No. 2020-2009

United States Court of Appeals for the Federal Circuit

ANDRA GROUP, LP,

Plaintiff-Appellant,

– v. –

VICTORIA'S SECRET STORES BRAND MANAGEMENT, INC., VICTORIA'S SECRET DIRECT BRAND MANAGEMENT, LLC, L BRANDS, INC., VICTORIA'S SECRET STORES, L.L.C.,

Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of Texas, Case No. 4:19-cv-00288-ALM-KPJ Amos L. Mazzant, III, District Court Judge

PLAINTIFF-APPELLANT'S COMBINED PETITION FOR PANEL REHEARING AND REHEARING *EN BANC*

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OCTOBER 4, 2021

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 2020-2009

Short Case Caption Andra Group, LP v. Victoria's Secret Stores, LLC

Filing Party/Entity Andra Group, LP

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

Date: 10/04/2021

Signature: /s/ Casey Griffith

Name: Casey Griffith

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☐ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
Andra Group, LP	Victoria's Secret Stores Brand Management, Inc.	
	Victoria's Secret Direct Brand Management, LLC	
	L Brands, Inc.	
	Victoria's Secret Stores, LLC	

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

☐ None/Not Applicable ☐ Additional pages attached

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

☑ None/Not Applicable ☐ Additional pages attached

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

☑ None/Not Applicable ☐ Additional pages attached

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases

Statutes

Other Authorities

STATEMENT OF COUNSEL

Based on my professional judgment, I believe the panel decision is contrary to at least the following precedents: *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514 (2017); *In re Google*, 949 F.3d 1338 (Fed. Cir. 2020); *In re ZTE(USA)*, 890 F.3d 1008 (Fed. Cir. 2018); *In re Cray*, 871 F.3d 1355 (Fed. Cir. 2017).

Based on my professional judgment, I believe this appeal requires an answer to at least the following precedent-setting question of exceptional importance: Whether it is a violation of 28 U.S.C. § 1400(b) for a court to consider, as a *threshold matter* in a patent venue dispute, whether the place of business of one company can be imputed to another company for venue purposes when they have maintained "corporate separateness."

Pursuant to Rule 40 of the Federal Rules of Appellate Procedure and this Court's rules, the following points of law or fact were overlooked or misapprehended by the panel's Opinion: (1) The panel appears to have misunderstood the significance of L Brands, Inc.'s ("LBI") 10-K Forms filed with the SEC and LBI's stated ownership and control of the Victoria's Secret Stores's ("VSS") workers and locations; (2) the panel appears to have overlooked or misapprehended the extent of LBI's control over the VSS workers; (3) the panel seemingly ignores or fails to consider its prior precedent concerning what may

constitute a principal-agent relationship; (4) the panel appears to have misapprehend the significance of the unified business model shared between LBI, Victoria's Secret Direct Brand Management, LLC, Victoria's Secret Stores Brand Management, and VSS and their shared use of the Website to actually engage in business from VSS locations.

/s/ *Casey Griffith*
Casey Griffith
Counsel for Plaintiff-Appellant

INTRODUCTION

Plaintiff-Appellant Andra Group, Inc. ("Andra Group") petitions for panel rehearing and rehearing en banc of the August 3, 2021 Precedential Opinion (ECF No. 41) (the "Opinion"), entering judgment in favor of Appellees L Brands, Inc. ("LBI"), Victoria's Secret Direct Brand Management, LLC ("VS Direct"), Victoria's Secret Stores Brand Management, Inc. ("VS Brand" and collectively with LBI and VS Direct, the "Venue Defendants"), and Victoria's Secret Stores, L.L.C. ("VSS" or "stores," and collectively with Venue Defendants, "Appellees"), and affirming the decision of the Eastern District of Texas.

In the Opinion, the panel affirmed the district court's ruling that venue was improper in the Eastern District of Texas as to the Venue Defendants under 28 U.S.C. § 1400(b). Andra Group contends VSS's storefronts in the Eastern District of Texas are "regular and established place[s] of business" of the Venue Defendants, because Venue Defendants and stores workers maintain principal-agent relationships, and because the Venue Defendants have ratified the stores locations as their places of business. *See* Corrected Brief for Plaintiff-Appellant (ECF No. 21), at 10 ("Appellant Brief").

The panel disagreed. First, it held Andra Group failed to demonstrate the Venue Defendants each had the "right to direct or control" the stores workers. Opinion at 10. Second, it ruled the Venue Defendants have maintained corporate

formalities and separateness from VSS, so that VSS's venue could not be imputed to Venue Defendants. *See id.* Third, it ruled Andra Group failed to show Venue Defendants ratified the stores locations as their own regular and established places of business. *Id.* at 10-11.

Andra Group petitions for panel rehearing because the panel appears to have misapprehended legal and factual points in affirming that venue was improper in the Eastern District as to the Venue Defendants. Andra Group respectfully asks the panel to reconsider its Opinion considering the clarifications provided in Part I below.

