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

VERTICAL COMPUTER SYSTEMS, INC., Plaintiff, v. INTERWOVEN, INC., LG ELECTRONICS MOBILECOMM U.S.A., INC., LG ELECTRONICS INC., SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC., Defendants.	Civil No. 2:10-CV-00490 JURY TRIAL DEMANDED

VERTICAL'S COMPUTER SYSTEMS, INC.'S OPPOSITION
TO INTERWOVEN, INC.'S MOTION TO STAY, DISMISS OR TRANSFER

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I. INTRODUCTION

After almost two years of negotiations to reach an amicable settlement of Vertical Computer Systems, Inc.'s ("Vertical") patent claims against it, Interwoven, Inc. ("Defendant" or "Interwoven") abandoned the negotiations and surreptitiously filed a declaratory judgment action in the Northern District of California. This anticipatory filing for declaratory judgment is an improper attempt to exploit the first-to-file rule and secure a venue that differs from the one that Vertical had already chosen in this Court.

The California lawsuit essentially comprises a wholly-owned subsidiary of a British corporation (Interwoven) manipulating Vertical and the judicial system to improperly shop for a forum that it perceives to be the best place for its interests. But, the forum that it chose is simply not convenient for the parties and witnesses, and, as shown below, forcing Vertical to defend in that California forum is certainly not in the best interests of justice.

Vertical filed a motion in the Northern District of California to dismiss or transfer the California case to this Court. Interwoven opposed Vertical's motion and filed its own motion to enjoin Vertical from prosecuting the present action. Judge Seeborg of the Northern District of California heard both of the motions on January 20, 2011 and denied both motions. He based his decision entirely on the first to file rule.

Vertical began enforcing its patented technology in this Court in 2007 against Microsoft. It then brought the present action in this Court (in the district where it resides), against Interwoven, two LG companies and two Samsung companies to enforce the same patented technology. This case will decide the same fact-dependent issues present in the California case that Interwoven filed. Thus, for the sake of judicial economy and for the convenience of the parties and witnesses, Vertical respectfully requests that the Court deny Interwoven's motion and allow this consolidated action to proceed.

II. THE FACTS

A. The Parties

Plaintiff Vertical is a publicly held corporation that develops and sells software products. It has its principal place of business in this judicial district at 101 W. Renner Road, Richardson, Texas 75082. It has had this place of business for almost three years. Its previous place of business was in Forth Worth, Texas.

Defendant Interwoven, the movant of the present motion, is a Delaware corporation and a direct competitor of Vertical. As outlined below, it recently became a wholly owned subsidiary of Autonomy, a European software company based in Cambridge, England.

Defendant LG Electronics MobileComm U.S.A., Inc. is a California corporation and has its principal place of business at 1000 Sylvan Avenue, Englewood Cliffs, NJ 07632.

Defendant LG Electronics Inc. is a corporation organized under the laws of the Republic of Korea and has its principal place of business at LG Twin Towers 20, Yeouido dong, Yeongdeungpo-gu, Seoul, Republic of Korea 150-721.

Defendant Samsung Electronics America, Inc. is a New York corporation and has its principal place of business at 85 Challenger Road, Ridgefield Park, NJ 07660.

Defendant Samsung Electronics Co., Ltd. is a corporation organized under the laws of the Republic of Korea and has its principal place of business at 1320-10, Seocho 2-dong, Seocho-gu, Seoul 137-857, Republic of Korea. All of the defendants are doing business in this judicial district. **[Complaint, Dkt. No. 1, ¶¶1-6]**.

Interwoven brought the present motion alone. The Samsung companies have, however, filed a declaratory judgment action against Vertical in the Northern District of California on January 12, 2011. (Vertical plans to file a motion to dismiss the Samsung action in California.) The net outcome of all this is that two foreign corporations – Korean Samsung with its New Jersey subsidiary and British Autonomy with its Interwoven subsidiary are attempting to force

litigation in a district that they believe is beneficial to them, irrespective of the harm and inconvenience that it will cause Vertical.

