



by G. Warren Bleeker

# Heart of the MATTER

Despite its new ruling in *TC Heartland*, the high court leaves “wiggle room” regarding what constitutes a “regular and established place of business”

**FOR THE PAST** few decades, determining venue in a patent infringement case was a fairly straightforward matter. Under Federal Circuit precedent going back to 1990 in *VE Holding Corporation v. Johnson Gas Appliance Company*, venue was proper in any judicial district in which the defendant was subject to the court’s personal jurisdiction.<sup>1</sup> This past May, however, the U.S. Supreme Court revisited the issue. In a much-anticipated decision in *TC Heartland v. Kraft Foods Group Brands, LLC*, the Supreme Court overturned the long-standing Federal Circuit case law and, relying on its prior precedent, held that venue is proper only in a judicial district in the state in which the defendant is incorporated or “where the defendant has committed acts of infringement and has a regular and established place of business.”<sup>2</sup>

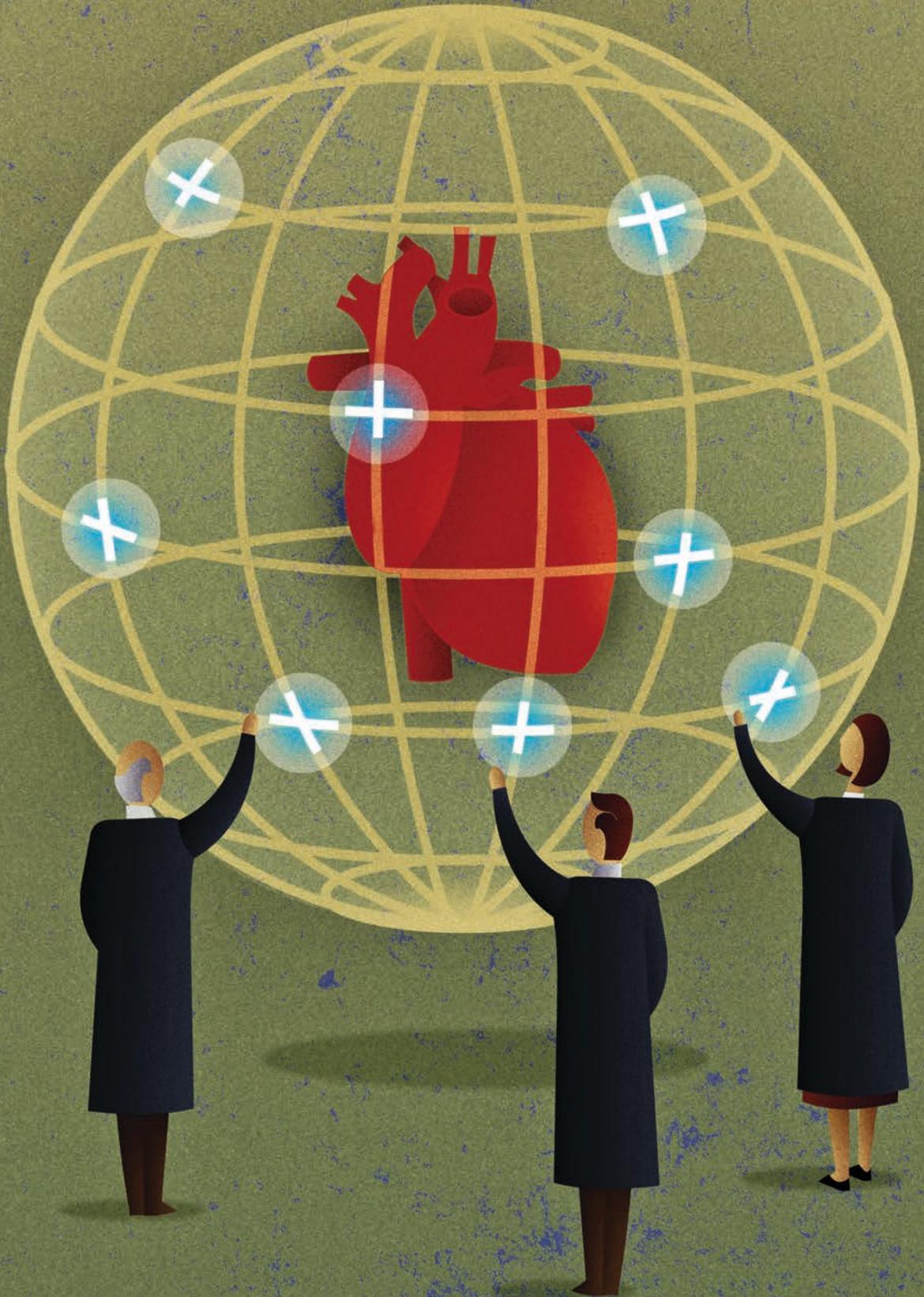
The Court’s ruling in *TC Heartland*, on its face, appears to narrow the venue choices for patent cases previously permitted by the Federal Circuit under *VE Holding*. However, the Court left plenty of wiggle room for patent owners asserting infringement claims to continue to bring suit in the judicial district of their

