Miscellaneous Docket No. _____

IN THE UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

IN RE: MICRON TECHNOLOGY, INC.,

Petitioner.

On Petition For A Writ Of Mandamus
To The United States District Court For The District Of Massachusetts
In Case No. 1:16-cv-11249-WGY, Judge William G. Young

PETITION FOR WRIT OF MANDAMUS

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CERTIFICATE OF INTEREST

Counsel for Petitioner Micron Technology, Inc. certifies as follows:

1. The full name of every party or amicus represented by us is:

   Micron Technology, Inc.

2. The name of the real party in interest represented by us is:

   Micron Technology, Inc.

3. All parent corporations and public companies that own 10 percent or more of the stock of the party represented by us are:

   None.

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

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Dated: September 12, 2017

/s/ Jared Bobrow
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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

STATUTES AND REGULATIONS

LEGISLATIVE

RULES

RELIEF SOUGHT

Petitioner Micron Technology, Inc. ("Micron") seeks an order directing the District Court to dismiss the case brought in the District of Massachusetts, where venue is improper, or in the alternative, to transfer the case to the District of Delaware or the District of Idaho, where the case could have been brought, pursuant to 28 U.S.C. § 1406(a).

FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

Whether the District of Massachusetts erred in denying Micron's motion to dismiss the case for improper venue, which motion was made promptly following the publication of *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), on the sole ground that Micron had waived the improper venue defense by not having raised it in a prior motion to dismiss that was made before *TC Heartland* abrogated this Court's decision in *VE Holding*?

This waiver question, in turn, presents the following issue: Whether an improper venue defense was "unavailable" to Micron until the Supreme Court's decision in *TC Heartland* abrogated this Court's decision in *VE Holding*?

STATEMENT OF JURISDICTION

This Court has jurisdiction to grant mandamus relief under the All Writs Act, 28 U.S.C. § 1651.

I.

INTRODUCTION

This petition presents a pressing issue deserving of prompt attention and extraordinary relief. District courts have split over the question of whether a party that moves to dismiss for improper venue based on *TC Heartland* has waived that defense by not having challenged venue in a pre-*TC Heartland* pleading or Rule 12 motion. The District Court in this case faced this emerging question and found that Micron had waived its venue challenge.

The District Court's decision is legally flawed, because it is based on the erroneous view that *TC Heartland* was not an intervening change in the law. For 27 years, this Court and district courts across the country universally upheld and applied this Court's *VE Holding* decision, which made proper venue coincident with personal jurisdiction, as good law. Before *TC Heartland*, any improper venue motion by Micron would have been flatly contrary to *VE Holding* and, therefore, was not "available" to Micron until that case was abrogated by the Supreme Court in *TC Heartland*. As set forth below, the District Court's denial of Micron's motion to dismiss or, in the alternative, transfer for improper venue, which was based solely on the District Court's determination that Micron had waived the venue challenge because *TC Heartland* was not an intervening change in law, was an abuse of discretion and usurpation of judicial power.

This case presents an ideal vehicle for providing much needed clarity and guidance to district courts and patent litigants on this issue. The case is still far from trial, Micron has never affirmatively conceded to venue, and it is beyond reasonable dispute that venue is improper in Massachusetts. Micron therefore respectfully requests that this Court issue a writ to correct the error promptly.

II.

FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

A. The Parties

Micron is a Delaware corporation headquartered in Idaho. Micron is a leader in the development and manufacture of memory technologies and products. Micron maintains no physical presence, *i.e.*, no facilities and no offices, in Massachusetts. Micron has no employees in Massachusetts. Micron does not maintain any bank accounts, manufacture any products, or warehouse any inventory in Massachusetts.

President and Fellows of Harvard College ("Harvard") is a Massachusetts corporation with its principal place of business in Massachusetts.

B. Procedural History

Harvard filed the instant action for alleged patent infringement against Micron on June 24, 2016. Appx68-90.

On August 15, 2016, Micron filed a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). Appx91-93; Appx94-104. Micron's motion did not challenge venue under Fed. R. Civ. P. 12(b)(3), because an improper venue defense was not available under the controlling Federal Circuit precedent at the time, *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990). The District Court granted Micron's motion to dismiss, but gave Harvard leave to move to amend its complaint. Appx19. Harvard moved for leave to file and, on January 30, 2017, filed its amended complaint. Appx105-136.

Micron filed its answer to the amended complaint on February 27, 2017. Appx137-153. Micron denied Harvard's venue allegations in Micron's answer, *id.* ¶ 5, because in the intervening period between when Micron filed its Rule 12(b)(6) motion, on August 15, 2016, and when it filed its answer, on February 27, 2017, the Supreme Court had granted certiorari in *TC Heartland LLC v. Kraft Food Brands Group, LLC*, 137 S. Ct. 614 (2016), on December 14, 2016. Micron repeated its denial of Harvard's venue allegations in Micron's amended answer filed on March 20, 2017. Appx154-170. To remove all doubt, Micron expressly stated in the parties' April 13, 2017 Joint Statement to the District Court pursuant to D. Mass. L.R. 16.1 and 16.6 that: "in view of the Supreme Court's review of the Federal Circuit's decision in [*In re TC Heartland LLC*], [Micron] has denied Harvard's allegation that venue is appropriate in this district. At this time, Micron

takes the position that if the Supreme Court reverses the Federal Circuit's decision in [*In re TC Heartland LLC*] and finds that 28 U.S.C. § 1400 is the sole provision governing venue in patent infringement actions, venue would not be appropriate in this district." Appx173-174.

On May 22, 2017, the United States Supreme Court issued its decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017). The Supreme Court abrogated *VE Holding* and held that, for venue purposes, a corporate defendant resides only in its state of incorporation. *Id.* at 1518-21.

