

## Hot Panel at Federal Circuit for Hearing on Apple's Petition for Mandamus on Judge Albright's Order Denying Transfer

SEPTEMBER 23, 2020

*In Re Apple, Inc., No. 2020-135*

In May, Judge Albright orally denied Apple's motion to transfer the case filed by Uniloc, and rather than waiting for Judge Albright to issue a written opinion, Apple filed its petition based on the oral denial. The Federal Circuit held its [hearing on September 22, 2020](#). Although the hot weather may be fading away this time of year, the panel was still hot.

During the pendency of the petition at the Federal Circuit, Judge Albright issued a written opinion. As a result, Apple tailored its arguments to Judge Albright's written opinion, rather than focusing on the oral order. Counsel for Apple began the argument arguing that Judge Albright made two primary errors: (1) relying on the Court's progress in the case at the time it issued its transfer opinion, and in particular the fact that it had issued a trial date, instead of looking at the facts that existed when the case was filed, and (2) discounting, under the "cost of attendance for willing witness" factor, the convenience for the witnesses willing to travel and the convenience for party witnesses. That was practically all Apple was able to argue before spending the rest of its time answering a litany of questions from the Court, particularly from Judge Moore.

Judge Moore quickly turned questioning to the standard of review. Judge Moore's questions pointed out that even if it were a case that should have been transferred, it does not mean that mandamus is appropriate—there must be a clear abuse of discretion. Judge Moore also later indicated that this case was different than previous cases brought by Uniloc that were transferred out of the Eastern District of Texas. Here, Apple has a campus of 8,000 employees in the Western District of Texas in Austin, and Flextronics, which did work relating to the accused product, is also located within the Western District of Texas. These facts seemed to resonate strongly with Judge Moore—particularly when combined with her questioning on the high burden for mandamus. Counsel for Apple responded by alleging that the Apple employees in Austin were not working on the technology, but Judge Moore replied that she saw no evidence of that and it was Apple's burden to demonstrate that the Apple employees were not relevant.

Counsel for Uniloc likewise made little argument before receiving numerous questions from Chief Judge Prost. Uniloc argued that Apple waived its arguments concerning Judge Albright's written order because Apple decided to file its petition based on Judge Albright's oral order, instead of waiting for a written order. Judge Prost asked counsel for Uniloc how long Apple should have reasonably waited before petitioning for mandamus. Counsel for

Uniloc suggested that it could have waited four to six months, given the status of the case. Moreover, Uniloc suggested that Apple had other approaches it could have taken, including filing a petition on Judge Albright's denial of Apple's motion to stay the case pending the decision on the motion to transfer. Based on the timing of Apple's motion and more recent decisions by the Federal Circuit, including the Adobe mandamus, counsel for Uniloc suggested the most the Court should do is remand the case to Judge Albright to consider in light of the new decisions and information.

**Takeaway:** This was Apple's third mandamus petition from Judge Albright's decisions not to transfer Apple's case out of the Western District of Texas. The Federal Circuit is clearly interested in motion to transfer issues in Judge Albright's court, which has become the hottest patent venue in the country this year. Although the Federal Circuit has issued multiple writs directed at the Eastern District of Texas over the past decade, as Judge Moore's questioning made clear, there are different dynamics at play in the Western District of Texas than the Eastern District of Texas.

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