No. 21-111

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN RE INTEL CORPORATION,
Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas in Case No. 1:19-cv-00977, Judge Alan D. Albright

RESPONDENT VLSI TECHNOLOGY LLC'S OPPOSITION TO PETITIONER INTEL CORPORATION'S MOTION FOR A STAY OF A DISTRICT COURT RETRANSFER ORDER PENDING RESOLUTION OF MANDAMUS PETITION, AN EXPEDITED BRIEFING SCHEDULE, AND/OR TEMPORARY STAY OF THE PROCEEDING

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I. INTRODUCTION

Plaintiff/Respondent VLSI Technology LLC ("VLSI") has no objection to this Court ruling expeditiously on Defendant/Petitioner Intel Corporation's ("Intel") pending mandamus petition, which petition will be fully briefed and ripe for determination by January 15, 2021. However, VLSI respectfully submits that Intel's motion to stay Judge Albright's challenged order pending this Court's resolution of the mandamus petition lacks merit and should be denied for multiple reasons.

First, Intel's motion to stay is wholly unnecessary provided this Court rules on Intel's mandamus petition prior to February 8, 2021, which is the date Intel asserts its counsel will otherwise have to travel to Waco, Texas for jury selection on February 11. Mot. at 1, 3. Since Intel's mandamus petition will be fully briefed by January 15 and involves a single issue with minimal (if any) facts in dispute, VLSI respectfully submits this Court's time is better spent addressing Intel's mandamus petition rather than this motion to stay which will be moot once this Court rules on the petition.

Second, Intel has not met its burden of demonstrating that it has a strong case on the merits of its mandamus petition. Among other problems, Intel has not cited a single decision that reversed a district judge's decision to transfer an action to another division in the same district, to be presided over by the same judge, let alone where the reason for the decision was that the first courthouse is closed indefinitely.

Third, Judge Albright already found that further continuing the trial (currently set for February 16) would not serve the public interest and would be prejudicial to VLSI (*e.g.,* Appx5; Appx9; Appx168), and Intel has not shown that those findings are clearly erroneous. Accordingly, a stay should presumptively be denied here unless this Court is firmly convinced that Intel's mandamus petition is meritorious (which VLSI respectfully submits it is not).

In short, Intel's mandamus petition lacks merit and should be denied, which would moot this motion to stay. Relatedly, provided that this Court rules upon Intel's mandamus petition prior to February 8, the relief requested in Intel's motion to stay is unnecessary. Further, and in any event, this motion to stay lacks merit and entering a stay would not serve the public interest and would be prejudicial to VLSI.

II. BRIEF STATEMENT OF FACTS

VLSI incorporates herein by reference its statement of facts in VLSI's response to Intel's pending mandamus petition, and will not repeat those facts here. (*E.g.*, *In re Intel*, No. 21-111, Dkt. 7 at 7-10).[1]

III. LEGAL STANDARD

In deciding whether to stay district court proceedings pending appellate review, this Court generally considers "(1) whether the stay applicant has made a strong showing that it is likely to succeed on the merits; (2) whether the applicant

[1] All "Dkt." References are to docket entries before this Court.

will be irreparably injured absent a stay; (3) whether issuance of a stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Nken v. Holder*, 556 U.S. 418, 425-426 (2009) (*quoting Hilton v. Braunskill*, 481 U.S. 770, 776 (1987)).

IV. ARGUMENT

A. Intel Has Not Made A Strong Showing That It Is Likely To Succeed On The Merits

Intel's mandamus petition presents a single issue, namely whether Judge Albright has clearly abused his discretion by reconsidering his own prior order transferring the case from Waco to Austin now that the Austin courthouse is closed indefinitely and in light of the fact that other changed circumstances also favor transferring the case in Waco. Intel does not cite even a single case reversing a district court's decision to transfer a case to another federal court in the same district, let alone one based on a finding that the first courthouse is closed indefinitely.

Intel's mandamus petition is based first and foremost on the Fifth Circuit's decision in *In re Cragar Indus., Inc*., 706 F.2d 503 (5th Cir. 1983). As discussed in VLSI's response to Intel's mandamus petition (*In re Intel*, No. 21-111, Dkt. 7, which is incorporated herein by reference), *Cragar* involved a plaintiff who successfully moved to transfer venue to a court in a different district and then, unhappy with the new venue, later moved the second court to retransfer the case back to the first court. *Cragar*, 706 F.2d at 504-05. The Fifth Circuit's decision discussed the problems

inherent in allowing one district judge to review the transfer order of another, and ruled that under the circumstances, the plaintiff had to show "most impelling circumstances" to support retransfer back to the first court. *Id.* at 505.