choice, even if that district falls outside of the state in which the defendant is incorporated. The key venue issue now being litigated is what constitutes a “regular and established place of business.” In *TC Heartland*, the Supreme Court did not provide any guidance on how this phrase should be interpreted.

## History of the Patent Venue Statute

The Judiciary Act of 1789—the initiating federal law regarding patent suits—“permitted a plaintiff to file suit in a federal district court if the defendant was ‘an inhabitant’ of that district or could be ‘found’ for service in that district.”<sup>3</sup> Then, in 1887, the statute was amended to allow “suit only in the district of which the defendant was an inhabitant or, in diversity cases, of which either the plaintiff or defendant was an inhabitant.”<sup>4</sup> Finally, in 1897, Congress enacted a patent-specific venue statute, which was a predecessor to the current patent venue statute, 28 USC Section 1400(b). The predecessor statute permitted suit in the district in which the defendant was an “inhabitant” or in which the defendant both maintained a “regular and established place

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of business” and committed an act of infringement.<sup>5</sup>

In 1942, the Supreme Court held in *Stonite Products Company v. Melvin Lloyd Company* that the patent venue statute was the exclusive venue provision for patent infringement suits, and Congress did not intend for the patent venue statute to “dovetail with the general provisions relating to the venue of civil suits.”<sup>6</sup> Rather, the patent venue statute “alone should control venue in patent infringement proceedings.”<sup>7</sup> In 1948, Congress recodified the patent venue statute as Section 1400(b), and the Supreme Court reaffirmed the *Stonite* opinion in 1957, holding in *Fourco Glass Company v. Transmirra Products Corporation* that Congress enacted Section 1400(b) as a standalone venue statute and that nothing in the 1948 recodification evidenced an intent to alter that status, even the fact that 28 USC Section 1391(c) by “its terms” embraced “all actions.”<sup>8</sup>

According to the Supreme Court in *TC Heartland*, “[t]his landscape remained effectively unchanged until 1988, when Congress amended the general venue statute, §1391(c).”<sup>9</sup> The revised provision stated that it applied “[f]or purposes of venue under this chapter.”<sup>10</sup> The same year, the Federal Circuit held that the amendment to Section 1391(c) established the definition for all other venue statutes under the same “chapter,” including the patent venue statute, Section 1400(b).<sup>11</sup> In 2011, Congress adopted the current version of Section 1391, which provides that its general definition applies “[f]or all venue purposes.”<sup>12</sup>

### **TC Heartland**

In January 2014, Kraft Foods Group Brands, LLC sued TC Heartland for patent infringement in the U.S. District Court for the District of Delaware.<sup>13</sup> TC Heartland moved to transfer venue to a district court in Indiana, citing *Fourco*, and arguing that it did not “resid[e]” in Delaware and had no “regular and established place of business” in Delaware under Section 1400(b).<sup>14</sup> The district court rejected these arguments. The Federal Circuit, citing *VE Holding*, denied a petition for a writ of mandamus, concluding that the general venue statute, Section 1391(c), supplies the definition of “resides” in Section 1400(b). The Federal Circuit concluded that subsequent statutory amendments had effectively amended Section 1400(b) as construed in *Fourco*, such that Section 1391(c) now supplies the definition of “resides” in Section 1400(b).<sup>15</sup> Thus, because the District of Delaware could exercise personal jurisdiction over TC Heartland, it “resided” in Delaware

under Section 1391(c) and, therefore, under Section 1400(b).<sup>16</sup>

In *TC Heartland*, in a unanimous decision,<sup>17</sup> the Supreme Court reversed the Federal Circuit precedent first stated in *VE Holding* and held that venue is proper in a patent infringement case only in a judicial district in the state in which the defendant is incorporated or “where the defendant has committed acts of infringement and has a regular and established place of business.”

