

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

NIVAGEN, INC.,

Plaintiff

v.

SUN PHARMACEUTICALS INDUSTRIES,
INC., SUN PHARMACEUTICAL INDUSTRIES
LTD., SUN PHARMA ADVANCED RESEARCH
COMPANY LTD., SUN PHARMACEUTICAL
MEDICARE LTD.,

Defendants.

Case No.: 2:24-cv-00036-RWS-RSP

JURY TRIAL DEMANDED

**DEFENDANTS' MOTION TO DISMISS FOR IMPROPER VENUE OR, IN THE
ALTERNATIVE, TRANSFER**

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**STATEMENT OF THE ISSUES TO BE DECIDED BY THE COURT PURSUANT TO
LOCAL RULE CV-7(a)(1)**

- I. Whether the Court should dismiss this patent case under 28 U.S.C. § 1406(a) for improper venue because Sun does not reside in this district and does not have a regular and established place of business in this district or, alternatively, in the interest of justice, should transfer this case for improper venue to the District of New Jersey, where Sun has its headquarters.
- II. Alternatively, whether the Court should transfer this case to the District of New Jersey pursuant to 28 U.S.C. § 1404(a) for the convenience of parties and witnesses, and in the interest of justice.

Pursuant to Fed. R. Civ. P. 12(b)(3), Defendants Sun Pharmaceutical Industries, Inc. (“Sun”), Sun Pharmaceutical Industries, Ltd., Sun Pharma Advanced Research Company Ltd., and Sun Pharmaceutical Medicare Ltd. (together, “Defendants”) move to dismiss the Complaint for Patent Infringement filed by Plaintiff Nivagen, Inc., (“Nivagen”) for improper venue under 28 U.S.C. § 1400(b).

Alternatively, Defendants move for transfer to the District of New Jersey, either for improper venue pursuant to 28 U.S.C. § 1406(a) or for convenience pursuant to 28 U.S.C. § 1404(a).

I. INTRODUCTION

The Court’s resolution of this motion should be guided by the Federal Circuit’s holding in *Celgene Corp. v. Mylan Pharms., Inc.* 17 F.4th 1111 (Fed. Cir. 2021). In *Celgene*, the Federal Circuit held that venue was improper where the facts merely showed that a handful of the defendant’s employees reside and work in the district and the defendant had advertised for an open position within the district. *Id.* The facts alleged by Nivagen in this case are materially the same as those in *Celgene*. In *Celgene*, as here, there was no allegation that the defendant owns, leases, or controls real property in the district that would confer venue or that the defendant conducted business from any building or part of a building in the district. *Id.* at 1122-23.

Instead, the plaintiff in *Celgene* relied on a theory that locations “associated” with the defendant’s employees constituted a “regular and established place of business” sufficient to impute venue to defendant. *Id.* To attempt to do so, plaintiff relied on: (1) an employee roster that identified employees who lived in the district; (2) a handful of business cards with employee names and home addresses in the district; and (3) two LinkedIn profiles of defendant employees that mentioned the district. *Id.* at 1123. Additionally, the plaintiff relied upon a job posting of the defendant asking that candidates live within the district or “within reasonable driving distance.”

Id. Whether taken together or separately, the Federal Circuit concluded that these facts did not establish that the defendant had a regular and established place of business under § 1400(b)—and venue was improper. *Id.* at 1127. The same is true for this case.

Nivagen has not alleged any factual grounds distinguishing its venue claim from *Celgene* or otherwise establishing that Sun, the only defendant that is a U.S. corporation, has a regular and established place of business in this district. Sun is a Delaware corporation with its principal place of business in Princeton, New Jersey. Sun does not own or lease any real property in this district that would confer venue and does not operate any warehouses, stores, or other facilities in this district. (Decl. ¶ 3.) Indeed, the entirety of Nivagen’s allegations regarding Sun’s limited presence in this district are confined to: (1) a limited number of employees who work remotely in the district, (2) two open job postings that involve the potential of future employees working in the district, (3) sales of the accused product in the district, and (4) participation in Texas’s Medicare Rebate Program. Under these facts, Nivagen has not—and cannot—meet its burden of showing that Sun resides in or has a “regular and established” physical place of business in this district, as 28 U.S.C. § 1400(b) requires for venue.

Because venue is improper, the Complaint should be dismissed. Alternatively, under either Section 1406(a) or Section 1404(a), this Court should transfer the case to the District of New Jersey, where venue is proper. To the extent relevant party witnesses and documents are within the United States, most or all are located in New Jersey. No relevant witnesses or sources of proof are in this district.

