2019-1922 (LEAD), -1923, -1925, -1926 (MEMBER CASES)

United States Court of Appeals for the Federal Circuit

UNILOC 2017 LLC, UNILOC USA, INC. AND UNILOC LUXEMBOURG, S.A.,

Plaintiffs-Appellants,

v.

APPLE INC.,

Defendant-Appellee,

ELECTRONIC FRONTIER FOUNDATION,

Intervenor, Appellee.

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

THIRD CORRECTED OPENING BRIEF FOR DEFENDANT-APPELLEE APPLE INC.

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OCTOBER 31, 2019

AMENDED CERTIFICATE OF INTEREST

Counsel for Appellee Apple Inc. certifies the following:

1. The full name of every party represented by me in this case is: Apple Inc.

2. The name of the real party in interest represented by me is: Apple Inc.

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

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are: Harry Lee Gillam of Gillam & Smith, LLP (former); Melissa R. Smith of Gillam & Smith, LLP (former); Kenneth Baum of Goldman Ismail Tomaselli Brennan & Baum LLP; Jennifer Greenblatt of Goldman Ismail Tomaselli Brennan & Baum LLP; Andrew J. Rima of Goldman Ismail Tomaselli Brennan & Baum LLP; Emma C. Ross of Goldman Ismail Tomaselli Brennan & Baum LLP;

Lauren Abendshien of Goldman Ismail Tomaselli Brennan & Baum LLP; Shaun Zhang of Goldman Ismail Tomaselli Brennan & Baum LLP.

5. The title and number of any case known to me 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.*, Case No. 3-18-cv-00360 (N.D. Cal.)**;** *Uniloc USA, Inc. et al. v. Apple Inc.*, Case No. 3-18-cv-00363 (N.D. Cal.)**;** *Uniloc USA, Inc. et al. v. Apple Inc.*, Case No. 3-18-cv-00365 (N.D. Cal.)**;** *Uniloc USA, Inc. et al. v. Apple Inc.*, Case No. 3-18-cv-00572 (N.D. Cal.)**.**

October 31, 2019

/s/ Doug Winnard
Doug Winnard

Attorney for Appellee Apple Inc.

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STATEMENT OF RELATED CASES

Apple is aware of the following cases that will directly affect or be directly affected by the Court's decision in this appeal:

Uniloc USA, Inc. et al. v. Apple Inc., Case No. 3-18-cv-00360 (N.D. Cal.);

Uniloc USA, Inc. et al. v. Apple Inc., Case No. 3-18-cv-00363 (N.D. Cal.);

Uniloc USA, Inc. et al. v. Apple Inc., Case No. 3-18-cv-00365 (N.D. Cal.);

Uniloc USA, Inc. et al. v. Apple Inc., Case No. 3-18-cv-00572 (N.D. Cal.).

I. STATEMENT OF THE ISSUES

(1) Whether the District Court properly exercised its discretion under Northern District of California Civil Local Rule 79-5 in denying a motion to seal where the party requesting to seal materials (a) later conceded that over 90 percent of those materials did not warrant sealing or redaction, and (b) asked to seal information such as case-law citations and lists of district-court cases.

(2) Whether the District Court properly exercised its discretion under Local Rule 7-9 in denying a motion for leave to seek reconsideration where the party seeking leave failed to show that it had acted with diligence, and where there was no intervening change in law or material fact.

II. STATEMENT OF THE CASE

This is a case about a District Court's straightforward enforcement of two local rules. The first rule, Northern District of California Civil Local Rule 79-5, requires a party seeking to seal materials to submit requests that are "narrowly tailored to . . . only . . . sealable material." The second rule, Local Rule 7-9, requires a party seeking leave to file a motion for reconsideration to show that leave is appropriate. The District Court determined that Plaintiffs Uniloc USA, Inc. and Uniloc Luxembourg, S.A. (collectively, "Uniloc") complied with neither. These decisions were well within the Court's discretion and should be affirmed.

