UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
TYLER DIVISION

UNILOC USA, INC., ET AL.	§	
Plaintiffs,	§	
	§	
vs.	§	**CASE NO. 6:10-CV-373**
	§	**PATENT CASE**
SONY CORPORATION OF AMERICA,	§	
ET AL.	§	
Defendants.	§	

UNILOC USA, INC., ET AL.	§	
Plaintiffs,	§	
	§	
vs.	§	**CASE NO. 6:10-CV-471**
	§	**PATENT CASE**
DISK DOCTORS LABS, INC. ET AL.	§	
Defendants.	§	

UNILOC USA, INC., ET AL.	§	
Plaintiffs,	§	
	§	
vs.	§	**CASE NO. 6:10-CV-472**
	§	**PATENT CASE**
NATIONAL INSTRUMENTS CORP.,	§	
ET AL.	§	
Defendants.	§	

UNILOC USA, INC., ET AL.	§	
Plaintiffs,	§	
	§	
vs.	§	**CASE NO. 6:10-CV-591**
	§	**PATENT CASE**
ENGRASP, INC., ET AL.	§	
Defendants.	§	

UNILOC USA, INC., ET AL.	§	
Plaintiffs,	§	
	§	
vs.	§	**CASE NO. 6:10-CV-636**
	§	**PATENT CASE**
BMC SOFTWARE, INC., ET AL.	§	
Defendants.	§	

UNILOC USA, INC., ET AL.	§	
Plaintiffs,	§	
	§	
vs.	§	**CASE NO. 6:10-CV-691**
	§	**PATENT CASE**
FOXIT CORPORATION, ET AL.	§	
Defendants.	§	

SYMANTEC CORPORATION, ET AL.	§	
Plaintiffs,	§	
	§	
vs.	§	**CASE NO. 6:11-CV-33**
	§	**PATENT CASE**
UNILOC USA, INC., ET AL.	§	
Defendants.	§	

PLAINTIFFS' MOTION FOR ENTRY OF PROTECTIVE ORDER

Pursuant to Federal Rule of Civil Procedure 26(c), Plaintiffs Uniloc USA, Inc. and Uniloc (Singapore) Private Limited (collectively, "Uniloc") ask that the Court enter the Protective Order attached as Exhibit A.

I.   PROTECTIVE ORDER NEGOTIATIONS WITH DEFENDANTS

Uniloc first sent Defendants a proposed protective order on May 22, 2011, which included a framework for review of Defendants' source code. No Defendant responded with comments to the proposed protective order; though numerous Defendants contacted Uniloc proposing widely varying review protocols and restrictions on early source code production.

In turn, Uniloc explained that the following, basic parameters are essential to effective and efficient source code review:

- **Means for production**: Standalone computer, or transmittal on a disk or laptop.

- **Format**: Production (i) in a native format such that the code can be reviewed with developers' tools (source code files .c, .cpp, .cs, .java, etc.) and (ii) in the same directories as the code is kept on the developer's computer so the reviewer can step through the code line-by-line and determine what functions call other functions and modules.

- **Code Review Tools**: Subject to consultation, free tools such as Visual Express Studio should be installed on the review computer.

- **Printing**: Permission to make reasonable print-outs on pre-labeled Bates-numbered pages (with the "SOURCE CODE – ATTORNEY'S EYES ONLY" confidentiality designation).[1]

- **Consultant Approval**: Consent for Uniloc's consultant to review the produced source code.

- **Note-Taking**: Permission to use a laptop for note-taking (the producing party may disable input/output connections).

Uniloc believes that these minimum parameters are reasonable. In fact, Uniloc has performed dozens of source code reviews in this and related cases under these, or substantially similar, conditions.