II. FACTS

Nivagen is a Delaware corporation with a principal place of business in Sacramento, California. (Compl. ¶ 1.) Sun is a Delaware corporation with a principal place of business in Princeton, New Jersey. (*Id.* at ¶ 2.) In attempting to link Sun to this district, Nivagen alleges ten

paragraphs in its Complaint that contain allegations that relate to venue. (See Compl. ¶¶ 6-15.) Those paragraphs allege: (1) that Sun transacts business in the State of Texas, including allegedly selling the accused infringing product in this district, (*id.* at ¶ 6); (2) in conclusory fashion, that Defendants have established places of business “for team leaders of sales, sales representatives, [and] account managers” in this district, (*id.* at ¶ 7); (3) that Sun appears to employ sales personnel in the State of Texas and, at the time of the Complaint, advertised for sales personnel in the State of Texas, including for a Director position for Professional Relations West and a Medical Science Liaison position for the West Region; (*id.* at ¶¶ 8-12); (4) that LinkedIn postings exist online from individuals purporting to be employed by Sun and purporting to be based in Texas or this district, (*id.* at ¶ 13); (5) that Sun participates in the Texas Medicare rebate program, (*id.* at ¶ 14); and (6) again, in conclusory fashion, that Sun has regular physical presences of its employees in this district (*id.* at ¶ 15). Even if the Court were to credit each of Nivagen’s venue-related allegations—which it should not for the reasons set forth herein—Sun’s acts within this district do not rise to the level of a “regular and established” physical place of business based on Federal Circuit precedent.

III. STATEMENT OF LAW

A. Plaintiff has the Burden of Establishing that Venue is Proper.

“Upon motion by the Defendant challenging venue in a patent case, the Plaintiff bears the burden of establishing proper venue.” *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1013 (Fed. Cir. 2018). In reviewing a Rule 12(b)(3) motion, the uncontroverted facts in a complaint are accepted as true, although the court need not credit conclusory allegations, *Am. GNC Corp. v. ZTE Corp.*, No. 4:17-cv-00620, 2017 WL 5163605, at *2 (E.D. Tex. Oct. 4, 2017), and “when unsubstantiated allegations are controverted by affidavit or declaration, the affidavit or declaration trumps.”

Walker v. Inter-Americas Ins. Corp., Inc., No. 7:03-CV-222, 2004 WL 1620790, at *1 (N.D. Tex. July 19, 2004).

Venue in patent infringement cases is proper only “in the judicial district where a defendant resides, **or** where a defendant has committed acts of infringement **and** has a regular and established place of business.” 28 U.S.C. § 1400(b) (emphasis added). This statutory test is a “restrictive measure,” cannot “be given a liberal construction,” and cannot be “conflate[d]” with different and more liberal tests for general venue or personal jurisdiction. *In re Cray Inc.*, 871 F.3d 1355, 1361 (Fed. Cir. 2017). Nivagen therefore must establish either (1) that Sun maintains a residence in this district or (2) that Sun has committed infringing acts and maintains a regular and established place of business in this district.

Residence. A “domestic corporation ‘resides’ only in its State of incorporation for purposes of the patent venue statute.” *TC Heartland LLC v. Kraft Food Grp. Brands LLC*, 581 U.S. 258, 267-70 (2017).

Infringing Acts and Regular and Established Place of Business in the District. To have a “regular and established place of business,” a three-part test must be satisfied: “(1) [the business] must be a physical place in the district; (2) [the physical location] must be a regular and established place of business; and (3) [the physical location] must be the place of the defendant.” *In re Cray*, 871 F.3d at 1360. The court should dismiss or transfer if any of these three requirements are not satisfied. *Id.*; see also 28 U.S.C. § 1406(a).

B. Venue Must be Proper as to All Defendants in the Action.

In a case involving multiple defendants, venue must be proper as to all defendants. *Magnacoustics, Inc. v. Resonance Tech. Co.*, No. 97-1247, 1997 WL 592863, at *1 (Fed. Cir. Sept. 25, 1997) (citing Moore’s Federal Practice 3d § 111.12[4][b]); *Agis Software Dev., LLC v. ZTE Corp.*, No. 2:17-CV-00517, 2018 WL 4854023, at *4 (E.D. Tex. Sept. 28, 2018). Once a court

decides that venue is improper to one defendant, it need not consider venue for the rest of the defendants to conclude that the case is not properly venued in the district. *Id.*

C. The Court Also May Transfer the Case for Convenience.

Alternatively, the Court may transfer for convenience, in the interest of justice, to a district where the plaintiff could have filed the case. *See* 28 U.S.C. § 1404(a). Even though the venue sections “are seemingly mutually exclusive venue provisions, one presupposing proper venue and the other presupposing improper venue, the Fifth Circuit takes the practical approach of permitting district courts to transfer a case under § 1404(a) or § 1406(a) without ever deciding whether venue is proper.” *Aralez Pharms., Inc. v. Teva Pharms. USA, Inc.*, No. 2:17-CV-00071, 2017 WL 3446543, at *2 (E.D. Tex. July 17, 2017).

