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

VERTICAL COMPUTER SYSTEMS, INC., Plaintiff, v. 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 COMPUTER SYSTEMS, INC.'S OPPOSITION TO
SAMSUNG DEFENDANTS' MOTION TO DISMISS, STAY OR TRANSFER

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I. INTRODUCTION

Samsung seeks to piggyback onto the Interwoven motion to dismiss, stay or transfer, arguing that it is entitled to Interwoven's filing date. However, like a troubled swimmer who grabs onto another, Samsung emphasizes just how impractical their presence in the Northern District of California really is and how judicial inefficiencies, duplicative litigation and conflicting rulings will unavoidably result if Samsung prevails in moving this suit to California. The only way to avoid such duplication, conflicts and inefficiencies is to deny Samsung's motion and allow the present case to proceed.

One cannot refute that should Interwoven and Samsung prevail and move their cases to California, there will be two lawsuits – one in California (a consolidation of the Interwoven and Samsung declaratory judgment actions) and this case in Texas. LG has not expressed any interest in filing a declaratory judgment action in California or joining any of the lawsuits there. Thus, at the very least, Vertical and LG will proceed to litigate here. And, the Court Appeals for the Federal Circuit has now made it the law that judicial economy is the most important factor, a factor that compels this action to proceed with all the parties.

On page 12 of the memorandum in support of its motion, Samsung, almost in passing, makes the following important admission:

> *Finally*, relevant witnesses and documents are likely located in Texas. STA, a Delaware corporation headquartered in Richardson, Texas, purchases the accused phones and tab computers from SEC in Korea, and imports them into the USA. Kwon Decl. ¶ 12. STA is then responsible for marketing and selling the accused phones and computers to wireless carriers (*e.g.*, Sprint, Verizon, AT&T), which distribute them to retailers and end users. *Id.* Witnesses and documents relevant to the importation, marketing and sales of the accused phones and tablet computers are located in Texas. (Emphasis in original.)

Samsung attempts to make this factor seem as though it is one supporting its position – to leave this district. It compels the exact opposite result.

This admission shows that Samsung, a Korean company with a New Jersey subsidiary, moves every telephone that it sells in the United States through the Eastern District of Texas, through Richardson, less than one mile from Vertical's offices. It is no wonder that it is a party, often a plaintiff, in so much litigation in the Eastern District of Texas. Samsung's filing of the present motion is therefore purely tactical with total disregard for the convenience of the courts and of the parties.

Samsung cannot refute the following material facts. It has admitted most of them:

1) Samsung Electronics Co., Ltd. (a party) is a Korean company that designs and manufactures smartphones and tablet computers in Korea and China.

2) Samsung Electronics America, Inc. (a party) is a subsidiary of Samsung Electronics Co., Ltd., and it is located in New Jersey.

3) Samsung Telecommunications America, LLC (a non-party) is a subsidiary of Samsung Electronics Co., Ltd. and a Delaware corporation headquartered in Richardson, Texas, less than one mile from Vertical's offices in Richardson. It distributes all the Samsung smart phones and tablet computers that Samsung imports into the United States throughout the United States from this location. Thus, Samsung moves all its phones and computers through Richardson, Texas.

4) Vertical is located in Richardson, Texas and all its witnesses and documents are located at or near that location.

5) The Samsung companies are parties to a large number of lawsuits in this district, and they are plaintiffs in many of those lawsuits.

6) Vertical was the first to file a lawsuit against Samsung. Samsung filed the declaratory judgment action in California two months later.

7) Should this Court deny the present motion and the similar, pending motion brought by Interwoven, the result will be only one lawsuit before this court.

8) Should this Court grant those motions and the District Court for the Northern District of California deny Vertical's motions to dismiss or transfer the declaratory judgment actions brought by Interwoven and Samsung there, then there will be two lawsuits before the California court and one here in Texas between Vertical and LG.

All these factors compel keeping Samsung in this Court. Thus, in the interests of judicial economy and for the convenience of the parties, Vertical respectfully requests that this Court deny Samsung's motion.

II. FACTS

A. The Parties Involved

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. It designs and manufactures the accused smartphones and tablet computers in Korea and China and then imports them into the United States.

Plaintiff Vertical is a publicly held corporation that develops and sells software products. It has its principal place of business in the Eastern District of Texas at 101 W. Renner Road, Richardson, Texas 75082. It started this line of lawsuits back in 2007 by filing suit against Microsoft in *Vertical Computer Systems, Inc. v. Microsoft Corporation*, Civil Action No. 2:07-cv-00144 (E. D. Tex.) and then followed that lawsuit by filing the present action.

B. Samsung Moves All Its Products Through This District

Samsung Telecommunications America, LLC (a non-party) is a subsidiary of Samsung Electronics Co., Ltd. and a Delaware corporation headquartered in Richardson, Texas, less than one mile from Vertical's offices in Richardson. From this location, it distributes, throughout the United States, all the Samsung smart phones and computers that Samsung Korea imports into the United States. Thus, Samsung moves all its phones and computers through Richardson, Texas. Samsung admits these facts in the first full paragraph in page 12 of the memorandum supporting the present motion.

