THE
NATIONAL LAW REVIEW

Lower Courts Continue to Grapple with Venue in the Wake of In re Micron and In re Cray

Tuesday, December 19, 2017

Further to our ongoing coverage of the post-*TC Heartland* patent litigation landscape, a pair of recent and interesting cases from Texas and Delaware further evolved this important venue-related jurisprudence.

On November 22, 2017, in *Intellectual Ventures II LLC v. FedEx Corp. et al.*, Case Number 2:16-cv-00980 (E.D. TX Nov. 22, 2017), Judge Rodney Gilstrap denied defendants' motion to dismiss for improper venue due to their conduct in view of the Federal Circuit's recent decision in *In re Micron*, which determined that *TC Heartland* was a change in the law, potentially reviving venue-based transfer motions previously waived. (We previously covered the *In re Micron* case here.) Defendants sought to dismiss the case for improper venue a few days after the denial of their IPR petitions. After they participated actively in litigation for months, the court did not take kindly to defendants' motion. Citing *In re Micron*, the court reasoned that "defendants who take a 'tactical wait-and-see' approach in objecting to venue present 'an obvious starting point for a claim of forfeiture.'" Further, the court noted that prior to the *TC Heartland* decision, defendants sought to transfer the case to the Western District of Tennessee under § 1404 rather than § 1406. Judge Gilstrap noted that this reliance on § 1404 was important because that statute "is premised on venue being proper in the transferor court whereas a motion under § 1406 reflects an objection to the current venue as being proper." Accordingly, the court concluded that defendants' waived their venue objection based on their own conduct, the judicial resources already expended, and the prejudice to plaintiff in reopening a dormant venue dispute "simply because it has become convenient for Defendants to litigate the issue now."

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On November 28, 2017, in *Bristol-Myers Squibb Company et al v. Aurobindo Pharma, USA Inc.*, Case No. 1-17-cv-00374 (DED November 28, 2017), Chief Judge Leonard P. Stark of the District of Delaware granted (in part) plaintiffs' motion for additional venue discovery in light of *In re Cray*, which we previously covered here. The court denied defendant's request that the court reject the plaintiffs' request for any venue discovery. The defendant argued that plaintiffs did not offer a legal basis for requesting discovery on the defendant's submissions to the Delaware Secretary of State. Plaintiffs argued that these submissions would likely include forms with addresses and property tax records, which would help inform the venue analysis, including whether defendant exercised control over a physical place of business in Delaware.

Chief Judge Stark concluded: "I don't believe that plaintiffs are engaged in a fishing expedition . . . . And I don't think that the decision in *Cray* makes the theories of venue being articulated by plaintiffs frivolous, and therefore, I don't believe that some targeted limited amount of discovery would be futile." He went on to note that *Cray* does not address whether a physical place of a corporate affiliate or subsidiary or alter ego or agent can, for venue purposes, be attributed to the named defendant in a case. The court then granted plaintiff's motion for additional venue discovery and ordered defendant to serve supplemental declarations addressing venue-related topics.