IN THE

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

2021-139, -140

On Petitions for Writ of Mandamus to the United States District Court for the Western District of Texas in Nos. 6:20-cv00257-ADA and 6:20-cv-00259-ADA, Judge Alan D. Albright

AMENDED NON-CONFIDENTIAL OPPOSITION TO PETITIONS FOR WRITS OF MANDAMUS

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UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2021-139, -140

Short Case Caption In Re: Samsung Electronics Co., Ltd.

Filing Party/Entity Ikorongo Texas LLC and Ikorongo Technology LLC

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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. ☑ None/Not Applicable	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
Ikorongo Texas LLC		
Ikorongo Technology LLC		

☐ Additional pages attached

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☐ None/Not Applicable ☐ Additional pages attached

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Ikorongo Texas LLC and Ikorongo Technology LLC v. Bumble Trading LLC	United States District Court Western District of TX-Waco Div.	Civil Action No. 6:20-cv-00256-ADA
Ikorongo Texas LLC and Ikorongo Technology LLC v. Lyft, Inc.	United States District Court Western District of TX-Waco Div.	Civil Action No. 6:20-cv-00258-ADA
Ikorongo Texas LLC and Ikorongo Tech. LLC v. Uber Technologies, Inc.	United States District Court Western District of TX-Waco Div.	Civil Action No. 6:20-cv-00843-ADA

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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TABLE OF CONTENTS

Page

CERTIFICATE OF INTEREST

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

INTRODUCTION 1

BACKGROUND 3

A. Ikorongo Texas sues Samsung, LG, Bumble, Uber, and Lyft in the Western District of Texas for violating four patents. 3

B. Samsung and LG move to transfer the cases to the Northern District of California. 4

C. In response, Ikorongo again establishes it could not have filed this suit in the Northern District of California. 6

D. Samsung and LG's replies still fail to fully address the requirement that the action might have been filed in the proposed transferee district. 7

E. The district court denies transfer both based on statutory requirements and based on the private and public interest factors. 7

F. The district court holds *Markman* hearings for Samsung, LG, Lyft, and Bumble and issues its *Markman* orders. 9

G. Samsung and LG file their writ petitions raising new arguments over a month after the district court denied transfer, but shortly after the district court issued its *Markman* order. 10

REASONS FOR DENYING THE WRIT 10

I. The Court should deny the requested "emergency" relief based on Samsung and LG's gamesmanship. 10

II. The district court lacked discretion to transfer the case to the Northern District of California. 13

A. Samsung and LG cannot meet their 28 U.S.C. § 1404(a) burden of proving this action could have been brought in the Northern District of California. 13

B. The Defendants' policy arguments for ignoring statutory requirements lack merit. 16

III. The district court had discretion to deny transfer based on the *Volkswagen* private and public interest factors. 24

A. The Northern District of California is not clearly more convenient under the private interest factors. 25

B. The Northern District of California is not clearly more convenient under the public interest factors. 35

C. The public and private interest factors weigh against transfer, and the petitions should be denied 38

CONCLUSION 39

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

CONFIDENTIAL MATERIAL OMITTED

This document contains redactions of confidential material at pages 26 and 27. The confidential material consists of locations of information, a number, and company relationships that were redacted from public filings in the district court.

TABLE OF AUTHORITIES

Page(s)

Cases

Cheney v. United States Dist. Court,
542 U.S. 367 (2004) 11

Fourco Glass Co. v. Transmirra Prods. Corp.,
353 U.S. 222 (1957) 17

Hertz Corp. v. Friend,
559 U.S. 77 (2010) 22

Hoffman v. Blaski,
363 U.S. 335 (1960) 13

In re Amazon,
779 F. Appx. 746 (Fed. Cir. 2019) 11

In re Apple Inc.,
581 F. Appx. 886, 889 (Fed. Cir. 2014) 29

In re Apple,
2020 U.S. App. LEXIS 35326 (Fed. Cir. 2020) 24

In re Dell Inc.,
600 F. Appx. 728 (Fed. Cir. 2015) 32

In re Genentech, Inc.,
566 F.3d 1338 (Fed. Cir. 2009) 36

In re Google LLC,
949 F.3d 1338 (Fed. Cir. 2020) 19

In re Hoffmann-La Roche Inc.,
587 F.3d 1333 (Fed. Cir. 2009) 19

In re Microsoft Corp.,
630 F.3d 1361 (Fed. Cir. 2011) 19

In re Telular Corp.,
319 F. Appx. 909 (Fed. Cir. 2009) 12

In re Vistaprint Ltd.,
628 F.3d 1342 (Fed. Cir. 2010) 33

In re Volkswagen AG,
371 F.3d 201 (5th Cir. 2004) 24

In re Volkswagen of Am., Inc.,
545 F.3d 304 (5th Cir. 2008) 11, 24

In re Zimmer Holdings, Inc.,
609 F.3d 1378 (Fed. Cir. 2010) 19

Keeler v. Standard Folding-Bed., Co.,
157 U.S. 659 (1895) 23

King v. U.S.,
100 F.2d 797 (5th Cir. 1939) 11

Lehigh Mining & Mfg. Co. v. Kelly,
160 U.S. 327 (1895) 21

Miller & Lux, Inc. v. East Side Canal & Irrigation Co.,
211 U.S. 293 (1908) 21

Poly-America, L.P. v. GSE Lining Tech., Inc.,
383 F.3d 1303 (Fed Cir. 2004) 22

Regents of Univ. of Cal. v. Eli Lilly & Co.,
119 F.3d 159 (Fed. Cir. 1997) 34

Rite-Hite Corp. v. Kelley Co.,
56 F.3d 1538 (Fed. Cir. 1995)....................22

Ross v. Blake,
136 S. Ct. 1850 (2016)....................17

Rotkiske v. Klemm,
140 S. Ct. 355 (2019)....................17

Singleton v. Volkswagen of Am.,
2006 U.S. Dist. LEXIS 65006 (E.D. Tex. Sept. 12, 2006)....................26

