No. 2021-190
Miscellaneous Docket

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

In re: NETFLIX, INC.,
Petitioner

On Petition for a Writ of Mandamus to the
United States District Court for the
Eastern District of Texas
No. 2:21-cv-00080-JRG-RSP
United States District Judge Rodney Gilstrap

BRIEF OF UNIFIED PATENTS, LLC AS *AMICUS CURIAE* IN SUPPORT OF NETFLIX, INC.'s PETITION FOR MANDAMUS

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September 28, 2021

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2021-190

Short Case Caption In re: Netflix, Inc.

Filing Party/Entity Unified Patents, LLC

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: 09/28/2021

Signature: /s/ William G. Jenks

Name: William G. Jenks

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
Unified Patents, LLC		Parents:
		UP HOLDCO INC.
		Unified Patents Holdings, LLC
		Unified Patents Acquisition, LLC
		Unified Patents Management, LLC
		No such public companies

☐ 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

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

Netflix, Inc. v. CA, Inc., Case No. 3:21-cv-03649 (N.D. Cal.)		

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

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INTERESTS OF *AMICUS CURIAE*[1]

Unified Patents, LLC is a membership organization dedicated to deterring abusive non-practicing entities, or NPEs, from extracting nuisance settlements from operating companies based on patents that are likely invalid. Unified's 3,000-plus members are Fortune 500 companies, start-ups, automakers, industry groups, cable companies, banks, credit card companies, technology companies, open source software developers, manufacturers, and others dedicated to reducing the drain on the U.S. economy of now-routine baseless litigations asserting infringement of patents of dubious validity. Unified also engages in public policy work, data services, consulting, and an array of independent services.

Unified files post-issuance petitions challenging NPE patents it believes are unpatentable or invalid. Thus, Unified is a deterrence entity that seeks to discourage the assertion of poor-quality patents. Unified acts and litigates independently from its members. *See, e.g.*, *Unified Patents, LLC. v. Uniloc USA, Inc. et al.*, IPR2018-00199 Paper No. 33, 10 (PTABMay 31, 2019) (collecting

[1] Petitioner and Respondents have consented to the filing of this brief. *See* Motion for Leave (accompanying); Fed. R. App. P. 29 (a)(2). No party's counsel authored this brief in whole or in part; neither party nor party counsel contributed money intended to fund preparing or submitting the brief; no person—other than the *amicus curiae*, their members, or their counsel—contributed money intended to fund preparing or submitting the brief. *See* Fed. R. App. P. 29 (a)(4)(E).

PTAB decisions). In 2020, Unified was the fourth most frequent petitioner before the PTAB, and it was by far the leading third-party filer.

