

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

IN RE: IRON OAK TECHNOLOGIES, LLC
PATENT LITIGATION

MDL No. _____

**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR TRANSFER
AND CONSOLIDATION OF IRON OAK TECHNOLOGIES, LLC
PATENT LITIGATION PURSUANT TO 28 U.S.C. § 1407**

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I. INTRODUCTION

Microsoft Corporation (“Microsoft”), respectfully submits this memorandum of law in support of its motion, pursuant to 28 U.S.C. § 1407, to centralize twelve related federal actions brought by or against Iron Oak Technologies, LLC (“Iron Oak”), and any subsequently filed related actions, in the Northern District of Texas before the Honorable Barbara M. G. Lynn for coordinated pretrial proceedings. The related Iron Oak actions assert patent infringement claims involving Microsoft Windows as well as other products under U.S. Patent Nos. 5,699,275 (“the ‘275 patent”) and 5,966,658 (“the ‘658 patent”), purportedly now owned by Iron Oak. Although the accused products vary, there is substantial overlap in factual issues among the accused products and among the actions – e.g., the operation of Microsoft Windows products is specifically identified in two actions.

Counsel for Microsoft has contacted Iron Oak and each of the other defendants. No party opposes the consolidation sought in the instant motion.

These scattered actions present numerous common issues of fact and law. Iron Oak asserts the same two claims from the ‘275 and ‘658 patents in every action.¹ The development and prosecution of those patents, as well as prior licensing of those patents, will be at issue in all proceedings. Prior art, including prior systems developed and commercialized by third parties, will be at issue in all cases, as will other issues related to whether the asserted claims are valid. The proper construction of those patents will be at issue in all cases. Moreover, the cases appear to present universally identical infringement theories, and in many instances, such theories

¹ In some of the cases listed in the Schedule of Actions, Iron Oak asserted other patents in addition to the ‘275 and ‘658 patents. In subsequent filings and communications, however, Microsoft understands that Iron Oak now has narrowed, or is in the process of narrowing, its contentions to just claim 1 of both the ‘275 and ‘658 patents in every case.

involve the design and operation of Microsoft's Windows operating system. Indeed, Iron Oak clearly produced the originally-filed complaints in all the cases from a universal template, with the new defendant name(s) substituted and any specific allegations concerning products/services being set out in an attached "Exhibit C" or "Exhibit F" in each case. Although the cases do present issues unique to certain defendants, ensuring that the patent claims are construed and assessed uniformly and that discovery, particularly of third parties, is conducted efficiently will predominate the pretrial proceedings.

Consolidating these cases for pretrial matters will result in considerable efficiencies while not leading to any material delay in resolving the cases. Seven of the related actions currently are pending before Chief Judge Lynn, and four are proceeding under a recently entered consolidated pretrial schedule. *See* Exhibit 16. Of the remaining actions, either no scheduling order has been entered or schedules have been entered that trail after the actions already pending before Chief Judge Lynn. *Id.*

Microsoft, accordingly, respectfully urges that all the related cases be consolidated before Chief Judge Lynn pursuant to 28 U.S.C. § 1407.

II. FACTUAL AND PROCEDURAL BACKGROUND

A. Iron Oak Technologies, LLC and "Defendants"

Iron Oak is a limited liability company organized under Texas law, with a principal place of business in a Richland Hills residential neighborhood approximately 25 miles outside of Dallas. It asserts that it is wholly owned by two named inventors from the '275 and '658 patents, William C. Kennedy III of Dallas, Texas and Kenneth R. Westerlage of Ft. Worth, Texas. Although it pleads that it is a technology development company, Iron Oak has no apparent business operation outside of asserting the '275 and '658 patents at issue (and perhaps other

patents originating from Highwaymaster Communications, Inc., a long defunct Dallas operating company.)

