BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

IN RE BRANDYWINE COMMUNICATIONS TECHNOLOGIES, LLC PATENT LITIGATION	§	**MDL No. 1:13-P-67**

BRIEF IN SUPPORT OF
PLAINTIFF BRANDYWINE COMMUNICATIONS TECHNOLOGIES, LLC'S MOTION TO TRANSFER TO THE MIDDLE DISTRICT OF FLORIDA PURSUANT TO 28 U.S.C. § 1407 FOR COORDINATED OR CONSOLIDATED PRETRIAL PROCEEDINGS

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I. INTRODUCTION

By this motion, Plaintiff Brandywine Communications Technologies, LLC ("Brandywine") seeks to centralize 41 cases pending in 22 districts across the country.[1] All of these actions allege infringement of the same six patents and will thus involve common questions of fact concerning the interpretation, infringement, validity, and enforceability of these patents. Therefore, centralization will promote the just and efficient conduct of the cases by eliminating duplicative discovery, preventing inconsistent pretrial rulings (for example on claim construction issues), and conserving the resources of the parties, their counsel, and the judiciary.

The Middle District of Florida is the most appropriate jurisdiction for the proposed centralization: five of the seven named inventors reside in that District, and the Honorable Charlene Edwards Honeywell is most familiar with the issues in this case because she has conducted a *Markman* hearing and issued a claim construction order in that District. For these reasons, Brandywine respectfully requests that the Panel transfer the actions listed in Exhibit A and pending outside the Middle District of Florida to the Middle District of Florida and, with the consent of that court, assign them to Judge Honeywell for coordinated or consolidated pretrial proceedings.

II. BACKGROUND

A. The Patents-in-Suit

The following six patents (the "patents-in-suit") are at issue in each action subject to this motion:

- U.S. Patent No. 5,206,854 entitled "Detecting Loss of Echo Cancellation," issued to William L. Betts of St. Petersburg, Florida, and Robert A. Day, II of Manalapan, New Jersey, on April 27, 1993;

[1] The cases are listed in Exhibit A attached hereto.

- U.S. Patent No. 5,251,328 entitled "Predistortion Technique for Communications Systems," issued to David G. Shaw of Middletown, New Jersey, on October 5, 1993;

- U.S. Patent No. 5,812,537 entitled "Echo Canceling Method and Apparatus for Data over Cellular," issued to Mr. Betts, Ramon B. Hazen of North Redington Beach, Florida, and Robert Earl Scott of Indian Rocks Beach, Florida, on September 22, 1998;

- U.S. Patent No. 5,828,657 entitled "Half-Duplex Echo Canceler Training Using a Pilot Signal," issued to Mr. Betts, Mr. Hazen, and Mr. Scott on October 27, 1998; and

- U.S. Patent Nos. 6,970,501 and 7,894,472, each entitled "Method and Apparatus for Automatic Selection and Operation of a Subscriber Line Spectrum Class Technology" and issued to Gordon Bremer of Clearwater, Florida and Philip J. Kyees of Largo, Florida on November 29, 2005 and February 22, 2011, respectively.

Exhs. B-G.

The patents generally relate to networking protocols, techniques and systems. The Defendants' products and services at issue primarily relate to the provision of Internet connectivity via digital subscriber line (DSL) technology. Brandywine is the owner by assignment of the patents-in-suit and owns all right, title, and interest in them, including the right to sue for past and future infringement. *E.g.*, Exh. A-21, ¶¶ 10, 19, 28, 46, 55, 64.

B. The Ongoing Litigations

In August 2011, Brandywine filed a lawsuit in the Middle District of Florida on the six patents-in-suit, plus a seventh patent, against four of the largest national DSL providers: Verizon, AT&T, CenturyLink, and Earthlink. The Court *sua sponte* ordered that the cases be severed, and in February 2012, Brandywine filed four separate suits in the same district. *E.g.*, Exhs. A-21, H, I, J. Two of those cases, *Brandywine Communications Technologies, LLC v. AT&T Corp., et al.*, No. 6:12-cv-283 (M.D. Fla. Feb. 21, 2012), and *Brandywine*

Communications Technologies, LLC v. Centurylink, Inc., et al., No. 6:12-cv-286 (M.D. Fla. Feb. 21, 2012), are still pending.[2]

On January 13, 2013, in the Middle District of Florida, the Honorable Charlene Edwards Honeywell conducted a claim construction hearing in the *Centurylink* case. On April 17, 2013, Judge Honeywell issued a 23-page claim construction opinion in which she construed fifteen disputed terms in five of the six patents-in-suit.[3] Exh. L.

In December 2012 and January 2013, Brandywine filed a second round of cases, each asserting infringement of the patents-in-suit against regional DSL providers and sellers throughout the country. *E.g.*, Exh. A-4. Thirty-nine of those cases remain pending in judicial districts across the country.[4] *See* Exh. A. Although the exact posture differs, each of the "second round" of cases is in its infancy: for example, only nine of those cases have proceeded to scheduling conference. *See* Exhs. A-2, A-18, A-19, A-20, A-28, A-32, A-34, A-35, A-41.

In sum, Brandywine currently asserts the same six patents against DSL providers in 41 cases, which are pending in 22 judicial districts. Because these cases involve common questions of fact, and to conserve the resources of the parties, the witnesses, and the judiciary, Brandywine seeks to centralize these cases in the Middle District of Florida.

III. ARGUMENT

A. Transfer and Centralization Is Warranted Because the Cases Involve One or More Common Questions of Fact and Are Pending in More than One

[2] The *AT&T* case was subsequently transferred to the Northern District of California. *See* Exh. K. Claim construction briefing has begun in that case, but no *Markman* hearing has been held, and no claim construction order has issued. *See* Exh. A-16.

