

I Have a Feeling We're Not in Beaumont Anymore – Or Are We?
Ruminations on TC Heartland
by Brent P. Lorimer

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After they arrive in Oz, Dorothy famously tells Toto “I’ve a feeling we’re not in Kansas anymore.” Oz, after all, was very different from Kansas. The Supreme Court’s recent opinion in *TC Heartland LLC v. Kraft Foods Group Brands, LLC* similarly unhinged just about everything familiar to patent owners in the world of patent venue. Patent owners are beginning to feel like they are not in Beaumont anymore.

Venue in patent cases is governed by 28 U.S.C. § 1400(b). Section 1400(b) states that venue is proper in a patent case “in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.” In *Fourco Glass Co. v. Transmirra Products Corp.*,[3] the Supreme Court held that “where the defendant resides” is limited to the state of incorporation of the defendant.[4] In 1990, the Federal Circuit held in *VE Holding Corp. v. Johnson Gas Appliance Co.*,[5] that when Congress amended 28 U.S.C. §1391(c) in 1988, the amendment altered the meaning of “residence” under §1400(b) to mean that a defendant “resides” in any district in which the defendant is subject to personal jurisdiction. Courts and litigants treated the result in *VE Holding* as settled law from 1990 to 2017. The Supreme Court in *TC Heartland LLC v. Kraft Foods Group Brands, LLC*[6] rejected the *VE Holding* result, holding that its prior *Fourco* holding remained intact. The result is that for purposes of the first prong of 1400(b), “[a]s applied to domestic corporations,[7] ‘reside[nce]’ in § 1400(b) refers only to the State of incorporation.”[8]

The Supreme Court’s decision in *TC Heartland* has generated plaudits from interests aligned with parties who are often sued, and boos from interests aligned with those who seek to enforce patent rights. Defendants have shouted “Huzzah!” in unison and filed a flurry of motions to dismiss for lack of proper venue. Plaintiffs have decried a perceived anti-patent animus of the Court, shifted the debate to what constitutes “acts of infringement” and “a regular and established place of business,” and have vigorously opposed motions to dismiss. The results on the ground, however, have been far less predictable than pundits predicted.

TC Heartland leaves litigants and the courts with at least two major sets of issues. The first relates to the impact of *TC Heartland* on cases filed before the Supreme Court issued its opinion, specifically whether defendants have waived improper venue as a defense, and the second relates to what litigants and the courts will do with the “acts of infringement” and “regular and established place of business” prong of 1400(b). This article analyzes both issues.

Waiver of Improper Venue

Following *TC Heartland*, patent law experts predicted an immediate *en masse* exodus from the Eastern District of Texas and an ignominious demise of patent litigation in that district. The Eastern District, however, has refused to go gently into the night, and other courts have followed suit.

A defendant waives improper venue by failing to make it the subject of a motion under Rule 12(b)(3) or including it in a responsive pleading.^[9] Post-*TC Heartland*, defendants who did not move to dismiss for improper venue have argued that they did not waive improper venue because *VE Holding* was treated by the Federal Circuit and district courts as binding precedent for 27 years, and the venue defense was therefore not “available”^[10] prior to the Supreme Court’s decision. This is the so-called “change of law” non-waiver theory. Some defendants have gone so far as to assert that a 12(b)(3) motion prior to *TC Heartland* would have been a violation of Rule 11, so the failure to assert improper venue cannot constitute a waiver of the defense. With two exceptions,^[11] however, district courts have rejected the “change of law” argument.^[12] Similarly, defendants who admitted proper venue believing *VE Holding* to be the law have been unsuccessful in asserting improper venue post-*TC Heartland*.^[13]

While the Federal Circuit has not weighed in on the waiver issue in a precedential opinion, it has denied two petitions for mandamus seeking to transfer cases based on an assertion that the district court erred in denying a motion to dismiss for improper venue. On June 9, 2017, the Federal Circuit denied a petition for mandamus seeking to require the U.S. District Court

