No. 20-____

IN THE
Supreme Court of the United States

SYNKLOUD TECHNOLOGIES, LLC,
Petitioner,

v.

ADOBE, INC.,
Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Federal Circuit wrongly overruled a district court judge's discretionary 1404(a) transfer decision when rational basis exists for all of the transfer factors and the "extraordinary error" standard was not met when multiple factors favored plaintiff's chosen venue including the completion of third-party discovery in the current forum, the court congestion factor and the only evidence supporting transfer was set forth in self-serving declarations from defendant.

2. Whether the equities lie considerably against granting mandamus, *United States v. Dern*, 289 U.S. 352, 359 (1933), *Zabel v. Tabb*, 430 F.2d 199, 208 (5th Cir. 1970) and *In re Telular Corp.*, 319 F. App'x 909, 911 (Fed. Cir. 2009), when defendant operates in, hires employees and transacts business in transferor forum; and in contrast (i) plaintiff is not subject to personal jurisdiction or venue in the transferee forum, (ii) a declaratory judgment action of patent non-infringement could not have been brought against plaintiff in the transferee forum, and (iii) a small business such as plaintiff would be forced to incur significant delays and significantly greater costs and expenses in the transferee forum.

3. Whether the district court's lack of explanation requires the Federal Circuit to remand the case back for an explanation instead of drastically ruling that

there was a clear abuse of discretion leading to a patently erroneous result, *see In re Archer Directional Drilling Servs., L.L.C.*, 630 F. App'x 327, 329 (5th Cir. 2016) (citing *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 310-11 (5th Cir. 2008)).

PARTIES TO THE PROCEEDING

Petitioner SynKloud Technologies, LLC was the plaintiff in the United States District Court, Western District of Texas, Case No. 6:19-cv-00527-ADA, and respondent in the proceeding before the United States Court of Appeals for the Federal Circuit, Case No. 2020-126. Respondent Adobe, Inc. was the defendant in the United States District Court, Western District of Texas, Case No. 6:19-cv-00527-ADA and petitioner before the United States Court of Appeals for the Federal Circuit, Case No. 2020-126.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, petitioner SynKloud Technologies, LLC states that its parent company is IdeaHub Inc., which owns 100% of its stock.

RELATED PROCEEDINGS

Proceedings directly related to this case within the meaning of Rule 14.1(b)(iii) are:

- *In re Adobe Inc.,* 20-126 (Fed. Cir.) (petition granted July 28, 2020; panel rehearing and rehearing *en banc* denied September 30, 2020)
- *SynKloud Technologies, LLC v. Adobe Inc.*, 3:20-cv-07760-WHA (N.D. Cal., order granted November 3, 2020) (transferred from W.D. Tex.)
- *SynKloud Technologies, LLC v. Adobe Inc.*, 6:19-cv-00527-ADA (W.D. Tex.) (order denied June 15, 2020) (original case transferred to N.D. Cal.).

Other proceedings not directly related to this case but involving the same parties are:

District Courts

- *SynKloud Technologies, LLC v. BLU Products, Inc.*, 19-cv-00553 (Mar. 22, 2019, D. Del.) (voluntarily dismissed without prejudice);
- *SynKloud Technologies, LLC v. Dropbox, Inc.* 19-cv-00525 (Sept. 6, 2019, W.D. Tex.) (pending);
- *SynKloud Technologies, LLC v. Dropbox, Inc.* 19-cv-00526 (Sept. 6, 2019, W.D. Tex.) (pending);
- *SynKloud Technologies, LLC v. HP Inc.*, 19-cv-01360 (Jul. 22, 2019, D. Del.) (pending);

- *Microsoft Corp. v. SynKloud Technologies, LLC.*, 20-cv-00007 (Jan. 3, 2020, D. Del.) (pending);

Patent Trial and Appeal Board

- *Unified Patents, LLC v. SynKloud Technologies, LLC*, IPR2019-01655 (Sept. 30, 2019) (*inter partes* review instituted for U.S. Patent No. 9,098,526).

- *Microsoft Corporation and HP Inc. v. SynKloud Technologies, LLC*, IPR2020-00316 (Dec. 20, 2019) (*inter partes* review instituted for U.S. Patent No. 9,098,526);

- *Microsoft Corporation and HP Inc. v. SynKloud Technologies, LLC*, IPR2020-01031 (Jun. 4, 2020) (petition for *inter partes* review of U.S. Patent No. 10,015,254 pending);

- *Microsoft Corporation and HP Inc. v. SynKloud Technologies, LLC*, IPR2020-01032 (Jun. 4, 2020) (petition for *inter partes* review of U.S. Patent No. 10,015,254 pending);

- *Adobe Inc. v. SynKloud Technologies, LLC*, IPR2020-01235 (Jul. 3, 2020) (petition for *inter partes* review of U.S. Patent No. 10,015,254 pending);

- *Adobe Inc. v. SynKloud Technologies, LLC*, IPR2020-01301 (Jul. 3, 2020) (petition for *inter partes* review of U.S. Patent No. 9,219,780 pending);

- *Microsoft Corporation and HP Inc. v. SynKloud Technologies, LLC*, IPR2020-01271 (Jul. 16, 2020) (petition for *inter partes* review of U.S. Patent No. 9,239,686 pending);

- *Microsoft Corporation and HP Inc. v. SynKloud Technologies, LLC*, IPR2020-01269 (Jul. 20, 2020) (petition for *inter partes* review of U.S. Patent No. 9,219,780 pending);

- *Microsoft Corporation and HP Inc. v. SynKloud Technologies, LLC*, IPR2020-01270 (Jul. 20, 2020) (petition for *inter partes* review of U.S. Patent No. 9,219,780 pending);

- *Adobe Inc. v. SynKloud Technologies, LLC*, IPR2020-1392 (Jul. 31, 2020) (petition for *inter partes* review of U.S. Patent No. 9,239,686 pending);

- *Adobe Inc. v. SynKloud Technologies, LLC*, IPR2020-1393 (Jul. 31, 2020) (petition for *inter partes* review of U.S. Patent No. 9,239,686 pending);

- *Microsoft Corporation and HP Inc. v. SynKloud Technologies, LLC*, IPR2020-00174 (Nov. 11, 2020) (petition for *inter partes* review of U.S. Patent No. 7,870,225 pending);

- *Microsoft Corporation and HP Inc. v. SynKloud Technologies, LLC*, IPR2020-00175 (Nov. 11, 2020) (petition for *inter partes* review of U.S. Patent No. 7,870,225 pending).

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes & Other Authorities:

No. 20-____

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SynKloud Technologies, LLC respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Federal Circuit in this case.

OPINIONS BELOW

The court of appeals' opinion (App., below, ADD1-ADD7[1]) overruling the district court discretionary denial of transfer is reported at AppxA. The district court transfer hearing transcript is reported at AppxB; it includes discussion of another case against unrelated defendant, Dropbox before the same district court. The court of appeal's denial of the rehearing and *en banc* petition is reported at AppxC.

STATEMENT OF JURISDICTION

The district court's discretionary judgment denying transfer was entered on March 27, 2020. A notice of appeal was filed on April 27, 2020 and the case was docketed in the court of appeals on April 28, 2020 (Fed. Cir., No. 20-126). The court of appeals order was entered on July 28, 2020. Petition for rehearing was filed on August 28, 2020 and were denied on September 30, 2020.

On March 19, 2020, this Court extended the time within which to file a petition for a writ of certiorari to 150 days from the date of the court of appeals order denying discretionary review, or order denying a timely petition for rehearing. The effect of that order was to extend the deadline for filing a petition for a writ of certiorari to March 1, 2021.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] ADD1-ADD7, Appx1-1132 and SAppx1-64 are citations to the appendices in the record below.

STATUTORY PROVISION INVOLVED

The pertinent statutory provision is 28 U.S.C. 1404(a) and is reprinted at Appendix D.

PRELIMINARY STATEMENT

The appeal concerns whether, in patent and other similarly-situated cases, transfer rulings on convenience factors in 1404(a) effectively require district court judges to transfer cases to the venues of large corporations' primary headquarters, notwithstanding the district court's discretionary authority to consider that fact as just one among many in rendering its decision under controlling Fifth Circuit precedent.

