Miscellaneous Docket No. 20-135

IN THE
United States Court of Appeals for the Federal Circuit

IN RE APPLE INC.,

Petitioner.

On Petition for Writ of Mandamus to the
United States District Court for the
Western District of Texas
No. 6:19-cv-00532-ADA, Hon. Alan D Albright

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

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UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 20-135

Short Case Caption In re Apple Inc.

Filing Party/Entity Apple Inc.

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I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 12/29/2020

Signature: /s/ Melanie L. Bostwick

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1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities.
☐ None/Not Applicable	☐ None/Not Applicable	☐ None/Not Applicable
Apple Inc.	Apple Inc.	None

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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INTRODUCTION

Uniloc seeks a remedy this Court cannot provide. It argues that the panel applied an insufficiently deferential standard in issuing a writ of mandamus. But the panel adhered to the en banc precedent of the regional circuit—which Uniloc barely mentions, and which this Court cannot change. Regardless, Uniloc provides no reason to disturb this standard. The panel gave substantial deference to the district court. But it identified numerous clear errors that combined to make the denial of transfer a clear abuse of discretion. Uniloc acknowledges that the panel's decision is in line with the precedent of this Court, and it identifies no conflict with Supreme Court or Fifth Circuit authority. The Court should decline to revisit the panel's sound ruling.

BACKGROUND

This case is one of 24 patent-infringement actions that Uniloc filed against Apple in the Eastern or Western District of Texas. The district courts transferred 21 of those cases, finding the Northern District of California to be clearly more convenient. *See* Appx85-87. Two cases remain stayed in the Eastern District pending appeals from inter partes review proceedings. Appx85-87.

This is the twenty-fourth case. Uniloc originally filed it in the Austin Division of the Western District of Texas, but voluntarily dismissed the case during transfer briefing. Appx86. The following year, Uniloc refiled in the Waco Division. As in the prior version of this case, Uniloc accuses Apple of infringing U.S. Patent No. 6,467,088. Appx14-16; Appx24. Uniloc's infringement contentions target the software-update functionality in devices running iOS and macOS. Appx16.

Like the other cases, this case has strong connections to the Northern District of California and little connection to the Western District of Texas. Apple therefore moved to transfer under 28 U.S.C. § 1404(a). Appx78-104. Apple submitted evidence showing that nearly all sources of proof regarding the accused products and technology are in the Northern District of California; all Apple employees likely to be witnesses are in that district; and several third-party witnesses (including Uniloc's board members) would be subject to compulsory process there. Pet. 18-33. Apple also showed that the Northern District of California has a strong local interest because the accused products

were designed and developed there and all of Apple's relevant employees are based there. Pet. 34-37.

In contrast, despite receiving extensive venue discovery, Uniloc could not identify any relevant witnesses in the district or any other connection between the Western District of Texas and this dispute. Uniloc instead emphasized Apple's general presence in Austin and tangential connections to the district, such as content-delivery networks (not mentioned in the infringement contentions) and a third-party that physically assembles the Mac Pro desktop computer (but does nothing with the accused software). Pet. 19-21.

Six months after Apple moved to transfer, and having denied Apple's requested stay, the district court held a hearing on the motion and announced it would deny transfer and issue a written decision soon. Appx10; Appx296. But more than a month passed without that written decision. During that time, the case progressed quickly—the district court held a *Markman* hearing, issued claim constructions, held a discovery hearing, and issued a decision on a protective order. Pet. 9-10.

Given the swift progression of the case, and after inquiring about the status of a written order, Apple sought mandamus, both to prevent the case from continuing to move forward in an inconvenient venue and to avoid being penalized for delay. *See* Dkt. 41 at 1 n.1. Apple's petition showed that there was no rational basis for refusing to transfer this case. Pet. 17-40.

