Case No. 20-104

United States Court of Appeals for the Federal Circuit

IN RE APPLE INC.,

Petitioner.

On Petition for a Writ of Mandamus from the United States District Court for the Western District of Texas in Case No. 6:18-cv-00372-ADA, Hon. Judge Alan D. Albright

FINTIV, INC.'S RESPONSE TO APPLE INC.'S PETITION FOR REHEARING EN BANC

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FEBRUARY 11, 2020

CERTIFICATE OF INTEREST

Counsel for Fintiv, Inc. certifies the following:

1. The full name of party represented by me:

Fintiv, Inc.

2. The name of the real party in interest (please only include any real party in interest NOT identified in Question 3) represented by me is:

Fintiv, Inc.

3. Parent corporations and publicly held companies that own 10% or more of stock in the party:

None.

4. The names of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or agency or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Kasowitz Benson Torres LLP: Jack Shaw and Gurtej Singh (now with Hogan Lovells).

MT2 Law Group - Mann Tindel Thompson: J. Mark Mann, G. Blake Thompson.

Haley & Olsen, P.C.: Craig D. Cherry, Justin Allen.

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir.R. 47. 4(a)(5) and 47.5(b). (The parties should attach continuation pages as necessary).

None.

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I. INTRODUCTION

In a well-reasoned opinion, the Federal Circuit Panel reviewed the arguments that Apple now rehashes in this Petition, and correctly determined that Apple failed to meet its "heavy burden to overturn the district court's transfer decision." (Doc. 36 at 3.) Unhappy with this result, Apple attempts to twist the Panel's decision into one that "threatens" the availability of § 1404(a) as a remedy in an attempt to meet the exacting burden of establishing that en banc review is necessary. (Doc. 37 at 2.) The Panel's decision denying Apple's writ of mandamus petition did nothing more than resolve a venue dispute; nothing about this decision warrants en banc rehearing. Based on Apple's theory of how transfer works, as long as the party seeking transfer files a self-serving declaration identifying witnesses elsewhere with hearsay assertions regarding what witnesses know, then the case necessarily must be transferred because the plaintiff cannot feasibly have the same access to the defendants' witnesses. This is wrong. The district court engaged in a reasoned analysis of each transfer factor as reflected in its order; Apple just disagrees with the outcome. This disagreement does not raise a question concerning the Panel's decision to one of "exceptional importance."

Moreover, contrary to Apple's assertions, there are significant ties between Apple and the WDTX. In its denial of mandamus the Panel properly credited the district court's determination "that certain Apple and NXP employees in Austin were

deserving of weight" and observed that "Fintiv introduced at least some evidence and argument connecting the backgrounds of [Apple and NXP] witnesses to relevant issues." (Doc. 36 at 4.)

Apple's second ground for seeking en banc review, that the Panel improperly faulted Apple for requesting alternative relief, is equally without merit. The Federal Circuit Panel properly pointed out that Apple had made previous assertions regarding the convenience of the Austin Division. (Doc. 36 at 3.) Additionally, Apple does not even argue that this alleged error is necessary to secure uniformity of the court's decisions or that it is a question of exceptional importance.

Because Apple's arguments fail to satisfy the exacting burden warranting rehearing en banc, Apple's Petition should be denied.

II. FACTUAL BACKGROUND

Fintiv, Inc. ("Fintiv") brought this case in Texas, where it and its predecessors have been conducting business since 2004. (Doc. 37 at 5; Appx129-130.) Nearly six months after Fintiv filed its complaint, Apple filed a motion to transfer this case to the NDCA, or, in the alternative, to the Austin Division of the WDTX. (Doc. 37 at 9; Appx70.) In its briefing, Fintiv provided copious evidence, including documentation confirming that third-party NXP's U.S. headquarters and largest U.S. presence is in Austin, as well as at least five NXP employees with knowledge about

NFC.[1] (Appx267, SAppx106, Appx136-156.) Fintiv also challenged the sufficiency information regarding NXP witnesses in NDCA submitted by Apple and argued that NXP did not provide necessary representations showing there were no NXP witnesses in Austin with relevant knowledge or information. (SAppx123.) Fintiv also showed that Apple's second largest campus is in the WDTX – in Austin – and its presence there is expected to grow. (Doc. 18-1 at 5-7; SAppx67; SAppx89.) Further, Fintiv identified over 40 Apple employees in Austin with direct experience and responsibility related to the accused functionality. (Appx132-144. Appx158-258, Appx265.) Apple did not submit declarations from any of those employees. (Doc. 18-1 at 8.)