The Court, citing *Fourco*, stated that it had “definitively and unambiguously held that the word ‘reside[nce]’ in Section 1400(b) has a particular meaning as applied to domestic corporations: It refers only to the state of incorporation.”<sup>18</sup> Further, “Congress has not amended §1400(b) since *Fourco*, and neither party asks the Court reconsider our holding in that case. Accordingly, the only question we must answer is whether Congress changed the meaning of §1400(b) when it amended §1391.”<sup>19</sup> The Court went on to note:

When Congress intends to effect a change of that kind, it ordinarily provides a relatively clear indication of its intent in the text of the amended provision. The current version of §1391 does not contain any indication that Congress intended to alter the meaning of §1400(b) as interpreted in *Fourco*. Although the current version of §1391(c) provides a default rule that applies “[f]or all venue purposes,” the version at issue in *Fourco* similarly provided a default rule that applied “for venue purposes.”<sup>20</sup>

Finally, the Court noted “there is no indication that Congress in 2011 ratified the Federal Circuit’s decision in *VE Holding*. In this context, we do not see any material difference between the two phrasings.”<sup>21</sup>

### **Place of Business**

For patent litigators, a key issue for determining proper venue in light of *TC Heartland* is how to interpret “regular and established place of business.” If that term is construed narrowly, venue in patent cases will be more restricted. However, if interpreted more broadly, proper venue post-*TC Heartland* might not differ considerably from venue law pre-*TC Heartland*.

In June 2017, U.S. District Judge Rodney Gilstrap, from the Eastern District of Texas, who reportedly handles the greatest number of patent cases in the United States,<sup>22</sup> issued an opinion denying defendant Cray, Inc.’s motion to transfer the case from Texas to Washington, where

Cray is incorporated.<sup>23</sup> In his written opinion, Judge Gilstrap discusses the state of the case law regarding “regular and established place of business” prior to the Federal Circuit’s ruling in *VE Holding*. Judge Gilstrap notes that before *VE Holding*, courts “had developed competing and conflicting interpretations of § 1400(b).” One court even noted that “[w]e can discern nothing even remotely approximating a uniform approach in the case law to the problem of...[what] constitute[s] a ‘regular and established place of business.’”<sup>24</sup>

One line of cases “held, or at least suggested, that an established place of business required a physical presence in the district.”<sup>25</sup> Judge Gilstrap notes that “[s]ome courts also required this physical presence to be land the defendant owned, leased, or controlled”<sup>26</sup> and others “required the physical presence to be a ‘substantial part’ of a defendant’s business.”<sup>27</sup> However, a separate line of cases “found venue proper even where the defendant lacked a physical presence in the district.”<sup>28</sup> These cases often focused on whether a defendant’s employee, operating out of his or her home, could constitute a “regular and established place of business.”<sup>29</sup>

The Federal Circuit also weighed in on this issue at that time. In its opinion in *In re Cordis Corporation*, the Federal Circuit held that “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.”<sup>30</sup> In *Cordis*, the Federal Circuit declined to issue a writ of mandamus, leaving in place the District Court’s ruling that Cordis, a Florida corporation, could be sued in Minnesota.<sup>31</sup>

The record established that Cordis, which sold cardiac pacemakers, employed two full-time sales representatives in Minnesota.<sup>32</sup> The sales representatives maintained home offices in Minnesota and stored literature, documents, and products in those offices. They performed administrative tasks in their home offices and claimed an income tax deduction for these offices. They kept between \$30,000 and \$60,000 worth of Cordis products in their home offices at any given time.<sup>33</sup> Cordis also engaged a secretarial service in Minnesota to receive messages, provide typing services, mail Cordis literature, receive shipments of Cordis sales literature, issue business cards, and answer the phones as “Cordis Corporation.”<sup>34</sup> The Federal Circuit concluded that a “rational and substantial legal argument may be made in support of the court’s order denying

