No. 2021-___

UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

IN RE INTEL CORPORATION,

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas in Case No. 1:19-cv-977, Judge Alan D. Albright

PETITION FOR A WRIT OF MANDAMUS

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January 4, 2021

CERTIFICATE OF INTEREST

Counsel for Petitioner Intel Corporation certifies the following:

1. Represented Entities. Fed. Cir. R. 47.4(a)(1). Provide the full names of all entities represented by undersigned counsel in this case.

Intel Corporation

2. Real Party in Interest. Fed. Cir. R. 47.4(a)(2). 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.

3. Parent Corporations and Stockholders. Fed. Cir. R. 47.4(a)(3). 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.

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).

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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).

VLSI Technology LLC v. Intel Corp., No. 6:19-cv-00254 (W.D. Tex.); *VLSI Technology LLC v. Intel Corp.*, No. 6:19-cv-00255 (W.D. Tex.); *VLSI Technology LLC v. Intel Corp.*, No. 6:19-cv-00256 (W.D. Tex.); *In re Intel Corp.*, No. 21-105 (Fed. Cir. Dec. 23, 2020) (Prost, C.J., Lourie & Chen, JJ.) (per curiam order granting mandamus petition).

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.

Dated: January 4, 2021

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STATEMENT OF RELATED CASES

This is a petition for a writ of mandamus challenging the district court's second attempt to retransfer a patent infringement suit brought by Respondent VLSI Technology LLC ("VLSI") against Petitioner Intel Corporation ("Intel") from the Western District of Texas's Austin Division to the District's Waco Division. Following the district court's first attempt to retransfer, Intel filed a petition for a writ of mandamus with this Court. *See In re Intel Corp.*, No. 2021-105 (Fed. Cir.) (Appx246-290). On December 23, 2020, the Court granted that petition and vacated the district court's first retransfer order. *In re Intel Corp.*, 2020 WL 7647543, at *3 (Fed. Cir. Dec. 23, 2020). On December 31, 2020, the district court again ordered retransfer from Austin to Waco. Appx1-11. This second mandamus petition challenges that second retransfer order.

The underlying suit (No. 1:19-cv-977) involves three cases that were consolidated for pretrial purposes: (1) *VLSI Tech. LLC v. Intel Corp.*, No. 6:19-cv-00254 (W.D. Tex.); (2) *VLSI Tech. LLC v. Intel Corp.*, No. 6:19-cv-00255 (W.D. Tex.); and (3) *VLSI Tech. LLC v. Intel Corp.*, No. 6:19-cv-00256 (W.D. Tex.). The retransfer order challenged in this mandamus petition unconsolidated No. 6:19-cv-00254 from the other two cases and pertains only to No. 6:19-cv-00254. Appx11.

Counsel for Intel are not aware of any other cases that could directly affect or be directly affected by the Court's decision in this matter.

JURISDICTIONAL STATEMENT

This petition seeks a writ of mandamus to a district court in a patent infringement action. This Court has jurisdiction under 28 U.S.C. §§1295 and 1651(a). *In re Princo Corp.*, 478 F.3d 1345, 1351 (Fed. Cir. 2007).

STATEMENT OF RELIEF SOUGHT

Intel respectfully requests that the Court grant this petition and reverse the ruling of the U.S. District Court for the Western District of Texas retransferring the case from the Austin Division to the Waco Division.

STATEMENT OF ISSUE PRESENTED

Just one week after this Court granted Intel's first mandamus petition and vacated the district court's first retransfer order, the district court ***again*** retransferred this Austin-related case from Austin to Waco for the sole purpose of rushing to trial in February 2021 while the Austin courthouse is closed due to COVID-19.

The issue presented here is whether the district court clearly and indisputably abused its discretion by retransferring the case from Austin to Waco where: (1) the district court failed to explain—and cannot explain—how the Austin courthouse's temporary closure has frustrated the "reasons of convenience that caused the earlier transfer to … Austin," as required by this Court's first mandamus order, 2020 WL 7647543, and *In re Cragar Industries, Inc.*, 706 F.2d

503, 505 (5th Cir. 1983); and (2) the district court's analysis under 28 U.S.C. §1404(a) improperly shifted the burden to Intel to show that Austin (the then-current forum) is still clearly more convenient than Waco, rather than requiring VLSI to demonstrate that Waco (the proposed transferee forum) is clearly more convenient than Austin; misapplied the private and public interest factors; placed undue weight on time-to-trial considerations; and ignored that COVID-19 conditions are currently worse in Waco than Austin.

INTRODUCTION

This is the second time the district court has retransferred this case from Austin to Waco during the COVID-19 pandemic in an attempt to rush to trial. On November 20, 2020, with the Austin courthouse temporarily closed for jury trials, the district court first ordered retransfer to Waco notwithstanding that it had previously found Austin to be the "clearly more convenient" forum under §1404(a) because Austin has several connections to this case, whereas Waco has no connections to the case at all. Perhaps recognizing that retransfer was not justified under §1404(a), particularly in view of its previous findings, the district court initially purported to retransfer the case to Waco under Federal Rule of Civil Procedure 77(b) and its "inherent power" to manage its docket.

This Court granted mandamus relief and vacated the district court's first retransfer order. The Court explained that a proper retransfer analysis must be

"based on the traditional factors bearing on a §1404(a) analysis" and must show "that 'unanticipated post-transfer events frustrated the original purpose for transfer' of the case from Waco to Austin originally." *Intel*, 2020 WL 7647543, at *3 (quoting *Cragar*, 706 F.2d at 505). The Court instructed that "[s]uch analysis should take into account the reasons of convenience that caused the earlier transfer to … Austin[.]" *Id.*

Undeterred, the district court has again retransferred the case to Waco for the sole purpose of rushing to trial (now scheduled for February 2021). And, again, the district court has clearly abused its discretion, as it has ignored this Court's instructions regarding the proper legal standards and misapplied §1404(a) in an attempt to justify its holding.

