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Fixing Forum Selling

Brian L. Frye & Christopher J. Ryan, Jr.*

“Forum selling” is jurisdictional competition intended to attract litigants. While consensual forum selling may be beneficial, non-consensual forum selling is harmful because it encourages jurisdictions to adopt an inefficient pro-plaintiff bias. In the last 20 years, the Eastern District of Texas has adopted an aggressive and remarkably successful policy of non-consensual forum selling in patent infringement actions. In 2016, 44% of all patent infringement actions were filed in the Eastern District of Texas, and 93% of them were filed by patent assertion entities or “patent trolls.”

In December 2016, the Supreme Court granted certiorari in TC Heartland v. Kraft, to consider the definition of corporate residence for the purpose of patent venue. If the Court adopts the narrow definition suggested by TC Heartland, it would effectively prevent the Eastern District of Texas from engaging in non-consensual forum selling in patent infringement actions. However, it could also unduly restrict patent venue. This Article argues that the Court could stop non-consensual forum selling in patent infringement actions by requiring district courts to decide motions to transfer venue before deciding any other motions or entering any substantive orders. This would prevent non-consensual forum selling by making it impossible for a district to offer bias as a salient incentive to marginal plaintiffs, and it would

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make litigation more efficient by ensuring that actions reach the appropriate district as quickly as possible.

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I. INTRODUCTION

I waive me right to be thried by an incorruptible, fair, an' on-prejudiced judge. Give me wan that's onfair an' prejudiced an' that ye can slip somethin' to.¹

Justice demands impartiality. A biased court makes a sham of due process. And biased courts are not only unjust, but also inefficient because they enable rent-seeking. But sometimes, courts have an incentive to adopt a bias. For example, courts have long engaged in “forum selling,” or jurisdictional competition intended to attract litigants. While consensual forum selling can be beneficial since it often encourages efficiency and impartiality, non-consensual forum selling is harmful, because it encourages courts to adopt inefficient pro-plaintiff biases. However, non-consensual forum selling is possible only if venue is proper.

In *TC Heartland LLC v. Kraft Food Brands LLC*, the Supreme Court of the United States will consider the scope of venue in a patent infringement action against a corporate defendant.² Patent venue is governed by a different statute than general venue, but under both statutes, venue is proper in any district in which a corporate defendant “resides.”³

¹ FINLEY PETER DUNNE, MR. DOOLEY SAYS 171 (1907).

² *TC Heartland LLC v. Kraft Food Brands Grp. LLC*, 137 S. Ct. 614 (2016).

³ 28 U.S.C. §§ 1391(b)(1) (2012); 1400(b) (2012).

Under the general venue statute, a corporate defendant “resides” in any district where it is subject to personal jurisdiction in the action.⁴ In 1957, the Supreme Court held that under the patent venue statute, a corporate defendant only “resides” in its state of incorporation and the districts where it practices the patent.⁵ But in 1990, the Federal Circuit held that the 1988 revision of the general venue statute applied its definition of corporate residence to the patent venue statute.⁶

The Federal Circuit’s interpretation of the definition of corporate residence for the purpose of patent venue had the unexpected consequence of enabling courts to engage in non-consensual forum selling in patent infringement actions.⁷ Since about 1999, the United States District Court for the Eastern District of Texas has aggressively pursued a policy of non-consensual forum selling in patent infringement actions with remarkable success. While the Eastern District of Texas is largely rural and home to few patent owners or alleged infringers, it heard 44% of the patent infringement actions filed in 2016.⁸ Most of those actions were filed by patent assertion entities—or “patent trolls”—attracted by the district’s pro-plaintiff rules and juries.⁹ The Federal Circuit, which has exclusive jurisdiction over patent appeals, has repeatedly tried to stop this non-consensual forum selling by ordering the Eastern District of Texas to transfer patent infringement actions to other districts, with little success.¹⁰

In *TC Heartland*, the Court will consider whether the Federal Circuit correctly interpreted the definition of corporate residence for the purpose of patent venue.¹¹ Obviously, it does so against the backdrop of rampant non-consensual forum selling in patent actions. The Court could probably stop non-consensual forum selling in patent actions by holding that the narrow definition of corporate residence for the purpose of patent venue it adopted in 1957 still applies. Under that definition, the Eastern District of Texas would almost never be a proper venue for a patent action. But doing so would also significantly restrict the scope of patent venue and prevent patent plaintiffs from filing actions in otherwise appropriate districts. It

⁴ 28 U.S.C. § 1391(c) (2012).

⁵ *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957).

⁶ *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990).

⁷ *See, e.g.*, Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CA. L. REV. 241, 242-46 (2016).

⁸ *See, e.g.*, Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 20 STAN. TECH. L. REV. 1, 3 (2017).

⁹ *See, e.g., id.*

¹⁰ *See In re TS Tech USA Corp.*, 551 F.3d 1315, 1319–21 (Fed. Cir. 2008); *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333, 1336–37 (Fed. Cir. 2009); *In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1379–80 (Fed. Cir. 2010); *In re Microsoft Corp.*, 630 F.3d 1361, 1362, 1364 (Fed. Cir. 2011).

¹¹ *TC Heartland LLC v. Kraft Food Brands Grp. LLC*, 137 S. Ct. 614 (2016).

could even encourage forum aversion, by enabling potential infringers to limit their exposure to patent actions to particular districts.

In theory, Congress could also stop non-consensual forum selling in patent actions by revising the patent venue statute. It is currently considering a bill that would revise the patent venue statute by limiting the scope of patent venue and facilitating mandamus relief.¹² But this bill is unlikely to pass and would probably have the same negative consequences as a judicial narrowing of the scope of patent venue.

However, the Court could easily and probably more effectively prevent non-consensual forum selling in patent actions by holding that district courts must decide motions to transfer venue before ordering discovery and must stay discovery pending appeal of their decision. Courts cannot engage in non-consensual forum selling unless they can retain jurisdiction over an action long enough to impose a salient discriminatory burden on the defendant. The Eastern District of Texas's primary method of imposing a discriminatory burden on patent defendants is by ordering extensive early discovery, which induces many defendants to settle.¹³ If the court could not impose discovery before an action is transferred, its ability to engage in non-consensual forum shopping in patent actions would be sharply curtailed.

This approach would prevent non-consensual forum selling in patent actions without limiting the scope of patent venue. Patent plaintiffs would retain a broad selection of appropriate venues, but they would be prevented from choosing inappropriate venues based on their pro-plaintiff bias. Requiring courts to wait for the final resolution of motions to transfer before ordering discovery should prevent non-consensual forum selling across the board, not just in patent actions. For example, evidence suggests that courts have engaged in forum selling in mass tort and bankruptcy actions as well, and such an approach would curb forum selling in these types of actions too.¹⁴ For these reasons, and those we articulate below, we argue that this approach is the preferred approach for the Court to employ in order to fix forum selling.

¹² Venue Equity and Non-Uniformity Elimination Act, S. 2733, 114th Cong. (2016).

¹³ See, e.g., Love & Yoon, *supra* note 8.

¹⁴ Klerman & Reilly, *supra* note 7, at 285.

A. A Brief History of Patent Venue

Originally, federal venue was quite limited. Under the Judiciary Act of 1789, federal venue was proper only in a district where a defendant resided or received service of process.¹⁵ Throughout the 19th century, whenever the Supreme Court adopted an expansive reading of the federal venue statutes, Congress enacted narrowing amendments. In 1877, the Supreme Court expanded the potential scope of federal venue by holding that a state could require a company to consent to venue as a condition of doing business.¹⁶ Congress responded in 1887 by narrowing the scope of federal venue, providing that it was proper in federal question actions only in the district where the defendant resided, but was proper in diversity actions in the districts where either the plaintiff or the defendant resided.¹⁷

In 1893, the Supreme Court held that the statutory limitation on federal venue did not apply to patent actions, and that patent venue was proper in any district where the defendant was subject to service of process.¹⁸ Congress again responded in 1897 by explicitly narrowing the scope of patent venue, providing that it was proper only in the districts where the defendant resided or practiced the patent.¹⁹

¹⁵ Judiciary Act of 1789, ch. 20, 1 Stat. 73, § 11 (“And no civil suit shall be brought before either of said courts against an inhabitant of the United States, by any original process in any other district than that whereof he is an inhabitant, or in which he shall be found at the time of serving the writ”); *Chaffee v. Hayward*, 61 U.S. 208, 212 (1858).

