



VENUE IN PATENT CASES IN THE YEAR SINCE THE SUPREME COURT'S *TC HEARTLAND* DECISION

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On May 22, 2017, the U.S. Supreme Court's decision in *TC Heartland* overruled a 27-year-old precedent governing patent venue. In 1990, the Federal Circuit held in *VE Holding Corp. v. Johnson Gas Appliance Co.* that the use of the word "reside" in the patent venue statute, § 1400, should be interpreted the same way as courts interpret its use in the general venue statute, § 1391.¹ Under the general venue statute, "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."² For corporations selling products across the country, the Federal Circuit's interpretation of the patent venue statute effectively allowed plaintiffs to sue for patent infringement in a jurisdiction of their choice. Over time, the Eastern District of Texas became a popular forum for patent litigation because it was perceived as being plaintiff-friendly.³

With the *TC Heartland* opinion, the Supreme Court effectively overruled *VE Holdings* by holding that, for the purposes of the patent venue statute, a U.S.-based corporate defendant "resides" *only* in the corporation's state of incorporation.⁴ If a suit is not brought in the corporate defendant's state of incorporation, the patent venue statute states that it must be brought "where the defendant has committed acts of infringement and has a regular and established place of business."⁵ With this abrupt narrowing of the understanding of where companies "reside," patent litigators have spent much of the past 15 months trying to determine where venue is proper for patent suits in the wake of *TC Heartland*.

The Immediate Fallout

The Court's decision in *TC Heartland* had a near-immediate impact on patent litigation practices. In the 90 days before the

Court's opinion, 33 percent of patent cases were filed in the Eastern District of Texas.⁶ In the 90 days immediately following the opinion, this number dropped to 13 percent.⁷ As the Eastern District of Texas began to fall out of favor due to questions surrounding venue, certain other jurisdictions began to see an increase in the filing of patent suits. Litigants filed 13 percent of patent infringement suits in the District of Delaware in the 90 days prior to *TC Heartland* and filed 26 percent of such suits in the 90 days following the decision.⁸ Other jurisdictions experiencing a similar, but less pronounced, increase in the immediate wake of *TC Heartland* include the Central District of California, the Northern District of California, and the Northern District of Illinois.⁹

The decision's immediate impact was not limited to newly filed suits. District courts with pending patent litigation faced a surge of motions to dismiss or to transfer cases, arguing that venue was

improper in light of *TC Heartland*. As will be discussed in more depth below, not all courts were willing to entertain such arguments. Once the procedural issues were resolved, however, courts have been relatively receptive to objections to venue. Statistics from the first quarter of 2018 are illustrative: In this period, courts considered 44 motions to dismiss or transfer for improper venue and granted 84 percent of the motions.¹⁰ In these cases in which the court granted the motion, the court transferred venue in 78 percent of the cases and dismissed in the remaining 22 percent.¹¹

Important Federal Circuit Decisions Since *TC Heartland*

Although *TC Heartland* had several immediate effects on patent litigation practices, the full range of its effects has been determined primarily by its subsequent application and clarification in the Federal Circuit and district courts.

Procedural Questions

In *In re Micron Technology Inc.*, the Federal Circuit addressed when and how parties are allowed to object to venue after *TC Heartland*.¹² After *TC Heartland*, some district courts held that parties had waived any improper-venue defenses under Federal Rules of Civil Procedure 12(g)(2) and 12(h)(1) by failing to object to venue in earlier pleadings.¹³ In *Micron*, the Federal Circuit held that Rule 12(h)(1)'s waiver rule does not apply to venue objections under *TC Heartland* because the *TC Heartland* opinion was a change of controlling law.¹⁴ As such, the improper venue defense was not "available" to defendants until the Supreme Court issued the *TC Heartland* opinion.¹⁵ The court also noted, however, that courts possess inherent powers and can exercise these inherent powers to advance the court's objectives even when the Federal Rules are not applicable.¹⁶ Thus, according to the Federal Circuit, courts may still find that a party has forfeited a venue objection when the party has not made a timely objection and when allowing the party to make an untimely objection would impair the court's expeditious and orderly disposition of the case.¹⁷ Despite the Federal Circuit's express reference to courts' inherent powers, most district courts have declined plaintiffs' requests to exercise such powers to prevent defendants from venue objections.¹⁸