Alternatively, Andra Group seeks rehearing by the en banc Court. In its Opinion, the panel rules, when determining whether the place of business of one company can be imputed to a related company, a "threshold inquiry" is whether they have maintained corporate separateness. Opinion at 8. Such a rule is contrary to Supreme Court precedent and this Court's precedent interpreting § 1400(b). Moreover, the panel's rule will inevitably allow corporations to manipulate venues available for patent infringement litigation, thereby frustrating such litigation and patent holder innovation.

ARGUMENT

I. THE PANEL SHOULD REHEAR THE CASE TO CORRECT ITS MISAPPREHENSIONS OF LAW AND FACT.

The Opinion suggests the panel misapprehended at least four points of law and fact, each relevant to whether venue is appropriate in the Eastern District for the

Venue Defendants under § 1400(b). The panel should grant rehearing to reconsider the Opinion in view of the correct understandings of the law and facts. *See* Fed. R. App. P. 40(a)(2).

A. LBI's SEC Filings Reflect a Principal-Agent Relationship Between LBI and Stores Workers, as they highlight LBI's Ratification of Stores Locations.

The panel appears to have misunderstood the significance of LBI's 10-K Forms filed with the SEC. The Opinion states the filing's "use of 'we' does not convey that 'we' means LBI specifically, but that 'we' could include the individual subsidiary brands, like Stores." Opinion at 7. This is not correct—LBI explicitly refers to itself as "we" and "the Company" in the 10-K Form's opening paragraph. *See* Joint Appendix at 452 (herein "J.A.__"). The panel should not have construed "we" to refer generally to one or more of LBI's subsidiaries. *See* Opinion at 7.

This misapprehension impacts the panel's agency and ratification analysis. In its 10-K Forms, LBI confirms its control over stores workers, solidifying their principal-agent relationship. *See* J.A.454 ("Our sales associates and managers . . .")[1]; Appellate Brief at 16-18. LBI utilizes stores workers to "reinforce the image represented by the [Victoria's Secret] brands," to "create the atmosphere of the stores by providing a high level of customer service," and to receive and deploy

[1] "Our" is the possessive form of "we." *See* American Heritage Dictionary of the English Language (5th ed. 2020).

LBI's "detailed plans designating fixture and merchandise placement to ensure coordinated execution of the company-wide merchandising strategy." (J.A.454). Further, LBI takes express ownership of stores locations and their operations—a critical component of the ratification analysis. *See* J.A.452 ("Our *company-owned* retail stores . . . ."); *id.* ("[W]e have been able to lease high-traffic locations in most retail centers *in which we operate*.") (emphasis added); Appellate Brief at 32. These statements of ownership and control need not be taken lightly, as statements made in a 10-K Form provide a reliable, comprehensive overview of an entity's business activities, financial condition, product development, and audited financial statements. *See OSI Pharm., LLC v. Apotex, Inc.*, 939 F.3d 1375, 1380 (Fed. Cir. 2019).

Had the panel correctly understood the 10-K Forms and LBI's express statements of ownership and control over VSS's workers and operations, it likely would have concluded LBI maintains a principal-agent relationship with the stores workers. Moreover, the panel would have agreed LBI has ratified the stores locations.

B. LBI Maintains Control Over Stores Workers.

The panel overlooked or misapprehended several facts concerning the principal-agent relationship between LBI and stores workers. Specifically, the panel—relying solely on the testimony of Lisa Barcelona, a store manager for

VSS—held stores workers are not LBI's agents because VSS has control over all interviewing, hiring and firing, and keeping workers accountable in following the LBI Code of Conduct. Opinion at 7-8. This holding overlooks several record facts clearly establishing a principal-agent relationship. First, LBI *does* have significant influence over the hiring process—as admitted by Barcelona, the Victoria's Secret Website (which LBI controls, *see* Section I(D), *infra*) (the "Website") directs any VSS applicants to LBI's own website, which hosts the VSS job postings and application process. J.A.767. Second, LBI uses non-discretionary language in its Code of Conduct, which store managers and workers must follow (Appx679, 82:1-2), stating violations thereof *will* result in "disciplinary action up to and termination of employment." J.A.773. Third, the Code of Conduct includes a multitude of specific policies designed to control stores workers' day-to-day tasks, including: processing of reimbursements (J.A.777); how workers record their hourly time (*Id.*); workers' permissible activities while on the clock (J.A.776); restrictions on worker supervisory roles (J.A.779); responses to store audits and investigations (J.A.783); restrictions on workers accepting cash gifts (J.A.780); and restrictions on soliciting co-workers while on the clock (J.A.785). LBI also prohibits stores workers from gaining a financial interest in any vendors, suppliers, or competitors (J.A.779), working for competitors (J.A.780), and it controls what they can share online and post on their personal social media accounts. J.A.785. While VSS may self-regulate

the accountability of its workers to follow these rules, the Code of Conduct's existence and application to stores workers solidifies the principal-agent relationship. Had the panel given full consideration of these additional facts, it likely would have held LBI maintains a principal-agent relationship with stores workers.

