UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 1:10-CIV-24063-MORENO

MOTOROLA MOBILITY, INC.,

Plaintiff,

vs.

MICROSOFT CORPORATION,

Defendant.

REPLY IN SUPPORT OF MICROSOFT'S MOTION TO TRANSFER THIS ACTION TO THE WESTERN DISTRICT OF WASHINGTON

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Motorola has offered no persuasive reason why this case should not be transferred to the Western District of Washington. Nor does Motorola make any attempt to deny that this lawsuit is anything more than one arm of its overall countersuit against Microsoft. There are already four cases pending between the parties in the Western District of Washington, which is the undeniable center of gravity of the parties' dispute. Motorola simply ignores the case law that strongly favors the resolution of litigation in the forum in which Microsoft's alleged infringement took place, which is undeniably the District of Washington. Furthermore, Motorola is not able to point to any overriding local interest in this dispute. Its few alleged connections to Florida pale in comparison to the substantial ties of this particular case and the parties' overall dispute to Washington. By Motorola's own admission, five of its seven patents-in-suit have no connection to Florida whatsoever. Accordingly, pursuant to 28 U.S.C. § 1404, and for purposes of efficiency and ease of resolution, Microsoft respectfully requests this Court to transfer this case to Washington.

I. THE CENTER OF GRAVITY OF THE PARTIES' DISPUTE IS IN THE WESTERN DISTRICT OF WASHINGTON.

Motorola does not dispute the strength or breadth of the case law that Microsoft cited in its opening brief repeatedly stating the general principle that, in patent infringement cases, "the preferred forum is that which is the center of gravity of the *accused activity*." *Trace-Wilco, Inc. v Symantec Corp.*, No. 08-80877, 2009 WL 455432, at *2 (S.D. Fla. Feb. 23, 2009) (emphasis added). *See also* D.E. 62 ("Mot."). at 8-11. At the core of this case, Motorola asserts that 17 Microsoft products infringe on Motorola's patents. All of those products were developed in Washington, and the majority of witnesses reside there. Kaefer Decl. [Doc. 62-1] at ¶¶ 6-12. These simple facts alone – which Motorola completely ignores – are reason enough to transfer this case.

Furthermore, as explained in Microsoft's opening brief, four patent-related cases between Microsoft and Motorola are already pending in the Western District of Washington. Mot. at 1-5. Two were originally brought in the Western District of Washington (WDWA-1577 and WDWA-1823), while two others were transferred there by the Western District of Wisconsin (WDWA-343 and WDWA-595). *Id.* In transferring the cases, the Western District of Wisconsin recognized the appropriateness of Washington as a forum for Motorola's patent infringement claims against Microsoft:

> **[**D]efendant's [Microsoft's] principal place of business is in the W.D. of Washington and at least one of the accused products (Windows 7) was designed there. Microsoft's employees responsible for the development and sale of Windows 7 work in that district.

WDWA-343 Transfer Order, attached to Attorney Decl. [D.E. 62-12] as Ex. 7, p. 3.

> Microsoft's principal place of business is in the Western District of Washington and all witnesses and documents relevant to this claim are stored there. . . . [A] fair amount of weight should be given to the fact that Microsoft's headquarters, witnesses and documentation are in Washington.

WDWA-595 Transfer Order, attached to Attorney Decl. [D.E. 62-13] at Ex. 8, p. 5, 6.

Once both of the Wisconsin cases had been transferred to Washington, which ensured that most of the parties' patent-related disputes could be resolved in one federal judicial forum, there were compelling reasons to seek transfer of this case to Washington as well. Motorola's assertions of an alleged "delay" overlook the fact that the second of the two Wisconsin cases was transferred on April 1, 2011 [D.E. 41 in 3:10-cv-00826-bbc], that the parties exchanged contention interrogatories on April 15, 2011 (which illustrated a lack of connections between this case and Florida), and that Microsoft's transfer motion in this action was filed soon thereafter.[1]

[1] Motorola cites *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989) and *In re Wyeth*, 406 Fed. App'x 475, 477 (Fed. Cir. 2010) as supporting its claim that parties seeking a change of venue must act with "reasonable promptness," *see* Opp. at 9, but these cases do not support Motorola's contentions. In *Peteet*, the court explained that transfer would be "yet another delay

