Miscellaneous Docket No. _____

United States Court of Appeals

for the

Federal Circuit

IN RE MARTEN TRANSPORT, LTD.,

Petitioner

On Petition for a Writ of Mandamus to the U.S. District Court for the Eastern District of Texas in Case Nos. 2:15-cv-00353-JRG-RSP and 2:15-cv-00527-JRG-RSP, Magistrate Judge Roy S. Payne

PETITION FOR WRIT OF MANDAMUS WITH APPENDIX IN SUPPORT

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Dated: January 8, 2016

CERTIFICATE OF INTEREST FOR MARTEN TRANSPORT, LTD.

Pursuant to Federal Circuit Rule 47.4(a) and Federal Rule of Appellate Procedure 26.1, counsel for Petitioner Marten Transport, Ltd. certifies the following:

1. The full name of every party represented by the undersigned is Marten Transport, Ltd.

2. There are no other real parties in interest represented by the undersigned.

3. There are no parent corporations or publicly held companies that own 10 percent or more of the stock of the party represented by the undersigned.

4. The names of all law firms and the partners or associates that appeared for the party now represented by the undersigned in the trial court or agency, or are expected to appear in this Court, are:

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DATED: January 8, 2016

/s/ Harry Van Camp
Counsel of Record for Petitioner
Marten Transport, Ltd.

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STATEMENT OF RELATED CASES

No appeal in or from the same civil action or proceeding in the lower court has previously been before the Federal Circuit or any other appellate court.

RELIEF SOUGHT

Petitioner Marten Transport, Ltd. ("Marten") respectfully requests that the Court grant this petition for a writ of mandamus and direct the district court to (i) promptly rule on Marten's Motion to Transfer Venue ("Venue Motion") and Marten's Motion to Dismiss Plaintiff's First-Amended Complaint ("Motion to Dismiss") and (ii) stay this case pending resolution of Marten's motions, including any subsequent petition for a writ of mandamus.

ISSUES PRESENTED

(1) Whether this Court should direct the district court to rule on Marten's long-pending motions to prevent prejudice to Marten and should require the resolution of the motions before further litigation proceeds on the merits.

(2) Whether this Court should direct the district court to stay this litigation pending final resolution of Marten's pending motions, including disposition of any subsequent petition for a writ of mandamus.

FACTS NECESSARY TO UNDERSTAND PETITION

On April 20, 2015, Plaintiff Eclipse IP LLC ("Eclipse") filed its Complaint for Patent Infringement against Marten in the Eastern District of Texas in Case No. 2:15-cv-00527-JRG-RSP. (A2). Eclipse alleged that Marten infringes U.S. Patent No. 7,876,239 ("the '239 Patent") and U.S. Patent No. 7,479,899 ("the '899 Patent"), both relating to "computer-based notification systems and methods."

(A21-22). On June 26, 2015, Marten's case was consolidated with 11 other patent infringement cases filed by Eclipse, in Case No. 2:15-cv-00353. (A3).

Eclipse is a Non-Practicing Entity ("NPE") that was formed in December 2010, which has no permanent employees, or business operations, and has no presence in the Eastern District of Texas other than its litigation presence. (A49-50). Eclipse has filed well over 160 patent infringement lawsuits throughout the country, and over 100 lawsuits related specifically to one or both of the patents at issue in this case. (A50). Eclipse has not taken any of those cases through claim construction hearings, instead either settling or dismissing the cases before courts are able to construe its patents. *Id*.

Marten is a trucking company headquartered in, and with a principal place of business in Mondovi, Wisconsin, within the Western District of Wisconsin. (A51-52). Marten has been located in Wisconsin since its founding in 1946. (A52). Marten is incorporated in the state of Delaware. *Id*. Marten employs several hundred employees in its Mondovi, Wisconsin, facilities, including all upper management personnel and all employees with technical knowledge of Marten's communications and monitoring systems. *Id*. All documents related to the "computer-based notification systems and methods" utilized by Marten are located in Mondovi, Wisconsin. (A54). Marten has no connection to the Eastern District

of Texas other than the fact that its trucks occasionally travel through the district. *Id*.

