No. 21-144

IN THE

United States Court of Appeals for the Federal Circuit

IN RE GOOGLE LLC,
Petitioner.

On Petition for Writ of Mandamus to the
United States District Court for the Western District of Texas
No. 6:20-cv-0075-ADA
District Judge Alan D. Albright

GOOGLE LLC'S REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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CERTIFICATE OF INTEREST

Counsel for Petitioner Google LLC hereby certifies as follows:

1. The full name of every party represented by me is: **Google LLC.**

2. The real parties in interest are: **Google LLC.**

3. All parent corporations and any publicly held companies that own 10% or more of the stock of the parties I represent are as follows:

Google LLC is a subsidiary of XXVI Holdings Inc., which is a subsidiary of Alphabet Inc., a publicly traded company. No publicly held company owns 10% or more of Alphabet Inc.'s stock.

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or that are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Hogan Lovells US LLP: None

White & Case LLP: Eric Lancaster and Michael J. Songer

Potter Minton PC: Michael E. Jones

5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal: **None.**

6. Organizational Victims and Bankruptcy Cases:

N/A

Dated: May 26, 2021 /s/ Neal Kumar Katyal

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INTRODUCTION

The theme of EcoFactor's response—repeated more than half a dozen times throughout its brief—is that a district court has "discretion" when "weighing" the transfer factors. *See, e.g.*, Resp. 1-2, 5-6, 10-11, 32. But a district court "necessarily abuse[s] its discretion if it base[s] its ruling on an erroneous view of the law." *Highmark Inc. v. Allcare Health Mgmt. Sys., Inc.*, 572 U.S. 559, 563 n.2 (2014) (citation omitted). Here, the District Court committed a series of legal errors in denying transfer, and neither EcoFactor nor the District Court is able to defend them.

The problems for EcoFactor become evident on the first page of its brief. EcoFactor begins by arguing that the Western District of Texas ("WDTX") "has a significant interest in this case" due to Google's "substantial presence in the district dating back 14 years." Resp. 1. But this Court rejected an almost indistinguishable argument six months ago, finding that the District Court abused its discretion by holding that Apple's "general contacts with the forum that are untethered to the lawsuit" established a significant interest in the case. *In re Apple Inc.*, 979 F.3d 1332, 1345 (Fed. Cir. 2020) ("*Apple III*"). EcoFactor's arguments go downhill from there: Each one either fails to plausibly distinguish precedents that foreclose EcoFactor's position, or simply ignores them.

The District Court's own decisions also confirm that it erred. Since issuing the order under review, the District Court has issued no fewer than four transfer

decisions whose analysis is irreconcilable with the order below. The District Court held that it would be "thwarting [its] duty to adhere to [Fifth] Circuit precedent" if it discounted the physical location of electronic documents, as it did here. *10Tales, Inc. v. TikTok Inc.*, No. 6:20-CV-00810-ADA, 2021 WL 2043978, at *2 (W.D. Tex. May 21, 2021); *see Koss Corp. v. Plantronics, Inc.*, No. 6:20-CV-00663-ADA, 2021 WL 2075685, at *3 (W.D. Tex. May 20, 2021) (same); Order Granting Google's Motion to Transfer Venue at 5 n.5, *InfoGation Corp. v. Google LLC*, No. 6:20-cv-00366-ADA (W.D. Tex. Apr. 29, 2021), ECF No. 65 ("*InfoGation* Order") (same). It held that "co-pending cases are only a relevant consideration against transfer where venue is not challenged in the co-pending case." *Correct Transmission LLC v. ADTRAN, Inc.*, No. 6:20-CV-00669-ADA, 2021 WL 1967985, at *5 (W.D. Tex. May 17, 2021). And it held that a party's "general presence" in the forum "should not be given much consideration." *10Tales*, 2021 WL 2043978, at *5 (quoting *Apple III*, 979 F.3d at 1345); *see Koss Corp.*, 2021 WL 2075685, at *7-8 (same).

