25-____

United States Court of Appeals for the Federal Circuit

IN RE FINTIV, INC.

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas, the Honorable Alan D. Albright, in 1:21-cv-00896-ADA

PETITION FOR WRIT OF MANDAMUS

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July 28, 2025

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CERTIFICATE OF INTEREST

Counsel for Petitioner Fintiv, Inc., certifies the following information is accurate and complete to the best of our knowledge:

1. **Represented Entities.** Provide the full names of all entities represented by undersigned counsel in this case. Fed. Cir. R. 47.4(a)(1).

Fintiv, Inc.

2. **Real Party in Interest.** Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. Fed. Cir. R. 47.4(a)(2).

None/Not Applicable.

3. **Parent Corporations and Stockholders.** Provide the full names of all parent corporations for the entities and all publicly held companies that own 10 percent or more of the stock of the entities:

None/Not Applicable.

- 4. **Legal Representatives.** List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. 4. 47.4(a)(4).
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- (b) Not applicable.
- 5. **Related Cases.** Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. *See* Fed. Cir. R. 47.4(a)(5) and 47.5(b).

None.

6. **Organizational Victims and Bankruptcy Cases.** Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). *See* Fed. Cir. R. 47.4(a)(6).

None/Not Applicable.

Dated: July 28, 2025 By: /s/ Meredith Martin Addy

Meredith Martin Addy

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INTRODUCTION

Fintiv seeks a writ of mandamus directing the United States District Court for the Western District of Texas to vacate the order scheduling trial for August 4, 2025 and denying previously-ordered and not completed discovery. Because trial is scheduled to begin in a week, Fintiv contemporaneously seeks an emergency stay of the district court action until after this Petition for Writ of Mandamus is decided.

On May 16, 2025, this Court issued a decision in this litigation reversing the district court's grant of summary judgment of noninfringement to Apple. Appx039-051. The case returned to the district court, and on June 23, 2025, the court scheduled trial to begin on August 4, 2025. The court scheduled the trial despite Apple's failure to produce court-ordered emails and witnesses for deposition, and despite Fintiv's lead counsel's prior scheduled court hearing in the Southern District of New York. As of the filing of this Petition for Writ of Mandamus, the court has provided no reasoning for its decision. Appx001; Appx017. Requiring trial to proceed on August 4 is an abuse of the trial court's discretion because it ignores the court's previous discovery order and guidance provided in a hearing, and because it prevents Fintiv from representation by its counsel of choice.¹

does not alleviate counsel's conflict.

¹ Late in the evening on July 28, 2025, the Southern District of New York *sua sponte* moved the start its hearing to August 12, 2025. As set forth below, however, this

Fintiv respectfully requests that this Court stay the district action until this Petition for Writ of Mandamus is decided and grant the Petition for Writ of Mandamus directing the district court to (1) vacate the order setting trial for August 4, 2025, direct Apple to complete the previously-ordered production, and permit Fintiv to depose the three previously-ordered Apple witnesses; and (2) reset the trial to a date when all counsel are available.

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1338(a). This Court has jurisdiction under 28 U.S.C. §§ 1295(a) and 1651(a). *In re Princo Corp.*, 478 F.3d 1345, 1352 (Fed. Cir. 2007).

RELIEF SOUGHT

Fintiv seeks a writ of mandamus directing the United States District Court for the Western District of Texas to: (1) vacate the order scheduling trial on August 4, 2025, direct Apple to complete the previously-ordered production and permit Fintiv to depose the three previously-ordered Apple witnesses; and (2) reset the trial to a date when all counsel are available.

ISSUES PRESENTED

Whether the district court abused its discretion by scheduling trial to begin on August 4, 2025, without addressing the outstanding issues that:

(1) after being ordered to do so by the district court, Apple has not produced emails and witnesses for deposition, going to the issues of infringement, copying, and willfulness, thus prejudicing Fintiv. Because the court, without explanation, ignored its own discovery order requiring Apple to produce these witnesses for deposition and related emails, ignored its own guidance to counsel, and instead scheduled trial to begin a week from now, the court abused its discretion, and Fintiv has no recourse, warranting Writ of Mandamus; and

(2) Fintiv's lead counsel and client-relationship manager Marc Kasowitz has a preexisting scheduling conflict that requires him to be in court for an evidentiary hearing and subsequent trial in the Southern District of New York. The court's scheduled trial date of August 4, prevents Fintiv from representation by its choice of counsel, Mr. Kasowitz, and is therefore an abuse of the court's discretion for which Fintiv has no recourse, warranting Writ of Mandamus.

STATEMENT OF THE CASE

This long pending case was most recently on appeal to the Federal Circuit on the district court's grant of summary judgment of noninfringement. On May 16, 2025, this Court reversed "the district court's summary judgment decision and remanded for further proceedings consistent with this opinion." *Fintiv, Inc. v. Apple Inc.*, 2023-2208 (Fed. Cir. May 16, 2025); Appx050.

Upon return to the district court, on June 27, 2025, the court *sua sponte* set a trial to begin on August 4, 2025,² just five weeks later, and ordered the parties to submit an Agreed Amended Scheduling Order reflecting that date, among others. Appx038. The parties could not agree on scheduling, so in their joint report, each party set forth its position. Appx 031-035.

Fintiv noted both that discovery was not complete and that it had a scheduling conflict. First, with respect to discovery, Fintiv explained that the case was not yet ready for trial because Apple had not produced emails or three witnesses for deposition, both of which were ordered by the court in 2022. Appx032 (citing Appx056-057 ¶2a, ¶2b). Once that remaining discovery was complete, Fintiv expected that the case would be ready for trial by October 2025, and Fintiv requested that the court provide alternative dates that were convenient for the court, from October 2025 through March 2026. *Id*.

Second, with respect to the trial conflict, Fintiv's lead counsel and client-relationship partner Marc Kasowitz was already scheduled to be in court in the Southern District of New York for a hearing starting on August 4, and expected to last three-to-four days, leading into a trial in *Binh Thanh Import Export Production* & *Trade Joint Stock Co. v. Amazon.com Services LLC*, C/A 1:23-cv-009292-LGS

² Pretrial conference on July 30; jury selection set to begin on July 31, 2025. Appx038.

(S.D.N.Y.). Appx031; Kasowitz Decl. ¶8. Additionally, Fintiv noted that five other Kasowitz attorneys who are primary counsel on the case would be moving offices during the short period leading up to trial, disrupting their ability to prepare and thus be prejudicial to Fintiv for trial starting on August 4, 2025. *Id.*; *see also* Appx025-028.

In contrast to Fintiv's scheduling proposal, Apple did not explain why it failed to comply with the court-ordered production or provide the court-ordered witnesses, asserting that was Fintiv's problem. Appx034-035. Nor did Apple address Fintiv's scheduling conflict. *Id.* Instead, Apple proposed a condensed summary judgment briefing schedule for its newly-minted summary judgment theory to be completed simultaneously with trial preparation, and Apple agreed that trial should begin on August 4. Appx034. Although previously telling Fintiv that Apple had availability in late October 2025 (Appx020), Apple told the court that, other than the August dates, it did not have *any* availability for trial before March 2026. Appx035.

On July 1, 2025, the court entered an Amended Scheduling Order adopting all of Apple's dates. Appx029-030. Summary judgment briefing was to be completed by July 23, 2025, with the Pre-Trial Conference one week later on July 30, 2025, Jury Selection on July 31, 2025, and Trial starting on August 4, 2025. *Id.* The court, however, failed to address Fintiv's lead counsel's scheduling conflict, or Fintiv's

request for completion of previously-ordered discovery. *Id.*; *see also* Appx056-057 ¶¶2a, 2b.

On July 14, 2025, Fintiv filed an "Opposed Emergency Motion to Continue Trial or, in the Alternative, Order Defendant Apple Inc. to Comply with Previous Discovery Orders." Appx005-010. Fintiv explained its arguments regarding Fintiv's lead counsel's scheduling conflict and Fintiv's five primary counsels' scheduled "office move—affecting all support staff, equipment, files, servers, etc.—which is disruptive and prejudicial to preparing for an August 4, 2025, trial." Appx008. Referencing its June 2022 Emergency Motion to reopen discovery and continue trial, Fintiv also described why Apple's missing discovery was of utmost importance and proceeding without it would be unduly prejudicial because it included emails about technical meetings reflecting "Apple's desire to implement Fintiv's technology into what eventually became Apple Pay." Appx005-008; see also Appx056-058; Appx081-093.

Fintiv also explained its lead counsel's scheduling conflict and Fintiv's five primary counsels' scheduled "office move—affecting all support staff, equipment, files, servers, etc.—which is disruptive and prejudicial to preparing for an August 4, 2025, trial." Appx008.

However, the court denied Fintiv's request for relief with no explanation:

[T]his email notifies the parties that the Court is DENYING Plaintiff's Opposed Emergency Motion to Continue Trial, or In the Alternative,

Order Defendant Apple Inc. to Comply with Previous Discovery Orders (ECF No. 494). A written order will appear on the docket ASAP.

Appx001. With the trial date looming in a week, Fintiv was forced to file its Petition for Writ of Mandamus and the copending Emergency Motion to Stay of the district court proceedings.

REASONS THE WRIT SHOULD ISSUE

Fintiv recognizes that the remedy of mandamus is available only in extraordinary situations to correct a clear abuse of discretion or usurpation of judicial power. See, e.g., In re Calmar, Inc., 824 F.2d 461, 464 (Fed. Cir. 1988). Such is the case here. "The party seeking the writ bears the burden of proving that there is no other means of obtaining the relief desired," Mallard v. United States District Court, 490 U.S. 296, 309 (1989), and "that the right to issuance of the writ is clear and indisputable." Allied Chem. Corp. v. Daiflon, Inc., 449 U.S. 33, 35 (1980); see also Ayres v. Canales, 790 S.W.2d 554, 556 (Tex. 1990) (confirming Texas law that a writ is proper when there is no adequate means of appeal). A request for writ of mandamus relief is determined under Federal Circuit law, except to the extent that underlying procedural issues may be governed by the law of the regional circuit, which in this case is the Fifth Circuit. See, e.g., In re Pioneer Hi-Bred Int'l, Inc., 238 F.3d 1370, 1374 (Fed. Cir. 2001).

Fintiv previously requested relief from the district court by moving for the court continue the trial, which is scheduled to begin on August 4, 2025, to resolve previously ordered but not produced discovery and lead counsel's scheduling conflict. Appx005-013. However, the district court denied Fintiv's motion without explanation (Appx001), making this Petition for Writ of Mandamus and accompanying Motion to Stay necessary.

I. The District Court Abused its Discretion by Scheduling Trial Without Requiring Apple to Complete Court-Ordered Discovery

A. History of the Court-Ordered Discovery

A brief history of the disputed court-ordered discovery is in order. The court-ordered discovery of Apple goes to the core of infringement, copying, and willful infringement. Appx065. On the eve of trial in 2022, Fintiv uncovered that Apple had been withholding evidence that Fintiv's predecessor SK C&C d/b/a/ CorFire ("CorFire") shared key aspects of its patented mobile wallet technology with Apple during at least five in-person meetings, occurring prior to Apple launching the accused Apple Pay product. Appx065. Additionally, after the meetings, Apple hired CorFire employees who were at those meetings, and one of those former CorFire employees became Apple's Director of Apple Pay and Apple Wallet Management. *Id.* Based on the information Fintiv had uncovered that conflicted with Apple's

written and produced discovery,³ Fintiv believed the additional court-ordered information would show that Apple copied CorFire's technology, which resulted in Apple Wallet. Fintiv requested to be able to amend the pleadings to add a willful infringement count. *See* Appx062.

Fintiv explained the import of its discovery in its June 2022 emergency motion to reopen discovery and continue trial:

First, the previously-ordered email and deposition discovery relates to meetings between Fintiv and its predecessor and Apple, and Apple's internal discussions before and after the launch of Apple Pay, regarding Apple's desire to implement Fintiv's technology into what eventually became Apple Pay. *See* Dkts. 431 &441 [Appx056-057; Appx081]. ...

[T]he existence and the importance of this discovery was only learned after the close of fact discovery on the eve of trial when Fintiv uncovered that Apple had failed to disclose that it had: (1) hired employees that previously worked at Fintiv's predecessor company SK C&C d/b/a/ CorFire ("CorFire") and (2) had meetings with CorFire about the accused Technology. *See* Dkt. 431 [Appx081-093].

Appx005-013.

At the hearing on Fintiv's motion, the court ordered Apple to produce documents and witnesses and concluded by recognizing the importance of completing such discovery before holding a trial:

-

³ See, e.g., 2022-06-24 Plaintiff's Emergency Motion for Reopening of Discovery, Trial Continuance, and Sanctions Hearing Presentation. Appx095-097 (Explaining Apple's 180 degree turn in its discovery representations).

What I would urge all of you to do is when you get to the point where you think you have finished—I'm not going to reset the trial until you all give me an indication that you're done with this stuff.

As soon as you all let me know that it is and we can have another pretrial conference and all that, *then I'll give you a trial date*.

App $x060-061\ 66:22-67:3$ (emphasis added).

As soon as you all let me know you're prepared for pretrial—pretrial conference, then we will set both the pretrial conference and the trial date.

Appx061, 67:22-25 (emphasis added). Further, the court and the parties envisioned that there would be a time for Fintiv to move to add willfulness back into the case:

MR. FOWLER: if Mr. Waldrop wants to file a motion after discovery is over to add willfulness back into the case, that could be heard at the pretrial conference or it could be heard before the pretrial conference.

Seems to me it should all be heard at the same time at the pretrial conference.

THE COURT: I'm happy to do that.

* * *

THE COURT: And that is the way I ordinarily would do it. Yes. Appx062, 68:13-23.

On July 5, 2022, the court followed-up and ordered, *inter alia*, Apple to produce documents and witnesses:

2. Fintiv's motion to reopen discovery is hereby **GRANTED-IN-PART** to the extent the Court orders additional limited bilateral discovery. The Court orders the following with respect to further discovery in this matter:

- a. Fintiv will be permitted to take the depositions of Apple employee Ben Vigier, former Apple employee Pascal Caillon, and former Apple employee Charles Buchbinder. ...
- b. Apple is ordered to produce the documents, including emails, identified in Apple's Opposition. ...

Appx056-057, ¶2a, 2b. On July 15, 2022, Apple produced 14 documents. And the parties continued to negotiate on scope of production. During that same time, the court ordered a mandatory settlement conference (Appx055) and mediation (Appx094) for June 8, 2023. Both were unsuccessful. Surprisingly, without the parties notifying the court that they had completed the ordered discovery, on June 7, the court set a pretrial conference for one week later on June 13, and a trial starting less than a month after that:

2023-06-07	Order Setting Trial Schedule
2023-06-08	Mediation
2023-06-13	Pretrial Conference & Summary Judgment Hearing
2023-07-10	July Selection and Trial

Appx053; Appx054; Appx052.

On June 8, the very next day and just three business days before the pre-trial conference, Apple requested to reargue its 2021 summary judgment motion for non-infringement, and the court scheduled that argument for the same day as the pre-trial conference – June 13, 2023. Appx052. At the pretrial conference, the court granted Apple's summary judgment of noninfringement, which this Court reversed in May

2025. As such upon remand, the ordered discovery remained outstanding, needed to be completed, and Fintiv needed to be provided an opportunity to move to reinstate its willfulness claim, before the case would be ready for trial.

B. On Remand, the District Court Ignored its Own Order, Apple's Outstanding Discovery, and its Agreement to Allow Fintiv to Move to Include Willfulness

On remand, on June 23, 2025, the court set the August 4, 2025 trial date without requiring Apple to comply with its outstanding discovery order related to the three witnesses for deposition and related emails. Appx038. On July 18, 2025, the court sent an email to the parties denying, without explanation, Fintiv's request to continue trial, and to order Apple to comply with the court's previous discovery order. Appx001; *see Banco Mercantil de Norte, S.A. v. Paramo*, 114 F.4th 757, 762 (5th Cir. 2024) (holding that the district court abused its discretion by failing to articulate any reason to support its ruling beyond a cursory statement that it considered the parties' filings). The court thus far has not provided an explanation. Appx001.

With trial approaching in one week, Fintiv is left with no choice but to seek this writ directing the district court to maintain discovery for a reasonable time until Apple produces the remaining ordered emails and the three witnesses for deposition. *See, e.g., Mallard*, 490 U.S. at 309; *Allied Chem.*, 449 U.S. at 35.

