

2021-1568 (LEAD), -1569, -1570, -1571, -1573

**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
Case Nos. 3:18-cv-00358-WHA, 3:18-cv-00360-WHA,
3:18-cv-363-WHA, 3:18-cv-00365-WHA, 3:18-cv-00572-WHA
before Judge William H. Alsup

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

May 26, 2021

Counsel for Plaintiffs-Appellants

CERTIFICATE OF INTEREST

FORM 9. Certificate of Interest

Form 9 (p. 1)
July 2020

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT AMENDED CERTIFICATE OF INTEREST

Case Number 21-1568, -1569, -1570, -1571, -1573
Short Case Caption Uniloc USA, Inc. v. Apple Inc.
Filing Party/Entity Uniloc USA, Inc.; Uniloc Luxembourg S.A.

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<p>1. Represented Entities. Fed. Cir. R. 47.4(a)(1).</p>	<p>2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2).</p>	<p>3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3).</p>
<p>Provide the full names of all entities represented by undersigned counsel in this case.</p>	<p>Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.</p> <p><input type="checkbox"/> None/Not Applicable</p>	<p>Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.</p> <p><input type="checkbox"/> None/Not Applicable</p>
<p>Uniloc USA, Inc.</p>	<p>Uniloc 2017 LLC</p>	<p>Uniloc Corporation Pty. Ltd.</p>
<p>Uniloc Luxembourg S.A.</p>	<p>Uniloc 2017 LLC</p>	<p>None</p>

Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

None/Not Applicable Additional pages attached

Nelson Bumgardner Albritton, P.C.	Edward R. Nelson, III	Anthony Michael Vecchione
Prince Lobel Tye LLP	Kevin Gannon	Tyrus C. Cartwright
Daniel McGonagle	Dean G. Bostock	Matthew David Vella

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court’s decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

None/Not Applicable Additional pages attached

ADDENDUM

4. Legal Representatives (continued)

Prince Lobel Tye LLP (continued):	Michael James Ercolini	Robert R. Gilman
Paul J. Hayes	Brian A. Tollefson	Tyrus S. Cartwright

5. Related Cases

Pursuant to Uniloc’s unopposed Motion, *see* Appeal No. 21-1568, Dkt. No. 14 (Motion), the present appeals were deconsolidated from *Uniloc USA, Inc. v. Apple Inc.*, Appeal No. 21-1572, on February 25, 2021. *See* Appeal No. 21-1568, Dkt. No. 15 (Order). Although now-deconsolidated Appeal No. 21-1572 arises from the same underlying case as Appeal No. 21-1573, as described in Uniloc’s Motion, the issues, orders on appeal and interested parties in the present appeals are different from Appeal No. 21-1572.

The following appeals, while perhaps not “related cases” within the meaning of this Court’s rules, were designated as companion cases to the deconsolidated Appeal No. 21-1572:

<i>Uniloc USA, Inc. v. Motorola Mobility LLC</i> , No. 21-1555 (Fed. Cir.)	<i>Uniloc 2017 LLC v. Google LLC</i> , Nos. 21-4198, -1500, -1501, -1502, -1503, -1504, -1505, -1506, -1507, -1508, -1509 (Fed. Cir.) (consolidated)
<i>Uniloc 2017 LLC v. Blackboard Inc.</i> , No. 21-1795 (Fed. Cir.)	

The following appeals, while perhaps not “related cases” within the meaning of this Court’s rules, arise from *inter partes* review proceedings involving some of the same patents asserted in these cases:

Uniloc 2017 LLC v. Unified Patents, LLC, Nos. 20-1666, -1667 (Fed. Cir.) (consolidated)	Apple Inc. v. Uniloc 2017 LLC, Nos. 20-1575, -1638 (Fed. Cir) (consolidated)	Uniloc 2017 LLC v. Apple Inc., No. 20-1038 (Fed. Cir.)
Iancu v. Fall Line Patents, LLC, No. 20-853 (U.S.)	Uniloc 2017 LLC v. Apple Inc., No. 20-1228, -1229 (Fed. Cir.)	

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INTRODUCTION

The Response Brief (“Resp.”) of Intervenor-Appellee Electronic Frontier Foundation (“EFF”) does not overcome the legal and factual errors identified by Uniloc’s Principal Brief (“Br.”), errors that compel reversal.

The same documents at-issue in this appeal were considered by this Court in a prior appeal, *Uniloc 2017 LLC v. Apple, Inc.*, 964 F.3d 1351 (Fed. Cir. 2020) (“*Uniloc 2017 v. Apple*”). In that opinion, this Court affirmed the district court’s order unsealing Uniloc’s information due to the overbreadth of Uniloc’s original request, but reversed and remanded as to all third-party financial and licensing information. This Court did so because the “third parties were not responsible for Uniloc’s filing of an overbroad sealing request,” *id.* at 1363-64 (Appx502); and because, despite an extensive record, “the district court failed to make findings sufficient to allow us to adequately assess whether it properly balanced the public’s right of access against the interests of the third-parties in shielding their financial and licensing information from public view,” *id.* at 1364 (Appx503).

