Miscellaneous Docket No. _____

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN RE JUNIPER NETWORKS, INC.,

Petitioner.

On Petition for a Writ of Mandamus to the U.S. District Court for the Western District of Texas in Case Nos. 6:20-cv-00812-ADA, 6:20-cv-00813-ADA, 6:20-cv-00814-ADA, 6:20-cv-00815-ADA, 6:20-cv-00902-ADA, and 6:20-cv-00903-ADA
Hon. Alan D. Albright

NON-CONFIDENTIAL PETITION FOR WRIT OF MANDAMUS

Kevin P.B. Johnson
Todd M. Briggs

QUINN EMANUEL URQUHART
&
SULLIVAN, LLP
555 Twin Dolphin Drive, 5th Floor
Redwood Shores, California 94065
Telephone: 650-801-5000
Facsimile: 650-801-5100

Attorneys for Petitioner.

July 2, 2021

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number

Short Case Caption In re Juniper Networks, Inc.

Filing Party/Entity Juniper Networks, Inc.

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: 07/02/2021

Signature: /s/ Todd Briggs

Name: Todd Briggs

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
Juniper Networks, Inc.		Dodge & Cox; The Vanguard Group

☐ 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

Quinn Emanuel Urquhart & Sullivan LLP: Nima Hefazi, Pushkal Mishra, Margaret Shyr, Joseph E. Reed, Dallas Bullard, Joshua Scheufler		
George Brothers Kincaid & Horton: B. Russell Horton		

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

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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Pursuant to Federal Circuit Rule 25.l (e)(l)(B), Petitioner provides the following description of the general nature of the material that has been deleted from this non-confidential petition:

The material deleted from pp. 5-6 includes information Brazos contends is confidential business information, including information regarding the location of its officers and records, and therefore designated as Attorneys' Eyes Only under the protective order governing the case.

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No appeals in or from the same civil action or proceeding in the lower court have previously been before the Federal Circuit or any other appellate court.

INTRODUCTION

The U.S. District Court for the Western District of Texas (Albright, J.) erroneously denied Petitioner-Defendant Juniper Networks, Inc.'s motion to transfer Plaintiff WSOU Investments, LLC d/b/a Brazos Licensing and Development's related patent infringement actions to the Northern District of California. The district court denied Juniper's transfer motion despite the cases' close and comprehensive connections to the Northern District of California and their lack of any meaningful connection to the Western District of Texas. Exercise of this Court's mandamus authority is warranted to correct the district court's denial of transfer, which defied 28 U.S.C. § 1404(a) and controlling, on-point precedent from both the Fifth Circuit and this Court.

Only by badly skewing its analysis of the private and public interest factors did the district court arrive at its purported grounds for denying transfer. Indeed, the district court's approach to several of the key factors distorts them beyond recognition. *First*, with respect to the ease of access to sources of proof factor, the district court acknowledged that there are documents and evidence at Juniper's headquarters in the Northern District of California while there are ***no*** documents or evidence in the

Western District of Texas, but nonetheless found that the relative ease of access to sources of proof is neutral. *Second*, for the compulsory process factor, the district court rightly noted that neither party had identified any unwilling witnesses who would need to be subpoenaed, yet concluded that the availability of compulsory process weighed against transfer. *Third*, with regard to the convenience of the witnesses factor, the district court acknowledged that Juniper had identified eleven witnesses in the Northern District of California who have unique, relevant knowledge, and that Brazos had identified at most one witness in the Western District of Texas, but found that this factor weighed only slightly in favor of transfer. *Fourth,* considering the court congestion factor, the district court relied on public time-to-trial statistics to hold that the court congestion factor weighed against transfer, but then betrayed its own speculation by dividing the case into two trials the next day. *Fifth*, analyzing the local interest factor, the district court correctly recognized that the district where the accused products were designed and developed generally has the strongest local interest in the case, and that Juniper primarily designed and developed the accused products in the Northern District of California, but found that the local interest factor nonetheless

cut *against* transfer. Because the district court's treatment of these five factors does not square with governing law as applied to undisputed facts, it reflects an abuse of discretion that cries out for correction via mandamus.

This Court has repeatedly and recently recognized that a writ of mandamus is properly issued to correct a district court's wrongful refusal to transfer a patent case under circumstances like these and that parties so aggrieved have no adequate alternative means of relief. Notably, the facts here favor transfer even more clearly than was true in *Adobe, Apple*, and *Tracfone*. This Court should again exercise its mandamus authority.

RELIEF SOUGHT

Juniper respectfully seeks a writ of mandamus directing the district court to vacate its order denying Juniper's motion to transfer this action, and to transfer this action to the Northern District of California.

ISSUE PRESENTED

Whether the district court clearly abused its direction in declining to transfer this case to the Northern District of California even though the majority of the key witnesses and evidence are located in that district, no key witnesses or evidence are located in the Western District of Texas, more third party witnesses are located in the Northern District of

California than the Western District of Texas, Juniper primarily designed and developed the accused products in the Northern District of California, and court congestion is an inherently highly speculative factor that cannot on its own warrant denial of transfer where several other factors favor it.

