



PATENT INFRINGEMENT LITIGATION IN THE ‘ROCKET DOCKET’ OF THE EASTERN DISTRICT OF VIRGINIA

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The U.S. District Court for the Eastern District of Virginia (EDVA) is regularly among the country’s most active venues for patent litigation because of its unwaveringly speedy docket. As the original “rocket docket,” the EDVA is well-known for consistently having the shortest docket time in the country. Fully embracing the “Justice Delayed, Justice Denied” motto etched into the courthouse in its Alexandria Division, the EDVA averages just over five months from filing to disposition and 11 months from filing to trial for all civil cases. These averages are no flash in the pan; they are consistent with the EDVA’s performance over the last several decades.

To achieve its rapid pace, the EDVA employs local rules and pre-trial orders that compress trial preparation and bar continuances in all but the most extreme circumstances. The EDVA does not, however, have patent local rules or uniform patent procedures. To the contrary, each of the three divisions (Alexandria, Richmond, and Norfolk) and each judge handles patent cases differently. This lack of uniformity, combined with the truncated schedule, the judges’ disdain for continuances, and the EDVA’s divisionwide random

assignment of patent cases (e.g., a case filed in Alexandria may be assigned to a judge in Norfolk), creates many traps for litigants. This article addresses the common pitfalls counsel could face, as well as the typical patent practices and procedures that judges in the EDVA use.

The Defendant’s Initial Response

A defendant in a patent infringement case in the EDVA is wise to consider moving to transfer venue or moving to dismiss all or part of the complaint. For one, EDVA judges will not hesitate to transfer venue or grant a motion to dismiss with merit. As importantly, such preliminary motions often delay issuance of the initial scheduling order, thus lengthening the pre-trial schedule by weeks or months and giving the defendant more time to prepare.

Venue Motions

Under *TC Heartland v. Kraft Foods Group Brands LLC*,¹ the U.S. Supreme Court ruled that venue over a corporate defendant is proper only where the defendant is incorporated or where it has committed acts of infringement and has a regular and established place of business. While many corporations have a physical presence in the EDVA, a defendant should always consider whether that presence satisfies 28 U.S.C. § 1400(b) and move to dismiss if it does not.

Because motions to transfer venue under 28 U.S.C. § 1404(a) are frequently filed in EDVA patent cases, the EDVA authority follows a well-established analysis.² The first question is whether the EDVA is the plaintiff’s home forum. If not, the court will give the plaintiff’s choice of forum minimal deference³ and transfer is likely in the

absence of some other tie to the EDVA, such as the presence of witnesses in Virginia or a connection between Virginia and the claims that goes beyond sales activity. Even if the plaintiff has no ties to Virginia, a defendant cannot rely on general allegations of inconvenience and will need to identify key witnesses (especially third-party witnesses) in the transferee forum and specify the relevant information offered by such witnesses to warrant a transfer.⁴

Motions to Dismiss

*Bell Atlantic Corp. v. Twombly*⁵ and *Ashcroft v. Iqbal*⁶ require that patent infringement complaints state a claim that is “plausible on its face” and that “pleads factual content that allows the court to draw the reasonable inference” that liability exists.⁷ Thus, complaints should, at a minimum, identify the accused products and specify how those products include each element of the patented claims.⁸ Claims for contributory or induced infringement must include more than a “formulaic recitation” of the elements of the cause of action.⁹ In particular, claims of induced infringement must plausibly allege that the defendant specifically intended its customers to infringe and knew the customer’s acts constituted infringement.¹⁰ Claims of willful infringement must allege knowledge of the patent¹¹ and “egregious infringement behavior” that goes “beyond typical infringement.”¹²

An accused infringer’s counterclaims of noninfringement or invalidity must also satisfy *Twombly/Iqbal*,¹³ and at least one EDVA judge has held that affirmative defenses of invalidity must do more than simply list code sections.¹⁴

Motions to Dismiss for Lack of Patentable Subject Matter

Numerous EDVA cases have applied *Alice Corp. Pty. v. CLS Bank International*¹⁵ to determine subject matter eligibility under 35 U.S.C. § 101.¹⁶ Though some challenges have been decided on a motion to dismiss or for judgment on the pleadings,¹⁷ in many cases it is “ordinarily desirable—and often necessary—to resolve claim construction disputes prior to a § 101 analysis.”¹⁸

Motions to Dismiss on Other Grounds

A few EDVA cases address motions to dismiss on grounds of indefiniteness under 35 U.S.C. § 112. While one EDVA judge has granted such a motion, the motion was heard at the same time as claim construction.¹⁹ Other EDVA judges have noted this distinction and have held that “the more prudent approach is to address indefiniteness either during or after the *Markman* hearing.”²⁰