First, the district court did not faithfully apply *Cragar*'s standard as instructed by this Court. Instead, the district court stated it "believed and continues to believe" that retransfer is appropriate under *Cragar*. Appx5. But in its original transfer order, the court determined that Austin is "clearly more convenient" than Waco because of Austin's strong nexus to this case, whereas Waco has no connection to the case. For example, the court found that "Intel has a campus in Austin," "[t]he patents-in-suit were all invented in Austin, primarily by residents of Austin, and at companies based in Austin," and Austin has a localized interest in deciding this case. Appx156-161. Despite this Court's clear instruction

concerning *Cragar*, the district court made no effort in its retransfer order to explain how the unanticipated post-transfer event—i.e., the Austin courthouse's temporary closure—has affected the "reasons of convenience that caused the earlier transfer to … Austin[.]" Nor could *Cragar* be satisfied here, as the Austin courthouse's temporary closure has not frustrated the original transfer's purpose. On the contrary, Austin's nexus to this case remains just as strong today as it was one year ago (while Waco continues to have no connection whatsoever), and this case can still be tried in Austin when the courthouse there reopens.

Second, the district court erroneously concluded that a §1404(a) analysis now supports retransfer to Waco. The court applied the wrong legal standard and improperly shifted the burden to ***Intel*** to show why Austin (the then-current forum) is still "clearly more convenient" than Waco (the proposed transferee forum), rather than requiring ***VLSI*** to show why Waco is now "clearly more convenient" than Austin. The district court also misapplied the §1404(a) factors, including by ignoring some of its earlier findings from its original transfer order and by placing undue weight on time-to-trial considerations in contravention of this Court's precedent. Further, the district court completely disregarded evidence regarding the state of the COVID-19 pandemic, which is currently ***worse*** in Waco than Austin, while ignoring Intel's argument that trying this Austin-related case in Waco in February 2021 would fundamentally disserve the public interest.

The district court seemed unsure about the legal basis for its ruling but retransferred anyway, stating that this Court would correct its errors if needed. Appx43 ("I think it would be good for the Circuit to tell me whether or not I'm properly applying that in terms of the retransfer."). This Court should correct the district court's errors once again and reverse (rather than vacate) the latest retransfer order. The district court can then conduct a trial in the proper forum when the Austin courthouse reopens—which, with vaccines now being distributed, should only be a few months away.

STATEMENT OF FACTS

A. VLSI Files Suit In Delaware, Dismisses That Suit, And Refiles In The Western District Of Texas.

VLSI is a Delaware-based non-practicing entity formed in 2016 by Fortress Investment Group LLC, a New York hedge fund. Appx59. In March 2019, having already sued Intel in California and Delaware for alleged infringement of thirteen patents, VLSI filed a third suit in Delaware asserting six additional patents.

In April 2019, VLSI voluntarily dismissed the third action and refiled it as three separate actions (asserting the same six patents and two others) in the Western District of Texas's Waco Division. The actions were assigned to Judge Albright, the Division's only district court judge.

In May 2019, Intel moved under §1404(a) to transfer the Texas cases to Delaware, where they were originally filed. Appx54-80. VLSI opposed, arguing

that "[t]he primary reasons [it] filed the cases [in the Western District of Texas] ... [are] because this is where each of the inventions was made, where the vast majority of inventors reside, where the originating companies and their successor are all based, [and] where Intel has a substantial facility[.]" Appx93; *see* Appx112-117. All of the connections upon which VLSI relied were connections to Austin.

The district court denied Intel's motion largely based on the cases' connections to Austin. Appx120-135. The court explained that each case "concerns inventions made in this District, by inventors who reside in this District, in the course of their employment at companies based in this District" and "Intel has a substantial presence in this District." Appx121.

B. The District Court Transfers The Case From Waco To Austin, Finding That Austin Is "Clearly More Convenient."

Intel then moved under §1404(a) for intra-district transfer from Waco to Austin, arguing that, to the extent any division within the Western District had a nexus to the case, it was Austin. Appx136-151. In October 2019, the district court granted Intel's motion, finding Austin "clearly more convenient" than Waco for several reasons. Appx152-161. The court found that the "relative ease of access to sources of proof," "cost of attendance," and "localized interest" factors all favor Austin over Waco because "Intel has a campus in Austin, but not in Waco," "Intel employs a significant number of people working in Austin," most of the named

inventors "reside in Austin while none reside in Waco," and "[t]he patents-in-suit were all invented in Austin, primarily by residents of Austin, and at companies based in Austin." Appx156-161. Time-to-trial was ***not*** among the bases for the court's ruling. In fact, the district court ***rejected*** Intel's argument that the added convenience of litigating in Austin could potentially expedite proceedings. Appx160; *see* Appx20 (VLSI acknowledging the original transfer to Austin was not based on time-to-trial because "[a]s a practical matter … it didn't affect the length of time to trial").

After transferring to Austin, the district court scheduled trial in the first of the three cases for November 2020.[1]

C. The District Court Retransfers To Waco Following The Austin Courthouse's Temporary Closure.

As COVID-19 infection rates surged across the country, the Chief Judge of the Western District of Texas issued several standing orders continuing all jury trials in the District. The orders allow a courthouse within the District to remain open for jury trials only if the senior-most judge within the division where the courthouse sits "determine[s] jury trials can be safely conducted" and enters an order "making those findings and resuming jury trials for the division." Appx325.

[1] Consistent with his practice, Judge Albright retained the cases instead of transferring them to another judge in Austin. Appx161.

Relying on that provision, Judge Albright—the only judge in the Waco Division—issued an order in August 2020 resuming jury trials in Waco. Appx322-323.

