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

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

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

UNILOC'S MOTION TO STRIKE PREVIOUSLY CONSTRUED CLAIM TERMS FROM THE PARTIES' P.R. 4-3 STATEMENT

Plaintiffs Uniloc USA Inc. and Uniloc Singapore Limited ("Uniloc") file this Motion to Strike and would show the Court as follows:

I. INTRODUCTION

In its May 20, 2011, Memorandum Opinion and Order, the Court stated:

> The Court notes that many claim terms have been previously construed and appealed to the Federal Circuit. While the Court understands the parties' need to preserve their rights for appeal, the Court prefers to minimize the time spent on previously construed terms. Accordingly, before the parties file a Joint Claim Construction and Prehearing

> Statement, the parties shall meet and confer regarding preserving the parties' arguments for appeal by stipulation rather than resubmitting previously construed terms for construction. The parties must seek leave and show good cause to submit previously construed terms for construction.

(Id. at p. 7 (emphasis added)). The Court reaffirmed this sentiment in its June 8, 2011, Docket Control Order:

> The Court prefers to minimize the time spent on previously construed terms. The parties shall meet and confer regarding preserving the parties' arguments for appeal by stipulation rather than resubmitting previously construed terms for construction. The parties must seek leave and show good cause to submit previously construed terms for construction. The parties shall coordinate to file one Joint Claim Construction and Prehearing Statement applicable to all the Uniloc cases.

The deadline for the parties to file their combined P.R. 4-3 Joint Claim Construction and Prehearing Statement is today, August 29, 2011, and Uniloc's opening claim construction brief is due on September 12, 2011. Uniloc's understanding of the Court's Orders is that if Defendants wished to submit previously construed terms, they needed to have sought leave from the Court weeks ago in order to provide the Court an opportunity to consider the request and rule prior to the filing of the P.R. 4-3 Joint Statement.

Yet in the P.R. 4-3 Statement, Defendants have submitted previously construed terms for the Court's consideration. Also in this Statement, Defendants have buried a purported request for leave to reconstrue the previously construed terms. By waiting until this late date, however, Defendants have ignored this Court's Orders and put Uniloc in the awkward position of having to prepare its opening *Markman* brief without certainty as to whether or not it should brief the previously construed claim terms.

Defendants should not be rewarded for their failure to diligently comply with this Court's Orders, and Uniloc requests that the Court strike Defendants' proposed re-constructions such that they need not be address them in the parties' upcoming *Markman* briefs.

II. DEFENDANTS ARE SEEKING TO SUBMIT PREVIOUSLY CONSTRUED TERMS WITHOUT PERMISSION FROM THE COURT

On August 28, 2011, Uniloc was informed by Chad Huston, counsel for Defendant Pervasive Software, Inc., that "Pervasive intends to seek leave of court to construe 'licensee unique ID' on Monday." This term was previously construed by the District of Rhode Island to mean "a unique identifier associated with a licensee." *See Uniloc USA, Inc. v. Microsoft Corp.*, 447 F. Supp. 2d 177, 183-189 (D.R.I. 2006). And the Federal Circuit affirmed it. *See Uniloc USA, Inc. v. Microsoft Corp.*, 290 Fed. Appx. 337, 344 (Fed. Cir. 2008) ("The district court correctly construed the 'licensee unique ID' as a unique identifier associated with a licensee that can be, but is not limited to, personally identifiable information about the licensee or user."). Uniloc does not believe that Pervasive can show good cause to re-construe this term. Furthermore, Pervasive has no excuse for its failure to seek leave before now.

Defendants have also expressed their intention to submit the term "local (in the phrase 'local licensee unique ID generating means')" for construction as indicated in the P.R. 4-3 Joint Statement. The phrase "local licensee unique ID generating means" was previously construed in Rhode Island to mean "Function: to generate a local or remote licensee unique ID/registration key; Structure: a summation algorithm or a summer and equivalents thereof." *Uniloc*, 447 F. Supp. 2d 177, 190-192. Defendants have stated

their belief that they do not need leave to present this term for construction. Even though Defendants are ostensibly only construing the term "local" within the context of the specific phrase "local unique ID generating means," by doing so Defendants are advocating to alter the previous construction. Accordingly, Uniloc contends they should have sought leave prior to this point.

