

No. 22-____

**UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT**

IN RE HYUNDAI MOTOR AMERICA

Petitioner

On Petition for a Writ of Mandamus to the
United States District Court for the Western District of Texas,
Case No. 6:20-cv-01125-ADA
Judge Alan D Albright

PETITION FOR A WRIT OF MANDAMUS

Ryan K. Yagura
Nicholas J. Whilt
Clarence A. Rowland
O'MELVENY & MYERS LLP
400 S. Hope Street
Los Angeles, CA 90071-2899
Telephone: (213) 430-6000
E-mail: ryagura@omm.com
nwhilt@omm.com
crowland@omm.com

Bradley N. Garcia
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006-4061
Telephone: (202) 383-5300
E-mail: bgarcia@omm.com

Attorneys for Petitioner Hyundai Motor America

November 1, 2021

**UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT
CERTIFICATE OF INTEREST**

Case Number: 22-
Short Case Caption: In re Hyundai Motor America
Filing Party/Entity: Hyundai Motor America

1. Represented Entities	2. Real Parties in Interest	3. Parent Corporations and Stockholders
Hyundai Motor America	Hyundai Motor Company	Hyundai Motor Company

4. Legal Representatives		
Darin W. Snyder	Timothy S. Durst	

5. Related Cases
<p>Petitioner is aware of one related case in which a defendant filed a similar improper venue motion that will likely be directly affected by the Federal Circuit's ruling in this appeal: <i>StratosAudio, Inc. v. Volkswagen Group of America, Inc.</i>, No. 6:20-cv-01131-ADA (W.D. Tex.)</p>

6. Organizational Victims and Bankruptcy Cases
Not Applicable

I certify that the foregoing information is accurate and complete to the best of my knowledge.

Dated: November 1, 2021

/s/ Bradley N. Garcia
Bradley N. Garcia

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I. RELIEF SOUGHT

Petitioner Hyundai Motor America (“HMA”) respectfully seeks a writ of mandamus directing the district court to vacate its order denying HMA’s motion to dismiss this action and to dismiss the complaint for improper venue under 28 U.S.C. §§ 1400 (b) and 1406(a).

II. ISSUES PRESENTED

1. Whether the district court clearly erred by concluding that a contract between a manufacturer and a third-party dealership that imposes certain minimum requirements on the dealership makes that dealership an agent of the manufacturer for purposes of the patent venue statute, even where it is undisputed that the manufacturer lacks the ability to hire or fire the dealership’s employees or otherwise control its day-to-day operations.

2. Whether the district court erred in finding that an independent dealership that resells the product it purchases from a distributor conducts the distributor’s business.

3. Whether the district court erred by concluding that HMA ratified third-party dealerships’ place of business as its own where HMA has no ownership interest or even right to access the premises.

III. STATEMENT OF JURISDICTION

This Court has jurisdiction to grant mandamus relief under the All Writs Act, 28 U.S.C. § 1651.

IV. INTRODUCTION

The U.S. District Court for the Western District of Texas held that venue in that district under 28 U.S.C. § 1400(b) was proper over HMA—a distributor of Hyundai-brand automobiles headquartered in California and with no place of business in that district. An essential component of the district court’s holding was its conclusion that independently owned and operated dealerships that sell Hyundai-brand vehicles are in fact agents of HMA who regularly conduct HMA business in the Western District of Texas. That holding is manifestly incorrect.

An agency relationship requires a finding that HMA *controls* the dealerships. And Texas law *expressly prohibits* HMA from directly or indirectly operating or controlling dealerships—thereby effectively prohibiting patent venue based on dealerships. Texas Occupations Code (“TOC”) §2301.476(c). As a result, pursuant to the terms of franchise agreements, HMA sells Hyundai-branded automobiles to independent dealerships, who then resell the automobiles to consumers. But, in accordance with Texas law, those franchise agreements explicitly provide that the dealerships are *not* HMA’s agents and have no authority to act on HMA’s behalf. Further still, even if anything in the franchise agreements *could* constitute control, Texas law specifically provides that any provisions in franchise agreements that constitute control are unenforceable. TOC § 2301.003(b). Thus, nothing in the franchise agreements can support a finding of

agency, and Texas law in any event would nullify any contractual provisions that constitute control.

The district court nevertheless found venue proper. As relevant here, the district court found that, despite the express contractual terms and Texas's prohibition of control, HMA controls the dealerships because the franchise agreements include requirements such as minimum standards of conduct for a retailer selling HMA's products and requirements to report inventory and sales volumes. The court therefore concluded that the dealership and its employees provided the "regular and established place of business" required for venue over HMA under 28 U.S.C. § 1400(b) and this Court's decisions in *In re Cray Inc.*, 871 F.3d 1355, 1358 (Fed. Cir. 2017), and *In re Google LLC*, 949 F.3d 1338, 1345 (Fed. Cir. 2020). Then, based on the franchise agreements and the fact that HMA's website has a "dealer locator" that provides information on dealership locations, the district court further found that HMA ratified the dealership places of business as its own, thereby satisfying *Cray*'s final requirement as well. *See Cray*, 871 F.3d at 1363 ("[T]he defendant must establish or ratify the place of business.").

The district court's holding is not only unsupported by the terms of the franchise agreements, but at essentially every step is contrary to this Court's decision in *Andra Grp., LP v. Victoria's Secret Stores, L.L.C.*, 6 F.4th 1283 (Fed.

Cir. 2021), which held on materially indistinguishable facts that similar agreements (even between related corporate entities) did not create agency, and that providing a “Store Locator” directing website users to third-party resellers did not amount to ratification of that third party’s place of business as the website operator’s own.

Id. at 1290. *Andra* issued before the district court ruled, and HMA promptly notified the court of the decision, but the district court’s order did not discuss *Andra*.

Mandamus relief is appropriate to correct the district court’s clearly erroneous order. If allowed to stand, the district court’s order will have far-reaching consequences. The contract provisions the district court relied on to find venue proper over HMA are commonplace in contracts between manufacturers and distributors dealing with independent third parties under arms-length contracts. Yet under the district court’s rationale, all such entities can now face infringement suits in the Western District of Texas. The district court’s holding represents a dramatic expansion of § 1400(b) to defendants whose only connection to the venue is their contractual relationship with third-party resellers, and effectively reestablishes nationwide venue based on stream of commerce, which the Supreme Court rejected in *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514 (2017). This Court has repeatedly used mandamus to curtail district courts’ improper expansion of § 1400(b) and to decide important issues of “proper judicial

administration” and “basic” and “undecided legal questions.” *Cray*, 871 F.3d at 1358–1359; *In re Micron Tech., Inc.*, 875 F.3d 1091, 1095 (Fed. Cir. 2017); *In re BigCommerce, Inc.*, 890 F.3d 978, 981 (Fed. Cir. 2018); *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1011 (Fed. Cir. 2018). The Court should do the same here.

V. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. HMA’s Relationship With Independent Dealerships

HMA does not own or operate any dealerships in the Western District of Texas. Appx054 (Dkt. 12-1 at ¶9). Nor does HMA own, rent, or lease any offices in the district. *Id.* at ¶6. HMA does not sell any vehicles to consumers in the district, nor provide any services to customers there. *Id.* at ¶¶7-8. This is because HMA is prohibited from doing so by Chapter 2301 of the TOC, which governs distributors like HMA. That law provides that “a manufacturer or distributor may not directly or indirectly own an interest in a franchised dealer or dealership ... or a nonfranchised dealer or dealership.” TOC §2301.476(c)(1). It also prohibits HMA from “operat[ing] or control[ing] a franchised dealer or dealership ... or a nonfranchised dealer or dealership.” TOC §2301.476(c)(2). Thus, like all other automobile manufacturers and distributors, HMA enters into franchise agreements with independent third parties who own and operate automobile dealerships in Texas. *See, e.g.*, Appx132–171 (Dkts. 22-9, 22-10). Under these franchise

agreements, the dealerships purchase vehicles from HMA and sell them to customers in Texas. Appx133 and Appx144 (Dkts. 22-9 at §1, 22-10 at §10).

HMA's website expressly provides that Hyundai dealerships are "all independently owned and operated." Appx055 (Dkt. 12-1 at ¶15). As required by Texas law, dealerships use manufacturer trademarks to indicate the product sold. TOC § 2301.354(a). But the dealership websites explain that they are they are not HMA and are, for example, "family-owned," or owned by entities such as Penske Automotive, a massive publicly traded company. Appx078–081, Appx084, Appx201–211, and Appx232 (Dkts. 13-2, 13-3 at 2, 24-2, 24-3, 24-4 at 22). The dealership websites are separate from HMA's website, and all of the dealership websites clarify that the dealerships are each "an independent Hyundai franchised dealership," and warn visitors that certain information may be shared with third parties such as Hyundai Motor America. Appx084, Appx242, Appx244, Appx259 (Dkts. 13-3 at 2, 24-5 at 4, 24-6 at 2, 24-7 at 4).

HMA's website has "dealer locator" functionality, which provides information regarding independent dealership locations to customers. Appx054 (Dkt. 12-1 at ¶15). The "dealer locator" search results show the dealerships' full names, which indicate the independent owner/operator of the dealerships, such as "Automax Hyundai," "Round Rock Hyundai," "Greg May Hyundai," "Roger Beasley Hyundai," and so forth. Appx112 (Dkt. 22-1).

B. The Franchise Agreements Between HMA And Dealerships

The franchise agreements between HMA and the dealerships are “governed and construed according to the laws of the state in which DEALER is located,” which, in this case, is Texas. Appx167 (Dkt. 22-10, §G). The franchise agreements state:

DEALER is an independently owned business entity. This Agreement does not make DEALER the agent or legal representative of HMA or FACTORY for any purpose whatsoever. DEALER is not granted any express or implied right or authority to assume or to create any obligation or responsibility on behalf of or in the name of HMA or FACTORY or to bind it (or them) in any manner whatsoever.

Appx168. That is, the franchise agreements expressly disclaim any agency relationship and any authority by a dealership to act on HMA’s behalf.

The franchise agreements do not grant HMA any authority over dealership operations, such as the ability to hire or fire dealership employees. To the contrary, they specify that the dealer has “*complete authority* to make all decisions on behalf of DEALER with respect to DEALER’s operations.” Appx133 (Dkt. 22-9 at §4) (emphasis added). If the dealership breaches the terms of the contract, HMA does not have any authority to force the dealership to comply with the terms—instead, HMA’s only remedy is to terminate the contract. Appx157 (Dkt. 22-10 at §B.3). The franchise agreements also do not give HMA any ability to enter dealership premises without consent. HMA may enter without consent only

in strictly limited circumstances, such as within 30 days of termination to verify inventory of automobiles and parts HMA will repurchase (Appx161 (Dkt. 22-10, §16.D.3.b.(1))), or 30 days after termination to remove Hyundai marks that the dealership failed to remove (Appx156 (Dkt. 22-10 at §15.B)).

C. The Suit Below And HMA's Motion To Dismiss

On December 11, 2020, StratosAudio filed its complaint against HMA in the Western District of Texas, alleging infringement of one or more claims of seven patents: U.S. Patent Nos. 8,166,081; 8,688,028; 8,903,307; 9,584,843; 8,200,203; 9,294,806; and 9,355,405 (“Patents-in-Suit”). Appx13 (Dkt. 1 at ¶1). That same day, StratosAudio filed four other lawsuits in the same district against other automobile manufacturers, including Mazda Motor of America, Inc., Subaru of America, Inc., Volvo Cars of North America, LLC, and Volkswagen Group of America, Inc. *See* Complaint, *StratosAudio, Inc. v. Mazda Motor of Am., Inc.*, No. 6-20-cv-01126, (W.D. Tex Dec. 11, 2020), ECF No. 1; Complaint, *StratosAudio, Inc. v. Subaru of Am., Inc.*, No. 6-20-cv-01128, (W.D. Tex Dec. 11, 2020), ECF No. 1; Complaint, *StratosAudio, Inc. v. Volvo Cars of North Am., LLC et al.*, No. 6-20-cv-01129, (W.D. Tex. Dec. 11, 2020), ECF No. 1; Complaint, *StratosAudio, Inc. v. Volkswagen Group of Am., Inc.*, No. 6-20-cv-01131, (W.D. Tex Dec. 11, 2020), ECF No. 1.

In the complaint, StratosAudio did not allege that the dealerships are agents of HMA. Appx015–016 (Dkt. 1 at ¶¶10–14). Instead, StratosAudio alleged that venue is proper because HMA “conducts its business of the exclusive distribution of new automobiles to the consuming public ... to and through Greg May Hyundai” (one of several dealerships in the district). Appx015 (Dkt. 1 at ¶10). On February 22, 2021, HMA moved to dismiss for improper venue, emphasizing that StratosAudio failed to allege that Greg May Hyundai’s place of business is a “regular and established place of business” of HMA. *See* Appx034–051 (Dkt. 12). The initial round of briefing was completed by March 15, 2021 (*see* Appx086–107, Appx185–197 (Dkts. 21, 23, 24), and the district court held a hearing on the motion on June 23, 2021 (*see* Appx290 (Dkt. 36)). After the hearing, the district court ordered the parties to submit supplemental briefs addressing *Google’s* requirement of the “physical presence of an employee or other agent of the defendant conducting the defendant’s business at the alleged ‘place of business,’” which StratosAudio had failed to address in the initial round of briefing.

On September 17, 2021, the district court denied HMA’s motion to dismiss. Appx388–399 (Dkt. 60). The district court ruled that the independent dealerships are HMA’s agents based on its interpretation of the franchise agreements. Appx397–399 (Dkt. 60 at 10–12). The district court conspicuously did not consider the impact of Texas’s prohibition on manufacturer control over

independent dealerships in construing the franchise agreements. The district court also held that the dealership locations are a “place of business” of HMA because HMA ratified those places through the franchise agreements and by directing HMA website users to dealership locations through the “dealer locator.” Appx391–397 (Dkt. 60 at 4–10).

While HMA’s motion to dismiss remained pending for seven months, the district court continued on with substantive aspects of the case. Accordingly, the parties proceeded with claim construction briefing while the motion was pending, and a *Markman* hearing was held on September 28, 2021.

VI. STANDARD OF REVIEW

A petitioner seeking mandamus relief must (1) show a “clear and indisputable” right to the writ; (2) have “no other adequate means to attain the relief he desires”; and (3) demonstrate that “the writ is appropriate under the circumstances.” *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 311 (5th Cir. 2008) (en banc) (“*Volkswagen II*”) (quotation omitted).

This Court’s law governs whether venue is proper under § 1400(b). *ZTE*, 890 F.3d at 1012. The Court reviews the question of proper venue under § 1400(b) *de novo*. *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).” *ZTE*, 890 F.3d at 1012.

Generally, 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. But “the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A court is “not bound to accept as true a legal conclusion couched as a factual allegation.” *Id.* “Interpretation of an agreement presents a question of law, governed by state contract law.” *Interspiro USA, Inc. v. Figgie Int’l Inc.*, 18 F.3d 927, 931 (Fed. Cir. 1994).

VII. STATEMENT OF REASONS WHY THE WRIT SHOULD ISSUE

A. This Case Presents A Basic And Undecided Legal Question Necessary To Address The Scope Of § 1400(b)

As this Court noted in *Google*, “the requirements for mandamus are satisfied when the district court’s decision involves ‘basic’ and ‘undecided’ legal questions.” 949 F.3d at 1341. “In such situations, a district court’s order may constitute a “clear abuse of discretion” for which mandamus relief is the only adequate relief.” *Id.* In particular, this Court found “exceptional circumstances” warranting a writ of mandamus exist where intervention is “necessary to address the effect of the Supreme Court’s decision in *TC Heartland LLC v. Kraft Foods Group Brands LLC*, which was yet another § 1406(a) mandamus case.” *ZTE*, 890 F.3d at 1011; *see also Cray*, 871 F.3d at 1359 (granting mandamus to correct the district court’s interpretation of “a regular and established place of business” under

28 U.S.C. §§ 1400(b)); *Micron*, 875 F.3d at 1091–95 (Fed. Cir. 2017); *BigCommerce*, 890 F.3d at 985. Thus, to provide proper guidance to the district courts following *TC Heartland*, this Court granted mandamus in *Cray* to clarify that to establish venue over defendant based on a “regular and established place of business” under § 1400(b), “(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. “All three *Cray* factors must be met for venue to be proper against a defendant.” *Andra*, 6 F.4th at 1290.

This Court has also used mandamus relief to further clarify and crystalize the three *Cray* factors. For example, in *Cray* itself, this Court explained that “the defendant must establish or ratify the place of business” in order for a physical place to be considered a “place of the defendant” under the third *Cray* factor. *Cray*, 871 F.3d at 1363. More recently in *Google*, this Court used mandamus to clarify that, under 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.’” *Google*, 949 F.3d at 1345. Applying the Restatement (Third) of Agency, the Court found that the internet service providers (ISPs) that contract with Google are not agents of Google. *Id.*

This case presents another such “basic” and “undecided” question that is “necessary to address the effect of the Supreme Court’s decision in *TC Heartland*” (*Google*, 949 F.3d at 1341, 1345), namely, the correct test for analyzing a defendant manufacturer or distributor’s contract (and applicable local laws that specifically govern the contract) with a third party retailer to determine (1) whether that third party is an agent of the defendant, (2) whether the third party conducts defendant business, and (3) whether the defendant ratified that third party’s place of business. As demonstrated in the sections below, the district court relied on entirely commonplace provisions in the franchise agreements to find venue proper, using analysis that is manifestly incorrect and contrary to this Court’s existing precedent. *See infra* Part VII.B-D.

This ruling in particular will, if left uncorrected by this Court, lead to the further proliferation of cases inappropriately filed in the Western District of Texas and other forums. To say it is common for a corporation to contract with a third-party vendor located in a different district would be a massive understatement. The district court’s expansive construction of § 1400(b)—which extends venue to any defendant that has a commonplace reseller agreement requiring maintenance of adequate inventory and accounting to the distributor—could essentially reestablish nationwide venue for many manufacturers and distributors, in conflict

with *TC Heartland* and the patent venue statute's "intentional narrowness." *ZTE*, 890 F.3d at 1014.

Even beyond the world of patent litigation, the district court's expansive approach to agency law upsets long-settled precedent and will have a chilling effect on industries involving manufacturers and distributors that sell products to local retailers. *See, e.g., Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 290 (5th Cir. 2004) (dismissing discrimination suit against manufacturer General Motors based on finding that dealership was not an agent of General Motors). Distant manufacturers and distributors will be faced with unprecedented new risks, as they potentially become responsible for the acts of retailers over whom they have no right of control, and those costs will presumably be born by consumers. Out-of-district businesses may even consider ceasing to contract with retailers in some districts, if an agency relationship can be based on the commonplace provisions that the district court focused on. The questions presented by this petition are, therefore, exceedingly important for purposes of § 1400(b) and beyond.

Moreover, district courts are already divided on the basic legal issues presented in this case, with the Eastern and Western Districts of Texas on one side, and many other courts on the other. For example, a court in the Northern District of Georgia reached the opposite conclusion as to venue on materially identical facts. *Omega Pats., LLC v. Bayerische Motoren Werke AG*, 508 F. Supp. 3d 1336

(N.D. Ga. 2020). There, the defendant BMWNA did not own, lease, or rent any of the dealerships, which were separate corporate entities. *Id.* at 1340. And much like Texas law involved in this case, Georgia law prohibited BMWNA from owning dealerships in many instances. *Id.* The *Omega* plaintiff argued that BMWNA ratified the dealerships' place of business because BMWNA "promotes each of these locations as its place of business ... and on the BMWNA website." *Id.* at 1342. Like StratosAudio, the *Omega* plaintiff also pointed to "dealer agreements" between BMWNA and the dealerships that "set forth standards and requirements ... that dealers are required to comply with for both sales and services" and alleged that BMWNA provides new car warranty services at these dealerships. *Id.* The court disagreed and concluded BMWNA had *not* ratified the dealerships as its own places of business. Instead, the court reasoned that "[a]t best, Omega's allegations show BMWNA maintains a mutually beneficial, coordinated business relationship with the dealerships to sell its products to customers in this District. But facilitating business and services through an independent entity is not enough for ratification." *Id.* at 1343. District courts in California, Maryland, and elsewhere have reached similar results. *See W. View Rsch., LLC v. BMW of N. Am., LLC*, No. 16-2590, 2018 WL 4367378, at *6-7 (S.D. Cal. Feb. 5, 2018) (finding "thirty separate provisions" in a dealership "operating agreement" did not create venue); *Reflection, LLC v. Spire Collective*

LLC, No. 17-1603, 2018 WL 310184, at *2 (S.D. Cal. Jan. 5, 2018) (explaining that “distributors and even subsidiaries, that are independently owned and operated, that are located in the forum and work with the accused infringer, [are] not sufficient to show that the accused infringer has a regular and established business under § 1400(b).”); *Guy A. Shaked Invs. Ltd. v. Ontel Prods. Corp.*, No. 19-10592, 2020 WL 6107066, *3-*4 (C.D. Cal. July 30, 2020) (“storing products in an independent distributor’s warehouse and selling products in the state through a third party are not sufficient to show venue under 28 U.S.C. § 1400(b)”); *FrenchPorte, LLC v. C.H.I. Overhead Doors, Inc.*, No. 20-00467, 2021 WL 242499, *5-*8 (D. Md. Jan. 25, 2021) (dealers of the accused product located in the forum, and listed on the accused infringer’s website, were independent dealers and therefore did not create venue); *see also Vaxcel Int’l Co. v. Minka Lighting, Inc.*, No. 18-0607, 2018 WL 6930772, at *3 (N.D. Ill. July 11, 2018) (collecting cases for the proposition that “independent distributors” such as “authorized retailers” “do not suffice to establish venue under § 1400(b)).

The *Omega* decision found venue improper based on the franchise agreements even though it expressly recognized that the Eastern District of Texas came to the “entirely opposite conclusion[.]” in *Blitzsafe Texas, LLC v. Bayerische Motoren Werke AG*, No. 17-00418, 2018 WL 4849345, at *7 (E.D. Tex. Sept. 6, 2018) (Gilstrap, J.), vacated sub nom *Blitzsafe Texas LLC v. Mitsubishi Elec.*

Corp., No. 17-00418, 2019 WL 3494359 (E.D. Tex. Aug. 1, 2019) (finding that BMW dealerships qualified as BMW’s places of business under *Cray*). See *Omega*, 508 F. Supp. 3d at 1341. And the Western District of Texas has now joined that camp. Those decisions alone demonstrate this issue is recurring and that courts have and will continue to reach inconsistent outcomes absent this Court’s prompt guidance. Although in theory the denial of a motion to dismiss for improper venue may be reviewed after a final judgment, this Court has recognized that “experience has shown that it is unlikely that, as these cases proceed to trial, these issues will be preserved and presented to this court through the regular appellate process.” *Google*, 949 F.3d at 1342. In addition, “the substantial expense to the parties that would result from an erroneous district court decision confirms the inadequacy of appeal” in such cases. *Id.* at 1342–43.

Finally, because the district court’s opinion offers a new basis on which plaintiffs can assert venue over a wide category of manufacturer/distributor-defendants under § 1400(b), it will likely have the effect of leading to additional § 1404(a) transfer motions, and resulting requests for writs, as defendants seek to avoid an improper venue. This Court’s intervention is thus required for “proper judicial administration” and mandamus relief is appropriate. *Cray*, 871 F.3d at 1358.

B. The District Court Erred By Holding That Third-Party Resellers Are Agents Of HMA Based On An Agreement That Cannot And Does Not Give HMA Control Over The Third Party

Under 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.’” *Google*, 949 F.3d at 1345. The district court held this factor was satisfied because the independent dealerships are HMA’s agents. Appx397 (Dkt. 60 at 10). That holding is clearly incorrect.

As this Court recently explained, “[a]gency 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.” *Andra*, 6 F.4th at 1287–88 (citing 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 *Google*, 949 F.3d at 1345). Under Fifth Circuit law, “[a]t the core of agency is a fiduciary relation arising from the consent by one person to another that the other shall act on his behalf and subject to his control[,], equally central to the master-servant relation is the master’s control over or right to control the

physical activities of the servant.” *Arguello v. Conoco, Inc.*, 207 F.3d 803, 807–08 (5th Cir. 2000) (finding no “control” where franchisor had no right of “participation in the daily operations of the” franchisee nor to “participate[] in making personnel decisions”).

The franchise agreements do not remotely support a conclusion that the dealerships are HMA’s agents. The franchise agreements give HMA no authority whatsoever over the hiring and firing of dealership employees—a critical power for agency. See *Andra*, 6 F.4th at 1288–89; *Arguello*, 207 F.3d at 808; *Smith v. Foodmaker, Inc.*, 928 S.W.2d 683, 687 (Tex. App. 1996) (finding no agency where franchisor had “no right of control over the hiring practices, terms, or conditions of [franchisee’s] employees”). To the contrary, they specify that the dealer has “*complete authority* to make all decisions on behalf of DEALER with respect to DEALER’s operations.” Appx133 (Dkt. 22-9 at §4) (emphasis added). And the franchise agreements explicitly disclaim any agency relationship and provide that HMA does *not* consent to dealerships acting on its behalf. Appx168 (Dkt. 22-10 at 30).

The district court’s contrary finding lacks merit. The district court stated that the agreements “clearly show” that HMA has manifested consent “that the dealerships shall act on HMA’s behalf.” Appx398 (Dkt. 60 at 11). But the district court notably provided no citation for that statement, and, again, the agreements

explicitly provide otherwise. The district court also noted that “HMA requires daily reports regarding sales and deliveries from the dealerships, restricts the locations and ownership transfers of the dealerships, and provides warranty services to consumers through the dealers.” *Id.* But even if those statements were correct, they would not support a finding of a principal-agency relationship. In *Arguello*, for example, plaintiffs argued that Conoco Inc. was responsible for incidents at Conoco-branded stores on an agency theory, emphasizing that Conoco required the stores “to maintain their business according to the standards set forth” in the entities’ contract and “controls the customer service dimension of the Conoco-branded stores.” 207 F.3d at 807. But the Fifth Circuit emphasized that the contract explicitly disclaimed any agency relationship and that the contract terms the plaintiff identified did not grant Conoco “any participation in the daily operations of the branded stores” nor give Conoco authority “in making personnel decisions.” *Id.* at 808. The same is true here.

The district court committed legal error in finding that HMA’s right to receive reports constitutes control. *Cardinal Health Sols., Inc. v. Valley Baptist Med. Ctr.*, 643 F. Supp. 2d 883, 888–89 (S.D. Tex. 2008) (explaining that rights that do not constitute control for agency include “the power to order the work stopped or resumed, to inspect its progress or receive reports, to make suggestions or recommendations which need not necessarily be followed, to prescribe

alterations, and to set standards for acceptable service quality.’’). The district court also committed legal error in finding that HMA has the right to restrict locations and ownership transfers of dealerships. TOC §§ 2301.359, 2301.464 (specifying Texas DMV controls ownership transfer and dealership relocation); Appx054 (Dkt. 12-1 at ¶14). The district court’s finding that HMA provides warranty services to consumers through dealerships is factually incorrect (Appx053–054 (Dkt. 12-1 at ¶¶8,12)) and improperly disregards the corporate distinctness between HMA and the independent dealerships. See *EMED Techs. Corp. v. Rebro-Med Sys., Inc.*, No. 17-728, 2018 U.S. Dist. LEXIS 93658, at *4 (E.D. Tex. June 4, 2018) (Bryson, J.) (collecting cases).

This Court’s recent decision in *Andra* is also instructive. The plaintiff there sued four separate but related corporate entities in the Eastern District of Texas: L Brands, Inc. (“LBI”), the parent company of the other defendants; Victoria’s Secret Stores, LLC (“Stores”), the operator of physical Victoria’s Secret (“VS”) retail stores; Victoria’s Secret Direct Brand Management, LLC (“Direct”), the operator of the VS website and mobile app; and Victoria’s Secret Stores Brand Management, Inc. (“Brand”), which creates the VS branded apparel and products. *Andra*, 6 F.4th at 1286. The district court dismissed the complaint against LBI, Direct, and Brand (collectively, the “Non-Store Defendants”) on the ground that

the Non-Store Defendants lacked a regular and established place of business in the district. *Id.*

The parties in *Andra* did not dispute that Stores, not the Non-Store Defendants, operates retail locations in the district. *Id.* at 1287. Instead, Andra argued that LBI “controls store location workers by dictating store operations, hiring, and conduct” and that because LBI requires Stores’ associates to sign and follow LBI’s Code of Conduct, this indicates control over the employees. *Id.* at 1288. Andra also argued that Direct “controls store location workers by dictating their handling of returns of merchandise purchased on the [Victoria’s Secret] website.” *Id.* Andra argued 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.* Rejecting each of these arguments, this Court explained:

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 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.*

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. 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.

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.

Andra, 6 F.4th at 1288–89 (citations omitted; emphasis added).

The same rationale applies here. Like *Andra*, StratosAudio failed to show that HMA has any right to direct or control dealership employees, such as through hiring and firing power. Again, all such powers are expressly vested in the dealerships by contract. Appx133 (Dkt. 22-9 at §4). And, also as in *Andra*, HMA’s control of its products and the website does not equate to the “right to direct or control” the dealership’s employees at the dealership physical locations.

The district court’s finding of an agency relationship is particularly erroneous because the district court entirely ignored the Texas law prohibiting HMA from “operat[ing] or control[ing] a franchised dealer or dealership . . . or a nonfranchised dealer or dealership.” *See* TOC §2301.476(c)(2). Texas law provides that any agreement or contract term that attempts to waive that prohibition is “void and unenforceable.” TOC § 2301.003(b). Thus, any provisions that could constitute control would be unenforceable. And any interpretation finding control would be contrary to basic principles of contract

interpretation. Under Texas law, “[t]he task of a court interpreting the terms of a contract is to vindicate the intent of the parties,” not to find it unenforceable. *Sid Richardson Carbon & Gasoline Co. v. Interenergy Res., Ltd.*, 99 F.3d 746, 754 (5th Cir. 1996) (applying Texas law); *see also America’s Favorite Chicken Co. v. Samaras*, 929 S.W.2d 617, 623-624 (Tex. App. - San Antonio 1996, writ denied). The district court therefore should have construed the terms of the franchise agreements to preserve their enforceability, *i.e.*, against conferring HMA any “control” over the dealership. *See Interspiro*, 18 F.3d at 931 (“Interpretation of an agreement presents a question of law, governed by state contract law”). But the court did the exact opposite. Regardless, the district court did not cite any provision of the franchise agreements that could plausibly support an agency relationship, much less a provision that *had* to be interpreted to create such a relationship in violation of Texas law, and its agency finding was error.

C. The District Court Erred By Holding That Independent Dealerships Conduct HMA Business

The second *Cray* factor also requires that the purported agent must “conduct[] the defendant’s business.” *Google*, 949 F.3d at 1345. In this case, the district court found, without any factual support, that “HMA is in the business of manufacturing and distributing vehicles to consumers” and that the dealerships “conduct[] HMA’s business in this [d]istrict.” Appx399 (Dkt. 60 at 12).

Andra is again instructive. In *Andra*, Stores operated the physical Victoria's Secret retail stores, while other Non-Store Defendants created the Victoria's Secret branded apparel and products. *Andra*, 6 F.4th at 1286. Finding venue improper over the Non-Store Defendants, this Court explained:

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.

Non-Store Defendants carry out different business functions than Stores. And the companies' shared use of "Victoria's Secret" in their name does not detract from the separateness of their businesses.

Andra, 6 F.4th at 1290 (citations omitted).

As in *Andra*, HMA carries out different business functions than the dealerships. HMA is in the business of selling Hyundai-brand vehicles to independent dealerships across the country. Appx052, Appx132 (Dkt. 12-1 at ¶3, Dkt. 22-9 at §1). The dealerships are in the business of retail sales and maintenance for end customers. Appx132 (Dkt. 22-9 at §1). Texas law codifies this distinction by prohibiting HMA from being "engaged in the business of buying, selling, or exchanging new motor vehicles and servicing or repairing motor vehicles under a manufacturer's warranty at an established and permanent place of business." TOC §§2301.002(16), 2301.252(a), 2301.476(c). The dealerships

perform the function of retail stores, much like the Victoria's Secret stores in *Andra*. See *Andra*, 6 F.4th at 1289–90. While the dealerships and HMA may work together for their mutual benefit, that fact is not sufficient to show the dealerships perform “the business of” HMA or to merit ignoring the distinctions in business activities mandated by Texas law. Nor does the shared use of Hyundai trademarks—the designation of product origin—undermine the separateness of HMA and dealership businesses. See *Andra*, 6 F.4th at 1290.

The district court also found that “HMA provides new purchase warranties and services to the consumers through its dealerships.” Appx399(Dkt. 60 at 12). To be clear, the undisputed facts in this case are that the activities of selling of new vehicles and performing warranty service in this district are performed by dealerships, not HMA. Appx053–054 (Dkt. 12-1 at ¶¶8, 12). There is no evidence suggesting that HMA conducts any warranty or service business at a physical place of business in this district, and doing so would be illegal. TOC §§2301.002(16), 2301.252(a), 2301.476(c). Further, *Google* held that maintenance activities conducted by third parties pursuant to contract are “ancillary” and do not constitute the business of the defendant. 949 F.3d at 1345–46. And, unlike in *Google*, HMA does not even own the property that is being maintained—the dealerships or consumers do. *Google*, 949 F.3d at 1343–46 (finding no venue created by third

party maintenance of Google-owned server). In short, no HMA business is conducted in this district.

D. The District Court Erred By Finding That HMA Ratified Third-Party Dealership Places Of Business

The district court's finding that HMA ratified dealerships as HMA places of business is also clearly erroneous. Under the third *Cray* factor, a physical place may be considered a "place of the defendant" if the plaintiff shows that the defendant "establish[ed] or ratif[ied] the place of business." *Cray*, 871 F.3d at 1363. In *Cray*, this Court listed various "considerations" that are relevant to whether the defendant established or ratified the place of business. *Id.* 1363-64. Those considerations include (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.*

Those factors do not support a finding of ratification here. As to the first, it is undisputed that HMA does not own or lease physical dealership locations.

Appx053 (Dkt. 12-1, ¶¶6, 9). Nor does HMA exercise any other “attributes of possession or control over the place.” *Cray*, 871 F.3d at 1363–1364. To the contrary, the franchise agreements give HMA no general right to enter a dealer’s premises without consent. Appx138–170 (Dkt. 22-10). HMA may only enter the dealership’s place of business without consent *after* termination of the agreement and only to verify remaining inventory or to remove trademarks. Appx156, Appx162 (Dkt. 22-10 at §15.B, §16.D.3.b.(1)). Even if HMA’s president were to show up at the doors of a dealership, he would not have any right to enter without the dealership’s permission. *Id.* HMA plainly does not have “control over the place” in the requisite sense for ratification. And again, TOC §2301.476 prohibits HMA from owning or operating any dealership in Texas.

The district court’s contrary finding was based on its conclusion that, through the franchise agreements, “HMA controls numerous aspects of the dealerships’ operations.” Appx392 (Dkt. 60 at 5). As support, the court cited various typical contractual obligations related primarily to minimum standards HMA expects from its dealerships. Appx393–394 (Dkt. 60 at 6–7). That analysis is fundamentally mistaken. Not one of those provisions has anything to do with giving HMA control over a dealership’s *physical place of business*. Rather, they are contractual obligations regarding the minimum standards for dealer conduct of dealer business. Moreover, the ratification analysis focuses on whether the

defendant “publicly” adopts the place of business as his own. *Cray*, 871 F.3d at 1357. There is no evidence that the franchise agreements are open to the public, and in fact they are not.

That the question of “whether the defendant owns or leases the place, or exercises other attributes of possession or control over the place” is not directed to any control over the third party’s *business activities* is evident from *Cray* itself. *See Cray*, 871 F.3d at 1363. *Cray* involved a question of whether the presence of two Cray employees who worked remotely from their respective homes in the district could support venue over Cray under § 1400(b). This Court did not analyze whether the defendants had control over the two employees. Instead, this Court analyzed whether Cray had the requisite control over the *place—i.e.*, the home offices. The franchise agreements make it clear that HMA does not have any control over the dealership places of business, much less the type of control required to support a finding of ratification.

Second, as to whether HMA “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” (*Cray*, 871 F.3d at 1363), the district court reasoned that “[d]efendant’s relationship with the dealerships is conditioned on the dealerships’ continued presence” in the district. Appx395 (Dkt. 60 at 8). That analysis too was fundamentally mistaken. There is

no equivalence between the independent dealerships in this case and the “employees” in *Cray*. In *Cray*, this Court asked whether the two Cray employees were *required to work* from the district at issue, because in assessing whether Cray had ratified their homes as its place of business, “[t]he fact that Cray allowed its employees to work from the Eastern District of Texas is insufficient.” 871 F.3d at 1365. The same analysis cannot apply to non-employee relationships, where a defendant contracts with an independent third party. If it did, then any time a distributor contracts with a third-party to run a storefront in a specific location, the distributor would automatically be deemed to have adopted that third party’s location as its own “place of business” for purposes of the patent venue statute, and could therefore face a patent infringement suit in that location. That rule would contravene the statute’s “intentional narrowness.” *ZTE*, 890 F.3d at 1014. Indeed, because this Court has held that a “place of business” could be mere shelf space, the implications of the district court’s holding are plainly even broader. *See Google*, 949 F.3d at 1343–44 (“leased shelf space or rack space can serve as a ‘place’ under the statute”). If a manufacturer requires approval for a third party provider of shelf space to move that space, then, under the district court’s reasoning, it would have ratified that shelf space as its own place of business. The broad reach of the district court’s holding and the potential impact it poses present sufficiently exceptional circumstances warranting this Court’s intervention.

For the third consideration—*i.e.*, whether the defendant has made “representations that it has a place of business in the district”—the district court reasoned that “HMA represents to the public that it has a place of business in the Western District of Texas” because HMA’s website identifies dealership locations. It also noted that HMA’s website “displays a list of its authorized dealerships, allows the user to search for these dealerships’ inventory, gives the user an opportunity to schedule a test drive,” and allows its dealerships to “display the ‘Hyundai’ logo and use its Hyundai trademarks and tradenames.” Appx396 (Dkt. 60 at 9).

That analysis is directly contrary to *Andra*. On materially identical facts, *Andra* found that a website showing a “Find a Store” feature that directed users of victoriassecret.com to store locations does not indicate the website operator’s ratification of those store locations. 6 F.4th at 1289. Rejecting this argument, the Court explained that the “Find A Store” feature “points customers to Stores locations, not non-Store Defendants locations.” *Id.* at 1290. So too here: The “dealer locator” in HMA’s website shows the dealerships’ locations but does not show any HMA locations at the same time, and instead refers users to dealerships for vehicle details or test drives. Appx054–055 (Dkt. 12-1 at ¶15). In fact, HMA’s website goes one step further than the Victoria’s Secret website, affirmatively indicating that the dealers are independently owned businesses. *Id.* There is no

evidence that the dealerships display HMA's corporate name, "Hyundai Motor America," at their locations.

The district court's observation that HMA permits dealerships to use Hyundai trademarks is also irrelevant. As the Court put it in *Andra*, "the companies' shared use of 'Victoria's Secret' in their name does not detract from the separateness of their businesses." 6 F.4th at 1290. The dealerships use Hyundai's trademarks under the terms of the franchise agreements to indicate the source of products they sell, as required by statute. TOC § 2301.354(a). Some of the dealerships also openly state their ownership by other companies, such as Penske Automotive, which owns dealerships associated with many different brands including Audi, Toyota, Lexus, BMW, MINI, Aston Martin, Ferrari, Lamborghini, and others. Appx189, Appx201–239 (Dkt. 24 at 4; Dkt 24-2, 24-3, 24-4).

For all these reasons, the district court's finding that HMA ratified its dealership's place of business as its own is clearly erroneous. That finding is also irreconcilable with this Court's holding in *Andra* and the contrary holdings of other district courts on materially identical facts. Unless this Court intervenes, the district court will surely apply its rationale to all manner of distributor-reseller relationships and subject defendants to patent infringement suits in a forum they could not possibly have anticipated.

VIII. CONCLUSION

For the foregoing reasons, HMA respectfully requests that this Court issue a writ of mandamus directing the district court to dismiss this case for lack of proper venue.

Respectfully submitted,

O'MELVENY & MYERS LLP

/s/ Bradley N. Garcia

Bradley N. Garcia

Counsel for Petitioner

CERTIFICATE OF COMPLIANCE

1. This petition complies with the type-volume limitation of Federal Rule of Appellate Procedure 21(d)(1). The body of the petition contains 7,576 words, excluding the portions exempted by rule.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). The brief has been prepared in a proportionally spaced typeface using Microsoft® Word and 14-point Times New Roman type.

Dated: November 1, 2021

/s/ Bradley N. Garcia

Bradley N. Garcia

PROOF OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on November 1, 2021.

A copy of the foregoing was served upon the following counsel of record and district court via an express carrier:

Charles Larsen
Daniel S. Sternberg
White & Case LLP
75 State Street, 24th Floor
Boston, MA 02109
Telephone: (617) 979-9300
Email: charles.larsen@whitecase.com
Email: dan.sternberg@whitecase.com

Michael J. Songer
White & Case LLP
701 13th Street NW
Washington, DC 20005
Telephone: (202) 626-3200
Email: michael.songer@whitecase.com

Jonathan J. Lamberson
Henry Yee-Der Huang
White & Case LLP
3000 El Camino Real, Two Palo Alto
Square, Suite 900
Palo Alto, CA 94306
Telephone: (650) 213-0300
Email: lamberson@whitecase.com
Email: henry.huang@whitecase.com

Corby R. Vowell
Friedman, Suder & Cooke
604 E. 4th Street, Suite 200
Fort Worth, TX 76102
817-574-7010
Email: vowell@fsclaw.com

Hon. Alan D Albright
United States District Court for the
Western District of Texas
800 Franklin Avenue, Room 301
Waco, Texas 76701
Telephone: (254) 750-1510

I declare under penalty of perjury under the laws of the United States that
the foregoing is true and correct.

Dated: November 1, 2021

/s/ Bradley N. Garcia
Bradley N. Garcia
Counsel for Petitioner

VOLUME I OF II – Pages Appx000i to Appx238

No. 22-____

**UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT**

IN RE HYUNDAI MOTOR AMERICA

Petitioner

On Petition for a Writ of Mandamus to the
United States District Court for the Western District of Texas,
Case No. 6:20-cv-01125-ADA
Judge Alan D Albright

**NONCONFIDENTIAL APPENDIX TO PETITION FOR WRIT OF
MANDAMUS**

Ryan K. Yagura
Nicholas J. Whilt
Clarence A. Rowland
O'MELVENY & MYERS LLP
400 S. Hope Street
Los Angeles, CA 90071-2899
Telephone: (213) 430-6000
E-mail: ryagura@omm.com
nwhilt@omm.com
crowland@omm.com

Bradley N. Garcia
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006-4061
Telephone: (202) 383-5300
E-mail: bgarcia@omm.com

Attorneys for Petitioner Hyundai Motor America

November 1, 2021

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Exhibit J – An excerpt from an exhibit filed in <i>Leep Hyu, L.L.C. v. Hyundai Motor America</i> , No. 3:11-cv-00081-CRW-RAW, D.I. 1-2 (D.Iowa June 22,	

2011).	
Dkt. 22-10, filed March 8, 2021	Appx138
Exhibit K – An excerpt from an exhibit filed in <i>Hyundai Capital America v. Nemet Motors LLC</i> , 1:19-cv-05506-EK-RER, D.I. 1 (E.D.N.Y. Oct. 10, 2019)	
Dkt. 22-11, filed March 8, 2021	Appx171
Reply In Support of Hyundai Motor America’s Motion to Dismiss for Improper Venue	
Dkt. 24, filed March 15, 2021.....	Appx185
Second Declaration of Clarence Rowland	
Dkt. 24-1, filed March 15, 2021	Appx198
Exhibit 4 – Printout from website https://www.roundrockhyundai.com/usedinventory/index.htm?make=Toyota&make=Ford (last accessed on March 14, 2021)	
Dkt. 24-2, filed March 15, 2021	Appx201
Exhibit 5 – Printout from website https://www.penskeautomotive.com/about/About-Us/default.aspx (last accessed on March 14, 2021)	
Dkt. 24-3, filed March 15, 2021	Appx209
Exhibit 6 – Printout from website https://www.penskeautomotive.com/locations/default.aspx , (last accessed on March 10, 2021)	
Dkt. 24-4, filed March 15, 2021	Appx211

VOLUME II OF II – Pages Appx239 to Appx399

Exhibit 7 – Printout from website https://www.hyundaiautomax.com/privacy.htm (last accessed on March 10, 2021)	
Dkt. 24-5, filed March 15, 2021	Appx239
Exhibit 8 – Printout from website https://www.southpointhyundai.com/privacy-policy/ (last accessed on March 10, 2021)	
Dkt. 24-6, filed March 15, 2021	Appx243

Exhibit 9 – Printout from website https://www.hyundaiatx.com/privacy (last accessed on March 10, 2021) Dkt. 24-7, filed March 15, 2021	Appx256
Exhibit 10 – ECF No. 94 from <i>Blitzsafe Texas, LLC v. Bayerische Motoren Werke AG</i> , No. 17-00418 (E.D. Tex. Sept. 20, 2018). Dkt. 24-8, filed March 15, 2021	Appx266
Minutes of Civil Proceedings Dkt. 36, filed June 23, 2021	Appx290
Transcript of Motion Hearing (June 23, 2021) Dkt. 38, filed June 26, 2021	Appx291
StratosAudio, Inc.’s Supplemental Briefing To Hyundai Motor America’s and Volkswagen Group of America, Inc.’s Motions to Dismiss Dkt. 41, filed July 5, 2021	Appx332
Exhibit A – Relevant Portions of <i>Restatement</i> , §1.01, cmt. f; Google, 949 F.3d at 1345-46. Dkt. 41-1, filed July 5, 2021	Appx340
Hyundai Motor America’s Supplemental Brief In Connection with Its Motion for Improper Venue Dkt. 42, filed July 12, 2021	Appx372
[Proposed] First Amended Joint Scheduling Order Dkt. 43, filed July 14, 2021	Appx380
Memorandum Opinion and Order Dkt. 60, filed September 17, 2021	Appx388

CONFIDENTIAL MATERIAL OMITTED

The material omitted from the Nonconfidential Appendix includes confidential information relating to business practices and other commercially sensitive information of Petitioner and Plaintiffs. This material is subject to the district court's Standing Order Regarding Filing Documents Under Seal and Redacted Public Versions (October 13, 2021) and was redacted from public filings in the district court. For material that is part of the record and had a sealed and a public version of a document, the Confidential Appendix includes the sealed version and the Nonconfidential Appendix includes the public version. In the Confidential Appendix, confidential material is highlighted in light blue, which corresponds to the redacted portions of the public versions. Material that is highlighted in yellow in both versions of the appendix was highlighted in those materials as submitted to the district court.

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

October 13, 2021

CLERK, U.S. DISTRICT COURT
WESTERN DISTRICT OF TEXASBY: J. Galindo-Beaver
DEPUTY

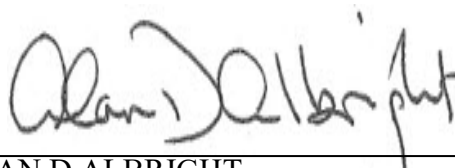
**STANDING ORDER REGARDING
FILING DOCUMENTS UNDER SEAL AND REDACTED PUBLIC VERSIONS**

This Order shall apply in all patent cases pending before the undersigned. As a public forum, the Court has a policy of providing to the public full access to documents filed with the Court. Nevertheless, parties in patent cases routinely produce and rely on information that is confidential. Therefore, in all patent cases pending before the undersigned, the Court hereby grants leave for any party to file materials containing confidential information under seal without filing a separate motion seeking leave of the Court to do so.

The filing party shall file a publicly available, redacted version of any motion or pleading filed under seal within seven days. The parties need not file redacted versions of exhibits to such documents. Exhibits that are nonconfidential in their entirety should not be filed under seal at all. The parties shall coordinate to make sure that the publicly available version redacts information that any party deems confidential. Redactions should be targeted to redact only that information. The publicly available version shall be labeled "PUBLIC VERSION." Cooperating to file the publicly available version shall not be deemed as agreeing that the redacted information is confidential.

When this Court enters an order resolving a motion in which one or more of the parties filed briefing under seal, the Court will enter its order under seal. The movant shall follow the above protocol and file a publicly available, redacted version of the Court's sealed order within seven days after the Court enters the sealed order.

SIGNED this 13th day of October, 2021.



ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

PATENT

**U.S. District Court [LIVE]
Western District of Texas (Waco)
CIVIL DOCKET FOR CASE #: 6:20-cv-01125-ADA**

STRATOSAUDIO, INC. v. Hyundai Motor America
Assigned to: Judge Alan D Albright
Cause: 35:271 Patent Infringement

Date Filed: 12/11/2020
Jury Demand: Both
Nature of Suit: 830 Patent
Jurisdiction: Federal Question

Plaintiff

STRATOSAUDIO, INC.

represented by **Charles Larsen**
White & Case LLP
75 State Street, 24th Floor
Boston, MA 02109
(617) 979-9300
Fax: (617) 979-9301
Email: charles.larsen@whitecase.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

David Markoff
White & Case LLP
701 13th Street NW
Washington, DC 20005
(202) 729-2592
Fax: (202) 639-9355
Email: david.markoff@whitecase.com
TERMINATED: 10/14/2021
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Don Zhe Nan Wang
Axinn, Veltrop & Harkrider, LLP
560 Mission Street, 28th Floor
San Francisco
San Francisco, CA 94105
United Sta
415 490-1499
Fax: 415 490-2001
Email: dwang@axinn.com
TERMINATED: 10/13/2021
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Jonathan J. Lamberson
White & Case LLP
3000 El Camino Real, Two Palo Alto
Square, Suite 900

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Palo Alto, CA 94306
(650) 213-0300
Fax: (650) 213-8158
Email: lamberson@whitecase.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Michael J. Songer
White & Case LLP
701 13th Street, Nw
Washington, DC 20005-3807
(202) 626-3200
Fax: (202) 639-9355
Email: michael.songer@whitecase.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Ryuk Park
872 Hyde Street
Cupertino, CA 95014
607-242-9789
Email: ryukpark@gmail.com
TERMINATED: 05/04/2021
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Daniel S. Sternberg
White & Case LLP
75 State Street
Boston, MA 02109
(617) 979-9300
Fax: (617) 979-9301
Email: dan.sternberg@whitecase.com
PRO HAC VICE
ATTORNEY TO BE NOTICED

Henry Yee-Der Huang
White & Case LLP
3000 El Camino Real, 2 Palo Alto Square,
Suite 900
Palo Alto, CA 94306
(650) 213-0300
Fax: (650) 213-8158
Email: henry.huang@whitecase.com
ATTORNEY TO BE NOTICED

Corby R. Vowell
Friedman, Suder & Cooke
604 E. 4th Street
Suite 200
Fort Worth, TX 76102
817-574-7010
Fax: 817-334-0401

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Email: vowell@fsclaw.com
ATTORNEY TO BE NOTICED

V.

Defendant

Hyundai Motor America

represented by **Clarence Rowland**
O'Melveny & Myers LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071
(213) 430-6000
Fax: (213) 430-6407
Email: crowland@omm.com
LEAD ATTORNEY
ATTORNEY TO BE NOTICED

Darin W. Snyder
O'Melveny & Myers LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111-3823
(415) 984-8700
Fax: (415) 984-8701
Email: dsnyder@omm.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Nicholas J. Whilt
O'Melveny & Myers LLP
400 South Hope Street, 18th Floor
Los Angeles, CA 90071
(213) 430-6000
Fax: (213) 430-6407
Email: nwhilt@omm.com
LEAD ATTORNEY
PRO HAC VICE
ATTORNEY TO BE NOTICED

Ryan K Yagura
O'Melveny & Myers - LA
400 South Hope Street, 18th Floor
Los Angeles, CA 90071-2899
213-430-6189
Fax: 213-430-6407
Email: ryagura@omm.com
ATTORNEY TO BE NOTICED

Timothy S. Durst
O'Melveny & Myers LLP
2501 North Harwood Street Suite 1700
Dallas, TX 75201
(972) 360-1900
Fax: 972-360-1901

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Email: tdurst@omm.com
ATTORNEY TO BE NOTICED

Date Filed	#	Docket Text
11/19/2020	4	STANDING ORDER REGARDING NOTICE OF READINESS FOR SCHEDULING CONFERENCE IN PATENT CASES. Signed by Judge Alan D Albright. (bw) (Entered: 12/11/2020)
12/11/2020	1	COMPLAINT (Filing fee \$ 402 receipt number 0542-14277071), filed by STRATOSAUDIO, INC.. (Attachments: # 1 Exhibit 1, # 2 Appendix A, # 3 Exhibit 2, # 4 Appendix B, # 5 Exhibit 3, # 6 Appendix C, # 7 Exhibit 4, # 8 Appendix D, # 9 Exhibit 5, # 10 Appendix E, # 11 Exhibit 6, # 12 Appendix F, # 13 Exhibit 7, # 14 Appendix G, # 15 Civil Cover Sheet)(Vowell, Corby) (Entered: 12/11/2020)
12/11/2020	2	REQUEST FOR ISSUANCE OF SUMMONS by STRATOSAUDIO, INC.. (Vowell, Corby) (Entered: 12/11/2020)
12/11/2020	3	Notice of Filing of Patent/Trademark Form (AO 120). AO 120 forwarded to the Director of the U.S. Patent and Trademark Office. (Vowell, Corby) (Entered: 12/11/2020)
12/11/2020		Case assigned to Judge Alan D Albright. CM WILL NOW REFLECT THE JUDGE INITIALS AS PART OF THE CASE NUMBER. PLEASE APPEND THESE JUDGE INITIALS TO THE CASE NUMBER ON EACH DOCUMENT THAT YOU FILE IN THIS CASE. (bw) (Entered: 12/11/2020)
12/11/2020	5	Summons Issued as to Hyundai Motor America. (bw) (Entered: 12/11/2020)
12/14/2020	6	RULE 7 DISCLOSURE STATEMENT filed by STRATOSAUDIO, INC.. (Vowell, Corby) (Entered: 12/14/2020)
12/21/2020	7	SUMMONS Returned Executed by STRATOSAUDIO, INC.. Hyundai Motor America served on 12/18/2020, answer due 1/8/2021. (Vowell, Corby) (Entered: 12/21/2020)
01/05/2021	8	NOTICE of Attorney Appearance by Ryan K Yagura on behalf of Hyundai Motor America. Attorney Ryan K Yagura added to party Hyundai Motor America(pty:dft) (Yagura, Ryan) (Entered: 01/05/2021)
01/05/2021	9	Unopposed MOTION for Extension of Time to File Answer by Hyundai Motor America. (Attachments: # 1 Proposed Order)(Yagura, Ryan) (Entered: 01/05/2021)
01/05/2021	10	MOTION to Appear Pro Hac Vice by Nicholas J. Whilt (Filing fee \$ 100 receipt number 0542-14342896) by on behalf of Hyundai Motor America. (Whilt, Nicholas) (Entered: 01/05/2021)
01/05/2021	11	MOTION to Appear Pro Hac Vice by Ryan K Yagura for Clarence Rowland (Filing fee \$ 100 receipt number 0542-14342933) by on behalf of Hyundai Motor America. (Yagura, Ryan) (Entered: 01/05/2021)
01/13/2021		Text Order GRANTING 9 Motion for Extension of Time to Answer entered by Judge Alan D Albright. It is ORDERED that Defendants Unopposed Motion for Extension of Time to Respond to Complaint is GRANTED. Defendants deadline to respond to Plaintiffs Complaint is extended until and including February 22, 2021. (This is a text-only entry generated by the court. There is no document associated with this entry.) (re) (Entered: 01/13/2021)
01/13/2021		Reset Deadlines: Hyundai Motor America answer due 2/22/2021. (lad) (Entered: 01/14/2021)

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01/25/2021		Text Order GRANTING 10 Motion to Appear Pro Hac Vice for Attorney Nicholas J. Whilt for Hyundai Motor America. Before the Court is the Motion for Admission Pro Hac Vice. The Court, having reviewed the Motion, finds it should be GRANTED and therefore orders as follows: IT IS ORDERED the Motion for Admission Pro Hac Vice is GRANTED. IT IS FURTHER ORDERED that Applicant, if he/she has not already done so, shall immediately tender the amount of \$100.00, made payable to: Clerk, U.S. District Court, in compliance with Local Rule AT-I (f)(2). Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order entered by Judge Alan D Albright. (This is a text-only entry generated by the court. There is no document associated with this entry.) (mm6) (Entered: 01/25/2021)
01/25/2021		Text Order GRANTING 11 Motion to Appear Pro Hac Vice for Attorney Clarence Rowland for Hyundai Motor America. Before the Court is the Motion for Admission Pro Hac Vice. The Court, having reviewed the Motion, finds it should be GRANTED and therefore orders as follows: IT IS ORDERED the Motion for Admission Pro Hac Vice is GRANTED. IT IS FURTHER ORDERED that Applicant, if he/she has not already done so, shall immediately tender the amount of \$100.00, made payable to: Clerk, U.S. District Court, in compliance with Local Rule AT-I (f)(2). Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order entered by Judge Alan D Albright. (This is a text-only entry generated by the court. There is no document associated with this entry.) (mm6) (Entered: 01/25/2021)
02/12/2021	17	Standing Order Regarding Filing Documents Under Seal and Redacted Pleadings in Patent Cases. Signed by Judge Alan D Albright. as of 2/12/2021. (bot1) (Entered: 02/24/2021)
02/22/2021	12	Sealed Motion Motion to Dismiss for Improper Venue by Hyundai Motor America (Attachments: # 1 Affidavit Declaration of Thomas O'Connor) (Yagura, Ryan) (Entered: 02/22/2021)
02/22/2021	13	ATTACHMENT - <i>Declaration of Clarence Rowland</i> to 12 Sealed Motion Motion to Dismiss for Improper Venue by Hyundai Motor America by Hyundai Motor America. (Attachments: # 1 Exhibit 1 Rowland Declaration, # 2 Exhibit 2 Rowland Declaration, # 3 Exhibit 3 Rowland Declaration, # 4 Proposed Order)(Rowland, Clarence) (Entered: 02/22/2021)
02/23/2021	14	RULE 7 DISCLOSURE STATEMENT filed by Hyundai Motor America. (Yagura, Ryan) (Entered: 02/23/2021)
02/24/2021	15	MOTION to Appear Pro Hac Vice by Corby R. Vowell <i>for Charles Larsen</i> (Filing fee \$ 100 receipt number 0542-14520726) by on behalf of STRATOSAUDIO, INC.. (Vowell, Corby) (Entered: 02/24/2021)
02/24/2021	16	MOTION to Appear Pro Hac Vice by Corby R. Vowell <i>for Ryuk Park</i> (Filing fee \$ 100 receipt number 0542-14520862) by on behalf of STRATOSAUDIO, INC.. (Vowell, Corby) (Entered: 02/24/2021)
02/26/2021	18	MOTION to Appear Pro Hac Vice by Corby R. Vowell <i>for Michael Songer</i> (Filing fee \$ 100 receipt number 0542-14532061) by on behalf of STRATOSAUDIO, INC.. (Vowell, Corby) (Entered: 02/26/2021)
02/26/2021		Text Order GRANTING 15 Motion to Appear Pro Hac Vice for Attorney Charles Larsen for STRATOSAUDIO, INC. Before the Court is the Motion for Admission Pro Hac Vice. The Court, having reviewed the Motion, finds it should be GRANTED and therefore orders as follows: IT IS ORDERED the Motion for Admission Pro Hac Vice is GRANTED. IT IS FURTHER ORDERED that Applicant, if he/she has not already done

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		so, shall immediately tender the amount of \$100.00, made payable to: Clerk, U.S. District Court, in compliance with Local Rule AT-I (f)(2). Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order entered by Judge Alan D Albright. (This is a text-only entry generated by the court. There is no document associated with this entry.) (mm6) (Entered: 02/26/2021)
02/26/2021		Text Order GRANTING 16 Motion to Appear Pro Hac Vice for Attorney Ryuk Park for STRATOSAUDIO, INC. Before the Court is the Motion for Admission Pro Hac Vice. The Court, having reviewed the Motion, finds it should be GRANTED and therefore orders as follows: IT IS ORDERED the Motion for Admission Pro Hac Vice is GRANTED. IT IS FURTHER ORDERED that Applicant, if he/she has not already done so, shall immediately tender the amount of \$100.00, made payable to: Clerk, U.S. District Court, in compliance with Local Rule AT-I (f)(2). Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order entered by Judge Alan D Albright. (This is a text-only entry generated by the court. There is no document associated with this entry.) (mm6) (Entered: 02/26/2021)
02/26/2021	19	Redacted Copy of 12 Sealed Motion Motion to Dismiss for Improper Venue by Hyundai Motor America by Hyundai Motor America. (Attachments: # 1 Affidavit Declaration of Thomas O'Connor)(Yagura, Ryan) (Entered: 02/26/2021)
03/03/2021		Text Order GRANTING 18 Motion to Appear Pro Hac Vice for Attorney Michael J. Songer for STRATOSAUDIO, INC. Before the Court is the Motion for Admission Pro Hac Vice. The Court, having reviewed the Motion, finds it should be GRANTED and therefore orders as follows: IT IS ORDERED the Motion for Admission Pro Hac Vice is GRANTED. IT IS FURTHER ORDERED that Applicant, if he/she has not already done so, shall immediately tender the amount of \$100.00, made payable to: Clerk, U.S. District Court, in compliance with Local Rule AT-I (f)(2). Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order entered by Judge Alan D Albright. (This is a text-only entry generated by the court. There is no document associated with this entry.) (mm6) (Entered: 03/03/2021)
03/04/2021	20	STATUS REPORT <i>Case Readiness Status Report</i> by STRATOSAUDIO, INC.. (Vowell, Corby) (Entered: 03/04/2021)
03/08/2021	21	Sealed Motion StratosAudio, Inc.'s Opposition to Hyundai Motor America, Inc.'s Motion to Dismiss by STRATOSAUDIO, INC. (Vowell, Corby) (Entered: 03/08/2021)
03/08/2021	22	AFFIDAVIT in Support of 12 Sealed Motion Motion to Dismiss for Improper Venue by Hyundai Motor America by STRATOSAUDIO, INC.. (Attachments: # 1 Exhibit A - Hyundai USA (dealer-locator), # 2 Exhibit B - Automax Hyundai, # 3 Exhibit C - Round Rock Hyundai, # 4 Exhibit D - South Point Hyundai, # 5 Exhibit E - Roger Beasley Hyundai, # 6 Exhibit F - Hyundai USA (special-programs), # 7 Exhibit G - Hyundai USA (inventory-search), # 8 Exhibit H - Hyundai USA (Test drive), # 9 Exhibit I - HMA Dealer Sales & Service Agreement, # 10 Exhibit J - HMA Dealer Sales & Service Agreement Std Provisions, # 11 Exhibit K - Loan and Security Agreement)(Vowell, Corby) (Entered: 03/08/2021)
03/11/2021	23	Redacted Copy of 21 Sealed Motion StratosAudio, Inc.'s Opposition to Hyundai Motor America, Inc.'s Motion to Dismiss by STRATOSAUDIO, INC. by STRATOSAUDIO, INC.. (Vowell, Corby) (Entered: 03/11/2021)
03/15/2021	24	REPLY to Response to Motion, filed by Hyundai Motor America, re 12 Sealed Motion Motion to Dismiss for Improper Venue by Hyundai Motor America filed by Defendant

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		Hyundai Motor America (Attachments: # 1 Affidavit Second Declaration of Clarence Rowland, # 2 Exhibit 4 Rowland Declaration, # 3 Exhibit 5 Rowland Declaration, # 4 Exhibit 6 Rowland Declaration, # 5 Exhibit 7 Rowland Declaration, # 6 Exhibit 8 Rowland Declaration, # 7 Exhibit 9 Rowland Declaration, # 8 Exhibit 10 Rowland Declaration) (Yagura, Ryan) (Entered: 03/15/2021)
03/29/2021	25	MOTION to Appear Pro Hac Vice by Corby R. Vowell <i>for Jonathan J. Lamberson</i> (Filing fee \$ 100 receipt number 0542-14640594) by on behalf of STRATOSAUDIO, INC.. (Vowell, Corby) (Entered: 03/29/2021)
03/29/2021	26	MOTION to Appear Pro Hac Vice by Corby R. Vowell <i>for Don Zhe Nan Wang</i> (Filing fee \$ 100 receipt number 0542-14640719) by on behalf of STRATOSAUDIO, INC.. (Vowell, Corby) (Entered: 03/29/2021)
03/31/2021		Text Order GRANTING 25 Motion to Appear Pro Hac Vice for Attorney Jonathan J. Lamberson for STRATOSAUDIO, INC. Before the Court is the Motion for Admission Pro Hac Vice. The Court, having reviewed the Motion, finds it should be GRANTED and therefore orders as follows: IT IS ORDERED the Motion for Admission Pro Hac Vice is GRANTED. IT IS FURTHER ORDERED that Applicant, if he/she has not already done so, shall immediately tender the amount of \$100.00, made payable to: Clerk, U.S. District Court, in compliance with Local Rule AT-I (f)(2). Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order entered by Judge Alan D Albright. (This is a text-only entry generated by the court. There is no document associated with this entry.) (mm6) (Entered: 03/31/2021)
03/31/2021		Text Order GRANTING 26 Motion to Appear Pro Hac Vice for Attorney Don Zhe Nan Wang for STRATOSAUDIO, INC. Before the Court is the Motion for Admission Pro Hac Vice. The Court, having reviewed the Motion, finds it should be GRANTED and therefore orders as follows: IT IS ORDERED the Motion for Admission Pro Hac Vice is GRANTED. IT IS FURTHER ORDERED that Applicant, if he/she has not already done so, shall immediately tender the amount of \$100.00, made payable to: Clerk, U.S. District Court, in compliance with Local Rule AT-I (f)(2). Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order entered by Judge Alan D Albright. (This is a text-only entry generated by the court. There is no document associated with this entry.) (mm6) (Entered: 03/31/2021)
04/07/2021	27	MOTION to Withdraw as Attorney <i>Ryuk Park</i> by STRATOSAUDIO, INC.. (Attachments: # 1 Proposed Order)(Lamberson, Jonathan) (Entered: 04/07/2021)
04/30/2021	28	NOTICE of <i>Inter Partes Review Petitions</i> by STRATOSAUDIO, INC. (Nan Wang, Don) (Entered: 04/30/2021)
05/04/2021		Text Order GRANTING 27 Motion to Withdraw as Attorney. IT IS ORDERED that Ryuk Park is withdrawn as counsel of record for Plaintiff StratosAudio, Inc. (This is a text-only entry generated by the court. There is no document associated with this entry.) (JZ) (Entered: 05/04/2021)
05/17/2021	29	NOTICE of <i>Supplemental Inter Partes Review Petitions</i> by STRATOSAUDIO, INC. (Nan Wang, Don) (Entered: 05/17/2021)
05/27/2021	30	Joint MOTION <i>for Entry of Disputed Scheduling Orders</i> by STRATOSAUDIO, INC.. (Attachments: # 1 Exhibit A, # 2 Exhibit B)(Lamberson, Jonathan) (Entered: 05/27/2021)
06/08/2021	31	MOTION to Withdraw as Attorney <i>Don Zhe Nan Wang</i> by STRATOSAUDIO, INC.. (Attachments: # 1 Proposed Order)(Lamberson, Jonathan) (Entered: 06/08/2021)

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06/14/2021	32	ORDER Setting Zoom Motion Hearing for 6/21/2021 01:30 PM before Judge Alan D Albright. Signed by Judge Alan D Albright. (bot3) (Entered: 06/15/2021)
06/16/2021	33	Standing Order regarding Scheduling Order. Signed by Judge Alan D Albright. (Entered: 06/17/2021)
06/17/2021	34	ORDER RESETTING Zoom Motion Hearing for 6/23/2021 09:30 AM before Judge Alan D Albright. Signed by Judge Alan D Albright. (bot3) (Entered: 06/17/2021)
06/21/2021	35	MOTION to Appear Pro Hac Vice by Darin W. Snyder (Filing fee \$ 100 receipt number 0542-14935937) by on behalf of Hyundai Motor America. (Snyder, Darin) (Entered: 06/21/2021)
06/23/2021	36	Minute Entry for proceedings held before Judge Alan D Albright: Discovery Hearing held on 6/23/2021. Case called for Motion and Discovery Hearing for this and companion case. The Court heard argument regarding the Motion to Transfer Venue for the cases. The Court took the motion to transfer venue under advisement and an Order will issue with the Court's ruling. The Court also heard argument regarding the schedule in this case. The Court is not inclined to make any scheduling changes at this time. (Minute entry documents are not available electronically.) (Court Reporter Kristie Davis.) (ir) (Entered: 06/23/2021)
06/23/2021	37	MOTION to Appear Pro Hac Vice by Corby R. Vowell <i>for David Markoff</i> (Filing fee \$ 100 receipt number 0542-14943351) by on behalf of STRATOSAUDIO, INC.. (Vowell, Corby) (Entered: 06/23/2021)
06/26/2021	38	Transcript filed of Proceedings held on 6-23-21, Proceedings Transcribed: Motion Hearing. Court Reporter/Transcriber: Kristie Davis, Telephone number: 254-340-6114. Parties are notified of their duty to review the transcript to ensure compliance with the FRCP 5.2(a)/FRCrP 49.1(a). A copy may be purchased from the court reporter or viewed at the clerk's office public terminal. If redaction is necessary, a Notice of Redaction Request must be filed within 21 days. If no such Notice is filed, the transcript will be made available via PACER without redaction after 90 calendar days. The clerk will mail a copy of this notice to parties not electronically noticed Redaction Request due 7/19/2021, Redacted Transcript Deadline set for 7/27/2021, Release of Transcript Restriction set for 9/24/2021, (kd) (Entered: 06/26/2021)
06/29/2021	39	Proposed Scheduling Order - <i>[Proposed] Joint Scheduling Order</i> by Hyundai Motor America. (Yagura, Ryan) (Entered: 06/29/2021)
06/29/2021	40	NOTICE of Filing <i>[Proposed] Order Regarding Discovery Dispute</i> by Hyundai Motor America (Yagura, Ryan) (Entered: 06/29/2021)
07/05/2021	41	Memorandum in Opposition to Motion, filed by STRATOSAUDIO, INC., re 12 Sealed Motion Motion to Dismiss for Improper Venue by Hyundai Motor America filed by Defendant Hyundai Motor America <i>Plaintiff's Supplemental Brief</i> (Attachments: # 1 Exhibit A)(Lamberson, Jonathan) (Entered: 07/05/2021)
07/12/2021	42	BRIEF regarding 12 Sealed Motion Motion to Dismiss for Improper Venue by Hyundai Motor America by Hyundai Motor America. (Yagura, Ryan) (Entered: 07/12/2021)
07/14/2021		Text Order GRANTING 35 Motion to Appear Pro Hac Vice for attorney Darin W. Snyder for Hyundai Motor America. Before the Court is the Motion for Admission Pro Hac Vice. The Court, having reviewed the Motion, finds it should be GRANTED and therefore orders as follows: IT IS ORDERED the Motion for Admission Pro Hac Vice is GRANTED. IT IS FURTHER ORDERED that Applicant, if he/she has not already done so, shall immediately tender the amount of \$100.00, made payable to: Clerk, U.S. District Court, in compliance with Local Rule AT-I (f)(2). Pursuant to our Administrative Policies

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		and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order entered by Judge Alan D Albright. (This is a text-only entry generated by the court. There is no document associated with this entry.) (mm6) (Entered: 07/14/2021)
07/14/2021	43	Proposed Scheduling Order - <i>[Proposed] First Amended Joint Scheduling Order</i> by Hyundai Motor America. (Yagura, Ryan) (Entered: 07/14/2021)
07/15/2021		Text Order GRANTING 37 Motion to Appear Pro Hac Vice for Attorney David Markoff for STRATOSAUDIO, INC. Before the Court is the Motion for Admission Pro Hac Vice. The Court, having reviewed the Motion, finds it should be GRANTED and therefore orders as follows: IT IS ORDERED the Motion for Admission Pro Hac Vice is GRANTED. IT IS FURTHER ORDERED that Applicant, if he/she has not already done so, shall immediately tender the amount of \$100.00, made payable to: Clerk, U.S. District Court, in compliance with Local Rule AT-I (f)(2). Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order entered by Judge Alan D Albright. (This is a text-only entry generated by the court. There is no document associated with this entry.) (mm6) (Entered: 07/15/2021)
07/15/2021	44	SCHEDULING ORDER: Markman Hearing set for 10/4/2021 09:30 AM before Judge Alan D Albright. Joinder of Parties due by 11/15/2021. Amended Pleadings due by 1/24/2022. Dispositive and Daubert Motions due by 7/11/2022. Pretrial Conference set for 9/12/2022 before Judge Alan D Albright. Jury Selection set for 10/3/2022 before Judge Jeffrey C. Manske. Jury Trial set for 10/3/2022 before Judge Alan D Albright. Signed by Judge Alan D Albright. (ir) (Entered: 07/15/2021)
07/16/2021	45	NOTICE of Compliance (<i>Identification of Claim Terms for Construction</i>) by Hyundai Motor America (Yagura, Ryan) (Entered: 07/16/2021)
07/28/2021	46	ORDER REGARDING DISCOVERY DISPUTE 32 . Signed by Judge Alan D Albright. (jc5) (Entered: 07/29/2021)
08/02/2021	47	NOTICE of Second Supplemental Inter Partes Review Petitions by STRATOSAUDIO, INC. (Markoff, David) (Entered: 08/02/2021)
08/06/2021	48	Proposed Scheduling Order - <i>[Proposed] Second Amended Joint Scheduling Order</i> by Hyundai Motor America. (Yagura, Ryan) (Entered: 08/06/2021)
08/09/2021	49	NOTICE of New Authority in Connection with its Motion to Dismiss for Improper Venue by Hyundai Motor America re 12 Sealed Motion Motion to Dismiss for Improper Venue by Hyundai Motor America (Attachments: # 1 Opinion)(Yagura, Ryan) (Entered: 08/09/2021)
08/13/2021	50	MOTION to Withdraw as Attorney <i>David Markoff</i> by STRATOSAUDIO, INC.. (Attachments: # 1 Proposed Order)(Lamberson, Jonathan) (Entered: 08/13/2021)
08/17/2021	51	Opening Claim Construction Brief by Hyundai Motor America. (Attachments: # 1 Affidavit Declaration of Tim A. Williams, # 2 Affidavit Declaration of Robert B. Groselak, # 3 Exhibit A Groselak Declaration, # 4 Affidavit Declaration of Henry Houh, # 5 Exhibit a Houh Declaration, # 6 Affidavit Declaration of Barry P. Medoff, # 7 Exhibit A Medoff Declaration, # 8 Exhibit B Medoff Declaration, # 9 Exhibit C Medoff Declaration, # 10 Exhibit D Medoff Declaration, # 11 Exhibit E Medoff Declaration)(Yagura, Ryan) (Entered: 08/17/2021)
08/19/2021	52	MOTION to Appear Pro Hac Vice by Corby R. Vowell (Filing fee \$ 100 receipt number 0542-15136984) by on behalf of STRATOSAUDIO, INC.. (Attachments: # 1 Proposed Order Order)(Vowell, Corby) (Entered: 08/19/2021)

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08/19/2021		Text Order GRANTING 52 Motion to Appear Pro Hac Vice for Attorney Daniel S. Sternberg for STRATOSAUDIO, INC. Before the Court is the Motion for Admission Pro Hac Vice. The Court, having reviewed the Motion, finds it should be GRANTED and therefore orders as follows: IT IS ORDERED the Motion for Admission Pro Hac Vice is GRANTED. IT IS FURTHER ORDERED that Applicant, if he/she has not already done so, shall immediately tender the amount of \$100.00, made payable to: Clerk, U.S. District Court, in compliance with Local Rule AT-I (f)(2). Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order entered by Judge Alan D Albright. (This is a text-only entry generated by the court. There is no document associated with this entry.) (jc5) (Entered: 08/20/2021)
09/02/2021	53	NOTICE <i>Third Supplemental Notice of Inter Partes Review Petitions</i> by STRATOSAUDIO, INC. (Lamberson, Jonathan) (Entered: 09/02/2021)
09/07/2021	54	STATUS REPORT - <i>Hyundai Motor America's Status Report Regarding Pending Venue Motion</i> by Hyundai Motor America. (Yagura, Ryan) (Entered: 09/07/2021)
09/07/2021	55	Reply Claim Construction Brief regarding 51 Claim Construction Brief,, by STRATOSAUDIO, INC.. (Attachments: # 1 Affidavit Declaration of Jonathan Lamberson, # 2 Exhibit 1 - Lamberson Declaration, # 3 Exhibit 2 - Lamberson Declaration, # 4 Exhibit 3 - Lamberson Declaration, # 5 Exhibit 4 -Lamberson Declaration, # 6 Exhibit 5 - Lamberson Declaration, # 7 Exhibit 6-Lamberson Declaration, # 8 Exhibit 7 - Lamberson Declaration, # 9 Exhibit 8-Lamberson Declaration, # 10 Exhibit 9-Lamberson Declaration, # 11 Exhibit 10-Lamberson Declaration, # 12 Exhibit 11-Lamberson Declaration, # 13 Exhibit 12-Lamberson Declaration, # 14 Exhibit 13-Lamberson Declaration, # 15 Exhibit 14-Lamberson Declaration, # 16 Exhibit 15-Lamberson Declaration, # 17 Exhibit 16-Lamberson Declaration, # 18 Exhibit 17-Lamberson Declaration, # 19 Exhibit 18-Lamberson Declaration, # 20 Exhibit 19-Lamberson Declaration, # 21 Exhibit 20-Lamberson Declaration, # 22 Exhibit 21-Lamberson Declaration, # 23 Exhibit 22-Lamberson Declaration, # 24 Exhibit 23-Lamberson Declaration, # 25 Exhibit 24-Lamberson Declaration, # 26 Exhibit 25-Lamberson Declaration, # 27 Exhibit 26-Lamberson Declaration, # 28 Exhibit 27-Lamberson Declaration, # 29 Exhibit 28-Lamberson Declaration, # 30 Exhibit 29-Lamberson Declaration, # 31 Affidavit Dr. William Mangione-Smith, # 32 Exhibit 1-Mangione-Smith)(Huang, Henry) (Entered: 09/08/2021)
09/08/2021	56	MOTION to Appear Pro Hac Vice by Corby R. Vowell (Filing fee \$ 100 receipt number 0542-15200979) for Henry Yee-Der Huang on behalf of STRATOSAUDIO, INC.. (Attachments: # 1 Proposed Order Order on Motion to Appear Pro Hac Vice)(Vowell, Corby) (Entered: 09/08/2021)
09/08/2021		Text Order GRANTING 56 Motion to Appear Pro Hac Vice for Attorney Henry Yee-Der Huang for STRATOSAUDIO. INC. Before the Court is the Motion for Admission Pro Hac Vice. The Court, having reviewed the Motion, finds it should be GRANTED and therefore orders as follows: IT IS ORDERED the Motion for Admission Pro Hac Vice is GRANTED. IT IS FURTHER ORDERED that Applicant, if he/she has not already done so, shall immediately tender the amount of \$100.00, made payable to: Clerk, U.S. District Court, in compliance with Local Rule AT-I (f)(2). Pursuant to our Administrative Policies and Procedures for Electronic Filing, the attorney hereby granted to practice pro hac vice in this case must register for electronic filing with our court within 10 days of this order entered by Judge Alan D Albright. (This is a text-only entry generated by the court. There is no document associated with this entry.) (jc5) (Entered: 09/10/2021)
09/10/2021	57	ORDER, (Markman Hearing RESET for 9/27/2021 03:30 PM before Judge Alan D Albright). Signed by Judge Alan D Albright. (bot1) (Entered: 09/10/2021)

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09/10/2021	58	ORDER, (Markman Hearing RESET for 9/27/2021 03:30 PM before Judge Alan D Albright). Signed by Judge Alan D Albright. (bot1) (Entered: 09/10/2021)
09/15/2021	59	Proposed Scheduling Order [<i>Proposed</i>] <i>Third Amended Joint Scheduling Order</i> by Hyundai Motor America. (Yagura, Ryan) (Entered: 09/15/2021)
09/17/2021	60	MEMORANDUM OPINION AND ORDER. After careful consideration of the relevant facts, applicable law, and the parties oral arguments, the Court DENIES 12 HMAs Motion. Signed by Judge Alan D Albright. (ir) (Entered: 09/17/2021)
09/20/2021	61	Reply Claim Construction Brief regarding 51 Claim Construction Brief,, by Hyundai Motor America. (Attachments: # 1 Affidavit Second Declaration of Robert Groselak, # 2 Exhibit B Groselak Declaration, # 3 Exhibit C Groselak Declaration, # 4 Exhibit D Groselak Declaration, # 5 Exhibit E Groselak Declaration, # 6 Exhibit F Groselak Declaration, # 7 Exhibit G Groselak Declaration, # 8 Exhibit H Groselak Declaration, # 9 Exhibit I Groselak Declaration, # 10 Exhibit J Groselak Declaration)(Yagura, Ryan) (Entered: 09/20/2021)
09/21/2021	62	ORDER, (Markman Hearing RESET for 9/28/2021 03:30 PM before Judge Alan D Albright). Signed by Judge Alan D Albright. (bot1) (Entered: 09/21/2021)
09/21/2021	63	NOTICE of Attorney Appearance by Timothy S. Durst on behalf of Hyundai Motor America. Attorney Timothy S. Durst added to party Hyundai Motor America(pty:dft) (Durst, Timothy) (Entered: 09/21/2021)
09/22/2021	64	Joint Claim Construction Brief or Statement by STRATOSAUDIO, INC.. (Lamberson, Jonathan) (Entered: 09/22/2021)
09/24/2021	65	Reply Claim Construction Brief regarding 61 Claim Construction Brief,, by STRATOSAUDIO, INC.. (Attachments: # 1 Exhibit 29, # 2 Exhibit 30)(Lamberson, Jonathan) (Entered: 09/24/2021)
09/27/2021	66	ORDER, (Markman Hearing RESET for 9/28/2021 03:00 PM before Judge Alan D Albright). Signed by Judge Alan D Albright. (bot1) (Entered: 09/27/2021)
09/28/2021	67	Minute Entry for proceedings held before Judge Alan D Albright: Markman Hearing held on 9/28/2021. Case called for Markman Hearing by Zoom for this and 4 companion cases. The Court heard the disputed claim term definitions and ruled upon the final terms. There will be an Order forthcoming. (Minute entry documents are not available electronically.) (Court Reporter Lily Reznik.)(jc5) (Entered: 09/28/2021)
10/01/2021	68	ANSWER to 1 Complaint, with Jury Demand - <i>Hyundai Motor America's Answer and Affirmative Defenses to Plaintiff's Complaint for Patent Infringement</i> by Hyundai Motor America.(Yagura, Ryan) (Entered: 10/01/2021)
10/07/2021	69	ORDER, (Discovery Hearing set for 10/7/2021 03:30 PM before Judge Alan D Albright). Signed by Judge Alan D Albright. (bot3) (Entered: 10/07/2021)
10/07/2021	70	Minute Entry for proceedings held before Judge Alan D Albright: Discovery Hearing held on 10/7/2021 (Minute entry documents are not available electronically.) Case called for Discovery Hearing by Zoom in this and 4 companion cases. Parties argued theirdiscovery issue before the Court. Order will be forthcoming. (Court Reporter Kristie Davis.)(jc5) (Entered: 10/07/2021)
10/08/2021	72	Standing Order Regarding Order Governing Proceedings Patent Cases. Signed by Judge Alan D Albright. (Entered: 10/13/2021)
10/12/2021	71	Transcript filed of Proceedings held on 10-7-21, Proceedings Transcribed: Discovery Hearing (Zoom). Court Reporter/Transcriber: Kristie Davis, Telephone number: 254-340-

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		6114. (kd) (Entered: 10/12/2021)
10/13/2021		Text Order GRANTING 31 Motion to Withdraw as Attorney entered by Judge Alan D Albright. It is ORDERED that Don Zhe Nan Wang is hereby withdrawn as counsel of record for Plaintiff StratosAudio, Inc. (This is a text-only entry generated by the court. There is no document associated with this entry.) (JZ) (Entered: 10/13/2021)
10/13/2021		Text Order GRANTING 50 Motion to Withdraw as Attorney entered by Judge Alan D Albright. It is ORDERED that David Markoff is hereby withdrawn as counsel of record for Plaintiff StratosAudio, Inc. (This is a text-only entry generated by the court. There is no document associated with this entry.) (JZ) (Entered: 10/13/2021)
10/14/2021	73	NOTICE of Filing [Proposed] Order Regarding Discovery Dispute by STRATOSAUDIO, INC. (Lamberson, Jonathan) (Entered: 10/14/2021)

PACER Service Center			
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PACER Login:	om002190:2610089:0	Client Code:	13264/0600000-00010
Description:	Docket Report	Search Criteria:	6:20-cv-01125-ADA
Billable Pages:	10	Cost:	1.00

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

STRATOSAUDIO, INC.,

Plaintiff,

v.

HYUNDAI MOTOR AMERICA,

Defendant.

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Case No. 6:20-cv-1125

JURY TRIAL DEMANDED

COMPLAINT FOR PATENT INFRINGEMENT

This is an action for patent infringement arising under the Patent Laws of the United States of America, 35 U.S.C. § 1 *et seq.*, in which Plaintiff StratosAudio, Inc. (“Plaintiff” or “StratosAudio”) makes the following actions against Defendant Hyundai Motor America (“Defendant” or “Hyundai”):

INTRODUCTION

1. This complaint arises from Defendant’s unlawful infringement of the following U.S. Patents owned by StratosAudio, Inc.: U.S. Patent No. 8,166,081; U.S. Patent No. 8,688,028; U.S. Patent No. 8,903,307; U.S. Patent No. 9,584,843; U.S. Patent No. 8,200,203; U.S. Patent No. 9,294,806; and U.S. Patent No. 9,355,405 (collectively the “Asserted Patents”).

PARTIES

2. StratosAudio is a privately held company incorporated under the laws of Delaware. StratosAudio was founded in 2001 and is headquartered in Kirkland Washington.

3. StratosAudio is a pioneer in the field of media enhancement systems, especially as it relates to interactive advertising, programming and other data manipulation that enables the identification of broadcast media content using data transmitted in an associated datastream, the

combination of such streams used in personalized media distribution, with widely applicable adaptation in commercial media and entertainment systems including vehicle head unit consoles.

4. Based on years of research and development, StratosAudio has created an international patent portfolio comprising more than seventy (70) issued patents broadly directed to media enhancement systems.

5. StratosAudio has, over the years, invested millions of dollars innovating and creating audio media enhancement systems of the type described in StratosAudio's patents.

6. StratosAudio is partly owned by an individual located in this judicial district in Temple, Texas. This individual is also a named inventor on a number of the asserted patents.

7. Hyundai Motor America is a California corporation with its principal place of business in Fountain Valley, California. Hyundai may be served through its registered agent for service in the State of Texas, National Registered Agents, Inc., 1999 Bryan St., Suite 900, Dallas, Texas 75201. Hyundai is registered to do business in the State of Texas and has been since at least May 13, 1986.

JURISDICTION AND VENUE

8. This action arises under the patent laws of the United States, 35 U.S.C. § 1, et seq., including § 271. This Court has original subject matter jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1338(a).

9. This Court has personal jurisdiction over Defendant because, among other things, Defendant has done business in this District, and has committed and continues to commit acts of patent infringement in this District giving rise to this action, and has established minimum contacts with this forum such that the exercise of jurisdiction over Defendant would not offend traditional notions of fair play and substantial justice. Defendant, directly and indirectly through subsidiaries

and intermediaries, has committed and continues to commit acts of infringement in this District by, among other things, making, using, selling, offering to sell, and importing products that infringe the asserted patents.

10. 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. For example, Hyundai conducts its business of the exclusive distribution of new automobiles to the consuming public in this judicial district through its authorized dealers in this judicial district, including selling automobiles, directly and/or indirectly, to and through Greg May Hyundai, located at 1501 W. Loop 340, Waco, Texas 76712. On information and belief, Hyundai does not permit sales of any new Hyundai vehicle from any location except its authorized dealers, such as Greg May Hyundai.

11. The Hyundai dealerships in this judicial district are all named with the “Hyundai” designation (e.g., Greg May Hyundai). The Hyundai dealerships in this judicial district all prominently display Hyundai trademarks, including the Hyundai logo, with no reservations or disclaimers. Hyundai authorizes its dealers in this judicial district to utilize Hyundai’s trademarks, trade name, and other intellectual property associated with the distribution and sale of automobiles and provision of related services.

12. Hyundai dealerships in this judicial district are held out to the consuming public as places of Hyundai where Hyundai, through its dealers, sells Hyundai cars. Hyundai’s website directs users to enter their zip code so that Hyundai can display to the website user Hyundai vehicles available in inventory in their area, so that Hyundai can identify a franchised dealer in their area, and so that Hyundai can schedule a test drive by having Hyundai provide customer information to the Hyundai dealerships, including dealerships in this judicial district. Upon input

of zip code information from this judicial district, Hyundai names and ratifies its dealers in this judicial district, such as Greg May Hyundai, as its place of business where: 1) the user of a website may test drive its cars; 2) it assists a website user in scheduling a test drive at a dealer in this judicial district; 3) it collects customer information and provides that information to its dealers in this judicial district; Hyundai enables website users to solicit quotes to purchase a vehicle from dealers in this judicial district.

13. Hyundai also conducts business through its authorized dealers in this judicial district by providing new purchase warranties and service pursuant to those warranties to the consuming public. Hyundai further delegates maintenance responsive to vehicle safety recalls to its authorized dealers in this judicial district by informing Hyundai owners of the defect and directing Hyundai owners to the authorized dealers for repair of the defect.

14. Hyundai also controls the sale of automobiles in this judicial district by, among other items, establishing criteria and certifying vehicles as part of a “Certified Pre-Owned Hyundai vehicles” program. Hyundai directly controls aspects of employees of its authorized dealers by training service technicians through Hyundai’s Car Care Express program. Hyundai also provides direct and indirect financial input into the operations of its authorized dealers in this district by, on information and belief, offering vehicle financing through Hyundai Motor Finance, and by offering “floor plan” loans directly to its authorized dealers in this judicial district. On information and belief, Hyundai further conducts business through its control over the sale and/or ownership transfer of its authorized dealers in this judicial district, which includes the right to refuse any transfer of ownership of its authorized dealers, and through its control of specific geographic areas in which its authorized dealers in this judicial district may operate.

COUNT I – INFRINGEMENT OF THE '081 PATENT

15. Plaintiff realleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

16. Plaintiff is the owner and assignee of all rights, title and interest in and to U.S. Patent No. 8,166,081 entitled “System and Method for Advertisement Transmission and Display” (the “’081 patent”), issued on April 24, 2012. A true and correct copy of the ’081 patent is attached hereto as **Exhibit 1**.

17. Defendant makes, uses, offers for sale, sells, and/or imports into the United States certain products and services that directly infringe, literally and/or under the doctrine of equivalents, one or more claims of the ’081 patent, including but not limited to claims 9-11 and 23, and continue to do so since the issuance of the ’081 patent. By way of illustrative example, these infringing products and services include, without limitation, vehicle communication and entertainment systems with head unit consoles that incorporate or otherwise enable Apple Carplay, and at least one of the following: HD radio, SiriusXM radio, and/or FM radio with RBDS (the “Accused Consoles”).

18. Defendant has had knowledge of the ’081 patent from a date no later than the date of the filing of this Complaint. Defendant has known how the Accused Consoles operate and/or are used and has known, or has been willfully blind to the fact, that making, using, offering to sell, and selling the Accused Consoles within the United States, or importing the Accused Consoles into the United States, would constitute infringement.

19. Defendant has induced, and continues to induce, infringement of one or more claims of the ’081 patent by actively encouraging others (including distributors, dealers, and customers) to use, offer to sell, sell, and import the Accused Consoles. On information and belief

these acts include providing information and instructions supporting sales by others, providing the Accused Consoles to others, and indemnifying patent infringement within the United States.

20. Defendant has also infringed, and continues to infringe, one or more claims of the '081 patent by offering to commercially distribute, commercially distributing, making, and/or importing the Accused Consoles, which are used in practicing the process, or using the systems, of the patent, and constitute a material part of the invention. Defendant knows the articles of the Accused Consoles to be especially made or especially adapted for use in infringement of the patent, not a staple article, and not a commodity of commerce suitable for substantial noninfringing use. Accordingly, Defendant has been, and currently is, contributorily infringing the '081 patent in violation of 35 U.S.C. § 271(c).

21. The Accused Consoles satisfy all the claim limitations of one or more claims of the '081 patent. For example, **Appendix A** sets forth in more detail the Accused Consoles and their operation in Hyundai vehicles for a representative claim of the '081 patent.

22. By making, using, offering for sale, selling, and/or importing into the United States the Accused Consoles, Defendant has injured Plaintiff and is liable for infringement of the '081 patent pursuant to 35 U.S.C. § 271.

23. As a result of Defendant's infringement of the '081 patent, Plaintiff is entitled to monetary damages in an amount adequate to compensate for Defendant's infringement, but in no event less than a reasonable royalty for the use made of the invention by Defendant, together with interest and costs fixed by the Court.

24. Defendant's infringing activities have injured and will continue to injure Plaintiff, unless and until this Court enters an injunction prohibiting further infringement of the '081 patent,

and specifically enjoining further manufacture, sale, use, importation, and/or offers for sale that come within the scope of the patent claims.

COUNT II – INFRINGEMENT OF THE '028 PATENT

25. Plaintiff realleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

26. Plaintiff is the owner and assignee of all rights, title and interest in and to U.S. Patent No. 8,688,028 entitled “Broadcast Response System” (the “’028 patent”), issued on April 1, 2014. A true and correct copy of the ’028 patent is attached hereto as **Exhibit 2**.

27. Defendant makes, uses, offers for sale, sells, and/or imports into the United States certain products and services that directly infringe, literally and/or under the doctrine of equivalents, one or more claims of the ’028 patent, including but not limited to claims 11, 14-16, and 18, and continue to do so since the issuance of the ’028 patent. By way of illustrative example, these infringing products and services include, without limitation, vehicle communication and entertainment systems with head unit consoles that incorporate or otherwise enable the Apple Carplay with Apple Music streaming services playing live radio such as, Beats 1 and/or Apple Music 1 Radio, HD radio, FM radio with RBDS, or SiriusXM radio with iTunes tagging functionality (the “Accused Consoles”).

28. Defendant has had knowledge of the ’028 patent from a date no later than the date of the filing of this Complaint. Defendant has known how the Accused Consoles operate and/or are used and has known, or has been willfully blind to the fact, that making, using, offering to sell, and selling the Accused Consoles within the United States, or importing the Accused Consoles into the United States, would constitute infringement.

29. Defendant has induced, and continues to induce, infringement of one or more claims of the '028 patent by actively encouraging others (including distributors, dealers, and customers) to use, offer to sell, sell, and import the Accused Consoles. On information and belief these acts include providing information and instructions supporting sales by others, providing the Accused Consoles to others, and indemnifying patent infringement within the United States.

30. Defendant has also infringed, and continues to infringe, one or more claims of the '028 patent by offering to commercially distribute, commercially distributing, making, and/or importing the Accused Consoles, which are used in practicing the process, or using the systems, of the patent, and constitute a material part of the invention. Defendant knows the articles of the Accused Consoles to be especially made or especially adapted for use in infringement of the patent, not a staple article, and not a commodity of commerce suitable for substantial noninfringing use. Accordingly, Defendant has been, and currently is, contributorily infringing the '028 patent in violation of 35 U.S.C. § 271(c).

31. The Accused Consoles satisfy all the claim limitations of one or more claims of the '028 patent. For example, **Appendix B** sets forth in more detail the Accused Consoles and their operation in Hyundai vehicles for a representative claim of the '028 patent.

32. By making, using, offering for sale, selling, and/or importing into the United States the Accused Consoles, Defendant has injured Plaintiff and is liable for infringement of the '028 patent pursuant to 35 U.S.C. § 271.

33. As a result of Defendant's infringement of the '028 patent, Plaintiff is entitled to monetary damages in an amount adequate to compensate for Defendant's infringement, but in no event less than a reasonable royalty for the use made of the invention by Defendant, together with interest and costs fixed by the Court.

34. Defendant's infringing activities have injured and will continue to injure Plaintiff, unless and until this Court enters an injunction prohibiting further infringement of the '028 patent, and specifically enjoining further manufacture, sale, use, importation, and/or offers for sale that come within the scope of the patent claims.

COUNT III – INFRINGEMENT OF THE '307 PATENT

35. Plaintiff realleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

36. Plaintiff is the owner and assignee of all rights, title and interest in and to U.S. Patent No. 8,903,307 entitled "Broadcast Response System" (the "'307 patent"), issued on December 2, 2014. A true and correct copy of the '307 patent is attached hereto as **Exhibit 3**.

37. Defendant makes, uses, offers for sale, sells, and/or imports into the United States certain products and services that directly infringe, literally and/or under the doctrine of equivalents, one or more claims of the '307 patent, including but not limited to claims 11 and 15-18, and continue to do so since the issuance of the '307 patent. By way of illustrative example, these infringing products and services include, without limitation, vehicle communication and entertainment systems with head unit consoles that incorporate or otherwise enable the Apple Carplay with Apple Music streaming services playing live radio such as Beats 1 and/or Apple Music 1 Radio, HD radio, FM radio with RBDS, or SiriusXM radio with iTunes tagging functionality (the "Accused Consoles").

38. Defendant has had knowledge of the '307 patent from a date no later than the date of the filing of this Complaint. Defendant has known how the Accused Consoles operate and/or are used and has known, or has been willfully blind to the fact, that making, using, offering to sell,

and selling the Accused Consoles within the United States, or importing the Accused Consoles into the United States, would constitute infringement.

39. Defendant has induced, and continues to induce, infringement of one or more claims of the '307 patent by actively encouraging others (including distributors, dealers, and customers) to use, offer to sell, sell, and import the Accused Consoles. On information and belief these acts include providing information and instructions supporting sales by others, providing the Accused Consoles to others, and indemnifying patent infringement within the United States.

