Miscellaneous Docket No. 21-148

IN THE
United States Court of Appeals for the Federal Circuit

IN RE DISH NETWORK L.L.C.,

Petitioner.

On Petition for Writ of Mandamus to the
United States District Court for the
Western District of Texas
No. 6:19-cv-00716-ADA, Hon. Alan D Albright

DISH NETWORK L.L.C.'S REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

Clement Roberts
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

Alyssa Caridis
ORRICK, HERRINGTON & SUTCLIFFE LLP
777 South Figueroa Street
Suite 3200
Los Angeles, CA 90017

Eric A. Shumsky
Elizabeth R. Cruikshank
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400

Alyssa Barnard-Yanni
ORRICK, HERRINGTON & SUTCLIFFE LLP
701 5th Avenue
Suite 5600
Seattle, WA 98104

Counsel for Petitioner

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INTRODUCTION

Transfer is overwhelmingly justified in this case "[f]or the convenience of parties and witnesses." 28 U.S.C. § 1404(a). Start with the basic facts that BBiTV downplays or ignores. Colorado is where DISH is headquartered and incorporated, where the accused products were developed, and where relevant witnesses and documents are located. Conversely, BBiTV has *no* ties to the Western District of Texas. Nor do the events giving rise to this case. While DISH has some general operations in the district, those contacts are irrelevant to BBiTV's *infringement allegations*, which are directed to DISH's electronic program guide. For this reason, even the district court did not find this dispute had any connection to the Western District of Texas.

Confronted with this clear case for transfer, BBiTV changes the subject to "judicial economy." Opp. 9-18. Citing a single case, *In re Vistaprint*, 628 F.3d 1342 (Fed. Cir. 2010), some 35 times in 33 pages, BBiTV asserts that the existence of co-pending litigation is "paramount"—that its own decision to sue multiple defendants in the

Western District of Texas effectively insulates it from transfer. *E.g.*, Opp. 2.

BBiTV is wrong. *Vistaprint* did not hold that judicial economy *always* outweighs convenience; it rejected an argument that judicial economy could *never* outweigh convenience. And *Vistaprint* did not purport to overturn this Court's holdings that co-pending litigation is not dispositive, Pet. 22-23, much less that witness convenience—the factor emphasized in the text of the statute—is "the single most important factor," Pet. 13. On the contrary, *Vistaprint* expressly recognized that when, as here, "the convenience factors strongly weigh in favor of the transferee venue," "'negligible' judicial efficiencies" cannot defeat transfer. 628 F.3d at 1344.

BBiTV's approach is fundamentally at odds with this Court's § 1404(a) jurisprudence. The private- and public-interest factors require a court to identify the location that is central to the dispute, such as where the technology was developed and where witnesses and documents are located. Thus, in a case like this one, which "featur[es] most witnesses and evidence closer to the transferee venue with few or no convenience factors favoring the venue chosen by the plaintiff," the

court "should grant a motion to transfer." *In re Nintendo*, 589 F.3d 1194, 1198 (Fed. Cir. 2009). The petition should be granted.

ARGUMENT

I. The District Court Clearly Abused Its Discretion In Evaluating The Private-Interest Factors.

A. Witness convenience and compulsory process.

Witness convenience and compulsory process strongly favor transfer because numerous witnesses—both party and non-party—are in Colorado, and none is in Texas. Pet. 13-21. The district court's numerous legal errors related to these critical factors call out for mandamus. Pet. 20-21.

1. The district court erred as a matter of law when it gave the convenience of party witnesses "little weight." *See* Pet. 15-17 (citing cases); *In re Volkswagen of Am.*, 545 F.3d 304, 317 (5th Cir. 2008) (en banc) ("*Volkswagen II*") (relying on plaintiffs' and third-party defendant's residence in transferee district). BBiTV says the district court discounted this testimony for case-specific reasons, having "familiarize[d] [it]self … with the nature of the case and the probable testimony at trial." Opp. 25 (quoting *Vistaprint*, 628 F.3d at 1346). The district court said no such thing. Instead, as that court has done in

numerous other cases, *see* Pet. 15 n.5, it made a blanket assertion that party witnesses are entitled to "little weight." That was the court's sole basis for disregarding the DISH witnesses who designed and developed the accused products and operate the accused systems, who are uniformly based in Colorado. Appx8-9.