The district court denied Apple's Motion to transfer venue to the NDCA, but granted Petitioner's alternative motion to transfer venue to the Austin Division of WDTX. (Appx17.) The district court concluded that because one private interest factor (access to proof) weighed in favor of transfer while two public interest factors (court congestion and localized interest) weighed against transfer, and the other factors were neutral, Apple had not met its "heavy burden" to demonstrate the NDCA is "clearly more convenient." (*Id.*) However, the district court held

[1] Apple admits that NXP's witnesses are crucial to the infringement issues in the case because NXP designed an element of the Accused Products that is present throughout Fintiv's infringement contentions. (Appx307-309.)

Petitioner met its burden of demonstrating that "Austin 'is clearly more convenient'" than Waco and therefore granted Apple's alternative request. (*Id*.)

On October 16, 2019, Apple filed a Petition for Writ of Mandamus. (Doc. 2.) Fintiv filed its Response on October 24, 2019. (Docs. 8, 18-1.) Apple's Reply was filed on October 28, 2019. (Doc. 20.) On December 20, 2019, the Panel entered an Order denying Apple's Petition. (Doc. 36.[2]) This Court found that the district court's ruling was not a clear abuse of discretion. (Doc. 36 at 5.) This Court pointed out that "[w]hatever may be said about the validity of … resolving factual disputes in favor of the nonmoving party in the context of a transfer motion," it could not "say that Apple's right to relief here is indisputably clear" but that it was undisputed that Apple bore the burden of proof. *Id.* In its decision, the Panel also pointed out that Apple did not dispute that the district court considered all of the relevant transfer factors, that "the district court wrestled with the complicated task" of considering

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[2] Prior to the Court's Order denying Apple's petition, Roku, Inc., a defendant in an unrelated case, *MV3 Partners LLC v. Roku, Inc.*, W.D. Tex., C.A. No. 6:18-cv-00308-ADA, in the same trial court and before the same judge as the case at issue, filed an *amicus curiae* brief in support of Apple's petition. (Docs. 25 and 26.) Prior to denying Apple's petition for a writ of mandamus, the Court granted Roku's motion. (Doc. 32.) After Apple filed the instant Petition for Rehearing En Banc, Roku again filed a motion for leave to file an *amicus curiae* brief, which this Court granted. (Docs. 44-47.) Roku's *amicus* brief should be disregarded because (1) it contains redundant arguments that merely reiterate Apple's position, (2) transfer analysis is fact specific, and (3) Roku chose not to file its own mandamus petition when it had the opportunity to do so, yet now attempts to piggy-back on Apple's petition in an effort to influence law affecting its own case. (Doc. 47.)

the information presented by both parties, and that the district court had determined that "certain Apple and NXP employees in Austin were deserving of weight, while other employees of other companies were not." (*Id*. at 3-4.) This Court stated that "Fintiv introduced at least some evidence and argument connecting the backgrounds of these individuals to relevant issues" and that there was plausible evidence presented that these individuals may have relevant information. (*Id*. at 4.) Additionally in its Order, the Panel stated that "a trial judge has a superior opportunity to familiarize himself or herself with the nature of the case and the probable testimony at trial, and ultimately is better able to dispose of these motions." (Doc. 36 at 4 (*quoting In Re Vistaprint Ltd.,* 628 F.3d 1342, 1349 (Fed. Cir. 2010).) Further, this Court held "[n]or can Apple now take back its previous assertion to the district court that the Austin Division 'is clearly more convenient for both parties.'" (Doc. 36 at 3.)