40. Defendant has also infringed, and continues to infringe, one or more claims of the '307 patent by offering to commercially distribute, commercially distributing, making, and/or importing the Accused Consoles, which are used in practicing the process, or using the systems, of the patent, and constitute a material part of the invention. Defendant knows the articles of the Accused Consoles to be especially made or especially adapted for use in infringement of the patent, not a staple article, and not a commodity of commerce suitable for substantial noninfringing use. Accordingly, Defendant has been, and currently is, contributorily infringing the '307 patent in violation of 35 U.S.C. § 271(c).

41. The Accused Consoles satisfy all the claim limitations of one or more claims of the '307 patent. For example, **Appendix C** sets forth in more detail the Accused Consoles and their operation in Hyundai vehicles for a representative claim of the '307 patent.

42. By making, using, offering for sale, selling, and/or importing into the United States the Accused Consoles, Defendant has injured Plaintiff and is liable for infringement of the '307 patent pursuant to 35 U.S.C. § 271.

43. As a result of Defendant's infringement of the '307 patent, Plaintiff is entitled to monetary damages in an amount adequate to compensate for Defendant's infringement, but in no

event less than a reasonable royalty for the use made of the invention by Defendant, together with interest and costs fixed by the Court.

44. Defendant's infringing activities have injured and will continue to injure Plaintiff, unless and until this Court enters an injunction prohibiting further infringement of the '307 patent, and specifically enjoining further manufacture, sale, use, importation, and/or offers for sale that come within the scope of the patent claims.

COUNT IV – INFRINGEMENT OF THE '843 PATENT

45. Plaintiff realleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

46. Plaintiff is the owner and assignee of all rights, title and interest in and to U.S. Patent No. 9,584,843 entitled "Systems, Methods, and Devices for Scanning Broadcasts" (the "'843 patent"), issued on February 28, 2017. A true and correct copy of the '843 patent is attached hereto as **Exhibit 4**.

47. Defendant makes, uses, offers for sale, sells, and/or imports into the United States certain products and services that directly infringe, literally and/or under the doctrine of equivalents, one or more claims of the '843 patent, including but not limited to claims 10, 11, 13, and 15, and continue to do so since the issuance of the '843 patent. By way of illustrative example, these infringing products and services include, without limitation, vehicle communication and entertainment systems with head unit consoles that incorporate or otherwise enable the Apple Carplay with Apple Music streaming services playing live radio such as Beats 1 and/or Apple Music 1 Radio, HD radio, FM radio with RBDS, or SiriusXM radio with iTunes tagging functionality (the "Accused Consoles").

48. Defendant has had knowledge of the '843 patent from a date no later than the date of the filing of this Complaint. Defendant has known how the Accused Consoles operate and/or are used and has known, or has been willfully blind to the fact, that making, using, offering to sell, and selling the Accused Consoles within the United States, or importing the Accused Consoles into the United States, would constitute infringement.

49. Defendant has induced, and continues to induce, infringement of one or more claims of the '843 patent by actively encouraging others (including distributors, dealers, and customers) to use, offer to sell, sell, and import the Accused Consoles. On information and belief these acts include providing information and instructions supporting sales by others, providing the Accused Consoles to others, and indemnifying patent infringement within the United States.

50. Defendant has also infringed, and continues to infringe, one or more claims of the '843 patent by offering to commercially distribute, commercially distributing, making, and/or importing the Accused Consoles, which are used in practicing the process, or using the systems, of the patent, and constitute a material part of the invention. Defendant knows the articles of the Accused Consoles to be especially made or especially adapted for use in infringement of the patent, not a staple article, and not a commodity of commerce suitable for substantial noninfringing use. Accordingly, Defendant has been, and currently is, contributorily infringing the '843 patent in violation of 35 U.S.C. § 271(c).

51. The Accused Consoles satisfy all the claim limitations of one or more claims of the '843 patent. For example, **Appendix D** sets forth in more detail the Accused Consoles and their operation in Hyundai vehicles for a representative claim of the '843 patent.

52. By making, using, offering for sale, selling, and/or importing into the United States the Accused Consoles, Defendant has injured Plaintiff and is liable for infringement of the '843 patent pursuant to 35 U.S.C. § 271.

53. As a result of Defendant's infringement of the '843 patent, Plaintiff is entitled to monetary damages in an amount adequate to compensate for Defendant's infringement, but in no event less than a reasonable royalty for the use made of the invention by Defendant, together with interest and costs fixed by the Court.

54. Defendant's infringing activities have injured and will continue to injure Plaintiff, unless and until this Court enters an injunction prohibiting further infringement of the '843 patent, and specifically enjoining further manufacture, sale, use, importation, and/or offers for sale that come within the scope of the patent claims.

COUNT V – INFRINGEMENT OF THE '203 PATENT

55. Plaintiff realleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

56. Plaintiff is the owner and assignee of all rights, title and interest in and to U.S. Patent No. 8,200,203 entitled "Broadcast Response Method and System" (the "'203 patent"), issued on June 12, 2012. A true and correct copy of the '203 patent is attached hereto as **Exhibit 5**.

57. Defendant makes, uses, offers for sale, sells, and/or imports into the United States certain products and services that directly infringe, literally and/or under the doctrine of equivalents, one or more claims of the '203 patent, including but not limited to claims 43, 47, 48, 51, 52, 55, 56, and 62, and continue to do so since the issuance of the '203 patent. By way of illustrative example, these infringing products and services include, without limitation, vehicle

communication and entertainment systems with head unit consoles that incorporate or otherwise enable the Apple Carplay with Apple Music streaming services playing live radio such as Beats 1 and/or Apple Music 1 Radio, HD radio, FM radio with RBDS, or SiriusXM radio with iTunes tagging functionality (the “Accused Consoles”).

58. Defendant has had knowledge of the ’203 patent from a date no later than the date of the filing of this Complaint. Defendant has known how the Accused Consoles operate and/or are used and has known, or has been willfully blind to the fact, that making, using, offering to sell, and selling the Accused Consoles within the United States, or importing the Accused Consoles into the United States, would constitute infringement.

59. Defendant has induced, and continues to induce, infringement of one or more claims of the ’203 patent by actively encouraging others (including distributors, dealers, and customers) to use, offer to sell, sell, and import the Accused Consoles. On information and belief these acts include providing information and instructions supporting sales by others, providing the Accused Consoles to others, and indemnifying patent infringement within the United States.

60. Defendant has also infringed, and continues to infringe, one or more claims of the ’203 patent by offering to commercially distribute, commercially distributing, making, and/or importing the Accused Consoles, which are used in practicing the process, or using the systems, of the patent, and constitute a material part of the invention. Defendant knows the articles of the Accused Consoles to be especially made or especially adapted for use in infringement of the patent, not a staple article, and not a commodity of commerce suitable for substantial noninfringing use. Accordingly, Defendant has been, and currently is, contributorily infringing the ’203 patent in violation of 35 U.S.C. § 271(c).

61. The Accused Consoles satisfy all the claim limitations of one or more claims of the '203 patent. For example, **Appendix E** sets forth in more detail the Accused Consoles and their operation in Hyundai vehicles for a representative claim of the '203 patent.

62. By making, using, offering for sale, selling, and/or importing into the United States the Accused Consoles, Defendant has injured Plaintiff and is liable for infringement of the '203 patent pursuant to 35 U.S.C. § 271.

63. As a result of Defendant's infringement of the '203 patent, Plaintiff is entitled to monetary damages in an amount adequate to compensate for Defendant's infringement, but in no event less than a reasonable royalty for the use made of the invention by Defendant, together with interest and costs fixed by the Court.

64. Defendant's infringing activities have injured and will continue to injure Plaintiff, unless and until this Court enters an injunction prohibiting further infringement of the '203 patent, and specifically enjoining further manufacture, sale, use, importation, and/or offers for sale that come within the scope of the patent claims.

COUNT VI – INFRINGEMENT OF THE '806 PATENT

65. Plaintiff realleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

66. Plaintiff is the owner and assignee of all rights, title and interest in and to U.S. Patent No. 9,294,806 entitled "Systems, Methods, and Devices for Scanning Broadcasts" (the "'806 patent"), issued on March 22, 2016. A true and correct copy of the '806 patent is attached hereto as **Exhibit 6**.

67. Defendant makes, uses, offers for sale, sells, and/or imports into the United States certain products and services that directly infringe, literally and/or under the doctrine of

equivalents, one or more claims of the '806 patent, including but not limited to claims 5-10 and 13, and continue to do so since the issuance of the '806 patent. By way of illustrative example, these infringing products and services include, without limitation, vehicle communication and entertainment systems with head unit consoles that incorporate or otherwise enable the Apple Carplay with Apple Music streaming services playing live radio such as Beats 1 and/or Apple Music 1 Radio, HD radio, FM radio with RBDS, or SiriusXM radio with iTunes tagging functionality (the "Accused Consoles").

68. Defendant has had knowledge of the '806 patent from a date no later than the date of the filing of this Complaint. Defendant has known how the Accused Consoles operate and/or are used and has known, or has been willfully blind to the fact, that making, using, offering to sell, and selling the Accused Consoles within the United States, or importing the Accused Consoles into the United States, would constitute infringement.

69. Defendant has induced, and continues to induce, infringement of one or more claims of the '806 patent by actively encouraging others (including distributors, dealers, and customers) to use, offer to sell, sell, and import the Accused Consoles. On information and belief these acts include providing information and instructions supporting sales by others, providing the Accused Consoles to others, and indemnifying patent infringement within the United States.

70. Defendant has also infringed, and continues to infringe, one or more claims of the '806 patent by offering to commercially distribute, commercially distributing, making, and/or importing the Accused Consoles, which are used in practicing the process, or using the systems, of the patent, and constitute a material part of the invention. Defendant knows the articles of the Accused Consoles to be especially made or especially adapted for use in infringement of the patent, not a staple article, and not a commodity of commerce suitable for substantial noninfringing use.

Accordingly, Defendant has been, and currently is, contributorily infringing the '806 patent in violation of 35 U.S.C. § 271(c).

71. The Accused Consoles satisfy all the claim limitations of one or more claims of the '806 patent. For example, **Appendix F** sets forth in more detail the Accused Consoles and their operation in Hyundai vehicles for a representative claim of the '806 patent.

72. By making, using, offering for sale, selling, and/or importing into the United States the Accused Consoles, Defendant has injured Plaintiff and is liable for infringement of the '806 patent pursuant to 35 U.S.C. § 271.

73. As a result of Defendant's infringement of the '806 patent, Plaintiff is entitled to monetary damages in an amount adequate to compensate for Defendant's infringement, but in no event less than a reasonable royalty for the use made of the invention by Defendant, together with interest and costs fixed by the Court.

74. Defendant's infringing activities have injured and will continue to injure Plaintiff, unless and until this Court enters an injunction prohibiting further infringement of the '806 patent, and specifically enjoining further manufacture, sale, use, importation, and/or offers for sale that come within the scope of the patent claims.

COUNT VII – INFRINGEMENT OF THE '405 PATENT

75. Plaintiff realleges and incorporates by reference the foregoing paragraphs as if fully set forth herein.

76. Plaintiff is the owner and assignee of all rights, title and interest in and to U.S. Patent No. 9,355,405 entitled "System and Method for Advertisement Transmission and Display" (the "'405 patent"), issued on May 31, 2016. A true and correct copy of the '405 patent is attached hereto as **Exhibit 7**.

77. Defendant makes, uses, offers for sale, sells, and/or imports into the United States certain products and services that directly infringe, literally and/or under the doctrine of equivalents, one or more claims of the '405 patent, including but not limited to claims 12-16, and continue to do so since the issuance of the '405 patent. By way of illustrative example, these infringing products and services include, without limitation, vehicle communication and entertainment systems with head unit consoles that incorporate or otherwise enable Apple Carplay, and at least one of the following: HD radio, SiriusXM radio, and/or FM radio with RBDS (the "Accused Consoles").

78. Defendant has had knowledge of the '405 patent from a date no later than the date of the filing of this Complaint. Defendant has known how the Accused Consoles operate and/or are used and has known, or has been willfully blind to the fact, that making, using, offering to sell, and selling the Accused Consoles within the United States, or importing the Accused Consoles into the United States, would constitute infringement.

79. Defendant has induced, and continues to induce, infringement of one or more claims of the '405 patent by actively encouraging others (including distributors, dealers, and customers) to use, offer to sell, sell, and import the Accused Consoles. On information and belief, these acts include providing information and instructions supporting sales by others, providing the Accused Consoles to others, and indemnifying patent infringement within the United States.

80. Defendant has also infringed, and continues to infringe, one or more claims of the '405 patent by offering to commercially distribute, commercially distributing, making, and/or importing the Accused Consoles, which are used in practicing the process, or using the systems, of the patent, and constitute a material part of the invention. Defendant knows the articles of the Accused Consoles to be especially made or especially adapted for use in infringement of the patent,

not a staple article, and not a commodity of commerce suitable for substantial noninfringing use. Accordingly, Defendant has been, and currently is, contributorily infringing the '405 patent in violation of 35 U.S.C. § 271(c).

81. The Accused Consoles satisfy all the claim limitations of one or more claims of the '405 patent. For example, **Appendix G** sets forth in more detail the Accused Consoles and their operation in Hyundai vehicles for a representative claim of the '405 patent.

82. By making, using, offering for sale, selling, and/or importing into the United States the Accused Consoles, Defendant has injured Plaintiff and is liable for infringement of the '405 patent pursuant to 35 U.S.C. § 271.

83. As a result of Defendant's infringement of the '405 patent, Plaintiff is entitled to monetary damages in an amount adequate to compensate for Defendant's infringement, but in no event less than a reasonable royalty for the use made of the invention by Defendant, together with interest and costs fixed by the Court.

84. Defendant's infringing activities have injured and will continue to injure Plaintiff, unless and until this Court enters an injunction prohibiting further infringement of the '405 patent, and specifically enjoining further manufacture, sale, use, importation, and/or offers for sale that come within the scope of the patent claims.

PRAYER FOR RELIEF

WHEREFORE, StratosAudio prays for the following relief:

- a. a judgment declaring that Defendant infringes any and/or all of the Asserted Patents;
- b. that this Court permanently enjoin Defendant and its officers, directors, agents, servants, affiliates, divisions, branches, subsidiaries, parents, licensees, successors, and assigns,

and all persons acting in concert or privity with any of them, from further infringement of any and/or all of the Asserted Patents;

c. an award of damages, enhanced damages, costs, expenses, pre-judgment interest, and post-judgment interest as to infringement of and and/or all of the Asserted Patents;

d. an order accounting for damages incurred by Plaintiff and to pay supplemental damages, including without limitation pre-judgment and post-judgment interest;

e. A judgment and order finding that this is an exceptional case within the meaning of 35 U.S.C. § 285 and awarding Plaintiff its reasonable attorney's fees against Defendant; and

f. such other relief to which it may be entitled in law or equity and which this Court deems to be just or proper.

DEMAND FOR JURY TRIAL

Plaintiff, under Rule 38 of the Federal Rules of Civil Procedure, requests a trial by jury of any issues so triable by right.

Dated: December 11, 2020

Respectfully submitted,

/s/ Corby R. Vowell
FRIEDMAN, SUDER & COOKE
604 East 4th Street, Suite 200
Fort Worth, TX 76102
817-334-0400
Fax: 817-334-0401
vowell@fsclaw.com

WHITE & CASE LLP

Michael Songer (Pro Hac Vice to be filed)
701 Thirteenth Street, NW
Washington DC, 20005
202.626.3600
michael.songer@whitecase.com

Charles Larsen (Pro Hac Vice to be filed)
75 State Street
Boston, MA 02109
617.979.9300
charles.larsen@whitecase.com

Ryuk Park (Pro Hac Vice to be filed)
2 Palo Alto Square, 3000 El Camino Real, #900
Palo Alto, CA 94306
650.213.0300
ryuk.park@whitecase.com

**ATTORNEYS FOR PLAINTIFF
STRATOSAUDIO, INC.**

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

STRATOSAUDIO, INC.,

Plaintiff,

v.

HYUNDAI MOTOR AMERICA,

Defendant.

Case No. 6:20-cv-01125-ADA



PUBLIC VERSION OF SEALED DOCUMENT

MOTION TO DISMISS FOR IMPROPER VENUE

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I. INTRODUCTION

Pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure, Defendant Hyundai Motor America (“HMA”) moves to dismiss the Complaint of Plaintiff StratosAudio, Inc. (“StratosAudio”) for failure to adequately plead venue pursuant to 28 U.S.C. §§ 1400(b) and 1406. The Complaint fails to allege any physical place of business of HMA exists in this district. Instead, StratosAudio identifies the places of independent auto dealerships—non-parties who are not owned, operated, or controlled by HMA. HMA is a California entity with no facilities in this district. Thus, the Complaint should be dismissed for improper venue.

II. FACTUAL BACKGROUND

StratosAudio alleges that HMA infringes seven patents by making, using, offering for sale, selling, and/or importing certain vehicles with particular infotainment systems. *See* ECF No. 1, ¶¶ 1, 17. HMA is incorporated in California, and does not own, rent, or lease any offices, warehouses, stores, facilities, or other physical places in this district. Declaration of Thomas O’Connor (“O’Connor Decl.,” filed concurrently), ¶ 6. HMA does not own, operate, or control any auto dealerships in this district. *Id.*, ¶ 9. Auto dealerships, such as Greg May Hyundai in Waco, Texas, are distinct entities from HMA and are independently owned and operated. *Id.* HMA does not sell vehicles directly to consumers in this district, and does not provide vehicle maintenance or repair services to consumers in this district. *Id.*, ¶¶ 7–8. HMA’s website expressly provides that Hyundai dealerships are “all independently owned and operated.” *Id.*, ¶ 15.

III. LEGAL STANDARD

Venue in patent cases is proper “[A] where the defendant resides, or [B] where the defendant has [i] committed acts of infringement and [ii] has a regular and established place of business.” 28 U.S.C. § 1400(b). The “Plaintiff bears the burden of establishing proper venue”

under § 1400(b). *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1013 (Fed. Cir. 2018). Under option [B][ii], there are “three general requirements relevant to the inquiry: (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). 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). “The statute thus cannot be read to refer merely to a virtual space or to electronic communications from one person to another.” *Id.* “Regular” means that the business must operate in a “‘steady, uniform, orderly, and methodical’ manner,” and “sporadic activity cannot create venue.” *Id.* (citations omitted). For example, a semiannual display of “products at a trade show” in a district would only be a temporary presence insufficient to satisfy the venue requirements. *Id.* at 1363. And “of the defendant” requires consideration of “whether the defendant owns or leases the place, or exercises other attributes of possession or control over the place.” *Id.* “[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 LLC*, 949 F.3d 1338, 1345 (Fed. Cir. 2020).

Fundamentally, “the Supreme Court has cautioned against a broad reading of the venue statute.” *Id.* at 1347. “The requirement of venue is specific and unambiguous; it is not one of those vague principles which, in the interest of some overriding policy, is to be given a ‘liberal’ construction.” *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 264 (1961) (citation omitted). Thus, the Federal Circuit favors “relatively clear rules, where the statutory text allows, so as to minimize expenditure of resources on threshold, non-merits issues, of which venue is one.” *In re Google*, 949 F.3d at 1347.

Where a Plaintiff fails to prove venue under § 1400(b), the complaint must be dismissed or transferred. *See* Fed. R. Civ. P. 12(b)(3) (improper venue is a defense to a complaint); *In re Cray*, 871 F.3d at 1367 (holding dismissal required due to improper venue); *In re Google*, 949 F.3d at 1347 (same); 28 U.S.C. § 1406.

IV. **ARGUMENT**

StratosAudio’s Complaint fails to demonstrate that venue is proper in this district under either prong of § 1400(b). Under the first prong of § 1400(b), a domestic corporate defendant “resides” only where it is incorporated. *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1517 (2017). This prong is not satisfied because StratosAudio admits that HMA is incorporated in California, not Texas. *See* ECF No. 1 at 7; *In re Cray*, 871 F.3d 1355, 1360 (Fed. Cir. 2017).

Under the second prong of §1400(b), StratosAudio’s Complaint alleges venue is proper for a number of reasons. ECF No. 1, ¶¶ 10–14. However, StratosAudio’s venue allegations are legally insufficient to establish venue under § 1400(b).

A. **Venue Is Improper Because The Dealerships Are Independent And Distinct Entities**

“[S]o long as a formal separation of [closely related] entities is preserved, the courts ordinarily will not treat the place of business of one corporation as the place of business of the other.” *EMED Techs. Corp. v. Repro-med Sys., Inc.*, No. 17-728, 2018 U.S. Dist. LEXIS 93658, at *4 (E.D. Tex. June 4, 2018) (Bryson, J.) (citing Wright & Miller, Fed. Prac. & Proc. Juris. § 3823 (4th ed.) (transferring case due to improper venue). This basic rule is supported by a large volume of case law (*see id.* (collecting cases)), and this district applies that rule. *See, e.g., Bd. of Regents v. Medtronic PLC*, No. 17-0942, 2018 U.S. Dist. LEXIS 153269, at *5–6 (W.D.

Tex. July 19, 2018) (Yeakel, J.) (holding that even a location of a “corporate relative” would not establish venue for a separate and distinct corporate relative).

StratosAudio argues venue is proper because HMA allegedly “conducts its business of the exclusive distribution of new automobiles to the consuming public in this judicial district through its authorized dealers in this judicial district, including selling automobiles, directly and/or indirectly, to and through Greg May Hyundai,” located in Waco, Texas. ECF No. 1, ¶ 10. Thus, the only “place of business” identified by StratosAudio is the location of authorized Hyundai dealerships. All such dealerships in this district are separately owned, operated and controlled. O’Connor Decl., ¶ 9; Declaration of Clarence Rowland (“Rowland Decl.,” filed concurrently), Ex. 2 (Greg May Hyundai website printout stating it is family and locally owned). Texas specifically prohibits auto manufacturers and distributors from owning, operating, controlling, or acting in the capacity of an auto dealership. *See* Texas Occupations Code § 2301.476. Further, HMA does not own, rent, or lease any offices, warehouses, stores, facilities, or other physical places at the dealerships, or anywhere else in this district. O’Connor Decl., ¶ 6. Thus, the locations of independent dealerships do not establish venue for HMA.

District courts have considered materially the same facts and found venue improper. For example, in *Omega Patents, LLC v. Bayerische Motoren Werke AG*, No. 20-01907, 2020 U.S. Dist. LEXIS 248567, at *6–16 (N.D. Ga. Dec. 21, 2020), the plaintiff, Omega, failed to allege that defendant, auto distributor BMWNA, “owns, leases, or rents any of the dealerships,” and did not allege that “the entities fail to maintain and preserve the formalities of corporate separateness.” *Id.* at *8. “Absent such allegations, numerous decisions from other federal courts stand for the proposition that ‘independent distributors, such as authorized retailers . . . do not suffice to establish venue under § 1400(b).’” *Id.* (quoting *Vaxcel Int’l Co. v. Minka Lighting*,

Inc., No. 18-0607, 2018 U.S. Dist. LEXIS 226492, at *6 (N.D. Ill. July 11, 2018) (collecting cases)); *see also Reflection, LLC v. Spire Collective LLC*, No. 17-1603, 2018 WL 310184, at *2 (S.D. Cal. Jan. 5, 2018) (collecting cases establishing that “distributors and even subsidiaries, that are independently owned and operated, that are located in the forum and work with the accused infringer, [are] not sufficient to show that the accused infringer has a regular and established business under § 1400(b).”).

Here, the facts are materially the same—the dealership locations StratosAudio relies upon to establish venue are places owned, operated, and controlled by separate corporate entities. And, StratosAudio has failed to plead that HMA has “an employee or other agent of the defendant conducting the defendant’s business at the alleged ‘place of business.’” *Google*, 949 F.3d 1345. Moreover, StratosAudio has not alleged any facts to support piercing the corporate veil, let alone “clear evidence” to upend the “heavy presumption” that corporate entities are separate. *Nat’l Steel Car Ltd. v. Greenbrier Cos.*, No. 19-00721, 2020 U.S. Dist. LEXIS 132270, at *8 (W.D. Tex. July 27, 2020) (Albright, J.). Thus, the independent dealerships do not constitute “places” of HMA, and venue is improper.

B. HMA Does Not Control Dealerships

Cray held that “[r]elevant considerations” for analyzing whether a particular place is a place of the defendant (and not a place of some other entity) “include whether the defendant owns or leases the place, or exercises other attributes of possession or *control* over the place.” 871 F.3d at 1363 (emphasis added). In *Cray*, the court found that employee home offices were not “places” of the defendant because they were not owned, leased, possessed, or controlled by the defendant—they were personal residences of the employees. *Id.* at 1365. Against this backdrop, StratosAudio’s Complaint appears to argue that dealerships are HMA places of business based on alleged “control” by HMA. ECF No. 1, ¶ 14. Notably, Texas law specifically

provides that “a manufacturer or distributor may not directly or indirectly . . . operate or control . . . a franchised dealer or dealership.” Texas Occupations Code § 2301.476(b), (c). Here, regardless of any conclusory allegations, unwarranted factual inferences, or legal conclusions in StratosAudio’s pleadings, venue is improper because HMA does not own, operate, or control dealerships or dealership employees in this district. O’Connor Decl., ¶ 9.

Turning to the specifics of StratosAudio’s “control” allegations, they are insufficient to establish venue, and in many cases are also incorrect. *See Ferrer v. Chevron Corp.*, 484 F.3d 776, 780 (5th Cir. 2007) (“We construe the plaintiffs’ complaints in the light most favorable to them, accepting all well-pleaded facts as true, but we do not accept as true conclusory allegations, unwarranted factual inferences, or legal conclusions.”); *accord Sprewell v. Golden State Warriors*, 266 F.3d 979, 988 (9th Cir. 2001) (“The court need not . . . accept as true allegations that contradict matters properly subject to judicial notice or by exhibit. Nor is the court required to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.”). StratosAudio alleges HMA has

control over the sale and/or ownership transfer of its authorized dealers in this judicial district, which includes the right to refuse any transfer of ownership of its authorized dealers, and through its control of specific geographic areas in which its authorized dealers in this judicial district may operate.

ECF No. 1, ¶ 14. StratosAudio is largely wrong. [REDACTED]

[REDACTED]. O’Connor Decl., ¶ 14. And,

[REDACTED]. *Id.* More importantly, regardless of whether StratosAudio’s allegations are accurate, contractual agreements between distributors and dealerships do not constitute control for purposes of § 1400(b). For example, in *Omega*, the

court found venue improper even though defendant entered into “dealer agreements” with the dealerships that “set forth standards and requirements . . . that dealers are required to comply with for both sales and services.” 2020 U.S. Dist. LEXIS 248567, at *12. The court explained that “some modicum of control over the dealerships’ macro level operations by” the distributor do not “transform[]” dealerships into the distributor’s “own places of business.” *Id.* at *15. Similarly, in *W. View Research, LLC v. BMW of North Am., LLC*, No. 16-2590, 2018 WL 4367378, at *6–7 (S.D. Cal. Feb. 5, 2018), the plaintiff argued the defendant, auto distributor BMWNA, exercised sufficient “control” over independent dealerships to convert them into places of business of BMWNA. Plaintiff argued this control existed because of “thirty separate provisions” in an “operating agreement” providing contractual rights for BMWNA, including a “provision in the operation agreement [that] essentially conditions employment on sales performance in the” district. *Id.* at *6. The court explained that plaintiff’s “theory is predicated on the Defendants’ operating agreement with the BMW and MINI dealerships exerting such control that the dealerships are essentially the same entity. This theory ignores the separate corporate forms of Defendants and the dealerships. The Court finds no facts to support collapsing the corporate forms; the dealerships’ physical locations are not places of defendants.” *Id.* at *7. Here, StratosAudio’s vague allegations of control based on alleged contractual rights are even more minimal than those in *W. View* and *Omega*, and are simply an improper effort to collapse the corporate forms.

StratosAudio’s other control-related allegations are similarly deficient. StratosAudio also alleges that HMA “establishes criteria” for “certifying vehicles as part of a ‘Certified Pre-Owned Hyundai Vehicles’ program.” ECF No. 1, ¶ 14. However, [REDACTED], and HMA does not conduct the actual certification process

for any individual car—that activity is performed by independent dealerships. O’Connor Decl., ¶ 10. StratosAudio also alleges that HMA “controls aspects of employees of its authorized dealers by training service technicians through Hyundai’s Car Care Express program.” ECF No. 1, ¶ 14. The Car Care Express program is a program that offers services such as oil changes and tire rotation. O’Connor Decl., ¶ 11. Those services are also performed by independent dealerships, not by HMA. *Id.* And dealership employees are overseen and controlled by dealerships, not HMA. O’Connor Decl., ¶ 9. Thus, to the extent the Certified Pre-Owned or Car Care Express programs are conducted in this district, those activities are performed and controlled by dealerships, not HMA. *See, e.g., Vaxcel*, 2018 U.S. Dist. LEXIS 226492 at *5–6 (finding that venue is improper even if defendant “set up product displays, provide[s] after-sales services, or train[s] store employees”).

Finally, StratosAudio alleges that HMA “provides direct and indirect financial input into the operations of its authorized dealers in this district by . . . offering vehicle financing through Hyundai Motor Finance, and by offering ‘floor plan’ loans directly to its authorized dealers in this judicial district.” ECF No. 1, ¶ 14. This is untrue—HMA does not provide vehicle financing or floor plan loans to consumers or authorized dealerships in this district. O’Connor Decl., ¶ 15. [REDACTED]

[REDACTED]. *Id.* Thus, these financing allegations do not establish venue.

In short, HMA does not control any dealerships in this district, and the weight of authority establishes that the presence of independent, authorized retailers or distributors does not establish venue over a separate entity. *See, e.g., Green Fitness Equip. Co., LLC v. Precor*

Inc., No. 18-00820, 2018 U.S. Dist. LEXIS 109479, at *10–11 (N.D. Cal. June 29, 2018) (collecting cases).

C. HMA Does Not Ratify Dealerships As Places Of HMA

StratosAudio alleges HMA’s website “ratifies” dealerships as places of HMA in several ways, such as through references to the dealerships on HMA’s website and licensing of the Hyundai trademark. ECF No. 1, ¶¶ 11, 12. StratosAudio’s allegations regarding ratification are likely a reference to *Cray*’s statement that for an employee home office, which is not owned or leased by the defendant, to establish venue, it “must be a place *of the defendant*, not solely a place of the defendant’s employee. Employees change jobs. Thus, the defendant must establish or *ratify* the place of business. It is not enough that the employee does so on his own.” *Cray*, 871 F.3d at 1363 (emphasis added). In other cases, courts found that similar auto distributors had not ratified independent dealerships. In *Omega*, for example, the plaintiff argued ratification occurred because, *inter alia*, (1) BMWNA was the exclusive importer of the BMW vehicles distributed through dealerships, (2) BMWNA “promotes each of these locations as its place of business . . . and on the BMWNA website,” (3) BMWNA marketed “BMW products in the district,” and (4) BMWNA maintained an “interactive website listing each of the local dealerships as a ‘BMW Center.’” *Omega*, 2020 U.S. Dist. LEXIS 248567, at *12. The court reasoned that “[a]t best, Omega’s allegations show BMWNA maintains a mutually beneficial, coordinated business relationship with the dealerships to sell its products to customers in this district. But facilitating business and services through an independent entity is not enough for ratification.” *Id.* at *14–15 (citing *Uni-Sys, LLC v. United States Tennis Ass’n Nat’l Tennis Ctr.*, No. 17-147, 2020 U.S. Dist. LEXIS 61122, at *46–47 (E.D.N.Y. Apr. 7, 2020) (holding that “contract[s] to do business . . . are just that—agreements to do business, not to maintain a place

of business. One can engage in business at a place that is not its own Ratifying a place of business as one’s own requires more than simply agreeing to do business at the place.”)).

Here, StratosAudio alleges that consumers can use the HMA website to search dealerships and inventory and to schedule a test drive, and HMA collects and transmits customer information to dealerships.¹ ECF No. 1, ¶ 12. To clarify, all auto sales and test drives of new Hyundai vehicles in this district are conducted by independent auto dealerships, not by HMA, as HMA does not have any facilities in this district. O’Connor Decl., ¶ 15. StratosAudio also alleges dealerships “display Hyundai trademarks” and HMA authorizes use of its “trademarks, trade name, and other intellectual property associated with the distribution and sale of automobiles and provision of related services.” ECF No. 1, ¶ 11. These allegations fail to establish venue because they simply describe a “coordinated business relationship” used to facilitate business through the independent dealerships. *See Omega*, 2020 U.S. Dist. LEXIS 248567 at *14–15 (rejecting arguments based on website and shared branding); *Bd. of Regents*, 2018 U.S. Dist. LEXIS 153269 at *6–7 (finding “the use of the common or generic name Medtronic on the exterior of the building, as well as the press releases announcing the business to be conducted in the district by Medtronic MiniMed, Inc., and its subsidiary MiniMed Distribution Corp., which are separate and distinct corporate entities, are insufficient to establish that venue in this district is proper for the Board’s claims alleged against Medtronic, Inc.”); *W. View*, 2018 WL 4367378 at *6–8 (rejecting plaintiff argument that venue was proper based on the fact that defendant “prominently advertises the BMW brand at the dealerships”); *Cray*, 871 F.3d at 1364 (“[T]he mere fact that a defendant has advertised that it has a place of business . . .

¹ Websites and virtual communications do not constitute a “place” of business as the “place” must be physical. *Cray*, 871 F.3d at 1360 (“The statute . . . cannot be read to refer merely to a virtual space or to electronic communications from one person to another.”).

is not sufficient; the defendant must actually engage in business from that location.”); *Green Fitness*, 2018 U.S. Dist. LEXIS 109479 at *11 (use of logo by independent distributor deemed inadequate to establish venue).

Fundamentally, StratosAudio fails to allege that the relationship between HMA and any particular dealership is anything more than an agreement for independent business entities to coordinate their business—a fatal deficiency. StratosAudio cannot reasonably make that allegation because the HMA website and the Greg May Hyundai website are separate and, for example, even expressly avoid ratification by stating that they are separate businesses. HMA’s website states that dealerships are “all independently owned and operated.” O’Connor Decl., ¶ 15; Rowland Decl., Ex. 1. And Greg May Hyundai’s website states it is “an independent Hyundai franchised dealership” and is “family-owned” and “managed and owned locally.” Rowland Decl., Exs. 2 at 2 and 3 at 2. Thus, HMA’s use of its website and trademarks to coordinate and facilitate business with the dealerships is not ratification, and venue is improper.

D. HMA’s Warranty Program Does Not Establish Venue

StratosAudio alleges that HMA “conducts business through its authorized dealers in this judicial district by providing new purchase warranties and service pursuant to those warranties to the consuming public,” and by “informing Hyundai owners” of “vehicle safety recalls” and “directing Hyundai owners to the authorized dealers for repair” ECF No. 1, ¶ 13. To clarify, HMA does not perform repair or service of customer cars in this district, those functions are performed by independent dealerships selected by vehicle owners. O’Connor Decl., ¶ 14. And generally, warranty programs and repairs or service conducted by independent entities do not establish venue. *See, e.g., Zaxcom, Inc. v. Lectrosonics, Inc.*, No. 17-3408, 2019 WL 418860, at *9 (E.D.N.Y. Feb. 1, 2019) (“Defendant has contracted with Jaycee over a period of years to provide nonexclusive repair and maintenance services on certain of Defendant’s

products, which have been purchased by customers through third-party dealers, and which may or may not be under warranty. This does not, without more, render Jaycee’s location a place of business of Defendant.”); *Omega*, 2020 U.S. Dist. LEXIS 248567, at *13–15 (finding “new car warranty services at . . . dealerships” insufficient to establish venue over distributor); *Knapp-Monarch Co. v. Casco Prod. Corp.*, 342 F.2d 622, 625 (7th Cir. 1965) (“[T]he fact that Casco’s warranties against defective products were honored by its dealers and its authorized repair station does not mean that the company had a regular and established place of business in Chicago. This activity, although concerned with Casco’s products, was conducted at places of business which were independently operated.”).

V. CONCLUSION

HMA respectfully requests the Court dismiss this case.

Dated: February 22, 2021

Respectfully submitted,

/s/ Ryan K. Yagura

Ryan K. Yagura (Tex. Bar No. 24075933)

ryagura@omm.com

Nicholas J. Whilt (*Pro Hac Vice*, Cal Bar. No. 247738)

nwhilt@omm.com

Clarence A. Rowland (*Pro Hac Vice*, Cal. Bar No. 285409)

crowland@omm.com

O’MELVENY & MYERS LLP

400 S. Hope Street

Los Angeles, CA 90071

Telephone: 213-430-6000

Fax: 213-430-6407

Attorneys for Defendant Hyundai Motor America

CERTIFICATE OF SERVICE

The undersigned certifies that on February 22, 2021, counsel of record identified below are being served with a copy of this document and all attached documents by email.

Corby R. Vowell
Friedman, Suder & Cooke
604 E. 4th Street
Suite 200
Fort Worth, TX 76102
817-574-7010
Fax: 817-334-0401
Email: vowell@fsclaw.com

/s/ Ryan K. Yagura
Ryan K. Yagura

CERTIFICATE OF SERVICE

The undersigned certifies that on February 26, 2021, counsel of record who are deemed to have consented to electronics service are being served with a copy of this document via the Court's ECF system.

/s/ Ryan K. Yagura

Ryan K. Yagura

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

STRATOSAUDIO, INC.,

Plaintiff,

v.

HYUNDAI MOTOR AMERICA,

Defendant.

Case No. 6:20-cv-01125-ADA

PUBLIC VERSION OF SEALED DOCUMENT

DECLARATION OF THOMAS O’CONNOR

1. My name is Thomas O’Connor. I am over the age of eighteen, am of sound mind, and am fully competent to make the statements in this declaration.

2. I have been employed by Hyundai Motor America, Inc. (“HMA”) since December 2005. My current title is Senior Manager, Facilities, HR & Administration, a position that I have held since March 2019. I work out of HMA’s national headquarters in Fountain Valley, California.

3. HMA is a U.S. corporation incorporated in California with its headquarters in Fountain Valley, California. One of HMA’s business activities is acting as the U.S. distributor for Hyundai-branded vehicles. As part of this activity, HMA distributes new Hyundai-branded vehicles to authorized Hyundai dealerships across the country.

4. I have been informed that the Western District of Texas (“WDTX”) is the region defined in 28 U.S.C. § 124(d). I have been informed that certain products are accused of patent infringement in the above captioned matter, including infotainment consoles with iTunes tagging, FM radio with RBDS, HD Radio, SiriusXM, Apple CarPlay running Apple Music

streaming services playing live radio such as Beats 1 or Apple Music 1, in Hyundai autos named Accent, Azera, Elantra, Elantra GT, Genesis Sedan, i10, i30, i40, Ioniq, Kona, Nexo, Palisade, Santa Fe, Santa Fe XL, Santa Fe Sport, Sonata, Sonata Hybrid, Tucson, Veloster, and Venue (collectively, the “Accused Products”).

5. HMA does not research, design, develop, or manufacture any of the Accused Products in the WDTX.

6. HMA does not own, rent, or lease any offices, warehouses, stores, facilities, or other physical places in the WDTX.

7. HMA does not sell any vehicles directly to consumers in the WDTX.

8. HMA does not provide vehicle maintenance or repair services to consumers in the WDTX.

9. HMA does not own, operate, or control any authorized Hyundai dealerships in the WDTX. Such dealerships in the WDTX, including Greg May Hyundai in Waco, Texas, are entities that are distinct from HMA and are independently owned and operated. HMA does not represent that such dealerships in the WDTX are places of business of HMA. Further, HMA does not control the employees of authorized Hyundai dealers. [REDACTED]

[REDACTED]

[REDACTED]

10. [REDACTED]

[REDACTED]. This program is nationwide and not targeted at or unique to the WDTX. HMA does not conduct the actual certification process of cars located in the WDTX—that activity is conducted by authorized Hyundai dealerships.

11. “Hyundai Car Care Express” is a program available at certain participating dealerships that provides services such as oil changes and tire rotation. This program is nationwide and is not targeted at or unique to the WDTX. Any services performed under this program in the WDTX are performed by authorized Hyundai dealerships, not by HMA.

12. When sold by authorized Hyundai dealerships in the WDTX, new Hyundai-branded vehicles come with a warranty from HMA. The HMA warranty program is nationwide and is not targeted at or unique to the WDTX. To the extent maintenance or services need to be performed for a customer in the WDTX pursuant to a warranty, those services are performed by authorized Hyundai dealerships (pursuant to agreements between HMA and authorized Hyundai dealerships). A customer in the WDTX may choose to have his or her vehicle serviced at the authorized Hyundai dealership of their choosing, including those outside the WDTX.

13. HMA does not provide vehicle financing or floor plan loans to consumers or authorized Hyundai dealerships in the WDTX. [REDACTED]

[REDACTED]

[REDACTED].

14. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED].

15. HMA’s website allows customers to search by zip code for the locations of authorized Hyundai dealers and their inventory, and to request a test drive at a local dealership

[REDACTED]

[REDACTED] These functions are accessible nationwide and are not targeted at or unique to the WDTX. All purchases and test drives of new Hyundai vehicles in the WDTX are conducted by authorized Hyundai dealerships, not by HMA. HMA's website does not state that any authorized Hyundai dealerships are owned, operated, or controlled by HMA or are places of HMA. To the contrary, for purchasing or details regarding individual vehicles in the WDTX, users are directed to the websites of authorized Hyundai dealership. And, the HMA website explicitly informs users that Hyundai dealers are "all independently owned and operated." See <https://www.hyundaiusa.com/us/en/privacy-policy>.

I declare under penalty of perjury that the forgoing statements are true and correct based upon my personal knowledge and reasonable and diligent investigation.

Executed on February 22, 2021



Thomas O'Connor

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

STRATOSAUDIO, INC.,

Plaintiff,

v.

HYUNDAI MOTOR AMERICA,

Defendant.

Case No. 6:20-cv-01125-ADA

DECLARATION OF CLARENCE ROWLAND

1. I am a counsel at O'Melveny & Myers LLP, the firm representing Defendant Hyundai Motor America ("HMA") in the above captioned matter.
2. I submit this declaration in support of HMA's "MOTION TO DISMISS FOR IMPROPER VENUE," concurrently filed herewith.
3. I have personal knowledge of the statements set forth in this declaration and, if called as a witness, would testify competently thereto.
4. Attached hereto as **Exhibit 1** is a true and correct copy of a printout I made from the website <https://www.hyundaiusa.com/us/en/privacy-policy>, last accessed on February 18, 2021.
5. Attached hereto as **Exhibit 2** is a true and correct copy of a printout I made from the website <https://www.gregmayhyundai.com/about-greg-may-hyundai-in-waco-tx>, last accessed on February 18, 2021.
6. Attached hereto as **Exhibit 3** is a true and correct copy of a printout I made from the website <https://www.gregmayhyundai.com/terms>, last accessed on February 18, 2021.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Dated: February 22, 2021



Clarence A. Rowland
O'Melveny & Myers LLP

CERTIFICATE OF SERVICE

The undersigned certifies that on February 22, 2021, all counsel of record who are deemed to have consented to electronic service are being served with a copy of this document via the Court's CM/ECF system.

/s/ Clarence Rowland
Clarence Rowland

EXHIBIT 1

Hyundai Motor America Privacy Policy

Effective Date: January 1, 2020

Your privacy is important to Hyundai Motor America and its parent company and affiliates (“**Hyundai**” “**we**,” “**us**” or “**our**”), as is your trust in Hyundai’s products and services. We strive to protect your privacy, while providing opportunities to receive desired information regarding Hyundai’s products, services, and offers that are relevant and useful to you. This Hyundai Motor America Privacy Policy (this “**Privacy Policy**”) describes how we collect, use, and share your personal information, including, as applicable, your rights regarding access, deletion, opting-out, and correction of your personal information.

OVERVIEW

This table provides a summary of the personal information we collect and how we use it, which is further explained in our Privacy Policy below. While the actual information we collect and our use of such personal information varies depending upon the nature of our relationship and interactions, the table below provides a general overview of the categories of personal information we collect and the purposes for which we use such information.

Categories of personal information collected	Uses of personal information
<p><i>Identifiers:</i> such as a real name, alias, address, VIN, IP address and online identifiers, email address, account name, SSN, driver’s license number and other government identifiers, or other unique personal identifiers.</p>	<p>Providing our Services</p> <p>Safety, recall and warranty</p> <p>Analyzing and improving our Services</p> <p>Personalizing content and experiences</p>
<p><i>Customer records:</i> paper and electronic customer records containing personal information, such as name, signature, address, telephone number, education, current employment, employment history,</p>	<p>Marketing and promotional purposes</p> <p>In support of our general business operations</p> <p>Securing and protecting our rights</p>



<p>number, financial account number and other financial or payment information and medical information.</p>	<p>Complying with legal obligations</p>
<p><i>Commercial information:</i> including records of property, products or services purchased, obtained, or considered, vehicle ownership reports, or other purchasing or use histories.</p>	
<p><i>Internet or other electronic network usage data:</i> including, but not limited to, browsing history, clickstream data, search history, and information regarding interactions with an internet website, application, or advertisement, including access logs and other usage data related to your use of any company websites, applications or other online services.</p>	
<p><i>Geolocation data:</i> precise location information about a particular individual or device.</p>	
<p><i>Audio, video and other electronic data:</i> audio, electronic, visual, thermal, olfactory, or similar information such as, CCTV footage, photographs, and call recordings and other audio recording (e.g., recorded meetings).</p>	
<p><i>Employment history:</i> professional or employment-related information</p>	
<p><i>Education information:</i> education information that is not publicly available</p>	



<p>defined in the federal Family Educational Rights and Privacy Act.</p>	
<p><i>Profiles and inferences:</i> including inferences drawn from any of the information identified above to create a profile reflecting a resident’s preferences, characteristics, behavior or attitudes.</p>	
<p>California residents. If you are a California resident, please be sure to review the section Additional Information for California Residents below for important information, as required by California privacy laws, about the categories of personal information we collect and disclose and your rights under California privacy laws.</p>	

Scope

This Privacy Policy applies to our collection, use and disclosure of personal information related to (a) current and former US owner(s) of Hyundai vehicles, (b) users of our websites (each a “Site”) and mobile applications (each as “App”) that link to or display this Privacy Policy, (c) users of our vehicle technologies and services that we make available via the vehicles you own or operate, and (d) subscribers to Hyundai Blue Link and other subscription services ((b), (c), and (d) collectively the “Services”), (e) individuals that contact us, interact with us or express interest in our vehicles or Services, and (f) our efforts to operate and expand our business.

Additional Privacy Notices. We may also provide additional privacy notices for specific services, such as the [Hyundai Vehicle Technologies and Services Privacy Notice](#), which applies to and provides additional information about our collection, use and disclosure of personal information related to our vehicle technologies and services.

Personal Information. Personal information includes any information that identifies, relates to, describes, or is reasonably capable of being associated, or reasonably linked or linkable with a particular individual or household. Personal information includes information that can identify you, such as contact information, vehicle ownership information, geolocation data, web tracking information, payment card information, and demographic data.

Not Covered by this Policy. This Policy does not apply to job applicants and candidates who apply for employment with us, or to employees and non-employee workers. It does not apply to the collection, use, and disclosure of personal information by independently owned and operated dealers or businesses.



User Consent

Your use of our Services is subject to the applicable terms of use, which may include our [Terms of Use](#) and [Connected Services Terms and Conditions](#) (collectively, the “Terms”), including applicable limitations on liability and the resolution of disputes. Our terms are incorporated by reference into this Privacy Policy.

By disclosing your personal information to us or using our Services, you understand and agree that Hyundai may collect, use and disclose your personal information in accordance with this Privacy Policy and the Terms. If required by applicable law, we will obtain your consent to our collection, use, transfer and disclosure of your personal information. IF YOU DO NOT AGREE WITH ANY PART OF THIS PRIVACY POLICY OR OUR TERMS, THEN PLEASE DO NOT USE THE SERVICES

Our Services are intended for use and access by U.S. residents only. Hyundai does not knowingly collect, process, access or intend to access the personal information of persons residing outside of the U.S., including in Europe and China. If you do not reside in the U.S., you should visit the Hyundai-affiliated website that is applicable to your country or region.

Personal Information We Collect

We collect information about you directly from you, from third parties, and automatically through your use of our Services or interactions with us. We may combine the information we collect from these various sources.

Sources of Personal Information. The personal information we collect varies depending upon the circumstances. For example, we collect personal information when you engage with Hyundai, its dealers, or its service providers directly, such as when buying a vehicle, registering for a service or creating an account, requesting information from us, making part or service requests; participating in promotional activities, such as surveys, sweepstakes, contests, special events, blogs and chats; or when you contact us or otherwise voluntarily provide information to us.

Hyundai also automatically collects usage data when you use Hyundai’s Services. This may include data collected via cookies and web beacons; web analytics and log files; and vehicle, driver, and connected services usage data. Please see below for additional information regarding our collection of this type of information. Some of our Services may capture and record geolocation and general location data about your vehicle. If you visit a physical Hyundai location, we may use CCTV and other security monitoring to secure our premises, which may lead to the collection of personal information about visitors to our premises.

In addition, Hyundai may also obtain information about you and your vehicle in a number of other ways. For example, we may obtain information about you or your vehicle from vehicle sales records and other public sources, from Hyundai affiliates and business partners such as satellite radio and roadside assistance programs. Hyundai dealers (which are all independently owned and operated)



and other sources that provide us leads including lists of potential vehicle purchasers or current owners.

Categories of Personal Information. Certain privacy laws, such as the CCPA, require that we disclose the categories of personal information that we may collect about individuals. While the actual information we collect varies depending upon the circumstances, generally we may collect the following categories of personal information:

- *Identifiers:* such as a real name, alias, address, VIN, IP address and online identifiers, email address, account name, SSN, driver's license number and other government identifiers, or other unique personal identifiers.
- *Customer records:* paper and electronic customer records containing personal information, such as name, signature, address, telephone number, education, current employment, employment history, SSN, driver's license number, and other government identifiers, insurance policy number, financial account number and other financial or payment information and medical information.
- *Commercial information:* including records of property, products or services purchased, obtained, or considered, vehicle ownership reports, or other purchasing or use histories.
- *Internet or other electronic network usage data:* including, but not limited to, browsing history, clickstream data, search history, and information regarding a resident's interaction with an internet website, application, or advertisement, including access logs and other usage data related to your use of any company websites, applications or other online services.
- *Geolocation data:* precise location information about a particular individual or device.
- *Audio, video and other electronic data:* audio, electronic, visual, thermal, olfactory, or similar information such as, CCTV footage, photographs, and call recordings and other audio recording (e.g., recorded meetings).
- *Employment history:* professional or employment-related information.
- *Education information:* education information that is not publicly available personally identifiable information as defined in the federal Family Educational Rights and Privacy Act.
- *Profiles and inferences:* including inferences drawn from any of the information identified above to create a profile reflecting a resident's preferences, characteristics, behavior or attitudes.



Use of Personal Information

Hyundai uses the information collected above in a number of ways. And we may use your information individually or combine it with other information to generate aggregate statistical information. The primary uses of your information include:

- **Running our business and providing our Services:** to provide and maintain our Services; to improve our Services; to authenticate users; to perform technical operations, such as updating software; to communicate with you about our Services, vehicles and other products and services; to respond to your requests; to administer Events that you participate in; to fulfill your orders and process your payments; to provide technical support; and for other customer service and support purposes.
- **Safety, recall and warranty:** for safety, recall and warranty purposes, such as to send recall notices, process recall and warranty claims, and for other purposes related to vehicle safety.
- **Analyzing and improving our Services and offerings:** to better understand how users access and use our vehicles, other products, and the Services; for research and analytical purposes, such as to evaluate and improve our Services and business operations; to develop new features, products, or services; and to otherwise improve our Services and user experiences.
- **Personalizing content and experiences:** to tailor content we send or display on the Services in order to offer location customization and personalized help and instructions and to otherwise personalize your experiences; to reach you with more relevant ads and to measure ad campaigns.
- **Marketing and promotional purposes:** to send you newsletters, offers or other information we think may interest you; to contact you about our products, services or information we think may interest you; to administer promotions and contests; and to promote other services we offer.
- **In support of our general business operations:** where necessary to the administration of our general business, accounting, record keeping and legal functions, including to analyze operational and business results and risks, to collect outstanding amounts owed, and maintain business records.
- **Securing and protecting our rights:** to protect our business operations, secure our network and information technology, assets and services; to prevent and detect fraud, unauthorized activities, access and other misconduct; where we believe necessary to investigate, prevent or take action regarding suspected violations of our Terms and other agreements with you, as well



- **Complying with legal requests and obligations:** to comply with the law or legal proceedings. For example, we may disclose information in response to subpoenas, court orders, and other lawful requests by regulators and law enforcement, including responding to national security or law enforcement disclosure requirements.

Anonymous and De-identified Information. We also may de-identify information and create anonymous and aggregated data sets and reports in order to assess, improve, and develop our business, products, and services; prepare benchmarking reports; and for other research and analytics purposes.

Disclosure of Personal Information

We disclose personal information to provide and improve our Services; to reach you with more relevant information and offers; to support recall, warranty and safety purposes; to provide you with information about third party offers you may be interested in; to honor your consent or authorization; and to achieve other purposes set out below:

- **Affiliates and Subsidiaries:** Hyundai may share your personal information with Hyundai Motor Company, our parent company headquartered in South Korea. Hyundai may also share your personal information with our finance affiliate Hyundai Capital America and our R&D affiliate Hyundai America Technical Center, Inc., both located in the United States.
- **Service providers and suppliers:** We may disclose personal information to our vendors, service providers, suppliers, contractors or agents who use such data in order to perform functions on our behalf.
- **Marketing partners and third parties:** Hyundai may share personal information, including information about users of Services or vehicle owner information, with third parties including our affiliates and subsidiaries, authorized dealers, and licensees. In addition, personal information may be used by our business partners, including marketing and promotional partners, to conduct joint marketing programs with Hyundai, show you advertisements about our products and services on third party sites, and to offer you other valuable products and services. We may share personal information, such as name, contact information and other data about your vehicles or interests, with our authorized dealers in your area so that they may contact you about your vehicle needs and purchase plans, or otherwise reach out to you for marketing purposes.
- **Programs:** Hyundai may invite you to participate in promotional activities, such as surveys, sweepstakes, contests, special events, blogs and chats ("**Programs**"). These Programs are



Program, we may use personal information you provide. For example, we may send you email messages to invite you to join a contest. Your personal information may also be shared with our business partners and may also be used by our business partners if you indicate your interest in receiving communications directly from that company. If you elect to receive communications from our business partners, your information will be used by that company in accordance with its policies and this Privacy Policy will not apply to that company's use of your information. Sometimes the rules, terms and conditions, or disclaimers that apply to a particular Program include information on how we may use the personal information that you provide to us through your participation in the Program. If there is a conflict between the rules, terms, and conditions that apply to a particular Program and this Privacy Policy, those applying to the particular Program will govern. Please review all of the information about a Program before you provide us (or our business partners) with any personal information.

- *Participating vendors:* Some of our Services offer opportunities to make purchases online from special participating vendors. On Services with online purchase opportunities for products and merchandise, we may also give participating vendors the order information and authorization for the merchant bank. Any time you order from a participating vendor, that vendor will automatically have all the information related to the order. Participating vendors may use that information to advise you directly of other products and offerings that they provide.
- *Credit card companies and payment services:* In some cases, we use third party payment and transaction services to facilitate your transactions and process your orders. In such cases, we will share your personal information and credit card information with third party payment services companies solely for the purpose of completing the transaction or processing your order.
- *Public postings:* You should be aware that if you voluntarily disclose information, personal or otherwise, online in any community area (whether through Hyundai's websites or any other Service available online), that information can be collected and used by others. Accordingly, you should use caution when sharing any personal information or other sensitive information with others in any community area (whether through Hyundai's websites or any other Service available online).
- *Business transfers:* We may disclose and transfer personal information as part of any merger, acquisition, financing, sale of company assets or interests in the respective company, or in the case of insolvency, bankruptcy, or receivership, including during negotiations related to such business transfers.
- *Protecting rights and interests:* We may disclose your information to protect or defend the safety, rights, property, or security of Hyundai, third parties or the general public, including to protect the Services, to detect, prevent, or otherwise address fraud, security, technical issues



illegal, unethical, or legally actionable activity. We may also use personal information as evidence in litigation in which we are involved, and as necessary to enforce this Privacy Policy, our Terms of Use, and other applicable agreements with you.

- **Legal compliance and lawful requests:** We may disclose your information to comply with applicable legal or regulatory obligations, including as part of a judicial proceeding, in response to a subpoena, warrant, court order, or other legal process, or to cooperate with investigations or lawful requests, whether formal or informal, from law enforcement or government entities.

Anonymized and Aggregated Data. We may share aggregate or de-identified information with third parties for research, marketing, analytics, and other purposes, provided such information does not reasonably identify you.

Categories of Personal Information Disclosed. Certain privacy laws, such as the CCPA, require that we tell you about the categories of personal information that we have disclosed for a business purpose as well as the categories that we have “sold”. Please review the section Categories of Personal Information Collected above for further descriptions of each category of personal information.

- **Disclosed for a business purpose.** In general, we may disclose the following categories of personal information for the business purposes described above:

Categories of personal information disclosed for our business purposes	Categories of third parties to whom this information was disclosed
Identifiers	Affiliates and subsidiaries; dealers; service providers and suppliers; marketing partners; digital advertising and analytics providers; payment services companies; and government entities.
Customer records	Affiliates and subsidiaries; dealers; service providers and suppliers; marketing partners; payment services companies; and government entities.
Commercial information	Affiliates and subsidiaries; dealers; service providers and suppliers; marketing partners; digital advertising and analytics providers; payment services companies; and government entities.



Identifiable internet or other electronic network activity information	Affiliates and subsidiaries; service providers and suppliers; marketing partners; digital advertising and analytics providers; and government entities.
Geolocation data	Affiliates and subsidiaries; service providers and suppliers; and government entities
Audio, visual, and other electronic data	Affiliates and subsidiaries; service providers and suppliers; and government entities.
Employment history	Affiliates and subsidiaries; service providers and suppliers; and government entities.
Education information	Affiliates and subsidiaries; service providers and suppliers; and government entities.
Profiles and inferences	Affiliates and subsidiaries; service providers and suppliers; marketing partners; digital advertising and analytics providers; payment services companies; and government entities.

- Disclosed with your consent. With your consent, we do disclose or make available certain personal information to third parties including dealers and other third party providers.
- *Sold.* The CCPA defines a “sale” as disclosing or making available to a third party personal information in exchange for monetary or other valuable consideration. While we do not disclose personal information to third parties in exchange for direct monetary compensation from such third parties, we do disclose or make available personal information to third parties, in order to receive certain services or benefits from them pursuant to written agreement. Additionally, we allow third party tags to collect information such as browsing history on our Sites to improve and measure our ad campaigns, including: identifiers; customer records; commercial information; internet or other electronic network usage data; and profiles and inferences. The categories of information disclosed under this section, and third parties to whom the information was disclosed, is as follows.



Categories of personal information disclosed or made available	Categories of third parties to whom this information was disclosed or made available
Identifiers	Affiliates and subsidiaries; vendors; marketing partners; and digital advertising and analytics providers.
Customer records	Affiliates and subsidiaries; vendors; marketing partners; and digital advertising and analytics providers.
Commercial information	Affiliates and subsidiaries; vendors; marketing partners; and digital advertising and analytics providers.
Internet or other electronic network activity information	Affiliates and subsidiaries; vendors; marketing partners; and digital advertising and analytics providers.
Profiles and inferences	Affiliates and subsidiaries; vendors; marketing partners; and digital advertising and analytics providers.

Cookies and Tracking

We and our third-party providers use cookies, clear GIFs/pixel tags, JavaScript, local storage, log files, and other mechanisms to automatically collect and record information about your browsing activities, and use of the Websites and other Services. We may combine this data with other personal information we collect about you. This data is used to understand how our Services are used, track bugs and errors, provide and improve our Services, verify account credentials, allow logins, track sessions, prevent fraud, and protect our Services, as well as for targeted marketing and advertising, to personalize content and for analytics purposes. We provide additional information about tracking technologies below. You can learn about how to register your preferences regarding certain uses of the technologies by reading the Cookies and Tracking Choices section below.


Cookies. We may collect certain information regarding website activities through the use of HTTP cookies which are small files stored on your web browser. Cookies enable us to track website usage so that we may better target the interests of our users and enhance their experience on our websites as well as to remember user preferences and optimize the design of our websites. You can






website features or services may not function properly without cookies.

Web beacons. Some of our web pages, commercial email messages and/or newsletters may contain electronic images known as web beacons, which are also called single-pixel GIFs. Web beacons collect information including a cookie number, time and date of a page view and a description of the page on which the web beacon resides. Web beacons are a technique we may use to enhance and personalize the websites and the products and services we offer, to provide product information and advertisements that are more relevant to your interests, compile aggregated statistics about the usage of our websites, improve and personalize our advertising, and to track the number of users who have opened and acted upon our commercial email messages.

Log files. We collect log information to analyze trends, administer the Services, track users' movement around our Services and gather broad demographic information for aggregate use in improving the websites.

Do Not Track. Our Sites do not support Do Not Track at this time. Do Not Track (DNT) is a privacy preference that you can set in your web browser to indicate that you do not want certain information about your webpage visits collected across websites when you have not interacted with that service on the page. For all the details, including how to turn on Do Not Track, visit [donottrack.us](https://www.donottrack.us). 

Third-Party Analytics. We may use third-party analytics companies, for example [Google Analytics](#)  [the privacy policy](#)  and [opt-out](#)  to evaluate use of our Services. We use these tools to help us understand use of, and to improve, our Services, performance, ad campaigns, and user experiences. These entities may use cookies and other tracking technologies, such as web beacons or local storage objects (LSOs), to perform their services.

Interest-Based Advertising On some of our Services, we may work with third-party ad networks, analytics companies, measurement services and others (“third-party ad companies”) to display advertising on our vehicles and Services and to manage our advertising on third-party sites, mobile apps and online services. We and these third-party ad companies may use cookies, pixels tags and other tools to collect information on our Services (and on third-party sites and services), such as browsing history, IP address, device ID, cookie and advertising IDs, and other identifiers, general location information and, with your consent, your device's geolocation information; we and these third-party ad companies use this information to provide you more relevant ads and content and to evaluate the success of such ads and content.

Custom Audiences and Matching. We may share certain hashed customer list information (such as your email address) with third parties—such as Facebook and Google—so that we can better target ads and content to our customers, and others with similar interests, within their services. These third parties use the personal information we provide to help us target ads and to enforce their terms, but we do not permit them to use or share the data we submit with other third-party advertisers.



Cookies and Tracking Choices. If you would like to opt-out of third party collection of information on our Sites via cookies and similar tracking technologies, you can Manage Preferences. This tool provides you with information about the third parties that collect information via cookies and similar technologies and allows you to opt out of such collection. You will need to visit Manage Preferences on all of the browsers and devices you use to access our websites. If you clear cookies on your browser, you will need to reset your preferences at Manage Preferences.

In addition, for more information or to opt out of third party advertising cookies and tags, you may visit www.privacyrights.info/. You may also obtain more information about targeted or “interest-based advertising” by visiting the [Network Advertising Initiative](#) or the [Digital Advertising Alliance](#). Opting out of participating ad networks does not opt you out of being served advertising. You may continue to receive generic or “contextual” ads on our Services. You may also continue to receive targeted ads on other websites, from companies that do not participate in the above programs.

Your Rights and Choices

You may access, delete and update certain of your personal information by accessing and adjusting your account settings, or by contacting us as specified below. Please note that we may maintain copies of information that you have updated, modified or deleted, as permitted, in our business records and in the normal course of our business operations.

Opting-Out of Certain Communications. Hyundai offers you the opportunity to opt-out from marketing communications from Hyundai, and to opt out of certain disclosures of personal information to third parties.

- You may opt-out of marketing emails or manage your subscription preferences for emails from us at any time by using the unsubscribe mechanism within any marketing email we send to you. Even if you opt out, we may still send you non-commercial emails, such as registration confirmation, Vehicle updates, and responses to direct requests.
- If you wish to opt-out or request that we cease sending you commercial or other information via phone or postal mail, you may opt out by submitting a request at our Contact Us page.
- You may also opt out of our sharing of your personal information (including Covered Information) with third parties for marketing purpose by submitting a request at our Contact Us page.

Accessing and Updating Your Information. If you register for an account, including accounts to access and use the Vehicle Technologies and Services, you can access and update certain information we have relating to your account within your account settings. For Blue Link services, this can be done on the My Account page of MyHyundai.com. You may also update or delete your



maintain copies of information that you have updated, modified or deleted, as permitted, in our business records and in the normal course of our business operations.

If you have opted out of receiving future emails from us, we will implement your opt-out request within ten (10) business days of receiving the opt-out request. If you have opted out of receiving future promotional materials by regular mail, we will implement your opt-out request within a commercially reasonable time. In those instances, we will retain your information in a “do not promote” file in our database, and you will receive no further communications from us except as required by law.

California Residents. California residents have certain rights, under California privacy laws, regarding their personal information, which are set forth in the **Additional Information for California Residents** section below.

The Security of Your Information

We use security policies, procedures, and tools which are designed to safeguard the personal information we collect. However, the security of information transmitted through the Internet can never be guaranteed regardless of the level of security. We are not responsible for any interception or interruption of any communications through the Internet or for changes to or losses of data. Users of our Services are responsible for maintaining the security of any password, user ID or other form of authentication involved in obtaining access to password protected or secure areas of any of our website. In order to protect you and your data, we may suspend your use of any of the websites, without notice, pending an investigation, if any security issue arises. Access to and use of password protected and/or secure areas of any of the websites are restricted to authorized users only. Unauthorized access to such areas is prohibited and may lead to criminal prosecution or civil action.

Third Party Sites

We may offer links to or from our websites to other websites within the Hyundai family as well as to websites, services, and resources operated by third parties. We offer links to third party websites so that you can conveniently visit our vendors and advertisers or locate other content likely to be of interest to you. We are not responsible for the privacy practices, content or policies of websites operated by third parties and urge you to inquire about their privacy and information sharing practices before providing any personal information. In the event that you provide personal information to any third party website or service, you understand that Hyundai is not responsible for such third parties' use or misuse of your personal information. You further acknowledge and agree that Hyundai shall not be responsible or liable, directly or indirectly, for any damage or loss caused or alleged to be caused by or in connection with use of or reliance on any such content, goods or services available on or through any such third party website, service, or resource.

Children's Privacy

We do not knowingly collect or maintain personal information from any person under the age of



designed to attract anyone under the age of thirteen (13).

Changes to this Privacy Policy

Hyundai reserves the right to change this Privacy Policy at any time. Hyundai will use, share, and disclose all personal and other user information in accordance with the Privacy Policy in effect at the time the information is collected. We will post any changes to this Privacy Policy on this page so check back frequently so that you are always aware of what information we collect, how we use it, and under what circumstances we may disclose it. Continued interaction with us following changes to these terms will mean that you accept the changes.

How to Contact Us

Please visit our Contact Us page.

Additional Information for California Residents

This section provides information for California residents about their rights regarding their personal information, as required under California privacy laws, including the California Consumer Privacy Act ("CCPA").

Notice at Collection. We are required to notify California residents, at or before the point of collection of their personal information, the categories of personal information collected and the purposes for which such information is used.

Do Not Sell. California residents have the right to opt-out of our sale of their personal information for all purposes, including direct marketing by third parties. Opt-out rights can be exercised by submitting a Do Not Sell request via our Personal Information Request portal. We do not sell personal information about residents who we know are younger than 16 years old without opt-in consent. To opt-out of the sharing, including sales, of personal information with third parties that collect information from our Sites via cookies or similar tracking technologies, you can Manage Preferences. You will need to visit Manage Preferences on all of the browsers and devices you use to access our websites. If you clear cookies on your browser, you will need to reset your preferences at Manage Preferences.

Verifiable Requests to Delete, and Requests to Know. Subject to certain exceptions, California residents have the right to make the following requests:

- **Right of Deletion:** California residents have the right to request deletion of their personal information that we have collected about them, subject to certain exemptions, and to have such personal information deleted, except where necessary for any of a list of exempt purposes.



- **Right to Know – Right to a Copy:** California residents have the right to request a copy of the specific pieces of personal information that we have collected about them in the prior 12 months and to have this delivered, free of charge, either (a) by mail or (b) electronically in a portable and, to the extent technically feasible, readily useable format that allows the individual to transmit this information to another entity without hindrance.

- **Right to Know – Right to Information:** California residents have the right to request that we provide them certain information about how we have handled their personal information in the prior 12 months, including the:
 - categories of personal information collected;
 - categories of sources of personal information;
 - business and/or commercial purposes for collecting and selling their personal information;
 - categories of third parties/with whom we have disclosed or shared their personal information;
 - categories of personal information that we have disclosed or shared with a third party for a business purpose;
 - categories of personal information collected; and
 - categories of third parties to whom the residents' personal information has been sold and the specific categories of personal information sold to each category of third party.

Submitting Requests. You may submit requests to us at our Personal Information Request portal. In addition, you may make certain requests to us by contacting us at: (800) 633-5151 (toll free). If you choose to submit a request via our portal, you will be able to track the status of your request.

Please note that we may require additional information from you in order to honor your request, including your name, email address, phone number, and mailing address. If you provide this information via our portal, we will send you an email or text message to verify the information is correct.

If you are submitting a request through an authorized agent, the authorized agent must confirm their relationship with you. We may also request that any authorized agents verify their identity, including by providing information about themselves, such as their name, email, phone number, and address. We may reach out to you directly to confirm that you have provided the agent with your permission to submit the request on your behalf.

There may be circumstances where we will not be able to honor your request. For example, if you request deletion, we may need to retain certain personal information to comply with our legal



Discrimination and Incentives. The CCPA prohibits discrimination against those who exercise their rights under the CCPA and imposes requirements on any financial incentives offered to California residents related to their Personal Information. A business may offer financial incentives for the collection, sale or deletion of California residents' personal information, provided it is not unjust, unreasonable, coercive or usurious, and is made available in compliance with applicable transparency, informed consent, and opt-out requirements. California residents have the right to be notified of any financial incentives offers and their material terms, the right to opt-out of such incentives at any time, and may not be included in such incentives without their prior informed opt-in consent.

Shine the Light. You may exercise your rights under California's \Shine the Light law (Civil Code Section 1798.83) by utilizing the Do Not Sell My Personal Information request on the CCPA portal.

Related links

[About Hyundai](#)

[Help / FAQ](#)

[Dealer Locator](#)

Vehicles 

Shopping Tools 

Why Hyundai 

Owner 

About 



[Hyundai Homepage](#) | [N logo](#)



Vehicles Build & Price Inventory



Language: English 

[Site Map](#) | [FAQ's](#) | [Accessibility](#) | [Terms of Use](#) | [Legal](#) | [Privacy Policy](#) |
[Vehicle Technologies and Services Privacy Notice](#) | [Do not sell my information](#) | [AdChoices](#)

For disability accessibility concerns, please contact us at 1-800-633-5151 or accessibility@hmmausa.com |
Hyundai's accessibility efforts are guided by WCAG 2.0 AA.

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America .

EXHIBIT 2



Hyundai Dealership in Waco, TX

Our family-owned dealership group has been around for 25 years, but we've recently branched out into a new facility in Waco, Texas, in 2015. We are managed and owned locally, so we are excited to provide quality vehicles our shoppers can rely on in our Waco, Killeen, Belton, Hillsboro and Temple areas. So, give our team a call if you're nearby, because we can help you find your future vehicle.

Do you already know which model you want? From the Greg May Hyundai Palisade and Tucson to the compact Greg May Hyundai Elantra, you can pick your favorite in our inventory and take it for a test drive in Waco. If you decide it's the one, you can speak with our expert finance team, who can help you find the right finance package that fits your budget.

Don't forget our service team is around to keep your vehicle up to snuff in Greg May Hyundai. We have an express lane to get you in and out quickly if your vehicle needs simple maintenance like an oil change or tire rotation. Or, if your car needs more serious engine or transmission repairs, you can take it to our shop where an experienced service team member will get it back into pristine condition and back to you as quickly as possible.

While you are waiting in our comfortable customer lounge you can hop on our Wi-Fi, or if you don't have any time to wait around you can utilize our shuttle services or rental vehicles. If you have any questions you can speak with a friendly Greg May Hyundai team member. We look forward to hearing from you!

Visit Us

1501 West Loop 340, Waco, TX 76712

[Get Directions](#)

Sales: (833) 310-1026 | [Hours](#)

Service: (833) 314-1073 | [Hours](#)

Parts: (833) 314-1084 | [Hours](#)

Browse inventory

[NEW](#) [USED](#) [MANUFACTURER CERTIFIED](#)

All Years 	Hyundai 
All Models 	Max Price 

FIND MATCHES

EXHIBIT 3

Guiding Principles:

In connection with your transaction, Greg May Hyundai may acquire information about you as described in this notice, which we handle as stated in this notice.

We may collect personally identifiable information such as name, postal address, telephone number, e-mail address, social security number, date of birth, etc. This personal information is collected and used by Greg May Hyundai staff for the purpose of facilitating a relationship or business transaction.

Our website resides behind a firewall and uses SSL (Secure Sockets Layer, the industry-standard security protocol used to communicate with browsers) to transmit personal information. Data is strongly encrypted during transmission to ensure that personal and payment information is secure. Industry-standard data encryption techniques are used to protect personal information on our servers. SSL-capable browsers typically have a symbol on the browser window to indicate when they are in a secure mode. In addition, the URL will begin with "https:" for all browsers.

Greg May Hyundai does not sell, rent or disclose e-mail addresses to other organizations.

Please read Greg May Hyundai's privacy policy before using this website. By using Greg May Hyundai's website, you acknowledge and agree you have read and agree to the following privacy terms.

In connection with your transaction, whether online or at our dealership, Greg May Hyundai may acquire information about you as described in this policy, which Greg May Hyundai handles as stated in this policy. Greg May Hyundai may collect personally identifiable information such as name, postal address, telephone number, email address, social security number, date of birth, etc. While Greg May Hyundai makes reasonable efforts to secure all data submitted via this website, Greg May Hyundai cannot guarantee security of personal information, and all information submitted via this website is at your own risk.

By visiting this website and/or agreeing to share your location with Greg May Hyundai, Greg May Hyundai may acquire non-personally identifiable information about you, such as your geographic location, internet service provider, internet browser, IP address, search engine or referral source you used to access this website, and browsing preferences. By using this website, you acknowledge and agree Greg May Hyundai may use this anonymized information to improve the experience of our customers and visitors to this website.

Greg May Hyundai uses cookies on this website to help collect some identifiable personal data. The cookies also enable Greg May Hyundai to tie the URL of the device you use to provide certain personal information on Greg May Hyundai's website to other personal information you may provide to Greg May Hyundai at the dealership. This personal information is collected and used by Greg May Hyundai for the purpose of facilitating a relationship or business transaction and customizing Greg May Hyundai's interaction with you. By entering and using our website, and by voluntarily providing Greg May Hyundai

with your personal information, you consent to Greg May Hyundai tying your personal information to the URL of the device you use to enter Greg May Hyundai's website. Disabling the cookies on your web browser or withholding your personal information at the dealership will prevent Greg May Hyundai from tying your URL to any personal information you provided to Greg May Hyundai at the dealership.

Disclosure of Certain Information to Hyundai Motor America. Greg May Hyundai is an independent Hyundai franchised dealership. When you use this website, Greg May Hyundai may provide personal information you enter on this website or otherwise provide to us to Hyundai for Hyundai's marketing and other business purposes. For example, when you indicate that you would like to receive more information about Hyundai and its products, services or offers, personal information such as your name, address, city, state, zip code, email address and telephone number will be provided to Hyundai. In addition, if you buy or lease a Hyundai vehicle from Greg May Hyundai, we may share information about your vehicle purchase (such as vehicle identification number (VIN), make, model, model year, date of purchase or lease and service history) with Hyundai.

In addition, Greg May Hyundai or our business partners use Google Analytics to help collect and process some of the information Greg May Hyundai collects about you. To learn more about how Google uses data when you use this site, please review Google's privacy policy here: www.google.com/policies/privacy/partners/.

Greg May Hyundai's website resides behind a firewall and uses SSL (Secure Sockets Layer, the industry-standard security protocol used to communicate with browsers) to transmit personal information. Data is strongly encrypted during transmission to ensure that personal and payment information is secure. Industry-standard data encryption techniques are used to protect personal information on our servers. SSL-capable browsers typically have a symbol on the browser window to indicate when they are in a secure mode. In addition, the URL will begin with "https:" for all browsers.

Greg May Hyundai only shares your information with our affiliates or business partners, and such disclosure is made only in connection with our regular business practices. Greg May Hyundai does not sell, rent, or disclose email addresses to any other organizations.

If you have any questions about this policy or Greg May Hyundai's privacy practices, please contact Greg May Hyundai.

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

STRATOSAUDIO, INC.,

Plaintiff,

v.

HYUNDAI MOTOR AMERICA,

Defendant.

Case No. 6:20-cv-01125-ADA

**[PROPOSED] ORDER ON DEFENDANT’S MOTION TO DISMISS FOR IMPROPER
VENUE**

This Court, after considering Defendant Hyundai Motor America’s Motion for to Dismiss for Improper Venue, is of the opinion that the Motion should be granted.

It is therefore **ORDERED** that Defendant’s Motion to Dismiss for Improper Venue is **GRANTED** and this action is dismissed without prejudice.

SIGNED THIS ___ day of _____, 2021.

ALAN D. ALBRIGHT
UNITED STATES DISTRICT JUDGE

PUBLIC VERSION

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

STRATOSAUDIO INC.,)	
	)	Case No. 6:20-CV-01125-ADA
Plaintiff,)	
)	
v.	)	JURY TRIAL DEMANDED
)	
HYUNDAI MOTOR AMERICA,)	
)	
Defendant.)	

**STRATOSAUDIO, INC.’S OPPOSITION TO
HYUNDAI MOTOR AMERICA, INC.’S
MOTION TO DISMISS**

PUBLIC VERSION

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I. INTRODUCTION

Hyundai Motor America’s (“Hyundai”) Motion to Dismiss (D.I. 12) (“Motion”) presents one main argument for transfer: that Plaintiff StratosAudio, Inc. (“StratosAudio”) cannot utilize Hyundai’s dealers in this District to establish venue because the dealers are “separate corporate entities.” Motion at 5. This argument ignores both the controlling law on venue determination for patent cases and the facts regarding Hyundai’s relationship to its dealers.

The U.S. Court of Appeals for the Federal Circuit has set forth the legal requirements for venue that relate to a defendant’s “control” or “ratification” of a place of business. *In re Cray*, 871 F.3d 1355, 1363 (Fed. Cir. 2017). Notwithstanding Hyundai’s arguments, the mere fact that a defendant and an entity in a judicial district are “separate corporate entities” is not dispositive in determining venue. Motion at 5. In addition, Hyundai’s Motion ignores the facts of its *actual* relations with its dealers. The reality is that Hyundai ratifies and controls almost every aspect of its dealers’ business, including, but not limited to, (i) the location of its dealers’ premises and facilities, (ii) advertising, (iii) sales, (iv) parts, (v) inventory, (vi) service and warranty, and (vii) personnel.

Judge Gilstrap in the Eastern District of Texas has already examined the venue issue raised by Hyundai – whether a vehicle manufacturer ratifies or controls its dealers under *In re Cray* – and determined that venue in that judicial district was proper. *Blitzsafe Tex., LLC v. Bayerische Motoren Werke AG*, 2018 U.S. Dist. LEXIS 173065 (E.D. Tex. Sep. 5, 2018). This Court should apply that same analysis and reach the same conclusion: that Hyundai’s dealers’ premises are, for the purposes of venue, to be treated as Hyundai’s own place of business. Therefore, Hyundai’s Motion to Dismiss/Transfer for Improper Venue should be denied.

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II. LEGAL STANDARDS

A plaintiff bears the burden of establishing proper venue. *In re Cray Inc.*, 871 F.3d 1355, 1360 (Fed. Cir. 2017). On a motion to dismiss for improper venue, a plaintiff need only present facts which, taken as true, establish venue. *Langton v. CBeyond Communication, LLC*, 282 F. Supp. 2d 504, 508 (E.D. Tex. 2003). “Courts will accept as true uncontroverted facts in a plaintiff’s pleadings, and will resolve any conflicts in the plaintiff’s favor.” *Id.*; *see also etradeshow.com, Inc. v. Netopia Inc.*, 2004 WL 515552, at *2 (N.D. Tex. Jan. 30, 2004).

Venue for domestic defendants in patent infringement cases is governed by 28 U.S.C. § 1400(b). *TC Heartland LLC v. Kraft Foods Group Brands LLC*, 137 S. Ct. 1514, 1521 (2017). Section 1400(b) provides that “[a]ny civil action for patent infringement may be brought [1] in the judicial district where the defendant resides, or [2] where the defendant has committed acts of infringement and has a regular and established place of business.” *TC Heartland*, 137 S. Ct. at 514. As to venue under the second prong of Section 1400(b), there are “three general requirements relevant to the inquiry: (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 at 1360.

III. ARGUMENT

Hyundai meets the requirements of the second prong of Section 1400(b). First, Hyundai has not disputed – because there can be no dispute – that Hyundai’s dealerships are both “physical places” within the District and that they are “regular and established.” *See, e.g., Blitzsafe Tex., LLC v. Bayerische Motoren Werke AG*, 2018 U.S. Dist. LEXIS 173065, *13 (E.D. Tex. Sep. 5, 2018) (hereinafter “*Blitzsafe I*”), *vacated by party stipulation by Blitzsafe Tex., LLC v. Mitsubishi Elec. Corp.*, 2019 U.S. Dist. LEXIS 129945 (E.D. Tex. Aug. 1, 2019) (hereinafter

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“*Blitzsafe III*”).¹ The only issue is whether Hyundai’s dealers located in this District satisfy the third requirement – that the dealerships are “places” of Hyundai for the purposes of the venue statute. A location is a “place of the defendant” if the defendant (i) “exercises ... attributes of possession or control over” the place **or** (ii) has taken steps to “ratify the place of business.” *In re Cray*, 871 F.3d at 1363 (emphasis added). Hyundai’s relations with its dealers meet **both** the “ratification” and “control” tests of a “place of the defendant.” Venue in this judicial district is, thus, proper over Hyundai.

A. Hyundai Has Ratified Its Dealership As “The Place Of Business”

1. The Facts Alleged in StratosAudio’s Complaint Demonstrate that Venue Is Proper under the “Ratification” Theory

There are at least five authorized Hyundai dealerships in this District. D.I. 1 (Compl.), ¶ 10; Declaration of Ryuk Park (“Park Decl.”), Ex. A. New Hyundai vehicles are available for purchase exclusively through these authorized dealers. Compl., ¶ 10. The dealerships include the name “Hyundai.” *Id.*, ¶ 11. And while one dealer’s website indicates that it is a “family-owned dealership” (D.I. 13-2 at 3), the other four do not and thus associate themselves fully with Hyundai. *See e.g.*, Park Exs. B-E. All of the dealerships prominently display the “Hyundai” logos and use Hyundai’s trademarks, trade names, and other intellectual property associated with the distribution and sale of vehicles and provision of related services. Compl., ¶ 11; *see also*, Park Ex. B at 1.

¹ The court vacated its order in *Blitzsafe I* pursuant to the parties’ joint stipulation to vacate, not based on any consideration of the merits or its analysis in *Blitzsafe I*. *Blitzsafe III*, 2019 U.S. Dist. LEXIS 129945, *4 (In the Motion, the Parties **jointly move to vacate** the Court’s September 6, 2019 Order Denying Defendant’s Motion to Dismiss for Lack of Personal Jurisdiction or Improper Venue”). Consequently, the original reasoning articulated by the court in *Blitzsafe I* remains sound.

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In addition, Hyundai's website (www.hyundaiusa.com/us/en) directs users to these dealerships when searching for Hyundai vehicles in this district. *Id.*, ¶ 12; Park Ex. A. Hyundai's website will display a list of these franchise dealerships when a user inputs a zip code within this District. *Id.* Hyundai's website also allows its users to search for new or certified pre-owned vehicle inventory, schedule a test drive, compare vehicles, compare competitor products, obtain trade-in information, and apply for financing without the need to visit a dealer's website. Compl., ¶ 12; *see also* Park Exs. F-H.

A Texas court has already analyzed, and confirmed, that an automobile distributor (BMW North America, or "BMWNA") can "ratify" its dealerships for venue purposes under these same facts. *Blitzsafe I*, 2018 U.S. Dist. LEXIS 173065 at *20. In reaching this conclusion, the court noted that (i) BMWNA did not permit sales of its vehicles except through its authorized dealers; (ii) the dealerships were named "BMW"; (iii) BMW's dealerships prominently displayed BMW's logo, indicating to the public that they are a place where BMWNA, through its franchised dealers, sells BMW vehicles; and (iv) BMWNA's website directed its users to nearby dealerships and allowed them to search for new vehicle inventory, browse brochures, schedule test drives, select vehicle models and trims, and obtain pricing information for its vehicles from the dealerships. *Id.* at *20-22; *see also Blitzsafe Tex., LLC v. Mitsubishi Elec. Corp.*, 2019 U.S. Dist. LEXIS 86350, *6-7 (E.D. Tex. May 22, 2019) (summarizing the factors considered in finding venue proper under the ratification theory).

2. *Additional Facts Further Demonstrate that Venue Is Proper under the "Ratification" Theory*

Additional facts exist which further demonstrate Hyundai's ratification of its dealerships activities. As part of the condition for entering into a dealership agreement, Hyundai approves

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the locations of its dealer’s premises. *See e.g.*, Park Ex. I at 2 (“However, in order for HMA² to establish and maintain an effective network of authorized Hyundai Dealers for the sale and servicing of Hyundai Products and to maximize Customer convenience, HMA has **approved** the following facilities as the **exclusive location(s)** for the sale and servicing of Hyundai Products and for the display of Hyundai Marks.”) (emphasis added). Hyundai also prohibits any changes to the location of its dealers’ premises without consent. *Id.* at 3 (“DEALER agrees not to display Hyundai marks or to conduct any dealership operations ... at any location other than the location(s) approved herein, without the prior written consent of HMA.”); Park Ex. J at 15 (“DEALER agrees, therefore, that it will not, under any circumstances, conduct Dealer operations at any other location, whether as a satellite operation, subdealership, through an associate Dealer or otherwise, without the prior written consent of HMA.”). In addition to restricting the locations of the dealerships, Hyundai also restricts the activities its dealers may conduct at the approved premises. Park Ex. I at 3 (“[E]ach location is **approved only for the activity indicated**. DEALER may not alter the activity of any location approved herein or otherwise use such location for any activities other than the approved activity, without the prior written consent of HMA.”) (emphasis added). And when conducting such approved activities, Hyundai requires its dealers to use its facilities according to its requirements. Park Ex. J at 15 (“In addition, DEALER agrees that all of its facilities will be satisfactory as to space, appearance, amenities, layout, equipment, and signage and **will at all times be in accordance with HMA’s minimum facilities standards**, as amended from time to time.”). Finally, Hyundai restricts transfer of ownership to its dealerships. Compl., ¶ 14; Park Ex. I at 2 (“[A]ny change in ownership, regardless of the share or relationship between parties ... requires the prior written

² “HMA” stands for Hyundai Motor America. Park Ex. I at 1.

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consent of HMA.”). [REDACTED]

[REDACTED], it actually has an absolute right of first refusal to any proposed transfer of ownership.³ Park Ex. J at 25 (stating that when Hyundai “refuses to approve a transfer or sale of any ownership interest in the dealership,” Hyundai “will have the right of first refusal or an option to purchase the dealership assets, including any leasehold interest or realty.”). These facts directly refute Hyundai’s assertion that “the relationship between [Hyundai] and any particular dealership is anything more than an agreement for *independent* business entities to coordinate their business.” D.I. 12 at 11. On the contrary, they evince Hyundai’s vested interest in the dealerships, their locations, and the degree to which Hyundai ratifies them.

B. Venue Is Also Proper Because Hyundai Exercises Significant Control Over Its Dealerships

While ratification alone sufficiently establishes venue against Hyundai, venue is also proper against Hyundai under the “control” theory. As examined below, Hyundai exercises authority over nearly all aspects of a dealer’s business operations, including, but not limited to: (i) advertising, (ii) sales, (iii) parts, (iv) service, (v) purchase of inventory, (vi) warranty to customers, (vii) facilities maintenance, and (viii) records keeping. *See generally* Park Ex. I (Hyundai Dealer Sales & Service Agreement); Park Ex. J (Hyundai Dealer Sales and Service Agreement Standard Provisions). The following examples, from Hyundai’s own documents, demonstrate this control.

³ To the extent Hyundai might argue that this provision in Hyundai’s Dealer Sales and Service Agreement Standard Provisions regarding transfer of ownership is unenforceable under Texas law, such an argument would not be dispositive of whether Hyundai ratifies or controls its dealers. *Blitzsafe I*, 2018 U.S. Dist. LEXIS 173065, *19 (“Even though BMWNA is not permitted to own or control, generally, the dealerships within this District, that does not mean that they are not places of BMWNA under the third *In re Cray* factor.”).

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First, as explained above, Hyundai controls its dealers' premises and facilities, including their locations, operating hours, and permitted activities that may be conducted on-site. *See e.g.*, Park Ex. I at 2-3; Ex. J at 15, 19. Hyundai even specifies the requirements for, and thereby controls, the usage of its dealers' facilities. Park Ex. J at 15 ("In addition, DEALER agrees that all of its facilities will be satisfactory as to *space, appearance, amenities, layout, equipment, and signage* and *will at all times be in accordance with HMA's minimum facilities standards*, as amended from time to time.") (emphases added). Additionally, Hyundai specifies how its dealers should utilize its trademarks, trade names, and other intellectual property in advertising and marketing. *See e.g., Id.* These facts demonstrate the extensive control Hyundai has over its dealer's premises and facilities.

Second, Hyundai exercises control over its dealers' purchase and maintenance of vehicle and parts inventory. Hyundai controls the types and quantities of vehicles its dealers must maintain at their premises. Park Ex. J at 8 ("DEALER agrees to stock and sell, subject to available supply, all models and types of Hyundai Motor Vehicles in the Hyundai Product Addendum and that it *will, at all times, maintain at least the minimum inventory of Hyundai Motor Vehicles requested by HMA.*") (emphasis added). Hyundai also specifies the care with which its dealers must maintain its vehicle inventory. Park Ex J at 8 ("DEALER will maintain all Hyundai Motor Vehicles for display and demonstration purposes in showroom ready condition."). Hyundai (through its subsidiary) even controls the whereabouts of its dealers' vehicle inventory. Park Ex. K at 6 ("Dealer *shall not move* or permit to be moved *any Inventory from the Premises without the prior written consent of Lender.*") (emphasis added). Hyundai further specifies the type and quantities of parts its dealers must carry. Park Ex. J at 14 ("DEALER, therefore, agrees to carry in stock at all times during the term of this Agreement a

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complete inventory of Hyundai Genuine Parts or Accessories, as listed in HMA's current inventory guide.”); *id.* at 14 (“DEALER will stock a sufficient quantity and variety of parts and accessories to meet Customer demand and to perform warranty repairs and special policy work.”).

Third, Hyundai controls the price and manner of payment and financing. Hyundai has exclusive control over the pricing and terms of sale for all of its vehicles. Park Ex. J at 6 (“HMA reserves the right, without prior notice to DEALER, to establish and revise prices and other terms of sale for all Hyundai Products sold to DEALER under this Agreement.”). Hyundai additionally controls the procedure for payment and financing. Park Ex. J at 6 (“DEALER agrees to pay for Hyundai Products *pursuant to such procedures as HMA may designate* from time to time. ... DEALER will make arrangements with *its designated financial institution* to accommodate the use of such systems.”) (emphases added).⁴

Fourth, Hyundai requires its dealerships to maintain a Hyundai specified minimum net working capital amount. Park Ex. J at 16 (“DEALER agrees to establish and maintain actual net working capital in an amount not less than the minimum net working capital specified in a separate Minimum Net Working Capital Agreement made between DEALER and HMA.”) Hyundai has the exclusive authority to adjust the minimum net working capital amount that it requires the dealerships to maintain. *Id.* (“If HMA determines, in its sole discretion, that changed circumstances require it to adjust the net working capital requirement hereunder,

⁴ Hyundai [REDACTED]. Motion at 8. What Hyundai conveniently omitted is [REDACTED] is a subsidiary of Hyundai Motor America.

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DEALER agrees to revise its minimum net working capital to be used in the dealership's operation accordingly.”).

Fifth, Hyundai unilaterally determines the price and the terms upon which its dealers purchase its vehicles and perform maintenance service. *See e.g.*, Park Ex. J at 6 (“HMA reserves the right, without prior notice to DEALER, to establish and revise prices and other terms of sale for all Hyundai Products sold to DEALER under this Agreement.”); *id.* (DEALER agrees to pay for Hyundai Products pursuant to such procedures as HMA may designate from time to time.”); *Braman Hyundai, Inc. v. Hyundai Motor America Corp.*, 1:20-cv-23301-AMC, D.I. 34, ¶ 69 (alleging that Hyundai “have reimbursed and continue to reimburse [dealer] for labor performed and parts sold ... **at flat rates unilaterally set by [Hyundai]** that are substantially below [dealer’s] established statutory reimbursement rates.”) (emphasis added).

Sixth, Hyundai specifies the terms and scope of warranties to be included in its vehicle sales as well as requires how its dealers provide notice and advertise such warranties. *See e.g.*, Park Ex. J at 7 (“DEALER is not authorized to assume any additional warranty obligations or liabilities on behalf of HMA.”); Park Ex. J at 11 (“DEALER is free to sell warranty or service contract protection for Hyundai Motor Vehicles which is different from and independent of HMA’s warranties ... however, DEALER agrees that if it elects to sell such independent warranties ... DEALER will *conspicuously disclose in writing upon the Customer’s purchase order* the extent to which the independent warranty or service contract protection purchased by the Customer overlaps that provided by HMA.”) (emphasis added).

Seventh, Hyundai requires each dealer to report its finances and operations monthly, something one would ordinarily expect to be provided to an owner or a shareholder only. *See e.g.*, Park Ex. K at 5-6 (“Dealer shall provide to [HMA] (A) Dealer’s monthly factory/distributor

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financial statements ... (B) ... Dealer's adjusted calendar year-end factory/distributor financial statements ... (C) ... Dealer's balance sheet as at the end of each fiscal year ..., in each case reviewed by an independent certified public accountant acceptable to [HMA]..., and (D) Dealer's corporate tax returns for each calendar year."); Hyundai further requires its dealers to send daily updates regarding the sale and delivery of new Hyundai vehicles. *See e.g.*, Park Ex. J at 17 ("DEALER agrees to ... **[a]ccurately report to HMA**, with such relevant information as HMA may reasonably require, the delivery of each new motor vehicle to a purchaser **by the end of the day** in which the vehicle is delivered to the purchaser thereof.") (emphasis added). Furthermore, Hyundai requires its dealers to maintain all sales and service records of Hyundai vehicles for at least five years. *Id.* ("DEALER agrees to keep complete and up-to-date records regarding the sale and servicing of Hyundai Products for a minimum of five (5) years, exclusive of any retention period required by any governmental entity.").

Eighth, Hyundai even specifies the type and quantity of IT equipment such as computers and data processing systems that its dealers must use and maintain. *See e.g.*, Park Ex. J at 16 ("HMA requires DEALER, and DEALER agrees, to acquire, install, maintain and upgrade at DEALER's sole expense, electronic data processing systems, compatible with HMA's data systems, from a source designated by HMA. The computer terminals for such system will be installed and maintained at the DEALER location(s) identified herein. Furthermore, DEALER agrees to utilize said system in accordance with HMA's instructions."). Additionally, Hyundai requires that the dealer allows Hyundai unrestricted access to these systems. Park Ex. K at 6 ("Dealer shall provide [HMA] or its designee **full access to Dealer's computer systems** and take such other action as may be requested by [HMA.]") (emphasis added).

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Ninth, Hyundai specifies the number of personnel that its dealers must have on-site and their certifications and training. *See e.g.*, Park Ex. J at 12 ("DEALER agrees to establish and maintain a complete service and parts organization, including ***a service manager, a parts manager and a sufficient number of Customer relations, service and parts personnel*** who meet such educational, management, technical training and competency standards *as HMA may establish or approve.*") (emphasis added). Further, Hyundai provides mandatory training programs for dealership sales personnel and requires its dealerships to enforce participation in such training. *See e.g.*, Park Ex. J at 9 ("HMA will offer general and specialized sales management and sales training programs for the benefit and use of DEALER's sales organization. ***DEALER ... agrees to require its sales personnel to participate in such programs as HMA may offer*** from time to time for their benefit.") (emphasis added).

Tenth, Hyundai also conducts performance reviews on (i) the dealers' sales, service, and parts, (ii) customer satisfaction, and (iii) even the dealer's maintenance of its premises and facilities. Park Ex. J at 10 ("HMA will evaluate DEALER's sale performance at least annually."); *id.* at 15 ("HMA will periodically evaluate DEALER's performance of its service and parts responsibilities, including without limitation: warranty service, Customer relations; service and parts merchandising, management and operations; new vehicle predelivery service; parts inventory; tools and equipment; competency of service and parts personnel; participation of DEALER's personnel in various training programs; and the adequacy of service and parts facilities."); *id.* at 16 ("HMA will periodically evaluate the adequacy of DEALER's facilities" for "compliance with HMA's then current requirements for dealership operations, the appearance, condition, layout and signage of the dealership facilities."). Hyundai has also been accused of using its performance reviews to impose additional requirements on its dealers and

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thereby control the price at which its dealers could offer Hyundai vehicles to the consuming public. *Braman Hyundai, Inc. v. Hyundai Motor America Corp.*, 1:20-cv-23301-AMC, D.I. 34, ¶¶ 22, 59 (S.D. Fla. Nov. 18, 2020).

Lastly, Hyundai controls and can restrict whether and to whom a dealer may sell or transfer its business. *See e.g.*, Park Ex. I at 2 (“[A]ny change in ownership, regardless of the share or relationship between parties, or any change in General Manager, from the person(s) identified herein, requires the prior written consent of HMA.”). Hyundai also dictates the legal structure of the dealership, with Hyundai’s prior approval needed before any restructuring of the dealership’s business. *See e.g.*, Park Ex. K at 5 (“Dealer shall not change its type of organization, jurisdiction of organization or other legal structure except with the prior written consent of [HMA.]”).