Motions to Stay Pending *Inter Partes* Review

Like other courts, the EDVA has been “nearly uniform” in staying litigation once *inter partes* review (IPR) proceedings are instituted. Several EDVA judges have even stayed proceedings prior to institution based on “the pace of discovery” and the EDVA’s pre-trial schedule.²¹ Notably, these pre-institution stays have been granted where the plaintiff was a nonpracticing entity,²² the patent had expired,²³ or the plaintiff delayed in bringing suit.²⁴ By contrast, stays have been denied where the parties were competitors and the prejudice may have “outsized consequences to the party asserting infringement” that outweigh any efficiencies of a stay.²⁵ As with all issues in the EDVA, defendants hoping to get a stay should file their IPR petitions as early as possible.²⁶ Parties should keep the court informed of the status of any related IPR proceedings regardless of whether a stay is sought.²⁷

The Pre-trial Schedule

After resolving any preliminary motions, the court will issue its initial scheduling order. The scheduling procedure, however, varies significantly among the three divisions and sometimes among individual judges.

In Alexandria, the court will issue a standard one-page pre-trial order that sets the dates for the close of discovery, an initial Rule 16(b) conference before a magistrate judge, and a final pre-trial conference at which the trial date will be set (approximately eight weeks later). The parties usually include patent-specific pre-trial events, such as infringement and invalidity contentions and claim construction briefing, in the discovery plan submitted before the Rule 16(b) conference.

In Norfolk, the initial pre-trial conference is held before a scheduling clerk who will set pre-trial deadlines and a trial date according to a standard schedule that does not address patent-specific deadlines. Some Norfolk judges include patent-specific events in a subsequent order, but otherwise the parties typically have no opportunity to propose a patent-specific pre-trial schedule.

In Richmond, each district judge conducts the initial pre-trial conference and is often open to pre-trial schedules tailored to a patent case. At the conference, the judge sets the trial date and enters his or her own standard initial pre-trial order, which includes a comprehensive list of deadlines. The parties often propose patent-specific deadlines prior to the conference, and the court addresses unique patent requirements in a supplemental order.

Regardless of the division or judge, the primary purpose of the initial pre-trial conference is to set a schedule that results in a trial within nine months. With some exceptions, the EDVA judges treat patent cases like any other civil case, and even judges who tailor their pre-trial orders to patent cases often simply add those provisions to the typical pre-trial schedule.

Discovery

In the EDVA, discovery is typically completed in four to six months, which is a challenging timeline in any case and is particularly difficult in a patent case. The abbreviated schedule generally favors plaintiffs who can refine their theories and prepare for discovery before filing suit, whereas defendants must develop defenses and locate helpful information in only a few months. This disadvantage can be exacerbated by the asymmetrical discovery obligations that often occur when a larger corporate defendant is sued by a small or nonpracticing entity patentee. To overcome these disadvantages, it is crucial for defendants to begin document collection, investigate affirmative defenses, and retain experts as soon as they receive the complaint. Gathering and producing the most relevant documents early allows defendants to buy time to complete document collection and avoid discovery disputes. Whether representing the plaintiff or the defendant, counsel must remain involved in discovery and not rely on the client to adequately preserve and search for relevant documents. Relatedly, one EDVA judge recently sanctioned a party and its counsel for failing to sufficiently follow up with key employees or adequately search for relevant emails.²⁸

The abbreviated discovery period and the typical breadth of discovery requests in patent cases can give rise to aggressive motions practice by parties seeking to gain a tactical advantage. Local Rule 37(E) requires that the parties meet and confer before filing a discovery motion, and the EDVA judges take this requirement seriously.

The audience for discovery motions, however, varies by division. In Alexandria, magistrate judges handle all discovery motions on an accelerated schedule that allows for briefing and oral argument in just seven days. In Richmond, discovery disputes are typically handled by the district judge, but each judge handles them with different procedures and schedules. In Norfolk, magistrate judges generally hear all discovery motions under a standard three-week briefing schedule. Given the short discovery schedule, as well as the cost and delay required to address discovery motions, both parties are well served to choose their battles carefully and avoid being distracted by ancillary discovery disputes.

Claim Construction

Parties often agree to file simultaneous opening and response claim construction briefs (usually subject to the local rule limit of 30 pages), but there is no standard briefing practice in the EDVA. Claim construction hearings in the EDVA usually last no more than a few hours and rarely involve anything other than attorney argument. Because of the discovery short schedule, it benefits both parties to seek an early claim construction hearing, well before opening expert reports are due, so that the court can issue its claim construction ruling before opening expert reports are served. Otherwise, the parties' experts are forced to take alternative positions based on competing claim constructions and often have to serve supplemental reports and/or submit to supplement depositions.