STATEMENT OF FACTS

A. The Parties

Brazos unabashedly advertises itself as a patent assertion entity, with its website hawking "licensing and monetization" and "litigation" services to help "turn … patents into cash-flowing assets."[1] Appx158; Appx216. Brazos claims its principal place of business is Waco, Texas—by pointing to an office that Brazos established shortly before launching its current campaign of patent litigation in the Western District of Texas. Appx116. Brazos is not coy about the reason it set up shop in Waco, telling the district court that its office is "less than two blocks from the Waco Division Courthouse." Appx246. Yet Brazos is unable to specify any business it does from that office, apart from filing well over a

[1] Brazos is the d/b/a pseudonym of WSOU Investments, LLC. WSOU registered to do business in Texas in January 2020 and soon thereafter indicated it would do business as Brazos. Juniper will refer to WSOU/Brazos as "Brazos" throughout this Petition.

hundred lawsuits in the Waco Division. By contrast, Brazos has done business (and business highly relevant to this action) in California, albeit not the Northern District: Brazos received much of its patent portfolio via an assignment agreement that listed WSOU's address in Los Angeles. Appx161.

Brazos's leadership also has more ties to California than to Texas: of the four corporate officers listed on Brazos's website, one is based in New York, two are in California, and only one (Matt Hogan) is in Texas. Appx220-232. Mr. Hogan appears to have moved to Texas in early 2020 for the same reason Brazos set up its office there: to litigate in the Western District. Mr. Hogan testified in a 30(b)(6) deposition that none of Brazos's other officers have [redacted] in [redacted] since [redacted] Appx568-570. Brazos has only two employees in its Waco office: Mr. Hogan and its in-house counsel, who was hired after Brazos filed its suits against Juniper. Appx567. Mr. Hogan is responsible for business development and has no knowledge of or responsibility for Brazos's patent portfolio or licensing. Appx591. The Brazos employees who do have that relevant knowledge are Founder and Chairman Craig Etchegoyen and President Stuart Shanus—both of whom are based in

California. *Id.* Indeed, Brazos [redacted] Mr. Shanus an [redacted] in [redacted] Appx586-588.

Juniper is a Delaware corporation with its principal place of business in Sunnyvale, California. Juniper's Sunnyvale headquarters is just over 10 miles from the San Jose federal courthouse, and around 40 miles from the courthouses in San Francisco and Oakland. Appx148-149.

Juniper makes and sells routers, switches, and other network and network security products, some of which Brazos accuses of patent infringement. About 2800 Juniper employees—including most of the engineers, supervisors, technical support, and finance/marketing personnel with relevant knowledge—work at its Sunnyvale headquarters. Appx148-150. Juniper also has offices in Massachusetts, New Jersey, India, and China. But most of the design, development, and testing of the accused products took place in Sunnyvale—and none took place in Texas. *Id.* Predictably, most of the witnesses with relevant knowledge work at Juniper's Sunnyvale headquarters, and Juniper identified 11 specific witnesses with unique, relevant knowledge who work there. Appx311-313. While there are witnesses with relevant knowledge in other locations—including New Jersey and Bangalore,

India—Juniper has no employees in Texas who have specific or relevant knowledge about the accused products. *Id.*

Juniper also stores the majority of its technical documents, source code, and financial documents in Sunnyvale. Appx151. Juniper stores no technical documents or source code relating to the accused products (in hard-copy form or on servers) in Texas (*id.; see also* Appx310), and Juniper employees in Texas generally do not have access to such technical documents and source code. Appx309. Juniper will also make its source code available for inspection at its Sunnyvale headquarters. Appx151. Even after taking over four months of venue discovery in an attempt to identify ties between Juniper and the Western District of Texas, Brazos was unable to identify a single Juniper witness with relevant knowledge or a single piece of evidence related to the accused products in that district.

Juniper also has other small (mostly sales) offices in various locations. Appx152. It also has work-from-home sales and support employees located throughout the world, including approximately 40 employees in the Western District of Texas. *Id.* These sales and support employees—most of whom worked from home even before COVID—have

no specific knowledge about any of the accused products and do not generally have access to technical documents or source code related to the accused products. *Id.* At the time Brazos filed its complaints, Juniper had a small office in Austin, Texas. That office existed to serve a company called Mist, which Juniper acquired in 2019 and does not design or develop the accused products. Appx152. On March 31, 2021, that Austin office closed under a "Cease Business" order from Juniper. Appx554. That office was Brazos's sole basis for establishing venue in the Western District of Texas. Appx118. The 13 employees who previously worked there became work-from-home employees, the furniture and other Juniper assets were removed, and Juniper employees are now not permitted to go to the office or to conduct business from it. Appx554-555. Following the closure of the Austin sales office, Juniper has no offices in the Western District of Texas. Appx555.

B. The Lawsuit

Brazos filed five patent infringement cases (6:20-cv-00812, -00813, -00814, -00815, and-00816) against Juniper on September 4, 2020.[2] Appx29; Appx44; Appx57; Appx70; Appx83. Brazos filed two additional

[2] Brazos has since dismissed Case No. 6:20-cv-00816. Appx87.

patent infringement cases (6:20-cv-00902 and -00903) against Juniper on September 30, 2020.[3] Appx94; Appx107. Juniper filed answers in the first five cases on November 16, 2020 and in the two later-filed cases on December 11, 2020. Appx32; Appx44; Appx58; Appx70; Appx83; Appx92; Appx107.

