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

VERTICAL COMPUTER SYSTEMS, INC.,	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 2:10-cv-490
v.	§	
	§	**JURY TRIAL DEMANDED**
INTERWOVEN, INC., LG ELECTRONICS MOBILECOMM U.S.A., INC., LG ELECTRONICS INC., SAMSUNG ELECTRONICS CO., LTD., SAMSUNG ELECTRONICS AMERICA, INC.,	§	
	§	
Defendants.	§	

PLAINTIFF, VERTICAL COMPUTER SYSTEMS, INC.'S, RESPONSE IN OPPOSITION TO LG ELECTRONICS MOBILECOMM U.S.A., INC. AND LG ELECTRONICS INC.'S MOTION TO SEVER AND TRANSFER CLAIMS TO THE U. S. DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY OR IN THE NORTHERN DISTRICT OF CALIFORNIA

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I. INTRODUCTION

Vertical Computer Systems, Inc. ("Vertical") submits this memorandum and the appended Declaration of Luiz C. Valdetaro in opposition to the pending motion to sever and transfer filed by LG Electronics Mobilecomm U.S.A., Inc. and LG Electronics, Inc. (collectively "LG").

Nearly two years after the start of this action and more than a year after this Court denied the very same motion as to the Samsung defendants, LG has decided that it no longer wishes to defend against Vertical's claims in the same action with Samsung and that it wants to transfer the case against it to either the Northern District of California or the District of New Jersey. It cites the recent decision of the Court of Appeals for the Federal Circuit in *In re EMC Corp.* (dealing with severance under Fed. R. Civ. P. 20) as justification for this latest disruption of the present litigation, but the fact that it has not asked for severance without transfer as an alternative remedy shows its true intent – to remove the case to what it believes is a more favorable forum.

The evidence relating to the issues of infringement, invalidity and unenforceablity are almost identical as to both LG and Samsung. The basis of infringement for both defendants is the Android operating system provided by Google. Both LG and Samsung meet the compatibility requirements of Google. And, as shown below, Vertical's showing of infringement for LG is essentially the same as that for Samsung. Thus, under the standard of *In re EMC Corp.*, requiring that the claims against each defendant "show an aggregate of operative facts," the present case presents the most compelling situation for joinder of two independent defendants.

The same factors considered by this Court in denying Samsung's motion to transfer apply to the present motion by LG. The first-to-file doctrine establishes a plaintiff's "presumptive rights" to select the forum of its choice. Vertical chose its home forum where all the documents and witnesses reside. Judicial economy, which plays a paramount role in trying to maintain an orderly and effective administration of justice, compels having one case for Samsung and LG to

minimize the waste of time, energy and money. And, this forum is the most convenient because almost all of the witnesses and documents reside in it or near it. A foreign corporation should not dictate where it wants an aggrieved plaintiff's claim decided.

Therefore, for the reasons outlined below, Vertical respectfully requests that the Court deny LG's motion.

II. THE FACTS

A. The Parties to this Action

This is a patent infringement action between Vertical, a software company located in this district, and two groups of Korean-based companies, Samsung and LG.

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.

LG Electronics Mobilecomm U.S.A., Inc. is a California corporation and has its principle places of business in San Diego, CA and in Englewood Cliffs, NJ 07632. In the declaration supporting the present motion, Mr. James Fishler, an LG senior vice president for marketing, declares that the business of LG Electronics Mobilecomm U.S.A., Inc. "is in the process of being transitioned from San Diego to Englewood Cliffs, N.J."

LG Electronics, Inc. is a corporation organized under the laws of the Republic of Korea and has its principal place of business at LG Twin Towers 20, Yeouido dong, Yeongdeungpo-gu, Seoul, Republic of Korea 150-721. It designs and manufactures the accused smartphones and tablet computers in Korea and then imports them into the United States.

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. (The Samsung

companies have not joined LG in the present motion, but they essentially tried to do previously what the LG companies are attempting to do now.)

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.

Samsung Telecommunications America, LLC (**a non-party**) ("STA") 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.

LG, collectively, is a multinational corporation with offices around the world. In the United States, it has offices in San Diego, CA; in Englewood Cliffs, NJ; in Huntsville, AL; **and in Fort Worth, TX**. The San Diego and New Jersey locations are marketing companies; the Alabama location is a service location; and **the Fort Worth, Texas location, like the Samsung Richardson location, is a distribution and service center**. (See Google search results showing this information, attached as **Exhibit A**.)

