November 7, 2019 **Regarding the case: 19-1726**

From:Xiaohua Huang,

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To: Clerk of the Court

U.S. Court of Appeals for the Federal Circuit

717 Madison Place, NW

Washington, DC20439

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Dear Madam/Sir.

The enclosed is :

XIAOHUA HUANG'S COMBINED PETITION

FOR PANEL REHEARING OR REHEARING EN BANC

Thank you!

Have A Very Nice Day!

Best Regards

Xiaohua Huang

No. 19-1726

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

Mr. Xiaohua Huang *pro se*

Plaintiff-Appellant

v.

Huawei Technologies Ltd.

Defendant-Appellee

Appeal from the United States District Court
for the District of Eastern Texas in case No. 2:16-cv-947
Judge Rodney/Roy Payne

XIAOHUA HUANG'S COMBINED PETITION FOR PANEL REHEARING OR REHEARING EN BANC

Xiaohua Huang *pro se*

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xiaohua_huang@hotmail.com

CERTIFICATE OF INTEREST

Pro se Plaintiff-Appellant Xiaohua Huang certifies the following:

1. The full name of every party or amicus represented by me is: Xiaohua Huang

2. The name of the real party in interest represented by me is: Xiaohua Huang

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FEDERAL CIRCUIT RULE 35(b) STATEMENT

I believe the panel decision is contrary to the following decision(s) of the precedent(s) of this court in *Acumed LLC v. Stryker Corp., 525 F.3d 1319, 1324,1325,1326,1327 (Fed. Cir. 2008).*

I believe this appeal requires an answer to one or more precedent-setting questions of exceptional importance:

(1) Whether the panel decision did not prove the devices accused in case2 are "essentially the same" as the devices accused in case 1 with evidence of detail comparison and analysis as in case *Acumed LLC v. Stryker Corp., 525 F.3d 1319, 1324,1325,1326,1327 (Fed. Cir. 2008)* and Whether the panel decision just merely stated "the devices accused in case2 are 'essentially the same' as the devices accused in case 1".

(2) Whether the Panel decision ignored that Plaintiff-Appellant Mr. Huang argued clearly the difference between the devices accused in case 2 and the devices accused in case 1 in "Mr. Huang's amended informal brief" (Dkt. 18 of case 19-1726).

(3) Whether the District Court's decision on case 1 and the panel decision of this court on case 1 is completely erroneous and an abuse of discretion and Law by denying the evidence produced by Mr. Huang and only based on Magistrate Judge Payne's fraudulent statement and Huawei's perjured declaration.

(4) Whether the panel decision and the district court prejudiced *pro se* Mr. Huang and abused the discretion.

(5) Whether the panel decision ignored that the district court may have interest conflicts in this case and has made error in evidence findings and denied the evidence presented by Plaintiff Mr. Huang.

/s/ Xiaohua Huang *pro se*

INTRODUCTION

The panel decision of present case, the panel decision of case 15-1505 in this court and the district court decision of 2:15-cv-1413(case 1) and 2:16-cv-947(case 2) are all based on the erroneous presentation of the factual material evidence. The panel and the district Court ignored the factual material evidence produced by Mr. Huang *pro se* and only rely on the

erroneous statement of Panel and the District Court. The Panel and the District Court have systematically prejudiced Mr. Huang *pro se*. The evidence and the argument that the decision of the district court on case 1 and case 2 are erroneous were produced in Dkt.No.18 (Amended informal brief) and Dkt. No.20 (Appendix) of case 19-1726. The panel decision ignored the factual material evidence produced by Mr. Huang *pro se*. The panel's decision is merely based on their own statements and Huawei's statements which is contrary to the factual material evidence and law.

