said so: "Conclusive here, though, is the fact that the dates and dollar amounts involved in Uniloc's patent licenses 'go to the heart of' the primary dispute, that of Uniloc's standing (or lack of) to sue." Appx34. The importance of the license table to the standing dispute intensifies the public's interest in accessing it: "The public owes little deference to this Court's statement of *fact* and has every right to inspect the bases for those statements. Review of the parties' and the Court's calculation of Uniloc's actual monetization requires public access to the underlying amounts and dates of Uniloc's patent licenses." Appx35 (emphasis in original). The District Court denied Uniloc's sealing motion because of the public's overwhelming interest in understanding the new standing decision and scrutinizing its factual basis.

The district court did not err in denying Uniloc's requests based on the public's need to understand and scrutinize the judicial process. "People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing." *Richmond Newspapers*, 448 U.S. at 572; *see also Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661,

665 (D.C. Cir. 2017) ("[a]ccess to records serves the important functions of ensuring the integrity of judicial proceedings in particular") (citation and internal quotation marks removed).

Nor did it err in recognizing the public's interest in the patent system: "It is the public interest which is dominant in the patent system." *CAP Export, LLC v. Zinus, Inc.*, No. 2020-2087, Federal Circuit May 5, 2021, slip op. at 18 (quoting *Mercoid Corp. v. Mid-Continent Inv. Co.*, 320 U.S. 661, 665 (1944)). To function properly, "the patent system requires that 'everything that tends to a full and fair determination of the matters in controversy should be placed before the court.'" *Id.* (quoting *Keystone Driller Co. v. Gen. Excavator Co.*, 290 U.S. 240, 244 (1933) (quoting 1 Joseph Story, *Commentaries on Equity Jurisprudence* § 98 (W.H. Lyon, Jr. ed., 14th ed. 1918))).

### B. Uniloc Never Established Compelling Reasons to Seal Third Party Licensing Information.

#### 1. The Third Party Licensing Table Does Not Contain Trade Secrets.

Uniloc continues to argue the entire contents of a table with historical licensing information are trade secrets. That argument is wrong: basic facts like a licensee's name or a license's duration are not trade secrets.

Under the Uniform Trade Secret Act, a trade secret must "derive[] independent economic value, actual or potential, from not being generally known

to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." U.S.T.A. § 1(4). Something without any independent economic value accruing from the lack of disclosure is not a trade secret.

The basic information in the summary table—licensee names, license dates, and license rates—does not have independent economic value. Although Uniloc continues to claim this table contains trade secret information, *see* App. Br. at 14–15, the supporting declarations from third party licensees (that are publicly accessible) do not support that claim. *See* Appx436–439 (Allscripts); Appx440–442 (Avid); Appx443-446 (Cerner); Appx447–448 (NEC). Those licensees who submitted unsealed declarations did not state that their names, the dates of their licenses, or the amounts paid have any independent economic value contingent on disclosure.[1]

The publicly-available declarations describe the information in the license table as confidential financial information—not trade secrets. *See* Appx442 ("Avid considers the specific license terms it negotiates for third-party intellectual property licenses . . . to be confidential information of Avid."); Appx445

[1] Because many of the licensees submitted sealed or heavily-redacted declarations, EFF cannot see their contents. *See* App. Br. 57 (citing Appx805–833). We hope the Court will scrutinize these secret submissions carefully for evidence that this kind of basic licensing information has independent economic value that could qualify it as a trade secret.

(describing Cerner's settlement agreement details as "confidential," not trade secrets); Appx448 ("The financial information (payment amount . . . is confidential and proprietary information of NEC.").

There is only one publicly available third-party declaration that uses the term "trade secret," and it uses the term broadly to encompass "all financial records." Appx438 ("[A]s with all financial records, Allscripts considers [the amount it paid Uniloc] a trade secret."). Thus, none of the publicly accessible declarations supports Uniloc's assertions of trade secrecy.

