IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

KONINKLIJKE PHILIPS N.V. and U.S. PHILIPS CORPORATION, Plaintiffs/Intervenor-Defendants/Counterclaim Plaintiffs in Intervention, v. ASUSTeK COMPUTER INC. and ASUS COMPUTER INTERNATIONAL, Defendants, and MICROSOFT CORPORATION, Intervenor-Plaintiff/ Counterclaim Defendant in Intervention, and MICROSOFT MOBILE INC., Counterclaim Defendant in Intervention.	)	C.A. No. 15-1125 (GMS)
KONINKLIJKE PHILIPS N.V. and U.S. PHILIPS CORPORATION, Plaintiffs, v. HTC CORP. and HTC AMERICA, Defendants.	)	C.A. No. 15-1126 (GMS)

KONINKLIJKE PHILIPS N.V. and U.S. PHILIPS CORPORATION, Plaintiffs, v. SOUTHERN TELECOM, INC., Defendant.	C.A. No. 15-1128 (GMS)
KONINKLIJKE PHILIPS N.V. and U.S. PHILIPS CORPORATION, Plaintiffs/Intervenor-Defendants/Counterclaim Plaintiffs in Intervention, v. YIFANG USA, INC. D/B/A E-FUN, INC., Defendants, and MICROSOFT CORPORATION, Intervenor-Plaintiff/ Counterclaim Defendant in Intervention, and MICROSOFT MOBILE INC., Counterclaim Defendant in Intervention.	C.A. No. 15-1131 (GMS)

KONINKLIJKE PHILIPS N.V. and U.S. PHILIPS CORPORATION, Plaintiffs/Intervenor-Defendants/Counterclaim Plaintiffs in Intervention, v. ACER INC. and ACER AMERICA CORPORATION, Defendants, and MICROSOFT CORPORATION, Intervenor-Plaintiff/ Counterclaim Defendant in Intervention, and MICROSOFT MOBILE INC., Counterclaim Defendant in Intervention.	)	C.A. No. 15-1170 (GMS)

REPLY BRIEF IN SUPPORT OF
DEFENDANTS' JOINT MOTION TO TRANSFER

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INTRODUCTION

There is no question that venue is improper in this District. Defendants' sworn declarations establish to a certainty that none of them is incorporated or has a regular and established place of business here, and Philips offers no contrary evidence. Although Philips seeks "limited, focused discovery" if the Court rejects its waiver argument, it gives no reason to doubt Defendants' declarations—it simply ignores them—and it fails to say what other relevant facts discovery might possibly establish. No amount of discovery can change the basic reality that none of the Defendants has an office, store, warehouse, or even an employee in this District. Because venue is improper, the cases must be transferred.

Philips' only response is to argue that Defendants waived their objection to venue in this District by (1) withdrawing their venue challenge after the Federal Circuit's decision in *TC Heartland* and (2) seeking "affirmative relief" from the Court afterward. Both arguments fail. Defendants preserved their venue challenge in their answers, as Rule 12 permitted them to do, and they did not waive the argument under Rules 12(g)(2) and 12(h)(1). Philips' cases on "affirmative relief" do not apply, as Defendants sought only defensive relief against Philips' claims of patent infringement. And Philips' arguments about "principles of fairness" are unavailing. At bottom, Philips' position is that Defendants should have burdened the Court by maintaining their original venue motion in spite of the Federal Circuit's decisive rejection of their arguments. The law does not require such quixotic persistence. Defendants withdrew the motion out of respect for the Court's time and docket, as any responsible litigant would have done. And at no point did Defendants suggest, or could Philips reasonably have thought, that they did not intend to advance their venue defense if the Supreme Court overturned the Federal Circuit's decision in *TC Heartland*.

Because there is no waiver here, Defendants' motion should be granted and the cases transferred. The destination is Philips' choice. As Defendants explained in their Opening Brief, all Defendants will consent to venue and jurisdiction in the Northern District of California to keep the cases together for convenience. Should Philips refuse, however, under 28 U.S.C. § 1406(a) the cases must be transferred to districts in which they could have been brought.