After Apple filed its petition, the district court issued a Notice stating it would enter an order within a week, Dkt. 12 (Ex. A), followed by its written order denying transfer, SAppx1. The order confirmed that the district court's decision to keep the case was not based on relevant witnesses and evidence in the Western District of Texas. Rather, it was based on Apple's general business activities in Austin, though not the activities implicated in this case. SAppx6. Although it weighed the sources of proof factor "slightly" pro-transfer because "the greater balance of witnesses … are located within NDCA," SAppx21-22, the district court weighed the practical-problems factor "heavily against transfer" because of the "significant steps" taken while the transfer motion was pending (and even after it was orally decided), SAppx29-30. The district court also weighed the court-congestion factor against

transfer because it had set a trial date. SAppx30-31. Meanwhile, it found the compulsory-process, witness-convenience, and local-interest factors neutral, despite acknowledging that "most relevant party witnesses are located in NDCA" and despite failing to identify any meaningful link between Apple's Austin campus and this litigation. SAppx21; SAppx24; SAppx27; SAppx32-33.

Uniloc filed its opposition after the district court's order issued. Apple addressed the district court's reasoning in its reply brief—the first opportunity to do so. Uniloc then sought (and received) leave to file a sur-reply. Following oral argument, a divided panel of this Court granted Apple's petition and issued a writ of mandamus directing the district court to transfer this case to the Northern District of California. Op. 1-21.

REASONS FOR DENYING THE PETITION

I. There Is No Basis For En Banc Rehearing.

Uniloc identifies nothing in the majority's opinion that meets the demanding criteria for en banc review. *See* Fed. R. App. P. 35(a). There is no conflict with Supreme Court precedent, and Uniloc does not even attempt to show a conflict with Fifth Circuit or Federal Circuit

precedent. Indeed, Uniloc barely acknowledges the en banc Fifth Circuit precedent that governs this Court's review.[1] And it repeatedly complains that the majority *followed* Federal Circuit precedent applying Fifth Circuit law.

Uniloc argues that mandamus is ill-suited for discretionary issues like transfer, but the Supreme Court, the Fifth Circuit, and this Court have held otherwise. *See La Buy v. Howes Leather Co.*, 352 U.S. 249, 250 (1957); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1318 (Fed. Cir. 2008); *In re Volkswagen of Am., Inc.*, 545 F.3d 304 (5th Cir. 2008) (en banc) ("*Volkswagen II*").

Although Uniloc argues that the panel's ruling "conflicts with Supreme Court decisions," Reh'g Pet. 1, it identifies no such conflict. Uniloc relies heavily on *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379 (1953), but that case involved mandatory transfer under § 1406(a), not discretionary transfer under § 1404(a). The Supreme Court agreed with the Fifth Circuit that "in the circumstances of [that]

[1] Uniloc's omission is notable given its (baseless) assertion that the panel's ruling conflicts with *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1574-75 (Fed. Cir. 1984), which requires adherence to regional circuit law. *See* Reh'g Pet. vi, 9-10.

case the writ was inappropriate." *Id.* at 382. But it confirmed the appellate court's "'power in a proper case to issue such writs'" if there is a "clear abuse of discretion." *Id.* at 383-84 (citation omitted). This Court has followed *Bankers Life* and imposed a higher standard for mandamus relief in § 1406(a) cases. *See In re HTC Corp.*, 889 F.3d 1349, 1352-53 (Fed. Cir. 2018).

But this is a § 1404(a) case. The Fifth Circuit set the standard for such cases in *Volkswagen II*, following the Supreme Court's guidance in *Bankers Life*. The Fifth Circuit acknowledged the "admonition … not to issue a writ to correct a mere abuse of discretion." *Volkswagen II*, 545 F.3d at 310. But "[t]he inverse of the admonition, of course, is that a writ is appropriate to correct a clear abuse of discretion." *Id.* The court then confirmed that a transfer denial under § 1404(a) is amenable to mandamus review and granted mandamus to order transfer. *Id.* at 309-10.[2]