Unlike trade secrets, information that is merely "confidential" is not sealable without more. *See Kamakana*, 447 F.3d at 1183 ("[T]he United States should have been on notice that [the] confidential categorization of discovery documents under the protective order was not a guarantee of confidentiality, especially in the event of a court filing.").

Blanket protective orders do not change the analysis. *See Foltz v. State Farm Mut. Auto. Ins. Co*., 331 F.3d 1122, 1138 (9th Cir. 2003) ("Because [the litigant] obtained the blanket protective order without making a particularized showing of good cause with respect to any individual document, it could not reasonably rely on the order to hold these records under seal forever.") (citations omitted); *see also* Civ. L.R. 79-5(d)(1)(a) ("A stipulation, or a blanket protective order that allows a

party to designate documents as sealable, will not suffice to allow the filing of documents under seal.").

Absent evidence that these are trade secrets, this Court's recent precedent confirms that basic information such as entity names need not be sealed. *See DePuy Synthes Prod., Inc. v. Veterinary Orthopedic Implants, Inc.*, 990 F.3d 1364, 1373 (Fed. Cir. 2021) ("[T]he district court did not clearly err by finding that the Manufacturer Identity is itself not a trade secret entitled to confidential treatment.").

**2. Patent Licensing Information Is Not Per Se Sealable.**

Notwithstanding the dearth of supporting authority, Uniloc continues to argue that patent licensing information is sealable per se. *See* App. Br. 30. As this Court's prior ruling confirms, the presumption of public access precludes sealing material on a per se basis because "all filings [a]re presumptively accessible," and the proponent of sealing has a "duty to provide compelling reasons for shielding particular materials from public view." *Uniloc*, 964 F.3d at 1362.

Uniloc's continues to rely on *Apple Inc. v. Samsung Elecs. Co., Ltd.*, No. 5:11-cv-01846-LHK, 2012 WL 4933287, at *2 (N.D. Cal. Oct. 16, 2012) to argue "licensing information in patent cases is invariably sealed." App. Br. 30. That completely ignores this Court's prior ruling, which carefully distinguished the type of information at issue there—"product-specific financial information, such as

profit, cost, and margin data, as well as certain proprietary market research reports"—as well as submissions provided in support of sealing—"detailed declarations describing both the competitive injury that would result if such information were disclosed and the significant efforts the[ parties] had made to keep their product-specific financial information confidential." *Uniloc*, 964 F.3d at 1361.

Uniloc also ignores the fundamental distinction between this case and *Apple*. As this Court has already explained, the primary issue in *Apple* was "whether the district court erred in concluding that 'the parties' strong interest in keeping their detailed financial information sealed' failed to override 'the public's relatively minimal interest in this particular information." *Id.* Given the different information, supporting submissions, and public interest involved, the Court in *Apple* "had no occasion to address the central issues presented here, which are whether a district court abuses its discretion by applying local procedural rules to deny an overbroad and unsupported motion to seal and a subsequent motion for reconsideration." *Id.*

No precedent supports Uniloc's theory that licensing information in patent cases is sealable per se. *See* App. Br. 30. However numerous, district court decisions are not precedents. *Uniloc*, 964 F.3d at 1362 ("[T]he fact that other courts, under other circumstances, have permitted litigants to submit revised sealing requests does not mean that the district court was required to do so here.")

(citing *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) ("A decision of a federal district court judge is not binding precedent in either a different judicial district, the same judicial district, or even upon the same judge in a different case." (citation and internal quotation marks omitted)).

Nor are they analogous to this case, where a representative of the public intervened to oppose the sealing requests before they were granted.