C. Juniper's Motion to Transfer

On November 25, 2020, Juniper filed a motion to transfer this case to the Northern District of California. Appx128-147. Juniper argued that transfer was warranted under 28 U.S.C. § 1404(a) because, among other reasons, the relevant witnesses and documents are primarily in the Northern District of California and none are in the Western District of Texas. *Id.* The parties conducted extensive venue discovery while the case forged ahead on the merits of claim construction.[4]

The transfer motion was fully briefed on May 24, 2021 (Appx36) and the district court heard argument on June 1, 2021. Appx669-691.

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[3] Brazos filed one suit asserting each of seven patents. For the district court's and the parties' convenience, Juniper brought one motion to transfer concerning all seven cases (filing an identical motion on all seven dockets), and similarly brings this one Petition concerning the six remaining cases.

[4] Juniper sought to stay the case pending resolution of its transfer motion. Appx233. The district court never ruled on Juniper's motion to stay.

The district court also permitted fact discovery to begin on June 4, 2021. Appx692. On June 23, 2021—less than 24 hours before the scheduled *Markman* hearing—the district court issued an order denying Juniper's transfer motion. Appx1. The district court found that "the court congestion, local interest, and compulsory process factors weigh against transfer—with only the convenience of willing witnesses weighing in favor of transfer and all other factors [were] neutral." Appx22.

JURISDICTIONAL STATEMENT

This Court has jurisdiction under the All Writs Act, 28 U.S.C. § 1651, and because the underlying action is a patent case. 28 U.S.C. § 1295; *In re Princo Corp.,* 478 F.3d 1345, 1351 (Fed. Cir. 2007).

STANDARD OF REVIEW

A writ of mandamus may issue "to correct a clear abuse of discretion or usurpation of judicial power." *In re Calmar*, 854 F.2d 461, 464 (Fed. Cir. 1988). A party seeking a writ of mandamus must show: (1) a clear and indisputable right to relief; (2) that there are no adequate alternative legal channels through which the party may obtain relief; and (3) that mandamus is appropriate under the circumstances. *See Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-81 (2004); *see also In re TS Tech USA Corp.*,

551 F.3d 1315, 1318-19 (Fed. Cir. 2008) ("A party seeking a writ bears the burden of proving that it has no other means of obtaining the relief desired, and that the right to issuance of the writ is clear and indisputable.") (citation omitted).

In the context of a motion for transfer under § 1404(a), "the test for mandamus essentially reduces to the first factor" because "the possibility of an appeal in the transferee forum following a final judgment … is not an adequate alternative" and because "an erroneous transfer [or, as here, denial of transfer] may result in judicially sanctioned irreparable procedural injury." *In re Apple*, 979 F.3d 1332, 1336-37 (Fed. Cir. 2020). The Fifth Circuit has similarly held that, "[i]f the district court clearly abused its discretion" in denying the transfer motion, the moving party's "right to issuance of the writ is necessarily clear and indisputable." *In re Volkswagen of Am., Inc.,* 545 F.3d 304, 311 (5th Cir. 2008) (en banc); *see also TS Tech*, 551 F.3d at 1321 (right to mandamus relief is clear and indisputable where denial of transfer constitutes clear abuse of discretion "such that refusing transfer produced a 'patently erroneous' result'")

REASONS WHY THE WRIT SHOULD ISSUE

A writ of mandamus is well warranted to correct the district court's

patently erroneous denial of Juniper's motion to transfer this patent infringement action, for which most of the relevant evidence and witnesses are located in the Northern District of California and no evidence and (at most) one possible witness are located in the Western District of Texas. Juniper's right to mandamus relief is clear and indisputable because the district court's rulings concerning the convenience factors under 28 U.S.C. § 1404(a) reflected clear abuses of its discretion. Notably, this Court has repeatedly and recently recognized that mandamus is an appropriate remedy for a district court's wrongful refusal to transfer a case and that parties so aggrieved have no adequate alternative to mandamus. For the reasons explained herein, the same reasoning and result should obtain in this case.

I. JUNIPER'S RIGHT TO MANDAMUS RELIEF IS CLEAR AND INDISPUTABLE

Juniper's right to mandamus relief is clear and indisputable because the district court committed clear abuses of its discretion in denying Juniper's motion to transfer this action, producing a patently erroneous result. *See TS Tech*, 551 F.3d at 1321.

A. The District Court Clearly Abused Its Discretion In Applying The Convenience Factors Under 28 U.S.C. § 1404(a).

The district court clearly abused its discretion by improperly applying the Fifth Circuit's convenience factors under 28 U.S.C. § 1404(a). *See In re Genentech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009); *In re Adobe, Inc.*, 823 F. App'x. 929 (Fed. Cir. 2020) *In re Apple Inc.,* 979 F.3d 1332 (Fed. Cir. 2020); *In re Tracfone Wireless, Inc.*, 2021 WL 1546036 (Fed. Cir. Apr. 20, 2021); *In re: Samsung Elecs. Co., Ltd.*, 2021 WL 2672136 (Fed. Cir. June 30, 2021). Indeed, the basis for transfer here is even more compelling, when analyzed factor by factor, than was true in the above recent cases in which this Court granted mandamus petitions and ordered transfer.