Next, BBiTV asserts that DISH's witnesses can be ignored because "[i]f one or two witnesses would be seriously inconvenienced by travel, 'remote witness testimony' or the playing of a recorded deposition can also be sufficient." Opp. 25. But the case it cites, *Battle ex rel. Battle v. Memorial Hospital at Gulfport*, had nothing to do with transfer; there, a witness testified by deposition, rather than live, as a sanction for a party's "dilatory tactics." 228 F.3d 544, 553-54 (5th Cir. 2000). Moreover, BBiTV gets § 1404(a) backward. The statute's purpose is to identify the venue that is "clearly more convenient" for witnesses and parties; the inconvenience of *attending* trial cannot be eliminated by proposing that witnesses not attend trial. Pet. 18-19. BBiTV also suggests that witness convenience does not favor transfer when there are any witnesses outside both the transferor and transferee district, Opp. 26, but neither this Court nor the Fifth Circuit

has ever suggested this: The language BBiTV quotes for this proposition, *In re Apple*, 818 F. App'x 1001, 1004 (Fed Cir. 2020), concerns local interest rather than witness convenience.

It is telling that BBiTV makes factual arguments that even the district court rejected. BBiTV asserts that "[n]othing in the record suggests that the witnesses who know the most about the hardware are anywhere but the Western District of Texas." Opp. 26-27. And it claims that "DISH did not rebut BBiTV's contention that there are individuals with knowledge about the accused hardware that reside in the district." Opp. 27. But the district court found that BBiTV "fail[ed] to demonstrate that any of the DISH employees working in its remanufacturing and call center facilities may possess software or hardware information relevant to this case." Appx8-9.

2. The district court further erred as a matter of law when it ignored various third-party witnesses in the absence of proof that they were unwilling to testify. Pet. 17-18. In its response, BBiTV ignores the numerous cases in which both this Court and the Fifth Circuit evaluate the compulsory-process factor without imposing any such requirement. *See* Pet. 17 (citing cases). BBiTV ignores both the

practical difficulty of getting an unwilling witness to cooperate in providing such evidence and the possibility that a witness may change their mind about testifying. *See* Pet. 17-18; *cf. In re Acer Am.*, 626 F.3d 1252, 1255 (Fed. Cir. 2010).

BBiTV also misconstrues *In re HP*, in which, in granting mandamus, this Court relied on the district court's failure to presume that third-party witnesses were unwilling. 2018 WL 4692486, at *3 & n.1 (Fed. Cir. Sept. 25, 2018). Contrary to BBiTV's contention, this Court did not simply "criticize the lower court's reasoning as out of line with [the district court's] *own* precedent." Opp. 24. District courts don't have to follow their own precedent, *see, e.g.*, *Camreta v. Greene*, 563 U.S. 692, 709 n.7 (2011); a failure to do so certainly is no basis for mandamus.

The Fifth Circuit cases BBiTV cites do not hold otherwise. BBiTV's lead case, *Indusoft v. Taccolini*, is unpublished; it stated only that unwillingness should be "alleged"; and it involved a specific finding that the witness there was willing. 560 F. App'x 245, 249 (5th Cir. 2014). BBiTV's lengthy stringcite of other cases sheds no light

whatsoever on unwilling witnesses or compulsory process; they merely recite the private- and public-interest factors. Opp. 23.[1]

3. Similarly, the district court clearly erred by disregarding former DISH employees—both of whom formerly held the title "Director of Software Engineering" and were involved in designing and developing the accused products—under *both* the witness-convenience and compulsory-process prongs. *See* Pet. 20. BBiTV says again that DISH failed to provide "affirmative evidence that the witnesses were unwilling to testify," Opp. 3—which is wrong for the reasons discussed above—but ignores the court's distinct error in disregarding these witnesses under both factors. If the court did not view them as "unwilling" witnesses, then it should have evaluated their convenience as willing non-party witnesses. Pet. 20.

4. Finally, the district court committed legal error when it discounted the relevance of non-party witnesses on the ground that such witnesses can testify remotely or via deposition. Pet. 18; *supra* 4

[1] BBiTV also suggests (at 23-24 n.7) that the third-party witnesses here should be ignored. Citing nothing in the record, it theorizes that DISH does not actually intend to call these witnesses because DISH has not provided deposition dates for them. In reality, BBiTV agreed to postpone depositions of those witnesses.

