IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

VERTICAL COMPUTER SYSTEMS, INC.,	§	Civil Action No. 2:10-CV-490
	§	
Plaintiff,	§	**Jury Trial Demanded**
	§	
v.	§	
	§	
INTERWOVEN, INC., LG ELECTRONICS MOBILECOMM U.S.A., INC., LG ELECTRONICS, INC., SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC.,	§	
	§	
Defendants.	§	
	§	

DEFENDANT INTERWOVEN, INC.'S MOTION TO STAY, DISMISS OR TRANSFER

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Defendant Interwoven, Inc. ("Interwoven") moves pursuant to the first-to-file rule and 28 U.S.C. § 1404(a) to stay, dismiss, or transfer this case from the United States District Court for the Eastern District of Texas to the United States District Court for the Northern District of California. By granting this motion, this Court can promote judicial economy by transferring this action to the first-filed court in the Northern District of California.

I. INTRODUCTION

On October 14, 2010, Interwoven filed suit against Vertical Computer Systems, Inc. ("Vertical") in the Northern District of California. Thirty-two days later, Vertical filed this mirror-image case against Interwoven on November 15, 2010, in a blatant attempt at forum shopping. This case does not belong in Texas for the following reasons:

- *Thirty-two days after* Interwoven filed an action in the Northern District of California, Vertical tried to secure a more favorable forum for itself by filing essentially the same action in this Court;
- It is undisputed that Vertical *knew* it had already been sued in California and cited to the same in its Complaint here;
- Under well-established precedent, Interwoven is the first litigant to file and, thus, enjoys the "presumptive right of the first litigant to choose the forum." *Kahn v. General Motors Corp.*, 889 F.2d 1078, 1081-82 (Fed. Cir. 1989); and
- The Northern District of California—where Interwoven is headquartered, where it developed the products at issue, and where the relevant documents and witnesses are located— presents a far more convenient forum for this litigation, without prejudicing Plaintiff.

In light of well-established legal precedent, Interwoven respectfully requests that this Court stay, dismiss or transfer this action to the Northern District of California.[1]

II. FACTUAL BACKGROUND

Interwoven is a California software company. Declaration of Bijal V. Vakil ("Vakil Decl.") ¶ 2. Interwoven is a wholly-owned subsidiary of Autonomy Corporation, plc with its principal place of business in San Francisco, California. Vakil Decl. ¶ 3. Based in San Jose, California, Interwoven commenced an action in the Northern District of California on October 14, 2010, requesting a declaratory judgment to establish that its products do not infringe Vertical's patents, U.S. Patent No.'s 6,826,744 (the "'744 patent") and 7,716,629 (the "'629 patent") and that those patents are invalid. Vakil Decl. ¶ 4.

At that time, it had been over twenty months since Vertical first initiated informal conversations with Interwoven. Vakil Decl. Ex. C at ¶ 6. After starting these discussions, Vertical walked away for almost a year. In August 2010, Vertical surfaced again with supposedly new allegations based on a book published in 2006 relating to a product from 2006. Vakil Decl. Ex. C at ¶ 7. To finally resolve this dispute, Interwoven exercised its rights under the Declaratory Judgment Act and brought a declaratory action in the district in which it is headquartered.[2]

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[1] It is unfortunate that Vertical failed to engage in appropriate professional courtesies to promote judicial economy in this matter. Despite the fact that the other defendants have received extensions of time, Vertical refused to grant the same to Interwoven necessitating motion practice that will likely follow on different tracks for each Defendant. Accordingly, because of Vertical's uncooperative stance, Interwoven files this Motion separately from the other parties who have received extensions from Vertical in this matter. Vakil Decl. ¶ 11.

[2] While not relevant to the legal issues presented in this Motion, Vertical may repeat arguments it has made before the District Court for the Northern District of California, i.e., that the parties were in the midst of discussions at the time that Interwoven filed its declaratory action in the Northern District of California. These irrelevant arguments fail because neither of these parties (both of whom are sophisticated and represented by counsel) entered into a standstill or any other type of agreement that would preclude either party from enforcing its legal rights.