Section 1404(a) provides that, "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district … where it might have been brought."[5] 28 U.S.C. § 1404(a). A case should be transferred when the proposed forum is "clearly more convenient" than the plaintiff's chosen venue. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008). "Clearly more

[5] Neither Brazos nor the district court disputed that the case "might have been brought" in the Northern District of California.

convenient" is a lower bar than the "substantially more convenient" standard used when considering dismissal based on forum non conveniens. *Id.* at 313-14.

The Fifth Circuit considers four private and four public factors in determining whether transfer is appropriate under section 1404(a). The four private factors are: "(1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make trial of a case easy, expeditious, and inexpensive."[6] *Id.* The four public factors are: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized disputes decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflict of laws or in the application of foreign law." *Id.* at 315.

No one factor is dispositive (*In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004)), but not all factors deserve equal weight. Rather, the cost

[6] The Fifth Circuit expressly forbids district courts from considering the plaintiff's choice of venue as a distinct factor. *TS Tech,* 551 F.3d at 1320.

and convenience to witnesses is generally considered the most important factor in the transfer analysis. *Genentech*, 566 F.3d at 1343.

1. The District Court Clearly Erred in Holding that Relative Ease to Access to Sources of Proof Does Not Favor Transfer

The district court legally erred in finding that the access to sources of proof factor did not weigh in favor of transfer. Appx5-9. It is well settled that, in a patent case, "the bulk of the relevant evidence usually comes from the accused infringer," and therefore "the place where the defendant's documents are kept weighs in favor of transfer to that location." *Genentech*, 566 F.3d at 1345 (internal quotation marks omitted). The *Genentech* court found that the district court "clearly erred" in finding that this factor was neutral where the petitioners' evidence was located in California and "no evidence [was] housed within the state of Texas." *Id*. at 1345-46. "[T]he movant need not show that all relevant documents are located in the transferee venue to support a conclusion that the location of relevant documents favors transfer. Nor is this factor neutral merely because some sources of proof can be identified in the [transferring] district." *Apple*, 979 F.3d at 1340.

Here, it is undisputed that the majority of the relevant documents and evidence are in the Northern District of California at Juniper's Sunnyvale headquarters while ***none*** are in the Western District of Texas. Appx151; Appx310. Juniper stores the technical documents and source code related to the accused products on servers, most of which are located at its headquarters in Sunnyvale. Appx151. Juniper has servers and source code repositories outside of California, but none in Texas. Appx310. And while Brazos claimed to have a small number of documents located in the Western District of Texas, the district court properly disregarded those claims and found no evidence that Brazos has ***any*** documents (in physical or electronic form) or evidence within the Western District of Texas. Appx8-9.

Accordingly, the district court did not dispute that ***most*** of Juniper's documents and evidence (including confidential technical documents and source code related to the accused products) is in the ***Northern District of California***, nor did it find that ***any*** relevant documents or evidence are in the Western District of Texas. Nevertheless, it ruled that the ease of access to sources of proof was

neutral. To justify this anomalous finding, the court below rested its conclusion on two bases that this Court has already expressly rejected.

First, the district court appeared to place some stock in the fact that Juniper has ***some*** documents in places other than its headquarters in California or in Texas. Appx8 ("Juniper has admitted to having information stored in many other locations across the world"). This Court has held that such reasoning is legal error. *Apple*, 979 F.3d at 1340 ("[T]he movant need not show that all relevant documents are located in the transferee venue to support a conclusion that the location of relevant documents favors transfer."). And while the *Apple* court emphasized that this factor is not neutral "merely because some sources of proof can be identified in the [transferring] district" (*id.*), here there are ***no*** sources of proof in the Western District of Texas—and the district court did not find otherwise. Appx8. Nor did the district court explain how the presence of some servers containing relevant documents in places like New Jersey and India should matter specifically when choosing between the Western District of Texas and the Northern District of California.

Second, the district court faulted Juniper for not identifying specific documents or pieces of evidence that are available in the Northern

District of California but not the Western District of Texas. Appx8 ("the Court finds that Juniper has not sufficiently differentiated which documents would be more readily available in the NDCA compared to the WDTX"). The district court's apparent finding that Juniper did not specify which documents are stored in Sunnyvale ignores the sworn declaration of a Juniper employee who did exactly that. Appx151 ("Juniper also stores the majority of its documentary evidence relevant to the Accused Products, including records relating to the research and design of the Accused Products, source code, and marketing, sales, and financial information for the Accused Products, at its Sunnyvale headquarters.").[7] The district court's reasoning cannot be squared with *Apple*, in which this Court held that the district court legally erred by ignoring Apple's evidence that it "stores a significant amount of relevant information in NDCA, including the relevant source code, Apple records relating to the research and design of the accused products, and

