

No. 20-144

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

IN RE GOOGLE LLC,
Petitioner

On Petition for a Writ of Mandamus to the United States District Court
for the Eastern District of Texas in case no. 2:19-cv-00090-JRG,
Chief Judge J. Rodney Gilstrap

REPLY IN SUPPORT OF PETITION FOR A WRIT OF MANDAMUS

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August 17, 2020

TABLE OF CONTENTS

Table of Authoritiesii

Table of Abbreviations and Conventions iii

Introduction..... 1

Argument2

 I. This case warrants mandamus review2

 A. The petition raises two important, unresolved, and
 recurring legal issues2

 B. PMC’s charges of “discovery resistance” are a baseless
 diversion5

 II. The district court’s ruling was wrong7

 A. CTDI is not Google’s agent for dealing with consumers.....7

 1. CTDI does not deal with consumers on Google’s behalf.....7

 2. The CTDI–Google agreements do not make CTDI
 Google’s agent for dealing with customers 11

 B. Refurbishment is ancillary to Google’s product business..... 13

 C. The patent service statute cannot be ignored..... 15

 III. This Court should stay non-venue proceedings in the district court..... 15

Conclusion 17

Certificate of Compliance

Certificate of Authority

Proof of Service

Note: Because PMC has not yet filed its corrected response, the page references in this reply refer to PMC’s original, uncorrected response filed on August 12.

TABLE OF AUTHORITIES

Cases	Pages
<i>Cray Inc., In re</i> , 871 F.3d 1355 (Fed. Cir. 2017)	4, 5
<i>Google Inc., In re</i> , No. 15-138, 2015 WL 5294800 (July 16, 2015)	16
<i>Google LLC, In re</i> , No. 18-152, 2018 WL 5536478 (Fed. Cir. Oct. 29, 2018)	4
<i>Google LLC, In re</i> , 914 F.3d 1377 (Fed. Cir. 2019) (Reyna, J., dissenting from denial rehearing en banc)	5
<i>Google LLC, In re</i> , 949 F.3d 1338 (Fed. Cir. 2020)	<i>passim</i>
<i>Tour Tech. Software, Inc. v. RTV, Inc.</i> , 377 F. Supp. 3d 195 (E.D.N.Y. 2019)	5
<i>Zaxcom, Inc. v. Lectrosonics, Inc.</i> , No. 17-CV-3408, 2019 WL 418860 (E.D.N.Y. Feb. 1, 2019)	4
 Statutes and Rules	 Pages
28 U.S.C. § 1400(b)	<i>passim</i>
28 U.S.C. § 1694	2, 5, 8, 15
Fed. R. App. P. 8	16
Fed. R. App. P. 21	16
Fed. R. App. P. 27(a)(1)	15
 Other Authority	 Pages
Restatement (Third) of Agency (2006):	
§ 1.01 cmt. c	8, 9
§ 2.05 cmt. c	11

TABLE OF ABBREVIATIONS AND CONVENTIONS

ACT Br.	amicus brief of ACT / The App Association, Acushnet Company, Check Point Software Technologies, Inc., DataStax, Inc., Fitbit, Inc., L Brands, Inc., Netflix, Inc., Ring Central, Inc., Unified Patents, LLC, and Vizio, Inc.
Appx ____	appendix page ____
CCIA Br.	amicus brief of the Computer and Communications Industry Association
CTDI	Communications Test Design, Inc.
Dkt.	docket entry in the district court
Eastern District	Eastern District of Texas
Flower Mound facility	CTDI's facility in Flower Mound, Texas
Google	petitioner Google LLC
<i>In re Google</i>	<i>In re Google LLC</i> , 949 F.3d 1338 (Fed. Cir. 2020)
ISA	the Inbound Services Agreement between CTDI and Google, dated August 15, 2017
ISPs	the internet service providers addressed in <i>In re Google</i>
Pet.	Google's Petition for a Writ of Mandamus
PMC	respondent Personalized Media Communications, LLC
Restatement	Restatement (Third) of Agency (2006)
Rule	Federal Rule of Appellate Procedure
SOW	Statement of Work for CTDI's "Third Party Refurbishment Services in the US," dated May 15, 2018
SuppAppx ____	supplemental appendix page ____

INTRODUCTION

PMC’s response minimizes the district court’s ruling as a fact-bound application of settled law. Far from it. The district court’s decision breaks new legal ground and—if allowed to stand—would radically expand the scope of the patent venue and service statutes, contrary to congressional intent and repeated instructions from the Supreme Court and this Court. This Court should again exercise its instructional mandamus authority and resolve two important, undecided issues that will frequently recur in the wake of *In re Google LLC*, 949 F.3d 1338 (Fed. Cir. 2020).

