Exhibit M

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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

SYMANTEC CORPORATION and XTREAMLOK PTY,

Plaintiffs,

vs.

UNILOC USA, INC., UNILOC (SINGAPORE) PRIVATE LIMITED and UNILOC CORPORATION PTY LIMITED,

Defendants.

UNILOC USA, INC., UNILOC (SINGAPORE) PRIVATE LIMITED and UNILOC CORPORATION PTY LIMITED,

Counterclaimants,

vs.

SYMANTEC CORPORATION and XTREAMLOK PTY,

Counterdefendants.

Case No. SACV10-01483 DOC (MLGx)

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS/ COUNTERCLAIMANTS' MOTION TO TRANSFER VENUE TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS OR, IN THE ALTERNATIVE, TO DISMISS

Date: December 20, 2010
Time: 8:30 a.m.
Courtroom No.: 9D
Judge: Honorable David O. Carter

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STATUTES

28 U.S.C. § 1404(a) 1

Defendants Uniloc USA, Inc., Uniloc (Singapore) Private Limited and Uniloc Corporation Pty. Limited (collectively, "Uniloc") respectfully submit this reply memorandum of points and authorities in support of their motion to transfer the patent issues in this case to the Eastern District of Texas pursuant to 28 U.S.C. § 1404(a) or, in the alternative, to dismiss in favor of the pending proceedings in the Eastern District of Texas. For the reasons set forth below and in its opening memorandum, Uniloc requests that this motion be granted.

I. ARGUMENT

Uniloc responds below to Symantec/XtreamLok's arguments in the order presented in Symantec/XtreamLok's brief.[1/]

A. THE ACTION COULD HAVE BEEN BROUGHT IN TEXAS

Symantec's first argument, on pages 4-5 of its brief, is that this action could not have been brought in the Eastern District of Texas because XtreamLok and Uniloc Corporation Pty Ltd. are Australian corporations. Uniloc, however, is moving to transfer the patent claims herein to Texas. As indicated by Uniloc's Texas complaint, XtreamLok is not a defendant in Uniloc's patent claims. Thus, contrary to Symantec/XtreamLok's argument, Uniloc does not need to establish personal jurisdiction over XtreamLok in Texas. Moreover, XtreamLok is a subsidiary of Symantec. *See* Dkt. No 1 (Complaint), ¶ 2. Thus, Symantec and XtreamLok themselves could have filed this case against Uniloc in Texas, just as they did together here. As to Uniloc Corporation Pty. Ltd., it would not oppose personal jurisdiction over it in Texas should this case be transferred or the patent claims herein be dismissed. *See* Second Declaration of Bradley C. Davis, ¶ 4. Accordingly, Symantec/XtreamLok's argument on this point should be rejected.

[1/] On page 3 of its brief, Symantec/XtreamLok argues that, as set forth in its pending motion to enjoin, Uniloc agreed to resolve the patent dispute in this Court and dismiss the Texas case. As set forth on page 6 of Uniloc's opposition brief thereto (Dkt. No. 21), Uniloc denies that such an agreement was made.

Symantec also argues that this case could not have been brought in Texas due to a choice of forum clause in the now-terminated license agreement between Uniloc and XtreamLok. *See* Symantec Memo., p. 5. As stated in Symantec/XtreamLok's Complaint herein, however, following arbitration over Symantec/XtremLok's failure to pay royalties owed Uniloc under the agreement, in September 2009, the Arbitrator determined that the License Agreement had been breached and properly terminated by Uniloc. *See* Dkt. No. 1, ¶ 12. Accordingly, the forum selection clause relied upon by Symantec/XtreamLok is null and void. Neither Symantec nor XtremLok challenged the Arbitrator's findings and Uniloc dismissed the case under Rule 41(a) in November 2009. *Id.*, ¶ 13. In any event, the choice of forum clause reads as follows:

> (3) This Court shall retain jurisdiction over Uniloc's Patent Infringement and Unfair Competition Claims, and shall re-activate the matter upon application of the parties upon completion of the arbitration to allow the continuation of the action as to any claims and issues which either party may contend remain to be resolved in accordance with applicable law.

Declaration of Dean G. Bostock, Ex. 5, pp. 2-3.

None of the parties sought to reactivate that case. Instead, Uniloc filed its suit against Symantec *et al.* on September 14, 2010, and Symantec/XtreamLok elected to file this new case against Uniloc two weeks later on October 1, 2010. As a result, Symantec/XtreamLok chose not to attempt to reactivate the earlier case. Thus, Symantec/XtreamLok's choice of forum argument fails.