Here, the facts are very different than in *Cragar*. VLSI originally filed the action in Waco. Intel, not VLSI, moved Judge Albright to keep the case on his docket but to transfer it 102 miles away to Austin (where Judge Albright also routinely sits). (Appx140). Intel argued, repeatedly, that transferring the case to Austin could expedite its resolution, and at worst would not delay time to trial. (Appx148). Subsequently, not only was the Austin courthouse closed indefinitely, but other factors that Intel had previously argued supported moving the case to Austin turned out either to be non-factors or to favor Waco over Austin. (Appx10-11).

Judge Albright has had the case throughout and is neither revisiting a sister court's order nor sending the parties into a "vicious circle" of transfers, the two policy concerns against retransfer orders that are discussed in the *Cragar* decision. Furthermore, even were the *Cragar* standard for retransfers fully applicable here, notwithstanding that the facts here are completely different and do not implicate either of *Cragar's* policy concerns against retransfer, Judge Albright correctly found that the COVID-19 pandemic and related indefinite closure of the Austin courthouse frustrated the purpose of his prior transfer order, and constitute exactly the type of

unexpected and "impelling circumstance" described in *Cragar* that warrants reconsideration of the prior transfer order. (Appx8-9; Appx11; Appx167-169).

Intel's contention that Judge Albright erred by ordering that the action be transferred back to Waco also fails for many additional reasons, which are briefly summarized below:

- Numerous authorities squarely state that district courts have broad authority to transfer cases within a given district, *i.e.*, an intra-district transfer, such as the one presented here. *Sundell v. Cisco Sys. Inc.*, 1997 WL 156824, at *1, 111 F.3d 892 (5th Cir. 1997) ("Under 28 U.S.C. § 1404(b), the district court has broad discretion in deciding whether to transfer a civil action from a division in which it is pending to any other division in the same district."); *Smith v. Michels Corp.*, No. 2:13-CV-00185-JRG, 2013 WL 4811227, at *2 (E.D. Tex. Sep. 9, 2013) ("the Federal Rules of Civil Procedure allow significant discretion to district courts in deciding where court is to be held within a district, even without the consent of the parties . . . the Court finds that it is allowed greater deference when considering § 1404(a) motions for intra-district change of venue as opposed to inter-district transfer."); *Madden v. City of Will Point Tex.*, No. 2:09-CV-250 (TJW), 2009 WL 5061837, at *3 (E.D. Tex. Dec. 15, 2009) (noting

that there is "greater deference available to the Court when considering intra-district transfers."). *Cf. Cottier v. Schaeffer,* No. 11-5026-JLV, 2011 WL 3502491, at *1 (D.S.D. Aug. 10, 2011) (holding that intra-district transfers "are discretionary transfers subject to the same analysis as under 28 U.S.C. § 1404(a), but are judged by a less rigorous standard.") (citations omitted); *White v. ABCO Engineering Corp.*, 199 F.3d 140, 144 (3d Cir. 1999) (noting that intra-district transfers are subject to less scrutiny because such a transfer is "much less cumbersome than its inter-district counterpart."); *Hanning v. New England Mut. Life Ins. Co.*, 710 F. Supp. 213, 215 (S.D. Ohio 1989) ("Intradivisional transfers pursuant to 28 U.S.C. § 1404(b) are discretionary transfers subject to the same analysis as under § 1404(a) but apparently judged by a less rigorous standard."); *Jennings v. Contract Consultants, Inc.*, No. 3:07-CV-0539-L, 2008 WL 977355, at *4 (N.D. Tex. Apr. 8, 2008) (holding "[i]f a distance of 203 miles is considered to be a 'minor inconvenience,' this court cannot fathom that requiring the parties and witnesses to travel to Dallas for trial, rather than Fort Worth, would in any way be an abuse of discretion on its part.") (citing *Jarvis Christian College v. Exxon Corp*., 845 F.2d 523, 528 (5th Cir. 1988) (affirming *sua sponte* transfer from Houston to

Tyler, Texas under § 1404 even though district court had failed to provide notice or hold a hearing prior to the transfer)).

- Judge Albright's transfer order contains, and also incorporates from his prior order transferring only the trial to Waco, numerous factual findings that firmly support the conclusion that the convenience of the parties and the interests of justice will best be served by transferring the case back to Waco, where it was originally filed. (Appx1-11). Intel's mandamus petition does not show that any of Judge Albright's factual findings are clearly erroneous, let alone that all of them are.
- Intel suggests in its mandamus petition that Judge Albright somehow erred by not considering COVID-19 data in Waco in retransferring the case, but Intel raised those arguments in a separate motion to continue the trial date that Judge Albright denied and which Intel has chosen not to challenge in its mandamus petition. Judge Albright's findings that it will be safe to proceed with trial in Waco in early 2021 are supported by substantial evidence, including testimony from an expert epidemiologist who inspected the Waco courthouse, and by Judge Albright's own personal experience of conducting multiple safe trials and hearings at the Waco courthouse since Fall 2020. (SAppx69-74; SAppx81-82; SAppx100-108; Appx47-51).

