IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNILOC USA, INC., ET AL. Plaintiffs, **vs.** **SONY CORPORATION OF AMERICA, ET AL.** Defendants.	§ § § § § § § § §	**CASE NO. 6:10-CV-373** **PATENT CASE**
UNILOC USA, INC., ET AL. **Plaintiffs,** **vs.** **DISK DOCTORS LABS, INC., ET AL.** **Defendants.**	§ § § § § § § § §	**CASE NO. 6:10-CV-471** **PATENT CASE**
UNILOC USA, INC., ET AL. Plaintiffs, **vs.** **NATIONAL INSTURMENTS CORP., ET AL.** Defendants.	§ § § § § § § § §	**CASE NO. 6:10-CV-472** **PATENT CASE**
UNILOC USA, INC., ET AL. **Plaintiffs,** **vs.** **ENGRASP, INC., ET AL.** **Defendants.**	§ § § § § § § § §	**CASE NO. 6:10-CV-591** **PATENT CASE**

UNILOC USA, INC., ET AL. **Plaintiffs,** **vs.** **BMC SOFTWARE, INC., ET AL.** **Defendants.**	§ § § § § § § § §	**CASE NO. 6:10-CV-636** **PATENT CASE**
UNILOC USA, INC., ET AL. **Plaintiffs,** **vs.** **FOXIT CORPORATION, ET AL.** **Defendants.**	§ § § § § § § § §	**CASE NO. 6:10-CV-691** **PATENT CASE**
SYMANTEC CORPORATION, ET AL. **Plaintiffs,** **vs.** **UNILOC USA, INC., ET AL.** **Defendants.**	§ § § § § § § § §	**CASE NO. 6:11-CV-33** **PATENT CASE**

PARTIALLY AGREED MOTION FOR ENTRY OF DOCKET CONTROL ORDER

Pursuant to the Court's May 20, 2011 Order, Plaintiff Uniloc, and Defendants Activision, Adobe, Aladdin entities, ApexSQL, Articulate Global, Aspyr Media, Autodesk, BMC, CA, Borland Software, ComponentOne, Data Access, Digital River, EA, eEye, Engrasp, Filemaker, Final Draft, Foxit, Freedom Scientific entities, GEAR Software and GEAR Software Holdings, GeoSpatial, Intego, Intuit, LegalPRO, Magix, McAfee, National Instruments, NitroPDF, Onyx,

Pinnacle, Quinstar, Safenet, Sage Software, ScriptLogic, Seagull entities, Solar Winds, Sonic Solutions, Sony, Symantec, Tableau Software, TransMagic, and Wildpackets move the Court for entry of one of the competing versions of a Proposed Docket Control Order.

As reflected in the certificate of conference attached hereto, 57 of the 60 defendants in all the related cases have complied with the meet and confer requirements in Local Rule CV-7(h). The parties were able to reach full agreement on a Proposed Discovery Order for all seven cases submitted on May 31, 2011. However, despite their best efforts, the parties were unable to reach an agreement on all issues in the Proposed Docket Control Order. Below, the Plaintiffs and Defendants each briefly explain their position on the issues that remain in dispute in the Proposed Docket Control Order for resolution by the Court.

Those Defendants who have filed motions for transfer and stay provide this proposed schedule subject to and without waiving their requests for transfer or stay.

I. The Parties' Agreement

For the Court's convenience, the Court's Order of May 20, 2011 is attached as Exhibit A. A Proposed Docket Control Order incorporating the Plaintiff's positions and a Proposed Docket Control Order incorporating the Defendants' positions are attached as Exhibits B and C, respectively.

The core dispute between the parties essentially concerns whether the mediation and certain disclosures should be as stated in the Court's May 20th Order or whether they should be deferred for a month. Each party presents its position below. The plaintiff's position begins here and the Defendants' position begins on page 8.

Plaintiffs' Statement In Support Of Their Position

The Court held a status conference on April 26, 2011 for all seven cases to discuss case management and to hear the parties' suggestions to "streamline discovery", and "promote efficient and economical streamlining of the cases."