Stewart Org., Inc. v. Ricoh Corp.,
487 U.S. 22 (1988)....................24

Stonite Co. v. Melvin Lloyd Co.,
315 U.S. 561 (1942)....................17

TC Heartland LLC v. Kraft Foods Grp. Brands LLC.
137 S. Ct. 1514 (2017)....................17

U.S. v. Dern,
289 U.S. 352 (1933)....................11

Uniloc 2017 LLC v. Apple Inc.,
No. 19-cv-532, Dkt. 72 (W.D. Tex. June 6, 2020)....................19

Van Dusen v. Barrack,
376 U.S. 612 (1964)....................18

VirtualAgility Inc. v. Salesforce.com,
759 F.3d 1307 (Fed. Cir. 2014)....................18

Waterman v. Mackenzie,
138 U.S. 252 (1891)....................4, 8, 22

Weatherford Tech. Holdings, LLC v. Tesco Corp.,
2019 U.S. Dist. LEXIS 231529 (E.D. Tex. May 22, 2018)....................25

Statutes and Rules

28 U.S.C. § 1400(b) 14, 15

28 U.S.C. § 1404(a) 13, 20, 24

35 U.S.C. § 261 .... 4, 8

Fed. R. Civ. P. 43 28

INTRODUCTION

Samsung and LG waited until after an unfavorable *Markman* order to file their petitions for "emergency" relief and they make arguments never addressed to the district court; yet they accuse Ikorongo of "gamesmanship." Parties have every right to engage in transactions that affect where they can sue and be sued, and the petitioners here engage in myriad corporate structures for myriad reasons, including manipulating jurisdiction and application of laws. Indeed, LG resides in Delaware and could have moved to transfer this action there. But it only resides there because it engages in the fiction of being incorporated in Delaware while primarily doing business from New Jersey. Similarly, Samsung could have moved to transfer its case to New York, where it is incorporated, and it claims much of the evidence lies. Instead, they sought transfer to the Northern District of California, *where no party resides*, and Ikorongo Texas's complaints could not have been filed. Samsung and LG cannot even meet the threshold inquiry for their motions to transfer, and the district court had no discretion to grant the requested relief. Thus, the petitions should be denied.

Even if Samsung and LG could meet that threshold requirement, they cannot establish a clear entitlement to transfer warranting mandamus. The district court did not abuse its discretion by finding the private and public interest factors weigh in favor of keeping all of the litigation regarding these patents together in front of one judge, rather than shipping off two of the five cases for piecemeal litigation. There is no dispute that the case against one defendant (Bumble) will not be transferred to the Northern District of California, and that litigation has been tied to this litigation with matching schedules since last August. In that time, the parties have briefed claim construction and the district court held a joint *Markman* hearing and issued its *Markman* order for all of the cases. Samsung and LG waited until a week after receiving that order to file these petitions, even though it had *a month* between denial of transfer and the *Markman* hearing to file their petitions and/or request a stay of the hearing. The Court should not countenance the games Samsung and LG play here, and it should deny the petitions.

BACKGROUND

A. Ikorongo Texas sues Samsung, LG, Bumble, Uber, and Lyft in the Western District of Texas for violating four patents.

In 2020, Ikorongo Texas sued Samsung, LG, Bumble, Lyft, and Uber in the Western District of Texas for patent infringement. Samsung Appx. 13-25; *see also* LG Appx. 14-23; *Ikorongo Texas LLC v. Bumble Trading, LLC*, No. 6:20cv256, Dkt. 1 (W.D. Tex. March 31, 2020); *Ikorongo Texas LLC v. Lyft, Inc.*, No. 6:20cv258, Dkt. 1 (W.D. Tex. March 31, 2020); *Ikorongo Texas LLC v. Uber Tech., Inc.*, No. 6:20cv843, Dkt. 1 (W.D. Tex. Sept. 15, 2020). It sued Samsung and LG for infringing four patents, and it sued Bumble, Lyft, and Uber for infringing two of those four. *Id*. The complaints were amended to add Ikorongo Technology one day later. *E.g.,* Samsung Appx 26. All of the cases, except the later-filed case against Uber, were placed on the same schedule for, among other things, motions to transfer, *Markman* hearing (which was consolidated), pretrial conference, and trial. *Ikorongo Texas LLC v. Samsung Elecs. Co., Ltd*, No. 6:20cv259, Dkt. 23, (W.D. Tex. Aug. 24, 2020); *Ikorongo Texas LLC v. LG Elecs., Inc.*, No. 6:20cv257, Dkt. 24 (W.D. Tex. Aug. 24, 2020); *Lyft* Dkt. 28; *Bumble* Dkt. 28.

In the complaints, Ikorongo Texas clearly pleaded that its patent rights were limited to certain counties in Texas, including counties in the Western District of Texas, and thus clearly established it could not sue Samsung or LG in the Northern District of California. Samsung Appx. 14; LG Appx. 15. It even cited the relevant case, noting its limited ownership existed "under the principles of *Waterman v. Mackenzie*, 138 U.S. 252 (1891) and 35 U.S.C. §261." *Id*.

B. Samsung and LG move to transfer the cases to the Northern District of California.

In September 2020—five months after the complaints were filed—Samsung, LG, Lyft, and Bumble moved to transfer their cases to the Northern District of California. Samsung Appx. 40; LG Appx. 40; *Lyft* Dkt. 30; *Bumble* Dkt. 37. All four defendants lauded the Northern District of California's purported convenience, but none addressed whether Ikorongo Texas could have filed these actions there. *Id*. Bumble ultimately withdrew its motion because it did not have a place of business in the Northern District of California—a threshold requirement—ensuring that its case would go forward in the Western District of Texas regardless of other motions to transfer. *Bumble* Dkt. 37.

Notably, Samsung did not move to transfer the case to New York, where it is incorporated, and Ikorongo could have filed this action. In its petition, Samsung notes contacts for this case with New York. Samsung Pet. 6-7. And LG did not move to transfer its case to Delaware, where it is incorporated. Delaware, of course, is much closer to LG's principal place of business in New Jersey and closer to the purported relevant evidence in New York. LG Pet. 5-7.