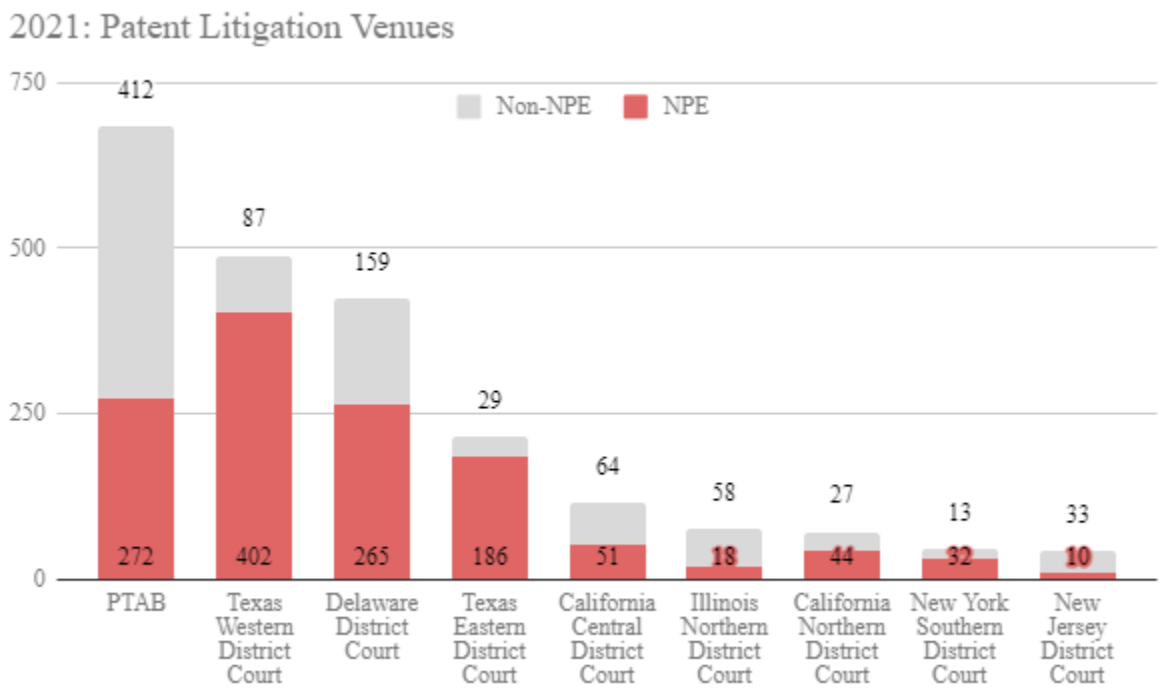
Unified studies the ever-evolving business models, financial backings, and practices of NPEs. Unified monitors ownership data, litigation financing, secondary-market patent sales, demand letters, post-grant procedures, and patent litigation to track NPE activity. *See, e.g.*, Unified Patents, *2021 Patent Dispute Report: First Half in Review* (Jul. 1, 2021), *available at* https://www.unifiedpatents.com/insights/q2-2021-patent-dispute-report ("Unified's 2021 Patent Dispute Report").

In addition, Unified's counsel has long made a particular study of district court stays pending PTAB proceedings. *See, e.g.*, Jonathan Stroud, *The Law of District Court Stays for USPTO Proceedings*, Landslide, September/October 2021; Jonathan Stroud, NFC Technology LLC v. HTC America, Inc.: *Judge Bryson's Sitting-By-Designation Guide to Securing Stays in Light of Inter Partes Reviews*, 65 American Univ. L. Rev. 1075 (2016); Jonathan Stroud, *Staying Litigation for Covered Business Method Post-Grant Reviews*, 17 Colum. Sci. & Tech. L. Rev. 120 (2015) (cited in 29 A.L.R. Fed.3d Art. 9 (2018)); Jonathan Stroud, Linda Thayer & Jeffrey Totten, *Stay Awhile: The Evolving Law of District Court Stays in Light of Inter Partes Review, Post-Grant Review, and Covered Business Method Post-Grant Review*, 11 Buff. Intell. Prop. L.J. 226 (2015) (same).

ARGUMENT

I. This Court Should Grant the Writ to Supervise the Eastern District

The Eastern District of Texas is the third most popular court for bringing patent suits. *See* Unified's 2021 Patent Dispute Report, Figure 4 (reproduced below). It is also a favorite district of non-practicing entities. Of the district courts that saw significant patent filings, the Eastern District had the highest percentage of cases brought by non-practicing entities. *See id.*



As a result, the stay and venue standards of the Eastern District are of extraordinary importance.

In the Fifth Circuit, writs of mandamus "are supervisory in nature and are particularly appropriate when the issues also have an importance beyond the immediate case." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 319 (5th Cir. 2008) (en banc) (citing *United States v. Bertoli,* 994 F.2d 1002, 1014 (3d Cir.1993)); *see also United States v. Sanchez-Gomez*, 138 S. Ct. 1532, 1540 (2018) ("Supervisory mandamus refers to the authority of the Courts of Appeals to exercise 'supervisory control of the District Courts' through their 'discretionary power to issue writs of mandamus.'") (quoting *La Buy v. Howes Leather Co.,* 352 U.S. 249, 259–260 (1957)). The lower court here requires supervision.

Mandamus, to be sure, is "an extraordinary remedy, to be reserved for extraordinary situations." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 289 (1988). But one traditional use of the writ is to compel an inferior court to exercise its authority when it has a duty to do so. *Id.* This is what Petitioner seeks here, a writ instructing the court below to stay merits proceedings until its venue motion is resolved.