FACTUAL AND PROCEDURAL BACKGROUND

I. Case 2:15-cv-1413 (case 1)

Mr. Huang filed "Huang v. Huawei Techs. Co., 2:15-cv-1413-JRG-RSP (E.D. Tex. Aug. 14, 2015)" ("Case 1") with evidence that the TCAM IP used in Huawei's chips and TCAM chips used in Huawei's Switches and Routers infringed US patent 6744653 and 6999331(Appx501-545). Mr. Huang accused SEVEN Huawei's products listed in www.huawei.com in case 1:

NE40E-X16A/X8A High end Universal Service Router;
NE40E-X1/X2-M Series Universal Service Router ;
S9300 Series Terabit Routing Switches;
S9700 Series Terabit Routing Switches;

S12700 Series Agile Switches;
S6300 Switches;
Cloud Engine 12800 Series Data Center Core Switches

On May 23, 2016 Huawei filed Fed.R.Civ.P. 11 motion (Dkt.52) (Appx583-619) and used their 5 employees to declare that Huawei's division HiSilicon designed 7 model numbers of ASIC chips using the TCAM IP licensed from eSilicon, SD XXNo1, SDXXNo2, SDXXNo3, SDXXNo4, SDXXNo5, SDXXNo6, SDXXNo7. The XXNos are redacted. Huawei has not used any those 7 models ASIC chips containing TCAM IP in the SEVEN Huawei products which have been accused in case 1, but used those 7 models of ASIC chips containing TCAM in Huawei's networking products (Switches and Routers) which are only sold outside USA.

Around May 26, 2016 Mr. Huang found a commerce website https://e.huawei.com. The two website https://e.huawei.com/cn/ (China) and https://e.huawei.com/us/ (USA) lists entire more than 80 identical Huawei's networking products, which are sold both in China and USA respectively. That means, except the SEVEN accused products, based on Huawei's declaration, that some products of the more than 80 products listed in website

https://e.huawei.com use some of the those 7 models of ASIC chips (designed by HiSilicon) using the TCAM IP licensed from eSilicon. Then Mr. Huang moved the Court for leave to add 70 more products beside the SEVEN accused products to case 1 in Dkt.No.58. Mr. Huang produced the good cause in Dkt.59 and 74 with Exhibit O and P which proved that some of newly found 70 more products to be added contains the TCAM IP infringing US patents and sold in the USA. Judge Payne denied Plaintiff-Appellant's motion to add newly found 70 more products, and has the case STAYed for two month for Mr. Huang to retain Lawyer. (Appx622- 652). On September 29, 2016 Defendant-Appellee Huawei filed motion for Summary Judgment of non-infringement in Dkt.105. On October 17, 2016 Mr. Huang produced evidence and independent expert's declaration and expert report to prove the SEVEN products of Huawei's infringement to US patent No. RE45259 (Appx654-746). On November 22, 2016 Judge Payne made erroneous and fraudulent statement that Plaintiff-Appellant Mr. Huang's evidence were not produced during the Discovery. In fact those evidence were produced before the deadline of the Discovery November 17, 2016, Judge Payne stroke all the factual material evidence produced

by Mr. Huang and recommend to District Court to grant Defendant Huawei's motion of non-infringement in Dkt.134 (Appx142). The district court adopted Dkt.134 and granted Defendant Huawei's motion to dismiss Plaintiff Mr. Huang's claim erroneously. As pointed out by District Judge J. Owen Forrester in Sklar v. Clough, 2007 U.S. Dist. LEXIS 49248 (N.D. Ga. July 6, 2007), "a district court may 'consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form'" (citation omitted).

On January 31, 2017 Defendant-Appellee Huawei filed motion for attorney fees in Dkt.179 based on its internal counsel's perjured declaration of forged telephone conversation. In Dkt.184 and its exhibits Plaintiff-Appellant Mr. Huang proved that Defendant- Appellee's internal Counsel made perjured declaration and has very bad faith (Appx847-893). In the Hearing of March 8, 2017 Huawei Counsel Leon Carter said to Judge Payne: "Let him (Huang) pay money." Judge Payne replied: "He does not have Money." This part was omitted in the transcript. This conversation showed that Leon Carter was in an advanced position able to command Judge Payne. On

March 27, 2017 in Order 204 Judge Roy Payne used his fraudulent statement and "he (Mr. Huang) did not want to share revenue with a lawyer." (Appx133) as cause and took perjured declaration of Defendant-Appellee Huawei and granted Defendant's motion for attorney's fee and expert costs despite the factual material evidence

II. Case 17-1505

Mr. Huang appealed the district court's decision of case 2:15-cv-1413 to Federal Circuit in case 17-1505, the Panel only took Huawei's perjury and Judge Payne's fraudulent statement as evidence and made further erroneous statement that "Mr. Huang did not do any pre-litigation investigation" and "he (Mr. Huang nevertheless did not want to share revenue with a lawyer". Although the Panel admitted that Mr. Huang produced the witness declaration, expert report and reverse engineering data before the deadline of Discovery in case 2:15-cv-1413, but the Panel chose to believe the district court.

