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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

UNILOC USA, INC. and UNILOC LUXEMBOURG, S.A., Plaintiffs, v. APPLE INC., Defendant.	Case No.: 3:18-cv-00360 (WHA) 3:18-cv-00363 (WHA) 3:18-cv-00365 (WHA) 3:18-cv-00572 (WHA) **NOTICE OF MOTION AND MOTION OF ELECTRONIC FRONTIER FOUNDATION TO INTERVENE FOR LIMITED PURPOSE OF OPPOSING MOTIONS TO SEAL** Date: February 14, 2019 Time: 8:00 AM Courtroom 12, 19th Floor Honorable William Alsup

NOTICE OF MOTION

PLEASE TAKE NOTICE that on February 14, 2019 at 8:00 AM in Courtroom 12, 19th Floor at the United States Courthouse at San Francisco, California, Proposed Intervenor, Electronic Frontier Foundation ("EFF"), will respectfully move pursuant to Federal Rule of Civil Procedure 24(b) to intervene in this case for the limited purpose of securing an order: (1) denying Defendant's Administrative Motion to File Under Seal Defendant's Motion to Dismiss for Lack of Subject-Matter Jurisdiction (Doc. 134)[1], denying Plaintiffs' Administrative Motion to File Under Seal (Doc. 141), and denying Defendant's Administrative Motion to File Under Seal Portions of Defendant's Reply and Exhibits (Doc. 146); and (2) ordering the parties to refile the sealed documents without redactions or, in the alternative, with redactions limited to those supported by compelling reasons. Plaintiffs Uniloc USA, Inc. and Uniloc Luxembourg, S.A. (collectively "Uniloc") oppose this motion. Defendant Apple, Inc. ("Apple") informed EFF that it takes no position on EFF's motion as the motion concerns material that Uniloc designated as confidential.

[1] Docket numbers correspond to the docket in case 3:18-cv-00360 (WHA).

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MEMORANDUM

I. INTRODUCTION

The Electronic Frontier Foundation ("EFF") seeks to intervene in this case for the limited purpose of vindicating the public's right to access court records. Defendant Apple has filed a dispositive motion asking the Court to dismiss this case on the basis of lack of subject matter jurisdiction. But page after page of the public briefing relating to that motion is hidden behind redactions. The public has no access to the underlying facts. Even lengthy sections of the legal argument are redacted, leaving the public with no way to understand the dispute. This conflicts with the public's common law and First Amendment right of access.

The Ninth Circuit has held that "compelling reasons," are required to seal documents used in dispositive motions. *Kamakana v. Honolulu*, 447 F.3d 1172, 1179 (9th Cir. 2006). This standard is higher than good cause. *See id.* Counsel for Uniloc have filed conclusory declarations claiming that the disclosure of the redacted information in dispositive motions before this Court would cause it competitive harm. These perfunctory declarations do not satisfy the compelling reasons standard.

While all court proceedings are presumptively open, the public interest in patent disputes is particularly strong because patents potentially govern the conduct of anyone who wants to make, use, or sell the claimed inventions. Thus, the public has an interest in knowing who owns, or might claim rights to enforce, a patent. Plaintiffs in this case appear determined to hide such facts from the public. But Plaintiffs' desire to confound the public cannot trump the public's First Amendment right of access. The Court should deny the motions to seal and ensure access to court records.

II. BACKGROUND

This is a high-profile case with significant implications beyond the parties. Uniloc is one of the most active patent litigants in the world. Indeed, Uniloc entities have filed hundreds of patent suits in U.S. district courts. *See* Malathi Nayak, *Google, Amazon, Apple Are Targets of Uniloc Lawsuit Blitz*, Bloomberg Law, Nov. 23, 2018, at https://news.bloomberglaw.com/ip-law/google-amazon-apple-are-

targets-of-uniloc-lawsuit-blitz. The conduct of Uniloc as a patent owner and litigant is of considerable concern to the public and policy makers.[2]

