

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

STRATOSAUDIO, INC.,

Plaintiff,

v.

VOLKSWAGEN GROUP OF AMERICA,
INC.,

Defendant.

Case No. 6:20-CV-1131

**VOLKSWAGEN GROUP OF AMERICA, INC.’S
MOTION TO DISMISS OR TRANSFER FOR IMPROPER VENUE**

Because Volkswagen Group of America, Inc. (“Volkswagen”) does not have “a regular and established place of business” in this District, venue is not properly laid in this Court.

Pursuant to 28 U.S.C. §§ 1400(b) and 1406(a), and Fed R. Civ. P. 12(b)(3), defendant Volkswagen respectfully moves the Court to dismiss the case, or to transfer it to a district where it might properly have been brought. Volkswagen respectfully suggests that it would be in the interest of justice to transfer this case to the United States District Court for the Eastern District of Michigan.

1. Plaintiff’s Venue Allegations

It is Plaintiff’s burden to establish that venue is proper. *See, e.g., Omega Patents, LLC v. BMW of North America et al.*, 1:20-cv-01907-SDG, 2020 WL 8184342 (N.D. Ga. December 21, 2020), at *1.

In its complaint, Plaintiff avers, “Venue is proper in this District under 28 U.S.C. § 1400(b) because, among other things, Defendant has transacted business in this District and has

committed acts of infringement in and has a regular and established place of business in this judicial district.”¹

The only places of business that Plaintiff identifies in the complaint are Volkswagen and Audi dealerships (D.I. 1 at 10). Plaintiff does not allege that these dealerships are anything other than independent franchises. Indeed, the fact is that:

The VW-brand dealerships located in the Western District of Texas are owned and operated by entities independent of VWGoA (and Volkswagen altogether). VWGoA has no ownership interest in any of the dealerships in the Western District of Texas. In fact, the state laws of Texas prohibit VWGoA from owning or operating any dealerships in the state of Texas.

Hahn Decl. (accompanying this motion) at ¶ 10.

Volkswagen neither owns nor leases any real estate in this District, *id.* at ¶ 4, and does not employ personnel stationed in the District, *id.* at ¶ 7. Plaintiff does not allege otherwise. In short, “VWGoA does not have any offices, warehouses, or other places of business within the Western District of Texas.” Hahn Decl. at ¶ 5.

2. A Franchised Automotive Dealership Is Not an Automaker’s Own Place of Business

Three district courts have recently considered whether an automaker’s authorized dealerships are the automaker’s places of business for purposes of the patent venue statute. On the one hand, both the United States District Court for the Northern District of Georgia and the United States District Court for the Southern District of California concluded that the presence of dealerships does not confer venue for a suit against the automaker, because the dealerships are

¹ Plaintiff did not allege that Volkswagen is resident in this District. Indeed, Plaintiff pleads, correctly, that Volkswagen is a New Jersey corporation (D.I. 1 at ¶ 7), which is an admission that for venue purposes Volkswagen is resident only in New Jersey. *See, e.g., TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S.Ct. 1514, 1520 (2017) (holding that for corporate venue purposes, residence “refers only to the State of incorporation”).

not “the place of the defendant.” *Omega Patents*, 2020 WL 8184342, citing *In re. Cray Inc.*, 871 F.3d 1355, 1360 (Fed. Cir. 2017); see *West View Research, LLC v. BMW of North America, LLC, et al.*, 16-cv-2590 JLS (AGS), 2018 WL 4367378 (S.D. Cal. February 5, 2018).

On the other hand, in a since-vacated decision, the United States District Court for the Eastern District of Texas concluded that the presence of dealerships did make venue proper. See *Blitzsafe Texas, LLC v. BMW of North America, LLC, et al.*, 2:17-cv-00418-JRG, 2018 WL 4849345 (E.D. Tex. September 6, 2018), vacated by *Blitzsafe Texas LLC v. Mitsubishi Electric Corp. et al.*, 2:17-cv-00418-JRG, 2019 WL 3494359 (E.D. Tex., August 01, 2019).