C. VS Direct's and VS Brand's Principal-Agent Relationship with Stores Workers Can Exist Absent "Full Control."

The panel seemingly ignores or fails to consider its prior precedent on what is required to create a principal-agent relationship. While the principal's "right to direct or control" is a stated element of the principal-agent relationship (*see* Opinion at 6-8), under this Court's precedent, the relationship can still exist in lieu of the principal having full control over the agents' actions. *See In re Google*, 949 F.3d 1338, 1345 (Fed. Cir. 2020); *Applications in Internet Time, LLC v. PRX Corp.*, 897 F.3d 1336, 1357 (Fed. Cir. 2018); 3 Am. Jur. 2d Agency § 6 ("[A] special agent is authorized to do only one or more specific acts in pursuance of particular instructions or with restrictions necessarily implied from the act to be done."). As the Court discusses in in *Google*, the ability to provide interim instruction distinguishes a principal-agent relationship from a contractual, arms-length relationship. *See* 949 F.3d at 1345-46.

Here, the panel deviates from precedent and demands more of VS Direct and VS Brand than necessary to establish a principal-agent relationship with stores workers. *See* Opinion at 8. VS Direct controls stores workers and their handling of online merchandise returns. Specifically, VS Direct dictates how stores workers

process returns of merchandise originally purchased on the Website (J.A.694, 97:7-14), and it limits the return of the merchandise to stores locations and by mail (J.A.879). VS Direct also recognizes revenues from any purchases made by a stores worker on the Website on the customer's behalf. *Id.* These are more than "discrete tasks" as suggested by the panel (Opinion at 8)—they are components of VS Direct's business, made evident by it recognizing revenue as a result. J.A.879. Moreover, it is of no consequence VS Direct's control over the store workers is not extensive—VS Direct can still provide interim instruction to facilitate in-store handling of its merchandise, which is a niche, but nevertheless critical component of VS Direct's regular and established business. *See Google*, 949 F.3d at 1345; *Applications in Internet Time*, 897 F.3d at 1357; 3 Am. Jur. 2d Agency § 6.

VS Brand controls stores managers and workers by dictating which merchandise they can sell at stores locations. The panel appears to have overlooked the testimony of Barcelona, who confirmed the store managers' and workers' lack of discretion over what products they sell. *See* J.A.665 at 68:5-11 (manager has no insight on products chosen for sale); 68:22-24 (manager cannot request alternative brands of clothing to sell, including brands within LBI umbrella); 68:12-14 (manager cannot change what stores sell). Like VS Direct, VS Brand has control over the day-to-day sales operations of the store managers and workers, which is critical to VS Brand's regular and established business.

Had the panel properly applied its precedent for what amounts to a principal-agency relationship, it likely would have agreed that VS Direct and VS Brand both maintain sufficient control over stores workers needed to establish the principal-agent relationships.

D. The Venue Defendants Engage in Business at the Store Locations via their Unified Business Model and the Website.

The panel misapprehends the significance of Venue Defendant's unified business model with VSS, along with Venue Defendants' use of the Website to "actually engage in business" from stores locations. In the Opinion, the panel held the Venue Defendants merely working together "in some aspects" is insufficient to show ratification. Opinion at 9. This holding glosses over the extent of the Venue Defendants' unified business model—a highly symbiotic relationship centering around the stores locations. LBI takes ownership of and dictates operations at stores locations by curating the customers' "in-store experience," planning fixture and merchandise placement in the stores locations to ensure a coordinated, company-wide merchandising strategy, and managing in-store marketing of the Victoria's Secret brand. J.A.452, 454. It also funds improvements, fixtures, decorations, and other operating costs for the stores locations. J.A.454. VS Brand focuses on the distribution and sale of the Victoria's Secret products from stores locations—propped up by LBI—while also maintaining the PINK and VICTORIA'S SECRET marks strategically utilized in store locations. J.A.879, ¶¶ 15-16. And VS Direct

often facilitates the distribution of Victoria's Secret online products through stores locations. J.A.879.

Venue Defendants also use the Website to facilitate the Victoria's Secret business through stores locations. The Website—controlled and operated collectively by LBI (J.A.454), VS Brand, and VS Direct (J.A.310-211; 800, ¶ 11; 814, ¶ 3)—directs customers to stores locations using the "Find a Store" feature (J.A.829), is used by store workers to show customers Victoria's Secret products and facilitate product returns (J.A.633, 36:7-15; 637, 40:4-6; 864), and is used by customers to find product offers available at stores locations (J.A.832).

