Vinson&Elkins
Established 1917

Sing a Song About the Heartland

Patent Litigation Post-*TC Heartland*

Stephen C. Stout, Ph.D.
Partner, Intellectual Property

"Any civil action for patent infringement may be brought in the judicial district [1] **where the defendant resides**, or [2] where the defendant has committed acts of infringement and has a regular and established place of business."

28 U.S.C. § 1400(b)

"[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."

28 U.S.C. § 1391(c)

"We hold that 28 U. S. C. § 1400(b) **is the sole and exclusive** provision controlling venue in patent infringement actions, and that it is **not to be supplemented** by the provisions of 28 U. S. C. § 1391(c)."

Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222 (1957)

"**For 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."

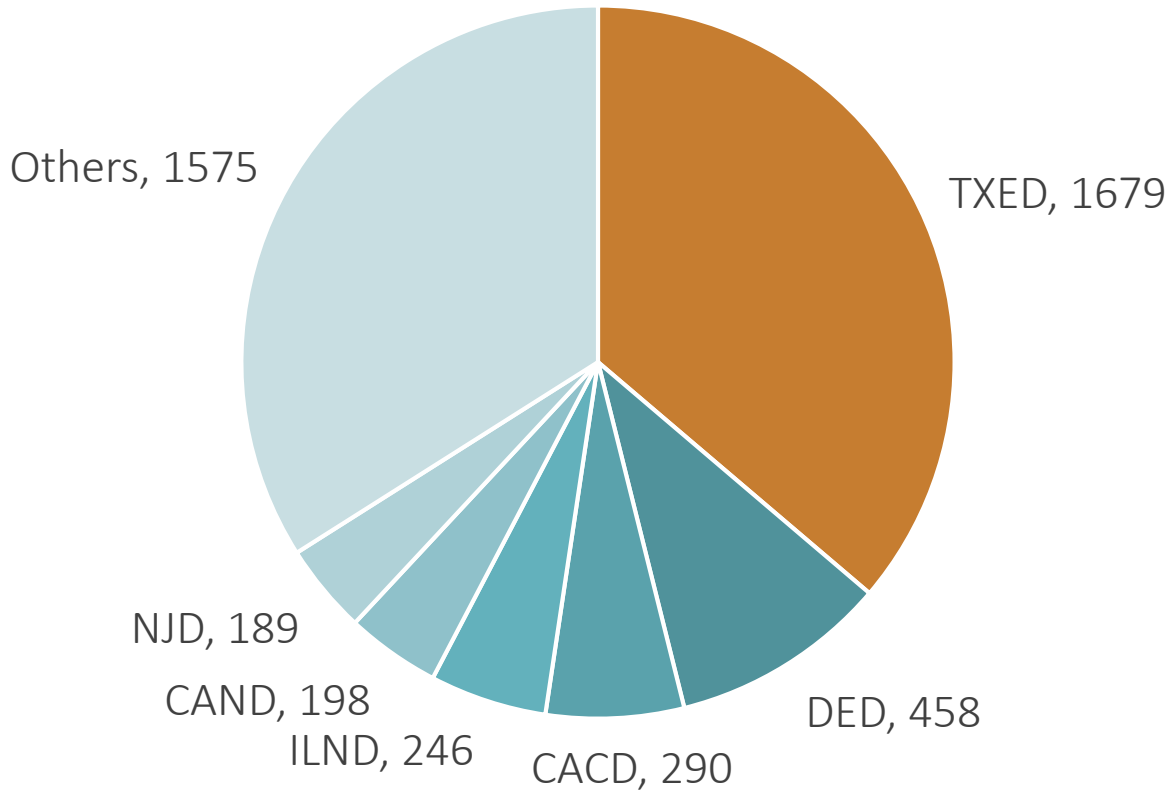
28 U.S.C. § 1391(c) (1988)

"Section 1391(c) applies . . . to § 1400(b), as expressed by the words 'For purposes of venue under this chapter.' **There can be no mistake about that**....

[V]enue in a patent infringement case includes any district where there would be personal jurisdiction over the corporate defendant at the time the action is commenced."

VE Holding Corp. v. Johnson Gas Appliance Co., 917 F.2d. 1574 (Fed. Cir. 1990)

One-Third of Patent Cases Nationwide in 2016 Were Filed in the Eastern District of Texas



"We conclude that the amendments to § 1391 did not modify the meaning of § 1400(b) as interpreted by *Fourco*. We therefore hold that **a domestic corporation 'resides' only in its State of incorporation** for purposes of the patent venue statute."

TC Heartland LLC v. Kraft Foods Grp.,
137 S.Ct. 1514 (2017)

"[A] defendant not resident in the United States may be sued **in any judicial district**."

28 U.S.C. § 1391(c)(2)

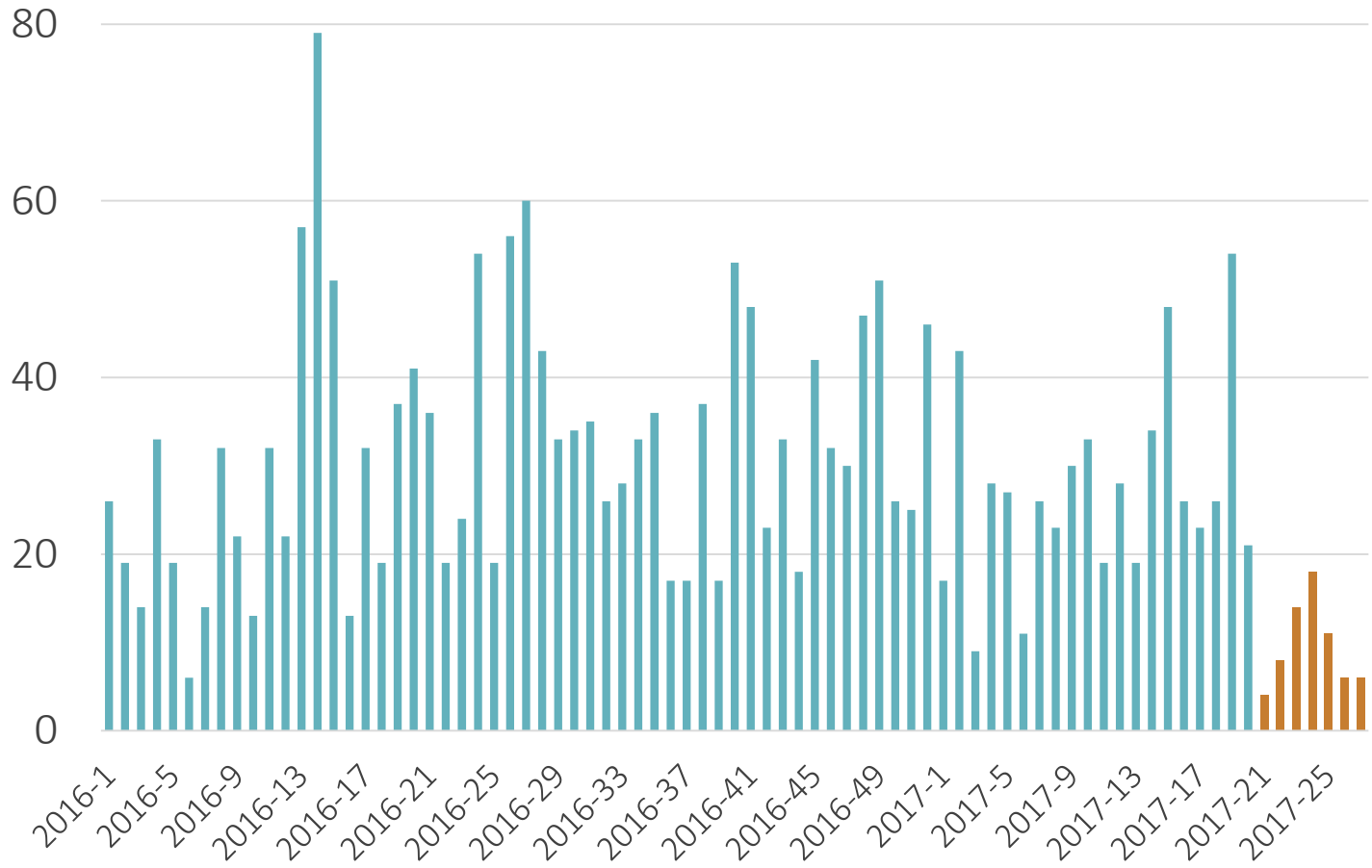
"We conclude that in § 1391(d) Congress was stating a principle of broad and overriding application . . . . **Since respondent Brunette is an alien corporation, it cannot rely on § 1400 (b) as a shield against suit** in the District of Oregon."