III. ARGUMENT

A. APPLE CANNOT MEET THE EXACTING STANDARDS REQUIRED TO WARRANT EN BANC REHEARING

"An en banc hearing or rehearing **is not favored** and ordinarily will not be ordered unless: (1) en banc consideration is necessary to secure or maintain uniformity of the court's decisions; or (2) the proceeding involves a question of exceptional importance." *See* Fed. R. App. P. 35(a) (emphasis added); *see also Sony Elecs., Inc. v. United States*, 382 F.3d 1337, 1339 (Fed. Cir. 2004). A question is of

exceptional importance if it creates "important systemic consequences for the development of the law and the administration of justice." *Athena Diagnostics, Inc. v. Mayo Collaborative Servs., LLC*, 927 F.3d 1333, 1370 (Fed. Cir. 2019). If the question "involves an issue on which the panel decision conflicts with the authoritative decisions of other United States Courts of Appeals that have addressed the issue," it may be one of "exceptional importance." Fed. R. App. P. 35(b)(1)(B). Further, a party cannot first raise an argument on a petition for rehearing that was not raised before the district court or the Panel. *See Miller v. Tex. Tech Univ. Health Scis. Ctr.*, 421 F.3d 342, 349 (5th Cir. 2005)(en banc).

B. APPLE'S QUESTION DOES NOT RISE TO THE LEVEL OF ONE OF EXCEPTIONAL IMPORTANCE

Apple has failed to satisfy the stringent requirements for rehearing, much less rehearing en banc. The question presented by Apple is not one of exceptional importance. (Doc. 37 at 1.) Apple's assertion that rehearing is necessary to "correct the clear error in this case" and to "prevent this district court and others from applying the same flawed rule in the future" is meritless. (*Id.* at 2.)

1. The Panel Correctly Determined That Apple Did Not Meet Its Heavy Burden Warranting Mandamus

Apple concedes it had the burden to prove in the district court that the NDCA is a clearly more convenient venue and bears a heavy burden of proof in this Court for a writ of mandamus. (Doc. 37 at 14; Doc. 36 at 5.) Apple failed to meet its

burden both times. A repeated theme of Apple's petition is that the district court failed to "actually engage with the evidence and make a reasoned determination about whether particular testimony is, in fact, probable." (Doc. 37 at 15.) This assertion is inaccurate. The district court engaged in a reasoned analysis as its order shows. And as the Panel noted in its Order, "Apple does not dispute that the Court considered all the relevant transfer factors." (Doc. 36 at 3.) Apple simply disagrees with the outcome. Fintiv presented far more than just "bare allegations." Fintiv identified numerous Apple and third-party witnesses with knowledge derived from publicly-available information, and the district court "wrestled with the complicated task" of evaluating evidence regarding potential witnesses. (Doc. 36 at 4; Doc. 18-1 at 16-18.) Notably, Apple does not deny that those Fintiv-identified witnesses may have relevant knowledge regarding Apple's alleged infringement. Instead it carefully characterizes some of those witnesses as not having "***unique*** information regarding the Accused Technology." (Appx290-292 at ¶ 6 (emphasis added).).

The district court's findings did not rely on resolving the dispute in favor of Fintiv merely because Fintiv is the non-moving party; the court weighed the veracity of the evidence presented pertinent to each of the public and private interest factors. (Doc. 18-1 at 15-27; Appx4-17.) For example, regarding the public interest factors, the district court did not just blindly resolve the local interest factor in favor of Fintiv as Apple argues. (Doc. 37 at 17.) It evaluated Apple's presence in each venue, the

presence of multiple Fintiv employees in WDTX, and the significant presence of NXP in WDTX, especially pointing out that Fintiv's principal place of business is located in Austin and how that differed from the facts of the case law proffered by Apple.[3] The court also found that the court congestion factor disfavored transfer because WDTX was 25% faster than any of the NDCA statistics provided by ***either*** party. (Appx13-15.)

Regarding the private interest factors, Apple presented no declarations from the witnesses Fintiv identified as potentially having relevant knowledge. And Apple's declarant provided only hearsay evidence that the subset of witnesses that he contacted did not have "***unique*** information regarding the Accused Technology." (Appx290-292 at ¶ 6) (emphasis added). Pursuant to Apple's argument, such testimony – which is inadmissible as evidence because it does not fall within a hearsay exception – should automatically trump the "relevance and materiality of the information the witness[es identified by Fintiv] may provide" in the court's analysis. *In re Genentech, Inc.*, 566 F.3d 1338, 1343 (Fed. Cir. 2009). Such an advantage to any defendant moving for transfer cannot be correct, as it would allow a defendant's self-serving, hearsay declaration to virtually always favor transfer;

[3] Apple's arguments regarding the district court's purported reliance upon the presence of NXP's witnesses in WDTX are irrelevant because the district court stated that even if NXP was excluded from the analysis, the factor would still weigh against transfer. (Appx16.)

after all, the defendant will necessarily have greater knowledge of its own witnesses than will be available to a plaintiff.

