# EXHIBIT M

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Vertical Computer Systems, Inc.

**IN THE UNITED STATES DISTRICT COURT**

**FOR THE NORTHERN DISTRICT OF CALIFORNIA**

INTERWOVEN, INC.,

Plaintiff,

v.

VERTICAL COMPUTER SYSTEMS, INC.,

Defendant.

Case No. 10-cv-4645-RS

**DEFENDANT VERTICAL COMPUTER SYSTEMS, INC.'S NOTICE OF MOTION AND MOTION TO DISMISS INTERWOVEN'S DECLARATORY JUDGMENT COMPLAINT PURSUANT TO FRCP 12(b)(6) AND RENEWED MOTION TO TRANSFER THIS ACTION TO THE EASTERN DISTRICT OF TEXAS**

Date: March 10, 2011
Time: 1:30 p.m.
Courtroom 3 (17th Floor)
Judge Richard Seeborg

TO PLAINTIFF AND ITS ATTORNEY OF RECORD:

PLEASE TAKE NOTICE that on March 10, 2011, at 1:30 p.m., or as soon thereafter as the matter may be heard, before Judge Richard Seeborg in Courtroom 3 of the above-entitled Court, located at 450 Golden Gate Ave., San Francisco, CA 94102, Defendant Vertical Computer Systems, Inc. ("Vertical") will, and hereby does, move this Court for an order to dismiss

Interwoven, Inc.'s ("Interwoven") declaratory judgment complaint pursuant to FRCP 12(b)(6), and an order transferring this lawsuit to the Eastern District of Texas.

Interwoven has failed to sufficiently plead non-infringement, invalidity and unenforceability. Vertical requests that the Court dismiss its complaint. Also, Interwoven cannot claim to be the first to file a complaint and obtain the benefit of the first-to-file rule because the complaint it filed is wholly defective. Thus, Vertical renews its motion to transfer this case to the Eastern District of Texas where Vertical first filed a proper complaint initiating the litigation between the two parties.

Accordingly, for the reasons outlined more fully in the accompanying supporting memorandum, Vertical respectfully requests that the Court grant its motion.

DATED: February 3, 2011

Respectfully submitted,

/s/ Mark V. Isola

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VERTICAL COMPUTER SYSTEMS, INC.,

Defendant.

Case No. 10-cv-4645-RS

**DEFENDANT VERTICAL COMPUTER SYSTEMS, INC.'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS INTERWOVEN'S DECLARATORY JUDGMENT COMPLAINT PURSUANT TO FRCP 12(b)(6) AND RENEWED MOTION TO TRANSFER THIS ACTION TO THE EASTERN DISTRICT OF TEXAS**

Date: March 10, 2011
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## I. INTRODUCTION

Defendant Vertical Computer Systems, Inc. ("Vertical") respectfully moves to dismiss each of the two claims of Plaintiff Interwoven, Inc.'s Complaint for Declaratory Judgment pursuant to Federal Rule of Civil Procedure 12(b)(6). In both of its claims, Interwoven, Inc. ("Interwoven") has failed to sufficiently plead non-infringement, invalidity, or unenforceability, and therefore Interwoven's claims must be dismissed as a matter of law.

More specifically, Interwoven's Complaint for Declaratory Judgment contains two claims relating to U.S. Pat. Nos. 6,826,744 ("the '744 patent") and 7,716,629 ("the '629 patent"), respectively. The first claim reads: "No valid, and enforceable, claim of the '744 patent is infringed by the Plaintiff." Similarly, the second claim reads: "No valid and unenforceable claim of the '629 patent is infringed by Plaintiff." Implicit in these claims is the proposition that the '744 patent and the '629 patent are invalid or unenforceable. Yet Interwoven has not sufficiently pleaded non-infringement, invalidity or unenforceability, and therefore its claims must be dismissed.

Interwoven's bare non-infringement claim does not put Vertical on notice as to which patent claims are alleged not to be non-infringed, nor does it put Vertical on notice as to which Interwoven products are allegedly not infringed. Similarly, Interwoven's invalidity claims do not state under which statutory section – much less under which statutory subsection - the '744 patent and the '629 patent (collectively, "the patents-at-issue") are invalid. This naked assertion of invalidity is conclusory and wholly devoid of factual support. As such, Interwoven's claims of non-infringement and invalidity do not withstand scrutiny under the Supreme Court's *Twombly* and *Iqbal* decisions.