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for the Eastern District of Virginia to transfer a case to the Eastern District of Tennessee, or alternatively, to stay trial to determine if venue was proper under *TC Heartland*. *In re Sea Ray Boats, Inc., Brunswick Corporation*, 2017-124. In *Sea Ray*, Cobalt Boats had sued Sea Ray in Virginia in 2015. Two weeks before trial, Sea Ray moved to transfer the case to Tennessee, arguing that venue was not proper in Virginia under *TC Heartland*. The Virginia district court denied the motion, arguing that Sea Ray had waived the defense. Sea Ray therefore sought a writ to compel transfer or a stay of trial in Virginia. The Federal Circuit denied the petition, without offering much guidance as to the reason for its decision. Judge Newman dissented, arguing that “[t]here is little doubt that the Court’s decision in *TC Heartland* . . . was a change in the law of venue”

On July 24, 2017, The Federal Circuit denied another petition for mandamus in *In re Techtronic Industries North America, Inc., One World Technologies, Inc., OWT Industries, Inc., Ryobi Technologies, Inc.* Case No. 2017-125. In that case, the defendant had admitted venue was proper, even after oral argument in *TC Heartland*. The defendant then moved to dismiss, arguing that the result in *TC Heartland* was a change in law. The district court held that “the argument that ultimately succeeded in the Supreme Court was available to [the defendant] ‘just as easily as it was to the plaintiff in *TC Heartland*.’” The Federal Circuit declined to issue mandamus to change the result in the district court, “without prejudice to [the defendant] raising its venue arguments on appeal after issuance of a final judgment in the case.” While neither of these decisions is precedential, the Federal Circuit does not currently seem to have an appetite to change findings of waiver of improper venue in the district courts based on the “change of law” theory.

Even assertion of improper venue in the Answer may not be enough to preserve a motion under Rule 12(b)(3). In *Realtime Data LLC v. Carbonite, Inc.*[\[14\]](#) the defendant simultaneously filed its Answer and a motion to dismiss under Rule 12(b)(6) for invalidity under 35 U.S.C. § 101. As part of its Answer, Carbonite denied the venue allegations of the Complaint and affirmatively asserted that “to the extent the U.S. Supreme Court decides that 28 U.S.C. § 1400(b) is the exclusive statute for determining venue in patent cases . . . ,

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Carbonite reserves the right to amend its answer and/or seek to dismiss this case based on improper venue.” The defendant’s 12(b)(6) motion was filed ten months after the *TC Heartland* petition for *certiorari* was granted and a month after the *TC Heartland* oral argument, and did not include a 12(b)(3) motion. Magistrate Judge Love of the Eastern District of Texas denied the motion to dismiss for improper venue, finding that Carbonite had waived venue by failing to include it as part of the Rule 12(b)(6) motion to dismiss.[\[15\]](#)

A defendant may also waive the defense of improper venue “by actively litigating [a] suit.”[\[16\]](#) In *Elbit Sys. Land and C41 Ltd, et al. v. Hughes Network Systems, LLC*,[\[17\]](#) the defendant participated in claim construction, contested fact and expert discovery, and engaged in not fewer than ten discovery motions. All of this occurred before the defendant raised its post-*TC Heartland* venue motion. Judge Schroeder of the Eastern District denied the motion, finding that the defendant had waived venue by its participation in active litigation in the venue.[\[18\]](#)

To date, *TC Heartland* has not resulted in droves of patent cases being dismissed in the Eastern District of Texas (or anywhere else) for lack of proper venue. Some cases have been transferred under 1404(a) or 1406(a), but those cases are in a minority. The courts have largely managed to hang on to the cases they have, because the defendants have (i) failed to plead improper venue in the Answer (ii) have failed to move for dismissal based on improper venue or (iii) have waited so long that the district court has found waiver based on participation in the litigation in the venue.

