

**UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF TEXAS  
MARSHALL DIVISION**

BROOK + WHITTLE LTD,

Plaintiff,

v.

NESTLÉ USA, INC., ET AL.,

Defendants.

Case No. 2:24-CV-00735-JRG-RSP

**DEFENDANT NESTLÉ USA, INC.'S  
MOTION TO DISMISS FOR IMPROPER VENUE**

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## **I. PRELIMINARY STATEMENT**

The Eastern District of Texas is an improper venue for this case. Defendant Nestlé USA, Inc. ("NUSA") is a Delaware corporation that does not reside in this District, nor does it have a "regular and established place of business" here (at the time of filing the complaint or thereafter). 28 U.S.C. § 1400(b). Plaintiff Brook + Whittle Ltd ("B+W") bases its venue allegations on incorrect information and a false assertion that NUSA maintains a place of business in Plano, Texas. NUSA has never had a place of business at that address, and therefore B+W has filed its patent infringement complaint in an improper venue. The Court should dismiss the complaint under Fed. R. Civ. P. 12(b)(3).

## **II. STATEMENT OF FACTS**

On September 8, 2024, B+W filed a complaint against NUSA and a Japanese corporation, Fuji Seal International, Inc. ("Fuji Seal"), for alleged infringement of U.S. Patent No. 11,961,422 ("the '422 Patent"). (Dkt. No. 1, ¶ 1.) Specifically, B+W's complaint alleges that NUSA's Nesquik product infringes the '422 Patent. (*Id.*, ¶ 36.) B+W alleges that venue is proper in this District because NUSA has committed acts of infringement here and because NUSA has a "regular and established" place of business in this District. (*Id.*, ¶¶ 15-16.) However, the facts demonstrate that B+W's allegations are incorrect.

At the time the complaint was filed—and since the complaint was filed—NUSA has not had any ongoing business operations or facilities in this District. (Ex. A, Besman Decl., ¶ 3.) NUSA has not owned or leased **any** building, or part of a building, in the Eastern District of Texas from which NUSA has conducted its business, including: (i) any office buildings or office spaces; (ii) any manufacturing or assembly plants; (iii) any research and development laboratories; (iv) any distribution centers; or (v) any retail stores, service locations, or customer support centers. (*Id.* at ¶ 5.) NUSA also has **not** owned or leased any real estate in this District. (*Id.*) Nor does NUSA

own or lease **any** shelf space at any retail or other stores in this District. (*Id.* at ¶ 6.)

In the complaint, B+W incorrectly alleges that "Nestlé makes sales in this District through its 'Sales/Regional Office' located at 5800 Granite Parkway, Plano, TX 75024," and, accordingly, has a regular and established place of business there. (Dkt. No. 1, ¶¶ 13, 16.) But, at the time of the filing of the complaint and since, NUSA has **not** owned or leased any office buildings or office spaces in Plano, Texas, including the Sale/Regional Office as alleged in the complaint. (Ex. A, Besman Decl., ¶ 4.) The "Sales/Regional Office undefined" purportedly located at 5800 Grantie Parkway, Plano, Texas 75024 was listed on NUSA's website at <https://www.nestlejobs.com/locations> in error. (*Id.*) NUSA has **never**, in fact, owned or leased any office buildings or office spaces located at that address, including at the time the complaint was filed. (*Id.*)

### **III. LEGAL STANDARD**

Under Fed. R. Civ. P. 12(b)(3), "[a] defendant may request dismissal where venue is improper in the District where the case is brought." *Pers. Audio, LLC v. Google, Inc.*, 280 F. Supp. 3d 922, 925 (E.D. Tex. 2017) (citing Fed. R. Civ. P. 12(b)(3)). It is plaintiff's burden, however, to prove that venue is proper. *Id.* at 924. In patent infringement cases, "Section 1400(b) alone controls patent venue and it is to be strictly construed." *Id.* at 926; *see also TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 581 U.S. 258, 265-68 (2017). As a result, "Federal Circuit law controls." *Pers. Audio*, 280 F. Supp. 3d at 927; *see also In re Cray Inc.*, 871 F.3d 1355, 1360 (Fed. Cir. 2017) ("Section 1400(b) is unique to patent law, and constitutes the exclusive provision controlling venue in patent infringement proceedings. Thus, Federal Circuit law, rather than regional circuit law, governs our analysis of what § 1400(b) requires.") (citing *TC Heartland*, 581 U.S. at 263-65). In this District, venue is assessed as of the time the complaint is filed. *Pers. Audio*, 280 F. Supp. 3d at 931.