The scope and breadth of these agreements directly contradict Hyundai’s claim that its dealers are “independent” franchises, at least for venue determination purposes.⁵ Motion at 4. On the contrary, they show that Hyundai exercises a vast amount of control over its dealers by imposing various obligations and restrictions that one would ordinarily expect to be imposed on its own employees only. Given the amount of control Hyundai exercises over its dealers, venue against Hyundai is proper in this District under the “control” theory as well.

C. Hyundai Improperly Substitutes the Factors-Based Venue Analysis Under Ratification and Control With a Rigid, Rule-Based “Independent Entity” Test

Hyundai does not analyze venue based on the facts that were discussed in *Blitzsafe I*, or mention the case at all. Instead, Hyundai relies on several cases from different jurisdictions to

⁵ The Hyundai documents cited above are located in the public domain. To the extent more recent documents exist, they have not been located by StratosAudio nor cited by Defendant in its Motion.

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argue that Hyundai's lack of ownership interest in its dealerships defeats venue. Motion at 6 (“regardless ... venue is improper because HMA does not own, operate, or control dealerships or dealership employees in this district.”).

Hyundai's argument, however, ignores the fact that the Federal Circuit has not articulated such a rigid “ownership” test for venue that looks at only whether the two entities maintain “separate corporate forms.” Motion at 7. The test instead focuses on “ratification” or “control” of the entity's activities. *In re Cray*, 871 F.3d at 1363. As noted by Judge Gilstrap, ownership is not a dispositive factor:

Even though [an automobile distributor] is not permitted to own or control, generally, the dealerships within this District, that does not mean that they are not places *of* [the automobile distributor] under the third *In re Cray* factor ... [T]he Federal Circuit expressly endorsed holding a location that the Defendant has advertised as its own to be a place of business where ‘the defendant [] actually engage[s] in business from that location. The considerations a district court may examine in determining the extent to which a defendant has ratified a place of business as its own include ‘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.’”

Blitzsafe I, 2018 U.S. Dist. LEXIS 173065, *19-20 (internal citations omitted). Indeed, depending on the facts, a distributor can ratify or exercise overarching control over an authorized retailer's business and operations regardless of whether the distributor has any ownership interest in the retailer. In short, even if two corporate entities “maintain and preserve the formalities of corporate separateness,” this does not mean that one entity cannot ratify and/or exercise dominant control over the other. Motion at 4. Moreover, the Federal Circuit expressly cautioned against such a rigid rule-based approach. *In re Cray*, 871 F.3d 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.*”) (emphasis added).

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Vaxcel Int'l Co. v. Minka Lighting, Inc., 2018 U.S. Dist. LEXIS 226492 (N.D. Ill. July 11, 2018), which Hyundai relies on, illustrates the dangers of relying on such an inflexible rule instead of a more flexible, fact-based analysis. Hyundai cites *Vaxcel* for the proposition that “independent distributors, such as authorized retailers ... do not suffice to establish venue under § 1400(b).” *Id.* at *6 (quoted by *Omega Patents, LLC v. Bayerische Motoren Werke AG*, 2020 U.S. Dist. LEXIS 248567, at *8). But the issue is not as simple as Hyundai suggests, because, as noted in *In re Cray*, it is the substance of the relationship, not merely the title, that drives the venue determination. In *Vaxcel*, the plaintiff was attempting to obtain venue over Minka Lighting, Inc. (“Minka”) by the presence of many Home Depot stores in the district which sold Minka Lighting goods. But Minka was only one of thousands (if not tens of thousands) of entities which provided products to Home Depot. Thus, the Court found that Home Depot could not be the “place” of Minka, because Minka did not “ratify” or “control” Home Depot. *Vaxcel*, 2018 U.S. Dist. LEXIS 226492 at *5-6. There was no allegation that Minka had any say in where Home Depot’s stores would be located, how Home Depot should maintain and use its facilities, or how Home Depot should train its personnel. This factual context of *Vaxcel* highlights the limited applicability of the *Vaxcel* court’s rule that “independent distributors, such as authorized retailers ...do not suffice to establish venue under § 1400(b).” Indeed, given the limited contact, with Home Depot merely serving to sell Minka goods among many thousands of other goods, the determination that a small entity like Minka would “ratify” or “control” Home Depot is easily determined.⁶

⁶ The same is true for *Reflection, LLC v. Spire Collective LLC*, 2018 U.S. Dist. 2429 (S.D. Cal. Jan 5, 2018), which Hyundai also relies on. There, plaintiff sought to establish venue against defendant based on the presence of Amazon.com’s fulfillment centers in the district because defendant maintains a selling account with Amazon.com. Again, the defendant’s activities (Continued...)

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The facts of this case are entirely different, however. Here, venue is not being sought simply because an entity (the dealerships) is an authorized reseller of Hyundai's goods among many other types of vehicles. Customers visiting Hyundai dealers in this District are undoubtedly visiting them to buy new Hyundai's vehicles, not Ford or Toyota vehicles. Moreover, the relationship between the dealerships and Hyundai goes well beyond merely selling vehicles. As set forth above, Hyundai has a say in almost every aspect of its dealers' business operations. And most importantly, any decision by Hyundai to limit or discontinue supplies of its vehicles to its dealers in this District will almost surely have a catastrophic impact on the dealers' business.

Other decisions cited by Hyundai also have limited applicability. As explained, *Omega Patents* adopted the *Vaxcel* court's rigid rule (that a separate entity cannot be a basis to support venue of another absent an alter ego relationship⁷), which has limited applicability to the facts of

were but a small part of Amazon.com's operations. Moreover, defendant had no control over its products once they were sent to Amazon.com's fulfillment centers. *Id.* at *10. Thus, there could be no dispute that Amazon.com's fulfillment centers "cannot be said to be the 'place of Defendant.'" *Id.*

⁷ The alter ego test is also inapplicable in this case because StratosAudio is not alleging any parent-subsidary relationship between Hyundai and its dealers in this District. For this reason, this Court's holding in *National Steel Car Ltd. v. Greenbrier Co., Inc.*, No. 6:19-cv-00721-ADA, Slip Op. at 5 (W.D. Tex. July 27, 2020), which only addressed the question of establishing venue over a parent based on its subsidiary's presence in this district, does not apply to this case. Further, neither *West View Research* nor *Omega Patents* apply the correct law or standard for determining the existence of an alter ego relationship. For example, the criteria for "veil-piercing" to determine alter ego status is *different* for the purposes of considering jurisdictional issues as opposed to liability. "Courts have acknowledged that jurisdictional veil-piercing and substantive veil-piercing involve different elements of proof." *PHC Minden L.P. v. Kimberly-Clark Corp.*, 235 S.W.3d 163, 174 (Tex. Sup. Ct. 2007). For jurisdictional purposes, jurisdiction over a parent may be imputed on its subsidiary if "the parent corporation exerts such domination and control over its subsidiary 'that they do not in reality constitute separate and distinct corporate entities but are one and the same corporation for purposes of jurisdiction.'" *Id.* at 173. As set forth herein, Hyundai's control over its dealers is so extensive and pervasive that in reality, Hyundai "and [its] dealer[s] function as (Continued...)

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an automobile distributor-dealership relationship, despite expressly acknowledging that “a defendant may ‘*ratify* the place of business,’ *even if it does not own*, lease, or rent *it*.” *Omega Patents*, 2020 U.S. Dist. LEXIS 248567, at *9 (emphases added). *West View Research, LLC v. BMW of N. Am., LLC*, 2018 WL 4367378 (S.D. Cal. Feb. 5, 2018), which is yet another case Hyundai cited, also adopted and applied the rigid rule rather than engaging in a fact-intensive analysis. Further, *West View Research* “focused entirely on the alleged ‘control’ which BMWNA exerts on its dealerships” and did not address ratification. *Blitzsafe I*, 2018 U.S. Dist. LEXIS 173065, *30, n.15. *West View Research* also “did not address BMWNA’s provisioning of new vehicle warranties to customers through the dealerships,” which the *Blitzsafe I* court found to be “an independent basis for proper venue” under the ratification theory. *Blitzsafe I*, 2018 U.S. Dist. LEXIS 173065, at *30, n.15.

Hyundai’s focus solely on “ownership” and the cursory analyses in *Omega Patents* and *West View Research* is thus misplaced. Indeed, Hyundai has all but ignored the wide scope of its activities showing “ratification” of and “control” over its dealers – activities that clearly demonstrate the connection and influence by Hyundai over its dealer entities.

D. To the Extent Helpful To the Court, Hyundai’s Motion Should Be Denied Until Parties Have Completed Venue Discovery

The facts as set forth above are sufficient to establish venue against Hyundai in this District. To the extent Hyundai challenges the facts as presented in Hyundai’s own Operating documents, StratosAudio respectfully requests that the Court deny Hyundai’s Motion without prejudice to allow targeted venue discovery pursuant to the Federal Rules and this Court’s Standing Order that focus on the following:

an integrated, two-part seller (or lessor),” leaving little, if any, independence to its dealers. *Blitzsafe I*, 2018 U.S. Dist. LEXIS 173065, at *25. Given these facts, *even if* the alter ego test for jurisdictional purposes were to apply, Hyundai would meet its requirements.

PUBLIC VERSION

- The relationship between Hyundai and its dealers in this District, and in particular, any requirements or obligations Hyundai imposes upon its dealers in this District (e.g., through its Dealership Agreements, Standard Provisions, and other agreements or requirements); and
- Hyundai's efforts to enforce its dealers' compliance with its agreements (including, e.g., its Standard Provisions).

If necessary, such targeted venue discovery is liberally allowed. "Where issues arise as to jurisdiction or venue, discovery is available to ascertain the facts bearing on such issues." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351 n.13 (1978). Courts have broad discretion to permit jurisdictional discovery, and are only "denied where it is *impossible* that the discovery 'could ... add[] any significant facts' that might bear on the jurisdictional determination. *Blitzsafe II*, 2019 U.S. Dist. LEXIS 86350, *13 (citing *Alpine View Co. v. Atlas Copco AB*, 205 F.3d 208, 221 (5th Cir. 2000)). Further, "[s]ince evidence of jurisdictional facts is often largely or wholly in the possession of an adverse party, broad jurisdictional discovery also ensures that jurisdictional disputes will be 'fully and fairly' presented and decided." *Id.* (citing *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1345 (5th Cir. 1978)).

IV. CONCLUSION

For the foregoing reasons, StratosAudio respectfully requests that the Court deny Hyundai's Motion to Dismiss for Improper Venue with prejudice or, in the alternative, without prejudiced to refile after completion of venue discovery.

PUBLIC VERSION

Dated: March 8, 2021

Respectfully submitted,

/s/ Corby Vowell

FRIEDMAN, SUDER & COOKE

604 East 4th Street, Suite 200
Fort Worth, TX 76102
817-334-0400
Fax: 817-334-0401
vowell@fsclaw.com

WHITE & CASE LLP

Michael Songer (admitted pro hac vice)
701 Thirteenth Street, NW
Washington DC, 20005
202.626.3600
michael.songer@whitecase.com

Charles Larsen (admitted pro hac vice)
75 State Street
Boston, MA 02109
617.979.9300
charles.larsen@whitecase.com

Ryuk Park (admitted pro hac vice)
2 Palo Alto Square, 3000 El Camino Real, #900
Palo Alto, CA 94306
650.213.0300
ryuk.park@whitecase.com

**ATTORNEYS FOR PLAINTIFF
STRATOSAUDIO, INC.**

CERTIFICATE OF SERVICE

I hereby certify that on the 11th day of March, 2021, I electronically filed the foregoing document with the clerk of the court for the U.S. District Court, Western District of Texas, Waco Division using the electronic case filing system of the court. The electronic case filing system sent a “Notice of Electronic Filing” to the attorneys of record who have consented in writing to accept this Notice as service of this document by electronic means.

/s/ Corby R. Vowell

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

STRATOSAUDIO INC.,)	
	)	Case No. 6:20-CV-01125-ADA
Plaintiff,)	
)	
v.	)	JURY TRIAL DEMANDED
)	
HYUNDAI MOTOR AMERICA,)	
)	
Defendant.)	

DECLARATION OF RYUK PARK

1. My name is Ryuk Park. I am an attorney at White & Case LLP, counsel of record for Plaintiff StratosAudio, Inc. in the above-captioned matter.

2. I submit this declaration in support of StratosAudio, Inc.'s Opposition to Defendant Hyundai Motor America's Motion to Dismiss for Improper Venue, concurrently filed herewith.

3. I have personal knowledge of the statements set forth in this declaration and, if called as a witness, would testify competently thereto.

4. Attached as **Exhibit A** is a true and correct copy of a printout I made from the webpage www.hyundaiusa.com/us/en/dealer-locator on March 6, 2021.

5. Attached as **Exhibit B** is a true and correct copy of a printout I made from the webpage www.hyundaiautomax.com/dealership/about.htm on March 6, 2021.

6. Attached as **Exhibit C** is a true and correct copy of a printout I made from the webpage www.roundrockhyundai.com/dealership/about.htm on March 6, 2021.

7. Attached as **Exhibit D** is a true and correct copy of a printout I made from the webpage www.southpointhyundai.com/about-us/ on March 6, 2021.

8. Attached as **Exhibit E** is a true and correct copy of a printout I made from the webpage www.hyundaiaustin.com/dealership/about.htm on March 6, 2021.

9. Attached as **Exhibit F** is a true and correct copy of a printout I made from the webpage www.hyundaiusa.com/us/en/special-programs on March 6, 2021.

10. Attached as **Exhibit G** is a true and correct copy of a printout I made from the webpage www.hyundaiusa.com/us/en/inventory-search on March 6, 2021.

11. Attached as **Exhibit H** is a true and correct copy of another printout I made from the webpage testdrive.hyundaidrive.com/time on March 8, 2021.

12. Attached as **Exhibit I** is a true and correct copy of an excerpt from an exhibit filed in *Leep Hyu, L.L.C. v. Hyundai Motor America*, No. 3:11-cv-00081-CRW-RAW, D.I. 1-1 (D.Iowa June 22, 2011). The first page of **Exhibit I** bears the title “Hyundai Motor America Dealer Sales and Service Agreement.”

13. Attached as **Exhibit J** is a true and correct copy of an excerpt from an exhibit filed in *Leep Hyu, L.L.C. v. Hyundai Motor America*, No. 3:11-cv-00081-CRW-RAW, D.I. 1-2 (D.Iowa June 22, 2011). Page 6 of **Exhibit J** bears the title “Hyundai Motor America Dealer Sales and Service Agreement Standard Provisions.”

14. Attached as **Exhibit K** is a true and correct copy of an excerpt from an exhibit filed in *Hyundai Capital America v. Nemet Motors LLC*, 1:19-cv-05506-EK-RER, D.I. 1 (E.D.N.Y. Oct. 10, 2019). The first page of **Exhibit K** bears the title “Hyundai Capital Inventory Loan and Security Agreement.”

//

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct to the best of my knowledge.

Dated: March 8, 2021

/s/ Ryuk Park
Ryuk Park

Exhibit A



Vehicles

Build & Price

Inventory

Why Hyundai

Offers

Menu

Hyundai Dealerships near

76543



1 Automax Hyundai 2.0 mi.

2 Round Rock Hyundai 39.0 mi.

3 Greg May Hyundai 40.7 mi.

4 South Point Hyundai 61.7 mi.

5 Roger Beasley Hyundai 80.1 mi.

Showroom Service Center

24795 Ih 35
Kyle, TX 78640

[Get Directions](#)
(737) 404-5001

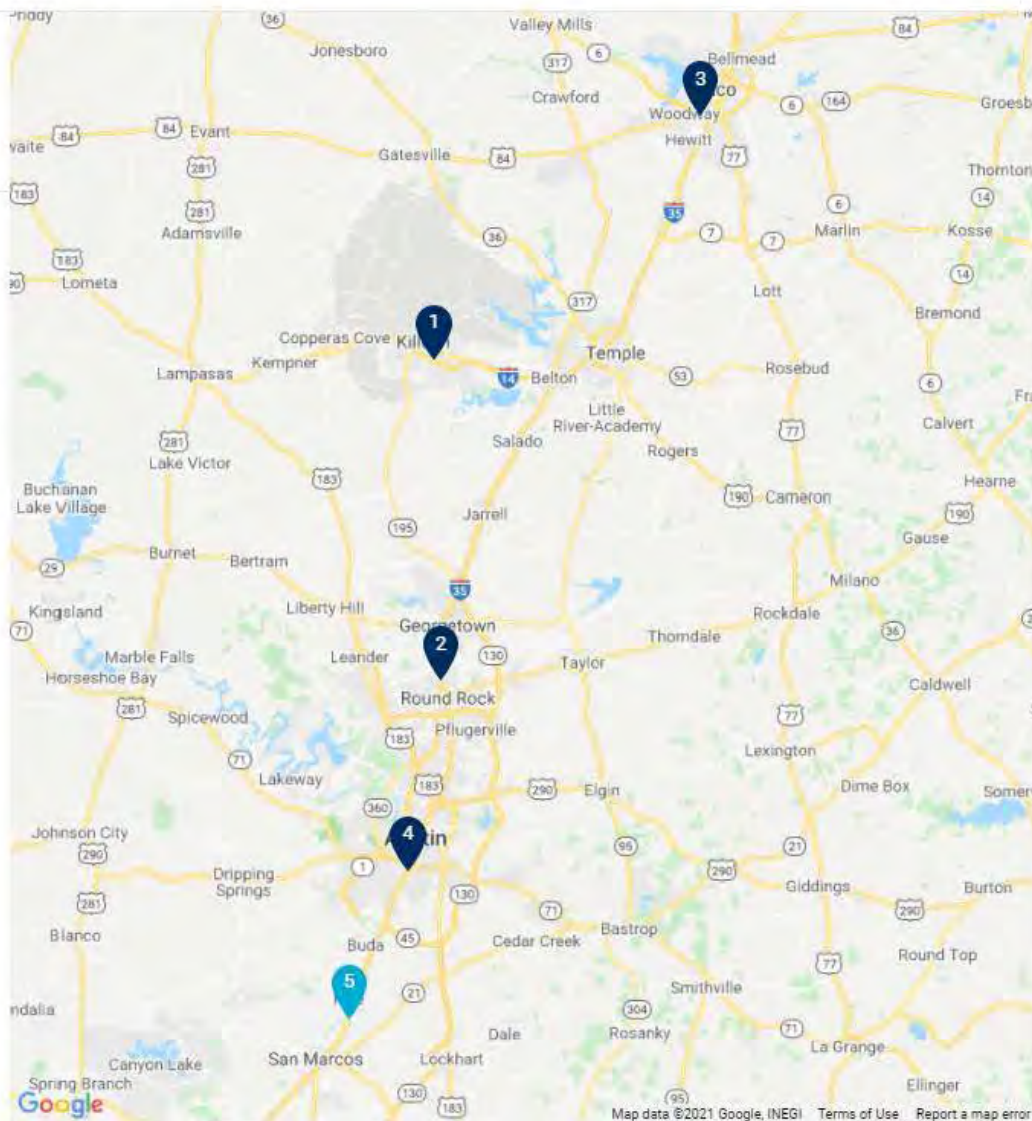


Exhibit B

Sales: 888-825-9389 Service: 888-825-9767 Parts: 888-840-5771 3221 E Central Texas Expressway, Killeen, TX 76543



[Read an important message from Automax Hyundai.](#)

About



Contact

Automax Hyundai
3221 E Central Texas Expressway
Killeen, TX 76543
Sales: 888-825-9389
Service: 888-825-9767
Parts: 888-840-5771

Hours

Monday	9:00am - 7:00pm
Tuesday	9:00am - 7:00pm
Wednesday	9:00am - 7:00pm
Thursday	9:00am - 7:00pm
Friday	9:00am - 7:00pm
Saturday	9:00am - 7:00pm
Sunday	Closed

About Our Hyundai Dealership in Killeen, TX

Here at Automax Hyundai, proudly serving Round Rock, Waco, Georgetown TX and Temple, we know that there's a lot more to buying a car than... well, simply buying a car. Our team is here to guide you through every facet of your automotive experience from helping you shop for the perfect new or used Hyundai or Genesis model to helping you keep your ride in tip-top shape with expert auto service and genuine OEM parts. We're here to help from every angle of the buying and owning process, and we're eager to help you realize your automotive dreams.

Professional, Courteous Automotive Assistance

Whether you're in the market for a brand-new vehicle, a deal on a used model, or you need an oil change on your Hyundai and Genesis model, we're always ready and waiting to help you get what you need. We live by the golden rule at Automax Hyundai and we treat everyone who visits us in the Round Rock, Waco, Georgetown TX and Temple area exactly how we would want to be treated. We make each transaction with us easy and transparent, from sales to navigating auto financing deals, and we make caring for your vehicle for the long haul easier as well, with expert service and parts centers.

Visit Automax Hyundai Today to get Started

Our showroom in Killeen is a quick drive from the surrounding Round Rock, Waco, Georgetown TX and Temple areas. Our staff is happy to answer any and all Hyundai or Genesis questions that you may have so that you can make an informed decision about your next vehicle or caring for your current one. We look forward to serving you soon!



Loading Map...

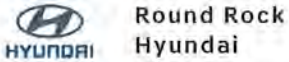
Exhibit C

3/6/2021

Round Rock Hyundai Dealer | About Round Rock Hyundai

Español

Sales: 888-579-1539 Service: 888-604-7807 Parts: 866-781-2556 2405 N Interstate 35 Frontage Road, Round Rock, TX 78664



[Read an important message from Round Rock Hyundai.](#)

About Round Rock Hyundai Dealership Serving Austin and Cedar Park, TX

Sales Hours

Monday	9:00AM - 8:00PM
Tuesday	9:00AM - 8:00PM
Wednesday	9:00AM - 8:00PM
Thursday	9:00AM - 8:00PM
Friday	9:00AM - 8:00PM
Saturday	9:00AM - 8:00PM
Sunday	Closed

Service Hours

Monday	7:00AM - 6:00PM
Tuesday	7:00AM - 6:00PM
Wednesday	7:00AM - 6:00PM
Thursday	7:00AM - 6:00PM
Friday	7:00AM - 6:00PM
Saturday	Closed
Sunday	Closed

Parts Hours

Monday	7:00AM - 6:00PM
Tuesday	7:00AM - 6:00PM
Wednesday	7:00AM - 6:00PM
Thursday	7:00AM - 6:00PM
Friday	7:00AM - 6:00PM
Saturday	Closed
Sunday	Closed

*Express Service Reservations Only.


From New and Used Car Sales to Parts and Service, Round Rock Hyundai Aims to Provide a Truly Stellar Automotive Experience

There are numerous reasons why drivers choose Round Rock Hyundai. We proudly serve Austin with new Hyundai inventory. We also serve Leander, Cedar Park, Pflugerville, Liberty Hill and Georgetown TX. Our teams of sales advisors, service technicians and financing experts are trained with one focus in mind: addressing each of your needs with the utmost respect, care and attention to detail.

That means you can expect to learn all of the features of the specific new Elantra, Santa Fe, Sonata, Tucson or Ioniq Hybrid you're interested in. In the market for a used car? Our team will be happy to fill you in on each of the reliable options in our inventory. And when the time comes for you to drive home your next car, our auto finance team is standing by with solutions to fit your individual needs.

At Round Rock Hyundai, our commitment to excellence does not end with the sale, though. In order to ensure a positive ownership experience, we staff an onsite auto service and repair department. And for those of you who prefer to perform their own work, we also maintain a vast collection of auto parts for sale in Round Rock.

How Round Rock Hyundai Supports the Local Community

Our commitment to Round Rock and local drivers extends beyond car sales and service. The Round Rock Hyundai team proudly supports local organizations. These include Texas Humane Heroes and  ll Children's Blood and Cancer Center. The latter was the recipient of our local Hope on s program this year.

Contact

Round Rock Hyundai
 2405 N Interstate 35 Frontage Road
 Round Rock, TX 78664
 Sales: 888-579-1539
 Service: 888-604-7807
 Parts: 866-781-2556

We use cookies and browser activity to improve your experience, personalize content and ads, and analyze how our sites are used. For more information on how we collect and use this information, please review our Privacy Policy. California consumers may exercise their CCPA rights here. (<https://ccpa.penskeautomotive.com/C75C848F-9FCF-42D0-A085-DE26B078DD77>)

3/6/2021

Round Rock Hyundai Dealer | About Round Rock Hyundai



Round Rock Hyundai truly has every one of your automotive needs covered. The only question left now is how we can best serve you. To take advantage of any one (or more) of our services, be sure to contact us today. Or, stop by and see us in person at 2405 N Interstate 35 Frontage Road Round Rock, Texas today.



We use cookies and browser activity to improve your experience, personalize content and ads, and analyze how our sites are used. For more information on how we collect and use this information, please review our Privacy Policy. California consumers may exercise their CCPA rights here. (<https://ccpa.penskeautomotive.com/C75C848F-9FCF-42D0-A085-DE26B078DD77>)

Exhibit D



[CONTACT US \(/CONTACT-US/\)](/CONTACT-US/)




[MEET OUR STAFF \(/ABOUT/STAFF/\)](/ABOUT/STAFF/)



[REVIEWS \(/SURECRITIC-REVIEWS/\)](/SURECRITIC-REVIEWS/)

ABOUT US

 OPEN TODAY! SALES: 8AM-8PM

 CALL US AT: 512-937-1404





South Point Hyundai, Providing Service, Quality and Everything In Between to Hyundai Drivers from Austin

South Point Hyundai, commonly known as the “Texas Hyundai Giant”, is the #1 Hyundai Dealer from Dallas to Laredo and has been for 9 Consecutive Years.

South Point Hyundai offers an extensive line up of new Hyundai and pre-owned vehicles to choose from, with over 1000 New and Pre Owned vehicles in Dealer Stock. No matter what you’re looking for we will have it. South Point Hyundai also has a quick and easy loan process, whether it’s a conventional retail loan, new or pre-owned lease, 1st-time buyer, or college grad program, South Point Hyundai will match the perfect finance package to best meet each customer’s unique needs. South Point Hyundai also has a wide variety of 1st and 2nd owner cars, trucks, and SUVs under \$10,000.00. So whether you are looking for a New, Certified, Used, High line, car, truck, or SUV, South Point Hyundai has a vehicle for you. Don’t feel comfortable visiting our showroom? No problem. South Point Hyundai is now offering a Valet Sales (/valet-sales/) program where you can complete the entire car-buying process online, from the comfort and safety of your own home.

Our expert car service, quick lube, and maintenance department will always be ready to make sure your car will run as smoothly as the day you purchased it. We offer an online appointment setting called “X-time” giving you the ultimate respect for your preference and time. Improving your Hyundai with the latest and greatest in the market is as exciting as it can be with the expert knowledge of our Hyundai Parts department. Our dedicated Quick Service Team can have you in and out in a matter of minutes, and when the job requires a little more time South Point Hyundai is glad to help with arranging alternate transportation for each and every customer. In response to Coronavirus, we’re also now offering Hyundai Valet Service (/valet-service/) for all your Hyundai service needs.

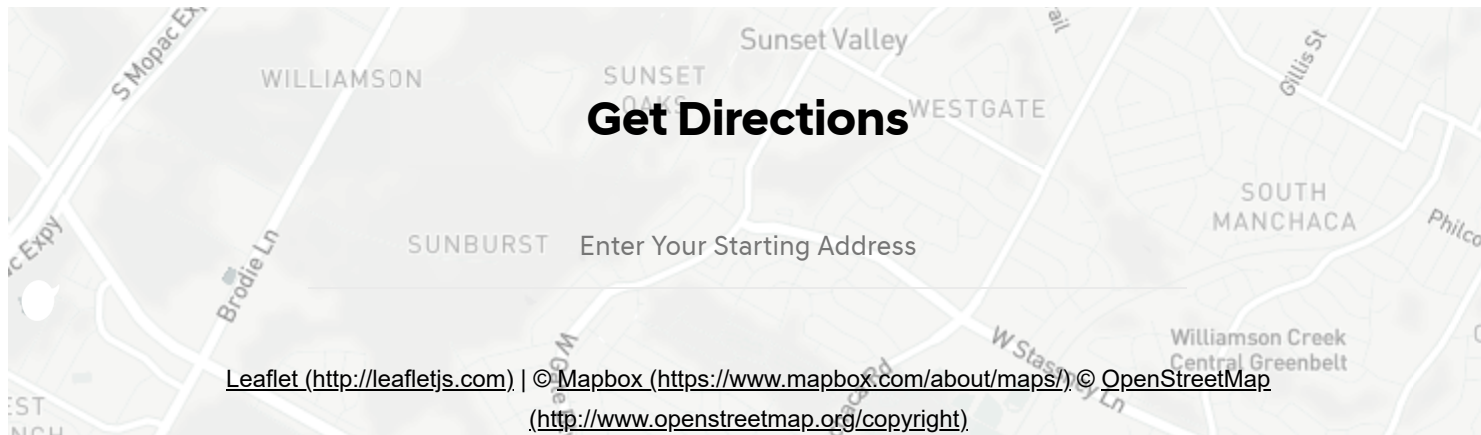


Our South Point Hyundai Upgrade Department allows you the leisure of getting your car appraised free of charge for your convenience. Concierge service with an exclusive customer waiting area where you will receive free wi-fi and complimentary premium coffee and snacks. Our upgrade guests receive demonstrations and benefits presentations by our highly trained South Point Hyundai Upgrade Specialist where you can see the advancement in technology that Hyundai has to offer year after year.

South Point Hyundai believes in commitment, a commitment to our customers that we will provide industry-leading customer service each and every time. We believe anything else is not acceptable. So come check out South Point Hyundai, the Texas Hyundai Giant at 4610 S IH 35 Austin, TX on the motor mile, or Call 512-937-1404.

South Point Hyundai is an Award Of Excellence winner, having won the prestigious award given out by Hyundai Motor America 9 Consecutive Years from 2011 through 2019. The award recognizes dealers for their outstanding customer sales and service along with their commitment to excellence.

You'll find a better selection, better price, better payment, better service, and always more for your trade at South Point Hyundai.



Connect With Us






<https://twitter.com/SouthPointHyundai>
<https://www.facebook.com/SouthPointHyundai>
<https://plus.google.com/SouthPointHyundai>
<https://www.instagram.com/SouthPointHyundai/>



Inventory



Service



Finance



About



(HTTPS://WWW.SOUTHPOINTHYUNDAI.COM)

SOUTH POINT HYUNDAI

(HTTPS://WWW.SOUTHPOINTHYUNDAI.COM)

[Privacy Policy \(https://www.southpointhyundai.com/privacy-policy/\)](https://www.southpointhyundai.com/privacy-policy/)

[Contact Us \(https://www.southpointhyundai.com/contact-us/\)](https://www.southpointhyundai.com/contact-us/) [Sitemap \(/sitemap/\)](/sitemap/)

[My Hyundai Owner \(https://owners.hyundaiusa.com/us/en/index.html\)](https://owners.hyundaiusa.com/us/en/index.html)

Copyright © 2021 South Point Hyundai

Advanced Automotive Dealer Websites by [Dealer Inspire \(https://www.dealerinspire.com\)](https://www.dealerinspire.com)

Exhibit E

3/6/2021

About Us - Kyle, Texas | Roger Beasley Hyundai

Sales: (512) 262-2020 Service: (512) 504-7077 Parts: (512) 504-7079 24795 I-35, Kyle, TX 78640

Search Inventory



Roger Beasley Imports

Schedule Service

Addressing COVID-19 (<https://www.hyundaiaustin.com/dealership/covid-19.htm>)

About Roger Beasley Hyundai



Contact

Hyundai Kyle

24795 I-35
Kyle, TX 78640

Sales: (512) 262-2020
Service: (512) 504-7077
Parts: (512) 504-7079

Hours

Monday	8:30 AM - 8:00 PM
Tuesday	8:30 AM - 8:00 PM
Wednesday	8:30 AM - 8:00 PM
Thursday	8:30 AM - 8:00 PM
Friday	8:30 AM - 8:00 PM
Saturday	8:30 AM - 8:00 PM
Sunday	Closed

In 1972 Roger Beasley opened his first car dealership.

Now Roger Beasley Imports includes 2 top tier brands and 5 separate dealerships in and around Austin, Texas. The success and expansion of the Beasley brand can only be attributed to Roger Beasley's consistent belief in his founding principles: take care of the customer no matter what, provide quality products and service, and be an active supporter of the local community. Ultimately the goal is for you to drive home happy.

Here's what you should expect:

<p>AMAZING EXPERIENCE You'll find a uniquely simple and satisfying experience in every department. A no pressure, no surprises car-buying process coupled with quick, honest service.</p>	<p>HONESTY Our main goal is to build lasting relationships. We treat all customers with honesty and respect. We're proud to have built our dealerships on transparency, integrity and trust.</p>	<p>A FAIR DEAL Every car we advertise is currently in our inventory and available for anyone to purchase at that price. No gimmicks, no hidden fees or charges. The advertised price is your price.</p>
------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------	--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------




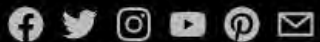
Roger Beasley Hyundai has 2 locations in Central Texas that service Austin, San Antonio and anywhere in between. Both dealerships are conveniently located on I-35. The original on an expansive property in Kyle just north of San Marcos. The second and newest location resides right in the heart of New Braunfels, only 20 miles north of Antonio. You'll find a very generous selection of new and pre-owned Hyundai's at es, all at honest and fair prices.

Exhibit F

Case 6:20-cv-01125-ADA Document 22-6 Filed 03/08/21 Page 2 of 2

Vehicles	Shopping Tools	Why Hyundai	Owner	About
All Vehicles	Shop Hyundai	Overview	Ownership Resources	Our Company
SUVs	Find a Dealer	America's Best Warranty	Login to MyHyundai	COVID-19 Response
Sedans	Build & Price	Shopper Assurance	Make a Payment	Careers
Compacts	Offers & Promotions	Owner Assurance	Maintenance Schedules	News
Alt-Fuel	Request a Quote	Complimentary Maintenance	Schedule Service	Motorsports
Performance	Search New Inventory	Happy Drivers	Owners Manuals	Auto Shows
Vehicle Brochures	Schedule a Test Drive	Philanthropy	24/7 Roadside Assistance	Awards & Accolades
Genesis	Search Certified Pre-Owned	Made in America	Blue Link®	Contact Us
	Compare our Vehicles	Build for Tomorrow	Accessories	
	Compare to Competitors	Social Responsibility	Merchandise & Apparel	
	Calculate a Payment	Diversity & Inclusion	Safety Recalls	
	Estimate Trade-in Value		Engine Recalls	
	Apply for Credit		Theta Engine Settlement	



Language: English ▾

Exhibit G



Vehicles

Build & Price

Inventory

Why Hyundai

Offers

Menu

Find Your Hyundai

Saved Vehicles

Search within 50 miles of 76543

Maximum MSRP

\$0 - \$59,000

Fuel Source

Gasoline

Alternative

SUVs

2021 VENUE

Starting at \$18,750 MSRP



48 near you

Select

2020 VENUE

Starting at \$17,350 MSRP



0 near you

Select

2021 KONA

Starting at \$20,500 MSRP



136 near you

Select

2020 KONA

Starting at \$20,300 MSRP



0 near you

Select

2021 TUCSON

Starting at \$23,700 MSRP

2020 TUCSON

Starting at \$23,550 MSRP

2021 SANTA FE

Starting at \$26,850 MSRP

2020 SANTA FE

Starting at \$26,275 MSRP

Exhibit H



Case 6:20-cv-01125-ADA Document 22-8 Filed 03/08/21 Page 2 of 2

Vehicles

Build & Price

Inventory

Why Hyundai

Offers

Menu

Schedule a Hyundai Test Drive

Powered by *drive*

2021 Venue

Automax Hyundai

Mon, Mar 8th at 6:00pm

Review request

Monday
Mar. 8

Tuesday
Mar. 9

Wednesday
Mar. 10

Thursday
Mar. 11

Friday
Mar. 12

Saturday
Mar. 13

Sunday
Mar. 14

Morning

Afternoon

Evening

6:00

7:00

8:00

6:30

7:30

8:30

Next

Exhibit I

HYUNDAI MOTOR AMERICA DEALER SALES AND SERVICE AGREEMENT

This is an Agreement between HYUNDAI MOTOR AMERICA (HMA), a California corporation, and Leep HYU, LLC (DEALER), a(n) individual, partnership, limited liability company, corporation, duly incorporated in the state of Iowa, and doing business as Lujack Hyundai.

INTRODUCTION

HMA sells Hyundai Products which are manufactured or approved by Hyundai Motor Company (FACTORY). HMA has established a network of authorized Hyundai Dealers, operating at approved locations and according to Hyundai standards, to sell and service Hyundai Products. HMA has selected its Dealers based on their experience and commitment that they will sell and service Hyundai Products in a manner which promotes and maintains Customer confidence and satisfaction, and increases product acceptance and awareness.

DEALER represents that its Owner(s) and General Manager identified herein have the skill, experience, capital and facilities to ensure that DEALER operates a first-class dealership. HMA enters into this Agreement upon DEALER's assurances of the continued personal services of said Owner(s) and General Manager. The purpose of this Agreement is to memorialize such assurances, to appoint DEALER as an authorized Hyundai Dealer, to provide for the effective representation of Hyundai Products and to set forth the rights and obligations of HMA and DEALER hereunder.

Accordingly, the parties agree as follows:

1. APPOINTMENT OF DEALER

Subject to the terms of this Agreement, HMA hereby grants DEALER the non-exclusive right:

To buy the Hyundai Products identified in the Hyundai Product Addendum attached hereto which HMA, in its sole discretion, may revise from time to time; and

To identify itself as an authorized Hyundai Dealer using Hyundai Marks in the promotion, sale and servicing of Hyundai Products and at the location(s) approved herein.

DEALER accepts its appointment as an authorized Hyundai Dealer and agrees to:

Conduct its business in a manner which will engender Customer confidence and satisfaction and reflect positively upon HMA;

Effectively promote and sell Hyundai Products;

Professionally service Hyundai Products; and

Establish and maintain satisfactory dealership facilities at the location(s) approved by HMA.

2. TERM OF THIS AGREEMENT

This Agreement will become effective on the date it is executed by HMA and will continue in effect for a period of two (2) years, unless terminated as provided herein. This Agreement may not be extended or renewed except in writing signed by Director, Sales Operations of HMA..

3. DEALER OWNERSHIP

HMA enters into this Agreement in reliance upon the personal qualifications and representations of the persons identified below and upon DEALER's assurances that the following persons, and only the following persons, will be the Owner(s) of DEALER.

<u>NAME</u>	<u>ADDRESS</u>	<u>TITLE</u>	<u>OWNERSHIP INTEREST</u>
Quad Cities Automotive Group, LLC		—	100%

4. DEALER MANAGEMENT

DEALER recognizes that the effective performance of its obligations hereunder requires that experienced DEALER management be actively involved at all times. HMA enters into this Agreement in reliance upon the qualifications of Thomas J. Pospisil to manage DEALER's operations and upon DEALER's assurance that such person, and no other person, will at all times function as General Manager and be considered as Dealer Operator with complete authority to make all decisions on behalf of DEALER with respect to DEALER's operations. DEALER further agrees that the General Manager shall devote full time (100%) to the management of DEALER's operations.

5. CHANGE IN DEALER OWNERSHIP OR MANAGEMENT

This is a personal services agreement. HMA has entered into this Agreement in reliance upon DEALER's assurances of the active involvement of the Owners and General Manager identified herein in DEALER's operations. Accordingly, any change in ownership, regardless of the share or relationship between parties, or any change in General Manager, from the person(s) identified herein, requires the prior written consent of HMA, which HMA shall not unreasonably withhold.

6. DEALER LOCATION

DEALER is free to sell Hyundai Products to Customers wherever they may be located. However, in order for HMA to establish and maintain an effective network of authorized Hyundai Dealers for the sale and servicing of Hyundai Products and to maximize Customer convenience, HMA has approved the following facilities as the exclusive location(s) for the sale and servicing of Hyundai Products and for the display of Hyundai Marks:

HYUNDAI NEW VEHICLE SALES
AND SHOWROOM

101 W. 37th Street
Davenport, IA 52806

PARTS AND SERVICE

Same

SALES AND GENERAL OFFICES

Same

USED VEHICLE DISPLAY AND SALES

Same

BODY AND PAINT

N/A

DEALER agrees not to display Hyundai marks or to conduct any dealership operations, including the display, sale and/or service of Hyundai Products, at any location other than at the location(s) approved herein, without the prior written consent of HMA.

Moreover, each location is approved only for the activity indicated. DEALER may not alter the activity of any location approved herein or otherwise use such location for any activities other than the approved activity, without the prior written consent of HMA.

7. STANDARD PROVISIONS

The HMA Dealer Sales and Service Agreement Standard Provisions are incorporated herein and made a part of this Agreement as if fully set forth herein.

8. ADDITIONAL PROVISIONS

In consideration of HMA's agreement to appoint DEALER as an authorized Hyundai Dealer, DEALER further agrees:

HMA has entered into this Agreement based upon DEALER's promise to provide adequate representation in the current Hyundai dealership facility located at 101 W. 37th Street in Davenport, Iowa. DEALER acknowledges that adequate representation may include, but not be limited to, those standards set forth in HMA's "DEALERSHIP FINANCIAL / FACILITY / SIGNAGE STANDARDS", signed by DEALER on March 14, 2007 and incorporated by reference herein.

8. ADDITIONAL PROVISIONS

DEALER is wholly owned by a corporate entity known as Quad Cities Automotive Group, LLC ("Corporate Owner"). DEALER has represented to HMA that Indiana Auto Investment Group ("IAIG") owns a majority of all voting shares of the Corporate Owner. DEALER has represented to HMA that Michael R. Leep, Sr. owns a majority of all voting shares of IAIG. HMA has entered into this Agreement with DEALER in reliance upon the personal qualifications and representations of, and assurances of the active involvement of, Michael R. Leep, Sr. Accordingly, by his signature hereto, Michael R. Leep, Sr. agrees, individually and on behalf of the Corporate Owner, that there will be no change in ownership of voting shares of the Corporate Owner without the prior written consent of HMA. DEALER recognizes that failure to obtain such consent shall be grounds for termination under Paragraph 16 of this Agreement. For purposes of this paragraph, voting shares includes all shares of the corporation entitled to vote on any matters affecting the corporation and all stocks, notes, bonds or other instruments convertible into voting shares.

Paragraph 13. A. of the Standard Provisions is hereby amended to read; "The net working capital required to conduct the business of DEALER properly depends upon many factors, including the nature, size and volume of DEALER's vehicle sales, service and parts operations. Therefore, DEALER agrees to establish and maintain minimum net working capital in an amount not less than established minimum HMA net working capital requirements. If HMA determines, in its sole discretion, that changed circumstances require it to adjust established HMA net working capital requirements hereunder, DEALER agrees to revise its minimum net working capital to be used in the dealership's operation accordingly and within a reasonable period of time."

DEALER further acknowledges that HMA's approval of DEALER's current operation, does not, in any way, constitute a promise by HMA that it will sell DEALER any particular number of vehicles or an assurance by HMA that DEALER will achieve any particular level of sales, operate at a profit or realize any return on his investment. The actual profits to be realized will depend to a great extent on the management of the dealership, as well as on business and economic conditions. DEALER acknowledges that, as in any investment in a competitive industry, there are no guarantees.

DEALER recognizes that the obligations incurred herein are material terms of this Agreement. Failure to comply with any or all of these provisions may be grounds for termination of this Agreement.

3a.

DD-0755 11/05

9. EXECUTION OF AGREEMENT

This Agreement shall be valid and binding only if it is signed:

On behalf of DEALER by a duly authorized person; and

On behalf of HMA by the Director, Sales Operations and the General and/or Regional Manager, if any, of HMA.

By their signatures hereto, the parties agree to abide by the terms and conditions of this agreement, including the Standard Provisions incorporated herein, in good faith and for their mutual benefit.

Leep HYU, LLC dba Lujack Hyundai
(Dealer Entity Name)

DATE: 5-21-07 By: [Signature] Mg. Member
Signature Title

DATE: _____ By: _____
Signature Title

DATE: _____ By: _____
Signature Title

DATE: _____ By: _____
Signature Title

HYUNDAI MOTOR AMERICA

DATE: 4/30/07 By: [Signature] General Manager, Region
Signature Title

DATE: 5/11/07 By: [Signature] Director, Sales Operations
Signature Title

DATE: 5-21-07 By: [Signature] Mg. Member
Signature Title

DATE: _____ By: _____
Signature Title

DATE: _____ By: _____
Signature Title

DATE: _____ By: _____
Signature Title

HYUNDAI MOTOR AMERICA

DATE: 4/30/07 By: [Signature] General Manager, Region
Signature Title

DATE: 5/10/07 By: [Signature] Director, Sales Operations
Signature Title

Exhibit J

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Dealer Sales and Service Agreement

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HYUNDAI MOTOR AMERICA DEALER SALES AND SERVICE AGREEMENT STANDARD PROVISIONS

The Standard Provisions set forth below are expressly incorporated in and made a part of the HMA Dealer Sales and Service Agreement.

10. SALE OF HYUNDAI PRODUCTS

A. DEALER'S AGREEMENT TO PURCHASE HYUNDAI PRODUCTS

1. Quantities

DEALER agrees to purchase Hyundai Products in such quantities and varieties as may be necessary to fulfill its obligations under this Agreement. HMA will distribute such products pursuant to such procedures as HMA may deem appropriate from time to time. HMA's agreement to sell may only be established by written confirmation by HMA that the product will be shipped. HMA will use its best efforts to provide Hyundai Products to DEALER subject to available supply from FACTORY, HMA's marketing requirements, and any change or discontinuance with respect to any Hyundai Product.

HMA and DEALER recognize that certain Hyundai Products may be in short supply from time to time because of factors which are beyond the control of HMA or FACTORY. Where such a shortage is determined by HMA to exist, HMA will endeavor to allocate the affected Hyundai Product(s) among its Dealers in a fair and equitable manner, as it may determine in its sole discretion.

HMA agrees to provide DEALER with an explanation of the method used to distribute such products and, upon written request, will advise DEALER of total sales by model to all Dealers collectively in the Region and to DEALER individually.

DEALER acknowledges that certain products manufactured by or for FACTORY may be distributed in the United States by distributors other than HMA. Entering into this Agreement, therefore, confers no rights or benefits upon DEALER with respect to the sale or servicing of such products.

2. Prices and Other Terms of Sale

HMA reserves the right, without prior notice to DEALER, to establish and revise prices and other terms of sale for all Hyundai Products sold to DEALER under this Agreement. HMA, however, will provide notice to DEALER of any revision in prices and other terms of sale before shipping any Hyundai Product subject to such revision.

3. Payment For Hyundai Products

DEALER agrees to pay for Hyundai Products pursuant to such procedures as HMA may designate from time to time. Such procedures may include electronic funds transfer and other automatic collection systems. Automatic collections will be against DEALER's then applicable wholesale credit line. HMA will advise DEALER in writing of the implementation of such systems. DEALER will make arrangements with its designated financial institution to accommodate the use of such systems.

4. Delivery of Hyundai Products

a. Mode and Place of Delivery

HMA will select the distribution points, carriers and the mode of transportation and will be responsible for all charges in effecting delivery of Hyundai Products to DEALER. DEALER agrees to reimburse HMA for all delivery, freight and other related charges as they appear on HMA's invoice to DEALER.

b. Title and Risk of Loss

Subject to the terms of sale which HMA may establish from time to time, title and risk of loss to Hyundai Products will pass to DEALER upon tender of the Hyundai Products to DEALER or its authorized agent. HMA will retain, and DEALER hereby grants to HMA, a security interest in, and the right to retain or repossess, all Hyundai Products sold to DEALER by HMA until HMA is paid in full therefor.

c. Diversion of Deliveries

If DEALER should fail or refuse or for any reason be unable to take delivery of any Hyundai Products, or if DEALER should request diversion of a shipment from HMA, DEALER will be responsible, and will pay HMA promptly upon demand, for all costs and expenses incurred by HMA as a result of such diversion. HMA may direct that the returned Hyundai Products be delivered to another destination. The amount charged DEALER, however, will not exceed the charge of returning the products to the original point of shipment plus any demurrage, storage or related charges.

d. Failure or Delay of Delivery

DEALER will not be liable for any delay or failure to accept delivery and HMA will not be liable for delay or failure to deliver Hyundai Products, where such delay or failure to deliver is due, in whole or in part, to any event of Force Majeure, or any delay or failure of FACTORY or other supplier of HMA or any carrier to deliver Hyundai Products.

e. Damage Claims

As between HMA and DEALER, HMA assumes responsibility for damage to Hyundai Products occurring prior to delivery to DEALER or its authorized agent. DEALER agrees, however, to submit such claims in the manner required in the Hyundai Warranty Policies and Procedures Manual.

f. Option to Repurchase Damaged Motor Vehicles

DEALER agrees to notify HMA promptly if any new motor vehicle(s) in DEALER's inventory, other than those used as demonstrators, should for any reason be substantially damaged. To preserve the quality and value of new Hyundai Motor Vehicles offered to the public, HMA will have the option to repurchase any or all such vehicles at a price equal to the net purchase price paid by DEALER to HMA. HMA will make appropriate payment for repurchased vehicles directly to any lienholder. DEALER agrees to assign its rights under any insurance contract relating to the repurchased vehicle(s) to HMA.

5. Warranties on Hyundai Products

DEALER understands and agrees that the only warranties that will be applicable to each new Hyundai Product sold to DEALER by HMA will be the written limited warranty or warranties expressly furnished by FACTORY or HMA or as stated in the Hyundai Warranty Policies and Procedures Manual, as it may be revised from time to time. With respect to DEALER, such limited warranties are in lieu of all other warranties, express or implied, including any implied warranty of merchantability or fitness for a particular purpose or any liability for commercial losses based on negligence or strict liability. Except for its limited liability under such written warranty or warranties, neither FACTORY nor HMA assumes any other warranty obligation or liability. DEALER is not authorized to assume any additional warranty obligations or liabilities on behalf of HMA or FACTORY. Any such additional obligations or liabilities assumed by DEALER will be solely the responsibility of DEALER.

6.

6. Effect of Change of Design, Specifications or Options

HMA reserves the right at any time in its sole discretion and without notice to change the design or specifications of any Hyundai Product or the availability of options in any Hyundai Product. HMA is under no obligation to make any similar change upon any product previously purchased by or shipped to DEALER. No change will be considered a model year change unless so specified by HMA.

7. Effect of Discontinuance of Manufacture

The manufacture and production of all or part of any Hyundai Product, whether motor vehicle, parts, options, or accessories, including any model, series, or body style of any Hyundai Motor Vehicle, may be discontinued at any time without any obligation or liability to DEALER on the part of FACTORY or HMA by reason thereof.

B. DEALER'S AGREEMENT TO PROMOTE AND SELL HYUNDAI PRODUCTS

1. Best Efforts

DEALER is an integral part of a network of authorized Hyundai Dealers dedicated to the vigorous and effective promotion and sale of Hyundai Products. Accordingly, DEALER agrees to use its best efforts to effectively promote and sell Hyundai Products to Customers in DEALER's primary market area.

2. Adequate Vehicle Inventory

As a duly authorized Hyundai Dealer, DEALER recognizes that its Customers will expect DEALER to stock a reasonable quantity and variety of current model Hyundai Motor Vehicles. Accordingly, DEALER agrees to stock and sell, subject to available supply, all models and types of Hyundai Motor Vehicles in the Hyundai Product Addendum and that it will, at all times, maintain at least the minimum inventory of Hyundai Motor Vehicles requested by HMA. DEALER will maintain all Hyundai Motor Vehicles for display and demonstration purposes in showroom ready condition.

3. Hyundai Dealer Advertising Association

HMA and DEALER recognize the benefits which may be derived from a comprehensive joint advertising effort by Hyundai Dealers. Accordingly, HMA agrees to assist Hyundai Dealers, including DEALER, in the establishment of a cooperative advertising association. DEALER agrees to cooperate with HMA in the formation of such association and, once it is established, to participate actively and to contribute to it in accordance with the by-laws of the association.

The Hyundai Dealer Advertising Association will finance its advertising programs through the assessment of a fixed amount for each new Hyundai Motor Vehicle purchased by Hyundai Dealers. As a service to the Dealer Association, HMA will collect the agreed amount, provided that the Association maintains control over the amount of the assessment and the manner in which the funds are expended and so long as such funds are expended for the promotion of Hyundai Products which may also include Parts and Service advertising campaigns from time to time.

4. Primary Market Area

While DEALER is required to vigorously develop its primary market area, nothing contained in this Agreement will limit or be construed to limit the geographical area in which DEALER may promote, or the persons to whom DEALER may sell, Hyundai Products.

The primary market area is a geographic area which HMA will designate from time to time for the sole purpose of evaluating DEALER's performance of its sales and service obligations hereunder. DEALER recognizes that the designation of a primary market area is not intended to be permanent and that HMA may, in its sole discretion, change DEALER's primary market area from time to time.

5. Appointment of New Dealers

DEALER agrees that HMA will have the right, from time to time, to appoint or to relocate new or additional authorized Hyundai Dealers in or near the primary market area served by DEALER based upon such reasonable criteria as HMA may establish in its sole discretion.

C. DEALER'S SALES OPERATIONS

1. Sales Organization

To enable DEALER to fulfill its responsibilities satisfactorily under this Agreement, DEALER agrees to organize and maintain an adequate and trained sales organization.

2. Fair Dealing

HMA has selected DEALER because of the reputation of its Owner(s) and the General Manager, identified herein, for integrity and their commitment to fair dealing. DEALER will at all times maintain a high standard of ethics in advertising, promoting and selling Hyundai Products and will not engage in any misrepresentation or unfair or deceptive trade practices. DEALER will not advertise Hyundai Products in a manner likely to mislead or deceive the public or to impair the good will of HMA or DEALER or the reputation of Hyundai Products. Furthermore, DEALER will deal with its Customers in a courteous, fair and forthright manner and will not engage in any deceptive or fraudulent practices, including without limitation, bait and switch and improper retention of deposits.

3. Disclosure as to Prices of Hyundai Products

DEALER agrees to explain to purchasers of Hyundai Products the items which make up the purchase price and to give such purchasers itemized invoices and any other information required by law. DEALER further agrees that it will not make any misleading statements as to the items which make up the total selling price of any Hyundai Motor Vehicle, or as to the prices related to such items including destination or other charges paid to HMA. DEALER also agrees not to charge Customers for any services for which DEALER is reimbursed by HMA, including pre-delivery inspection and adjustment services, without disclosing the fact of such reimbursement to the Customer.

4. Disclosure as to Parts or Accessories

DEALER recognizes that its Customers have a right to expect that any product that they purchase from DEALER meets the high quality standards associated with HMA, FACTORY, the Hyundai Marks and Hyundai Products in general. Accordingly, DEALER agrees that, if it sells or installs any part or accessory that is not a Hyundai Genuine Part or Accessory, it will disclose such fact to the Customer and will advise the Customer that the item is not included in warranties furnished by HMA or FACTORY. In all cases, the purchaser's contract of purchase and sale will include written notice of such disclosure. In addition, DEALER will clearly explain to the Customer the extent of any warranty covering the equipment, part or accessory involved and will deliver a copy of such warranty to the Customer at the time of sale.

DEALER agrees that it will not represent or offer to sell as new Hyundai Genuine Parts or Accessories, any parts or accessories used by it in the repair or servicing of Hyundai Motor Vehicles which are not in fact Hyundai Genuine Parts or Accessories.

D. ASSISTANCE PROVIDED BY HMA

1. Sales Training Assistance

To assist DEALER in the fulfillment of its sales responsibilities under this Agreement, HMA will offer general and specialized sales management and sales training programs for the benefit and use of DEALER's sales organization. DEALER recognizes the importance of having a well trained sales staff to meet its obligations hereunder and agrees to require its sales personnel to participate in such programs as HMA may offer from time to time for their benefit.

2. Sales Promotion Assistance

In order that authorized Hyundai Dealers may be assured of the benefits of comprehensive advertising and promotion of Hyundai Products, HMA agrees to establish and maintain general advertising and promotion programs and will from time to time make sales promotion and campaign materials available to DEALER to promote the sale of such Hyundai Products at a reasonable charge where applicable. DEALER agrees to cooperate in HMA's advertising programs and to fully utilize the materials offered DEALER by HMA.

3. Field Sales Personnel Assistance

To assist DEALER in handling its sales responsibilities under this Agreement, HMA agrees to provide trained field sales personnel to advise and counsel DEALER on sales-related subjects, including but not limited to merchandising, training and sales management.

E. EVALUATION OF DEALER'S SALES PERFORMANCE

HMA will evaluate DEALER's sales performance at least annually and agrees to review such evaluations with DEALER so that DEALER may take prompt action if necessary to improve its sales performance to such satisfactory levels as HMA may reasonably require. HMA will provide DEALER with a copy of such evaluation upon request. HMA may, at its discretion, evaluate DEALER's sales performance based on one or more of the following criteria:

1. Achievement of fair and reasonable sales objectives as HMA may establish at its discretion;
2. A comparison of sales and/or registrations of Hyundai Motor Vehicles to sales and/or registrations of other line makes: (i) in DEALER's primary market area; (ii) in HMA's Region or any area thereof as HMA may reasonably establish; or (iii) nationally;
3. The trend of DEALER's sales performance over a reasonable period of time;
4. The manner in which DEALER has conducted its sales operations, including advertising, sales promotions and Customer relations;
5. The availability of new motor vehicles to DEALER from HMA; or
6. Significant local conditions that may have affected DEALER's performance.

11. SERVICE AND PARTS

A. DEALER RESPONSIBILITIES

DEALER recognizes that its Customers are entitled to prompt, courteous and professional service and that Customer satisfaction is vital to the mutual success of DEALER and HMA. DEALER agrees, therefore: to take all reasonable steps to provide service and parts for all Hyundai Motor Vehicles, regardless of where purchased, and whether or not under warranty; to ensure that necessary repairs on Customer vehicles are accurately diagnosed and performed in accordance with the highest professional standards; to advise the Customer and obtain his or her consent prior to the initiation of any repairs; and, to treat the Customer courteously and fairly at all times.

1. New Motor Vehicle Predelivery Service

DEALER will perform predelivery service on each new Hyundai Motor Vehicle prior to delivery to the retail Customer according to HMA's instructions. Any required campaign or policy service will also be completed at the time of predelivery service.

2. Warranty and Policy Service

DEALER will perform warranty service on each Hyundai Motor Vehicle at the time of predelivery service and when requested by the owner according to the requirements of the Hyundai Warranty Policies and Procedures Manual. DEALER will perform policy service as HMA may require from time to time. DEALER will provide each owner for whom warranty or policy service is performed with a copy of the repair order stating all services performed.

3. Campaign Inspections

HMA may, from time to time, require DEALER to inspect and correct conditions in Hyundai Motor Vehicles. DEALER agrees to perform such campaign inspections regardless of where or from whom the subject Hyundai Motor Vehicles were purchased. Because of the importance of campaign inspections to the overall reputation of Hyundai Motor Vehicles for their high quality standards, HMA may ship parts and other materials to DEALER without DEALER's authorization. DEALER will accept such shipments and upon completion of the campaign, HMA will credit DEALER for any extra parts and materials so shipped provided DEALER returns or otherwise disposes of such parts and materials according to HMA's instructions.

4. Reimbursement Rates

HMA agrees to compensate DEALER for all warranty, policy, and campaign inspection work, including labor and diagnosis, in accordance with procedures and at rates to be announced from time to time by HMA and in accordance with applicable law. DEALER agrees that such rates will constitute full and complete payment to DEALER for such work. Both parties agree that warranty and policy service is provided for the benefit of Customers and DEALER agrees that the Customer will not be obligated to pay any charges for warranty or policy work, except as required by law.

HMA will reimburse DEALER for predelivery service at an authorized labor and/or diagnosis rate and according to the predelivery service time allowances as established by HMA or as required by law.

If DEALER wishes to adjust the established reimbursement rate for labor and diagnosis in connection with warranty, policy or predelivery service performed on Customer's vehicles, DEALER agrees to make the appropriate written application to HMA and to comply with such applicable procedures or policies as may be set forth in the Hyundai Warranty Policies and Procedures Manual.

5. Independent Warranty or Service Contract

DEALER recognizes that HMA's limited warranties are provided to Customer at no additional expense. HMA recognizes that DEALER is free to sell warranty or service contract protection for Hyundai Motor Vehicles which is different from and independent of HMA's warranties. In order to avoid any misconception among its Customers, however, DEALER agrees that if it elects to sell such independent warranties or service contracts to Customers:

a. DEALER will conspicuously disclose in writing upon the Customer's purchase order the extent to which the independent warranty or service contract protection purchased by the Customer overlaps that provided by HMA or FACTORY; and

b. Whenever a Customer purchases such independent warranty or service contract protection and seeks service on a Hyundai Product during the period of time that such Product is also covered by the limited warranty provided by HMA or FACTORY, DEALER will not apply for, and agrees that it will not be entitled to, reimbursement under such limited warranty unless DEALER has advised the Customer in writing, on all copies of the repair order, that the service was provided pursuant to HMA's limited warranty and not the independent warranty or service contract protection that the Customer purchased.

6. Installation and Use of Non-Genuine Parts or Accessories

DEALER understands that it has the right to sell, install or use products which are not Hyundai Genuine Parts or Accessories.

DEALER agrees, however, that its Customers may reasonably expect that any part or accessory which DEALER sells, installs or uses in the repair or servicing of Hyundai Motor Vehicles meets the high quality standards of Hyundai Genuine Parts or Accessories. Therefore, in cases where DEALER does not sell, install or use a Hyundai Genuine Part or Accessory, DEALER will only utilize such other parts or accessories as:

Will not adversely affect the mechanical operation of the Hyundai Motor Vehicle being serviced or repaired; or

Are equivalent in quality and design to Hyundai Genuine Parts or Accessories.

In the event any disagreement arises between HMA and DEALER regarding the use by DEALER of parts other than Hyundai Genuine Parts or Accessories or parts expressly approved by HMA, DEALER agrees that it will have the burden of proving either:

That the parts replaced will not adversely affect the mechanical operation of the Hyundai Motor Vehicle being serviced or repaired; or

That parts used by it are equivalent in quality and design to Hyundai Genuine Parts or Accessories or parts expressly approved by HMA.

If DEALER uses parts or accessories which are not Hyundai Genuine Parts or Accessories or are not approved in writing by HMA for use in Hyundai Motor Vehicles, DEALER does so at its own risk and neither HMA nor FACTORY will be responsible to DEALER or to any third party for any products liability, warranty or other claim which may arise as a consequence of the installation and/ or use of such parts.

7. Safety and Emission Control Laws

DEALER agrees to comply and operate consistently with all applicable provisions of federal, state and local motor vehicle safety and emission control laws, rules and regulations.

In addition, HMA and DEALER will each provide the other with such information and assistance as may reasonably be requested by the other in connection with the performance of obligations imposed on either party by any applicable federal, state and local motor vehicle safety and emission control requirements.

In the event that the laws of the state in which DEALER is located require motor vehicle dealers or distributors to install in new or used motor vehicles, prior to the retail sale thereof, any safety devices or other equipment not installed or supplied as standard equipment by FACTORY or HMA, then DEALER, prior to its sale of any Hyundai Motor Vehicles on which such installations are so required, will properly install such devices or equipment on such Hyundai Motor Vehicles. DEALER will comply with state and local laws pertaining to installation of such equipment, including without limitation, the reporting thereof.

B. SERVICE AND PARTS OPERATIONS

1. Service and Parts Personnel

DEALER agrees to establish and maintain a complete service and parts organization, including a service manager, a parts manager and a sufficient number of Customer relations, service and parts personnel who meet such educational, management, technical training and competency standards as HMA may establish or approve.

2. Handling of Service Complaints

DEALER understands that the development and maintenance of Customer confidence and satisfaction in Hyundai Products requires DEALER's full support. DEALER, therefore, agrees to investigate and handle all complaints from Customers according to procedures prescribed by HMA and in a manner calculated to secure and maintain the Customers' good will towards DEALER, HMA and Hyundai Products. Moreover, DEALER agrees to cooperate with HMA and to provide such information as HMA may in its judgment require to comply with any federal or state consumer protection law, rule or regulation, including without limitation, warranty and repair or replace laws or to avoid any liability thereunder. Furthermore, DEALER agrees to participate in and cooperate with such Customer complaint resolution procedures as HMA may designate from time to time.

3. Service Equipment and Special Tools

DEALER agrees to procure such service equipment and special tools as HMA may require from time to time, and to maintain the same in good repair and in proper calibration to enable

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4. Parts Inventory

DEALER will stock a sufficient quantity and variety of parts and accessories to meet Customer demand and to perform warranty repairs and special policy work. DEALER recognizes, however, that its Customers may reasonably expect that DEALER will have Hyundai Genuine Parts or Accessories immediately available for purchase or installation. DEALER, therefore, agrees to carry in stock at all times during the term of this Agreement a complete inventory of Hyundai Genuine Parts or Accessories, as listed in HMA's current inventory guide, to enable DEALER to meet its Customers' needs and to fulfill its service responsibilities under this Agreement. HMA reserves the right to audit DEALER's inventory from time to time and may require DEALER to supplement its inventory to meet its obligations hereunder.

DEALER will install and maintain a parts inventory control system approved by HMA to track availability and sales of parts.

C. ASSISTANCE PROVIDED BY HMA

1. Service Training Assistance

DEALER recognizes the importance of providing consistent, dependable and high quality service to its Customers. DEALER agrees that frequent training and refresher courses are a necessary prerequisite to providing such service.

To assist DEALER in fulfilling its service and parts responsibilities hereunder, HMA from time to time will offer general and specialized service and technical training programs and materials. DEALER will require its service and/or parts personnel to participate in such programs.

2. Service Manuals and Materials

HMA agrees to provide DEALER with copies of such DEALER service manuals and bulletins, publications and technical data as HMA deems necessary for the effective operation of DEALER's service and parts organization. DEALER will have responsibility for keeping such manuals, publications and data current and available for consultation by its parts and service employees.

3. Field Service Personnel Assistance

To assist DEALER in handling its parts and service responsibilities under this Agreement, HMA agrees to make available field service personnel who will, from time to time, advise and counsel DEALER on parts and service related subjects, including product quality, technical adjustment, repair and replacement of product components, parts inventory, parts sales, Customer relations, warranty administration, and service and parts merchandising, training and management.

D. EVALUATION OF DEALER'S SERVICE AND PARTS PERFORMANCE

DEALER's service and parts performance is extremely important to the effective representation of Hyundai Products. Therefore, under this Agreement, HMA will periodically evaluate DEALER's performance of its service and parts responsibilities, including without limitation: warranty service; Customer relations; service and parts merchandising, management and operations; new vehicle predelivery service; parts inventory; tools and equipment; competency of service and parts personnel; participation of DEALER's personnel in various training programs; and the adequacy of service and parts facilities. HMA agrees to review such evaluations with DEALER so that DEALER may take prompt action if necessary to improve its service and parts performance to satisfactory levels as HMA may reasonably require. HMA will provide DEALER with a copy of the evaluation upon request.

12. DEALER LOCATION

A. RESPONSIBILITIES OF DEALER

HMA has entered into this Agreement in reliance upon DEALER's representation that it will establish and maintain dealership facilities and operations only at the location(s) identified in paragraph 6. DEALER agrees, therefore, that it will not, under any circumstances, conduct Dealer operations at any other location, whether as a satellite operation, subdealership, through an associate Dealer or otherwise, without the prior written consent of HMA.

Moreover, it is the mutual desire of DEALER and HMA that DEALER's facilities reflect a distinctive first-class appearance in common with all other duly authorized Hyundai Dealers. Accordingly, DEALER agrees to procure from approved sources and install all items necessary to insure that DEALER's retail environment complies in all respects with such distinctive first-class appearance. In addition, DEALER agrees that all of its facilities will be satisfactory as to space, appearance, amenities, layout, equipment, and signage and will at all times be in accordance with HMA's minimum facilities standards, as amended from time to time.

B. OPERATING HOURS

DEALER agrees that the transportation, service and maintenance needs of its Customers can be met properly only if DEALER keeps its dealership premises open for business during hours which are reasonable and convenient for such Customers. Accordingly, DEALER will maintain its respective dealership operations open for business during days and hours which are customary and lawful for such operations in the community or locality in which DEALER is located and in accordance with industry standards.

C. SIGNS

Subject to applicable law, DEALER agrees to purchase from sources designated by HMA and to erect and maintain at the dealership location(s), entirely at DEALER's expense, standard product and service signs of types authorized by HMA, as well as such other authorized signs as are necessary to identify the dealership operations effectively and as recommended by HMA. DEALER shall in no way alter or modify such authorized signs without obtaining prior written approval from HMA.

D. DATA PROCESSING SYSTEMS

To facilitate the accurate and prompt reporting of relevant DEALER operational and financial data including, without limitation, sales reports, warranty claims and parts purchasing and to ensure rapid communication with authorized Hyundai Dealers, HMA requires DEALER, and DEALER agrees, to acquire, install, maintain and upgrade at DEALER's sole expense, electronic data processing systems, compatible with HMA's data systems, from a source designated by HMA. The computer terminals for such system will be installed and maintained at the DEALER location(s) identified herein. Furthermore, DEALER agrees to utilize said system in accordance with HMA's instructions.

E. FACILITY PLANNING ASSISTANCE

To assist DEALER in planning, building and maintaining the dealership facilities, HMA will make available to DEALER, upon request, sample copies of building layout plans, facility planning recommendations, and an applicable identification program covering the placement, installation and maintenance of authorized signs. In addition, representatives of HMA will be available to DEALER from time to time to counsel and advise DEALER regarding the proper organization and maintenance of the dealership's exterior and interior facilities and any expansion or alteration thereof.

F. EVALUATION OF DEALERSHIP FACILITIES

HMA will periodically evaluate the adequacy of DEALER's facilities pursuant to its responsibilities under this Agreement. In making such evaluations, HMA will consider: the actual building and land space provided by DEALER for the performance of its responsibilities under this Agreement; compliance with HMA's then current requirements for dealership operations, the appearance, condition, layout and signage of the dealership facilities; and such other factors, if any, which in HMA's judgment may directly relate to DEALER's performance of its responsibilities under this Agreement. HMA will discuss such evaluations with DEALER, so that DEALER may take prompt action, if necessary, to comply with HMA's minimum facility standards. HMA will provide DEALER with a copy of the evaluation upon request.

13. CAPITAL STANDARDS

A. NET WORKING CAPITAL

The net working capital required to conduct the business of DEALER properly depends upon many factors, including the nature, size and volume of DEALER's vehicle sales, service and parts operations. Therefore, DEALER agrees to establish and maintain actual net working capital in an amount not less than the minimum net working capital specified in a separate Minimum Net Working Capital Agreement made between DEALER and HMA and executed by DEALER and HMA concurrently with this Agreement. If HMA determines, in its sole discretion, that changed circumstances require it to adjust the net working capital requirement hereunder, DEALER agrees to revise its minimum net working capital to be used in the dealership's operation accordingly and within a reasonable period of time.

B. WHOLESALE CREDIT

DEALER recognizes that in order to operate its dealership successfully and to fulfill its responsibilities hereunder, it must maintain flooring and lines of credit adequate to meet its ongoing obligations. Accordingly, DEALER agrees to obtain, maintain and increase as HMA may require, adequate flooring and lines of credit from any reputable financial institution or other credit source.

Subject to the foregoing obligations, DEALER is free to do its financing business, wholesale or retail or both, with whomever it chooses and to the extent it desires.

14. ACCOUNTS, RECORDS AND REPORTS

A. UNIFORM ACCOUNTING SYSTEM

HMA uses the operating information provided by its Dealers to develop composite operating statistics which are useful to Dealers and to HMA in business management. In order for such information to be useful, however, Hyundai Dealers must submit data which is accurate and based on uniform accounting procedures. Accordingly, DEALER agrees to maintain a uniform accounting system designated by HMA, and in accordance with the Hyundai Accounting Manual, as amended from time to time. In addition, DEALER will furnish to HMA, by the tenth (10th) of each month, in a format prescribed by HMA, a complete and accurate financial and operating statement covering the preceding month and calendar year-to-date operations. DEALER will also promptly furnish to HMA a copy of any adjusted financial or operating statement prepared by or for DEALER.

B. SALES REPORTING

HMA requires timely sales information to evaluate correctly current market trends and to maintain a fair and equitable vehicle distribution system. In addition, such data is necessary for HMA to evaluate DEALER's sales performance and to provide meaningful advice and recommendations to DEALER.

Accordingly, DEALER agrees to:

1. Accurately report to HMA, with such relevant information as HMA may reasonably require, the delivery of each new motor vehicle to a purchaser by the end of the day in which the vehicle is delivered to the purchaser thereof; and
2. Furnish HMA with such other reports as HMA may reasonably require from time to time.

C. SALES AND SERVICE RECORDS

DEALER agrees to keep complete and up-to-date records regarding the sale and servicing of Hyundai Products for a minimum of five (5) years, exclusive of any retention period required by any governmental entity. In order that the policies and procedures relating to the application for reimbursement for warranty, policy work and predelivery service may be applied uniformly to all Dealers, DEALER agrees to prepare, keep current and retain records in support of requests for reimbursement for warranty and policy work performed by DEALER in accordance with the policies and procedures prescribed in the Hyundai Warranty Policies and Procedures Manual and standards established by HMA consistent with said manual.

D. AUDIT OF DEALER RECORDS

DEALER agrees that HMA will have the right, at all reasonable times and during DEALER's regular business hours, to examine, audit and reproduce all records, accounts and all other data relating to the sale and service of Hyundai Products by DEALER. HMA will provide a copy of the report of the examination or audit to DEALER upon request.

E. CONFIDENTIALITY

HMA agrees that it will not provide any data or documents submitted to it by DEALER to any third party, except FACTORY, unless authorized by DEALER, required by law, or otherwise pertinent to legal proceedings. DEALER agrees, however, that HMA may use such data or documents to generate composite data which HMA believes will be useful to assist its Dealers in improving dealership operations. Such composite data will not specifically identify any Dealer.

15. TRADEMARKS, SERVICE MARKS AND TRADE NAMES

A. USE BY DEALER

HMA is the exclusive owner of, or is authorized to use and to permit DEALER and others to use, the Hyundai Marks. HMA grants to DEALER the nonexclusive privilege of displaying or otherwise using the Hyundai Marks in connection with the promotion and sale of Hyundai Products and the conduct of DEALER operations at the location(s) approved herein.

DEALER agrees, however, that it will promptly discontinue the display and use of any such Hyundai Marks, and will change the manner in which any Hyundai Marks are displayed and used, when for any reason, it is requested to do so by HMA. DEALER further agrees that it will do nothing to impair the value of or contest the right of HMA to the exclusive use of any trademark, design mark, service mark or trade name at any time acquired, claimed or adopted by HMA. In addition, no company owned by or affiliated with DEALER or any of its Owners may use any Hyundai Mark or product name without the prior written consent of HMA.

B. DISCONTINUANCE OF USE

Upon termination, non-renewal or expiration of this Agreement, DEALER agrees that it will immediately discontinue all use of the word Hyundai and the Hyundai Marks, or any semblance thereof and cease representing itself as an authorized Hyundai Dealer. Thereafter, DEALER will not use, either directly or indirectly, any Hyundai Marks or any other similar marks in a manner likely to cause confusion or mistake or to deceive the public. In addition, DEALER will promptly remove all product signs bearing the word Hyundai or the Hyundai Marks from its facilities at DEALER's sole cost and expense.

In the event DEALER fails to comply with its obligations herein within thirty (30) days of termination, non-renewal or expiration, HMA will have the right to enter upon DEALER's premises and remove, without liability, all signs bearing the word Hyundai or any Hyundai Marks. DEALER will reimburse HMA for any costs and expenses incurred in connection with the enforcement of this paragraph, including reasonable attorney's fees.

16. TERMINATION OF AGREEMENT

A. TERMINATION BY DEALER

DEALER may voluntarily terminate this Agreement at any time by written notice to HMA. Termination will be effective thirty (30) days after HMA receives such notice unless otherwise mutually agreed in writing.

B. TERMINATION FOR CAUSE

1. Immediate Termination

HMA will have the right to terminate this Agreement immediately in any of the following situations:

- a. Any misrepresentation to HMA by DEALER or any Owner or General Manager in applying for this Agreement or for approval as Owner or General Manager of DEALER;
- b. If DEALER, or any Owner, officer, or General Manager of DEALER, is convicted of any felony or for any violation of law which in HMA's sole opinion tends to adversely affect the operation, management, reputation, business or interests of DEALER or HMA, or to impair the good will associated with the Hyundai Marks. Such violations of law may include, without limitation, any finding or adjudication by any court of competent jurisdiction or government agency that DEALER has engaged in any misrepresentation or unfair or deceptive trade practice;
- c. Submission by DEALER to HMA of: (i) false claims for reimbursement, sales incentives, refunds, rebates or credits; (ii) false financial information, sales reports or other data required by HMA; or (iii) false statements relating to predelivery preparation, testing, warranties, servicing, repairing, or maintenance required by HMA;
- d. If the dealership is closed for a period of seven (7) consecutive days, except when due to an event of Force Majeure;
- e. Failure of DEALER to obtain or maintain any license, or the suspension or revocation of any license, necessary for the conduct by DEALER of its business pursuant to this Agreement; or
- f. If DEALER becomes insolvent, or files any voluntary petition under any bankruptcy law, or executes an assignment for the benefit of creditors, or any petition is filed by any third party to have DEALER declared bankrupt or to appoint a receiver or trustee, or another officer having similar power, and such filing or appointment is not vacated within thirty (30) days or there is any levy under attachment or execution or similar process which is not vacated or removed by payment or bonding within ten (10) days.

2. Termination Upon Sixty Days Notice

If HMA learns that any of the following events have occurred and determines, in its sole discretion, that the matter may require termination of this Agreement, HMA will so advise DEALER in writing. If DEALER does not correct the condition or explain the matter to HMA's satisfaction within thirty (30) days of such notice, then HMA will have the right to terminate this Agreement upon sixty (60) days notice. Events which may result in such termination include:

- a. Any sale or transfer of ownership interest by DEALER without the prior written consent of HMA;
- b. Any removal, withdrawal or change, whether voluntary or involuntary, of a General Manager having an ownership interest in DEALER without the prior written consent of HMA;
- c. Any attempted or actual sale, transfer or assignment by DEALER of this Agreement or any of the rights granted DEALER hereunder, or any attempted or actual transfer, assignment or delegation by DEALER of any of the responsibilities assumed by it under this Agreement, without the prior written consent of HMA;
- d. The conduct, directly or indirectly, of any dealership operation at any location other than those specifically approved herein, without the prior written consent of HMA;

- c. Any sale or transfer, by operation of law or otherwise, or any relinquishment or discontinuance of use by DEALER, of any of the locations approved herein or of other principal assets required in the conduct of dealership operations, without the prior written consent of HMA;
- f. Any dispute, disagreement or controversy between or among partners, managers, officers or stockholders of DEALER which, in the sole opinion of HMA, adversely affects DEALER's operations or the interests of DEALER or HMA;
- g. Retention by DEALER of any General Manager, who in HMA's reasonable opinion is not competent, whether or not such person was previously approved by HMA as General Manager of DEALER;
- h. Any conduct which in HMA's opinion impairs the reputation of DEALER or HMA;
- i. Any refusal to permit HMA to examine or audit DEALER's accounts and records as provided herein upon receipt by DEALER of written notice from HMA requesting such permission or information;
- j. Repeated failure of DEALER to furnish timely sales or financial information and related data;
- k. Failure of DEALER to establish or maintain required net working capital or adequate wholesale credit;
- l. Failure of DEALER to pay HMA for any Hyundai Products in accordance with the terms and conditions of sale;
- m. Failure of DEALER to comply with the provisions of any laws or regulations relating to the sale or service of Hyundai Products;
- n. Repeated failure of DEALER's sales, service or parts personnel, including but not limited to management, to fully participate in any training program offered by HMA to DEALER;
- o. Failure of DEALER to properly obtain, erect, maintain, repair and illuminate signs and other displays in a manner approved by HMA;
- p. Failure to maintain an adequate supply of general and special tools and equipment designated by HMA;
- q. Failure by DEALER to maintain good relations with its Customers including but not limited to failure to notify HMA of complaints by Customers, as HMA may require, and repeated failure to properly resolve Customer complaints;
- r. Failure to maintain the required minimum inventory of Hyundai Motor Vehicles, whether for showroom display, demonstration or immediate sale;
- s. Failure to maintain an adequate parts inventory;
- t. Repeated failure to use proper parts and accessories in the repair and servicing of Hyundai Motor Vehicles; or
- u. Breach or violation by DEALER of any other term or provision of this Agreement.

3. Termination For Failure of Performance

If, upon evaluation of DEALER's performance pursuant to paragraphs 10(E), 11(D) and/or 12(F) herein, HMA determines that DEALER has failed to perform adequately its sales, service or parts responsibilities or to provide adequate dealership facilities, HMA will endeavor to review promptly with DEALER the nature and extent of such failure(s). As soon as practicable thereafter, HMA will notify DEALER in writing of DEALER's failure of performance and will grant DEALER 180 days from the date of such notice to correct such failure(s). If DEALER fails or refuses to correct such failure(s) or has not made substantial progress towards remedying such failure(s) at the expiration of such period, HMA may terminate this Agreement upon sixty (60) days notice or such other notice as may be required by law.

4. Termination of HMA

This Agreement will terminate upon the effective date of the termination or expiration of HMA's right to distribute Hyundai Products.

5. Termination Upon Death or Incapacity

HMA has entered into this Agreement in reliance upon the personal services of Owner(s) and General Manager and is concerned that DEALER continues to be owned and operated by persons who meet HMA's requirements. In order to ensure that it is represented by qualified persons, and to protect its interests, and subject to paragraphs 16(B)(5)(a)-(c), HMA will have the right to terminate this Agreement in the event of the death of an Owner or upon the incapacity of any Owner who is also the General Manager identified herein, upon written notice to DEALER. HMA will provide such notice within a reasonable time after Owner's death or incapacity. Termination hereunder will be effective ninety (90) days from the date of such notice.

a. Succession to Majority Ownership by Designated Successor

Notwithstanding its right to terminate upon the death of any Owner, HMA agrees to permit succession to majority ownership by any person approved as a Successor Owner as provided herein. Accordingly, at any time during the term of this Agreement, any Majority Owner may nominate a candidate to assume his or her ownership interest in the dealership upon the death or incapacity of the requesting Owner. Such nomination must be made on a form provided by HMA. In the event that the Majority Owner is also the General Manager, such Owner may also nominate the candidate to succeed as General Manager.

As soon as practicable after such nomination, HMA will request such personal and financial information from the Majority Owner and/or the candidate as it reasonably and customarily may require in evaluating candidates for ownership and/or management. Owner agrees that HMA may apply criteria then currently used by HMA in qualifying Owners and/or General Managers of authorized Dealers. Upon receipt of all requested information, HMA will either approve or disapprove such candidate. If HMA initially approves the candidate, said approval will remain in effect for the term of this Agreement. HMA agrees that the Majority Owner may renominate a candidate after the expiration of this Agreement and HMA will review such nomination: (i) so long as HMA and DEALER have entered into a new Hyundai Dealer Sales and Service Agreement; and (ii) the proposed candidate continues to comply with the then current criteria used by HMA in qualifying such candidates.

If HMA does not initially qualify the candidate, HMA agrees to review its decision with the Majority Owner. The Majority Owner is free at any time to renew his or her nomination. However, in such instance, the candidate must again qualify pursuant to HMA's then current criteria. The Majority Owner may, by written notice, withdraw a nomination at any time, even if HMA previously has qualified said candidate.

In the event that the Majority Owner has obtained approval of his or her candidate as Successor Owner, and upon the death of the Majority Owner, HMA agrees to enter into a new Hyundai Dealer Sales and Service Agreement promptly with the Successor Owner and any remaining

Owner(s). The term of the new agreement shall be for one year. The Majority Owner recognizes, however, that before HMA shall be obligated to appoint the approved Successor Owner as the new Majority Owner, HMA shall have the right to request assurances from the legal representative of the Majority Owner's estate that there is no conflict between the appointment of the Successor Owner hereunder and any valid will executed by the Majority Owner. In any case where a Successor Owner has been designated pursuant to this paragraph but the beneficial interest of the deceased Majority Owner in DEALER has passed by will or by the laws of intestate succession to another person, then HMA will proceed as though the Majority Owner had withdrawn his or her nomination of the Successor Owner pursuant to this paragraph.

b. Succession to Ownership After Death of Owner

Except for those cases in which a Successor Owner is appointed pursuant to the foregoing paragraph 16(B)(5)(a), if any Owner's interest in DEALER passes by will (or in the absence of a will, if such interest would pass by the laws of intestate succession) to any person (heir), HMA agrees to review the qualifications of such heir to succeed as Owner of DEALER. Such right to be considered will not arise until the legal representative of the Owner's estate notifies HMA within ninety (90) days of the date of notice of termination hereunder of the heir's interest in succeeding Owner and provided that:

- (i) there has been no change in the General Manager of DEALER; or
- (ii) the notice from the legal representative proposes a new DEALER General Manager candidate for HMA's approval.

The effect of notice from the legal representative will be to suspend the notice of termination issued hereunder.

Upon receipt of such notice, HMA will investigate and make a determination as to the proposed new Owner's qualifications as provided in paragraph 16(B)(5)(d) herein. HMA expressly retains the right to terminate this Agreement if the proposed new Owner fails to meet HMA's then current ownership and/or General Manager qualification requirements.

c. Succession Upon Incapacity of Owner

The parties agree that, as used herein, incapacity will refer to any physical or mental ailment which, in HMA's opinion, adversely affects Owner's ability to meet his or her obligations under this Agreement. Termination for incapacity will apply only where the incapacitated Owner is also the General Manager identified herein.

Prior to the effective date of any notice of termination hereunder, an incapacitated Owner, or his or her legal representative, may propose a new candidate for the position of General Manager to HMA. Such proposal must be in writing and will suspend the pending notice of termination until HMA advises DEALER of its approval or disapproval of the new candidate. Upon receipt of the notice, HMA will investigate and make a determination as to the qualifications of the proposed General Manager as provided in paragraph 16(B)(5)(d) herein.

d. HMA's Investigation and Determination

Any heir wishing to succeed to ownership pursuant to paragraph 16(B)(5)(b) or any person seeking to be a General Manager pursuant to either paragraph 16(B)(5)(b) or (c) must complete such application and submit such personal and financial information in such form as HMA may reasonably and customarily require in connection with its review. All requested information must be provided promptly and in no case later than thirty (30) days after receipt of such request. Upon the submission of all requested information, HMA agrees to review the qualifications of the applicant pursuant to the then current criteria generally applied by HMA in qualifying Dealer Owners and/or General Managers. HMA will either approve or disapprove the application within ninety (90) days of full compliance with all of HMA's requests for information. If HMA approves the application, it will offer

to enter into a new Hyundai Dealer Sales and Service Agreement with DEALER or its successor in interest in the form then currently in use, except that the newly approved applicants will be identified as new Owner and/or General Manager as appropriate. Except in cases involving the death of a Minority Owner, discussed in the next sentence, the new agreement will be for a term of one (1) year. In cases involving the death of a Minority Owner, which does not result in a change in General Manager, if HMA approves the heir as new Minority Owner, then HMA and DEALER will simply amend the current Agreement to reflect the new minority ownership.

In the event that HMA disapproves the applicant or the applicant withdraws his or her application to be approved as Owner or General Manager or fails to provide the required information in a timely fashion, HMA may reinstate the notice of termination by written notice to DEALER and to the proposed new Owner, candidate for General Manager and/or incapacitated Owner.

C. EFFECTIVE DATE OF TERMINATION

If any period of notice of termination required under this paragraph 16 is less than that required by applicable law, the period of notice required hereunder will be deemed to be the minimum period required by such law.

D. EFFECT OF TERMINATION

1. DEALER's Conduct

Upon receipt of any notice of termination, expiration or non-renewal, DEALER agrees to conduct itself and its operations until the effective date of termination, expiration or non-renewal in a manner which will not injure the reputation or good will of the Hyundai Marks or HMA and is consistent with its obligations hereunder.

2. The Right to Purchase

Upon sending any notice of termination, expiration or non-renewal hereunder, HMA will have no further obligation whatsoever to sell and DEALER will have no right to purchase any Hyundai Products. Any decision to permit DEALER to purchase Hyundai Products thereafter will be in HMA's sole discretion and will not be construed as a waiver of the termination or a renewal, extension or continuation of this Agreement.

Upon the expiration or prior termination of this Agreement, HMA will have the right to cancel any and all pending requests by DEALER to purchase Hyundai Products and any shipments of same scheduled for delivery to DEALER.

3. Repurchase of Hyundai Products

a. HMA's Obligations

Upon expiration, non-renewal or termination of this Agreement, HMA will repurchase from DEALER the following products which DEALER initially purchased from HMA or from a source designated by HMA:

(i) New, unused, unmodified and undamaged current model Hyundai Motor Vehicles then in DEALER's inventory. The prices of such Motor Vehicles will be the price at which they were originally purchased by DEALER, less all prior refunds or other allowances made by HMA to DEALER with respect thereto.

(ii) New, unused and undamaged Hyundai Genuine Parts or Accessories then unsold in DEALER's inventory which are in good and saleable condition, provided that they are listed in the then current Hyundai Dealer Parts Price List. The prices for such parts and accessories will be the prices last established by HMA for the sale of identical parts or accessories to Dealers in the area in which DEALER is located.

(iii) Tools and equipment required or recommended by HMA and then owned by DEALER which are especially designed for servicing Hyundai Motor Vehicles. The prices for such tools and equipment will be the price paid by DEALER less appropriate depreciation or such other price as the parties may negotiate.

(iv) Signs which HMA has required or recommended for identification of DEALER. The price of such signs will be the price paid by DEALER less appropriate depreciation or such other price as the parties may negotiate.

HMA shall have no obligation to repurchase products as provided herein in the event it agrees to enter into a new Hyundai Dealer Sales and Service Agreement with DEALER.

b. DEALER's Responsibilities

DEALER's right to reimbursement hereunder is contingent upon the following:

(i) Within thirty (30) days after the date of expiration or the effective date of termination of this Agreement, DEALER will request HMA in writing to purchase its qualifying inventory and will provide HMA with a detailed and accurate list of such inventory. After receiving such list, HMA may, in its discretion, enter upon DEALER's premises to verify such inventory as qualifying under Paragraph 16(D)(3)(a) herein. If DEALER does not provide HMA with a list of inventory, then HMA may enter upon DEALER's premises, without liability, to take inventory and DEALER will reimburse HMA for any costs and expenses incurred in connection therewith.

(ii) Upon HMA's instructions, DEALER will deliver such products as HMA will agree to repurchase hereunder to HMA's place of business at DEALER's expense. If DEALER fails to do so, HMA may transport such products and deduct the cost therefor from the repurchase price.

(iii) DEALER agrees to execute and deliver to HMA instruments satisfactory to HMA conveying good and marketable title to such property as HMA may require. If such property is subject to any lien or charge of any kind, DEALER agrees to secure the discharge and satisfaction thereof prior to the repurchase of such property by HMA. DEALER further agrees to comply with the requirements of any federal or state laws which relate to the repurchase including bulk sales or transfer laws.

(iv) DEALER agrees that it must remove, at its own expense, all signage bearing the Hyundai Marks before it is eligible for payment hereunder.

c. Payment by HMA

HMA will pay DEALER for such items as DEALER may request repurchase and which qualify hereunder as soon as practicable upon DEALER's compliance with the obligations set forth herein and upon computation of any outstanding indebtedness of DEALER to HMA, which indebtedness HMA may offset from any amounts due to DEALER hereunder.

d. Disagreement Regarding Valuation

If DEALER disagrees with HMA's valuation of any item herein, and DEALER and HMA have not resolved their disagreement within sixty (60) days of the effective date of termination or expiration of this Agreement, HMA will pay to DEALER the amount to which it reasonably believes DEALER is entitled. DEALER's exclusive remedy to recover any additional sums which it believes is due under this paragraph will be by arbitration in accordance with the commercial arbitration rules of the American Arbitration Association. The site of the arbitration will be the office of the American Arbitration Association in the locality of HMA's principal place of business or Regional Office.

17. RIGHT OF FIRST REFUSAL OR OPTION TO PURCHASE

HMA has entered into this Agreement to secure market representation at the location(s) identified herein. The vitality of HMA's authorized Dealer network and the effective sale and servicing of Hyundai Products nationwide is dependent upon the continued representation of HMA by its authorized Dealers at their approved location(s). Accordingly, DEALER agrees that in the event that HMA refuses to approve a transfer or sale of any ownership interest in the dealership, pursuant to paragraph 5, HMA will have the right of first refusal or an option to purchase the dealership assets, including any leasehold interest or realty, as provided herein.

A. HMA'S RIGHTS

HMA must advise DEALER in writing of its decision to exercise its right of first refusal or option to purchase the dealership within thirty (30) days of its refusal to approve any sale or transfer pursuant to paragraph 5. DEALER agrees that HMA will have the right to assign its rights hereunder to any third party it may select. HMA hereby guarantees the full payment of the purchase price by such assignee. DEALER may render HMA's exercise of its rights hereunder null and void if it withdraws its buy/sell proposal within thirty (30) days following receipt of HMA's notice exercising such rights.

If DEALER has entered into a bona fide arm's length written buy/sell agreement regarding ownership of DEALER or its rights under this Agreement, HMA's right under this paragraph will be a right of first refusal, permitting HMA to assume the buyer's rights and obligations under such written agreement.

If DEALER has not entered into a bona fide arm's length written buy/sell agreement governing such transfer or sale, then HMA's rights hereunder will be the option to purchase the principal assets of DEALER utilized in the dealership operations, including real estate and/or leasehold interest, and to terminate this Agreement.

B. PURCHASE PRICE

If DEALER has entered into a bona fide arm's length buy/sell agreement as provided herein, the purchase price and other terms of sale will be those set forth in such agreement and any related documents. HMA may request and DEALER agrees to provide any and all supporting documents relating to the transfer which HMA may require to assess the bona fides of the agreement. Refusal to provide such documentation or to state that no such documents exist will create the presumption that the buy/sell agreement is not a bona fide agreement. In the absence of a bona fide arm's length buy/sell agreement, the purchase price will be the fair market value as negotiated by the parties. If the parties are unable to reach a negotiated sale in a reasonable time, the price and other terms of sale will be established exclusively by arbitration in accordance with the commercial arbitration rules of the American Arbitration Association. The site of the arbitration will be the office of the American Arbitration Association in the locality of HMA's principal place of business or Regional Office.

C. TRANSFER CONDITIONS

Upon HMA's exercise of its rights and tender of the purchase price hereunder, DEALER will transfer the affected real property by warranty deed conveying marketable title free and clear of all liens, claims, mortgages, encumbrances, tenancies and occupancies. The warranty deed will be in proper form for recording and DEALER will deliver complete possession of the property and the deed at time of closing. DEALER will also furnish to HMA copies of any easements, licenses or other documents affecting the property or dealership operations and will assign any permits or licenses which are necessary for the use of the property or the conduct of such DEALER operations.

DEALER also agrees to execute and deliver to HMA instruments satisfactory to HMA conveying title to all personal property, including leasehold interests, involved in the transfer or sale to HMA. If any personal property is subject to any lien or charge of any kind, DEALER agrees to secure the discharge and satisfaction thereof prior to the transfer or sale of such property to HMA.

18. DEFENSE AND INDEMNIFICATION

A. DEFENSE AND INDEMNIFICATION BY HMA

HMA will assume the defense of DEALER and agrees to indemnify and hold DEALER harmless in any legal proceeding naming DEALER as a defendant and involving any Hyundai Product when the proceeding also involves allegations of:

- (1) Breach of any Hyundai warranty related to the Hyundai Product, bodily injury or property damage allegedly caused solely by a defect in design, manufacture or assembly of a Hyundai Product (except for tires not manufactured by FACTORY), provided that the defect could not reasonably have been discovered by DEALER by reasonable inspection or during the predelivery service on the Hyundai Product required hereunder;
- (2) Any misrepresentation or misleading statement or unfair or deceptive trade practice of HMA; or
- (3) Any substantial damage to a Hyundai Product purchased by DEALER from HMA which was repaired by HMA and where DEALER had not been notified of such damage in writing prior to the delivery of the subject vehicle, part or accessory to a retail Customer; and

Provided:

- (4) That DEALER promptly delivers to HMA, in a manner to be designated by HMA, copies of any summons and complaint and requests in writing a defense and/or indemnification as provided herein;
- (5) That the complaint does not involve allegations of DEALER misconduct, including but not limited to, improper or unsatisfactory service or repair, misrepresentation, or any claim of DEALER's unfair or deceptive trade practice;
- (6) That the Hyundai Product which is the subject of the lawsuit was not altered by or for DEALER;
- (7) That DEALER agrees to cooperate fully in the defense of such action as HMA may reasonably require; and
- (8) That DEALER agrees that HMA may offset any recovery on DEALER's behalf against any indemnification that may be required hereunder.

B. DEFENSE AND INDEMNIFICATION BY DEALER

DEALER will assume the defense of HMA and FACTORY and indemnify and hold them harmless in any legal proceeding naming HMA or FACTORY as a defendant when the legal proceeding involves allegations of:

- (1) DEALER's alleged failure to comply, in whole or in part, with any obligation assumed by DEALER pursuant to this Agreement;
- (2) DEALER's alleged negligent or improper repairing or servicing of a new or used Hyundai Motor Vehicle or equipment, or such other motor vehicles or equipment as may be sold or serviced by DEALER;
- (3) DEALER's alleged breach of any contract or warranty other than that provided by HMA or FACTORY;
- (4) DEALER's alleged misleading statements, misrepresentations, or deceptive or unfair trade practices; or
- (5) Any modification or alteration made by or on behalf of DEALER to a Hyundai Product, except those made pursuant to the express instruction of HMA; and

Provided:

- (6) That HMA or FACTORY promptly delivers to DEALER, copies of any summons and complaint and requests in writing a defense and/or indemnification as provided herein;
- (7) That HMA or FACTORY agree to cooperate fully in the defense of such action as DEALER may reasonably require; and
- (8) That the complaint does not involve allegations of liability premised upon separate HMA or FACTORY conduct or omissions.