B. <u>The Subject Matter of this Lawsuit</u>

The subject matter of Vertical's complaint here (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 specifications and drawings. Vertical is the owner of the '744 and '629 patents and has standing to sue for infringement.

Samsung and LG infringe these two patents through their manufacture, importation and sale of cellular telephones and tablet computers having an Android operating system. In fact, for purposes of this litigation, the accused products of Samsung and LG are essentially the same. They all include the Android operating system which forms the basis of Vertical's claims of infringement. (The Android Operating system originates from one company – Google.) Thus, the infringement contentions and claim charts provided by Vertical in this action cover the same claims and the same accused technology. Vertical attaches its claim charts for Samsung as **Exhibit C** and for LG as **Exhibit D**. A comparison of these two sets of claim charts shows that the evidence on the issue of infringement is essentially the same for both Samsung and LG.

C. Procedural History of This Litigation and the Litigation in the Northern District of California

Almost two years ago, on October 14, 2010, Interwoven, Inc. filed suit in the United States District Court for the Northern District of California, seeking a declaration of non-infringement, invalidity and unenforceability of the '744 and '629 patents. *Interwoven, Inc. v. Vertical Computer Systems, Inc.*, Civil Action No. 3:10-cv-04645-RS ("the Interwoven Action"). A month later, on November 15, 2010, (but before Interwoven served its Complaint on Vertical), Vertical filed the present lawsuit against Interwoven, Samsung and LG, alleging infringement of the patents-in-suit by Interwoven's TeamSite software platform and LG's and Samsung's Android smartphones and tablets. The following month (December 7, 2010) Vertical also filed a motion in the Northern District of California to transfer venue to this Court or to dismiss Interwoven's Complaint (Interwoven Action, Dkt. No 8). The California Court denied this motion based on the first-to-file rule and its conclusion that neither district was demonstrably more or less convenient than the other as to Interwoven and Vertical (Interwoven Action, Dkt. No 35).

On January 12, 2011, Samsung filed suit against Vertical in the Northern District of California, seeking the same declaration that Interwoven had sought in the Interwoven Action. *Samsung Electronics Co., Ltd. v. Vertical Computer Systems, Inc.*, Civil Action No. 3:11-cv-

00189-RS ("the Samsung Action"). In response, Vertical, on February 3, 2011, filed a motion to dismiss Interwoven's Complaint under Fed. R. Civ. P. 12(b)(6) and renewed its motion to transfer the Interwoven Action to this Court (Interwoven Action, Dkt. No 38). Vertical also filed (on February 4, 2011) a motion to transfer the Samsung Action to this Court (Samsung Action, Dkt. No. 16). On February 25, 2011, Samsung countered by filing a motion in this Court to dismiss, stay or transfer this case to the Northern District of California (Dkt. No. 31). (Interwoven had filed a similar motion in this Court on January 10, 2011, (Dkt. No. 19)).

Throughout all of this procedural activity, LG did not file any declaratory judgment action in any other district; it did not move to dismiss, transfer or stay this litigation; and it did not join either Interwoven or Samsung in any of their motions. And, until now, LG has also not moved to sever its case from that of Samsung.

On May 2, 2011, the Northern District of California denied Vertical's renewed motion to transfer the Interwoven Action, but granted Vertical's motion to transfer the Samsung action. (Interwoven had filed an amended complaint which mooted the Fed. R. Civ. P. 12(b)(6) portion of Vertical's motion.) The California Court held as follows:

> Vertical's infringement suit filed in the Eastern District of Texas alleges that Samsung infringes the subject patents through its manufacture, importation and sale of cellular telephones operating an Android system. Samsung's suit in California seeks a declaratory judgment of noninfringement. Roughly around the time of the hearing on Vertical's motion to dismiss or transfer Interwoven's declaratory judgment Complaint, this Court learned that the Samsung companies had filed a declaratory judgment action of their own in this district. This Court then related Samsung's suit to Interwoven's, pursuant to Civil Local Rule 3-12, and the instant motion duly followed.
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> Vertical maintains its principal place of business in Richardson, Texas, which is located within the Eastern District of Texas. Until 2003, Vertical was based in Los Angeles, California, and at least two senior employees continue to operate out of this state. These employees work out of their respective homes, and the company does not maintain any official offices within the State. The employees Vertical characterizes as material witnesses, however, all reside in Texas, and most of them specifically within the Eastern District of Texas. Vertical insists that the bulk of all other witnesses and documents relevant to the patents are located near its headquarters in Richardson.

