Lessons Learned From The Western District of Texas

By Peter Tong

June 21, 2023

Background

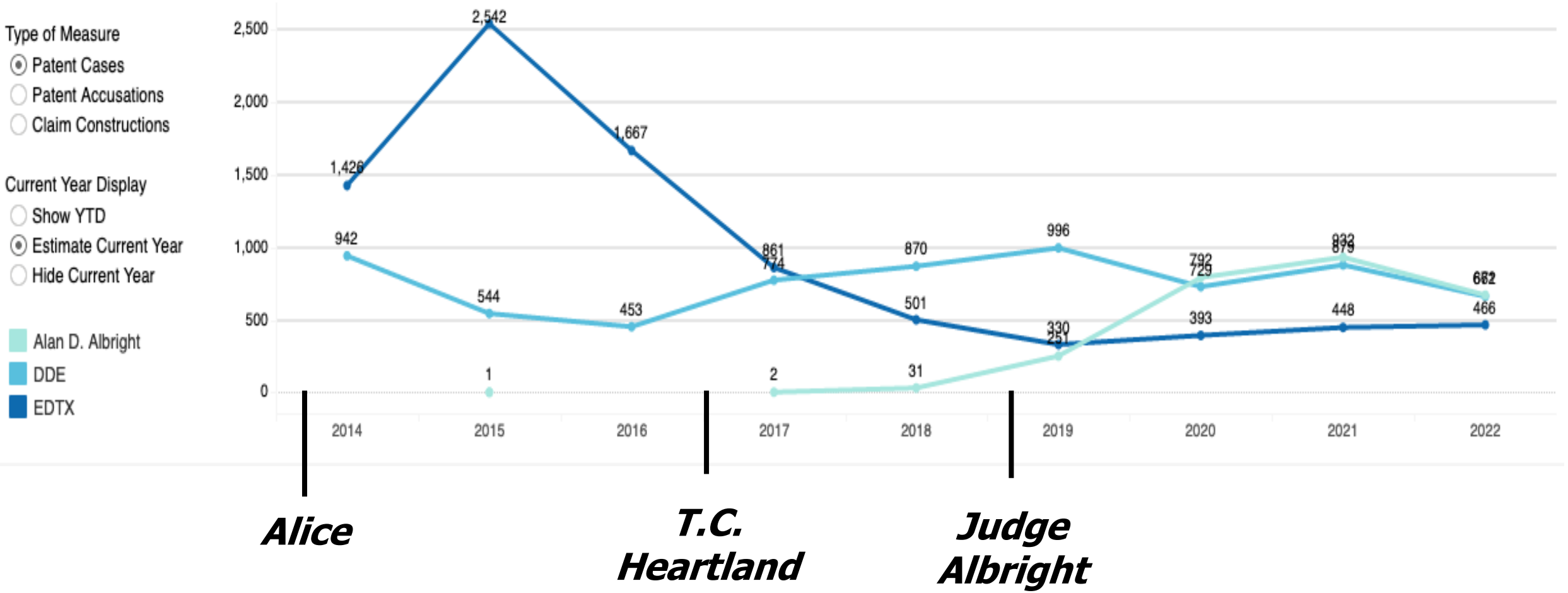
- UT Dallas, BSEE 2010 *summa cum laude*
- UT Austin, JD 2014
- Worked in CA & TX
- Law clerk to Judge Albright, 2022
- Joined Russ August & Kabat in 2023 to open Dallas office for contingency cases and local counsel work
- Summarizes WDTX decisions on LinkedIn

Agenda

- Introduce the Court and Judges
- Walkthrough of Judge Albright's Order Governing Proceedings
  - Scheduling
  - Contentions
  - Discovery disputes
  - Transfer law (including Fifth/Federal Circuit conflict)
  - Claim construction
  - Summary judgment
  - Motions *in limine*
  - Trial practice pointers
- Status of the Business Reassignment Order

Patent Filings

Source: Docket Navigator, Early 2023



Judge Albright – W.D. Tex.