In *In re ZTE (USA) Inc.*, the Federal Circuit addressed which party has the burden of establishing that venue is either proper or improper.¹⁹ Previously, courts had been split on the issue, with some placing the burden on plaintiffs to prove that venue is proper and others placing the burden on defendants to prove that venue is not proper.²⁰ In *ZTE*, the Federal Circuit held that the burden is on the plaintiffs to establish proper venue under the patent venue statute.²¹ The court noted that the patent venue statute is intentionally narrow compared to the general venue statute and reasoned that the statute's "intentional narrowness supports placing the burden of establishing proper venue on the plaintiff."²²

Substantive Questions

In *In re Cray*, the Federal Circuit addressed what qualifies as a "regular and established place of business" in a judicial district.²³ The Federal Circuit listed "three general requirements relevant to the inquiry."²⁴ First, there must be a physical place in the district.²⁵ This place need not be a formal office or store, but it must be a physical, geographical location.²⁶ Second, the physical place must be a regular and established place of business.²⁷ Accordingly, the place must op-

erate in a "steady, uniform, orderly, and methodical manner."²⁸ Mere sporadic activity will not suffice—there must be a degree of stability and permanence. Third, the physical place must be the place of the defendant.²⁹ In other words, the defendant must establish or ratify the place of business.³⁰ Relevant considerations include whether the defendant owns, leases, or otherwise controls the place.³¹

In *In re HTC Corp.*, the Federal Circuit addressed the impact of *TC Heartland* on cases involving foreign defendants.³² Previously, plaintiffs could sue a foreign defendant in any judicial district in which valid service could be made upon the defendant.³³ Following *TC Heartland*, some argued that the more narrow language in the patent venue statute could overcome the long-standing rule that the venue statutes did not apply to suits against foreign defendants.³⁴ The Federal Circuit disagreed, stating, "this court—without clear guidance from Congress—will not broadly upend the well-established rule that suits against alien defendants are outside the operation of the federal venue laws."³⁵

In *In re BigCommerce*, the Federal Circuit addressed where a corporation resides when its state of incorporation comprises multiple judicial districts.³⁶ The district court had denied the defendant's venue objections, stating that a domestic corporation resides in the state of its incorporation and that, for purposes of venue, residence in that state includes residing in each judicial district therein.³⁷ The Federal Circuit reversed, holding that, within the meaning of the patent venue statute, a corporation resides in a single judicial district.³⁸ When the corporation is incorporated in a state in which there are multiple judicial districts, the corporation resides in the district in which it has its "principal place of business" or, in the absence of such a place, the district "in which the corporation has its registered office or agent."³⁹

Issues Settled in District Court

The Federal Circuit is not alone in applying *TC Heartland* and shaping the extent of its effect on patent litigation. Following the Federal Circuit's opinion in *In re Cray*, district courts have issued decisions addressing what constitutes a "regular and established place of business." As these decisions accumulate, courts are in agreement about certain facts. For example, multiple courts have held that storing a defendant's products at an Amazon warehouse in the judicial district and fulfilling customers' orders from such a warehouse does not qualify as a regular and established place of business for venue purposes.⁴⁰ Likewise, courts have consistently held that selling products through third-party retail partners or distributors in the district is not sufficient to establish venue.⁴¹ Courts have consistently reached the same conclusion for defendants with employees working from their personal residences in the district⁴²—even when as many as 46 of a defendant's employees resided and worked in the district.⁴³