Under 28 U.S.C. § 1404(a), the court first determines whether the case originally could have been brought in the proposed transferee district. *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 312 (5th Cir. 2008) (en banc) (“*Volkswagen I*”). If this threshold inquiry is met, the court then weighs the relative convenience of the transferee district and the transferor district, based on several private and public interest factors. *Id.* In considering these factors, “[t]ypically, the most important . . . is whether substantial inconvenience will be visited upon key fact witnesses should the court deny transfer.” *Frederick v. Advanced Fin. Sols., Inc.*, 558 F. Supp. 2d 699, 704 (E.D. Tex. 2007). If “most witnesses and evidence [are] closer to the transferee venue with few or no convenience factors favoring the venue chosen by the plaintiff, the trial court should grant a motion to transfer.” *In re Nintendo Co.*, 589 F.3d 1194, 1198 (Fed. Cir. 2009).

IV. ARGUMENT

A. Venue Is Not Proper in this District under 28 U.S.C. § 1400(b).

1. Sun Does Not Reside in this District.

The first test for patent venue plainly is not met. Sun is incorporated in Delaware, making Sun a resident of that state. *See TC Heartland*, 581 U.S. at 262.

2. Sun Does Not Have a Regular and Established Place of Business in this District.

The alternative test of § 1400(b)—acts of infringement *and* a regular and established place of business in the district—is also not met. Even assuming—for the sake of argument only—that Nivagen has alleged facts sufficient to satisfy the first part of the test—that alleged acts of infringement have occurred in this district—Nivagen has failed to allege facts sufficient to satisfy the second part. To establish venue under the alternative test of § 1400(b), a plaintiff *must also satisfy* its burden of establishing that the defendant has a regular and established place of business in this district. Nivagen’s allegations in this regard fall far short of what the Federal Circuit’s precedent requires and to find otherwise would materially undercut the holding of *TC Heartland*.

Nivagen’s reliance on employees working from their homes in this district (Compl. ¶¶ 8, 13), or, in the case of the job postings (Compl. ¶¶ 9-12), potential employees who may work in this district, fails because the Federal Circuit has squarely held that such “employee-associated locations are not a regular and established place of business of the defendants under § 1400(b).” *Celgene*, 17 F.4th at 1125. Such employee-associated locations fail to satisfy the second and third prongs of the *Cray* test because they are not “regular and established places of business,” nor are they places “of the defendant.” *See id.*

The only other two facts alleged that Nivagen claims support venue in this case are irrelevant to the “regular and established place of business” test from *In re Cray*. Nivagen alleges

that (1) Sun does business in this district, including selling the allegedly infringing products in this district (Compl. ¶¶ 6-7); and (2) Sun participates in the Texas Medicare rebate program (Compl. ¶ 14). While these allegations might relate to the first question—whether acts of alleged infringement occurred in this district—neither of these allegations support any conclusion that Sun has a “regular and established place of business” in this district. Thus, whether taken individually or together, the allegations of Nivagen’s Complaint against Sun fail to establish that venue is proper in this district.

a. Conclusory Allegations Cannot Establish Venue

In paragraph 7 of its Complaint, Nivagen made the conclusory assertion that Sun “maintains regular, physical, continuous, and established places of businesses, including places of businesses for team leaders of sales, sales representatives, account managers, in his [sic] district, which Defendants have established, ratified, and controlled.” (Compl. ¶ 7.) Similarly, in paragraph 15 of the Complaint, Nivagen asserted without factual support that “Defendant Sun has regular, physical presences of Defendant Sun employees in this district conducting Defendant Sun’s business. Defendant Sun maintains a regular and established place of business at the Defendant Sun defined places and separate areas by the regular, physical presence of its employees.” (Compl. ¶ 15.) The Federal Circuit has repeatedly advised courts that they need not accept conclusory allegations that simply parrot the standard without providing specific factual bases for such allegations. *Westech Aerosol Corp. v. 3M Co.*, 927 F.3d 1378, 1382 (Fed. Cir. 2019) (finding plaintiff “failed to plead *any* facts showing [defendant] had a regular and established place of business” in the district where it merely recited elements of 1400(b)) (emphasis in original) (citing *McZeal v. Sprint Nextel Corp.*, 501 F.3d 1354, 1356 (Fed. Cir. 2007) and *Taylor v. Books A Million, Inc.*, 296 F.3d 376, 378 (5th Cir. 2002)). Thus, for purposes of evaluating

whether Nivagen has alleged facts sufficient to establish venue, the Court should ignore these conclusory allegations.

As explained more fully below, Nivagen has provided the Court with no reason to presume its conclusory allegations have any factual support sufficient to establish venue.

b. Having Employees Who Live and/or Work in this District Is Insufficient to Show that Sun has a “Regular and Established Place of Business” in this District.

