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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SOUTHERN DIVISION

UNILOC 2017 LLC, Plaintiff, v. INFOR, INC.,	Case No. 8:19-cv-01150-DOC-KES (Consolidated)
NETSUITE INC.,	**REPLY IN SUPPORT OF NETSUITE'S MOTION TO DISMISS FIRST AMENDED COMPLAINT**
SQUARE ENIX, INC., SQUARE ENIX LLC, SQUARE ENIX CO., LTD., and SQUARE ENIX HOLDINGS CO., LTD,	Judge: Hon. David O. Carter Date Filed: June 10, 2019 Hearing Date: December 7, 2020 Time: 8:30 AM Location: Ronald Reagan Federal Bldg., Courtroom 9D
UBISOFT, INC., Defendants.	

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1 **I. INTRODUCTION**

2 Judge Schroeder and Judge Stearns have already undertaken thorough
3 analyses construing the term "application program." Uniloc's opposition makes
4 clear that it is pursuing this case as if these prior cases before Judge Schroeder and
5 Judge Stearns never happened, dismissing their claim construction rulings as mere
6 "interlocutory order[s]" that are not preclusive (in the case before Judge Schroeder,
7 because Uniloc quickly settled). Uniloc wants this Court to expend the time and
8 resources to "perform its own construction" anew (while, in the same breath,
9 telling the Court in the 26(f) report that implementing Northern District-type claim
10 construction procedures would "drag the claim construction process out over six
11 months, and simply retrace the path already trod by other districts…"). D.I. 68 at
12 11. Uniloc's litigation approach is an abuse of the judicial process and should be
13 stopped.

14 Uniloc has asserted the '293 and '578 patents approximately 50 times across
15 at least seven different district courts. Whether for reasons of estoppel, comity, or
16 judicial efficiency, Uniloc should not get a completely fresh redo each time it loses
17 a case-dispositive issue decided by another Federal Judge. Litigation, including—
18 in particular—post-pleading contentions and fact discovery, is expensive and
19 burdensome for both the Court and the parties. Accordingly, this Court should
20 adopt the same construction of "application program" as Judge Schroeder and
21 Judge Stearns and dismiss Uniloc's First Amended Complaint (-1151 case, D.I. 26,
22 "FAC") with prejudice before anyone wastes further resources re-litigating the
23 same issues. This approach will serve the interests of justice and judicial
24 efficiency, and will further serve as a model for the other district courts around the
25 country still adjudicating Uniloc's claims on these same two patents.

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II. ARGUMENT

A. Uniloc Should Not Be Allowed to Burden NetSuite With Discovery in View of a Dispositive Claim Construction Issue Already Decided Against It By Two Other Federal Judges

Uniloc argues that NetSuite's motion is a "thinly-veiled" summary judgment motion because it depends on a claim construction issue. D.I. 62 ("Opp.") at 1. This is wrong. The point is that, under *Iqbal* and *Twombly*, a plaintiff must state a "plausible" claim for relief, meaning it must do more than offer threadbare recitals naming a product and providing a conclusory statement that it infringes. *Medsquire LLC v. Spring Med. Sys., Inc.*, No. 11-cv-04504-JHN-PLA, 2011 WL 4101093, at *3 (C.D. Cal. Aug. 31, 2011). Here, Uniloc does neither, and fails to put NetSuite on notice of how any of its products could possibly infringe.

In fact, Uniloc does not even specify a NetSuite product in the FAC. In connection with the '578 patent, Uniloc refers to "cloud software" (FAC at ¶ 7) and "Netsuite products" generally (*id.* at ¶ 10). It does even less for the '293 patent. *See id.* at ¶¶ 17-25. Nor does Uniloc state a "plausible" claim for how such alleged "cloud software" or "products" infringe under Judge Schroeder's and Judge Stearns' constructions of "application programs," which should at least be highly-persuasive, if not collaterally estop Uniloc from advocating a different position. *See* D.I. 62-1, ¶ 8 ("The parties to the Eastern District of Texas action [before Judge Schroeder] later reached a settlement and agreed to dismiss the action"); *e.Dig. Corp. v. Futurewei Techs., Inc.*, 772 F.3d 723, 725 (Fed. Cir. 2014) (affirming California district court's application of collateral estoppel to claim construction, even though the case was settled post-construction); *Int'l Gamco, Inc. v. Multimedia Games Inc.*, 732 F. Supp. 2d 1082, 1091 (S.D. Cal. 2010) (citing *Reyn's Pasta Bella, LLC v. Visa USA, Inc.*, 442 F.3d 741, 746 (9th Cir. 2006) (under Ninth Circuit law, a court approved settlement is a final judgment on the merits for purposes of collateral estoppel); *Neev v. Alcon Labs, Inc.*, No. 15-00336,