District courts have also been consistent in respecting the formal separation between corporate entities for venue purposes. Plaintiffs have repeatedly attempted to use the places or actions of a corporate relative to establish proper venue for a defendant, and district courts have repeatedly rejected such arguments.⁴⁴ Some district courts, though, have indicated that such an argument would be successful if a plaintiff were able to demonstrate a lack of corporate separateness between the defendant and one of its corporate relatives doing business in the district.⁴⁵

In addition to these factual determinations, some district courts have addressed related legal issues. Multiple courts have begun to

address whether the patent venue statute requires plaintiffs to establish a connection (or “nexus”) between a defendant’s regular and established place of business and the alleged acts of infringement. In *Plexxikon Inc. v. Novartis Pharmaceuticals Corp.*, the Northern District of California held that “the plain language of the [patent venue] statute does not include a nexus requirement.”⁴⁶ Further, even when the plaintiff is able to demonstrate such a “nexus,” courts have cautioned plaintiffs that showing a nexus between the acts of infringement and the district in which the plaintiffs have brought suit does not, without more, satisfy the venue statute’s second requirement that the defendant have a regular and established place of business in the district.⁴⁷

The *TC Heartland* decision also prompted some speculation about where parties would be able to seek declaratory judgment in patent cases. Before *TC Heartland*, defendants in patent cases often used declaratory judgment to counteract plaintiffs’ forum-shopping practices.⁴⁸ Defendants had a wide range of forum options for seeking declaratory judgment because, as the Federal Circuit explained in *VE Holdings*, “a declaratory judgment action alleging that a patent is invalid and not infringed . . . is governed by the general venue statutes, not by § 1400(b).”⁴⁹ It does not appear that *TC Heartland* impacted this part of *VE Holdings*. At least one court—in the Northern District of Illinois—has faced a motion to dismiss a declaratory judgment since *TC Heartland*.⁵⁰ Although the court ultimately granted the motion, it did not cite *TC Heartland* or § 1400(b) in its analysis, indicating that the general venue statute still governs declaratory judgment actions.⁵¹

Issues Unsettled in District Court

Although lower courts have resolved many questions surrounding *TC Heartland* in the little over a year since its issuance, several questions still lack a conclusive answer.

Regular and Established—But When?

While district courts move toward consensus on *what* qualifies as a regular and established place of business, there remains a split on *when* the statute requires that the defendant have a regular and established place of business. One line of cases suggests that, for venue to be proper, the defendant must have a regular and established place of business in the district at the time the lawsuit is filed. Courts following this rule include the Eastern District of Texas and the Eastern District of Pennsylvania.⁵² A separate line of cases suggests a more flexible standard. In these cases, the courts have held that venue may still be proper when a defendant does not have a regular and established place of business in the district at the time the lawsuit is filed if (1) the defendant had a regular and established place of business in the district at the time the claim accrued and (2) the plaintiff filed the lawsuit within a reasonable time thereafter. The Middle District of Florida has demonstrated approval of this rule.⁵³

ANDA’s ‘Impenetrable Problem’

The Supreme Court’s opinion in *TC Heartland* has also raised questions regarding litigation under the Hatch-Waxman Act. Under the Hatch-Waxman Act, a pharmaceutical company can file an Abbreviated New Drug Application (ANDA), which allows a company to declare its intent to manufacture and sell a generic drug and begin to take certain steps toward doing so.⁵⁴ However, the statute allows patent owners to sue these companies when the patent owner believes

the generic drug will infringe one of its patents.⁵⁵ As the District of Delaware explained in *Bristol-Myers Squibb Co. v. Mylan Pharmaceuticals Inc.*, the first decision applying *TC Heartland* to ANDA litigation, “Congress’ choice of verb tense in the patent venue statute creates an almost impenetrable problem in the particular context of Hatch-Waxman patent litigation . . . because the temporal focus of the Hatch-Waxman infringement analysis is the future, not [] the past.”⁵⁶

In an effort to solve this “impenetrable” problem, the court in *Bristol-Myers* held that, for patent venue purposes, “acts of infringement” include the submission of an ANDA, “other acts the applicant non-speculatively intends to take if its ANDA receives final FDA approval,” and “steps already taken indicating [the applicant’s] intent to market the ANDA product in the district.” The practical effect of the decision in *Bristol-Myers* is that plaintiffs in Hatch-Waxman patent suits would have little challenge to argue that the defendant has committed “acts of infringement” in each and every judicial district.