B. JUDICIAL ECONOMY FAVORS TRANSFER

On pages 5-7 of its brief, Symantec/XtreamLok argues that judicial economy does not favor transfer. This argument makes no sense. As indicated in its opening brief, prior to Symantec/XtreamLok filing the Complaint herein, Uniloc filed seven cases in the Eastern District of Texas alleging that numerous defendants (including Symantec) are infringing the patent-in-suit in this case, U.S. patent number 5,490,216 ("the '216 patent"). Judicial economy, therefore, would be served by transferring this

case to Texas where Uniloc's first-filed case against Symantec is pending. There are eleven other defendants named in Uniloc's suit against Symantec in Texas. *See* Bostock Decl., Ex. 4. Using the judicial resources of this Court to resolve the patent dispute between the parties hereto would simply be duplicative of the resources that the Texas court will use to resolve that first-filed case. Thus, judicial economy favors transfer to the Texas case where Symantec is a named defendant.[2/]

On pages 6-7 of its brief, Symantec/XtreamLok criticizes Uniloc for filing multiple cases in Texas against multiple parties who sell different products. This argument, however, favors transfer. If Symantec/XtreamLok believes that filing multiple cases in Texas for infringement of the '216 patent does not serve judicial economy, then Symantec/XtreamLok's request to maintain this additional case for infringement of the '216 patent should be rejected.[3/]

C. SYMANTEC/XTREAMLOK'S CHOICE OF FORUM SHOULD BE GIVEN NO WEIGHT

On pages 7-10 of its brief, Symantec/XtreamLok argues that its choice of forum should be given deference. Symantec/XtreamLok cites several cases holding that a plaintiff's choice of forum is given deference and argues that knowledgeable witnesses and relevant documents reside in this forum. Symantec/XtreamLok Br., p. 8. There can be no dispute, however, that Uniloc filed its case in Texas on September 24, 2010 and that Symantec/XtreamLok filed this case two weeks later on October 1, 2010. Thus, Uniloc's Texas case is the first-filed case and, therefore, Symantec/XtreamLok's choice of forum is not given weight.

2/ On page 6 of its brief, Symantec/XtreamLok cites *In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1382 (Fed. Cir. 2010) in support of its argument against transfer. As indicated in the part of the case cited by Symantec/XtreamLok, however, the *Zimmer* decision rested heavily of the location of identified witnesses. As set forth, *infra*, Symantec/XtreamLok's attempts to identify witnesses in this District fail. Accordingly, *Zimmer* does not help Symantec/XtreamLok's cause.

3/ As noted in footnote 3 of Symantec/XtreamLok's brief, all of the Texas cases are pending before Judge Davis. Accordingly, it is likely that some of those cases will be consolidated.

As set forth at the end of Uniloc's opening brief, when two actions involving overlapping issues and parties are pending in two different federal courts, there is a "strong presumption across the federal circuits that favors the forum of the first-filed suit under the first filed rule." *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 (11th Cir. 2005); *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 625 (9th Cir. 1991).[4/] The two actions need not be identical so long as they are substantially similar. *Inherent.com v. Martindale-Hubbell*, 420 F. Supp. 2d 1093, 1097 (N.D. Cal. 2006). The purpose of the rule is to promote efficiency and avoid duplicative litigation. *Id.* Accordingly, as this is the second-filed suit, the Court should transfer the patent claims herein to Texas or dismiss them in favor of the Texas proceedings between Uniloc and Symantec.

On pages 8-9 of its brief, Symantec/XtreamLok again argues that the forum selection clause of the license between Uniloc and XtreamLok warrants a denial of the motion to transfer because it shows that Uniloc is forum-shopping. As indicated above, however, that license agreement is null and void because XtreamLok was found to have underpaid royalties resulting in a termination of the license. In addition, aware that the forum selection clause was null and void, Symantec/ XtreamLok failed to reactivate that case and chose instead to file this new case two weeks after Uniloc filed its case in Texas.

On page 9 of its brief, Symantec/XtreamLok asserts that "Uniloc also makes a number of other specious arguments." First, Symantec/XtreamLok argues that Uniloc's argument regarding the inapplicability of the forum selection clause from the prior litigation "makes no sense." Symantec/XtreamLok, however, fail to explain why they should obtain the benefit of a provision in a license agreement that was terminated for breach thereof by Symantec/XtreamLok. Moreover, even were such a result justified, as set forth above, Symantec/XtreamLok failed to reactivate the prior

[4/] The prior case between these parties does not factor in the "first-filed" analysis because it was dismissed in 2009 and, therefore, was not pending during the pendency of this case or the Texas case.

case, and elected instead to file this new case after Uniloc filed in Texas. Moreover, as the forum selection clause reproduced above states, both parties would have had to apply to reactivate that case, and neither party did.