Uniloc, like "many litigants[,] would like to keep confidential the salary they make, the injuries they suffered, or the price they agreed to pay under a contract, but when these things are vital to claims made in litigation they must be revealed." *Baxter Int'l, Inc. v. Abbott Lab'ys*, 297 F.3d 544, 547 (7th Cir. 2002). But when information in a patent license becomes material to claims made in litigation, that information must be revealed unless the proponent of sealing can overcome the presumption of public access. *See, e.g., Cinpres Gas Injection Ltd. v. Volkswagen Grp. of Am., Inc.*, No. 12-CV-13000, 2013 WL 11319319, at *4 (E.D. Mich. Feb. 14, 2013) (denying motion to seal because "defendant has not shown how dissemination of the agreement would 'injure its future patent license negotiations' or how defendant [VW AG] would be harmed if competitors learn what technology and equipment VW AG licensed from plaintiff, the fee VW AG paid and VW AG's sublicensing rights").

Rather than supporting its flawed theory, "Uniloc's reliance on the numerous district court orders which have sealed similar information underscores the larger problem of indiscriminate oversealing in patent and commercial cases nationwide." Appx33.

### 3. Conclusory Assertions of Competitive Harm Cannot Justify Sealing.

Uniloc has made numerous assertions about competitive harm disclosure would cause, but has never provided any concrete evidence or explanation of what that harm would be or how it would occur. It remains unclear how disclosing the names of Uniloc's licensees could cause any competitive harm.[2]

Neither Uniloc nor its licensees explain how other patentees might leverage information about amounts paid to license Uniloc's patents. Because a patent grants its owner exclusive rights, Uniloc alone can offer licenses to use its patents. *See F.T.C. v. Actavis, Inc.*, 570 U.S. 136, 147 (2013) ("[A] valid patent excludes all except its owner from the use of the protected process or product.") (quoting *United States v. Line Material Co.,* 333 U.S. 287, 308 (1948)). Uniloc has no competitors; its licensees have no other suppliers. Any negotiations third-party licensees have with patentees other than Uniloc will necessarily involve different patents, and the amounts those patentees offer will be based on the economic value

[2] If Uniloc genuinely believes disclosing the names of licensees would cause harm, it is also unclear why it never sought to seal only the names of licensees.

of their own patents. Uniloc does not explain how other patentees could exploit information about its patent licenses to obtain additional economic value in negotiations for their own.

Given the number of licensees who voiced no objection to disclosure, the unsupported assertions of those who objected should carry little weight. *See* Appx4 ("Uniloc solicited the views of all one hundred nine licensees regarding the sealing of their patent license details. It reports that two agreed to disclosure, eight offered to disclose their identities but asked to keep the remaining details under seal, and twenty three asked to keep all information under seal.").

At the very least, Uniloc should not be able to seal information about those licensees who implicitly or explicitly consented to disclosure. Uniloc's desire for secrecy should not trump their respect for the public's access rights.

Given the lack of evidence corroborating Uniloc's claims of competitive harm, the district court did not abuse its discretion in denying Uniloc's motion to seal. *See DePuy*, 990 F.3d at 1372–73 (holding that district court did not err in denying motion to seal manufacture's name based on allegations—but not evidence—of competitive harm).

### C. The District Court's Eminently Reasonable Decision Was Not an Abuse of Discretion and Is Uncontroverted by the Record.

Uniloc's disagreement with the district court's findings and conclusion that the strong presumption of public access required disclosure of the third-party

materials cannot establish that the district court abused its discretion. In the Ninth Circuit, overturning a district court's order to unseal judicial records requires clear evidence that the court's unsealing order is illogical, unsupported by any inferences that may be drawn from the facts in the record. *See Perry*, 667 F.3d at 1084.

*Perry* demonstrates why it is rare for an appellate court to overturn district court's unsealing order. In that case, the court found a district court's unsealing order amounted to an abuse of discretion because it "was an 'implausible' and 'illogical' application of the 'compelling reason' standard to the facts at issue." *Id*. at 1085 (quoting *U.S. v. Hinkson*, 585 F.3d 1247, 1262 (9th Cir. 2009)).