¹⁶ *Ex parte Schollenberger*, 96 U.S. 369, 376 (1877) (“They have in express terms, in consideration of a grant of the privilege of doing business within the State, agreed that they may be sued there.”).

¹⁷ Act of March 3, 1887, ch. 373, 24 Stat. 552 (“and no civil suit shall be brought, before either of said courts against any person by any original process of proceeding in any other district than that whereof he is an inhabitant; but where the jurisdiction is founded only on the fact that the action is between citizens of different States, suit shall be brought only in the district of the residence of either the plaintiff or the defendant”); revised by Act of August 13, 1888, ch. 866, 25 Stat. 433.

¹⁸ *In re Hohorst*, 150 U.S. 653, 663-64 (1893) (“[W]e are of opinion that the provision of the existing statute, which prohibits suit to be brought against any person ‘in any other district than that whereof he is an inhabitant,’ is inapplicable to an alien or a foreign corporation sued here, and especially in a suit for the infringement of a patent right; and that, consequently, such a person or corporation may be sued by a citizen of a state of the Union in any district in which valid service can be made upon the defendant.”)

¹⁹ Act of March 3, 1897, ch. 395, 29 Stat. 695, § 48. (“[I]n suits brought for the infringement of letters patent the circuit courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant, or in any district in which the defendant, whether a person, partnership, or corporation, shall have committed acts of infringement and have a regular and established place of business.”). *See also Stonite Prod. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 566 (1942) (holding that Section 48 of the Act of 1897 “is the exclusive provision controlling venue in patent infringement proceedings”).

The Federal Judicial Code of 1948 amended the federal venue rules, enacting a new general venue rule and a new patent venue statute.²⁰ The general venue statute provided that federal venue was proper in federal question actions only in the district where all of the defendants resided, but was proper in diversity actions in the districts where either all of the plaintiffs or all of the defendants resided.²¹ But the statute also provided, “A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.”²² Consequently, in an action against a corporate defendant, federal venue was typically proper in almost any district.

The patent venue statute provides: “Any civil action for patent infringement may be brought in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.”²³ In 1957, the Supreme Court held that the definition of corporate residence provided in the general federal venue statute did not change the definition of corporate residence for the purpose of patent venue.²⁴ Accordingly, the “residence” of a corporate defendant in a patent infringement action was its state of incorporation and any state in which it practiced the patent.²⁵

The Judicial Improvements and Access to Justice Act of 1988 amended the general venue statute: “[f]or purposes of venue under this chapter, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced.”²⁶ A defendant is subject to personal jurisdiction if it “purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws.”²⁷ This includes intentionally sending goods to the forum state.²⁸ As a consequence, general venue in an action against a corporate defendant typically became proper in almost any district.

²⁰ 62 Stat. 907 (1948).

²¹ 28 U.S.C. § 1391(a)(1) (2012).

²² 28 U.S.C. § 1391(c) (2012).

²³ 28 U.S.C. § 1400(b) (2012).

²⁴ *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222 (1957).

²⁵ *Id.*

²⁶ Judicial Improvements and Access to Justice Act of 1988, Pub. L. No. 100-702, 102 Stat. 4642

²⁷ *See, e.g., J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S. Ct. 2780, 2787-88 (2011) (quoting *Hanson v. Denckla*, 357 U.S. 235, 253 (1958)).

²⁸ *Id.* (“Sometimes a defendant does so by sending its goods rather than its agents. The defendant’s transmission of goods permits the exercise of jurisdiction only where the defendant can be said to have targeted the forum.”).

In 1990, the Federal Circuit held that the addition of the phrase “under this chapter” to the general venue statute implied that the definition of corporate residence provided in the general venue statute also applies to the patent venue statute.²⁹ Accordingly, the Federal Circuit concluded that a corporate defendant in a patent action also “resides” in any district where that defendant is subject to personal jurisdiction.³⁰ Given the broad interpretation of personal jurisdiction over corporations, patent venue in an action against a corporate defendant was suddenly proper in almost any district, enabling non-consensual forum selling.

The Federal Courts Jurisdiction and Venue Clarification Act of 2011 further amended the general venue statute to provide: “[e]xcept as otherwise provided by law this section shall govern the venue of all civil actions brought in district courts of the United States.”³¹ In addition, the amended statute adds: “[f]or all venue purposes . . . an entity with the capacity to sue and be sued in its common name under applicable law, whether or not incorporated, shall be deemed to reside, if a defendant, in any judicial district in which such defendant is subject to the court’s personal jurisdiction with respect to the civil action in question and, if a plaintiff, only in the judicial district in which it maintains its principal place of business.”³² While it did not amend the text of the patent venue statute, it conceivably affected the definition of corporate residence for the purpose of patent venue.³³

B. Forum Shopping

“Forum shopping” is a pejorative term for choosing to litigate a civil action in the forum most favorable to yourself.³⁴ United States

²⁹ VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d 1574 (Fed. Cir. 1990).

³⁰ *Id.*

³¹ 125 Stat. 758 § 202 (Dec. 7, 2011) (codified at 28 U.S.C. § 1391(a)(1) (2012)).

³² 125 Stat. 758 § 102 (Dec. 7, 2011) (codified at 28 U.S.C. § 1391(c)(2) (2012)).

³³ Interestingly, the general venue statute refers to “a defendant,” but the patent venue statute refers to “the defendant,” which may suggest that Congress did not intend the definition of corporate residence in the general venue statute to apply to the definition of residence in the patent venue statute.

³⁴ *See, e.g.*, BLACK’S LAW DICTIONARY 590 (5th ed. 1979) (“Forum Shopping. Such occurs when a party attempts to have his action tried in a particular court or jurisdiction where he feels he will receive the most favorable judgment or verdict.”). *See also* Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967) (referring to forum shopping as a “national legal pastime”); and Helene Curtis Indus. v. Sales Affiliates, 105 F. Supp. 886, 902 (S.D.N.Y.), *aff’d*, 199 F.2d 732 (2d Cir. 1952) (“The truth of the matter is that this affidavit adds one more reinforcing increment to my conviction that Sales Affiliates is forum shopping with a vengeance. I discern no other rationale which can adequately explain the stratagems which it has employed throughout this controversy. Our courts are not meant for such use.”). *But see* Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553

jurisprudence enables forum shopping by allowing plaintiffs to file an action in the forum of their choice. Moreover, defendants are able to engage in forum shopping by removing an action to federal court, filing a motion to transfer venue, or filing a motion to dismiss for forum non conveniens.³⁵

Forum shopping is objectionable because it enables parties to choose a forum that is biased in their favor. But parties engage in forum shopping for many different reasons. While choosing a biased forum is harmful, choosing an impartial, efficient, or convenient forum is beneficial. The problem is not that parties are shopping for a favorable forum, but that they can buy harmful bias.³⁶

C. Empirical Evidence of Forum Shopping in Patent Infringement Actions

Empirical evidence strongly suggests that many patent plaintiffs engage in forum shopping for the purpose of choosing a forum that is biased in their favor. The district in which a patent infringement action is litigated clearly affects the predicted outcome.³⁷ Unsurprisingly, patent plaintiffs tend to choose districts that increase their likelihood of success.³⁸ While patent plaintiffs have probably always engaged in forum shopping, it has become increasingly prevalent in the last 20 years.³⁹ Several studies have shown that patent plaintiffs overwhelmingly prefer those particular districts which tend to favor them and which defendants avoid.⁴⁰ Notably,

(1989) (arguing that there is nothing inherently objectionable about forum shopping); and *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 779 (1984) (“Petitioner’s successful search for a State with a lengthy statute of limitations is no different from the litigation strategy of countless plaintiffs who seek a forum with favorable substantive or procedural rules or sympathetic local populations.”).

³⁵ See generally Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1507, 1511 (1995); and Juenger, *supra* note 34.

³⁶ See generally Clermont & Eisenberg, *supra* note 35, at 1515.

³⁷ Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation*, 79 N.C. L. REV. 889 (2001) (employing the use of data from “every patent case that was terminated by any means (e.g., settlement, dismissal, judgment) from 1995 to 1999 (five years of data) in every district court (9615 cases) and every patent case that went to trial (1409 cases with 1943 separate claims) from the period 1983 to 1999 (seventeen years of data).”)

