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

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

DEFENDANTS SAMSUNG ELECTRONICS CO., LTD. AND SAMSUNG ELECTRONICS AMERICA, INC.'S OPPOSITION TO PLAINTIFF'S MOTION TO TRANSFER THE ANCORA-SAMSUNG MATTER BACK TO WACO UNDER 28 U.S.C. § 1404(a)

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I. INTRODUCTION

The Court should hold Ancora to its agreement to transfer this action to Austin pursuant to 28 U.S.C. § 1404(b) and deny its motion to transfer back to Waco. Ancora's motion is based on the convenience factors of 28 U.S.C. § 1404(a), but that provision is irrelevant to its request. More than one year ago, at a time when no trial had been set, Ancora and Samsung stipulated to the entry of an order transferring this action to Austin. In exchange, Samsung relinquished its right to challenge venue in the Western District. Ancora now seeks to transfer this action back to Waco merely because it prefers an April 2021 trial date over a trial date occurring later this year. The Court should deny Ancora's attempt to renege on its agreement.

Indeed, when the possibility of a transfer to Waco was initially raised, the Court instinctively understood the significance of the parties' stipulation and indicated a preference for this action to remain in Austin so long as the trial is likely to occur in 2021:

> And I know you know that. I'm just saying I would very much prefer for your – because you all had this agreement, I would love for this case to go to trial in Austin. That would be absolutely fine with me.
>
> If within a reasonable time, either in April, or a reasonable time after that, barring any horrible calamity, I was – I could tell you all we can go to trial in Austin, that's where we'll go to trial. I'm not going to move it to Waco unless the alternative to moving it to Waco is that it might not get tried this year. . . .
>
> And so – because I want you to be able to tell your clients that as well. It's not to hold the trial in April. It is to hold it in 2021, which I don't think is an unfair assertion.

(Disc. Hr'g Tr. 15:15-17:4 January 26, 2021). The Court's inclination to keep this action in Austin is correct. The parties freely negotiated a transfer from Waco to Austin, and Samsung surrendered its statutory rights to object to venue as part of the bargain. Thus, the Court should evaluate Ancora's motion under the framework set forth by the Supreme Court in *Atlantic*

Marine, which mandates that agreements between parties regarding an agreed-to forum should not be disturbed absent extraordinary circumstances. *See Atl. Marine Const. Co. v. U.S. Dist. Ct. for W. Dist. of Texas*, 571 U.S. 49, 64–66 (2013). No such extraordinary circumstances exist in this case. Given the decrease in COVID-19 cases and the increase of vaccinations, trial in Austin is likely to occur this year. Ancora should not be permitted to renege on its promise merely because it prefers to keep the April 2021 trial date, which does not rise to the extraordinary circumstances requirement of *Atlantic Marine*, and this matter should remain in Austin. The Court should deny Ancora's motion and hold a status conference after the Austin division reopens to schedule a trial in Austin in 2021.

II. BACKGROUND

On June 21, 2019, Ancora filed suit in the Waco division. ECF 001 (Complaint). On January 9, 2020, the parties filed a stipulation with the Court formalizing their agreement to transfer this action to Austin pursuant to 28 U.S.C. § 1404(b). ECF 033 (Joint Stip.). The Court thereby ordered transfer. ECF 034 (Order). As reflected in the stipulation, Samsung consented to venue in the Western District on the condition that the case be tried in Austin:

> NOW, THEREFORE, Ancora, LG, and Samsung, through each's respective counsel, hereby jointly stipulate to the entry of an Order transferring the above-captioned actions to the United States District Court for the Western District of Texas, Austin Division, pursuant to 28 U.S.C. § 1404(b). Defendants further stipulate and agree that LG and Samsung each waives any right it may have to object to venue or move to transfer either above-captioned action to another division or district.

ECF 033. Despite not challenging the validity of the stipulation, Ancora now requests that the Court move the case back to Waco under the convenience factors. Mot. at 3. Importantly, Ancora does not do so under any provision in the stipulation.