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1 -01551, 01538-JVS, 2016 WL 9051170, at *12-13 (C.D. Cal. Dec. 22, 2016)
2 (collateral estoppel is discretionary in the interests of judicial efficiency and
3 uniformity but can apply after a settlement).
4 Beyond the considerations of fairness and judicial efficiency, the Federal
5 Circuit has stressed the importance of claim construction uniformity across district
6 courts. *Finsar Corp. DirecTV Grp., Inc.*, 523 F.3d 1323, 1329 (Fed. Cir. 2008)
7 ("Given 'the importance of uniformity in the treatment of a given patent,' [citation to
8 *Markman*] this court would be remiss to overlook another district court's
9 construction of the same claim terms in the same patent as part of this separate
10 appeal. In the interest of uniformity and correctness, this court consults the claim
11 analysis of different district courts on the identical terms in the context of the same
12 patent."); *see also Sears Petroleum & Transp. Corp. v. Archer Daniels Midland Co.*,
13 No. CIVA 503CV-1120 DEP, 2007 WL 2156251 at *8 (N.D.N.Y. July 24, 2007)
14 (holding that "considerable deference should be given" to prior claim constructions
15 unless the parties make new arguments not considered by the prior court).
16 Uniloc's Opposition does not raise any arguments about construction of the
17 term "application program" that were not already raised before Judges Schroeder
18 and Stearns. For example, Uniloc relies on a declaration from Dr. Shamos opining
19 that "application programs" may execute within the browser window. Opp. at 5-7.
20 But, this is the same opinion that Uniloc submitted in support of its motion to
21 reconsider to Judge Schroeder,[1] who found it irrelevant to the construction of
22 "application programs" in denying such motion. *See* D.I. 62-6 at 14.[2] Specifically,
23 Judge Schroeder ruled that Uniloc made limiting statements during prosecution of
24 the related '466 patent, and that this prosecution history was equally relevant to
25
26 [1] *See also Uniloc USA, Inc. v. ADP, LLC*, No. 2:16-cv-00741, D.I. 344 & 344-1 (E.D. Tex. Nov. 5, 2019) (Uniloc's motion to reconsider and declaration of Dr.
27 Michael Shamos submitted therewith).
[2] Judge Schroeder ruled that the Shamos declaration was untimely but then still
28 held that the discussion in paragraphs 72 and 73 of the declaration (repeated on page 6 of Uniloc's opposition brief) were irrelevant as related to the user interface

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1 construction of "application programs" in both the '293 and the '578 patents. D.I.
2 54-4 at 14, 20. On Uniloc's motion to reconsider, Judge Schroeder found that the
3 passage of the '578 patent specification quoted by Dr. Shamos "describes only the
4 user interface" and that "[n]either the disclosure [of the '578 patent] nor Dr.
5 Shamos's declaration explain *where* the application is launched after URL is
6 requested." *See id.*; *see also* D.I. 54-4 at 14, 20. Uniloc also relied on the same
7 argument and opinion of Dr. Shamos in support of its construction of "application
8 program" before Judge Stearns, who also rejected it. *Compare Uniloc 2017 v.*
9 *Paychex, Inc.*, No. 19-cv-11272-RGS, 2020 WL 2329474, at *4 (D. Mass. May 11,
10 2020) *with Uniloc 2017 v. Paychex, Inc.*, No. 19-cv-11272-RGS, D.I. 26 at 6-8 &
11 D.I. 26-1, ¶¶ 71-74 (D. Mass. Jan. 23, 2020) (Uniloc's opening claim construction
12 brief and declaration of Dr. Michael Shamos submitted therewith).[3]
13 Contrary to Uniloc's argument, the Federal Circuit's *Nalco* decision does not
14 require this Court to ignore collateral estoppel, judicial efficiency and fairness
15 considerations and deny NetSuite's motion. In *Nalco*, the Defendants'
16 implausibility argument depended upon a disputed factual finding that had never
17 previously been resolved by another Federal Judge. *Nalco Co. v. Chem-Mod, LLC*,
18 883 F.3d 1337, 1350 (Fed. Cir. 2018) ("The only argument Defendants make
19 regarding the implausibility of [plaintiff's infringement theory] is that the
20 thermolabile bromine precursor could not survive the extreme heat of the
21 combustion areas of the furnace without decomposing . . . . Defendants have not
22 explained why we should—or could—make such a finding at this stage in light of
23 Nalco's explicit pleadings to the contrary."). Here, even putting aside Judge
24 Schroeder's and Judge Stearns' prior constructions, the construction of
25 "application programs" turns entirely on a legal issue—whether the prosecution
26 history of the '466 patent is relevant to the Asserted Patents here—and therefore
27 falls into the category of cases resolvable at the pleading stage. *See also* D.I. 54 at
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