³⁸ See Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 403 (2010) (recommending preferential jurisdictions on the basis of data from “records of the thirty-three most active patent district courts, considering plaintiff win rate, the likelihood of getting to trial, and the speed of the forum”).

³⁹ Compare Moore, *supra* note 37, at 937 (showing some evidence of forum shopping), with Love & Yoon, *supra* note 8, and Lemley, *supra* note 38 (showing overwhelming evidence of forum shopping).

⁴⁰ See Love & Yoon, *supra* note 8; Lemley, *supra* note 38; Moore, *supra* note 37.

the patent plaintiffs who most aggressively engage in forum shopping are patent assertion entities.⁴¹

Currently, the forum of choice for patent plaintiffs is the Eastern District of Texas.⁴² For about a decade, the Eastern District of Texas has heard more patent infringement actions than any other district.⁴³ And in 2016 alone, it heard almost half of the patent infringement actions filed in the United States.⁴⁴ On its face, the Eastern District of Texas's remarkable popularity with patent plaintiffs is surprising because it lacks a major corporate, technology, or population center.⁴⁵

Empirical studies of the Eastern District of Texas's powerful appeal to patent plaintiffs are inconclusive. Some scholars have suggested that patent plaintiffs are attracted by its relatively uncongested docket and speedy resolution of patent actions.⁴⁶ Others have suggested that they are attracted by its pro-plaintiff jury pool.⁴⁷ And still others have observed that certain judges in the Eastern District of Texas deliberately attracted patent plaintiffs by adopting pro-plaintiff procedures and local rules.⁴⁸ While

⁴¹ See Sara Jeruss, Robin Feldman, & Joshua Walker, *The America Invents Act 500: Effects of Patent Monetization Entities on US Litigation*, 11 DUKE L. TECH. REV. 357 (2012) (finding that patent assertion entities have increased from 22% of the cases filed in 2006 to almost 40% of the cases filed in 2011).

⁴² See Love & Yoon, *supra* note 8.

⁴³ See James Pistorino, *Concentration of Patent Cases in Eastern District of Texas Increases in 2010*, 81 BNA PAT., COPYRIGHT & TRADEMARK J. 803 (2011), http://www.perkinscoie.com/files/upload/PL_11_04Pistorino.pdf; Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J. L. & TECH. 193, 204-05 (2007).

⁴⁴ See Love & Yoon, *supra* note 8.

⁴⁵ Klerman & Reilly, *supra* note 7, at 248-250; see also James C. Pistorino & Susan J. Crane, *2011 Trends in Patent Case Filings: Eastern District of Texas Continues to Lead Until America Invents Act is Signed*, Perkins Coie 10 (March 2012), <https://www.perkinscoie.com/images/content/2/0/v2/2058/pl-12-03pistorinoarticle.pdf> (showing Eastern District of Texas filings by division); PACER, <https://www.pacer.gov/map.html> (last visited Oct. 12, 2015) (providing a map outlining the boundaries of the districts in Texas).

⁴⁶ Xuan-Thao Nguyen, *Justice Scalia's "Renegade District": Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 141 (2008) (noting the relatively quick disposition of cases in the district as compared to its peers); Yan Leychkis, *Of Fire Ants and Claim Construction: An Empirical Study of the Meteoric Rise of the Eastern District of Texas as a Preeminent Forum for Patent Litigation*, 9 YALE J. L. & TECH. 193, 209-15 (2007) (considering the district to be a rocket docket, wherein cases are quickly resolved).

⁴⁷ Love & Yoon, *supra* note 8, at 13.

⁴⁸ "Judges in the Eastern District have themselves acknowledged a desire to attract patent cases. For example, Judge T. John Ward, the original architect of the Eastern District's patent docket, explained that 'when I came to the bench, I sought out patent cases.' . . . The Eastern District's use of procedural rules and discretion in procedural matters to attract cases is almost completely shielded from appellate review by the abuse of discretion standard of review applicable to most procedural decisions, the harmless error doctrine, and the final judgment rule." Klerman & Reilly, *supra* note 7, at 250 (citing Allan

some combination of these factors is probably driving the remarkable appeal of the Eastern District of Texas to patent plaintiffs, existing empirical studies of the phenomenon are descriptive, and do not claim to identify its causes.

D. Forum Selling

“Forum selling” is a term Daniel Klerman coined to describe jurisdictional competition among courts intended to attract litigants.⁴⁹ It is hardly a new phenomenon. For example, scholars have long recognized that jurisdictional competition among the Court of Common Pleas, King’s Bench, and Exchequer affected the evolution of the common law.⁵⁰

Daniel Klerman and Greg Reilly observe that forum selling can be either beneficial or harmful, depending on the circumstances and the relationship between the parties. Specifically, while consensual forum selling may be beneficial, non-consensual forum selling is typically harmful. For example, forum selling may be beneficial in relation to some contractual forum selection clauses, because sophisticated contracting parties have a mutual incentive to select an unbiased and efficient forum.⁵¹ Likewise, forum selling may be beneficial when all parties must consent to the forum, because parties will only consent to litigation in an unbiased, efficient forum. But non-consensual forum selling is harmful because plaintiffs have an incentive to choose a forum that is biased in their favor. Accordingly, non-consensual forum selling creates an incentive for courts to adopt a pro-plaintiff bias, in order to attract litigants.

Forum selling has become conspicuously prevalent in patent infringement actions. In 2013, about half of all patent infringement actions

Pusey, *Marshall Law: Patent Lawyers Flock to East Texas Court for its Expertise and ‘Rocket Docket,’* Dall. Morning News, Mar. 26, 2006, at 1D). It has been suggested that the district’s pro-plaintiff propensity is a holdover from days when its docket was dominated by personal injury, products liability, and medical malpractice litigation, prior to tort reform. Ronen Avraham & John M. Golden, *From PI to IP: Yet Another Unexpected Effect of Tort Reform* (U. of Tex. Law, Law & Econ. Research Paper No. 211, 2012), https://papers.ssrn.com/sol3/papers2.cfm?abstract_id=1878966 (demonstrating empirically the Eastern District of Texas’ shift from a tort-dominant docket to a patent-dominated docket); Julie Creswell, *So Small a Town, So Many Patent Suits*, N.Y. TIMES (Sept. 24, 2006), www.nytimes.com/2006/09/24/business/24ward.html. However, by measures of jury awards, the district is no more pro-plaintiff—and perhaps slightly less plaintiff friendly—than other districts with largely patent dockets. See Love & Yoon, *supra* note 8, at 20.

⁴⁹ Klerman & Reilly, *supra* note 7, at 242-246.

⁵⁰ See generally Daniel M. Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. (2007); see also John H. Baker, INTRODUCTION TO ENGLISH LEGAL HISTORY 40-47 (4th ed. 2002); Todd Zywicki, *The Rise and Fall of Efficiency in the Common Law: A Supply-Side Analysis*, 97 NW. U. L. REV. 1551 (2003).

⁵¹ As Klerman and Reilly observe, contractual forum selling may not be beneficial if one of the parties is not sophisticated. Klerman & Reilly, *supra* note 7, at 242-46.

were filed in just two districts, neither of which is home to many patent practitioners: the Eastern District of Texas and the District of Delaware.⁵² Since then, the percentage of patent infringement actions filed in the Eastern District of Texas has increased, approaching 50%, and the percentage filed in the District of Delaware has decreased to about 10%, at least in part because the America Invents Act of 2011 prevented the Eastern District of Texas from allowing patent plaintiffs to join many unrelated defendants in a single action.⁵³

The Federal Circuit has exclusive jurisdiction over appeals of all patent infringement actions, so districts cannot compete on substantive law, but they can compete on procedural and administrative rules. Indeed, the Federal Circuit's exclusive jurisdiction over patent appeals may have encouraged districts to engage in forum selling.⁵⁴ The evidence strongly suggests that the Eastern District of Texas has pursued an aggressive policy of non-consensual forum selling, by adopting uniformly pro-plaintiff procedures and local rules. By contrast, while District of Delaware may also have engaged in some non-consensual forum selling, it has recently shifted its focus to efficiency and impartiality. Apparently, biased jurisdictions are more competitive than unbiased jurisdictions, an unsurprising outcome, given that plaintiffs are entitled to their choice of forum, and they have a strong incentive to choose a forum that is biased in their favor, especially if they can keep it.

