EXHIBIT E

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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 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
Time: 1:30 p.m.
Courtroom 3 (17th Floor)
Judge Richard Seeborg

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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,

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FOR THE NORTHERN DISTRICT OF CALIFORNIA

INTERWOVEN, INC.,

Plaintiff,

v.

VERTICAL COMPUTER SYSTEMS, INC.,

Defendant.

Case No. 3:10-cv-04645-RS

VERTICAL'S REPLY 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 24, 2011
Time: 1:30 p.m.
Courtroom 3 (17th Floor)
Judge Richard Seeborg

I. INTRODUCTION

In its January 24, 2011 order, this Court decided to keep this action rather than dismiss or transfer it to the Eastern District of Texas and based its decision on the first-to-file rule, despite Vertical's showing that Interwoven had surreptitiously filed this action while misleading Vertical

into believing that Interwoven wanted to settle their dispute. Many courts had long recognized this type of conduct to provide an exception to the first-to-file rule. A recent line of cases decided by the Court of Appeals for the Federal Circuit has further subordinated the first-to-file rule. They have held that the paramount consideration in a transfer analysis is judicial economy.

If a parallel action can accommodate all parties, then that action should be the one to proceed with all the parties. Should this Court keep both this action and Samsung's declaratory judgment action, there will be two lawsuits before this Court and one in Texas between Vertical and LG because LG has not expressed any interest in joining Interwoven and Samsung here. However, should this Court transfer both of these cases to Texas, then the Texas court will have all the parties in one lawsuit. This is the outcome mandated by the Federal Circuit.

Vertical also advances another exception to the first-to-file rule – the filing of such a deficient complaint that Interwoven may not claim the benefit of the first-to-file rule. Interwoven has essentially admitted the factual basis for such an exception by expanding its wholly deficient complaint from 21 paragraphs to the 80 paragraphs of its amended complaint. A comparison of the two Interwoven complaints confirms that Interwoven hastily filed its complaint without any regard to the issues involved. It engaged in forum shopping, and it is simply not entitled to any first-to-file benefit.

Furthermore, the Court's prior ruling was premature because it did not consider the effects of Samsung's joinder. As separately and more fully stated in the memorandum supporting Vertical's motion to transfer the Samsung action back to Texas, Vertical was the first-to-file, vis-à-vis Samsung, and every factor possible, especially the judicial economy factor, compels transfer of the Samsung action back to Texas, to the Eastern District through which Samsung moves all its cell phones and tablet computers, where it is a party in countless patent lawsuits, and where its accused products overlap with those of LG.

Therefore, in view of the reasons outlined below and for those outlined in the opening memorandum supporting this motion, Vertical respectfully requests that the Court dismiss this action or transfer it to the Eastern District of Texas.

II. 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, Docket No. 971 (Fed. Cir. February 9, 2011) (non-precedential) (**Exhibit J**), the Federal Circuit decided a request for *mandamus* in a case with facts very similar to the facts of this case and with the same two courts involved. 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 the Eastern District of Texas in June 2010 and joined Aliphcom with other defendants. This Court disregarded the first-to-file rule and transferred the case to the Eastern District of Texas.

The Federal Circuit refused to overturn this Court's 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 convenience elements, citing its previous decision in In re Vistaprint, Misc. No. 954, __ F.3d __, 2010 Westlaw 5136034 (Fed. Cir. Dec. 15, 2010). The Texas district is where Vertical has sued all the parties. The case in Texas will proceed even if this Court keeps the

Interwoven and Samsung cases. Thus, the result that the Federal Circuit seeks to avoid – judicial inefficiencies, duplicative litigation and conflicting rulings – will prevail. The only way to avoid this outcome is transfer of the Interwoven and Samsung actions to Texas. Also, should the Court decide to keep the Interwoven and Samsung lawsuits, its decision would directly conflict with its decision in In re Aliphcom.

Interwoven attempts to distinguish the Aliphcom case by arguing that the Texas lawsuit had progressed further than the California action. But, the Federal Circuit did not rely or emphasize this factor or any of the other immaterial distinctions that Interwoven raises. As it did in the Vistaprint case, the Federal Circuit emphasized judicial economy. 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 K**). 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." In re Google Inc., 2011 U.S. App. LEXIS 4381 at *7 (Fed. Cir. Mar. 4, 2011).

Here, too, Vertical's case against Interwoven should proceed in Texas because the case in Texas already includes other defendants, such as LG, and therefore proceeding in Texas 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.

III. WHEN CONSIDERED TOGETHER WITH THE SAMSUNG FACTORS, ALL OTHER FACTORS COMPEL TRANSFER

Since the Court has determined that the Interwoven and Samsung cases are related, then the Court should consider the convenience factors associated with Samsung in its transfer analysis

of the Interwoven factors. Vertical summarized those factors in "Vertical's Reply In Support Of Its Motion To Dismiss, Transfer or Stay Samsung's Lawsuit," and that summary includes the following:

1) Samsung Electronics Co., Ltd. (a party) is a Korean company that 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 (not a 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 computers 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 the Eastern District of Texas and they are plaintiffs in many of those lawsuits.

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

Consideration of these factors clearly tips the scale in favor of transfer and breaks the stalemate that the Court found between the Interwoven and Vertical factors.

IV. INTERWOVEN HAS NOT CORRECTED ALL OF THE DEFICIENCIES OF ITS ORIGINAL COMPLAINT

Interwoven argues that its amended complaint has corrected all of the deficiencies of its original complaint. It has not. As outlined by Vertical in its opening memorandum, Vertical has not asserted, as infringed, all of the claims of the two patents-in-suit. Interwoven's amended complaint does not reflect that distinction. Thus, the amended complaint continues to be defective; and Interwoven continues to waste this Court's time with inadequate pleadings. However, in the interest of judicial economy, Vertical withdraws that portion of the motion that seeks dismissal based on Fed.R.Civ.P. 12(b)(6) but maintains its motion as it relates to renewal/reconsideration of the transfer issue.

The most important point regarding Interwoven's pleadings is not any further deficiency in the amended complaint, but the pathetic state of Interwoven's original complaint. The only accomplishment of that complaint was to identify the parties and the two patents. This fact further supports the conclusion that Interwoven was engaging in forum shopping and further supports the discarding of the first-to-file rule in this case. 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. Instead, Vertical's complaint filed in Texas controls, and therefore this action should proceed in Texas.

V. CONCLUSION

In view of the foregoing and in view of the facts and arguments presented in Vertical's opening memorandum, Vertical respectfully requests that the Court grant its motion to transfer this action to the Eastern District of Texas.

DATED: March 10, 2011

Respectfully submitted,

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