Samsung and LG instead whistled past the graveyard, moving to transfer the cases to the Northern District of California while also ignoring that the cases could not have been filed there. Samsung and LG, represented by the same counsel (who also represent Google), gave one short paragraph's attention to this issue in their motions. Samsung Appx. 47; LG Appx. 47. Both paragraphs simply (1) stated the standard that the case can be brought where a defendant resides or where it has committed acts of infringement and has a regular place of business, then (2) stated the relevant defendants' contacts with the Northern District of California—making no effort to establish any alleged acts of infringement in the Northern District of California. *Id*. They also claimed that public and private interest factors render the Northern

District of California "clearly more convenient" based on an incompetent Google witness with no personal knowledge of any pertinent facts and relied instead on hearsay.[1]

C. In response, Ikorongo again establishes it could not have filed this suit in the Northern District of California.

Ikorongo again spelled out the district court's lack of discretion in its response. Samsung Appx. 154-56. It noted that venue is only proper where the defendant resides or where it committed acts of infringement and has an "established place of business." *Id*. Regarding the Northern District of California, Ikorongo noted that the defendants did not reside there, and they did not engage in acts of infringement there *vis-à-vis* Ikorongo Texas, as Ikorongo Texas only had patent rights in Texas. *Id*. Ikorongo then discussed the private and public interest factors, establishing that the Western District of Texas is the more convenient forum or at least that Samsung and LG did not meet their heavy burdens to show the Northern District of California was clearly more convenient.

[1] Ikorongo moved to strike this "evidence," but the district court did not rule on the motion to strike. *E.g., Samsung* Dkt. 55-02.

D. Samsung and LG's replies still fail to fully address the requirement that the action might have been filed in the proposed transferee district.

Even after Ikorongo laid out its explanation on how transfer to the Northern District of California is statutorily barred, Samsung and LG held their powder, apparently awaiting these petitions for writs of mandamus. In their reply briefs, Samsung and LG cited none of the Supreme Court and Federal Circuit precedent they cited here. Samsung Appx. 193-94; LG Appx. 173-75. They filed identical arguments asking the district court to apply a new standard that the district court may disregard limits on a party's patent rights. *Id.* They cited no authority for this theory that a patent holder can sue in a district in which it has no patent rights, so long as the defendant is infringing someone else's patent rights there.

E. The district court denies transfer both based on statutory requirements and based on the private and public interest factors.

On March 1, 2021, the district court denied the motions to transfer. Samsung Appx. 206; LG Appx. 186. Initially, it found that Samsung and LG failed to meet their burdens "to show that Ikorongo Texas's current action could have initially been brought in the Northern District of California." Samsung Appx. 208. According to the district court, their

only acts of relevant alleged infringement occurred in Texas, and *Waterman v. Mackenzie*, 138 U.S. 252 (1891) and 35 U.S. C. § 261 establish that a patent holder had the right to convey a geographically limited exclusive right to the patent to Ikorongo Texas. Samsung Appx. 209-10. The court further noted Samsung and LG's claim that a patentee can force litigation to only one district is false. Samsung Appx. 211. "[A]ssignment cannot grant a plaintiff access to a forum it could not access already . . . [and] regardless of whether an entity's right to sue has been limited by a Specified Part, an action may always be brought in the judicial district where the defendant resides." *Id*.

The district court further found the transfer motions would have been denied in any event based on the *Volkswagen* private and public interest factors. Samsung Appx. 211-23. Regarding the private factors, the district court found ease of access to proof weighs slightly in favor of transfer based on the fiction that relevant documents exist in the Northern District of California, but it noted this is "at odds with modern patent litigation" because the relevant documents are, in reality, equally accessible anywhere. Samsung Appx. 213-14 & n.9. It further found the compulsory process factor neutral, and the convenience analysis weighed

slightly in favor of transfer because very few third-party witnesses would need to attend trial, Ikorongo agreed to pay expenses, and they likely would be willing to testify due to their employers' relationships with the defendants. Samsung Appx. 214-218. And the court found ease of trial to weigh against transfer because it would force the litigation on these patents to be split between two districts, as the Bumble matter would remain in the Western District of Texas. Samsung Appx. 219-20.

The district court next found that public interest factors did not favor transfer. Administratively, it would be better for the matter to proceed in whole in the Western District of Texas because it is less congested than the Northern District of California. Samsung Appx. 221-22. And the other public interest factors were neutral. Samsung Appx. 222-23. Thus, Samsung and LG had not met their "'heavy burden' to demonstrate that the Northern District of California is 'clearly more convenient.'" Samsung Appx. 224.

F. The district court holds *Markman* hearings for Samsung, LG, Lyft, and Bumble and issues its *Markman* orders.

Exactly a month later, on April 1, 2021, the district court held a joint *Markman* hearing for Samsung, LG, Lyft, and Bumble. Samsung

Appx. 10-11; LG Appx. 12; *Lyft* Dkt. 71; *Bumble* Dkt. 61. Samsung and LG had not notified the court or Ikorongo of any intent to file a petition for a writ of mandamus regarding transfer, nor had they requested that the court delay the *Markman* hearing. The court entered its *Markman* order, and Samsung and LG filed their petitions for writs of mandamus six days later.

G. Samsung and LG file their writ petitions raising new arguments over a month after the district court denied transfer, but shortly after the district court issued its *Markman* order.

A week after receiving the *Markman* order, Samsung and LG filed nearly identical petitions for writs of mandamus. They spend ten pages, citing numerous cases not raised in the district court, arguing that this case could have been brought in the Northern District of California. E.g., Samsung Pet. 12-22. They assert a "long line of precedent examining similar pre-filing attempts to manipulate venue," none of which was provided to the district court, Samsung Pet. 12.

