No. 21-147

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN RE APPLE, INC.,
Petitioner,

On Petition for Writ of Mandamus to the
United States District Court for the Western District of Texas,
Case No. 6:20-cv-00665-ADA
Hon. Alan D Albright

RESPONSE OF KOSS CORPORATION TO APPLE'S PETITION FOR WRIT OF MANDAMUS

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May 25, 2021

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CERTIFICATE OF INTEREST

I, Benjamin E. Weed, counsel for Koss Corporation, hereby certify that the following information and any attached sheets are accurate and complete to the best of my knowledge:

1. The full name of every entity represented by me:

   Koss Corporation

2. For each entity represented by me, the name of every real party in interest, if that entity is not the real party in interest:

   N/A

3. For each entity represented by me, that entity's parent corporation and every publicly held corporation that owns 10% or more of its stock:

   N/A

4. The names of all law firms, partners, and associates that have not entered an appearance in the appeal, and (A) appeared for Appellee in the lower tribunal; or (B) are expected to appear for the entity in this court:

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5. The title and number of any pending case that will be directly affected by this court's decision in this appeal:

   Koss Corp. v. Apple, Inc., No. 6:20-cv-00661-ADA (W.D. Tex.)
   Koss Corp. v. PEAG LLC, No. 6:20-cv-00662-ADA (W.D. Tex.)
   Apple Inc. v. Koss Corp., No. 6:21-cv-00495-ADA (W.D. Tex)

The first two cases listed above are patent infringement cases filed by Koss in the Western District of Texas, Waco Division, which are pending before the same district judge as the case at issue in this Action, in which the asserted patents overlap in part with the patents at issue in this Action.

In the cases against PEAG (6:20-cv-00662-ADA (W.D. Tex.)) a motions to dismiss or transfer is pending.

Apple v. Koss Corp., No. 6:21-cv-00495-ADA (W.D. Tex.) is a case that was transferred from the Northern District of California upon an order of dismissal and transfer in *Apple Inc. v. Koss Corp.*, No. 4:20-cv-05504-JST (N.D. Cal.).

6. All information required by Fed. R. App. P. 26.1(b) and (c):

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Date: May 25, 2021

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INTRODUCTION

Koss Corporation ("Koss") submits this Response in opposition to Apple Inc.'s ("Apple") Petition for a writ of mandamus. Should Apple prevail, it would result in this Court directing the United States District Court for the Western District of Texas ("WDTX"), the Honorable Alan D Albright, to vacate the well-reasoned order denying transfer and to transfer this action to the United States District Court for the Northern District of California ("NDCA"). Importantly, *another* District Court Judge, the Honorable John Tigar in the NDCA, has already recognized the merit in the appealed-from order. Apple essentially asks this Court to find that *two* district courts have arrived at a conclusion that amounts to an abuse of discretion; this Court should decline that invitation.

The factual record developed in the WDTX indisputably shows the District Court did ***not*** abuse its discretion in denying Apple's motion to transfer. Indeed, the record makes it clear that Apple failed to meet its burden to prove that NDCA is "clearly more convenient" than WDTX. Apple now cries foul and, without support, accuses the District Court of abusing its discretion. One need only review the District Court's ruling to see that it performed a careful and thoughtful analysis of the transfer factors in a manner consistent with Fifth Circuit precedent. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 314, 315 (5th Cir. 2008) ("*Volkswagen II*").

Apple's claims of "erroneous conclusions of law" and "misapplications of fact" are simply disguised demands for this court to conduct a *de novo* review of the District Court's opinion and reach a different conclusion. The standard of review of the District Court's ruling is "abuse of discretion," and a district court only abuses its discretion when the decision is either clearly contrary to law or unsupported by the facts. *In re Echostar Corp.*, 388 F. App'x 994, 994-95 (Fed. Cir. 2010).

This Court has very recently denied a mandamus petition challenging Judge Albright's denial of a motion to transfer in *In re Western Digital Techs., Inc*., 2021 U.S. App. LEXIS 13765, *2 (Fed. Cir. May 10, 2021). *Western Digital* held that the District Court did not abuse its discretion in finding that:

> [T]the Western District of Texas would be more convenient for, and could compel the testimony of, more likely non-party witnesses, that the Western District of Texas has a local interest, and that the Northern District of California has a more congested docket. Although we may have evaluated some of the factors differently, we are not prepared to say that the district court's ultimate conclusion that the transferee venue was not clearly more convenient amounted to a clear abuse of discretion.

