NOTE: This order is nonprecedential.

United States Court of Appeals for the Federal Circuit

In re: GOOGLE LLC,
Petitioner

2018-152

On Petition for Writ of Mandamus to the United States District Court for the Eastern District of Texas in No. 2:17-cv-00442-JRG, Judge J. Rodney Gilstrap.

ON PETITION

Before DYK, REYNA, and TARANTO, *Circuit Judges*.

Order for the court filed PER CURIAM.
Dissenting opinion filed by *Circuit Judge* REYNA.

PER CURIAM.

O R D E R

Google LLC petitions for a writ of mandamus that would direct the United States District Court for the Eastern District of Texas to dismiss or transfer this patent case for improper venue under 28 U.S.C. § 1400(b) ("Any civil action for patent infringement may be brought 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.").

SEVEN Networks, LLC opposes the petition. Google replies.

I

SEVEN sued Google in the Eastern District of Texas, alleging that Google was infringing ten of its patents. SEVEN's complaint alleges that venue in the Eastern District is proper under 28 U.S.C. § 1400(b). It does not allege that Google "resides" in the Eastern District. Rather, it alleges that "Google has committed acts of infringement in this District and has a regular and established place of business in this District." Amended Complaint at 2–3, *SEVEN Networks, LLC v. Google LLC*, 2:17-CV-00442 (E.D. Tex. Aug. 22, 2017), ECF No. 34.

Following discovery on venue, Google moved to dismiss or transfer the case under 28 U.S.C. § 1406(a) and Federal Rule of Civil Procedure 12(b)(3). The district court denied Google's motion, concluding that SEVEN met its burden of demonstrating that venue in the Eastern District of Texas over Google was proper. *SEVEN Networks, LLC v. Google LLC*, 315 F. Supp. 3d 933, 966–67 (E.D. Tex. 2018). The decision rested on the servers that Google owns and uses to deliver content to its customers through "Edge Nodes" in Google's content-delivery "Edge Network"; some of those servers are located at facilities of various local Internet Service Providers ("ISPs") in the Eastern District, under contracts establishing strong Google control over the servers and their physical location. Examining the statutory language and its interpretation by this court in *In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017), *see SEVEN*, 315 F. Supp. 3d at 938–41, the district court held that those servers and their locations under those contracts together constituted "regular and established place[s] of business" for Google, *id.* at 947–67. The court further held that venue is proper under § 1400(b) when the district is one where the defendant has "committed acts of infringement" and "has a regular

and established placed of business," even if the alleged acts of infringement are not related to the identified regular and established place of business. *Id.* at 945–46.

Google now seeks mandamus. Google principally challenges the district court's conclusion that the Google servers and their locations in the district, under the contracts discussed in the opinion, constitute regular and established places of business of Google's. Secondarily, Google argues that § 1400(b) requires that the alleged acts of infringement be related to the regular and established places of business.

II

A writ of mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes." *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004) (internal quotation marks and citation omitted). There are three general requirements for a writ to issue. First, the petitioner must "have no other adequate means to attain the relief" desired. *Id.* (citation omitted). Second, the petitioner must show that the "right to issuance of the writ is 'clear and indisputable.'" *Id.* at 381 (quoting *Kerr v. U.S. Dist. Court for N. Dist. of Cal.*, 426 U.S. 394, 403 (1976)). Third, "even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances." *Id.* (citations omitted).

In accordance with the Supreme Court's decision in *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 379–84 (1953), this court has made clear that, unlike with convenience-based motions to transfer under 28 U.S.C. § 1404, mandamus ordinarily is unavailable for immediate review of rulings on motions under § 1406 asserting lack of venue under § 1400(b): a post-judgment appeal generally is an adequate remedy for asserted § 1400(b) violations. *See In re HTC Corp.*, 889 F.3d 1349, 1352–54 (Fed. Cir. 2018). We have nevertheless found mandamus

to be available for asserted § 1400(b) violations in certain exceptional circumstances warranting immediate intervention to assure proper judicial administration. *See, e.g.*, *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1011 (Fed. Cir. 2018); *In re BigCommerce, Inc.*, 890 F.3d 978, 980 (Fed. Cir. 2018); *In re Micron Tech., Inc.*, 875 F.3d 1091, 1102 (Fed. Cir. 2017); *Cray*, 871 F.3d at 1367. But we do not find such circumstances in this case.

The district court's venue ruling rests on a variety of facts it found about Google's interests in and activities involving its servers and Google's contracts with hosting ISPs that govern the location of those servers. The ruling states that it is not the servers in isolation, but the servers and their specific locations under specific contracts, that are regular and established places of business of Google's. *SEVEN*, 315 F. Supp. 3d at 951–53, 956, 964, 965, 966–67. And it does so based on findings of at least the following facts. Google owns and wholly controls the servers, located in the district under specific contracts with ISPs—which may not even tighten a screw without Google's instruction. *Id.* at 951–53, 965. The location of the servers in the district serves Google's business interests—by serving interests of Google's ISP customers (*e.g.*, in saving transport costs), Google's end-user customers (*e.g.*, in quick delivery of content), or both—as confirmed by Google's advertising of its Edge Network and the Edge Nodes for efficient content delivery; and upon installation of the servers, Google places its inventory in (loads its content onto) those servers, and when Google's end-user customers ask Google for that inventory, Google can and often does fulfill those requests from those local servers. *Id.* at 947–50, 956, 960–61, 965–66. And the server-placement contracts provide Google very strong control to keep the servers at their locations once they are installed. *Id.* at 952–53, 965.

