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 ACTION NO. 2:10-CV-490

JURY TRIAL

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

Vertical spends most of its Opposition on issues that have nothing to do with LGE or its Motion to Sever and Transfer. But Vertical does not dispute key facts that are central to LGE's Motion. LGE's Motion to Sever and Transfer should be GRANTED.

I. LGE Is Improperly Joined To Samsung And Should Be Severed.

Vertical fails to meet the "same transaction or occurrence" test to properly join LGE with Samsung. Fed. R. Civ. P. 20(a); *In re EMC*, 677 F.3d 1351, 1356 (Fed. Cir. 2012). It is true that both LGE and Samsung accused products run Android software. However, Vertical does not dispute that LGE and Samsung are independent companies—in fact, fierce competitors—that develop, design, market, and sell their respective products independently. Merely "alleging a common manufacturer, product type, and that they both infringe, along with the same patent is not enough to support joinder where defendants are unrelated companies, selling different

products." *In re EMC*, 677 F.3d at 1359 (citing *Sorensen v. DMG Holdings, Inc.*, No. 08-cv-559, 2010 WL 4909615, at *1 (S.D.Cal. Nov. 24, 2010)).

Vertical's sole basis for infringement against both LGE and Samsung relies on a hypothetical example from a book about the Android Operating System. When the program is compiled and then executed, however, errors occur ("run-time errors"), contradicting Vertical's assertion that the hypothetical example 'runs fine.' *See* Ex. A, p. 11; Ex. B, p. 9. Vertical's Interrogatories in fact ask about modifications made to the Android OS -- implying that Vertical is aware that the system running on LG products may not, in fact, be the same as Samsung's. Ex. C, Nos. 3-5. Vertical has no facts to show the products are indeed the same.

II. This Case Should Be Transferred To the District of New Jersey Or, In the Alternative, To The Northern District of California.

a. Vertical Does Not Dispute That LGE Has No Relevant Witnesses Or Evidence In The Eastern District Of Texas

Vertical does not dispute the facts that LGE has no operations, no relevant witnesses, and no relevant evidence in the Eastern District of Texas. Nor does Vertical dispute that LGE's U.S. mobile phone business is headquartered in New Jersey and that the knowledgeable witnesses and documents concerning LGE's U.S. marketing and sales of its accused mobile phone products are located in New Jersey. Despite its argument that these witnesses are not relevant, Vertical has, in fact, asked for discovery on the marketing and sales of LGE's accused products. *See, e.g.,* Ex. D, Nos. 10-17, 19, 27. This evidence, and the witnesses that will testify about it, are in New Jersey.

Nor is the Eastern District of Texas more convenient than the Northern District of California. Vertical acknowledges that LGE's Android team is located in San Jose, CA and

works with Google at its Mountain View, CA headquarters. Relevant witnesses and evidence concerning LGE's implementation of Android for the U.S. market are located in California.

b. Vertical Does Not Properly Apply The § 1404 Transfer Factors

The proper inquiry for § 1404 transfer is well-established. The threshold question is "whether the judicial district to which transfer is sought would have been a district in which the claim could have been filed." *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004). There is no dispute that Vertical's claims against LGE could have been brought in New Jersey or the Northern District of California.

When the transferee district is proper, the court must then consider the private and public interest factors relating to the convenience of parties and witnesses as well as the interests of particular venues in hearing the case. *See e.g., In re Nintendo Co., Ltd*., 589 F.3d 1194, 1197–98 (Fed. Cir. 2009). LGE applied each of these factors in its Opening Brief and the weight of the analysis favors transfer. But instead of offering the Court a competing application of these factors, Vertical crafts its own legal inquiry for transfer. Vertical's analysis is inapplicable and, in any event, unpersuasive. LGE addresses Vertical's arguments below.