Id. at *3-4. The District Court denied Apple's transfer motion here on the same grounds as in *Western Digital*, and the outcome before this Court with regard to Judge Albright's ruling below should be no different.

The District Court found that three private interest factors and two public interest factors weighed against the transfer Apple sought, while the remaining

three factors weighed in favor of transfer or were neutral. Appx28. Notably, the District Court determined that the two most important factors, the availability of compulsory process to secure the attendance of (unwilling) witnesses and the cost of attendance for willing witnesses, weigh against transfer. *Id*.

The availability of compulsory process weighs against transfer here because two relevant, non-party witnesses who live in WDTX are unwilling to testify at trial. Appx13. Neither is subject to compulsory process in NDCA but both are subject to the subpoena power of WDTX. *Id*. These witnesses have relevant evidence regarding Koss's Striva line of headphone products and facts underlying Koss' potential damages theories, as well as development and maintenance of Koss' website (which included functionality that made the Striva line of headphone products functional) and product development files for Koss' Striva headphones. *Id*. These are all important pieces of the story Koss intends to tell the jury at trial.

The cost of attendance for willing witnesses also weighs against transfer because WDTX is more convenient than NDCA to nearly all of the non-party inventor witnesses. Appx20. Under Fifth Circuit precedent, the convenience of non-party willing witnesses is given greater consideration than the convenience of party witnesses. *Id*. Seven (out of eight) third-party inventors of the asserted patents reside in Illinois and Wisconsin, outside of the subpoena power of either venue. *Id*. WDTX is a closer and more convenient forum for those seven witnesses

than NDCA, and even exists in the same time zone as the Illinois and Wisconsin residences of these witnesses. *Id*. The remaining third-party inventor resides in California but is willing to attend trial in Texas because Koss is paying for his expenses. Appx21.

The District Court held that two public interest factors weigh against transfer—the administrative difficulties flowing from court congestion and the local interests factors. Appx28. The District Court noted that the Waco division of WDTX has disposed of cases faster than the NDCA and thus the relative time to trial is shorter in WDTX, weighing against transfer. Appx25. The District Court found that WDTX and NDCA both have local interests in deciding the case, but this factor weighs against transfer because Koss has a significant financial presence in WDTX and Apple maintains its second largest corporate campus in WDTX with over 6,000 employees. Appx27. Moreover, Apple acknowledges that it is currently expanding its presence in Austin, Texas to create one of the world's largest office buildings and hotel specifically for Apple employees. Appx18-19, 26. Apple continues to avail itself of the benefits of doing business in WDTX, yet repeatedly seeks to shirk the aspects of doing business in WDTX that it apparently deems unfavorable.

Because the District Court properly exercised its discretion to deny Apple's motion to transfer, Apple cannot demonstrate that it is entitled to the extraordinary

remedy of mandamus relief. Apple has no "clear and indisputable right to relief" and has not shown that "the writ is appropriate under the circumstances." Apple would have this Court reweigh the facts and re-analyze the transfer factors to find purported errors, an exercise beyond the purpose of mandamus. Whether transfer might have been appropriate or whether the facts could have been weighed differently is irrelevant.

While Apple may earnestly desire to litigate this case in NDCA, the District Court applied a correct and appropriate analysis of the facts and concluded, in the exercise of its proper and lawful discretion, that Apple had not proved that NDCA was "clearly" more convenient. As noted above, United States District Court Judge Jon S. Tigar in NDCA recently lauded (and relied on) Judge Albright's ruling to transfer a second filed declaratory judgment action brought against Koss by Apple to WDTX. RAppx002. Judge Tigar's May 12, 2021 order praises Judge Albright's order, calling it "thoughtful," and noting that Judge Albright "carefully considered the public and private interest factors … and explained its reasoning at length in its 29-page" opinion. *Id*.

The District Court's well-reasoned denial of Apple's motion to transfer was manifestly not an abuse of discretion, and this Court should deny Apple's Petition.