C. Fintiv Had an Expectation that it Would be Permitted to Complete Court-Ordered Discovery Before Trial was Scheduled

After informing the parties that it was "not going to reset the trial date until you all give me an indication that you're done" with the court-ordered discovery (Appx061 67:24-25.2), the district court did just what it said it would not do. By acting directly contrary to its prior instruction, the district court abused its discretion, setting the trial date with just five weeks' notice and without enforcing the previously-ordered discovery. Appx038. Texas courts have held that allowing the withholding relevant documents improperly presents a clear tactical disadvantage to the other party, especially when forced to proceed to trial without all relevant discovery at their disposal. *Queens Univ. at Kingston v. Samsung Elecs. Co.*, 2:14-cv-53-JRG-RSP, 2015 U.S. Dist. LEXIS 176745, *6 (E.D. Tex. Aug. 27, 2015) (remarking in context of granting a stay).

The Fifth Circuit has held that it is an abuse of discretion for a district court to render a final judgment when the non-moving party has not completed relevant discovery. See, e.g., Witchita Falls Office Assocs. v. Banc One Corp., 978 F.2d 915 (5th Cir. 1992); McCoy v. Energy XXI GOM, LLC, 659 Fed. Appx. 750, 759 (5th Cir. 2017) (holding district court abused its discretion by refusing to allow plaintiff to conduct sufficient discovery to support fairly raised allegations). For example, in Witchita Falls Office Assocs. ("WFOA"), the Fifth Circuit held that the "district court had improperly curtailed discovery," by granting summary judgment before

plaintiff had concluded discovery. *Id.* at 920. In *WFOA*, on June 4, 1991, the district court granted a protective order cutting off all discovery sought by the plaintiff WFOA, and on June 6, 1991, the district court granted summary judgment against all of WFOA's claims. On appeal the Fifth Circuit reversed noting that the district court should have deferred its summary judgment ruling until after WFOA had a chance to obtain the requested discovery. *Id.* at 920.

Similarly, here, there was no discovery cut-off date, and the court had indicated it was waiting for the parties to tell it that they had completed discovery. (Appx061 at 67:24-25.2). At the time the court *sua sponte* set the trial date, the parties had not completed discovery. Therefore, based on the court's statements, the parties understood that discovery was still ongoing. For the court to schedule a trial with five weeks' notice and ignore Apple's failure to complete the previously ordered discovery is an abuse of discretion. *Id.* at 920.

Without court-ordered discovery going to the merits of infringement, copying, and willful infringement leaves Fintiv at a clear tactical disadvantage. *See Queens Univ.*, 14-cv-53-JRG-RSP, 2015 U.S. Dist. LEXIS 176745, *6. Additionally, the court agreed to allow Fintiv to move to add willful infringement back into the case (Appx062), however, without this discovery and pursuant to the court's order scheduling trial to begin in a week, Fintiv will be denied the opportunity to pursue its claim, also constituting an abuse of discretion. *WFOA*, 978 F.2d at 920.

With trial approaching in one week, Fintiv's only option for relief is this Petition for Writ of Mandamus asking the Court to direct the district court to vacate the August 4 trial date until Apple completes the court-ordered production and Fintiv deposes the three Apple witnesses.

II. The District Court Abused its Discretion by Scheduling Trial During Lead Counsel's Litigation Conflict thus Preventing Fintiv's Right to its Choice of Counsel

A litigant has a right to be represented by the attorney of his choice. *Keller Indus., Inc. v. Blanton*, 804 S.W.2d 182, 185 (Tex. App. Houston 1991). And that right "is a significant one." *Ayres*, 790 S.W.2d at 557-58. "Absent a compelling reason, courts should not deprive litigants of that right because such deprivation can result in immediate and palpable harm." *Keller Indus.*, 804 S.W.2d at 185 (citation omitted).

On June 23, 2025, after the court *sua sponte* set the August 4, 2025 trial date, Fintiv informed the court that its lead counsel and client-relationship partner Marc Kasowitz has a preexisting federal court hearing in the Southern District of New York, and because of the scheduling conflict as well the five other primary counsels' office move, Fintiv requested that the trial not be scheduled on August 4. Appx031-033.

In addition to this case, Mr. Kasowitz is also lead counsel in *Binh Thanh Import Expert Production & Trade Joint Stock Co. v. Amazon.com Services LLC*, in

which the court previously ordered an evidentiary hearing to begin on August 4, 2025. Appx015-019. The parties have listed nine witnesses to testify during the S.D.N.Y. August 4, 2025 hearing, and at least five of those witnesses need translators, thus slowing down the testimony. Kazowitz Decl. ¶7. The parties have also identified over 250 exhibits for this hearing. *Id.* Based on the number of witnesses, the number of translations, and the number of exhibits, Mr. Kasowitz estimates that the S.D.N.Y hearing should last three-to-four days. Further, based on this S.D.N.Y. court's local procedures, once the court resolves the matters scheduled for the August 4 hearing, the parties are expected to "be ready to proceed [with trial] on 24 hours' notice" Kazowitz Decl. ¶4.

However, the court refused to change the August 4 date, Appx029-030, without formal hearing and without explanation. Appx001. As of the filing of this Petition no written order has appeared, and in just one week this case will start trial, leaving Fintiv with no choice than to file this Petition for Writ of Mandamus. *See, e.g., Mallard*, 490 U.S. at 309; *Allied Chem.*, 449 U.S. at 35.

The *Binh Thanh* hearing days originally conflicted entirely with the *Fintiv v. Apple* trial, which the Court scheduled to start on August 4 and last for five days. Kasowitz Decl. ¶9. However, late in the day on July 28, 2025, the *Binh Thanh* court *sua sponte* rescheduled its August 4 hearing to August 12. Kasowitz Decl. ¶11. While this new hearing date means that the two trials do not entirely overlap, it still

makes proper preparation for either trial virtually impossible, which is unfair for both of Mr. Kasowitz's clients who expect him to be their lead trial counsel. Kasowitz Decl. ¶¶12, 13. Indeed, if the *Fintiv v. Apple* trial only lasts five days, that will provide Mr. Kasowitz with one business day and the weekend to prepare for the *Binh Thanh* trial. Kasowitz Decl. ¶12. If the *Fintiv v. Apple* trial lasts more than five days, the two trials will again overlap. Such a schedule simply prejudicial to both clients. Kasowitz Decl. ¶12.

The Texas Keller court held that "[a]bsent a compelling reason," courts should not deprive litigants of their right to choice of counsel, "because such deprivation can result in immediate and palpable harm." *Id.* at 185. However, that is precisely what the district court has done here by refusing to change the August 4 trial date. In Keller, the Texas state court had refused to allow two Illinois attorneys to represent their client pro hac vice. The court did so without a hearing. Id. at 184. The Court of Appeals granted the writ and directed the court to admit the foreign attorneys, holding that "Texas courts have long held that the right to be represented by counsel of choice is a valuable one and the unwarranted denial of that right has been held to be fundamental error." Id. at 185 (citing Farmers' Gas Co. v. Calame, 262 S.W. 546, 548 (Tex. Civ. App. Waco 1924). Here as in Keller, the district court did not provide the parties with a hearing, nor did it provide the parties with its reasoning for refusing to move the trial date. Appx001.

The old Farmer's Gas Co. v. Calame, case from 1924 is on point. 262 S.W. at 548. In Farmer's Gas, Mr. Griffith was Farmer's Gas's "regularly employed attorney representing appellant generally, and he was also specially employed to represent it in this suit." Id. at 547. Unfortunately, Mr. Griffith had "prior and conflicting engagements which required him to be at and to try cases in other courts during the whole of said week." *Id.* When the court refused to change the trial date, Mr. Griffith filed for continuance, setting forth his conflicts. The court however, overruled the motion and the case proceeded to trial ex parte. Not surprisingly, Mr. Calame won. *Id.* at 549. On appeal, the court reversed, holding that the "right to appear and be represented at such hearing by counsel of his own selection, familiar with his cause is a very valuable right. The unwarranted denial of such right has Similarly to Farmer's Gas, here, been held to be fundamental error." Id. Mr. Kasowitz is Fintiv's long time attorney, earning Fintiv's trust in battle. See id. at 547 (Mr. Griffith was the regularly employed counsel). As the Farmer's Gas court noted, under Texas law the "unwarranted denial" of right to counsel of choice, where such counsel has preexisting conflicts that require him to be in court in another jurisdiction, results in a fundamental error justifying the grant of the writ.

Here, until today, Mr. Kasowitz had a complete preexisting conflict with the August 4 trial. That the court abused its discretion and ignored that conflict has not changed merely because the S.D.N.Y. moved its trial to a week later. Indeed,

requiring trial on August 4, still prevents Fintiv representation by its counsel of choice. Kasowitz Decl. ¶12.

This Court also has granted writ of mandamus when counsel of choice is not available. *In re Shared Memory Graphics LLC*, 659 F.3d 1336, 1342 (Fed. Cir. 2011). In *Shared Memory Graphics*, the Court held that the petitioner will be "adversely affected if it is required to wait until after a final adverse judgment to have the issue addressed because petitioner will be required to proceed through the litigation without counsel of its choice." *Id.* at 1342. The district court had disqualified plaintiff's counsel of choice based on a purported conflict of interest. On Petition, plaintiff argued that the court erred because the conflict of interest was waived under a preexisting Joint Defense Agreement. *Id.* at 1341. This Court agreed and granted the writ, explaining that the adverse effect of not doing so would be to deny petitioner its choice of counsel. *Id.* Such is the case here.

Indeed, Fintiv has no meaningful path to obtain relief other than seeking this writ of mandamus. "By the time an appeal could be taken, the trial would be over, and [Fintiv] would have gone through the litigation without the counsel of its choice." *Shared Memory Graphics*, 659 F.3d at 1340. This Court should grant the writ of mandamus and direct the district court to vacate its August 4 trial date and set a new one that allows both parties to be represented by their counsel of choice.

Case: 25-142 Document: 2-1 Page: 26 Filed: 07/29/2025

CONCLUSION

The Court should stay the case, and hence the August 4 trial date, pending decision on this Petition for Writ of Mandamus; grant the Writ and direct the district court to (1) vacate the order scheduling trial on August 4, 2025, direct Apple to complete the previously-ordered production and permit Fintiv to depose the three previously-ordered Apple witnesses; and (2) reset the trial to a date when all counsel are available.

Dated: July 28, 2025 Respectfully submitted,

Marc E. Kasowitz KASOWITZ LLP Paramount Plaza 1633 Broadway New York, New York 212.506.1700 mkasowitz@kasowitz.com

Meredith Martin Addy

Meredith Martin Addy ADDYHART LLC 10 Glenlake Parkway Suite 130 Atlanta, Georgia 30328 312.320.4200 meredith@addyhart.com

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

In re Fintiv, Inc. 25-____

This brief complies with the relevant type-volume limitation of the Federal Rule of Appellate Procedure and Federal Circuit Rules because it has been prepared using a proportionally-spaced typeface and includes 4,582 words.

Dated: July 28, 2025 By: /s/ Meredith Martin Addy

Meredith Martin Addy

CERTIFICATE OF SERVICE

I certify that, pursuant to Fed. R. App. P. 25(c), on July 28, 2025, a true and correct copy of the above Petition for Writ of Mandamus was filed electronically and provided to all counsel of record by email to:

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Ahimsa E. Hodari DLA PIPER US Houston, Texas ahimsa.hodari@us.dlapiper.com

In addition, an electronic copy was sent to the U.S. District Judge:

The Honorable Alan D. Albright TXWDml_LawClerks_WA_JudgeAlbright@txwd.uscourts.gov, and Zachary_Ellis@txwd.uscourts.gov

/s/ *Meredith Martin Addy*Meredith Martin Addy

ADDENDUM

Appx001-097

Dkt25-____

United States Court of Appeals for the Federal Circuit

IN RE FINTIV, INC.

Petitioner.

On Petition for Writ of Mandamus to the United States District Court for the Western District of Texas, the Honorable Alan D. Albright, in 1:21-cv-00896-ADA

NON-CONFIDENTIAL APPENDIX IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS CONFIDENTIAL]

Marc E. Kasowitz (admission pending) Kasowitz LLP Paramount Plaza 1633 Broadway New York, New York 10019 212.506.1700

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July 28, 2025

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Counsel for Petitioner Fintiv, Inc.

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Note regarding Confidential Material

Material redacted on Appendix pages Appx059-063 and Appx081-093, Appx095-097 of the non-confidential version of this Appendix, and highlighted in the confidential version are the confidential sealed versions from the pending underlying matter (1:21-cv-0096-ADA)

From: Zachary Ellis zachary_ellis@txwd.uscourts.gov @

Subject: RE: Fintiv v. Apple - Scheduling Issues

Date: July 18, 2025 at 2:21 PM

To: Ray Mort raymort@austinlaw.com, Guaragna, John John.Guaragna@us.dlapiper.com, TXWDml_LawClerks_WA_JudgeAlbright TXWDml_LawClerks_WA_JudgeAlbright@txwd.uscourts.gov

Cc: Cunningham, Sean Sean.Cunningham@us.dlapiper.com, Paul G. Williams PWilliams@kasowitz.com, Marcus Barber MBarber@kasowitz.com, Marc E. Kasowitz MKasowitz@kasowitz.com, Jonathan K. Waldrop JWaldrop@kasowitz.com, Fintiv Fintiv@kasowitz.com, gil@gillamsmithlaw.com, DLA-Apple-Fintiv DLA-Apple-Fintiv@us.dlapiper.com, ThucMinh Nguyen TNguyen@kasowitz.com, Mark Siegmund msiegmund@cjsjlaw.com, Saulnier, Mike Michael.Saulnier@us.dlapiper.com

ALERT: THIS IS AN EXTERNAL EMAIL. DO NOT CLICK ON ANY LINK, ENTER A PASSWORD, OR OPEN AN ATTACHMENT UNLESS YOU KNOW THAT THE MESSAGE CAME FROM A SAFE EMAIL ADDRESS.

Counsel,

To avoid delay between submitting the Order and the Order appearing on the docket, this email notifies the parties that the Court is **DENYING** Plaintiff's Opposed Emergency Motion to Continue Trial or, In the Alternative, Order Defendant Apple Inc. to Comply with Previous Discovery Orders (ECF No. 494). A written order will appear on the docket ASAP.

Best,



Zachary H. Ellis
Law Clerk to the Honorable Alan D Albright
United States District Court, Western District of Texas
Zachary Ellis@txwd.uscourts.gov

From: Zachary Ellis <zachary_ellis@txwd.uscourts.gov>

Sent: Sunday, July 13, 2025 1:38 PM

To: Ray Mort <raymort@austinlaw.com>; Guaragna, John <John.Guaragna@us.dlapiper.com>;

TXWDml_LawClerks_WA_JudgeAlbright <TXWDml_LawClerks_WA_JudgeAlbright@txwd.uscourts.gov> Cc: Cunningham, Sean <Sean.Cunningham@us.dlapiper.com>; Paul G. Williams <PWilliams@kasowitz.com>;

MBarber@kasowitz.com; Marc E. Kasowitz < MKasowitz@kasowitz.com>; JWaldrop@kasowitz.com; Fintiv

<TNguyen@kasowitz.com>; Mark Siegmund <msiegmund@cjsjlaw.com>; Saulnier, Mike

<Michael.Saulnier@us.dlapiper.com>

Subject: Re: Fintiv v. Apple - Scheduling Issues

Counsel,

The Court will consider any requests for relief regarding the trial date that are made via motion on the docket. The Court notes that it considered the parties' respective positions in ECF No. 486 when setting the August 4 trial date.

Best,

Zachary H. Ellis Law Clerk to the Honorable Alan D Albright

From: Ray Mort < raymort@austinlaw.com >

Sent: Sunday, July 13, 2025 9:02:17 AM

To: Zachary Ellis zachary ellis xachary ellis <a href="mailto:txw

MBarber@kasowitz.com <MBarber@kasowitz.com>; Marc E. Kasowitz <MKasowitz@kasowitz.com>; JWaldrop@kasowitz.com>; Fintiv@kasowitz.com>; gil@gillamsmithlaw.com

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< Michael. Saulnier@us.dlapiper.com >

Subject: RE: Fintiv v. Apple - Scheduling Issues

CAUTION - EXTERNAL:

AII,

We write regarding the Court's entry of the schedule and August 4 trial date for the Fintivy Apple case. We

note that the Court did not accept Fintiv's proposed schedule and did not order Apple to produce the emails and make available for deposition the witnesses that were previously ordered by the Court (Dkt. 441). We also note that the Court did not rule on our request for supplemental expert reports based on this additional discovery. We respectfully reiterate that proceeding to trial without this discovery and without lead trial counsel Marc Kasowitz is prejudicial to Fintiv for three reasons.

