2021–190

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, Hon. Rodney Gilstrap

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Respondents CA Inc. and Avago Technologies International Sales PTE. Limited's Response to Petition for Writ of Mandamus

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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 CA, Inc. and Avago Technologies International Sales PTE. Limited

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: 10/04/2021

Signature: /s/ Bruce S. Sostek

Name: Bruce S. Sostek

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
CA, Inc.		Broadcom, Inc.
Avago Technologies International Sales PTE. Limited		Broadcom, Inc.

☐ 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., 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

CERTIFICATE OF INTEREST (CONT'D)

Counsel for CA, Inc. and Avago Technologies International Sales PTE. Limited certifies that the following law firms, partners, associates, and counsel have appeared on their behalf before the district court:

From Holland & Knight LLP: Bruce S. Sostek, Richard L. Wynne, Jr., Adrienne E. Dominguez, Justin S. Cohen, Austin C. Teng, J. Michael Heinlen, Michael D. Karson (now from Winstead PC)

From McKool Smith, P.C.: Samuel F. Baxter, Jennifer L. Truelove

From Hopkins & Carley, a Law Corporation: Robert K. Jain

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Netflix seeks mandamus to stay all substantive proceedings in the district court pending a ruling on its venue motion. Appx132.[1] But the district court has given that motion top priority. On September 27, 2021, the magistrate judge entered a Report and Recommendation (R&R) denying the motion—*before considering or ruling on any substantive issues in the case*. RAppx1. Because this is all the standard requires, Netflix's Petition should be denied.

LEGAL STANDARD

The remedy of mandamus is available only in "exceptional" situations to correct a "clear abuse of discretion or usurpation of judicial power" by a trial court. *In re Calmar, Inc.*, 854 F.2d 461, 464 (Fed. Cir. 1988). Under the well-established standard for obtaining such relief, the petitioner must: (i) show that it has a clear and indisputable legal right; (ii) show it does not have any other method of obtaining relief; and (iii) convince the court that the "writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Ct. for D.C.*, 542 U.S. 367, 380–81 (2004) (citation omitted). Netflix has not met this standard.[2]

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[1] Citations to Appx## are to the Appendix in Support of Netflix's Petition for Writ of Mandamus. Citations to RAppx## are to the Appendix in Support of Respondents CA, Inc. and Avago Technologies International Sales PTE. Limited's Response to Petition for Writ of Mandamus.

[2] Netflix's Petition applies an improper standard, based on *Standard Havens Products, Inc. v. Gencor Industries, Inc.*, 897 F.2d 511, 512 (Fed. Cir. 1990), that would require the Court to consider certain factors in determining whether to grant mandamus. But *Gencor* did not involve a request for mandamus relief. It ruled on an appellant's motion to stay entry of judgment pending appeal. *See id.* While the

ARGUMENTS

Netflix asks the Court to stay "all substantive proceedings in this case," based on an alleged "long history of last-minute venue orders in the Texas district courts" and "Netflix's overwhelming case on the merits." Pet. at 31. The issue, however, is not how "Texas" courts[3] have allegedly acted in the past, but rather whether *this* district court, in *this* case, clearly abused its discretion. Netflix has not even argued, much less shown, that the district court has abused its discretion. And there is no basis for Netflix's contention that its case on the merits is overwhelming. On the contrary, the R&R found Netflix's arguments on the merits unconvincing and at times even "disingenuous." *See* RAppx10 (n.1).

A. The district court prioritized ruling on Netflix's venue motion.

This Court has never held that cases must necessarily be stayed pending resolution of a defendant's motion to dismiss or transfer. The rule is simply that when such a motion is filed, it should take "top priority." *See In re Apple Inc.*, 979 F.3d 1332, 1337 (Fed. Cir. 2020). That is what happened here. The district court's

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factors set forth in *Gencor* may be appropriately considered in that context, they are not relevant here. Indeed, CA, Inc. and Avago Technologies International Sales PTE Limited (collectively, CA) are not aware of any cases in which this Court (or any other) has applied the *Gencor* factors in ruling on a petition for mandamus.