[3] The parties did not disagree as to any claim terms in the '854 patent. Exh. L at 2 n.1.

[4] Two additional actions, *Brandywine Communications Technologies, LLC v. iSelect Internet, Inc.*, No. 2:12-11002 (C.D. Cal.) (Kronstadt, J.), and *Brandywine Communications Technologies, LLC v. BAIS Inc.*, No. 2:12-cv-11026 (C.D. Cal.) (Wright, J.), are expected to be dismissed shortly and thus are not subject to this motion.

District, and Pretrial Consolidation Will Promote the Just and Efficient Conduct of the Cases

When enacting § 1407, Congress specifically listed patent suits among the types of cases appropriate for multidistrict litigation. *See* H.R. REP. NO. 90-1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900. Centralization is appropriate in this case because the actions involve the same six patents-in-suit, which are being asserted against the same technology (i.e., DSL services). Indeed, the Panel has often centralized litigation involving products that allegedly infringe a common patent or patents. *In re Bear Creek Techs., Inc., ('722) Patent Litig.*, 858 F. Supp. 2d 1375, 1379 (J.P.M.L. 2012) (collecting cases); *see also, e.g., In re TR Labs Patent Litig.*, 896 F. Supp. 2d 1337 (J.P.M.L. 2012); *In re Unified Messaging Solutions LLC Patent Litig.*, 883 F. Supp. 2d 1340 (J.P.M.L. 2012); *In re Phoenix Licensing, L.L.C. Patent Litig.*, 536 F. Supp. 2d 1373 (J.P.M.L. 2008); *In re Acacia Media Techs. Corp. Patent Litig.*, 360 F. Supp. 2d 1377 (J.P.M.L. 2005). The Panel should similarly centralize the cases at issue here.

To qualify for pretrial transfer under 28 U.S.C. § 1407, civil actions must meet three general requirements: (1) they must involve one or more common questions of fact; (2) they must be pending in more than one district; and (3) pretrial consolidation must promote the "just and efficient conduct" of such actions and be for "the convenience of parties and witnesses." 28 U.S.C. § 1407(a); H.R. REP. NO. 90-1130 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900; *see also Bear Creek*, 858 F. Supp. at 1378.

The cases listed in Exhibit A meet all three criteria. First, because the same six patents are asserted in each case, the actions will share substantial background questions of fact concerning numerous anticipated issues regarding the interpretation, infringement, validity, and enforceability of the patents-in-suit and implicating factual issues concerning such matters as the technology underlying the patents and accused products, prior art, priority, and claim

construction. *Compare, e.g., Unified Messaging Solutions*, 883 F. Supp. 2d at 1341-42; *Bear Creek*, 858 F. Supp. 2d at 1379-80; *Phoenix Licensing*, 536 F. Supp. 2d at 1374; *Acacia Media*, 360 F. Supp. 2d at 1379. Second, the cases are pending in 22 different districts. *See* Exh. A. And, third, centralization will eliminate duplicative discovery, prevent inconsistent pretrial rulings (particularly on claim construction issues), and conserve the resources of the parties, their counsel and the judiciary. *Compare, e.g., TR Labs*, 896 F. Supp. 2d at 1338; *Unified Messaging Solutions*, 883 F. Supp. 2d at 1342; *Bear Creek*, 858 F. Supp. 2d at 1380; *Phoenix Licensing*, 536 F. Supp. 2d at 1374; *Acacia Media*, 360 F. Supp. 2d at 1379.

Specifically, transfer under § 1407 will permit all of the actions to proceed in one forum before a single transferee judge who can structure pretrial proceedings to consider all parties' legitimate discovery needs while ensuring that common parties and witnesses are not subjected to duplicative discovery demands. *Compare Acacia Media*, 360 F. Supp. 2d at 1379. Thus, centralization offers substantial savings in terms of judicial economy by having a single judge become acquainted with the complex patented technology and construe the patent in a consistent fashion (as opposed to having multiple judges separately decide such issues). *Compare Bear Creek*, 858 F. Supp. 2d at 1380.

In sum, the actions involve common questions of fact, and centralization will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation. *Compare, e.g., TR Labs*, 896 F. Supp. 2d at 1337; *Unified Messaging Solutions*, 883 F. Supp. 2d at 1342; *Bear Creek*, 858 F. Supp. 2d at 1380; *Phoenix Licensing*, 536 F. Supp. 2d at 1374; *Acacia Media*, 360 F. Supp. 2d at 1379. The Panel should centralize the actions.

B. Pretrial Proceedings Should Be Centralized in the United States District Court for the Middle District of Florida

The Middle District of Florida is the most appropriate transferee district for pretrial proceedings in this litigation. Judge Honeywell has conducted a *Markman* hearing and recently issued a claim construction opinion in the *Centurylink* action, so she is familiar with many of the issues that this litigation presents. *Compare TR Labs*, 896 F. Supp. 2d at 1338 (judge who had conducted a *Markman* hearing and recently issued an extensive claim construction order was "clearly the best choice to serve as transferee judge"). In addition, the Middle District of Florida is most convenient for the identified third-party witnesses because five of the seven named inventors of the patents-in-suit reside in that District. *Compare Phoenix Licensing*, 536 F. Supp. 2d at 1374 (transferring cases to district in which inventor resided).

IV. CONCLUSION

For the foregoing reasons, pursuant to 28 U.S.C. § 1407, Brandywine respectfully requests that the Panel transfer the actions listed on Exhibit A and pending outside the Middle District of Florida to the Middle District of Florida for coordinated or consolidated proceedings before Judge Honeywell.

Respectfully submitted,

Dated: May 16, 2013

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