Moreover, § 1404 does not impose any time limit on filing a motion to transfer and indeed, courts have recognized that "[a] delay in making a motion for transfer is not generally a sufficient ground for denying the motion . . ." *Angrignon v. KLI, Inc.*, No. 08-81218-CIV-Cohn/Seltzer, 2009 U.S. Dist. LEXIS 130424, at *6 (S.D. Fla. June 12, 2009) (citing 32A Am. Jur. 2d Federal Courts § 1298) (granting motion to transfer irrespective of delay in filing); *Edsall v. CSX Transp., Inc.*, No. 05-CV-903-WDS, 2006 U.S. Dist. LEXIS 82798 (N.D. Ill. Nov. 14, 2006) (even though "plaintiff's case might be minimally delayed because of this transfer, this factor is outweighed because the sources of proof and the site of plaintiff's alleged injury are located in [the transferee forum]. . . .[A] mere passage of time or delay is not alone sufficient to deny a motion to transfer.'") (internal citation omitted).[2] The bottom line is that this case

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in this protracted litigation," as the case had been pending for eighteen months since being remanded back to the trial court from a consolidated proceeding. 868 F.2d at 1436. Likewise, in *Wyeth*, the case had been pending for seventeen months, causing the court to explain that "[w]ithout reasonable promptness on the part of the movant, a case proceeds, requiring the court to expend time and effort that might become wasted upon transfer." 406 Fed. App'x 475 at 476-77. Motorola concedes that this case has been pending for only a little over six months (Opp. at 9), and this Court has not been requested to issue any rulings or orders other than the protective order and scheduling-related orders.

[2] For this reason, courts have granted motions that were filed much later in the proceedings than Microsoft's motion. *See, e.g., A.I. Credit Corp. v. Legion Ins. Co., Inc.*, No. 97 C 7351, 1999 U.S. Dist LEXIS 542 (N.D. Ill. Jan. 14, 1999) (granting defendants' motion to transfer that was filed approximately 7.5 months after the initial complaint was filed: "[T]he court does not find that this delay should bar a transfer . . . [T]here is no evidence that the [ ] [d]efendants had engaged in significant pretrial activity prior to filing the instant motion . . . The court finds that this delay in filing the motion to transfer should not bar the transfer of a case, like this one, where the interests of justice strongly militate in favor of transfer."); *Essex Crane Rental Corp. v. Kirsch Constr. Co.*, 486 F. Supp. 529, 535 (S.D.N.Y. Feb. 21, 1980) (granting defendant's motion to transfer filed nearly two years after the action was filed: "[P]laintiff's opposition based upon the timing of the instant application [to transfer] reduces to but one of many considerations . . . . [I]t is clear that there is no per se rule prohibiting a change of venue merely because a motion to transfer is filed some time after suit is commenced and some progress is made on the pre-trial phase of discovery").

belongs in Washington, along with all of the other pending cases between Motorola and Microsoft.

Motorola's assertion that it would be "prejudiced" if this case is transferred due to ongoing discovery is overstated. Motorola has cited no reason why, if the case is transferred, the discovery that has been completed to-date cannot be fully utilized in the Western District of Washington. *See Poncy v. Johnson & Johnson*, 414 F. Supp. 551, 557 (S.D. Fla. 1976) (granting the allegedly "untimely" motion to transfer and noting that "all discovery conducted by the parties to date can be fully utilized in the transferee court.").

Further, Motorola's assertions that Microsoft has "embraced" this forum or somehow waived its transfer arguments by filing counterclaims are irrelevant. Opp. at 1. Indeed, these arguments are nothing more than an attempt to divert focus away from the dearth of Florida connections to Motorola's own claims. The only authority Motorola identifies supporting its position is a secondary source relegated to a footnote. Opp. at 12, n.8. The Western District of Wisconsin rejected the same argument made by Motorola in opposing transfer of what is now the WDWA-595 case. The Court explained that "[a]t most, defendant's choice of asserting counterclaims is a concession that it would be more efficient to have one lawsuit in an inconvenient forum than two lawsuits, one in a convenient forum and one in a non-convenient forum." D.E. 41 in 3:10-cv-00826-bbc at 9 (Atty. Decl. [D.E. 62-5] at ¶ 9, Ex. 8).[3]

Moreover, as numerous courts have explained, "the focus of the Court's inquiry in deciding a motion to transfer under § 1404(a) is on the action as filed and not on the counterclaims interposed by the party seeking transfer." *NBA Props., Inc. v. Salvino, Inc.*, No.