Acts of Infringement and a Regular and Established Place of Business

The Supreme Court did not substantively address the meaning of “acts of infringement” or “a regular and established place of business” prong of 1400(b) in *TC Heartland*. There is, however, guidance on this issue, both prior to and after *TC Heartland*.

Prior to 1985, courts relied on the test established in *Mastantuono v. Jacobsen Manufacturing*[\[19\]](#) to discern whether venue was proper under the “regular and established

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place of business” prong of § 1400(b). The *Mastantuono* test states that a “regular and established place of business” requires more than “doing regular business.” To establish the existence of a “regular and established place of business” in a district, the defendant must be shown to regularly engage in carrying on a substantial part of its ordinary business on a permanent basis in a physical location within the district, over which it exercises some measure of control.[\[20\]](#) Courts interpreted the requirement for a physical location to mean ownership of office space or a similar establishment in the district through which permanent, consistent business was conducted.

The Federal Circuit revisited the meaning of a “regular and established place of business” in *In re Cordis Corp.*[\[21\]](#) Medtronic, a Minnesota corporation, sued Cordis for patent infringement in the United States District Court for the District of Minnesota. Cordis, a Florida corporation with its principal place of business in Miami, was not registered to do business in Minnesota and did not lease or own any property in Minnesota. Cordis did, however, market and sell the accused product in Minnesota through two salaried employees who worked from their homes in Minnesota. Cordis supplied the employees with company cars. Hospitals could purchase the pacemakers directly from inventory the salesmen kept in their homes. Cordis paid for a secretarial service in Minnesota to assist the employees, and the secretarial service answered the phone “Cordis Corporation.”

Cordis argued that venue was improper because it did not “rent or own a fixed physical location in Minnesota,” which “absolutely precludes a finding that it has a regular and established place of business as required by § 1400(b).”[\[22\]](#) The Federal Circuit disagreed, holding 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.”[\[23\]](#)

Cordis relied on *Phillips v. Baker*[\[24\]](#) and *University of Illinois Foundation v. Channel Master*[\[25\]](#) to define the meaning of “physical presence.” The Federal Circuit distinguished *Phillips* on the basis that the infringing activity in that case involved a mobile, seasonally used apparatus for grain shippers which was assembled and disassembled at the location

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where it was used. Cordis's presence in Minnesota was permanent, while the presence of the apparatus in *Phillips* was "merely temporary, and there was no way to contact its representatives except by communication with the home office in Florida."[\[26\]](#)

In *Channel Master*, the Seventh Circuit found venue was improper where Channel Master, a New York Corporation, was sued in Illinois for patent infringement. Channel Master employed salespersons in the district who worked from home. The Federal Circuit distinguished *Channel Master*, observing that in that case, all orders were taken from, all payments made to, and all sales shipped from the New York office, not from the salespersons' home offices as was the case in *Cordis*. The Channel Master employees did not keep stock or samples of the accused infringing product in their homes. The Federal Circuit also distinguished *Channel Master* because while the Channel Master employee in Illinois did provide technical training in the district, there was no evidence that the training concerned the accused infringing subject matter.[\[27\]](#) *Cordis* was the last substantive opinion from the Federal Circuit on the "regular and established place of business" prong of 1400(b) prior to *TC Heartland*, and the *VE Holding* opinion largely mooted the second prong of the statute. As a result, the case law on what constitutes a "regular and established place of business" has been largely stagnant since 1985.

The Eastern District of Texas, however, has been paying attention and has used the "regular and established place of business" prong of 1400(b) to retain venue of cases where the defendant is not incorporated in Texas. In *Raytheon Company v. Cray, Inc.*,[\[28\]](#) Judge Gilstrap analyzed the meaning of "regular and established place of business" and found venue proper. In *Raytheon*, the defendant Cray sold "high performance computing" products ("HPCs"). Cray employed Douglas Harless as "National Account Manager" in the Eastern District, and identified Athens, Texas (located in the Eastern District) as one of its "American Sales Territories." Mr. Harless lived in the Eastern District, was responsible for sales to nine customers, amounting to \$345 million in revenue, had a phone number with an area code in the Eastern District, and managed accounts in the financial, biomedical and petroleum industries. Additionally, Mr. Harless, acting on behalf of Cray, sold an HPC to the University of

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Texas. The computer was delivered to the Austin campus (outside the Eastern District), but was accessed by remote terminals from various locations, including two campuses within the Eastern District. Another employee, Troy Testa, was a “Sr. Territory Manager,” lived in the Eastern District, and “[h]ad a pipeline of over \$6,000,000 on a \$2,500,000 quota” for Cray.

