**IN THE UNITED STATES DISTRICT COURT**
**FOR THE WESTERN DISTRICT OF TEXAS**
**AUSTIN DIVISION**

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| ANCORA TECHNOLOGIES, INC.,<br><br>Plaintiff,<br>v.<br><br>LG ELECTRONICS INC. and LG ELECTRONICS U.S.A., INC.,<br><br>Defendants. | CIVIL ACTION NO. 1:20-CV-00034-ADA<br><br>JURY TRIAL DEMANDED |
| ANCORA TECHNOLOGIES, INC.,<br>.<br>Plaintiff,<br>v.<br><br>SAMSUNG ELECTRONICS CO., LTD., and SAMSUNG ELECTRONICS AMERICA, INC.,<br><br>Defendants. | CIVIL ACTION NO. 1:20-CV-00034-ADA<br><br>JURY TRIAL DEMANDED |

**ANCORA'S OPPOSED MOTION TO TRANSFER THE**
**ANCORA-SAMSUNG MATTER BACK TO WACO UNDER 28 U.S.C. § 1404(a)**

## INTRODUCTION

Ancora respectfully moves the Court to transfer this case from Austin to Waco for purposes of holding trial that is currently set to begin in less than two months. Because this case is set for trial in a courthouse that is not holding trials, and because the COVID-19 pandemic that caused the Austin courthouse's closure could not have been predicted, transfer is proper.

Currently, the jury trial between Ancora and Samsung is scheduled for April 19, 2021 in the Western District of Texas, Austin Division. *See* D.I. 142. But as this Court explained at a recent hearing, "Austin's not going to be open in April." D.I. 125 (Jan. 26, 2021 H'g Tr.) at 14:2-4. Nor is there any indication that the Austin Division will reopen in the "foreseeable future." *VLSI Tech. LLC v. Intel Corp.*, 2020 WL 8254867, at *4-5 (W.D. Tex. Dec. 31, 2020). Thus, the Court invited Ancora "to file a motion" for an intra-district transfer to the Waco Division—where Ancora initiated this action—if Ancora sought "to move forward with the trial date that is currently set." D.I. 125 at 14:6-16.

Ancora seeks precisely that. Indeed, Ancora seeks the same relief that this Court recently granted in the *VLSI* case. Because of the enormous effort and resources expended in preparing for the April 19 trial, and to avoid upending the Court's "extremely busy" docket, *VLSI*, 2020 WL 8254867, at *5, Ancora respectfully requests a transfer to the Waco Division under 28 U.S.C. §1404(a). Waco is a far more convenient forum because, among other reasons, trial actually can proceed in that forum.[1]

## BACKGROUND

On June 21, 2019, Ancora filed this patent-infringement action against the Samsung defendants in the Western District of Texas, Waco Division. The Court consolidated this action

[1] Ancora respectfully asks the Court to consider this Motion on an expedited schedule. With trial less than 2 months away, Ancora will need to book accommodations and other services whose cancellation period begins in March 2021. Samsung rejected Ancora's request for expedited briefing and consideration.

with a related patent-infringement suit that Ancora had filed in the same Division against two LG Electronics entities. D.I. 27. On January 9, 2020, at defendants' request, the parties stipulated to the entry of an order under 28 U.S.C. § 1404(b) transferring the consolidated action to the Austin Division. D.I. 33. The Court granted this request. D.I. 34. Ancora stipulated to this transfer because, at that time, Austin was also a convenient forum.

Circumstances have since changed dramatically and unexpectedly. Through no fault of the parties or the Court, the January 2020 transfer to Austin will delay the Ancora-Samsung trial "indefinitely" if the case is not transferred back to Waco. The Austin Division's courthouse "remains closed" with "no foreseeable end to the closure." *VLSI Tech. LLC v. Intel Corp.*, 2020 WL 6828034, at *2-3 (W.D. Tex. Nov. 20, 2020).[2] Just today, the Austin Division issued the Twelfth Order Relating to Entry Into the United States Courthouse Austin, Texas,[3] which is materially indistinguishable from the prior orders "extend[ing] the effective closure of the Austin courthouse." *VLSI*, 2020 WL 8254867, at *5 (discussing the December 21, 2020 Tenth Order).