First, the previously-ordered email and deposition discovery relates to meetings between Fintiv and its predecessor and Apple and Apple's internal discussions before and after the launch of Apple Pay, regarding Apple's desire to implement Fintiv's technology into what eventually became Apple Pay. As a reminder, the existence and the importance of this discovery was only learned after the close of fact discovery and on the eve of trial in June 2022 when Fintiv uncovered that Apple had failed to disclose that it had: (1) hired employees that previously worked at Fintiv's predecessor company; and (2) had meetings with Fintiv's predecessor about the accused technology. This necessitated Fintiv filing an emergency motion to obtain this discovery, which the Court granted. In fact, while Fintiv has not received all of the previously-ordered discovery, some of that discovery that has been produced by Apple confirms that Apple's trial witnesses (e.g., Ahmer Khan) were directly involved in those discussions and meetings. Critically, this information was not disclosed by Apple during discovery, has been previously ordered by the Court, and is significant to issues of infringement, validity and damages. After the emergency motion, Fintiv moved to compel this discovery, but was prevented from obtaining it after the Court granted summary judgment in June 2023.

Second, Mr. Kasowitz has a conflict in SDNY for a hearing and trial <u>starting on August 4.</u> (Dkt. 486). We also note for the Court that Mr. Kasowitz is also lead trial counsel and the relationship partner for Fintiv. We respectfully understand that the Court wants an expeditious trial setting, and we have investigated the week of <u>October 13</u> as a potential alternative trial date, but our damages expert is not available then. Fintiv (counsel and witnesses) is available for trial on a date for the week of <u>December 15, 2025</u>, and may be available for trial for the week of <u>October 13, 2025</u>.

Finally, we respectfully note that Apple's new summary judgment briefing raises new factual issues and arguments that were not raised during the case and that the e-mail and deposition discovery previously ordered by the Court is necessary for Fintiv to put on a full and complete case regarding infringement, validity and damages. Fintiv respectfully requests that the Court reconsider its denial of a continuance of the trial and that the Court order the e-mail and deposition discovery previously granted to Fintiv.

If the Court is unwilling to reconsider the above (which we hereby request), for purposes of the record, Fintiv respectfully request that the Court: (1) enter a denial for Fintiv's request for a continuance for the reasons outlined in the parties' joint submission (Dkt. 486); (2) enter a denial of Fintiv's request for alternative relief, namely an order requiring Apple to produce the previously ordered emails in 7 days and the depositions of the three witnesses previously ordered (Dkt. 441); and (3) denial of supplemental expert reports based on discovery obtained in Nos. 1 and 2.

Ray



AustinLaw.com · (512)-677-6825 · RayMort@AustinLaw.com

The statements contained herein are not intended to and do not constitute an opinion as to any tax or other matter. They are not intended or written to be used, and may not be relied upon, by you or any other person for the purpose of avoiding penalties that may be imposed under any Federal tax law or otherwise.

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From: Zachary Ellis < zachary ellis@txwd.uscourts.gov>

Sent: Tuesday, July 8, 2025 5:06 PM

To: Guaragna, John < John.Guaragna@us.dlapiper.com >; TXWDml_LawClerks_WA_JudgeAlbright

<TXWDml LawClerks WA JudgeAlbright@txwd.uscourts.gov>

Cc: Cunningham, Sean Sean.Cunningham@us.dlapiper.com; Paul G. Williams Pwilliams@kasowitz.com; MBarber@kasowitz.com; Marc E. Kasowitz MKasowitz@kasowitz.com; JWaldrop@kasowitz.com; Fintiv Fintiv@us.dlapiper.com; ThucMinh Nguyen

<TNguyen@kasowitz.com>; Mark Siegmund <msiegmund@cjsjlaw.com>; Saulnier, Mike

<<u>Michael.Saulnier@us.dlapiper.com</u>>; Ray Mort <<u>raymort@austinlaw.com</u>>

Subject: RE: Fintiv v. Apple - Juror Questionnaire

Counsel,

This email confirms that the Jury Coordinator for the Austin Division is aware of the August trial date. Further, the

Court referred Jury Selection to Judge Hightower on July 1 (ECF No. 489), and you can expect to receive more information from her chambers soon.

Best,



Zachary H. Ellis
Law Clerk to the Honorable Alan D Albright
United States District Court, Western District of Texas
Zachary Ellis@txwd.uscourts.gov

From: Guaragna, John < John.Guaragna@us.dlapiper.com >

Sent: Tuesday, July 8, 2025 4:56 PM

To: Zachary Ellis <zachary_ellis@txwd.uscourts.gov>; TXWDml_LawClerks_WA_JudgeAlbright

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< Fintiv@kasowitz.com >; gil@gillamsmithlaw.com; DLA-Apple-Fintiv < DLA-Apple-Fintiv@us.dlapiper.com >; ThucMinh Nguyen

<a href="mailto: , Mark Siegmund , Saulnier, Mike

< Michael. Saulnier@us.dlapiper.com >; raymort@austinlaw.com

Subject: RE: Fintiv v. Apple - Juror Questionnaire

CAUTION - EXTERNAL:

Dear Zak and Law Clerks:

I have included below the email and link to the previously approved juror questionnaire for this case. (The original email and a hard copy also are attached.) In case this was not already in progress and given the early August trial date, we wanted to provide this to the Court for the upcoming trial. Also, please let us know if there is a separate communication we should make to Judge Hightower on this topic and we would be happy to do so. And if the Court has any other questions, please let us know.

From: Melissa Copp < Melissa Copp@txwd.uscourts.gov>

Sent: Tuesday, May 31, 2022 4:09 PM

To: cjia@kasowitz.com; craig@swclaw.com; DJones@kasowitz.com; Gibson, Erin <Erin.Gibson@us.dlapiper.com>; george@cowdenlawfirm.com; gil@gillamsmithlaw.com; HKim@kasowitz.com; steve.ravel@kellyhart.com; Guaragna, John <John.Guaragna@us.dlapiper.com>; jdowning@kasowitz.com;

<u>JWaldrop@kasowitz.com; justin@swclaw.com; mkasowitz@kasowitz.com; MBarber@kasowitz.com; Fowler, Mark <Mark.Fowler@us.dlapiper.com>; pwilliams@kasowitz.com; Steadman, Paul</u>

Mark < Mark. Fowler@us.dlapiper.com>; pwilliams@kasowitz.com; Steadman, Paul < Paul. Steadman@us.dlapiper.com>; Maggiore, Peter < peter.maggiore@us.dlapiper.com>; raymort@austinlaw.com; Cunningham, Sean < Sean. Cunningham@us.dlapiper.com>; sivan@kasowitz.com; Lim, Stephanie < stephanie.lim@us.dlapiper.com>; tnguyen@kasowitz.com; twelch@kasowitz.com; Loney,

Zachary <<u>Zachary Loney@us.dlapiper.com</u>>
Cc: Regan Rundio <<u>Regan Rundio@txwd.uscourts.gov</u>>; TXWDml_NoJudge Chambers WA Judge Gilliland <<u>TXWDml_NoJudge_Chambers_WA_JudgeGilliland@txwd.uscourts.gov</u>>; Idelma Rivera

<a href="mailto:square: square: square

Subject: A21CV896 Fintiv vs. Apple - Special Patent Questionnaire Preview Link

△EXTERNAL MESSAGE

Counsel,

Thank you again for providing your joint proposed special patent questionnaire for Case No. 1:21-CV-896, *Fintiv, Inc. vs. Apple Inc.* The <u>approved</u> questions have been populated into Survey Monkey and will be distributed out to 35 prospective jurors scheduled to appear for the **Jury Selection** proceedings for <u>Thursday, June 16, 2022 at 9:00am before Judge Derek T. Gilliland in Courtroom #1 in the Austin Division.</u> The Pre-Voir Dire Conference is currently set for <u>Tuesday, June 14, 2022 at 2:00pm via Zoom also before Judge Derek T. Gilliland</u>. Please note that some questions were stricken, reworded or combined.

Below is a link to the Special Patent Juror Questionnaire. An email to the jurors will be distributed with the survey link on Thursday, June 2, 2022. The deadline for the jurors to fill out the questionnaire will be **Thursday**, **June 9**, **2022** and the responses will be sent out to

counsel by **Monday**, **June 13th**. If responses can be culled sooner, they will be provided earlier via .pdf format (other formats such as .csv and .xls may be provided upon request).

https://www.surveymonkey.com/r/H7R35HK

Thank you, Melissa

Sincerely, -john

John M. Guaragna

Partne

T +1 512 457 7125

john.guaragna@us.dlapiper.com

DLA Piper LLP (US) 303 Colorado Street Suite 3000 Austin, TX 78701



dlapiper.com

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PUBLIC VERSION

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

FINTIV, INC.,	§
	§ Civil Action No.: 1:21-cv-00896-ADA
	§
Plaintiff,	§
	§ JURY TRIAL DEMANDED
v.	§
ADDI E INC	§
APPLE INC.,	§
Defendent	§
Defendant.	§

PLAINTIFF FINTIV, INC.'S OPPOSED EMERGENCY MOTION TO CONTINUE TRIAL OR, IN THE ALTERNATIVE, ORDER DEFENDANT APPLE INC. TO COMPLY WITH PREVIOUS DISCOVERY ORDERS

Plaintiff Fintiv, Inc. ("Fintiv" or "Plaintiff") respectfully moves to continue the August 4, 2025, trial or, in the alternative, for an order requiring Defendant Apple Inc. ("Apple" or "Defendant") to comply with a prior discovery order to produce emails and make its witnesses available for depositions on an expedited basis to allow supplemental expert reports based on the same immediately thereafter ("Motion"). Given the urgency of this Motion (as jury selection is scheduled for July 31, 2025), Fintiv respectfully requests that the Court order expedited briefing with Apple's response due by Thursday, July 17, 2025. Fintiv waives its right to a reply. Apple indicated that it is opposed to this Motion.

I. Procedural History & Factual Background

On May 16, 2025, the United States Court of Appeals for the Federal Circuit issued a Judgment reversing this Court's grant of summary judgment in Apple's favor and remanding "for

¹ Following the parties' July 14, 2025, telephonic meet and confer, counsel for Apple agreed in writing to submit its opposition to this Motion by July 17, 2025. Declaration of Jonathan K. Waldrop ("Waldrop Decl.") at \P 3.

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PUBLIC VERSION

the district court to address whether summary judgment of noninfringement is warranted as to [certain] limitations or on the remaining grounds asserted by Apple, which the district court did not reach." See Dkt. 482 at 12. On June 24, 2025, this Court issued an Order instructing the parties to submit an agreed amended schedule that included jury selection on July 31, 2025, and trial on August 4, 2025. See Dkt. 483. On June 27, 2025, the parties filed their Joint Submission Regarding Disputed Scheduling Order ("Joint Submission"), in which Fintiv (1) notified the Court that its lead counsel Marc Kasowitz was unavailable and its primary counsel was in the middle of moving offices, and (2) proposed a schedule with alternative trial dates to allow time for Apple to produce emails and make its witnesses available for discovery as previously ordered, and Fintiv to supplement its expert reports based on the same. See Dkts. 486-487. On July 1, 2025, the Court entered an Amended Scheduling Order with the August 4, 2025, trial date. See Dkt. 488. In doing so, the Court did not accept Fintiv's proposed schedule and did not order Apple to produce emails and make available for deposition the witnesses that were previously ordered by the Court, nor allow supplementation of Fintiv's expert reports to include said discovery. See Dkt. 441 (Order on Emergency Motion [ECF NO. 431] ordering Apple to produce documents and emails and granting Fintiv's request to depose former Apple employees Ben Vigier, Pascal Callion, and Charles Buchbinder). On July 2, 2025, Apple filed its Supplemental Brief In Support Of Summary Judgment In Accordance With The Federal Circuit Mandate ("Supplemental SJ") (Dkt. 490), to which Fintiv's Opposition is due July 16, 2025, pursuant to the Amended Scheduling Order (Dkt. 488).

II. The August 4, 2025, Trial Setting Is Prejudicial To Fintiv

First, the previously-ordered email and deposition discovery relates to meetings between Fintiv and its predecessor and Apple, and Apple's internal discussions before and after the launch

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PUBLIC VERSION

of Apple Pay, regarding Apple's desire to implement Fintiv's technology into what eventually became Apple Pay. See Dkts. 431 & 441. As set forth in Fintiv's Emergency Motion For Reopening Of Discovery, Trial Continuance, And Sanctions ("June 2022 Emergency Motion"), the existence and the importance of this discovery was only learned after the close of fact discovery and on the eve of trial in June 2022 when Fintiv uncovered that Apple had failed to disclose that it had: (1) hired employees that previously worked at Fintiv's predecessor company SK C&C d/b/a CorFire ("CorFire"); and (2) had meetings with CorFire about the accused technology. See Dkt. 431. This necessitated Fintiv's filing of the June 2022 Emergency Motion to obtain this discovery, which the Court granted. See Dkt. 441 at 1-2 ("The Court orders the following with respect to further discovery in this matter: (a) Fintiv will be permitted to take the depositions of Apple employee Ben Vigier, former Apple employee Pascal Caillon, and former Apple employee Charles Buchbinder... (b) Apple is ordered to produce the documents, including emails, identified in Apple's Opposition... (f) Both parties are ordered to conduct additional searches through limited sets of email and ESI using custodians and search terms agreed to by the parties, and to produce nonprivileged results of those email/ESI searches to the other side. Unless otherwise agreed to by the parties, the time period for searching of email/ESI shall be limited to the calendar years 2011 through 2016..."). Indeed, while Fintiv has not received all of the previously-ordered discovery, some of the discovery that has been produced by Apple confirms that Apple's trial witnesses (e.g., Ahmer Khan) were directly involved in the discussions and meetings with CorFire. Ex. 1.2 Critically, this information was not disclosed by Apple during discovery, has been previously ordered by the Court, and is significant to issues of infringement, validity, and damages. In fact, after the June 2022 Emergency Motion, Fintiv moved to compel this discovery, but was

² "Ex. ___" refers to exhibits to the Waldrop Decl. filed contemporaneously herewith.

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PUBLIC VERSION

prevented from obtaining it after the Court granted summary judgment in June 2023. *See* Dkts. 450 & 467.

Second, as set forth in the Joint Submission (Dkt. 486), Fintiv's lead trial counsel Marc Kasowitz is unavailable for trial on August 4, 2025. Mr. Kasowitz has an evidentiary hearing that will lead into trial in *Binh Thang Import Export Production & Trade Joint Stock Co. v. Amazon.com Services LLC*, Case No. 1:23-cv-00292-LGS (SDNY). Additionally, five of Fintiv's primary counsel (Jonathan Waldrop, Marcus Barber, John Downing, Heather Kim, and ThuchMinh Ngyuen) are in the process of an office move – affecting all support staff, equipment, files, servers, etc. – which is disruptive and prejudice to preparing for an August 4, 2025, trial.

Last, Apple's new summary judgment briefing raises new factual issues and arguments that were not raised during the case, and the email and deposition discovery previously ordered by the Court is necessary for Fintiv to put on a full and complete case regarding infringement, validity, and damages. Specifically, Apple's Supplemental SJ raises new factual and legal issues with regard to infringement of claim 11 element (g) regarding provisioning the widget. *See* Dkt. 490. Apple never disclosed a non-infringement position related to this element of claim 11 in its Interrogatory Responses or in the Expert Rebuttal Report of Henry Dreifus. Exs. 2 & 3. Additionally, Apple's Supplemental SJ raises new non-infringement positions related to both widget related limitations of claim 23. *See* Dkt. 490. Notably, claim 23 element (d) is already subject to Motions to Strike for failure to disclose a non-infringement position on this element. *See* Dkts. 262 & 263. These motions are currently under consideration by the Court from the September 24, 2021 pretrial conference. Ex. 4 at 66:19-20 ("[The Court:] I will take up the – what was it – the OTA, I will take that up discretely..."), 71:10-11 ("[The Court:] Again, I'll take up

4

³ Mr. Kasowitz is not only lead trial counsel, but also the relationship partner for Fintiv.