The Federal Circuit's non-precedential decision at issue here is the first mandamus petition granted on appeal from the Western District of Texas ("WDTX"). In doing so, the Federal Circuit reweighed the evidence to choose its preferred interpretation of evidence that district court had already considered and reached its own conclusions (as indicated by its Order reversing the district court's reasonable analysis of compulsory process, sources of proof, cost of attendance and court congestion).

The Federal Circuit also largely ignored other pertinent evidence that the district court carefully considered and found supported denial of the transfer motion. This evidence opposing transfer included the fact that the identified third party subpoenas were already served and responded to completely, with no motion to quash, and that the only identified witness was willing to appear in the

transferor forum. The Federal Circuit's analysis also gave no weight to the court congestion factor, practically removing the factor in its entirety from the transfer for convenience analysis. The Federal Circuit's selective analysis and reweighing of the evidence cannot lead to reversal under the clear abuse of discretion standard of review.

This petition raises a significant question concerning the proper institutional roles of trial and appellate courts and whether fidelity will be given to the governing standards of review that demarcate the roles of trial and appellate courts in the performance of justice. Standards of review are prisms that delimit appellate authority to reverse while permitting trial courts to exercise their discretion on a wide swath of issues. The trial court's discretionary authority may result in a variety of outcomes, which under current precedent, cannot be second-guessed (even in the event a court of appeals sat in the first instance and would have chosen a different outcome).

Because of the importance to the proper functioning of our legal system, these standards of review and deference to the trial court's discretionary authority should be employed by the Federal Circuit strictly and honored faithfully. This is especially true when the Federal Circuit applies another circuit's law (in this case, the Fifth Circuit) and as such should not use its intermediate Federal Circuit case law to stray further away from these overarching, fundamental tenets of our legal system.

The underlying legal question presented to the sound discretion of the district

court was whether transfer was clearly more convenient than not – a very high yardstick for defendants given the substantive test's demand of "clearly." The question on the court of appeals' subsequent mandamus review was and now before this Court is whether the district court's ruling on that question was a clear abuse of discretion. The court of appeals essentially concluded that, despite the district court's weighing of the factors and concluding Adobe did not meet the high "clearly more convenient" standard, the district court erred in its weighing of the evidence, which the court of appeals labeled a clear abuse of discretion.

A clear abuse of discretion cannot be found as a matter of law, where a legally deferential balancing test is concluded to be close but on the side of not justifying transfer. In effect, the court of appeals reweighed the factors in the first instance and concluded it would have reached a different result. But that is not the law.

The defendant makes much hoopla about Texas, the district Judge, and the unfairness of being subjected to patent litigation there. But this appeal is not about East Texas or East Texas patent litigation of the aughts. It is about Austin and West Texas today. Austin is indisputably a burgeoning new Silicon Valley in the Southwest where the defendant conducts substantial business, has two offices, has multiple witnesses residing, and has hundreds employed.

In essence, it is a geographic location that defendant avails itself of to employ citizens, conduct business, and make billions—all on matters directly germane to this very case. The idea that the defendant is shocked, or that somehow systemically the judicial system is not working if they are called into district court

in the WDTX—where they employ people at issue in this very case—is meritless, and the defendant's constant assault as if this is some new version of the aughts' East Texas narrative is improper, irrelevant and demeaning to the district court there.

Undisputedly, defendant Adobe, Inc. operates in, hires employees in and transacts business in the Western District of Texas. Rather than being condemned for holding defendants who operate in the district to stand and defend themselves within their same chosen district, Judge Albright should be applauded for managing a fast-paced docket in patent litigations drawing on his past experience as a patent attorney, with the help of law clerks who have technical backgrounds including a doctorate degree in electrical engineering. If standards of review are to have any meaning, then this record cannot sustain concluding that the district court clearly abused its discretion in weighing factors and concluding that transfer was not clearly demonstrated. The Supreme Court's certification of this petition is needed to correct this serious error.

REASONS FOR GRANTING THE PETITION

I. THERE IS NO ABUSE OF DISCRETION WHEN RATIONAL BASIS EXISTS FOR WEIGHT ACCORDED TO EACH OF THE TRANSFER CONVENIENCE FACTORS

The statutory language in 1404(a) for transfer based on forum non conveniens explicitly uses the language "a district court ***may*** transfer."

> **"(a)** 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 or to any district or division to which all parties have consented."

28 U.S.C. § 1404. (AppxD.)

"A court may deny a petition for mandamus '[i]f the facts and circumstances are rationally capable of providing reasons for what the district court has done.' *Volkswagen*, 545 F.3d at 317 n. 7 (internal quotation marks omitted); *see also, In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985) (noting that 'if a rational and substantial legal argument can be made in support of the rule in question, the case is not appropriate for mandamus')." *In re Genentech, Inc.*, 566 F.3d 1338, 1347–48 (Fed. Cir. 2009). As discussed below, the facts and circumstances here are rationally capable of providing reasons for the weight accorded by the district court and its sound exercise of discretion in denying the transfer motion.

A. The District Court's Reliance on Factual Evidence of Its Own Scheduling Orders and Dockets Is Proper

While acknowledging that for the court congestion factor, the real issue is whether a trial may be speedier in another court (ADD6), the appeals court assumed incorrectly that the Northern District of California ("NDCA") is not crowded compared to the WDTX. (Appx1063 at 9:2-7.) The trial date in this action in the WDTX was set for October, 2021. (Appx854.) No court in the NDCA will realistically grant a trial at the same time or earlier. (*Id.*) The trial date currently set for NDCA is June 6, 2022. Such a lengthy delay is prejudicial to plaintiff. (*Id.;* Appx1083-1084 at 29:23-30:12.) The old maxim, "[j]ustice delayed is justice denied" applies here. *Atl. C. L. R. Co. v. Davis*, 185 F.2d 766, 768 n.3. (5th Cir. 1950)

The appeals court's discounting of statistics (ADD7, n.*) from another recent case that involved the same transferee and transferor forums is also incorrect. The citation includes the following:

> In its motion, Apple argues that based on data from Lex Machina over a 11-year period from January 2008 to December 2018, NDCA has a shorter ***median time to trial (approximately 28 months)*** for patent cases than WDTX (approximately 32 months). ECF No. 40 at 9. But Apple concedes that the less congested Waco Division docket will likely change those statistics. *Id*.
>
> In its response, Fintiv cites United States District Court statistics over a 12-month period ending March 31, 2019, which show that the median time to trial in civil cases is 25.7 months in WDTX versus ***28.4 months in NDCA***. ECF No. 45 at 10.

Fintiv, Inc. v. Apple Inc., No. 6:18-cv-00372-ADA, 2019 WL 4743678, at *7 (W.D. Tex. Sept. 13, 2019). The Honorable Federal Circuit Judge Moore dissented on this very point stating in another case, "[t]he majority finds no flaws with these fact findings (and claims to credit them), but it nonetheless dismisses them out of hand as insufficient to support the district court's analysis [for court congestion]." *In re Apple Inc.*, 979 F.3d 1332, 1350 (Fed. Cir. 2020). She also noted:

> "First, parties should be mindful that personal attacks against judges such as those lodged in this case are not welcome, and at least in my opinion completely unwarranted. Second, I am not comfortable with the new role the majority has carved out for our court, and I believe it is inconsistent with the Fifth Circuit law that we are bound to follow."

In re Apple Inc., 979 F.3d 1332, 1348 (Fed. Cir. 2020).

By citing, either directly or indirectly, a recent case involving a similar court congestion analysis that included statistical data, SynKloud properly put forth evidence to support that court congestion weighs against transfer. Indeed, Defendant concedes, "no patent infringement case has proceeded to trial in this

Court. Thus, there are no statistics to compare." (Appx1007.) Yet, defendant turns away from the reality with an actual set date of trial in this action.

In addition, there is no law or authority that prohibits a district court evaluating its own docket and scheduling order. To the contrary, under the Federal Rules of Evidence, a trial judge is empowered to take judicial notice of its own docket, and certainly address docket management issues such as this, which are quintessentially within the district court's discretionary authority. (Appx1114 at 60:3-15.); FED. R. EVID. 201(c) ("The Court may take judicial notice on its own.")