On remand, the district court (1) cast aside the otherwise-uniform practice in the Ninth Circuit that patent-licensing information should be sealed; (2) created out of whole-cloth a new and unsupported ground for unsealing all patent-related licensing information; and (3) once again disregarded the wealth of evidence provided by the third-parties and Uniloc supporting sealing. The Ninth Circuit

already settled the question of whether licensing information should be sealed: “[P]ricing terms, royalty rates, and guaranteed minimum payment terms found in a license agreement [are] plainly within the definition of ‘trade secrets.’” *In re Elec. Arts, Inc.*, 298 Fed. App’x 568, 569 (9th Cir. 2008). *In re Electronic Arts* has been cited more than 180 times by the district courts of that Circuit, including more than 90 times in the Northern District of California alone. But it was not followed by the district court below. The order on appeal should be reversed and remanded with instructions to redact and seal the documents as proposed by Uniloc.

ARGUMENT

I. EFF is wrong on the law.

A. The Northern District of California recognizes that the to-be-sealed information constitutes trade secrets.

EFF is consistently mistaken on the law of sealing information related to licensing. *See* Resp. at 12-14. For example, EFF claims that “[t]he basic information in the summary table—licensee names, license dates and license rates—does not have independent economic value.” Br. at 13.¹ And yet, other district courts of the Northern District of California have recognized that this information, such as a licensee’s names, is in fact valuable and protectable. *See, e.g., Huawei Techs., Co, Ltd v. Samsung Elecs. Co, Ltd.*, 340 F. Supp. 3d 934,

¹ Despite the Ninth Circuit’s clear statement in *In re Elec. Arts, Inc.*, it is difficult to discern just what licensing information EFF believes can be sealed.

1004 (N.D. Cal. 2018) (“Percentages of royalties sought or secured in negotiations or resulting licensing agreements may remain under seal at this juncture, if those terms are not otherwise publicly known. *This includes references to the identities of third-parties to those agreements, assuming the existence of the agreement itself is not otherwise publicly known.*”) (emphasis added); *Finjan, Inc. v. Sophos, Inc.*, No. 14-cv-01197-WHO, 2016 WL 7911365, at *1 (N.D. Cal. Aug. 30, 2016) (granting patentee’s request to protect the identity of its licensees during trial by using codenames when referring to the licensee and redacting the licensee’s name from the license agreements submitted as evidence in the trial); *see also, e.g., GoDaddy.com, LLC v. RPost Commc’ns Ltd.*, No. CV-14-00126-PHX-JAT, 2016 WL 3068638, at *5 (D. Ariz. June 1, 2016) (sealing identities of third-party suppliers; “the Court finds that this information is merely tangentially related to the merits of RPost’s motion for summary judgment. Under such circumstances, the public’s interest in the information is at its nadir.”).

EFF cites *DePuy Synthes Prod., Inc. v. Veterinary Orthopedic Implants, Inc.*, 990 F.3d 1364, 1373 (Fed. Cir. 2021), for the proposition that “[a]bsent evidence that these are trade secrets, this Court’s recent precedent confirms that basic information such as entity names need not be sealed.” Resp. at 15. But that opinion supports Uniloc’s position, not EFF’s. Defendant Veterinary Orthopedic Implants (“VOI”) sought to seal the identity of the manufacturer of its accused

products, which manufacturer was joined as a co-defendant in the amended complaint. *DePuy*, 990 F.3d at 1367. The district court refused to seal this information in the amended complaint and VOI appealed. If the identity of a party or third-party could not be sealed *per se*, that appeal would have been easy: This Court would simply have said as much and affirmed. Instead, this Court reviewed the law and considered the matter. And, upon that consideration, the Court affirmed *because the manufacturer's name was already publicly known*. *Id.* at 1371-72. Conversely, the identities of the third-party licensees are not known in the instant appeals.

As for license rates, every single one of the thirty orders cited in footnotes 5 through 19 of Uniloc's Principal Brief sealed that exact information. *See* Br. at 30-34, nn.5-19. As discussed immediately below, after two years, EFF has yet to cite a single *contra* case from anywhere in the Ninth Circuit.

B. EFF fails yet again to cite a single case from the Northern District of California that unsealed licensing information.

The judges of the Northern District of California consistently seal licensing information. *See, e.g.*, Uniloc's Br. at 30-34, nn.5-19. Uniloc has time,² and

² *See, e.g.*, Appx887 (Uniloc's Opposition to EFF's Third Motion to Intervene) ("There is a reason that EFF does not provide a single citation for its overreaching statement [that '[t]he basic information in the summary table—licensee names, license dates, and license rates—does not have independent economic value,']: It does not because cannot.").

again,³ and again,⁴ challenged EFF to identify even a single example from the Northern District of California ordering this sort of licensing information unsealed.

After more than two years, EFF has filed three motions to intervene, *see* Appx376-389, Appx451-459, Appx626-645; two replies in support of its motions to intervene, *see* Appx469-475, Appx905-923; and attended oral arguments, *see* Appx924-940. EFF also intervened in the prior appeal to this Court with a brief and oral arguments. *See Uniloc 2017 v. Apple*, 964 F.3d 1351. Finally—after all of this ink and argument—in its latest Responsive Brief, EFF cites to *one* case where *one* district court ordered some licensing information unsealed. *See* Resp. at 17 (citing *Cinpres Gas Injection Ltd. v. Volkswagen Grp. of Am. Inc.*, No. 12-cv-13000, 2013 WL 11319319 (E.D. Mich. Feb. 14, 2013)). That case was neither from the Northern District of California; nor from any other district in California; nor anywhere else in the Ninth Circuit. Instead, it was an unpublished opinion from the Eastern District of Michigan, a court in the Sixth Circuit.