Finally, two separate groups of Defendants intend to submit two "disclaimers" of varying scope for the Court's consideration based on statements attributable to the patentee in reexamination. Through the application of either alleged disclaimer, Defendants are seeking to affect the construction of previously construed patent claims through narrowing amendments to prior constructions.

As this Court is well aware, the doctrine of prosecution history disclaimer "limits the interpretation of claims so as to exclude any interpretation that may have been disclaimed or disavowed during prosecution in order to obtain claim allowance." *Omega Eng'g, Inc. v. Raytek Corp.*, 334 F.3d 1314, 1323 (Fed. Cir. 2003). For the doctrine to apply, the disclaimer of claim scope must be clear and unmistakable. *Computer Docking Station Corp. v. Dell, Inc.*, 519 F.3d 1366, 1374 (Fed. Cir. 2008). Indeed, the Federal Circuit has stated, "we will find that the applicant disclaimed protection during prosecution only if the allegedly disclaiming statements constitute a clear and unmistakable surrender of subject matter." *Ecolab, Inc. v. FMC Corp.*, 569 F.3d 1335, 1342 (Fed. Cir. 2009) (quoting *Bayer AG v. Elan Pharm. Research Corp.*, 212 F.3d 1241, 1251 (Fed. Cir. 2000)).

There is no statement in the reexamination file history that meets this threshold, and Defendants' disclaimer issue is little more than a backdoor attempt to re-address

previously construed claim terms without making a threshold case for disclaimer that meets the Court's good cause standard.

It bears mention that the last Office Action in the reexamination was mailed on January 18, 2011, and Uniloc submitted its reply on or around March 18, 2011. Defendants have had months to consider the reexamination file history and ample opportunity to seek leave without leaving Uniloc to guess at what issues will be relevant to its opening brief on claim construction.

III. CONCLUSION

In order to provide clarity in the claim construction briefing process, Uniloc respectfully requests that the Court strike Defendants' untimely attempts to submit previously construed terms for construction. Specifically, Uniloc requests that the Court issue an order stating (1) that the terms "local unique ID" and "local (in the phrase 'local licensee unique ID generating means)" shall not be briefed and (2) that the alleged disclaimer issue affecting all terms shall not be briefed. If, however, the Court desires to see some (or all) of the issues discussed above briefed and addressed in the upcoming claim construction hearing, Uniloc respectfully requests the Court allow it at least five additional days to submit pertinent briefing.

Dated: August 29, 2011

By:

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ATTORNEYS FOR PLAINTIFFS UNILOC USA, INC. AND UNILOC SINGAPORE PRIVATE LIMITED

CERTIFICATE OF SERVICE

I hereby certify that on the 29th day of August 2011, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Eastern District of Texas, Tyler Division, using the electronic case filing system of the court. The electronic case filing system sent a "Notice of Electronic Filing" to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

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

CERTIFICATE OF CONFERENCE

On Thursday, August 25, 2011, Uniloc and Defendants' counsel participated in a telephonic conference to discuss the filing of the parties' P.R. 4-3 Statement. This conference lasted over an hour and covered a number of topics related to the P.R. 4-3 Statement. During the conference, a discussion was held regarding the inclusion of the two terms and "disclaimer" issue Uniloc seeks to strike in the present Motion. Uniloc contended that the inclusion of these terms in the P.R. 4-3 Statement was improper because defendants had not previously sought leave (or been granted leave) as called out in the Court's Discovery Order. Defendants disputed Uniloc's contention. No resolution to this issue was reached during the conference. Email correspondence on this issue continued through the weekend. As of the time of this filing, no resolution has been reached.

/s/ Barry J. Bumgardner
Barry J. Bumgardner