B. Compulsory Process Does Not Significantly Favor Transfer When the Only Identified Subpoenas in Transferee Forum Were Already Served and Complied With

The Federal Circuit's analysis also diverges from controlling jurisprudence from the Fifth Circuit by disregarding already compliant witnesses related to the compulsory process factor. Here, the district court had already allowed for issuance of third-party subpoenas on the inventor and his company through early discovery – the only known third party witness outside of the transferor forum. (SAppx003-SAppx064.) There were no motions to quash. The only identified third parties in the transferee forum, STTWebOS, Inc. and the inventor, Mr. Tsao, also did not move to quash the subpoenas. (*Id.*) *See also In re Volkswagen of Am., Inc.*, 545 F.3d 304, 316 (5th Cir. 2008). In *Volkswagen*, the district court erred in holding that it would deny any motions to quash, whereas here, there was no motion to quash to begin with. Unlike *Volkswagen*, the subpoenas were responded to and complied with. *Id.*

In addition, SynKloud identified non-parties, specifically four former defendant employees in the WDTX, who would be outside of compulsory process range if the case is transferred. (Appx850.) Defendant did not put forth any evidence to indicate that these third-party witnesses from the transferor forum would be willing witnesses in transferee forum, or that they could not testify in the transferor forum. This factual conflict was not expressly addressed by the district court and, therefore, again, must be resolved in SynKloud's favor given the standard of review. But the Federal Circuit did the opposite and failed to properly apply a clear abuse of discretion standard of review. Based on these facts, the compulsory process factor cannot significantly favor transfer.

C. A Single Third-Party Witness Identified from Transferee Forum Is a Willing Witness and There Were No Declarations from Third Party Witnesses from Transferor Forum

The only identified third party witness, the inventor, submitted a declaration stating he is a willing witness and will travel for trial to the transferor forum. (Appx992-993.) *See Quest NetTech Corp. v. Apple, Inc.,* No. 2:19-cv-00118-JRG, 2019 WL 6344267, at *4 (E.D. Tex. Nov. 27, 2019). Against this, the defendant did not offer any declarations from identified third party witnesses from the transferor forum. (Appx850.) Unlike in *Volkswagen*, where the third party witnesses submitted affidavits stating the transferor forum would be inconvenient, here the only identified third party witness submitted a declaration that he is a willing witness and transferor forum is not inconvenient.

The Federal Circuit discounted the willing witness in this case and did not account for the third party witnesses for which there is no evidence that they would

appear in the transferee forum willingly. Based on these facts, the convenience of witnesses cannot significantly favor transfer and to disregard the district court's weighing of this factor is an alarming departure from the clear abuse of discretion standard of review.

D. Cost of Attendance of Willing Witnesses Factor Cannot be Analyzed Using Only Self-Serving Declarations from One Side

The Federal Circuit also gave undue weight to self-serving declarations from the defendant, while inexplicably discounting evidence proffered by plaintiff, especially when defendant's willing witnesses are located outside of the transferee forum, specifically from Germany or India. (Appx204.) In the Fifth Circuit, "[t]his factor primarily concerns the convenience of nonparty witnesses," and "the convenience of party witnesses is given little weight." *C&J Spec Rent Servs., Inc. v. LEAM Drilling Sys., LLC*, 2019 WL 3017379, at *4 (E.D. Tex. July 10, 2019).

The Federal Circuit inappropriately reweighed the district court's discretionary balancing of the evidence on the cost of attendance factor, substituting its own conclusion in the first instance rather than evaluating whether the district court abused its discretion. That action was wrong procedurally.

The appellate court's holding that a defendant's evidence regarding witnesses is superior plaintiff's, failing to account for the fact that the defendant controls its own witnesses, is wrong substantively. *See Romag Fasteners, Inc v. Fossil, Inc.*, 140 S. Ct. 1492, 1496, 206 L. Ed. 2d 672 (2020) (elaborating on "principles of equity" as "more naturally suggests fundamental rules that apply more systematically across claims and practice areas.")

Here, there is no evidence of any third-party witness favoring the transferee forum. By ignoring SynKloud's evidence on cost of attendance (Appx853, Appx1087-1088 at 33:23-34:10) and weighing only the cost of attendance of defendant's party witnesses (a defendant with substantially greater financial means than SynKloud), the Federal Circuit improperly tilted this factor to strongly favor transfer. It also failed to account for the Fifth Circuit's "100 mile" rule to assess the cost of attendance for distant witnesses. (*Id.*)

E. The Relative Ease of Access to Sources of Proof Does Not Favor Transfer

With respect to the ease of access to sources of proof, the Federal Circuit is in denial and has not caught up to the advancement in technology that provides relative ease of access, i.e., with cloud-based storage, documents are easily accessible from anywhere. The District Court looked to where documentary evidence, such as documents and physical evidence, is stored. *Volkswagen II*, 545 F.3d at 316. Also, as the accused infringer, Adobe likely would have the bulk of documents relevant in this case. *Genentech*, 566 F.3d at 1345.

Here, Adobe admits that a substantial number of the documents at issue (including the technical documents), are not located in NDCA but instead in Oregon and Virginia. Pet. at 9-10 (citing Appx267, Appx407-408, Appx555, Appx695-696). Petitioner also admits that documents and witnesses may also be located in Seattle, India and Germany. (Appx199; Appx694-695; Appx406-407; Appx553-554.) As the District Court noted in a prior case, "in modern patent litigation, all (or nearly all) produced documents exist as electronic documents on a party's server. Then, with a

click of a mouse or a few keystrokes, the party produces these documents." *Fintiv, Inc. v. Apple Inc.*, No. 6:18-cv-00372-ADA, 2019 WL 4743678, at *4 (W.D. Tex. Sept. 13, 2019). The parties have already experienced that here, with defendant Dropbox (in the related case) having agreed to produce source code in the WDTX—with a click of a button – from its headquarters in NDCA. (Appx1086-1087 [32:21-33:11].) There is no reason to believe that Adobe could not do the same - indeed, its entire business is based on storing large amounts of data in the cloud. And Adobe has not proffered any evidence as to why the digital documents at issue in this case are not equally accessible in the WDTX with a click of a button, or proffered any evidence on the existence of hard copy documents that would make NDCA clearly more convenient. (*See* Appx205.) The factor is relevant ease of access—with documents created and stored electronically, accessibility is essentially the same across the country. This Court can provide the proper precedent on the weight this factor should be given for technology companies using cloud storage. At minimum, this factor should be neutral, if not weighed against transfer.

II. THE FEDERAL CIRCUIT FLIPS THE FIFTH CIRCUIT TEST OF FINDING "EXTRAORDINARY ERROR" BECAUSE "NOT A SINGLE RELEVANT FACTOR FAVORS THE PLAINTIFF'S CHOSEN VENUE"

The Federal Circuit acknowledged and did not disturb the district court's finding that one factor weighed against transfer. (ADD7, "Yet even with-out disturbing the court's suggestion. . . .") Under the Fifth Circuit standard, a single relevant factor weighing against transfer is sufficient to deny transfer and does not qualify as "extraordinary error" allowing grant of a mandamus petition under the clear abuse of discretion standard. This is especially true when none of the other

factors significantly favor transfer. This alone demonstrates the need for the Supreme Court's certification of this petition to correct the Federal Circuit's increasing lack of adherence to Fifth Circuit precedent and the deference awarded to district courts.

Notably, while no single convenience factor is given undue weight, the Fifth Circuit does not allow eliminating a factor when it weighs against transfer. Instead, the Fifth Circuit has said:

> The main guidance from the *en banc* court in *Volkswagen II*, as it informs this case, is that the district court should have been fully aware of the ***inadvisability of denying transfer where only the plaintiff's choice weighs in favor*** of denying transfer and where the case has no connection to the transferor forum and virtually all of the events and witnesses regarding the case—here, indeed all of those events, facts, witnesses, and other sources of proof—are in the transferee forum. *In Volkswagen II*, 545 F.3d at 318, ***we classified as an "extraordinary error[ ]" the "fact that not a single relevant factor favors the [plaintiffs'] chosen venue."***

In re Radmax, Ltd., 720 F.3d 285, 290 (5th Cir. 2013).[2]

This makes sense. For example, in both *Volkswagen II* and *In re Radmax,* the controlling Fifth Circuit cases, ***not a single factor*** weighed against transfer and supported plaintiff's choice of forum. "[T]he plaintiff's choice of forum is entitled to great weight in the balancing of factors, and unless the balance strongly favors the defendants, the plaintiff's choice of forum should not be overturned." *Innovation First Int'l, Inc. v. Zuru, Inc.*, 513 F. App'x 386, 391 (5th Cir. 2013) (citing *Syndicate 420 at Lloyd's London v. Early Am. Ins. Co.*, 796 F.2d 821, 830 (5th Cir. 1986)). This Court has noted that "a plaintiff's choice of forum is entitled to greater

[2] Unless otherwise indicated, emphasis in this Brief has been added.