II. The Eastern District Courts are Seemingly in a Hurry Except When Deciding Venue Motions

The Eastern District of Texas places patent cases on a "rocket docket," using an expedited case schedule to rush cases along but often failing to timely address venue motions. *See* Petition at 11-13. Given that its docket is dominated by non-practicing entities, there seems to be no rationale for doing so. Companies that

assert patents but do not manufacture or sell products that practice the patents rarely need accelerated resolution of their claims. *See In re Juniper Networks, Inc.*, No. 2021-160, 2021 WL 4343309, at *7 (Fed. Cir. Sept. 24, 2021) (citing *In re Morgan Stanley*, 417 F. App'x 947, 950 (Fed. Cir. 2011)).

A. Venue Motions Are a Top Priority in the Fifth Circuit

In transfer decisions from Texas courts, this court applies Fifth Circuit law. *See In re TS Tech USA Corp.,* 551 F.3d 1315, 1319 (Fed. Cir. 2008). The Fifth Circuit considers venue motions to be a "top priority." *In re Horseshoe Ent.*, 337 F.3d 429, 433 (5th Cir. 2003). This is particularly true here, where Petitioner—like the petitioner in *Horseshoe*—"filed its motion to transfer timely and before it filed its answer." *Id.* This court has repeatedly admonished district courts in the Fifth Circuit to take up these motions early in litigation. *See, e.g.*, *In re EMC Corp.*, 501 F. App'x 973, 975 (Fed. Cir. 2013) ("This case is a prime example of the importance of addressing motions to transfer at the outset of litigation.").

The change of venue statute allows a district court to transfer any civil action to another viable district "[f]or the convenience of the parties and witnesses, in the interest of justice." 28 U.S.C. § 1404(a). "In the context of transfer of venue motions, lengthy delays have the ability to frustrate 28 U.S.C. § 1404(a)'s intent to prevent the waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *In re Google Inc.*,

No. 2015-138, 2015 WL 5294800, at *1 (Fed. Cir. Jul. 16, 2015) (internal marks omitted) (citing *Van Dusen v. Barrack,* 376 U.S. 612, 616 (1964); *Cont'l Grain Co. v. The Barge FBL–585,* 364 U.S. 19, 26, 27 (1960)).

This court has "therefore stressed 'the importance of addressing motions to transfer at the outset of litigation.'" *Google*, at *1 (quoting *EMC,* 501 F. App'x at 975). And it has explained, "the principle that a trial court must first address whether it is a proper and convenient venue before addressing any substantive portion of the case." *In re Nintendo Co., Ltd.*, 544 F. App'x 934, 941 (Fed. Cir. 2013).

This reasoning is even more apt when the motion in question seeks dismissal for improper venue and requests transfer in the alternative. The "waste of time, energy, and money" is even greater should the court ultimately dismiss the case. Further, the Eastern District regularly hires technical advisors at the parties' expense and has done so here, exacerbating the potential harm caused by delay. *See* Scott Graham, *How a Former Law Clerk Earned $700K This Year as a Court-Appointed Technical Advisor*, The Recorder (Aug. 26, 2021) (discussing the Eastern District's having "a group of about four technical advisors they call on regularly to assist with claim construction"); Appx331 (*sua sponte* appointing a technical advisor at the parties' expense).

B. Venue Motions Are Not a Top Priority in the Eastern District

As Petitioner has explained—and the cases above show—the lower court does not treat venue motions as a top priority. *See* Petition at 11-13. Nor is this an isolated lapse. *See id.* The courts of Texas—particularly the Eastern District and the Waco Division of the Western District—have become the epicenter of delay and error. They often fail to timely address venue motions, and they frequently abuse their discretion when deciding venue motions. *See* Petition at 11-13. It is no coincidence that *EMC*, *Google*, and *Nintendo* all originated in the Eastern District.

In recent years the Western District—or at least its Waco Division—has joined the Eastern in delaying venue motions. *See, e.g.*, *In re SK hynix Inc.*, 835 F. App'x 600, 600-601 (Fed. Cir. 2021) ("We agree with SK hynix that the [Western District] court's handling of the transfer motion up until this point in the case has amounted to egregious delay and blatant disregard for precedent."); *In re TracFone Wireless, Inc.*, 848 F. App'x 899, 901 (Fed. Cir. 2021) ("We order the [Western District] court to stay all proceedings until such time that it issues a ruling on the motion to transfer that provides a basis for its decision that is capable of meaningful appellate review.")

