Miscellaneous Docket No. _____

United States Court of Appeals for the Federal Circuit

IN RE BIGCOMMERCE, INC.,

Petitioner.

On Petition For A Writ Of Mandamus
To The United States District Court for the Eastern District of Texas
In Case No. 6:17-cv-00186
Judge Rodney Gilstrap

PETITION FOR WRIT OF MANDAMUS

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December 21, 2017

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CERTIFICATE OF INTEREST

Pursuant to Federal Circuit Rule 47.4(a)(1) and Federal Rule of Appellate Procedure 26.1, counsel for Petitioner BigCommerce, Inc. certifies the following:

1. Full Name of Party Represented by me:

   BigCommerce, Inc.

2. Name of Real Party in interest (Please only include any real party in interest NOT identified in Question 3) represented by me is:

   None

3. Parent corporations and publicly held companies that own 10% or more of stock in the party:

   BigCommerce, Inc. states that its parent corporation is BigCommerce Holdings, Inc. No publicly held corporation owns 10% or more of BigCommerce's stock.

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

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5. The title and number of any case known to counsel to be pending in this or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal are:

Express Mobile, Inc. v. BigCommerce, Inc., No. 2:17-cv-00160-JRG-RSP, pending in the Eastern District of Texas, is another case that may be affected by this Court's decision on this mandamus petition. In that case, the district court expressly relied on its reasoning set forth in the venue decision challenged by this mandamus petition.

Dated: December 21, 2017

/s/ Mark A. Lemley

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STATEMENT OF RELATED CASES

Pursuant to Federal Circuit Rule 47.5, BigCommerce, Inc. states as follows:

(a) There have been no previous appeals, or mandamus petitions, in or from this civil action;

(b) The *Express Mobile, Inc. v. BigCommerce, Inc.*, No. 2:17-cv-00160-JRG-RSP action, pending in the Eastern District of Texas, is another case that may be affected by this Court's decision on this mandamus petition. Specifically, in the *Express Mobile* case, the district court expressly relied on its reasoning set forth in the venue decision challenged by this mandamus petition.

RELIEF SOUGHT

Petitioner BigCommerce, Inc. ("BigCommerce") seeks an order directing the district court to dismiss the case brought in the Eastern District of Texas, where venue is improper.

QUESTION PRESENTED

In which judicial district(s) do domestic corporations incorporated in multi-district states "reside" under the patent venue statute?

STATEMENT OF JURISDICTION

This Court has jurisdiction to grant mandamus relief under the All Writs Act, 28 U.S.C. § 1651. *See, e.g., In re Link_A_Media Devices Corp.*, 662 F.3d 1221 (Fed. Cir. 2011).

I. INTRODUCTION

BigCommerce is incorporated in the state of Texas. It is headquartered in Austin, the state capital, in the Western District of Texas. It has no place of business—however that phrase is interpreted—in the Eastern District of Texas.

This Petition presents an important, recurring, and unsettled question: Where, within Texas, does BigCommerce "reside" under the patent venue statute? Does a company "reside" simultaneously in all the judicial districts in a state simply because it is incorporated there? Or does it reside only in the ***district*** within that state in which the state capital is located, and in which it actually registered its incorporation—here, the Western District of Texas?[1]

The district court held that a corporation simultaneously resides in every district in the state in which it is incorporated, regardless of whether it has any place of business or connection to that district. The statutory text and case law show otherwise.

This Court should grant mandamus to resolve this issue. The issue did not arise in this Court before the Supreme Court's decision in *TC Heartland, LLC v. Kraft*

[1] Companies, of course, also are subject to venue in any district in which they have a regular and established place of business and have committed acts of infringement. Uncontroverted evidence establishes that BigCommerce has regular and established places of business in the Western District of Texas and in the Northern District of California (where its technological headquarters are located) but ***not*** in the Eastern District of Texas.

Foods Grp. Brands LLC, 137 S. Ct. 1517 (2017), which held that a corporation resides only where it is incorporated. It was not presented in *TC Heartland* because that case arose in Delaware, which has only one judicial district. It will arise repeatedly in the near future, because many of the states with the most patent cases, including California, Florida, New York, Texas, and Virginia, have multiple judicial districts. And the question is appropriately resolved on mandamus. It would make little sense to require hundreds of defendants in a similar position to litigate their cases through trial in a venue that might well be improper in order to preserve the venue issue for an eventual appeal that would require the entire case to be relitigated in a different forum.

II. FACTS RELEVANT TO THE ISSUES PRESENTED

BigCommerce is incorporated in Texas. It is headquartered in Austin, Texas, in the Western District of Texas, but it has no place of business in the Eastern District of Texas. The capital of Texas is Austin, in the Western District of Texas.