The other parties to the current actions – Dell, HP, Sharp, Lenovo, ASUS, Acer, Samsung, Huawei, Toshiba, Fujitsu, ZTE – make computer devices. In addition to making computer devices, Microsoft designs, develops, and distributes Windows operating system software, which is used broadly across devices made by other companies and accused of infringement by Iron Oak. Of relevance here, each defendant designs, develops, manufactures, and/or sells tablets and/or laptop computers throughout the United States and elsewhere in the world.

B. The Asserted '275 and '568 Patents

According to Iron Oak's Complaints, the '275 patent is directed to a system and method for remote patching of operating code located in a mobile unit. *See*, Exhibit 1 ('275 patent), Abstract. That system includes a manager host that sends a discrete patch message to a mobile unit. *Id.* The mobile unit receives the patch message and merges it with its existing operating code to create patched operating code, and thereafter uses the patched operating code. *Id.* The application that led to the '275 patent was filed in April 1995.

Likewise, Iron Oak contends that the '658 patent is directed to the automated selection of a communication path. *See*, Exhibit 2 ('658 patent), Abstract. The system includes a database storing information for at least one communication attribute for the communication paths. *Id.* A processor coupled to the database selects one of the communication paths using the communication attribute information in response to a request for communication. *Id.* The application that led to the '658 patent was filed in September 1996.

Both patents issued with Highwaymaster Communications, Inc., of Dallas, Texas, shown as original assignee. Highwaymaster sought to make products providing voice and data

communications to trucking fleets but faltered, relabeled itself, and then faded away. *See e.g.*, Exhibit 17, https://www.joc.com/end-road-highwaymaster_20020324.html. According to Patent Office records, rights to both patents were assigned to Vehicle IP, LLC, in 2005, to Fundamental Wireless, LLC in 2007, and subsequently to Iron Oak in 2013. Both patents are now expired.

C. The Pending Cases and Accused Products

Iron Oak asserts claim 1 of each of the ‘275 and ‘658 patents in a generic manner across every case it has filed. In each case, Iron Oak contends that common automatic update features implemented on tablets and/or laptops infringe claim 1 of the ‘275 patent with nearly identically framed allegations. For example, in the Lenovo matter, Iron Oak contended:

Lenovo manufactures computer laptops and tablets, such as . . . Lenovo uses various servers to deliver and install over-the-air operating code updates to laptops and tablets. Communications between Lenovo’s laptops/tablets and the servers may be facilitated through Wi-Fi and/or cellular networks connected to the Internet.

Lenovo remotely upgrades the operating software for its laptops/tablets. . . .

Exhibit 12 – Exh. F, Lenovo Complaint. Iron Oak’s contentions concerning the ‘275 patent directed to Fujitsu were nearly identical, except as to the model names for the products:

Fujitsu sells computer laptops and tablets, such as . . . Fujitsu uses various servers to deliver and install over-the-air operating code updates to laptops and tablets. Communications between Fujitsu’s laptops/tablets and the servers may be facilitated through Wi-Fi and/or cellular networks connected to the Internet.

Fujitsu remotely upgrades the operating software for its laptops/tablets. . . .

Exhibit 9 – Exh. F, Fujitsu Complaint.

Allegations involving Microsoft Windows software are likewise similar. For example, as to Dell and claim 1 of the ‘275 patent, Iron Oak points, in part,² to:

² Iron Oak also contends that claim 1 is met by Dell when it “provides a number of other ways to update drivers and other portions of their operating code, such as” Exhibit 8 – Exh. F, Dell Complaint.

Dell laptops and tablets, such as the Inspiron series of laptops and tablets, running Microsoft Windows XP, Windows Vista, or Windows 7, or other windows versions with the Automatic Update feature, include a system for remote patching of operating code.

Exhibit 8 – Exh. F, Dell Complaint. In its Complaint against HP, Iron Oak included the identical identification of Windows operating system, with only the HP model name swapped for the Dell model name:³

HP laptops and tablets, such as the Pavilion series of laptops and tablets, running Microsoft Windows XP, Windows Vista, or Windows 7, or other windows versions with the Automatic Update feature, include a system for remote patching of operating code.