Meanwhile, the district court noted at several hearings in this case that the Austin courthouse might remain closed for jury trials in November 2020 (and thereafter), such that trial might not proceed as previously scheduled. Thus, in October 2020, the court rescheduled trial for January 2021. Appx162. In November 2020, the court issued a retransfer order stating that, "if the Austin courthouse does not reopen with enough time to hold a January trial, the trial … will be held in Waco." Appx163-170. The court stated that retransfer was warranted under Federal Rule of Civil Procedure 77(b) and the court's "inherent power" to manage its docket. Appx165-168. The court also stated in passing that its holding "[wa]s completely consistent with the guidance provided in *Cragar*." Appx169. The court did not mention §1404(a), or explain why the private and public interest factors no longer favored Austin, as it had previously found.[2]

Shortly thereafter, the Western District's Chief Judge renewed the districtwide standing order continuing jury trials, thereby keeping the Austin courthouse closed through January 2021. Appx327-329. Thus, by operation of the

[2] In fact, the court instructed the parties ***not*** to analyze §1404(a) in the initial retransfer briefing. Appx244.

district court's November 2020 retransfer order, trial in this case was scheduled to begin in Waco on January 11, 2021.

D. This Court Grants Intel's Mandamus Petition And Instructs The District Court To "Take Into Account The Reasons Of Convenience That Caused The Earlier Transfer To … Austin."

Intel promptly filed a mandamus petition, arguing that the district court exceeded its authority by retransferring the case under Rule 77(b) and its "inherent power." Appx246-290. This Court agreed, and on December 23, 2020, granted Intel's petition and vacated the district court's retransfer order. *Intel*, 2020 WL 7647543.

This Court held that neither Rule 77(b) nor the district court's "inherent authority for docket management … authorizes the order at issue[.]" *Id.* at *1. The Court further explained that a proper retransfer analysis must be "based on the traditional factors bearing on a §1404(a) analysis" and must show "that 'unanticipated post-transfer events frustrated the original purpose for transfer' of the case from Waco to Austin originally." *Id.* at *3 (quoting *Cragar*, 706 F.2d at 505). The Court instructed that "[s]uch analysis should take into account the reasons of convenience that caused the earlier transfer to the Austin division." *Id.*

E. The District Court Again Retransfers To Waco.

On December 23, 2020 (the same day this Court granted Intel's mandamus petition), immediately before the close of business, VLSI filed an "emergency"

motion to retransfer to Waco under §1404(a). Appx291-306. VLSI argued that retaining the case in Austin "will substantially delay the trial date in this case because the Austin Division's courthouse is presently not holding any civil trials," and that *Cragar* does not prohibit retransfer. Appx295-296; Appx301-303. On December 26, 2020, the district court ordered Intel to respond by December 29, 2020. Intel opposed VLSI's motion, arguing that retransfer is impermissible under *Cragar* because the Austin courthouse's temporary closure did not frustrate the purpose of the district court's original transfer—i.e., to litigate and try the case in the forum having the strongest ties thereto. Appx313-316. Intel also argued that the §1404(a) factors that previously favored Austin continue to favor Austin, and that Austin is even more appropriate now than at the time of the original transfer because the COVID-19 pandemic is currently worse in Waco than Austin. Appx316-320.

On December 30, 2020, the district court heard argument on VLSI's motion. Appx12-53. Notwithstanding that VLSI was the moving party, the court stated that Intel had an "uphill road … to climb" in convincing the court that Austin is the appropriate venue. Appx25. The court was singularly focused on "time to trial" because "if I don't get this case tried either in January or February or very soon, … I don't just have a window when I can try it easily in March or April or May or June, because those are all taken." Appx35. The court decided "it is appropriate

for me to transfer the case back to Waco," but reset the trial for February 16, 2021 to allow time for this Court to address the retransfer issue (again) because "it would be good for the Circuit to tell me whether or not I'm properly applying [§1404(a)] in terms of the retransfer." Appx41-43.

On December 31, 2020, the district court issued a written order granting VLSI's motion and again retransferring to Waco. Appx1-11. The court "re[e]valuate[d] its §1404(a) analysis in light of the pandemic" and found "at least two factors weigh in favor of transferring the case back to Waco" (both based on time-to-trial considerations) and "one factor is against transferring to Waco[.]" Appx5-11. The court then concluded *Cragar* was satisfied because "the pandemic has frustrated transfer by changing what was clearly more convenient pre-pandemic to what is not clearly more convenient mid-pandemic." Appx11.

With trial now scheduled for Waco in February 2021, Intel promptly filed this second mandamus petition.

SUMMARY OF ARGUMENT

The district court once again clearly and indisputably abused its discretion by retransferring this case from Austin to Waco.

1. The district court did not properly apply *Cragar*'s standard for retransfer as instructed by this Court. While the district court summarily concluded that *Cragar* was satisfied, it failed to explain how the unanticipated

post-transfer event—i.e., the Austin courthouse's temporary closure—has affected the specific "reasons of convenience that caused the earlier transfer to … Austin[.]" *Intel*, 2020 WL 7647543, at *3. That standard cannot be satisfied here. The district court originally transferred this case to Austin based on Austin's many connections to the case (as compared to Waco's lack of any connection), which made the "relative ease of access to sources of proof," the "cost of attendance," and the "localized interest" all favor Austin over Waco. Appx156-161. The Austin courthouse's temporary closure has not frustrated the original transfer's purpose because Austin's nexus to this case remains just as strong today (while Waco continues to have no connection to the case), and the original transfer's purpose can still be effectuated by trying the case in Austin when the courthouse there reopens.

2. The district court also clearly and indisputably erred in holding that retransfer was appropriate under §1404(a). The court improperly shifted the burden to ***Intel*** to show that Austin is still clearly more convenient than Waco, rather than requiring ***VLSI*** to show that Waco is now the clearly more convenient forum. The court also misapplied the §1404(a) factors, including by improperly elevating time-to-trial considerations and by disregarding some of its own prior findings that favored Austin over Waco. Finally, the court ignored both Intel's evidence regarding the state of the COVID-19 pandemic—which is currently

worse in Waco than Austin—and Intel's arguments explaining why the public interest would be disserved if this Austin-related case were tried in Waco during the surging pandemic.