[3] What is notable is the extent to which Netflix and *amicus curiae* Unified Patents (of which Netflix is a member) try to bias this Court against the district court by conflating the actions of different district courts across the state of Texas, as if to suggest that they were engaged in some type of collusive decision-making. Such a suggestion is both inaccurate and improper, as discussed further below.

first substantive ruling was the R&R recommending that Netflix's venue motion should be denied. It has not held a *Markman* hearing or entered a claim-construction order. It has not held a discovery hearing or entered a discovery order. Indeed, it has not held a single hearing (other than a pro forma scheduling conference) or entered any order on a substantive issue other than the R&R.

Netflix filed its Petition despite the fact that the magistrate judge had advised the parties that the court expected to address the venue motion "in advance of any claim construction hearing." Appx333. By filing its petition, Netflix elected to disregard the court's notification and file its Petition based on cases from a different district court and the unsupported assumption that Judge Gilstrap would not timely rule on the R&R.[4] But arguments based on assumption and speculation do not show extraordinary circumstances warranting mandamus relief. *See, e.g.*, *In re Taiwan Union Tech. Corp.*, 587 F. App'x 638, 641 (Fed. Cir. 2014); *In re Salomon S.A.*, 983 F.2d 1085 (Table), 1992 WL 350865, at *3 (Fed. Cir. 1992). Netflix has not identified any authority requiring a district court to stay deadlines under the facts here. Nor can it, because if the district court "give[s] the stay

[4] *See* Pet. at 14 n.3 ("Netflix [cannot] expect Judge Gilstrap's ruling on venue until the latter half of December, and quite possibly as late as the end of March 2022."); *id.* at 28 ("[A]ny ruling by the district court on the venue motion is months away and will almost certainly not happen before the scheduled claim construction hearing."). Netflix's speculation does not satisfy the stringent requirements for entitlement to mandamus relief.

motion and venue issues top priority," as it has, there is no such obligation. *See In re Adtran, Inc.*, 840 F. App'x 516, 517 (Fed. Cir. 2021) (refusing to grant mandamus relief requiring a stay where there was no showing that the district court failed to prioritize ruling on a motion to dismiss or transfer).

Mandamus should be denied for this reason alone.

B. The conduct of other courts and the PTAB cannot support mandamus in this case.

1. That other courts have allegedly failed to prioritize ruling on motions to transfer is no reason to grant mandamus here.

Netflix apparently wants to use this case to "teach a lesson" to district courts in Texas that allegedly "flout this Court's directive to give venue and transfer motions 'top priority.'" Pet. at 27; *see also id.* at 2 (arguing that "some courts" "flout the law" by setting "early, aggressive merits deadlines, ignoring repeated requests to resolve dispositive venue motions, and litigating the merits of cases that should never have been filed there"); *id.* at 31 (arguing that mandamus is proper, "given the long history of last-minute venue orders in the Texas district courts").

The purpose of mandamus, however, is not to address alleged wrongs by other courts in other cases. The purpose of mandamus is to correct a "clear abuse of discretion or usurpation of judicial power." *Calmar*, 854 F.2d at 464. And the decision whether to grant mandamus must be made based on the particular facts of each case, not by alleged bad acts of other "Texas district courts" or "some courts"

generally. Pet. at 2, 31; *see Cheney*, 542 U.S. at 381 (holding mandamus relief must be "appropriate *under the circumstances*" (emphasis added)); *see also, e.g.*, *In re Precision Screen Machs., Inc.*, 729 F.2d 1428, 1429 (Fed. Cir. 1984) ("[W]e decline to issue the writ sought, finding *in the circumstances of this case* no clear demonstration of any abuse of discretion by the district court." (emphasis added)). Netflix's reliance on a history of rulings in other cases is therefore irrelevant.