Sometimes this court withholds mandamus but only after expressing its confidence that the lower court will act. *See, e.g.*, *In re Freelancer Ltd.*, 850 F. App'x 791, 792 (Fed. Cir. 2021) ("We expect, however, that the [Western District]

court will soon address the pending motion to dismiss or alternatively grant a stay."); *In re Bose Corp.*, 848 F. App'x 426, 427 (Fed. Cir. 2021) ("We expect the [Western District] court will promptly decide the pending motion to dismiss or transfer.").

When the Western District acts on a venue motion, it often abuses its discretion to the point where this court must correct it through mandamus. *See, e.g., In re Samsung Elecs. Co., Ltd.*, 2 F.4th 1371, 1381 (Fed. Cir. 2021) ("The [Western District's] March 1, 2021 orders denying transfer are vacated, and the district court is directed to grant Samsung's and LG's motions to the extent that the cases are transferred … under 28 U.S.C. § 1404(a)."); *In re Hulu, LLC*, No. 2021-142, 2021 WL 3278194, at *5 (Fed. Cir. Aug. 2, 2021) (Mandamus to the Western District because "we readily conclude that the district court clearly abused its discretion in denying Hulu's transfer motion."); *In re TracFone Wireless, Inc.*, 852 F. App'x 537, 540 (Fed. Cir. 2021) ("The March 11, 2021 order is vacated, and the [Western District] court is directed to grant TracFone's motion to the extent that the case is transferred … under § 1404(a).")

The disconnect between rushing headlong toward trial while sidelining or denying meritorious venue motions cries out for stronger medicine from this court. Petitioner here requests relief commensurate with the problem: An order staying merits proceedings until 28 days after the court rules on the pending venue motion.

Petition at 31. The stay ensures that Petitioner's venue motion is a top priority. That it can be resolved and, if necessary, considered by this court on mandamus before the parties and the court below expend additional resources. It also helps ensure that the PTAB will consider the related petitions pending before it with a more accurate view of which court will try the case and when.

III. The Court Should Grant the Petition to Protect Access to Inter Partes Review

Ten years ago, Congress enacted the America Invents Act to provide an expert, inexpensive alternative forum for deciding the patentability of claims. *See* H. Rep. No. 112–98, Part I, at 48 (2011) (post-grant review proceedings are designed to be "quick and cost effective alternatives to litigation"). When district courts rush the merits while ignoring venue motions, they help shield plaintiff's patents from the agency's expert scrutiny and prevent defendants from enjoying the cost benefits of inter partes review.

A. The PTAB Regularly Declines Meritorious Petitions Based on the *Fintiv* Factors

The PTO Director may institute an inter partes review where "there is a reasonable likelihood that the petitioner would prevail with respect to at least 1 of the claims challenged in the petition." 35 U.S.C. § 314(a). But Section 314(a) grants the Director the discretion to reject a petition that meets that statutory merits standard. *See Cuozzo Speed Techs., LLC v. Lee*, 136 S. Ct. 2131, 2140 (2016).

