

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

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UNILOC USA, INC., and)	
UNILOC SINGAPORE PRIVATE)	
LIMITED,)	
	Plaintiffs,)	Civil Action No.: 6:10-cv-00472-LED
)	
	v.)	
)	
NATIONAL INSTRUMENTS, INC.,)	
<i>et al.</i> ,)	
	Defendants.)	
<hr/>)	

**PLAINTIFFS’ SURREPLY IN OPPOSITION TO
DEFENDANTS’ MOTION TO TRANSFER VENUE
UNDER 28 U.S.C. § 1404(A)**

Plaintiffs, Uniloc USA, Inc. and Uniloc Singapore Private Limited (together “Uniloc”), respectfully submit this surreply in opposition to the motion of defendants, BMC Software *et al.*, to transfer venue pursuant to 28 U.S.C. § 1404(a). For the reasons set forth herein and in Uniloc’s opposition brief, defendants’ motion to transfer this case to the District of Rhode Island should be denied.

BACKGROUND

In its opposition to defendants’ motion, Uniloc argued that transfer should be denied *inter alia* because: (1) none of the defendants has a presence in Rhode Island; (2) the case could not originally have been brought in that District; (3) the private and public factors strongly favor denying the motion, and (4) judicial economy would not be served by transfer because the presiding judge in Rhode Island has recused himself from that case and transfer of this case would still leave other Uniloc cases pending in this District. *See* Dkt. No. 55.

Defendants' reply largely ignores these issues and fails to present any evidence that would even suggest that the relevant facts would support transfer.

A. JUDICIAL ECONOMY AND PUBLIC INTEREST

Defendants first argue that there is a substantial overlap between this case and the *Uniloc v. Microsoft* case in Rhode Island. Defs' Br., pp. 3-4. On page 11 of its opposition brief, Uniloc argued that there is no substantial overlap because none of the defendants here was a party to that case, and none of these defendants has been accused of using the accused Microsoft technology at issue in Rhode Island. See Dkt. No. 55, p. 11. In their reply, defendants do not state otherwise. Thus, transfer should be denied. See, e.g., *Zoltar Satellite Sys., Inc. v. LG Electronics Mobile Comms. Co.*, 402 F. Supp.2d 731, 737 (E.D. Tex. 2005) (for substantial overlap between cases there should be the same or similar parties and products).

Defendants also argue that denying transfer would possibly lead to inconsistent claim construction. Defs' Br., pp. 3-4. In its opposition brief, Uniloc argued that “[d]efendants do not identify, however, a single claim term that would potentially be construed inconsistently by this Court as compared with Judge Smith’s constructions in the Rhode Island case.” See Dkt. No. 55, p. 11. In their reply brief, defendants still fail to identify a single such claim term. Accordingly, defendants claim construction argument should be rejected.

Defendants next argue that significant time has not lapsed since the Rhode Island case. Defs' Br., p. 4. Defendants attempt to distinguish *In re Verizon Bus. Network Servs., Inc.*, 635 F.3d 559 (Fed. Cir. 2011), cited by Uniloc, because the earlier case in that litigation was settled five years earlier and prior to trial. Defendants ignore that, as pointed out on page 14 of Uniloc’s opposition brief, claim construction was issued by Judge Smith almost

five years ago in August, 2006. Moreover, although the case went to trial in Rhode Island, the trial judge has now recused himself from the case and, as pointed out at the recent Status Conference, Rhode Island has transferred over two dozen cases out of that district due to docket congestion. Thus, these factors strongly favor denying the motion.

B. JURISDICTION IN RHODE ISLAND

Defendants next argue that this case could have been brought in Rhode Island. Defs' Br., pp. 4-5. On pages 2-3 of its opposition brief, Uniloc argued that defendants have failed to demonstrate that this case could have been brought in Rhode Island, because defendant, Pervasive Software, had failed to submit a declaration. *See Chirife v. St. Jude Med., Inc.*, 2009 U.S. Dist. LEXIS 50482 at 3-4 (E.D. Tex. Jun. 16, 2009) (defendants must show that they are all subject to jurisdiction in the transferee court). Defendants have failed to submit any declaration by Pervasive Software with their reply brief. Accordingly, their motion must be denied.