Uniloc ultimately resent its proposed protective order to Defendants on July 5, 2011. (Exh. B, Nelson Letter). The document has since been through two rounds of revisions with

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[1] Note that the Protective Order that Uniloc asks this Court to enter represents a document advanced from Uniloc's original proposal in the sense that it includes negotiated provisions that are agreeable to Uniloc and Defendants alike. For example, the Protective Order includes a departure from the enumerated printing parameter. Despite the fact that printing portions of code at the time of review is ideal, Uniloc's proposed Order reflects its willingness to allow the producing Defendant to print the code excerpts as requested by Uniloc and to send those excerpts to Uniloc post-review.

some, but not all, parties to the pending Uniloc cases.[2]

The material revisions in Defendants' most recent draft include multiple unworkable restrictions and limitations, prompting a meet and confer across all cases on Thursday, July 28. Over twenty Defendants or Defendant groups participated; but the participants were unable to resolve the outstanding issues and are at an impasse.

The Docket Control Order sets August 15, 2011 as the deadline for exchanging additional disclosures. Uniloc believes that entering a protective order in advance of this deadline will ensure that these disclosures are timely and that there are established, uniform rules for conducting source code reviews going forward.

II.   SOURCE CODE REVIEW PROTOCOL ISSUES

The majority of differences among the parties involve the disclosure, review and handling of Defendants' respective source code. In an effort to highlight the differences for the Court, Uniloc attaches a comparison of Uniloc's proposed protective order (Exh. A) with Defendants' most recent iteration. (See Exh. C, showing Defendants' changes in redline). It bears mention that many Defendants have reached agreements with Uniloc on interim source code review procedures that are consistent with the protective order Uniloc submits for entry.

a. Location of source code computer

The parties have agreed that source code may be produced on a standalone computer (the "Source Code Computer"). (Exh. C, at ¶ 20(a)). Uniloc proposes, however, that the Source Code Computer be located: (i) at any office of the Producing Party's outside counsel in Texas, (ii) any place of business of the Producing Party in Texas, or (iii) if mutually agreed to, any other

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[2] That the Defendant drafts are not endorsed by all Defendants is a complicating issue.

location. Defendants' draft removes the requirement to produce the Source Code Computer in Texas. (Exh. C, at ¶ 20(a)).

Uniloc believes that the Source Code Computer should be located in Texas (absent mutual agreement of the parties) for a variety of reasons: (i) This case is pending in Texas and any trial will be conducted in Texas and any source code will eventually have to be in Texas for that purpose, (ii) all Defendants have retained local counsel in Texas, and (iii) most Defendants are represented by outside counsel who have offices in Texas. Furthermore, if Defendants have carte blanche to produce the Source Code Computer at any location, they could use the location of the Source Code Computer offensively as a mechanism to drive up costs and hinder efficient discovery.

b. Production of source code as it is kept in the normal course of business

Uniloc believes that any source code should be produced as it is kept in the normal course of business. This position is consistent with Rule 34(b)(2)(E)(i), which provides that "[a] party <u>must</u> produce documents as they are kept in the usual course of business…" Fed. R. Civ P. 34(b)(2)(E)(i) (emphasis added).

Defendants removed this provision in their recent draft, which is contrary to the requirements of the Federal Rules. (See Exh. C, at ¶ 20(a)). Uniloc's position is consistent with the Federal Rules and requests that this provision be incorporated to ensure the code review is no more burdensome for Uniloc than for Defendants.

c. Use of a laptop to take notes

Uniloc's primary consultant has a medical condition, arthritis, which makes taking hand written notes difficult. Given the voluminous amount of code review expected in this case,

Uniloc believes that using a laptop for note taking is reasonable. Defendants' draft would forbid the use of a laptop for note taking. (Exh. C, at ¶ 20(d)).

To the extent that Defendants are concerned about unauthorized access to any notes on Uniloc's consultant's laptop, the Court should be aware that the laptop has a variety of security features, including: (i) the use of a hidden TruCrypt partition using 256 bit AES (rated by the National Security Agency for top secret documents[3]), (ii) a 30+ character password in addition to the password file being secured with Syskey, and (iii) the TruCrypt partition has an additional 20+ character password that is not the same as the login. Thus, Uniloc believes that it has taken sufficient precautions and has adequately addressed any legitimate security concerns. In fact, notes on the laptop would arguably be more secure than any handwritten notes on paper.