E. Forum Selling in the Eastern District of Texas

Empirical studies aside, the Eastern District of District of Texas has clearly pursued an aggressive policy of non-consensual forum selling by deliberately adopting pro-plaintiff procedures and local rules.⁵⁵ The numbers speak for themselves. The Eastern District of Texas is a rural district, home to few, if any, patent owners or practitioners. Yet, in the last decade, it has become the improbable forum of choice for patent plaintiffs.

⁵² J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631, 632-33 (2015). Other popular venues for patent infringement actions are the Central District of California, the Northern District of California, the Northern District of Illinois, the District of New Jersey, the Southern District of New York, the Southern District of California, the Southern District of Florida, and the District of Massachusetts, all of which are home to many patent practitioners or their parent companies. Klerman & Reilly, *supra* note 7, at 249.

⁵³ Klerman & Reilly, *supra* note 7, at 257-58 (citing Pub. L. No. 112-29, 125 Stat. 284 (2011) (amending U.S.C. tit. 25)).

⁵⁴ Anderson, *supra* note 52, at 635.

⁵⁵ See, e.g., Klerman & Reilly, *supra* note 7; see also Loren Steffy, *Patently Unfair*, TEXAS MONTHLY October 2014, <http://www.texasmonthly.com/politics/patently-unfair/>.

In 2016, about 44% of all patent infringement actions were filed in the Eastern District of Texas.⁵⁶

Some scholars have argued that the Eastern District of Texas hears most of the patent actions filed in the United States simply because it is the best forum in which to litigate a patent infringement action.⁵⁷ Supposedly, it has specialized judges, procedures, and rules that appeal to patent litigants. In other words, those scholars argue that the Eastern District of Texas is actually engaged in consensual forum selling. But this argument is belied by the decisions of patent litigants. The Eastern District of Texas is only the forum of choice for patent plaintiffs, not defendants. Only a vanishingly small number of prospective patent defendants file declaratory judgment actions in the Eastern District of Texas.⁵⁸

The only plausible explanation for the Eastern District of Texas's remarkably rapid dominance of patent litigation is forum selling. The Eastern District of Texas did not appeal to patent plaintiffs until it adopted aggressively pro-plaintiff procedures and local rules. And its appeal to patent plaintiffs rapidly increased as it dialed up its pro-plaintiff bias, by adopting ever more discriminatory procedures and local rules and ignoring the Federal Circuit's efforts to limit its bias. Notably, the late Justice Scalia even explicitly referred to the Eastern District of Texas as a "renegade" jurisdiction, based on its egregious non-consensual forum selling in patent actions.⁵⁹

Tellingly, the overwhelming majority of plaintiffs who file patent infringement actions in the Eastern District of Texas are patent assertion entities, or "patent trolls."⁶⁰ Between January 2014 and June 2016, about 94% of the patent infringement actions filed in the Eastern District of

⁵⁶ Love & Yoon, *supra* note 8, at 3.

⁵⁷ See, e.g., Nguyen, *supra* note 46, at 141; see also Leychkis, *supra* note 46, at 204-05.

⁵⁸ See Love & Yoon, *supra* note 8, at 12; see also Klerman & Reilly, *supra* note 7.

⁵⁹ Transcript of Oral Argument at 11, *eBay, Inc. v. MercExchange, L.L.C.*, 547 U.S. 388 (2006) (No. 05-130).

⁶⁰ See Jeff Bounds, *Patent Cases Flood East Texas Courts*, HOUSTON CHRONICLE (Aug. 14, 2015), <http://www.houstonchronicle.com/business/article/Patent-cases-flood-East-Texas-courts-6444470.php>. "High volume plaintiffs accounted for 650 new patent cases in the Eastern District in the April to June period, or 77 percent of the new caseload. High-volume plaintiffs are often, but not always, businesses that make money exclusively by wringing licensing fees and settlements out of businesses that may infringe the patents those plaintiffs control." *Id.*; see also Daniel Nazer & Vera Ranieri, *Why Do Patent Trolls Go to Texas? It's Not for the BBQ*, ELEC. FRONTIER FOUNDATION (July 9, 2014), <https://www.eff.org/deeplinks/2014/07/why-do-patent-trolls-go-texas-its-not-bbq>; Mark Liang, *The Aftermath of TS Tech: The End of Forum Shopping in Patent Litigation and Implications for Non-practicing Entities*, 19 TEX. INTELL. PROP. L.J. 29, 31 (2010) (citing Daniel P. McCurdy, *Patent Trolls Erode the Foundation of the U.S. Patent System*, SCIENCE PROGRESS (Jan. 12, 2009), <http://www.scienceprogress.org/2009/01/patent-trolls-erode-patent-system>).

Texas were filed by patent assertion entities.⁶¹ By contrast, about 60% of the patent infringement actions filed in the District of Delaware were filed by patent assertion entities, and about 45% of the patent infringement actions filed in districts other than the Eastern District of Texas were filed by patent assertion entities.⁶²

Initially, the Eastern District of Texas's success with forum selling in patent actions is surprising. But it should not be, as the Eastern District of Texas has long experience with non-consensual forum selling. It cut its teeth on forum selling in the 1980s, when it became the forum of choice for mass tort actions by adopting pro-plaintiff procedures and rules. When tort reform limited its ability to attract tort plaintiffs, the Eastern District of Texas turned its attention to attracting patent plaintiffs.⁶³

The Eastern District of Texas has adopted an assortment of procedural rules and practices that make it unusually attractive to patent plaintiffs. It resists granting summary judgment, requires extensive early discovery, refuses to stay patent infringement actions pending reexamination by the Patent Office, sends cases to trial relatively quickly, and tends to impanel plaintiff-friendly juries.⁶⁴ Moreover, while most district courts randomize case assignments to prevent “judge shopping,” the Eastern District of Texas allows plaintiffs to choose the division in which their cases will proceed, effectively allowing plaintiffs the ability to select the judge before whom the case will be heard, thus increasing the power the plaintiff wields when selecting the forum.⁶⁵ It also allows plaintiffs to join or

⁶¹ Love & Yoon, *supra* note 8, at 9 tbl.2.

⁶² *Id.*

⁶³ *See id.* at 15-16; *see generally* Avraham & Golden, *supra* note 48.

⁶⁴ *See* Klerman & Reilly, *supra* note 7, at 251-52. Given that dockets with a high percentage of cases resolved by dispositive motion are generally considered to be pro-defendant, a very low summary judgment rate is likely indicative of a pro-plaintiff cultural disposition of the court. *See also* Paul M. Janicke, *The Judicial Panel on Multidistrict Litigation: Now a Strengthened Traffic Cop for Patent Venue*, 32 REV. LITIG. 497, 502 (2013) (observing that summary judgment is “somewhat culturally foreign in the Eastern District”). Andrei Iancu & Jay Chung, *Real Reasons the Eastern District of Texas Draws Patent Cases—Beyond Lore and Anecdote*, 14 SMU SCI. & TECH. L. REV. 299, 316-17 & n.88 (2011) (analyzing data from 1991-2010); Lemley, *supra* note 38, at 403.

⁶⁵ *See* Anderson, *supra* note 52, at 670-673. For an explanation of the purpose of case randomization, *see* United States v. Mavroules, 798 F. Supp. 61, 61 (D. Mass 1992) (noting that case randomization “prevents judge shopping by any party, thereby enhancing public confidence in the assignment process”) and Paul R. Gugliuzza and Megan M. La Belle, *The Patently Unexceptional Venue Statute*, 66 AM. U. L. REV. (forthcoming 2017) (manuscript at 29), <https://ssrn.com/abstract=2914091>. “This ability to choose the division effectively determines the judge because of another unusual practice in East Texas whereby the Chief Judge assigns cases by general order pursuant to 28 U.S.C. § 137. The most recent of these orders provides for the following case allocation: 100% of patent cases filed in the Beaumont Division are assigned to Chief Judge Ron Clark; 95% of all civil cases (including patent cases) filed in the Marshall Division are assigned to Judge Rodney

consolidate patent infringement actions against unrelated defendants, and it manages these cases in ways that advantage plaintiffs, such as limiting the amount of time available to each individual defendant.