Nivagen next alleges in paragraph 8 of its Complaint, “[u]pon information and belief, Defendants employ sales personnel in the State of Texas. Sun (at the time of this complaint) has advertised for sales personnel in the State of Texas.” (Compl. ¶ 8.) This allegation is also conclusory and, equally important, is devoid of any claim that any Sun-employed sales personnel are within this district as opposed to “in the State of Texas.” *See, e.g., In re BigCommerce, Inc.*, 890 F.3d 978, 982 (Fed. Cir. 2018) (“A plain reading of ‘the judicial district’ [in § 1400(b)] speaks to venue in only one particular judicial district in the state.”); *Xodus Med., Inc. v. Allen Med. Sys.*, No. 2:17-cv-00581, 2018 WL 2338763, *1 (W.D. Penn. May 22, 2018) (“Venue must lie not only in the state where the lawsuit is brought, but specifically in the judicial district in which the case is filed.”); *Ingenioshare, LLC v. Epic Games, Inc.*, No. W-21-CV-00663-ADA, 2022 WL 827808, at *4 (W.D. Tex. Mar. 18, 2022) (concluding that, because employees could “even move within Texas but outside of this district,” the allegations were not district-specific and thus did not support venue). The same is true for Sun’s alleged advertisements for sales personnel—Nivagen only alleged “in the State of Texas” and did not limit its allegations to this district. *Id.*

Nivagen tries to bulk up its conclusory allegation by later identifying ten alleged Sun employees—from Defendants’ 44,000 employees worldwide—and claiming they “are in Texas and this district” based on unsubstantiated online LinkedIn profiles. (Decl. ¶ 4; Compl. ¶ 13.) Nivagen never expressly links any specific LinkedIn profile to this district as opposed to Texas

generally. *See, e.g., In re BigCommerce, Inc.*, 890 F.3d at 982; *Xodus Med.*, 2018 WL 2338763, at *1; *Ingenioshare*, 2022 WL 827808, at *4. Nivagen’s own purported evidence undermines the bulk of its claims as a factual matter. The LinkedIn information cited by Nivagen reveals that two alleged employees are identified only as “LinkedIn Member,” while another one lists a location outside of this district (in Katy, TX), and three are identified not as Sun employees but rather as “contractors” for Sun,¹ leaving only four alleged employees identified by Nivagen who have identified a location on their LinkedIn profiles within this district. (Compl. ¶ 13.) That is not enough to impute venue on Sun.

Further, merely having sales representatives or other employees who may live or perform some work in the district is insufficient under the law to show a “regular and established” place of business in the district. *See, e.g., Celgene*, 17 F.4th at 1123-24 (“Indeed, it is not enough that there exists within the district a physical location where an employee of the defendant carries on certain work for his employer.”); *Westport Fuel Sys. Canada, Inc. v. Ford Motor Co.*, No. 2:21-cv-00453, 2022 WL 4280490, *1 (E.D. Tex. Sept. 15, 2022) (“Plaintiff’s evidence demonstrates a set of sporadic visits. But contrary to its assertion, Plaintiff failed to offer any evidence that demonstrated such visits were ‘steady, uniform, orderly, and methodical.’”) (citation omitted); *Personal Audio, LLC v. Google, Inc.*, 280 F. Supp. 3d 922, 935 (E.D. Tex. 2017) (allowing employees to live and work within the district, without evidence that employment was conditioned on continued residence in the district or storing materials in the district so that they can be distributed or sold from that place, does not establish venue). To hold otherwise, would undermine the underpinnings of *TC Heartland*, particularly in today’s ubiquitous remote-work environments.

¹ *See Correct Transmission LLC v. Adtran, Inc.*, No. 6:20-CV-00669, 2021 WL 1967985, at *3 (W.D. Tex. 2021) (“[A]n independent contractor relationship is insufficient to satisfy the third element of *Cray*.”)

Indeed, the Federal Circuit in *In re Cray* and its progeny have made clear that the mere fact that an employee voluntarily resides in a district and works from home does not transform the employee's residence into a regular and established place of business of the employer:

[T]he third requirement when determining venue is that 'the regular and established place of business' must be 'the place of the defendant.' As the statute indicates, 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.

Cray, 871 F.3d at 1363 (emphasis in original). "Relevant considerations include whether the defendant owns or leases the place, or exercises other attributes of possession or control over the place," or conditions employment on residence and/or product storage in district. *Id.* "[I]f an employee can move his or her home out of the district at his or her own instigation, without the approval of the defendant, that would cut against the employee's home being considered a place of business of the defendant." *Id.* Under this standard, the allegations in Nivagen's Complaint fall far short of the requisite showing that any Sun employee has a home that is a "regular and established place of business" of Sun for several reasons.

First, Nivagen has not actually alleged that any of the employees identified in its Complaint actually reside in this district. To satisfy the *Cray* standard, a plaintiff must show that there is "a physical place within the district" and that such place is the "place of the defendant." *Id.* at 1360. In this case, Nivagen has failed to identify or allege any specific physical place, including any employee home, that is actually in this district.