Brunette Machine Works, Ltd. v. Kockum Industries, Inc., 406 U.S. 706 (1972)

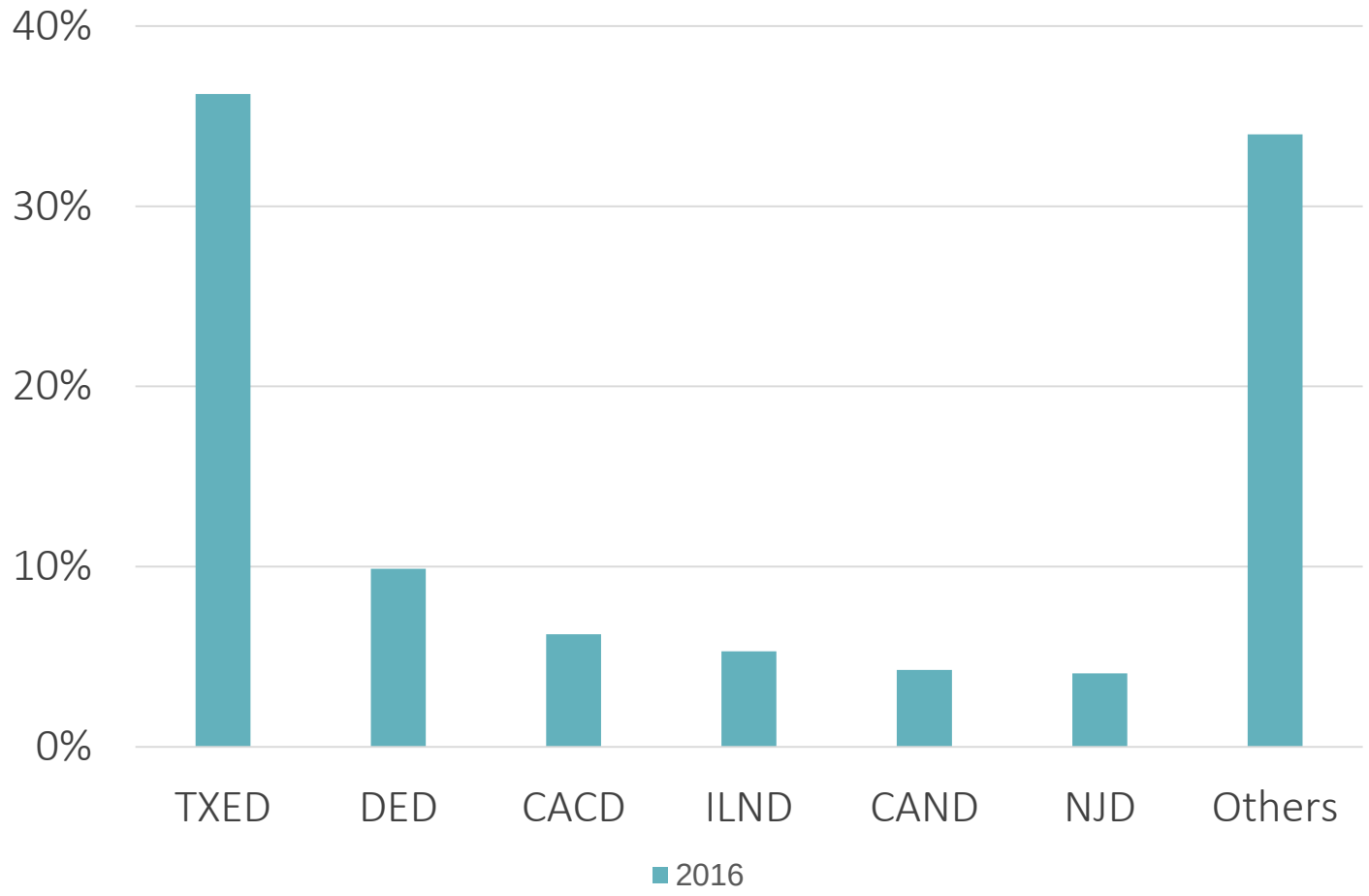
"The parties dispute the implications of petitioner's argument for foreign corporations. **We do not here address that question**, nor do we express any opinion on this Court's holding in *Brunette*."

TC Heartland LLC v. Kraft Foods Grp.,
137 S.Ct. 1514 (2017)

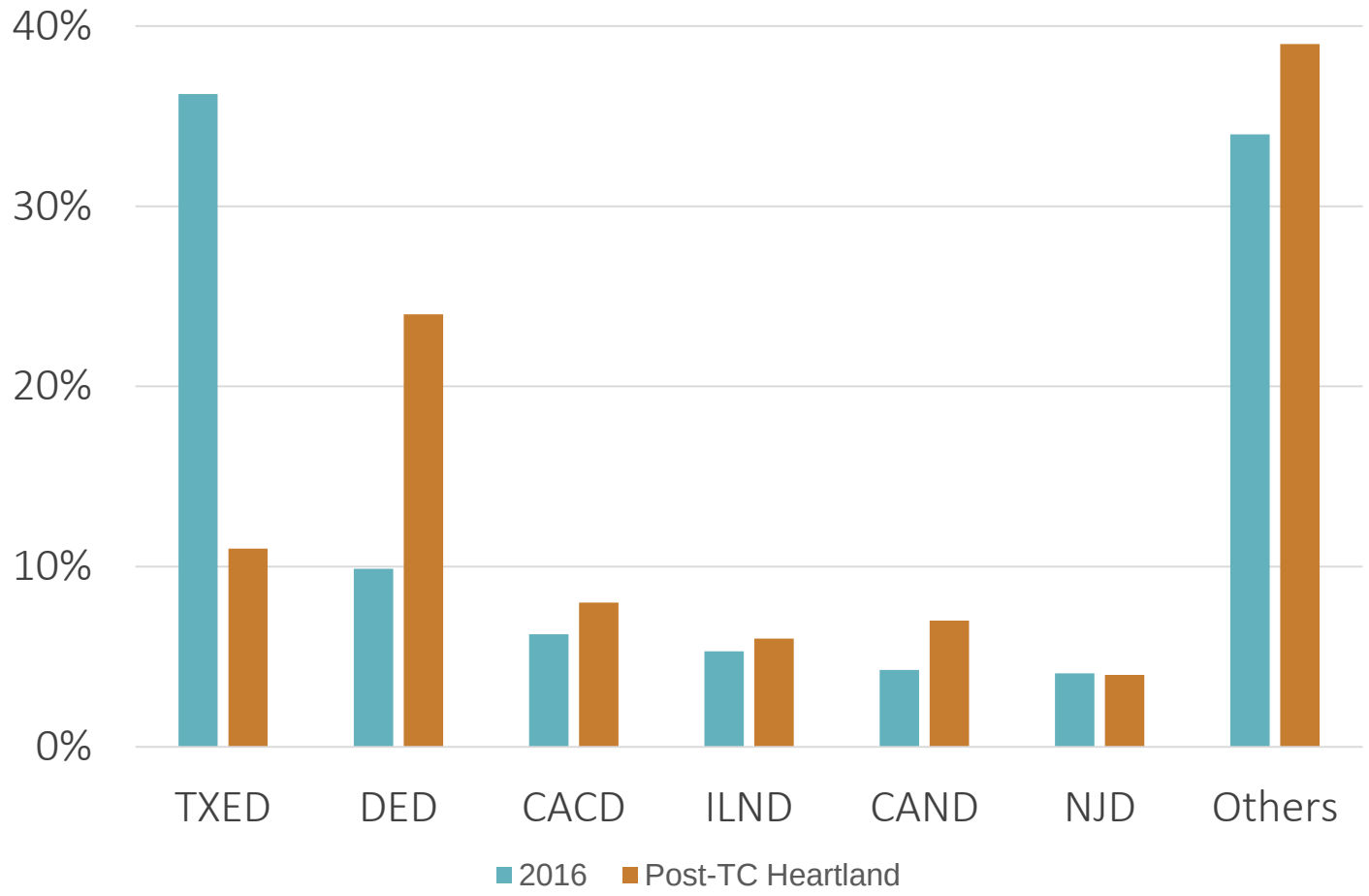
Number of Eastern District of Texas Patent Cases by Week