III. LEGAL STANDARD

It is a deeply rooted principle in the law that contractual provisions between parties

should generally not be disturbed. *Palmer v. Chamberlin*, 191 F.2d 532, 542 (5th Cir. 1951) (citing *Steele v. Drummond*, 275 U.S. 199, 205 (1927)) ("[I]t is a matter of great public concern that freedom of contract be not lightly interfered with."). In accordance with this principle, the Supreme Court in *Atlantic Marine* held, "When parties have contracted in advance to litigate disputes in a particular forum, courts should not unnecessarily disrupt the parties' settled expectations . . . . In all but the most unusual cases, therefore, 'the interest of justice' is served by holding parties to their bargain." *Atl. Marine*, 571 U.S. at 66. Accordingly, the party seeking to defy an agreement as to the appropriate forum bears the burden of showing why extraordinary circumstances dictate not enforcing the parties' agreement. *Id.* at 63.

In the context of an agreed-to forum, a court evaluating a motion to transfer pursuant to 28 U.S.C. § 1404(a) "should not consider arguments about the moving party's private interests" because the parties have waived challenges to the convenience of that forum for themselves and their witnesses. *Id.* at 64. "A court accordingly must deem the private-interest factors to weigh ***entirely*** in favor of the preselected forum." *Id.* (emphasis added) (citing *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988); *Bremen v. Zapata Off–Shore Co.*, 407 U.S. 1, 17–18 (1972) ("[w]hatever 'inconvenience' [the parties] would suffer by being forced to litigate in the contractual forum as [they] agreed to do was clearly foreseeable at the time of contracting.").

The public-interest factors (which may be considered) will rarely support a transfer motion from the agreed-to forum. For instance, in *Howmedica Osteonics Corp. v. Sarkisian*, 2015 WL 1780941, *7 (D.N.J. Apr. 20, 2015), the district court characterized the facts as "the 'unusual' case identified in *Atlantic Marine* that should be transferred" because (1) enforcing the parties' agreements would "divide the case . . . into three separate cases, in three different venues" and (2) California, not New Jersey, had a "strong public interest" in the case since it

"involve[d] the rights of California citizens ability to work in California." *Id.* at *3, *9. The court therefore declined to follow *Atlantic Marine.* The Third Circuit reversed the district court. *In re: Howmedica Osteonics Corp.*, 867 F.3d 390 (3d Cir. 2017). The Third Circuit did not find that these reasons constituted extraordinary circumstances under *Atlantic Marine* and clarified that the parties' bargained-for agreements should not be set aside even when it may appear as if there are strong public interests against enforcement. *Id.* at 402–06; *see also Atl. Marine*, 571 U.S. at 51 ("Because public-interest factors will rarely defeat a transfer motion, the practical result is that forum-selection clauses should control except in unusual cases.").

IV. ARGUMENT

The Court should uphold the parties' stipulation and reject Ancora's attempt to renege on its agreement to hold trial in Austin. Here, honoring the stipulation would result in likely delaying the trial by only a few months. This is not the extraordinary circumstance contemplated in *Atlantic Marine* that would excuse the enforcement of the stipulation.[1]

A. THE COURT SHOULD ENFORCE THE PARTIES' STIPULATION

The parties negotiated a stipulation for this matter to proceed in Austin in order to resolve any potential disputes as to venue—it was deemed to be the fairest forum for all litigants to proceed. It remains the fairest forum, and the parties' agreement should be enforced. In *Atlantic Marine*, the Supreme Court, in addressing a forum selection clause, stated that "[t]he calculus changes . . . when the parties' contract contains a valid forum-selection clause" because such a clause "represents the parties' agreement as to the most proper forum," and the enforcement of

[1] While Ancora relies heavily on the *VLSI v. Intel* decision, Ancora fails to mention that, unlike the parties in *VLSI* who never agreed on the proper venue from the outset, the parties in this matter entered a formal agreement. *See VLSI Tech. LLC v. Intel Corp.*, 2020 WL 8254867, at *1 (W.D. Tex. Dec. 31, 2020) (discussing the parties' dispute over an inter-district and then an intra-district transfer prior to the re-transfer to Waco). The decision there turned on convenience factors. *Id.* at *6. The decision here should turn on the stipulation.

agreements, "bargained for by the parties, protects [the parties'] legitimate expectations and furthers vital interests of the justice system."*Atl. Marine*, 571 U.S. at 63. The court further held that because "the overarching consideration under § 1404(a) is whether a transfer would promote 'the interest of justice,' 'a valid forum-selection clause [should be] given controlling weight in all but the most exceptional cases.'" *Id.* Thus, the interest of justice would be severely undermined if Ancora were to succeed in unilaterally voiding the parties' agreement.

