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## Federal Judge Seeks Patent Cases

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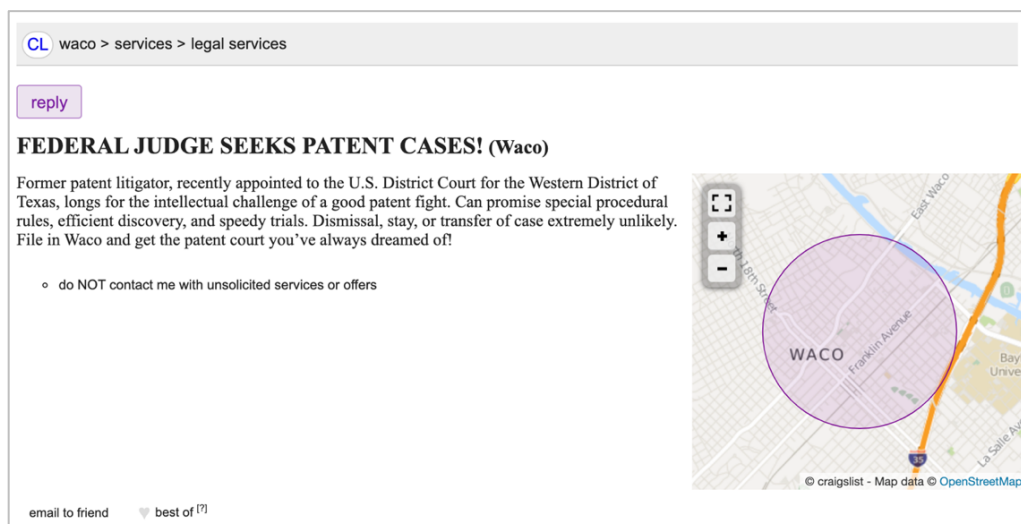
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## FEDERAL JUDGE SEEKS PATENT CASES

J. Jonas Anderson\* & Paul R. Gugliuzza†



*That probably seems like a bizarre Craigslist ad. It's not real—we mocked it up for this article. Still—and startlingly—it accurately portrays what's happening right now in the U.S. District Court for the Western District of Texas. One judge, appointed to the court less than two years ago, has been advertising his district—through presentations to patent lawyers, comments to the media, procedures in his courtroom, and decisions in patent cases—as the place to file your patent infringement lawsuit. And he has succeeded. In 2018, the Western District received only 90 patent cases—a mere 2.5% of patent suits nationwide. In 2020, the Western District is on track to receive more than 800—the most of any district in the country. Importantly, these suits are overwhelmingly filed by so-called patent trolls—entities that don't make any products or provide services but instead exist solely to enforce patents.*

*The centralization of patent cases before a single judge, acting entirely on his own to seek out patent litigation, is facilitated by the Western District's case filing system, which allows plaintiffs to choose not just the court but the specific judge who will hear their case. These dynamics—a*

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*judge advertising for patent cases and plaintiffs shopping for that judge—undermine public confidence in the impartiality of the judiciary, make the court an uneven playing field for litigants, and facilitate the nuisance suits patent trolls favor. Two reforms would help solve this problem: first, district judges should—by law—be randomly assigned to cases and, second, venue in patent cases should be tied to geographic divisions within a judicial district, not just the district as a whole.*

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## INTRODUCTION

*MV3 Partners, LLC v. Roku, Inc.*, was a typical patent infringement case, not unlike thousands of others pending in federal court on any given day.<sup>1</sup> Trial was slated to begin on June 1, 2020, in the U.S. District Court for the Western District of Texas. Then the COVID-19 pandemic erupted. Cities were locked down. Offices closed. Many attorneys couldn't leave their homes, much less travel across the country for a deposition, hearing, or trial. Accordingly, on April 2, Roku, the defendant, asked the judge to delay the impending trial. Roku's entire legal team, its motion explained, including "witnesses, attorneys, staff and support, the client, and third party vendors" were all under stay-at-home orders, making trial preparation essentially impossible—to say nothing of traveling from Maryland and Virginia (where most of Roku's team was based) to Waco, Texas, for trial, or of the dangers a trial might pose to "the jury, Court, the Court's staff, the witnesses, the parties, and their counsel."<sup>2</sup>

The judge, Alan Albright, denied the motion, noting that, "[b]ecause trial is still several weeks away," it would be "premature to continue the case at this time."<sup>3</sup> The parties' trial preparation—such as it was—thus continued apace. On May 13, with trial barely two weeks away, Judge Albright finally postponed it.<sup>4</sup> But only until June 29 and with the admonitions that the new date was "unavoidable" and that "trial must go when set."<sup>5</sup> On June 4, Judge Albright conducted the final pre-trial conference, outlining the precautions to be used, including seating witnesses behind plexiglass, providing box lunches to the jury, and limiting the number of attorneys who could sit at the counsel table.<sup>6</sup> On

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<sup>1</sup> In 2019, 3,588 patent cases were filed in the federal district courts. Jacqueline Bell, *How Patent Litigation Changed in 2019*, LAW360 (Feb. 26, 2020), <https://www.law360.com/articles/1247871/how-patent-litigation-changed-in-2019>.

<sup>2</sup> Roku's Opposed Motion for a Continuance Due to the COVID-19 Pandemic 1, 3, *MV3 Partners LLC v. Roku, Inc.*, No. 6:18-cv-308 (W.D. Tex. Apr. 2, 2020).

<sup>3</sup> Text Order Denying Motion to Continue, *MV3 Partners LLC v. Roku, Inc.*, No. 6:18-cv-308 (W.D. Tex. Apr. 8, 2020).

<sup>4</sup> Minute Entry, *MV3 Partners LLC v. Roku, Inc.*, No. 6:18-cv-308 (W.D. Tex. May 13, 2020).

<sup>5</sup> *Id.*

<sup>6</sup> Minute Entry, *MV3 Partners LLC v. Roku, Inc.* No. 6:18-cv-308 (W.D. Tex. June 4, 2020).

June 15, however, with COVID-19 cases in Texas skyrocketing, Judge Albright, reluctantly, delayed trial until August.<sup>7</sup>

The COVID-19 pandemic has upended American life. Millions are unemployed. Many who still have jobs—grocery store workers, delivery drivers, healthcare providers—risk their lives every day. Those of us who are privileged have learned to work entirely from home; our biggest risk is a dancing child or stray pet wandering into the background of a Zoom meeting. COVID has disrupted the practice of law, too. Even the U.S. Supreme Court has yielded, holding oral arguments by telephone and broadcasting them live for the first time.<sup>8</sup> The U.S. Court of Appeals for the Federal Circuit, which hears appeals of all patent cases nationwide,<sup>9</sup> has likewise suspended in-person oral arguments until further notice.<sup>10</sup>

But Judge Albright appears determined to forge ahead with patent litigation as usual. Judges in other patent-heavy district courts are, too. Though some judges have compromised and held patent proceedings on Zoom,<sup>11</sup> Chief Judge Rodney Gilstrap of the Eastern District of Texas, who, until last year, heard more patent cases than any judge in the country,<sup>12</sup> recently denied a defendant's motion to delay an in-person jury trial slated to begin on August 3, quoting poet Robert Frost's idiom

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<sup>7</sup> Minute Entry, *MV3 Partners LLC v. Roku, Inc.*, No. 6:18-cv-308 (W.D. Tex. June 15, 2020).

<sup>8</sup> U.S. Supreme Court, Media Advisory Regarding May Teleconference Argument Audio (Apr. 30, 2020), [https://www.supremecourt.gov/publicinfo/press/pressreleases/pr\\_04-30-20](https://www.supremecourt.gov/publicinfo/press/pressreleases/pr_04-30-20).

<sup>9</sup> See Paul R. Gugliuzza, *Rethinking Federal Circuit Jurisdiction*, 100 GEO. L.J. 1437, 1461-62 (2012) (describing the court's jurisdiction).

<sup>10</sup> U.S. Court of Appeals for the Federal Circuit, Order: Conducting Oral Arguments (May 18, 2020), <http://www.ca9.uscourts.gov/sites/default/files/rules-of-practice/Administrative-Orders/AdministrativeOrder-2020-02-05182020.pdf>.

<sup>11</sup> See Ryan Davis, *After 5 Weeks, Zoom Patent Trial In Cisco Case Nears End*, LAW360 (June 11, 2020), <https://www.law360.com/ip/articles/1281604/after-5-weeks-zoom-patent-trial-in-cisco-case-nears-end> (describing a bench trial in *Centripetal Networks, Inc. v. Cisco Sys., Inc.*, No. 2:18cv94 (E.D. Va.)); see also Cara Salvatore, *Virus Fears Mean Serenity, Ferring Will Have Remote IP Trial*, LAW360 (June 17, 2020), <https://www.law360.com/ip/articles/1283904/virus-fears-mean-serenity-ferring-will-have-remote-ip-trial> (Ferring B.V. v. Serenity Pharms., LLC, No. 17 Civ. 9922 (S.D.N.Y.)).

<sup>12</sup> See Kaleigh Rogers, *The Small Town Judge Who Sees a Quarter of the Nation's Patent Cases*, VICE (May 5, 2016), [https://www.vice.com/en\\_us/article/aek3pp/the-small-town-judge-who-sees-a-quarter-of-the-nations-patent-cases](https://www.vice.com/en_us/article/aek3pp/the-small-town-judge-who-sees-a-quarter-of-the-nations-patent-cases).

that “the best way out is always through.”<sup>13</sup> What is going on with these judges?

They are in the midst of a vigorous competition to attract patent cases to their courtrooms. As this article shows, Judge Albright is winning. And this court competition is not good for the patent system or the court system more broadly.

We usually think of forum shopping as a litigant-driven process. Plaintiffs choose a forum based on where they think they will win a larger verdict, more favorable law will apply, the statute of limitations is longer, or jurors will be more sympathetic.<sup>14</sup> Defendants have several mechanisms to escape the plaintiff’s chosen forum, including objecting to jurisdiction and venue, removing the case from state court to federal court, seeking transfer from one court to another because of convenience considerations, and, in some circumstances, arguing that convenience considerations warrant dismissal altogether.<sup>15</sup>

Recent scholarship has shown that forum shopping isn’t all about the parties—courts and judges try to attract certain types of cases, too.<sup>16</sup> The incentives for this judicial behavior—“court competition,” one might say<sup>17</sup>—are varied, but include the prestige associated with particular types of cases, economic benefits to the local community, power maximization, and judges’ intellectual interest in certain areas of law.<sup>18</sup> Today, court competition for litigation is most acute in the field of patent law.<sup>19</sup> Over the past two decades, district courts from coast-to-coast

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<sup>13</sup> *Optis Wireless Tech., LLC v. Apple, Inc.*, No. 2:19-cv-66, slip op. at 8 (E.D. Tex. July 21, 2020) (quoting Robert Frost, *A Servant to Servants, North of Boston* (1914)). In the poem, it’s worth noting, Frost makes clear that he agrees with that sentiment only “in so far [a]s that I can see no way out but through.”

<sup>14</sup> See Friedrich K. Juenger, *Forum Shopping, Domestic and International*, 63 TUL. L. REV. 553, 556-58 (1989).

<sup>15</sup> See Debra Lyn Bassett, *The Forum Game*, 84 N.C. L. REV. 333, 353 (2006).

<sup>16</sup> See, e.g., LYNN M. LOPUCKI, *COURTING FAILURE* (2005); J. Jonas Anderson, *Court Capture*, 59 B.C. L. REV. 1543, 1576 (2018); Stefan Bechtold, Jens Frankenreiter & Daniel Klerman, *Forum Selling Abroad*, 92 S. CAL. L. REV. 487, 489 (2019); Daniel Klerman, *Jurisdictional Competition and the Evolution of the Common Law*, 74 U. CHI. L. REV. 1179, 1179 (2007).

<sup>17</sup> J. Jonas Anderson, *Court Competition for Patent Cases*, 163 U. PA. L. REV. 631 (2015).

<sup>18</sup> For a leading positive economic account of judicial behavior, see Richard A. Posner, *What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)*, 3 SUP. CT. ECON. REV. 1, 13-30 (1993).

<sup>19</sup> See Anderson, *supra* note 17; Daniel Klerman & Greg Reilly, *Forum Selling*, 89 S. CAL. L. REV. 241 (2016).

have taken steps to attract patent cases, including adopting special procedural rules for patent cases only,<sup>20</sup> processing cases quickly,<sup>21</sup> and, sometimes, by explicitly encouraging lawyers to file patent cases in their district.<sup>22</sup> The standout example of a court successfully competing to attract patent litigation is the U.S. District Court for the Eastern District of Texas,<sup>23</sup> which, through the concerted efforts of its judges, became a magnet for cases filed by so-called patent trolls—entities that exist solely to enforce patents and often file suit aiming to extract a quick settlement that is less than it would cost the defendant to litigate the case.<sup>24</sup>

By 2015, the largely rural Eastern District of Texas, which hears many of its patent cases in the town of Marshall (population 23,523), was receiving over 2,500 patent case filings annually—nearly half of the 5,762 patent cases filed nationwide that year.<sup>25</sup> The Eastern District attracted patent litigation by, among other things, adopting expedited case schedules, refusing to transfer cases even when litigation would have been more convenient elsewhere, voicing and exercising a preference to have cases decided after trial rather than on summary judgment, and, perhaps most importantly, by allowing plaintiffs to predict with a high degree of certainty which judge would hear their case.<sup>26</sup>

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<sup>20</sup> Megan M. La Belle, *The Local Rules of Patent Procedure*, 47 ARIZ. ST. L.J. 63, 102 (2015).

<sup>21</sup> Xuan-Thao Nguyen, *Dynamic Federalism and Patent Law Reform*, 85 IND. L.J. 449, 478-79 (2010).

<sup>22</sup> See, e.g., Kate Angliss, *Patent Law in Pittsburgh*, 11 PITTSBURGH J. TECH. L. & POL'Y 1, 1-2 (2011) (quoting Judge Joy Conti of the Western District of Pennsylvania: "I think it's advantageous [to file patent cases in the Western District]. Our court has a moderate caseload so that they can get fairly quick attention here. . . . We have local patent rules . . . . That has been viewed very favorably around the country. Also we have judges who are interested in patent law.").

<sup>23</sup> The obligatory citation on the rise of the Eastern District as a patent litigation hotbed is Julie Cresswell's article in the *New York Times*, *So Small a Town, So Many Patent Suits* (Sept. 24, 2006), <https://www.nytimes.com/2006/09/24/business/24ward.html>.

<sup>24</sup> See Mark A. Lemley & A. Douglas Melamed, *Missing the Forest for the Trolls*, 113 COLUM. L. REV. 2117, 2126 (2013).

<sup>25</sup> DOCKET NAVIGATOR, 2015 YEAR IN REVIEW: PATENT LITIGATION 19.

<sup>26</sup> Jonas Anderson, *Judge Shopping in the Eastern District of Texas*, 48 LOY. CHI. L. REV. 539, 544-50 (2016).



Complaints about the centralization of patent litigation in East Texas—and the court’s patentee-friendly practices<sup>27</sup>—culminated in the Supreme Court’s 2017 decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, which interpreted the patent venue statute in a way that prevented many patentees from filing their cases in rural East Texas.<sup>28</sup> But *TC Heartland* didn’t eliminate court competition for patent litigation—far from it. As this article shows, competition for patent cases remains alive and well. The only difference is that the court winning the competition is now a couple hundred miles down the road from Marshall, in Waco.

As recently as 2018, the Western District of Texas was an afterthought for patent litigators. That year, the court received only 90 patent case filings—2.5% of the 3,599 patent cases filed nationwide.<sup>29</sup> That has changed dramatically in the past year and a half. In 2019, the court received 275 cases—nearly 8% of the 3,531 patent cases filed nationwide, ranking fourth among all federal district courts.<sup>30</sup> The Western District is on track to receive more than twice as many patent cases in 2020, having received over 400 filings through June 30—more than any other district in the country. And over 85% of the patent cases filed in the Western District are filed by the same types of patent trolls (or, less pejoratively, non-practicing entities (NPEs)), that dominated litigation in the Eastern District of Texas.<sup>31</sup>

The dynamics of court competition that have caused patent cases to quickly accumulate in West Texas are arguably more problematic than they were in East Texas before *TC Heartland*. NPEs have become a mainstay in patent litigation, accounting for nearly half of the patent cases filed nationally. Yet unlike in the Eastern District, where the growth of NPE patent litigation was spurred by several different judges sitting in different divisions, the Western District’s growing NPE patent docket is being driven by a single judge, Judge Albright, who plaintiffs can choose—with absolute certainty—to hear their case by selecting the

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<sup>27</sup> See, e.g., Brief of 61 Professors of Law & Economics as Amici Curiae in Support of Petitioner at 6, *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), available at 2017 WL 526928 (discussing how the concentration of cases in East Texas “has harmed the patent system”).

<sup>28</sup> 137 S. Ct. at 1517 (limiting venue in patent infringement suits against corporations to the district where the defendant (a) is incorporated or (b) has committed acts of infringement and has a regular and established place of business).

<sup>29</sup> DOCKET NAVIGATOR, 2018 YEAR IN REVIEW: PATENT LITIGATION SPECIAL REPORT 12.

<sup>30</sup> DOCKET NAVIGATOR, 2019 YEAR IN REVIEW: PATENT LITIGATION SPECIAL REPORT 15.

<sup>31</sup> UNIFIED PATENTS, Q2 2020 PATENT DISPUTE REPORT FIG. 3.

Waco Division (where he is the only sitting judge) from a drop-down menu on the court's electronic filing system.<sup>32</sup> Remarkably, after selecting the Waco Division when they file their complaint, plaintiffs don't actually have to litigate the case in Waco. Judge Albright will, as a matter of course, grant requests to transfer any case from the Western District's Waco Division to its Austin Division. But—crucially—rather than allowing the case to be reassigned to a judge who is actually based in Austin, Judge Albright keeps all of these transferred cases on his own docket.

This combination of judge shopping and transfer practice is not the only thing Judge Albright has done to attract patent cases. As we show below, he has evolved and expanded on tactics used successfully by judges in the Eastern District of Texas, including adopting a fast-track default case schedule (as illustrated by his urgency to go to trial in the midst of the COVID-19 pandemic), which, among other things, shields patents from post-issuance review at the Patent Office; refusing to transfer cases out of the Western District, even when litigation would be more convenient elsewhere; engaging in questionable interpretations of Supreme Court and Federal Circuit precedent on the crucial issue of patent eligibility; and, as the fictitious Craigslist ad at the outset of the article suggests, aggressively marketing the Western District of Texas as the ideal forum for patent litigation.<sup>33</sup>

To be sure, judicial expertise and experience can be valuable in patent cases,<sup>34</sup> and Judge Albright himself litigated numerous patent disputes before joining the federal bench.<sup>35</sup> But those benefits must be weighed against the costs of allowing a judge, acting entirely on his own, to curate a heavy patent docket. Those costs include: (1) undermining public confidence in the impartiality of the judiciary, (2) making the court an uneven playing field for litigants (particularly for non-NPEs),

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<sup>32</sup> Many federal judicial districts, like the Western District of Texas, are further divided into divisions. For more, see *infra* Part I.C.

<sup>33</sup> See *infra* Part II.C.

<sup>34</sup> See Rochelle Cooper Dreyfuss, *The Federal Circuit: A Case Study in Specialized Courts*, 64 N.Y.U. L. REV. 1, 13 (1989). But see David L. Schwartz, *Practice Makes Perfect? An Empirical Study of Claim Construction Reversal Rates in Patent Cases*, 107 MICH. L. REV. 223, 225-26 (2008) (finding that judges who frequently hear patent cases are reversed by the Federal Circuit at about the same rates as judges who rarely hear patent cases).

<sup>35</sup> For more on Judge Albright's background, see *infra* Part I.C.

and (3) sacrificing a diversity of viewpoints in setting patent law and in designing the procedural aspects of patent litigation.<sup>36</sup>

Surprisingly, the forum selling and judge shopping that's occurring in the West Texas is perfectly lawful: There is essentially no law governing how federal district courts may assign cases to individual judges. As this article explains, two small steps would go a long way toward fixing the problem. First, cases should be assigned randomly to all judges, or, at least a subset of multiple judges, sitting in a particular district. And, second, venue should be tied to a specific division within a district, not just to the district as a whole, as is the case under current law. These reforms would curb the ability of individual judges to successfully lobby for additional patent case filings while retaining some benefits of expertise, as patent cases will still tend to naturally cluster in certain judicial districts.<sup>37</sup>

This article describes and critiques the newest incarnation of court competition for patent cases in four parts. Part I provides background on theories of forum shopping, summarizes the doctrines governing forum selection in patent cases, and describes the rise and (partial) fall of the Eastern District of Texas as a successful court competitor for patent litigation. Part II documents the emergence of the Western District of Texas—and Judge Albright's courtroom in particular—as the new capital of American patent litigation. Part III identifies several reasons *why* the Western District is attractive to patent plaintiffs, and it argues that those mechanisms of court competition harm the patent system and the court system more generally. Part IV proposes two solutions to remedy those harms.

## I. FORUM SHOPPING IN AND COURT COMPETITION FOR PATENT CASES

To understand what is going on with patent cases in Texas, one must first understand why plaintiffs forum shop and how those incentives have enabled district judges to compete for patent cases. This part will describe theories of forum shopping, judge shopping, and court competition for litigants, outline the doctrines governing forum selection in patent cases, and examine the recent history of the Eastern District of Texas as a successful court competitor for patent disputes.

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<sup>36</sup> See Anderson, *supra* note 26, at 555.

<sup>37</sup> See Jeanne C. Fromer, *Patentography*, 85 N.Y.U. L. REV. 1444, 1449 (2010).

