Miscellaneous Docket No. _____

United States Court of Appeals for the Federal Circuit

IN RE INTEX RECREATION CORP., INTEX TRADING LTD., THE COLEMAN COMPANY, INC., AND BESTWAY (USA), INC.

Petitioners.

On Petition for a Writ of Mandamus to the United States District Court for the Eastern District of Texas in Case No. 2:17-cv-0235-JRG, United States District Judge Rodney Gilstrap

PETITION FOR WRIT OF MANDAMUS

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MARCH 5, 2018

CERTIFICATE OF INTEREST FOR
INTEX RECREATION CORP. AND INTEX TRADING LTD.

Pursuant to Federal Circuit Rule 47.4, the undersigned counsel for Petitioners Intex Recreation Corp. and Intex Trading Ltd. hereby certifies that:

1. The full names of every party or amicus represented by me is:

Intex Recreation Corp. and Intex Trading Ltd.

2. The names of the real parties in interest represented by me is: **N/A**

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus represented by me are (please list each party or amicus represented with the parent or publicly held company that owns 10 percent or more so they are distinguished separately):

Intex Recreation Corp. is a wholly-owned subsidiary of Intex Corp., a privately held company with no public entity owning any portion thereof.

Intex Trading Ltd is a wholly-owned subsidiary of Intex Marketing Ltd., a privately held company with no public entity owning any portion thereof.

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

Patrick C. Bottini of Faegre Baker Daniels LLP
Reid E. Dodge of Faegre Baker Daniels LLP
Charles Everingham IV of Akin Gump Strauss Hauer & Feld LLP

Respectfully submitted,

FAEGRE BAKER DANIELS LLP

Dated: March 5, 2018

By: */s/ R. Trevor Carter*

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Counsel for Petitioners, Intex Recreation Corp. and Intex Trading Ltd.

CERTIFICATE OF INTEREST FOR THE COLEMAN COMPANY, INC.

Pursuant to Federal Circuit Rule 47.4, the undersigned counsel for Petitioner The Coleman Company, Inc. hereby certifies that:

1. The full names of every party or amicus represented by me is:

The Coleman Company, Inc.

2. The names of the real parties in interest represented by me is: **N/A**

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus represented by me are (please list each party or amicus represented with the parent or publicly held company that owns 10 percent or more so they are distinguished separately):

The Coleman Company, Inc. is a wholly-owned subsidiary of Newell Brands Inc., a publicly held company.

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

N/A

Respectfully submitted,

MEUNIER CARLIN & CURFMAN LLC

Dated: March 5, 2018

By: _____

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rules 21(a)(2) and 47.4, the undersigned counsel for Petitioner Bestway (USA), Inc. hereby certifies that:

1. The full names of every party or amicus represented by me is:

   Bestway (USA), Inc.

2. The names of the real parties in interest represented by me is:

   None.

3. All parent corporations and any publicly held companies that own 10 percent or more of the stock of the party or amicus represented by me are:

   Bestway (Hong Kong) Enterprise Company Limited

4. The names of all law firms and the partners or associates that appeared for the party now represented by me in the trial court or are expected to appear in this court (and who have not or will not enter an appearance in this case) are:

   MCDERMOTT WILL & EMERY LLP
   Krista Vink Venegas
   Michael P. Chu
   Jay H. Reiziss
   Alexander P. Ott

   GILLAM & SMITH LLP
   Melissa R. Smith

Dated: March 5, 2018

Krista Vink Venegas

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RELIEF SOUGHT

Petitioners respectfully request that the Court grant this petition for a writ of mandamus and vacate the District Court's February 13 denial of Petitioners' Transfer Motions and Severance Motions. Petitioners further request that the Court remand with instructions to grant Petitioners' Transfer Motions pursuant to § 1406, or in the alternative, to remand with instructions to address the merits of Petitioners' Transfer motions pursuant to 28 U.S.C. § 1406 and 28 U.S.C. § 1404(a), and Severance Motions pursuant to Fed. R. Civ. P. 21 and 35 U.S.C. § 299. If the Court remands to the District Court for a decision on the merits, Petitioners request the Court instruct the District Court to stay this case pending final resolution of Petitioners' motions.

ISSUES PRESENTED

(1) Did the Petitioners, who timely intervened as a matter of right under Federal Rule of Civil Procedure 24(a) in a patent infringement case brought against their retailer customers—with the express intent of challenging improper and inconvenient venue under 28 U.S.C. § 1400, 28 U.S.C. § 1406, and 28 U.S.C. § 1404(a)—automatically waive their rights to raise all venue defenses by virtue of their intervention?

(2) Did the district court abuse its discretion when it declined under Federal Rule of Civil Procedure 21 and 35 U.S.C. § 299 to sever patent infringement

claims against competing defendants whose multiple, unrelated products are joined in the same suit on the basis that those defendants exercised their right to intervene under Federal Rule of Civil Procedure 24(a)?

STATEMENT OF JURISDICTION

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

INTRODUCTION

This mandamus petition asks the Court to address an issue of first impression for the Federal Circuit and correct the clear error the District Court made below when it held that accused infringers who are **intervenors of right** in a patent case under Rule 24(a) automatically waive their right to assert venue defenses otherwise available under Rule 12(b)(3), 28 U.S.C. § 1400, 28 U.S.C. § 1406, and 28 U.S.C. § 1404(a). Not only does the District Court's automatic venue-waiver rule deprive necessary but unnamed (as parties in the complaint) patent defendants of basic procedural rights, it encourages patent plaintiffs to create an end run around *TC Heartland*[1] and *In re Cray*[2] by suing national retailers and strategically omitting upstream product manufacturers and suppliers as named defendants.

[1] *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017)
[2] *In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017)

Petitioners supply and indemnify the accused products to the original defendant, Walmart, and to other retailers nationwide. Petitioners are not incorporated in Texas and indisputably do not maintain any regular and established place of business in the Eastern District of Texas. The Eastern District of Texas has no factual connection to the merits of this case: no witnesses reside there, no documents are housed there, and no inventive acts or accused product development occurred there. Moreover, Petitioners are joined as co-defendants, even though their competing products are independently developed and sold. Petitioners timely objected to these clear venue and joinder defects, but the District Court held Petitioners' procedural defenses were automatically waived solely because Petitioners are intervenors of right under Fed. R. Civ. P. 24(a), and despite the District Court's own ruling that their intervention was mandatory and necessary to protect Petitioners' interests.

Parties who successfully intervene as of right under Rule 24 must be "treated as if [they] were an original party and ha[ve] equal standing with the original parties." *Donovan v. Oil, Chem., & Atomic Workers Int'l Union*, 718 F.2d 1341, 1350–51 (5th Cir. 1983) (quotation and citations omitted). Petitioners are entitled to such treatment, because as the "upstream" accused product suppliers and full indemnifiers of Walmart, they are the "true defendants." *In re Nintendo of Am., Inc.*, 756 F.3d 1363, 1365 (Fed. Cir. 2014). Here, however, the District Court

issued a decision that does the opposite: it treats intervenors of right differently than original defendants by taking away, by fiat, guaranteed procedural rights.