To that end, the Court issued an Order on May 20, 2011 specifying a number of specific dates. The Court ordered early disclosure of Infringement Contentions and settlement agreements by Uniloc and sales data for accused products by Defendants prior to mediation. The stated intention was to assist both sides to identify the potential liability exposure and provide both sides with some additional information that may further facilitate meaningful settlement discussions at an early mediation. As Uniloc pointed out at the status conference, other than these modest steps, no party needed run up litigation or discovery expenses until after the close of mediation. As such, the Court deferred the P.R. 3-3 and 3-4 disclosures and all other disclosures under the Discovery Order until after the early mediation deadline. The Court set six specific dates streamlining the case to efficiently and economically move it toward the October 14, 2011 Markman hearing, now just 4 1/2 months away.

Uniloc's proposed Docket Control Order complies each of the dates set by the Court's Order. Together with the Court ordered dates, Uniloc's proposal allows the parties to focus on mediation in June and July. For those parties remaining after mediation, the case moves forward in earnest. August opens with the Initial Disclosures, followed mid-month by the Additional Disclosures and Invalidity Contentions, and closes with the P.R. 4-3 Joint Claim Construction Statement. During September, the parties are engaged in Markman briefing. Where parties are interested, Uniloc will continue to engage in settlement communications.

In an already tight schedule, Defendants seek delay by pushing back by another month the mediation dates, their P.R. 3-3 and 3-4 invalidity disclosures and the Discovery Order's Initial and Additional Disclosures. However, while pushing back their own disclosures, Defendants seek to interject a new deadline for early disclosures by Uniloc and additional prerequisites for mediation, neither of which are found in the Court's Order and all of which needlessly running up litigation and discovery expenses for all sides prior to the mediation.

Further, Defendants' pushing back of the court ordered dates results in numerous date juxtapositions which are neither streamlined, efficient or economical. For example, while the extended mediation is underway, all of the parties must also comply with P.R. 4-1 thru 4-3 processes. This is both inefficient, since Uniloc will certainly be in mediations almost daily, and thwarts a major purpose of the court's stated intentions: reducing litigation costs that must be incurred by either side before an opportunity for a mediated resolution. Additionally, Defendants' proposal unnecessarily interjects the claim construction positions of every party into the P.R. 4-x process, despite the fact that many of them may settle out over the remaining 30 days of mediation. Furthermore, Defendants' proposal requires the P.R. 4-1 thru 4-3 process and Uniloc to file its 4-5(a) opening Markman brief all prior to the Defendants' making their P.R. 3-3 & 3-4 invalidity disclosures.

In contrast, Uniloc's proposal and the Court's dates allow the parties to focus on mediation and seek to resolve this dispute with as many parties as possible during June and July. After mediation, only those remaining parties will have input into P.R. 4-1 thru 4-3 processes and, more importantly, all parties will have the benefit of the of the P.R. 3-3 & 3-4 invalidity disclosures prior

to beginning the P.R. 4-x processes. Uniloc's proposal, following the Court's May 20th Order, is the more streamlined, economical and efficient process.

Defendants also seek to impose a new deadline for early discovery on Uniloc and additional prerequisites for mediation not found in the Court's Order. First, Defendants' proposed order requires Uniloc to disclose a litany of documents from the earlier Rhode Island litigation. Uniloc does not dispute that these documents would be made available under the later Additional Disclosures, but they certainly are not required for mediation. And, while Defendants seek to push back the court ordered date for all of their disclosures, including even the basic data of the Initial Disclosures, Defendants' proposal singles out Uniloc for early document production and discovery expense. More imporantly, much of the requested data is publically available on PACER and all of the requested material is already in the possession of Fish and Richardson who participated in the Rhode Island case and now represents approximately a dozen defendants in this matter.