(same error as to party witnesses). BBiTV offers no response whatsoever to DISH's point that such an approach would disregard *all* out-of-district witnesses, and thereby impermissibly negate the witness convenience and compulsory-process factors. Instead, BBiTV suggests that the district court made a considered judgment, entitled to deference, that the prior-art witnesses were unlikely to testify here. Opp. 24. Again, this is unsupported by the district court's decision, which made generalizations about prior-art witnesses untethered to this case. Appx7. Here, the prior-art system about which these witnesses are knowledgeable bears directly on a priority-date dispute that remains live. Pet. 19-20 n.7.[2]

[2] BBiTV also suggests DISH's prior-art witnesses should be disregarded because DISH relied on LinkedIn pages as evidence they are in the District of Colorado and (BBiTV says) the district court discounted reliance on LinkedIn evidence. Opp. 24. But the district court expressed no doubt that these witnesses are in Colorado. Appx7-8. The district court discounted *BBiTV's* purported Texas-based witnesses not because BBiTV found them on LinkedIn, but because DISH introduced evidence that those individuals either were not based in Texas or had never worked for DISH. Appx8 n.1; Appx476-477.

B. Access to sources of proof.

"[T]he place where the defendant's documents are kept weighs in favor of transfer to that location." *In re Genentech*, 566 F.3d 1338, 1345 (Fed. Cir. 2009). DISH's relevant documents are stored in Colorado. Pet. 5-8, 21; *see Genentech*, 566 F.3d at 1345-46. The district court found this factor neutral only by discounting documents stored *electronically*, contrary to binding precedent, on the ground "that the focus on physical location of electronic documents is out of touch with modern patent litigation." Appx5; *see* Pet. 21-22.

BBiTV offers two responses.

First, BBiTV accuses DISH of "misread[ing] the district court's order," suggesting that the court's decision did not rest on disregarding this precedent. Opp. 22. According to BBiTV, the district court permissibly found that DISH had failed to "prove[] that 'it would be difficult or burdensome to make … electronic documents available in' the Western District of Texas." Opp. 22 (quoting Appx6). But that is exactly the logic this Court has repudiated. *See In re TS Tech USA*, 551 F.3d 1315, 1321 (Fed. Cir. 2008) (trial court erred in finding access-to-proof factor neutral on the ground that "documents were stored

electronically" and therefore not burdensome to produce); *Genentech*, 566 F.3d at 1346 (trial court erred in finding focus on "physical location" of documents to be "antiquated in the era of electronic storage and transmission"); Pet. 21-22.

Second, BBiTV speculates that relevant evidence may be in Western Texas, Opp. 21-22—and insinuates that the district court so found, Opp. 22 ("It was well within the district court's discretion to conclude that the evidence at [DISH's Texas] facilities outweighs the fact that certain other documents are stored in Colorado…."). Not so. The district court's analysis of the access-to-proof factor mentioned no evidence in the Western District of Texas. Appx5-6. And its analysis of other factors expressly *rejected* similar arguments. Appx8-9; *see supra* 5.

Further, BBiTV's speculation is without merit. Pet. 5-8. BBiTV's claim seems to be that any facility related to DISH's business of providing video content to customers is "relevant" to this dispute, and therefore will house evidence. *E.g.*, Opp. 6. But this patent-infringement case is about DISH's electronic program guide. Pet. 4. The physical location where, for example, DISH refurbishes old

hardware, Opp. 14, has no bearing on the disputed issues. Thus, the district court properly declined to adopt this argument when BBiTV made it below, Appx462-465. And in the district court, BBiTV did not argue (and therefore forfeited) its new argument that DISH's satellite uplink facility in Mustang Ridge was "intimately connected to infringement" or houses relevant evidence. *Compare*, *e.g.*, Opp. 14, 21-22, *with* Appx462-465. Indeed, BBiTV's infringement contentions make no mention of satellite uplink.[3] This is a red herring, plain and simple.