III. Case 2:16-cv-947(case2)

On August 26, 2016 Plaintiff-Appellant Mr. Huang filed case 2:16-cv-947 (case 2) against Huawei to accuse the newly found 70 products which contain some of the 7 models of ASIC chips

containing TCAM IP from eSilicon and TCAM chips.(Appx 300-322). One of 70 products accused in case 2 is Huawei's NE5000E Router which contains TCAM chips of Netlogic Microsystems Inc. and ASIC chips (SD587 and SD587i)using TCAM IP from eSilicon (Appx300-339). Both TCAM IP from eSilicon and TCAM chips of Netlogic Microsystems Inc read the claims of '331patent, '653patent and '259patent with evidence of reverse engineering data and data sheet.

On March 8, 2017 in Order Dkt.48 of case 2 Magistrate issued the Order to STAY the case. On January 11, 2019 Judge Payne denied Plaintiff Mr.Huang' s motion to transfer the case 2 to District Court of Northern California, on February 12, 2019 Judge Payne used fraudulent statement and took all Huawei's unsupported perjured declaration as evidence granted Huawei's motion to dismiss case 2.

ARGUMENT

1.Case2 should not be barred by claim preclusion to case1

1.1The devices in case 2 are NOT essentially same to the devices in case 1

Whether a claim in patent infringement case to be barred by res judicata (claim preclusion) needs to refer the case

ACUMEDLLC v. STRYKER case No. 2007-1115 of United States Court of Appeals for the Federal Circuits (Acumed LLC v. Stryker Corp., 525 F.3d 1319, 1326 (Fed.Cir.2008).

"[O]ne of the essential transactional facts giving rise to a patent infringement claim is 'the structure of the device or devices in issue.' " Therefore, '[C]laim preclusion does not apply unless the accused device in the action before the court is "essentially the same". The party asserting res judicata has the burden of showing that the accused devices are essentially the same.

Stryker admitted that the T2 was not essentially the same as its prior product — thus eliminating any possibility of claim preclusion. To win on claim preclusion, it must argue that the new product is the same as the old product.

The panel decision and the district court abuse the discretion since both the panel and the district court never produce any evidence, analysis and comparison to prove the devices accused in case 1 is "essentially the same" to the devices accused in case 2. Both the district court and Panel decision merely just make erroneous statement that *"the Case 2 chips are essentially the same as the Case 1 chips for purposes of claim*

preclusion.1" without any evidence and analysis proof of the chips. It will be address that the TCAM chips used in the devices accused in case 1 are NOT essentially same to the TCAM chips used in the devices accused in case 2 .

Case 1 and case 2 claimed that"the TCAM licensed from eSilicon and TCAM chips of Netlogic/Broadcom" used in Huawei's products infringed US patents 6744653,6999331 and RE45259. So the nucleus is "TCAM" licensed from eSilicon and "TCAM chips of Netlogic/Broadcom".

The fact is that Huawei declared that the Seven products accused in the case1 did not contain any of 7 ASIC chips using TCAM IP while some of the more than 70 products accused in case 2 contain some of 7 ASIC chips using TCAM IP, which makes the devices accused in case2 are NOT essentially same from the devices accused in case 1.

It is the TCAM IP infringing the claim limitation of '653 patent and '331patent, products (devices) accused in case 1 contain NO ASIC chips using TCAM IP and the products (devices) accused in case 2 contain ASIC chips using TCAM IP, so the structure of the devices in case1 and case 2 are "essentially different" in terms of reading the claim limitation

of the '653 and '331patents.