d. Audible monitoring of source code reviews

Uniloc has yielded to Defendants' request to visually monitor any source code review in order to ensure compliance with the requirements of the protective order (such as not copying source code to an external device). However, Defendants proposal would permit them to audibly monitor such reviews. (Exh. C, at ¶ 20(g)). Such is unjustifiably intrusive and would permit Defendants to eavesdrop on conversations between Uniloc counsel and consultant. Courts have rejected attempts by opposing counsel to similarly monitor counsel and their experts while conducting inspections and reviews. *See Mancuso v. D.R.D. Towing Co., L.L.C.*, 2006 U.S. Dist. LEXIS 9672, at *6 (E.D. La. Mar. 10, 2006).

e. Restrictive limitations on printing

Defendants seek to limit the number of source code pages that may be printed to fifty pages. (Exh. C, at ¶ 20(i)). This is an unworkable limitation for a variety of reasons. First,

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[3]See http://csrc.nist.gov/groups/ST/toolkit/documents/aes/CNSS15FS.pdf.

Uniloc does not know how many files are relevant for a given Defendant's activation technology until it has an opportunity to review the code. Second, Uniloc has no control over the size of the relevant files. A file might be three to four pages long, or it could be 100 pages long (particularly if there are substantial programmer's comments contained within). Given Defendants' proposed restriction, Uniloc might not be able to print more than one partial file. Third, it is possible that certain Defendants use more than one activation technology, or that the source code has undergone revisions over time. Defendants' printing restrictions would prevent Uniloc from printing relevant pages/files for use in this case and necessitate multiple trips to review the same code.

Uniloc has agreed that it will not "request printed copies of Source Code in order to review blocks of Source Code elsewhere in the first instance, i.e., as an alternative to reviewing that Source Code electronically on the Source Code Computer." (Exh. C, at ¶ 20(i)) As Uniloc has no desire to print large sections of non-relevant code, this should adequately address Defendants' concerns.

III. UNILOC HAS ENTERED INTO INTERIM REVIEW PROTOCOLS WITH NUMEROUS DEFENDANTS THAT ARE SUBSTANTIALLY SIMILAR, IF NOT IDENTICAL, TO THE PROCEDURES PROPOSED IN UNILOC'S PROPOSED PROTECTIVE ORDER

In order for Uniloc to review early source code disclosures pursuant to the Court's Order dated May 20, 2011, Uniloc has entered into interim review protocols with numerous Defendants. In fact, Uniloc has signed what is essentially a full-blown, interim protective order with Defendants Adobe, BMC Software, Freedom Scientific, National Instruments, Pinnacle Systems, SafeNet, Aladdin Systems, and Oynx Graphics (the "Adobe Defendants"). (See Exh. D). The agreement with the Adobe Defendants is materially the same as Uniloc's present proposed protective order and includes the following:

1. Source Code Computer available in Texas (Exh. D, at ¶20(a));

2. Notes to be taken on a laptop (Exh. D, at ¶ 20(b); see also ¶ 20(d));

3. No hard printing limitations (Exh. D, at ¶20(f));

4. No audible monitoring of the review proceedings.

In fact, in the pending cases alone, Uniloc has conducted a number of code reviews subject to similar arrangements, and those reviews have run smoothly. Since Uniloc's interim code review procedures have proved successful, Uniloc sees no reason why these procedures should not be adopted and applied to all Defendants.

IV.   CONCLUSION

Uniloc respectfully requests that the Court enter its proposed protective order without further modification in order to establish uniform rules for further source code reviews, and to otherwise permit discovery to proceed on August 15, 2011 unimpeded.

Dated: August 2, 2011.

Respectfully Submitted,

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CERTIFICATE OF CONFERENCE

Counsel for Uniloc scheduled a meet and confer for July 28 to discuss the proposed protective order and invited Defendants to attend. A significant number of defendants and defendant groups participated on the July 28 call. The discussions have conclusively resulted in an impasse, leaving an open issue for the Court to resolve.

/s/ Edward R. Nelson, III
Edward R. Nelson, III

CERTIFICATE OF SERVICE

The undersigned certifies that on August 2, 2011, the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this motion was served on all counsel who have consented to electronic service. Local Rule CV-5(a)(3)(A).

/s/ Edward R. Nelson, III
Edward R. Nelson, III