



VENUE DECISIONS AND TRENDS POST-TC HEARTLAND

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In 2017, the Supreme Court overruled *VE Holding Corp. v. Johnson Gas Appliance Co.*,¹ a 27-year-old precedent holding in that the use of the word “reside” in the patent venue statute, § 1400, should be interpreted the same way as courts interpret its use in the general venue statute, § 1391. Under the general venue statute, “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.”² For corporations selling products across the country, the Federal Circuit’s interpretation of the patent venue statute effectively allowed plaintiffs to sue for patent infringement in a jurisdiction of their choice.

In *TC Heartland*, the Supreme Court held that, for the purposes of the patent venue statute, a U.S.-based corporate defendant “resides” *only* in the corporation’s state of incorporation.³ If a suit is not brought in the corporate defendant’s state of incorporation, the patent venue statute requires that it be brought “where the defendant has committed acts of infringement and has a regular and established place of business.”⁴

Federal Circuit Decisions Since *TC Heartland*

In *In re Cray*, the Federal Circuit addressed what qualifies as a “regular and established place of business” in a judicial district.⁵ The court listed “three general requirements relevant to the inquiry.” First, there must be a physical place in the district. Second, the physical place must be a regular and established place of business. Third, the physical place must be the place of the defendant.

In *In re Micron Tech. Inc.*, the Federal Circuit addressed when and how parties are allowed to object to venue after *TC Heartland*.⁶ The Federal Circuit held that Rule 12(h)(1)’s waiver rule does not apply to venue objections under *TC Heartland* because the *TC*

Heartland opinion was a change of controlling law. The Federal Circuit has since applied this precedent in granting a mandamus petition in *In re Oath Holdings Inc.*, wherein the court vacated the Eastern District of New York’s finding that the defendant had waived its venue objection and ordered that the patent infringement action be dismissed or transferred pursuant to the patent venue statute.⁷

In *In re HTC Corp.*, the Federal Circuit addressed the impact of *TC Heartland* on cases involving foreign defendants.⁸ Previously, plaintiffs could sue a foreign defendant in any judicial district in which valid service could be made upon the defendant. The Federal Circuit confirmed this was still the law, explaining “this court—without clear guidance from Congress—will not broadly upend the well-established rule that suits against alien defendants are outside the operation of the federal venue laws.” HTC’s motion for rehearing/rehearing en banc was denied, as was its petition for certiorari to the U.S. Supreme Court.⁹

In *In re BigCommerce*, the Federal Circuit addressed where a corporation resides when its state of incorporation comprises multiple judicial districts.¹⁰ The court held that, within the meaning of the

patent venue statute, a corporation resides in a single judicial district. When the corporation is incorporated in a state in which there are multiple judicial districts, the corporation resides in the district in which it has its “principal place of business” or, in the absence of such a place, the district “in which the corporation has its registered office or agent.”¹¹

In *In re ZTE (USA) Inc.*, the Federal Circuit addressed which party has the burden of establishing that venue is either proper or improper.¹² The Federal Circuit held that the burden is on plaintiffs to establish proper venue under the patent venue statute.

In *In re Telebrands*, the Federal Circuit denied the defendants’ petition for mandamus because of the parties’ history of litigating their disputes before the Eastern District of Texas.¹³ Giving deference to the district court’s finding that the defendants waived their venue defense, the Federal Circuit found the defendants could raise their venue challenge after final judgment. The *In re Telebrands* decision was therefore a watershed moment in the Federal Circuit’s post-*TC Heartland* jurisprudence—venue disputes were no longer presumptively entitled to interlocutory adjudication.

District Court Decisions Since *TC Heartland*

District courts have issued a number of decisions addressing what constitutes a “regular and established place of business.” One court held that registration with the New Jersey Board of Pharmacy did not, by itself, satisfy the regular and established place of business element, nor did it operate as consent to being sued in New Jersey for patent infringement.¹⁴ Multiple courts have held that storing a defendant’s products at an Amazon warehouse in the judicial district and fulfilling customers’ orders from that warehouse does not qualify as a regular and established place of business for patent venue purposes.¹⁵ Likewise, courts have overwhelmingly held that selling products through third-party retail partners or distributors in the district is not sufficient to establish patent venue.¹⁶ But if a defendant operates its own retail stores in the district, courts will typically find the defendant has a regular and established place of business.¹⁷