Knowing it had been sued in the Northern District of California, Vertical filed a mirror-image action in this Court. *See* Compl. ¶¶ 14, 20. In addition to Interwoven, Vertical named four other defendants (the LG and Samsung parties), none of which are incorporated or headquartered in Texas. As of January 17, 2008, Vertical was located in Fort Worth, in the Northern District of Texas. Vakil Decl. Ex. E at 1. Prior to filing this suit, Vertical apparently relocated to a Richardson, Texas address, but Vertical's new address is nearly *ten times* as far geographically from this Court as it is from the nearest Northern District of Texas courthouse. Vakil Decl. ¶ 7.

It is undisputed that Interwoven is based in the Northern District of California. The relevant documents and witnesses concerning the development of the allegedly infringing Interwoven TeamSite 2006 product accused in the Complaint are likely to be found at Interwoven's headquarters in San Jose, California. Vakil Decl. Ex. A at 26. Interwoven's headquarters also house the financial and marketing documents that will be relevant to any damages calculation. *Id.* Additionally, since Vertical produces and sells software products, whether it has complied with the statutory notice requirements of the patent marking statute will be an issue in this case. Vertical distributes its products through a California entity, so documents and witnesses concerning Interwoven's potential patent marking defense are likely to be found in California. Vakil Decl. Ex. G at 6-7. It is likely that the LG and Samsung defendants similarly do not have relevant connections with this district.

Vertical is no stranger to California. Vertical directed its patent licensing strategy at Interwoven in the Northern District of California, beginning in January of 2009. Vakil Decl. Ex. H at 2 (stating that in January 2009, "Vertical contacted interwoven," and in March 2009 "[r]epresentatives of Vertical and Interwoven met in San Jose, California"). Vertical was based in California from approximately 2000 until at least September 2003. Vakil Decl. Ex. H at 5-6. William Kenneth Mills, a Director of Vertical since 2000, resides in Los Angeles, and is Vertical's current agent for service of process in California. *Id.* at 6.

Additionally, according to its publicly-available Securities and Exchange Commission filings, Vertical has other connections to California. Vertical acquired the business and assets of Pelican Applications, LLC, a California company, in May, 2010. Vakil Decl. Ex. I at 9. Vertical has two California-based wholly-owned subsidiaries, Vertical Internet Solutions, Inc. and Pointmail.com, Inc., both California corporations. Vakil Decl. Ex. G at 6-7. Vertical also has a royalty interest in Claremont, California-based TranStar Systems, Inc., and has "a distribution agreement with the President of TranStar to market [Vertical's] products." *Id*. at 7. As an entity who receives the benefits and protections from the State of California, Vertical cannot escape from these clear connections with the Northern District of California simply because it added two other defendants in this case.

III. ARGUMENT

A. Interwoven's "Presumptive Right" as the First-Filed Litigant Should Not be Disturbed

1. The First-to-File Doctrine Favors Granting This Motion

The "first-to-file" rule is almost two centuries old, and this case presents no reason to deviate from this well-established precedent. See *Smith v. M'Iver*, 22 U.S. 532, 535-36 (1824) ("[i]n all cases of concurrent jurisdiction…the cause must be decided by the tribunal which first obtains possession of it"). In patent cases, the Federal Circuit has held that consistent application of the first-to-file rule with respect to co-pending declaratory judgment and infringement actions serves the important purpose of maintaining national uniformity in patent law. *Genentech Inc. v. Eli Lilly and Co.*, 998 F.2d 931, 937 (Fed. Cir. 1993) (reasoning that the first-to-file rule prevents an automatic default to the patentee's forum of choice, whether or not they sought—or sought to avoid—judicial resolution of the dispute) abrogated on other grounds by *Wilton v. Seven Falls Co.*, 515 U.S. 277 (1995); *see also Electronics for Imaging, Inc. v. Coyle*, 394 F.3d 1341, 1348 (Fed. Cir. 2005). Accordingly, it is undisputed that Federal Circuit law governs the present issue

of co-pending patent infringement proceedings in multiple district courts. *Lab. Corp. of Am. Holdings v. Chiron Corp.*, 384 F.3d 1326, 1331 (Fed. Cir. 2004).