Further, the district court specifically noted that one Austin-based Design Verification Engineer Fintiv identified – Ruotao Wang (who had worked on a project entitled "Design, Verification and Testing of a Multifunctional NFC Transponder Chip") – had not submitted a declaration in which that witness asserted he had no relevant knowledge, despite the fact that the witness was under Apple's control. (Appx7 n.2.) Apple argues that its executive's hearsay declaration regarding the knowledge of the numerous potential witnesses precludes the viability of Mr. Wang's knowledge, but Apple's only assertions regarding Mr. Wang are purely attorney argument; the same type of attorney argument that Apple proclaims should not be considered as evidence. (*See, e.g.*, Doc. 37 at 16.) Further, while Apple asserted that ***it*** did not plan to call any witnesses from WDTX, the district court recognized in its order that Fintiv believes some of the witnesses it identified in WDTX have relevant knowledge that could show Apple's infringement. (Appx7.) These facts were also part of the district court's analysis.

The Panel correctly gave deference to the trial judge's evaluation of the compulsory process and willing witness factors, concluding "that there was at least a plausible basis for the district court to find that these individuals may have relevant

information. The court's ruling was thus not a clear abuse of discretion." (Doc. 36 at 4-5.)

2. The Panel's Decision Does Not Endorse a Clearly Erroneous Legal Approach

The movant has a heavy burden to show that transfer is clearly more convenient, which is much more than just breaking a tie as would be the case if analogized to a "preponderance of the evidence" standard. *In re Volkswagen of Am., Inc*., 545 F.3d 304, 315 (5th Cir. 2008). Resolving facts in favor of a non-moving party is generally accepted when courts make evidentiary rulings, such as in summary judgment submissions. *Billups-Rothenberg, Inc. v. Assoc. Regional and Univ. Pathologists, Inc.*, No. 2010-1401, 2011 WL 1601996, *4 (Fed. Cir. 2011) ("drawing all reasonable inferences in favor of the non-movant").

The district court's reliance on this approach is clearly consistent with decisions within and outside of the Western District of Texas, as explained in Fintiv's Response. (*See* Doc. 18-1 at 20-21.) It is not improper to resolve factual disputes in this manner in the context of transfer motions. District courts routinely look at evidentiary submissions, including declarations, documents, and testimony in summary judgment and other transfer motions and resolve factual disputes in these motions.[4] Notably, the district court in *AGIS Software Development LLC v.*

[4] Numerous district courts in and outside of the Fifth Circuit have adopted the same standard to resolve factual disputes in favor of the non-moving party when reviewing

Apple, Inc., considered similar arguments and facts raised by Apple, and also cited and relied on the approach taken in the *Weatherford* (*Weatherford Tech. Holdings, LLC v. Tesco Corp.*, No. 2:17-CV-00456-JRG, 2018 WL 4620636, at *2 (E.D. Tex. May 22, 2018) line of cases. (Doc. 18-1 at 24-25); No. 2:17-CV-00516-JRG, 2018 WL 2721826, at *2 (E.D. Tex. June 6, 2018). This Court ultimately denied Apple's petition for mandamus. (SAppx52-53.) Here, Fintiv has shown a much greater nexus to WDTX, including Petitioner's witnesses in WDTX; Apple, NXP, and Fintiv having offices in WDTX; and other party and third-party witnesses present in WDTX.