REASONS WHY THE WRIT SHOULD ISSUE

"Mandamus may be employed in exceptional circumstances to correct a clear abuse of discretion … by a trial court." *In re Calmar, Inc.*, 854 F.2d 461, 464 (Fed. Cir. 1988). Generally, three conditions must be satisfied: (1) the petitioner must demonstrate a clear and indisputable right to the writ; (2) the petitioner must have no other adequate method of attaining the desired relief; and (3) the court must be satisfied that the writ is appropriate under the circumstances. *Cheney v. U.S. Dist. Ct.*, 542 U.S. 367, 380-381 (2004). These hurdles, "however demanding, are not insuperable," *id.* at 381, and are satisfied here.

I. THE DISTRICT COURT HAS AGAIN CLEARLY AND INDISPUTABLY ABUSED ITS DISCRETION BY RETRANSFERRING TO WACO.

In granting Intel's first mandamus petition, this Court made clear that the district court could only retransfer the case from Austin to Waco if it finds the *Cragar* retransfer standard is satisfied and transfer would otherwise be appropriate under §1404(a). *Intel*, 2020 WL 7647543, at *3. But in ordering retransfer to Waco, the district court did not apply the correct standards or heed this Court's instructions regarding how to apply them. As explained below, neither *Cragar* nor

§1404(a) permits retransfer to Waco, and the district court clearly and indisputably erred in holding otherwise.

A. Retransfer Is Not Permissible Under *Cragar*.

1. The Austin courthouse's temporary closure did not frustrate the purpose of the original transfer to Austin.

Under *Cragar*, the district court's original order transferring the case from Waco to Austin should have been treated as "the law of the case[.]" 706 F.2d at 505. After a transfer, a court "should not re-transfer 'except under the most impelling and unusual circumstances.'" *Id.* Retransfer is appropriate only when "unanticipatable post-transfer events frustrate the original purpose for transfer[.]" *Id.*; *see Christianson v. Colt Industries Operating Corp.*, 486 U.S. 800, 819 (1988) (retransfer "should necessarily be exceptional").

As this Court explained in its mandamus order, an analysis of whether "'unanticipated post-transfer events frustrate[d] the original purpose for transfer'" here "should take into account the reasons of convenience that caused the earlier transfer to … Austin[.]" *Intel*, 2020 WL 7647543, at *3 (quoting *Cragar*, 706 F.2d at 505). The district court's original transfer ruling was based on Austin's strong nexus to the case—as compared to Waco's lack of any connection to the case—which made the "relative ease of access to sources of proof," "cost of attendance," and "localized interest" factors all favor Austin over Waco. Appx156-161. In particular, the district court relied on the following facts:

- "Intel has a campus in Austin, but not in Waco." Appx156.
- "Intel employs a significant number of people working in Austin." Appx160.
- Nearly all the "inventors reside in Austin while none reside in Waco[.]" Appx158.
- "The patents-in-suit were all invented in Austin, primarily by residents of Austin, and at companies based in Austin." Appx160.
- "[T]he Austin Division has a greater localized interest" in having this case decided there. Appx161.

Each of these facts remains true today, and none has been affected by the Austin courthouse's temporary closure.

Thus, while the Austin courthouse's temporary closure due to COVID-19 may be an unanticipated post-transfer event, it has not frustrated the purpose of the original transfer to Austin. As compared to Waco, Austin ***still*** has far more ties to this case and a greater localized interest in deciding it. The purpose for the original transfer—i.e., to litigate and try this case in the forum having the most ties to it—can still be given full effect by trying the case in Austin when the courthouse there reopens.

Under the governing *Cragar* standard, therefore, the district court was not permitted to retransfer this case back to Waco. *Cragar*, 706 F.2d at 505; *see Emke v. Compana LLC*, 2009 WL 229965, at *4-5 (N.D. Tex. Jan. 30, 2009) (denying retransfer where certain bases for original transfer ruling—i.e., "location of

witnesses," and "location of documentary evidence"—were not frustrated by an unanticipatable event).[3]

2. The district court again failed to properly apply *Cragar*.

Despite this Court's clear instruction, the district court provided only a cursory discussion of *Cragar*. The district court cited its now-vacated retransfer order and stated that it "believed and continues to believe that the decision to transfer the … case back to Waco is in accord with … *Cragar*." Appx5 (citing Appx168). The court then concluded that "the pandemic has frustrated transfer by changing what was clearly more convenient pre-pandemic to what is not clearly more convenient mid-pandemic." Appx11. The court's bare treatment of *Cragar* is, once again, insufficient to support retransfer.

As an initial matter, the district court nowhere explained what the purpose of the original transfer was or how the Austin courthouse's temporary closure supposedly frustrated it. The court thus failed to apply *Cragar* in any meaningful way, much less consistent with this Court's guidance. This failure alone constitutes clear and indisputable error. *In re Nitro Fluids L.L.C.*, 978 F.3d 1308,

[3] This case is plainly different from the few cases ordering retransfer. *E.g.*, *JTH Tax Inc. v. Mahmood*, 2010 WL 2175843, at *2 (N.D. Miss. May 27, 2010) (retransferring where "original purpose of the transfer—consolidation of the two actions for judicial economy—[was] frustrated"); *Plywood Panels, Inc. v. M/V Thalia*, 141 F.R.D. 689, 690-691 (E.D. La. 1992) (retransferring where third-party complaints filed after original transfer presented personal jurisdiction problems in transferee forum).

1312 (Fed. Cir. 2020) ("[E]rror concerning the legal standard for assessing whether transfer is required … warrants mandamus relief[.]"); *Hayman Cash Register Co. v. Sarokin*, 669 F.2d 162, 170 (3d Cir. 1982) (granting mandamus where court misapplied retransfer standard).

Nor did the district court consider how the Austin courthouse's temporary closure affects the specific "reasons of convenience that caused the earlier transfer to the Austin division," as instructed by this Court. *See Intel*, 2020 WL 7647543, at *3. As described above, the district court found in its original transfer order that three factors favored Austin: "relative ease of access to sources of proof," "cost of attendance," and "localized interest." Appx156-161. Yet in ordering retransfer to Waco, the district court did not consider whether the Austin courthouse's temporary closure frustrated any of those factors or the facts underlying them. As explained above, it did not. *Supra* pp. 15-17.

