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 INC.'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Benjamin E. Weed
70 W. Madison St., Suite 3300
Chicago, IL 60602
K&L GATES LLP
Telephone (312) 372-1121
Facsimile (312) 827-8000
Benjamin.weed@klgates.com

October 12, 2021

Attorneys for Koss Corporation

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 21-0147

Short Case Caption In Re Apple, Inc.

Filing Party/Entity Koss Corporation

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/12/2021

Signature: /s/ Benjamin E. Weed

Name: Benjamin E. Weed

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
Koss Corporation		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

Darlene F. Ghavimi K&L Gates LLP, Austin, TX	Jim Shimota K&L Gates LLP, Chicago, IL	Philip A. Kunz K&L Gates LLP, Chicago, IL
Erik Halverson K&L Gates LLP, Chicago, IL	Gina A. Johnson K&L Gates LLP, Chicago, IL	Peter E. Soskin K&L Gates LLP, San Francisco, CA

5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☐ None/Not Applicable ☐ Additional pages attached

Koss Corp. v. Bose Corp., 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., 6:21-cv-00495-ADA (W.D. Tex)

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).

☑ None/Not Applicable ☐ Additional pages attached

TABLE OF CONTENTS

Page

I. INTRODUCTION 1

II. ARGUMENT 3

A. The Authority in Apple's "Statement of Counsel" Is Not Contrary to the Panel's Decision Below 3

B. Apple's Statement of the "points of law or fact [that] were overlooked or misapprehended by the panel's order" Is Incorrect 6

1. Neither Judge Albright nor the Panel Misapprehended the Likelihood of Witnesses Testifying at Trial. 6

2. The Panel Properly Relied on Judge Albright's Analysis of the Connection to the Western District of Texas 8

3. The Panel Did Not Overlook Judge Albright's Analysis of the Then-Pending Lawsuits 9

C. Apple's Argument Essentially Eliminates the Separate Venue Statute in Favor of a Rule that Defendants Have the Right to a Trial Only in the Jurisdiction Where they Are Headquartered 11

D. Apple's Purported Divide in this Court's Handling of Mandamus Petitions is a Request for Blanket Transfers out of Texas for any Apple Case 13

III. CONCLUSION 15

TABLE OF AUTHORITIES

Page(s)

Cases

In re Acer Am. Corp.
626 F.3d 1252 (Fed. Cir. 2010) 4

In re Apple Inc.
979 F.3d 1332 (Fed. Cir. 2020) 4

In re Genentech, Inc.
566 F.3d 1338 7

Hoffman v. Blaski
363 U.S. 335 (1960)..10

Gundle Lining Constr. Corp. v. Fireman's Fund Ins. Co.
844 F. Supp. 1163 (S.D. Tex. 1994)..5

In re Samsung Elecs. Co., Ltd.
2 F.4th 1371 (Fed. Cir. 2021) 3, 4

In re EMC Corp.,
501 F. App'x 973 (Fed. Cir. 2013) 10

ADS Sec. L.P. v. Advanced Detection Sec. Servs., Inc.
2010 WL 1170976 (W.D. Tex. Mar. 23, 2010)...5

AGIS Software Dev. LLC v. Apple, Inc.
2018 U.S. Dist. LEXIS 94947 (June 6, 2018) 5

Statutes

28 U.S.C. § 1400 12

28 U.S.C. § 1400(b) 1

28 U.S.C. §1404 2

28 U.S.C. § 1404(a) 12

28 U.S.C. §1404(a) and (2) a 1

35 U.S.C. § 315(e) 6

Other Authorities

http://ikorongo.com..4

Rule 26(a)(1) 15

I. INTRODUCTION

Apple Inc.'s ("Apple") Combined Petition for Panel Rehearing and Rehearing *En Banc* ("Petition") asks some set of this Court to make either of two unsupportable conclusions: (1) to determine that the mandatory language in the patent venue statute, 28 U.S.C. § 1400(b), is meaningless in view of the *permissive* language in the "change of venue" statute, 28 U.S.C. § 1404(a) and (2) a competitor (here, Apple) is entitled as a matter of right to defend itself in the venue where it has its corporate headquarters should it so choose. Neither conclusion could be farther from correct, and the panel hearing Apple's Petition for Mandamus ("Mandamus") has already so found. Apple has identified no compelling reason for either the original panel, or the *en banc* court, to upset the reasoned opinion of District Judge Alan Albright in the Western District of Texas or the prior panel of this court.

