Vertical Computer Systems, Inc. v. Interwoven, Inc. et al Doc. 31 Att. 11



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IN THE UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

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| INTERWOVEN, INC.,<br><br>Plaintiff,<br><br>v.<br><br>VERTICAL COMPUTER SYSTEMS, INC.,<br><br>Defendant. | Case No. 10-cv-4645-JL<br><br>**VERTICAL'S MEMORANDUM IN SUPPORT OF ITS MOTION TO TRANSFER VENUE OR, IN THE ALTERNATIVE, TO DISMISS INTERWOVEN'S COMPLAINT FOR DECLARATORY JUDGMENT**<br><br>Date: January 12, 2011<br>Time: 9:30 a.m.<br>Courtroom F (5th Floor)<br>Magistrate Judge James Larson |



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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. ("Plaintiff" or "Interwoven") abandoned the negotiations and surreptitiously filed the present action. 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 similar litigation.

The present 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 not the one that is convenient for the parties and witnesses, and, as shown below, forcing Vertical to defend the present action in this Court is certainly not in the best interest of justice.

Vertical has brought an action in the Eastern District of Texas, where it resides, against Interwoven, two LG companies and two Samsung companies for infringement of the same two patents in suit here. That case will decide the same fact-dependent issues present in this case. Thus, for the sake of judicial economy and for the convenience of the parties and witnesses, Vertical respectfully requests that the Court either dismiss the present action or transfer it to the Eastern District of Texas.

## II. FACTS

On April 18, 2007, Vertical brought an action against Microsoft in the Eastern District of Texas, its home district, alleging infringement of U.S. Patent No. 6,826,744 ("the '744 patent," attached as **Exhibit A**). Vertical prosecuted that action well into discovery and through briefing of all the claim construction issues. On the eve of the claim construction hearing, the parties settled the action. (**Valdetaro Decl. ¶1**).

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 B**). 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.

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 C**).

Representatives of Vertical and Interwoven met in San Jose, California on March 5, 2009 to discuss Vertical's claims against Interwoven. 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 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 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 D**). 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.

Vertical continued its investigation of Interwoven's products and with the help of a book titled "The Definite Guide to Interwoven Team Site" and written by Brian Hastings and Justin McNeal, identified Interwoven's Teamsite 2006 product as the one that infringes the '744 patent. In the meantime, a continuation of the '744 patent application issued into U.S. Patent No. 7,716,629 ("the '629 patent," attached as **Exhibit E**). This patent has the same specification and drawings as the '744 patent but different claims. Vertical has 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 early 2009 and to amicably reach a resolution.

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 resolve 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 present declaratory judgment action on October 14, 2010, the day before the end of

its extension. This ended the evasions, misrepresentations, and diversions perpetrated on Vertical by Interwoven. But, Interwoven chose not to serve its complaint for a whole month. It served its complaint two days after Vertical filed its action in Texas against Interwoven and the LG and Samsung companies.

Vertical filed suit in the Eastern District of Texas on November 15, 2010, claiming infringement of the '744 and '629 patents against the following companies:

1. Interwoven, Inc.;
2. LG Electronics MobileComm U.S.A., Inc.;
3. LG Electronics Inc.;
4. Samsung Electronics Co., Ltd.; and
5. Samsung Electronics America, Inc.

(Texas Complaint, attached as **Exhibit H**). Vertical continues to investigate infringement of the '744 and '629 patents; and it may add more parties to the Texas action. The Texas action, in any event, will continue irrespective of the present action.

Vertical has its principle place of business in Richardson, Texas, located in the Eastern District of Texas. The material witnesses for this case reside in or near this district. Vertical houses most of the documents relevant to this litigation in Richardson. And, Vertical sells and services its products, including the SiteFlash product that the patents-in-suit cover, out of Richardson. (**Valdetaro Decl. ¶6**).

Vertical does not have any offices in California. It does not have any employees that are material witnesses and that have resided 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.

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.

Interwoven's complaint is defective for many reasons. For example, it does not specify the patent claims that Vertical has asserted, the specific patent claims that Interwoven asserts are invalid, the reasons why it believes those claims are invalid, or the details of its unenforceability allegations, as required by Fed.R.Civ.P. 9(b). This is indeed what a disorderly dash to the courthouse has produced. The complaint also has false and misleading venue-related allegations.

