Transfers from the So-Called "Rocket Docket" May Reach Escape Velocity

Patent infringement suits against national corporations can be brought in virtually any district court in the United States. *See* Elizabeth P. Offen-Brown, *Forum Shopping and Venue Transfer in Patent Cases: Marshall's Response to TS Tech and Genetech*, 25 Berkeley Tech. L.J. 61, 66 (2010). The past decade saw a dramatic surge in the increase of patent infringement suits filed in the Eastern District of Texas. *See id.* at 70; Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. Times (Sept. 24, 2006). The Eastern District's popularity is generally attributed to plaintiff-friendly juries, large jury awards in patent infringement cases, and relatively short times to trial. Even though most cases filed in the Eastern District have little or no connection to that forum, defendants have typically had little success in transferring cases elsewhere. However, the Eastern District may be losing its status as a "rocket docket" known for speedy trials and judges hesitant to grant venue transfer motions. Over the past two years, the Federal Circuit has increasingly scrutinized denials of motions to transfer venue, making the Eastern District less attractive to forum-shopping plaintiffs. Also, time to trial has increased to over two years.

Motions to transfer venue in patent cases, like all federal civil cases, are governed by 28 U.S.C. § 1404(a), which permits transfer "[f]or the convenience of the parties and witnesses." In the Fifth Circuit, a party seeking transfer must establish that the proposed venue is "clearly more convenient" than the plaintiff's chosen venue. *In re Volkswagen of America, Inc.*, 545 F.3d 304, 315 (5th Cir. 2008) ("*Volkswagen II*") (en banc). The transfer analysis requires courts to consider a number of "public" and "private" interest factors, including, among others: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process; (3) the cost of attendance for witnesses; and (4) the local interest in having localized interests decided at home. *Id.*

Putting the Brakes on Forum Shopping

The Federal Circuit's crackdown on forum-shopping began with *In re TS Tech USA Corp.*, 551 F.3d 1315 (Fed. Cir. 2008). The plaintiff, a Michigan-based corporation, filed a patent infringement suit in the Eastern District of Texas against TS Tech, an Ohio corporation, and related defendants. TS Tech moved to transfer the case to the Southern District of Ohio, asserting that it was a far more convenient forum because most of the physical and documentary evidence was located in Ohio, and the key witnesses lived in Ohio, Michigan, and Canada. It also argued that the case had no meaningful connection to the Eastern District of Texas because none of the parties were incorporated or had offices in Texas. The plaintiff opposed transfer, maintaining that venue was proper because some of the allegedly infringing products were sold there. The district court denied the motion, holding that: (1) TS Tech had failed to demonstrate that the inconvenience to the parties and witnesses clearly outweighed the deference to the plaintiff's choice of forum, and (2) because some of the allegedly infringing products were sold in the Eastern District of Texas, its citizens had a "substantial interest" in having the case tried locally. *Id.* at 1318.

TS Tech filed a petition for a writ of mandamus. The Federal Circuit unanimously ruled in favor of TS Tech, holding that the district court had erred by treating the plaintiff's choice of forum as a distinct factor in the § 1404(a) analysis. *Id.* at 1320. The moving party's burden to show that the transferee venue is "clearly more convenient," said the Federal Circuit, already incorporates the proper deference to the plaintiff's choice of venue. *Id.* The district court had also erred by ignoring the Fifth Circuit's 100-mile rule, which holds that when the distance between the existing venue and the transferee venue is more than 100 miles, "the factor of inconvenience to the witnesses increases in direct relationship to the additional distance to be traveled." *Id.* Third, the district court had incorrectly treated the location of the physical and documentary evidence—all of which was far more conveniently located to Ohio—as a neutral factor in the analysis. *Id.* at 1321. Finally, it held that the mere fact that some of the allegedly infringing products were sold in the Eastern District did not create a meaningful connection to the venue. Rather, because the products were sold throughout the United States, the citizens of the Eastern District had no more interest in having the case tried locally than citizens of any other district. *Id.* The Federal Circuit therefore ordered the case transferred to the Southern District of Ohio.

The following year, the Federal Circuit decided a slightly more difficult case, *In re Genetech, Inc.*, 566 F.3d 1338 (Fed. Cir. 2009). In contrast to *TS Tech*—in which the physical evidence and witnesses were all located in or close to the transfer venue—*Genetech* involved decentralized evidence, parties, and witnesses. The plaintiff, a German pharmaceutical firm, had filed a patent infringement suit in the Eastern District of Texas against two California defendants. The defendants sought to transfer the case to the Northern District of California, identifying at least ten witnesses who resided in that state. The plaintiff, who opposed the motion, indentified several witnesses in Europe, on the East Coast, and in Iowa. Most of the defendants' physical evidence was located in California, while the plaintiff pointed to evidence located in Europe and Washington, D.C. It was undisputed that no witnesses or evidence were located in the Eastern District of Texas. The district court denied the motion, reasoning that it would be easier for the witnesses on the East Coast and in Europe to travel to Texas than to California, and easier for the plaintiff to transport its physical evidence from Europe to Texas. The district court also noted that one of the defendants had previously chosen to file an unrelated suit in the Eastern District of Texas, and therefore could hardly complain that the venue was now inconvenient. *See id.* at 1346.