Dispositive Motions

One of the hallmarks of the EDVA is the willingness of the judges to grant summary judgment where appropriate. That said, parties must be judicious in moving for summary judgment because, absent leave of court (which is rarely granted), EDVA local rules limit parties to a single summary judgment motion and a supporting brief of no more than 30 pages that must include identification of all undisputed material facts on which the motion is based. Moreover, the pre-trial schedule gives the court little time to consider summary judgment motions, particularly if the motion is filed near the close of discovery, as the motion will not be fully briefed until shortly before trial. This often forces a busy judge to absorb complex technological and patent law issues and make a ruling in just a few weeks, while at the same time considering *Daubert* motions, motions *in limine*, and other pre-trial matters often filed in the few weeks before trial. As a result, parties are well served to file summary judgment motions as early as possible and to focus on discrete legal issues that cannot be characterized as factual disputes.

Pre-trial Preparation and Trial

In the EDVA, parties must file witness lists, exhibit lists, jury instructions, and proposed *voir dire* (and objections to the other party's filings) and litigate motions *in limine* and other pre-trial issues in the final weeks before trial. This confluence of filings and rulings in the midst of trial preparation creates immense pressure, often resulting in the most frenzied and chaotic portion of a case.

This pressure only increases when trial begins, as no stage of litigation in the EDVA moves more swiftly than the trial itself. EDVA trials rarely last more than a week, and the court strongly, sometimes forcefully, encourages tight, condensed presentations. *Voir dire* consists primarily of generic judge-posed questions that are addressed to the entire jury pool and is completed in less than an hour. The entire

jury selection process takes one to one-and-a-half hours, with opening statements (usually less than an hour per side) starting immediately thereafter. EDVA judges strongly encourage brief and pointed direct and cross-examinations and will interrupt any questions they feel are repetitive. Redirect examination is brief and will be cut off at the first hint of repetition. Redundant witnesses are strongly disfavored, and judges will not hesitate to exclude testimony already covered by another witness. Parties are limited to a single expert per discipline, encouraging parties to use fewer witnesses who can cover more issues and who are skilled at explaining technical matters to a lay jury.

Statistics suggest that patentees have a decided advantage before juries in the EDVA. At least one factor in this may be that a speedy trial forces "high level" presentations that favor broad infringement claims over detailed, multifaceted defenses.

Conclusion

The EDVA's convenient location and speedy docket attracts patent infringement lawsuits. While the pressures of the "rocket docket" provide plaintiff-patentees with some advantages, defendants often like the EDVA's willingness to grant dispositive motions and its strict trial procedures. As a result, the EDVA remains a popular forum for patent lawsuits. ☺

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Endnotes

¹*TC Heartland v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017).

²*See Phillips v. Uber Techs. Inc.*, 2016 U.S. Dist. LEXIS 4590 (E.D. Va. Jan. 13, 2016) (citing cases).

³*See, e.g., Lycos Inc. v. TiVo Inc.*, 499 F. Supp. 2d 685, 692 (E.D. Va. 2007).

⁴*See Phillips*, 2016 U.S. Dist. LEXIS 4590 at *5 ("[The EDVA] draws a distinction between party-witnesses and nonparty witnesses and affords greater weight to the convenience of nonparty witnesses."); *CertusView Techs. LLC v. S & N Locating Servs. LLC*, 2013 U.S. Dist. LEXIS 175339 at *14-*16 (E.D. Va. Dec. 12, 2013) (that transferee forum more convenient is not sufficient to establish that the EDVA is an inconvenient forum).

⁵*Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

⁶*Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

⁷*Disc Disease Sols. Inc. v. VGH Sols. Inc.*, 888 F.3d 1256, 1260 (Fed. Cir. 2018).

⁸See *Disc Disease*, 888 F.3d at 1260; *Artrip v. Ball Corp.*, 735 F. App'x 708, 2018 U.S. App. LEXIS 13915 (Fed. Cir. 2018); see also *Jenkins v. LogicMark LLC*, 2017 U.S. Dist. LEXIS 10975, *6-*7 (E.D. Va. Jan. 25, 2017); *Orbcomm Inc. v. Calamp Corp.*, 2016 U.S. Dist. LEXIS 96264, *21-*23 (E.D. Va. July 22, 2016).

⁹*Jenkins*, 2017 U.S. Dist. LEXIS 10975 at *9-*11; see also *Audio MPEG*, 2016 U.S. Dist. LEXIS 181710 at *51-*54.

¹⁰*Smart Wearable Techs. Inc. v. Fitbit Inc.*, 274 F. Supp. 3d 371 (E.D. Va. 2017); *CarFax Inc. v. Red Mountain Techs. Inc.*, 119 F. Supp. 3d 404, 415 (E.D. Va. 2015).

¹¹*WBIP LLC v. Kohler Co.*, 829 F.3d 1317, 1341 (Fed. Cir. 2016).

