BEFORE THE
UNITED STATES JUDICIAL PANEL ON
MULTIDISTRICT LITIGATION

In re BRANDYWINE COMMUNICATIONS TECHNOLOGIES, LLC PATENT LITIGATION	)	MDL No. 2462

G4 COMMUNICATIONS CORPORATION'S OPPOSITION TO BRANDYWINE COMMUNICATIONS TECHNOLOGIES, LLC'S MOTION TO TRANSFER

Pursuant to Rule 6.1(c) of the Rules of the Judicial Panel of Multidistrict Litigation, G4 Communications Corporation ("G4") hereby opposes Brandywine Communications Technologies, LLC's ("Brandywine") Motion to Transfer to the Middle District of Florida Pursuant to 28 U.S.C. § 1407 for Coordinated or Consolidated Pretrial Proceedings ("Motion to Transfer") with respect to G4's lawsuit, *Brandywine Comm's Tech., LLC v. G4 Comm's Corp.*, Civil Action No. 1:13-cv-00017-LM (D. N.H.) ("the G4 lawsuit").

Congress surely never envisioned the proliferation of non-practicing entities (a/k/a "patent trolls") that now fill the courts when crafting 28 U.S.C. § 1407. Such plaintiffs have no businesses to run, no customers to serve, no reputations to preserve, no fear of countersuit, and no disincentive to bringing marginal and/or baseless lawsuits. They operate under rules and incentives far different than the litigants and businesses Congress originally confronted. Nor could Congress have anticipated the perverse incentives arising from an employee-less shell company filing scores of lawsuits against small companies for using third-party equipment, the manufacturers of which the plaintiff inexplicably refuses to sue. In any event, this Panel can and

should refuse to transfer the cases named in Brandywine's petition pursuant to the plain terms of 28 U.S.C. § 1407(a). Transfer would be neither "just" nor "efficient." Brandywine has failed to articulate any factual commonality across the cases, and transfer would be unduly prejudicial to the defendants (particularly the smaller ones). At the very least, this Panel should delay transfer for those defendants that are poised to end their cases with a motion for summary judgment.

FACTUAL BACKGROUND

Brandywine is a subsidiary of Acacia Research Corporation, *see* JPMDL Dkt. 36, widely recognized as one of the largest patent trolls in the world.[1] In 2010, Brandywine acquired five of the patents-in-suit and in November 2012 acquired the sixth.[2] *See* Exs. A-F (assignment histories). Since late 2012, Brandywine has filed nearly 80 separate actions in districts across the country against a variety of DSL service providers, mostly small companies, alleging infringement of the patents-in-suit. Many of those cases have been settled and dismissed. In its Motion to Transfer, Brandywine now seeks to centralize the 41 remaining cases pending in 22 districts by transferring them to the Middle District of Florida for pretrial purposes.

G4 is a New Hampshire corporation with a principal place of business in Manchester, New Hampshire. Decl. of Gent Cav in Supt. of Opp. to Motion to Transfer ("Cav Decl.") at ¶ 1. G4 offers telephone and internet service, including digital subscriber line ("DSL") service, to business and residential customers in New Hampshire. *Id.* at ¶¶ 4-5. G4's customers and operations are located exclusively within New Hampshire. *Id.* ¶ 5 The company is run by the

[1] *See, e.g.*, http://www.inc.com/magazine/201202/kris-frieswick/patent-troll-toll-on-businesses.html; http://news.investors.com/technology/060413-658692-obama-targets-tech-patent-trolls.htm?ref=HPLNews.

[2] U.S. Patent Nos. 5,206,854 (the "'854 Patent"), 5,251,328 (the "'328 Patent"), 5,812,537 (the "'537 Patent"), 5,828,657 (the "'657 Patent"), 6,970,501 (the "'501 Patent"), 7,894,472 (the "'472 Patent").

same man who founded it seventeen years ago, shortly after emigrating from Turkey: Mr. Gent Cav. *Id.* at ¶¶ 1-2. G4 has a total of 23 employees. *Id.* at ¶ 3.

G4 uses a variety of third-party equipment to implement its DSL services. *Id.* at ¶ 6. All of the office equipment (DSL Access Multiplexers or "DSLAMs") used by G4 and all of the customer modems supplied by G4 employ chipsets manufactured by companies licensed by Brandywine – a fact which we have come to believe is central to the case, notwithstanding the complete lack of factual assertions in Brandywine's various complaints and its Motion to Transfer. *Id.* at ¶¶ 6-7.