The following provides each venue-related allegation made by Interwoven, followed by an explanation by Vertical:

> 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**).

Interwoven cannot create contacts and activity in California. As the above facts clearly show, the most convenient forum is Texas.

## III. ARGUMENT

### A. Declaratory Judgment Is Not Available To An Accused Infringer who Unilaterally Abandons Negotiations To File Suit

A wealth of legal authority holds that when an accused infringer files suit in its home jurisdiction in anticipation of a coercive action by a patent holder, such suit should be dismissed as improper procedural fencing. Interwoven filed this suit in an attempt to secure this jurisdiction as the forum for the resolution of its dispute with Vertical, knowing that a suit by Vertical against Interwoven was imminent.

Courts have made it abundantly clear that a district court should not exercise its discretion to hear a declaratory judgment action when the declaratory remedy is being used for the purpose of procedural fencing or to provide an arena for a race to *res judicata*. "Such

anticipatory suits are disfavored because they are examples of forum shopping." *Callaway Golf Co. v. Corporate Trade, Inc.*, 2010 U.S. Dist. LEXIS 17906 at *9 (S.D. Cal. Mar. 1, 2010) (citing *Mission Ins. Co. v. Puritan Fashions Corp.*, 706 F.2d 599, 602 n. 3 (5th Cir. 1983)); see also *Herbert Ltd. Partnership v. Electronic Arts, Inc.*, 325 F.Supp.2d 282, 292 (S.D.N.Y. 2004)). Courts seek to "eliminate the race to the courthouse door in an attempt to preempt a later suit in another forum." *Id*.; see also *Learning Network, Inc. v. Discovery Communications, Inc.*, 11 Fed. Appx. 297; 301; 2001 WL 627618 at *3 (4th Cir. 2001) (citing *Myles Lumber Co. v. CNA Financial Corp.*, 233 F.3d 821, 824 (4th Cir. 2000)).

"In patent cases, where 1) the patentee notifies an alleged infringer of suspected infringement, 2) good faith negotiations ensue and 3) the alleged infringer then files a declaratory judgment action in another forum, a subsequently-filed action by the patentee in the nature of patent infringement filed within a reasonable time after the first action is entitled to some deference and the 'first-filed rule' will not be dispositive." *Saes Getters S.P.A. v. Aeronex, Inc.*, 219 F. Supp. 2d 1081, 1091 (S.D. Cal. 2002) (citing *Kleinerman v. Luxtron Corp.*, 107 F. Supp. 2d 122 (D. Mass. 2000)).

**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 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 purposes of declaratory acts would be aborted by its use as an instrument of procedural fencing either to secure delay or to choose a forum. It was not intended by the act to enable a party to obtain a change of tribunal and thus accomplish in a particular case what could not be accomplished under the removal act, and such would be the result in the instant case." *Exxon Shipping Co. v. Airport Depot Diner*, 120 F.3d 166, 170 (9th Cir. Alaska 1997) (citing *H.J. Heinz Co. v. Owens*, 189 F.2d 505, 508 (9th Cir. 1951)); see also, *The Hartford Fire Ins. Co. v. McGhee*, 2010 U.S. Dist. LEXIS 52180 at *8 (N.D. Cal. May 27, 2010) (declining to exercise jurisdiction over a declaratory relief action because it would "encourage forum shopping, procedural fencing, and the 'race for res judicata.'"); *Gerin v. Aegon USA, Inc.*, 2007 U.S. Dist. LEXIS 28049 at *19 (N.D. Cal. Apr. 3, 2007) (transferring case to "discourage forum-shopping and duplicative litigation); *Callaway Golf Co.*, 2010 U.S. Dist. LEXIS 17906 at *9 (granting motion to transfer to "eliminate the race to the courthouse door in an attempt to preempt a later suit in another forum").