Apple is one of the largest companies in the world and its devices play a major role in the economy and the day-to-day lives of millions of people. *See, e.g.,* Anthony Karcz, *10 Years With The iPhone: How Apple Changed Modern Society*, Forbes, Jan. 9, 2017, at https://www.forbes.com/sites/anthonykarcz/2017/01/09/apple-iphone-10-year-anniversary/. Apple's conduct as both a patent owner and as a defendant is also of considerable public interest. *See, e.g.*, Susan Decker, Mark Gurman, & Joel Rosenblatt, *Apple, Samsung Declare Peace in Biggest Modern Tech Patent Fight*, Bloomberg, June 27, 2018, at https://www.bloomberg.com/news/articles/2018-06-27/apple-samsung-settle-patent-infringement-dispute. The redacted briefing at issue in this motion concerns both the dispute between these parties and, potentially, the standing of Uniloc entities to bring other suits.

EFF is a non-profit organization based in San Francisco that advocates for privacy, freedom of expression, and for patent policy that serves the public interest. EFF has more than 39,000 active members. EFF's activities include impact litigation, public advocacy and education, and the design of new technologies to help individuals protect their privacy. EFF staffers regularly write and comment about patent law, litigation, and policy.[3] As part of this advocacy work, EFF requires access to public dockets. On two previous occasions, EFF has successfully moved to intervene in district court patent litigation to seek access to improperly withheld material. *See Blue Spike, LLC v. Audible Magic Corp.*, No. 6:15-CV-584, 2016 WL 3870069 (E.D. Tex. Apr. 18, 2016); *Traffic Info., LLC v. Farmers Grp., Inc.*, No. 2:14-CV-713-RWS-RSP, 2016 WL 3460763 (E.D. Tex. Apr. 7, 2016).

EFF seeks access to the briefing and exhibits relating to Apple's dispositive motion to dismiss for lack of standing. Apple argues that no Uniloc entity has standing to assert the patents at issue in these

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[2] A search conducted on January 4, 2018, for 'Uniloc and patent' on Westlaw's news database returned over 900 results.

[3] *See, e.g.*, Vera Ranieri, *The Death Knell is Tolling for Shipping & Transit LLC*, EFF Deeplinks, July 11, 2017, at https://www.eff.org/deeplinks/2017/07/death-knell-tolling-shipping-transit-llc; Daniel Nazer, *Patent Troll Lodsys Settles for Nothing to Avoid Trial*, EFF Deeplinks, October 2, 2013, at https://www.eff.org/deeplinks/2013/10/patent-troll-lodsys-settles-nothing-avoid-trial.

cases. More specifically, Apple contends . . . well, EFF simply does not know what Apple contends because the relevant portions of the public briefing are entirely redacted. *See* Apple's Motion to Dismiss at 3-8, 11-21 (Doc. 135).[4] The limited information available to the public suggests that Apple's motion to dismiss relies upon the terms of an agreement between Uniloc Luxemburg and Fortress. *See id.* at 9. But Apple's opening brief is so heavily redacted that almost all of the background *and* argument sections are withheld. *See id.* at 3-8, 11-21. In many cases, even the names of the documents at issue in this briefing are being withheld as the relevant declarations introducing those exhibits are redacted or sealed. *See* Declaration of Doug Winnard (Doc. 135-1) (heavily redacted); Declaration of James Palmer (Doc. 142-1) (sealed entirely). Similarly, the agreement or agreements between Uniloc Luxemburg and Fortress at the heart of the dispositive briefing are being withheld entirely from the public. That is to say, not just dollar amounts, but every single provision of the key agreements is unavailable.

EFF seeks public access to unsealed and unredacted versions of documents corresponding to the following Docket Numbers:

> 135, 135-1, 135-2, 135-3, 135-4, 135-5, 135-6, 135-7, 135-8, 135-11, 135-12, 135-13, 135-14, 135-16, 135-17, 135-18, 135-19, 135-20, 135-24, 135-29, 142, 142-1, 142-2, 147, 147-1, 147-3, 147-4, 147-7.

In the alternative, EFF asks that the parties be directed to refile these documents with redaction and sealing reduced to a point were only material meeting the "compelling interest" standard is withheld.