Courts in the District of Delaware have generally followed the *Bristol-Myers* approach in ANDA cases.⁵⁷ However, the Northern District of Texas adopted a different approach in *Galderma Laboratories L.P. v. Teva Pharmaceuticals USA Inc.*⁵⁸ There, the court acknowledged the holding in *Bristol-Myers*, but declined to follow it.⁵⁹ Instead, the court held that, to determine whether the defendant has committed acts of infringement, courts should “look to the forum where the ANDA submission itself was prepared and submitted.”⁶⁰ The practical effects of this approach would be a significantly more limited set of forum options from which ANDA plaintiffs could choose.

Revitalization of Pendent Venue?

Under the doctrine of pendent venue, courts will allow a multi-claim case to proceed in a jurisdiction where venue is proper to some, but not all, of the plaintiff’s claims.⁶¹ In order to exercise pendent venue, the court must determine that all of the claims “arise out of a common nucleus of fact.”⁶² The pendent venue doctrine is not unique to patent law. Before *TC Heartland*, plaintiffs in patent suits had little use for the doctrine because *VE Holding* gave plaintiffs such wide discretion in choosing where to file patent claims.⁶³ After *TC Heartland*, though, courts are once again starting to see arguments that a plaintiff’s patent claims should be allowed to proceed in a venue under the doctrine of pendent venue.

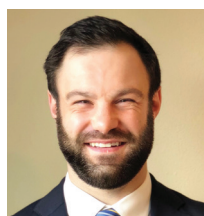
Using pendent venue in a patent case is not completely without precedent. In *Hsin Ten Enterprise USA Inc. v. Clark Enterprises*, the Southern District of New York exercised pendent venue over the plaintiff’s patent infringement claim where venue was proper for the plaintiff’s separate trademark infringement claim. The court reasoned that the trademark claim was the “primary” claim and that there would be a substantial overlap in the claims’ proof. More recently, in *Omega Patents LLC v. CalAmp Corp.*, the Middle District of Florida applied pendent venue to hold that venue was proper for *all* of the plaintiff’s patent claims, even though the defendant argued that venue was only proper for *some* of the claims.

Since *Omega Patents*, though, courts in other districts have been hesitant to use pendent venue to overcome the limitations of *TC Heartland*. In *Jenny Yoo Collection Inc. v. Watters Designs Inc.*, the Southern District of New York refused to apply the pendent venue doctrine to the plaintiff’s patent infringement claim, citing *TC Heartland*’s more narrow reading of the patent venue statute as justification.⁶⁴ In *National Products v. Arkon Resources Inc.*, the

Western District of Washington declined to apply pendent venue, explaining that pendent venue will apply only when the case at issue has been brought in a venue which satisfies the most “specific” of the various governing venue statutes.⁶⁵ Similarly, in *California Expanded Metal Products Co. v. Klein*, the Central District of California declined to apply the pendent venue doctrine, focusing on the “specificity” of the patent venue statute in light of *TC Heartland*.⁶⁶ Finally, in *Olivia Garden Inc. v. Stance Beauty Labs LLC et al.*, the plaintiff argued that the court should apply pendent venue to find jurisdiction proper for one defendant because jurisdiction was proper for a second, distinct defendant.⁶⁷ Despite the plaintiff’s argument that pendent venue was necessary to avoid “bifurcating th[e] matter,” the court found no authority stating that it should apply pendent venue over a third party in the wake of *TC Heartland*.⁶⁸

Conclusion

Federal Circuit and district court decisions provide clarity on a number of issues regarding the application of the Court’s *TC Heartland* decision, although a number of other issues continue to evolve. ☉



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Endnotes

¹*VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990), *abrogated by TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017).