PROCEDURAL HISTORY

Brandywine filed its Complaint against G4 on January 11, 2013 in the United States District Court for the District of New Hampshire. *See* Ex. G (Complaint). In its Complaint, Brandywine alleged that G4 infringed various patents-in-suit through its DSL service, modems and equipment. Ex. G.

On May 29, 2013, Brandywine moved to stay the New Hampshire proceedings pending a decision from this Panel on its Motion to Transfer. Notwithstanding that motion to stay, the Court held a preliminary pretrial conference on May 30, 2013. G4 indicated its intent to (i) formally oppose Brandywine's motion to stay and (ii) move immediately for summary judgment on all claims on the ground that all of its modems and equipment use licensed chipsets and, therefore, cannot infringe the patents-in-suit under *Quanta Computer, Incorporated v. LG Electronics, Incorporated*, 553 U.S. 617 (2008).

Also during the May 30, 2013 conference, the Court *sua sponte* noted that Brandywine's Complaint did not comply with the local patent rules because it did not identify with sufficient particularity G4's allegedly infringing products or processes. The Court issued an order directing Brandywine to file an amended Complaint by June 14, 2013 and stated that "[f]ailure to

file such an amended complaint will likely result in dismissal of the complaint." *See* Ex. H (May 31, 2013 Order) at 2-3.

ARGUMENT

I. LEGAL STANDARD

Pursuant to 28 U.S.C. § 1407, this Panel may transfer cases for pre-trial purposes when: 1) they involve one or more common questions of fact; 2) they are pending in more than one district; and 3) pretrial consolidation promotes the "just and efficient conduct" of such actions and the "convenience of the parties and witness." 28 U.S.C. § 1407(a). The existence of common questions of fact is not enough, by itself, to merit transfer under § 1407. *See, e.g.*, *In re Cable Tie Patent Litig.*, 487 F. Supp. 1351, 1353 (J.P.M.L. 1980) (denying transfer of multiple patent infringement cases despite there being common questions of fact); *In re: Plastic Injection Molding Mfg. Process (%2C184) Patent Litig.*, MDL 2149, 2010 WL 1530354 (J.P.M.L. Apr. 14, 2010) (denying transfer even though "all actions share one or more factual questions relating to the validity of United States Patent 4,935,184").

II. TRANSFER OF G4'S CASE IS NOT APPROPRIATE UNDER 28 U.S.C. § 1407

A. Brandywine Has Not Established that this Matter Involves Questions of Fact Common to the Other Brandywine Actions

Brandywine's Motion to Transfer does not identify any facts common to the various defendants. The Motion makes no mention of any specific equipment, DLSAM, modems, or practices that infringe the patents-in-suit. It says nothing about what infringes, or how.

The Complaints add no further insight. The Complaint in G4's case, for example, alleges only that G4 infringes the patents-in-suit through its DSL service, modems and equipment. *See, e.g.*, Ex. G (Complaint) at ¶ 37 ("[D]efendants' Accused Services and Products for the '657 Patent include but are not limited to Defendants' DSL service, modems, and equipment"). The

other Complaints are equally vague. Unless and until Brandywine makes assertions about what, in fact, each of the defendants are doing that infringes the patents-in-suit, it cannot say there are common issues of fact across all defendants.

Nor does the assertion of the same patents make the actions ripe for centralization. *See In re: Genetic Techs. Ltd. (%2C179) Patent Litig*., 883 F. Supp. 2d 1337, 1338 (J.P.M.L. 2012) (refusing to centralize matters involving the same patents when the defendants possessed "idiosyncratic potentially dispositive defenses" such as laches, estoppel, and the litigation history of the plaintiff indicated a likelihood of settlement of the matters); *In re: Plastic Injection Molding*, 2010 WL 1530354, at *1377 (denying transfer of patent infringement actions involving the same patent); *In re Allen Compound Bow Patent Litig.*, 446 F. Supp. 248, 250 (J.P.M.L. 1978) (same). Proof of infringement will vary from case to case (if and when Brandywine explains its infringement theories) because the defendants use dozens of different kinds of third-party equipment.

There are also few, if any, efficiencies to be gained by pre-trial consolidation with regard to invalidity. Anticipation is a question of fact. *See, e.g.*, *Orion IP, LLC v. Hyundai Motor Am.*, 605 F.3d 967, 974 (Fed. Cir. 2010). Obviousness, though ultimately a question of law, is based on underlying facts. *See, e.g.*, *Pregis Corp. v. Kappos*, 700 F.3d 1348, 1353 (Fed. Cir. 2012). Both issues will have to be decided at the remanded trials. The mere fact that the named cases involve the same patents-in-suit does not create common questions of fact *likely to be resolved during the pretrial phrase*. There is therefore little benefit from consolidating the cases for these reasons.[3]

[3] As a practical matter, the inventor deposition transcripts can and will be shared by the defendants without the need for transfer.