On June 2, 2017, less than two weeks after *TC Heartland* issued, Micron filed a motion to dismiss for improper venue pursuant to Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406, based on the change in the law effectuated by *TC Heartland*. Appx214-216; Appx217-229. The District Court issued an order denying Micron's motion on August 30, 2017. Appx1-13. The District Court based its decision on the premise that "*TC Heartland* does not qualify as intervening law," and therefore concluded that "Micron waived any challenge to venue" "because Micron filed a motion to dismiss in August 2016, but did not assert an objection to venue." *Id.* at Appx12-13.

This case is still in an early stage. Fact discovery is on-going. No depositions have been conducted. The Court has not held a claim construction hearing or issued a claim construction ruling. The period for expert discovery is

months away. No summary judgment motions have been filed. Trial is scheduled for April 2018. Appx213.

III.

REASONS THE WRIT SHOULD ISSUE

A writ of mandamus is proper if: (1) the right to issuance of the writ is clear and indisputable; (2) there is no other adequate means to attain the relief; and (3) this Court is satisfied that the writ is appropriate under the circumstances. *E.g.*, *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). Each of these factors is satisfied in this case.

A. The Right To A Writ Is Clear And Indisputable

Mandamus may be employed to correct "a clear abuse of discretion or usurpation of judicial power." *In re EMC Corp.*, 677 F.3d 1351, 1354 (Fed. Cir. 2012). A district court "necessarily abuse[s] its discretion if it based its ruling on an erroneous view of the law." *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990); *see In re EMC*, 677 F.3d at 1355 ("A district court abuses its discretion if it relies on an erroneous conclusion of law."). It is also "well established that mandamus is available to contest a patently erroneous error in an order denying transfer of venue." *Id.* at 1354; *see, e.g.*, *In re Nintendo of Am., Inc.*, 756 F.3d 1363, 1364-65 (Fed. Cir. 2014); *In re Toyota Motor Corp.*, 747 F.3d 1338 (Fed. Cir. 2014).

In denying Micron's motion to dismiss—and thereby exercising jurisdiction even though venue is improper—the District Court committed a clear abuse of discretion and usurpation of judicial power, to which Micron's right to a writ to remedy is clear and indisputable.

1. The District Court's Holding Relies on the Erroneous Conclusion of Law that *TC Heartland* Was Not a Change in the Law Excepted From Waiver.

A party cannot waive a defense that is not "available" to it. Fed. R. Civ. P. 12(g)(2). A defense foreclosed by controlling case-law is not "available," and thus cannot be waived by a failure to raise it. *See Curtis Publishing Co. v. Butts*, 388 U.S. 130, 143 (1967); *Glater v. Eli Lilly & Co.*, 712 F.2d 735, 738 (1st Cir. 1983); *see also Chassen v. Fidelity Nat'l Fin., Inc.*, 836 F.3d 291, 293 (3d Cir. 2016); *Gucci Am., Inc. v. Li*, 768 F.3d 122, 135-36 (2d Cir. 2014); *Benoay v. Prudential-Bache Secs., Inc.*, 805 F.2d 1437, 1440 (11th Cir. 1986); *Fisher v. A.G. Becker Paribas Inc.*, 791 F.2d 691, 697 (9th Cir. 1986); *Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981). An intervening change in the law, including in particular a defense revealed for the first time by the reversal of previously foreclosing case-law, is therefore commonly expressed as an "exception" to waiver. *Glater*, 712 F.2d at 738-39; *see, e.g.*, *Big Horn Cty. Elec. Coop., Inc. v. Adams*, 219 F.3d 944, 953 (9th Cir. 2000).

That is precisely the case here: The venue challenge raised in Micron's motion to dismiss for improper venue was unavailable at the time that Micron filed its motion to dismiss for failure to state a claim, on August 15, 2016, because a venue challenge was foreclosed by controlling legal precedent, *VE Holding*. The defense only became available when *VE Holding* was abrogated by *TC Heartland.* Therefore, Micron's motion to dismiss for improper venue, which was filed promptly after the publication of *TC Heartland*, should have been excepted from the waiver rule.

The general venue statute, 28 U.S.C. § 1391(c), provides that a corporation "***shall be deemed to reside***, if a defendant, in any judicial district in which such defendant is subject to the court's personal jurisdiction with respect to the civil action in question." 28 U.S.C. § 1391(c) (2011 ed.) (emphasis added). The venue statute for patent infringement actions, 28 U.S.C. § 1400(b), provides: "Any civil action for patent infringement may be brought in the judicial district ***where the defendant resides***, or where the defendant has committed acts of infringement and has a regular and established place of business." 28 U.S.C. § 1400(b) (1952 ed.) (emphasis added). The general venue statute has been recodified and amended several times since it was first enacted, as has the patent venue statute. Following each amendment, courts have been asked to address the legal question of whether the definition of corporate residence provided in the general venue statute, as

amended, should apply to the patent venue statute. *See TC Heartland*, 137 S. Ct. at 1518-20 (summarizing history).

Pertinent to the present dispute, the last time prior to *TC Heartland* that the Supreme Court addressed a variant of this legal question was in 1957. In *Fourco Glass Co. v. Transmirra Products Corp.*, the Supreme Court held that the definition of corporate residence in Section 1391(c), which was last amended in 1948, did ***not*** apply to Section 1400(b), which had been enacted that same year, in 1948. 353 U.S. 222, 226 (1957). Accordingly, a corporate defendant's residency under Section 1400(b) was the same as it was prior to 1948, *i.e.*, in its state of incorporation. *Id.* *Fourco* thus addressed the legal question of the interpretation of 1948 statutory language then in effect at the time in 1957.

Section 1391(c), however, was subsequently amended in 1988 to include a prefatory clause, "***[f]or purposes of venue under this chapter***, a defendant that is a corporation shall be deemed to reside in any judicial district in which it is subject to personal jurisdiction at the time the action is commenced." Pub. L. No. 100-702, tit. X, § 1013(a), 102 Stat 4642, 4669 (1988) (emphasis added). This amendment consequently created a new legal question: whether the 1988 amendment, which specifies that Section 1391(c) shall apply "for purposes of venue under this chapter," requires that the definition of corporate residence set forth in Section 1391(c) be applied to the patent venue statute, Section 1400(b),

which fell within the same chapter of the U.S. Code as Section 1391(c), *i.e.*, Chapter 87 of Title 28.