Over six months ago, on June 29, 2015, Marten filed its Motion to Transfer Venue to the Western District of Wisconsin. (A3). Briefing on the motion was complete five and a half months ago, on July 23, 2015. (A4).

On the same day Marten filed its Venue Motion—June 29, 2015—it also filed a Rule 12(b)(6) Motion to Dismiss based on 35 U.S.C. § 101 and the Supreme Court's decision in *Alice Corp. Pty. Ltd. v. CLS Bank International*, 134 S. Ct. 2347 (2014). (A25). When Eclipse's Response to the Motion to Dismiss was due, Eclipse instead filed an Amended Complaint. (A135). Subsequently, Marten filed a Motion to Dismiss the Amended Complaint on July 29, 2015. (A223). Briefing on the Motion to Dismiss was complete on August 27, 2015. (A17). Since Marten's motions were filed, the district court has not ruled on the motions or set hearings.

In an attempt to spur action on the pending motions, Marten sent and filed a letter to Magistrate Judge Roy S. Payne on November 10, 2015, requesting that the district court issue decisions on the Venue Motion and the Motion to Dismiss. (A566). The district court did not respond to the letter. Marten repeated its request in the parties' Joint Claim Construction Statement (filed December 9, 2015), stating that "Marten requests that the Court address Marten's pending Motion to Transfer Venue and Motion to Dismiss prior to the Claim Construction Hearing."

(A577). The district court has not responded or issued rulings on the pending motions.

While its motions have been pending, Marten has been forced by the district court's Docket Control Order and Discovery Order to engage in the substantive defense of the case. (A519; A552). Pursuant to the Docket Control Order, the parties have proceeded with infringement contentions, invalidity contentions, exchange of proposed claim terms and preliminary claim constructions, and preparing and filing a Joint Claim Construction Statement. (A519). Claim construction briefing is set to begin on January 20, 2016, less than two weeks from now, and the claim construction hearing is set for March 2, 2016, less than two months from now. (A521). The deadline to complete claim construction discovery has already passed, and the parties are ordered to substantially complete document production by January 20, 2016. *Id*. The district court has given no indication that Marten's motions will be decided prior to claim construction.

Since it has been forced to proceed with the merits of the case, Marten has incurred exorbitant costs in an inconvenient forum. As claim construction briefing and hearing preparation begins, costs will rapidly escalate yet again.

Every other defendant in this consolidated case apparently found these costs too much to bear. Out of the original 12 consolidated defendants, Marten is the

only remaining defendant. (A8-12). All other defendants have been voluntarily dismissed, presumably due to settlements reached with Eclipse. (A12-19).

Of the 12 defendants in the consolidated action, nine filed motions to dismiss. *Id*. The district court never set a single hearing on these motions, much less issued decisions. Rather than continue to wait for the district court to decide their motions and incur additional costs, the other eight defendants that filed motions to dismiss apparently chose to settle with Eclipse.

In order to avoid the further prejudice Marten would suffer if it is forced to continue engaging in the merits of the case in an inconvenient forum, Marten seeks relief from this Court.

REASONS FOR GRANTING THE WRIT

A writ of mandamus is properly granted to correct the "usurpation of judicial power." *In re Link_A_Media Devices Corp.*, 662 F.3d 1221, 1222 (Fed. Cir. 2011). Specific to this case, "a lengthy delay in ruling on a request for relief can amount to a denial of the right to have that request meaningfully considered." *In re Google*, No. 15-138, 2015 WL 5294800, at *1 (Fed. Cir. July 16, 2015). The district court's delay in this case has amounted to a denial of Marten's rights to have its motions meaningfully considered.

