



through its authorized dealers in Austin and Waco and exercises control over those dealerships. *Id.* at 3–5, ¶¶ 10–14.

## II. LEGAL STANDRD

Federal Rule of Civil Procedure 12(b)(3) allows a party to move to dismiss an action for “improper venue.” FED. R. CIV. P. 12(b)(3). 28 U.S.C. § 1440(b) is the “sole and exclusive provision controlling venue in patent infringement actions.” *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1519 (2017). “Whether venue is proper under § 1400(b) is an issue unique to patent law and is governed by Federal Circuit law,” rather than regional circuit law. *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1012 (Fed. Cir. 2018). “[U]pon motion by the Defendant challenging venue in a patent case, the Plaintiff bears the burden of establishing proper venue.” *Id.* at 1013–14. Plaintiff may carry this burden by establishing facts that, if taken to be true, establish proper venue. *Castaneda v. Bradzoil, Inc.*, No. 1:20-CV-1039-RP, 2021 WL 1390423, at \*1 (W.D. Tex. Apr. 13, 2021). “On a Rule 12(b)(3) motion to dismiss for improper venue, the court must accept as true all allegations in the complaint and resolve all conflicts in favor of the plaintiff.” *Id.* (citing *Braspetro Oil Servs. Co. v. Modec (USA), Inc.*, 240 F.App’x 612, 615 (5th Cir. 2007) (per curiam)). In determining whether venue is proper, “the Court may look beyond the complaint to evidence submitted by the parties.” *Ambraco, Inc. v. Bossclib, B.V.*, 570 F.3d 233, 237–38 (5th Cir. 2009).

Section 1400(b) provides that venue in patent cases is proper “[1] where the defendant resides, or [2] where the defendant [a] has committed acts of infringement and [b] has a regular and established place of business.” 28 U.S.C. § 1400(b). Under the first prong, the Supreme Court has held that “a domestic corporation ‘resides’ only in its State of incorporation for purposes of the patent venue statute.” *TC Heartland*, 137 S. Ct. at 1517. Under the second prong, the Federal

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Circuit interpreted, in *In re Cray Inc.*, 871 F.3d 1355 (Fed. Cir. 2017), “regular and established place of business” to impose 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.” *Id.* at 1360. Regarding the first requirement, a “place” refers to a “‘building or a part of a building set apart for any purpose’ or ‘quarters of any kind’ from which business is conducted.” *Id.* at 1362 (citations omitted). Regarding the second requirement, “regular” means that the business must operate in a “‘steady, uniform, orderly, and methodical’ manner,” and “sporadic activity cannot create venue.” *Id.* (citations omitted). And the third requirement means that the place cannot be solely a place of the defendant’s employee – “the defendant must establish or ratify the place of business.” *Id.* at 1363.

Subsequently, in *In re Google LLC*, 949 F.3d 1338 (Fed. Cir. 2020), the Federal Circuit added a fourth requirement: “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.’”<sup>1</sup> *Id.* at 1345.

### III. DISCUSSION

The main dispute before the Court is whether Volkswagen has “a regular and established place of business” in this District. The parties do not dispute that Volkswagen does not “reside” in this District and therefore the first prong of Section 1400(b) does not apply. Under the second prong, the parties do not dispute that Plaintiff has plausibly pled that “defendant has committed acts of infringement” and the parties also do not dispute that the dealerships are “physical places”

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<sup>1</sup> In *Google*, Federal Circuit considered this requirement as part of the second *Cray* factor. *In re Google LLC*, 949 F.3d 1338, 1344 (Fed. Cir. 2020) (“We agree . . . that under the second *Cray* factor, a ‘place of business’ generally requires an employee or agent of the defendant to be conducting business at that place.”). However, this *Google* requirement is essentially a different requirement than the original second *Cray* requirement, which places more focus on the phrase “regular and established.” Therefore, this Court treats the *Google* requirement as a fourth requirement in addition to the three *Cray* requirements.

in this District and are “regular and established” under the first and second *Cray* requirements. Therefore, the Court discusses below whether the third and fourth requirements are met in this case to establish proper venue in this District.

**A. Ratification**

Under the third *Cray* requirement, a plaintiff must show that the place of business at issue is “the place of the defendant.” *In re Cray*, 871 F.3d at 1360. To meet this requirement, “the defendant must establish or ratify the place of business.” *Id.* at 1363. There is no bright-line rule for this inquiry. *Id.* at 1362 (“In deciding whether a defendant has a regular and established place of business in a district, no precise rule has been laid down and each case depends on its own facts.”). The Federal Circuit set forth a number of considerations to determine whether the defendant has ratified the place of business, 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 an employee’s continued residence in the district or the storing of materials at a place in the district so that they can be distributed or sold from that place”; (3) whether the defendant has made “representations that it has a place of business in the district”; 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.” *Id.* at 1363-64. These considerations are not exhaustive but are more illustrative in nature. *Blitzsafe Texas, LLC v. Bayerische Motoren Werke AG*, No. 2:17-CV-00418-JRG, 2018 WL 4849345, at \*6 (E.D. Tex. Sept. 6, 2018).

More recently, the Federal Circuit found additional factors relevant to this analysis, including: “the nature of [the defendant’s] relationship with [its] representatives [in the District], or whether it has any other form of control over any of them”; “whether [the defendant] possesses,

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owns, leases, or rents the [facility] . . . or owns any of the equipment located there”; “whether any signage on, about, or relating to the [facility] associates the space as belonging to [the defendant]”; and “whether the location of the [facility] was specified by the defendant or whether [a third party] would need permission from the defendant to move [the facility] outside of the . . . District or to stop working for [the defendant].” *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1015–16 (Fed. Cir. 2018).

***1. Defendant exercises control over the dealerships’ places in this District.***

For this factor, Volkswagen’s main argument is a one-sentence statement in its Reply, stating that it is “forbidden to ‘operate or control’ the dealerships” under Texas law. Dkt. 16 at 3–4; Tex. Occ. Code § 2301.476(c) (“[A] manufacturer or distributor may not directly or indirectly . . . operate or control . . . a franchised dealer or dealership.”). However, this does not mean that Volkswagen does not exercise *de facto* control over the dealerships to some degree, nor does it mean that the dealerships are not places of Volkswagen as a matter of law. *See, e.g., Blitzsafe*, 2018 WL 4849345, at \*7.

As Plaintiff points out, Volkswagen controls numerous aspects of its dealerships’ operations through a number of agreements with its dealerships. Dkt. 22 at 8-15. Volkswagen’s alleged control over its dealers include: (1) the dealers’ premises and facilities and their use and maintenance; (2) the dealers’ use of Volkswagen trademarks and trade names in advertising and marketing; (3) the price and terms upon which its dealers purchase its vehicles; (4) the dealers’ inventory of vehicles and parts; (5) the terms and scope of warranties to be included in its vehicle sales, the manner in which its dealers provide notice and advertise such warranties, and the rate or price at which a Volkswagen or Audi dealer will be reimbursed for services; (6) monthly reporting from the dealers of their finances and operations; (7) the IT equipment such as computers that its dealers must use and maintain; (8) the number of personnel that its dealers must have on site and

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