ARGUMENT

I. LEGAL STANDARD

This Court reviews Apple's Petition for writ of mandamus seeking to overturn the District Court's order on the motion to transfer under an abuse of discretion standard, which properly defers to the District Court's reasoned assessment in adjudicating the same. *In re Echostar Corp*., 388 F. App'x 994, 994-95 (Fed. Cir. 2010) (stating "mandamus may be used to correct a patently erroneous denial of transfer" which is an "exacting" standard, "requiring the petitioner to establish that the district court's decision amounted to a failure to meaningfully consider the merits of the transfer motion" (citations omitted)).

Issuance of a writ of mandamus is a "drastic" remedy reserved only for truly extraordinary cases. *Ex parte Fahey*, 332 U.S. 258, 259-60 (1947). Absent a "patently erroneous result," this Court will not "second guess" the lower court's transfer ruling. *In re Intel Corp.,* No. 2021-111, 2021 WL 217377, at *2 (Fed. Cir. Jan. 21, 2021). In fact, this Court need only find "plausible support of record" for the District Court's determination to deny the issuance of the writ of mandamus. *In re Vistaprint Ltd.*, 628 F.3d 1342, 1347 (Fed. Cir. 2010). The Fifth Circuit has concluded that writs are not appropriate to "correct a mere abuse of discretion," but only to "correct a *clear* abuse of discretion." *Volkswagen II*, 545 F.3d at 309-10 (emphasis added).

As the Fifth Circuit has warned, courts reviewing petitions for writ mandamus "must be careful lest they suffer themselves to be misled by labels such as 'abuse of discretion' and 'want of power' into interlocutory review of nonappealable orders on the mere ground that they may be erroneous." *Volkswagen II,* 545 F.3d at 309-10, *citing Will v. United States*, 389 U.S. 90, 98 n. 6, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967).

Fifth Circuit law sets forth a set of private and public interest factors for courts to analyze when deciding a motion to transfer pursuant to 28 U.S.C. § 1404(a).[1] *Volkswagen II*, 545 F.3d at 315. The convenience of witnesses is certainly considered the most important factor in the transfer analysis. *In re Genentech, Inc.*, 566 F.3d 1338, 1342 (Fed. Cir. 2009). However, existing, long-standing Fifth Circuit precedent further holds that the convenience of ***non-party*** witnesses is accorded much greater weight than the convenience of any party (and especially employee) witnesses. *State St. Cap. Corp. v. Dente*, 855 F. Supp. 192, 198 (S.D. Tex. 1994) (collecting cases); *Gardipee v. Petroleum Helicopter*, 49 F. Supp. 2d 925, 929 (E.D. Tex. 1999); *ADS Sec. L.P. v. Advanced Detection Sec.*

[1] The private interest factors are: (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. The public interest factors are: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity

Servs., No. A-09-CA-773-LY, 2010 U.S. Dist. LEXIS 27903, *4 (W.D. Tex. Mar. 23, 2010); *Moskowitz Family LLC v. Globus Med., Inc.*, No. 6:19-cv-672-ADA, 2020 WL 4577710, *4 (W.D. Tex. Jul. 2, 2020); *Woolf v. Mary Kay Inc.*, 176 F. Supp.2d 642, 650 (N.D. Tex. 2001); *Ternium Intern. U.S.A. Corp. v. Consol. Sys.*, No. 3:08-CV-0816-G, 2009 U.S. Dist. LEXIS 15606, 2009 WL 464953, at *4 (N.D. Tex. Feb. 24, 2009). The Fifth Circuit affords the convenience of party and/or employee witnesses much less weight than non-party witnesses simply because a party can compel its own party/employee witness to testify and appear at trial. *Gardipee*, 49 F. Supp. 2d. at 929.

II. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS ANALYSIS OF THE PRIVATE INTEREST FACTORS

Apple contends that the District Court abused its discretion in analyzing two of the four private interest factors - the availability of compulsory process and the convenience to witnesses. Petition at 17. The record does not support its argument. The District Court relied upon, and properly weighed, abundant evidence in exercising its discretion to find that these two factors weigh against transfer.

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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.

A. There Was Ample Evidence Before the District Court to Support Its Finding That the Availability of Compulsory Process Factor Weighs Strongly Against Transfer.