This new legal issue was addressed "as a matter of first impression" by this Court in 1990. In *VE Holding Corp. v. Johnson Gas Appliance Co.*, the Court held that the 1988 amendment to Section 1391(c) was intended to apply to Section 1400(b). 917 F.2d 1574, 1584 (Fed. Cir. 1990). Under *VE Holding*, venue in patent infringement cases was not limited to a corporation's state of incorporation but could include any jurisdiction in which a corporate defendant is subject to personal jurisdiction. *See id.*

For 27 years, this Court's holding in *VE Holding* was widely recognized as binding, controlling precedent in all subsequent patent cases (until it was abrogated by the Supreme Court in *TC Heartland* in 2017). *See In re TC Heartland LLC*, 821 F.3d 1338, 1343 (Fed. Cir. 2016) (noting, prior to the reversal in *TC Heartland*, that it had been "repeatedly recognized that *VE Holding* [was] the prevailing law"); *infra* Part 2 (listing exemplary Federal Circuit and district court cases which cite *VE Holding*). As such, all district courts were obligated to follow it. *See* 28 U.S.C. § 1295; *Gunn v. Minton*, 133 S. Ct. 1059, 1067 (2013); *Foster v. Hallco Mfg. Co., Inc.*, 947 F.2d 469, 475 (Fed. Cir. 1991) ("A district court must, of course, follow Federal Circuit precedent in a case arising under the patent laws, 35 U.S.C. §§ 1 et seq.").

Thus, while *VE Holding* was still valid law, Micron was precluded from filing an improper venue motion. Such a venue challenge would have been rejected by both the District Court and by this Court in accordance with *VE Holding*. The venue challenge was unavailable to Micron and could not have been waived by Micron's failure to raise it while *VE Holding* was still valid law.

The Supreme Court did not address *VE Holding* or the question addressed in *VE Holding*, *i.e.*, whether the 1988 amendment to Section 1391(c) required the definition of corporate residency in Section 1391(c) to be applied to Section 1400(b), until 2017. In *TC Heartland*, the Supreme Court for the first time held that it did not, and neither did the subsequent 2011 amendment to Section 1391(c). 137 S. Ct. at 1521. The Court abrogated *VE Holding*, and held that the definition of corporate residency previously articulated in *Fourco*, *i.e.*, the state of incorporation, applied to Section 1400(b). *See id.*

TC Heartland was an intervening change in the law. The Supreme Court "announce[s] a new rule of law" which "must be given retroactive effect" when its decision "overrule[s] clear past precedent on which litigants may have relied" or "decide[s] an issue of first impression." *Harper v. Va. Dept. of Taxation*, 509 U.S. 86, 111 (1993) (Kennedy, J., concurring) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106 (1971)). In *TC Heartland*, the Supreme Court abrogated past precedent on which litigants, including Micron, relied (*i.e.*, *VE Holding*); and it

decided an issue of first impression to the Supreme Court (*i.e.*, whether the 1988 and 2011 amendments required the application of the definition of corporate residency in Section 1391(c) to Section 1400(b)). Only after *TC Heartland* issued could Micron have challenged venue. Accordingly, Micron's motion to dismiss for improper venue should be excepted from waiver, because it was based on the intervening change in the law effectuated by *TC Heartland*.

The District Court, however, denied Micron's motion to dismiss for improper venue based on the contrary legal conclusion that "*TC Heartland* does not qualify as intervening law." Appx12. The District Court's conclusion of law is erroneous, and its denial of Micron's motion based on that erroneous conclusion was therefore an abuse of discretion. The District Court's sole rationale was that a holding of no waiver would "suggest[] that the Federal Circuit has the power to overturn or abrogate Supreme Court precedent, or that the Supreme Court's denial of certiorari may be interpreted as a statement on the validity of the decision below, an idea [the District Court] hesitates to encourage, as it likely conflicts with Supreme Court jurisprudence." *Id.* The District Court's reasoning is misplaced.

In *VE Holding*, this Court did not "overturn or abrogate" Supreme Court precedent. To the contrary, this Court expressly stated that it was addressing a "matter of first impression" in that case—namely, the interpretation of "new language" added to Section 1391(c) in 1988—a matter for which this Court

acknowledged that "the prior cases, including Supreme Court cases," had not addressed because they had addressed "different statutory language":

> The issue, then, is not whether the prior cases, including Supreme Court cases, determined that under different statutory language Congress' intent was that § 1400(b) stood alone. The issue is, what, as a matter of first impression, should we conclude the Congress now intends by this new language in the venue act.

VE Holding, 917 F.2d at 1579.

This Court did not attempt to—and indeed would not have had the authority to—overturn or abrogate the Supreme Court's decision in *Fourco*, the only prior Supreme Court case to address the applicability of Section 1391(c) to Section 1400(b), because "Section 1391(c) as it was in *Fourco* [was] no longer" in effect at the time of *VE Holding*. *Id.* at 1579. In other words, *Fourco* did not address, and could not have addressed, the specific question decided in *VE Holding*—an interpretation of the 1988 amendment—because the amendment occurred some 31 years after *Fourco* was decided. "The specific question in *Fourco* was whether the statutory language previously enacted by the Congress as § 1391(c) [in 1948 prior to the 1988 amendment] supported a conclusion that Congress intended to have §§ 1391(c) and 1400(b) read together." *Id.* The specific question in *VE Holding* was different: "whether, by [the 1988] amendment to § 1391(c) of chapter 87, Congress meant to apply that definition [of 'reside' in § 1391(c)] to the term

['reside'] as it is used in § 1400(b)." *Id.* at 1575. In *VE Holding*, this Court interpreted the 1988 amendment to Section 1391(c) to supersede *Fourco*, and thus did not overrule or abrogate *Fourco* but simply found it inapplicable to the amended statute.