Courts have consistently reached the same conclusion for defendants with employees working from their personal residences in the district¹⁸—namely, that the mere location of employees does not establish venue—even when as many as 46 of a defendant’s employees resided and worked in the district.¹⁹ The Southern District of New York, however, denied one defendant’s motion to dismiss for improper venue, finding the defendant had a regular and established place of business through an employee’s home office in the forum.²⁰ The court explained that the defendant’s employee’s home office “is not merely a ‘sporadic’ or isolated work environment.... Sales representatives ‘contact[] a prospective customer at a potential customer’s office’ and ‘take initial sales orders.’ ... Although [defendant] does not require sales people to live in their assigned territory, [it] admits that it ‘tries to hire people living within their assigned sales territory,’ one of which is New York. Indeed, [defendant’s] job postings reveal that it seeks out territory managers for specific locations.... And ... sales agents must contact potential customers at their offices and conduct trainings when [defendant’s] products arrive. All of these tasks necessitate proximity to customers.”

While *Cray* settled the fact that a “regular and established place of business” in a judicial district must be a physical place, courts have not yet settled on whether the physical space occupied by data servers is sufficient to meet the standard. Several courts have been

reluctant to answer that question in the affirmative.²¹ One court in the Eastern District of Texas, however, denied Google’s motion to dismiss for improper venue, finding that Google had a regular and established place of business in the district through its Google Global Cache servers housed by third-party ISPs.²² The court recognized that “a virtual space or electronic communications alone are insufficient to denote a ‘place’ within the meaning of the statute” but found “they may, with more, be indicative of the requirement having been met.... Here ... there is more than ‘merely’ ‘a virtual space or [] electronic communications from one person to another.’ The ‘place’ is specifically localized: a physical server occupying a physical space. Not only does Google exercise exclusive control ... over the digital aspects of the GGC, Google exercises exclusive control over the physical server and the physical space within which the server is located and maintained.... [Defendant’s] ownership of the server and its contents is absolute, as is [its] control over the server’s location once it is installed.... The statute does not require ‘substantial’ business or ‘large’ impact from the business being done at the place of business—in order to lay proper venue in a judicial district, the statute simply requires that a regular and established place of business be present.” Google’s petition for mandamus to the Federal Circuit was recently denied.²³

But district courts have also concluded that web-based businesses are not exempt from the requirements of *In re Cray*. The District of Nevada granted defendant’s motion to transfer for improper venue, rejecting plaintiff’s argument that *In re Cray* does not apply to web-based businesses.²⁴ The court explained that:

The key inquiry is not whether physical objects are involved, but rather whether the public has access to the defendant corporation through an employee or office located in the district where a suit is brought or if the public directly accesses the services of defendant through a location in the respective forum.... The bulk of the defendant’s employees, product development, and overall operations are located in San Francisco, and that it does not own or lease any buildings in this district, it has no Nevada phone numbers or addresses listed for its operations, and it stores no inventory or data in Nevada. These facts demonstrate that Defendant maintains no place of business in Nevada, much less one that is both regular and established.

One court confronted the issue of whether defendants’ regular and established places of business on oil rigs off the coast could satisfy patent venue in a district of an adjacent state.²⁵ The court relied on the extension of jurisdiction provided under the Outer Continental Shelf Lands Act (OCSLA) to support finding that patent venue was proper under the second prong of § 1400(b): “The court finds no need ... to determine how the boundary between Texas and Louisiana extends off the coast. The Auger Rig and the High Island Rig are ‘permanently or temporarily attached to the seabed’ of the Outer Continental Shelf for the purpose of ‘exploring for, developing, or producing resources,’ and they are located within 200 miles of Port Arthur, Texas. As such they fall within this court’s jurisdiction under § 1331(a)(1) of OCSLA.”

District courts have been consistent in respecting the formal separation between corporate entities for venue purposes. Plaintiffs have repeatedly attempted to use the places or actions of a corporate relative to establish proper venue for a defendant, and district courts have

repeatedly rejected such arguments.²⁸ One court recently pointed out that “neither the Supreme Court nor the Federal Circuit has ruled on whether a defendant’s subsidiary’s ‘place of business’ could be one that ‘the defendant has’ for purposes of § 1400(b).”²⁹ Some district courts have indicated that such an argument would be successful if a plaintiff were able to demonstrate a lack of corporate separateness between the defendant and one of its corporate relatives doing business in the district.³⁰ For instance, the District of Delaware recognized that under the first prong of the patent venue statute, the law would allow one entity to be treated “as if it were a resident in a second district,” where the entity’s affiliate resided, if there was an alter ego relationship or its corporate veil was pierced.³¹