## A. Theory: Forum Shopping, Court Competition, and Judge Shopping

### 1. Forum Shopping

In the United States, the plaintiff generally has the right to choose the forum. In many disputes, there will be several courts in which the plaintiff might properly file.<sup>38</sup> But defendants also have a say. They can object to jurisdiction or venue.<sup>39</sup> Or they can ask the court to transfer the case to a more convenient forum.<sup>40</sup> Or they can file a declaratory judgment action, essentially flipping the script on the plaintiff.<sup>41</sup> Thus, for lawyers, forum shopping—attempting to have one’s case heard in the forum that offers the greatest odds of success<sup>42</sup>—is “a national legal pastime.”<sup>43</sup>

Courts generally tolerate forum shopping as an “inevitable” consequence of our federal system.<sup>44</sup> However, the Supreme Court has frowned on the practice at times. In *Erie Railroad Co. v. Tompkins*, the Court famously took a dim view of litigants shopping between state and federal courts for differing substantive law.<sup>45</sup> And lower courts have relied on the Supreme Court’s occasional disdain for forum shopping as a reason to refuse to hear certain cases, particularly when those cases might be more properly heard in another country.<sup>46</sup> But as long as forum shopping is permitted—and it generally is—litigants are more

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<sup>38</sup> See Kevin M. Clermont & Theodore Eisenberg, *Exorcising the Evil of Forum-Shopping*, 80 CORNELL L. REV. 1508, 1508 (1995).

<sup>39</sup> See *infra* Part I.B.

<sup>40</sup> See 28 U.S.C. § 1404(a).

<sup>41</sup> See *id.* § 2201(a).

<sup>42</sup> Lynn M. LoPucki & William C. Whitford, *Venue Choice and Forum Shopping in the Bankruptcy Reorganization of Large, Publicly Held Companies*, 1991 WIS. L. REV. 11, 14.

<sup>43</sup> J. Skelly Wright, *The Federal Courts and the Nature and Quality of State Law*, 13 WAYNE L. REV. 317, 333 (1967).

<sup>44</sup> See, e.g., *Shady Grove Orthopedic Associates v. Allstate Ins.*, 559 U.S. 393, 416 (2010) (“[D]ivergence from state law, with the attendant consequence of forum shopping, is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure.”); see also *Goad v. Celotex Corp.*, 831 F.2d 508, 512 n.12 (4th Cir. 1987) (“There is nothing inherently evil about forum-shopping.”).

<sup>45</sup> 304 U.S. 64, 74-75 (1938); see also *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (noting “discouragement of forum shopping” is one of the “twin aims” of *Erie*).

<sup>46</sup> See, e.g., *Iragorri v. United Techs. Corp.*, 274 F.3d 65, 72 (2nd Cir. 2001) (“[T]he more it appears that the plaintiff’s choice of a U.S. forum was motivated by forum-shopping reasons . . . the easier it becomes for the defendant to succeed on a forum non conveniens motion . . .”) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 (1981)).

than happy to participate. And they're right to do so: Empirical evidence indicates that plaintiffs win 58% of civil cases that remain in the plaintiff's selected forum but only 29% of cases the defendant successfully has transferred.<sup>47</sup>

Nearly all legal scholarship has treated forum shopping as a phenomenon that exists solely because of the actions of the parties to a case.<sup>48</sup> In the traditional account, forum shopping involves three steps: (1) determining which forums meet the prerequisites of jurisdiction and venue, (2) weighing the benefits and drawbacks of each forum, and (3) filing suit in the forum that yields the greatest likelihood of a favorable outcome.<sup>49</sup>

## 2. Court Competition

In the past decade, however, scholars have begun looking beyond plaintiffs and defendants for the genesis of forum shopping. These scholars, following the pathmarking work of Lynn LoPucki<sup>50</sup> and Friedrich Juenger,<sup>51</sup> have identified courts that purposely attract plaintiffs to their courtrooms by altering their procedures and case schedules in a plaintiff-friendly manner. This "court competition" complicates the traditional forum shopping story by introducing a new actor: judges themselves.

Why would a court seek certain litigants? We've each written about this previously,<sup>52</sup> but, in short, it involves the individual incentives for judges and the institutional incentives of the courts they sit on. Judges might, for example, prefer patent cases to other types of cases,<sup>53</sup> seek

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<sup>47</sup> Clermont & Eisenberg, *supra* note 38, at 1511-12.

<sup>48</sup> See, e.g., Bassett, *supra* note 15, at 379 ("The players in forum shopping include the plaintiff(s) and counsel, the defendant(s) and counsel, and any anticipated additional participants.").

<sup>49</sup> See, e.g., Clermont & Eisenberg, *supra* note 38, at 1508; Bassett, *supra* note 15, at 382.

<sup>50</sup> LOPUCKI, *supra* note 16 (studying bankruptcy cases).

<sup>51</sup> Juenger, *supra* note 14 (studying international law).

<sup>52</sup> See Anderson, *supra* note 17; Paul R. Gugliuzza, *The Federal Circuit as a Federal Court*, 54 WM. & MARY L. REV. 1791, 1853 (2013).

<sup>53</sup> See, e.g., Tim McGlone, *Resigning Judge Says He Was Tired of Drug and Gun Cases*, PILOTONLINE.COM (Feb. 14, 2008), <http://hamptonroads.com/2008/02/resigning-judge-says-he-was-tired-drug-and-gun-cases> (reporting that U.S. District Judge Walter D. Kelley Jr. enjoyed complex patent cases more than drug and gun cases).

increased prestige from being recognized as a “patent judge,”<sup>54</sup> or be interested in the post-judicial careers open to judges who have handled large amounts of patent litigation.<sup>55</sup> Additional motivation may come from the local communities in which judges reside. Local bar associations may push judges to bring more cases to the district.<sup>56</sup> Judges may recognize the benefit that bringing cases to the district will have on the local economy.<sup>57</sup> Additional cases can also lead to additional resources for the district. When the Eastern District of Texas began to receive large amounts of patent cases, its courtrooms were renovated.<sup>58</sup> Other benefits include additional judgeships for the district,<sup>59</sup> increased

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<sup>54</sup> See RICHARD A. POSNER, *THE FEDERAL COURTS: CHALLENGE AND REFORM* 13-14 (1999) (arguing that “prestige is unquestionably an element of the judicial utility function” but suggesting that “there is little an individual judge can do to enhance his prestige as a judge”).

<sup>55</sup> Judge T. John Ward, for example, retired from the Eastern District of Texas in 2011 and is now a partner of his own firm. See T. John Ward, Ward & Smith, <http://www.wsfirm.com/attorneys/t-john-ward>. Judge David Folsom retired from the Eastern District of Texas in 2012 and is now a partner at Jackson Walker, specializing in intellectual property cases. See David Folsom, Jackson Walker LLP, [http://www.jw.com/David\\_Folsom](http://www.jw.com/David_Folsom). And Judge Joseph Farnan of the District of Delaware retired from the bench in 2010 and started a law firm with his sons; he lists his specialty as “patent litigation and consulting.” See Joseph J. Farnan, Jr., Farnan LLP, <http://www.farnanlaw.com/Joe-Farnan-Bio.html>.

<sup>56</sup> For instance, in the Western District of Pennsylvania, the district’s selection for the Patent Pilot Program, under which a subset of the district’s judges can choose to specialize in patent cases, Pub. L. No. 111-349, 124 Stat. 3674 (2011), was seen by both judges and the local patent bar as an opportunity to increase the ability to compete for “out of state” patent cases. See Anderson, *supra* note 17, nn.163-64.

<sup>57</sup> See Molly Hensley-Clancy, *U.S. District Court of Western Pennsylvania Attracts Patent Cases*, PITTSBURGH POST-GAZETTE (July 23, 2012, 4:00 AM), <http://www.post-gazette.com/business/legal/2012/07/23/U-S-District-Court-of-Western-Pennsylvania-attracts-patent-cases> (predicting that the increase in patent cases will bring more work for local patent attorneys and that larger firms may also establish local offices); Dick Dahl, *IP Plaintiffs Flocking to Small Town in Eastern Texas*, ST. LOUIS DAILY REC., June 6, 2006 (“[T]he steady pace of out-of-town-lawyers—who often arrive in large numbers for a high-stakes trial—has created a regular flow of money into [Marshall, Texas].”).

<sup>58</sup> Xuan-Thao Nguyen, *Justice Scalia’s “Renegade Jurisdiction”: Lessons for Patent Law Reform*, 83 TUL. L. REV. 111, 142, n.153 (2008).

<sup>59</sup> See, e.g., Testimony of Hon. Timothy M. Tymkovich, Chair, Committee on Judicial Resources of Judicial Conf. of the United States, Before the Subcommittee on Bankruptcy and the Courts, Committee on the Judiciary of the U.S. Senate (Sept. 10, 2013), <https://www.uscourts.gov/sites/default/files/judge-tymkovich-testimony.pdf> (recommending 91 new federal judgeships, noting that “each of these judgeship recommendations is justified due to the growing workload in these courts”).

funding,<sup>60</sup> and additional court personnel, including magistrate judges.<sup>61</sup>

Judges who want to attract certain types of cases do so, by and large, by establishing procedural rules, administrative processes, and informal norms of case management that are both plaintiff friendly and predictable *ex ante*.<sup>62</sup> The court can communicate its interest to the parties choosing the forum in several ways. First, the court can codify its practices into local procedural rules. Second, word-of-mouth between attorneys can convey the court's interest and advantages to other litigants—practitioner publications are filled with suggestions of courts that are ideal for certain types of cases.<sup>63</sup> Lastly, judges and courts can explicitly advertise their interest in certain types of cases. While this last method may seem unlikely (and uncouth), it is increasingly common in patent litigation, as we show below.<sup>64</sup>

Patent disputes provide an ideal opportunity to observe court competition because, for at least three reasons, litigants shouldn't have much to forum shop for. First, patent infringement cases can't be filed in state court—they can only be filed in federal court.<sup>65</sup> Exclusive federal jurisdiction eliminates numerous forum options plaintiffs might otherwise shop among. Second, substantive law in patent cases, as well as procedural law on matters “pertain[ing]” to patent law, is governed nationwide by the precedent of the U.S. Court of Appeals for the Federal

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<sup>60</sup> See, e.g., Letter from Hon. B. Lynn Winmill, Chief Dist. Judge, Dist. of Idaho, to Senator Mike Crapo et al. 1 (Aug. 15, 2013), <http://www.judgingtheenvironment.org/library/letters/New-judgeships-ID-J-Winmill-Myers-8-15-13.pdf> (“[T]he formula for allocating funds to the district [courts] is driven, in large part, by the number of judicial officers in each district.”).

<sup>61</sup> See WOLF HEYDEBRAND & CARROLL SERON, *RATIONALIZING JUSTICE: THE POLITICAL ECONOMY OF FEDERAL DISTRICT COURTS* 94 (1990) (“[T]he size of the court's total personnel resources is explained, in large part, by the combined effect of the governmental sector . . . and civil filings . . .”).

<sup>62</sup> See, e.g., Brian J. Love & James Yoon, *Predictably Expensive: A Critical Look at Patent Litigation in the Eastern District of Texas*, 2017 STAN. TECH. L. REV. 1, 5 (“[W]hat makes the Eastern District so attractive to patent plaintiffs is the accumulated effect of several marginal advantages, particularly with respect to the timing and success rate of important pretrial events. To borrow a shopworn phrase, the devil is in the details—specifically the nitty gritty details of seemingly mundane procedural choices, like the relative timing of discovery deadlines, transfer decisions, and claim construction.”).

<sup>63</sup> See, e.g., Mark A. Lemley, *Where to File Your Patent Case*, 38 AIPLA Q.J. 401, 403-04 (2010).

<sup>64</sup> See *infra* Part II.C.

<sup>65</sup> See 28 U.S.C. § 1338(a).

Circuit,<sup>66</sup> which eliminates a key incentive for plaintiffs to shop among various district courts or regional circuits. Finally, patent litigants are bound by the same set of procedural rules—the Federal Rules of Civil Procedure—regardless of the district in which they file suit.

### 3. Judge Shopping

So, what's left to shop for when we have cases that can't be filed in state court, uniform substantive law, and procedural rules that apply nationwide? Quite a lot, it turns out.

One aspect of court competition that has proven to be especially popular with plaintiffs, in patent cases in particular, is the ability to judge shop—that is, the ability to select not just a specific court but a specific judge.<sup>67</sup> Though forum shopping is viewed as a natural consequence of a federal system, the academic literature has adopted a dim view of judge shopping.<sup>68</sup> The legal system shares this disdain; there are many examples of attorneys being sanctioned because their actions were construed as attempts to manipulate the system in order to receive a more favorable judge.<sup>69</sup>

Though most district courts have instituted some sort of random procedure for assigning cases to judges,<sup>70</sup> there is no law that requires them to do so. And, in many districts with randomization procedures, there is a way for plaintiffs to work around them.<sup>71</sup> The ability to know the judge before filing is valuable to plaintiffs—even more valuable than

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<sup>66</sup> *In re Spalding Sports Worldwide, Inc.*, 203 F.3d 800, 803 (Fed. Cir. 2000). The Federal Circuit does not apply its own law to issues that are not unique to patent law yet may be present in a patent case (such as contract interpretation). But, in most cases, those nonpatent issues do not guide the choice of forum. See Jennifer Sturiale, *A Balanced Consideration of the Federal Circuit's Choice of Law Rule*, 2020 UTAH L. REV. 475, 515-17.

<sup>67</sup> See Alex Botoman, *Divisional Judge-Shopping*, 49 COLUM. HUMAN RIGHTS L. REV. 297, 319 (2018).

<sup>68</sup> See, e.g., Theodore Eisenberg & Lynn M. LoPucki, *Shopping for Judges: An Empirical Analysis of Venue Choice in Large Chapter 11 Reorganizations*, 84 CORNELL L. REV. 967, 971 (1999) (stating that “judge shopping . . . has received universal condemnation”).

<sup>69</sup> See, e.g., *No Judge Shopping Allowed*, 19 NAT'L L.J., May 5, 1997, at A8 (sanctioning an attorney for filing thirteen lawsuits for Dr. Jack Kevorkian and withdrawing all but one to secure a favorable judge).

<sup>70</sup> See Botoman, *supra* note 67, at 311.

<sup>71</sup> *Id.* at 317-20.



shopping for a forum.<sup>72</sup> For example, Lynn LoPucki has documented how, in the late 1980s, the District of Delaware and the Southern District of New York engaged in competition for bankruptcy cases.<sup>73</sup> Delaware ultimately emerged victorious, with around 90% of large company bankruptcy filings. Part of the attraction of Delaware, according to LoPucki, was the ability to know one's judge beforehand. In Delaware's one-judge bankruptcy court, there was no guess work about which judge would be assigned to a case; the Southern District of New York, by contrast, employed the traditional "wheel" randomization method.<sup>74</sup>

#### 4. The Harm from Court Competition

Forum shopping by parties, though tolerated by the legal system, raises three normative concerns. The first is about non-uniformity in decisionmaking. If one court is more plaintiff-friendly than another, selecting the plaintiff-friendly forum will lead to greater likelihood of success. In an ideal system, however, outcomes are based on the merits of the underlying case, not where that case is brought. Second, forum shopping leads to procedural inefficiencies. Litigants must spend time and money disputing jurisdiction, venue, removal, transfer, and dismissal, instead of litigating the merits of their case. Courts must then resolve those issues and write opinions justifying their decisions. Finally, forum shopping can lead to uneven enforcement of rights—similar cases reaching different results—which makes the legal system appear unjust and arbitrary, tarnishing the public's perception of the courts.<sup>75</sup>

Though forum shopping is to some extent inevitable, court competition among judges amplifies these concerns. First, to compete for litigants, courts must adopt rules or procedures or make rulings that blatantly benefit plaintiffs, who choose the forum. Second, court competition can add inefficiencies to the judicial process when judges make case management decisions for the purpose of attracting future litigants—not to end the case accurately and at the lowest cost possible. Finally, questions of judicial neutrality are inevitable when courts are

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<sup>72</sup> Andrei Iancu & Jay Chang, *Real Reasons the Eastern District of Texas Draws Patent Cases - Beyond Lore and Anecdote*, 14 SMU SCI. & TECH. L. REV. 299, 311 (2011) (stating that judge assignment is "one of the most important factors" to litigants).

<sup>73</sup> LOPUCKI, *supra* note 16, at 15.

<sup>74</sup> *Id.* at 30.

<sup>75</sup> See Kimberly A. Moore, *Forum Shopping in Patent Cases: Does Geographic Choice Affect Innovation?*, 79 N.C. L. REV. 889, 924 (2001).

actively courting litigants. Both the public and potential defendants are likely to disapprove of judges publicly encouraging litigants to file in their courtrooms. This undermines perceptions about the fairness of litigation.

### B. Doctrine: Jurisdictional Rules and the Patent Venue Statute

With those theoretical underpinnings in mind, we can now examine the law that governs forum choice in patent litigation. Three requirements are key: subject matter jurisdiction, personal jurisdiction, and venue.

Subject matter jurisdiction in patent infringement suits is simple: those suits, as noted, must be filed in federal court, not state court. By statute, the federal courts have exclusive jurisdiction over all cases “arising under” patent law.<sup>76</sup>

Personal jurisdiction is also straightforward in most patent infringement disputes for two reasons. First, the Federal Circuit has taken a broad view of when a patent infringement defendant creates the required “minimum contacts”<sup>77</sup> with a particular state, holding that jurisdiction exists any time the defendant’s allegedly infringing products travel to that state through the so-called stream of commerce.<sup>78</sup> For example, in the leading Federal Circuit decision, a defendant incorporated in China and manufacturing ceiling fans in Taiwan could be sued in Virginia because it sold the fans to a distributor based in New Jersey and the fans ended up being sold at home improvement stores in Virginia.<sup>79</sup>

A second reason personal jurisdiction is straightforward in most patent infringement suits is that a (sometimes overlooked) federal statute on service of process in patent cases, 28 U.S.C. § 1694, states,

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<sup>76</sup> 28 U.S.C. § 1338(a).

<sup>77</sup> *Int’l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945).

<sup>78</sup> Though patent infringement cases may be filed in federal court exclusively, the defendant’s contacts with a particular state remain relevant because the Federal Rules of Civil Procedure tie the federal courts’ personal jurisdiction to the personal jurisdiction of the courts of the state in which they are sitting. *See* FED. R. CIV. P. 4(k)(1)(A).

<sup>79</sup> *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1564 (Fed. Cir. 1994). The Supreme Court, it’s worth noting, has twice attempted to decide whether similar stream-of-commerce fact patterns establish personal jurisdiction in the state where a product ultimately causes injury but produced a majority opinion on neither occasion. *See J. McIntyre Mach., Ltd. v. Nicastro*, 564 U.S. 873, 876 (2011); *Asahi Metal Indus. Co. v. Superior Court*, 480 U.S. 102, 105 (1987).

essentially, that if the defendant is not a “resident” of the district in which the suit is filed but has a “regular and established place of business” there, personal jurisdiction can be established by serving process on the defendant’s “agent . . . conducting such business.”<sup>80</sup> What that statute means, as will be clear shortly, is that personal jurisdiction exists in a patent infringement suit in any district in which venue is proper—the third, final, and most controversial doctrine governing forum choice in patent infringement litigation.

The modern statute governing venue in patent cases, codified at 28 U.S.C. § 1400(b), dates back to 1897.<sup>81</sup> It provides—echoing the language of § 1694—that venue over a patent infringement suit is proper in the judicial district (a) “where the defendant resides” or (b) “where the defendant has committed acts of infringement and has a regular and established place of business.”<sup>82</sup> For the better part of a century, it was clear from the Supreme Court’s 1952 ruling in *Fourco Glass Co. v. Transmirra Products Corp.* that, for the purpose of the patent venue statute, a corporate defendant “reside[d]” only in its state of incorporation,<sup>83</sup> meaning that it could be sued for patent infringement only in (a) its state of incorporation or (b) a state where it had committed acts of infringement and had a regular and established place of business.<sup>84</sup>

In 1988, however, Congress amended the general venue statute, 28 U.S.C. § 1391, to provide that “[f]or purposes of venue under this chapter”—which includes the patent venue statute, § 1400(b)—“a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction.”<sup>85</sup> In 1990, the Federal Circuit held, in *VE Holding v. Johnson Gas Appliance Co.*, that

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<sup>80</sup> 28 U.S.C. § 1694. Though personal jurisdiction in federal court is often tied to the jurisdiction of the local state courts, *see supra* note 78, Congress can also, through a statute such as § 1694, confer personal jurisdiction on the federal courts over particular types of cases, *see* FED. R. CIV. P. 4(k)(1)(C).

<sup>81</sup> For a summary of patent venue statute’s history, *see* Paul R. Gugliuzza & Megan M. La Belle, *The Patently Unexceptional Venue Statute*, 66 AM. U. L. REV. 1027, 1035-40 (2017).

<sup>82</sup> 28 U.S.C. § 1400(b).

<sup>83</sup> 353 U.S. 222, 228 (1952).

<sup>84</sup> *See* *Stonite Prod. Co. v. Melvin Lloyd Co.*, 315 U.S. 561, 563 (1942) (holding that “Section 48 [of the Judicial Code]”—the section in which § 1400(b) was previously codified—“is the exclusive provision controlling venue in patent infringement proceedings”).

<sup>85</sup> 28 U.S.C. § 1391(c) (1988).

this new definition of corporate residence applied to patent cases.<sup>86</sup> Consequently, a corporation could be sued for patent infringement, under the “residence” prong of § 1400(b), in any judicial district in which it was subject to personal jurisdiction.<sup>87</sup> Given the Federal Circuit’s broad conception of personal jurisdiction, *VE Holding* meant that large corporate defendants could be sued in practically any district in the country. Court competition for patent cases quickly commenced.

### C. History: The Rise and (Partial Fall) of the Eastern District of Texas

Marshall is a Texas town of about 24,000 people located twenty miles from the Louisiana border. It sits on the edge of an oil reservoir that has been fraught with royalty battles, creating a jury pool with a strong sentiment for property rights. The town doesn’t have a U.S. attorney’s office or an FBI office, which makes the criminal docket light. Marshall could fairly be described as a sleepy legal town. Until the patent litigators came along.<sup>88</sup>

The Eastern District of Texas began its rise as a hub for patent cases in the mid-1990s when Texas Instruments began filing infringement suits there to avoid the crowded docket in the Northern District of Texas, which includes the company’s home of Dallas.<sup>89</sup> In 1999, Judge T. John Ward was sworn in as the federal district judge in Marshall. Having focused his practice mainly on products liability and malpractice litigation, Judge Ward seemed like an unlikely booster of patent law in East Texas. But, soon after the Northern District of California adopted the first set of patent local rules in the country, Judge Ward began following a similar set of procedural rules in his courtroom.<sup>90</sup> The rules helped Judge Ward move through patent cases quickly, and the Eastern District became known as a patent “rocket docket.”<sup>91</sup>

Marshall became a patent litigation hotbed. In 2002, only 32 patent lawsuits were filed in the Eastern District.<sup>92</sup> That number increased to

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<sup>86</sup> 917 F.2d 1574, 1575 (Fed. Cir. 1990).

