

Exhibit O

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8 **UNITED STATES DISTRICT COURT**
9 **CENTRAL DISTRICT OF CALIFORNIA**

10 SYMANTEC CORPORATION and
11 XTREAMLOK PTY,

12 Plaintiffs,

13 vs.

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

16 Defendants.

Case No. SACV10-01483 DOC
(MLGx)

**DEFENDANTS/
COUNTERCLAIMANTS'
OPPOSITION TO PLAINTIFFS'
MOTION TO ENJOIN UNILOC
FROM PROCEEDING WITH
DUPLICATIVE ACTION AS
AGAINST SYMANTEC, AND TO
REQUIRE UNILOC TO DISMISS
SYMANTEC AS A DEFENDANT
FROM THAT ACTION**

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

24 Counterclaimants,

25 vs.

26 SYMANTEC CORPORATION and
XTREAMLOK PTY,

27 Counterdefendants.

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

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1 Defendants Uniloc USA, Inc., Uniloc (Singapore) Private Limited and Uniloc
2 Corporation Pty. Limited (together “Uniloc”) respectfully submit this brief in
3 opposition to the motion of plaintiffs, Symantec Corporation and XstreamLoc Pty, to
4 enjoin Uniloc from proceeding with a first-filed action against Symantec in Texas and
5 to dismiss Symantec as a defendant in that action. For the reasons set forth below,
6 Uniloc requests that Symantec/XstreamLok’s motion be denied.

7 **I. BACKGROUND**

8 Uniloc USA, Inc. is a Texas Limited Liability Company with an office in
9 Plano, Texas and a principal place of business in Irvine, California. Dkt. No. 15, ¶ 1.
10 Uniloc (Singapore) Private Limited is a Singapore corporation located in Singapore.
11 *Id.*, ¶ 2. Uniloc Corporation PTY Limited is an Australian corporation. *Id.*, ¶ 3.
12 Uniloc (Singapore) Private Limited is the owner of U.S. Patent No. 5,490,216 (“the
13 ‘216 patent”). *See* Declaration of Dean G. Bostock (“Bostock Decl.”), Ex. 1, p. 1.
14 Uniloc USA, Inc. is the exclusive licensee under the ‘216 patent in the United States.
15 Dkt. No. 15, ¶ 10. According to the Complaint, Symantec Corporation is a Delaware
16 corporation having a principal place of business in Mountain View, California, and
17 XstreamLok Ltd. is an Australian company and an indirect subsidiary of Symantec.
18 Dkt. No. 1, ¶¶ 1-2.

19 The ‘216 patent relates to a software registration system that is used to prevent
20 the unauthorized use of software. *See Uniloc USA, Inc. v. Microsoft Corp.*, 447 F.
21 Supp.2d 177, 180 (D.R.I. 2006); *Uniloc USA, Inc. v. Microsoft Corp.*, 290 Fed. Appx.
22 337, 339 (Fed. Cir. 2008) (unpublished). The subject matter claimed in the ‘216
23 patent was invented by the sole inventor named on the patent, Frederic B.
24 Richardson, in 1992. *See* Bostock Decl., Ex. 1, p. 1. At the time, Mr. Richardson
25 was living in his native Australia. Subsequently, Mr. Richardson formed, and
26 assigned his patent rights to, Uniloc (Singapore) Private Limited, which is still the
27 owner of the ‘216 patent. *See id.* In the mid-1990’s, Mr. Richardson contacted
28 Microsoft Corporation’s Australian affiliate to determine whether or not Microsoft

1 had any interest in his invention. Microsoft expressed an interest and Uniloc
2 provided Microsoft with its product for Microsoft to sample, with an express
3 prohibition against Microsoft reverse engineering the software. *See* Bostock Decl.,
4 Ex. 2, ¶ 8. Thereafter, Uniloc learned that Microsoft had violated its agreement not to
5 reverse engineer the Uniloc software and had copied Uniloc’s invention when
6 Microsoft implemented its own registration system known as “Product Activation.”
7 As a result, in 2003, Uniloc brought suit against Microsoft for infringement of the
8 ‘216 patent. After more than five years of litigation, the case went to trial in Rhode
9 Island in March, 2009. The jury returned a verdict that Microsoft had willfully
10 infringed the patent and awarded damages in the amount of \$388 million. *See*
11 Bostock Decl., Ex. 3. Microsoft thereafter prevailed on judgment as a matter of law,
12 the verdict was vacated, and that case is now on appeal before the Federal Circuit.