This Court has explained that, in the transfer context, mandamus is warranted whenever a district court's errors "produce a patently erroneous result." *Apple III*, 979 F.3d at 1346. Here, the District Court denied transfer even though the plaintiff, the defendant, and the university that collaborated on the patented inventions are headquartered in the Northern District of California ("NDCA"); nearly every witness

and all relevant evidence is located there; and NDCA is where the accused product and the patent-in-suit were developed. Mandamus should be granted.

ARGUMENT

I. THE PRIVATE INTEREST FACTORS WEIGH HEAVILY IN FAVOR OF TRANSFER.

A. The Presence of All Relevant Physical and Electronic Evidence in NDCA Weighs Heavily in Favor of Transfer.

Here's the first tell that EcoFactor faces an uphill battle: EcoFactor does not even attempt to dispute that every item of evidence relevant to this case is located in NDCA, while not a single piece of evidence is located in WDTX. *See* Pet. 14-15. Under this Court's precedents, that should have been more than enough for the sources-of-proof factor to weigh "heavily in favor of transfer." *In re Nintendo Co.*, 589 F.3d 1194, 1199-1200 (Fed. Cir. 2009); *see* Pet. 14-15.

EcoFactor claims that the District Court was permitted to disregard the location of the evidence in light of "the realities of transporting electronic documents." Resp. 13. But the District Court has since acknowledged that is incorrect: It has explained on three separate occasions that Fifth Circuit precedent bars courts from considering the fact that "the relevant evidence may be equally accessible in both Districts electronically." *10Tales*, 2021 WL 2043978, at *2; *see Koss*, 2021 WL 2075685, at *3; *InfoGation* Order at 5 n.5; *see also, e.g.*, *In re TS Tech USA Corp.*, 551 F.3d 1315, 1321 (Fed. Cir. 2008) (fact that "documents were

stored electronically" is immaterial under Fifth Circuit law). Here, by contrast, the District Court stated that it saw "little benefit" in focusing on the physical location of electronic documents, Appx5, and found this factor "neutral" notwithstanding the presence of every document in NDCA, Appx6.

Furthermore, the District Court clearly erred by asserting that all of Google's evidence is available electronically and easily accessible in WDTX. Appx6. EcoFactor does not dispute that transporting Google's source code to WDTX would be highly burdensome. *See* Pet. 16-17. EcoFactor claims that Google never demonstrated that its source code is located in NDCA. Resp. 14. However, Google submitted declarations stating that "[t]he relevant Google documents about the Nest Learning Thermostat" are located in NDCA, Appx155-156; Appx350, and produced contemporaneous correspondence in which EcoFactor's own attorney acknowledged that "the Source Code" computer is "in Silicon Valley," Appx249 (email of May 1, 2020).

In addition, EcoFactor now admits that the prototypes of the Nest Learning Thermostat are physical evidence that would have to be "shipped" to WDTX. Resp. 15. EcoFactor argues that the cost of shipping would be "low." *Id.* But the Fifth Circuit has held that the sources-of-proof factor turns on "*relative* ease of access, not *absolute* ease of access," and that even a "slight" inconvenience is enough to favor transfer. *In re Radmax, Ltd.*, 720 F.3d 285, 288 (5th Cir. 2013) (per curiam). It

would plainly be more convenient to access the physical prototypes and all of Google's remaining evidence in NDCA, where it is stored, rather than halfway across the country in WDTX.

B. The Availability of Compulsory Process in NDCA Heavily Favors Transfer.

The availability of compulsory process also lopsidedly favors transfer. No potential third-party witness is within the subpoena power of WDTX, while at least three categories of non-party witnesses are within the subpoena power of NDCA. Pet. 17-18.

EcoFactor contends that the District Court could disregard all of these third-party witnesses because there is no affirmative evidence that they are unwilling to attend trial. But in *In re HP Inc.*, this Court faulted the district court for committing the same error, explaining that "even the Eastern District of Texas's own cases have held that" a non-party witness "is presumed to be unwilling." No. 2018-149, 2018 WL 4692486, at *3 n.1 (Fed. Cir. Sept. 25, 2018) ("*HP I*"). Contrary to EcoFactor's suggestion (at 17), this case was not enforcing a rule applicable only in the Eastern District of Texas—nor could it have been, since district court cases are "not binding precedent . . . even upon the same judge." *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011) (citation omitted). Rather, this Court was applying its own longstanding rule that this factor favors transfer if compulsory process "may" be useful "in the

event process is required to hale relevant witnesses into court." *In re Acer Am. Corp.*, 626 F.3d 1252, 1255 (Fed. Cir. 2010).[1]