Koss Corporation ("Koss") brought suit against Apple in July, 2020, and has been before the Federal Circuit for nearly the entirety of that period. Yet, on the eve of the close of fact discovery, and with trial a scant six (6) months away, Koss again finds itself wasting resources arguing about why the parties have been fighting in the Western District of Texas since the summer of 2020.

Quite simply, Apple failed to demonstrate that the extraordinary relief of mandamus was warranted with regard to Judge Albright's well-reasoned opinion that Apple's preferred venue was not "clearly more convenient" than the Western

District of Texas. As has been its approach throughout this case, Apple's litigation strategy here was completely reactionary. Knowing Koss would be filing suit, Apple did not try to make a declaratory judgment filing in California before Koss sued in Texas. Instead, it made a declaratory filing some weeks later, which District Judge Jon Tigar correctly recognized was "too little, too late" to permit Apple to dictate the venue in which to litigate Koss's patent infringement claims. Apple made a Motion to Strike Koss's Texas Complaint, which Judge Albright denied. And lastly, Apple made a Motion under 28 U.S.C. § 1404 to transfer venue to the Northern District of California, which Judge Albright again denied.

Now, Koss, a competitor in the marketplace with a litigation strategy whose propriety has been soundly and repeatedly blessed by Texas and California district court judges, approaches trial with a nearly complete factual record, a claim construction order, and dozens of hours of videotaped deposition testimony at the ready to prove its case of infringement. Koss's experts have spent countless hours reviewing Apple's source code at Apple's counsel's offices in *Chicago*, not California, and its experts have begun to prepare reports on burden-bearing issues, due to Apple in just over a month. Yet Koss submits this brief here on a venue issue, and at the same time defends against an attempt by Apple to extend discovery in the Western District of Texas.

Judge Albright's ruling was well-founded in the facts and law, and this Court has already recognized that mandamus was not warranted. Neither Apple nor the *amici* have presented a compelling argument as to why Koss should be forced to restart its fight with its competitor in California, and have certainly not shown that panel rehearing or rehearing *en banc* is warranted.

Apple's Petition must be denied, lest this Court risk making a ruling that borders on eliminating the patent venue statute, because it means that even for competitors, the defendant is always entitled to defend itself in the venue of its choosing.

II. ARGUMENT

A. The Authority in Apple's "Statement of Counsel" Is Not Contrary to the Panel's Decision Below

The opinion in *In re Samsung Elecs. Co., Ltd.* begins with a description of the Plaintiff in that matter:

> Ikorongo Texas LLC ("Ikorongo Texas") filed the initial complaints in these cases against Samsung and LG in the Western District of Texas on March 31, 2020—a month after Ikorongo Texas was formed as a Texas limited liability company. Although Ikorongo Texas claims to be unrelated to Ikorongo Technology LLC ("Ikorongo Tech"), a North Carolina limited liability company, the operative complaints indicate that Ikorongo Texas and Ikorongo Tech are run out of the same Chapel Hill, North Carolina office. Additionally, as of March 20, 2020, the same five individuals "own[ed] all of the issued and outstanding membership interests" in both Ikorongo entities.

2 F.4th 1371, 1373 (Fed. Cir. 2021). Ikorongo's website confirms that it is a licensing entity, not a competitor of the Samsung or LG entities that petitioned this Court for mandamus:

> Ikorongo is focused on creating and licensing enabling technologies for the future of the cloud connected device market.

(http://ikorongo.com, last accessed October 8, 2021).

The plaintiff in *In re Apple Inc.* is Uniloc, a non-practicing entity (979 F.3d 1332 at 1135-36 (Fed. Cir. 2020)); Apple has represented as much in filing its Second Amended Complaint in its fight with Fortress Investment Group LLC and several other entities, including several Uniloc entities. (Dkt. 236 in 19-cv-07651 at ¶120).