Uniloc has filed three declarations supporting the sealing and redaction of documents relating to Apple's motion to dismiss. *See* Declaration of Aaron Jacobs (Doc 148); Declaration of Aaron Jacobs (Doc 141-1); Declaration of Aaron (Doc 137). These declarations contain the same rote justifications for sealing the material. For example, Uniloc contends that:

> Uniloc plaintiffs are private companies and these documents contain sensitive, confidential and proprietary information related to financial data, licensing terms and business plans with respect to various Uniloc entities. This information qualifies for protection under Federal Rule of Civil Procedure 26(c), and disclosure of this extremely sensitive information would create a substantial risk of serious harm to the Uniloc entities.

[4] Docket numbers correspond to the docket in case 3:18-cv-00360 (WHA).

Jacobs Decl. at ¶ 4 (Doc. 148); *compare* Jacobs Decl. at ¶ 6 (Doc. 141-1); Jacobs Decl. at ¶ 14 (Doc. 137). Uniloc contends that every single provision of its licensing agreements must be kept confidential. Uniloc does not provide any specific details regarding how competitors might use this information to its detriment or what kind of competitive harm it might suffer.

III. ARGUMENT

As an organization that writes and comments about patent litigation, EFF has standing to vindicate the public interest in access to this proceeding. Since the sealed and redacted filings at issue concern a dispositive motion, Uniloc must demonstrate compelling reasons to lock out the public. *Kamakana*, 447 F.3d at 1179. Uniloc has not met that burden and the relevant filings should be made available.

A. EFF Should Be Permitted to Intervene for the Limited Purpose of Vindicating the Public's Right of Access.

EFF's right to intervene in this case, like the public's right of access to courts more generally, finds support in both the common law and the First Amendment. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 589, 597 (1978) ("It is clear that the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents."); *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 580 (1980) ("[T]he right to attend criminal trials is implicit in the guarantees of the First Amendment . . . ."). That right is afforded protection because "[p]ublic access is essential . . . to achieve the objective of maintaining public confidence in the administration of justice." *Richmond Newspapers*, 448 U.S. at 595–96 (Brennan, J. concurring); *see also In re Express-News Corp.*, 695 F.2d 807, 808–09 (5th Cir. 1982) (the "public has no less a right under the First Amendment to receive information about the operation of the nation's courts than it has to know how other governmental agencies work and to receive other ideas or information"); *Globe Newspaper Co. v. Super. Ct.*, 457 U.S. 596, 609 n.25 (1982) (press and public "must be given an opportunity to be heard" on questions relating to access to a criminal proceeding) (citation and internal quotation marks omitted).

It is well-established that nonparties have standing to intervene to gain public access to sealed court documents. *See Phoenix Newspapers, Inc. v. U.S. Dist. Ct.*, 156 F.3d 940, 949 (9th Cir. 1998)

(press must be afforded an opportunity to object to closure of court proceedings); *Davis v. East Baton Rouge Parish Sch. Bd.*, 78 F.3d 920, 926–27 (5th Cir. 1996) (nonparty news agencies had standing to challenge court's confidentiality order); *Brown v. Advantage Eng'g*, 960 F.2d 1013, 1016 (11th Cir. 1992). If non-parties could not intervene to seek access to withheld documents, the First Amendment's protections would become meaningless. *See CBS Inc. v. Young*, 522 F.2d 234, 237–38 (6th Cir. 1975) ("We are not persuaded by the argument that petitioner lacks standing because it is not a party to the civil litigation. The fact remains that its ability to gather the news concerning the trial is directly impaired or curtailed. The protected right to publish the news would be of little value in the absence of sources from which to obtain it.").

Permissive intervention under Rule 24(b) is an appropriate mechanism for a non-party to seek access to court records. *See San Jose Mercury News, Inc. v. U.S. Dist. Ct.*, 187 F.3d 1096, 1100-01 (9th Cir. 1999); *EEOC v. Nat'l Children's Ctr., Inc.*, 146 F.3d 1042, 1045-46 (D.C. Cir. 1998). EFF's interest in access to court records satisfies Rule 24(b)(1)(B)'s "claim or defense" requirement, which is construed liberally. *See San Jose Mercury News, Inc*., 187 F.3d at 1100; *Newby v. Enron Corp.*, 443 F.3d 416, 424 (5th Cir. 2006). EFF met and conferred with the parties prior to filing this motion. Apple takes no position on the underlying question of whether the court documents should remain redacted and sealed (as it is Uniloc that designated the relevant documents as confidential). Uniloc opposes this motion and the unsealing of any documents currently sealed. Thus, EFF and the public's interest in open court proceedings is not adequately represented by the parties to this suit.