[substantial] deference when the plaintiff has chosen the home forum." *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 255 (1981). Here, SynKloud is not a foreign entity, was originally incorporated in Delaware and converted to Texas corporation. (AppxE1.) When a substantial deference is given to plaintiff's choice of forum, any additional relevant factors are sufficient to deny transfer based on convenience.

The Federal Circuit balancing test appears to treat plaintiff's choice of forum as a mere factor. This is inconsistent with this Court's precedents in *Piper Aircraft* and *Sinochem*. Plaintiff's choice of forum, especially its home forum, is accorded substantial deference. *Piper Aircraft Co.,* 454 U.S. 255. "A defendant invoking forum non conveniens ordinarily bears a ***heavy burden*** in opposing the plaintiff's chosen forum." *Sinochem Int'l Co. v. Malay. Int'l Shipping Corp.*, 549 U.S. 422, 425 (2007).

By flipping the test in the negative and disregarding the congestion factor that the Federal Circuit concedes weighs against transfer, the Federal Circuit has established a new test favoring transfer that is easily met. Illustrated below for simplicity is the table with factors and corresponding decisions.

Plaintiff's Choice of Forum	**Factors favoring denial of transfer**	**Factors favoring transfer**	**Rulings**
Substantial Deference	0 (not a single factor favors denial of transfer)	8	Fifth Circuit's "extraordinary error" standard ***met*** if transfer denied. *In re Radmax, Ltd.*, 720 F.3d 285, 290 (5th Cir. 2013).

Plaintiff's Choice of Forum	**Factors favoring denial of transfer**	**Factors favoring transfer**	**Rulings**
Substantial Deference	1 (a single factor favors denial of transfer)	7	Fifth Circuit's "extraordinary error" standard is ***not met*** if transfer denied. *See In re Radmax, Ltd.*, 720 F.3d 285, 290 (5th Cir. 2013).
Substantial Deference	2-6	2-6	Fifth Circuit's "extraordinary error" standard is ***not met*** if transfer denied (***Applicable Here***). *See In re Radmax, Ltd.*, 720 F.3d 285, 290 (5th Cir. 2013).
No apparent Deference	1 (targeted discounting of the Court Congestion factor)[3]	7	Federal Circuit, purporting to apply Fifth Circuit precedent, holds that "extraordinary error" standard is met if transfer denied. Decision Here at AppxA. *See also In re Genentech, Inc.*, 566 F.3d 1338, 1347 (Fed. Cir., May 22, 2009).

Here, the Federal Circuit has effectively put the burden on the nonmovant to establish the filed district is more convenient as opposed to requiring the movant to

[3] *Action Indus., Inc. v. U.S. Fid. & Guar. Co.*, 358 F.3d 337, 340 (5th Cir. 2004) (none of the factors get dispositive weight). Federal Circuit's targeted discounting of the court congestion factor is also not supported in law. *See* similar targeted discounting by majority in *In re Apple Inc.*, 979 F.3d 1332 (Fed. Cir. 2020) and dissent by Federal Circuit Judge Moore.

establish that the proposed district is "clearly" more convenient. But according to the Fifth Circuit, having even a single factor that supports plaintiff's choice of forum is sufficient to deny transfer and refuse to find "extraordinary error" for a grant of mandamus petition, especially when none of the other factors significantly favor transfer.

To the extent defendant suggests (ADD3-4) and the Federal Circuit agreed (ADD6) that *In re Genentech, Inc.* holds that a single factor weighing against transfer (in addition to the deference given to plaintiff's choice of forum) is not sufficient to deny transfer, such a holding conflicts with the Fifth Circuit standard and so must be corrected. *In re Genentech, Inc.*, 566 F.3d 1338, 1347 (Fed. Cir., May 22, 2009).

III. WHEN DEFENDANT OPERATES IN, HIRES EMPLOYEES IN, AND TRANSACTS BUSINESS IN TRANSFEROR FORUM, AND SYNKLOUD HAS NO CONNECTION TO TRANSFEREE FORUM, EQUITIES LIE CONSIDERABLY AGAINST GRANTING MANDAMUS

Mandamus is an extraordinary remedy. It should only be granted when the equities are considerably in favor of granting mandamus relief, but even then a court may still refuse to grant such relief. *United States v. Dern*, 289 U.S. 352, 359 (1933), *Zabel v. Tabb*, 430 F.2d 199, 208 (5th Cir. 1970) and *In re Telular Corp.*, 319 F. App'x 909, 911 (Fed. Cir. 2009). Here, defendant operates in, hires employees in and transacts business in the transferor forum. (Appx907-913, Appx845-846, Appx849, Appx851, Appx857, Appx906, Appx921, Appx946, Appx1045-1048; Appx1102 at 48:3-24.)

In contrast, (i) plaintiff is not subject to personal jurisdiction or venue in the transferee forum; (ii) a declaratory judgment action of patent non-infringement could not have been brought against plaintiff in the transferee forum; and (iii) plaintiff as a small business would face significantly increased costs and expenses in the transferee forum along with a delayed trial schedule. (Appx853, Appx1087-1088 at 33:23-34:10.) This Court should deny the mandamus for reasons comparable to those which would lead a court of equity in the exercise of sound discretion. Subjecting SynKloud to patent litigation in a forum not voluntarily selected and chosen, when defendant's contacts in SynKloud's chosen forum are so extensive that defendant could be subject to general jurisdiction there, unreasonably tilts the scales in favor of defendant.

Judge Albright should be applauded for providing a venue with a fast docket that promotes efficiency. Other districts, including, for example, the Eastern District of Virginia, Southern District of Florida and Central District of California have also adopted patent pilot programs to provide fast and efficient dockets. Judge Albright's success in promoting his efficient management of patent litigation should not be held against him or the plaintiff. When the law allows for defendants to be sued in the transferor forum, this Court should not tilt statutory provisions or controlling case law for policy purposes.

IV. AT A MINIMUM, THE FEDERAL CIRCUIT SHOULD HAVE REMANDED TO THE DISTRICT COURT FOR AN EXPLANATION

The Federal Circuit refused to give credit to the full scope of facts here, as discussed in the sections above. The district court had a rational basis for according

appropriate weight for each of the factors, determined that there was no factor that significantly favored transfer, and determined that the court congestion factor weighed against transfer. However, the district court did not reduce its decision to writing, likely leaving some of the rationale unexplained. In such a case, the Fifth Circuit requires a remand and an explanation from a district court judge where this is a lack of explanation. *See In re Archer Directional Drilling Servs., L.L.C.,* 630 F. App'x 327, 329 (5th Cir. 2016) ("In the present case, the lack of explanation makes it impossible for us to determine whether the district court clearly abused its discretion, which is required in order for us to decide whether to grant mandamus relief. *See Volkswagen*, 545 F.3d at 310–11.") Without a remand for explanation, the Federal Circuit's finding of a clear abuse of discretion is improper. *Id*.

Here, the district court's oral order did not explain the rationale behind the weight accorded to the different factors. But this omission does not change the district court's analysis that none of the factors significantly favored transfer and the court congestion factor weighed against transfer. *See Ormco Corp. v. Align Tech., Inc*., 498 F.3d 1307, 1317–18 (Fed. Cir. 2007) ("However, we review decisions, not opinions . . . the district court arrived at the correct conclusion, we need not exalt form over substance . . . .").

Defendant's speculation (Adobe's Reply at 3) and the Federal Circuit's reliance on defendant's speculation, as to how the district court resolved or did not resolve factual conflicts (ADD6) is improper. It amounts to a *de novo* review and weighing of the evidence, which is not the role of the appellate court under

controlling Fifth Circuit law and the governing standard of review.

CONCLUSION

This petition for writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 26, 2021

APPENDIX A

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

In re: ADOBE INC.,
Petitioner

2020-126

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas in No. 6:19-cv-00527-ADA, Judge Alan D. Albright.