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PUBLIC VERSION

the issue of the OTX proxy. But other than that, I'm going to deny Fintiv relief..."). Apple moving for summary judgment on new factual and legal arguments with a closed record is highly prejudicial. Accordingly, Fintiv intends to move to strike at least these portions of Apple's Supplemental SJ that were not disclosed in Apple's Interrogatory Responses.

Fintiv's counsel and witnesses are available for trial weeks of October 13, 2025, and December 15, 2025, or a later date at the Court's convenience.

III. A Continuance Will Not Prejudice Apple

A continuance will not prejudice Apple because granting the relief will not change the status quo of Apple's continuous infringement without paying Fintiv's reasonable royalty.

Rule 16(b) of the Federal Rules of Civil Procedure provides that a scheduling order may be modified "for good cause and with the judge's consent." *Fahim v. Marriott Hotel Servs., Inc.*, 551 F.3d 344, 348 (5th Cir. 2008) (internal quotation marks omitted). The factors guiding the "good cause" determination include: "(1) the party's explanation; (2) the importance of the requested relief; (3) potential prejudice in granting the relief; and (4) the availability of a continuance to cure such prejudice." *Green Hills Dev. Co. v. Credit Union Liquidity Servs., LLC*, 3:11-CV-1885-P, 2013 WL 12126783, at *2 (N.D. Tex. May 14, 2013); *see Sapp v. Mem'l Hermann Healthcare Sys.*, 406 Fed. Appx. 866, 869 (5th Cir. 2010) (*per curiam*) ("no single factor is dispositive, nor must all the factors be present"). A motion for continuance should be granted if a party discovers new information or the opposing side failed to produce documents. *See Sw. Refrigerated Warehousing Servs. Joint Venture v. M.A. & Sons, Inc.*, No. EP-16-CV-00421-DCG, 2017 WL 8777365, at *1 (W.D. Tex. Dec. 20, 2017) (granting motion for continuance where a party discovered new information and opposing party failed to turn over requested documents); *see also Advanced Display Systems, Inc. v. Kent State Univ.*, 212 F.3d 1272, 1284-86 (Fed. Cir.

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PUBLIC VERSION

2000) (applying Fifth Circuit law and reversing denial of new trial where a party "deliberately and intentionally withheld" key evidence pertaining to the issue of obviousness).

All factors weigh in favor of granting Fintiv's Motion. First, Fintiv will be prejudiced because its lead counsel is unavailable, and its other primary counsel are in the middle of moving offices. Second, Apple never complied with the previously-ordered discovery, which is pivotal to issues of validity, infringement, and damages; this is especially important given that Apple raised new factual issues and arguments in its Supplemental SJ after the close of all discovery and on the original record of this case. Third, Apple will not be prejudiced as it was already obligated to produce emails and make its witnesses available for deposition, and any royalty owed for its infringement is status quo. Last, granting the relief requested in this Motion will cure prejudice to Fintiv as its lead counsel and witnesses are available for trial the weeks of October 13, 2025, and December 15, 2025 (or a later date of the Court's choosing), and Fintiv will finally obtain the long overdue discovery from Apple before presenting this case to a jury.

IV. Conclusion

For the foregoing reasons, Fintiv respectfully requests the Court continue the August 4, 2025, trial date or, in the alternative, order Apple to produce the previously-ordered documents and emails within 7 days and make its witnesses available for depositions as previously ordered so that Fintiv can supplement its expert reports to encapsulate the same.

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PUBLIC VERSION

Dated: July 14, 2025 RESPECTFULLY SUBMITTED,

By: /s/Jonathan K. Waldrop

Jonathan K. Waldrop (CA Bar No. 297903)

(Admitted in this District) jwaldrop@kasowitz.com

Darcy L. Jones (CA Bar No. 309474)

(Admitted in this District) djones@kasowitz.com

Marcus A. Barber (CA Bar No. 307361)

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Heather S. Kim (CA Bar No. 277686)

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hkim@kasowitz.com

ThucMinh Nguyen (CA Bar No. 304382)

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Document: 2-2 Page: 14 Filed: 07/29/2025 Case: 25-142

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PUBLIC VERSION

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Attorneys for Plaintiff FINTIV, INC.

Case 1:21-cv-00896-ADA Document 510 Filed 07/18/25 Page 9 of 9

PUBLIC VERSION

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served or delivered electronically, via email, to all counsel of record on this 14th day of July, 2025.

/s/ Jonathan K. Waldrop
Jonathan K. Waldrop

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EXHIBIT A

Case 1:21-cv-00896-ADA Document 509-1 Filed 07/17/25 Page 2 of 6

From: Zachary Ellis <zachary_ellis@txwd.uscourts.gov>

Sent: Sunday, July 13, 2025 11:38 AM

To: raymort@austinlaw.com; Guaragna, John; TXWDml_LawClerks_WA_JudgeAlbright **Cc:** Cunningham, Sean; Paul G. Williams; MBarber@kasowitz.com; Marc E. Kasowitz;

JWaldrop@kasowitz.com; Fintiv; gil@gillamsmithlaw.com; DLA-Apple-Fintiv; ThucMinh

Nguyen; Mark Siegmund; Saulnier, Mike

Subject: Re: Fintiv v. Apple - Scheduling Issues



EXTERNAL MESSAGE

Counsel,

The Court will consider any requests for relief regarding the trial date that are made via motion on the docket. The Court notes that it considered the parties' respective positions in ECF No. 486 when setting the August 4 trial date.

Best,

Zachary H. Ellis

Law Clerk to the Honorable Alan D Albright

From: Ray Mort <raymort@austinlaw.com> Sent: Sunday, July 13, 2025 9:02:17 AM

To: Zachary Ellis <zachary_ellis@txwd.uscourts.gov>; Guaragna, John <John.Guaragna@us.dlapiper.com>; TXWDml_LawClerks_WA_JudgeAlbright <TXWDml_LawClerks_WA_JudgeAlbright@txwd.uscourts.gov>
Cc: Cunningham, Sean <Sean.Cunningham@us.dlapiper.com>; Paul G. Williams <PWilliams@kasowitz.com>; MBarber@kasowitz.com <MBarber@kasowitz.com>; Marc E. Kasowitz <MKasowitz@kasowitz.com>; JWaldrop@kasowitz.com>; Fintiv <Fintiv@kasowitz.com>; gil@gillamsmithlaw.com

<gil@gillamsmithlaw.com>; DLA-Apple-Fintiv <DLA-Apple-Fintiv@us.dlapiper.com>; ThucMinh Nguyen

<TNguyen@kasowitz.com>; Mark Siegmund <msiegmund@cjsjlaw.com>; Saulnier, Mike

<Michael.Saulnier@us.dlapiper.com>

Subject: RE: Fintiv v. Apple - Scheduling Issues

CAUTION - EXTERNAL:

All,

We write regarding the Court's entry of the schedule and <u>August 4</u> trial date for the Fintiv v. Apple case. We note that the Court did not accept Fintiv's proposed schedule and did not order Apple to produce the emails and make available for deposition the witnesses that were previously ordered by the Court (Dkt. 441). We also note that the Court did not rule on our request for supplemental expert reports based on this additional discovery. We respectfully reiterate that proceeding to trial without this discovery and without lead trial counsel Marc Kasowitz is prejudicial to Fintiv for three reasons.

First, the previously-ordered email and deposition discovery relates to meetings between Fintiv and its predecessor and Apple and Apple's internal discussions before and after the launch of Apple Pay, regarding Apple's desire to implement Fintiv's technology into what eventually became Apple Pay. As a

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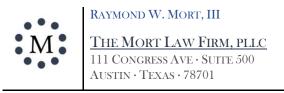
reminder, the existence and the importance of this discovery was only learned after the close of fact discovery and on the eve of trial in June 2022 when Fintiv uncovered that Apple had failed to disclose that it had: (1) hired employees that previously worked at Fintiv's predecessor company; and (2) had meetings with Fintiv's predecessor about the accused technology. This necessitated Fintiv filing an emergency motion to obtain this discovery, which the Court granted. In fact, while Fintiv has not received all of the previously-ordered discovery, some of that discovery that has been produced by Apple confirms that Apple's trial witnesses (e.g., Ahmer Khan) were directly involved in those discussions and meetings. Critically, this information was not disclosed by Apple during discovery, has been previously ordered by the Court, and is significant to issues of infringement, validity and damages. After the emergency motion, Fintiv moved to compel this discovery, but was prevented from obtaining it after the Court granted summary judgment in June 2023.

Second, Mr. Kasowitz has a conflict in SDNY for a hearing and trial starting on August 4. (Dkt. 486). We also note for the Court that Mr. Kasowitz is also lead trial counsel and the relationship partner for Fintiv. We respectfully understand that the Court wants an expeditious trial setting, and we have investigated the week of October 13 as a potential alternative trial date, but our damages expert is not available then. Fintiv (counsel and witnesses) is available for trial on a date for the week of **December 15, 2025**, and may be available for trial for the week of **October 13, 2025**.

Finally, we respectfully note that Apple's new summary judgment briefing raises new factual issues and arguments that were not raised during the case and that the e-mail and deposition discovery previously ordered by the Court is necessary for Fintiv to put on a full and complete case regarding infringement, validity and damages. Fintiv respectfully requests that the Court reconsider its denial of a continuance of the trial and that the Court order the e-mail and deposition discovery previously granted to Fintiv.

If the Court is unwilling to reconsider the above (which we hereby request), for purposes of the record, Fintiv respectfully request that the Court: (1) enter a denial for Fintiv's request for a continuance for the reasons outlined in the parties' joint submission (Dkt. 486); (2) enter a denial of Fintiv's request for alternative relief, namely an order requiring Apple to produce the previously ordered emails in 7 days and the depositions of the three witnesses previously ordered (Dkt. 441); and (3) denial of supplemental expert reports based on discovery obtained in Nos. 1 and 2.

Ray



AustinLaw.com · (512)-677-6825 · RayMort@AustinLaw.com

The statements contained herein are not intended to and do not constitute an opinion as to any tax or other matter. They are not intended or written to be used, and may not be relied upon, by you or any other person for the purpose of avoiding penalties that may be imposed under any Federal tax law or otherwise.

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Case 1:21-cv-00896-ADA Document 509-1 Filed 07/17/25 Page 4 of 6

From: Zachary Ellis <zachary_ellis@txwd.uscourts.gov>

Sent: Tuesday, July 8, 2025 5:06 PM

To: Guaragna, John < John.Guaragna@us.dlapiper.com>; TXWDml_LawClerks_WA_JudgeAlbright

<TXWDml_LawClerks_WA_JudgeAlbright@txwd.uscourts.gov>

Cc: Cunningham, Sean <Sean.Cunningham@us.dlapiper.com>; Paul G. Williams <PWilliams@kasowitz.com>; MBarber@kasowitz.com; Marc E. Kasowitz <MKasowitz@kasowitz.com>; JWaldrop@kasowitz.com; Fintiv

<Fintiv@kasowitz.com>; gil@gillamsmithlaw.com; DLA-Apple-Fintiv@us.dlapiper.com>; ThucMinh

Nguyen <TNguyen@kasowitz.com>; Mark Siegmund <msiegmund@cjsjlaw.com>; Saulnier, Mike

<Michael.Saulnier@us.dlapiper.com>; Ray Mort <raymort@austinlaw.com>

Subject: RE: Fintiv v. Apple - Juror Questionnaire

Counsel.

This email confirms that the Jury Coordinator for the Austin Division is aware of the August trial date. Further, the Court referred Jury Selection to Judge Hightower on July 1 (ECF No. 489), and you can expect to receive more information from her chambers soon.

Best,



Zachary H. Ellis

Law Clerk to the Honorable Alan D Albright
United States District Court, Western District of Texas
Zachary Ellis@txwd.uscourts.gov

From: Guaragna, John < John.Guaragna@us.dlapiper.com>

Sent: Tuesday, July 8, 2025 4:56 PM

To: Zachary Ellis <zachary ellis@txwd.uscourts.gov>; TXWDml LawClerks WA JudgeAlbright

<TXWDml LawClerks WA JudgeAlbright@txwd.uscourts.gov>

Cc: Cunningham, Sean <<u>Sean.Cunningham@us.dlapiper.com</u>>; Paul G. Williams <<u>PWilliams@kasowitz.com</u>>; MBarber@kasowitz.com; Marc E. Kasowitz < MKasowitz@kasowitz.com; JWaldrop@kasowitz.com; Fintiv

<Fintiv@kasowitz.com>; gil@gillamsmithlaw.com; DLA-Apple-Fintiv < DLA-Apple-Fintiv@us.dlapiper.com>; ThucMinh

Nguyen < TNguyen@kasowitz.com >; Mark Siegmund < msiegmund@cjsjlaw.com >; Saulnier, Mike

<Michael.Saulnier@us.dlapiper.com>; raymort@austinlaw.com

Subject: RE: Fintiv v. Apple - Juror Questionnaire

CAUTION - EXTERNAL:

Dear Zak and Law Clerks:

I have included below the email and link to the previously approved juror questionnaire for this case. (The original email and a hard copy also are attached.) In case this was not already in progress and given the early August trial date, we wanted to provide this to the Court for the upcoming trial. Also, please let us know if there is a separate

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communication we should make to Judge Hightower on this topic and we would be happy to do so. And if the Court has any other questions, please let us know.

From: Melissa Copp@txwd.uscourts.gov>

Sent: Tuesday, May 31, 2022 4:09 PM

To: cjia@kasowitz.com; craig@swclaw.com; DJones@kasowitz.com; Gibson, Erin

<Erin.Gibson@us.dlapiper.com>; george@cowdenlawfirm.com; gil@gillamsmithlaw.com;

HKim@kasowitz.com; steve.ravel@kellyhart.com; Guaragna, John < John.Guaragna@us.dlapiper.com >; jdowning@kasowitz.com; JWaldrop@kasowitz.com; justin@swclaw.com; mkasowitz@kasowitz.com; MBarber@kasowitz.com; Fowler, Mark < Mark.Fowler@us.dlapiper.com >; pwilliams@kasowitz.com;

Steadman, Paul < Paul. Steadman@us.dlapiper.com >; Maggiore, Peter

<peter.maggiore@us.dlapiper.com>; raymort@austinlaw.com; Cunningham, Sean

<Sean.Cunningham@us.dlapiper.com>; sivan@kasowitz.com; Lim, Stephanie

<stephanie.lim@us.dlapiper.com>; tnguyen@kasowitz.com; twelch@kasowitz.com; Loney, Zachary

<<u>Zachary.Loney@us.dlapiper.com</u>>

Cc: Regan Rundio < Regan Rundio@txwd.uscourts.gov >; TXWDml_NoJudge Chambers WA Judge Gilliland < TXWDml_NoJudge Chambers WA JudgeGilliland@txwd.uscourts.gov >; Idelma Rivera < Idelma Rivera@txwd.uscourts.gov >; Tanya Demings < Tanya Demings@txwd.uscourts.gov >

Subject: A21CV896 Fintiv vs. Apple - Special Patent Questionnaire Preview Link

▲ EXTERNAL MESSAGE

Counsel,

Thank you again for providing your joint proposed special patent questionnaire for Case No. 1:21-CV-896, *Fintiv, Inc. vs. Apple Inc.* The <u>approved</u> questions have been populated into Survey Monkey and will be distributed out to 35 prospective jurors scheduled to appear for the **Jury Selection** proceedings for <u>Thursday, June 16, 2022 at 9:00am before Judge Derek T. Gilliland in Courtroom #1 in the Austin Division.</u> The Pre-Voir Dire Conference is currently set for <u>Tuesday, June 14, 2022 at 2:00pm via Zoom also before Judge Derek T. Gilliland</u>. Please note that some questions were stricken, reworded or combined.

Below is a link to the Special Patent Juror Questionnaire. An email to the jurors will be distributed with the survey link on Thursday, June 2, 2022. The deadline for the jurors to fill out the questionnaire will be **Thursday**, **June 9, 2022** and the responses will be sent out to counsel by **Monday**, **June 13**th. If responses can be culled sooner, they will be provided earlier via .pdf format (other formats such as .csv and .xls may be provided upon request).

https://www.surveymonkey.com/r/H7R35HK

Thank you, Melissa

Sincerely, -john

Case 1:21-cv-00896-ADA Document 509-1 Filed 07/17/25 Page 6 of 6

John M. Guaragna

Partner

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CAUTION - EXTERNAL EMAIL: This email originated outside the Judiciary. Exercise caution when opening attachments or clicking on links.

