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October 4, 2022

Via CM/ECF

Peter R. Marksteiner
Circuit Executive & Clerk of the Court
United States Court of Appeals for the Federal Circuit
717 Madison Place, N.W.
Washington, DC 20439

Re: *In re Apple Inc.*, No. 22-164

Dear Colonel Marksteiner:

Pursuant to Rule 28(j), I write to apprise you of a relevant opinion that the district court recently issued. The district court previously denied Apple's request to stay proceedings pending this Court's mandamus review. Dkt. 17 (Stay Reply) at 1. The district court has now issued a "supplemental opinion" (attached hereto) regarding that denial. *Scramoge v. Apple Inc.*, No. 6:21-CV-01071-ADA, Dkt. 66 (W.D. Tex. Sept. 30, 2022) (Opinion).

This Opinion confirms (at 2) that the district court "has decided not to rule on [Apple's] transfer motion[]" at this point. The Opinion then states (at 3) that this Court's precedent allows such a deferral, regardless of how long it lasts, so long as transfer is resolved before "substantive motions and hearings." As Apple has explained, this is incorrect. Precedent requires that transfer motions receive "top priority," Pet. 17-19, and this Court has "identified the completion of fact discovery and supervision of discovery disputes … as tasks that should take place after transfer is resolved," Pet. Reply 4. The Opinion, however, leaves in place the district court's scheduling order, which violates both requirements by deferring transfer until after the completion of fact discovery, Pet. 19-22.

The Opinion also states (at 4): "Even if the Federal Circuit vacates the amended scheduling orders, this Court intends to order supplemental, expanded venue discovery and supplemental briefing to achieve its goal of having the parties present reliable evidence before this Court rules on the transfer motion." That is merely a restatement of the improper delay the district court's scheduling order already accomplishes. Pet. 14-16. And it is just as much a clear abuse of discretion under this alternative name. Furthermore, the Opinion identifies no reason why

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the existing venue record fails to provide "reliable evidence" from which the court can decide the motion. As Apple has repeatedly demonstrated, the court has identified nothing inaccurate or unreliable about Apple's venue evidence. *Compare*, Pet. 8-10; Pet. Reply 8-12.

Respectfully,

/s/ Melanie L. Bostwick
Melanie L. Bostwick
Counsel for Petitioner Apple Inc.

cc: Counsel of record (via CM/ECF)

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

SCRAMOGE TECHNOLOGY LTD., ***Plaintiff,*** ***v.*** **APPLE INC.** ***Defendant.***	§ § § § § § §	**CIVIL NO. 6:21-CV-1071-ADA**
AIRE TECHNOLOGY LIMITED, ***Plaintiff,*** ***v.*** **APPLE INC.** ***Defendant.***	§ § § § § § §	**CIVIL NO. 6:21-CV-01101-ADA**
XR COMMUNICATIONS LLC, ***Plaintiff,*** ***v.*** **APPLE INC.** ***Defendant.***	§ § § § § § §	**CIVIL NO. 6:21-CV-00620-ADA**

SUPPLEMENTAL CONSOLIDATED OPINION DENYING MOTION TO STAY

The Court issues this supplemental consolidated opinion explaining its reasoning for having **DENIED** three similarly situated motions to stay pending mandamus review. *Scramoge Tech. Ltd. v. Apple Inc.*, No. 6:21-cv-1071-ADA (W.D. Tex. Sept. 8, 2022) ECF No. 58 (hereinafter "*Scramoge Case*"); *Aire Tech. Ltd. v. Apple Inc.*, No. 6:21-cv-01101-ADA (W.D. Tex. Sept. 9, 2022) ECF No. 55 (hereinafter "*Aire Case*"); *XR Communications LLC v. Apple, Inc.*, No. 6:21-cv-00620 (W.D. Tex. Sept. 7, 2022) ECF No. 70 (hereinafter "*XR Case*").

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Background

In each of these three cases, Apple moved for transfer relying on the same 30(b)(6) venue declarant, Mr. Mark Rollins, that Apple repeatedly used in so many cases that the Court no longer believes that he does any substantive investigation when preparing his declarations or when preparing for his depositions. *Scramoge Tech. Ltd. v. Apple Inc.*, No. 6:21-CV-00579-ADA, 2022 WL 1667561, at *2 (W.D. Tex. May 25, 2022) (explaining history of problems with Mark Rollins). Thus, in these three cases, the Court has modified the schedule to open discovery before having the parties re-brief the transfer motion. Fact discovery will allow the parties to find the relevant evidence and witnesses that bear on the transfer factors rather than speculate about them. The Court has decided not to rule on the transfer motions supported by such an unreliable venue declarant. In these three cases, Apple petitioned for a writ of mandamus and petitioned to stay these cases pending mandamus review.

Applicable Law

District courts possess an inherent power to manage their own docket, including the power to stay proceedings. *Clinton v. Jones*, 520 U.S. 681, 706 (1997). District courts traditionally look to four factors in determining whether a stay is appropriate when an order is subject to appellate review: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether the issuance of the 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, 434 (2009).

The Court's Opinion

All of these factors weigh against a stay.

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Apple is Unlikely to Succeed on the Merits

Apple's mandamus petitions are unlikely to succeed because they challenge this Court's inherent power to set a schedule and to order the equivalent of supplemental discovery and briefing. This Court acted within the Federal Circuit's mandate from *In re SK hynix Inc.*, 835 F. App'x 600, 601 (Fed. Cir. Feb. 1, 2021). The Federal Circuit order states, "The petition is granted to the extent that the district court must stay all proceedings concerning the substantive issues in the case until such time that it has issued a ruling on the transfer motion capable of providing meaningful appellate review of the reasons for its decision." *Id.* The revised schedule set by this Court defers all substantive motions and hearings in this case until after ruling on the transfer motion.

Apple Will Suffer No Irreparable Injury Absent a Stay.

Without a stay, Apple will incur only the ordinary cost of discovery and proceed in the ordinary course of litigation. There is no irreparable injury—such fact discovery immediately opens when a case is filed in most courts, and costs may be eventually recovered if the litigation is frivolous. The exact outcome—proceeding to fact discovery—will occur regardless of whether this Court transfers any cases. Fact discovery will begin in this or in another venue. Indeed, Apple acknowledged this when seeking leave to supplement its transfer motion in the XR Case. *XR Case*, ECF No. 60. During the pendency of mandamus review, this case is unlikely to reach the stage where the Court decides anything dispositive.

Issuing the Stay Will Substantially Injure the Other Parties Interested in the Three Cases

A stay will harm the plaintiffs in these three cases by delaying their cases and denying supplemental discovery that might contradict the unreliable statements of Mr. Mark Rollins. Such actions amount to procedural gamesmanship. Indeed, the Court revised its OGP because so many

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