<sup>87</sup> *Id.*

<sup>88</sup> For background on Marshall and its federal court, see generally Loren Steffy, *Patently Unfair*, TEXAS MONTHLY (Sept. 15, 2014), available at <https://www.texasmonthly.com/politics/patently-unfair>.

<sup>89</sup> See Timothy T. Hsieh, *Approximating a Federal Patent District Court After TC Heartland*, 13 WASH. J.L. TECH. & ARTS 141, 146 (2018).

<sup>90</sup> *Id.* at 146-47.

<sup>91</sup> See *id.* at 147.

<sup>92</sup> See Creswell, *supra* note 23.

more than 200 in 2006.<sup>93</sup> “Patent trolls” or “nonpracticing entities” (NPEs) came to favor the Eastern District of Texas due to the rapid speed cases proceeded toward trial, the property rights-favoring jury pool, and their win rate.<sup>94</sup> In 2006, the *New York Times* reported that patent plaintiffs in Marshall won at trial seventy-eight percent of the time. NPEs have continued to favor filing in the Eastern District; more than ninety percent of filings in recent years were filed by entities that could be characterized as NPEs.<sup>95</sup>

In 2011, Judge Ward retired and Judge Rodney Gilstrap took his place in Marshall. Before Judge Gilstrap took the bench, the Eastern District was already the most popular venue for patent litigation in the country, receiving nearly 300 cases in 2010. Judge Gilstrap adopted practices unique to his courtroom that made it even more appealing for patent plaintiffs, such as requiring defendants to file a request before moving for summary judgment or seeking to invalidate a patent the ground that it did not claim patent-eligible subject matter.<sup>96</sup> He also started and ended discovery earlier than other popular venues for patent cases, which meant that defendants began to incur litigation expenses sooner—and thus felt more pressure to settle—than in other districts.<sup>97</sup>

But the innovation that most attracted the attention of patent plaintiffs was Marshall’s unique divisional case assignment practice, which enabled judge shopping.<sup>98</sup> Some background: Each of the ninety-four federal judicial districts across the country are divided from each other by some geographic boundary—some judicial districts encompass an entire state (such as the District of Utah<sup>99</sup>), other states are divided into multiple judicial districts (such as Oklahoma, which contains a Northern, Eastern, and Western District<sup>100</sup>). Most federal district courts are further divided further into divisions. The Eastern District

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<sup>93</sup> *Id.*

<sup>94</sup> See Hsieh, *supra* note 89, at 147.

<sup>95</sup> Love & Yoon, *supra* note 62, at 12.

<sup>96</sup> Harper Bates, *Judge Gilstrap Removes Letter Briefing Requirement for Summary Judgment Motions in Patent Cases* (July 25, 2016), <https://www.harperbates.com/news/judge-gilstrap-removes-letter-briefing-requirement-for-summary-judgment-motions-in-patent-cases>.

<sup>97</sup> See Love & Yoon, *supra* note 62, at 21.

<sup>98</sup> Anderson, *supra* note 26.

<sup>99</sup> 28 U.S.C. § 125.

<sup>100</sup> *Id.* § 116.

of Texas, for example, contains six divisions, headquartered in Marshall, Lufkin, Beaumont, Sherman, Texarkana, and Tyler.<sup>101</sup>

Though federal district judgeships are, by statute, allocated to individual judicial districts, most judges in multi-division districts are, as a matter of internal court administration, assigned to a specific division. For instance, in the Eastern District of Texas, Chief Judge Gilstrap's "duty station" is Marshall; the other seven active judges (and three senior judges) have duty stations that cover the other divisions in the district. As for assigning cases among the judges in a district, the only statute on point, 28 U.S.C. § 137, requires simply that cases "shall be divided among the judges as provided by the rules and orders of the court."<sup>102</sup> Thus, district courts have "broad discretion to assign cases as they see fit."<sup>103</sup>

Cases filed in the Eastern District of Texas are, under a general order issued by the court, assigned randomly. Crucially, however, the random assignment is not among all the judges in the district *but among the judges in the division in which the case is filed*.<sup>104</sup> This means that a case filed in the Tyler Division, for example, is randomly assigned—but only among the two judges based there, Judge Barker and Judge Kernodle. Furthermore, the court singles out particular types of cases for special treatment. According to the most recent general order, the Eastern District assigns 100% of patent cases filed in the Marshall Division to one judge: Judge Gilstrap.<sup>105</sup>

This divisional assignment process makes judge shopping easy. Plaintiffs can select Judge Gilstrap by simply filing their case in Marshall, which entails nothing more than selecting "Marshall" from a drop-down menu on the court's electronic filing system.<sup>106</sup> And plaintiffs often select Marshall for their patent cases. Between 2013 and 2017, over 5,000 patent disputes were filed in Judge Gilstrap's court. Division-

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<sup>101</sup> *Id.* § 124(c).

<sup>102</sup> *Id.* § 137(a).

<sup>103</sup> Katherine A. Macfarlane, *The Danger of Nonrandom Case Assignment: How the Southern District of New York's "Related Cases" Rule Shaped Stop-and-Frisk Rulings*, 19 MICH. J. RACE & L. 199, 209 (2014).

<sup>104</sup> See U.S. District Court for the Eastern District of Texas, General Order 19-13 (Aug. 26, 2019), <http://www.txed.uscourts.gov/sites/default/files/goFiles/GO-19-13.pdf>.

<sup>105</sup> *Id.*

<sup>106</sup> Klerman & Reilly, *supra* note 19, at 255.

driven judge-shopping is, in short, how the Eastern District of Texas placed so many patent cases before one judge.<sup>107</sup>

But judge shopping was not the only attraction of the Eastern District of Texas for patent plaintiffs. Its patent local rules set an aggressive, plaintiff-friendly schedule. And cases were much more likely to get past summary judgment and to trial in the Eastern District of Texas. For instance, from 2014 through 2016, the court granted only 18% of summary judgment motions filed by defendants, barely half the grant rate other districts.

**Table 1: Defendants' Motion for Summary Judgment (Jan. 2014-June 2016)<sup>108</sup>**

	<b>Total Number of SJ Motions</b>	<b>% Granted<sup>109</sup></b>	<b>% Denied</b>	<b>Median Days to SJ Decision</b>
E.D. Tex.	227	17.6%	59.5%	1053
D. Del.	243	32.1%	38.7%	969
N.D. Cal.	163	33.7%	44.2%	694

Furthermore, the Eastern District of Texas was reluctant to transfer cases to other district courts, granting less than half of the motions it decided from 2014 through 2016—a low rate considering the court's rural location. Also, when the court did grant transfer motions, it took much longer to do so than most other courts; over 200 days longer on average than the Northern District of California.

<sup>107</sup> From 2014 through 2019, Judge Gilstrap received 67% of the patent cases filed in the Eastern District of Texas and Judge Schroeder received 27%. Plaintiffs may also shop for Judge Schroeder; he receives 100% of the civil cases filed in the Texarkana division. *See* General Order 19-13, *supra* note 104.

<sup>108</sup> Love and Yoon, *supra* note 62, at 18, tbl. 6.

<sup>109</sup> The percentage granted and the percentage denied do not add up to 100% because some motions are partially granted, partially denied, or some other outcome. These motions are excluded from the table.

**Table 2: Patent Case Motions to Transfer (Jan. 2014-Jun 2016)<sup>110</sup>**

	Total Number of Transfer Motions	% Granted	% Denied	Median Days to Transfer
E.D. Tex.	346	47.4%	44.5%	340
D. Del.	92	52.2%	35.9%	286
N.D. Cal.	26	50%	42.3%	137

The Eastern District was also more reluctant than its peer districts to stay a case pending administrative review of patent validity at the Patent Office.<sup>111</sup> From 2013 through 2016, the Eastern District granted only about forty percent of stay motions; the Northern District of California, another popular venue for patent cases, granted nearly seventy percent.<sup>112</sup>

The Eastern District's reign as the undisputed capital of U.S. patent litigation concluded with the Supreme Court's 2017 decision in *TC Heartland*. In that case, the Court overturned the Federal Circuit's 1990 ruling in *VE Holding*, which held that venue was proper in a patent infringement case in any district the defendant was subject to personal jurisdiction.<sup>113</sup> Instead, the Supreme Court reiterated its prior precedent holding that, for the purpose of the patent venue statute, "a domestic corporation 'resides' only in its State of incorporation."<sup>114</sup>

Accordingly, today, venue in patent infringement suits against domestic corporations<sup>115</sup> is proper only in (1) the defendant's state of incorporation and (2) any district in which the defendant has committed acts of infringement and has a regular and established place of business.

<sup>110</sup> These numbers were taken from Love & Yoon, *supra* note 62, at 17, tbl. 5.

<sup>111</sup> Douglas B. Wentzel, *Stays Pending Inter Partes Review: Not in the Eastern District of Texas*, 98 J. PAT. & TRADEMARK OFF. SOC'Y 120 (2016) ("Through August 2015, the Eastern District of Texas had the lowest grant rate of stays pending IPR outcome in the nation.").

<sup>112</sup> Paul R. Gugliuzza, *(In)valid Patents*, 92 NOTRE DAME L. REV. 271, 287 (2016).

<sup>113</sup> *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1517 (2017).

<sup>114</sup> *Id.* (citing *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222, 228 (1952)).

<sup>115</sup> Foreign defendants may be sued for patent infringement in any district. See 28 U.S.C. § 1391(c)(3); *In re HTC Corp.*, 889 F.3d 1349, 1354 (Fed. Cir. 2018) (applying § 1391(c)(3) to patent infringement cases).



Since *TC Heartland*, the Federal Circuit has interpreted both of these options narrowly. For instance, in cases involving defendants that are incorporated in a state that contains multiple judicial districts (such as Texas, which includes a Northern, Southern, Eastern, and Western District), the Federal Circuit has held that venue is not proper in *every* district in that state.<sup>116</sup> Rather, venue is proper only in (a) the district in which the defendant maintains its principal place of business, if its principal place of business is in that state, or (b) “the district in which [the defendant’s] registered office, as recorded in its corporate filings, is located.”<sup>117</sup> The Federal Circuit has also issued several opinions outlining the activities that constitute “a regular and established place of business” and hence establish venue under the second option of § 1400(b). Those opinions emphasize that the defendant’s presence in the district must be “steady, uniform, orderly, and methodical,”<sup>118</sup> that the defendant must have an employee or agent in the district (not merely a contractor or equipment),<sup>119</sup> and that the place of business must be *the defendant’s* (not, for example, the home of an employee who works remotely).<sup>120</sup>

These restrictions on venue have significantly decreased the amount of patent litigation filed in the Eastern District of Texas. While the Eastern District was receiving nearly 50% of the patent cases nationally before *TC Heartland*, in 2018 it received about 14% (505 cases) and in 2019 it received about 9% (333). That’s still a large number. The 333 cases in 2019 ranked the Eastern District third nationally (behind the District of Delaware and the Central District of California). But it’s far off the high-water mark of 2,544 cases in 2015. Figure 1 below shows the annual patent case filings in the Eastern District of Texas since 2012 the percentage of the U.S. patent cases filed in East Texas over the same time period.

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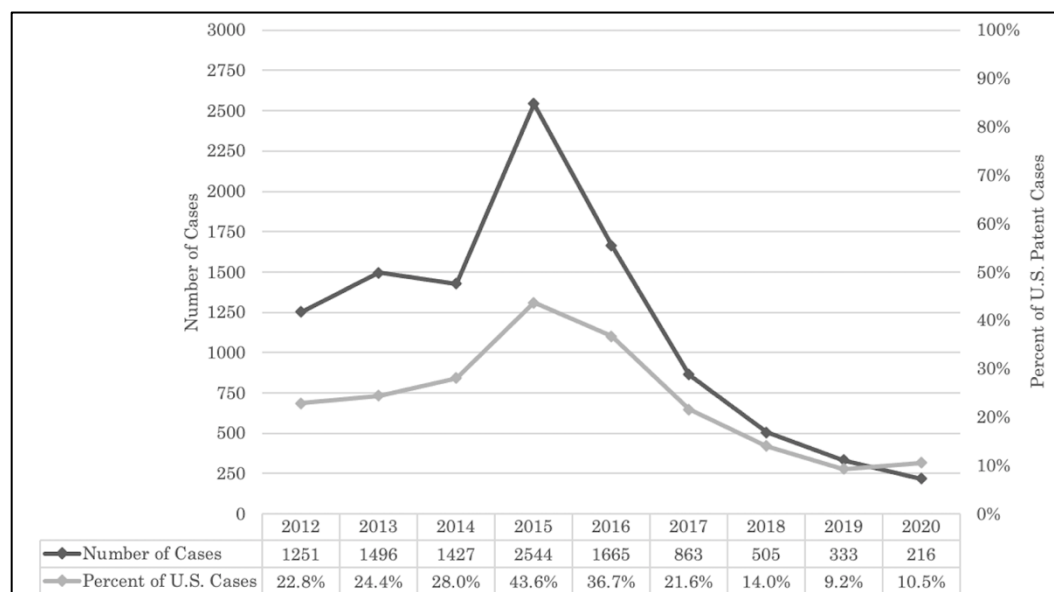
<sup>116</sup> *In re BigCommerce, Inc.*, 889 F.3d 1349, 982 (Fed. Cir. 2018).

<sup>117</sup> *Id.* at 986.

<sup>118</sup> *In re Cray Inc.*, 871 F.3d 1355, 1362 (Fed. Cir. 2017).

<sup>119</sup> *In re Google LLC*, 949 F.3d 1338, 1344 (Fed. Cir. 2020).

<sup>120</sup> *Cray*, 871 F.3d at 1365.

**Figure 1: Patent Case Filings in the Eastern District of Texas**

This is not to say that the attractiveness of the Eastern District of Texas for patent plaintiffs has lessened; rather, establishing venue has become more difficult. Motions to transfer venue out of the Eastern District are now much more successful than they were before *TC Heartland*.<sup>121</sup> And when the judges of the Eastern District of Texas have tried to keep cases in the district, they have repeatedly been rebuffed by the Federal Circuit.<sup>122</sup>

Faced with an uphill climb to establish venue in East Texas, plaintiffs must look elsewhere. Many plaintiffs are simply choosing a forum in which venue is firmly established—that explains the rise in popularity of the District of Delaware (the most popular state of incorporation).<sup>123</sup> But *TC Heartland*'s restrictions on venue have also,

<sup>121</sup> See Owen Byrd, *Patent Litigation Trends Three Months After T.C. Heartland*, LEXMACHINABLOG (Oct. 27, 2017) (finding that the Eastern District of Texas' transfer motion grant rate rose to 84% in the three months after *TC Heartland*), <https://lexmachina.com/patent-litigation-trends-in-the-three-months-after-t-c-heartland>.

<sup>122</sup> The Federal Circuit has, on at least four occasions since *TC Heartland*, issued mandamus petitions ordering judges in the Eastern District to transfer cases. See *In re Google LLC*, 949 F.3d 1338, 1344 (Fed. Cir. 2020); *In re HP Inc.*, No. 2018-149, 2018 WL 4692486, at \*1 (Fed. Cir. Sept. 25, 2018); *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1010 (Fed. Cir. 2018); *In re Cray Inc.*, 871 F.3d 1355, 1362 (Fed. Cir. 2017).

<sup>123</sup> See Ofer Eldar & Neel M. Sukhatme, *Will Delaware Be Different? An Empirical Study of TC Heartland and the Shift to Defendant Choice of Venue*, 104 CORNELL L. REV. 101, 122-24 (2018).

as one of us predicted,<sup>124</sup> led to newcomers in the court competition for patent cases, such as the Western District of Texas.

## II. THE NEW EASTERN DISTRICT: THE WESTERN DISTRICT OF TEXAS

The Western District of Texas includes the high-tech hub of Austin. So, on first glance, the district's emergence as a popular venue for patent litigation seems more reasonable than Marshall's. But when you look a little closer, concerns emerge. First, most patent cases in the Western District are being filed not in Austin, but 100 miles away, in Waco. And almost all of those cases are being heard by one judge, Judge Alan Albright. To set the stage for a deep dive into how the Western District—and Judge Albright's courtroom in particular—has emerged as a patent litigation hotbed and why that's a problem, this part discusses the city, court, and judge at the center of the story.

### A. From East to West

Unlike its sleepy cousins to the east, the cities of the Western District of Texas are much larger. The Western District boasts San Antonio (population 1.493 million), Austin (population 964,254), and El Paso (population 682,669)—all of which dwarf the largest city in the Eastern District of Texas: the Dallas suburb of Plano (population 288,061), to say nothing of Marshall. In addition, the cities of the Western District have a more robust manufacturing and technology base than the cities of East Texas, including the booming tech hub of Austin, as well as the more industrial focused cities of El Paso and San Antonio.<sup>125</sup>

The Western District of Texas has several advantages over the Eastern District of Texas for patent plaintiffs. First among them is the presence of frequent patent infringement defendants conducting business in the Western District, which helps establish personal jurisdiction and venue. Austin, for example, is the headquarters of Dell Computers, one of the largest developers, sellers, and supporters of computers in the world.<sup>126</sup> Apple has about 7,000 employees in Austin and, in 2019, it broke ground on a \$1 billion dollar campus that will

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<sup>124</sup> See J. Jonas Anderson, *Reining in a 'Renegade Court': TC Heartland and the Eastern District of Texas*, 39 CARDOZO L. REV. 1569, 1610-13 (2018).

<sup>125</sup> See Austin Winstrom, *Austin No. 1 for Tech Salary Growth, Hired Report Finds*, AUSTIN BUSINESS JOURNAL (June 17, 2020).

<sup>126</sup> *Dell Releases New, Higher Headcount at HQ*, AUSTIN BUSINESS JOURNAL (July 18, 2018).

house up to 15,000 more.<sup>127</sup> Austin also has major campuses for IBM, Amazon, Google, Facebook, and many others, lending Austin the nickname of the “Silicon Hills.”<sup>128</sup> A recent analysis by CBRE, a commercial real estate firm, ranked Austin the sixth best city for technology jobs in the United States; nearby San Antonio ranked forty-seventh.<sup>129</sup> Even El Paso, in the far western reaches of the district, has several Silicon Valley startups that have opened offices recently.<sup>130</sup> All of this makes it easier for a plaintiff to show, as the patent venue statute requires, that the defendant both has committed an act of infringement and has a regular and established place of business in the Western District.<sup>131</sup>

In addition to proximity to technology companies, the Western District offers proximity to patent attorneys. Although Marshall has built a strong base of patent lawyers over the years,<sup>132</sup> most of the lawyers who argue in Marshall are based in a bigger city in Texas or out-of-state.<sup>133</sup> By contrast, many national law firms with strong patent practices have offices in Austin, including Baker Botts, DLA Piper, Wilson Sonsini, and Fish & Richardson.

Despite those advantages over the Eastern District, until very recently, the Western District had a relatively moderate docket of patent cases, receiving around fifty cases annually between 2012 and 2016. But, as Figure 2 below shows, that has changed dramatically the past

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<sup>127</sup> See Lisa Eadicicco, *Apple Details Plans to Build a \$1Billion Campus in Austin Ahead of Trump’s Visit to its Texas Factory*, BUSINESS INSIDER (Nov. 20, 2019), <https://www.businessinsider.com/apple-details-new-billion-campus-austin-texas-trump-factory-visit-2019-11>.

<sup>128</sup> See *Silicon Hills*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Silicon\\_Hills](https://en.wikipedia.org/wiki/Silicon_Hills).

<sup>129</sup> Madison Iszler, *Report: San Antonio’s Tech Workforce Small But Growing*, SAN ANTONIO EXPRESS-NEWS (July 18, 2019), available at <https://www.expressnews.com/business/technology/article/Report-San-Antonio-s-tech-workforce-small-but-14107958.php>.

<sup>130</sup> See e.g., Vic Kolenc, *Silicon Valley Startup to Open in Downtown El Paso Office Tower, Hire Workers*, EL PASO TIMES (Dec. 6, 2018) (<https://www.elpasotimes.com/story/money/business/2018/12/06/silicon-valley-startup-opening-office-el-paso-find-new-workers/2217508002> (chronicling Curacubby’s location in El Paso, its first employees outside of California)).

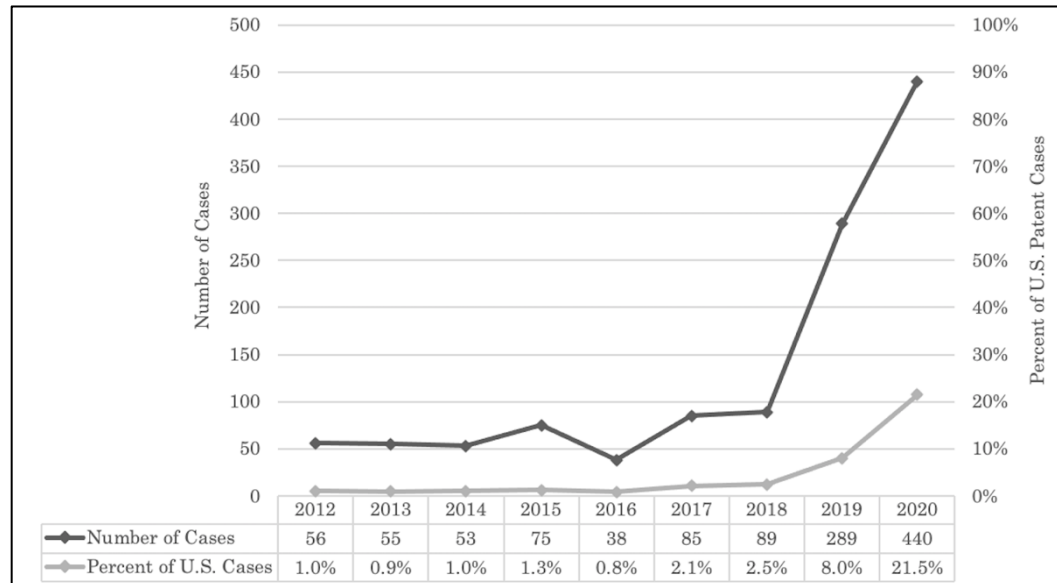
<sup>131</sup> See 28 U.S.C. § 1400(b).