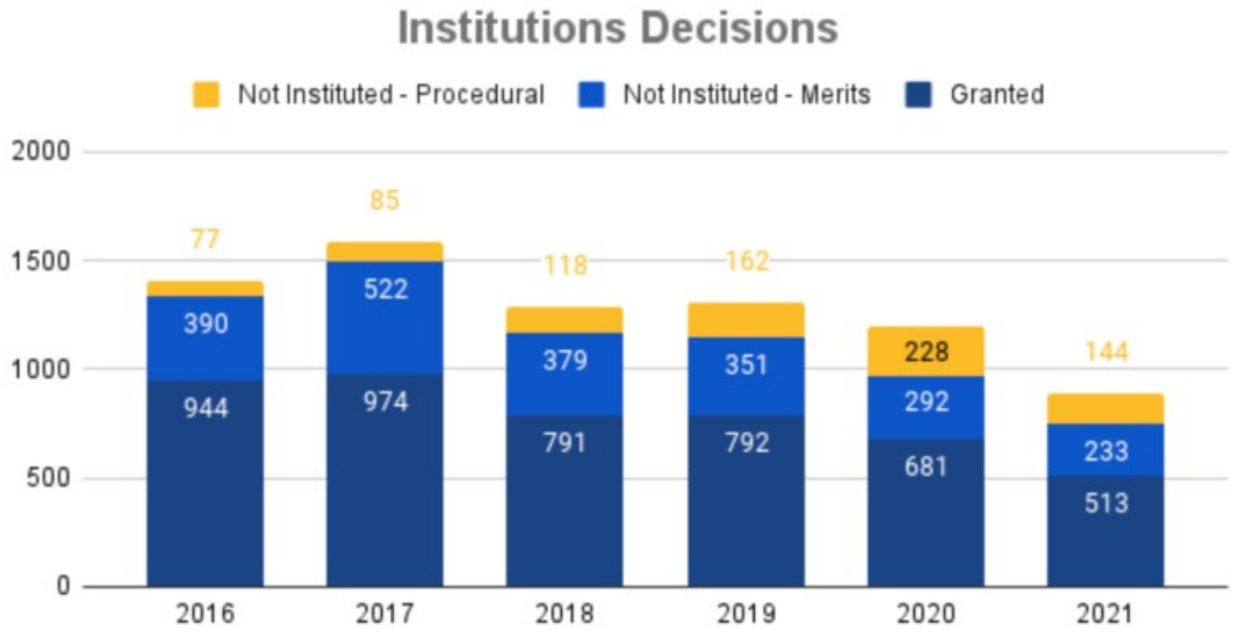
The Director has delegated that authority to the Board. *See* 37 C.F.R. § 42.4(a) (stating that the "Board institutes the trial on behalf of the Director").

The Board often invokes agency discretion under Section 314(a) to deny petitions that meet the statutory standard for institution when there is a co-pending district court proceeding. *See NHK Spring Co. v. Intri-Plex Techs., Inc.*, IPR2018-00752, Paper 8 (PTAB Sept. 12, 2018) (precedential, designated May 7, 2019); *Apple Inc. v. Fintiv, Inc.*, IPR 2020-00019, Paper 11 at 5 (PTAB Mar. 20, 2020) (precedential, designated May 5, 2020) ("*Fintiv I*").

When invoking Section 314(a) discretion—in cases involving parallel district court proceedings—the Board balances the so-called "*Fintiv* factors." *Fintiv I* at 5-6; *see also NHK Spring*, Paper 8 at 19-20. These *Fintiv* factors—which compare the status, predicted progress, and trial date of the district court case with the agency's projected date for final written decision—have become the dominant basis for procedural denials.

Since *NHK* and *Fintiv*, the Board's discretionary denials have exploded, despite an overall decline in the number of petitions filed. *See* Unified Patents, *PTAB Uses Discretion, Fintiv to Deny Petitions 38% in 2021 to Date* (Sept. 22, 2021) *available at* https://www.unifiedpatents.com/insights/2021/9/22/an-early-look-at-the-ptabs-use-of-fintiv-and-discretion-discretionary-denials-through-