This Court has noted that a district court enjoys considerable discretion when assessing the relevance and materiality of potential witnesses and evidence. *In re Genentech, Inc.*, 566 F.3d 1338, 1343 (Fed. Cir. 2009). "Those principles apply with particular force to a district court's evaluation of whether an individual is deserving of consideration in the willing witness or compulsory process factors." Order Denying Petition for Writ of Mandamus, *In re Apple Inc.*, No. 2020-104 (Fed. Cir. Dec. 20, 2019).

For this factor, the District Court considers the availability of compulsory process to ensure the attendance of witnesses, and particularly "non-party witnesses whose attendance may need to be secured by a court order." *Fintiv, Inc. v. Apple Inc.*, No. 6:18-cv-00372-ADA, 2019 WL 4743678, at *5 (W.D. Tex. Sept. 13, 2019). Thus, the District Court below analyzed the location of five third-party witnesses whose attendance may need to be compelled by court order: an inventor of several of the accused patents (Mr. Sagan); two alleged prior art witnesses (Messers Zellweger and Wilson); a third party witness with knowledge of the firmware in Koss's Striva line of headphones relevant to Koss' own development of the patented technology, relevant to Koss' potential lost profits damages analysis (Mr. Alihassan, who is a current employee of a headphone competitor of

Apple and Koss); and a third party witness identified by Koss with knowledge of Koss's product development documents, website development, and archived documents (Mr. Petrone). Appx8-11.

1. Mr. Sagan (Third Party Inventor)

Mr. Sagan is one of eight inventors of the patents in suit and the only one who lives in California. Appx197. Apple contends (confusingly) that the District Court "declined to credit" Mr. Sagan in the analysis of this factor. Petition at 20. Apple also contends that it was impermissibly required to prove that Mr. Sagan was "unwilling" in order to be considered in this factor. Appx25. Apple is wrong on both counts. The District Court determined that Mr. Sagan was not an "unwilling" witness because Koss represented under Fed. R. Civ. P. 11 that Mr. Sagan was willing to travel to WDTX at Koss' expense. Appx11. Thus, the District Court determined that Mr. Sagan should not be evaluated under the compulsory process prong. Appx12. Contrary to Apple's assertion, the District Court did not impose a burden of proof on Apple to show Mr. Sagan was unwilling. Rather, it noted that after Koss presented evidence that Mr. Sagan *was* a willing witness, Apple claimed that it was Koss' obligation to "establish that Mr. Sagan will irrevocably testify at trial" for Mr. Sagan to be considered a willing witness and offered no facts to show Mr. Sagan was *not* a willing witness. Appx12. The District Court, based on the record developed (or lack thereof, as Apple failed to

seek any testimony of Mr. Sagan during the District Court's venue discovery period), rightly rejected that argument and was well within its discretion to find that Mr. Sagan was a willing witness. Contrary to Apple's characterization, the District Court merely recognized that the argument around Mr. Sagan amounted to Apple failing to carry its burden.

2. Mr. Zellweger and Mr. Wilson (Apple's Purported Third Party Prior Art Witnesses)

Apple identified two purported third-party prior art witnesses located in NDCA for the first time in its Reply brief before the District Court—Messrs. Zellweger and Wilson. Appx10. Even if Apple had timely disclosed these witnesses in its opening motion, the District Court was well within its discretion to find that prior art witnesses are unlikely to testify. In fact, despite having identified these witnesses and bearing a burden on its motion, Apple failed to even assert that these witnesses were *unwilling* to testify in Texas. Appx12.

In support of this argument, Apple cites to *In re HP Inc.*, No. 2018-149, 2018 WL 4692486, at *3 (Fed. Cir. Sept. 25, 2018), which is inapposite. In *HP*, this Court found that the party seeking transfer need not affirmatively indicate that it would call to testify at trial certain employees who had left their respective companies since the motion to transfer had been filed. *Id.* The case does not call into question the District Court's well-reasoned assumption that few if any prior art witnesses will ultimately testify at trial. *Fintiv,* 2019 WL 4743678, at *5 (citing *E.*

Tex. Boot Co. v. Nike, Inc., Nos. 2:16-CY- 0290-JRG-RSP, 2:16-CY-0475-JRG-RSP, 2017 WL 2859065, at *4 (E.D. Tex. Feb. 15, 2017)). Ironically, Apple complains that the District Court failed to follow this Court's direction to assess the relevance and materiality of the witness' potential testimony, (Petition at 23), when that is exactly what the District Court did with respect to these prior art witnesses.

