2022-108

United States Court of Appeals for the Federal Circuit

IN RE VOLKSWAGEN GROUP OF AMERICA, INC.,

Petitioner.

On Petition for a Writ of Mandamus to the United States District Court for the Western District of Texas in Case No. 6:20-cv-01131-ADA, Honorable Alan D. Albright, Judge

STRATOSAUDIO, INC.'S RESPONSE TO PETITION FOR A WRIT OF MANDAMUS

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NOVEMBER 9, 2021

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 22-108

Short Case Caption In re Volkswagen Group of America, Inc.

Filing Party/Entity StratosAudio, Inc.

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Date: 11/09/2021

Signature: /s/ Jonathan Lamberson

Name: Jonathan Lamberson

1. Represented Entities. Fed. Cir. R. 47.4(a)(1).	**2. Real Party in Interest.** Fed. Cir. R. 47.4(a)(2).	**3. Parent Corporations and Stockholders.** Fed. Cir. R. 47.4(a)(3).
Provide the full names of all entities represented by undersigned counsel in this case.	Provide the full names of all real parties in interest for the entities. Do not list the real parties if they are the same as the entities. ☑ None/Not Applicable	Provide the full names of all parent corporations for the entities and all publicly held companies that own 10% or more stock in the entities. ☑ None/Not Applicable
StratosAudio, Inc.		

☐ Additional pages attached

4. Legal Representatives. List all law firms, partners, and associates that (a) appeared for the entities in the originating court or agency or (b) are expected to appear in this court for the entities. Do not include those who have already entered an appearance in this court. Fed. Cir. R. 47.4(a)(4).

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5. Related Cases. Provide the case titles and numbers of any case known to be pending in this court or any other court or agency that will directly affect or be directly affected by this court's decision in the pending appeal. Do not include the originating case number(s) for this case. Fed. Cir. R. 47.4(a)(5). See also Fed. Cir. R. 47.5(b).

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I. INTRODUCTION

Petitioner Volkswagen Group of America, Inc.'s ("VWGoA") request for mandamus asks this Court to ignore the detailed factual determinations from the district court showing the extensive control VWGoA has over its dealers. Yet VWGoA does not contest a single factual finding necessary to the district court's ruling, nor can VWGoA establish that the district court based its opinion on a clearly erroneous view of the law. In short, VWGoA's petition simply seeks a "do-over" and asks this Court to discount the district court's factual findings and inappropriately substitute its judgment for that of the district court. That is not a proper approach to mandamus, and its petition should be denied.

On agency, this is simply not a close case: VWGoA controls what types of employees the dealer must employ, the interior and exterior appearance of the dealership, what furniture and lighting the dealership uses, what inventory the dealership maintains, what stationery and business forms the dealership uses, what brochures the dealership displays, what tools the dealership uses for repairs, what computer equipment the dealership must purchase, and the working capital the dealership must maintain. VWGoA can require dealership employees to attend training sessions. VWGoA can send dealers parts and materials without the dealer's consent. VWGoA can enter the dealership unannounced to conduct inspections and audits. VWGoA has complete power over dealership location, relocation, transfers

of ownership, or changes in management. Finally, VWGoA uses the dealerships to provide warranties and warranty repairs, which by law constitutes VWGoA doing business in the state of Texas. With this level of control, there is no genuine dispute VWGoA's dealers are its agents. At the very least, it was not a "clear abuse of discretion" for the district court to rely on this evidence to find venue under this Court's precedents. Similarly, the district court did not clearly err in finding VWGoA was in the business of marketing and distributing cars in the United States, and that it uses dealers to carry out that business.

As to ratification, there was also no abuse of discretion in the district court's ratification decision. The district court's findings were based on the high level of control VWGoA exercises over a dealer's physical space, the fact that VWGoA directs customers to these physical locations, and the fact that VWGoA conditions dealership upon location. Once again, VWGoA does not contest a single one of the factual findings necessary to the district court's ruling. Because there was no clear abuse of discretion, VWGoA's petition for an extraordinary writ should be denied.

II. THE PRIOR PROCEEDINGS

On February 19, 2021, VWGoA moved to dismiss or transfer under 28 U.S.C. §§ 1400(b) and 1406(a). SAppx001-006. In its motion, VWGoA provided a single argument against a proper venue finding—that because its franchised dealerships were separate corporate entities, VWGoA "does not have any offices, warehouses,

or other places of business within the Western District of Texas." *Id*. VWGoA did not analyze its franchise agreements with its dealerships, or apply this Court's venue framework, as articulated in *In re Cray*, 871 F.3d 1355 (Fed. Cir. 2017). *Id*.