In fact, the reasoning in *Atlantic Marine* is even more applicable to the instant dispute, wherein the parties negotiated to litigate ***this specific dispute*** in a particular division, whereas forum-selection clauses are negotiated for hypothetical future disputes that may arise. The parties here intentionally and knowingly entered an agreement to litigate this specific matter in Austin, and this agreement should be enforced. *Zapata Off–Shore Co.*, 407 U.S. at 12–13 ("There are compelling reasons why a freely negotiated private . . . agreement, unaffected by fraud, undue influence, or overweening bargaining power, . . . should be given full effect.").

1. Delay of a few months does not amount to extraordinary circumstances that justify voiding the stipulation between the parties.

A several-month delay to the current trial date would not result in manifest injustice, thereby providing justification to nullify the parties' agreement. The Court has already delayed the original trial date as between LG and Ancora from April 2021 to June 2021 based on discovery related delays. ECF 129. Moreover, courts routinely stay cases resulting in a delay to the original trial date in many cases even when the plaintiff opposes. *E.g.*, *Papst Licensing GmbH & Co., KG v. Apple, Inc.*, 2018 WL 3656491, at *6 (E.D. Tex. Aug. 1, 2018) (granting stay in part pending appeal of IPR); *Smartflash LLC v. Apple Inc.*, 621 F. App'x 995, 1004–06 (Fed. Cir. 2015) (reversing the district court's denial of a stay in part pending review of a CBM petition). No such rulings have been found to be manifestly unjust.

The alleged alleviation of congestion of the Court's docket also does not present extraordinary circumstances, especially when this is just one case among many currently on the docket and a denial of the transfer would not materially impact the Court's current docket. Indeed, Ancora has not shown that any other litigants, besides Samsung and LG, have a stipulated forum in place, so this case is likely to be the only one that would require adjustment to the Court's schedule since LG's case is scheduled for trial in June. Ancora therefore cannot show that enforcement of the stipulation would result in a manifest injustice, akin to depriving Ancora of its day in Court. *See Zapata Off–Shore Co.*, 407 U.S. at 17–18 ("[I]t should be incumbent on the party seeking to escape his contract to show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain.").

2. Samsung did not waive its objections to venue in Waco.

Ancora argues that the case could have been brought in Waco because the case was filed there. (Mot. at 4) This circular argument is incorrect because venue was not proper as to SEA, as Samsung indicated in its answer.[2] When the parties reached the agreement, Samsung did not

[2] Though Samsung agreed in the stipulation not to contest venue in Austin, Ancora fails to mention that prior to the parties' agreement on venue Samsung explicitly preserved its objections to venue in its answer. ECF 014 (Answer) ¶ 15 ("SEC denies that venue in this District is convenient and reserves the right to seek transfer to a more appropriate or convenient forum. SEA denies that venue properly lies in this District."). Ancora cites several cases regarding waiver of venue (Mot. at 5-6), but those cases are inapposite because the defendants in those cases failed to object to venue in a timely manner or proceeded without preserving their objections to venue. In contrast, Samsung preserved objections to venue in its answer and the parties' stipulation (ECF. 33). Additionally, unlike the parties in the cases Ancora cites, Samsung and Ancora were operating under an agreement regarding venue, so additional objections were not necessary until the current motion before the Court. Ancora also argues that Samsung could not allege venue was improper in Waco because the parties agreed to venue in Austin and the divisional venue statute was repealed. Mot. at 6, n.4. This argument also fails because again

agree to waive objections to any other forum outside of Austin. Ancora misconstrues Samsung's agreement to proceed in Austin as a broad waiver to any and all objections to venue that might later arise. Thus, Ancora apparently argues that once the parties agreed to move the case to Austin, Samsung waived the right to challenge a unilateral attempt by Ancora to void the agreement and re-transfer the case back to Waco. But Samsung only agreed to forego its statutory right to object to venue based on a stipulation that the suit would proceed in Austin, which Ancora now seeks to rescind. Any other understanding would make no sense.