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1. Venue is proper in a patent infringement case if the case is brought in federal court in a state where a corporate defendant is incorporated.  
True.  
False.
2. In *TC Heartland v. Kraft Foods Group Brands, LLC*, the U.S. Supreme Court outlined a four-factor test to determine whether a defendant has a “regular and established place of business” in a state.  
True.  
False.
3. The Federal Circuit, in *VE Holding Corporation v. Johnson Gas Appliance Co.*, held that venue was proper in a patent infringement case in any judicial district in which the defendant was subject to the court’s personal jurisdiction.  
True.  
False.
4. A plaintiff in a patent infringement case has an automatic right to obtain discovery relating to venue.  
True.  
False.
5. Under the *TC Heartland* holding venue is automatically established in a district where the defendant sells an infringing product.  
True.  
False.
6. In *In re Cordis Corporation* the Federal Circuit held that the appropriate inquiry as to a “regular and established place of business” is whether the corporate defendant conducts business in that district through a permanent, continuous presence there and not whether it has a fixed physical presence.  
True.  
False.
7. In 1942, the U.S. Supreme Court held in *Stonite Products Co. v. Melvin Lloyd Co.* that the patent venue statute was not the exclusive venue provision for patent infringement suits.  
True.  
False.
8. In 1957, the U.S. Supreme Court held in *Fourco Glass Co. v. Transmirra Products Corporation* that the patent venue statute was not altered by the general venue statute, which includes language stating that it applies to “all actions.”  
True.  
False.
9. In *TC Heartland*, the U.S. Supreme Court held that venue is proper in a patent infringement case only in a judicial district in the state in which the defendant is incorporated or where the defendant committed acts of infringement and has a regular and established place of business.  
True.  
False.
10. Following *TC Heartland*, U.S. District Judge Rodney Gilstrap identified four factors courts should

- consider in determining whether the defendant has a regular and established place of business in the district.  
True.  
False.
11. One of Judge Gilstrap’s factors is whether a defendant has a physical presence in the district.  
True.  
False.
12. One of Judge Gilstrap’s factors is the extent to which the defendant derives benefits from its presence in the district.  
True.  
False.
13. One of Judge Gilstrap’s factors is whether the defendant has been sued previously in that district.  
True.  
False.
14. One of Judge Gilstrap’s factors is the extent to which a defendant interacts in a targeted way with existing or potential customers, consumers, users, or entities within a district.  
True.  
False.
15. One of Judge Gilstrap’s factors is the extent to which a defendant represents, internally or externally, that it has a presence in the district.  
True.  
False.
16. One of Judge Gilstrap’s factors is whether the defendant is incorporated in the district.  
True.  
False.
17. Corporations or other entities that are potential targets of patent infringement cases that want to make it more difficult to be sued in a particular state should consider minimizing their conduct in that state.  
True.  
False.
18. A plaintiff can establish venue in a patent infringement case by proving the defendant has a regular and established place of business in that district.  
True.  
False.
19. Courts have taken a uniform approach in determining what constitutes a regular and established place of business for patent venue purposes.  
True.  
False.
20. Judge Gilstrap has been criticized for setting venue rules for patent cases in a way that may keep many cases in his district.  
True.  
False.



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Cordis's motion to dismiss for lack of proper venue," and the Court declined to issue a writ.<sup>35</sup>

In his recent opinion, Judge Gilstrap identifies four factors that courts should consider in making the determination whether the defendant has a regular and established place of business in the district. One factor is physical presence—"the extent to which a defendant has a physical presence in the district, including but not limited to property, inventory, infrastructure, or people." Thus, a "retail store, warehouse, or other facility in the district weighs strongly in favor of finding a regular and established place of business" but the lack of physical building "is not dispositive."<sup>36</sup> A second factor to consider is the extent to which a defendant represents, internally or externally, that it has a presence in the district.<sup>37</sup> For example, if a defendant has agents or representatives located in a district, and represents to the public that it can communicate with the defendant through those agents or representatives, this factor would weigh in favor of proper venue in that district.<sup>38</sup> A third factor to consider is "the extent to which a defendant derives benefits from its presence in the district, including but not limited to sales revenue."<sup>39</sup> Judge Gilstrap notes that "courts have often looked to

the benefits a defendant has received from its business in a particular district as a factor supporting a regular and established place of business, especially where a defendant has generated significant revenue from such business."<sup>40</sup> A fourth factor to consider is the "extent to which a defendant interacts in a targeted way with existing or potential customers, consumers, users, or entities within a district, including but not limited to through localized customer support, ongoing contractual relationships, or targeted marketing efforts."<sup>41</sup> Judge Gilstrap states that no one factor should be dispositive, and this determination "should be driven by a fair consideration of the totality of the circumstances."<sup>42</sup>

Even though Judge Gilstrap has been criticized for purportedly "set[ting] venue rules for patent cases in a way that may keep many cases in his district,"<sup>43</sup> his detailed opinion and historical look at how courts have interpreted the phrase "regular and established place of business" is a helpful starting point for litigators faced with determining where to file suit, whether to challenge venue, and what advice to give to their clients on these issues.