EcoFactor is also incorrect that the District Court validly disregarded NDCA's power to subpoena the employees of research institutions that EcoFactor partnered with in developing its patents. Google did not make "vague and unsupported statements regarding the location" of these witnesses. Resp. 18 (quoting *In re HP Inc.*, 826 F. App'x 899, 903 (Fed. Cir. 2020) ("*HP II*") (per curiam)). It identified precisely where they are located: at the University of California, Berkeley. ECF No. 19, at 4; Appx267-280. Moreover, Google explained "how [they] have relevant and material information," Resp. 19 (citing *In re Genentech Inc.*, 566 F.3d 1338, 1343-44 (Fed. Cir. 2009)): because they "could yield prior art or relevant information about EcoFactor's development of its asserted inventions and products." ECF No. 19, at 5; *see* ECF No. 25-1, at 3. EcoFactor's charge that Google has no intention of calling these witnesses is groundless. Google stated below that these employees are "likely witnesses," ECF No. 19, at 11 (capitalization omitted), who have information "germane" to its defense, ECF No. 25-1, at 3.

[1] EcoFactor's assertion that it has a "consulting agreement" with one of the named inventors does not rebut the presumption of unwillingness. Resp. 16. EcoFactor has never produced this agreement, and there is no evidence that it requires the inventor to testify on EcoFactor's behalf. Further, even if this individual consented to testify, he would still need to be considered under the willing-witness factor, and NDCA—the place where he resides and works, *see* Appx158 (¶¶ 8-9)—would clearly be the more convenient forum.

EcoFactor is also wrong that the possibility of obtaining video depositions negates the relevance of the compulsory-process factor. Resp. 19. This factor favors transfer because NDCA has "absolute subpoena power" over all of the non-party witnesses, whereas WDTX can, at most, subpoena the non-party witnesses to attend a deposition in California. *In re Hoffman-La Roche Inc.*, 587 F.3d 1333, 1338 (Fed. Cir. 2009). It is highly questionable whether a video deposition could be introduced at trial. *See Battle ex rel. Battle v. Mem'l Hosp. at Gulfport*, 228 F.3d 544, 554 (5th Cir. 2000) (describing the Fifth Circuit's "preference for live testimony over deposition," which can be "rebutt[ed]" only where "a witness is unavailable or exceptional circumstances" are present). And it would plainly be more convenient for the parties to perform depositions in the district where the case is being litigated, rather than 1,000 miles away.

C. The Cost of Attendance For Willing Witnesses Weighs Heavily in Favor of Transfer.

The cost-of-attendance factor also heavily favors transfer. Nearly every possible party witness is located in NDCA, including all of the Google personnel with relevant knowledge of the Nest Learning Thermostat and every EcoFactor employee. Pet. 20-21. The only six Google employees in Texas with involvement in Nest are customer-service or sales employees with no knowledge relevant to this case. Appx154-155 (¶¶ 13-16).

EcoFactor argues (at 21-22) that the District Court was entitled to give "the convenience of party witnesses . . . little weight." Appx9 (citation omitted). But EcoFactor ignores the long line of this Court's cases placing significant, often dispositive weight on the convenience of party witnesses. *See* Pet. 23 (citing examples). EcoFactor also cannot square its position with *In re Apple, Inc.*, 818 F. App'x 1001 (Fed. Cir. 2020) ("*Apple II*"), where this Court expressed "concern" when the District Court relied on the "discordant proposition that the convenience of party witnesses is given 'little weight.' " *Id.* at 1003. EcoFactor notes that the Court did not grant mandamus in that case. Resp. 22. True enough—but the Court explained that it let the District Court's error slide only because the District Court treated "the convenience of the party witnesses [as] the determinative consideration" and weighed it "*in favor* of transfer." *Apple II*, 818 F. App'x at 1003 (emphasis added). Just the opposite is true here: The District Court discounted the relevance of the convenience factor and deemed it neutral. EcoFactor cannot ask for another mulligan.