**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.

**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. "[T]he Declaratory Judgment Act should not be used to 'deprive the plaintiff of his traditional choice of forum and timing…'" *Nat'l Broom Co. of Cal. v. Brookstone Co.*, 2009 U.S. Dist. LEXIS 69630 at *7 (N.D. Cal. July 30, 2009); *see also First Nationwide Mort. Corp. v. FISI Madison*, 219 F.Supp.2d 669 (D. Md. 2002) (dismissing declaratory judgment action as improper anticipatory filing when filed "under the apparent threat of a presumed adversary filing the mirror image of that suit in another court"); *Successories, Inc. v. Arnold Palmer Enters., Inc.*, 990 F.Supp. 1044, 1046-47 (N.D. Ill. 1998) (dismissing declaratory judgment action as improper anticipatory filing when accused infringer had "engaged in no more than three months of settlement negotiations" and trademark holder "believed that negotiations were still ongoing").

In the lawsuit currently before the Court, the two parties 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.

**B. This Case Should Be Transferred To The Eastern District Of Texas**

This case logically belongs in the Eastern District of Texas, consolidated with the related cases pending there. Having a court already involved in related cases trying this case as well will serve judicial economy. Permissive transfers are governed by 28 U.S.C. § 1404(a):

> For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

The threshold question under Section 1404(a) requires the court to determine whether the case could have been brought in the forum to which the transfer is sought. *Roling v. E*Trade Sec., LLC*, 2010 U.S. Dist. LEXIS 123714 at *4 (N.D. Cal. Nov. 22, 2010). If venue would be appropriate in the would-be transferee court, then the court must make an "individualized, case-by-case consideration of convenience and fairness." *Id.* Among all considerations, "'[t]he convenience of witnesses 'is often the most important factor considered by the court when deciding a motion to transfer for convenience.'" *Genentech, Inc. v. GlaxoSmithKline, LLC,* 2010 U.S. Dist. LEXIS 126773 at *6 (N.D. Cal. Nov. 30, 2010) (citing *Kannar v. Alticor, Inc.*, No. C-08-5505 MMC, 2009 U.S. Dist. LEXIS 35091, 2009 WL 975426, at *2 (N.D. Cal. April 9, 2009)). Moreover, "[i]n evaluating the 'interests of justice,' the pendency of related actions in the proposed transferee forum is a highly persuasive factor." *Wiley v. Trendwest Resorts,* 2005 U.S. Dist. LEXIS 38893 at *10 (N.D. Cal. Aug. 9, 2005). Other relevant considerations include the cost of litigation, and the plaintiff's choice of forum. *Genentech, Inc.*, 2010 U.S. Dist. LEXIS 126773 at *6.

The statement of facts above clearly shows that the transferee district is not only where Vertical could have brought the action, Vertical did bring the action there. It also shows that Texas is the most convenient forum for witnesses, document collection and all aspects of discovery. As such, Texas is not only the most convenient forum, but would also affect substantial cost savings.

**1. Related Cases Are Pending In The Eastern District of Texas**

Perhaps the most compelling reason that this case should be transferred to the Eastern District of Texas is the existence of related litigation pending there. Vertical brought suit on November 15, 2010, in the Eastern District of Texas 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 the Eastern District of Texas weighs strongly in favor of transfer of this case to that district for consolidation with the cases against the LG and Samsung companies. The present case and the case in Texas 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, the same documentary evidence will likely be presented in both cases. Many of the same witnesses will be called to testify. And the Texas district 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 *Wiley v. Trendwest Resorts*, 2005 U.S. Dist. LEXIS 38893 at *10 (N.D. Cal. Aug. 9, 2005) ("The feasibility of consolidation is also a significant factor in a transfer decision. Litigation of related claims in the same tribunal is strongly favored because it facilitates efficient, economical and expeditious pre-trial proceedings and discovery and avoids duplicitous litigation and inconsistent results.") (internal quotations omitted); *Heartland Payment Sys. v. VeriFone Isr., Ltd.*, 2010 U.S. Dist. LEXIS 41226 at *13 (N.D. Cal. Apr. 22, 2010) ("[A]ppearing in a single district is more convenient than appearing in two different districts on opposite coasts of the country.") (internal citation omitted). Here, as in these cases, transfer also 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 the Eastern District of Texas and then again in the Northern District of California.

Finally, transfer is still appropriate here even though there are different defendants in this and the Texas action because "common questions of law and fact are involved, consolidation of the instant action with the one[s] pending in [the Eastern District of Texas] is a possibility. The feasibility of consolidation is a significant factor in deciding a transfer motion." *Cambridge Filter Corp. v. International Filter Co.*, 548 F. Supp. 1308, 1311 (D. Nev. 1982). The retention by this Court of this action will only "result in wasteful and unnecessary duplication." *Schneider v. Sears*, 265 F. Supp. 257, 267 (S.D.N.Y. 1967).

