

Nos. 2021-139, -140

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT**

IN RE: SAMSUNG ELECTRONICS CO., LTD.,
SAMSUNG ELECTRONICS AMERICA, INC.,
LG ELECTRONICS INC., LG ELECTRONICS USA, INC.,

Petitioners

On Petitions for Writ of Mandamus to the United States District
Court for the Western District of Texas in Nos. 6:20-cv-00257-ADA
and 6:20-cv-00259-ADA, Judge Alan D. Albright.

**CORRECTED NONCONFIDENTIAL REPLY IN SUPPORT OF
PETITIONS FOR WRIT OF MANDAMUS**

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May 12, 2021

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INTRODUCTION

Plaintiffs' opposition does not dispute that Plaintiffs subdivided rights in the Asserted Patents for the purpose of defeating transfer motions they expected from Petitioners, the other defendants they sued in the same court on the same day, and later defendants. Instead, Plaintiffs speculate that *some* entities might have legitimate reasons for assigning geographically limited rights in a patent. That is irrelevant. The question here is: when a geographic division of rights is transparently and brazenly designed to defeat the normal operation of venue rules, must a court credit that effort in assessing a motion to transfer? The answer is "no." Venue statutes "should be construed to prevent parties who are opposed to a change of venue from defeating a transfer which, but for their own deliberate acts or omissions, would be proper, convenient and just." *Van Dusen v. Barrack*, 376 U.S. 612, 625 (1964). This Court has authority to disregard Plaintiffs' pre-filing machinations on the facts of these cases.

In any event, even if those efforts to defeat transfer are not disregarded, they are unavailing under the plain text of 28 U.S.C. § 1400(b) and the allegations in these cases. Section 1400(b) focuses on whether the "action[s]" allege that the "defendant[s] [have] committed acts of infringement" in the NDCA, and Plaintiffs' Amended Complaints indisputably allege that. 28 U.S.C. § 1400(b). Plaintiffs argue that the transfer analysis should focus only on their single-plaintiff, unserved

original complaints, rather than the Amended Complaints. But it is hornbook law that an amended complaint supersedes an original, and Plaintiffs cite no support for an exception to that rule in this context.

Plaintiffs’ defense of the district court’s analysis of the § 1404(a) convenience factors fails as well. Plaintiffs do not dispute that—contrary to the district court’s finding—there are *no* relevant witnesses in the WDTX and over a dozen potential witnesses in the NDCA. Nor do they defend the district court’s conclusion that the compulsory-process factor was neutral. And though they do argue that the convenience of witnesses who are distant from both the NDCA and the WDTX is material, this Court has consistently—and very recently—rejected that proposition. Like the district court, Plaintiffs place great weight on the fact they filed other suits involving the same patent family in the WDTX. But this Court has rejected that rationale as well, in part because it would encourage tactical suits to manipulate venue. Put simply, Plaintiffs and the district court fail to identify any reasoned basis under this Court’s precedent for keeping these suits in the WDTX.

Finally, Plaintiffs’ assertion that Petitioners have engaged in “gamesmanship” of their own is baseless. Petitioners filed their Petitions about a month after the district court’s ruling after due deliberation before asking for extraordinary relief, which is typical of petitions this Court has granted. Given

Plaintiffs' transparent efforts to keep these cases in the WDTX regardless of the convenience of the parties and witnesses and the likelihood the scheme will be repeated if not addressed now, mandamus relief is warranted.

ARGUMENT

I. Plaintiffs Could Have Brought These Suits In The Northern District Of California

There are two independent reasons why Plaintiffs could have brought these suits in the NDCA. First, the Court can and should disregard Plaintiffs' pre-filing manipulation. Second, the Court can and should interpret 28 U.S.C. § 1400(b) according to its plain text to turn on "where the defendant has committed acts of infringement" in an "action," not on a specific plaintiff's contractual rights.

Plaintiffs' arguments against these reasons are meritless.

A. Plaintiffs' Attempt To Manipulate Venue Should Be Disregarded

Plaintiffs do not dispute their pre-filing maneuvers: they concededly subdivided rights to the Asserted Patents just 11 days before filing these suits and others with Ikorongo Texas as the sole plaintiff, only to have Ikorongo Technology join the suits the very next day and without ever serving the initial complaints.

