Miscellaneous Docket No. 20-127

IN THE

United States Court of Appeals for the Federal Circuit

IN RE APPLE, INC.,
Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas
No. 1:20-cv-00351-ADA, Hon. Alan D. Albright

[PARTIAL CONSENT] MOTION OF RETAIL LITIGATION CENTER, INC. FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF REHEARING EN BANC

Ruthanne M. Deutsch
Hyland Hunt
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW, Suite 900
Washington, DC 20001
Phone: (202) 868-6915
Fax: (202) 609-8410

Counsel for Amicus Curiae *Retail Litigation Center, Inc.*

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2020-127

Short Case Caption In re: APPLE, INC.

Filing Party/Entity Retail Litigation Center, 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: 07/30/2020 Signature: s/ Ruthanne M. Deutsch

Name: Ruthanne M. Deutsch

FORM 9. Certificate of Interest

Form 9 (p. 2)
July 2020

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.	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	☑ None/Not Applicable	☑ None/Not Applicable
Retail Litigation Center, 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

Deutsch Hunt PLLC	Ruthanne M. Deutsch	Hyland Hunt

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

As called for by Federal Rule of Appellate Procedure 29(b) and Federal Circuit Rules 29 and 35(g), Retail Litigation Center, Inc. ("RLC") hereby moves for leave to file a brief as *amicus curiae* in support of rehearing en banc. RLC has conferred with counsel for all parties. Petitioner consents. Counsel for Respondent has not responded to communications requesting consent. The proposed amicus brief is attached as Exhibit 1 to this motion.

The Retail Litigation Center, Inc. is the only trade organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. These leading retailers employ millions of workers in the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases.

Amicus supports en banc review because the panel's decision risks collapsing the distinction between a proper venue and the clearly more convenient venue—a distinction that matters for industries across all economic sectors and cases of all types. Most of the RLC's members operate nationwide or across large regional areas, and are thus often subject to suit in venues that are proper yet wholly unconnected to the suit and exceptionally inconvenient. Section 1404 protects against being

forced to defend an action in such a proper-but-inconvenient venue. But only so long as rules are enforced that give primacy to case-specific factors (like witness convenience) and require evidence (not unsupported assertion) to establish a connection between the suit and one of a defendant's many operating locations. By declining to enforce those rules here, the panel opened the door to situations where any proper venue is deemed a convenient-enough one, permitting district courts to disregard proof of a vastly more convenient forum and increasing the incentives for forum shopping.

For the foregoing reasons, RLC respectfully requests that this motion be granted and that it be permitted to file the proposed amicus brief.

Dated: July 30, 2020

Respectfully submitted,

By: */s/* Ruthanne M. Deutsch

Ruthanne M. Deutsch
Hyland Hunt
DEUTSCH HUNT PLLC
300 New Jersey Ave. NW
Suite 900
Washington, DC 20001
Phone: (202) 868-6915

Counsel for *Amicus Curiae* Retail Litigation Center, Inc.

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that this motion complies with the type-volume limitation of Federal Rule of Appellate Procedure 27(d)(2)(A).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b), the motion contains 357 words.

2. This brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(g), the undersigned has relied on the word count feature of this Microsoft Word in preparing this certificate.

Dated: July 30, 2020

/s/ Ruthanne M. Deutsch
Ruthanne M. Deutsch

CERTIFICATE OF SERVICE

I hereby certify that I filed the foregoing motion and accompanying exhibit with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system this 30th day of July, 2020, and served a copy on counsel of record by the CM/ECF system.

A copy of the foregoing was served upon the district court judge via first-class USPS mail:

Hon. Alan D Albright
United States District Court for the Western District of Texas
501 West Fifth Street, Suite 1100
Austin, Texas 78701
Telephone: (512) 916-5896

Dated: July 30, 2020

/s/Ruthanne M. Deutsch
Ruthanne M. Deutsch

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Hyland Hunt
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Fax: (202) 609-8410

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TABLE OF CONTENTS

Page

CERTIFICATE OF INTEREST i

TABLE OF AUTHORITIES v

STATEMENT OF INTEREST OF *AMICUS CURIAE*..1

INTRODUCTION AND SUMMARY OF ARGUMENT.......................................2

ARGUMENT 3

THE PANEL'S DECISION CONFLATES PROPER VENUE AND CONVENIENT VENUE AND CREATES PERVERSE INCENTIVES FOR HARMFUL FORUM SHOPPING AND FORUM SELLING. 3