C. EXTENT OF RESPONSIBILITY

The assumption of the defense of a party includes the obligation of selecting counsel and paying all attorney's fees, court costs and expenses (including expert's fees). The assumption of the obligation to indemnify and hold harmless will include payment of any judgment amount awarded on any claim subject to the indemnity and hold harmless provision and any settlement amount as the indemnifying party may agree to pay to resolve such claim.

D. CONDITIONAL DEFENSE AND/OR INDEMNIFICATION

In agreeing to defend and/or indemnify each other, DEALER and HMA each may make their agreement conditional on the continued existence of the state of facts as then known to such party and may provide for the withdrawal of such defense and/or indemnification at such time as facts arise which, if known at the time of the original request for a defense and/or indemnification, would have caused either DEALER or HMA to refuse such request.

The party withdrawing from its agreement to defend and/or indemnify will give timely notice of its intent to withdraw. Such notice will be in writing and will be effective upon receipt. Moreover, the withdrawing party will be responsible for all costs and expenses of defense up to the date of receipt of the notice of withdrawal.

E. THE EFFECT OF SUBSEQUENT DEVELOPMENTS

In any case where a request for a defense and/or indemnification is rejected, or is not made at the outset of any legal proceeding, and subsequent developments in the case make clear that the allegations which initially precluded a request or an acceptance of a request for a defense and/or indemnification are no longer at issue therein or are without foundation, then any party having a right to a defense and/or indemnification hereunder may still tender such request for a defense and/or indemnification to the other party. Neither DEALER nor HMA, however, will be required to agree to such subsequent request for a defense and/or indemnification where that party would be unduly prejudiced by such a delay.

F. TIME TO RESPOND AND RESPONSIBILITIES OF THE PARTIES

DEALER and HMA will have thirty (30) days from the receipt of a request for a defense and/or indemnification to conduct an investigation to determine whether or not, or under what conditions, it may agree to defend and/or indemnify pursuant to this paragraph 18. If local rules require a response to the complaint in the lawsuit prior to the time provided hereunder for a response to such request, the requesting party will take all steps necessary, including obtaining counsel, to protect its own interest in the lawsuit until DEALER or HMA assumes the requested defense and/or indemnification. In the event that HMA or DEALER agrees to assume defense and/or indemnification obligations hereunder, such party will have the right to engage and direct counsel of its own choosing and, except in cases where the request is made pursuant to paragraph 18(E) herein, will have the obligation to reimburse the requesting party for all reasonable costs and expenses, including attorney fees, incurred prior to such assumption.

G. SURVIVAL OF OBLIGATION

The obligations of the parties set forth in this Paragraph 18 shall survive the termination of this Agreement.

19. MISCELLANEOUS PROVISIONS

A. ENTIRE AGREEMENT

Except as otherwise specifically provided for herein, this Agreement constitutes the entire agreement of the parties and contains all covenants, warranties or representations made by the parties to each other and supersedes any and all previous agreements, either oral or in writing, between the parties and relating to the subject matters covered herein.

B. AMENDMENT

No amendment of any portion of this Agreement will be valid or binding upon the parties hereto unless the same is approved in writing by an authorized representative of each of the parties.

C. RELEASE OF CLAIMS

Upon execution of this Agreement by DEALER, and in consideration of HMA entering into this Agreement, DEALER hereby releases HMA from any and all claims, demands, contracts and liabilities (including, but not limited to, statutory liabilities) known or unknown, of any kind whatsoever, arising out of or in connection with any prior agreements, business transactions, course of dealing, discussions or negotiations between the parties prior to the effective date hereof and regardless of whether DEALER knows or suspects the claim to exist in its favor at the time of

executing the release and whether or not if known to it, it would have materially affected its release hereunder. Notwithstanding any other provision herein, however, this release does not extend to any accounts payable by one party to the other as a result of the purchase of any Hyundai Products, audit adjustments or reimbursement for any services.

D. ASSIGNMENT

Except as provided in this Agreement, neither this Agreement nor the rights or obligations of either party hereunder may be sold, assigned, delegated or otherwise transferred without the prior written consent of the other party.

E. SEVERABILITY

If any term or provision of this Agreement, or the application thereof to any person or circumstance, will be contrary to any law or will be adjudged by any court or government agency to be invalid, void or unenforceable, such term or provision will be deemed deleted from this Agreement and the remaining provisions and any application thereof will continue in full force and effect without being impaired or invalidated in any way.

F. CAPTIONS

The various captions used in this Agreement are for organizational purposes only and may not be used to interpret the provisions hereof. In any case where the caption and the related text conflict, the text will govern.

G. GOVERNING LAW

This Agreement will be governed and construed according to the laws of the state in which DEALER is located.

H. WAIVERS

Any failure of either party at any time to require performance by the other party of any provision herein will not be deemed to be a waiver by such party of any subsequent breach or violation of the same or any other provision.

I. NOTICES

Unless otherwise specifically provided herein, any notice required to be given by either party to the other under or in connection with this Agreement will be in writing and delivered personally or by certified mail, return receipt requested and will be effective from the date of receipt. Notices to DEALER will be directed to DEALER or its representative at DEALER's place of business identified herein. Notices to HMA will be directed to the President of HMA at its national headquarters. In the event that any party refuses to accept delivery of notice hereunder, such notice will be effective on the date delivery is refused.

J. NEW AND SUPERSEDING DEALER AGREEMENTS

In the event any new and superseding form of Dealer agreement is offered by HMA to authorized Hyundai Dealers in general at any time prior to the expiration of the term of this Agreement, HMA may, by written notice to DEALER, terminate this Agreement and replace it with a new agreement in the new and superseding form for a term not less than the then unexpired term of

this Agreement. Unless otherwise agreed in writing, the rights and obligations of DEALER that may otherwise become applicable upon any termination or expiration of the term of this Agreement will not be applicable in the event of the execution by HMA and DEALER of any new or superseding Dealer agreement and the matured rights and obligations of either party hereunder will continue under the new agreement.

K. INDEPENDENT ENTITY

DEALER is an independently owned business entity. This Agreement does not make DEALER the agent or legal representative of HMA or FACTORY for any purpose whatsoever. DEALER is not granted any express or implied right or authority to assume or to create any obligation or responsibility on behalf of or in the name of HMA or FACTORY or to bind it (or them) in any manner whatsoever.

L. FORCE MAJEURE

Neither party will be liable for any breach of this Agreement to the extent caused by or resulting from prohibition or restriction by law or regulation of any government, fire, flood, storm, war, strike, lockout or other labor troubles, accident, riot, act of God or other events beyond that party's control.

M. NO FRANCHISE FEE

DEALER warrants and agrees that it has paid no fee, nor has it provided any goods or services in lieu of same, to HMA in consideration of entering into this Agreement and that the sole consideration for HMA's entering into this Agreement was DEALER's ability, integrity, assurance of personal services and expressed intention to deal fairly and equitably with HMA and the public and any other promises recited herein.

N. WAIVER OF TRIAL BY JURY

HMA and DEALER hereby waive, to the extent permitted by law, the right to trial by jury for all disputes, controversies or claims which may arise between DEALER and HMA out of or in connection with this Agreement, or its construction, interpretation, effect, performance or non-performance, termination or the consequences thereof, or in connection with any transaction contemplated between the parties.

O. TAXES

DEALER will pay all local, state, federal or other applicable taxes, including without limitation, sales taxes, use taxes, excise taxes, levied or based upon the sale of Hyundai Products by HMA to DEALER and will maintain accurate records of same for reporting purposes.

20. DEFINITIONS

The following terms, as used in this Agreement, will be defined exclusively as set forth below:

A. **Agreement:** This Agreement consists of the HMA Dealer Sales and Service Agreement entered into by DEALER and HMA and includes the Standard Provisions.

B. **Authorized Hyundai Dealer:** Dealers who are authorized by HMA to sell and service Hyundai Products, and to use the Hyundai Marks in connection therewith, pursuant to a duly executed Hyundai Dealer Sales and Service Agreement.

C. **DEALER Facilities:** The buildings, improvements, fixtures and equipment situated at the approved DEALER location(s).

D. **DEALER Location:** The location or locations, and any facilities located thereon, identified in paragraph 6, which HMA has approved for dealership operations.

E. **Dealership Operations:** All Dealer operations contemplated by this Agreement, including, without limitation, sale and servicing of Hyundai Products, use and display of Hyundai Marks, advertising and promotion of Hyundai Products, rental and leasing of Hyundai Motor Vehicles, sale of used cars, body shop work, and financing or insurance services, whether conducted directly or indirectly by DEALER.

F. **General Manager:** The person identified in paragraph 4 of the Agreement considered to be a "Dealer Operator" with full operational responsibility and authority for dealership operations.

G. **Hyundai Genuine Parts or Accessories:** All new or remanufactured Hyundai parts, accessories and equipment marketed by HMA and listed in HMA's parts catalog, or the functional equivalent thereof, as amended from time to time.

H. **Hyundai Marks:** The various Hyundai trademarks, service marks, names, logos and designs used by HMA in connection with Hyundai Products and which HMA authorizes DEALER to use in the sale and servicing of Hyundai Products.

I. **Hyundai Motor Vehicles:** All automobiles, trucks, vans, cab/chassis or other motor vehicles which FACTORY, in its sole discretion, sells to HMA for resale to authorized Hyundai Dealers.

J. **Hyundai Products:** All Hyundai Motor Vehicles, parts, accessories and equipment which FACTORY, in its sole discretion, and/or authorized suppliers sell to HMA for resale to authorized Hyundai Dealers.

K. **Hyundai Warranty Policies and Procedures Manual:** The current publication issued by HMA known as the Hyundai Warranty Policies and Procedures Manual, or its functional equivalent, as it may be revised or supplemented from time to time.

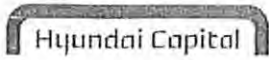
L. **Owner:** The person(s) identified in paragraph 3 of this Agreement.

M. **Standard Provisions:** The Standard Provisions are a part of all Hyundai Dealer Sales and Service Agreements and are fully incorporated therein by the express provision of paragraph 7 of the Agreement. The Standard Provisions commence with paragraph 10 to reflect continuity with the first nine paragraphs of the Agreement.

Hyundai Motor America
10550 Talbert Avenue
P.O. Box 20850
Fountain Valley, CA 92728-0850

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DD-0896 5/99
(Previous Revision:
DD-0896 12/98)

Exhibit K



INVENTORY LOAN AND SECURITY AGREEMENT

This INVENTORY LOAN AND SECURITY AGREEMENT (this "Agreement"), dated as of September 5, 2014, is entered into by and between HYUNDAI CAPITAL AMERICA, a California corporation ("Lender") having an address at 3161 Michelson Drive, Suite 1900, Attention: Commercial Credit, Irvine, CA 92612 and NEMET MOTORS, LLC, a New York limited liability company ("Dealer") having addresses at 144-02 Hillside Avenue, Jamaica, New York 11432 and 153-03 Hillside Avenue, Jamaica, New York 11432 (collectively, the "Premises").

Recitals

- A. Dealer acquires new and used motor vehicles ("Vehicles") from manufacturers, distributors, auctioneers and other sellers from time to time in the ordinary course of its business.
- B. Dealer desires that Lender finance Dealer's inventory of Vehicles, and Lender has agreed to do so on the terms and subject to the conditions set forth below.

Agreement

In consideration of the mutual covenants and agreements herein contained, Dealer and Lender agree as follows:

1. Definitions; Interpretation.

- (a) Defined Terms. For purposes of this Agreement, the following terms shall have the respective meanings given to them below:

"Application" shall mean the "Commercial Credit Application" submitted by Dealer to Lender on or prior to the date of this Agreement.

"Business Day" shall mean any day other than a Saturday, Sunday or other day on which commercial banks are authorized to close in Irvine, California.

"Change of Control" shall mean (i) the sale, transfer or other disposition, directly or indirectly, of thirty percent (30%) or more of the stock, partnership interests, membership interests or other equity interests in Dealer, whether in one transaction or a series of transactions, (ii) the sale, transfer or disposition (in one transaction or a series of transactions) of more than twenty percent (20%) of the assets of Dealer to any one or more Persons, except for the sale or lease of inventory in the ordinary course of Dealer's business, (iii) Dealer shall enter into any agreement with any one or more Persons to assume or take-over the operations or management of Dealer's business in any significant respect or (iv) the liquidation or dissolution of Dealer or the adoption of a plan by the stockholders, partners or members of Dealer relating to the dissolution or liquidation of Dealer.

"Date of Sale or Lease" shall mean the earliest to occur of (i) the date of delivery of the Vehicle to the customer, (ii) the date of the retail installment contract or lease for the Vehicle, (iii) the date title to the Vehicle is transferred by Dealer to any Person, (iv) the date Dealer receives any down payment for the Vehicle or (v) the date the sale is reported to Lender.

"Default" shall mean any event or condition that constitutes an Event of Default or that, with the giving of any notice, the passage of time, or both, would be an Event of Default.

"Default Rate" shall mean, with respect to any Advance, an interest rate equal to the interest rate otherwise applicable to such Advance (as set forth in the then current Variable Terms Addendum) plus 2% per annum.

"Event of Default" shall have the meaning set forth in Section 10.

"Governmental Authority" shall mean the government of the United States of America, or any political subdivision thereof, whether state or local, and any agency, authority, instrumentality, regulatory body, court, central bank or other entity exercising executive, legislative, judicial, taxing, regulatory or administrative powers or functions of or pertaining to government.

"Guarantor" shall mean any Person who executes a Continuing Guaranty and Subordination Agreement or a

Secured Continuing Guaranty and Subordination Agreement in favor of Lender in connection with the Obligations or otherwise guarantees all or any portion of the Obligations.

"Inventory" shall mean any "inventory," as such term is defined in the UCC, now owned or hereafter acquired by Dealer, and, in any event, shall include, without limitation, all new and used motor vehicles, parts and accessories that are held for sale or lease by Dealer.

"Lien" shall mean, with respect to any property, any security interest, mortgage, pledge, lien, charge or other encumbrance in, of, or on such property or the income therefrom, including the interest of a vendor or lessor under a conditional sale agreement, capital lease or other title retention agreement, or any agreement to provide any of the foregoing, and the filing of any financing statement or similar instrument under the UCC or comparable law of any jurisdiction.

"Loan Documents" shall mean, collectively, this Agreement and all exhibits, schedules and addenda hereto, the Application, each Assignment of Factory/Distributor Receivables, Continuing Guaranty and Subordination Agreement, Equity Account Agreement, Secured Continuing Guaranty and Subordination Agreement, Subordination Agreement, Subordination and Pledge Agreement, control agreement and all other documents, instruments, certificates and agreements delivered by or on behalf of any Loan Party to Lender in connection with this Agreement or any other Loan Document on or prior to the date of this Agreement.

"Loan Parties" shall mean, collectively, Dealer and Guarantors.

"Material Adverse Change" shall mean (i) a material adverse change in the business, prospects, operations, results of operations, assets, liabilities or condition (financial or otherwise) of Dealer, (ii) a material impairment of Dealer's ability to perform its obligations under the Loan Documents to which it is a party or of Lender's ability to enforce the Obligations or realize upon the Collateral, or (iii) a material impairment of the enforceability or priority of Lender's Liens with respect to the Collateral as a result of an action or failure to act on the part of Dealer, in each case as determined by Lender.

"Obligations" shall mean (i) any and all advances and all other obligations, liabilities and indebtedness of every kind, nature and description owing by Dealer to Lender, including principal, interest, charges, fees, costs and expenses, however evidenced, whether as principal, surety, endorser, guarantor or otherwise, arising under this Agreement or any other Loan Document, whether now existing or hereafter arising, whether arising before, during or after the initial or any renewal term of this Agreement or after the commencement of any case or proceeding with respect to Dealer under the United States Bankruptcy Code or any similar statute (including the payment of interest and other amounts which would accrue and become due but for the commencement of such case, whether or not such amounts are allowed or allowable in whole or in part in such case), whether direct or indirect, absolute or contingent, joint or



several, due or not due, primary or secondary, liquidated or unliquidated, or secured or unsecured and (ii) all other obligations, liabilities and indebtedness of every kind, nature and description owing by Dealer to Lender under or pursuant to any other agreement, guaranty or instrument, whether now existing or hereafter arising.

"Person" shall mean any natural person, corporation, limited liability company, trust, joint venture, association, company, partnership, Governmental Authority or other entity.

"UCC" shall mean the Uniform Commercial Code as in effect in the state in which the Premises are located and/or any other jurisdiction the laws of which may be applicable to or in connection with the creation, perfection or priority of any Lien on any Collateral.

"Variable Terms Addendum" shall mean the Variable Terms Addendum to this Agreement, as the same may be amended, supplemented, replaced or otherwise modified from time to time in accordance with the terms thereof.

(b) Interpretative Provisions.

- (i) All terms used herein that are defined in the UCC shall have the meanings given therein unless otherwise defined in this Agreement.
- (ii) All references to the plural herein shall also mean the singular and to the singular shall also mean the plural unless the context otherwise requires.
- (iii) All references to statutes and regulations shall include any amendments of the same and any successor statutes and regulations.
- (iv) All references to Dealer and Lender or to any other Person herein shall include their respective successors and assigns.
- (v) The words "hereof", "herein", "hereunder", "this Agreement" and words of similar import when used in this Agreement shall refer to this Agreement as a whole and not any particular provision of this Agreement and as this Agreement now exists or may hereafter be amended, modified, supplemented, extended, renewed, restated or replaced.
- (vi) The word "including" when used in this Agreement shall mean "including, without limitation" and the word "will" when used in this Agreement shall be construed to have the same meaning and effect as the word "shall".
- (vii) An Event of Default shall exist or continue unless and until such Event of Default is expressly waived by Lender in accordance with Section 18.

2. Discretionary Advances

- (a) In Lender's sole and absolute discretion, Lender may (but shall not be obligated to) make advances to Dealer ("Advances") from time to time in such amounts as may be requested by Dealer or in such lesser amounts as Lender may elect in its sole and absolute discretion for the purpose of Dealer's acquisition of Vehicles for its Vehicle inventory. Lender may condition the making of any Advance on the satisfaction of one or more conditions in its sole and absolute discretion. Lender may also, even if no Event of Default has occurred, and without any cause whatsoever, refuse to make any Advance requested by Dealer.
- (b) Advances hereunder may be made by Lender:
 - (i) On Dealer's behalf to manufacturers, distributors, dealers, auctioneers and other sellers of Vehicles to Dealer;
 - (ii) Directly to Dealer for the purpose of Dealer's acquisition or holding of Vehicle inventory; or

(iii) On Dealer's behalf to a third party which has previously financed Dealer's Vehicle inventory.

- (c) Lender is authorized and requested to deal directly with manufacturers, distributors, dealers, auctioneers or other sellers of Vehicles in arranging payment on Dealer's behalf. Lender may rely upon any invoice or advice from any such manufacturer, distributor, dealer, auctioneer or other seller as being correct in all respects and Lender is relieved and released from any responsibility or liability for the correctness, validity or authenticity of any invoice or other instrument presented to it for payment or for the existence, quality, condition, identity, value, title or delivery of property purported to be represented by any such invoice or other instrument.
- (d) Lender will establish and may from time to time, in its sole and absolute discretion, increase or decrease the limit on Advances to be made to or on behalf of Dealer and the makes, models, types and age of Vehicles eligible for Advances.

3. Interest and Charges

- (a) All Advances made by Lender pursuant to Section 2 hereof, and all other indebtedness of Dealer to Lender under this Agreement, shall bear interest from the date of advance by Lender to the date of payment by Dealer at the rate set forth in the Variable Terms Addendum in effect from time to time. All interest hereunder shall be computed on the basis of a year of 365 days (or 366 days in a leap year) and shall be payable for the actual number of days elapsed. Dealer agrees to pay all fees and charges set forth in the Variable Terms Addendum in effect from time to time.
- (b) Interest on the total amount owed by Dealer under this Agreement, together with any applicable fees and charges, shall be billed by Lender monthly and shall be due and payable ten (10) calendar days after the date of billing by Lender.
- (c) If any amount payable by Dealer under any Loan Document is not paid when due (without regard to any applicable grace periods), whether at stated maturity, by acceleration or otherwise, such amount shall thereafter bear interest at a per annum rate equal to the Default Rate to the fullest extent permitted by applicable law. Furthermore, upon the request of Lender, while any Event of Default exists, Dealer shall pay interest on the principal amount of all outstanding Obligations hereunder at a per annum rate equal to the Default Rate to the fullest extent permitted by applicable law. Accrued and unpaid interest on past due amounts (including interest on past due interest) shall be due and payable upon demand.
- (d) To the fullest extent permitted by applicable law, if any payment under this Agreement is not made on or before its due date, Lender may at its option assess a late charge of 5% of the overdue amount. Dealer acknowledges that such late charge represents a reasonable sum considering all of the circumstances existing on the date of this Agreement and represents a fair and reasonable estimate of the costs that will be sustained by Lender due to the failure of Dealer to make timely payments. Dealer further agrees that proof of actual damages would be costly and inconvenient. Such late charge shall be paid without prejudice to the right of Lender to collect any other amounts provided to be paid or to declare a default under this Agreement or from exercising any other rights and remedies of Lender.
- (e) In the event Dealer elects to participate in an insurance program providing comprehensive and collision coverage on Vehicles floored by Lender under this Agreement and for which Lender provides reporting and other services, the premiums for such coverage paid by Lender shall be billed each month by Lender to Dealer, who shall pay such monthly charges to Lender upon receipt of such billing or as otherwise directed by Lender.



- (f) Notwithstanding anything herein to the contrary, if at any time the interest rate applicable to any Advance, together with all fees, charges and other amounts which are treated as interest on such Advance under applicable law (collectively the "Charges"), shall exceed the maximum lawful rate (the "Maximum Rate") which may be contracted for, charged, taken, received or reserved by Lender in accordance with applicable law, the rate of interest payable in respect of such Advance hereunder, together with all Charges payable in respect thereof, shall be limited to the Maximum Rate and, to the extent lawful, the interest and Charges that would have been payable in respect of such Advance but were not payable as a result of the operation of this Section 3(e) shall be cumulated and the interest and Charges payable to Lender in respect of other Advances or periods shall be increased (but not above the Maximum Rate therefor) until such cumulated amount, together with interest thereon at the Federal Funds Effective Rate to the date of repayment, shall have been received by Lender.
4. **Payment by Dealer.** Dealer shall pay Lender all indebtedness created pursuant to this Agreement as follows:
- (a) Dealer agrees to immediately pay to Lender the outstanding amount of each Advance by Lender on a Vehicle upon the sale, lease or trade of such Vehicle or on the date such Vehicle is destroyed, stolen, lost or confiscated; provided, however, that unless an Event of Default has occurred and is continuing, Dealer shall have the privilege of paying such amount to Lender in accordance with the terms of the Variable Terms Addendum. Dealer acknowledges and agrees that the above privilege is solely for the administrative convenience of Dealer and may be revoked without prior notice at any time if, in the sole judgment of Lender, Dealer has failed to comply with the terms hereof. Notwithstanding anything herein to the contrary, the outstanding Advance(s) on any sold Vehicle(s) for which Dealer has received but not yet remitted payment shall be due and payable at the time of any audit.
- (b) Without limiting Dealer's obligations under Section 4(a) above, Dealer shall make each of the payments described in the Variable Terms Addendum in effect from time to time, which payments may vary based on the type of Vehicle (new, used, program, demonstrator or service loaner).
- (c) In the event that, in the sole judgment of Lender, the value of any Vehicle upon which an Advance has been made becomes reduced, such as by the introduction of new model year motor vehicles, Lender may, in its sole and absolute discretion, require Dealer to remit all or a portion of the Advance on any such Vehicle and Dealer hereby agrees to pay all or a portion of such Advance upon verbal or written demand by Lender.
- (d) In the event (i) any new Vehicle upon which Lender has made an Advance is not sold by Dealer within 365 days of such Advance or (ii) any used Vehicle upon which Lender has made an Advance is not sold by Dealer within four (4) months of such Advance, Lender may, in its sole and absolute discretion, require Dealer, and Dealer promises, to immediately repay all or a portion of such Advance upon verbal or written demand by Lender.
- (e) At its option, Dealer may, upon notice to Lender, at any time or from time to time, voluntarily prepay the Obligations in whole or in part without premium or penalty.
- (f) Any and all payments by or on account of the Obligations shall be made by Dealer without setoff, counterclaim or deduction. All payments by Dealer hereunder shall be made to Lender by Automated Clearing House in United States Dollars and in immediately available funds not later than 2:00 pm Pacific Time on the date specified herein or in the Variable Terms Addendum. All payments received by Lender after 2:00 pm Pacific time shall be deemed received on the next succeeding Business Day and any applicable interest or fee shall continue to accrue.
- (g) Dealer irrevocably waives the right to direct the application of any and all payments at any time hereafter received by Lender from or on behalf of Dealer, and Dealer irrevocably agrees that Lender shall have the continuing exclusive right to apply and reapply any and all such payments against the then due and owing Obligations of Dealer as Lender may deem advisable. In the absence of a specific determination by Lender with respect thereto, all payments shall be applied first to unpaid fees, costs and expenses then due and payable under this Agreement or the other Loan Documents, second to accrued interest then due and payable under this Agreement or the other Loan Documents and finally to reduce the principal amount of outstanding Advances.
- (h) In addition to any rights and remedies of Lender provided by law, Lender shall have the right at any time, without prior notice to or consent of Dealer, any such notice and consent being expressly waived by Dealer to the extent permitted by applicable law, to set-off and apply against the Obligations any amount owing from Lender to Dealer, whether under this Agreement or under any other agreement between Lender and Dealer. The aforesaid right of set-off may be exercised by Lender against Dealer or against any trustee in bankruptcy, debtor in possession, assignee for the benefit of creditors, receiver or execution, judgment or attachment creditor of Dealer or against anyone else claiming through or against Dealer or such trustee in bankruptcy, debtor in possession, assignee for the benefit of creditors, receiver, or execution, judgment or attachment creditor, notwithstanding the fact that such right of set-off may not have been exercised by Lender at any prior time. Lender shall endeavor to promptly notify Dealer after any such set-off and application made by Lender; provided, however, that the failure to give such notice shall not affect the validity of such set-off and application.
5. **Demonstrators.** From time to time Dealer may use one or more Vehicles for demonstration and promotional purposes ("Demonstrator Service") pursuant to the following terms and conditions:
- (a) No Event of Default shall have occurred and be continuing.
- (b) Dealer shall give prior notification to Lender of its intent to place a Vehicle into Demonstrator Service, and in that connection shall also provide it to Lender the Vehicle's vehicle identification number, date that the Vehicle is placed or will be placed in Demonstrator Service, date that the Vehicle will be removed from Demonstrator Service, and any additional information or documents that Lender may request from time to time.
- (c) Dealer shall obtain Lender's prior approval to place a Vehicle in Demonstrator Service.
- (d) Upon Lender's request, Dealer shall execute and deliver to Lender a demonstrator agreement in form and substance satisfactory to Lender.
- (e) Lender shall have the right to limit the number of Vehicles in Demonstrator Service at any one time in its sole and absolute discretion.
6. **Termination.**
- (a) Lender may terminate this Agreement:
- (i) Immediately upon the occurrence of an Event of Default; or
- (ii) Without the occurrence of an Event of Default, and with or without cause, by giving sixty (60) days prior written notice of termination to Dealer, which the parties agree shall constitute a reasonable notice period and a sufficient, fair and reasonable period of time to enable Dealer to secure financing from another source. Dealer understands and agrees that upon the expiration of such sixty (60) day period, it shall pay to Lender all Obligations created and outstanding under this

Agreement, including principal, interest, charges, fees, costs, and expenses.

- (b) At any time on or after the effective date of termination of this Agreement, Lender may, in its sole and absolute discretion, accelerate the entire indebtedness due from Dealer under the Loan Documents and Dealer promises to pay such indebtedness upon demand. Any such termination shall not alter or affect the rights and obligations of the parties with regard to any Obligations incurred prior to the effective date of any such termination.
7. **Representations and Warranties.** Dealer hereby represents and warrants to Lender the accuracy and completeness of each of the following statements as of the date of this Agreement and that such statements shall be deemed as continuing and reaffirmed at the time of each Advance hereunder:
- (a) **Name; State of Organization; Collateral Locations.**
- (i) The exact legal name of Dealer is as set forth on the signature page of this Agreement. Dealer has not, during the five (5) years prior to the date of this Agreement, been known by or used any other name or been a party to any merger or consolidation, or acquired all or substantially all of the assets of any Person, or acquired any of its property or assets out of the ordinary course of business, except as disclosed by Dealer in the Application.
- (ii) Dealer is an entity of the type and incorporated, organized or formed in the jurisdiction set forth in the introductory paragraph of this Agreement.
- (iii) The principal place of business of Dealer is the Premises and, as of the date of this Agreement, its only other places of business and the only other locations of Collateral, if any, are set forth in the Application, subject to the right of Dealer to establish new locations in accordance with Section 9(b) below. The Application correctly identifies any of such locations as of the date of this Agreement that are not owned by Dealer and sets forth the owners and/or operators thereof.
- (b) **Existence, Power and Authority.** Dealer (i) is a corporation, partnership or limited liability company duly incorporated, organized or formed, validly existing and in good standing under the laws of the jurisdiction of its incorporation, organization or formation, (ii) has all requisite power and authority and all requisite governmental licenses, authorizations, consents and approvals to (A) own its assets and carry on its business and (B) execute, deliver and perform its obligations under the Loan Documents to which it is a party, (iii) is duly qualified and is licensed and in good standing under the laws of each jurisdiction where its ownership, lease or operation of properties or the conduct of its business requires such qualification or license, and (iv) is in compliance with all laws, rules and regulations applicable to Dealer.
- (c) **No Conflict.** The execution, delivery and performance by Dealer of each Loan Document to which Dealer is a party have been duly authorized by all necessary corporate, partnership, limited liability company or other organizational action, and do not and will not (i) contravene the terms of the charter, articles of organization, by-laws, partnership agreement, operating agreement or any other organizational document of Dealer; (ii) conflict with or result in any breach or contravention of, or the creation of any Lien under, (A) any contract or agreement to which Dealer is a party or (B) any order, injunction, writ or decree of any Governmental Authority or any arbitral award to which Dealer or its property is subject; or (iii) violate any applicable law, rule or regulation.
- (d) **Third Party Approvals.** No approval, consent, exemption, authorization, or other action by, or notice to, or filing with, any Governmental Authority or any other Person is necessary or required in connection with the execution, delivery or performance by, or enforcement against, Dealer of this Agreement or any other Loan Document.
- (e) **Financial Statements; No Material Adverse Change.** All financial statements relating to any Loan Party (other than an individual) which have been or may hereafter be delivered by any Loan Party to Lender have been prepared in accordance with generally accepted accounting principles applied on a consistent basis and fairly present in all material respects the financial condition and the results of operation of such Loan Party as at the dates and for the periods set forth therein. No Material Adverse Change has occurred since the date of the most recent financial statements of Dealer furnished to Lender by or on behalf of Dealer.
- (f) **Collateral.** Dealer has good and marketable title to the Collateral, has not made any prior sale, pledge, encumbrance, assignment or other disposition of any of the Collateral, and the Collateral is free from all encumbrances and rights of setoff of any kind except the Liens in favor of Lender created by this Agreement.
- (g) **Priority of Liens.** Unless Lender has agreed in writing, pursuant to an intercreditor agreement, to accept a junior security interest or lien, and except for purchase money security interests in equipment, the Liens granted to Lender under this Agreement and the other Loan Documents constitute valid and perfected first priority security interests in and liens on the Collateral.
- (h) **Licenses.** Each material license, distributorship, franchise, dealer sales and service agreement and similar agreement issued to Dealer, or to which Dealer is a party, is in full force and effect. To the best of Dealer's knowledge, no party to any such license or agreement is in default or violation thereof. Dealer has not received any written notice or threat of cancellation or termination of any such license or agreement.
- (i) **Survival of Warranties; Cumulative.** All representations and warranties contained in this Agreement or any of the other Loan Documents shall survive the execution and delivery of this Agreement and shall be deemed to have been made again to Lender on the date of each additional Advance hereunder and shall be conclusively presumed to have been relied on by Lender regardless of any investigation made or information possessed by Lender. The representations and warranties set forth herein shall be cumulative and in addition to any other representations or warranties which Dealer shall now or hereafter give, or cause to be given, to Lender.
8. **Collateral.**
- (a) **Grant of Security Interest.** As collateral security for the prompt payment and performance in full when due of the Obligations (whether at stated maturity, by acceleration or otherwise) and any other indebtedness and obligations of Dealer to Lender now existing or hereafter incurred, created or arising, Dealer hereby grants to Lender a continuing security interest in and lien on all personal property and fixtures of Dealer, whether now owned or hereafter acquired or existing, whether or not specifically financed by Lender and wherever located, including Dealer's right, title, and interest in and to the following (collectively, the "**Collateral**"):
- (i) All inventory, including new and used motor vehicles, parts, accessories, display or demonstration items, returns and repossessions and other personal property held for sale or lease, and all additions and accessions thereto;
- (ii) All general intangibles, including payment intangibles, contract rights, tax refunds, license rights, franchise rights, trademarks, service marks, trade names, goodwill, choses or things in action, computer programs, computer discs and tapes, catalogs, purchase orders, and customer lists;

- (iii) All equipment, including new and used machinery, equipment, tools, appliances, office furniture, computer equipment, signs and leasehold improvements;
- (iv) All accounts, accounts receivable and rights to payment of money of any kind, including all accounts, accounts receivable, general intangibles, contract rights and rights to payment of money due or to become due to Dealer from any manufacturer or distributor of motor vehicles, and from any of their respective divisions, subsidiaries and affiliates, including those arising out of Dealer holdbacks (the percentage of the dealer vehicle price payable to the manufacturer for each such motor vehicle which is retained by the manufacturer or distributor for payment to Dealer), rebates, subsidies, subventions, credits, incentives of any kind or nature, cash management accounts, excise tax refunds payable to Dealer, any dealer participation or other account maintained by Lender in the name of Dealer, and payment rights under any termination assistance provisions or similar provisions in any franchise or dealer sales and service agreement to which Dealer is a party;
- (v) All chattel paper, documents, instruments, deposit accounts, investment property, commercial tort claims, fixtures, letters of credit, letter-of-credit rights, supporting obligations, goods, money, books and records; and
- (vi) All cash and non-cash proceeds and products of the foregoing, including insurance proceeds and all claims against third parties for loss or damage to or destruction of the Collateral.

Any terms used in the foregoing collateral description that are defined in the UCC shall be construed and defined as set forth in the UCC.

- (b) **Perfection of Security Interest; Further Assurances.** Dealer hereby authorizes Lender to file, without the signature of Dealer where permitted by applicable law, one or more financing or continuation statements, and amendments thereto, relating to the Collateral and to the inclusion of additional collateral in the financing statements. Dealer hereby ratifies any and all financing statements or amendments previously filed by Lender in any jurisdiction. Dealer agrees to (i) defend the Collateral against all claims and demands of all Persons at any time claiming the same or any interest therein, except for Liens expressly permitted by Lender, (ii) comply with the requirements of all state and federal laws in order to grant to Lender valid and perfected first priority security interests in the Collateral, with perfection, in the case of any investment property, deposit account or letter of credit, being effected by giving Lender control of such investment property, deposit account or letter of credit and (iii) do whatever Lender may request from time to time to evidence or perfect the security interest in the Collateral granted herein and otherwise effect the purposes of this Agreement and the other Loan Documents, including filing notices of liens, cooperating with Lender's representatives, obtaining waivers from landlords and mortgagees and from warehousemen and their landlords and mortgagees and paying claims which might, if unpaid, become a Lien on the Collateral. Lender may, in its discretion, obtain or require Dealer to deliver to Lender any manufacturer's certificate of origin, certificate of title or other document of title for each Vehicle and Lender may retain such document in its possession until each such Vehicle is sold by Dealer and Dealer's indebtedness related thereto is paid.

9. Covenants.

(a) Maintenance of Existence; Name Changes, Etc.

- (i) Dealer shall at all times preserve, renew and keep in full force and effect its corporate, partnership or limited liability company existence and all rights and franchises with respect thereto and, except those that expire or

otherwise terminate in accordance with their terms, maintain in full force and effect all registrations, approvals, authorizations, leases, contracts, consents, franchises and permits necessary to carry on the business as presently or proposed to be conducted.

- (ii) Dealer shall not change its name unless each of the following conditions is satisfied: (A) Lender shall have received at least thirty (30) days' prior written notice from Dealer of such proposed change in its name, which notice shall accurately set forth the new name; (B) Lender shall have received a copy of the amendment to the certificate of incorporation, certificate of formation or other organizational document of Dealer providing for the name change certified by the Secretary of State or other applicable government official of the jurisdiction of incorporation or organization of Dealer or other similar Governmental Authority as soon as it is available; and (C) Dealer shall execute and deliver to Lender any and all documents, including loan agreements, security agreements, and amendments and addenda, which Lender may require.
- (iii) Dealer shall not change its chief executive office or its mailing address or organizational identification number (or if it does not have one, shall not acquire one) unless Lender shall have received at least thirty (30) days' prior written notice from Dealer of such proposed change, which notice shall set forth such information with respect thereto as Lender may require and Lender shall have received such agreements as Lender may reasonably require in connection therewith. Dealer shall not change its type of organization, jurisdiction of organization or other legal structure except with the prior written consent of Lender.
- (b) **New Collateral Locations.** Dealer may open a new location within the United States provided Dealer gives Lender at least ten (10) Business Days prior written notice of the intended opening of any such new location and obtains all necessary approvals from its motor vehicle franchisor(s) and all necessary permits, endorsements or licenses from any Governmental Authority having jurisdiction over such matters.
- (c) **Compliance with Laws, Regulations, Etc.** Dealer shall, at all times, comply in all material respects with all laws, rules, regulations, licenses, approvals, orders and permits applicable to it and duly observe in all material respects all requirements of any Governmental Authority.
- (d) **Payment of Taxes and Claims.** Dealer shall duly pay and discharge all taxes, assessments, contributions and governmental charges upon or against it or its properties or assets (including the Collateral), except for taxes the validity of which are being contested in good faith by appropriate proceedings diligently pursued and with respect to which adequate reserves have been set aside on its books.
- (e) **Books and Records; Reporting**
 - (i) Dealer will maintain proper books of record and account, in which full, true and correct entries shall be made of all financial transactions and matters involving the assets and business of Dealer.
 - (ii) Dealer shall provide to Lender (A) Dealer's monthly factory/distributor financial statements not later than twenty (20) days after the end of each calendar month, (B) if prepared by Dealer, Dealer's adjusted calendar year-end factory/distributor financial statements not later than January 31 of the immediately following calendar year, (C) if prepared, Dealer's balance sheet as at the end of each fiscal year, and the related statements of income or operations, shareholders' equity and cash flows for such fiscal year, in each case reviewed by an independent certified public accountant acceptable to Lender, not later than 120 days after the end of each fiscal year of Dealer, and (D) Dealer's corporate tax

returns for each calendar year not later than the earlier of (1) thirty (30) days after the filing thereof and (2) September 30 of the immediately following year.

- (iii) As soon as practicable, and in any event within three (3) Business Days after any officer, director, shareholder, partner, manager or member of Dealer becomes aware of the existence of any condition or event which constitutes a Default or Event of Default hereunder, telephonic notice specifying the nature and period of existence thereof, and, no more than two (2) Business Days after such telephonic notice, written notice again specifying the nature and period of existence thereof and specifying what action Dealer is taking or proposes to take to cure such Default.
- (iv) Promptly after request by Lender, Dealer shall deliver to Lender such data and information regarding the operations, business affairs, assets and financial condition of the Loan Parties, or compliance with the terms of this Agreement, as from time to time may be requested by Lender.
- (f) **Inventory.** With respect to the Inventory: (i) Dealer shall protect and secure the Inventory at all times; (ii) Dealer shall not sell, lease or otherwise dispose of the Inventory except in the ordinary course of business, but understands and agrees that upon and during the continuation of any Event of Default set forth in Section 10(a)(f), its privilege to sell Inventory shall be and remain revoked such that no Inventory may be sold, leased or disposed of, whether in the ordinary course of business or otherwise; (iii) Dealer shall at all times maintain Inventory records, keeping correct and accurate records itemizing and describing the kind, type, quality and quantity of Inventory and Dealer's cost therefor; (iv) Dealer shall conduct a physical count of the Inventory at any time or times as Lender may request, and promptly following such physical inventory shall supply Lender with a report in the form and with such specificity as may be satisfactory to Lender concerning such physical count; (v) Dealer shall not move or permit to be moved any Inventory from the Premises without the prior written consent of Lender, except for sales of Inventory in the ordinary course of its business; (vi) Dealer shall use, store and maintain the Inventory with all reasonable care and caution and in accordance with applicable standards of any insurance and in conformity with applicable laws; (vii) Dealer shall assume all responsibility and liability arising from or relating to the use, sale or other disposition of the Inventory; (viii) Dealer shall keep the Inventory in good and marketable condition; and (ix) Dealer shall not loan or rent to any Person any Vehicle, the purchase of which is financed in whole or in part with any Advance, except for Vehicles loaned to customers on a short term basis while their vehicles are being serviced by Dealer so long as Dealer has obtained Lender's prior written consent to the use of the specific Vehicle(s) as service loaners.
- (g) **Insurance.** Dealer, at its sole cost and expense, shall obtain and maintain at all times Insurance covering such risks (including, by way of example, fire, theft, vandalism, mischief, collision, acts of terrorism, acts of God, property damage, personal injury and public liability), in such amounts, containing such terms, in such form, for such periods, and written by such companies as is customary in their industry and is satisfactory to Lender. Dealer shall also obtain and maintain endorsements acceptable to Lender for such insurance naming Lender as an additional Insured and as lender's loss payee. Each insurer shall agree by endorsement upon the policy or policies of insurance issued by it to Dealer as required above, or by independent instruments furnished to Lender, that it will give Lender at least thirty (30) days prior written notice before any such policy or policies of insurance shall be altered or canceled, and that no act or default of Dealer, or any other Person, shall affect the right of Lender to recover under such policy or policies of insurance required above or to pay any premium in whole or in part relating thereto. Dealer shall, prior to the

Initial Advance hereunder, furnish Lender with a Certificate or Certificates of Insurance verifying that such insurance coverage meeting Lender's requirements is issued and in effect. Dealer shall, at least thirty (30) days prior to the expiration of each such policy of insurance, furnish Lender with evidence of renewals or "insurance binders" evidencing renewal thereof. In the event Dealer fails to obtain or maintain or provide satisfactory evidence of insurance required hereunder, Lender, without waiving any Event of Default, may, but shall have no obligation to do so, obtain and maintain such policies of insurance and pay such premiums and take any other action with respect to such policies which Lender deems advisable, and any such amounts paid by Lender shall be paid by Dealer to Lender upon demand and shall be part of the Obligations secured by the Collateral under this Agreement.

- (h) **Inspection and Audit Rights.** From time to time, (i) Dealer shall permit any representatives designated by Lender, at any time and without notice to Dealer, to (A) visit the Premises and its other properties for the purposes of inspecting, verifying and auditing the Collateral and Dealer's books and records, (B) examine and make copies of and extracts from its books and records, and (C) discuss its affairs, finances and condition with its officers, employees and independent accountants, all at such times and as often as deemed necessary or appropriate by Lender and (ii) if at any time Lender desires to conduct an electronic or remote audit of Dealer's books and records, Dealer shall provide Lender or its designee full access to Dealer's computer systems and take such other action as may be requested by Lender or its designee to enable Lender to conduct such electronic or remote audit. Lender may, at its option, charge Dealer for all reasonable fees, costs and expenses incurred by Lender in conducting an audit hereunder, and Dealer shall pay such amounts to Lender upon notice to Dealer of such charges and making demand for payment thereof. Dealer's violation of or failure or refusal to promptly and fully cooperate in connection with any provision of this section shall constitute an Event of Default under Section 10(a) of this Agreement.
- (i) **Further Assurances.** At the request of Lender at any time and from time to time, Dealer shall, at its sole expense, duly execute and deliver, or cause to be duly executed and delivered, such further agreements, documents and instruments, and do or cause to be done such further acts as may be necessary or proper to evidence, perfect, maintain and enforce the Liens and the priority thereof in the Collateral and to otherwise effectuate the provisions or purposes of this Agreement or any other Loan Document.
10. **Events of Default.** The occurrence or existence of any one or more of the following events shall constitute an "Event of Default" under this Agreement:
- (a) A default by (i) Dealer in the payment of any indebtedness under (A) this Agreement or any other Loan Document or (B) any other agreement between Lender and Dealer; (ii) Dealer in the performance of any term, covenant, condition or provision contained in (A) this Agreement or any other Loan Document or (B) any other agreement between Lender and Dealer; or (iii) any Guarantor under any Loan Document or under any other agreement between Lender and Guarantor; or
- (b) Any Loan Party shall (i) apply for or consent to the appointment of a receiver, trustee, liquidator or custodian of itself or of all or a substantial part of its property, (ii) be unable, or admit in writing its inability, to pay its debts generally as they mature, (iii) make a general assignment for the benefit of its or any of its creditors, (iv) be dissolved or liquidated in full or in part, (v) become insolvent (as such term may be defined or interpreted under any applicable statute), or (vi) commence a voluntary case or other proceeding seeking liquidation, reorganization or other relief with respect to itself or its debts under any bankruptcy, insolvency or other similar law now or hereafter in effect or consent to any such

- relief or to the appointment of or taking possession of its property by any official in an involuntary case or other proceeding commenced against it; or
- (c) An involuntary proceeding shall be commenced or an involuntary petition shall be filed seeking (i) liquidation, reorganization or other relief in respect of any Loan Party or its debts, or of a substantial part of its assets, under any Federal, state or foreign bankruptcy, insolvency, receivership or similar law now or hereafter in effect or (ii) the appointment of a receiver, trustee, custodian, sequestrator, conservator or similar official for any Loan Party or for a substantial part of its assets, and, in any such case, such proceeding or petition shall continue undismissed for 60 days or an order or decree approving or ordering any of the foregoing shall be entered; or
 - (d) Dealer (i) fails to make any payment when due (whether by scheduled maturity, required prepayment, acceleration, demand, or otherwise) in respect of any indebtedness or contingent obligation (other than indebtedness hereunder) having an aggregate principal amount of more than \$50,000.00, or (ii) fails to observe or perform any other agreement or condition relating to any such indebtedness or contingent obligation or contained in any instrument or agreement evidencing, securing or relating thereto, or any other event occurs, the effect of which default or other event is to cause, or to permit the holder or holders of such indebtedness or the beneficiary or beneficiaries of such contingent obligation to cause, with the giving of notice if required, such indebtedness to be demanded or to become due or to be repurchased, prepaid, defeased or redeemed (automatically or otherwise), or an offer to repurchase, prepay, defease or redeem such indebtedness to be made, prior to its stated maturity, or such contingent obligation to become payable; or
 - (e) Any judgment for the payment of money is rendered against any Loan Party in excess of \$50,000.00 individually or in the aggregate (to the extent not covered by insurance where the insurer has assumed responsibility for such judgment in writing) and shall remain undischarged or unvacated for a period in excess of thirty (30) days or execution shall at any time not be effectively stayed, or any judgment other than for the payment of money, or injunction, attachment, garnishment or execution is rendered against any Loan Party or any of the Collateral having a value in excess of \$50,000.00 at all other times; or
 - (f) Dealer shall default under, or fail to maintain in good standing, any franchise, license, permit, dealer sales and service agreement or other agreement necessary for the proper and/or full operation of Dealer's business, or Dealer's dealer number shall be deactivated, whether voluntarily or involuntarily, by Hyundai Motor America or Kia Motors America, Inc.; or
 - (g) A default or breach occurs under any agreement between Dealer and any creditor of Dealer that entered into a subordination, intercreditor or other similar agreement with or in favor of Lender, or any creditor that has entered into such an agreement with or in favor of Lender breaches any term of such agreement, or Dealer makes any payment on account of indebtedness which has been subordinated to the Obligations in whole or in part except with the prior written consent of Lender; or
 - (h) Any bank or securities intermediary terminates or notifies Lender of its intent to terminate any deposit account control agreement, securities account control agreement or similar agreement between Lender and such bank or securities intermediary; or
 - (i) Any Guarantor (i) revokes or terminates or purports to revoke or terminate or fails to perform any of the terms, covenants, conditions or provisions of the guaranty agreement to which he, she or it is subject or (ii) dies, dissolves or suspends or discontinues doing business; or
 - (j) The termination, expiration, or cancellation of, or the occurrence of any default (beyond any applicable grace or cure period) under, the lease for the Premises which is in effect on the date of this Agreement, unless Dealer enters into a replacement lease satisfactory to Lender; or
 - (k) Any loss, theft, damage or destruction, or taking or forfeiture of any item or items of Collateral or other property of Dealer occurs that is not adequately covered by insurance; or
 - (l) Any Change of Control; or
 - (m) Any representation or warranty made by Dealer or any other Loan Party in any of the Loan Documents shall prove to be untrue or inaccurate in any respect as of the date on which such representation or warranty is made or deemed made; or
 - (n) A default by Nemet Motors, LLC or any other person or entity affiliated with, owned by or under common ownership with Dealer in the payment of any indebtedness or performance of any obligation under any agreement between Lender and such person or entity; or
 - (o) Any Material Adverse Change; or
 - (p) Any proceeds of the Collateral, any working capital, or any other Dealer monies shall be commingled with amounts belonging to any other Person or any other business owned by Dealer or its affiliates, or Dealer deposits or holds such proceeds, working capital or other Dealer monies in any account accessible by or titled in the name of any other Person.
11. **Rights and Remedies Upon Default.** Upon the occurrence of an Event of Default, Lender shall have the following rights and remedies:
- (a) Lender may declare the unpaid principal amount of all outstanding Advances, all interest accrued and unpaid thereon, and all other amounts owing or payable hereunder or under any other Loan Document to be immediately due and payable, without presentment, demand, protest or other notice of any kind, all of which are hereby expressly waived by Dealer; provided, however, that upon the occurrence of an actual or deemed entry of an order for relief with respect to Dealer under the United States Bankruptcy Code, the unpaid principal amount of all outstanding Advances, all interest accrued and unpaid thereon, and all other amounts owing or payable hereunder or under any other Loan Document shall automatically become due and payable, without any further act on the part of Lender.
 - (b) Lender may exercise all rights and remedies available to it under this Agreement and the other Loan Documents.
 - (c) In addition to all other rights and remedies available to Lender under this Agreement or any other Loan Document, Lender shall have all of the rights and remedies of a secured party under the UCC.
 - (d) Without limiting the generality of the foregoing:
 - (i) Lender may (A) without demand or notice to Dealer or any other person, collect, receive, or take actual or constructive possession of the Collateral or any part thereof and for that purpose Lender may enter upon any premises on which the Collateral is located and remove the Collateral therefrom or render it inoperable, and/or (B) sell, lease, or otherwise dispose of the Collateral, or any part thereof, in one or more parcels at public or private sale or sales, at Lender's offices or elsewhere, for cash, on credit, or for future delivery, and upon such other terms as Lender may deem commercially reasonable or otherwise as may be permitted by law.
 - (ii) Lender may exercise any and all rights and remedies of Dealer under or in respect of the Collateral, including any and all rights of Dealer to demand or otherwise require payment of any amount under, or performance of any provision of, any of the Collateral.

- (iii) Lender may require Dealer to remit to Lender all proceeds of sale of each item of Collateral immediately upon receipt thereof by Dealer.
- (iv) Lender may, without the necessity of first bringing an action or proceeding against Dealer before a court of competent jurisdiction, appoint a representative ("Keeper") to take any one or more of the following actions: (A) to enter the Premises and other locations where Dealer conducts business, and to remain on the Premises for such time as the Keeper may deem necessary and appropriate; (B) to take constructive or actual possession or control over the Vehicles and other Collateral; (C) to take possession and control over certificates of origin and title with respect to each Vehicle comprising part of Dealer's inventory; (D) to take constructive or actual possession and control over all documents, books, records, papers, accounts, chattel paper, electronic chattel paper, instruments, promissory notes, payment intangibles, supporting obligations, contract rights, software or any similar types of tangible or intangible property relating to or comprising part of the Collateral; (E) to receive payment of Collateral proceeds; (F) to give notice to any bank or financial institution at which any deposit account is maintained and in which proceeds of Collateral are deposited, to turn over such proceeds directly to Lender and/or (G) to take whatever additional actions the Keeper may deem within his or her sole judgment and discretion to be necessary and proper to protect and preserve the Collateral, and to protect, preserve and carry out Lender's rights and remedies under this Agreement and under applicable law. The Keeper need not be independent, and may be an officer or employee of Lender. The Keeper shall have no fiduciary duty or obligation to any Loan Party. Dealer shall fully cooperate with the Keeper and shall provide the Keeper with such offices and other facilities as the Keeper may reasonably request. Dealer shall pay the reasonable fees and expenses of the Keeper, which obligation shall be secured by the Collateral. Lender's appointment of a Keeper shall not impair or in any way prejudice the rights of Lender to exercise any of its security rights and remedies as provided under this Agreement or any other Loan Document, or under applicable law.
- (v) Lender shall have the right, and Dealer hereby authorizes Lender and its designees, to enter upon the premises wherever Collateral may be and remove same or to store same at such location, without any obligation for rent or other reimbursement to Dealer or Dealer's landlord, pending sale or other disposition thereof. Lender may render any Collateral unusable to Dealer.
- (vi) Lender shall have the right, and Dealer hereby authorizes Lender, either in Lender's name or Dealer's, to contact any account debtor of Dealer, including, without limitation, account debtors obligated or claimed to be obligated under accounts of the types described in Section 8(a)(iv) and (v), in order to verify the amount and status of any such debt, and to ask for, demand, collect, sue for, receive, compromise, settle and give receipts for, and arrange for direct payment to Lender of, any and all such accounts. Dealer further authorizes Lender to contact any third party having possession of Collateral to arrange return thereof directly to Lender.

12. Sale of Collateral.

- (a) Lender shall have the right at any public sale or sales, and, to the extent permitted by applicable law, at any private sale or sales, to bid (which bid may be, in whole or in part, in the form of cancellation of indebtedness) and become a purchaser of the Collateral or any part thereof free of any right or equity of redemption on the part of Dealer, which right or equity of redemption is hereby expressly waived and released by

Dealer. Upon the request of Lender, Dealer shall assemble the Collateral and make it available to Lender at any place designated by Lender that is reasonably convenient to Lender. Unless the Collateral is perishable or threatens to decline speedily in value, or is of a type customarily sold on a recognized market (in which event Lender shall provide Dealer such notice as may be practicable under the circumstances), Lender shall give Dealer at least ten (10) days prior written notice of the date, time, and place of any proposed public sale, and of the date after which any private sale or other disposition of the Collateral may be made. Dealer agrees that such written notice shall satisfy all requirements for notice to Dealer which are imposed under the UCC or other applicable law with respect to the exercise of Lender's rights and remedies upon default. Lender shall not be obligated to make any sale of Collateral if it shall determine not to do so, regardless of the fact that notice of sale of Collateral may have been given. Lender may, without notice or publication, adjourn any public or private sale or cause the same to be adjourned from time to time by announcement at the time and place fixed for sale, and such sale may, without further notice, be made at the time and place to which the same was so adjourned. Dealer shall be liable for all reasonable expenses of locating, retaking, holding, storing, reconditioning, repairing, and preparing the Collateral for sale, and all reasonable attorneys' fees, legal expenses, and other costs and expenses incurred by Lender in connection with the collection of the Obligations and the enforcement of Lender's rights under this Agreement. Dealer shall remain liable for any deficiency if the proceeds of any sale or other disposition of the Collateral applied to the Obligations are insufficient to pay the Obligations in full. Dealer waives all rights of marshaling, valuation, and appraisal in respect of the Collateral. Any cash held by Lender as Collateral and all cash proceeds received by Lender in respect of any sale of, collection from, or other realization upon all or any part of the Collateral may, in the discretion of Lender, be held by Lender as collateral for, and then or at any time thereafter applied in whole or in part by Lender against, the Obligations in such order as Lender may determine in its sole discretion. Any surplus of such cash or cash proceeds and interest accrued thereon, if any, held by Lender and remaining after payment in full of all the Obligations shall be promptly paid over to the Dealer or to whomsoever may be lawfully entitled to receive such surplus; provided that Lender shall have no obligation to invest or otherwise pay interest on any amounts held by it in connection with or pursuant to this Agreement.

- (b) Dealer agrees that the sale by Lender of any Collateral, repossessed by Lender, to the manufacturer, distributor or seller thereof, or to any person designated by such manufacturer, distributor or seller, at the invoice cost to Dealer, less any credits or other discounts granted to Dealer with respect thereto, and less reasonable costs, including the costs of transportation and reconditioning, shall be deemed to be a commercially reasonable means of disposing of the same. Dealer further agrees that the following means of disposing of Collateral are commercially reasonable: (i) return by Lender of any Collateral, repossessed by Lender, to the manufacturer, distributor or seller thereof, in accordance with any repurchase agreement or other agreement between Dealer or Lender and such manufacturer, distributor or seller, (ii) sale of repossessed Vehicles at a physical auction open only to motor vehicle dealers and (iii) sale of repossessed Vehicles or other Collateral by online auction, including an online auction open only to motor vehicle dealers. Notwithstanding the foregoing, it is expressly understood that such means of disposal shall not be exclusive, and that Lender shall have the right to dispose of any Collateral repossessed hereunder by any commercially reasonable means.
- (c) Lender, in the exercise of Lender's rights and remedies upon default, may conduct one or more going out of business sales, in Lender's own right or by one or more agents and

contractors. Such sale(s) may be conducted upon any premises owned, leased, or occupied by Dealer.

- (d) Dealer waives demand, notice of default or dishonor, notice of payment and nonpayment, notice of any default, nonpayment at maturity, release, compromise, settlement, extension, or renewal of accounts, documents, instruments, chattel paper, and guarantees held by Lender on which Dealer is liable.

13. Power of Attorney. DEALER HEREBY IRREVOCABLY CONSTITUTES AND APPOINTS LENDER (AND ALL PERSONS DESIGNATED BY LENDER), WITH FULL POWER OF SUBSTITUTION, AS ITS TRUE AND LAWFUL ATTORNEY-IN-FACT WITH FULL IRREVOCABLE POWER AND AUTHORITY IN THE NAME OF DEALER OR IN ITS OWN NAME, TO TAKE, WHEN AN EVENT OF DEFAULT EXISTS, ANY AND ALL ACTIONS AND TO EXECUTE ANY AND ALL DOCUMENTS AND INSTRUMENTS WHICH LENDER AT ANY TIME AND FROM TIME TO TIME DEEMS NECESSARY OR DESIRABLE TO ACCOMPLISH THE PURPOSES OF THIS AGREEMENT AND, WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, DEALER HEREBY GIVES LENDER THE POWER AND RIGHT ON BEHALF OF DEALER AND IN ITS OWN NAME TO DO ANY OF THE FOLLOWING AFTER THE OCCURRENCE OF AN EVENT OF DEFAULT, WITHOUT THE CONSENT OF DEALER:

- (a) to demand, sue for, collect, or receive, in the name of Dealer or in Lender's own name, any money or property at any time payable or receivable on account of or in exchange for any of the Collateral and, in connection therewith, endorse checks, notes, drafts, acceptances, money orders, documents of title, or any other instruments for the payment of money under the Collateral or any policy of insurance;
- (b) to pay or discharge taxes, Liens, or other encumbrances levied or placed on or threatened against the Collateral;
- (c) to notify post office authorities to change the address for delivery of Dealer's mail to an address designated by Lender and to receive, open, and dispose of mail addressed to Dealer;
- (d) (i) to direct account debtors and any other parties liable for any payment under any of the Collateral to make payment of any and all monies due and to become due thereunder directly to Lender or as Lender shall direct; (ii) to receive payment of and receipt for any and all monies, claims and other amounts due and to become due at any time in respect of or arising out of any Collateral; (iii) to sign and endorse any certificates of title, bills of sale, invoices, freight or express bills, bills of lading, storage or warehouse receipts relating to the Collateral; (iv) to commence and prosecute any suit, action, or proceeding at law or in equity in any court of competent jurisdiction to collect the Collateral or any part thereof and to enforce any other right in respect of any Collateral; (v) to defend any suit, action, or proceeding brought against Dealer with respect to any Collateral; and (vi) to make, settle, compromise, or adjust any claims under or pertaining to any of the Collateral (including claims under any policy of insurance).

THIS POWER OF ATTORNEY IS A POWER COUPLED WITH AN INTEREST AND SHALL BE IRREVOCABLE UNTIL PAYMENT IN FULL OF ALL OF THE OBLIGATIONS. Lender shall be under no duty to exercise or withhold the exercise of any of the rights, powers, privileges, and options expressly or implicitly granted to Lender in this Agreement, and shall not be liable for any failure to do so or any delay in doing so. Neither Lender nor any Person designated by Lender shall be liable for any act or omission or for any error of judgment or any mistake of fact or law, except any of the same resulting from its or their gross negligence or willful misconduct. This power of attorney is conferred on Lender solely to protect, preserve, maintain, and realize upon its security interest in the Collateral. Lender shall not be responsible for any decline in the value of the Collateral and shall not be required to take any steps to preserve rights against prior parties or to protect, preserve, or maintain any Lien given to secure the

Collateral. Dealer hereby releases Lender and its officers, employees and designees from any liabilities arising from any act or acts under this power of attorney and in furtherance thereof, whether of omission or commission, except as a result of Lender's own gross negligence or willful misconduct as determined pursuant to a final non-appealable order of a court of competent jurisdiction.

- 14. **Right to Cure.** Lender may, at its option, (a) cure any default by Dealer under any material agreement with a third party that affects the Collateral, its value or the ability of Lender to collect, sell or otherwise dispose of the Collateral or the rights and remedies of Lender therein or the ability of Dealer to perform its obligations hereunder or under any of the other Loan Documents, (b) pay or bond on appeal any judgment entered against Dealer, (c) pay or discharge taxes, liens, security interests or such other encumbrances as may attach to the Collateral; (d) pay for insurance on the Collateral, (e) pay for the maintenance, appraisal or reappraisal, and preservation of the Collateral and (f) pay any amount, incur any expense or perform any act which, in Lender's judgment, is necessary or appropriate to preserve, protect, insure or maintain the Collateral and the rights of Lender with respect thereto. Lender may add any amounts so expended to the Obligations, such amounts to be repayable by Dealer on demand. Lender shall be under no obligation to effect such cure, payment or bonding and shall not, by doing so, be deemed to have assumed any obligation or liability of Dealer. Any payment made or other action taken by Lender under this Section 14 shall be without prejudice to any right to assert an Event of Default hereunder and to proceed accordingly.

- 15. **Indemnification.** Dealer shall indemnify and hold Lender and its officers, directors, agents, employees, advisors, contractors and counsel (each such Person being an "Indemnitee"), harmless from and against any and all losses, claims, damages, liabilities, costs or expenses (including reasonable attorneys' fees and expenses) imposed on, incurred by or asserted against any of them in connection with any litigation, investigation, claim or proceeding, whether commenced or threatened, which in any manner or to any extent is related to the negotiation, preparation, execution, delivery, enforcement, performance or administration of this Agreement, any other Loan Documents, or any undertaking or proceeding related to any of the transactions contemplated hereby or any act, omission, event or transaction related or attendant thereto, including amounts paid in settlement, court costs, and the reasonable attorneys' fees and expenses of counsel; except that Dealer shall not have any obligation under this Section 15 to indemnify an Indemnitee with respect to a matter covered hereby to the extent resulting from the gross negligence or willful misconduct of such Indemnitee as determined pursuant to a final, non-appealable order of a court of competent jurisdiction (but without limiting the obligations of Dealer as to any other Indemnitee or to such Indemnitee to the extent not resulting from gross negligence or willful misconduct). To the extent permitted by applicable law, Dealer shall not assert, and Dealer hereby waives, any claim against any Indemnitee, on any theory of liability, for special, indirect, consequential or punitive damages (as opposed to direct or actual damages) arising out of, in connection with, or as a result of, this Agreement, any of the other Loan Documents or any undertaking or transaction contemplated hereby. No Indemnitee referred to above shall be liable for any damages arising from the use by unintended recipients of any information or other materials distributed by it through telecommunications, electronic or other information transmission systems in connection with this Agreement or any of the other Loan Documents or the transaction contemplated hereby or thereby. All amounts due under this Section 15 shall be payable upon demand. The foregoing indemnity, agreements and waivers shall survive the payment of the Obligations and the termination of this Agreement.

- 16. **Attorney's Fees, Costs and Expenses and Taxes.** Dealer agrees (a) to pay or reimburse Lender for all costs and expenses incurred in connection with the perfection of liens granted under this Agreement and under the other documents executed in connection herewith, and the consummation and administration of the transactions contemplated by this Agreement and the other

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documents executed in connection herewith, including all fees and expenses of attorneys and auditors, all search, filing, recording and appraisal charges and fees and taxes related thereto, and other out-of-pocket expenses incurred by Lender; (b) to pay and indemnify Lender for any present or future stamp, value added or documentary taxes or any other excise or property taxes, charges, or similar levies that arise from any payment made hereunder or from the execution, delivery, performance, recordation, or filing of, or otherwise with respect to, this Agreement or any other Loan Document; and (c) to pay or reimburse Lender for all costs and expenses incurred in connection with the enforcement, attempted enforcement, or preservation or pursuit of any rights or remedies under this Agreement or the other documents executed in connection herewith, including all such costs and expenses incurred during any "workout" or restructuring and during any legal proceeding, including any court or jury trial, arbitration or other alternative dispute resolution proceeding, bankruptcy proceeding, and during any appeal of any of the foregoing, and shall entitle Lender to payment for all fees and expenses of attorneys, auditors, accountants, keepers and other outside experts and consultants retained by Lender. All amounts due under this Section shall be payable within ten (10) Business Days after demand therefor. The agreements in this Section 16 shall survive the termination of this Agreement.

17. **Notice.** Except as otherwise expressly provided in this Agreement, all consents, notices, demands, requests, approvals or other communications given under this Agreement shall be in writing and shall be deemed sufficiently given or rendered if delivered by (a) hand delivery, (b) certified mail (return receipt requested), (c) first class U.S. mail, or (d) by a nationally recognized overnight delivery service making receipted deliveries, addressed to Lender or Dealer, as applicable, at the address set forth in the first paragraph of this Agreement or to such other address(es) as Lender or Dealer may designate as its new address(es) for such purpose by notice given to the other in accordance with the provisions of this paragraph. Any such approval, consent, notice, demand, request or other communication shall be deemed to have been given (a) if by hand delivery, when actually received, (b) if by certified mail, upon execution of return receipt, (c) if by regular first class mail, four business days after deposit, and (d) if by overnight delivery service, upon delivery.
18. **Amendments in Writing.** No amendment or waiver of any provision of this Agreement or any other Loan Documents shall be effective unless in writing signed by the party against whom enforcement of such amendment or waiver is sought, and each such amendment or waiver shall be effective only in the specific instance and for the specific purpose for which given.
19. **Waiver of Bond.** In the event Lender seeks to take possession of any or all of the Collateral by judicial process, Dealer hereby irrevocably waives, to the fullest extent permitted by applicable law, any bonds and any surety or security relating thereto that may be required by applicable law as an incident to such possession, and waives any demand for possession prior to the commencement of any such suit or action.
20. **Successors and Assigns; Assignment.** This Agreement shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns permitted hereby, except that Dealer may not assign or transfer any of its rights or obligations under this Agreement or any other Loan Document without the prior written consent of Lender (and any other attempted assignment or transfer by Dealer shall be null and void). Lender may at any time assign all or a portion of its rights and obligations under this Agreement without the consent of Dealer. Nothing in this Agreement, express or implied, shall be construed to confer upon any Person (other than the parties hereto and their respective successors and assigns permitted hereby) any legal or equitable right, remedy or claim under or by reason of this Agreement.
21. **Entire Agreement.** Except as otherwise provided or referred to herein, there are no other agreements or understandings, either oral or in writing, between the parties affecting this Agreement or relating to any of the subject matters covered by this Agreement. This Agreement and the other Loan Documents constitute the entire contract between the parties relating to the subject matter hereof and supersede any and all previous agreements and understandings, oral or written, relating to the subject matter hereof.
22. **Information.** Dealer authorizes Lender to make such inquiries of third parties concerning the financial condition or business operations of Dealer as Lender may deem necessary. Dealer further specifically agrees and authorizes Lender to inspect, examine, and secure from Hyundai Motor America and each of its affiliates (collectively, "Hyundai") or from Kia Motors America, Inc. and each of its affiliates (collectively, "Kia"), at any time copies of all financial statements and other financial data, and all other statements, reports, records, and other information that Dealer has furnished previously, or may hereafter furnish, to Hyundai or Kia, or that Hyundai or Kia may have prepared or obtained, or may hereafter prepare or obtain, in connection with any audit or review by it of the Dealer's business, and Hyundai and Kia may consider Dealer's execution of this Agreement as its authority to release the foregoing to Lender. Dealer further authorizes Lender to furnish Hyundai and/or Kia at any time copies of all financial statements and other financial data, and all other statements, reports, records and other information (a) that Dealer previously has furnished, or may hereafter furnish, to Lender, or (b) that Lender may have prepared or obtained, or may hereafter prepare or obtain, in connection with any audit or review of Dealer's business by Lender.
23. **No Waiver.** The failure of Lender to seek redress for violation of, to insist upon the strict performance of, or to take any action in connection with the breach of any obligation, covenant or condition of this Agreement or any other document executed in connection herewith shall not be construed as a waiver or relinquishment for the future performance of such obligation, covenant or condition, but the same shall continue and remain in full force and effect with respect to any subsequent breach, act or omission. The receipt by Lender of any amount payable or owed pursuant to this Agreement or any other document executed in connection herewith or any other sums with knowledge of the breach of any obligation, covenant or condition of this Agreement or any other document executed in connection herewith shall not be deemed a waiver of such breach. No payment by Dealer or receipt by Lender of a lesser amount than any amount due or owing pursuant to this Agreement or any other document executed in connection herewith shall be deemed to be other than a payment on account of the earliest such amount due and owing, or as Lender may elect to apply such payment, nor shall any endorsement or statement on any check or any letter accompanying any check or payment be deemed an accord and satisfaction, and Lender may accept such check or payment without prejudice to Lender's right to recover the balance of any amount due and owing or pursue any other remedy provided by this Agreement or any other document executed in connection herewith. No delay on the part of Lender in exercising any right, power or privilege hereunder shall operate as a waiver thereof nor shall any single or partial exercise of any right, power or privilege hereunder preclude other or further exercise thereof or the exercise of any other right, power or privilege.
24. **Severability.** Any provision of this Agreement held to be invalid, illegal or unenforceable in any jurisdiction shall, as to such jurisdiction, be ineffective to the extent of such invalidity, illegality or unenforceability without affecting the validity, legality and enforceability of the remaining provisions hereof; and the invalidity of a particular provision in a particular jurisdiction shall not invalidate such provision in any other jurisdiction.
25. **Choice of Law.** This Agreement shall be governed by and construed in accordance with the laws of the state of New York (the "Forum State").
26. **Headings.** Section headings used herein are for convenience of reference only, are not part of this Agreement and shall not affect the construction of, or be taken into consideration in interpreting, this Agreement.

27. **Counterparts; Effectiveness.** This Agreement may be executed in counterparts (and by different parties hereto on different counterparts), each of which shall constitute an original, but all of which when taken together shall constitute a single contract. This Agreement shall become effective when it shall have been executed by Lender and when Lender shall have received counterparts hereof which, when taken together, bear the signature of Dealer, and thereafter shall be binding upon and inure to the benefit of the parties hereto and their respective successors and assigns. Delivery of an executed counterpart of a signature page of this Agreement by facsimile or email shall be effective as delivery of a manually executed counterpart of this Agreement.

28. **Arbitration.** All claims or disputes arising out of or relating to this Agreement, or the breach thereof, whether such claims or disputes sound in contract, tort, trade practices, equity, statutory or common law or otherwise, shall be determined by arbitration administered by the American Arbitration Association in accordance with its Commercial Financial Disputes Arbitration Rules (the "Rules"). To the extent applicable in civil actions in the Forum State, the Forum State's substantive and procedural laws, including, without limitation, rules of civil procedure, rules of evidence, and rules of discovery, shall apply. Judgment on the award rendered by the arbitrator may be entered in any court having jurisdiction thereof, and the parties waive any objection based upon a lack of personal jurisdiction in the court where enforcement is sought. There shall be one arbitrator, which arbitrator shall be a retired judge of any court in the Forum State and experienced in commercial finance and lending transactions. Resolution of the claim or dispute shall be based solely upon the substantive law governing the claims and defenses pleaded, and the arbitrator may not invoke any basis (including, but not limited to, notions of what is deemed "just and equitable" pursuant to AAA Commercial Rule R-43) other than such controlling law. The award shall be in writing, signed by the arbitrator, and shall include a statement setting forth the reasons for the disposition of any claim. The award shall include findings of fact and conclusions of law. The arbitrator shall award to the prevailing party, if any, as determined by the arbitrator, the arbitrator's fees together with all of its attorney's fees and expenses as such attorney's fees, costs and expenses are defined in this Agreement.

Nothing in the preceding paragraph, or otherwise, nor the exercise of any right to arbitration, nor the commencement or pendency of any proceeding, shall limit the right of any party to this Agreement: (1) to seek judicial equitable relief, or other equitable relief available to it under applicable statutory and/or case law including, but not limited to, injunctive relief and the appointment of a receiver; or (2) to exercise any self-help rights or any other rights or remedies available to it by contract or applicable statutory or case law (including but not limited to the filing of an involuntary petition in bankruptcy, the right of set off, attachment, recoupment, foreclosure, or repossession) with respect to its extension of credit,

the protection and preservation of collateral, the liquidation and realization of collateral, the protection, continuation and preservation of lien rights and priorities, the collection of indebtedness, and the processing and payment or return of checks, whether such occurs before, during or after the pendency of any arbitration proceeding. The institution and maintenance of an action for judicial relief or pursuit of provisional or ancillary rights or remedies or exercise of self-help remedies, all as provided herein, and the pursuit of any such rights or remedies, shall not constitute a waiver of the right or obligation of any party to this Agreement, including the plaintiff seeking judicial relief or remedies, to submit a dispute to arbitration, including disputes that may arise from the exercise of such rights. The arbitrator shall not have the power to order specific performance of any obligation or duty of any party to this Agreement or to issue injunctions in connection therewith or otherwise. The parties agree that the duty to arbitrate disputes hereunder extends beyond the date of the expiration or termination of this Agreement, and beyond the date of the fulfillment of any repayment obligations of any party hereunder. In the event of any conflict between the Rules and this Section 28, the provisions of this Section 28 shall control.

BY AGREEING TO THIS BINDING ARBITRATION PROVISION, BOTH LENDER AND DEALER GIVE UP ANY AND ALL RIGHTS TO TRIAL BY JURY.

BY INITIALING BELOW, EACH OF DEALER AND LENDER ACKNOWLEDGES THAT IT HAS READ, UNDERSTANDS AND AGREES TO THE ABOVE ARBITRATION PROVISIONS.

LENDER'S INITIALS:



DEALER'S INITIALS:



29. **Jury Waiver.** TO THE MAXIMUM EXTENT PERMITTED BY LAW, LENDER AND DEALER KNOWINGLY, VOLUNTARILY, AND AFTER CONSULTING OR HAVING HAD THE OPPORTUNITY TO CONSULT WITH LEGAL COUNSEL OF EACH PARTIES' RESPECTIVE CHOICE, AGREE THAT, IN THE EVENT OF LITIGATION BETWEEN THE PARTIES REGARDING THE PERFORMANCE OR ENFORCEMENT OF THIS AGREEMENT, OR IN ANY OTHER MANNER RELATED TO THIS AGREEMENT, THE PARTIES, FOR THEIR MUTUAL BENEFIT AND INTENDING TO REDUCE LITIGATION EXPENSES, HEREBY WAIVE ANY RIGHT TO TRIAL BY JURY IN ANY SUCH ACTION, SUIT OR CLAIM.

LENDER'S INITIALS:



DEALER'S INITIALS:



[Signatures on Next Page]



IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be executed under seal as of the date set forth in the introductory paragraph of this Agreement.

HYUNDAI CAPITAL AMERICA, a California corporation

NEMET MOTORS, LLC, a New York limited liability company

By: [Signature] (Seal)

By: [Signature] (Seal)

Name: Sam Frobe

Name: Scott A. Perlestein, Sr.

Title: Senior Director, Commercial Credit

Title: Manager and President

Date: 11/28/14

Date: 8/21/14

State of New York

County of Queens } ss.:

On the 21 day of August in the year 2014, before me, the undersigned, personally appeared SCOTT PERLESTEIN, personally known to me or proved to me on the basis of satisfactory evidence to be the individual(s) whose name(s) is (are) subscribed to the within instrument and acknowledged to me that he/she/they executed the same in his/her/their capacity(ies), and that by his/her/ their signature(s) on the instrument, the individual(s), or the person upon behalf of which the individual(s) acted, executed the instrument.

[Signature]
(SIGNATURE AND OFFICE OF PERSON TAKING ACKNOWLEDGMENT, ALONG WITH REQUIRED PRINTED, TYPED OR STAMPED DATA)

Judith A. Doran
Notary Public, State of N.Y.
Qualified In Queens County
#01D04878042
Commission Expires 2/23/2015

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VARIABLE TERMS ADDENDUM TO INVENTORY LOAN AND SECURITY AGREEMENT

This Variable Terms Addendum to Inventory Loan and Security Agreement (this "Addendum") is entered into by and between Hyundai Capital America, a California corporation ("Lender"), and Nemet Motors, LLC, a New York limited liability company ("Dealer") with reference to that certain Inventory Loan and Security Agreement dated as of September 5, 2014 (the "ILSA"; capitalized terms used herein without definition shall have the meanings set forth therein) between Lender and Dealer.

INTEREST RATES, CURTAILMENT AND MATURITY DATES

For New, Demonstrator and Service Loaner Vehicles:

Interest Rate: Index Rate minus 0.26% per annum. As used herein, "Index Rate" shall mean the floating commercial loan rate of Bank of America, N.A. announced from time to time as its "prime rate" or "base rate" (herein called "prime rate"). Any change in the Bank of America, N.A. prime rate shall effect immediately a corresponding change in the Index Rate. Notwithstanding anything expressed or implied herein to the contrary, it is recognized that the Bank of America, N.A. prime rate and the Index Rate are not necessarily the rates of interest charged by Bank of America, N.A. or Lender to their respective most creditworthy customers.

Each Advance on a Demonstrator Vehicle (as defined below) shall be due and payable in full on the earlier of (a) twelve (12) months from the date such Advance is made by Lender and (b) the first date such Demonstrator Vehicle has 6,000 miles on its odometer. Dealer agrees to pay a monthly amount equal to 2.00% of the original principal amount of each Advance on a Demonstrator Vehicle, commencing on the four (4) month anniversary of the date of such Advance and continuing through the eleven (11) month anniversary of the date of such Advance. "Demonstrator Vehicles" shall mean current model year or 1-year old Hyundai or Kia vehicles used for demonstration or promotional purposes.

Each Advance on a Service Loaner Vehicle (as defined below) shall be due and payable in full twelve (12) months from the date such Advance is made by Lender. Dealer agrees to pay a monthly amount equal to 1.00% of the original principal amount of each Advance on a Service Loaner Vehicle, commencing on the one (1) month anniversary of the date of such Advance and continuing through the eleven (11) month anniversary of the date of such Advance. "Service Loaner Vehicles" shall mean current model year or 1 year-old Hyundai or Kia vehicles that are loaned by Dealer to its customers for use while their vehicles are being serviced by Dealer.

The repayment schedule(s) noted above are in addition to and not in lieu of Dealer's obligation to repay Advances in accordance with Section 4 of the ILSA.

OTHER TERMS

Changes to Interest Rates, Charges and Certain Definitions: Dealer hereby acknowledges and agrees that Lender may at any time, in its sole discretion and without Dealer's consent, change (i) the definition of the Index Rate, (ii) the percentages specified in excess of the Index Rate, (iii) any charges hereunder (including, without limitation, adding new charges to this Addendum) and/or (iv) the definitions of Demonstrator Vehicles, and Service Loaner Vehicles, upon not less than five (5) days prior written notice to Dealer by Lender specifying such changes and the effective date(s) thereof.

FLOORPLAN PAYMENT REQUIREMENTS APPLICABLE TO ALL VEHICLES

So long as no Event of Default has occurred and is continuing, each Advance on a Vehicle shall be due and payable in full on the earlier of (a) the second (2nd) business day after the first to occur of (i) the funding of the retail installment contract or lease for such Vehicle, (ii) Dealer's receipt of payment in full for such Vehicle, (iii) the date of delivery of such Vehicle to another dealer in trade or in connection with a sale transaction or (iv) the date such Vehicle is destroyed, stolen, lost or confiscated, or (b) the fifteenth (15th) calendar day after the Date of Sale or Lease of such Vehicle. The foregoing payment requirements are in addition to and not in lieu of Dealer's obligation to repay Advances in accordance with Section 4 of the ILSA.

FINANCIAL COVENANTS

Dealer shall maintain a Current Ratio (as defined below) of not less than 1.10:1 at all times. "Current Ratio" shall mean (a) the total dollar amount of Dealer's current assets (including any last in first out "LIFO" adjustments) less any current intangible assets, divided by (b) the total dollar amount of Dealer's current liabilities.

Dealer shall not permit the Tangible Net Worth Ratio to exceed 7.5:1 at any time. "Tangible Net Worth Ratio" shall mean (a) Dealer's total liabilities plus forty percent (40%) of any LIFO adjustments minus subordinated debt, divided by (b) Dealer's net worth (minus any value for goodwill, trademarks, patents, copyrights, organizational expense and other similar intangible assets, plus subordinated debt, plus sixty percent (60%) of any LIFO adjustments).

Effective as of September 5, 2014.

HYUNDAI CAPITAL AMERICA, a California corporation

NEMET MOTORS, LLC, a New York limited liability company

By: [Signature]

By: [Signature]

Name: Sam Frobe

Name: Scott A. Perlstein, Sr.

Title: Senior Director, Commercial Credit

Title: Manager and President

Date: 11/28/14

Date: 11/26/14

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

STRATOSAUDIO, INC.,

Plaintiff,

v.

HYUNDAI MOTOR AMERICA,

Defendant.

Case No. 6:20-cv-01125-ADA

**REPLY IN SUPPORT OF HYUNDAI MOTOR AMERICA'S
MOTION TO DISMISS FOR IMPROPER VENUE**

StratosAudio argues HMA does not dispute the first two of the three venue prongs. ECF No. 21 (“Opp.”) at 2. To the contrary, none of the prongs is satisfied here because HMA does not have a regular and established place of business in this district. ECF No. 12 (“Mot.”) at 3–5.

I. STRATOSAUDIO MISUNDERSTANDS THE VENUE FRAMEWORK

StratosAudio fundamentally misunderstands the Federal Circuit’s explanation of the patent venue framework in *In re Cray*, 871 F.3d 1355 (Fed. Cir. 2017). There, the court held that even where a defendant’s employee is working from home and regularly conducts the defendant’s business in the district, the plaintiff must still show that there is a “regular and established place of business” in the district that is a “place *of the defendant.*” *Id.* at 1363, 1366 (emphasis added). Contrary to StratosAudio’s repeated arguments, *Cray* did not hold (or even mention) that the “place of the defendant” prong can be met by satisfying one of two separate tests, a ratification test or a control test. *Opp.* at 3. Instead, *Cray* explained that “control” is a “consideration” for whether an employer ratifies an employee’s home office (*i.e.*, one test, not two). *Cray*, 871 F.3d at 1363. As explained below, HMA does not ratify any location in this district, and HMA’s lack of control over dealerships firmly disproves ratification.

Moreover, StratosAudio ignores the Federal Circuit’s recent holding in *In re Google*, 949 F.3d 1338, 1345 (Fed. Cir. 2020), that “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 1344–45 (emphasis added). In that case, the court determined that defendant Google did not have an employee at a third party’s place of business, and the third party contractor did not meet the high bar of agency. *Id.* at 1345–46. Despite a contractual arrangement between Google and a third party, the court also determined that venue was improper because the business conducted by the third party was not the business of Google. *Id.* at 1347 (“The venue statute should be read to exclude agents’

activities . . . that are merely connected to, but do not themselves constitute, the defendant's conduct of business"). *Google* refused to impute the employees or activities of a third party contractor to the defendant, and *Cray* did not even involve third party employees or activities.

Here, StratosAudio's venue theory is largely based on HMA's contractual relationship with certain third party dealerships. However, venue is improper because StratosAudio has failed to plead that HMA has an employee or other agent conducting HMA's business at any place of business (including dealerships) in this district. Mot. at 5. Indeed, a dealership agreement cited by StratosAudio explicitly states that the dealership is not an agent of HMA:

DEALER is an independently owned business entity. This Agreement ***does not make DEALER the agent or legal representative of HMA . . . for any purpose whatsoever.*** DEALER is not granted any express or implied right or authority to assume or to create any obligation or responsibility on behalf of or in the name of HMA . . . or to bind it . . . in any manner whatsoever.

ECF No. 22-10 at 30 (emphasis added).

StratosAudio also fails to plead that any dealerships in this district conduct HMA business, as opposed to dealership business. Mot. at 5. To the contrary, the dealership agreement StratosAudio cites demonstrates the dealerships are not conducting the business of HMA. *See* ECF No. 22-9 at 1. In the agreement, HMA agrees to allow the dealership to "buy the Hyundai Products" and to engage in the "sale and servicing of Hyundai Products and at the location(s) approved herein." *Id.* In exchange, the dealership "agrees to," *inter alia*, "[e]ffectively promote and sell Hyundai Products" in a "professional[]" and "first class" manner. *Id.* In essence, HMA is in the business of selling vehicles to professional dealerships, and there is no evidence that any HMA employee or agent is conducting that activity at the dealerships. Instead, dealership employees are in the business of selling vehicles to consumers, which Texas law prohibits HMA from engaging in. Mot. at 4; *see also Google*, 949 F.3d at 1347 ("The venue

statute should be read to exclude agents' activities . . . that are merely connected to, but do not themselves constitute, the defendant's conduct of business . . .").

Other district courts have found that under these facts venue is improper. *See, e.g., Omega Patents, LLC v. Bayerische Motoren Werke AG*, No. 20-01907, 2020 U.S. Dist. LEXIS 248567, at *13–14 (N.D. Ga. Dec. 21, 2020); *W. View Research, LLC v. BMW of North Am., LLC*, No. 16-2590, 2018 WL 4367378, at *6–7 (S.D. Cal. Feb. 5, 2018). StratosAudio mischaracterizes these cases, arguing that they improperly created a “rigid ‘ownership’ test.” Opp. at 13. But those cases explicitly discuss *Cray* and find that its ratification test is unmet based on similar facts. *See* Mot. at 4–11 (citing, *inter alia*, *Omega*, 2020 U.S. Dist. LEXIS 248567 at *13–14; *W. View*, 2018 WL 4367378 at *6–7). Venue is similarly improper here.

A. Common Branding And Website Referrals Do Not Create Venue

StratosAudio argues venue is proper under its “ratification” theory because there are five dealerships in this district that “include the name ‘Hyundai’” and display the Hyundai trademark. Opp. at 3. This argument is misleading, as the dealerships are not named “Hyundai Motor America,” they are named, for example, “Greg May Hyundai” or “Roger Beasley Hyundai,” specifically identifying themselves as distinct from HMA. *See* ECF No. 22-1. Additionally, this district, and others, have held that common use of trademarks is insufficient to establish venue. Mot. at 9–11 (citing, *inter alia*, *Bd. of Regents v. Medtronic PLC*, No. 17-0942, 2018 U.S. Dist. LEXIS 153269, at *6–7 (W.D. Tex. July 19, 2018) (Yeakel, J.)). Rather, common branding reflects “a coordinated business relationship” allowing independent retail locations to sell products, and “facilitating business and services through an independent entity is not enough for ratification.” Mot. at 10 (quoting *Omega*, 2020 U.S. Dist. LEXIS 248567, at *6–16). Fundamentally, “[t]he principal role of trademark law is to ensure that consumers are able to identify the source of goods,” and a trademark “quickly and easily assures a potential customer

that *this* item—the item with the mark—is made by the same producer as other similar marked products.” *Au-Tomotive Gold, Inc. v. Volkswagen of Am., Inc.*, 457 F.3d 1062, 1067 (9th Cir. 2006) (emphasis original). Indeed, Texas requires dealerships to display manufacturer trademarks to help consumers. TOC § 2301.354(a) (requiring “dealers” to display “appropriate signs” that are “easily visible to the public” that “identify the products the dealer offers for sale”). Viewed in the proper context, trademarks are widely used in thousands of retail locations to identify product source, not to indicate a manufacturer ratifies the place of the retailer.

StratosAudio implies Greg May Hyundai’s location is not ratified as a “place” of HMA because Greg May Hyundai’s website states it is “family owned.” Opp. at 3. StratosAudio pivots to instead rely upon the websites of four other dealerships because they allegedly “do not” state they are independently owned “and thus associate themselves fully with” HMA. *Id.* However, StratosAudio is incorrect. The first of the four dealerships StratosAudio points to—Round Rock Hyundai—states that it is a “Penske Automotive Dealership,” and makes no mention of any ownership or control by HMA. Ex. 4 at 7.¹ Penske is a publicly traded company that operates automotive dealerships, “employs over 23,000 people worldwide” and “is a member of the Fortune 500” Ex. 5. Penske Automotive owns hundreds of dealerships associated with brands including Audi, Toyota, Lexus, BMW, MINI, Aston Martin, Ferrari, Lamborghini, and many others. Ex. 6. The dealership is plainly a place of a massive public company (Penske), not HMA. And so are Round Rock Honda and Toyota across the street. Ex. 6 at 21. The websites for the other dealerships similarly identify themselves as independent from

¹ All references to “Ex.” herein refer to exhibits attached to the Second Declaration of Clarence Rowland, filed concurrently herewith.

HMA. *See, e.g.*, Ex. 7 at 3 (“Automax Hyundai is an independent Hyundai franchised dealership.”); Ex. 8 at 1 (same for South Point Hyundai); Ex. 9 at 3 (same for Hyundai Kyle).

StratosAudio also argues ratification is evidenced by the HMA website (Opp. at 4), which is incorrect (Mot. at 10–11). In sum, trademarks and the HMA website do not establish HMA ratifies the dealerships as a place of business of HMA. To the contrary, the evidence demonstrates dealerships are independent entities operating their own businesses.

B. HMA’s Dealership Agreements Do Not Support Venue

StratosAudio argues ratification is evidenced by contractual provisions that “approve[]” of the dealership location and prohibit changing it, restrict use of the Hyundai marks to only the dealership location, set “approved . . . activit[ies]” and “minimum facilities standards,” and provide HMA a “right of first refusal or an option to purchase the dealership assets.”² Opp. at 4–6. None of the terms, however, evidences ratification of dealerships as places of business of HMA, because they do not suggest an HMA employee or agent will be regularly conducting HMA business there. The terms reflect a “business relationship” whereby HMA sells vehicles to dealerships, who in turn promise to operate in a competent manner when selling vehicles to retail customers. *See Omega*, 2020 U.S. Dist. LEXIS 248567, at *14–15. The terms only contemplate dealerships conducting their business at the dealership, which includes the retail sale of Hyundai-brand vehicles at the dealership location. *See* ECF No. 22-9 at 1. This third party business does not satisfy the venue statute, and venue is improper here. *Google*, 949 F.3d at 1347 (“The venue statute should be read to exclude agents’ activities . . . that are merely connected to, but do not themselves constitute, the defendant’s conduct of business”); Mot. at 3–5.

² StratosAudio argues that the agreement’s right of first refusal” is “contrary to [HMA’s] assertion that it can only refuse transfer of ownership ‘in limited circumstances.’” Opp. at 6. But the “right of first refusal” does not allow HMA to refuse transfer, it allows HMA an option to buy. *See Capital Parks v. Southeastern Adv. & Sales Sys.*, 30 F.3d 627, 629 (5th Cir. 1994).

StratosAudio also argues HMA controls the dealerships based on *Cray*, which held that one of the “considerations” for whether a place is “ratif[ied]” is whether the defendant “exercises . . . attributes of . . . control.” 871 F.3d at 1363. Texas law offers a definition for control:

[T]he right of control . . . includes the power to set tasks and to dictate the *means and details* of the agent’s work to accomplish those tasks; these means and details include the power to hire and fire and the power of supervision over the agent’s employees, to participate in the daily operations of the agent’s work, and to give the agent interim instructions once work has begun that go beyond the power to order the work stopped or resumed, to inspect its progress or receive reports, to make suggestions or recommendations which need not necessarily be followed, to prescribe alterations, and to set standards for acceptable service quality.

Cardinal Health Solutions, Inc. v. Valley Baptist Med. Ctr., 643 F. Supp. 2d 883, 888–89 (5th Cir. 2008) (emphasis added) (relying on the Restatement of Agency). The Federal Circuit applied agency principles in finding Google did not control a contractor. *Google*, 949 F.3d 1345–46 (applying the Restatement Of Agency to hold venue improper where “Google has no right of interim control over” a third party contractor). Additionally, applying such agency principles, the Fifth Circuit has held that manufacturers do not control dealerships. *See, e.g., Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285, 290 (5th Cir. 2004) (“[dealership] is an independent business and . . . [manufacturer] does not control [dealership’s] daily operations.”).

Here, HMA’s lack of control over the dealerships firmly disproves ratification. StratosAudio cites a variety of contractual terms related to “(i) advertising, (ii) sales, (iii) parts, (iv) service, (v) purchase of inventory, (vi) warranty to customers, (vii) facilities maintenance, and (viii) records keeping.” *Opp.* at 4–12. None of the terms evidence control because they do not afford HMA the power to control the “means and details” of the dealership’s business, such as the power to hire, fire, or supervise dealership employees, or to “participate in the daily operations” of the dealership. *See Cardinal*, 643 F.3d at 892–93. The terms simply “set standards for acceptable service quality” and allow HMA to “inspect” and “receive reports,”

which are not evidence of control. *See id.* Further, it is illegal for HMA to “control” dealerships. *See* TOC § 2301.476. If any contractual term constituted “control,” then the provision would be illegal and would therefore be unenforceable. *See Lulirama Ltd., Inc. v. Access Broadcast Servs.*, 128 F.3d 872, 880 (5th Cir. 1997) (“Under Texas contract law, illegal contracts are generally unenforceable” and a court may “sever the illegal portion”).

StratosAudio’s vague characterizations of the terms are also misleading and fail to account for the impact of Texas statutes that effectively rule out any “means and details” control that could establish venue. For example, StratosAudio vaguely argues HMA “unilaterally determines the prices and the terms upon which its dealers purchase its vehicles and perform maintenance service” and “labor.” *Opp.* at 9. But it cites no case holding that a supplier’s limited ability to set prices at a national level (or agreeing to reimburse a retailer for maintenance) subjects the supplier to venue at the location of retailers. Moreover, manipulating prices or terms to control individual dealers is prohibited. TOC §§ 2301.468 (prohibiting manufacturers from treating “dealers of the same line-make differently” based on unfair standards or guidelines), 2301.451, 2301.452. And labor rates are adjusted pursuant to a statutory framework overseen by the Texas DMV. *See, e.g.*, TOC §§ 2301.402, 2301.403(c)–(e).

StratosAudio points to provisions regarding performance reviews by HMA, but those are regulated by Texas law, and StratosAudio again cites no case holding that such a provision can establish venue. TOC §§ 2301.467 (prohibiting unreasonable sales or service standards), 2301.468. It also argues HMA “controls and can restrict . . . transfer” of the dealership (*Opp.* at 12), which is incorrect. *Mot.* at 6; TOC §§ 2301.458 (stating “a manufacturer . . . may not . . . attempt to prevent the sale or transfer of . . . a dealer,” except through a regulated process), 2301.359, 2301.360. The Texas DMV resolves transfer disputes. TOC § 2301.360. It also

argues HMA controls “the usage of its dealers’ facilities.” Opp. at 7. But, as discussed above, this provision (and the other cited provisions) does not suggest that an HMA employee or agent regularly conducts HMA business at the dealership. And Texas regulates property use provisions in dealership agreements to avoid giving the manufacturer control. TOC § 2301.481 (“A manufacturer . . . may not require that a dealer enter into a property use agreement as a condition of . . . entering into a franchise; add[ing] a line-make,” etc.). Provisions relating to warranty and recall programs and advertising are also regulated. *See, e.g.*, TOC §§ 2301.402, 2301.403, 2301.404, 2301.405, 2301.406, 2301.456, 2301.460, 2301.469, 2301.473(2)(B).

StratosAudio argues HMA controls dealerships because “any decision by Hyundai to limit or discontinue supplies of its vehicles to its dealers . . . will almost surely have a catastrophic impact on the dealers’ business.” Opp. at 15. But Texas prohibits HMA from manipulating supply to control dealerships. *See, e.g.*, TOC §§ 2301.452, 2301.473, 2301.479. StratosAudio also argues “[c]ustomers visiting Hyundai dealers . . . are undoubtedly visiting them to buy new Hyundai vehicles, not Ford or Toyota vehicles.” Opp. at 15. However, StratosAudio ignores that dealerships may also sell Ford, Toyota, and any other type of used vehicle they choose to sell. *See, e.g.*, Ex. 5. And any manufacturer that attempts to prevent a dealership from selling additional brands of new vehicles bears the burden of proving such denial is reasonable under a statutory “all existing circumstances” test. *See, e.g.*, TOC § 2301.472. Indeed, Round Rock Hyundai, for example, is owned by Penske, who also operates Round Rock Toyota and Honda across the street. *See* Ex. 6 at 21. If HMA violates any of the dealership statutes, damages statutes may apply. TOC §§ 2301.203, 2301.801, 2301.802, 2301.804.

StratosAudio also attempts to justify venue based on activities of a non-party subsidiary of HMA, Hyundai Capital America (“HCA”), which allegedly controls “the procedure for

payment and financing.” Opp. at 8 n.4. But the activities of subsidiaries are not imputed to their parents. Mot. at 3–4 (citing *Bd. of Regents* and other cases). StratosAudio cites no authority supporting the multi-layer collapse of separate HCA and dealership entities into HMA. And again, payment and pricing are governed by statute where material to the dealership business. *See, e.g.*, TOC §§ 2301.401, 2301.405, 2301.406, 2301.468, 2301.4749, 2301.475, 2301.459.