Pets. 7-9, 16-17. Plaintiffs also do not dispute that their sole reason for doing so was "in anticipation of opposing transfer on the basis the district court allowed."

Id. at 16.

Instead, Plaintiffs discuss hypothetical reasons why *other* entities might legitimately assign geographically limited patent rights, such as for patents on a “new method of extracting oil from the earth” or “reducing emissions in automobiles.” Opp. 23-24. But none of their hypotheticals explain why any entity would assign patent rights that divide up counties within specific judicial districts or strategically sequence the filing of complaints as Plaintiffs did here. *Id.* at 23. And even if there were a reasoned basis to divide rights in certain circumstances, Plaintiffs do not even pretend that *their* pre-filing assignments served any such purpose. Ruling for Petitioners on this anti-manipulation ground would not harm plaintiffs with legitimate geographic patent rights, and their legitimate interest in remaining in a particular district (as well as that district’s own legitimate interest) would rightfully be considered in the § 1404(a) analysis. Notably, Plaintiffs here point to no such legitimate interests in their § 1404(a) analysis. *See, e.g.*, Opp. 37-38 (addressing “local interest” factor without even mentioning Ikorongo Texas).

Plaintiffs’ distinction of *Hertz Corp. v. Friend*, 559 U.S. 77 (2010), on the ground that the Court was concerned with “phony principal places of business,” whereas “geographic limitation of patent rights is a real and important vehicle” illustrates their basic error: when either is done “in anticipation of litigation” in an “attempt at manipulation,” courts assessing venue need not credit them. *In re Microsoft*, 630 F.3d 1361, 1363 (Fed. Cir. 2011). In short, Plaintiffs offer no

legitimate reason for their pre-filing assignment of geographically limited patent rights. To the contrary, they do not dispute that their purpose was to manipulate venue.

As the Petitions demonstrated, courts have consistently rejected similar attempts by plaintiffs to manipulate venue and jurisdictional rules. *See* Pets. 12-15 (citing, *e.g.*, *Van Dusen*, 376 U.S. 612; *In re Microsoft*, 630 F.3d 1361; *In re Zimmer Holdings Inc.*, 609 F.3d 1378 (Fed. Cir. 2010); *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333 (Fed. Cir. 2009); *Hertz*, 559 U.S. 77); *see also* Computer & Communications Industry Association (“CCIA”) Amicus Br. 7-14. Plaintiffs argue that these authorities are irrelevant because none involve an “extra-textual exception[] to mandatory statutes.” Opp. 16-17. Plaintiffs miss the point. If their pre-filing maneuvers are disregarded as those authorities instruct, and each suit is viewed for “what it is”—“a nationwide suit for infringement of the Asserted Patents”—then venue is appropriate in the NDCA under both sides’ readings of § 1400(b). Pets. 12.

In *Van Dusen*, the plaintiff similarly argued that a suit could not be transferred because state law precluded it from suing in the transferee forum. The Supreme Court held that the outcome of a transfer motion “should derive from rights and privileges conferred by federal law and not from the deliberate conduct of a party favoring trial in an inconvenient forum.” 376 U.S. at 624. Plaintiffs rely

on *Miller & Lux v. East Side Canal & Irrigation Co.*, 211 U.S. 293 (1908), but the Court there was clear that an assignment done for a “fictitious or pretended” purpose rather than a “real” one need not be credited. *Id.* at 304. Though that case involved a statute prohibiting improper joinder, this Court has recognized that it is part of a broader jurisprudence ignoring pre-filing “attempt[s] at manipulation” of “jurisdictional and venue laws.” *In re Microsoft*, 630 F.3d at 1364. Plaintiffs do not identify any case allowing pre-filing maneuvers remotely analogous to theirs to defeat a transfer motion.