In view of the Federal Circuit’s decision in *Micron*, numerous district courts have disposed of arguments that a party waived its right to object to venue while the case was stayed. The Eastern District of Texas granted a venue motion in a case that had been stayed for more than a year, finding that defendants had sufficiently preserved their venue objections by referring to them in each of the status reports filed since *TC Heartland*.³² In a case with similar facts, the Western District of Pennsylvania found that the effective date for deciding whether a venue objection had been waived was the date the stay in the case had been lifted.³³ By contrast, the Southern District of Ohio denied a venue motion on the basis that defendants had waived their objections by waiting six months after *TC Heartland* to raise them, while participating in judicially mediated settlement discussions and summary judgment briefing.³⁴ And the District of Delaware recently denied a defendant’s motion to transfer a patent case to the Southern District of New York because defendant’s voluntary waiver of a future venue defense in that district was irrelevant to whether the plaintiff could have brought its claims in that district when it filed the lawsuit.³⁵

Multiple courts have found that the patent venue statute does not require plaintiffs to establish a connection (or “nexus”) between a defendant’s regular and established place of business and the alleged acts of infringement.³⁶ In *Plexxikon Inc. v. Novartis Pharmaceuticals Corp.*, the Northern District of California held that “the plain language of the [patent venue] statute does not include a nexus requirement.”³⁷ Notably, the Federal Circuit has tacitly signaled its agreement with this statutory construction, noting the second prong of the patent venue statute “uses simply ‘and,’ not another phrase pointing to a tighter linkage” between the place of business and the alleged acts of infringement.³⁸ Further, even when the plaintiff is able to demonstrate such a “nexus,” courts have cautioned plaintiffs that showing a nexus between the acts of infringement and the district in which the plaintiffs have brought suit does not, without more, satisfy the venue statute’s second requirement that the defendant have a regular and established place of business in the district.³⁹

Before *TC Heartland*, defendants had a wide range of forum options for seeking declaratory judgment because, as the Federal Circuit explained in *VE Holdings*, “a declaratory judgment action alleging that a patent is invalid and not infringed . . . is governed by the general venue statutes, not by § 1400(b).”⁴⁰ It does not appear that *TC Heartland* impacted this part of *VE Holdings*. At least one court—in the Northern District of Illinois—has faced a motion to dismiss a declaratory judgment since *TC Heartland*.⁴¹ Although the court ultimately granted the motion, it did not cite *TC Heartland* or §1400(b) in its analysis, indicating that the general venue statute still governs declaratory judgment actions.⁴²

Open Issues Since *TC Heartland*

While district courts move toward consensus on *what* qualifies as a regular and established place of business, there remains a split on *when* the statute requires that the defendant have a regular and established place of business. One line of cases suggests that, for venue to be proper, the defendant must have a regular and established place of business in the district at the time the lawsuit is filed.⁴³ In a separate line of cases, the courts have held that venue may still be proper when a defendant does not have a regular and established place of business in the district at the time the lawsuit is filed if (1) the defendant had a regular and established place of business in the district at the time the claim accrued and (2) the plaintiff filed the lawsuit within a reasonable time thereafter.⁴⁴

The Supreme Court’s opinion in *TC Heartland* has also raised questions regarding litigation under the Hatch-Waxman Act, under which a pharmaceutical company can file an Abbreviated New Drug Application (ANDA) declaring its intent to manufacture and sell a generic drug and begin to take certain steps toward doing so.⁴⁵ The law allows patent owners to sue these companies when the patent owner believes the generic drug will infringe one of its patents. As the District of Delaware explained, “Congress’ choice of verb tense in the patent venue statute creates an almost impenetrable problem in the particular context of Hatch-Waxman patent litigation . . . because the temporal focus of the Hatch-Waxman infringement analysis is the future, not [] the past.”⁴⁶ In an effort to solve this problem, the court held that, for patent venue purposes, “acts of infringement” includes the submission of an ANDA, “other acts the applicant non-speculatively intends to take if its ANDA receives final FDA approval,” and “steps already taken indicating [the applicant’s] intent to market the ANDA product in the district.” The effect of the decision is that plaintiffs in Hatch-Waxman patent suits can argue that the defendant has committed “acts of infringement” in each and every judicial district, thereby subjecting the defendant to suit in any district in which it has a regular and established place of business.⁴⁷ The District of Delaware and Eastern District of Texas have also rejected the argument that a Hatch-Waxman lawsuit is not for patent infringement—and thus not subject to the patent venue statute: “By filing a Hatch-Waxman patent infringement action, Plaintiffs obtained the benefit of the automatic 30-month stay of FDA approval of [Defendant’s] ANDA, a benefit to which Plaintiffs would not have been entitled if their cause of action were anything other than a claim for patent infringement.”⁴⁸ However, the Northern District of Texas has used a different approach, holding that, to determine whether the defendant has committed acts of infringement, courts should “look to the forum where the ANDA submission itself was prepared and submitted.”⁴⁹

