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

	§	
RFCYBER CORP.,	§	Case No. 6:21-cv-00916-ADA
	§	
Plaintiff,	§	**JURY TRIAL DEMANDED**
	§	
v.	§	
	§	
APPLE INC.,	§	
	§	
Defendant.	§	
	§	

NOTICE OF SUPPLEMENTAL AUTHORITY

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Plaintiff RFCyber Corp. ("RFCyber") respectfully submits this Notice of Supplemental Authority to the Court regarding Defendant Apple Inc.'s ("Apple") Motion for Intra-District Transfer to the Austin Division. Dkt. 93.

On October 31, 2022, the United States Court of Appeals for the Fifth Circuit denied a Petition seeking a Writ of Mandamus ordering the United States District Court for the Northern District of Texas to transfer a case to the Western District of Texas. *In re Planned Parenthood Fed'n of Am., Inc.,* 52 F.4th 625(5th Cir. 2022). The Fifth Circuit held that Petitioners failed to show a clear and undisputable right to the writ where the record "falls well short of establishing that the destination venue is clearly more convenient than Respondents' chosen venue." *Id.* at 630.

Specifically, the Fifth Circuit found that the private and public interest factors did not compel transfer:

- As to the location of evidence, the Court held: "[t]he location of evidence bears much more strongly on the transfer analysis when . . . the evidence is physical in nature." *Id*. Since "the vast majority of the evidence was electronic, and therefore equally accessible in either forum," and "[t]here was some remaining documentary evidence in both the Northern District and the Western District," the factor weighed against transfer. *Id.* Similarly, in this case, the vast majority of Apple's evidence is electronic, and Apple has identified no physical evidence whatsoever located in Austin. Dkt. 93 at 10; Dkt. 102 at 11-12. Conversely, RFCyber's documents are located in Waco. Dkt. 102 at 11-12.
- "As to the availability of compulsory process, the district court found that this factor did not weigh in favor of transfer because the ***Petitioners failed to identify any witnesses who would be unwilling to testify***." *Planned Parenthood*, 52 F.4th at

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630. (emphasis added). Here, Apple admits that it has identified no witnesses who are unwilling to testify. Dkt. 93 at 11.

- "As to the cost of attendance for willing witnesses, the relevant witnesses reside across the state and across the country. . . . In light of this fact, the parties spar over whether it would be cheaper for the witnesses to travel to Austin or Amarillo. The district court acknowledged these arguments, finding that there are more flights into Austin, but that other[] costs in Amarillo are less—such as hotels and restaurants." *Planned Parenthood*, 52 F.4th at 631. Here, the parties proposed competing concerns as to witness attendance, but it was undisputed that many of Apple's witnesses would have to travel regardless of the ultimate venue, and that RFCyber had an office it could utilize in Waco. Dkt. 102 at 12-13.
- As to local interests, "the defendants and the witnesses are located across the state and across the country. We agree that this is not the sort of localized case where the citizens of Austin have a greater 'stake' in the litigation than the citizens of Amarillo." *Planned Parenthood*, 52 F.4th at 632. Here, Apple is a national company with offices across the country. While it has a large office in Austin (the importance of which it sought to minimize in its withdrawn Motion for Inter-District Transfer), this patent infringement case is not a "localized case where the citizens of Austin have a greater 'stake' in the litigation than" those of Waco. *Id.*
- As to court congestion, "[t]o the extent docket efficiency can be reliably estimated, the district court is better placed to do so than this court. Moreover, this case appears to be timely proceeding to trial before the Amarillo Division. That fact further counsels against transfer." *Id.* at 631. Similarly, the case is proceeding in a timely

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fashion in this Division, with claim construction already completed and fact discovery scheduled to close on January 17, 2023. Dkt. 29 at 3. Apple merely speculates otherwise. Dkt. 105 at 4.

Finally, the Fifth Circuit noted that "Petitioners' failure to seek relief until late in the litigation weighed against transfer." *Planned Parenthood*, 52 F.4th at 631. In particular, the Petitioners waited until seven months after the case was unsealed, and after they had lost a motion to dismiss and for reconsideration. *Id.* Similarly here, Apple waited to file its motion until eight months after the beginning of claim construction proceedings, and months after it filed its doomed motion to transfer to the Northern District of California. Apple's untimeliness further weighs against its motion to transfer. Dkt. 102 at 6-10.

Dated: December 8, 2022

Respectfully submitted,

/s/ *Vincent J. Rubino, III*

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