Defendants argue that they have submitted new declarations (but not by Pervasive Software) stating that they marketed accused products prior to suit being instituted in this case. Defendants' declarations are still fatally flawed. As Uniloc argued on page 3 of its opposition, the Rhode Island court has explained that *de minimis* sales are "the kind of fortuitous, random, and attenuated contact that the Supreme Court has held insufficient to warrant the exercise of jurisdiction." *Swarowski Optik N. Am. Ltd. V. Euro Optics, Inc.*, 2003 U.S. Dist. Ct. LEXIS, at *26 (D.R.I. Aug. 25, 2003). The new declarations filed by defendants do not state that their sales in Rhode Island were any more than *de minimis*. Thus, defendants have not shown that jurisdiction would have been proper in Rhode Island.

C. THE PRIVATE FACTORS ARE NOT NEUTRAL AND FAVOR DENYING THE MOTION TO TRANSFER

Finally, defendants argue that the private “convenience factors are neutral.” Defs’ Br., pp. 5-6. Defendants argue that Rhode Island is convenient because Uniloc was once based in Rhode Island and Uniloc makes little mention of any hardship to itself. Defendants ignore that Uniloc USA is a Texas corporation and has maintained an office in Plano for over two-and-a-half years where its relevant documents are also located. Lin Decl., ¶¶ 4, 7 (submitted with Uniloc’s opposition brief). Defendants also argue that they “would not have [filed this motion] if they felt that it would be inconvenient to litigate in Rhode Island.” Defs’ Br., pp. 5-6. Defendants argument makes no sense. None of the defendants is based in or has an office or employee in Rhode Island. Moreover, as demonstrated by the chart on page 5 of Uniloc’s opposition brief, this Court is closer to each of defendants’ headquarters than is Rhode Island. Indeed, defendant BMC Software is based in Houston, Texas. Thus, defendants’ argument that Rhode Island is more convenient than this Court must be rejected.

Defendants have also failed to respond to Uniloc’s argument regarding the availability of compulsory process in this District as compared with Rhode Island. Uniloc’s opposition brief pointed out that defendants “fail to identify a single witness in either venue.” Dkt. No. 55, p. 6. Defendants’ reply brief likewise fails to identify any such witnesses. In contrast, Exhibit A to Uniloc’s opposition brief identifies 31 key party and non-party witnesses who reside in this District or elsewhere in Texas. The availability of subpoena power over these witnesses in this case weighs against transfer. *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009). Defendants’ failure to identify any witnesses in Rhode Island, therefore, weighs strongly against transfer.

Defendants also fail to rebut Uniloc's argument that the cost of trial in Rhode Island is greater than the cost of trial in Rhode Island. Uniloc submitted an independent survey of the comparative costs of trial in the two courts as Exhibit B to its opposition brief. As the survey demonstrates, out-of-pocket costs for trial in Rhode Island is estimated at \$130,220 - \$153,980 as compared with \$87,000 for trial in this District. *See* Dkt. No. 55, p. 8. As a result, the private convenience factors are not neutral but strongly favor denying the motion to transfer.

CONCLUSION

For the reasons stated above, defendants' motion to transfer to Rhode Island should be denied.

DATED: May 9, 2011

Respectfully Submitted,
**UNILOC USA, INC. and UNILOC
(SINGAPORE) PRIVATE LIMITED**

By: /s/ Paul J. Hayes

Paul J. Hayes
(LEAD ATTORNEY)
Dean G. Bostock
HAYES, BOSTOCK & CRONIN LLC
300 Brickstone Square, 9th Floor
Andover, Massachusetts 01810
Tel: 978-809-3850
Fax: 978-809-3869
Email: phayes@hbcllc.com
Email: dbostock@hbcllc.com

T. John Ward, Jr.
Texas State Bar No. 00794818
J. Wesley Hill
Texas State Bar No. 24032294
WARD & SMITH LAW FIRM
111 West Tyler Street
Longview, Texas 75601
Tel: (903) 757-6400
Fax: (903) 757-2323
Email: jw@jwfirm.com
wh@jwfirm.com

Of counsel:

**ATTORNEYS FOR PLAINTIFFS
UNILOC USA, INC. and UNILOC
(SINGAPORE) PRIVATE LIMITED**

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically in compliance with Local Rule CV-5 on May 9, 2011. As of this date, all counsel of record have consented to electronic service and are being served with a copy of this document through the Court's CM/ECF system under Local Rule CV-5(a)(3)(A).

/s/ Dean G. Bostock