C. Co-pending litigation.

Notwithstanding this Court's clear direction that witness convenience is "the single most important factor," *Genentech*, 566 F.3d at 1343 (citation omitted),[4] BBiTV makes judicial economy the centerpiece of its argument. Opp. 9-18. That is unsurprising, given how heavily the other factors weigh against BBiTV. But even as to

[3] *Broadband iTV v. DISH Network*, No. 19-CV-716 (W.D. Tex. May 14, 2021), ECF No. 84-4. Instead, the contentions accuse DISH's video-on-demand electronic program guide, which is delivered over the internet. *Id.* at 8-9.

[4] BBiTV argues that DISH "relies on an incorrect legal standard." Opp. 15. This language is quoted from *Genentech*. *See also Apple*, 818 F. App'x at 1004 (same language).

judicial economy, any benefit here is minimal. The district court has no prior experience construing the patents. Pet. 24. BBiTV points to co-pending litigation involving overlapping patents, but its claim is greatly overstated. It says that there are three other cases, Opp. 7, 10, but one of them, against Amazon, was filed months after DISH's motion to transfer,[5] and the others (against AT&T and its wholly owned subsidiary DirecTV) have been consolidated, Appx10 n.2. BBiTV identifies no particular commonality between the cases; it notes the fact of overlapping patents and simply asserts "that the cases 'involve overlapping issues, such as claim construction, invalidity, prior art, conception, and reduction to practice.'" Opp. 10 (quoting Appx9-10). Moreover, in this case, any theoretical benefit resulting from overlapping claim construction is negligible, Pet. 25, a point to which BBiTV never responds.

In short, BBiTV's position amounts to a claim that a plaintiff who sues multiple defendants in a single jurisdiction is impervious to transfer. "This cannot be correct." *In re Google*, 2017 WL 977038, at *2

[5] Complaint, *Broadband iTV v. Amazon.com*, No. 20-CV-921 (W.D. Tex. Oct. 6, 2020), ECF No. 1.

(Fed. Cir. Feb. 23, 2017). This Court has squarely rejected that theory. *In re Zimmer Holdings*, 609 F.3d 1378, 1382 (Fed. Cir. 2010) (co-pending litigation does not "negate[] the significance of having trial … where the other convenience factors clearly favor"). When co-pending cases involve "different discovery, evidence, proceedings, and trial," the minor efficiencies attributable to overlapping patents cannot overcome a significant showing of convenience. *Id.*; *Google*, 2017 WL 977038, at *2; *see also Vistaprint*, 628 F.3d at 1344 ("where the convenience factors strongly weigh in favor of the transferee venue," "'negligible' judicial efficiencies" cannot overcome transfer). Pet. 22-25.

This case is closely analogous to *Zimmer*, in which the trial court denied transfer for reasons that mirror almost precisely the district court's order here:

> The [district] court … stressed the significance of an ongoing patent suit … filed by [the plaintiff] against another defendant. The court described the second suit as involving the "same patent, the same plaintiff, and similar technology." The court further added that "there will undoubtedly be an overlap of issues for claim construction," and that "transferring this case to either of the proposed venues will prevent the parties from taking advantage of the built-in efficiencies that result from having related cases before the same judge."

609 F.3d at 1380 (brackets omitted). This Court granted mandamus, holding that these factors could not "negate[] … the other convenience factors." *Id.* at 1382.

Recognizing that *Zimmer* and *Google* are devastating to its position, BBiTV minimizes them as having predated *TC Heartland v. Kraft Foods Group Brands*, 137 S. Ct. 1514 (2017). Opp. 2, 16. But *TC Heartland* considered whether venue was proper under § 1400(b); it had nothing to do with § 1404(a). (*Vistaprint*, the centerpiece of BBiTV's argument, likewise predates *TC Heartland*.) BBiTV also distinguishes *Zimmer* and *Google* on the theory that, unlike DISH, the defendants in those cases "had virtually no connection to the [transferor] district." Opp. 16. But a defendant's connections to a district that are unrelated to the dispute at hand have no bearing on the § 1404(a) analysis. *Infra* 20; Pet. 5-8.