The district court for the Eastern District of Texas refused to dismiss the complaint for improper venue. That refusal was based in the first instance on its conclusion that the Supreme Court's decision in *TC Heartland* did not change the law and that BigCommerce had thus waived its venue challenge pursuant to Rule 12 (h)(1)(A). Appx002. Alternatively, the district court held that the fact that BigCommerce had incorporated in Texas, registering with the Secretary of State in

the Western District of Texas, meant that it resided simultaneously in all four Texas judicial districts. Appx003.

At the time the district court issued its order denying dismissal, trial courts were in "widespread disagreement" over whether *TC Heartland* constituted a change in law that exempted the application of Rule 12(h)(A)'s waiver rule. *In re Micron Tech., Inc.*, 875 F.3d 1091, 1094 (Fed. Cir. 2017). Just last month, however, this Court resolved that disagreement in *In re Micron* by holding that "*TC Heartland* changed the controlling law in the relevant sense" such that a party's failure to raise a *TC Heartland*-based venue defense in a pre-*TC Heartland* responsive pleading does not result in waiver under Rule 12. *Id*. *In re Micron* thus eliminated the district court's first basis for denying dismissal for improper venue under Section 1406, and BigCommerce timely brought this mandamus petition challenging the district court's only remaining basis for denying dismissal.

This case remains in its early stages, with neither side having served written discovery or taken any depositions—and with the district court still months away from having to substantively engage with the asserted patent.[2] Nor is trial imminent: jury selection is not set to begin until late October 2018. In short, no practical

[2] Neither side has filed a motion requiring the district court to substantively engage with the asserted patent, and the *Markman* hearing is not scheduled to occur until February 2018.

considerations or other interests warrant denial of this Petition on procedural grounds, and the matter is ripe for a decision on the important and unsettled question of where a domestic corporation incorporated in a multi-district state "resides" under the patent venue statute.

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. *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." *In re EMC*, 677 F.3d 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, 1340 (Fed. Cir. 2014). In denying BigCommerce'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. BigCommerce's right to a writ to remedy that error is clear and indisputable.

B. The District Court's Ruling Is Based On The Erroneous Conclusion Of Law That A Corporation Resides Simultaneously In Every District In Its State of Incorporation

A domestic corporation does not "reside" in each and every single judicial district in a multi-district state of incorporation.

1. Statutory Text

The residency prong of the patent venue statute states: "Any civil action for patent infringement may be brought in **the judicial district** where the defendant resides." 28 U.S.C. § 1400(b) (emphasis added). By its plain meaning, section 1400(b) refers to residence as something that happens in a single judicial district, not in multiple districts simultaneously. A court should not lightly depart from the plain meaning of the statute. *Caminetti v. U.S.*, 242 U.S. 470, 485 (1917); *United States v. Ron Pair Enters., Inc.*, 489 U.S. 235, 241 (1989); *In re Bartfeld*, 925 F.2d 1450, 1453 (Fed. Cir. 1991); *Vectra Fitness, Inc. v. TNWK Corp.*, 162 F.3d 1379, 1382 (Fed. Cir. 1998).

The district court ignored the plain meaning of the statute based on a single phrase in dictum in *TC Heartland.* In rejecting this Court's conclusion that a

corporation resides for venue purposes wherever it is subject to personal jurisdiction, the Supreme Court held that "a domestic corporation 'resides' only in its State of incorporation for purposes of the patent venue statute." *TC Heartland*, 137 S. Ct. at 1517.

That language did not prejudge the issue in this case. First, the statement was dictum. The phrases "the judicial district" and "State of incorporation" track different concepts. They are one and the same thing for single-district states like Delaware—the state at issue in *TC Heartland*. The Supreme Court lacked occasion to issue any holding about multi-district states of incorporation in *TC Heartland* because the issue was not before the Court. Second, even if the Court's offhand language were treated as binding, it does not compel the district court's interpretation. There is no dispute after *TC Heartland* that a corporation resides only in its state of incorporation. The dispute is ***where*** in that state a corporation resides: in the district of incorporation or in every district in the state? The Supreme Court's language did not purport to resolve that question, which was not before it, and certainly shouldn't be understood to override the plain meaning of the statute.

2. Case Law

While *TC Heartland* did not resolve the question in this case, the Supreme Court has previously spoken on the issue.