From: Marcus Barber < MBarber@kasowitz.com >

Sent: Tuesday, June 24, 2025 11:00 AM

To: Guaragna, John < John.Guaragna@us.dlapiper.com >

Cc: Marc E. Kasowitz < MKasowitz@kasowitz.com>; JWaldrop@kasowitz.com; raymort@austinlaw.com;

Fintiv < Fintiv@kasowitz.com >; gil@gillamsmithlaw.com; DLA-Apple-Fintiv < DLA-Apple-

Fintiv@us.dlapiper.com>; ThucMinh Nguyen <TNguyen@kasowitz.com>

Subject: RE: Fintiv v. Apple: Meet and Confer

♠EXTERNAL MESSAGE

Hi John:

Please see attached the Joint Submission of Disputed Scheduling Order with Fintiv's portion added. Please let us know if you have further edits or if this is good to file.

In the attached we noted that we unfortunately have a conflict for October 27, 2025. Please let us know if you have any open dates before March 2026. However, we will also look at March 2026 in the meantime as we wish to submit at least one joint date for the court's consideration.

Thanks,

Marcus

Marcus Barber
Kasowitz Benson Torres LLP
101 California Street,
Suite 3000
San Francisco, California 94111
Tel. (650) 453-5413
Fax (650) 745-2673

Fax. (650) 745-2673 MBarber@kasowitz.com

From: Guaragna, John < <u>John.Guaragna@us.dlapiper.com</u>>

Sent: Monday, June 23, 2025 8:31 AM

To: Marcus Barber < MBarber@kasowitz.com >

Cc: Marc E. Kasowitz < MKasowitz.com; Jonathan K. Waldrop < JWaldrop@kasowitz.com; raymort@austinlaw.com; Fintiv@kasowitz.com; gil@gillamsmithlaw.com; DLA-Apple-Fintiv CDLA-Apple-Fintiv@us.dlapiper.com; ThucMinh Nguyen TNguyen@kasowitz.com>

Subject: RE: Fintiv v. Apple: Meet and Confer

Marcus: Apple is available for trial on October 27, 2025. We have unavoidable conflicts on the other dates you suggest - except possibly March 2026, which we are still investigating.

-john

John M. Guaragna

Partner

T +1 512 457 7125

john.guaragna@us.dlapiper.com

DLA Piper LLP (US) 303 Colorado Street Suite 3000 Austin, TX 78701

<image001.png>

dlapiper.com

From: Marcus Barber < MBarber@kasowitz.com>

Sent: Friday, June 20, 2025 11:14 AM

To: Guaragna, John < <u>John.Guaragna@us.dlapiper.com</u>>

Cc: Marc E. Kasowitz < MKasowitz@kasowitz.com >; JWaldrop@kasowitz.com; raymort@austinlaw.com;

Fintiv < Fintiv@kasowitz.com >; gil@gillamsmithlaw.com; DLA-Apple-Fintiv < DLA-Apple-Fintiv

<u>Fintiv@us.dlapiper.com</u>>; ThucMinh Nguyen <<u>TNguyen@kasowitz.com</u>>

Subject: RE: Fintiv v. Apple: Meet and Confer

↑EXTERNAL MESSAGE

Hi John:

As a follow-up, does Apple have availability any other weeks in November, December, January 2026, February 2026 or March 2026? I ask b/c I am fairly confident we have a conflict Oct 27, but I'm working to confirm that and we would like to have some trial dates to jointly propose.

Thanks,

Marcus

From: Guaragna, John < John.Guaragna@us.dlapiper.com >

Sent: Wednesday, June 18, 2025 2:01 PM **To:** Marcus Barber < MBarber@kasowitz.com>

Cc: Marc E. Kasowitz < MKasowitz@kasowitz.com >; Jonathan K. Waldrop < JWaldrop@kasowitz.com >;

raymort@austinlaw.com; Fintiv <Fintiv@kasowitz.com>; gil@gillamsmithlaw.com; dla-apple-

<u>fintiv@dlapiper.com</u>; ThucMinh Nguyen <<u>TNguyen@kasowitz.com</u>>

Subject: RE: Fintiv v. Apple: Meet and Confer

Marcus:

Apple does not agree to Fintiv's proposed schedule. Given the parties do not have an agreed schedule, we have prepared the attached Joint submission

with Apple's position that can be filed next Tuesday after the mandate issues. Please provide Fintiv's position so we can include it in the Joint submission.

Thanks, -john

John M. Guaragna

Partner

T +1 512 457 7125

DLA Piper LLP (US) 303 Colorado Street

john.guaragna@us.dlapiper.com

Suite 3000 Austin, TX 78701

<image001.png>

dlapiper.com

From: Marcus Barber < MBarber@kasowitz.com>

Sent: Friday, June 13, 2025 12:18 PM

To: Guaragna, John < <u>John.Guaragna@us.dlapiper.com</u>>; ThucMinh Nguyen < <u>TNguyen@kasowitz.com</u>> **Cc:** Marc E. Kasowitz < <u>MKasowitz@kasowitz.com</u>>; <u>JWaldrop@kasowitz.com</u>; <u>raymort@austinlaw.com</u>;

Fintiv <Fintiv@kasowitz.com>; gil@gillamsmithlaw.com; dla-apple-fintiv@dlapiper.com

Subject: RE: Fintiv v. Apple: Meet and Confer

↑EXTERNAL MESSAGE

Hi John:

Following up on our meet-and-confer, please see below Fintiv's proposal. Under this proposal the case would be ready to be set for trial at the court's convince by October 2025. We have also provided below trial dates the currently work for Fintiv. As discussed, we do not believe Apple's proposed additional MSJ briefing is necessary. As we indicated during the meet and confer, the case has been pending for 7.5 years and all issues have been brief.

- 1. July 7: Deadline to Produce emails per court order
- 2. August 18: Deadline to Complete Court Ordered Depositions (including but not limited to:
- 3. September 22: Deadline to Supplement Expert Reports
- 4. Trial Dates: (1) December 15, 2025; and (2) February 23, 2026

Please note that for each trial date, we would propose to have jury selection the Thursday before the trial and that we assume a 5-day trial.

Please let us know if Apple will agree. Also, as requested please provide Apple's trial availability.

Thanks,

Marcus

Marcus Barber Kasowitz Benson Torres LLP 333 Twin Dolphin Drive, Suite 200 Redwood Shores, CA 94065 Tel. (650) 453-5413 Fax. (650) 745-2673 MBarber@kasowitz.com

From: Guaragna, John < John.Guaragna@us.dlapiper.com>

Sent: Friday, June 6, 2025 5:03 AM

To: ThucMinh Nguyen < <u>TNguyen@kasowitz.com</u>>

Cc: Marc E. Kasowitz < <u>MKasowitz@kasowitz.com</u>>; Jonathan K. Waldrop < <u>JWaldrop@kasowitz.com</u>>; raymort@austinlaw.com; Fintiv@kasowitz.com>; gil@gillamsmithlaw.com; dla-apple-fintiv@dlapiper.com

Subject: RE: Fintiv v. Apple: Meet and Confer

Minh:

In advance of our meet and confer on Monday, we wanted to share Apple's scheduling proposal. Given the CAFC's instruction "for the district court to address whether summary judgment of noninfringement is warranted as to those limitations or on the remaining grounds asserted by Apple, which the district court did not reach," the Court should first address summary judgment. Our proposed schedule is consistent with that direction.

- 1. <u>June 30</u>: Apple submits 10-page supplemental MSJ brief limited solely to "whether summary judgment of noninfringement is warranted as to those limitations or on the remaining grounds asserted by Apple, which the district court did not reach."
- 2. <u>July 14</u>: Fintiv submits 10-page supplemental opposition brief directed to those issues.
- 3. <u>July 21</u>: Apple submits 5-page supplemental reply brief directed to those issues.
- 4. At the Court's earliest convenience following July 21: In-person hearing on renewed MSJ and trial scheduling, if necessary.
- 5. [Remaining dates TBD]

Best, -john

John M. Guaragna

Partner

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john.guaragna@us.dlapiper.com

DLA Piper LLP (US) 303 Colorado Street Suite 3000 Austin, TX 78701

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

FINTIV, INC.,	§ Civil Action No.: 1:21-cv-00896-ADA
Plaintiff,	§ § 8 JURY TRIAL DEMANDED
v.	§
APPLE INC.,	§ §
Defendant.	§ §

NOTICE OF CHANGE OF FIRM NAME AND CONTACT INFORMATION

TO THE HONORABLE JUDGE OF SAID COURT:

PLEASE TAKE NOTICE THAT Kasowitz Benson Torres LLP has changed its name to Kasowitz LLP as of June 25, 2025.

PLEASE ALSO TAKE NOTICE THAT the following attorneys have changed their contact information effective immediately:

Jonathan K. Waldrop, Darcy L. Jones, Marcus A. Barber, John W. Downing, Heather S. Kim, and ThucMinh Nguyen.

The new contact information for the above attorneys is as follows:

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Please take notice of these changes and update your records accordingly.

Case 1:21-cv-00896-ADA Document 493 Filed 07/14/25 Page 2 of 4

Dated: July 14, 2025 RESPECTFULLY SUBMITTED,

By: /s/ Jonathan K. Waldrop

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Case 1:21-cv-00896-ADA Document 493 Filed 07/14/25 Page 3 of 4

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Case 1:21-cv-00896-ADA Document 493 Filed 07/14/25 Page 4 of 4

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served or delivered electronically to all counsel of record on this 14th day of July, 2025, via the Court's CM/ECF system.

/s/ Jonathan K. Waldrop
Jonathan K. Waldrop

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

FINTIV, INC.,	
Plaintiff,	
v.	Civil Action No. 1:21-cv-896-ADA
APPLE INC.,	
Defendant.	

AMENDED SCHEDULING ORDER

It is **ORDERED** that, pursuant to Rule 16 of the Federal Rules of Civil Procedure, the following schedule shall govern all deadlines in this case up to and including the trial of this matter:

Date	Description
July 2, 2025	Apple submits 10-page supplemental summary judgment brief limited solely to "whether summary judgment of noninfringement is warranted as to those [widget-related] limitations"
	File Notice of Request for Daily Transcript or Real Time Reporting. If a daily transcript or real time reporting of court proceedings is requested for trial, the party or parties making said request shall file a notice with the Court and email the Court Reporter, Kristie Davis at kmdaviscsr@yahoo.com
July 16, 2025	Fintiv submits 10-page supplemental opposition brief directed to "whether summary judgment of noninfringement is warranted as to those [widget-related] limitations"
July 23, 2025	Apple submits 5-page supplemental reply brief directed to "whether summary judgment of noninfringement is warranted as to those [widget-related] limitations"
	Parties file joint notice identifying remaining disputes to take up at the Final Pretrial Conference

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July 30, 2025	Final Pretrial Conference at 2:00 p.m. CT via Zoom
July 31, 2025	Jury Selection before U.S. Magistrate Judge Susan Hightower
August 4, 2025	Trial begins at 9:00 a.m. CT in Courtroom No. 5, Sixth Floor, U.S. Courthouse, 501 West Fifth Street, Austin, TX

SIGNED this 1st day of July, 2025.

ALAN D ALBRIGHT

UNITED STATES DISTRICT JUDGE

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

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FINTIV, INC.,	
Plaintiff,	
V.	Civil Action No. 1:21-cv-896-ADA
APPLE INC.,	
Defendant.	

JOINT SUBMISSION REGARDING DISPUTED SCHEDULING ORDER

Pursuant to the Court's Order Governing Proceedings and Order dated June 24, 2025, the parties have met and conferred in an attempt to reach agreement on a Scheduling Order. The parties were unable to agree on all dates in a proposed Scheduling Order. The parties' positions on this dispute are set forth below. Exhibit A shows Fintiv's proposed dates, and Exhibit B shows Apple's proposed dates.

Fintiv's Position

Pursuant to the Court's instructions to propose an expeditious schedule, Fintiv has proposed a schedule under which this case should be ready to be tried as early as October 2025 at the Court's convenience. Unfortunately, Fintiv's lead trial counsel Marc Kasowitz has a conflict on August 4, 2025. Mr. Kasowitz has an evidentiary hearing that will lead into a trial in *Binh Thanh Import Export Production & Trade Joint Stock Co. v. Amazon.com Services LLC*, C/A 1:23-cv-00292-LGS (SDNY). Additionally, five of Fintiv's other primary counsel, including Jonthan Waldrop, Marcus Barber, John Downing, Heather Kim, ThucMinh Nyguen, are in the process of an office move, which is disruptive and prejudicial to preparing for a trial on August 4, 2025. Fintiv greatly appreciates the Court's willingness to provide an expeditious trial date and would

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request this accommodation regarding the same. Fintiv has proposed two dates on which it is available (below). Further, in an effort to propose joint trial dates to the Court, Fintiv has also requested (multiple times) additional trial availability from Apple in October 2025, November 2025, December 2025, January 2026, February 2026, and March 2026. Accordingly, Fintiv respectfully requests that the Court provide the parties with alternative trial dates that are convenient for the Court in the ranges listed above (October 2025 – March 2026) so that our case is not prejudiced. If the Court is not willing to provide this accommodation, Fintiv respectfully request that the Court order Apple to produce the emails in 7 days and to make the three witnesses listed below available for deposition within the 14 days following the email production.

Contrary to Apple's assertions that Fintiv is backtracking on its representations to the Court regarding expert reports, the interim deadlines proposed in Fintiv's proposal are deadlines from the Court's prior orders regarding email discovery (Dkt. 441, para. 2b), the additional depositions the Court permitted Fintiv to take (Dkt. 441, para. 2a), and any supplementation of expert reports resulting from the outstanding discovery email and deposition discovery. Fintiv has also proposed (below) two trial dates for the Court's consideration.

With respect to Apple's proposal for additional briefing, Fintiv objects. This case has been pending for 7.5 years and all summary judgment issues have been fully briefed, argued, and denied by the Court. Apple has already had two summary judgment hearings and fulsome briefing on the same. However, to the extent the Court wants more briefing, Fintiv requests that any such briefing occur after the additional discovery ordered by the Court – contemplated in Fintiv's proposed schedule. The discovery is highly relevant and proceeding without the same would be prejudicial to Fintiv's case. For example, Ben Vigier is an Apple engineer and prior artist who is on emails about meeting with CoreFire engineers that took place at Apple. By way of further example,

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Mr. Callion is a former CoreFire employee that Apple hired, and he served in a senior role on Apple Pay. Importantly, Fintiv has not delayed in seeking this discovery and has already moved to compel with respect to obtaining the emails from Mr. Vigier and Callion as these will feature prominently in their respective depositions. Fintiv respectfully requests the Court's indulgence of

additional trial dates to permit time to obtain this highly relevant discovery.

Fintiv understands the Federal Circuit's remand to seek a written order with respect to the Court's previous denial of summary judgment on Apple's other grounds for purposes of the post-trial appeal. Apple's interpretation of Federal Circuit's remand is self-serving and nonsensical given that the denial of summary judgment is not appealable. In other words, a final judgment is required before this case can be appealed again. For this reason, the Court can and should set a trial date at this time.

Fintiv proposes the following schedule:

• <u>July 14</u>: Deadline to Produce emails per court order (Dkt. 441, para. 2b)

• August 24: Deadline to Complete Court Ordered Depositions of: (1) Ben Vigier;

(2) Charles Buchbinder; and (3) Pascal Caillon (Dkt. 441, para. 2a)

• **September 29**: Deadline to Supplement Expert Reports

• <u>Trial Dates</u>: (1) December 15, 2025; and (2) February 23, 2026

Apple's Position

In its May 16, 2025 decision, the Federal Circuit expressly remanded "for the district court to address whether summary judgment of noninfringement is warranted as to those [widget-related] limitations or on the remaining grounds asserted by Apple, which the district court did not reach." *Fintiv, Inc. v. Apple Inc.*, 2025 WL 1419363 *5 (Fed. Cir. May 16, 2025). Given the Federal Circuit's express instructions on remand, Apple proposes including a condensed briefing schedule with short, supplemental briefing to focus on "whether summary judgment is warranted"

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as to those [widget-related] limitations," as the Federal Circuit instructed. Specifically, Apple

proposes the following dates:

July 2: Apple submits 10-page supplemental summary judgment brief limited solely to "whether summary judgment of noninfringement is warranted as to those [widget-related]

limitations"

July 16: Fintiv submits 10-page supplemental opposition brief directed to that issue.

July 23: Apple submits 5-page supplemental reply brief directed to that issue.