REASONS FOR DENYING THE WRIT

I. The Court should deny the requested "emergency" relief based on Samsung and LG's gamesmanship.

Samsung and LG apparently sandbagged the district court, failing to make the arguments there that it raises here and waiting until after

the district court issued its *Markman* order to file these petitions. The Court has discretion to deny relief on this basis alone. Mandamus is an extraordinary remedy that is only available "when there is a clear abuse of discretion." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 308 (5th Cir. 2008). The writ may only issue when (1) there is no adequate alternative means for relief (2) the right to relief is clear and indisputable—a clear abuse of discretion—and (3) "'the writ is appropriate under the circumstances.'" *Id.* at 311, *quoting Cheney v. United States Dist. Court*, 542 U.S. 367, 380-81 (2004)

Because the court must analyze whether the writ is appropriate under the circumstances, it takes on characteristics of "a discretionary and equitable remedy." *In re Amazon*, 779 Fed. Appx. 746, 746 (Fed. Cir. 2019) (unpublished), *citing Cheney*, 542 U.S. at 381 & *U.S. v. Dern*, 289 U.S. 352, 359 (1933); *see also King v. U.S.*, 100 F.2d 797, 797 (5th Cir. 1939) ("the remedy of mandamus is equitable in its nature, and will be granted, withheld, or tempered, according to the equitable circumstances in each case"). And this Court has acknowledged mandamus can be denied for failure to timely file the petition in a case involving a denied

motion to transfer. *See In re Telular Corp.*, 319 Fed. Appx. 909, (Fed. Cir. 2009) (unpublished).

This is an appropriate case for discretionary denial of the petition. Samsung and LG waited to see which direction the wind would blow, committing district court resources to a *Markman* hearing and order, before petitioning for relief. The Court issued its order denying transfer on March 1, 2021. On March 2, it set the *Markman* hearing for April 1, 2021. For those 30 days, Samsung and LG did nothing. They did not seek relief from the district court's denial of transfer until six days after the court issued its *Markman* order construing the claims.

If transfer was critical to Samsung and LG, they would not have slumbered on their purported rights. Indeed, this Court gave Ikorongo just ten days to respond. It is reasonable to believe Samsung and LG similarly could have filed their petitions within ten days of the order denying transfer, or at least within *thirty*. They could have moved to stay the case or postpone the *Markman* hearing. At the very least, they could have informed the district court of their intent, so the court could choose how to expend its resources. Instead, they waited long enough to see how the district court would construe the claims. The district court invested

the time to prepare for and conduct a *Markman* hearing, construe the claims, and issue the order. Only then, Samsung and LG filed their petitions. Samsung and LG accuse Ikorongo of gamesmanship, but they have unclean hands. And the Court has discretion to deny mandamus on that ground.

II. The district court lacked discretion to transfer the case to the Northern District of California.

A. Samsung and LG cannot meet their 28 U.S.C. § 1404(a) burden of proving this action could have been brought in the Northern District of California.

In any event, there is no clear right to relief—no right to relief at all—because the district court did not abuse its discretion. Under 28 U.S.C. § 1404(a), "for the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented." A case "might have been brought" in a district only if federal jurisdictional statutes would have allowed the original complaint to have been filed in that district. *Hoffman v. Blaski*, 363 U.S. 335, 342-43 (1960). The general rule that an amended complaint supersedes an original complaint does not change that. *Id.*, at 343 ("'In the normal meaning of words this

language of section 1404 (a) directs the attention of the judge who is considering a transfer to the situation which existed when the suit was instituted.'" (citation omitted)). The action cannot be transferred anywhere Ikorongo Texas "did not have a *right* to bring it" in the first instance. *Id*. at 336.

There is no dispute here that 28 U.S.C. § 1400(b) governs venue for this suit. It provides that "[a]ny civil action for patent infringement may be brought in the judicial district where the defendant resides or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b). The original complaints filed by Ikorongo Texas assert claims of infringement in Texas—the only place Ikorongo Texas has any patent rights, and they allege that Samsung resides in New York and LG resides in Delaware. Samsung Appx. 12-13; LG Appx. 13-14. Thus, under the plain statutory language Samsung could be sued in New York under Section 1400(b), LG could be sued in Delaware, and either of them, having committed acts of infringement in Texas, could be sued in Texas *if* they had "established place[s] of business" in the relevant district. Both have established places of business in the Western District of Texas. *Id*. By statute, no other

judicial district could have been a proper venue, and there is no scenario under which Ikorongo Texas's complaint "might have been brought" in the Northern District of California.

Samsung and LG gesture at the statutory language, arguing that Section 1400(b) provides the right to sue anywhere there is infringement, even if that infringement involves *someone else's* patent rights. Samsung and LG claim they sold infringing products "throughout the country." *See* Samsung Pet. 19-20. And because Section 1400(b) does not expressly state that venue lies where there were "acts of infringement *as to each plaintiff*," it must mean that the infringement requirement may be satisfied wherever there was an act of infringement. *Id*. This fails both as a textual matter and as a matter of common sense.

The section provides the venue requirement for "[a]ny civil action for patent infringement." 28 U.S.C. § 1400(b). The provision's discussion later in the sentence of places "where the defendant has committed acts of infringement" necessarily refers to infringement for which the civil action was brought. So a plaintiff with geographically limited rights can only bring a suit for infringement that occurs within its geographically limited area. In such a case, the only place "where the defendant has

committed acts of infringement" is in that area. Thus, a single suit by multiple plaintiffs with geographically limited rights must be brought in a district where both have rights or where the defendant resides. This further undermines Samsung and LG's claim that Ikorongo Technology joining the suit a day after Ikorongo Texas was "gamesmanship." It is irrelevant to transfer. A joint suit in which both companies are plaintiffs cannot be brought in the Northern District of California because there is no pendent patent jurisdiction. *Hoffman*, 363 U.S. at 343.

Samsung and LG's reading would create an absurd result. Geographically limited patentholders could sue in a venue where the defendant does not reside and the geographically limited patentholder has no patent rights—where someone else has patent rights and the right to enforce the patents. *Id.* The statutory provision here is clear—venue lies in the state of residence, or where the patentholder's rights have been infringed, so long as the defendant has a place of business there.