First, this Court should reject the district court’s extremely broad view of when a third-party service provider is an “agent” of the defendant such that the provider’s place of business is the defendant’s place of business under 28 U.S.C. § 1400(b). Under settled agency-law principles, CTDI can be Google’s “agent” *only* if it represents Google in dealings with third parties. Google handles consumer relations itself; CTDI is just an independent repair-service provider. The district court improperly focused on Google’s right to give CTDI technical instructions rather than the fact that CTDI does not represent Google vis-à-vis consumers. PMC argues that anyone whose actions may affect a defendant’s liability to consumers is the defendant’s agent, even if it has no consumer-facing role. But that theory is stunningly broad and unprecedented, and this Court should reject it now.

Second, the Court should clarify *In re Google*'s critical distinction between performing the "business" of the defendant and performing an ancillary service. Google is not in the business of repairing electronic devices; aftermarket repairs are just an ancillary aspect of Google's business designing and selling new products. If the district court's contrary view prevails, the distinction between a "business" and ancillary functions will be practically meaningless, and §§ 1400(b) and 1694 will be dramatically broader than Congress envisioned in 1897 and this Court contemplated in *In re Google*.

This Court should grant mandamus to curb the district court's latest over-extension of the patent venue and service statutes.

ARGUMENT

I. This case warrants mandamus review

A. The petition raises two important, unresolved, and recurring legal issues

As Google's petition explained (at 15-16), mandamus review is appropriate because this case raises two fundamental and recurring issues regarding the second prong of 28 U.S.C. § 1400(b) that were not resolved by *In re Google*: (1) when is an independent third-party service provider an "agent" of the defendant such that the provider's "place of business" is attributable to the defendant?; and (2) when are activities of such an "agent" the "business" of the defendant rather than an ancillary function?

PMC argues (at 11, citing Pet. 32) that “[t]he sole reason Google offers for why an appeal would be inadequate is the expense and effort associated with trial.” But what PMC cites is one of Google’s arguments for a *stay*. While the expense and effort of trial support mandamus, PMC ignores Google’s main mandamus-worthiness arguments. Pet. 15-16.

PMC next suggests (at 11) that the petition does “not even raise[]” the issue of when an independent third-party service provider qualifies as an “agent.” False. CTDI is an independent third-party service provider, and the district court held that CTDI is Google’s “agent” such that CTDI’s Flower Mound repair facility is Google’s “place of business” as well. The petition squarely challenged the legal analysis underlying that holding. Pet. 17-27.

Contrary to PMC’s suggestion (at 11-12), *In re Google* did not resolve the agency issue. This Court discussed but did not definitively decide the issue because it concluded that the ISP employees there were not conducting Google’s “business” even assuming they were Google’s “agents.” 949 F.3d at 1345-47.

Nor was the district court’s novel analysis a “garden-variety application of settled agency law,” as PMC urges (at 12). It ignored both the nature of the inquiry under § 1400(b) and fundamental tenets of agency law, including the requirement that a non-employee agent must represent its principal in dealings with

third parties. *See* Pet. 20-23; *see also* CCIA Br. (explaining the error and the practical importance of the agency issue).

PMC further argues (at 12) that there is no need to clarify when an agent's activities constitute the "business" of the defendant rather than an ancillary function because this Court already addressed that in *In re Google*. But while *In re Google* did distinguish between a main "business" and "ancillary" functions, the district court misread and misapplied that holding in a way that would disastrously affect businesses in a wide variety of industries. *See* Pet. 15-16, 28-30; ACT Br.

PMC points (at 13-14) to this Court's denial of mandamus in *In re Google LLC*, No. 18-152, 2018 WL 5536478 (Fed. Cir. Oct. 29, 2018), but that split decision highlights the need for early intervention when district courts misapply venue law: just a year later, this Court found it necessary to grant mandamus to address the same issues. 949 F.3d at 1341-43; *see also In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017). In theory, improper venue is appealable after final judgment, but "experience has shown that it is unlikely that, as these cases proceed to trial, these issues will be preserved and presented to this [C]ourt through the regular appellate process." *In re Google*, 949 F.3d at 1342.