In response, StratosAudio provided two independent bases for venue under § 1400(b). First, StratosAudio demonstrated that VWGoA ratified its franchisees places of business as its own. SAppx012-017. In support, StratosAudio pointed to VWGoA's website, which allows users to view inventories at local dealerships, apply for financing, and schedule test-drives. *Id*. StratosAudio further noted that the degree of control VWGoA possessed over its dealerships through its franchise agreements provided additional support that VWGoA held out the dealership locations as its own places of business. SAppx017-025. Second, StratosAudio explained that the dealers are VWGoA's agents and, under Texas law, VWGoA was conducting business at its dealership locations. SAppx036-041.

On June 4, 2021, before the district court had an opportunity to rule on VWGoA's motion, VWGoA petitioned this Court for a writ of mandamus, demanding that this Court order the district court to dismiss or transfer StratosAudio's complaint. Case 21-149, ECF No. 2-1, at 1.[1] The Court denied

[1] While VWGoA's petition was pending, the district court ordered supplemental briefing regarding this Court's holding in *In re Google*, 949 F.3d 1338 (Fed. Cir. 2020) that "a 'regular and established place of business' requires the regular,

VWGoA's petition, explaining that "Volkswagen has not shown that it is unable to obtain a ruling on its venue motion in a timely fashion without mandamus." Case 21-149, ECF No. 5, at 2. Unsatisfied with the Court's ruling, VWGoA petitioned for panel rehearing, again demanding that the Court take action before the district court fully considered the merits of VWGoA's arguments. Case 21-149, ECF No. 6, at 2. The Court summarily denied the petition. Case 21-149, ECF No. 7, at 1.

On September 20, 2021, the district court denied VWGoA's motion. Appx0001. In its decision, the district court determined that VWGoA ratified its dealers' places of business as its own, and VWGoA employed the dealers as its agents to conduct business. Appx0008, Appx0010. The district court's opinion relied on numerous factual findings, none of which VWGoA contests.

To support its conclusion of ratification, the district court found that VWGoA exerted a significant degree of control over its dealers, including over:

> (1) the dealers' premises and facilities and their use and maintenance; (2) the dealers' use of Volkswagen trademarks and trade names in advertising and marketing; (3) the price and terms upon which its dealers purchase its vehicles; (4) the dealers' inventory of vehicles and parts; (5) the terms and scope of warranties to be included in its vehicle sales, the manner in which its dealers provide notice and advertise such warranties, and the rate or price at which a Volkswagen or Audi dealer will be reimbursed for services; (6) monthly reporting from the dealers of their finances and operations; (7) the IT equipment such as

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physical presence of an employee or other agent of the defendant conducting the defendant's business at the alleged 'place of business.'" SAppx034-035 (quoting *id.* at 1345).

> computers that its dealers must use and maintain; (8) the number of personnel that its dealers must have on site and their certifications and training; (9) performance reviews on the dealers' sales, service, and parts, customer satisfaction, and even the dealer's maintenance of its premises and facilities; and (10) restricting whether and to whom a dealer may sell or transfer its business.

Appx0005–0006.

The district court also found that VWGoA's relationship with its dealers is conditioned on the dealer's continued presence in the district. Appx0006. Finally, the district court found that VWGoA represented to the public that it had a place of business because "[w]hen a user searches for Volkswagen dealerships in the District, Volkswagen'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." Appx0007. The district court additionally found that, under Texas law, because VWGoA manages procedures for processing warranty claims, "that means Volkswagen engages in business in the state." *Id.* (citing Tex. Occ. Code § 2301.251(c)).

The district court found many of the same uncontested facts also supported its conclusion that the dealerships are VWGoA's agents. Specifically, the district court found that the franchise agreements demonstrated that that "Volkswagen exercises a broad scope of control over its authorized dealerships." Appx0009. The district court also found that "the agreements between Volkswagen and its dealerships clearly show that there is manifestation of consent by Volkswagen to the dealerships

that the dealerships shall act on Volkswagen's behalf, and the consent by the dealerships to act." *Id.* The district court also found that the dealerships were VWGoA's agents because they conducted VWGoA's business in the district. Appx0010.