B. The Defendants' policy arguments for ignoring statutory requirements lack merit.

Samsung and LG claim the Court should pretend Ikorongo Technology never transferred any rights to its patents, which were later acquired by Ikorongo Texas. But courts cannot create extra-textual

exceptions to mandatory statutes. *See*, *e.g.*, *Ross v. Blake*, 136 S. Ct. 1850, 1856-57 (2016) (rejecting Fourth Circuit's "special circumstances" exception to PLRA exhaustion requirement); *see also Rotkiske v. Klemm*, 140 S. Ct. 355, 361 (2019) ("It is not our role to second guess Congress' decision to include a 'violation occurs' provision, rather than a discovery provision, in §1692k(d)."). The Supreme Court stressed the importance of following the statutory language to its end, regardless of alternate considerations, in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1518 (2017). It is Congress's role to resolve any purported misuses of the statute, not the courts'.

Samsung and LG's request conflicts with a nearly century of Supreme Court jurisprudence construing Section 1400(b) restrictively. *See*, *id*. ("The Act was designed 'to define the exact jurisdiction of the . . . courts in these matters,' and not to 'dovetail with the general [venue] provisions."), *quoting Stonite Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 565 n.5 & 566 (1942); *see also Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 229 (1957). And despite Samsung and LG's purported "long line of precedent" rejecting efforts to manipulate venue, it apparently cannot find a single case where this Court, the Fifth Circuit, or the

Supreme Court ruled that a case can be transferred to a district where the filing plaintiff was barred by statute from bringing the action. Meanwhile, most of Samsung and LG's case law interprets discretionary factors; not the mandatory threshold requirement under § 1404.

Samsung and LG rely on the Supreme Court's decision in *Van Dusen v. Barrack*, 376 U.S. 612 (1964) and several of this Court's cases to claim that the Court should ignore the limits on Ikorongo Texas's patent rights. *See* Samsung Pet. 12-18. The argument is waived, as Ikorongo Texas did not make this argument to the district court, and it did not cite any of this case law. *VirtualAgility Inc. v. Salesforce.com*, 759 F.3d 1307, 1315 (Fed. Cir. 2014) (argument not raised before the district court was waived). At least, the district court could not have clearly abused its discretion by failing to adopt arguments and case law never presented to it. But they are irrelevant in any event. The plaintiff had a *right* to file its original complaint in the proposed transferee forum in every single one of those cases.

In *Van Dusen*, no federal law prevented the plaintiffs from filing in the transferee forum. 376 U.S. at 621 ("It must be noted that the instant case, unlike *Hoffman*, involves a motion to transfer to a district in which

both venue and jurisdiction are proper."). And in Samsung and LG's remaining three cases, the Court disregarded movement of documents or fictional principal places of business when considering the *discretionary* factors calculating the most convenient forum. *In re Microsoft Corp.*, 630 F.3d 1361, 1365 (Fed. Cir. 2011); *In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1381 (Fed. Cir. 2010); *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333, 1337 (Fed. Cir. 2009). None of these cases support ignoring the base requirement that a case can only be transferred to a district in which the plaintiff had a right to bring it.

Samsung and LG request that this Court make new law allowing transfer into an improper venue based on a theory that the Court should ignore limitations of a company's patent enforcement rights. Companies make business decisions that affect jurisdiction and venue all the time. Apple closed its stores in the Eastern District of Texas apparently to avoid suits there. *Uniloc 2017 LLC v. Apple Inc.*, No. 19-cv-532, Dkt. 72 at *9 & n.4 (W.D. Tex. June 6, 2020). Google has relied on corporate formalities and independent contractor relationships to avoid being sued there as well. *See In re Google LLC*, 949 F.3d 1338, 1345-46 (Fed. Cir. 2020). Samsung and LG rely on the fictions of incorporation. Samsung

could have moved to transfer its case to its state of residence, New York. It did not do so. Neither did LG move to transfer the case to its state of residence, Delaware. If these companies had incorporated in California, this would not be an issue. Similarly, the third-party contact on which Samsung and LG consistently rely, Google, has turned itself into an LLC owned by owned by a Delaware holding company that is owned by another Delaware corporation. Samsung Pet. ii. And unlike defendants' corporate shell games, Ikorongo Technology and Ikorongo Texas are not related companies, one is not a subsidiary or parent of the other, and their shareholders are not identical.

Without any sense of irony, Samsung and LG claim it weighs in favor of transfer that "where an entity is incorporated (e.g., Delaware) bears no necessary relation (and frequently no relation at all) to the district that would be most convenient under the 'individualized, case-by-case consideration of convenience and fairness' inquiry that § 1404(a) requires." *See* Samsung Pet. 18. That, of course, does not apply to companies that incorporate where they do business, such as Apple (California) and Microsoft (Washington). But according to Samsung and LG, the fact that a corporation chooses to incorporate where it does little

or no business should be respected out of a sense of corporate formality, while the fact that a patent holder geographically divides rights should be completely ignored. Even if the Court could ignore statutory venue requirements for policy reasons, Samsung and LG's policy arguments are plain hypocritical.

In any event, Samsung and LG's own cases establish that a litigation motivation for assigning legal rights cannot defeat statutory requirements so long as there is a real assignment of legal rights. *Miller & Lux, Inc. v. East Side Canal & Irrigation Co.*, 211 U.S. 293, 304 (1908) ("We do not intend by what has been said to qualify the general rule, long established, that the jurisdiction of a Circuit Court, when based on diverse citizenship, cannot be questioned upon the ground merely that a party's motive in acquiring citizenship in the State in which he sues was to invoke the jurisdiction of a Federal court."); *Lehigh Mining & Mfg. Co. v. Kelly*, 160 U.S. 327, 336 (1895).[2] Here, there is no evidence in the

[2] These cases also are inapposite because they involve attempts to create federal jurisdiction where there was none, and the courts applied statutory power to ignore improper joinder. *Miller & Lux*, 211 U.S. at 296. Given "the presumption in every stage of a cause being that it is without jurisdiction of a court of the United States," the Court protected the principle of limited jurisdiction. *Lehigh Mining*, 160 U.S. at 337. Here, the assignment of rights did not affect jurisdiction and the parties

record regarding ownership interests, and if there were, it would indicate Ikorongo Technology does not own or control Ikorongo Texas, and Ikorongo Texas's ownership structure requires arms-length dealing that may have negative effects as well. *See*, *e.g.*, *Poly-America, L.P. v. GSE Lining Tech., Inc.*, 383 F.3d 1303, 1311 (Fed Cir. 2004) ("Poly-America and Poly-Flex may not enjoy the advantages of their separate corporate structure and, at the same time, avoid the consequential limitations of that structure"). And unlike the Supreme Court's concern with phony principal places of business asserted in *Hertz Corp. v. Friend*, 559 U.S. 77, 97 (2010), geographic limitation of patent rights is a real and important vehicle.

