EXHIBIT A

United States Court of Appeals for the Federal Circuit

In re: ZTE (USA) INC.,
Petitioner

2018-113

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas in No. 4:17-cv-00620-ALM-KPJ, Judge Amos L. Mazzant, III.

CHARLES M. MCMAHON, McDermott Will & Emery LLP, Chicago, IL, for petitioner. Also represented by BRIAN ANDREW JONES; MICHAEL S. NADEL, JAY REIZISS, Washington, DC.

ALISON AUBREY RICHARDS, Global IP Law Group, Chicago, IL, for respondent American GNC Corporation. Also represented by DAVID P. BERTEN, ALEXANDER J. DEBSKI.

ON PETITION

Before REYNA, LINN, and HUGHES, *Circuit Judges.*

LINN, *Circuit Judge.*

O R D E R

ZTE (USA) Inc. ("ZTE USA") petitions for a writ of mandamus directing the United States District Court for the Eastern District of Texas to dismiss this case for improper venue under 28 U.S.C. § 1406(a). *See Am. GNC Corp. v. ZTE Corp.*, No. 4:17-cv-00620-ALM-KPJ (E.D. Tex. Nov. 7, 2017) ("*Denial Order*"). American GNC Corporation ("American GNC") opposes. Because the district court incorrectly assigned the burden of proof on venue and failed to fully consider the factors relevant to the question of whether the call center in question was that of ZTE USA, we grant the petition to the extent of vacating the order denying the motion to dismiss and remanding the motion for reconsideration consistent with this order.

I

In February 2017, American GNC filed a complaint against ZTE USA and ZTE (TX) Inc.[1] in the Marshall Division of the Eastern District of Texas alleging infringement of its patents. ZTE USA filed a motion to dismiss for improper venue under 28 U.S.C. § 1406 and § 1400(b) in April 2017. While that motion was pending, ZTE USA and ZTE (TX) Inc.[2] sought transfer to the United States District Court for the Northern District of Texas or the Northern District of California under 28 U.S.C. § 1404(a).

The magistrate judge concluded that venue was proper in the Eastern District of Texas for purposes of the § 1404(a) convenience analysis but did not rule on the motion to dismiss for improper venue under § 1406(a). In September 2017, the case was transferred from the Eastern District of Texas's Marshall Division to its

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[1] ZTE Corporation was also named as a defendant but was dismissed without prejudice in July 2017.

[2] ZTE (TX) Inc. did not object to venue in this case.

Sherman Division, and assigned to a new district court judge and a new magistrate judge. After supplemental briefing on the issue of improper venue, the magistrate judge denied ZTE USA's motion to dismiss for improper venue, finding that ZTE USA failed to show it did not have a regular and established place of business in the Eastern District of Texas as required under the second prong of 28 U.S.C. § 1400(b). *See Am. GNC Corp. v. ZTE Corp.,* No. 4:17-cv-00620, 2017 WL 5163605 (E.D. Tex. Oct. 4, 2017) ("*Magistrate Report*").

The magistrate judge noted that "courts are not uniform in their views as to which party bears the burden of proof with respect to venue," but, citing Fifth Circuit law, placed the burden on the objecting defendant to show improper venue. *Id.* at *2.

The magistrate judge determined that ZTE USA had contracted with a call center in Plano, Texas, operated by First Contact LLC (a subsidiary of iQor US Inc.), which constituted a physical place, and that ZTE USA, through the call center employees dedicated to ZTE USA calls, transacted business there. *Id.* at *3–4. The magistrate judge explained that "ZTE USA has failed to meet its burden to show it does not have a regular and established place of business in the District." *Id.* at *3.

In its objections to the magistrate judge's report, ZTE USA objected to the finding that the call center in Plano, Texas, established venue, arguing that it is inconsistent with *In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017). ZTE USA also argued that the magistrate judge erred by placing the burden of proof on ZTE USA to establish that venue was not proper. The district court judge disagreed with both objections and denied ZTE USA's motion to dismiss for improper venue. ZTE USA's petition for mandamus followed. *Am. GNC Corp. v. ZTE Corp.*, No. 4:17-cv-00620, 2017 WL 5157700 (E.D. Tex. Nov. 7, 2017).

II

A

A party seeking a writ of mandamus bears the heavy burden of demonstrating to the court that it has no "adequate alternative" means to obtain the desired relief, *Mallard v. U.S. Dist. Court for the S. Dist. of Iowa*, 490 U.S. 296, 309 (1989), and that "the right to issuance of the writ is clear and indisputable," *Bankers Life & Cas. Co. v. Holland*, 346 U.S. 379, 384 (1953) (internal quotation marks omitted). Further, even if these two prerequisites have been met, a court issuing a writ must, in its discretion, "be satisfied that the writ is appropriate under the circumstances." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004). Moreover, mandamus review of an improper venue decision under § 1406(a) is rarely granted in the absence of exceptional circumstances. *Banker's Life*, 346 U.S. at 382–84; *Cheney*, 542 U.S. at 380; *In re Cray, Inc.*, 871 F.3d at 1358 ("Mandamus is reserved for exceptional circumstances."); *see also Comfort Equip. Co v. Steckler*, 212 F.2d 371, 374–75 (7th Cir. 1954) (denying mandamus review of a denied improper-venue motion); *Gulf Research & Dev. Co. v. Leahy*, 193 F.2d 302, 304–06 (3d Cir. 1951) (similar).

This court found exceptional circumstances to exist in § 1406(a) mandamus petitions in *Cray*, 871 F.3d 1355 and *In re Micron Technology, Inc.*, 875 F.3d 1091 (Fed. Cir. 2017), because those decisions were necessary to address the effect of the Supreme Court's decision in *TC Heartland*, which was yet another § 1406(a) mandamus case. 137 S. Ct. 1514, 1517 (2017), *rev'g and remanding In re TC Heartland, LLC.*, 821 F.3d 1338 (Fed. Cir. 2016).

Moreover, the Supreme Court and this court have confirmed that mandamus relief may be appropriate in certain circumstances to decide "basic" and "undecided" questions, *Schlagenhauf v. Holder*, 379 U.S. 104, 110 (1964), and "to further supervisory or instructional goals

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