In *Stonite Products, Co. v. Melvin Lloyd Co.*, 315 U.S. 561 (1942), the district court for the Western District of Pennsylvania dismissed a patent infringement suit brought against Stonite Products Company, an inhabitant of the Eastern District of Pennsylvania without a regular and established place of business in the Western District of that State. The district court applied then 28 U.S.C. § 109, which stated, "In suits brought for the infringement of letters patent the district courts of the United States shall have jurisdiction, in law or in equity, in the district of which the defendant is an inhabitant." *Id*. at 562 n.1 (quoting the then-operative version of 28 U.S.C. § 109); *see also* Appx013 (patent venue statute historical and revision notes). The Third Circuit reversed the district court, citing then 28 U.S.C. § 113, a general venue provision that permitted suits, not of a local nature, against two or more defendants residing in different judicial districts within the same state, to be brought in either district within the state. *Id*. at 563.

The Supreme Court reversed in turn. It held that 28 U.S.C. § 109 was the exclusive provision controlling venue in patent infringement proceedings. *Id*. at 566-673 "Even assuming that [section 113] covered patent litigation prior to the Act of 1897, we do not think that its application survived that Act, which was intended to define the exact limits of venue in patent infringement suits. Furthermore, the Act of 1897 was a restrictive measure, limiting a prior, broader venue." *Id.* at 566.

The Supreme Court's decision did not, it is true, expressly interpret the meaning of "inhabits" under section 109. But the Court clearly assumed that a corporation inhabited only one judicial district. Had the rule been otherwise, there would have been no reason to see section 109 and section 113 as in conflict at all, no reason to refer to section 113 as involving "broader venue" than the patent statute, and certainly no reason to refuse to apply section 113 to patent cases.

The final disposition of *Stonite* further supports the common sense understanding of "inhabits" as limited to a particular place. Instead of vacating the Third Circuit's opinion and asking it to determine on remand how many different districts in Pennsylvania the defendant inhabited, the Supreme Court reversed the Third Circuit, holding venue improper altogether under section 109. Put differently, the Supreme Court's decision to reverse as opposed to remand supports an interpretation of "inhabits" as not vesting patent venue in every single judicial district in multi-district states of incorporation.

In any event, *Stonite* is not alone. The Supreme Court consistently interpreted the term "inhabits" as applied to corporations as indicating, ***not*** amenability to suit in every district in the state, but the opposite: amenability to suit only where the company's corporate offices were located. The Court discussed the issue at length in *Galveston, H. & S.A. Ry. Co. v. Gonzales*, 151 U.S. 496, 503-04 (1894):

> These cases must be regarded as establishing the doctrine that a domestic corporation is both a citizen and an

> inhabitant of the state in which it is incorporated; but in none of them is there any intimation that where a state is divided into two districts, a corporation shall be treated as an inhabitant of every district of such state, or of every district in which it does business, or indeed of any district other than that in which it has its headquarters or such offices as answer in the case of a corporation to the dwelling of an individual.
>
> . . .
>
> In the case of a corporation, the question of inhabitancy must be determined not by the residence of any particular officer, but by the principal offices of the corporation, where its books are kept and its *corporate* business is transacted, even though it may transact its most important business in another place. It is but a corollary of the proposition laid down in the three cases above referred to that if the corporation be created by the laws of a state in which there are two judicial districts, it should be considered an inhabitant of that district in which its general offices are situated and in which its general business, as distinguished from its local business, is done.

Id. (emphasis in original).

While it is true that the *Galveston* Court interpreted the term "inhabits" while the current statute uses "resides," the Supreme Court has held that:

> "'[R]esides' in the recodified version of § 1400(b) bore the same meaning as 'inhabit[s]' in the pre–1948 version. The words 'inhabitant' and 'resident,' as respects venue, are synonymous.' The substitution of 'resides' for 'inhabit[s]' thus did not suggest any alteration in the venue rules for corporations in patent cases."

TC Heartland, 137 S. Ct. at 1519. "28 U.S.C.A. § 1400(b) made no substantive change from 28 U.S.C. (1940 ed.) § 109 as it stood and was dealt with in the *Stonite*

case." *Fourco Glass Co. v. Transmirra Prods. Corp.*, 353 U.S. 222, 228 (1957); *see also* Appx013 (patent venue statute historical and revision notes, stating that the "[w]ords 'inhabitant 'and 'resident,' as respects venue, are synonymous")

3. The District Court's Efforts to Distinguish *Stonite* Are Unavailing.

The district court acknowledged *Stonite*, but sought to distinguish it on several grounds. First, the district court treated the *Stonite* ruling as dictum. The district court noted, in relevant part:

> Defendant's reliance on *Stonite Products Co. v. Melvyn Lloyd Co.*, 315 U.S. 561 (1942) is misplaced. (Dkt. No. 14 ("BigCommerce is today's Stonite . . . venue is therefore improper.").) This issue was not before the Court in *Stonite*. There, the district court only discussed the extent to which the defendant had a regular and established place of business in the Western District of Pennsylvania . . . Indeed, the Supreme Court noted in the first sentence of its opinion in Stonite that "[t]he ***only*** question presented . . . is whether Section 48 of the Judicial Code . . . is the sole provision governing the venue of patent infringement litigation." *Stonite*, 315 U.S. at 561 (emphasis added).

