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

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| VERTICAL COMPUTER SYSTEMS, INC., | § | |
| | § | |
| Plaintiff, | § | |
| | § | |
| v. | § | CIVIL ACTION NO. 2:10-CV-490 TJW |
| | § | |
| INTERWOVEN, INC., LG ELECTRONICS MOBILECOMM U.S.A., INC., LG ELECTRONICS INC., SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC., | § | |
| | § | |
| Defendants. | § | |
| | § | |

**SAMSUNG DEFENDANTS' REPLY IN SUPPORT OF**
**THEIR MOTION TO DISMISS, STAY OR TRANSFER**

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Samsung hereby replies to Vertical's Opposition to Samsung's motion to dismiss, stay or transfer the present case to the United States District Court for the Northern District of California under the first-to-file rule.

## I. INTRODUCTION

In its Opposition, Vertical's two primary arguments are that the Court should deny Samsung's motion in the interest of judicial economy, and that the Eastern District of Texas is more convenient than the Northern District of California. Neither of those arguments has any merit.

Vertical's judicial economy argument ignores that Judge Seeborg has already determined that Interwoven's California case was the first filed, denied Vertical's motion to transfer Interwoven's California case to this District, determined that Samsung's and Interwoven's California cases are related, and scheduled a case management conference in both cases for April 14, 2011. Given Judge Seeborg's decision to proceed with Interwoven's and Samsung's cases in the Northern District of California, the only way to promote judicial economy is to grant Samsung's motion and transfer the present case to the Northern District of California so that one judge can preside over all three related actions.

Vertical's convenience argument ignores the facts that Google – the company that developed, maintained and distributed the alleged "arbitrary object framework" – is located in the Northern District of California, that a Samsung subsidiary – Samsung Telecommunications America, LLC ("STA") – maintains a development lab in the Northern District of California that works with Google on Android-related aspects of Samsung's accused products, that defendant LG Mobilecomm has offices in Southern California, and that defendants Samsung Electronics Co., Ltd. ("SEC") and LG Electronics, which are both headquartered in Korea, are closer to the

Northern District of California than to the Eastern District of Texas. Considering the location of all the parties, witnesses and documents likely relevant to Vertical's allegations against Interwoven, Samsung and LG, there is no persuasive reason to deviate from the presumption that the present case should proceed in the venue of the first-filed action – the Northern District of California.

## II. ARGUMENT

### A. Dismissal, Stay or Transfer of the Present Case to the Northern District of California Is the Only Way to Promote Judicial Economy

The gravamen of Vertical's Opposition is that judicial economy will be served best by denying Samsung's and Interwoven's motions to dismiss, stay or transfer the present case to the Northern District of California. Vertical Opposition at 1, 7-10. But Vertical has it backwards. As Vertical's Opposition fails to acknowledge, Judge Seeborg is proceeding with Interwoven's and Samsung's cases in the Northern District of California. Vertical likewise ignores that Judge Seeborg has already found Interwoven's case the first filed,[1] denied Vertical's motion to transfer Interwoven's California case to this District, deemed Interwoven's

[1] Vertical argues that Interwoven's original complaint was deficient and therefore does not constitute the first-filed action in light of *Walburn v. Lockheed Martin Corp.*, 431 F.3d 966 (6th Cir. 2005). Vertical Opposition at 7. *Walburn*, however, refers to the statutory right of preemption in the context of a *qui tam* action pursuant to 31 U.S.C. § 3735(b)(5), and is thus irrelevant to the first-to-file issue in the present case. *See Sharma v. Pandey*, No. 07-cv-13508, 2007 WL 4571817, at *4 (E.D. Mich. Dec. 27, 2007). Moreover, Vertical's *Walburn* argument in currently pending in its renewed motion to transfer Interwoven's case, and should be decided by Judge Seeborg. *See O2 Micro Int'l Ltd. v. Monolithic Power Sys., Inc.*, No. 2:04-CV-359, 2006 WL 887391, at *2 (E.D. Tex. Mar. 28, 2006) (finding that the court "first vested with jurisdiction over the dispute . . . should therefore determine where this dispute should ultimately be resolved").

and Samsung's cases as related actions, and scheduled a case management conference in both cases for April 14, 2011.[2] Declaration of Julian Moore ("Moore Decl.") Exs. A & D.[3]

Denying Samsung's and Interwoven's motions would result in three parallel cases – two in California and one in Texas – involving the same two Patents-in-Suit, overlapping issues of claim construction, invalidity and unenforceability, overlapping accused products, and overlapping parties. Such a result would undermine judicial efficiency, ensure duplicative litigation, and create a risk of conflicting rulings.[4]

Vertical further argues that even if Samsung's and Interwoven's motions are granted, "Vertical and LG will proceed to litigate here." Vertical Opposition at 1. That is wrong for several reasons. First, Samsung and Interwoven have moved to dismiss, stay or transfer this entire case, including all of Vertical's allegations against Samsung, Interwoven and LG, given the overlapping patents, issues, accused products and parties arising out of those allegations.[5] Second, as this Court has previously found, "complete identity of parties and claims is not required when evaluating a case under first-filed principles." *O2 Micro Int'l Ltd.*

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[2] Due to scheduling conflicts, the parties will be seeking leave to move the conference to April 28th.

[3] The Moore Declaration was filed with Samsung's Motion to Dismiss, Stay or Transfer on February 25, 2011.

[4] The Federal Circuit cases that Vertical relies on do not support its position. In *Aliphcom*, the Federal Circuit denied mandamus where the district court transferred a later-filed case to the forum of a first-filed case to promote judicial efficiency and avoid the risk of inconsistent judgments. *In re Aliphcom*, No. 971, 2011 U.S. App. LEXIS 2604, at *4 (Fed. Cir. Feb. 9, 2011) (nonprecedential). And *In re Google* did not even involve the first-to-file rule – there was no related litigation pending in any other court. *In re Google Inc.*, No. 968, 2011 U.S. App. LEXIS 4381 (Fed. Cir. Mar. 4, 2011) (nonprecedential).