²28 U.S.C. § 1391(c).

³Daniel Nazer & Vera Ranieri, *Why Do Patent Trolls Go to Texas? It’s Not for the BBQ*, ELECTRONIC FRONTIER FOUND. (July 9, 2014), <https://www.eff.org/deeplinks/2014/07/why-do-patent-trolls-go-texas-its-not-bbq>.

⁴*TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017).

⁵28 U.S.C. § 1400(b).

⁶Owen Byrd, *Patent Litigation Trends in the Three Months After T.C. Heartland*, LEX MACHINA (Oct. 18, 2017), <https://lexmachina.com/patent-litigation-trends-in-the-three-months-after-t-c-heartland>.

⁷*Id.*

⁸*Id.*

⁹*Id.*

¹⁰Christina Ji-Hye Yang & Mareesa Frederick, *Post-TC Heartland Trends in the 1st Quarter of 2018*, LAW360 (May 3, 2018, 11:55 AM), <https://www.law360.com/articles/1039101/post-tc-heartland-trends-in-the-1st-quarter-of-2018>.

¹¹*Id.*

¹²875 F.3d 1091 (Fed. Cir. 2017).

¹³*See, e.g., President & Fellows of Harv. Coll. v. Micron Tech. Inc.*, 270 F. Supp. 3d 331, 336 (D. Mass.), *vacated*, 875 F.2d 1091 (Fed. Cir. 2017).

¹⁴*Micron*, 875 F.3d at 1099.

¹⁵*Id.*

¹⁶*Id.* at 1100.

¹⁷*Id.* at 1101.

¹⁸*See, e.g., Automated Packaging Sys. Inc. v. Free-Flow Packaging Int’l Inc.*, No. 5:14-cv-2022 2018 WL 400326 (N.D. Ohio Jan. 12, 2018); *Palomar Techs. Inc. v. MRSI Sys.*, No. 15-CV-1484 (S.D. Cal. Feb. 5, 2018); *West View Research LLC v. BMW of N. Am. LLC*, No. 16-CV-2590 2018 WL 436 7378 (S.D. Cal. Feb 5, 2018); *but see Agri-Labs Holding LLC v. Taplogic LLC*, 304 F. Supp. 3d 773 (N.D. Ind. Jan. 16, 2018) (denying defendant’s motion as untimely where the case had been pending for three years).

¹⁹890 F.3d 1008 (Fed. Cir. 2018).

²⁰*Compare Unity Opto Tech. Co. v. Lowe’s Home Ctr. LLC*, No. 3:18-cv-00027, 2018 U.S. Dist. LEXIS 75632 (W.D. Wis. May 4, 2018) (“[T]he plaintiff has the burden of proving that venue is proper under 1400(b).”) *with Sovereign IP LLC v. Apple Inc.*, No. 2:17-cv-207, 2017 WL 5126158 (E.D. Tex. July 25, 2017) (“Because an objection to venue is a personal privilege that offers protection from inconvenience, the burden of establishing improper venue lies with the defendant.”).

²¹*ZTE*, 890 F.3d at 1013.

²²*Id.* at 1014.

²³871 F.3d 1355 (Fed. Cir. 2017).

²⁴*Id.* at 1360.

²⁵*Id.*

²⁶*Id.* at 1362.

²⁷*Id.* at 1360.

²⁸*Id.* at 1362.

²⁹*Id.*

³⁰*Id.* at 1363.

³¹*Id.*

³²889 F.3d 1349 (Fed. Cir. 2018).

³³*See In re Hohorst*, 150 U.S. 563 (1893).