Vistaprint is not to the contrary. It did not reject this Court's prior recognition, in cases like *Zimmer*, that judicial economy will rarely overcome a significant showing on the convenience factors. 609 F.3d at 1382. Far from suggesting that judicial economy is "paramount," *cf.* Opp. 9-10, 15-16, *Vistaprint* merely rejected a sweeping claim that

judicial economy could *never* overcome convenience factors weighing in favor of transfer. 628 F.3d at 1345-46; *see id.* at 1347 ("judicial economy can be of 'paramount consideration'" "*in a given case*," based on its particular facts (emphasis added)). In *Vistaprint*, "the trial court [had] bec[o]me very familiar with the only asserted patent and the related technology during a prior litigation." *Id.* at 1346.[6] And, with regard to the convenience factors, "no defendant party [wa]s actually located in the transferee venue and the presence of witnesses in that location [wa]s not overwhelming." *Id.* at 1346-47. It was these two facts, "coupled with … co-pending litigation," that led this Court to conclude that "the trial court's balancing [of factors] was [not] so unreasonable as to warrant the extraordinary relief of mandamus." *Id.*

This case is like *Zimmer* and *Google*, not *Vistaprint*. As in *Zimmer*, but unlike in *Vistaprint*, the district court had no prior familiarity with the patents-in-suit when this suit was filed. Pet. 25. As in *Zimmer*, but not *Vistaprint*, DISH, its documents, and its witnesses are in the transferee venue, and convenience factors

[6] Prior familiarity with the patent from a previous case was also key to *In re Vicor*, 493 F. App'x 59, 61 (Fed. Cir. 2012), cited at Opp. 16.

overwhelmingly favor transfer. *Supra* 3-11.[7] Thus, as in *Google*, "*Vistaprint* is distinguishable." 2017 WL 977038, at *2. Allowing the district court's decision to stand would effectively overrule *Zimmer* and insulate plaintiffs from transfer anytime they sue multiple defendants in the Western District of Texas.

II. The District Court Clearly Abused Its Discretion In Evaluating The Public-Interest Factors.

A. Local interest.

The local-interest factor requires "'significant connections between a particular venue and *the events that gave rise to a suit*.'" *In re Apple*, 979 F.3d 1332, 1345 (Fed. Cir. 2020) (quoting *Acer*, 626 F.3d at 1256). BBiTV accuses DISH's electronic program guide, displayed on the screen when customers use DISH boxes and apps, of patent infringement. Pet. 4. The accused product was designed in Colorado;

[7] These facts also distinguish *In re Canrig Drilling Technology*, 2015 WL 10936672, at *1-2 (Fed. Cir. Aug. 7, 2015), where witnesses were located in both the transferor and transferee districts. *See* Opp. 16.

Nor is this case analogous to *In re Volkswagen of Am.*, 566 F.3d 1349, 1350-51 (Fed. Cir. 2009). *See* Opp. 11-13. There, plaintiff filed two suits against thirty total defendants, headquartered or incorporated in four countries and ten states, for infringing the same patents.

the District of Colorado's interest is therefore "self-evident." *In re Hoffman-La Roche*, 587 F.3d 1333, 1336, 1338 (Fed. Cir. 2009).

According to BBiTV, "[t]he district court reasonably concluded that the labors of DISH's more than 1,000 employees in the Western District of Texas 'gave rise' to this litigation." Opp. 28; *see also* Opp. 27 ("[T]he district court reasonably concluded that both districts have 'connections with the events that gave rise to [a] suit.'" (alteration in original)). The district court made no such finding. Instead, it relied exclusively on DISH's generalized "substantial presence" in Western Texas: the fact that DISH "employs over 1,000 employees and owns call centers, warehouses, a remanufacturing center, and a service center in this District." Appx12. This was error as a matter of law under *Apple*, which rejected just such reliance on so-called "substantial presence[]" to establish a local interest. 979 F.3d at 1345.

B. Court congestion.

Judges in the Western District of Texas carry a much heavier caseload than judges in the District of Colorado. Pet. 29. The district court ignored this fact, instead comparing its default trial schedule to the average time to trial in the District of Colorado. Appx10-11. This

was error: "[A] district court cannot merely set an aggressive trial date and subsequently conclude … that other forums … are more congested." *Apple*, 979 F.3d at 1344. The idea that trial will proceed as scheduled, Opp. 30-31, strains credulity. Patent filings just in Waco have increased by more than 2,732% in the last three years, Pet. 30, which means *a single judge* has seen this exponential growth. *Cf.* Opp. 31 (downplaying importance of the total number of pending cases in a district). It is hardly "speculative," *id.*, to assert that a judge cannot dispose of 793 new patent cases a year as expeditiously as he could dispose of 28 new patent cases a year.[8]