Instead, the district court found only that the "cost of attendance" and "relative ease of access to sources of proof" are now neutral due to "changed circumstances" because "document discovery is complete" and the number of witnesses has narrowed in the last year. Appx6-8. But those "changed circumstances" merely reflect the passage of time—i.e., that the case has proceeded through a year of litigation since the original transfer ruling and is nearing trial. The passage of time is neither "unanticipatable" nor related to the

Austin courthouse's temporary closure. It thus cannot serve as the basis for a court to uproot its original transfer ruling as the district court did here.

Finally, the district court's concern that it cannot get this case to trial in February 2021 without retransferring to Waco does not satisfy *Cragar*. *See* Appx8-11. As VLSI has acknowledged (Appx20(9:10-22)), the district court's original transfer ruling was ***not*** based on time-to-trial considerations; it was based on Austin's strong nexus to this case, particularly as compared to Waco's lack of any nexus to the case. *Supra* pp. 15-16. Thus, the fact that the district court and the parties may have to wait longer than originally anticipated to try the case in Austin does not affect, much less frustrate, the original transfer's purpose. As explained above, that purpose can still be fully realized by trying this case in Austin when the courthouse reopens.

B. Retransfer Is Inappropriate Under §1404(a).

Even if *Cragar* were satisfied, retransfer to Waco is still unwarranted under §1404(a). Under §1404(a), transfer is appropriate only when "the movant demonstrates that the transferee venue is clearly more convenient[.]" *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) (en banc). The district court previously found Austin "clearly more convenient" than Waco because Austin, unlike Waco, has substantial connections to this case and a strong localized interest in deciding it. Appx156-161. Having ordered that transfer in October

2019, the venue for this case became Austin. Thus, the analysis under §1404(a) is no longer whether Austin is "clearly more convenient" than Waco, but whether the proposed transferee forum (here, Waco) is "clearly more convenient" than Austin. Yet the district court did not even purport to apply that analysis, and the analysis it did apply includes multiple additional errors concerning the §1404(a) factors. The retransfer order is thus a clear and indisputable abuse of discretion.

1. The district court's §1404(a) analysis applied the wrong standard and improperly shifted the burden to Intel.

The district court ordered retransfer because it determined that the pandemic changed "what was clearly more convenient pre-pandemic to what is ***not clearly more convenient*** mid-pandemic." Appx11. In other words, the court found that Austin is no longer as convenient as it once was. That is clearly the wrong legal standard.

With the case having ***already*** been transferred to Austin, retransfer back to Waco could be appropriate only if—in addition to *Cragar* being satisfied—the court found that ***VLSI*** satisfied its burden to show that ***Waco is clearly more convenient than Austin*** under §1404(a). *See Intel*, 2020 WL 7647543, at *1 ("Intel generally has a 'statutory right' to have this case tried in the division in which the action lies."); *Volkswagen*, 545 F.3d at 1315 (transfer appropriate only when "***the movant demonstrates*** that the transferee venue is ***clearly more convenient***" (emphases added)); *Robert Bosch Healthcare Sys., Inc. v. Cardiocom,*

LLC, 2014 WL 2702894, at *3 (N.D. Cal. June 13, 2014) (plaintiff moving to retransfer "bears the burden of establishing the propriety of a §1404 transfer").

It was not enough for the district court to find that Austin is merely ***less convenient*** than it was one year ago. *See Blue Calypso, Inc. v. Groupon, Inc.*, 2013 WL 11879675, at *7 (E.D. Tex. Sept. 27, 2013) ("[S]lightly more convenient does not rise to the level required under section 1404(a)."). Yet that is exactly what the district court did, effectively shifting the burden to ***Intel*** to show why Austin is ***still*** "clearly more convenient." Appx11 (court concluding Austin "is not clearly more convenient"); Appx25 (court stating Intel had "uphill road … to climb" in convincing court that Austin is the appropriate venue). But that was not Intel's burden, and the district court's analysis is incompatible with fundamental §1404(a) law. *Supra* pp. 20-21.[4]

[4] To the extent the district court believed VLSI's burden was lessened because "trial courts have … greater discretion in granting intra-district transfers," Appx3, it was mistaken. The court cited a single case addressing ***§1404(b***), not §1404(a). *Id.* (citing *Sundell v. Cisco Sys. Inc.*, 111 F.3d 892, 1997 WL 156824, at *1 (5th Cir. 1997)); *see Intel*, 2020 WL 7647543, at *2 (recognizing that, unlike §1404(a) transfers, §1404(b) transfers require both parties' consent). Trial courts do not have greater discretion for granting intra-district transfers under §1404(a). *Rios v. Scott*, 2002 WL 32075775, at *4 (E.D. Tex. July 13, 2002) ("[T]rial courts should entertain Section 1404(a) motions for intra-district change of venue with caution, and should not grant the requested relief" absent "a ***firm conclusion*** that the proposed new venue is ***decidedly more convenient*** and in the interest of justice." (emphases added)).

Under the district court's approach—i.e., retransferring when the forum where the case is pending may no longer be as convenient as it once was—the standard for retransfer would be ***lower*** than the standard for transfer in the first instance. That makes little sense and defies *Cragar*, which clearly imposes a ***higher*** standard for retransfer, not a lower one. *Cragar*, 706 F.2d at 505 ("[T]he transferee-district … should not re-transfer 'except under the most impelling and unusual circumstances[.]'"); *see Christianson*, 486 U.S. at 819 (retransfer "should necessarily be exceptional"). The district court's application of §1404(a) thus cannot be correct. *Nitro Fluids*, 978 F.3d at 1311-1312 (granting mandamus where district court improperly shifted applicable burden in transfer analysis).