A. The Motions to Seal

On October 25, 2018, Defendant Apple Inc. filed a dispositive motion to dismiss the present suits for lack of subject-matter jurisdiction. (Appx262.) That motion referenced material that Uniloc had designated as highly confidential under the protective order entered by the District Court. (Appx001.) Local Rule 79-5(e) required Apple to file an administrative motion to seal this material, and Apple did so.[1]

[1] Apple took no position below on how much of Uniloc's designated material was sealable. In accordance with the procedure set forth in Local Rule 79-5(e)(1), Apple left it to Uniloc to file declarations as required by

(Appx255.) When Uniloc filed its opposition to Apple's motion to dismiss, and Apple filed its reply, the parties filed similar sealing motions. (Appx417–419, Appx458–459.)

Uniloc filed short declarations in support of the motions to seal. (Appx413–416, Appx420–422, Appx502–504.) When it did, Uniloc asked the District Court to seal the vast majority of the underlying briefs, including citations to case law and quotations from published opinions. (Appx415, referring to Appx279–280, Appx281–282, Appx283–287.) Uniloc also requested that 23 exhibits, comprising over 100 pages, be sealed in their entireties. (Appx414–415, referring to Appx299–412.) These exhibits included matters of public record, such as a list of Uniloc's active patent cases. (Appx388.) In support of each of its sealing requests, Uniloc offered general statements that the document in question contained "sensitive, confidential [or highly confidential], and proprietary information . . . [of or] with respect to various Uniloc entities." (Appx414, Appx422.)

Local Rule 79-5(d)(1)(A) to establish which material should be placed under seal and why.

Notably, none of Uniloc's filings raised the issue that Uniloc now emphasizes on appeal—confidentiality concerns regarding third-party licensees. (Br. at 12 (describing this information as "the most important" information for present purposes).) And Uniloc never sought any extensions of time in which to file its declarations. (*See* Appx035.) Nor did Uniloc seek leave to supplement the record with additional evidence supporting sealing at any time before the Court ruled on the motions to seal. On January 9, 2019, before the Court issued those rulings, third-party Electronic Frontier Foundation ("EFF") moved to intervene. (Appx053.)

B. The District Court's Denial of Uniloc's Request to Seal

On January 17, 2019, the District Court denied the administrative motions to seal. (Appx031.) The Court held that Uniloc's requests to seal were "far from 'narrowly tailored' as required by [L.R. 79-5(b)]." (Appx032.) In particular, the Court stated that Uniloc sought to seal an "astonishing" amount of material, including portions of Apple's motion that "simply quote Federal Circuit law." (*Id.*) The District Court also held that, in its declarations, Uniloc had provided only a "generalized

assertion of competitive harm" that failed to provide adequate justification for its sweeping sealing requests. (Appx031–032.)

The District Court gave Uniloc two weeks to seek an interlocutory appeal of the sealing order. (Appx032.) The District Court granted EFF's motion to intervene for purposes of appeal, but otherwise denied EFF's motion and did not rely on the motion in reaching its decision. (Appx032, Appx035.)

C. Uniloc's Motion for Leave to Seek Reconsideration

On February 15, 2019, after receiving an extension of time, Uniloc filed a motion for leave to seek reconsideration under Local Rule 7-9. (Appx548.)[2] But in the motion for leave, Uniloc did not identify any new factual developments or changes in the law that had occurred after the Court had ruled on the sealing question. None had. Nor did Uniloc explain its diligence prior to the order in procuring the evidence it had identified as grounds for reconsideration. It was not diligent. Instead, Uniloc confessed that it had "rereview[ed] the materials the parties sought to seal" only ***after*** the Court's sealing order had issued.

[2] Apple took no position below on Uniloc's motion for leave. Indeed, Local Rule 7-9(d) does not permit responses to this kind of motion.

(Appx553.) At the same time, Uniloc proposed to withdraw "on the order of ***95%***" of its original redactions. (Appx552 (emphasis added).) In explaining why Uniloc sought to keep the remaining 5 percent under seal, Uniloc identified, *inter alia*, specific loan figures and the royalty-payment terms of patent licenses. (Appx564–573.) Uniloc also submitted a new declaration from its litigation counsel, explaining the basis for each of the redactions Uniloc now proposed to maintain. (Appx574.)