ON PETITION

Before PROST, *Chief Judge*, MOORE and HUGHES, *Circuit Judges.*

PROST, *Chief Judge.*

O R D E R

Adobe Inc. petitions for a writ of mandamus asking this court to direct the United States District Court for the Western District of Texas to grant its motion to transfer pursuant to 28 U.S.C. § 1404(a) to the United States District Court for the Northern District of California. SynKloud Technologies, LLC opposes. Adobe replies.

BACKGROUND

SynKloud brought this suit against Adobe, a company headquartered in San Jose, California, alleging infringement of six patents by various Adobe products related to cloud storage. The complaint stated that SynKloud is a company organized under the laws of Delaware, with its principal place of business in Milton, Delaware.

Adobe moved the district court to transfer the case to the Northern District of California where it is headquartered pursuant to § 1404(a), which authorizes transfer "[f]or the convenience of parties and witnesses, in the interest of justice." Adobe argued that "[o]ther than this litigation, SynKloud does not appear to have any connection whatsoever to Texas," noting that SynKloud's President resides in New York, SynKloud was not registered to do business in Texas, and it did not appear to have any operations, employees, or customers in Texas. A.198.

Adobe further urged that the Northern District of California would be clearly more convenient. In support, Adobe submitted sworn declarations attesting to the fact that the teams responsible for the development, marketing, and sales of the accused services are primarily based in the Northern District of California. *See, e.g.*, A.264–68, 405–08. Adobe noted that its own witnesses who would likely testify about the design, marketing, and sales of the accused products overwhelmingly reside in the transferee forum. Adobe further argued that, while it has two offices in Austin, Texas, those offices "have nothing to do with the design, development, or operation of the Accused Products" that were at issue in the case. A.199.

Adobe additionally noted that the inventor of the asserted patents, Sheng Tai Tsao, and his company, STT WebOS, Inc., which had assigned the patents to SynKloud, are located in the Northern District of California, and hence were only subject to the subpoena power of the transferee court. Adobe argued that "Mr. Tsao and STT WebOS

have advertised that they had 'demonstratable' products 'protected by' most, if not all, of the patents-in-suit prior to the earliest filing date of the asserted patents, potentially invalidating them by violating the statutory on-sale bar," and thus "have highly relevant information related to the validity issues in this case." A.197.

After a hearing, the district court denied Adobe's motion from the bench. With regard to the relative ease of access to sources of proof factor, the district court found that the convenience of having Adobe's, the inventor's, and STT WebOS's documents in the Northern District of California outweighed SynKloud's purported convenience in the location of SynKloud's documents in New York and Virginia. The district court acknowledged a disagreement between the parties as to whether any Adobe employee in Austin, Texas had relevant knowledge. However, the court found that "even if I conclude and resolve this factual conflict in favor of SynKloud," it would still find "that this factor slightly favors transfer." A.1112.

The district court also concluded that the compulsory process factor "slightly favors transfer," noting that while "[w]itnesses related to the power of assignment and prior art rarely testify," "it [is] almost certain that one party or the other would want the inventor to testify." A.1113. The court noted a disagreement between the parties as to whether former Adobe employees in Austin, Texas had relevant information. But the court again explained that even if it resolved that conflict in SynKloud's favor, it seemed unlikely that all four identified individuals would testify and did not ultimately sway the court to weigh this factor in favor of retaining the case. The court also found that the local interest factor "is neutral to slightly favors transfer," given that "Adobe has facilities in both districts," and "SynKloud does not." A.1114.

The single factor that the court weighed in favor of retaining the case was the court congestion factor. The court

noted that it "had a year and a half of experience in terms of setting schedules and timing of cases and trials" and had "an order governing proceedings that I use in virtually every case that specifies that the trial will occur within roughly 44 to 47 weeks after a Markman hearing," and that "[t]o the best of my recollection," the court had no difficulty "setting a trial within that anticipated window." A.1114. While the court acknowledged that the Northern District of California "might be more convenient," it still decided to deny Adobe's motion. A.1115.

DISCUSSION

Applying Fifth Circuit law in cases from district courts in that circuit, this court has held that mandamus may be granted to direct transfer for convenience upon a showing that the transferee forum is clearly more convenient, and the district court's contrary ruling was a clear abuse of discretion. *See In re Genentech, Inc.*, 566 F.3d 1338, 1348 (Fed. Cir. 2009); *In re TS Tech USA Corp.*, 551 F.3d 1315, 1318–19 (Fed. Cir. 2008); *see also In re Radmax, Ltd.*, 720 F.3d 285, 287 (5th Cir. 2013); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 311 (5th Cir. 2008) (en banc).

"A motion to transfer venue pursuant to § 1404(a) should be granted if 'the movant demonstrates that the transferee venue is clearly more convenient,' taking into consideration" the relevant private and public *forum non conveniens* factors. *Radmax*, 720 F.3d at 288 (quoting *Volkswagen*, 545 F.3d at 315); *see also In re Nintendo Co., Ltd.*, 589 F.3d 1194, 1198 (Fed. Cir. 2009) (holding that "in a case featuring most witnesses and evidence closer to the transferee venue with few or no convenience factors favoring the venue chosen by the plaintiff, the trial court should grant a motion to transfer").

In denying Adobe's motion to transfer here, the district court committed several errors. First, the district court failed to accord the full weight of the convenience factors it considered and weighed in favor of transfer. Second, the

court overlooked that the willing witness factor also favored transferring the case. Third, the court ran afoul of governing precedent in giving dispositive weight to its ability to more quickly schedule a trial. Taken together, we agree that the district court's denial of transfer here was a clear abuse of discretion.

First, the district court failed to accord proper weight to the convenience of the transferee venue. The court, by its own assessment, found that no private convenience factor here favored retaining the case in the Western District of Texas and several such factors favored transfer. In particular, the court noted that in addition to Adobe, the inventor and his company were in Northern California, and hence transfer would make providing testimony or documentary evidence more convenient or allow a party to subpoena such information. The court also declined to credit any potential witness or location in the Western District of Texas as having relevant evidence. Clearly, "[w]hen fairly weighed," here, the compulsory process and sources of proof factors together tip "significantly in" favor of transferring the case. *In re Google Inc.*, No. 2017-107, 2017 WL 977038, at *3 (Fed. Cir. Feb. 23, 2017); *see also In re Acer Am. Corp.*, 626 F.3d 1252, 1255 (Fed. Cir. 2010) (determining that subpoena power of the transferee court "surely tips in favor of transfer" notwithstanding the possibility that some potential witnesses were within subpoena range of the transferor court). However, the district court only weighed those factors as "slightly" favoring the transferee forum.

Second, and relatedly, the district court failed to weigh the cost of attendance for willing witnesses factor in its discussion, yet this factor also favors transfer. Adobe identified a significant number of its own employees as potential witnesses who reside in the Northern District of California. On the other hand, SynKloud's own employees will be coming from outside both districts. *See In re Toyota Motor Corp.*, 747 F.3d 1338, 1340 (Fed. Cir. 2014) ("The comparison between the transferor and transferee forums is not

altered by the presence of other witnesses and documents in places outside both forums."). Although SynKloud insisted that there may be Adobe employees working from its Austin, Texas office that may have relevant information, the district court found elsewhere in its analysis that, even if it could give SynKloud the benefit of the doubt here with regard to those sources of evidence, Northern California would still be more convenient.

Third, the district court erred in denying transfer based solely on its perceived ability to more quickly schedule a trial. In *Genentech*, we granted mandamus where, like here, there was a stark contrast in convenience between the two forums. 566 F.3d at 1348. There, the district court found that the court congestion factor weighed against transfer based solely on its assessment of the average rate of disposition of cases between the two forums. *Id.* at 1347. We questioned whether the court congestion factor was relevant under the circumstances and held that even without disturbing the court's suggestion that it could dispose of this case more quickly than the transferee venue, where "several relevant factors weigh in favor of transfer and others are neutral, then the speed of the transferee district court should not alone outweigh all of those other factors." *Id.*

The same conclusion follows here. Like the district court's analysis in *Genentech*, the district court's assessment of the court congestion factor here does not withstand scrutiny. The factor concerns whether there is an appreciable difference in docket congestion between the two forums. *See Parsons v. Chesapeake & Ohio Ry. Co.*, 375 U.S. 71, 73 (1963); *Gates Learjet Corp. v. Jensen*, 743 F.2d 1325, 1337 (9th Cir. 1984) ("The real issue is . . . whether a trial may be speedier in another court because of its less crowded docket."). Nothing about the court's general ability to set a schedule directly speaks to that issue. Nor does the record demonstrate an appreciable difference in docket congestion between the forums that could legitimately be

worthy of consideration under this factor.* Yet even without disturbing the court's suggestion that it could more quickly resolve this case based on its scheduling order, with several factors favoring transfer and nothing else favoring retaining this case in Western Texas, the district court erred in giving this factor dispositive weight.

