

EXHIBIT N

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11 **IN THE UNITED STATES DISTRICT COURT**
12 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

14 SAMSUNG ELECTRONICS CO., LTD. and
15 SAMSUNG ELECTRONICS AMERICA,
INC.,

16 Plaintiffs,

17 v.

18 VERTICAL COMPUTER SYSTEMS, INC.,
19 Defendant.

Case No. 3:11-cv-0189-RS

**VERTICAL COMPUTER SYSTEMS,
INC.'S NOTICE OF MOTION AND
MOTION TO DISMISS, TRANSFER OR
STAY SAMSUNG'S LAWSUIT**

Date: March 24, 2011
Time: 1:30 p.m.
Courtroom 3 (17th Floor)
Judge Richard Seeborg

22 TO PLAINTIFF AND ITS ATTORNEY OF RECORD:

23 PLEASE TAKE NOTICE that on March 24, 2011, at 1:30 p.m., or as soon thereafter as
24 the matter may be heard, before Judge Richard Seeborg in Courtroom 3 of the above-entitled
25 Court, located at 450 Golden Gate Ave., San Francisco, CA 94102, Defendant Vertical Computer
26 Systems, Inc. ("Defendant") will, and hereby does, move this Court for an order dismissing the
27 complaint brought by Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc.
28 (collectively, "Samsung") and alternatively to transfer the Samsung lawsuit to the Eastern District

1 of Texas based on 28 U.S.C. §1404 or to stay the lawsuit.

2 Vertical sued Samsung in the Eastern District of Texas two months before Samsung
3 brought this parallel action which presents the same three parties (Vertical and the two Samsung
4 companies) and the same patent claims of the same two patents and the same accused products.
5 Samsung's conduct in filing this action is a blatant attempt at forum shopping. This Court does
6 not have any connection with Samsung, the claims asserted in the Samsung lawsuit and Vertical.
7 The most convenient forum for both Vertical and Samsung is the Eastern District of Texas where
8 Vertical first filed suit.

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

11
12 DATED: February 4, 2011

Respectfully submitted,

13 /s/ Mark V. Isola

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14 SAMSUNG ELECTRONICS CO., LTD. and
15 SAMSUNG ELECTRONICS AMERICA,
INC.,

16 Plaintiffs,

17 v.

18 VERTICAL COMPUTER SYSTEMS, INC.,

19 Defendant.

Case No. 3:11-cv-0189-RS

**DEFENDANT VERTICAL COMPUTER
SYSTEMS, INC.'S MEMORANDUM IN
SUPPORT OF ITS MOTION TO DISMISS,
TRANSFER OR STAY SAMSUNG'S
LAWSUIT**

Date: March 24, 2011
Time: 1:30 p.m.
Courtroom 3 (17th Floor)
Judge Richard Seeborg

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1 **I. INTRODUCTION**

2 Pursuant to the first-to-file rule, Vertical Computer Systems, Inc. ("Vertical") respectfully
3 moves this Court to dismiss the Complaint brought by Samsung Electronics Co., Ltd. and
4 Samsung Electronics America, Inc. (collectively, "Samsung") and alternatively to transfer the
5 Samsung lawsuit to the Eastern District of Texas based on 28 U.S.C. §1404 or to stay the lawsuit.
6 Vertical sued Samsung in the Eastern District of Texas **two months** before Samsung brought this
7 parallel action which presents the same three parties (Vertical and the two Samsung companies)
8 and the same patent claims of the same two patents and the same accused products.

9
10 Samsung's conduct in filing this action is a blatant attempt at forum shopping. This Court
11 does not have any connection with Samsung, the claims asserted in the Samsung lawsuit and
12 Vertical. The only stated rationale for Samsung's action is the fact that the suit between
13 Interwoven and Vertical involves the same two patents. But the lawsuit in Texas which Vertical
14 filed before Samsung brought the present lawsuit involves similar products and the same two
15 patents against LG Electronics MobileComm U.S.A., Inc. and LG Electronics Inc. (The products
16 of Vertical are completely different.) That lawsuit remains pending and will continue. Thus,
17 judicial economy cannot possibly form the basis for Samsung's conduct— that conduct is
18 impermissible forum shopping.
19

20 This forum is not convenient for either Samsung or Vertical. Vertical resides in the
21 Eastern District of Texas; all of its witnesses reside in or near that district; and Vertical houses its
22 documents there. Also, Samsung, although it is a Korean company with a New Jersey subsidiary,
23 is not a stranger to the Eastern District of Texas. It is a party in a large number of many actions
24 there. And significantly, it has filed its own lawsuits there. Thus, it cannot argue that the Eastern
25 District of Texas is not convenient. It is the most convenient district for both Vertical and
26 Samsung.
27
28

1 Therefore, for the reasons outlined below, Vertical respectfully asks that the Court grant
2 this motion and dismiss Samsung from this lawsuit.