III. LEGAL STANDARDS

"In general, three conditions must be satisfied for a writ to issue: (1) the petitioner must demonstrate a clear and indisputable right to issuance of the writ; (2) the petitioner must have no other adequate method of attaining the desired relief; and (3) the court must be satisfied that the writ is appropriate under the circumstances." *In re Apple Inc.*, 979 F.3d 1332, 1336 (Fed. Cir. 2020). "Moreover, mandamus review of an improper venue decision under § 1406(a) is rarely granted in the absence of exceptional circumstances." *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1011 (Fed. Cir. 2018). Exceptional circumstances are those "amounting to a judicial usurpation of power" or a "clear abuse of discretion." *Cheney v. United States Dist. Ct.*, 542 U.S. 367, 380 (2004).

Section 1400(b) establishes three requirements for venue: "(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; *In re Google LLC*, 949 F.3d 1338, 1339 (Fed. Cir. 2020). "[U]nder the second *Cray*

factor, a 'place of business' generally requires an employee or agent of the defendant to be conducting business at that place." *Google*, 949 F.3d at 1344.

IV. ARGUMENT

VWGoA does not contest that its dealerships are physical places in the district, or that they are regular and established places of business. The only issues are whether a dealership is a "place of the defendant," and whether the dealerships are VWGoA's agents for venue purposes. VWGoA cannot meet its burden to show that the district court's ruling on either issue was an abuse of discretion.

A. VWGoA Has Not Shown the District Court Abused its Discretion in Finding Dealers are its Agents for Venue Purposes

The law of agency is not in dispute. "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.* at 1345.

As discussed above, and as the district court correctly found, VWGoA has the right to direct and control its dealers, in many respects. For example:

- VWGoA has control over the name of the dealership (Appx0173);
- VWGoA controls the number and type of employees a dealer must employ at its dealership (Appx0195-0198, Appx0065, Appx0148);

- VWGoA controls the interior and exterior appearance of the dealership, and how it is constructed (Appx0053-0054, Appx0186-0188, Appx0148);
- VWGoA controls the use of signs, trademarks and logos at the dealership (Appx0066, Appx0173, Appx0148);
- VWGoA controls what furniture and lighting the dealer uses (Appx0183);
- VWGoA controls what stationery and business forms the dealership uses (Appx0066, Appx0149);
- VWGoA controls what brochures the dealers have, how many they must have on hand, and how they are displayed (Appx0066, Appx0174, Appx0149);
- VWGoA controls what tools the dealers use for repairs, and how many repair stalls they have (Appx0054, Appx0069, Appx0151);
- VWGoA controls working capital, owner equity, and amounts for lines of credit (Appx0048, Appx0097-0098, Appx0140, Appx0175);
- VWGoA controls inventory levels (Appx0071); and
- VWGoA has control over the types of computer hardware and software systems the dealership uses (Appx0074, Appx0156).

Notably, VWGoA does not challenge that it possesses these and all the other indicia of control discussed in the district court's opinion. These indicia of control are what led the district court to correctly conclude the dealers in the district serve as VWGoA's agents. Appx0008-0010. Based on this undisputed factual record, this decision was not "a clear abuse of discretion."

VWGoA argues (at 22-23) that the facts here are analogous to those present in *Andra Grp., LP v. Victoria's Secret Stores, L.L.C.*, 6 F.4th 1283 (Fed. Cir. 2021), but this is incorrect. In *Andra*, the patent holder argued store *employees* were agents of the store's parent corporation, but the parent company had no ability to hire or fire those store employees. *Id*. at 1287 ("Andra argues that Stores employees are agents of LBI, Direct, and Brand"). Here, the district court correctly found it was the ***dealers themselves***, not their employees, who serve as VWGoA's agents. Appx0008-0010. There is no dispute VWGoA has the ability to hire and terminate its dealers. *See* Appx0080 ("Termination"); Appx0161. Also, as noted above, the agreements at issue here go far beyond anything in *Andra*, covering minutiae such as lighting, furniture, stationery, and brochures.

VWGoA also identifies (at 23) various district court decisions it says have found dealers are not agents of manufacturers, but it acknowledges other district court decisions have reached a different result. This is unsurprising since agency

determinations are fact-intensive. The facts here leave no reasonable dispute about the existence of agency but, at the very least, there was no clear abuse of discretion.