ARGUMENT

I. PHILIPS HAS NO RESPONSE ON THE MERITS

Defendants' Opening Brief ("Br.") included sworn declarations proving that no Defendant has an office, a warehouse, a retail location, or even a single employee in Delaware. D.I. 195, at 5;[1] D.I. 196, 197, 198, 199, 200. Philips' opposition brief includes no evidence to the contrary. Although Philips requests "limited, focused discovery" if the Court rejects its waiver argument, Defs.' Answering Br. ("Opp. Br."), D.I. 221, at 12, any such discovery would be futile. There is no reason to doubt the declarants' sworn testimony, and Philips fails to say how discovery would allow it to establish venue in spite of the declarants' undisputed testimony. Discovery cannot change the unchallenged facts. Defendants lack anything resembling "a permanent and continuous presence" in the District, and venue is therefore improper. *See* Br. 5 (citing 28 U.S.C. § 1400(b); *In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985)).

II. DEFENDANTS DID NOT WAIVE VENUE

A. Defendants Cannot Have Waived Venue Because The Defense Was Not "Available" Until The Supreme Court's Decision In *TC Heartland*

It is well settled that a defendant cannot waive a defense that is not yet available. Fed. R. Civ. P. 12(g)(2) (describing waiver of "a defense or objection *that was available* to the party" (emphasis added)); *see* 5C Charles A. Wright & Arthur R. Miller, *Federal Practice & Procedure*

[1] All docket citations are to C.A. 15-1170 unless otherwise noted.

§ 1388 (4th ed.). It is equally well settled that a defense is not "available" if it only arises through a change in the law, such as a new decision by the Supreme Court. *Chassen v. Fidelity Nat'l Fin., Inc.*, 836 F.3d 291, 293 (3d Cir. 2016); *Holzsager v. Valley Hosp.*, 646 F.2d 792, 796 (2d Cir. 1981) (citing *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 143 (1967)).

The Supreme Court's decision in *TC Heartland* represents a sea change in the law. Prior to that, almost thirty years of Federal Circuit precedent held that venue was proper in any district in which the defendant was subject to personal jurisdiction. *See In re TC Heartland LLC*, 821 F.3d 1338 (Fed. Cir. 2016); *VE Holding Corp. v. Johnson Gas Appliance Co.*, 917 F.2d 1574 (Fed. Cir. 1990). Every major treatise recognized the Federal Circuit's interpretation as controlling. Ex. A, 14D Wright & Miller, *supra*, § 3823 (4th ed. April 2017); Ex. B, 26 *Federal Procedure, L. Ed.* § 60:1019 (March 2017); Ex. C, 8 *Chisum on Patents* § 21:02[2]; Ex. D, 5 *Matthews Annotated Patent Digest* § 36:153 (May 2017). Congressional reports recognized that interpretation, too. *See In re TC Heartland LLC*, 821 F.3d at 1343 (citing sources). And lower courts consistently applied that interpretation in practice. *E.g.*, *Script Sec. Sols. LLC v. Amazon.com, Inc.*, 170 F. Supp. 3d 928, 930-35 (E.D. Tex. 2016) (Bryson, J., sitting by designation); *Kabb, Inc. v. Sutera*, 1992 WL 245546, at *1 (E.D. La. Sept. 4, 1992). When the Supreme Court issued its decision in May 2017, reversing the Federal Circuit, the requirements for venue changed instantaneously.

Nonetheless, Philips cites *Cobalt Boats, LLC v. Sea Ray Boats, Inc.*, No. 15-cv-21, 2017 WL 2556679, at *3 (E.D. Va. June 7, 2017), and *Elbit Systems Land and C4I Ltd. v. Hughes Network Systems, LLC*, No. 15-cv-37, 2017 WL 2651618, at *19-20 (E.D. Tex. June 20, 2017), for the proposition that *TC Heartland* did not change the law because the Supreme Court merely relied on earlier precedent for its holding. Opp. Br. 9; Notice of Suppl. Auth., D.I. 225. The

courts in *Cobalt Boats* and *Elbit Systems* reasoned that, because the Federal Circuit cannot overturn Supreme Court precedent, the Court's decision in *Fourco Glass Co. v. Transmirra Products Corp.*, 353 U.S. 222 (1957), "has continued to be binding law since it was decided in 1957, and thus, it has been available to every defendant since 1957." *Cobalt Boats*, 2017 WL 2556679, at *3; *accord Elbit Sys. Land*, 2017 WL 2651618, at *19-20.