TC Heartland disagreed with *VE Holding*, but it did not do so on the ground that *VE Holding* had overruled or abrogated *Fourco* or any other Supreme Court precedent. Rather, the Supreme Court stated that *VE Holding* had misinterpreted the effect of the amendments to Section 1391(c) that were made after *Fourco* was decided. *See TC Heartland*, 137 S. Ct. at 1520-21. "[T]he only question [before the Supreme Court in *TC Heartland* was] whether Congress changed § 1400(b)'s meaning when it amended § 1391," *id.* at 1516, the very question that this Court addressed "as a matter of first impression" in *VE Holding*, 917 F.2d at 1579. The Supreme Court noted that neither party had asked it to reconsider the holding in *Fourco*, *TC Heartland*, 137 S. Ct. at 1521, which suggests that confirming *VE Holding* (as the appellee argued for unsuccessfully) would not have required overturning or abrogating *Fourco*. The *TC Heartland* decision thus implicitly acknowledges that the Supreme Court had not addressed the question raised in *VE Holding* until *TC Heartland*; that *Fourco* did not (and could not have) addressed that question; and that *VE Holding* did not (and could not have) overruled or abrogated *Fourco*.

Until *TC Heartland*, the Supreme Court had never decided how the 1988 amendment should be interpreted, and *Fourco* did not and could not have done so. Until *TC Heartland*, this Court's decision addressing the interpretation of the 1988 amendment in *VE Holding* was the only controlling precedent on this question, which all district courts were bound to follow in all patent cases, including in this one. The Supreme Court's abrogation of *VE Holding* in *TC Heartland* changed the law.

The District Court's inference that treating *TC Heartland* as a change in the law requires interpreting the Supreme Court's denial of certiorari in *VE Holding* as a statement on the validity of the decision likewise is misplaced. As discussed in Part 2 *infra*, the denial of certiorari on a decision is relevant not to the merits of the decision but to the reasonableness of a party's conduct in not raising a defense in contravention of that decision, which in turn is relevant to the equities of whether to apply waiver in such a situation.[1]

[1] Harvard also argued to the District Court that Micron had submitted to venue because it asserted an invalidity counterclaim. Appx10-12. The District Court did not rely on this as a basis for finding waiver, Appx1-13, nor could it have: the assertion of a counterclaim does not waive venue. *See, e.g.*, *Hillis v. Heineman*, 626 F.3d 1014, 1016-17 (9th Cir. 2010); *Happy Mfg. Co. v. S. Air & Hydraulics, Inc.*, 572 F. Supp. 891, 893 (N.D. Tex. 1982); *Rogen v. Memry Corp.*, 886 F. Supp. 393, 396 (S.D.N.Y. 1995); *Queen Noor, Inc. v. McGinn*, 578 F. Supp. 218, 220 (S.D. Tex. 1984); *see also Blue Spike, LLC v. Contixo Inc.*, No. 6:16-cv-1220-JDL, 2017 U.S. Dist. LEXIS 116749, at *4-5 (E.D. Tex. July 26, 2017) (finding

2. The District Court Abused Its Discretion and Usurped Judicial Power In Holding That Micron Had Waived Its Venue Challenge

In all events, the District Court's strict application of waiver on the premise that *TC Heartland* did not change the law ignores practical reality. The District Court acknowledged that "[w]aiver is not a procedural game, but rather an equitable doctrine, which allows a court discretion to transfer venue when justice so requires." Appx12-13 (citing 28 U.S.C. §§ 1404, 1406; *Zipes v. Trans World Airlines, Inc.*, 455 U.S. 385, 398 (1982) (holding that compliance with requirements to file a Title VII suit be waived "when equity so requires"); *Hand Held Prods., Inc. v. Code Corp.*, No. 2:17-167-RMG, 2017 WL 3085859, at *3-4 (D.S.C. July 18, 2017) (holding that "even if *TC Heartland* was not a change in law," equity merited holding defendant had not waived venue challenge)). The District Court furthermore acknowledged that "the patent venue landscape prior to *TC Heartland* was not understood with the same clarity that we benefit from today." Appx12-13. Yet, the District Court nevertheless held that "Micron waived

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unpersuasive plaintiff's argument that defendant waived its improper venue defense by virtue of its counterclaim and noting "[b]oth the Federal Circuit and Fifth Circuit have recognized that, other waiver issues aside, filing a counterclaim does not operate to waive a party's objections to personal jurisdiction") (citing *Rates Tech. Inc. v. Nortel Networks Corp.*, 399 F.3d 1302, 1307 (Fed. Cir. 2005) ("[F]iling a counterclaim, compulsory or permissive, cannot waive a party's objections to personal jurisdiction, so long as the requirements of Rule 12(h)(1) are satisfied.")).

any challenge to venue," but offered no explanation for its holding beyond the fact that "Micron filed a motion to dismiss in August 2016, but did not assert an objection to venue." Appx13.

The District Court abused its discretion in so holding, because its suggestion that Micron should have asserted its venue challenge in its first motion would have placed an unreasonable demand on Micron to assert a challenge that, at the time the motion was filed in August 2016, was certain to be rejected even if not impossible technically. Whether rightly or wrongly, *VE Holding* had been accepted universally by this Court and all district courts as controlling precedent. Micron could not reasonably have been expected to raise a challenge contrary to *VE Holding* until it was abrogated in *TC Heartland*. The intervening law exception exists precisely to prevent the inequitable application of the waiver rule in these circumstances.