As for Defendants' additional mediation prerequisites, Defendants suggest deferring mediation until after Uniloc has amended its P.R. 3-1 contentions based on source code discovery. This is the same position that Defendants advanced at the status conference and is no different than the standard approach to full, open discovery. Defendants state that final P.R. 3-1 contentions will lead to a higher likelihood of settlement. Possibly it will, or it may just as likely lead to more disputes. However, it will undoubtedly lead to the expense associated with full discovery, just like a case operating under the Court's typical schedule. Uniloc should not have to put on its full case at this early stage, just to have mediation. No doubt it would be more a robust settlement discussion if both parties had more information, full discovery, invalidity contentions and even

expert reports on damages. However, Uniloc understands increased litigation costs to be the exact opposite outcome of the Court's efficiency efforts, especially at this early stage. An opportunity to mediate with full discovery will be available at the second mediation for those parties who make the business decision to continue the litigation.

The Court's Order provided for an early mediation where the parties have P.R. 3-1 contentions identifying infringed claims and accused products, together with the sales data for those accused products. This limited discovery allows the parties to analyze potential liability exposure and facilitate meaningful settlement discussions at an early stage. Separately, given the number of parties, the Court also provided for a voluntary early disclosure of source code (as opposed to the later mandatory disclosure with the P.R. 3-3 and 3-4s) for those parties wishing to make such disclosures to further facilitate meaningful infringement and settlement discussions. This process has occurred with a number of defendants who already produced their source code pursuant to a letter agreement. However, since the hearing on April 26, 2011, not a single party has approached Uniloc to discuss producing its source code. Instead, after letting over a month pass, their proposal is simply to push back the dates even further. Uniloc filed the first of these cases almost a year ago in June 2010. There has been ample opportunity for every defendant to already produce its source code as multiple defendants already have. The fact of the matter is that a number of defendants have stated that they use and have used multiple activation schemes across their various products and often even a single activation scheme changed over the past six years in response to security breaches. In those instances, final amended P.R. 3-1s will require review of the source code for each activation scheme and discovery into how those individual schemes changed over time. That level of detail and the associated cost and expense is not needed to have

a meaningful settlement discussion at mediation. Uniloc providing P.R. 3-1s naming specific products, together with sales data on those products is sufficient for the parties to have a meaningful discussion. Uniloc urges the Court to reaffirm the dates contained in its May 20th Order and adopt Uniloc's proposed Docket Control Order.

Defendants' Statement In Support Of Their Position

Plaintiff readily points out that it wishes to stick with the Court designated dates from this Court's May 20th Order whereas the Defendants (those named as joining in the first paragraph of this filing, excluding Magix and GeoSpatial) wish to defer a handful of early designated dates by one month. The deferral is appropriate and beneficial to both the parties and this Court and the Defendants hereby move this Court to modify the designated dates from its May 20th Order and adopt the dates specified in the Defendants' Proposed Docket Control Order, attached as Exhibit B.

This Court's May 20th Order scheduled an early mediation and further ordered the production of limited information to increase the chances of a successful mediation. Specifically, this Court ordered the plaintiff to produce its infringement contentions and its licenses and ordered the Defendants to produce their sales numbers. The Court also gave the Defendants the option of producing their source code, and if the Defendants did so, the plaintiffs would supplement their infringement contentions with detailed allegations based on the source code.

Because the near-term focus is on early mediation, the Court deferred general discovery until after the mediation.

The Defendants agree with this general approach. However, the Defendants respectfully suggest that there is a flaw in the Court's proposed schedule. Specifically, the First Mediation Deadline is currently set to July 31. This is too soon. Where source code is produced early, the Defendants require supplemental infringement contentions from Uniloc prior to the mediation—and sufficiently prior to the mediation to allow the Defendants to analyze Uniloc's arguments and determine a responsive mediation position. There is little hope of a successful mediation if the Defendants have not had time to receive and evaluate Uniloc's detailed infringement contentions based on Uniloc's source code review.

However, this Court has set a mediation deadline of July 31, a mere one day after Uniloc is to provide its supplemental infringement contentions based on its source code review. That is not enough time. Accordingly, the Defendants propose pushing out the mediation deadline one month to August 31 to allow sufficient time to analyze Uniloc's supplemental infringement contentions. In addition, an August 31 deadline avoids placing the deadline in the middle of the summer, which may be a difficult time to arrange sixty mediations.