Samsung Electronics, Ltd. is a corporation organized under the laws of the Republic of Korea. Samsung Electronics America is a New York corporation with its principal place of business in New Jersey. It does not claim to operate any offices in California, or maintain documents within this state. Samsung does note, however, that the phones and tablet computers it manufactures use an Android operating system, which was developed and distributed by Google, headquartered in the Northern District of California. Accordingly, Samsung surmises that at least some documents and material witnesses potentially relevant to its alleged acts of infringement are located within this district. Samsung also makes the rather weak observation that California is geographically closer than Texas to Korea, where Samsung researches and manufactures its Android-powered products. Samsung does acknowledge, however, that witnesses and documents relevant to defending its suit are also located in Texas. STA, a Delaware corporation headquartered in Richardson, apparently purchases the accused phones and computers from Korea, and is responsible for the importation of Samsung products to the United States. In other words, the accused product's point of entry into the United States is the Eastern District of Texas. That company also markets and sells Samsung's products to wireless carriers and, accordingly, witnesses and documents relevant to importation, marketing and sales of Samsung's accused products are located in that judicial district.

* * *

Vertical and Samsung agree that the Court should honor the first to file presumption. Interestingly, both parties assert that its action represents the first-filed Complaint. Vertical plainly is the only party who can claim that title in this particular instance. Although Samsung suggests the Court should consider the date on which Interwoven filed a declaratory judgment suit, it presents no legal or even logical authority for that proposition. Vertical also has the better argument as to convenience factors, the interests of judicial economy (and, in particular, the avoidance of inconsistent results). On account of witness and document location, it would obviously be more convenient for Vertical if the suit were litigated in Texas. As to Samsung (unlike Interwoven), there is ample reason to believe litigation in Texas would actually be more convenient than it would be in this district. Samsung, after all, has substantial ties to the Eastern District of Texas (apparently, the accused products themselves enter the United States through that district), and houses documents and witnesses relevant to this litigation there.

As to efficiency, a district court in Texas is presiding over Vertical's infringement suit against the Samsung plaintiffs. All that is before this Court is a declaratory judgment action brought by a separate plaintiff against Vertical. As Vertical is quick to acknowledge, Samsung's products are distinct from Interwoven's. It is simply not persuasive, as Samsung argues, that it would be a better use of resources and would stem the risk of inconsistent results for this Court to hear both declaratory judgment actions.[3] For all these reasons, transfer of Samsung's declaratory judgment suit to the Eastern District of Texas is warranted and Vertical's motion, with respect to C 11-0189 RS, is therefore granted. [Footnote omitted]

A week later, on May 10, 2011, this Court similarly granted Interwoven's motion to transfer but denied Samsung's motion for the same relief. (Dkt. No. 41). It held:

> The Court appreciates that given the same patents are asserted in all three cases, there is a potential for overlap regarding claim construction issues, infringement issues, invalidity issues, and unenforceability issues. However, given that the Court will sever Interwoven from the present case, the risk of inconsistent rulings as it relates to the specific parties is significantly decreased. Moreover, the Court finds that the plaintiffs in the second-filed cases should not be rewarded for the procedural hooks they attempted to create with their respective filings. That is, Samsung is incorrect to assume that simply because it filed its action in the same district as Interwoven, it automatically obtains Interwoven's first-filed status. As discussed, the Samsung Action was filed after the present action and is not entitled to first-filed status. Thus, in the interest of an orderly administration of justice, the Court DENIES Samsung's motion with respect to Defendants Samsung and LG.
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> In addition to adhering to the first-to-file rule, the Court finds that Samsung has failed to prove that the Northern District of California is clearly more convenient for the remaining Defendants in this case. **First, Defendant LG has not answered in the present case and has not expressed any interest in joining any of the lawsuits in the Northern District of California**. Moreover, the record before the Court is insufficient to determine whether the Northern District of California is clearly more convenient for LG.
>
> Similarly, Samsung has failed to prove that the Northern District of California is clearly more convenient. In fact, Samsung concedes that relevant witnesses and documents are located in Texas. Specifically, Samsung Telecommunications America, LLC ("STA") is a Delaware corporation headquartered in Richardson, Texas, that purchases the accused devices from Samsung Electronics Co., Ltd. ("SEC") in Korea. (Dkt. No. 31-1.) STA imports the accused devices into the United States and then markets and sells the devices to wireless carriers (e.g., Sprint, Verizon, AT&T), which distribute them to retailers and end users. Id. Mr. Kwon's declaration confirms that witnesses and documents relevant to the importation, marketing and sales of the accused devices are located in Texas. Considering these facts, and finding Samsung's other arguments relating to transfer unpersuasive, the Court concludes that Samsung has not shown that the Northern District of California is clearly more convenient. Accordingly, because there is no persuasive reason to deviate from the first-to-file preference as it relates to the remaining defendants, the Court concludes that the matter should proceed in this Court with respect to Defendants LG and Samsung. [Emphasis Added]