Contrary to PMC's suggestion (at 13), other courts *have* taken different approaches. *E.g.*, *Zaxcom, Inc. v. Lectrosonics, Inc.*, No. 17-CV-3408, 2019 WL 418860, at *7-9 (E.D.N.Y. Feb. 1, 2019) (authorized service center in district did

not support venue despite extensive contractual restraints); *Tour Tech. Software, Inc. v. RTV, Inc.*, 377 F. Supp. 3d 195 (E.D.N.Y. 2019) (photographers' places of business did not support venue even though photographers were arguably representatives of defendant). Moreover, the Eastern District is one of the most popular courts for patent-infringement plaintiffs, and its error stemmed from misunderstanding and misapplying a decision by this Court. Letting the issues fester will not resolve them.

PMC sums up (at 14-15) by minimizing the decision as a “targeted ruling” based on unique facts. But the district court misconstrued the law and focused on irrelevant facts, which will produce a wave of erroneous decisions if not corrected. If this Court denies mandamus, it will invite a slew of filings in the Eastern District, just like the dozens of cases filed there after this Court's denial of mandamus in 2018. *See In re Google LLC*, 914 F.3d 1377, 1380 (Fed. Cir. 2019) (Reyna, J., dissenting from denial rehearing en banc). Instead, as in *Cray* and the other cases cited in the petition, this Court should exercise its instructional authority and nip this expansion of §§ 1400(b) and 1694 in the bud.

B. PMC's charges of “discovery resistance” are a baseless diversion

To dissuade the Court from exercising mandamus review, PMC accuses Google (at 1, 8) of “obscuring” CTDI's refurbishment work at the Flower Mound facility. That allegation is false and irrelevant.

PMC suggests that Google should have produced information about the Flower Mound facility earlier, presumably in response to a vague request for documents regarding “Google operations or server locations” in the Eastern District. *See* SuppAppx447. But Google did not and does not view the Flower Mound facility as a “Google operation.” Moreover, PMC’s early venue discovery was directed to networking equipment; nothing suggested that CTDI’s refurbishment work was a relevant “Google operation.” SuppAppx446-447; SuppAppx456-470. When PMC asked for materials specific to the Flower Mound facility, SuppAppx456, Google promptly provided them—over three weeks before PMC filed its first venue brief. In the end, PMC received everything it asked for and fully briefed its CTDI-agency theory four times.

At the hearing on Google’s motion, PMC suggested that Google had hidden the Flower Mound facility from Eastern District plaintiffs. SuppAppx529-532. That accusation was wholly unfounded: Google produced the relevant documents in both this case and an earlier Eastern District case, and the deposition transcript the parties have cited came from the earlier case. *See* Appx192-215, Appx254-276, Appx341-361, Appx383-400. Google’s counsel offered to respond to PMC’s accusations, but the district court cut him off, saying they did not matter. SuppAppx538 (“[A]t this point, I’m not concerned about how we got here. I’m concerned about ... what we have before us.”). Footnote 1 of the court’s order

then expressed concerns about PMC's allegations but concluded that this was not the place to address them. Appx005 n.1.

PMC repeats its accusations here, but this Court should recognize them for what they are: a baseless distraction from the meritorious issues in the petition.

II. The district court's ruling was wrong

Although PMC suggests otherwise (at 17-19, 35-36), Google's petition does not dispute that the Flower Mound facility is a "physical place" and a "regular and established place of business" of someone. The dispute is whether that facility is a place where *Google* conducts *its* "business." CTDI's refurbishment of Google products at Flower Mound is immaterial because (a) CTDI is an independent service provider, not Google's agent for dealing with customers, and (b) product repairs are at most ancillary to Google's business of selling new devices.

A. CTDI is not Google's agent for dealing with consumers

1. CTDI does not deal with consumers on Google's behalf

In suggesting (at 19) that Google's no-agency arguments are limited to the extent of Google's right to direct or control CTDI's actions and its ability to give CTDI interim instructions, PMC disregards the threshold legal error identified in the petition. As a matter of law, a non-employee agent must represent a principal in dealings with third parties, and CTDI indisputably does not.