Judge Albright joined the Court in September 2018.
He was appointed by President Donald Trump.

- Education
  - Univ. of Texas School of Law, J.D. - 1984
  - Trinity University, B.A. - 1981
- Legal Experience
  - Magistrate Judge - 1990s
  - Practiced patent litigation
    - Fish & Richardson
    - Bracewell

- Likes: Politics, dogs, hamburgers

Judge Gilliland – E.D. Tex.

Magistrate Judge Gilliland took the bench in 2022. He previously litigated with Judge Albright. He most recently worked at Sorey & Gilliland in EDTX. He has deep experience as a patent litigator.

- Education
  - Baylor University, J.D. 1998
- Legal Experience
  - Texas A&M, B.S.M.E. 1993

- Likes: Hunting, watersports, playing games with his kids

Notable Differences

- Has seen it all
- Can rule orally from the bench
- Tries to avoid mandamus reversals
- Automatic unopposed extensions
- Big picture

- Is relatively new to bench
- Must provide reasoned rulings
- Tries to do what Judge Albright would do
- Must file motion for unopposed extension
- Detail oriented

Judge Gilliland's Order

At the conclusion of the hearing, the Court ordered the parties to jointly submit a proposed order memorializing the Court's rulings. As noted in the minute entry of the hearing (ECF No. 169), that order was due to the Court on November 8, 2022. Though neither party requested relief from that deadline, they did not submit a proposed order until December 30, 2022 (ECF No. 178), which was deficient and had to be resubmitted on January 3, 2023 (ECF No. 179). Rather than submit a proposed order, on November 7, 2022, Motion Offense filed an objection to the Court's order, despite having never submitted the required proposed order. *See* ECF No. 173 (improperly designated by counsel as a "Response" in the CM/ECF system). As Motion Offense filed an objection to the Court's oral order, demonstrating that it had the ability to comply with the Court's order to submit a proposed but flagrantly to do so. Such failure without any proffered excuse or previous request for extension justifies the imposition of sanctions. *See Batson v. Neal Spelce*

Judge Gilliland's Order

Assocs., Inc., 765 F.2d 511, 515 (5th 1985) (noting that "it is universally understood that a court's orders are not to be wilfully ignored, and, certainly, attorneys are presumed to know that refusal to comply will subject them and their clients to sanctions."); Fed. R. Civ. P. Rule 37. This Court believes that the mildest sanction for this failure would be the denial of all relief requested by Motion Offense. Thus, all of Motion Offense's requested relief is **DENIED** as a sanction for failure to timely submit a proposed order.

Dropbox, Inc. v. Motion Offense, LLC, No. 6:20-cv-00251-ADA (W.D. Tex. Jan. 6, 2023) (Gilliland, Magistrate J.)

Order Governing Proceedings (OGP) 4.3

FILED
April 04, 2023
CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY: J Galindo-Beaver
DEPUTY

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

STANDING ORDER GOVERNING PROCEEDINGS (OGP) 4.3—PATENT CASES

This OGP governs proceedings in all patent cases pending before the undersigned or Judge Derek T. Gilliland and takes effect upon entry in all patent cases, except where noted. If there are conflicts between this OGP and prior versions in existing cases that the parties are unable to resolve, the parties are encouraged to contact the Court for guidance via email to the Court's law clerk.

Parties should generally email any inquiries to the Court's law clerk. The Court's voicemail is not checked regularly. Email is the preferred contact method.

Parties should generally use the following email address that includes the Court's law clerks for both Judge Albright and Judge Gilliland:

TXWDml_LawClerks_WA_JudgeAlbright&Gilliland@txwd.uscourts.gov.

Messages directed only to Judge Albright's law clerks may be sent to:

TXWDml_LawClerks_WA_JudgeAlbright@txwd.uscourts.gov.