<sup>132</sup> See Ronen Avraham & John M. Golden, *From PI to IP: Yet Another Unexpected Effect of Tort Reform*, 20 AM. L. & ECON. REV. 168 (2018).

<sup>133</sup> See Melissa Repko, *How Patent Suits Shaped a Small East Texas Town Before Supreme Court’s Ruling*, DALLAS MORNING NEWS, (May 23, 2017).

couple years—particularly when you consider that the 2020 numbers cover only half the year!

**Figure 2: Patent Case Filings in the Western District of Texas**



### B. Waco

Waco, Texas (population 124,805), on Interstate 35 halfway between Austin and Dallas, is small compared to the other cities in the Western District.<sup>134</sup> Waco's economy partially depends on crops and livestock, though manufacturing and service industry positions have enhanced its economic base.<sup>135</sup> Waco is perhaps best known as the home of Baylor University; slightly less so as the home of the Dr. Pepper Museum.<sup>136</sup> The home-renovation television show *Fixer Upper* films in Waco, too. And President George W. Bush's ranch, Prairie Chapel, is located in Crawford, about twenty-five miles west of town.<sup>137</sup>

Like the rest of the Western District, the Waco Division received few patent cases until recently. In 2016 and 2017, only two patent cases, total, were filed in Waco. But Waco's one-judge division has recently become the go-to court for patent plaintiffs. In 2019, 248 patent cases were filed there—a 24,800% increase over 2017's total of one. Already in

<sup>134</sup> *Waco, Texas*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Waco,\\_Texas](https://en.wikipedia.org/wiki/Waco,_Texas).

<sup>135</sup> *Waco*, ENCYCLOPEDIA BRITANNICA, <https://www.britannica.com/place/Waco>.

<sup>136</sup> Dr. Pepper Museum, <https://drpeppermuseum.com>.

<sup>137</sup> *Prairie Chapel Ranch*, WIKIPEDIA, [https://en.wikipedia.org/wiki/Prairie\\_Chapel\\_Ranch](https://en.wikipedia.org/wiki/Prairie_Chapel_Ranch).

2020 there have been over 400 patent cases filed in Waco. With half the year remaining, the Waco Division is poised to become the most popular court in the land for patent cases.

### C. Judge Alan Albright

Alan D Albright<sup>138</sup> was confirmed as a U.S. district judge by the Senate on September 6, 2018. In two years on the bench, Judge Albright has significantly increased patent case filings in Waco through a national recruitment tour, adopting patentee-friendly procedural rules based on input from local attorneys, and signaling patentee-friendly views through his decisions on the bench.<sup>139</sup>

Judge Albright was born in Hershey, Pennsylvania in 1959.<sup>140</sup> His parents moved to San Antonio when he was five, and he has lived in Texas ever since, graduating from Trinity University (in San Antonio) and the University of Texas at Austin School of Law.<sup>141</sup> Judge Albright began his legal career as a clerk to Senior Judge James Nowlin in the Western District of Texas.<sup>142</sup> He then worked for two firms over four years where he focused on general litigation and insurance bad faith claims<sup>143</sup> before becoming a federal magistrate judge in Austin in 1992.<sup>144</sup> Albright served as a magistrate from 1992 to 1999, presiding over pretrial phases of mostly criminal cases.<sup>145</sup>

Albright left the bench to work for various private firms in Austin,<sup>146</sup> most notably patent powerhouse Fish & Richardson and Houston-based

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<sup>138</sup> The lack of a period after the D isn't a mistake—D is Judge Albright's middle name, not an initial. See Alan D Albright, WIKIPEDIA, [https://en.wikipedia.org/wiki/Alan\\_D\\_Albright](https://en.wikipedia.org/wiki/Alan_D_Albright).

<sup>139</sup> See generally Tommy Witherspoon, *Waco Becoming Hotbed for Intellectual Property Cases with New Federal Judge*, WACO HERALD-TRIBUNE (Jan. 18, 2020), [https://www.wacotrib.com/news/local/waco-becoming-hotbed-for-intellectual-property-cases-with-new-federal-judge/article\\_0bcd75b0-07c5-5e70-b371-b20e059a3717.html](https://www.wacotrib.com/news/local/waco-becoming-hotbed-for-intellectual-property-cases-with-new-federal-judge/article_0bcd75b0-07c5-5e70-b371-b20e059a3717.html).

<sup>140</sup> U.S. Senate Committee on the Judiciary, Questionnaire for Judicial Nominees, <https://www.judiciary.senate.gov/imo/media/doc/Albright%20SJQ.pdf>.

<sup>141</sup> *Id.*

<sup>142</sup> See Witherspoon, *supra* note 139.

<sup>143</sup> Questionnaire for Judicial Nominees, *supra* note 140, at 32.

<sup>144</sup> *Id.* at 2.

<sup>145</sup> *Id.* at 14.

<sup>146</sup> *Id.* at 2, 32.

Bracewell LLP.<sup>147</sup> Albright represented large companies accused of infringement (Microsoft and Overstock.com were among his clients) as well as small biotech patentees.<sup>148</sup>

Immediately upon his appointment as a district judge in 2018, Judge Albright went on a media blitz, letting everyone know that his court would welcome patent litigation.<sup>149</sup> The *Waco Tribune-Herald* reported that Judge Albright “let it be known in no uncertain terms that he would like his Waco courtroom to become a hub for IP cases.”<sup>150</sup> He attended dinners for patent litigators and patent owners to extoll the virtues of trying patent cases in Waco.<sup>151</sup> Judge Albright stated that he took the position in Waco because he “thought it was the perfect place to try and establish a serious venue for sophisticated patent litigation.”<sup>152</sup> Most tellingly, he gave a presentation at the 2019 annual meeting of the American Intellectual Property Law Association titled, “Why You should File Your Next Patent Case Across the Street from the ‘Hey Sugar,’” referring to a candy store near his Waco courthouse.<sup>153</sup>

So far, Judge Albright’s efforts have been successful. Since he took the bench, more than 500 patent cases have been filed in the Waco, more than the division had received in its prior thirty-five years of existence.<sup>154</sup> These increased filings have had a ripple effect in Waco’s small legal community. Three patent-focused law firms have announced

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<sup>147</sup> *Albright, 8 Others Join Bracewell from Fish*, AUSTIN BUSINESS JOURNAL (Oct. 5, 2009) <https://www.bizjournals.com/austin/stories/2009/10/05/daily2.html>; see also *Former Federal Judge Brings IP Know-How Back to Bracewell*, LAW360 (June 2, 2015) (reporting on Albright’s return back to Bracewell from a year spent at Sutherland, Asbill, and Brennan LLP).

<sup>148</sup> See Questionnaire for Judicial Nominees, *supra* note 140, at 33-37.

<sup>149</sup> *Waco’s New Judge Primes District for Patent Growth*, LAW360 (Feb. 12, 2019) <https://www.law360.com/ip/articles/1128078/waco-s-new-judge-primes-district-for-patent-growth>.

<sup>150</sup> Witherspoon, *supra* note 139.

<sup>151</sup> See Scott Graham, *Skilled in the Art: How Far Can Judges Go in Touting Their Districts?*, LAW.COM (Sep. 3, 2019), <https://www.law.com/2019/09/03/skilled-in-the-art-viasat-demands-9m-in-fees-and-2-in-punitives-how-far-can-judges-go-in-touting-their-districts> (describing a dinner hosted by Ocean Tomo (a patent evaluation company) and featuring Judge Albright in which the judge “spread the word far and wide about how his Waco court would be a great place to try IP cases”).

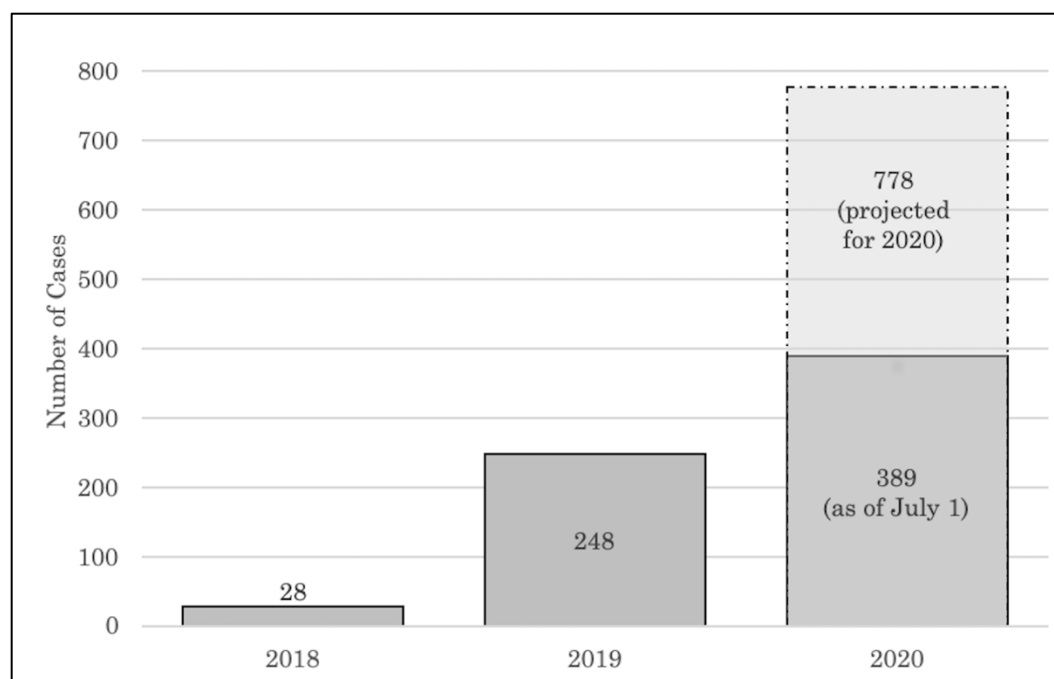
<sup>152</sup> *Id.*

<sup>153</sup> See Britain Eakin, *New West Texas Judge Wants His Patent Suits Fast and Clean*, LAW360 (Oct. 25, 2019), <https://www.law360.com/articles/1213867/new-west-texas-judge-wants-his-patent-suits-fast-and-clean>.

<sup>154</sup> Graham, *supra* note 152.

plans to open offices in Waco, including one firm that previously did not have an office in Texas.<sup>155</sup> Perhaps the surest sign of Waco's arrival on the patent scene is that there's now a blog dedicated solely to patent litigation in the Western District.<sup>156</sup> Figure 3 below quantifies Judge Albright's effect on patent filings in Waco.

**Figure 3: Patent Cases Filed in Waco Division**



To bring patent cases to Waco, Judge Albright adopted two orders designed to speed up the process of patent litigation, just as Judge Ward did in the Eastern District of Texas in the early 2000s: a general order governing patent proceedings (which covers matters such as discovery limits, protective orders, and the claim construction process)<sup>157</sup> and a

<sup>155</sup> See Tommy Witherspoon, *Waco, East Texas Law Firms Combine Forces for IP practice*, WACO TRIBUNE-HERALD (Mar. 16, 2019), [https://www.wacotrib.com/news/crime/waco-east-texas-law-firms-combine-forces-for-ip-practice/article\\_98220b4b-2f90-5b7e-bfb0-b76d3aa58b71.html](https://www.wacotrib.com/news/crime/waco-east-texas-law-firms-combine-forces-for-ip-practice/article_98220b4b-2f90-5b7e-bfb0-b76d3aa58b71.html).

<sup>156</sup> The Waco Patent Blog by Erick Robinson, <http://www.wacopatentblog.com>.

<sup>157</sup> Judge Alan Albright, Order Governing Proceedings – Patent Case (W.D. Tex. Feb. 26, 2020), <https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/Waco/Albright/Order%20Governing%20Proceedings%20-%20Patent%20Cases%20022620.pdf>. Claim construction is the process by which a court determines the precise scope of the patent and the meaning of its claims; it is generally viewed to be the most important event in any patent case. See generally *Phillips v. AWH Corp.*, 415 F.3d 1303, 1312 (Fed. Cir. 2005) (en banc) (articulating “the basic principles of claim construction”).



scheduling order for patent cases.<sup>158</sup> Judge Albright relied on lawyers to weigh in as he developed these orders.<sup>159</sup>

In less than two years, Judge Albright has transformed Waco from a forgotten corner of the Western District into one of the most powerful patent courts in the country. This transformation was not an accident; Judge Albright has courted patent litigants since he joined the bench. But attracting this amount of patent litigation does not happen solely because a judge has invited plaintiffs. The next part will outline how Judge Albright convinced patent plaintiffs to join him in Waco and explain why Waco's rise is problematic for patent law and the court system.

### III. HOW THE WEST BECAME THE EAST, AND WHY IT'S A PROBLEM

Judge Albright's ability to compete for patent litigants is largely due to the Supreme Court. Until *TC Heartland* made venue more difficult to establish (especially in rural districts), patent cases could be filed virtually anywhere. And overwhelmingly they were filed in Marshall, Texas. Since *TC Heartland*, patent plaintiffs (particularly NPE plaintiffs) have had to look elsewhere. They often choose the District of Delaware, but Delaware's isn't always a good option—it has a crowded docket, busy judges,<sup>160</sup> and often grants motions to transfer, particularly to districts that are perceived to be defendant friendly, such as the Northern District of California.<sup>161</sup> This part explains how Judge Albright maneuvered to attract the torrent of patent cases now flowing into the Western District.

#### A. Division Assignment Practice That Enables Judge Shopping

The Western District of Texas (like the Eastern District of Texas), allows judge shopping. But the two districts differ in the particulars. Unlike the Eastern District, the Western District doesn't single out patent cases for special treatment; rather, it strictly divides cases by division. For instance, cases filed in the El Paso Division are randomly

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<sup>158</sup> Order Governing Proceedings, *supra* note 158, app'x A.

<sup>159</sup> See Witherspoon, *supra* note 140.

<sup>160</sup> See Cara Bayles, *Crisis to Catastrophe, As Judicial Ranks Stagnate, 'Desperation' Hits the Bench*, LAW360 (Mar. 19, 2019), <https://www.law360.com/articles/1140100/as-judicial-ranks-stagnate-desperation-hits-the-bench>.

<sup>161</sup> See *Swelling Docket Pushing Delaware Judges to Transfer Patent Cases*, BLOOMBERG LAW (SEP. 20, 2017) <https://news.bloomberglaw.com/pharma-and-life-sciences/swelling-docket-pushing-delaware-judges-to-transfer-patent-cases>.

assigned among the judges of that division,<sup>162</sup> cases filed in the Austin Division are randomly assigned to the Austin judges,<sup>163</sup> and so on. But, while this may seem like randomization, in divisions with only one judge—such as the Waco Division—this means that all cases are automatically assigned to that judge.<sup>164</sup> In other words, if you do, in fact, file your patent case across from the Hey Sugar, you have a 100% chance of that case being assigned to Judge Albright.

Secure in the knowledge that patent cases filed in Waco will be heard by Judge Albright, patent plaintiffs are even more incentivized to file in Waco because of Judge Albright's unique assignment orders to his magistrate judge. Judge Albright assigns all cases to his magistrate to handle all non-dispositive motions—except in patent, copyright, and certain habeas corpus cases.<sup>165</sup> Thus, patent plaintiffs know that Judge Albright will be personally involved in every aspect of the litigation and won't be distracted with other, non-patent cases on his docket. That level of attention from a district judge during all stages of litigation is exceedingly rare.<sup>166</sup> Delaware, for example, heavily uses magistrates in patent cases.<sup>167</sup> Even the Eastern District of Texas relies on magistrates

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<sup>162</sup> See El Paso Division Standing Order No. 001, (Aug 22, 2019), *available at* <https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/El%20Paso/Order%20Regarding%20Procedures%20For%20The%20Pilot%20Project%20And%20The%20Direct%20Assignment%20To%20Magistrate%20Judges%20Of%20Civil%20Proceedings%202019%20ELP%20DIV-SO-001.pdf>.

<sup>163</sup> See U.S. District Court for the Western District of Texas, Amended Order Assigning the Business of the Court, items V & X (Dec. 4, 2019) (assigning civil and criminal cases filed in the Austin division evenly between Judge Yeakel and Judge Pitman), *available at* <https://www.txwd.uscourts.gov/wp-content/uploads/Standing%20Orders/District/Amended%20Order%20Assigning%20Business%20of%20the%20Court%20120419.pdf>.

<sup>164</sup> *Id.* item XII.

<sup>165</sup> U.S. District Court for the Western District of Texas Waco Division, *In re: Court Docket Management for the Waco Division* (Nov. 27, 2018); U.S. District Court for the Western District of Texas Waco Division, *In re: Court Docket Management for the Waco Division* (Aug. 5, 2019).

<sup>166</sup> See Tim A. Baker, *The Expanding Role of Magistrate Judges in the Federal Courts*, 39 VAL. U. L. REV. 661, 661 (2005) (stating that “commonly it is the magistrate judges, rather than the district judges, who assume active, pretrial roles in case management and settlement—the mainstay of modern federal court civil practice”)

<sup>167</sup> See Jeff Castellano, *The Latest Pretrial Procedures in the District of Delaware*, LAW360 (Mar. 25, 2019), <https://www.law360.com/articles/1142297/the-latest-pretrial-procedures-in-the-district-of-delaware>.

to handle important motions and pre-trial hearings, including claim construction.<sup>168</sup>

For plaintiffs, choosing the Waco Division could not be simpler. Plaintiffs simply select “Waco” from a drop-down menu of divisions on the Western District’s electronic case filing system and—voila!—the case is automatically assigned to Judge Albright.

It is difficult to overstate the value this divisional judge shopping has for plaintiffs. Plaintiffs, in general, are averse to uncertainty, or unpredictability, in litigation.<sup>169</sup> By reducing uncertainty, a plaintiff can more accurately assess the value of their case, leading to a higher settlement value on average.<sup>170</sup> Knowing *ex ante* who will decide the case and the manner, schedule, and procedures by which it will be handled eliminates much uncertainty from of the litigation process, and thus places more money into the plaintiff’s pocket. Judge-shopping eliminates the need to identify the most advantageous court for a case and instead shifts the focus to identifying the most advantageous judge.

This court versus judge distinction matters. Forum shopping is valuable to plaintiffs because, by choosing a venue with favorable law or procedure, one can increase the odds of winning a case and increase the settlement value of the case. But judge shopping combines the increased odds of forum shopping with additional considerations that increase the value of a case: favorable judicial temperament, likelihood of favorable rulings on substantive motions, favorable political disposition, and so on.

So, the Western District of Texas allows plaintiffs to easily select Judge Albright. But Judge Albright has to appeal to those plaintiffs, too. The rest of this part will describe how Judge Albright attracts plaintiffs

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<sup>168</sup> See Referral Order RG-72-1, U.S. District Court for the Eastern District of Texas, *Civil Actions Assigned to Judge Rodney Gilstrap* (Oct. 7, 2016) (stating that 50% of civil actions assigned to Judge Gilstrap will be referred to Magistrate Judge Payne for all pre-trial proceedings).

<sup>169</sup> Samuel R. Gross & Kent D. Syverud, *Getting to No: A Study of Settlement Negotiations and the Selection of Cases for Trial*, 90 MICH. L. REV. 319, 373 (1991) (“The overall uncertainty about results in commercial transaction cases thus operates as yet another incentive for plaintiffs to accept heavily discounted settlements.”); see also Iancu & Chang, *supra* note 72, at 311 (“Predictability is important to any litigant, and it can reduce costs of litigation and promote judicial efficiency.”).

<sup>170</sup> George Priest & Benjamin Klein, *The Selection of Disputes for Litigation*, 13 J. L. STUD. 1 (1984).

and why plaintiffs are tripping over themselves to file their patent cases in Waco, especially NPE plaintiffs.

### B. Fast-Track Case Schedules

The Western District of Texas does not have local rules specific to patent cases, in contrast to the Eastern District of Texas,<sup>171</sup> the Northern District of California,<sup>172</sup> and most other heavy patent districts.<sup>173</sup> Yet Judge Albright's standing orders governing patent cases effectively function as his own personal patent local rules. Judge Albright's orders set clear expectations for patent litigants, like other patent local rules across the country. But Judge Albright mandates an unusual level of speed.

Before diving into specifics, we should pause to explain why increased speed of litigation is advantageous to patentees and, conversely, costly for defendants. Patentees love speed: if they are looking to go to trial, speed enables that to happen sooner; if they are looking for a settlement, speedy time-to-trial puts a financial strain on a defendant, encouraging settlement; if they are seeking to remove a competitor from the market, the speedier the better. There are not many downsides to speed for plaintiffs.

Understanding why defendants generally prefer a lengthier process is more complex. Consider the case of a large defendant, such as Google. Upon being sued for infringement, one might think Google would prefer speed—it reduces the time spent waiting for trial and gives Google an earlier chance to prove that it does not infringe or that the patent is invalid. But the reality of patent litigation derails this train of thought.

Over 85% of the patent suits brought in the Western District of Texas are brought by NPEs.<sup>174</sup> For a company like Google, NPE suits are not a one-off chance to prove that Google does not infringe; they are more

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<sup>171</sup> U.S. District Court for the Eastern District of Texas, General Order 05-8 (Feb. 22, 2005), <http://www.txed.uscourts.gov/sites/default/files/goFiles/GO-05-08.pdf>.

<sup>172</sup> U.S. District Court for the Northern District of California, Patent Local Rules (revised Jan. 17, 2017), [<https://www.cand.uscourts.gov/rules/patent-local-rules>].