Exhibit 10 – Exh. F, HP Complaint.

With respect to the '658 patent, Iron Oak contends in every case that commonplace network connection processes, particularly wireless network selection operations, infringe claim

1. Iron Oak's contentions are generic across the many cases. For example, in the Lenovo matter, Iron Oak contended:

Lenovo's laptops automatically select communication paths on wired, cellular, and Wi-Fi networks and Lenovo's tablets automatically select communication paths on cellular and Wi-Fi networks. . . .

Exhibit 12 – Exh. F, Lenovo Complaint. Iron Oak's contentions concerning the '658 patent directed to Fujitsu were nearly identical, except as to the model names for the products:

Fujitsu's laptops automatically select communication paths on wired and Wi-Fi networks and Fujitsu's tablets automatically select communication paths on cellular and Wi-Fi networks. . . .

Exhibit 9 – Exh. F, Fujitsu Complaint.

Allegations involving Microsoft Windows software are, again, uniform and generic across cases. For example, as to Dell and the '658 patent claim 1, Iron Oak points, in part, to:

³ Iron Oak also contends that claim 1 is met by HP when it “provides a number of other ways to update drivers and other portions of their operating code.” Exhibit 10 – Exh. F, HP Complaint.

Dell laptops and tablets, such as the Inspiron series of laptops and tablets, running Microsoft Windows XP, Windows Vista, or Windows 7, or other windows versions are an apparatus for automatically selecting one of a plurality of communication paths.

Exhibit 8 – Exh. F, Dell Complaint. Then, in its Complaint against HP, Iron Oak included the identical identification of Windows operating system, with only the HP model name swapped for the Dell model name:

HP laptops and tablets, such as the Pavilion series of laptops and tablets, running Microsoft Windows XP, Windows Vista, or Windows 7, or other windows versions are an apparatus for automatically selecting one of a plurality of communication paths.

Exhibit 10 – Exh. F, HP Complaint.

III. ARGUMENT

A. The Legal Standard

Transfer and pretrial coordination of these related actions in a single court is appropriate and will promote the goals of 28 U.S.C. § 1407. Transfer is appropriate where: (A) “civil actions involving one or more common questions of fact are pending in different districts;” (B) transfer and coordination “will promote the just and efficient conduct of such actions;” and (C) transfer and coordination will serve “the convenience of parties and witnesses.” 28 U.S.C. § 1407(a). The panel considers a balance of these three criteria in view of the overall statutory purpose to achieve efficiencies in the pretrial process; no individual criteria is determinative. *In re Cessna Aircraft Distrib’ship Antitrust Litig.*, MDL No. 123, 460 F. Supp 159, 161-62 (J.P.M.L. 1978). Eliminating the possibility of overlapping or inconsistent rulings and preventing duplication of discovery strongly support centralization under §1407. *See In re LTV Corp. Secs. Litig.*, MDL No. 371, 470 F. Supp. 859, 862 (J.P.M.L. 1979).

Patent cases scattered across multiple districts represent the proto-typical situation for MDL consolidation, as recognized by Congress in enacting §1407. *See* H.R. Rep. No. 90-1130, at 3 (1968), *reprinted in* 1968 U.S.C.C.A.N. 1898, 1900 (“The types of cases in which massive filings of