The right to geographically divide patent rights, with each geographic assignee having an individual right to sue for infringement occurring in their designed area, has a long and unbroken history in U.S. patent law. It was expressly recognized by the Supreme Court in 1891 in *Waterman* and by this Court in *Rite-Hite Corp. v. Kelley Co.*, 56 F.3d 1538, 1551-52 (Fed. Cir. 1995) (en banc) and numerous other cases.

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agree that the Western District of Texas is a statutorily appropriate venue regardless of the transfer of rights.

Historically and currently, there are myriad valuable reasons a party might geographically divide patent rights. In earlier years, patent holders often assigned multiple geographically limited ownerships in their patents to allow for more local control and enforcement of the rights. *See, e.g., Keeler v. Standard Folding-Bed., Co.*, 157 U.S. 659, 662 (1895) (noting "as is often the case, the patentee has divided the territory of the United States into twenty or more 'specified parts'"). One can imagine that a patentholder of a plow that lived in Ohio in the 1800s might not want to travel to South Carolina to join a patent suit filed by a South Carolina co-patent owner or licensee.

Now, it still has utility. For example, if a patentee has developed and patented a new method of extracting oil from the earth, it may have a successful business of doing so in Pennsylvania and Ohio, but have no interest in doing it itself in Texas or California. It could license the patent to a company interested in practicing the method in Texas, but run the risk that they would be required to join any litigation concern Texas-based patent infringement; something they may wish to avoid. A geographic assignment solves that problem. Moreover, some patents may have greater economic value in certain locations than others. As

another example, imagine a patent to reducing emissions in automobiles. California has much stricter emissions requirements than most states. A patentee may believe it could obtain a greater royalty, consistent with that greater value, in California.

III. The district court had discretion to deny transfer based on the *Volkswagen* private and public interest factors.

Only after finding that a lawsuit could have been filed in the judicial district to which transfer is sought will a court next proceed to examine "the convenience of the parties and witnesses." *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004). "The Fifth Circuit assesses transfer requests using the well-established private and public interest factors." *In re Apple*, 2020 U.S. App. LEXIS 35326 (Fed. Cir. 2020) (*citing In re Volkswagen of Am., Inc.*, 545 F.3d 304, 314 (5th Cir)). District courts have discretion under Section 1404(a) to engage in an "individualized, case-by-case consideration of convenience and fairness." *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988). The defendant bears the burden of proving a transfer of venue would be "clearly" more convenient for the parties and witnesses and would be in the interest of justice. *Volkswagen*, 545 F.3d at 315. A court may "consider undisputed facts outside the pleadings, but it must draw all reasonable inferences

and resolve all factual conflicts in favor of the non-moving party." *Weatherford Tech. Holdings, LLC v. Tesco Corp.*, No. 2:17-cv-00456-JRG, 2019 U.S. Dist. LEXIS 231529 (E.D. Tex. May 22, 2018). When the transferee forum is not clearly more convenient than the chosen forum, the plaintiff's choice should be respected. *Volkswagen*, 545 F.3d at 315.

A. The Northern District of California is not clearly more convenient under the private interest factors.

The private interest factors favored denying the motion to transfer. The private interest factors include: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious and inexpensive." *Volkswagen*, 545 F.3d at 315 (citation omitted). The first three factors are neutral and the fourth weighs heavily against transfer.

1. The district court slightly erred in its analysis when it found that the ease of access to documents slightly favored transfer. Citing *Volkswagen*, the court begrudgingly held that the relevant documents, which are in the cloud, exist solely in the Northern District of California, Samsung Appx. 213-14 & n.2, but *Volkswagen* does not bind the court to

that finding. There, the district court ruled that the access to evidence factor was neutral because under the advance of technology, all the evidence "can easily be transported" to the current venue. *Singleton v. Volkswagen of Am.*, No. 06-cv-222, 2006 U.S. Dist. LEXIS 65006 (E.D. Tex. Sept. 12, 2006). The Fifth Circuit rejected that reasoning because it still required some inconvenience, and "all the documents and physical evidence relating to the accident are in the [potential transferee] division." *Volkswagen*, 545 F.3d at 316. That does not apply here. The relevant documents are stored in the cloud—they do not need to be transported. Ikorongo Appx. 35-36 at 76:17-77:14. Google's representative could not identify a single physical document that did not also exist in the cloud. Ikorongo Appx. 40 at 94:7-13. So *all* documents can be *accessed* just as easily in the Western District of Texas as they can in the Northern District of California. And that is the analysis for the first prong—relative ease of "access."

Indeed, if the Court must engage in the fiction of treating the documents as existing where they are stored, that weighs *against* transfer. Cloud based documents must come from a server to the end user. Google does not maintain servers in the location

location [redacted], but it does maintain servers in Texas, within 90 miles of the courthouse. Ikorongo Appx. 35-36 at 76:17-77:14. So the documents on Texas servers must be transported out of the state to be accessed in the Northern District of California, whereas no document will need to be transferred from the location [redacted] to the Western District of Texas if transfer is denied. Similarly, Samsung's documents exist on servers in location [redacted], Ikorongo Appx. 45—over number [redacted] miles closer to the Western District of Texas than the Northern District of California—and LG's documents are in location [redacted], and location [redacted], LG Appx. 138, *citing LG* Dkt. 56-05 at 55:24-56:14; 57:17-58:2.