[5] Throughout its Opposition, Vertical characterizes the present action as three separate "cases" – one against Interwoven, one against Samsung, and one against LG. That is wrong. Vertical filed a single action against all three entities, presumably because it recognized that its allegations against those entities are plainly related.

*v. Monolithic Power Sys., Inc.*, No. 2:04-CV-359, 2006 WL 887391, at *2 (E.D. Tex. Mar. 28, 2006). Third, courts in this District have transferred later-filed cases even though they involve defendants that are not parties to the first-filed cases. *See, e.g., Charles E. Hill & Assoc., Inc. v. Amazon.com, Inc.*, No. 2:02-CV-186, 2003 U.S. Dist. LEXIS 18479, at *4 (E.D. Tex. Jan. 23, 2003) (granting transfer under first-to-file rule, noting "[t]hat additional parties have been joined as defendants does not alter [the] result"). Fourth, as this Court has also previously found, the interests of justice support transfer of a later-filed case to the forum of the first-filed case where the court in the first-filed case has denied a motion to transfer. *O2 Micro*, 2006 WL 887391, at *2. Fifth, as Judge Seeborg has already found, Vertical cannot circumvent the policies underlying the first-to-file rule by merely tacking LG onto the present action. Moore Decl. Ex. A at 4 n.1; *see also Micron Tech., Inc. v. Mosaid Techs., Inc.*, 518 F.3d 897, 903 (Fed. Cir. 2008). Sixth, Vertical does not dispute that LG is subject to personal jurisdiction in California and, as a result, Vertical can assert its infringement allegations against LG in the Northern District of California. Finally, despite repeated opportunities to do so, LG has never filed an opposition to either Samsung's or Interwoven's motions to dismiss, stay or transfer to the Northern District of California.[6]

Given Judge Seeborg's decision to proceed with Interwoven's and Samsung's California actions, this Court should transfer the present case to the Northern District of California. Only then will one judge have jurisdiction over all three related cases, thereby promoting judicial efficiency, eliminating duplicative litigation, and avoiding the risk of conflicting rulings. *See In re Google Inc.*, 2011 U.S. App. LEXIS 4381, at *7 (Fed. Cir. Mar. 4,

[6] Vertical does not deny that it is having settlement discussions with LG. It makes no sense for this Court to deny Samsung's and Interwoven's motions because of LG, and then have LG settle out shortly thereafter.

2011) (nonprecedential) ("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.").

### B. The Northern District of California Is More Convenient to This Dispute than the Eastern District of Texas

Vertical's convenience argument likewise ignores critical facts. For example, Vertical ignores that Google – the company that developed, maintained and distributed the accused "arbitrary object framework" – is located in the Northern District of California, that Defendant SEA's subsidiary STA maintains a development lab in the Northern District of California that works with Google on Android-related aspects of Samsung's accused products, that defendant LG Mobilecomm has offices in Southern California, and that defendants SEA and LG Electronics, which are both headquartered in Korea, are closer to the Northern District of California than to the Eastern District of Texas.

Instead, Vertical argues that "Samsung moves all of its smartphones and table [sic] computers through this district." Vertical Opposition at 11. Vertical is wrong again. Samsung ships its accused Smartphones and tablet computers that are both 3G and Wi-fi enabled to either its Illinois or Texas storage facilities, from which they are shipped to Samsung's wireless customers (e.g., Verizon and AT&T). Samsung ships its accused tablet computers that are only Wi-fi enabled to either its California or Illinois storage facilities, from which they are shipped to Samsung's retail customers (e.g., Best Buy). Even as to those accused devices that pass through Texas, Vertical has never explained why their temporary storage in Texas is relevant to the convenience analysis.

Vertical also argues that this forum is more convenient than the Northern District of California because "[i]mportant third parties, *e.g.*, Samsung's Texas customers, reside in Texas," and because the named inventor of the Patents-in Suit, Aubrey McAuley, resides in Austin, Texas. Vertical Opposition at 5-6, 11, 12. There is, however, no reason to believe that Samsung's Texas customers are any more important than Samsung's California customers. And Judge Seeborg has already rejected Vertical's argument concerning Mr. McAuley.[7] Moore Decl. Ex. A at 6.

Given the location of all of the parties, witnesses and documents likely relevant to Vertical's allegations against Interwoven, Samsung and LG, there is no persuasive reason to deviate from the first-to-file presumption.

## III. CONCLUSION

For the foregoing reasons, Samsung respectfully requests that this Court dismiss, stay or transfer the present case to the Northern District of California.

[7] While the Northern District of California has "absolute subpoena power" over Google witnesses because they work within that District, this Court does not have "absolute subpoena power" over Mr. McAuley given that he is located in Austin, almost 290 miles away from this Court. *See, e.g.*, *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333, 1337-38 (Fed. Cir. 2009); *Promote Innovation LLC v. Ortho-McNeil Pharm. LLC*, No. 2:10-109-TJW, 2011 U.S. Dist LEXIS 15408, at *9-11 (E.D. Tex. Jan. 12, 2011).

Dated: March 25, 2011

Respectfully submitted,

By: */s/ Eric H. Findlay*

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**CERTIFICATE OF SERVICE**

I hereby certify that all counsel of record, who are deemed to have consented to electronic service are being served this 25th day of March 2011, with a copy of this document via the Court's CM/ECF system per Local Rule CV-5(a)(3).

/s/ *Eric H. Findlay*
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