Judge Gilstrap reviewed the facts in *Raytheon* and found them strikingly similar to the facts of *Cordis*. While he acknowledged some differences, he found that the *Raytheon* facts established venue under the Federal Circuit’s holding in *Cordis*.[\[29\]](#)

Aware that the eyes of the country are on the Eastern District of Texas, Judge Gilstrap “conducted a thorough analysis” of the “jumbled and irreconcilable” case law dealing with the meaning of a “regular and established place of business.” He foreshadowed the breadth of his view of proper venue by discussing how technology and e-commerce have fundamentally changed the way businesses function in the modern world, finding that technology has lessened the burden placed on defendants when required to litigate in *fora* where they have economic, but not necessarily brick-and-mortar, business relations. The stated reason for Judge Gilstrap’s opinion was to make venue analysis simpler and to “avoid costly and far-flung venue discovery, where possible.”[\[30\]](#)

The *Raytheon* opinion identifies four factors, none of which is dispositive, that should be considered when determining whether a defendant has a “regular and established place of business” in the forum chosen by the plaintiff. Those factors are (1) physical presence in the venue; (2) presence of the defendant’s representatives in the venue; (3) benefits received by the defendant from its conduct in the venue; and (4) targeted interactions with the district.

Physical presence in the venue can include ownership of property, inventory, infrastructure or placement of people in the venue to act on behalf of the defendant. The presence of owned or leased real estate or buildings is a persuasive fact in the venue analysis, but lack of a physical building in the district is not dispositive.

The presence of representatives is not limited to traditional “employees” of the defendant. Instead, this factor examines the presence of agents the defendant holds out as its own,

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particularly where the defendant advertises the availability of its goods or services through such agents, and expects customer inquiries to be directed to the agent. Reliance on traditional definitions of “employees,” in Judge Gilstrap’s view, will likely lead to “gamesmanship.”

Benefits received by the defendant by reason of its conduct in the district are relevant to but not dispositive of, venue analysis. This factor is particularly interesting in light of Judge Gilstrap’s analysis of the lack of a requirement that the defendant’s acts of infringement be connected to a regular and established place of business in the district. Specifically, Cray argued that the acts of infringement establishing venue must be part of the regular and established place of business. Judge Gilstrap disagreed, agreeing with courts holding that

Nothing in the language of Section 1400(b) justifies the conclusion that a defendant’s place of business in the district must have some connection with the accused device. The statute requires only that the defendant have committed acts of infringement in the district and have a regular and established place of business there; there is no requirement that the two factors be related.[\[31\]](#)

Judge Gilstrap concluded that the statute requires no relationship between the act of infringement and the regular and established place of business.”[\[32\]](#) Judge Gilstrap did not expressly tie this finding to his “benefits” analysis, but it seems likely that he would find venue where the defendant received significant economic benefits from its activities in a district, even if those benefits were not tied to the acts of infringement. [\[33\]](#)

The fourth factor, “targeted interactions with the district,” analyzes the defendant’s interactions with the venue in the context of specific personal jurisdiction. Specifically, Judge Gilstrap analyzed opinions relying upon ongoing contractual relations the defendant maintains in the forum as being relevant to the establishment of venue. This analysis is remarkably similar to the minimum contacts analysis that was the standard under *VE Holding*. Some may argue that this is a back-door way to avoid the holding of *TC Heartland*. Because it is only one of multiple factors, however, the targeted interactions factor may

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survive appellate scrutiny.