July 30: Final Pretrial Conference

<u>July 31</u>: Jury Selection

August 4: Trial

In contrast, Fintiv ignores summary judgment entirely and proposes that the parties conduct

additional discovery that is both unwarranted and unnecessary. Indeed, Fintiv had many months

before the prior trial to attempt to obtain this discovery, but declined to do so. In light of this and

given that trial is now set for August 2025, opening discovery now would be unworkable.

Similarly, Fintiv also seeks to supplement its expert reports despite having represented to the Court

that Fintiv was "totally fine with relying on Dr. Shamos' report as to what he says is the widget."

Transcript of September 23, 2021 Pretrial Conference at 114. This too is unwarranted and would

be prejudicial to Apple given the current trial date.

Apple is prepared to proceed with trial on the August 4 date ordered by the Court and

respectfully requests that the Court take up Apple's summary judgment motion, as instructed by

the Federal Circuit, at the July 30 Final Pretrial Conference. Fintiv complains that the case has

been pending for 7.5 years, but in the same breath claims it is unable to proceed on the ordered

date and seeks additional unnecessary discovery and an extended schedule. And contrary to

Appx034

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Fintiv's statement above, Apple has been communicating with Fintiv about trial dates, but has been unable to find other weeks that work for all Apple witnesses and counsel before March 2026.

Dated: June 27, 2025

Respectfully submitted,

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Case 1:21-cv-00896-ADA Document 486 Filed 06/27/25 Page 6 of 7

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Case 1:21-cv-00896-ADA Document 486 Filed 06/27/25 Page 7 of 7

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was served or delivered electronically to all counsel of record on this 27th day of June, 2025, via the Court's CM/ECF system.

/s/ Jonathan K. Waldrop
Jonathan K. Waldrop

Case 1:21-cv-00896-ADA Document 483 Filed 06/24/25 Page 1 of 1

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

FINTIV, INC.,		§
, ,	Plaintiff,	\$ CASE NO. 1.21 CV 0000C AD
		§ CASE NO. 1:21-CV-00896-AD
<i>v</i> .		§ .
		Š
APPLE, INC.		§
	Defendant.	§
	3	Š

ORDER

It is **ORDERED** that on or before June 27, 2025, the parties shall jointly move for entry of an Agreed Amended Scheduling Order that includes the following events:

- Final Pre-Trial Conference on July 30, 2025 at 2:00 PM CT.
- Jury Selection on July 31, 2025 before U.S. Magistrate Judge Susan Hightower.
- Trial begins at 9:00 AM CT on August 4, 2025 in Courtroom No. 5, Sixth Floor,
 U.S. Courthouse, 501 West Fifth Street, Austin, TX 78701.

SIGNED this 24th day of June, 2025.

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

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NOTE: This disposition is nonprecedential.

United States Court of Appeals for the Federal Circuit

FINTIV, INC., Plaintiff-Appellant

v.

APPLE INC., Defendant-Appellee

2023-2208

Appeal from the United States District Court for the Western District of Texas in No. 1:21-cv-00896-ADA, Judge Alan D. Albright.

Decided: May 16, 2025

MEREDITH LEIGH MARTIN ADDY, AddyHart P.C., Atlanta, GA, argued for plaintiff-appellant. Also represented by Charles A. Pannell, III; Caren Yusem, Washington, DC; Marcus Barber, John Downing, Darcy L. Jones, Heather Kim, ThucMinh Nguyen, Jonathan K. Waldrop, Kasowitz Benson Torres LLP, Redwood Shores, CA; Paul Gunter Williams, Atlanta, GA.

MELANIE L. BOSTWICK, Orrick, Herrington & Sutcliffe LLP, Washington, DC, argued for defendant-appellee. Also

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FINTIV, INC. v. APPLE INC.

represented by ABIGAIL COLELLA; ALEXANDRA BURSAK, New York, NY; JESSICA HANNAH, DLA Piper LLP, San Francisco, CA; STANLEY JOSEPH PANIKOWSKI, III, San Diego, CA.

Before DYK, CHEN, and STARK, Circuit Judges.

CHEN, Circuit Judge.

In December 2018, Fintiv, Inc. (Fintiv) sued Apple Inc. (Apple) for infringement of certain claims of U.S. Patent No. 8,843,125 ('125 patent). After construing the claim term "widget" and at first denying Apple's motion for summary judgment, the United States District Court for the Western District of Texas changed course and granted summary judgment of noninfringement in favor of Apple. Fintiv, Inc. v. Apple Inc., No. 21-CV-896, 2023 WL 4237356 (W.D. Tex. June 21, 2023) (Order). Fintiv appeals. For the reasons explained below, we reverse.

BACKGROUND

I.

The '125 patent is titled "System and Method for Managing Mobile Wallet and Its Related Credentials." The patent relates to virtual wallets stored on mobile devices—in other words, a "mobile wallet application" capable of storing "virtual cards" that can be used to "replace conventional physical wallets." '125 patent col. 1 ll. 25–46. The mobile device may also store "user financial credentials, such as credit card numbers," which can be used for "contactless payment" using Near Field Communication technology. *Id.* col. 1 ll. 47–62.

The patent teaches a mobile wallet management system that, among other components, includes a wallet client management component and a widget management component. *Id.* col. 4 ll. 52–56. The wallet client management component "is responsible for the wallet application itself

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(referred [to] as the container), which may house the individual widgets (e.g., applications stored at the application level related to a financial institution, transportation account, and the like)." *Id.* col. 4 ll. 57–61. The widget management component "on the other hand is responsible for the individual widgets stored within the wallet container." *Id.* col. 5 ll. 4–6. The patent explains that "[w]idgets may be an application configured to interface with a user of the mobile device," such as "individual payment applications, transportation applications, and other related applications." *Id.* col. 5 ll. 6–9.

Once a mobile wallet application is installed on the mobile device, the user can "provision . . . specific contactless card applets" and "corresponding widget applications and [wallet management applets (WMA)] onto [the] mobile device." Id. col. 8 ll. 18–22. "The corresponding widget may reside in the mobile wallet application, at the application level, to provide an interface to the user." Id. col. 8 ll. 63– 65 (figure reference number omitted). And the corresponding WMA, "which may include account specific information of the contactless card apple[t] (e.g. credit card number, expiration date, security code, PIN, etc.), may be provisioned into" a secure element of the device. Id. col. 8 l. 66 - col. 9 1. 2. Thus, "[b]y installing both the WMA applet and the widget, the user may view and manage the information stored in the WMA applet through the corresponding widget." Id. col. 9 ll. 2-5 (figure reference numbers omitted).

Fintiv asserted infringement of independent claims 11, 18, and 23 and dependent claims 13–14, 20, and 24–25 (collectively, asserted claims) of the '125 patent against Apple. Independent claim 11 recites a method for provisioning a contactless card applet in a mobile device comprising, among other steps, "retrieving a widget and a wallet management applet (WMA) corresponding to the contactless card applet" and "provisioning the selected contactless card applet, the widget, and the WMA." Independent claim 18

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recites a wallet management system comprising, among other things, "a widget management component configured to store and to manage widgets" and "a rule engine configured to filter a widget based on the mobile device information." Independent claim 23 recites a mobile device comprising, among other things, "a mobile wallet application configured to store a widget corresponding to a contactless card applet" and "an over-the-air (OTA) proxy configured to provision the contactless card applet, a widget corresponding to the contactless card applet, and the WMA."

II.

Fintiv accused multiple Apple devices—the iPhone, iPad, Apple Watch, and Mac—of infringing through their use of Apple Pay and Apple Wallet. Apple Pay allows consumers to make electronic payments, including, for example, through the Apple Wallet application. A user may provide their payment card information to add the card to the Apple Wallet application. The user may then select a card from Apple Wallet to make a payment through Apple Pay or view certain information about the card.

Central to the district court's grant of summary judgment and this appeal is the court's construction of "widget." The district court construed "widget" as "plain-and-ordinary meaning and where the plain-and-ordinary meaning is 'software that is either an application or works with an application, and which may have a user interface." J.A. 66–67. Neither party takes issue with that construction.

Apple moved for summary judgment of noninfringement on four independent grounds, one of which was non-infringement of the "widget" limitation and "widget'-related limitations" (i.e., the claimed actions performed on a widget and the components configured to act on a

FINTIV, INC. v. APPLE INC.

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widget). Order, 2023 WL 4237356, at *2–3. The district court initially denied the motion without any reasoning. Almost two years later, and just one month prior to the scheduled trial, Apple requested to reargue its motion. Upon reargument, the district court granted the motion for summary judgment.

In granting the motion, the court reasoned that Fintiv and its expert witness, Dr. Michael Shamos, "failed to identify the claimed widget in the accused products." *Id.* at *3. The court reviewed Fintiv's "source code and non-source code" evidence, including Dr. Shamos's testimony, but found it insufficient to identify a "widget," as construed. *Id.* at *4. In short, the court reasoned that "nowhere does Fintiv's opposition state that 'the "widget" in the accused product is X,' where X is an identifiable piece of software, as required by the [c]ourt's construction." *Id.* The court did not address the widget-related limitations or Apple's remaining grounds for summary judgment of noninfringement. *See id.* at *3, *5.

The district court entered final judgment accordingly. We have jurisdiction under 28 U.S.C. § 1295(a)(1).

Apple also moved for summary judgment on the grounds that (1) foreign users do not "use" the accused system "within the United States" and thus do not infringe under 35 U.S.C. § 271(a), (2) the accused iPads and Macs do not meet the court's construction of the "contactless card applet" limitation of claims 11 and 23 and their dependent claims, and (3) the pairing of the accused iPhone and Apple Watch does not satisfy the court's construction of the claim term "mobile device." J.A. 15160. The district court did not address these alternative grounds, see Order, 2023 WL 4237356, at *2, and we thus need not consider them on ap-

peal.

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FINTIV, INC. v. APPLE INC.

STANDARD OF REVIEW

"We review the grant of summary judgment of non-infringement under the law of the relevant regional circuit." Clare v. Chrysler Grp. LLC, 819 F.3d 1323, 1326 (Fed. Cir. 2016). "Applying Fifth Circuit law, we review the district court's decision to grant summary judgment de novo, applying the same standard as the district court." Absolute Software, Inc. v. Stealth Signal, Inc., 659 F.3d 1121, 1129 (Fed. Cir. 2011) (citing United States v. Caremark, Inc., 634 F.3d 808, 814 (5th Cir. 2011)). "Summary judgment is appropriate if, in viewing the evidence in a light most favorable to the non-moving party, the court finds that 'there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Id. (quoting Fed. R. Civ. P. 56(a)).

Infringement is a question of fact. *Id.* at 1129–30. "On appeal from a grant of summary judgment of non-infringement, we determine whether, after resolving reasonable factual inferences in favor of the patentee, the district court correctly concluded that no reasonable jury could find infringement." *Id.* at 1130.

DISCUSSION

This appeal concerns a single limitation: the "widget" limitation. None of the claims comprise simply "a widget." In the case of the method claims, the claims require certain actions performed on a widget ("retrieving" and "provisioning"). See, e.g., '125 patent at claim 11. And in the case of the system and device claims, the claims require certain elements "configured to" act on a widget. See, e.g., '125 patent at claim 23 ("a mobile wallet application configured to store a widget"). But Fintiv's theory of infringement for all the asserted claims alike requires proving the presence of a widget. See, e.g., Appellant's Opening Br. 35 ("[T]o survive summary judgment, Fintiv was only required to present evidence that created a legitimate inference of the existence of a widget..."); Appellant's Reply Br. 1

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("Fintiv has never argued that it did not have to present evidence of widget software.").

Fintiv first argues that the district court erroneously demanded Fintiv present source code evidence of a widget. We disagree with Fintiv's characterization of the district court's decision. True, the district court reasoned in part that Fintiv failed to identify source code comprising a widget. See Order, 2023 WL 4237356, at *3–4, *3 n.1. But the court ultimately concluded that Fintiv didn't proffer source code or non-source code evidence to rebut Apple's motion. See id. at *4 (rejecting Fintiv's "conten[tion] that it has proffered sufficient evidence (source code and non-source code) to defeat Apple's motion" (emphasis added)). The district court faulted Fintiv for "fail[ing] to identify software that constitutes the accused 'widget," not only for failing to present source code evidence of software. Id. (emphasis added).

We agree with Fintiv, however, that the district court erroneously granted summary judgment of noninfringement. The district court adopted a broad construction of "widget," defining it as "software that is either an application or works with an application, and which may have a user interface." J.A. 66–67. This construction does not require the claimed widget to possess any particular functional attributes, nor does it specify what the widget must do in relation to other claim limitations. Neither party challenges that construction. Under this broad construction, Fintiv proffered sufficient evidence to create a genuine issue of material fact that a widget exists in the accused products.²

² Although it is not disputed on appeal, the district court's construction appears unduly broad without specifying that the widget perform any particular functionality

FINTIV, INC. v. APPLE INC.

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As an initial matter, there is no genuine dispute that Fintiv and Dr. Shamos failed to identify specific source code as the claimed widget. Dr. Shamos conceded during his deposition that none of the source code he cited makes up the widget. See Order, 2023 WL 4237356, at *3; J.A. 15244–46. Indeed, both Fintiv and Dr. Shamos admit that Dr. Shamos's report cited source code modules "to identify code for 'retrieving' the widget or performing other actions on widgets—not the code for the widget itself." Appellant's Br. 44; see J.A. 18983.³

Still, "[a] patentee may prove infringement by 'any method of analysis that is probative of the fact of infringement,' and circumstantial evidence may be sufficient." *Martek Bioscis. Corp. v. Nutrinova, Inc.*, 579 F.3d 1363, 1372 (Fed. Cir. 2009) (citations omitted). Fintiv points to the testimony of Dr. Shamos related to observed functionality in the accused products as circumstantial evidence of a widget.

The '125 patent describes the widget as allowing a user to interact with information corresponding to a virtual

beyond that the "software . . . may have a user interface." J.A. 67. However, Fintiv appears to agree that its theory of infringement requires identifying a widget in the accused products that allows for the user to interact with credit card information. See '125 patent col. 8 l. 60 – col. 9 l. 5; Oral Arg. at 2:14–3:29, available at https://oralarguments.cafc.uscourts.gov/default.aspx?fl=23-2208_0306202 5.mp3.

³ At oral argument, the parties agreed to waive confidentiality for all material redacted "in the briefing," save for source code file names. Oral Arg. at 0:20–1:40. This waiver did not clearly extend to material marked confidential in the joint appendix. Nonetheless, we discuss herein material from the appendix that is revealed by the parties' briefs.

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credit card. See '125 patent col. 8 l. 60 – col. 9 l. 5. Consistent with that disclosure, Dr. Shamos testified in his report that "[t]he software (the 'widget') allows a user to, for example, view the card's details or perform transactions." J.A. 18767. Dr. Shamos explained:

For instance, the widget (providing a user interface) is also provisioned (made available for use), as reflected in the screenshots below. Each screenshot below (showing the virtual card image for the Visa card) presents a software (with a user interface) that is made available to the user for selecting, via its user interface, among the available ones to, for example, view the card's details or perform transactions.







Id. at 18790–91; see also, e.g., id. at 18794–95. Dr. Shamos elaborated during his deposition. For example, he explained, "I can select [the card art] . . . as a payment instrument[,] or I can select it and view its details[,] or I can select it and I can delete it," and "the interactivity that occurs between the user and that card information is performed by a widget." J.A. 18961; see also id. ("[T]he widget is software that enables you to do things with the card."). He further testified that "the underlying code exists that retrieves the credentials associated with that card," id. at 18966, and "the widget is the code that's sitting behind . . . the card art

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that is activated when I touch it," J.A. 15247. See also, e.g., J.A. 18960–61, 18963–64 (Dr. Shamos further testifying regarding the widget limitation).

The district court faulted Fintiv and Dr. Shamos for not "identify[ing] specifically what in [Dr. Shamos's] screenshots is the claimed 'widget." Order, 2023 WL 4237356, at *4 (emphasis added). But the widget software does not necessarily need to be a discrete element visible "in" the user operation screenshots. Dr. Shamos identified the alleged widget as the "software (with a user interface) that is made available to the user for selecting, via its user interface," one of the available cards to, "for example, view the card's details or perform transactions." J.A. 18790. In other words, the software underlying the observed user interface and functionality that allows a user to interact with the virtual cards in the Apple Wallet application to make payments and view the cards' details.