In addition, other district courts, following *TC Heartland*, have construed the "place of business" requirement more nar-

rowly. A district court in the Western District of Texas has held that venue is not proper even when the defendant is authorized to do business in Texas, has distributors in Texas, and sells products to those Texas distributors.<sup>44</sup> The court held that the "kind and degree of defendants' contacts do not support a finding that defendants have a permanent and continuous presence which shows a regular and established place of business in the Western District of Texas."<sup>45</sup> A district court in the District of Arizona recently transferred a case to North Carolina, where the defendant is incorporated, despite allegations that the defendant sold infringing products at Home Depot in Arizona and had at least one sales manager and an engineer located in Arizona.<sup>46</sup> The court also declined to permit discovery relating to venue, concluding that discovery, additional briefing, and an evidentiary hearing "would be contrary to the just, speedy, and inexpensive determination of the merits of the action."<sup>47</sup>

Plaintiffs who have an interest in pursuing claims against a defendant not incorporated in the state in which the venue is located should try to develop a factual record to support their choice of venue, either through presuit investigation and research or through early discovery, if permitted. The facts should include whether the defendant has agents or representatives physically located in the state—and the nature of their actions within the state, whether the defendant has any physical presence in the state (e.g., buildings, warehouses, call centers, offices), the volume of sales in that state, if the defendant targets customers in that state, or has made representations about their presence in that state.

On the flip side, corporations or other entities who are the targets of patent infringement cases may want to consider taking steps to minimize their conduct in states to make it more difficult to be sued in those venues. While it might be impossible or impractical for some companies to stop sales to entire states or judicial districts, they may be able to take other steps to minimize conduct with certain venues. They could avoid setting up retail stores, warehouses, or other facilities in those districts. They could avoid retaining agents or representatives or call centers in those districts. And they could avoid or minimize public statements about their activities in those districts.

Ultimately, the question of what constitutes a regular and established place of business will be litigated and decided by the district courts, the Federal Circuit will review many of those decisions, and pos-

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sibly the Supreme Court will have to weigh in again on this issue. ■

<sup>1</sup> VE Holding Corp. v. Johnson Gas Appliance Co., 917 F. 2d 1574 (Fed. Cir. 1990).

<sup>2</sup> TC Heartland v. Kraft Foods Group Brands, LLC, 581 U.S. \_\_\_, 137 S. Ct. 1514 (2017).

<sup>3</sup> Judiciary Act, §11, 1 Stat. 79 (1789).

<sup>4</sup> TC Heartland, 137 S. Ct. at 1518 (citing Judiciary Act, §1, 24 Stat. 552 (1887) and Stonite Prods. Co. v. Melvin Lloyd Co., 315 U.S. 561, 563-64 (1942)).

<sup>5</sup> TC Heartland, 581 U.S. at \_\_\_, 137 S. Ct. at 1518 (citing Patent Act, Ch. 391, 29 Stat. 695 (1897)).

<sup>6</sup> Stonite, 315 U.S. at 565-66.

<sup>7</sup> *Id.*

<sup>8</sup> Fourco Glass Co. v. Transmirra Prods. Corp., 353 U.S. 222, 228 (1957).

<sup>9</sup> TC Heartland, 581 U.S. at \_\_\_, 137 S. Ct. at 1519.

<sup>10</sup> *Id.* (citing Judicial Improvements and Access to Justice Act, Pub. L. No. 100-702, §1013(a), 102 Stat. 4669 (1988)).

<sup>11</sup> VE Holding Corp. v. Johnson Gas Appliance Co., 917 F. 2d 1574, 1578 (Fed. Cir. 1988).

<sup>12</sup> TC Heartland, 581 U.S. at \_\_\_, 137 S. Ct. at 1520.

<sup>13</sup> Kraft Foods Grp. Brands LLC v. TC Heartland, LLC, No. CV 14-28-LPS, 2015 WL 4778828, at \*2 (D. Del. Aug. 13, 2015).

<sup>14</sup> TC Heartland, 581 U.S. at \_\_\_, 137 S. Ct. at 1517.

<sup>15</sup> In re TC Heartland, LLC, 821 F. 3d 1338, 1341-43 (2016).

<sup>16</sup> *Id.*

<sup>17</sup> Justice Gorsuch took no part in the consideration or decision of the case.

<sup>18</sup> TC Heartland, 581 U.S. at \_\_\_, 137 S. Ct. at 1520.