[3] Indeed, this Court has considered – and granted – motions to transfer when the defendant has filed counterclaims. *See, e.g.*, *Fed. Dep. Ins. Co. v. Fedorov*, No. 10-20912-Civ, 2011 U.S. Dist. LEXIS 57418, at *7 (S.D. Fla. May 26, 2011) (granting motion to transfer where defendant filed counterclaims).

99 Civ. 11799 AGS, 2000 WL 323257, at *5 n.2 (S.D.N.Y. Mar. 27, 2000).[4] There is no question that, when focusing on the action as filed, the locus of the dispute is in Washington. *Id.* Motorola's contention that Microsoft could have filed its counterclaims in Washington not only underscores Washington's strong connection to this case, but doing so would have generated yet additional piecemeal litigation between the parties. Granting the motion to transfer and consolidating *all* of the parties' pending District Court cases into one judicial forum in Washington would further the efficient resolution of the litigation.

II. THIS ACTION DOES NOT HAVE ANY MEANINGFUL CONNECTION TO THE SOUTHERN DISTRICT OF FLORIDA.

In the face of Microsoft's motion, Motorola attempts to rely on a limited number of historical business activities that purportedly occurred within this District. Motorola's brief, however, does not even come close to showing the requisite substantial connection between this case and the Southern District of Florida.

- ***Only 2 of the 14 patents at issue were purportedly invented in Florida*:** Only two of Motorola's seven patents were allegedly invented by inventors who resided in Florida. Opp. at 2, 3-4. Motorola does not contend that its other five patents have any connection whatsoever to this District. There is no dispute that all of Microsoft's seven patents at issue were invented in Washington.

[4] *See also Charter Commc'ns, Inc. v. McCall*, No. 4:05CV332JCH, 2005 WL 2076415, at *1 (E.D. Mo. Aug. 26, 2005) (finding a witness's testimony "irrelevant for purposes of the Court's venue analysis, as it goes solely to Defendant's counterclaim"); *Kenwin Shops, Inc. v. Bank of La.*, 97 Civ. 970 (LMM), 98 Civ. 3703 (LMM), 1999 U.S. Dist. LEXIS 6785, at *8 (S.D.N.Y. May 10, 1999) ("Since § 1404(a) directs the Court's attention to the situation which existed when suit was instituted, the existence of a subsequently filed counterclaim can have no bearing on the power of the Court to transfer the action.") (quoting *Medtronic, Inc. v. Am. Optical Corp.*, 337 F. Supp. 490, 494 (D. Minn. 1971)); *Int'l Corp. v. Moore Bus. Forms, Inc.*, No. CIV-85-146E, 1989 WL 158321, at *3 (W.D.N.Y. Dec. 26, 1989) (Section 1404(a) "does not apply to third-party claims, counterclaims or cross-claims. Rather, it is concerned with the institution of the original action and not with third-party actions.").

- ***All of Microsoft's 17 accused products were developed in Washington*:** In its complaint, Motorola identifies seventeen Microsoft products as infringing products. All of these products were developed in Washington. *See* Compl. [Doc. 1] at ¶ ¶ 15, 22, 29, 36, 43, 50, 57; Kaefer Decl. [Doc. 62-1] at ¶¶ 5-10.

- ***Only 1 of Motorola's 27 accused products were allegedly developed in Florida*:** Motorola asserts that only *one* accused product – the i1 IDEN phone – was developed in this District. Opp. at 2, 5. Putting aside the fact that the i1 IDEN phone is only placed at issue through Microsoft's counterclaims – which are not to be considered – there are 27 different accused products at issue in this case, and none of the other 26 products are alleged to have any connection to Florida. Moreover, Motorola has failed to provide any evidence that any employees, documents, or activities related to the i1 IDEN product are *currently* located in Florida. Remarkably, all of Motorola's contentions about the i1 IDEN product are in the past tense. *See* Opp. at 5 (noting that development of the product ended June 2010, that employees working on the product "were" located in Plantation); Conroy Decl. [Doc. 74-3] at ¶¶ 4, 7-10 (same). The fact that historically, employees related to this one product *were* located in Florida does not establish a *current* connection to the District and does not outweigh the numerous significant connections to Washington.