Plaintiffs also do not dispute that the practical consequence of permitting such venue manipulations like theirs is to eviscerate § 1404(a) by preventing transfer to the forum that would be most convenient for the parties and witnesses in a given case. Pets. 17-19. And if permitted to stand, this scheme will lead to copycat efforts by other plaintiffs. Indeed, Plaintiffs themselves repeated the approach in their suit against Uber. *Id.* at 17-18; *see also* CCIA Amicus Br. 14.

Plaintiffs’ assertion that Petitioners failed to preserve their venue-manipulation argument is incorrect. Opp. 18. After Plaintiffs raised their novel arguments in opposing Petitioners’ motions to transfer, Petitioners argued that Plaintiffs’ “pre-filing contractual maneuverings can[not] allow [them] to avoid transfer regardless of convenience,” that “[n]othing in 28 U.S.C. § 1404(a), 28 U.S.C. § 1400(b), or precedent permits such gamesmanship,” and that “accepting

[Plaintiff’s] argument would have far-reaching implications.” Samsung Appx194; LG Appx174-175. That Petitioners’ five-page reply briefs did not cite the *cases* they cite on appeal is irrelevant. Issues may be argued on appeal so long as “the lower court [is] fairly put on notice as to the substance of the issue,” *Nelson v. Adams USA, Inc.*, 529 U.S. 460, 469 (2000), and parties “are not bound to their precise arguments raised below,” *Isr. Bio-Eng’g Project v. Amgen, Inc.*, 475 F.3d 1256, 1266 (Fed. Cir. 2007); *see also Four Seasons Hotels & Resorts, B.V. v. Consorcio Barr S.A.*, 377 F.3d 1164, 1170 (11th Cir. 2004) (issues are waived only if party “did not previously raise the issue *at all*,” not merely because party did not cite “precedent” in support). Those principles apply here.¹

B. Section 1400(b) Focuses On Where The Defendant’s Conduct Occurred

Even crediting Plaintiffs’ artificial geographic division of rights in the Asserted Patents, these suits could have been brought in the NDCA. Pets. 19-22. The statute provides that an “action . . . may be brought . . . where the defendant has committed acts of infringement.” 28 U.S.C. § 1400(b). Each “action” (the Samsung action and LG action) indisputably alleges that each Petitioner has committed acts of infringement in the NDCA—the very purpose of filing

¹ To be clear, Plaintiffs’ (meritless) waiver argument does not apply to Petitioners’ alternative argument addressed in Part I.B.

Amended Complaints was to broaden the infringement allegations throughout the country, including the NDCA. Pets. 8.

Plaintiffs argue that even in a suit with multiple plaintiffs, the § 1400(b) analysis must proceed plaintiff-by-plaintiff and, thus, that such a suit “must be brought in a district where both [plaintiffs] have rights or where the defendant resides.” Opp. 16. This argument is contrary to the statutory text, which focuses on where an “action” may be brought by asking where “*the defendant* has committed acts of infringement.” 28 U.S.C. § 1400(b) (emphasis added). The statute does not say that venue is proper only in a district where “the defendant has committed acts of infringement *as to each plaintiff*.”

Plaintiffs’ reading would also lead to absurd results. If Plaintiffs were right that a single suit with multiple plaintiffs can be brought only in a district where *both* have patent rights, then (absent district-splitting gamesmanship like theirs) a suit could *only* be filed in a defendant’s state of residence, and the suit could never be transferred regardless of the convenience of parties and witnesses in that particular case. That result has no basis in § 1400(b) and would eviscerate § 1404(a)’s purpose of “allocat[ing] suits to the most appropriate or convenient federal forum.” *In re HTC Corp.*, 889 F.3d 1349, 1356 (Fed. Cir. 2018).

Moreover, as explained in the petitions, the venue statute focuses on defendants and does not turn on anything about the plaintiffs. Pets. 19-22. That is

because venue rules are meant to protect *defendants*. See, e.g., *In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017); *Van Dusen*, 376 U.S. at 621.

