Exhibit P

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14 XtreamLok, Pty

15   UNITED STATES DISTRICT COURT
                 CENTRAL DISTRICT OF CALIFORNIA
16   SOUTHERN DIVISION

17
    SYMANTEC CORPORATION and   CASE NO. SACV10-01483 DOC (MLGx)
18 XTREAMLOK, PTY,
                                      REPLY IN SUPPORT OF
19   Plaintiffs,   **SYMANTEC AND XTREAMLOK'S**
                                      MOTION TO ENJOIN UNILOC
20   v.   **FROM PROCEEDING WITH**
                                      DUPLICATIVE ACTION AS
21 UNILOC USA, INC., UNILOC   **AGAINST SYMANTEC, AND TO**
    (SINGAPORE) PRIVATE LIMITED   **REQUIRE UNILOC TO DISMISS**
22 and UNILOC CORPORATION PTY   **SYMANTEC AS A DEFENDANT**
    LIMITED,   **FROM THAT ACTION**
23   Defendants.
24   **Hearing Date: December 20, 2010**
25   **Time: 8:30 AM**
                                      Place: Courtroom 9D
26   **Judge: Hon. David O. Carter**
27 AND RELATED COUNTERCLAIMS
28

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SYMANTEC / XTREAMLOK REPLY

None of Uniloc's arguments in opposition to Symantec and XtreamLok's motion has merit. Accordingly, the Court should enjoin Uniloc from prosecuting the Texas action as against Symantec and require Uniloc to dismiss Symantec from that action.

I.   UNILOC AGREED TO DISMISS SYMANTEC FROM THE TEXAS ACTION

Although Uniloc has repeatedly recognized and agreed that its dispute with Symantec belongs in this Court, it now disputes the applicability, or the existence, of such agreements. Perhaps its most remarkable claim is that it did not agree to dismiss Symantec from the Texas action. (Dkt. No. 21 ("Opp.") at 6; Dkt No. 21-1 ("Bostock Decl.") ¶ 11.) The email correspondence between the parties' counsel demonstrates otherwise:

- Symantec's lead counsel wrote to Uniloc's lead counsel with the following question: "do you have a final answer for us as to whether Uniloc will agree to dismiss its action against Symantec in Texas?"
- The response from Uniloc's counsel: "We think it best for Uniloc to file a related complaint in CA and then *to dismiss in TX*."
- Symantec's counsel then replied, noting: "We are presuming that Uniloc intends to file in California before our response is due in Texas, and that *you will thus dismiss the Texas action* before we have to respond."
- The response from Uniloc's counsel: "*You[r] presumptions are correct*."

(*See* Dkt. No. 18-9 (emphases added).)

Given that this correspondence is so clear, it is difficult to understand Uniloc's assertion that it did not agree to dismiss Symantec from the Texas action. Because Uniloc *did in fact agree* (as is unambiguously shown above) to dismiss Symantec from the Texas action, one of two things must be true: either (1) Uniloc's lead counsel, speaking on behalf of and after consulting with Uniloc,

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1   agreed that Uniloc would dismiss Symantec in Texas, but then was instructed by

2   Uniloc to attempt to renege on that agreement; or (2) Uniloc's lead counsel agreed,

3   on behalf of, but not having consulted with, Uniloc, that Uniloc would dismiss

4   Symantec in Texas, and then was instructed by Uniloc to attempt to renege on that

5   agreement. Either way, through its lead counsel, Uniloc made not one, but two

6   separate representations that Uniloc would dismiss Symantec from the Texas

7   action.[1] Uniloc's argument to the contrary simply is disingenuous.

8   **II.   THE FORUM SELECTION CLAUSE APPLIES**

9   This dispute began in 2008, when Uniloc sued Symantec and XtreamLok in

10 this forum based on the 2002 Uniloc / XtreamLok license agreement, which

11 provides that the courts in Orange County, California have "***exclusive*** jurisdiction"

12 over "any action arising out of or relating to" the agreement, and the parties "***waive***

13 any other venue to which either party might be entitled." (Dkt. No. 18-3 at 4.)

14 Uniloc now argues that this forum selection clause "no longer applies" because the

15 arbitrator found that the agreement had terminated. (Opp. at 4-5.) It cites no

16 authority for this proposition. Indeed, the case law is to the contrary. *See, e.g.*,

17 *Water, Inc. v. Everpure, Inc.*, No. CV-08-218, 2008 U.S. Dist. LEXIS 71744, at

18 *10-11 (C.D. Cal. Aug. 4, 2008) (finding that the forum selection clause applied

19 despite Plaintiff's argument that the Agreement had been terminated prior to suit

20 and therefore "its claims [we]re not related to the Agreement"); *Mahoney v. DePuy*

21 *Orthopaedics, Inc.*, No. F-07-1321, 2007 U.S. Dist. LEXIS 85856, at *3, *22 (E.D.

