



MBHB *snippets* Alert

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CAFC Issues Writ of Mandamus reversing Eastern District of Texas 4-Factor Test for a “Regular and Established Place of Business” Under §1400(b)

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In *In re: Cray, Inc.*, No. 2017-129, the CAFC issued a writ of mandamus vacating Judge Gilstrap’s decision involving venue under 28 U.S.C. §1400(b) in *Raytheon Co. v. Cray Inc.*, Case No. 15-cv-1554 (E.D. Texas). That earlier decision raised concerns over whether the Supreme Court’s venue holding in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017), would be given full effect. Judge Gilstrap had applied a broad 4-factor test for finding whether a defendant such as Cray had a “regular and established place of business” in the Eastern District of Texas under §1400(b). Judge Gilstrap’s test had attracted significant attention, and posited the Eastern District of Texas against most other district courts in applying § 1400(b).

Judge Lourie, writing for a unanimous panel in a 20-page decision, held that the statute had three distinct requirements for a regular and established place of business, which were not met by the test applied by Judge Gilstrap:

- A “place”: “when determining venue, the first requirement is that there ‘must be a physical place in the district.’” Slip Op., p. 11. That is, “[t]he statute requires a ‘place,’ *i.e.*, ‘[a] building or a part of a building set apart for any purpose’ or ‘quarters of any kind’ from which business is conducted.” *Id.*
- That it be “regular and established”: “sporadic activity cannot create venue.” *Id.* at 12.
- That it be of the “defendant’s,” not an employee’s or third party’s: “it must be a place *of the defendant*, not solely a place of the defendant’s employee. Employees change jobs.

Thus, the defendant must establish or ratify the place of business. It is not enough that the employee does so on his or her own.” *Id.* at 13.

Decided September 21, 2017

The opinion can be found at http://www.ca9c.uscourts.gov/sites/default/files/Cray_2017-129_9.21.17_ORDER.pdf.

MBHB attorneys **Grant Drutchas** and **Aaron Gin, Ph.D.** will be presenting on this and other venue selection issues in their upcoming MBHB webinar, ***The Good, the Bad, and the Ugly: Patent Litigation Forum Selection in the Wake of TC Heartland***, set for Tuesday, October 17, 2017, from 10:00-11:15 a.m. CT. Information and registration is available via the MBHB website at <http://www.mbhb.com/events/xpqEventDetail.aspx?xpST=EventDetail&event=230>.

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