³ *See, e.g., Uniloc 2017 LLC v. Apple, Inc.*, 964 F.3d 1351 (Fed. Cir. 2020), oral arguments at 0:00:42, *available at* <http://oralarguments.cafc.uscourts.gov/default.aspx?fl=19-1922.mp3>. (“This [licensing] information qualifies as trade secrets, and not even the Intervenor [EFF] could find a case where this sort of narrowly tailored information as forced into the public.”).

⁴ *See, e.g.,* Appx931 (Dec. 17, 2020 Tr.) (“Uniloc has every single time pointed out there wasn’t a single case in which any court in this district has ordered licensing terms disclosed. Not once. [¶] I will tee this up for EFF. And despite now four chances, EFF didn’t find a case in which any court of this district has ordered this information disclosed. Not once.”).

That EFF still cannot identify even a single such order from the Northern District of California—let alone the Ninth Circuit—speaks volumes. This Court is bound by Ninth Circuit law and, as this Court previously recognized, in the Ninth Circuit “pricing terms, royalty rates, and guaranteed minimum payment terms” found in a license agreement “plainly falls within the definition of ‘trade secrets.’” *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1222 (Fed. Cir. 2013) (“*Apple v. Samsung*”) (quoting *In re Elec. Arts*, 298 Fed. App’x at 569). It was reversible error for the district court to find otherwise.

C. EFF misrepresents the *Apple v. Samsung* opinions and this Court’s treatment of them.

EFF misstates the district court and this Court’s opinions from the *Apple v. Samsung* case, as well as how this Court interpreted those opinions in the prior appeal in the instant cases. In particular, EFF argues:

Uniloc’s [sic.] 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.

Resp. at 15-16. In other words, Uniloc cited, *inter alia*, one of the *Apple v. Samsung* district court opinions for the proposition that “licensing information in patent cases is invariably sealed.” In response, EFF alleges that this Court’s opinion in the prior appeal in these cases (*Uniloc 2017 v. Apple*) somehow changed or limited the district court’s opinion in *Apple v. Samsung*, or that the district court’s opinions in *Apple v. Samsung* do not support the proposition that “licensing information in patent cases is invariably sealed.” EFF is demonstrably wrong.

The problem appears to stem from EFF misunderstanding as to the issues raised in the cited opinions from *Apple v. Samsung*. The district court opinions each related to several motions to seal, including not only “product-specific financial information, such as profit, cost, and margin data, as well as certain proprietary market research reports,” *but also* licensing information. And, while the district court did refuse to seal some of the former information (thus leading to the appeal in *Apple v. Samsung*), the district court consistently sealed the latter (which was not on appeal).

For example, in her August 2012 order, Judge Koh considered, *inter alia*, Apple’s motion “to seal terms of licensing agreements that it has entered into with various third parties.” She granted that motion:

[T]he Court will follow the Ninth Circuit’s guidance and seal all information related to the payment terms of Apple’s licensing agreements.

Apple Inc. v. Samsung Elecs. Co., Ltd., No. 5:11-cv-01846-LHK, 2012 WL 3283478, at *6 (N.D. Cal. Aug. 9, 2012) (citing *In re Elec. Arts, Inc.*, 298 Fed. App'x at 569). Similarly, in her October 2012 order, Judge Koh considered, *inter alia*, Apple's motion to redact "specific information about the royalty rates in Apple's license agreements with various third parties." She granted that motion:

[R]oyalty rates are sealable under the "compelling reasons" standard because disclosure could create an asymmetry of information in the negotiation of future licensing deals.

Apple v. Samsung, 2012 WL 4933287, at *2 (citing *In re Elec. Arts, Inc.*, 298 Fed. App'x at 569). And again, in her November 2012 order, Judge Koh considered, *inter alia*, a motion to seal "full, unredacted license agreements between Apple and third parties, including payment and royalty terms." She granted that motion:

The 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. 5:11-cv-01846-LHK, 2012 WL 5988570, at *4 (N.D. Cal. Nov. 29, 2012) (emphasis added) (citing *In re Elec. Arts*, 298 Fed. App'x at 569). In short, each of Judge Koh's opinions addressed the question of sealing licensing terms, and in each instance she sealed them.

Judge Koh's August 2012 and November 2012 opinions also considered other materials, specifically including "product-specific financial information, including costs, sales, profits, and profit margins," and "market research reports,"

which she unsealed. *Apple v. Samsung*, 727 F.3d at 1223, 1226. This was the basis for the appeal in *Apple v. Samsung*. But, to repeat, the licensing information was sealed and was not at issue on appeal to this Court. In fact, outside of the summary of the procedural history of the various motions, this Court’s opinion in *Apple v. Samsung* did not use the word “license” other than to acknowledge that the Ninth Circuit recognizes that licensing terms are trade secrets:

[I]n *In re Electronic Arts*, for example, the Ninth Circuit held that a district court had abused its discretion in refusing to seal “pricing terms, royalty rates, and guaranteed minimum payment terms” found in a license agreement because such information “plainly falls within the definition of ‘trade secrets.’”