Respectfully, those cases were wrongly decided. The Federal Circuit's decision in *VE Holding* held that amendments to 28 U.S.C. § 1391(c) in 1988 changed the law, and that *Fourco* therefore no longer applied. 917 F.2d at 1575. Although the Supreme Court ultimately disagreed and held that *Fourco* controlled, in the meantime the district courts were bound to follow the Federal Circuit's clear precedent interpreting *Fourco* not to apply. Indeed, district courts continued to follow the Federal Circuit's binding precedent even after the Supreme Court granted certiorari in *TC Heartland*. *E.g.*, Ex. E, *Fireking Security Prods., LLC v. Am. Security Prods. Co.*, No. 16-cv-233 (S.D. Ind. Apr. 24, 2017). The courts in *Cobalt Boats* and *Elbit Systems* ignored the reality that the Federal Circuit's interpretation of § 1400(b) was settled law everywhere except perhaps the chambers of the Supreme Court. Treatises, lower courts, and Congress all agreed that the Federal Circuit's interpretation was the prevailing law. Thus, it strains credulity to say that the *Fourco* interpretation was available "to every defendant since 1957" despite decades of Federal Circuit precedent rejecting it. Parties cannot be expected to press defenses in that circumstance. The doctrine of waiver requires "conscientiousness, not clairvoyance." *Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 92 (2d Cir. 2009).

Other courts have recognized that defenses are not waived under Rule 12 when the Supreme Court overturns or abrogates circuit precedent, even if the Court does not couch its decision in terms of a new right or rule. For example, in *Gucci America, Inc. v. Weixing Li*, 768

F.3d 122, 135 (2d Cir. 2014), the party was a foreign bank with only a few branches in the United States. Prior to the Supreme Court's decision in *Daimler AG v. Bauman*, 134 S. Ct. 746 (2014), Second Circuit precedent held that a foreign bank doing business in New York was subject to general jurisdiction. 768 F.3d at 136. *Daimler* then clarified the application of general jurisdiction rules to foreign entities like the bank. *Id.*; 134 S. Ct. at 759-62. Although *Daimler* did not purport to change the law—it merely applied principles of past decisions to the facts at hand, *see* 134 S. Ct. at 754-62—the Second Circuit concluded the bank was no longer subject to general jurisdiction after *Daimler*, and it held that the bank's failure to raise the defense below was not a waiver because the defense "would have been directly contrary to controlling precedent in this Circuit." 768 F.3d at 135-36 (citation and internal quotation marks omitted).

Similarly, the Third Circuit reasoned in *Chassen v. Fidelity National Financial, Inc.* that a defendant did not waive its right to compel "bipolar" arbitration, which only became viable after the Supreme Court's decision in *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011), despite its failure to raise the issue below. 836 F.3d at 293. As the court explained:

> A waived claim or defense is one that a party has knowingly and intelligently relinquished. How, then, can a party waive a right in a situation in which no right existed? The answer is: it cannot. Every circuit to have answered this question has held that a litigant need not engage in futile gestures merely to avoid a claim of waiver.

Id. (citations, alterations, and internal quotation marks omitted). So too here. It would have been a futile gesture for Defendants to maintain their original venue motion when it was squarely foreclosed by the Federal Circuit's decision in *TC Heartland*.

B. In Any Event, Defendants Preserved Their Venue Challenge By Pleading Improper Venue

As Philips acknowledges, the defense of improper venue may be preserved "in its responsive pleading." Opp. Br. 7 (citing Fed. R. Civ. P. 12(h)(1)); *see also Martin v. Del. Law*

Sch. of Widener Univ., 625 F. Supp. 1288, 1296 n.4 (D. Del. 1985) (noting that "it is perfectly acceptable" to raise improper venue "by either motion or responsive pleading"). Defendants pleaded improper venue in their answers to Philips' Second Amended Complaints—their first responsive pleadings in the case. *See* Br. 3-4 & n.2.