[2] None of the other Supreme Court cases cited by Uniloc calls *Volkswagen II* into doubt. *Allied Chemical Corp. v. Daiflon, Inc.*, did not involve transfer at all. 449 U.S. 33, 36 (1980) ("A trial court's ordering of a new trial rarely, if ever, will justify the issuance of a writ of mandamus."). The others did not involve mandamus. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (addressing

This Court has consistently followed this precedent in reviewing mandamus petitions arising from Texas district courts' orders. *See, e.g.*, *In re HP Inc.*, 826 F. App'x 899, 901 (Fed. Cir. 2020); *In re Toyota Motor Corp.*, 747 F.3d 1338, 1339 (Fed. Cir. 2014); *In re Microsoft Corp.*, 630 F.3d 1361, 1363 (Fed. Cir. 2011); *In re Acer Am. Corp.*, 626 F.3d 1252, 1254 (Fed. Cir. 2010); *In re Genentech, Inc.*, 566 F.3d 1338, 1341 (Fed. Cir. 2009); *TS Tech*, 551 F.3d at 1319. The panel likewise followed this precedent in deciding that mandamus was warranted here because "the district court clearly abused its discretion." Op. 7; *see also* Op. 3-4, 21.

Uniloc does not even try to show a conflict between the panel's ruling and the *Volkswagen II* standard. Nor does it offer a basis for this Court to revisit the Fifth Circuit's law (or this Court's longstanding application of that law). When a panel's opinion "is not viewed as having changed the law," disagreement with that opinion "is not a sufficient reason for en banc review." *Dow Chem. Co. v. Nova Chems.*

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collateral-order doctrine); *Stewart Org. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988) (holding federal law governs transfer based on forum-selection clause); *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 257 (1981) (applying "clear abuse of discretion" standard to forum non conveniens dismissal).

Corp. (Canada), 809 F.3d 1223, 1228 (Fed. Cir. 2015) (Moore, J., concurring in denial of rehearing).

II. The Panel Applied The Deferential Review Required Under Fifth Circuit Law.

Uniloc cannot show that the panel's decision conflicts with Fifth Circuit law, because the majority complied with *Volkswagen II* at every turn.

Although its petition is aimed squarely at the standard for reviewing a district court's transfer decision, Uniloc never acknowledges that standard. As explained above, the Fifth Circuit permits mandamus "to correct a clear abuse of discretion" in § 1404(a) decisions. *Volkswagen II*, 545 F.3d at 310. "'A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts.'" *Id.* (quoting *McClure v. Ashcroft*, 335 F.3d 404, 408 (5th Cir. 2003)). Because an abuse of discretion must be "clear," mandamus will issue only if "these types of errors … produce a patently erroneous result." *Id.*[3] To

[3] Contrary to amicus U.S. Inventor's claim (at 11), the Fifth Circuit *has* granted mandamus based on misapplications of law to fact—indeed, it did so in *Volkswagen II*. 545 F.3d at 316-18.

determine whether such errors have occurred, the reviewing court must "review[] carefully the circumstances presented to and the decision making process used by" the district court. *In re Horseshoe Entm't*, 337 F.3d 429, 432 (5th Cir. 2003) (quoted approvingly in *Volkswagen II*).

The majority recited this test in full. Op. 3. And it applied it faithfully, identifying multiple clear errors of law and misapplications of law to fact that combined to produce a "patently erroneous result." Op. 21. Specifically, the panel held that the district court: (1) misapplied Fifth Circuit law to the facts by crediting the alleged convenience of witnesses outside either forum, who must travel significant distances regardless of transfer, Op. 12; (2) legally erred by advancing the case on the merits after Apple's transfer motion was filed—and decided orally—and then weighing those merits-related steps against transfer, Op. 14; (3) misapplied law to fact by counting the practical-problems factor against transfer despite the 21 related cases pending in the transferee forum, Op. 15-16; (4) misapplied law to fact by relying heavily on the mere fact that it had set an "aggressive" trial date, Op. 16; and (5) misapplied law to fact by treating Apple's "general contacts" with

the Western District of Texas, "untethered to the lawsuit," as important to the local-interest factor, Op. 17-18.[4]

The panel held that these errors "accumulate[d] to produce a patently erroneous result" justifying a writ of mandamus. Op. 20. Uniloc makes no attempt to address this accumulation. Instead, Uniloc levels a series of discrete attacks against the majority's reasoning. Each is misdirected.

