

THE PATENTEE AND INFRINGER BATTLEFRONT WORSENS AS COURTS SHARPEN THE INFRINGER'S SWORD

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I. INTRODUCTION

Ms. General Counsel of Pharma Co. ("Pharma") arrives at work early Monday morning to find reports that a rival company, InfringaLot, Inc. ("InfringaLot"), has begun selling a very similar drug for which Pharma has a patent. Ms. General Counsel writes to InfringaLot informing it that Pharma believes InfringaLot is selling a product which falls under Pharma's patent. She ends the letter with an open offer to license the patent to InfringaLot. She hopes the license offer will promote a cordial business relationship and avoid expensive litigation, which would heavily burden Pharma. InfringaLot rejects the letter and files a declaratory judgment action for noninfringement and patent invalidity in federal district court.

Prior to 2007, a federal district court would dismiss this action for failure of subject-matter jurisdiction.¹ However, due to landmark changes in the jurisprudence of the Supreme Court and the Federal Circuit Court of Appeals in 2007, this action can now proceed—a radical change in the relationship between patentees and alleged infringers.²

After years of inactivity, the Supreme Court recently tried its hand at reforming patent law.³ Since 2004, the Court has granted certiorari, and

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1. See, e.g., *SanDisk Corp. v. STMicroelectronics, Inc.*, No. C 04-04379 JF, 2005 WL 5801276 (N.D. Cal. Jan. 20, 2005), *vacated*, 480 F.3d 1372 (Fed. Cir. 2007).

2. See, *SanDisk Corp. v. STMicroelectronics, Inc.*, 480 F.3d 1372 (Fed. Cir. 2007).

3. Robert P. Taylor, *The Supreme Court and the Federal Circuit: KSR, eBay, and MedImmune*, in 13TH ANNUAL INST. ON INTELL. PROP. L. 71, 75 (Practicing Law Institute 2007); see Robert C. Scheinfeld & Parker H. Bagley, *Patent and Trademark Law: Key Decisions from Supreme Court, Federal Circuit*, 237 N.Y. L.J. 1, 1 (2007) (noting "a sea change in patent law jurisprudence").