Further, consistent with Dr. Shamos's opinion that software underlies the observed functions is testimony of an Apple witness, Mr. Tackin. When asked about what Apple refers to as "passes" in the context of Apple Pay, Mr. Tackin testified that a "pass" could be understood as "a [user interface] and *software* presentation on the application processor that relates to the card that was installed." J.A. 19378 (emphasis added); *see also id.* at 19380 (testifying that the "card art could be . . . considered as part of the pass"). Like Dr. Shamos, Apple's own witness testified that software underlies the card art and user interface presentation.⁴

⁴ As explained above, Dr. Shamos conceded that the specific source code files he cited in his report were to identify code for performing certain actions on widgets, not code for a widget itself. Fintiv contends that the district court

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Although Dr. Shamos did not identify the precise source code that makes up the alleged widget, drawing reasonable inferences in favor of Fintiv, the non-moving party, Fintiv's evidence is sufficient for a reasonable jury to find that software provides the functionality Dr. Shamos observed and identified in the accused products. See Absolute Software, 659 F.3d at 1133; see, e.g., Packet Intel. LLC v. NetScout Sys., Inc., 965 F.3d 1299, 1306 (Fed. Cir. 2020) (finding of infringement supported by expert's testimony describing operation of the accused products); Vita-Mix Corp. v. Basic Holding, Inc., 581 F.3d 1317, 1326 (Fed. Cir. 2009) (vacating summary judgment because circumstantial evidence created a genuine issue of fact regarding infringement). That a plaintiff seeks to prove infringement of computer-implemented technology by evidence other than source code does not mean that infringing source code does not exist. See Chewy, Inc. v. Int'l Bus. Machs. Corp., 94 F.4th 1354, 1363–64 (Fed. Cir. 2024) (citing Amdocs (Israel) Ltd. v. Openet Telecom, Inc., 761 F.3d 1329, 1343 (Fed. Cir. 2014)). For its part, Apple speculates that "mere data," rather than software, could underlie the functions observed by Dr. Shamos. Appellee's Br. 64. But Apple cites no competing testimony or product documentation to support that view. Cf. Finjan LLC v. SonicWall, Inc., 84 F.4th 963, 971, 973 (Fed. Cir. 2023) (affirming summary judgment of noninfringement where defendant submitted evidence that its accused products operate in a manner differently than as required by the construction of a claim term).

* * *

improperly relied on Dr. Shamos's concessions to find that "passes are not the widget." *Order*, 2023 WL 4237356, at *4. We agree with Fintiv to the extent that the district court meant that "passes" more generally—beyond the specific files cited by Dr. Shamos—could not be the widget or evidence of a widget.

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The district court granted summary judgment because Fintiv "has no evidence of a 'widget' in the accused products; that is, the accused products contain no 'software that is either an application or works with an application, and which may have a user interface." *Order*, 2023 WL 4237356, at *3. Beyond the apparent implausibility that the accused products contain no software,⁵ Fintiv has sufficiently identified and proffered circumstantial evidence of a widget, as we have explained above.

The real issue, it appears to us, is whether the alleged widget as identified by Fintiv can satisfy related claim limitations. For example, the limitation requiring the widget to "correspond∏ to the contactless card applet," '125 patent at claims 11, 23, or the steps requiring the widget to be "retriev[ed]" and "provision[ed]," id. at claim 11. At oral argument, Apple repeatedly argued that these limitations could not be satisfied. See Oral Arg. at 21:28–54, 22:19–23:19, 24:01–12, 27:53–28:43. But the district court did not grant summary judgment based on those related claim limitations and that issue was not briefed to us on appeal. Accordingly, we remand for the district court to address whether summary judgment of noninfringement is warranted as to those limitations or on the remaining grounds asserted by Apple, which the district court did not reach. See Order, 2023 WL 4237356, at *2.

CONCLUSION

We have considered Apple's remaining arguments and find them unpersuasive. For the reasons stated above, we *reverse* the district court's grant of summary judgment and remand for further proceedings consistent with this opinion.

⁵ Counsel for Apple seemed to agree. *See* Oral Arg. at 22:28–23:22.

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REVERSED AND REMANDED

Costs

Costs to Fintiv.

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UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

FINTIV, INC.

\$
vs.

NO: AU:21-CV-00896-ADA

APPLE INC., WELLS FARGO BANK, N.A.,
USAA FSB

ORDER RESETTING PRETRIAL CONFERENCE

IT IS HEREBY ORDERED that the above entitled and numbered case is reset for PRETRIAL CONFERENCE by private Zoom on June 13, 2023 at 01:30 PM.

IT IS SO ORDERED this 9th day of June, 2023.

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

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UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

FINTIV, INC.

vs.

\$

NO: AU:21-CV-00896-ADA

\$

APPLE INC., WELLS FARGO BANK, N.A., \$

USAA FSB

ORDER SETTING PRETRIAL CONFERENCE

IT IS HEREBY ORDERED that the above entitled and numbered case is set for PRETRIAL CONFERENCE by public Zoom on June 13, 2023 at 01:30 PM.

IT IS SO ORDERED this 7th day of June, 2023.

ALAN D ALBRIGHT

UNITED STATES DISTRICT JUDGE

05/11/2023	458	Minute Entry for proceedings held before Judge Jeffrey C. Manske: Status	
		Conference held on 5/11/2023 (Minute entry documents are not available	
		electronically.). (Court Reporter FTR.)(dm) (Entered: 05/15/2023)	

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UNITED STATES DISTRICT COURT WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

FINTIV, INC.	§	
	§	CIVIL NO:
VS.	§	AU:21-CV-00896-ADA
	§	
APPLE INC., WELLS FARGO BANK, N.A.,	§	
USAA FSB	Ü	

ORDER SETTING SETTLEMENT CONFERENCE

IT IS HEREBY ORDERED that the above entitled and numbered case is set for **SETTLEMENT CONFERENCE** before Magistrate Judge Jeffrey C. Manske in Magistrate Courtroom Second Floor, on the United States Courthouse, 800 Franklin Ave., Waco, TX, on **Thursday, June 08, 2023 at 09:00 AM.**

IT IS SO ORDERED this 21st day of April, 2023.

ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

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

FINTIV, INC.,	
Plaintiff,	Civil Action No. 1:21-cv-00896-ADA
v.	
APPLE INC.,	
Defendant.	

ORDER ON EMERGENCY MOTION [ECF NO. 431]

On this day, came on for consideration Plaintiff Fintiv, Inc.'s Emergency Motion for Reopening Discovery, Trial Continuance, and Sanctions. ECF No. 431 ("Emergency Motion"). The Court having considered Fintiv's moving papers and Apple's response, ECF No. 437 ("Opposition"), the authorities cited in the parties' briefs, the exhibits attached thereto, and the arguments of counsel, hereby rules as follows:

- 1. Fintiv's motion for a trial continuance is hereby **GRANTED**. The Court will reschedule trial in this matter following the completion of the bilateral, limited fact discovery ordered below, and any resulting motion practice.
- 2. Fintiv's motion to reopen discovery is hereby **GRANTED-IN-PART** to the extent the Court orders additional limited bilateral discovery. The Court orders the following with respect to further discovery in this matter:
 - a. Fintiv will be permitted to take the depositions of Apple employee Ben
 Vigier, former Apple employee Pascal Caillon, and former Apple
 employee Charles Buchbinder. As to Mr. Caillon and Mr. Buchbinder,

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Apple will endeavor to secure their voluntary attendance at depositions, but failing that, Fintiv may serve subpoenas on each individual to secure their deposition attendance.

- Apple is ordered to produce the documents, including emails, identified in Apple's Opposition.
- c. Fintiv is ordered to produce the documents, including invoices, identified in the Emergency Motion.
- d. Apple will be permitted to take the deposition of former CorFire employee

 George Eubank. Fintiv will endeavor to secure his voluntary attendance at
 a deposition, but failing that, Apple may serve a subpoena on Mr. Eubank
 to secure his deposition attendance.
- e. To the extent either party wishes to depose any additional witnesses but the other party opposes, the former shall contact the Court to request leave to conduct additional depositions.
- f. Both parties are ordered to conduct additional searches through limited sets of email and ESI using custodians and search terms agreed to by the parties, and to produce nonprivileged results of those email/ESI searches to the other side. Unless otherwise agreed to by the parties, the time period for searching of email/ESI shall be limited to the calendar years 2011 through 2016. If the parties are unable to agree upon the parameters of such custodians, searches and productions, the issues shall be referred to Magistrate Judge Gilliland for resolution.

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addressed with the Court after the completion of the discovery ordered above.

This includes motions related to leave to amend pleadings, expert reports, and

The Court further **ORDERS** that any additional motion practice shall be

pretrial disclosures. It also includes any motions to reconsider rulings made

during the September 2021 pretrial conference.

4. Fintiv's motion for sanctions is hereby **DENIED** as to the requested Rule 37

death penalty sanctions. The Court will address any application related to

attorneys' fees and/or costs by either party after the conclusion of trial in this

matter. The Court will address any application related to a jury instruction

regarding an adverse inference of Apple's suppression and/or concealment of

evidence during the jury charge process.

SIGNED THIS 5th day of July, 2022.

3.

THE HONORABLE ALAN D ALBRIGHT

UNITED STATES DISTRICT JUDGE

Confidential Material Omitted

Sealed – Redacted in Full

Appx059 - Appx063

-70-1 UNITED STATES DISTRICT COURT) 2 WESTERN DISTRICT OF TEXAS 3 I, Kristie M. Davis, Official Court Reporter for the 4 5 United States District Court, Western District of 6 Texas, do certify that the foregoing is a correct 7 transcript from the record of proceedings in the above-entitled matter. 9 I certify that the transcript fees and format comply 10 with those prescribed by the Court and Judicial Conference of the United States. 11 12 Certified to by me this 25th day of June 2022. 13 /s/ Kristie M. Davis 14 KRISTIE M. DAVIS Official Court Reporter 15 800-Franklin Avenue Waco, Texas 76701 (254) 340-611416 03:41 kmdaviscsr@yahoo.com 17 18 19 20 21 22 23 24 25

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

FINTIV, INC.,	§
	§ Civil Action No.: 1:21-cv-00896-ADA
Plaintiff,	§
	§
	§ JURY TRIAL DEMANDED
v.	§
A DDI E ING	§
APPLE INC.,	§
	§
Defendant.	§

PLAINTIFF FINTIV, INC.'S EMERGENCY MOTION FOR REOPENING OF DISCOVERY, TRIAL CONTINUANCE, AND SANCTIONS

Plaintiff Fintiv, Inc. ("Fintiv" or "Plaintiff")—having learned within the past two weeks of critical new evidence suppressed by Defendant Apple Inc. ("Apple" or "Defendant") in blatant violation of its discovery obligations—respectfully moves to reopen discovery for the limited purpose of addressing this new evidence, to continue the June 21, 2022 trial to allow such discovery to be completed, and for monetary sanctions.

The newly discovered facts—evidenced by a sworn declaration and documentary evidence—demonstrate that SK C&C d/b/a CorFire ("CorFire"), from which Fintiv acquired the Patent-in Suit, shared key aspects of its patented mobile wallet technology during at least five inperson meetings with Apple in 2011 and 2012—three years before Apple launched its infringing Apple Pay—and that Apple thereafter hired CorFire employees who attended the meetings and even put one in charge of its Apple Pay and Apple Wallet Management program. During discovery, Apple not only wrongfully suppressed these facts—which go directly to Apple's willfulness in infringing the Patent-in Suit —but also falsely represented to Fintiv and this Court that no such meetings had occurred.

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Given the urgency of this Motion, Fintiv respectfully requests that the Court order expedited briefing with Apple's response due by Wednesday, June 8, 2022. Fintiv waives its right to a reply and respectfully requests a hearing on or before Friday, June 10, 2022, if possible.

I. PROCEDURAL HISTORY & FACTUAL BACKGROUND

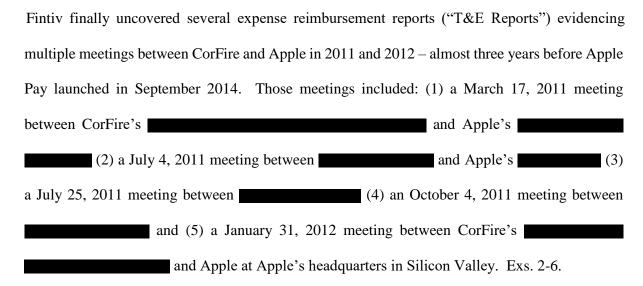
On July 14, 2020, Fintiv moved for leave to file a third amended complaint seeking relief for claims including Apple's willful infringement relating to pre-suit communications that Fintiv discovered—and that Apple had failed to disclose—during the course of discovery. Dkt. 139. This discovery revealed, among other things, that Apple failed to disclose that (1) in 2011 CorFire met with Apple to pitch and present its mobile wallet secure element technology to Apple's engineers and product managers and (2) Apple hired ________ CorFire's former m-Commerce Global Product & New Business Development Manager. *Id.* at 6-7. After considering the arguments by the parties, the Court ultimately decided that Fintiv had not shown "good cause" to add a claim for willful infringement. Importantly, the Court did not make a finding that the facts Fintiv sought to add were not credible or that Fintiv could not prove Apple had pre-suit knowledge of the Patent-in-Suit, including to support Fintiv's indirect infringement claims. Instead, the Court's ruling was based on the late addition of a new cause of action and the Court's opinion on Fintiv's ability to prove that specific cause of action, willful infringement, with such facts. Ex. 1, 19/1/20 Tr. at 96:12-97:11.1.

Since the conclusion of the September 1, 2020 hearing on Fintiv's motion for leave, Fintiv continued diligently searching for evidence of third-party CorFire's meetings and pre-suit communications with Apple. After devoting numerous hours to this effort, with little success,

¹ "Ex. ___" refers to exhibits to the Declaration of Jonathan K. Waldrop ("Waldrop Decl."), filed contemporaneously herewith.

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Eubank, who at the time was CorFire's Vice President of Channel Sales, recalled the January 31, 2012 meeting at Apple's headquarters in Cupertino, California, and specifically recalled sharing CorFire's mobile wallet technology, including a presentation about key aspects of its patented technologies, in an effort to partner with Apple in launching a mobile wallet. Declaration of George Eubank ("Eubank Decl."), ¶ 6. Eubank specifically recalled making a presentation to Apple concerning CorFire's products and services, including CorPay (CorFire's mobile wallet technology) and its secure element chip and widget technologies for mobile wallets, and although he no longer has a copy of the specific written presentation shared with Apple, Fintiv was able to locate a presentation that Eubank confirmed was substantially similar to the one presented to Apple, a copy of which is attached to his Declaration submitted herewith. Eubank Decl., ¶ 7.

As evidenced in the newly discovered T&E Reports, CorFire's attended all five in-person meetings with Apple in 2011 and 2012. Exs. 2-6. At the time, CorFire's Senior Vice President, Europe & Merchant Accounts. Ex. 7. left CorFire in 2014, and since 2015, he has been Apple's Director of Apple Pay & Wallet Product Management. *Id*.

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Throughout this litigation, Apple failed to disclose, in response to Fintiv's discovery requests, these highly relevant and material facts about its repeated communications with CorFire and its hiring of among other former CorFire employees)—facts that were undisputably in Apple's possession.² For example, on March 20, 2020, Fintiv served Interrogatory No. 15 requiring Apple to "[i]dentify the Date(s) when Apple became first aware of the Asserted Patent, the Related Patents, and the Related Patent Applications." Ex. 9. In its response, Ex. 10. In fact, however, the newly discovered evidence reveals that Apple learned of at least key aspects of the patented technology years before this lawsuit was filed. Similarly, on June 22, 2020, Fintiv served Interrogatory No. 27 requesting that Apple "[d]escribe Your communications with SK C&C and Your knowledge of SK C&C's intellectual property (e.g., the Patent-in-Suit) prior to this Action, including but not limited to, when you first communicated with SK C&C's former employee Jason Miller, the circumstances surrounding Your hiring of Mr. Miller from SK C&C, why You decided to hire Mr. Miller, what Mr. Miller has worked on and continues to work on during his employment at Apple, and whether Mr. Miller had knowledge of SK C&C's intellectual property, including the Patent-in-Suit." Ex. 11 (emphasis added). Apple's response to this interrogatory

Ex. 8, 9/24/21 Pretrial Conference Tr. at 51:1-10, 51:24-52:3, 52:18-24.