2. The availability of compulsory process, at most, only slightly favors transfer. Samsung and LG ignore that at most, a few of these witnesses will need to testify at trial and depositions can be done in witnesses' home districts. Samsung and LG have not identified a single witness who is unwilling to testify, and given the witnesses are Google employees, Avast employees, and inventors, *see* Samsung Appx. 44-47, their recalcitrance seems unlikely. Google is relationship [redacted] Samsung and LG, Ikorongo Appx. 47-48 at 71:25-72:9, and presumably would compel its employees to testify. Avast similarly has important

business relationships here. As for the inventors, one of the two inventors Samsung and LG rely on is moving out of California before the scheduled trial date, and both submitted declarations committing to testifying in the Western District of Texas voluntarily. Ikorongo Appx. 57, 59. That leaves only one of six inventors subject to the subpoena power of the Northern District of California, and subpoenas are unnecessary anyway. The others already live outside California in Colorado, Tennessee, and North Carolina—closer to the Western District of Texas. This case will rely on voluntary attendance of witnesses or alternative forms of obtaining testimony regardless of the district in which it proceeds. To the extent witnesses are needed to testify at trial and refuse, their depositions can be used, and courts are now far more familiar with allowing remote testimony under Fed. R. Civ. P. 43.

Samsung and LG assert that the district court erred in stating that some third parties can fall within the district court's subpoena power. *See* Samsung Pet. 25. They misconstrue the district court's meaning. The court simply meant that the fact of third-party companies having places of business in the district means the company can be compelled to provide corporate representatives' testimony in the district. In any

event, Google already has voluntarily submitted an employee for deposition here. Samsung and LG argue that it is erroneous to note that there is no evidence witnesses are unwilling to testify, and they should be presumed unwilling, citing a case involving third-party witnesses with myriad employers and interests. *See* Samsung Pet. 26, *citing In re Apple Inc.*, 581 F. App'x 886, 889 (Fed. Cir. 2014) (unpublished). In the absence of evidence that witnesses would be willing to testify voluntarily, that might make sense. But here, as noted above, witnesses are employed by a company the Petitioners have identified as a real party in interest and another with business interests in the case. The inventors have stated on the record they would testify voluntarily. The evidence that witnesses would or likely would be willing to testify must be met with contrary evidence they would not. Samsung and LG have offered no such evidence.

Given the likelihood of voluntary testimony, the alternatives to voluntary testimony, the district court's ability to compel Google's testimony, and the fact that only one of six inventors will be subject to the subpoena power of the Northern District of California in any event, this factor is neutral or only slightly weighs in favor of transfer.

3. The Northern District of California is no more convenient for witnesses, overall, than the Western District of Texas. The court correctly recognized that "only a few party witnesses and even fewer non-party witnesses will likely testify at trial." Samsung Appx. 218. Apart from an inventor or a single party corporate representative witness per side, it is atypical for either party to call their employees or third parties as live fact witnesses in patent trials. Expert witnesses usually present the competing trial positions on infringement, invalidity and damages, sometimes supplemented by videotaped deposition excerpts of party fact witnesses. Ikorongo does not currently expect to call the Samsung, LG, Google, and other third-party employees that Samsung and LG identified as residing in NDCA, live at trial, but rather by deposition (if at all).

And as established above, the potential witnesses are spread all over the country. Google and Avast witnesses purportedly are in California. Samsung has around 1,200 employees in the State of Texas who may have information relevant to this case, including at its "flagship" north Texas campus. Ikorongo Appx. 45-46; https://news.samsung.com/us/samsung-electronics-america-open-flagship-north-texas-campus/. Other Samsung and LG witnesses are on

the East Coast, and the inventors are spread throughout the country. Ikorongo's founder and CEO, Hugh Svendsen, and other Ikorongo members reside in North Carolina, which is substantially closer to WDTX than NDCA.

In either venue, the majority of witnesses will have to travel and be "'away from work, family, and community,'" Samsung Pet. 28 (citation omitted), but travel to Waco is significantly less onerous than travel to San Francisco. The U.S. General Services Administration daily per diem allowances (which are based on the relative costs of lodging and meals in various locales across the United States) for Waco versus San Francisco conclusively illustrate the magnitude of this cost difference. For January 2021, the GSA per diem was $333 per day for San Francisco lodging, but only $107 per day for Waco. *See* https://www.gsa.gov/travel/plan-book/per-diem-rates. Similarly, the GSA allowed a much higher daily per diem for meals and incidentals of $76 for San Francisco compared to $56 for Waco. *Id*. The cost of attendance for all witnesses not in NDCA is substantially higher when traveling to San Francisco than to Waco. Ikorongo Appx. 51-53.

4. The practical problems that make trial easy, expeditious and inexpensive weigh heavily in favor of the cases remaining in the Western District of Texas. The district court already has invested significant time and energy into these matters. As Samsung and LG failed to disclose to this Court, the district court already has evaluated the patents, held a joint *Markman* hearing, and issued its *Markman* order. *See In re Dell Inc.*, 600 F. App'x 728, 730 (Fed. Cir. 2015) (denying petition for writ of mandamus regarding denial of transfer when "the court found that judicial economy considerations weighed strongly against transfer because it had previously held a *Markman* hearing, considered numerous substantive pretrial motions, held a jury trial, and entertained extensive post-trial motions regarding the '227 patent, and, additionally, was simultaneously considering the separate case against Apple involving the same patent and similar underlying technology") (unpublished). Samsung and LG argued below that the lack of a *Markman* hearing weighed in favor of transfer. Samsung Appx. 51; LG Appx. 52. Of course, now that the court has held the *Markman* hearing and issued its order, that weighs against transfer. Transfer would significantly hinder the forward progress of this case. The district court

is now familiar with the asserted patents through claim construction and other pretrial matters, and judicial economy further favors this district.

When there is a co-pending case involving the same patent and underlying technology, that also weighs heavily against transfer. *In re Vistaprint Ltd.*, 628 F.3d 1342, 1346 (Fed. Cir. 2010). The case against Bumble *will* be tried in the Western District of Texas, and it involves two of the four patents asserted against Samsung and LG, as does the case against Lyft.[3] Without citing any evidence, Samsung and LG attempt to distance their cases from Bumble's claiming differences with the relevant patents and infringing technologies, *see* Samsung Pet. 29-30, but they cannot distance themselves from Bumble given the record.