[7] For this reason, the District Court's reliance on *In re Apple Inc.,* 743 F.3d 1377, 1379 (Fed. Cir. 2014) is misplaced. There, "Apple's vague assertions and unknown relevance and location of potential sources" of proof left the district court "unable to weigh the relative ease of access to sources of proof factor." *Id.* Here, as just laid out, Juniper has explained in detail the relevance and location of the documents and evidence at issue.

marketing, sales, and financial information for the accused products." 979 F.3d at 1340. Here, as in *Apple*, "[n]either the district court nor [Brazos] disputes that such records are located in NDCA." *Id.* Here, as in *Apple*, it was error to find that this factor does not weigh heavily in favor of transfer.[8]

In sum, the district court found that access to sources of proof is neutral even though the vast majority of relevant documents are stored in the Northern District of California while ***none*** are in the Western District of Texas. This finding ignores both controlling precedent and common sense, and it reflects clear legal error.

[8] The district court's finding is even more puzzling given that the same district court recently found that this factor favored transfer in another case involving Juniper and comparable facts. *Compare Correct Transmission, LLC v. Juniper Networks, Inc.*, 2021 WL 2143739, at *3 (W.D. Tex. May 26, 2021) (finding this factor favored transfer because "Juniper's source code and other relevant files are still located ***primarily*** at its headquarters in California" and because "as the alleged infringer Juniper will likely produce most of this case's documentary evidence, the physical location where it keeps the ***majority*** of its information should weigh most heavily.") (emphases added) with Appx8 (faulting Juniper for "[v]ague assertions that the 'majority' of the evidence relating to the accused devices is located in California").

2. The District Court Clearly Erred in Holding that Availability of Compulsory Process Weighs Against Transfer

After writing a detailed analysis of why the availability of compulsory process factor should be neutral, the district court then held—inexplicably—that that factor "slightly" weighs against transfer. Appx9-10. Juniper identified four prior art witnesses in the Northern District of California.[9] Appx141, Appx154. Brazos, in turn, could identify only two inventors for one of the six patents at issue (which it did not specify were unwilling) located near Dallas—in the Northern District of Texas, not the Western District, and by Brazos's admission over 100 miles from Waco. Appx252-253. The district court also ignored that Brazos's two most important witnesses—Mr. Etchegoyen and Mr. Shanus—both live in California and are thus subject to compulsory process in the Northern District of California but not the Western District of Texas.[10] Appx677-678; *see also* Fed. R. Civ. P. 45(c) ("A subpoena may command a person to attend a trial … within the state

[9] Juniper initially identified six such witnesses, but two were prior artists for the now-dismissed patent.

[10] While Brazos will argue that Mr. Etchegoyen and Mr. Shanus are not unwilling witnesses, only a subpoena can protect against the prospect that they might ultimately refuse to testify at trial.

where the party resides, is employed, or regularly transacts business in person, if the person … is a party or a party's officer").

In any event, the district court rightly pointed out that neither party "presented evidence nor even alleged that any of the named witnesses are unwilling witnesses." Appx10. The district court then cited one of its own prior opinions for the proposition that this factor carries little weight where neither party identifies unwilling witnesses. *Id.* (*citing Turner v. Cincinnati Ins. Co.,* 2020 WL 210809, at *3 (W.D. Tex. Jan. 14, 2020)). The district court, having laid out a legal basis for finding this factor neutral, then asserted without explanation that it weighs against transfer.[11] *Id.*

That is patently erroneous. If anything, this factor ***favors*** transfer because there are ***more*** non-party witnesses in the Northern District of

[11] In *Turner*, the district court cited *Peregrine Myanmar Ltd. v. Segal*, 89 F.3d 41, 47 (2d Cir. 1996) for the proposition that "the compulsory process factor weighs against transfer when neither side claims a witness would be unwilling to testify." 2020 WL 210809, at *3. But *Peregrine* says nothing of the kind. Rather, the *Peregrine* court noted that "neither side claims that any witness will be unwilling to testify," and then held that the private factors ***as a whole*** did not support transfer. 89 F.3d at 47. Nor would such a rule make any sense: if only unwilling witnesses are relevant, and if there are no unwilling witnesses weighing on either side of the scale, this factor by definition is neutral.

California (four) than in the Western District of Texas (none) and because two critical witnesses (Mr. Etchegoyen and Mr. Shanus) are subject to compulsory process in the Northern District of California but not the Western District of Texas. *See In re Apple, Inc.,* 581 F. App'x. 886, 889 (Fed. Cir. 2014) (compulsory process factor "weigh[s] heavily in favor of transfer when more third-party witnesses reside within the transferee venue than reside in the transferor venue."). Even accepting the district court's own reasoning, however, the result would be a push that does not favor either side. By nonetheless characterizing it as weighing against transfer, the district court put an unfair thumb on the scale and committed clear legal error.