B. Centralization Would Promote Neither Justice Nor Efficiency, Particularly for G4

Centralization would promote neither justice nor efficiency. None of the defendants named in the Motion to Transfer is headquartered or has a principal place of business in the Middle District of Florida. No Brandywine employees (to our knowledge) live or work there. Brandywine notes that some of the inventors live there, but any convenience to them arising from transfer is more than outweighed by the inconvenience to the party witnesses. If each defendant has only two relevant witnesses, transfer will inconvenience approximately 80 witnesses in exchange for the convenience of six inventors.

Transfer would particularly prejudice G4. G4 is small. Is operates almost exclusively within New Hampshire. It has a total of 23 employees. Forcing G4 to coordinate its defense with the likes of AT&T, CenturyTel, and the defendants in 39 other actions ensures that G4's voice will be lost. If transferred, the cases would surely be consolidated under Rule 42, and the defendants herded into a joint defense group. Such joint defense groups are notoriously difficult to manage. How will meetings proceed? Who will lead them? How will the parties even decide that question? How will subsequent decisions be made? How will disagreements be resolved? The din of inter-defendant discussions will drown out G4's voice.

Centralization presents even graver problems when it comes to briefing. In all likelihood, the transferee court will require the defendants to file major motions jointly or at least subject to a joint page limit. For issues that involve facts specific to each defendant (*i.e.* infringement) each defendant will have a different story to tell. G4 would be left to wrestle with AT&T and CenturyTel, among others. The outcome of that struggle is not much in doubt.

Perhaps most important – and surely not lost on Brandywine – coordinating its defense with the other Brandywine defendants could significantly increase G4's litigation costs.

Coordination among the various defendants will add many hours to the process of deciding issues involving the merits of the case (*i.e.* deposition strategy, formulation of discovery requests, invalidity contentions). Additional time means additional legal fees. G4's matter should be not transferred.

III. IN THE ALTERNATIVE, G4'S TRANSFER SHOULD BE DELAYED TO ALLOW FOR A DECISION ON SUMMARY JUDGMENT

If, despite the foregoing, the Panel were inclined to transfer G4's case for pretrial purposes, it should delay the effective date of that transfer (at least with respect to G4's case) until after the United States District Court for the District of New Hampshire has ruled on G4's soon-to-be-filed motion for summary judgment.

G4 is in the possibly unique position of only using modems and equipment employing chipsets licensed by Brandywine. Cav Decl. at ¶ 7. Since G4's own liability is derivative of any infringement by this third-party equipment, G4 will be immune from liability under the terms of the licenses and/or *Quanta*. G4 intends to move for summary judgment on all counts on this basis. The only factual issues implicated by the motion are the equipment G4 uses and what chipsets that equipment employs. There are very few *facts* at issue. None are in dispute.

The delay necessary to allow for this would be minimal. Briefing will be completed by mid-August, and the District of New Hampshire appears quite ready to consider the motion. In exchange for this minor delay, G4 will be able to present its position on this issue while avoiding the increased cost and coordination challenges that would accompany centralization. This opportunity to easily and efficiently resolve Brandywine's claims against G4 outweighs

whatever minor inconvenience G4's delayed transfer could possibly cause.[4]

This Panel is statutorily charged with considering both "efficien[cy]" *and* "just[ice]." 28 U.S.C. § 1407(a). Even assuming a transfer would advance the former (which we dispute), the Panel must consider the latter. Whatever minimal diminution in efficiency would be created by carving out G4 (and others in the same situation) and temporarily delaying transfer so that G4 and other small players can end their cases, that small diminution is warranted by the interest of justice.

CONCLUSION

G4 Communications Corporation respectfully requests that this Panel deny Brandywine's Motion to Transfer or, in the alternative, delay transfer until such time that G4 and Brandywine are able to fully brief and resolve G4's anticipated summary judgment motion.[5]

Respectfully submitted,

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[4] Indeed, the Panel could transfer some cases while delaying those defendants prepared to move for summary judgment. Little will happen in the transferee district during that 60-day delay.

[5] G4 joins several other defendants, too, in noting that the Northern District of California is a preferable transferee district.