Messages directed only to Judge Gilliland's law clerks may be sent to:

TXWDml_NoJudge_Chambers_WA_JudgeGilliland@txwd.uscourts.gov.

I. NOTICE OF READINESS[1]

In all patent cases pending before the undersigned or Judge Gilliland, the parties are directed to jointly file the Case Readiness Status Report ("CRSR") in the format attached as Appendix B: (a) within 7 days after the Defendant (or at least one Defendant among a group of related Defendants sued together) has responded to the initial pleadings in cases where there are no CRSR Related Cases, or (b) when there are CRSR Related Cases, within 7 days after the last Defendant (or last Defendant group when at least one Defendant among the group has responded) among the CRSR Related Cases has responded to the initial pleadings. The CRSR shall be filed in each case and identify all other CRSR Related Cases. For this Order, cases shall be considered CRSR Related Cases when they meet both criteria: (1) the cases are filed within 30 days after the first case is filed, and (2) the cases share at least one common asserted patent.

The parties shall meet and confer before jointly filing the CRSR. Plaintiff shall have responsibility for filing the CRSR on time. If the parties have any pre-*Markman* issues needing resolution, the parties shall email the Court a joint submission of the parties' positions after filing the CRSR so the Court can consider whether to hold a hearing to resolve these issues. If the

[1] This supersedes the March 7, 2022 Standing Order Regarding Notice of Readiness for Patent Cases.

Contentions and Schedules

II. GENERAL DEADLINES

The following deadlines apply:

1. Patent cases shall be set for a Rule 16 CMC in accordance with the preceding section.

2. Not later than 7 days before the CMC. The plaintiff shall serve preliminary infringement contentions chart setting forth where in the accused product(s) each element of the asserted claim(s) are found. The plaintiff shall also identify the priority date (*i.e.,* the earliest date of invention) for each asserted claim and produce: (1) all documents evidencing conception and reduction to practice for each claimed invention, and (2) a copy of the file history for each patent in suit.

3. Two weeks after the CMC. The parties shall file a **motion** to enter an agreed Scheduling Order that generally tracks the exemplary schedule attached as Exhibit A to this OGP, which should suit most cases. If the parties cannot agree, the parties shall submit a joint motion for entry of a Scheduling Order briefly setting forth their scheduling disagreement. Absent agreement of the parties, the plaintiff shall be responsible for the timely submission of this and other joint filings. When filing any Scheduling Order, the parties shall also jointly send an editable copy to the Court's law clerk.

4. Seven weeks after the CMC. The defendant shall serve preliminary invalidity contentions in the form of (1) a chart setting forth where in the prior art references each element of the asserted claim(s) are found, (2) an identification of any limitations the defendant contends are indefinite or lack written description under § 112, and (3) an identification of any claims the defendant contends are directed to ineligible subject matter under § 101. The § 101 contention shall (1) identify the alleged abstract idea, law of nature, and/or natural phenomenon in each challenged claim; (2) identify each claim element alleged to be well-understood, routine, and/or conventional; and (3) to the extent not duplicative of §§ 102/103 prior art contentions, prior art for the contention that claim elements are well-understood, routine, and/or conventional. The defendant shall also produce (1) all prior art referenced in the invalidity contentions, and (2) technical

OGP § II

- All schedules affecting the Court must be filed as a **motion**.
- Contentions:
  - Must give reasonable notice
  - Preliminary contentions may have gaps for confidential information until discovery, but all public information must be cited.
  - May "bucket" representative products when reasonable, but defendants can use buckets against plaintiffs. *See IGT v. Zynga Inc.*, 6:21-cv-331-ADA.

Discovery Limits: Flexible

III. GENERAL DISCOVERY LIMITS

Except with regard to venue, jurisdictional, and claim construction-related discovery, all other discovery shall be stayed until after the *Markman* hearing. Notwithstanding this general stay of discovery, the Court will permit limited discovery by agreement of the parties, or upon request, where exceptional circumstances warrant it. For example, if discovery outside the United States is contemplated via the Hague, the Court is inclined to allow such discovery to commence before the *Markman* hearing.