On May 11, 2011, Vertical filed a petition for a writ of mandamus in the Court of Appeals for the Federal Circuit, seeking to have the Federal Circuit (a) vacate the May 2, 2011 order of the District Court for the Northern District of California which had denied Vertical's

Renewed Motion to Transfer and (b) instruct the Northern District to compel the transfer of the Interwoven Action to this Court (petition attached as **Exhibit E**). The Federal Circuit denied Vertical's Petition on August 17, 2011. (Federal Circuit decision attached as **Exhibit F**).

The Northern District of California then proceeded to construe the claims of the patents-in-suit; and on December 30, 2011 issued its claim construction Order (attached as **Exhibit G**). Interwoven responded by filing requests for reexamination for both the '744 and '629 patents-in-suit. It also filed a motion to stay the Interwoven action pending the reexaminations (Interwoven Action, Dkt. No. 86). The Northern District denied the stay motion (Interwoven Action Dkt. No. 102) and set the close of fact discovery for October 12, 2012 and the trial for August 12, 2013 (See Scheduling order, Interwoven Action, Dkt. No. 117).

The Patent Office granted reexamination of both of the patents-in-suit; and those reexamination proceedings remain pending. The Patent Office has rejected some of the patent claims that Vertical had asserted against Interwoven, LG and Samsung. But, the Patent Office has also confirmed the patentability of many of the patent claims that Vertical has asserted against all those companies. It is axiomatic that Vertical need only prove infringement of only one claim of a patent-in-suit to prevail on the issue of infringement. *Panduit Corp. v Dennison Mfg. Co.*, 836 F.2d 1329, 1330, fn. 1 (Fed. Cir. 1987).

This Court has set trial for May 7, 2014. Vertical has served its infringement contentions; and Samsung and LG have served their invalidity contentions in this case. Vertical served written discovery and Samsung and LG have responded. The parties have also exchanged documents. Interestingly, only LG has served written discovery on Vertical to which Vertical responded. LG has also led the negotiations for a protective order. It appeared that the parties had resolved the differences with respect to the protective order, but, LG has neglected to follow through and finalize the order. (This allows LG to conveniently argue that Vertical has not examined its source code, which Vertical cannot examine adequately before retaining experts.)

D. Cooperation Between LG, Samsung and Google

As stated above, LG and Samsung, for purposes of these patents-in-suit, have essentially the same products, with relevant parts sourced from the same company (Google) which cooperates with LG and Samsung to see that these parts (the Android operating system) adhere to Google's compatibility requirements. When Samsung filed its motion to transfer on February 25, 2011, STA's director of project management, Seo-Won Kwon, filed a declaration stating that:

> 10. STA maintains a development lab in San Jose, California, which works with Google on the Android-related aspects of Samsung's Android Devices. This lab performs a variety of software engineering work related to the Android platform, including optimizing device performance and conducting internal benchmarking. The lab also works closely with the Android team at Google to ensure that Samsung's Android Devices adhere to Google's compatibility requirements.

(Declaration of Seo-Won Kwon attached as **Exhibit H**).

Mr. James Fishler, LG's Marketing Vice President, in his declaration supporting LG's present motion was not quite as forthcoming as Mr. Kwon, but he, nonetheless, admitted that LG "works with Google's Android focused engineers and support staff located in Mountain View, California." (See ¶11 of Fishler Declaration). Based on these admissions, one can easily conclude that both LG and Samsung use the same operating system and they both cooperate with Google to meet Google's compatibility requirements. The evidence on infringement, invalidity and unenforceability is entirely the same for both LG and Samsung.