Second, on pages 9-10, Symantec/XtreamLok argues that it does not disagree with the Federal Circuit's statement in *In re Oracle*, that a forum selection clause is not dispositive in the transfer analysis. The parties are in agreement on this point of law. Uniloc thus fails to see how its reliance on *In re Oracle* is "specious."

Third, on page 10, Symantec/XtreamLok again argues that the forum selection clause from the prior litigation works against transfer. According to this argument, the reactivation of the prior case did not require "immediacy." Once again, Symantec/XtreamLok ignores the fact that it never moved to reactivate the prior case, let alone jointly with Uniloc. Symantec/XtreamLok belatedly filed this second case 10 months after the arbitration decision in an attempt to forum-shop its way out of Texas. Accordingly, its third argument should likewise be rejected.

D. COMPARATIVE COSTS

On pages 11-14 of its brief, Symantec/XtreamLok argues that the comparative costs do not favor transfer. With respect to documents, it argues that "[v]irtually all [of its] relevant documentary evidence in this case is accessed from computers in Los Angeles County, California and Sydney, Australia, or otherwise resides physically in those locations, and virtually none exists in Texas." Symantec/XtreamLok br., p. 11. Thus, Symantec/XtreamLok's documents can be equally accessed by computer from Texas. This is consistent with its website that touts its ability to handle large amounts of documents electronically. As set forth in Uniloc's opening brief:

> [m]ore than ten million end users at more than 31,000 organizations ranging from small businesses to the Fortune 500 use Symantec Hosted Services to secure and manage information stored on endpoints and delivered via email, Web, and instant messaging.

Bostock Decl., Ex. 17, p. 1.

Thus, the location of many documents may be in this District, but they can be accessed easily from Symantec's numerous facilities in Texas. Further, Symantec does not deny that it is sitting on over $2.5 billion in cash and equivalents that will be available to minimize any inconvenience it may face litigating in Texas where it has voluntarily litigated in the past. Uniloc Opening Br., p. 13. As a result, this factor does not favor denying the present motion.[5/]

On pages 12-13, Symantec/XtreamLok argues that the cost of flying its witnesses from this District to Texas for trial would be costly because most of the "developers who develop the accused technology in the United States actually work in Symantec's Los Angeles County facility." Symantec/XtreamLok, however, does not identify a single such witness. Accordingly, its argument on this point should be disregarded. *See, e.g,* *Martin v. Spring Break '83 Prods. LLC*, No. 09-cv-6104, 2009 WL 4673918, at *3 (C.D. Cal. Dec. 3, 2009) (note that "a large majority of the witnesses needed in this case . . . reside in Louisiana" is a "general statement [that] does not provide the Court with evidence that specific witnesses would be inconvenienced if the case is transferred"); *Szegedy v. Keystone Food Prods., Inc.*, No. 08-cv-5369. 2009 WL 2767683, at *4 (C.D. Cal. Aug.26, 2009) ("though plaintiff states generally that she plans to call California-based employees of VMG Partners as witnesses . . . plaintiff has not specifically identified relevant witnesses").

On pages 9 and 12 of its opening brief, Uniloc pointed out that Symantec could not complain about the convenience *vel non* of litigating a patent case in Texas because Symantec itself previously brought such a case in the Eastern District of Texas against a defendant based in Utah. On page 13 of its opposition, Symantec/XtreamLok argues that each transfer motion must be give case-by-case consideration and that, somehow, its prior filing in Texas is irrelevant. Uniloc submits that Symantec/XtreamLok's prior filing in Texas directly contradicts its

[5/] As noted on page 12 of Symantec/XtreamLok's brief, Uniloc's documents from the prior litigation regarding the '216 patent are located in Texas.

present argument that it is not convenient for Symantec/XtreamLok and its witnesses to litigate a patent case in Texas.

E. ABILITY TO ENFORCE A JUDGMENT/OBSTACLES TO A FAIR TRIAL/CONFLICT OF LAWS

On page 14, Symantec/XtreamLok agrees with Uniloc that these factors are all neutral in this case. Symantec/XtreamLok points out that its common law claim for Money Paid might generate an issue of local law. This claim, however, rises and falls on the patent claims.