But perhaps most importantly, the Eastern District of Texas refuses to transfer patent infringement actions, even though a different district is more appropriate in essentially every case.⁶⁶ Moreover, when the Eastern District of Texas does transfer actions, it takes much longer to do so than other districts, about 100 days longer than the average.⁶⁷ The Eastern District of Texas receives far more motions to transfer venue than the District of Delaware and grants fewer of those motions, even though the District of Delaware typically has a much stronger connection to patent defendants than the Eastern District of Texas. Most of the patent defendants sued in the District of Delaware are incorporated in Delaware. By contrast, most of the patent defendants sued in the Eastern District of Texas have no connection to the district or to Texas.⁶⁸

The Eastern District of Texas also has unusually broad and demanding discovery requirements, and it has adopted a local rule that requires defendants to comply with discovery requests even if a motion to dismiss, remand, or transfer is pending.⁶⁹ The Eastern District of Texas also orders discovery much earlier than other districts, including the District of Delaware.⁷⁰

The combination of early discovery and refusal to transfer made the Eastern District of Texas the forum of choice for patent assertion entities asserting weak patents with the intention of settling early for a fraction of the defendant's projected litigation costs.⁷¹ Patent plaintiffs asserting strong claims will consider many different factors when choosing a forum, including efficiency, impartiality, and convenience. But patent plaintiffs asserting weak claims will focus on factors that enable them to extract a nuisance settlement as quickly as possible.

Gilstrap; 100% of patent cases filed in the Sherman Division are assigned to Judge Amos Mazzant; and 70% of patent cases filed in the Tyler Division are assigned to Judge Trey Schroeder. This practice explains why Judge Gilstrap heard more than 3,000 patent cases between 2014 and mid-2016, which is more than the total number of patent cases filed in California, Florida, and New York combined during the same time period." *Id.*

⁶⁶ See Li Zhu, *Taking Off: Recent Changes to Venue Transfer of Patent Litigation in the Rocket Docket*, 11 MINN. J.L. SCI. & TECH. 901 (2010).

⁶⁷ Love & Yoon, *supra* note 8, at 11, 16.

⁶⁸ *Id.*

⁶⁹ E.D. Tex R. CV-26.

⁷⁰ Love & Yoon, *supra* note 8, at 23 ("In a median patent case litigated before Judge Gilstrap in the Eastern District of Texas, fact discovery will end 66 days sooner, and expert discovery 157 days sooner, than in a typical patent case assigned to Judge Stark in the District of Delaware.").

⁷¹ See *id.* at 24.

The practice of refusing to transfer patent infringement actions is critical to the Eastern District of Texas's forum selling strategy. If patent defendants could readily obtain transfer to a more appropriate venue, then all of the other pro-plaintiff practices would be worthless, and plaintiffs would no longer have an incentive to file patent infringement actions in the Eastern District of Texas. Accordingly, the Eastern District of Texas's refusal to transfer patent infringement actions, even when transfer is clearly appropriate, provides strong evidence that it is engaging in a practice of non-consensual forum selling.⁷² Its repeated flouting of Federal Circuit opinions effectively trying to force it to grant motions to transfer makes that evidence conclusive.

F. Forum Selling in the District of Delaware

In the early 2000s, the District of Delaware became a popular forum for patent infringement actions. While Delaware is home to few patent owners or practitioners, it is the state of incorporation for most large corporations, at least in part because of the quality and impartiality of its judicial system. As a consequence, Delaware courts are interested in attracting commercial litigation of all kinds.

The District of Delaware may be attractive to patent plaintiffs because it rarely grants summary judgment in patent actions, which increases the cost of litigation to defendants and gives the plaintiff additional leverage.⁷³ But it is possible that the District of Delaware rarely grants summary judgment because it hears many actions that are close cases. As Mark Lemley has observed, the patentee win rate in a district is a function of the merits of the actions filed there, and a district viewed as pro-plaintiff may have a deceptively low patentee win rate, if it attracts plaintiffs asserting weak patents.⁷⁴

The District of Delaware has a remarkably high trial rate, which could indicate that it hears many actions in which the outcome is uncertain.⁷⁵ However, the District of Delaware has adopted local rules increasing the burden on summary judgment in patent actions only.⁷⁶ Notably, the

⁷² It is unclear why the Eastern District of Texas adopted its policy of non-consensual forum selling. Some of the judges have suggested that they wanted to hear more interesting cases and increase the prestige of the district. Others have suggested that the judges wanted to help the local economy by providing work for local lawyers and customers for local businesses. And some have observed that the remarkable increase in patent litigation has personally benefited the judges, their families, and their business associates. *See, e.g.*, Klerman & Reilly, *supra* note 7, at 270-77.

⁷³ Lemley, *supra* note 38, at 3-4.

⁷⁴ *Id.* at 410.

⁷⁵ Anderson, *supra* note 52, at 655.

⁷⁶ *Id.* at 674.

District of Delaware's rate of grants of summary judgment in patent actions in recent cases is consistent with other districts at about 33%, while the Eastern District of Texas's rate is considerably lower, at about 18%. The District of Delaware is also reluctant to grant motions to transfer venue.⁷⁷ However, it often has a strong claim to proper venue, as many patent defendants are incorporated in Delaware.

The reason for the appeal of the District of Delaware to patent litigants is unclear. Initially, it may have appealed to forum shopping patent plaintiffs because its procedures and local rules provided them with an advantage. It may even have engaged in some degree of forum selling in order to attract more patent plaintiffs. However, when the District of Delaware adopted new procedures and local rules calculated to make it more impartial, patent filings quickly decreased. Specifically, the District of Delaware adopted procedures and rules intended to make patent litigation more efficient, including a mediation program, regular consultation with the patent bar, uniform jury instructions, and an accelerated trial schedule.⁷⁸ While the District of Delaware has a relatively high patentee win rate in patent infringement actions, it is nevertheless the forum of choice for many accused infringers who file declaratory judgment actions for noninfringement.⁷⁹

The Federal Circuit typically affirms appeals from the District of Delaware.⁸⁰ For example, in 2015 the Federal Circuit affirmed in over 70% of appeals from the District of Delaware, but only 39% of appeals from the Eastern District of Texas. Over a longer time frame, the Eastern District of Texas's affirmance rate improves, but its affirmance rate decreased as its patent selling activity increased.

G. Transfer of Venue in Patent Actions

The Eastern District of Texas can systematically refuse to transfer patent infringement actions only because a district court's decision to grant or deny a motion to transfer receives extremely deferential review. Whether venue is proper is a question of law reviewed *de novo*.⁸¹ But if venue is proper, the decision whether to transfer venue requires an exercise of judgment.⁸²

A district court may transfer an action in which venue is proper to another district "[f]or the convenience of parties and witnesses" and "in

⁷⁷ *Id.* at 676.

⁷⁸ See John E. Kidd, Keeto H. Sabharwal, *The District of Delaware: An Ideal Venue for Patent Litigators*, Del. Law, Winter 2000, at 17.

⁷⁹ Lemley, *supra* note 38, at 410.

⁸⁰ See Kidd and Sabharwal, *supra* note 78, at 16.

⁸¹ 28 U.S.C. § 1406(a) (2012).

⁸² See 28 U.S.C. § 1404(a).

the interest of justice.”⁸³ A district court considering a motion to transfer should consider several factors related to the convenience of the parties and the proper administration of justice.⁸⁴ If the district court denies a motion to transfer, this denial may be challenged by filing a petition for a writ of mandamus, which shall be granted only if petitioner shows a “clear and indisputable” right to relief.⁸⁵

Mandamus is an extraordinary and unusual remedy. Historically, courts were extremely reluctant to grant mandamus relief, although they have become more liberal with it in recent years. The Federal Circuit has remained averse to mandamus relief. Initially, the Federal Circuit’s interpretation of its mandamus authority was confused and extremely limited. Essentially, it held that it could only exercise mandamus over patent-related issues and not over other issues presented to the district court.⁸⁶

In reviewing the Eastern District of Texas’s decisions to deny motions to transfer patent infringement actions, the Federal Circuit has applied the Fifth Circuit’s deferential standard of review used for reviewing a petition for mandamus challenging the denial of a motion to transfer.⁸⁷ Under that standard of review, a circuit court should grant a petition for a writ of mandamus ordering a district court to transfer an action only if it finds a “clear abuse of discretion” that produced a “patently erroneous result.”⁸⁸

⁸³ *Id.*

⁸⁴ *See* *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 2244 (1988). In determining whether to grant a motion to transfer, a court should consider several non-exclusive “private” and “public” interest factors. The private interest factors include: (1) the relative ease of access to sources of proof; (2) the availability of compulsory process to secure the attendance of witnesses; (3) the cost of attendance for willing witnesses; and (4) all other practical problems that make a trial easy, expeditious and inexpensive. The public interest factors to be considered are: (1) the administrative difficulties flowing from court congestion; (2) the local interest in having localized interests decided at home; (3) the familiarity of the forum with the law that will govern the case; and (4) the avoidance of unnecessary problems of conflicts of law or in the application of foreign law. *See* *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 258 (1981).