During the past six months, one of two events should have occurred. Either the district court should have decided Marten's Venue Motion, or it should have

decided Marten's Motion to Dismiss. Marten contends that both motions would have been granted pursuant to controlling case law had they been considered. The allowance of either motion would have saved Marten from defending this case in an inconvenient forum. Instead, due to the court's delay and order to proceed on the merits, Marten has been forced to litigate a substantially frivolous case that has no connection to the Eastern District of Texas. This delay has frustrated 28 U.S.C. § 1404(a)'s intent to "prevent the waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense . . ." *Id*. (internal quotations and citations omitted). Marten faces substantial additional prejudice if the district court proceeds with the claim construction process without deciding Marten's pending motions.

I. THE COURT SHOULD DIRECT THE DISTRICT COURT TO PROMPTLY DECIDE MARTEN'S MOTION TO TRANSFER VENUE.

This Court should grant Marten's Petition for Writ of Mandamus and direct the district court to promptly decide Marten's Venue Motion.

In the context of motions to transfer venue, "lengthy delays have the ability to frustrate 28 U.S.C. § 1404(a)'s intent to prevent the waste of time, energy, and money and to protect litigants, witnesses and the public against unnecessary inconvenience and expense, when defendants are forced to expend resources litigating substantive matters in an inconvenient venue while a motion to transfer

lingers unnecessarily on the docket." *Google*, 2015 WL 5294800 at *1 (internal quotations and citations omitted). Consistent with this intent, magistrate judges are required to "promptly conduct" nondispositive matters, including motions to transfer. Fed. R. Civ. P. 72(a); *Id.*

Trial courts must give top priority to venue motions, deciding them prior to proceeding on substantive matters. *In re Nintendo Co.*, 544 Fed.Appx. 934, 941 (Fed. Cir. 2013) ("a trial court must first address whether it is a proper and convenient venue before addressing any substantive portion of the case."); *In re EMC Corp.*, Misc. No. 142, 2013 WL 324154, at *2 (Fed. Cir. Jan. 29, 2013) (recognizing "the importance of addressing motions to transfer at the outset of litigation."); *In re Horseshoe Entm't*, 337 F.3d 429, 433 (5th Cir. 2003) (stating that a motion to transfer "should have taken a top priority in the handling of this case . . ."); *McDonnell Douglas Corp. v. Polin*, 429 F.2d 30, 30 (3rd Cir. 1970) ("it is not proper to postpone consideration of the application for transfer under § 1404(a) until discovery on the merits is completed.").

Undue delay in ruling on a time-sensitive motion "for no reason other than docket congestion is impermissible." *See Google*, 2015 WL 5294800 at *1 (citing *Johnson v. Rogers*, 917 F.2d 1283, 1285 (10th Cir. 1990)). Instead, the passage of time, combined with a magistrate judge's ordering of substantive development of a

case, may amount to an arbitrary refusal to consider the merits of a transfer motion. *Google*, 2015 WL 5294800 at *2.

A. It Is Within This Court's Discretion To Issue A Writ Directing The District Court To Promptly Decide Marten's Venue Motion.

This Court has conclusively established that it may issue a writ of mandamus where a district court has failed to rule on a motion to transfer. *Id*.; *In re Nintendo*, 544 Fed. Appx. at 942-43. In *Google*, this Court recently granted a petition for writ of mandamus in circumstances nearly identical to those presented in this case. In that case, this Court found that Google had made a compelling case that Magistrate Judge Roy S. Payne of the Eastern District of Texas had "arbitrarily refused to consider the merits of its transfer motion." *Google*, WL 5294800 at *2. Consequently, the Court "direct[ed] the magistrate to rule on the motion to transfer within 30 days and to stay all proceedings pending completion of the transfer matter." *Id*. The Court also "remind[ed] the lower court that any familiarity that it has gained with the underlying litigation due to the progress of the case since the filing of the complaint is irrelevant when considering the transfer motion and should not color its decision." *Id*. This Court specifically relied on the "passage of time and magistrate judge's ordering of substantive development of the case" in finding that "the magistrate arbitrarily refused to consider the merits of [Google's] transfer motion." *Id*.