C. LG Has Not Expressed Any Intent to Move From This District

Defendants LG Electronics MobileComm U.S.A. Inc. and LG Electronics Inc. ("LG") have not expressed any interest in filing a declaratory judgment action in California or joining any of the lawsuits there. Thus, at the very least, Vertical and LG will proceed to litigate in this Court.

D. The Subject Matter Of The Lawsuit

The subject matter of Vertical's complaint here (attached as **Exhibit A**) and Samsung's complaint in California (attached as **Exhibit B**) is United States Patent No. 6,826,744 ("the '744 patent") titled "System and Method for Generating Web Sites in an Arbitrary Object Framework" and United States Patent No. 7,716,629 ("the '629 patent") 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. Samsung infringes these two patents through their manufacture, importation and sale of cellular telephones having an Android operating system. This subject matter is exactly the same in both districts.

E. The Texas And the California Actions

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

F. Factors Relating to Convenience

Vertical has its principle place of business in Richardson, Texas, located in the Eastern District of Texas. 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 C)**. The location of any pending or prospective litigation did not influence in any way the selection of the present place of business. (See **Valdetaro Declaration, ¶¶ 2, 4**).

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 motion, 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. (See **Valdetaro Declaration, ¶ 2**).

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 this lawsuit. (See **Valdetaro Declaration, ¶ 3**).

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. It goes without saying that the most convenient forum for Mr. McAuley

is the Eastern District of Texas, not the Northern District of California. (See **Valdetaro Declaration, ¶ 5**).

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

III. ARGUMENT

A. Vertical Was The First-To-File

The first-to-file doctrine establishes a plaintiff's "presumptive right" to select the forum for litigation. See *Kahn v. General Motors Corp.,* 889 F.2d 1078, 1081-82 (Fed. Cir. 1989). This rule applies to patent cases, as to any other type of case. *Meru Networks, Inc. v. Extricom, Ltd.,* 2010 U.S. Dist. LEXIS 90212, at *3 (N.D. Cal. Aug. 31, 2010) (Whyte, J.) (citing *Genentech, Inc. v. Eli Lilly & Co.*, 998 F.2d 931, 938 (Fed. Cir. 1993)). The facts of this case do not present any reason to depart from this well-established principle: Vertical's "presumptive right" as the first litigant to file, vis-à-vis Samsung, weighs heavily in Vertical's favor and denial of Samsung's motion is necessary in this case "to prevent wrong or injustice." See *Kahn,* 889 F.2d at 1081-82. Samsung has not established, and cannot establish, that Vertical had no "sound reason" for filing its suit in the Eastern District of Texas nor that its choice "was motivated by inequitable conduct, bad faith, or forum shopping," as is required to disturb the presumption. As shown above, Vertical resides in the Eastern District of Texas and conducts its business here.

Samsung makes the assumption that it can take advantage of Interwoven's original filing date in California to support its first-to-file argument. However, should this line of logic prevail, then Vertical's position that it was the first-to-file when it filed the first lawsuit in 2007 against

Microsoft should similarly prevail and trump both Interwoven's and Samsung's first-to-file arguments.

Even if Samsung could take advantage of Interwoven's filing in California (and it cannot) there are a number of reasons why even Interwoven cannot claim first-to-file status. First, as fully briefed in the opposition to the pending Interwoven motion to dismiss, stay or transfer, Interwoven surreptitiously filed the declaratory judgment action in California and thus cannot have first-to-file status. Second, Vertical has further shown in its pending motion in California that the Interwoven complaint there was completely deficient. (Vertical's supporting memorandum and reply in California, attached as **Exhibit E**). The only accomplishment of that complaint was to identify the parties and the two patents. (Interwoven admitted the deficiency of its original complaint in California by filing an amended complaint with much greater detail regarding the dispute between Vertical and Interwoven.)

This fact further supports the conclusion that Interwoven was engaging in forum shopping and further prevents Interwoven from relying on the first-to-file rule. In fact, courts have found that a deficient complaint does not constitute the first filed complaint. *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966, 972 (6th Cir. Ohio 2005) (The "complaint's failure to comply with Rule 9(b) rendered it legally infirm from its inception, and therefore it cannot preempt [the later filed] action under the first-to-file bar."). Because Interwoven's original complaint was defective, it cannot be used as a "placeholder" under the first-to-file rule; and Samsung cannot claim any right to it. Instead, Vertical's complaint here controls, and therefore this action should proceed against Samsung as well as Interwoven and LG.