22 Cal. Nov. 7, 2007) (despite the fact that the parties agreed to terminate an

23 agreement with a forum selection clause, the court found that "there is no dispute

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25 [1]   Mr. Bostock's declaration on this topic is not a model of clarity. While he
does appear to waive attorney-client privilege on this issue, the specific nature and
26 timing of his communications with his client is clearly incomplete. While it might
be of collateral interest to explore those communications further, the truth is that
27 the agreement is unambiguously confirmed in the emails.

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2   REPLY IN SUPPORT OF MOTION TO
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1   that the forum selection clause is presumptively valid"); *Advent Elecs., Inc. v.*

2   *Samsung Semiconductor, Inc.*, 709 F. Supp. 843, 846 (N.D. Ill. 1989) ("In the

3   absence of contractual language expressly or implicitly indicating the contrary, a

4   forum selection clause survives termination of the contract.") (citation omitted);

5   *AGR Fin., L.L.C. v. Ready Staffing, Inc.*, 99 F. Supp. 2d 399, 401 (S.D.N.Y. 2000)

6   ("Even if the Agreement was terminated, its forum selection clause would still be

7   effective [so long as] the 'jist' of plaintiff's claim involved" the agreement)

8   (citations omitted); *YWCA of U.S. v. HMC Entm't*, 1992 U.S. Dist. LEXIS 14713,

9   at *9-10 (S.D.N.Y. Sept. 23, 1992) (applying forum selection clause and rejecting

10 plaintiff's argument that the clause would not apply because "the contract expired

11 by its own terms"); 13-67 Corbin on Contracts § 67.2 (2010) ("Although

12 termination and cancellation of an agreement extinguish future obligations of both

13 parties to the agreement, neither termination nor cancellation affect those terms

14 that relate to the settlement of disputes or choice of law or forum selection

15 clauses."). The very purpose of a forum selection clause often is to litigate post-

16 termination disputes that relate to the subject matter of an agreement, which is the

17 case here. Termination of the agreement simply does not render the clause

18 ineffective.[2] Uniloc's argument to the contrary is wrong.

19 **III.   THE PARTIES' PRIOR STIPULATION, AND THIS COURT'S**

20 **ORDER, REMAIN IN EFFECT**

21   In addition to its attempt to (a) renege on its explicit agreement to dismiss

22 Symantec from the Texas action, and (b) ignore (without authority) the continuing

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24 ───────────────
    [2]   Uniloc also argues that the parties have not previously litigated this dispute.
25 (Opp. at 4.) But Uniloc recognizes, as it must, that it did file suit in 2008 alleging
    infringement of the '216 patent. Obviously, there has been no adjudication on the
26 merits of the infringement claim. That is precisely the subject of Symantec's
    motion – to require Uniloc to proceed on the merits in this forum, rather than in
27 Texas.
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applicability of the 2002 forum selection clause, Uniloc argues that the parties'

Stipulation and this Court's Order from the 2008 action are essentially a nullity.

Uniloc is wrong.

First, Uniloc contends that the Stipulation (in which it agreed that "***this***

Court will retain jurisdiction to decide Uniloc's claims for Patent Infringement")

and this Court's Order (that the Court "***shall retain jurisdiction over Uniloc's***

Patent Infringement . . . Claim[]") should not be enforced because Uniloc sued a

lot of other companies in the Eastern District of Texas and it would like to lump

Symantec into one of those cases along with eleven other companies unrelated to

Symantec. (Opp. at 6-7; *see also* Dkt. Nos. 18-5 (Stipulation), 18-6 (Order).)

Uniloc does not explain why or how its unilateral decision to do so would vitiate

the venue provision in the 2002 license agreement, the parties' Stipulation, or this

Court's Order. Instead, Uniloc simply rehashes the same misguided argument

from its Motion to Transfer/Dismiss that a transfer to Texas "would promote

judicial economy." (Opp. at 7.) However, as set forth in Symantec/XtreamLok's

opposition to that motion, the reality is that those proceedings are in their infancy:

the Texas court has issued a schedule in three of the cases, and in those three cases,

only two out of 41 defendants remain.[3] Uniloc voluntarily dismissed all of the

defendants in the third case. Moreover, the action against Symantec in Texas is

improper in any event, because it joins multiple unrelated defendants and accuses

them of patent infringement by reason of selling multiple unrelated products, in

violation of the permissive joinder statute. (*See* Dkt. No. 20 at 5-7.)