Id. at 1222 (quoting *In re Elec. Arts*, 298 Fed. App’x at 569).

In the prior appeal of the instant cases, this Court contrasted the issues from *Apple v. Samsung* with the issues then on appeal in *Uniloc 2017 v. Apple*:

More fundamentally, the primary issue in [our *Apple v. Samsung* opinion] 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.” We had no occasion to address the central issues presented here [in *Uniloc 2017 v. Apple*], 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.

Uniloc 2017 v. Apple, 964 F.3d at 1361.

So, in opinion after opinion, Judge Koh followed “the Ninth Circuit’s guidance” and consistently “seal[ed] all information related to the payment terms

[in the] licensing agreements.” When some of those opinions came before this Court, it was only with respect to *other*, non-licensing information that Judge Koh had ordered disclosed. And yet, this Court still explicitly recognized that “pricing terms, royalty rates, and guaranteed minimum payment terms” found in a license agreement “plainly falls within the definition of ‘trade secrets.’” *Apple v. Samsung*, 727 F.3d at 1222 (quoting *In re Elec. Arts*, 298 Fed. App’x at 569). EFF was thus mistaken when it suggested that this Court’s opinion in *Uniloc 2017 v. Apple* somehow changed or undermined Judge Koh’s repeated recognition that under Ninth Circuit precedent, licensing information is invariably sealed. Instead, this Court simply recognized that its opinion in *Apple v. Samsung* did not address the central issues then before it in *Uniloc 2017 v. Apple*.

D. Attorney declarations are the standard evidence accepted for motions to seal in the Northern District of California

EFF argues that “a self-serving declaration from counsel cannot establish factual matters without any evidentiary support.” Resp. at 24. Invective aside, EFF is demonstrably wrong. As noted in *Uniloc’s* Principal Brief, attorney declarations are the standard evidence accepted in the Northern District of California for sealing confidential information. Br. at 35.⁵

⁵ Selecting from among the examples of orders sealing licensing information issued by fifteen different judges of the Northern District of California cited in *Uniloc’s* Principal Brief, *see* Br. at 30-34 nn.5-19, the following are examples of

declarations from outside counsel that were the *only* grounds for orders from fourteen of the judges—

Chen: Appx1104-1106, *Abbvie Inc. v. Novartis Vaccines & Diagnostics, Inc.*, No. 3:17-cv-01815-EMC, Dkt. No. 47-1 (June 5, 2017).

Davila: Appx1107-1111, *PersonalWeb Techs LLC v. IBM Corp.*, No. 5:16-cv-01266-EJD, Dkt. No. 319-1 (N.D. Cal. July 13, 2017).

Freeman: Appx1112-1113, *Finjan v. Blue Coat Sys., LLC*, No. 5:15-cv-03295-BLF, Dkt. No. 379 (N.D. Cal. Oct. 27, 2017).

Gilliam: Appx1123-1124, *Big Baboon, Inc. v. SAP Am., Inc.*, No. 4:17-cv-02082-HSG, Dkt. No. 65-1 (N.D. Cal. Sept. 25, 2018).

Gonzalez Rogers: Appx1060-1062, *Uniloc 2017 LLC v. Google LLC*, No. 4:20-cv-04355-YGR, Dkt. No. 354-2 (Oct. 2, 2020).

Hixon: Appx1127-1128, *Finjan, Inc. v. Juniper Network, Inc.*, No. 3:17-cv-05659-WHA (TSH), Dkt. No. 542-1 (N.D. Cal. June 20, 2019).

Illston: Appx1093-1095, *Verinata Health, Inc. v. Sequenom, Inc.*, No. 3:12-cv-00865 SI, No. 219-1 (N.D. Cal. July 15, 2014).

Koh: Appx1091-1092, *Abaxis, Inc. v. Cepheid*, No. 10-cv-02840-LHK, Dkt. No. 91 (N.D. Cal. Sept. 21, 2011).

Keulen: Appx1125-1126, *X One Inc. v. Uber Techs., Inc.*, No. 5:16-cv-06050-LHK (SVK), Dkt. No. 181-1 (N.D. Cal. June 7, 2019).

LaPorte: Appx1119-1122, *Dodocase VR, Inc. v. MerchSource, LLC*, No. 3:17-cv-07088-EDL, Dkt. No. 71-1 (N.D. Cal. Apr. 30, 2018).

Orrick: Appx1114-1118, *Huawei Techs., Co., Ltd. v. Samsung Elecs. Co., Ltd.*, No. 3:16-cv-02787-WHO, Dkt. No. 234-1 (N.D. Cal. Feb. 1, 2018).

Tigar: Appx1129-1132, *Droplets, Inc. v. Yahoo!, Inc.*, No. 4:12-cv-03733-JST, Dkt. No. 601-1 (N.D. Cal. Jan. 20, 2021).

White: Appx1099-1103, *ChriMar Sys. Inc. v. Cisco Sys. Inc.*, No. 4:13-cv-01300-JSW, Dkt. No. 380-1 (N.D. Cal. Apr. 29, 2016).

Wilken: Appx1096-1098, *Digital Reg of Texas, LLC v. Adobe Sys., Inc.*, No. 4:12-cv-01971-CW, Dkt. No. 753-1 (N.D. Cal. Nov. 20, 2014).