Interwoven's unenforceability claims are likewise deficient. Again the basis for Interwoven's claims is unclear, although it can be assumed that Interwoven is attempting to allege that the patents are unenforceable as a result of inequitable conduct on behalf of the patentee. It is well-settled law that claims of inequitable conduct are tantamount to claims of fraud and are therefore subject to the heightened pleading standard of Rule 9(b). Interwoven's unfounded

claims of unenforceability do not even come close to meeting the heightened pleading standard of Rule 9(b).

For these reasons, and as further set forth below, Interwoven's claims of non-infringement, invalidity and unenforceability fall woefully short of federal pleading requirements and must be dismissed as a matter of law.

## II. FACTUAL BACKGROUND

Interwoven, in his haste to select a forum that it believes is advantageous to its interests, simply filed a defective complaint (attached as **Exhibit A**) that completely fails in every respect. This complaint simply states for both the '744 patent and the '629 patent that "No valid, and enforceable, claim of the '744 patent is infringed by the Plaintiff.... No valid, and enforceable, claim of the '629 patent is infringed by Plaintiff." Interwoven makes these vague allegations even though Vertical provided a detailed infringement analysis to Interwoven in August of 2010 (letter attached as **Exhibit B**) of the '744 and '629 patents identifying which claims that Interwoven infringed and which Interwoven product infringes those claims. None of that information appears in Interwoven's complaint (**Exhibit A**). Interwoven has conceded that it filed a defective complaint by stating in a draft case management statement that it intends to file an amended complaint on February 4, 2011. This itself proves that it is not entitled to the filing date of October 14, 2010. Thus, Vertical respectfully requests that the Court dismiss the initial complaint filed by Interwoven and transfer this case to Texas where Vertical first filed a proper complaint.

## III. ARGUMENT

### (A) Interwoven's Claims Of Non-Infringement Must Be Dismissed Because They Are Insufficient Under The Supreme Court's Decisions In *Twombly* And *Iqbal*

Interwoven's factually unsupported conclusion that it does not infringe the patents at issue is insufficient to satisfy the federal pleading standard. Under Rule 8(a)(2), a complaint requires "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (U.S. 2009). "A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (U.S. 2007)). "Nor does a complaint suffice if it tenders 'naked

assertion[s]' devoid of 'further factual enhancement.'" *Id.* (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (U.S. 2007)).

In cases dealing with a complaint filed by a patentee plaintiff, the law is very clear. A complaint fails to satisfy these requirements where the "[p]laintiff has failed to identify the infringing products or devices with any specificity." *Interval Licensing LLC v. AOL, Inc.*, 2010 U.S. Dist. LEXIS 131081, at *9 (W.D. Wash. Dec. 10, 2010). Where such a bare bones complaint is filed, "[t]he Court and Defendants are left to guess what devices infringe on the [asserted] patents." *Id.* These allegations are insufficient to put Defendants on "notice as to what [they] must defend." *Id.* Instead, a properly filed complaint "must identify which of Defendants' products, devices, or schemes allegedly infringe on Plaintiff's patents." *Id.* at *11.

This law applies equally to a case, like the present case, that deals with a declaratory judgment plaintiff who is an accused infringer. The plaintiff must identify which claims that it believes the defendant has asserted, which products that the defendant has accused, which claims that it does not infringe and which products that do not infringe. Interwoven has made no such allegations, even though it has had possession of Vertical's infringement contentions since August, 2010.

The two counts of Interwoven's complaint merely assert that Interwoven does not infringe the patents at issue. This complaint is insufficient because it does not specify particular claims of the patents, nor does it identify which products Interwoven alleges do not infringe the patents at issue. These unsupported legal conclusions do not put Vertical on notice as to what it must defend. Therefore, both counts of Interwoven's complaint must be dismissed.

