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

ALACRITECH, INC., Plaintiff, v. CENTURYLINK, INC., *et al.*, Defendants.	Case No. 2:16-cv-693-RSW-RSP LEAD CASE Jury Trial Demanded
ALACRITECH, INC., Plaintiff, v. DELL INC., Defendant.	Case No. 2:16-cv-695-RWS-RSP Jury Trial Demanded

DEFENDANT DELL INC.'S MOTION TO DISMISS FOR IMPROPER VENUE

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I. INTRODUCTION AND SUMMARY OF ARGUMENT

The Supreme Court recently issued a decision that clarified the standard for venue in patent infringement cases. *TC Heartland LLC v. Kraft Foods Group Brands LLC*, -- S. Ct. --, No. 16-341, 2017 WL 2216934 (May 22, 2017). In that decision, the Court held that venue is only proper where a defendant is incorporated or where it has committed acts of infringement and has a regular and established place of business. *Id.* Plaintiff's Complaint contains no allegations that meet this standard. Because Dell Inc. is not incorporated in Texas and does not have a regular and established place of business in this District, the Court should dismiss this case for improper venue or, at the very least, transfer this case to the Northern District of California in accordance with Defendants' motion to transfer venue (Case No. 2:16-cv-693, D.E. 59, 70, 95-1, 225).

II. NATURE AND STATE OF PROCEEDINGS

Alacritech filed its original Complaint in this case on June 30, 2016 (Case No. 2:16-cv-695, D.E. 1), and Dell filed its original Answer on August 25 and an amended Answer on February 28, 2017 (Case No. 2:16-cv-693, D.E. 27, 139). In its amended Answer, Dell alleged that venue is improper in this District, given the Supreme Court's recent grant of *certiorari* in the *TC Heartland* case (Case No. 2:16-cv-693, D.E. 139). On September 29, 2016, Dell, along with the defendants in related cases, filed a motion to transfer this case to the Northern District of California (Case No. 2:16-cv-693, D.E. 59). Alacritech served its initial patent disclosures on September 9, 2016, and Dell served its Invalidity Contentions on November 11. Fact discovery and the claim construction process are ongoing. Fact discovery is set to close on October 13, 2017, and trial is currently set to begin on April 2, 2018 (Case No. 2:16-cv-693, D.E. 264).

III. PLEADED FACTS

As Plaintiff pleaded, Defendant Dell is incorporated in Delaware and headquartered in the Western District of Texas, in Round Rock (Case No. 2:16-cv-695, D.E. 1). As discussed

previously in a declaration by Bryan Kelly supporting Dell's motion to transfer venue, Dell sells computers, monitors, servers, and other devices that Dell sources and assembles from various third-party suppliers (Case No. 2:16-cv-693, D.E. 59-20 ¶ 4). Alacritech's infringement allegations against Dell are directed to functionality in the network interfaces/adapters included in various Dell products (*id.* ¶¶ 5, 8). Dell does not design or manufacture those components but instead buys them from third-party suppliers such as Intel, Broadcom, Cavium, and Mellanox (*id.* ¶ 7). Dell does not have any regular and established place of business, including retail stores, manufacturing plants, or other facilities, in the Eastern District of Texas (*see id.* ¶ 3; Case No. 2:16-cv-695, D.E. 1).[1]

IV. LEGAL STANDARD

In patent cases, venue is only proper "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." 28 U.S.C. § 1400(b). The Supreme Court recently held that the term "resides" in § 1400(b) "refers only to the State of incorporation." *TC Heartland LLC v. Kraft Foods Group Brands LLC*, -- S. Ct. --, No. 16-341, 2017 WL 2216934, at *1 (May 22, 2017).[2] The Federal

[1] Although one of Dell's former subsidiaries, Dell Services, was located in the Eastern District of Texas, that subsidiary is not a named defendant and is not identified by name in Alacritech's infringement contentions, and Dell sold the subsidiary in 2016 (*see* Case No. 2:16-cv-695, D.E. 1; Alacritech's Patent Initial Disclosures for Dell Inc. (attached as Ex. 1)). Moreover, for venue purposes, "[i]t is well established that a subsidiary corporation which is incorporated as a separate entity from its parent corporation is considered to have its own principal place of business." *Burnside v. Sanders Assocs., Inc.*, 507 F. Supp. 165, 166 (N.D. Tex. 1980) (internal quotations omitted); *see also L.D. Schreiber Cheese Co. v. Clearfield Co.*, 495 F. Supp. 313, 318 (W.D. Pa.) ("It is clear under 28 U.S.C. § 1400(b) that the mere existence of a wholly-owned subsidiary in a judicial district does not, by itself, suffice to establish venue over the subsidiary's parent corporation.").

[2] Although the *TC Heartland* decision issued after Alacritech served its Complaint in this action, its holding must be applied to this case, as "the Supreme Court's interpretation of federal civil law 'must be given full retroactive effect in all cases still open on direct review and as to all events,

Circuit has held that the appropriate inquiry for determining whether a corporate defendant has a regular and established place of business in a district "is whether the corporate defendant does its business in that district through a permanent and continuous presence there." *In re Cordis Corp.*, 769 F.2d 733, 734-37 (Fed. Cir. 1985).

If a lawsuit is brought in an improper venue, a district court "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." 28 U.S.C. § 1406(a). Once a defendant raises a motion to dismiss for improper venue, the burden of sustaining venue lies with the plaintiff. *See Langdon v. Cbeyond Commc'n, LLC*, 282 F. Supp. 2d 504, 508 (E.D. Tex. 2004).

V. ARGUMENT

A. It Is Proper for the Court to Consider this Issue at this Stage of the Litigation

Generally, a motion to dismiss for improper venue must be made before a defendant files its responsive pleading, or the defense is waived. *See* Fed. R. Civ. P. 12(b)(3), 12(h)(1). However, "a party cannot be deemed to have waived objections or defenses which were not known to be available at the time they could first have been made, especially when it does raise the objections as soon as their cognizability is made apparent." *Holzsager v. Valley Hospital*, 646 F.2d 792, 796 (2d Cir. 1981); *see also Holland v. Big River Minerals Corp.*, 181 F.3d 597, 605 (4th Cir. 1999) ("[A]n exception to the general rule of waiver . . . exists . . . when there has been an intervening change in the law recognizing an issue that was not previously available."). "[T]he mere failure to interpose [] a defense prior to the announcement of a decision which might support it cannot

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regardless of whether such events predate or postdate the Supreme Court's announcement of the rule.'" *NeuroRepair, Inc. v. The Nath Law Grp.*, 781 F.3d 1340, 1344 (Fed. Cir. 2015) (quoting *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 97 (1993)).

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