The fifteenth judge, **Spero**, sealed licensing information without any declaration. *See* Appx1068, *SmugMug, Inc. v. Virtual Photo Store LLC*, No. 4:09-cv-02255 CW (JCS), Dkt. No. 69 (Nov. 6, 2009).

Indeed, at least until the instant cases, the district court below also routinely accepted attorney declarations as the sole evidence in support of motions to seal, or sealed licensing information without any declaration at all. *See* Br. at 35-37.⁶ And in any event, even if there were a basis upon which to change the accepted practice of the district, it would be an abuse of discretion to change those rules without notice and then apply them to the third-parties here.

EFF points to *USB Techs. v. Piodata, Inc.*, No. CV 19-8369-GW (ASx), 2019 WL 8807790 (C.D. Cal. Dec. 13, 2019),⁷ for the proposition that “[d]istrict courts in the Ninth Circuit similarly do not rely on attorney attestations without more.” Resp. at 24. The citation to *USB Techs.* is inapt. To start, the *Central* District of California in *USB Techs.* was not interpreting the *Northern* District of California’s Local Rules. Second, in *USB Techs.*, the issue was entry of a default judgment, along with a demand for monetary damages and attorneys’ fees, a significantly more involved procedure:

Usually in seeking a default judgment, a plaintiff will file a formal motion with a supporting memorandum explaining the legal authority and facts supporting the relief sought, including by reference to the [seven factors established in *Eitel v. McCool*, 782 F.2d 1470, 1471-72 (9th Cir. 1986),] and the statutory provisions supporting any requested

⁶ **Alsup:** Appx1038-1041, *Finjan v. Juniper Network*, No. 3:17-cv-05659-WHA, Dkt. No. 418 (N.D. Cal. Apr. 5, 2019); Appx965-967, *Oracle*, No. 3:10-cv-03561-WHA, Dkt. No. 600 (N.D. Cal. Jan. 10, 2012).

⁷ EFF miscited *USB Techs.* as 2018 WL 8807790. The correct citation is found above.

monetary relief. A declaration is also usually attached establishing that the requirements of C.D. Cal. Local Rule 55-1 are met. Additional supporting declarations (including from a percipient witness) and evidence are also often submitted to support money damages. None has been filed here. Instead, the only basis to support the relief requested is the attached declaration of Plaintiff's counsel, Todd Brandt. *See* Declaration of Todd Brandt ("Brandt Decl."), Docket No. 14-2. Brandt declares that Defendant infringes the asserted patent and states that "on information and belief, Defendant's infringing U.S. sales have been, on average, at least between 1M-1.5M per year" since "no later than December 2014." *Id.* ¶ 3. Brandt cites no evidentiary support for this belief regarding the amount of sales. Brandt further states that in his opinion "Plaintiff's damages for Defendant's past infringement . . . is a royalty rate of 10%/year for each of the six years to date that Defendant has been infringing." *Id.* ¶ 7. He provides no evidentiary basis for this estimation.

USB Techs., 2019 WL 8807790, at *1 (footnote omitted). This is a far cry from the instant situation under the Northern District of California's Local Rule 79-5(e), which merely requires that the "Designating Party" file a declaration. And, again, Uniloc and Fortress did so. *See also* Br. at 43-45 & n.21.

Finally, EFF quotes *Elbit Sys. of Am., LLC v. Thales Visionix, Inc.*, 881 F.3d 1354, 1359 (Fed. Cir. 2018), for the proposition that "[a]ttorney argument is not evidence and cannot rebut other admitted evidence." Resp. at 24 (internal quotation marks omitted). First, there is no "other admitted evidence" that is being rebutted, so EFF's point is not quite clear. Second, the *Elbit* matter was an appeal from an *inter partes* review, so it had nothing to do with interpreting any district court's local rules. And, third, the "attorney argument" in *Elbit* was from appellant's principal brief in which appellant attempted to argue to this Court that

appellee's expert's sworn testimony from the IPR was wrong as a matter of fact. *Id.* at 1359. So, neither the opinion nor the legal proposition is relevant. Instead, here we have a sworn declaration made under penalty of perjury, attesting to the truth of the matters asserted, a far cry from an attorney's *ipse dixit* appellate brief.

E. A declaration does not need to use the words “trade secret” to establish that information is a trade secret.

Beyond the “self-serving declaration from counsel,” EFF argues that the third-party licensees' declarations fail because some of them do not include the words “trade secret.” Resp. at 13-14. That phrase is not some talismanic charm, without which information loses protection. For example, the same district court below in *Oracle Am., Inc. v. Google Inc.*, No. 3:10-cv-03561-WHA, Dkt. No. 687 at 2 (N.D. Cal. Jan. 10, 2012), Appx963-964, sealed Google's information based upon a declaration from Google's outside counsel that described the information as “confidential,” and did not once use the words “trade secret.” See Appx965-967 (Google's declaration); see also Br. at 36 (discussing same). Indeed, thirteen of the fourteen declarations cited *supra* in footnote 5 did not include the words “trade secret.” And yet, in each of those thirteen instances, the information was sealed by those thirteen other judges of the Northern District of California. So too, here, each of the third-party declarations explained that the to-be-sealed information is confidential and valuable to that third-party, Appx436-450, Appx805-837, the recognized requirements of trade secrets. See generally Br. at 48-61.