Federal Circuit law prioritizes first-filed actions for declaratory judgment, in particular, because "the purpose of the Declaratory Judgment Act [is] to enable a person caught in controversy to obtain resolution of the dispute, instead of being forced to await the initiative of the antagonist." *Genentech, Inc.*, 998 F.2d at 937 (finding that the district court abused its discretion in transferring a first-filed declaratory judgment action to the forum of the later filed infringement action). Simply put, the first-to-file rule in patent cases creates a "*presumptive right* of the first litigant to choose the forum, that "weigh[s] heavily in [that litigant's] favor" and should be disturbed in limited circumstances; "only to prevent wrong or injustice." *Kahn v. General Motors Corp.*, 889 F.2d 1078, 1081-82 (Fed. Cir. 1989) (emphasis added).

2. Interwoven's Declaratory Judgment Action Indisputably Enjoys First-Filed Status

This Court recently recognized that "in the absence of compelling circumstances, the Court initially seized of a controversy should be the one to decide whether it will try the case." *E-Z-EM, Inc. v. Mallinckrodt, Inc.*, No. 2-09-cv-124, slip op., 2010 WL 1378665 (E.D. Tex. Mar. 31, 2010) (Ward, J.) citing *Dillard v. Merrill Lynch, Pierce, Fenner & Smith*, 961 F.2d 1148, n.28 (5th Cir. 1992). Accordingly, this Court adheres to the first-to-file rule where two actions are "so duplicative or ... involve such substantially similar issues that one court should decide the subject matter of both actions." *Datamize, Inc. v. Fidelity Brokerage Servs., LLC*, No. 2-03-cv-321-DF, 2004 WL 1683171 at *3 (E.D. Tex. Apr. 22, 2004) (Folsom, J.). The undisputed fact of Interwoven's earlier-filed case warrants the application of this well-settled rule to transfer the case to the Northern District of California.

The chronology of these actions clearly favors Interwoven's action for declaratory judgment. Interwoven filed its action on October 14, 2010, while Vertical filed this action on November 15, 2010. Even where complaints are filed within hours of each other, the first-filed

action is entitled to priority under the first-to-file rule. See *Lab. Corp.*, 384 F.3d at 1332-33 (affirming injunction of later-filed action where parties' filings were only four hours apart). Interwoven indisputably enjoys first-filed status because the issues in both actions more than substantially overlap; they are identical issues of infringement and validity of the same two patents and the same accused products.

As the Federal Circuit and the Fifth Circuit have recognized, a later-filing party, like Vertical, cannot evade the first-to-file rule simply by joining additional defendants in its later-filed, duplicative action, as Vertical has attempted to do by joining the LG and Samsung Defendants here.. "If, as in this case, a patent holder could simply name another defendant or add a few additional claims to the later filed infringement suit, then the Supreme Court's more lenient standard for the declaratory judgment plaintiff would lose its primary intended effect." *Micron Tech., Inc. v. Mosaid Techs.*, Inc., 518 F.3d 897, 903 (Fed. Cir. 2008); *see also Save Power Ltd. v. Syntek Fin. Corp.*, 121 F.3d 947, 951 (5th Cir. 1997) ("Complete identity of parties is not required for dismissal or transfer of a case filed subsequently to a substantially related action."). There is no legitimate reason why Vertical could not raise the claims it has raised here as counterclaims in the California case. Indeed, that is precisely what should occur in the interests of judicial economy and efficiency, and under the Federal Rules of Civil Procedure.[3]

3. No "Wrong or Injustice" Will Result from Proceeding in California

Vertical has no basis to argue that proceeding in California will cause it "wrong or injustice," or that this case represents an "exceptional circumstance," as is required to disturb the