The Plaintiff in *In re Acer Am. Corp.* is MedioStream, Inc., an assertion entity that while not as notorious as Uniloc, appears to be out of the business of allegedly capturing "media attention, followed by some of the worlds [sic] leading computer hardware and software companies." (MedioStream complaint against MSFT, 08-cv-00369 at ¶8). And according to this Court, "MedioStream's sources of proof are likely located within the Northern District of California, along with the records of the prosecuting patent attorneys." 626 F.3d 1252, 1256 (Fed. Cir. 2010).

On the opposite end of the spectrum from the plaintiffs in the cases Apple's counsel contends are contrary to the panel's decision here is Koss Corporation, a publicly-traded, family-run, technology company that has been a stalwart participant

in the stereo headphone industry since John Koss invented the first SP/3 stereo headphone in 1958. Judge Albright properly recognized the impact this had on the venue transfer analysis:

> However, the Court notes that this is a unique type of patent infringement case involving market competitors. Both Koss and Apple market headphone and audio accessory products, notably competing lines of wireless headphone products. As such, Koss's documents—especially those involving the competing Striva products—are more heavily implicated by the damages analysis in this case than it would be for one between non-competitors. See 35 U.S.C. § 284; *see also WesternGeco LLC v. ION Geophysical Corp*., 138 S. Ct. 2129, 2139, 201 L. Ed. 2d 584 (2018) (a patent owner's recovery can include lost profits).

(Dkt. 71 at 6-7). This is important because missing from Apple's Petition (and from the *amicus* briefing) is an acknowledgement that the convenience of non-party personnel is a factor the district courts in the Fifth Circuit recognize carries special weight. *See, e.g.*, *Gundle Lining Constr. Corp. v. Fireman's Fund Ins. Co.*, 844 F. Supp. 1163 (S.D. Tex. 1994); *see also ADS Sec. L.P. v. Advanced Detection Sec. Servs., Inc.*, No. A-09-CA-773-LY, 2010 WL 1170976, at *4 (W.D. Tex. Mar. 23, 2010); *AGIS Software Dev. LLC v. Apple, Inc.*, Case No. 2:17-cv-00516-JRG, 2018 U.S. Dist. LEXIS 94947, at *17 (June 6, 2018).

Here, the importance of, in particular, the information provided by Koss's outside IT firm (and its owner, Tom Petrone), is something that the plaintiffs in Apple's cited cases simply cannot match. Mr. Petrone has been assisting Koss in locating and producing source code for the product line that Koss developed

pursuant to its patented inventions, and has also assisted in the ordinary document collection processes that burden plaintiffs in competitor cases. Moreover, Apple recently conducted an inspection of precious prototypes that Koss does not trust moving out of its Milwaukee, Wisconsin world headquarters.

Thus, the three cases Apple's counsel believes compel rehearing in fact do not; Judge Albright's reasoning, and the panel's consideration of the same, should end the inquiry.

B. Apple's Statement of the "points of law or fact [that] were overlooked or misapprehended by the panel's order" Is Incorrect

The panel did not commit the three errors Apple's counsel contends it did. (Petition at 1-2).

1. Neither Judge Albright nor the Panel Misapprehended the Likelihood of Witnesses Testifying at Trial.

First, the panel did not incorrectly believe that the district court found that Apple's employee witnesses are unlikely to be called at trial. Judge Albright made the following statement in his Order: "In the Court's experience, such witnesses [i.e., prior art witnesses] are unlikely to be called upon to testify." Dkt. 71 at 12. This much remains true; in fact, now that some of Apple's IPR petitions have been instituted, upon the PTAB's issuance of a Final Written Decision, pursuant to 35

U.S.C. § 315(e), Apple will be estopped from using the prior art patent on which these prior art witnesses are named as inventors at trial in this matter.[1]

Second, Judge Albright did not say that it was unlikely Apple's employee witnesses will be called at trial. He opined that "Koss observes that merely presenting a sprawling list of witnesses is not persuasive because it is unlikely that Apple will call each of these thirteen witnesses at trial." (Dkt. 71 at 16). And he agreed: "the Court finds it highly unlikely that Apple will call the majority of its thirteen employee witnesses at trial," and followed that observation with the further observation that more than 20% of those thirteen employee witnesses reside outside the NDCA, and in fact reside several hundred miles from the same. And the panel succinctly and correctly summarized that reasoning:

> The district court considered the convenience factors and explained its reasoning at length. It noted that two non-party potential witnesses reside in the Western District of Texas who were unwilling to travel to California to testify,* Appx13, that Apple appeared to rely on a number of employee witnesses within the transferee venue that were not likely to be called at trial as well as employee witnesses residing hundreds of miles outside of the transferee venue, Appx17–18, and that one of the

---

[1] As noted below, part of the problem with Apple's approach is that it asks this Court, in the context of a panel rehearing/en banc hearing request, to consider the facts *as they exist today*. Koss does not believe this is appropriate, as discussed below (*see* Section B.3), but should this Court wish to indulge Apple, a full picture of the present state of the world shows that Judge Albright's assessment of the "single most important factor in the transfer analysis" would weigh even more heavily against transfer today, where Apple will be estopped from relying on Messrs. Zelwegger's and Wilson's patent. (Dkt. 71 at 14; *see also In re Genentech, Inc.* 566 F.3d 1338, 1342).

> inventors was willing to travel from California to Texas to testify, Appx21.

(Panel Decision at 2-3).

The panel properly recognized the basis of Judge Albright's reasoning (including the impact of Apple's purported company witnesses) and no further review of the panel decision is needed or warranted.

2. The Panel Properly Relied on Judge Albright's Analysis of the Connection to the Western District of Texas

Apple contends that the panel incorrectly believed Judge Albright found connections between the Western District of Texas and the events that give rise to the lawsuit. Apple alleges that "the district court relied solely on each party's general activities in Texas, unrelated to the issues in this case, in assessing local interest." (Petition at 11). Not so.

Initially, Judge Albright found that this factor weighs only slightly against transfer. (Dkt. 71 at 27). And he noted Koss's citation to the venue discovery in this case that there are Apple employees in the district that worked on the "distribution, support, and technical development of the accused products." (Dkt. 71 at 27). Elsewhere in the opinion, Judge Albright noted that third party witness Tom Petrone, "co-owner of Koss's IT vendor Synectics who lives and works in Austin [] declared that he is unwilling to travel to California for trial." *Id*. at 9. He

also mentioned former Red Fusion employee Hytham Alihassan who worked on the Striva project for Koss and who currently lives in Austin. *Id*.

The Panel made the correct statement that Judge Albright found that "there were connections between the Western District of Texas and events that gave rise to this suit." (Panel Decision at 3). And as just demonstrated, Judge Albright did just that with regard to both the fact that activities occur in Apple's massive Austin facility in the chain of commerce of the Accused Products, and that there are Austin-based activities associated with Koss's side of the story (e.g., Mr. Petrone's work for Synectics and Mr. Alihassan's knowledge of the time he spent at Red Fusion). Apple's contention that the only ties to the Western District of Texas in this case are the fact that the parties both sell products there intentionally overlooks these important ties to the District and is flat out incorrect; acknowledgement of that fact alone confirms the propriety of the Panel's findings. The Panel was correct in its statement, and Judge Albright was thorough in his analysis.

3. The Panel Did Not Overlook Judge Albright's Analysis of the Then-Pending Lawsuits

Apple's Petition asks this Court to adopt an approach to venue in which the shifting sands of litigation can cause venue to become more or less proper as time goes by. Indeed, Apple argues that "there are no such 'co-pending lawsuits' in the Western District of Texas." (Petition at 12). Apple concedes this is its request, stating "shortly after Apple filed its mandamus petition, the district court transferred

the remaining proceeding to the Northern District of California." But Judge Albright's opinion, of which Apple sought the extraordinary relief of mandamus, was written as of a particular point in time and this Court's review of the same (especially in the form of a petition beyond an already denied mandamus petition) perverts the analysis.