1. The First-To-File Doctrine Is Inapplicable Here

Vertical proclaims it has a "'presumptive right' as the first litigant to file, vis-à-vis LG" to bring its case in the Eastern District of Texas. Opp. at 12. However, the first-to-file doctrine under §1404 is inapplicable. *See Abercrombie & Fitch Co. v. Ace European Group, Ltd.*, No. 2:11-cv-1114, 2012 WL 2995171, at *3 (S.D. Ohio Jul.23, 2012)("The first-filed rule does not supersede the inquiry into the balance of convenience under § 1404(a)").

2. Vertical's Judicial Economy Argument Improperly Depends On Joinder

Vertical claims that judicial economy would be served by keeping LGE in the Eastern District of Texas and joined with Samsung in this action. However, proper joinder is a separate inquiry from the judicial economy needed to justify transfer. And LGE is *not* properly joined with Samsung.

Moreover, to date, this Court has had little to no substantive involvement in this action. It is undisputed that this Court is unlikely to have historical knowledge about the patents or the technology. Meanwhile, the Northern District of California is intimately familiar with the patents and the technology, having already issued a *Markman* order[1] in the *Interwoven* case that this Court severed and transferred in May 2011. Judicial economy would be served by a transfer to the Northern District of California.[2]

3. Vertical's Claims Of "Convenience" Are Limited To Its Own Witnesses

The private interest factors of the **parties** must take into account (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses.

Vertical attempts to defend the "convenience" of this forum by relying on the self-serving "convenience" of its own witnesses. Even so, and as noted by LGE in its Opening Brief, no relevant evidence or witnesses are within the subpoena power of this Court. Vertical admits that its headquarters are located 125 miles from this Court, which is outside of the 100-mile subpoena

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[1] Chief Judge Davis' recent opinion in *Norman IP Holdings LLC v. Lexmark International, Inc*., 6:11-CV-495 (E.D. Tex. August 10, 2012) is not applicable since at least one Markman has occurred in another jurisdiction, which is one of the alternative places to which transfer is sought. But regardless of where the claim construction order issued, the existence of a prior claim construction order anywhere moots the need for this Court to defer transfer so that its claim construction order can be of use to the transferee court (whether adopted by it or not).

[2] As LGE stated in its Opening Brief, the judicial economy inquiry is neutral with respect to transfer to New Jersey.

power of this Court. Opp. at 14. Moreover, Vertical's chief technical officer Mr. Valdetaro and chief executive officer Mr. Wade reside in Dallas, Texas, which is not in the Eastern District of Texas. *Id.* The inventor, described by Vertical as "the most important witness" resides in Austin, Texas, which is also not in the Eastern District of Texas. *Id.* at 14-15. While Vertical's chief financial officer purportedly resides in this District, Vertical has not identified this individual in its Initial Disclosures as a person likely to have relevant knowledge in this litigation. None of this supposed "convenience" outweighs the fact that no evidence pertaining to LGE's U.S. mobile phone business is located in the Eastern District of Texas. Instead, this evidence, which Vertical has requested in discovery, (*see* Ex. C, Nos. 3-5, 9; Ex. D, Nos. 10-17, 19, 27), resides in New Jersey and in California. The private interest factors therefore favor transfer when the convenience of LGE's evidence and witnesses is considered.

Finally, Vertical claims that the Eastern District of Texas is convenient for LGE because it has availed itself in this District by filing its own lawsuits here. Opp. at 15. Vertical appears to be confusing personal jurisdiction over LGE for the convenience of the LGE's witnesses and evidence in this case. In addition, this argument is misguided because a convenience inquiry in other cases, if one was even raised as an issue, is irrelevant to the convenience inquiry here.

CONCLUSION

Given the above facts and arguments, LGE's respectfully the requests that this Court grant LGE's Motion to Sever and Transfer.

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Respectfully submitted,

FISH & RICHARDSON P.C.

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CERTIFICATE OF SERVICE

The undersigned hereby certify that a true and correct copy of the above and foregoing document has been served on August 21, 2012 upon all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system per Local Rule CV-5(a)(3). Any other counsel of record will be served by first class mail.

/s/ *David J. Healey*