**(B) Interwoven's Invalidity Claims Must Be Dismissed**

Interwoven's claims of invalidity are insufficient because they do not identify the basis for invalidity. This court has held that simply pleading the statute to allege patent invalidity is "radically insufficient" because it does not provide the other party with a basis for assessing the claim. *Qarbon.com Inc. v. eHelp Corp.*, 315 F. Supp. 2d 1046, 1050 (N.D. Cal. 2004). See also *PB Farradyne, Inc. v. Peterson*, 2006 U.S. Dist. LEXIS 3408 (N.D. Cal. Jan. 13, 2006) (Illston, J.) (holding claim did not provide fair notice of its basis where the claim merely concluded that

the asserted patents were "invalid for failure to meet one or more of the requirements of Title 35, United States Code, including the requirements of sections 102, 103, 112 and/or other applicable statutes.") Yet in the present case, *Interwoven has not even pleaded the statutory section which forms that basis of its invalidity claims*. Instead, Interwoven has left Vertical guessing as to which one of at least four statutory sections forms the basis for its claims of invalidity.

Specifically, a patent can be found invalid under §§101, 102, 103, or 112 of the Patent Act. Section 102 alone provides for seven (7) subsections under which a patent can be invalid. (**Exhibit C**, 35 U.S.C. §102). Furthermore, at least five (5) of those subsections in turn set forth numerous independent grounds for invalidating a patent, including prior public use, prior offer to sell, prior printed publication, abandonment, prior patenting in a foreign country by the inventor or his or her legal representatives or assigns, prior published patent applications by others, prior issued patents by others, non-joinder of inventors, prior invention by others and the like. See 35 U.S.C. §102(a)-(g) (**Exhibit C**). As such, it immediately becomes self-evident that Interwoven's insinuations of invalidity are radically insufficient and must therefore be dismissed.

**(C) Interwoven's Unenforceability Claims Do Not Meet The Heightened Pleading Standard Set Forth In Fed.R.Civ.P. 9(B) And Clarified By The Federal Circuit In *Exergen***

"In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake." Fed.R.Civ.P. 9(b). "[I]nequitable conduct, while a broader concept than fraud, must be pled with particularity." *Advanced Micro Devices, Inc. v. Samsung Elecs. Co.*, 2009 U.S. Dist. LEXIS 45736, at *12 (N.D. Cal. May 18, 2009) (Illston, J.) (citing *Ferguson Beauregard/Logic Controls v. Mega Systems, LLC*, 350 F.3d 1327, 1344 (Fed. Cir. 2003)). As the Federal Circuit clarified in *Exergen*, "the circumstances in Rule 9(b) must be set forth with particularity, i.e., they must be pleaded in detail--this means the who, what, when, where, and how of the alleged fraud." *Exergen Corp. v. Wal-Mart Stores*, Inc., 575 F.3d 1312, 1327 (Fed. Cir. 2009) (internal quotations omitted). Stated another way, a defendant would be required to plead that (1) an individual associated with the filing and prosecution of a patent application made an affirmative misrepresentative of material fact, failed to disclose a material information (such as

a prior art reference), or submitted false material information; **and** (2) the individual did so with specific intent to deceive the PTO. *Star Scientific, Inc. v. R.J. Reynolds Tobacco Co.*, 537 F.3d 1357, 1365 (Fed. Cir. 2008).

Yet Interwoven has not pleaded any of these requirements. Interwoven merely insinuated that the patents are unenforceable, yet it has not made out the "what" and "where" requirements set forth by the Federal Circuit. To meet those requirements, Interwoven must "identify which claims, and which limitations in those claims, the withheld references are relevant to, and where in those references the material information is found." *Exergen*, 575 F.3d at 1329. Because Interwoven has failed to plead any of these requirements, its claims of unenforceability must be dismissed.

## IV. CONCLUSION

WHEREFORE, Vertical respectfully requests that the Court grant its motion to dismiss Interwoven's Complaint for Declaratory Judgment pursuant to Rule 12(b)(6) because it fails to sufficiently plead non-infringement, invalidity and unenforceability. Accordingly, Vertical also requests, based on the above, that the Court transfer the Interwoven lawsuit to the Eastern District of Texas because Interwoven was not the first to file a proper complaint. Vertical filed the first complaint in Texas.

DATED: February 3, 2011

Respectfully submitted,

/s/ Mark V. Isola

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