StratosAudio argues *Vaxcel Int’l. Co. v. Minka Lighting, Inc.*, 2018 U.S. Dist. LEXIS 226492 (N.D. Ill. July 11, 2018) and *Reflection, LLC v. Spire Collective LLC*, No. 17-1603, 2018 WL 310184 (S.D. Cal. Jan 5, 2018) are distinguishable because those cases involved defendants that were only a few out of “thousands (if not tens of thousands)” of product suppliers to retailers such as Home Depot and Amazon fulfillment centers in the district. Opp. at 14. But the same is true here—HMA is only one of thousands (if not tens of thousands) of suppliers of products to the dealerships, as consumers regularly sell their used cars to dealerships. *See* Ex. 4 (Round Rock Hyundai used car listings). And dealerships can and do sell additional brands of new vehicles pursuant to a regulated procedure (TOC § 2301.472), such as the Penske Round Rock location which sells new Hyundai, Honda, and Toyota vehicles (in addition to used vehicles) (Ex. 6 at 21). StratosAudio also argues that there was no evidence of contractual control in those cases (Opp. at 14), but, as explained above, the same is true here.

In short, ratification is firmly disproven by HMA’s lack of control. The dealership agreements set up a rough framework for HMA’s sale of vehicles to dealerships, but dealerships control their own retail sales business and are protected by Texas statutes.

C. *Blitzsafe* Was Wrong And Is Outdated

In contrast to the mountain of case law finding venue improper in similar circumstances (*see* Mot. at 3–12, citing, *inter alia*, *Reflection*, 2018 WL 310184, at *2 (collecting cases)), StratosAudio cites only a single case suggesting venue might be proper—*Blitzsafe Tex., LLC v.*

Bayerische Motoren Werke AG, 2018 U.S. Dist. LEXIS 173065 (E.D. Tex. Sept. 5, 2018).

However, the court later vacated that order by agreement of the parties. Also, in a motion for reconsideration (which was never decided), the defendant explained that *Blitzsafe* “rel[ie]d on many (in fact, 23) factual allegations not raised by Plaintiff, to which [defendant] BMWNA had no opportunity to respond.” Ex. 10 at 7. For example, *Blitzsafe* reasoned that BMWNA’s website goes “so far as to solicit orders on its own website for its BMW Centers.” *Id.* at 10. To the contrary, as supported by the new declaration, “the website refers any user in the District to multiple dealerships that compete with each other—and the dealerships are not owned or operated by BMWNA.” *Id.* Thus, *Blitzsafe* was premised on incorrect facts. The defendant’s new facts, case law, and detailed analysis likely would have moved the court to reconsider its earlier decision. *See id.* at 5–13. Indeed, *Omega* carefully scrutinized *Blitzsafe* and rejected it:

[A]lthough the plain language of *Cray* indicates that ratification may be a permissible avenue for finding patent venue in some circumstances, the Court respectfully disagrees with *Blitzsafe* that the Federal Circuit intended its *Cray* holding to be interpreted so broadly as to encompass independent entities in the absence of an alter-ego relationship. The Federal Circuit decided *Cray* in the context of a residential home office, which bears little resemblance to the relationship between BMWNA and the independent dealerships.

Omega, 2020 U.S. Dist. LEXIS 248567, at *13. Unlike *Blitzsafe* (issued 2018), *Omega* (issued Dec. 2020) had the benefit of the Federal Circuit’s *Google* opinion (issued Feb. 2020). *Id.*, 2020 U.S. Dist. LEXIS 248567, at *3 (citing *Google*). Neither *Blitzsafe* nor StratosAudio offer any reasoning that would distinguish *Google*, which should, along with *Omega*, govern this case.

II. CONCLUSION

HMA respectfully requests the Court dismiss this case. In the alternative, the Court may transfer HMA under 28 U.S.C. § 1406 to the Central District of California, where it is incorporated and headquartered, as identified in declaration attached to HMA’s original Motion. *See* ECF No. 12-1, ¶ 3; *In re BigCommerce, Inc.*, 890 F.3d 978, 985–86 (Fed. Cir. 2018).

Dated: March 15, 2021

Respectfully submitted,

/s/ Ryan K. Yagura

Ryan K. Yagura (Tex. Bar No. 24075933)

ryagura@omm.com

Nicholas J. Whilt (*Pro Hac Vice*, Cal Bar. No. 247738)

nwhilt@omm.com

Clarence A. Rowland (*Pro Hac Vice*, Cal. Bar No. 285409)

crowland@omm.com

O'MELVENY & MYERS LLP

400 S. Hope Street

Los Angeles, CA 90071

Telephone: 213-430-6000

Fax: 213-430-6407

Attorneys for Defendant Hyundai Motor America

CERTIFICATE OF SERVICE

The undersigned certifies that on March 15, 2021, counsel of record identified below are being served with a copy of this document and all attached documents by the Court's ECF system.

Charles Larsen
White & Case LLP
75 State Street, 24th Floor
Boston, MA 02109
(617) 979-9300
Fax: (617) 979-9301
Email: charles.larsen@whitecase.com

Michael J. Songer
White & Case LLP
701 13th Street, Nw
Washington, DC 20005-3807
(202) 626-3200
Fax: (202) 639-9355
Email: michael.songer@whitecase.com

Ryuk Park
White & Case LLP
3000 El Camino Real, 2 Palo Alto
Square, Suite 900
Palo Alto, CA 94306
(650) 213-0300
Fax: (650) 213-8158
Email: ryuk.park@whitecase.com

Corby R. Vowell
Friedman, Suder & Cooke
604 E. 4th Street
Suite 200
Fort Worth, TX 76102
817-574-7010
Fax: 817-334-0401
Email: vowell@fsclaw.com

/s/ Ryan K. Yagura

Ryan K. Yagura

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

STRATOSAUDIO, INC.,

Plaintiff,

v.

HYUNDAI MOTOR AMERICA,

Defendant.

Case No. 6:20-cv-01125-ADA

SECOND DECLARATION OF CLARENCE ROWLAND

1. I am a counsel at O'Melveny & Myers LLP, the firm representing Defendant Hyundai Motor America ("HMA") in the above captioned matter.
2. I submit this declaration in support of the "REPLY IN SUPPORT OF HYUNDAI MOTOR AMERICA'S MOTION TO DISMISS FOR IMPROPER VENUE," concurrently filed herewith.
3. I have personal knowledge of the statements set forth in this declaration and, if called as a witness, would testify competently thereto.
4. Attached hereto as **Exhibit 4** is a true and correct copy of a printout I made from the website <https://www.roundrockhyundai.com/used-inventory/index.htm?make=Toyota&make=Ford>, last accessed on March 14, 2021. All red boxes around the word "Penske" are annotations added by me. Page numbers and a reference to this case were added by my firm in the lower right of each page.
5. Attached hereto as **Exhibit 5** is a true and correct copy of a printout I made from the website <https://www.penskeautomotive.com/about/About-Us/default.aspx>, last accessed on

March 14, 2021. Page numbers and a reference to this case were added by my firm in the lower right of each page.

6. Attached hereto as **Exhibit 6** is a true and correct copy of a printout I made from the website <https://www.penskeautomotive.com/locations/default.aspx>, last accessed on March 10, 2021. All yellow highlighting was added by me. Page numbers and a reference to this case were added by my firm in the lower right of each page.

7. Attached hereto as **Exhibit 7** is a true and correct copy of a printout I made from the website <https://www.hyundaiautomax.com/privacy.htm>, last accessed on March 10, 2021.

8. Attached hereto as **Exhibit 8** is a true and correct copy of a printout I made from the website <https://www.southpointhyundai.com/privacy-policy/>, last accessed on March 10, 2021. Page numbers and a reference to this case were added by my firm in the lower right of each page.

9. Attached hereto as **Exhibit 9** is a true and correct copy of a printout I made from the website <https://www.hyundaiaustin.com/privacy>, last accessed on March 10, 2021. Page numbers and a reference to this case were added by my firm in the lower right of each page.

10. Attached hereto as **Exhibit 10** is a true and correct copy of ECF No. 94 from *Blitzsafe Texas, LLC v. Bayerische Motoren Werke AG*, No. 17-00418 (E.D. Tex. Sept. 20, 2018). Page numbers and a reference to this case were added by my firm in the lower right of each page.


I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.



Dated: March 15, 2021



Clarence A. Rowland
O'Melveny & Myers LLP

EXHIBIT 4

Sales: 888-579-1539 Service: 888-604-7807 Parts: 866-781-2556 [Español](#) [Directions](#)  Search Inventory

 **Round Rock Hyundai**  [New Inventory](#) [Pre-Owned Inventory](#) [Finance & Trade](#) [Specials & Research](#) [Service & Parts](#) [About Us](#) [Store Hours](#) [Log In](#)

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Condition

All Conditions

Pre-Owned 13

Year

Make


Alfa Romeo 1

BMW 6

Chevrolet 4

Chrysler 3

Dodge 2



2018 Toyota Highlander LE I4 SUV


30268
20/24 mpg City/Hwy
2.7L I-4 Engine
Automatic
FWD

Cash Price **\$23,000**
Est. Finance **\$318/mo**

[Confirm Availability](#)

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● Predawn Gray Mica Exterior
● Ash Interior
Stock #: YZ035776
Dealer Notes: CARFAX One-Owner.



Ford 3

Genesis 6

GMC 2

Honda 1

Hyundai 47

INFINITI 1

Jeep 3

Kia 2

Lexus 4

Mazda 1

MINI 1

Mitsubishi 2

Nissan 4

Subaru 1

Toyota 10

Model

4Runner 1

Avalon 1

C-HR 1

Camry 1

F-150 1

Fusion 2

Highlander 2

RAV4 1

Sienna 3

Trim

Body Style

Drive Line

4x2 1

4x4 1

All-wheel Drive 1

Front-wheel Drive 10


Engine

I-4 cyl 6

V-6 cyl 7

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**2018 Ford
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47576
18/23 mpg City/Hwy
3.5L V-6 Engine
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Stone Gray Exterior
Gray Interior

Stock #: YZB87891
Dealer Notes: Clean CARFAX.
BLUETOOTH HANDS-FREE
PHONE, BACKUP CAMERA, AU...

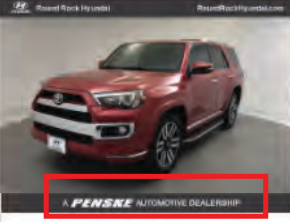
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17/22 mpg City/Hwy
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Stock #: GU123497
Dealer Notes: Priced below KBB
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Cash Price **\$27,500**

Est. Finance **\$379/mo**

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**2019 Toyota
C-HR XLE SUV**

11456
27/31 mpg City/Hwy
2.0L i-4 Engine
Variable
FWD

Iceberg Exterior
Black Interior

Stock #: YZ024665
Dealer Notes: New Price!
CARFAX One-Owner,

Cash Price **\$18,500**

Est. Finance **\$256/mo**

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Loan

Min: \$100 Max: \$550

13 Matches

Price

Min: \$5,000 Max: \$40,000

13 Matches

Include "No Price Available"

Exterior Color

- Black 1
- Blue 3
- Gray 3
- Red 1
- Silver 3
- White 1
- Other 1

Interior Color

Interior Material

Transmission

Compare Save [More Details](#)

2018 Toyota RAV4 XLE SUV

18557
23/30 mpg City/Hwy
2.5L I-4 Engine
Automatic
FWD

CARFAX 1 OWNER

Cash Price: **\$19,900**
Est. Finance: **\$275/mo**

[Confirm Availability](#)
[Buy Online](#)

18557
23/30 mpg City/Hwy
2.5L I-4 Engine
Automatic
FWD

- Silver Sky Metallic Exterior
- Ash Interior

Stock #: YZ422879
Dealer Notes: CARFAX One-Owner.

Compare Save [More Details](#)

Compare Save [More Details](#)

2018 Toyota Sienna Limited 7 Passenger Van

57573
19/27 mpg City/Hwy
3.5L V-6 Engine
Automatic
FWD

CARFAX 1 OWNER

Cash Price: **\$25,500**
Est. Finance: **\$352/mo**

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57573
19/27 mpg City/Hwy
3.5L V-6 Engine
Automatic
FWD

- Parisian Night Pearl Exterior
- Ash Interior

Stock #: YU962788
Dealer Notes: CARFAX One-Owner.

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Compare Save [More Details](#)

2019 Toyota Avalon Limited Sedan

4963
22/31 mpg City/Hwy
3.5L V-6 Engine
Automatic
FWD

CARFAX 1 OWNER

Cash Price: **\$33,000**
Est. Finance: **\$455/mo**

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4963
22/31 mpg City/Hwy
3.5L V-6 Engine
Automatic
FWD


- Wind Chill Pearl Exterior
- Graphite Interior

Stock #: GU023261

Compare Save [More Details](#)

Dealer Notes: CARFAX One-Owner.

Compare Save More Details >



2009 Toyota Sienna Limited Van

114631 Cash Price **\$10,250**


17/23 mpg City/Hwy
3.5L V-6 Engine
Automatic
FWD

● Slate Exterior
● Stone Interior

Stock #: YU232994
Dealer Notes: Clean CARFAX. BLUETOOTH HANDS-FREE PHONE, NAVIGATION, BACKU...

Confirm Availability
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2007 Toyota Sienna Van

147266 Cash Price **\$6,500**


19/26 mpg City/Hwy
3.5L V-6 Engine
Automatic
FWD

● Blue Mirage Metallic Exterior
● Taupe Interior

Stock #: YU031373
Dealer Notes: CARFAX One-Owner.

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2016 Toyota Camry LE Sedan

98603 Cash Price **\$12,500**
Est. Finance **\$174/mo**

25/35 mpg City/Hwy
2.5L i-4 Engine
Automatic
FWD

● Midnight Black Metallic Exterior
● Ash Interior

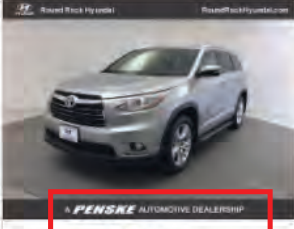
Stock #: YU145139

Confirm Availability
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Dealer Notes: BLUETOOTH
HANDS-FREE PHONE, BACKUP
CAMERA, AUX PORT, USB POR...

Compare Save More Details >



2014 Toyota Highlander Limited V6 SUV

86783
19/25 mpg City/Hwy
3.5L V-6 Engine
Automatic
FWD

PENSKE AUTOMOTIVE DEALERSHIP

CARFAX
1 OWNER


Cash Price **\$19,850**
Est. Finance **\$274/mo**

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Silver Sky Metallic Exterior
Black Interior
Stock #: GU011790
Dealer Notes: CARFAX One-Owner.

Compare Save More Details >



2019 Ford Fusion Titanium Sedan

41561
20/29 mpg City/Hwy
2.0L i-4 Engine
Automatic
AWD

PENSKE AUTOMOTIVE DEALERSHIP

SHOW ME THE FREE
CARFAX
VEHICLE HISTORY REPORTS

Cash Price **\$19,000**
Est. Finance **\$263/mo**

[Confirm Availability](#)

[Buy Online](#)

Ingot Silver Metallic Exterior
Ebony Interior
Stock #: YV152691
Dealer Notes: Clean CARFAX: BLIND SPOT MONITOR, PUSH BUTTON START, BLUETOOTH...

Compare Save More Details >

PHOTOS COMING SOON
CALL DEALER FOR DETAILS



Round Rock Hyundai
RoundRockHyundai.com

PENSKE AUTOMOTIVE DEALERSHIP

2013 Ford Fusion Titanium Sedan

74259
22/33 mpg City/Hwy
2.0L i-4 Engine
Automatic
FWD
Other Exterior

Cash Price **Please Call**

[Confirm Availability](#)

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Charcoal Black Interior
Stock #: YU379389
Dealer Notes: 12 Speakers, 18 Polished Aluminum Wheels, 4-

Polished Aluminum wheels, 4-
Wheel Disc Brakes, ABS brakes...

Compare Save

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For In-Transit inventory any date of arrival is estimated. Dealer reserves the right to change the date due to conditions beyond our control. Please contact dealer for delivery details. Prices and payments (including the amount down payment) do not include tax, titles, tags, documentation charges, emissions testing charges, or other fees required by law or lending organizations. Credit approval required and contact for details.

Find a Used Hyundai for sale in Round Rock! Plus more affordable used cars for Austin, Leander, Cedar Park, Pflugerville, Liberty Hill TX and Georgetown TX Drivers

Find low cost and high quality with a used Hyundai in Round Rock. Some vehicles might be a year old, but they still come loaded with the latest onboard features. So you save you some green in the process! It's why we're always discussing used cars options with those from Round Rock, Austin, Leander and Cedar Park.. There are plenty in different types available. Just browse the specials on our [featured used car sales page](#). So you're sure to find one that suits you in nearby Pflugerville, Liberty Hill or Georgetown TX. You can take most of the steps to [buy your car online in Round Rock](#) with our virtual tools here.

Auto Financing Solutions for Your Next Used Hyundai | Round Rock Hyundai | Used Dealer Serving Pflugerville

Once you've found the used vehicle you like, Round Rock Hyundai would like to take the next step with you. That means going over [car financing](#) terms. We have a team that truly cares about their work. So they strive to give you the best options possible. Often, people tell us we go above and beyond. However, we just call it another day's work. Shouldn't that be standard operating procedure when buying a used car? Visit our [used Hyundai dealership from Austin](#) or Georgetown, TX today!

How can I save on an affordable used car in Round Rock?

Save money on a quality pre-owned Hyundai right here at Round Rock Hyundai. We have a selection of used Hyundai models for sale in Round Rock, TX right now with amazing offers to help you save money. Our dealership is centrally located just minutes from Austin with a wide selection of models and incredible prices just for you. Let our team members pair you with a reliable used Hyundai with change to spare. We serve customers from Pflugerville to Liberty Park and look forward to working with your through each step of your next car-buying experience. Continue reading to learn more about our used Hyundai selection below.

Available Models

Our used Hyundai inventory features a variety of best-selling models for our Leander and Cedar Park customers. We have used Hyundai cars like the Accent, Elantra, Elantra GT, Genesis, Sonata, Sonata Hybrid, and Veloster. For more versatility and space, check out our used Hyundai SUVs as well. We have used SUV models like the Kona, Santa Fe, and Tucson. Whether you're looking for efficiency or agility, there is a used Hyundai for you here at Round Rock Hyundai.

Visit Round Rock Hyundai Today!

While you're here, be sure to check out our [bargain inventory](#) and [certified Hyundai models](#) as well. We also have a finance center to get you the auto loans you need in a matter of minutes. Our finance team is dedicated to making sure you get a great rate of the model you want in minutes. Be sure to start the finance process from home by filling out an online finance application. Contact us or stop by for more information.

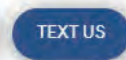
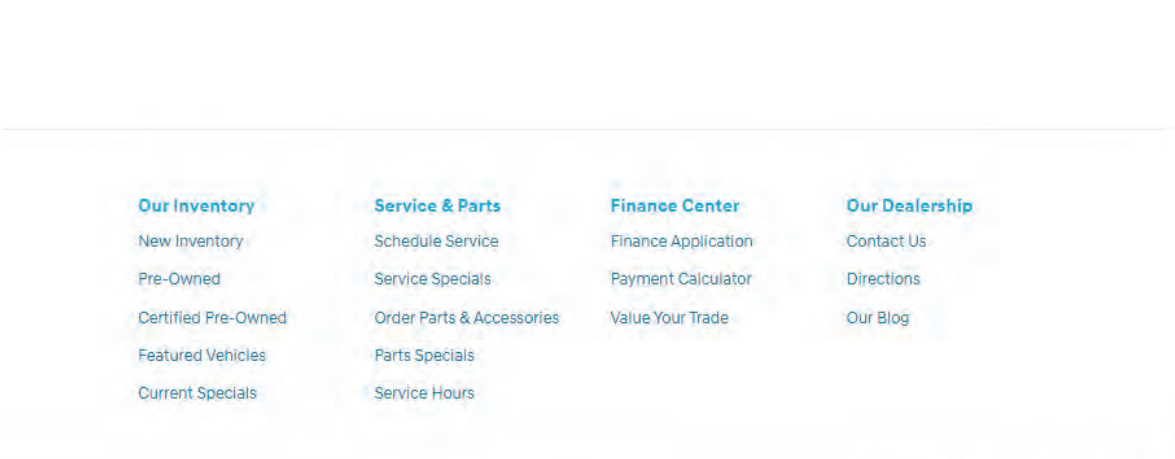


EXHIBIT 5



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- [SCHEDULE SERVICE](#)
- [LOCATIONS](#)
- [SUSTAINABILITY](#)
- [ABOUT US](#)
-

ABOUT US

Penske Automotive Group, Inc., (NYSE:PAG) headquartered in Bloomfield Hills, Michigan, is an international transportation services company that operates automotive and commercial truck dealerships principally in the United States, the United Kingdom, Canada and Western Europe, and distributes commercial vehicles, diesel engines, gas engines, power systems and related parts and services principally in Australia and New Zealand.

Penske Automotive Group employs over 23,000 people worldwide, is a member of the Fortune 500, Russell 1000 and Russell 3000 indexes, and is ranked among the World's Most Admired Companies by Fortune Magazine.

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EXHIBIT 6



LOCATIONS

418 Records Found

Dealer Name	Franchises	Address	City	State	Country	Postal Code	Phone
Acura North Scottsdale	Acura	7007 E. Chauncey Lane	Phoenix	Arizona	United States	85054	(480) 538-4600
Acura of Escondido	Acura	1502 Auto Park Way	Escondido	California	United States	92029	(760) 737-3300
Acura of Fayetteville	Acura	1418 West Showroom Drive	Fayetteville	Arkansas	United States	72704	(479) 695-7800
Acura Turnersville	Acura	3400-E Route 42	Turnersville	New Jersey	United States	08012	(856) 649-1800
Agnew Auto Exchange	SEAT	49-59 Ladas Drive	Belfast	-	Northern Ireland	BT6 9FR	011 44 2890 703131
Agnew SEAT Boucher	SEAT	1 Glenmachan Place, Boucher Rd.	Belfast	-	Northern Ireland	BT12 6QH	011 44 2890 321177
ALPINA Aoyama	ALPINA	7-1-15, Akasaka	Minato-ku	-	Japan	107-0052	011 81 3 3478 3511
ALPINA Setagaya	ALPINA	1-1-1, Nakamachi	Setagaya-ku	-	Japan	158-0091	011 81 3 5758 2500
Atlanta Toyota	Toyota	2345 Pleasant Hill Road	Duluth	Georgia	United States	30096	(770) 476-8282

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Audi Chantilly	Audi	14839 Stonecroft Center Court	Chantilly	Virginia	United States	20151	(703) 956-2100
Audi Eatontown	Audi	95 State Route	Eatontown	New Jersey	United	07724	(732) 389-

36

States

1000

Audi Escondido	Audi	1556 Auto Park Way	Escondido	California	United States	92029	(760) 520-6600
Audi Fairfield	Audi	435 Commerce Dr.	Fairfield	Connecticut	United States	06825	(203) 335-0666
Audi Herrogate	Audi	Grimbald Crag Road St. James Retail Park	Knaresborough	-	United Kingdom	HG5 8PY	014 23 586 852
Audi Mentor	Audi	8599 Market Street	Mentor	Ohio	United States	44060	(440) 951-1040
Audi North Scottsdale	Audi	7150 East Princess Drive	Phoenix	Arizona	United States	85054	(480) 538-4000
Audi South Coast	Audi	1425 Auto Mall Drive	Santa Ana	California	United States	92705	(714) 973-7766
Audi Stevens Creek	Audi	3350 Stevens Creek Blvd.	San Jose	California	United States	95117	(408) 244-5400
Audi Turnersville	Audi	3751 Route 42	Turnersville	New Jersey	United States	08012	(856) 649-7930
Audi Tysons Corner	Audi	8598 Leesburg Pike	Vienna	Virginia	United States	22182	(703) 564-6200
Audi Warwick	Audi	1517-D Bald Hill Road	Warwick	Rhode Island	United States	02886	(401) 824-2377
Audi Zentrum Aachen	Audi	Madriider Ring 19	Aachen	-	Germany	-	011 49 241 920320 0
Austin - Round Rock Collision Center	Collision Center	12331 North Mopas Expressway	Austin	Texas	United States	78758	(512) 807-4500
Autohaus Nix	Toyota	Frankfurter Strasse 1-7	Wachtersbach	-	Germany	-	011 49 6053803 0
Autohaus Nix	Volkswagen	Frankfurter Strasse 1-7	Wachtersbach	-	Germany	-	011 49 605361829 0
Autohaus Nix GmbH	Toyota	Alte Ziegelei 22	Fulda-Petersberg	-	Germany	-	011 49 66148038100
Autohaus Nix GmbH	Toyota	Spessartring 11	Offenbach	-	Germany	-	011 49 69 857079 25
Autohaus Nix GmbH	Toyota	Hanauer Landstrasse 429-431	Frankfurt	-	Germany	-	011 49 69 4167440
Autohaus Nix		Hanauer					011 49 69300

GmbH	Lexus	Landstraße 431	Frankfurt	-	Germany	-	38880
Autohaus Nix GmbH	Toyota	Elly-Beinhorn-Straße 1	Eschborn	-	Germany	-	011 49 6196 88718 0
Autohaus Nix GmbH	Toyota	Grafenhauser Strasse 79	Darmstadt	-	Germany	-	011 49 6151130110
Autohaus Nix GmbH	Lexus	Grafenhauser Strasse 79	Darmstadt	-	Germany	-	011 49 6151130120
Autopark Collision Center	Collision Center	500 SE Walton Blvd, Suite #6	Bentonville	Arkansas	United States	72712	(479) 251-2251
AutoVanti Bologna	BMW	via del Lavoro, 1 - 40057 Quarto inferiore - Granarolo dell'Emilia	Bologna	-	Italy	-	011 39 0516058411
AutoVanti Bologna	MINI	via del Lavoro, 1 - 40057 Quarto inferiore - Granarolo dell'Emilia	Bologna	-	Italy	-	011 39 0516058411
AutoVanti Bologna	BMW	Via Guido Rossa, 8, 40033 Casalecchio di Reno	Bologna	-	Italy	-	011 39 051 6137811
AutoVanti Bologna	MINI	Via Guido Rossa, 8, 40033 Casalecchio di Reno	Bologna	-	Italy	-	011 39 051 6137811
AutoVanti Brianza	BMW	Via Milano 33	Desio	-	Italy	-	011 39 03623981
AutoVanti Milano	BMW	Viale Del Ghisallo, 20	Milano	-	Italy	-	011 39 02-82823350
AutoVanti Milano	MINI	Viale Del Ghisallo, 20	Milano	-	Italy	-	011 39 02-82823350
AutoVanti Milano	MINI	Via Guglielmo Silva, 8	Milano	-	Italy	-	011 39 02-4816095
AutoVanti Milano	BMW	Via Guglielmo Silva, 8	Milano	-	Italy	-	011 39 02-4816095
AutoVanti Monza	BMW	Viale Sicilia, 130	Monza	-	Italy	-	011 39 03939391
AutoVanti Monza	MINI	Viale Sicilia, 130	Monza	-	Italy	-	011 39 03939391

Barcelona Premium - Ronda Litoral	MINI	Carrer de Joan d Austria, 1	Sant Adria de Besos	-	Spain	08930	011 34 933319800
Barcelona Premium - Ronda Litoral	BMW	Carrer de Joan d Austria, 1	Sant Adria de Besos	-	Spain	08930	011 34 933319800
Barcelona Premium - Sant Boi	MINI	Carretera del Prat, 15	Sant Boi de Llobregat	-	Spain	08830	011 34 933319800
Barcelona Premium - Sant Boi	BMW	Carretera del Prat, 15	Sant Boi de Llobregat	-	Spain	08830	011 34 933319800
Barcelona Premium Diagonal	MINI	Carrer d'Entenca, 324-326	Barcelona	-	Spain	08029	011 34 933319800
Barcelona Premium Diagonal	BMW	Carrer d'Entenca, 324-326	Barcelona	-	Spain	08029	011 34 933319800
Barcelona Premium Gran Via	BMW	Calle Montserrat Roig, 31	L'Hospitalet de Llobregat	-	Spain	08908	011 34 933319800
Barcelona Premium Gran Via	MINI	Calle Montserrat Roig, 31	L'Hospitalet de Llobregat	-	Spain	08908	011 34 933319800
Barcelona Premium Ronda de Dalt	Service	Carrer Esteve Terradas, 77-79	Barcelona	-	Spain	08023	011 34 934180000
Bavarian Garages	BMW	2 Boucher Crescent	Belfast	-	Northern Ireland	BT12 6HU	011 44 2890 381311
Bavarian Garages	MINI	22 Boucher Crescent	Belfast	-	Northern Ireland	BT12 6HU	011 44 2890 956464
Bedford Collision Center	Collision Center	99 Broadway Avenue	Bedford	Ohio	United States	44146	(440) 536-3480
Belfast Audi	Audi	80 Sydenham Road	Belfast	-	Northern Ireland	BT3 9DP	011 44 2890 380000
Bentley Birmingham	Bentley	2 Wingfoot Way, Fort Parkway	Birmingham	-	United Kingdom	B24 9HF	011 44 121 306 4000
Bentley Edinburgh	Bentley	Fort Kinnaird	Edinburgh	-	Scotland	EH1 3HR	011 44 131 475 2100
Bentley Leicester	Bentley	Watermead Business Park, Syston	Leicestershire	-	United Kingdom	LE7 1PF	011 44 116 260 1111

Bentley Manchester	Rolls-Royce	Mobberley Road, Knutsford	Cheshire	-	United Kingdom	WA16 8GT	011 441565 220305
Bentley Manchester	Bentley	Mobberley Road, Knutsford	Cheshire	-	United Kingdom	WA16 8GT	011 441565 220305
Bentley Scottsdale	Bentley	7171 E. Chauncey Lane	Phoenix	Arizona	United States	85054	(480) 538- 4300
BluVanti Bologna Maserati	Maserati	via San Donato 3/2, 40057 Quarto Inferiore - Granarolo dell'Emilia (BO)	Bologna	-	Italy	-	011 39 335- 1099841
BMW North Scottsdale	BMW	18018 N. Scottsdale Road	Phoenix	Arizona	United States	85054	(480) 538- 3900
BMW of Austin	BMW	7011 McNeil Dr.	Austin	Texas	United States	78729	(512) 343- 3500
BMW of Greenwich	BMW	355 West Putnam Ave.	Greenwich	Connecticut	United States	06830	(203) 413- 1900
BMW of Gwinnett Place	BMW	3264 Commerce Avenue	Duluth	Georgia	United States	30096	(770) 476- 8800
BMW of Mamaroneck	BMW	236 West Boston Post Road	Mamaroneck	New York	United States	10543	(914) 670- 0011
BMW of Ontario	BMW	1301 Auto Center Drive	Ontario	California	United States	91761	(909) 390- 7888
BMW of San Diego	BMW	5090 Kearny Mesa Rd.	San Diego	California	United States	92111	(858) 560- 5050
BMW of Tenafly	BMW	301 County Road	Tenafly	New Jersey	United States	07670	(201) 568- 9000
BMW of Turnersville	BMW	3400 Route 42	Turnersville	New Jersey	United States	08012	(856) 649- 7100
BMW of Warwick	BMW	1515 Bald Hill Road	Warwick	Rhode Island	United States	02886	(401) 304- 3200
BMW Premium Selection Yokohama Kohoku	BMW	288-1, Higashikata-cho	Yokohama-shi	-	Japan	224-0045	011 81 45 472 2600
BMW Service Center	Service	110 Midway Ave	Port Chester	New York	United States	10573	(914) 881- 3600
Bologna Premium	Jaguar	Via Isonzo 16 – Casalecchio di	Bologna	-	Italy	-	011 39 51 6113911

Reno

Bologna Premium	Lamborghini	Via Isonzo 16 – Casalecchio di Reno	Bologna	-	Italy	-	011 39 51 6113355
Bologna Premium	Land Rover	Via Isonzo 16 - Casalecchio de Reno	Bologna	-	Italy	-	011 39 51 6113911
Bologna Premium	Volvo	Via Isonzo 16 - Casalecchio de Reno	Bologna	-	Italy	-	011 39 51 6113911
Bradford Audi	Audi	2 Beckside, off Canal Road	Bradford	-	United Kingdom	BD1 4RA	011 441274 715600
Bugatti Scottsdale	Bugatti	7111 E. Chauncey Lane	Phoenix	Arizona	United States	85054	(480) 538-4300
Cadillac of Turnersville	Cadillac	3400 Route 42	Turnersville	New Jersey	United States	08012	(856) 649-1600
Capitol Honda	Honda	745 W. Capitol Expressway Auto Mall	San Jose	California	United States	95136	(408) 445-4400
CarShop Bristol	Used Vehicles	Taurus Road, Patchway	Bristol	-	United Kingdom	BS34 6FG	011 44 117 453 2429
CarShop Cardiff	Used Vehicles	Penarth Road	Cardiff	-	United Kingdom	CF11 8TT	011 44 808 250 1130
CarShop Chester Springs	Used Vehicles	21 Pottstown Pike	Chester Springs	Pennsylvania	United States	19425	(844) 818-2858
CarShop Cranberry	Used Vehicles	21200 Rt. 19	Cranberry Twp.	Pennsylvania	United States	16066	(844) 820-5165
CarShop Doncaster	Used Vehicles	Trax Park, Decoy Bank South	Doncaster	-	United Kingdom	DN4 5PD	011 44 808 250 1130
CarShop Glen Mills	Used Vehicles	1021 Baltimore Pike	Glen Mills	Pennsylvania	United States	19342	(610) 808-6200
CarShop Hatfield	Used Vehicles	2801 Bethlehem Pike	Hatfield	Pennsylvania	United States	19440	(844) 839-2750
CarShop Manchester	Used Vehicles	Alexandria Drive	Manchester	-	United Kingdom	OL7 0QN	0161 638 3050
CarShop Mount Holly	Used Vehicles	1971 Burlington-Mt. Holly Road	Mount Holly	New Jersey	United States	08060	(855) 383-0645
CarShop Northampton	Used Vehicles	Ravens Way	Northampton	-	United Kingdom	NN3 9UD	011 44 808 250 1130

CarShop Norwich	Used Vehicles	73 Whiffler Road	Norwich	-	United Kingdom	NR3 2AW	011 44 808 250 1130
CarShop Robinson	Used Vehicles	301 Park Manor Drive	Robinson Twp.	Pennsylvania	United States	15205	(866) 654- 4732
CarShop Sheffield	Used Vehicles	Brittania Way	Sheffield	-	United Kingdom	S60 5BD	0114 205 5488
CarShop Swindon	Used Vehicles	Penny Lane	Swindon	-	United Kingdom	SN3 3BW	011 44 808 250 1130
CarShop Wakefield	Used Vehicles	Calder Island Way	Wakefield	-	United Kingdom	WF27AW	01924 588799
CarShop Warrington	Used Vehicles	Calver Park Rd	Warrington	-	United Kingdom	WA2 8JH	01925 673 633
Central Florida Toyota	Toyota	11020 South Orange Blossom Tr.	Orlando	Florida	United States	32837	(407) 472- 5200
Chevrolet of Fayetteville	Chevrolet	1310 West Showroom Drive	Fayetteville	Arkansas	United States	72704	(479) 695- 7500
Chevrolet of Turnersville	Chevrolet	3400 Route 42	Turnersville	New Jersey	United States	08012	(856) 649- 1600
Crevier BMW	BMW	1500 Auto Mall Dr.	Santa Ana	California	United States	92705	(714) 835- 3171
Crevier MINI	MINI	1455 Auto Mall Dr.	Santa Ana	California	United States	92705	(657) 231- 5200
Derby Audi	Audi	1 Royal Scot Road, Pride Park	Derby	-	United Kingdom	DE24 8AJ	011 441332 546800
East Madison Toyota	Toyota	3501 Lancaster Dr.	Madison	Wisconsin	United States	53718	(608) 243- 5500
Fairfield Collision Center	Collision Center	102 Linwood Avenue	Fairfield	Connecticut	United States	06824	(203) 367- 7483
Fayetteville Collision Center	Collision Center	1400 West Transport Road	Fayetteville	Arkansas	United States	72704	(479) 251- 2250
Gateway Toyota	Toyota	395 Rt. 37 East	Toms River	New Jersey	United States	08753	(732) 240- 2000
Genesis of Round Rock	Genesis	2405 North Interstate 35	Round Rock	Texas	United States	78665	512-244- 9000
Graypaul Birmingham Ferrari	Ferrari	120 Highlands Rd.	Shirley	-	United Kingdom	B90 4GT	011 44 121 701 2458

Graypaul Birmingham Maserati	Maserati	120 Highlands Rd.	Shirley	-	United Kingdom	B90 4GT	011 44 121 701 2458
Graypaul Edinburgh	Maserati	Fort Kinnaird	Edinburgh	-	Scotland	EH15 3HR	011 44 131 475 4500
Graypaul Edinburgh	Ferrari	Fort Kinnaird	Edinburgh	-	Scotland	EH15 3HR	011 44 131 475 4500
Graypaul Nottingham	Maserati	Lenton Lane	Nottingham	-	United Kingdom	NG7 2NR	011 44 1159 833 555
Graypaul Nottingham	Ferrari	Lenton Lane	Nottingham	-	United Kingdom	NG7 2NR	011 44 1159 833 555
Guy Salmon Ascot	Jaguar	71-75 High Street, Ascot	Berkshire	-	United Kingdom	SL5 7HS	011 44 134 487 5675
Guy Salmon Jaguar Bristol	Jaguar	809 Bath Road, Bristol	City of Bristol	-	United Kingdom	BS4 5NL	011 44 117 975 5200
Guy Salmon Jaguar Coventry	Jaguar	Jaguar House, Earlplace Business Park, Fletchamstead Highway	Coventry	-	United Kingdom	CV4 9XH	011 4424 7667 2999
Guy Salmon Jaguar Maidstone	Jaguar	Euroway House, Wood Close, Quarry Wood Estate, Aylesford	Kent	-	United Kingdom	ME20 7UB	011 44 1622 797 700
Guy Salmon Jaguar Northampton	Jaguar	Jaguar House, Kettering Road,	Northampton	-	United Kingdom	NN1 4AJ	011 441604 239944
Guy Salmon Jaguar Stockport	Jaguar	S. Park Business Park, Bailey Road	Stockport	-	United Kingdom	SK1 2AD	011 44161 474-7799
Guy Salmon Jaguar Thames Ditton	Jaguar	47 Portsmouth Road, Thames Ditton	Surrey	-	United Kingdom	KT7 0TA	011 44208 398 4222
Guy Salmon Land Rover Ascot	Land Rover	71-75 High Street, Ascot	Berkshire	-	United Kingdom	SL5 7HS	011 44 1344 870383
Guy Salmon Land Rover Bristol	Land Rover	Pioneer Park, Whitby Road, Brislington	Bristol	-	United Kingdom	B S4 3QB	011 44 117 300 3180
Guy Salmon Land Rover Coventry	Land Rover	Birmingham Road, Allesley,	Coventry	-	United Kingdom	CV5 9GY	011 4424 76 839500

Guy Salmon Land Rover Knutsford	Land Rover	Manchester Road, Knutsford	Cheshire	-	United Kingdom	WA16 0ST	011 441565 632525
Guy Salmon Land Rover Maidstone	Land Rover	Wood Close, Quarry Wood Estate, Aylesford	Kent	-	United Kingdom	ME20 7UB	011 44 1622 795666
Guy Salmon Land Rover Northampton	Land Rover	1 Ferris Row, Riverside Business Park	Northampton	-	United Kingdom	NN3 9HX	011 44 1604 547700
Guy Salmon Land Rover Portsmouth	Land Rover	Compass Road, North Harbour, Portsmouth	Hampshire	-	United Kingdom	PO6 4SJ	011 44 2392 177336
Guy Salmon Land Rover Sheffield	Land Rover	301 Savile Street	Sheffield	-	United Kingdom	S4 7UD	011 44114 276 5655
Guy Salmon Land Rover Stockport	Land Rover	S. Park Business Park, Bailey Road	Stockport	-	United Kingdom	SK1 2AD	011 44161 474 7799
Guy Salmon Land Rover Stratford-upon- Avon	Land Rover	Birmingham Road, Avenue Farm, Stratford Upon Avon	Warwickshire	-	United Kingdom	CV37 0HR	011 441789 205 990
Guy Salmon Land Rover Thames Ditton	Land Rover	47 Portsmouth Road, Thames Ditton	Surrey	-	United Kingdom	KT7 0TA	011 44208 339 0200
Guy Salmon Land Rover Wakefield	Land Rover	325 Barnsley Road, Sandal,	Wakefield	-	United Kingdom	WF2 6EH	011 441924 242 422
Halifax Volkswagen	Volkswagen	Halifax Road, Shelf, Halifax	West Yorkshire	-	United Kingdom	HX3 7JT	011 44 1422 205 611
Honda Mall of Georgia	Honda	3699 Buford Drive	Buford	Georgia	United States	30519	(678) 318- 3100
Honda North	Honda	750 West Herndon Ave.	Clovis	California	United States	93612	(559) 297- 1000
Honda of Danbury	Honda	102 Federal Road	Danbury	Connecticut	United States	06810	(203) 730- 5699
Honda of Escondido	Honda	1700 Auto Park Way	Escondido	California	United States	92029	(760) 737- 3200
Honda of Fayetteville	Honda	1384 West Showroom Drive	Fayetteville	Arkansas	United States	72704	(479) 695- 7700
Honda of Mentor	Honda	8555 Market	Mentor	Ohio	United	44060	(440) 974-

		Street			States		9500
Honda of Turnersville	Honda	3400-G Route 42	Turnersville	New Jersey	United States	08012	(856) 649-1500
Huddersfield Audi	Audi	Trident Business Park, Leeds Road	Huddersfield	-	United Kingdom	HD2 1UA	011 44 1484 350000
Huddersfield Volkswagen	Volkswagen	Leeds Road	Huddersfield	-	United Kingdom	HD2 1UL	011 44 1484 542001
Hudson Chrysler Jeep Dodge	Chrysler, Jeep, Dodge	625 Route 440	Jersey City	New Jersey	United States	07304	(201) 435-2003
Hudson Nissan	Nissan	585 Route 440	Jersey City	New Jersey	United States	07305	(201) 435-2003
Hudson Toyota	Toyota	599 Route 440	Jersey City	New Jersey	United States	07305	(201) 433-0009
Hyundai of Pharr	Hyundai	1605 W. US Expressway 83	Pharr	Texas	United States	78577	(956) 784-8300
Hyundai of Turnersville	Hyundai	3400 Route 42	Turnersville	New Jersey	United States	08012	(856) 649-7500
Infiniti of Warwick	Infiniti	1085 Centerville Road	Warwick	Rhode Island	United States	02886	(401) 304-3250
Isaac Agnew Saab	Saab	1 Boucher Way	Belfast	-	Northern Ireland	BT12 6RE	011 44 2890 389999
Isaac Agnew Volkswagen	Volkswagen	1 Boucher Road	Belfast	-	Northern Ireland	BT12 6HR	011 44 2890 234477
Isaac Agnew Volkswagen Mallusk	Volkswagen	2 Mallusk Way	Newtonabbey	-	Northern Ireland	BT36 4AA	011 44 2890 342111
Jacobs Automobile Alsdorf	Volkswagen	Max-Planck-Str. 17-21	Alsdorf	-	Germany	-	011 49 2404 55080
Jacobs Automobile Alsdorf	Audi	Max-Planck-Str. 17-21	Alsdorf	-	Germany	-	011 49 2404 55080
Jacobs Automobile Bergheim	Audi	Lechenicher Strasse 30-38	Bergheim	-	Germany	-	011 49 2271 7617 0
Jacobs Automobile Bergheim	Volkswagen	Lechenicher Strasse 30-38	Bergheim	-	Germany	-	011 49 2271 7617 0
Jacobs		Zweigstelle					

Automobile Duren	Volkswagen	Duren; Felix- Wankel-Str. 2	Duren	-	Germany	-	011 49 2421 5910100
Jacobs Automobile Duren	Audi	Zweigstelle Duren; Felix- Wankel-Str. 2	Duren	-	Germany	-	011 49 2421 5910100
Jacobs Automobile Duren	SEAT	Zweigstelle Duren; Felix- Wankel-Str. 2	Duren	-	Germany	-	011 49 2421 5910100
Jacobs Automobile Erkelenz	Volkswagen	Krefelder Str. 2	Erkelenz	-	Germany	-	011 49 2431 977730
Jacobs Automobile Erkelenz	Audi	Krefelder Str. 2	Erkelenz	-	Germany	-	011 49 2431 977730
Jacobs Automobile Erkelenz	Skoda	Krefelder Str. 2	Erkelenz	-	Germany	-	011 49 2431 977730
Jacobs Automobile Geilenkirchen	Audi	Zweigstelle Geilenkirchen; Am Furthenrode 58-60	Geilenkirchen	-	Germany	-	011 49 2451 98700
Jacobs Automobile Geilenkirchen	Volkswagen	Zweigstelle Geilenkirchen; Am Furthenrode 58-60	Geilenkirchen	-	Germany	-	011 49 2451 98700
Jacobs Automobile Heinsberg	Volkswagen	Ferdinand- Porsche-Strasse 2	Heinsberg	-	Germany	-	011 49 2452 919710
Jacobs Automobile Heinsberg	Audi	Ferdinand- Porsche-Strasse 2	Heinsberg	-	Germany	-	011 49 2452 919710
Jacobs Automobile Neuenhofstrasse	Skoda	Neuenhofstrasse 100	Aachen	-	Germany	-	011 49 241 557016 00
Jacobs Automobile Stolberg	Volkswagen	Eschweiler Strasse 58 - 62	Stolberg	-	Germany	-	011 49 2402 999000-0
Jaguar Annapolis	Jaguar	101 Ferguson Road	Annapolis	Maryland	United States	21409	(410) 907- 8300
Jaguar Chandler	Jaguar	7470 West Orchid Lane	Chandler	Arizona	United States	85226	(480) 421- 4600
Jaguar Darien	Jaguar	1335 Boston Post Road	Darien	Connecticut	United States	06820	(203) 655- 8811

Jaguar Englewood	Jaguar	30 Van Nostrand Avenue	Englewood	New Jersey	United States	07631	(201) 408-6600
Jaguar Monmouth	Jaguar	807 Highway 35	Ocean	New Jersey	United States	07712	(732) 869-2500
Jaguar North Scottsdale	Jaguar	18100 N. Scottsdale Road	Phoenix	Arizona	United States	85054	(480) 538-4100
Jaguar Paramus	Jaguar	405 NJ - 17	Paramus	New Jersey	United States	07652	(201) 987-8900
Kearny Mesa Acura	Acura	5202 Kearny Mesa Road	San Diego	California	United States	92111	(858) 541-0200
Kearny Mesa Toyota	Toyota	4910 Kearny Mesa Road	San Diego	California	United States	92111	(858) 279-8151
Lamborghini Birmingham	Lamborghini	2 Wingfoot Way, Fort Parkway	Birmingham	-	United Kingdom	B24 9HF	011 44 121 306 4000
Lamborghini Edinburgh	Lamborghini	Fort Kinnaird	Edinburgh	-	Scotland	EH1 3HR	011 44 131 475 2100
Lamborghini Leicester	Lamborghini	Watermead Business Park, Syston	Leicestershire	-	United Kingdom	LE7 1PF	011 44 116 260 1111
Lamborghini North Scottsdale	Lamborghini	7171 E. Chauncey Lane	Phoenix	Arizona	United States	85054	(480) 538-4300
Land Rover Annapolis	Land Rover	101 Ferguson Road	Annapolis	Maryland	United States	21409	(410) 907-8300
Land Rover Chandler	Land Rover	7470 West Orchid Lane	Chandler	Arizona	United States	85226	(480) 421-4600
Land Rover Darien	Land Rover	1335 Boston Post Road	Darien	Connecticut	United States	06820	(203) 655-8811
Land Rover Englewood	Land Rover	30 Van Nostrand Avenue	Englewood	New Jersey	United States	07631	(201) 903-7357
Land Rover Monmouth	Land Rover	807 Highway 35	Ocean	New Jersey	United States	07712	(732) 869-2500
Land Rover North Scottsdale	Land Rover	18100 N. Scottsdale Road	Phoenix	Arizona	United States	85054	(480) 538-4100
Land Rover Paramus	Land Rover	405 NJ - 17	Paramus	New Jersey	United States	07652	(201) 987-8900
Leeds Audi	Audi	Apex Way, Apex Business Park	Leeds	-	United Kingdom	LS11 5LN	011 44113 290 4000

Leeds

United

011 44 113

Volkswagen	Volkswagen	Elland Road	Leeds	-	Kingdom	LS11 8TU	382 7600
Leicester Audi	Audi	212 Narborough Road South, Braunstone Town	Leicester	-	United Kingdom	LE3 2LD	011 44 116 242 1300
Lexus de Ponce	Lexus	Urb. Industrial San Rafael, 3-B, Marginal Ponce By Pass, Carr. #2	Ponce	-	Puerto Rico	731	(787) 651-5001
Lexus de San Juan	Lexus	Ave. Kennedy km 3.7, Marginal Reparto Ind'l, Bechara	San Juan	-	Puerto Rico	920	(787) 273-3000
Lexus Forum Frankfurt	Lexus	Hanauer Landstraße 431	Frankfurt	-	Germany	-	011 49 69300 3888 0
Lexus of Austin	Lexus	9910 Stonelake Boulevard	Austin	Texas	United States	78759	(512) 343-3400
Lexus of Chandler	Lexus	7430 West Orchid Lane	Chandler	Arizona	United States	85226	(480) 421-4000
Lexus of Lakeway	Lexus	108 Ranch Road 620 South	Lakeway	Texas	United States	78734	(512) 580-0600
Lexus of Madison	Lexus	8000 Airport Rd.	Middleton	Wisconsin	United States	53562	(608) 821-6000
Lexus of Warwick	Lexus	1095 Centerville Road	Warwick	Rhode Island	United States	02886	(401) 824-2249
Lexus San Diego	Lexus	4970 Kearny Mesa Road	San Diego	California	United States	92111	(858) 268-8000
Lincoln South Coast	Lincoln	1405 Auto Mall Drive	Santa Ana	California	United States	92705	(657) 231-5300
Los Gatos Acura	Acura	16151 Los Gatos Blvd.	Los Gatos	California	United States	95032	(408) 358-8000
Maranello	Ferrari	Tower Garage, The By-Pass (A30), Egham	Surrey	-	United Kingdom	TW20 0AX	011 441784 436431
Maranello	Maserati	Tower Garage, The By-Pass (A30), Egham	Surrey	-	United Kingdom	TW20 0AX	011 441784 436431
Marin Collision Center	Collision Center	5880 Paradise Drive	Corte Madera	California	United States	94925	(415) 924-8441

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Marin Honda	Honda	2 Shoreline Parkway	San Rafael	California	United States	94901	(415) 924-8990
Mazda of Escondido	Mazda	1560 Auto Park Way	Escondido	California	United States	92029	(760) 737-3275
McLaren Manchester	McLaren	1 Canute Place, Knutsford, Cheshire	Manchester	-	United Kingdom	WA16 6BQ	011 44 1565 755 412
Mercedes-Benz of Bath	smart	Foxcote Avenue, Peasdown, St. John	Bath	-	United Kingdom	BA2 8SF	011 44 1761 422 000
Mercedes-Benz of Bath	Mercedes-Benz	Foxcote Avenue, Peasdown, St. John	Bath	-	United Kingdom	BA2 8SF	011 44 1761 422 000
Mercedes-Benz of Bedford	Mercedes-Benz	18122 Rockside Road	Bedford	Ohio	United States	44146	(440) 439-0100
Mercedes-Benz of Bedford	Mercedes-Benz	Ampthill Road	Bedford	-	United Kingdom	MK42 9QZ	011 441234 272888
Mercedes-Benz of Belfast	Mercedes-Benz	6 Boucher Crescent	Belfast	-	Northern Ireland	BT12 6HU	011 44 2890 689000
Mercedes-Benz of Bristol	Mercedes-Benz	Lysander Road, Cribbs Causeway, Westbury on Trym	Bristol	-	United Kingdom	BS10 7UB	011 44 117 950 6000
Mercedes-Benz of Bristol	smart	Lysander Road, Cribbs Causeway, Westbury on Trym	Bristol	-	United Kingdom	BS10 7UB	011 44 117 950 6000
Mercedes-Benz of Carlisle	Mercedes-Benz	Montgomery Way, Rosehill, Carlisle	Cumbria	-	United Kingdom	CA1 2RW	011 44 1228 541111
Mercedes-Benz of Chandler	Mercedes-Benz	7450 West Orchid Lane	Chandler	Arizona	United States	85226	(480) 421-4500
Mercedes-Benz of Chantilly	Mercedes-Benz	14841 Stonecroft Center Court	Chantilly	Virginia	United States	20151	(703) 956-2000
Mercedes-Benz of Cheltenham & Gloucester	smart	Ashville Business Park, Cheltenham Road East, Staverton	Gloucester	-	United Kingdom	GL2 9QJ	011 44 1452 854700

Ashville

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Mercedes-Benz of Cheltenham & Gloucester	Mercedes-Benz	Business Park, Cheltenham Road East, Staverton	Gloucester	-	United Kingdom	GL2 9QJ	011 44 1452 854700
Mercedes-Benz of Fairfield	Mercedes-Benz	165 Commerce Dr.	Fairfield	Connecticut	United States	06825	(203) 368-6725
Mercedes-Benz of Greenwich	Mercedes-Benz	261 West Putnam Ave.	Greenwich	Connecticut	United States	06830	(203) 869-2850
Mercedes-Benz of Milton Keynes	Mercedes-Benz	Greyfriars Court, Kingston	Milton Keynes	-	United Kingdom	MK10 0BN	011 44 1908 512500
Mercedes-Benz of Newbury	Mercedes-Benz	123 London Road, Newbury	Berkshire	-	United Kingdom	RG14 2BX	011 441635 524444
Mercedes-Benz of Newcastle	smart	City West Business Park, Scotswood Road, Newcastle Upon Tyne	Cleveland	-	United Kingdom	NE4 7DF	011 44 191 226 7444
Mercedes-Benz of Newcastle	Mercedes-Benz	City West Business Park, Scotswood Road, Newcastle Upon Tyne	Cleveland	-	United Kingdom	NE4 7DF	011 44 191 226 7444
Mercedes-Benz of North Scottsdale	Mercedes-Benz	18530 N. Scottsdale Rd.	Phoenix	Arizona	United States	85054	(480) 991-1155
Mercedes-Benz of Northampton	smart	Riverside Business Park, Carousel Way	Northampton	-	United Kingdom	NN3 9HG	011 44 1604 774200
Mercedes-Benz of Northampton	Mercedes-Benz	Riverside Business Park, Carousel Way	Northampton	-	United Kingdom	NN3 9HG	011 44 1604 774200
Mercedes-Benz of Portadown	Mercedes-Benz	9 Carn Court Road, Carn Roundabout	Portadown	-	Northern Ireland	BT63 5YX	011 44 2838 337373
Mercedes-Benz of San Diego	Mercedes-Benz	4750 Kearny Mesa Road	San Diego	California	United States	92111	(858) 569-6900
Mercedes-Benz of Sunderland	Mercedes-Benz	Hylton Grange, Wessington Way	Sunderland	-	United Kingdom	SR5 3HR	011 44 191 516 0303
Mercedes-Benz of Swindon	smart	Drakes Way, Swindon	Wiltshire	-	United Kingdom	SN3 3HT	011 441793-756666
Mercedes-Benz of Swindon	Mercedes-Benz	Drakes Way, Swindon	Wiltshire	-	United Kingdom	SN3 3HT	011 441793-756666

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Mercedes-Benz of Teesside	smart	Concorde Way, Yarm Road	Stockton-on-Tees	-	United Kingdom	TS18 3RB	011 44 1642 677 877
Mercedes-Benz of Teesside	Mercedes-Benz	Concorde Way, Yarm Road	Stockton-on-Tees	-	United Kingdom	TS18 3RB	011 44 1642 677 877
Mercedes-Benz of Tysons Corner	Mercedes-Benz	8545 Leesburg Pike	Vienna	Virginia	United States	22182	(703) 442-8200
Mercedes-Benz of Warwick	Mercedes-Benz	1557 Bald Hill Road	Warwick	Rhode Island	United States	02886	(401) 824-2361
Mercedes-Benz of Weston-Super-Mare	Mercedes-Benz	Bridge Rd, Weston-Super-Mare	Avon	-	United Kingdom	BS23 3NE	011 44 1934 421 000
MINI North Scottsdale	MINI	7101 E. Chauncey Lane	Phoenix	Arizona	United States	85054	(480) 538-3900
MINI of Austin	MINI	7113 McNeil Dr.	Austin	Texas	United States	78729	(512) 410-2734
MINI of Marin	MINI	5880 Paradise Drive	Corte Madera	California	United States	94925	(415) 301-6048
MINI of Ontario	MINI	1251 Auto Center Drive	Ontario	California	United States	91761	(909) 390-1818
MINI of San Diego	MINI	5202-A Kearny Mesa Road	San Diego	California	United States	92111	(858) 616-6464
MINI of Tempe	MINI	7855 S. Test Drive	Tempe	Arizona	United States	85284	(480) 421-4700
MINI of Warwick	MINI	1515-A Bald Hill Road	Warwick	Rhode Island	United States	02886	(401) 824-2376
MINI Shinyurigaoka	MINI	1-5-15, Katahira	Kawasaki-shi	-	Japan	215-0023	011 81 44 959 3032
MINI Yokohama Tsuzuki	MINI	1-11-10, Kitayamada	Yokohama-shi	-	Japan	224-0021	011 81 45 590 5031
Motorwerks BMW	BMW	1300 American Blvd. West	Bloomington	Minnesota	United States	55420	(952) 888-2700
Motorwerks MINI	MINI	705 Louisiana Avenue South	Golden Valley	Minnesota	United States	55426	(952) 830-4800
Nicole BMW Aoba Miyamae	BMW	3-2-1, Arima	Kawasaki-shi	-	Japan	216-0003	011 81 44 870 8500
Nicole BMW Head Office	BMW	2-5-7, Todde	Kawasaki-shi	-	Japan	212-0005	011 81 44 551 2000
Nicole BMW		15-46,					011 81 45

Service Center	BMW	Kuzugaya	Yokohama-shi	-	Japan	224-0062	948-2500
Nicole BMW Shinyurigaoka	BMW	1-5-11, Katahira	Kawasaki-shi	-	Japan	215-0023	011 81 44 959 1400
Nicole BMW Yokohama Kohoku	BMW	3-21-28, Hayabuchi	Yokohama-shi	-	Japan	224-0025	011 81 45 592 1200
Nicole Competizione Certified Pre-Owned	Ferrari	15-40, Kuzugaka	Yokohama-shi	-	Japan	224-0062	011 81 45 949 4461
Nicole Competizione Yokohama	Ferrari	2-2-1, Minato Mirai, Nishi-ku	Yokohama-shi	-	Japan	220-0012	011 81 45 680 4465
Nicole Competizione Yokohama Service Centre	Ferrari Service	15-40, Kuzugaka	Yokohama-shi	-	Japan	224-0062	011 81 45 948 2030
Nissan of Turnersville	Nissan	3400 Route 42	Turnersville	New Jersey	United States	08012	(856) 649-7200
North Wales Audi	Audi	The Point, Conwy Road, Llandudno Junction	North Wales	-	United Kingdom	LL31 9AY	011 44 1492 585 777
North Wales SEAT	SEAT	The Point, Conwy Road, Llandudno Junction	North Wales	-	United Kingdom	LL31 9AY	011 44 1492 585 766
North Wales Volkswagen	Volkswagen	The Point, Conwy Road, Llandudno Junction	North Wales	-	United Kingdom	LL31 9AY	011 44 1492 585 738
North Wales Volkswagen Van Centre	Volkswagen	The Point, Conwy Road, Llandudno Junction	North Wales	-	United Kingdom	LL31 9AY	011 44 1492 585 700
Nottingham Audi	Audi	11 Abbeyfield Road, Lenton Industrial Estate	Nottingham	-	United Kingdom	NG7 2SZ	011 44 115 988 2820
Palm Beach Toyota	Toyota	200 South Congress	West Palm Beach	Florida	United States	33406	(561) 242-4460
Penske Automotive Collision	Collision Center	350 North Hayden Road	Scottsdale	Arizona	United States	85257	(480) 941-8800

Penske Chevrolet	Chevrolet	3210 E. 96th Street P.O. Box 40319	Indianapolis	Indiana	United States	46240	(317) 846-6666
Penske Collision (West Palm Beach)	Collision Center	2835 Ranch House Road	West Palm Beach	Florida	United States	33406	(561) 242-4460
Penske Collision Center	Collision Center	7860 Balboa Avenue	San Diego	California	United States	92111	(858) 223-4200
Penske Collision Indianapolis	Collision Center	4100 East 96th Street	Indianapolis	Indiana	United States	46240	(317) 975-6300
Penske Honda	Honda	4140 E. 96th Street P.O. Box 40319	Indianapolis	Indiana	United States	46240	(317) 574-9600
Penske Luxury	Luxury	2555 Telegraph Road	Bloomfield Hills	Michigan	United States	48304	(844) 724-5898
Penske Rapid Repair Arizona	Rapid Repair	7110 East Princess Drive	Phoenix	Arizona	United States	85054	(480) 538-6050
Penske Rapid Repair Orange County	Rapid Repair	1330 Auto Mall Drive	Santa Ana	California	United States	92705	(657) 231-5840
Penske Rapid Repair San Diego	Rapid Repair	7860 Balboa Avenue	San Diego	California	United States	92111	(858) 223-4280
Peter Pan BMW	BMW	2695 S. El Camino Real Dr.	San Mateo	California	United States	94403	(650) 349-9077
Porsche Beachwood	Porsche	25855 Chagrin Blvd.	Beachwood	Ohio	United States	44122	(216) 763-4911
Porsche Centre Belfast	Porsche	1 Boucher Way	Belfast	-	Northern Ireland	BT12 6RE	011 44 2890 389999
Porsche Centre Edinburgh	Porsche	Fort Kinnaird	Edinburgh	-	Scotland	EH15 3HR	011 44 131 475 5000
Porsche Centre Glasgow	Porsche	9 Rocep Way, Braehead	Renfrew	-	Scotland	PA4 8XT	011 44 1412 588015
Porsche Centre Leicesters	Porsche	Fletton Close, Thurmaston Lane	Leicesters	-	United Kingdom	LE4 9LP	011 44 116 3678863
Porsche Centre Mid-Sussex	Porsche	Innovation Drive, York Road, Burgess Hill	West Sussex	-	United Kingdom	RH15 9TW	011 44 1444 242911
Porsche Centre Silverstone	Porsche	Old Tiffield Road, Towcester	Northamptonshire	-	United Kingdom	NN12 6PF	011 441327-355911

Porsche Centre Solihull	Porsche	Highlands Road, Solihull	West Midlands	-	United Kingdom	B90 4GT	011 44 12 745 9911
Porsche Chantilly	Porsche	4055 Stonecroft Blvd	Chantilly	Virginia	United States	20151	(703) 956-7200
Porsche Fairfield	Porsche	475 Commerce Dr.	Fairfield	Connecticut	United States	06825	(203) 367-3700
Porsche Monmouth	Porsche	280 Highway 36	West Long Branch	New Jersey	United States	07764	(732) 935-7600
Porsche North Scottsdale	Porsche	18000 N. Scottsdale Road	Phoenix	Arizona	United States	85054	(480) 538-3800
Porsche Stevens Creek	Porsche	4155 Stevens Creek Blvd.	Santa Clara	California	United States	95051	(408) 247-1655
Porsche Tysons Corner	Porsche	8601 Westwood Center Dr.	Vienna	Virginia	United States	22182	(703) 564-6300
Porsche Warwick	Porsche	1517-A Bald Hill Road	Warwick	Rhode Island	United States	02886	(401) 824-2335
Porsche West Broward	Porsche	4641 SW 148 Avenue	Davie	Florida	United States	33331	(954) 901-3000
PorscheZentrum Mannheim	Porsche	Lembacherstr. 22	Mannheim	-	Germany	-	011 49 621 483 66 10
Portadown Audi	Audi	7 Carn Court	Portadown	-	Northern Ireland	BT63 5YX	011 44 2838 333633
Premier Truck Group of Amarillo	Commercial Vehicles	2210 Whitaker	Amarillo	Texas	United States	79120	(806) 374-1033
Premier Truck Group of Ardmore	Commercial Vehicles	3601 12th Ave. NW	Ardmore	Oklahoma	United States	73401	(580) 223-2233
Premier Truck Group of Belleville	Commercial Vehicles	53 - Grills Road	Ontario	-	Canada	K8N 4Z5	(613) 966-8785
Premier Truck Group of Chattanooga	Commercial Vehicles	137 Gateway Drive	Ringgold	Georgia	United States	30736	(706) 937-3700
Premier Truck Group of Dallas (North)	Commercial Vehicles	3040 Irving Blvd	Dallas	Texas	United States	75247	(214) 879-6112
Premier Truck Group of Dallas (South)	Commercial Vehicles	4200 Port Blvd	Dallas	Texas	United States	75241	(972) 225-4300

Premier Truck Group of Fort Worth	Commercial Vehicles	1804 N.E. Loop 820	Ft. Worth	Texas	United States	76106	(817) 626-7090
Premier Truck Group of Hamilton	Commercial Vehicles	1831 Barton Street East	Hamilton	-	Canada	L8H 5Y2	(905) 578-2000
Premier Truck Group of Idaho Falls	Commercial Vehicles	6413 South Doug Andrus Drive	Idaho Falls	Idaho	United States	83402	(208) 534-6330
Premier Truck Group of Knoxville	Commercial Vehicles	1413 Everett Road	Knoxville	Tennessee	United States	37932	(865) 824-2400
Premier Truck Group of Midland	Commercial Vehicles	4 S Industrial Loop	Midland	Texas	United States	79701	(432) 687-5437
Premier Truck Group of Mississauga	Commercial Vehicles	7035 Pacific Circle	Mississauga	-	Canada	L5T 2A8	(905) 564-8270
Premier Truck Group of Niagara Falls	Commercial Vehicles	8230 Oakwood Dr.	Niagara Falls	-	Canada	L2E 6S5	(289) 296-4643
Premier Truck Group of North Texas	Commercial Vehicles	1610 N Collins Freeway	Howe	Texas	United States	75459	(903) 532-1313
Premier Truck Group of Odessa	Commercial Vehicles	1100 S. Grandview Ave.	Odessa	Texas	United States	79760	(432) 580-8400
Premier Truck Group of Oklahoma City	Commercial Vehicles	5301 I-40 West	Oklahoma City	Oklahoma	United States	73128	(405) 917-5009
Premier Truck Group of Oshawa	Commercial Vehicles	720 Wilson Road South	Niagara Falls	-	Canada	L1H 6E8	(905) 432-3838
Premier Truck Group of Salina	Commercial Vehicles	1288 South State Street	Salina	Utah	United States	84654	(435) 670-1030
Premier Truck Group of Salt Lake City	Commercial Vehicles	2240 South 5370 West	West Valley City	Utah	United States	84120	(801) 978-7900
Premier Truck Group of St. Catharines	Commercial Vehicles	87 Berryman Ave.	Niagara Falls	-	Canada	L2R 7M5	(905) 684-4114
Premier Truck Group of St.	Commercial	229 North 5500	Hurricane	Utah	United	84737	(435) 414-

George	Vehicles	West			States		2430
Premier Truck Group of Tremonton	Commercial Vehicles	2136 West 1000 North	Tremonton	Utah	United States	84337	(438) 919-1830
Premier Truck Group of Tulsa	Commercial Vehicles	5104 West 60th Street	Tulsa	Oklahoma	United States	74107	(918) 445-5300
Premier Truck Group of Twin Falls	Commercial Vehicles	541 Arlen Drive	Jerome	Idaho	United States	83338	(208) 644-6030
Premier Truck Group Parts Centre	Parts	7135 Kennedy Road	Mississauga	-	Canada	L5S 2A5	(905) 856-3094
Reading Audi	Audi	Worton Dr., Reading	Berkshire	-	United Kingdom	RG2 0TG	
Rolls Royce Motor Cars Manchester	Rolls-Royce	Manchester Rd., Knutsford	Cheshire	-	United Kingdom	WA16 OST	011 44 1565 700 000
Rolls Royce Motor Cars Sunningdale	Rolls-Royce	London Road, Sunningdale	Berkshire	-	United Kingdom	SL5 OEX	011 44 1344 871200
Rolls-Royce Motor Cars Scottsdale	Rolls-Royce	7111 E. Chauncey Lane	Phoenix	Arizona	United States	85054	(480) 538-4500
Rolls-Royce Motor Cars Yokohama	Rolls-Royce	2-2-1, Minato Mirai, Nishi-ku	Yokohama-shi	-	Japan	220-0012	011 81 45 680 4500
Round Rock Collision Center	Collision Center	2450 North Mays Street	Round Rock	Texas	United States	78665	(512) 904-6100
Round Rock Honda	Honda	2301 N. Interstate 35	Round Rock	Texas	United States	78664	(512) 244-9000
Round Rock Hyundai	Hyundai	2405 N. Interstate 35	Round Rock	Texas	United States	78665	(512) 244-9000
Round Rock Toyota	Toyota	2307 N. Interstate 35	Round Rock	Texas	United States	78664	(512) 244-9000
Schumacher Airstream	Airstream	18530 North Scottsdale Road	Phoenix	Arizona	United States	85054	(480) 538-6100
Scottsdale Aston Martin	Aston Martin	7111 E. Chauncey Lane	Phoenix	Arizona	United States	85054	(480) 538-4400
Scottsdale Ferrari	Ferrari	18118 N. Scottsdale Rd.	Phoenix	Arizona	United States	85054	(480) 991-5322

Scottsdale Maserati	Maserati	18118 N. Scottsdale Rd.	Phoenix	Arizona	United States	85054	(480) 991- 5322
Skipton Volkswagen	Volkswagen	Skipton Road, Crosshills	Keighley	-	United Kingdom	BD20 7DS	011 44 1535 614400
Skoda North Wales	Skoda	The Point, Conwy Road, Llandudno Junction	North Wales	-	United Kingdom	LL31 9AY	011 44 1492 550 742
Slough Audi	Audi	Dover Road, Slough	Berkshire	-	United Kingdom	SL1 4RF	011 44 1753 696100
smart of Belfast	smart	6 Boucher Crescent	Belfast	-	Northern Ireland	BT12 6HU	011 44 2890 689000
smart of Milton Keynes	smart	Greyfriars Court	Milton Keynes	-	United Kingdom	MK10 0BN	011 441908- 231320
Sprinter of San Diego	Sprinter	4750 Kearny Mesa Rd	San Diego	California	United States	92111	(858) 356- 5616
Stanley Motor Works	Volvo	19 Boucher Crescent	Belfast	-	Northern Ireland	BT12 6HU	011 44 2890 686000
StarEmilia Bologna	smart	Via del Lavoro 50 - Casalecchio di Reno	Bologna	-	Italy	-	011 39 05119936600
StarEmilia Bologna	Mercedes- Benz	Via del Lavoro 50 - Casalecchio di Reno	Bologna	-	Italy	-	011 39 05119936600
StarEmilia Ferrara	Mercedes- Benz	Via dei Trasvolatori Atlantici 4	Ferrara	-	Italy	-	011 39 0532067700
StarEmilia Ferrara	smart	Via dei Trasvolatori Atlantici 4	Ferrara	-	Italy	-	011 39 0532067700
Subaru Orange Coast	Subaru	1350 Auto Mall Drive	Santa Ana	California	United States	92705	(657) 231- 5400
Sytner Aston Martin Nottingham	Aston Martin	2 Thane Road	Nottingham	-	United Kingdom	NG7 2AA	011 44 115 837 1419
Sytner Cardiff	BMW	50 Penarth Road, Cardiff	South Glamorgan	-	United Kingdom	CF10 5RS	011 44 2920 550 300
Sytner Cardiff	MINI	Hadfield Road	Cardiff	-	United Kingdom	CF11 8AQ	011 44 2920 558 970
Sytner Chigwell	MINI	Langston Road, Loughton	Essex	-	United Kingdom	IG10 3UE	011 44 208 418 7600

Sytner Chigwell	BMW	Langston Road, Loughton	Essex	-	United Kingdom	IG10 3UE	011 44 208 418 7600
Sytner Coventry	BMW	128 Holyhead Road, Coventry	West Midlands	-	United Kingdom	CV5 8NA	011 44 24 7660 0600
Sytner Coventry	MINI	128 Holyhead Road, Coventry	West Midlands	-	United Kingdom	CV5 8NA	011 44 24 7660 0600
Sytner Harold Wood	BMW	A12 Colchester Road, Romford	Essex	-	United Kingdom	RM3 0GX	011 44 1708 384577
Sytner Harold Wood	MINI	A12 Colchester Road, Romford	Essex	-	United Kingdom	RM3 0GX	011 44 1708 384577
Sytner Haverfordwest	MINI	Slebech, Haverfordwest	Pembrokeshire	-	United Kingdom	SA62 4PD	011 44 1437 771 122
Sytner Haverfordwest	BMW	Slebech, Haverfordwest	Pembrokeshire	-	United Kingdom	SA62 4PD	011 44 1437 771 122
Sytner High Wycombe	BMW	575 - 647 London Road	High Wycombe	-	United Kingdom	HP11 1EZ	011 44 1494 455100
Sytner High Wycombe	MINI	575 - 647 London Road	High Wycombe	-	United Kingdom	HP11 1EZ	011 44 1494 455200
Sytner Leicester	BMW	Meridian East, Meridian Business Park	Leicester	-	United Kingdom	LE19 1UY	011 44116 282 7700
Sytner Leicester	MINI	Meridian East, Meridian Business Park	Leicester	-	United Kingdom	LE19 1UY	011 44116 282 7700
Sytner Maidenhead	BMW	Bath Road, Taplow, Maidenhead	Berkshire	-	United Kingdom	SL6 0BW	011 44 1628 680 300
Sytner Newport	BMW	Usk Way, The Old Town Dock, Newport, Gwent	South Wales	-	United Kingdom	NP20 2DS	011 44 1633 241 500
Sytner Newport	MINI	Usk Way, The Old Town Dock, Newport, Gwent	South Wales	-	United Kingdom	NP20 2DS	011 44 1633 241 500
Sytner Nottingham	ALPINA	Lenton Lane	Nottingham	-	United Kingdom	NG7 2AX	011 44115 934 1414
Sytner Nottingham	BMW	Lenton Lane	Nottingham	-	United Kingdom	NG7 2AX	011 44115 934 1414
Sytner Nottingham	MINI	Lenton Lane	Nottingham	-	United Kingdom	NG7 2AX	011 44 115 934 1414

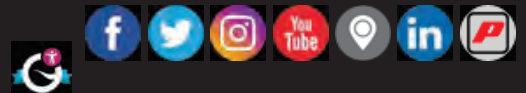
Sytner Oldbury	BMW	819 Wolverhampton Road, Oldbury	West Midlands	-	United Kingdom	B68 8DA	011 44 121 552 2825
Sytner Oldbury	MINI	819 Wolverhampton Road, Oldbury	West Midlands	-	United Kingdom	B68 8DA	011 44 121 552 2825
Sytner Select Leicester	Used Vehicles	1 Blackbird Road, Leicester	Leicestershire	-	United Kingdom	LE4 0AH	011 44 116 367 4183
Sytner Select Portadown	Used Vehicles	3 Carn Court Road	Portadown	-	United Kingdom	BT63 5YX	011 44 28 3833 6337
Sytner Sheffield	BMW	Hollis Croft, Broad Lane	Sheffield	-	United Kingdom	S1 3BU	011 44114 270222
Sytner Sheffield	MINI	301 Savile Street, Sheffield	South Yorkshire	-	United Kingdom	S4 7UD	011 44 114 2525390
Sytner Slough	MINI	478 Bath Road	Slough	-	United Kingdom	SL1 6BB	011 44 1628 550 400
Sytner Solihull	MINI	120 Highlands Road, Shirley	Solihull	-	United Kingdom	B90 4GT	011 44121 733 3444
Sytner Solihull	BMW	120 Highlands Road, Shirley	Solihull	-	United Kingdom	B90 4GT	011 44121 733 3444
Sytner Sunningdale	BMW	London Road, Sunningdale	Berkshire	-	United Kingdom	SL5 OEX	011 44 1344 630400
Sytner Sunningdale	MINI	London Road, Sunningdale	Berkshire	-	United Kingdom	SL5 OEX	011 44 1344 630400
Sytner Swansea	BMW	375 Carmarthen Road	Swansea	-	United Kingdom	SA5 8LW	01 792 651 505
Sytner Swansea	MINI	375 Carmarthen Road	Swansea	-	United Kingdom	SA5 8LW	01 792 651 505
Sytner Tamworth BMW	BMW	Winchester Road, Tamworth	West Midlands	-	United Kingdom	B78 3HG	011 44 1827 309 000
Sytner Tamworth MINI	MINI	Kinson Drive, Tamworth	West Midlands	-	United Kingdom	B78 3JF	011 44 1827 309 001
TAMSEN GmbH	Aston Martin	Merkurring 2	Hamburg	-	Germany	-	011 49 40 57 00 300
TAMSEN GmbH	Ferrari	Merkurring 2	Hamburg	-	Germany	-	011 49 40 57 00 300
TAMSEN GmbH	Maserati	Merkurring 2	Hamburg	-	Germany	-	011 49 40 57 00 300

TAMSEN GmbH	Lamborghini	Merkurring 2	Hamburg	-	Germany	-	011 49 40 57 00 300
TAMSEN GmbH	Bentley	Merkurring 2	Hamburg	-	Germany	-	011 49 40 57 00 300
Tempe Honda	Honda	8030 S. Autoplex Loop	Tempe	Arizona	United States	85284	(480) 893- 7900
Tollbar Warwick	Volvo	Heathcote Lane	Warwick	-	United Kingdom	CV34 6SP	011 44 1926 477333
Toyota of Bedford	Toyota	18151 Rockside Rd.	Bedford	Ohio	United States	44146	(440) 439- 8600
Toyota of Clovis	Toyota	895 West Shaw Avenue	Clovis	California	United States	93612	(559) 291- 5544
Toyota of Fayetteville	Toyota	1352 West Showroom Drive	Fayetteville	Arkansas	United States	72704	(479) 695- 7600
Toyota of Pharr	Toyota	1625 W. US Expressway 83	Pharr	Texas	United States	78577	(956) 784- 3300
Toyota of Surprise	Toyota	13543 North Autoshow Ave.	Surprise	Arizona	United States	85388	(623) 312- 3100
Toyota of Turnersville	Toyota	3400 Route 42 PO Box 9070	Turnersville	New Jersey	United States	08012	(856) 728- 5000
Triangle Honda 65	Honda	Ave. 65th Infanteria km 5.9	San Juan	-	Puerto Rico	924	(787) 757- 3000
Triangle Toyota de San Juan	Toyota	223 Marginal John F Kennedy Bechara	San Juan	-	Puerto Rico	920	(787) 775- 5700
Turnersville Collision Center	Collision Center	3400-H Route 42	Turnersville	New Jersey	United States	08012	(856) 516- 6650
Tyson's Corner Collision Center	Collision Center	8550 Tyco Road	Vienna	Virginia	United States	22182	(703) 790- 3220
United BMW	BMW	1501 Alpharetta Hwy.	Roswell	Georgia	United States	30076	(678) 832- 4600
United Collision Center	Collision Center	3150 Steve Reynolds Blvd.	Duluth	Georgia	United States	30096	(770) 622- 7986
United Ford Parts Distribution Center	Parts	12007 East 61st Street	Broken Arrow	Oklahoma	United States	74012	918-317- 6830
VantiQuattro Bologna	Audi	Via del'Industria 36	Bologna	-	Italy	-	011 39 51 5068811

VantiQuattro Bologna	Audi	Via Guido Rossa 2-14 Casalecchio di Reno	Bologna	-	Italy	-	011 39 51 9526804
VantiQuattro Imola	Audi	Via Pola 13	Imola	-	Italy	-	011 39 542 628457
VantiSport Bologna	Porsche	Via Monterumici 15	Bologna	-	Italy	-	011 39 51 3145811
VantiSport Mantova	Porsche	Via Parigi 4	Porto Mantovano	-	Italy	-	011 39 376 408715
VantiSport Modena	Porsche	Via Emilia Est 1463	Modena	-	Italy	-	011 39 59 2862011
Volkswagen North Scottsdale	Volkswagen	7001 E. Chauncey Lane	Phoenix	Arizona	United States	85054	(480) 538- 4700
Volkswagen South Coast	Volkswagen	1450 Auto Mall Drive	Santa Ana	California	United States	92705	(657) 231- 5600
Volkswagen Zentrum Aachen	Volkswagen	Trierer Strasse 169	52078 Aachen	-	Germany	-	011 49 241 9777 0
Wakefield Audi	Audi	Calder Park, Peel Avenue	Wakefield	-	United Kingdom	WF2 7UA	011 44 1924 241400
Warwick Collision Center	Collision Center	1517D Bald Hill Road	Warwick	Rhode Island	United States	02886	(401) 821- 1510
West London Audi	Audi	958 Great West Road, Brentford	Greater London	-	United Kingdom	TW8 9BQ	011 44 208 3804000
Wolfchase Toyota	Toyota	P. O. Box 3240 (Zip: 38088- 3240) 2201 North Germantown Parkway	Cordova	Tennessee	United States	38016	(901) 377- 8000

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PROOF OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on November 1, 2021.

A copy of the foregoing was served upon the following counsel of record and district court via an express carrier:

Charles Larsen
Daniel S. Sternberg
White & Case LLP
75 State Street, 24th Floor
Boston, MA 02109
Telephone: (617) 979-9300
Email: charles.larsen@whitecase.com
Email: dan.sternberg@whitecase.com

Michael J. Songer
White & Case LLP
701 13th Street NW
Washington, DC 20005
Telephone: (202) 626-3200
Email: michael.songer@whitecase.com

Jonathan J. Lamberson
Henry Yee-Der Huang
White & Case LLP
3000 El Camino Real, Two Palo Alto
Square, Suite 900
Palo Alto, CA 94306
Telephone: (650) 213-0300
Email: lamberson@whitecase.com
Email: henry.huang@whitecase.com

Corby R. Vowell
Friedman, Suder & Cooke
604 E. 4th Street, Suite 200
Fort Worth, TX 76102
817-574-7010
Email: vowell@fsclaw.com

Hon. Alan D Albright
United States District Court for the
Western District of Texas
800 Franklin Avenue, Room 301
Waco, Texas 76701
Telephone: (254) 750-1510

I declare under penalty of perjury under the laws of the United States that
the foregoing is true and correct.

Dated: November 1, 2021

/s/ Bradley N. Garcia
Bradley N. Garcia
Counsel for Petitioner

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No. 22-____

**UNITED STATES COURT OF APPEALS FOR THE
FEDERAL CIRCUIT**

IN RE HYUNDAI MOTOR AMERICA

Petitioner

On Petition for a Writ of Mandamus to the
United States District Court for the Western District of Texas,
Case No. 6:20-cv-01125-ADA
Judge Alan D Albright

**NONCONFIDENTIAL APPENDIX TO PETITION FOR WRIT OF
MANDAMUS**

Ryan K. Yagura
Nicholas J. Whilt
Clarence A. Rowland
O'MELVENY & MYERS LLP
400 S. Hope Street
Los Angeles, CA 90071-2899
Telephone: (213) 430-6000
E-mail: ryagura@omm.com
nwhilt@omm.com
crowland@omm.com

Bradley N. Garcia
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, DC 20006-4061
Telephone: (202) 383-5300
E-mail: bgarcia@omm.com

Attorneys for Petitioner Hyundai Motor America

November 1, 2021

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CONFIDENTIAL MATERIAL OMITTED

The material omitted from the Nonconfidential Appendix includes confidential information relating to business practices and other commercially sensitive information of Petitioner and Plaintiffs. This material is subject to the district court's Standing Order Regarding Filing Documents Under Seal and Redacted Public Versions (October 13, 2021) and was redacted from public filings in the district court. For material that is part of the record and had a sealed and a public version of a document, the Confidential Appendix includes the sealed version and the Nonconfidential Appendix includes the public version. In the Confidential Appendix, confidential material is highlighted in light blue, which corresponds to the redacted portions of the public versions. Material that is highlighted in yellow in both versions of the appendix was highlighted in those materials as submitted to the district court.

EXHIBIT 7

Sales: 888-825-9389 Service: 888-825-9767 Parts: 888-840-5771 3221 E Central Texas Expressway, Killeen, TX 76543



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Anytime you visit our Web site, we may gather certain non-personally identifiable information regarding the means you use to access our site. This information may include the type and version of your browser, your service provider, your IP address and any search engine you may have used to locate the site. We use this information to help diagnose problems with our server, administer the site, and compile broad statistical data. In addition, we gather certain navigational information where you go on our Web sites. This information enables us to determine which areas of the sites are most frequently visited and helps us to tailor the sites to the needs and interests of our online visitors. Such information is gathered by us in the aggregate and will not be associated with a specific individual without that individual's consent.

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Contact

Automax Hyundai
3221 E Central Texas Expressway
Killeen, TX 76543
Sales: 888-825-9389
Service: 888-825-9767
Parts: 888-840-5771

Hours

Monday	9:00am - 7:00pm
Tuesday	9:00am - 7:00pm
Wednesday	9:00am - 7:00pm
Thursday	9:00am - 7:00pm
Friday	9:00am - 7:00pm
Saturday	9:00am - 7:00pm
Sunday	Closed

3/10/2021

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To help us better understand and respond to your needs and interests, we may in the future receive information about you from other sources. We will ask any provider of such information to represent and warrant that the information has been gathered and maintained in accordance with all state and federal laws. Any such information will be maintained by us in accordance with the standards set forth in this privacy policy along with other personal information you've provided.

Disclosure of Personal Information:

Our dealership understands the importance of your privacy. We collect and maintain the personal information of our consumers for our use and our subsidiaries. We do not sell, rent, or trade consumer information to third parties, other than as described below, and never without your consent. Third parties may collect personally identifiable information about your online activities over time and across different websites when you use this website.

Business Partners:

Our dealership may partner with select retailers and other companies at various times to provide expanded services to our site visitors. As part of such a relationship, we may share with these companies the use of certain interactive Web site functions (i.e. the E-Mail Reminder Service). Information provided by site visitors through the use of such interactive functions may be available to both our dealership and our partners.

Agents:

Our dealership may use other companies and individuals to perform certain functions on our behalf. Examples include administering e-mail services and running special promotions. Such parties only have access to the personal information needed to perform these functions and may not use or store the information for any other purpose. Subscribers or site visitors will never receive unsolicited e-mail messages from agents working on our behalf.

Business Transfers:

In the event that our dealership sells or transfers a particular portion of its business assets, consumer information may be one of the business assets transferred as part of the transaction. If substantially all of the assets of our dealership are acquired, consumer information may be transferred as part of the acquisition.

Compliance with Law/Safety:

Our dealership may disclose specific personal information based on a good faith belief that such disclosure is necessary to comply with or conform to the law or that such disclosure is necessary to protect the users of our Web sites, the sites themselves, or the public.

With Consent:

Other than as set forth in this Privacy Policy, you will be notified when any personally-identifiable information about you may be shared with third parties, and you will be given the opportunity to decline to share that information.

Use of Cookies:

Our dealership may use a browser feature known as a "cookie." Cookies are small files placed on your hard drive that assist us in providing you with a customized browsing experience. Our dealership uses cookies to provide you with the convenience of not having to reenter information, such as user IDs and passwords, multiple times during your visits to our Web sites. Cookies can also be utilized to help us provide you with information targeted to your interests, based upon your prior browsing on our Web sites. The "help" section of the toolbar on most browsers will inform you on how to prevent your browser from accepting new cookies, how to have the browser notify you upon the receipt of a new cookie, or how to disable the use of cookies completely. As our Web sites have been designed to take advantage of the use of cookies. Should you configure your browser to decline their use, certain features of our Web sites may not function correctly and you may be required to reenter any user IDs and passwords more frequently

Accessing Our Web Sites from Outside of the United States:

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If you are visiting our Web site from a location outside of the U.S., your connection will be through and to servers located in the U.S. Any information you provide during your visit will be processed and maintained on our Web server and other internal systems located within the U.S.

External Links:

Our Web sites contain links to other sites. Our dealership is not responsible for the privacy practices or the content of such Web sites. To help ensure the protection of your privacy, we recommend that you review the privacy policy of any site you visit via a link from one of our Web sites.

Passwords:

The personal data record created through your registration with our Web site can only be accessed with the unique password associated with that record. To protect the integrity of the information contained in this record, you should not disclose or otherwise reveal your password to third parties.

Public Forums:

Our Web sites may make chat rooms, forums, message boards, and/or news groups available to its users at various times. Please remember that, unless otherwise stated, any information that is disclosed in these areas becomes public information and you should exercise caution when deciding to disclose your personal information in these areas.

Opt-out Procedures:

You may always opt-out of receiving future communications from our dealership. Our sites allow users to opt-out of receiving such communications at the point where personal information is requested, or through other means as identified.

Browser-Based Do Not Track:

Some browsers incorporate a "Do Not Track" (DNT) feature that, when turned on, signals to websites and online services that you do not want to be tracked. Because there is not yet an accepted standard for how to respond to a DNT signal, we do not currently respond to DNT signals on this website or on websites where we provide advertisements, content, or other services.

Contacting the Web Sites:

If you have questions concerning this Privacy Policy or the practices of these sites, you may contact us.

Hyundai Dealer Privacy Policy

Disclosure of Certain Information to Hyundai Motor America. Automax Hyundai is an independent Hyundai franchised dealership. When you use this website, Automax Hyundai may provide personal information you enter on this website or otherwise provide to us to Hyundai for Hyundai's marketing and other business purposes. For example, when you indicate that you would like to receive more information about Hyundai and its products, services or offers, personal information such as your name, address, city, state, zip code, email address and telephone number will be provided to Hyundai. In addition, if you buy or lease a Hyundai vehicle from Automax Hyundai, we may share information about your vehicle purchase (such as vehicle identification number (VIN), make, model, model year, date of purchase or lease and service history) with Hyundai.

EXHIBIT 8

You Are Here: Home (<https://www.southpointhyundai.com/>) » **Privacy Policy**

Privacy Policy

Disclosure of Certain Information to Hyundai Motor America

South Point Hyundai is an independent Hyundai franchised dealership. When you use this website, South Point Hyundai may provide personal information you enter on this website or otherwise provide to us to Hyundai for Hyundai's marketing and other business purposes. For example, when you indicate that you would like to receive more information about Hyundai and its products, services or offers, personal information such as your name, address, city, state, zip code, email address and telephone number will be provided to Hyundai. In addition, if you buy or lease a Hyundai vehicle from South Point Hyundai, we may share information about your vehicle purchase (such as vehicle identification number (VIN), make, model, model year, date of purchase or lease and service history) with Hyundai.

Use of this website signifies your acknowledgment and consent to this privacy policy. Please read this privacy policy carefully before using this web site.

Our dealership takes your privacy seriously and is committed to safeguarding your privacy online. Because we gather certain types of personal information from visitors to this web site (e.g. name, e-mail address, etc.), we have developed this privacy policy (the "Privacy Policy") to help you understand the terms and conditions surrounding the collection and use of your personal information. This Privacy Policy discloses the types of personal information we gather, how it is used, and how you can gain access to and edit any data that we've collected about you at any time. By using this site, you acknowledge that you have read and agree to be bound by this Privacy Policy and agree and acknowledge that you are subject to this website's governing terms of service.



Guiding Principles:

Our dealership collects personal information online primarily to provide our visitors with a more relevant experience on this web site. When doing so, we will make every reasonable effort to avoid excessive or irrelevant collection of data. Our dealership will take reasonable physical, electronic and managerial measures to safeguard and secure any personal information you provide to us (e.g. data will be stored in protected databases on secured servers with restricted access). However, given that electronically submitted data is not 100% secure, we make no representations or warranties as to the security of any personal information you submit online, which you do at your own risk.

Disclosure of Personal Information:

We do not sell, rent, or trade consumer personal information to third parties other than as described in this Privacy Policy or in support of our service offerings to customers and consumers. Our dealership may disclose certain personal information as follows:

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- to business partners, such as third-party service providers, agents and affiliated entities in connection with the services that they perform for our dealership, such as providing certain services necessary for the administration of this web site and the provision of certain interactive functionalities. Please note that some of our agents and contractors are located outside of the country and, as such, are subject to foreign laws, including laws that may require disclosure of personal information to government agencies in those countries;
- to law enforcement agencies for the purposes of investigating fraud or other offences; or
- to legal, financial, and other professional advisors or in connection with the sale or reorganization of all or part of its business or operations.

Except as provided above, our dealership will not use or disclose personal information for purposes other than those for which it was collected, except with your consent, as required or permitted by law, and to provide the features and service(s) you've requested and conduct routine business operations. At the time you register for certain features or services, you may be notified of, and asked to consent to, the sharing of your personal information necessary for the provision of these requested features or services.

Non-Personally Identifiable Data:

Anytime you visit this web site, we may gather certain non-personally identifiable information regarding the means you use to access our site. This information may include the type and version of your browser, your service provider, your IP address, device ID, certain geo-location data, and any search engine or other referring site you may have used to locate the site. We use this information to help diagnose problems with our server, administer the Web site, conduct attribution reporting, personalize user experiences (including certain targeted features or advertising), and compile broad statistical data. In addition, we gather certain navigational information about where you go on this web site. This information enables us to determine which areas of the Web sites are most frequently visited and helps us to tailor the sites to the needs and interests of our online visitors. Such information is gathered by us in the aggregate and will not be associated with a specific individual except in connection with specific services and operations such as attribution reporting and maintenance of customer accounts.



Use of Cookies:

Our dealership may use a browser feature known as a "cookie." Cookies are small files placed on your hard drive that assist us in providing you with a customized browsing experience. Our dealership uses cookies to provide you with the convenience of not having to reenter information, such as user IDs and passwords, multiple times during your visits to this web site. Cookies can also be utilized to help us provide you with information targeted to your interests, based upon your prior browsing on this web site. The "help" section of the toolbar on most browsers will inform you on how to prevent your browser from accepting new cookies, how to have the browser notify you upon the receipt of a new cookie, or how to disable the use of cookies completely. As this web site has been designed to take advantage of the use of cookies, should you configure your browser to decline their use, certain features of this web site may not function correctly, and you may be required to reenter any user IDs and passwords more frequently.

Personal Information Voluntarily Provided:

Any personal information you provide to us (i.e. name, telephone, e-mail address, etc.) when you enroll in one of our E-Mail Reminder Services, request information, or use any of the other interactive portions of this web site may be used to provide you with information you've requested about our company, our products and our services, or to provide you with special notices. Certain information you provide, such as veteran or student status, may be used to confirm your eligibility for

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certain OEM promotions. Certain financial information may be used to begin the purchase and finance application process with our dealership. You may opt out of receiving future communications at any time (see opt-out Procedures and California & Nevada Privacy Notice below). This data may also be used to tailor your experience on this web site by providing content that is relevant to your interests and geographic region.

Accessing this Web Site:

This web site is hosted on servers located in the United States. As such, your connection will be through and to servers located in the U.S. Any personal information you provide during your visit will be processed and maintained on our Web server and other internal systems located within the U.S.

External Links:

This web site contains links to other sites. Our dealership is not responsible for the privacy practices or the content of such web sites. To help ensure the protection of your privacy, we recommend that you review the privacy policy of any site you visit via a link from this web site.

Passwords:

The personal data record created through your registration with this web site can only be accessed with the unique password associated with that record. To protect the integrity of the personal information contained in this record, you should not disclose or otherwise reveal your password to third parties.

Public Forums:



This web site may make chat rooms, forums, message boards, and/or news groups available to its users at various times. Please remember that, unless otherwise stated, any information that is disclosed in these areas becomes public information and you should exercise caution when deciding to disclose your personal information in these areas.

Opt-out Procedures:

Other than as set forth in this Privacy Policy, when any personally-identifiable information about you may be shared with third parties you will have the ability to decline to share that information.

You may always opt-out of receiving future communications from our dealership. This web site allows users to opt-out of receiving such communications at the point where personal information is requested, or through other means as identified.

Changes to this Privacy Policy:

We reserve the right to change and update this Privacy Policy. These changes will be made when appropriate, in a timely manner. We encourage you to examine our Policy from time to time to ensure you are aware of any changes we may have made. Your continued use of this site and affiliated sites after any such update indicates your agreement to the same.

Use of Third-Party Service Provider Behavioral Services:

This website may use third-party tracking services to collect non-personally identifiable online demographical and behavioral data generated by website visitors. A data collection script provided by this service and installed on this website may collect the following kinds of data: website session activity, including your personally identifiable information when

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entered into a form field such as name, phone, email, or when you arrive at our website through a link containing a unique identifier; links that you click, pages that you view, form fields that you select, and text fields that you enter. The information is used to compile your shopping activity to produce an individual shopping profile for you, which contains information about your brand preferences, and to aggregate your website behavioral data in anonymized form with all other visitors' anonymized shopping activity data on our website to help us analyze industry trends, general shopping patterns, overall consumer demands, and website performance.

Children:

We believe that it is especially important to protect children's privacy online. We do not knowingly collect or use any personally identifiable information from children under the age of 13 and we do not knowingly provide any personally identifiable information, regardless of its source, to any third party for any purpose whatsoever from visitors younger than 13 years old. No information should be submitted to or posted by visitors younger than 13 years old.

Collection of Information by Third Parties:

As noted above, affiliates, third parties who place advertisements on this website, and other third-party service providers may collect and use information about your visits to and use of this website through the use of cookies, web beacons and other similar technologies. For example, we may work with companies that collect statistical information regarding site usage and provide related analytical services. We may work with third-party advertising companies that use cookies and web beacons to serve advertisements when you come to the site and to generate statistics and metrics related to the delivery of such advertisements. We also may work with third-party advertising platforms and networks that use cookies, web beacons and other technologies to collect non-personally identifiable information about your visits to and interactions with this site and other websites in order to provide targeted communications and other advertisements.