The panel and the district court argue the case1 and case2 use the same infringement contention and claim chart. The fact is that the devices accused in case 1 containing NO ASIC chips using TCAM IP based on Huawei's declaration, but the devices accused in case 2 containing ASIC chips using TCAM IP based on Huawei's declaration. It is TCAM IP which read the claim limitation of the patents, so the structure of the devices in case1 and case 2 are NOT "essentially same" in terms of reading the claim limitation of the '653 and '331patents. Case 2 can not be barred by case 1 based on the analysis in *Acumed LLC v. Stryker Corp., 525 F.3d ,1327 (Fed. Cir. 2008).*

On May 23, 2016 Huawei used their 5 employees to declare that Huawei's division HiSilicon designed 7 model numbers of ASIC chips using the TCAM IP licensed from eSilicon, SD XXNo1, SDXXNo2, SDXXNo3, SDXXNo4, SDXXNo5, SDXXNo6, SDXXNo7. Huawei has not used any those 7 models ASIC chips containing TCAM IP in the SEVEN Huawei products accused in case 1, but used those 7 models of ASIC chips containing TCAM in other Huawei's networking products (Switches and Routers) .(Appx583-619)

Huang found a commerce website https://e.huawei.com lists entire more than 80 identical Huawei's networking products, which are sold both in China and USA respectively. That means, except the SEVEN accused products in case 1, based on Huawei's declaration, that some products of the more than 80 products listed in website https://e.huawei.com use some of the those 7 models of ASIC chips (designed by HiSilicon) using the TCAM IP licensed from eSilicon.

One of 70 products accused in case 2 is Huawei's NE5000E Router which contains TCAM chips of Netlogic Microsystems Inc. and ASIC chips (SD567, SD587 and SD587i) using TCAM IP from eSilicon (Appx333- 334). NE5000E was not accused in case 1.

Both TCAM IP from eSilicon and TCAM chips of Netlogic Microsystems Inc. read the claims of '331patent, '653patent and '259 patent based on the evidence of reverse engineering data and data sheet.

In case 1 Plaintiff Mr. Huang accused the TCAM chip Model IDT75K72234, IDT75S10020, IDT75S10010 and NL9512 used in Huawei's products. In case 2 Plaintiff Mr. Huang accused more TCAM chip model NL6000 Family, NL7000

Family, NL/NLA 9000 Family, NL/NLA 1000Family, NL/NLA 12000 Family, NLS025, NLS045, NLS055, NLS1005, NLS1008, NLS105, NLS2008, NLS205, 75K serials and P1025 NSE chips of Freescale Semiconductor Inc.(part of NXP) used in Huawei's products beside IDT75K72234, IDT75S10020, IDT75S10010 and NL9512, those TCAM chips were not accused in case1. Based on reverse engineering data the TCAM chips accused in case 2 are NOT "essentially same" to the TCAM chips models accused in case 1. The TCAM chips accused in case2 do not use dynamic circuit and not infringed the claim 29 of '259 patent while the TCAM chip model accused in case 1 used the dynamic circuit and infringed claim 29 of '259 patent. So case 2 can not be barred by case 1 with claim preclusion.

1.2 The decision of the District Court and this court on case 1 is erroneous

The District Court may involves "Fraud on the Court" in case1, which will be argued in next section, and the decision of the district court and this court on case 1 are erroneous and can not be used to bar case2.

2. District Court denied plaintiff-Appellant Huang's motion to transfer case 2:16-cv-947 to US District Court of Northern

California is erroneous and an abuse of discretion and Law. The District Court abused discretion and involved"Fraud on the Court" in case 1 and case 2

Plaintiff Mr. Huang did adequate pre-litigation and produced expert report and witness declaration in Dkt.109 and its exhibit to prove that accused Huawei's products infringed US patents 6744653, 6999331 and RE45259. Judge Payne's Orders to dismiss case 2:15-cv-1413 and sanction Plaintiff Mr. Huang to pay Defendant Huawei $600K are erroneous and an abuse of discretion.