¹²*Halo Elecs. Inc. v. Pulse Elecs. Inc.*, 136 S. Ct. 1923, 1932, 1935 (2016); see also *Jenkins*, 2017 U.S. Dist. LEXIS 10975 at *11-*13.

¹³*Info. Planning & Mgmt. Serv. v. Dollar Gen. Corp.*, 2016 U.S. Dist. LEXIS 883, *8-*9 (E.D. Va. Jan. 5, 2016); see also *TecSec Inc. v. Protegrity Inc.*, 2001 U.S. Dist. LEXIS 26740 (E.D. Va. June 27, 2001).

¹⁴*Info. Planning*, 2016 U.S. Dist. LEXIS 883 at *10-*13.

¹⁵*Alice Corp. Pty. v. CLS Bank Int'l.*, 134 S. Ct. 2347 (2014).

¹⁶See, e.g., *Virginia Innovation Sci. Inc. v. Amazon.com Inc.*, 2017 U.S. Dist. LEXIS 1917 (E.D. Va. Jan. 5, 2017); *Orbcomm*, 2016 U.S. Dist. LEXIS 96264 at *4-*20; *Peschke Map Tech's LLC v. Rouse Props. Inc.*, 168 F. Supp. 3d 881 (E.D. Va. 2016); *MicroStrategy Inc. v. Apttus Corp.*, 118 F. Supp. 3d 888 (E.D. Va. 2015); *CertusView Techs. LLC v. S&N Locating Servs. LLC*, 111 F. Supp. 3d 688 (E.D. Va. 2015); *In re TLI LLC Patent Litig.*, 87 F. Supp. 3d 773 (E.D. Va. 2015), *aff'd*, 823 F.3d 607 (Fed. Cir. 2016); *Amdocs (Isr.) Ltd. v. Openet Telecom Inc.*, 56 F. Supp. 3d 813 (E.D. Va. 2014), *rev'd*, 841 F.3d 1288 (Fed. Cir. 2016).

¹⁷*Consumer 2.0 Inc. v. Tenant Turner Inc.*, 2018 U.S. Dist. LEXIS 188169 (E.D. Va. Nov. 1, 2018) (granting motion to dismiss based

on § 101); *Bridge & Post Inc. v. Verizon Comm'n's Inc.*, 319 F. Supp. 3d 818 (E.D. Va. 2018) (granting motion to dismiss based on § 101); see also *Audio MPEG*, 2016 U.S. Dist. LEXIS 181710 at *33 (denying motion to dismiss based on § 101); *Orbcomm*, 2016 U.S. Dist. LEXIS 96264 at *4 (appropriate to decide patent eligibility at the Rule 12(b)(6) stage); *CertusView Techs.*, 111 F. Supp. 3d at 704 (deciding patent eligibility on Rule 12(c) motion for judgment on the pleadings).

¹⁸*Peschke Map Tech's.*, 168 F. Supp. 3d at 884 (quoting *Bancorp Servs. LLC v. Sun Life Assur. Co. of Canada (U.S.)*, 687 F.3d 1266, 1273 (Fed. Cir. 2012)).

¹⁹*In re TLI LLC Patent Litig.*, 87 F. Supp. 3d at 782.

²⁰*Audio MPEG*, 2016 U.S. Dist. LEXIS 181710 at *45.

²¹See, e.g., *In re TLI LLC Patent Litig.*, 2014 U.S. Dist. LEXIS 182206 at *8; *Health Diagnostic Lab. Inc.*, Civil Action No. 3:14CV796-HEH, slip op. at 2-4 (E.D. Va. Feb. 4, 2015).

²²*In re TLI LLC Patent Litig.*, 2014 U.S. Dist. LEXIS 182206 at *8; *Virginia Innovation Sci's. v. Samsung Elec's. Co. Ltd.*, Case No. 2:14CV217, slip op. at 5-6 (E.D. Va. Nov. 18, 2014); see also *University of Va. Patent Fdn. v. Hamilton Co.*, 2014 U.S. Dist. LEXIS 135202 at *7 (W. D. Va. Sept. 25, 2014) (collecting cases).

²³*Audio MPEG Inc. v. Hewlett-Packard Co.*, 2015 U.S. Dist. LEXIS 126014 at *12 (E.D. Va. Sept. 21, 2015).

²⁴*Id.*

²⁵*Segin Sys. v. Stewart Title Guar. Co.*, 30 F. Supp. 3d 476, 484 (E.D. Va. 2014).

²⁶See, e.g., *Cobalt Boats*, 2015 U.S. Dist. LEXIS 67258 at *7.

²⁷*Virginia Innov. Sci's. v. Samsung Elec's. Co. Ltd.*, 983 F. Supp. 2d 713, 760 (E.D. Va. 2014).

²⁸*Vir2us Inc. v. Invincea Inc.*, 2017 U.S. Dist. LEXIS 11720 (E.D. Va. Jan. 25, 2017).

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