3. Mr. Alihassan (Third Party Witness, Employed By A Competitor, Knowledgeable About Koss Products)

Mr. Alihassan is a current employee of a Koss (and Apple) competitor, Plantronics, Inc., residing in Austin, Texas. Appx13. Because Koss has also sued Plantronics for infringement of the same patents, the Court logically concluded that Mr. Alihassan would be unlikely to testify willingly in either Texas or California. *Id*. The District Court also held that Mr. Alihassan is a relevant witness because he formerly worked at Red Fusion, the company that Koss contracted to assist in developing firmware for Koss' Striva headphones, and that his testimony is relevant to Koss' potential lost profits theories. *Id*. Apple makes a passing statement that Koss "did not describe the relevant knowledge" possessed by Mr. Alihassan, but the District Court's well-reasoned order shows otherwise. Petition at 13-14.

4. Mr. Petrone (Third Party Witness Knowledgeable of Koss Documents and Website Contents)

Mr. Petrone is the co-owner of Koss' IT vendor, Synectics International Inc. ("Synectics"); Synectics has been Koss's IT vendor since before Koss developed the Striva line of headphones.[2] Appx196. Mr. Petrone has stated that he is unwilling to travel to NDCA to testify. *Id*. Although the District Court determined that Mr. Petrone would be unlikely to testify at trial, it is undisputed that Mr. Petrone is an unwilling witness and the fact that he would be subject to compulsory process in WDTX but not NDCA was relevant to the analysis. Appx13. Apple makes no argument as to why this determination was an abuse of discretion.

Accordingly, the District Court did not abuse its discretion in finding that the availability of compulsory process factor weighed heavily against transfer.

B. There Was Abundant Evidence Before the District Court to Support Its Finding That the Cost of Attendance for Willing Witnesses Factor Weighs Against Transfer.

Apple's disagreement with the District Court's ruling on the witness convenience factor is based on a flawed representation of Fifth Circuit law. Apple complains that the District Court erred by failing to equally consider the convenience of party and non-party witnesses alike. Petition at 21-22. That is not

[2] Koss believes the district court underplayed the role of Mr. Petrone as it relates to the litigation; Mr. Petrone has already been an integral part of the litigation process, and his involvement has only become more critical as the parties delve into fact discovery post-*Markman*.

the law in the Fifth Circuit. As the District Court repeatedly explained, the convenience of non-party witnesses is given the most weight and the convenience of party witnesses is given little weight. Appx14. Herein lies the critical distinction, which also happens to be a distinction that Apple ignores in its Petition.

The District Court did not discount all thirteen of Apple's witnesses as it claims. Petition at 20. The District Court carefully considered all the pertinent facts as to all of Apple's witnesses—those in NDCA and those elsewhere—but ultimately concluded that the greater weight afforded to the convenience of the many non-party witnesses shifted this factor against transfer. Appx16. Apple neglects to mention that Koss argued that WDTX was more convenient for Koss employees and party witnesses than NDCA, but the District Court similarly (and exercising its proper discretion) gave that argument little weight. Appx15.

The District Court did not rigidly apply the Fifth Circuit's 100-mile rule nor did it misapply case law to the facts of this case. The District Court properly weighed the convenience of the seven third-party inventors who are all located in Illinois and Wisconsin, and noted that the cost to travel to WDTX for these individuals is "substantially less" than the cost to travel to NDCA. Appx16. Apple claims this determination is inconsistent with certain of this Court's recent decisions interpreting the 100-mile rule, but provides no explanation as to what the inconsistency is. The District Court further considered Apple's large presence in

this district as lessening some of the inconveniences its party witnesses may endure, which reduced the amount of weight given to these witnesses. Appx16.

