IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

UNILOC 2017 LLC, Plaintiff, v. AKAMAI TECHNOLOGIES, INC., Defendant.	)	Civil Action No. 1:19-cv-11276 **FILED UNDER SEAL** **Leave to file granted on November 11, 2019**

REPLY IN SUPPORT OF AKAMAI TECHNOLOGIES, INC.'S MOTION FOR JUDGMENT ON THE PLEADINGS

Uniloc's Opposition confirms it has no basis to maintain this case against Akamai. Uniloc does not (and cannot) dispute the following critical facts:

- Akamai is an "IBM Strategic Partner" under the 2016 and 2018 Patent Purchase Agreements governing Uniloc's rights to the Asserted Patents (*see* Akamai Br. 7-8 (Dkt. 28); Opp. 4 (Dkt. 31));
- "IBM Strategic Partners" are within the definition of a "Licensee" under the Patent Purchase Agreements—and thus Akamai is also a "Licensee" under the Agreements (*see* Akamai Br. 7-8; Opp. 2);
- Uniloc's right to sue third parties is "[redacted]" listed in the Agreement, including that Uniloc "[redacted]" with IBM's contractual relationships with its Licensees (Dkt. 22-1, Ex. 1 (2016 Agreement) §§ 2.4, 4.2; Akamai Br. 6; Opp. 2-3); and
- If Uniloc knowingly sues or maintains a suit against a Licensee for infringement of the Asserted Patents, then it must indemnify the Licensee for all losses and expenses arising from the suit (Akamai Br. 8; Opp. 3).

Uniloc concedes based on these facts that the case should be dismissed. It nevertheless argues that—even though Uniloc entities previously dismissed two suits against Akamai on the same patents—its claims should now be dismissed a third time without prejudice. Uniloc's arguments are wrong on the facts and the law.

First, Uniloc is wrong that it has the right to sue "anyone it chooses"—including IBM Strategic Partners and Licensees like Akamai—for alleged infringement of the Asserted Patents. Opp. 1. Uniloc's argument is contradicted by the "[redacted]" on suing third parties in Section 4.2 of the 2016 Agreement, which Akamai addressed in its opening brief (Akamai Br. 6-7) and

Uniloc ignores (Opp. 2-3). Specifically, Section 4.2 of the Agreement provides that Uniloc's right to bring suits against third parties on the Asserted Patents is "[redacted]." *See* 2016 Agreement § 4.2. Those restrictions include a bar on Uniloc from interfering with any contractual relationship between IBM and its "Licensees" in Section 2.4. *See, e.g., id.* § 2.4 ([redacted]); Akamai Br. 5-7. *See id.* As provided in Akamai's Amended Answer and Counterclaims, Akamai has an extensive ongoing contractual relationship with IBM pursuant to which it has engaged in over [redacted] of business with IBM. *See* Dkt. 23 (Declaration of William Kamenides) at ¶ 3; Dkt. 23-1, Ex. 3 (Akamai Sales Data for IBM); Dkt. 23-7, Ex. 11 (Akamai website: "By securely optimizing IBM's content based on type and destination, ***Akamai enables IBM to ensure a flawless web experience for customers — no matter where they are***."). Uniloc's suit plainly interferes with this Akamai-IBM relationship: Uniloc's claims are directed to Akamai's "Luna Control Center" that Akamai's customers—***including IBM***—use to manage their content delivery services from Akamai. *See* Complaint, *e.g.*, ¶ 18 (alleging that "Akamai also infringed the '578 Patent by actively inducing the use of the Luna Control Center CDN. Akamai's customers who used the system as Akamai instructed infringed the '578 Patent, as described above."). The Agreement thus plainly bars Uniloc from suing Licensees such as Akamai. *See* 2016 Agreement § 2.4, 4.2.