Following the *Markman* hearing, the following discovery limits apply. The Court will consider reasonable requests to adjust these limits should circumstances warrant.

1. Interrogatories: 30 per side[3]
2. Requests for Admission: 45 per side
3. Requests for Production: 75 per side
4. Fact Depositions: 70 hours per side (for both party and non-party witnesses combined)
5. Expert Depositions: 7 hours per report[4]

Electronically Stored Information. As a preliminary matter, the Court will not require general search and production of email or other electronically stored information (ESI) related to email (such as metadata), absent a showing of good cause. If a party believes targeted email/ESI discovery is necessary, it shall propose a procedure identifying custodians and search terms it believes the opposing party should search. The opposing party can oppose or propose an alternate plan. If the parties cannot agree, they shall contact the Court in accordance with the procedures below, to discuss their respective positions.

IV. DISCOVERY DISPUTES

Standing Referral. Under Rule 1 of the Local Rules for the Assignment of Duties to United States Magistrate Judges, Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, discovery disputes in patent cases pending before the

OGP § III-IV

- Good Cause: the search is specific, hits are limited, and important documents are confirmed to exist.
- Standing Referral to Judge Gilliland (just in case)

Discovery Disputes

Procedure. A party may not file a Motion to Compel discovery unless: (1) lead counsel have met and conferred in good faith to try to resolve the dispute, and (2) the party has contacted the Court's law clerk to summarize the dispute and the parties' respective positions. When contacting the Court's law clerk for discovery or procedural disputes, the following procedures shall apply.

If the parties remain at an impasse after lead counsel have met and conferred, the requesting party shall email a summary of the issue(s) and specific relief requested to all counsel of record. The summary of the issue shall not exceed 500 words for one issue or a combined 1,000 words for multiple issues. The responding party has 3 business days[5] thereafter to provide an email response, also not to exceed 500 words for one issue or a combined 1,000 words for multiple issues. The specific relief requested should propose the exact language to be issued in a court order for each part of every disputed issue. The specific relief requested does not count toward the word limits. The Court encourages the parties to provide their submission in the following table format, which clearly identifies the disputed issues and specific relief requested.

OGP § IV

Example:

Issue	Requesting Party's Position	Responding Party's Position
RFP 1: All sale records of the Product.	Responding Party didn't produce anything. Responding Party keeps its sales records in a sales database. Relief: Order that "Responding Party must produce a copy of the sales database within 7 days."	We found no sales records of the Product in the sales database. Relief: Find that "no documents responsive to RFP 5 exist" and deny Requesting Party's relief.
ROG 5: Identify all employees who worked on the Product.	Responding Party only identified a subset of the employees. Relief: Order that "Responding Party is compelled to fully respond to ROG 5 by identifying the names and locations of the remaining employees who worked on Product by [date]."	We identified the relevant employees. The other employees are not relevant, and it is too burdensome to identify every employee. Relief: Order that "Responding Party need not identify any other employees in response to ROG 5."

Once the opposing party provides its response, the requesting party shall email the summaries of the issues to the Court's law clerks for both Judge Albright and Judge Gilliland with opposing

Discovery Disputes – Most Common Mistakes

- Most common mistake: Not knowing what you want the Court to do.
  - "The specific relief requested should propose the exact language to be issued in a court order for each part of every disputed issue." OGP 4.3 at 4.
  - Bad: "The motion is granted." – What is the relief? Which parts? When?
  - Bad: "Defendant must produce all relevant documents within two weeks" – when parties were arguing about what is relevant.
  - Bad: Anything that the Court can't enforce, oversee, or clearly understand (e.g., party must make a "reasonable effort" to analyze something).
- Better example:
  - The relevance objections for categories X, Y, and Z are overruled. Defendant must produce these within two weeks.
  - Defendant must search and turn over documents from repository "X" that include keywords "Y"

Discovery Disputes – Most Common Mistakes

- Second most common mistake:
  - Movant: “They haven’t given us the discovery.”
  - Opposing party: “We’ve already given it all,” or “We didn’t find anything.”
  - Court: Well, what do you want me to do? Be specific.