First, the District Court's automatic waiver rule vitiates Petitioners' mandatory intervention rights under Rule 24, which contains no venue waiver provision. To the contrary, Rule 24 instructs the proposed intervenor to file a pleading that "sets out the claim or defense for which intervention is sought"—without any limitation as to what kind of defense can be identified. Second, the District Court's automatic waiver rule eliminates Petitioners' rights under Rule 12(b)(3) and § 1406 to raise the defense of improper venue in their first responsive pleadings in the case. It also contradicts the waiver standard of Rule 12(h)(3), which limits waiver of Rule 12(b)(3) motions only to circumstances (not present here) where a defendant has failed to raise the defense in a responsive pleading at the first opportunity. Finally, the District Court's automatic waiver rule contravenes this Court's recent ruling in *In re Micron Technology, Inc.* that any federal court venue-waiver ruling must be exercised through a framework that "requires respecting, and not 'circumvent[ing],' relevant rights granted by statute or Rule." 875 F.3d 1091, 1101 (Fed. Cir. 2017) (alteration in original) (quoting *Dietz v. Bouldin*, 136 S. Ct. 1885, 1892 (2016)).

The automatic venue-waiver rule, if allowed to stand, allows patent plaintiffs to circumvent patent venue requirements set forth in *TC Heartland* and *In re Cray*

by failing to name necessary defendants and forcing those defendants to either: (1) surrender patent venue rights by moving to intervene, (2) restrict IPR rights by filing an unnecessary declaratory judgment, or (3) stand by as third parties advance defenses and counterclaims impacting the suppliers' products and rights. Likewise, the District Court's equally erroneous ruling that § 299 severance does not apply to intervening defendants increases the tactical incentive for patent plaintiffs to omit necessary defendants from lawsuits.

In sum, the denial of Petitioners' procedural rights is antithetical to the venue and joinder protections granted to accused infringers by statutes, Rules, and controlling decisional authority. For these reasons, this mandamus petition should be granted.

FACTS NECESSARY TO UNDERSTAND THE ISSUES PRESENTED

A. The Parties and Complaint

Plaintiff is Team Worldwide Corporation, a Taiwanese corporation headquartered in Taipei City. Appx22 ¶ 1. Plaintiff originally named as defendants Wal-Mart Stores Inc., Wal-Mart Stores Texas, LLC, Wal-Mart.com USA LLC, and Sam's West, Inc. ("Walmart"). Appx22-23 ¶¶ 2-5. The Complaint alleges infringement of three of Plaintiff's patents based on Walmart's importation, sale, and offer to sell the accused products. Appx26 ¶ 18. The Complaint identifies three "Infringing Products" as: "Aerobed® brand air mattresses," "Coleman® brand

air mattresses," and "Intex® brand air mattresses," (Appx26 ¶ 19), all of which are supplied to Walmart by three companies: The Coleman Company Inc. ("Coleman") supplies the Aerobed and Coleman products, and Intex Recreation Corp. ("IRC") and Intex Trading Ltd. ("ITL") (collectively, "Intex") supply the Intex products.[3] The third Petitioner, Bestway (USA) Inc. ("Bestway") learned its products were accused of infringement months after the Complaint was filed, when Plaintiff served its infringement contentions, accusing (for the first time) a number of products independently supplied by Petitioners and others. Appx175. Petitioners[4] each tendered indemnification (for all litigation costs and awards related to their respective products) at Walmart's demand. *See* Appx274-275; *see also, e.g.*, Appx207-212. On August 2 and 3, 2017, Intex and Coleman moved to intervene. Bestway moved to intervene on October 5, 2017.

C. Petitioners Intervene and Challenge Joinder and Venue

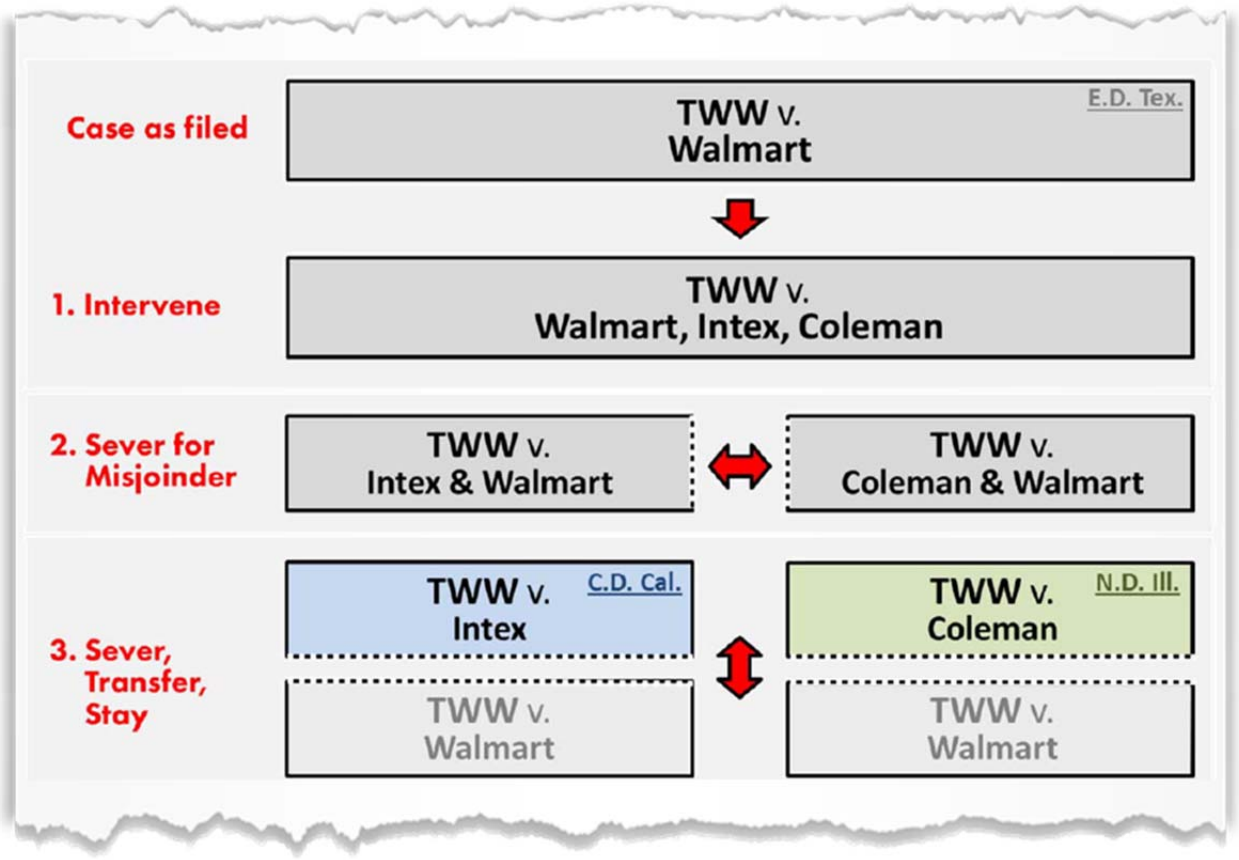
The Petitioners have been clear from the very first moment they moved to intervene that "the manner in which this case was filed has required [Petitioners] to intervene for the purpose of severing and transferring venue." *E.g.*, Appx195.