In that case, the district court overseeing a trial challenging the constitutionality of a California initiative prohibiting same-sex marriage had permitted video recording, with "unequivocal assurances that the video recording at issue would not be accessible to the public." *Perry*, 667 F.3d at 1085. Another district court judge subsequently ordered the video recording unsealed, finding the previous judge had not in fact promised that the recording would not be made public. *Id*. In reversing, the Ninth Circuit held that the "record compels the opposite inference" in light of the earlier judge's unequivocal assurances that the video would not be made public. *Id*. The unsealing order amounted to "an abuse of

discretion because it lacked 'support in inferences that may be drawn from facts in the record.'" *Id*. at 1086 (quoting *Hinkson*, 585 F.3d at 1262).

In this case, the district court's unsealing order does not come anywhere close to that level of disregard for the facts in the record or what can plausibly be inferred from them. As explained above, the district court reviewed all the facts before it and found that there was a significant public interest in disclosure that reinforced the strong presumption that the third-party materials should be unsealed. Uniloc's disagreement with the district court's decision is a far cry from the evidence and clear disregard of it by the unsealing court in *Perry*.

## III. The District Court Exercised Sound Discretion in Denying Uniloc's Sealing Requests for Non-Compliance with Local Rule 79-5.

### A. Uniloc's Requests Were Overbroad.

The Northern District of California's Local Rule 79-5 requires sealing requests be "narrowly tailored to seek sealing only of sealable material." Civ. L. R. 79-5(c). Once again, Uniloc failed to follow that rule.

Uniloc is trying to seal an entire documentary exhibit comprising three pages of an internal Fortress memorandum. This memorandum supposedly reflects "Fortress's internal deliberations on whether to invest more in Uniloc's litigation campaign." Appx35.

Uniloc has failed to justify sealing these three pages in their entirety. EFF fully supports the district court's ruling that the entire memorandum should be

public. But even assuming that Uniloc is correct that some portion of the Fortress Investment Memorandum might be sealable, it is hard to fathom that the document must remain completely under seal. Those pages must include at least some non-confidential information (*e.g.* page numbers) that is not sealable, and therefore must be disclosed. But Uniloc is seeking to seal all three pages in their entirety.

Given Uniloc's non-compliance with the narrow tailoring requirement of Local Rule 79-5, the district court did not abuse its discretion in denying Uniloc's sealing requests. *See Uniloc*, 964 F.3d at 1363 ("A district court does not abuse its discretion simply because it elects to strictly enforce its local procedural rules." citing *Grove v. Wells Fargo Fin. California, Inc.*, 606 F.3d 577, 582 (9th Cir. 2010) (affirming denial of request for taxable costs because the party "failed to comply with the local rules governing motions for [such] costs"); *Christian v. Mattel, Inc.*, 286 F.3d 1118, 1129 (9th Cir. 2002) (district court did not abuse its discretion in refusing to consider any of a litigant's supplemental filings given that he "failed to comply with local rules regarding page limitations and typefaces")).

### B. Uniloc Failed to Provide Compelling Reasons to Seal the Fortress Memorandum.

#### 1. Uniloc Violated the Local Rules by Submitting a Declaration from its Counsel Rather than Fortress.

That was not Uniloc's only violation of the local rules. As the District Court put it, "Rule 79-5 does not require much to seal. But it does require that "*the*

*Designating Party* must file a declaration . . . establishing that all of the designated material is sealable." Appx35 (citing Civ. L.R. 79-5(e)(1)).

On appeal, Uniloc asserts the Fortress Memorandum contains information that "has not been shared outside of Fortress." App. Br. 59. At the district court, Uniloc's counsel likewise asserted that "no one at Uniloc—or anyone else not associated with Fortress— has seen the Fortress Investment Memorandum." Appx623. Nevertheless, the only declaration submitted to support its request to seal the Fortress Memorandum came from Uniloc's *own* counsel. *See* Appx35 ("Fortress has not submitted a declaration in support of its sealing request. Instead, Uniloc filed the hearsay declaration here, merely reporting what Fortress's counsel apparently said.").