VWGoA also argues (at 24) that "no fiduciary relationship exists between VWGoA and the dealerships," but it offers no explanation for its argument. VWGoA is apparently arguing this Court must find a fiduciary duty before finding agency, but that is backwards: agency creates a fiduciary duty. *See* Restat. 3d of Agency § 8.01; *Chou v. Univ. of Chi. & Arch Dev. Corp.*, 254 F.3d 1347, 1362 (Fed. Cir. 2001) ("A fiduciary relationship automatically arises from particular relationships, such as attorney-client and principal-agent"); *Shum v. Intel Corp.*, 633 F.3d 1067, 1077 (Fed. Cir. 2010) (same). Also, a "fiduciary duty" only requires "a duty to act for another's benefit, while subordinating his or her own personal interest to that other person." *See Univ. of W. Va. v. Van Voorhies*, 278 F.3d 1288, 1300 (Fed. Cir. 2002). It is not difficult to find many examples of fiduciary duties in the VWGoA dealership agreements. For example, VWGoA requires dealers to make warranty repairs, even for cars that dealer did not sell. Appx0070, Appx0152. VWGoA makes dealers agree to maintain the inventory it specifies (Appx0071, Appx0152), even if the dealer would like to purchase more or fewer vehicles. Ultimately the dealer agrees to use "best efforts" to sell VWGoA cars. Appx0067,

Appx0149. These are but a few of the many ways VWGoA places duties upon its dealers through its dealership agreements.[2]

VWGoA also argues (at 25) that its dealership agreements "expressly and repeatedly disclaim agency," but that is not dispositive. *See* Restat. 3d of Agency § 1.02 ("Whether a relationship is characterized as agency in an agreement between parties … is not controlling."); *see also Pac. Gas & Elec. Co. ex rel. Brown v. United States*, 838 F.3d 1341, 1359 (Fed. Cir. 2016) ("[P]arties' statements in a contract are not dispositive as to the existence of an agency relationship."). The indicia of control discussed above are far too extensive to be swept away by some self-serving boilerplate.

VWGoA also suggests in a footnote that the Court should not find agency because it is not allowed to have control over its dealerships in Texas. If VWGoA is concerned about the result of such a holding, it could simply amend its dealership agreements to remove the extensive control provisions. VWGoA's argument is also

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[2] Cases discussing "fiduciary duty" in the context of dealers involve tort claims brought between the dealer and the manufacturer, an issue not present here. While VWGoA raises concerns about increased tort liability, there are already limitations on liability of a principal for the acts of its agent. *See* Restat. 3d of Agency § 7.03. Also, findings on venue do not necessarily impact liability determinations. *See, e.g.*, *Snyders Heart Valve LLC v. St. Jude Med. S.C., Inc.*, No. 4:16-cv-00812-ALM-KPJ, 2018 U.S. Dist. LEXIS 105770, at *14 (E.D. Tex. Mar. 7, 2018) ("there is a distinction between 'preliminary examination' of venue at the motion to dismiss stage and 'subsequent findings' based on the merits")

irrelevant because, even if its dealership agreements are somehow unenforceable, its dealers have nevertheless chosen to voluntarily enter into these agreements and to give VWGoA *effective* control over their operations.

Regardless, it is not necessary for this Court to address whether VWGoA is violating Texas Occupations Code § 2301.476(c)(2). The only question presented here is whether the district court committed a clear abuse of discretion in finding VWGoA's dealers were sufficiently its agents for venue purposes. There was no such abuse of discretion, so the petition should be denied.[3]

B. The Dealerships Conduct VWGoA's Business, and VWGoA Manifested Assent

VWGoA suggests (at 25-26) that even if its dealers are its agents, they are not conducting VWGoA's business, which it says is limited to "selling vehicles to dealers, not to consumers." The very idea that dealers are not conducting VWGoA's business is absurd. VWGoA's website demonstrates that VWGoA is in the business

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[3] AAI's amicus brief raises a concern about whether dealerships could be served with process through dealers, suggesting this would be "completely unworkable." It does not explain why. Texas law already allows a corporation to designate another corporation as its agent for service of process. *See* Tex. Bus. Orgs. Code § 5.201. VWGoA has in fact designated a corporate agent for service of process in Texas, and it is unclear why anyone would serve process through any other agent. Regardless, even if they did, that would put VWGoA in the same position as any other company with employees or agents in the district. If VWGoA does not like the result, it can always modify its dealership agreements to eliminate its control over the dealers.