Philips asserts that Defendants waived venue under Rules 12(g)(2) and 12(h)(1), but those provisions do not support Philips' claim. Rule 12(h)(1) states that a venue defense is waived when a party "omit[s] it from a motion in the circumstances described in Rule 12(g)(2)." Rule 12(g)(2) in turn bars a party from making a Rule 12 motion "raising a defense or objection that was available to the party but omitted from its earlier motion." Waiver thus hinges on the *filing* of a Rule 12(b) motion that omits a particular defense. Defendants never filed such a motion. As Philips concedes, Defendants' first motions under Rule 12(b)(6) were filed the same day as their original venue motions, and their second set of Rule 12(b)(6) motions were filed while the venue motions were still pending. Opp. Br. 5; *see, e.g.*, D.I. 11, 13, 20 in C.A. 15-1170. Defendants never filed a Rule 12(b) motion while failing to press their venue defense, which is what the plain text of the Rule requires for waiver.

Philips nevertheless argues that "Defendants' withdrawal [of their venue motion] effected waiver of improper venue under Rules 12(g)(2) and 12(h)(1)." Opp. Br. 9. But Philips cites no authority for the proposition that withdrawing a motion under Rule 12(b) while another Rule 12(b) motion is pending meets the criteria of Rules 12(g)(2) and 12(h)(1). The broad language that Philips plucks from *Davis v. Smith*, 253 F.2d 286, 288 (3d Cir. 1958), *see* Opp. Br. 8, is irrelevant because the defendant in *Davis* "unequivocally demonstrated waiver of the venue privilege" before the suit even began "by appointing an agent within Pennsylvania to

accept service of process." 253 F.3d at 288-89. *Davis* has nothing to do with the presence or absence of waiver when a defendant withdraws a motion.

C. Defendants Did Not Waive Venue By Seeking "Affirmative Relief"

Philips also contends that Defendants waived venue "by seeking affirmative relief" from the Court. Opp. Br. 10. Philips is incorrect.

To begin with, Defendants have *not* sought "affirmative relief" from this Court. In two cases cited by Philips, the waiving parties sought "affirmative relief" that was truly affirmative—*i.e.*, a claim or counterclaim against another party. *Adam v. Saenger*, 303 U.S. 59, 61 (1938) (party was original plaintiff); *Bel-Ray Co. v. Chemrite (Pty) Ltd.*, 181 F.3d 435, 439, 443-44 (3d Cir. 1999) (defendants sought injunctive relief against plaintiff). Defendants have sought no such relief; they have merely defended against Philips' claims of patent infringement.

Although the waiving parties did not seek affirmative relief in Philips' remaining two cases, *In re Tex. E. Transmission Corp. PCB Contamination Ins. Coverage Litig.*, 15 F.3d 1230 (3d Cir. 1994), and *Wyrough & Loser, Inc. v. Pelmor Labs., Inc.*, 376 F.2d 543 (3d Cir. 1967), those cases are of no help to Philips. In *Texas Eastern*, the court found certain defendants waived service by participating in the case, failing to move for dismissal, and seeking summary judgment on other grounds. 15 F.3d 1236. But the decision was not based solely on the defendants' conduct; it was also based on the fact that the party claiming the defendants had not been served—for odd reasons, the party who *brought* the claims against them—previously argued that they were proper parties to the case. *See id.* n.4. Such shenanigans are not present here. And in *Wyrough*, the court found that the defendant waived personal jurisdiction by participating in four days of hearings on a preliminary injunction—but the defendant never raised the issue before the hearings. 376 F.2d at 545-46. Here, Defendants objected to venue at

the first opportunity, and all of their alleged requests for "affirmative" relief occurred after they expressly pleaded improper venue pending the Supreme Court's decision in *TC Heartland*.

D. Principles Of Fairness Weigh Against A Finding Of Waiver

Philips' opposition contends that "principles of fairness" weigh in favor of a finding that Defendants waived their venue challenge. The opposite is true. As Defendants already explained, they withdrew their venue motion due to its futility under then-existing law, and out of respect for the Court's time and docket. Br. 3. Maintaining the motion in spite of the Federal Circuit's decision in *TC Heartland* would have wasted the Court's time and led to the same result. Yet Philips now asks the Court to punish Defendants for their conscientiousness. That would be manifestly unfair.

There is no merit to Philips' suggestion that Defendants waived concerns about burden or inconvenience because their "original venue motion . . . never asserted that venue in the District of Delaware imposed any undue burden or fairness." Opp. Br. 11. Those concerns were irrelevant to the earlier venue motion because proper venue does not depend on burden or convenience; it either exists or it does not. *See* 28 U.S.C. § 1400(b); *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 264 (1961) ("The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a 'liberal' construction."). And the burdens of litigating in Delaware are self-evident from the facts supporting Defendants' venue motions: Defendants have no witnesses, documents, or employees in the District. Delaware is inconvenient and expensive for Defendants.