B. Judicial Economy Is The "Paramount" Factor

In a number of recent decisions, the Court of Appeals for the Federal Circuit has consistently emphasized that judicial economy trumps all other factors in a transfer analysis. In *In re Aliphcom,* 2011 U.S. App. LEXIS 2604 (Fed. Cir. Feb. 9, 2011) (unpublished) (**Exhibit F**),

the Federal Circuit decided a request for *mandamus* in a case with parallel lawsuits in the same two courts as those involved here. It rejected an attempt by Aliphcom to keep its first-filed declaratory lawsuit in the Northern District of California rather than the Eastern District of Texas. Aliphcom filed 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 district in June 2010 and joined Aliphcom with other defendants. The California court disregarded the first-to-file rule and transferred the case to this Court.

The Federal Circuit refused to overturn the decision to transfer the case to Texas and 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 is more important than the various other convenience elements, citing its previous decision in *In re Vistaprint*, Misc. No. 954, __ F.3d __, 2010 WL 5136034 (Fed. Cir. Dec. 15, 2010). This district is where Vertical has sued all the parties. This case will proceed even if this Court transfers the Interwoven and Samsung cases. Thus, the result that the Federal Circuit seeks to avoid – judicial

inefficiencies, duplicative litigation and conflicting rulings – will prevail should Samsung and Interwoven prevail. The only way to avoid this outcome is to keep the Interwoven and Samsung actions here.

Days after it issued the *Aliphcom* decision, the Federal Circuit again emphasized judicial economy in yet another decision involving the same two courts. In *In re Google,* the Federal Circuit denied a defendant's petition for writ of mandamus to move its case to California, instead finding that the defendant should remain in a case in Texas where the case in Texas included other defendants. *In re Google Inc.*, 2011 U.S. App. LEXIS 4381 (Fed. Cir. Mar. 4, 2011) (**Exhibit G**). In that case, the Federal Circuit denied the defendant's petition because "Courts have consistently held that judicial economy plays a paramount role in trying to maintain an orderly, effective, administration of justice and having one trial court decide all of these claims clearly furthers that objective." *Id.* at *7.

Here, too, Vertical's case against Samsung should proceed in this district because the case here already includes other defendants, such as LG, and therefore proceeding here would help maintain an orderly and effective administration of justice, while avoiding the potential for inconsistent outcomes. This is consistent with the objectives that the Federal Circuit has described as "paramount." *Id.*

Thus, the most compelling reason that this case should stay in this district is the existence of related litigation pending there. *Thill v. Edward D. Jones & Co., L.P.*, 2006 U.S. Dist. LEXIS 69485 (N.D. Cal. Sept. 18, 2006) ("Coordination of the three actions clearly makes sense and the possibility of inconsistent results arguably supports transfer of the action for trial."). Vertical brought suit on November 15, 2010, in this Court against Interwoven, the two LG companies, and the two Samsung companies. The Samsung Android cell phones are very similar to the LG Android cell phones. Vertical's case against the Samsung and LG defendants here has many overlapping legal and factual issues. Thus, the most convenient place for the suit between

Vertical and Samsung is the same court where the LG case remains pending and where other cases involving cell phones may be brought.

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

C. The Most Convenient Forum For This Dispute Is The Eastern District Of Texas

1. The Convenience Of The Witnesses Favors The Eastern District of Texas

Above all factors, "[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). 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. (Samsung has not identified a single witness who resides in or near the Northern District of California.)

2. The Convenience Of The Parties Favors The Eastern District of Texas

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

Samsung may argue that Vertical moved its offices to the Northern District of Texas for the purposes of establishing residence here for the lawsuit there. Not one shred of evidence supports this argument. Vertical moved its offices to Richardson almost three years ago. It did so after filing the action against Microsoft, the first of this series of cases. (*Vertical Computer Systems, Inc. v. Microsoft Corporation*, Civil Action No. 2:07-cv-0144 (E.D. Tex.)). If it had moved its offices for the purpose of establishing venue, 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 in Texas.

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

3. The Location Of Relevant Documents And Other Evidence Favors The Eastern District of Texas

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. Samsung cannot argue that its documents are located in California because its research and manufacturing facilities are located in Korea. Thus, all the documents present in this country 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.

D. Samsung's Arguments Are Misleading

Samsung's opposition includes a number of misleading arguments. First, on page 2 of its memorandum supporting its motion, Samsung states that the licensing discussions between Vertical and Interwoven "collapsed." As explained in Vertical's briefs relating to transfer of the Interwoven action, Interwoven's new owner, Autonomy, used those settlement discussions to mislead Vertical and surreptitiously file a declaratory judgment action in California – the discussions did not "collapse."

Second, on page 5 of its memorandum, Samsung states that LG and Vertical are "discussing settlement." Whether Vertical and LG are discussing settlement is not material to the analysis here. Those that have speculated about settlement have been wrong more often than not. It is just as likely for the declaratory judgment actions to settle as it is for the action between Vertical and LG to settle. In fact, Samsung has indicated a willingness to discuss settlement.

IV. CONCLUSION

In view of the foregoing, Vertical respectfully requests that the Court deny Samsung's motion to stay, dismiss, or transfer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that the following counsel of record who are deemed to have consented to electronic service are being served this March 15, 2011, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by electronic mail, facsimile transmission and/or first class mail on this same date.

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