multidistrict litigation are reasonably certain to occur include . . . patent and trademark suits . . .”). Correspondingly, the Panel has repeatedly ordered MDL centralization in patent cases in view of common questions of infringement, invalidity, damages, and claim construction. *See, e.g., In re Mobile Telecomms., LLC Patent Litig.*, MDL No. 2722, 222 F. Supp. 3d 1337 (J.P.M.L. 2016); *In re Indus. Print Techs. Patent Litig.*, MDL No. 2614, 98 F. Supp. 3d 1378 (J.P.M.L. 2015); *In re CTP Innovations, LLC Patent Litig.*, MDL No. 2581, 65 F. Supp. 3d 1410 (J.P.M.L. 2014); *In re Nebivolol ('040) Patent Litig.*, MDL No. 2364, 867 F. Supp. 2d 1354, 1355 (J.P.M.L. 2012); *In re Maxim Integrated Prods., Inc., Patent Litig.*, MDL No. 2354, 867 F. Supp. 2d 1333, 1335 (J.P.M.L. 2012); *In re Bear Creek Techs., Inc. ('722) Patent Litig.*, MDL No. 2344, 858 F. Supp. 2d 1375, 1380 (J.P.M.L. 2012); *In re Innovatio IP Ventures, LLC, Patent Litig.*, MDL No. 2303, 840 F. Supp. 2d 1354 (J.P.M.L. 2011); *In re Webvention LLC ('294) Patent Litig.*, MDL No. 2294, 831 F. Supp. 2d 1366 (J.P.M.L. 2011). In each instance, the panel recognized the benefits of efficient and consistent resolution of those issues that are specific to patent cases.

As set forth below, all of these criteria are satisfied here.

B. The Iron Oak Actions Should be Consolidated

1. The Iron Oak Actions Present Common Questions of Fact

Multiple actions alleging infringement of common patents are typical examples of the cases envisioned under 28 U.S.C. § 1407 as presenting common issues of fact and law. *See e.g., In re CTP Innovations, LLC Patent Litig.*, MDL No. 2581; *In re Indus. Print Techs. Patent Litig.*, MDL No. 2614; *In re Mobile Telecomms., LLC Patent Litig.*, MDL No. 2722. Just as in those matters cited above, the asserted patents here present common issues, for example, as to the design and development of the subject matter described and claimed in the patents, the prosecution of the patents before the Patent Office, the prior art considered and not considered by the Patent Office in issuing the patents, ownership and transfer of rights under the patents, and

prior licensing and enforcement of the patents. Simply coordinating depositions of the named inventors, at least some of whom are third parties, calls for a coordinated and organized process. Similarly, discovery concerning third party prior art systems clearly mandates coordination when so many matters are co-pending. And, perhaps most paramount of the common legal determinations presented in these cases is that of claim construction – a matter likely to be significantly contested given Iron Oak’s attempt to read expired trucking patents on modern computer operating systems and networking operations.

The design, development and operation of multiple versions of the Windows operating system represents a particular set of facts that is at issue in multiple cases. To date, Iron Oak’s contentions expressly implicate Windows in the Dell and HP matters. It is currently unknown whether the allegations against other defendants will likewise implicate Microsoft products. However, Iron Oak’s contentions in other matters, such as the Fujitsu matter, suggest that, at a minimum, the parties will seek discovery from Microsoft concerning Windows, and, certainly, Microsoft has put the operation of its products directly at issue in its own Declaratory Judgment action and its motions to intervene in the actions against Dell and HP, filed concurrently with this motion in the Western District of Texas.

Although not described in the Complaints or yet subject to discovery, defendants understand that the asserted patents have been licensed as part of a larger portfolio in the past to a number of third parties. Coordinated discovery from those third parties would lessen the burden on those entities while allowing the parties now facing infringement allegations to gather the information needed to value this case and, potentially, lead to early resolution.

2. The Interest of Protecting Against Inconsistent Judgments Favors Consolidation

Further, the generic and common infringement theories magnify the cross-case common facts and legal issues here. As described above, Iron Oak asserts its patents in virtually identical fashion across many different computer makers' products. Likewise, Iron Oak points to specific functionality in the Microsoft Windows operating system in multiple, different cases, and that functionality is at issue in Microsoft's Declaratory Judgment action. Whether the generically and commonly accused operations implicate the asserted patents should be resolved on a common and, most importantly, not inconsistent set of facts and legal rulings in all matters.