E. This Court is the Most Convenient for all the Parties

As outlined above and in the declaration of Luiz C. Valdetaro, Vertical resides in this district and all its witnesses reside in this district or in Dallas. The inventor resides in Austin; and Vertical keeps all of its documents here in this district. (See ¶¶ 2-5 of the **Valdetaro Declaration**). As further shown in Mr. Valdetaros' declaration, Vertical has absolutely no presence or activity in New Jersey and hardly any presence or activity in California. The material witnesses that LG employs, especially the technical witnesses, reside where most of the

LG design and development occurs – in Korea. Accordingly, for the reasons developed more fully below, this district is the most convenient forum for the litigation against both Samsung and LG. A review of the Pacer system for cases in this district shows that LG and Samsung have been plaintiffs as well as defendants (many times joint defendants) in countless cases here.

III. ARGUMENT

A. Severance Is Improper Under the Standard of In re EMC Corp.

In *In re EMC Corp.*, 677 F.3d 1351 (Fed. Cir. 2012) (Decision dated May 4, 2012, attached as **Exhibit I**), the Court of Appeals for the Federal Circuit considered a petition for a writ of mandamus filed by eight of eighteen companies named as defendants in a single complaint in this Court. The petitioners had sought to sever the cases against them and have those cases transferred to four different districts around the country. This Court denied the defendants' motions based, in part, on a finding that the claims against the defendants arose out of the same transaction, occurrence, or series of transactions or occurrences because the accused services were "not dramatically different."

The Federal Circuit granted the petition for mandamus and directed this Court to reconsider the motions to sever under a different standard. The Federal Circuit held that:

> Defendants may be joined in a single action only if the two independent requirements of Rule 20 are satisfied: (1) the claims against them must be asserted 'with respect to or arising out of the same transaction, occurrence, or series of transactions or occurrences,' and (2) there must be a 'question of law or fact common to all defendants.' Fed.R.Civ.P. 20(a)(2). Rule 20 clearly contemplates joinder of claims arising from a 'series of transactions or occurrences'—a single transaction is not required.
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> * * *
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> The Supreme Court has stated that under the Federal Rules of Civil Procedure, 'the impulse is toward entertaining the broadest possible scope of action consistent with fairness to the parties; joinder of claims, parties and remedies is strongly encouraged.' Gibbs, 383 U.S. at 724, 86 S.Ct. 1130.
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> Thus, independent defendants satisfy the transaction-or-occurrence test of Rule 20 when there is a logical relationship between the separate causes of action. The logical relationship test is satisfied if there is substantial evidentiary overlap in the facts giving rise to the cause of action against each defendant. In other words, the

defendants' allegedly infringing acts, which give rise to the individual claims of infringement, must share an aggregate of operative facts.

* * *

We agree that joinder is not appropriate where different products or processes are involved. Joinder of independent defendants is only appropriate where the accused products or processes are the same in respects relevant to the patent. But the sameness of the accused products or processes is not sufficient. Claims against independent defendants (i.e., situations in which the defendants are not acting in concert) cannot be joined under Rule 20's transaction-or-occurrence test unless the facts underlying the claim of infringement asserted against each defendant share an aggregate of operative facts. To be part of the 'same transaction' requires shared, overlapping facts that give rise to each cause of action, and not just distinct, albeit coincidentally identical, facts. The sameness of the accused products is not enough to establish that claims of infringement arise from the 'same transaction.' Unless there is an actual link between the facts underlying each claim of infringement, independently developed products using differently sourced parts are not part of the same transaction, even if they are otherwise coincidentally identical.

* * *

The district court enjoys considerable discretion in weighing the relevant factors.[4]

In exercising its discretion, the district court should keep in mind that even if joinder is not permitted under Rule 20, the district court has considerable discretion to consolidate cases for discovery and for trial under Rule 42 where venue is proper and there is only 'a common question of law or fact.'

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[4] As discussed above, we do not decide today whether the new joinder provision at 35 U.S.C. §299 changes the test for joinder of defendants in patent infringement actions, and our approach to the new provision is not dictated by this case. The new statute only allows joinder of independent defendants whose acts of infringement involve "the same accused product or process." Id. §299(a)(1) (emphasis added). We need not decide whether the sameness test in the new legislation is identical to the sameness test we adopt here for cases not covered by the new legislation.