In that case, Google filed its petition with this Court just over seven months after it filed its motion to transfer in the Eastern District of Texas. *Id*. at *1; (A600). In the district court, the magistrate judge had "ordered the parties to engage in extensive discovery, including the taking of depositions and exchanging infringement and invalidity contentions . . ." *Google*, WL 5294800 at *1. Google filed its petition prior to the scheduled claim construction hearing. (A608). However, during the pendency of the petition, the district court conducted the claim construction hearing, but did not issue a claim construction ruling. (A608-11). That case has now transferred to the Northern District of California, and the parties are scheduled to proceed through, and incur costs for, a second, new claim construction hearing in that court. (A631).

In the current case, Marten's Venue Motion has been pending for over six months. During that time—just as in *Google*—Magistrate Judge Payne ordered the parties to engage in extensive discovery, including taking depositions and exchanging infringement and invalidity contentions. (A519). The deadline for claim construction discovery has now passed and document production is ordered to be substantially complete by January 20, 2016. (A521). Claim construction briefing begins on January 20, 2016, less than two weeks from now, and the claim construction hearing is scheduled for March 2, 2016, less than two months from now. *Id*.

Google waited one month longer than Marten to file its petition, but it also suffered unnecessarily due to its delay. Despite having its transfer motion ultimately granted, Google was forced to prepare for and participate in a claim construction hearing in the Eastern District of Texas while its petition was pending, and is now scheduled to participate in a second claim construction hearing in the Northern District of California. This Court's *Google* decision does not require that parties wait until the eve of a claim construction hearing to petition for mandamus relief, and Marten should not be forced to undergo the same duplicative effort and waste of resources that Google endured.

B. A Writ Of Mandamus Is Necessary To Prevent Irreparable Prejudice.

The Eastern District of Texas has repeatedly justified the denial of venue motions based on its familiarity with the patents at issue. *See Personalweb Techs., LLC v. Yahoo!, Inc.*, No. 6:12-cv-658, 2014 WL 1689046, at *7 n.6 (E.D. Tex. Feb. 12, 2014) (denying motion to transfer that had been filed nearly a year earlier, noting that the court had gained familiarity with the patents "[s]ince the date this case was filed . . ."); *TQP Dev., LLC v. Yelp Inc.*, No. 2:12-cv-656-JRG-RSP, 2013 WL 5450309, at *5 (E.D. Tex. Sept. 30, 2013) (denying motion to transfer that had been filed ten months earlier, relying on the judicial economy related to the court's familiarity with the patent); *Portal Techs., LLC v. IAC/Interactivecorp*, No. 2:11-cv-439-JRG-RSP, 2012 WL 3494826, at *3 (E.D. Tex. Aug. 15, 2012) (denying a

motion to transfer that had been filed more than six months earlier, relying on the court's familiarity with the patent after conducting a claim construction hearing).

Here, the parties are less than two weeks away from claim construction briefing, and less than two months from the claim construction hearing. Consequently, if this Court does not issue the requested writ, Marten risks the possibility that the district court will deny its Venue Motion based on the Court's newly gained "familiarity" with the patents at issue. Thus, Marten faces the potential prejudice of being stranded in an inconvenient forum despite having filed a meritorious motion to transfer over six months ago.

Mandamus relief is particularly important in this case, where a transfer order from the district court would likely not be appealable in any other manner. *In re TS Tech USA Corp.*, 551 F.3d 1315, 1322 (Fed. Cir. 2008) (noting that appeal would not be an adequate remedy because the petitioner would not be able to demonstrate that it would have won the case had it been tried in a convenient venue).