B. Nature of the Lawsuit

This is a patent infringement action that involves United States Patent No. 6,826,744 (the "'744 patent," attached as **Exhibit A**) titled "System and Method for Generating Web Sites in an Arbitrary Object Framework" and United States Patent No. 7,716,629 (the "'629 patent, attached as **Exhibit B**") having the same title. The '744 patent describes and claims a method for generating computer applications on a host system in an arbitrary object framework. The method includes creating arbitrary objects and managing and deploying them. The '629 patent is a continuation of the '744 patent and has essentially the same specification and drawings. Vertical is the owner of the '744 and '629 patents and has standing to sue for infringement. Interwoven markets software, such as the Interwoven TeamSite 2006, which infringes a number of claims of the '744 and '629 patents. Defendants LG and Samsung also infringe these two patents through their manufacture, importation and sale of cellular telephones having an Android operation system. **[Complaint, Dkt. No. 1, ¶¶11-15]**.

C. Enforcement of the '744 Patent And Its Continuation

On April 18, 2007, Vertical brought an action against Microsoft in this judicial district, alleging infringement of the '744 patent **(Exhibit A**). (The '629 patent had not issued at that time.) Vertical prosecuted that action well into discovery and through briefing of all the claim construction issues. On the night before the claim construction hearing, on July 24, 2008, the parties with the help of a local mediator, James Knowles, settled the action. (**Valdetaro Decl. ¶2**).

Then, on January 12, 2009, Vertical contacted Interwoven, alleging that the '744 patent, the same patent involved in the Microsoft action, covered one of Interwoven's products (letter attached as **Exhibit C**). Unbeknownst to Vertical, Interwoven was in the middle of merger and

acquisition discussions at that time with Autonomy Corp. plc ("Autonomy"), a British corporation. A press release, which Vertical recently discovered, had announced that those discussions would lead to a merger in approximately the second quarter of 2009:

> CAMBRIDGE, ENGLAND – January 22, 2009 – Autonomy Corporation plc (LSE: AU or AU.L), A global leader in infrastructure software and Interwoven, Inc. ("NASDAQ:IWOV), a global leader in content management software, today announced that they have entered into a definitive agreement under which Autonomy will acquire Interwoven.

(Press Release attached as **Exhibit D)**.

Almost two weeks before that deal closed, representatives of Vertical and Interwoven met in San Jose, California on March 5, 2009 to discuss Vertical's claims against Interwoven. The parties had agreed to amicably resolve their differences. At that meeting, Interwoven's representatives made a detailed presentation, alleging that Interwoven had developed its products before the invention of the '744 patent. Interwoven did not, however, disclose its TeamSite 2006 product or how it functions. Its representatives deflected the entire presentation and subsequent discussion to products from the 1990s. Their motivation is now clear – avoid disruption of the closing with Autonomy in any way possible. (**Valdetaro Decl. ¶3**).

The acquisition of Interwoven closed on March 17, 2009 (See **Autonomy Corp. plc Annual Report and Accounts for 2009**, pages 58-59, attached as **Exhibit E**). Interwoven is now a wholly owned subsidiary of Autonomy. The Autonomy brand has eclipsed everything previously associated with Interwoven. Even the Interwoven website, www.interwoven.com, prominently displays the name Autonomy – not Interwoven. And, given recent comments by Autonomy's counsel outlined below, it is now certain that Autonomy terminated many of Interwoven's employees.

Vertical continued its investigation of Interwoven's products and found a book titled "The Definite Guide to Interwoven TeamSite" and written by Brian Hastings and Justin McNeal. This book helped Vertical identify Interwoven's TeamSite 2006 product and allowed Vertical to

conclude that the TeamSite 2006 product infringes the '744 patent (**Exhibit A**). In the meantime, a continuation of the '744 patent application issued into the '629 patent (**Exhibit B**). Vertical has further concluded that the TeamSite 2006 product also infringes the '629 patent. (**Valdetaro Decl. ¶4**)

On August 12, 2010, Vertical sent correspondence to counsel that previously represented Interwoven in the 2009 meeting, renewing the settlement discussions (letter attached as **Exhibit F**). It provided claim charts showing how the TeamSite 2006 product infringes the '744 and '629 patents. In that correspondence, Vertical asked for a response by September 15, 2010. Vertical sought to continue the settlement discussions that the parties had started in 2009 and to amicably reach a resolution. But, both parties understood that if they did not resolve their differences, Vertical would seek relief in this Court.

