

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

UNILOC USA, INC., et al.,	§	
Plaintiffs,	§	
v.	§	Case No. 2:16-cv-00393-RWS
	§	LEAD CASE
	§	
AVG TECHNOLOGIES USA, INC.,	§	
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BITDEFENDER LLC,	§	Case No. 2:16-cv-00394-RWS
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PIRIFORM, INC.,	§	Case No. 2:16-cv-00396-RWS
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UBISOFT, INC.,	§	Case No. 2:16-cv-00397-RWS
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KASPERSKY LAB, INC.,	§	Case No. 2:16-cv-00871-RWS
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SQUARE ENIX, INC.,	§	Case No. 2:16-cv-00872-RWS
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Defendants.		

UNILOC USA, INC., et al.,	§	
Plaintiffs,	§	
v.	§	Case No. 2:16-cv-00741-RWS
	§	LEAD CASE
	§	
ADP, LLC,	§	
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BIG FISH GAMES, INC.,	§	Case No. 2:16-cv-00858-RWS
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Defendants.		

**PLAINTIFFS' OPPOSITION TO EXPEDITED OPPOSED MOTION BY DEFENDANTS
PIRIFORM, INC., ADP, LLC, BIG FISH GAMES, INC., BLACKBOARD INC.,
BOX, INC., AND ZENDESK INC. FOR LEAVE TO FILE
SUPPLEMENTAL CLAIM CONSTRUCTION BRIEFING**

Plaintiffs Uniloc USA, Inc. and Uniloc Luxembourg, S.A. (collectively “Uniloc”) respectfully submit this Opposition to the Expedited Opposed Motion for Leave to File Supplemental Claim Construction Briefing (“Motion for Leave”) filed by Defendants ADP, LLC (“ADP”) and Big Fish Games, Inc. (Big Fish”) from the *ADP* lead case, No. 2:16-cv-00741, and Defendant Piriform, Inc. (“Piriform”) from the *AVG* lead case, No. 2:16-cv-00393 (collectively “the moving Defendants”).¹ *See* Dkt. Nos. 217 (2:16-cv-00741); 186 (2:16-cv-00393).

I. ARGUMENT

A. The Docket Control Orders Required Timely Briefing of Indefiniteness Arguments

Pursuant to the Discovery Orders that were entered in the aforementioned cases, the parties were directed to include any indefiniteness arguments in their *Markman* briefing.

Specifically, the Discovery Orders included the following provision:

Indefiniteness: In lieu of early motions for summary judgment, the parties are directed to include any arguments related to the issue of indefiniteness in their *Markman* briefing, subject to the local rules’ normal page limits.

See Dkt. No. 143, p. 5 (2:16-cv-00741); Dkt. No. 73, p. 7 (2:16-cv-00393).

In their *Markman* briefing, the moving Defendants raised only two indefiniteness arguments applying to eight means-plus-function clauses. *See* Dkt. 135-1, pp. 5-6 (April 20, 2017); Dkt. 150, pp.15-19 (June 10, 2017). With respect to the over 100 other means-plus-function clauses, the moving Defendants did not raise or brief any indefiniteness issues. Instead, Uniloc and Defendants together began the time-consuming and tedious task of meticulously combing through the written descriptions of the patents-in-suit (and two other patents, incorporated by reference) to catalog the multitude of structures that corresponded to the claimed functions.

¹ Uniloc has settled with Zendesk, Inc. and Uniloc has also filed Notices of Voluntary Dismissal with respect to Blackboard, Inc. and Box, Inc.

Although the parties needed more time to finish the job by the last joint submission, the parties did not encounter any significant differences. Thus, the parties reported to the Court, on June 16, 2017:

The parties have exchanged several-rounds of competing identifications of specific structure for each of these [means-plus-function] terms, and are continuing to work in good faith to resolve their remaining disagreements. At this time, the parties do not believe that the Court needs to address these disagreements as part of the claim construction process.

See Dkt. 159, p. 2; Dkt. 186, p. 2.

On June 23, 2017, Defendants filed an “Emergency” Motion to Enforce the Parties’ Previously Agreed Constructions or, in the Alternative, for Leave to File Supplemental Briefing. *See* Dkt. No. 195 (2:16-cv-00741); Dkt. No. 162 (2:16-cv-00393). In their motion, Defendants did not raise any indefiniteness arguments.

On July 5, 2017, the Court granted Defendants’ motion and rescheduled the *Markman* hearing from July 7 to August 10, 2017 and ordered further *Markman* briefing. *See* Dkt. No. 199 (2:16-cv-00741); Dkt. No. 168 (2:16-cv-00393). That same day, Uniloc’s counsel wrote to Defendants’ counsel: “Guys – This is good news. Now maybe we can finish the MPF project!” *See* Gannon Dec., Ex. A.

On July 10, 2017, Uniloc was surprised to learn that the moving Defendants decided to change their strategy and, for the first time, argue indefiniteness as to virtually all of the (over 100) means-plus-function clauses. This change was not a result of an oversight; nor was it insignificant. Rather, it was a radical change in defense strategy, being implemented long after the deadlines this Court (and Judge Gilstrap) had imposed with respect to the *Markman* briefing. *See* Dkt. No. 143 (2:16-cv-00741); Dkt. No. 73 (2:16-cv-00393).

The moving Defendants had not previously disclosed, or even hinted, in prior communications with Uniloc, or in filings with this Court, that they would attempt such a strategy. They did not mention it in the June 16 Joint Claim Construction Chart (Dkt. 159 (2:16-cv-00393); Dkt. 186 (2:16-cv-00741)), nor in the emergency motion filed on June 23 (Dkt. 162 (2:16-cv-00393); Dkt. 195 (2:16-cv-00741)).

The moving Defendants' simply adding indefiniteness as an "additional issue" to the Joint Claim Construction and Prehearing Statement filed on July 11, 2017 violates the Docket Control Orders entered in these cases. *See* Dkt. No. 202 (2:16-cv-00741); Dkt. No. 169 (2:16-cv-00393). Furthermore, it contravenes this Court's requirements that parties act diligently, and formulate positions and arguments in a timely manner. *See Finisar Corp. v. DirecTV Grp., Inc.*, 424 F. Supp. 2d 896, 901 (E.D. Tex. 2006)("[t]he Local Patent Rules 'exist to further the goal of full, timely discovery and provide all parties with adequate notice and information with which to litigate their cases, not to create supposed loopholes through which parties may practice litigation by ambush."); *see also STMicroelectronics, Inc. v. Motorola, Inc.*, 307 F. Supp. 2d 845, 849 (E.D. Tex. 2004) ("[t]he Court's Patent Rules are specific exceptions to the normal pretrial procedures that the Court has enacted to effectuate an orderly and efficient pretrial process").

The Court has already construed the claim language finding several terms indefinite. The moving Defendants' Motion for Leave is simply too late. Defendants had the opportunity to properly raise their indefiniteness defenses during their Markman briefing but failed to do so.

II. CONCLUSION

For the foregoing reasons, the moving Defendants' Motion should be denied.

Date: August 16, 2017

Respectfully submitted,

/s/ Kevin Gannon

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ATTORNEYS FOR THE PLAINTIFFS

CERTIFICATE OF SERVICE

I certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on August 16, 2017.

/s/ Kevin Gannon