Relatedly, the Eastern District of Virginia recently faced a venue motion in patent infringement case involving a new type of plant seeds.⁵⁰ There was no dispute the defendant had a regular and established place of business in the district, but the parties disagreed about whether defendant’s depositing of seeds with the American Type Culture Collection facility (also located in the district) satisfied the “acts of infringement” element under the statute. The court found that venue was proper because depositing the accused seeds as a necessary means to monetize them constituted an infringing “use” under 35 U.S.C. § 271(a).

Under the doctrine of pendent venue, courts will allow a multclaim case to proceed in a jurisdiction where venue is proper to some, but not all, of the plaintiff’s claims.⁵¹ In order to exercise pen-

dent venue, the court must determine that all of the claims “arise out of a common nucleus of fact.” The Middle District of Florida applied pendent venue to hold that venue was proper for *all* of the plaintiff’s patent claims, even though the defendant argued that venue was only proper for *some* of the claims.⁵² But courts in other districts have been hesitant to use pendent venue to overcome the limitations of *TC Heartland*.⁵³ For instance, the District of Minnesota recently found that “there is no ‘pendent’ venue over a patent infringement claim unless there is ‘original’ venue over a separate patent-infringement claim under § 1400(b).”⁵⁴

Another issue district courts continue to grapple with is what to do about venue-related discovery. District courts are more likely to grant requests for venue-related discovery when the plaintiff provides some evidence that could reveal a regular and established place of business in the jurisdiction with further discovery.⁵⁵ Conversely, district courts are more likely to reject requests for venue-related discovery if the evidence does not appear to show that the required factors can be met.⁵⁶ ☺



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Endnotes

¹917 F.2d 1574 (Fed. Cir. 1990).

²28 U.S.C. § 1391(c).

³*TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017).

⁴28 U.S.C. § 1400(b).

⁵871 F.3d 1355 (Fed. Cir. 2017).

⁶875 F.3d 1091 (Fed. Cir. 2017).

⁷*In re Oath Holdings Inc.*, No. 2018-157, 2018 U.S. App. LEXIS 32250 (Fed. Cir. Nov. 14, 2018).

⁸889 F.3d 1349 (Fed. Cir. 2018).

⁹*HTC Corp. v. 3G*, 2019 U.S. LEXIS 1400 (U.S. Feb. 25, 2019); *In re HTC Corp.*, 2018 U.S. App. LEXIS 27271 (Fed. Cir. Sept. 6, 2018).

¹⁰890 F.3d 978 (Fed. Cir. 2018).

¹¹*Id.* at 895-96; *accord Frac Shack Inc. v. Alaska Fuel Dist.*, No. 1:18-660 (W.D. Tex. Jan. 29, 2019) (granting motion to transfer case to different division within the same district under § 1404(a)).

¹²890 F.3d 1008 (Fed. Cir. 2018).

¹³*In re Telebrands Corp., Bulbhead.com LLC*, No. 18-140 (Fed. Cir. Aug. 15, 2018).

¹⁴*Metuchen Pharms. LLC v. Empower Pharms. LLC*, No. 18-11406, 2018 U.S. Dist. LEXIS 187105 (D.N.J. Nov. 1, 2018).

¹⁵*See, e.g., Reflection LLC v. Spire Collective LLC*, No. 3:17-01603, 2018 U.S. Dist. LEXIS 2429 (S.D. Cal. Jan. 1, 2018); *SportPet Designs Inc. v. Cat1st Corp.*, No. 17-0554, 2018 U.S. Dist. LEXIS 34355 (E.D. Wis. Mar. 2, 2018).