Second, Nivagen has made no specific factual allegations supporting a conclusion that Sun has "ratified" any employee home, or any other location in the district, such that it is actually ***the place of the defendant*** under the *Cray* test. In evaluating whether an employee home is the place of the defendant, the Federal Circuit has set forth a non-exhaustive list of relevant factors,

including (1) whether the defendant owns or leases the place, or exercises other attributes of possession or control over the place; (2) whether the defendant conditioned employment on (a) an employee's continued residence in this district or (b) the storing of materials at the place so that they can be distributed or sold from that place; (3) a defendant's representations about that place, including advertisements; and (4) the nature and activity of the alleged place of business of the defendant in the district in comparison with that of other places of business of the defendant in other venues. *Celgene*, 17 F.4th at 1122. Nivagen has alleged no facts supporting ratification of any alleged Sun employee homes in this district. Nivagen has not alleged that Sun owns or leases any employee homes; Nivagen has not alleged that any Sun employee's employment is conditioned on them living within the district or them distributing or selling products from their home; Nivagen has pointed to no advertisements or public statements made by Sun suggesting that it conducts business from the employee homes; and Nivagen has made no specific allegations of employee activity in this district that would likely not be true of every other district in which Sun sells its products.

Third, none of the employees identified in Nivagen's Complaint are actually required to live in this district or have had their residences "ratified" by Sun as places of business. Of the ten employees identified in Nivagen's Complaint, only two are actually employed by Sun and reside in this district. (Decl. ¶¶ 5-6.) One of those two employees is an account manager for a territory that includes states in addition to Texas, and the other is a senior territory manager for a territory that includes parts of the Northern District of Texas. (Decl. ¶¶ 6-8.) Neither of those two employees are required or even expected to live in this district. (Decl. ¶ 9.) Sun does not own or pay for the residences of either of these employees. (Decl. ¶ 10.) Either employee is free to move out of this district and need not consult Sun before doing so. (Decl. ¶ 11.) Sun has not held out either of these employees' residences as places of business for Sun. (Decl. ¶ 10.)

Courts have concluded that similar allegations of sales employees residing in the district devoid of any allegations or facts supporting a conclusion that defendant controls or ratifies the employees' homes do not establish venue. For example, in *Novartis Pharms. Corp. v. Accord Healthcare Inc.*, the court granted defendant's motion to dismiss for improper venue, because "Novartis points to no facts supporting a reasonable expectation that discovery would lead to evidence sufficient to satisfy any of *Cray's* requirements. Novartis does not allege that [defendant's] materials are stored at the Delaware employee's home; that her home is owned, controlled, or otherwise established by [defendant]; that the employee's employment is conditioned upon residence in Delaware; or that there is anything to stop the employee from moving out of Delaware, at any time she wishes, for any reason (without any threat to her continued employment by [defendant])." No. 18-1043, 2019 WL 2502535, at *4 (D. Del. June 17, 2019). The same is true here. Indeed, Sun does not require or encourage employees to reside in this district, does not own or lease homes for the employees to work in this district, and does not condition employment upon regular storage of Sun materials at their homes in this district. (Decl. ¶¶ 9-11.) The mere fact that Sun employs individuals who may reside in the district is insufficient to establish venue.

c. Job Postings Advertising Work in this District Is Insufficient to Show that Sun has a "Regular and Established Place of Business" in this District.

Nivagen relies on two open job postings allegedly listed by Sun to support its assertion of venue. (Compl. ¶¶ 9-12.) The first is for a position titled "Director, Professional Relations West" (Compl. ¶¶ 9-11) and the second is for a "Medical Liaison for the West Division" (Compl. ¶ 12). Neither of these job postings are sufficient to establish venue over Sun.

As an initial matter, in determining whether venue is proper, this Court looks to facts and circumstances as of the date the suit was filed. *See, e.g., Parallel Network Licensing LLC v. Arrow*

Elecs., Inc., No. 4:21-CV-00714, 2022 WL 1597364, *3 (E.D. Tex. May 19, 2022) (“[T]he Court looks to the facts and circumstances that existed on the date the suit was filed to determine whether [defendant] has an established place of business in the Eastern District of Texas.”); *Personal Audio, LLC v. Google, Inc.*, 280 F. Supp. 3d 922, 924 (E.D. Tex. 2017) (“The court concludes that the burden of proof is on Plaintiff and that the venue facts are to be examined as of the date the suit is filed.”). The job postings alleged by Nivagen may never be filled and, regardless, they cannot be the basis for venue.² Courts have considered similar allegations regarding open job postings and concluded that “marketing for a job position in Texas does not impute venue.” *Ingenioshare, LLC v. Epic Games, Inc.*, No. W-21-CV-00663-ADA, 2022 WL 827808, at *4 (W.D. Tex. Mar. 18, 2022); *see also Celgene*, 17 F.4th at 1123 (concluding that a job posting asking candidates to live within the district or “within reasonable driving distance” were not relevant to venue).