Plaintiffs next suggest that the Court should not look at the Amended Complaint at all. Opp. 13-16. The district court held no such thing, and Plaintiffs' theory is wrong. An amended complaint supersedes the original complaint. See, e.g., *Eason v. Holt*, 73 F.3d 600, 603 (5th Cir. 1996). Several courts have therefore looked to an amended complaint for purposes of determining satisfaction of the § 1400(b) threshold requirement. See, e.g., *Lesmeister v. Selective Serv. Sys.*, No. CV H-16-3362, 2017 WL 3506864, at *2 (S.D. Tex. Aug. 16, 2017); *Thermolife Int'l, LLC v. Vital Pharm., Inc.*, No. CV142449RSWLAGRX, 2014 WL 12235190, at *3 (C.D. Cal. Aug. 15, 2014). Plaintiffs cite no contrary case. Plaintiffs' only case did not involve an amended complaint at all. *Hoffman v. Blaski*, 363 U.S. 335, 342-43 (1960). Assessing the Amended Complaint is particularly appropriate here given Plaintiffs' transparent gamesmanship: They never served the "original" complaints and filed the Amended Complaints the very next day.

II. The Public and Private Interest Factors Favor Transfer

Petitioners showed that while relevant documents and many relevant witnesses are located in the NDCA, none are located in the WDTX. Plaintiffs' response confirms Petitioners' assertions, as Plaintiffs fail to defend the district

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court's rationale on several issues and identify no connection whatsoever between these litigations and the WDTX except that Plaintiffs chose to file suit there.

A. The Private Interest Factors Favor Transfer

1. Sources of proof are more easily accessible from the NDCA than the WDTX.

The district court correctly found that the ease of access to sources of proof weighs in favor of transfer. All documents related to the accused Google Maps and Google+ applications are either physically present in or electronically accessible from the NDCA. Samsung Appx144-145. Technical documents related to AT&T Secure Family are also located in [redacted] location with third-party Avast, which developed the application in [redacted] location. Samsung Appx201-202, 204; LG Appx181-182, 184.

By contrast, Plaintiffs have not identified a single document or other evidence that is physically present in the WDTX. Plaintiffs assert that because certain of *Google's* physical documents are also stored in the cloud, "*all* documents can be *accessed* just as easily in the [WDTX] as they can in the [NDCA]." Opp. 26. Plaintiffs ignore that AT&T Secure Family technical documents are in [redacted] location, and no evidence suggests that these documents are available in the cloud. Samsung Appx201-202, 204.

2. The availability of compulsory process heavily favors transfer.

Plaintiffs do not dispute that Petitioners identified over a dozen potential third-party witnesses—Google and Avast engineers, and at least one of the named inventors—who are subject to compulsory process in the NDCA. Pets. 24-25. By contrast, Plaintiffs identify *no* potential witnesses subject to compulsory process in the WDTX. Plaintiffs also do not defend the district court’s statement that “third-party engineers” are within its subpoena power because their employers have locations within this district. Instead, they implausibly recast the district court’s reference to specific “engineers” as a mere statement that it can compel a deposition of a corporate representative. Opp. 28. This factor thus weighs heavily in favor of transfer. Strikingly, while the district court found this factor neutral, even Plaintiffs admit that this factor “slightly favors transfer.” *Id.* at 27.

Plaintiffs’ primary argument is that Petitioners have not shown that the potential third-party witnesses are unwilling to testify. Opp. 27-28. That argument was fully addressed in the Petitions. Pets. 25-26. Moreover, Plaintiffs’ assertion that Avast has “important business relationships” in the WDTX is wholly unsupported, and Plaintiffs fail to explain why, even if true, this would make Avast’s NDCA-resident witnesses willing to testify in the WDTX. Opp. 27-28.

3. The NDCA is more convenient for witnesses than the WDTX.

Plaintiffs do not dispute that the district court clearly erred by stating that Google and Avast have a “few witnesses” in the WDTX when in fact no relevant WDTX-based witnesses from these entities have been identified. *Pets.* 27. Nor do Plaintiffs contest that nobody has identified a single witness in the WDTX, whereas more than a dozen potential witnesses live in the NDCA. Instead, Plaintiffs baselessly speculate that most of those individuals located in the NDCA will not be called as witnesses. Plaintiffs have no response to Petitioners’ point that, because third-parties Google and Avast developed the accused applications, Petitioners will likely call a number of them at trial to discuss how the accused applications were developed and function. *Id.* at 27-28.