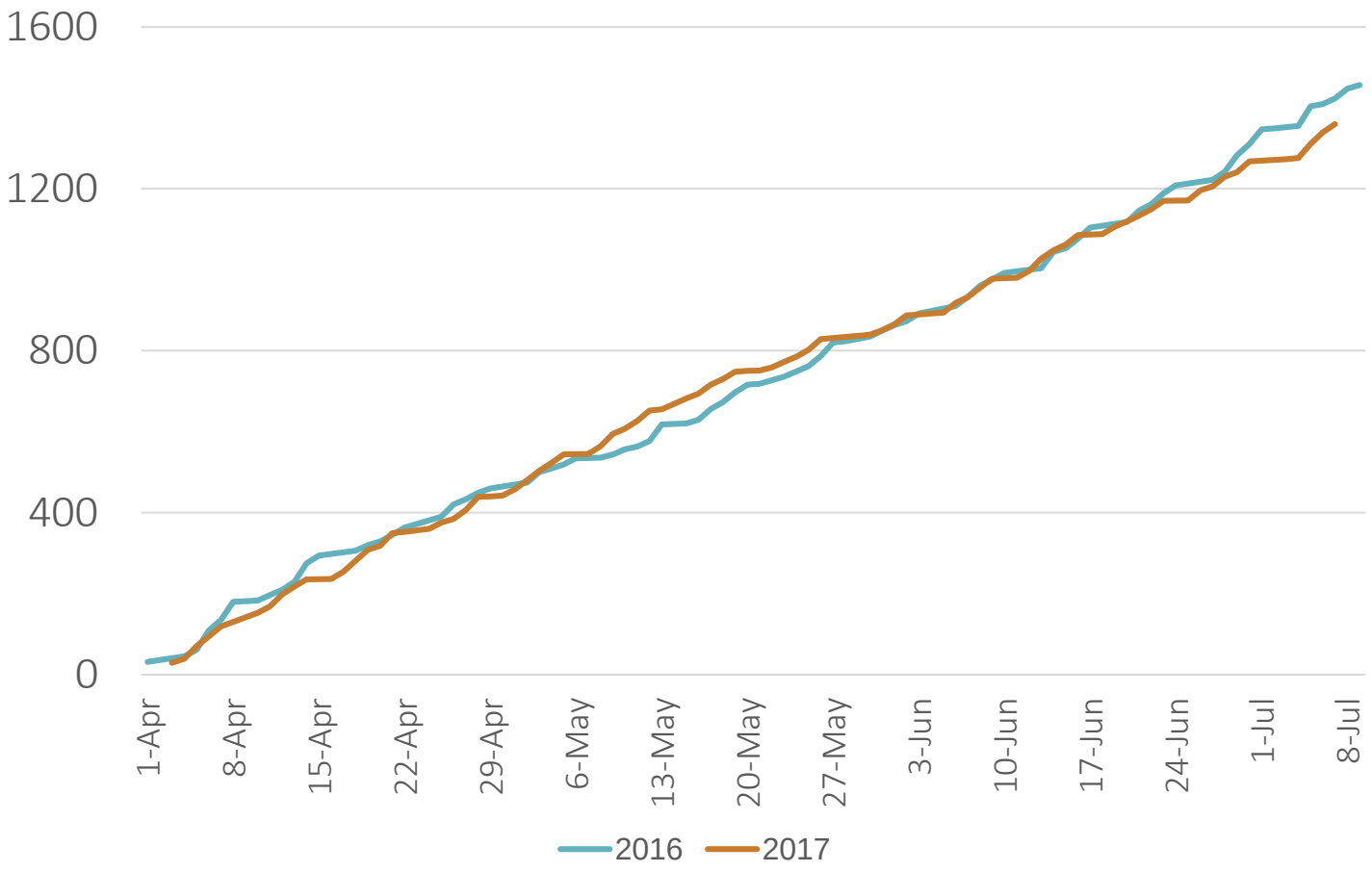
Patent Case Filings Nationwide Before and After *TC Heartland*



Patent Case Filings Nationwide Before and After *TC Heartland*



Number of Patent Case Filings Nationwide Year over Year



"Any civil action for patent infringement may be brought in the judicial district [1] where the defendant resides, or [2] where the defendant has committed acts of infringement and **has a regular and established place of business**."

28 U.S.C. § 1400(b)

Venue FOR PATENT LAWYERS

Learn to:

- Challenge venue
- Assess venue in your case
- Raise venue in pending cases post-*TC Heartland*

"**(b) How to Present Defenses.** Every defense to a claim . . . must be asserted in the responsive pleading . . . . But a party may assert the following defenses by motion . . . (3) improper venue.

* * * *

(2) ***Limitation on Further Motions*** . . . . [A] party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion."

FED. R. CIV. P. 12(b)-(g)

"**(1) *When Some Are Waived*.** A party waives any defense listed in Rule 12(b)(2)-(5) by:

(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."

FED. R. CIV. P. 12(h)

"(a) The district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.

(b) Nothing in this chapter shall impair the jurisdiction of a district court of any matter involving a party who does not interpose timely and sufficient objection to the venue."

28 U.S.C. § 1406

"All well-pleaded allegations in the complaint bearing on the venue question are generally taken as true, unless contradicted by the defendant's affidavits. A district court may examine facts outside the complaint to determine whether its venue is proper. And, as is consistent with practice in other contexts, such as construing the complaint, the court must draw all reasonable inferences and resolve all factual conflicts in favor of the plaintiff."

5B Charles Alan Wright & Arthur Miller, Federal Practice and Procedure § 1352, at 324 (3d ed. 2004)

"On a motion under Rule 12(b)(3), facts must be shown that will defeat the plaintiff's assertion of venue. **A number of federal courts have concluded that the burden of doing so is on the defendant** . . . . On the other hand, **an equal (perhaps a larger) number of federal courts have imposed the burden on the plaintiff** in keeping with the rule applied in the context of subject matter and personal jurisdiction. The latter view seems correct."

5B CHARLES ALAN WRIGHT & ARTHUR MILLER, FEDERAL PRACTICE AND PROCEDURE § 1352, at 320 (3d ed. 2004)

"While there is a split of authority among federal courts and in the Fifth Circuit with regard to which party shoulders the burden of establishing venue on a Rule 12(b)(3) motion to dismiss for improper venue, it appears the majority place the burden with the plaintiff."