- ***Only 11 out of at least 36 non-party witnesses reside in Florida*:** Motorola identified eleven non-party individuals who allegedly reside in this District. Opp. at 2, 4. However, Motorola utterly failed in their Opposition to provide any evidence in connection with these individuals that would support their arguments against transfer. Indeed, many of these individuals appear to be outside lawyers who have worked for Motorola at one time or another, and it is far from obvious why Motorola would call them as witnesses at trial. Indeed, Motorola

did not identify three of these lawyers until one business day before it filed its opposition brief and nearly two weeks after Microsoft filed this Motion. The belated disclosure, coupled with Motorola's failure to describe why Motorola has a need to call them to testify at trial, *see* Opp. at 4 (identifying patent prosecuting attorneys Gregg Rasor, Pablo Meles, and Philip Macnak), is a telling admission about the lack of importance of these witnesses. Nor has Motorola asserted that these witnesses would need to be compelled to testify by subpoena. *See, e.g., Mason v. Smithkline Beecham Clinical Labs.*, 146 F. Supp. 2d 1355, 1361 (S.D. Fla. 2001) (location of witnesses and availability of compulsory process irrelevant where there is no showing "that the witnesses would be unwilling to testify and that compulsory process would be necessary"). In any event, the fact that some non-party witnesses might be located in Florida does not overcome the fact that all of the developers of the allegedly infringing products are located in Washington. This is precisely why the Western District of Wisconsin transferred two other cases between the parties to Washington.[5]

Indeed, in light of these facts, Motorola did not itself conclude that all of the relevant public and private interest factors support litigating the case here. Rather, Motorola argues that the convenience of the parties and witnesses, the location of sources of proof, and this District's local interest are "neutral" factors. Opp. at 15, nn. 11, 16. That is hardly a compelling reason for Motorola to pursue scattershot litigation across the country and exhaust the resources of multiple federal judicial districts.

[5] Motorola's reliance on this Court's decision in *Motorola Mobility, Inc. v. Apple*, No. 10-23580-Civ-UU (S.D. Fl. May 24, 2011), which denied Apple's motion to transfer an action to Wisconsin, is misplaced. Opp. at 17; (*see also* Exhibit A). There, the Court characterized Motorola's connection to the Southern District of Florida as "weak," but because Apple did not have any apparent connection to the Western District of Wisconsin, the Court ultimately denied Apple's motion to transfer. Exhibit A, at 7 ("A weak connection presumably is better than no connection at all.") Here, there is no dispute that this case has numerous strong connections to the Western District of Washington.

With respect to Motorola's unfounded suggestion that perhaps the District of Washington is unable to manage its additional claims, Opp. at 17, this Court has recognized that "trial efficiency and the interests of justice especially favor consolidated litigation in patent cases." *Global Innovation Tech. Holdings, LLC v. Acer Am. Corp.*, 634 F. Supp. 2d 1346 (S.D. Fla. 2009). Furthermore, consolidation and coordination of large complex litigation is commonplace in the federal courts, both through the Judicial Panel on Multidistrict Litigation, 28 U.S.C. § 1407, and other court-specific practices. And Motorola has no answer to the fact that one of the primary products under attack both here and in Washington is Windows 7. Compl. [Doc. 1] at ¶ 15; D.E. 1 in 2:2011-cv-00343-jlr [D.E. 6-25 at Ex. 5] at ¶¶ 6, 14, 21, 28. Many of the witnesses, including the marketing, advertising, sales, product management, and finance personnel who work on the Windows 7 product, are likely to be the same. There is no overriding public interest that should require this Court to adjudicate satellite litigation here, especially when the resources required to adjudicate this case could be streamlined with the cases already pending in Washington.

In short, Motorola's Opposition acknowledges that it does not have a sincere belief that the Southern District of Florida has a substantial connection to Motorola's disputes with Microsoft. Instead, Motorola engaged in shotgun filings in an attempt to purposely and unnecessarily increase the cost and complexity of litigation and game the system for its own strategic advantage. As these cases have been, one by one, transferred to Washington, there now exists a very real prospect for one Court to efficiently and effectively manage the litigation, in a forum where there is a substantial nexus to the dispute, to achieve the overriding interest of the "just, speedy, and inexpensive determination" of the actions. Fed. R. Civ. Pro. 1. A transfer of

this last remaining, rogue action to Washington would clearly provide the best and most efficient opportunity to achieve this overriding goal.

CONCLUSION

Given the fact that four related cases are already pending in Washington, the center of gravity of this dispute is in Washington, and this District does not have any overriding local interest in exhausting judicial resources to resolve this dispute, Microsoft respectfully requests this Court to transfer this action to the Western District of Washington pursuant to 28 U.S.C. § 1404.

Dated: June 14, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 14th day of June, 2011, I electronically filed the foregoing document with the Clerk of the Court, using the CM/ECF system, which will automatically send email notification of such filing to all counsel who have entered an appearance in this action.

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