13 In 2002, Uniloc granted XstreamLok a license under the ‘216 patent.
14 Subsequent to the grant of that license, Symantec acquired XstreamLok. Following
15 that acquisition, Uniloc believed that XstreamLok/Symantec were under-reporting the
16 royalties due pursuant to the license. As a result, Uniloc filed suit against Symantec
17 and XstreamLok in this Court in May 2008 alleging infringement of the ‘216 patent,
18 unfair competition and breach of contract. *See* Bostock Decl., Ex. 4. In October
19 2008, the parties agreed to arbitrate the claim for breach of the license agreement and
20 stipulated to stay that case pending resolution of the arbitration proceedings. More
21 particularly, the parties stipulated that:

22 (3) This Court shall retain jurisdiction over Uniloc’s Patent
23 Infringement and Unfair Competition Claims, and shall re-activate the
24 matter upon application of the parties upon completion of the
25 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.

26 *See* Bostock Decl., Ex. 5, pp 2-3. This Stipulation was embodied in the Order
27 staying the case pending arbitration. *See id*, Ex. 6, p. 1, ¶ 3.

1 As stated in Symantec/XtreamLok's Complaint herein, in September 2009, the
2 Arbitrator determined that royalties had been underpaid by Syamntec/XtreamLok
3 and, as a result, the License Agreement had been breached and terminated. *See* Dkt.
4 No. 1, ¶ 12. The Arbitrator also ordered XtreamLok to pay Uniloc the unpaid
5 royalties that were due and payable. *Id.* The Arbitrator's findings were subject to a
6 determination to be made subsequently on whether or not the products on which
7 royalties had been underpaid were covered by the '216 patent. *Id.* Thereafter,
8 however, neither side attempted to reactivate that case. Accordingly, Uniloc
9 dismissed the case pursuant to Fed. R. Civ. P. 41(a). *Id.*, ¶ 13.

10 On September 14, 2010, Uniloc (Singapore) Private Limited and Uniloc USA,
11 Inc. brought suit for infringement of the '216 patent against Symantec and others in
12 the Eastern District of Texas. *See* Bostock Decl., Ex. 7. In response, on October 1,
13 2010, Symantec and XtreamLok filed the Complaint herein requesting *inter alia*
14 declaratory judgments that they do not infringe the '216 patent and that the '216
15 patent is invalid. *See* Dkt. No. 1, ¶¶ 17-22. In their Complaint, Symantec and
16 XtreamLok argue that a jurisdiction retention clause contained in the dismissal of a
17 prior case between the parties hereto in this Court requires that the patent dispute
18 between them regarding the '216 patent be resolved in this Court. *See id.*, ¶¶ 9-16.
19 As set forth below, Uniloc asserts that this provision is not controlling in light of
20 intervening acts and a recent decision of the Court of Appeals for the Federal Circuit.
21 *See In re Oracle Corp.*, 2010 WL 4286372 (Fed. Cir. Nov. 1, 2010) (unpublished).

22 **II. LEGAL STANDARDS**

23 When two actions involving overlapping issues and parties are pending in two
24 different federal courts, there is a "strong presumption across the federal circuits that
25 favors the forum of the first-filed suit under the first filed rule." *See, e.g., Manuel v.*
26 *Convergys Corp.*, 430 F.3d 1132, 1135 (11th Cir. 2005); *Alltrade, Inc. v. Uniweld*
27 *Products, Inc.*, 946 F.2d 622, 625 (9th Cir. 1991). The two actions need not be
28 identical so long as they are substantially similar. *Inherent.com v. Martindale-*

1 Hubbell, 420 F. Supp. 2d 1093, 1097 (N.D. Cal. 2006). The purpose of the rule is to
2 promote efficiency and avoid duplicative litigation. *Id.* If the rule applies, the
3 second-filed court “has discretion to transfer, stay, or dismiss the second case in the
4 interest of efficiency and judicial economy.” *Cedars-Sinai Med. Ctr. v. Shalala*, 125
5 F.3d 765, 769 (9th Cir. 1997).