The 1404 analysis is performed at the time the motion is made. *In re EMC Corp.*, 501 F. App'x 973, 976 (Fed. Cir. 2013) (quoting *Hoffman v. Blaski*, 363 U.S. 335, 343 (1960)) ("Petitioners complain that Oasis's claims against other defendants have since been dismissed, but, as discussed above, the relevant inquiry is the state of affairs at the time 'when suit was instituted.' *Hoffman*, 363 U.S. at 343. Because the dismissal of Oasis's suits as to the other defendants occurred later, it is not relevant to the venue inquiry."). There is a reason for this. Apple's position means that so long as a defendant with unlimited resources continues to waste the resources of this Court, the patentee's chosen district court, and the patentee by continuing to ask for reconsideration, rehearing, etc., being the "last man standing" in a particular court means that a case could be transferred late in the game. Indeed, here, fact discovery is less than a month from closing, expert reports on burden bearing issues are due two weeks later, and the landscape has changed. But Apple asks this Court to find that even if the other cases had, for example, been settled, Apple's still-live venue motion should have a different outcome now than before.

> Judge Albright properly considered the state of the world as of the date he wrote his opinion; the panel on appeal reviewing his opinion considered the propriety of his opinion. Again, Apple's argument, taken to its logical conclusion, would counsel Koss to file new lawsuits in the WDTX concurrently with filing the instant response to the Petition; the gamesmanship that would exist if Apple's "shifting sands of time" approach cannot be what analysis under 35 U.S.C. § 1404 requires.

Under Apple's theory, venue discovery would be without end. Imagine, for example, an employee who resides in the transferor district at the time the venue motion is decided and subsequently moves to the transferee district; under Apple's theory, a Petition for Mandamus would be ripe each time that occurred and should overturn the district court's prior decision not to transfer the case. This result is absurd.

No error has been made, and Apple's Petition should be denied. And as important, the ludicrous results of Apple's posited theories should be seen for what they are, and also denied.

C. Apple's Argument Essentially Eliminates the Separate Venue Statute in Favor of a Rule that Defendants Have the Right to a Trial Only in the Jurisdiction Where they Are Headquartered

Apple argues that the panel erred because it "discount[ed] Apple's identified witnesses in the transferee venue…" (Petition at 10). But Apple's argument essentially boils down to the idea that because the proof of infringement relies on *Apple*, rather than *Koss*, witnesses, the case must necessarily be venued where Apple's witnesses reside. Apple's analysis of the venue transfer statute, however,

swallows the statute that governs where venue is proper. Under Apple's worldview, it would be impossible for a Plaintiff to maintain an action against Apple in the Western District of Texas, since Apple (purportedly) does all of its product development activity elsewhere. So despite the fact that venue is unquestionably proper in the Western District of Texas, and that some of Koss's witnesses and activities occur in the Western District of Texas, Apple asks this Court to ignore proper venue and the practical realities of Koss's business in favor of the location of Apple's witnesses in the Northern District of California.

But the law does not require this result.

Instead, the venue transfer statute requires that "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." 28 U.S.C. § 1404(a) (emphasis added). And Apple does not quarrel with Judge Albright's description of when such transfer *may* occur:

> Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'" *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 29 (1988) (*quoting Van Dusen v. Barrack*, 376 U.S. 612, 622 (1964)). The party moving for transfer carries the burden of showing good cause. Volkswagen II, 545 F.3d at 314 ("When viewed in the context of § 1404(a), to show good cause means that a moving party, in order to support its claim for a transfer, must . . . clearly demonstrate that a transfer is '[f]or the convenience of parties

> and witnesses, in the interest of justice.'") (quoting 28 U.S.C. § 1404(a)).

(Dkt. 71 Order Denying MTD at 2). Nor does it quarrel with Judge Albright's citation to *Volkswagen II* for the proposition that a plaintiff's choice of venue *should* be respected when the transferee venue is *not clearly more convenient* than the plaintiff's chosen venue. (*Id*. at 3).

Thus, a transfer under 28 U.S.C. § 1404(a) should be an exception, not a rule, to a Plaintiff's otherwise proper choice of venue under 28 U.S.C. § 1400. Apple's Petition asks this Court to flip that notion on its head, saying that notwithstanding a properly-selected venue, a Defendant should be able to choose to litigate its patent infringement in the locale where the products are developed, at its choice. That simply is not the law; Judge Albright knew it, and Apple knows it too.