In May 10, 2016 Plaintiff Mr. Huang met a Lawyer Betty near Marshall Texas who referred Mr. Huang to two Lawyers Dan and his partner in Los Angeles, California. Dan offered to represent Mr. Huang to settle $5 million for his three patents (Appx428-436). During the meeting in LAX airport Dan claimed that their partner Local Counsel Betty knows Judge Gilstrap very well and signed up hundreds of patent cases in TXED each year. Plaintiff Mr. Huang obtained evidence that Huawei's 3G,4G networking products all used his patents and Huawei's 5G networking products will have to use his patents, that Huawei has used his patents and generated multi-billion

USD profits in USA and hundreds of billion USD profit worldwide and would generate more profit in the future. Mr. Huang collected reverse engineering evidence and does not feel good for a 5 million quick settlement, then Plaintiff Mr. Huang said he wants to litigate the case by himself since he has got reverse engineering data to prove the infringement. Dan said: "just by you Judge Gilstrap by all means will not let the Company such as Huawei to transfer their money to your account. Judge does not understand your patent and will judge you lose." Plaintiff Mr. Huang said: "I can appeal to the federal circuit." Dan said: "you should not expect that Judges in the Federal circuit will reverse the Order of Eastern Texas for a pro se." Later Plaintiff Mr. Huang said that he wants to finish claim construction brief by himself before retaining them.

One of Huawei's Counsel Scott W. Breedlove worked in Leon Carter's firm for many years, then left Carter's firm to join Vinson & Elkins in Dallas and worked in the same Law firm office with Mr. Stephen Gilstrap (Mr. Stephen Gilstrap is Son of Judge Gilstrap) for several years, then returned back to Carter's firm to represent Huawei in case 1, then attend the Hearing on March 8, 2017, where Leon Carter commend Judge

Roy Payne : "let him(Mr. Huang) pay money". Stephen Gilstrap and Vinson & Elkins LLP has interest conflict with Judge Gilstrap in US district Court of Eastern Texas. Huawei's Counsel Scott Breedlove has interest conflict with Judge Gilstrap and District Court.

Case 2:15-cv1413 was dismissed with the cause that the evidence was not produced during the Discovery, although the cause is false. On the Order 134 Magistrate Judge Roy Payne stated : "Mr. Huang highlights several alleged reverse engineering records, but the Court must GRANT Huawei's motion to strike....these records because Mr. Huang failed to produce them during discovery. Accordingly, it is RECOMMENDED that Huawei's motion for summary judgment be GRANTED." Judge Payne just lied since all the evidence produced before October 17, 2016 and before the deadline of Discovery.(Appx141-143). By March 8, 2017, two yeas before the resolution of Appeal to Federal Circuits , the case 2:16-cv-947 and case 2:15-cv-1513 had proved Huawei's infringement to US patent 6744653,6999331 and RE45259. The District Court Judge Payne STAYed the case 2:16-cv-947 on March 8, 2017, and never allow the case be reactivated until

January 11, 2019 to deny Mr. Huang's motion to transfer case 2:16-cv-947 to US District Court of Northern California and dismiss the case 2:16-cv-947 with the claim preclusion to case 2:15-cv-1413. Judge Payne's Order to STAY the case 2:16-cv-947 is a further abuse of description to further help Huawei to avoid paying the royalty of patent infringement in USA. The fact is that Plaintiff Mr.Huang appealed to US Supreme Court, and there is no resolution yet, so the case 2:15-cv-1413 is not the case which finally lost by plaintiff Mr. Huang. The District Court abused the discretion again to dismiss the case 2:16-cv-947 while case 2:15-cv-1413 is being appealed in the US Supreme Court.

The case 2:16-cv-947 overcome the cause which the Court used to dismiss case 2:15-cv-1413 "the evidence were not produced during the Discovery" which is Judge Payne's lie and fraudulent statement. But the Court have the case 2:16-cv-947 STAYed to wait that judgment made on case 2:15-cv-1413 was confirmed by Federal Circuit, then used the claim preclusion to dismiss the case 2:16-cv-947. The district court's decision in favor of Huawei further proved that the Court is "Fraud is on the Court".