Third-party service providers may also collect information from your devices and may combine personal and non-personal information about you with information from other sources including your visits to this and other websites, mobile websites and/or mobile applications across your various devices.

If you would like to obtain more information about the practices of some of these parties, or if you would like to make choices about their use of your information, please click here:

<http://www.aboutads.info/choices/> (<http://www.aboutads.info/choices/>)

More information and additional consumer choice options may be found at this link:

http://www.networkadvertising.org/managing/opt_out.asp (http://www.networkadvertising.org/managing/opt_out.asp)

Information and additional consumer choice options regarding mobile device tracking may be found at these links (or successor URLs):

IDFA limit ad tracking:

<https://support.apple.com/en-us/HT202074> (<https://support.apple.com/en-us/HT202074>)

AAID reset and opt-out

<https://support.google.com/googleplay/android-developer/answer/6048248?hl=en>
(<https://support.google.com/googleplay/android-developer/answer/6048248?hl=en>)

Notice to European Residents:

This site is intended for use solely in the United States (including its territories and commonwealths), Canada, and Mexico by U.S., Canadian and Mexican residents. We make no claims that the site is appropriate for use outside of the United States, Canada or Mexico. We do not knowingly collect or solicit personal information from residents of the European Union. If you believe that we may have any information from or about an EU resident, please email our service provider, Dealer Inspire, at Privacy@DealerInspire.com (mailto:Privacy@DealerInspire.com). No information should be submitted to or posted by any EU resident.

California & Nevada Privacy Notice – Your California Privacy Rights:

If you are a California or Nevada resident, state law may provide you with additional rights regarding our use of your personal information. This information is intended to comply with the California Consumer Privacy Act of 2018 and Nevada Senate Bill 220 (an Act relating to Internet privacy) and other California and other state privacy laws (all such laws are collectively referred to for purposes of this Privacy Policy as the “CCPA”). Any terms defined in the CCPA have the same meaning when used in this Privacy Notice.

Information We Collect:

We may collect information that identifies, relates to, describes, references, is capable of being associated with, or could reasonably be linked, directly or indirectly, with a particular consumer or device (“personal information”). In particular, we have collected the following categories of personal information from consumers within the last twelve (12) months:



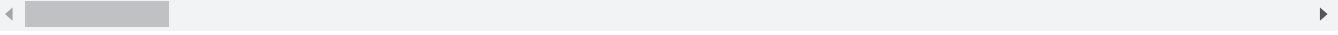
Category
A. Identifiers
B. Personal information categories listed in the California Customer Records statute (Cal. Civ. Code § 1798.80(e))
C. Protected classification characteristics under California or federal law
D. Commercial information
E. Biometric information
F. Internet or similar network activity
G. Geolocation data
H. Sensory data

Category

I. Professional or employment-related information

J. Non-public education information (per the Family Educational Rights and Privacy Act (20 U.S.C. Section 1232g, 34 C.F.R.

K. Inferences drawn from personal information

**Personal information does not include:**

- Publicly available information from government records.
- De-identified or aggregated consumer information.
- Information excluded from the CCPA's scope, like:
 - health or medical information covered by the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and the California Confidentiality of Medical Information Act (CMIA) or clinical trial data;
 - personal information covered by certain sector-specific privacy laws, including the Fair Credit Reporting Act (FRCA), the Gramm-Leach-Bliley Act (GLBA) or California Financial Information Privacy Act (FIPA), and the Driver's Privacy Protection Act of 1994.

**We obtain the categories of personal information listed above from the following categories of sources:**

- Directly from our users when they submit a lead form or other web form on the site.
- Directly and indirectly from interaction with our website (or an affiliated site). For example, from submissions through our website portal or website usage details (including without limitation IP address, device ID, geolocation data collected automatically).
- Directly and indirectly from our service providers or their agents.
- From data aggregators/providers and similar vendors.
- From third parties that interact with us in connection with the services we perform. For example, we may receive aggregated vehicle sales records for analytics and other purposes.
- From anti-fraud and other crime prevention partners.

Use of Personal Information:

We may use or disclose the personal information we collect for one or more of the following business purposes:

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- To fulfill or meet the reason for which the information is provided. For example, if you provide us with personal information in order to indicate interest in a particular vehicle, promotion or offering.
- To provide you with information, products or services that you request from us.
- To provide you with email alerts, event registrations and other notices concerning our products or services, or events or news, that may be of interest to you.
- To carry out our obligations and enforce our rights arising from any contracts entered into between you and us, including for billing and collections.
- To improve our website and present its contents to you including the powering of products and features used throughout the site.
- To power and maintain saved user accounts.
- For attribution purposes.
- To send promotional materials.
- To provide custom and/or individually-tailored website experiences.
- For ad serving, targeting and retargeting, creation of audience segments, and related OBA (online behavioral advertising) purposes.
- To create inferred search preferences and inclination/intent to purchase certain vehicles or makes/models for improved ad targeting and custom experience implantation.
- For internal operations and site optimization including product development.
- For testing, research, analysis and product development.
- As necessary or appropriate to protect the rights, property or safety of us, our clients or others.
- To enable anti-fraud and crime prevention efforts.
- To respond to law enforcement requests and as required by applicable law, court order, or governmental regulations.
- As described to you when collecting your personal information or as otherwise set forth in the CCPA.
- To evaluate or conduct a merger, divestiture, restructuring, reorganization, dissolution, or other sale or transfer of some or all of our assets, whether as a going concern or as part of bankruptcy, liquidation, or similar proceeding, in which personal information held by us is among the assets transferred.
- For additional purposes more fully described in this Privacy Policy.



We will not collect additional categories of personal information or use the personal information we collected for materially different, unrelated, or incompatible purposes without providing you notice.

Sharing Personal Information:

We may disclose your personal information to a third party for a business purpose. When we disclose personal information for a business purpose, we enter a contract that describes the purpose and requires the recipient to both keep that personal information confidential and not use it for any purpose except performing the contract.

In the preceding twelve (12) months, we have disclosed the following categories of personal information for a business purpose:

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- A. Identifiers
- B. Personal information categories listed in the California Customer Records statute (Cal. Civ. Code § 1798.80(e))
- C. Protected classification characteristics under California or federal law
- D. Commercial information
- F. Internet or similar network activity
- G. Geolocation data
- K. Inferences drawn from personal information

In the preceding twelve (12) months we have not sold personal information.

Categories of Parties to which we may Disclose Personal Information:

We may disclose your personal information for a business purpose to the following categories of third parties:

- Our subsidiaries, parent(s) and affiliates
- Service providers (including, without limitation, website and internal operations platform providers)
- Automotive OEMs
- Third parties to whom you or your agents authorize us to disclose your personal information in connection with products or services we provide to you.



In the preceding twelve (12) months we have not sold personal information.

Your Rights and Choices:

The CCPA provides consumers with specific rights regarding their personal information. This section describes your CCPA rights and explains how to exercise those rights.

Access to Specific Information and Data Portability Rights

You have the right to request that we disclose certain information to you about our collection and use of your personal information over the past 12 months. Once we receive and confirm your verifiable consumer request, we will disclose to you:

- The categories of personal information we collected about you.
- The categories of sources for the personal information we collected about you.
- Our business or commercial purpose for collecting or selling that personal information.
- The categories of third parties with whom we share that personal information.
- The specific pieces of personal information we collected about you (also called a data portability request).
- If we sold or disclosed your personal information for a business purpose, two separate lists disclosing:
 - sales, identifying the personal information categories that each category of recipient purchased; and
 - disclosures for a business purpose, identifying the personal information categories that each category of recipient obtained.

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Deletion Request Rights

You have the right to request that we delete any of your personal information that we collected from you and retained, subject to certain exceptions. Once we receive and confirm your verifiable consumer request, we will delete (and direct our service providers to delete) your personal information from our records, unless an exception applies.

We may deny your deletion request if retaining the information is necessary for us or our service providers to:

- Complete the transaction for which we collected the personal information, provide a good or service that you requested, take actions reasonably anticipated within the context of our ongoing business relationship with you, or otherwise perform our contract with you.
- Detect security incidents, protect against malicious, deceptive, fraudulent, or illegal activity, or prosecute those responsible for such activities.
- Debug products to identify and repair errors that impair existing intended functionality.
- Exercise free speech and/or ensure the right of another consumer to exercise their free speech rights, or exercise another right provided for by law.
- Comply with the California Electronic Communications Privacy Act (Cal. Penal Code § 1546 seq.).
- Engage in public or peer-reviewed scientific, historical, or statistical research in the public interest that adheres to all other applicable ethics and privacy laws, when the information's deletion may likely render impossible or seriously impair the research's achievement, if you previously provided informed consent.
- Enable solely internal uses that are reasonably aligned with consumer expectations based on your relationship with us.

Non-Discrimination:



We will not discriminate against you for exercising any of your CCPA rights. Unless permitted by the CCPA, we will not:

- Deny you goods or services.
- Charge you different prices or rates for goods or services, including through granting discounts or other benefits, or imposing penalties.
- Provide you a different level or quality of goods or services.
- Suggest that you may receive a different price or rate for goods or services or a different level or quality of goods or services.

Changes to this Privacy Policy:

We reserve the right to update and periodically amend this Privacy Policy at our discretion and at any time. If we make changes to this Privacy Notice, amendments will be posted online, and the date of update will be included. Your continued use of this site and affiliated sites after any such update indicates your agreement to the same.

Contact Information:

If you have any questions or comments about this Privacy Policy (including the provisions of the California & Nevada Privacy Notice) the ways in which we collect and use your personal information, your choices and rights regarding such use, or wish to exercise your rights under California, Nevada or other state law, please do not hesitate to contact us using the contact

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information available on this site. You may also direct requests to our service provider, Dealer Inspire, at Privacy@DealerInspire.com (mailto:Privacy@DealerInspire.com) or call Dealer Inspire at 855.357.4677 (tel:8553574677)

© 2019

Last Updated January 1, 2020



Dealership Info

 **Phone Numbers:**

Main:

855-358-0723 (tel:8553580723)

Sales:

512-937-1404 (tel:5129371404)

Service:

512-893-6900 (tel:5128936900)

Parts:

512-371-6064 (tel:5123716064)

 **Sales Hours:**

Mon - Sat

8:00 AM - 8:00 PM

Sun

Closed

 **Service Hours:**

Mon - Fri

7:00 AM - 7:00 PM

Sat

8:00 AM - 6:00 PM

Sun

Closed

 **Parts Hours:**

Mon - Fri

7:00 AM - 7:00 PM

Sat

8:00 AM - 6:00 PM

Sun

Closed



[View larger map](#)



Map data ©2021 Google

Connect With Us



(https://twitter.com/SouthPointHyundai) (https://www.facebook.com/SouthPointHyundai) (https://plus.google.com/+SouthPointHyundai) (https://www.instagram.com/SouthPointHyundai)

Inventory



Service



Finance



About



(HTTPS://WWW.SOUTHPOINTHYUNDAI.COM)

SOUTH POINT HYUNDAI

(HTTPS://WWW.SOUTHPOINTHYUNDAI.COM)

Privacy Policy (<https://www.southpointhyundai.com/privacy-policy/>)

Contact Us (<https://www.southpointhyundai.com/contact-us/>) Sitemap (</sitemap/>)

My Hyundai Owner (<https://owners.hyundaiusa.com/us/en/index.html>)

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Advanced Automotive Dealer Websites by [Dealer Inspire \(https://www.dealerinspire.com\)](https://www.dealerinspire.com)

EXHIBIT 9

Sales: (512) 262-2020 Service: (512) 504-7077 Parts: (512) 504-7079 24795 I-35, Kyle, TX 78640

Search Inventory



Schedule Service

Addressing COVID-19 (https://www.hyundaiaustin.com/dealership/covid-19.htm)

Privacy

Our dealership takes your privacy seriously and is committed to safeguarding your privacy online. Because we do gather certain types of information from visitors to our sites, we have developed a privacy statement to help you understand the terms and conditions surrounding the collection and use of that information. This statement discloses the types of information we gather, how it is used, and how you can gain access to and edit any data that we've collected about you at any time.

Guiding Principles:

Our dealership respects the privacy of individuals who visit our Web sites, send us e-mail, or participate in features/services we offer online. Accordingly, our policy regarding online privacy has been developed using the following guiding principles:

Our dealership maintains a strict "no-spam" policy. Subscribers to our e-mail services (or any other feature/service found on our Web site) will not receive unsolicited e-mail messages from us. Our dealership collects information online primarily to provide our visitors with a more relevant experience on our sites. When doing so, we will make every reasonable effort to avoid excessive or irrelevant collection of data. Our dealership will take reasonable physical, electronic and managerial measures to safeguard and secure any information you provide to us (e.g. data will be stored in protected databases on secured servers with restricted access). Our dealership will not share any information you've provided to us with anyone without your consent other than to provide the service you've requested. At the time you register for any such service, you will be notified of, and asked to consent to, the sharing of your information with any particular third party necessary to the provision of the requested service.

Non-Personally Identifiable Data:

Anytime you visit our Web site, we may gather certain non-personally identifiable information regarding the means you use to access our site. This information may include the type and version of your browser, your service provider, your IP address and any search engine you may have used to the site. We use this information to help diagnose problems with our server, administer the site, and compile broad statistical data. In addition, we gather certain navigational information about where you go on our Web sites. This information enables us to determine which areas of the Web sites are most frequently visited and helps us to tailor the sites to the needs and interests of our online visitors. Such information is gathered by us in the aggregate and will not be associated with a specific individual without that individual's consent.

Information Voluntarily Provided:

Any information you provide to us (i.e. name, e-mail address, etc.) when you enroll in one of our E-Mail Reminder Services, request information, or use any of the other interactive portions of our Web sites, is securely maintained on our Web server and internal systems. This information may be used to provide you with information you've requested about our company, our products and our services, or to provide you with special notices. You may opt out of receiving future communications at any time (see opt-out Procedures below). This data may also be used to tailor your experience on our sites by providing content that is relevant to your interests and geographic region.

Information Collected from Other Sources:

Related Links

- ▶ About
- ▶ Directions
- ▶ Contact
- ▶ Schedule Service

Contact

Hyundai Kyle

24795 I-35
Kyle, TX 78640

Sales: (512) 262-2020
Service: (512) 504-7077
Parts: (512) 504-7079

Hours

Monday	8:30 AM - 8:00 PM
Tuesday	8:30 AM - 8:00 PM
Wednesday	8:30 AM - 8:00 PM
Thursday	8:30 AM - 8:00 PM
Friday	8:30 AM - 8:00 PM
Saturday	8:30 AM - 8:00 PM
Sunday	Closed

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To help us better understand and respond to your needs and interests, we may in the future receive information about you from other sources. We will ask any provider of such information to represent and warrant that the information has been gathered and maintained in accordance with all state and federal laws. Any such information will be maintained by us in accordance with the standards set forth in this privacy policy along with other personal information you've provided.

Disclosure of Personal Information:

Our dealership understands the importance of your privacy. We collect and maintain the personal information of our consumers for our use and our subsidiaries. We do not sell, rent, or trade consumer information to third parties, other than as described below, and never without your consent. Third parties may collect personally identifiable information about your online activities over time and across different websites when you use this website.

Business Partners:

Our dealership may partner with select retailers and other companies at various times to provide expanded services to our site visitors. As part of such a relationship, we may share with these companies the use of certain interactive Web site functions (i.e. the E-Mail Reminder Service). Information provided by site visitors through the use of such interactive functions may be available to both our dealership and our partners.

Agents:

Our dealership may use other companies and individuals to perform certain functions on our behalf. Examples include administering e-mail services and running special promotions. Such parties only have access to the personal information needed to perform these functions and may not use or store the information for any other purpose. Subscribers or site visitors will never receive unsolicited e-mail messages from agents working on our behalf.


Business Transfers:

In the event that our dealership sells or transfers a particular portion of its business assets, consumer information may be one of the business assets transferred as part of the transaction. If substantially all of the assets of our dealership are acquired, consumer information may be transferred as part of the acquisition.

Compliance with Law/Safety:

Our dealership may disclose specific personal information based on a good faith belief that such disclosure is necessary to comply with or conform to the law or that such disclosure is necessary to protect the users of our Web sites, the sites themselves, or the public.

With Consent:

Other than as set forth in this Privacy Policy, you will be notified when any personally-identifiable information about you may be shared with third parties, and you will be given the opportunity to  to share that information.

Use of Cookies:

Our dealership may use a browser feature known as a "cookie." Cookies are small files placed on your hard drive that assist us in providing you with a customized browsing experience. Our dealership uses cookies to provide you with the convenience of not having to reenter information, such as user IDs and passwords, multiple times during your visits to our Web sites. Cookies can also be utilized to help us provide you with information targeted to your interests, based upon your prior browsing on our Web sites. The "help" section of the toolbar on most browsers will inform you on how to prevent your browser from accepting new cookies, how to have the browser notify you upon the receipt of a new cookie, or how to disable the use of cookies completely. As our Web sites have been designed to take advantage of the use of cookies. Should you configure your browser to decline their use, certain features of our Web sites may not function correctly and you may be required to reenter any user IDs and passwords more frequently

Accessing Our Web Sites from Outside of the United States:

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If you are visiting our Web site from a location outside of the U.S., your connection will be through and to servers located in the U.S. Any information you provide during your visit will be processed and maintained on our Web server and other internal systems located within the U.S.

External Links:

Our Web sites contain links to other sites. Our dealership is not responsible for the privacy practices or the content of such Web sites. To help ensure the protection of your privacy, we recommend that you review the privacy policy of any site you visit via a link from one of our Web sites.

Passwords:

The personal data record created through your registration with our Web site can only be accessed with the unique password associated with that record. To protect the integrity of the information contained in this record, you should not disclose or otherwise reveal your password to third parties.

Public Forums:

Our Web sites may make chat rooms, forums, message boards, and/or news groups available to its users at various times. Please remember that, unless otherwise stated, any information that is disclosed in these areas becomes public information and you should exercise caution when deciding to disclose your personal information in these areas.

Opt-out Procedures:

You may always opt-out of receiving future communications from our dealership. Our sites allow users to opt-out of receiving such communications at the point where personal information is requested, or through other means as identified.

Browser-Based Do Not Track:

Some browsers incorporate a "Do Not Track" (DNT) feature that, when turned on, signals to websites and online services that you do not want to be tracked. Because there is not yet an accepted standard for how to respond to a DNT signal, we do not currently respond to DNT signals on this website or on websites where we provide advertisements, content, or other services.

Contacting the Web Sites:

If you have questions concerning this Privacy Policy or the practices of these sites, you may contact us.

Hyundai Dealer Privacy Policy

Disclosure of Certain Information to Hyundai Motor America. Hyundai Kyle is an independent Hyundai franchised dealership. When you use this website, Hyundai Kyle may provide personal information you enter on this website or otherwise provide to us to Hyundai for Hyundai's marketing and other business purposes. For example, when you indicate that you would like to get more information about Hyundai and its products, services or offers, personal information such as your name, address, city, state, zip code, email address and telephone number will be shared to Hyundai. In addition, if you buy or lease a Hyundai vehicle from Hyundai Kyle, we may share information about your vehicle purchase (such as vehicle identification number (VIN), make, model, model year, date of purchase or lease and service history) with Hyundai.

HYUNDAI MOTOR AMERICA WEBSITE PRIVACY POLICY Effective Date: June 7, 2016 Your privacy is important to Hyundai Motor America ("Hyundai" "we," "us" or "our") and its affiliate companies, as is your trust in Hyundai's products and services. We strive to protect your online privacy, while providing an enjoyable website experience that provides information, products, and services that are relevant and useful to you. The purpose of this Hyundai Motor America Privacy Policy (this "Privacy Policy") is to notify and inform you of how we collect, use and share information through our U.S. websites: HyundaiUSA.com, MyHyundai.com, and certain other Hyundai websites (e.g., hyundaicertified.com) (collectively, the "Site"). This Privacy Policy describes: • The information that we collect • How information is collected • How we use the information • How we may share information with third parties • The security of your information • Your

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information choices **USER CONSENT AND INCORPORATION PLEASE REVIEW THIS PRIVACY POLICY CAREFULLY.** By using the Site, you accept the terms of this Privacy Policy and our Terms of Use and consent to our collection, use, disclosure and retention of your information as described in this Privacy Policy. **IF YOU DO NOT AGREE WITH ANY PART OF THIS PRIVACY POLICY OR OUR TERMS OF USE, THEN PLEASE DO NOT USE THE SITE.** **VEHICLE TECHNOLOGIES AND SERVICES; THIRD PARTY SITES** Vehicle Technologies and Services We also offer certain vehicle technologies and services to make our vehicles safer, more environmentally friendly, more convenient and more fun to drive. Some of these technologies and services collect, use or share information that is collected, generated, recorded or stored by our Hyundai vehicles. This Privacy Policy applies only to the collection, use and sharing of information collected on the Site and does not apply to collection of information by those vehicle technologies and services. Our privacy practices with respect to our vehicle technologies and services are described in our Hyundai Vehicle Owner Privacy Policy and our Blue Link Service Subscriber Privacy Policy. Should you use such vehicle technologies and services, we encourage you to read the applicable privacy policies. **Third Party Sites** Hyundai may offer links to or from the Site to other websites within the Hyundai family as well as to websites, services and resources operated by third parties. We offer links to third party websites so that you can conveniently visit our vendors and advertisers or locate other content likely to be of interest to you. We are not responsible for the privacy practices, content or policies of websites operated by third parties and urge you to inquire about their privacy and information sharing practices before providing any Personally Identifiable Information. In the event that you provide Personally Identifiable Information to any third party website or service, you understand that Hyundai is not responsible for such third parties' use or misuse of your Personally Identifiable Information. You further acknowledge and agree that Hyundai shall not be responsible or liable, directly or indirectly, for any damage or loss caused or alleged to be caused by or in connection with use of or reliance on any such content, goods or services available on or through any such third party website, service or resource. **EFFECTIVE DATE AND CHANGES TO PRIVACY POLICY** The Effective Date of this Privacy Policy is set forth at the top of this webpage. Hyundai reserves the right to change this Privacy Policy at any time. Hyundai will use, share, and disclose all personal and other user information in accordance with the Privacy Policy in effect at the time the information is collected. We will post any changes to this Privacy Policy on this page so check back frequently so that you are always aware of what information we collect, how we use it and under what circumstances we may disclose it. Continued use of this Site following changes to these terms will mean that you accept the changes. **INFORMATION WE COLLECT** You can visit the Site to read about our vehicles or use our online tools without providing any Personally Identifiable Information (other than, in some cases, your zip code). You may also choose to participate in activities and obtain services on the Site for which we may collect Personally Identifiable Information. We also collect Non-Personally Identifiable Information automatically when you use the Site. "Personally Identifiable Information" is information associated with or that may be used to identify or contact a specific person. Personally Identifiable Information includes: (1) contact data (name, address, city, state, zip code, email address and telephone number); (2) demographic data (such as age range, gender, birth month); (3) vehicle information (vehicle identification number (VIN), make, model, model year, selling dealer and date of purchase or lease); and (4) credit card number and payment card information. "Non-Personally Identifiable Information" is



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information that, by itself, does not identify the individual, such as the operating system you are using, IP address, the date and time stamp of your visit, referring URLs, your Internet service provider, browser type and related browser data, the pages you visit and purchase history. HOW INFORMATION IS COLLECTED Information You Provide To Us We collect information that you provide to us when you use the Site. The information that we collect and how we process it depends on how you use the Site. We may collect Personally Identifiable Information when you participate in certain activities on the Site or request certain services, including:

- When you register or create an account
- When you make brochure and information requests, order vehicle parts and accessories and request to receive site announcements and special offers
- When you participate in promotional activities, such as surveys, sweepstakes, contests, special events, blogs and chats
- When you contact us
- When you otherwise voluntarily provide your Personally Identifiable Information

We Collect Automatically We also collect certain information from users of the Site automatically when they visit. We may collect such information in the following ways:

Cookies. We may collect certain preference information of website users through the use of cookies, including flash cookies, which are small files stored on your hard drive in order to optimize the design of the Site. Our “cookies” are only used when you are visiting the Site. Cookies enable us to track and aggregate user behavior data so that we may better target the interests of our users and enhance their experience on the Site. You can set your browser to refuse all cookies or to indicate when a cookie is being sent. However, some website features or services may not function properly without cookies.


Web Analytics and Other Technologies. A number of technologies exist to assess consumer behavior both on-line and off-line. Hyundai may employ a variety of these technologies, including web beacons (see below), web analytics techniques, and other behavior marketing technologies, to assess consumer behavior and to understand how we can better serve our customers. Many of these technologies are provided to Hyundai via third party providers specializing in behavioral marketing and consumer behavior. In the course of using these behavioral marketing technologies, we automatically collect Non-Personally Identifiable Information from you which may be aggregated with other information for analytic purposes. For example, we may use Adobe Omniture and Google Analytics to help analyze how users use the Site. The Google Analytics tool uses cookies to collect standard Internet log information and visitor behavior information

 anonymous form. The information generated by the cookie about use of the Site (including IP address) is transmitted to Google. This information is then used to evaluate visitors' use of the Site and to compile statistical reports on website activity for Hyundai. For more information regarding Google Analytics please visit Google's website, and pages that describe Google Analytics, such as www.google.com/analytics/learn/privacy.html.

Web Beacons. Some of our web pages, promotional email messages and/or newsletters may contain electronic images known as web beacons, which are also called single-pixel GIFs. Web beacons collect information including a cookie number, time and date of a page view and a description of the page on which the web beacon resides. Web beacons are a technique we may use to enhance and personalize the Site and the products and Services we offer, to provide product information and advertisements that are more relevant to your interests, compile aggregated statistics about the usage of the Site and to track the number of users who have opened and acted upon our promotional email messages.

Third Party Advertisers. Some banner ads provided by third parties may be displayed on the Site. These ads contain

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cookies and may also contain web beacons. Unlike cookies and web beacons used by Hyundai in content it controls on the Site, cookies or web beacons received with banner ads are collected by our advertisers and we do not have access to this information. We use third parties to serve some or all of the advertisements that are placed within the Site and they may use information (not including Personally Identifiable Information) about your visits to the Site and other websites to assist in serving advertisements to you. These companies may employ cookies, web beacons and action tags to measure advertising effectiveness. They may share anonymous information with their clients such as date and time the banner ad was shown you, the specific ad shown and the IP address. Log Files. Like most websites, we collect log information to analyze trends, administer the sites, track users' movement and gather broad demographic information for aggregate use in improving the sites. IP addresses are not linked to personally identifiable information. Information We Obtain From Other Sources Hyundai may also obtain information about you and your vehicle in a number of other ways. For example, we may obtain information about you or your vehicle when you provide it to us at an event such as an auto show, from business reply cards, sweepstakes entries, test-drive incentive applications, surveys, vehicle sales records and other public sources. • Contact information (name, address, city, state and zip code, email address, telephone number) • Vehicle information (vehicle identification number (VIN), make, model, model year, selling dealer, date of purchase or lease, etc.) • Demographic information (age range, marital status, household composition, etc.) • Non-credit-related marketing information (when you plan to purchase or lease, the vehicle in which you are interested, etc.) • Relationships you have with Hyundai affiliates and business partners such as XM Satellite Radio and roadside assistance programs In addition, Hyundai dealers (which are all independently owned and operated) and other sources that provide lists of potential vehicle purchasers or current owners may provide to us the information they have regarding you or your vehicle. We use this information to serve your needs through better customer service and to advise you of our products and services. HOW WE USE INFORMATION We may use your information individually or combine it with other information to generate aggregate statistical information. The primary uses of your information include: • To fulfill a specific product or service you have requested • To provide product information • To operate, improve, enhance and personalize the Site and the products and services we offer, and to  each user a more consistent and personalized experience when acting with us • To answer your questions or address any complaints you may have made • To evaluate candidates as they apply for an employment position with Hyundai • To let you know about special discounts or added vehicle services or functions • To show advertisements that are more relevant to your interests • For research and analysis • For customer service, security, to detect fraud or illegal activities, or and for archival and backup purposes • To enforce our Terms of Use or other applicable policies HOW WE MAY SHARE INFORMATION WITH THIRD PARTIES Third Party Service Providers, Affiliates and Marketing Partners. Hyundai may share Personally Identifiable Information and Non-Personally Identifiable Information, including website user or vehicle owner information with third parties including our service providers, affiliates, authorized dealers, licensees, suppliers and marketing partners so that they can provide services on our behalf (e.g., brochure fulfillment), show you advertisements about our products and services on their third party sites or so they may use it to offer you other valuable products and services. In addition, user or vehicle owner data may be used by our

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suppliers to provide services for Hyundai and by our business partners to conduct joint marketing programs with Hyundai. We will not share your Personally Identifiable Information with third parties other than these without your permission. Programs. Hyundai may invite you to participate in promotional activities, such as surveys, sweepstakes, contests, special events, blogs and chats (“Programs”). These Programs are oftentimes co-marketed with an unaffiliated Hyundai business partner. If you participate in a Program, we may use Personally Identifiable Information you provide. For example, we may send you email messages to invite you to join a contest Program. Your Personally Identifiable Information may also be shared with our business partner and may also be used by our business partner if you indicate your interest in receiving communications directly from that company. If you elect to receive communications from our business partner, your information will be used by that company in accordance with its policies and this Privacy Policy will not apply to that company’s use of your information. Sometimes the rules, terms and conditions or disclaimers that apply to a particular Program include information on how we may use the Personally Identifiable Information that you provide to us through your participation in the Program. If there is a conflict between the rules, terms and conditions that apply to a particular Program and this Privacy Policy, those applying to the particular Program will govern. Please review all of the information about a Program before you provide us (or our business partners) with any Personally Identifiable Information. For Audit and Legal Purposes. Hyundai may disclose any Personally Identifiable Information or Non-Personally Identifiable Information collected to any person performing audit, legal, operational or other similar services for Hyundai. Hyundai may also disclose any Personally Identifiable Information or Non-Personally Identifiable Information when required to do so by subpoena, court order, or warrant. Hyundai will also disclose any Personally Identifiable Information or Non-Personally Identifiable Information deemed necessary to protect the safety of an individual, the public, or the security and reliability of Hyundai and the Site. Participating Vendors. Some of our websites offer opportunities to make purchases online from special participating vendors. On websites with online purchase opportunities for products and merchandise, we may also give participating vendors the order information and authorization for the merchant bank. Any time you order from a participating vendor, that vendor will automatically have all the information related to the order. Participating vendors may use that information to advise you directly of other products and offerings that they offer. Credit Card Companies; Third Party Payment Services; Third Party Promotional Sites. As in any transaction, your credit card company will have all relevant information about the name of the vendor, item(s) purchased, date of purchase and total cost. Hyundai will not otherwise provide any Personally Identifiable Information to your credit card company. In some cases, we use third party payment and transaction services to facilitate your transactions and process your orders. In such cases, we will share your Personally Identifiable Information and credit card information with third party payment services companies solely for the purpose of completing the transaction or processing your order. In some cases, we will share your Personally Identifiable Information and credit card information with third parties who may offer you a gift or promotional offer as a result of your interest. Other Third Parties. We may share your Personally Identifiable Information with third parties, such as advertisers, sponsors and other promotional and business partners, only when you have not opted out of receiving communications from third parties. If you wish to opt-out of receiving third party communications, you



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may exercise this right by following the opt-out procedures contained in any email or written communication Hyundai sends to you or by following the procedures set forth in the “Unsubscribe or Opt-Out” section of this Privacy Policy. Public Postings. You should be aware that if you voluntarily disclose information, personal or otherwise, online in any community area (whether through Hyundai’s websites or any other service available online), that information can be collected and used by others. Accordingly, you should use caution when sharing any Personally Identifiable Information with others in any community area (whether through Hyundai’s websites or any other service available online). Changes in Corporate Structure. In developing our business, we might sell certain assets, or the company, or parts of it, may be sold, merged or otherwise transferred. In such transactions, user information, whether Personally Identifiable Information or otherwise, may be one of the transferred assets. With Your Consent. Other than the cases above, we won’t disclose your Personally Identifiable Information for any purpose unless you consent to it in some way, including by your continued use of the Site after notice. THE SECURITY OF YOUR INFORMATION We use industry standard security policies, procedures and tools designed to safeguard data submitted through the Site against accidental or intentional loss, theft, unauthorized access, destruction, use, modification and disclosure. However, the security of information transmitted through the Internet can never be guaranteed. We are not responsible for any interception or interruption of any communications through the Internet or for changes to or losses of data. Users of the Site are responsible for maintaining the security of any password, user ID or other form of authentication involved in obtaining access to password protected or secure areas of any of the Site. In order to protect you and your data, we may suspend your use of any of the Site, without notice, pending an investigation, if any breach of security is suspected. Access to and use of password protected and/or secure areas of any of the Site are restricted to authorized users only. Unauthorized access to such areas is prohibited and may lead to criminal prosecution. YOUR INFORMATION CHOICES You may choose to share your Personally Identifiable Information with us. However, your participation in using our websites and providing Personally Identifiable Information is completely voluntary. You can unsubscribe and opt-out to certain communications and access, or update and delete your contact information, by contacting us at the email address, number or address specified below. Accessing and Updating Your Information If you register for an account on MyHyundai.com, you can access and update certain information we have relating to your online account by signing into your account and going to the “My Account” section of the Site. You may also update or delete your contact information by emailing us at consumeraffairs@hmausa.com, by calling (800) 633-5151 or by writing us directly at: Hyundai Motor America/Phoenix, P.O. Box 83835, Phoenix, AZ 85071-3835. Unsubscribe Or Opt-Out Hyundai offers you the opportunity to opt-out from receiving promotional email or mail from Hyundai about our products and services. • For email, you may opt-out at any time by using the unsubscribe mechanism within the email. The unsubscribe mechanism allows you to manage your subscription preferences to email alerts and special offers. Notwithstanding the above, this mechanism does not allow you to opt-out of receiving transactional email, such as registration confirmation, vehicle updates and responses to direct requests. • For calls or direct mail, you may opt out at consumeraffairs@hmausa.com or by calling (800) 633-5151. • If the information you have provided will be available to third parties for marketing purposes, you will also be given the opportunity to opt-out from this practice at consumeraffairs@hmausa.com or by calling (800) 633-5151.

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• You also may write to us directly if you wish to: (a) ask that we not share your Personally Identifiable Information with third parties for marketing purposes; or (b) opt out or request that we cease sending you promotional or other information via calls, mail or email. Such written requests should be sent to Hyundai Motor America/Phoenix, P.O. Box 83835, Phoenix, AZ 85071-3835. At the time information is collected from you, other choices you have about how the information may be used may be explained. If you have opted out of receiving future emails from us, we will implement your opt-out request within ten (10) business days of receiving the opt-out request. If you have opted out of receiving future promotional materials by regular mail, we will implement your opt-out request within a commercially reasonable time. In those instances, we will retain your information in a "do not promote" file in our database, and you will receive no further communications from us as required by law. YOUR CALIFORNIA PRIVACY RIGHTS Under California Civil Code Section 1798.83, also known as Senate Bill 27, or "Shine the Light" law California residents with whom we have an established business relationship are entitled to request and receive, free of charge, once per calendar year, a copy of Hyundai's California Information Sharing Disclosure Notice about the customer information we shared, if any, with other businesses for their own direct marketing uses in the previous calendar year. You may call (800) 633-5151 or email us at consumeraffairs@hmausa.com to request a copy. We will provide the requested information to you at your email address in response. Please be aware that not all information sharing is covered by the "Shine the Light" law requirements and only information on covered sharing will be included in our response. CHILDREN'S PRIVACY We do not knowingly collect or maintain Personally Identifiable Information from any person under the age of thirteen (13) as they are not of driving age. No parts of our Services are directed to or designed to attract anyone under the age of thirteen (13). DO NOT TRACK The Site does not support Do Not Track at this time. Do Not Track (DNT) is a privacy preference that you can set in your web browser to indicate that you do not want certain information about your webpage visits collected across websites when you have not interacted with that service on the page. For all the details, including how to turn on Do Not Track, visit donottrack.us. CLASS ACTION WAIVER You may only resolve disputes with us on an individual basis and may not bring and expressly waive bringing a claim as a plaintiff or a class member in a class, consolidated, or representative action. Class arbitrations, class actions, private attorney general actions, and consolidation with other arbitrations are not allowed. GENERAL PROVISIONS All matters relating to the Site are governed by the laws of the State of California in the United States irrespective of its conflicts of laws provisions. In the event that Hyundai wishes to pursue legal action against you, it may bring such legal action in any federal or state court having jurisdiction. Lawsuits against Hyundai must be brought in federal or state court in Orange County, California. HOW TO CONTACT US WITH QUESTIONS Please email us at consumeraffairs@hmausa.com, call us at (800) 633-5151, or write us at Hyundai Motor America/Phoenix, P.O. Box 83835, Phoenix, AZ 85071-3835 if you have any questions about this Privacy Policy.

EXHIBIT 10

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

BLITZSAFE TEXAS, LLC,

Plaintiff,

v.

**BAYERISCHE MOTOREN WERKE AG
AND BMW OF NORTH AMERICA,
LLC,**

Defendants.

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DEFENDANTS BAYERISCHE MOTOREN WERKE AG'S AND BMW OF NORTH AMERICA, LLC'S MOTION TO RECONSIDER DENIAL OF MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION OR IMPROPER VENUE OR, IN THE ALTERNATIVE, TO TRANSFER (DKT. 60)

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I. INTRODUCTION: THIS IS NOT THE RIGHT DISTRICT FOR THIS CASE

Respectfully, Defendants Bayerische Motoren Werke AG (“BMWAG”) and BMW of North America, LLC (“BMWNA”) (together, “Defendants”) move for reconsideration of the Court’s September 6, 2018 Order (Dkt. 90) (the “Order”), denying the October 16, 2017 motion to dismiss for lack of venue as to BMWNA and for lack of jurisdiction as to BMWNA. (Dkt. 60).

First, BMWNA respectfully requests that that Court reconsider its decision that venue exists in this District. BMWNA does not reside here, as, for venue, there must be a regular and established place of business of the defendant in the district. *TC Heartland LLC, v. Kraft Foods Grp. Brands LLC*, 137 S. Ct. 1514, 1516 (2017). In finding venue, the Order makes two fundamental errors. First, the Order takes the extraordinary step of going outside the record to establish venue, thereby taking on the burden of Blitzsafe Texas, LLC (“Plaintiff”) to prove that this District is the appropriate venue. *See In re ZTE (USA) Inc.*, 890 F.3d 1008, 1013 (Fed. Cir. 2018). By conducting its own fact finding, rather than ruling on the issues presented by the parties, the Court misconstrued facts and reached an erroneous conclusion. Second, the Order misapplied the law by finding that one corporate entity can “ratify” a place owned, operated, and controlled by a separate party, even if separate companies maintain and observe all corporate formalities (and where there is no evidence to support piercing the corporate veil or alter ego). Fundamentally, the Order defies abundant case law—including case law from this District—that a third-party dealership cannot be the venue-anchoring place of BMWNA. *EMED Techs. Corp. v. Repro-Med Sys., Inc.*, No. 2:17-CV-728-WCB-RSP, 2018 WL 2544564 (E.D. Tex. June 4, 2018) (Bryson, J.).

Second, BMWAG respectfully requests that the Court reconsider its decision to exercise jurisdiction over BMWAG. The exercise of jurisdiction over BMWAG is unreasonable and unfair, because BMWAG is a German company that does not make, use, sell, or offer to sell any products in the Eastern District of Texas. The Order requires reconsideration because it provides a basis for

jurisdiction over any company that sells any product through distribution channels, so long as that product is eventually sold in Texas—a result that cannot square with current jurisdiction precedent.

BMWNA and BMWAG thus respectfully request reconsideration of the Order, dismissal of the First Amended Complaint, or alternatively, transfer of the case to the District of New Jersey.

II. FACTUAL BACKGROUND: THE COURT’S ORDER OF SEPTEMBER 6, 2018

BMWAG and BMWNA originally filed the motion to dismiss on August 28, 2017 (Dkt. 30), but Blitzsafe amended its complaint, and BMWAG AND BMWNA then renewed the motion on October 16, 2017 (Dkt. 60). The Court ruled on the motion in its September 6, 2018 Order.

A. Venue as to BMWNA

The Court’s Order found venue appropriate as to BMWNA under the second half of 28 U.S.C. § 1400(b),¹ concluding that BMWNA has a place of business in the District, despite not owning or leasing offices or facilities in the District. (Dkt. 90 at 7–25). The Court recognized that the venue statute has three requirements relevant to the “regular and established place of business” inquiry: “(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. If any statutory requirement is not satisfied, venue is improper under § 1400(b).” *Id.* at 10 (citing *In re Cray*, 871 F.3d 1355, 1360 (Fed. Cir. 2017)). The Court relied on Plaintiff’s allegation that there are four dealerships in the District,² to conclude that the first two requirements were met. *Id.* at 10. The Court then focused

¹ 28 U.S.C. § 1400(b) provides that “[a]ny civil action for patent infringement may be brought . . . where the defendant has committed acts of infringement and has a regular and established place of business.” As to “acts of infringement,” the Court concluded that Blitzsafe alleged that BMWNA had “committed acts of infringement” in the District sufficient to meet venue statute requirements. *Id.* at 9. The Court reasoned, “[s]ince the sale may occur where the buyer is located, BMWNA has at least offered for sale and/or sold vehicles containing the infringing products in this District.” *Id.*

² The four dealerships at issue in the District include three independent BMW dealerships, (1) BMW of Beaumont, (2) BMW of Tyler, (3) Classic BMW, as well as (4) MINI of Plano.

on whether these third-party owned and operated dealerships were “of the defendant,” *i.e.*, somehow attributable to BMWNA.

First, the Order took judicial notice of a statement from a separate, unrelated case that BMWNA “has conducted and does conduct business in [the Eastern District of Texas] by distributing automobiles to dealers.” *Id.* at 13 (citing *Entry Sys., LLC v. Vivint, Inc.*, No. 2:14-CV-1089-JRG, Doc. No. 21, ¶ 4 (E.D. Tex. Nov. 14, 2012)). The Court did not state how “conducting business” was relevant to the inquiry if/how third-party dealerships were “places of the defendant.”

Second, the Order acknowledged that, according to Texas Occupations Code § 2301.476(c), BMWNA is “not permitted to own or control, generally, the dealerships within this District.” *Id.* at 14. Yet, the Court reasoned that this did “not mean that they are not places of BMWNA under the third *In re Cray* factor, although, certainly, at first glance, the prohibition cuts against such a finding.” *Id.* (emphasis in original). The Court held that BMWNA has “adopted and ratified the dealerships within this District as its places of business,” (*id.* at 15), based on several “facts,” many of which were introduced not by Plaintiff, but by the Court’s own, new investigation.

Third, without a source, the Order concluded that “BMWNA does not permit sales of any new BMW vehicle from any location *except* authorized dealers, such as the BMW Centers found within this district.” *Id.* Next, the Court found that dealerships in the District are “*named* ‘BMW,’” although the Court continued in the same sentence to note that the dealerships each have specific, non-BMWNA names (for example, BMW of Tyler, BMW of Beaumont, and Classic BMW). *Id.* at 16. Finally, the Order took judicial notice of websites, *which neither party had cited*, to purportedly show that independent third-party dealerships are “places of” BMWNA, for example:

- GoogleMaps images purportedly showing that each of the BMW dealerships in the District are held out to be “places of BMW,” despite the photographs also showing the full name of each dealership (*e.g.*, BMW of Tyler, BMW of Beaumont, and Classic BMW). *Id.* at 16–17 n.7.

- “Search New Vehicle Inventory” feature, as accessed via the www.bmwusa.com website, purportedly showing vehicles available near zip code 75701,³ which refers customers to third-party dealership websites for accurate quotes on a customer’s selected BMW. *Id.* at 19 n.10.
- “Schedule a Test Drive/Contact a BMW Center/Request a Quote” features, as accessed via the www.bmwusa.com website, where BMWNA purportedly “collect[s] customer information, and provid[es] that information to its BMW Centers,” referring any Eastern District of Texas customer that visits BMWNA’s website to a local non-BMWNA BMW Center. *Id.* at 20.
- “Build Your Own” feature, as accessed via the www.bmwusa.com website, where any Eastern District of Texas customer may assemble a custom build of a BMW model and then proceed to order it—via a third-party non-BMWNA BMW Center located in the District. *Id.* at 20.

Based on these purported facts, and in particular, the new research conducted by the Court, the Court found “clear-cut ratification” of the “BMW dealerships in this District [as] places of business of BMWNA within the context of the special patent venue statute, § 1400(b).” *Id.* at 21.

Fourth, the Order also found a further basis for exercising venue, namely that BMWNA “conducts its business of the provision of new purchase warranties and service pursuant to those warranties to the consuming public in this district through its authorized dealerships.” *Id.* at 24.

B. Jurisdiction over BMWAG

The Order also denied BMWAG’s motion to dismiss the Amended Complaint for lack of jurisdiction. *Id.* at 1–5. Citing *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558 (Fed. Cir. 1994), the Court held that jurisdiction was appropriate because “BMWAG places the accused products into the stream of commerce with knowledge that, through BMWNA’s established distribution to other BMW entities, the accused vehicles will be sold in Texas.” *Id.* at 4.⁴

³ 75701 is the zip code for the Tyler, Texas area. <https://www.unitedstateszipcodes.org/75701/>.

⁴ The Court also denied BMWAG’s motion to dismiss for lack of venue. Citing *In re HTC Corp.*, 889 F.3d 1349, 1354 (Fed. Cir. 2018), the Court held that, because BMWAG is a foreign entity, “venue is proper in this District and, indeed, in any district.” (Dkt. No. 90 at 6). The Federal Circuit recently denied rehearing *en banc* in *In re HTC*. See *In re HTC Corp.*, No. 2018-130, D.I. 32 (Fed. Cir. Sept. 6, 2018) (slip opinion). BMWAG does not seek reconsideration on venue, but BMWAG does preserve all objections to venue in view of any potential Supreme Court review of this issue.

III. STANDARD OF REVIEW: RECONSIDERATION IS REQUIRED TO CORRECT A CLEAR ERROR OF LAW AND/OR TO PREVENT MANIFEST INJUSTICE

The Court has the authority to grant a motion for reconsideration under Fed. R. Civ. P. 59(e). *Lodsys, LLC v. Brother Intern. Corp.*, Case No. 2:11-CV-90-JRG, 2013 WL 1338767, at *3 (E.D. Tex. Jan. 14, 2013); *Hamilton v. Williams*, 147 F.3d 367, 379 n.10 (5th Cir. 1998). Grounds for granting such a motion include: “(1) an intervening change in controlling law; (2) the availability of new evidence not previously available; or (3) the need to correct a clear error of law or prevent manifest injustice.” *In re Benjamin Moore & Co.*, 318 F.3d 626, 629 (5th Cir. 2002).

IV. ARGUMENT: CLEAR ERROR REQUIRES RECONSIDERATION OF THE COURT’S DUAL VENUE AND JURISDICTION DETERMINATIONS

It is clear error to determine that this District is the appropriate venue for BMWNA, where there are no “places of” BMWNA in the District, as the evidence contradicts the core of venue-related facts in the Order (*see generally* Decl. of Lavenue, Ex. A (Rebuttal Chart)), Plaintiff failed to meet its burden of proving venue, and the Order contradicts the decisions in *EMED Techs.*, 2018 WL 2544564 (E.D. Tex. June 4, 2018) (Bryson, J.) and *Soverain IP, LLC v. AT&T, Inc.*, No. 2:17-cv-293, 2017 WL 5126158 (E.D. Tex. Oct. 31, 2017), *report and recommendation adopted* 2017 WL 6452802 (E.D. Tex. Dec. 18, 2017). It would also be clear error to hold jurisdiction over BMWAG, an entity with no direct contacts to Texas. (Dkt. 60, Schäck & Göbel Decl. ¶¶ 4–12).

A. The Court Should Reconsider Its Venue Holding for BMWNA as the Order Relies on Inaccurate Extra-Record Facts and It Does Not Follow the Law

The Order takes the extraordinary step of using extra-record facts to convert third-party owned and operated dealerships into “places of” BMWNA, even though the Federal Circuit has cautioned that any venue-anchoring place of business must “be a place of the defendant.” *In re Cray*, 871 F.3d at 1363 (emphasis in original). Moreover, with the Court having stepped into Plaintiff’s shoes, by researching, finding, and then relying on extra-record information, which

neither party cited or pleaded, the Order violates the principle that it is *Plaintiff's* burden to establish venue. *In re ZTE*, 890 F.3d at 1013. Further, the Order contradicts this Court's recent decisions in *EMED Techs.*, which confirmed that the "consistent and substantial case law authority that the place of business of a corporation's distributor is not, without more, an appropriate venue for a patent infringement action," 2018 WL 2544564, at *3, and *Soverain IP*, which found that a place of business of one corporate entity cannot be imputed to another unless the entities "lack formal corporate separateness, which is a difficult standard to meet," 2017 WL 5126158, at *1.

For purposes of venue, the law is definite that, "[s]o long as a formal separation of [closely related] entities is preserved, the courts ordinarily will not treat the place of business of one corporation as the place of business of the other." *EMED Techs.*, 2018 WL 2544564, at *2 (citing Wright & Miller, Fed. Prac. & Proc. Juris. § 3823 (4th ed.)). And "there is abundant case law from other district courts holding that a distributor's place of business cannot establish venue for its supplier." *EMED Techs* 2018 WL 2544564, at *2 (collecting cases).⁵

⁵ See *Wet Sounds, Inc. v. PowerBass USA, Inc.*, No. CV H-17-3258, 2018 WL 1811354, at *2 (S.D. Tex. Apr. 17, 2018) (third-party distribution centers insufficient); *Hildebrand v. Wilmar Corp.*, No. 17-cv-02821, 2018 WL 1535505, at *3 (D. Colo. Mar. 29, 2018) (no venue where "the places of business on which Mr. Hildebrand bases venue are the physical locations of Wilmar's distributors, not those of Wilmar"); *Automated Packaging Sys., Inc. v. Free-Flow Packaging Int'l, Inc.*, No. 5:14-cv-2022, 2018 WL 400326, at *9 n.8 (N.D. Ohio Jan. 12, 2018) ("While APS maintains that FPI has a close relationship with its distributors, this is still insufficient to establish that FPI has a regular and established business in the district, as any such physical presence of the distributor belongs to the distributor and not FPI."); *Reflection, LLC v. Spire Collective LLC*, No. 17-cv-1603, 2018 WL 310184, at *3 (S.D. Cal. Jan. 5, 2018) ("[A] distributor or subsidiary of a parent corporation selling the infringer's product does not demonstrate that a defendant has a regular and established business in this district."); *Galderma Labs., L.P. v. Teva Pharm. USA, Inc.*, 290 F. Supp. 3d 599, 611 (N.D. Tex. 2017) (presence of third-party sales representatives insufficient); *Patent Holder LLC v. Lone Wolf Distributors, Inc.*, No. 17-23060-CIV, 2017 WL 5032989, at *6 (S.D. Fla. Nov. 1, 2017) (physical locations of defendant's dealers in the district "are irrelevant to the Court's analysis under § 1400(b)"); *CAO Lighting, Inc. v. Light Efficient Design*, No. 4:16-cv-00482, 2017 WL 4556717, at *3 (D. Idaho Oct. 11, 2017) (holding that physical location of distributors does not establish venue because the defendant "does not own, rent, lease, or occupy these locations or any other property or equipment in the state"); *JPW Indus.*,

1. The Court used judicially-noticed proofs, some which are factually incorrect, and improperly usurped Plaintiff's burden to prove venue

It cannot be disputed that the BMW dealerships in this district are *not* owned or operated by BMWNA. (Hernandez Decl. ¶¶ 4–7). The Court concluded otherwise by relying on many (in fact, 23) factual allegations not raised by Plaintiff, to which BMWNA had no opportunity to respond.⁶ (Ex. A (Rebuttal Chart)). Thus, the Court clearly erred, by usurping Plaintiff's role as

Inc. v. Olympia Tools Int'l, Inc., No. 3:16-cv-03153, 2017 WL 4512501, at *3 (M.D. Tenn. Oct. 10, 2017) (holding that “business connections with distributors, retailers, and consumers in this district” insufficient); *Talsk Research Inc. v. Evernote Corp.*, No. 16-cv-2167, 2017 WL 4269004, at *4 (N.D. Ill. Sept. 26, 2017) (“The Federal Circuit’s decision in *Cray* leaves no room for Plaintiff to argue that the handful of non-employee, independent contractors present in this District constitute a ‘regular and established place of business’ for Defendant within the meaning of § 1400(b).”); *Boston Sci.. Corp. v. Cook Grp. Inc.*, 269 F. Supp. 3d 229, 248 (D. Del. 2017) (“[A] regular and established place of business does not arise solely from a defendant simply shipping goods into a district—whether to an individual or for distribution by third parties.”); *Bristol-Myers Squibb Co. v. Mylan Pharms. Inc.*, No. 17-cv-379, 2017 WL 3980155, at *17 (D. Del. Sept. 11, 2017) (“[A] regular and established place of business does not arise solely from a defendant simply shipping goods into a district—whether to an individual or for distribution by third parties.”); *Free-Flow Packaging Int'l, Inc. v. Automated Packaging Sys., Inc.*, No. 17-cv-01803, 2017 WL 4155347, at *7 (N.D. Cal. Aug. 29, 2017) (using third-party company to sell products is insufficient); *OptoLum, Inc. v. Cree, Inc.*, No. 16-cv-03828, 2017 WL 3130642, at *6 (D. Ariz. July 24, 2017) (selling infringing products at Home Depot stores in the district does not establish a place of business for the manufacturer); *LoganTree LP v. Garmin Int'l, Inc.*, No. SA-17-CA-0098, 2017 WL 2842870, at *2 (W.D. Tex. June 22, 2017) (“It is well settled that the mere presence of independent sales representatives does not constitute a ‘regular and established place of business’ for purposes of Section 1400(b).” (quoting *Kabb, Inc. v. Sutera*, No. 91-cv-3551, 1992 WL 245546, at *2 (N.D. Tex. Sept. 4, 1992))); *see also Dual Mfg. & Eng'g, Inc. v. Burrus Indus., Inc.*, 531 F.2d 1382, 1387 (7th Cir. 1976) (“In these cases we found venue improper in the subject district even though defendant’s activities in the district included one or more of the following: maintaining an exclusive distributorship; establishing and maintaining some control over a chain of exclusive, independent distributors; maintaining an independent business man as a sales representative on a commission basis....” (quoting *Grantham v. Challenge-Cook Bros.*, 420 F.2d 1182, 1184–85 (7th Cir. 1969))). Case law to the contrary was not readily found during research.

⁶ Other district court decisions have been remanded upon taking improper judicial notice of extra-record facts. *See, e.g., Costello v. Flatman, LLC*, 558 Fed. Appx. 59, 60–61 (2d Cir. 2014) (summary order) (remanding where district court improperly took judicial notice of the ADA-accessibility of certain businesses by visiting them); *Pickett v. Sheridan Health Care Center*, 684 F.3d 632, 650–51 (7th Cir. 2011) (remanding where court took judicial notice of economic index). Regarding judicially noticed facts, of the forty-two alleged “facts” that are cited in the Order, twenty-three were found by the Court, responses to which are attached. (Ex. A (Rebuttal Chart)).

the one bearing the burden to prove venue is appropriate. *In re ZTE*, 890 F.3d at 1013. And, as shown by all of the evidence of record now, these allegations do not support venue in this District. Indeed, there are many examples of the impropriety of the Order’s judicially-noticed fact-findings.

First, although recognizing that the Texas Occupations Code (TOC) contains a bar on automobile manufacturers owning dealerships, the Order referenced exceptions but then deemed the exceptions “of no moment in the present analysis.” (Dkt. No. 90 at 13–14). Yet, BMWNA *does not* own any dealerships in the District and fully complies with TOC § 2301.476(c).⁷ (Hernandez Decl. ¶ 6). The sections of the TOC as cited in the Order relate to *temporary* ownership, which cannot square with the requirement that a “place” must be “regular and established.” *In re Cray*, 871 F.3d at 1363. Further, as expert analysis of the TOC shows, BMWNA is specifically prohibited from *directly or indirectly* owning or controlling a dealership. (Decl. of Herring at ¶¶ 8–16).

Second, the Order *independently found* that BMWNA does not permit sales of any new BMW vehicle from any location except authorized dealers and that “BMW, through its franchised dealers, sells BMW cars[.]” (Dkt. No. 90 at 15–16). But, this cuts against venue, as “franchised dealers” are separate entities, not owned or operated by BMWNA, and BMWNA neither owns nor controls any place of business that sells cars directly in this District. (Hernandez Decl. ¶¶ 4–7).

Third, the Order *independently found* that dealerships in the District are named “BMW,” display the BMW logo, and are held out to the consuming public as places of BMW for the purchase of new BMWs. (Dkt. No. 90 at 16–17 n.7). But, the photographs in the Order⁸ also show

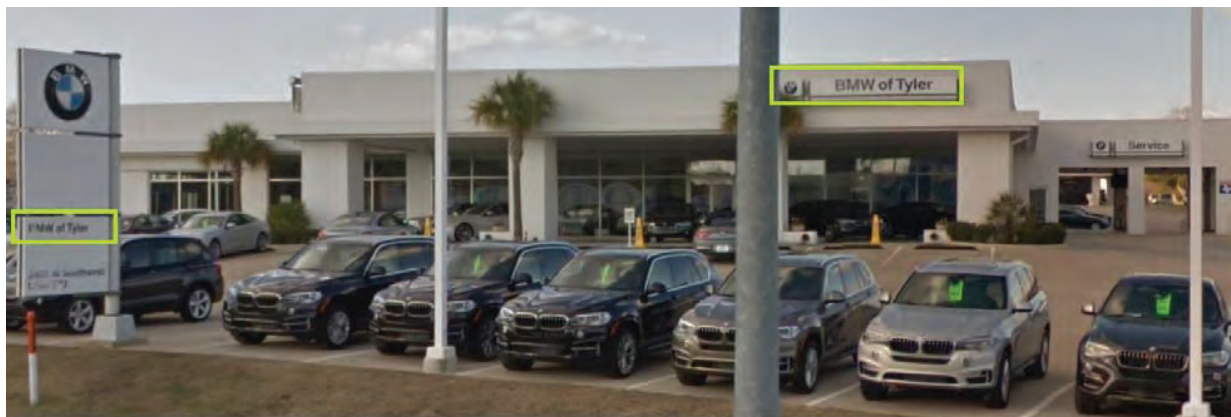
⁷ BMWNA owns one dealership, not in the State of Texas, which existed before state laws prohibited automakers/distributors from owning/controlling dealerships. (Hernandez Decl. ¶ 9).

⁸ In fact, the various judicially-noticed pictures of dealerships, as shown in the Order, all display large, prominent signs, which clearly bear the full name of each individual dealership. A selective identification of a single “BMW” logo does not accurately represent the dealership, because the BMW logo is not displayed without the full name of the dealership also displayed on the premises:

the full name of each dealership—e.g., BMW of Tyler, BMW of Beaumont, and Classic BMW—which are separate and apart from BMWNA. (Hernandez Decl. ¶ 8). The consuming public would not see a dealership without seeing the individual dealership’s name. Indeed, these dealerships in the District *are direct competitors*, because they are separate businesses. (Hernandez Decl. ¶ 11).

Fourth, the Order *independently found* that one may use the “Search New Vehicle Inventory” feature on the www.bmwusa.com website, by use of a zip code search of 75701, and that the website displays BMWs in the District, which a user can reserve. (Dkt. No. 90 at 18–19). But, the “Search New Vehicle Inventory” feature displays vehicles available at third-party owned and operated dealerships, and as the Order recognizes, it is the non-BMWNA dealership that provides any consumer with the accurate quote for a given car. (Hernandez Decl. ¶¶ 15–18).

Fifth, the Order *independently found* that the nomenclature “BMW Center” “further cements the impression by the consuming public that BMW’s business is done at and through its dealerships[.]” (Dkt. No. 90 at 19 n.11). This is speculation, as there is no evidence or allegation in the record that, when consumers buy vehicles at dealerships in Texas, they believe they are doing business with a New Jersey-based distributor. Indeed, the term “BMW Center” refers to the



(Decl. of Lavenue, Ex. B; *see also* Exs. C, D (complete images of BMW dealerships)).

third-party owned and operated dealerships in the District, *not BMWNA*. (Hernandez Decl. ¶ 19).

Sixth, the Order *independently found*, again by speculation, that BMWNA “names and ratifies” BMW Centers as places of its business, by allowing users to schedule a test drive, contact a BMW Center, and request a quote via its website. (Dkt. No. 90 at 20). Yet, in all these instances, the Order fails to recognize that a user would be referred to a third-party dealership, and *BMWNA* itself does not itself operate any of those dealerships in the District. (Hernandez Decl. ¶¶ 15–19).

Seventh, the Order *independently found* that a user can prepare a custom build of a car using the “Build Your Own” feature on the www.bmwusa.com website and can then proceed to order the new vehicle via the BMW Center. (Dkt. No. 90 at 20). Further, the Court independently found that BMWNA goes “so far as to *solicit orders* on its own website for its BMW Centers.” *Id.* But, the website refers any user in the District to multiple dealerships that compete with each other—and the dealerships are not owned or operated by BMWNA. (Hernandez Decl. ¶¶ 11, 20).

In sum, nothing in these Court-discovered fact findings requires upending “abundant case law” that a third-party owned dealership is not a place of the defendant, *EMED Techs.*, 2018 WL 2544564, at *2 (*see n.5, supra*), and relying on such fact finding to hold otherwise is clear error.

Finally, the Order also concludes that there is a separate and independent basis for finding venue, namely, that “BMWNA conducts its business of the provision of new purchase warranties and service pursuant to those warranties to the consuming public in this district through its authorized dealerships.” (Dkt. No. 90 at 24). Yet, Plaintiff did not make this argument, and moreover, the Order’s conclusion is wrong, as maintaining an authorized warranty service, including repair and replacement of defective parts, is *not* a basis on which to conclude that a defendant owns a regular and established place of business in the District. The Order purports to find that BMWNA “conducts business” in Texas by citing the TOC, relating to the provision of

warranties. However, even if an entity *conducts business* at a place, such does not confer *ownership or control* of that place, as needed to support venue. (Decl. of Herring at ¶¶ 15–17); *see Dual Mfg. & Eng’g v. Burris Indus.*, 531 F.2d 1382, 1386–88 (7th Cir. 1976) (citing *Grantham*, 420 F.2d 1182, 1184–85 (7th Cir. 1969)). As such, offering a warranty for a product that is honored by a dealership does not convert a dealership into an established place of business of BMWNA. *Knapp-Monarch Co. v. Casco Prod. Corp.*, 342 F.2d 622, 625 (7th Cir. 1965) (“Similarly, the fact that Casco’s warranties against defective products were honored by its dealers and its authorized repair station does not mean that the company had a regular and established place of business in Chicago. This activity, although concerned with Casco’s products, was conducted at places of business which were independently operated.”). Of note, even warranty-based repair work conducted at a dealership is not the *manufacturer’s* opportunity to cure under Texas Lemon Laws, because a dealership and manufacturer remain separate entities. (Decl. of Herring at ¶¶ 8–17). As shown in the fact exhibit, and by the expert declaration on TOC, no allegation related to BMW warranties can turn third-party owned and operated dealerships in this District into “places of BMWNA.” (Hernandez Decl. ¶¶ 21–23); (Exhibit A (Rebuttal Chart)); (Decl. of Herring at ¶¶ 8–17).

2. A third-party dealership is *not* a place of a separate defendant

It is black-letter law that corporations are considered to be separate and distinct entities, and courts must “start from the general rule that the corporate entity should be recognized and upheld, unless specific and unusual circumstances call for an exception.” *Manville Sales Corp. v. Paramount Sys. Inc.*, 917 F.2d 544, 552 (Fed. Cir. 1990). The bulk of the case law prohibits using a third-party dealership to justify venue. *EMED Techs.*, 2018 WL 2544564, at *2 (*see n.5, supra*).

BMWNA complies with the Texas Occupations Code (TOC) prohibiting dealership ownership. (Hernandez Decl. ¶ 6). The policy behind the TOC is largely protective of dealerships and prevents them from having to compete with vertically-integrated manufacturers and

distributors. (Decl. of Herring at ¶ 10); *Int'l Truck & Engine Corp. v. Bray*, 372 F.3d 717, 728 (5th Cir. 2004) (finding Texas could properly prohibit a truck manufacturer from operating a used-truck dealership). In *Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493 (5th Cir. 2001), Ford was *prohibited* from selling cars directly to consumers as that would have violated the Code. (Decl. of Herring at ¶ 11). Here, BMWNA directs customers to independent dealerships in Texas to, among other things, schedule test drives and obtain quotes from vehicles. BMWNA is, according to the Code, *prohibited* from controlling (directly or indirectly) the dealership. (Decl. of Herring at ¶¶ 8–16). The Order clearly errs, as it is undisputed that BMWAG and BMWNA observe corporate formalities, and there is no suggestion that BMWNA uses dealerships as alter egos, for illegal purposes, or as shams to perpetrate fraud. (Hernandez Decl. ¶ 23); *see also Rimade Ltd. v. Hubbard Enterprises*, 388 F.3d 138, 143 (5th Cir. 2004) (listing what warrants veil piercing).

Indeed, as the Order recognized, the court in *West View Research, LLC v. BMW of North Am., LLC* refused to impute the locations of independent dealerships to BMWNA on almost identical facts. Case No. 16-CV-2590-JLS (AGS), 2018 WL 4367378 (S.D. Cal. Feb. 5, 2018). There, the court concluded that third-party owned and operated dealerships could not be used to establish venue over BMWNA, because BMWNA “and the dealerships are separate corporate entities.” *Id.* at 15. Further, the *West View* court found “no facts to support collapsing the corporate forms; the dealerships’ physical locations are not places of Defendants.” *Id.* at 16. The Order purports to distinguish *West View*, although agreeing that “there is not sufficient rationale to collapse the corporate forms of BMWNA and the dealerships.” (Dkt. No. 90 at 25 n.15). Instead, the Order states that, because “dealerships constitute parts of a necessary distributorship which the law commands BMWNA adopt in order to conduct its business within the state of Texas; the business of BMWNA in Texas is necessarily done by and through its BMW Centers.” *Id.* This

reasoning is not only circular but illogical; according to the Order, BMWNA controls the dealerships because Texas law mandates that BMWNA cannot control the dealerships. To approach the same issue differently, as Judge Bryson noted on a similar issue, the “‘necessary distributor’ theory makes no sense in light of the language and purpose underlying the patent venue statute, 28 U.S.C. § 1400(b),” and, therefore, “business necessity is insufficient to impute” a distributor’s place of business to the defendant. *EMED*, 2018 WL2544564, at *3. Thus, the Order’s adoption of the necessary distributor theory would, in effect, overturn the venue decisions in *TC Heartland* and *Cray*, converting the test for venue in patent cases from one of venue into one similar to the test for personal jurisdiction. *Id.* Thus, the Order makes a clear error of law by holding that independent third-party dealerships per se form venue-anchoring places of BMWNA.

B. The Court Clearly Erred By Finding Jurisdiction Over BMWAG

The Order relied on a stream-of-commerce theory to support jurisdiction over BMWAG. (Dkt. No. 90 at 3). Yet, the precise requirements of the stream-of-commerce theory of jurisdiction remain unsettled, and the question of whether mere placement into the stream of commerce is sufficient to establish jurisdiction, or whether intent that the products reach the forum is required, remains open. *Celgard, LLC v. SK Innovation Co., Ltd.*, 792 F.3d 1373, 1381–82 (Fed. Cir. 2015).

Cases in this District and others cannot square with the holding that BMWAG’s connections with this District establish jurisdiction. This District has found that the stream of commerce was *insufficient* to show that there would be have been jurisdiction, and therefore venue, in a proposed transferee forum. For example, in *NovelPoint Learning LLC v. LeapFrog Enterprises, Inc.*, this Court found that there was no evidence of jurisdiction in California despite the defendant admitting that it sold its products nationally. Case No. 6:10-CV-229-JDL, 2010 WL 5068146, at *3 (E.D. Tex. Dec. 6, 2010). Crucial to the holding was the defendant, like BMWAG here, “had no offices, facilities, distribution facilities, or employees” in the district. *Id.* Likewise,

in *Motion Games, LLC v. Nintendo Co., Ltd.*, the Eastern District of Texas found the presence of retail stores (analogous to the third-party dealerships) in a forum was not sufficient to show jurisdiction over the parent corporate entities, because the retail stores are separately operated: “Defendants merely speculate that Rent-A-Center West, Inc. and GameStop Inc. are equivalent to their respective parents for purposes of personal jurisdiction analysis, without any supporting evidence.” Case No. 6:12-CV-878-LED-JDL, 2014 WL 11621698 at *3 (E.D. Tex. March 28, 2014). There is no evidence here that the independent BMW dealers are equivalent to BMWAG.

Of note, this Court has specifically found jurisdiction lacking in a proposed transferee forum, despite the fact that the defendant had sold products in that district through distributors:

Exedea did not “purposefully” direct its activities to the residents of [the transferee district] . . . [because] Exedea’s “services” consisted of simply signing for . . . phones when they arrived in the United States and verifying shipping information. Exedea never transmitted instructions . . . concerning shipments of products to Washington and had no role in determining where or to whom the product would be shipped after it arrived at Brightpoint in Indiana. Exedea never sold [the] phones to end users in Washington, never conducted marketing activities or solicited business in Washington, and never travelled to Washington to sell products. [So, therefore] [b]ecause Exedea never purposefully directed its activities toward anyone in Washington, there is no specific jurisdiction over Exedea in Washington.

Wi-Lan, Inc. v. HTC Corp., Case No. 2:11-CV-68-JRG, 2012 WL 2461112, at *2 (E.D. Tex. June 27, 2012) (citations omitted). Just as in *Wi-Lan*, there is no evidence that BMWAG has ever transmitted instructions to the third-party dealerships or that BMWAG has any role in determining where or to whom BMW products would be shipped, after BMWAG transfers ownership. Indeed, BMWAG does not sell any vehicles in Texas; instead, vehicles of BMWAG are transferred to BMWNA outside of the District. (Dkt. 60, Schäck & Göbel Decl. ¶¶ 4,9). Moreover, BMWAG transfers vehicles to BMWNA for nationwide distribution; it does not produce or transfer vehicles

specifically for Texas customers. *See id.* Likewise, BMWAG does not develop or produce any vehicles in the District (Dkt. 60, Schäck & Göbel Decl. ¶ 7; Dkt. 60, Hernandez Decl. ¶¶ 4, 6), and the accused Infotainment Systems are not designed, developed, or manufactured in Texas (Dkt. 60, Schäck & Göbel Decl. ¶¶ 8). There simply cannot be jurisdiction over BMWAG on this record.

This Court’s exercise of jurisdiction is also at odds with recent Supreme Court precedent reigning in personal jurisdiction. For example, in *Daimler AG v. Bauman*, the Court limited general jurisdiction to places where a foreign entity is “at home.” 571 U.S. 117, 122 (2014). In the same year, in *Walden v. Fiore*, the Court emphasized that jurisdiction must be based on contacts that the “defendant *himself*” creates with the forum State. 571 U.S. 277, 284 (2014) (emphasis in original) (citations omitted). Extending *Walden* in *Bristol-Meyers Squibb Co. v. Sup. Ct. of CA*, the Court found no specific personal jurisdiction where the plaintiffs were not in-state residents, holding that the “bare fact that the [defendant] contracted with a California distributor is not enough to establish personal jurisdiction in the State.” 137 S. Ct. 1773, 1783 (2017). Thus, this trend of cases, which reign in personal jurisdiction, cannot be squared with the Order—a ruling that supports personal jurisdiction over *any company* that puts *any item* into a distribution channel, so long as that item eventually reaches Texas. BMWAG’s attenuated connection to Texas cannot support jurisdiction.

V. CONCLUSION: THE COURT SHOULD RECONSIDER ITS ORDER

The Court should reconsider its Order because it has wide-ranging consequences for dealerships, manufacturers, and distributors. The Order ignores a dealership’s property rights and improperly attributes the right of control and possession of a corporate entity. *See U.S. v. Gen. Motors Corp.*, 323 U.S. 372, 378 (1945) (explaining that the “group of rights inhering in the citizen’s relation to the physical thing, as the right to possess, use and dispose of it”). If the Order stands, it could create a host of unintended property, tax, regulatory, and contractual consequences.

Respectfully submitted,

Dated: September 20, 2018

/s/ Lionel M. Lavenue

Lionel M. Lavenue
FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, LLP
Two Freedom Square
11955 Freedom Drive
Reston, VA 20190
Phone: (571) 203-2700
Fax: (202) 408-4400

ATTORNEY FOR DEFENDANTS
BAYERISCHE MOTOREN WERKE AG, AND
BMW OF NORTH AMERICA, LLC

CERTIFICATE OF SERVICE

I hereby certify that on September 20, 2018, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send a notification of such filing (“NEF”) all counsel of record who have appeared in this case. I also caused the documents above to be sent to all counsel of record via electronic mail.

/s/ Lionel M. Lavenue

Lionel M. Lavenue
FINNEGAN, HENDERSON, FARABOW,
GARRETT & DUNNER, LLP
Two Freedom Square
11955 Freedom Drive
Reston, VA 20190
Phone: (571) 203-2700
Fax: (202) 408-4400

ATTORNEY FOR DEFENDANTS
BAYERISCHE MOTOREN WERKE AG, AND
BMW OF NORTH AMERICA, LLC

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
WACO DIVISION

MINUTES OF CIVIL PROCEEDINGS

STRATOSAUDIO, INC.

vs.

HYUNDAI MOTOR AMERICA

§
§
§
§
§

CIVIL NO:
WA:20-CV-01125-ADA

JUDGE: ALAN D ALBRIGHT
DEPUTY CLERK: Suzanne Miles
COURT REPORTER: Kristie Davis
LAW CLERK: Jun Zheng

DATE: June 23, 2021
TIME: 9:31 - 10:25 (28 min) NE

ATTORNEY(S) FOR PLAINTIFF(S):
Corby R. Vowell; Michael J. Songer; Jonathan J. Lamberson

ATTORNEY(S) FOR DEFENDANT(S):
Ryan K. Yagura; Clarnece Rowland; Darin Snyder

PROCEEDINGS:

Case called for Motion and Discovery Hearing for this and companion case. The Court heard argument regarding the Motion to Transfer Venue for the cases. The Court took the motion to transfer venue under advisement and an Order will issue with the Court's ruling. The Court also heard argument regarding the schedule in this case. The Court is not inclined to make any scheduling changes at this time.

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

STRATOSAUDIO, INC. * June 23, 2021
*
VS. * CIVIL ACTION NOS.
*
HYUNDAI MOTOR AMERICA * W-20-CV-1125
VOLKSWAGEN GROUP OF AMERICA, INC. W-20-CV-1131

BEFORE THE HONORABLE ALAN D ALBRIGHT
MOTION HEARING (via Zoom)

APPEARANCES:

For the Plaintiff: Jonathan J. Lamberson, Esq.
White & Case LLP
3000 El Camino Real
2 Palo Alto Square, Suite 900
Palo Alto, CA 94306

Michael J. Songer, Esq.
White & Case LLP
701 13th Street, Nw
Washington, DC 20005-3807

Corby R. Vowell, Esq.
Friedman, Suder & Cooke
604 E. 4th Street, Suite 200
Fort Worth, TX 76102

For Defendant Hyundai: Clarence Rowland, Esq.
Ryan K Yagura, Esq.
O'Melveny & Myers LLP
400 South Hope Street
Los Angeles, CA 90071

Darin W. Snyder, Esq.
O'Melveny & Myers LLP
Two Embarcadero Center, 28th Floor
San Francisco, CA 94111-3823

For Defendant Volkswagen:

David Philip Whittlesey, Esq.
Shearman & Sterling LLP
111 Congress Ave, Suite 1700
Austin, TX 78701

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Mark A. Hannemann, Esq.
Shearman & Sterling LLP
599 Lexington Avenue
New York, NY 10022

Court Reporter: Kristie M. Davis, CRR, RMR
PO Box 20994
Waco, Texas 76702-0994
(254) 340-6114

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1 (June 23, 2021, 9:31 a.m.)

2 DEPUTY CLERK: Motion hearing in Civil Action
3 W-20-CV-1125, styled StratusAudio, Incorporated versus Hyundai
4 Motor America, and Case No. W-20-CV-1131, styled StratosAudio,
5 Incorporated versus Volkswagen Group of America.

6 THE COURT: If I could have announcements from counsel,
7 please.

8 MR. VOWELL: Good morning, Your Honor. This is Corby
9 Vowell with Friedman, Suder & Cooke for the plaintiff
10 StratosAudio.

11 MR. SNYDER: Good morning, Your Honor. This is Darin
12 Snyder of O'Melveny and Myers for defendant Hyundai Motor
13 America. My colleague Mr. Clarence Rowland is going to be
14 handling the argument for us today.

15 THE COURT: Very good.

16 MR. WHITTLESEY: Your Honor, David Whittlesey here from
17 Shearman & Sterling for Volkswagen, and with me my partner Mark
18 Hannemann. I think he will be taking the lead on our arguments
19 today.

20 MR. VOWELL: And, Your Honor, also on the plaintiff's side
21 let me let lead counsel introduce themselves.

22 MR. SONGER: Your Honor, this is Mike Songer.

23 Thank you, Mr. Vowell.

24 It's Mike Songer from White & Case, and I'll be handling
25 the venue motion.

1 THE COURT: Okay.

2 MR. LAMBERSON: Good morning, Your Honor. Jonathan
3 Lamberson also from White & Case, and I will be handling the
4 discovery/schedule dispute.

5 THE COURT: What do you all suggest we take up first?

6 MR. SONGER: I'd say the venue.

7 THE COURT: Okay. I thought so too. I'm happy to hear
8 the argument on the motion for transfer.

9 MR. WHITLESEY: Your Honor, we have two -- there's two
10 motions, one for Volkswagen, one for Hyundai. Do you have any
11 preference as to which one goes first?

12 THE COURT: I don't.

13 (Clarification by the reporter.)

14 MR. HANNEMANN: All right. Thank you, Your Honor. This
15 is Mark Hannemann from Shearman representing Volkswagen. It's
16 nice to see you on the other side of the virtual bench. It's
17 been awhile.

18 Plaintiff's argument in this case would provide nationwide
19 venue for patent suits against wholesalers who do business
20 nationwide. This is exactly the opposite of Congress' intent
21 in passing the venue statute which is explained in, for
22 example, the Federal Circuit's Cray decision.

23 The basic problem with plaintiff's argument is that it
24 conflates whether someone is doing business at a place with
25 whether that place is their own established place of business.

1 I don't know that there's a lot for me to say other than that
2 Volkswagen does not have a place of business in the Waco
3 Division. It owns no real estate. It rents no real estate.
4 It -- the only allegation is that its dealers are in Waco,
5 which means that Volkswagen is doing business with its dealers,
6 but it's not doing that business at the dealerships. And
7 without a place of business of Volkswagen, there is no venue in
8 this district for a patent case against Volkswagen.

9 I can talk in more detail about the Cray case. I could
10 talk about ratification, which is something that comes up in
11 the plaintiff's brief, but if you have any particular questions
12 for me right now, I'd be happy to answer them.

13 THE COURT: Let me hear from -- obviously a response, but,
14 I mean, I think the -- I just find it a fascinating question.
15 I mean, I really do. You know, it's -- is Volkswagen --
16 Volkswagen is selling cars in the district. I mean -- well,
17 let me try it this way. I'll use a passive voice.

18 Volkswagen cars are being sold in the Western Division.
19 We don't have a fight over that. And they're being sold by
20 independent dealers. I think -- you know, I get all the facts,
21 but I still find it a fascinating question about whether or not
22 that is doing business in the Western District, and I'm happy
23 to hear -- let me hear from the plaintiff and then we'll go
24 back.

25 MR. SONGER: Yes, Your Honor. This is Mr. Songer.

1 I agree this is a fascinating issue, and they are doing
2 business for at least two reasons in this district, and the
3 first is -- although Mr. Hannemann just simply focused on what
4 VW does, it ignored the wealth of evidence of what it directs
5 its dealers to do. And those operating agreements, which we've
6 attached to our opposition, spell out the detail to which VW
7 goes and either ratifies, controls, adopts, directs the dealers
8 to engage in their activities, and it goes through the list,
9 and we've listed it out and I'm not going to go through in
10 detail, but it goes down to the detail beyond just telling you
11 how many cars you can have and the price that is set and you
12 have to use the trademarks. It goes to telling you what your
13 building has to look like. It goes and deals with warranties
14 that I'll talk about in a minute. It gives specifications for
15 the accounting system. It even goes so far as to detail the
16 type of IT equipment that should be used by the dealers that's
17 there. And there's 11 -- I think we listed 11 factors that are
18 there well beyond which was in Judge Gilstrap's Blitzsafe case
19 where he found both control and ratification from the
20 manufacturers over those dealers. But this isn't a --

21 Go ahead.

22 THE COURT: And let me ask you all this. Again, I just
23 find this fascinating. I mean, I -- it also makes me wonder,
24 and I don't think this was addressed really in TC Heartland
25 because it wasn't necessary, but what was the intent of

1 Congress when they said the venue will be where someone is
2 doing business and does that -- you know, it's -- look. It's
3 one thing if -- to me if Apple is having its phones sold by an
4 AT&T dealer -- one AT&T dealer in the entire district, is Apple
5 doing business? I mean, Apple phones are being sold, but
6 are -- is Apple doing business? That's one question.

7 Here you have Volkswagen dealerships to the -- I don't
8 remember the names of the folks that are running them, but to
9 the world, the world sees a Volkswagen dealership in the
10 district. Not an independent dealership that happen -- not
11 like a Walmart that happens to be selling Kleenex, but this is
12 a Volkswagen dealership, and is that or is that not doing
13 business especially where the well-known standard is, you know,
14 make, use, sell, make for sale -- it seems to me that that
15 applies here as well. And so is there -- and we've -- I've
16 looked at my clerks pretty carefully over the agreements that
17 you just talked about in terms of the control that the
18 defendants exercise over these folks that are operating the car
19 dealerships. Is there anything else you wanted to say? I
20 interrupted you and I'm sorry about that.

21 MR. SONGER: No. That's all right, Judge. You're allowed
22 to do that of course.

23 Yes. If you want the guidance on that, I would look
24 towards the Google case which both defendants say that we
25 didn't address, but we didn't need to because the agency issue

1 in there was addressed by Judge Gilstrap in Blitzsafe.

2 Google -- now, I was looking at that second prong about
3 the argument over whether you needed actual employees there or
4 agents, and the Google Federal Circuit case came out and looked
5 at the venue statute as it came down through Congress over the
6 years, and it pointed out in there that things that directly
7 affect the business such as exchange of goods, is the language,
8 transportation, storage and those types of factors were deemed
9 to be activities that would fall within the venue statute.

10 And in Google it was distinguishing from ISPs and routine
11 maintenance work that was done on those servers and said, well,
12 the -- at that time the venue statute didn't really contemplate
13 that type of work, but the venue statute at that time certainly
14 contemplated the sale of goods, and that's what we have here in
15 addition to the other activities and the offer of services
16 through warranties and otherwise.

17 And that -- the Google case goes through the history of
18 what's there, and I believe it addresses dead on what we have
19 here and what's required. You have the manufacturers who sell
20 exclusively to their dealers and then they require the control
21 that we've pointed out and the consumers go and buy from those
22 dealers.

23 Also, not to be overlooked, and as was pointed out by
24 Judge Gilstrap in the Blitzsafe case, both VW and Hyundai
25 provide warranties.

1 THE COURT: I was about to ask you -- I was literally
2 about to ask you. Who -- if I buy a Volkswagen from one of
3 these dealers, is it the dealership or the -- or Volkswagen
4 that is providing the warranty? It's Volkswagen, right?

5 MR. SONGER: It's Volkswagen and it's Hyundai as well,
6 although Hyundai also allows the dealers to offer an additional
7 warranty on top of the manufacturer one.

8 THE COURT: But when I go there as a purchaser of a
9 Hyundai or a Volkswagen and I told I'm getting the 100 --
10 whatever it is, 100,00 miles, doesn't matter, and five
11 year/100-mile warranty, the person who is making that offer of
12 the warranty of the car that I'm purchasing is the car
13 manufacturer, correct?

14 MR. SONGER: That's our understanding based on the
15 operating agreements, and neither defendant has argued
16 otherwise based on those.

17 THE COURT: Let me hear, if I could, from anything counsel
18 for Volkswagen would like to say and then we'll shift over to
19 Hyundai.

20 MR. HANNEMANN: Sure. I think that the citation to the
21 Google case is very important. The Google case -- in the
22 Google case the Federal Circuit unambiguously held that there
23 has to be the regular physical presence of an employee at a
24 place for that employer -- employee's employer to be doing
25 business at that place, and there's no question that there's no

1 Volkswagen employees in the Western District of Texas. I think
2 under the black law -- the black letter law of Google that
3 means there's no Volkswagen place of business.

4 Under the Cray case what the -- the Court noted that the
5 fact that the defendant has advertised it has a place of
6 business or even set up an office is not sufficient. The
7 defendant must actually engage in business from that location.

8 And so the mixup that Judge Gilstrap went through with the
9 Blitzsafe case is he focused on wrongly, I think, on whether
10 BMW was doing business in the Eastern District of Texas.
11 That's not the question. The question is whether the car
12 manufacturers are doing business at the dealerships, not by
13 selling cars to the dealerships but by having somebody on the
14 ground in West Texas providing services from that location, and
15 that just simply is not the case.

16 MR. SONGER: If I may address that, Your Honor?

17 THE COURT: Sure. Of course.

18 MR. SONGER: Google goes beyond employees. It says agents
19 or employees when it's looking at that factor. So it's not
20 just a -- an employee with --

21 THE COURT: And so I understand what you mean by that, as
22 opposed to Volkswagen -- and correct me if I'm wrong, and the
23 other side can help. Your position is is that when
24 Volkswagen -- and I'm assuming this applies to Hyundai as
25 well -- in essence, the way car dealerships are set up, which

1 may even be unique, a very unique business, the folks that are
2 running the auto dealership -- again, we've talked about the
3 sale of the car, we're talking about the warranties. Your
4 position is that they are essentially agents -- they're not
5 employees because they're not receiving a check directly from
6 Volkswagen, but they are the agents of -- direct agents of
7 Volkswagen's because they're selling the cars, they're selling
8 the warranties, they're selling the upgrades, they're selling
9 everything else. And so that's my -- is that my understanding
10 what your agency position is?

11 MR. SONGER: It is, Your Honor, and this was addressed by
12 Judge Gilstrap who pointed out that -- and cited the case law
13 to support this. And this is -- and when I say Blitzsafe, I
14 think we're referring to the Blitzsafe 1 decision from 2018.

15 But at Page star 11 he points out that and cites case law
16 that says: Although dealers may not be agents in the broad
17 sense of the term, certainly for what they're doing, it's true
18 that an automobile dealership -- and I'm quoting here -- may,
19 under certain circumstances, be an agent of the manufacturer.
20 And he goes through and he cites cases that talk about that
21 point. So that is exactly what we're saying, and it was
22 addressed by Judge Gilstrap and it does apply here.

23 MR. ROWLAND: Your Honor, can Hyundai respond to some of
24 these points?

25 THE COURT: No. I'm just -- no.

1 (Laughter.)

2 THE COURT: Of course you can.

3 Yes. I just wanted to make sure we exhausted the
4 Volkswagen, and then obviously I'm going to give Hyundai a
5 chance, but I was just -- one more -- if anyone wants to say
6 anything else in either direction on behalf of Volkswagen, I'm
7 happy to hear it and then I was about to shift to Hyundai.

8 MR. HANNEMANN: Thank you, Your Honor.

9 I'm not aware that in any of the briefing there was an
10 allegation that the dealerships' employees are agents of
11 Volkswagen. And I would strenuously object. I don't know how
12 one strenuously objects as opposed to just a regular objection,
13 but I --

14 THE COURT: Whatever it is, you want it on the record that
15 your objection is -- you disagree with that strenuously.

16 MR. HANNEMANN: Correct. Correct.

17 Those are employees of the dealers. They're not agents of
18 Volkswagen Group of America.

19 THE COURT: Okay. You don't just -- as a friend of mine
20 would say, you deny the allegation and you despise the
21 alligator. I think -- I thank you. And so...

22 MR. HANNEMANN: I definitely do not, Your Honor. I'm
23 sorry to interrupt, but Mr. Songer and I go back a long way and
24 definitely do not despise him.

25 THE COURT: Okay. I'll hear from Hyundai.

1 MR. ROWLAND: Thank you, Your Honor.

2 There's essentially two points that have been discussed so
3 far. The first was the agency issue, and the second was the
4 business of HMA issue.

5 On the agency issue Judge Gilstrap stated that it is
6 certainly true that dealers are not agents of manufacturers in
7 a broad sense of the term.

8 And then what the remainder of his decision does is it
9 goes through some other sense of agency which is not supported
10 by the -- which is not what the Federal Circuit applies. The
11 Federal Circuit applies the third restatement of agency, and
12 that's in the Google decision.

13 And under the third restatement of agency, there are
14 several essential elements of what it requires to be an agent.
15 One of those essential elements is that the dealership has to
16 be controlled by HMA. Here there's no control because it would
17 be illegal for HMA to be controlling these dealerships. Texas
18 law provides that a distributor may not directly or indirectly
19 operate or control a franchise dealer or dealership. So any
20 argument that there's any control by HMA would be incorrect.
21 And if any provision of these agreements that we've been
22 discussing constitutes control under the agency rules, then
23 that provision would be illegal and would be unenforceable, and
24 that's the Lulirama case. Any provision in there that could
25 constitute control would be illegal and would be unenforceable.

1 And the Fifth Circuit has even gone farther and has
2 specifically held in case law that manufacturers like GM do not
3 control dealerships and are not agents of dealerships.

4 Dealerships are not agents of manufacturers.

5 So we have specific Fifth Circuit law on point saying that
6 there's no control. We have specific third restatement of
7 agency rules which cannot be satisfied and which plaintiff does
8 not address. They say they cited a case that addresses agency,
9 but that case does not apply to the third restatement of
10 agency. It applies some other definition of agency which is
11 not what the Federal Circuit uses.

12 Second, just briefly on the conducting the business of
13 HMA, HMA is not conducting any business in this district. HMA
14 is a California corporation that sells cars to hundreds of
15 dealerships across the country. That's a distributor business.

16 Dealerships, in contrast, are engaged in a separate
17 business selling cars to consumers, and that's a retail
18 business. The distinction between distributing and retailing
19 is a codified distinction under Texas law. Under Texas law HMA
20 cannot be engaged in the business of buying, selling or
21 exchanging new motor vehicles at an established and permanent
22 place of business in Texas. It would be illegal for HMA to be
23 engaging in that business.

24 So I think under Texas law we have a clear distinction
25 between different types of business, and HMA is not conducting

1 a business that then dealerships are conducting in this
2 district.

3 And I think the third key point here, which has not been
4 discussed too much, but the key point here is that these
5 dealerships are independent contractors. As the Court recently
6 held in the Adtran case, an independent contractor relationship
7 is insufficient to satisfy the third element of Cray. These
8 dealerships are companies such as, you know, Round Rock
9 Hyundai. That's owned by a massive public company called
10 Penske Automotive that operates hundreds of dealerships across
11 the country, and it is simply incorrect to say that Hyundai
12 controls this massive public corporation or any of its retail
13 outlets. There's no basis to collapse the forums and impute
14 the operations of these dealerships to HMA.

15 Finally, the Court also addressed this warranty issue. A
16 warranty is an obligation to affect repairs, in essence. But
17 that warranty does not give HMA any control over the
18 dealerships, and that's really the key issue here. To
19 establish any sort of agency, there has to be control, and
20 these warranties do not allow the dealerships to control -- the
21 manufacturers to control the dealerships, and that's because
22 these agreements do not exist in a vacuum. Every material part
23 of the relationship between these dealerships and the
24 manufacturers is regulated by statute, including warranties.

25 The warranties, for example -- I mean, one of the key

1 issues of a warranty is that the manufacturer has to reimburse
2 the dealership for warranty repairs, but those labor rates and
3 warranty rates are governed by a statute. And to the extent
4 dealerships are unhappy with HMA's warranty reimbursements, the
5 Texas DMV oversees that dispute. The Texas DMV controls the
6 warranty reimbursements. So there's no avenue for HMA to
7 somehow affect some sort of lever of control over these
8 dealerships through warranties.

9 And, additionally, HMA is not affecting warranty repairs
10 in this district. That's the dealerships. They do that and
11 then we reimburse them. But there's no HMA employee or agent
12 in this district that is conducting that business. It's the
13 dealerships which are independent third parties.

14 So there's kind of three key issues: One, there's no
15 agent, and plaintiff has not mentioned -- I don't believe
16 plaintiff mentions the agency issue at all in their briefing.
17 They certainly don't apply the Google agency framework, and
18 they also don't apply the Fifth Circuit agency framework which
19 has a detailed set of rules for what you would need to do to
20 show agency.

21 There's also no HMA business being conducted in this
22 district because HMA is -- it would be illegal for HMA to be
23 conducting that business, and Texas has explicitly delineated
24 between the different types of business here.

25 And, third, these are independent contractors, and there's

1 no basis to collapse the corporate forums, and that's
2 essentially what Judge Gilstrap did in the Blitzsafe case. And
3 that analysis was before the Google decision which sets forth
4 the proper legal framework and tells us that we need to apply
5 the third restatement of agency, not Judge Gilstrap's
6 alternative analysis in which he initially admitted that
7 dealers are not agents of manufacturers.

8 Does the Court have any questions about that?

9 THE COURT: I don't.

10 A response from plaintiff?

11 MR. SONGER: Yes, Your Honor. Let me address them in
12 turn.

13 First, on the -- well, I'll address the last one on the
14 warranty issue and doing business.

15 Counsel's overlooking that, again, Judge Gilstrap went to
16 the statute that noted that under warranty provisions, and this
17 is Occupational Code 2301.251C. It's discussed on star 11 of
18 Blitzsafe. That they -- those manufacturers if they directly
19 or indirectly reimburse another person to perform warranty
20 repair services on a vehicle, is engaged in business in this
21 state regardless of whether they sell or offer for sale new
22 motor vehicles. So they are engaged in business by statute by
23 the provision of those warranty services.

24 The second point is on the statute, the statute -- and
25 both parties cited this -- it talks about how in a broad

1 provision that the manufacturers can't control or own and
2 what's -- the dealerships and what's involved there.

3 But, again, that statute was discussed and analyzed by
4 Judge Gilstrap, and the defendants have not provided any
5 explanation of what control means in that case in that statute
6 that says a manufacturer can't own or control from what's
7 there.

8 It's also not absolute. That's a minor point. There are
9 exemptions where a manufacturer can actually own a dealership
10 for a limited period of time -- periods of time. There's
11 exceptions in that statute, mainly dealing when you transfer
12 franchises. I don't want to overplay that as to what's
13 involved.

14 But that ties into the agency issue. And the agency issue
15 under Google and the Fifth Circuit, and Hyundai cited the
16 Cardinal Health Solutions case to support this argument, there
17 is an agency relationship from that case and from Hyundai's
18 brief, it's reply brief on Page 6. The key is, does the right
19 to control, which in the context of agency, do you set tasks
20 and dictate the means and details of the agent's work to
21 accomplish those tasks?

22 Now, Hyundai just spoke about the power to hire and fire
23 employees, but the quote they cited in the cases go beyond
24 that: Participate in the daily operations of the agent's work.
25 Give the agent interim instructions once work has begun.

1 Inspect the progress or receive reports. Make suggestions or
2 recommendations, et cetera.

3 And the point is is that what both parties have done is
4 effectively ignore their operating agreements and the wealth of
5 information that's in there at exactly what the manufacturers
6 require the dealers to do. They just go and say, well, they're
7 not agents because here's something that says it, but look at
8 the means and details that are being performed by the
9 dealerships that Hyundai controls. They set again the facility
10 standards on what the building looks like. They set the
11 inventory levels. They tell the types of parts and quantities
12 you have to carry. They require training. They require that's
13 there. They set prices for maintenance. They set minimum
14 working capital.

15 Again, Hyundai has access to its dealers' IT systems
16 that's there. So, and, again, I'm not going to go through all
17 the points that we raised because Your Honor and the clerks
18 read those agreements and read the briefs. But the key on that
19 agency, even as Hyundai points out, is -- are the -- is their
20 control over the means and details of the agent's work, and
21 that clearly is there based on what they do in those operating
22 agreements and what they require their role as it relates to
23 the dealerships and what's involved there.

24 THE COURT: Anything else from -- yeah. Of course.

25 MR. ROWLAND: Great. So there are a number of significant

1 issues I want to address there.

2 First, on the conducting business through warranties, the
3 statute says that for purposes of the statutes, it's conducting
4 business, but there's no identified established place of
5 business. The venue statute focuses on a physical place of
6 business where an HMA employee or agent is conducting business.

7 This sort of general sense of conducting business is not
8 focused on a physical location within the district, which is
9 what the venue statute is focused on. So I don't think that
10 gets us over the hill.

11 Second, counsel said the defendants have not provided any
12 definition of control. We did provide a definition of control
13 and so did the Federal Circuit in the Google case. The
14 definition of control is brought in through the third
15 restatement of agency which the Federal Circuit applied and
16 also which the Fifth Circuit applies. So there's a clear
17 definition of control offered in our briefing.

18 Additionally, counsel said that there are exemptions where
19 HMA could somehow own or control a franchise, but those
20 exemptions are not relevant in this case. Those exemptions
21 relate to facilitating a peaceful like transfer of the
22 dealership to a different dealer which is a short term thing
23 that there are no facts, you know, in this case suggesting that
24 HMA has some sort of temporary ownership of one of these
25 dealerships. HMA submitted a declaration stating that we do

1 not own any of the dealerships. So none of those exceptions
2 that counsel referenced would be relevant here.

3 Additionally, counsel missed parts and misread the
4 Cardinal Health case. He said that -- on Page 6 of our brief
5 we include a block quote which specifies rights of control.
6 And there are essentially two parts to that paragraph. The
7 first part of the paragraph lists examples of things that can
8 constitute control. The second part of the paragraph after the
9 word "that go beyond" -- the phrase that "go beyond the power,"
10 the second part of that paragraph are things that are not
11 control.

