

IN THE UNITED STATES DISTRICT COURT  
FOR THE WESTERN DISTRICT OF TEXAS  
WACO DIVISION

KOSS CORPORATION,  
*Plaintiff,*

v.

BOSE CORPORATION,  
*Defendant.*

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6-20-CV-00661-ADA

**ORDER GRANTING BOSE CORPORATION'S  
MOTION TO DISMISS FOR IMPROPER VENUE AND MOOTING BOSE  
CORPORATION'S ALTERNATE MOTION TO TRANSFER VENUE**

Came on for consideration this date is Defendant Bose Corporation's Motion to Dismiss for Improper Venue, or Preferably to Transfer Venue to the District of Massachusetts. Def.'s Mot., ECF No. 21. The Court has considered the Motion, all relevant filings, oral argument, and the applicable law.<sup>1</sup> For the reasons set forth below, the Court finds that Defendant's Motion to Dismiss for Improper Venue should be **GRANTED**.

**I. BACKGROUND**

Bose is incorporated in the state of Delaware with its corporate headquarters located in the District of Massachusetts. Def.'s Mot. at 1. Until this year, Bose operated retail locations. *Id.* As part of a decision to close all Bose retail stores, Bose closed down its Bose Factory Store in San Marcos, Texas on February 29, 2020. *Id.* at 1–2. Since then, Bose asserts that is has neither owned nor operated any place of business in Texas. *Id.* at 2.

Bose sells its products in third-party retail stores present in the Western District of Texas. Def.'s Mot. at 2. In some stores, Bose provides interactive display units for demonstration of Bose products. *Id.* at 10. Bose employees do not conduct business at the Bose displays. Def.'s

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<sup>1</sup> Although Koss filed a sur-reply (ECF No. 32) in response to Bose's reply, it did not seek leave from the Court to do so. In response, Bose filed a sur-sur-reply (ECF No. 34) but also did not seek leave from the Court. Accordingly, the Court strikes Koss's sur-reply and Boses's sur-sur-reply and will not consider these filings in its analysis.

Reply at 8, ECF No. 25-1. Bose contracts with a third-party vendor, ActionLink, to service and maintain the Bose interactive displays. *Id.* at 2. Until March 2020, ActionLink also provided Bose Display Representatives to third party retail stores. *Id.* at 9. Bose Display Representatives were ActionLink employees whose task was to “engage and train retail associates on . . . Bose products.” *Id.* at 10.

Plaintiff Koss Corporation filed its Complaint in this Court on July 22, 2020 against Bose Corporation alleging direct and indirect infringement of U.S. Patent Nos. 10,206,025, 10,368,155, and 10,469,934 (the “Asserted Patents”). Pl.’s Compl. ECF No. 1. Each Patent relates to wireless headphone technology, and Koss asserts that Bose infringes the Asserted Patents by selling wireless headphone products. *Id.* at 15–21. Koss’s Complaint states that venue is proper in the Western District of Texas under 28 U.S.C. §1400(b) because of the presence of the Bose Factory Store in San Marcos and because Bose has regularly transacted business in this District. *Id.* at ¶ 10.

Bose filed a Motion to Dismiss for Improper Venue, or Preferably to Transfer Venue to the District of Massachusetts on December 17, 2020 alleging that the San Marcos store closed before the Plaintiff’s action was brought, and that Bose neither resides in the Western District of Texas nor has a “regular and established place of business” in Texas. Def.’s Mot. at 1. Koss filed a response opposing the motion on February 12, 2021 stating that Bose does have a “regular and established place of business” in this District. Pl.’s Resp., ECF No. 23-2. Bose filed a reply on February 19, 2021. Def.’s Reply. ECF No. 25-1. Koss filed a sur-reply on February 26, 2021. Pl.’s Sur-Reply, ECF No. 32. Bose filed a sur-sur-reply on March 4, 2021. Def.’s Sur-Sur-Reply, ECF No. 34. The Court held a hearing on April 16, 2021 where both parties gave oral arguments on the Motion to Dismiss.



## II. LEGAL STANDARD

Under Federal Rules of Civil Procedure 12(b)(3), a court may dismiss a case when venue is “wrong” or “improper” in the forum where the case was filed. Fed. R. Civ. P. 12(b)(3). The plaintiff bears the burden of establishing proper venue. *Slyce Acquisitions Inc. v. Syte – Visual Conceptions Ltd.*, 422 F. Supp. 3d 1191, 1198 (W.D. Tex. 2019). The plaintiff need only make a prima facie showing to establish venue if the court does not hold an evidentiary hearing. *Johnston v. Multidata Sys. Int’l Corp.*, 523 F.3d 602, 609 (5th Cir. 2008). The Court must accept all allegations in the plaintiff’s complaint as true and resolve all conflicts in favor of the plaintiff. *Braspetro Oil Servs. Co. v. Modec (USA), Inc.*, 240 F. App’x 612, 615 (5th Cir). The Court may consider evidence in the record beyond the facts alleged in the complaint and its admissible attachments. *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 238 (5th Cir. 2009). If venue is improper and timely challenged, the court has discretion to dismiss or transfer the case. *Caldwell v. Palmetto State Savs. Bank of S.C.*, 811 F.2d 916, 919 (5th Cir.).

The patent venue statute, 28 U.S.C. § 1400, is the “sole and exclusive provisions controlling venue in patent infringement actions.” *TC Heartland LLC v. Kraft Food Grp. Brands LLC*, 137 S. Ct. 1514, 1519 (2017). Under the patent venue statute, a plaintiff may establish venue in the district “where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.” 28 U.S.C. § 1400(b). A defendant has a “regular and established place of business” in any district where (1) a defendant has a physical place, (2) the physical place is a regular and established place of business, and (3) the physical place is the place of the defendant. *In re Cray Inc.*, 871 F.3d 1355, 1360 (Fed. Cir. 2017). The standard for a regular and established place of business requires more than the

minimum contacts standard necessary under personal jurisdiction. *In re Cray Inc.*, 871 F.3d at 1360.

A “place” requires a “building or part of a building set apart for any purpose” or “quarters of any kind” where business is conducted. *Id.* at 1362. “Regular” indicates a steady, uniform, orderly, and methodical manner of business operations. *Id.* “Established” denotes that the place of business is settled certainly or fixed permanently. *Id.* Courts should consider whether the defendant lists the place of business on its website or other directory, or whether the defendant’s name appears on the building’s sign. *Id.* at 1363–64. The fact that the defendant advertised the place as its place of business or has an office in that place is not sufficient to establish venue. *Id.* at 1364. “The defendant must actually engage in business from that location.” *Id.*

A defendant need not own real property in the district to fulfill the venue requirement. *In re Google LLC*, 949 F.3d 1338, 1343 (Fed. Cir. 2020). Rather, the defendant can meet the statutory requirement by possessing or controlling any physical place in the district. *Id.*

### III. ANALYSIS

Bose asserts that Koss cannot establish proper venue in the Western District of Texas because Bose does not reside in or have a regular and established place of business in this District. Def.’s Mot. at 1. Koss believes that, by owning interactive displays installed in third-party retail stores, Bose leases and has control over a “place” in the Western District of Texas and, thus, has a regular and established place of business in this District. Pl.’s Resp. at 1. Bose contends that the interactive displays are not a “place” under §1400(b). Def.’s Reply at 1. In addition, Bose argues that the installation and maintenance activities it performs with the interactive displays are not enough to create a “regular and established place of business.” Def.’s Reply at 1.

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