Autonomy's general counsel, Mr. Joel Scott, responded before the deadline and stated that he wanted to discuss the matter further and asked for an extension to October 15, 2010, so that the parties may attempt to settle Vertical's claim. Scott stated that many of the Interwoven employees, including those involved in the March, 2009 meeting, were no longer with the company, and that he needed time to investigate the matter. (**Valdetaro Decl. ¶5**). In fact, Scott labeled a confirming email "PRIVILEGED-FOR SETTLEMENT PURPOSES ONLY, Fed.R.Evid. 408, Cal. Evid. Code §1152." (See email attached as **Exhibit G**).

Based on the subsequent events outlined below, Interwoven had other intentions. It brought the declaratory judgment action in the Northern District of California on October 14, 2010, the day before the end of its extension. But, Interwoven chose not to serve its complaint. Had Interwoven wanted to resolve its dispute with Vertical expeditiously it would have served its complaint immediately. Its delay reveals its true intention – to select a forum that it perceives is favorable to its cause.

Vertical filed the present action on November 15, 2010, two (2) days before it received Interwoven's service of the California complaint. Throughout its opening memorandum, including page 1, Interwoven argues that "[i]t is undisputed that Vertical knew it had been sued in California …." It bases this argument on paragraph 20 of Vertical's complaint in this case, in which Vertical alleges that:

> Interwoven again misled Vertical into believing that it would attempt to resolve any patent infringement claim by Vertical by negotiating in good faith, but it obtained an extension of time under the pretext of studying the issues presented by Vertical **to prepare a lawsuit against Vertical.** [Emphasis added].

The fact remains, however, that Interwoven did not inform Vertical of its California lawsuit until it served that complaint, two days after Vertical filed this lawsuit. Vertical continues to investigate infringement of the '744 and '629 patents; and it may add more parties to this action.

D. Convenience Factors

Vertical has its principle place of business in Richardson, Texas, located in this judicial district. Vertical moved from Fort Worth, Texas to this location in the Spring of 2008 for the convenience of its employees. It did so after considering six (6) different locations, starting in the Spring of 2007. Two of the sites, including what ultimately became the present address of Vertical, were located in Colin County and the rest in Dallas County. **(Exhibit H)**. The location of any pending or prospective litigation did not influence in any way the selection of the present place of business. (**Valdetaro Decl. ¶¶6, 10**).

The material witnesses for this case reside in or near this district. For example, Luiz Valdetaro, Vertical's chief technical officer whose declaration Vertical has filed in support of this opposition, resides in Coppell, Texas; the chief executive officer of Vertical resides in Dallas, Texas; Vertical's current chief financial officer, Freddie Holder, resides in Richardson, Texas in the Eastern District as did the previous chief financial officer who resided in Rockwall, Texas. Vertical houses most of the documents relevant to this litigation in Richardson. And, Vertical

sells and services its products, including the Vertical SiteFlash product that the patents-in-suit cover, out of Richardson. (**Valdetaro Decl. ¶¶6, 10**).

Vertical does not have any offices in California. It does not have any employees that are material witnesses and that reside in California. Vertical has not sold its SiteFlash product in California. To the best of its knowledge, a prior owner of the patents-in-suit (a company that did not have any relation to Vertical) sold a product covered by those patents to a company in California. Vertical collected maintenance fees for that product, but it has not collected any fees or serviced that product since 2004. Since that time, Vertical has not sold any product or provided any services in California. California is simply not a convenient forum for Vertical. (**Valdetaro Decl. ¶7**).

The inventor of the patents-in-suit, Aubrey McAuley, is one of the most important witnesses in this case. He resides in Austin, Texas. He is not an employee of Vertical. He is an employee of an unrelated third party who does not allow him the flexibility to travel to faraway places for this litigation. (**Valdetaro Decl. ¶8**) It goes without saying that the most convenient forum for Mr. McAuley is the Eastern District of Texas, not the Northern District of California.

In contrast, Interwoven is a wholly owned subsidiary of Autonomy, a British corporation. (Under 28 U.S.C. §1391(d), an alien may be sued in any district). Its website, www.interwoven.com, identifies the company as Autonomy. The website also identifies entities such as Texas Instruments of Richardson, Texas and the Texas Department of Transportation as its customers. (**Valdetaro Decl. ¶9**). Thus, the accused product is located in Texas and material third party witnesses are located in Texas. Clearly, the most convenient forum for this litigation is Texas.