Google's petition explained why a non-employee agent must represent a principal in dealings with third parties, both as a matter of agency law and because that is necessary for the agent-service provision of § 1694 to make sense. Pet. 20-21. PMC argues (at 27) that *employees* need not interact with outsiders to be agents of their employers. But that is irrelevant because the alleged agent here is CTDI, and CTDI's personnel are not Google employees. Appx317-318 (ISA § 7).

PMC next cites Restatement § 1.01 cmt. c for the premise that “a principal might employ an agent who acquires information from third parties on the principal's behalf but does not ‘deal’ in the sense of entering into transactions on the principal's account.” True: homeowners, for example, may retain real-estate agents to negotiate with and transmit offers to potential buyers but ultimately sign contracts themselves. *See id.* But even in those cases, the agent represents the principal in dealings with third parties. By contrast, service providers who “simply furnish[] advice and do[] not interact with third parties as the representative of the recipient of the advice” are *not* agents. *Id.* The same is true of service providers generally: if you're not an employee of a company and you don't represent the company in interactions with third parties, you're not an agent of that company.¹

¹ Courts have disagreed over whether, in addition to representing the principal in interactions with third parties, an agent must be capable of altering legal relations between the principal and third parties. This Court has said yes
(footnote continued on next page)

CTDI neither transacts nor interacts with customers on Google's behalf. As shown in Google's petition (at 21-22), CTDI simply receives malfunctioning devices in the mail, fixes those it can, and ships fixed products out. Google handles all communications with customers, including authorizations to return devices and receive replacements. The district court found that customers do not know that CTDI exists, much less what it does. Appx008. CTDI cannot be Google's agent for dealing with customers with whom it does not speak, negotiate, or even exchange information.

PMC is also wrong in contending (at 28-29) that CTDI is Google's agent because it "tak[es] actions that bind Google with respect to its third-party customers." The SOW does require CTDI to perform "in-warranty service" if a product appears defective rather than damaged by the consumer and CTDI is qualified to repair it. Appx146-147 (SOW § 6.9(A)). But CTDI does that behind the scenes; it makes no representations or warranties to consumers. *Google* issues warranties to consumers, and *Google* is responsible to consumers for complying. CTDI does not alter Google's warranty obligations to consumers. If CTDI makes a mistake,

(twice), and so have the 5th, 9th, and 11th Circuits. *See* Pet. 20-21. PMC cites (at 28) a 10th Circuit case that suggested otherwise in *dictum*, and the Restatement commentary suggests that an agent need not have authority to *bind* the principal if it negotiates or exchanges information on the principal's behalf. This Court need not resolve the issue here because the authorities agree that a non-employee agent must at least represent its principal in interactions with third parties.

Google may have to make amends. But that does not make CTDI Google's *agent* for dealing with customers. Companies that sell devices frequently contract out the design or manufacturing of components—often with highly detailed instructions. If the component-supplier fails to catch a defect, the end-product seller may be liable for breach of warranty. But that does not convert the component-supplier into the seller's *agent* because the component-supplier's failure does not alter the seller's warranty obligations and the component-supplier does not represent the seller in dealings with third parties.

PMC also has no valid answer to the scenario described in the petition (at 22) in which all products are returned to and shipped from Google and Google deals with CTDI on the side. PMC does not contend that CTDI's real-world mailroom function transforms CTDI into Google's agent. Instead, PMC doubles down and argues (at 29 n.7) that CTDI is Google's agent if it "makes a warranty determination which alters Google's legal rights with respect to its customers." PMC ignores CTDI's lack of consumer interaction. By PMC's logic, *any* contractor whose actions or inactions may cause liability to third parties would be an "agent" of the seller—including all arms-length vendors and delivery services. If that were true, venue would be proper wherever such contractors perform their work, and plaintiffs could serve those contractors rather than the defendant.

Congress intended the opposite: narrower, more predictable venue in patent cases. *In re Google*, 949 F.3d at 1346-47 (citing cases).

Finally, PMC’s assertion of “agency denial estoppel” (at 30) is belated and inapposite. PMC bore the burden of proof, it never argued such a theory below, and the district court did not adopt it—for good reason. According to the Restatement:

The doctrine is applicable when the person against whom estoppel is asserted has made no manifestation that an actor has authority as an agent but is responsible for the third party’s belief that an actor is an agent and the third party has justifiably been induced by that belief to undergo a detrimental change in position.