Apple makes a second argument essentially amounting to the notion that the District Court's analysis is "internally inconsistent" resulting in a clear abuse of discretion. Petition at 25. Apple first claims that the District Court should not have considered Mr. Petrone as both an unwilling witness and a willing witness. Petition at 26. However, there is undisputed record evidence by way of unchallenged, sworn declaration that Mr. Petrone was unwilling to testify in NDCA (far from his place of residence) but perfectly willing to testify at trial in WDTX, which is near his place of residence. Appx196. The District Court did not abuse its discretion in concluding that Mr. Petrone is a willing witness.

Apple further alleges that the District Court's analysis is internally inconsistent by treating Apple's party witnesses differently than Koss's witnesses. Petition at 26-27. Apple neglects to mention that the District Court treated Apple and Koss ***party*** witnesses equally, and universally gave relatively little weight to their convenience. Appx19. The District Court's analysis differed only when considering the convenience of *third-party* witnesses, which, according to established Fifth Circuit law, is appropriate because the convenience of nonparty witnesses is given great weight. Appx16. Apple goes on to complain that the District Court misapplied the 100-mile rule as against Apple party witnesses

located in Southern California when compared with the seven non-party inventor witnesses located in Illinois and Wisconsin. Petition at 24. As explained before, the truth of the matter is that the District Court properly considered that Apple's witnesses are party witnesses and Koss' inventor witnesses are not.

III. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN ITS ANALYSIS OF CERTAIN PUBLIC INTEREST FACTORS.

With respect to the public interest factors, Apple contends that the District Court abused its discretion only as to two factors: (1) the court congestion factor, and (2) the local interest factor. Petition at 29, 31. Neither argument survives dispassionate consideration. There was abundant evidence before the District Court to support its discretion that the court congestion and local interest factors weigh against transfer, and the District Court did not abuse its discretion in so finding.

A. The Parties Presented Abundant to Support the District Court's Finding That the Administrative Difficulties Flowing From Court Congestion Factor Weighs Against Transfer.

The District Court found that this factor weighs against transfer because WDTX has a faster time to trial than NDCA. Appx25. Apple argues that this factor should be neutral, because "the recent, dramatic spike in patent cases in the Western District of Texas is certainly relevant to its docket congestion." Petition at 34. However, as the District Court stated in its ruling, "a court must make its decision on the basis of past data rather than anticipated schedules." Appx25. Apple asks this Court to set aside the District Court's discretion in assessing *its*

own schedule and find that the factor is merely neutral based only on an anticipated schedule of the WDTX. It is improper to speculate about time to trial, including Apple's guesses regarding how the Western District of Texas may handle its congestion. *See In re Apple Inc.*, 979 F.3d 1332, 1344 n.5 (Fed. Cir. 2020). Apple's argument should be rejected and by no means rises to the level of a finding of abuse of discretion.

B. There Was Abundant Evidence Before the District Court to Support Its Finding That the Local Interest Factor Weighs Against Transfer.

The District Court did not abuse its discretion in finding that the "local interest" factor weighs ***slightly*** against transfer. The District Court recognized that both venues have a significant interest in deciding the case because Apple is one of the largest employers in both NDCA and WDTX. Appx27. Despite Apple's assertion to the contrary, the District Court's analysis did not end there. The District Court also determined that WDTX had a substantial connection to the events giving rise to the cause of action—namely, that Apple has engaged in infringing activities within the district. Appx26. The District Court noted that Apple "attempts to minimize its local impact in this District" and wrongly claims that Koss has no connection to this district, despite doing extensive business in Texas and filing Texas state tax returns. Appx27-28. The District Court determined that because "Apple's presence in both districts is neutral in terms of transfer, but

Koss's presence in WDTX weighs against transfer" the local interest factor slightly weighed against transfer. *Id*. at 28.

Without assigning any factor dispositive weight, the District Court determined that all of the public interest factors were either neutral or weighed against transfer. Thus, it is only logical that the public interest factors collectively must weigh against transfer. The District Court did not err in so deciding.