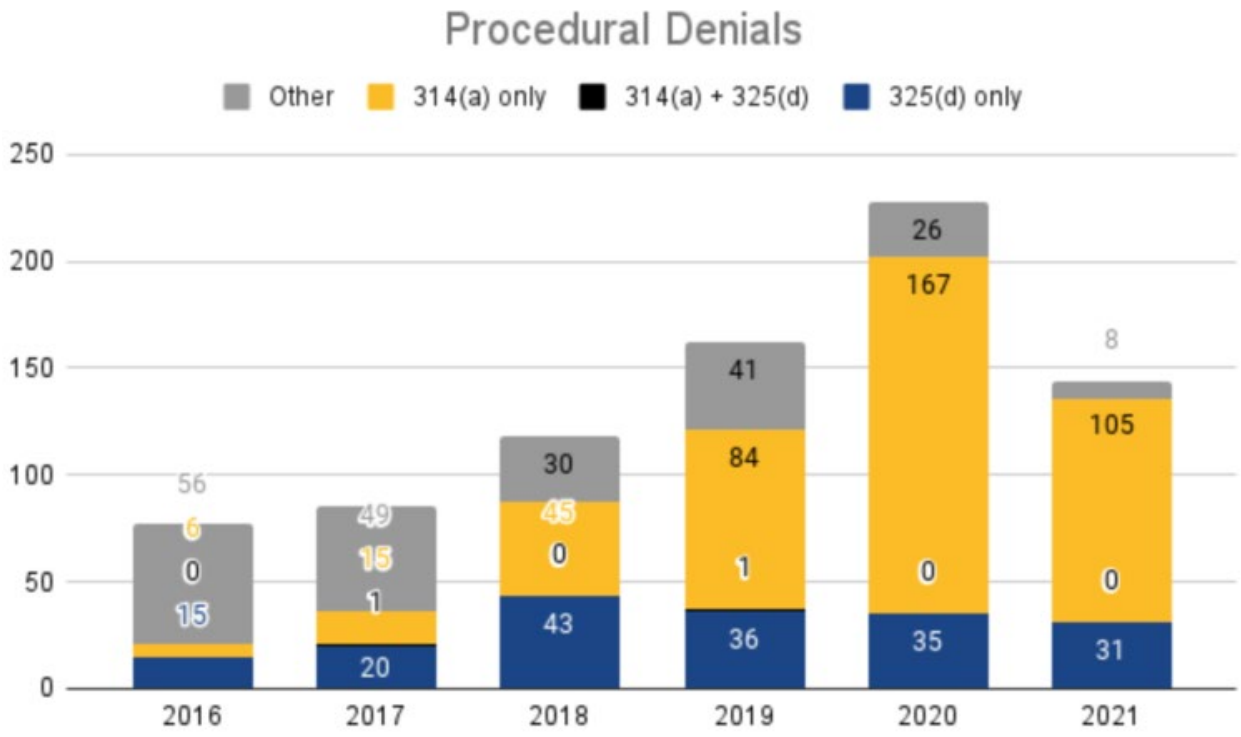
september-2021 ("Unified's 2021 PTAB Discretion Report").[2] This is shown in Unified's 2021 PTAB Discretion Report, Fig. 1 (reproduced below).



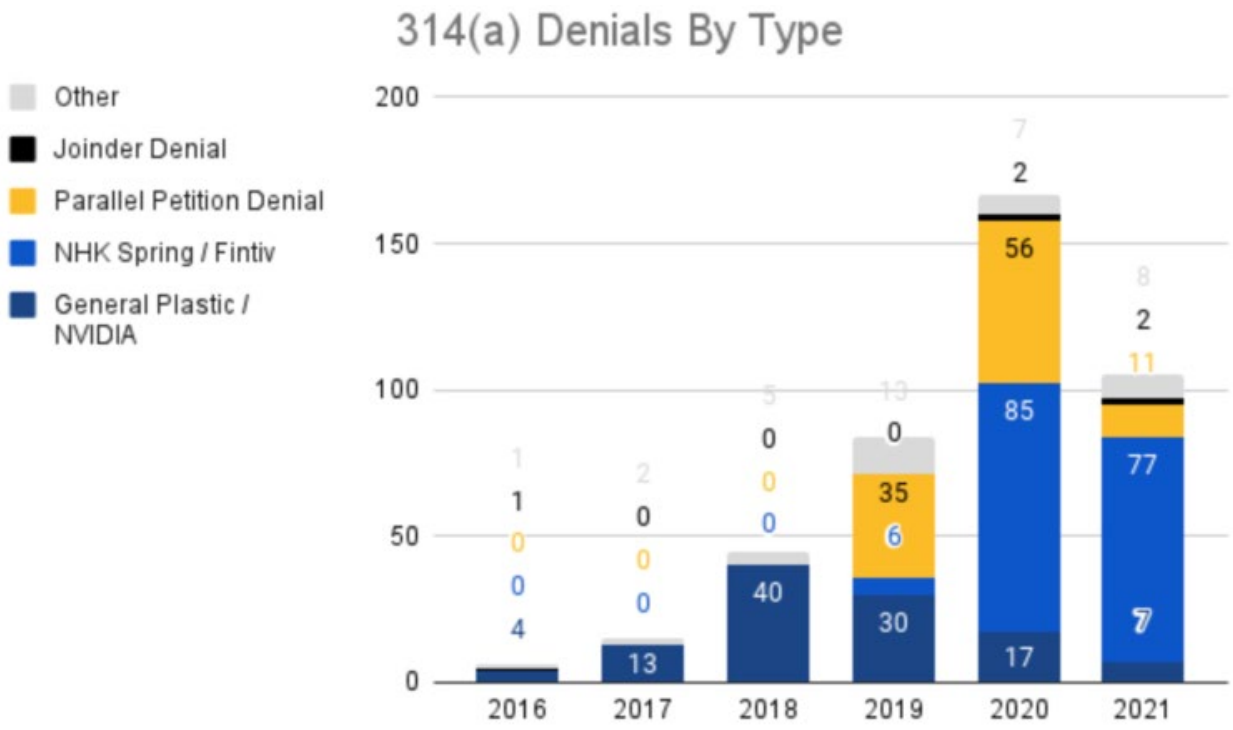
In 2020 the PTAB denied nearly 19% of all institution petitions on procedural grounds; this year, over 16% petitions have been denied under the Board's discretion. *Id.* As a result, almost 40% of all denials have been non-substantive. *Id.*