The Samsung, LG, Lyft, and Bumble cases have been tied together on the same schedule since August 2020, and Samsung and LG have not objected to that efficiency. As noted, Samsung, LG, Lyft, and Bumble held their *Markman* hearings together, and the parties all have

[3] One of the two remaining patents in the Samsung and LG cases is a reissue of the same patents in the Bumble case. Thus, only one patent of a different family is at issue in Samsung and LG.

conferred together on other matters, such as scheduling. Indeed, for all of Samsung and LG's arguments that the relevant technologies in the two cases differ, Samsung, LG, Bumble, and Lyft filed a Combined Responsive Claim Construction brief taking identical claim construction positions. Dist. Ct. Dkt. 55. They also have submitted identical invalidity contentions in the district court and filed identical IPRs before the PTAB.

The existing litigation below proves the cases can be handled more easily, expeditiously, and inexpensively when litigated together. And such considerations can be determinative of a transfer motion, even when another venue may be more convenient for the parties. *Regents of Univ. of Cal. v. Eli Lilly & Co.*, 119 F.3d 159, 1565 (Fed. Cir. 1997). Denying transfer here will result in a single locale for trials of the suits filed on these patents, whereas the discretionary relief Samsung seeks would inefficiently and unavoidably necessitate trial on the same patents in two separate districts, by two separate district courts operating under disparate schedules and local procedures.

Moreover, with respect to the cost of conducting a trial in NDCA versus WDTX, which is a real-world "practical problem that make[s]

trial of a case easy, expeditious, and *inexpensive,*" this factor cuts strongly against Samsung's transfer request. As noted above, the collective cost for witness lodging and meals is more than triple in San Francisco than in Waco. All the other necessary and customary costs of a patent trial are similarly far more expensive in San Francisco than Waco. Ikorongo Appx. 53-54. All the factors involving making litigation easy, expeditious and inexpensive weigh heavily against transfer.

B. The Northern District of California is not clearly more convenient under the public interest factors.

The public interest factors also weigh against transfer. They are "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws [or in] the application of foreign law." *Volkswagen*, 545 F.3d at 315 (citation omitted). The parties agree that the third and fourth factors are neutral. The first two factors weigh against transfer.

1. Administrative difficulties flowing from court congestion weighs against transfer. Of course, splitting the currently combined litigation into two inherently creates unnecessary congestion by

duplicating efforts in two courts that could be handled in one. And the biggest relevant inquiry under this factor is "[t]he speed with which a case can come to trial and be resolved[.]" *In re Genentech, Inc.*, 566 F.3d 1338, 1347 (Fed. Cir. 2009). Samsung and LG admitted below that the Western District of Texas "may be able to try the case earlier than a court in the NDCA." Samsung Appx. 52; LG Appx. 53. Ikorongo agrees—this case has already been pending there for some time, such that the parties have already received a *Markman* order and negotiated a Protective Order. Most importantly, trial of this suit in WDTX was less than a year away—in January 2022.[4] Ikorongo Appx. 10. Considering that all in-person, in-court proceedings were suspended in NDCA as a result of the Covid-19 pandemic, the NDCA is almost certainly suffering from more court congestion than usual, with a sure backlog of delayed trials waiting to be re-scheduled. Ikorongo Appx. 61-65. This disparity is directly relevant to the venue transfer analysis, and it will increase an already significant disparity the district court found based on record evidence in another case. *See* Samsung Appx. 221-22, *citing Parus*

[4] Trial has since been rescheduled to March 2022, still less than a year away.

Holdings Inc., at *7. Samsung and LG chide the district court for referring to that analysis, but they cite no evidence undermining it, nor do they argue it was wrongly decided or has subsequently become incorrect. The administrative factor weighs against transfer.

2. The local interests factor also weighs against transfer. There is not an incredibly strong interest for either district, but the Western District of Texas has a greater local interest. Samsung and LG rely on the argument that "[t]hree of the five Accused Applications were designed and developed in the NDCA." *See* Samsung Pet. 31. Below, they gave no reason that purported fact is relevant and stated this renders the public interest factors "either favor[ing] transfer or neutral." The district court then provided a somewhat ethereal localized interest insofar as the litigation "calls into question the work and reputation of several individuals residing" in the NDCA. Samsung Appx. 223. But those individuals neither are defendants nor work for a defendant, and any effects on those people are speculative at best. Meanwhile, Samsung, *a defendant*, employs over 1200 people in Texas and has a "flagship" Texas campus. Ikorongo Appx. 45-46. Its actions are called into question by name as a defendant, and its direct pecuniary interests and reputation

are at least as much at stake, given its name in the caption. To the extent the work and reputation of involved people constitutes a "local interest" for a district court, the Western District of Texas has a much greater interest. The local interest, while small for either court, also weighs against transfer.

C. The public and private interest factors weigh against transfer, and the petitions should be denied.

The private interest factors are all neutral, except one that weighs heavily against transfer. And both of the public interest factors weigh against transfer. Thus, the public and private interest factors weigh against transfer. Samsung and LG, therefore, have fallen short of even their burden to convince a trial court to override a plaintiff's choice of venue by proving their proposed venue is "clearly more convenient." They certainly have fallen far short of the required showing for this Court to issue a writ of mandamus—proving that the district court's decision not to transfer was a "clear abuse of discretion." In light of (1) their failure to meet this burden, (2) the unavailability of the Northern District of California as a venue, (3) their waiver of arguments by failing to raise them before the district court, and (4) their gamesmanship in waiting

until after the *Markman* ruling to file these petitions, Samsung and LG's petitions for writs of mandamus should be denied.

CONCLUSION

For the foregoing reasons, the petitions for writs of mandamus should be denied.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing is proportionately spaced and contains 7,781 words excluding parts of the document exempted by Rule 32(a)(7)(B)(iii).

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June 7, 2021

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CERTIFICATE OF SERVICE

I certify that on June 7, 2021, the foregoing was served on all parties or their counsel of record through the CM/ECF system.

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