6 **III. RESPONSE TO PLAINTFFS’ BACKGROUND STATEMENT**

7 Uniloc submits the following response to Symantec/XtreamLok’s Background
8 statement.

9
10 **A. THE PARTIES HAVE NOT PREVIOUSLY LITIGATED THIS**
11 **PATENT DISPUTE**

12 On pages 2-3 of their brief, Symantec/XtreamLok argue that dismissal is
13 warranted because this patent dispute has already been litigated in this Court.
14 Symantec is mistaken. Certainly, as Symantec states, Uniloc brought suit against
15 Symantec and its subsidiary XtreamLok for, *inter alia*, infringement of the ‘216
16 patent in 2008 in this Court. However, as admitted in Symantec/XtreamLok’s
17 Complaint herein, the patent infringement issue was never tried in that case. The
18 only issue resolved in that case was the Arbitrator’s decision that Symantec/
19 XtreamLok had breached the License Agreement with Uniloc by under-paying
20 royalties. *See* Dkt. No. 1, ¶12. The Arbitrator specifically stated that she was not
21 resolving the underlying patent dispute, which was left for the Court to decide. *Id.*
22 This Court never decided the patent issue because, once it prevailed on the contract
23 issue as Symantec/XtreamLok states, Uniloc voluntarily dismissed the case pursuant
24 to Fed. R. Civ. P. 41. Thus, contrary to Symantec’s argument, the parties did not
25 already litigate the patent-in-suit in this Court.

26 **B. THE PARTIES’ VENUE STIPULATION IS INAPPLICABLE**

27 Symantec next argues that the parties stipulated in a license agreement between
28 Uniloc and Symantec’s subsidiary XtreamLok that the Central District of California

1 would have exclusive jurisdiction over any action arising out of the agreement.
2 Symantec fails to mention a fact that contradicts its argument. As stated above, the
3 Arbitrator found that Symantec had breached the license and the license had,
4 therefore, terminated. As a result, the venue clause no longer applies.

5 **C. SYMANTEC DID NOT REACTIVATE THE 2008 CASE**

6 Symantec next argues that this Court ordered that it would retain jurisdiction
7 over Uniloc's patent infringement claim. As Symantec recognizes, however, the stay
8 order issued in the prior case in this Court stated that the Court "shall re-activate the
9 matter upon application of the parties upon completion of the arbitration." Notably,
10 Symantec did not attempt to re-activate the 2008 case. Neither did Uniloc. Instead,
11 Symantec did nothing after the 2008 case was dismissed in November 2009 until two
12 weeks after Uniloc filed this case on September 14, 2010. Even then, Symantec did
13 not re-activate the 2008 case. Instead, recognizing that the venue stipulation was no
14 longer valid due to the termination of the license agreement with Uniloc,
15 Symantec/XstreamLok filed this new case. Thus, not only was the venue stipulation
16 voided by the termination of the license agreement, but Symantec also waived that
17 provision by failing to re-activate the 2008 case and filing this new case.

18 **D. THE ARBITRATION DID NOT RESOLVE THE PATENT**
19 **DISPUTE**

20 In part D of its brief, Symantec states that the prior arbitration did not resolve
21 the patent dispute between the parties. Uniloc agrees. Hence, Symantec's argument
22 in section A of its brief that the parties have already litigated the patent-in-suit in this
23 Court is admittedly incorrect as set forth above.

24 **E. SYMANTEC'S FORUM SHOPPING**

25 On page 5 of its brief, Symantec argues that Uniloc incorporated in Texas and
26 is forum-shopping in Texas. This argument is a smokescreen designed to divert
27 attention away from Symantec's blatant attempt to forum-shop. As stated above,
28 Uniloc dismissed the 2008 California case in November 2009. Uniloc filed its case

1 against Symantec in Texas on September 14, 2010. Two weeks later, on October 1,
2 2010, Symantec filed this retaliatory declaratory judgment case against Uniloc. Thus,
3 Symantec did nothing for almost a year after the dismissal of the 2008 case. Only
4 after Uniloc filed the case in Texas did Symantec file its complaint in this Court.
5 Accordingly, it is Symantec that is forum-shopping, not Uniloc.