The 2016 Agreement's indemnity provision confirms this. *See* 2016 Agreement § 4.3. Section 4.3 of the Agreement provides that if Uniloc knowingly sues a Licensee for infringement, then Uniloc must indemnify the Licensee for ***all losses, costs, and expenses***

arising from the suit—meaning that Uniloc cannot recover anything in a suit against a Licensee like Akamai. *See* 2016 Agreement § 4.3 [redacted]. It would thus make little sense to interpret the Patent Purchase Agreements, as Uniloc has urged, to somehow permit Uniloc to sue Licensees for infringement of the Asserted Patents, only to then require Uniloc to indemnify the Licensee for all losses, costs, and expenses arising from the suit. *See Agility Pub. Warehousing Co. KSCP v. Mattis*, 852 F.3d 1370, 1380 (Fed. Cir. 2017) ("We consider the contract as a whole and interpret it to harmonize and give meaning to all of its parts."); *Farmers Ins. Exch. v. RNK, Inc.*, 632 F.3d 777, 785 (1st Cir. 2011) ("In interpreting contractual language, we consider the contract as a whole.").

Accordingly, because Uniloc has failed to state any plausible claim for which relief can be granted, its case should be dismissed with prejudice. *See Artrip v. Ball Corp.*, 735 F. App'x 708, 714-15 (Fed. Cir. 2018) (affirming dismissal with prejudice where the plaintiff had failed to state a plausible infringement claim); *see also Networktwo Commc'ns Grp., Inc. v. Spring Valley Mktg. Grp. & Communityisp, Inc.*, No. 99-cv-72913, 2003 WL 1119763, at *9 (E.D. Mich. Feb. 13, 2003) (dismissing breach of contract claim with prejudice where the alleged damages were "barred by the terms" of the relevant contract).

Uniloc's reliance on the Federal Circuit's decision in *Uniloc USA, Inc. v. ADP, LLC*, 772 Fed. Appx. 890 (Fed. Cir. 2019) is misplaced. Specifically, Uniloc argues that the Federal Circuit held that the indemnity provision of the 2016 Agreement applies only if IBM "considers Uniloc to be in breach" or "has asserted a right to sublicense and release" the "ostensible third-party beneficiary." Opp. 3. The court made no such ruling. Instead, in that case, certain parties

asserted that Uniloc breached the indemnity provision of the 2016 Agreement even though they were ***not*** IBM Strategic Partners or Licensees and did "***not*** assert that they are intended beneficiaries of the contract." *See Uniloc*, 772 Fed. Appx. at 895 (emphasis added). The court held that those parties had no right to invoke the indemnity provision because each of them was "a ***non***-beneficiary third party." *Id.* (emphasis added). Unlike the parties in that case, Akamai undisputedly ***is*** an IBM Strategic Partner and Licensee under the 2016 Agreement and therefore is a third-party beneficiary of the Agreement. *See* Akamai Br. 7-8; Opp. 2. Indeed, the 2016 Agreement expressly provides that "[redacted]." *See* 2016 Agreement § 2.5.

Second, Uniloc's argument that this case should be dismissed without prejudice on the grounds that it could somehow later "resolve the contractual issue" is wrong as a matter of law. Opp. 4. As an initial matter, it is well established that a "ruling allowing a Motion to Dismiss for failure to state a claim is ***presumed to be with prejudice***." *Segelman v. City of Springfield*, 561 F. Supp. 2d 123, 125 (D. Mass. 2008) (emphasis added); *see also United States ex rel. Karvelas v. Melrose-Wakefield Hosp.*, 360 F.3d 220, 241 (1st Cir. 2004) (holding that "a dismissal pursuant to Fed. R. Civ. P. 12(b)(6) is presumed to be with prejudice"), *abrogated on other grounds by United States ex rel. Gagne v. City of Worcester*, 565 F.3d 40 (1st Cir. 2009). Moreover, it is well established that the "***mere possibility***" of entitlement to relief is not sufficient to withstand dismissal. *See Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) ("mere possibility" that the plaintiff might have a claim is not sufficient to state a plausible claim). Because Uniloc does not (and cannot) propose any amendment to its complaint to cure the deficiencies in its claims, despite having had the opportunity to do so, the dismissal should be with prejudice. *See Hensley v. Imprivata*, 260 F. Supp. 3d 101, 127 n.11 (D. Mass. 2017)

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