The *NHK Spring/Fintiv* analysis has become the dominant basis for procedural denials. *Id.*, Figs. 2, 6. Nearly three-quarters of all procedural denials are based on Section 314(a). *See id.*, Fig. 2 (reproduced below).

[2] Unified's 2021 data is current through September 8, 2021. *Id.*



Parsing further, *NHK Spring/Fintiv* "continues to be the dominant framework of 314(a) denials." Unified's 2021 PTAB Discretion Report. In 2021 thus far, *NHK Spring/Fintiv* denials account for 77 of the 105 (73%) Section 314 denials, over 50% of procedural denials, and over 20% of all denials—procedural and merits-based. *See id.*, Fig. 6 (reproduced below).



Unified projects that for full-year 2021, the number of Section 314(a) denials will hold steady while the percentage of *NHK Spring/Fintiv* denials grows by nearly 40%. *See* Unified's 2021 Patent Dispute Report, Figs. 21-22.

B. Courts That Pocket Venue and Stay Motions Can Cause the PTAB to Deny Meritorious Petitions

The enormous rise in discretionary denials—driven by increased denials under the *Fintiv* factors—has severe consequences for defendants inappropriately before Texas's Eastern and Western District courts. Diligent defendants, like Petitioner, often seek inter partes review within a few months of being sued. At the same time, if they are before an inappropriate court, they may file a venue motion to dismiss or transfer. But a delay in deciding such motions—combined

with aggressive scheduling of nearly every other aspect of litigation—encourages the PTAB to deny otherwise meritorious petitions by invoking agency discretion.

Under *NHK Spring* and *Fintiv*, the Board may invoke discretion not to institute a meritorious petition based on the following factors:

> 1. whether the court granted a stay or evidence exists that one may be granted if a proceeding is instituted;
>
> 2. proximity of the court's trial date to the Board's projected statutory deadline for a final written decision;
>
> 3. investment in the parallel proceeding by the court and the parties;
>
> 4. overlap between issues raised in the petition and in the parallel proceeding;
>
> 5. whether the petitioner and the defendant in the parallel proceeding are the same party; and
>
> 6. other circumstances that impact the Board's exercise of discretion, including the merits.

Fintiv, Paper 11 at 5-6; *see also NHK Spring*, Paper 8 at 19-20.

Fintiv factors two and three can be shifted against review when a district court delays action on a venue motion or incorrectly decides a venue motion, even if the Federal Circuit ultimately overturns that decision on mandamus.

The second *Fintiv* factor—proximity of trial date to the Board's one-year-from-institution deadline—is particularly notorious. The court below has set an aggressive trial date, as is common in the Eastern and Western Districts. This court has long recognized that the court's prospective trial date "appears to be the

most speculative" factor in the transfer analysis. *See In re Genentech, Inc.*, 566 F.3d 1338, 1347 (Fed. Cir. 2009) (mandamus to the Eastern District). More recently, this court explained that "it is improper to assess the court congestion factor based on the fact that the Western District of Texas has employed an aggressive scheduling order." *Juniper Networks* at *6 (collecting cases).