3. The District Court Clearly Erred in Holding that Witness Convenience Only Slightly Favored Transfer

While the district court correctly held that the cost and convenience of witnesses favors transfer, it erred in finding this factor to favor transfer only "slightly." Appx11-17. The facts show that this factor significantly favors transfer. Courts generally agree that the cost and convenience to witnesses is the most important factor in transfer analysis. *Genentech*, 566 F.3d at 1343. The district court rightly cited

Genentech for that proposition. Appx11. And here, the cost and convenience of witnesses overwhelmingly favors transfer. Juniper identified 11 specific witnesses with unique and relevant knowledge who are located at its Sunnyvale headquarters.[12] Appx311-313. By contrast, even after taking months of venue discovery, Brazos identified ***no*** relevant Juniper witnesses in the Western District of Texas, and the district court did not find that any Juniper witnesses were in the district.

Despite acknowledging that Juniper identified eleven witnesses in the Northern District of California and that Brazos identified at most one relevant witness in the Western District of Texas, the district court found that the convenience of witnesses only "slightly" favored transfer. Appx16-17. In so doing, "the district court provided no sound basis to diminish these conveniences." *Samsung,* 2021 WL 2672136 at *6. The district court found that, because the witnesses Juniper identified are Juniper employees, their convenience is entitled to little weight. Appx16. But this finding cannot be squared with *Tracfone*'s holding that "[t]he convenience of having several ***party witnesses*** be able to testify at trial

[12] Juniper initially identified 13 witnesses with relevant knowledge in Sunnyvale, but two of them were relevant only to the now-dismissed case.

without having to leave home" outweighs any inconvenience to witnesses who live in neither district. 2021 WL 1546036, at *3 (emphasis added); *see also Samsung*, 2021 WL 2672136 at *6 (concluding it was legal error to "[give] no weight to the presence of possible party witnesses in Northern California despite this court holding that the district court must consider those individuals"). Indeed, the most salient difference between this case and *Tracfone* points ***more strongly*** to transfer: in *Tracfone,* only four relevant party witnesses were found in the transferee district (*id.*); here, there are 11.

The district court also wrongly credited (Appx16) Brazos's identification of a Brazos employee (Mr. Hogan) in the Western District of Texas as a potential witness even though Mr. Hogan—a business development professional who by his own admission has no knowledge of or responsibility for Brazos's patent portfolio or licensing—has no knowledge relevant to the case. Appx591. The district court acknowledged that "Mr. Hogan's duties might make his testimony less significant in the grand scheme than the testimony of those who do manage and license Brazos's patents," but stated—without explanation—that it was "not convinced that Mr. Hogan's testimony

would be wholly irrelevant." Appx16. But Mr. Hogan's general "knowledge of Brazos's business operations" (Appx255) ***is*** wholly irrelevant to the question of whether the asserted patents are valid and infringed. And while the district court's reluctance to "evaluate the significance of the identified witnesses' testimony" (Appx 16) is understandable as a general matter, applying that principle in these specific circumstances—where a plaintiff is asserting, quite implausibly, that its in-district employee has relevant knowledge, even though the only knowledge he has is obviously irrelevant—would invite and reward rank gamesmanship by plaintiffs. *See In re Zimmer Holdings, Inc.,* 609 F.3d 1378, 1381 (Fed. Cir. 2010); *Hertz Corp v. Friend*, 559 U.S. 77 (2010); *Samsung*, 2021 WL 2672136 at *5 ("the Supreme Court and this court have repeatedly assessed the propriety of venue by disregarding manipulative activities of the parties."). Attentive observers can readily discern that there are ***no*** relevant witnesses in Waco, and the district court legally erred in finding otherwise.

Additionally, both Brazos employees "who do manage and license Brazos's patents" (Appx16)—Mr. Shanus and Mr. Etchegoyen—are based in California. Appx223, Appx228-229. Travel from the Los Angeles area

to San Jose or San Francisco is substantially less costly and more convenient than travel from Los Angeles to Waco. But the district court, after applying the Fifth Circuit's 100-mile rule with mathematical precision to Juniper's witnesses in neither the Western District of Texas nor the Northern District of California (Appx15), simply credited Brazos's assertion that its two most knowledgeable witnesses would be happy to travel from California to Waco.[13] Appx15-16.

In sum, there are at least 11 Juniper witnesses in the Northern District of California and none in the Western District of Texas, and there are at least two Brazos witnesses in California and at most one (with no relevant knowledge) in the Western District of Texas. The district court, however, concluded that the cost and convenience of witnesses weighed only "slightly" in favor of transfer. Such a result is patently erroneous. *See Samsung*, 2021 WL 2672136 at *6.

[13] Again, this approach is all the more puzzling considering that the same district court has previously found that "[s]elf-serving statements about [potential party witnesses'] willingness to travel to" a forum are entitled to little weight. *SITO Mobile R&D IP v. Hulu, LLC*, 2021 WL 1166772 at *4 (W.D. Tex. Mar. 24, 2021).

4. Other Practical Considerations is Neutral

The district court correctly found that this factor is neutral. Appx17-18.