12 And if you read that Cardinal Health case, you'll see
13 later on they go into some of those things that are not control
14 and explain that those do not demonstrate control. So, for
15 example, plaintiff went through a number of these examples
16 setting facility standards. Cardinal Health explicitly says
17 setting standards for acceptable service quality, that is not
18 control under the law.

19 Counsel also said training could be an example of control,
20 but Cardinal Health says that the power to make suggestions or
21 recommendations which need not necessarily be followed, in
22 other words, training, that is not an example of control.

23 Counsel also went through some other examples saying that
24 in our agreement we have things like the ability to set prices
25 for -- I'm not sure if he was referring to warranty repairs or

1 for the vehicles, but that's also incorrect. HMA does not have
2 the high level power to manipulate quantity or prices or
3 transfer the dealership or to set labor rates for warranty
4 repairs. All of that is expressly governed by statute with any
5 disputes overseen by the Texas DMV.

6 And, for example, Section 2301.473 says a distributor may
7 not fail or refuse to offer to its same line make franchise
8 dealers all models manufactured for that line make, which means
9 they cannot withhold the products.

10 They also cannot require or attempt to require a franchise
11 dealer to order, accept delivery of or pay anything of value
12 directly or indirectly for a motor vehicle or an appliance part
13 or accessory.

14 All of these potential levers of control are governed by
15 the statutes and prohibit HMA from forcing these dealerships to
16 maintain levels of inventory or to meet specific sales quotas
17 or to follow any instructions or else the supply is going to be
18 withheld. Nothing could be further from the truth.

19 And, additionally, if any of these provisions did
20 constitute any amount of control, that provision would be
21 illegal and would be unenforceable. So it could not, as a
22 matter of law, constitute any control when it's not an
23 enforceable provision. I think the real rules that govern the
24 relationship between the manufacturers and the dealerships are
25 these statutes. It's not the agreements. It's the statutes.

1 MR. SONGER: Your Honor, just two last points on that.
2 When we look to the statutes, Hyundai wants to disregard the
3 statute when it talks about warranties and doing a place of
4 business and say, well, that's not a physical place, but on the
5 other parts it wants to come in and say clearly these do
6 provide. The reality is is that the dealership statute that
7 all the parties have cited and that Judge Gilstrap cited have
8 all been in the context of dealership arrangements and not in
9 the context of the venue statute.

10 And to address just two points that were raised in that
11 last point on unenforceable contracts, you know, counsel
12 suggested that the law says that Hyundai can't give inventory
13 requirements, if I heard correctly. But Hyundai clearly tells
14 its dealers that they must maintain at least the minimum
15 inventory of Hyundai vehicles requested by HMA. That's in the
16 agreement.

17 And with training, again, counsel pointed out under
18 agency, well, there's training, but it's -- I thought I heard
19 it's not mandatory, but my point is is it is mandatory. Dealer
20 agrees to require its sales personnel to participate in
21 programs that HMA offers from what's there. Again, when you go
22 through -- and the suggestion that Hyundai shouldn't be brought
23 into court on a venue purpose because they are engaged -- if
24 the contracts say this, they are illegal and void under Texas
25 law, begs the question of why they're promulgating illegal and

1 void contracts to their dealers and whether their dealers know
2 this.

3 So my overall point is is that, again, at a high level
4 counsel says here's what the cases say, but in both of these
5 motions when you look at the requirements for agency, control,
6 the statute, the Georgia case, the devil's in the details. And
7 when you get to the level of control or input or ratification
8 or however you want to characterize it, these manufacturers do
9 exercise that attribute.

10 MR. ROWLAND: If I could just respond to that. I think
11 that plaintiff's counsel simply doesn't understand how this
12 industry works. These -- my understanding, and I don't profess
13 to be an expert, but my understanding is that the same
14 dealership agreements, in essence, are used everywhere in all
15 states, and that's because there are all these state laws which
16 would essentially prohibit dealerships from being treated
17 inconsistently with other dealerships. So it's difficult to
18 change these agreements. They're kind of just applied
19 everywhere. And that's why we have this weird situation where
20 you have an agreement with a whole bunch of specifications and
21 provisions that could arguably be inconsistent with certain
22 state laws, and it's because everybody -- all the attorneys and
23 the people operating these industries understand that the real
24 rules that control are these statutes, and that's why the
25 statutes, you know, repeatedly say things like notwithstanding

1 the franchise agreement. You know, the -- it's understood and
2 is expressed in here that there may be inconsistent --
3 inconsistencies between these agreements and statutes, but the
4 statutes control. So it is wrong as a matter of law to say
5 that these agreements somehow create control because it's the
6 statutes that control, and it's the statutes which plaintiff's
7 briefing completely ignores and does not understand the context
8 of.

9 MR. HANNEMANN: Your Honor, if I could have just two
10 minutes in reply. Would you accept that?

11 THE COURT: Sure. Of course.

12 MR. HANNEMANN: Oh, thank you.

13 I don't think that the devil is in any of the details that
14 were just discussed about the relationship between Hyundai and,
15 by implication, Volkswagen and the dealerships.

16 What the Cray case says is that what's relevant is whether
17 the defendant has control over the place of business. And if
18 Volkswagen's CEO, if Volkswagen Group of America's CEO wants to
19 walk onto a dealership and go inside, he or she needs
20 permission from the dealer. There's no Volkswagen Group of
21 America corporate control over those premises, not at all.

22 We also didn't talk about the two cases that are actually
23 precedential that did consider this issue. The Omega Patents
24 case and the West View Research case. The Omega Patents case,
25 for example, went through this same analysis and concluded that

1 facilitating business and services through an independent
2 entity is not enough for ratification. That's referring to
3 plaintiff's ratification theory.

4 Judge Gilstrap's decision I think mixed up personal
5 jurisdiction and venue analysis. We never got to see how Judge
6 Gilstrap would deal with that on reconsideration or how the
7 Federal Circuit would deal with it because the parties settled
8 and that opinion was vacated. It has no precedential value
9 now. We would refer the Court instead to the analysis, as I
10 said, in Omega Patents and West View Research.

11 MR. SONGER: To address Omega, Your Honor, and I'll limit
12 it to that, the Omega case, it is -- it points out it came
13 after Blitzsafe and Judge Gilstrap and it just basically said,
14 I read what Judge Gilstrap said and I disagree, and it went
15 through the analysis, but what the Omega case says is that this
16 ownership ability is a factor, and that's -- follows Cray and
17 the Federal Circuit. It's a factor, not the factor. I would
18 argue that VW -- especially VW and Hyundai both think that
19 ownership is the factor to consider when the Federal Circuit
20 has not said that and even Omega doesn't say that when it goes
21 through it.

22 The cases that Omega cited in support are all not relevant
23 to the dealership issue. They're all cases like the Amazon
24 case, the Spire case or the Home Depot case. I think that's
25 Vaxcel, where you've got someone selling goods and they're

1 trying to get venue because the goods are sold in Home Depot
2 with a very wide range and no evidence of what those agreements
3 would be. In fact, there's probably hardly any as to what Home
4 Depot will do other than say we agree to sell them. Certainly
5 not what we have here.

6 And the Omega case did look at the ratification theory.
7 It came up with of course the different result than Judge
8 Gilstrap reached which I would argue is incorrect from what's
9 there.

10 But on the facts, the facts that were presented in this
11 case, in Omega it said -- it looked at comment marketing
12 strategies and some modicum of control over the dealers' macro
13 level operations are not enough without more to satisfy the
14 venue statute.

15 Again, the details are important. The Court there was
16 looking at macro level operations and what they were doing.
17 They looked at the website and some other things and they did
18 not look at the micro level and the wealth of detail that we
19 have presented by the agreements here.

20 THE COURT: Okay. Let's move on to the next issue. Who
21 will be handling that?

22 MR. ROWLAND: For HMA for the defendants I'll be speaking
23 regarding the discovery and scheduling dispute.

24 THE COURT: Okay.

25 MR. LAMBERSON: I'll be handling for the plaintiff, Your

1 Honor.

2 THE COURT: Okay. Happy to hear it.

3 MR. ROWLAND: Sure. It's our motion, so I'll go first.

4 There's essentially two issues. The first is that we have
5 a dispute over whether or not plaintiff has told us their
6 priority dates. Kind of a basic issue for evaluating prior art
7 and determining whether the prior art is useful in this case is
8 whether or not it predates the asserted patents. And here
9 plaintiff -- the Court's rules required the plaintiff to
10 identify the priority date, i.e., the earliest date of
11 invention for each asserted claim.

12 Plaintiff's infringement contentions stated that for each
13 patent the priority date is at least as early as a particular
14 date which, in essence, means any date going back to the
15 beginning of time which does not tell us any useful information
16 about what their priority dates would be.

17 THE COURT: I'm not -- I don't follow that. Did they not
18 give you a date, or -- when you say they go back to the
19 beginning of time, I don't understand what that means. You
20 have the dates. Obviously they were filed, and if they -- have
21 they not given you a date earlier than that that they are
22 saying -- I'm just not following when you say if you go back to
23 the beginning of time.

24 MR. ROWLAND: Understood, Your Honor. They give us --
25 they -- it's a sentence which is designed to not convey useful

1 information. Their sentence is that the priority date is at
2 least as early as a given date. So it's at least, say,
3 November 2000, at least as early as November 2000, but the at
4 least language means it could be any date before that as well.
5 So we --

6 THE COURT: Well, for -- well, no. I know that may mean
7 that grammatically, but -- I'm not disputing you grammatically,
8 but if for purposes of your -- for purposes right now of
9 your -- what art you're going to find, that's the date that
10 you're going to use. If the plaintiff decides that they can
11 come up -- that they have an earlier date and they can show a
12 good faith basis to me for why they didn't know that the date
13 should be earlier, then they can come to me and say that it's
14 an earlier date, but for right now you have a priority date.

15 MR. ROWLAND: Understood, Your Honor. That was the --
16 what we were looking to clarify there.

17 THE COURT: Okay. You have --

18 MR. LAMBERSON: If I could clarify the record, Your Honor,
19 we did give them an earlier date. They didn't like our at
20 least as early as. And I want -- you know, there's three
21 different terms getting thrown around. There's priority date,
22 conception date and invention date. So we gave them both what
23 I will call a priority date, an earliest filing date, and we
24 gave them -- when they said, well, what's your conception date,
25 we gave them the conception date. That date was November of

1 1999, and that does predate the filing. And so we gave them
2 both. And so it doesn't go back to the beginning of time. And
3 so that's the range we're dealing with. And --

4 THE COURT: Well, then you're right. That's the range
5 we're dealing with. And so that's -- whatever you gave them on
6 those dates, that's the range we're dealing with unless you
7 have some good faith reason to show me that it might be a date
8 earlier than that in the future.

9 MR. ROWLAND: If I could clarify that. The statement that
10 they're referring to is they sent us an e-mail, not part of the
11 infringement contentions, that says the earliest date by which
12 StratosAudio believed it conceived of at least some of the
13 elements claimed in the asserted patents is November 1999, but
14 that's not an invention date which is what's required by the
15 Court's rules. Saying that at least some of the elements in
16 eight unrelated patents doesn't tell us anything about an
17 invention date or a conception date. It's essentially just an
18 arbitrary date that is not -- that is not a date of invention
19 and it's also not a part of the infringement contentions. So
20 it's not --

21 THE COURT: I agree with you. I mean, you have -- they've
22 given you -- they've told you what their priority date is, and
23 that's what's important with respect to -- in my opinion with
24 respect to the art -- the date you have to find the art that's
25 earlier. Whatever they told you is their priority date is what

1 their priority date is.

2 MR. ROWLAND: And that would be the dates that are in
3 their infringement contentions, not dates in e-mails, right?

4 THE COURT: Yes. That's right.

5 MR. LAMBERSON: And, Your Honor, just to clarify, when I
6 say priority date, I mean earliest effective filing date. And
7 when we look at the case law cited by defendants, the Fortinet
8 case from the Northern District, they say the same thing. They
9 say that, you know, under the Northern District local patent
10 rules, you have to give an earliest effective filing date. You
11 don't have to give a conception date because that date may
12 change. Now, we also gave them a conception date when they
13 asked for it in an e-mail.

14 THE COURT: I literally don't know what we're arguing
15 about here.

16 MR. LAMBERSON: I don't either, Your Honor, frankly, but
17 what I'm worried about is we've given the defendants a date
18 range. We said this is the earliest possible date we conceived
19 of it and here's the effective filing dates which are the
20 latest possible date. I just want to make entirely clear for
21 the Court and everybody else that that is the range we're
22 working between. And conception occurred at some point in that
23 range and we were producing the documents to corroborate that.

24 MR. ROWLAND: Two points in response. One is the -- for
25 example, one patent has a provisional application of 2008. I

1 don't think plaintiff has any basis to swear back nine years
2 for that patent to 1999. So all that invention date that
3 they're stating is, first of all, not an invention date. It
4 doesn't tell us anything because it's not on a claim-by-claim,
5 patent-by-patent basis, and it also doesn't -- it's not an
6 allegation that each element of the claim was invented as of
7 that date. So that statement is not really meaningful.

8 And, additionally, all we would like to clarify is that
9 the dates that are in their infringement contentions are what
10 govern, not this vague statement in an e-mail which is not an
11 invention date that's required by the Court's rules.

12 MR. LAMBERSON: And, Your Honor, the Court's rules say
13 priority date, i.e., invention date. I think that may be the
14 confusion here. In the contentions we gave them our priority
15 dates. When they asked for a conception date, we gave them a
16 conception date. That was by e-mail, but I think it was the
17 day after we served our contentions or the week of. So we've
18 given them everything we could possibly give them at this point
19 as far as we can tell.

20 THE COURT: All of this makes sense to me. I'm not sure
21 what the discussion is.

22 MR. ROWLAND: The key issue here is that we don't want
23 them to be able to come back later and say, our invention date
24 for one of these patents is in 2005.

25 THE COURT: Well, they might. They might come back and

1 say that, but to do that they would have to convince me that
2 they should be allowed to do that. And if they do do that --
3 and I will accommodate you all in terms of allowing you to do
4 additional work on invalidity. I mean, these are preliminary
5 infringement -- I'm sorry -- these are preliminary infringement
6 contentions. They're preliminary invalidity contentions. As
7 what I've heard from you is the plaintiff has told you both
8 what they believe the minimum priority date is, but they've
9 also given you information which I think they should and you're
10 entitled to say there may be a conception date that was earlier
11 than that. We may be able to show that -- I'm just making this
12 part up, but, you know, if we told you the priority date was
13 the date the filing of the patent is, that's as good as we got
14 right now because we can't prove earlier. But we might find an
15 inventor's notebook that shows that in fact conception was
16 complete and it was ready to be patented six months earlier,
17 and if we find that notebook, we're not going to be bound by
18 the date that we gave you in our preliminary contentions, but
19 they're going to have to come back to me and explain, this is
20 why we have an earlier date. We did this -- we made all this
21 in good faith at this point and I'll deal with it. So right
22 now you have the dates that are the preliminary dates. If the
23 plaintiff wants to move back or front, however you want to say
24 it, if they want to make an earlier priority date, they may be
25 able to do so, but they'll have to get my permission, and if we

1 do that, then it's going to -- we're going to modify other
2 rights that you have.

3 MR. ROWLAND: Understood, Your Honor. That makes perfect
4 sense. So my understanding is that the dates in their
5 infringement contentions are their current allegations and we
6 may need to go back and do additional work later on if they
7 changes those dates, but for now the operative dates are the
8 dates in their contentions.

9 THE COURT: That's exactly correct.

10 MR. ROWLAND: Perfect.

11 MR. LAMBERSON: And, Your Honor, they're going to -- I
12 just raised it because they're going to say this later. I know
13 where this is going. They're going to ignore the e-mail. We
14 also gave them the conception date. I mean, if we should
15 put -- you know, I'm just not sure how to handle it when we
16 have a rule saying disclose your priority dates and we give
17 them the priority dates and then they say, well, what's your
18 conception date, we give them the conception date, you know,
19 and now they're saying, well, because it's not -- because you
20 gave it to us after we asked you. It's not in your
21 contentions.

22 THE COURT: Let me -- because I'm really ready to move on.
23 Were I the defendant, and I'm not, I would find art that if --
24 I wanted to have art that I relied upon and was -- and felt
25 secure that it might survive through the trial, I would make

1 sure that it was at least more than a year earlier than
2 whatever the earliest date the plaintiff has given to you, if
3 that helps.

4 MR. ROWLAND: It does, Your Honor. But in this case
5 that -- what -- the date that they put in the e-mail is not a
6 real date. It is -- they're essentially saying that they could
7 swear back nine years on one of these patents, on several of
8 these patents, and I don't think there's any basis for that.
9 So they're saying that they gave us a conception date.

10 THE COURT: Well, if there's no basis for that -- if
11 there's no basis for that, then I can take that up at a summary
12 judgment time.

13 MR. ROWLAND: Understood, Your Honor. I think we
14 understand the Court's views.

15 MR. LAMBERSON: And I'll expect we'll have more disputes
16 about this, but I appreciate that we should move on. I think
17 it's clear, but thank you, Your Honor.

18 THE COURT: What else do we need to take up?

19 MR. LAMBERSON: The case schedule is dependent on this
20 issue, Your Honor. The defendants were asking for some
21 additional time because we've been trying to produce some
22 e-mails relating to our conception date which we're now
23 producing this week. I don't know if Your Honor looked at that
24 issue, but we -- the plaintiffs believe the schedule should be
25 entered, and there's no reason to hold things up while we make

1 document productions.

2 MR. ROWLAND: And if I could respond to that.

3 Plaintiff -- we had filed a discovery dispute over documents
4 that plaintiff had admittedly withheld related to conception or
5 reduction to practice, and counsel said that this week they're
6 producing them, but I'm not sure that's true. They sent us the
7 letter last night saying they're producing some documents
8 yesterday, some on Friday, and then there's an unknown amount
9 of other documents that they might rely on to prove conception
10 and reduction to practice that they don't yet say they're going
11 to produce or that they plan to produce or when they would
12 produce those. So we'd like a date certain by which they will
13 produce those documents that they are not planning to produce
14 this week as an initial matter.

15 THE COURT: For the plaintiff what date do you anticipate
16 that will be?

17 MR. LAMBERSON: Well, the issue, Your Honor, here -- these
18 are archival materials. So the e-mails we will produce this
19 week. We were finally able to export them. The other
20 materials, as I understand it, there's a hard drive that's
21 corrupt. We've sent it to a data recovery agency. I don't
22 know if we'll be able to get anything off of it. There's also
23 some CDs that may or may not be readable. So right now, I
24 mean, I would hope, you know, within the next month or so, but
25 it's -- I just don't know if these materials are going to be

1 recoverable. That's why we haven't produced them yet.

2 THE COURT: Okay. Well, I'm not going to delay what we're
3 doing while we find out whether or not that's discoverable. So
4 what is the exact issue -- is there a question about when you
5 should enter the scheduling order? I'm not sure what the exact
6 question is.

7 MR. ROWLAND: Well, what we would like to do is because
8 plaintiff is essentially complying with the infringement
9 contentions deadline largely this week, we'd like to have an
10 extension to have time to review the hundreds of thousands of
11 pages of documents that they -- I think they said yesterday
12 they produced 100,000 pages of documents that I think were due
13 back in March. So we would like some additional time to craft
14 our invalidity contentions -- back in -- excuse me. Back in
15 May. So essentially they're a little over five weeks late in
16 complying with the infringement contentions deadline at least,
17 and they may be even later depending on later productions, and
18 we'd like a little bit of additional time for invalidity
19 contentions to review these additional documents.

20 THE COURT: And what's the plaintiff's position with
21 respect to that?

22 MR. LAMBERSON: We don't read this Court's rule as
23 requiring every shred of conception-related evidence to be out
24 the door before defendants have to put in their preliminary
25 contentions. They can certainly do their preliminary

1 contentions. As they review the e-mails, if they decide
2 there's something in there that has some bearing on invalidity,
3 which I don't think there will be. They have our full range of
4 conception dates. And these e-mails fall in that range. But
5 if there is something new in there, they can ask, you know, to
6 serve -- to supplement their preliminary contentions. They
7 were able to serve, you know, and file IPRs on all the asserted
8 patents without having these e-mails, and I don't think they
9 need them for their preliminary contentions.

10 THE COURT: I agree with that. I'm going to maintain
11 whatever the current schedule is.

12 Is there anything else we need to take up?

13 MR. ROWLAND: There is no current schedule. We'd asked
14 for July 8th to be eight weeks after the -- we asked for
15 July 8th, which is eight weeks after the infringement
16 contentions, to serve our invalidity contentions. Is that
17 eight week period acceptable?

18 THE COURT: Is that acceptable to the -- when is the
19 Markman set? Do we have a Markman set?

20 MR. HANNEMANN: October, I believe, Your Honor.

21 MR. ROWLAND: Yeah.

22 THE COURT: Frankly, I'm less -- I'm not very concerned --
23 that's terrible to put on the record. I'm concerned about
24 maintaining the Markman date. I'm less concerned about you all
25 jiggering the dates that are in between now and then.

1 For the plaintiff, what damage does it do to you all if
2 defendants have a little additional time, three or four extra
3 weeks of time? Does that prevent us from getting to the
4 Markman when it's currently scheduled?

5 MR. LAMBERSON: We're fine with the July 8th date that
6 defendants just proposed, Your Honor. That's fine with us.

7 THE COURT: Then that's fine.

8 Do we have anything else to take up?

9 MR. HANNEMANN: Your Honor, yes. Just one very quick
10 thing from Volkswagen. Our understanding from previous
11 communications from the Court is that the case is going to roll
12 on while the Court considers the venue motion.

13 THE COURT: It is.

14 MR. HANNEMANN: It is. Okay. That's all.

15 THE COURT: Yeah. I'm trying to make it as clear as
16 possible I'm not going to have -- I'm not going to conduct a
17 Markman hearing while there are pending jurisdictional issues
18 out there. I'm doing my -- I'm trying to do my best to make
19 it -- hold on one second.

20 (Pause in proceedings.)

21 THE COURT: I'm trying to do my best to accomplish that
22 in -- and what I am also trying to do is making sure the
23 parties know that they have to let me know occasionally if I'm
24 about to violate my own rule in that regard. But if this
25 Markman's not until October, you all are at no peril of not

1 having an order on the motion -- the pending motions way before
2 that. So you all can continue on the -- we will continue the
3 other schedule and we should have an order out relatively
4 quickly compared to an October date.

5 Anything else?

6 MR. SONGER: Thank you, Your Honor.

7 THE COURT: Okay. You guys have a good day. Take care.

8 (Hearing adjourned at 10:26 a.m.)

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1 UNITED STATES DISTRICT COURT)
2 WESTERN DISTRICT OF TEXAS)

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4 I, Kristie M. Davis, Official Court Reporter for the
5 United States District Court, Western District of Texas, do
6 certify that the foregoing is a correct transcript from the
7 record of proceedings in the above-entitled matter.

8 I certify that the transcript fees and format comply with
9 those prescribed by the Court and Judicial Conference of the
10 United States.

11 Certified to by me this 27th day of June 2021.

12

13

/s/ Kristie M. Davis
KRISTIE M. DAVIS
Official Court Reporter
800 Franklin Avenue
Waco, Texas 76701
(254) 340-6114
kmdaviscsr@yahoo.com

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

STRATOSAUDIO INC.,)	
)	
Plaintiff,	)	Case No. 6:20-CV-01125-ADA
	)	Case No. 6:20-CV-01131-ADA
v.)	
	)	JURY TRIAL DEMANDED
HYUNDAI MOTOR AMERICA,)	
)	
Defendant.)	
_____)	
STRATOSAUDIO, INC.,)	
)	
Plaintiff,)	
)	
v.)	
)	
VOLKSWAGEN GROUP OF AMERICA, INC.,)	
)	
Defendant.)	
_____)	

**STRATOSAUDIO, INC.’S SUPPLEMENTAL BRIEFING TO
HYUNDAI MOTOR AMERICA’S and VOLKSWAGEN GROUP OF AMERICA, INC.’S
MOTIONS TO DISMISS**

I. INTRODUCTION

Pursuant to the Court’s direction by email dated June 28, 2021, plaintiff StratosAudio, Inc. (“StratosAudio”) hereby submits this Supplemental Brief regarding the U.S. Court of Appeals for the Federal Circuit’s holding in *In re Google*, 949 F.3d 1338 (Fed. Cir. 2020) that “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. This Supplemental Brief applies to the Motions to Dismiss filed by Defendant Hyundai Motor America’s (“Hyundai”) (Case No. 6:20-CV-01125-ADA) and Defendant Volkswagen Group of America, Inc.’s (“VW”) (Case No. 6:20-CV-01131-ADA) and incorporates StratosAudio’s Oppositions to those Motions, including the prior arguments related to Hyundai’s and VW’s control over their dealers. D.I. 21 at 6-16 (20-cv-01125); D.I. 22 at 8-16 (20-cv-01131).¹

Both VW and Hyundai dispute whether they have employees with a presence in this District. This fact, even if true, ignores that an *agency* relationship is sufficient for venue purposes. *Google*, 949 F.3d at 1345 (discussing the ‘main purpose’ of the patent venue statute to give jurisdiction where a “*permanent agency transacting the business* is located.”). The Federal Circuit cited three “essential elements” of agency derived from the Restatement and the Supreme Court to determine if an agency relationship exists for venue purposes: (1) “the principal’s ‘right to direct or control’ the agent’s actions;” (2) “the manifestation of consent” by the principal to

¹ Neither Hyundai nor VW has alleged or argued that the various dealer agreements and operating standards StratosAudio cited and attached as exhibits to StratosAudio’s Oppositions do not apply to dealerships in this District. Indeed, there are likely other agreements between the manufacturers and dealers in this District, as well as other facts relevant to this issue that, if necessary, would be obtained through discovery detailing even greater control of the manufacturers over the dealers.

the agent that the agent shall act on the principal's behalf; and (3) consent by the agent to act. *Google*, 949 F.3d at 1345 (quoting *Meyer v. Holley*, 537 U.S. 280, 286 (2003) and citing *Restatement (Third) of Agency* §1.01)(hereinafter "*Restatement*").² StratosAudio alleged, and the Hyundai and VW dealership agreements demonstrate, that each of these elements is satisfied for venue.³

II. CONTROL BY DISTRIBUTION OF NEW VEHICLES, PARTS, and SERVICE

Both Hyundai and VW direct and control how each dealer carries out the promoting, selling, and servicing of Hyundai's and VW's products (i.e., their vehicles and parts), thereby creating an agency relationship. The manufacturers, through the dealer agreements, dictate what the dealers "shall and shall not do" and grant the manufacturers "the right to give interim instructions or directions to [the dealers] once their relationship is established" – which is but one of the factors determining agency. *Restatement*, §1.01, cmt. f; *Google*, 949 F.3d at 1345-46.⁴

A. Hyundai Direction

Hyundai, through the "Dealer Standard Provisions" (Doc. 21-10 in 20-cv-01125), dictates many requirements for the dealers, including:

- sales standards (§10.B.1); inventory level (§10.B.2, 10.C.2); disclosures to customers (§10.C.3-4); participation in Hyundai training programs (§10.D.1, §11.C.1); utilization of Hyundai provided materials (§10.D.2);
- instructions on predelivery vehicle service (§11.A.1); recall requirements (§11.A.3); minimum employees, Hyundai approval and training (§11.B.1); how to

² A copy of relevant portions of the *Restatement (Third) of Agency* are attached as Exhibit A for the Court's convenience.

³ StratosAudio's Complaints allege that Hyundai and VW transact business through their dealers and other direct means. *See, e.g.*, D.I. 1 at ¶¶ 10-14 (Case 20-cv-01125); D.I. 1 at ¶¶ 10-14 (Case 20-cv-01131).

⁴ The manufacturer requirements herein also satisfy the "control" requirements set forth in *Cardinal Health Solutions, Inc. v. Valley Baptist Med. Ctr.*, 643 F.Supp. 883 (S.D. Tex. 2008), discussed (and erroneously cited as 5th Circuit law) in Hyundai's Reply brief.

- resolve consumer complaints (§11.B.2); required equipment and tool purchase from Hyundai (§11.B.3); inventory requirements for parts (§11.B.4);
- specifications for the dealers facilities (§12.A), signs (which cannot be modified by the dealer) (§12.C), and data processing systems (§12.D); and
- the establishment of working capital (§13.A).

Many of these directives indicate requirements that Hyundai requires “from time to time” (e.g. §§ 10.D.2, 11.A.3, 11.B.2, 11.B.3). As noted by the Federal Circuit, the right to give directives “from time to time” is “suggestive of an agency relationship.” *Google*, 949 F.3d at 1346. Moreover, Hyundai also evaluates the dealers performance for many key criteria, dictates changes to the dealers, and can terminate the dealer agreement if a dealer does not meet *Hyundai’s* standards. *See, e.g.*, §10.E.2 (sales), §11.D (service and parts), §12.F (facilities), §16.B.3 (termination). Indeed, section 16.B. of the Dealer Standard Provisions allows Hyundai unilaterally to terminate the agreement if the dealer does not perform any requirement to *Hyundai’s* standards. Hyundai thus “retains the capacity throughout the relationship to assess the agent’s performance, provide instructions to the agent, and terminate the agency relationship by revoking the agent’s authority.” *Restatement*, § 1.01, cmt. f.

B. Volkswagen Direction

VW similarly dictates and controls many aspects of the dealers operations in an agency relationship. VW, through its “Operating Standards,” dictates many dealer requirements related to the dealers sales, personnel, equipment, and the physical facility. *See generally* Doc. 22-4 in 20-cv-01131). VW even creates an entire “Operating Plan” with its dealers that are reviewed periodically to meet certain “performance requirements.” *Id.* at p. 5.

VW’s dealer “Standard Provisions” also establish requirements imposed by VW, including the following (set forth in Doc. 22-3 in 20-cv-01131): “minimum” staff positions (Art. 3(1)); “premise” requirements (including hours of operation) (Art. 3(2)-(3)); use of VW

trademarks, and approval of signage and stationery (Art. 4 (1)-(3)); approval of advertising (Art. 4(4)); sales requirements (Art. 5(1), (2)); inventory and sale of parts (Art. 6); service (Art. 7), recalls (Art. 7(5), prices and inventory levels (Art. 8(1),(3)); and the use of specific forms and equipment (Art. 10(1)). Indeed, most of the obligations imposed on the dealers by the Standard Provisions are “in accordance with” or “set forth” in the Operating Standards, the Operating Plan, or other “Recommendations.” *See, e.g.*, Arts. 3(1)(b), 3(2), 5(1), 6(2), 7(1) and (2), and 8(3). Similar to Hyundai, VW has the ability to change these requirements “from time to time” *See, e.g.*, Arts. 3(2), 4(1), 5(1), 6(1). In addition, VW can evaluate the dealer’s performance, dictate changes, and terminate the dealer if performance does not meet VW’s requirements. *See* Art. 3(1), Art. 11 (evaluation), 14(2)-(3) (termination).

C. CONDUCT OF MANUFACTURER’S BUSINESS

The dealers are clearly conducting the manufacturer’s business by the distribution of vehicles, parts, and conducting service thereon. Unlike in *Google*, the Hyundai and VW dealer activities are not “merely connected to” or ancillary to the manufacturer’s business operations. The dealers are how both Hyundai and VW engage in business to the consuming public. *Google*, 949 F.3d at 1346-47. The dealers’ activities “themselves constitute” Hyundai’s and VW’s “conduct of business,” and they “furnish to customers...what the business offers.” *Id.* As noted in *Google*, the dealer’s activities – sales, direct customer services, storage, transport, and the exchange of goods and services – are directly in line with types of activities conducted by agents that meet Congress’ expectations for the patent venue statute at the time it was enacted. *Id.*⁵ The

⁵ In addition to the agency operations, both Hyundai and VW directly conduct business in this District by having dealers perform warranty repair services. *Blitzsafe Tex., LLC v. Bayerische Motoren Werke AG (Blitzsafe I)*, 2018 U.S. Dist. LEXIS 173065 at *11 (E.D. Tex. Sep. 5, 2018) (citing Tex. Occ. Code §2301.251(c)). Furthermore, the sale of “certified” vehicles by the dealers is a separate basis for finding the direct conduct of business by Hyundai and VW.

dealer's activities are also far different, and more comprehensive, than the types of activities (network access, one-time installation, and equipment maintenance) noted by *Google* that would *not* create an agency relationship. *Id.*

III. CONSENT

An agency relationship also requires “the manifestation of consent” by the principal to the agent that the agent shall act on the principal's behalf; and consent by the agent to act. *Google*, 949 F.3d at 1345. The various agreements cited in StratosAudio's Oppositions demonstrate these elements, as they are replete with requirements and obligations demonstrating that the dealers are acting on behalf of Hyundai or VW, with the dealers consenting to such actions. In addition, the dealers are authorized representatives to sell automobiles and products on the authority of the manufacturers. Doc 21-10 in 20-cv-01125 at §20 (“Authorized Hyundai Dealer”); Doc. 22-3 in 20-cv-01131 at Art. 16 (VW).⁶

Neither Hyundai nor VW disputed this allegation, and both provide “standards” for “certified” pre-owned vehicles. *Blitzsafe I*, *supra* at *11-12; *see also* the relevant websites at www.cpo.hyundaiusa.com/us/en/certified-pre-owned/ and www.vwcpo.com/cpo/vw-program/.⁶ The fact that Hyundai's and VW's relationship with its agents (the dealers) is contractual, that the dealers and manufacturers are separate corporate entities, or that the Hyundai and VW agreements disavow or prohibit an agency relationship does not negate a finding that the dealers are agents of the manufacturer or that the requisite consent for agency exists. *Restatement*, §8.13, cmt. b; §1.01, cmt. c; § 1.02 (“Whether a relationship is characterized as agency in an agreement...is not controlling.”). Indeed, “agency” with respect to the determination of venue as opposed to the imposition of corporate or tortious liability are different concepts. *Ruiz v. Conoco, Inc.*, 868 S.W.2d 752, 759 (Tex. 1993) (“It cannot be doubted that these words [agency or representative] considered alone have several different legal meanings, and there is no indication in [the Texas venue statute] that agency in the sense of responsibility of the principal for tortious conduct of the agent was intended.”) (quoting *Milligan v. Southern Express, Inc.*, 250 S.W.2d 194, 199 (Tex. 1952)). As noted by Judge Gilstrap, while the “mere fact” that a dealer is an authorized dealer does not make it an agent of the manufacturer, the dealer “may under certain circumstances be an agent of a manufacturer.” *Blitzsafe Tex., LLC v. Bayerische Motoren Werke AG*, 2018 U.S. Dist. LEXIS 173065 at *11 (E.D. Tex. Sep. 5, 2018) (citing and quoting *Kent v. Celozzi-Ettleson Chevrolet, Inc.*, No. 99-cv-2868, 1999 WL 1021044 at *4 (N.D. Ill. Nov. 3, 1999)). Those “certain circumstances,” enunciated by the Federal Circuit in *In re Google*, exist for Hyundai and VW with respect to the determination of venue for patent purposes.

Dated: July 5, 2021

Respectfully submitted,

/s/ Jonathan Lamberson

WHITE & CASE LLP
Jonathan Lamberson (pro hac vice)
CA Bar. No. 239107
3000 El Camino Real, #900
2 Palo Alto Square
Palo Alto, CA 94306
Tel: 650-213-0300
Fax: 650-213-8158
Email: lamberson@whitecase.com

WHITE & CASE LLP
Michael Songer (pro hac vice)
DC Bar No. 24031621
701 Thirteenth Street, NW
Washington DC, 20005
Tel: 202-626-3600
Fax: 202-639 9355
Email: songer@whitecase.com

WHITE & CASE LLP
Charles Larsen (pro hac vice)
MA Bar No. 652355
75 State Street
Boston, MA 02109
Tel: 617-979-9300
Fax: 617-979 9301
Email: charles.larsen@whitecase.com

FRIEDMAN, SUDER & COOKE
Corby R. Vowell
TX Bar No. 24031621
604 East 4th Street, Suite 200
Fort Worth, TX 76102
Tel: 817-334-0400
Fax: 817-334-0401
Email: vowell@fsclaw.com

**ATTORNEYS FOR PLAINTIFF
STRATOSAUDIO, INC.**

CERTIFICATE OF SERVICE

I hereby certify that on the 5th day of July 2021, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing via electronic mail to all counsel of record. Any other counsel of record will be served by first class U.S. mail.

/s/ Jonathan Lamberson

Jonathan Lamberson

EXHIBIT A

Appx340

Restat 3d of Agency, § 1.01

Restatement of the Law, Agency 3d - Official Text > Chapter 1- Introductory Matters > Topic 1- Definitions and Terminology

§ 1.01 Agency Defined

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.

COMMENTS & ILLUSTRATIONS

Comment:

a. Scope and cross-references. Comment *b* discusses various usages of agency terminology. Comment *c* is a general discussion of the defining elements of agency. Comment *d* discusses how a relationship of agency is formed. It is not necessary that the agent manifest assent to the principal. See Comment *c* and § 3.01, Comment *b*. Comments *e-h* discuss the elements of agency in more detail. Section 1.02 states the principle that it is a legal conclusion whether a particular relationship is one of agency. Section 1.03 defines manifestation. Section 1.04 defines and distinguishes among some common types of agents and principals.

b. Usage. This definition states the elements of the relationship widely referred to as "common-law agency" or "true agency." The definition excludes cognate relationships in which, although the legal consequences of one person's actions are attributed to another person, one or more of the defining elements of agency are not present. See §§ 3.12-3.13, dealing with powers given as security and irrevocable proxies, and § 8.09, Comment *d*, discussing the duties of an escrow holder. Nonetheless, such cognate relationships are often grouped with relationships of common-law agency. More generally, legal usage varies. Some statutes and many cases use agency terminology when the underlying relationship falls outside the common-law definition.

Moreover, the terminology of agency is widely used in commercial settings and academic literature to characterize relationships that are not necessarily encompassed by the legal definition of agency. In philosophical and literary studies, "agency" often means an actor's capacity to assert control over the actor's own intentions, desires, and decisions. In economics, definitions of principal-agent relations encompass relationships in which one person's effort will benefit another or in which collaborative effort is required. In commercial settings, the term "principal" is often used to designate one who benefits from or is affected by the acts of another, or one who sponsors or controls another. It is also common usage to refer without distinction to parties who serve any intermediary function as "agents." Not all such situations, however, meet the legal definition of an agency relationship. Moreover, the legal consequences of agency may attach to only a portion of the relationship between two persons, a fact that dictates care in using the term "agency relationship." Aspects of an overall relationship may constitute agency and entail its legal consequences while other aspects do not. It is also possible for the same person to be a principal as well as an agent in an interaction with a third party. The Introduction states the coverage of this Restatement.

c. Elements of agency. As defined by the common law, the concept of agency posits a consensual relationship in which one person, to one degree or another or respect or another, acts as a representative of or otherwise acts on behalf of another person with power to affect the legal rights and duties of the other person. The person represented has a right to control the actions of the agent. Agency thus entails inward-looking consequences, operative as between the agent and the principal, as well as outward-looking consequences, operative as among the agent, the principal, and third parties with whom the agent interacts. Only interactions that are within the scope of an agency relationship affect the principal's legal position. In some situations, the consequences of agency are imposed without a person's consent, such as when a court appoints a lawyer for a person appearing before the court, or when a statute designates an agent for purposes of service of process. See Comment *d* for further discussion of consent.

Restat 3d of Agency, § 1.01

The common-law definition requires that an agent hold power, a concept that encompasses authority but is broader in scope and connotation. The terminology of "power" is neutral in that it states a result but not the justification for the result. An agent who has actual authority holds power as a result of a voluntary conferral by the principal and is privileged, in relation to the principal, to exercise that power. Actual authority is defined in § 2.01. Actual authority does not exhaust the circumstances under which the legal consequences of one person's actions may be attributed to another person. An agent also has power to affect the principal's legal relations through the operation of apparent authority, as stated in § 2.03. Additionally, a person may be estopped to deny the existence of an agency relationship, as stated in § 2.05. Separately, a person may, through ratification, create the consequences of actual authority with respect to an actor's prior act. See Chapter 4.

Agency encompasses a wide and diverse range of relationships and circumstances. The elements of common-law agency are present in the relationships between employer and employee, corporation and officer, client and lawyer, and partnership and general partner. People often retain agents to perform specific services. Common real-estate transactions, for example, involve the use of agents by buyers, sellers, lessors, and lessees. Authors, performers, and athletes often retain specialized agents to represent their interests in dealing with third parties. Some industries make frequent use of nonemployee agents to communicate with customers and enter into contracts that bind the customer and a vendor. Agents who lack authority to bind their principals to contracts nevertheless often have authority to negotiate or to transmit or receive information on their behalf. Some common forms of agency have a personal and noncommercial flavor, exemplified by the relationship created by a power of attorney that confers authority to make decisions regarding an individual's health care, place of residence, or other personal matters. See Comment *d*. On durable powers of attorney, see § 3.08(2).

Not all relationships in which one person provides services to another satisfy the definition of agency. It has been said that a relationship of agency always "contemplates three parties--the principal, the agent, and the third party with whom the agent is to deal." 1 Floyd R. Mechem, *A Treatise on the Law of Agency* § 27 (2d ed. 1914). It is important to define the concept of "dealing" broadly rather than narrowly. For example, a principal might employ an agent who acquires information from third parties on the principal's behalf but does not "deal" in the sense of entering into transactions on the principal's account. In contrast, if a service provider simply furnishes advice and does not interact with third parties as the representative of the recipient of the advice, the service provider is not acting as an agent. The adviser may be subject to a fiduciary duty of loyalty even when the adviser is not acting as an agent. The common law of agency, however, additionally encompasses the employment relation, even as to employees whom an employer has not designated to contract on its behalf or otherwise to interact with parties external to the employer's organization. In contrast, the common term "independent contractor" is equivocal in meaning and confusing in usage because some termed independent contractors are agents while others are nonagent service providers. The antonym of "independent contractor" is also equivocal because one who is not an independent contractor may be an employee or a nonagent service provider. This Restatement does not use the term "independent contractor," except in discussing other material that uses the term. Section 7.07(3) states the criteria that classify a person as an employee, as opposed to a nonagent service provider, for purposes of an employer's vicarious liability for torts committed within the scope of employment.

Despite their agency relationship, a principal and an agent retain separate legal personalities. Agency does not merge a principal's personality into that of the agent, nor is an agent, as an autonomous person or organization with distinct legal personality, merged into the principal. The fact that an agent acts on behalf of, or represents, another person implies the existence of limits on the scope of the agency relationship and on the extent to which the principal is accountable for the agent's acts. The metaphor of identification, which merges an agent's distinct identity with the principal's, is potentially misleading and not helpful as a starting point for analysis.

A relationship is not one of agency within the common-law definition unless the agent consents to act on behalf of the principal, and the principal has the right throughout the duration of the relationship to control the agent's acts. A principal's manifestation may be such that an agency relationship will exist without any communication from the agent to the principal explicitly stating the agent's consent. If the principal requests another to act on the principal's behalf, indicating that the action should be taken without further communication and the other consents so to act, an agency relationship exists. If the putative agent does the requested act, it is appropriate to infer that the action was taken as agent for the person who requested the action unless the putative agent manifests an intention to the contrary or the circumstances so indicate.

Restat 3d of Agency, § 1.01

A principal's right to control the agent is a constant across relationships of agency, but the content or specific meaning of the right varies. Thus, a person may be an agent although the principal lacks the right to control the full range of the agent's activities, how the agent uses time, or the agent's exercise of professional judgment. A principal's failure to exercise the right of control does not eliminate it, nor is it eliminated by physical distance between the agent and principal. For further discussion of control, see Comment *f*. The common-law definition of agency presupposes a principal who exists and who has legal capacity throughout the duration of the relationship; otherwise the principal will not be able on an ongoing basis to assess the agent's performance in relationship to the principal's interests. See § 3.04. The requirement that an agent be subject to the principal's control assumes that the principal is capable of providing instructions to the agent and of terminating the agent's authority. Comments *d* and *f* discuss, inter alia, the tension between these elements of the common-law definition and durable powers of attorney. The chief justifications for the principal's accountability for the agent's acts are the principal's ability to select and control the agent and to terminate the agency relationship, together with the fact that the agent has agreed expressly or implicitly to act on the principal's behalf.

d. Creation of agency. Under the common-law definition, agency is a consensual relationship. The definition requires that an agent-to-be and a principal-to-be consent to their association with each other. In contrast to the formulation in Restatement Second, Agency § 1, the definition in this section refers to a principal's manifestation of "assent," not "consent." The different terminology is intended to emphasize that unexpressed reservations or limitations harbored by the principal do not restrict the principal's expression of consent to the agent. See *Restatement Second, Contracts* § 17, Comment c. If an agent is otherwise on notice of the meaning the principal ascribes to a particular expression, that meaning is operative as between principal and agent. See § 1.03, Comment e. A principal's manifestation of assent to an agency relationship may be informal, implicit, and nonspecific. See § 1.03, which defines manifestation.

As to the agent, a relationship of agency as defined in this section requires that the agent "manifests assent or otherwise consents so to act," in contrast to the requirement in Restatement Second, Agency § 1 that the agent "consent." The formulation in this section, consistent with Restatement Second, recognizes that it is not necessary to the formation of a relationship of agency that the agent manifest assent to the principal, as when the agent performs the service requested by the principal following the principal's manifestation, or when the agent agrees to perform the service but does not so inform the principal and does not perform. It is a question of fact whether the agent has agreed.

Additionally, the consensual aspect of agency does not mean that an enforceable contract underlies or accompanies each relation of agency. Many agents act or promise to act gratuitously. While either acting as an agent or promising to do so creates an agency relation, neither the promise to act gratuitously nor an act in response to the principal's request for gratuitous service creates an enforceable contract. See *Restatement Second, Contracts* § 71.

In some instances, however, relationships that are less than fully consensual and, therefore, not common-law agency relations trigger legal consequences equivalent to those of agency. A notable instance is a durable power of attorney. The basic presupposition that agency is a consensual relationship that vests in the principal the right of interim control over the agent is at odds with the relationship between principal and agent created by a durable power of attorney, a relationship in which the agent's power survives or is triggered by the principal's loss of mental competence. Once the principal becomes unable to terminate the relationship or to provide instructions to the agent, the principal's relationship with the agent is no longer the relationship presupposed by the common law of agency, even though in creating the power the principal consented initially to the mechanism that led to the later and less consensual relationship with the agent. Although no res exists, the relationship then resembles a trust. Durable powers are treated in § 3.08(2) and in Restatement Third, Property (Wills and Other Donative Transfers) § 8.1, Comment *l*.

Many of the legal consequences of agency also apply in situations that resemble agency in form but in which the parties' consent is subject to constraints imposed by law or by legal or regulatory institutions. As a consequence of such constraints, the decision to appoint a particular agent or to continue the agency relation is not within the parties' exclusive control. For example, the law implies a principal-agency relationship between the owner of a lost item and government officials who recover it. Additionally, court-appointed counsel represents the client, notwithstanding the client's objection, and counsel's withdrawal from representation in

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litigation requires the court's assent. All attorneys are subject to ethical responsibilities that constrain the authority of their clients as principals.

Likewise, the legal consequences resemble those of common-law agency when an "agent's" powers are specified by operation of law, not by the parties. A statutory designation of the Secretary of State as agent to receive service of process is not a consensual choice of agent on the part of the principal or specification of the agent's powers but follows a choice to carry on activity in a particular state. In maritime law, under the 1989 International Convention on Salvage, a ship's master has authority to contract for salvage operations on behalf of the vessel's owner, and the master and the owner have authority to conclude such contracts on behalf of the owner of property on board the vessel. Additionally, the law may mandate that an agent be used to perform a particular function, such as the federal statutory requirement that stock in an employee ownership plan be held and voted by trustees.

e. Fiduciary character of relationship. The scope of an agency relationship defines the scope of an agent's duties to a principal and a principal's duties to an agent. If the relationship between two persons is one of agency as defined in this section, the agent owes a fiduciary obligation to the principal. The word "fiduciary" appears in the black-letter definition to characterize or classify the type of legal relationship that results if the elements of the definition are present and to emphasize that an agency relationship creates the agent's fiduciary obligation as a matter of law.

As a general matter, the term "fiduciary" signifies that an agent must act loyally in the principal's interest as well as on the principal's behalf. See Comment *g* for a discussion of "acting on behalf of." See § 8.01 for an agent's basic duty of loyal action. Any agent has power over the principal's interests to a greater or lesser degree. This determines the scope in which fiduciary duty operates. An agent has such power even when the principal holds a superior economic position or possesses greater expertise or acumen.

To establish that a relationship is one of agency, it is not necessary to prove its fiduciary character as an element. The obligations that a principal owes an agent, specified in §§ 8.13-8.15, are not fiduciary. In addition to an agent's fiduciary duties, the agent has a duty to fulfill specific contractual undertakings that the agent has made to the principal and to third parties, as well as to fulfill any duties imposed on the agent by law. Correlatively, a principal can owe duties created by contractual undertakings to the agent. Chapter 8 states the specific duties owed by the agent and the principal. Section 8.06 governs consent by the principal to conduct that would otherwise breach the agent's duties of loyalty.

Fiduciary duty does not necessarily extend to all elements of an agency relationship, and does not explain all of the legal consequences that stem from the relationship. Fiduciary duty does not operate in a monolithic fashion. Most questions concerning agents' fiduciary duty involve the agent's relationship to property owned by the principal or confidential information concerning the principal, the agent's undisclosed relationship to third parties who compete with or deal with the principal, or the agent's own undisclosed interest in transactions with the principal or competitive activity. It is open to question whether an agent's unconflicted exercise of discretion as to how to best carry out the agent's undertaking implicates fiduciary doctrines.

Three types of consequences result from an agent's fiduciary duties to the principal. First, if an agent breaches a fiduciary duty of loyalty, distinctive remedies are available to the principal. Moreover, burdens of proof are often allocated differently in cases alleging breach of fiduciary obligation than in civil litigation generally. A different limitation period may apply, and it may not begin to run until the principal discovers the breach of duty. These points are elaborated in §§ 8.01-8.06.

Second, the content of an agent's duties to the principal is distinctive. Unless the principal consents as stated in § 8.06, an agent may not use the principal's property, the agent's position, or nonpublic information the agent acquires while acting within the scope of the relationship, for the agent's own purposes or for the benefit of another. Similarly, unless the principal consents as stated in § 8.06, an agent may not bind the principal to transactions in which the agent deals with the principal on the agent's own account without disclosing the agent's interest to the principal. Without the principal's consent, an agent may not compete with the principal as to the subject matter of the agency, nor may the agent act on behalf of one with interests adverse to those of the principal in matters in which the agent is employed. See §§ 8.01-8.06 for a detailed treatment of these duties.

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Third, the fiduciary character of an agent's position, on the one hand, and the principal's right to control the agent, on the other hand, are linked in a manner that differentiates both (a) the function of an agent-fiduciary from that of a nonagent-fiduciary and (b) agency relationships from nonagency relationships that are defined and controlled solely by contract. An agent's fiduciary position requires the agent to interpret the principal's statement of authority, as well as any interim instructions received from the principal, in a reasonable manner to further purposes of the principal that the agent knows or should know, in light of facts that the agent knows or should know at the time of acting. An agent thus is not free to exploit gaps or arguable ambiguities in the principal's instructions to further the agent's self-interest, or the interest of another, when the agent's interpretation does not serve the principal's purposes or interests known to the agent. This rule for interpretation by agents facilitates and simplifies principals' exercise of the right of control because a principal, in granting authority or issuing instructions to an agent, does not bear the risk that the agent will exploit gaps or ambiguities in the principal's instructions. In the absence of the fiduciary benchmark, the principal would have a greater need to define authority and give interim instructions in more elaborate and specific form to anticipate and eliminate contingencies that an agent might otherwise exploit in a self-interested fashion. That is, the principal would be at greater risk in granting authority and stating instructions in a form that gives an agent discretion in determining how to fulfill the principal's direction. For organizational principals, this rule simplifies the process through which directions are communicated, understood, and executed within an organization. Accordingly, instructions need not be drafted with the detail and specificity that typify the instruments embodying the terms of many arm's-length commercial and financial relationships.

Illustrations:

1. P Corporation manufactures tobacco products, including two brands of cigarettes. Brand C has the largest sales in North America. Brand D has fewer sales in North America but exceeds Brand C in worldwide sales, chiefly in less-developed countries. A is employed by P Corporation as the general manager of its cigarette division. A reports to P Corporation's Executive Vice President. A forms the beliefs that cigarette smoking is injurious to health and that it is socially desirable that fewer rather than more people smoke cigarettes. A does not disclose these beliefs to P Corporation. The Executive Vice President, intending to refer to Brand D, instructs A as follows: "Redirect all expenditures on advertising to the best-selling brand." A believes that it is socially undesirable to export cigarette consumption in the face of a declining domestic market. A enters into an advertising contract with T Corporation, in which T Corporation will advertise Brand C exclusively.

A has breached the fiduciary duty A owes to P Corporation. Although the Executive Vice President's direction to A did not precisely specify how to determine the identity of "the best-selling brand," A's interpretation of the instruction was contrary to P Corporation's interests as A should reasonably have understood them. P Corporation is a party to the contract A made with T Corporation if T Corporation reasonably believed A had authority to make the contract. See § 2.03, which defines apparent authority. A lacked actual authority to make the contract because A could not reasonably believe P Corporation wished A to do so. See §§ 2.01-2.02, which define actual authority and its scope.

2. P, an operatic tenor, employs A as a business manager with authority to book P's performances. P directs A to book P to perform a concert in a particular concert hall owned by T. A knows that the acoustic quality of T's concert hall has recently deteriorated in quality due to an error made in remodeling. Neither the error nor the deterioration is public knowledge, and A has no reason to believe P knows of it. A books P to perform in T's concert hall without telling P about the acoustic deterioration because A hopes to obtain employment with T. A has breached A's fiduciary duty to P, even though A carried out P's literal instructions.

f. Principal's power and right of interim control

(1). *Principal's power and right of interim control--in general.* An essential element of agency is the principal's right to control the agent's actions. Control is a concept that embraces a wide spectrum of meanings, but within any relationship of agency the principal initially states what the agent shall and shall not do, in specific or general terms. Additionally, a principal has the right to give interim instructions or directions to the agent once their relationship is established. Within an organization the right to control its agents is essential to the organization's ability to function, regardless of its size, structure, or degree of hierarchy or complexity. In an organization, it is often another agent, one holding a supervisory position, who gives the directions. For

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definitions of the terms "superior" and "subordinate" coagents, see § 1.04(9). A principal may exercise influence over an agent's actions in other ways as well. Incentive structures that reward the agent for achieving results affect the agent's actions. In an organization, assigning a specified function with a functionally descriptive title to a person tends to control activity because it manifests what types of activity are approved by the principal to all who know of the function and title, including their holder.

A relationship of agency is not present unless the person on whose behalf action is taken has the right to control the actor. Thus, if a person is appointed by a court to act as a receiver, the receiver is not the agent of the person whose affairs the receiver manages because the appointing court retains the power to control the receiver.

A principal's control over an agent will as a practical matter be incomplete because no agent is an automaton who mindlessly but perfectly executes commands. A principal's power to give instructions, created by the agency relationship, does not mean that all instructions the principal gives are proper. An agent's duty of obedience does not require the agent to obey instructions to commit a crime or a tort or to violate established professional standards. See § 8.09(2). Moreover, an agent's duty of obedience does not supersede the agent's power to resign and terminate the agency relationship. See § 3.10.

The power to give interim instructions distinguishes principals in agency relationships from those who contract to receive services provided by persons who are not agents. In many agreements to provide services, the agreement between the service provider and the recipient specifies terms and conditions creating contractual obligations that, if enforceable, prescribe or delimit the choices that the service provider has the right to make. In particular, if the service provider breaches a contractual obligation, the service recipient has a claim for breach of contract. The service provider may be constrained by both the existence of such an obligation and the prospect of remedies for breach of contract. The fact that such an agreement imposes constraints on the service provider does not mean that the service recipient has an interim right to give instructions to the provider. Thus, setting standards in an agreement for acceptable service quality does not of itself create a right of control. Additionally, if a service provider is retained to give an independent assessment, the expectation of independence is in tension with a right of control in the service recipient.

To the extent the parties have created a relationship of agency, however, the principal has a power of control even if the principal has previously agreed with the agent that the principal will not give interim instructions to the agent or will not otherwise interfere in the agent's exercise of discretion. However, a principal who has made such an agreement but then subsequently exercises its power of control may breach contractual duties owed to the agent, and the agent may have remedies available for the breach.

Illustrations:

3. P arranges with A for A to buy large quantities of coffee beans on P's behalf. The compensation agreed to is predicated on P's assurance that A will not need to travel abroad to make the purchases. Later P directs A to fly to Colombia to buy coffee beans. A has a choice. A may resign as P's agent. If A does not resign, A must obey the instruction but may have a claim against P for the increased cost of A's performance. A may waive the claim if A fails to remind P of P's assurance before departing for Colombia if it is reasonable to do so, for example if it appears that P has forgotten the assurance.

4. P owns a professional baseball team. Needing a new general manager, P negotiates an agreement with A, a manager. A insists that P provide an assurance in A's employment agreement that A will have autonomy in running the team. P agrees. Before the start of the season, P directs A to schedule no night games on weeknights during the school term. It is feasible for A to comply with P's directive. A must obey the instruction. Alternatively, A may resign. If A resigns, A has a contract claim against P. If A does not resign, A may have a contract claim against P, but A's ability to recover on the claim would depend, inter alia, on A's ability to show damage.

If an agent disregards or contravenes an instruction, the doctrine of actual authority, defined in § 2.01, governs the consequences as between the principal and the agent. Section 8.09 states an agent's duties to act only within the scope of actual authority and to comply with lawful instructions. The rights and obligations of the third party with whom the agent interacts are governed by the doctrines of actual authority and apparent authority. Doctrines of estoppel, restitution, and ratification are also relevant under some circumstances. See §§ 2.03, 2.05-2.07, and 4.01-4.08.

Illustrations:

5. Same facts as Illustration 4. After A learns of P's directive, A enters into a scheduling agreement with another team, owned by Q, under which P's team will play night games during the school term. Q has no notice of P's directive to A. Although A lacks actual authority to bind P to the agreement, the agreement may bind P and Q if A acted with apparent authority.

6. Same facts as Illustration 5, except that Q has notice of P's instructions to A. Unless P ratifies A's conduct, neither P nor Q is bound by the agreement because A has neither actual nor apparent authority to bind P. Section 4.01(2) states the circumstances under which ratification occurs.

The principal's right of control in an agency relationship is a narrower and more sharply defined concept than domination or influence more generally. Many positions and relationships give one person the ability to dominate or influence other persons but not the right to control their actions. Family ties, friendship, perceived expertise, and religious beliefs are often the source of influence or dominance, as are the variety of circumstances that create a strong position in bargaining. A position of dominance or influence does not in itself mean that a person is a principal in a relationship of agency with the person over whom dominance or influence may be exercised. A relationship is one of agency only if the person susceptible to dominance or influence has consented to act on behalf of the other and the other has a right of control, not simply an ability to bring influence to bear.

The right to veto another's decisions does not by itself create the right to give affirmative directives that action be taken, which is integral to the right of control within common-law agency. Thus, a debtor does not become a creditor's agent when a loan agreement gives the creditor veto rights over decisions the debtor may make. Moreover, typically a debtor does not consent to act on behalf of the creditor as opposed to acting in its own interests.

The principal's right of control presupposes that the principal retains the capacity throughout the relationship to assess the agent's performance, provide instructions to the agent, and terminate the agency relationship by revoking the agent's authority. See § 3.10 on the principal's power to revoke authority. Under the common law of agency, as stated in Restatement Second, Agency § 122(1), a durable agency power, one that survives the principal's loss of mental competence, was not feasible because of the loss of control by the principal. Section 3.08(2), like statutes in all states, recognizes the efficacy of durable powers, which enable an agent to act on behalf of a principal incapable of exercising control. Legitimizing the power does not eliminate the risks for the principal that are inherent when the agent is not subject to direction or termination by the principal.

(2). *Principal's power and right of interim control--corporate context.* Many questions testing the nature of the right of control arise as a result of the legal consequences of incorporating or creating a juridical or legal person distinct from its shareholders, its governing body, and its agents. A corporation's agents are its own because it is a distinct legal person; they are not the agents of other affiliated corporations unless, separately, an agency relation has been created between the agents and the affiliated corporation. Similarly, the hierarchical link between a local union and its international affiliate does not by itself create a relationship of agency between the local and the international.

Although a corporation's shareholders elect its directors and may have the right to remove directors once elected, the directors are neither the shareholders' nor the corporation's agents as defined in this section, given the treatment of directors within contemporary corporation law in the United States. Directors' powers originate as the legal consequence of their election and are not conferred or delegated by shareholders. Although corporation statutes require shareholder approval for specific fundamental transactions, corporation law generally invests managerial authority over corporate affairs in a board of directors, not in shareholders, providing that management shall occur by or under the board of directors. Thus, shareholders ordinarily do not have a right to control directors by giving binding instructions to them. If the statute under which a corporation has been incorporated so permits, shareholders may be allocated power to give binding instructions to directors through a provision in the corporation's articles or through a validly adopted shareholder agreement. The fact that a corporation statute may refer to directors as the corporation's "agents" for a particular purpose does not place directors in an agency relationship with shareholders for purposes of the common law of agency. In any event, directors' ability to bind the corporation is invested in the directors as a board, not in individual directors acting unilaterally. A director may, of course, also be an employee or officer (who may or may not be an employee) of the corporation, giving the director an additional and separate conventional position or role as an

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agent. Fellow directors may, with that director's consent, appoint a director as an agent to act on behalf of the corporation in some respect or matter.

Illustrations:

7. A is an employee of S Corporation. P Corporation owns all the stock of S Corporation. A is not an agent of P Corporation because P Corporation's only relationship with A is that P Corporation is the sole shareholder of A's employer.

8. Same facts as Illustration 7, except that S Corporation and P Corporation are incorporated in a jurisdiction that permits a corporation to provide in its articles of incorporation that the powers of the corporation's directors shall be exercised subject to written instructions given by the corporation's shareholders in a resolution adopted by a majority of the shareholders. S Corporation's articles contain such a provision. A is not an agent of P Corporation.

9. Same facts as Illustration 7, except that A and P Corporation agree that, in performing A's duties as an employee of S Corporation, A shall act as P Corporation directs in the interest of P Corporation. A consents so to act. A is an agent of P Corporation as well as of S Corporation.

g. Acting on behalf of. The common-law definition of agency requires as an essential element that the agent consent to act on the principal's behalf, as well as subject to the principal's control. From the standpoint of the principal, this is the purpose for creating the relationship. The common law of agency encompasses employment as well as nonemployment relations. Employee and nonemployee agents who represent their principal in transactions with third parties act on the principal's account and behalf. Employee-agents whose work does not involve transactional interactions with third parties also act "on behalf of" their employer-principal. By consenting to act on behalf of the principal, an agent who is an employee consents to do the work that the employer directs and to do it subject to the employer's instructions. In either case, actions "on behalf of" a principal do not necessarily entail that the principal will benefit as a result.

In any relationship created by contract, the parties contemplate a benefit to be realized through the other party's performance. Performing a duty created by contract may well benefit the other party but the performance is that of an agent only if the elements of agency are present. A purchaser is not "acting on behalf of" a supplier in a distribution relationship in which goods are purchased from the supplier for resale. A purchaser who resells goods supplied by another is acting as a principal, not an agent. However, courts may treat a trademark licensee as the agent of the licensor in certain situations, with the result that the licensor is liable to third parties for defective goods produced by licensees.

Illustrations:

10. P Corporation designs and sells athletic footwear using a registered trade name and a registered trademark prominently displayed on each item. P Corporation licenses A Corporation to manufacture and sell footwear bearing P Corporation's trade name and trademark, in exchange for A Corporation's promise to pay royalties. Under the license agreement, P Corporation reserves the right to control the quality of the footwear manufactured under the license. A Corporation enters into a contract with T to purchase rubber. As to the contract with T, A Corporation is not acting as P Corporation's agent, nor is P Corporation the agent of A Corporation by virtue of any obligation it may have to defend and protect its trade name and trademark. P Corporation's right to control the quality of footwear manufactured by A Corporation does not make A Corporation the agent of P Corporation as to the contract with T.

11. Same facts as Illustration 10, except that P Corporation and A Corporation agree that A Corporation will negotiate and enter into contracts between P Corporation and retail stores for the sale of footwear manufactured by P Corporation. A Corporation is acting as P Corporation's agent in connection with the contracts.

12. P Corporation, a financial-services firm, licenses A Corporation, a supermarket chain, to sell P Corporation's money-transfer service through A Corporation's supermarkets. P Corporation's agreement with A Corporation requires A to handle transactions in accord with P's operating procedures and to maintain records accessible by P. To use the service, a customer remits cash at an A Corporation supermarket. The intended recipient of the cash, upon presentation of appropriate identification, may collect it at another A Corporation supermarket or other outlet licensed by P Corporation. Once an A Corporation supermarket accepts cash from a customer, P is bound to wire cash in that amount to the

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outlet specified by the customer. A Corporation is P Corporation's agent in activities connected with the money-transfer service.

13. P owns a shopping mall. A rents a retail store in the mall under a lease in which A promises to pay P a percentage of A's monthly gross sales revenue as rent. The lease gives P the right to approve or disapprove A's operational plans for the store. A is not P's agent in operating the store.

14. Same facts as Illustration 13, except that A additionally agrees to collect the rent from the mall's other tenants and remit it to P in exchange for a monthly service fee. A is P's agent in collecting and remitting the other tenants' rental payments. A is not P's agent in operating A's store in the mall.

An actor who acts under the immediate control of another person is not that person's agent unless the actor has agreed to act on the person's behalf. For example, a foreman or supervisor in charge of a crew of laborers exercises full and detailed control over the laborers' work activities. The relationship between the foreman and the laborers is not an agency relationship despite the foreman's full control, nor is their relationship one of subagency. Section 1.04(8) defines subagency. The foreman and the laborers are coagents of a common employer who occupy different strata within an organizational hierarchy. See § 1.04(9), which defines "superior" and "subordinate" coagents. The foreman's role of direction, defined by the organization, does not make the laborers the foreman's own agents. The laborers act on behalf of their common employer, not the foreman. Likewise, the captain of a ship and its crew are coagents, hierarchically stratified, who have consented to act on behalf of their common principal, the ship's owner.

It is possible to create a power to affect a person's legal relations to be exercised for the benefit of the holder of the power. Such powers typically are created as security for the interests of the holder or otherwise to benefit a person other than the person who creates the power. Consequently, the holder of such a power is not an agent as defined in this section, even though the power has the form of agency and, if exercised, will result in some of agency's legal consequences. The creator does not have a right to control the power holder's use of the power, and the power holder is not under a duty to use it in the interests of the creator. Sections 3.12-3.13 specifically treat powers given as security.

Illustrations:

15. P, a building contractor, has a credit account with T, a seller of building supplies. P tells F, P's impecunious friend, that F may buy building supplies on P's account from T for F's own use. P must pay the charges that F incurs on P's account with T. F is not P's agent in buying the building supplies because F is not acting on P's behalf.

16. Same facts as Illustration 15, except that P tells F to make purchases from T and charge them to P's account only to meet P's needs. F is P's agent in making the purchases and charging them to P's account.

17. P lends A money to purchase a piece of property, taking a mortgage on the property as security. The mortgage gives P the power to sell the property if A defaults on the loan. In exercising the power of sale, P does not act as A's agent because P is acting, not on A's behalf, but to protect P's interest as mortgagee.

Relationships of agency are among the larger family of relationships in which one person acts to further the interests of another and is subject to fiduciary obligations. Agency is not antithetical to these other relationships, and whether a fiduciary is, additionally, an agent of another depends on the circumstances of the particular relationship. For example, as defined in [Restatement Third, Trusts § 2](#), a trust is a fiduciary relationship with respect to property that arises from a manifestation of intention to create that relationship; a trustee is not an agent of the settlor or beneficiaries unless the terms of the trust subject the trustee to the control of either the settlor or the beneficiaries. Principals in agency relationships have power to terminate authority and thus remove the agent; trust beneficiaries, in contrast, do not have power to remove the trustee.

As agents, all employees owe duties of loyalty to their employers. The specific implications vary with the position the employee occupies, the nature of the employer's assets to which the employee has access, and the degree of discretion that the employee's work requires. However ministerial or routinized a work assignment may be, no agent, whether or not an employee, is simply a pair of hands, legs, or eyes. All are sentient and, capable of disloyal action, all have the duty to act loyally. For further discussion of the scope of fiduciary duty, see § 8.01, Comment c.

Illustration:

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18. A is an assembly-line worker in an aircraft manufacturing plant owned by P Corporation. A's work consists solely of inserting rivets that fasten components in aircraft bodies. A's foreman tells A to speed up production. A asks why, and the foreman responds, "The top-secret word from the plant manager is that P Corporation has received a large contract from the Defense Department." "So, is this a one-time thing?" asks A. "No," replies the foreman. "They're going to have to expand the plant because the contract will require more manufacturing space." After the day's work, as a result of what A has been told by the foreman, A buys an option to purchase land adjacent to the plant. The land is the only space on which the plant might feasibly expand. A's purchase of the option breaches A's fiduciary duty to P Corporation because it constitutes a use of nonpublic information of P Corporation without P Corporation's permission. See § 8.05(2).

h. Intermediaries. Many actors perform an intermediary role between parties who engage in a transaction. Not all are agents in any sense, and not all who are agents act on behalf of those who use the intermediary service provided. For example, an employee of a courier service who shuttles documents among parties who are closing a transaction among them is not the parties' agent simply because an intermediary function is provided.

Agents who perform intermediary functions vary greatly in the nature of the services provided. Variable as well are the scope of the agency relationship and its consequences for the principal. At the modest end of the spectrum, a translator employed by a principal in negotiations enables the principal's words to be understood by others and enables the principal to understand the language used by others. The translator does not occupy a role that conventionally involves identifying parties with whom the principal might deal or a role that confers discretionary authority to determine whether to commit the principal to the terms of a proposed transaction or to initiate or vary terms for the principal. Nonetheless, the translator's relation to the principal is one of agency. The translator acts on the principal's behalf and the principal has the power to provide interim instructions as to how the translation shall be done.

If an intermediary lacks authority even to negotiate on behalf of a party, characterizing the intermediary as an agent may not carry much practical import because the scope of the agency would be very narrow. But despite the narrowness of its scope, an agency relation imposes legal consequences when the agent's acts are within its scope. In some circumstances, an agent's inaction will have legal consequences for the principal.

Illustration:

19. P appoints A an agent to receive service of process. P instructs A, "Anything with which you are served in my name, send it to me by express service." A is served with a complaint in an action that names P as a defendant. A does not send the complaint to P, causing P to miss the deadline for filing an answer to the complaint. As a consequence, P's adversary in the lawsuit obtains a default judgment against P. A's receipt of process is within the scope of A's authority. P is bound by its consequences.

Farther along the spectrum, an intermediary who is a finder conventionally serves the function of identifying or introducing to each other prospective parties to transactions but does not engage in negotiations. Intermediaries who are brokers, on the other hand, negotiate on behalf of the principal. Some agents have authority to commit the principal to the terms of a transaction. An individual actor's role may evolve over the course of a transaction, expanding or shrinking the scope of any agency relationship. Moreover, an agent may assume a pivotal role in the course of a transaction, a role that may commence with relaying information from one party to another but then encompass explanations and clarifications, all of which induce reliance by the recipient.

Ordinarily, the scope of an agency relationship is defined solely by the parties to the relationship. Legislation may address specific transactions. For example, several states have legislation concerning residential real estate that permits prospective buyers and sellers to enter into agreements with real-estate brokers that modify or reconfigure the duties that the common law of agency has conventionally imposed on the broker with whom property is listed, and on brokers who assist prospective purchasers. For discussion, see § 3.15, Comment *f*.

REPORTER'S NOTES**REPORTER'S NOTES**

a. Comparison with Restatement Second, Agency, and codifications. The black letter for this section is consistent with the substance of the definition in Restatement Second, Agency § 1, except for the introduction of "assent," as explained in Comment *d*. The term "relationship" replaces "relation" to reflect contemporary

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usage. The commentary to this section addresses the essential elements of the agency relation, consistently in substance with Restatement Second, Agency §§ 12-14.

In contrast, the definition of agency in the California Civil Code is "[a]n agent is one who represents another, called the principal, in dealings with third persons. Such representation is called agency." [Cal. Civ. Code § 2295](#) (1985 & Supp. 2005). California cases import control as an additional element in the definition, see, e.g., *De-Suza v. Andersack*, 133 Cal.Rptr. 920, 924 (Cal.App.1976). The Georgia Code states that "[t]he relation of principal and agent arises whenever one person, expressly or by implication, authorizes another to act for him or subsequently ratifies the acts of another in his behalf." *Ga. Code § 10-6-1* (1996 & Supp. 2004). Georgia cases also import an element of control. See, e.g., [Greenbaum v. Brooks](#), 139 S.E.2d 432, 434 (Ga.App. 1964).

The Louisiana Code defines two distinct types of agency, procuration and mandate. Procuration is "a unilateral juridical act by which a person, the principal, confers authority on another person, the representative, to represent the principal in legal relations. The procuration may be addressed to the representative or to a person with whom the representative is authorized to represent the principal in legal relations." La. Civ. Code Art. 2987 (Supp. 2004). A mandate is "a contract by which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal." Id. Art. 2989. As procuration is defined by Art. 2987, the principal may confer authority on the representative without the representative's knowledge or acceptance. The fact that procuration is defined as a unilateral juridical act makes it an "offer to contract" under the Civil Code's provisions on consent, La. Civ. Code Bk. III, T. IV, ch. 3, arts. 1927-1947. Such an act requires the eventual consent of the representative in order to become a contract of mandate and create its effects.

b. Usage. In economics, the classic definition is Michael Jensen & William Meckling, *Theory of the Firm: Managerial Behavior, Agency Costs and Ownership Structure*, 3 J. Fin. Econ. 305, 308-309 (1976) ("[w]e define an agency relationship as a contract in which one or more persons (the principal(s)) engage another person (the agent) to perform some service on their behalf which involves delegating some decisionmaking authority to the agent."). On accounts of agency in economics contrasted with legal conceptions and consequences of agency relationships, see Daniel Spulber & Ramon Casadesus-Masanell, *Trust and Incentives in Agency*, __ S. Cal. Interdisc. L.J. __ (forthcoming 2005). On usage within philosophy, see, e.g., Charles Taylor, *Human Agency and Language: Philosophical Papers I*, at 99 (1985) (boundary between agents and "mere things" is mistakenly specified by others by a criterion of performance, while "[w]hat is crucial about agents is that things matter to them To say that things matter to agents is to say that we can attribute purposes, desires, aversions to them in a strong, original sense.").

The classic illustration of an agency relationship formed when the parties had other significant legal relationships with each other is *Thayer v. Pacific Elec. Ry. Co.*, 360 P.2d 56 (Cal.1961) (holding finder of fact could conclude that, by making notation of damage on freight bill at shipper's request, railroad's station agent acted as shipper's agent for purposes of giving notice of shipper's intention to file claim for damage to shipment).

For the point that an agent may additionally be a principal, see *American Bureau of Shipping v. Tencara Shipyard S.P.A.*, 170 F.3d 349, 353 (2d Cir.1999) (shipyard acted as owners' agent in contracting for classification services but acted in part on its own behalf as well because hiring classification society fulfilled contractual undertaking to shipowners; shipyard thus derived sufficient benefit to be bound by arbitration clause in agreement with classification society); [Obras Civiles, S.A. v. ADM Sec., Inc.](#), 32 F.Supp.2d 1018, 1023 (N.D.Ill. 1999) (under terms of payment-commitment letter, agent incurred obligation to repay money deposited by third party, although money was deposited into account of disclosed principal).

c. Elements of agency. The treatment of "power" as distinct from "authority" appears in Francis M.B. Reynolds, Bowstead & Reynolds on Agency 5-6 (17th ed. 2001). For a discussion of how these concepts evolved in Nordic legal codes, in contrast to common-law doctrine, see Hugo Tiberg, *Power and Authority in the Law of Agency* 57, in *Lex Mercatoria* (Francis Rose ed. 2000). Statements that an agent has the "ability" to affect the principal's legal relationship may be assertions about power not limited to authority. For an example, see [Chemtool, Inc. v. Lubrication Techs., Inc.](#), 148 F.3d 742, 745 (7th Cir.1998).

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A lawyer is characterized as the client's agent in Restatement Third, The Law Governing Lawyers, Chapter 2, Introductory Note ("A lawyer is an agent, to whom clients entrust matters, property, and information"). Defining the scope of a lawyer's agency relationship with a client is, of course, a separate matter.

An identification between agent and principal is the linchpin of some accounts of agency. "This notion of a fictitious unity of person has been pronounced a darkening of counsel in a recent useful work. But it receives the sanction of Sir Henry Maine, and I believe that it must stand as expressing an important aspect of the law, if, as I have tried to show, there is no adequate and complete explanation of the modern law, except by the survival in practice of rules which lost their true meaning when the objects of them ceased to be slaves. There is no trouble in understanding what is meant by saying that a slave has no legal standing, but is absorbed into the family which his master represents before the law." Oliver Wendell Holmes, *The Common Law* 232 (1923) (citations omitted). When a principal is a corporation, identifying any particular agent with the principal requires the court to determine whether the agent should be treated as the corporation's alter ego. For a trenchant critique of Anglo-New Zealand cases in this tradition, see Peter Watts, *The Company's Alter Ego--A Parvenu and Impostor in Private Law*, [\[2000\] N.Z. L. Rev. 137](#). An explanation for this tradition is that it originated in criminal law, in which "[t]he individual human being remains . . . the paradigmatic subject This means that in both doctrinal scholarship and legal theory, the debate about the liability of corporations is marked by the sustained use of metaphors, contrasts, images which depend upon the analogies and disanalogies between 'corporate' and 'human' persons." Nicola Lacey, *Philosophical Foundations of the Common Law: Social not Metaphysical*, in *Oxford Essays in Jurisprudence, Fourth Series* 17, 25 (Jeremy Horder ed., 1999). Professor Lacey's underlying assumption is that, whether a person is an individual or a corporation, "legal personality is not straightforwardly descriptive: rather, it makes reference to the conditions under which it is true to say that some social phenomenon--human, corporate, or other--may be held liable in law." *Id.* at 26.

The term "independent contractor" is defined in Restatement Second, Agency § 2(3) as "a person who contracts with another to do something for him but who is not controlled by the other nor subject to the other's right to control with respect to his physical conduct in the performance of the undertaking. He may or may not be an agent." See also [Wiggs v. City of Phoenix, 10 P.3d 625, 628 \(Ariz.2000\)](#) ("While it is always the case that an independent contractor is not a servant, it is not always the case that an independent contractor is not an agent"). In contrast, the preceding standard text defined an independent contractor as a person who was not an agent under the common-law definition. See 1 Floyd R. Mechem, 1 *A Treatise on the Law of Agency* § 40 (2d ed. 1914) (defining "independent contractor" as "one who exercises some independent employment, in the course of which he undertakes, supplying his own materials, servants and equipment, to accomplish a certain result, not being subject while doing so to the direction and control of his employer, but being responsible to him for the end to be achieved rather than for the means by which he accomplishes it."). Usage in Restatement Second, Agency, is characterized as "ambiguous" in J. Dennis Hynes, *Agency, Partnership & the LLC* xxxii (5th ed. 1998). See also John J. Slain, Charles A. Thompson & Freda F. Bein, *Agency, Partnership & Employment: A Transactional Approach* xii (1980) (stating authors' determination to use term "independent contractor" as little as possible due to confusion as to its meaning); Francis M.B. Reynolds, *Bowstead & Reynolds on Agency* 22 (17th ed. 2001) (expressing doubt that agency terminology "can be reduced to a satisfactory scheme.").

d. Creation of agency. A relationship of agency requires consent of both principal and agent. See, e.g., [B & G Enters., Inc. v. United States, 220 F.3d 1318, 1323 \(Fed.Cir.2000\)](#) (no agency relationship between federal government and state on basis that state enacted restrictions on tobacco vending machines to satisfy condition for federal funding; no manifestation by either federal government or state of intent to create relationship of agency); [Judah v. Reiner, 744 A.2d 1037, 1040-1041 \(D.C.2000\)](#) (demonstrating existence of agency relationship requires showing that person alleged to be principal knew of and consented to representations made by persons who held themselves out as representatives).

If a person asserted to be an agent is aware of a would-be principal's effort to create an agency relationship but does not affirm or repudiate it, and does not act consistently with it, the person is not an agent. See [Fred Striffler, Inc. v. General Motors Corp., 73 N.W.2d 526, 532 \(Mich. 1955\)](#). An agent's manifestation of consent is insufficient by itself to establish agency. See [Page v. Boone's Transport, Ltd., 710 A.2d 256, 257 \(Me.1998\)](#).

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For a discussion of possible meanings that may be ascribed to "assent," see Margaret Jane Radin, *Humans, Computers, and Binding Commitment*, [75 Ind. L.J. 1125, 1141 \(2000\)](#).

For examples of actors who gratuitously undertake to serve as agents, see, e.g., [Frawley v. Nickolich](#), [41 S.W.3d 420, 422 \(Ark.App.2001\)](#) (friend of bail bondsman who distributed bondsman's business cards at jail, in violation of anti-solicitation statute, acted as bondsman's agent; friend given cell-phone contact for bondsman and instructed to obtain information on callers' "bonding needs"); [Sanders v. Bowen](#), [396 S.E.2d 908, 909-910 \(Ga.App.1990\)](#) (in action brought by dog-bite victim, owner of pit bull charged with son's knowledge of dog's actions when son was responsible for dog's care); [Bostic v. Dalton](#), [158 S.W.3d 347 \(Tenn. 2005\)](#) (father acted gratuitously as his daughter's agent in supervising construction of her residence; father within exemption from liability for residential owners under workers'-compensation statute, *Tenn. Code Ann.* § 50-6-113(f)(1) (1999)).

On the agency relationship deemed to exist between an owner of lost property and government officials who recover it, see [United States v. Portrait of Wally](#), [105 F.Supp.2d 288, 294 \(S.D.N.Y. 2000\)](#) (agency relationship, not dependent on principal's consent, deemed to exist because government officials hold stolen property on behalf of the owner; property thereafter is no longer treated as stolen). But cf. [United States v. Portrait of Wally, a Painting by Egon Schiele](#), [2002 WL 553532](#), at *15 (S.D.N.Y. 2002) (revised factual allegations in government's subsequent amended complaint extinguish basis for characterizing officials who seized painting as agents of its owners; officials were unaware that painting had been stolen and did not act subject to a duty to return it).

On the stock holding and voting requirements in employee stock-ownership plans, see [Preston v. Allison](#), [650 A.2d 646 \(Del.1994\)](#). In *Preston*, the nominee holder voted the plan's shares incorrectly and contrary to instructions given by the plan participants. The court granted declaratory relief, with the consequence that the plaintiffs were declared to be the duly elected directors, thereby ousting the defendants. The court distinguished the circumstances in the immediate case from precedents in which shareholders were held to assume the risk that a nominee holder might vote shares incorrectly because in those cases the shareholders voluntarily chose to hold their stock in a nominee name. The court's distinction appears to reflect a concern to protect the integrity of the shareholder franchise from errors made by agents when the decision to use the agent is not voluntary. See [650 A.2d at 649](#), distinguishing [Enstar Corp. v. Senouf](#), [535 A.2d 1351 \(Del.1987\)](#) and [American Hardware Corp. v. Savage Arms Corp.](#), [136 A.2d 690 \(Del.1957\)](#).

For the international convention on salvage, see International Convention on Salvage 1989, Sen. Treaty Doc. 12, 102d Cong., 1st Sess. (1991).

e. Fiduciary character of relationship. For another illustration of the appearance of "fiduciary" in a black-letter definition, see [Restatement Third, Trusts § 2](#) ("[a] trust, as the term is used in this Restatement when not qualified by the word 'resulting' or 'constructive,' is a fiduciary relationship with respect to property, arising from a manifestation of intention to create that relationship and subjecting the person who holds title to the property to duties to deal with it for the benefit of charity or for one or more persons, at least one of whom is not the sole trustee"). Trustees' duties in particular contexts may be limited to fulfilling the express terms of the governing instrument and avoiding conflicts of interest. See [Elliott Assocs. v. J. Henry Schroder Bank & Trust Co.](#), [838 F.2d 66, 71 \(2d Cir.1988\)](#) (indenture trustee owes debenture holders no implicit pre-default duties; indenture trustee did not breach duty to debenture holders by waiving issuer's duty to give 50 days' advance notice of redemption of debentures when result was to save issuer one quarter's interest payment otherwise owed to debenture holders).

Some courts characterize fiduciary obligation in a manner that is inconsistent with a precise formulation. The best-known example is [SEC v. Chenery Corp.](#), [318 U.S. 80, 85-86 \(1943\)](#) ("to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge those obligations? And what are the consequences of his deviation from duty?").

While some courts treat "fiduciary duty" as a synonym for "duty of loyalty," others do not. Compare [O'Malley v. Boris](#), [742 A.2d 845, 849 \(Del. 1999\)](#) (as an agent, a stock broker "has a duty to carry out the customer's instructions promptly and accurately. In addition, the broker must act in the customer's best interests and must refrain from self-dealing unless the customer consents, after full disclosure. These obligations at times are described as fiduciary duties of good faith, fair dealing, and loyalty") (footnotes omitted) and [General Motors](#)

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Acceptance Corp. v. Crenshaw, Dupree & Milam L.L.P., 986 S.W.2d 632, 636 (Tex.App.1998) (agent's fiduciary duties "include a duty of good faith and fair dealing") with Condon Auto Sales & Serv., Inc. v. Crick, 604 N.W.2d 587, 599 (Iowa 1999) (employer claims against employees alleging unfair competition and self dealing are often brought as claims for breach of fiduciary duty because "a principal-agent relationship gives rise to a fiduciary duty of loyalty, and an employer-employee relationship can be closely associated with a principal-agent relationship"). For an argument that greater precision in terminology would be desirable, see Sarah Worthington, *Fiduciaries: When Is Self-Denial Obligatory*, 58 Cambridge L.J. 500, 503 (1999) ("In short, fiduciary terminology should be used carefully and restrictively, so that fiduciary law operates *only* to exact loyalty; it does not concern itself with matters of contract, tort, unjust enrichment and other equitable obligations (such as breach of confidence)").

For the significance of the scope of the relationship to the extent of an agent's fiduciary duties, see Fulcrum Fin. Partners v. Meridian Leasing Corp., 230 F.3d 1004, 1013 (7th Cir. 2000) (former general partner that retained authority as agent to remarket computer equipment owned by lessor did not breach fiduciary duty to lessor by providing upgrade service to lessor's customer without giving lessor opportunity to provide upgrade; parties' agreement that terminated partnership expressly permitted competitive activity and gave lessor no express right of first refusal on providing upgrade service when prior partnership agreement provided lessor right of first refusal); Sonnen-schein v. Douglas Elliman-Gibbons & Ives, 753 N.E.2d 857 (N.Y.2001) (real-estate broker did not breach fiduciary duty it owed to owner of apartment by showing other properties to prospective purchaser, absent any restriction to contrary in agreement between broker and owner).

For the general proposition that employees owe duties of loyalty to their employer, see *Employee Duty of Loyalty: A State-by-State Survey 1* (Stewart S. Manela & Arnold H. Pedowitz eds., 1995).

For an early articulation of the linkage between faithful execution of the principal's instructions and the fiduciary character of agency, see Short v. Skipwith, 22 F.Cas. 9, 10-11 (D.Va.1806) (No. 12,809) (Marshall, C.J.) (despite fact that principal was in France and agent was in Virginia, "it was to be expected, that the orders of the [principal] would not be disobeyed, and his remote situation incurred the obligation not altogether to neglect any part of his business"; agent is accountable for lost profit suffered by principal due to agent's failure promptly to invest principal's funds as directed, when value of security into which principal directed investment rose because if remedy were limited simply to restoring funds with interest, "the encouragement which such a decision would give to dangerous and corrupt practices in the intercourse between a principal and his agent, must be apparent. It would hold forth an inducement, in every instance where extraordinary profit might be made, to divert trust funds into other channels than those for which they were designed, to the great injury of a large portion of society.").

On the distinction between fiduciary and other duties owed by an agent, see *Bristol & West Bldg. Soc. v. Mothew*, [1998] Ch. 1, 18 (C.A.) (per Millett, L.J.) ("Breach of fiduciary obligation connotes disloyalty or infidelity. Mere incompetence is not enough. A servant who loyally does his incompetent best for his master is not unfaithful and is not guilty of a breach of fiduciary duty.").

A determination that partners are not subject to fiduciary constraints in an adversarial transaction is consistent with the recognition that actions taken as an agent on behalf of the partnership implicate fiduciary standards. See Exxon Corp. v. Burghlin, 4 F.3d 1294, 1301 (5th Cir.1993) (in making buyout offer to limited partners, general partner not subject to fiduciary duty of disclosure but could rely on provision in partnership agreement permitting it to withhold information; "[i]n regard to the buyout offer, Exxon was not acting on behalf of the partnership, representing both its and the limited partners' interests. If it were, the duty of good faith and fair dealing necessarily would be high, to avoid the problem of a general partner's self-dealing.").

For the proposition that only the scope of the agency limits an agent's fiduciary duties, see O'Malley v. Boris, 742 A.2d 845, 849 (Del.1999) (although clients gave their stockbroker relatively little discretionary authority, broker made choice of sweep-account funds and thus is accountable for decision under fiduciary standards; clients alleged that broker breached its fiduciary duties by switching sweep account to fund in which it had an interest, without telling clients how broker acquired its interest in fund).

For an illustrative discussion of the context-specificity of fiduciary obligation, see Gibbs v. Breed, Abbott & Morgan, 710 N.Y.S.2d 578, 582-583 (App.Div.2000). At issue in *Gibbs* was the behavior of two partners who

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left one law firm for another, followed by clients and employees. The court observed that "the fiduciary restraints upon a partner with respect to client solicitation are not analogous to those applicable to employee recruitment. By contrast to the lawyer-client relationship, a partner does not have a fiduciary duty to the employees of a law firm, which would limit its [sic] duty of loyalty to the partnership. Thus, recruitment of firm employees has been viewed as distinct and 'permissible on a more limited basis than ... solicitation of clients,'" quoting Robert Hillman, *Loyalty in the Firm: A Statement of General Principles on the Duties of Partners Withdrawing From Law Firms*, 55 Wash. & Lee L. Rev. 997, 1031 (1998).

For the agent's duty to act in the principal's interest, see *Newton v. Merrill, Lynch, Pierce, Fenner & Smith, Inc.*, 135 F.3d 266, 271 (3d Cir.) (en banc) (1998) (when customers place orders with securities broker and do not specify price at which order should be executed, "it is a reasonable inference that [customers], in placing their orders, sought their own economic advantage and that they would not have placed them without an understanding that the defendants would execute them in a manner that would maximize [customers'] economic benefit from the trade.").

On the source or nature of an agent's fiduciary duty, it is relevant that no statutory provision alters or expressly permits alteration of the agent's fiduciary duty of loyalty. See *Schock v. Nash*, 732 A.2d 217, 225 (Del.1999) ("Unlike corporate law and limited partnership law that provide statutory modifications to the common law of fiduciary duty, there is no statutory provision that alters the common law fiduciary duty of loyalty owed by an attorney-in-fact under a durable power of attorney"; holder of durable power breached fiduciary duties by gratuitously transferring substantially all of grantor's property to herself when power did not clearly state grantor's intention to permit gratuitous self-transfers to holder and holder did not present credible evidence that grantor knew of holder's intention to convey property to herself during grantor's lifetime).

Recent cases treating an agent's fiduciary obligation as a consequence that follows from a determination that the relationship is one of agency include *In re Daisy Sys. Corp.*, 97 F.3d 1171, 1178-1179 (9th Cir.1996); *Pacific Tall Ships Co. v. Kuehne & Nagel, Inc.*, 76 F.Supp.2d 886, 895 (N.D.Ill.1999); *VNA Plus, Inc. v. Apria Healthcare Group, Inc.*, 29 F.Supp.2d 1253, 1264 (D.Kan.1998); *Arthur D. Little Int'l, Inc. v. Doo-yang Corp.*, 928 F.Supp.1189, 1207-1208 (D.Mass.1996); *O'Malley v. Boris*, 742 A.2d 845, 849 (Del.1999).

For statements of fiduciary duties applicable to various nonagent fiduciaries, see *Restatement Second, Contracts* § 173; *Restatement Third, Trusts (Prudent Investor Rule)* § 170; *Restatement Third, The Law Governing Lawyers* §§ 60, 121-122; *Principles of Corporate Governance: Analysis and Recommendations* §§ 4.01 and 5.01.

For the proposition that a fiduciary's duty is not limited to following instructions, even when the instructions are stated clearly, see *Evvtex Co. v. Hartley Cooper Assocs., Ltd.*, 102 F.3d 1327, 1333 n.7 (2d Cir.1996) (in addition to complying with clear instructions, agent or other fiduciary must also disclose relevant information). See also *Estate of O'Neal v. United States*, 81 F.Supp.2d 1205, 1225 (N.D.Ala.1999), vacated in part on other grounds, 258 F.3d 1265 (11th Cir.2001) (Alabama does not permit agent "to occupy a position that would allow him to profit as a result of that agency relationship").

An employee-agent's failure to disclose a conflicting interest is treated as a breach of fiduciary duty in *Cameco, Inc. v. Gedicke*, 724 A.2d 783, 789 (N.J.1999), even though the risk of conflict may well have seemed slight to the employee, who set up an independent business that serviced competitors of the employer: "To an employee, the possibility of conflict with the employer's interest may seem remote; to the employer, the possibility may seem more immediate. The greater the possibility that another occupation will conflict with the employee's duties to the employer, the greater the need for the employee to alert the employer to that possibility."

"Cause" to terminate under an employment agreement may include withholding information about activities that divert energy and loyalty from the employer's enterprise. See *Certified Sec. Sys., Inc. v. Yuspeh*, 713 So. 2d 558, 564 (La.App.1998).

Duties stemming from relationships characterized as fiduciary are, in the present legal order, distinct from the consequences of relationships stemming solely from arm's-length contracting. That contract law may oblige parties to act with good faith, and to deal fairly with each other, may produce results that are different from the consequences of a fiduciary relationship. See, e.g., *United Jersey Bank v. Kensey*, 704 A.2d 38, 46

[\(N.J.Super.App.Div.1997\)](#) (lender who does not actively encourage borrower to rely on its advice while concealing its self interest is under no duty to disclose to borrower information lender may have that bears on financial viability of transaction borrower is about to enter).

On the general consequences of imposing fiduciary duty, see Tamar Frankel, *Fiduciary Duties*, in 2 *New Palgrave Dictionary of Economics and the Law* 127, 128 (1998) (ultimate effect of the law "is to provide entrustors with incentives to enter into fiduciary relationships, by reducing entrustors' risks and costs of preventing abuse of entrusted power . . .").

f. Principal's power and right of interim control

(1). *Principal's power and right of interim control--in general.* Representative statements that control is an element in an agency relationship include [MJ & Partners Rest. Ltd. P'ship v. Zadikoff, 10 F.Supp.2d 922, 931 \(N.D.Ill.1998\)](#) (relationship of agency is considered fiduciary relationship as a matter of law in Illinois; "[t]o determine whether an agency relationship exists the court must consider two factors: (1) whether the principal has the right to control the manner and method in which agent performs his services, and (2) whether the agent has the power to subject the principal to personal liability"); [Nichols v. Arthur Murray, Inc., 56 Cal.Rptr. 728, 731 \(Cal.App.1967\)](#) ("[i]f, in practical effect, one of the parties has the right to exercise complete control over the operation by the other an agency relationship exists"); and [Anderson v. Badger, 191 P.2d 768, 771 \(Cal.App.1948\)](#) ("[i]f the one who is to perform the service is subject to control as to the manner of performance by the one for whom the service is rendered he is an employee, or agent, whereas, if he is not subject to control but is engaged to produce a certain result by means and in a manner of his own choosing he is an independent contractor").

On the definition of control when the agent is not an employee, see [Green v. H & R Block, Inc., 735 A.2d 1039, 1051 \(Md.1999\)](#) ("[i]n sum, the control a principal exercises over its agent is not defined rigidly to mean control over the minutia of the agent's actions, such as the agent's physical conduct, as is required for a master-servant relationship. The level of control may be very attenuated with respect to the details. However, the principal must have ultimate responsibility to control the end result of his or her agent's actions; such control may be exercised by prescribing the agent's obligations or duties before or after the agent acts, or both"). Accord, [Spencer v. Hendersen-Webb, Inc., 81 F.Supp.2d 582, 596 \(D.Md.1999\)](#) (key to control is whether principal has "ultimate responsibility to control the end result of the agent's actions"; test may be satisfied by relationship between a creditor and a debt collector); [Thrash v. Credit Acceptance Corp., 821 So. 2d 968, 972 \(Ala.2001\)](#) (actor engaged by creditor to repossess car acted as agent when creditor retained control; creditor instructed actor to make no contact with debtor prior to repossession and, upon learning that actor lubricated debtors' driveways to facilitate repossession, directed that practice cease); [Policy Mgmt. Sys. Corp. v. Indiana Dept. of State Revenue, 720 N.E.2d 20, 25 \(Ind.T.C.1999\)](#) (principal's control need not be complete but cannot consist simply of right to dictate accomplishment of a desired end). See also [Scally v. Hilco Receivables, LLC, 392 F.Supp.2d 1036, 1040 \(N.D.Ill.2005\)](#) (collection firm was not agent of assignee of defaulted debt; periodic reports from collection firm to assignee did not give assignee control of collection firm's activities); [J & E Air, Inc. v. State Tax Assessor, 773 A.2d 452, 456-457 \(Me.2001\)](#) (management agreement between airplane's owner and its primary user did not create relationship of agency although owner made some "management decisions"; primary user of airplane, not its owner, was in control during plane's use in interstate commerce, held license to fly plane, directed booking of chartered flights, and had "ultimate decisional authority").

For the proposition that a judicially appointed receiver is not the agent of the municipality whose affairs the receiver administers, see [Canney v. City of Chelsea, 925 F.Supp. 58, 64-65 \(D.Mass.1996\)](#) (court's right to control receiver means receiver is not agent of municipality; relationship between receiver and court is "agency-type" but not necessarily one of common-law agency).