Also, Interwoven admits that it has research and development facilities in Austin, Texas. On page 7, footnote 3, of its Opposition to Motion to Transfer Venue or Dismiss (attached as **Exhibit I**), filed in Civil Case No. 3:10-cv-04645 (N. D. Cal.), it states that:

> Interwoven utilizes several facilities for research and development around the United States, including one in Austin, Texas (Austin is located in the Western, not the Eastern, District of Texas). However, it is Interwoven's position that development relevant to this lawsuit occurred at its San Jose headquarters.

But, Interwoven does not offer any evidence to support its "position" that that development occurred in San Jose. Interwoven, in fact, does not offer any evidence on the location of its witnesses and its documents. All they submit is unsupported arguments.

E. Actions Taken In The Northern District of California

On December 7, 2010, Vertical filed a motion in the California case asking the Court to dismiss the California action or transfer it to this Court. Rather than just answering Vertical's motion in California and allowing the California court to decide Vertical's motion to dismiss or transfer, Interwoven filed a separate motion for injunctive relief, seeking to stop Vertical from pursuing this litigation in Texas. The California court heard both motions on the same day (January 20, 2011). On January 24, 2011, the California court denied both motions (Order attached as **Exhibit J**).

On page 2 of the memorandum that Interwoven filed in the California case in support of its motion to enjoin Vertical (attached as **Exhibit K**), Interwoven makes a revealing argument. It states that this Court is "more favorable to patent holders" and by implication suggests that the California court is more favorable to accused infringers. This argument and suggestions are improper. But, those arguments and suggestions most certainly confirm that Interwoven is engaging in forum shopping.

In support of its motion here, Interwoven has submitted its California complaint as an exhibit. That complaint includes various venue allegations, and Vertical answered those allegations in the following manner in its opening brief supporting its motion to dismiss in California:

> A. From 2000 through at least mid-2004, Vertical was based in California at 6336 Wilshire Boulevard, Los Angeles, CA 90048.

Response: This statement is false. Effective on September 8, 2003, Vertical announced the closing of its office in Los Angeles, California and moved its principal executive office to Austin, Texas. It subsequently moved to Richardson, Texas. Vertical has not kept any offices in California. (**Valdetaro Decl. ¶10**).

B. Vertical maintains a registered agent for service of process in California. William Kenneth Mills of 865 South Figueroa Street, Suite 3200, Los Angeles, CA 90017 who has been a director of Vertical since December 2000 and is listed as Vertical's agent for service of process in California.

Response: This statement is true. (**Valdetaro Decl. ¶11**).

C. Based on publicly available information, Vertical is actively acquiring the business and assets of California companies. On May 21, 2010, Vertical Healthcare Solutions, Inc., a company wholly-owned by Vertical, purchased the business and substantially all the assets of Pelican Applications, LLC, a California Limited Liability Company.

Response: This statement is misleading. SnAPPnet, Inc., a Texas corporation and a subsidiary of Vertical, not Vertical Healthcare Solutions, Inc., a Texas corporation and another Vertical subsidiary, purchased the business and assets of Pelican Applications, LLC. The assets that SnAPPnet purchased from Pelican were not located in California. (**Valdetaro Decl. ¶12**).

D. Based on publicly available information, Vertical has two California-based subsidiaries. Vertical Internet Solutions, Inc. and Pointmail.com, Inc. that are California corporation, and are wholly-owned subsidiaries of Vertical.

Response: This statement was true at one time, but Pointmail.com, Inc. and Vertical Internet Solutions, Inc. have been inactive entities since at least 2003 and their status with the California Secretary of State office is "suspended." (**Valdetaro Decl. ¶13**).

E. Based on publicly available information, Vertical has a royalty interest in TranStar, based in Claremont, CA. TranStar is a system integrator and consulting firm. Vertical is entitled to receive 3% of any transaction fees generated by TranStar in perpetuity.

Response: While Vertical had previously entered into a royalty agreement with TranStar, Inc. ("TranStar"), it has never received royalties from TranStar. To its knowledge, TranStar is not active. TranStar is a Nevada corporation and its status with the Nevada Secretary of State's offices is "revoked." (**Valdetaro Decl. ¶14**).

F. Based on publicly available information, Vertical also has a distribution agreement with TranStar, based in Claremont, CA to market Vertical's products.

Response: This is a false statement. Vertical does not have a distribution agreement with TranStar, Inc. (**Valdetaro Decl. ¶15**).