The Federal Circuit is considering a petition for mandamus in the *Raytheon* case, and recently extended the time for Raytheon to respond to Cray's petition until August 1, 2017 and extended the time for Cray to file its response until August 8, 2017. Representative Darrell Issa, chairman of the House Subcommittee on the Courts, has called Judge Gilstrap's *Raytheon* opinion "reprehensible" and an "end-run" around the Supreme Court's *TC Heartland* decision.

Conclusion

Dorothy's observation that she did not feel like she was in Kansas anymore was on its face accurate. Oz was starkly different from Kansas. Similarly, the *TC Heartland* represents a starkly different approach to venue compared to the *VE Holding* analysis. When you watch all of the *Wizard of Oz*, however, it is apparent that the Lion, the Scarecrow, the Tin Man and the Wicked Witch of the West shaped Dorothy's life both in Kansas and in Oz. Close examination of *Raytheon* and its progeny suggests that regardless of what the wizard is doing behind the curtain, we may be closer to Kansas than we think. Judge Gilstrap may have provided the Federal Circuit and the Eastern District of Texas the means to allow plaintiffs to continue to file patent litigation in favorable *fora*, like plaintiffs in other civil cases. On the other hand, the drumbeats at the Supreme Court and in Congress for a serious course correction on venue issues are banging very loudly. Stay tuned.

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[3] 353 U.S. 222, 226 (1957).

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[4] *Id.*

[5] 917 F. 2d 1574, 1578-70 (1990).

[6] 137 S.Ct. 1514.

[7] The result in *TC Heartland* on its face applies only to corporations, and only to *domestic* corporations. This is curious, because the defendant in *TC Heartland* was an LLC, not a corporation.

[8] *Id.*

[9] FRCP 12(h)(1)(B)(1)-(2). District courts considering the issue disagree whether the issue of waiver is governed by the precedent of the regional circuit (*Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, No. 2:5CV21, 2017 WL 2556679, at *2 (E.D. Va. June 7, 2017) or the precedent of the Federal Circuit (*Navico, Inc. and Navico Holding AS v. Garmin International, Inc. and Garmin USA, Inc.*, Civil Action No. 2:16-CV-190 (E.C. TX, July 11, 2017)). In most cases, however, the choice of governing law has not made any difference.

[10] *Gilmore v. Palestinian Interim Self Gov't Auth.*, 843 F.3d. 958, 964 (D.C. Cir. 2016).

[11] *Westech Aerosol Corp. v. 3M Co.*, 2017 WL 2671297 at *2 (W.D. Wash June 21, 2017); *OptoLum, Inc. v. Cree, Inc.*, CV-16-03828-PHX-DLR (D. Ariz., July 24, 2017).

[12] See *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, 2017 WL 2556679, at *3 (E.D. Va. June 7, 2017) ('TC Heartland does not qualify for the intervening law exception to waiver because it merely affirms the viability of *Fourco*') *Elbit Sys. Land & C41 Ltd. v. Hughes Network Sys., LLC.*, 2017 WL 2651618, at *20 (E.D. Tex. June 20, 2017) ("[T]he Supreme Court's decision in *TC Heartland* does not qualify [as a change in law]."); *Life Techs. Inc. v. Nintendo of America, Inc.*, 2017 WL 2778006, at *7 (N.D. Tex. June 27, 2017) ('TC Heartland does not qualify as an intervening change in law.');

Chamberlain Group, Inc. v. Techtronic Industries Co. et al, at 3

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(N.D. 111. June 28, 2017) (“[T]he Court follows *Elbit* and *Cobalt Boats* ... in finding that *TC Heartland* did not represent a change in the law that would excuse waiver under these circumstances.”); *Amax, Inc. v. ACCO Brands Corp.*, 2017 WL 2818986, at *3 (D. Mass. June 29, 2017) (same); *Infogation v. HTC Corp.*, 2017 WL 2869717, at *4 (S.D. Cal. July 5, 2017) (same); *Navico, Inc. v. Garmin Int’l, Inc.*, 2017 WL 2957882, at *2 (E.D. Tex. July 11, 2017) (same). The reason for this near unanimity is that “the Supreme Court itself expressly rejected the notion that venue law in patent cases changed after *Fourco*.” *Navico*, 2017 WL 2957882, at *2 (citing *TC Heartland*, 137 S. Ct. at 1520).