On Hearing of March 8, 2017 Plaintiff Mr. Huang argued that the evidence of reverse engineering was already authentic by then, that Huawei infringed US patent RE45259 was proved further by the evidence provided by Broadcom. Plaintiff Mr. Huang produced adequate pre-litigation evidence and was in good faith, Huawei's Counsel was perjured, Mr. Huang should not be sanctioned for attorney fees. Huawei Counsel Leon Carter said to Judge Payne: "Let him (Mr. Huang) pay the money." Magistrate Judge Payne replied: "He (Mr. Huang) does not have Money." This part was omitted in the transcript. This conversation showed that Leon Carter was in an advanced position able to command Magistrate Judge Payne, Magistrate Judge Payne's judgment was commended by Defendant Huawei Counsel Carter, the district court reporter deliberately omitted this conversation in transcript. With evidence support Plaintiff Mr.Huang filed motion Dkt.170 to ask the District Court to take action on Huawei's perjured declaration with evidence support, the District Court denied Mr. Huang's motion right away with fraudulent cause that Mr. Huang's motion has no evidence support. The Court's conduct encouraged Huawei Counsel Li and Torkelson to make more perjured declaration in

Motion for attorney fees. Even when Plaintiff Huang proved Huawei's declaration is perjured, the District Courts still took all Huawei Counsel's perjury as evidence to grant Huawei's Motion for money based on Huawei Counsel's instruction which proved again what Huawei counsel Ms. Li said " they knows Judges very well."

Order Dkt.204 and the decision of Panel of the Federal circuit all stated: " he (Mr. Huang) nevertheless did not want to share the revenue with a lawyer." ,which seems to be the true reason of the "Fraud on the Court". Although admitting that Plaintiff Mr. Huang produced"Expert report and declaration" to prove Huawei's infringement to US patent 6744653, 6999331 and RE45259 before the deadline of Discovery and Mr. Huang is one expert witness who was disclosed before, the Panel of federal circuit of case 17-1505 still affirmed Judge Payne's decision to dismiss case 2:15-cv-1413 and took Judge Payne's lie in Dkt.134 that "Mr. Huang highlights several alleged reverse engineering records, but the Court must GRANT Huawei's motion to strike....these records because Mr. Huang failed to produce them during discovery. Accordingly, it is RECOMMENDED that Huawei's motion for summary

judgment be GRANTED." "

In Dkt.71 of case 2:16-cv-947 Defendant Huawei further moved the District Court to use its inherent power again to restrict Mr. Huang to appeal to higher level court for the district Court's decision of case 2:16-cv-947 and further sanction Mr. Huang to pay money to Defendant Huawei's attorney fee. Huawei also asked Gilstrap to sentence Mr. Huang contempt the District Court. Based on all those the case 2 should be allowed to transfer out of US district court of eastern Texas.

CONCLUSION

For the foregoing reasons, Mr. Huang respectfully requests that this Court grant the petition for panel rehearing or rehearing en banc.

Dated: November 7, 2019 Respectfully Submitted,

Xiaohua Huang

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CERTIFICATE OF COMPLIANCE

1. This petition for rehearing en banc complies with the type-volume limitations of Federal Rule of Appellate Procedure 35(b)(2)(A) because it contains 3,721 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the typestyle requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Office Word in Century Schoolbook 14-point font.

/s/ xiaohua huang

NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

XIAOHUA HUANG,
Plaintiff-Appellant

v.

HUAWEI TECHNOLOGIES CO., LTD.,
Defendant-Appellee

2019-1726

Appeal from the United States District Court for the Eastern District of Texas in No. 2:16-cv-00947-JRG-RSP, Judge J. Rodney Gilstrap.

Decided: October 9, 2019

XIAOHUA HUANG, Los Gatos, CA, pro se.

SCOTT W. BREEDLOVE, Carter Arnett, PLLC, Dallas, TX, for defendant-appellee. Also represented by E. LEON CARTER.

Before PROST, *Chief Judge,* MOORE and WALLACH, *Circuit Judges.*

PER CURIAM.