The harmful effects of this limbo would cascade not just for Ancora, but also—and more importantly—for the Court's docket. As the Court recently explained in granting a materially similar transfer request, "[d]elaying one trial means moving another" because the Court is "extremely busy and has at least one trial scheduled every month now through 2022." *Id.* Among the many trials that would be logjammed by delaying this case is the *Ancora v. LG Electronics* matter, which is scheduled for trial in June 2021. *See* D.I. 142. Nor is there any convenience gained by waiting to hold trial in Austin rather than Waco. In fact, the parties' recently exchanged witness lists confirm that neither party intends to call an Austin-based witness to testify in person. *See* Seigel Decl. ¶¶ 4-5 & Exs. 1 & 2.

[2] *Vacated on other grounds*, 2020 WL 7647543 (Fed. Cir. Dec. 23, 2020).
[3] Available at https://bit.ly/37QnfX1.

By contrast, were this case transferred to Waco, trial could commence as scheduled. This Court "has conducted multiple in-person hearings since the pandemic began and continues to be prepared to conduct this trial and others in Waco going forward." *VLSI*, 2020 WL 8254867, at *5.

Simply put, § 1404(a) is designed for exactly the kind of intra-district transfers that Ancora now requests.

**LEGAL STANDARD**

As relevant, § 1404(a) provides: "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

As the Federal Circuit recently confirmed, this Court "has considerable discretion in deciding whether to transfer an action under § 1404(a)." *In re Intel Corp.*, ___ F. App'x ___, 2021 WL 217377, at *2 (Fed. Cir. Jan. 21, 2021) (permitting transfer from Austin to Waco). A district court's decision to transfer "will not [be] second guess[ed] … as long as there is plausible support in the record for that conclusion." *Id.* (quotation marks omitted). And where, as here, a party requests an intra-district transfer from one division to another, the Court enjoys "even greater discretion than … in the case of inter-district transfers." *VLSI*, 2020 WL 8254867, at *2 (citation omitted).

On a § 1404(a) motion to transfer, the Court analyzes two steps: (1) whether the case could have been properly brought in the forum to which transfer is sought, and (2) whether transfer would promote the interest of justice and/or convenience of the parties and witnesses. *Id.*; *see also In re Volkswagen of Am., Inc.*, 545 F.3d 304, 312 (5th Cir. 2008) (en banc) (similar). "The determination of 'convenience' turns on a number of public and private interest factors, none of which can be said to be of dispositive weight." *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 340 (5th Cir. 2004) (footnote omitted). The "private" interest factors include: "(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." *Id.* at 340 n.8. In turn, the "public" interest factors include: "(1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized controversies 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 of the application of foreign law." *Id.*

Further, "this Court retains discretion to retransfer an action back to the original district [or division] where it was filed when unanticipatable post-transfer events frustrate the original purpose for transfer." *VLSI*, 2020 WL 8254867, at *3 (citing *In re Cragar Indus., Inc.*, 706 F.2d 503, 505-06 (5th Cir. 1983)). "Such unanticipated post-transfer events, in conjunction with the traditional factors bearing on a § 1404(a) analysis, are the appropriate statutory authority for moving an action from one court to another intra-district court." *Id.*

## ARGUMENT

Like *VLSI*, this case should be transferred from Austin to Waco under § 1404(a).

### I. This Case Could Have Been (And Was) Brought in the Waco Division, And Unanticipatable Post-Transfer Events Frustrated the Original Purpose for Transfer to the Austin Division.

It is indisputable that Ancora could have brought this case in the Waco Division. Indeed, Ancora did initiate this action in that division, identifying appropriate grounds for venue. *See Ancora Techs., Inc. v. Samsung Elecs. Co. et al.*, No. 6:19-cv-385, D.I. 1 (Complaint) ¶¶ 10-16; *VLSI*, 2020 WL 8254867, at *3. Samsung admitted that venue was proper in the Western District as to Samsung Electronics Co. Ltd. No. 6:19-cv-385, D.I. 14 (Answer) ¶ 15. And Samsung consented to venue in the Western District in seeking a stipulation to transfer the case to the Austin Division. *See* D.I. 33.

To be sure, Samsung has suggested that, had the parties not stipulated to transfer the case to the Austin Division at the outset, Samsung might have moved to transfer venue to some other