First, the panel did not "[i]mproperly [c]ollapse[]" the three-part mandamus test. Reh'g Pet. 6-7. It recognized, consistent with precedent, that there is no adequate alternative to a mandamus petition challenging a transfer denial. Op. 3-4; *Volkswagen II*, 545 F.3d at 319 (deeming this "indisputable"). And it further recognized that mandamus is appropriate to prevent procedural injury when the denial of transfer amounts to a clear abuse of discretion. Op. 4. Notably,

[4] The majority also determined that the district court erred in its analysis of the "sources of proof" factor but did not rely on these errors in issuing the writ. *See* Op. 7-10.

Uniloc did not contest either of these prongs of the mandamus standard in its panel briefing.[5]

Second, the panel did not rule on "grounds never raised below." Reh'g Pet. 7-8. The *district court* did. Uniloc relied on the inventors and prosecuting attorney, who reside outside either forum, only for the compulsory-process factor. Appx187. Apple responded that the Western District of Texas did not have subpoena power over any identified third parties. Appx204. The district court instead considered these individuals under the "willing witnesses" factor, SAppx27, and Apple addressed that error. Reply 11. The other issues cited by Uniloc (at 8) were likewise raised first in the district court's written opinion; Apple similarly addressed them in reply. *See* SAppx29-33; Reply 13-18.

Third, the panel did not grant mandamus based on new law. Reh'g Pet. 8-9. *In re Adobe Inc.*, 823 F. App'x 929, 932 (Fed. Cir. 2020), did not announce any new principle; it relied on this Court's prior precedential ruling in *Genentech*. The *Dropbox* remand Uniloc cites was

[5] Contrary to Uniloc's suggestion (at 7), the panel *did* address Apple's "conduct" and found it appropriate, Op. 4-6, notwithstanding Uniloc's suggestion that Apple should have waited "at least four to six months" for a written order before seeking mandamus, Oral Arg. 23:03.

based not on *Adobe* announcing new law, but rather on *Adobe* changing the relevant facts in Dropbox's own related case. *In re Dropbox, Inc.*, 814 F. App'x 598, 599 (Fed. Cir. 2020) (remanding because district court had cited co-pendency of now-transferred Adobe litigation in denying Dropbox transfer).

Fourth, the panel did not hold that the Fifth Circuit's "100-mile rule does not apply as stated when a witness is traveling by airplane." Reh'g Pet. 9. That rule recognizes that witnesses are increasingly inconvenienced when they must travel more than 100 miles to attend trial, and it favors the ability of witnesses "to testify at home." *Volkswagen II*, 545 F.3d at 317. It makes no sense to apply that rule to witnesses who must travel regardless of venue, and the Fifth Circuit has never done so. The panel also declined to do so, instead giving appropriate weight to the many California-based witnesses who will be spared *any* travel by transfer. Op. 10-13. The panel also adhered to Fifth Circuit law by requiring a clear abuse of discretion, not merely "reversible error." Reh'g Pet. 10; *see supra* 9-10; *In re Lloyd's Register N. Am., Inc.*, 780 F.3d 283, 290-93 (5th Cir. 2015) (following *Volkswagen II* and granting mandamus).