¹⁶*See, e.g., Brookins v. Caterpillar Inc.*, No. 3:18-129 (D.N.D. June 26, 2019); *Edgewell Personal Care Brands v. Munchkin Inc.*,

No. 3:16-00094 (VLB) (D. Conn. Mar. 29, 2018); *Susan McKnight v. United Indus. Co.*, No. 2:16-2534 (W.D. Tenn. Feb. 27, 2018); *Ascion LLC v. Tempur Sealy Int’l Inc.*, No. 15-12067, 2017 U.S. Dist. LEXIS 169279 (E.D. Mich. Oct. 13, 2017); *JPW Indus. Inc. v. Olympia Tools Int’l Inc.*, No. 3:16-03153, 2017 U.S. Dist. LEXIS 167312 (M.D. Tenn. Oct. 10, 2017).

¹⁷*Sing. Asahi Chem. & Solder Indus. Pte Ltd. v. Apple Inc.*, 1:18-1662, 2018 U.S. Dist. LEXIS 196031 (N.D. Ohio Nov. 16, 2018) (Apple operated four retail stores within the district).

¹⁸*See, e.g., Uniloc USA Inc. v. UbiSoft Inc.*, No. 2:16-00781 (E.D. Tex. Mar. 29, 2018); *BillingNetwork Patent Inc. v. Modernizing Medicine Inc.*, No. 17 5636 (N.D. Ill. Nov. 6, 2017); *Regents of the Univ. of Minn. v. Gilead*, No. 16-2915, 2017 U.S. Dist. LEXIS 174093 (D. Minn. Oct. 20, 2017); *Niazi Lic. Corp. v. St. Jude Med. S.C. Inc.*, No. 17-183, 2017 U.S. Dist. LEXIS 183849 (W.D. Wis. Nov. 7, 2017); *Uniloc v. Nutanix*, No. 2:17-00174 (E.D. Tex. Dec. 6, 2017); *Automated Packaging Sys. v. Free-Flow Packaging Int’l Inc.*, No. 5:14-2022, 2018 U.S. Dist. LEXIS 5910 (N.D. Ohio Jan. 12, 2018).

¹⁹*Board of Regents, Univ. of Texas v. Boston Scientific Corp.*, No. A-17-1103-LY (W.D. Tex. Mar. 12, 2018); *see also Zaxcom v. Lectrosonics*, No. 1:17-3408 (E.D.N.Y. Feb. 1, 2019) (employee’s home office did not constitute regular and established place of business of defendant because it did not own/lease/control employee’s home office nor condition his employment on continued residence); *Khan v. Hemisphere*, 1:18-5368 (N.D. Ill. Jan. 23, 2019) (defendant did not have regular and established place of business based on employees’ residences because it did not contribute to their housing).

²⁰*RegenLab USA LLC v. Estar Techs. Ltd.*, 335 F. Supp. 3d 526, 550-51 (S.D.N.Y. 2018).

²¹*CUPP Cybersecurity LLC v. Symantec Corp.*, No. 3:18-1554, 2018 U.S. Dist. LEXIS 220880 (N.D. Tex. Jan. 16, 2019) (granting motion to transfer venue because defendant’s servers in third-party data center did not constitute regular and established place of business); *Treehouse Avatar v. Valve Corp.*, No. 15-427, 2017 U.S. Dist. LEXIS 191056, at *10-11 (D. Del. Nov. 20, 2017) (location of online video game provider’s customers’ servers within the district was “too remote to establish the physical presence required”).

²²*SEVEN Networks LLC v. Google LLC*, No. 2-17-00442 (E.D. Tex. July 19, 2018).

²³*In re Google LLC*, No. 18-152, 2018 U.S. App. LEXIS 31000 (Fed. Cir. Oct. 29, 2018), *reh’g denied*, 2019 U.S. App. LEXIS 3525 (Fed. Cir. Feb. 5, 2019).

²⁴*Voip-Pal.com Inc. v. Twitter Inc.*, 2-16-02338 (D. Nev. July 23, 2018).

²⁵*Weatherford Tech. Holdings LLC v. Tesco Corp.*, No. 2:17-456, 2018 U.S. Dist. LEXIS 183553 (E.D. Tex. Oct. 26, 2018).