1404(a) motions. *See, e.g., Saint Lawrence Commc'ns LLC v. Amazon.com, Inc.,* No. 2:19-CV-00027-JRG, 2019 WL 2904756, at *3 (E.D. Tex. July 5, 2019); *Thompson v. Titus Transp., LP*, No. 11-CV-1338-EFM-KMH, 2012 WL 5933075, at *3 and *7- *8 (D. Kan. Nov. 27, 2012); *Sleepy Lagoon, Ltd. v. Tower Grp., Inc.,* 809 F. Supp. 2d 1300, 1306, 1312-13 (N.D. Okla. 2011). Further, courts have applied this standard to resolve factual disputes in favor of the Plaintiff and still granted a defense motion to transfer, thereby undercutting Petitioner's argument that the en banc Court must act to prevent the raising of the bar for venue transfer cases to an "unsurmountable height." (Doc. 37 at 17.) *See Rogers v. Wilmington Tr. Co.*, No. 1:17-CV-00392-AWI-SAB, 2018 WL 489168, at *8, 9, n.1 (E.D. Cal. Jan. 19, 2018) (granting defendants' motion to transfer); *Palmer Events, LLC v. Hyundai Hope on Wheels*, No. 3:15-CV-02223-PK, 2016 WL 1179857, at *1, n.1 (D. Or. Feb. 26, 2016), *report and recommendation adopted*, No. 3:15-CV-02223-PK, 2016 WL 1181679 (D. Or. Mar. 25, 2016) (granting defendants' motion to transfer); *Cardoni v. Prosperity Bank*, No. 14-CV-0319-CVE-PJC, 2014 WL 3369334, at *4 (N.D. Okla. July 9, 2014) (granting motion to transfer pursuant to a forum selection clause).

Apple contends that, "[c]ontrary to *Weatherford*, a district court can and must make actual factual findings of fact as to how the § 1404(a) factors apply in a given case." (Doc. 37 at 9.) Apple cites to two cases in support of this contention; both are inapposite – especially as the district court here did appropriately make factual findings. *See In re LimitNone, LLC,* 551 F.3d 572, 577 (7th Cir. 2008); *Hustler Magazine, Inc. v. U.S. Dist. Ct. for Dist. of Wyoming*, 790 F.2d 69, 71 (10th Cir. 1986). *LimitNone* involved whether factual determinations necessary to the transfer motion were decisions on the merits that were improperly decided before subject-matter jurisdiction was established. 551 F.3d at 576-578. And the court in *Hustler* granted a petition for mandamus because the trial judge ruled from the bench and refused to even hear the case. 790 F.2d at 70-71. Further, the facts showed that only one witness, and none of the parties, had any connection with the transferor forum. *Id*. at 71. By contrast, the district court here fully considered and properly weighed the evidence and determined that one private interest factor weighed slightly in favor of transfer, two public interest factors weighed against transfer, and the remaining private factors were neutral. (Appx17.) The Panel correctly recognized that "the district court considered all the relevant transfer factors" and that it weighed those factors before making reasoned determinations. (Doc. 36 at 3-4.) The Panel acknowledged that "a trial judge has a superior opportunity to familiarize himself or herself with the nature of the case . . . and ultimately is better able to dispose of these

motions" and correctly held that the district court did not clearly abuse its discretion to warrant mandamus relief. *Id*. at 4-5 (*quoting In re Vistaprint,* 628 F.3d at 1346).

C. APPLE'S SECOND GROUND DOES NOT WARRANT EN BANC REVIEW

Apple's second ground for seeking en banc review is that the Panel improperly faulted Apple for requesting alternative relief for transfer to Austin. (Doc. 37 at 17.) If the Panel relied on judicial estoppel, en banc reconsideration of this reliance is not necessary to maintain uniformity of the court's decisions, nor does Apple argue this point. Further, Apple does not even pretend that anything related to the Panel's reliance on judicial estoppel involves a question of exceptional importance. Instead, Apple argues that the Panel's decision is inequitable, and implies that it is being punished "for offering alternative theories of convenience." (Doc. 37 at 20.)

Apple's litigation strategy was to offer a theory in the alternative, and it *repeatedly and expressly* requested in its Motion that the district court transfer this action to the Austin Division, even arguing that it was a "clearly more convenient forum." (*See* Appx70, Appx79.) The district court accepted this alternative theory, thus Apple was not "forced" to accept an intradistrict transfer to a *still-inconvenient forum*. Apple is not being "punished" by being granted the relief it sought. (Doc. 36 at 3.)