6 **F. UNILOC DID NOT AGREE TO DISMISS SYMANTEC FROM**
7 **THE TEXAS CASE**

8 On pages 5-6 of its brief, Symantec erroneously argues that Uniloc agreed in
9 writing to dismiss its Texas case against Symantec. Counsel for Uniloc indicated in a
10 discussion with counsel for Symantec that he (counsel for Uniloc) had recently met
11 with Uniloc and that, as a result of that visit, understood that Uniloc's intent was to
12 file a patent suit in California and that Symantec could then dismiss this case. This is
13 confirmed by the email that Symantec relies upon wherein counsel for Uniloc
14 indicated that was his understanding of Uniloc's "intent." *See* Flagel Decl., Ex. G.
15 Counsel for Uniloc did not agree or promise, in writing or otherwise, that Uniloc had
16 finally agreed upon such actions. Ultimately, in subsequent discussions with Uniloc,
17 counsel for Uniloc was informed that he should file a patent infringement
18 counterclaim to Symantec's complaint herein, assert that venue here was not proper
19 due to the pendency of this first-filed case in Texas, and oppose any motion by
20 Symantec to dismiss the Texas case. Bostock Decl., ¶ 11. That is what Uniloc has
21 done.

22 **IV. ARGUMENT**

23 In their Complaint in this case, Symantec/XtreamLok deny infringement and
24 assert that the claims of the '216 patent are invalid. *See* Dkt. No. 1, ¶¶ 17-22. Uniloc
25 counterclaims that Symantec/XtreamLok infringed the '216 patent and that such
26 infringement has caused damage to Uniloc. *See* Dkt. No. 15, ¶¶ 8-13. To date, this
27 Court has not issued a Scheduling Order or otherwise become involved substantively
28 in this patent dispute. In contrast, prior to Symantec/XtreamLok filing the Complaint

1 herein, Uniloc filed seven cases in the Eastern District of Texas alleging that
2 numerous defendants (including Symantec) have infringed the '216 patent.
3 Scheduling Orders have been entered in three of the Texas cases. Pursuant thereto,
4 claim construction briefing is ongoing, document production has been completed,
5 depositions have been taken, a *Markman* hearing is scheduled for February 3, 2011,
6 and trial has been scheduled to commence on November 14, 2011. *See* Bostock
7 Decl., Ex. 8, pp. 1-5. It would make no sense to try Uniloc's patent claims against
8 Symantec in a separate trial in this Court when the case is going to trial against the
9 other defendants in Texas. "The presence of related litigation in another venue
10 weighs heavily in favor of transfer," *Schott v. Ivy Asset Management Corp.*, No. 10-
11 cv -1562, 2010 WL 4117467, at *5 (N.D. Cal. Oct. 19, 2010) (citations omitted), as
12 Uniloc has requested in its pending motion to transfer. Thus, the presence of the
13 pending first-filed Texas case weighs heavily in favor of denying
14 Symantec/XtreamLok's motion and favors Uniloc's motion to transfer because it
15 would promote judicial economy.

16 The nature of the patent relief requested by Symantec/XtreamLok in this case
17 also favors denyin Symantec/XtreamLok's motion and transferring to Texas. In its
18 Texas complaint against Symantec, Uniloc affirmatively alleges that Symantec has
19 infringed the '216 patent. In contrast, the patent claims asserted by
20 Symantec/XtreamLok in this case (Counts I and II) are requests for declaratory
21 judgments that the '216 patent is not infringed and is invalid. *See*, Dkt. No. 1, ¶¶ 17-
22 22. "[D]istrict courts possess discretion in determining whether and when to
23 entertain an action under the Declaratory Judgment Act, even when the suit otherwise
24 satisfies subject matter jurisdictional prerequisites." *Wilton v. Seven Falls Co.*, 515
25 U.S. 277, 282, 115 S. Ct. 2137, 132 L. Ed. 2d 214 (1995). The Texas Court has no
26 such discretion to decline to hear Uniloc's infringement claims. Accordingly, this
27 Court should exercise its discretion and decline to hear Symantec/XtreamLok's
28 declaratory judgment claims for the reasons stated above.

1 Typically the plaintiff's choice of forum is accorded weight. *See, e.g., Irvine*
2 *Pharm. Services v. Arnold*, 2008 WL 4792513, at *3. A plaintiff's choice of forum,
3 however, is given diminished weight when the plaintiff files suit outside of its home
4 forum. *See, e.g., Garcia v. 3M Co.*, No. 09-cv -1943, 2009 WL 3837243, at *2 (N.D.
5 Cal. Nov. 16, 2009) (citation omitted). As Symantec is located in the Northern
6 District, its choice of filing in this District is given little weight.