- Offer alternative relief if you don’t win:
  - Offer a knowledgeable 30(b)(6) witness prepared on topics A, B, and C
  - Schedule extension
  - Alternative form of discovery (some items deferred until expert reports)
  - Preclude an argument

- The Court has no power over third parties not in the case
  - But the Court can warn a party with a business relationship with the third party

Discovery Responses and Expert Reports

- If you initially answer a ROG, you can defer some details until expert reports.
  - But if the case gets transferred, another Judge may preclude arguments missing from your ROG responses.
  - Do not over-rely on *StratosAudio, Inc. v. Volvo Cars USA, LLC*, No. 6:20-CV-1129-ADA, 2022 WL 1261651 (W.D. Tex. Apr. 28, 2022). In this case, StratosAudio did answer an interrogatory directed to reasons for validity, so StratosAudio was permitted to further narrow its contentions and add specificity later.
  - *Midas Green Tech., LLC v. Rhodium Enterprises, Inc.*, No. 6:22-cv-00050-ADA, ECF No. 103 (W.D. Tex. Mar. 7, 2023) sets out the Court's expectations (not on WestLaw/Lexis).

ORDER

On February 27, 2023, the Court held a video conference to resolve the parties' discovery disputes. Having considered the parties' submissions and oral arguments, the Court GRANTS-IN-PART and DENIES-IN-PART Defendants' Requested Relief and ORDERS the following:

1. With respect to Defendants' Interrogatory No. 8 (the "Damage Basis Interrogatory"), Midas is hereby ordered to supplement its response to Interrogatory No. 8 to generally describe the damages theories sought, together with the factual bases for those theories. Midas at least needs to indicate whether it is seeking lost profits and why, and whether it is seeking a reasonable royalty, sufficient to put Defendants on notice of what Midas is seeking and the general basis for it. While Plaintiff is not required to supply a very high level of detail or its complete legal and factual basis for damages, Plaintiff must at least generally state what it is seeking and the support therefor. Midas must provide its supplement to Defendants' Interrogatory No. 8 by March 13, 2023.

Discovery Responses and Expert Reports

- Expert Reports
  - Ideally, this should contain everything your expert might say at trial and be based on a trial script.
  - Most common disputes:
    - The expert said it, but in a different section.
    - This is incorporated by reference.

Discovery Order & Venue Discovery

Written Order.[6] Within 7 days of the discovery hearing, the parties shall email a joint proposed order to the Court's law clerk that includes the parties' positions from their dispute chart, the parties' requested relief, and the parties' understanding of the Court's ruling so that the arguments and outcome can be docketed. If one party disputes the language of the order, then that party shall send an editable version of the proposed order to the Court's law clerk with the disputed language in tracked changes. Failure to provide a proposed written order for the docket results in waiver of the dispute for appeal.

V. VENUE & JURISDICTIONAL DISCOVERY

The Court hereby[7] establishes the following presumptive limits on discovery related to venue and jurisdiction: each party is limited to 5 interrogatories, 10 Requests for Production, and 10 hours of deposition testimony. The time to respond to such discovery requests is reduced to 20 days. If a party believes these limits should be expanded, the party shall meet and confer with opposing counsel and if an impasse is reached, the requesting party is directed to contact the Court's law clerk for a telephonic hearing.

Venue or jurisdictional discovery automatically opens upon the filing of an initial venue or jurisdictional motion and shall be completed no later than 10 weeks after the filing of such motion. Parties shall file a notice of venue or jurisdictional discovery if the discovery will delay a response to a transfer or jurisdictional motion.