Because the various disclosures (initial disclosures, additional disclosures, and invalidity contentions) should follow the mediation, it is only appropriate that these deadlines be deferred one month as well.

It is particularly appropriate to defer the invalidity contentions. These are time consuming to put together and if this task can be avoided by early mediation and settlement, all the better. Uniloc is already well aware of the invalidity positions advanced by Microsoft in the Rhode Island trial and in the reexamination proceedings currently pending before the Patent Office. If there is not much more to find, Uniloc will not be harmed by the one month deferral. On the other hand,

if there is additional prior art to uncover, the Defendants deserve more time to develop their invalidity theories. In fact, their invalidity theories will likely be impacted by the detailed infringement contentions of Uniloc based on its source code review.

Thus, even if the mediation deadline does not slip, the Defendants request that invalidity contentions be deferred until September 15, 2011 rather than at the conclusion of many summer vacations.

Finally, there is no harm to Uniloc from the one month delay. In fact, the delay can only help as it will allow both sides to better prepare for the mediations and reduce the uncertainty as to the strength or weakness of Uniloc's infringement contentions.

One additional difference between the two proposals: The Defendants request early disclosure (on June 24) of claim construction related documents from the Rhode Island case uniquely in Uniloc's possession. Given the speed at which claim construction is being conducted, it makes sense for Uniloc to produce early its basic information (briefing and deposition transcripts concerning the invention and claim construction). There is no burden to Uniloc to produce such information, which is surely in a litigation file server within Uniloc itself or with its attorneys.

Finally, Uniloc complains that the Markman dates are compressed. The Defendants would support a one month slip of those dates as well, and in fact approached Uniloc with such a proposal to see if the parties could jointly approach the Court about a Markman hearing date in November. Uniloc declined. If Uniloc remains concerned about the Markman dates, the remedy is to defer those dates by one month as well, but not to accelerate mediation to an unworkable date.

In Exhibit B, the Defendants have laid out their proposal for the Docket Control Order. Disputed entries are highlighted in yellow. A brief position statement is also included in each disputed entry. The position statement is also highlighted in yellow.

Respectfully submitted, this 2st day of June, 2011.

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ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF CONFERENCE

I hereby certify that counsel for 57 of the 60 defendants has complied with the meet and confer requirements in Local Rule CV-7(h). This motion is consented to and not opposed by the parties listed below. Some parties have not participated.

The Court Issued its Order on May 20, 2011. Uniloc emailed to all defendants a proposed Docket Control Order on May 22, 2011. A group of defendants circulated a counter-proposal on May 26th. Seven group telephonic conferences were held May 27, 2011. Counsels for Uniloc and various defendants exchanged numerous emails between May 22, and May 31, 2011. Uniloc circulated modifications on May 30, 2011. A group of defendants responded with additional changes. Additional meet and confers were conducted by telephone and by email on May 31, 2011 and June 1-2, 2011with counsels for various parties. At the time of filing, a number of parties (49 listed below) consented to the Joint Briefing and moving the court to entry of one of the competing versions of a Proposed Docket Control Order.

Uniloc USA, Uniloc Singapore, Adobe, Aladdin entities, ApexSQL, Articulate Global, Aspyr Media, Autodesk, BMC, CA, Borland Software, ComponentOne, Data Access, Digital River, EA, eEye, Engrasp, Filemaker, Final Draft, Foxit, Freedom Scientific entities, GEAR Software and GEAR Software Holdings, GeoSpatial, Intego, Intuit, LegalPRO, Magix, McAfee, National Instruments, NitroPDF, Onyx, Pinnacle, Quinstar, Safenet, Sage Software, ScriptLogic, Seagull entities, Solar Winds, Sonic Solutions, Sony, Symantec, Tableau Software, TransMagic, and Wildpackets.

/s/ Paul J. Hayes (w/permission Wesley Hill)

CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document through the Court's CM/ECF system per Local Rule CV-5(a)(3) on the 2nd day of June, 2011.

/s/ Wesley Hill
Wesley Hill