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[3] While Uniloc has made conclusory assertions intimating that significant
work has been done in connection with those two remaining defendants, it is
telling that no detail whatsoever has been provided. Clearly, far more work has
been done in connection with the Uniloc/Microsoft litigation in Rhode Island.
Thus, if that were the standard, Uniloc should be seeking to transfer to Rhode
Island.

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1   Second, Uniloc makes the puzzling argument that "[t]he nature of the patent

2   relief requested by Symantec/XtreamLok in this case also favors denyin[g]

3   Symantec/XtreamLok's motion and transferring to Texas," because this Court has

4   discretion to determine whether to entertain the dispute under the Declaratory

5   Judgment Act whereas Uniloc's claims in Texas are affirmative claims for patent

6   infringement. (Opp. at 7.) Given that Uniloc has asserted affirmative

7   counterclaims for patent infringement in this action, it is hard to see how this

8   argument makes any sense at all. Moreover, again, Uniloc does not explain how or

9   why the "nature of the patent relief requested" would vitiate Uniloc's agreement to

10   dismiss Symantec from the Texas action, the venue provision in the 2002 license

11   agreement, the parties' Stipulation, or this Court's prior Order retaining

12   jurisdiction.

13   Third, Uniloc argues that Symantec's choice of forum should be "given little

14   weight" because Symantec is located in the Northern District of California. (Opp.

15   at 8.) Uniloc does not explain how or why Symantec's location would affect the

16   reality that this case had to be brought in this Court based on the prior agreements

17   and Order. In any event, Uniloc is simply wrong. In fact, not only is a plaintiff's

18   choice of forum accorded substantial deference, but it is entitled to even greater

19   deference where, as here, there is a significant connection between the forum and

20   the events underlying the claim. *See Gates Learjet Corp. v. Jensen*, 743 F.2d

21   1325, 1335 (9th Cir. 1984); *Amini Innovation Corp. v. JS Imps., Inc.*, 497 F. Supp.

22   2d 1093, 1110 (C.D. Cal. 2007). Here, although Symantec is headquartered in the

23   Northern District of California, the U.S. facility where the accused activation

24   technology is developed is located in the Central District of California. That is

25   where most of the knowledgeable witnesses reside, and it is also where Uniloc

26   USA maintains its principal place of business. (*See* Dkt. No. 20 at 8, 15-17; Dkt

27   No. 20-1 ¶¶ 6-7; Dkt. No. 13 ¶ 3.)

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1   Ironically, Uniloc asserts that "it is obvious that Symantec is forum-

2   shopping." (Opp. at 8; *see also id.* at 5-6.) But it is Uniloc that is forum shopping

3   and should be enjoined from doing so. After all, Uniloc agreed to a forum

4   selection clause specifying that this forum would have exclusive jurisdiction; filed

5   an action in this forum against Symantec and XtreamLok; stipulated that this Court

6   would retain jurisdiction over Uniloc's infringement claims after completion of an

7   arbitration between the parties (which this Court ordered); and voluntarily

8   dismissed its action after completion of the arbitration, only to re-file it against

9   Symantec months later in Texas.

10   Fourth, Uniloc argues that because the arbitrator found that the 2002 license

11   agreement had been terminated, somehow this Court's prior Order retaining

12   jurisdiction after completion of the arbitration "no longer applies." (Opp. at 8.)

13   This is clearly wrong, since this Court's Order is specifically directed to that

14   outcome: "This Court shall retain jurisdiction over Uniloc's Patent Infringement

15   and Unfair Competition Claims, and shall re-activate the matter upon application

16   of the parties upon completion of the arbitration . . . ." (Dkt. No. 18-6 at 2.) This

17   Court's retention of jurisdiction was not dependent upon the outcome of the

18   arbitration.

19   Fifth, Uniloc contends that, even if applicable, this Court's retention of

20   jurisdiction "is not always controlling." (Opp. at 8-9.) For support, Uniloc relies

21   on a non-precedential Federal Circuit decision directing the lower court to vacate

22   its order denying a motion to transfer venue, because the lower court relied solely

23   on "the parties' private expression of venue choice" and "fail[ed] to provide a

24   meaningful evaluation of the § 1404(a) factors." *See In re Oracle Corp.*, 2010

25   U.S. App. LEXIS 22829 (Fed. Cir. 2010). Uniloc does not explain why the *Oracle*

26   decision would affect this Court's retention of jurisdiction. All that the *Oracle*

27   decision stands for is that a forum selection clause is not dispositive in the transfer

28   analysis, and the other familiar factors under Section 1404(a) must be considered.

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1   That proposition is hardly remarkable, and Symantec and XtreamLok do not

2   contend otherwise. Moreover, the proposition is irrelevant to the instant motion,

3   which does not seek relief under Section 1404(a).