Now, Uniloc argues this approach did not violate Local Rule 79-5 because "Prince Lobel Tye LLP, counsel for Uniloc, also represents Fortress with respect to production of the Fortress Memorandum in these cases." App. Br. 61. In other words, Uniloc is arguing that Uniloc and Fortress should be treated as the same entity when sealing court records, but as separate entities when filing lawsuits, likely so that Fortress is not on the hook for fee awards. Uniloc cannot have it both ways.

### 2. The Fortress Memorandum Does Not Qualify as a Trade Secret

If the Fortress Memorandum contains research related to investing in Uniloc, and only Uniloc, it cannot qualify as a trade secret. California law is crystal clear: "marketing research can be trade secret if it explores the needs of numerous, diverse buyers, but is not protectible if it relates to a single prominent buyer that is presumably aware of its own needs." *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1456 (2002) (citations and internal quotation marks omitted).

The district court did not err in refusing to seal information that could not qualify as a trade secret under governing law.

### 3. Self-Serving Declarations from Counsel Cannot Establish Facts Without Any Other Supporting Evidence.

Whether Fortress and Uniloc are the same entity or not, a self-serving declaration from counsel cannot establish factual matters without any evidentiary support. "'[A]ttorney argument is not evidence,' and cannot rebut other admitted evidence." *Elbit Sys. of Am., LLC v. Thales Visionix, Inc.*, 881 F.3d 1354, 1359 (Fed. Cir. 2018) (quoting *Icon Health & Fitness, Inc. v. Strava, Inc.*, 849 F.3d 1034, 1043 (Fed. Cir. 2017)). District courts in the Ninth Circuit similarly do not rely on attorney attestations without more. *See, e.g., USB Techs. v. Piodata, Inc.*, No. CV 19-8369-GW (ASx), 2018 WL 8807790 (C.D. Cal., Dec. 31, 2019)

(refusing to order default judgment because "the only basis to support the relief requested is the attached declaration of Plaintiff's counsel").

#### 4. The Presumption of Public Access Applies to the Judicial Process, Not Judicial Opinions.

This Court held last time that "all filings [a]re presumptively accessible, and it [i]s Uniloc's duty to provide compelling reasons for shielding particular materials from public view," *Uniloc*, 964 F.3d at 1362. But Uniloc continues to miscomprehend that rule, arguing that the Fortress Memorandum should be sealed because "the district court did not cite [it in] its order dismissing the case." App. Br. 60. That is absurd. District courts do not provide a citation for every part of the record they consider in the decision-making process. *See Metlife, Inc. v. Fin. Stability Oversight Council*, 865 F.3d 661, 668 (D.C. Cir. 2017). ("The fact that the court did not cite or quote portions of those documents does not mean that it did not 'rely' on them—if only to determine that they did not dissuade it from its bottom-line conclusion.").

Cabining the public's right of access to materials cited in a court opinion would eviscerate the public's right of access to judicial records and proceedings. *See In re Violation of Rule 28(D)*, 635 F.3d 1352, 1356 (Fed. Cir. 2011) (recognizing common law presumption and constitutional right of access to "court proceedings" under *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),

respectively). The public needs to *observe* the judicial process to ensure public confidence and accountability in the administration of justice. Verifying outcomes is not enough: "Citizens could hardly evaluate and participate in robust public discussions about the performance of their court systems if complaints—and, by extension, the very existence of lawsuits—became available only after a judicial decision had been made." *Courthouse News Serv. v. Planet*, 947 F.3d 581, 592 (9th Cir. 2020).