2. The district court misapplied the §1404(a) factors.

In addition to applying the wrong standard, the district court also misapplied the §1404(a) factors.[5] Although the court correctly found the "localized interest" factor continues to favor Austin and the "compulsory process" factor no longer favors Waco, the court clearly erred in finding the "cost of attendance" and "relative ease of access to sources of proof" factors were neutral and the "all other

[5] In the Fifth Circuit, the §1404(a) factors are: (1) "relative ease of access to sources of proof"; (2) "availability of compulsory process to secure the attendance of witnesses"; (3) "cost of attendance for willing witnesses"; (4) "all other practical problems that make trial of a case easy, expeditious and inexpensive"; (5) "administrative difficulties flowing from court congestion"; (6) "local interest in having localized interests decided at home"; (7) "familiarity of the forum with the law that will govern the case"; and (8) "avoidance of unnecessary problems of conflict of laws [or] the application of foreign law." *Volkswagen*, 545 F.3d at 315.

practical problems" and "administrative difficulties" factors favored Waco. Appx7-10. The court also improperly balanced the factors by disregarding the substantial connections between this case and Austin and elevating time-to-trial considerations, all while ignoring the current state of the COVID-19 pandemic. Ultimately, the court's conclusion that §1404(a) supports retransfer to Waco is a clear abuse of discretion. Appx10-11.

"Local Interest in Having Localized Interests Decided at Home." The district court correctly found that Austin has a greater "localized interest" in this case than Waco. Appx10. As the court acknowledged: "[T]he facts relating to localized interest have not changed materially since the [original transfer] …. Intel still has a campus in Austin, the patents-in-suit still originated in Austin-based companies and inventors reside in Austin." *Id.* By contrast, Waco has no localized interest in this case. Appx153-154; Appx160-161. Thus, Austin has a much stronger localized interest in deciding this case.

"Compulsory Process." The district court also correctly found that, although the "compulsory process" factor previously favored Waco, it is now neutral. This is because the original transfer ruling considered that there were Dallas-based non-party witnesses who may need to be compelled to testify in the consolidated cases. There are no such witnesses, however, on either party's trial witness list for this case. Appx7.

"Cost of Attendance." In its original transfer order, the district court found the "cost of attendance" factor "strongly" favors Austin because nearly all of the "inventors reside in Austin while none reside in Waco," and employees from third-party NXP—the company from which the patents originated—likewise reside in Austin. Appx158-160. This factor continues to "strongly" favor Austin over Waco because the parties either expect to call or may call four trial witnesses who live in Austin, including two named inventors (Messrs. Bearden and Zhang); a VLSI employee (Dr. Simpson); and an NXP employee (Mr. Chastain). Appx317. By contrast, ***no*** trial witness resides in Waco. *Id.* Moreover, the "cost of attendance" for a trial in Waco is prohibitive for certain witnesses, as at least one Intel expert will not travel in February 2021 due to the surging COVID-19 pandemic. Appx171-172. Despite these facts, the district court concluded this factor is now "neutral, if not weighing in favor of transferring the case to Waco." Appx7. That was based on several errors.

First, the district court found that "hotel costs in Waco are cheaper than in Austin." *Id.* But the court previously considered hotel costs and found the "cost of attendance" strongly favors Austin over Waco because nearly all "inventors reside in Austin while none reside in Waco," "NXP witnesses may also be key witnesses," and "from a traffic point-of-view, Austin is more convenient." Appx158-160. None of this has changed. The court simply failed to reconcile its

prior determination, including by ignoring its finding regarding Austin being more convenient from "a traffic point-of-view."

Second, the district court determined that "both parties have requested and this Court has ruled that witnesses may testify via video conferencing at trial." Appx7. But as the district court previously found, video-conferenced testimony is not an adequate substitute for in-person testimony. Appx167 ("[T]he Court does not believe that it is fair and/or appropriate to hold a virtual jury trial."); *see also* Appx197 (Judge Gilstrap order explaining that "the remote, sterile, and disjointed reality of virtual proceedings cannot at present replicate the totality of human experience embodied in and required by our Sixth and Seventh Amendments"). That some witnesses may need to testify remotely due to COVID-19 concerns if trial occurs in February 2021 does not somehow make Waco more convenient than Austin, especially considering that this remote testimony will prejudice Intel's case.

Third, the district court found that of "the witnesses that do travel," one witness (Mr. Bearden) does not object to proceeding in Waco, another witness (Mr. Zhang) lives within 100 miles of the Waco courthouse, and "VLSI has offered to cover these witnesses' costs of attendance in Waco." Appx7. But the court ignored that Austin is still clearly more convenient for these witnesses because they live closer to Austin, including Mr. Bearden who is apparently willing to

testify in either location and Mr. Zhang who lives just 20 miles from the Austin courthouse and 97 miles from the Waco courthouse. *In re Radmax, Ltd.*, 720 F.3d 285, 288-289 (5th Cir. 2013) ("We did not imply, however, that a transfer ***within*** 100 miles does not impose costs on witnesses or that such costs should not be factored into the venue-transfer analysis[.]"). And VLSI's strategic offer to pay for certain witnesses' travel in an effort to support retransfer does not alleviate the ***inconvenience*** of Waco relative to Austin.[6]

Simply put, several witnesses reside in Austin, whereas none reside in Waco. The district court therefore should have found that the "cost of attendance" factor still strongly favors Austin over Waco.

"Relative Ease of Access to Sources of Proof." In its original transfer order, the district court determined that this factor favors Austin over Waco. Appx156-157. Specifically, the court found that "given that Intel has a campus in Austin, but not in Waco, it is easier to access Intel's electronic documents from Austin than from Waco," and documents from third parties (including NXP and the asserted patents' inventors) "are relatively more accessible from Austin than Waco." *Id.* These facts continue to be true today.

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[6] The district court also assumed, based on ***VLSI's*** representation in its reply brief (which conflicts with VLSI's trial witness list), that "two other[witnesses] in Austin are unlikely to be called." Appx7. The court ignored that ***Intel*** may call one of those witnesses (Dr. Simpson). Appx317.