**2. The Convenience Of The Witnesses Will Be Served By Transfer**

The convenience of witnesses is an important factor in deciding a motion for transfer under § 1404(a). *American Standard Co. v. Bendix Corp.*, 487 F. Supp. 254, 261 (W.D. Mo. 1980). Live testimony is a primary reason courts are concerned about the convenience of witnesses. *Langford v. Ameritanz, Inc.*, 2006 U.S. Dist. LEXIS 32823 at *24 (E.D. Cal. May 12, 2006). In order to effectuate live testimony, this Court may properly consider the limits of its subpoena power in deciding whether to transfer venue. *U-Haul Int'l, Inc. v. Hire a Helper, LLC*, 2008 U.S. Dist. LEXIS 77629 at *5-6 (S.D. Cal. Sept. 22, 2008) (citing *FUL Inc. v. Unified Sch. Dist. No. 204*, 839 F. Supp. 1307, 1311 (N.D. Ill. 1993)) ("[W]itnesses outside the subpoena power of the court[] weigh heavily in a transfer decision[.]"). This Court can subpoena any witness within 100 miles of the courthouse in San Jose. Fed.R.Civ.P. 45(b). Few material witnesses are within the subpoena power of this Court. *Heartland Payment Sys.*, 2010 U.S. Dist. LEXIS 41226 at *15 (transferring case where only one identified witness was located in California, and the remainder were in Georgia, Texas, and New Jersey). Vertical's headquarters,

on the other hand, is located approximately 125 miles from the Texas court and almost all of the witnesses are in its district.

**3. The Convenience Of The Parties Requires Transfer Of This Action**

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. Interwoven should not have any problem in defending this lawsuit in Texas under these circumstances.

**4. The Location Of Relevant Documents And Other Evidence Favors Transfer**

The location of documents, records, and other sources of proof is a factor the Court may properly consider when deciding whether to transfer venue. *Genentech, Inc., LLC*, 2010 U.S. Dist. LEXIS 126773 at *6 (citing "the ease of access to sources of proof" as a factor to consider). This factor weighs heavily in favor of transfer to the Eastern District of Texas. As such, virtually all the documents and other evidence relevant to this litigation are more easily and economically transported from their locations to the Eastern District of Texas than to the Northern District of California.

**C. The Federal Circuit Has Already Held That Dismissal Is Proper In The Circumstances Of This Case**

In a factually similar case, *Serco Services Co. v. Kelley Co.*, the Federal Circuit held that dismissal of a first-filed declaratory judgment action in favor of a related case was proper. 51 F.3d 1037 (Fed. Cir. 1995). Serco received a letter from Kelley alleging that Serco's product infringed the claims of Kelley's patent. *Id*. 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 Texas district court 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 were supported dismissal of the declaratory judgment action. *Id.* at 1038-40.

Interwoven, like Serco, filed an anticipatory declaratory judgment action in a forum bearing no relation to the convenience and availability of witnesses or to the ease with which documents could be obtained. And Interwoven, like Serco, ignored the possibility of consolidation of its declaratory judgment action with related litigation. Thus, Vertical respectfully requests that this Court, like the Serco court, dismiss the declaratory judgment action. Interwoven's claims against Vertical, and Vertical's claims against Interwoven, can be consolidated with related cases pending in the Eastern District of Texas. As explained above, the Eastern District of Texas is indubitably more convenient than this district for the parties and witnesses. In short, "the relative convenience of the parties [is] 'sound reason' not to continue [Interwoven's] declaratory suit." *Id.* at 1040.

## IV. CONCLUSION

Because Vertical promptly filed an infringement action against Interwoven in a convenient forum, Interwoven has no need for the declaratory relief that it seeks. To allow this suit to go forward, then, would not serve any purpose other than rewarding Interwoven for its unseemly conduct in surreptitiously breaking off negotiations with Vertical and dashing to the courthouse. Accordingly, Vertical's motion should be granted.

Dated: December 7, 2010

Respectfully submitted,

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