unidentified district. *See* D.I. 125 (Jan. 26, 2021 H'g Tr.) at 15:9-14. But such a hindsight-based argument is irrelevant here. Ancora would have opposed such a motion, which is more than sufficient to support a transfer back to the Waco Division. *See VLSI*, 2020 WL 8254867, at *3 (holding that "the first step in the analysis [under § 1404(a)] supports transfer back to Waco" where the plaintiff "originally filed the case in Waco and opposed [a] motion to transfer the case[] to Austin"). Nor could Samsung have successfully disputed that venue was proper within the Western District of Texas given that (1) neither Samsung defendant contested personal jurisdiction; (2) Ancora properly alleged that Samsung Electronics America "committed acts of infringement and has a regular and established place of business" within the district, 28 U.S.C. § 1400(b); *see also* No. 6:19-cv-385, D.I. 1 (Complaint) ¶¶ 10-16; and (3) Samsung Electronics Co. Ltd. is an entity incorporated outside of the United States and thus can be sued in any federal court that has personal jurisdiction, *see In re HTC Corp.*, 889 F.3d 1349, 1356 (Fed. Cir. 2018) (affirming "centuries-old understanding that the venue laws . . . do not restrict the location of suits against [foreign] defendants").

Moreover, even if Samsung Electronics America once possessed venue-based objections, they were knowingly (and doubly) waived. "Improper venue is a waivable defense," *Realtime Data, LLC v. Rackspace US, Inc.*, 2017 WL 3254689, at *2 (E.D. Tex. July 21, 2017), and Samsung Electronics America waived it by first stipulating to have the case heard in Austin and then again by failing to preserve an improper venue objection in its Motion for Summary Judgment. *See id.* (rejecting motion to dismiss for improper venue filed right before *Markman* order issued where defendant "filed numerous discovery motions, . . . [issued] *Markman* briefing, and otherwise submitted to venue in this district"); *iLife Techs., Inc. v. Nintendo of Am., Inc.*, 2017 WL 2778006, at *5 (N.D. Tex. June 27, 2017) (finding defendant waived venue objection by admitting venue was proper in its answer and filing a Motion to Transfer Venue pursuant to § 1404(a), but failing to bring a timely motion under Rule 12(b)(3) and § 1400(b)); *Heyward v.*

*Pub. Hous. Admin.*, 238 F.2d 689, 695 (5th Cir. 1956) ("[Defendant] by filing the motion for summary judgment and thus putting at issue the merits of the case effectively waived whatever objection to venue as it may have had."). Had Samsung wanted to preserve an improper venue objection, it could have, but it chose not to.[4]

Nor can there be any dispute that "the Austin courthouse's closure due to COVID-19 was an unanticipated post-transfer event" and that "the pandemic presents a quintessential 'unusual and impelling circumstance' in which to order transfer." *VLSI*, 2020 WL 8254867, at *3 (quoting *Cragar*, 706 F.3d at 505). Ancora agreed in good faith to a stipulated transfer to Austin because, at the time, Samsung could credibly contend that Austin was convenient. More than a year later, that is no longer true: Just as in *VLSI*, the Austin Division's closure means that this case "is better tried in the original forum for reasons which became known after the original transfer order." *Cragar*, 706 F.2d at 505; *accord VLSI*, 2020 WL 8254867, at *3.

The first step of the § 1404(a) inquiry thus supports transfer. And the remaining factors confirm that "the pandemic has frustrated the original purpose of transferring the case to the Austin division." *Id.*

## II. The Fifth Circuit's Private Interest Factors Support Transfer.

### A. The "Relative Ease of Access to Sources of Proof" Factor Is Neutral.

This factor is neutral because the parties have already amassed and electronically stored their evidence. Here, as in *VLSI*, "document discovery is complete and available in electronic form to all counsel for all parties." *Id.* at *4. Specifically, the parties have exchanged exhibit lists

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[4] Samsung similarly cannot argue that it would have objected to "divisional venue" in the Waco Division of the Western District. That is because "there is no longer any requirement in federal civil cases that venue be laid in a particular division within a district" after the 1988 repeal of the divisional venue statute, 28 U.S.C. § 1393. *See* 14D Wright & Miller, *Federal Practice & Procedure* § 3809 (4th ed. 2020); *Beck v. Koppers, Inc.*, 2009 WL 230036, at *2 (N.D. Miss. Jan. 29, 2009) (denying second motion to transfer a series of trials from Greenville Division to Oxford Division where the Court had originally transferred case for trial from its duty station in Grenville to Oxford, then transferred back to Grenville, after concluding that it was "in the interests of justice to conduct the future trials in Greenville," and noting that "given the absence of a divisional venue statute, the subject practice does not run contrary to law").

identifying exclusively electronic materials, *see* Seigel Decl. ¶ 6, which are equally accessible in Waco as they are in Austin. Nor have the parties identified any Austin-based individual on their respective witness lists. *See id.* ¶¶ 4-5 & Exs. 1 & 2. This factor is no obstacle to transfer.