[13] *Navico, Inc. and Navico Holding AS v. Garmin International, Inc. and Garmin USA, Inc.*, Civil Action No. 2:16-CV-190 (E.D. Tx. July 11, 2017); *Reebok International, Ltd. et al., v. TRB Acquisitions, LLD et al.*, Case No. 3:16-cv-1618-S1(D. Or. July 14, 2017); *Fox Factory, Inc. v. SRAM, LLC* (Civil Action No. 2:15-cv-00506-WHO (July 18, 2017); *Realtime Data LLC, v. Barracuda Networks, Inc.*, Civil Action No. 6-17-CV-120 (July 13, 2017).

[14] Civil Action No. 6:17-CV-123 RWS (E.D. Tx, July 11, 2017).

[15] See, also, *Wordlogic Corporation and 602531 British Columbia, LTD., v. Flesky, Inc.*, Case No. 16C 11714 (N.D. Ill. July 18, 2017) (Defendant filed a Rule 12(b)(6) motion on February 3, 2017, but did not assert improper venue until after *TC Heartland* issued. Court found waiver of venue defense).

[16] *United States v. Ziegler Bolt & Parts Co.*, 111 F.3d 878, 882 (Fed. Cir. 1997); accord *Peterson v. Highland Music, Inc.*, 140 F.3d 1313, 1318 (9th Cir. 1998)(finding defenses “may be waived as a result of the course of conduct pursued by a party during litigation”).

[17] Civil Action No. 2:15-CV-00037-RWS (E.D. Tx. July 19, 2017).

[18] See, also, *Realtime Data, LLC v. Echostar Corporation*, Civil Action No. 6:17-CV-84 (E.D. Tx. July 19, 2017).

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[19] 184 F. Supp. 178 (S.D.N.Y. 1960).

[20] *Id.* at 180.

[21] 769 F.2d 733 (Fed. Cir. 1985).

[22] *Id.* at 736.

[23] *Id.* at 738.

[24] 121 F.2d 752 (9th Cir. 1941).

[25] 382 F.2d 514 (7th Cir. 1967).

[26] *Phillips v. Baker*, 121 F.2d at 736.

[27] *University of Illinois Foundation*, 382 F. 2d at 737.

[28] Civil Action No. 2:15-CV-01554-JRG (E.D. Tx., June 29, 2017).

[29] *Id.* at 18.

[30] *Id.* at 22.

[31] *Am. Can Co. v. Crown Cork and Seal Co.*, 443 F. Supp. 333, 336 (E.D. Wis. 1977); *Gaddis v. Calgon Corp.*, 449 F.2d 1318, 1320 (5th Cir. 1971).

[32] *Raytheon* at 13-14.

[33] In another interesting twist, Judge Gilstrap held that a plaintiff need only *allege* acts of infringement for purposes of establishing venue, and that a 12(b)(3) motion is not the time to

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resolve substantive disputes about whether the defendant *actually* infringes. Additionally, Cray argued that Raytheon's venue allegations were defective on their face, because Cray's sale of an HPC to the University of Texas involved delivery to Austin, which is not in the Eastern District. Judge Gilstrap found that the allegation that Cray knew or should have known that its HPC would be accessed by various of the University of Texas campuses, including campuses in the Eastern District, was sufficient to establish "acts of infringement" for purposes of venue. Judge Gilstrap further held that Mr. Harless's conduct in contacting potential customers and "offering" Cray HPCs for sale was sufficient to allege proper venue, because *the offer itself* was potentially an infringing act, regardless of where the HPC would ultimately be delivered.