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CLIENT ALERT

# The Presence of a Defendant's Data Servers in a District, Without the Regular Presence of an Employee or Agent, Does Not Qualify as a "Regular and Established Place of Business" Sufficient to Support Venue

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In granting a writ of mandamus, the Federal Circuit clarified that an accused infringer did not have a "regular and established place of business" in a district where no employee or agent of the accused infringer regularly conducted business.

At the district court, the patentee alleged that venue was proper in the Eastern District of Texas based on the presence of the accused infringer's servers in the district. In particular, the accused infringer contracted with a third party to operate its servers in the district, but did not own or operate the datacenters and did not employ any employees at those locations. The accused infringer moved to dismiss for lack of venue, which the district court denied, concluding that the servers qualified as a "regular and established place of business" under 28 U.S.C. § 1406(a). The accused infringer subsequently petitioned for mandamus.

The Federal Circuit granted the petition and ordered that the case be transferred or dismissed for lack of venue. The court explained that the accused infringer's servers could, in fact, qualify as a "place of business," which can include virtual space or electronic communications, and is not limited to real property. However, a "regular and established place of business" requires the regular, physical presence of an employee or other agent of the accused infringer. While the court did not require that an employee or agent always be a human, and did not decide whether a machine can be an "agent," the accused infringer's servers and associated contracts failed to satisfy a regular, physical presence of an employee or other agent in the district.

A copy of the opinion can be found here.

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