Likewise, an examination of Intel's cases cited in support of its mandamus petition underscores that Judge Albright did not err here. The retransfer cases applying *Cragar* cited in Intel's briefs are either (1) district court decisions that ***granted*** retransfer motions based on changed circumstances far less extreme than those presented here, (*JTH Tax Inc. v. Mahmood*, No. 2:09-CV-134-P-S, 2010 WL 2175843, at *2 (N.D. Miss. May 27, 2010); *Plywood Panels, Inc. v. M/V Thalia*, No. 91-2116, 141 F.R.D. 689, 690-91 (E.D. La. 1992)); or (2) district court decisions that denied retransfer motions on facts that are easily distinguishable and inapposite. *See Gorzynski v. JetBlue Airways Corp*., 10 F. Supp. 3d 408 (W.D.N.Y. 2014); *Emke v. Compana LLC*, No. 3:06-CV-1416-O (BH), 2009 WL 229965, at *4 (N.D. Tex. 2009). These cases are discussed more fully in VLSI's opposition to Intel's Petition, which discussion is incorporate herein by reference. (*In re Intel*, No. 21-111, Dkt. 7 at 15-18). Intel's own authorities support the conclusion that Judge Albright acted appropriately in transferring the case back to Waco under these circumstances, and certainly do not support the conclusion that he has clearly abused his discretion.

Unable to cite cases involving even remotely analogous facts in which any district court was reversed for transferring a case to another courthouse in the same district, Intel instead resorts to citing several inapposite decisions involving unrelated parties in which Judge Albright was reversed for *denying motions to transfer cases to federal courts in other districts*. Those decisions involve unrelated

issues, facts and parties, and have no relevance or applicability here whatsoever other than to unfairly attack Judge Albright personally.

B. A Stay Is Not Necessary, Including Because This Motion Will Be Moot If This Court Rules On Intel's Mandamus Petition By February 8, 2021

Intel's brief admits that the only way a stay is even potentially necessary here is if this Court is unable to consider Intel's mandamus petition before February 8. However, since Intel's mandamus petition will be fully briefed by January 15, 2021 (based on this Court's directions), raises only a single issue, and involves few (if any) disputed findings of fact, there is every reason to believe that this Court intends to consider Intel's mandamus petition before February 8. If so, this motion to stay will be moot.

C. Judge Albright Has Already Found VLSI Would Be Prejudiced By Yet Another Continuance (Which Would Be The Result Of Intel's Requested Stay)

In his recently vacated order sending only the trial back to Waco, Judge Albright found that "because the trial dates for the [related] -00255 and -00256 cases [between VLSI and Intel] are two and four months, respectively, after the trial date for the -00254 case, delaying the trial date of the -00254 case not only delays the trial date of that case, but it has a multiplicative effect by delaying the trial dates of the other two cases by the same amount of time." (Appx168). Judge Albright further found that "because patents have a limited term, the Court does not believe it should

unnecessarily delay a trial date, especially when an alternate venue is available." (*Id.*).

Intel ignores these findings, and asserts that a further continuance of the trial date will cause no prejudice to VLSI. Intel is wrong. Judge Albright's recent findings of potential prejudice to VLSI apply with equal force to Intel's motion to stay, since the net result if a stay were entered would be that the trial date would be continued yet again, potentially until 2022 or later. (Appx9).

Moreover, a continuance under these circumstances – consigning the case to a courthouse that is closed indefinitely – would also significantly prejudice VLSI because Intel is simultaneously suing VLSI in another court (namely, the United States District Court for the Northern District of California) on antitrust allegations that are based on Intel's contention that VLSI's patent claims in this action lack merit.[2] Intel is thus seeking to indefinitely block resolution of the merits of VLSI's claims in this case, while arguing in another case that VLSI's claims here are so meritless that they somehow give rise to an antitrust claim. Such litigation tactics by Intel are prejudicial to VLSI and underscore that Intel lacks good cause to stay the challenged order.

[2] *Intel Corp., et al. v. Fortress Investment Group, et al.*, No. 3:19-cv-07651-EMC (N.D. Cal.).

D. The Public Interest Will Not Be Served By A Stay

In the challenged order, Judge Albright found that the public interest will be served by moving forward with the case in Waco rather than waiting for the Austin courthouse to someday reopen, when Austin will face a still-growing glut of backlogged trials. (Appx9; Appx167-168). Again, Intel ignores that adverse finding and argues that the public interest will be served by a stay, because (Intel argues) otherwise there is a chance that the case would have to be retried if this Court later grants Intel's mandamus petition.