Nevertheless, in its retransfer order, the district court found this factor "neutral" because "document discovery is complete and readily available in electronic form." Appx6-7. The court ignored, however, that Austin is still more convenient than Waco for any ***new*** document issues that may arise before, during, or after trial—just as it was during document discovery. *E.g.*, *Qualcomm Inc. v. Broadcom Corp.*, 548 F.3d 1004, 1009 (Fed. Cir. 2008) (party produced 21 emails on "one of the last days of trial" and 200,000 more pages "were produced post-trial"). Thus, the court should have found this factor still favors Austin over Waco.

"All Other Practical Problems that Make Trial of a Case Easy, Expeditious and Inexpensive"; "Administrative Difficulties Flowing from Court Congestion." The district court previously found these factors neutral or inapplicable, and they remain neutral today. Appx160-161. Yet in its retransfer order, the court concluded that these factors now favor Waco based entirely on ***time-to-trial considerations***. Specifically, the court found that "all other practical problems" favors Waco because the "Austin courthouse is closed for the foreseeable future" and that "administrative difficulties flowing from court congestion" favors Waco because now that "the Austin courthouse is closed, this

case can only move forward in the Waco courthouse in the near future." Appx8-10.[7]

But in evaluating these factors, the district court failed to consider that the Austin courthouse is not closed due to a problem unique to Austin (or to this case). Instead, the Austin courthouse is closed due to the COVID-19 pandemic, which has actually been ***worse*** in Waco than Austin—a fact the court ignored altogether. *Infra* pp. 31-33. Additionally, the court's analysis focused on the wrong time period, comparing a delay from ***November 2020*** to April 2021 and stating that the delay here is at least 5 months and likely 7-8 months, even though the Waco trial is currently scheduled for February 2021. Appx9. Thus, at this point, a trial in Austin would likely be only 2-3 months later than one in Waco.[8] The court also

[7] At the hearing on VLSI's motion, the district court repeatedly emphasized its desire to get this case tried by February 2021 because it is concerned about its backlog. *E.g.*, Appx35; *see* Appx9 (court noting it "is extremely busy and has at least one trial scheduled every month from now through 2022"). But the district court has invited its busy docket. *See* Witherspoon, *Waco Becoming Hotbed for Intellectual Property Cases with New Federal Judge*, Waco Tribune-Herald (Jan. 18, 2020), https://wacotrib.com/news/local/waco-becominghotbed-for-intellectual-property-cases-with-new-federal-judge/article_0bcd75b0-07c5-5e70-b371-b20e059a3717.html.

[8] VLSI cannot claim prejudice from any such delay because it can be fully compensated by money damages (if infringement is found) regardless of when trial occurs. By contrast, retransfer to Waco unfairly prejudices Intel because it has relied on the original transfer in preparing its case for trial in Austin. *Odem v. Centex Homes, Inc.*, 2010 WL 2382305, at *2 (N.D. Tex. May 19, 2010) (refusing retransfer and finding defendant "would be prejudiced by retransfer at this late stage"), *adopted*, 2010 WL 2367332 (N.D. Tex. June 8, 2010).

ignored evidence suggesting the Austin courthouse is likely to reopen in the foreseeable future as the current COVID-19 surge subsides and vaccines are administered. Appx184-185; Appx192. Instead, the court apparently relied on off-the-record discussions and its "speculat[ion] that … the Austin courthouse might be closed until June 2021, if not later." Appx8.

3. The district court's §1404(a) analysis placed undue weight on time-to-trial considerations.

As explained above, none of the §1404(a) factors actually supports retransfer to Waco, and the district court erred in finding otherwise. What is more, the court incorrectly balanced those factors against one another. The court found that only ***two*** of the six relevant factors favor Waco ("all other practical problems" and "administrative difficulties" both based on the same time-to-trial considerations), while one favors Austin ("localized interests"). That cannot possibly justify retransfer, which requires finding Waco "clearly more convenient" than Austin, where this case undisputedly has several connections to Austin and none to Waco, and COVID-19 conditions are worse in Waco than Austin.

The district court summarily stated in its retransfer order that it did not place "dispositive or undue weight" on time-to-trial, but that is exactly what it did. Appx8-11. The ***only*** two factors the court found favored retransfer to Waco were based ***entirely*** on the court's concern about getting this case to trial in February 2021. *Id.* And the court's statements at the hearing on VLSI's motion make clear

this was the motivating factor for retransferring to Waco. *E.g.*, Appx35. The district court's placement of dispositive weight on time-to-trial directly conflicts with this Court's precedent that "the speed of the transferee district court should not alone outweigh all [the] other factors[.]" *In re Apple*, 979 F.3d 1332, 1344 & n.5 (Fed. Cir. 2020); *see In re Adobe Inc.*, 823 F. App'x 929, 932 (Fed. Cir. 2020) ("[T]he district court erred in giving this factor dispositive weight[.]").

Even if it were appropriate to give significant weight to time-to-trial considerations, that still would not justify retransfer here. The only reason the case can (as of now) be tried in Waco in February 2021 is that the judge—as the only district judge in Waco—unilaterally reopened the Waco courthouse during the COVID-19 pandemic notwithstanding that many other courthouses, including the federal courthouse in Austin and state courthouses in Waco, remain closed. In so doing, the district court ensured that considering time-to-trial would favor retransfer. But a transfer ruling cannot turn on a court's ***own*** action that influences the very factor (e.g., time-to-trial) the court considers in its analysis. *Apple*, 979 F.3d at 1343 (court erred in concluding "merits-related steps it had taken weighed heavily against transfer" where the court itself made the "decision to give undue priority to the merits … over a party's transfer motion").

Under these circumstances, time-to-trial considerations cannot outweigh the other factors the district court previously found favor Austin over Waco. And they

certainly do not outweigh the public interest in not trying a case in the wrong forum during a public health crisis. *Infra* pp. 31-33. The district court's contrary conclusion was clearly an abuse of discretion.