BBiTV also defends the district court's assertion that the District of Colorado is not presently holding in-person jury trials. Opp. 31-32. BBiTV and the district court misread the District of Colorado's order. That order provided certain guidance about two courthouses (in Colorado Springs and Grand Junction) whose courtrooms were too small "to meet social distancing requirements for certain types of court proceedings." District of Colorado, District Court General Order 2021-3

[8] BBiTV also points to the average time from filing to trial in the Western District of Texas, Opp. 29-30, but even the district court didn't think this relevant, Appx10-11.

(Feb. 12, 2021), https://tinyurl.com/6ycfdra4. From this, BBiTV reasons that in-person jury trials were proceeding *only* in Colorado Springs and Grand Junction. Opp. 32. This is both illogical and incorrect: The trial in progress the day the district court issued its decision, Pet. 31 n.10, was held in Denver. *See* Amended Order Setting Trial and Trial Preparation Conference, *Harris v. Falcon Sch. Dist. 49*, No. 18-CV-2310 (D. Colo. April 10, 2020), ECF No. 81.

III. BBiTV's Additional Arguments Lack Merit.

BBiTV contends that the fact that DISH has not sought transfer every time it has been sued in the Western District of Texas "undermin[es] [DISH's] assertions here." Opp. 15. On the contrary, it shows that DISH properly recognizes that the statutory factors consider in each case whether transfer serves "the convenience of parties and witnesses" on both sides of the case, 28 U.S.C. § 1404(a), and that DISH is not reflexively fleeing Waco.

Elsewhere, BBiTV argues that by seeking the alternative relief of transfer to Austin, DISH somehow "conceded" that litigation in the Western District of Texas would not be "burdensome." Opp. 2, 15, 20. This is a non sequitur. DISH has consistently maintained that the

District of Colorado would be clearly more convenient for this dispute than the Western District of Texas. DISH simply argued in the alternative that, as between Waco and Austin, "it is somewhat more convenient for the parties and out-of-state witnesses to attend hearings and trial in Austin rather than Waco because the Austin federal courthouse is closer to the airport in Austin than Waco is to the Dallas/Fort Worth airport." Appx208.

Finally, BBiTV mischaracterizes DISH's arguments that this forum has "no connection to the case" as a suggestion that venue is improper. Opp. 1-2; *see also* Opp. 13 ("[I]f the Western District of Texas really had 'no connection' to this case … DISH could have sought dismissal for improper venue."). BBiTV is mistaken. Venue focuses on the forum's connection *to the defendant*, separate and apart from whether the forum is connected *to the dispute*. 28 U.S.C. § 1400(b). So venue may be proper even if, as here, transfer is warranted because none of the parties, witnesses, or facts giving rise to this lawsuit has any relevant connection to the Western District of Texas.

CONCLUSION

For the foregoing reasons, and those stated in the petition, the Court should grant DISH's petition.

Respectfully submitted,

/s/Eric A. Shumsky

Eric A. Shumsky
Elizabeth R. Cruikshank
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street NW
Washington, DC 20005
(202) 339-8400

Alyssa Barnard-Yanni
ORRICK, HERRINGTON & SUTCLIFFE LLP
701 5th Avenue
Suite 5600
Seattle, WA 98104

Clement Roberts
ORRICK, HERRINGTON & SUTCLIFFE LLP
405 Howard Street
San Francisco, CA 94105

Alyssa Caridis
ORRICK, HERRINGTON & SUTCLIFFE LLP
777 South Figueroa Street
Suite 3200
Los Angeles, CA 90017

Counsel for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on June 21, 2021.

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

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

Hon. Alan D Albright
United States District Court for the Western District of Texas
800 Franklin Avenue, Room 301
Waco, Texas 76701
Telephone: (254) 750-1510

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/Eric A. Shumsky
Eric A. Shumsky
Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

The reply complies with the type-volume limitation of Fed. Cir. R. 21(b) because this reply contains 3898 words.

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

ORRICK, HERRINGTON & SUTCLIFFE LLP

/s/ Eric A. Shumsky
Eric A. Shumsky
Counsel for Petitioner