II. EFF is wrong on the facts.

A. The to-be-sealed information is undisputed and irrelevant to the district court's substantive decision to dismiss Uniloc's case for lack of standing.

EFF incorrectly asserts that “the decision [in the -358 case] 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 [sic.] standing.” Resp. at 3. EFF is demonstrably wrong. There is no new dispute regarding or significance to the simple math, which math is not at “the heart” of the question of Uniloc's standing.

The licensing information at-issue is found in literally the first exhibit to Apple's first motion to dismiss in the -360 *et. seq.* cases, dating back to October 2018. The district court in May 2019 recognized 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).” Appx42. And no one has identified anything since to change that logical conclusion; nothing produced, cited or stated since the 2018 filing or 2019 order has increased or altered the meaning of that information, or made the *individual* names and *individual* license payments any more relevant. So, the public's interest in this information is *de minimis*.

The district court, Uniloc and Apple all agree that the total amount of income during the time in question was about \$14,000,000. The district court,

Uniloc and Apple all agree that \$14,000,000 is less than \$20,000,000. The only question is whether this undisputed math somehow divests Uniloc of standing, based on a disputed interpretation of Uniloc-Fortress agreements. In addressing that question, *none of the to-be-sealed information was cited by the district court* because it is irrelevant. So, the public will not benefit at all by the disclosure of it and there is no need to disclose the individual names and payments of this third-party licensee. *See, e.g., Network Appliance, Inc. v. Sun Microsystems Inc.*, No. C-07-06053 EDL, 2010 WL 841274, at *3 (N.D. Cal. Mar. 10, 2010) (sealing material that would “do little to aid the public’s understanding of the judicial process, but have the potential to cause significant harm to [a party’s] competitive and financial position within its industry”).

Again, whether a given entity paid a peppercorn or \$10,000,000 for a license to one or all of Uniloc’s patents was irrelevant to Apple’s motion. The issue was whether, *in the aggregate*, the value of Uniloc’s licenses hit a certain threshold. The public has no legitimate interest in knowing the individual licensees’ names or the amounts that they paid. *Center for Auto Safety v. Chrysler Group, LLC*, 809 F.3d 1092, 1096 (9th Cir. 2016) (“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.’”) (quoting *U.S. v. Amodeo*, 71 F.3d

1044, 1048 (2d Cir. 1995)); *see also, e.g., Pintos v. Pac. Creditors Ass'n*, 605 F.3d 665, 679 (9th Cir. 2010) (“[The] relevant factors” include the “public interest in understanding the judicial process and whether disclosure of the material could result in improper use of the material for scandalous or libelous purposes or infringement upon trade secrets.”) (quoting *Hagestad v. Tragesser*, 49 F.3d 1430, 1434 (9th Cir. 1995)); *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1213 (9th Cir. 2002) (“[T]he public policy reasons behind a presumption of access to judicial documents [are] judicial accountability [and] education about the judicial process . . .”).

Conversely, as established by sworn declaration,⁸ after sworn declaration,⁹ after sworn declaration,¹⁰ the third-parties’ compelling interests in maintaining the confidentiality of their information overcomes the presumption of public access. *Nixon v. Warner Commc’ns, Inc.*, 435 U.S. 589, 597 (1978) (“[T]he common-law right of inspection has bowed before the power of a court to insure that its records’ are not . . . sources of business information that might harm a litigant’s competitive standing.”) (quoting *In re Casewell*, 18 R.I. 835, 836, 29 A. 259 (1893)).

⁸ *See, e.g.*, Appx436-450 (five unsealed third-party declarations).

⁹ *See, e.g.*, Appx805-833 (eight sealed third-party declarations).

¹⁰ *See, e.g.*, Appx766-772 ¶¶ 8-10 (twenty-three requests from third-parties relayed by Uniloc to the district court).

B. Uniloc did not argue that Uniloc and Fortress should be treated as the same entity.

As noted in Uniloc’s Principal Brief, the same firm represents Uniloc in these cases and separately represents Fortress with respect to its production of the Fortress Memorandum. Br. at 61. This prompted EFF to assert:

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.

Resp. at 23. Uniloc argued no such thing. The law firm of Prince Lobel Tye LLP has separate engagement agreements with Uniloc and Fortress. Counsel maintains a distinct wall between these clients.

The counsel who signed the declaration in support of the motion to seal was in the uniquely informed position to file that declaration regarding Uniloc’s compelling interests and Fortress’s compelling interests regarding their respective information, some of which is known to both and other of which is not. *See* Appx619-625 ¶¶ 3, 19-23. Counsel never suggested that these separate entities be treated as one.

C. The Fortress Memorandum qualifies for trade secret protection under California law.

EFF quotes *Whyte v. Schlage Lock Co.*, 101 Cal. App. 4th 1443, 1456 (2002), for the proposition that “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.” Resp. at 24. Whatever the merits of that discrete quote might be, it is irrelevant to the situation at hand; the Fortress Memorandum does not relate to marketing research or a buyer. As Uniloc’s Principal Brief explained, the Fortress Memorandum “summarizes Fortress’s prior interactions and business dealings with Uniloc; analyzes Uniloc in depth; and proposes additional investments in Uniloc, based upon Fortress’s internal, proprietary analyses of Uniloc.” Br. at 59 (citing Appx614-615). None of that is “marketing research” or a “buyer.”