Venue Defendants' business relationship with VSS is more than a mere arms-length contractual relationship, as the panel suggests. *Cf. In re ZTE(USA)*, 890 F.3d 1008, 1015 (Fed. Cir. 2018). Had the panel fully considered Venue Defendants' unified business model and use of the Website, it would have ruled they actually engage in business from stores locations. *Cf.* Opinion at 9 (citing *In re Cray*, 871 F.3d 1355, 1364 (Fed. Cir. 2017)).

II. THE COURT SHOULD REHEAR THE CASE EN BANC TO ADDRESS THE PANEL'S "CORPORATE SEPARATENESS" RULE.

If the panel declines to reconsider its ruling in view of the misapprehensions discussed above, then the Court should grant a rehearing en banc to address the following: (1) the panel's erroneous "corporate separateness" rule when determining

venue for related entities under § 1400(b); and (2) the impact of such a rule on patent infringement litigation and innovation.

A. The Panel's "Corporate Separateness" Inquiry Conflicts with Supreme Court Precedent and this Court's Precedent.

In its Opinion, the panel ruled that, when determining whether the venue of one company can be imputed to a related company, a "threshold inquiry" is whether they have maintained "corporate separateness." Opinion at 8-9. Citing the Supreme Court's ruling in *Cannon Mfg. Co. v. Cudahy Packing Co.*, 267 U.S. 333, 334-35 (1925), the panel stated, "[W]here related companies have maintained corporate separateness, the place of business of one corporation is not imputed to the other for venue purposes." Opinion at 8-9. The panel subsequently held that Venue Defendants maintained their corporate formalities, and that the companies shared use of "Victoria's Secret" in their names "does not detract from the separateness of their businesses." *Id.* at 10.

The panel's reliance on *Cannon* to instill a new "corporate separateness" rule is erroneous. As an initial matter, the Supreme Court decided *Cannon* in the context of personal jurisdiction, not the patent venue statute. *See* 267 U.S. at 334. But even if *Cannon* and its progeny were impactful for venue determinations, the Supreme Court later made clear in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1517 (2017) that § 1400(b) is the *sole* source of authority for venue determinations for domestic entities in patent infringement lawsuits. Thus, reliance

on *Cannon* and other precedent decided outside the parameters of the patent venue statute is improper.

Moreover, this Court has warned against district courts analogizing to showings sufficient for personal jurisdiction or the general venue statute when making venue determinations under § 1400(b). *See In re Cray*, 871 F.3d at 1361; *see also Valeant Pharm. N.A., LLC v. Mylan Pharm. Inc.*, 978 F.3d 1374, 1380 (Fed. Cir. 2020) (citing *Cray*, 871 F.3d at 1361); *In re ZTE*, 890 F.3d at 1014 (same). To date, neither the Supreme Court nor this Court have deemed a "corporate separateness" inquiry appropriate for corporations and related entities under § 1400(b). Likewise, no precedent makes the ratification analysis inapplicable or secondary to a corporate separateness inquiry. Nevertheless, the panel charts its own course in an attempt to modify how corporations and related entities are evaluated under § 1400(b).

The "corporate separateness" analysis also contravenes this Court's precedent from *Cray* and *ZTE* for determining venue for related entities under § 1400(b). Within recent years, when presented with such a question, this Court has focused on evaluating a defendant entity's connection to and control or influence over the related entity operating within the disputed venue. *See ZTE*, 890 F.3d at 1015; *Cray*, 871 F.3d at 1364. Indeed, this Court in *Cray* held, "no precise rule has been laid down, *and each case depends on its own facts.*" 871 F.3d at 1362. The Court

expanded this logic in *ZTE* by explaining that reasoned consideration must be given to "all relevant factors or attributes of the relationship" between a defendant and a related entity to determine if the latter serves as a "regular or established place of business" for the former. 890 F.3d at 1015. These concepts are applicable to *all* domestic entities—no exceptions are made for corporations, and the existence of corporate formalities maintained between such entities are of no consequence. *See id.* at 1015; *Cray*, 871 F.3d at 1364. Here, rather than maintain these concepts, the panel attempts to create a new escape hatch for corporations that potentially maintain their corporate formalities. *See* Opinion at 8. At minimum, this new "corporate separateness" inquiry will become a prior question that will oft supplant an evaluation of a corporation's connection to and control or influence over its subsidiaries or related entities through which it conducts business.

If the panel does not correct its deviations from *TC Heartland* and this Court's precedent, the en banc Court should grant rehearing to determine whether a "corporate separateness" rule is appropriate when determining venue for related entities under § 1400(b).