EFF is a public interest organization that advocates for, among other things, reform of the patent system. *See generally* Electronic Frontier Foundation, Patents, https://www.eff.org/patent. As part of its public advocacy regarding patent policy, EFF publishes a widely-read blog which often relies on public court filings in order to disseminate information regarding the patent system to the public. *See generally* Electronic Frontier Foundation, Deeplinks Blog, https://www.eff.org/deeplinks. This makes EFF an appropriate intervenor. *See Blue Spike*, 2016 WL 3870069 at *1-2 (granting a motion by EFF to intervene for the purposes of unsealing court records).

B. The Extensive Sealing and Redactions in this Case Violate the Public's Common Law and First Amendment Right of Access to Courts.

Given the importance of public access, courts have recognized that "[t]here is a strong presumption in favor of a common law right of public access to court proceedings." *See In re Violation of Rule 28(d)*, 635 F.3d 1352, 1356 (Fed. Cir. 2011) (citing *Nixon*, 435 U.S. at 597–99); *Kamakana*, 447 F.3d at 1178. That presumption must not be dismissed lightly given the dangers that come from restrictions on public access. *See Richmond Newspapers*, 448 U.S. at 595 (Brennan, J., concurring) ("Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law."); *Landmark Communications v. Virginia*, 435 U.S. 829, 839 (1978) ("[t]he operation of the ... judicial system itself ... is a matter of public interest, necessarily engaging the attention of the news media").

The presumption of public access applies with more force when, as here, the documents in question relate to a dispositive motion. *Kamakana*, 447 F.3d at 1179; *see also Joy v. North*, 692 F.2d 880, 894 (2d Cir. 1982) (denying a motion to seal a report containing alleged trade secrets, noting that since the report was "the basis for the adjudication, only the most compelling reasons can justify the total foreclosure of public and professional scrutiny"). The "strong presumption of access to judicial records" applies to dispositive pleadings even if the documents had previously been sealed or withheld. *Kamakana*, 447 F.3d at 1179.

The burden of overcoming this presumption rests on the proponent of the sealing. *See* Fed. R. Civ. P. 26(c)(1). For dispositive pleadings, the proponent of sealing must establish "compelling reasons" in support of excluding the public. *Kamakana*, 447 F.3d at 1179-80. Under this test, it is not enough that disclosure might cause the litigant embarrassment or otherwise lead to negative press coverage. *See id.* at 1179.

Uniloc has failed to meet these standards. The Jacobs declaration regarding Apple's opening brief and exhibits merely lists the exhibits with rote, perfunctory claims that the documents contain sensitive information. *See* Declaration of Aaron Jacobs ¶¶ 5-11 (Doc. 137) (concerning exhibits A-G, J-M, O-T, and W to the Declaration of Doug Winnard). The declaration fails to include *any* detail about these exhibits, why the information in the exhibits is confidential, and how its disclosure could cause

Uniloc competitive harm. Moreover, even the *names* of many of these documents are being withheld from the public. *See* Declaration of Doug Winnard ¶¶ 3-5, 8-9, 12-15, 17-21, 25 (Doc. 135-1) (redacting all identifying information concerning the exhibits). Uniloc's wholly conclusory claims of confidentiality do not satisfy the "compelling interest" standard and the motion to seal these exhibits should be denied. *See Hill Holiday Connors Cosmopulos, Inc. v. Greenfield*, No. 6:08–cv–03980–GRA, 2010 WL 890067, *4 (D.S.C. Mar. 8, 2010) (denying motion to seal where proponent simply "regurgitate[d] boilerplate language for each document" and "never explain[ed] which specific documents contain what type of trade secrets"); *see also Main & Assocs., Inc. v. Blue Cross & Blue Shield of Ala.*, No. 2:10-CV-326-MEF, 2010 WL 2025375, at *1 (M.D. Ala. May 20, 2010) ("conclusory" assertions regarding confidentiality and harm not enough to justify sealing).