<sup>173</sup> Some districts have division specific patent local rules, like the Northern District of Texas, see Second Amended Miscellaneous Order No. 62 (Sep. 12, 2019), available at <http://www.txnd.uscourts.gov/sites/default/files/orders/misc/Misc62-3.pdf>. The District of Delaware also does not have patent local rules, but the judges of that district all have standing orders for patent cases that are individualized to each judge.

<sup>174</sup> Over 85% of patent plaintiffs in the Western District of Texas are NPEs. See *infra* Appendix C.

like a game of whack-a-mole. The goal of most NPEs in litigation is to quickly earn a license fee—that is, a settlement—and then move on to the next defendant.<sup>175</sup> Defendants are often faced with the dilemma of paying to litigate past discovery or settling for an amount that will likely be lower than the cost of such discovery.<sup>176</sup>

For companies such as Google that are subject to hundreds of NPE lawsuits at any given time, speed merely results in quicker settlements, which in turn lead to more NPE litigation as that settlement money can support further attorney fees and patent acquisition by NPEs. Thus, in general, large patent defendants do not favor speedy timelines.

Judge Albright's scheduling order makes clear to would-be plaintiffs that the court provides them the speed they desire. For example, Judge Albright calls for the claim construction hearing (the so-called *Markman* hearing<sup>177</sup>) to occur twenty-four weeks after the case management conference.<sup>178</sup> This is almost two-and-a-half months earlier than the notoriously fast Eastern District of Texas which schedules *Markman* hearings for 33.5 weeks after the case management conference.<sup>179</sup>

Judge Albright achieves this level of speed by limiting discovery prior to the *Markman* hearing. Discovery is the most expensive part of most patent litigation and often the most time consuming.<sup>180</sup> Judge Albright, unlike other judges with large dockets of patent cases, stays discovery

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<sup>175</sup> Colleen V. Chien, *From Arms Race to Marketplace: The New Complex Patent Ecosystem and Its Implications for the Patent System*, 62 HASTINGS L.J. 297, 297 (2010).

<sup>176</sup> Litigators estimate that the median cost to defend a patent suit with between \$10 and \$25 million at stake through the end of discovery is \$1.9 million. The total cost through the end of trial is \$3.1 million. AM. INTELL. PROP. L. ASS'N, 2015 REPORT OF THE ECONOMIC SURVEY I-111.

<sup>177</sup> See *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996) (holding that patent claim construction must be conducted by the judge, not a jury).

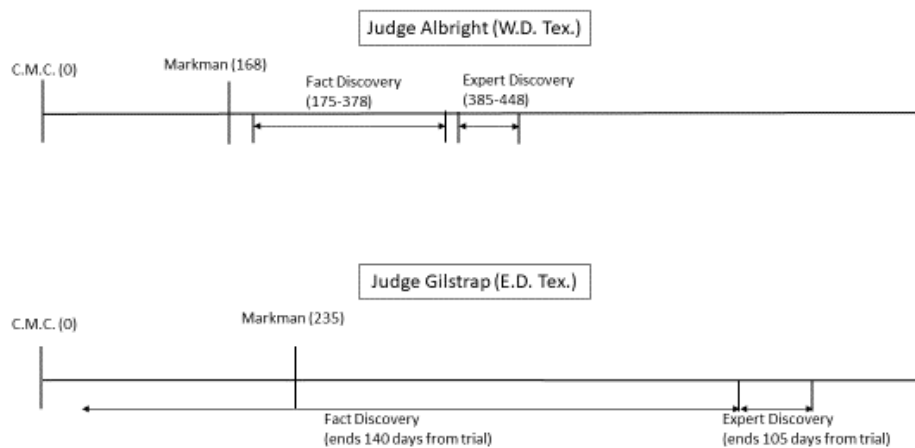
<sup>178</sup> U.S. District Court for the Western District of Texas, Waco Division, *Patent Scheduling Order*, at 7 (Feb. 26, 2020) (scheduling the *Markman* hearing 24 weeks after the case management conference or "as soon as practicable").

<sup>179</sup> See Eastern District of Texas Patent Local Rules 3-3 to 4-6 (235 days from the initial case management conference until the *Markman* hearing). There are additional speed advantages achieved before the Case Management Conference. For instance, in the Northern District of California, parties have until 14 days after the initial Case Management Conference to serve their preliminary infringement contentions. In Judge Albright's court, parties must submit their preliminary infringement contentions not later than 7 days before the Case Management Conference. Order Governing Proceedings, *supra* note 158, app'x A at 6.

<sup>180</sup> See *infra* note 247.

before *Markman* except to the extent it is necessary for claim construction.<sup>181</sup> While this might appear to limit unnecessary litigation costs, it actually presents a significant disadvantage to defendants because a defendant seeking to invalidate a patent by, say, proving prior public use or sale of the patented invention must wait until after the *Markman* hearing to commence discovery on those issues. The figure below compares the discovery schedule according to Judge Albright's scheduling order with the schedule used by Judge Gilstrap of the Eastern District of Texas. Key dates are measured in days from the initial case management conference (CMC).

**Figure 4: Discovery Schedules for Judges Albright and Gilstrap**



*Markman* is a key decision point in patent litigation. Once the judge resolves the meaning of the patent's claims, the case often settles or is immediately resolved on summary judgment. For cases that do not end with *Markman*, an aggressive trial schedule awaits in Waco. Judge Albright expedites cases through discovery by resolving disputes via a quick phone call with the parties instead of requiring time-consuming motions.<sup>182</sup> And he schedules trials to begin one year following the *Markman* hearing.<sup>183</sup> That means that, according to Judge Albright's

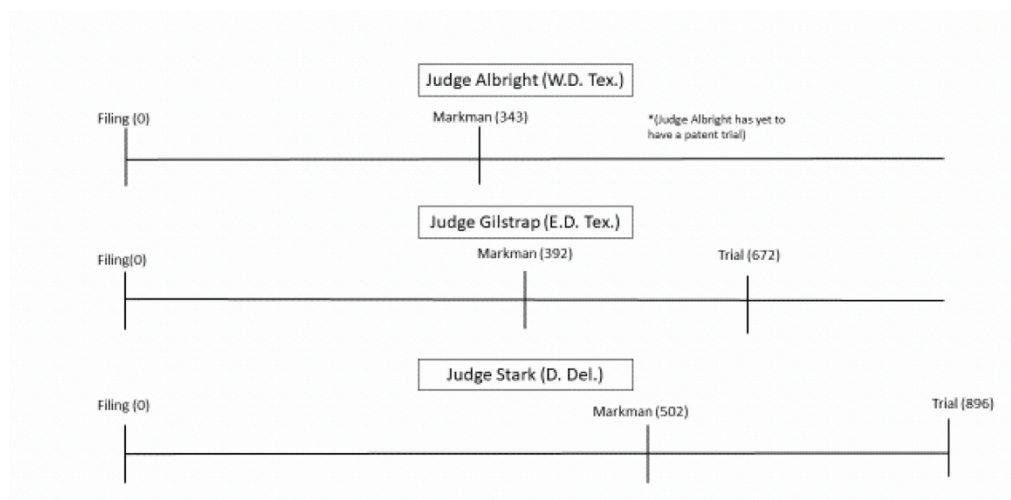
<sup>181</sup> Order Governing Proceedings, *supra* note 158, app'x A at 7.

<sup>182</sup> See Ryan Davis, *West Texas Cements Its Place as Patent Hotbed*, LAW360 (Feb. 26, 2020), <https://www.law360.com/articles/1247952/west-texas-cements-its-place-as-patent-hotbed>.

<sup>183</sup> Order Governing Proceedings, *supra* note 158, app'x A at 8.

scheduling order, cases are tried less than eighteen months after the initial case management conference.<sup>184</sup> That is, in a word, insane. Given the number of patent cases that Judge Albright is receiving (nearly 600 per year) and the eighteen-month timeline for trial, it seems implausible that Judge Albright could actually stick to his aggressive scheduling order. (Indeed, in nearly two years on the bench, he has yet to conduct a patent trial.) The figure below compares Judge Albright's median time to *Markman* (and trial) with the two other federal judges with the most patent cases: Judge Gilstrap of the Eastern District of Texas, and Judge Stark of the District of Delaware. For plaintiffs wanting speed, there is no better option than Judge Albright.

**Figure 5: Comparison of Median *Markman* and Trial Dates (January 2010–June 2020)**



Aside from imposing a schedule that is faster than even other fast-to-trial district courts, Judge Albright's scheduling order has additional advantages for plaintiffs: because his court is so fast (or, appears to be fast) plaintiffs can avoid review of their patent by the Patent Trial and Appeal Board (PTAB) at the Patent Office. In 2011, Congress created the PTAB to hear several new administrative hearings of patent validity challenges.<sup>185</sup> These proceedings have proven popular. By far the most widely used is inter partes review, which permits a challenger to argue that almost any patent is invalid on the ground that it lacks novelty or is obvious based on documentary prior art, such as prior patents and

<sup>184</sup> *Id.*

<sup>185</sup> America Invents Act, Pub. L. 112-29, 125 Stat. 284 (2011). For a detailed overview of the new procedures, see Rochelle Cooper Dreyfuss, *Giving the Federal Circuit A Run for Its Money: Challenging Patents in the PTAB*, 91 NOTRE DAME L. REV. 235, 242-49 (2015).

publications.<sup>186</sup> Since its inauguration in 2013, the PTAB has received over 10,000 petitions for inter partes review, instituted review on over half of them, and held at least some claims unpatentable in 80% of its final decisions.<sup>187</sup>

Plaintiffs fear the PTAB, which a former Chief Judge of the Federal Circuit infamously dubbed a “patent death squad.”<sup>188</sup> Judge Albright has specifically stated a goal of always beating the PTAB to a validity decision.<sup>189</sup> In his view, patentees are entitled to a jury trial on validity in most cases.<sup>190</sup> Nevermind that Congress created the PTAB to give defendants an alternative (and cheaper) way to attempt to invalidate a patent than district court<sup>191</sup> or that the Supreme Court has rebuffed constitutional challenges to jury-less PTAB adjudication of patentability.<sup>192</sup> Moreover, as explained in more detail below, a case in, say, Delaware or the Northern District of California is likely to be stayed if the PTAB agrees to review the patent’s validity. But Judge Albright seems unlikely to stay infringement cases pending PTAB review.<sup>193</sup> In fact, his expedited schedule can lead the PTAB forgo review altogether.<sup>194</sup>

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<sup>186</sup> 35 U.S.C. § 311(b).

<sup>187</sup> See U.S. Patent & Trademark Off., Trial Statistics: IPR, PGR, CBM (Oct. 2019), [https://www.uspto.gov/sites/default/files/documents/Trial\\_Statistics\\_2019-10-31.pdf](https://www.uspto.gov/sites/default/files/documents/Trial_Statistics_2019-10-31.pdf).

<sup>188</sup> This quote is attributed to a speech Judge Randall Rader gave at the annual meeting of the American Intellectual Property Association on October 25, 2013. See Tony Dutra, *Rader Regrets CLS Bank Impasse, Comments on Latest Patent Reform Bill*, BLOOMBERG BNA (Oct. 29, 2013).

<sup>189</sup> Eakin, *supra* note 154.

<sup>190</sup> *Id.*; see also *Continental Intermodal Group – Trucking LLC v. Sand Revolution LLC*, No. 7:18-cv-147 (W.D. Tex. July 22, 2020) (denying a stay pending an instituted inter partes review, noting that he “strongly believes [in] the Seventh Amendment”).

<sup>191</sup> See H.R. REP. NO. 112-98, at 48 (2011).

<sup>192</sup> See *Oil States Energy Servs., LLC v. Greene’s Energy Grp., LLC*, 138 S. Ct. 1365, 1370 (2018) (holding that inter partes review violates neither Article III nor the Seventh Amendment).

<sup>193</sup> See *Q1 in Review: New Uncertainties Spark Further Change as Reform Momentum Builds*, RPX BLOG (Apr. 30, 2019), <https://www.rpxcorp.com/intelligence/blog/q1-in-review-new-uncertainties-spark-further-change-as-reform-momentum-builds/>. (“Judge Albright has . . . publicly stated that he will not stay cases pending the outcome of *inter partes* reviews (IPRs) absent special circumstances, as he believes that patent owners deserve jury trials in federal court.”).

<sup>194</sup> See *infra* Part III.D.



## C. Venue Transfer Rulings

Even when personal jurisdiction and venue are proper, § 1404(a) of the Judicial Code allows a federal court to transfer a case to another district, or to another division within the same district, “[f]or the convenience of parties and witnesses, in the interest of justice.”<sup>195</sup> As discussed, a key way in which the Eastern District of Texas attracted patent cases was by being reluctant to transfer under § 1404(a). This reluctance was so pronounced that the Federal Circuit repeatedly used the extraordinary writ of mandamus to order Eastern District judges to transfer cases when litigation would plainly have been more convenient elsewhere—a step the Federal Circuit has taken against practically no other district court.<sup>196</sup>

Since taking the bench, Judge Albright has likewise staunchly refused to transfer cases out of the Western District. As of July 7, 2020, he has decided thirteen motions seeking transfer away from the Western District under § 1404(a); he has denied eleven.<sup>197</sup> In fact, in a recent order, Judge Albright effectively told Apple—which has been sued at least ten times in cases assigned to Judge Albright and regularly seeks to have those cases moved to the Northern District of California—to stop filing transfer motions.<sup>198</sup> Plaintiffs’ high success rate in keeping their cases in West Texas is attractive, particularly as compared to the Eastern District, where arguments for improper venue are stronger<sup>199</sup>

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<sup>195</sup> 28 U.S.C. § 1404(a).

<sup>196</sup> See Paul R. Gugliuzza, *The New Federal Circuit Mandamus*, 45 IND. L. REV. 343, 346 (2012).

<sup>197</sup> For a list of the decisions, see appendix A.

<sup>198</sup> *Uniloc 2017 LLC v. Apple Inc.*, No. 6:19-cv-532, slip op. at 7 (W.D. Tex. June 19, 2020) (“At minimum, given that Apple has its second largest campus in WDTX, has thousands of employees within the District, manufactures accused products within the District . . . , and many of its suppliers have a significant presence within the District . . . , the Court does not expect that another district in the country will be frequently ‘clearly more convenient’ than WDTX.”).

<sup>199</sup> That is not to say that venue is *always* proper in West Texas—at least one small defendant established that venue was improper by showing that it maintained no place of business whatsoever in the Western District. *Optic153 LLC v. Thorlabs Inc.*, No. 6:19-cv-667, slip op. at 3 (W.D. Tex. June 19, 2020). And another defendant escaped venue because the plaintiff could not meet the “heavy burden” of showing that the defendant’s subsidiary, which conducted business in the district, was its corporate “alter ego.” *Nat’l Steel Car Ltd. v. Greenbrier Co.*, No. 6:19-cv-721, slip op. at 5 (W.D. Tex. July 27, 2020).

and transfer under § 1404(a) for convenience reasons, though once infrequent, is now more likely.<sup>200</sup>

The substance of Judge Albright's orders sends clear signals, too. In several decisions, Judge Albright has emphasized the lack of congestion in his court as cutting against transfer. Yet the evidence he cites as a lack of congestion is not the *actual* speed at which cases have been tried in West Texas in the recent past. On that metric, time to trial in West Texas is between 25 and 32 months.<sup>201</sup> That's pretty average—time to trial in the Northern District of California (the district to which many defendants seek transfer) is about 28 months.<sup>202</sup> Yet Judge Albright consistently finds that this factor weighs against transfer because of his scheduling order, which sets trial for roughly 20 months after filing—not because there is any evidence that trials *actually* take place that quickly.<sup>203</sup> In fact, despite the rapidly growing number of cases in the Western District, Judge Albright has begun asserting that the time from filing to trial is now as little as 15 months.<sup>204</sup>

In assessing the convenience of various districts under § 1404(a), Judge Albright has also downplayed the importance of the location of evidence and witnesses by questioning Fifth Circuit and Federal Circuit precedent making clear that, though transmitting documents is easier

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<sup>200</sup> The two § 1404(a) transfer motions Judge Albright granted were easy cases: In one, the patentee had already filed a separate infringement suit in the Southern District of Texas against the same defendant, claiming infringement by the same device, and asserting patents that were highly similar to one another. *See DynaEnergetics Europe GmbH v. Hunting Titan, Inc.*, No. 6:20-cv-69 (W.D. Tex. June 16, 2020). In the other, the patentee was based in Maryland and the accused infringer was based in Pennsylvania; the only connection to the Western District was that the infringing product was being used by some doctors there. *See Moskowitz Family LLC v. Globus Medical, Inc.*, No. 6-19-672 (W.D. Tex. July 2, 2020).

<sup>201</sup> *See Fintiv, Inc. v. Apple Inc.*, No. 6:18-cv-372, slip op. at 14 (W.D. Tex. Sept. 10, 2019).

<sup>202</sup> *See id.*

<sup>203</sup> *See, e.g., id.* at 15; *accord Syncloud Techs. LLC v. DropBox, Inc.*, No. 6:19-cv-525, slip op. at 12 (W.D. Tex. May 14, 2020) (citing *Fintiv*); *STC.UNM v. Apple Inc.*, No. 6:19-cv-428, slip op. at 13 (W.D. Tex. Apr. 1, 2020) (“[Under the court’s general order governing patent cases], trial will commence 20 months from the date of filing . . . . The Court finds that this factor weighs in favor of transfer [*sic*—surely he means “against”] because the 20-month time to trial of this case is significantly shorter (and approximately 30% faster) than the median of 28.4 months to trial in the NDCA.”) (citing *Fintiv*).

<sup>204</sup> *Solas OLED Ltd. v. Apple Inc.*, No. 6-19-cv-537, slip op. at 14 (W.D. Tex. June 23, 2020); *see also Uniloc 2017 LLC v. Apple Inc.*, No. 6-19-cv-532, slip op. at 31 (W.D. Tex. June 19, 2020) (“prospective” time to trial is 18.4 months).

in our digital age, physical locations remain relevant.<sup>205</sup> Likewise, he has discounted arguments by defendants, particularly those headquartered in the Northern District of California, about the cost of witness attendance by asserting “[t]he convenience of *party* witnesses is given little weight” under § 1404(a).<sup>206</sup> Yet the Fifth Circuit’s leading, en banc decision on § 1404(a) indicates precisely the opposite: in ordering transfer of a products liability case from the Eastern District of Texas to the Northern District, the Fifth Circuit explicitly noted that the plaintiffs and the third-party defendant both lived in the Northern District.<sup>207</sup>

In late July of this year, the Federal Circuit, for the first time, granted a mandamus petition to overturn one of Judge Albright’s transfer rulings.<sup>208</sup> But the Federal Circuit’s nonprecedential order was highly case-specific, focusing mainly on errors Judge Albright made in weighing and identifying the relevant factors in the § 1404(a) analysis.<sup>209</sup> Of most potential relevance going forward is that the Federal Circuit expressed skepticism about Judge Albright’s habit of finding that his default scheduling order weighs against transfer.<sup>210</sup> But even that skepticism was tethered to how Judge Albright weighted the various factors in the particular the case at hand.<sup>211</sup>

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<sup>205</sup> *E.g.*, *Fintiv*, No. 6:18-cv-327, slip op. at 9 (“Even though it would not have changed the outcome of this motion, this Court expresses its hope that the Federal Circuit will consider addressing and amending its precedent in order to explicitly give district courts the discretion to fully take into consideration the ease of accessing electronic documents.”).

<sup>206</sup> *E.g.*, *SynKloud Techs. LLC v. Dropbox, Inc.*, No. 6:19-cv-525, slip op. at 9 (W.D. Tex. May 14, 2020) (citing a magistrate’s report and recommendation in *ADS Sec. L.P. v. Advanced Detection Sec. Servs., Inc.*, No. A-09-CA-773, 2010 WL 1170976, at \*4 (W.D. Tex. Mar. 23, 2010)).

<sup>207</sup> *See In re Volkswagen of Am., Inc.*, 545 F.3d 304, 317 (5th Cir. 2008) (en banc). In more recent orders, Judge Albright has conceded that “the convenience of party witnesses is given some weight,” but he still insists that “the weight only becomes consequential in the absence of a significant number of non-party witnesses.” *E.g.*, *Uniloc 2017*, No. 6-19-cv-532, slip op. at 26 n.13.

<sup>208</sup> *In re Adobe Inc.*, No. 2020-126, 2020 WL 4308164 (Fed. Cir. July 28, 2020).

<sup>209</sup> *See id.* at \*2-3 (noting that “the district court failed to accord the full weight of the convenience factors it considered and weighed in favor of transfer” and that “the court overlooked that the willing witness factor also favored transferring the case”).

<sup>210</sup> *See id.* at \*3 (“Nothing about the court’s general ability to set a schedule directly speaks to [differences in docket congestion among the two courts.]”).

<sup>211</sup> *See id.* (“[E]ven without disturbing the court’s suggestion that it could more quickly resolve this case based on its scheduling order, with several factors favoring transfer

In short, it remains to be seen whether the Federal Circuit will—as it eventually did with the Eastern District of Texas—regularly begin to find that Judge Albright’s transfer orders meet the high standard for mandamus relief, which requires the party seeking the writ to show that the transferee forum is “clearly more convenient” and that the denial of transfer was “a clear abuse of discretion.”<sup>212</sup> Unlike the Eastern District, which includes no major Texas city, many cases and defendants are more plausibly connected to the Western District because of offices or stores in Austin, in particular. To that end, it’s worth noting that § 1404(a) also allows transfer not just to other districts but also to other divisions within the same district.<sup>213</sup> In contrast to Judge Albright’s frequent refusal to transfer cases *out* of the Western District, Judge Albright transfers cases *within* the district—in particular, from the Waco Division to the Austin Division—on a regular basis. As of June 26, 2020, in seven cases, plaintiffs opposed a defendant’s effort to move a case from Waco to Austin. But, in each of those cases, Judge Albright granted the defendant’s motion.<sup>214</sup> In each case, he kept the matter on his own docket and kept his scheduling order in place.<sup>215</sup>

Moreover, in more than forty cases, the parties have stipulated to transfer venue from the Waco Division to the Austin Division.<sup>216</sup> Judge Albright has granted every one of those stipulated transfer requests and has kept each one of those cases on his docket, too.