⁸⁵ *Allied Chem. Corp. v. Daiflon, Inc.*, 449 U.S. 33, 190 (1980).

⁸⁶ *See In re Innotron Diagnostics*, 800 F.2d 1077, 1081-86 (Fed. Cir. 1986); *see also* Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 368 (2012).

⁸⁷ *In re TS Tech USA Corp.*, 551 F.3d 1315, 1319 (Fed. Cir. 2008) (citing *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir.2008) (en banc)). The Federal Circuit applies its own law to patent questions, but applies the law of the relevant regional circuit court to non-patent questions; *see* Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U.L. REV. 1, 59 (1989). There is no reason for regional circuit courts to have different law governing the review of a district court’s denial of a motion to transfer venue.

⁸⁸ *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir.2008) (en banc) (citing *Will v. United States*, 389 U.S. 90, 98 n. 6, 88 S. Ct. 269, 19 L.Ed.2d 305 (1967) and

According to the Fifth Circuit, “A district court abuses its discretion if it: (1) relies on clearly erroneous factual findings; (2) relies on erroneous conclusions of law; or (3) misapplies the law to the facts.”⁸⁹ But a Circuit Court should grant mandamus relief only if an abuse of discretion produces a “patently erroneous result.”⁹⁰

Despite this extraordinarily deferential standard of review, the Federal Circuit has repeatedly ordered the Eastern District of Texas to transfer patent infringement actions. But the Eastern District of Texas has consistently ignored the Federal Circuit’s instructions regarding the proper standard for evaluating a motion to transfer and the evidence that is relevant to the public and private factors informing the decision whether to grant a motion to transfer.

Prior to 2008, the Federal Circuit had rarely granted a writ of mandamus and ordered a district court to transfer a patent infringement action.⁹¹ Since then, it has granted eleven, ten of which were interlocutory appeals from the Eastern District of Texas.⁹² This is highly unusual because mandamus is an extraordinary remedy, and the Federal Circuit’s exercise of mandamus has historically been quite conservative.⁹³

In 2008, the Federal Circuit ordered the Eastern District of Texas to transfer a patent infringement action to the Southern District of Ohio. Lear Corporation filed a patent infringement action against TS Tech USA Corporation, *et al.*, in the Eastern District of Texas. TS Tech filed a motion to transfer to the Southern District of Ohio where the documentary evidence and witnesses were located, noting that none of the parties had any connection to Texas. The court denied the motion on the grounds that venue was proper and that several products embodying the allegedly infringed patent had been sold in the Eastern District of Texas. TS Tech filed a petition for mandamus, which the Federal Circuit granted, finding that the district court had clearly abused its discretion.⁹⁴

In 2009, the Federal Circuit ordered the Eastern District of Texas to transfer a patent infringement action to the Eastern District of North

Bankers Life & Cas. Co. v. Holland, 346 U.S. 379, 382–83, 74 S. Ct. 145, 98 L. Ed. 106 (1953)).

⁸⁹ McClure v. Ashcroft, 335 F.3d 404, 408 (5th Cir. 2003).

⁹⁰ In re Volkswagen of Am., Inc., 545 F.3d at 310.

⁹¹ Gugliuzza, *supra* note 86, at 347–48. “In its early days, the Federal Circuit at times disclaimed supervisory authority over district courts and refused to grant mandamus on any issue that did not implicate the court’s patent law, including transfer of venue [M]andamus has been and remains a difficult remedy to obtain in the Federal Circuit. From 2000 through 2010, the Federal Circuit granted only 23 of the 215 mandamus petitions it decided” (internal citations omitted). *Id.*

⁹² *See id.*

⁹³ Gugliuzza, *supra* note 86, at 345–47.

⁹⁴ In re TS Tech USA Corp., 551 F.3d at 1321.

Carolina. Novartis Vaccines and Diagnostics, Inc., a California-based corporation, filed a patent infringement action against Hoffmann–La Roche Inc., et al in the Eastern District of Texas. Hoffman-LaRoche filed a motion to transfer the action to the Eastern District of North Carolina, where most of the documentary evidence and witnesses were located. The Eastern District of Texas denied the motion on the grounds that witnesses and evidence were spread around the country, and Novartis had transferred 75,000 pages of electronic documents to the Eastern District of Texas. Hoffman-LaRoche filed a petition for mandamus, which the Federal Circuit again granted, finding that the Eastern District of Texas had clearly abused its discretion, specifically repudiating its reliance on the presence of electronic documents in Texas.⁹⁵

In 2010, the Federal Circuit ordered the Eastern District of Texas to transfer a patent infringement action to the Northern District of Indiana. MedIdea, LLC filed a patent infringement action against Zimmer Holdings, Inc. et al in the Eastern District of Texas. MedIdea was a Michigan corporation headquartered in Michigan, and Zimmer was headquartered in Indiana. Zimmer filed a motion to transfer the action to either the Northern District of Indiana or the Eastern District of Michigan. The district court denied the motion because: MedIdea had an office in the Eastern District of Texas in which it “likely” kept relevant evidence; the court should defer to the plaintiff’s choice of forum; and MedIdea had filed another action litigating the same patent in the Eastern District of Texas. Zimmer filed a petition for mandamus, which the Federal Circuit granted, finding that MedIdea’s claim to be based in Texas was a sham, most of the evidence and witnesses were located in the Northern District of Indiana, and hearing the two different actions in the same court would not increase efficiency.⁹⁶

Finally, in 2011, the Federal Circuit ordered the Eastern District of Texas to transfer a patent infringement action to the Western District of Washington. Allvoice Developments U.S., LLC filed a patent infringement action against Microsoft Corporation in the Eastern District of Texas. Allvoice was a United Kingdom company with a subsidiary LLC formed under Texas law and an office in Texas. Microsoft is headquartered in the Western District of Washington. Microsoft filed a motion to transfer the action to the Western District of Washington. The district court denied this motion because Allvoice was a Texas LLC with an office in Texas. Microsoft filed a petition for mandamus, which the Federal Circuit granted, finding that most of the evidence and witnesses were located in the Western District of Washington. It specifically rejected

⁹⁵ *In re Hoffmann-La Roche Inc.*, 587 F.3d 1333, 1336-38 (Fed. Cir. 2009).

⁹⁶ *In re Zimmer Holdings, Inc.*, 609 F.3d 1378, 1381-82 (Fed. Cir. 2010).

the district court's reliance on Allvoice's connections to Texas, observing that connections with a forum created in anticipation of litigation should be ignored.⁹⁷

H. TC Heartland v. Kraft

On January 14, 2014, Kraft Foods Group Brands LLC filed a patent infringement action against TC Heartland LLC and Heartland Packaging Corporation ("HPC") in the United States District Court for the District of Delaware, alleging that TC Heartland's "liquid water enhancer products" infringed three of Kraft's patents.⁹⁸ Kraft is a Delaware limited liability company headquartered in Northfield, Illinois. TC Heartland is an Indiana limited liability company, headquartered in Carmel, Indiana, and HPC is a defunct Indiana corporation. TC Heartland manufactures liquid water enhancer products in Carmel and Indianapolis, Indiana. It is not registered to do business in Delaware, and it has no contact with Delaware other than sending products there. In 2013, TC Heartland sent about 2% of its allegedly infringing liquid water enhancer products to Delaware.⁹⁹

On June 23, 2014, TC Heartland filed a motion to dismiss for lack of personal jurisdiction and for transfer of venue to the Southern District of Indiana. The district court denied the motion to dismiss for lack of personal jurisdiction, finding that it could exercise personal jurisdiction consistent with due process because TC Heartland "knowingly and intentionally shipped a significant number of accused products directly to Delaware."¹⁰⁰ The district court also denied the motion to transfer venue to the Southern District of Indiana, finding that venue was proper in the District of Delaware and that the convenience of the parties and the interests of justice were not "strongly in favor" of transfer.¹⁰¹

⁹⁷ *In re Microsoft Corp.*, 630 F.3d 1361, 1364 (Fed. Cir. 2011).