Additionally, Nivagen’s own allegations undercut any reliance on the open job postings for venue in this district. As to the Director position, Nivagen’s allegation quotes from the job posting and states that it “is a field-based role: Locations considered are West Coast (California), Arizona or Texas.” (Compl. ¶10.) Thus, even if job postings were sufficient to establish venue—which they are not—Nivagen’s allegations support only an inference that the potential employee *may* choose to reside in this district or *may* choose to reside in one of the other many districts in California, Arizona, or the rest of the State of Texas, which is not enough to establish venue.

The Medical Liaison position alleged by Nivagen is even more attenuated in terms of venue in this district. Nivagen’s Complaint sets forth a complete job description, which specifies that

² In fact, the individual Sun hired for the Director, Professional Relations West, position does not live in this district and Sun never even hired someone for the Medical Liaison position. (Decl. ¶ 12.)

the Medical Liaison will interact with “a targeted group of national and regional thought leaders/healthcare professionals (HCPs) as well as payers and managed care accounts.” (Compl. ¶ 12.) Nivagen does not allege, or include any detail from the job posting itself, that the medical liaison will be based in this district, or even in Texas, that their employment is contingent upon residence in this district, that Sun will pay for or lease their home or other place of business, or that Sun will hold them out as having a place of business in this district. Instead, Nivagen lobs the conclusory allegation that, since this job posting was advertised in Texas, that “[t]his Liaison will undoubtedly interact with health care practitioners (HCP), nurse practitioners (NP), and/or physician assistants (PA) in this State and in this District.” Even if this conclusory allegation turned out to be true (which, as shown above, numerous of Nivagen’s claims are not), this Court has recognized that employees’ sporadic work in the district is insufficient to impute venue. *See, e.g., Westport Fuel Sys. Canada Inc. v. Ford Motor Co.*, 2:21-CV-00453-RWS, 2022 WL 4280490, *1-2 (E.D. Tex. Sept. 15, 2022) (plaintiff’s showing that employees of the defendant participated in nearly 600 visits in a five-year period constituted merely “sporadic” activity in the district insufficient to impute venue).

d. Sales and Medicare Program Participation do not Create a “Regular and Established Place of Business” in this District.

The *only* other allegations set forth in Nivagen’s Complaint relating to venue are that Sun sells products, including the allegedly infringing products, in this district and that Sun participates in Texas’s Medicare Rebate program. (Compl. ¶ 14.) However, Sun is a nationwide seller of pharmaceuticals, and these allegations are just as likely to be true about every other federal district in this country. (See Decl. ¶ 15.) Thus, reliance on the fact that Sun sells products in this district or that it participates in Texas’s Medicare Rebate program would serve only to subvert the well-established and developed law of *T.C. Heartland*, *In re Cray*, and their progeny. *See Metuchen*

Pharms. LLC v. Empower Pharms. LLC, No. 18-11406, 2018 WL 5669151, *2-4 (D.N.J. Nov. 1, 2018) (concluding that registration of a pharmacy within the district, having a license to practice pharmacy in the district, consenting to attend certain regulatory proceedings as a condition of their pharmacy license in the district, receiving prescriptions within the district, and collecting payments from insurance plans within the district were insufficient to assert venue under § 1400(b)); *see also Bausch Health Ir. Ltd. v. Mylan Labs. Ltd.*, No. 21-10403, 2022 WL 683084, at *8 (D.N.J. Mar. 8, 2022) (“[S]imply *doing* business in a district or being *registered* to do business in a district is insufficient, without more, to make that district a regular and established place of business.”) (emphasis in original).

e. Accepting Plaintiff’s Venue Argument Would Subject Pharmaceutical Companies to Venue in Virtually Every District in the Country

As a practical matter, were this Court to find that venue over Sun is proper based on the facts alleged, most branded pharmaceutical companies would be subject to venue in virtually every district in the country. In general, and especially because approval of pharmaceuticals is done by the FDA at the federal level, Nivagen’s conclusory allegations in this case will be true for most branded pharmaceutical companies for not only this district, but likely every district in the country. Branded pharmaceutical companies regularly sell nationwide, regularly participate in Medicare programs in every state, and employ sales personnel to cover territories and visit doctors in districts across the country. To conclude that such activity rises to the level of a “regular and established place of business” for purposes of venue would undercut the policy at the heart of § 1400(b) and would essentially swallow *TC Heartland*. *See, e.g., Boston Sci. Corp. v. Cook Grp., Inc.*, 269 F. Supp. 3d 229, 247 (D. Del. 2017) (“This is clear from *TC Heartland*[] which described *Fourco* as holding that § 1400(b)’s use of the word ‘resides’ negat[es] any intention to make corporations suable, in patent infringement cases, where they are merely doing business.”); *Hildebrand v.*