Plaintiffs also point to other potential witnesses in North Carolina, the “East Coast,” or other locations, and assert they would be more inconvenienced by traveling to the NDCA than the WDTX. *Opp.* 30-31. The district court did not use that rationale here. And this Court recently rejected it on similar facts because in either venue the witnesses “will likely have to leave home for an extended period.” *In re Tracfone Wireless*, No. 21-136, *slip op.* at 5-6 (Fed. Cir. Apr. 20, 2021) (non-precedential) (quoting *In re Apple Inc.*, 979 F.3d 1332, 1342 (Fed. Cir. 2020)).

Plaintiffs’ focus on the relative costs of food and lodging in the WDTX and the NDCA is also meritless. Even looking only at monetary costs—rather than the

more fundamental personal costs to extended travel—any cost savings would be more than offset by the number of witnesses who will not need food or lodging if the case were tried in the NDCA and the fact that every identified witness would need to travel to the WDTX.

Finally, Plaintiffs’ assertion that some of SEA’s EDTX employees “may have information relevant to this case” (Opp. 30) is pure speculation, which again the district court did not credit.

The district court clearly erred by finding this factor weighs “only very slightly” in favor of transfer.

4. Plaintiffs oversell gains in judicial economy if Petitioners’ cases stay in the WDTX.

Contrary to Plaintiffs’ assertions, transfer would not “significantly hinder the forward progress” of these cases. Opp. 32. Plaintiffs claim that the district court has “invested significant time and energy” into Petitioners’ cases, but in reality, the only substantive hearing the Court has held is the *Markman* hearing, and when Petitioners’ motions were filed, the district court had invested *no* time in these cases. Discovery opened on April 2, 2021—a mere three weeks ago. Plaintiffs do not explain why the parties do not have the option to proceed with the district court’s *Markman* rulings and continue with discovery if these cases were transferred. Moreover, this Court has repeatedly held that a court’s familiarity

with a suit since filing is “irrelevant.” *In re ADTRAN, Inc.*, 840 F. App’x 516, 517 (Fed. Cir. 2021); *see also In re Apple*, 979 F.3d at 1342-43.

In any event, gains in judicial economy by keeping Petitioners’ cases in the WDTX would be minimal given the significant differences between Petitioners’ cases and the *Bumble* case. *Bumble* involves only two of the four patents asserted against Petitioners. Pets. 29-30. In addition, Bumble’s accused product—a dating application—is vastly different from the accused products in Petitioners’ cases, such as Google Maps and Google Play Music. *Id.* at 30.

Plaintiffs emphasize that Petitioners and Bumble have submitted identical invalidity contentions and IPRs for the two overlapping patents, but that should be no surprise given the scope and content of the prior art does not change based on the allegedly infringing technology of the defendants. Opp. 34. Although Petitioners and Bumble agreed to the same claim constructions, that does not mean that their non-infringement positions or the technology underlying the accused applications are the same.

Plaintiffs’ reliance on *Regents of University of California v. Eli Lilly & Co.*, 119 F.3d 1559, 1565 (Fed. Cir. 1997), for the proposition that judicial economy can be “determinative of a transfer motion, even when another venue may be more convenient for the parties,” is misplaced. Opp. 34. In *Regents*, the district court found that the convenience of the parties and witnesses favored *neither* forum and

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thus found judicial economy determinative. 119 F.3d at 1565. By contrast, here, the convenience of witnesses and compulsory process factors overwhelmingly weigh in favor of transfer, as explained above. The relevant principle is therefore that co-pending suits involving different products and defendants should not be given “substantial weight,” *In re Zimmer Holdings*, 609 F.3d at 1382, and certainly should not be allowed to “dominate the analysis,” *In re Google, Inc.*, 2017 WL 977038, at *2 (Fed. Cir. Feb. 23, 2017).