3 **II. FACTS**

4 **A. The Parties Involved**

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

7 Plaintiff Samsung Electronics Co., Ltd. is a corporation organized under the laws of the
8 Republic of Korea and has its principal place of business at 1320-10, Seocho 2-dong, Seocho-gu,
9 Seoul 137-857, Republic of Korea.

10 Defendant Vertical is a publicly held corporation that develops and sells software
11 products. It has its principal place of business in the Eastern District of Texas at 101 W. Renner
12 Road, Richardson, Texas 75082.

13 **B. The Subject Matter Of The Lawsuit**

14 The subject matter of Samsung's complaint here (attached as **Exhibit A**) and Vertical's
15 complaint in Texas (attached as **Exhibit B**) is United States Patent No. 6,826,744 ("the '744
16 patent") titled "System and Method for Generating Web Sites in an Arbitrary Object Framework"
17 and United States Patent No. 7,716,629 ("the '629 patent") having the same title. The '744 patent
18 describes and claims a method for generating computer applications on a host system in an
19 arbitrary object framework. The method includes creating arbitrary objects and managing and
20 deploying them. The '629 patent is a continuation of the '744 patent and has essentially the same
21 specification and drawings. Vertical is the owner of the '744 and '629 patents and has standing to
22 sue for infringement. Samsung infringes these two patents through their manufacture,
23 importation and sale of cellular telephones having an Android operating system. This subject
24 matter is exactly the same in both districts.

1 **C. The Texas And the California Actions**

2 Vertical filed the first lawsuit – in the Eastern District of Texas on November 15, 2010
3 **(Exhibit B)**. Samsung filed the present parallel declaratory judgment action **(Exhibit A)** on
4 January 12, 2011. Samsung filed this action two months after Vertical filed the Texas lawsuit.
5 Thus, there cannot be any doubt that Vertical's Texas action is the first filed action.
6

7 **D. Factors Relating to Convenience**

8 Vertical has its principle place of business in Richardson, Texas, located in the Eastern
9 District of Texas. Vertical moved from Fort Worth, Texas to this location in the Spring of 2008
10 for the convenience of its employees. It did so after considering six (6) different locations,
11 starting in the Spring of 2007. Two of the sites, including what ultimately became the present
12 address of Vertical, were located in Colin County and the rest in Dallas County. **(Exhibit C)**.
13 The location of any pending or prospective litigation did not influence in any way the selection of
14 the present place of business. (See **Valdetaro Declaration, ¶¶2, 4**).
15

16 The material witnesses for this case reside in or near this district. For example, Luiz
17 Valdetaro, Vertical's chief technical officer, whose declaration Vertical has filed in support of this
18 motion, resides in Coppell, Texas; the chief executive officer of Vertical resides in Dallas, Texas;
19 Vertical's current chief financial officer, Freddie Holder, resides in Richardson, Texas in the
20 Eastern District as did the previous chief financial officer who resided in Rockwall, Texas.
21 Vertical houses most of the documents relevant to this litigation in Richardson. And, Vertical
22 sells and services its products, including the Vertical SiteFlash product that the patents-in-suit
23 cover, out of Richardson. (See **Valdetaro Declaration, ¶2**).
24

25 Vertical does not have any offices in California. It does not have any employees that are
26 material witnesses and that reside in California. Vertical has not sold its SiteFlash product in
27 California. To the best of its knowledge, a prior owner of the patents-in-suit (a company that did
28

1 not have any relation to Vertical) sold a product covered by those patents to a company in
2 California. Vertical collected maintenance fees for that product, but it has not collected any fees
3 or serviced that product since 2004. Since that time, Vertical has not sold any product or
4 provided any services in California. California is simply not a convenient forum for this lawsuit.
5 (See **Valdetaro Declaration, ¶3**).