OGP §§ IV-V

- Written Order – Creates record of positions and decisions for appeal and searching.
- Judge Gilliland is **strict** about this.

- Venue Discovery – Tend to grant liberally.

Transferring the Case (*e.g.*, to NY or CA)

- Parties are expected to have solid evidence both for and against transfer
  - The Court will not do your homework for you

- There is a split between Fifth Circuit and Federal Circuit transfer law
  - The issue is already going up on appeal

Fifth Circuit/Federal Circuit Conflict of Law

Private Factor	Fifth Circuit	Federal Circuit
Compulsory Process to Secure the Attendance of Witnesses	[T]his factor did not weigh in favor of transfer because the Petitioners failed to identify any witnesses who would be unwilling to testify. Indeed, the availability of compulsory process "receives less weight when it has not been alleged or shown that any witness would be unwilling to testify." *In re Planned Parenthood Fed'n of Am., Inc.*, 52 F.4th 625, 630–31 (5th Cir. 2022).	"when there is no indication that the witness is willing," the Court must presume that its subpoena power will be necessary to secure the witnesses' attendance. *In re DISH Network LLC*, No. 2021-182, 2021 WL 4911981, at *3 (Fed. Cir. Oct. 21, 2021).

Private Factor	Fifth Circuit	Federal Circuit
Cost of Attendance for Willing Witnesses	[W]e set a 100–mile threshold as follows: "When the distance between an existing venue for trial of a matter and a proposed venue under § 1404(a) is more than 100 miles, the factor of inconvenience to witnesses increases in direct relationship to the additional distance to be traveled." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 317 (5th Cir. 2008)	We have rejected a "rigid[ ]" application of the rule when "witnesses ... will be required to travel a significant distance no matter where they testify" and when all witnesses would be inconvenienced by having to leave home to attend trial. . . . [T]he inquiry should focus on the cost and inconvenience imposed on the witnesses by requiring them to travel to a distant forum and to be away from their homes and work for an extended period of time. *In re Google LLC*, No. 2021-170, 2021 WL 4427899, at *4 (Fed. Cir. Sept. 27, 2021)

Fifth Circuit/Federal Circuit Conflict of Law

Private Factor	Fifth Circuit	Federal Circuit
Relative ease of access to evidence	the vast majority of the evidence was electronic, and therefore equally accessible in either forum. The location of evidence bears much more strongly on the transfer analysis when, as in *Volkswagen*, the evidence is physical in nature. *In re Planned Parenthood Fed'n of Am., Inc.*, 52 F.4th 625, 630 (5th Cir. 2022)	the district court found that these sources of proof would not be difficult to access electronically from Google's offices in the Western District of Texas, that does not support weighing this factor against transfer. . . . if anything, that factor weighs in favor of transfer. *In re Google LLC*, No. 2021-171, 2021 WL 4592280, at *7 (Fed. Cir. Oct. 6, 2021)

Private Factor	Fifth Circuit	Federal Circuit
Other factors that make trial easy, expeditious, and inexpensive	the existence of multiple lawsuits involving the same issues is a **paramount consideration** when determining whether a transfer is in the interest of justice. *In re Volkswagen of Am., Inc.*, 566 F.3d 1349, 1351 (Fed. Cir. 2009) (citing *Continental Grain Co. v. The FBL-585*, 364 U.S. 19, 26 (1960)) (emphasis added)	the district court overstated the concern about waste of judicial resources and risk of inconsistent results *In re Samsung Elecs. Co., Ltd.*, 2 F.4th 1371, 1379 (Fed. Cir. 2021), cert. denied sub nom. *Ikorongo Texas LLC v. Samsung Elecs. Co.*, 212 L. Ed. 2d 540, 142 S. Ct. 1445 (2022)