[3] Once Interwoven filed its declaratory judgment action, Vertical's claims in this case were barred under Federal Rule of Civil Procedure 13(a) on compulsory counterclaims. The very purpose of Rule 13(a) is to prevent the exact type of forum-shopping Vertical has engaged in by filing this case. In view of the identity of parties and patents, the conditions of Rule 13(a) are satisfied. *See Vivid Techs., Inc. v. American Sci. & Eng'g, Inc.*, 200 F.3d 795, 801 (Fed. Cir. 1999) ("Of the cases compiled in the treatises and that we have found, every court that has discussed the issue has recognized that an infringement counterclaim is compulsory in an action for declaratory judgment of non-infringement.").

well-settled first-to-file presumption. See *Mann Mfg., Inc. v. Hortex, Inc.*, 439 F.2d 403, 407 (5th Cir. 1971) ("In the absence of compelling circumstances, the court initially seized of a controversy should be the one to decide whether it will try the case."). Interwoven's "presumptive right" as the first litigant to file weighs heavily in Interwoven's favor and should only be disturbed in limited circumstances "to prevent wrong or injustice." *Kahn v. General Motors Corp.*, 889 F.2d 1078, 1081-82 (Fed. Cir. 1989).

Vertical cannot establish that Interwoven had "no sound reason" for filing its suit in the Northern District of California, nor that its choice "was motivated by inequitable conduct, bad faith, or forum shopping." *Genentech, Inc. v. Eli Lilly and Co.*, 998 F.2d 931, 938 (Fed. Cir. 1993). Indeed, Interwoven filed this case in the nearest District Court to its principal place of business in San Jose, California.

Interwoven sought declaratory judgments of invalidity and non-infringement to end Vertical's baseless allegations of patent infringement, "instead of being forced to await the initiative of the antagonist." *Genentech, Inc.*, 998 F.2d at 937 (stating the policy underlying the Declaratory Judgment Act). In *Sherwin-Williams Co. v. Holmes Cty.*, 343 F.3d 383 (5th Cir. 2003), the Fifth Circuit found that, since declaratory actions are inherently anticipatory, it is not improper anticipatory litigation or otherwise abusive "forum shopping" to merely file a declaratory judgment action in a federal court with jurisdiction to hear it in anticipation of other litigation. *Id*. at 391-92. Rather, to overcome the first-to-file rule, a party must prove the declaratory action was filed for an "improper or abusive" reason. *Id.* at 391. Because Interwoven was merely investigating Vertical's allegations, having made no representations limiting its right to sue in any way, Vertical cannot claim abuse in Interwoven seeking firm judicial resolution.

Beyond Interwoven's presumptive right to choose the forum, litigating in the Northern District of California presents absolutely no injustice to Vertical (particularly in view of the location of the alleged dispute). As discussed above, Vertical directed its patent licensing strategy at Interwoven in the Northern District of California, beginning in January of 2009.

Vakil Decl. Ex. H at 2. Vertical was based in California from 2000 to at least September 2003, maintains an agent for service of process in California, acquired the business and assets of a California company this year, has two California-based wholly-owned subsidiaries, distributes its products through a California company in which it also has a royalty interest, and maintains a website inviting contact from customers and investors including residents of California. Vakil Decl. Ex. H at 5-6, Ex. I at 9, Ex. G at 6-7. Interwoven's action for declaratory judgment arose directly out of these contacts, so Vertical clearly could have foreseen the possibility of being sued in California. No unfairness or injustice to Vertical can result from proceeding in California, where this case was first filed.

B. Alternatively, This Case Should be Transferred Because the Northern District of California is Clearly a More Convenient Forum

Congress has tempered a plaintiff's choice of venue by enacting the venue transfer statute, 28 U.S.C. § 1404(a). As recognized by the Fifth Circuit:

> The underlying premise of § 1404(a) is that courts should prevent Plaintiffs from abusing their privilege under § 1391 by subjecting Defendants to venues that are inconvenient under the terms of § 1404(a).

In re Volkswagen of Am., Inc., 545 F.3d 304, 313 (5th Cir. 2008) (en banc) ("*Volkswagen II*"); *see also In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2008).