The PTAB takes the opposite approach. The PTAB will "generally take courts' trial schedules at face value absent some strong evidence to the contrary." *See Apple Inc. v. Fintiv, Inc.*, IPR 2020-00019, Paper 15 at 13 (PTAB May 13, 2020) (informative, designated Jul. 13, 2020) ("*Fintiv II"*). And what constitutes "strong evidence" is not reassuring. *See Sand Revolution II, LLC v. Continental Intermodal – Trucking LLC*, IPR 2019-01393, Paper 24 at 8-9 (PTAB June 16, 2020) (informative, designated Jul. 13, 2020). In *Sand Revolution*, the PTAB initially denied institution by relying in part on an early trial date. *See id.*, Paper 12 at 15-16, 18. But the PTAB reconsidered on rehearing after the parties jointly moved to extend trial-court deadlines, and the trial date was pushed from April 27, 2020, to July 20, 2020, to November 9, 2020, then to "February 8, 2021 (or as available)" in light of Covid. *See id.*, Paper 24 at 8-9. Thus, an early trial date typically weighs heavily against an IPR petitioner, regardless of its speculative nature, unless the court actually moves that date before the time for requesting rehearing expires.

Similarly, *Fintiv* factor three—investment in the parallel proceeding by the court and the parties—can artificially weigh against defendants while awaiting a decision on their venue motions. The court below has declined to suspend or stay upcoming discovery, claim construction, and trial dates, and each day the investment by the court and the parties increases. *See* Petition at 1, 7. The district court should not consider the work invested by the parties when deciding venue motions. *See TracFone Wireless*, 848 F. App'x at 901 ("[W]e remind the lower court that any familiarity that it has gained with the underlying litigation due to the progress of the case since the filing of the complaint is irrelevant.") (citing *Google*, 2015 WL 5294800 at *2). But the PTAB again takes the opposite approach. It considers "the amount and type of work already completed in the parallel litigation by the court and the parties at the time of the institution decision." *Fintiv I* at 9 (emphasis added). Thus, the longer a court delays action on a proper venue motion, the more substantive work is completed, and the more likely the PTAB is to decline institution for non-merits reasons.

This concern goes beyond mere speculation. The applicability of the *Fintiv* factors has been studied with respect to the Western District of Texas. *See* Pauline Pelletier, Deborah Sterling & Anna Phillips, *How West Texas Patent Trial Speed Affects PTAB Denials*, IP Law360 (Feb. 16, 2021). Pelletier, Sterling, & Phillips found that—in 2020—the Board declined to institute 15 of 39 petitions (38%) after

it addressed the *Fintiv* factors in the context of the Western District's aggressive schedule in parallel cases. *See id.*

Where, as here, there is a significant delay between the filing of a venue motion and the district court's decision on venue—during which the case barrels along—prejudice begins to accrue in the PTAB against even the diligent defendant.

CONCLUSION

The court should issue the requested writ. The availability of PTAB proceedings as an alternative to litigation in a significant fraction of all U.S. patents cases is at stake.

Respectfully Submitted,

/s/William Jenks

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

1. This brief complies with the type-volume limitation of Fed. Cir. R. 21(e). It contains 3185 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fed. Cir. R. 32(b)(2).

2. This brief 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 it has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in Times New Roman 14-point font.

/s/ William G. Jenks
William G. Jenks

CERTIFICATE OF SERVICE

I hereby certify that, on Sept. 28, 2021, I caused to be electronically filed the foregoing MOTION FOR LEAVE and accompanying BRIEF *AMICUS CURIAE* IN SUPPORT OF PETITIONER using the court's CM/ECF filing system. 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. *See* Fed. R. App. P. 25(d); Fed. Cir. R. 25(e).

In addition, I certify that counsel for Respondent, not yet of record, were served by email on Sept. 28, 2021 as follows:

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A copy of the foregoing was also provided to the district court judge via UPS at the following address:

Hon. Rodney Gilstrap
United States District Court for the Eastern District of Texas
Sam B. Hall, Jr. Federal Building and United States Courthouse
100 East Houston Street
Marshall, Texas 75670

/s/ William G. Jenks
William G. Jenks