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
SUR-REPLY IN SUPPORT OF ITS OPPOSITION TO
SAMSUNG DEFENDANTS' MOTION TO DISMISS, STAY OR TRANSFER

I. INTRODUCTION

Samsung apparently has vowed not to let facts or logic get in the way of its arguments supporting its motion for dismissal or transfer of the present case against it. Vertical and LG want to litigate their dispute in this district; and Samsung cannot compel them to move it to California. Thus, Samsung simply cannot achieve the judicial economy it allegedly seeks. But, Samsung has hoisted the judicial economy mantra only recently and only because the Court of Appeals for the Federal Circuit recently held, in two important cases, that judicial economy is the primary and dominant factor in determining the present motion. Unfortunately, for Samsung, the relief it seeks cannot achieve judicial economy, no matter how Samsung spins the material facts of this motion. The only path to avoiding parallel lawsuits is (a) for the Northern District of California to dismiss the declaratory lawsuits filed by Interwoven and Samsung there **and** (b) for this Court to deny Interwoven's and Samsung's motion.

Vertical has long ago chosen to enforce the patents-in-suit in this district. It filed its first lawsuit against Microsoft here in 2007. This is the district in which it resides and operates its

business, providing software products to its customers. This is the district in which Samsung has filed and defended multiple patent lawsuits. This is the district in which LG has chosen to litigate with Vertical. Try, as it has, Samsung cannot change or obscure these facts. Samsung also cannot dispute that Vertical was the first to file the lawsuit between it and Vertical. It cannot dispute that Interwoven filed a wholly defective complaint in California which it merely used as a place setter to further its forum shopping efforts. Samsung has not even attempted to dispute these factors.

The Northern District of California has not yet ruled on these issues. It had scheduled a hearing for March 24, 2011, but then vacated that hearing, indicating that it would decide Vertical's two pending motions to dismiss on the papers filed by the parties. It has not yet decided Vertical's renewed motion to dismiss or transfer the Interwoven declaratory judgment action; and it certainly has not decided Vertical's motion to dismiss or transfer the Samsung declaratory judgment action. Samsung's suggestions of the contrary are simply not credible.

Vertical brought suit against Samsung, Interwoven and LG in this district. It will continue to enforce the patents-in-suit in this district against other companies. No reasonable person can dispute that the only way to achieve judicial economy is for the litigation in this Court to continue against all parties. Therefore, for the reasons stated in this sur-reply and in Vertical's opposition to Samsung's present motion, Vertical respectfully request that the Court deny Samsung's motion.

II. THE NORTHERN DISTRICT OF CALIFORNIA HAS NOT ISSUED A FINAL RULING

The two declaratory judgment actions in California (*Interwoven, Inc. v. Vertical Computer Systems, Inc.*, Case No. 3:10-cv-04645-RS and *Samsung Electronics Co., Ltd. and Samsung Electronics America, Inc. v. Vertical Computer Systems, Inc.*, Case No. 3:11-cv-0189-RS) have not progressed to even the case management conference stage. The California court

had scheduled the case management conference for April 14, 2011, but the parties moved to continue that date, in part, so that the Court could rule on two pending motions.

The two motions pending before the California court are: Vertical's 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 (Case No. 3:10-cv-04645-RS, Dkt. No. 38) and Vertical's Motion to Dismiss, Transfer or Stay Samsung's Lawsuit (Case No. 3:11-cv-00189-RS, Dkt. No. 16). The Northern District of California took both of these motions under submission without oral argument on March 17, 2011. Thus, the issues presented here still remain pending in California, and Samsung cannot credibly argue that the California court has reached any final conclusion.

The Northern District of California must reconcile its preliminary decision in the Interwoven case with the clear mandate issued by the Court of Appeals for the Federal Circuit that judicial economy trumps all factors, even the first-to-file doctrine of which Interwoven cannot avail itself because it deceived Vertical into engaging in settlement discussions and because it filed a completely defective complaint. The Northern District of California may disregard these legitimate exceptions to the first-to-file rule, but it cannot prevent a second parallel lawsuit from proceeding in this Court.

III. SAMSUNG HAS NOT PROVIDED ANY COMPELLING REASON FOR CONVENIENCE IN CALIFORNIA

On page 10 of its opening memorandum, Samsung identifies a non-party subsidiary, Samsung Telecommunications America, LLC (STA). On page 12, it further explains that STA is a Delaware corporation headquartered in Richardson, Texas and that it is "responsible for marketing and selling the accused phones and computers to wireless carriers." It now attempts to deflate this admission by explaining that some Wi-Fi enabled Samsung tables **may** move through a California facility. It does not, however, dispute that most of its products move through Texas

and that its Richardson subsidiary controls all of those products. It also does not dispute all the other factors, including its involvement in all the litigation in this district and its primary location in Asia, where it designs and manufactures the accused products. In arguing about this speculative and insignificant routing of some of its products, Samsung is indeed arguing about the bar bill on the Titanic.

Samsung further argues that the presence of a third party, Google, in the Northern District of California, somehow makes that district more convenient. It states that Google "developed, maintained, and distributed the accused 'arbitrary object/framework.'" But the accused products are cell phones and tablet computers; and Samsung is the one that develops and sells those products. Once again, Samsung is arguing the bar bill and not the important factors, such as the residence of the inventor of the patents-in-suit which is Texas.

IV. WHETHER LG IS SUBJECT TO PERSONAL JURISDICTION IN CALIFORNIA IS IMMATERIAL

In this court and in the Northern District of California, Samsung argues 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." Vertical can sue LG in many places. But the most convenient place is its home district where LG has apparently decided to remain. Vertical certainly will not move its claims against LG to California. Thus, the California court cannot avoid parallel lawsuits in the California and Texas districts if it does not transfer the declaratory judgment actions to this Court.

V. CONCLUSION

In view of the foregoing and in view of the facts and arguments presented in Vertical's initial opposition to the present motion, Vertical respectfully requests that the Court deny Samsung's motions.

Dated: April 4, 2011

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing document was filed electronically in compliance with Local Rule CV-5(a). As such, this document was served on all counsel who are deemed to have consented to electronic service. Local Rule CV-5(a)(3)(A). Pursuant to Fed. R. Civ. P. 5(d) and Local Rule CV-5(d) and (e), all other counsel of record not deemed to have consented to electronic service were served with a true and correct copy of the foregoing by email, on this the 4th day of April, 2011.

/s/ William E. Davis, III
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