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

VERTICAL COMPUTER SYSTEMS, INC.,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 2:10-cv-490
v.	§	
	§	**JURY TRIAL DEMANDED**
INTERWOVEN, INC., LG ELECTRONICS MOBILECOMM U.S.A., INC., LG ELECTRONICS INC., SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC.,	§	
	§	
Defendants.	§	

VERTICAL'S COMPUTER SYSTEMS, INC.'S SUR-REPLY IN SUPPORT OF ITS OPPOSITION TO INTERWOVEN, INC.'S MOTION TO STAY, DISMISS OR TRANSFER

Interwoven, Inc. ("Interwoven") now relies on Judge Seeborg's order in the parallel declaratory judgment action in the Northern District of California to foreclose this Court's consideration of the very issue it has brought before the Court. Interwoven filed a request for judicial notice of Judge Seeborg's order and again asserts the order in its reply. It fails, however, to request judicial notice of the subsequent actions taken by Vertical Computer Systems, Inc. ("Vertical") in California or of the recent decision by the Court of Appeals for the Federal Circuit which compels a much different outcome than that reached by Judge Seeborg. The Federal Circuit mandates consideration of judicial efficiency, a factor to which Judge Seeborg did not assign much weight in reaching his decision. This case will proceed whether the California case proceeds or does not proceed. Vertical has put new Federal Circuit authority in front of Judge Seeborg that we believe will cause Judge Seeborg to reverse his prior ruling. Specifically, on very similar facts to this case, the Federal Circuit requires a great deal of weight to be given to judicial efficiency. **In re Aliphcom**, Docket No. 971 (Fed. Cir. February 9, 2011, attached as

Exhibit L). Thus, for the reasons outlined in that precedent, in Vertical's opposition and in the text below, Vertical respectfully requests that this Court deny Interwoven's motion.

Vertical submits the following additional facts in support of its opposition to Interwoven's Motion to Transfer, Dismiss or Stay.

1. On February 3, 2011, Vertical filed a motion in the declaratory judgment action brought by Interwoven in the Northern District of California, asking the Court to dismiss the complaint in its entirety for failing to properly allege non-infringement, invalidity, and unenforceability and renewing Vertical's motion to transfer or dismiss (Motion and Memorandum attached as **Exhibit M**).

2. Essentially conceding that it had not filed a proper complaint in California, Interwoven filed an amended complaint on February 7, 2011.

3. Vertical filed a motion to dismiss, transfer or stay the declaratory judgment action filed by Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. in the Northern District of California and based it on the first-to-file rule, convenience and judicial economy. (Motion and Memorandum attached as **Exhibit N**).

4. The Federal Circuit recently decided a request for mandamus in a case identical to this case. The Federal Circuit, in **In re Aliphcom**, Docket No. 971 (Fed. Cir. February 9, 2011) (decision attached as **Exhibit L**) rejected an attempt by Aliphcom to keep its declaratory lawsuit in the Northern District of California rather than the Eastern District of Texas. Aliphcom field a declaratory judgment action against Wi-LAN, Inc. in the Northern District of California in May, 2010, after receiving correspondence from Wi-LAN that alleged that Aliphcom's product practiced Wi-LAN's patents. Wi-LAN then filed suit against Aliphcom in this Court in June, 2010 and joined Aliphcom with some other defendants.

5. The Federal Circuit in **In re Aliphcom** held that:

> The district court acknowledged that in the present case there are multiple factors which might counsel against transfer, such as the locations of documents and witnesses and that Wi-LAN has admitted that it has no regular U.S. employees in Texas or elsewhere and no "robust" activities in Texas. However, the district court concluded that these convenience elements were out-weighed by the concerns of judicial efficiency and inconsistent judgments presented by allowing two cases with overlapping claims to proceed in two different federal courts.
>
> This court recently held that substantial justification for maintaining an action in a forum existed on the ground of judicial economy when, inter alia, there was co-pending litigation before the trial court involving the same patent and underlying technology. *See* **In Re Vistaprint**, Misc. No. 954, -- F.3d --, 2010 Westlaw 5136034 (Fed. Cir. Dec. 15, 2010). Specifically, this court explained "that having the same … judge handle this and the co-pending case involving the same patent would be more efficient than requiring another magistrate or trial judge to start from scratch." *Id.* at *4. Therefore, this court cannot say that the district court clearly and indisputably abused its discretion in ordering the declaratory judgment action transferred to the Eastern District of Texas. *Id.*

The Federal Circuit in **In re Aliphcom** acknowledged that judicial efficiency trumps convenience elements, citing its previous decision in **In re Vistaprint**, Misc. No. 954, __ F.3d __, 2010 Westlaw 5136034 (Fed. Cir. Dec. 15, 2010).

Here, Vertical and its witnesses all reside in this district. The documents are located in this district. Every possible factor dictates that this Court keep Interwoven in this case with the other defendants. The California court simply erred in denying Vertical's initial motion to transfer or dismiss.

Dated: February 16, 2011

Respectfully submitted,

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Attorneys for Plaintiff, Vertical Computer Systems, Inc.

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 16th day of February, 2011.

/s/ William E. Davis, III
William E. Davis, III