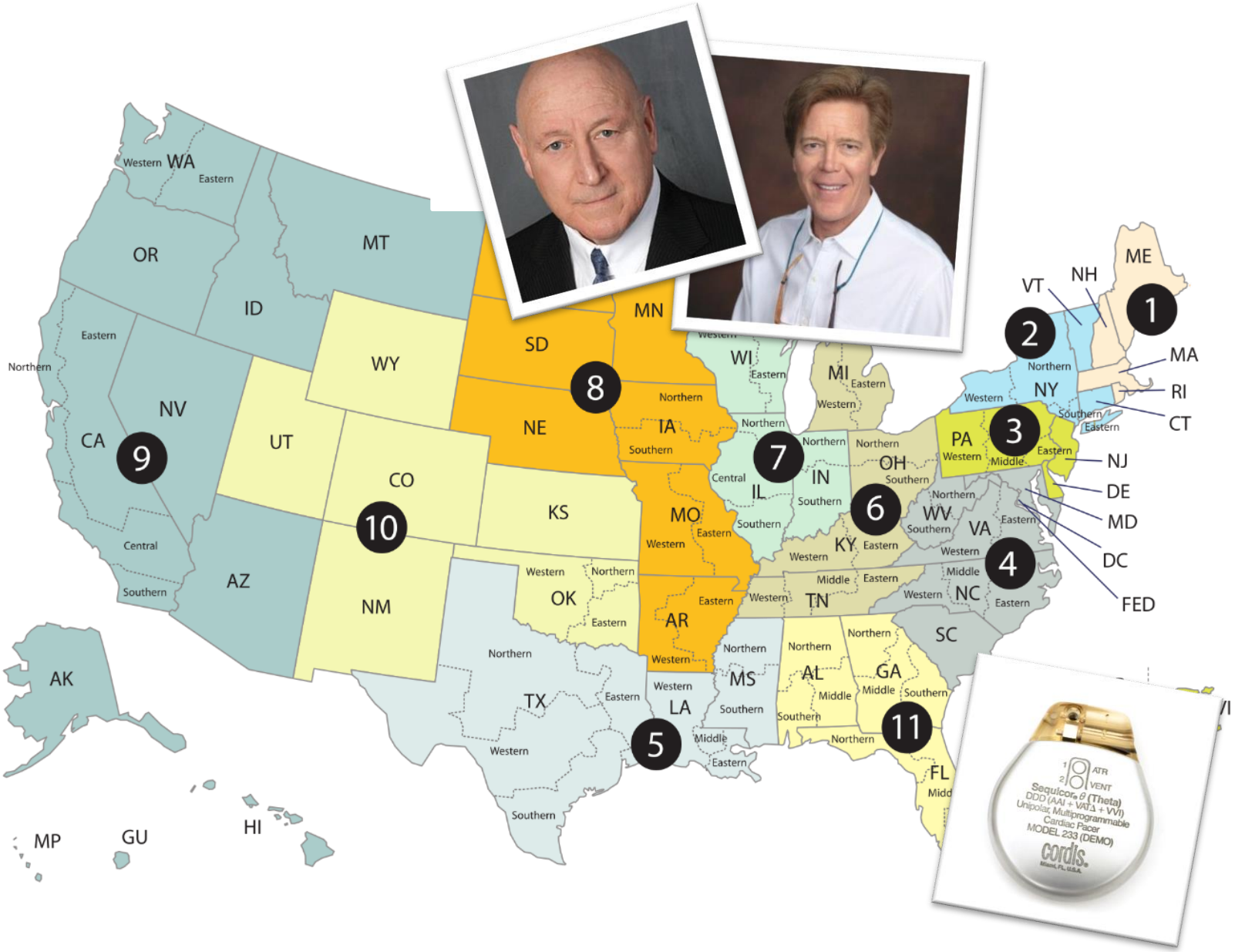
Broadway Nat'l Bank v. Plano Encryption Techs, LLC, 173 F.Supp.3d 469, n.2 (W.D. Tex., Mar. 28, 2016)

Post-*Heartland* Venue Cases

"Any civil action for patent infringement may be brought in the judicial district [1] where the defendant resides, or [2] where the defendant has committed acts of infringement and **has a regular and established place of business**."

28 U.S.C. § 1400(b)


GREAT NEW TASTE!
CHANGE FOR THE BEST!
Coke
NEW
SONY
AHF
60
Walkman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MODEL 233 (DEMO)
cordis.

"[I]n determining whether a corporate defendant has a regular and established place of business in a district, the appropriate inquiry is whether the corporate defendant does its business in that district through **a permanent and continuous presence there** and not . . . whether it has a fixed physical presence in the sense of a formal office or store."

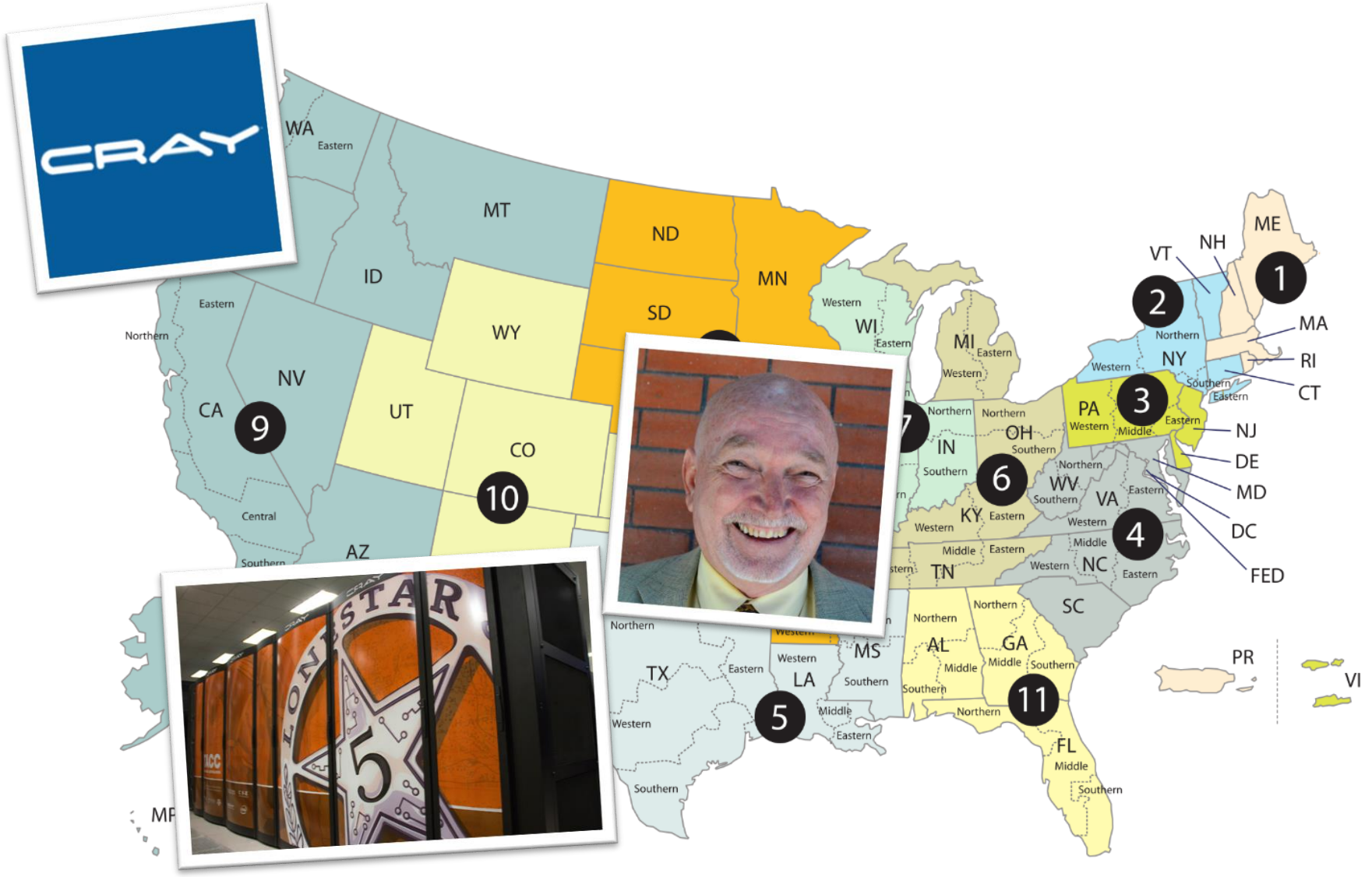
In re Cordis Corp., 769 F.2d 733 (Fed. Cir. 1985)

"[T]he remedy of mandamus is 'strong medicine' to be reserved for the most serious and critical ills, and if a rational and substantial legal argument can be made in support of the rule in question, **the case is not appropriate for mandamus, even though on normal appeal, a court might find reversible error**. As the record indicates that a rational and substantial legal argument may be made in support of the court's order denying Cordis' motion to dismiss for lack of proper venue, we decline to issue the writ."

In re Cordis Corp., 769 F.2d 733 (Fed. Cir. 1985)

Raytheon Co. v. Cray, Inc.

No. 2:15-cv-01554, 2017 WL 2813896 (E.D. Tex. Jun. 29, 2017)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"The activities performed by Cray in this Court's view are factually similar to the activities performed by the representatives in *Cordis* and therefore are sufficient to meet the 'regular and established place of business' requirement of § 1400(b)."