D. The District Court's Denial of Uniloc's Motion for Leave

On May 7, 2019, the District Court denied Uniloc's motion for leave to seek reconsideration under Local Rule 7-9. (Appx033.) The Court stated that Uniloc "should have done it right from the outset rather than over-classifying and then trying to get away with whatever they can on a motion to reconsider." (Appx034.) The Court also rejected Uniloc's complaint that it did not have adequate time to review the materials to be sealed, because Uniloc had not sought an extension, and because Uniloc had "no one but themselves to blame for over-designating information as confidential to begin with." (Appx035, n.2.)

The Court then proceeded to analyze Uniloc's new, narrower request to seal, and new supporting declarations. (Appx034–036.) For

instance, the Court determined that Uniloc had provided only a "boilerplate assertion" supporting its request to seal information relating to a proprietary Uniloc software platform. (Appx036.) The Court gave Uniloc two weeks to appeal its decision (*id.*), and Uniloc timely appealed.

III. SUMMARY OF ARGUMENT

This Court should affirm the District Court's rulings because the District Court acted within its discretion in enforcing its local rules. It was well within the Court's discretion to deny Uniloc's initial sealing requests for failure to satisfy the "narrowly tailored" requirement of Local Rule 79-5(b): these requests included public materials like this Court's case law, and Uniloc eventually withdrew "95%" of them.

It was also within the Court's discretion to deny Uniloc leave to seek reconsideration under Local Rule 7-9. Rule 7-9 requires the leave-seeking party to make a specific showing, such as an intervening change in law or a material difference in fact that the moving party did not previously know, despite the exercise of reasonable diligence. Uniloc made no such showing—nor could it. Uniloc knew of the relevant facts when it made its initial request; it simply failed to include those facts in that request.

Uniloc scarcely mentions these rules on appeal and makes no effort to show that it complied with them. (Br. at 9, 13.) Instead, Uniloc focuses on the substance of its untimely redactions in view of law regarding public access to court records. But this Court need not decide whether Uniloc's evidence ***could have*** been enough to support sealing had it been presented in accordance with the District Court's rules. This Court need determine only that the District Court acted within its discretion in enforcing its rules in the first place.

Should this Court decide that the District Court abused its discretion, however, it should reverse with instructions as outlined on page 57 of Uniloc's brief. The redactions of financial and pricing information that Uniloc now proposes, though untimely, are narrowly tailored and supported by a particularized showing of competitive harm.

IV. ARGUMENT

"Broad deference is given to a district court's interpretation of its local rules." *Bias v. Moynihan*, 508 F.3d 1212, 1223–24 (9th Cir. 2007) (citations omitted). And "[o]nly in rare cases will . . . the [court's] exercise of discretion in connection with the application of local rules" be questioned. *Grove v. Wells Fargo Fin. California, Inc.*, 606 F.3d 577, 582

(9th Cir. 2010) (citation and internal quotation marks omitted). This is not one of those rare cases: Uniloc failed to comply with the local rules on sealing and reconsideration, and the District Court thus acted within its discretion in enforcing those rules as it did.

A. The District Court Properly Exercised its Discretion in Denying the Motions to Seal For Failure to Comply with Local Rule 79-5

"A district court's compliance with local rules is reviewed for an abuse of discretion." *Bias*, 508 F.3d at 1223 (citation and internal quotation marks omitted). Here, Local Rule 79-5 requires that all requests to seal be "narrowly tailored to seek sealing only of sealable material." N.D. Cal. Civ. L.R. 79-5(b). Uniloc does not dispute that it violated this rule. To the contrary, by withdrawing "95%" of its original requests, Uniloc effectively concedes that these requests were not narrowly tailored. And Uniloc could hardly do otherwise: its original requests included public material, such as citations to Federal Circuit case law (Appx279–281, Appx283, Appx285) and quotations from published district court opinions (Appx284). Uniloc also sought to seal a list of patents assigned to it (Appx366), and a list of pending cases

involving Uniloc's patents (Appx388)—both of which are matters of public record.

The denial of such a sweeping request to seal public information cannot be an abuse of discretion. This is not a case where a party submitted only slightly-overbroad redactions or later admitted that a small portion of its originally-proposed redactions were unnecessary. *Cf.* Appx797, *Finjan, Inc. v. Juniper Networks, Inc.*, No. 17-cv-05659-WHA, slip op. (N.D. Cal. June 25, 2019) (permitting revised redactions on a line-by-line basis where "[m]ost of the proposed redactions [were] appropriate"). The vast majority of Uniloc's original requests were unnecessary, and the court did not abuse its discretion in denying them. *Cf. Apple Inc. v. Psystar Corp.*, 658 F.3d 1150, 1162 (9th Cir. 2011) (vacating at least one order to seal because it "inappropriately extended to non-confidential material").

