Case No. 16-105

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN RE: TC HEARTLAND, LLC,

Petitioner.

On Petition for A Writ of Mandamus to the U.S. District Court for the District of Delaware in Case No. 14-00028 (LPS), Chief Judge Leonard P. Stark.

BRIEF OF AMICI CURIAE ELECTRONIC FRONTIER FOUNDATION, PUBLIC KNOWLEDGE, AND ENGINE ADVOCACY IN SUPPORT OF PETITIONER

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October 29, 2015

CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 29(a) and 47.4, counsel for *Amici Curiae* certifies that:

1. The full name of the *amici* represented by me is:

Electronic Frontier Foundation, Public Knowledge, Engine Advocacy

2. The name of the real party in interest (if the party named in the caption is not the real party in interest) represented by me is:

N/A

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the amici curiae represented by me are:

None.

4. The name of all law firms and the partners or associates that appeared for the party or amicus now represented by me in the trial court or are expected to appear in this Court is:

Vera Ranieri, Electronic Frontier Foundation, San Francisco, California.

Charles Duan, Public Knowledge, Washington D.C.

October 29, 2015 /s/ Vera Ranieri

Vera Ranieri
Attorney for Amici Curiae

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INTEREST OF AMICI CURIAE

Amici curiae[1] are non-profit groups that focus on protecting consumer interests and small innovators in the digital age, particularly with respect to intellectual property law. Litigation over patents can have substantial impact on those consumer interests, by dragging small, innovative businesses into complex litigation that they often cannot afford. This potentially forces them into settlements whose costs are passed onto consumers or, worse yet, prevents them from bringing new and useful products and services to market.

The rampant forum shopping seen in patent litigation, and the attendant negative incentives that forum shopping creates, are thus of substantial concern to those small businesses and consequently to the public at large. Accordingly, *amici* feel strongly that this Court should reconsider its decision in *VE Holding*, which seeded this troubling forum shopping situation.

Amicus Engine Advocacy is a technology policy, research, and advocacy organization that bridges the gap between policymakers and startups, working with

[1] Petitioner TC Heartland, LLC consents to the filing of the brief, while respondent Kraft Food Group Brands LLC does not consent. *Amici* have concurrently filed a motion for leave to file this brief. Pursuant to Rule 29(c) of the Federal Rules of Appellate Procedure, *amici* certify that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Furthermore, no person or entity, other than *amici*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief.

government and a community of high-technology, growth-oriented startups across the nation to support the development of technology entrepreneurship. Engine Advocacy has worked with the White House, Congress, federal agencies, and state and local governments to discuss policy issues, write legislation, and introduce the tech community to Washington insiders.

Amici the Electronic Frontier Foundation and Public Knowledge have often served as *amicus* in key patent cases, including *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347 (2014), *Nautilus, Inc. v. Biosig Instruments, Inc.*, 134 S. Ct. 2120 (2014), *Bilski v. Kappos*, 561 U.S. 593 (2010); *KSR Int'l Co. v. Teleflex Inc.*, 550 U.S. 398 (2007); and *eBay Inc. v. MercExchange, LLC*, 547 U.S. 388 (2006).

ARGUMENT

I. The Forum Shopping Situation in Patent Cases Demonstrates that *VE Holding* Misconstrued Congressional Intent for Patent Venue

It is highly unlikely that Congress would have enacted a venue statute that would have led to one of the worst, most notorious situations of forum shopping in recent history. But *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990), construed 28 U.S.C. § 1400(b) to permit venue in just about any court of the patent owner's choosing. That effectively implies that Congress intended to create exactly that forum shopping situation, one that "conjures negative images of a manipulable legal system in which justice is not imparted

fairly or predictably." Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. Rev. 889, 892 (2001).

This Court needs no reminder that patent owners are intentionally selecting particular forums—or, rather, a *single* forum of choice: the Eastern District of Texas. That district received 44% of all new patent cases filed in the first half of this year. *See* Brian C. Howard, *2015 First Half Patent Case Filing Trends*, Lex Machina (2015) ("Lex Machina"), *available at* https://lexmachina.com/2015-first-half-patent-case-filing-trends/ (noting that 3,122 cases have been filed from Jan-June 2015, 1,387 of which were filed in E.D. Tex.). Two judges within that district currently hear almost one out of every four patent cases *in the entire country*. Brian C. Howard, *Lex Machina 2014 Year in Review*, Lex Machina (2015) ("Year in Review"), *available at* http://pages.lexmachina.com/rs/lexmachina/images/2014%20Patent%20Litigation%20Report.pdf.[2] This is despite the fact that the district has a small population and no major corporate or technology industry.