Raytheon Co. v. Cray, Inc.
No. 2:15-cv-01554, 2017 WL 2813896 (E.D. Tex. Jun. 29, 2017)

Cordis	*Raytheon*
• 2 full-time sales representatives with home offices	• 1 full-time sales representative with home office (+1)
• Company-owned cars	• No car; cell phone, internet, mileage, travel reimbursements
• Administrative support in district	• Administrative support out of district
• Business cards with number of administrative support	• Invoices, proposals, emails provided local number
• Cordis in local telephone book	• Internal document of sales territories identified Athens, Texas
• Sales representatives kept inventory and sold directly	• Access to online sales brochures
• Acted as technical consultants	• "[N]ew account development and key account management."
• N/A	• $345 million in sales revenue

"The following factors, gleaned from prior courts and adapted to apply in the modern era, serve two purposes. **First, they focus the regular and established place of business analysis such that parties may address only the relevant facts of the case and avoid costly and far-flung venue discovery**, wherever possible. Second, while promoting administrative simplicity, they nonetheless encompass the flexibility earlier courts found appropriate when interpreting the statutory text in light of diverse business structures and practices which evolve with advances in technology."

Raytheon Co. v. Cray, Inc.
No. 2:15-cv-01554, 2017 WL 2813896 (E.D. Tex. Jun. 29, 2017)

The *Raytheon* Factors

"Physical Presence" Retail store, warehouse, facility, property, inventory, equipment (owned or leased), infrastructure, or people (employees, contractors, or agents)

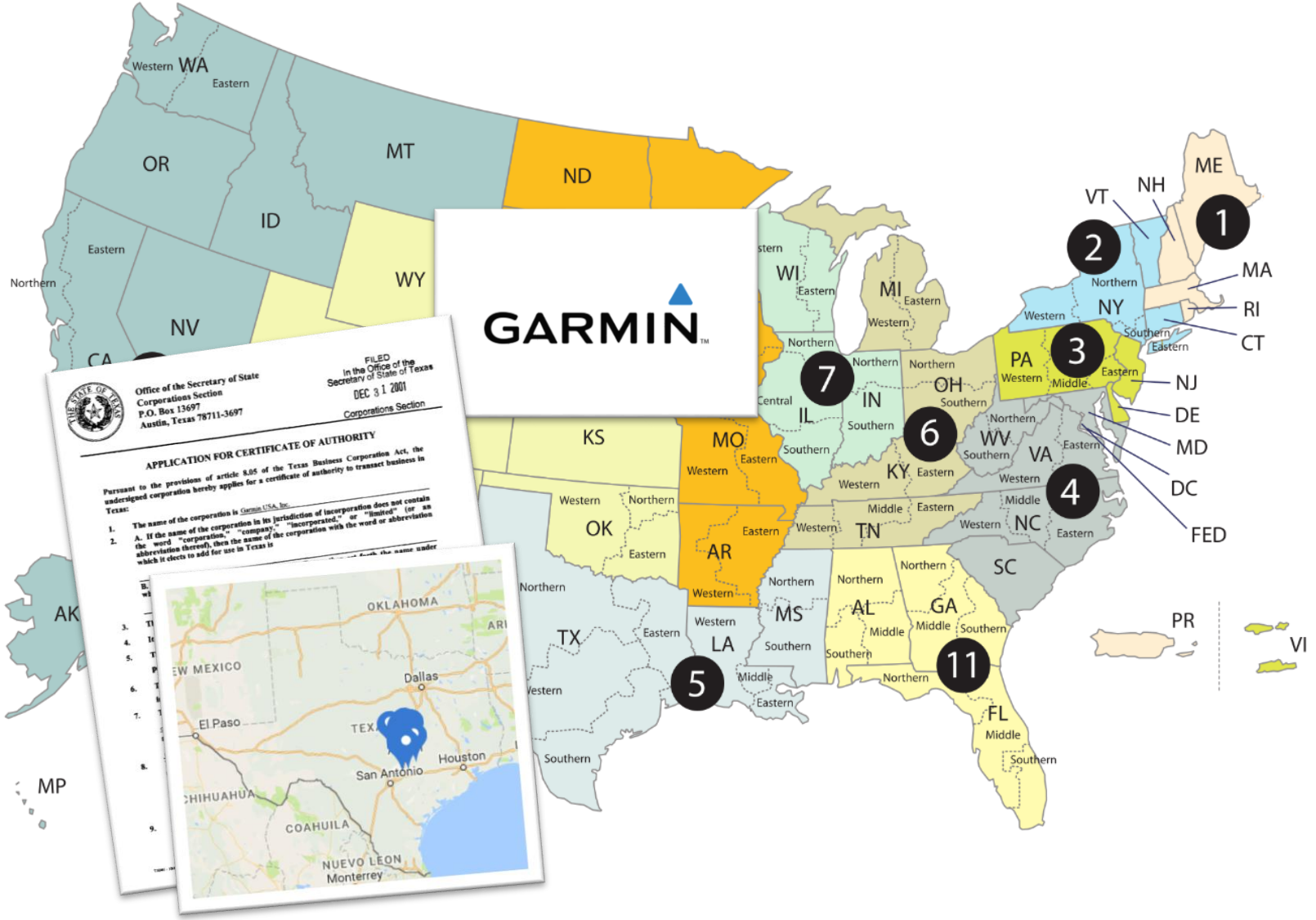
"Defendant's Representations" Internal or external representations that the defendant has a presence in the district, e.g., in advertising

"Benefits Received" Extent to which defendant derives benefits from its presence in the district; sales revenue

"Targeted Interactions with the District" "Targeted" interactions with existing or potential customers, consumers, users or entities; localized customer support, ongoing contractual relationships, targeted marketing efforts; efforts to "promote brand strength and business goodwill"

"None of these factors should alone be dispositive, and other realities present in individual cases should likewise be considered. **Courts should endeavor to determine whether a domestic business enterprise seeks to materially further its commercial goals within a specific district through ways and means that are ongoing and continuous.** Such a conclusion should be driven by a fair consideration of the totality of the circumstances, and not by the siren call of bright line rules or an overt attachment to form."

Raytheon Co. v. Cray, Inc.
No. 2:15-cv-01554, 2017 WL 2813896 (E.D. Tex. Jun. 29, 2017)


GARMIN
Office of the Secretary of State
Corporations Section
P.O. Box 13697
Austin, Texas 78711-3697
FILED
In the Office of the
Secretary of State of Texas
DEC 31 2001
Corporations Section
APPLICATION FOR CERTIFICATE OF AUTHORITY
Pursuant to the provisions of article 8.05 of the Texas Business Corporation Act, the undersigned corporation hereby applies for a certificate of authority to transact business in Texas:
1. The name of the corporation is Garmin USA, Inc.
2. A. If the name of the corporation in its jurisdiction of incorporation does not contain the word "corporation," "company," "incorporated," or "limited" (or an abbreviation thereof), then the name of the corporation with the word or abbreviation which it elects to add for use in Texas is
OKLAHOMA
Dallas
El Paso
Houston
San Antonio
COAHUILA
NUEVO LEON
Monterrey
WA
OR
CA
ID
NV
MT
WY
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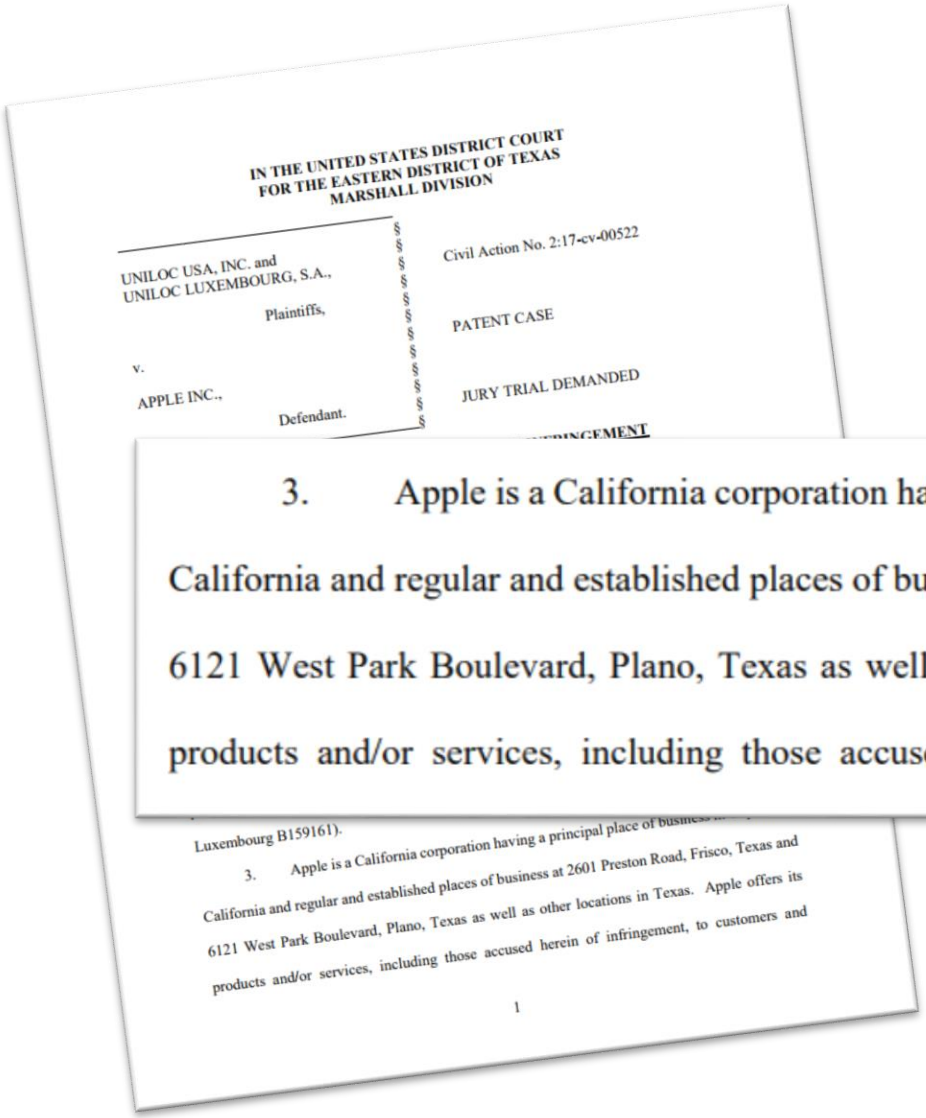
"The fact that [defendants] are authorized to do business in Texas is not controlling and will not establish the [§ 1400(b)] requirement. Nor does defendants' website allowing viewers to access a list of San Antonio/Austin distributors provide venue under the patent infringement statute. Finally, the fact that defendants sell their activity trackers to distributors in Texas Western will not establish venue. It is well settled that the mere presence of independent sales representatives does not constitute a 'regular and established place of business' for purposes of Section 1400(b)."