In the *Blitzsafe* case, Judge Gilstrap, citing *Cray*, found that venue was proper because BMW had “adopted and ratified the dealerships within this District as its place of business.” 2018 WL 4849345 at *7–8. The *Omega Patents* court considered Judge Gilstrap’s reasoning at length, 2020 WL 8184342 at *4–6, but, having analyzed the case law, including *Cray*, concluded that venue was not proper:

A finding that venue is proper in this District as to BMWNA under the facts alleged would, in this Court’s view, significantly expand the scope of § 1400(b)—a result it does not believe the Federal Circuit intended with its decision in *Cray*. 871 F.3d at 1361. See also *Uni-Sys.*, 2020 WL 1694490, at *15 (“Reading the statute as [plaintiff] suggests would read out any distinction between the ‘doing business’ inquiry of the general venue statute, 28 U.S.C. § 1391, and the ‘regular and established place of business’ inquiry of the patent venue statute, 28 U.S.C. § 1400(b).”); *Tour Tech.*, 377 F. Supp. 3d at 209 (distinguishing *Blitzsafe* and holding “[a]lthough RTV’s actions and contacts within the district would likely be sufficient to satisfy the general venue statute, the Court is mindful that the patent venue statute is narrower.”). In sum, the Court finds that venue is not proper in this District against BMWNA under § 1400(b).

Id. at *6 (Emphasis added; brackets in original).

The Court of Appeals for the Federal Circuit considered its *Cray* precedent in *In re. Google LLC*, 949 F.3d 1338 (2020). The Court noted that, per *Cray*, there are three requirements

for a regular and established place of business for purposes of the patent venue statute: “(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.” 949 F.3d at 1343; *see Cray*, 871 F.3d at 1360. “In the final analysis, the court must identify a physical place, of business, of the defendant.” *Cray*, 871 F.3d at 1364.

But Volkswagen does not have any places of business in this District. *See generally* Hahn Decl.

As noted above, in finding venue for BMWNA to be proper, the *Blitzsafe* court relied on a “ratification” theory: “Here, BMWNA has undoubtedly adopted and ratified the dealerships within this District as its places of business.” 2018 WL 4849345 at *8. The court found that BMW had “ratified” the dealerships as its own places of business because only authorized dealers are permitted to sell new BMWs, the dealerships have “BMW” in their names and display BMW’s trademarks, and because BMW’s own web site points consumers at the dealerships. *Id.* But both the *West View Research* court and the *Omega Patents* court explicitly rejected this reasoning. *See generally* 2020 WL 8184342; 2018 WL 4367378.

Those courts were correct to do so, because regardless of the fact that dealerships sell cars, and use the car makers’ trademarks to do so, and regardless of the fact that the car makers refer consumers to the dealers, the dealerships are nonetheless separate entities from the car makers. Volkswagen and Audi dealers have physical places of business, but they are the dealers’ own places of business, not Volkswagen’s.

In *Google*, the Federal Circuit (though talking about computer server farms) articulated another reason why dealerships are not the car makers’ places of business: To qualify under the venue statute, a place of business “generally requires an employee or agent of the defendant to be

conducting business at that place.” 949 F.3d at 1344. Volkswagen has no employees or agents located at the dealerships. Hahn Decl. at ¶ 7.

The *Omega Patents* and *West View Research* decisions are correct, and the now-vacated *Blitzsafe* decision is wrong. Volkswagen does not have a regular and established place of business in this District, and so, pursuant to 28 U.S.C. §§ 1400(b) and 1406(a), this case must be dismissed or transferred.

Volkswagen does maintain a place of business in Auburn Hills, Michigan. *See* Hahn Decl. at ¶ 11. Volkswagen therefore respectfully submits that it would be in the interest of justice to transfer the case to the United States District Court for the Eastern District of Michigan.

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