5. The District Court Clearly Erred in Finding that Court Congestion Weighs Against Transfer

The district court legally erred in finding that the court congestion factor weighed against transfer. Appx18-19. The district court rested its finding solely on generalized public statistics showing the Western District of Texas has a faster average time to trial than does the Northern District of California. *Id*. However, this Court has repeatedly held that this factor is the most speculative because "scheduled trial dates are often subject to change." *Apple*, 979 F.3d at 1344 n.5. As if to prove this very point, the day after finding that the court congestion factor weighed against transfer because of the speed with which the case would come to trial in the Western District of Texas, the district court informed the parties that there would need to be ***two*** trials because of the large number of patents asserted. Appx37.[14] And as this Court held in *Apple*,

[14] The district court's ruling is also inconsistent with its own rulings. For example, in May 2021 the district court found that the court congestion factor was *neutral* as to transfer from the Western District of Texas to the Northern District of California. *10Tales, Inc. v.*

the "most relevant[]" consideration is time to trial for ***patent*** cases, for which "NDCA has historically had a *shorter* time to trial." 979 F.3d at 1343-44 (emphasis in original).

But even if the Court chooses not to "disturb the [district] court's suggestion that it [can] dispose of this case more quickly than" the Northern District of California (*Adobe*, 929 F. App'x at 932), where "several factors weigh in favor of transfer and others are neutral, then the speed of the transferee district court should not alone outweigh all of those other factors." *Genentech*, 566 F.3d at 1347. Nor did the district court "point[] to any reason that a more rapid disposition of the case that might be available in the Western District of Texas would be important enough to be assigned significant weight in the transfer analysis here." *Samsung*, 2021 WL 2672136 at *7. Courts' relative speed is not "of particular significance" where, as here, the plaintiff "does not make or sell any product that practices the claimed invention." *In re Morgan Stanley*, 417 F. App'x 947, 950 (Fed. Cir. 2011).

TikTok Inc., 2021 WL 2043978, at *5 (W.D. Tex. May 21, 2021). The district court did not explain what changed between May and June such that the court congestion factor now weighs against transfer with respect to the same two districts.

6. The District Court Clearly Erred in Finding that Local Interest Does Not Favor Transfer

The district court's finding that the local interest weighs against transfer is patently erroneous. Remarkably, the district court found this factor weighs against transfer even after correctly noting that "the most relevant consideration" is "where the development of the allegedly infringing products occurred." Appx20-21 (citing *Apple*, 979 F.3d at 1345). Neither Brazos nor the district court dispute that the accused products were primarily designed and developed at Juniper's Sunnyvale headquarters. Appx20-21. Despite this, the district court held that the local interest weighed against transfer. The district court rested this holding on three premises, each of which is squarely foreclosed by this Court's precedent.

First, while the district court did not dispute that Juniper mostly designed and developed the accused products in Sunnyvale, it pointed out that some design and development took place in China and New Jersey. Appx21. The district court did not explain why activity in New Jersey or China affects the transfer analysis as between the Western District of Texas and the Northern District of California, nor did it account for the undisputed facts that (1) most of the relevant design and development

happened in the latter while (2) none happened in the former. It is clear error to find this factor neutral where "[t]he relevant events leading to the infringement claims here took place largely in Northern California, and not at all in the Western District of Texas." *Samsung*, 2021 WL 2672136 at *7. It is even clearer error to, as the court below did, find that this factor weighs ***against*** transfer under such circumstances.

Second, the district court noted that "Juniper maintains a substantial presence in both the WDTX and Texas as a whole through its Texas offices." Appx21. But Juniper's former Austin office, which Juniper took over when it acquired a small company called Mist, had nothing to do with the accused products, none of which were researched, designed, or developed there. *See Apple*, 979 F.3d at 1345 (inquiry is "not merely the parties' significant connections to each forum writ large," but instead the "significant connections between a particular venue and *the events that gave rise to a suit*.") (emphasis in original); *see also id.* ("The district court thus misapplied the law to the facts by so heavily weighing Apple's general contacts with the forum that are untethered to the lawsuit, such as Apple's general presence in WDTX"). The district court

did not claim otherwise. Relying on Juniper's generalized ties to the Western District of Texas was clear error.

Third, the district court wrongly relied on Brazos's purported generalized connections to the Western District of Texas, again ignoring that the key inquiry is the "significant connections between a particular venue and *the events that gave rise to a suit*." *Apple*, 979 F.3d at 1345 (emphasis in original). The district court's bald assertion that "Brazos's ties to the WDTX are not insignificant" (Appx21) would be legally irrelevant even if it were factually correct:[15] Brazos's generalized ties to the Western District of Texas have nothing to do with the events that give rise to this lawsuit. Indeed, the only thing Brazos has done that even arguably constitutes an event giving rise to this suit is to acquire its patent portfolio—which it did via an address in California. Appx161.

Once viewed through the proper lens, the case for transfer under this factor is even more compelling than it was in *Apple*. Where Apple's contacts with the Western District of Texas were large (over 3000

[15] The district court's finding that Brazos has significant ties to the Western District of Texas is factually suspect. *See supra* at 4-6. And whatever ties Brazos has today to the Western District of Texas are "recent, ephemeral, and an artifact of litigation." *Zimmer Holdings,* 609 F.3d at 1381.

employees) and growing, Juniper's are small and shrinking. And Juniper's ties to the Western District are even more "untethered to the lawsuit" than were those of Apple, which had at least some employees with relevant knowledge in the Western District, plus a third party who manufactured at least some accused products there. 979 F.3d at 1345-46. That the local interest favors transfer here follows *a fortiori* from *Apple*.