[3] Plaintiff previously accused the exact same Intex products of infringing a related patent (U.S. Patent No. 6,793,469) in an earlier case against IRC, which resulted in a finding of non-infringement and award of attorney's fees under 35 U.S.C. § 285 against Plaintiff. *Intex Recreation Corp. v. Team Worldwide Corp.*, 1-04-cv-01785 (D.D.C. filed Oct. 15, 2004).

[4] Intex, Coleman, and Bestway are the suppliers referred to collectively herein as "Petitioners."

Also, pursuant to Rule 24(c), Petitioners submitted a "pleading that sets out the . . . defense[s] for which intervention is sought" that expressly included the defense that "**venue in this District is not proper**." *E.g.*, Appx213-238. Petitioners (Intex, specifically) even attached the procedural motions that would be filed upon intervention—the first motion asking to sever the independent suppliers for misjoinder ("Severance Motion"), and the second motion asking to sever the suppliers from Walmart, transfer the supplier cases to proper and convenient forums, and stay the remaining cases against Walmart in the Eastern District of Texas ("Transfer Motion"). Appx183. Walmart concurred in Petitioners' motions and agreed to be bound by the judgments in the transferee forums. *E.g.*, Appx239-241.

Leaving no doubt about Petitioners' intent, Intex depicted the steps it (and Petitioners) intended to take to assert its venue and severance rights:



Appx183.

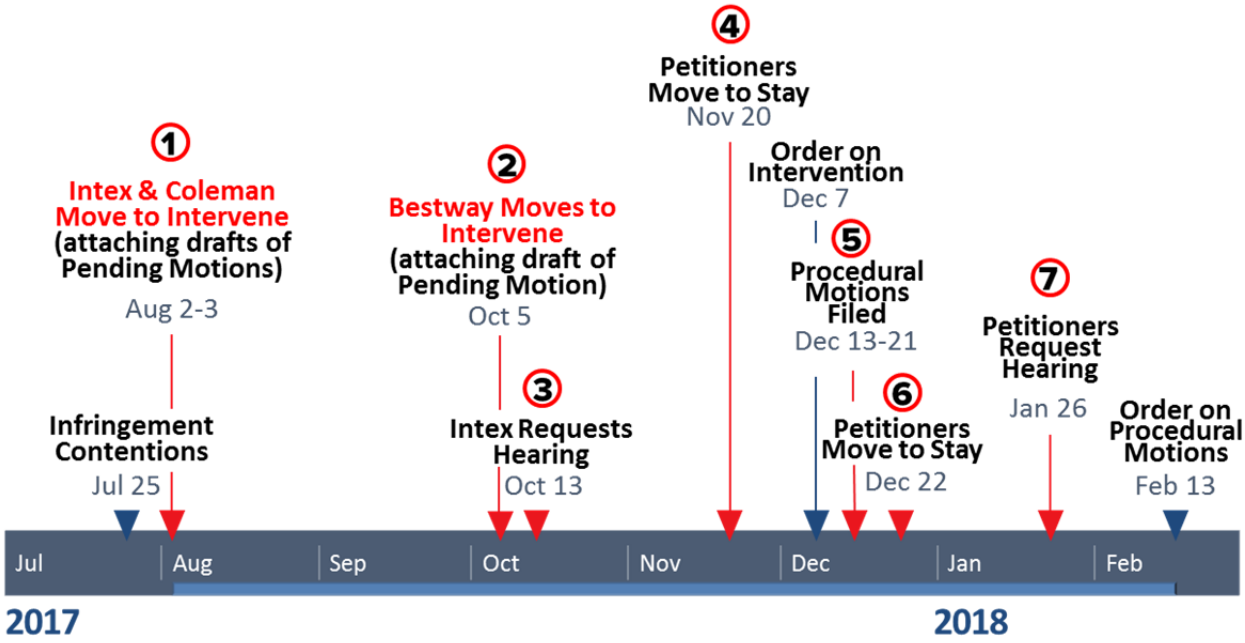
Plaintiff opposed Petitioners' motions to intervene, admitting its **intentional strategy** to use a national retailer as a broad device for joining separate defendants from separate places selling separate products. Appx243; Appx249 ("Suing a national retailer like Wal-Mart is especially appropriate when the retailer sells multiple infringing products it obtains from multiple separate sources." (citation omitted)).

On December 7, 2017, the District Court found that Petitioners were entitled to intervene as of right under Rule 24(a) (Appx273), because Petitioners **(1)** "were

timely in their requests to intervene as defendants"; **(2)** have "acknowledged a contractual obligation to defend and indemnify Walmart, giving each a resulting financial stake in the outcome of this case"; **(3)** have interests that may be "impair[ed] or impede[d]" by the outcome of the case; and **(4)** "*may* not [be] adequately represent[ed] . . . ." Appx278, Appx280, Appx282, Appx284. Simply stated, Petitioners' "products, not Walmart, will be the focus of the litigation." Appx280. The District Court ordered Petitioners to answer Plaintiff's complaint, acknowledging that "[a]ll the proposed intervenors make, sell, or distribute Accused Products and will bring defenses of non-infringement, invalidity, and other defenses" in their Answers in Intervention. Appx285. Importantly (in the context of waiver), Petitioners timely filed those Answers along with their procedural motions.

E. Despite Raising Timely Venue Defenses and Joinder Objections, Petitioners' Motions Were Denied

Throughout the case, Petitioners diligently raised their venue defenses and joinder objections on no fewer than seven occasions:



Appx9-20.

Notwithstanding Petitioners' timely intervention and unequivocal assertion of their venue and severance rights, on February 13, 2018, the District Court denied Petitioners' procedural motions, holding that by choosing to intervene, Petitioners automatically waived any and all defenses based on propriety or convenience of venue. Appx564. The District Court also concluded that intervenors cannot avail themselves of § 299's protections because "intervenors did not enter this case under the joinder rules of Rule 20." Appx554.

REASONS WHY THE WRIT SHOULD ISSUE

I. The Right to a Writ Is Clear and Indisputable

Petitioners' right to a writ is clear and indisputable because the District Court abused its discretion by denying Petitioner's procedural defenses and

restricting Petitioners' rights under its erroneous automatic waiver rule, and "mandamus is available to contest a patently erroneous error in an order denying transfer of venue." *In re EMC Corp.*, 677 F.3d 1351, 1354 (Fed. Cir. 2012). Also, "mandamus is available as a remedy" to challenge a district court's refusal to grant a motion for severance under Rule 21. *Id.* at 1354–55.

a. Rule 24(a) Grants Intervenors of Right the Full Rights to Raise Procedural Defenses as Original Parties

The District Court's automatic venue-waiver ruling is directly contrary to the plain language of Rule 24(a) and (c). Rule 24(a) contains no express waiver clause on the procedural defenses of intervenors of right. Nor does it suggest that an intervenor of right surrenders its venue defenses or joinder objections simply by taking advantage of a fundamental procedural right that "must" be granted under the Rule 24(a) standard. To the contrary, Rule 24(c) expressly provides that a motion to intervene must "be accompanied by a pleading that sets out the claim or defense for which intervention is sought," with no limitation on raising a venue defense.