of selling cars: it allows users to view vehicles, apply for financing, and arrange for test drives. Appx0025. VWGoA runs marketing campaigns urging customers to buy Volkswagen-branded vehicles. *See* Appx0173-0174; Appx0097 (referring to "Volkswagen-advertised … marketing programs); Appx0020, ¶ 9. VWGoA collects personal information from consumers, including information collected by its dealers, and uses that information to aid in its marketing efforts. Appx0025.[4] Presumably VWGoA agrees marketing vehicles is one of its business purposes (Appx0020, ¶ 9), so using dealers to collect the data it uses for marketing is clearly conducting VWGoA's business.

VWGoA also provides "schools, special training and meetings for Dealer's personnel." Appx0064, Appx0147. VWGoA reviews its dealer's sales performance. *Id.*; Appx0075; Appx0157 ("DEALER PERFORMANCE REVIEW"). VWGoA can even make direct payments to dealership employees through an "incentive program." Appx0071, Appx0153. These efforts, too, aid VWGoA's business purposes, even though they focus on a dealer's sales to end customers.

Warranty services are another clear example of VWGoA doing business in the district. VWGoA provides warranties for new vehicles. Appx0073, Appx0155.

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[4] VWGoA's website confirms this allegation in the complaint. *See* https://www.vw.com/en/privacy.html.

Dealers are required to explain the warranties to customers and make their text a part of the dealer's contract. *Id*. Dealers must follow VWGoA's instructions for handling warranty repair work. *Id*. Finally, VWGoA agrees to reimburse dealers for such warranty repairs. Appx0070, Appx0152. Under Tex. Occ. Code § 2301.251(c), this constitutes conducting "business in this state," and VWGoA is conducting that business at the locations of its authorized dealers.

VWGoA has clearly manifested assent to have its dealers carry out each of the above activities, as demonstrated by its dealership agreements and the fact that there are dealers present in the district. Appx0024. VWGoA's only argument against assent is a separate provision in its agreement that states its dealerships are not its agents, but as discussed above, that is not dispositive. Because the dealers carry out VWGoA's business in the district as VWGoA's agents, the district court did not clearly err in finding an agency relationship, and venue is proper.

C. VWGoA Has Not Shown the District Court Abused its Discretion When it Found Ratification

As the Court noted in *Cray*, "[t]he [venue] statute's 'main purpose' was to 'give original jurisdiction to the court where a permanent agency transacting the business is located.'" 871 F.3d at 1361. If the Court finds VWGoA's dealers are its

agents for venue purposes, the same facts also demonstrate that ratification is present.[5]

Under the third *Cray* factor, for a location to be a "place of the defendant," "the defendant must establish or ratify the place of business." *Cray*, 871 F.3d at 1363. This is a fact-specific inquiry. *See id.* at 1362. The Court has recognized relevant considerations that would establish ratification 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;" and (3) marketing or advertisements "to the extent they indicate that the defendant itself holds out a place for its business;" and (4) "the nature and activity of the alleged place of business of the defendant in the district in comparison with that of other places of business of the defendant in other venues." *Id.* at 1363–64. It has also made clear these are not the only possible ways to find ratification. *See ZTE*, 890 F.3d at 1015. Here, the district court did not commit clear error in analyzing the

[5] The existence of agency further distinguishes this case from *Andra*. There, the patent holder lost its agency argument, and alternatively attempted to argue two related corporate entities were not distinct. Here, StratosAudio does not argue a lack of corporate separateness, and showing agency does not require the same proofs as ignoring the corporate form. Indeed, agency assumes the principal and agent are separate legal entities. *See* Restat. 3d of Agency § 1.01.

relevant *Cray* and *ZTE* ratification factors and finding VWGoA ratified its dealers places of business.