² The newly discovered evidence not only strongly supports Fintiv's willful infringement claim, but also refutes Apple's pending motion for judgment on the pleadings as to pre-suit indirect infringement and requires reconsideration of the Court's decision granting in part motion *in limine* no. 2

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Ex. 12. Apple's response

Apple's concealment was not limited to interrogatory responses, but included its document production as well. On March 23, 2020 and July 24, 2020, Fintiv served on Apple its second and third sets of Requests for Production of Documents, respectively, seeking: "All Documents referring to or mentioning SK C&C, its affiliates, related entities, and all other persons acting on its behalf;" "All Documents referring to or mentioning Mozido Corfire – Korea, Ltd., its affiliates, related entities, and all other persons acting on its behalf"; and "All Documents reflecting Your communications with Fintiv and its predecessors, including but not limited to Mozido, Inc. and SK C&C, prior to December 21, 2018, including for example those through Messrs. Parker, Nazir, and Ewing regarding the Patent-in-Suit, Related Patents, Related Patent Applications, Accused Technology, and/or Wallet Cards, and Your knowledge of SK C&C's intellectual property (e.g., the Patent-in-Suit)...." Ex. 13, p. 9, Nos. 40-41 (emphasis added); Ex. 14, p. 9, No. 64 (emphasis added). Apple never produced a single document responsive to these Requests, and, given the new evidence, it strains credulity, to say the least, that no such documents exist. In fact, to take just one example, Apple unquestionably has documents concerning its

 3 At least one written presentation discussing CorFire's patented mobile wallet technology was shared at the January 31, 2012 meeting. Eubank Decl., \P 7.

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and Apple when CorFire's mobile wallet technology was discussed—and who is now in charge of Apple Pay and Apple Wallet.

Apple served Initial Disclosures on November 14, 2019, and Supplemental Initial Disclosures on February 27, 2020, July 27, 2020, September 24, 2020, and June 23, 2021. Exs. 15-19. Despite supplementing its initial disclosures four times, Apple again failed to disclose as a person with knowledge Apple did disclose Ex. 19. Apple, however, failed to disclose that had attended the March 17, 2011, July 4, 2011, July 25, 2011, and October 4, 2011 meetings with CorFire on behalf of Apple, that has relevant information regarding these meetings, or even that the meetings ever occurred. Exs. 2-6.

II. ARGUMENT

A. The Trial Should be Continued to Allow for Reopening of Discovery

As shown above, the newly discovered evidence shows that during discovery Apple concealed the fact that it had five meetings with Fintiv's predecessor CorFire, obtained CorFire documents about the technology three years before Apple Pay launched with all the key functionalities described in the CorFire presentation, and even hired CorFire employees who had attended those meetings. Despite Fintiv's diligence (diligence this Court acknowledged at the September 1, 2020 hearing), Fintiv did not discover any of this evidence until very recently and was unable to produce the evidence in response to Apple's repeated discovery requests for information Apple itself already had concerning these matters — which plainly gave Apple the confidence to continue concealing them.

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As a matter of fundamental fairness, and to prevent Apple from profiting from its repeated discovery violations, Apple should be ordered to produce all documents related to these matters, including but not limited to the newly discovered meetings, and to produce for deposition and any other witnesses who have knowledge of the meetings. *See e.g., Sw. Refrigerated Warehousing* 2017 WL 8777365, at *1; *Garcia v. Woman's Hosp. of Texas*, 97 F.3d 810 (5th Cir. 1996); *Garcia*, 97 F.3d at 814.

The requested relief here is critical because Apple's concealment hamstrung Fintiv in obtaining highly relevant, if not dispositive, evidence concerning at least infringement, nonobviousness, credibility of witnesses, damages, and potentially willful infringement. The Apple-CorFire meetings, CorFire's presentation to Apple about key aspects of the patented technology, and the 2010 pending patent application describing that technology constitute powerful evidence of at least copying and willful infringement. See, e.g., KAIST IP US LLC v. Samsung Elecs. Co., 439 F. Supp. 3d 860, 884–85 (E.D. Tex. 2020) (upholding jury's finding of willful infringement based on presentations by inventor to infringer, infringer's knowledge that inventor had filed a patent application, and inventor's license offer to infringer prior to infringer's development of the accused product); Ligwd, Inc. v. L'Oreal USA, Inc., 941 F.3d 1133, 1138-39 (Fed. Cir. 2019) (copying can be shown by having access to the invention and evidence of copying efforts, even without evidence that a specific patented product was copied); i4i Ltd. P'ship v. Microsoft Corp., 598 F.3d 831, 860 (Fed. Cir. 2010), aff'd, 564 U.S. 91 (2011) (plaintiff presented sufficient evidence at trial to prove willful infringement where, inter alia, infringer reviewed plaintiff's materials and attended its presentation of the software, which practiced the technology described in the asserted patent). This is particularly so given that Apple subsequently hired at least two CorFire employees and suppressed the evidence of the five pre-launch Apple-

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CorFire meetings during discovery. *See Avocent Huntsville, LLC v. ZPE Systems, Inc.*, 2018 WL 1411100, at *22 (N.D. Cal. 2018) (denying dismissal of willful infringement claim where accused infringer employed patentee's former employees); *Imperium IP Holdings (Cayman), Ltd. v. Samsung Elecs. Co.*, No. 4:14-CV-00371, 2017 WL 1716788, at *3 (E.D. Tex. Apr. 27, 2017) (defendants' material misrepresentations in their interrogatory responses and during trial regarding infringement and willfulness, and failure to produce relevant documents until trial, were sufficiently egregious to warrant enhanced damages).

Moreover, Rule 16(b) of the Federal Rules of Civil Procedure provides that a scheduling order may be modified "for good cause and with the judge's consent." Fahim v. Marriott Hotel Servs., Inc., 551 F.3d 344, 348 (5th Cir. 2008) (internal quotation marks omitted). The factors guiding the "good cause" determination include: "(1) the party's explanation; (2) the importance of the requested relief; (3) potential prejudice in granting the relief; and (4) the availability of a continuance to cure such prejudice." Green Hills Dev. Co. v. Credit Union Liquidity Servs., LLC, 3:11-CV-1885-P, 2013 WL 12126783, at *2 (N.D. Tex. May 14, 2013); see Sapp v. Mem'l Hermann Healthcare Sys., 406 Fed. Appx. 866, 869 (5th Cir. 2010) (per curiam) ("no single factor is dispositive, nor must all the factors be present"). A motion for continuance should be granted if a party discovers new information or the opposing side failed to produce documents. See Sw. Refrigerated Warehousing Servs. Joint Venture v. M.A. & Sons, Inc., No. EP-16-CV-00421-DCG, 2017 WL 8777365, at *1 (W.D. Tex. Dec. 20, 2017) (granting motion for continuance where a party discovered new information and opposing party failed to turn over requested documents); see also Advanced Display Systems, Inc. v. Kent State Univ., 212 F.3d 1272, 1284-86 (Fed. Cir. 2000) (applying Fifth Circuit law and reversing denial of new trial where a party "deliberately and intentionally withheld" key evidence pertaining to the issue of obviousness).

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Here, the explanation for and importance of the requested relief are plain, and Apple should not be heard to assert any prejudice because the requested relief is necessitated by its own wrongful conduct and evidence suppression. In any event, there is no prejudice to Apple because granting the relief will not change the status quo of Apple's continuous infringement without paying Fintiv's reasonable royalty.

B. Fintiv Should be Granted Leave to Amend its Complaint to Allege Claims Uncovered During Discovery

As discussed above, discovery related to meetings between the parties in which Fintiv or its predecessors discussed key aspects of CorFire's patented, innovative technology is relevant to numerous issues in this case, including the relationship between the parties, copying, indirect infringement, willful infringement, witness credibility, and trade secret misappropriation. Accordingly, Fintiv should be granted leave to amend its complaint to the extent discovery reveals any new claims. New information learned during discovery provides good cause to amend under Rule 16. See, e.g., H&R Block Tax Servs., Inc. v. Jackson Hewitt Tax Serv., Inc., No. 6:08CV37, 2008 WL 11265109, at *3 (E.D. Tex. Dec. 23, 2008) (granting motion for leave when plaintiff did not discover "significant details" until after the deadline); Cornell Univ. v. Illumina, Inc., No. 10-433-LPS-MPT, 2016 WL 3046258, at *5 (D. Del. May 27, 2016) (finding good cause met where the party's new allegations were based on "a new set of facts obtained and confirmed during discovery which took place after the Scheduling Order's deadline for amending pleadings"); Sprint Comms. Co., L.P. v. Time Warner Cable, Inc., No. 11–2686–JWL, 2013 WL 6589564, *2 (D. Kan. 2013) (granting patentee leave to amend to add a claim of willful infringement, even though leave was sought four months after the deadline to amend pleadings, where patentee showed that before the deadline the accused infringer had denied all pre-suit knowledge of the patent). Apple, at best,

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negligently failed to discover and disclose this information earlier, and at worst, knowingly and willfully ignored its discovery obligations. *See, e.g., Pears v. Mobile County*, 645 F. Supp. 2d 1062, 1085-86 (S.D. Ala. 2009) (holding that where defendant carefully worded its discovery responses and pleadings to mislead plaintiff, the behavior constituted good cause to allow plaintiff to amend his pleadings after the amendment deadline). Indeed, a failure to grant Fintiv leave to amend would prevent Fintiv from presenting a full infringement case and would require Fintiv to go to trial on an incomplete record. *See LBS Innovations, LLC v. Aaron Bros., Inc.*, No. 2:11-CV-142, 2012 WL 12897919, at *2 (E.D. Tex. Nov. 9, 2012) (amendment should be allowed when "disallowing [it] would deprive Plaintiff of a plausible theory" for relief "and substantive review of the issues"). Here too, Apple should not be permitted to profit from failing to timely provide complete discovery of information in its possession.

C. Monetary Sanctions are Warranted

Based on the above conduct, Fintiv requests monetary sanctions against Apple to cover Fintiv's costs for: (1) preparing and filing this motion; (2) cancelling trial accommodations; (3) litigating motions now mooted or requiring reconsideration; and (4) any other costs the Court deems just. Fed. R. Civ. P. 37(c)(1)(A) (authorizing the court to order payment of the reasonable expenses and attorney's fees caused by the failure to disclose a witness).

III. CONCLUSION

For the foregoing reasons, Fintiv respectfully requests the Court reopen discovery for the limited purpose of obtaining documents and depositions from Apple about the 2011 and 2012 Apple-CorFire meetings, continue the currently-scheduled June 21, 2022 trial to a date two weeks after the completion of such discovery, allow Fintiv to supplement its pretrial disclosures, including witness and exhibits lists, as appropriate, and award monetary sanctions.

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Dated: June 6, 2022 RESPECTFULLY SUBMITTED,

By: /s/Jonathan K. Waldrop

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FINTIV, INC.

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PUBLIC VERSION

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing instrument was served or delivered electronically to all counsel of record via U.S. District Court [LIVE] — Document Filing System to all counsel of record on this 6th day of June, 2022.

/s/ Jonathan K. Waldrop

Jonathan K. Waldrop

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

FINTIV, INC.,	§
, ,	§ Civil Action No.: 1:21-cv-00896-ADA
	§
Plaintiff,	§
	§ JURY TRIAL DEMANDED
v.	§
A DDI E ING	§
APPLE INC.,	§
.	§
Defendant.	§

DECLARATION OF JONATHAN K. WALDROP IN SUPPORT OF PLAINTIFF FINTIV, INC.'S EMERGENCY MOTION FOR REOPENING OF DISCOVERY, TRIAL CONTINUANCE, AND SANCTIONS

I, Jonathan K. Waldrop, declare as follows:

- 1. I am a Partner with the law firm of Kasowitz Benson Torres LLP and am one of the attorneys responsible for the representation of Plaintiff Fintiv, Inc. ("Fintiv" or "Plaintiff") in this matter. I make this declaration in support of Plaintiff's Emergency Motion for Reopening of Discovery, Trial Continuance, and Sanctions.
- 2. If called to testify under oath in court, I could and would testify competently to the facts stated herein.
- 3. Attached hereto as **Exhibit 1** is a true and correct copy of excerpts from the Transcript of the September 1, 2020 Videoconference Motion Hearing.
- 4. Attached hereto as **Exhibit 2** is a true and correct copy of the expense receipt for the March 17, 2011 meeting between of SK C&C d/b/a Corfire ("CorFire") and of Defendant Apple Inc. ("Apple").

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	5.	Attached hereto as Exhibit 3 is a true and correct copy of the business expense
reimbu	ırsemen	t form for the July 4, 2011 meeting between of CorFire and
		of Apple.
	6.	Attached hereto as Exhibit 4 is a true and correct copy of the business expense
reimbu	ırsemen	t form for the July 25, 2011 meeting between of CorFire and
		of Apple.
	7.	Attached hereto as Exhibit 5 is a true and correct copy of the business expense
reimbu	ırsemen	t form for the October 6, 2011 meeting between of CorFire and
		of Apple.
	8.	Attached hereto as Exhibit 6 is a true and correct copy of the business expense
reimbu	ırsemen	t report for the January 31, 2012 meeting between
	of Cor	Fire and Apple at Apple's headquarters in Silicon Valley.
	9.	Attached hereto as Exhibit 7 is a true and correct copy of Pascal Caillon's LinkedIn
profile		
	10.	Attached hereto as Exhibit 8 is a true and correct copy of excerpts from the
Transc	ript of t	he September 24, 2021 Pretrial Conference.
	11.	Attached hereto as Exhibit 9 is a true and correct copy of Fintiv's Second Set of

12. Attached hereto as **Exhibit 10** is a true and correct copy of Apple's Responses and Objections to Fintiv's Second Set of Interrogatories (Nos. 9-26), served April 22, 2020.

Interrogatories (Nos. 9-26) to Defendant Apple Inc. ("Apple"), served March 23, 2020.

13. Attached hereto as **Exhibit 11** is a true and correct copy of Fintiv's Third Set of Interrogatories (Nos. 27-28) to Apple, served June 22, 2020.

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14. Attached hereto as **Exhibit 12** is a true and correct copy of Apple's Responses and Objections to Fintiv's Third Set of Interrogatories (Nos. 27-28), served July 22, 2020.

15. Attached hereto as **Exhibit 13** is a true and correct copy of Fintiv's Second Set of Requests for Production of Documents (Nos. 38-62) to Apple, served March 23, 2020.

16. Attached hereto as **Exhibit 14** is a true and correct copy of Fintiv's Third Set of Requests for Production of Documents (Nos. 63-70) to Apple, served July 24, 2020.

17. Attached hereto as **Exhibit 15** is a true and correct copy of Apple's Initial Disclosures, served November 14, 2019.

18. Attached hereto as **Exhibit 16** is a true and correct copy of Apple's First Supplemental Initial Disclosures, served February 27, 2020.

19. Attached hereto as **Exhibit 17** is a true and correct copy of Apple's Second Supplemental Initial Disclosures, served July 27, 2020.

20. Attached hereto as **Exhibit 18** is a true and correct copy of Apple's Third Supplemental Initial Disclosures, served September 24, 2020.

21. Attached hereto as **Exhibit 19** is a true and correct copy of Apple's Fourth Supplemental Initial Disclosures, served June 23, 2021.

I hereby declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge, information, and belief, formed after reasonable inquiry under the circumstances.

Executed on the 6th day of June, 2022, in Redwood Shores, California.

/s/ Jonathan K. Waldrop Jonathan K. Waldrop

Confidential Material Omitted

Sealed – Redacted in Full

Appx081 - Appx093

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UNITED STATES DISTRICT COURT

WESTERN DISTRICT OF TEXAS AUSTIN DIVISION

FINTIV, INC.	§	
	§	
vs.	§	Case Number: AU:21-CV-00896-ADA
	§	
APPLE INC., WELLS FARGO BANK,	§	
N.A., USAA FSB		
Dafandant		

ORDER SETTING HEARING

IT IS HEREBY ORDERED that the above entitled and numbered case is SET for Mediation (in person), in U.S. Magistrate Court, Courtroom No. 3, Second Floor, 800 Franklin Avenue, Waco, Texas, on Thursday, June 8, 2023, at 9:00 a.m.

IT IS SO ORDERED this 24th day of April, 2023.

JEFFREY C. MANSKE

UNITED STATES MAGISTRATE JUDGE

Confidential Material Omitted

Redacted in Full

Appx095 - Appx096

CERTIFICATE OF SERVICE

I certify that, pursuant to Fed. R. App. P. 25(c), on July 28, 2025, a true and correct copy of the foregoing was filed electronically and provided to all counsel of record by email to:

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/<u>s/ Meredith Martin Addy</u> Meredith Martin Addy