Xiaohua Huang appeals a decision of the United States District Court for the Eastern District of Texas granting summary judgment in favor of Huawei Technologies Co. Ltd. ("Huawei"). *See Huang v. Huawei Techs. Co.*, No. 16-CV-00947-JRG-RSP, 2019 WL 1246260 (E.D. Tex. Feb. 12, 2019), *report and recommendation adopted*, No. 16-CV-00947-JRG-RSP, 2019 WL 1239433 (E.D. Tex. Mar. 18, 2019). Mr. Huang also appeals an order of the district court denying his motion to transfer. *See* J.A. 115–17. Because the district court did not abuse its discretion in denying Mr. Huang's motion to transfer and because Mr. Huang's claims are barred by claim preclusion and the *Kessler* doctrine, we *affirm*.

BACKGROUND

Mr. Huang filed a first lawsuit against Huawei in the Eastern District of Texas on August 14, 2015. *Huang v. Huawei Techs. Co.*, 2:15-cv-1413-JRG-RSP (E.D. Tex. Aug. 14, 2015) ("Case 1"). He alleged that Huawei products containing certain third-party chips infringed U.S. Patent Nos. RE 45,259, 6,744,653, and 6,999,331.

On June 1, 2016, Mr. Huang moved for leave to amend his December 1, 2015 infringement contentions. He sought to add dozens of new accused products and product families. The district court denied his motion.

Mr. Huang then filed the present action in the Eastern District of Texas. *Huang v. Huawei Techs. Co.*, 2:16-cv-00947-JRG-RSP (E.D. Tex. Aug. 26, 2016) ("Case 2"). He alleged infringement of the patents asserted in Case 1 by the products he had attempted to add to Case 1.

Meanwhile, the court granted summary judgment of noninfringement in Case 1. Mr. Huang appealed.

Huawei then moved for summary judgment in Case 2 based on claim preclusion and the *Kessler* doctrine, *Kessler*

v. Eldred, 206 U.S. 285 (1907). The district court stayed Case 2 pending the resolution of Mr. Huang's appeal in Case 1. On June 8, 2018, this Court affirmed the district court's grant of summary judgment in Case 1. *Huang v. Huawei Techs. Co.*, 735 F. App'x 715, 722 (Fed. Cir. 2018), *cert. denied*, 139 S. Ct. 2623 (2019). Following that decision, Mr. Huang moved to transfer venue in Case 2 to the Northern District of California. After lifting the stay, the district court denied that motion. Then, finding that the Case 2 accused products are "essentially the same" as those accused in Case 1, the district court entered summary judgment for Huawei based on claim preclusion.

Mr. Huang appeals. We have jurisdiction under 28 U.S.C. § 1295(a)(1). For the reasons stated below, we hold that the district court did not abuse its discretion when it denied Mr. Huang's motion to transfer venue and did not err in deciding that Mr. Huang is precluded from pursuing his claims of infringement in Case 2.

DISCUSSION

I

We review a district court's ruling on a motion to transfer venue under 28 U.S.C. § 1404 under the law of the regional circuit, in this case the Fifth Circuit. *In re Link_A_Media Devices Corp.*, 662 F.3d 1221, 1222–23 (Fed. Cir. 2011). In the Fifth Circuit, the decision whether to transfer venue under § 1404 is reviewed for abuse of discretion. *Peteet v. Dow Chem. Co.*, 868 F.2d 1428, 1436 (5th Cir. 1989). An abuse of discretion may be found where the district court's decision relies on an erroneous view of the law or on a clearly erroneous view of the evidence. *Esmark Apparel, Inc. v. James*, 10 F.3d 1156, 1163 (5th Cir. 1994).

Section 1404 grants the district court discretion to transfer a case "[f]or the convenience of parties and witnesses" and "in the interest of justice." Mr. Huang argues that transfer was proper because it was both in the interest

of justice and more convenient. Neither argument has merit. First, he alleges that Huawei had undue influence over the proceedings in the Eastern District of Texas. He claims that Huawei "retained the lawyers having interest conflict[s] with the Judge to avoid paying the royalty." Appellant's Br. at 70. Mr. Huang proffers no evidence of the alleged conflict.