The well-settled principle that waiver can only occur for a "known" right, and can only be waived by being "knowingly and intelligently relinquished," underscores that waiver should not be applied blindly but rather must be applied in a manner that takes into consideration equitable concerns. *See Curtis Pub.*, 388 U.S. at 145 ("We would not hold that Curtis waived a '***known*** right' before it was aware of the *New York Times* decision. It is agreed that Curtis' presentation of the constitutional issue after our decision in *New York Times* was prompt." (emphasis

added)); *Glater*, 712 F.2d at 738 (finding that parties "[were] not, and could not have been expected to have been, ***aware***" of the availability of a defense (emphasis added)); *see also Chassen*, 836 F.3d at 293 ("A waived claim or defense is one that a party has ***knowingly and intelligently*** relinquished. How, then, can a party waive a right in a situation in which no right existed? The answer is: it cannot." (emphasis added)); *Holzsager*, 646 F.2d at 796 ("[A] party cannot be deemed to have waived objections or defenses which were not ***known*** to be available at the time they could first have been made, especially when it does raise the objections as soon as their cognizability is made apparent.").

Micron could not have "knowingly and intelligently relinquished" a venue challenge that would have been contrary to *VE Holding* at the time it filed its first motion to dismiss in August 2016, because at that time such a challenge was not "known" to be available. The Federal Circuit's pronouncement in *VE Holding* is binding in all patent cases. *See supra* Part 1 (citing authority). Micron had no reason to question that authority. Indeed, no decision of this Court, the Supreme Court, or any other court had called *VE Holding* into question for 27 years since the publication of that case. To the contrary, *VE Holding* had been cited repeatedly as valid and controlling law, and the question addressed in *VE Holding* had been routinely found by district courts and this Court to be unquestionably resolved. *See, e.g.*, *In re TC Heartland*, 821 F.3d at 1341 ("The arguments raised regarding

venue have been firmly resolved by *VE Holding*, a settled precedent for over 25 years."); *Trintec Indus., Inc. v. Pedre Promotional Prods., Inc.*, 395 F.3d 1275, 1280 (Fed. Cir. 2005) (stating "the venue point is a non-issue" because "[v]enue in a patent action against a corporate defendant exists wherever there is personal jurisdiction" (citing *VE Holding*)); *Saint Lawrence Commc'ns LLC v. HTC Corp.*, No. 2:15-cv-919-JRG, 2016 WL 1077950, at *3 (E.D. Tex. Mar. 18, 2016) ("*VE Holding* continues to be controlling precedent which binds this Court."); *E.digital Corp. v. FMJ Storage, Inc.*, No. 15-CV-323-H-BGS, 2015 WL 11658710, at *1 (S.D. Cal. June 9, 2015); *Nutrition Physiology Corp. v. Enviros Ltd.*, 87 F. Supp. 2d 648, 652, 657 (N.D. Tex. 2000).[2]

Likewise, "Congressional reports ha[d] repeatedly recognized that *VE Holding* [was] the prevailing law" prior to *TC Heartland*. *In re TC Heartland*, 821 F.3d at 1343; *see, e.g.*, H.R. Rep. No. 114–235, at 34 (2015); S. Rep. No. 110–259, at 25 (2008); H.R. Rep. No. 110-314, at 39-40 (2007); *cf.* Venue Equity and Non-Uniformity Elimination Act of 2016, S. 2733, 114th Congress, 2d Session (2016).

[2] Nor would it have been reasonable to expect the venue challenge to be known after the mandamus petition in *TC Heartland* was filed in 2015, because even after that filing, district courts refused to accept the same argument advanced in that mandamus petition and continued to hold that *VE Holding* was still good law. *See, e.g.*, *Script Sec. Sols. L.L.C. v. Amazon.com, Inc.*, 170 F. Supp. 3d 928, 934 (E.D. Tex. 2016) (Bryson, J., sitting by designation); *Telesign Corp. v. Twilio, Inc.*, No. 15-cv-3240-PSG(SSX), 2015 WL 12765482, at *5 (C.D. Cal. Oct. 16, 2015) (collecting cases).

Every major treatise also agreed. *See, e.g.*, 14D Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 3823 (4th ed., Apr. update 2017); 26 Paul M. Coltoff et al., Federal Procedure § 60:1019 (Lawyers ed., Mar. update 2017); 8 Donald S. Chisum, Chisum on Patents § 21:02[2] (2017); 5 Robert A. Matthews, Jr., Matthews Annotated Patent Digest § 36:153 (May update 2017).

The Supreme Court twice denied petitions for a writ of certiorari on this issue. *See Johnson Gas Appliance Co. v. VE Holding Corp.*, 499 U.S. 922 (1991); *Vulcan Equip. Co. v. Century Wrecker Corp.*, 499 U.S. 962 (1991). While a denial of a petition for a writ of certiorari is not an expression on the merits of the underlying decision, a denial of certiorari may have relevant implications on the applicability of the equitable doctrine of waiver, which concerns the reasonableness of a party's inaction. *See CG Tech. Dev., LLC v. Fanduel, Inc.*, No. 2:16-cv-00801-RCJVCF, 2017 WL 3207233, at *1 n.1 (D. Nev. July 27, 2017). The Supreme Court's denials of certiorari at a minimum suggest that Micron's (and others') reliance on the validity of *VE Holding* was reasonable at the time, even if that reliance would later be found misplaced.

To find that Micron had waived because it had not raised a challenge in the face of such overwhelming contrary authority would be to suggest that Micron should have pursued a motion that the District Court and this Court certainly would have denied, on the mere chance that a reviewing court might reverse or abrogate

that authority at some point in the future. Such a demand for clairvoyance and otherwise futile gestures is unfair and inconsistent with the equitable nature of the waiver doctrine. *See Holzsager*, 646 F.2d at 796 (finding that the "clairvoyance demanded" to assert a defense prior to a decision supporting the defense "is inconsistent with the doctrine of waiver"); *see also Chassen*, 836 F.3d at 293 ("Every circuit to have answered this question has held that a litigant [need not] engage in futile gestures merely to avoid a claim of waiver." (brackets in original)).[3] The District Court's holding would render the intervening-law exception a nullity, as it would mean that no party could ever rely on the argument that a challenge was "unavailable," because *all* precedent (even Supreme Court precedent) can theoretically be overturned on certiorari.

