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

XR COMMUNICATIONS d/b/a VIVATO TECHNOLOGIES, *Plaintiff,* *v.* **APPLE INC.,** *Defendant.*	§ § § § § § §	**CIVIL NO. 6:21-CV-00620-ADA**

DISCOVERY AND SCHEDULING ORDER

Before the Court is: Apple Inc.'s ("Defendant") Opposed Sealed Motion for Leave to File a Supplemental Reply Brief and Associated Supplemental Evidence in Support of Apple Inc.'s Motion to Transfer, ECF No. 54; and Opposed Sealed Motion for Leave to File Supplemental Declarations in Support of Apple Inc.'s Motion to Transfer, ECF No. 55. After considering the motions and the parties' briefing, the Court hereby **GRANTS** these motions.

A party may move to transfer a case for "the convenience of parties and witnesses, in the interest of justice." 28 U.S.C. § 1404. As part of this inquiry, courts look to the locations of the parties, the witnesses, and the evidence, among other factors. *In re Volkswagen AG*, 371 F.3d 201, 203 (5th Cir. 2004) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 241 n.6 (1981)).

The Court intends to make a fair, evidenced-based ruling on Defendant's pending motion to transfer based on an accurate identification of the witnesses, parties, and evidence relevant to this case. Supplementing the record furthers this goal. In fairness, if one party supplements its motion, the Court will give the other party the same opportunity. Thus, the Court permits both parties to provide supplemental evidence and arguments.

Full fact discovery will allow the parties to provide the Court with the best evidence for ruling on a motion to transfer. In this Court's experience, speculation and incompletely discovery

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often plagues early transfer motions. Before fact discovery, parties have not yet identified the relevant prior art to assert at trial, the relevant witnesses, the relevant third parties, or the relevant evidence. Thus, in early motions to transfer, the *Volkswagen* factors drive parties to identify witnesses and evidence based on location rather than relevance. Too frequently, such transfer-driven speculation about the witnesses and evidence fails to align with reality. At trial, the parties end up calling different witnesses, asserting different prior art, and presenting different evidence from what they identify in their transfer briefs. Requiring venue discovery to precede fact discovery also frequently leads to unnecessary discovery disputes about whether certain discovery requests fall into one bucket or the other.

Thus, the Court finds it prudent to have the parties to renew their response, reply, and sur-reply briefing on the motion to transfer before the Court resolves the transfer issue, which will also be before the *Markman* hearing. Accordingly, the Court will set the following dates:

- the deadline for Plaintiff's replacement response brief is set two weeks after the currently scheduled close of fact discovery;
- the deadline for Defendant's replacement reply brief is set for four weeks after the currently scheduled close of fact discovery;
- the deadline for Plaintiff's replacement sur-reply brief is set for six weeks after the currently scheduled close of fact discovery; and
- the *Markman* will occur approximately 10 weeks after the currently scheduled close of fact discovery.

IT IS HEREBY ORDERED that:

1) Defendant's motions, ECF Nos. 54, 55, are **GRANTED**. Defendant has leave to file the supplemental declarations attached to ECF Nos. 54, 55.

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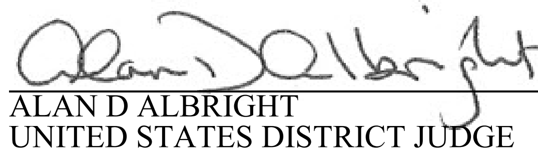
2) Full fact discovery is now open.

3) The parties shall meet and confer to file a joint motion to enter a scheduling order for replacement briefing based on instructions above within the next two weeks.

SIGNED this 25th day of August, 2022.



ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

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