A. Rehearing Is Warranted to Keep Section 1404(a)'s Promise. 3

B. Incentives for Harmful Forum Shopping and Forum Selling Will Arise Absent a Grant of Rehearing to Confirm the Clear Propriety of Transfer Here. 9

CONCLUSION 11

TABLE OF AUTHORITIES

Page(s)

Cases

Atlantic Marine Const. v. U.S. Dist. Ct.,
571 U.S. 49 (2013)....................4, 6

Gulf Oil Corp. v. Gilbert, d/b/a Gilbert Storage & Transfer Co.,
330 U.S. 501 (1947)....................4, 5

In re BP Lubricants USA Inc.,
637 F.3d 1307 (Fed. Cir. 2011) 9

In re Cray Inc.,
871 F.3d 1355 (Fed. Cir. 2017) 8

In re Genentech,
566 F.3d 1338 (Fed. Cir. 2009) 5, 6

In re Nintendo Co. Ltd.,
589 F.3d 1194 (Fed. Cir. 2009) 2, 5

In re Volkswagen of America, Inc.,
545 F.3d 304 (5th Cir. 2008) (en banc) 4, 5

LaBuy v. Howes Leather Co.,
352 U.S. 249 (1957)....................9

Norwood v. Kirkpatrick,
349 U.S. 29 (1955)....................5

TC Heartland LLC v. Kraft Grp. Food Brands LLC,
137 S. Ct. 1514 (2017)....................8

Van Dusen v. Barrack,
376 U.S. 612 (1964)....................6, 7, 9

Statutes

28 U.S.C. § 1391(b) 8

28 U.S.C. § 1404 .... *passim*

Other Authorities

Brian L. Frye & Christopher J. Ryan, Jr., *Fixing Forum Selling*,
25 U. Miami Bus. L. Rev. 1 (2016) 10

Daniel Klerman & Greg Reilly, *Forum Selling*,
89 S. Cal. L. Rev. 241 (2016) 10

J. Jonas Anderson, *Reining in a Renegade Court:* TC Heartland *and the Eastern District of Texas*, 39 Cardozo L. Rev. 1569 (2018) 11

Josh Landau, *Meet the Western District of Texas—NPEs Certainly Have*, Patent Progress (May 27, 2020) 11

STATEMENT OF INTEREST OF *AMICUS CURIAE*[1]

The Retail Litigation Center, Inc. ("RLC") is the only trade organization dedicated to representing the retail industry in the judiciary. The RLC's members include many of the country's largest and most innovative retailers. These leading retailers employ millions of workers in the United States, provide goods and services to tens of millions of consumers, and account for tens of billions of dollars in annual sales. The RLC seeks to provide courts with retail-industry perspectives on important legal issues impacting its members, and to highlight the potential industry-wide consequences of significant pending cases.

Amicus supports en banc review because the panel's decision risks collapsing the distinction between a proper venue and the clearly more convenient venue—a distinction that matters for industries across all economic sectors and cases of all types. Most of the RLC's members operate nationwide or across large regional areas, and are thus often subject to suit in venues that are proper yet wholly unconnected to the suit and exceptionally inconvenient. Section 1404 protects against being forced to defend an action in such a proper-but-inconvenient venue. But only so long

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[1] No counsel for any party authored this brief in whole or in part, and no person or entity other than the amicus, its members, or its counsel made a monetary contribution intended to fund the brief's preparation or submission. The brief is accompanied by a motion for leave to file. Petitioner consents; counsel for STC.UNM has not responded to communications requesting consent. *See* Fed. R. App. P. 29(b); Fed. Cir. R. 35(g).

as rules are enforced that give primacy to case-specific factors (like witness convenience) and require evidence (not unsupported assertion) to establish a connection between the suit and one of a defendant's many operating locations. By declining to enforce those rules here, the panel opened the door to situations where any proper venue is deemed a convenient-enough one, permitting district courts to disregard proof of a vastly more convenient forum and increasing the incentives for forum shopping.

INTRODUCTION AND SUMMARY OF ARGUMENT

Like other cases where this Court has granted mandamus and ordered transfer, this case features "a stark contrast in relevance, convenience and fairness between the two venues." *In re Nintendo Co. Ltd.,* 589 F.3d 1194, 1198 (Fed. Cir. 2009). The panel's refusal to do so here warrants en banc review. It condones unduly weighting factors that can occur (or be manufactured) in virtually any venue—especially for businesses with nationwide operations—while all but ignoring convenience factors that should be dispositive.