In the District Court, Apple's task was to prove, upon a weighing of factors, that its preferred venue was "clearly" more convenient. *Volkswagen II*, 545 F.3d at 315. The District Court gave dispassionate, rational consideration of the motion employing the factors required by prevailing law and issued a thoughtful and reasoned opinion, which collectively weighed the factors together, and found ultimately that Apple fell short of its burden. Inasmuch as this Court reviews the District Court's decision "only for a clear abuse of discretion producing a patently erroneous result," *In re Intel Corp.*, 2021 WL 217377, at *2, Koss submits that Apple has failed to meet the heavy burden it bears on this Petition. Apple's Petition should be denied.

CONCLUSION

For all of the foregoing reasons, Koss respectfully submits that Apple has failed to demonstrate that any aspect of the District Court's measured assessment of the factual record before it, and its careful exercise of discretion in view of that record,

lacked any plausible support. There is therefore no basis for this Court to characterize the District Court's actions as an "abuse" of its discretion. This Court should deny the Apple's Petition for a writ of mandamus, awarding Koss its costs for the burden of defending the District Court's prudent exercise of its discretion.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 25, 2021, true and correct copies of the foregoing **RESPONSE OF KOSS CORPORATION TO APPLE'S PETITION FOR WRIT OF MANDAMUS** was electronically filed through the Court's ECF system. All participants in the case are registered CM/ECF users and service will be accomplished by the appellate CM/ECF system.

/s/ *Benjamin E. Weed*
Benjamin E. Weed

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief uses a proportionately spaced 14-point typeface, and, based on the word count function of Microsoft Word, contains 4,213 words, excluding the items listed in Fed. R. Appellate P. 32(f) and Federal Circuit Rule 32(b)(2).

Dated: May 25, 2021

/s/ *Benjamin E. Weed*
Benjamin E. Weed

No. 21-147

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN RE APPLE, INC.,
Petitioner,

On Petition for Writ of Mandamus to the
United States District Court for the Western District of Texas,
Case No. 6:20-cv-00665-ADA
Hon. Alan D Albright

APPENDIX IN SUPPORT OF KOSS CORPORATION'S RESPONSE TO APPLE'S PETITION FOR WRIT OF MANDAMUS

(RAPPX001 - 002)

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May 25, 2021

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UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

APPLE INC.,

Plaintiff,

v.

KOSS CORPORATION,

Defendant.

Case No. 20-cv-05504-JST

ORDER GRANTING MOTION TO TRANSFER

Re: ECF No. 24

On September 29, 2020, Defendant Koss Corporation filed a motion to transfer, dismiss or stay the instant action brought by Plaintiff Apple, Inc. ECF No. 24.

The Court granted the motion to stay at a hearing held on November 4, 2020. ECF No. 39. The Court explained that the first-to-file rule applied because more than two weeks before this action commenced, Koss filed a complaint for patent infringement against Apple in the Western District of Texas involving claims regarding the same five patents, and Apple had briefed its breach of contract claim in its motion to strike the Texas complaint. ECF No. 42 at 35. In considering Koss's motion to transfer, the Court held that "the Western District of Texas [was] in a better position to consider [Section] 1404(a)'s convenience factors in light of the four related cases involving the same patents that are currently pending before the same judge," and ordered the parties to file a notice with the Court within five days of receiving an order from the Western District of Texas regarding Apple's motion to strike "as well as any future motion to transfer." *Id.* at 36.

On April 5, 2021, Koss notified the Court that the Western District of Texas had denied Apple's motion to strike the Texas complaint, ECF No. 68, and on April 29, 2021, Koss notified the Court that the Western District of Texas had "denied Apple's Motion to Transfer," ECF No.

70 at 2. Apple responded that it intends to seek reconsideration of that order and continues to oppose transfer of this case to the Western District of Texas. ECF No. 71.

The court in the Western District of Texas carefully considered the public and private interest factors to determine whether the case involving the same parties and patents pending before that court should be transferred here, and explained its reasoning at length in its 29-page order denying Apple's motion to transfer. *See Koss Corp. v. Apple Inc.*, No. 6:20-cv-00665, ECF No. 76 (W.D. Tex. Apr. 22, 2021). For the reasons stated in the Court's order staying this case, as well as the thoughtful § 1404 analysis of the Western District of Texas, the Court now grants Koss's motion to transfer.

The Clerk shall transfer this case to the United States District Court for the Western District of Texas.

IT IS SO ORDERED.

Dated: May 12, 2021

JON S. TIGAR
United States District Judge