G. Vertical maintains a website (www.vcsy.com) that advertises its products, including SiteFlash, ResponseFlash, emPath, and Emily Solutions. These products are the subject of the distribution agreement with TranStar, outlined above, based on publicly available information. The website solicits both customers, through its product and service advertisements and investors, through its investor relations section. It further provides contact information for Vertical for both customers and investors and an interactive form for submitting questions including for residents of California.

Response: This is a false statement. Vertical has no distribution agreement with TranStar. (**Valdetaro Decl. ¶15**).

This detailed and uncontroverted response has not stopped Interwoven from continuing to argue its unsupported allegations here, on page 4 of the memorandum supporting the present motion, and throughout the briefing in the two California motions that Vertical conducts business in California. It does not.[1] Thus, it is apparent that Interwoven will say anything to have its way. For these reasons and as fully shown below, Vertical respectfully requests that the Court deny Interwoven's motion.

[1] Interwoven's accusation of a lack of professional courtesies in footnote 1 of its motion is inaccurate. Vertical extended the courtesy of a *thirty-day extension* of time for Interwoven to answer. Dkt. X. Interwoven then requested a second extension in order to delay procedings in this Court in favor of its improper declaratory judgment action filed in California. Vertical declined Interwoven's second request. Protecting Vertical's interests should not be characterized as a lack of professional courtesy.

III. ARGUMENT

A. Interwoven Does Not Enjoy the "Presumptive Right" of a First-Filed Litigant Because Its Action is An Improperly Filed Anticipatory Suit

"The Fifth Circuit has … recognized certain exceptions to the first-to-file rule." *Excentus Corp. v. Kroger Co.*, 2010 U.S. Dist. LEXIS 97130, at *7 (N.D. Tex. Sept. 16, 2010). For example, it is a "well-recognized exception" that anticipatory suits are disfavored because they "deprive a potential plaintiff of his choice of forum," and are therefore a "compelling circumstance[] courts cite when declining to apply the first-filed rule." *Paragon Indus., L.P. v. Denver Glass Mach., Inc.*, 2008 U.S. Dist. LEXIS 65665, at *11 (N.D. Tex. Aug. 22, 2008). See also *Excentus Corp. v. Kroger Co.*, 2010 U.S. Dist. LEXIS 97130, at 7-8 (N.D. Tex. Sept. 16, 2010) ("[F]iling an action for declaratory judgment in direct anticipation of being sued often negates the rule."). This exception is applicable to the present case, and therefore this Court should allow Vertical to proceed with the present action.

More specifically, Interwoven improperly filed its suit in the Northern District of California in anticipation of litigation with Vertical while leading Vertical to believe that it was genuinely engaged in settlement discussions. If not for Interwoven's misrepresentations, Vertical would have filed the Texas case much sooner, rather than attempting to negotiate a settlement. *PAJ, Inc. v. Yurman Design, Inc.*, 1999 U.S. Dist. LEXIS 1424, at *9-10 (N.D. Tex. Feb. 9, 1999) ("[T]he Court cannot allow a party to secure a more favorable forum by filing an action for declaratory judgment when it has notice that the other party intends to file suit involving the same issues in a different forum.") (internal quotations omitted). By granting Interwoven's motion to stay, dismiss, or transfer the Texas case, this Court would be "create[ing] disincentives to responsible litigation by rewarding the winner of a race to the courthouse." *Paragon Indus., L.P. v. Denver Glass Mach., Inc.*, 2008 U.S. Dist. LEXIS 65665, 11-12 (N.D. Tex. Aug. 22, 2008) (internal quotation omitted).

1. In Surreptitiously Filing Suit While Negotiations With Vertical Were Ongoing, Interwoven Has Engaged In Unethical And Improper Procedural Fencing

An accused infringer that surreptitiously files suit in the midst of negotiations with the patent holder is engaged in "procedural fencing," a well recognized and universally condemned litigation practice. In filing a declaratory judgment action, such an infringer purports to seek relief from the uncertainty of being accused of infringement without the ability to secure an adjudication of its rights. In reality, however, the infringer has no need for declaratory relief in that context because the patent owner is actively enforcing its infringement claim. Thus, the infringer's true motive of securing its chosen forum is readily apparent.