F. CONVENIENCE OF THE PARTIES

On pages 14-15, Symantec/XtreamLok argues that the convenience of the parties disfavors transfer. It states that Symantec has a place of business in this forum, but acknowledges that Uniloc has places of business in Texas. Symantec/XtreamLok fails to identify a single witness for whom Texas would be an inconvenient forum. On pages 13-14 of its opening brief, Uniloc pointed out that: (1) Symantec maintains substantial facilities in Austin, Dallas and Houston, Texas; (2) Symantec is registered to do business in Texas; and (3) Symantec maintains training facilities in Dallas and Houston to which it invites students to travel (to Texas) for training. In its opposition, Symantec/XtreamLok does not deny any of this. Accordingly, and when Symantec's prior filing of a patent case in the Eastern District is considered, Symantec/XtreamLok's argument that Texas is inconvenient should be dismissed.

G. CONVENIENCE OF THE WITNESSES

As noted by Symantec/XtreamLok, Uniloc stated that its CEO and expert witnesses would be willing to travel to Texas for trial. In response, on page 16, Symantec/XtreamLok argues that "nearly all of Symantec's developers of the accused technology reside in or around either Los Angeles County or Sydney, Australia." Symantec/XtreamLok, however, does not identify a single such witness by name. Accordingly, this assertion should be disregarded. *Martin v. Spring Break '83*

Productions, 2009 WL 4673918, at *3; *Szegedy v. Keystone Food Prods.*, 2009 WL 2767683, at *4. On page 16, Symantec/XtreamLok also argues that the attorney who prosecuted the '216 patent lives in this District. This attorney (Jerry Sewell) did not testify at the prior trial in the *Uniloc v. Microsoft* case. Second Bostock Decl., ¶ 4. Accordingly, Mr. Sewell is not likely to testify at trial in this case, whether tried here or in Texas. On pages 16-17, Symantec/XtreamLok argues that Professor Hellman lives here and is expected to testify at trial on the issue of prior art. Symantec/XtreamLok should not be heard to claim inconvenience on behalf of Professor Hellman, particularly when Professor Hellman traveled to Rhode Island to testify on behalf of Microsoft. Second Bostock Decl., ¶ 4. Texas is closer than Rhode Island to this forum where Professor Hellman resides. Thus, the location of witnesses does not favor denying the present motion.

H. ACCESSIBLITY TO RECORDS AND DOCUMENTS

As indicated above, Symantec/XtreamLok can easily access its records and documents in Texas.

I. LOCATION WHERE CONDUCT COMPLAINED OF OCCURRED

On pages 18-19, Symantec/XtreamLok argues that "development of the accused technology actually does take place in this district, and therefore many potential witnesses are here as well." Symantec/XtreamLok does not deny, however, that it sells the actual, developed infringing technology throughout the U.S., including in Texas, irrespective of where the products are developed. Once again, Symantec/XtreamLok argues that witnesses to this development reside in this District but fails to identify by name a single "potential witness" to which it refers. Accordingly, this factor is neutral, as stated in Uniloc's opening brief.

J. APPLICATION OF EACH FORUM'S SUBSTANTIVE LAW

On page 19, Symantec/XtreamLok agrees with Uniloc that the patent issues that are the subject of the present motion will be resolved under federal patent law.

Symantec/XtreamLok points out that its common law claim for Money Paid might generate an issue of local law. This claim, however, rises and falls on the federal patent claims. Thus, this factor does not warrant denying the motion to transfer the patent claims.

K. AVAILABILITY OF COMPULSORY PROCESS

On pages 19-20, Symantec/XtreamLok argues that the availability of compulsory process to compel attendance of unwilling non-party witnesses to testify in this Court favors denying Uniloc's motion. According to Symantec/XtreamLok, these witnesses include "the former Symantec developers of the accused technology who still reside in the Central District of California, and the law firm and lead attorney who prosecuted the asserted patent." As none of these "former Symantec developers" is specifically identified, this argument should be rejected. *Martin v. Spring Break '83 Productions*, 2009 WL 4673918, at *3; *Szegedy v. Keystone Food Prods.*, 2009 WL 2767683, at *4. Lastly, Professor Hellman is unlikely to require service of compulsory process as he voluntarily flew to Rhode Island to testify as a fact witness for Microsoft at the prior trial in the *Uniloc v. Microsoft* case. Thus, this factor does not warrant denying the motion to transfer the patent claims.