B. The Panel's "Corporate Separateness" Rule Will Frustrate Patent Litigation and Discourage Innovation.

The panel's "corporate separateness" rule will have a significant impact on patent litigation in the United States. With such a rule, corporations can more easily manipulate venue for patent infringement lawsuits. Indeed, a corporation could ratify

any *unrelated* company's place of business for its own gain, while benefitting from a more rigorous corporate separateness rule that would prevent a subsidiary's venue from being imputed onto it. *See Javelin Pharms., Inc. v. Mylan Labs., Ltd.*, C.A. No. 16-224-LPS, 2017 WL 5953296, at *4 (D. Del. Dec. 1, 2017). Worse, a corporation will be able to avoid patent infringement litigation in any venue wherein a related entity operates, so long as they ostensibly maintain corporate separateness. As clearly demonstrated here, the panel's new legal framework will allow corporations to profit from forums where its subsidiaries operate, while avoiding accountability in those forums for acts of patent infringement in which the corporation shares culpability.

The "corporate separateness" rule will also limit available venues for patent infringement actions. A consequence of the *TC Heartland* by the Supreme Court was the restriction of available venues for patent holders to file infringement actions. *See Robert G. Bone*, *Forum Shopping and Patent Law – A Comment on TC Heartland*, 96 Tex. L. Rev. 141, 141 (2017). The panel's new rule worsens this issue—infringement actions will be heavily funneled into venues wherein entities are incorporated, as such venues are the only places of "residence" for corporations under § 1400(b). *See TC Heartland,* 137 S. Ct. at 1517; *In re Cray*, 871 F.3d at 1364. Consequently, patent holders will have little choice but to file infringement actions where the defendants are incorporated, as a venue dispute can be avoided if the

lawsuit takes place where the entity "resides," rather than where they may *potentially* have a "regular and established place of business." *See* Robert Tapparo, *The Supreme Court and the Federal Circuit Turn Patent Infringement Venue Jurisprudence Upside Down*, Am. Univ. Bus. L.R., Vol. 7:3, at 422 (2018). This is problematic for businesses lacking the funds necessary to litigate expensive patent infringement actions in foreign jurisdictions. An increase in litigation expenses will result in the suing entities' patent portfolios to lose value, as the cost of enforcement will outweigh any benefits received through litigation. *See id.* at 420 (discussing consequences of recent precedent from the Supreme Court and this Court on litigation costs for patent holders). Consequently, the "corporate separateness" escape hatch will minimize innovation, as businesses will be unable or unwilling to enforce their patent rights in federal court. *See id.*

Conversely, a narrowing of available venues for patent infringement actions will result in further docket congestion within the District of Delaware and other courts chosen by large corporations to be the staging ground for patent litigation. Indeed, as seen following *TC Heartland*, the proportionally high number of incorporated businesses in Delaware will cause even more patent infringement cases filed within the district. *See id.* at 422; Amanda W. Newton, *Tightening the Gilstrap: How TC Heartland Limited the Pharmaceutical Industry When It Reined in the Federal Circuit*, 25 J. Intell. Prop. L. 255, 268 (2018) (citing Malathi Nayak,

Swelling Docket Pushing Delaware Judges to Transfer Patent Cases, 86 USLW (BNA) No. 11 (Sept. 28, 2017)). Moreover, the panel's rule will likely stymie any trends of success for patent holders to bring infringement claims in venues wherein the defendant corporation arguably has a "regular and established place of business." *See, e.g.*, Jeremy Dutra*, Subsidiary's Facility Qualifies as a Regular and Established Place of Business of the Parent for Patent Venue Purposes*, IPTechBlog (July 10, 2018), available at https://www.iptechblog.com/2018/07/subsidiarys-facility-qualifies-as-a-regular-and-established-place-of-business-of-the-parent-for-patent-venue-purposes/ ("Decisions like that in *Board of Regents* may signal a trend in which district courts are willing to peek behind formal legal structures and consider whether, under the totality of the circumstances, a defendant has ratified a subsidiary's presence as its own.").

Accordingly, if the panel does not reconsider its Opinion, the en banc Court should grant rehearing to further evaluate the implications of a "corporate separateness" rule for related entities under § 1400(b) on patent litigation and patent holder innovation in the United States.

CONCLUSION

The Court should grant rehearing, either for the panel to reconsider the points of law and fact it overlooked or misapprehended, or for the en banc Court to resolve

whether a "corporate separateness" analysis is proper under § 1400(b) as a threshold matter when determining venue for related entities.

Dated: October 4, 2021

Respectfully submitted,

/s/ *Casey Griffith*

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ADDENDUM

United States Court of Appeals for the Federal Circuit

ANDRA GROUP, LP,
Plaintiff-Appellant

v.

VICTORIA'S SECRET STORES, L.L.C., VICTORIA'S SECRET STORES BRAND MANAGEMENT, INC., VICTORIA'S SECRET DIRECT BRAND MANAGEMENT, LLC, L BRANDS, INC.,
Defendants-Appellees

2020-2009

Appeal from the United States District Court for the Eastern District of Texas in No. 4:19-cv-00288-ALM-KPJ, Judge Amos L. Mazzant, III.

Decided: August 3, 2021

MAEGHAN WHITEHEAD, Griffith Barbee PLLC, Dallas, TX, argued for plaintiff-appellant. Also represented by CASEY GRIFFITH.