Absent rehearing, perverse incentives will arise for plaintiffs to file multiple suits in the same inconvenient venue, where the presence of co-pending litigation or the judge's view of his or her own case-management efficiency can tip the scales against transfer. The incentives will be all the stronger when district courts are

permitted to give undue weight to unproven speculation about local interest factors, something that could happen anywhere a nationwide defendant does business.

Plaintiffs have wide-ranging choices under the pertinent venue statutes. Forum shopping can be beneficial, especially for cases involving forum-selection clauses negotiated by sophisticated parties. But where jurisdictions compete for nonconsensual litigation, forum shopping and forum selling can feed off each other, resulting in systemic inefficiencies, high litigation costs, and forced settlements of actions of dubious merit. Under the current ruling, corporate defendants with nationwide operations, like the RLC's members, could be forced to defend against meritless suits in venues that, although technically proper, are vastly more inconvenient. This Court should grant rehearing to honor the promise of §1404(a) and avoid such harms.

ARGUMENT

THE PANEL'S DECISION CONFLATES PROPER VENUE AND CONVENIENT VENUE AND CREATES PERVERSE INCENTIVES FOR HARMFUL FORUM SHOPPING AND FORUM SELLING.

A. Rehearing Is Warranted to Keep Section 1404(a)'s Promise.

A proper venue may still be very inconvenient. That is why the transfer inquiry focuses not only on a defendant's operations in a particular place, but the specific connections between the suit at hand (and its parties, witnesses, and evidence) and the forum. The district court's analysis paid lip service to these principles but effectively upended them. The panel acknowledged that the court

committed two legal errors in its analysis. First, the court gave short shrift to party and witness convenience in favor of easily manufactured non-case-specific factors. Second, the court accepted speculation driven by the defendant's mere presence in the forum in lieu of the requisite evidence of suit-related forum connections. But the panel refused to do anything about these errors. The combined result is that Austin's propriety as a venue sufficed to establish its convenience—collapsing the proper-venue and transfer inquiries and thereby undermining the transfer remedy created by Congress.

1. "Unlike [challenges to proper venue under] § 1406(a), § 1404(a) does not condition transfer on the initial forum's being 'wrong.'" *Atlantic Marine Const. v. U.S. Dist. Ct.*, 571 U.S. 49, 59 (2013). Instead, it requires only a showing that the transferee venue is "clearly more convenient." *In re Volkswagen of America, Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (en banc). Section 1404 thus provides a remedy if a plaintiff chooses to sue in a proper but inconvenient forum.

Venue statutes afford plaintiffs options—options that are practically limitless for nationwide businesses—so that they can be "quite sure of some place" to pursue their remedy. *Gulf Oil Corp. v. Gilbert, d/b/a Gilbert Storage & Transfer Co.*, 330 U.S. 501, 507 (1947). "But the open door may admit those who seek not simply justice but perhaps justice blended with some harassment." *Id.* Even where the plaintiff too faces "some inconvenience" there is "temptation to resort to a strategy

of forcing the trial at a most inconvenient place for an adversary." *Id.* That is why the Supreme Court recognized the inherent power of federal courts to dismiss actions filed in inconvenient venues through the doctrine of *forum non conveniens*, before the transfer statute was enacted. *Id.* at 511.

The transfer statute provides courts with a less draconian option than outright dismissal to remedy forum inconvenience. 28 U.S.C. § 1404(a). Congress crafted the relief to be provided "upon a lesser showing of inconvenience" than required for *forum non conveniens* dismissals. *Norwood v. Kirkpatrick*, 349 U.S. 29, 32 (1955); *accord In re Volkswagen*, 545 F.3d at 314.

2. As Apple explains (Rehr'g Pet. 17-18), under this Court's (and the Fifth Circuit's) precedent for evaluating a transfer motion, the most important factor is witness convenience. "[I]n a case featuring most witnesses and evidence closer to the transferee venue with few or no convenience factors favoring the venue chosen by the plaintiff, the trial court should grant a motion to transfer." *Nintendo,* 589 F.3d at 1198 (collecting cases). Here, *all* identified witnesses were located in California (mostly in the Northern District); none are in Texas (neither Austin nor Waco). Rehr'g Pet. 4-5.