Courts refuse to hear such suits because the purposes that the Declaratory Judgment Act was meant to serve would be undermined by a rule rewarding the choice of forum to an infringer that unilaterally abandons negotiations to race to the courthouse. "The wholesome purpose of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or choose a forum. …The federal declaratory judgment is not a prize to the winner of the race to the courthouse." *Texas Instruments, Inc. v. Micron Semiconductor, Inc.*, 815 F. Supp. 994, 998 (E.D. Tex. 1993) (citing *Tempco Electric Heater Corporation v. Omega Engineering, Inc.*, 819 F.2d 746 (7th Cir. 1980)).

2. Interwoven Filed This Suit As A Litigation Ploy And Faced No Injury From Uncertainty Or Delay

Interwoven filed this action for the purpose of avoiding the resolution of its dispute with Vertical in Texas and gaining leverage against Vertical in its settlement negotiations. Interwoven was not motivated by any fear that injury might result from the possibility of uncertainty or delay. In this case, as in those cited above, the lack of any legitimate reason for filing suit by the declaratory judgment plaintiff exposes Interwoven's true and improper motive.

The fact that Interwoven chose not to serve its California complaint for over a month further confirms Interwoven's forum shopping motivation.

3. Use of the Declaratory Action as a Litigation Ploy is Contrary to the Public Interest

Use of the declaratory judgment action to avoid a forum viewed as undesirable by an infringer is a well-recognized litigation ploy and condemned as contrary to the public interest. “Courts disfavor anticipatory suits because they are an aspect of forum shopping that deprive a potential plaintiff of his choice of forum.” *Frank's Tong Serv. v. Grey Wolf Drilling Co.*, L.P., 2007 U.S. Dist. LEXIS 98002 (S.D. Tex. Sept. 11, 2007) (citing *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 n.3 (5th Cir. 1983). "[T]he cost [of] a rule which will encourage an unseemly race to the courthouse and quite likely numerous unnecessary suits … is simply too high." *Texas Instruments, Inc. v. Micron Semiconductor*, Inc., 815 F. Supp. 994, 998 (E.D. Tex. 1993) (internal citations omitted).

In the lawsuit currently before the Court, Interwoven and Vertical were engaged in negotiations. Interwoven never advised Vertical that the negotiations were over or that delay in resolution of the matter might cause it harm. In fact, Interwoven was the one that caused any delay by misguiding Vertical's investigation. Accordingly, the first-to-file rule is not applicable to the present case and Vertical respectfully asks this Court to deny Interwoven’s Motion to Stay, Dismiss or Transfer.

B. The Eastern District of Texas is the Proper Forum Based on Federal Circuit Precedent

In a factually similar case, *Serco Services Co. v. Kelley Co.*, 51 F.3d 1037 (Fed. Cir. 1995), the Federal Circuit held that dismissal of a first-filed declaratory judgment action in favor of a related case was proper. Serco received a letter from Kelley alleging that Serco's product infringed the claims of Kelley's patent. 51 F.3d at 1037-38. Serco responded with a letter stating its non-infringement position. *Id.* at 1038. Kelley sent another letter to Serco several months

later accusing Serco of infringement and stating that "unless you confirm to us by September 20, 1993 that Serco [will cease its infringing activities], Kelley will commence a law suit." *Id.* On September 17, 1993, Serco brought a declaratory judgment action against Kelley in the Northern District of Texas. *Id.* On September 20, 1993, Serco wrote back to Kelley, reiterating its non-infringement position. That same day, Kelley brought suit against Serco for patent infringement. *Id.*

The district court in Texas granted Kelley's motion to dismiss, stating that the anticipatory nature of the declaratory judgment action, coupled with convenience factors, merited dismissal of the declaratory judgment action. *Id.* In affirming the judgment of the district court, the Federal Circuit stated that (1) there is not absolute right to a declaratory judgment; (2) whether to dismiss or transfer a first-filed declaratory judgment action in favor of a later-filed infringement suit is left to the district court's discretion; and (3) the district court's consideration of the convenience and availability of witnesses, the possibility of consolidation with related litigation, and the anticipatory nature of the declaratory judgment action supported dismissal of the declaratory judgment action. *Id.* at 1038-40.