1. VWGoA Exercises Attributes of Possession or Control Over a Dealer's Location

There should be no dispute that VWGoA "controls numerous aspects of its dealerships' operations," as the district court correctly found. Appx0005–0006. Indeed, the district court found ten separate indicia of such control (*id.*), and VWGoA does not dispute any of the district court's fact findings. VWGoA Pet. at 3–4. As just one example, VWGoA has almost complete control over the dealer's physical premises: it has the authority to approve or reject any proposed locations and the structure of its dealer's premises; it prohibits its dealers from changing the location or structure of its premises without its approval; it further requires its dealers to construct and use its facilities according to its specifications and requirements, including specific designs; it prohibits dealers from "(a) mak[ing] any major structural change in any of the Dealer's Premises, (b) chang[ing] the location of any of Dealer's Premises or (c) establish[ing] any additional premises for Dealer's Operations" without VWGoA's approval; and it specifies how its dealers' premises and facilities should be maintained and used. *See* Appx0048, Appx0053-0054, Appx0140, Appx0148, Appx0157, Appx0173. VWGoA even controls what chairs and lighting its dealers must use. Appx0183. Consequently, the district court's conclusion that VWGoA "exercises control over the dealerships' places" is not

based on an erroneous view of the law or on a clearly erroneous assessment of the evidence, and cannot constitute an abuse of discretion.

VWGoA argues (at 12) that it has insufficient control over dealerships because its employees "would be trespassing if they entered one of the dealerships uninvited." First, it is not clear that this is true. For example, VWGoA apparently has the ability to conduct unannounced inspections. Appx0124, Appx0156. To the extent VWGoA is arguing it cannot inspect after a store is closed, that is irrelevant because an agency relationship presupposes some reasonable limits on the scope of the agency. *See* Restat. 3d of Agency § 1.01 ("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…").

VWGoA also argues (at 10) that its dealers are "separate corporations, not alter egos." This is irrelevant because StratosAudio alleges the dealers are VWGoA ***agents***, not its alter egos. A corporation maintains its separate legal personality despite entering into an agency relationship. *See* Restat. 3d of Agency § 1.01 ("[d]espite 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."). VWGoA cites *Andra* for its language about "corporate separateness," but there the patent holder lost its agency argument,

and alternatively attempted to argue the two related corporate entities were not distinct. 6 F.4th at 1289. Here, StratosAudio makes no such argument.[6]

VWGoA attempts (at 13) to analogize itself to the Non-Store Defendants in *Andra*, but that comparison is misplaced. This Court said in *Andra* that the defendants merely "work[ed] together in some aspects." *Id*. at 1290. The record here is much more extensive, with VWGoA dictating where its dealerships are located, what they do at their physical space, what tools they use, and several other indicia of control.

VWGoA also argues in a footnote that it "does not own or lease the dealers' premises." That is irrelevant: this Court held in *Google* that "a 'place of business' is not restricted to real property that the defendant must 'own[] or lease.'" *See* 949 F.3d at 1343.

Finally, VWGoA argues the fact that it does not display its own legal name (Volkswagen Group of America, Inc.) at dealerships weighs against ratification. But VWGoA uses the same branding and logos as its foreign parent. *See, e.g.*, Appx0048-52, Appx0059, Appx0091, Appx0107. Ultimately, what name and logo VWGoA obligates its dealers to display is irrelevant; what is relevant is the fact that VWGoA has sufficient control over the dealers' physical space to require them to

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[6] As discussed further below, *Andra* cannot be read to suggest a finding of alter ego is necessary to establish proper venue.

show the signage and logos of VWGoA's choosing. This evidence demonstrates ratification.[7]

2. VWGoA Conditions Dealership On Location

The district court found, and VWGoA does not contest, that VWGoA imposes "stringent restrictions on the locations and ownership transfer of its authorized dealership." Appx0006. VWGoA admits it has "the general power to approve locations and ownership." VWGoA Pet. at 16–17. In fact, VWGoA's location-based restrictions are extensive:

- Dealers agree they will not make any major structural changes to their premises, change the location of the dealership, or establish any additional premises for dealership operations without VWGoA's prior written consent (Appx0048, Appx0140);
- VWGoA must review and approve the dealer's construction plans (Appx0053-0054);
- VWGoA places requirements on dealership square footage, the number of repair stalls, how many cars must be displayed, the type of

[7] VWGoA (at 16) identifies cases where district courts have found shared branding insufficient to support venue. As discussed above, shared branding is just one of dozens of indicia of control present here. Whether each fact alone is independently sufficient to support venue is not a proper way to conduct the analysis required under *Cray*.

furniture, lighting, tools and workshop equipment (Appx0054, Appx0151, Appx0183-0190, Appx0193); and

- VWGoA dictates the dealership's computer software, hardware, and office equipment (Appx0074, Appx0156, Appx0191-0192).