Pursuant to the venue transfer statute, once the court decides a case might have been brought in the destination venue, it must then turn to whether "the convenience of the parties and witnesses, in the interest of justice" requires transfer. *Volkswagen II*, 545 F.3d at 312. This "convenience" determination turns on the assessment of four "public interest" and four "private interest" factors. *Volkswagen II*, 545 F.3d at 315 (citing *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 67 S. Ct. 839 (1947)). Importantly, "Fifth Circuit precedent clearly forbids treating Plaintiff's choice of venue as a distinct factor in the § 1404(a) analysis." *TS Tech*, 551 F.3d at 1320.

The private interest factors are: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make a trial easy, expeditious and inexpensive. The public interest factors are: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflicts of laws [or in] the application of foreign law. *Id.* (citing *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004)). All of these factors weigh in favor of transferring this case to the Northern District of California.

Recently, after weighing these factors in *In re Microsoft*, the Federal Circuit granted a writ of mandamus, ordering this district court to transfer the case to a more convenient forum. *In re Microsoft Corp.*, Misc. No. 944, slip op., 2010 WL 4630219 at *3-4 (Fed. Cir. Nov. 8, 2010). The plaintiff had set up an office in the Eastern District of Texas and simply shipped documents there a short time prior to filing suit. *Id.* The Federal Circuit ruled that courts need not honor connections to the preferred forum likely established in anticipation of litigation. *Id.* As in *Microsoft*, it appears that Vertical recently set up an address in Richardson in an attempt to establish a connection with the Eastern District. As of January 17, 2008, Vertical was located in Fort Worth, in the Northern District of Texas. Vakil Decl. Ex. E at 1. This type of gamesmanship should be disregarded in the convenience analysis.

Similarly, in *In re Nintendo Co.*, the Federal Circuit also granted a writ of mandamus, ordering this district court to transfer a patent infringement action in "a case featuring most witnesses and evidence closer to the transferee venue with few or no convenience factors favoring the venue chosen by the Plaintiff . . . ." *In re Nintendo Co.*, 589 F.3d 1194, 1198 (Fed. Cir. 2009). None of the identified key witnesses lived in the Eastern District of Texas and no relevant documentation or other evidence was located there. *Id.* at 1198-99. This case is directly analogous to the present case, because no witnesses have been identified as residing in this

district, and the bulk of the evidence is situated in Northern California, where Interwoven is based.

Finally, again in *In re Hoffmann-La Roche*, the Federal Circuit issued a writ of mandamus directing the district court to transfer a case where one of the three parties, four of the eighteen non-party witnesses, and three of seven party witnesses were located in the transferee forum. 587 F.3d 1333 (Fed. Cir. 2009). The court discounted the presence of plaintiff's documents in the Eastern District of Texas because they had been transferred to that district in anticipation of litigation. *Id.* at 1337. The court also discounted the presence of a non-party witness in Houston, Texas because the Eastern District court did not have complete subpoena power over that witness. *Id.* at 1338.[4] Similarly, Vertical only recently relocated to its address in Richardson, coinciding with its patent enforcement efforts against Interwoven.

Here, as in *Microsoft*, *Nintendo*, and *Hoffmann-La Roche*, there are no identifiable ties to the Eastern District of Texas other than connections created in anticipation of litigation. As set forth below, weighing the convenience factors clearly demonstrates that the Northern District of California is more convenient and a transfer therefore should be ordered.

1. Vertical Could Have Brought This Action in the Northern District of California

"The threshold determination to be made under Section 1404(a) is whether the claim could have been filed in the judicial district to which transfer is sought." *Fifth Generation Computer Corp. v. Int'l Bus. Machs. Corp.*, No. 9:08-CV-205, 2009 U.S. Dist. LEXIS 12502, at

[4] Here, the inventor listed on the patents, Aubrey McAuley, apparently resides in Austin, TX, which is in the Western District, nearly 300 miles from this Court. As the Federal Circuit did in *Hoffmann-La Roche*, this Court should disregard the presence of McAuley, a nonparty witness, in Texas, because he is beyond the reach of this Court's subpoena power. Vertical has represented that McAuley is a non-party witness and is unable to travel to the Northern District of California, *see* Vakil Decl. Ex. H at 5 ("[McAuley] is not an employee of Vertical."). However, Vertical's SEC filings show that McAuley was previously a Vice President of Vertical, and received both a salary and stock from Vertical. Vakil Decl. Ex. D at 34. Thus, the outcome of any litigation will likely be shared with him and he qualifies as an interested party who will be at trial.