²⁶*Interactive ToyBox LLC v. Walt Disney Co.*, No. 1:17-1137, 2018 U.S. Dist. LEXIS 182304 (W.D. Tex. Oct. 24, 2018); *Xodus Med. Inc. v. Allen Med. Sys. Inc.*, No. 2:17-00581, 2018 U.S. Dist. LEXIS 85889 (W.D. Pa. May 22, 2018); *Tower Labs. v. Lush Cosmetics Ltd.*, 285 F. Supp. 3d 321 (D.D.C. 2018); *Palomar Techs. v. MRSI Sys.*, No. 15-1484 (S.D. Cal. Feb. 5, 2018); *Soverain IP LLC v. AT&T Inc.*, No. 2:17-00293, 2017 U.S. Dist. LEXIS 207551 (E.D. Tex. Dec. 18, 2017).

²⁷*Deere & Co. v. AGCO Corp.*, Nos. 1:18-827 & -828, 2019 U.S. Dist. LEXIS 4326, at *6 (D. Del. Jan. 9, 2019) (denying defendants’ motion to transfer venue under § 1404(a)).

- ²⁸*XR Commc'ns LLC v. Ruckus Wireless Inc.*, No. 17-00596 (C.D. Cal. Mar. 30, 2018); *Post Consumer Brands LLC v. General Mills Inc.*, No. 4:17-2471, 2017 U.S. Dist. LEXIS 178307 (E.D. Mo. Oct. 27, 2017); *West View Research LLC v. BMW of N. Am. Inc.*, No. 16-2590 (S.D. Cal. Feb. 5, 2018).
- ²⁹*Bristol-Meyers Squibb Co. v. Aurobindo Pharma USA Inc.*, Nos. 17-374 & 17-379, 2018 U.S. Dist. LEXIS 179154, at *8-9 (D. Del. Oct. 18, 2018) (emphasis in original).
- ³⁰*Realtime Data LLC v. Hewlett Packard Enter. Co.*, Nos. 6:18-383 & 6:18-384, 2018 U.S. Dist. LEXIS 163581 (E.D. Tex. Sept. 24, 2018); *accord Chia-Ling Huang v. Lowes Home Ctr. LLC*, No. 2:18-10545 (C.D. Cal. May 1, 2019).
- ³¹*Xodus Med. Inc. v. Prime Med. LLC*, Nos. 13-01372, 16-01704 & 17-1123, 2018 U.S. Dist. LEXIS 156898 (W.D. Pa. Sept. 14, 2018); *see also Blackbird Tech LLC v. TADD LLC*, No. 1:16-970 (D. Del. May 10, 2019).
- ³²*Red Carpet Studios v. Midwest Trading Grp. Inc.*, No. 1:12-501, 2018 U.S. Dist. LEXIS 153789 (S.D. Ohio Sept. 10, 2018).
- ³³*GE Healthcare Bio-Sciences AB v. Bio-Rad Labs. Inc.*, No. 1:18-1899 (D. Del. May 6, 2019).
- ³⁴*BASF Plant Sci., LP v. Commonwealth Sci. & Indus. Research Org.*, No. 2:17-503, 2019 U.S. Dist. LEXIS 77521, at *15 (E.D. Va. May 7, 2019); *Seven Networks LLC v. Google LLC*, 315 F. Supp. 3d 933 (E.D. Tex. 2018); *Bristol-Meyers Squibb Co. v. Mylan Pharms. Inc.*, No. 17-379, 2017 U.S. Dist. LEXIS 146372 (D. Del. Sep. 11, 2017); *Plexxikon Inc. v. Novartis Pharm. Corp.*, No. 17-04405, 2017 U.S. Dist. LEXIS 201984 (N.D. Cal. Dec. 7, 2017).
- ³⁵*Plexxikon*, No. 17-04405.
- ³⁶*Google*, 2018 U.S. App. LEXIS 31000, at *9.
- ³⁷*See Uniloc USA Inc. v. Nutanix Inc.*, No. 17-00174 (E.D. Tex. Dec. 6, 2017).
- ³⁸917 F.2d at 1583.
- ³⁹*Shure Inc. v. Clearone Inc.*, No. 17-3078 (N.D. Ill. Mar. 16, 2018).
- ⁴⁰*Id.*; *see also Genesis Attachments LLC v. Detroit Edge Tool Co.*, No. 3:16-402 (W.D. Wis. Apr. 30, 2019).