It’s worth pausing here to emphasize what’s going on, particularly in the cases involving stipulated transfers. Plaintiffs are choosing Waco from the dropdown menu on the Western District’s electronic case filing system to get their cases in front of Judge Albright. But many of those plaintiffs have no interest in actually litigating in their chosen division

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and nothing else favoring retaining this case in Western Texas, the district court erred in giving this factor dispositive weight.”).

<sup>212</sup> *Id.* at \*2.

<sup>213</sup> 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.” (emphasis added)).

<sup>214</sup> For a list of cases, see appendix A.

<sup>215</sup> *See, e.g.,* Hammond Dev. Int’l, Inc. v. Amazon.com, Inc., No. 6:19-cv-355, slip op. at 11 (W.D. Tex. Mar 30, 2020) (“It is therefore ORDERED that the Amazon Defendants’ motion to transfer venue to the Austin Division of the Western District of Texas is GRANTED and that the above-styled case be TRANSFERRED to the Austin Division but remain on the docket of United States District Judge Alan D Albright and according to the scheduling order that was entered in this case on November 1, 2019.”).

<sup>216</sup> For a list of cases, see appendix A.

of Waco. Rather, plaintiffs are happy to have the case proceed in Austin—as long as Judge Albright remains on the case. Thus, the Western District of Texas allows for judge shopping by filing in a certain division (Waco) *and* allows transfer between divisions as a matter of course while allowing the plaintiff to retain the shopped-for judge. This is judge shopping on steroids.

And the Federal Circuit has—perhaps unknowingly—blessed Judge Albright’s practice of transferring cases to Austin to avoid transferring them out of the district altogether. Apple recently filed a mandamus petition in the Federal Circuit seeking to overturn an order by Judge Albright denying Apple’s motion to transfer a case to the Northern District of California under § 1404(a). The Federal Circuit denied the petition, emphasizing that Apple could not show that Judge Albright’s decision was “patently erroneous” (as is required to obtain mandamus relief) in part because Judge Albright had granted Apple’s alternative motion to transfer the case from Waco to Austin.<sup>217</sup> “Given that Apple received a transfer to its second-most convenient venue,” the court wrote “it is difficult to accept Apple’s assertion that the result here is patently erroneous.”<sup>218</sup>

#### D. Stays of Litigation

Another way Judge Albright has attracted patentees to his court is through his practice with regard to staying litigation pending related disputes in other fora, such as the PTAB. The typical petitioner at the PTAB is a defendant in a pending infringement lawsuit.<sup>219</sup> Because of the strict time line within which, by statute, the PTAB must conclude its review,<sup>220</sup> district judges commonly stay infringement litigation to allow the PTAB proceeding to run its course.<sup>221</sup> Judges in the Eastern District of Texas were less willing to stay litigation pending PTAB

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<sup>217</sup> *In re Apple Inc.*, No. 2020-127, 2020 WL 3249953, at \*2 (Fed. Cir. June 16, 2020).

<sup>218</sup> *Id.*

<sup>219</sup> See Saurabh Vishnubhakat et al., *Strategic Decision Making in Dual PTAB and District Court Proceedings*, 31 BERKELEY TECH. L.J. 45, 49-50 (2016) (“about 70%” of the time).

<sup>220</sup> With some exceptions, the PTAB must decide whether to institute review within three months after receiving the patent owner’s response to the petition, 35 U.S.C. § 314(b), and must issue its final decision within one year of instituting review, *id.* § 316(a)(11).

<sup>221</sup> See Love & Yoon, *supra* note 62, at 26-27 (“Judges in the District of Delaware and Northern District of California grant motions to stay, at least in part, over 70% of the time.”).

review,<sup>222</sup> and this was another factor that attracted plaintiffs to the district.

It's too early to have much quantitative data on Judge Albright's practices in deciding whether to stay litigation in light of PTAB proceedings, though he has denied the all four contested motions to stay pending inter partes review that we've been able to find.<sup>223</sup> Outside the PTAB context, Judge Albright has also denied a motion to stay pending an investigation by the U.S. International Trade Commission,<sup>224</sup> which has jurisdiction to prohibit the importation of products that infringe U.S. patents.<sup>225</sup> But we shouldn't make too much of this limited quantitative data: Judge Albright has stayed an infringement suit in light of pending cases involving the same patents in another district<sup>226</sup> and a PTAB proceeding in a case involving the same plaintiff.<sup>227</sup>

A qualitative analysis of Judge Albright's stay orders is, however, intriguing. For instance, in early 2020, Judge Albright denied a motion to stay an infringement suit against a user of allegedly infringing computer software, the Sprouts supermarket chain, in light of a later-filed suit by the developer of that software, Dropbox, seeking a declaratory judgment that its software didn't infringe the plaintiff's patents.<sup>228</sup> As general rule of civil procedure, when two factually related suits are pending in different districts, courts usually allow the first-filed suit to go forward while staying any later-filed suits.<sup>229</sup> But patent law contains an important exception to this first-to-file rule—the so-

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<sup>222</sup> See *id.* at 27 (“By contrast, the grant rate in the Eastern District of Texas is less than 58%.”).

<sup>223</sup> *Multimedia Content Mgm't LLC v. Dish Network L.L.C.*, No. 6:18-cv-207 (W.D. Tex. May 30, 2019); *Solas OLED Ltd. Dell Techs. Inc.*, No. 6:19-cv-514 (W.D. Tex. June 23, 2020); *Continental Intermodal Group – Trucking LLC v. Sand Revolution LLC*, No. 7:18-cv-147 (W.D. Tex. July 22, 2020); *Kerr Mach. Co. v. Vulcan Indus. Holdings, LLC*, No. 6:20-cv-200 (W.D. Tex. Aug. 2, 2020).

<sup>224</sup> *Neodron Ltd. V. Dell Techs. Inc.*, No. 1:19-cv-819 (W.D. Tex. Dec. 16, 2019).

<sup>225</sup> See Sapna Kumar, *The Other Patent Agency: Congressional Regulation of the ITC*, 61 FLA. L. REV. 529, 534 (2009).

<sup>226</sup> *Lighthouse Consulting Grp., LLC v. Ally Fin. Inc.*, No. 6:19-cv-592 (W.D. Tex. Mar. 25, 2020).

<sup>227</sup> *Lighthouse Consulting Grp., LLC v. US Bank*, No. 6:19-cv-607 (W.D. Tex. Mar. 24, 2020).

<sup>228</sup> *Motion Offense, LLC v. Sprouts Farmers Mkt., Inc.*, No. 6:19-cv-417 (W.D. Tex. Jan. 26, 2020).

<sup>229</sup> See 4 CHARLES ALAN WRIGHT ET AL., *FEDERAL PRACTICE AND PROCEDURE* § 1051 (4th ed. 2020).

called customer-suit exception, under which a later-filed declaratory judgment suit by the manufacturer of an accused product will proceed first despite a previously filed infringement suit against the manufacturer's customer.<sup>230</sup>

But Judge Albright refused to apply the customer-suit exception in the *Sprouts* case because *Sprouts* was the only Dropbox customer who had been sued, because the infringement issue was “less complicated” (direct infringement versus *Sprouts*, which was actually using the infringing software, versus indirect infringement against Dropbox, the manufacturer) and, of course, because of the Western District's speedy schedule (“time from the Rule 16 Case Management Conference to trial,” Judge Albright wrote, “is 15.5 months”).<sup>231</sup> *Sprouts* asked the Federal Circuit to issue a writ of mandamus to stay the infringement suit, but the Federal Circuit denied the petition, noting that, after the Western District denied *Sprouts*' stay motion, the court in which Dropbox filed its declaratory judgment suit, the District of Delaware, had transferred Dropbox's suit to West Texas.<sup>232</sup>

Though it is just one decision, the Federal Circuit, again, might have unknowingly drawn a map for patentees who want to ensure their infringement cases are kept in Judge Albright's court, particularly when the manufacturer—who is the patentee's real target because the threatened damages are much larger and the manufacturer usually has deeper pockets—has tenuous ties to West Texas: the patentee should sue a single customer—one who is indisputably conducting business in the Western District (and over whom venue is therefore clearly proper). Given his reasoning in the *Sprouts* case, Judge Albright is unlikely to stay that direct infringement claim against a single customer. So, when the manufacturer files its inevitable declaratory suit, there's a good chance that, just as in *Sprouts*, that later-filed case will be transferred into the Western District, where the earlier-filed and properly venued customer infringement suit is proceeding toward trial on a breakneck pace.

In addition, Judge Albright's procedural practices make it unlikely defendants will find much success seeking stays pending review at the PTAB. The PTAB, on the agency's reading of the relevant statute, has

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<sup>230</sup> See Brian J. Love & James C. Yoon, *Expanding Patent Law's Customer Suit Exception*, 93 B.U. L. REV. 1605, 1616 (2013) (citing *Katz v. Lear Siegler, Inc.*, 909 F.2d 1459, 1464 (Fed. Cir. 1990)).

<sup>231</sup> *Motion Offense*, No. 6:19-cv-417, slip op. at 3-4.

<sup>232</sup> *In re Sprouts Farmers Mkt., Inc.*, 799 F. App'x 877, 878 (Fed. Cir. 2020).

discretion to decline to institute review separate and apart from the merits of the challenger's invalidity arguments.<sup>233</sup> In exercising that discretion, the PTAB, in the recent past, employed a non-exclusive, multi-factor test that included considerations such as the similarities (or differences) between the asserted art and the prior art reviewed during examination, the overlap between the challenger's arguments and the arguments made during examination, and whether the challenger has shown how the examiner erred in evaluating the prior art.<sup>234</sup> In 2018, in a precedential opinion captioned *NHK Spring Co. v. Intri-Plex Technologies, Inc.*, the PTAB added a new factor—whether pending district court litigation will resolve the issues presented more quickly than the PTAB.<sup>235</sup> In a more recent decision, the PTAB articulated several additional factors it would use in deciding whether to deny institution under *NHK Spring*, including the proximity of the court's trial date to the PTAB's projected statutory deadline for a final decision, the investment in the parallel proceeding by the court and the parties, the overlap between issues raised in the petition and in the parallel proceeding, and whether the challenger and the defendant in the parallel proceeding are the same party.<sup>236</sup>

Judge Albright's aggressive default schedule helps ensure that, in most cases, those factors will cut in favor of denying institution. For starters, trial in his court will usually be scheduled to begin before inter partes review would typically conclude. As discussed, Judge Albright schedules *Markman* hearings six months after the case management conference, with trial roughly eighteen months after the conference. Inter partes review at the PTAB, by contrast, typically takes from eighteen to twenty-four months—plus the time the defendant needs to prepare and file its petition after being sued for infringement.<sup>237</sup> Subsequent PTAB decisions have placed even greater emphasis on the district court's schedule. In one of the few PTAB decisions involving a parallel case in West Texas, the PTAB denied institution of an inter partes review *solely* because of the Western District's speedy timeline.<sup>238</sup>

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<sup>233</sup> 35 U.S.C. § 314.

<sup>234</sup> See *Becton, Dickinson & Co. v. B. Braun Melsungen AG*, No. IPR2017-01586, slip op. at 17-18 (PTAB Dec. 15, 2017).

<sup>235</sup> No. IPR2018-752, slip op. at 20 (PTAB Sept. 12, 2018).

<sup>236</sup> *Apple Inc. v. Fintiv, Inc.*, No. IPR2020-19 (PTAB May, 5, 2020).

<sup>237</sup> Scott McKeown, *How Long Will Inter Partes Review Really Take?*, PATENTS POST-GRANT (Oct. 12, 2011), <https://www.patentspostgrant.com/how-long-will-inter-partes-review-really-take>.

<sup>238</sup> *Sand Revolutions II, LLC v. Continental Intermodal Group – Trucking, LLC*, IPR2019-01393, slip op. at 18 (PTAB Feb. 5, 2020).



The PTAB found that all of its older factors for exercising discretion favored institution—except the district court’s timeline for trial.<sup>239</sup>

Setting a case schedule that essentially eliminates the prospect of PTAB review undermines the system Congress set up in the AIA to weed out low quality patents.<sup>240</sup> Indeed, many of the patents being asserted in West Texas *are* low quality, as we discuss next.

#### E. Rulings on Motions to Dismiss

One of the most important substantive issues in any patent infringement case—particularly cases involving the computer and communication patents frequently asserted in West Texas—is patent eligibility. Some background to begin. Section 101 of the Patent Act recites eligibility in broad terms: any new and useful “process, machine, manufacture, or composition of matter” potentially qualifies for patenting.<sup>241</sup> A judge-made exception to the statute, however, limits patents on naturally occurring scientific phenomena, mathematical formulas, and abstract mental processes. In four decisions from 2010 to 2014,<sup>242</sup> the Supreme Court gave that exception sharp teeth, casting significant doubt on the validity of patents—which the Patent Office frequently issued before 2010—that recite a longstanding business practice (say, hedging risk<sup>243</sup> or using an escrow<sup>244</sup>) and add the limitation of, essentially, “do it on a computer.”<sup>245</sup> From 2014 through 2017, 98 of the 104 eligibility disputes decided by the Federal Circuit

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<sup>239</sup> *Id.*

<sup>240</sup> Several technology trade groups and advocacy organizations raised precisely this point in a recent letter to Congress, singling out the Western District’s fast case schedule as enabling patentees to “evade [post-issuance review] by pointing to the expedited timeline initially contemplated in district court,” even though that timeline will be “frequently amended during a case.” Letter from Engine Advocacy et al. to Hon. Lindsey Graham, Chairman, Senate Committee on the Judiciary (June 18, 2020), *available at* <https://www.law360.com/articles/1288087/attachments/0>.

<sup>241</sup> 35 U.S.C. § 101.

<sup>242</sup> *Alice Corp. v. CLS Bank Int’l*, 573 U.S. 208 (2014); *Ass’n for Molecular Pathology v. Myriad Genetics, Inc.*, 569 U.S. 576 (2013); *Mayo Collaborative Servs. v. Prometheus Labs., Inc.*, 566 U.S. 66 (2012); *Bilski v. Kappos*, 561 U.S. 593 (2010).

<sup>243</sup> *Bilski*, 561 U.S. at 599.

<sup>244</sup> *Alice*, 573 U.S. at 212.

<sup>245</sup> *See Secured Mail Sols. LLC v. Universal Wilde, Inc.*, 873 F.3d 905, 911 (Fed. Cir. 2017) (“Merely reciting the use of a generic computer or adding the words ‘apply it with a computer’ cannot convert a patent-ineligible abstract idea into a patent-eligible invention.”).

involved information technology, and the Federal Circuit ruled the patent to be invalid over 93% of the time.<sup>246</sup>

Eligibility invalidations—unlike other sorts of invalidity rulings—occur early in litigation. Validity requirements such as novelty and nonobviousness are almost always considered to raise disputes of fact, meaning that the earliest stage at which they can be resolved is summary judgment—after the parties have incurred most if not all of the costs of discovery, which account for half or more of litigation expenses in a typical patent case.<sup>247</sup> But eligibility—because it is often viewed to present only a question of law—is frequently decided on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), which is the very first document a defendant files in response to a plaintiff's complaint. And those motions have been quite successful. From 2013 to 2018, district courts granted about 70% of motions to dismiss on eligibility grounds.<sup>248</sup>

Indeed, for several years after the Supreme Court began strengthening the eligibility requirement in 2010, some courts treated eligibility as a *pure* question of law,<sup>249</sup> meaning that it could always be resolved at the pleading stage of the case. In 2018, however, the Federal Circuit issued two decisions making clear that the eligibility inquiry can involve disputes of fact, particularly on the question of whether the patent claims activity that is well-understood, routine, and conventional (and hence does not satisfy the eligibility requirement).<sup>250</sup> In the eighteen months after those decisions, defendants' success rate on motions to dismiss on eligibility grounds dropped to 45%.<sup>251</sup>

But courts can and still do decide eligibility at the pleading stage as a matter of law when ineligibility is clear from the patent itself. Just

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<sup>246</sup> Paul R. Gugliuzza & Mark A. Lemley, *Can a Court Change the Law By Saying Nothing?*, 71 VAND. L. REV. 765, 790 (2018).

<sup>247</sup> Greg Reilly, *Linking Patent Reform and Civil Litigation Reform*, 47 LOY. U. CHI. L. REV. 179, 198 (2015).

<sup>248</sup> Ryan Davis, *Quick Alice Wins Dwindling in Wake of Berkheimer Ruling*, LAW360 (July 25, 2019), <https://www.law360.com/articles/1181804/quick-alice-wins-dwindling-in-wake-of-berkheimer-ruling>.

<sup>249</sup> See, e.g., *Lumen View Tech. LLC v. Findthebest.com, Inc.*, 984 F. Supp. 2d 189, 204 (S.D.N.Y. 2013); *Big Baboon, Inc. v. Dell, Inc.*, No. CV 09-1198, 2011 WL 13124454, at \*8 (C.D. Cal. Feb. 8, 2011).

<sup>250</sup> *Berkheimer v. HP, Inc.*, 881 F.3d 1360, 1369-70 (Fed. Cir. 2018); *Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1125 (Fed. Cir. 2018).

<sup>251</sup> Davis, *supra* note 248.

not in the Western District of Texas. Since taking the bench, Judge Albright has decided questions of patent eligibility ten times, all on motions to dismiss under Rule 12(b)(6). In contrast to nationwide trends, Judge Albright has ruled for the patentee in all ten cases.<sup>252</sup>

A close read of Judge Albright's eligibility opinions reveals another clear message to patentees: your information technology patents—vulnerable to quick invalidation elsewhere—are safe in West Texas. Judge Albright's first four eligibility rulings, issued from December 2018 to May 2019, upheld the patents-in-suit under the eligibility test adopted by the Supreme Court. But those patents were arguably quite weak. One of Judge Albright's decisions upheld a patent on a mobile dating app,<sup>253</sup> even though it looked similar to the do-it-on-a-computer patents courts have frequently invalidated since 2010.<sup>254</sup> Likewise, Judge Albright upheld a patent on a method of regulating network access (which Judge Albright conceded was an abstract idea) because its use of a “centralized controller” generating “controller instructions” for “gateway units” did not recite “well-understood, routine, or conventional” activity.<sup>255</sup> Yet the Federal Circuit has repeatedly held that generic computer components do not save an otherwise abstract patent from an ineligibility ruling.<sup>256</sup>

Particularly questionable is an opinion confirming the eligibility of a patent that claimed, simply, a method of giving a customer at a retail

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<sup>252</sup> For a list of cases, see appendix B.

<sup>253</sup> Match Group, LLC v. Bumble Trading Inc., No. 6:18-cv-80, slip op. at 9 (W.D. Tex. Dec. 18, 2018).

<sup>254</sup> See, e.g., Jedi Techs., Inc. v. Spark Networks, Inc., No. 1:16-cv-1055, 2017 WL 3315279, at \*20-21 (D. Del. Aug. 3, 2013) (invalidating a patent directed to “matching people based on criteria such as personality traits or location” because “[t]he concept of matchmaking . . . has been performed by humans for a very long time”); see also Intellectual Ventures I, LLC v. Symantec Corp., 838 F.3d 1307, 1318 (Fed. Cir. 2016) (“[W]ith the exception of generic computer-implemented steps, there is nothing in the claims themselves that foreclose them from being performed by a human, mentally or with a pen and paper.”).

<sup>255</sup> Multimedia Content Mgm't LLC v. Dish Network Corp., No. 6:18-cv-207, slip op. at 4 (W.D. Tex. Jan. 10, 2019).

<sup>256</sup> Two-Way Media Ltd. v. Comcast Cable Commc'ns, LLC, 874 F.3d 1329, 1340-41 (Fed. Cir. 2017) (finding no inventive concept in a patent claiming “[a] method for metering real-time streaming media for commercial purposes” even though the patent recited “intermediate servers,” “real-time media streams,” and “a user device”); British Tel. PLC v. IAC/InterActiveCorp., No. 2019-1917, 2020 WL 2892601, at \*2 (Fed. Cir. June 3, 2020) (invalidating a patent on eligibility grounds because it “recite[d] only generic computer hardware—a ‘telecommunications system’ and ‘terminal’— . . . performing functions that the . . . patent’s specification admits were conventional”).

store the option of having a receipt printed, emailed, or both.<sup>257</sup> Though you’ve probably been asked many times by a store clerk how you’d like to receive your receipt (if at all), Judge Albright ruled that the patent was directed not to that longstanding business practice (that is, to an abstract idea<sup>258</sup>) but to a “specific improvement in the way computers . . . process receipts.”<sup>259</sup> Perhaps more remarkably, Judge Albright ruled that there was dispute of fact about whether the patent—the application for which was filed in January 2010—involved well-understood, routine, or conventional activity.<sup>260</sup>

One on-going controversy in eligibility law is whether the court must conduct claim construction before deciding eligibility. The short answer is: it depends. The Federal Circuit has said that claim construction “will ordinarily be desirable—and often necessary” before deciding eligibility, because deciding eligibility “requires a full understanding of the basic character” of the claimed invention.<sup>261</sup> In numerous decisions, however, the Federal Circuit has approved of district courts deciding eligibility without any formal claim construction. Instead, consistent with the general process courts use to decide motions to dismiss, the court simply reads the claims in the manner most favorable to the non-moving party (here, the patentee).<sup>262</sup>

In August 2019 (after the last of Judge Albright’s first four eligibility rulings discussed above), a split panel of the Federal Circuit decided a case called *MyMail, Ltd. v. ooVoo, LLC*, in which the court vacated a judgment on the pleadings of ineligibility because district court did not

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<sup>257</sup> *eCeipt LLC v. Homegoods, Inc.*, No. 6:19-cv-32, slip op. at 10 (W.D. Tex. May 20, 2019).

<sup>258</sup> *See Enfish, LLC v. Microsoft Corp.*, 822 F.3d 1327, 1335 (Fed. Cir. 2016) (“[F]undamental economic and conventional business practices are often found to be abstract ideas, even if performed on a computer.”).

<sup>259</sup> *eCeipt LLC v. Homegoods, Inc.*, No. 6:19-cv-32, slip op. at 10 (W.D. Tex. May 20, 2019).