At least three pieces of evidence further indicate that Congress could not have intended its venue statutes to be construed as *VE Holding* construed them. First, procedures in the Eastern District of Texas strongly favor patent owners in an apparent attempt to attract litigants, a practice described as "forum selling." Second, discrepancies in results over the same patent between the Eastern District

[2] All websites last visited Oct. 27, 2015.

of Texas and other courts strongly evince the effects of that district's bias. Third, the numerous granted writs of mandamus to transfer cases out of that district show that the district is inappropriate and inconvenient for litigants. These troubling results are plainly contrary to Congress's intent in enacting laws about venue.

A. The Judicial Abrogation of Congress's Patent Venue Statute has Given Rise to Forum Selling for Patent Cases

"Forum selling," described in Daniel Klerman and Greg Reilly's paper of the same name, refers to the phenomenon of judges creating procedural and substantive laws that favor plaintiffs, in order to attract cases to their district. Daniel Klerman & Greg Reilly, *Forum Selling*, S. Cal. L. Rev. (forthcoming 2015) ("Klerman"), *available at* https:// www. law. umich. edu/ centersandprograms/ lawandeconomics/workshops/Documents/Paper%202.Klerman.Forum%20Selling.pdf.[3] Klerman finds significant evidence that the Eastern District has engaged in forum selling. *Id.* at 7-31; *see also id.* at 31-33 (rebutting alternative explanations); J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. Penn. L. Rev. 631, 659-666 (2015) (similarly discussing judicial incentives to attract patent cases).

The Eastern District has adopted certain procedural rules that benefit patent owners—particularly those with weak patents and no products—to the detriment of

[3] Klerman hypothesizes that judges may engage in forum selling for a variety of reasons, including "prestige, local benefits, or re-election[.]" Klerman, *supra*, at 3; *see also id.* at 26-30. *Amici* take no position as to any purported motivations.

small innovators and those accused of infringement. These rules drive up costs to defendants and work to increase settlement pressure untethered to the merits of a particular claim for patent infringement.

For example, Judge Gilstrap and Judge Schroeder—who collectively in 2014 heard 23% of all the patent cases in the country[4]—forbid parties from filing summary judgment absent permission from the court. *See* Sample Docket Control Order for Patent Cases Assigned to Judge Rodney Gilstrap, at 4-5, *available at* http:// www. txed. uscourts. gov/ page1. shtml? location= info: judge& judge= 17 ("Docket Control Order").[5] These judges also require the production of all relevant documents *without* regard to the needs of the case in light of such things as resources or amounts in controversy, and *without* request from the other side. *See* Sample Discovery Order for Patent Cases Assigned to Judge Rodney Gilstrap, at 2, *available at* http:// www. txed. uscourts. gov/ page1. shtml? location= info: judge& judge=17. The judges furthermore limit the ability of a party to move for a stay pending the disposition of a merits motion or a motion to transfer. *See* Docket Control Order at 5.

[4] *See* Year in Review, *supra*, at 1, 15.

[5] Judge Schroeder's standing orders are similar to Judge Gilstrap's standing orders in the relevant respects. Judge Schroeder's orders may be found at http://www.txed.uscourts.gov/page1.shtml?location=info:judge&judge=18.

These rules, although facially neutral, give significant advantages to patent owners with minimal assets, dubious patents or infringement claims, or a goal of extracting undeserved settlements.[6] Non-practicing entities whose sole business is asserting patents often have little by way of documents to produce, making the burden of automatic, virtually unlimited discovery fall primarily on the accused infringer. Similarly, the roadblocks to summary judgment favor those with weak patents or claims of infringement, who often seek to delay merits decisions while simultaneously increasing litigation costs on defendants, in order to extract settlements that, although significant, still fall below the cost of trial.

