

**BEFORE THE UNITED STATES JUDICIAL PANEL
ON MULTIDISTRICT LITIGATION**

IN RE BRANDYWINE)
COMMUNICATIONS) **MDL No. 2462**
TECHNOLOGIES, LLC)
PATENT LITIGATION)

**MEMORANDUM IN OPPOSITION TO PLAINTIFF’S MOTION TO
TRANSFER PURSUANT TO 28 U.S.C. § 1407**

Defendant Loretto Communication Services, Inc. (“Loretto”) submits this Memorandum in Opposition to the Motion to Transfer submitted by Plaintiff Brandywine Communications Technologies, LLC (“Brandywine”) to establish a multidistrict litigation proceeding in the Middle District of Florida.

BACKGROUND

Since 2011, Brandywine has launched a litigation spree across the United States by acquiring patents and suing over 100 defendants, without inquiring into the factual basis for its claims. With regard to the six patents at issue in this case, Brandywine first filed suit over eighteen months ago against four entities: AT&T Corp., CenturyTel, Inc., Verizon Communications, Inc. and EarthLink, Inc., in the Middle District of Florida. At this point, the cases against CenturyLink and AT&T are still pending, though the AT&T case has been transferred to the Northern District of California.

Over the past few months, Brandywine has indiscriminately filed suit against thirty-nine entities, including Loretto, raising the same patent claims in a boilerplate complaint. Several defendants have notified Plaintiff that its patent claims are baseless because the DSL technology at issue is extensively licensed—a fact that Brandywine has not considered important enough to investigate. (See March 18, 2013 letter from Loretto Counsel to Brandywine Counsel, attached

as Exhibit A to Memorandum in Opposition; Brandywine and CenturyTel Joint Stipulation Regarding Patent Assertions, attached as Exhibit B to Memorandum in Opposition; Precision Communications, Inc. Answer at 6, Impulse Advanced Communications, LLC Answer at 5, Windstream Corporation Answer at 9, CenturyTel Answer at 11, Orbitcom, Inc. Answer at 9, Peak Internet, LLC Answer at 8, IKANO Communications, Inc. Motion to Stay at 6-7, attached as collective Exhibit C to Memorandum in Opposition.) Undeterred, on May 16, 2013, Brandywine filed a motion to transfer the forty one pending cases to the Middle District of Florida.

Plaintiff seeks to join thirty-nine cases, all of which are still very young (indeed, the defendants have not filed responsive pleadings in many of the actions), with two significantly more advanced proceedings, where discovery is nearly complete and one court has already construed several patent claims. *Brandywine Communications Technologies, LLC v. CenturyTel Broadband Services, LLC*, No. 6:12-cv-286 (M.D. Fla. Feb. 21, 2012), in particular, is very far advanced. The court has already issued a claim construction opinion on fifteen of the disputed terms in five of the six patents-in-suit. According to the *CenturyTel* docket report, the discovery deadline for that action is *less than two months away* on August 2, 2013. (*CenturyTel* Docket Report, attached as Exhibit D to Memorandum in Opposition.) Moreover, the parties to that action must file all dispositive motions by September 3, 2013, and the final pretrial conference is set for December 31, 2013. (*Id.*) Nonetheless, Brandywine insists that the progress of the *CenturyTel* action should be abandoned.

ARGUMENT

The Panel should deny Brandywine's Motion to Transfer pursuant to 28 U.S.C § 1407. Pretrial centralization will neither "promote the just and efficient conduct of the actions," nor convenience the parties and witnesses to the pending actions. *Id.*

Transfer will not further the purposes of § 1407 for three reasons. First, centralization will not avoid duplicative discovery because the *CenturyTel* action is so far advanced. Given that the discovery deadline in *CenturyTel* is less than two months away, the common discovery regarding patent validity and construction is essentially complete and can be shared with all of the parties. Second, centralization will not streamline the proceedings because many of the cases are likely to involve idiosyncratic, potentially dispositive defenses relating to license agreements. Disputes regarding the existence of licenses will likely predominate and implicate unique facts, making the validity of the patents a secondary issue. And third, under the principles of *Blonder-Tongue*, centralization would be premature because patent invalidity findings in *CenturyTel* would estop Brandywine in the other proceedings. Therefore, the Panel should deny Brandywine's Motion to Transfer.

A. Centralization will not avoid duplicative discovery because the parties in *CenturyTel* have already engaged in significant discovery relating to patent validity and construction.

Centralization will not avoid duplicative discovery because the parties in *CenturyTel* have already engaged in a significant amount of discovery relating to patent construction and validity. The only significant question of fact linking the forty one pending cases, and for which consolidated discovery could possibly prove helpful, is the construction and validity of the six patents-in-suit. However, the same six patents are at issue in every suit, including the *CenturyTel* action. Importantly, the parties in *CenturyTel* have had *eighteen months* to conduct discovery regarding the six patents. Over that time, the parties produced enough information for the

Middle District of Florida to issue a claim construction opinion on five of the six patents at issue. Moreover, the discovery deadline for *CenturyTel* is less than *two months* away. (Exh. D.) Thus, the *CenturyTel* action has already produced the discovery pertaining to patent construction and validity.