*6 (E.D. Tex. Feb. 17, 2009). There should be no dispute that this case could have been filed in the Northern District of California. Interwoven has its principal place of business within the Northern District and, as such, is subject to personal jurisdiction there. *See e.g.*, 28 U.S.C. §§ 1391(b) and (c), and § 1400(b). Thus, the transfer analysis turns on weighing the private and public interest factors.

2. The Private Interest Factors Clearly Weigh in Favor of Transfer to the Northern District of California

The presence of witnesses and documents concerning defendant's products is often the most important consideration in balancing the convenience factors. "In patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer. Consequently, the place where defendants' documents are kept weighs in favor of transfer to that location." *Genentech Inc. v. Biogen Idec Inc.*, 566 F.3d 1338, 1348 (Fed. Cir. 2009). In this case, these witnesses and documents are present in California, particularly in the Northern District, and not in Texas.

Interwoven has been based in San Jose since its founding in 1995. Vakil Decl. ¶ 2. The accused product, TeamSite 2006, was developed largely at Interwoven's headquarters in San Jose. *Id.*, Ex. A at 26 ("[Interwoven's] primary offices are located in a leased facility in San Jose, California…. The facility is used by our administrative, sales, marketing, engineering, customer support and services departments."). To the extent that any witnesses with knowledge of the development of Interwoven's software in general, and the products at issue in particular, or any of Interwoven's financial and marketing professionals with knowledge relevant to damages, are concentrated in any one location, that location is San Jose. *Id.* Further, the relevant documents concerning the development of Interwoven's products are likely to be located at Interwoven's San Jose headquarters. *Id.* Financial and marketing documents relevant to damages are also likely to be located at Interwoven's San Jose headquarters, or at Autonomy's headquarters in San Francisco. *Id.* Also, witnesses and documents relevant to Interwoven's

potential patent marking defense will be found in California, because Vertical distributes its products through a California entity. Vakil Decl. Ex. G at 7. Vertical's purported office location in Richardson, Texas is almost 300 miles from this Court. In contrast, the Northern District of California is the nearest district court to Interwoven's headquarters. It would cost far more, and be far less convenient, for all of these witnesses and documents to be transported from California to Texas than it would to litigate this case in California where it was first filed.

3. The Public Interest Factors Clearly Weigh in Favor of Transfer to the Northern District of California

The case currently pending in the Northern District of California adds to the considerations of judicial efficiency and economy favoring transfer in this case. Further, the local interest in having the case decided in California is much stronger than that in Texas because Interwoven is headquartered in the Northern District of California, and the accused products were developed there.

This case is an attempt by Vertical to forum shop, which clearly runs counter to the public interest. Vertical recently changed its address from Ft. Worth to Richardson in an effort to establish a connection to the Eastern District of Texas. Vertical's new address is nearly ten times as far geographically from this Court as it is from the nearest Northern District of Texas courthouse. *In re Microsoft* and a host of other recent Federal Circuit decisions have urged trial courts to disregard such recent and ephemeral connections as those which Vertical has attempted to set up in anticipation of this litigation.

IV. CONCLUSION

In view of well-established legal precedent that uniformly applies the first-to-file rule based on similar fact patters, and for the foregoing reasons, Interwoven respectfully requests that this Court stay, dismiss, or transfer this case to the Northern District of California.

Dated: January 10, 2011

Respectfully submitted,

By: */s/ Bijal V. Vakil*

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CERTICATE OF SERVICE

I hereby certify that all counsel of record who have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3) on this 10th day of January 2011. Any other counsel of record will be served by first class U.S. mail on this same date.

/s/ Bijal V. Vakil
Bijal V. Vakil