Instead, the first two pages of the Fortress Memorandum relate to Fortress’s business operations, borrower modeling and financial analyses, information which courts in the Northern District of California have consistently sealed. *See, e.g., In re Koninklijke Philips Patent Litig.*, No. 4:18-cv-01885-HSG, 2020 WL 1865294, at *2 (N.D. Cal. Apr. 13, 2020) (sealing “information related to business operations”); Appx989-990, *Rembrandt Patent Innovations, LLC v. Apple Inc.*, No. 3:14-cv-05094 WHA, Dkt. No. 144144 at 2 (N.D. Cal. Jan. 12, 2016) (sealing “business model” information); *Arista Networks, Inc. v. Cisco Sys., Inc.*, No. 5:16-cv-00923-BLF, 2018 WL 2010622, at *2-3 (N.D. Cal. Apr. 30, 2018) (sealing, *inter alia*, “highly confidential and sensitive information relating to Cisco’s financial information and internal development strategies,” “highly confidential and sensitive information relating to Arista’s financial and customer information,”

and “confidential settlement terms between Cisco and third-party, Huawei Technologies”); *Juicero, Inc. v. iTaste Co.*, No. 5:17-cv-01921-BLF, 2017 WL 8294276, at *2 (N.D. Cal. Jun. 28, 2017) (sealing “confidential financial and business information”); *Transperfect Global*, 2014 WL 4950082, at *1 (sealing “confidential financial and marketing information”); *Transperfect Global, Inc. v. MotionPoint Corp.*, No. 4:10-cv-02590-CW, 2014 WL 4950082, at *1 (N.D. Cal. Sept. 25, 2014) (sealing, *inter alia*, “confidential financial and marketing information”). Disclosure of this information would not help the public at all in understanding the propriety of the district court’s substantive order, and so the public’s interest in it is low. Conversely, Fortress has a compelling interest in its confidentiality, as disclosure of it would harm Fortress’s ability to negotiate in the future with Uniloc—which has not seen the information—as well as other third-parties with whom Fortress might seek to deal. Appx623-624 ¶¶ 19-23.

The last page of the Fortress Memorandum lists fifty-five third-party licenses. For the reasons discussed above and in Uniloc’s Principal Brief, this licensing information should remain under seal.

III. EFF is wrong about the *Uniloc v. Google* litigation.

A. Uniloc does not seek to seal witness testimony that was already disclosed in *Uniloc v. Google*.

EFF argues that “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.).” Resp. at 26. EFF is demonstrably wrong. In particular, EFF asserts:

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.”

Id. EFF’s characterization of Google’s reply brief with respect to Mr. Palmer’s testimony is accurate. But it is also irrelevant to the current appeal, because that testimony has nothing to do with the discrete third-party licensee information that Uniloc here seeks to seal. As Uniloc explained in its Principal Brief:

Apple’s motion to dismiss in the -358 case was accompanied by sixty-three pages of transcript from the deposition of James Palmer, a Managing Director at Fortress Investment Group. Appx549-612. Uniloc sought to seal just a few words across three lines, *which disclose the identity of third-party licensees*. Appx555.

Br. at 58 (emphasis added). The few words across three lines of testimony that Uniloc seeks to seal in these cases *were not* disclosed in the *Google* litigation; neither do those few words have anything to do with the substance to which EFF points from the *Google* litigation. *Compare* Appx555 *with* Resp. at 26. The to-be-sealed words in these cases are found on page 119 of Mr. Palmer’s transcript, a page which was not even filed in the *Google* litigation. Again, the to-be-sealed words in these cases are the names of several third-party licensees, not the details

of Uniloc’s supposed default as were submitted on the record in the *Google* litigation.

B. EFF’s attempts to distinguish Judge Gonzalez Rogers’ order sealing the same information are disingenuous.

It appears that EFF believes Uniloc somehow mislead or confused the Judge Gonzalez Rogers in the *Google* litigation with respect to her order sealing some of the same information, or that she did not do her job. EFF is incorrect.

To start, EFF points to one part of Uniloc’s motion to seal in the *Google* litigation and argues that “Uniloc asked Judge Rogers to seal *bank account information*. No such or similar information is or ever has been at issue in this case.” Resp. at 30 (emphasis in original). EFF then asserts that “the sealing request in *Uniloc v. Google* concerned bank account information not at issue in this case” *Id.* at 31. It appears that EFF is arguing that Uniloc somehow conned Judge Gonzalez Rogers into sealing the third-party licensing information by convincing her that it was bank account information. This is demonstrably wrong. Uniloc submitted a motion and declaration identifying the facts and history to date, including Judge Alsup’s original order denying Uniloc’s motion to seal and this Court’s prior order remanding the matter for further consideration. Appx1056-1062. And, even if Uniloc had somehow attempted to fool Judge Gonzalez Rogers, it must have failed, insofar as she specifically cited the licensing information—and not bank account information—as the basis for her order:

Uniloc 2017 seeks to seal portions of *two exhibits that identify third-party licensees and the amounts they paid for each license, as well as their confidential payment information*. Pricing terms and confidential financial information are routinely sealed as materials that may be used to harass or harm a party's competitive standing. The requests are narrowly tailored and do not prevent the public from understanding the issues in this motion. Accordingly, Uniloc 2017's motion seal is GRANTED.