In briefing Vertical's motion to dismiss or transfer and Interwoven's motion to enjoin in the California case, Interwoven has attempted to distinguish *Serco Services*. It first attempted to distinguish it on convenience grounds, failing completely to mention the first-to-file rule. Interwoven then argued that Vertical did not send a cease and desist letter with a threat to sue on a specific date. First, Vertical sent two cease and desist letters (**Exhibits C and F**), not just one. Second, even though precedent does not require a threat to sue on a specific date, there was such a threatened date in the correspondence of this case. The August 12 letter (**Exhibit F**) provided a September 15, 2010 date, and the confirming letter by Autonomy's general counsel (**Exhibit G**) provided an October 15, 2010 date. It does not make sense for Autonomy to obtain an extension

if the parties did not contemplate litigation. That the letters do not use inflammatory language is not relevant.

Also in the California briefing, Interwoven relied upon *Electronics for Imaging, Inc. v. Coyle,* 394 F.3d 1341, 1346 (Fed. Cir. 2005), arguing that dismissal of a first-filed declaratory judgment action based solely on the grounds that it was anticipatory is an abuse of discretion. *Electronics for Imaging*, however, is distinguishable because, in that case, the patentee was not negotiating directly with the accused infringer, but was instead "attempt[ing] extra-judicial patent enforcement with scare-the-customer-and-run tactics that infect the competitive environment of the business community with uncertainty and insecurity." *Elecs. for Imaging, Inc. v. Coyle*, 394 F.3d 1341, 1346 (Fed. Cir. 2005) (citing *Arrowhead Indus. Water, Inc. v. Ecolochem, Inc.*, 846 F.2d 731, 735 (Fed. Cir. 1988)). In the present case, by contrast, the parties have been directly engaged in prolonged negotiations. Vertical did not attempt to infect the business community with uncertainty and insecurity, but instead delayed filing its lawsuit because it relied upon Interwoven's representation that the parties would act in good faith to resolve this dispute. For at least these reasons, *Electronics for Imaging* is inapplicable based on the present facts. *Serco Services*, on the other hand, could not be any more applicable on the facts and on the law, and Vertical respectfully requests that the Court apply it here.

C. The Most Convenient Forum Is The Eastern District of Texas And Therefore Transfer Should be Denied

1. Related Cases Are Pending In This Court

A compelling reason that this case should stay in this Court is the existence of related litigation pending here. *ColorQuick, L.L.C. v. Vistaprint Ltd.*, 2010 U.S. Dist. LEXIS 136226, at *24 (E.D. Tex. July 22, 2010) ("[T]o avoid inconsistent results and to avoid unnecessarily duplicating efforts, judicial economy may counsel in favor of transferring a case to, or retaining a case in, a district where other cases involving the patent-in-suit are pending."). Vertical brought

suit on November 15, 2010, in this Court against Interwoven, two LG companies, and two Samsung companies. The fact that cases in which the same utility patents that are at issue in this case are pending in this Court weighs strongly in favor of this Court consolidating it with the cases against the LG and Samsung companies. The cases against the three defendant groups have numerous overlapping legal issues. For example, the meaning and scope of the claims of the '744 and '629 patents is an issue in both cases, as is the validity of those patents. **In addition, this Court is already familiar with the '744 patent, given its experience with the prior case between Vertical and Microsoft.**

As the Supreme Court observed in *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19 (1960):

> To permit a situation in which two cases involving precisely the same issues are simultaneously pending in different District Courts leads to the wastefulness of time, energy and money that § 1404(a) was designed to prevent. Moreover, such a situation is conducive to a race of diligence among litigants for a trial in the District Court each prefers.

364 U.S. at 26; see also *Medtronic Ave, Inc. v. Cordis Corp.*, 2003 U.S. Dist. LEXIS 26956, at *13-15 (E.D. Tex. Mar. 19, 2003) ("[P]iecemeal litigation in the complex and technical area of patent and trademark law is especially undesirable"). Judicial economy is "a paramount consideration" that has consistently been considered by courts, including those in this district. *ColorQuick, L.L.C.*, 2010 U.S. Dist. LEXIS 136226 at *22 (Judicial economy is "a paramount consideration when determining whether a transfer is in the interest of justice.") (citing *In re Volkswagen of Am., Inc.*, 566 F.3d 1349, 1351 (Fed. Cir. 2009)); see also *MHL Tek, LLC v. Nissan Motor Co.*, 2009 U.S. Dist. LEXIS 13676, 2009 WL 440627, at *7 (E.D. Tex. Feb. 23, 2009) (declining to transfer case where "two other cases involving the exact same patents [were] before this Court").