RICHARD WILLIAM MILLER, Ballard Spahr LLP, Atlanta, GA, argued for defendants-appellees. Also represented by LYNN E. RZONCA, Philadelphia, PA.

Before REYNA, MAYER, and HUGHES, *Circuit Judges*.

HUGHES, *Circuit Judge*.

Andra Group, LP appeals the district court's grant in part of the Defendants' motion to dismiss for improper venue. Because we find that venue is improper in the Eastern District of Texas as to the three dismissed defendants under 28 U.S.C. § 1400(b), we affirm.

I

Defendants are related companies. *Andra Grp., LP v. Victoria's Secret Stores, LLC*, No. 4:19-cv-288, 2020 WL 1465894 at *1 (E.D. Tex. Mar. 26, 2020) (*Decision*). L Brands, Inc. (LBI) is the corporate parent of several retailers in the apparel and home product field. *Id.* This case involves the parent LBI and several Victoria's Secret entities: (1) Victoria's Secret Stores, LLC (Stores) operates the physical Victoria's Secret stores; (2) Victoria's Secret Direct Brand Management, LLC (Direct) manages the victoriassecret.com website and the Victoria's Secret mobile application; and (3) Victoria's Secret Stores Brand Management, Inc. (Brand) creates Victoria's Secret branded intimate apparel and beauty products. *Id.* "LBI's subsidiaries each maintain their own corporate, partnership, or limited liability company status, identity, and structure." *Id.* Each Defendant is incorporated in Delaware. *Andra Grp., LP v. Victoria's Secret Stores, LLC*, No. 4:19-cv-288, 2020 WL 2478546, at *2 (E.D. Tex. Feb. 24, 2020) (*Report and Recommendation*), *report and recommendation adopted*, *Decision*, 2020 WL 1465894. LBI, Direct, and Brand (collectively, the Non-Store Defendants) do not have any employees, stores, or any other physical presence in the Eastern District of Texas (the District). *Id.* at *3. Stores operates at least one retail location in the District. *Id.* at *5.

In April 2019, Andra sued Defendants for infringement of U.S. Patent No. 8,078,498 (the '498 patent), which claims

inventions directed to displaying articles on a webpage, including applying distinctive characteristics to thumbnails and displaying those thumbnails in a "master display field." '498 patent 11:27–42. **[J.A. 56]** Andra's infringement claims are directed to the victoriassecret.com website, related sites, and smartphone applications that contain similar functionality as the website. Appellant's Br. 3–4.

Defendants moved to dismiss the infringement suit for improper venue under 28 U.S.C. § 1406(a), or in the alternative, to transfer the lawsuit to the Southern District of Ohio. Andra filed an amended complaint, and the Defendants renewed their motion. *Report and Recommendation*, 2020 WL 2478546, at *1. Defendants argued that venue was improper because Stores did not commit acts of infringement in the District and the Non-Store Defendants did not have regular and established places of business in the District.

The magistrate judge recommended that the Non-Store Defendants be dismissed for improper venue but that the suit continue against Stores, because testimony by one Stores employee supported a finding of the alleged infringing acts in the District. *Id.* at *4–5. The magistrate judge did not consider transfer, because the parties had only briefed the issue of transfer where venue was improper against all the Defendants. *Id.* at *5. The magistrate judge discussed a potential division in the case, where venue was proper against some Defendants and improper against others, in a telephone conference on February 19, 2020, and Andra stated that it would proceed in the District against the Defendants who were not dismissed even if some of the Defendants were dismissed. *Id.*

After reviewing objections by both parties to the magistrate's report and recommendation, the district court adopted the findings and conclusions of the magistrate judge as the findings and conclusions of the court. *Decision*,

2020 WL 1465894 at *1. The district court dismissed the Non-Store Defendants without prejudice for improper venue on March 26, 2020. In a departure from its earlier statement that it would proceed against any Defendants who were not dismissed, Andra voluntarily dismissed the last remaining Defendant, Stores, and the district court subsequently dismissed all remaining claims without prejudice on May 15, 2020. Andra timely filed notice of appeal of the dismissal of the Non-Store Defendants for improper venue.

II

"We review de novo the question of proper venue under 28 U.S.C. § 1400(b)." *Westech Aerosol Corp. v. 3M Co.*, 927 F.3d 1378, 1381–82 (Fed. Cir. 2019). "[T]he plaintiff has the burden of establishing proper venue under 28 U.S.C. § 1400(b)." *Id.*

> 28 U.S.C. § 1400(b) provides that "[a]ny 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 "domestic corporation 'resides' only in its State of incorporation for purposes of the patent venue statute." *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1517 (2017).

Because each Defendant is incorporated in Delaware, no defendant "resides" in Texas for the purpose of patent venue. Thus, to establish venue in this case, Andra must show that each Defendant committed acts of infringement and maintains a regular and established place of business in the Eastern District of Texas.

