No. 16-341

IN THE
Supreme Court of the United States

TC HEARTLAND, LLC D/B/A HEARTLAND FOOD PRODUCTS GROUP,
Petitioner,

v.

KRAFTS FOODS GROUP BRANDS LLC,
Respondent.

On Writ of Certiorari to The United States Court of Appeals For the Federal Circuit

BRIEF OF TDE PETROLEUM DATA SOLUTIONS, INC. *AS AMICUS CURIAE* IN SUPPORT OF RESPONDENT

Malcolm E. Whittaker
Counsel of Record
Whittaker Law Firm
2341 Glen Haven Boulevard
Houston, Texas 77030
832-434-7157
IPLitigate@aol.com

Counsel for Amicus Curiae TDE Petroleum Data Solutions, Inc.

Dated: March 8, 2017

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES

RULES

OTHER AUTHORITY

INTEREST OF AMICUS CURIAE[1]

Amicus Curiae TDE Petroleum Data Solutions, Inc. (TDE) is an energy sector operating company. TDE provides a computer implemented process that enables drillers to monitor and organize global oil rig operations using sensor data to accurately and in real time determine the state of the oil rig and, if necessary, to control the operations of the oil rig.

Currently, TDE provides its service worldwide. However, significant portions of its activities are in the United States and TDE maintains an office in Sugar Land, Texas.

In order to protect its innovation, TDE has a portfolio of United States and foreign patents and patent applications. In addition to its U.S. Patents and pending applications, TDE has issued patents or pending patent applications in the United Kingdom, France, Germany, and Norway.

In short, TDE has built a valuable and successful business based, in large measure, on its patents and associated intellectual property. Seeking

---

[1]Pursuant to Rule 37.2 of the Rules of this Court, Petitioner has consented to the filing of this brief. In accordance with Rule 37.2(a), *Amicus Curiae* provided notice to counsel for the Respondent of its intent to file a brief. Respondent has consented.

This brief was not written in whole or in part by counsel for any party, and no person or entity other than *Amicus Curiae* and its counsel has made a monetary contribution to the preparation and submission of this brief.

to capitalize on TDE's ingenuity, TDE's competitors have attempted to ride on TDE's coattails and violate TDE's intellectual property rights. In order to protect its competitive position in the United States, TDE has previously brought suit against a competitor for patent infringement in the Eastern District of Texas. If necessary in the future, TDE will bring suit for patent infringement against its competitors. Because of its strong interest in effective and readily enforceable intellectual property, TDE has chosen to participate as *amicus curiae* in this case.

The energy sector, and particularly oil and gas exploration and production, are a large share of Texas' economy. Indeed, significant reserves of oil and gas are located in Texas, and particularly the area encompassing the judicial district of the Eastern District of Texas. Because approximately 1/3rd of the 10 millions barrels of oil produced daily in the United States are found in Texas[2], many vendors sell to energy sector companies doing business in Texas. In many cases, these vendors have no regular place of business or physical presence located in Texas. In fact, some of the vendors are located outside the United States and provide goods and services for use in Texas to a distributor or other intermediary. In other words, these non-U.S. entities are likely subject to personal jurisdiction in the U.S. District Courts located in Texas under a stream of commerce theory as applied by the United States Court of Appeals for the Federal Circuit in *Beverly Hills Fan Co. v. Royal*

---

[2] Houston Chronicle, October 1, 2015, "Texas Shed 28,300 Oil and Gas Jobs Since December [2014]"

Sovereign Corp., 21 F.3d 1558, 1571 (Fed. Cir. 1994) and derived from this Court's decision in *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1947).

However, if venue in patent cases is interpreted in the unfounded way proposed by Petitioner, TDE's position as a market leader because of its intellectual property will be even more challenging. This will be particularly true if TDE is required to take legal action to prevent non-U.S. based competitors infringing TDE's United States patents. As such, *Amicus Curiae* TDE writes in support of Respondent.