### C. Uniloc Is Trying to Seal Witness Testimony That Has Been Publicly Disclosed

Uniloc continues to seek the sealing of witness testimony even though the substance of much (if not all) of it has already been unsealed in *Uniloc v. Google*, No. 4:20-cv-05345-YGR (N.D. Cal.) In *Uniloc v. Google*, the defendant's reply (on its motion to dismiss for lack of standing) describes the substance of James Palmer's sealed deposition testimony. Evidently, Mr. Palmer stated "that [Uniloc] failed to meet its mandatory revenue requirements and took no affirmative action to cure any default," thus undermining Mr. Palmer's opinion that Uniloc's "predecessor did not default" as well as his "efforts to downplay the importance of the revenue requirement." Def. Google's Reply Supp. Br. in Supp. of Renewed Mot. to Dismiss for Lack of Standing at 1, *Uniloc v. Google*, No. 4:20-cv-05345-YGR (N.D. Cal.) (Oct. 23, 2020), ECF No. 202.

The district court did not err in refusing to seal percipient witness testimony about facts unfavorable to Uniloc's standing argument.

## IV. The Public Has an Overwhelming Interest in Obtaining Access to these Sealed Filings to Deter Other Litigants from Following Uniloc's Example.

Uniloc's excessive and unsupported sealing requests have deprived the public of access and wasted judicial resources for more than two years. If Uniloc prevails despite its non-compliance with local rules on sealing, its success will inspire other litigants to do the same. If there is no downside to submitting excessive and unsupported sealing requests, there will be no reason not to do so. Like Uniloc here, patent litigants will try to seal as much as they can, regardless of what the law allows, and fight every step of the way to maintain their position. The result will not only be a drastic loss of transparency, but also a massive increase in the burden on courts, who "must also serve as the gatekeepers for vast quantities of information." *Uniloc*, 964 F.3d at 1363.[3]

[3] Courts around the country have recognized this problem as well. *See also id.* (citing *Takeda Pharm. U.S.A., Inc. v. Mylan Pharm., Inc.*, No. cv-19-2216-RGA, 2019 WL 6910264, at *1 (D. Del. Dec. 19, 2019) ("In my experience, corporate parties in complex litigation generally prefer to litigate in secret. To that end, discovery is over-designated as being confidential, pleadings and briefs are filed under seal, redacted versions of sealed documents are over-redacted, requests are made to seal portions of transcripts of judicial proceedings, and parties want to close the courtroom during testimony."); *Cardiac Pacemakers, Inc. v. St. Jude Med., Inc.*, No. 1:96-cv-1718-DFH-TAB, 2007 WL 141923, at *2 (S.D. Ind. Jan. 16, 2007) ("[A]ll too frequently this Court finds itself reviewing overbroad and

EFF hoped that "denying Uniloc's sweeping motion to seal . . . sent a strong message that litigants should submit narrow, well-supported sealing requests in the first instance, thereby obviating the need for judicial intervention." *Id.* But the excessive and overbroad requests Uniloc filed in connection with Apple's new motion shows that message was not strong enough. Now, it is up to this Court to send a strong message that future litigants will heed.

### A. Uniloc Continues to Ignore the Presumption of Public Access.

Last time, this Court plainly stated that "judicial records are public documents almost by definition, and the public is entitled to access by default." *Id.* (quoting *Kamakana v. City & Cty. of Honolulu*, 447 F.3d 1172, 1180 (9th Cir. 2006) (internal quotation marks omitted).

Unfortunately, Uniloc still refuses to acknowledge the public's default entitlement to access, arguing instead that the public is only entitled to information it needs to verify a court's decision. *See, e.g.*, App. Br. 25, 59, 60. This Court has already said that argument is backwards: "All filings [a]re presumptively accessible, and it [i]s Uniloc's duty to provide compelling reasons for shielding particular materials from public view." *Uniloc*, 964 F.3d at 1362.

---

unsupported requests to file documents under seal. Lest practitioners suspect the Court is overstating its case, counsel in one case recently filed a motion seeking to file excerpts from the Federal Register under seal.").