EcoFactor also continues to insist that it has identified "several witnesses in Texas with relevant knowledge regarding the accused products." Resp. 22. This claim collapses under scrutiny. Of the "five additional Google employees in Austin" EcoFactor purported to identify below, Appx9, EcoFactor does not dispute that one of those individuals (Zach Floca) actually works in NDCA, and thus counts against

its argument. *See* Appx349 (¶ 5). Meanwhile, EcoFactor admits that two of the individuals (Michael Ladner and Justin Walker) "no longer work for Google," Resp. 24; *see* Appx349 (¶¶ 6, 8), and so should not be considered under the willing-witness factor at all.[2] And it is undisputed that the fourth individual (Aaron Berndt) is the same general sales employee Google identified in its initial declaration. Appx349 (¶ 4); *see* Appx154-155 (¶ 13). Google's Global Head of Reporting and Insights, People Operations explained without contradiction that this individual is not "involved in the marketing or finance of the Nest Learning Thermostat." Appx154-155 (¶¶ 12-13).

That leaves just one Google employee in Austin (Peter Grabowski) who "worked on Nest from 2014 to 2017" while located "in California." Appx349 (¶ 7). Google's declarations make clear that this employee does not currently "work on the Nest Learning Thermostat functionality at issue," Appx349 (¶ 9), and has no "relevant knowledge of this litigation," Appx155 (¶ 16). Furthermore, the presence of one individual in WDTX with knowledge about Nest functionality could not

[2] EcoFactor has waived any argument that it requires compulsory process to obtain the testimony of these individuals. *See* ECF No. 23, at 4 (stating that not "a single relevant third party . . . would require compulsory process"). In any event, neither has information relevant to this suit. Both worked in customer support roles and reported to management in NDCA. *See* Appx349 (¶¶ 6, 8) (describing their roles as "Customer and Sales Support Associate" and "Support Engineer"); Appx155 (¶ 14) ("management personnel with relevant knowledge regarding customer support of the Nest Learning Thermostat are based in Mountain View").

possibly counterbalance the presence of more than *1,500 Nest employees* in NDCA, including the vast majority of the personnel responsible for the development, design, and marketing of the Nest Learning Thermostat. Appx153, Appx155 (¶¶ 7-8, 17).[3] Indeed, EcoFactor has not named, deposed, or called a single witness from WDTX in either this case or its pending litigation before the International Trade Commission. Pet 22 n.7.

D. The Presence of Two Pending Suits in WDTX—Also the Subject of Transfer Motions—Does Not Weigh Against Transfer.

EcoFactor fails to offer any viable defense of the District Court's treatment of the final private-interest factor. Just as in *In re Google Inc.*, the District Court improperly "weigh[ed] the judicial economy factor in [the] plaintiff's favor solely based on the existence of multiple co-pending suits, while the remaining defendants have similar transfer motions pending seeking transfer to a common transferee district." No. 2017-107, 2017 WL 977038, at *3 (Fed. Cir. Feb. 23, 2017); *see In re EMC Corp.*, 501 F. App'x 973, 976 (Fed. Cir. 2013). EcoFactor attempts to distinguish *Google* on the ground that "the transfer motions filed in the co-pending cases are no longer 'pending.' " Resp. 27. That is no distinction at all: In *Google*,

[3] EcoFactor misleadingly claims that there are a "nearly equal amount of Google employees" in Austin as in NDCA. Resp. 25. There are only 5 employees in WDTX involved with Nest, none of whom has relevant knowledge. Appx154-155 (¶¶ 13-14). Of the remaining roughly 1,400 employees in WDTX, all work on other Google products and services—and add up to less than *one-thirtieth* of the total number of Google employees who work in NDCA. *See* Appx152, Appx154 (¶¶ 4, 11).

the other motions were no longer pending once the case was on mandamus review, and indeed had been "previously denied" when Google's motion was decided. 2017 WL 977038, at *2. Yet this Court noted that "the order in which the district court rules on each of the respective pending motions" makes no difference. *Id.* It also found that the district court erred even though, like here, the court did not base its decision "merely" on the judicial-economy factor. Resp. 26; *see Google*, 2017 WL 977038, at *3.