Restatement § 2.05 cmt. c. Here, according to PMC and the district court, consumers do not even know CTDI exists. They may understand that they are sending their devices to “an authorized repair partner” of Google, Appx221, but there was no evidence that consumers believe CTDI is Google’s agent, much less that consumers detrimentally change their position as a result. Even if there were, the result would be an estoppel as between Google and *consumers*, not Google and *PMC* (a non-consumer).

2. The CTDI–Google agreements do not make CTDI Google’s agent for dealing with customers

PMC’s reliance on the contracts between CTDI and Google is unavailing because their terms do not establish that CTDI is Google’s agent in dealing with

consumers. The ISA expressly states that CTDI is *not* Google’s agent, Appx324 § 12.12, and the SOW is not contrary.

The SOW does specify the services CTDI must provide, the protocols it must follow, the quality controls it must implement, and the reports it must make. But none of that makes CTDI Google’s *agent for dealing with consumers*. Again, PMC stresses, and the district court found, that CTDI’s work is invisible to consumers.

PMC primarily relies on the “interim instructions” principle. To begin with, however, much of what PMC describes (e.g., at 4-6) involves original contractual provisions, not *interim* instructions. Of the provisions that contemplate updated instructions, none involves interactions with consumers. Google does not instruct CTDI on how to respond to requests, inquiries, or problems of particular consumers because CTDI does not speak to consumers—Google handles that itself. The bullet-pointed provisions cited by PMC (at 20-21) involve protocols for internal operations such as levels of refurbishment, what part-numbering system to use, where materials should be stored, which operating system to install, what functionality should be tested, etc. Google updates those protocols because product lines evolve and Google and CTDI figure out more efficient ways to operate over time. Only one cited provision involves something a consumer might see, and that involves technical aspects of packaging labels for repaired products (e.g., barcodes,

serial numbers, and product descriptions). CTDI does not communicate with consumers about its repair work, Google’s warranty obligations, or anything else.

Ultimately, PMC relies on Google’s authority to request changes in CTDI’s technical services to *Google*. But those are not interim instructions relating to any agency vis-à-vis *consumers*. Moreover, even as between Google and CTDI, the changes Google may request are “minor.” Under the SOW, CTDI need not accede to any “Material Change”—one that would “have an adverse effect on [CTDI’s] costs in providing the Services or the cost of [CTDI’s] performance or the time required to provide the Services.” Appx154 (SOW § 6.15(B)). It would be absurd for proper venue to turn on a defendant’s ability to request minor changes over the course of a multi-year contract with an independent technical-service provider that does not interact with consumers.

B. Refurbishment is ancillary to Google’s product business

CTDI’s product-refurbishment services are immaterial for a second, independent reason: under *In re Google*, 949 F.3d at 1346-47, the defendant must conduct its “business” within the district, and—like server maintenance—product repair is only ancillary to Google’s relevant business.

PMC contends (at 32) that CTDI’s services include the “actual producing, storing, and furnishing to consumers of what [devices] the business offers” (citation omitted). But the relevant Google business focuses on designing and selling

new devices. Repairing products in the aftermarket is quite different from designing and selling new products. PMC argues that CTDI repairs and refurbishes the same products that Google sells to consumers. But CTDI neither designs nor makes nor sells Google products, and it warehouses them only in connection with its repair services. Appx150 (SOW § 6.11).

By analogy, consider car-repair shops. Such shops repair and temporarily store damaged cars, sometimes pursuant to warranty contracts with automakers or indemnity contracts with insurance companies. But that does not make car repair the business of automakers and insurance companies. Car-repair shops are in the business of car repair; automakers are in the business of designing, making, and selling new cars; and insurance companies are in the business of providing insurance. Each is a different business.

Here, Google's business is designing and selling new devices, and CTDI's business is repairing devices in the aftermarket. PMC asserts (at 33) that "after-market warranty-repair is essential to Google's hardware devices business." But that is attorney argument, not evidence, and PMC's logic proves too much. It makes no sense to say that local authorized car-repair shops conduct the business of GM or Ford. And no one would say that companies that ship Google products or provide Google with office supplies are in the hardware-device business even though such support may be "essential" in some sense.