<sup>19</sup> *Id.*

<sup>20</sup> *Id.* (citations omitted).

<sup>21</sup> *Id.* (citing Pure Oil Co. v. Suarez, 384 U.S. 202, 202-05 (1966)).

<sup>22</sup> Ryan Davis, *Lawmakers Slam ‘Reprehensible’ New Gilstrap Venue Rules*, Law360, July 13, 2017, <https://www.law360.com> [hereinafter Davis].

<sup>23</sup> Raytheon Corp. v. Cray, Inc., No. 2:15-CV-01554-JRG, 2017 WL 2813896 (E.D. Tex. June 29, 2017).

<sup>24</sup> Lace v. Lace, No. 89 C 0414, 1989 WL 103364, at \*2 (N.D. Ill. 1989).

<sup>25</sup> See Raytheon, 2017 WL 2813896, at \*8 (citing Holub Indus., Inc. v. Wyche, 290 F. 2d 852, 854 (4th Cir. 1961)); General Radio Co. v. Superior Elec. Co., 293 F. 2d 949, 951 (1st Cir. 1961); Phillips v. Baker, 121 F. 2d 752, 756 (9th Cir. 1941); Warner-Lambert Co. v. C.B. Fleet Co., 583 F. Supp. 519, 522 (D. N.J. 1984) (discussing this line of cases); Coleco Indus., Inc. v. Kransco Mfg., Inc., 247 F. Supp. 571, 574 (S.D. N.Y. 1965).

<sup>26</sup> Raytheon, 2017 WL 2813896, at \*8 (citing Johnston v. IVAC Corp., 681 F. Supp. 959, 962 (D. Mass. 1987)).

<sup>27</sup> Raytheon, 2017 WL 2813896, at \*8 (comparing Mastantuono v. Jacobsen Mfg. Co., 184 F. Supp. 178 (S.D. N.Y.1960) with Coleco, 247 F. Supp. at 575).

<sup>28</sup> Raytheon, 2017 WL 2813896, at \*8 (citing Brunswick Corp. v. Suzuki Motor Co., 575 F. Supp. 1412, 1424 (E.D. Wis. 1983) (“This court does not lack venue over U.S. Suzuki simply because it rents no real estate in Wisconsin.”) and Instrumentation Specialties Co. v. Waters Assocs., Inc., No. 76 C 4340, 1977 WL 22810, at \*6 (N.D. Ill. Oct. 12, 1977) (emphasis is on physical presence “invite[s] gamesmanship to avoid venue”).

<sup>29</sup> Raytheon, 2017 WL 2813896, at \*8 (citing Shelter-Lite, Inc. v. Reeves Bros., 356 F. Supp. 189, 195 (N.D.

Ohio 1973) (“[A]n unyielding rule that a regular and established place of business cannot arise by virtue of a salesman operating out of his residence is at odds with the practicalities and necessities of the business community.”).

<sup>30</sup> In re Cordis Corp., 769 F. 2d 733, 737 (Fed. Cir. 1985).

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 735.

<sup>33</sup> *Id.*

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 737.

<sup>36</sup> Raytheon Corp. v. Cray, Inc., No. 2:15-CV-01554-JRG, 2017 WL 2813896, at \*11-12 (E.D. Tex. June 29, 2017).

<sup>37</sup> *Id.* at \*12.

<sup>38</sup> *Id.*

<sup>39</sup> *Id.* at 13.

<sup>40</sup> *Id.* at \*13 (citing Instrumentation Specialties Co. v. Waters Assocs., Inc., No. 76 C 4340, 1977 WL 22810, at \*6 (N.D. Ill. Oct. 12, 1977) (noting that the defendant had made “substantial annual sales” in the district).

<sup>41</sup> *Id.* at \*13

<sup>42</sup> *Id.* at \*14.

<sup>43</sup> Davis, *supra* note 22.

<sup>44</sup> Logantree LO v. Garmin Int’l, et al., No. SA-17-CA-0098-FB, 2017 WL 2842870, at \*2 (W.D. Tex. June 22, 2017) (judgment entered No. SA-17-CA-0098-FB, 2017 WL 2844167 (W.D. Tex. June 22, 2017)).

<sup>45</sup> *Id.*

<sup>46</sup> Optolium, Inc. v. Cree, Inc., No. CV-16-0328-PHX-DLR, 2017 WL 3130642, at \*6 (D. Ariz. July 24, 2017).

<sup>47</sup> *Id.* (internal quotations omitted).



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