<sup>260</sup> *Id.* at 12-13.

<sup>261</sup> *Bancorp Servs., LLC v. Sun Life Assurance Co.*, 687 F.3d 1266, 1273-74 (Fed. Cir. 2012); *see also* Timothy R. Holbrook & Mark D. Janis, *Patent-Eligible Processes: An Audience-Based Perspective*, 17 VAND. J. ENT. & TECH. L. 349, 376-77 (2012) (arguing that claim construction should precede the eligibility determination).

<sup>262</sup> *See, e.g., Aatrix Software, Inc. v. Green Shades Software, Inc.*, 882 F.3d 1121, 1125 (Fed. Cir. 2018); *Bascom Glob. Internet Servs., Inc. v. AT&T Mobility LLC*, 827 F.3d 1341, 1352 (Fed. Cir. 2016); *see also* *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) (“When there are well-pleaded factual allegations [in the plaintiff’s complaint], a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.”).

construe a particular term in the patent.<sup>263</sup> The Federal Circuit, consistent with its prior case law, noted that “if the parties raise a claim construction dispute at the [pleading] stage, the district court must either adopt the [patentee’s] constructions or resolve the dispute to whatever extent is needed to conduct the § 101 analysis.”<sup>264</sup> The district court’s error, according to the Federal Circuit, was that it simply “never addressed the parties’ claim construction dispute”—it neither construed the disputed term nor adopted the patentee’s proposed construction.<sup>265</sup> Thus, the Federal Circuit vacated the district court’s ruling of ineligibility and remanded the case for further proceedings.<sup>266</sup>

The Federal Circuit’s decision in *MyMail* made headlines because it was the first appellate decision to overturn an eligibility ruling for the sole reason that the district court did not conduct claim construction.<sup>267</sup> But the decision didn’t change the law much.<sup>268</sup> Indeed, on remand, the district judge construed the term in dispute and granted the defendant’s renewed motion for judgment on the pleadings.<sup>269</sup> And the Federal Circuit certainly did not adopt a blanket rule that claim construction is *always* required to decide eligibility at the pleading stage.

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<sup>263</sup> *MyMail, Ltd. v. ooVoo, LLC*, 934 F.3d 1373, 1381 (Fed. Cir. 2019). The term was “toolbar” in a patent about modifying those toolbars on internet-connected devices. *See id.* at 1376. Judge Lourie dissented on the ground that the patent was “clearly” ineligible “regardless of claim construction.” *Id.* at 1381 (Lourie, J., dissenting). The standards for deciding a motion for judgment on the pleadings (made under Federal Rule of Civil Procedure 12(c)) are identical to the standards for deciding a motion to dismiss under Rule 12(b)(6); the only difference is that the defendant files a motion for judgment on the pleadings instead of a motion to dismiss if it has already answered the plaintiff’s complaint. *See* FED. R. CIV. P. 12(c) (“After the pleadings are closed . . . a party may move for judgment on the pleadings.”).

<sup>264</sup> *MyMail*, 934 F.3d at 1379 (majority opinion) (citing *Aatrix*, 882 F.3d at 1125).

<sup>265</sup> *Id.* at 1380.

<sup>266</sup> *Id.* at 1381.

<sup>267</sup> *See* Ryan Davis, *Fed. Cir. Undoes Alice Ax Made Before Claim Construction*, LAW360 (Aug. 16, 2019), <https://www.law360.com/articles/1189583/fed-circ-undoes-alice-ax-made-before-claim-construction>.

<sup>268</sup> *See* Anthony Fuga, *Disputed Patent Claim Terms May Delay Section 101 Decisions*, LAW360 (Aug. 26, 2019), <https://www.law360.com/articles/1192178/disputed-patent-claim-terms-may-delay-section-101-decisions>. (“I do not anticipate much of a change going forward for a couple of reasons. First, the *MyMail* case feels like an outlier [because] [t]he district court did not address claim construction at all . . . . Second, an early [eligibility] determination doesn’t often turn on claim construction.”).

<sup>269</sup> *MyMail, Ltd. v. OoVoo, LLC*, No. 17-cv-04487, 2020 WL 2219036, at \*22 (N.D. Cal. May 7, 2020).

Yet Judge Albright seized on *MyMail* to send additional signals to patentees that their patents are safe from quick eligibility invalidations in his court. In his next three eligibility rulings, all issued in late 2019, Judge Albright did not apply the Supreme Court's eligibility test as he did in his first four opinions. Instead, he simply issued short orders—substantively identical in each case—that did little more than cite *MyMail* and say that the defendant could refile its eligibility motion after claim construction.<sup>270</sup>

Another favorable signal Judge Albright sent to patentees was in one of his most recent opinions expounding upon eligibility law, denying the defendants' renewed motion to dismiss on eligibility grounds in *Slyce Acquisition Inc. v. Syte-Visual Conception Ltd.*<sup>271</sup> Doubling down on his earlier, blanket refusal to decide eligibility without first conducting claim construction, the opinion in *Slyce Acquisition* gave several reasons why deciding eligibility is “rarely appropriate” at the pleading stage of the case.<sup>272</sup>

Most notably, Judge Albright wrote that a key “factor that favors delaying a court's § 101 analysis” is that the Supreme Court's eligibility test is “difficult . . . to apply and yields inconsistent results.”<sup>273</sup> “This lack of predictability and consistency,” Judge Albright continued, “is widely known and extremely problematic.”<sup>274</sup> In support of this assertion, Judge Albright cited commentary by noted skeptics of the Supreme Court's reinvigoration of the eligibility requirement, including Paul Michel, a former Chief Judge of the Federal Circuit,<sup>275</sup> as well as a pair of dissenting opinions by Federal Circuit judges.<sup>276</sup> Contrary to

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<sup>270</sup> *Slyce Acquisition Inc. v. Syte-Visual Conception Ltd.*, No. 6:19-cv-257, slip op. at 20 (W.D. Tex. Oct. 22, 2019) (“Given the [Federal] Circuit's holding and guidance in *MyMail, Ltd. v. ooVoo, LLC*, the Court denies Defendants' motion without prejudice and directs it to refile its motion, if it so chooses, after the issuance of the Court's claim construction order.” (citation omitted)); *FreshHub, Inc. v. Amazon.com Inc.*, No. 6:19-cv-388, slip op. at 2 (W.D. Tex. Sept. 6, 2019); *Hammond Dev. Int'l, Inc. v. Google LLC*, No. 6:19-cv-00356, slip op. at 2 (W.D. Tex. Sept. 3, 2019).

<sup>271</sup> *Slyce Acquisition Inc. v. Syte-Visual Conception Ltd.*, No. 6:19-cv-257, slip op. at 9 (W.D. Tex. Jan. 10, 2020).

<sup>272</sup> *Id.* at 8.

<sup>273</sup> *Id.* at 13.

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at (citing Testimony of Judge Paul R. Michel (Ret.) at 2, The State of Patent Eligibility in America: Part I, Hearing Before the Subcomm. on Intellectual Prop. of the S. Comm. on the Judiciary, 113th Cong. (2019)).

<sup>276</sup> *Id.* at 13-14 (citing *Interval Licensing LLC v. AOL, Inc.*, 896 F.3d 1335, 1348-56 (Fed. Cir. 2018) (Plager, J., concurring-in-part and dissenting-in-part); *Smart Sys.*

Judge Albright's implication, however, commentary on the Supreme Court's eligibility case law is not uniformly negative—far from it.<sup>277</sup> And the notion that eligibility outcomes are highly unpredictable is based mostly on anecdote;<sup>278</sup> it is hard to see how a legal test that asks whether a patent covers well-understood, routine, and conventional activity is any more malleable than inquiries into whether a claimed invention “would have been obvious . . . to a person having ordinary skill in the art”<sup>279</sup> or whether it “fail[s] to inform, with reasonable certainty, those skilled in the art about the scope of the invention.”<sup>280</sup> More than anything else, claims about the unpredictability of the eligibility analysis appear to mask disagreements with the policy choice made by the Supreme Court—to weaken patent protection in certain areas of technology.<sup>281</sup> Thus, Judge Albright has aligned himself with those who disapprove of the Supreme Court's case law and seek to narrow its

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*Innovations, LLC v. Chi. Transit Auth.*, 873 F.3d 1364, 1377 (Fed. Cir. 2017) (Linn, J., dissenting-in-part and concurring-in-part)).

<sup>277</sup> See, e.g., John M. Golden, *Redundancy: When Law Repeats Itself*, 94 TEX. L. REV. 629, 701-03 (2016) (defending “the Supreme Court's move to revive subject-matter eligibility doctrine” and to do so in a way overlaps with other patentability requirements); Paul R. Gugliuzza, *The Procedure of Patent Eligibility*, 97 TEX. L. REV. 571, 575 (2019) (“The eligibility requirement, despite its potential *substantive* flaws, . . . provide[s] a useful *procedural* mechanism to end . . . weak cases quickly and cheaply.”); Emily Michiko Morris, *Intuitive Patenting*, 66 S.C. L. REV. 61, 113 (2014) (“[P]atentable subject matter law has some purpose and does some work beyond that of the other patentability requirements. . . . [O]nly patentable subject matter serves to distinguish patentable technology from unpatentable discoveries, information, and human thought and activity.”); see also CONG. RES. SERV., PATENT-ELIGIBLE SUBJECT MATTER REFORM IN THE 116TH CONGRESS 20-24 (Sept. 17, 2019), <https://fas.org/sgp/crs/misc/R45918.pdf> (collecting commentary both criticizing and praising the current law of patent eligibility).

<sup>278</sup> For an attempt to study the predictability of eligibility outcomes in a more systematic fashion, see Jason D. Reinecke, *Is the Supreme Court's Patentable Subject Matter Test Overly Ambiguous?*, 2019 UTAH L. REV. 581, 599 (survey using a sample of eligibility cases that had actually been litigated and finding that, based on the patent claims alone, patent prosecutors were able to correctly predict how the court ruled 67.3% of the time and patent litigators correctly predicted outcomes 59.7% of the time).

<sup>279</sup> 35 U.S.C. § 103.

<sup>280</sup> *Nautilus, Inc. v. Biosig Instruments, Inc.*, 572 U.S. 898, 901 (2014). This is the test for whether a patent satisfies the definiteness requirement of 35 U.S.C. § 112(b).

<sup>281</sup> See generally Greg Reilly, *How Can the Supreme Court Not “Understand” Patent Law?*, 16 CHI.-KENT J. INTELL. PROP. 292, 306 (2017) (noting that critics of the Supreme Court's patent decisions often claim that the Court does not “understand” patent law but arguing that those critics “really mean that the Supreme Court's decisions differ from their policy preferences regarding patent law”).

restrictions on patentability as much as possible—a position favorable to plaintiffs in infringement litigation.

Returning to Judge Albright’s order in *Slyce Acquisition*, it’s also remarkable that, despite devoting nearly ten pages to the topic of eligibility, it contains no actual analysis of the whether the patent in suit satisfied the eligibility requirement. The portion of the opinion labeled “Summary and application” is less than a page long and does not discuss the facts of the case at all. Instead, it explains simply that “the Court believes that delaying the determination of a patents [sic] § 101 eligibility is the wisest course of action.”<sup>282</sup>

Nothing in Supreme Court or Federal Circuit precedent supports the idea, propounded by Judge Albright in *Slyce Acquisition*, that deciding eligibility on the pleadings is “rarely” appropriate, as a rule. To the contrary, the Federal Circuit continues to regularly affirm pleading-stage eligibility dismissals, including several since *MyMail*.<sup>283</sup> Yet adopting a blanket rule of never deciding eligibility on the pleadings (at least not in favor of the defendant) is exactly what Judge Albright has done. In the three eligibility motions he’s decided most recently, he’s simply entered a text order citing *Slyce Acquisition* and saying that the defendant can refile its motion “after the opening of fact discovery.”<sup>284</sup>

This timeline gives plaintiffs enormous leverage in negotiating a settlement. In *Slyce Acquisition*, Judge Albright defended his

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<sup>282</sup> *Slyce Acquisition Inc. v. Syte-Visual Conception Ltd.*, No. 6:19-cv-257, slip op. at 16 (W.D. Tex. Jan. 10, 2020).

<sup>283</sup> See, e.g., *Elec. Comm’n Techs., LLC v. ShoppersChoice.com, LLC*, 958 F.3d 1178, 1183-84 (Fed. Cir. 2020); *Dropbox, Inc. v. Synchronoss Techs., Inc.*, No. 2019-1765, 2020 WL 3400682, at \*8 (Fed. Cir. June 19, 2020); *CardioNet, LLC v. InfoBionic, Inc.*, No. 2020-1018, 2020 WL 3564691, at \*2 (Fed. Cir. July 1, 2020); *Data Scape Ltd. v. W. Digital Corp.*, No. 2019-2161, 2020 WL 3564683, at \*2 (Fed. Cir. July 1, 2020); *Ubisoft Entm’t, S.A. v. Yousician Oy*, No. 2019-2399, 2020 WL 3096369, at \*2 (Fed. Cir. June 11, 2020); *British Tel. PLC v. IAC/InterActiveCorp.*, No. 2019-1917, 2020 WL 2892601, at \*2 (Fed. Cir. June 3, 2020); *Cisco Sys., Inc. v. Uniloc 2017 LLC*, No. 2019-2048, 2020 WL 2465483, at \*3 (Fed. Cir. May 13, 2020); *WhitServe LLC v. Donuts Inc.*, No. 2019-2240, 2020 WL 1815758, at \*4 (Fed. Cir. Apr. 10, 2020).

<sup>284</sup> *Scanning Techs. Innovations, LLC v. Brightpearl, Inc.*, No. 6:20-cv-114 (W.D. Tex. Apr. 11, 2020) (“In light of the Court’s order in *Slyce v. Syte*, the Court does not believe this is one of the rare cases where it is appropriate to resolve the Section 101 eligibility of the patents-in-suit as a Rule 12(b) motion to dismiss.” (citation omitted)); *Aeritas, LLC v. Sonic Corp.*, No. 6:20-cv-103 (W.D. Tex. Mar. 14, 2020) (same); *Broadband iTV, Inc. v. DISH Network LLC*, No. 6:19-cv-716 (W.D. Tex. July 25, 2020). Judge Albright recently denied a fourth eligibility motion, but the dispute focused entirely on questions of claim preclusion. See *VideoShare, LLC v. Google LLC*, No. 6:19-cv-663 (W.D. Tex. May 4, 2020).



reluctance to decide eligibility on the pleadings by asserting that it wouldn't significantly increase litigation costs because the only interim expense was "the cost of preparing the claim construction briefing and preparing for the *Markman* hearing."<sup>285</sup> But his more recent decisions make clear that defendants can refile their motions only after fact discovery begins, meaning that the motions will likely not be decided until after discovery is well underway, if not nearly complete given the expedited schedule he imposes.

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Viewed as a whole, the increasing concentration of patent litigation in the Western District of Texas is problematic. Judge Albright's procedural practices are designed mainly to process cases as quickly as possible—except when it is defendants who want a quick dismissal on eligibility grounds. This plaintiff-favoring speed increases patentees' leverage in settlement negotiations. A reluctance to stay cases pending disputes elsewhere has the same effect—titling the field in favor of patentees. To further attract patent cases to his court, Judge Albright has engaged in questionable interpretations and applications of binding appellate case law on the issues of venue and patent eligible subject matter. The Western District's case assignment practice permits plaintiffs to predict—with certainty—that they will benefit from the favorable procedure and law in Judge Albright's court. Eliminating judge shopping would help bring the playing field back to level.

#### IV. ELIMINATING JUDGE SHOPPING AND REDUCING COURT COMPETITION FOR PATENT CASES

Expressing an eagerness to hear particular types of cases, as Judge Albright has done with patent cases, might be unseemly, but it probably doesn't violate ethics rules.<sup>286</sup> The most pertinent provision of the Code of Conduct for federal judges requires them to "act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary."<sup>287</sup> On its face, Judge Albright's promotion of the Western District as a patent forum is neutral among parties; only after a close look at the law and practice in his courtroom does it become clear that patentees have an advantage.

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<sup>285</sup> *Slyce*, No. 6:19-cv-257, slip op. at 12 n.3.

<sup>286</sup> See J. Jonas Anderson, *Judicial Lobbying*, 91 WASH. L. REV. 401, 414-16 (2016) (discussing the relevant ethical limits).

<sup>287</sup> Admin. Office of the U.S. Courts, *Guide to Judiciary Policy*, Vol. 2: Ethics and Judicial Conduct, ch. 2, Canon 2(A) (2014).

What could be done to make things level? For starters, by simply writing this article, we hope to encourage Judge Albright (or, failing that, the Federal Circuit) to take a close look at procedural practices in and the decisions coming out of the Western District to ensure the court is a fair forum for all litigants who appear before it.

In addition, there are two legal reforms that would eliminate the judge shopping that has led to the concentration of patent cases in East Texas and, now, West Texas: (1) randomization of judicial assignment and (2) venue rules tailored to particular divisions within a district, not just the district as a whole. Though either change could be accomplished by Congress, a more realistic site for reform would be the Judicial Conference of the United States, which has the authority to make rules of practice and procedure for the federal courts (subject to approval by the Supreme Court).

#### A. Randomization of Case Assignment

As discussed, federal district courts are not obligated to randomly assign cases. Section 137 of the Judicial Code states only that “[t]he business of a court having more than one judge shall be divided among the judges as provided by the rules and orders of the court.”<sup>288</sup> One change that would reduce judge shopping would be to amend § 137 to mandate random assignment. Under our proposal, random assignment would take precedence over local rules that assign cases divisionally even if the division contains only one judge. This change would statutorily mandate a randomization practice that many district courts have already mandated through their local rules.<sup>289</sup>

A modified § 137 could read as follows (our changes in bold):

The business of a district court having more than one judge shall be **randomly** divided among the judges as provided by the rules and orders of the court. The chief judge of the district court shall be responsible for the observance of such rules and orders, and shall divide the business and assign the cases so far as such rules and orders do not otherwise prescribe. **Notwithstanding the rules and orders of the court, no judge in a district court**

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<sup>288</sup> 28 U.S.C. § 137.

<sup>289</sup> See e.g., D. Neb. Gen. R. 1.4 (mandating random assignment of cases in the District of Nebraska unless “these rules state or the chief judge directs otherwise”); D.R.I. L.R. Gen. 105 (mandating random assignment in the District of Rhode Island).

**having more than one judge shall have greater than 50% probability of being assigned a given case.**

Alternatively, this statute could be modified to only mandate randomization in patent law because that is the area in which non-random assignment is currently leveraged by plaintiffs to judge shop. A patent-specific randomization provision would not be unique in intellectual property law. There is already a randomization provision for disputes over license agreements for public performance of a copyrighted work in 28 U.S.C. § 137(b).<sup>290</sup>

The proposed statute would leave divisions of district courts in place, but it would eliminate the ability for litigants to know *ex ante* who their judge will be by eliminating the possibility that cases filed in a particular division will all be assigned to a single judge. We think such a random assignment requirement is needed to ensure that federal courts remain fair and equitable for both plaintiffs and defendants.<sup>291</sup> Courts interested in competing for patent cases need to provide valuable advantages to plaintiffs. The Western and Eastern Districts of Texas have both granted plaintiffs the ability to judge shop as a means of enticing patent plaintiffs to their courtrooms.

This proposal would not eliminate forum shopping in patent law. It is likely that plaintiffs would still seek out the Western District of Texas, even if their odds of landing Judge Albright are less than 100%. But our proposal would at least eliminate the egregious type of judge shopping that has been occurring in East and West Texas.

## B. Divisional Venue

Another change Congress could make would be to revise the patent venue statute to require a connection not just with the district, but with the *division* in which the case is filed. (This change would, of course, apply only to districts that are divided into divisions.)

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<sup>290</sup> 28 U.S.C. § 137(b)(1)(B) (mandating that in “cases of performing rights society subject to a consent decree, any application for the determination of a license fee for the public performance of music in accordance with the applicable consent decree shall be made in the district court with jurisdiction over that consent decree and randomly assigned to a judge of that district court”). Further, 28 U.S.C. § 137(b)(1)(B)(i) mandates that the judge assigned randomly cannot be a judge that previously was assigned a case of a performing rights society seeking a determination of a license fee.

<sup>291</sup> For a thorough explication of the benefits of randomness in allocating cases among courts and judges, see Ori Aronson, *Forum by Coin Flip: A Random Allocation Model for Jurisdictional Overlap*, 45 SETON HALL L. REV. 63, 91 (2015).

Again, some districts have already adopted similar provisions. One example is the Central District of California, which consists of an Eastern Division in Riverside, a Southern Division in Santa Ana, and a Western Division in Los Angeles. The Central District's general order assigning cases provides, essentially, that civil cases will be assigned to the Southern Division or the Eastern Division if 50% or more of the parties who reside in the district reside in that division.<sup>292</sup> Otherwise, the case will be assigned to Western Division in Los Angeles, which is far more populous and has many more judges than the other two divisions.<sup>293</sup>

This model would thwart judge shopping in the Western District of Texas. Cases could be assigned by default to the Austin or San Antonio divisions—which are the most populous, most centrally located, and have the first- and third-most judges of any division in the district—and would be assigned to the smaller or more far-flung divisions (Waco, El Paso, Midland, Del Rio, and Pecos) only if the parties have ties to those places.<sup>294</sup>

An alternative model for divisional venue is the Northern District of Georgia. The relevant local rule there provides that, if all of the defendants reside in the district, then the case must be filed in the *division* where the defendants reside.<sup>295</sup> The rules also provide that “[a]ny civil action brought in this district on the grounds that the cause of action arose here must be filed in a division of the district wherein the activity occurred.”<sup>296</sup>

Applying this model to patent cases in the Western District of Texas, recall that, under *TC Heartland*, defendants in patent infringement cases “reside” in their state of incorporation only. Since most defendants are not incorporated in Texas, that would leave only the second option—that the case arose in the district, so the case must be filed in the division in which the relevant activity occurred. In other words, the defendant will need to have committed at least one act of infringement *in the*

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<sup>292</sup> U.S. Dist. Ct. C.D. Cal., Gen. Order No. 19-03 § I.B.1.a.(1)(c) (Feb. 28, 2019).