4. The district court ignored facts regarding the COVID-19 pandemic, which strongly weigh against retransfer.

The district court further erred in its §1404(a) analysis by completely ignoring Intel's argument that Waco is ***less*** convenient than Austin, and the interests of justice would be disserved by retransfer to Waco, because COVID-19 risks are much worse in Waco than Austin. Appx311; Appx320. Intel pointed out that both the rolling seven-day average rate of new cases and the infection rate have been consistently worse in McLennan County (Waco) than Travis County (Austin). Appx180-182.[9] Intel also pointed out that Waco-McLennan County hospitals have been flooded with COVID-19 patients and have nearly all ICU beds occupied. Appx189-190; *see Waco-McLennan County COVID-19 Statistics*, http://covidwaco.com/county (visited Jan. 2, 2021).[10] Indeed, in light of these

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[9] *Waco-McLennan County COVID-19 Statistics*, http://covidwaco.com/county (visited Jan. 2, 2021); *Texas COVID-19 Data, New Confirmed Cases over Time by County*, https://dshs.texas.gov/coronavirus/additionaldata.aspx (visited Jan. 2, 2021); *Texas COVID-19 Data, Estimated Active Cases over Time by County*, https://dshs.texas.gov/coronavirus/additionaldata.aspx (visited Jan. 2, 2021).

[10] Smith, *Year Ends with Crowded Waco Hospitals, Soaring COVID-19 Death Toll*, Waco Tribune-Herald (Jan. 1, 2021), https://wacotrib.com/news/local/year-ends-with-crowded-waco-hospitals-soaring-covid-19-death-toll/article_c14ed0dc-4c77-11eb-9917-535f98bbfdee.html?utm_medium=social&utm_source=email&utm_campaign=user-share; Wallace, *COVID-19 Hospitalization Rate Continues To*

troubling circumstances, state courthouses in Waco have postponed all jury trials. Appx215-219; Appx232-236.[11]

These are important facts that weigh strongly against retransfer. As Intel explained, it would contravene the public interest to have Waco jurors decide a case that implicates Austin-related issues in the best of times. It would be especially detrimental to the public interest to require Waco jurors to risk their health and safety to do so during a public health crisis. *In re Volkswagen AG*, 371 F.3d 201, 206 (5th Cir. 2004) ("[J]ury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation."); *cf. Asbury v. Germania Bank*, 752 F. Supp. 503, 505 (D.D.C. 1990) (retaining case involving "Illinois parties, Illinois witnesses, Illinois facts, and Illinois law" in D.C. "borders on a violation of due process").

Worsen in Laredo, Already the Highest in Texas, Laredo Morning Times (Dec. 27, 2020), https://www.lmtonline.com/news/article/COVID-19-hospitalization-rate-continues-to-worsen-15830599.php (reporting "the Waco area has the second-highest [COVID-19] hospitalization rate" in Texas).

[11] The Supreme Court of Texas has ordered all state courts not to conduct in-person jury proceedings absent prior approval, Appx215-219; Appx241-242, and courts in the Eastern District of Texas have postponed jury trials following a recent trial where jurors, court staff, and both parties' counsel tested positive for COVID-19 despite safety precautions. Appx200-212; Appx221-230 (mistrial in Sherman following COVID-19 outbreak among trial participants); Appx195-198 (Judge Gilstrap order postponing jury trials until at least March 2021 due to "dangerously rising rate of increase in COVID-19 cases and swelling hospitalizations").

The district court's failure to consider these facts amounted to a total disregard of evidence counter to the court's holding. This, too, warrants mandamus relief. *Apple*, 979 F.3d at 1340 (granting mandamus where district court identified "some relevant proof" in §1404(a) analysis but "fail[ed] to meaningfully consider" counter-evidence).

II. INTEL CANNOT OBTAIN RELIEF BY ANY OTHER MEANS.

As the Court observed in granting Intel's first mandamus petition, "[t]here is no real dispute … that mandamus is an appropriate means of reviewing the district court's [first retransfer] order" because "it is difficult to see how Intel could obtain meaningful review of the decision otherwise." *Intel*, 2020 WL 7647543, at *1; *see Cheney*, 542 U.S. at 380. This observation is correct. In the transfer context, "the possibility of an appeal in the transferee forum following a final judgment … is not an adequate alternative." *Apple*, 979 F.3d at 1337.

A post-judgment appeal would be especially inadequate here because the harm Intel's petition seeks to prevent—i.e., trying a case in a forum having no interest in the case during a public health crisis—cannot be adequately redressed after trial. A February 2021 trial in Waco would result in a trial in the wrong forum at great expense, and would subject both trial participants and the Waco community to serious health risks given the COVID-19 pandemic. Those harms cannot be avoided unless this Court intervenes before trial. *Volkswagen*, 545 F.3d

at 319 (finding condition necessarily satisfied in transfer context because "the harm—inconvenience to witnesses, parties and other[s]—will already have been done by the time the case is tried and appealed, and the prejudice suffered cannot be put back in the bottle").

III. MANDAMUS IS APPROPRIATE IN THESE CIRCUMSTANCES.

Mandamus relief also "is appropriate under the circumstances." *Cheney*, 542 U.S. at 381. This condition is necessarily met because "an erroneous transfer may result in judicially sanctioned irreparable procedural injury." *Apple*, 979 F.3d at 1337. Indeed, this Court ***already*** found that mandamus was appropriate under similar circumstances when it granted Intel's first mandamus petition. *Intel*, 2020 WL 7647543, at *3.

Moreover, mandamus relief is particularly appropriate here. The issue before the Court, which involves the legal standards for retransferring patent cases, has "importance beyond the immediate case." *Volkswagen*, 545 F.3d at 319. And mandamus relief would prevent everyone involved in the trial (scheduled for February 2021) from being exposed to serious health risks during the surging COVID-19 pandemic and before they may be vaccinated. *See* Appx171-174; Appx188-192.

CONCLUSION

Intel respectfully requests that the Court grant this petition and reverse the district court's retransfer ruling.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 4th day of January, 2021, I filed the foregoing with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users, and I caused a copy of the foregoing to be served via email and overnight courier to the following addresses:

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