Because virtually all of the "events that gave rise to" the lawsuit (the research, design, and development of the accused products) took place in the transferee district whereas ***none*** took place in the transferor district, this factor weighs unambiguously and overwhelmingly in favor of transfer. *See Samsung*, 2021 WL 2672136 at *7. The district court's contrary finding is patently erroneous on its face.

7. Familiarity of the Forum with Governing Law is Neutral.

The parties agree and the district court correctly held that this factor is neutral.

8. Conflict of Laws and Applicability of Foreign Law is Neutral.

The parties agree and the district court correctly held that this factor is neutral.

II. MANDAMUS IS APPROPRIATE TO CORRECT THE DISTRICT COURT'S WRONGFUL REFUSAL TO TRANSFER THIS ACTION

Under the facts of this case, the convenience of witnesses, access to sources of proof, and local interest factors weigh overwhelmingly in favor of transfer. The other factors either favor transfer or are at worst neutral. Taken as a whole, therefore, the convenience factors overwhelmingly favor transfer, and the district court's denial of Juniper's motion reflects exactly the sort of patently erroneous result that this Court has exercised its mandamus authority to correct. This Court and the Fifth Circuit have repeatedly and recently determined that mandamus is an appropriate remedy where, as here, a district court clearly abuses its discretion in denying a motion to transfer. *See, e.g.*, *Genentech*, 566 F.3d at 1347 (granting mandamus petition where district court "clearly abused its discretion in denying transfer of venue"); *Adobe*, 823 F. App'x. at 932 (similar); *Apple,* 979 at 1339 (same); *Tracfone*, 2021 WL 1546036 at *3 (granting mandamus because "with several factors favoring transfer and no factor favoring keeping the case in the plaintiff's chosen forum, the district court's decision that the transferee venue was not clearly more convenient produced a patently erroneous result.");

Samsung, 2021 WL 2672136 at *6-*7; *Volkswagen*, 545 F.3d at 310 & n.5 ("[T]he precedents are clear that mandamus is entirely appropriate to review [a transfer ruling] for an abuse of discretion that clearly exceeds the bounds of judicial discretion.") (citing cases).

III. JUNIPER HAS NO OTHER ADEQUATE MEANS OF RELIEF

Absent mandamus, Juniper will not have any adequate means of relief. *See, e.g.*, *TS Tech,* 551 F.3d at 1322 ("[I]t is clear … that a party seeking mandamus for a denial of transfer clearly meets the 'no other means' requirement."). Direct appellate review is generally not available until after final judgment. *See* 28 U.S.C. § 1291. Nor may Juniper obtain relief under 28 U.S.C. § 1292(b)—which permits interlocutory review in limited circumstances—because that provision requires certification by the district court that the interlocutory order to be reviewed involves "a controlling question of law." 28 U.S.C. § 1292(b). Accordingly, Juniper has no adequate alternative means of relief, and a writ of mandamus is warranted.

CONCLUSION

The petition should be granted, and the district court directed to transfer this action to the Northern District of California.

Dated: July 2, 2021 Respectfully submitted,

QUINN EMANUEL URQUHART & SULLIVAN, LLP

By: */s/ Todd Briggs*
Todd Briggs
Counsel for Petitioners

CERTIFICATE OF COMPLIANCE

The petition complies with the type-volume limitation of Fed. R. App. P. 21(d)(1) because this petition contains 6959 words, excluding parts exempted by Federal Rules of Appellate Procedure 21 and 32, and Federal Circuit Rule 32.

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July 2, 2021
Date

/s/*Todd Briggs*

Name: Todd Briggs
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 July 2, 2021.

A copy of the foregoing was served upon the following counsel of Record via email and on the district court judge via FedEx:

Raymond W. Mort, III
raymort@austinlaw.com
THE MORT LAW FIRM, PLLC
100 Congress Avenue, Suite 2000
Austin, Texas 78701
tel/fax: (512) 677-6825

Alessandra C. Messing
amessing@brownrudnick.com
Timothy J. Rousseau
trousseau@brownrudnick.com
Yarelyn Mena
ymena@brownrudnick.com
BROWN RUDNICK LLP
7 Times Square
New York, New York 10036
telephone:(212) 209-4800
facsimile: (212) 209-4801
Edward J. Naughton
enaughton@brownrudnick.com
Rebecca MacDowell Lecaroz
rlecaroz@brownrudnick.com
BROWN RUDNICK LLP
One Financial Center
Boston, Massachusetts 02111
telephone:(617) 856-8200
facsimile: (617) 856-8201

David M. Stein
dstein@brownrudnick.com
Sarah G. Hartman
shartman@brownrudnick.com
BROWN RUDNICK LLP
2211 Michelson Drive, 7th Floor
Irvine, California 92612
telephone:(949) 752-7100
facsimile: (949) 252-1514

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

July 2, 2021 /s/*Todd Briggs*
Date

Name: Todd Briggs
Counsel for Petitioner

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July 2020

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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