Ancora's argument that Samsung failed to challenge venue in its motion for summary judgment contradicts its contention that Samsung agreed to waive objections to venue in the parties' stipulation. Samsung had no reason to challenge venue in its motion for summary judgment because Samsung appropriately relied on the stipulation. Indeed, Samsung's alleged waiver in relying on the stipulation further shows the prejudice to Samsung if that reliance is now unjustifiably deprived. Ancora cannot in the same breath seek to void the agreement and seek to hold Samsung to the agreement by asserting that Samsung waived objections to venue under the agreement. Only Samsung's bargained-for benefit in consenting to venue would be voided by re-transferring the case to Waco, as Samsung continues to object to venue.

3. Ancora's argument about a hypothetical transfer motion is irrelevant.

Ancora also argues that Samsung would have lost a motion to transfer out of the Waco Division if it had filed one. But even if this were true (it is not), Ancora's argument has no bearing on the enforceability of the parties' stipulation to proceed in Austin. Samsung gave up its statutory right to challenge venue as consideration for the agreement to proceed in Austin, and

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Samsung did not enter a blanket waiver to venue in any other circumstances than the parties' agreement to proceed in Austin. Ancora's motion and hypotheticals about what Samsung could argue ignore the parties' stipulation to proceed in Austin.

Ancora has not given any reason why the stipulation should be disregarded in its favor now that it regrets the consequences of its bargain. *See Wagner v. NutraSweet Co.*, 95 F.3d 527, 532 (7th Cir. 1996) ("As long as the person receives something of value in exchange for her own promise or detriment, the courts will not inquire into the adequacy of the consideration.").[3]

B. TRIAL IS LIKELY TO PROCEED IN AUSTIN IN THE NEAR FUTURE

It is Ancora's burden to show that trial is not likely to proceed in 2021. Ancora attempts to show this merely by citing to the January 2021 *VLSI* decision and the discussion therein regarding trial scheduling during the COVID-19 pandemic. The COVID-19 situation is starkly different now. The Austin courthouse's closure is not "indefinite." In fact, the Court's Twelfth Order, Texas explicitly states that it is effective through March 31, 2021 unless modified or extended.[4] Texas public health officials report that COVID-19 cases are falling sharply and vaccination rates are rising steadily in Texas.[5] In fact, just this week the governor lifted many of the COVID-19 statewide restrictions amid declining rates.[6] Additionally, public health researchers estimate that even if the current pace of vaccinations does not increase, the United States will likely reach herd immunity by July 2021.[7] Given these circumstances, the courthouse

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[3] When consideration is given and accepted as part of a stipulation or contract, courts should set aside the agreement only for unconscionability, for which there is no basis and no argument from Ancora. *See Garcia v. LumaCorp, Inc.*, 429 F.3d 549, 555 (5th Cir. 2005) ("[F]or consideration to be deemed inadequate under Texas law, 'it must be so grossly inadequate as to shock the conscience, being tantamount to fraud.'") (citation omitted).

[4] *See* https://bit.ly/37QnfX1.

[5] *See* https://www.kwtx.com/2021/02/24/as-covid-19-ebbs-in-central-texas-officials-look-to-accelerate-pace-of-vaccinations/.

[6] *See* https://www.msn.com/en-us/news/us/texas-lifts-mask-mandate-amid-falling-virus-hospitalizations/ar-BB1eaduv.

[7] *See* https://www.nytimes.com/interactive/2021/02/20/us/us-herd-immunity-covid.html.

is likely to reopen soon and this matter is likely to proceed to trial in 2021.[8]

C. PROPER CONSIDERATION OF THE 28 U.S.C. § 1404(a) FACTORS WEIGH IN FAVOR OF KEEPING THE TRIAL IN AUSTIN

Both the private and public factors weigh against a transfer.