### B. The "Compulsory Process" Factor Is Neutral.

This factor is similarly neutral. It considers "the availability of compulsory process to secure the attendance of witnesses." *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) (per curiam). But because there are no "fact witnesses on either party's witness list" affected by the different subpoena radius of the Austin Division versus the Waco Division, *see VLSI*, 2020 WL 8254867, at *4, this factor provides no reason to remain in Austin.

### C. The "Cost of Attendance" Factor Favors Transfer.

This cost-sensitive factor favors transfer because holding the trial in Waco is cheaper than holding it in Austin. For one thing, "hotel costs in Waco are cheaper than in Austin." *Id.* For another, Ancora would not oppose any request by Samsung to have a properly designated Samsung witness testify by videoconferencing at trial, which would "fully alleviate inconvenience if there are witnesses … who do not wish to travel." *Id.* Moreover, most of Samsung's witnesses live outside of Texas, making Waco at least as convenient as Austin for travel and more economical for lodging. And to Ancora's knowledge, the only Texas-based witness Samsung intends to call is Shoneel Kolhatkar, who is based in Richardson, Texas. *See* Seigel Decl. ¶¶ 4-5 & Exs. 1 & 2.[5] Waco is undoubtedly more convenient because Mr. Kolhatkar would have to drive through it (and continue for another 100 miles) to reach Austin.

[5] Ancora reserves the right to seek exclusion of any trial testimony by Mr. Kolhatkar, given that Samsung first disclosed Mr. Kolhatkar as a potential witness on February 5, 2021, over two months after fact discovery closed and nearly a month after expert discovery closed.

In short, this factor favors transfer because Waco is far more cost-effective than Austin.

**D. The "All Other Practical Problems" Factor Firmly Favors Transfer.**

The Waco Division is overwhelmingly more convenient under this catch-all factor because "this case can only move forward in the Waco courthouse in the near future." *VLSI*, 2020 WL 8254867, at *5. As discussed above, "the Austin division … remains closed indefinitely," 2020 WL 6828034, at *2, a point reinforced by the Austin Division's recent order further extending its halt on all civil trials. Remaining in the Austin Division would indefinitely postpone the Ancora-Samsung trial and upset the rest of the Court's trial docket, including the Ancora-LG case set for trial just seven weeks later.

Transferring this matter to the Waco Division avoids these myriad practical problems. In contrast to Austin, the Waco Division "has conducted multiple in-person hearings since the pandemic began and continues to be prepared to conduct [trials] in Waco going forward," including the *VLSI* case being tried this week. 2020 WL 8254867, at *5. Not only that, but the Waco Division has been committed to holding trials safely, having adopted numerous measures designed to protect the well-being of all trial participants. *See VLSI Tech. LLC v. Intel Corp.*, No. 6:21-CV-00057-ADA (Feb. 10, 2021), D.I. 421; *see also* Divisional Standing Order Regarding Trials in Waco (Sept. 23, 2020).[6]

Nor is there any merit to Samsung's apparent objection to a transfer to Waco—or to having willing experts testify in person—based on a July 2020 request to conduct source code review remotely. *See* D.I. 125 (Jan. 26, 2021 H'g Tr.) at 17:6-19. To begin, Samsung's reference to a Boston-based non-testifying expert (Mr. Hoolooman), *id.*, is irrelevant because Ancora's Iowa-based testifying expert (Dr. Martin) is willing and able to travel to Waco for trial. In addition, the circumstances that warranted remote source code review are hardly comparable to trial testimony:

[6]Available at https://bit.ly/37MHa9h.

Plaintiffs' multiple experts spent hundreds and hundreds of hours over the course of months reviewing Samsung's source code, which required repeated cross-country flights to access a physical review location. Indeed, Ancora's experts (testifying and consulting) collectively spent over 1,000 hours (25 work weeks) conducting code review in both the LG and Samsung cases. That extended scenario stands in stark contrast to trial, where only one of Ancora's technical experts—Dr. Martin—would only have to travel once and be present for less than a week.

And notably, Ancora's non-testifying Boston-based experts stated their preference for remote review only after being notified of a positive COVID-19 case occurring in the building where Samsung was hosting code review. *See* D.I. 90 (July 27, 2020 H'g Tr.) at 7:9-14. In contrast, here the Court has issued orders intended to preclude just such an outcome. Further, knowledge about the virus itself has continued to evolve, including techniques as to how to minimize the risk of exposure and infection.

