UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
WACO DIVISION

XR COMMUNICATIONS, LLC, dba, VIVATO TECHNOLOGIES, PLAINTIFF, v. ASUSTEK COMPUTER INC. DEFENDANT.	Civil Action No. 6:21-cv-00622-ADA **JURY TRIAL DEMANDED**

DEFENDANT ASUSTEK COMPUTER INC.'S REPLY MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION FOR LEAVE TO FILE A MOTION TO TRANSFER VENUE

TABLE OF CONTENTS

Page(s)

Defendant ASUSTeK Computer Inc. ("ASUSTeK" or Defendant") submits this Reply Memorandum of Law in Support of its Motion for Leave to File a Motion to Transfer Venue ("Motion") in this action to the Central District of California ("CDCA"), or in the alternative to the Northern District of California ("NDCA") under 28 U.S.C. § 1404(a) (the "Transfer Motion") outside the deadline set by the Order Governing Proceedings (the "OGP").

I. ARGUMENT

A. The Appeal in *XR Commc'n v. Asus Comp. Inter.*, 2017-CV-02948 is Highly Relevant and Risks Inefficient Parallel Litigation.

Contrary to Plaintiff's contentions, the appeal in *XR Commc'n v. Asus Comp. Inter.*, 2017-CV-02948 (C.D. Cal.) is highly relevant to this litigation. First, the case, which was filed prior to the instant litigation, involves patents for wireless communications systems that XR Communications, LLC, dba, Vivato Technologies ("XR") has been serially asserting against Defendants in various courts since 2017. The case in particular involves patents related to Wifi standards, just as the patents in this WDTX litigation. Thus, the issues on appeal in the CDCA litigation involving patents from the same family could impact interpretation of patents-in-suit here. Moreover, the U.S. Patent No. 7,729,728 (the "'728 Patent") was asserted in both jurisdictions, which XR does not address. XR does not explain why asserting the same patent in two different jurisdictions is efficient because it is not. XR passes over the fact that it filed first on the '728 Patent and on U.S. Patent No. 10,594,376 (the "'376 Patent") in the CDCA. Even if the Court were to credit XR's argument that *different claims* were asserted such that there is not *substantial* case overlap, efficiency and convenience still dictates that Defendant not have to litigate the same patent in two different jurisdictions along with patents in the same family covering Wifi standards when XR chose first to file in the CDCA (where it itself is headquartered).

B. ASUSTeK's has been Diligent and this Case is Still in its Infancy.

While Plaintiff tries to argue that ASUSTeK has unduly delayed in filing this Motion, ASUSTeK has acted diligently in a case in its initial stages. The case has not progressed to Markman and no discovery has been served. At the same time, the collateral estoppel motions in *XR Commc'n v. D-Link*, 8:17-cv-00596 (C.D. Cal.) show that there are continued claim construction issues pending in another forum that have yet to be resolved and could impact this litigation. Contrary to Plaintiffs contentions that those issues have been resolved, the collateral estoppel motion in *D-Link* was only denied because of the form of the motion – a Rule 12(c) motion for judgment on the pleadings – and not because the collateral estoppel issue is no longer viable. *XR Commc'n v. D-Link*, 8:17-cv-00596 (C.D. Cal) Dkt. 376 ("Defendants thus do not meet their burden to "clearly establish[] on the face of the pleadings that no material issue of fact remains to be resolved and that it is entitled to judgment as a matter of law."). Moreover, just recently XR dismissed the '728 claims in the CDCA case against the CDCA defendants (*see id.* at Dkt. 378), while XR had refiled these same' 728 claims against ASUSTeK in the WDTX. These events prompted ASUSTeK to move for leave to transfer, as it is clear the CDCA is the venue best suited to address the '728 and related patents. And now that XR has appealed the CDCA case against ASUSTeK, it is clearly more convenient. *See Butowsky v. Folkenflik*, No. 4:18CV442, 2020 WL 9936143, at *25 (E.D. Tex. Sept. 1, 2020), *report and recommendation adopted,* No. 4:18CV442, 2020 WL 9936140 (E.D. Tex. Sept. 21, 2020) (finding good cause where motion for leave was prompted by later order issued past the scheduling order deadline); *Robles v. Archer W. Contractors, LLC*, No. 3:14-CV-1306-M, 2015 WL 4979020, at *3 (N.D. Tex. Aug. 19, 2015) (finding good cause when plaintiff based its motion for leave on new information gained after relevant deadlines); *Settlement Cap. Corp. v. Pagan*, 649 F. Supp. 2d 545, 566 (N.D. Tex. 2009) (same).

C. ASUSTeK's Motion to Transfer is Important and Meritorious.

Plaintiff's final argument against allowing leave is that the Transfer Motion is unimportant and would be futile. Plaintiff does not provide any argument on the Transfer Motion's purported lack of importance beyond a conclusory statement. As to the purported futility on ASUSTeK's Motion, XR has in essence provided its opposition to ASUSTeK's Transfer Motion inside its opposition to its motion for leave. Such arguments on the merits of the motion would be more appropriate once the Court ***grants*** ASUSTeK's Motion for Leave, and it would make little sense to deny the motion to leave to file such motion on the contention that the Court ***might*** not grant the underlying motion, when the actual underlying motion has yet to be fully briefed, is based on balancing of factors and the discretion of this Court, and ASUSTeK's Transfer Motion is has sound legal argument supported by the facts. Nothing in Plaintiff's motion supports the argument that ASUSTeK's Transfer Motion would be futile. Because Plaintiff is attempting to brief the underlying Transfer Motion in its opposition here, ASUSTeK refers the Court to Exhibit A (Dkt. 42-1), its proposed Transfer Motion, in the first instance, while responding to Plaintiff's substantive transfer arguments within the confines of this briefing.

1. The Public Interest Factors Favor Transfer

Local Interests. XR focuses only on the fact that ASUSTeK is a foreign corporation while ignoring the other facts that make the CDCA the venue with the most significant local interest in this litigation. For example, XR ignores that since XR, the "company asserting harm," is resident of transferee district, this factor favors transfer. *In re Acer Am. Corp.*, 626 F.3d 1252, 1256 (Fed. Cir. 2010); *see also Hill v. Core Lab'ys LP*, No. 7:15-CV-0093-RAJ, 2016 WL 11744812, at *5 (W.D. Tex. Mar. 3, 2016) ("A jurisdiction where a party's principal place of business is located does have a particularized interest in the suit's outcome."). XR itself is a resident of the CDCA and filed the first action against ASUSTek in the CDCA. The Court need go no further.

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