Uniloc 2017 LLC v. Google LLC, ___ F. Supp. 3d ___, No. 4:20-cv-04355-YGR, 2020 WL 7626430, at *13 n.23 (N.D. Cal. Dec. 22, 2020) (citation omitted) (emphasis added).

EFF then admits that Uniloc did bring the third-party licensing information to Judge Gonzalez Rogers' attention, but mounts a collateral attack by asserting that "Uniloc could not even be bothered to submit any of the third party declarations supporting the sealing request to Judge Rogers." Resp. at 30. As an initial matter, this is an odd argument, insofar as EFF recognizes that the "*Designating Party* must file a declaration." Resp. at 23 (emphasis in original). Uniloc produced the information in question and so Uniloc was the Designating Party with respect to it. Further, EFF also must admit that Uniloc did explicitly identify the third-party declarations in the record and directed Judge Gonzalez Rogers to them. *Id.* at 30. As noted in Uniloc's Principal Brief and in its explanation to Judge Gonzalez Rogers, the declarations have each been filed several times, so Uniloc sought to avoid yet another set of iteratively sealed identical documents. In any event, it appears that EFF believes that because

Uniloc did not submit those documents *yet again* that Judge Gonzalez Rogers must not have done her job by reviewing them. That is an unfounded and unfair assumption.

Finally, EFF mischaracterizes the filings in the *Google* cases as “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 interest.” Resp. at 32. Again, this is demonstrably wrong. At Judge Gonzalez Rogers’ direction, on October 2, 2020, the parties in *Uniloc v. Google* resubmitted all briefs and exhibits in a single 656-page filing. See *Uniloc v. Google*, No. 4:20-cv-04355-YGR, Dkt. No. 355 (N.D. Cal. Oct. 2, 2020). Of those 656 pages, the parties redacted portions of two documents spanning parts of four pages, or about 0.5% of the total. See Appx1056-1062. On October 9, 2020, Google submitted a supplemental brief in support of its motion to dismiss. Google moved to redact portions of the supplemental brief and to file under seal four additional Uniloc documents. *Uniloc v. Google*, No. 4:20-cv-04355-YGR, Dkt. No. 357 (N.D. Cal. Oct. 2, 2020). But, Uniloc submitted a declaration stating that none of those supplemental filings needed to be sealed. *Id.*, Dkt. No. 360. On October 16, 2020, Uniloc filed a supplemental responsive brief with exhibits. *Id.*, Dkt. No. 362. Uniloc did not seek to seal any of those new materials. Finally, on October 23, 2020, Google filed a supplemental reply brief with exhibits. *Id.*, Dkt. No. 363.

None of those were sealed. All told, 785 pages of briefs and exhibits were submitted to Judge Gonzalez Rogers in association with Google’s motion to dismiss, of which—to reiterate—only portions of four pages across two documents were sealed. This does not constitute “a textbook example of the broad, unsupported oversealing.”

IV. This is not the correct court to consider EFF’s policy arguments.

Finally, whatever the merits of EFF’s policy arguments might be, *see, e.g.*, Resp. at 25-26, 27-29, 32-34, this is not the correct court to consider them. Instead, as this “appeal does not involve substantive issues of patent law, [this Court] must apply the law of the regional circuit in which the district court sits.” *Uniloc 2017 v. Apple*, 964 F.3d at 1357 (quoting *Apple v. Samsung*, 727 F.3d at 1220). And, as noted before, the Ninth Circuit has already done so: “[P]ricing terms, royalty rates, and guaranteed minimum payment terms found in a license agreement [are] plainly within the definition of ‘trade secrets.’” *In re Elec. Arts*, 298 Fed. App’x at 569-70.

* * *

In closing, it is worth recognizing that EFF (perhaps unintentionally) acknowledges a key point: “Uniloc could have saved the court and EFF inestimable time, effort, and expense *simply by filing proper sealing requests in the first instance.*” Resp. at 33 (emphasis added). But this Court in the prior appeal

already considered the issue of overbreadth and remanded to the district court solely the question of whether the third-parties' information should be sealed. Overbreadth is not at issue, and so whether the sealing requests with respect to the third-parties were "proper in the first instance" is irrelevant. Again, the only question remanded to the district court was whether the 109 third-parties' information should be sealed, irrespective of whether the request was overbroad "in the first instance." It appears, then, that EFF's tacit answer is yes; that is, had there not been an overbroad request in the first instance, the information at issue in this appeal could have been sealed. And, since the overbreadth issue has already been dealt with, and the requests are as narrowly tailored as possible, the information in question should be sealed.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order and remand with instructions to redact and seal the documents as proposed in Uniloc's motion.

May 26, 2021

Respectfully submitted,

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

Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury that on this 26th day of May, 2021,
a copy of the foregoing 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 Circuit Rule 32(b). This brief contains 6,548 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b)(2).

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 Professional Plus 2013 in 14-point Times New Roman type style.

May 26, 2021

/s/ Aaron S. Jacobs

Aaron S. Jacobs