⁹⁸ A "liquid water enhancer" is a small bottle of concentrated liquid intended to flavor, color, and sweeten water. They use natural or artificial non-caloric sweeteners, and often include vitamin supplements. The allegedly infringed patents are: U.S. Patent No. 8,293,299 ("Containers and methods for dispensing multiple doses of a concentrated liquid, and shelf stable Concentrated liquids"); U.S. Patent No. 8,511,472 ("Containers having perforated shrink wrap sleeves"); and U.S. Patent No. 8,603,557 ("Containers and methods for dispensing multiple doses of a concentrated liquid, and shelf stable concentrated liquids"). Complaint, *Kraft Foods Group Brands LLC v. TC Heartland LLC et al.*, No. 1:14CV00028 (D. Del. Jan. 14, 2014).

⁹⁹ *Kraft Foods Grp. Brands LLC v. TC Heartland, LLC*, No. 14-28-LPS, 2015 WL 4778828, at *1 (D. Del. Aug. 13, 2015), *adopted by*, No. 14-28-LPS, 2015 WL 5613160 (D. Del. Sept. 24, 2015). The report states that Kraft is a "corporation," but that is inconsistent with the name of the company and the records of the Delaware Secretary of State.

¹⁰⁰ *Id.* at *4-*5.

¹⁰¹ *Id.* at *15.

First, TC Heartland argued that the district court was required to transfer venue under 28 U.S.C. § 1406(a) because patent venue was improper in the District of Delaware.¹⁰² TC Heartland argued that the 2011 amendments of the general venue statute limited the application of its definition of corporate residence to general venue and caused the definition of corporate residence for the purpose of patent venue to revert to a defendant corporation's "state of incorporation, or 'where the defendant has committed acts of infringement and has a regular and established place of business.'"¹⁰³ The district court disagreed, finding that the 2011 amendments did not limit the application of the general venue statute's definition of corporate residence and did not affect the definition of corporate residence for the purpose of patent venue.¹⁰⁴

Second, TC Heartland's motion asserted that the court should transfer the action to the Southern District of Indiana under 28 U.S.C. § 1404(a) for the convenience of the parties and witnesses and in the interest of justice.¹⁰⁵ TC Heartland argued that the Southern District of Indiana was the proper venue because: "(1) that is TC Heartland's principal place of business and is where the claims arose; (2) that location is closer than is Delaware to Kraft's principal place of business; and (3) there are potential third party witnesses in that district who may be called as trial witnesses regarding the state of the relevant art."¹⁰⁶ After considering the private and public interest factors deemed relevant to transfer of venue by the Third Circuit, the district court found that they were "not 'strongly in favor of'" transfer.¹⁰⁷ Specifically, it found that: plaintiff's choice of forum, administrative difficulties, and public policy weighed against transfer; the defendant's choice of forum, where the claim arose, and the convenience of the parties favored the transfer; and the remainder of the factors were neutral.¹⁰⁸

¹⁰² 28 U.S.C. § 1406(a) ("The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.").

¹⁰³ Kraft Foods Grp. Brands LLC v. TC Heartland, LLC, No. 14-28-LPS, 2015 WL 4778828, at *7 n. 11 (D. Del. Aug. 13, 2015), *adopted by*, No. 14-28-LPS, 2015 WL 5613160 (D. Del. Sept. 24, 2015).

¹⁰⁴ *Id.* at *7-*10.

¹⁰⁵ 28 U.S.C. § 1404(a) ("For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.").

¹⁰⁶ Kraft Foods Grp. Brands LLC v. TC Heartland, LLC, No. 14-28-LPS, 2015 WL 4778828, at *11 n. 11 (D. Del. Aug. 13, 2015), *adopted by*, No. 14-28-LPS, 2015 WL 5613160 (D. Del. Sept. 24, 2015).

¹⁰⁷ *Id.* at *11-*15.

¹⁰⁸ *Id.* at *15 (citing *Jumara v. State Farm Ins. Co.*, 55 F.3d 873 (3d Cir. 1995)).

TC Heartland petitioned the Federal Circuit for a writ of mandamus ordering the District of Delaware to dismiss the action or transfer it to the Southern District of Indiana. The Federal Circuit denied the petition, holding that venue was proper in the District of Delaware and that the District of Delaware could exercise personal jurisdiction over TC Heartland consistent with due process. Most importantly, the Federal Circuit held that the 2011 amendments of the general venue statute did not affect the application of its definition of corporate residency to the patent venue statute.¹⁰⁹ On September 12, 2016, TC Heartland filed a petition for certiorari, asking whether the definition of corporate residency provided in the general venue statute also applies to the patent venue statute. The Supreme Court granted certiorari on December 14, 2016, and heard oral argument on March 27, 2017.¹¹⁰

I. Fixing Forum Selling

The evidence shows that patent infringement litigation is concentrated in the Eastern District of Texas because it has pursued an aggressive policy of non-consensual forum selling by adopting pro-plaintiff procedures and local rules. The Eastern District of Texas overwhelmingly attracts patent infringement actions filed by patent assertion entities, often asserting weak patents for their nuisance value. As other districts reform their procedures and rules to make them more impartial, the Eastern District of Texas's attractiveness to patent plaintiffs, especially patent assertion entities, has only increased.

While consensual forum selling may be beneficial, non-consensual forum selling is harmful. But how can we prevent the Eastern District of Texas from pursuing non-consensual forum selling in patent infringement actions? Some scholars have suggested an overhaul of the patent litigation system. For example, much as Congress gave almost exclusive appellate jurisdiction over patent infringement actions to the Federal Circuit, it could give exclusive original jurisdiction over patent infringement actions to a single district court, perhaps headquartered in Washington, D.C., like the Federal Circuit.¹¹¹ But that would be a costly and rather drastic move, which could replicate some of concerns associated with the Federal Circuit, like its unconscious pro-patent bias.

Other scholars have argued that mandatory delays in discovery could help prevent non-consensual forum selling, but caution that abuse of

¹⁰⁹ *In re TC Heartland LLC*, 821 F.3d 1338, 1341-43 (Fed. Cir.), cert. granted sub nom. *TC Heartland LLC v. Kraft Food Brands Grp. LLC*, 137 S. Ct. 614 (2016).

¹¹⁰ *TC Heartland LLC v. Kraft Food Brands Grp. LLC*, 137 S. Ct. 614 (2016).

¹¹¹ Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444 (2010).

discretion could limit the effectiveness of procedural reforms.¹¹² Still, other scholars contend that Congress could prevent forum selling in patent actions by limiting the scope of patent venue.¹¹³ Congress has considered the VENUE Act, which would limit the scope of patent venue. Likewise, the Supreme Court could limit the scope of patent venue by adopting TC Heartland's interpretation of the patent venue statute.¹¹⁴ As Colleen Chien and Michael Risch have observed, if Congress were to enact pending patent venue legislation or if the Supreme Court were to adopt TC Heartland's interpretation of the patent venue statute, then about half of patent infringement actions filed by non-practicing entities would have to be filed in a different forum, and the same goes for about two-thirds of those filed in the Eastern District of Texas.¹¹⁵

The Supreme Court granted certiorari in *TC Heartland* in the shadow of the Eastern District of Texas's egregious and improper embrace of forum selling to patent plaintiffs. A ruling in TC Heartland's favor would prevent the Eastern District of Texas from continuing this practice. However, the facts of *TC Heartland* do not suggest that the District of Delaware is engaged in improper forum selling, and Delaware is at least arguably a proper forum for the action. If the Supreme Court overrules the Federal Circuit's decision in *VE Holding* and holds that the 1988 amendment of the general venue statute did not change the definition of corporate residence for the purpose of patent venue, it would certainly prevent forum selling. But perhaps it would solve the problem of forum selling by unduly limiting the scope of venue in patent infringement actions.¹¹⁶

Venue necessarily operates in tandem with personal jurisdiction. Historically, Congress has gradually expanded the scope of both personal jurisdiction and venue, especially in relation to corporations. Today, personal jurisdiction and venue typically allow a federal court to hear an action against a corporation in any forum in which the corporation does business. This is probably as it should be. As technology gradually

¹¹² Love & Yoon, *supra* note 8, at 34-35.

¹¹³ *See id.* at 35.