This Court has previously held that even a "substantial number" of witnesses is enough to "weigh substantially in favor of transfer" from Texas to the Northern District of California. *In re Genentech*, 566 F.3d 1338, 1345 (Fed. Cir. 2009). "All"

certainly qualifies as "substantial." But instead of weighing this case-specific factor "substantially in favor of transfer," *id.*, the district court wholly discounted the convenience of party witnesses. The panel recognized this legal error yet refused to correct it. Order 5.

The district court compounded its short-shrifting of case-specific factors by overweighting non-case-specific, malleable factors like the presence of co-pending litigation, relative court congestion, and purported local interest related to the speculative participation of an industry group. But under this Court's precedents (until now), such factors are "essentially irrelevant." *Genentech*, 566 F.3d at 1348. Public interest factors should "rarely defeat a transfer motion," *Atlantic Marine*, 571 U.S. at 51, especially when they are easily manufactured, such that they could effectively be present anywhere. Filing a multitude of cases to tip the scales against transfer through co-pending litigation is precisely the sort of "deliberate conduct of [the] party favoring trial in [the] inconvenient forum" that should not count. *See Van Dusen v. Barrack*, 376 U.S. 612, 624 (1964). Finding local interest based in part on the headquarters location of an industry group with no demonstrated relevance to the specific allegations, Rehr'g Pet. 5, offers an easily-replicated gambit to plaintiffs filing suit in any venue housing a trade association or other organization that has even a remote relation to the case.

When demonstrated suit-related factors like the locations of witnesses and evidence are stacked against these ephemeral and manipulable considerations, the outcome should not be close. Under *Genentech* and countless other decisions, the Northern District of California is "clearly more convenient" than the Western District of Texas—whether Waco, where plaintiffs filed, or Austin, the marginally-lesser-of-two-evils venue that was the focus of argument below. Rehr'g Pet. 9-10.[2] Section 1404(a) demands an "individualized, case-by-case consideration of convenience and fairness," *Van Dusen*, 376 U.S. at 622, that eschews reliance on makeweight factors that can be ginned up in practically any location.

3. The panel also declined to correct the district court's unsupported findings about Austin's relationship to the controversy—even while acknowledging the district court erred by drawing all inferences in favor of plaintiffs. Order 4-5. Placing a thumb on the scale against transfer, the district court relied on a job posting for Apple's Austin office and unsupported assertions that some Texas representative of an Austin-based industry group might testify. Order 2-3. By refusing to correct this analysis despite acknowledged legal error, the panel decision permits a defendant's employees in the transferor venue (or even an unidentified possible future employee)

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[2] Amicus agrees that a defendant's acknowledgement that a marginally-less-worse forum would be preferable—in the event of the denial of its plainly warranted transfer request—does not undermine the clear abuse of discretion in denying the transfer. *See* Rehr'g Pet. 8-13.

to count as a relevant transfer-defeating contact despite no demonstrable connection to the underlying dispute. Under this approach, any contact that makes venue proper could also generate "local interest" weighing against transfer, no matter how attenuated the connection to the suit at hand.

Deferring to factually unsupported findings of some de minimis local connection will widely disrupt a defendant's right to transfer to a more convenient forum. Venue is triggered wherever a defendant has a "regular and established place of business." *In re Cray Inc.*, 871 F.3d 1355, 1361-1362 (Fed. Cir. 2017). Retailers are thus potentially subject to venue wherever they have brick and mortar stores that sell purportedly infringing objects.[3] If speculation about unidentified and nonexistent witnesses can displace a concrete showing of convenience, a mere showing of proper venue can effectively block transfer to a far more convenient venue.

The district court's ruling—now blessed by the panel despite its legal errors—thus yields a roadmap that future district courts can use to shield a patently erroneous refusal to transfer. Factors defeating transfer can be discovered in most proper venues, particularly when erroneous presumptions are applied, and paying lip service to all the transfer factors suffices—even if "essentially irrelevant" factors are

[3] The general federal venue statute, § 1391(b) is even broader. *See generally TC Heartland LLC v. Kraft Grp. Food Brands LLC*, 137 S. Ct. 1514 (2017).

prioritized over case-specific factors that are supposed to be paramount. For businesses with a large national presence, Congress's goal of fair consideration of transfer to a clearly more convenient venue will be rendered a nullity.

B. Incentives for Harmful Forum Shopping and Forum Selling Will Arise Absent a Grant of Rehearing to Confirm the Clear Propriety of Transfer Here.