There is equally little merit to Philips' suggestion that the work of the parties and this Court would be "squander[ed]" in a transfer. Opp. Br. 11. Defendants do not seek dismissal, only transfer. The documents, depositions, discovery responses, and motions that have occupied the parties would travel with the cases. It is not as if the cases would start anew.

Nor is there merit to Philips' complaints about splitting up the case into "multiple" different courts. Opp Br. 11. All Defendants have consented to be transferred to the Northern District of California. If the Court determines that venue is improper in this District, Philips can also consent to the Northern District of California, allowing the Court to transfer the cases together by consent of the parties under § 1404(a). But even if Philips does not consent, that is no reason to keep the cases here; there is no venue in this Court, and transfer is not a discretionary option but a requirement of the statute. 28 U.S.C. § 1406(a).

Finally, there is no merit to Philips' insinuation that Defendants delayed this motion for tactical reasons. *E.g.*, Opp. Br. 3-4. Defendants brought this motion as swiftly as possible after the Supreme Court's decision in *TC Heartland* on May 22. In fact, counsel for Defendants contacted Philips' counsel on May 25, asking to meet and confer on the issue of venue. The parties met and conferred on May 30, but Philips asked for additional time to consider transfer. Defendants then filed their motion on June 6, at the earliest opportunity, just fifteen days after *TC Heartland* was decided. Defendants did not "wait[] . . . more than five months after their respective Answers . . . to bring the instant motion to transfer." Opp. Br. 3. Defendants brought this motion promptly.

III. PHILIPS' RESPONSES ON § 1404 LACK MERIT

Philips lodges a mix of general and defendant-specific complaints with regard to transfer under 28 U.S.C. § 1404(a), which Defendants seek as an alternative to splitting the cases into multiple forums. Philips' complaints all miss the mark.

On the *Jumara* factors, Philips argues that the burden and inconvenience on Defendants are excused by the fact that "Defendants are large multi-national corporations" with "vast financial resources." Opp. Br. 17, 18 (citing *Smart Audio Techs. LLC v. Apple Inc.*, 910 F. Supp. 2d 718, 731 (D. Del. 2012)). That of course is not true of YiFang and Southern Telecom, which

are small, cost-sensitive companies that Philips chose to sue outside their home districts. And although Acer, ASUS, and HTC are significantly bigger, this case is a far cry from *Smart Audio*, where the plaintiff was a small company and the defendant was Apple, the world's largest public company by market capitalization. *See* 910 F. Supp. 2d at 723.

Philips also argues that Defendants failed to establish the propriety of venue in the Northern District of California as to HTC, Southern Telecom, and YiFang USA. Opp. Br. 13-14. But Defendants' Opening Brief stated that HTC has a regular and established place of business in the Northern District of California, which is sufficient to create venue. Br. 7 n.8. If there is any need for further details, the accompanying Declaration of Sherrie Gietzen attests to the number of HTC America's regular employees in San Francisco. As to YiFang, Philips argues venue is proper only in the Central District of California under 28 U.S.C. § 1391(d). Opp. Br. 14-15. That provision is inapplicable after *TC Heartland*, which held that § 1400(b) is the sole provision governing venue in patent infringement cases, and is not supplemented by § 1391. *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1520-21 (2017).

Moreover, Philips' focus on specific defendants misses the larger point, which is that *all* Defendants consent to jurisdiction and venue in the Northern District of California. If the Court concludes that venue is improper in this District, the cases must be transferred, either to a single district by consent (under § 1404) or to districts in which they could have been brought (under § 1406). Consent transfer under § 1404 gives Philips an option to keep the cases together in one forum, as appears to be its preference. Defendants' offer still stands. It is up to Philips to take it.

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June 27, 2017

CERTIFICATE OF SERVICE

I hereby certify that on June 27, 2017, I caused the foregoing to be electronically filed with the Clerk of the Court using CM/ECF, which will send notification of such filing to all registered participants.

I further certify that I caused copies of the foregoing document to be served on June 27, 2017, upon the following in the manner indicated:

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