The purpose behind Rule 24 also shows that the Rule should not be applied to deprive an intervenor of right of its venue defenses. In contrast to the modern Rule 24, former Equity Rule 37 required that "the intervention shall be in subordination to, and in recognition of, the propriety of the main proceeding." Fed. R. Eq. 37, 226 U.S. 659 (1912) (repealed 1938). However, Rule 24 was

broadened upon adoption of the Federal Rules of Civil Procedure because "[t]he whole tenor and framework of the Rules of Civil Procedure preclude application of a standard which strictly limits the intervenor to those defenses and counterclaims which the original defendant could himself have interposed." *Stewart-Warner Corp. v. Westinghouse Elec. Corp.*, 325 F.2d 822, 827 (2d Cir. 1963). In 1966, the Rules were again "liberalized," *Spring Const. Co. v. Harris*, 614 F.2d 374, 377 (4th Cir. 1980), by an amendment that was "intended to overcome what was felt to be an overly restrictive attitude toward intervention on the part of the courts," *United States v. City of Jackson*, 519 F.2d 1147, 1150 (5th Cir. 1975).

Given the plain language and broad purpose of Rule 24, Federal Courts have repeatedly held that "[w]hen a party intervenes, it becomes a full participant in the lawsuit and is treated just as if it were an original party." *Schneider v. Dumbarton Developers, Inc.*, 767 F.2d 1007, 1017 (D.C. Cir. 1985); *Donovan*, 718 F.2d at 1350–51 (intervenors of right are "treated as if [they] were an original party and ha[ve] equal standing with the original parties."). This Court has itself noted "[t]he intervenor, once allowed to become a party, is treated in the same way as any other party." *Waymo LLC v. Uber Techs., Inc.*, 870 F.3d 1350, 1363 n.6 (Fed. Cir. 2017) (quoting Wright and Miller, *Federal Practice & Procedure* § 3914.18 (2d ed.)); *see also Diamond v. Charles*, 476 U.S. 54, 68 (1986) (observing "intervenors are considered parties" (citation omitted)).

Intervenors of right are entitled to assert their procedural defenses to the same extent as original parties because "[i]f the third party is intervening of right," there is "little reason to deprive him of any of his procedural defenses merely because the original plaintiff failed to name him as a defendant or because no other party sought to have him joined pursuant to Rule 19." *SEC v. Ross*, 504 F.3d 1130, 1150 (9th Cir. 2007). Consequently, intervenors of equal standing with the original party have been held to be entitled to:

- **Move to dismiss the case on the merits.** *SEC v. U.S. Realty & Improvement Co.*, 310 U.S. 434, 458 (1940).
- **Insist on the right to jury trial.** *Ross v. Bernhard*, 396 U.S. 531, 542 (1970).
- **Continue litigating the case in the absence of the original party.** *Diamond*, 476 U.S. at 68.
- **Challenge the court's subject matter jurisdiction.** *Harris v. Amoco Prod. Co.*, 768 F.2d 669, 675 (5th Cir. 1985).
- **Object to stipulations entered prior to intervention.** *LaRouche v. FBI*, 677 F.2d 256, 258 (2d Cir. 1982) (citation omitted).
- **Maintain claims in the original party's absence**. *Pasadena City Bd. of Educ. v. Spangler*, 427 U.S. 424, 430–31 (1976).
- **Assert compulsory counterclaims**. *Lenz v. Wagner*, 240 F.2d 666, 669 (5th Cir. 1957).

A similar procedural right is a defendant's right to proper venue, which is a "protection which Congress has afforded him." *United States ex rel. Harvey Gulf Int'l Marine, Inc. v. Md. Cas. Co.*, 573 F.2d 245, 248 (5th Cir. 1978). Indeed,

following *TC Heartland*, this Court has emphasized that Congress adopted the special patent venue statutes to "eliminate the abuses engendered by previous venue provisions allowing such suits to be brought in any district in which the defendant could be served." *In re Cray*, 871 F.3d at 1361 (quotation omitted). Neither this Court nor the Supreme Court has provided any reason why these critical protections would not be afforded to intervenors as of right under Rule 24(a).[5]

b. Petitioners Are Entitled to Raise Venue Defenses which Require Transfer for Improper and Inconvenient Venue

The District Court's automatic waiver rule does not follow the "basic legal framework governing determinations of forfeiture of a venue defense," *In re Micron*, 875 F.3d at 1094, and contradicts governing Supreme Court precedent, which limits the District Court's exercise of its inherent power (such as in finding

[5] In a footnote, the District Court suggests Petitioners could have filed a declaratory judgment to achieve proper venue, but this step is unnecessary and would not have alleviated Petitioners' need to intervene here. Moreover, requiring Petitioners to file a declaratory judgment would unnecessarily and prejudicially restrict Petitioners' rights to file for *Inter Partes Review* under 35 U.S.C. § 315. And the forum in which such an action could be filed would be narrowly confined by personal jurisdiction under this Court's holding in, *e.g.*, *Avocent Huntsville Corp. v. Aten International Co.*, 552 F.3d 1324, 1332–35 (Fed. Cir. 2008). Indeed, where a plaintiff's only presence is in the district where it chose to file suit, a declaratory judgment would likely provide no alternative forum, exposing the declaratory judgment route as an inadequate justification to limit Petitioners' plain rights under Rule 24. Further, filing **three** declaratory judgments in **three** new districts is no more efficient than resolving this issue through intervention before one judge in the single district where the case was filed.

waiver not provided for in the statutes and Rules) to "a reasonable response" that is not "contrary to any express grant of or limitation on the district court's" authority, *Dietz*, 136 S.Ct. at 1892 (citation omitted). That Supreme Court precedent prohibits findings of waiver that "'circumvent[]' relevant rights granted by statute or Rule." *In re Micron*, 875 F.3d at 1094 (quoting *Dietz*, 136 S. Ct. at 1892).

Here, Petitioners raised timely venue defenses at the first possible opportunity, even **before** intervention was granted, exactly as permitted under Rules 12(b)(3) and 12(h)(1). Those procedural rights were "circumvented" by the District Court's erroneous application of an automatic waiver rule that "effectively eliminate[s] the unqualified right provided by Rule 12(b)" of raising venue defenses. *Rates Tech. Inc. v. Nortel Networks Corp.*, 399 F.3d 1302, 1308 (Fed. Cir. 2005). Such an outcome is particularly improper given the importance of § 1400(b), which "eliminate[s] the abuses engendered" by broad venue findings over accused infringers like Petitioners. *In re Cray*, 871 F.3d at 1361 (citation omitted).