677 F.3d at 1356-1359.

As shown in the facts and analysis of *In re EMC Corp.*, the Federal Circuit expressed concern about complicated patent litigation involving a large number of defendants with hardly a connection between them other than that their services or products infringe the same patents. That is not the case in the present litigation. First, the only defendants are LG and Samsung; and

Vertical does not plan to add any other parties to this action. Second, Vertical has asserted the same claims of each of the patents-in-suit against both LG and Samsung. Third, LG's and Samsung's products have the same components with respect to the asserted patent claims; and LG and Samsung source them from Google with which they cooperate to implement the Android operating system in the same way. Clearly, the defendants' infringing acts share an aggregate of operative facts. Even evidence for the damage calculation is substantially overlapping because Vertical seeks a reasonable royalty from both LG and Samsung; and any established royalty or license would apply to both.

B. None of the Relevant Factors Support Transfer

1. 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 LG, weighs heavily in Vertical's favor and denial of LG's motion is necessary in this case "to prevent wrong or injustice." See *Kahn*, 889 F.2d at 1081-82. LG 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.

2. Judicial Economy is the "Paramount" Factor

The Court of Appeals for the Federal Circuit emphasized judicial economy in *In re Google*, 2011 U.S. App. LEXIS 4381 (Fed. Cir. Mar. 4, 2011) (**Exhibit J**) where it 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 this Court, a case which included other defendants. In that case, the Federal Circuit denied the defendant's petition because "[c]ourts 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 LG should proceed in this district because the case here already includes another defendant, Samsung, 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, one of the most compelling reason that this case should stay in this district is the existence of related litigation pending here. *Thill v. Edward D. Jones & Co., L.P.*, 2006 U.S. Dist. LEXIS 69485 (N.D. Cal. Sept. 18, 2006). Vertical brought suit on November 15, 2010, in this Court against Interwoven, the two LG companies, and the two Samsung companies. The LG Android cell phones are essentially the same as the Samsung Android cell phones. Vertical's case against the Samsung and LG defendants here has almost all overlapping legal and factual issues. Thus, the most convenient place for the suit between Vertical and LG is the same court.

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. "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 at *3 (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 LG case here.

3. The Most Convenient Forum for this Dispute is the Eastern District of Texas

a. 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. Vertical does not have any presence as it relates to this litigation in either California or New Jersey. LG identifies a marketing executive and an accountant as examples of witnesses located in New Jersey. The declaration that the marketing executive submitted in favor of the present motion shows that he is definitely not a material witness for this case; and the accountant certainly is not a material witness. The material LG witnesses are all in Korea.

b. 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. (See **Valdetaro's Declaration**, ¶¶2-5). The accused product is located in Texas. Important third parties, *e.g.*, LG's Texas customers, reside in Texas. LG should not have any problem in defending this lawsuit in Texas under all of these circumstances. Indeed, LG's claim that the Eastern District of Texas is inconvenient is unfounded. LG has been a party to a myriad of other cases in that district. In fact, LG has even chosen to file a number of

cases in that district. (See *LG Electronics, Inc. v. Petters Group Worldwide, LLC;* Case No 5:08-cv-00163 (E.D. TX)*; LG Electronics, Inc. v. Vizio, Inc., et al,* Case No. 5:10-cv-00161 (E.D. TX); *LG Electronics, Inc. v. Funai Electric Co, et al,* Case No. 5:09-cv-00114 (E.D. TX); and *LG Electronics, Inc. v. TTE Technology, Inc. et al,* Case No. 5:07-cv-00026 (E.D. TX)). Accordingly, the Eastern District of Texas is not inconvenient and this litigation should proceed here.

c. 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 or to the District of New Jersey. LG cannot argue that its documents are located in California or New Jersey 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 here as well. This includes the most important witness – the inventor, Aubrey McAuley.

IV. CONCLUSION

In view of the foregoing, Vertical respectfully requests that the Court deny LG's motion to sever and transfer.

Dated: August 10, 2012

Respectfully submitted,

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Vertical Computer Systems, Inc.

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 10th day of August, 2012.

/s/ William E. Davis, III
William E. Davis, III