C. Mandamus Is Appropriate Because Fifth Circuit Case Law Requires Transfer.

The district court's delay in addressing Marten's Venue Motion is particularly egregious because the merits of the motion are so clear. In the Fifth Circuit, a motion to transfer should be granted upon a showing that the transferee venue is "clearly more convenient" than the venue chosen by the plaintiff. *In re*

Nintendo Co., 589 F.3d 1194, 1197 (Fed. Cir. 2009); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 315 (5th Cir. 2008). In a case featuring most witnesses and evidence closer to the transferee venue with few or no convenience factors favoring the venue chosen by the plaintiff, the trial court should grant a motion to transfer. *Nintendo*, 589 F.3d at 1198-99.

The Fifth Circuit considers "private" and "public" interest factors in deciding motions to transfer, as detailed in Marten's Venue Motion. (A55-56). As demonstrated in the motion, every factor either weighs in favor of transfer or is neutral. No factor weighs against transfer.

On the critical issue of witnesses, Eclipse was unable to identify even a single potential witness located in the Eastern District of Texas, or even in the entire state of Texas. (A113). Instead, Eclipse offered only speculation and erroneous legal arguments. As just one example, instead of identifying any witnesses within the Eastern District of Texas, Eclipse advanced the improper argument that Marten's Venue Motion should be denied because "Plaintiff's attorneys are located in Austin, Texas." (A150); *Horseshoe Entm't*, 337 F.3d at 434 ("The factor of 'location of counsel' is irrelevant and improper for consideration . . .")

Similarly, Eclipse was unable to identify a single piece of evidence located in the Eastern District of Texas. (A114-15). Marten, conversely, presented

evidence that "[a]ll documents related to the 'computer-based notification systems and methods' utilized by Marten are located in Mondovi, Wisconsin, within the Western District of Wisconsin." (A54).

Applying Fifth Circuit case law, Marten's Venue Motion is clearly meritorious. Given that fact, the delay in ruling on Marten's motions has been especially harmful. This Court should grant Marten's petition.

II. THE COURT SHOULD DIRECT THE DISTRICT COURT TO PROMPTLY DECIDE MARTEN'S MOTION TO DISMISS.

Rule 1 of the Federal Rules of Civil Procedure dictates that courts should administer the Federal Rules "to secure the just, speedy, and inexpensive determination of every action and proceeding." It is established that a lengthy delay in ruling on a party's request for relief can amount to a denial of the right to have that request meaningfully considered. *Google*, 2015 WL 5294800 at *1. A magistrate judge must promptly conduct proceedings to hear a pretrial dispositive matter, and must enter a recommended disposition. Fed. R. Civ. P. 72(b)(1).

In this case, the magistrate judge has not promptly entered a recommended disposition on Marten's pending Motion to Dismiss or given any indication that the district court will address the motion prior to claim construction, or even before trial. Given the looming claim construction hearing, the district court's delay amounts to the denial of Marten's right to have its motion meaningfully considered.

As explained in its Motion to Dismiss, Marten's position is that Eclipse's patents – the '239 and '899 Patents – are invalid under 35 U.S.C. § 101 and *Alice Corp. Pty. Ltd. v. CLS Bank International.*, 134 S. Ct. 2347 (2014), because they do not claim subject matter eligible for patent protection. (A224). Marten's Motion to Dismiss is particularly ripe for decision because the parent patent, U.S. Patent No. 7,199,716 ("the '716 Patent"), to both patents asserted in this case has already been invalidated by the Central District of California by way of a section 101 *Alice* motion. *See Eclipse IP LLC v. McKinley Equip. Corp.*, No. 2:14-cv-00154, 2014 WL 4407592, at *11 (C.D. Cal. Sept. 4, 2014); (A25; A525). The patents at issue in this case are strikingly similar to their predecessor, the '716 Patent, increasing the likelihood that they will be invalidated just as the '716 Patent was. (A25).