Wilmar Corp., No. 17-cv-02821, 2018 WL 1535505, at *3 (D. Colo. Mar. 29, 2018) (“[F]inding venue proper in every state in which the defendant sells its products through a distributor would render § 1400(b)’s ‘place of business’ requirement substantially similar to the ‘minimum contacts’ requirement underlying personal jurisdiction. The Federal Circuit has specifically warned courts to be ‘careful not to conflate showings that may be sufficient for other purposes, *e.g.*, personal jurisdiction or the general venue statute, with the necessary showing to establish proper venue in patent cases.’”) (quoting *Cray*, 871 F.3d at 1361).

None of the allegations in Nivagen’s Complaint, taken alone or in combination, demonstrate a basis for venue under § 1400(b). Accordingly, this case should be dismissed or transferred pursuant to 28 U.S.C. § 1406(a). If the Court finds that transfer instead of dismissal is in the interest of justice for the reasons discussed below, the Court should transfer this case to the District of New Jersey.

B. Because Venue is Improper as to Sun, the Court Need Not Consider Venue with Respect to Other Defendants to Conclude that Venue in this District is Improper.

Sun is a U.S. corporation that is incorporated in Delaware and maintains a principal place of business in Princeton, New Jersey. The other three defendants in this case, Sun Pharmaceutical Industries Ltd., Sun Pharma Advanced Research Company Ltd., and Sun Pharmaceutical Medicare Ltd. are Indian corporations. Because venue is improper in this district as to Sun, this Court need not consider venue with respect to the other defendants in this case to conclude that venue is improper in this district. *See, e.g., Magnacoustics, Inc. v. Resonance Tech. Co.*, No. 97-1247, 1997 WL 592863, at *1 (Fed. Cir. Sept. 25, 1997) (“[A]s firmly established by judicial decisions, in an action involving multiple defendants venue and jurisdiction requirements must be met as to each defendant.”) (citing Moore’s Federal Practice 3d § 111.12[4][b]); *Agis Software Dev., LLC v. ZTE Corp.*, No. 2:17-CV-00517, 2018 WL 4854023, at *4 (E.D. Tex. Sept. 28, 2018) (“Having found

venue improper as to [one defendant], the Court need not consider the propriety of venue as to [another defendant] as, in order for a district to be one in which an action may be brought, . . . both venue and jurisdiction must be proper there as to all defendants.”) (internal citations omitted).

C. Alternatively, the Case Should be Transferred to the District of New Jersey for Convenience and in the Interests of Justice.

The first test for transfer under 28 U.S.C. § 1404(a), whether the case originally could have been brought in the proposed transferee district, is met here: the proposed transferee district, the District of New Jersey, is the home venue of Sun. The issue then is what district is more convenient based on several private and public interest factors. As shown below, several factors, including the access to sources of proof and the conveniences of the witnesses, favor New Jersey while a few others are neutral. None favor the Eastern District of Texas.

1. The Private Interests Favor Transfer.

a. Access to Sources of Proof.

The relative ease of access to sources of proof in this case weighs in favor of transfer. “In patent infringement cases, the bulk of the relevant evidence usually comes from the accused infringer. Consequently, the place where the defendant’s documents are kept weighs in favor of transfer to that location.” *In re Genentech, Inc.*, 566 F.3d 1338, 1345 (Fed. Cir. 2009); *see also Wireless Recognition Techs. LLC v. A9.com, Inc.*, No. 2:10-cv-364-JRG, 2012 WL 506669, at *3 (E.D. Tex. Feb. 15, 2012) (“[A]lleged infringer’s proof is particularly important to venue transfer analyses in patent infringement cases.”).

Sun’s evidence and sources of proof are located either outside the United States or at their corporate headquarters in Princeton, New Jersey. (Decl. ¶¶ 2, 13.) There is no relevant evidence or any relevant sources of proof in this district. Nivagen is a Delaware company with its headquarters in Sacramento, California, and no identifiable Texas presence, making its filing of

the complaint in this district ostensibly some form of forum shopping as opposed to anything else. (See Compl. ¶ 1.) Sun does not design or manufacture any pharmaceuticals, including the accused product, in Texas. (Decl. ¶ 14.) Because nearly all the relevant witnesses and documentary evidence are in the District of New Jersey or outside the United States, and none are in Texas, the first private interest factor favors transfer to that district.

b. Availability of Compulsory Process.

The second private interest factor concerns the availability of compulsory process to secure the attendance of non-party witnesses. At this point, neither party has identified a third party in the Eastern District of Texas that may have relevant testimony or evidence in this case. This factor is therefore neutral.

c. Convenience of the Witnesses.