³⁴Joseph Re & Perry Oldham, *TC Heartland Complicates Venue for Foreign Defendants*, LAW360 (June 29, 2017, 12:34 PM), <https://www.law360.com/articles/935949/tc-heartland-complicates-venue-for-foreign-defendants>.

³⁵*HTC*, 889 F.3d at 1361.

³⁶890 F.3d 978 (Fed. Cir. 2018).

³⁷*Diem LLC v. BigCommerce Inc.*, No.6: 17-cv-00 186, 2017 WL 3187473 (E.D. Tex. July 26, 2017), *vacated*, 890 F.3d 978 (Fed. Cir. 2018).

³⁸*BigCommerce*, 890 F.3d at 986.

³⁹*Id.* at 895-96.

⁴⁰*See, e.g., Reflection LLC v. Spire Collective LLC*, No. 3:17-cv-01603, 2018 U.S. Dist. LEXIS 2429 (S.D. Cal. Jan. 5, 2018); *SportPet Designs Inc. v. Cat1st Corp.*, No. 17-CV-0554, 2018 U.S. Dist. LEXIS 34355 (E.D. Wis. Mar. 2, 2018).

⁴¹*See, e.g., Susan McKnight Inc. v. United Indus. Co.*, No. 2:16-cv-2534, 2018 WL 468876 (W.D. Tenn. Feb. 27, 2018); *Edgewell Personal Care Brands LLC v. Munchkin Inc.*, No. 3:16-cv-00094 (VLB) (D. Conn. Mar. 29, 2018); *Ascion LLC v. Tempur Sealy Int’l Inc.*, No. 15-12067, 2017 U.S. Dist. LEXIS 169279 (E.D. Mich. Oct. 13, 2017); *JPW Indus. Inc. v. Olympia Tools Int’l Inc.*, No. 3:16-cv-03153, 2017 U.S. Dist. LEXIS 167312 (M.D. Tenn. Oct. 10, 2017).

⁴²*See, e.g., Uniloc USA Inc. v. Ubisoft Inc.*, No. 2:16-CV-00781 (E.D. Tex. Mar. 29, 2018); *BillingNetwork Patent Inc. v. Modernizing*