In prior cases the Panel has held that “suitable alternatives to transfer under Section 1407 exist in order to minimize the possibility of duplicative or unreasonable discovery.” *In re Cable Tie Patent Litigation*, 487 F. Supp. 1351, 1354 (J.P.M.L 1980) (denying transfer where bulk of discovery was already accomplished in one action because discovery cutoff date was only two months away); *In re Allen Compound Bow Patent Litigation*, 446 F. Supp. 248, 250 (J.P.M.L. 1978) (denying transfer where discovery concerning common factual questions was well advanced in proceedings pending for two years); *In re Wyeth Patent Infringement Litigation*, 445 F. Supp. 992, 993 (J.P.M.L. 1978) (denying transfer where “suitable alternatives to Section 1407 transfer are available in order to minimize the possibility of duplicative discovery”). In this case, the Middle District of Florida can order that discovery completed in the *CenturyTel* action relevant to the six patents must be made available to other parties. Indeed, if Brandywine is sincerely worried about burdensome and duplicative discovery, it can agree to stipulations that make relevant factual materials in all of the actions available to other parties. Because the *CenturyTel* action has been pending for two years, the discovery deadline is only two months away, and suitable alternatives exist for minimizing burdensome discovery, transfer would not further the purposes of § 1407.

B. Centralization will not streamline the proceedings because many defendants have raised idiosyncratic, potentially dispositive license defenses that will implicate significant unique facts.

Centralization will not streamline the proceedings because many defendants have raised “idiosyncratic, potentially dispositive [license] defenses that will implicate significant unique facts.” *See In re Genetic Technologies Limited ('179) Patent Litigation*, 883 F. Supp. 2d 1337, 1338 (J.P.M.L. 2012) (denying transfer where unique facts relating to individual defenses predominated over the issues of patent construction and validity). While Brandywine asserts that centralization is proper because the construction and validity of the six patents-in-suit will predominate during the proceedings, the facts tell another story.

In its haste to sue virtually every telecom provider across the country who utilizes its allegedly patented technology, Brandywine did not take the time to differentiate between those providers who are, and are not, operating pursuant to licenses. For instance, Loretto has notified Brandywine that its DSL equipment is operated pursuant to an RPX Corporation sublicense, which bars all of the alleged claims. (*See* Exh. A.) Loretto is not alone. Based on a recent survey of the available pleadings, many of the defendants have raised license defenses. (*See* Exhs. B, C.) Moreover, in a Joint Stipulation Regarding Patent Assertions filed in the *CenturyTel* case just last week, Brandywine admitted that many of its claims are barred by license agreements with DSL technology manufacturers. (Exh. B.) As the Panel has held, when a patent holder “has a fairly extensive licensing history,” centralization is unlikely to produce the typical advantages of § 1407 transfer. *See In re Genetic Techs.* 883 F. Supp. at 1337.

Now that Brandywine has openly admitted to its practice of indiscriminately filing lawsuits against providers operating pursuant to valid licenses, discovery and dispositive motions regarding these licenses are likely to predominate in the thirty nine actions still in their infancy. Questions of fact regarding licensing will be unique to each defendant and will require individualized discovery proceedings. The patent construction validity issues, in the meantime,

will be pushed aside; those issues are immaterial when a license exists and, as discussed previously, discovery regarding the patents has already occurred in the *CenturyTel* action. Since these actions will likely be disposed of early on the basis of unique facts regarding licensing, transfer would not serve the purposes of § 1407.

C. Under the principles of *Blonder-Tongue*, centralization would be premature because patent invalidity findings in the *CenturyTel* action would estop Brandywine in other proceedings.

Centralizing the actions to this proceeding would be premature because the *CenturyTel* action is well-advanced and, pursuant to *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402, U.S. 313 (1971), a determination of patent invalidity in that action would prove dispositive in the remaining actions. The *CenturyTel* court has already issued a claim construction order and, according to the docket report, dispositive motions are due by September 3, 2013, while the final pretrial conference is set for December 31, 2013. (Exh. D.) Either through a motion for summary judgment or a jury trial, one or all of the patents-in-suit could be found invalid within the next few months. The Panel has “consistently denied transfer of actions in patent litigation where one of the actions was proceeding expeditiously toward trial on the common issue of validity.” *In re Bourns Patent Litigation*, 385 F. Supp. 1260, 1261 (J.P.M.L. 1974); *see also In re Illinois Tool, Inc. v. Foster Grant Co., Inc.*, 547 F.2d 1300, 1302-03 (7th Cir. 1976). Because the vast majority of these actions are in their infancy and the *CenturyTel* action is nearing completion, considerations of judicial economy favor allowing the potentially dispositive *CenturyTel* action to proceed unencumbered. Thus, centralization would not further the purposes of § 1407.

CONCLUSION

For the foregoing reasons, Defendant Loretto respectfully requests that the Panel deny Plaintiff Brandywine's Motion to Transfer.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify on June 5, 2013, a copy of the foregoing was filed electronically. Parties may access this filing through the Court's electronic filing system. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties indicated on the electronic filing receipt.

/s/ William T. Ramsey