In short, retaining this case in the Western District of Texas is not convenient for the parties and witnesses. It is not in the interest of justice or proper administration. And the district court's contrary determination amounted to a clear abuse of discretion. We therefore grant Adobe's petition for a writ of mandamus to direct transfer.

Accordingly,

IT IS ORDERED THAT:

The petition is granted.

FOR THE COURT

July 28, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

s35

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* SynKloud merely referred to the district court's own statement in another case, *Fintiv, Inc. v. Apple Inc.*, No. 6:18-cv-00372-ADA, 2019 WL 4743678, at *7 (W.D. Tex. Sept. 13, 2019), in which the court relied on the same scheduling order to state that it averaged a 25% faster time to trial when compared to the Northern District of California.

APPENDIX B

09:49

IN THE UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF TEXAS

WACO DIVISION

SYNKLOUD TECHNOLOGIES, LLC	*	March 27, 2020
	*	
	*	
VS.	*	CIVIL ACTION NOS.
	*	
DROPBOX, INC.	*	W-19-CV-525, W-19-CV-526
ADOBE, INC.	*	W-19-CV-527

BEFORE THE HONORABLE ALAN D ALBRIGHT, JUDGE PRESIDING
TELEPHONIC MOTION HEARING

APPEARANCES:

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	Winston Liaw, Esq. Farella Braun & Martel, LLP 235 Montgomery Street, 17th Floor San Francisco, CA 94104
Court Reporter:	Kristie M. Davis United States District Court PO Box 20994 Waco, Texas 76702-0994

Proceedings recorded by mechanical stenography, transcript produced by computer-aided transcription.

MR. LANTIER: Nothing more from Dropbox, Your Honor. Thanks again.

THE COURT: Okay.

MR. MAR: Your Honor, for Adobe this is Eugene Mar. Just a procedural question, Your Honor, in terms of where the Court will go from here in terms expectation on timing.

THE COURT: For Dropbox about 35 seconds, and for Adobe we are -- I'm sorry. For Adobe it'll be about 35 seconds. For Dropbox it will be slightly longer, but we'll have an order out I think by next Monday or Tuesday.

With respect to the factors with regard to Adobe, I'm going to address first the relative ease of access to sources of proof factor. Adobe has documents in the Northern District of California and the inventor, and also there are other, you know, STTWebOS documents that are in the Northern District of California. I find that these outweigh the location of SynKloud's documents in New York and Virginia.

I find that there's a factual conflict with respect to whether current and former employees have relevant knowledge. Neither side asked for venue discovery, and so I'm going to find that those factual conflicts remain. That being said, even if I conclude and resolve this factual conflict in favor of SynKloud, it's unclear whether it's enough to tip the factor from favors transfer to weighs against transfer. I'm going to find, therefore, that this factor slightly favors transfer.

For the compulsory process factor, because all of the facts -- the Court finds the facts to be particularly speculative, I put less weight on them. Witnesses related to the power of assignment and prior art rarely testify, I know that from my own personal experience, so I'm placing almost no weight on the location of these witnesses. In contrast, the Court finds it almost certain that one party or the other would want the inventor to testify. So that weighs in favor of transfer if the inventor is unwilling to testify.

Even if the Court were to resolve the factual conflict with regard to the four former Adobe employees having relevant knowledge in favor of SynKloud and needed to be compelled to testify, it seems unlikely to the Court they all four would testify, and, thus, it is unclear whether these witnesses are enough to tip this factor, and it favors transfer -- tips this factor from favors transfer to weighs against transfer. Therefore, the Court concludes with respect to the factor of compulsory process that the factor slightly favors transfer.

With respect to kind of the generic all of the practical problems that make trial of the case easy, expeditious and inexpensive, the Court finds that this factor is neutral.

With respect to the Court congestion factor, this phone call has been extremely helpful to the Court. I think Adobe in its papers at least has made the point that I've not yet had any patent trials, which is obviously correct, and they did not

do that in any way to be pejorative, just to make the point that in some ways trial -- time to trial numbers can be speculative. That being said, the Court is -- has had a year and a half of experience in terms of setting schedules and timing of cases and trials and all that, and we have an order governing proceedings that I use in virtually every case that specifies that the trial will occur within roughly 44 to 47 weeks after a Markman hearing. To the best of my recollection, although maybe I'm off by one or two cases, we've had no difficulty in this court in me setting a trial within that anticipated window, and if we have not done so, at least my recollection is that it would be only because the parties asked for a different time period. In a couple cases we made that time period shorter rather than longer. Therefore, the Court finds that this factor weighs against transfer.

With respect to the local interest and having localized interest decided at home, while Adobe has facilities in both districts, SynKloud does not. The Court finds that this factor is neutral to slightly favors transfer.

With regard to the familiarity of the forum with the law that will govern the case, I will -- I have been -- obviously I think -- I know what I know, but obviously I think there are very fine judges in the Northern District of California, and the Court finds this factor to be neutral.

With regard to the avoidance of unnecessary problems of

conflict of laws or in the application of foreign law, the Court finds this to be neutral.

So to summarize, two of the three factors slightly favor transfer while one, in the Court's opinion, weighs against. The Court finds that the Northern District of California might be more convenient, but the Court finds that Adobe has not established that it is clearly more convenient which is the standard; therefore, the Court is going to deny Adobe's motion to transfer.

With respect, as I said, to Dropbox, we're working on an order that I will not preview at this time, but we will get it out I'm anticipating by no later than -- well, it'll be next week, and we'll do everything we can to make sure that it is early next week.

Does anyone else -- does anyone have anything having made that ruling -- let me say this also as clearly as I can. I understand the importance of this motion. I'll state on the record it was -- it is and was a very close call, and I can't diminish that at all. I understand that at least one of the parties to this may believe that I'm in error, and I'm not -- I'm a federal judge. I'm not perfect. And so the decision may be made to take this up on some kind of appeal. Obviously that is -- that doesn't offend me at all. I understand everyone on the phone call has to take -- do everything they can to protect their client's rights. All I would ask is if either -- is

12:18 if -- gosh. I'm having a senior moment here. If Adobe makes
12:18 the decision to take this -- my order up on appeal, that's
12:18 fine, obviously, but I would invite you to -- I would ask that
12:18 you just let the Court know that you're doing that, let Josh
12:18 know, and keep us apprised of the progress just so we can --
12:18 you know, that helps us with our scheduling as well.
12:19 So that being said, I'll ask plaintiff, is there anything
12:19 else you need to take up with the Court?
12:19 MS. BRAHMBHATT: No, Your Honor. Thank you very much.
12:19 There may be a source code protective order issue that may come
12:19 up as a discovery thing, but we are not there yet. So we may
12:19 reach out to talk to you later.
12:19 THE COURT: If you have a -- I'm sorry. I didn't mean to
12:19 interrupt you. So let me say something about that. We are
12:19 doing our very best to try and get transcriptions from the
12:19 substantial -- if there is a substantial issue -- and source
12:19 code and protective orders is one that has been a recurring
12:19 issue before the Court. I'm doing, Josh more than me, but
12:19 we're doing our very best to get other hearings where I have
12:19 ruled on that issue up so that you all can read them and have
12:20 some insight to how I handle them in case the issues are
12:20 similar to what I've worked on. That being said, as I've
12:20 always tried to make clear, if you have any issues over -- in
12:20 any way about any issue but especially source code, I'd
12:20 certainly understand the sensitivity of that, and if you all