Apple recognizes that, in at least some circumstances, a district court may find it appropriate to give parties additional opportunities to comply with Local Rule 79-5 before denying a motion to seal with prejudice. (Br. at 49.) But the Local Rules do not require the court to furnish such opportunities. To the contrary, they provide that a motion

to seal may be "denied in its entirety," resulting in an "unredacted" version of the material being placed on the public docket. L.R. 79-5(f)(2). Moreover, Uniloc's failure to comply with Local Rule 79-5(b) was particularly egregious. *Cf.* Appx931, *Nevro Corp. v. Boston Sci. Corp.*, No. 16-cv-06830-VC, slip op. (N.D. Cal. Dec. 20, 2017) (denying motion to seal, and ordering public refiling of materials, where the requesting party made overbroad requests supported by only "vague, conclusory, and largely repetitive boilerplate"). Thus, the District Court acted within its discretion in denying the motions to seal without giving Uniloc an opportunity to amend them, absent a showing under Local Rule 7-9 that the District Court should grant leave to reconsider its ruling.

B. The District Court Properly Exercised its Discretion in Denying Uniloc Leave Under Local Rule 7-9

The District Court also properly exercised its discretion in denying Uniloc leave to file a motion for reconsideration. Local Rule 7-9 requires parties to "first obtain[] leave of court to file the motion" for reconsideration of an interlocutory order. L.R. 7-9(a). This Rule sets a "higher threshold" designed to deter parties from "opportunistically mov[ing] the Court to reconsider any order that [the movant] disagrees with, needlessly impeding the progress of the case and unduly burdening

opposing parties and the Court." *Nidec Corp. v. Victor Co. of Japan*, Ltd., No. C 05-0686 SBS, 2007 WL 4108092, at *3–4 (N.D. Cal. Nov. 16, 2007) (citing *Balla v. Idaho State Bd. of Corr.*, 869 F.2d 461, 467 (9th Cir. 1989)). Thus, in order to obtain leave, a party must show:

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

L.R. 7-9(b). Uniloc invoked Local Rule 7-9(b)(1) and (b)(2), but did not make the showing required by either subpart.[3] (Appx553.)

First, Uniloc failed to "show that in the exercise of reasonable diligence . . . [it] did not know" the facts forming the basis of its motion for reconsideration, as required by Local Rule 7-9(b)(1). When it

[3] Uniloc did not rely on 7-9(b)(3), and for good reason. Uniloc presented scarcely any facts or legal arguments to the District Court to support its original requests to seal. (Appx413–416.) Instead, Uniloc relied on new arguments in its motion for reconsideration. (*See* Appx554 (citing new declarations from third parties).)

originally asked to seal the materials in question, Uniloc already knew that the exhibits at issue contained financial figures and licensing information. (*See* Appx414 (declaration of litigation counsel stating he had reviewed the material sought to be sealed).) As the District Court held, nothing prevented Uniloc from presenting the facts and legal arguments necessary to support its requests to seal the first time around. (Appx034.) Uniloc may regret not doing so, but "[l]eave to file for reconsideration will not be granted merely because a party regrets its choices in prior briefing." *Biggs v. Experian Info. Sols., Inc.*, No. 5:16-cv-01507-EJD, 2016 WL 7175640, at *1 (N.D. Cal. Oct. 21, 2016) (citation and internal quotation marks omitted).