Instead, the District Court denied Petitioners' Transfer Motions, finding Petitioners' requested relief would "create[] a special venue rule on waiver" for Petitioners. Appx564. But the opposite is true—the automatic waiver rule "creates a special [] rule on waiver" that contravenes Petitioners' rights under Rules 12 and 24, as well as 28 U.S.C. § 1406 and 1404. Moreover, the District Court mistakenly relied on the Supreme Court's holdings in *Clark v. Barnard*, 108

U.S. 436, 447 (1883), *Central Trust Co. v. McGeorge*, 151 U.S. 129 (1894), and the Second Circuit's holding in *Trans World Airlines, Inc. v. Civil Aeronautics Bd.*, 339 F.2d 56, 63–64 (2nd Cir. 1964). Appx561-563. These cases, discussed *infra*, support the relief Petitioners seek, as does the Ninth Circuit's in-depth analysis in *Ross*, 504 F.3d 1130.

1. An Automatic Waiver Rule Is Improper Under the Micron and Dietz Framework

This Court has not addressed whether an intervenor as of right in a patent case automatically waives the right to challenge venue upon intervention, but its approach to questions of venue waiver and its rulings in analogous scenarios clearly reject an automatic waiver rule.

In *Micron*, this Court addressed whether defendants waived objections to the propriety of venue by not raising them prior to the Supreme Court's ruling in *TC Heartland*. This Court set forth a "basic legal framework governing determinations of forfeiture of a venue defense," turning first to the waiver provisions in the Rules. *Micron*, 875 F.3d at 1094. The Court examined Rule 12(h)(1), which provides two circumstances in which a 12(b)(3) objection to venue[6] may be waived under the Rules:

[6] Although Petitioners moved for transfer under § 1406, rather than dismissal, "[a] transfer request pursuant to section 1406(a) necessarily turns upon the same underlying issue as a motion to dismiss pursuant to Rule 12(b)(3)—whether the

> (A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or
>
> (B) failing to either:
>
> (i) make it by motion under this rule; or
>
> (ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

Id. at 1096. None of these waiver conditions are present here.

The Court also acknowledged that waiver may be provided by other Rules and statutes. *Id*. at 1094. On the issue of venue, other Rules and statutes governing Petitioners' Transfer Motions include Rule 24(c), which explicitly requires an intervenor to serve a "pleading" that "sets out the claim or defense for which intervention is sought," providing no limitation on those defenses. Section 1406(b) also provides that venue objections may not "impair the jurisdiction of a district court" when the party bringing those objections "does not interpose timely and sufficient objection." 28 U.S.C. § 1406(b). Neither limitation is present here.

Finally, as this Court noted in *Micron*, waiver may also be derived from the court's "inherent powers . . . to achieve the orderly and expeditious disposition of cases." *Micron*, 875 F.3d at 1100 (citation omitted). However, the exercise of such an inherent power "must be a 'reasonable response to the problems and needs' confronting the court's fair administration of justice" and "cannot be

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action lays venue in the wrong judicial district." *Berry v. Potter*, 2006 WL 335841, at *1 (D. Ariz. Feb. 10, 2006).

contrary to any express grant of or limitation on the district court's power contained in a rule or statute." *Dietz*, 136 S. Ct. at 1892 (citation omitted).[7] An inherent power "may rest on sound determinations of untimeliness or consent," but "requires respecting, and not 'circumvent[ing],' relevant rights granted by statute or Rule," and "must be exercised with caution to avoid the forbidden circumvention." *Micron*, 875 F.3d at 1101 (quoting *Dietz*, 136 S. Ct. at 1892) (alteration in original). This Court provided some guidance regarding what facts would properly constitute waiver, such as a party's performance of "some act which **indicates to the court that [it] elects not to raise [its] privilege of venue**." *Id*. (alteration in original) (emphasis added) (citation omitted).

The District Court did not apply the *Micron* framework, nor could it.[8] There is no statement or suggestion in Rule 24(a) that an objection to venue is automatically waived through intervention as of right. Petitioners' venue defenses easily satisfy Rule 12(h)(1) because they were raised at the first opportunity by Petitioners after Petitioners entered the case as intervenors of right under Rule

[7] This "reasonableness" limitation on district courts' inherent authority has been long recognized by this Court's precedent and in commentary on the Rules. *See, e.g. Rates Tech*., 399 F.3d at 1306–07; 1966 Comments to Rule 24 ("[I]ntervention of right . . . may be subject to appropriate conditions or restrictions responsive among other things to the requirements of efficient conduct of the proceedings.").

[8] The District Court attempted to justify its Order on a characterization of Petitioner's intervention as "voluntary." *E.g.* Appx560-561. That characterization contradicts the District Court's findings in support of Petitioners' intervention as of right. *See infra* at 8–9.

24(a): in their Answers in Intervention and by motion (which were previewed to the Court and Plaintiff even before Petitioners' intervened).

Moreover, nothing in the governing statutes provides any indication that an intervenor automatically waives its rights to contest venue. To the contrary, Petitioners' objections satisfy § 1406 because they were (1) timely and (2) sufficient. The District Court specifically found "all three proposed intervenors were timely in their requests to intervene" and does not disagree that Petitioners raised sufficiently meritorious challenges to venue. Appx278.

The District Court does not identify an "act which **indicates to the court that [they] elect[ed] not to raise [their] privilege of venue**." *Micron*, 875 F.3d at 1101 (quotation omitted). In sum, the District Court's automatic waiver rule is inconsistent with and contradicts the Rules, statutes, and authorities cited in *Micron*, which all contemplate waiver occurring only as a result of untimeliness, omission, or intentional indication of consent. *See* 875 F.3d at 1101 (citations omitted). Beyond *Micron*, an automatic waiver rule also contradicts this Court's holdings in analogous circumstances. In *Rates Technology*, this Court addressed whether a party consents to personal jurisdiction when it files permissive counterclaims. The Court rejected plaintiff's argument that a defendant *per se* "waive[s] its jurisdictional objections by filing permissive counterclaims," holding:

> [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. Indeed, holding to the contrary would effectively eliminate the unqualified right provided by Rule 12(b) of raising jurisdictional defenses either by motion or answer.

399 F.3d at 1305, 1308. The waiver issue rested on 12(h)(1) factors of untimeliness and omission. *Id.* at 1309 ("[Defendant] did not dally, but moved to dismiss on jurisdictional grounds at its earliest opportunity."). Neither circumstance is present here.