[3] *See also Valspar Corp. v. PPG Indus., Inc.*, No. 16-cv-1429, 2017 WL 3382063, at *4 (D. Minn. Aug. 4, 2017) ("It is illogical and unfair to argue that PPG erred by not making an argument that both this Court and the parties knew would have been rejected—just as it had consistently been rejected around the country for a quarter of a century. Valspar responds, in part, by arguing that raising the defense of improper venue was not pointless at the time this case commenced, because, just as TC Heartland did, PPG could have ultimately prevailed upon the Supreme Court to take its case on certiorari and overrule *VE Holding*. The Court observes, however, that Valspar's argument would mean that no party could ever rely on the argument that a defense was 'unavailable' because *all* precedent (even Supreme Court precedent) can theoretically be overturned on certiorari." (internal citations omitted)); *CG Tech. Development*, 2017 WL 3207233, at *2 ("Even if *TC Heartland* had simply reaffirmed the Court's interpretation of § 1400(b) while ignoring § 1391 and *VE Holding*, a finding that Movants should also have done so would not give fair consideration to the practical realities upon which the equitable concept of waiver is based.").

3. Venue Is Improper In Massachusetts Under *TC Heartland*

Having disposed of the sole basis for the District Court's decision, Micron's right to dismissal or transfer of this action is clear and indisputable. Under Section 1400(b), a party must bring a patent infringement action in either (1) "the judicial district where the defendant resides" or (2) "where the defendant has committed acts of infringement and has a regular and established place of business." Because Micron neither resides in, nor has a regular and established place of business within, the District of Massachusetts, venue in the District of Massachusetts is improper.

It is undisputed that Micron does not "reside" in the District of Massachusetts, and therefore venue cannot arise under the first prong of § 1400(b). Under *TC Heartland*, a corporate defendant "resides" only in its state of incorporation. 137 S. Ct. at 1521. Harvard admits that Micron is a Delaware corporation. Appx137; Appx235. Micron therefore does not "reside" in the District of Massachusetts.

Venue cannot arise under the second prong of § 1400(b) either, because it is beyond reasonable dispute that Micron does not have "a regular and established place of business" in the District of Massachusetts. Micron is headquartered in Idaho, not Massachusetts. Appx105; Appx235. Micron maintains no physical presence, *i.e.*, no facilities and no offices, in this District. Appx235. Micron does

not maintain any bank accounts in Massachusetts, does not manufacture any products in Massachusetts, and does not warehouse any inventory in Massachusetts. *Id.* Micron does not have any employees in Massachusetts. *Id.*

Harvard raised only three grounds in the District Court to show a regular and established place of business in Massachusetts, none of which has any merit.

First, Harvard asserts that the contacts with Massachusetts of a Micron subsidiary, Micron Semiconductor Products, Inc. ("MSP"), should be imputed to Micron. Appx251. But MSP indisputably is a separate corporation with a separate board of directors. Appx289-291. Under such circumstances, a subsidiary's contacts with a district are not imputed to the parent for venue purposes. *See Aro Mfg. Co. v. Auto. Body Research Corp.*, 352 F.2d 400, 404 (1st Cir. 1965) (parent was not doing business in Massachusetts for personal jurisdiction purposes "merely because its subsidiary was"); *see also Amateur-Wholesale Elec. v. R.L. Drake Co.*, 515 F. Supp. 580, 586 (S.D. Fla. 1981) (acknowledging that "courts have uniformally [sic] held that even where a foreign corporation has no office within the district and has failed to transact business within the state, but its wholly-owned subsidiary does business within the state and has common officers with the parent corporation, there is insufficient business to subject the foreign corporation to venue in the district"); *L.D. Schreiber Cheese Co., Inc. v. Clearfield Cheese Co., Inc.*, 495 F. Supp. 313, 318 (W.D. Pa. 1980) ("It is clear under 28

U.S.C. § 1400(b) that the mere existence of a wholly-owned subsidiary in a judicial district does not, by itself, suffice to establish venue over the subsidiary's parent corporation."); *Hayashi v. Sunshine Garden Prods., Inc.*, 285 F. Supp. 632, 634 (W.D. Wash. 1967) (merely showing that parent owns the subsidiary and shares a common president is not sufficient to subject the parent to venue in the district).

Second, Harvard relies on the activities of Micron's third-party sales representatives and distributors in the District. Appx251-252. But a party's independent sales representatives and distributors cannot be used to show that the party has a regular and established placed of business in a district. *See Cordis Corp. v. Cardiac Pacemakers*, 599 F.2d 1085, 1086-87 (1st Cir. 1979); *see also Knapp-Monarch Co. v. Casco Prods. Corp.*, 342 F.2d 622, 625 (7th Cir. 1965).

Third, Harvard speculates that there are other Micron employees in Massachusetts based on profiles posted on the LinkedIn social media website. Appx251. That is demonstrably incorrect, as none identifies an employee of Micron in Massachusetts. *See* Appx272; Appx278-286; Appx291-293.

B. No Other Adequate Means Is Available

Absent mandamus, Micron "would not have an adequate remedy for an improper failure to transfer" or dismiss the case. *In re TS Tech USA Corp.*, 551 F.3d 1315, 1322 (Fed. Cir. 2008). Micron's statutory venue rights would be

rendered meaningless if it were forced to litigate the case through a final judgment in the District of Massachusetts before it could contest venue on appeal.