1. Though the private factors are irrelevant, they do not favor transfer.

This Court should not consider the private-interest factors because convenience of the parties is not a relevant consideration when those same parties agreed to the forum in which the dispute is currently being litigated. *Atl. Marine*, 571 U.S. at 64. Even if the Court were to consider these factors, they would weigh against a transfer. Though Ancora admits that the private factors are largely neutral, it argues "cost of attendance" weighs in favor of transfer based primarily on hotel costs. However, the Court has considered hotel costs and travel time in the context of a motion for a transfer and concluded that the "Austin and Waco Divisions are equally convenient for out-of-state witnesses." *VLSI Tech. LLC v. Intel Corp.*, 2019 WL 8013949, at *5 (W.D. Tex. Oct. 7, 2019). In any event, Ancora was aware of hotel costs when it agreed to hold trial in this action in Austin.

Moreover, the convenience of the witnesses is often the most important factor in determining whether a venue is appropriate. *See Denver & Rio Grande W. Ry. Co. v. Brotherhood of R.R. Trainmen*, 387 U.S. 556, 560 (1967) ("[V]enue is primarily a matter of convenience of litigants and witnesses"). Ancora's argument that Waco is more convenient for its witnesses is not credible.[9] Ancora's other convenience arguments relate to time-to-trial

[8] In a submission to the PTAB in the fall of 2020 Samsung argued that the trial date was uncertain. But the uncertainty about the COVID situation has significantly diminished since then with cases dropping precipitously and the widespread availability of COVID-19 vaccines.

[9] Ancora previously represented to the Court that its technical expert, Dr. Martin, was "quite nervous" about traveling to Tyler or within his city of residence to review Samsung's source code. (7/27/20 Hrg. Tr.). Ancora cannot now argue that it is more convenient for Dr. Martin to

considerations that it disguises as "all other practical problems." Notably, a decision to transfer based on time to trial alone is improper. *In re Apple*, 979 F.3d 1332, 1344 & n.5 (Fed. Cir. 2020) ("the speed of the transferee district court should not alone outweigh all [the] other factors."); *see also In re Adobe Inc.*, 823 F. App'x 929, 932 (Fed. Cir. 2020) ("[T]he district court erred in giving this factor dispositive weight."). Therefore, these factors do not support a transfer.

2. The public factors weigh against a transfer.

Ancora concedes that the public interest factors are primarily neutral. Ancora argues about "administrative difficulties" only and points to the Court's backlog of cases. But vague assertions regarding "congestion" or "backlog" do not rise to the extraordinary circumstances that warrant transfer. *Atl. Marine*, 571 U.S. at 64. Under the Section 1404(a) convenience analysis such concerns are hardly dispositive. *Id.* at 62. Indeed, "[a] contractual choice-of-forum clause should be held unenforceable [only] if enforcement would contravene a strong public policy of the forum in which suit is brought . . . ." *Zapata Off–Shore Co.*, 407 U.S. at 15; *see also Atl. Marine*, 571 U.S. at 51 ("public-interest factors will rarely defeat a transfer motion"); *Howmedica Osteonics,* 867 F.3d at 408-10 (finding public interest in holding one single trial over three separate trials in the forum with the strongest interest insufficient to trump forum selection clause). There is no such strong public policy arguments here.[10]

V. CONCLUSION

For the foregoing reasons, the Court should deny Ancora's motion.

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travel to Waco to attend trial when he previously did not want to venture out in his own city.

[10] Samsung does not address whether unanticipated post-transfer events frustrate the original purpose of the transfer pursuant to *In re Cragar Indus., Inc.*, 706 F.2d 503, 505 (5th Cir. 1983), because that case considered an initial transfer made under 28 U.S.C § 1404(a), whereas here the parties stipulated to a transfer under § 1404(b). However, although the pandemic could not have been predicted, a delay of a few months does not frustrate the original purpose of the transfer and is insufficient to void the parties' stipulation.

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Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that all counsel of record who have consented to electronic service are being notified of the filing of this document via the Court's CM/ECF system per Local Rule CV-5(b)(1).

/s/ *Robert T. Haslam*
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