6
7 The inventor of the patents-in-suit, Aubrey McAuley, is one of the most important
8 witnesses in this case. He resides in Austin, Texas. He is not an employee of Vertical. He is an
9 employee of an unrelated third party who does not allow him the flexibility to travel to faraway
10 places for this litigation. It goes without saying that the most convenient forum for Mr. McAuley
11 is the Eastern District of Texas, not the Northern District of California. (See **Valdetaro**
12 **Declaration, ¶5**).

13
14 Also, Samsung is no stranger to the Eastern District of Texas. A search of the U.S.
15 Party/Case Index on PACER for Samsung Electronics returns 191 matches. (**Exhibit D**). This
16 includes cases filed by Samsung as a plaintiff. See, e.g., *Samsung Electronics v. Sandisk*
17 *Corporation*, 9:02-CV-00058 (E.D. Tex. Mar. 5, 2002); *Samsung Electronics Co., Ltd. v.*
18 *Matsushita Electric Industrial Co., Ltd., et al*, 2:05-CV-00440 (E.D. Tex. Sept. 15, 2005).

19 **III. ARGUMENT**

20 **A. This Court Should Not Allow Samsung's Blatant** 21 **Attempts to Circumvent the First-To-File Doctrine**

22 **1. The First-to-File Doctrine Applies and Favors** 23 **Denying the Motion to Transfer or Dismiss**

24 The first-to-file doctrine establishes a plaintiff's "presumptive right" to select the forum
25 for litigation. See *Kahn v. General Motors Corp.*, 889 F.2d 1078, 1081-82 (Fed. Cir. 1989). This
26 rule applies to patent cases, as to any other type of case. *Meru Networks, Inc. v. Extricom, Ltd.*,
27 2010 U.S. Dist. LEXIS 90212, at *3 (N.D. Cal. Aug. 31, 2010) (Whyte, J.) (citing *Genentech*,
28

1 *Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 938 (Fed. Cir. 1993)). This Court routinely applies the first-
2 to-file rule. *See, e.g., Meru Networks, Inc.*, 2010 U.S. Dist. LEXIS 90212 (Whyte, J.) (dismissing
3 later-filed declaratory judgment action in favor of first-filed patent infringement action). The
4 facts of this case do not present any reason to depart from this well-established principle:
5 Vertical's "presumptive right" as the first litigant to file weighs heavily in Vertical's favor and
6 dismissal, transfer or stay is necessary in this case "to prevent wrong or injustice." *See Kahn*, 889
7 F.2d at 1081-82. Samsung has not established, and cannot establish, that Vertical had no "sound
8 reason" for filing its suit in the Eastern District of Texas nor that its choice "was motivated by
9 inequitable conduct, bad faith, or forum shopping," as is required to disturb the presumption. As
10 shown below, Vertical resides in the Eastern District of Texas and conducts its business there.

11
12 **B. The Most Convenient Forum For This**
13 **Dispute Is The Eastern District of Texas**

14 **1. A Related Case Against LG Remains**
15 **Pending In The Eastern District of Texas**
16 **Along With The Samsung Case There**

17 In addition to the fact that Vertical first sued Samsung in the Eastern District of Texas,
18 another compelling reason that this case should stay in the Eastern District of Texas is the
19 existence of related litigation pending there. *Thill v. Edward D. Jones & Co., L.P.*, 2006 U.S.
20 Dist. LEXIS 69485 (N.D. Cal. Sept. 18, 2006) ("Coordination of the three actions clearly makes
21 sense and the possibility of inconsistent results arguably supports transfer of the action for trial.").
22 Vertical brought suit on November 15, 2010, in the Texas court against Interwoven, two LG
23 companies, and two Samsung companies. The accused products of Samsung are not similar to
24 the Interwoven accused product. (The TeamSite 2006 product has very few similarities to the
25 Android cell phones of Samsung). But, the Samsung Android cell phones are very similar to the
26 LG Android cell phones. Vertical's case against the Samsung and LG defendants in Texas has
27 many more overlapping legal and factual issues than a combination of cases that Interwoven and
28

1 Samsung have forced onto this Court. Thus, the most convenient place for the suit between
2 Vertical and Samsung is the same court where the LG case remains pending and where other
3 cases involving cell phones may be brought.