Similarly, Uniloc offers inadequate support for sealing the terms of agreements between Uniloc Luxemburg and Fortress.[5] Since these agreements are at the heart of Apple's motion to dismiss, the public interest is at its highest. Yet Uniloc simply notes that the relevant documents contain licensing terms and refers to unspecified harm that it might suffer if the terms were disclosed. *See* Jacobs Decl. at ¶ 4 (Doc. 148); Jacobs Decl. at ¶ 6 (Doc. 141-1); Jacobs Decl. at ¶ 14 (Doc. 137). In effect, Uniloc is claiming a blanket right to withhold patent licensing terms from the public. That is not the law.

Courts do not apply a simplistic rule allowing patent license and assignment agreements to be withheld in their entirety. For example, in *Autodesk, Inc. v. Alter*, No. 16-CV-04722-WHO, 2017 WL 1862505 (N.D. Cal. May 9, 2017), the parties sought to seal a patent licensing agreement. Judge Orrick denied the motion as to most of the provisions of the agreement. He noted that the terms of the agreement were "directly relevant to the merits" of the case and the parties' claims could not be resolved without reference to its terms. *Id.* at *8. He concluded that, while the "settlement amount Disney paid

[5] Given the extreme sealing in this case, it is challenging for non-parties to know which agreements the parties are discussing. At a minimum, EFF seeks access to the "division of rights amongst the various Uniloc entities" summarized in Appendix A of the Winnard Declaration (Doc. 135-1) and the agreements between Uniloc and Fortress referred to on page 9 of Apple's motion to dismiss (to the extent these have been submitted as exhibits to the dispositive pleadings).

Alter should remain confidential," the parties had failed to meet their burden of setting forth compelling reasons to seal the remaining license provisions. *Id.*

Similarly, in *Audionics Sys. Inc v. AAMP of Fla. Inc*, No. CV 12-10763-MMM, 2013 WL 12129952 (C.D. Cal. Dec. 6, 2013), the plaintiff sought to seal "an agreement regarding the assignment of rights in several patents." The Court denied the motion, noting that the request to seal the assignment agreement in its entirety was overbroad and requiring the plaintiff to provide a more specific basis. *Id.* at *3. The Ninth Circuit has held that courts can seal "pricing terms, royalty rates, and guaranteed minimum payment terms" in a license agreement where a party establishes that these are a trade secret. *In re Elec. Arts, Inc.*, 298 Fed. Appx. 568, 569–70 (9th Cir. 2008) (nonprecedential). But that narrow ruling is far from what Uniloc seeks here: a blanket shield for patent licensing terms and assignments. Rather, the proper course is to limit sealing to those provisions that truly raise a risk of competitive harm, as supported by specific grounds.

The public interest in disclosure is particularly strong here where it appears that the key provisions concern not commercial terms (like royalty rates or pricing terms) but how Fortress and various Uniloc entities have divided up enforcement rights in patents. To the extent that Uniloc wishes to keep the public in the dark about who owns what rights in its patents, that is not a competitive interest that this Court should give much weight to. After all, "[a] patent holder should know what he owns, and the public should know what he does not." *Festo Corp. v. Shoketsu Kinzoku Kogyo Kabushiki Co.*, 535 U.S. 722, 731 (2002). Judicial opinions considering similar disputes routinely discuss the relevant licensing and assignment provisions openly. *See, e.g.*, *Diamond Coating Techs., LLC v. Hyundai Motor Am.*, 823 F.3d 615, 618 n.1 (Fed. Cir. 2016) (noting that the parties had "designated the entire PATA and Ancillary Agreement as confidential" but that "during oral argument, Diamond agreed to waive any claim of confidentiality at the court's request"). Notably, not a single opinion cited in Uniloc's opposition brief includes redactions. Quite simply, courts do not allow disputes like this to be decided behind a veil of secrecy.

IV. CONCLUSION

For the foregoing reasons, EFF respectfully asks that the Court grant this motion to intervene and deny the motions to seal in this case.

Dated: January 9, 2019

Respectfully submitted,

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