Contrary to Apple's assertions, the Panel correctly pointed out that Apple asserted to the district court that the Austin Division is '***clearly more convenient*** for

both parties' and could not now avoid those statements. (*Id.*, Doc. 36 at 3 (emphasis added).) In fact, as Fintiv stated in its Response (Doc. 18-1 at 13, 29), Apple made numerous statements supporting its motion, in the alternative, to transfer this case to the Austin Division, and, throughout its briefing, it repeatedly maintained that Austin was a clearly more convenient venue.[5] (Appx70, Appx79.)

To the extent the Panel relied on Fintiv's judicial estoppel argument in its decision, this reliance is not contrary to law as explained in Fintiv's Response, and the Court may invoke this doctrine at its discretion. (*See* Doc. 18-1 at 12-15, 27-21; *see also, U.S. Philips Corp. v. Sears Roebuck & Co.*, 55 F.3d 592, 597 (Fed. Cir. 1995) ("it is proper for the appellate court to raise the estoppel 'in an appropriate case'").) Petitioner made the choice to hedge its bets and argued both that the NDCA was a more convenient venue, and that the Austin Division was a clearly more convenient venue than the Waco Division. (Appx79.) The fact that the district court picked Apple's "backup request" does not negate the fact that Apple's argument in the lower court was contrary to the one Apple brought in its Petition for a writ of mandamus. (Doc. 2 at 2; *see, e.g., Ins. Co. of N. Am. v. Ozean/Stinnes-Linien,* 367

[5] Apple now argues that "[t]his was only ever a case about Austin versus Northern California." (Doc. 37 at 19.) However, in analyzing the transfer factors, specifically transfer factor #3 regarding the attendance for willing witnesses and public interest factor #1 regarding administrative difficulties flowing from court congestion, Apple only addressed these factors in relation to Waco as compared to NDCA, not Austin versus NDCA. (Doc. 18-1 at 14; Appx77-78.)

F.2d 224 (5th Cir. 1966) (a party that successfully asserted a motion to transfer the case to Savannah for convenience of the parties and witnesses was estopped from asserting a motion in Savannah to decline jurisdiction); *Crenshaw Enter., Ltd. v. Irabel, Inc.,* No. 1:17-CV-322, 2018 WL 6185991, at *12 (E.D. Tex. Jan. 18, 2018).

The Panel correctly saw through Apple's attempted gamesmanship and reminded Apple it could not avoid its previous inconsistent assertions. (Doc. 36 at 3.) The only criteria for judicial estoppel is that the "party 'must have convinced the court to accept the previous position.'" *Gabarick v. Laurin Mar. (Am.) Inc.,* 753 F.3d 550, 554 (5th Cir. 2014). It is irrelevant that the argument the district court ultimately accepted was one in the alternative. (Doc. 18-1 at 30.) Judicial estoppel "focuses on the consistency of a party's arguments ***as accepted by the court***." *Gabarick*, 753 F.3d at 555 (emphasis added). Thus, after the district court relied on and accepted Petitioner's alternative argument that the Austin Division is more convenient, "any argument inconsistent with that position may be subject to judicial estoppel in subsequent proceedings." (*Id*. at 554; Doc. 2 at 12; Appx17; Appx79.)

IV. CONCLUSION

The Petition should be denied for the foregoing reasons.

Respectfully submitted this 11th day of February, 2020.

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CERTIFICATE OF SERVICE

I, Jonathan K. Waldrop, hereby certify that a copy of the foregoing FINTIV, INC.'S RESPONSE TO APPLE INC.'S PETITION FOR REHEARING EN BANC was served on this 11th day of February, 2020, upon the following in the manner indicated:

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CERTIFICATE OF COMPLIANCE

I certify that the foregoing FINTIV, INC.'S RESPONSE TO APPLE INC.'S PETITION FOR REHEARING EN BANC complies with the type-volume and typeface requirements as follows:

1. The foregoing complies with the type-volume limitation of Fed. R. App. P. 21(d)(1). This brief contains 3801 words, excluding the parts of the brief exempted by Fed. R. App. P. 21(a)(2)(C), 32(f), and Fed. Cir. R. 32(b). Microsoft Word 2013 was used to calculate the word count; and
2. The foregoing complies with the requirements of Fed. R. App. P. 32(c)(2) because this brief has been prepared in proportionally-spaced typeface using Microsoft Word 2013 in 14-point Times New Roman typeface.

Dated: February 11, 2020 Respectfully submitted,

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