Absent course correction from the en banc Court, the panel's endorsement—or at least failure to correct—the district court's reliance on easily manipulated non-case-specific factors will create perverse incentives for forum shopping and forum selling. Mandamus is thus appropriate given the issue's "importan[ce] to 'proper judicial administration.'" *In re BP Lubricants USA Inc.,*637 F.3d 1307, 1313 (Fed. Cir. 2011) (quoting *LaBuy v. Howes Leather Co.*, 352 U.S. 249, 259–60 (1957)).

"The power to defeat a transfer to the convenient federal forum should derive from rights and privileges conferred by federal law and not from the deliberate conduct of a party favoring trial in an inconvenient forum." *Van Dusen*, 376 U.S. at 624. In *Van Dusen*, the Supreme Court liberally construed § 1404(a) in favor of transfer, holding that the range of eligible transferee jurisdictions was limited only by the generous federal venue provisions, not by state law restrictions. *Id.* Similarly, procedures created in the transferor forum to attract and retain more cases—a phenomenon known as forum selling—should not be allowed to defeat transfer. Section 1404(a) exists not to reward harassing conduct, but to mitigate the costs and

unfairness of having to litigate in an inconvenient forum. Contrary to Congress's intent, the rulings below break that promise of efficiency and convenience.

Parties can engage in forum shopping for many beneficial reasons, including seeking a more convenient forum or one with perceived subject-matter expertise or a smaller docket. Courts can compete for cases by offering those attributes, with resulting societal benefits, as when sophisticated parties agree to forum-selection clauses to resolve contract disputes. *See* Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. Cal. L. Rev. 241, 244-245 (2016). But "empirical evidence strongly suggests that many patent plaintiffs engage in forum shopping for the purpose of choosing a forum that is biased in their favor." Brian L. Frye & Christopher J. Ryan, Jr., *Fixing Forum Selling*, 25 U. Miami Bus. L. Rev. 1, 8 (2016). This phenomenon is not unique to patent litigation. Some jurisdictions encourage specific types of litigation by targeted forum selling. *See* Klerman & Reilly, *Forum Selling*, *supra*, at 285-298 (describing forum selling for nonconsenual litigation in other contexts, including mass torts and bankruptcy). The result can be the distortion of "rules and practices relating to case assignment, joinder, discovery, transfer, and summary judgment in a pro-patentee (plaintiff) direction." *Id.* at 243.

Rehearing will discourage cycles of harmful forum shopping that feeds forum selling. In upholding a clearly erroneous transfer denial, from a court with a stated interest in attracting more plaintiffs, the panel's decision paves the way for potential

abuse. *See generally*, J. Jonas Anderson, *Reining in a Renegade Court:* TC Heartland *and the Eastern District of Texas*, 39 Cardozo L. Rev. 1569 (2018); Josh Landau, *Meet the Western District of Texas—NPEs Certainly Have*, Patent Progress (May 27, 2020).[4]

The Court should grant rehearing and grant the petition for mandamus to evenhandedly serve the convenience of the parties and the "interests of justice," as § 1404(a) demands, and to send a strong signal to district courts and parties alike that transfer to a "clearly more convenient" forum cannot be thwarted by "essentially irrelevant" factors buoyed by flawed legal presumptions.

CONCLUSION

The Court should grant rehearing en banc.

Dated: July 30, 2020

Respectfully submitted,

By: */s/ Ruthanne M. Deutsch*

Ruthanne M. Deutsh
Hyland Hunt
DEUTSCH HUNT PLLC

Counsel for *Amicus Curiae* Retail Litigation Center, Inc.

[4] *Available at* https://www.patentprogress.org/2020/05/27/meet-the-western-district-of-texas-npes-certainly-have/.

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1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b), the brief contains 2475 words.

2. This brief has been prepared in proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(g), the undersigned has relied on the word count feature of this Microsoft Word in preparing this certificate.

Dated: July 30, 2020

/s/ Ruthanne M. Deutsch
Ruthanne M. Deutsch

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 30, 2020.

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

A copy of the foregoing was served upon the district court judge via first-class USPS mail:

Hon. Alan D Albright
United States District Court for the Western District of Texas
501 West Fifth Street, Suite 1100
Austin, Texas 78701
Telephone: (512) 916-5896

/s/ Ruthanne M. Deutsch
Ruthanne M. Deutsch