12:20 can't get it worked out, that's fine with the Court. I
12:20 understand why the plaintiff has to be zealous in trying to get
12:20 source code and get it in a way -- produced in a way that makes
12:20 it as easy as possible for you and your experts to use. I
12:20 understand why the defendants have an aversion to producing
12:20 more than one word or one number, and so I am absolutely happy
12:20 to help you all resolve any issues you have if you can't work
12:20 them out. It doesn't anger the Court that -- I don't have the,
12:21 "good lawyers should work this kind of stuff out" attitude. I
12:21 think good lawyers need to represent their client's interests,
12:21 and if you can't resolve it, then just let us know and we'll be
12:21 able to set a hearing typically within 24 hours.
12:21 Counsel for Dropbox?
12:21 MR. LANTIER: Yes, Your Honor. This is Greg Lantier.
12:21 Nothing further from Dropbox.
12:21 THE COURT: Counsel for Adobe?
12:21 MR. MAR: Your Honor, this is Eugene Mar. There's nothing
12:21 further from us. We appreciate the time you spent with us on
12:21 this matter.
12:21 THE COURT: Well, let me -- again, let me make as clear as
12:21 I can on the record, the argument -- the briefing was
12:21 exceptional. Arguments today were unbelievably helpful. As
12:21 Justice Breyer said in the Supreme Court argument when they
12:22 were talking about taxation of internet sales that his biggest
12:22 problem as a judge is that one side argues and he thinks

12:22 they're right and then the other side argues and he thinks
12:22 they're right. You know, that -- that's just a sign of really
12:22 good lawyering, and ultimately I have to make a decision one
12:22 way or the other. So, again, I think the lawyers did a great
12:22 job on this. We'll get an order out as quickly as possible on
12:22 Dropbox, and I hope all of you stay safe in these times and
12:22 take care of your families, and if -- I will see you all -- if
12:22 not sooner, I will see you all in September. Have a great day.
12:22 (Hearing adjourned at 12:22 p.m.)

UNITED STATES DISTRICT COURT)

WESTERN DISTRICT OF TEXAS)

I, Kristie M. Davis, Official Court Reporter for the United States District Court, Western District of Texas, do certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

I certify that the transcript fees and format comply with those prescribed by the Court and Judicial Conference of the United States.

Certified to by me this 30th day of March 2020.

/s/ Kristie M. Davis

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APPENDIX C

NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

IN RE: ADOBE INC.,
Petitioner

2020-126

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas in No. 6:19-cv-00527-ADA, Judge Alan D. Albright.

ON PETITION FOR PANEL REHEARING AND REHEARING EN BANC

Before PROST, *Chief Judge*, NEWMAN, LOURIE, DYK, MOORE, O'MALLEY, REYNA, WALLACH, TARANTO, CHEN, HUGHES, and STOLL, *Circuit Judges*.

PER CURIAM.

O R D E R

Respondent Synkloud Technologies, LLC filed a combined petition for panel rehearing and rehearing en banc. The petition was referred to the panel that issued the order, and thereafter the petition for rehearing en banc was referred to the circuit judges who are in regular active service.

Upon consideration thereof,

IT IS ORDERED THAT:

The petition for panel rehearing is denied.

The petition for rehearing en banc is denied.

FOR THE COURT

September 30, 2020
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court

APPENDIX D

28 USCS § 1404, Part 1 of 3

Current through Public Law 116-259, approved December 23, 2020. Some sections may be more current.

United States Code Service > TITLE 28. JUDICIARY AND JUDICIAL PROCEDURE (§§ 1 — 5001) > Part IV. Jurisdiction and Venue (Chs. 81 — 99) > CHAPTER 87. District Courts; Venue (§§ 1390 — 1413)

§ 1404. Change of venue

(a) 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 or to any district or division to which all parties have consented.

(b) Upon motion, consent or stipulation of all parties, any action, suit or proceeding of a civil nature or any motion or hearing thereof, may be transferred, in the discretion of the court, from the division in which pending to any other division in the same district. Transfer of proceedings in rem brought by or on behalf of the United States may be transferred under this section without the consent of the United States where all other parties request transfer.

(c)A district court may order any civil action to be tried at any place within the division in which it is pending.

(d) Transfers from a district court of the United States to the District Court of Guam, the District Court for the Northern Mariana Islands, or the District Court of the Virgin Islands shall not be permitted under this section. As otherwise used in this section, the term “district court” includes the District Court of Guam, the District Court for the Northern Mariana Islands, and the District Court of the Virgin Islands, and the term “district” includes the territorial jurisdiction of each such court.

History

HISTORY:

Act June 25, 1948, ch. 646, *62 Stat. 937*; Oct. 18, 1962, *P. L. 87-845*, § 9, 76A Stat. 699; Oct. 19, 1996, *P. L. 104-317*, Title VI, § 610(a), *110 Stat. 3860*; Dec. 7, 2011, *P. L. 112-63*, Title II, § 204, *125 Stat. 764*.

Annotations

Notes

HISTORY; ANCILLARY LAWS AND DIRECTIVES

Prior law and revision:

Amendment Notes

1962.

APPENDIX E

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Attorneys for Plaintiff
SynKloud Technologies LLC

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN JOSE DIVISION

SYNKLOUD TECHNOLOGIES, LLC,

Plaintiff,

vs.

ADOBE, INC.,

Defendant.

Case No. 3:20-cv-7760

NOTICE REGARDING CHANGE OF ADDRESS AND CORPORATE CONVERSION

TO THE COURT AND TO DEFENDANT AND THEIR COUNSEL OF RECORD, PLEASE TAKE NOTICE:

Plaintiff SynKloud Technologies, LLC ("SynKloud" or "Plaintiff") hereby submits this notice regarding its change of address to 3000 Polar Lane #202 Cedar Park, TX 78613 and conversion from a Delaware corporation to a Texas corporation. (*See* Exhibits A-B.).

Respectfully submitted,

DATED: February 25, 2021

/s/ *Deepali A. Brahmbhatt*
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Attorneys for Plaintiff
SynKloud Technologies, LLC

CERTIFICATE OF SERVICE

I, Deepali A. Brahmbhatt, certify that pursuant to Local Rule 5-5, counsel of record who have consented to electronic service are being served on February 25, 2021 with copies of the attached document(s) via the Court's CM/ECF system, which will send notification of such filing to counsel of record.

Executed on February 25, 2021.

/s/ Deepali A. Brahmbhatt
Deepali A. Brahmbhatt

EXHIBIT A

Delaware

The First State

I, JEFFREY W. BULLOCK, SECRETARY OF STATE OF THE STATE OF DELAWARE, DO HEREBY CERTIFY THE ATTACHED IS A TRUE AND CORRECT COPY OF THE CERTIFICATE OF CONVERSION OF "SYNKLOUD TECHNOLOGIES, LLC", FILED IN THIS OFFICE ON THE THIRTIETH DAY OF OCTOBER, A.D. 2020, AT 12:11 O`CLOCK P.M.

Jeffrey W. Bullock, Secretary of State

6996173 8100
SR# 20208140537

Authentication: 203980447
Date: 10-30-20

You may verify this certificate online at corp.delaware.gov/authver.shtml

State of Delaware
Secretary of State
Division of Corporations
Delivered 12:11 PM 10/30/2020
FILED 12:11 PM 10/30/2020
SR 20208140537 - File Number 6996173

STATE OF DELAWARE
CERTIFICATE OF CONVERSION
FROM A DELAWARE LIMITED LIABILITY COMPANY
TO A NON-DELAWARE ENTITY
PURSUANT TO SECTION 18-216 OF
THE LIMITED LIABILITY COMPANY ACT

1.) The name of the Limited Liability Company is **Synkloud Technologies, LLC**.

(If changed, the name under which it's certificate of formation was originally filed: _____)

2.) The date of filing of its original certificate of formation with the Secretary of State is **July 30, 2018**.

3.) The jurisdiction in which the business form, to which the limited liability company shall be converted, is organized, formed or created is **Texas**.

4.) The conversion has been approved in accordance with this section;

5.) The limited liability company may be served with process in the State of Delaware in any action, suit or proceeding for enforcement of any obligation of the limited liability company arising while it was a limited liability company of the State of Delaware, and that it irrevocably appoints the Secretary of State as its agent to accept service of process in any such action, suit or proceeding.

6.) The address to which a copy of the process shall be mailed to by the Secretary of State is

Synkloud Technologies, LLC
c/o BH Registered Agents, LLC
1105 N. Market St, Floor 11, Wilmington, DE 19801

In Witness Whereof, the undersigned have executed this Certificate of Conversion on this 21 day of October, A.D. 2020.