Beyond its interest in this Court construing the venue provisions of the United States Code such that TDE can effectively enforce its vested patent rights, *Amicus Curiae* TDE Petroleum Data Solutions, Inc. has no stake in the parties or in the outcome of the case.

SUMMARY OF THE ARGUMENT

Petitioner's argument that venue for patent infringement matters is determined under 28 U.S.C. § 1400(b)[3] without reference to the definitions of "residence" that are set forth in 28 U.S.C. § 1391(c)(1)-(3) for "all venue purposes" is unfounded because, if construed as proposed by Petitioner, there would be no district in which venue is proper against a non-United States corporation that shipped goods into the United States if it did not also have a "regular and established place of business" in the United States. As such, Petitioner's argument

[3] Petitioner's Brief, p. i. and p. 19.

cannot be correct because it would effectively immunize a non-United States supplier from suit for patent infringement even when it purposefully availed itself of doing business in the United States by shipping infringing goods to retailers in the United States. It is preposterous to believe that Congress would have enacted legislation so harmful to American patent owners.

Accepting *arguendo* Petitioner's argument that the concentration of patent cases in the United States District Court located in the Eastern District of Texas constitutes "improper forum shopping," Congress has provided appropriate relief to defendants through motions to transfer under 28 U.S.C. § 1404 (transfer for convenience of parties) and 28 U.S.C. § 1406 (transfer of cases initially filed in an improper venue). These motions ameliorate Petitioner's concerns that patent litigation is becoming excessively concentrated in the Eastern District of Texas.

Accepting *arguendo* Petitioner's statutory construction that patent infringement suits can only be brought in the *"state of incorporation"* of the defendant or *"where the defendant has committed acts of infringement and has a regular and established place of business,"* will likely have the unintended consequence of producing a flood of suits against retailers selling infringing goods or services. Phrased differently, if a foreign supplier produces a good or service that infringes a patent, the patent owner will have no option except bringing suit against retailers selling the infringing good or service in the United States in order to establish

"acts of infringement" by a defendant having a "regular and established place of business [in the district]," required under Petitioner's proposed statutory construction. Rather than reducing patent litigation in the Eastern District of Texas, it will merely add additional defendants that have the misfortune of unknowingly selling a good or service that has been supplied to them by the foreign manufacturer. Potentially, this could produce a vastly larger number of patent suits against a multiplicity of retailer-defendants instead of a single targeted lawsuit against a single manufacturer. In turn, the retailers will likely seek indemnification from the foreign manufacturer in a new and separate suit. Rather than reducing litigation, Petitioner's proposed statutory construction will result in piece-meal litigation rather than the more efficient resolution of the dispute in a single lawsuit.

ARGUMENT

I. PETITIONER HEARTLAND'S PROPOSED STATUTORY CONSTRUCTION ELMINATES ANY PROPER VENUE WHEN A FOREIGN CORPORATION SHIPS GOODS TO RETAILERS IN THE UNITED STATES

As discussed, at length, in both Petitioner and Respondent's briefs, 28 U.S.C. § 1400(b) 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." (emphasis added)

Petitioner's argument that venue for patent infringement matters is determined under 28 U.S.C. § 1400(b)[4] without reference to the definitions of "residence" that are set forth in 28 U.S.C. § 1391(c)(1)-(3) for "all venue purposes" is unfounded because, if construed as proposed by Petitioner, there would be no district in which venue is proper against a non-United States corporation that shipped goods into the United States unless:

[4] *Id.*

(i) the foreign supplier was incorporated in the venue or

(ii) the foreign supplier "committed acts of infringement [in the district]" and also had a "regular and established place of business" in the same judicial district.

Petitioner's argument cannot be correct because it would effectively immunize a non-United States supplier from suit for patent infringement while it purposefully availed itself of doing business in the United States by shipping infringing goods to retailers in the United States. It is preposterous to believe that Congress would have enacted legislation so harmful to American patent owners.