3. Consolidation and Transfer Will Best Serve the Convenience of the Parties and Witnesses

As noted, multiple third parties and named parties are implicated across cases in disparate districts. These include the named inventors, including those not affiliated with Iron Oak, as well as prior owners of the patents, prior licensees, prior art system developers, and Microsoft as a supplier of the implicated operating systems. Redundant and repetitive discovery directed to such parties is wasteful and, indeed, contrary to the spirit of the Federal Rules of Civil Procedure for third parties. Consolidation provides a ready vehicle to prevent any undue burden on any party, but especially on third parties.

C. The Iron Oak Actions Should be Consolidated in The Northern District of Texas

1. No Party Will be Prejudiced By Consolidation in Dallas

Consolidation in Dallas will not inconvenience any party meaningfully. The bulk of the cases are already pending there. Although additional parties will need to be noticed and accommodated during discovery, that is inevitable in any event – especially for dealing with third party witnesses. Further, Iron Oak and its principals are local to Dallas, so travel to Dallas

seems inevitable for every party involved. To that end, Dallas has a world-class airport with direct flights to nearly every major metropolitan region in the country.

Further, given the current schedules in the scattered cases, no party is likely to suffer any material delay in reaching a trial-ready status as a result of the desired consolidation.

2. Chief Judge Lynn is Best Suited to Handle this MDL Proceeding

As previously recognized by the Panel, Chief Judge Lynn is an experienced patent jurist who has presided over complex patent litigation. The Northern District of Texas also is participating in the national Patent Pilot Program, and Chief Judge Lynn is one of the judges participating in that program. In addition to presiding over numerous patent cases, Chief Judge Lynn has presided over complex MDL matters previously, including MDL No. 2614, *In re Industrial Print Technologies, LLC Patent Litigation*.

Chief Judge Lynn currently is presiding over seven of the matters for which Microsoft seeks MDL consolidation, and each of those cases (except, to date, the recently-filed Microsoft matter, in addition to the Sharp and ZTE matters) is on the same track for discovery and pre-trial proceedings leading to trial in March, 2020. In the course of addressing scheduling those matters, Chief Judge Lynn recognized the desirability of cross-district coordination and has suggested that she would attempt to ensure that result through whatever means she had at her disposal. Formally consolidating these cases with Chief Judge Lynn would facilitate and simplify those efforts.

3. Iron Oak's History of Litigation

Iron Oak filed its first infringement cases on November 29, 2016, in the Northern District of Texas. It has filed other cases sporadically since then, in addition to agreeing to re-file cases in other jurisdictions. Most recently, Iron Oak sued Dell and HP in Austin, Texas, in late fall of

2017, and has lodged amended complaints in both matters over the last month. Microsoft filed its Declaratory Judgment case in Dallas during the last week of January, 2018.

At the end of January, 2018, Chief Judge Lynn entered a scheduling order in four of the cases pending before her providing for discovery, claim construction, and other orderly processes leading to trial in March 2020. Thereafter, Judge Pitman in the Dell and Acer cases pending in the Western District of Texas entered scheduling orders putting those cases on path for trial later in 2020. Similarly, the Lenovo case in the District of Delaware is proceeding pursuant to an order leading to trial in July 2023.

Absent consolidation, these cases will continue on separate tracks with the corresponding risks of duplicative discovery, especially as to third parties, and potentially inconsistent rulings despite diligent efforts by the assigned judges to coordinate. Likewise, absent consolidation, additional cases launched by Iron Oak could multiply those risks further.

IV. CONCLUSION

For the foregoing reasons, Microsoft respectfully requests that this Panel centralize the twelve related federal actions brought by or against Iron Oak, and any subsequently filed related actions, in the Northern District of Texas before the Honorable Barbara M. G. Lynn for coordinated pretrial proceedings pursuant to 28 U.S.C. § 1407.

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