As in the cases cited above, this case avoids the evils that § 1404(a) is designed to prevent. Discovery can be consolidated, thereby saving the time, energy, and money of the

parties. The same court can decide the issues of claim interpretation, validity, and infringement, thereby saving judicial resources and avoiding duplicitous litigation and inconsistent results. And witnesses can appear one time in Texas instead of once in this Court and then again in the Northern District of California.

2. The Convenience Of The Witnesses Favors This Court

"The convenience and cost of attendance for witnesses is an important factor in the transfer calculus." *ColorQuick, L.L.C.*, 2010 U.S. Dist. LEXIS 136226 at *16. Under Fifth Circuit law, "[w]hen the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled." *Id.* at *17.

Vertical's headquarters is located approximately 125 miles from this Court and almost all of the witnesses are in or near this district. The chief technical officer of Vertical, Mr. Valdetaro, resides in Dallas. The chief executive officer, Mr. Richard Wade, also resides in Dallas, Texas. The chief financial officer of Vertical resides in this district. The inventor of the '744 and '629 patents resides in Austin, Texas; and this district is convenient for this witness, given the restrictions of his employment. (Interwoven has not identified a single witness who resides in or near the Northern District of California.)

3. The Convenience Of The Parties Favors This Court

Vertical's offices, personnel and documents are located in Texas. Clearly, Texas is the most convenient forum for Vertical. Interwoven boasts of having customers in Texas. The accused product is located in Texas. Important third parties, *e.g.*, Interwoven's Texas customers, reside in this district. Interwoven should not have any problem in defending this lawsuit in Texas under all of these circumstances.

Interwoven argues that Vertical only recently moved its offices to this district for the purposes of establishing residence here for this lawsuit. Not one shred of evidence supports this

argument. Vertical moved its offices here almost three years ago. It did so after filing the action against Microsoft, the first of this series of cases. If it had any of the intentions attributed to it by Interwoven, it would have moved its offices before the Microsoft action. Vertical moved from Fort Worth to Richardson, Texas for the convenience of its employees, the same convenience that would be served by keeping the present lawsuit here.

4. The Location Of Relevant Documents And Other Evidence Favors This Court

The location of documents, records, and other sources of proof is a factor the Court may properly consider when deciding whether to transfer venue. This factor weighs heavily in favor of keeping the case in the Eastern District of Texas. As such, virtually all the documents and other evidence relevant to this litigation are either located in this district or are more easily and economically transported from their locations to this district than to the Northern District of California.

Interwoven cannot argue that its documents are located in California because its research facility in Texas will have access to any documents that Interwoven will produce; and Interwoven can produceits source code and other highly confidential information at its Texas facility. Thus, all the documents are located in Texas; and almost all of the witnesses are located there as well. This includes the most important witness – the inventor, Aubrey McAuley.

In the California case, the only rebuttal that Interwoven offered with respect to this witness was to speculate on his status in 2001, 2002 and 2004 and offer to take his deposition in Texas. This is the same approach that it uses in trying to manufacture contacts and activity by Vertical in California. And, the California activity that it alleges is Southern California activity, not activity or presence in the Northern District where it filed suit.

D. Interwoven Does Not Offer Any Evidence To Support Its Arguments

Interwoven does not offer any evidence to supports its transfer "analysis." Its memorandum in support of its motion is replete with evasive and troubling language. The second paragraph, on page 3 of its memorandum, under the heading "Factual Background," is a good example of its evasive and misleading statements. There Interwoven states the following:

> … 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…. Vertical distributes its products through a California entity … so documents and witnesses concerning Interwoven's patent marking defense **are likely** to be found in California…. **It is likely** that the LG and Samsung defendants similarly do not have relevant connections with this district. [Emphasis added].

Interwoven has not established anything and has not controverted any of the evidence presented by Vertical.

In fact, during the January 20, 2011 hearing in California, the California court asked counsel for Interwoven to disclose the location of the Interwoven developer of the accused TeamSite 2006 product. Interwoven's counsel could not do so. Thus, even though the California court has denied Vertical's motion to dismiss or transfer, Vertical respectfully asserts that the time of filing of the California case and the location of an Interwoven office (the only factors relied upon by the California court) do not "trump" all the above evidence.

IV. CONCLUSION

For the reasons provided above, Vertical respectfully requests that the Court deny Interwoven's motion.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email, on this the 27th day of January, 2011.

/s/ William E. Davis, III
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