This case is thus unlike precedents in which the judicial economy factor weighed in the plaintiff's favor because cases addressing "precisely the same issues," Resp. 25 (citation omitted), were not the subject of co-pending transfer motions, and so were bound to remain in the forum regardless of how the pending motion was resolved. *See In re Volkswagen of Am., Inc.*, 566 F.3d 1349, 1350-51 (Fed. Cir. 2009); *In re Google Inc.*, 412 F. App'x 295, 295-296 (Fed. Cir. 2011); *Correct Transmission*, 2021 WL 1967985, at *5. Here, by contrast, it is entirely possible that if this case were properly transferred to NDCA—and the District Court's legal errors were corrected in the process—considerations of convenience would favor transferring the ecobee and Vivint cases, as well.

II. THE PUBLIC INTEREST FACTORS WEIGH IN FAVOR OF TRANSFER.

A. Google's Office in Austin Does Not Give WDTX a Local Interest in This Suit.

The local-interest factor should have pointed decisively in favor of NDCA. That is where the accused product and the patents-in-suit were developed, EcoFactor and Google are headquartered, and one of the patents' two inventors resides. Pet. 7, 27-28. It is also where EcoFactor itself has previously expressed a preference to litigate claims involving Nest. *See* Appx224 (¶ 9.11); Appx 244 (¶ 11); Appx249 (email dated May 1, 2020).[4]

EcoFactor argues that the District Court properly found that all of these case-specific connections with NDCA are counterbalanced by the fact that Google has an office in WDTX. Resp. 30.[5] Tellingly, however, EcoFactor does not even try to square its position with this Court's recent decision in *Apple III*, which rejected an almost identical argument. *See* 979 F.3d at 1344-45. It also ignores the long line of cases holding that the local-interest factor pertains to a forum's "connections with the events *that gave rise to th[e] suit*," not general contacts untethered to the

[4] Contrary to EcoFactor's suggestion (at 31), Google made the same argument in the District Court, citing the same agreements. *See* ECF No. 19, at 3-4.

[5] Google's petition did not "suggest[] that Google no longer has an office" in Austin. Resp. 7 n.2. It used the past tense because the relevant declaration contains information about Google's workforce that was current "[a]s of April 2020," when the transfer motion was filed. Pet. 4.

litigation. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 318 (5th Cir. 2008) (en banc) ("*Volkswagen II*"); *see Acer*, 626 F.3d at 1256; *Koss Corp.*, 2021 WL 2075685, at *7-8; *10Tales*, 2021 WL 2043978, at *5.

Even on the most charitable reading of the facts, Google's office in WDTX has no connection to "the events that gave rise to th[is] suit." The handful of Nest employees who work there are all involved in customer service or sales, not the development of the allegedly infringing product. Appx154-155 (¶¶ 13-16). And the sole employee in WDTX who was at one time involved in product development for Nest performed all of his Nest-related work in NDCA. Appx349 (¶ 7).

EcoFactor argues that WDTX has a significant interest in this case because "the accused products are marketed and sold throughout Texas and the Western District." Resp. 30-31. The District Court did not accept that argument, and for good reason: The Fifth Circuit has "unequivocally rejected" the contention that a district "ha[s] a 'substantial interest'" simply because the product at issue is "sold in that venue." *TS Tech*, 551 F.3d at 1321.

B. The Court Congestion Factor Does Not Favor Transfer.

EcoFactor falters in its defense of the final factor, as well. This factor "concerns whether there is an appreciable difference in docket congestion between the two forums." *In re Adobe Inc.*, 823 F. App'x 929, 932 (Fed. Cir. 2020). EcoFactor does not contest that NDCA has dramatically fewer patent cases than

WDTX, Pet. 30, and that it "historically 'has a shorter time to trial for patent cases than WDTX.' " *Apple III*, 979 F.3d at 1344 (citation omitted).