2. Analogous Doctrines Do Not Support an Automatic Waiver Rule

Analogizing to judicial decisions that hold an intervenor automatically consents to personal jurisdiction, the District Court cites cases from the Eleventh and Sixth Circuits[9] but does not acknowledge the clear Circuit split on the issue (and the other Circuits that firmly rejected such waiver). On the other side of this split are (at least) the Second, Ninth, and Tenth Circuits. In *Ross*, the Ninth Circuit held that an intervenor does not automatically waive its contemporaneous objections to personal jurisdiction. *Ross*, 504 F.3d at 1150; *see also City of N.Y. v. Mickalis Pawn Shop, LLC*, 645 F.3d 114, 139 (2d Cir. 2011) (citing *Ross* with approval). Rather, *Ross* and other decisions hold that when an intervenor "appears and challenges jurisdiction," its appearance establishes only "it[s] agree[ment] to

[9] The District Court also views the Seventh Circuit decision in *Gradel v. Piranha Capital, L.P.* as supporting its position, but the intervenor in that case did not object to jurisdiction. 495 F.3d 729, 731 (7th Cir. 2007).

be bound by the court's determination on the jurisdictional issue." *Mickalis Pawn Shop*, 645 F.3d at 139 (citation omitted).

This approach is consistent with the Supreme Court's holding that "[b]y submitting to the jurisdiction of the court for the limited purpose of challenging jurisdiction, the defendant **agrees to abide by that court's determination** on the issue of jurisdiction." *Ins. Corp. of Ireland v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 706 (1982) (emphasis added); *cf. Ross*, 504 F.3d at 1150 (defendant-intervenor "consents to have the district court determine all issues in the case, including issues of jurisdiction"); *cf. Vanderbilt Mortg. & Fin., Inc. v. Flores*, Civ. Act. No. C-09-312, 2010 WL 1875799, at *4 (S.D. Tex. May 6, 2010) (ruling on merits of intervenor's objections to personal jurisdiction). Already this year, a district court in the Tenth Circuit granted an intervenor's motion to transfer due to lack of personal jurisdiction (and improper venue). *McNaughton, v. Lowecha, LLC*, No. 1:17-cv-00662-RJ, 2018 WL 793789, at *8 (D.N.M. Jan. 10, 2018). Petitioners here only object to the District Court's refusal to make any "determination on the issue," due to its reliance on an automatic waiver rule that does not exist.

The District Court also noted that a state's sovereign immunity "can be waived by intervention,"[10] but that doctrine actually supports the rejection of an automatic waiver rule. The *Clark* holding on which the District Court relied is narrower than the District Court's reading—there, the intervenor waived immunity because it appeared **as a claimant**. 108 U.S. at 447. Or, as the Supreme Court explained, "a State's voluntary intervention in a federal-court action **to assert its own claim** constituted a waiver of the Eleventh Amendment." *Wis. Dep't of Corr. v. Schacht*, 524 U.S. 381, 395 (1998) (Kennedy, J., concurring) (emphasis added) (citing *Clark*, 108 U.S. at 447–48); *cf. Missouri v. Fiske*, 290 U.S. 18, 25 (1933) (agreeing state's "intervention was too limited in character to constitute a waiver of the immunity"); *see also Faulk v. Union Pac. R.R.*, 449 F. App'x 357, 363 (5th Cir. 2011) (unpublished) (agreeing state had not waived where "Louisiana makes no claims of its own in this case," and "in its motion to intervene and its intervenor complaint, the State expressly reserved its immunity"). Accordingly, the sovereign immunity waiver case law cited by the District Court actually supports Petitioners' motions where Petitioners intervened with the express purpose and intent of bringing venue objections, which were simultaneously raised and preserved.

[10] Appx561-562 (citing *84 Video/Newsstand, Inc. v. Sartini*, Case No. 1:07-cv-3190, 2009 WL 10656014, at *22 (N.D. Ohio June 22, 2009) (citing *Clark*, 108 U.S. at 447), *aff'd*, 455 F. App'x 541 (6th Cir. 2011)).

3. Supreme Court Precedent Does Not Support Automatic Waiver

Relying heavily on *Central Trust*, the District Court stated: "intervenors cannot question venue, where a defendant has not exercised that privilege." Appx562 (citing 151 U.S. 129). However, *Central Trust* stands for a much narrower rule. The original defendant in *Central Trust* appeared in a creditor's suit and "joined with the complainant in its prayer for the appointment of a receiver" without raising any objection to jurisdiction (or venue) under the relevant statute. 151 U.S. at 132–33. Subsequently, the defendant's "stockholders and creditors" intervened, arguing that "the court was without jurisdiction," based on the residence of "**the defendant company.**" *Id.* at 129 (emphasis added). The Court rejected the intervenors' attempts to **revive the original defendant's objections**, which the defendant had already waived. This "voluntary action" (Appx562 (citing 151 U.S. at 135)), which could not be overruled, was the voluntary waiver by the **original defendant of its own** "personal privilege" to jurisdiction. Of course, the intervenors were not allowed to nullify a defendant's prior waiver of its own rights.

Here, unlike *Central Trust*, Petitioners do not attempt to raise **Walmart's** venue objections.[11] Rather, Petitioners asserted their own "personal privilege" to object to venue over Petitioners based on their own status under 28 U.S.C. §

[11] Walmart, in its Answer, objected to venue as inconvenient, but not improper under § 1400(b). Appx156 ¶ 13.

1400(b) and the undisputed impropriety of venue over Petitioners. *Central Trust* does not restrict intervenors' ability to exercise their own, un-waived objections that were brought in a timely and diligent manner—indeed, of all the "automatic waiver" authority cited by the District Court, not a single case cites to *Central Trust*.

That remaining authority—one case from the Second Circuit (*Trans World*) and eight district court cases—is easily distinguished or rejected.[12] First, the intervenor in *Trans World* was a **permissive intervenor**. *Trans World Airlines*, 339 F.2d at 64. Second, the court in *Trans World* could not have considered the modern scope of Rule 24(a) because that case was decided prior to the 1966 Amendment. Further, the court's holding—not binding precedent—is qualified:

> [Intervenor] had to seek the **permission** of this court to intervene**. By doing so without simultaneously or soon thereafter raising a motion directed to venue**, [intervenor] waived any defense of improper venue it may have possessed as an intervenor.

Id. at 64 (emphasis added).

The remaining district court cases on which the District Court relied all cite to *Trans World* but provide little or no explanation or analysis of whether they are

[12] At least one judge in the Eastern District of Texas concluded that *Trans World Airlines* did not provide "support for the proposition that a party's right to request a transfer of venue should be waived as a cost of intervention" and "does not unequivocally stand for the proposition that an intervenor may not object to venue." *TiVo Inc. v. AT & T Inc.*, Civ. Act. No. 2:09-cv-259, 2010 WL 10922068, at *4 (E.D. Tex. Mar. 31, 2010).