<sup>293</sup> Currently, fifteen active judges are based in the Western Division, with only two in the Southern Division and one in the Eastern Division.

<sup>294</sup> Currently, four active judges are based in San Antonio and two are based in Austin. El Paso has four judges, Waco has one judge (Judge Albright), Del Rio has one judge, and Midland and Pecos share a judge.

<sup>295</sup> N.D. Ga. Local R. 3.1(B)(1)(a). If the defendants reside in different divisions, the case may be filed in any division in which one defendant resides. *Id.*

<sup>296</sup> N.D. Ga. Local R. 3.1(B)(3).

*division in which the case is filed.* This would eliminate the practice of plaintiffs filing suit in Waco against defendants that have committed alleged acts of infringement in the Western District generally, but engage in no activity in Waco, specifically. Examples would include Whole Foods and Dell, which have each been sued in Waco despite having no locations in that division and being headquartered in Austin,<sup>297</sup> and Apple, which likewise has no stores or offices in the Waco Division.<sup>298</sup> These cases would have to be filed in Austin—a place that not only has a stronger connection to the parties and the case, but one in which judge shopping is not possible.

### C. The Judicial Conference

Though Congress could certainly make the two changes described above,<sup>299</sup> we think the more appropriate (and realistic) entity to address court competition and judge shopping in patent law is the Supreme Court, by way of the Judicial Conference. The federal courts generally have the power to create rules that govern how they operate,<sup>300</sup> and the Rules Enabling Act authorizes the Supreme Court to promulgate rules of procedure that apply in all federal courts.<sup>301</sup>

The Supreme Court has delegated its oversight of the rulemaking process to the Judicial Conference. The Judicial Conference is the national policy-making body for federal courts and consists of the Chief Justice of the United States as the presiding officer, the chief judge of each judicial circuit, the chief judge of the Court of International Trade, and a district judge from each regional judicial circuit. The Conference essentially operates through a network of committees created

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<sup>297</sup> These cases are prime examples of judge shopping—the plaintiffs filed in Waco to get the case in front of Judge Albright, who then transferred the cases from Waco to Austin and kept them on his docket. *See Data Scape Ltd. v. Dell Techs., Inc.*, No. 6-19-cv-129 (W.D. Tex. June 7, 2019); *Freshub, Inc. v. Amazon.com Inc.*, No. 6-19-388 (W.D. Tex. Sept. 9, 2019).

<sup>298</sup> *Uniloc 2017 LLC v. Apple, Inc.*, No. 6-19-cv-532, slip op. at 4 (W.D. Tex. June 19, 2020).

<sup>299</sup> *See* Botoman, *supra* note 67, at 336 (proposing that Congress adopt a divisional venue statute).

<sup>300</sup> *See* 28 U.S.C. § 2071(a) (“The Supreme Court and all courts established by Act of Congress may from time to time prescribe rules for the conduct of their business.”).

<sup>301</sup> *Id.* § 2072(a) (“The Supreme Court shall have the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts . . . and courts of appeals.”).

specifically to address a wide variety of subjects, including rules of practice and procedure.

The Judicial Conference's Committee on Rules of Practice and Procedure (the Standing Committee) recommends rule changes to the full Judicial Conference, which (if approved) then recommends those changes to the Supreme Court. If the Court agrees with the proposal, the rule becomes law unless Congress enacts legislation to reject, modify, or defer it.

The Judicial Conference is specifically mandated to “carry on a continuous study of the operation and effect of the general rules of practice and procedure now or hereafter in use as prescribed by the Supreme Court for the other courts of the United States pursuant to law.”<sup>302</sup> As part of that process, the Judicial Conference should consider mandating randomization of case assignment or divisional venue (or both), along the lines proposed above.

But changing the law is not the only possibility. One of the Judicial Conference's statutory mandates is to “submit suggestions and recommendations to the various courts to promote uniformity of management procedures and the expeditious conduct of court business.”<sup>303</sup> To that end, the Judicial Conference could issue non-binding guidance to district courts about how to assign cases without facilitating judge shopping.

A final possible site for reform is the Federal Judicial Center—the judicial branch's research and education agency.<sup>304</sup> Though the FJC has no authority to dictate district court procedure, it regularly issues non-binding guidance about how courts and judges can best manage particular types of cases.<sup>305</sup> It wouldn't seem like too much of a leap for the FJC to prepare a document on “best practices in judicial case

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<sup>302</sup> *Id.* § 331.

<sup>303</sup> *Id.*

<sup>304</sup> Federal Judicial Center, About the FJC, <https://www.fjc.gov/about>.

<sup>305</sup> For examples, see TIMOTHY LAU, TRADE SECRET SEIZURE BEST PRACTICES UNDER THE DEFEND TRADE SECRETS ACT OF 2016 (June 2017), <https://www.fjc.gov/content/323518/dtsa-best-practices-june-2017>, and U.S. JUDICIAL PANEL ON MULTIDISTRICT LITIGATION & FEDERAL JUDICIAL CENTER, TEN STEPS TO BETTER CASE MANAGEMENT: A GUIDE FOR MULTIDISTRICT LITIGATION TRANSFEREE JUDGES (2d ed. 2014), <https://www.fjc.gov/sites/default/files/2014/Ten-Steps-MDL-Judges-2D.pdf>.

assignment” that encourages random assignment or divisional venue along the lines we suggest above.

### CONCLUSION

The Western District of Texas is winning the competition for patent cases. And the district’s success is largely the result of Judge Albright’s appeal to patent plaintiffs—especially non-practicing entities. Plaintiffs love that they can select Judge Albright and avoid having their case randomly assigned among various judges. Plaintiffs love the speed with which Judge Albright churns through his patent docket, forcing defendants to make settlement decisions earlier. Plaintiffs love Judge Albright’s attention to patent cases. Judge Albright’s reluctance to transfer cases out of West Texas is another selling point, as is his willingness to transfer cases within the division while still retaining the case. Plaintiffs also love knowing that Judge Albright is reluctant to stay the litigation, even for a patent validity challenge at the PTAB. And, finally, plaintiffs love that Judge Albright is very unlikely to invalidate their patent on eligibility grounds at an early stage of litigation.

But Judge Albright’s attractiveness to patent plaintiffs has downsides. While we do not question Judge Albright’s interest in patent cases nor his knowledge of the often-complex doctrines of patent law, Judge Albright’s overwhelming and instantaneous success at attracting patent cases to Waco should concern observers of the federal courts—including Congress. The mixture of judge shopping, plaintiff-friendly scheduling, and plaintiff-favoring motions practice in the Waco Division of the Western District of Texas exhibits all of the hallmarks of unhealthy court competition for plaintiffs.

Our proposed solutions are partial but necessary fixes to the problem. First, courts ought to mandate random assignment of judges to cases. This would eliminate the worst aspects of judge-shopping that are permitted by the Western District of Texas as well as many other districts nationwide. Second, venue ought to be based on the *division* in which the case is brought not just the *district* as a whole. This would eliminate cases from being tried in Waco when the defendant has no established place of business in Waco. These solutions are common sense and simple to implement. If courts will not make them on their own, Congress or the Judicial Conference should require that they do so.

## APPENDIX A: JUDGE ALBRIGHT VENUE RULINGS

Motions to Transfer Patent Infringement Cases Out of the Western  
District of Texas Under § 1404(a)

Case Name	Docket Number	Order Date	Transfer Sought To	Result
Moskowitz Family LLC v. Globus Medical, Inc.	6-19-cv- 672	July 2, 2020	E.D. Pa.	Granted
Hammond Development Int'l, Inc. v. Google LLC	1-20-cv-342	June 24, 2020	N.D. Cal.	Denied
Solas OLED Ltd. v. Apple Inc.	6-19-cv-537	June 23, 2020	N.D. Cal.	Denied
Voxer, Inc. v. Facebook, Inc.	6-20-cv-11	June 22, 2020	N.D. Cal.	Denied
Uniloc 2017 LLC v. Apple Inc.	6-19-cv-532	June 19, 2020	N.D. Cal.	Denied
DynaEnergetics Europe GMBH v. Hunting Titan, Inc.	6-20-cv-69	June 16, 2020	S.D. Tex.	Granted
Syncloud Techs., LLC v. Dropbox, Inc.	6-19-cv-526	May 18, 2020	N.D. Cal.	Denied
Syncloud Techs., LLC v. Dropbox, Inc.	6-19-cv-525	May 14, 2020	N.D. Cal.	Denied
STC.UNM v. Apple Inc.	6-19-cv-428	Apr. 1, 2020	N.D. Cal.	Denied
CloudofChange, LLC v. NCR Corp.	6-19-cv-513	Mar. 17, 2020	N.D. Ga.	Denied
Fintiv, Inc. v. Apple Inc.	6-18-cv-372	Sept. 13, 2019	N.D. Cal.	Denied
VLSI Technology LLC v. Intel Corp.	6-19-cv-254	Aug. 6, 2019	D. Del.	Denied
MV3 Partners LLC v. Roku, Inc.	6-18-cv-308	June 25, 2019	N.D. Cal.	Denied



Contested Motions to Transfer Patent Infringement Cases from the  
Waco Division to the Austin Division Under § 1404(a)

Case Name	Docket Number	Order Date	Result
Hammond Development Int'l, Inc. v. Google LLC	1-20-cv-342	June 24, 2020	Granted
Voxer, Inc. v. Facebook, Inc.	6-20-cv-11	June 22, 2020	Granted
STC.UNM v. Apple Inc.	6-19-cv-428	Apr. 1, 2020	Granted
Hammond Dev. Int'l, Inc. v. Amazon.com, Inc.	6-19-cv-355	Mar. 30, 2020	Granted
VSLI Tech. LLC v. Intel Corp.	6-19-cv-254	Oct. 7, 2019	Granted
Freshub, Inc. v. Amazon.com, Inc.	6-19-cv-388	Sept. 9, 2019	Granted
Data Scape Ltd. v. Dell Techs. Inc.	6-19-cv-129	June 7, 2019	Granted

Stipulated or Unopposed Transfers of Patent Infringement  
Cases from the Waco Division to the Austin Division

Case Name	Docket Number	Order Date
Ravgen, Inc. v. PerkinElmer Inc.	6-20-cv-452	Aug. 4, 2020
Paypal, Inc. v. Retailmenot, Inc.	6-20-cv-339	Aug. 1, 2020
Zeroclick, LLC v. LG Elecs. Inc.	6-20-cv-422	Aug. 1, 2020
Intelligent Agency, LLC v. NeighborFavor, Inc.	6-20-cv-39	July 23, 2020
Nippon Tel. & Tel. Corp. v. Acer Inc.	6-20-cv-227	July 21, 2020
Far North Patents, LLC v. Microchip Tech. Inc.,	6-20-cv-221	July 17, 2020
Zeroclick, LLC v. Samsung Electronics Co.	6-20-cv-425	July 16, 2020
Quartz Auto Techs. LLC v. Uber Techs., Inc.	6-20-cv-126	July 6, 2020
Quartz Auto Techs. LLC v. Lyft, Inc.	6-20-cv-156	July 4, 2020

Case Name	Docket Number	Order Date
Broadband iTV, Inc. v. AT&T Servs., Inc.	6-19-cv-712	July 4, 2020
Proven Networks, LLC v. Dell Techs. Inc.	6-20-cv-202	July 1, 2020
BCS Software, LLC v. Itron, Inc.	6-19-cv-728	June 26, 2020
BCS Software, LLC v. Landis+Gyr Techs., LLC	6-20-cv-5	June 26, 2020
Zeroclick, LLC v. Microsoft Corp.	6-20-cv-423	June 26, 2020
Zeroclick, LLC v. Dell Techs., Inc.	6-20-cv-421	June 26, 2020
Ravgen, Inc. v. Natera, Inc.	6-20-cv-451	June 25, 2020
Nippon Tel. & Tel. Corp. v. MediaTek Inc.	6-20-cv-225	June 18, 2020
Bell Semiconductor, LLC v. NXP Semiconductors, B.V.	6-20-cv-210	June 9, 2020
Nippon Tel. & Tel. Corp. v. Tex. Instruments Inc.	6-20-cv-226	May 29, 2020
Castlemorton Wireless, LLC v. Juniper Networks, Inc.	6-20-cv-26	May 23, 2020
Proven Networks, LLC v. Amazon.com, Inc.	6-20-cv-266	May 8, 2020
Castlemorton Wireless, LLC v. Arista Networks, Inc.	6-20c-v-23	May 5, 2020
Intellectual Ventures II LLC v. VMware Inc.	6-20-cv-220	Apr. 30, 2020
Far North Patents, LLC v. NXP USA, Inc.	6-20-cv-273	Apr. 14, 2020
STC.UNM v. Taiwan Semiconductor Mfg. Co.	6-19-cv-261	Apr. 9, 2020
Invicta Networks, Inc. v. Forcepoint LLC	6-20-cv-173	Mar. 28, 2020
Castlemorton Wireless, LLC v. Altice USA, Inc.	6-20-cv-38	Mar. 21, 2020
Zeroclick, LLC v. LG Elecs. Inc.	6-19-cv-571	Mar. 18, 2020
Zeroclick, LLC v. Samsung Elecs. Co.	6-19-cv-573	Mar. 17, 2020

Case Name	Docket Number	Order Date
Zeroclick, LLC v. Microsoft Corp.	6-19-cv-572	Mar. 16, 2020
Zeroclick, LLC v. Dell Techs., Inc.	6-19-cv-569	Mar. 14, 2020
Castlemorton Wireless, LLC v. Plantronics, Inc.	6-20-cv-56	Mar. 4, 2020
Onstream Media Corp. v. Facebook, Inc.	6-19-cv-708	Feb. 26, 2020
Slingshot Printing LLC v. HP Inc.	6-20-cv-48	Feb. 19, 2020
Slingshot Printing LLC v. HP Inc.	6-19-cv-549	Feb. 19, 2020
Slingshot Printing LLC v. HP Inc.	6-19-cv-364	Feb. 19, 2020
Slingshot Printing LLC v. HP Inc.	6-19-cv-363	Feb. 19, 2020
Slingshot Printing LLC v. HP Inc.	6-19-cv-362	Feb. 19, 2020
Exafer, Ltd. v. Microsoft Corp	6-19-cv-687	Feb. 4, 2020
Ancora Techs., Inc. v. LG Elecs., Inc.	6-19-cv-384	Jan. 12, 2020
Data Scape Ltd. v. iHeartMedia, Inc.	6-19-cv-483	Dec. 16, 2019
Stone Interactive Ventures LLC v. Elec. Arts, Inc.	6-19-cv-542	Dec. 2, 2019
Flash-Control, LLC v. Intel Corp.	6-19-cv-404	Nov. 13, 2019
Intellectual Ventures I LLC v. VMware, Inc.	6-19-cv-449	Nov. 3, 2019
Neodron, Ltd. v. Amazon.com, Inc.	6-19-cv-395	Sept. 12, 2019
Neodron Ltd. v. Samsung Elecs. Co.	6-19-cv-400	Sept. 12, 2019
Neodron, Ltd. v. HP Inc.	6-19-cv-397	Sept. 9, 2019
Neodron Ltd. v. Microsoft Corp.	6-19-cv-399	Sept. 9, 2019
Neodron, Ltd. v. Dell Techs. Inc.	6-19-cv-396	Aug. 19, 2019

Case Name	Docket Number	Order Date
Data Scape Ltd. v. Dell Techs. Inc.	6-19-cv-311	July 1, 2019

## APPENDIX B: JUDGE ALBRIGHT ELIGIBILITY RULINGS

Case Name	Docket Number	Order Date	Result
Broadband iTV, Inc. v. DISH Network LLC	6-19-cv-716	July 25, 2020	Denied w/o prejudice
VideoShare, LLC v. Google LLC	6-19-cv-663	May 4, 2020	Denied
Scanning Techs. Innovations, LLC v. Brightpearl, Inc.	6-20-cv-114	Apr. 11, 2020	Denied w/o prejudice
Aeritas, LLC v. Sonic Corp.	6-20-cv-103	Mar. 14, 2020	Denied w/o prejudice
Slyce Acquisition Inc. v. Syte-Visual Conception Ltd.	6-19-cv-257	Oct. 22, 2019	Denied w/o prejudice <sup>306</sup>
Freshub, Inc. v. Amazon.com, Inc.	6-19-cv-388	Sept. 6, 2019	Denied w/o prejudice
Hammond Dev. Int'l, Inc. v. Google LLC	6-19-cv-356	Sept. 3, 2019	Denied w/o prejudice
eCeipt LLC v. HomeGoods, Inc.	6-19-cv-32	May 20, 2019	Denied
ESW Holdings, Inc. v. Roku, Inc.	6-19-cv-44	May 13, 2019	Denied
Multimedia Content Mgm't LLC v. DISH Network LLC	6-18-cv-207	Jan. 10, 2019	Denied
Match Group, LLC v. Bumble Trading Inc.	6-18-cv-80	Dec. 18, 2018	Denied w/o prejudice

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<sup>306</sup> Motion for reconsideration denied on January 10, 2020.

APPENDIX C: MOST FREQUENT PATENT PLAINTIFFS IN THE WESTERN  
DISTRICT OF TEXAS, 2020 (MINIMUM 4 CASES)

Name	Cases	Entity Type
WSOU Investments LLC	110	NPE <sup>307</sup>
Neodron, Ltd.	20	NPE <sup>308</sup>
Castlemorton Wireless, LLC	17	NPE <sup>309</sup>
Zeroclick, LLC	15	Solo Inventor <sup>310</sup>
Lighthouse Consulting Group, LLC	12	NPE <sup>311</sup>
STC.UNM, Inc.	11	University, NPE <sup>312</sup>

<sup>307</sup> Founded in 2017; acquired 4,000 patents from Nokia/Alcatel-Lucent. Shares company address with Coast Asset Management and Juniper Capital Partners. Scott Graham, *Patent Litigation is on the Rebound, Led by WD-Tex Filings*, NAT. L.J. (July 1, 2020).

<sup>308</sup> Founded in 2018; Irish-based company acquired patents from U.S. tech company, Microchip. Neodron has recently brought suit against Apple, Microsoft, Amazon, Samsung, Sony, and LG. Sean Pollack, *Tech Minnow Neodron Battles Giants Including Samsung and Amazon Over Patents*, TIMES (June 30, 2019).

<sup>309</sup> Castlemorton has brought patent infringement claims on U.S. patent no. 7,835,421, which was filed in 1983 and will still be in force until 2027! *See* Complaint at 10-13, Castlemorton Wireless, LLC v. ALE USA, Inc. (D. Del. 2020) (Case 1:20-cv-00130-UNA).

<sup>310</sup> Incorporated in November 2019, (but was previously incorporated until 2017). Zeroclick consists of one person: Dr. Nes Irvine, the inventor of the patents held by Zeroclick. *See* Complaint at 2, Apple, Inc. v. Zeroclick LLC, No. 5:20-cv-03898) (N.D.Cal. 2020).

<sup>311</sup> Lighthouse Consulting Group has sued several large banks for infringing its patent on check depositing technology, including Wells Fargo, Citigroup, Charles Schwab, AMEX, Bank of America, Capital One, Morgan Stanley, Ally Financial, JP Morgan, and BB&T. *See* [https://portal.unifiedpatents.com/litigation/caselist?patents=8590940&sort=-filed\\_date](https://portal.unifiedpatents.com/litigation/caselist?patents=8590940&sort=-filed_date).

<sup>312</sup> The University of New Mexico's Technology Transfer Office. STC-UNM has come under fire recently for patent troll-like behavior. *See* Josh Landau, *Troll U: When Tech Transfer Stop Being About the Transfer*, PATENTPROGRESS (July 24, 2019) <https://www.patentprogress.org/2019/07/24/troll-u-when-tech-transfer-stops-being-about-the-transfer>.

Name	Cases	Entity Type
Slingshot Printing LLC	10	NPE <sup>313</sup>
Kamino LLC	8	NPE <sup>314</sup>
Proven Networks, LLC	8	NPE
BCS Software, LLC	7	NPE
CDN INNOVATIONS, LLC	7	NPE
Voip-Pal.com, Inc.	6	Publicly-traded NPE
Browse3D LLC	6	NPE
Vantage Micro LLC	6	NPE
EcoFactor, Inc.	6	Private Company
Optic153 LLC	6	NPE
Far North Patents, LLC	6	NPE
Omnitek Partners LLC	6	Private Company
Nippon Telegraph and Telephone Corporation	5	Foreign Company
Virtual Immersion Technologies LLC	5	NPE
Aeritas, LLC	5	NPE
Parus Holdings Inc.	5	Private Company

<sup>313</sup> Slingshot Printing has brought all of its patent infringement suits against HP Inc. under a variety of Lexmark inkjet patents. Lexmark sold its portfolio of inkjet assets and technology to Funai Electric Co. Ltd. in 2013 and, in April 2019, Funai assigned the portfolio to Slingshot. See <https://insight.rpxcorp.com/news/57150>.

<sup>314</sup> Kamino has sued several large retailers for infringing its patent on a light conducting plate for a back lighting device. Defendants include Amazon.com, Hewlett-Packard, and Best Buy, among others. See [https://portal.unifiedpatents.com/litigation/caselist?court=Texas+Western+District+Court&flag=DC&plaintiff=Kamino+LLC&sort=-filed\\_date](https://portal.unifiedpatents.com/litigation/caselist?court=Texas+Western+District+Court&flag=DC&plaintiff=Kamino+LLC&sort=-filed_date).

Name	Cases	Entity Type
Lupercal LLC	5	NPE
Solas OLED Ltd.	5	NPE
Computer Circuit Operations LLC	5	NPE
Terrestrial Comms LLC	5	NPE
NavBlazer, LLC	5	NPE
Essential Wifi LLC	5	NPE?
UNM Rainforest Innovations	5	University, NPE
Intellectual Ventures II LLC	4	NPE
Broadband iTV, Inc.	4	Private Company
Gabriel De La Vega	4	Solo Inventor?
Quartz Auto Technologies LLC	4	NPE
Ikorongo Texas LLC	4	NPE
Human Differential Intelligence, LLC	4	NPE
Hitel Technologies LLC	4	NPE