The main issue that Google presents to us concerns whether the district court erred in holding that its servers

and their locations under specific contracts constituted Google's "regular and established place[s] of business." 28 U.S.C. § 1400(b). On that issue, though, Google has failed to show that the district court's ruling implicates the "special circumstances justifying mandamus review of certain basic, unsettled, recurring legal issues over which there is considerable litigation producing disparate results." *Micron*, 875 F.3d at 1095; *see ZTE*, 890 F.3d at 1011; *Cray*, 871 F.3d at 1359–60; *BigCommerce*, 890 F.3d at 981.

The district court focused on many specific details of Google's arrangements and activities, as already summarized, and examined those details under the specific language of the statute and of this court's decision in *Cray*. The court also closely examined a wide range of relevant legal authority, including authority concerning warehouses and authority concerning machines that serve customers without their owner's employees (or indeed any human attendants) on site. *SEVEN*, 315 F. Supp. 3d at 938–41, 954–56, 958–61, 962, 963. As one of the amici supporting Google recognizes, the scope of the district court's decision is, in many respects, "unclear." Br. of Amici Curiae Etsy 13. Under these circumstances, it is not known if the district court's ruling involves the kind of broad and fundamental legal questions relevant to § 1400(b) that we have deemed appropriate for mandamus despite the general adequacy of ordinary post-judgment appeal for rulings on venue motions under § 1406. *Compare with Cray*, 871 F.3d at 1359–60 (basic framework for applying statutory terms hardly interpreted for more than twenty-five years), *Micron*, 875 F.3d at 1095–96 (change of law and preservation or loss of § 1400(b) rights), *BigCommerce*, 890 F.3d at 980 (whether a defendant can reside in more than one district in a multi-district state), *and ZTE*, 890 F.3d at 1011 (whether Federal Circuit or regional circuit law applies and who has the burden of persuasion).

Nor does the issue involve anything close to the kind of almost-even disagreement among a large number of district courts that was present in *Micron*, 875 F.3d at 1095–96. Even if the legal issue were more clearly defined, the paucity of district court cases that have so far addressed the issue suggest that the "extraordinary remedy" of a writ of mandamus is not currently warranted. Thus, it would be appropriate to allow the issue to percolate in the district courts so as to more clearly define the importance, scope, and nature of the issue for us to review.

We thus find mandamus not to be warranted for Google's main argument.

Google's distinctly secondary issue presented to this court concerns the relationship between the "regular and established place of business" requirement and the "acts of infringement" requirement of the portion of § 1400(b) at issue. As to this issue too, we find an insufficient basis for mandamus relief. Although the issue involves a more clearly defined legal principle than Google's main issue, it is not one on which there is currently a substantial degree of disagreement or a demonstrated need for immediate appellate resolution. *See generally HTC*, 889 F.3d at 1352–54.

Moreover, although we again draw no ultimate merits conclusion, we conclude, based on the district court's opinion, that there is no "clear and indisputable" error in the court's resolution of this issue. That resolution finds at least a substantial basis in the language of the statute (which uses simply "and," not another phrase pointing to a tighter linkage) and in various precedents following the text in that respect, including a decision of then-District Judge Learned Hand, *Chadeloid Chemical Co. v. Chicago Wood Finishing Co.*, 180 F. 770, 771 (C.C.S.D.N.Y. 1910). Google has not shown otherwise by pointing outside venue law to the requirement, for specific personal juris-

diction, that a defendant's contacts with a forum must relate to the basis of the suit, as recently confirmed in *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S. Ct. 1773, 1780 (2017). The portion of § 1400(b) at issue here readily satisfies that requirement ("acts of infringement" must take place in the district) and then requires more (a "regular and established place of business"). Nor has Google shown a "clear and indisputable" right by pointing to language in this court's decision in *In re Cordis Corp.*—in which we denied mandamus—that described certain facts present in a Seventh Circuit decision. 769 F.2d 733, 737 (Fed. Cir. 1985) (discussing *Univ. of Ill. Found. v. Channel Master Corp.*, 382 F.2d 514 (7th Cir. 1967)). Whatever the force of Google's arguments in an ordinary appeal, they are insufficient to show a "clear and indisputable" right to support mandamus on this second venue issue.*

* Google initially advanced a third argument in its mandamus petition—that all the steps of a method claim must be alleged to have been performed within the district to meet the "acts of infringement" requirement of the venue statute. This issue became moot when, in the case-narrowing procedure followed in the district court, SEVEN withdrew its assertion of the method claims in question. Google asks this court, without any supporting analysis or any indication that it has asked the district court, to vacate the portion of the district court ruling focused on claims of method patent infringement, *SEVEN*, 315 F. Supp. 3d at 943–45. We deem it the better course to deny this request, leaving Google to present to the district court any argument it has for vacatur of the portion of the decision at issue.

Accordingly,

IT IS ORDERED THAT:

The petition for writ of mandamus is denied.

FOR THE COURT

Oct. 29, 2018
Date

/s/ Peter R. Marksteiner
Peter R. Marksteiner
Clerk of Court