"respect[ing], and not 'circumvent[ing]', relevant rights granted by statute or Rule." *Micron*, 875 F.3d at 1101 (second alteration in original) (citation omitted). Further, at least one of the cases, *Asbury Glen/Summit Ltd. Partnership v. Southeast Mortgage Co.*, 776 F. Supp. 1093 (W.D.N.C. 1991), plainly supports Petitioner's Transfer Motion. In *Asbury Glen*, the court **granted** the intervenor's motion to transfer, holding that the specific venue statute at issue "would be of little import" if it were subject to automatic waiver. 776 F. Supp. at 1096. Rejecting the same waiver argument made here, the court recognized that waiver principles "must be balanced against the Congressional intent evidenced by" a governing venue statute, especially an "exceptionally powerful statute, one that must be applied over other, more general, venue provisions." *Id*.; *cf. In re Cray*, 871 F.3d at 1361. This reasoning applies to § 1400(b) with equal force.

4. *Ross* Provides Sound Reasoning for Rejecting an Automatic Waiver Rule

The Ninth Circuit's decision in *Ross* provides the most cogent and in-depth analysis of the automatic waiver issue. As here, the defendant in *Ross* intervened as of right and immediately "made clear" that he contested personal jurisdiction and "the propriety of venue." 504 F.3d at 1148. Acknowledging the divergent holdings of the Sixth and Eleventh Circuits, the Ninth Circuit observed that "[t]hese courts, and even *Wright and Miller*, devote little space to analyzing this issue" and proceeded to analyze the consequences of an automatic waiver of

intervenors' rights to raise procedural defenses. *Id*. The court reiterated its prior holdings that a defendant does not waive personal jurisdiction by asserting compulsory and permissive counterclaims, which counseled against an automatic waiver rule:

> [W]here a party has filed a timely and unambiguous objection to the court's jurisdiction, we have concluded that the party has not consented to jurisdiction. . . . Our commonsense approach avoids the pitfalls of a more formalistic era in which a defendant had to choose between contesting the forum's jurisdiction through a special appearance and entering a general appearance and defending himself on the merits.

Id. at 1149 (citation omitted). The Ninth Circuit ultimately rejected the same arguments and authority cited here by the District Court, concluding "[i]f the third party is intervening of right . . . we see little reason to deprive him of any of his procedural defenses merely because the original plaintiff failed to name him as a defendant . . . ."[13] *Id.* at 1150; *cf. Rates Tech.*, 399 F.3d at 1309.

Ross is consistent with the case law of many other courts throughout the country. The Tenth Circuit ruled on this issue long ago, squarely rejecting the

[13] Although the Ninth Circuit spoke specifically to the plaintiff's personal jurisdiction waiver argument, its holding applied to the defendant's venue argument and extends equally to venue objections. *See Nazomi Commc'ns, Inc. v. Nokia Corp.*, SACV 10-151 DOC, 2010 WL 11508956, at *6 (C.D. Cal. June 21, 2010) ("The Ninth Circuit has rejected the argument that intervention strips a party of its ability to issue procedural objections."); *Sawyer v. Bill Me Later, Inc.*, 2011 WL 7718723, at *3 (C.D. Cal. Oct. 21, 2011) ("WebBank, as an intervenor, can raise improper venue as a defense.").

automatic waiver rule. *Coalition of Ariz./N.M. Counties for Stable Econ. Growth v. Dep't of the Interior*, 100 F.3d 837, 844 (10th Cir. 1996) ("If a party has the right to intervene under Rule 24(a)(2), the intervenor becomes no less a party than others and has the right to file legitimate motions, including venue motions."). Other Circuit Courts have allowed venue motions by intervenors without comment. *See, e.g.*, *ACLU v. FCC*, 774 F.2d 24, 27 (1st Cir. 1985); *Farah Mfg. Co. v. NLRB*, 481 F.2d 1143, 1145 (8th Cir. 1973).

5. Petitioners' Cases Should Be Transferred for Improper Venue Under § 1406

Petitioners' individual § 1406 arguments are set forth more fully in their separate Transfer Motions. Petitioners have each submitted signed declarations attesting to facts the Plaintiff does not dispute and the District Court did not question, namely that Petitioners: (1) are incorporated in other states (California, Delaware, and Arizona) and (2) do not maintain a regular and established place of business in the Eastern District of Texas. Appx199-200 ¶¶ 9-12; Appx261 ¶ 7; Appx410 ¶ 7; *cf.* Appx418-431, Appx454-469, Appx478-493; *see also* Appx558-564. Accordingly, there is no factual question that venue in the Eastern District of Texas is improper for Petitioners, which merits transfer pursuant to § 1406.

6. Petitioners' Cases Should Be Transferred for Convenience under § 1404(a)

In addition to finding Petitioners waived the right to challenge venue under § 1406, the District Court held that Petitioners also waived any right to object to venue as inconvenient. Appx564. In so holding, the District Court extended its automatic waiver further than many of the cases on which it relies. *See Intrepid Potash-N.M., LLC v. Dep't of the Interior*, 669 F. Supp. 2d 88, 91–92 (D.D.C. 2009) (refusing to extend the *Trans World* waiver rule to motions under § 1404(a), because "no coherent rationale distinguishes an 'original' defendant from a third-party defendant-intervenor for analysis under § 1404(a)" (quotation omitted)). Indeed, Plaintiff—who originally chose the venue—would be allowed to seek transfer for convenience under § 1404(a) without automatically waiving its rights. *See Ferens v. John Deere Co.*, 494 U.S. 516, 517 (1990). Accordingly, even if the Court disagreed with Petitioners' waiver arguments, the Court should still remand for consideration under § 1404(a), which Petitioners timely raised and have not waived.

As set forth in their Transfer Motions below, each of Petitioners' § 1404(a) arguments arises from the fact that this case "features a stark contrast in relevance, convenience, and fairness between the two venues," *In re Nintendo Co.*, 589 F.3d 1194, 1198 (Fed. Cir. 2009), because "nothing favors the transferor forum, whereas several factors favor the transferee forum[s]," *In re Toyota Motor Corp.*,

747 F.3d 1338, 1341 (Fed. Cir. 2014). Appx337-338, Appx346-352; Appx360-361, Appx363-364; Appx391-392, Appx400-405.

c. Intervenors of Right Joined in the Same Suit as Accused Infringers Are Entitled to the Protections of 35 U.S.C. § 299

The District Court's ruling on severance constitutes another impermissible limitation on the procedural rights of intervenors of right that this Court should correct. Title 35, Section § 299(a) restricts the extent to which "accused infringers may be joined in one action," essentially codifying this Court's approach to severance under Rule 21, under which Petitioners moved. Appx553. These provisions grant district courts broad authority to "sever any claim against a party," wherefore "courts have looked to Rule 20 for guidance." *In re EMC*, 677 F.3d at 1356 (citation omitted). Nevertheless, the District Court denied Petitioners' Severance Motions, reasoning "Section 299 does not and should not apply in this case because the intervenors **did not enter this case** under the joinder rules of Rule 20." Appx554 (emphasis added). This narrow interpretation does not comport with the statute, the Rule, or guidance provided by the case law. Specifically, the District Court erred by:

Narrowly reading the word "joined" in § 299. The District Court improperly applied a rigid and narrow reading of "joined" by limiting § 299 to "forced joinder." Appx557. But the word "joined" encompasses more than forced joinder. *See Town of Chester v. Laroe Estates, Inc.*, 137 S. Ct. 1645, 1651 (2017)

("For all relief sought, there must be a litigant with standing, whether that litigant **joins** the lawsuit as a plaintiff, a coplaintiff, or an intervenor of right." (emphasis added)); *Waymo*, 870 F.3d at 1363 n.6 ("Orders granting intervention . . . are treated in the same way as other orders with respect to party joinder." (quoting Wright and Miller, § 3914.18)).