The purpose of the venue statute is to "protect the defendant against the risk that a plaintiff will select an unfair or inconvenient place of trial." *Leroy v. Great W. United Corp.*, 443 U.S. 173, 183-84 (1979); *see Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 42-43 (1998); *Noxell v. Firehouse No. 1 Bar-B-Que Rest.*, 760 F.2d 312, 316 (D.C. Cir. 1985). If trial proceeds in the wrong forum, then the judgment will necessarily be invalid. *See Lexecon Inc.*, 523 U.S.at 41; *Leroy*, 443 U.S. at 181, 184 & n.18 (1979); *Hoffman v. Blaski*, 363 U.S. 335, 342 (1960); *Olberding v. Ill. Cent. R.R. Co.*, 346 U.S. 338, 340 (1953). It would be costly and wasteful to wait until appeal of final judgment to challenge venue. *See In re Volkswagen of Am., Inc.*, 545 F.3d 304, 319 (5th Cir. 2008) ("[T]he harm—inconvenience to witnesses, parties and other—will already have been done by the time the case is tried and appealed, and the prejudice suffered cannot be put back in the bottle.").

C. A Writ Is Appropriate

Where, as here, a case raises "basic and undecided" questions vexing the community broadly, and is of "first impression" for this Court, it is a natural candidate for mandamus. *In re BP Lubricants USA Inc.*, 637 F.3d 1307, 1310, 1313 (Fed. Cir. 2011) (quoting *Schlagenhauf v. Holder*, 379 U.S. 104 (1964)); *see*

In re Spalding Sports Worldwide, Inc., 203 F.3d 800, 804 (Fed. Cir. 2000). A writ is appropriate where it will "further supervisory or instructional goals" regarding "issues [that] are unsettled and important." *In re Queen's Univ. at Kingston*, 820 F.3d 1287, 1291 (Fed. Cir. 2016); *see also In re Atl. Pipe Corp.*, 304 F.3d 135, 140 (1st Cir. 2002) (writ appropriate to decide "a systemically important issue as to which this court has not yet spoken"); *United States v. Horn*, 29 F.3d 754, 769 (1st Cir. 1994) ("It is appropriate when the issue presented is novel, of great public importance, and likely to recur."); *In re Recticel Foam Corp.*, 859 F.2d 1000, 1006 (1st Cir. 1988) (writ appropriate "to resolve issues which are both novel and of great public importance"). Accordingly, this Court regularly finds mandamus appropriate for an issue that "has split the district courts," such that "[i]mmediate resolution of [the] issue will avoid further inconsistent development of [the] doctrine." *In re Queen's*, 820 F.3d at 1292; *see also In re MSTG, Inc.*, 675 F.3d 1337, 1341 (Fed. Cir. 2012) (petition to resolve "substantial uncertainty and confusion in the district courts").

Mandamus is especially appropriate in this case, because district courts are divided on whether an improper venue defense was available before *TC Heartland*. Numerous districts have held (correctly) that a venue challenge under *TC*

Heartland was not waived.[4] But many others have held (incorrectly) to the contrary.[5] This confusion is having an immediate and cascading effect on district

[4] *See Boston Sci. Corp. v. Cook Grp. Inc.*, No. 15-980-LPS-CJB, 2017 WL 3996139, at *5-10 (D. Del. Sep. 11, 2017); *Simpson Performance Prods., Inc. v. Mastercraft Safety, Inc.*, No. 5:16-cv-00155-RLV-DCK, 2017 WL 3620001, at *5-7 (W.D.N.C. Aug. 22, 2017); *Maxchief Invs. Ltd. v. Plastic Dev. Grp., LLC*, No. 3:16-cv-63, 2017 WL 3479504, at *3-4 (E.D. Tenn. Aug. 14, 2017); *Cutsforth, Inc. v. LEMM Liquidating Co., LLC*, No. 12-cv-1200(SRN/LIB), 2017 WL 3381816 (D. Minn. Aug. 4, 2017); *IPS Grp., Inc. v. CivicSmart, Inc.*, No. 3:17-cv-0632-CAB-(MDD), ECF No. 65 (S.D. Cal. Aug. 1, 2017); *CG Tech. Dev., LLC v. Fanduel, Inc.*, No. 16-801, 2017 WL 3207233, at *1-2 (D. Nev. July 27, 2017); *OptoLum, Inc. v. Cree, Inc.*, No. 16-cv-3828, 2017 WL 3130642, at *3-*5 (D. Ariz. July 24, 2017); *Hand Held Prods., Inc. v. Code Corp.*, No. 17-167, 2017 WL 3085859, at *3 (D.S.C. July 18, 2017); *Westech Aerosol Corp. v. 3M Co.*, No. 17-5067, 2017 WL 2671297, at *2 (W.D. Wash. June 21, 2017); *Fusilamp, LLC v. Littelfuse, Inc.*, No. 10-20528-CIV-ALTONAGA, 2017 WL 2671997 (S.D. Fla. June 12, 2017).

[5] *See Realtime Data LLC v. Carbonite, Inc.*, No. 6:17-CV-121 RWS-JDL, 2017 WL 3588048 (E.D. Tex. Aug. 21, 2017); *Realtime Data LLC v. EchoStar Corp.*, No. 6:17-CV-84 RWS-JDL, 2017 WL 3599537 (E.D. Tex. Aug. 21, 2017); *Realtime Data LLC v. Rackspace US, Inc.*, No. 6:16-CV-961-RWS, 2017 U.S. Dist. LEXIS 133446 (E.D. Tex. Aug. 21, 2017); *Aralez Pharms. Inc. v. Teva Pharms. USA, Inc.*, No. 2:17-CV-00071-JRG-RSP, 2017 WL 3437894 (E.D. Tex. Aug. 10, 2017), *adopting* 2017 WL 3446543 (E.D. Tex. July 17, 2017); *Tinnus Enters., LLC v. Telebrands Corp.*, No. 6:15-CV-551-RC, 2017 WL 3404795 (E.D. Tex. Aug. 8, 2017); *Realtime Data LLC v. Barracuda Networks, Inc.*, No. 6:17-CV-120, 2017 U.S. Dist. LEXIS 120934 (Aug. 1, 2017), *adopting* 2017 U.S. Dist. LEXIS 121581 (E.D. Tex. July 13, 2017); *Diem LLC v. BigCommerce, Inc.*, No. 6:17-CV-186-JRG-JDL, 2017 WL 3187473 (E.D. Tex. July 26, 2017); *Orthosie Sys. LLC v. Actsoft, Inc.*, No. 4:16-CV-00873, 2017 WL 3145913 (E.D. Tex. July 25, 2017); *McRo, Inc. v. Valve Corp.*, No. SACV-13-1874-GW(FFMx), 2017 WL 3189007 (C.D. Cal. July 24, 2017); *Skyhawke Techs., LLC v. DECA Int'l Corp.*, No. 3:10-cv-708-TSL-RHW, 2017 WL a3132066 (S.D. Miss. July 21, 2017); *Koninklijke Philips NV v. AsusTek Comp. Inc.*, No. 1:15-1125-GMS, 2017 WL