Fifth, the panel did not "[i]mpose[]" its own judgment. Reh'g Pet. 10-11. Uniloc asserts that the majority "did not find that the [district] judge failed to analyze the factors or that his analysis was unreasonable." *Id.* at 10. But that is not the standard. And Uniloc's lone example of a supposed "[l]ack of deference," *id.* at 11, is no such thing. Discussing the local-interest factor, the majority correctly noted that the district court had not relied on Apple's "CDN servers in Dallas, Texas." Op. 19; *see* SAppx31-33. Of course it didn't; Dallas is not in the Western District and thus not "local." The district court did, however, mention Austin-based employees who work on Apple's CDN, even though CDNs are not at issue in this case. Reply 7. But it provided no "reason to give these employees and this activity weight above and beyond other relevant employees," particularly since it agreed that "most relevant party witnesses resided" in Northern California. Op. 19-20 & n.8.

Finally, the panel did not intrude on the district court's docket-management authority. It applied Fifth Circuit precedent—which Uniloc ignores—requiring district courts to give transfer motions "top priority." *Horseshoe Entm't*, 337 F.3d at 433 (granting mandamus and

ordering transfer); *see* Op. 5. The majority did not mandate a stay in all cases, nor have parties "characterized [its] holding as requiring a stay," Reh'g Pet 12. Apple sought a stay *after the writ of mandamus issued*, because Uniloc wanted this case to proceed in the Western District while it sought rehearing. Dist. Ct. Dkt. 109 (Nov. 16, 2020); *see also* Dkt. 27 at 2-3, *10Tales, Inc. v. TikTok, Inc.*, No. 6:20-cv-00810-ADA (W.D. Tex. Dec. 4, 2020) (requesting stay of substantive deadlines but not suggesting stay is required).

III. The Panel Decision Does Not Implicate Any Exceptionally Important Question Requiring En Banc Intervention.

Uniloc's petition attempts to show that this case implicates "precedent-setting questions of exceptional importance." Reh'g Pet. vi; Fed. Cir. R. 35(b)(2). As demonstrated above, there is no precedent-setting question; the panel followed long-established Fifth Circuit law. Uniloc's petition fails the second half of the en banc test as well. Uniloc identifies no issue of such exceptional importance that it warrants this Court's en banc review of regional circuit law.

Uniloc attempts to show otherwise by warning of a deference crisis in patent cases. It argues that too many litigants are filing mandamus petitions challenging § 1404(a) rulings, and that this Court is granting

too many. Reh'g Pet. 2, 14-17. But there is no crisis. Writs of mandamus in transfer cases remain the rare exception. Uniloc suggests that district courts resolve hundreds of transfer motions in patent cases each year. In contrast, only fifteen § 1404(a)-related mandamus petitions have been filed with the Court this year, indicating that parties are reserving mandamus requests for the small fraction of cases where it may be warranted.[6] And the Court has granted the writ in only five of those cases.[7] (The basis for Uniloc's calculation of a "grant rate … over 50%," Reh'g Pet. 16, is unclear.)

Uniloc also tries to manufacture concern by suggesting that this Court's mandamus practices changed in December 2008, when—according to Uniloc—"a shift occurred" and "this Court began routinely granting convenience-mandamus petitions." Reh'g Pet. 2.

What happened in 2008? Two critical things, both of which Uniloc avoids mentioning. First, and most obviously, the Fifth Circuit issued its en banc ruling in *Volkswagen II* in October 2008, confirming that "mandamus is an appropriate means of testing a district court's

[6] Case Nos. 20-111, -112, -113, -115, -126, -127, -129, -130, -132, -134, -135, -140, -142; 21-103, -105.
[7] Case Nos. 20-126, -135, -140, -142, 21-105.

§ 1404(a) ruling," 545 F.3d at 309. To the extent this Court had previously expressed hesitance about its mandamus authority, *see* Reh'g Pet. 1-2, the law was now crystal clear for cases arising from the Fifth Circuit.

Less obviously, but just as significantly, any uptick in transfer mandamus filings since 2008 can be explained as the natural consequence of patent plaintiffs beginning to file in overwhelming numbers in venues with little or no connection to the claims at issue—such as the Eastern District of Texas. In 2000, the Eastern District had 23 *total* patent case filings, tying for 29th place among federal judicial districts.[8] That number gradually crept upward until it exploded in the late 2000s. The Eastern District became the number one patent docket in the country in 2007, with 369 new cases filed. Except for a brief dip in 2009, it remained in the top spot until 2018, following the Supreme Court's *TC Heartland* decision. *See TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017).