Attempting to limit § 299 to "Rule 20 (joinder)." Appx554. Contrary to the District Court's analysis, Rule 20 provides only one of several "joinder" mechanisms—it is not *the* "joinder" rule; it is *a* joinder rule, and, more specifically, only relates to instances of "**Permissive** Joinder of Parties."

Overlooking other methods of "joining" in § 299. Appx554. The District Court overlooked that § 299 applies to multiple methods of "joining" accused infringers, including required joinder (under Rule 19) and joinder as counterclaim defendants (under Rule 13), as well as consolidation of accused infringers for trial (under Rule 42).

Reading the terms in § 299 to create a negative implication. The District Court emphasized that "[t]he word 'intervention' is nowhere to be found in the statute," Appx555, but likewise, § 299 does not use the term "Permissive Joinder." The text and history of § 299 give no reason to conclude intervenors were excepted from its protections, and such a negative implication requires a showing "that

Congress considered the unnamed possibility and meant to say no to it." *Marx v. Gen. Revenue Corp.*, 568 U.S. 371, 381 (2013) (quotation omitted).

Using § 299's headings to limit its plain meaning. The District Court concluded that "[b]y its own terms, Section 299 applies to joinder." Appx554. But the word "joinder" only appears in § 299's heading and subheadings, and it is axiomatic that where "the text of the statute is plain and unambiguous, there is no call to resort to its heading to aid in construing it." *United States v. Carrillo-Colmenero*, 523 F.2d 1279, 1283 (5th Cir. 1975) (citing *Maguire v. Comm'r*, 313 U.S. 1, 9 (1941)).

Avoiding the purpose of § 299. Despite its focus on the legislative history of § 299, the District Court de-emphasized the section's drafters' statements regarding "section 299's purpose of allowing unrelated patent defendants to insist on being tried separately . . . ." 157 Cong. Rec. 13,187 (2011) (statement of Sen. Kyl). Importantly, the section's drafters did not restrict intervenors from enjoying the protections of § 299; to the contrary, they stated that the section was intended to "**end[] the abusive practice of treating as codefendants parties who make completely different products and have no relation to each other**." 157 Cong. Rec. 9,778 (2011) (statement of Rep. Goodlatte) (emphasis added).

The District Court's interpretation should be rejected because it is inconsistent with § 299's purposes and creates dangerous precedent for national

retailers who, like Walmart, will fall prey to plaintiffs' strategy of using those "mere resellers" to avoid the protections created by Congress in § 299.[14] Further, even if § 299 did not technically apply to Petitioners pursuant to the District Court's rigid reading, severance still would be appropriate under Rule 21 and this Court's precedent, *e.g.*, *In re EMC*, 677 F.3d 1351, and for the reasons expressly embodied in § 299.

d. Petitioners Are Entitled to Stay on Remand

In the event the Court decides to remand to the District Court with instructions to decide the merits of Petitioner's motions under the framework governing § 1406, §1404(a), and § 299, Petitioners request a writ of mandamus staying the case. A stay is appropriate because procedural motions like motions to transfer venue should be addressed at the outset of litigation and before proceeding to the merits, so as to prevent prejudice to the litigants. *See In re Nintendo Co.*, 544 F. App'x 934, 941 (Fed. Cir. 2013) (recognizing "the importance of addressing motions to transfer at the outset of litigation" (internal quotation marks omitted)); *In re Fusion-IO, Inc.*, 489 F. App'x 465, 466 (Fed. Cir. 2012). Petitioners raised their venue and joinder objections in a timely manner, early in the case, and they

[14] The District Court also held, in a footnote, that Petitioners waived their § 299 arguments "by voluntarily intervening in this case." Appx558, n.13. This automatic waiver ruling should be vacated for the same reasons Petitioners provide above.

are entitled to have those procedural objections adjudicated before proceeding any further with the merits of the case.

II. No Other Adequate Means Are Available

Petitioners do "not have an adequate remedy for an improper failure to transfer or sever the case by way of an appeal from an adverse final judgment because the defendant would be unable to demonstrate 'that it would have won the case had it been tried in a convenient [venue].'" *In re EMC*, 677 F.3d at 1355 (quoting *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 319 (5th Cir. 2008)).

III. A Writ of Mandamus Is Appropriate

Mandamus is appropriate because this case presents the Court with "basic, undecided" legal questions regarding waiver of an intervenor's procedural defenses in a patent case. *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964). Resolution of these issues will have significant implications for other patent litigants, and will likely shape the posture of patent cases nationwide. *In re Volkswagen*, 545 F.3d at 319. A writ of mandamus would define for litigants "the boundaries of discretion" available for courts to find waiver of venue and joinder rights "under the *Dietz* framework" and consistent with intervenors' procedural rights. *Micron*, 875 F.3d at 1102. Further, the case is still in a relatively early stage. The District Court held a claim construction hearing on February 27, 2018, but discovery is still ongoing,

no depositions have yet been taken, and the scheduled trial date is seven months away.

Finally, mandamus is appropriate because Plaintiff's strategy threatens to create an end run around Supreme Court precedent interpreting the patent venue statute, in a manner that would prejudice national retailers and product suppliers alike. By restricting the rights of upstream suppliers of accused products, retailers like Walmart will be increasingly targeted as venue "hooks" to achieve nation-wide venue in patent cases. By automatically denying intervening upstream suppliers' procedural defenses, the District Court's Order will create a roadmap for patent plaintiffs to use in suing national retailers to achieve any venue they desire. Mandamus is necessary to ensure such upstream suppliers (the "true defendants") are able to exercise their rightful procedural defenses to defend their rights, protect their customers, and deter plaintiffs' strategy of singling out a national retailer.

CONCLUSION

For the foregoing reasons, Petitioners request a writ of mandamus ordering the District Court to transfer Plaintiff's claims against each Petitioner to proper venues, or remand for consideration of the merits of Petitioners' procedural motions.

Dated: March 5, 2018

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 21(d)(1)

This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 21(d)(1). The brief contains 7,667 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Federal Circuit Rule 32(b).

This brief complies with the requirements of Federal Rule of Appellate Procedure 32(c)(2). This brief has been prepared in a proportionally spaced typeface using Microsoft Office Word Version 2010 in 14-point Times New Roman font.

Dated: March 5, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 5, 2018, the foregoing Petition for Writ of Mandamus was filed via the Court's CM/ECF system.

I further certify that on the same date, I caused a true and accurate copy of the Petition for Writ of Mandamus to be served via email on all counsel of record in the trial court, and to be placed for delivery to the trial court judge via overnight mail, as specified below:

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