Logantree LP v. Garmin Int'l, Inc.,
No. 5:17-cv-98, 2017 WL 2842870 (W.D. Tex. Jun. 22, 2017)

Post-*Heartland* Complaints



IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

UNILOC USA, INC. and
UNILOC LUXEMBOURG, S.A.,

Plaintiffs,

v.

APPLE INC.,

Defendant.

Civil Action No. 2:17-cv-00522

PATENT CASE

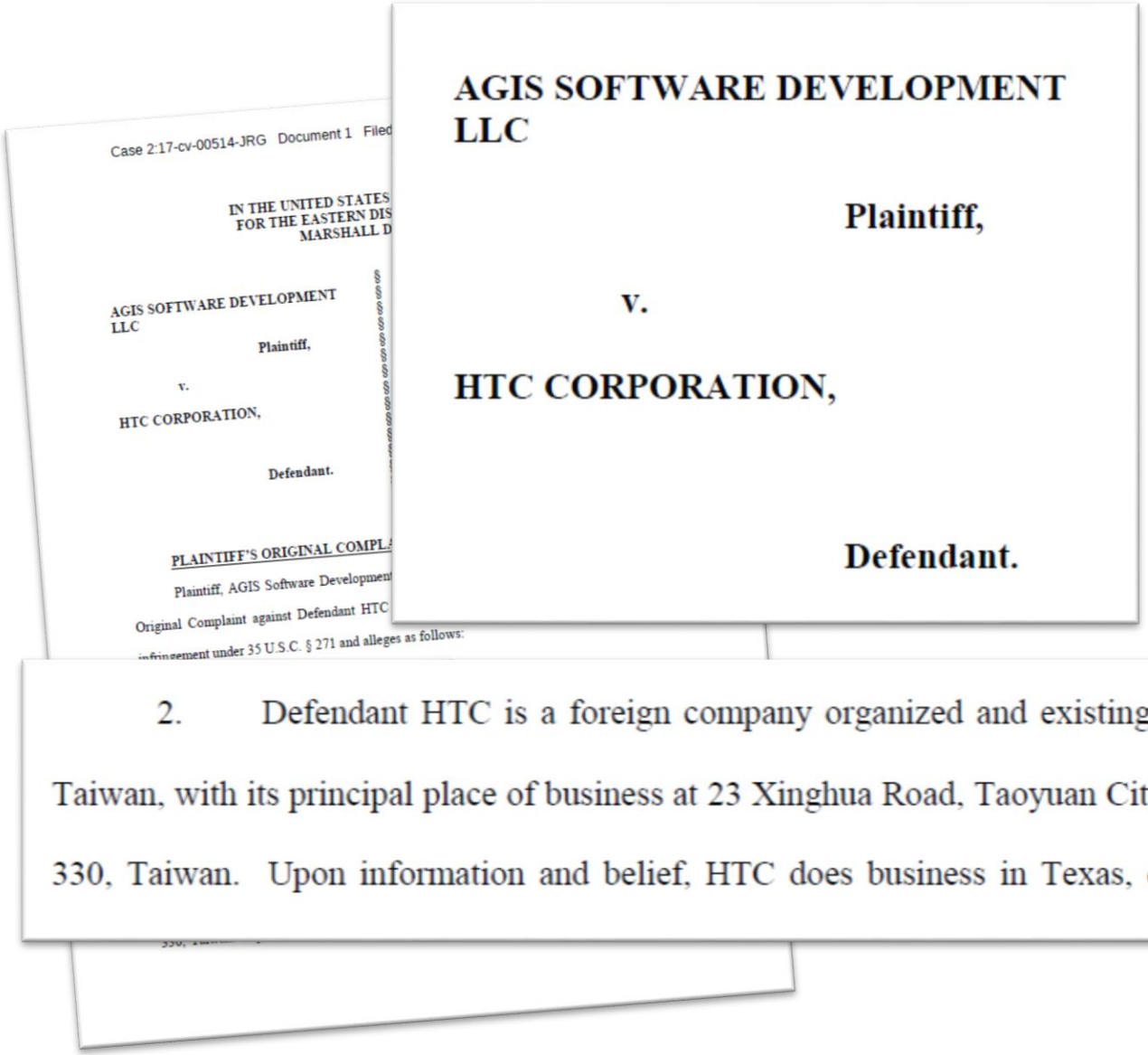
JURY TRIAL DEMANDED

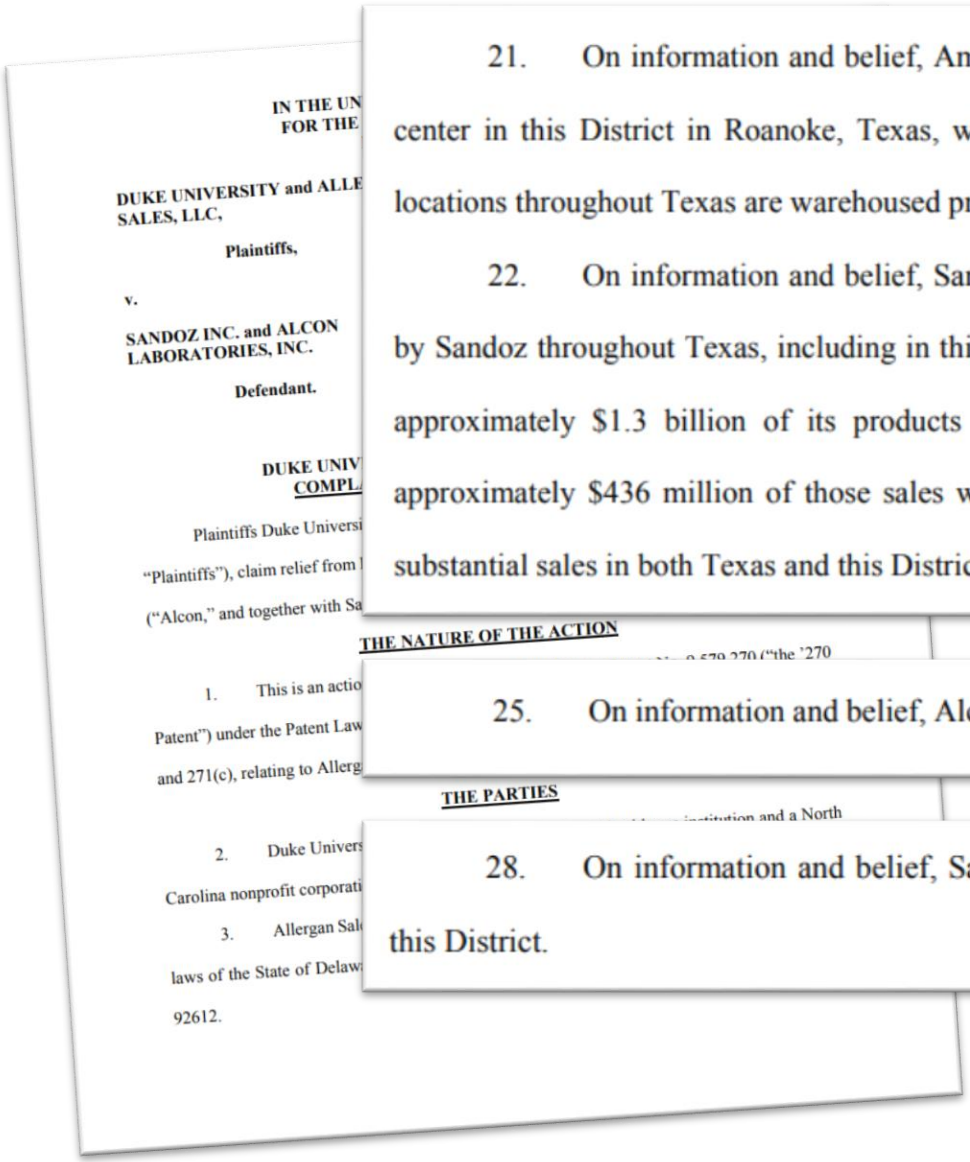
Luxembourg B159161).

3. Apple is a California corporation having a principal place of business in Cupertino, California and regular and established places of business at 2601 Preston Road, Frisco, Texas and 6121 West Park Boulevard, Plano, Texas as well as other locations in Texas. Apple offers its products and/or services, including those accused herein of infringement, to customers and

1

3. Apple is a California corporation having a principal place of business in Cupertino, California and regular and established places of business at 2601 Preston Road, Frisco, Texas and 6121 West Park Boulevard, Plano, Texas as well as other locations in Texas. Apple offers its products and/or services, including those accused herein of infringement, to customers and


Case 2:17-cv-00514-JRG Document 1 Filed
IN THE UNITED STATES
FOR THE EASTERN DIS
MARSHALL D
AGIS SOFTWARE DEVELOPMENT LLC
Plaintiff,
v.
HTC CORPORATION,
Defendant.
PLAINTIFF'S ORIGINAL COMPL
Plaintiff, AGIS Software Development
Original Complaint against Defendant HTC
infringement under 35 U.S.C. § 271 and alleges as follows:
AGIS SOFTWARE DEVELOPMENT LLC
Plaintiff,
V.
HTC CORPORATION,
Defendant.
2. Defendant HTC is a foreign company organized and existing under the laws of Taiwan, with its principal place of business at 23 Xinghua Road, Taoyuan City, Taoyuan County 330, Taiwan. Upon information and belief, HTC does business in Texas, directly or through



IN THE UN
FOR THE

DUKE UNIVERSITY and ALLE
SALES, LLC,

Plaintiffs,

v.

SANDOZ INC. and ALCON
LABORATORIES, INC.

Defendant.

DUKE UNIV
COMPL

Plaintiffs Duke Universi

"Plaintiffs"), claim relief from

("Alcon," and together with Sa

THE NATURE OF THE ACTION

1. This is an actio

Patent") under the Patent Law

and 271(c), relating to Allerg