¹¹⁴ Fromer, *supra* note 111, at 1477.

¹¹⁵ Colleen V. Chien & Michael Risch, *Recalibrating Patent Venue*, MD L. REV., (forthcoming 2018) (manuscript at 34-35), <https://ssrn.com/abstract=2834130>.

¹¹⁶ One of the authors of this Article, Brian L. Frye, joined the Brief of Amici Curiae 56 Professors of Law and Economics in Support of Petition for Writ of Certiorari. While he agrees with the contention of the amicus brief that *VE Holding* was wrongly decided and that expanding the definition of corporate residence for the purpose of patent venue enabled non-consensual forum selling in patent infringement actions, he also believes that the alternative solution to the problem offered in this Article would be superior. *See generally* Brief of Amici Curiae 56 Professors of Law and Economics in Support of Petition for Writ of Certiorari, *In re TC Heartland LLC*, 821 F.3d 1338 (2016) (No. 16-341).

diminishes the importance of the geographical location of litigation, it is reasonable to relax rules intended to protect defendants from the burden of litigation in inconvenient locations.

The patent venue statute is something of an anachronism, born of a time when the burden of litigating an action in an inconvenient geographical location was still quite substantial. Presumably, Congress intended the patent venue statute to encourage nationwide commerce by protecting defendants from patent infringement litigation in geographical locations where they only sold products. Nevertheless, in today's world, it is hard to see any abstract justification for adopting different venue rules solely for patent infringement actions. If venue is typically proper in an action against a corporate defendant in any district where the defendant corporation is subject to personal jurisdiction in that action, why should the scope of venue be narrower in patent actions?¹¹⁷

The problem with patent venue is not liberal venue rules, but non-consensual forum selling. In other words, the problem is not that patent venue is proper in the Eastern District of Texas, but rather that the Eastern District of Texas refuses to transfer venue to more appropriate districts in order to engage in forum selling. If that is the case, then there is no need to limit the scope of venue, which could have harmful consequences in cases where a district is actually the most appropriate forum for litigation, but venue would not be proper. On the contrary, the problem can be solved by forcing courts to transfer actions at an early state of litigation, thereby eliminating their ability to engage in forum selling. If district courts must consider a motion to transfer before ordering discovery, then their ability to engage in inefficient forum selling will be eliminated. No prospective plaintiff will choose a venue based on its pro-plaintiff bias if the plaintiff knows that the action will inevitably be transferred to a more appropriate venue. As a result, there will be no incentive for jurisdictions to engage in this kind of forum selling, because it will not work.

Accordingly, this Article suggests that the Supreme Court could solve the problem of inefficient forum selling by holding that district courts must decide a motion to transfer an action before ordering discovery. This solution would be easy to accomplish. It would require only a minimal change, and would probably increase the efficiency of the federal courts across the board, not just in patent infringement actions. The Supreme Court can accomplish this goal without changing anything else. It does not need to change the standard for evaluating a motion to transfer, and it does not need to change the standard of review for a petition for a writ of mandamus ordering a district court to transfer an action. If district courts cannot order discovery before deciding a motion to transfer, they cannot

¹¹⁷ See generally Gugliuzza; see also La Belle, *supra* note 65.

engage in forum selling because defendants will be able to transfer an action filed in an inappropriate venue before the district court can exert any pressure on them. This would not only stop non-consensual forum selling in patent actions, but also prevent it from arising in other kinds of actions. In addition, it would prevent non-consensual forum selling without limiting the scope of legitimate venues available to plaintiffs.

Forum shopping is common, even in the absence of non-consensual forum selling. Rational plaintiffs will choose the forum most favorable to their interests, and rational defendants will move to transfer venue if that forum is sufficiently unfavorable to their interests. There are legitimate and illegitimate reasons for plaintiffs and defendants to prefer different districts.¹¹⁸ Legitimate reasons for a patent plaintiff to prefer a district include its convenience for parties and witnesses, its relationship to the defendant and the subject matter of the action, and its reputation for quality and impartiality. Illegitimate reasons for a plaintiff to prefer a district include its reputation for pro-plaintiff bias, and vice-versa.

Typically, motions to transfer venue provide an effective and efficient means of ensuring that federal actions are litigated in an appropriate forum. Defendants file motions to transfer venue relatively rarely, and they appear to improve the accuracy of outcomes at minimal expense.¹¹⁹ And that makes sense. In theory, the purpose of venue rules is to ensure that an action is litigated in an appropriate geographical location that is reasonably convenient to all of the parties. So, plaintiffs file their actions in districts that are convenient to them, then defendants can file motions to transfer venue to districts that are more convenient on the merits, and district courts exercise their discretion in balancing the equities and determining whether transfer is appropriate under the circumstances.

That works fine when district courts are impartial and unbiased. But it also enables district courts to engage in non-consensual forum selling. As the Eastern District of Texas has amply illustrated, a court that wants to engage in non-consensual forum selling can simply refuse to grant motions to transfer venue, and can avoid appellate review by delaying its decisions on motion to transfer venue, allowing actions to proceed while motions to transfer venue are pending.

The decisions of the Federal Circuit ordering the Eastern District of Texas to transfer actions to other districts show that the current standard of review appears to be adequate, although it could probably be relaxed without any negative consequences. In fact, slightly relaxing the standard of review might have positive consequences. As it stands, the Federal

¹¹⁸ See generally Clermont & Eisenberg, *supra*, note 35; see also Juenger, *supra*, note 34.

¹¹⁹ Clermont & Eisenberg, *supra* note 35, at 1530.

Circuit seems reluctant to grant mandamus relief in any, except in the most egregious circumstances. While the Federal Circuit attempted to send a signal to the Eastern District of Texas by granting mandamus relief and ordering it to transfer a series of patent actions, the Eastern District of Texas simply ignored the Federal Circuit.

The Supreme Court could easily solve this problem by holding that there is only one standard of review for abuse of discretion. The Fifth Circuit's elevated standard of review for granting mandamus relief accomplishes nothing doctrinally, and only serves to signal to district courts that they can act with impunity, because the circuit courts will be reluctant to intervene. To say that the circuit court must find a "clear" abuse of discretion resulting in a "patently" erroneous result is only to say that circuit courts do not want to get involved and to signal to district courts that they can act with impunity. If the district court has abused its discretion, the circuit court should issue a writ of mandamus.¹²⁰

Moreover, requiring district courts to decide motions to transfer first should increase the efficiency of the federal court system by ensuring that actions reach their ultimate forum as quickly as possible. Eliminating inefficient non-consensual forum selling could also encourage efficient consensual forum selling. Some evidence suggests that before the Eastern District of Texas began engaging in inefficient non-consensual forum selling, some mutually desirable districts for patent litigation were emerging. If the Supreme Court tweaks its rules to prevent non-consensual forum selling, it could encourage districts to engage in consensual forum selling by offering efficient, impartial adjudication.¹²¹

II. CONCLUSION

TC Heartland offers the Court the opportunity to stop non-consensual forum selling in patent actions by limiting the scope of patent venue. While that would probably stop the problem, it would also limit the scope of legitimate venues available to patent plaintiffs. This Article suggests that

¹²⁰ Indeed, the proposed Venue Equity and Non-Uniformity Elimination (VENUE) Act of 2016 recognizes this by explicitly ordering circuit courts to grant mandamus relief if patent venue does not lie. "(b) Mandamus Relief.—For the purpose of determining whether relief may issue under section 1651 of title 28, United States Code, a clearly and indisputably erroneous denial of a motion under section 1406(a) of such title to dismiss or transfer a case on the basis of section 1400(b) of such title shall be deemed to cause irreparable interim harm." S. 2733, 114th Cong. § 2 (2016).

¹²¹ The authors believe that, despite scholarship to the contrary, the Supreme Court does in fact understand patent law and can mitigate if not eliminate manifest problems in patent law with its expected decision in *TC Heartland*. See also, Greg Reilly, *How Can the Supreme Court Not "Understand" Patent Law?*, 16 CHI.-KENT J. INTELL. PROP. (2017), (forthcoming 2017) (manuscript at 1-2), <https://ssrn.com/abstract=2919166>.

the Court could solve the problem more effectively by requiring courts to decide motions to transfer before ordering discovery and staying discovery-pending appeal. That should stop non-consensual forum selling in patent actions and prevent it from arising in other kinds of actions, without limiting the scope of legitimate venues available to patent plaintiffs.