On a petition for a writ of mandamus, the Federal Circuit rejected the district court's reasoning that Texas' "central" location in the middle of the country made the Eastern District a more convenient location than California. First, the witnesses from Europe, the East Coast, and Iowa would already be forced to travel a significant distance; it would be only slightly more inconvenient for them to travel the additional distance to California. Second, keeping the case in the Eastern District of Texas would impose a significant burden on the defendants to transport documents from California. Because the plaintiff already had to transport its evidence from Europe and Washington, D.C., bringing it to California rather than Texas could not pose a great additional burden. Third, there were a substantial number of witnesses who could be compelled to appear at trial in the Northern District of California through the court's 100-mile subpoena power, but no witnesses were within the Eastern District's subpoena power. Finally, because the case previously filed in the Eastern District involved a different set of parties, witnesses, and facts, the district court had erred by concluding that judicial economy weighed against transfer. The Federal Circuit ordered transfer to the Northern District of California.

Similarly, in *In re Nintendo Co. Ltd.*, 589 F.3d 1194 (Fed. Cir. 2009), witnesses resided in Washington, Japan, Ohio, and New York, but not Texas; no evidence was located in Texas; and none of the parties were incorporated or had offices in the state. The Federal Circuit ordered that the suit be transferred to the Western District of Washington, instructing that when "witnesses and evidence are closer to the transferee venue, and there are few or no convenience factors favoring the venue chosen by plaintiff, the trial court should grant a motion to transfer." *Id.* at 1198.

The Federal Circuit Rejects Plaintiffs' Attempts to Prevent Transfer

In *In re Hoffman-La Roche Inc.*, 587 F.3d 1333 (Fed. Cir. 2009), the Federal Circuit unanimously granted a writ of mandamus and ordered transfer of a patent infringement suit to North Carolina, where several key witnesses were located. Attempting to create a connection with the Eastern District of Texas, the California plaintiff had converted 75,000 pages of documents into electronic format and transferred them to its counsel's Texas office. The Federal Circuit dismissed that as a thinly-veiled attempt to manipulate venue. *Id.* at 1336-37.

Similarly, in *In re Zimmer Holdings, Inc.*, 609 F.3d 1378 (Fed. Cir. 2010), the Federal Circuit rejected the plaintiff's claim that its business presence in the Eastern District weighed against transfer. The plaintiff, a Michigan corporation, had merely transferred files from its corporate headquarters in Michigan to recently-acquired Texas office space, which it shared with another of its counsel's clients. The plaintiff had no employees in Texas and, in the view of the Federal Circuit was "attempting to game the system by artificially seeking to establish venue." *Id.* at 1381. The Federal Circuit also rejected the district court's finding that judicial economy would be served by keeping the suit in the Eastern District because the plaintiff had also sued another defendant in the district. According to the Federal Circuit, the overlap between the two cases was "negligible" and both were in the early stages of litigation. *Id.* at 1382. The court ordered transfer to the Northern District of Indiana, where the defendant's principal place of business and at least eight witnesses were located.

Most recently, in *In re Microsoft Corp.*, 630 F.3d 1361 (Fed. Cir. 2011), a plaintiff opened an office in Texas, moved documents there from the United Kingdom, and incorporated in Texas before filing suit in the Eastern District. The district court relied on these facts in denying a motion to transfer—a decision unanimously reversed by the Federal Circuit, on the basis that the plaintiff's Texas office staffed no employees and was "recent, ephemeral, and an artifact of litigation [that] appeared to exist for no other purpose than to manipulate venue." *Id.* at 1365. The Federal Circuit ordered transfer to the Western District of Washington, where the defendant's principal place of business, all its witnesses, and all its relevant documents and evidence were located.

A Defendant's Presence in Texas Does Not Preclude Transfer

In addition to rebutting attempts to establish a presence in the Eastern District to avoid transfer, the Federal Circuit has also recently rejected the argument that a *defendant's* presence in the state is enough to tilt the scales against transfer. In *In re Acer America Corp.*, 626 F.3d 1252 (Fed. Cir. 2010), a corporation headquartered in California brought suit in the Eastern District against 12 companies, 5 of which were also headquartered in California. Defendants sought transfer to the Northern District of California, but the district court denied the motion, largely because one defendant, Dell, Inc., was headquartered in the Northern District of Texas, approximately 300 miles from the court. The Federal Circuit unanimously granted a writ of mandamus, noting that all of the U.S.-based corporations except Dell, were headquartered in California, while *none* were located in the Eastern District. Further, significant numbers of witnesses were located in or near the Northern District of California, and therefore subject to that court's subpoena power. Likewise, a significant portion of the evidence was located in California, but none was in the Eastern District of Texas. Finally, because a number of the companies alleged to have caused the harm, as well as the plaintiff, were all residents of the Northern District of California, the local interest factor strongly favored transfer.

Time to Trial in Eastern District Now Over Two Years

In addition to this increased likelihood of transfer, the Eastern District appears to be losing its status as a "rocket docket" where plaintiffs can be assured of a short time to trial. According to official statistics, the median time interval from filing to trial for civil cases in which trials were completed has now reached 24.2 months for the Eastern District. *See Judicial Business of the United States Courts, Annual Report of the Director* (2010) at Table C-10. Numerous district courts throughout the United States have shorter median times to trial. *Id.* While certain factors may continue to favor plaintiffs in the Eastern District, it should thus no longer be assumed that a speedy time to trial will be one of them.

Conclusion

The recent decisions of the Federal Circuit have made cases with little or no connection to the Eastern District of Texas far more susceptible to transfer. An article published last year noted that motions to transfer patent suits filed in the Eastern District have risen 270 percent since *TS Tech*. In addition, there is evidence that as the district's popularity has risen, the time to trial has increased. These developments may diminish the district's appeal to forum-shopping plaintiffs, but it remains to be seen whether the Eastern District's popularity will disappear altogether.