D. Apple's Purported Divide in this Court's Handling of Mandamus Petitions Is a Request for Blanket Transfers out of Texas for any Apple Case

Apple concludes its Petition by chiding this Court for what Apple believes is a "deepening divide" in its case law regarding mandamus. But this Court has consistently and faithfully applied the relevant standard regarding mandamus to rulings on motions that are necessarily very fact specific and different from case to case. Indeed, Judge Albright carefully noted the eight (8) different factors that should be applied in assessing whether transfer of venue is proper. And his 29-page order demonstrates the specificity of the analysis to a particular fact pattern. Indeed,

he noted that, unlike many of the cases Apple wishes to liken this one to, Koss and Apple are competitors in the headphone space, which in and of itself affects many of the public and private factor analyses.

What Apple essentially asks is that this Court finds that Apple petitions for mandamus should always be granted because Apple famously stamps "Designed by Apple in California" on its product packaging. But Apple's complaining is no substitute for the fact that a panel of this Court has already found that Judge Albright's ruling withstands scrutiny under the relevant standard for mandamus. Apple's argument is too clever by half—asking for "consistency" gets Apple what it wants because it asks for the baseline for that consistency to be the outcome it desires. This Court should decline Apple's invitation for a blanket rule that Apple is immune from suit in Western Texas, a venue it plainly values (and of which it substantially avails itself).

Finally, a comment on Apple's observation about the "increase[ed] costs on litigants attempting to determine how to proceed, both at the district court and before this Court." Koss, the plaintiff/competitor/Wisconsin corporation, has incurred substantial, unnecessary costs because of Apple's unending resources and petulant displeasure for having to answer for its infringements in the Western District of Texas.

Koss gave Apple the opportunity to avoid litigation. Apple strung Koss along, and ultimately was precisely aware of when Koss would be filing suit. But Apple did nothing to avoid the cost of the lawsuit altogether. Instead, in a repeatedly reactionary series of approaches, Apple (a) moved to strike, (b) filed a declaratory complaint in California, (c) petitioned this Court for mandamus seeking a ruling on Apple's motion to transfer, (d) petitioned this Court for mandamus seeking reversal of Judge Albright's ultimate ruling on the motion to transfer, and (e) requested panel or *en banc* rehearing regarding the same. In all but the last case, Apple has lost. And in all cases, Koss has been forced to expend resources it should not have had to expend. So what Apple is really arguing is that it has been forced to expend resources because it keeps losing, and that is somehow wrong. The correct answer is to recognize that venue is proper and transfer is not warranted in the Western District of Texas. Had Apple done that months ago, it would not be left with less than a month in fact discovery without having taken a single deposition of Koss and still having to produce several of the thirteen witnesses it strategically chose to disclose in its Rule 26(a)(1) disclosures. Koss is presently opposing a motion to extend the discovery period, but in any event Apple's strategy permeates its complaint about wasting party resources.

III. CONCLUSION

The Court need not disturb the panel's prior (correct) review of Judge Albright's ruling on Apple's Motion to Transfer Venue. The extraordinary relief Apple seeks is certainly not warranted here, where Judge Albright properly applied the venue transfer law to the facts of the competitor lawsuit before him in the Western District of Texas and the Panel recognized as much. There is no transfer mandamus precedent that needs alignment; the faithful application of factors to facts may have warranted transfer of NPE cases brought by Uniloc and its ilk; it does not so warrant with regard to the company that invented the stereo headphone—Koss Corporation.

Respectfully submitted,

/s/ *Benjamin E. Weed*

Benjamin E. Weed
70 W. Madison St., Suite 3300
Chicago, IL 60602
K&L GATES LLP
Telephone (312) 372-1121
Facsimile (312) 827-8000
Benjamin.Weed@klgates.com

CERTIFICATE OF COMPLIANCE

The response complies with the type-volume limitation of Fed. R. App. P. 35(b)(2)(A) because this response contains 3,898 words, excluding the parts of the petition exempted by Fed. Cir. R. 32(b)(2).

This response 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 response has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman 14-Point font.

K&L Gates LLP

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

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 October 12, 2021.

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

A copy of the foregoing was served upon the district court 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

K&L Gates LLP

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