- ⁴¹*See, e.g., Personal Audio LLC v. Google Inc.*, No. 1:15-350, 2017 WL 5988868, at *7 (E.D. Tex. Dec. 1, 2017); *Infinity Comput. Prods. Inc. v. OKI Data Ams. Inc.*, Nos. 12-6797, 12-6799, 12-6800 & 12-6806, 2018 WL 1035793, at *9-10 (E.D. Pa. Feb. 23, 2018).
- ⁴²*See, e.g., ParkerVision Inc. v. Apple Inc.*, No. 3:15-04177 (M.D. Fla. Mar. 8, 2018); *but see Level Sleep LLC v. Dormeo N.A. LLC*, No. 2:18-120, 2019 U.S. Dist. LEXIS 17867, at *8 (E.D. Tex. Feb. 1, 2019).
- ⁴³*See generally* 21 U.S.C. § 355(j).
- ⁴⁴*Bristol-Myers Squibb Co.*, 2017 U.S. Dist. LEXIS 146372, at *15.
- ⁴⁵*See, e.g., Javelin Pharm. Inc. v. Mylan Labs. Ltd.*, No. 16-224, 2017 WL 5953296, at *2 (D. Del. Dec. 1, 2017); *Mallinckrodt IP v. B. Braun Med. Inc.*, No. 17-365, 2017 WL 6383610, at *2 (D. Del. Dec. 14, 2017).
- ⁴⁶*Aurobindo Pharma*, 2018 U.S. Dist. LEXIS 179154, at *16-17; *accord Novartis Pharms. Corp. v. Accord Healthcare Inc.*, No. 1:18-1043 (D. Del. June 17, 2019); *Apicore US LLC v. Beloteca Inc.*, No. 2:19-77 (E.D. Tex. Apr. 18, 2019).
- ⁴⁷*Galderman Labs., L.P. v. Teva Pharm. USA Inc.*, 290 F. Supp. 3d 599, 608 (N.D. Tex. 2017).
- ⁴⁸*BASF Plant Sci.*, 2019 U.S. Dist. LEXIS 77521.
- ⁴⁹*See Beattie v. United States*, 756 F.2d 91 (D.C. Cir. 1984).
- ⁵⁰*Omega Patents LLC v. CalAmp Corp.*, No. 6:13-1950-Orl-40DCI (M.D. Fla. Sept. 22, 2017).
- ⁵¹*Olivia Garden Inc. v. Stance Beauty Labs LLC et al.*, No. 17-05778 (N.D. Cal. July 12, 2018); *see also Jenny Yoo Collection Inc. v. Watters Designs Inc.*, No. 1:16-2205 (S.D.N.Y. Oct. 20, 2017); *Nat'l Prod. Inc. v. Arkon Res. Inc.*, No. C15-1984, 2017 WL 4403328 (W.D. Wash. Oct. 2, 2017); *Cal. Expanded Metal Prods. Co. v. Klein*, No. 18-00242 (C.D. Cal. Apr. 30, 2018).
- ⁵²*ARP Wave LLC v. Salpeter*, No. 0:18-2046, 2019 U.S. Dist. LEXIS 15577, at *14 (D. Minn. Jan. 31, 2019).
- ⁵³*See, e.g., Mallinckrodt IP v. B. Braun Med. Inc.*, No. 17-365-LPS, No. 17-660-LPS2017, U.S. Dist. LEXIS 205593 (D. Del. Dec. 14, 2017); *see also Traxcell Techs. LLC v. ALE USA Inc.*, No. 2:17-00041 (E.D. Tex. Nov. 13, 2017); *Seven Networks LLC v. Google LLC*, No. 2:17-00442 (E.D. Tex. Dec. 22, 2017); *Uni-Systems LLC v. U.S. Tennis Ass'n*, No. 17-147, 2018 U.S. Dist. LEXIS 172638 (E.D.N.Y. Oct. 5, 2018).
- ⁵⁴*See, e.g., Green Fitness Equip. Co. LLC v. Precor Inc.*, No. 18-00820, 2018 U.S. Dist. LEXIS 109479 (N.D. Cal. June 29, 2018); *Niazi v. St. Jude Med. S.C. Inc.*, No. 17-00183 (W.D. Wis. Nov. 7, 2017); *Patent Holder LLC v. Lone Wolf Distrib. Inc.*, No. 17-23060 (S.D. Fl. Oct. 31, 2017); *Symbology Innovations LLC v. Lego Sys. Inc.*, 158 F. Supp. 3d 916 (E.D. Va. 2017).