To show that a defendant has a regular and established place of business, there are three 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." *In re Cray Inc.*, 871 F.3d 1355, 1360 (Fed. Cir. 2017).

As we stated in *Cray*, "[t]he Supreme Court has . . . instructed that '[t]he requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interests of some overriding policy, is to be given a liberal construction.'" *Id.* at 1361 (second alteration in original) (quoting *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 264 (1961)); *see also In re Google LLC*, 949 F.3d 1338, 1346 (Fed. Cir. 2020) ("[T]he Supreme Court has cautioned against a broad reading of the venue statute.").

The parties do not dispute that Stores operates retail locations in the District, and whether venue is proper as to Stores is not at issue in this appeal. The question is whether these Stores locations can be considered "a regular and established place of business" of the Non-Store Defendants. *In re Cray*, 871 F.3d at 1360. Andra argues that Stores locations are "a regular and established place of business" of the Non-Store Defendants because Stores employees are agents of the Non-Store Defendants, or, alternatively, because the Non-Store Defendants have ratified Stores locations as their places of business. We address each argument in turn.

A

"[A] 'regular and established place of business' requires the regular, physical presence of an employee or other agent of the defendant conducting the defendant's business at the alleged 'place of business.'" *In re Google*, 949 F.3d at 1345. Because there is no dispute that the Non-Store Defendants lack employees in the District, Andra argues that Stores employees are agents of LBI, Direct, and Brand. Appellant's Br. 13–14.

> "Agency is the fiduciary relationship that arises when one person (a 'principal') manifests assent to

> another person (an 'agent') that the agent shall act on the principal's behalf and subject to the principal's control, and the agent manifests assent or otherwise consents so to act." Restatement (Third) of Agency § 1.01 (Am. L. Inst. 2006). "The essential elements of agency are (1) the principal's 'right to direct or control' the agent's actions, (2) 'the manifestation of consent by [the principal] to [the agent] that the [agent] shall act on his behalf,' and (3) the 'consent by the [agent] to act.'" *In re Google*, 949 F.3d at 1345 (alterations in original) (quoting *Meyer v. Holley*, 53 U.S. 280, 286 (2003).

Andra argues that LBI "controls store location workers by dictating store operations, hiring, and conduct." Appellant's Br. 16. Andra points to various public filings by LBI that speak in broad terms about real estate holdings and investments, contends that LBI controls the hiring and firing of employees, and argues that because LBI requires Stores associates to sign and follow LBI's Code of Conduct, this indicates control over the employees. Andra argues that Direct "controls store location workers by dictating their handling of returns of merchandise purchased on the [Victoria's Secret] website." *Id.* at 18. Finally, Andra argues that Stores employees are agents of Brand because Brand "'closely controls the distribution and sales of its products' exclusively available through store locations and the [w]ebsite." *Id.* at 19 (quoting J.A. 799–801 ¶¶ 11, 13, 15–16). Andra also contends that Brand's control over the Victoria's Secret website "strengthens the agency relationship with [] Brand." *Id.* at 19–20.

We considered a similar agency question in *In re Google*. There, a plaintiff sued Google for patent infringement in the Eastern District of Texas, alleging that venue was proper based on the presence of several Google Global Cache servers in the District. *In re Google*, 949 F.3d at 1340. Google did not own the datacenters where the servers were hosted but contracted with two internet service

providers (ISPs) in the district to host the servers. *Id.* The contracts included several limitations including: restricting "the ISPs' ability to relocate the servers without Google's permission," limiting unauthorized access to the space used by Google's servers, requiring the ISPs to provide "installation services," forbidding the ISPs from accessing, using, or disposing of the servers without Google's permission, and requiring the ISPs to provide "remote assistance services" involving basic maintenance activities performed on the servers by the ISP's on-site technician, if requested by Google. *Id.* at 1340–41.

The relevant inquiry was "whether the ISPs [were] acting as Google's agent." *Id.* at 1345. We held that although the installation of the servers and provision of maintenance may suggest an agency relationship, the installation activity was a "one-time event for each server" that did not constitute the conduct of a "regular and established" business, and "SIT ha[d] not established that the ISPs performing the specified maintenance functions [were] conducting Google's business within the meaning of the statute." *Id.* at 1346.

Here, as in *Google*, none of Andra's arguments are sufficient to show that Stores employees are agents of the Non-Store Defendants. None of the public filings cited by Andra demonstrate LBI's control, because they are documents covering all of LBI's brands. The documents' use of "we" does not convey that "we" means LBI specifically, but that "we" could include the individual subsidiary brands, like Stores. *See* J.A. 452, 846. Andra's contention that LBI controls the hiring and firing of store employees is directly contradicted by the testimony of the store manager for the Plano, Texas store, Lisa Barcelona, who stated during her deposition that she, a Stores employee, interviews associates and makes offers of employment. J.A. 642–43. She also testified that she decides whether to fire employees and that she does not need any approval before doing so, and that it is she who holds Stores employees at her store

accountable for following the Code of Conduct, not LBI. Thus, none of the facts alleged by Andra are sufficient to prove that Stores employees are agents of LBI, because LBI does not have "the right to direct or control" Stores employees, an essential element of an agency relationship. *In re Google*, 949 F.3d at 1345.