THE PARTIES

2. Duke Univers

Carolina nonprofit corporati

3. Allergan Sal

laws of the State of Delaw

92612.

21. On information and belief, AmeriSource Bergen Co. operates a large distribution center in this District in Roanoke, Texas, where Sandoz products bound for this District and locations throughout Texas are warehoused prior to distribution.

22. On information and belief, Sandoz markets and sells generic drugs manufactured by Sandoz throughout Texas, including in this District. On information and belief, Sandoz sold approximately $1.3 billion of its products in Texas in 2016. On information and belief, approximately $436 million of those sales were in this District. Sandoz continues to achieve substantial sales in both Texas and this District.

25. On information and belief, Alcon Laboratories, Inc. leases property in this District.

28. On information and belief, Sandoz and/or Alcon employ sales representatives in this District.

Waiver Cases

Cobalt Boats, LLC v. Sea Ray Boats, Inc.
No. 2:15-cv-21, 2017 WL 2556679 (E.D. Va. Jun. 7, 2017)

- Cobalt sued Sea Ray and Brunswick for patent infringement in 2015 in the E.D. Va.
- Sea Ray denied that venue was proper in its answer. Brunswick did not contest that venue was proper, but denied that the E.D. Va. was the most convenient forum in its answer.
- Defendants filed a § 1404(a) motion in March 2015, which the court denied the following month.
- The case was litigated for two years: IPR, stay, *Markman*, denied summary judgment motion.
- At the Final Pretrial Conference, three weeks before trial, set for June 12, 2017, defendants told the court that they intended to challenge venue following *TC Heartland*.

"Defendants reasonably argue that *VE Holding* challenges were untenable . . . . Despite that rational perspective, they err when they insist that repeated denials of certiorari on *VE Holding* and similar cases compel their position. As the Supreme Court has often stated, the denial of a writ of certiorari imports no expression of opinion upon the merits of the case."

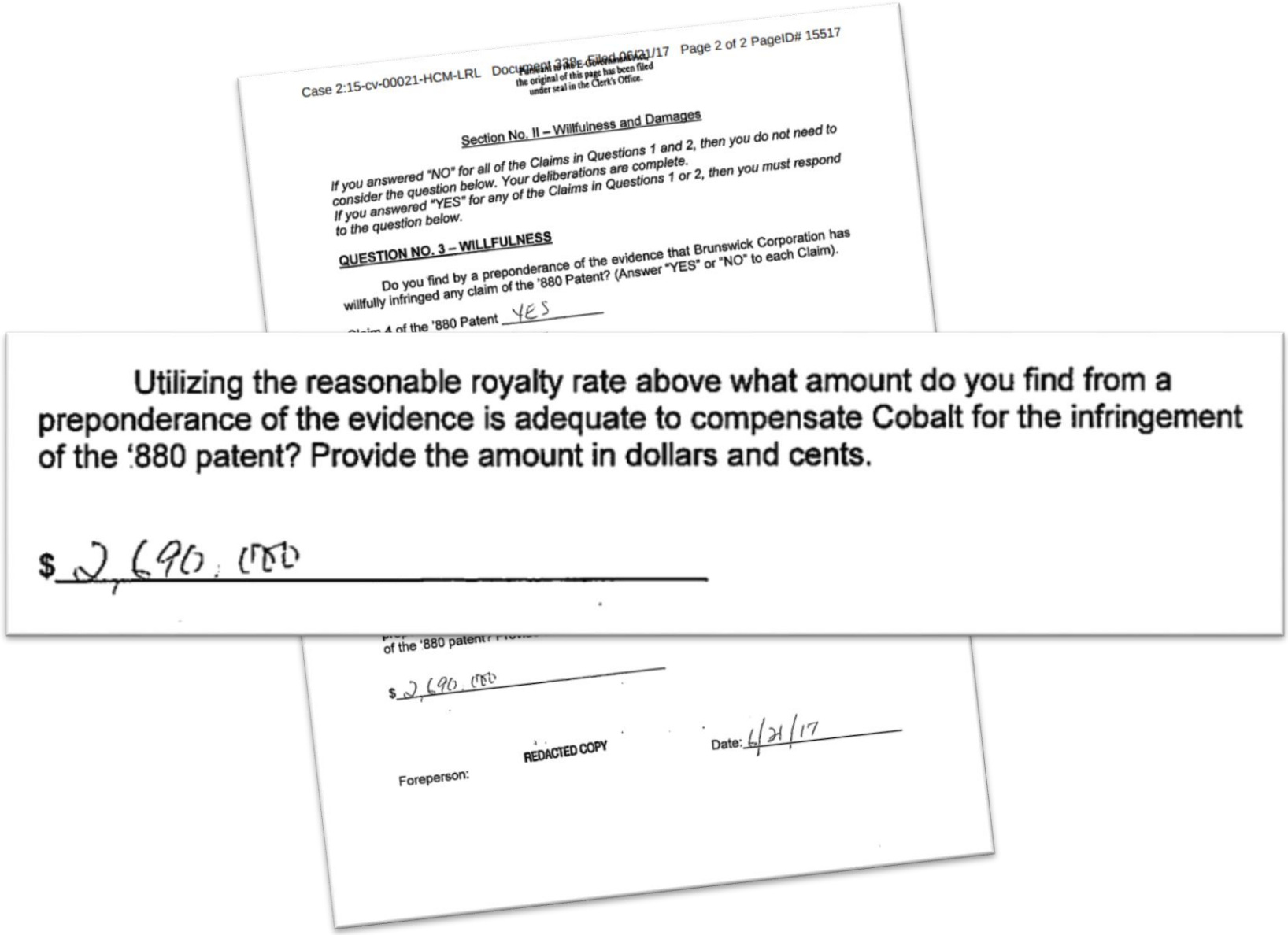
Cobalt Boasts, LLC v. Sea Ray Boats, Inc.
No. 2:15-cv-21, 2017 WL 2556679 (E.D. Va. Jun. 7, 2017)