Fifth Circuit/Federal Circuit Conflict of Law

Public Factor	Fifth Circuit	Federal Circuit
Administrative Difficulties and Court Congestion	To be sure, some courts have held that this factor is "speculative." *In re Genentech, Inc.*, 566 F.3d 1338, 1347 (Fed. Cir. 2009). But to the extent docket efficiency can be reliably estimated, the district court is better placed to do so than this court. *In re Planned Parenthood Fed'n of Am., Inc.*, 52 F.4th 625, 631 (5th Cir. 2022) On the morning of May 21, 2005, a Volkswagen Golf automobile traveling on a freeway in Dallas, Texas, was struck from behind and propelled rear-first into a flat-bed trailer parked on the shoulder of the freeway. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 307 (5th Cir. 2008)	this factor appears to be the most speculative *In re Genentech, Inc.*, 566 F.3d 1338, 1347 (Fed. Cir. 2009) It appears undisputed that Jawbone … is not engaged in product competition …. This factor, then, is neutral. *In re Google LLC*, No. 2023-101, 58 F.4th 1379, 1383 (Fed. Cir. 2003)

Public Factor	Fifth Circuit	Federal Circuit
Local Interests	Important considerations include ... the Plaintiff's residence. *Def. Distributed v. Bruck*, 30 F.4th at 435. Petitioners argue that the district erred as a matter of law by "adopting a districtwide analysis." But we have never framed the transfer analysis as focusing exclusively on either the destination *district* or destination *division.* *In re Planned Parenthood Fed'n of Am., Inc.*, 52 F.4th 625, 631 (5th Cir. 2022)	the accused products were designed and developed in the transferee venue *In re Google LLC*, No. 2021-170, 2021 WL 4427899, at *6 (Fed. Cir. Sept. 27, 2021) Since Flower Mound is in the Eastern District of Texas, not the Western District of Texas, BillJCo's office in Texas gives plaintiff's chosen forum no comparable local interest. *In re Apple Inc.*, No. 2022-137, 2022 WL 1676400, at *2 (Fed. Cir. May 26, 2022)

Unappreciated Venue Discovery Considerations

- Seek more venue discovery.

- Search Linked-In profiles (allows the Court to go either way on this factor)

- Do your work.
  - Do your depositions.
  - Conduct actual investigation, not just review documents.
  - Get a private investigator to look around. Search public records. Seek authorization to visit a location. Search wayback machine job posts.

Unappreciated Venue Discovery Considerations

- Credibility of Venue Witness
  - Do a full analysis using reliable methodology.
  - What is the scope of investigation?
  - What is sworn fact v. “best of my knowledge”
  - Explain **why** something is or isn’t relevant – especially for Austin companies
  - Many other ways to defend or attack this

- What remedy do you want against an unprepared witness?
  - Findings of disputed fact in favor when you have ANY evidence (typically given)
  - Findings of fact in your favor when you lack evidence (never given)
  - More discovery and schedule extension (sometimes given)
  - Other possible remedies

Claim Construction

IX. CLAIM CONSTRUCTION

Limits for Number of Claim Terms to be Construed

Terms for Construction. Based on the Court's experience, the Court believes that it should have presumed limits on the number of claim terms to be construed. The "presumed limit" is the maximum number of terms that each side may request the Court to construe without further leave of Court. If the Court grants leave for additional terms to be construed, depending on the complexity and number of terms, the Court may split the *Markman* hearing into multiple hearings.

The presumed limits based on the number of patents-in-suit are as follows:

1-2 Patents	3-5 Patents	More than 5 Patents
8 terms	10 terms	12 terms

When the parties submit their joint claim construction statement, in addition to the term and the parties' proposed constructions, the parties should indicate which party or side proposed that term, or if that was a joint proposal.

OGP § IX

Claim Construction

- The most common reason for adopting one party's construction is because the other party's construction is bad. It is easy to spot attempts to modify a claim.

- Judge Albright's philosophy is that most words don't need to be construed. He likes "plain and ordinary meaning" despite *O2 Micro*.

- To get away from POM, you typically need:
  - A definition in the specification, or
  - A legitimate dispute about which of two different meanings of a word apply.