- Med. Inc.*, No. 17 CV 5636, 2017 WL 5146008 (N.D. Ill. Nov. 6, 2017); *Regents of the Univ. of Minn. v. Gilead Scis. Inc.*, 299 F. Supp. 3d 1034 (D. Minn. Oct. 20, 2017); *Niazi Lic. Corp. v. St. Jude Med. S.C. Inc.*, No. 17-cv-183-jdp, 2017 U.S. Dist. LEXIS 183849 (W.D. Wis. Nov. 7, 2017); *Uniloc USA, MC. v. Nutanix Inc.*, No. 2:17-cv-00174-JRG (E.D. Tex. Dec. 6, 2017); *Automated Packaging Sys. Inc., v. Free-Flow Packaging Int'l Inc.*, No. 5:14-cv-2022, 2018 U.S. Dist. LEXIS 5910 (N.D. Ohio Jan. 12, 2018).
- ⁴³*Board of Regents, Univ. of Texas v. Boston Sci. Corp.*, No. A-17-CV-1103-LY (W.D. Tex. Mar. 12, 2018).
- ⁴⁴*Sovereign IP LLC v. AT&T Inc.*, No. 2:17-CV-00293-RWS, 2017 U.S. Dist. LEXIS 207551 (E.D. Tex. Dec. 18, 2017); *Xodus Med. Inc. v. Allen Med. Sys. Inc.*, No. 2:17-cv-00581, 2018 U.S. Dist. LEXIS 85889 (W.D. Pa. May 22, 2018); *Tower Labs. LTD. v. Lush Cosmetics*, 285 F. Supp. 3d 321 (D.D.C. 2018); *Palomar Techs. Inc., v. MIC Sys. LLC*, No. 15-CV-1484 (S.D. Cal. Feb. 5, 2018).
- ⁴⁵*XR Commc'ns LLC v. Ruckus Wireless Inc.*, No. SACV 17-00596 (C.D. Cal. Mar. 30, 2018); *Post Consumer Brands LLC v. Gen. Mills Inc. LLC*, No. 4:17-CV-2471, 2017 U.S. Dist. LEXIS 178307 (E.D. Mo. Oct. 27, 2017); *West View Research LLC v. BMW of N. Am. LLC*, No. 16-CV-2590 JLS (AGS) (S.D. Cal. Feb. 5, 2018).
- ⁴⁶*Plexxikon Inc. v. Novartis Pharm. Corp.*, No. 17-CV-04405, 2017 WL 6389674 (N.D. Ca. Dec. 7, 2017).
- ⁴⁷*See Uniloc USA Inc. v. Nutanix Inc.*, No. 17-CV-00174 (E.D. Tex. Dec. 6, 2017).
- ⁴⁸Chester S. Chuang, *Offensive Venue: The Curious Use of Declaratory Judgment to Forum Shop in Patent Litigation*, GEO. WASH. L. REV. 80 (2012).
- ⁴⁹*VE Holding*, 917 F.2d at 1583.
- ⁵⁰*Shure Inc. v. Clearone Inc.*, No. 17 C 3078, 2018 WL 303 2851 (N.D. Ill. Mar. 16, 2018).
- ⁵¹*Id.*
- ⁵²*See, e.g., Pers. Audio LLC v. Google Inc.*, 280 F. Supp. 3d 922, 93, (E.D. Tex.); *Infinity Comput. Prods. Inc. v. OKI Data Ams. Inc.*, Nos. 12-6797, 12-6799, 12-6800, 12-6806, 2018 WL 1035793, at *9-10 (E.D. Pa. Feb. 23, 2018).
- ⁵³*See, e.g., ParkerVision Inc. v. Apple Inc.*, No. 3:15-cv-04177, slip op. at 16 (M.D. Fla. Mar. 8, 2018).
- ⁵⁴*See generally* 21 U.S.C. § 355(j).
- ⁵⁵*See id.*
- ⁵⁶2017 WL 3980155, at *5 (D. Del. Sept. 11, 2017).
- ⁵⁷*See, e.g., Javelin Pharm. Inc. v. Mylan Labs. Ltd.*, No. CV 16-224, 2017 WL 5953296, at *2 (D. Del. Dec. 1, 2017); *Mallinckrodt IP v. B. Braun Med. Inc.*, No. CV 17-365, 2017 WL 6383610, at *2 (D. Del. Dec. 14, 2017).
- ⁵⁸290 F. Supp. 3d 599 (N.D. Tex. 2017).
- ⁵⁹*Id.* at 607 (remarking that the *Bristol-Myers* opinion was “thorough” but that there were “several issues with the decision”).
- ⁶⁰*Id.* at 608.
- ⁶¹*See Beattie v. United States*, 756 F.2d 91 (D.C. Cir. 1984).
- ⁶²*Id.*
- ⁶³*See* Part I, *supra*.
- ⁶⁴*Jenny Yoo Collection Inc. v. Watters Designs Inc.*, No. 1:16-cv-2205, 2017 WL 4997838 (S.D.N.Y. Oct. 20, 2017).
- ⁶⁵*Nat'l Prods. Inc. v. Arkon Res. Inc.*, No. C15-1984, 2017 WL 4403328 (W.D. Wash. Oct. 2, 2017).
- ⁶⁶*California Expanded Metal Prods. Co. v. Klein*, No. CV 18-00242 2018 WL 204 1955.
- ⁶⁷No. 17-cv-05778 2018, WL 3392061 (N.D. Cal. July 12, 2018).
- ⁶⁸*Id.* at 3.

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