4 As the Supreme Court observed in *Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19
5 (1960):

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

10 364 U.S. at 26; see also *CBS Interactive, Inc. v. Etilize, Inc.*, 257 F.R.D. 195, 202 (N.D. Cal.
11 2009) ("This piecemeal approach to litigation is contrary to the spirit of the Patent Local Rules
12 and will not be countenanced by the court."). "Consideration of the interest of justice, which
13 includes judicial economy, may be determinative to a particular transfer motion..." *Electronics
14 for Imaging, Inc. v. Tesseron, Ltd*, 2008 U.S. Dist. LEXIS 10844 (N.D. Cal. Jan. 29, 2008) (citing
15 *Regents of the University of California v. Eli Lilly & Co.*, 119 F.3d 1559, 1565 (Fed. Cir. 1997)).
16 Judicial economy, thus, can be served by sending the Samsung case back to Texas.

17
18 **2. The Convenience Of The Witnesses**
19 **Favors The Eastern District of Texas**

20 Above all of these factors, "[t]he convenience of witnesses is often the most important
21 factor considered by the court when deciding a motion to transfer for convenience." *Genentech,
22 Inc. v. GlaxoSmithKline, LLC*, 2010 U.S. Dist. LEXIS 126773, at *6 (N.D. Cal. Nov. 30, 2010).
23 Vertical's headquarters is located approximately 125 miles from this Court and almost all of the
24 witnesses are in or near this district. The chief technical officer of Vertical, Mr. Valdetaro,
25 resides in Dallas. The chief executive officer, Mr. Richard Wade, also resides in Dallas, Texas.
26 The chief financial officer of Vertical resides in this district. The inventor of the '744 and '629
27 patents resides in Austin, Texas; and this district is convenient for this witness, given the
28

1 restrictions of his employment. (Samsung has not identified a single witness who resides in or
2 near the Northern District of California.)

3 **3. The Convenience Of The Parties**
4 **Favors The Eastern District of Texas**

5 Vertical's offices, personnel and documents are located in Texas. Clearly, Texas is the
6 most convenient forum for Vertical. Samsung has customers located throughout the United
7 States, including the Eastern District of Texas. The accused product is located in Texas.
8 Important third parties, e.g., Samsung's Texas customers, reside in Texas. Samsung should not
9 have any problem in defending this lawsuit in Texas under all of these circumstances.
10

11 Samsung may argue that Vertical moved its offices to the Northern District of Texas for
12 the purposes of establishing residence here for the lawsuit there. Not one shred of evidence
13 supports this argument. Vertical moved its offices to Richardson almost three years ago. It did so
14 after filing the action against Microsoft, the first of this series of cases. (*Vertical Computer*
15 *Systems, Inc. v. Microsoft Corporation*, Civil Action No. 2:07-cv-0144 (E.D. Tex.)). If it had
16 moved its offices for the purpose of establishing venue, it would have moved its offices before the
17 Microsoft action. Vertical moved from Fort Worth to Richardson, Texas for the convenience of
18 its employees, the same convenience that would be served by keeping the present lawsuit in
19 Texas.
20

21 Indeed, Samsung's claim that the Eastern District of Texas is inconvenient is unfounded.
22 Samsung has been a party to a myriad of other cases in that district. In fact, Samsung has even
23 chosen to file cases in that district. See, e.g., *Samsung Electronics v. Sandisk Corporation*, 9:02-
24 CV-00058 (E.D. Tex. Mar. 5, 2002); *Samsung Electronics Co., Ltd., v. Matsushita Electric*
25 *Industrial Co., Ltd., et al*, 2:05-CV-00440 (E.D. Tex. Sept. 15, 2005). Accordingly, the Eastern
26 District of Texas is not inconvenient and this litigation should proceed in that district.
27
28

1 **4. The Location Of Relevant Documents And**
2 **Other Evidence Favors The Eastern District of Texas**

3 The location of documents, records, and other sources of proof is a factor the Court may
4 properly consider when deciding whether to transfer venue. This factor weighs heavily in favor
5 of keeping the case in the Eastern District of Texas. As such, virtually all the documents and
6 other evidence relevant to this litigation are either located in this district or are more easily and
7 economically transported from their locations to this district than to the Northern District of
8 California. Samsung cannot argue that its documents are located in California because its
9 research and manufacturing facilities are located in Korea. Thus, all the documents present in this
10 country are located in Texas; and almost all of the witnesses are located there as well. This
11 includes the most important witness – the inventor, Aubrey McAuley.
12

13 **IV. CONCLUSION**

14 For the reasons set forth above, Vertical respectfully requests that the Court dismiss
15 Samsung's complaint, or in the alternative, transfer the lawsuit to Texas, or stay it.
16

17 DATED: February 4, 2011

Respectfully submitted,

/s/ Mark V. Isola

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