Appx003–4.

The district court is correct that *Stonite* answered one question—"whether § 48 of the Judicial Code (28 U.S.C. § 109) is the sole provision governing the venue of patent infringement litigation, or whether that section is supplemented by § 52 of the Judicial Code (28 U.S.C. § 113)." *Stonite*, 315 U.S. at 561. But there would have been no need to ask that question if the definition of inhabit itself included the

possibility of venue in multiple districts within the state, because there would have been no conflict between the statutes in the case.

Two other district courts have found *Stonite* controlling. As the Northern District of California held in interpreting *Stonite*: "Although *Stonite* does not spell out the standard for inhabitant (or resident) of a district, from the facts and the holding, we conclude that for the purposes of § 1400(b), a defendant corporation resides in the district in its state of incorporation where its principal place of business is." *California Irrigation Servs., Inc. v. Barton Corp.*, 654 F. Supp. 1, 2-3 (N.D. Cal. 1985). *Accord Action Commc'n Sys., Inc. v. Datapoint Corp.*, 426 F. Supp. 973, 974-75 (N.D. Tex. 1977) ("I am led to the inescapable conclusion that a corporation may be sued under the §1400(b) residence provision only in the state of incorporation and, within that state, only in the judicial district where its principal place of business is located."). Further, as noted above, *Stonite* was not alone, but represented the general understanding of the term "inhabit" in Supreme Court jurisprudence at the time.

Second, the district court held that *Stonite* should not apply because the statute in that case used the word "inhabit" rather than "reside," the term in the current version of the statute. Appx005 n.2. But that argument was explicitly rejected by the Supreme Court, as noted above. The Court held that "resides" in 28 U.S.C. §1400(b) means the same thing as "inhabits" did in original section 109. *TC Heartland*, 137 S. Ct. at 1519. Not only can the use of the term "resides" not support

a change from the law set forth in *Stonite*, the demonstrated equivalence of "resides" and "inhabits" further supports the conclusion that BigCommerce does not reside in the Eastern District of Texas. *Galveston*, *supra*, 151 U.S. at 503-04.

Finally, the district court offered a policy argument that incorporation should be understood as acquiring residence in all judicial districts simultaneously:

> This Court also notes that BigCommerce was granted a corporate charter by the State of Texas rather than by a particular subdivision or judicial district thereof. It exists under Texas law throughout the State of Texas, not only in specific locations where it has a primary place of business or where it was engaged in commerce when it was incorporated. In fact, many corporations are chartered by the State *before they begin* business operations or without ever engaging in any operations in Texas at all. Under the logic asserted by BigCommerce, a sole proprietor operating in Waco, Texas who then incorporated would only be protected by the corporate shield in that existing location, and by extension he would have to seek another and separate grant of authority from the State if he later decided to open another location in Dallas where he desired the same protections. A Texas corporation is chartered by the State to pursue lawful commercial pursuits anywhere in Texas. It therefore resides in all the judicial districts of that state where it may pursue its commercial objectives.

Appx005–6**.**

But the fact that a Pennsylvania or Texas corporation is chartered by the State to pursue lawful commercial pursuits anywhere in that state does not mean that it ***therefore*** inhabits all the judicial districts of Pennsylvania or Texas. If it did, the Supreme Court would not have reversed the Third Circuit in *Stonite*, and it would not have had to consider the statutes it addressed to have been in conflict. And the

railroad in *Galveston* would certainly have been subject to jurisdiction elsewhere in Texas.

The mistake in the district court's logic becomes evident if we substitute an individual for a corporation. Individuals obtain state documents—driver's licenses, birth certificates—that give them legal rights throughout the state. And they reside "in the state." It does not follow that individuals are residents or inhabitants of every judicial district in the state. To the contrary, we know they are not. There is no more reason to assume that a corporation must necessarily inhabit or reside in every district in a state.

BigCommerce is incorporated in Texas. Thus, BigCommerce is a resident and inhabitant of Texas. But just because the Eastern District of Texas is within Texas, it does not follow that BigCommerce resides in the Eastern District of Texas, and certainly not when it has no connection with that jurisdiction.