The District Court found that court practices during the COVID-19 pandemic establish that it can resolve this case more quickly. Appx11. EcoFactor largely does not defend that rationale. It does not dispute that it was improper for the District Court to rely on events that post-dated the filing of the complaint, nor that the District Court erred by claiming that NDCA suspended all criminal and civil jury trials until early 2021. *See* Pet. 30-32. EcoFactor briefly asserts that the court's statements were offered "in respon[se] to Google's own argument about the pandemic." Resp. 29 (emphasis omitted). But Google's "argument" consisted of a single sentence observing that "the COVID-19 pandemic makes trial schedules even more speculative." ECF No. 19, at 13. That statement did not serve as an invitation to improperly weigh all manner of post-filing developments.

Instead of defending the District Court's reasoning, EcoFactor argues that the court-congestion factor should have weighed in its favor because WDTX's "default schedule would lead to a trial date sooner than the average time to trial in NDCA." Resp. 28 (quoting Appx11). But this Court has repeatedly admonished that "a court's general ability to set a fast-paced schedule is not particularly relevant," particularly where it "has not historically resolved cases so quickly." *Apple III*, 979 F.3d at 1344. And it is particularly irrelevant here, since had the District Court

promptly addressed Google's transfer motion—rather than delaying resolution for over 10 months—proceedings in NDCA would long since have begun.

III. A GRANT OF MANDAMUS FOLLOWS FROM PRECEDENT.

This Court has time and again granted mandamus on facts similar to—or considerably less lopsided than—those present here, based on nearly identical errors. Pet. 2-3; *see, e.g.*, *Apple III*, 979 F.3d 1332; *HP II*, 826 F. App'x 899. EcoFactor identifies two cases in which it claims the Court denied mandamus in analogous circumstances. Resp. 8-10. Neither is remotely comparable.

In *Apple II*, the Court found mandamus unwarranted because the District Court *granted* Apple's request for transfer to another division in WDTX. 818 F. App'x at 1003. Although Apple preferred transfer to NDCA, this Court explained that "[i]t is difficult to accept Apple's assertion that the result here is patently erroneous" given that "Apple received a transfer to its second-most convenient venue." *Id.* The Court also found reasonable the District Court's conclusions that a third-party witness with "relevant information" was located in WDTX, and that there was no evidence that the accused product was developed in NDCA. *Id.* at 1004. Here, by contrast, the District Court denied all the relief that Google sought, there is no legitimate convenience justification for trying this suit in WDTX, and even EcoFactor does not dispute that the case bears significant connections to NDCA—plus the District Court committed a panoply of legal errors not present in *Apple II*.

This Court's decision in *In re Western Digital Technologies, Inc.*, --- F. App'x ---, 2021 WL 1853373 (Fed. Cir. May 10, 2021), is similarly far afield. There, the plaintiff was a Swiss resident, the patents-in-suit were apparently developed abroad, and the defendant's documents were scattered across nine data centers located throughout the country. *Kuster v. Western Digital Techs., Inc.*, No. 6-20-CV-00563-ADA, 2021 WL 466147, at *2-3 (W.D. Tex. Feb. 9, 2021). Further, the District Court made extensive findings demonstrating that WDTX "would be more convenient for, and could compel the testimony of, more likely non-party witnesses." *Western Digital*, 2021 WL 1853373, at *1; *see Kuster* 2021 WL 466147, at *4-6. This case differs in every respect.

It is no surprise that EcoFactor is unable to find any case in which the Court denied mandamus in the face of facts like these. NDCA is the forum in which both parties are headquartered, all relevant evidence is located, nearly every potential witness resides, and the accused products and the patents-in-suit were developed. It is the "clearly more convenient" forum in which to adjudicate this case, and the District Court "patently err[ed]" by denying Google's motion to transfer. *Volkswagen II*, 545 F.3d at 315, 318.

CONCLUSION

The writ of mandamus should be granted, and the District Court should be directed to transfer this matter to the Northern District of California.

Dated: May 26, 2021

Respectfully submitted,

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/s/ Neal Kumar Katyal

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I certify that on May 26, 2021, the foregoing was electronically filed through this Court's CM/ECF system, which will send a notice of filing to all registered users. A copy of this document was also served on the district court judge by first-class mail, postage prepaid at the following address:

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/s/ Neal Kumar Katyal