- Little weight is given to expert opinions **UNLESS** the expert has actual evidence.

Summary Judgment

- Generally when filing, **everything** should have an exhibit **number**, even a supporting attorney declaration. This makes it easy to find by filing number.

- Write thoughtful **proposed orders and conclusions**!
  - Break it out. This is an outline of arguments/relief sought to guide the Court.
  - Not, “The motion for summary judgment of invalidity is granted.”
  - Instead:
    - “The Court grants summary judgment of invalidity for claim 1 in view of Reference. The Court grants summary judgment of invalidity for claim 2 in view of Reference and Art.”
    - “The remedy is that Party may not [do something] at trial.”

- Dispositive motions usually decided at the pre-trial conference.

Motions *in limine*

- Do not disguise *Daubert* motions as MIL's
- Has standard MIL's – do not duplicate them
- Too often, relief is unclear.
  - Example: MIL to exclude all evidence related to "X" topic without identifying the documents/pages/paragraphs being excluded.

Trial Practice Pointers

- Opening argument: Preview witnesses and why they matter, **especially for depos.**
- Closing argument: Jury has already decided by then.

- Object to questions that invite discovery issues. Objection, Goes into Discovery.
  - “But you don’t have any documents to show that to jury today, right?”
  - “But so-and-so isn’t here to confirm that today, is he/she?”

- Most common mistake on direct: asking leading questions.
  - This makes it feel like you, rather than your expert, is testifying.

Trial Practice Pointers

- Every question you ask your expert on direct should have its answer in the report.
  - Best to keep this clear and avoid vague references to other sections.

- Qualifying an expert: Expert should only talk about himself, not the patent.

- On cross, witnesses may answer “Sometimes,” or “It depends,” when presented with a “Yes or No” question.
  - Very short leash for evading questions – ask Judge Albright to make the witness answer directly.

Case Assignment

FILED

JUL 25 2022

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXAS
BY _____
DEPUTY

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

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ORDER ASSIGNING THE BUSINESS OF THE COURT AS IT RELATES TO PATENT CASES

Upon consideration of the volume of new patent cases assigned to the Waco Division, and in an effort to equitably distribute those cases, it is hereby ORDERED that, in accordance with 28 U.S.C. § 137, all civil cases involving patents (Nature of Suit Codes 830 and 835), filed in the Waco Division on or after July 25, 2022, shall be randomly assigned to the following district judges of this Court until further order of the Court.[1]

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

§
§
§

AMENDED ORDER ASSIGNING THE BUSINESS OF THE COURT

Pursuant to Section 137 of Title 28, United States Code, and to streamline previous orders, all cases, proceedings, and matters shall be assigned to the district judges of this Court as follows:

Item IX

U.S. District Judge Alan D. Albright:

(a) One hundred percent (100%) of the civil docket in the Waco Division, with the exception of patent cases; and

(b) One hundred percent (100%) of the criminal docket in the Waco Division; and

(c) Patent cases will be assigned as ordered on July 25, 2022, in the Court's Order Assigning the Business of the Court as it Relates to Patent Cases, with the exception that no further cases will be assigned to Senior Judge Frank Montalvo, and until further order of the Court; and

Case Assignment

13. When filing a patent case, the Plaintiff shall file a "Notice of Related Cases" on the day of filing the patent case. For the Notice of Related Cases, cases shall be considered "related" when they share at least one common asserted patent.[12] The Notice of Related Cases shall indicate the case caption, case number, and presiding Judge of any related case.

OGP § X

The Western District of Texas is still a great place to file.
(perhaps second to the Eastern District if you can get venue there)

You can still get great judges with fast times to trial.

The Court and juries are fair.
The "plaintiff-friendly" label is undeserved.

Trials are about 50-50.
Judge Albright disposed of many cases on validity, noninfringement, and damages.

Low-cost discovery.
Disputes over zoom. No default email discovery.

Questions?

(other than rumors…)

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