B. The Public Interest Factors Favor Transfer

The public interest factors also weigh in favor of transfer. In particular, contrary to Plaintiffs’ unsupported assertion that the local interest is “small for either court,” the local-interest factor weighs heavily in favor of transfer. The NDCA is a technology hub having strong local interests in the technology businesses located there. Google Maps, Google+, and AT&T Secure Family were all designed and developed in the NDCA. Samsung Appx144-145; LG Appx200-205. This suit thus calls into question the work and reputation of numerous NDCA residents. *In re Apple*, 979 F.3d at 1345; *In re Tracfone Wireless*, No. 21-136, *slip op.* at 7.

Plaintiffs argue—for the first time—that, as to Samsung, the localized interest factor weighs against transfer because Samsung employs ^{number} [REDACTED] people in Texas. Opp. 37-38. But Plaintiffs refer to SEA’s campus in Plano, TX, which is in

the EDTX, not the WDTX; neither SEC nor SEA has offices in the WDTX. Opp. 30 (linking to <https://news.samsung.com/us/samsung-electronics-america-open-flagship-north-texas-campus/>); Pls.’ Appx45 (50:6-51:7). Moreover, this factor focuses on the “significant connections between a particular venue and *the events that gave rise to a suit.*” *In re Apple*, 979 F.3d at 1345 (citation omitted). There is no evidence that any Samsung employees located anywhere in Texas played any role in the events that gave rise to this lawsuit.

Finally, Plaintiffs argue that the court-congestion factor weighs in favor of transfer. While the district court may ultimately be able to try this case earlier than the NDCA and has now scheduled trial for March 2022, this Court has recognized that “scheduled trial dates are often subject to change.” *In re Apple*, 979 F.3d at 1344 n.5. Thus, this factor alone should not outweigh all of the other factors that heavily weigh in favor of transfer. *In re Genentech*, 566 F.3d at 1347.

III. Mandamus Relief Is Appropriate

This Court has repeatedly granted mandamus to correct clearly incorrect denials of § 1404(a) motions. Pets. 11, 22 (collecting cases); *see also In re Tracfone Wireless*, No. 21-136, *slip op.* at 5-7 (same). Plaintiffs nevertheless ask this Court to deny relief here because Petitioners filed their petitions about one month after their transfer motions were denied and after the *Markman* hearing. Opp. 10-13. That request is meritless.

This Court has repeatedly granted mandamus petitions filed about a month after a district court ruling, just as Petitioners did here. *See, e.g., In re Adobe Inc.*, 823 F. App'x 929 (Fed. Cir. 2020); *In re Zimmer Holdings*, 609 F.3d 1378. The one, unpublished decision denying a petition on these grounds that Plaintiffs cite involved a *five*-month delay between denial of a transfer motion and the filing of a writ petition. *In re Telular Corp.*, 319 F. App'x 909 (Fed. Cir. 2009). That case cited others involving three- to five-month delays. Petitioners diligently prepared and filed their Petitions.

Plaintiffs cite no rule that a mandamus petition must be filed before a *Markman* hearing. Nor can they, because this Court has granted mandamus relief when a petition was filed after a *Markman* hearing. *See, e.g., In re Apple*, 979 F.3d at 1336. Even if these Petitions were filed before the *Markman* hearing, nothing would have changed because the district court only recently advised that it “will not conduct a *Markman* hearing until it has resolved the pending motion to transfer,” *In re Apple Inc.*, 2021 WL 1327238, at *1 (Fed. Cir. Apr. 9, 2021) (non-precedential) (citation omitted); nothing required Petitioners to request a stay after their motions were denied.

CONCLUSION

The Court should issue a writ of mandamus and direct the district court to transfer these cases to the NDCA.

Respectfully submitted,

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/s/ Bradley N. Garcia

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CERTIFICATE OF COMPLIANCE

1. This reply in support of petitions complies with the type-volume limitation of Federal Rule of Appellate Procedure 21(d)(1). The body of the reply in support of petitions contains 3,899 words, excluding the portions exempted by rule.

2. This brief 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: May 12, 2021

/s/ Bradley N. Garcia

Bradley N. Garcia

Counsel for Petitioners

PROOF 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 May 12, 2021.

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 via an express carrier:

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

Dated: May 12, 2021

/s/ Bradley N. Garcia
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