Instead of providing compelling reasons, Uniloc has primarily chosen to re-hash flawed arguments and sow confusion by talking about an entirely different case.

### B. Uniloc's Omission of Key Facts in Court Submissions Demonstrates the Futility of its Reliance on *Uniloc v. Google*.

EFF did not intervene in *Uniloc v. Google*, the case that Uniloc discusses extensively in its brief. But important factual differences in that case—which Uniloc omits from its brief—confirm the correctness of the district court's decision on appeal in this case.

A review of the public docket in *Uniloc v. Google* shows the case was transferred from the Eastern District of Texas to the Northern District of California in August, and on October 2, the parties re-filed briefs, exhibits, and supporting declarations in connection with Google's motion to dismiss for lack of standing. *See Uniloc v. Google*, No. 4:20-CV-04355-YGR (N.D. Cal.).

Uniloc submitted a declaration from counsel identifying two exhibits that it sought to seal, including:

> A redacted version of the **Turner 5/20/19 Declaration Exhibit C** is attached hereto. Turner 5/20/19 Declaration Exhibit C is a copy of the Payoff and Termination Agreement. Page UNILOC_APPLE_2017_17365 of this document includes the payments to and bank account information of several third parties. This ***bank account information*** is confidential, is maintained with strict secrecy by those third parties, and the disclosure of it could cause serious harm to these third parties.

Decl. of Aaron S. Jacobs in Supp. of Pl.'s Admin. Mot. to File Under Seal Exs. Accompanying the Parties' Filings with Respect to Google's Mot. to Dismiss at 2, *Uniloc 2017 LLC v. Google LLC*, No. 4:20-CV-04355-YGR (N.D. Cal. Oct. 12, 2020), ECF No. 354-2 (emphasis added).

Put simply, Uniloc asked Judge Rogers to seal ***bank account information***. No such or similar information is or has ever been at issue in this case.

And when Uniloc sought to seal the same table with third party licensing information in *Uniloc v. Google* that is at issue in this appeal, Uniloc could not even be bothered to submit any of the third party declarations supporting the sealing requests to Judge Rogers. As Uniloc's counsel explained in his declaration:

> I previously stated in detail the interests of and potential harm to these third parties in a declaration submitted in *Uniloc 2017 LLC v. Apple Inc.*, Case No. 3:18-cv-00360-WHA, Dkt. No. 168-2 (N.D. Cal.), and so respectfully direct the Court's attention to that document at paragraphs 4 through 10. I also respectfully direct the Court's attention to the thirteen declarations filed by third parties, asking that their particular information be kept under seal. *Id.* Dkt. Nos. 168-5 through 168- 16, 168-26. ***To avoid refiling these documents under seal (again), I do not attach them here***, but will resubmit them at the Court's request.

*Id.* (emphasis added). If Uniloc files separate cases, it must file separate papers on each case docket. It cannot point to what was "previously stated" elsewhere, particularly where, as here, some of those statements were sealed.

In short, the sealing request in *Uniloc v. Google* concerned bank account information not at issue in this case and Uniloc did not comply with the Northern District's local rules governing sealing of the table. Civ. L.R. 79-5(e)(1) ("the Designating Party must file a declaration . . . establishing that all of the designated material is sealable"). Indeed, the court in *Uniloc v. Google* criticized Uniloc's practice of seeking to incorporate by reference evidence it had submitted in other cases.[4]

Further, in seeking to file materials in *Uniloc v. Google* under seal, Uniloc relied on the same kind of generalized assertions it relied on two years before in front of Judge Alsup that he reviewed and found were insufficient to overcome the public's presumptive right of access. *See* Jacobs Decl. at 2, *Uniloc v. Google*, No. 4:20-CV-04355-YGR (N.D. Cal. Oct. 12, 2020), ECF No. 354-2. ("Disclosure of

[4] *See Uniloc v. Google*, 2020 WL 7626430, at *8, n.13 ("[B]oth sides have submitted evidence from parallel litigation between plaintiff and Apple Inc. and bypassed compliance with Federal Rules of Evidence. The Court accepts the parties' agreement on the record that there was no objection to either side's approach. However, the parties are on notice that such stipulations should be in writing and filed or the Court should be provided with a complete record.").

this information would create a significant, unavoidable and potentially insurmountable information disparity between Uniloc and future licenses. Moreover, it would also cause the third-parties listed on that table significant, unavoidable and potentially insurmountable information disparity between them and future licensors.").