II. PATENT CASES CAN BE TRANSFERRED TO CORRECT "FORUM SHOPPING"

Accepting *arguendo* Petitioner's argument that the concentration of patent cases in the United States District Court located in the Eastern District of Texas constitutes "improper forum shopping," [5] Congress has already provided appropriate relief to defendants through motions to transfer under 28 U.S.C. § 1404 (transfer for convenience of parties) and 28 U.S.C. § 1406 (transfer of cases initially filed in an improper venue). These motions ameliorate Petitioner's concerns that patent litigation is becoming excessively concentrated in the Eastern District of Texas (or any other district). Examples of

[5] Petitioner's brief, pp. 14-16

successful motions to transfer, and affirmance by the United States Court of Appeals for the Federal Circuit, are numerous. *See In re TS Tech USA Corporation*, 551 F.3d 1315 (Fed. Cir. 2008), *See also In re Nintendo Co.*, 589 F.3d 1194 (Fed. Cir. 2009), *In re Genetech*, 566 F.3d 1338, 1344 (Fed. Cir. 2009), *In re Hoffmann-La Roche*, *Inc.,* 587 F.3d 1333 (Fed. Cir. 2009), *In re Zimmer Holdings*, *Inc.*, 609 F.3d 1378 (Fed. Cir. 2009), *In re Microsoft Corporation*, 630 F.3d 1361 (Fed. Cir. 2010), *In re Acer America Corporation*, 626 F.3d 1252 (Fed. Cir. 2010), and *In re Link_A_Media Devices Corp.*, 662 F.3d 1221 (Fed. Cir. 2011) *(per curiam).*

As further evidence of the continued ready availability of transfer in appropriate cases, the United States Court of Appeals for the Federal Circuit recently granted a writ of mandamus and transferred a patent infringement suit from the Eastern District of Texas to the Northern District of California. *See In re Google*, *Inc.*, Case No.: 2017-107 (Fed. Cir. February 23, 2017); *accord Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 308 (1989) ("The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine an inferior court to a lawful exercise of its prescribed jurisdiction or to compel it to exercise its authority when it is its duty to do so.")

As such, the appropriate mechanism for cases that are filed in an inconvenient or improper forum is not to totally preclude filings in the forum through a strained statutory interpretation, rather the

appropriate and long standing mechanism is to allow district courts to decide motions to transfer as each case arises.

III. PETITIONER'S STATUTORY CONSTRUCTION WILL PRODUCE A FLOOD OF PATENT INFRINGMENT SUITS AGAINST RETAILERS

Accepting *arguendo* Petitioner's statutory construction that patent infringement suits can only be brought in the *"state of incorporation"* of the defendant or *"where the defendant has committed acts of infringement and has a regular and established place of business,"* will likely have the unintended consequence of producing a flood of suits against retailers selling infringing goods. Phrased differently, if a foreign supplier produces a good that infringes a patent, the patent owner will have no option except bringing numerous suits against retailers selling the infringing good in the United States in order to establish "acts of infringement" by a defendant having a "regular and established place of business [in the district]," required under Petitioner's proposed statutory construction.

Rather than reducing patent litigation in the Eastern District of Texas, it will merely add additional suits against additional defendants that have the misfortune to sell an infringing good that has been supplied to them by the foreign manufacturer. Potentially, this could produce a vastly larger number of patent suits against a multiplicity of retailer-defendants instead of a single targeted lawsuit against a single supplier or

manufacturer. In turn, the retailers will likely seek indemnification from the foreign manufacturer or supplier. Rather than reducing litigation, Petitioner's proposed statutory construction will result in piece-meal litigation rather than the more efficient resolution of the dispute in a single lawsuit.

CONCLUSION

The judgment of the United States Court of Appeals for the Federal Circuit should be affirmed.

Respectfully Submitted,

Malcolm E. Whittaker
Counsel of Record
Whittaker Law Firm
2341 Glen Haven Boulevard
Houston, Texas 77030
832-434-7157
IPLitigate@aol.com
Counsel for *Amicus Curiae* TDE Petroleum Data Solutions, Inc.