

upon “(1) the complaint alone; (2) the complaint supplemented by the undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts.” *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 238 (5th Cir. 2009) (quoting *Ginter ex rel. Ballard v. Belcher, Prendergast & Laport*, 536 F.3d 439, 449 (5th Cir. 2008)). Additionally, when resolving the matter on the pleadings, the Court “must accept as true all allegations in the complaint and resolve all conflicts in favor of the plaintiff.” *Mayfield v. Sallyport Glob. Holdings, Inc.*, No. 6:13-CV-459, 2014 WL 978685, at *1 (E.D. Tex. Mar. 5, 2014) (citing *Ambraco*, 570 F.3d at 237–38).

Venue facts are to be examined as of the date the suit is filed.¹ If venue is improper, the Court must dismiss, “or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.” 28 U.S.C. § 1406(a); Fed. R. Civ. P. 12(b)(3).

B. Patent Venue: 28 U.S.C. § 1400(b)

In matters unique to patent law, Federal Circuit law—rather than the law of the regional circuit—applies. *In re Cray*, 871 F.3d 1355, 1360 (Fed. Cir. 2017) (citing *Midwest Indus., Inc. v. Karavan Trailers, Inc.*, 175 F.3d 1356, 1359 (Fed. Cir. 1999)). “Section 1400(b) is unique to patent law, and ‘constitute[s] the exclusive provision controlling venue in patent infringement proceedings’” *Id.* (quoting *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S.Ct. 1514, 1518 (2017)) (alterations in original). Thus, Federal Circuit law governs the analysis of what § 1400(b) requires. *Id.* Additionally, under § 1400(b), “upon motion by the Defendant challenging

¹ During the evidentiary hearing, AGIS cited *In re Google*, 949 F.3d 1338 (Fed. Cir. 2020) to support its argument that venue is determined as of a time other than the time of filing. [Hearing 70, 4]. However, the footnote AGIS cited merely demonstrates that there is a circuit split as to what time venue is determined. *See In re Google*, 949 F.3d at 1340 n.1. The footnote goes on to state, “We need not decide the correct standard, because the GGC servers were present in the district both at the time the cause of action accrued and at the time the complaint was filed.” *Id.* Because AGIS has not cited any binding authority that holds venue is determined at a time other than the time of filing the complaint, this Court will follow the majority position that the time of filing suit governs venue.

venue in a patent case, the Plaintiff bears the burden of establishing proper venue.” *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1013 (Fed. Cir. 2018).

Turning to the language of 28 U.S.C. § 1400(b), it states: “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.” *Id.* Thus, under §1400(b), venue is proper: (1) “where the defendant resides” or (2) “where the defendant has committed acts of infringement and has a regular and established place of business.” For the purposes of § 1400(b), a domestic corporation resides only in its state of incorporation. *TC Heartland*, 137 S.Ct. at 1520.

If venue is not proper based on the defendant’s residence, venue may still be proper if the defendant has both “committed acts of infringement” and “has a regular and established place of business” in the district. For the former, “[w]here a complaint alleges infringement, the allegations ‘satisfy the acts of infringement requirement of § 1400(b)’ ‘[a]lthough the [] allegations may be contested.’” *Seven Networks, LLC v. Google LLC*, 315 F.Supp.3d 933, 942 (E.D. Tex. 2017) (quoting *Symbology Innovations, LLC v. Lego Sys., Inc.*, 282 F.Supp.3d 916, 928 (E.D. Va. 2017)) (alterations in original). For a regular and established place of business, *Cray* held that 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.” *Cray*, 871 F.3d at 1360. When determining these requirements, the Federal Circuit has emphasized that “each case depends on its own facts” and “no one fact is controlling.” *Id.* at 1362, 1366.

“[T]he first requirement is that there ‘must be a physical place in the district.’” *Id.* at 1362. According to *Cray*, “a place [is] a building or a part of a building set apart for any purpose or quarters of any kind from which business is conducted.” *Id.* (internal quotations marks omitted).

Furthermore, “[w]hile 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)), Additionally, a “virtual space” cannot satisfy this requirement. *Cray*, 871 F.3d at 1362.

The second requirement is that the physical place be a regular and established place of business. *Id.* “A business may be ‘regular,’ for example, if it operates in a ‘steady[,] uniform[,] orderly[,] and] methodical’ manner.” *Id.* (internal citations omitted) (alterations in original). In addition to regular, the place of business must be established. *Id.* at 1363. “The word contains the root ‘stable,’ indicating that the place of business is not transient. It directs that the place in question must be ‘settle[d] certainly, or fix[ed] permanently.’” *Id.* Essentially, the place of business “must for a meaningful time period be stable, established.” *Id.*

The third requirement is that the place, “[a]s the statute indicates, [] must be a place *of the defendant* Thus, the defendant must establish or ratify the place of business.” *Id.* (emphasis in the original). When considering whether a place is of the defendant, a court should consider: “whether the defendant owns or leases the place”; “whether the defendant conditioned employment on an employee’s continued residence in the district”; or whether the defendant does “exercise other attributes of possession or control over the place.” *Id.* Another relevant consideration is “whether the defendant lists the alleged place of business on a website, or in a telephone or other directory; or places its name on a sign associated with or on the building itself. . . .” *Cray*, 871 F.3d at 1363-64. “But, the mere fact that defendant has advertised . . . is not sufficient.” *Id.* at 1364. Furthermore, a “place of business” does not require a real property ownership or a leasehold interest in real property. *In re Google LLC*, 949 F.3d 1338, 1343–44 (Fed. Cir. 2020). But, “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." *Id.* at 1345 (internal quotations marks omitted). Finally, this requirement is satisfied if the defendant "actually engage[s]" in business from the physical location in the District. *Intellectual Ventures II LLC v. FedEx Corp.*, No. 2:16-cv-980-JRG, 2017 WL 5630023, at *7 (E.D. Tex. Nov. 22, 2017).

C. Agency

"An agency relationship is a '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 to act.'" *Google*, 949 F.3d at 1345 (quoting Restatement (Third) of Agency § 1.01). "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.'" *Id.* (citing *Meyer v. Holley*, 537 U.S. 280, 286 (2003)) (alterations in the original).

D. Transfer

If venue is not proper in a district, the district court may either dismiss, or "if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a). "Transfer is typically considered more in the interest of justice than dismissal." *Personal Audio*, 280 F.Supp.3d at 936. When deciding where to transfer under § 1406(a), a court may consider the 28 U.S.C. § 1404(a) convenience factors. *See Brooks & Baker, LLC v. Flambeau, Inc.*, Case No. 2:10-cv-146-TJW-CE, 2011 WL 4591905, at *6 (E.D. Tex. Sept. 30, 2011). However, those factors do not control the § 1406(a) transfer analysis. *See Uniloc USA, Inc. v. Nutanix, Inc.*, Case No. 2:17-cv-00174-JRG, 2017 WL 11527109, at *5 (E.D. Tex. Dec. 6,

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