Additionally, while Stores locations accepting returns of Direct merchandise purchased on the website is a service that may benefit Direct, Andra has not shown that Direct controls this process. This one discrete task is analogous to the ISPs' installation and maintenance of the servers in *Google*, which we found insufficient to establish an agency relationship. *Id.* at 1346. Finally, Brand's close control of its products and the website does not equate to "the right to direct or control" employees at the physical Stores locations in the District. *Id.* at 1345.

For the above reasons, we agree with the district court that Andra has not established that any of the Non-Store Defendants exercise the degree of control over Stores employees required to find an agency relationship.

B

Andra's second venue theory is that the Non-Store Defendants ratified Stores locations as their own places of business such that Non-Store Defendants may be said to maintain a regular and established place of business in the District.

A threshold inquiry when determining whether the place of business of one company can be imputed to another, related company is whether they have maintained corporate separateness. If corporate separateness has not been maintained, the place of business of one corporation may be imputed to the other for venue purposes. But where related companies have maintained corporate separateness, the place of business of one corporation is not imputed to the other for venue purposes. *See Cannon Mfg. Co. v.*

Cudahy Packing Co., 267 U.S. 333, 334–35 (1925); 14D Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3823 & nn.25–26 (4th ed.).

Andra does not argue that the Defendants have not maintained corporate separateness. Andra contends that each of the Non-Store Defendants has ratified the retail stores as its own based on the criteria outlined in *In re Cray*, including "whether the defendant owns or leases the place, or exercises other attributes of possession or control over the place," "the storing of materials at a place in the district so that they can be distributed or sold from that place," and the "defendant's representations that it has a place of business in the district." 871 F.3d at 1363.

Andra argues (1) that LBI has ratified store locations through its control over store operations and by holding out store locations as its own; (2) that Direct has ratified store locations by allowing merchandise purchased online to be returned in stores and by directing customers to store locations using the "Find a Store" feature; and (3) that Brand has ratified store locations by distributing and selling its merchandise from Store locations and because it is listed as the registrant for the Victoria's Secret website.

But "the mere fact that a defendant has advertised that it has a place of business or has even set up an office is not sufficient; the defendant *must actually engage in business* from that location." *In re Cray*, 871 F.3d at 1364 (emphasis added). Andra has not shown that the Non-Store Defendants actually engage in business at Stores locations. Andra asserts that the Non-Store Defendants maintain a "unified business model" with Stores, asserting many of the same facts it set forth in support of its agency theory, but the fact that the entities work together in some aspects, as discussed above, is insufficient to show ratification. *See In re ZTE(USA) Inc.*, 890 F.3d 1008, 1015 (Fed. Cir. 2018) (holding that a contractual relationship between two entities "does not necessarily make [the first company's] call center

'a regular and established place of business' of [the second company] in the [district]").

Several additional factors weigh against a finding of ratification here. The Non-Store defendants do not own or lease Stores locations; Stores leases and performs all operations at the retail locations. *Decision*, 2020 WL 1465894 at *5. The Victoria's Secret website's "Find a Store" feature points consumers to Stores locations, not Non-Store Defendants locations. J.A. 829. The Non-Store Defendants do not display their corporate names in the retail locations. *Decision*, 2020 WL 1465894 at *5. Non-Store Defendants carry out different business functions than Stores. *Id.* And the companies' shared use of "Victoria's Secret" in their name does not detract from the separateness of their businesses. Giving "reasoned consideration to all relevant factors or attributes of the relationship" between Stores and Non-Store Defendants, Andra has not met its burden to show that Non-Store Defendants have ratified Stores locations as their own places of business such that Non-Store Defendants may be said to maintain a regular and established place of business in the District.

III

All three *Cray* factors must be met for venue to be proper against a defendant. The second *Cray* factor, a "'regular and established place of business' requires the regular, physical presence of an employee or other agent of the defendant conducting the defendant's business at the alleged 'place of business.'" *In re Google,* 949 F.3d at 1345. Because Andra has not demonstrated that LBI, Brand, or Direct has "the right to direct or control" the actions of Store employees, *id.* at 1346, it has not shown the "regular, physical presence of an employee or other agent" of LBI, Brand, or Direct in the District. The Defendants have also maintained corporate formalities and Andra has not shown that Non-Store Defendants ratified Stores locations in the District as their own places of business. We therefore

affirm the district court's decision that venue was not proper in the District as to the Non-Store Defendants.

AFFIRMED

FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 2020-2009

Short Case Caption: Andra Group, LP v. Victoria's Secret Stores, LLC

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