court decisions, trials, and patent litigation generally. As Judge Newman recently acknowledged, there is "little doubt" that *TC Heartland* "changed the law," and the "important question" posed by the "issue of proper forum following the return to *Fourco* requires [the Federal Circuit's] resolution." *In re Sea Ray Boats, Inc.*, No. 17-124, 2017 WL 2577399, at *1 (Fed. Cir. June 9, 2017) (Newman, J., dissenting). Now is the right time to clarify this area of the law, as district courts continue to grapple with the application of *TC Heartland*. Prompt guidance is deserved.

This case is distinguishable from others in which a writ was found inappropriate because, unlike in those cases, trial is still far away in this case. In each of those other cases, the Court denied mandamus without deciding whether *TC Heartland* effected a change of law because the petitioners' requests were filed

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3055517 (D. Del. July 19, 2017); *Fox Factory, Inc. v. SRAM, LLC*, Nos. 3:16-cv-03716-WHO, 3:16-cv-00506-WHO, 2017 U.S. Dist. LEXIS 126799 (N.D. Cal. July 18, 2017); *Reebok Int'l Ltd. v. TRB Acquisitions LLC*, Civ. No. 16-1618, 2017 WL 3016034, at *3 (D. Ore. July 14, 2017); *Navico, Inc. v. Garmin Int'l, Inc.*, Civ. No. 16-190, 2017 WL 2957882, at *2 (E.D. Tex. July 11, 2017); *Infogation Corp v. HTC Corp.*, Civ. No. 16-1902, 2017 WL 2869717, at *4 (S.D. Cal. July 5, 2017); *Amax, Inc. v. ACCO Brands Corp.*, Civ. No. 16-10695, 2017 WL 2818986, at *3 (D. Mass. June 29, 2007); *Chamberlain Grp., Inc. v. Techtronic Indus. Co.*, Case No. 16-CV-6097, 2017 WL 3205772 (N.D. Ill. June 28, 2017); *iLife Techs., Inc. v. Nintendo of Am., Inc.*, Civ. No. 13-4987, 2017 WL 2778006, at *5-7 (N.D. Tex. June 27, 2017); *Elbit Sys. Land v. Hughes Network Sys., LLC*, No. 2:15-CV-00037, 2017 WL 2651618, at *18 (E.D. Tex. June 20, 2017); *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, No. 2:15-CV-00021-HCM-LRL, 2017 WL 2556679 (E.D. Va. June 7, 2017).

within days or weeks of trial. *See In re Nintendo of Am., Inc.*, No. 17-127, 2017 U.S. App. LEXIS 14835, at *3-4 (Fed. Cir. July 26, 2017) (less than two months); *In re Techtronic Indus. N. Am., Inc.*, No. 17-125, 2017 U.S. App. LEXIS 16324, at *2 (Fed. Cir. July 25, 2017) (less than two months); *In re Hughes Network Sys., LLC*, No. 17-130, 2017 WL 3167522, at *1 (Fed. Cir. July 24, 2017) (eleven days); *In re Sea Ray Boats*, 2017 WL 2577399 at *1 (three days). By contrast, this case is still in its early stages. When Micron filed its improper venue motion, trial was 10 months away, and even now trial is still seven months away. Fact discovery is still underway, and no depositions have been taken. A claim construction hearing will not be held until December; no expert reports have been submitted; and no summary judgment motions have been filed. Even assuming that Micron could raise its venue objection on appeal after trial, doing so would foster a much greater degree of inefficiency here than in the other cases, because the remaining proceedings in this case are far more substantial.

The prior cases also are distinguishable in that, in two of the cases, the Court relied on the petitioners' prior affirmative admissions that venue in the current forum was proper. *In re Nintendo*, 2017 U.S. App. LEXIS 14835 at *3; *In re Techtronic*, 2017 U.S. App. LEXIS 16324 at *2. Micron has never made such an affirmative admission. To the contrary, Micron expressly denied venue in its answer and amended answer. Appx139; Appx155. Micron even gave express

notice to Harvard and the District Court in April (before *TC Heartland* was published) that Micron would object to venue should *TC Heartland* overrule the Federal Circuit's interpretation of § 1400(b) in *VE Holding*. Appx173-174.

This case therefore arrives before the Court in a dramatically different posture than the foregoing cases and is substantially more appropriate for mandamus.

IV.

CONCLUSION

For the foregoing reasons, Micron respectfully requests that this Court issue a writ of mandamus directing the District of Massachusetts to dismiss the case or, in alternative, transfer the case to the District of Delaware or the District of Idaho.

Dated: September 12, 2017

Respectfully submitted,

By: */s/ Jared Bobrow*

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this brief complies with the type-volume limitations of Fed. R. App. P. 21(d)(1). This brief contains 7,518 words as calculated by the "Word Count" feature of Microsoft Word 2010, the word processing program used to create it.

The undersigned further certifies that this brief complies with the requirements of Fed. R. App. P. 32(c)(2). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in Times New Roman 14 point font.

Dated: September 12, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on September 12, 2017, I filed or caused to be filed copies of the foregoing with the Clerk of the United States Court of Appeals for the Federal Circuit via the CM/ECF system and served or caused to be served copies on all counsel of record by the CM/ECF system. Copies of the foregoing have also been served via e-mail and Federal Express on:

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