Finally, the situation in Waco now is significantly different now than it was then: As of July 2020, the Waco Division had not yet analyzed its local circumstances to determine whether it could hold in-person trials. Since then, the Court has ordered two Divisional Standing Orders Regarding Trials in Waco detailing the Court's findings that it "may safely conduct trials" in the Division.[7]

In short, because the "Austin courthouse is closed for the foreseeable future, but the Waco courthouse is open, this factor weighs in favor of transferring the case to Waco for a[n] [April] trial." *VLSI*, 2020 WL 8254867, at *5.

## III. The Fifth Circuit's Public Interest Factors Support Transfer.

Transferring this case from Austin to Waco furthers the public interest too.

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[7] Available at https://bit.ly/3bEx8YP; https://bit.ly/37MHa9h.

### A. The "Administrative Difficulties Flowing From Court Congestion" Factor Favors Transfer.

As the Court is well aware, it is "extremely busy and has at least one trial scheduled every month now through 2022"—and possibly beyond. *VLSI*, 2020 WL 8254867, at *5. As a result, the inability to try this case in Austin for the foreseeable future would upend not only Ancora-LG trial, but the rest of the Court's docket as well: "Delaying one trial means moving another." *Id.* This factor undoubtedly supports transfer, especially because the same District Judge would preside.

### B. The "Localized Interest" Factor Is Neutral.

Although Samsung maintains facilities in Austin, *see* No. 6:19-cv-385, D.I. 1 (Complaint) ¶¶ 10-13, the parties' evidence is electronic. And none of Samsung's proposed witnesses is based in Austin. Again, Samsung's only Texas-based witness, Shoneel Kolhatkar, would have to travel through Waco to get to Austin. *See* Seigel Decl. Ex. 2 (Kolhatkar LinkedIn Profile) at 1. Thus, this factor supports transfer even more so than in *VLSI*—where the Court granted an Austin-to-Waco transfer despite finding that this factor weighed against it. *See* 2020 WL 8254867, at *6.

### C. The Remaining Public Factors Are Neutral.

None of the other public-interest factors outweigh the compelling reasons to transfer this case. The remaining factors—the forum's familiarity with governing law or potential conflicts of law—are inapposite. *See id.* at *6 (finding these factors neutral). Whether in Waco or Austin, the Court and parties will continue to adhere to binding Fifth Circuit and Federal Circuit law.

## CONCLUSION

Immense time, energy, and resources have been expended in preparing for the April 19 trial. To ensure that this trial occurs as scheduled—and cognizant of the Court's full docket—Ancora requests that this Court transfer the Ancora-Samsung action to the Waco Division under 28 U.S.C. § 1404(a). This case is ready to proceed. The only thing stopping it is the venue.

Date: February 25, 2021

*/s/ Steven M. Seigel*
Charles Ainsworth
State Bar No. 00783521
Robert Christopher Bunt
State Bar No. 00787165
PARKER, BUNT & AINSWORTH, P.C.
100 E. Ferguson, Suite 418
Tyler, TX 75702
903/531-3535
charley@pbatyler.com
rcbunt@pbatyler.com
Lexie G. White (Texas 24048876)
SUSMAN GODFREY LLP
1000 Louisiana Street, Suite 5100
Houston, Texas 77002
Tel: (713) 651-9366
Fax: (713) 654-6666
lwhite@susmangodfrey.com

Andres Healy (*pro hac vice*)
Steven M. Seigel (*pro hac vice*)
Nicholas S. Crown (*pro hac vice*)
SUSMAN GODFREY LLP
1201 Third Avenue, Suite 3800
Seattle, Washington 98101
Tel: (206) 516-3880
Fax: 206-516-3883
ahealy@susmangodfrey.com
sseigel@susmangodfrey.com
ncrown@susmangodfrey.com

Zachary B. Savage (*pro hac vice*)
SUSMAN GODFREY LLP
1301 Avenue of the Americas, 32nd Floor
New York, New York 10019
Tel: (212) 336-8330
Fax: (212) 336-8340
zsavage@susmangodfrey.com

**COUNSEL FOR PLAINTIFF ANCORA TECHNOLOGIES, INC.**

## CERTIFICATE OF SERVICE

I hereby certify that all counsel of record, who are deemed to have consented to electronic service are being served this 25th day of February, 2021, with a copy of this document via the Court's CM/ECF system.

/s/ *Steven M. Seigel*
Steven M. Seigel

## CERTIFICATE OF CONFERENCE

I certify that on the 25th day of February, 2021, counsel for Ancora conferred with counsel for Samsung concerning the relief sought in this Motion, and was advised that counsel for Samsung opposed this Motion.

/s/ *Steven M. Seigel*
Steven M. Seigel