The forum shopping and forum selling that occur in the Eastern District of Texas is the predictable result of nationwide venue. Contrary to *VE Holding*, it is unlikely that Congress intended its venue statute to have such an effect for one side of patent litigation. *See* Klerman, *supra*, at 7; Moore, *supra*, at 896-97.

B. Forum Shopping Leads to Inconsistent Results, Undermining the Judicial System

Then-Professor Kimberly A. Moore described forum shopping as "troubling" because it "forces the acknowledgment that the promise of equal, consistent, and uniform application of justice...is unattainable." Moore, *supra*, at

[6] That these rules favor patent owners is further evidenced by the dearth of declaratory judgment filings in the Eastern District of Texas, suggesting that defendants seek to avoid that jurisdiction. *See* Klerman, *supra*, at 32.

893. The reality of today's patent litigation shows exactly how unattainable the equal, consistent, and uniform application of justice has become as a result of *VE Holding* opening the door to extensive forum shopping.

A review of one patent owner's litigation history—Eclipse IP—provides strong anecdotal evidence that patent owners take advantage of nationwide venue and specifically seek out districts such as the Eastern District of Texas in order to avoid quick merits decisions.

Eclipse IP is a high-volume repeat patent assertor. Between 2010 and 2014, Eclipse IP reportedly filed over a hundred lawsuits in the Central District of California. *Eclipse IP LLC v. PayByPhone Techs., Inc.*, Case No. CV 14-154-GW(AJWx), Civil Minutes, ECF. No. 30, at 2 (C.D. Cal. May 29, 2014). A judge there found that Eclipse IP "appears to generally seek modest lump sum licensing payments," perhaps suggesting that "Eclipse is leveraging the cost of litigation, rather than the strength of its patents." *Id.* He further expressed "concern[] that at least some of the Eclipse Cases have the potential for resolution to be driven primarily by the costs of defense," stayed all but a small portion of the case, and ordered Eclipse IP to file a notice of related cases for any further cases filed related to the same patents. *Id.*, Civil Minutes, ECF No. 33, at 2 (C.D. Cal. June 10, 2014).

Central District of California Judge Wu invalidated claims from three different Eclipse IP patents on a motion to dismiss, holding that they claimed

ineligible subject matter and failed to meet the requirements of 35 U.S.C. § 101. *See Eclipse IP LLC v. McKinley Equip. Corp.*, Case No. CV 14-154-GW(AJWx), 2014 WL 4407592 (C.D. Cal. Sept. 4, 2014).

Contrast this with Eclipse IP's subsequent 53 lawsuits, *none* of which were filed in the Central District of California, and 40 (75%) of which were filed in the Eastern District of Texas. *See* PACER Records, https://pcl.uscourts.gov/search (listing cases filed with "Eclipse IP" as plaintiff, and "patent" as nature of suit).

Eclipse IP's litigation activities are evidence of its desire to take advantage of the forum-specific benefits offered by the Eastern District of Texas. After one defendant moved to dismiss, Eclipse IP moved to strike the motion, arguing it was not allowed by the Judge Gilstrap's rules. *Eclipse IP, LLC v. Pro-Source Performance Prods., Inc.*, Case No. 2:15-cv-00363-JRG-RSP, Emergency Motion of Plaintiff Eclipse IP LLC to Strike Defendant Pro-Source Performance Products, Inc.'s Motion to Dismiss, ECF No. 18, at 2 (E.D. Tex. filed June 24, 2015). Though the motion to strike was denied, see *id.*; Order Denying Motion to Strike, ECF No. 21 (July 6, 2015), Eclipse IP's ability to entangle the process with such a motion only in the Eastern District of Texas indicates a practical discrepancy between the forums.

Furthermore, because his standing orders deny parties the ability to move for a stay pending a motion to dismiss, Judge Gilstrap has moved the consolidated

case forward at a fast pace. The motion to dismiss has remained pending for months—time enough for five defendants to settle. *See Eclipse IP LLC v. Alfa Vitamin Labs, Inc.*, Case No. 2:15-CV-353-JRG-RSP, Docket Control Order, ECF No. 73 (E.D. Tex. Aug. 25, 2015) (consolidated case with *Pro-Source Performance*). Eclipse IP was thus able in the Eastern District of Texas to execute on its goal of "leveraging the cost of litigation" to obtain "modest lump sum payments," something it failed to do in the Central District of California.