Control, however defined, is by itself insufficient to establish agency. In the debtor-creditor context, most courts are reluctant to find relationships of agency on the basis of provisions in agreements that protect the creditor's interests. See, e.g., [Krivo Indus. Supply Co. v. Nat'l Distillers & Chem. Corp., 483 F.2d 1098 \(5th Cir.1973\)](#), modified & reh'g denied, [490 F.2d 916 \(5th Cir.1974\)](#); [Buck v. Nash-Finch Co., 102 N.W.2d 84 \(S.D. 1960\)](#). In contrast, allegations of lender control over actors within the borrower's organization are consistent with a relationship of agency created on behalf of the creditor. Compare [Citibank, N.A. v. Data Lease Fin. Corp., 828 F.2d 686, 692 \(11th Cir. 1987\)](#) (director of borrower testified in deposition that he worked for lender and worked

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closely with it in matters of policy) with [Pearson v. Component Tech. Corp.](#), 247 F.3d 471, 501 (3d Cir.2001) (unrebutted testimony of individual alleged to function as secured creditor's agent within borrower denying that creditor controlled his actions). An unusual example to the contrary is [A. Gay Jenson Farms Co. v. Cargill, Inc.](#), 309 N.W.2d 285 (Minn.1981). In *Jenson Farms*, the court held that the borrower was the agent of its lender on the basis of the lender's control, when the lender purchased virtually all of the debtor's output and financed all of its operations. In the borrower's final days of operation, it was run directly by an official sent by the lender. The court determined, moreover, that the borrower was not a supplier of goods to the lender because the borrower did not have an independent business. The court relied on Restatement Second, Agency § 14 O, which states that "[a] creditor who assumes control of his debtor's business for the mutual benefit of himself and his debtor, may become a principal, with liability for the acts and transactions of the debtor in connection with the business." For an analysis of cases involving debtor-creditor relationships, see J. Dennis Hynes, Lender Liability: The Dilemma of the Controlling Creditor, [58 Tenn. L. Rev. 635 \(1991\)](#).

Setting standards for mortgage paper that a financial institution would purchase from an originating lender does not create a right of control in the financial institution. See [Chase Manhattan Mortgage Corp. v. Scott, Royce, Harris, Bryan, Barra & Jorgensen, P.A.](#), 694 So. 2d 827, 832-833 (Fla.App.1997). See also [Enterprise Press, Inc. v. Fresh Fields Mkts., Inc.](#), 13 F.Supp.2d 413, 416 (S.D.N.Y. 1998) (vendor not agent of marketing client; client's proofreading and slight corrections to drafts produced by vendor retained by marketing firm did not constitute sufficient exercise of control). The right to enforce contractually defined standards regarding procedures to assure service quality does not establish that a medical clinic is the agent of a hospital, even though the agreement creates a situation of "broader, more general influence or control" over the clinic. See [Hefner v. Dausmann](#), 996 S.W.2d 660, 666 (Mo.App.1999). See also [Maruho Co. v. Miles, Inc.](#), 13 F.3d 6, 11 (1st Cir.1993) (relationship between patent licensor and licensee was not relationship of agency, although licensor's ability to deny extension of license enabled it to influence terms of sublicenses; license agreement gave licensor no right to participate in or control licensee's negotiation or grant of sublicenses).

Service providers retained with an expectation of independence include bank examiners, independent testing laboratories, and expert witnesses. See [Conduis v. Howard Sav. Bank](#), 986 F.Supp. 914, 917 (D.N.J.1997).

A bailee's freedom from control by the bailor establishes that the bailee is not the bailor's agent. A bailor's failure to assert control does not by itself establish that the bailor lacked the right to do so, but it is suggestive that the right is not present. See [Harris v. Keys](#), 948 P.2d 460, 465 (Alaska 1997) (owner of motor home in remote location who asked friend to occupy it to discourage theft from site did not control friend's conduct in home; in determining whether owner is subject to vicarious liability for injuries caused by occupant's conduct, court holds that owner's failure to exercise control despite friend's near-destruction of motor home suggests lack of ability to control).

Employment agreements resembling the agreement in Illustration 4 are problematic when entered into by a corporation's directors with a senior officer because the agreement may be understood to evidence the directors' abdication of ultimate managerial responsibility. See [Grimes v. Donald](#), 20 Del. J. Corp. L. 757 (Del. Ch.1995), aff'd, 673 A.2d 1207 (Del. 1996) (employment agreement explicitly assured chairman and CEO that directors would not "unreasonably interfere" with his work and defined CEO's good-faith determination of "unreasonable interference" to be constructive termination, which entitled CEO to severance benefits; court characterizes agreement as unusual but not violative of directors' duties because severance benefits payable under agreement were not excessive).

(2). *Principal's power and right of interim control--corporate context.* On the relationship between local unions and international affiliates, see [Intercity Maint. Co. v. Local 254 Serv. Employees Int'l Union](#), 62 F.Supp.2d 483, 496-497 (D.R.I.1999), vacated in part on other grounds, 241 F.3d 82 (1st Cir.2001) ("traditional rules of agency law" define circumstances in which international union is responsible for illegal acts of local).

For the proposition that a parent-subsidary relationship does not in itself create a relationship of agency, see, e.g., [Manchester Equip. Co. v. American Way & Moving Co.](#), 60 F.Supp.2d 3, 7 (E.D.N.Y.1999) (parent liable on agency theory for acts of subsidiary only if subsidiary had actual or apparent authority to act on parent's behalf). See also [Motorsport Eng'g, Inc. v. Maserati SPA](#), 316 F.3d 26, 30 (1st Cir.2002) (fact that automobile distributor and manufacturer had common controlling shareholder does not establish that distributor signed contract with dealer as agent of manufacturer); [Cellini v. Harcourt Brace & Co.](#), 51 F.Supp.2d 1028, 1034

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[\(S.D.Cal.1999\)](#) (subsidiary not agent of parent corporation for purposes of liability under fair employment statute in absence of showing that parent "exercised any control over [subsidiary's] day-to-day employment decisions"); [Expeditors Int'l of Washington, Inc. v. Direct Line Cargo Mgmt. Servs., Inc., 995 F.Supp. 468, 482 \(D.N.J.1998\)](#) (court cannot find absence of control as matter of law when self-characterized "family of companies" jointly participated in dealings in freight and shared employees and stock ownership). The foundational principle is that a parent corporation is not liable for acts of its subsidiaries simply because it owns the subsidiary's stock. See [United States v. Bestfoods, 524 U.S. 51, 62 \(1998\)](#) (general principle of corporate law is applicable to parent-corporation liability under CERCLA; nothing in legislation "purports to reject this bedrock principle"). For a statement of the circumstances under which a subsidiary corporation is treated as the agent of its parent, see [Trans-america Leasing, Inc. v. La Republica de Venezuela, 200 F.3d 843, 849 \(D.C.Cir.2000\)](#) (parent must manifest desire for subsidiary to act on parent's behalf, subsidiary must consent so to act, parent must have right to exercise control with respect to matters entrusted to subsidiary, "and the parent exercises its control in a manner more direct than by voting a majority of the stock in the subsidiary or making appointments to the subsidiary's Board of Directors"). See also [In re Parmalat Sec. Litig., 375 F.Supp.2d 278, 294-295 \(S.D.N.Y. 2005\)](#) (allegations that member firm sought "direction and help" from global accounting firm and that global firm directed the removal of auditors on account sufficed as allegations of agency relationship).

The statutory basis for empowering shareholders to give binding instructions to directors is exemplified by Model Bus. Corp. Act § 2.02(b)(2)(iii) (permitting inclusion in certificate of incorporation of provision not inconsistent with law "defining, limiting, and regulating the powers of the corporation, its board of directors, and shareholders") and § 7.32(a)(1) and (8) (permitting unanimously adopted shareholder agreement to contain provision that "restricts the discretion or powers of the board of directors" or "otherwise governs the exercise of the corporate powers ... or the relationship among the shareholders, the directors, and the corporation, or among any of them, and is not contrary to public policy . . .").

For the proposition that directors as such are not agents, see James D. Cox, et al., *Corporations* § 8.03 (2d ed. 2003). A leading treatise from the United Kingdom characterizes directors as agents, finding it preferable to characterize them using an analogy to agency as opposed to drawing an analogy to trustees. See Paul L. Davies, *Gower on Company Law* 598 (6th ed. 1997) ("[T]o describe directors as trustees seems today to be neither strictly correct nor invariably helpful. In truth directors are agents of the company rather than trustees of it or its property."). Some corporation statutes treat directors as agents for specific purposes. See, e.g., [Cal. Corp. Code § 317\(a\)](#) (for purposes of indemnification section, term "agent" means a present or former director, officer, employee or other agent of corporation, or a person presently or formerly serving in such capacity in another enterprise at corporation's request). A corporation's statutory power to indemnify someone does not by itself establish that the person acted as the corporation's agent as defined by § 1.01. See [VonFeldt v. Stifel Fin. Corp., 714 A.2d 79, 85 \(Del.Supr.1998\)](#) (court holds that parent corporation's election of individual to board of wholly owned subsidiary establishes that individual served on the board "at the request" of parent corporation and thus may assert claims for indemnity against parent; court also observes in dictum that "this decision does not perforce the limitations on inter-firm liability that are a *raison d'etre* of wholly-owned subsidiaries."). For analysis, see Micah John Schruers, *VonFeldt v. Stifel Financial Corp.*: Clarifying the Scope of Delaware Corporate Indemnification Law, 25 J. Corp. L. 161 (1999). For an account more sympathetic to the general claim that directors may be characterized as shareholders' agents, see Robert A. Kessler, *The Statutory Requirement of a Board of Directors: A Corporate Anachronism*, 27 U. Chi. L. Rev. 696, 705 (1960). For examples of situations in which a board member served as an agent, see, e.g., [Cromer Fin. Ltd. v. Berger, 245 F.Supp.2d 552, 561-562 \(S.D.N.Y. 2003\)](#) (partner in accounting firm allegedly served as member of committee of international association charged with, inter alia, strategic direction and practice integration of member firms' auditing work for offshore investment funds; accounting firm charged with knowledge of information that partner acquired as member of committee concerning member's audit of fund when partner's familiarity with off-shore audits was basis for his committee membership); [Mercy Med. Ctr., Inc. v. United Healthcare of the Mid-Atlantic, Inc., 815 A.2d 886 \(Md.App.2003\)](#) (two members of board of physicians' network served as agents of network's majority shareholder, a hospital; hospital charged with knowledge of amendments to agreement between network and HMO).

g. Acting on behalf of. For the proposition that power to contract is a sufficient but not a necessary condition for agency, see [Vanwyk Textile Sys., B.V. v. Zimmer Mach. America, Inc., 994 F.Supp. 350, 369 \(W.D.N.C. 1997\)](#)

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(jury was presented with evidence sufficient to find agency when sales agent represented manufacturer in negotiations with customers within price ranges set by manufacturer). See also [O'Neill v. Department of HUD](#), [220 F.3d 1354, 1362 \(Fed.Cir. 2000\)](#) (federal conflict-of-interest legislation, [18 U.S.C. §§ 203\(a\)\(1\)](#) and [207\(a\)\(1\)](#), which refers to "acting ... as agent or attorney for, or otherwise representing" a person distinguishes between services of agent and other representational services; in this context an "agent" is a representative authorized to act for another or a business representative empowered to commit principal to third parties).

A distributor who sets resale prices acts as a principal and is, as a consequence, outside the protected category of "commercial agents," defined by the European Community Directive on Commercial Agents and the implementing regulations in the United Kingdom. See *Am B Imballaggi Plastici SRL v. Pacflex Ltd.*, [1999] 2 All E.R. (Comm) 249 (App.1999).

On trademark licensors' liability for defective products manufactured by licensees, see David J. Franklyn, *The Apparent Manufacturer Doctrine, Trademark Licensors and the Third Restatement of Torts*, [49 Case W. Res. L. Rev. 671 \(1999\)](#); David J. Franklyn, *Toward a Coherent Theory of Strict Tort Liability for Trademark Licensors*, [72 S. Cal. L. Rev. 1 \(1998\)](#).

In Illustration 10, P's right to control the quality of footwear manufactured under the license is conventionally understood to be necessary to avoid a "naked license," which is deemed to be an abandonment of the trademark. See 2 J. Thomas McCarthy, *McCarthy on Trademark and Unfair Competition* § 18:42 (1998). See also [Theos & Sons, Inc. v. Mack Trucks, Inc.](#), [729 N.E.2d 1113 \(Mass. 2000\)](#) (independent dealer's display of manufacturer's trademark sign did not constitute holding out as agent of manufacturer; assumption that dealer had agency relationship with manufacturer for purposes of doing warranty-related work does not create relationship of agency as to nonwarranty work).

The money-transfer business involved in Illustration 12 is subject to federal regulation. The Money Laundering Suppression Act of 1994, [31 U.S.C. § 5330\(d\)\(1\)](#), requires all money-transmitting businesses to register with the Department of the Treasury. The Bank Secrecy Act authorizes the Secretary of the Treasury to require financial institutions and their agents to report any "suspicious transaction relevant to a possible violation of law or regulation." See [31 U.S.C. § 5318\(g\)\(1\)](#).

Trustees may also be agents, depending on the presence of a right of control and a right to dispose of property. A trustee holds title to property and may or may not be subject to the control of the settlor or, more unusually, the beneficiaries of the trust. See [Restatement Third, Trusts § 2](#); [S.E.C. v. American Bd. of Trade, Inc.](#), [654 F. Supp. 361, 366](#) (S.D.N.Y.), *aff'd*, [830 F.3d 431 \(2d Cir.1987\)](#). If title to property is transferred to a trustee and the transferor has a right to control the transferee, the transferee is both an agent and a trustee. See *Chang v. Redding Bank of Commerce*, [35 Cal.Rptr.2d 64, 70 \(Cal. App.1995\)](#). Only "in rare cases" will a court remove a trustee at the request of beneficiaries; beneficiaries may not effect removal directly. See George T. Bogert, *Trusts* § 152, at 1541 (6th ed. 1987).

The outcome stated for Illustration 14 is supported by [Clapp v. JMK/Skewer, Inc.](#), [484 N.E.2d 918 \(Ill.App.1985\)](#). See also [Fasciana v. Electronic Data Sys. Corp.](#), [829 A.2d 160, 170-171 \(Del.Ch.2003\)](#) (for purposes of corporate-advancement statute, lawyer is not acting as corporation's "agent" when not dealing with third parties); *Cochran v. Stifel Fin. Corp.*, 2000 WL 286722 (Del.Ch.2000), *rev'd in part on other grounds*, [809 A.2d 555 \(Del. 2002\)](#) (holding that person who serves as director, officer, or agent of subsidiary is not automatically an "agent" of parent corporation for purposes of 8 Del. C. § 145(c), which obligates corporation to indemnify agent to extent agent is successful in defense; and holding that suit brought by wholly owned subsidiary is not brought "by or in the right of" the parent for purposes of 8 Del. § 145(b), which governs claims for indemnity in connection with such actions). Illustrations 15 and 16 are variants on an example in Restatement Second, Agency § 14 H, Comment a.

In [United States v. O'Hagan](#), [521 U.S. 642 \(1997\)](#), the Court applied the principle underlying Illustration 18 to explain that a lawyer's purchase of securities on the basis of nonpublic information received by the lawyer's firm from a client constituted a deceptive act for purposes of § 10(b) of the Securities Exchange Act of 1934 because it contravened the agent's duty of disclosure.

h. Intermediaries. On the range of roles that an agent may play in a real-estate transaction, including the provision and clarification of information, see *Rawlinson & Brown Pty. Ltd. v. Witham & Anor*, [1995] Austl. Torts

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R. 81 (N.S.W.App.1995). For the distinction between "finders" and "brokers," see [Northeast Gen. Corp. v. Wellington Adver., Inc.](#), 624 N.E.2d 129 (N.Y.1993); [Robles v. Consolidated Graphics, Inc.](#), 965 S.W.2d 552, 557-558 (Tex.App.1997).

For the point that a "middleman" is not usually an agent, see [Rauscher Pierce Refsnes, Inc. v. Great Sw. Savs., F.A.](#), 923 S.W.2d 112, 115 (Tex. App.1996). On the respective functions of introducing and clearing brokers, see [Arista Films, Inc. v. Gilford Sec., Inc.](#), 51 Cal.Rptr.2d 35, 36 (Cal. App.1996). On "manufacturer's representative," see [L.A.P.D., Inc. v. General Elec. Corp.](#), 132 F.3d 402, 403 (7th Cir.1997). On "soliciting agent," see [Booker v. United Am. Ins. Co.](#), 700 So. 2d 1333, 1336-1337 n.5 (Ala. 1997). If an independent insurance broker is supplied with an application form by an insurer, that fact in itself has been held not to make the broker the insurer's agent. See [Ranger Ins. Co. v. Kovach](#), 63 F.Supp.2d 174, 184 (D.Conn.1999) (noting contrary authority in [Tiner v. Aetna Life Ins. Co.](#), 291 So. 2d 774 (La.1974)).

For a typical example of a state statute applicable to transactions in residential real estate that expressly permits parties to modify the duties conventionally applicable to real-estate brokers, see [Ohio Rev. Code Ann. §§ 4735.51-.74](#).

An intermediary who acts only as a person's amanuensis may not be characterized as the person's agent. See [Estate of Stephens](#), 49 P.3d 1093 (Cal.2002) (upholding validity of deed signed at grantor's direction by interested amanuensis). For further discussion, see § 3.02, Comment c.

On the early evolution of stockbrokerage practices, see Stuart Banner, Anglo-American Securities Regulation (1998).

The terminology associated with particular intermediary functions may be specific to a particular trade or industry. For example, in the fine-arts and antiques trades, a "runner" has been characterized as a "private, free lance" dealer, typically reluctant to reveal the sources from which objects are obtained. See Mary McKenna, Problematic Provenance: Toward a Coherent United States Policy on the International Trade in Cultural Property, 12 U. Pa. J. Int'l Bus. L. 83, 116-117 n.160 (1991). A runner may attempt to sell work on behalf of a gallery in exchange for a commission. See [Dark Bay Int'l, Ltd. v. Aquavella Galleries, Inc.](#), 784 N.Y.S.2d 514, 515 (App.Div.2004), leave to appeal denied, 825 N.E.2d 1093 (N.Y. 2005) (no evidence that fugitive from justice acted with actual authority as a runner or otherwise in agreeing to sell Picasso painting allegedly on gallery's behalf; invoice from gallery to fugitive described painting and stated price and terms of sale to fugitive but did not use word "consignment").

An empirical study of the consequences of the Georgia statute focuses on the encouragement it gives to buyers to retain their own agents. The average time to sell a house fell, suggesting that buyers' agency reduces search costs and enables agents better to match buyers with houses that will appeal to them. Prices of expensive houses fell, while prices of the less expensive houses did not. See Christopher Curran & Joel Schrag, Does It Matter Whom an Agent Serves? Evidence from Recent Changes in Real Estate Agency Law, 43 J. Law & Econ. 265, 282-283 (2000). Ga. Code Ann. § 10-6A-1 et seq. Section 10-6A-7 specifies the duties owed by a buyer's broker. A broker does not breach any duty owed the buyer by showing properties to other purchasers, see § 10-6A-7(d), and the broker may provide defined types of ministerial assistance to the seller, see §§ 10-6A-7(C) and 10-6A-14. Section 10-6A-13 permits a brokerage firm to designate individual agents to represent different clients in the same transaction on an exclusive basis and provides that neither the firm nor the designated agents shall be deemed to be dual agents.

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§ 1.02 Parties' Labeling and Popular Usage Not Controlling

An agency relationship arises only when the elements stated in § 1.01 are present. Whether a relationship is characterized as agency in an agreement between parties or in the context of industry or popular usage is not controlling.

COMMENTS & ILLUSTRATIONS

Comment:

a. In general. Whether a relationship is one of agency is a legal conclusion made after an assessment of the facts of the relationship and the application of the law of agency to those facts. Although agency is a consensual relationship, how the parties to any given relationship label it is not dispositive. Nor does party characterization or nonlegal usage control whether an agent has an agency relationship with a particular person as principal. The parties' references to functional characteristics may, however, be relevant to determining whether a relationship of agency exists.

Many common legal relationships do not by themselves create relationships of agency as defined in § 1.01. These include relationships between suppliers and resellers of goods or property, franchisors and franchisees, lenders and borrowers, and parent corporations and their subsidiaries. For further discussion, see § 1.01, Comments *f*(2) and *g*. Relationships like these are also relationships of agency when the elements stated in § 1.01 are present.

b. Judicial acceptance or rejection of parties' characterization. An agreement between or among parties may positively characterize their relationship as one of agency or assert a negation of agency. Statements of each kind raise somewhat different issues. If a particular relationship is one of agency, a consequence may be that an act otherwise illegal is legal. This is so when relevant legislation defines illegality in terms of the existence of an agreement, the transmission of information, or some other interaction between two economically distinct parties. It is essential to the common-law definition of agency that the party designated as principal has the right to control the party designated as agent and that the party designated as agent act on behalf of the party designated as principal. See § 1.01, Comments *f* and *g*. These factors may also be important in statutory contexts, as may be the substance of the relationship, including the allocation of business risks and other indicia of entrepreneurship. It is appropriate for the court to consider whether the parties' characterization serves a function other than circumventing an otherwise-applicable statute, regulation, or rule of law, or invoking a statute, regulation, or rule of law to limit or prevent liability. On the relationships between statutes and common-law doctrines generally, see Introduction.

Illustration:

1. P Corporation, a credit bureau, collects information about users of credit. A statute permits disclosure of such information within a bureau but limits the circumstances under which credit bureaus may provide information about an individual's credit history to a third party without the individual's consent. Responding to journalistic inquiries is not among the circumstances permitted by the statute. P Corporation enters into an agreement with Q Corporation, a publisher of newspapers, designating Q Corporation the agent of P Corporation for the purpose of collecting and analyzing information. A court is not bound by the parties' characterization of the relationship in determining whether P Corporation's transmission of individually identified credit histories to Q Corporation violates the statute.

The parties' agreement may negatively characterize the relationship as not one of agency, or as one not intended by the parties to create a relationship of agency or employment. Although such statements are

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relevant to determining whether the parties consent to a relationship of agency, their presence in an agreement is not determinative and does not preclude the relevance of other indicia of consent.

c. Ambiguous and other nonlegal designations of agency relationships. Whether an actor has a relationship of agency with a particular principal, with one possible principal as opposed to another, with multiple principals, or is a coagent or a subagent, or is not an agent at all, is resolvable only by applying the legal definition of agency to the facts of the relationship. The fact that it is in the interest of an agent who sells the principal's product or service to accommodate a customer and pay attention to the customer's needs does not in itself make a seller's agent the customer's agent as well. How the parties characterized the relationship is not dispositive, nor is popular usage. Such questions commonly arise with regard to service providers in the insurance, real-estate, and travel industries, in which agency terminology is often used without regard for its legal significance. Whether these providers are acting as agents and, if so, who are their principals depends on the context. For definitions of terms, see § 1.04. Section 3.15 deals more specifically with subagency.

d. Burden of establishing existence of relationship of agency. The party asserting that a relationship of agency exists generally has the burden in litigation of establishing its existence. The parties' agreement does not control whether a person is an employee for purposes of the respondeat superior doctrine stated in § 7.07. Nor does it do so for purposes relevant to statutes or administrative regulations, or to avoid vicarious liability, when the definition of employee in § 7.07(3) is an element in determining the person's status.

REPORTER'S NOTES**REPORTER'S NOTES**

a. Comparison with Restatement Second, Agency. This section constitutes a further elaboration on the basic point made in Restatement Second, Agency § 1, Comment *b*: "Agency is a legal concept which depends upon the existence of required factual elements. . . ." Comment *a* gives examples of common legal relationships that do not themselves create relationships of agency. Comparable points are made by Restatement Second, Agency §§ 14 J and 14 M. Section 14 O states that a creditor who assumes control of a debtor's business for their mutual benefit may become liable as principal for the debtor's acts and transactions in connection with the business. In this Restatement, see § 1.01, Comment *f*(1) for discussion of debtor-creditor relationships and the common-law definition of agency.

b. Judicial acceptance or rejection of parties' characterization. For the general proposition that the parties' characterization is not conclusive, see *Anderson v. Badger*, 191 P.2d 768, 771 (Cal.App.1948) (contractual designation of person as "agent" will be disregarded if contract as a whole is one in which a person is engaged to produce a result by means solely of his own choosing or to sell goods at a stated price); [Policy Mgmt. Sys. Corp. v. Indiana Dept. of State Revenue](#), 720 N.E.2d 20, 25 (Ind.Tax 1999) (presence or absence of specific contract language does not control whether services received by taxpayer from its customers are taxable gross revenues or reimbursement in which taxpayer lacked any beneficial interest); [Amerifirst Sav. Bank of Xenia v. Krug](#), 737 N.E.2d 68 (Ohio App.1999) (record in case stemming from salesperson's promises and representations to retail customer presented genuine issue of material fact whether automobile dealer acted as lender's agent; use of term "agency" in agreement between dealer and lender not determinative, and no evidence submitted that relationship satisfied elements requisite to relationship of agency).

The test of whether the parties' characterization serves a function apart from circumventing an otherwise applicable legal requirement is articulated and applied in [Morrison v. Murray Biscuit Co.](#), 797 F.2d 1430 (7th Cir.1986) (agency relationship between cookie manufacturer and dealer had function apart from frustrating antitrust constraints on resale-price maintenance). On the relationship between agency and legal consequences under antitrust laws, compare [United States v. General Elec. Co.](#), 272 U.S. 476, 483-486 (1926) (manufacturer's control over price at which del credere agent sold patented product to customer did not constitute illegal resale-price maintenance) with [United States v. Masonite Corp.](#), 316 U.S. 265, 276-277 (1942) (del credere structure does not prevent manufacturer's selling arrangements from running afoul of Sherman Act, nor does its patent on product) and [Simpson v. Union Oil Co.](#), 377 U.S. 13, 20, 23-24 (1964) (arrangements like those in *General Electric* constitute per se violations of antitrust law; court distinguishes *General Electric* on ground that patents were involved; agents in *Simpson*, who took gasoline on consignment, were "independent businessmen" having "all or most of the indicia of entrepreneurs, except price fixing") and [United States v. General Elec. Co.](#), 358 F. Supp. 731 (S.D.N.Y. 1973) (exact arrangement upheld by Supreme Court in 1926 constitutes per se violation of § 1 of Sherman Act).

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Characterizations of agency may meet a warmer and less skeptical judicial welcome in the tax context than in a context in which a statute serves a specifically regulatory function. Recent tax authority focuses heavily on whether the formal aspects of the parties' characterization are consistent with agency. See [*Commissioner v. Bollinger*, 485 U.S. 340, 349-350 \(1988\)](#) ("genuineness of the agency relationship is adequately assured, and tax-avoiding manipulation adequately avoided" when fact that corporation is acting as its shareholders' agent with regard to asset is set forth in written agreement at time asset is acquired, corporation functions as agent with respect to asset for all purposes and is held out to third parties as agent, not as principal). But see [*National Carbide Corp. v. Commissioner*, 336 U.S. 422 \(1949\)](#) (corporation is not true agent of principal if its relations with principal depend on fact that it is owned by principal; corporation's business purpose must be to carry on "normal duties" of an agent).

Provisions in agreements that purport to negate a relationship of agency are held not to be determinative in the context of claims asserted by third parties in [*Pistone v. Superior Court*, 279 Cal.Rptr. 173, 177 \(Cal. App.1991\)](#) (in action brought by customer, administrator of vehicle service contract could be found to be car dealer's agent, despite provision disaffirming agency in agreement between dealer and administrator); [*N & G Constr., Inc. v. Lindley*, 384 N.E.2d 704, 706 \(Ohio 1978\)](#) (provision in agreement between coal owner and coal shipper stating that shipper was an "independent contractor" not determinative of agency status in tax dispute based on assessment of coal severance tax against coal owner).

The restrictions on transmission of information presupposed by Illustration 1 stem from the Fair Credit Reporting Act, [*15 U.S.C. § 1681*](#) et seq. See [*Trans Union Corp. v. FTC*, 81 F.3d 228, 234 \(D.C.Cir.1996\)](#) (relevant to credit bureau's liability whether consumer reports disseminated consistently with purposes of statute).

As between the parties to an agreement, an assertion or negation of agency is not determinative. See, e.g., [*MJ & Partners Rest. Ltd. P'ship v. Zadikoff*, 10 F.Supp.2d 922, 932 \(N.D.Ill.1998\)](#) (despite provisions in agreements among licensee of trademark, limited partnership designated to manage restaurant, and consulting firm with which partnership entered into contract for consulting and administrative services, individual who had significant responsibilities in running restaurant could be shown to be agent of trademark licensee, notwithstanding provision in consulting agreement characterizing firm as an independent consultant; "the existence of an agency relationship is determined on the actual practices of the parties, and not merely by reference to a written agreement"); [*Prudential Ins. Co. v. Eslick*, 586 F. Supp. 763, 764 \(S.D.Ohio 1984\)](#) (action by insurer against former salesman alleging breach of fiduciary duty; although contract between insurance company and former salesman characterized salesman as an "independent contractor," nature of parties' relationship must be determined by comprehensive factual analysis; court denies insurer's motion for summary judgment on point that former salesman was its agent); cf. [*GAVCO, Inc. v. Chem-Trend, Inc.*, 81 F.Supp.2d 633, 644 \(W.D.N.C.1999\)](#) (finding triable issue of fact as to whether parties intended relationship to remain one of exclusive dealing despite entering into agreement that contained a confidentiality provision but no covenant not to compete; parties were attempting to avoid characterization of relationship as employment for tax purposes); [*Old Republic Ins. Co. v. Hansa World Cargo Serv., Inc.*, 51 F.Supp.2d 457, 473 \(S.D.N.Y.1999\)](#) (contract language intended to protect undisclosed principal from liability for customs duties does not mean customs agent lacked actual authority to post bonds; customs agent may be able to establish claim for indemnity against undisclosed principal); [*Zajac v. Harris*, 410 S.W.2d 593, 594 \(Ark. 1967\)](#) (agreement characterizing plaintiff as employee of business owned by defendant not determinative of whether partnership existed; inferences that might ordinarily be drawn from facts that federal withholding and Social Security taxes were paid on plaintiff's share of firm's profits and that firm carried workers'-compensation insurance for plaintiff's protection effectively rebutted by undisputed fact that plaintiff was unable to read; "[t]here is no reason to believe that he appreciated the significance of the accounting practices now relied upon by [defendant]. They were unilateral"). See also [*South Sydney Dist. Rugby League Football League Ltd. v. News Ltd.*, \[2000\] 177 A.L.R. 611 \(Austl.Fed.Ct.\)](#), [*rev'd on other grounds*, \[2001\] 181 A.L.R. 188 \(Austl.Fed.Ct.\)](#), [*rev'd by* \[2003\] 215 C.L.R. 563 \(Austl.\)](#) (although provision in merger agreement that created partnership between media company and football league stated that company created to conduct competition was not agent of partnership, company in fact conducted partnership's business as its agent in operating competition).

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c. *Ambiguous and other nonlegal designations of agency relationships.* For the proposition that a sales agent's attentiveness to a customer's needs does not create an agency relationship with the customer, see [Weisblatt v. Minnesota Mut. Life Ins. Co.](#), 4 F.Supp.2d 371, 382 (E.D.Pa.1998) (insurer's agent did not owe special duty to act in customer's exclusive benefit; agent's evident attentiveness to customer's needs stemmed from "a duty to his employer--and to his own self-interest--to sell its products as successfully as possible."). On travel agents, see [Afflerbach v. Cunard Line, Ltd.](#), 14 F.Supp.2d 1260 (D.Wyo.1998); cf. [Manes v. Coats](#), 941 P.2d 120, 124 (Alaska 1997) (accommodation referral service was not an agent of traveler who used service). On insurance brokers as insureds' agents, see [Evvtex Co., Inc. v. Hartley Cooper Assocs. Ltd.](#), 102 F.3d 1327, 1331-1332 (2d Cir.1996).

d. *Burden of establishing existence of relationship of agency.* For the point that one asserting the existence of a relationship of agency has the burden of establishing it, see, e.g., [Romak USA, Inc. v. Rich](#), 384 F.3d 979, 985 (8th Cir.2004); [Bridas S.A.P.I.C. v. Government of Turkmenistan](#), 345 F.3d 347, 356 (5th Cir. 2003); [E.I. DuPont de Nemours & Co. v. Rhone Poulenc Fiber & Resin Intermediates, S.A.S.](#), 269 F.3d 187, 198 (3d Cir.2001); [United States v. Greer](#), 383 F.Supp.2d 861, 864-865 (W.D.N.C.2005); [Steigerwald v. Bradley](#), 136 F.Supp.2d 460, 470 (D.Md. 2001); [Heise v. Rosow](#), 771 A.2d 190, 193 (Conn.App.2001); [Aladdin Constr. Co. v. John Hancock Life Ins. Co.](#), 914 So. 2d 169, 177 (Miss.2005); [Springfield Hydroelec. Co. v. Copp](#), 779 A.2d 67, 73 (Vt.2001); [Acordia of Virginia Ins. Agency, Inc. v. Genito Glenn, L.P.](#), 560 S.E.2d 246, 249-250 (Va.2002).

The burden encompasses establishing that an actor served as an agent for a particular relevant purpose. See [Spencer v. Doyle](#), 733 N.E.2d 1082, 1085 (Mass.App.2000) (relevant question is whether collection firm, which had agency relationship with investors in purchasing accounts receivable, also acted as their agent in hiring auditor; firm engaged auditor for routine audit of its financial statements, not as agent on behalf of accounts-receivables investors). When an agent arguably acts on behalf of more than one principal, the burden of establishing an agency relationship encompasses establishing the relationship with respect to a particular principal. See, e.g., [Foisy v. Royal Maccabees Life Ins. Co.](#), 356 F.3d 141, 151 (1st Cir.2004) (jury could reasonably find that insurance broker acted as insurer's agent in making representations to annuitant about terms of annuity contract, although "[c]ertainly, the jury could have determined otherwise"; by time of representation, broker had initiated relationship with insurer, "acting at least in part on its behalf in securing [annuitant's] business"). Courts may differ on how best to characterize the same conduct when the situation is equivocal. Compare [Green v. H & R Block, Inc.](#), 735 A.2d 1039, 1047-1055 (Md.1999) (material issue of fact precluded summary judgment for tax-preparation firm; taxpayer signed application transmitted by firm to bank that made "rapid refund" loan to taxpayer but application authorized firm to share taxpayer's tax return, prepared by firm, with lender, which delivered loan check to firm to hold for taxpayer; firm's selfpromotion made it reasonable for customer to believe firm acted as customer's agent in relationship to lender and IRS) with [Peterson v. H & R Block Tax Servs., Inc.](#), 971 F.Supp. 1204, 1213 (N.D.Ill.1997) (dismissing claim that tax-preparation firm acted as taxpayer's agent; customer provided firm with information but did not provide instructions on how to prepare tax return) and [Basile v. H & R Block, Inc.](#), 761 A.2d 1115, 1121-1122 (Pa.2000) (relationship between taxpayer and tax-preparation firm was not relationship of agency because firm lacked power to bind taxpayer and only facilitated "rapid refund" loans; taxpayer's authorization and signature requisite for both tax return and loan application).

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Restatement of the Law, Agency 3d - Official Text > Chapter 8- Duties of Agent and Principal to Each Other > Topic 2- Principal's Duties to Agent

§ 8.13 Duty Created by Contract

A principal has a duty to act in accordance with the express and implied terms of any contract between the principal and the agent.

COMMENTS & ILLUSTRATIONS

Comment:

a. Scope and cross-references. The rule stated in this section obliges a principal to fulfill obligations created by the express and implied terms of any contract with an agent. Comment *b* is a general discussion of duties that a principal may owe an agent and their relationship to any contract between principal and agent. Comment *c* discusses revocable offers to pay compensation if an agent achieves a specified result. Comment *d* examines other issues involving a principal's duty to pay compensation to an agent.

For generally applicable doctrines in contract law, see Restatement Second, Contracts.

b. Principal's duties to agent; relationship to contract with agent. An agency relationship may exist in the absence of a contract between principal and agent. See § 1.01, Comment *d*. However, many principals and agents enter into contracts that define their duties to each other through the contract's express and implied terms. A principal has a duty to an agent to act in accord with those terms. In addition, other sources of law apart from common-law agency may impose additional duties on a principal in particular types of relationships with agents or in particular industries. When the relationship between a principal and an agent is one of employment, as an employer the principal owes duties to the employee, distinct from any contract between them, that are defined by statutes, by administrative regulations, and by common-law doctrines specifically applicable to employment relations. Specialized coverage of rules distinctly applicable to employment relationships is beyond the scope of this Restatement.

The express terms of agreements between agents and principals vary considerably, given the wide range of circumstances in which a principal may engage an agent and wide variations in the bargains struck by particular agents and principals. On the interpretation of agreements generally, see *Restatement Second, Contracts* §§ 200 to 204.

In general, a principal's breach of a contractual duty owed the agent subjects the principal to liability for breach of contract. A principal's conduct toward an agent may, separately, constitute a tort. Additionally, although a principal's conduct is not tortious, the principal has a duty to indemnify the agent against loss that the agent suffers as a consequence of the principal's breach of the duty to deal with the agent fairly and in good faith. See § 8.15, Comment *b*.

A principal's implied contractual duty of good faith and fair dealing obliges the principal to refrain from unreasonable interference with the agent's completion of work. The principal is subject to this duty when the principal has agreed to furnish an agent with an opportunity for work, in addition to agreeing to compensate the agent. For example, if a principal retains an agent to sell goods on commission and the agent agrees to represent the principal exclusively, unless otherwise agreed the principal has a duty at least to use best efforts to supply goods to be sold. Unless the principal and the agent agree otherwise, the principal is subject to liability to the agent for costs the agent incurs in good faith when the principal does not give the agent sufficient opportunity to recoup the agent's costs.

Illustration:

1. P Corp., which manufactures home health-care products, retains A as its exclusive sales representative for a new line of products. As senior executives of P Corp. are aware, A's representation of P Corp.'s new

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line of products will require A to make substantial expenditures before the products are available for sale. After A makes such expenditures and begins to take orders for the new products, P Corp. experiences production problems and decides not to manufacture the products. P Corp. is subject to liability to A for reasonable expenses incurred by A.

Even when a principal agrees to pay an agent a fixed amount that is not dependent on results achieved through the agent's efforts, the principal may also expressly or impliedly agree to provide the agent with work to do, for example when on-the-job training is understood to be an element of the parties' relationship. A principal may breach the duty to refrain from unreasonable interference with an agent's completion of work through directives given to the agent by the principal or through interactions with third parties. The principal's duty is a corollary of the general contract-law duty of good faith that is breached by preventing or hindering the occurrence of a condition to which a party's duty of performance is subject. See *Restatement Second, Contracts* § 225, Comment *b*, and § 205, Comment *d*.

Unless otherwise agreed, a principal is not subject to a general duty to refrain from competition with the agent that does not interfere with the agent's ability to achieve standards set by contract, which would be the counterpart to an agent's duty to refrain from competition with the principal as stated in § 8.04. Subject to possible antitrust implications, a principal and an agent may agree that the principal will not take specified actions except through the agent or that the principal will not engage other agents whose activities will be competitive with the agent's.

c. Revocable offer to pay compensation to agent. An owner's revocable offer to pay compensation is a conventional structure used in brokerage and other intermediary arrangements that contemplate sales or other transactions. The structure is typical of arrangements through which real estate is sold. See § 3.15, Comment *f*. The question is whether an owner should be free to revoke the offer although the broker or other agent has made an effort toward effecting a transaction upon which the promised compensation depends. It is important to differentiate between nonexclusive and exclusive brokerage structures. Many owners of residential property use an "open" listing, under which many brokers have the opportunity to attempt to sell property, with the successful showing broker receiving a sales commission. See *id.* In contrast with an exclusive listing of property with one broker, the open-listing pattern diffuses incentives across a larger number of brokers, each of whom may lack a substantial incentive to invest great effort in attempting to sell the property. Perhaps for this reason, courts generally have not protected a broker's reliance on the seller's revocable offer from subsequent revocation by the offeror in an open-offer structure. The general rule stated in *Restatement Second, Contracts* § 45(1) is that "[w]here an offer[or] invites an offeree to accept by rendering a performance and does not invite a promissory acceptance, an option contract is created when the offeree tenders or begins the invited performance or tenders a beginning of it." Thus, open-listing arrangements appear to be an exception to the protection of reliance by offerees recognized by § 45(1). In any event, § 45(2) makes an offeror's liability conditional on the offeree's "completion or tender of the invited performance," which would require that a disappointed broker show that it had arranged a sale or was able to do so.

In contrast, when property is listed for sale on an exclusive basis with one broker, it is more likely that the broker will invest significant effort in attempting to effect a sale. The exclusivity of the relationship between the broker and the owner furnishes two possible bases on which a court may protect a broker against revocation by the owner: (1) by interpreting the owner's offer as inviting a promise by the broker to use best efforts to effect a sale and inferring such a promise from the broker's commencement of performance; and (2) by treating the broker's commencement of performance as creating an option contract within § 45. In both instances, the broker's recovery depends on some showing that, had the broker been permitted to do so, the broker would have located a purchaser for the property. The test applied in many cases is whether the broker's work should be characterized as the "procuring cause" of a transaction that follows revocation of the offer.

An owner of property may reject a prospective buyer identified by a broker for reasons that are curable, and that, if cured, will remove an obstacle to the broker's right to receive the promised commission. Unless the parties have agreed otherwise, a real-estate broker has earned the promised commission when the broker produces a buyer who is ready, willing, and able to purchase at the terms set by the seller. A principal may be tempted to give no reason for rejecting a prospective buyer or to explain the reasons for rejection in general terms, in the prospect of preserving all possible defenses against subsequent claims by the broker that the results achieved by the broker satisfied the requisites for receiving the commission. However, the majority rule

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requires a principal to provide the broker with an explanation for the principal's rejection of a prospective buyer. If a principal remains silent about a curable defect in a prospective buyer's offer, the principal's silence waives the principal's ability to use the defect as a defense against a subsequent claim by the broker to be paid the promised commission.

The "procuring cause" question is relevant in other contexts as well, in particular to claims for commissions due under sales-representation agreements when the representative is discharged prior to the culmination of a sale but after the agent has completed everything necessary to procure the sale. Regardless of context, it is the agent's burden to show that the agent's efforts procured the sale.

In some states, statutes govern issues that arise under compensation agreements between sales representatives and principals. In particular, a principal may be subject to liability for double or triple damages when the principal fails to pay commissions within a stated period of time following termination of the relationship.

d. Compensation--other issues. Unless an agreement between a principal and an agent indicates otherwise, a principal has a duty to pay compensation to an agent for services that the agent provides. An agreement that an agent will not have a right to compensation for services provided may be implied from the agent's relationship to the principal or from the trivial nature of the services requested. The amount of compensation due may be determined by the terms of agreement between principal and agent and may be fixed in amount or made contingent on whether the agent achieves stated outcomes or on other criteria. An agreement between a principal and an agent may also set the agent's right to compensation at an amount or rate that is standard or customary in a particular industry. If an agent has a right to be paid compensation by a principal but the amount due cannot be determined on the basis of the terms of the parties' agreement, the agent is entitled to the value of the services provided by the agent.

A principal's duty to pay compensation to an agent does not extend to fulfilling an agent's duties to pay compensation to subagents engaged by the agent, unless the principal so agrees. See § 3.15, Comment *d*, for an extended discussion of the consequences of subagency relationships. Thus, unless a principal agrees otherwise, the principal is not a guarantor of obligations undertaken by its agent to pay subagents appointed by the agent. Were the rule otherwise, a principal would bear the risk that an appointing agent would make generous arrangements with a subagent in exchange for payments by the subagent or would be tempted for other reasons to disregard the principal's interests in making arrangements with a subagent.

In contrast, a principal's duties of indemnity extend to subagents appointed by agents of the principal. See § 8.14, Comment *b*.

REPORTER'S NOTES**REPORTER'S NOTES**

a. Relationship to Restatement Second, Agency, and codifications. This section is the counterpart to Restatement Second, Agency §§ 432, 433, 434, 435, 437, 441, and 454.

The analysis in Comment *c* of the liability of an offeror who makes a revocable offer of compensation to an agent differs from the formulation in § 454, which makes the offeror's liability dependent on whether the offeror revoked in bad faith. See Restatement Second, Agency § 454, Comment *a*.

Ga. Code § 10-6-31 (2000 & Supp. 2005) provides that "[a]n agent who shall have discharged his duty shall be entitled to his commission and all necessary expenses incurred about the business of his principal. If he shall have violated his engagement, he shall be entitled to no commission." Section 10-6-32 states that "[t]he fact that property is placed in the hands of a broker to sell shall not prevent the owner from selling, unless otherwise agreed. The broker's commissions are earned when, during the agency, he finds a purchaser who is ready, able, and willing to buy and who actually offers to buy on the terms stipulated by the owner."

Under La. Civ. Code art. 2989 (2005), a mandate "is a contract in which a person, the principal, confers authority on another person, the mandatary, to transact one or more affairs for the principal." Art. 2990 provides that a contract of mandate is governed by the Code's titles on "Obligations in General" and "Conventional Obligations or Contracts" on matters not specifically addressed in the title on "Representation and Mandate." Art. 3012 requires that the principal "reimburse and pay the mandatary even though without the mandatary's fault the purpose of the mandate was not accomplished."

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b. *Principal's duties to agent; relationship to contract with agent.* For an illustration of the point that a principal's conduct toward an agent may constitute a tort, see [Skrepnek v. Shearson Lehman Bros., Inc.](#), 889 S.W.2d 578, 580 (Tex.App.1994) (officer of customer of securities broker committed fraud against broker by purchasing stock through broker, representing that payment would be made while intending not to pay).

On a principal's duty not to interfere unreasonably with an agent's completion of work, see [Louis v. Lexington Dev. Corp.](#), 625 N.E.2d 289 (Ill.App.1993) (real-estate broker entitled to commission from purchaser although broker was not procuring cause of transaction; prospective purchaser advertised for properties to acquire, stating that "broker protection is assured" and informing broker that broker would not be excluded from negotiations once broker presented property; upon presentation of property, purchaser excluded broker from negotiations with vendor). On an agent's nonfulfillment of a condition wrongfully caused by the principal, see, e.g., [India.com, Inc. v. Dalal](#), 412 F.3d 315, 323-324 (2d Cir.2005) (issue of fact whether parent corporation acted wrongfully to evade payment of commission to former employee charged with arranging sale of subsidiary corporation; after former employee worked on deal for 6 months without compensation, parent breached stock-purchase agreement when its lawyers suspended services due to unpaid bills and requisite regulatory approvals were not obtained by deadline set in agreement, then resumed negotiations with purchaser).

Illustration 1 is based on [Di Gennaro v. Rubbermaid, Inc.](#), 214 F.Supp.2d 1354 (S.D.Fla.2002). The court characterizes the principal's duty to compensate an agent when a unilateral act of the principal prevents the agent from recouping reasonable costs that the agent incurs as "merely an application of the implied covenant of good faith and fair dealing," *id.* at 1359. See also [Florida-Georgia Chem. Co. v. Nat'l Labs](#), 153 So. 2d 752 (Fla. Dist.App. 1963) and [Meyer v. Pulitzer Publ'g Co.](#), 136 S.W. 5 (Mo.App.1911) (recognizing principal's duty to compensate agent when principal's action denies agent opportunity to recoup reasonable costs incurred by agent).

On a principal's competition with an agent, see [Metro Commc'ns Co. v. Ameritech Mobile Commc'ns, Inc.](#), 984 F.2d 739, 743 (6th Cir.1993) (contracts between provider of cellular-telephone service and sales agents explicitly granted provider discretion to compete with agents; implied covenant of good faith required competition to be reasonable and nonarbitrary but did not otherwise restrict provider's competition); [Aisenberg v. Hallmark Mktg. Corp.](#), 337 F.Supp.2d 257, 262 (D.Mass.2004) (agreement between manufacturer and sales representative providing for exclusive representation within territory contemplated that manufacturer had right to designate retailers as house accounts to be handled internally). See also [J.O.P. Consulting Group, LLC v. McCawley Precision Mach. Corp.](#), 707 N.Y.S.2d 102 (App.Div. 2000) (agreement between broker and client did not impose duty of confidentiality on client; broker brought to client's attention a prospect for acquisition, client referred prospect to another company with which it had a long-standing business relationship, other company acquired prospect, client's dealings with acquiror enhanced by its acquisition, and acquired company paid finder's fee to broker; no basis for inferring purpose of structure was to avoid paying fee to broker). For an example of an agreement that an agent's rights shall be exclusive, see [Care Travel Co. v. Pan Am. World Airways, Inc.](#), 944 F.2d 983 (2d Cir.1991) (agreement in which airline designated plaintiff as its general sales agent with the exclusive right to sell tickets for travel on airline between England, Karachi, and Bombay; airline breached agreement by permitting another agency to sell tickets along same routes).

A breach of duty by an agent may constitute a material failure of performance by the agent that constitutes the nonoccurrence of a constructive condition of the principal's remaining duties of performance under the contract and justifies the principal's suspension of performance. See *Restatement Second, Contracts* § 237. An agent's breach of duty may also justify the principal's termination of the contract. See E. Allan Farnsworth, *Contracts* § 8.18 (4th ed. 2004) (discussing circumstances under which termination is justified). A contract between a principal and an agent may contain a provision requiring that the agent be given notice of and an opportunity to cure any breaches of contract prior to termination of the contract by the principal. See [Mor-Cor Packaging Prods., Inc. v. Innovative Packaging, Inc.](#), 328 F.Supp.2d 857 (N.D.Ill. 2004). A "notice and cure" provision does not supersede the principal's right to terminate a contract with an agent unless the agent's breach is curable. See *id.* at 864. When the agent's breach is not curable, the principal retains the right to terminate the agent. On noncurable breaches by agents, see [Union Miniere, S.A. v. Parday Corp.](#), 521 N.E.2d 700, 703 (Ind.App.1988) (agent engaged to manage mining business acted affirmatively to undermine principal's business by attempting to dissuade state department from renewing principal's mining permit; agent's conduct "of a nature not easily

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curable"); [Larken, Inc. v. Larken Iowa City Ltd. P'ship, 589 N.W.2d 700, 704 \(Iowa 1998\)](#) (owner of hotel had right to terminate contract with manager when manager engaged in self-dealing despite express language requiring notice and right to cure prior to termination; manager's acts were "so serious that they frustrated one of the principal purposes of the management agreement, which was to manage the hotel in the best interests of the owner and to be honest and forthright in its dealings").

c. *Revocable offer to pay compensation to agent.* For the alternate contract-law analyses of revocable offers to pay compensation to real-estate brokers, see E. Allan Farnsworth, *Contracts* § 3.24, at 183-184 (4th ed. 2004). Restatement Second, Agency § 454, entitled "Revocation in Bad Faith of Offer of Compensation," states that "[a]n agent to whom the principal has made a revocable offer of compensation if he accomplishes a specified result is entitled to the promised amount if the principal, in order to avoid payment of it, revokes the offer and thereafter the result is accomplished as the result of the agent's prior efforts."

On the procuring-cause doctrine in the context of claims to commissions due on post-termination sales, see [Houben v. Telular Corp., 231 F.3d 1066, 1073 \(7th Cir.2000\)](#) (whether agent was procuring cause of transaction is issue of fact; jury could reasonably find former salesperson was procuring cause of sale when, although not "on the ground" in Hungary for project, she "was responsible for overseeing the work of the sales team and figuring out how to position [employer] to get the contract."). See also [Stubl v. T.A. Sys., Inc., 984 F.Supp. 1075 \(E.D.Mich.1997\)](#) (former employee failed to produce any evidence he procured accounts for employer).

Some formulations in the context of brokerage agreements explicitly require that the principal have acted in bad faith. See [Sibbald v. Bethlehem Iron Co., 83 N.Y. 378, 383 \(1881\)](#) (broker has no right to commission when broker fails to effect agreement or accomplish a bargain or if seller "in good faith and fairly has terminated the agency. . ."). A principal's termination is in bad faith if it is "merely a device by which the principal intended to avoid paying an otherwise payable commission." See [Berman & Brickell Inc. v. Penn Cent. Corp., 1986 WL 9689](#), at *3 (S.D.N.Y.1986). Relevant factors include "evidence of [principal's] good faith negotiations with prospective purchasers, evidence that [principal] interfered in some way with [broker's] attempts to perform under the brokerage contract prior to its termination, the passage of time between the termination of the brokerage agreement and the signing of the contract in question, and the difference in terms between those proposed by the broker and those finally agreed to." See [Air Support Int'l, Inc. v. Atlas Air, Inc., 54 F.Supp.2d 158, 167-168 \(E.D.N.Y. 1999\)](#) (agreement between airplane broker and lessor provided either party could terminate on 30 days' notice; no evidence lessor terminated in bad faith).

On a principal's duty to explain why a prospective buyer has been rejected, see [Record Realty v. Hull, 552 P.2d 191, 195 \(Wash.App.1976\)](#) (noting majority rule requires that ground for rejection be specified at that time to broker). The duty is applicable only to defects that are curable, see [Mutchnick v. Davis, 114 N.Y.S. 997, 999 \(App.Div.1909\)](#). On the consequences of failing to specify a ground for rejection, see 12 Am. Jur. 2d *Brokers* § 251 (1997) (general rule that failure to specify ground waives ground as basis for defending against broker's claim for compensation when broker produces offer substantially in accord with listing). For analysis of the consequences of this doctrine, see Robert H. Sitkoff, "Mend the Hold" and *Erie*: Why an Obscure Contracts Doctrine Should Control in Federal Diversity Cases, [65 U. Chi. L. Rev. 1059, 1073-1074 \(1998\)](#). Analogously, a buyer's failure to specify a curable defect when rejecting goods precludes subsequent reliance on the defect to justify rejection or establish breach by the seller as provided in U.C.C. § 2-605.

For the point that unless otherwise agreed a real-estate broker's commission is earned when the broker produces a buyer ready, willing, and able to buy at the terms set by the seller, see [French v. Ahlstrom, 612 N.Y.S.2d 458, 460 n.2 \(App.Div.1994\)](#) (unless otherwise agreed, broker's right to commission not dependent on whether sales contract is performed; language in listing agreement providing that fee will be paid to broker when sale is closed is ambiguous and raises question of fact about parties' intent; language could mean that no commission is earned until closing occurs or that commission is earned when broker produces ready, willing, and able buyer but payment of commission is deferred until closing).

For an exception to a broker's rights under the procuring-cause doctrine when negotiations continue beyond the expiration date of a brokerage agreement, see [Bear Kaufman Realty, Inc. v. Spec Dev., Inc., 645 N.E.2d 244, 247-248 \(Ill.App.1994\)](#) (even if broker is procuring cause of transaction, broker not entitled to commission when seller "after due inquiry and acting in good faith," contracts directly with a purchaser whose status as the

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broker's prospect is unknown to seller, at a reduced price in belief seller will not be required to pay commission; not unreasonable to expect broker to notify seller of identity of prospective purchaser).

For examples of agreements otherwise, see [CIBC World Mkts. Corp. v. Techtrader, Inc.](#), 183 F.Supp.2d 605, 611 (S.D.N.Y.2001) (contract between start-up company and investment bank required payment of fee if defined transaction occurred during term of bank's engagement or within 6 months thereafter; no requirement that bank take action to earn fee); [Glover v. Irving Winter Co.](#), 595 So. 2d 881, 886 (Ala.1992) (clause in brokerage agreement for lease gave broker right to commission when it had effect of sparking lessee's interest in buying property); [Bishop v. Sanders](#), 624 N.E.2d 64, 66 (Ind.App.1993) (exclusive listing agreement required payment of commission to broker even if owners sold property without broker's efforts during listing period); [Upper Cape Realty Corp. v. Morris](#), 756 N.E.2d 1193, 1196 (Mass.App. 2001) (brokerage agreement required payment of commission when broker "introduced" purchaser to property, which does not require that broker be predominant cause of sale).

On sales-representative statutes, see, e.g., [McCoy Assocs., Inc. v. Nulux, Inc.](#), 218 F.Supp.2d 286 (E.D.N.Y.2002) (plaintiff was not "sales representative" for purposes of [N.Y. Labor Law §§ 191-b](#) and [191-c](#) when it did not solicit business in New York); [In re Certified Question](#), 659 N.W.2d 597 (Mich.2003) ([Mich. Comp. Laws § 600.2961\(5\)](#), which imposes double damages on principal who fails to pay commission due former sales representative, is not subject to a good-faith defense); [Price Pfister, Inc. v. Moore & Kimmey, Inc.](#), 48 S.W.3d 341 (Tex.App.2001) ([Tex. Bus. & Com. Code § 35.84](#), which subjects principal to triple damages when commissions due remain unpaid, applicable to principal as remedy for principal's breach of contract although statute not applicable to principal at time when principal engaged sales representative).

d. Compensation--other issues. On the basis for determining the compensation terms of a contract, see [Callaway v. E.H. Smith Elec. Contractors, Inc.](#), 814 So. 2d 893 (Ala.Civ. App.2001) (client of construction-claims consultant liable for fee as stated in agreement; fact that president of client subjectively contemplated that fee would not be payable unless consultant achieved success in recovering claim without retaining lawyer does not defeat claim to payment as stated in agreement).

On extracontractual claims for the value of services provided, see [Meaney v. Connecticut Hosp. Assoc.](#), 735 A.2d 813 (Conn.1999) (unconsummated negotiations for incentive supplement to employee's salary do not create a basis in restitution on which employee may recover additional amounts for value of services); [Barry Mogul & Assocs. v. Terrestris Dev. Co.](#), 643 N.E.2d 245 (Ill.App. 1994) (when agreement between landowner and broker conditioned right to receive commission on occurrence of "closing," broker assumed risk that closing would not occur; no quasicontractual claim for services when parties have express contract). See also [APJ Assocs., Inc. v. North Am. Philips Corp.](#), 317 F.3d 610, 617 (6th Cir.2003) (affirming district court's grant of summary judgment for manufacturer sued by former sales representative; promissory-estoppel and unjust-enrichment claims may not override express terms of parties' written agreement, which barred payment of post-termination commissions).

For the point that a subagent does not have a right to be paid compensation by the appointing agent's principal unless the principal so agrees, see [Shipley v. Baillie](#), 547 N.W.2d 711 (Neb.1996); [McKnight v. Peoples-Pittsburgh Trust Co.](#), 61 A.2d 820 (Pa.1948). By agreeing to be responsible for paying compensation to a subagent, the principal becomes a guarantor of the agent's performance of its payment obligation. See [McKnight](#), 61 A.2d at 822. See also [Great Am. Life Ins. Co. v. Lonze](#), 803 S.W.2d 750, 753-754 (Tex.App.1990) (upholding provision in agreement between insurer and individual "producer" or seller of insurance products providing that all commissions due producer will be forwarded to insurer's general agent who will deduct any advances and settle with producer, and that insurer's payment of commissions to general agent shall discharge any payment obligation owed to producer; imposing obligation on insurer to supervise general agent in its payment of or accounting for commissions received from insurer would impermissibly override unambiguous term of agreement).

On implications of compensation structures for agents, see Saul Levmore, *Commissions and Conflicts in Agency Arrangements: Lawyers, Real Estate Brokers, Underwriters, and Other Agents' Rewards*, 36 J.L. & Econ. 503 (1993).

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

STRATOSAUDIO, INC.,

Plaintiff,

v.

HYUNDAI MOTOR AMERICA,

Defendant.

Case No. 6:20-cv-01125-ADA

**HYUNDAI MOTOR AMERICA'S SUPPLEMENTAL BRIEF
IN CONNECTION WITH ITS MOTION TO DISMISS FOR IMPROPER VENUE**

Venue is improper for at least two reasons: the dealerships (1) are not agents of HMA, and (2) do not conduct the business of HMA. ECF No. 12 at 5; ECF No. 24.

I. THE DEALERSHIPS ARE NOT AGENTS OF HMA

A. HMA Does Not Control Dealers

“At the core of agency is a fiduciary relation arising from the consent by one person to another that the other shall act on his behalf and subject to his control[,], *equally central to the master-servant relation is the master's control over or right to control the physical activities of the servant.*” *Arguello v. Conoco, Inc.*, 207 F.3d 803, 807–08 (5th Cir. 2000) (cites and quotes omitted) (emphasis added) (finding no “control” where franchisor had no right of “participation in the daily operations of the” franchisee nor to “participate[] in making personnel decisions”); *see also In re Google*, 949 F.3d 1338, 1345 (Fed. Cir. 2020). Here, Plaintiff cannot carry its burden to prove agency because HMA does not control the dealerships. ECF No. 12-1, ¶¶ 9–14. In Texas, a “distributor may not *directly or indirectly ... operate or control ...* a franchised dealer or dealership.” Texas Occupations Code (“TOC”) §2301.476 (emphases added). Further, there is no evidence, and Plaintiff does not allege, that HMA has the critical power of agency—the power to hire, fire, and supervise dealership employees. *See Arguello*, 207 F.3d at 808; *Smith v. Foodmaker, Inc.*, 928 S.W.2d 683, 687 (Tex. App. 1996) (finding no agency where franchisor had “no right of control over the hiring practices, terms, or conditions of [franchisee’s] employees”); *Jones v. Tex. A&M Univ.*, No. 18-1434, 2020 U.S. Dist. LEXIS 62396, at *31–32 (S.D. Tex. Feb. 26, 2020) (finding no agency where principal did not “control” the “means and the details of [alleged agent’s] accomplishment of daily operations”). To the contrary, the franchise agreements specify that the dealer has “*complete authority* to make all decisions on behalf of DEALER with respect to DEALER’s operations.” ECF No. 22-9, §4 (emphasis added). Thus, the dealer retains all rights of direction or control. *See Causey v. Sewell Cadillac-*

Chevrolet, Inc., 394 F.3d 285, 290 (5th Cir. 2004) (holding “[dealership] is an independent business and . . . [manufacturer] does not control [dealership’s] daily operations.”). And, there is no agency because the agreement specifies: “DEALER is an independently owned business. . . . This Agreement **does not make DEALER the agent or legal representative of HMA . . . for any purpose whatsoever.**” ECF No. 22-10 at 30 (emphasis added); see *Dulce Rests., L.L.C. v. Tex. Workforce Comm’n*, No. 07-19-00213-CV, 2020 Tex. App. LEXIS 7781, at *11 (Tex. App. Sep. 25, 2020); *Smith*, 928 S.W.2d at 687. Because all supervisory, interim rights of direction or control rest with the dealer (by contract and by law), there is no agency.

B. Plaintiff’s Arguments Regarding Specific Provisions Are Wrong

Plaintiff’s argument that specific provisions constitute control (ECF No. 40 (“Opp.”) at 2–3) is incorrect for three reasons. **First**, under TOC §2301.003, “[a]n agreement to waive the terms of this chapter is . . . unenforceable” and a “term or condition of a franchise inconsistent with this chapter is unenforceable.” Thus, if any provision allowed HMA to “directly or indirectly . . . operate or control” the dealerships (see TOC §2301.476), or act in contravention to any other section of Chapter 2301, it would be unenforceable and, therefore, would allow HMA no control. Plaintiff **does not dispute** this controlling law. Compare ECF No. 24 at 7 with Opp. at 1–5.

Second, even if TOC §2301.003 did not make control impossible (which it does), the specific provisions that Plaintiff cites do not qualify as control. Powers that do **not** constitute control include “the power to order the work stopped or resumed, to inspect its progress or receive reports, to make suggestions or recommendations which need not necessarily be followed, to prescribe alterations, and to set standards for acceptable service quality.” *Cardinal Health Solutions, Inc. v. Valley Baptist Med. Ctr.*, 643 F. Supp. 2d 883, 888–89 (S.D. Tex. 2008). All of the provisions cited by Plaintiff fall within these categories, and none of them afford HMA any right to supervise dealership employees in their compliance with any provision.

For example, Plaintiff relies on a provision that specifies: “HMA agrees to establish and maintain general advertising and promotion programs” and “DEALER agrees to cooperate in HMA’s advertising programs and to fully utilize the materials offered DEALER by HMA.” ECF No. 22-10, §10.D.2. And other provisions specify dealer shall maintain a “first-class appearance,” use specified “signs,” and interact with customers according to a given set of standards. *Id.*, §§12.A, 12.C, §10.C.3–4, §11.B.2. These provisions set standards for “minimum service quality,” which is not control. *Cardinal*, 643 F. Supp. 2d at 888–89; *Arguello*, 207 F.3d at 807 (no agency where franchise agreement required franchisee “stores to maintain their business according to the standards” set by franchisor). These provisions do not provide HMA any right to enter a dealership and supervise dealership employees in using the advertising materials, interacting with customers, or modifying dealer appearance or signage and, therefore, are not control. *See Arguello*, 207 F.3d at 807–08 (no control where franchise agreement required “customers shall be treated fairly, honestly, and courteously”). Similarly, Section 10.D.1 requires “training programs,” but the power “to make suggestions or recommendations which need not necessarily be followed” (*i.e.*, training) is not control. *Cardinal*, 643 F. Supp. 2d at 888–89. And §11.A.3, which requires the dealer to “inspect and correct conditions” as part of campaigns, is simply a service contracted for and is not control over dealership daily operations.

Third, Plaintiff misinterprets the provisions because it ignores state laws. Plaintiff argues §16.B.3 allows Hyundai to “unilaterally ... terminate the agreement if the dealer does not perform any requirement to Hyundai’s standards.” Opp. at 3. But HMA “may not terminate or discontinue a franchise ... unless ... the board makes a determination of good cause....” TOC §§2301.453, 2301.471. (And, the power to “order the work stopped or resumed” is not control. *Cardinal*, 643 F. Supp. 2d at 888–89.) Plaintiff argues §§10.B.1, 10.E.2, and 11.B.1 allow HMA

to evaluate “the dealers performance for many key criteria” and to specify “sales standards” and “standards” for employee education, training, and competency. Opp. at 2–3; ECF No. 22-10. But HMA “may not ... require adherence to unreasonable sales or service standards....” TOC §2301.467. Plaintiff argues §§11.B.3 and 12.D require “equipment and tool purchase from Hyundai” including “data processing systems.” Opp. at 2–3. But HMA “may not ... unreasonably require a franchised dealer to purchase special tools or equipment.” TOC §2301.467. Plaintiff argues §13.A allows HMA to specify “the establishment of working capital.” Opp. at 3. To the contrary, Texas law specifies reasonable capital requirements. TOC §2301.457. Thus, *the Texas DMV* governs termination, sales standards, equipment purchases, and working capital, not HMA. See TOC §§ 2301.203, 2301.529(b) 2301.801–2301.807. Plaintiff also argues §§10.B.2, 10.C.2, 11.B.3, and 11.B.4 allow HMA to specify “inventory” levels. Opp. at 2–3. But HMA “may not require or attempt to require a franchised dealer to order ... a motor vehicle or an appliance, part, accessory, or any other commodity unless the dealer voluntarily ordered or contracted for the item.” TOC § 2301.451.

In sum, the franchise agreements vest control in the dealers (ECF No. 22-9, §4), and any control by HMA that the provisions could provide would be unenforceable if they contravene Texas state law. Instead, the provisions constitute standards for minimum service quality, because sufficient equipment, properly trained employees, and facilities must be used to provide satisfactory service. See *Cardinal*, 643 F. Supp. 2d at 890. And, for the most part, the standards cited by Plaintiff are actually controlled by the Texas DMV, not HMA.

II. THE DEALERSHIPS ARE NOT CONDUCTING THE BUSINESS OF HMA

Even if the dealerships were agents (which they are not), venue is additionally improper because the dealerships do not conduct HMA business. See *Google*, 949 F.3d at 1345–47. As detailed in HMA’s Reply, HMA’s business (vehicle sales to dealerships) is distinct from the

dealership business (retail sales/maintenance for end consumers). ECF No. 24 at 2–3. Texas law codifies this distinction by prohibiting HMA from being “engaged in the business of buying, selling, or exchanging new motor vehicles and servicing or repairing motor vehicles under a manufacturer's warranty *at an established and permanent place of business....*” TOC §§ 2301.002(16) (emphasis added), 2301.252(a), 2301.476(c). This law controls.

Plaintiff misreads *Google* to argue that it supports attributing dealer business to HMA. Opp. at 4. In *Google*, the defendant *leased a place* (rack space) in the district where it stored property it *owned* (a server). 949 F.3d at 1343–44. Those facts led the court to evaluate whether a third party contractor’s maintenance *of that defendant-owned property* could constitute the business of the defendant (it could not). *Id.* at 1345–46. Here, in contrast, HMA does not own the vehicles that the dealership sells and maintains (the dealers/their customers do). *See* ECF No. 22-9, §1. *Google* does not authorize, or even consider, attributing to a defendant the business of third parties in connection with third party sales/maintenance of third party property.¹ It would be illegal for HMA to conduct such dealer business “directly or indirectly,” and it does not. Therefore, venue is improper and this case should be dismissed.

¹ Plaintiff argues warranty repair is HMA business, but *Google* held maintenance is an “ancillary” activity that is not defendant business (and unlike in *Google*, HMA does not own the property the dealers maintain). 949 F.3d at 1345–46. And, as explained above, it is illegal for HMA to engage in “repairing” vehicles at an “established...place of business.” Similarly, certified vehicle sales are not HMA business, as that activity is conducted by the dealers in connection with dealer property, not HMA property. ECF No. 12-1, ¶ 10. Plaintiff incorrectly argues HMA did not dispute this argument—it did. *See id.*; ECF No. 12 at 7. Plaintiff argues the agency standard varies in the venue context, but the cases it cites did not apply the *Google* standard, did not find “control,” and either found no agency or expressed serious doubts while not issuing an ultimate ruling on agency. *Blitzsafe* contradicts Plaintiff’s arguments because it held that “[i]t is certainly true that ‘dealers are not ‘agents’ of manufacturers’ in a broad sense of the term, nor does this Court so hold.” *Blitzsafe Texas, LLC v. Bayerische Motoren Werke AG*, 2018 WL 4849345, at *11 (E.D. Tex. Sept. 5, 2018). And, *Blitzsafe* predates *Google*, relied on incorrect facts and law in finding venue proper, and its ultimate finding of proper venue under the ratification test has been squarely rejected by another district court. ECF No. 24 at 9–10.

Dated: July 12, 2021

Respectfully submitted,

/s/ Ryan K. Yagura

Ryan K. Yagura (Tex. Bar No. 24075933)

ryagura@omm.com

Nicholas J. Whilt (*Pro Hac Vice*, Cal Bar. No. 247738)

nwhilt@omm.com

Clarence A. Rowland (*Pro Hac Vice*, Cal. Bar No. 285409)

crowland@omm.com

O'MELVENY & MYERS LLP

400 S. Hope Street

Los Angeles, CA 90071

Telephone: 213-430-6000

Fax: 213-430-6407

Attorneys for Defendant Hyundai Motor America

CERTIFICATE OF SERVICE

The undersigned certifies that on July 12, 2021, counsel of record are being served with a copy of this document by the Court's ECF system.

/s/ Ryan K. Yagura

Ryan K. Yagura

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

STRATOSAUDIO INC.,	)	Case No. 6:20-CV-01125-ADA
Plaintiff,)	
v.	)	JURY TRIAL DEMANDED
HYUNDAI MOTOR AMERICA,)	
Defendant.)	

STRATOSAUDIO INC.,	)	Case No. 6:20-cv-1126-ADA
Plaintiff,)	
v.	)	JURY TRIAL DEMANDED
MAZDA MOTORS OF AMERICA, INC.,)	
Defendant.)	

STRATOSAUDIO INC.,	)	Case No. 6:20-cv-1128-ADA
Plaintiff,)	
v.	)	JURY TRIAL DEMANDED
SUBARU OF AMERICA, INC.)	
Defendant.)	

STRATOSAUDIO INC.,	)	Case No. 6:20-cv-1129-ADA
Plaintiff,)	
v.	)	JURY TRIAL DEMANDED
VOLVO CARS USA, LLC,)	
Defendant.)	

STRATOSAUDIO INC.,	)	Case No. 6:20-CV-01131-ADA
Plaintiff,)	
v.	)	JURY TRIAL DEMANDED
VOLKSWAGEN GROUP OF AMERICA, INC.,)	
Defendant.)	

[PROPOSED] FIRST AMENDED JOINT SCHEDULING ORDER

Pursuant to the Court’s rulings during the June 23, 2021 Discovery Hearing, the Court hereby sets the following case deadlines¹:

<u>Date</u>	<u>Event</u>
May 13, 2021	Plaintiff shall serve preliminary ² infringement contentions in the form of a chart setting forth where in the accused product(s) each element of the asserted claim(s) are found. Plaintiff shall also identify the priority date (i.e. the earliest date of invention) for each asserted claim and produce: (1) all documents evidencing conception and reduction to practice for each claimed invention, and (2) a copy of the file history for each patent in suit.
May 27, 2021	The Parties shall submit an agreed Scheduling Order . If the parties cannot agree, the parties shall submit a separate Joint Motion for entry of each Order briefly setting forth their respective positions on items where they cannot agree. Absent agreement of the parties, the Plaintiff shall be responsible for the timely submission of this and other Joint filings.
July 8, 2021	Defendant shall serve preliminary invalidity contentions in the form of (1) a chart setting forth where in the prior art references each element of the asserted claim(s) are found, (2) an identification of any limitations the Defendant contends are indefinite or lack written description under section 112, and (3) an identification of any claims the Defendant contends are directed to ineligible subject matter under section 101. Defendant shall also produce (1) all prior art referenced in the invalidity contentions and (2) technical documents, including software where applicable, sufficient to show the operation of the accused product(s).
July 15, 2021	Parties exchange claim terms for construction.

¹ Defendants Volkswagen Group of America, Inc. (“VW”) and Hyundai Motor America (“HMA”) believe this order should not be entered at this time, and this litigation should not go forward in this Court, unless and until their respective motions to dismiss for improper venue are denied. VW and HMA join this proposed schedule only because they brought these concerns to the Court, and the Court stated on May 17, 2021 via email: “The Court will not stay the cases pending rulings on the motions to dismiss/transfer. Pursuant to the Court’s Standing Order Regarding Motion(s) for Inter-District Transfer, the Court will rule on these motions before Markman hearing.”

² The parties may amend preliminary infringement contentions and preliminary invalidity contentions without leave of court so long as counsel certifies that it undertook reasonable efforts to prepare its preliminary contentions and the amendment is based on material identified after those preliminary contentions were served, and should do so seasonably upon identifying any such material. Any amendment to add patent claims requires leave of court so that the Court can address any scheduling issues.

<u>Date</u>	<u>Event</u>
July 29, 2021	Parties exchange proposed claim constructions.
August 4, 2021	Parties disclose extrinsic evidence. The parties shall disclose any extrinsic evidence, including the identity of any expert witness they may rely upon with respect to claim construction or indefiniteness. With respect to any expert identified, the parties shall identify the scope of the topics for the witness's expected testimony. ³ With respect to items of extrinsic evidence, the parties shall identify each such item by production number or produce a copy of any such item if not previously produced.
August 6, 2021	Deadline to meet and confer to narrow terms in dispute and exchange revised list of terms/constructions.
August 12, 2021	Defendant files Opening claim construction brief, including any arguments that any claim terms are indefinite.
September 2, 2021	Plaintiff files Responsive claim construction brief.
September 13, 2021	Defendant files Reply claim construction brief
September 24, 2021	Plaintiff files a Sur-Reply claim construction brief.
September 24, 2021	Parties submit optional technical tutorials to the Court and technical adviser (if appointed). ⁴
September 28, 2021	Parties submit Joint Claim Construction Statement. <i>See General Issues Note #9 regarding providing copies of the briefing to the Court and the technical adviser (if appointed).</i>
October 4, 2021	Date of <i>Markman</i> hearing. 9:30 a.m. – 11:00 a.m.
October 5, 2021	Fact Discovery opens; deadline to serve Initial Disclosures per Rule 26(a)
November 15, 2021	Deadline to add parties.
November 29, 2021	Deadline to serve Final Infringement and Invalidity Contentions. After this date, leave of Court is required for any amendment to Infringement or Invalidity contentions. This deadline does not relieve the Parties of their obligation to seasonably amend if new information is identified after initial contentions.

³ Any party may utilize a rebuttal expert in response to a brief where expert testimony is relied upon by the other party.

⁴ The parties should contact the law clerk to request a Box link so that the party can directly upload the file to the Court's Box account.

<u>Date</u>	<u>Event</u>
January 24, 2022	Deadline to amend pleadings. A motion is not required unless the amendment adds patents or patent claims. (Note: This includes amendments in response to a 12(c) motion.)
April 4, 2022	Deadline for the first of two meet and confers to discuss significantly narrowing the number of claims asserted and prior art references at issue. Unless the parties agree to the narrowing, they are ordered to contact the Court's Law Clerk to arrange a teleconference with the Court to resolve the disputed issues.
May 2, 2022	Close of Fact Discovery.
May 9, 2022	Opening Expert Reports.
June 6, 2022	Rebuttal Expert Reports.
June 27, 2022	Close of Expert Discovery.
July 5, 2022	Deadline for the second of two meet and confer to discuss narrowing the number of claims asserted and prior art references at issue to triable limits. To the extent it helps the parties determine these limits, the parties are encouraged to contact the Court's Law Clerk for an estimate of the amount of trial time anticipated per side. The parties shall file a Joint Report within 5 business days regarding the results of the meet and confer.
July 11, 2022	Dispositive motion deadline and <i>Daubert</i> motion deadline. See General Issues Note #9 regarding providing copies of the briefing to the Court and the technical adviser (if appointed).
July 25, 2022	Serve Pretrial Disclosures (jury instructions, exhibits lists, witness lists, discovery and deposition designations).
August 8, 2022	Serve objections to pretrial disclosures/rebuttal disclosures.
August 15, 2022	Serve objections to rebuttal disclosures and File Motions <i>in limine</i> .
August 22, 2022	File Joint Pretrial Order and Pretrial Submissions (jury instructions, exhibits lists, witness lists, discovery and deposition designations); file oppositions to motions <i>in limine</i> .
August 29, 2022	File Notice of Request for Daily Transcript or Real Time Reporting. If a daily transcript or real time reporting of court proceedings is requested for trial, the party or parties making said request shall file a notice with the Court and e-mail the Court Reporter, Kristie Davis at kmdaviscsr@yahoo.com Deadline to meet and confer regarding remaining objections and disputes on motions <i>in limine</i> .

<u>Date</u>	<u>Event</u>
September 7, 2022	File joint notice identifying remaining objections to pretrial disclosures and disputes on motions <i>in limine</i> .
September 12, 2022	Final Pretrial Conference. The Court expects to set this date at the conclusion of the <i>Markman</i> Hearing.
October 3, 2022 ⁵	Jury Selection/Trial. The Court expects to set these dates at the conclusion of the <i>Markman</i> Hearing.

SIGNED this _____ day of _____, 2021

ALAN D. ALBRIGHT
UNITED STATES DISTRICT JUDGE

⁵ If the actual trial date materially differs from the Court's default schedule, the Court will consider reasonable amendments to the case schedule post-*Markman* that are consistent with the Court's default deadlines in light of the actual trial date.

AGREED:

/s/ Jonathan J. Lamberson

WHITE & CASE LLP
Jonathan Lamberson (*pro hac vice*)
CA Bar.No. 239107
3000 El Camino Real, #900
2 Palo Alto Square
Palo Alto, CA 94306
Tel: 650-213-0300
Fax: 650-213-8158
Email: lamberson@whitecase.com
don.zhenan.wang@whitecase.com

WHITE & CASE LLP
Michael Songer (*pro hac vice*)
CA Bar No. 175560
701 Thirteenth Street, NW
Washington DC, 20005
Tel: 202-626-3600
Fax: 202-639 9355
Email: songer@whitecase.com

WHITE & CASE LLP
Charles Larsen (*pro hac vice*)
MA Bar No. 652355
75 State Street
Boston, MA 02109
Tel: 617-979-9300
Fax: 617-979 9301
Email: charles.larsen@whitecase.com

FRIEDMAN, SUDER & COOKE
Corby R. Vowell
604 East 4th Street, Suite 200
Fort Worth, TX 76102
Tel: 817-334-0400
Fax: 817-334-0401
Email: vowell@fsclaw.com

Attorneys for Plaintiff StratosAudio, Inc.

/s/ Ryan Yagura

O'MELVENY & MYERS LLP
Ryan K. Yagura
(TX Bar No. 24075933)
Nicholas J. Whilt (*pro hac vice*)
CA Bar No. 247738
Clarence A. Rowland (*pro hac vice*)
CA Bar No. 285409
400 S. Hope Street
Los Angeles, CA 90071
Tel.: 213-430-6000
Fax: 213-430-6407
Email: ryagura@omm.com
nwhilt@omm.com
crowland@omm.com

*Attorneys for Defendant Hyundai
Motor America*

/s/ Lewis Hudnell

HUDNELL LAW GROUP P.C.
Lewis E. Hudnell, III
lewis@hudnelllaw.com
800 W. El Camino Real Suite 180
Mountain View, California 94040
T: 650.564.3698
F: 347.772.3034

*Attorneys for Defendant Volvo Cars
USA, LLC*

/s/ Matthew Satchwell

John M. Guaragna
Texas Bar No 24043308
DLA PIPER LLP (US)
401 Congress Avenue, Suite 2500
Austin, TX 78701-3799
Tel: 512.457.7125
Fax: 512.457.7001
john.guaragna@us.dlapiper.com

Paul R. Steadman (*Pro Hac Vice*)
Illinois Bar No. 6238160
paul.steadman@dlapiper.com
Matthew Satchwell (*Pro Hac Vice*)
Illinois Bar No. 6290672
matthew.satchwell@dlapiper.com
Stephanie Lim (*Pro Hac Vice*)
Illinois Bar No. 6324246
stephanie.lim@dlapiper.com
Robert Groselak (*Pro Hac Vice*)
Illinois Bar No. 6332753
DLA PIPER LLP (US)
444 West Lake Street, Suite 900
Chicago, IL 60606
Telephone: (312) 368-4000
Facsimile: (312) 236-7516

Sangwon Sung (*Pro Hac Vice*)
California Bar No. 309380
sangwon.sung@dlapiper.com
DLA PIPER LLP (US)
2000 University Avenue
East Palo Alto, CA 94303
Telephone: (650) 833-2000
Facsimile: (650) 833-2001

*Attorneys for Defendants
Mazda Motors of America, Inc. and
Subaru of America, Inc.*

/s/ Mark Hannemann

SHEARMAN & STERLING LLP

David P. Whittlesey
300 W. 6th Street, Suite 2250
Austin, Texas 78701
Telephone: 512.647.1907
Facsimile: 512.857.6602
David.Whittlesey@shearman.com

Mark Hannemann
599 Lexington Avenue
New York, NY 10022
Telephone: 212.848.7696
Facsimile: 646.848.7696
Mark.Hannemann@shearman.com

Thomas R. Makin
599 Lexington, Avenue
New York, NY 10022
Telephone: 212.848.7698
Facsimile: 646.8487698
Thomas.Makin@shearman.com

*Attorneys for Defendant Volkswagen
Group of America, Inc.*

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and correct copy of the foregoing document has been served on July 14, 2021 to all counsel of record who are deemed to have consented to electronic service via the Court's CM/ECF system.

/s/ Ryan K Yagura
Ryan K. Yagura
O'Melveny & Myers LLP

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

STRATOSAUDIO, INC.,
Plaintiff,

§
§
§
§
§
§
§

6:20-CV-01125-ADA

v.

HYUNDAI MOTOR AMERICA
Defendant.

MEMORANDUM OPINION AND ORDER

Before the Court is Defendant Hyundai Motor America’s (“HMA” or “Hyundai”) Rule 12(b)(3) Motion to Dismiss for improper venue pursuant to 28 U.S.C. §§ 1400(b), 1406. Dkt. 12. After careful consideration of the relevant facts, applicable law, and the parties’ oral arguments, the Court **DENIES** HMA’s Motion.

I. BACKGROUND

Plaintiff StratosAudio, Inc. (“StratosAudio”) filed this action against HMA on December 11, 2020, asserting infringement of seven patents by HMA’s vehicles with certain infotainment systems. Dkt. 1. On February 22, 2021, HMA moved to dismiss the action for improper venue under Rule 12(b)(3). Dkt. 12. HMA is a California corporation with its principal place of business in Fountain Valley, California. Dkt. 1 at 2, ¶ 7. HMA may be served through its registered agent for service in the State of Texas and has been registered to do business in the State of Texas since at least May 13, 1986. *Id.*

For propriety of venue, Plaintiff alleges the following: HMA distributes new automobiles in this judicial district exclusively through its five authorized HMA dealerships in this District. *Id.* at 3, ¶ 10; Dkt. 21 at 3. All authorized HMA dealerships in this District are named with the “Hyundai” designation and prominently display Hyundai trademarks and use the Hyundai trade

name. Dkt. 1 at 3, ¶ 11. HMA dealerships in this District are displayed on HMA’s website as places of Hyundai, where users can locate the Hyundai dealerships, check available inventory, and schedule a test drive. *Id.* at ¶ 12. HMA provides new purchase warranties and warranty service and repairs through its authorized dealerships. *Id.* at 4, ¶ 13. HMA also directly controls various aspects of its dealerships’ operations, including the sale of automobiles, training service technicians through its Car Care Express program, and offering financing through Hyundai Motor Finance. *Id.* at ¶ 14. HMA further controls the sale or ownership transfer of its authorized dealers, including the right to refuse transfer and the operating location of the dealers. *Id.*

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). 12 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 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.’”¹ *Id.* at 1345.

¹ 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

III. DISCUSSION

The main dispute before the Court is whether Defendant HMA has “a regular and established place of business” in this District. The parties do not dispute that defendant HMA 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” 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

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.

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, 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.

HMA argues that it does not exercise any control over its dealerships in this District because the Texas Occupation Code “specifically prohibits auto manufactures and distributors from owning, operating, controlling, or acting in the capacity of an auto dealership.” Dkt. 12 at 4–5; 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 HMA does not exercise *de facto* control of the dealerships to some degree, nor does it mean that the dealerships are not places of HMA as a matter of law. *See, e.g., Blitzsafe*, 2018 WL 4849345, at *7.

As Plaintiff points out, HMA controls numerous aspects of the dealerships’ operations through the Hyundai Dealer Sales & Service Agreement. Dkt. 21 at 6-12. HMA’s alleged control

over its dealers include: (1) the dealers' premises and facilities ("DEALER agrees that all of its facilities will be satisfactory as to space, appearance, amenities, layout, equipment, and signage and will at all times be in accordance with HMA's minimum facilities standards, as amended from time to time."); (2) the dealers' inventory ("DEALER agrees . . . that it will, at all times, maintain at least the minimum inventory of Hyundai Motor Vehicles requested by HMA"; "Dealer shall not move or permit to be moved any Inventory from the Premises without the prior written consent of Lender."); (3) the price and manner of payment ("DEALER agrees to pay for Hyundai Products pursuant to such procedures as HMA may designate from time to time. . . . DEALER will make arrangements with its designated financial institution to accommodate the use of such systems."); (4) the dealers' minimum net working capital amount ("DEALER agrees to establish and maintain actual net working capital in an amount not less than the minimum net working capital If HMA determines, in its sole discretion, that changed circumstances require it to adjust the net working capital requirement hereunder, DEALER agrees to revise its minimum net working capital to be used in the dealership's operation accordingly."); (5) the price and the terms upon which dealers purchase HMP vehicles and maintenance service ("HMA reserves the right, without prior notice to DEALER, to establish and revise prices and other terms of sale for all Hyundai Products sold to DEALER under this Agreement."); (6) the terms and scope of warranties to be included in its vehicle sales ("DEALER is free to sell warranty or service contract protection for Hyundai Motor Vehicles which is different from and independent of HMA's warranties . . . however, DEALER agrees that if it elects to sell such independent warranties . . . DEALER will conspicuously disclose in writing upon the Customer's purchase order the extent to which the independent warranty or service contract protection purchased by the Customer overlaps that provided by HMA."); (7) monthly or even daily reporting of finances and operations by each dealer

(“Dealer shall provide to [HMA] (A) Dealer’s monthly factory/distributor financial statements . . . (B) . . . Dealer’s adjusted calendar year-end factory/distributor financial statements ...(C) . . . Dealer’s balance sheet as at the end of each fiscal year . . ., in each case reviewed by an independent certified public accountant acceptable to [HMA] . . ., and (D) Dealer’s corporate tax returns for each calendar year”; “DEALER agrees to . . . [a]ccurately report to HMA, with such relevant information as HMA may reasonably require, the delivery of each new motor vehicle to a purchaser by the end of the day in which is the vehicle is delivered to the purchaser thereof.”); (8) the IT equipment such as computers and data processing systems that its dealers must use and maintain (“Dealer shall provide [HMA] or its designee full access to Dealer’s computer systems and take such other action as may be requested by [HMA.]”); (9) the number of personnel that its dealers must have on-site and their certifications and training (“DEALER agrees to establish and maintain a complete service and parts organization, including a service manager, a parts manager and a sufficient number of Customer relations, service and parts personnel who meet such educational, management, technical training and competency standards as HMA may establish or approve.”); (10) performance reviews on the dealers’ sales, service, and parts, customer satisfaction, and even the dealer’s maintenance of its premises and facilities; and (11) restricting whether and to whom a dealer may sell or transfer its business (“[A]ny change in ownership, regardless of the share or relationship between parties, or any change in General Manager, from the person(s) identified herein, requires the prior written consent of HMA;” “Dealer shall not change its type of organization, jurisdiction of organization or other legal structure except with the prior written consent of [HMA.]”). Dkt. 21 at 6–21.

This Court is not persuaded by HMA’s argument that Texas law deters HMA’s exercise of control over its dealerships. As explained above, HMA boasts a broad scope of control over its

dealerships. Requiring dealerships to send daily reports to HMA is just one of many examples of its extensive control. Nevertheless, HMA argues that “[i]f any contractual term constituted ‘control,’ then the provision would be illegal and would therefore be unenforceable.” Dkt. 24 at 7. But HMA cannot have its cake and eat it, too. HMA cannot enter into the Sales & Service Agreement with dealers in this District and try to enforce the Agreement on the one hand, and on the other hand argue that provisions of the Agreement are unenforceable for venue purposes.

2. Defendant’s relationship with the dealerships is conditioned on the dealerships’ continued presence in this District.

As HMA points out, under Texas law, HMA is not permitted to directly sell vehicles to consumers in this District. Dkt. 12 at 4; Tex. Occ. Code § 2301.476(c) (“[A] manufacturer or distributor may not directly or indirectly . . . act in the capacity of a franchised or nonfranchised dealer.”). Therefore, the only way that HMA can sell its vehicles to consumers in this District is through authorized dealerships that it currently has in the District. As Plaintiff alleges, new Hyundai vehicles are available for purchase exclusively through these authorized dealers. Dkt. 21 at 3. Thus, it is not surprising that HMA imposed stringent restrictions on the locations and ownership transfer of its authorized dealership in this District: “DEALER agrees not to display Hyundai marks or to conduct any dealership operations . . . at any location other than the location(s) approved herein, without the prior written consent of HMA”; and “[A]ny change in ownership, regardless of the share or relationship between parties, or any change in General Manager, from the person(s) identified herein, requires the prior written consent of HMA.” *See id.* at 5 and 12.

3. Defendant represents to the public that it has a place of business in this District.

Under this factor, “[p]otentially relevant inquiries include 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.” *In re Cray*, 871 F.3d at 1363–64. “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.” *Id.* at 1364. “Marketing or advertisements also may be relevant, but only to the extent they indicate that the defendant itself holds out a place for its business.” *Id.* at 1363.

HMA represents to the public that it has a place of business in the Western District of Texas. When a user searches for Hyundai dealerships in the District, HMA’s website displays a list of its authorized dealerships, allows the user to search for these dealerships’ inventory, and gives the user an opportunity to schedule a test drive. Dkt. 21 at 4. HMA also allows all its dealerships in this District to display the “Hyundai” logo and use its Hyundai trademarks and tradenames. *Id.* at 3.

In fact, HMA actually engages in business from the locations of its dealerships in this District. First, HMA conducts business in this District by distributing Hyundai vehicles to its authorized dealers. Second, and more importantly, HMA provides new purchase warranties to consumers at the dealerships in this District. Dkt. 1, ¶ 13; Dkt. 21 at 9. HMA contends that the warranty services are performed by independent dealerships selected by vehicle owners. Dkt. 12 at 11. However, HMA does not deny that it pays for the warranty services. Under Texas law, that means HMA engages business in the state. Tex. Occ. Code § 2301.251(c) (“A manufacturer or distributor that directly or indirectly reimburses another person to perform warranty repair services on a vehicle is engaged in business in this state regardless of whether the manufacturer sells or offers for sale new motor vehicles in this state.”).

In view of the above, the Court finds that HMA ratifies the places of business of its authorized dealerships in this District and those dealerships are therefore “place[s] of the defendant” under the third *Cray* requirements.

B. Agents Conducting Defendant’s Business in this District

In *In re Google*, the Federal Circuit also ruled that “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.

1. The authorized dealers are HMA’s agents.

“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.” *Id.* at 1345 (citing 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)) (internal quotation marks omitted).

HMA argues that the dealerships are not HMA’s agents because the agreement explicitly specifies that “[t]his Agreement does not make DEALER the agent or legal representative of HMA . . . for any purpose whatsoever.” Dkt. 42 at 1. Again, it is the substance of the agreement that controls, rather than the label the parties assign to their purported relationship. *See, e.g., In re MyFord Touch Consumer Litig.*, 46 F. Supp. 3d 936, 956 (N.D. Cal. 2014) (agency is a fact-dependent relationship). “While cases generally find that dealership agreements do not create

general principal-agent relationships, it is not—as a matter of law—impossible to find a specific agency relationship as to matters subject to manufacturer control.” *Stevens v. Ford Motor Co.*, 2020 U.S. Dist. LEXIS 256298, *17 (S.D. Tex. Nov. 2, 2020).

As discussed above, HMA exercises a broad scope of control over its authorized dealerships in this District through their agreements. Among others, HMA requires daily reports regarding sales and deliveries from the dealerships, restricts the locations and ownership transfers of the dealerships, and provides warranty services to consumers through the dealers. Taken together, HMA has a substantial control over its dealerships. Further, the agreements between HMA and its dealerships clearly show that there is manifestation of consent by HMA to the dealerships that the dealerships shall act on HMA’s behalf, and the consent by the dealerships to act. Therefore, the Court finds that Hyundai authorized dealerships in this District are agents of HMA at least for venue purposes. In fact, it is not uncommon for a district court to find a principal-agency relationship between an auto manufacturer and its dealers. For example, the District of New Jersey found that “the dealer acted as BMWNA’s agent, or at least that the two acted together.” *Morano v. BMW of N. Am., LLC*, 928 F. Supp. 2d 826, 837-38 (D.N.J. 2013); *see also Kent v. Celozzi-Ettleson Chevrolet, Inc.*, No. 99 C 2868, 1999 WL 1021044, at *4 (N.D. Ill. Nov. 3, 1999) (“While it is certainly true that the mere fact that Celozzi–Ettleson is an authorized General Motors dealer does not make it General Motors’ agent, it is equally true that an automobile dealership may under certain circumstances be an agent of the manufacturer.”). Particularly, the *Morano* court found that “BMWNA and the dealer function as an integrated, two-part seller” because BMWNA makes all of its consumer sales or leases through its authorized dealers and services the vehicles through BMWNA’s Warranty or Maintenance Program, while the dealers

handle the mechanics of the sale or lease and the warranty services. *Morano*, 928 F. Supp. 2d at 837-38.

2. *The authorized dealers conduct HMA's business.*

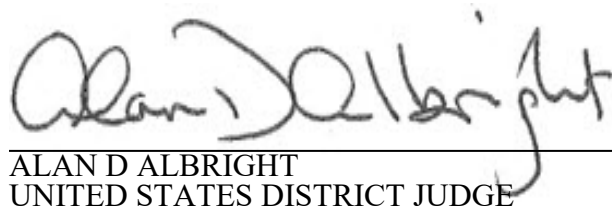
The authorized dealerships are also conducting HMA's business in this District. HMA is in the business of manufacturing and distributing vehicles to consumers. As explained above, the only way that HMA can distribute its vehicles to consumers in this District is through its authorized dealerships in this District. Further, HMA provides new purchase warranties and services to the consumers through its dealerships.

Therefore, the Court finds that the Hyundai dealerships in this District are agents of HMA conducting HMA's business in this District.

IV. CONCLUSION

For the reasons above, the Court finds that Defendant has a "regular and established place of business" in the Western District of Texas and venue is proper in this District under Section 1400(b). The Court therefore **DENIES** Defendant's Motion to Dismiss or Transfer.

SIGNED this 17th day of September, 2021.


ALAN D ALBRIGHT
UNITED STATES DISTRICT JUDGE

PROOF OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Federal Circuit by using the appellate CM/ECF system on November 1, 2021.

A copy of the foregoing was served upon the following counsel of record and district court via an express carrier:

Charles Larsen
Daniel S. Sternberg
White & Case LLP
75 State Street, 24th Floor
Boston, MA 02109
Telephone: (617) 979-9300
Email: charles.larsen@whitecase.com
Email: dan.sternberg@whitecase.com

Michael J. Songer
White & Case LLP
701 13th Street NW
Washington, DC 20005
Telephone: (202) 626-3200
Email: michael.songer@whitecase.com

Jonathan J. Lamberson
Henry Yee-Der Huang
White & Case LLP
3000 El Camino Real, Two Palo Alto
Square, Suite 900
Palo Alto, CA 94306
Telephone: (650) 213-0300
Email: lamberson@whitecase.com
Email: henry.huang@whitecase.com

Corby R. Vowell
Friedman, Suder & Cooke
604 E. 4th Street, Suite 200
Fort Worth, TX 76102
817-574-7010
Email: vowell@fsclaw.com

Hon. Alan D Albright
United States District Court for the
Western District of Texas
800 Franklin Avenue, Room 301
Waco, Texas 76701
Telephone: (254) 750-1510

I declare under penalty of perjury under the laws of the United States that
the foregoing is true and correct.

Dated: November 1, 2021

/s/ Bradley N. Garcia
Bradley N. Garcia
Counsel for Petitioner