

NOT RECOMMENDED FOR FULL-TEXT PUBLICATION

File Name: 09a0673n.06

No. 08-4278

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUITFILED
Oct 06, 2009
LEONARD GREEN, Clerk

DAVID HALPERN,)
v.)
Plaintiff-Appellant,)
PERITEC BIOSCIENCES, LTD.; PERITEC)
BIOSCIENCES; RAJESH K. KHOSLA;)
TIMUR SARAC,)
Defendants-Appellees.)

)
)
)
ON APPEAL FROM THE UNITED
STATES DISTRICT COURT FOR THE
NORTHERN DISTRICT OF OHIO

Before: MARTIN, ROGERS, and COOK, Circuit Judges.

PER CURIAM. Plaintiff Halpern appeals from the district court's Rule 12(b)(6) dismissal of his suit to enjoin patent-pending rights, testing, and marketing of a device he claims to have invented. Because Halpern's complaint seeks relief under the patent law, appellate jurisdiction lies exclusively in the Federal Circuit. 28 U.S.C. § 1295(a); 28 U.S.C. § 1338(a). Neither party's brief questions this Court's appellate subject matter jurisdiction; thus, we raise it *sua sponte*. *See* *Answers in Genesis of Ky., Inc. v. Creation Ministries Int'l, Ltd.*, 556 F.3d 459, 465 (6th Cir. 2009) ("federal courts have a duty to consider their subject matter jurisdiction in regard to every case and may raise the issue *sua sponte*").

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Halpern v. Peritec Biosciences, LTD., et al.

Jurisdiction lies in the Federal Circuit because Halpern's "patent rights" claim seeks to enjoin the exercise of provisional patent rights conferred by 35 U.S.C. § 154(d) and asks the district court to determine under the patent law his right to enjoin the exercise of provisional patent rights, patent-pending marketing, and patent-pending testing. Consequently, the Federal Circuit has exclusive jurisdiction over this appeal. This Court may, in the interests of justice, transfer the appeal for want of jurisdiction to a court where the appeal could have been brought if it were timely filed. 28 U.S.C. § 1631. The interests of justice favor transferring Halpern's appeal because it was not brought in bad faith and would also be time-barred if dismissed.

Accordingly, the appeal is transferred to the United States Court of Appeals for the Federal Circuit under 28 U.S.C. § 1631. The clerk of this court is directed to transmit the record and briefs to the clerk of that court.