That the district court in *Uniloc v. Google* let Uniloc's noncompliance with the local rules and its generalized, unsupported assertion slide does not prove that the district court here abused its discretion, particularly when the district court here did nothing more than hold Uniloc to the local rules governing sealing and reaffirm the public's presumptive right to access judicial records.

If anything, the decision in *Uniloc v. Google* is a textbook example of the broad, unsupported oversealing that frequently occurs because too often parties in patent disputes have no incentive to protect the public's right of access.

*Uniloc v. Google* also proves another point the district court made below: that parties engage in gamesmanship when they seek to file overbroad sealing requests and only seek to narrow them once a court—or a public intervenor like EFF—points out the party's failure to comply with local rule or to uphold the public's presumptive right of access to judicial records. *See* Appx33 ("Our adversarial system collapses when, as often occurs in these suits, *both parties* seek

to seal more information than they have any right to and so do not police each other's indiscretion.").

That Uniloc has engaged in this kind of gamesmanship for more than two years and two appeals demonstrates the need for this Court to send a strong message to patent litigants that the presumption of public access to court records and local court rules on sealing are mandatory.[5]

### C. If Uniloc Prevails, Future Litigants Will Follow its Example.

If this Court rewards Uniloc's intransigence by letting it keep court records secret for more than two years, it will send a powerful message encouraging other litigants to do the same. Already, Uniloc has managed to keep the public from learning basic facts about its licenses for more than two years. Uniloc could have saved the court and EFF inestimable time, effort, and expense simply by filing proper sealing requests in the first instance. Instead, it sought and fought for as much secrecy as possibly, prolonging this litigation at every opportunity by challenging rather than complying with the district court's three sealing orders.

[5] *See* Bernard Chao, *Seeking Transparency in Waco*, PATENTLYO, (Mar. 19, 2021), https://patentlyo.com/patent/2021/03/seeking-transparency-waco.html ("[E]ven though judges bear the primary responsibility for making their dockets transparent, that does not mean the parties should not show more restraint.").

The public should not have to work this hard to see court records that are strongly presumed to be public. Nor should courts have to work this hard to protect the public's access rights. Local rules on sealing are supposed to prevent overbroad and unsupported sealing requests such as these. These rules will become toothless if litigants know they can violate them in district court and still get their sealing requests granted on appeal here. The best way to encourage litigants to submit proper sealing requests in the first instance is for Court to grant a full affirmance and immediate public access to the sealed filings.

## CONCLUSION

For the foregoing reasons, EFF respectfully requests affirmance of the district court's decision and immediate public access to the sealed filings.

May 11, 2021

Respectfully submitted,

ELECTRONIC FRONTIER FOUNDATION

By: /s/ Aaron Mackey

Alexandra H. Moss
Aaron Mackey
815 Eddy Street
San Francisco, CA 94109-7701
Tel: (415) 436-9333
Fax: (415) 436-9993
amackey@eff.org

*Attorneys for Intervenor-Appellee Electronic Frontier Foundation*

## CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2021, 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.

/s/ Aaron Mackey
Aaron Mackey

*Counsel for Intervenor-Appellee*
*Electronic Frontier Foundation*

## 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 7,645 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 Version 16.47 in 14-point Times New Roman font.

May 11, 2021

/s/ Aaron Mackey
Aaron Mackey

*Counsel for Intervenor-Appellee*
*Electronic Frontier Foundation*