“The convenience of the witnesses is probably the single most important factor in transfer analysis.” *In re Genentech*, 566 F.3d at 1343. “Additional distance . . . means additional travel time; additional travel time increases the probability for meal and lodging expenses; and additional travel time with overnight stays increases the time which these fact witnesses must be away from their regular employment.” *Id.* (quoting *Volkswagen I*, 545 F.3d at 317).

Here, all witnesses that are likely to testify at trial are located outside of this district. To require Sun personnel to travel to the Eastern District of Texas would cause the employees significant inconvenience and expenses. Because Sun witnesses with relevant information reside in the District of New Jersey or have reason to travel to Princeton, New Jersey, it is, by far, the more convenient forum when compared to the Eastern District of Texas. *See Wireless Recognition Techs.*, 2012 WL 506669, at *5 (“In total, the number of witnesses residing in Texas, and any relevant information which they may provide, pales in comparison to the number of party and non-party witnesses with relevant information residing in [the transferee district.]”); *see also In re*

Google LLC, No. 2022-140, 2022 WL 1613192, at *1 (Fed. Cir. May 23, 2022) (transferring to district more convenient for the balance of the witnesses). Thus, the third private interest factor strongly favors transfer.

d. Other Practical Problems.

The fourth private interest factor addresses other practical problems such as judicial economy. In this case, this is a stand-alone action brought by Nivagen against Sun and its related entities. There are no parallel litigations or other defendants unrelated to Sun, so there are no concerns of judicial economy or conflicting verdicts. Accordingly, this factor is neutral.

2. The Public Interest Factors Favor Transfer

a. Local Interest.

The District of New Jersey's interest in this matter is self-evident. *See In re Hoffmann-La Roche*, 587 F.3d 1333, 1338 (Fed. Cir. 2009) (“[I]f there are significant connections between a particular venue and the events that gave rise to a suit, this factor should be weighed in that venue's favor.”). The District of New Jersey is home to Sun's headquarters. (Decl. ¶ 2.) Sun's day-to-day marketing and sales decisions relating to the sale of the accused products in the U.S. take place within that district. *Id.* Any alleged infringement by Sun would necessarily be connected to events in that District.

The connections to the Eastern District of Texas alleged in the Complaint relate solely to the *nationwide* sales of the accused product. (See, e.g., Compl. ¶¶ 6-7.) Such limited connections are insufficient to mandate venue in a particular district. *See In re Hoffmann-La Roche*, 587 F.3d at 1338; *In re TS Tech USA Corp.*, 551 F.3d 1315, 1321 (Fed. Cir. 2008). As one court explained, “[i]nterests that ‘could apply virtually to any judicial district or division in the United States,’ such as the nationwide sale of infringing products, are disregarded in favor of particularized local interests.” *Wireless Recognition Techs.*, 2012 WL 506669, at *6 (quoting *Volkswagen I*, 545 F.3d

at 318). Therefore, because New Jersey has a “stronger local interest in resolving this litigation,” this factor strongly favors transfer. *See Voxpath RS, LLC v. LG Elecs. U.S.A., Inc.*, No. 2:10-CV-160-JRG, 2012 WL 194370, at *7 (E.D. Tex. Jan. 23, 2012) (the transferee district had “a stronger local interest in resolving [the] litigation” where no party was “headquartered in the Eastern District of Texas, and none developed any of the accused products [there.]”).

b. Congestion.

Both districts have extensive experience with patent cases and are equipped to handle this case. While the District of New Jersey currently has a greater number of cases, this factor does not outweigh the stronger factors of access to proof, witness convenience, and local interest in this case. This factor is neutral.

c. Forum Familiarity with the Law That Will Govern the Case.

This factor is neutral because Nivagen’s claims “arise under the federal patent laws, for which there is uniformity nationwide.” *See, e.g., In re Link_A_Media Devices Corp.*, 662 F.3d 1221, 1224 (Fed. Cir. 2011).

d. Conflict of Laws.

As this is a patent case, this factor is neutral or does not apply.

3. Overall Balance of Interests.

The private and public interest factors weigh in favor of transfer and indicate that the District of New Jersey is a clearly more convenient forum than the Eastern District of Texas. “[I]n a case featuring most witnesses and evidence closer to the transferee venue with few or no convenience factors favoring the venue chosen by the plaintiff, the trial court should grant a motion to transfer.” *In re Nintendo*, 589 F.3d at 1198. Sun therefore respectfully requests, if the Court does not dismiss this case, that it transfer this case to the District of New Jersey.

V. CONCLUSION

Defendants respectfully request that this Court dismiss this action without prejudice for improper venue or, as an alternative, transfer it to the District of New Jersey.

Date: June 27, 2024

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CERTIFICATE OF SERVICE

I hereby certify that all counsel of record who are deemed to have consented to electronic service are being served this 27th day of June, 2024, with a copy of this document via electronic mail.

/s/ Eric H. Findlay

Eric H. Findlay