#### IV. THE COURT SHOULD DISMISS THE COMPLAINT FOR IMPROPER VENUE

B+W cannot meet its burden to prove that venue is proper in this District because NUSA neither resides in this District nor has a regular and established place of business in this District. Under Section 1400(b), venue is proper in a patent litigation case only if the case is filed in a district where: (i) defendant resides; *or* (ii) defendant has committed acts of infringement *and* has a regular and established place of business. 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.").

##### A. NUSA Does Not Reside in This District

For a domestic corporate defendant, like NUSA, "[t]he term 'resides' refers only to a defendant's state of incorporation." *Pers. Audio*, 280 F. Supp. 3d at 926 (citing *TC Heartland*, 265-67). In this case, NUSA is, and has been, incorporated in Delaware. (Ex. A, Besman Decl., ¶ 2.) Accordingly, venue cannot be based on NUSA's residence. 28 U.S.C. § 1400(b).

##### B. B+W Cannot Show that NUSA Has a Regular and Established Place of Business in This District

Venue is also not proper here because NUSA does not have a regular and established place of business in this District. 28 U.S.C. § 1400(b). Whether a defendant has a "regular and established place of business" has three general requirements: "(1) there must be *a physical place in the district*; (2) it must be a *regular and established* place of business; and (3) it must be the place *of the defendant*." *Cray*, 871 F.3d at 1360 (emphasis added) (finding that residence of two sales executives in the district was not sufficient for venue under § 1400(b)).

A "place" means "a building or part of a building set apart for any purpose or quarters of any kind from which business is conducted." *Id.* at 1362. In contrast, a "place" does not mean "a

virtual space" or "electronic communications from one person to another." *Id.* While the "place" need not be a "fixed physical presence in the sense of a formal office or store, there must still be a physical, geographical location in the district from which the business of the defendant is carried out." *Id.* (quoting *In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985)). As stated above, NUSA does not have—and did not have at the time the complaint was filed—a regular and established place of business in this District. (Ex. A, Besman Decl., ¶ 3.) NUSA has not leased or owned (i) any office buildings or office spaces; (ii) any manufacturing or assembly plants; (iii) any research and development laboratories; (iv) any distribution centers; or (v) any retail stores, service locations, or customer support centers. (*Id.* at ¶ 5.)

In the complaint, B+W incorrectly alleges that "Nestlé makes sales in this District through its 'Sales/Regional Office' located at 5800 Granite Parkway, Plano, TX 75024." (Dkt. No. 1, ¶ 13.) However, at the time of the filing of the complaint, NUSA did ***not, in fact,*** own or lease any office buildings or office spaces in Plano, Texas. (Ex. A, Besman Decl., ¶ 4.) The Court need not accept as true what has otherwise been proven as false by contradicting evidence, such as NUSA's declaration here. *Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007) ("We construe the plaintiffs' complaints in the light most favorable to them, accepting all well-pleaded facts as true, but we do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions."); accord *Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) ("The court need not . . . accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.").

The undefined "Sales/Regional Office" purportedly located at 5800 Granite Parkway, Plano, Texas 75024 was listed on NUSA's website at <https://www.nestlejobs.com/locations> in

error. (Ex. A, Besman Decl., ¶ 4.) NUSA *never* owned or leased any office buildings or office spaces located at that address, including at the time the complaint was filed. (*Id.*) Thus, NUSA has not had a physical place in the Eastern District of Texas. Because no physical place existed, NUSA did not have a regular and established place of business, and venue is not proper in this District.

**V. CONCLUSION**

For all the foregoing reasons, the Court should grant this motion to dismiss.

Dated: November 26, 2024

Respectfully submitted,

/s/ Amy E. LaValle  
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that all counsel of record who are deemed to have consented to electronic service are being served with a copy of the foregoing document, DEFENDANT NESTLÉ USA, INC.'S MOTION TO DISMISS FOR IMPROPER VENUE, via the Court's CM/ECF system per Local Rule CV-5(a)(3).

Dated: November 26, 2024

/s/ Amy E. LaValle

Amy E. LaValle