C. The Effect of the Venue Free-for-All for Patent Owners Especially Harms Small Companies, Innovators, and End Users

Small companies, innovators, and end users are the ones least able to travel to a distant forum and learn the procedures of a new jurisdiction. They are thus the ones most likely to succumb to undue settlement pressure made only greater by the ability of patent owners to forum shop.

It is clear that the Eastern District of Texas is not an appropriate forum for many of those that are sued for patent infringement. Since 2008, this Court has granted a mandamus petition arising from that district at least 19 times.[7] Motions to transfer, and often mandamus, have become the recourse of those sued in the Eastern District of Texas that have no ability to argue that venue is improper under

[7] These orders either directed the Eastern District of Texas to consider a motion to transfer, to properly consider certain facts on a motion to transfer, or to outright order the transfer the case contrary to the district court's refusal. The Federal Circuit orders known to counsel are listed in Appendix A.

28 U.S.C. § 1400(b) at the outset. This strongly suggests that it is frequently improper—indeed harmful—for cases to be venued in the Eastern District of Texas.

Unfortunately, for many even mandamus is out of reach. Countless cases have surely settled in light of high costs imposed by distant venues.

It blinks reality to think that Congress intended, by minor amendment to 28 U.S.C. § 1391, to create this absurd situation of forum shopping and forum selling. But that is precisely what *VE Holding* imputed to Congress, strongly suggesting that the disposition of that case was in error.

CONCLUSION

Congress did not intend for patent owners to be able to sue in any district in the country, no matter how tenuous the links the purported infringer has to the district. *Amici* ask that this Court restore balance in patent litigation. *Amici* support Petitioner in asking this Court to grant the petition for mandamus and recognize that *VE Holding* is no longer good law.

Dated: October 29, 2015

Respectfully submitted,

By: /s/ Vera Ranieri

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APPENDIX A

Case
In re Google Inc., No. 2015-138, 2015 WL 5294800 (Fed. Cir. July 16, 2015)
In re Apple, Inc., 581 F. App'x 886 (Fed. Cir. 2014) (per curiam)
In re Nintendo of Am., Inc., 756 F.3d 1363 (Fed. Cir. 2014)
In re Toyota Motor Corp., 747 F.3d 1338 (Fed. Cir. 2014)
In re Toa Techs., Inc., 543 F. App'x 1006 (Fed. Cir. 2013)
In re Nintendo Co., 544 F. App'x 934 (Fed. Cir. 2013)
In re Google Inc., 588 F. App'x 988 (Fed. Cir. 2014)
In re Oracle Corp., 399 F. App'x 587 (Fed. Cir. 2010)
In re EMC Corp., 677 F.3d 1351 (Fed. Cir. 2012)
In re Genentech, Inc., 566 F.3d 1338 (Fed. Cir. 2009)
In re TS Tech USA Corp., 551 F.3d 1315 (Fed. Cir. 2008)
In re Hoffmann-La Roche Inc., 587 F.3d 1333 (Fed. Cir. 2009)
In re Nintendo Co., 589 F.3d 1194 (Fed. Cir. 2009)
In re Acer Am. Corp., 626 F.3d 1252 (Fed. Cir. 2010), as amended (Jan. 13, 2011)
In re Zimmer Holdings, Inc., 609 F.3d 1378 (Fed. Cir. 2010)
In re Biosearch Techs., Inc., 452 F. App'x 986 (Fed. Cir. 2011)
In re Morgan Stanley, 417 F. App'x 947 (Fed. Cir. 2011) (per curiam)
In re Verizon Bus. Network Servs. Inc., 635 F.3d 559 (Fed. Cir. 2011)
In re Microsoft Corp., 630 F.3d 1361 (Fed. Cir. 2011)

CERTIFICATE OF SERVICE

I hereby certify that on this 29th day of October, 2015, I caused copies of the foregoing Brief of *Amici Curiae* Electronic Frontier Foundation, Public Knowledge, and Engine Advocacy to be served by electronic means via the Court's CM/ECF system on all counsel registered to receive electronic notices.

I further certify that two copies of the Motion for Leave to File a Brief of Amicus Curiae along with the proposed brief have been sent to the U.S. District Judge via FedEx:

The Honorable Leonard P. Stark
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