PMC distinguishes *In re Google* (at 33) on the ground that the ISPs were not “customer-facing.” But neither is CTDI, according to PMC itself. In actuality, PMC’s argument defies *In re Google*. This Court stressed the Supreme Court’s repeated refusal to read the patent-venue statute broadly and the need for predictable venue rules. 949 F.3d at 1346-47. Treating aftermarket repairs as the business of original sellers would greatly expand § 1400(b) to produce results that Congress did not contemplate in 1897 and companies today do not expect.

C. The patent service statute cannot be ignored

PMC brushes off § 1694 (at 33-35), but it is important because it allows plaintiffs to serve non-party agents instead of defendants. The district court’s ultra-broad view of agency thus raises serious practical and due-process issues. *See* ACT Br. 16-17. Allowing plaintiffs to serve non-consumer-facing CTDI personnel is just as problematic as allowing plaintiffs to serve non-consumer-facing ISP technicians.

III. This Court should stay non-venue proceedings in the district court

PMC’s objections to staying district-court proceedings pending this Court’s decision have no merit.

PMC’s procedural complaints (at 36-37) fail because this is a mandamus petition, not a motion in connection with an appeal. Rule 27(a)(1) provides that “[a]n application for an order or other relief is made by motion *unless these rules*

prescribe another form” (emphasis added). Rule 21 prescribes another form: parties may seek mandamus. Google’s mandamus petition asks this Court to overturn the district court’s denial of Google’s motion to dismiss or transfer for improper venue, and Google appropriately seeks a stay of district-court proceedings to ensure that the case is not tried in an improper venue. Mandamus petitioners often make ancillary stay requests, and this Court grants them when appropriate. *E.g., In re Google Inc.*, No. 15-138, 2015 WL 5294800, at *2 (July 16, 2015) (directing district court to rule on venue motion within 30 days and to “stay all other proceedings pending final resolution of the transfer motion”). PMC also relies on Rule 8, but that rule is inapposite by its terms because it governs motions for stays of a judgment or order “[p]ending [a]ppeal.” This is not an appeal; it is an original writ petition that seeks a stay of continuing district-court proceedings.

PMC’s arguments on the merits (at 37-39) apply the wrong test and reach the wrong conclusion. The four-factor test governing stays pending *appeal* does not apply in mandamus cases, but Google satisfies it anyway. Google *is* likely to succeed on the merits of its petition. Google *does* face irreparable harm because the purpose of § 1400(b) is to avoid subjecting defendants to trial in venues to which they have no significant connection. PMC would *not* be harmed by a brief stay: it waited a decade to sue, and it seeks only damages, not an injunction. And

there is no public interest in rushing to trial in an improper venue—especially during a pandemic.

PMC tries (at 38) to blame Google for the 13-month pendency of Google’s motion. But Google did not delay: it filed its venue motion early and wanted it resolved quickly. The district court instead took ten months to rule after briefing was completed, and pushed the case forward in the meantime. Google and Netflix both filed requests for ruling, Dkts. 179, 211, to no avail. Google could not have done anything more without antagonizing the district court.

Finally, although PMC opposes an interim stay, PMC does *not* dispute that other aspects of the case should be stayed if this Court grants writ relief. Rightly so: the district court should not conduct the imminently-scheduled trial while the propriety of venue in the Eastern District remains unresolved.

CONCLUSION

The Court should grant a writ directing the district court to vacate its ruling that venue is proper, and the case should be stayed until venue is properly resolved.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This reply complies with the type-volume limitation of Federal Rule of Appellate Procedure 21(b). The body of the reply contains 3,886 words, excluding the portions exempted by rule.

2. This reply complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft® Word and 14-point Times New Roman type.

Dated: August 17, 2020

/s/Dan L. Bagatell

Dan L. Bagatell

CERTIFICATE OF AUTHORITY

I certify that I have the authority of my co-counsel Charles K. Verhoeven to file this document with his electronic signature.

Dated: August 17, 2020

/s/Dan L. Bagatell

Dan L. Bagatell

PROOF OF SERVICE

I certify that on August 17, 2020, I caused a paper copy of this document to be sent to the presiding district judge at the following address:

Chief Judge J. Rodney Gilstrap
United States District Court for the Eastern District of Texas
Sam B. Hall, Jr. Federal Building and United States Courthouse
100 E. Houston Street
Marshall, Texas 75670

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct.

Dated: August 17, 2020

/s/Dan L. Bagatell

Dan L. Bagatell