Moreover, the cases it cites are easily distinguished from this one, as they all involved "egregious delays" in ruling on motions to transfer and the failure to prioritize doing so. In *SK Hynix*, for example, this Court held that failing to rule on a motion to transfer for over eight months "amounted to egregious delay and blatant disregard for precedent." *In re SK Hynix Inc.*, 835 F. App'x 600, 600–01 (Fed. Cir. 2021). And in *TracFone*, it held the district court "clearly abused its discretion" by "tak[ing] no action [for nearly eight months] to suggest it [was] proceeding towards quick resolution of the motion." *TracFone Wireless, Inc.*, 848 F. App'x 899, 900 (Fed. Cir. 2021); *see also Apple*, 979 F.3d at 1338 (finding district court improperly "held a *Markman* hearing, issued its claim construction order, held a discovery hearing, and issued a corresponding discovery order" before ruling on motion to transfer).

The facts are very different here, where the district court has prioritized ruling on Netflix's venue motion. The R&R is the first, and only, substantive act the court

has performed. It was entered just two months after briefing on the venue motion was completed, and there is no reason to assume that Judge Gilstrap will delay ruling on it. "Under the[se] circumstances"—the only relevant circumstances—mandamus is not appropriate. *See Cheney*, 542 U.S. at 381.

2. That the PTAB allegedly denies institution of IPRs based on aggressive schedules set by some district courts is no reason to grant mandamus here.

Netflix and *amicus curiae* Unified Patents contend that because Texas courts have historically set aggressive case schedules, "discretionary IPR institution denials on procedural grounds have been rapidly increasing over the past few years." *See* Pet. at 28–31; Br. of Unified Patents, LLC *passim*.[5] They further contend that the alleged failure of those courts to prioritize ruling on motions to stay undermines public policy by "provid[ing] an end run around the IPR regime created by Congress for faster and less expensive resolution of patent validity."[6]

[5] In its brief, Unified Patents states that it is a membership organization comprising over 3,000 members. *See* Br. at 1. It fails to acknowledge, however, that *Netflix* is one of those members, which pay money to support Unified Patents' activities. *Netflix, Inc. v. DIVX, LLC*, IPR2020-00052, 2020 WL 2507408, at *4 (PTAB May 14, 2020) ("Petitioner agrees that Netflix and Hulu are Unified members."). Ignoring that fact, Unified Patents' brief also states: "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." Br. at 1 n.1. It is difficult to reconcile Netflix's status as a fee-paying member of Unified Patents with Unified Patent's statement that Netflix did not contribute, at least indirectly, to the brief.

[6] Presumably, their theory is that if Texas courts would transfer cases to

Pet. at 29.

Even assuming (for the sake of argument only) that these contentions had merit, they provide no basis for granting mandamus here. Mandamus is not a vehicle for advancing or promoting policies—that is the legislature's job. Again, the purpose of mandamus is to correct a clear abuse of discretion. Because neither Netflix nor Unified Patents has shown that the district court has abused its discretion, mandamus should be denied.

C. Netflix has not been prejudiced.

Netflix argues that *if* the district court "proceed[s] with the substantive aspects of this case" it will be "prejudiced by having to litigate the advanced stages of a case before resolving even the most preliminary issues." Pet. at 23–24. Likewise, it contends that the "district court's refusal to follow the law in setting a substantive case schedule *may* prompt the PTAB to believe there is nothing to be gained by instituting Netflix's IPRs despite their merit." *Id.* at 25 (emphasis added). And it argues that if the case had been transferred to the Northern District of California, it *might not* have had to share in the cost of paying a technical advisor to advise the district court on claim-construction issues. *Id.* at 21–22.