4   Sixth, Uniloc argues that this Court's retention of jurisdiction in fact "is not

5   controlling in this case." (Opp. at 5, 9.) In an apparent attempt to justify its own

6   forum shopping, Uniloc asserts that it was entitled to dismiss the case in this Court

7   and file a new action in Texas because this Court's Order required the parties to

8   apply to the Court to reactivate the prior action after completion of the arbitration,

9   and neither party did so. (*Id*.) However, nothing in the Court's Order required

10   immediacy, and the parties' failure to immediately reactivate the prior action does

11   not render this Court's retention of jurisdiction "not controlling." Moreover, it

12   does nothing to vitiate either (1) the forum selection clause in the

13   Uniloc/XtreamLok agreement, or (2) the parties' Stipulation in which they agreed

14   without condition or any "immediate reactivation" requirement that this Court

15   would retain jurisdiction to resolve any infringement or related disputes after

16   completion of the arbitration. Indeed, the Stipulation makes clear that "this court

17   will retain jurisdiction to decide Uniloc's claims for Patent Infringement and

18   Unfair Competition to the extent that either party contends any claims or issues

19   remain." (Dkt. 18-5 at 3:11-14.) The only logical conclusion to be drawn from

20   Uniloc's voluntary dismissal in this Court is that it believed that there were no

21   "claims or issues [that] remain[ed]." Now, apparently, it contends that claims did

22   remain, but they should be litigated elsewhere. That was precisely what the

23   parties' Stipulation and this Court's Order was intended to prevent.

24   Finally, Uniloc argues that this Court should ignore the prior agreements and

25   its Order because Uniloc was "first to file" in Texas. (Opp. at 9.) Again, Uniloc

26   does not explain how or why its unilateral 2010 decision to file in Texas would

27   affect the venue provision in the 2002 license agreement, the earlier-filed 2008

28   action, the parties' Stipulation, or this Court's prior Order retaining jurisdiction.

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7   REPLY IN SUPPORT OF MOTION TO
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1   The first-to-file rule simply does not apply in this case, for at least several reasons:

2   (1) this Court is the first court with jurisdiction over this action; (2) different

3   parties and issues are involved in the two lawsuits (*e.g.*, XtreamLok and Uniloc

4   Corporation Pty Limited are not parties to the Texas actions); and (3) the prior

5   history in this forum and Uniloc's maneuvering to get into Texas, and the

6   convenience of the parties and witnesses, does not support application of the rule.

7   (*See* Dkt. No. 20 at 20-22.) In any event, the first-to-file rule is discretionary and

8   frequently is disregarded when there has been forum shopping, such as Uniloc's.

9   *See Alltrade, Inc. v. Uniweld Prods., Inc.*, 946 F.2d 622, 625-28 (9th Cir. 1991).

10 **IV.   THE COURT SHOULD NOT COUNTENANCE UNILOC'S**

11 **BLATANT FORUM SHOPPING OR ALLOW IT TO PROCEED IN**

12 **THE EASTERN DISTRICT OF TEXAS**

13   There is no logical basis for the parties' disputes to be presented to a court in

14 the Eastern District of Texas. Uniloc's headquarters are in Irvine, six miles from

15 this courthouse. Uniloc's principals work out of that office. The Symantec facility

16 in the United States at which the product development has occurred is located in

17 the Central District of California, 42 miles from this courthouse. The relevant fact

18 witnesses are over 1,300 miles and a highly inconvenient day's travel from the

19 Eastern District of Texas. (*See, e.g.*, Dkt. No. 20 at 8, 15-17; Dkt. No. 20-1 ¶¶ 6-

20 7.) The Court should not indulge Uniloc's blatant forum shopping. Uniloc is

21 obligated to proceed – if at all – in this forum. Uniloc agreed to dismiss Symantec

22 from the Texas action. Uniloc should be held accountable for its agreements and

23 ordered to dismiss Symantec from the Texas action.

24 **V.   CONCLUSION**

25   For the all of the foregoing reasons and for the reasons set forth in their

26 Motion and in their Opposition to Uniloc's pending transfer motion, Symantec and

27 XtreamLok respectfully request that this Court enjoin Uniloc from prosecuting the

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1   Texas action as against Symantec and require Uniloc to dismiss Symantec from

2   that action.

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4   Dated: December 6, 2010   Respectfully submitted,
                                               LATHAM & WATKINS LLP
5

6   By ____/s/ Mark A. Flagel_____
                                                     Mark A. Flagel
7   Attorneys for Plaintiffs
                                               SYMANTEC CORPORATION AND
8   XTREAMLOK, PTY

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