L. THE FIRST-TO-FILE RULE APPLIES

Finally, on pages 20-22 of its brief, Symantec/XtreamLok all but concedes that the first-to-file rule applies, but effectively argues that this Court should use its discretion and not apply the rule. Symantec/XtreamLok half-heartedly asserts that this Court is the first court with jurisdiction over this dispute due to the prior litigation between the parties. The first-to-file rule, however, is a mechanism, of establishing which of two pending cases should go forward. *See, e.g.*, *Manuel v. Convergys*, 430 F.3d at 1135 ("[w]here two actions involving overlapping issues and parties are pending in two federal courts, there is a strong presumption across the federal circuits that favors the forum of the first-filed suit under the first-filed rule"). The 2008 case between these parties was dismissed in November 2009. As a result, it

was not co-pending with either this case or the Texas case and, therefore, is not a candidate for the first-filed case analysis. Symantec/XtreamLok also points out that XtreamLok and Uniloc Corporation Pty Ltd. are not parties to the Texas case. This argument ignores the law that the first-to-file rule does not require that the parties, or the claims, in the two actions be identical, so long as they are substantially similar. *Inherent.com v. Martindale-Hubbell*, 420 F. Supp. 2d at 1097. As a result, Symantec/XtreamLok's argument should be rejected.

Additionally, Symantec/XtreamLok argues that the Court should exercise discretion and deny application of the first-to-file rule because of the forum selection clause in the prior litigation and a purported agreement to litigate the patent claims in this case. According to Symantec/XtreamLok, Uniloc has "acted in bad faith" by moving to transfer and asserting that the first-to-file rule applies. As Uniloc has set forth above, the forum selection provision in the cancelled agreement is no longer applicable. Moreover, Uniloc did not agree to resolve the patent claims in this case rather than in the first-filed Texas case. Accordingly, there is no good reason for ignoring the first-to-file rule in this case.

When two actions involving overlapping issues and parties are pending in two different federal courts, there is a "strong presumption across the federal circuits that favors the forum of the first-filed suit under the first filed rule." *Manuel v. Convergys Corp.*, 430 F.3d 1132, 1135 (11th Cir. 2005); *Alltrade, Inc. v. Uniweld Products, Inc.*, 946 F.2d 622, 625 (9th Cir. 1991). The purpose of the rule is to promote efficiency and avoid duplicative litigation. *Inherent.com v. Martindale-Hubbell*, 420 F. Supp.2d at 1097. Accordingly, as this is the second-filed suit, the Court should transfer the patent claims herein to Texas or dismiss them in favor of the Texas proceedings between Uniloc and Symantec.

Symantec itself has previously urged adherence to the first-filed rule in a case in Texas. Symantec was a defendant in *Information Protection and Authentication of Texas, LLC v. Symantec Corp. and PC Tools , Inc.*, Civil Action No. 08-cv-484

before Judge Folsom. On March 27, 2009, Symantec filed an emergency motion in that case requesting that plaintiff and third party defendant be enjoined from litigating a later-filed case involving the same patent in the Southern District of Florida. *See* Second Bostock Decl., Ex. 1. As Symantec argued in its brief therein, "Courts routinely apply the first-to-file rule if the issues in the initial and subsequent actions are 'duplicative' or 'likely to overlap to a substantial degree.'" *Id.*, p. 6 (citing *California Sec. Co-Op, Inc. v. Multimedia Cablevision, Inc.*, 897 F. Supp. 316, 317 (E.D. Tex. 1995) ("*California Security*")). Uniloc agrees. As this case and the Texas case involve the infringement and validity of the '216 patent, the present motion to transfer should be granted for the reasons Symantec previously argued in *California Security*. Symantec also argued in that case that "[i]n patent cases, the rule also serves to avoid the 'untenable prospect' of conflicting claim constructions, which are highly relevant to issues of infringement and invalidity." Second Bostock Decl., Ex. 1, p. 6 (citations omitted). Uniloc agrees. Thus, Symantec's opposition to this motion should be rejecting this potential "untenable result."

II. CONCLUSION

For the reasons set for above and in Uniloc's opening brief, Uniloc request that the present motion be granted and the patent claims be transferred to the Eastern District of Texas or, in the alternative, be dismissed.

Dated: December 6, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is 2029 Century Park East, Suite 1370, Los Angeles, California 90067.

I hereby certify that on December 6, 2010, I electronically filed

REPLY MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF DEFENDANTS/COUNTERCLAIMANTS' MOTION TO TRANSFER VENUE TO THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF TEXAS OR, IN THE ALTERNATIVE, TO DISMISS

with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all CM/ECF registered parties.

I declare under penalty of perjury that the foregoing is true and correct. Executed on December 6, 2010, at Los Angeles, California.

Jazmin Leon

JAZMIN LEON