Netflix's fears are all speculative. Fundamentally, Netflix's policy concerns

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districts where the time to trial is longer, the PTAB would be less likely to deny institution of defendants' IPRs.

are premised on an unsupported assertion that the district court "refus[ed] to follow the law in setting a substantive case schedule." Pet. at 25. Netflix's baseless accusations against the Chief Judge of the Eastern District of Texas are inappropriate, but regardless, there is no reason to assume that Judge Gilstrap will not timely rule on the R&R, that the PTAB will deny Netflix's IPR petitions "despite their merit," that the case will be transferred, or that a court in the Northern District of California would not require the assistance of a technical advisor.[7] Netflix's "[s]peculation is not sufficient to demonstrate prejudice." *Innogenetics, N.V. v. Abbott Labs.*, 512 F.3d 1363, 1374 (Fed. Cir. 2008).

Netflix further claims that since "there is not yet any answer in the case and no defenses or counterclaims have yet been pled," "the district court's aggressive schedule may make it impossible to take discovery on any defenses or counterclaims that might be raised in the case." This is not only speculative, it is also false. First, nothing is preventing Netflix from filing an answer. Second, Netflix has asserted numerous defenses and potential counterclaims in its Initial Disclosures. Third, and most critically, Netflix has in fact already engaged in significant discovery related to those defenses and counterclaims.[8]

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[7] Netflix's contention that it might be harmed if the case is dismissed is equally speculative—and even less reasonable. *See* Pet. at 23, 23 n.5 (supposing that CA "might opt not to litigate in California" and could "obviate [Netflix's DJ action related to the patents at issue here] by filing a covenant not to sue").

[8] *See* Defendant Netflix, Inc.'s Initial and Additional Disclosures (RAppx35);

Netflix has not been prejudiced by any alleged delay in ruling on its venue motion.

D. The merits of Netflix's venue motion are not relevant here.

Although Netflix admits that it is not seeking mandamus on its venue motion (Pet. at 11), it nonetheless devotes over a third of the pages in its Petition to arguing the merits of that motion. Netflix's arguments are both irrelevant and wrong. They are irrelevant because the issue here is whether the district court abused its discretion by not prioritizing the venue motion, not whether that motion should be granted. And they are wrong, as CA will show if Netflix chooses to mandamus an order adopting the R&R.[9] Indeed, after careful and painstaking consideration of Netflix's arguments, the magistrate judge rejected them, finding on the facts of this case that venue is proper in the Eastern District of Texas and that Netflix failed to show that the Northern District of California is a clearly more convenient forum.

Netflix's attempt to get a preemptive first bite at the apple on this issue should

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Defendant Netflix, Inc.'s First Set of Interrogatories to Plaintiffs CA, Inc. and Avago Technologies International Sales PTE. Limited (RAppx59); Letter from Sharif E. Jacob, counsel for Netflix, to Richard L. Wynne, counsel for CA (Aug. 2, 2021) (RAppx71). Netflix has also served eight subpoenas on third parties seeking documents to support its invalidity defenses, and has collected approximately 50,000 documents in response to them.

[9] They are also often misleading, as CA will also show if necessary.

be rejected.

CONCLUSION

Netflix has failed to show that the district court committed a "clear abuse of discretion or usurpation of judicial power" or that this is an "exceptional" case that warrants mandamus relief. *See Calmar*, 854 F.2d at 464. On the contrary, the district court has properly given Netflix's venue motion "top priority" by entering the R&R before considering or ruling on any substantive issues. *See Apple*, 979 F.3d at 1337–38. CA therefore respectfully requests that the Court deny the Petition.

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CERTIFICATE OF SERVICE

I certify that Respondents CA, Inc. and Avago Technologies International Sales PTE. Limited's Response to Netflix, Inc.'s Petition for Mandamus was served on the following counsel for Netflix by electronic mail on October 4, 2021.

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FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 2021-190

Short Case Caption: In re: Netflix, Inc.

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Signature: /s/ J. Michael Heinlen

Name: J. Michael Heinlen