That is particularly true because the district court's policy argument departs from both the statutory text and the controlling precedent. The patent venue statute limits patent lawsuits to "the judicial district" which the defendant "inhabits" or "resides." The fact that the Supreme Court held that a defendant resides only "in" a state of incorporation does not logically or for any policy reasons alter the meaning of that phrase to "every single judicial district within a state of incorporation."

IV. NO PRACTICAL CONSIDERATIONS OR OTHER INTERESTS WARRANT DENIAL OF THIS PETITION

BigCommerce filed this motion to dismiss for improper venue on May 31, 2017—a week after the Supreme Court's *TC Heartland* decision. The district court denied BigCommerce's dismissal motion on July 26, 2017. The district court's primary basis for denial was its conclusion that, because (in the district court's view) *TC Heartland* did not represent an intervening change in the law, BigCommerce waived its right to challenge venue by failing to raise an improper venue defense in its first responsive pleading.

On November 15, 2017, the Federal Circuit clarified that *TC Heartland* ***did*** represent an intervening change in the law. *In re Micron Tech., Inc.*, 875 F.3d at 1091. As such, this basis of the district court's reasoning is now established as plainly wrong. BigCommerce timely filed this motion for mandamus relief within weeks of the Federal Circuit's clarification in *Micron*.

Moreover, no practical considerations—such as an imminent trial—warrant denial of this petition. *Cf. id*. at 1102. Indeed, this case is in its infancy, with neither side having served written discovery or taken any depositions. The district court remains months away from having to substantively engage with the asserted patent, with a Markman hearing not scheduled to occur until February of 2018. In short, no practical considerations or other interests warrant denial of this Petition on procedural grounds, and the matter is ripe for a decision on the merits.

V. NO OTHER ADEQUATE REMEDY IS AVAILABLE

Absent mandamus, BigCommerce would not have an adequate remedy for the improper failure to dismiss this case. *Cf. In re TS Tech USA Corp.*, 551 F.3d 1315, 1322 (Fed. Cir. 2008). BigCommerce's statutory venue rights would be rendered meaningless if it were forced to litigate the case through a final judgment in the Eastern District of Texas 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 Corp. 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; *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.").

VI. EXTRAORDINARY RELIEF IS WARRANTED

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, as here, 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, 1005 n.4 (1st Cir. 1988) (writ appropriate "to resolve issues which are both novel and of great public importance").

Mandamus is especially appropriate in this case because this Petition presents an important, recurring, and unsettled question: Where, within a multi-district state, does a corporation "reside" under the patent venue statute? This issue did not arise in this Court before the Supreme Court's decision in *TC Heartland*, which held that a corporation resides only where it is incorporated. And, the issue was not presented

in *TC Heartland* because that case arose in Delaware, which has only one judicial district. It will arise repeatedly, because many of the states with the most patent cases have multiple judicial districts. And, as noted above, the question is appropriately resolved on mandamus because there exists no other adequate remedy. Indeed, it would make little sense to require hundreds of similarly-situated defendants litigate their cases through trial in a venue that might well be improper in order to preserve the venue issue for an eventual appeal.

Finally, because BigCommerce is amenable to suit elsewhere—including in the Northern District of California (where BigCommerce's technical headquarters are located and its accused product was developed)[3] and the Western District of Texas—there is no risk of BigCommerce evading suit if this case is dismissed for improper venue.

For all these reasons, this case is especially appropriate for mandamus review.

VII. CONCLUSION

For the foregoing reasons, BigCommerce respectfully requests that this Court issue a writ of mandamus directing the Eastern District of Texas to dismiss this case for lack of proper venue.

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[3] BigCommerce has separately moved under 28 U.S.C. § 1404 to transfer the case to the Northern District of California for the convenience of the parties and witnesses, and in the interest of justice. That motion remains pending, but would be mooted by a decision directing the district court to dismiss this case for improper venue.

Dated: December 21, 2017

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

The undersigned certifies that this petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 21(d). The petition contains 4,496 words, as calculated by the "Word Count" feature of Microsoft Word 2013, the word processing program used to create it.

The undersigned further certifies that this petition complies with the typeface requirements of Federal Rule of Appellate Procedure 32(c)(2). The petition has been prepared in a proportionally spaced typeface using Microsoft Word 2013 in Times New Roman 14 point font.

Dated: December 21, 2017

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CERTIFICATE OF SERVICE

I hereby certify that on December 21, 2017, one copy of BigCommerce's **PETITION FOR WRIT OF MANDAMUS AND APPENDIX** was dispatched by overnight courier for deliver on the next business day to:

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