7 In any event, it is obvious that Symantec is forum-shopping. The prior
8 litigation between these parties was dismissed in November 2009. Uniloc filed its
9 patent suit against Symantec (and others) in Texas on September 14, 2010.
10 Symantec/XstreamLok did not file their Complaint in this case until October 1, 2010,
11 i.e. more than a year after the prior litigation terminated and only two weeks after
12 Uniloc filed in Texas. Thus, it is apparent that Symantec/XstreamLok filed this
13 retaliatory suit in an effort to forum-shop its way out of Texas. Not surprisingly, a
14 court "should disregard a plaintiff's forum choice where the suit is a result of forum
15 shopping." *Garcia v. 3M*, 2009 WL 3837243, at *2 (citation omitted). Thus,
16 Symantec/XstreamLok's choice of this forum should be disregarded.

17 Symantec/XstreamLok will undoubtedly argue that it filed suit in this forum
18 because this Court retained jurisdiction over the patent issue in the prior case between
19 these parties. The pertinent provision of the dismissal Order is as follows:

20 (3) This Court shall retain jurisdiction over Uniloc's Patent
21 Infringement and Unfair Competition Claims, and shall re-activate the
22 matter upon application of the parties upon completion of the arbitration
23 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.

24 Bostock Decl., Ex. 6, p. 1 (emphasis added).

25 As conceded in Symantec/XstreamLok's Complaint herein, in September 2009,
26 the Arbitrator determined the License Agreement has been terminated. *See* Dkt. No.
27 1, ¶ 12. Accordingly, this provision no longer applies. In the *In re Oracle* decision
28 referenced above, the Federal Circuit has determined that, even were such a provision

1 still in effect, it is not always controlling. See *In re Oracle Corp.*, 2010 WL 4286372,
2 at *2 (“district court’s sole reliance on the parties’ private expression of venue choice
3 and failure to provide a meaningful evaluation of the § 1404(a) factors was plainly
4 incorrect as a matter of law”). Moreover, as neither party, let alone all parties, moved
5 to reactivate, Uniloc dismissed that case. Symantec/XtreamLok did not cry foul or
6 attempt to reactivate the prior case in order to resolve this patent dispute.

7 Symantec/XtreamLok did nothing until filing this present new case in response to the
8 Texas case filed against it in September 2010. Thus, Symantec/XtreamLok elected to
9 forego reactivating the prior case and to pursue instead the patent issues in a new
10 case. Accordingly, the above provision is not controlling in this case.

11 The first-filed rule also demands that Symantec/XtreamLok’s motion be
12 denied. Uniloc’s Texas case against Symantec was filed two weeks prior to
13 Symantec/XtreamLok filing this case. As a result, Uniloc’s Texas case is the “first-
14 filed.” When two actions involving overlapping issues and parties are pending in two
15 different federal courts, there is a “strong presumption across the federal circuits that
16 favors the forum of the first-filed suit under the first filed rule.” *Manuel v.*
17 *Convergys*, 430 F.3d at 1135; *Alltrade v. Uniweld Prods.*, 946 F.2d at 625. The two
18 actions need not be identical so long as they are substantially similar. *Inherent.com v.*
19 *Martindale-Hubbell*, 420 F. Supp.2d at 1097. The purpose of the rule is to promote
20 efficiency and avoid duplicative litigation. *Id.* Accordingly, as this is the second-
21 filed suit, the Court should deny Symantec/Xtreamlok’s motion.

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1 **V. CONCLUSION**

2 For the reasons set forth above, Uniloc requests that Symantec/XtreamLok's
3 motion be denied.

4 Dated: November 29, 2010

Respectfully submitted,

5 MINTZ LEVIN COHN FERRIS
6 GLOVSKY AND POPEO P.C.

7 

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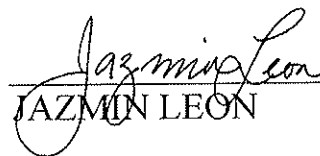
1 CERTIFICATE OF SERVICE

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

5 I hereby certify that on November 29, 2010, I electronically filed
6 **DEFENDANTS/COUNTERCLAIMANTS' OPPOSITION TO PLAINTIFFS'**
7 **MOTION TO ENJOIN UNILOC FROM PROCEEDING WITH**
8 **DUPLICATIVE ACTION AS AGAINST SYMANTEC, AND TO REQUIRE**
9 **UNILOC TO DISMISS SYMANTEC AS A DEFENDANT FROM THAT**
10 **ACTION**

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

13 I declare under penalty of perjury that the foregoing is true and correct.
14 Executed on November 29, 2010, at Los Angeles, California.

15 
16 JAZMIN LEON
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