[8] All statistics in this paragraph were obtained using Westlaw Monitor Suite, Patent (830) case filings by court, 2000-2020, and are available upon request.

The Eastern District's rise was not due to any increase in patent infringement in that district; it happened "despite a near complete dearth of large companies with headquarters in the district." Jonas Anderson, *Reining in a "Renegade" Court*, 39 Cardozo L. Rev. 1569, 1571 (2018); *see also* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 248 (2016) (noting Eastern District "emerged in the mid-2000s as the favored forum, despite lacking major population, corporate, or technology centers"). There *was* a venue-related shift in 2008, but mandamus wasn't the problem—mandamus was a modest solution to the rise in filings in unrelated venues, and by definition it captured only *clear* abuses of discretion in transfer rulings, leaving ordinary abuses of discretion without remedy.

Since *TC Heartland*, and since the Waco Division became available for patent filings in 2018, the Western District has seen a similar pattern. Plaintiffs filed 34 patent cases in the Western District in 2016;[9] just four years later, that number has increased more than *twentyfold*, to 837 new cases so far in 2020—740 of them in the Waco

[9] Statistic obtained through Westlaw Monitor Suite. *See supra* n.8.

Division alone.[10] Venue may be proper in the Western District, due to many companies' operations in Austin. But it is often inconvenient, particularly when (as here) the plaintiff accuses technology designed, developed, and supported in California. Uniloc suggests that the panel's opinion "borders on circumventing Congress's venue preferences" under § 1400(b). Reh'g Pet. 16. But Congress also expressed its preference for convenience-based transfer in § 1404(a). As the panel determined, Uniloc "improperly conflate[s]" the two statutes. Op. 19; *see* Reply 3. Uniloc has no response.

There is nothing wrong with patent litigants, facing trials in venues with little connection to the claims, seeking mandamus in extreme cases like this one. Nor is there any basis for Uniloc's suggestion that defendants may be misrepresenting the inconvenience of trial in Texas or taking advantage of supposed "uncertainty surrounding convenience." Reh'g Pet. 15-16. However "unlikely" Uniloc may find it, it is simply the truth that Apple's knowledgeable witnesses

[10] Statistics obtained through Docket Navigator search and available upon request. *See also, e.g.*, *How the West Became the East: The Patent Litigation Explosion in the Western District of Texas*, PatentlyO (Sept. 15, 2020), https://patentlyo.com/patent/2020/09/litigation-explosion-district.html.

are primarily in Cupertino, and not in Austin, due to the particular operations that take place at each location. Venue discovery confirmed that this is true in this case. Pet. 7-8, 18-19. And the record shows it is historically true: 87% of the 71 times Apple employees have testified live in patent trials since 2013—in districts across the country, and called by either side—the employee has come from Northern California. None have come from Texas. Appx205.

Uniloc's insinuation about Roku is equally baseless. Roku made clear that (like Apple) it has an Austin office, but the employees who work on the relevant functionality are in California. Dkt. 56 at 14. Trial did not "expose[]" any untruth. Reh'g Pet. 15. Rather, the same Austin-based witness who signed Roku's declaration supporting transfer testified at trial that the employees who work on the accused technology are in California. *See* Dkt. 52-1, 57-1, 401 at 90, *MV3 Partners LLC v. Roku, Inc.*, No. 6:18-cv-00308-ADA (W.D. Tex.).

CONCLUSION

The Court should deny rehearing.

December 29, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on December 29, 2020.

I certify that all counsel of record in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

A copy of the foregoing was served upon the district court judge via FedEx:

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CERTIFICATE OF COMPLIANCE

The response complies with the type-volume limitation of Fed. Cir. R. 35(e)(2) because this response contains 3897 words.

This response complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this response has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Century Schoolbook 14-point font.

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