"[T]he circuit courts are only empowered to express the law of their circuit in the absence of a controlling decision by the Supreme Court. The Supreme Court has never overruled *Fourco*, and the Federal Circuit cannot overrule binding Supreme Court precedent. Based on the Supreme Court's holding in *TC Heartland*, *Fourco* has continued to be binding law since it was decided in 1957, and thus, it has been available to every defendant since 1957."

Cobalt Boasts, LLC v. Sea Ray Boats, Inc.
No. 2:15-cv-21, 2017 WL 2556679 (E.D. Va. Jun. 7, 2017)

"There is little doubt that the Court's decision in *TC Heartland* was a change in the law of venue . . . . The issue of proper forum following the return to *Fourco* requires our resolution . . . . [W]here the change of law brings the propriety of the current venue directly into question, this defendant is entitled to consideration of its request."

In re Sea Ray Boats, Inc.
No. 2017-124, 2017 WL 2577399 (Fed. Cir. Jun. 9, 2017)
(Newman, J. dissenting)



Case 2:15-cv-00021-HCM-LRL Document 339 Filed 06/21/17 Page 2 of 2 PageID# 15517

Pursuant to the E-Government Act, the original of this page has been filed under seal in the Clerk's Office.

Section No. II – Willfulness and Damages

If you answered "NO" for all of the Claims in Questions 1 and 2, then you do not need to consider the question below. Your deliberations are complete.
If you answered "YES" for any of the Claims in Questions 1 or 2, then you must respond to the question below.

QUESTION NO. 3 – WILLFULNESS

Do you find by a preponderance of the evidence that Brunswick Corporation has willfully infringed any claim of the '880 Patent? (Answer "YES" or "NO" to each Claim).

Claim 4 of the '880 Patent YES

Utilizing the reasonable royalty rate above what amount do you find from a preponderance of the evidence is adequate to compensate Cobalt for the infringement of the '880 patent? Provide the amount in dollars and cents.

$ 2,690,000

of the '880 patent? Prov...

$ 2,690,000

REDACTED COPY

Foreperson:

Date: 6/21/17

Elbit Sys. Land & C41 Ltd. v. Hughes Network Sys., LLC.
No. 2:15-cv-00037, 2017 WL 2651618 (E.D. Tex. Jun. 20, 2017)

- Elbit sued Hughes and Blue Tide for patent infringement in January 2015.
- Hughes filed a 12(b)(6) motion on willfulness.
- Blue Tide filed a 12(b)(3) challenging venue arguing only that the court did not have personal jurisdiction over it.
- In their eventual answers, in April 2016, Hughes did not contest venue and Blue Tide denied that venue was proper. Both indicated that they reserved the right to contest venue based on *TC Heartland*.
- On June 3, 2017, less than two months before trial, Hughes and Blue Tide filed a motion to transfer under 28 U.S.C. § 1406(a).

"The Court need not reach Defendants' argument that a change in law constitutes an exception to waiver under Rule 12(h)(1)(A) because **the Supreme Court's decision in *TC Heartland* does not qualify**. *Fourco* was decided in 1957. While the Federal Circuit's decision in *VE Holding* was inconsistent with *Fourco*, the Federal Circuit cannot overturn Supreme Court precedent.

Elbit Sys. Land & C41 Ltd. v. Hughes Networks Sys., LLC., No. 2:15-cv-00037, 2017 WL 2651618 (E.D. Tex. Jun. 20, 2017)

"Hughes argues 'it was well known that any motion under § 1400(b) . . . would be viewed as meritless.' **While such a motion might have been viewed as meritless in a lower court,** that does not change the harsh reality that Hughes would have ultimately succeeded in convincing the Supreme Court to reaffirm *Fourco*, just as the petitioner in *TC Heartland* did."

Elbit Sys. Land & C41 Ltd. v. Hughes Networks Sys., LLC., No. 2:15-cv-00037, 2017 WL 2651618 (E.D. Tex. Jun. 20, 2017)

Amax, Inc. v. ACCO Brands Corp.
No. 1:16-cv-10695, 2017 WL 2818986 (D. Mass. Jun. 29, 2017)

- Amax sued ACCO Brands for patent and trademark infringement in April 2016.
- ACCO denied that venue was proper in its answer and moved to transfer under § 1404(a) to the N.D. of Illinois, where its principal place of business is located. The court denied the transfer motion.
- ACCO filed an early motion for summary judgment in February 2017.
- After *TC Heartland*, ACCO filed a motion to dismiss or transfer.

"By filing a motion to transfer venue based upon convenience and failing to assert that venue was improper in that motion, **defendant conceded that venue is proper in this Court** . . . . [D]efendant moved for summary judgment in February, 2017. By filing an early motion for summary judgment, **defendant abandoned its defense of improper venue**."

Amax, Inc. v. ACCO Brands Corp.
No. 1:16-cv-10695, 2017 WL 2818986 (D. Mass. Jun. 29, 2017)

Westech Aerosol Corp. v. 3M Co.
No. 3:17-cv-5067, 2017 WL 2671297 (W.D. Wa. Jun. 21, 2017)

January 27, 2017	Westech files complaint against 3M.
March 27, 2017	3M files Rule 12(b)(6) motion and does not raise venue defense.
April 24, 2017	Westech amends complaint as a matter of right.
May 4, 2017	3M files second Rule 12(b)(6) motion and does not raise venue defense.
May 22, 2017	Supreme Court issues *TC Heartland.*
May 25, 2017	3M seeks leave to amend Motion to Dismiss.

"*TC Heartland* changed the venue landscape. For the first time in 27 years, a defendant may argue credibly that venue is improper in a judicial district where it is subject to a court's personal jurisdiction but where it is not incorporated and has no regular and established place of business. Defendants could not have reasonably anticipated this sea change, and so did not waive the defense of improper venue by omitting it from their initial pleading and motions."

Westech Aerosol Co. v. 3M Co.
No. 3:17-cv-5067, 2017 WL 2671297(W.D. Wa. Jun. 21, 2017)

Biography

STEPHEN C. STOUT
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Education

The University of Texas School of Law, J.D. with honors, 2007

The University of Texas at Austin, Ph.D., Plant Biology, 2004

Louisiana State University, M.S., Plant Health, 2000

Texas A&M University, B.S., Botany, 1998

Stephen focuses on technology-based litigation and counseling. He has helped clients across the country in a wide variety of fields, ranging from biotechnology and pharmaceuticals to digital media and computer architecture.

Stephen has helped clients at every stage of their disputes including trial and appeal. He is an active and recognized member of the bar. He has co-authored a leading intellectual property treatise, O'Connor's Federal Intellectual Property Codes Plus, since 2009, and co-authored three amicus briefs to the U.S. Supreme Court on behalf of the Federal Circuit Bar Association and American Bar Association. For this work, Stephen has been recognized as a Texas Rising Star since 2011.

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