Second, Mr. Huang argues that the Northern District of California would be more convenient based on the parties' presence there. *Id.* at 68. Mr. Huang chose, however, to file in the Eastern District of Texas despite residing in California. J.A. at 116. Mr. Huang's decision weighs heavily against any argument that the Eastern District of Texas is inconvenient. Neither of Mr. Huang's arguments evidence an erroneous view of the law or clearly erroneous view of the evidence by the district court. Thus, we do not find an abuse of discretion in the district court's denial of Mr. Huang's motion.

II

We review a district court's grant of summary judgment under the law of the regional circuit. *Mohsenzadeh v. Lee*, 790 F.3d 1377, 1381 (Fed. Cir. 2015). The Fifth Circuit reviews grants of summary judgment *de novo*. *Keelan v. Majesco Software, Inc.*, 407 F.3d 332, 338 (5th Cir. 2005). Summary judgment is appropriate where there is no genuine dispute of material fact and the moving party is entitled to judgment as a matter of law. *Johnson v. World All. Fin. Corp.*, 830 F.3d 192, 195 (5th Cir. 2016). A dispute is genuine if a reasonable fact finder could find for the nonmoving party. *Id.*

The district court granted summary judgment in favor of Huawei because Huang's claims were barred by claim preclusion. Whether a cause of action is barred by claim preclusion is a question of law, which we review *de novo*, applying the law of the regional circuit. *SimpleAir, Inc. v. Google LLC*, 884 F.3d 1160, 1165 (Fed. Cir. 2018). The test

for claim preclusion in the Fifth Circuit has four elements: (1) the parties in the subsequent action are identical to, or in privity with, the parties in the prior action; (2) the judgment in the prior case was rendered by a court of competent jurisdiction; (3) there has been a final judgment on the merits; and (4) the same claim or cause of action is involved in both suits. *Duffie v. United States*, 600 F.3d 362, 372 (5th Cir. 2010).

Because the parties are identical, the judgment in the prior case was rendered by a court of competent jurisdiction, and the earlier judgment is final, the parties' dispute centers on the fourth element of claim preclusion, whether the same cause of action is involved in both suits. We apply our own law to resolve whether two patent causes of action are the same. *Senju Pharm. Co. v. Apotex Inc.*, 746 F.3d 1344, 1348 (Fed. Cir. 2014).

Claim preclusion in a patent case typically exists when a patentee attempts to assert the same patent against the same party and the same subject matter. *Id.* Subject matter is the same for claim preclusion purposes if the earlier accused devices and the devices accused in the current action are "essentially the same." *Foster v. Hallco Mfg. Co.*, 947 F.2d 469, 479–80 (Fed. Cir. 1991). Devices are "essentially the same" if they are "materially identical." *Nystrom v. Trex Co.*, 580 F.3d 1281, 1285–86 (Fed. Cir. 2009).

Here, the district court found that there was no genuine dispute that the accused devices in Case 1 and Case 2 are essentially the same. *See Huang*, 2019 WL 1246260, at *5. We agree. A comparison of the infringement charts filed in each case reveals that the charts are identical, mapping each other word-for-word. Any alleged difference between the accused products in each case is therefore unrelated to the limitations in the claim of the patents. *Acumed LLC v. Stryker Corp.*, 525 F.3d 1319, 1324 (Fed. Cir.

2008). Thus, the Case 2 chips are essentially the same as the Case 1 chips for purposes of claim preclusion.[1]

CONCLUSION

We have considered Mr. Huang's remaining arguments, but find them unpersuasive. For the foregoing reasons, we *affirm* the district court's denial of Mr. Huang's request to transfer venue and grant of summary judgment.

AFFIRMED

COSTS

No costs.

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[1] As for post-judgment activity, the district court findings that the Case 1 and Case 2 chips are essentially the same and its finding of non-infringement in Case 1, suffice to preclude the claims at issue. *See Brain Life*, 746 F.3d at 1056–57 (citing *Kessler*, 206 U.S. at 285–89).

CERTIFICATE OF SERVICE

I certify that on November 7, 2019, I caused a copy of the foregoing document to be served by electronic means via email and regular US mail on all counsel.

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