By: _____
Authorized Person

Name: Robert Colao, President
Print or Type

EXHIBIT B

Corporations Section
P.O.Box 13697
Austin, Texas 78711-3697

Ruth R. Hughs
Secretary of State

Office of the Secretary of State

CERTIFICATE OF CONVERSION

The undersigned, as Secretary of State of Texas, hereby certifies that a filing instrument for

Synkloud Technologies, LLC
File Number: [Entity not of Record, Filing Number Not Available]

Converting it to

Synkloud Technologies, LLC
File Number: 803817459

has been received in this office and has been found to conform to law. ACCORDINGLY, the undersigned, as Secretary of State, and by virtue of the authority vested in the secretary by law, hereby issues this certificate evidencing the acceptance and filing of the conversion on the date shown below.

Dated: 10/30/2020

Effective: 10/30/2020

Ruth R. Hughs
Secretary of State

Filing#:803817459 Document#:1005062460002 Filed On 10/30/2020 received by Upload

Certificate of Conversion

of a

Delaware Limited Liability Company

Converting to a

Texas Limited Liability Company

1. The name, organizational form, and jurisdiction of formation of the converting entity is: "Synkloud Technologies, LLC, a Delaware limited liability company". The date of formation of the converting entity is July 30, 2018.

2. The name, organizational form, and jurisdiction of formation of the converted entity is: "Synkloud Technologies, LLC, a Texas limited liability company".

3. The plan of conversion is attached.

4. The plan of conversion has been approved as required by the laws of the jurisdiction of formation and the governing documents of the converting entity.

5. In lieu of providing the tax certificate, the limited liability company as the converted entity is liable for the payment of any franchise taxes.

[Signature Page Follows]

In Witness Whereof, the undersigned has executed this Certificate of Conversion on this the 21 day of October, A.D. 2020.

Synkloud Technologies, LLC,
a Delaware limited liability company

By: _____
Name: Robert Colao
Title: President

SYNKLOUD TECHNOLOGIES, LLC,
a Delaware limited liability company

PLAN OF CONVERSION

This Plan of Conversion is made and entered into pursuant to Section 10.154 of the Texas Business Organization Code ("TBOC"), with respect to the conversion of **SYNKLOUD TECHNOLOGIES, LLC**, a Delaware limited liability company (which converting entity is referred to as the "Delaware Company"), into **SYNKLOUD TECHNOLOGIES, LLC,** a Texas limited liability company (which converted entity is referred to as the "Texas Company"):

W I T N E S S E T H:

WHEREAS, the Delaware Company is a limited liability company duly incorporated and existing under the laws of the State of Delaware;

WHEREAS, the member of the Delaware Company believes it is in the best interests of the Delaware Company to convert the Delaware Company into a Texas limited liability company pursuant to the terms and conditions hereinafter set forth (the "Conversion"), and such member of the Delaware Company has duly approved this Plan of Conversion (this "Plan");

NOW, THEREFORE, the Delaware Company shall be converted into the Texas Company in accordance with the applicable provisions of the TBOC, on the following terms and conditions;

ARTICLE I

CONTINUING EXISTENCE

Upon the Effective Date of the Conversion (as defined herein), the Delaware Company shall continue its existence in the organizational form of the Texas Company, a Texas limited liability company.

ARTICLE II

MANNER AND BASIS OF CONVERTING MEMBERSHIP INTERESTS

The manner and basis of converting the membership interests or other evidences of ownership of each member of the Delaware Company into membership interests of the Texas Company ("Membership Interests") shall be as follows:

> Each one percent (1%) of membership interest in the Delaware Company shall convert into a one percent (1%) membership interest in the Texas Company on the Effective Date of the Conversion.

ARTICLE III

CERTIFICATE OF FORMATION

Attached hereto as **Exhibit "A"** and incorporated herein by reference is the Certificate of Formation of the Texas Company.

ARTICLE IV

EFFECTIVENESS

The conversion shall become effective as of the filing with the Secretary of State of Texas (the "Effective Date of the Conversion").

[Signature page to follow]

IN WITNESS WHEREOF, the Delaware Company, pursuant to the approval and authority duly given by resolution adopted by its member, has caused this Plan of Conversion to be executed on this the 21 day of October, 2020.

SYNKLOUD TECHNOLOGIES, LLC,
a Delaware limited liability company

By: _____
Name: Robert Colao
Title: President

Exhibit "A"

[Follows]

Form 205 **(Revised 05/11)** Submit in duplicate to: Secretary of State P.O. Box 13697 Austin, TX 78711-3697 512 463-5555 FAX: 512 463-5709 **Filing Fee: $300**	This space reserved for office use. **Certificate of Formation** **Limited Liability Company**

Article 1 – Entity Name and Type

The filing entity being formed is a limited liability company. The name of the entity is:

Synkloud Technologies, LLC

The name must contain the words "limited liability company," "limited company," or an abbreviation of one of these phrases.

Article 2 – Registered Agent and Registered Office

(See instructions. Select and complete either A or B and complete C.)

☑ A. The initial registered agent is an organization (cannot be entity named above) by the name of:

Lawyer's Aid Service, Inc.

OR

☐ B. The initial registered agent is an individual resident of the state whose name is set forth below:

First Name	*M.I.*	*Last Name*	*Suffix*

C. The business address of the registered agent and the registered office address is:

505 West 15th Street	Austin	TX	78701
Street Address	*City*	*State*	*Zip Code*

Article 3—Governing Authority

(Select and complete either A or B and provide the name and address of each governing person.)

☑ A. The limited liability company will have managers. The name and address of each initial manager are set forth below.

☐ B. The limited liability company will not have managers. The company will be governed by its members, and the name and address of each initial member are set forth below.

GOVERNING PERSON 1

NAME (Enter the name of either an individual or an organization, but not both.)

IF INDIVIDUAL

Robert		Colao	
First Name	*M.I.*	*Last Name*	*Suffix*

OR

IF ORGANIZATION

Organization Name

ADDRESS

3000 Polar Lane #202	Cedar Park	TX	USA	78613
Street or Mailing Address	*City*	*State*	*Country*	*Zip Code*

GOVERNING PERSON 2

NAME (Enter the name of either an individual or an organization, but not both.)

IF INDIVIDUAL

First Name	*M.I.*	*Last Name*	*Suffix*
Ken		Lee	

OR

IF ORGANIZATION

Organization Name

ADDRESS

Street or Mailing Address	*City*	*State*	*Country*	*Zip Code*
3000 Polar Lane # 202	Cedar Park	TX	USA	78613

GOVERNING PERSON 3

NAME (Enter the name of either an individual or an organization, but not both.)

IF INDIVIDUAL

First Name	*M.I.*	*Last Name*	*Suffix*

OR

IF ORGANIZATION

Organization Name

ADDRESS

Street or Mailing Address	*City*	*State*	*Country*	*Zip Code*

Article 4 – Purpose

The purpose for which the company is formed is for the transaction of any and all lawful purposes for which a limited liability company may be organized under the Texas Business Organizations Code.

Supplemental Provisions/Information

Text Area: [The attached addendum, if any, is incorporated herein by reference.]

Synkloud Technologies, LLC is being formed pursuant to a plan of conversion. The converting entity's prior name is Synkloud Technologies, LLC, a Delaware limited liability company, its address is 124 Broadkill Road, #435, Milton, DE 19968, its form of organization is a Delaware limited liability company, its date of formation was July 30, 2018, and its jurisdiction of formation is Delaware.

Organizer

The name and address of the organizer:

Scott Flynn
Name

2001 Bryan Street, Suite 1250	Dallas	TX	75201
Street or Mailing Address	*City*	*State*	*Zip Code*

Effectiveness of Filing (Select either A, B, or C.)

A. ☑ This document becomes effective when the document is filed by the secretary of state.

B. ☐ This document becomes effective at a later date, which is not more than ninety (90) days from the date of signing. The delayed effective date is: _____

C. ☐ This document takes effect upon the occurrence of the future event or fact, other than the passage of time. The 90th day after the date of signing is: _____

The following event or fact will cause the document to take effect in the manner described below:

Execution

The undersigned affirms that the person designated as registered agent has consented to the appointment. The undersigned signs this document subject to the penalties imposed by law for the submission of a materially false or fraudulent instrument and certifies under penalty of perjury that the undersigned is authorized to execute the filing instrument.

Date: 10/29/2020

Signature of organizer

Scott Flynn
Printed or typed name of organizer