As explained above, based on the briefing schedule established by this Court, this Court will seemingly have sufficient time to act upon Intel's mandamus petition before February 8. Moreover, and in any event, the proposed stay would only benefit the public interest if Intel's mandamus petition had merit – which it does not. If the petition lacks merit (which it does), a further delay would only serve to further increase the backlog of cases in Austin and to prejudice VLSI, and would not serve the public interest at all.

Also, as Judge Albright discussed in the challenged order, on December 10, 2020, Chief Judge Garcia of the Western District of Texas entered his Eleventh Supplemental Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic for the Western District of Texas ("Eleventh

Supplemental COVID-19 Order").[3] The Eleventh Supplemental COVID-19 Order, and a related order entered on December 21, 2020,[4] extends the closure of the Austin courthouse *at least* through January 31, 2021, but gives district court judges such as Judge Albright the option of moving forward with trials in other courthouses in the Western District of Texas. Further, as Judge Albright found, the Austin courthouse is now closed for trials *at* least through March 2021, and potentially much longer. (Appx8). These findings further demonstrate that moving forward with the action in Waco is not only reasonable under the circumstances, but is in fact necessary in order to avoid an indefinite delay not only in this case, but for Judge Albright's entire trial docket.

V. CONCLUSION

Intel's motion to stay will be moot once this Court rules on Intel's pending mandamus petition. Thus, provided that this Court expects to rule on Intel's

[3] *See* Eleventh Suppl. Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic (W.D. Tex. Dec. 10, 2020), https://www.txwd.uscourts.gov/wp-content/uploads/2020/12/OrderEleventh SupplementalCOVID121020.pdf (visited Dec. 15, 2020). This order has recently been renewed in a Twelfth Supplemental Order. *See* Twelfth Suppl. Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 Pandemic (W.D. Tex. Jan. 7, 2021), OrdertwelfthSupplementalCOVID010721.pdf (visited Jan. 11, 2020).

[4] *See* Tenth Order Relating to Entry Into the United States Courthouse Austin, Texas (W.D. Tex. Dec. 21, 2020), https://www.txwd.uscourts.gov/wpcontent/uploads/2020/12/TenthOrderRelatingTo EntryIntoAustinCourthouse122120.pdf (visited Jan. 11, 2021).

mandamus petition prior to February 8, 2021, this motion to stay is mere surplusage. Furthermore, and in any event, Intel's motion to stay lacks merit and should be denied for all of the reasons set forth above.

Dated: January 12, 2021

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CERTIFICATE OF COMPLIANCE

The foregoing filing complies with the relevant type-volume limitation of the Federal Rules of Appellate Procedure and Federal Circuit Rules because:

1. The filing has been prepared using a proportionally-spaced typeface and includes 2,834 words.

2. The brief has been prepared using Microsoft Word for Office 365 in 14-point Times New Roman font. As permitted by Fed. R. App. P. 32(g), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

Dated: January 12, 2021

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CERTIFICATE OF INTEREST

Counsel for Respondent VLSI Technology LLC ("VLSI") certifies the following:

1. **Represented Parties.** Fed. Cir. R. 47.4(a)(1). The full name of every party represented by the undersigned counsel in this case is:

VLSI Technology LLC.

2. **Real Party In Interest.** Fed. Cir. R. 47.4(a)(2). Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities.

None.

3. **Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3). All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party represented by the undersigned counsel are:

CF VLSI Holdings LLC.

4. **Legal Representatives.** Fed. Cir. R. 47.4(a)(4). List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court.

Irell & Manella LLP: Morgan Chu, Benjamin Hattenbach, Amy Proctor, Alan Heinrich, Christopher Abernethy, Iian Jablon, Keith Orso, Ian Washburn, Dominik

Slusarczyk, Babak Redjaian, Brian Weissenberg, Charlotte Wen, Jordan Nafekh, and Benjamin Monnin.

MT^2 Law Group: Mark Mann and Andy Tindel.

5. **Related Cases.** Fed. Cir. R. 47.4(a)(5). The title and number of any case known to me to be pending in this or any other court of agency that will directly affect or be directly affected by this court's decision in the pending appeal are:

VLSI Technology LLC v. Intel Corp., No. 6:19-cv-00254 (W.D. Tex.);

VLSI Technology LLC v. Intel Corp., No. 6:19-cv-00255 (W.D. Tex.);

VLSI Technology LLC v. Intel Corp., No. 6:19-cv-00256 (W.D. Tex.);

In re Intel Corp., No. 21-105 (Fed. Cir.).

6. Organizational Victims and Bankruptcy Cases. Fed. Cir. R. 47.4(a)(6). Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees).

None.

Dated: January 12, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 11th day of January, 2021, I filed the foregoing with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

Dated: January 12, 2021

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