The district court's delay in deciding Marten's Motion to Dismiss is particularly harmful in light of Eclipse's litigation history involving the patents at issue. As noted above, Eclipse has filed over 100 lawsuits that involve one or both of the patents at issue in this case. Eclipse has not taken a single one of those cases through claim construction, much less to summary judgment or trial. It appears every case has been either settled or voluntarily dismissed before a court could examine the patents.

When a case of this type is prolonged, without addressing dispositive motions, many defendants are effectively "forced" to settle due to exorbitant defense costs, regardless of the merits of the case. *See, e.g.*, *Eon-Net LP v. Flagstar Bancorp*, 653 F.3d 1314, 1326-27 (Fed. Cir. 2011) (affirming the district court's finding of an "indicia of extortion" by a plaintiff with a history of filing nearly identical lawsuits against many defendants, following up each filing with settlement demands for amounts lower than the cost of defense); *Edekka LLC v. 3balls.com, Inc.*, Nos. 2:15-cv-541; 2:15-cv-585 JRG, 2015 WL 9225038, at *4 (E.D. Tex. Dec. 17, 2015) (concluding that the plaintiff "acted with the goal of exploiting the high cost to defend complex litigation to extract nuisance value settlement[s] from defendants.") (internal quotations omitted).

In a concurring opinion, Judge Mayer recently addressed these concerns by stressing the importance of resolving 35 U.S.C. § 101 issues at the start of litigation:

> [R]esolving subject matter eligibility at the outset provides a bulwark against vexatious infringement suits. The scourge of meritless infringement claims has continued unabated for decades due, in no small measure, to the ease of asserting such claims and the enormous sums required to defend against them. Those who own vague and overbroad business method patents will often file nearly identical patent infringement complaints against a plethora of diverse defendants, and then demand . . . a quick settlement at a price far lower than the cost to defend the litigation. In many such cases, the patentee will place[ ] little at risk when filing suit, whereas the accused infringer will be forced to spend huge sums to comply with broad discovery requests. … Given the staggering costs associated

> with discovery, "*Markman*" hearings, and trial, it is hardly surprising that accused infringers feel compelled to settle early in the process. … Addressing section 101 at the threshold will thwart attempts–some of which bear the "indicia of extortion"–to extract "nuisance value" settlements from accused infringers.

Ultramercial, Inc. v. Hulu, LLC, 772 F.3d 709, 719 (Fed. Cir. 2014) (Mayer, Circuit Judge, concurring) (internal quotations and citations omitted).

Indeed, all of the eight other defendants in this consolidated case that filed motions to dismiss have exited the case before their dispositive motions were decided, presumably reaching settlements with Eclipse. Marten is the only remaining defendant and should not be effectively "coerced" into settlement due to the delay in resolving its motions as the other defendants appear to have been.

Eclipse's litigation history suggests that the concerns articulated by Judge Mayer are present in this case. Marten believes it has a meritorious position that Eclipse's patents are invalid and that Eclipse's claims against Marten are meritless. For the reasons raised by Judge Mayer, Marten contends it is appropriate for this Court to direct the district court to address the Motion to Dismiss now, before Marten is further harmed by this "vexatious infringement suit." *Id.*

CONCLUSION

Marten's right to "secure the just, speedy, and inexpensive determination" of its action has been denied by the district court's failure to consider Marten's motions. Fed. R. Civ. P. 1. Marten requests that this Court issue a writ of

mandamus directing the district court to promptly rule on Marten's Venue Motion, and promptly rule on Marten's Motion to Dismiss in the event the district court denies the Venue Motion. Marten also requests that this Court direct the district court to stay this litigation until the motions are finally resolved, including through any subsequent petition for a writ of mandamus challenging that ruling, if any.

Dated this 8th day of January, 2016.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I served a copy of the Petition for Writ of Mandamus with Appendix in Support on January 8, 2016 by Federal Express on the following persons:

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