Uniloc also did not exercise reasonable diligence. Uniloc took no actions to uncover material facts during the almost three months between when Apple filed its motion to dismiss (October 25, 2018) and when the Court denied the motions to seal (January 17, 2019). To the contrary, Uniloc admitted that it did not act until the Court's order "prompted Uniloc and non-party Fortress to rereview the materials the parties sought to seal." (Appx553; *see also* Appx576 (contacting third parties ***after*** the District Court "had ordered" that Uniloc's requests to

seal be denied).) Uniloc was also fully aware that third-party licensing information could be found within the materials it sought to seal, yet it never mentioned that to the District Court in its initial requests. Nor did Uniloc ask the District Court for additional time or other opportunities to supplement the record. Uniloc thus failed to show the exercise of reasonable diligence that Local Rule 7-9(b)(1) requires. *See Woods v. Google LLC*, No. 5:11-cv-01263-EJD, 2019 WL 1936241, at *2 (N.D. Cal. May 1, 2019) (party was not "reasonably diligent" when it waited until after interlocutory order to procure new evidence).

Second, there was no "emergence of new material facts or . . . change of law" after the District Court's order issued on January 17, 2019, as required by Local Rule 7-9(b)(2). The information that Uniloc sought to introduce in a motion for reconsideration—namely, the sensitive nature of its financial and licensing terms—existed before the Court denied the original sealing requests. In seeking reconsideration, Uniloc thus sought to add only newly-***procured*** evidence (third-party declarations) confirming facts that Uniloc already knew. This is not a ground for reconsideration under Local Rule 7-9(b). *See, e.g.*, *Turner v. City & Cty. of San Francisco*, 892 F. Supp. 2d 1188, 1220 (N.D. Cal. 2012)

(denying motion for leave under Local Rule 7-9 where new deposition testimony provided no "new information," only "additional confirmation" of facts already known); *In re Finisar Corp. Sec. Litig.*, No. 5:11-cv-01252-EJD, 2019 WL 2247750, at *5 (N.D. Cal. May 24, 2019).

The District Court rightly concluded that Uniloc could and should have complied with the local sealing rule in the first instance, and thus appropriately denied Uniloc leave. In reaching this conclusion, the District Court necessarily found that Uniloc failed to make the showing required by Local Rule 7-9(b)(1) and (2), as each of these subparts requires a party to show why it could not have previously presented the court with the grounds forming the basis for reconsideration.

What's more, the court's decision makes practical sense: If litigants were permitted to behave as Uniloc has done here—submitting grossly overbroad sealing requests, and narrowly tailoring those requests only later, if caught—parties would have little incentive to comply with the rules in the first place. The District Court's denial of Uniloc's motion for leave under Local Rule 7-9 should thus be affirmed even if Uniloc's untimely redactions would have been acceptable if proposed earlier. *See Serrano v. Telular Corp.*, 111 F.3d 1578, 1584–85 (Fed. Cir. 1997).

C. If this Court Concludes that the District Court Abused its Discretion in Enforcing Local Rules, it Should Vacate with Instructions to Seal Uniloc's Narrower Redactions

This Court need not reach the merits of Uniloc's motion for reconsideration because it was appropriate for the District Court to deny Uniloc leave to file that motion on procedural grounds. Should this Court conclude that the District Court abused its discretion, however, this Court should vacate and remand with instructions to seal documents, as Uniloc has proposed. (Br. at 57.) Apple agrees that "pricing terms, royalty rates, and minimum payment terms of licensing agreements plainly constitute trade secrets, and thus are sealable." *Apple, Inc. v. Samsung Elecs. Co., Ltd.*, No. 11-CV-01846-LHK, 2012 WL 5988570, at *4 (N.D. Cal. Nov. 29, 2012). Had Uniloc asked for, and supported with specific evidence, only these narrowly-tailored redactions at the outset, Uniloc would have established a compelling reason to seal those materials.

V. CONCLUSION

This Court should affirm the District Court's enforcement of its Local Rules 7-9 and 79-5. If this Court determines that the District Court abused its discretion in doing so, however, then it should reverse and remand with instructions to seal documents as Uniloc has proposed.

Dated: October 31, 2019

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing **THIRD CORRECTED OPENING BRIEF FOR DEFENDANT-APPELLEE APPLE INC.** using the Court's CM/ECF filing system. Counsel registered with the CM/ECF system were served by operation of the Court's CM/ECF system per Fed. R. App. P. 25 and Fed. Cir. R. 25(c) on October 31, 2019.

Respectfully submitted,

/s/ Doug Winnard
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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a), because it contains 3,167 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 requires of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in Century Schoolbook 14-point font.

Dated: October 31, 2019

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