VWGoA will evaluate the dealer's premises for compliance with each of these requirements. Appx0075, Appx0157. In other words, VWGoA has control over where the dealers are (and are not) located, how the dealerships are built, what they contain, what inventory and parts they store, what computers they use, and many other factors. This is far more than merely "approving a dealer's location" or "the simple act of shipping a product from one location outside a district . . . to another inside the district," as VWGoA suggests in its brief (at 17-20), and it is more extensive location-based control than any prior venue case this Court has addressed.

VWGoA argues (at 17) that its dealership requirements are not "district-based distinctions." Presumably, it is suggesting its districts in the Western District of Texas are no different from its facilities elsewhere, but that is false: VWGoA has to approve each location of each dealership. If VWGoA did not want to do business in West Texas, it could have located its dealerships elsewhere. This is far different from the homeowners in *Cray*, who presumably were able to choose where to purchase their own homes. Also, VWGoA's argument ignores the provision of its agreements that allow it to ship parts and other materials to its dealers "without

Dealer's authorization." Appx0068, Appx0150. In other words, if VWGoA wants to store parts in West Texas, having a dealership there gives it the ability to do so. This precisely aligns with the relevant *Cray* factor, that VWGoA "conditioned … the storing of materials at a place in the district **so that they can be distributed or sold from that place**." 871 F.3d at 1363 (emphasis added).

Finally, VWGoA argues (at 17) that "approving the [dealer's] location does not communicate to the public that the dealer's place of business is VWGoA's." This improperly conflates the second *Cray* factor with the third which, as discussed below, relates to whether VWGoA represents it has a place of business in the district.

The district court correctly reasoned that, given the stringent restrictions VWGoA imposed on its dealers, and the fact that "the only way that Volkswagen can sell its vehicles to consumers in this District is through authorized dealerships," it was clear that VWGoA's relationship with the dealerships is conditioned on the dealerships' continued presence in the district. *See* Appx0006. This conclusion is not based on an erroneous view of the law or on a clearly erroneous assessment of the evidence and cannot constitute an abuse of discretion. Appx0007.

3. VWGoA Represents It Has a Place of Business in the District

The district court found, and VWGoA does not contest, that VWGoA distributes vehicles to authorized dealers in the district, that its website "allows the user to search for [] dealerships' inventory, and gives the user an opportunity to

schedule a test drive," and that VWGoA provides new purchase warranties to consumers at dealerships. Appx0007. As VWGoA admits, under Texas law, providing warranty services is engaging in business in the state. Tex. Occ. Code § 2301.251(c); VWGoA Pet. at 20 (admitting that reimbursing dealers for warranty service charges "may be considered doing business in the state of Texas"). Consequently, the district court's conclusion that VWGoA "represents to the public that it has a place of business in the District" is not based on an erroneous view of the law or on a clearly erroneous assessment of the evidence and cannot constitute an abuse of discretion.

VWGoA again argues (at 18) that it does not require dealers to display its corporate name, but as discussed above, it requires dealers to display the same trademark and logos VWGoA uses.

Finally, VWGoA argues the district court confused jurisdiction with venue. This is incorrect: it is VWGoA that confuses the two doctrines. One part of the test for agency, as discussed above, is that dealers do VWGoA's business at the dealer's facility. Warranty repair services paid for by VWGoA are acts of VWGoA doing its business in the district under Texas law. The fact that VWGoA directs customers to its dealers in West Texas for these services is also evidence VWGoA represents it has a place of business in West Texas. This evidence is thus relevant to both portions of the district court's venue tests.

4. Volkswagen Never Raised The Nature and Activity of the Alleged Place of Business Versus Other Places of Business

VWGoA argues (at 10-11) that the district court "ignored" the fourth *Cray* factor for ratification, but in fact VWGoA never discussed this factor in its briefing below. *See* SAppx001-005, SAppx027-033, SAppx073-078. It was therefore not an abuse of discretion for the district court not to consider this unaddressed factor.[8]

D. Prior Cases Do Not Address the Unique Facts Present Here

VWGoA contends that other contrary decisions on venue and agency based on car dealerships are correct, and show a split that warrants mandamus review. These contentions are misplaced. VWGoA's cited cases involved distinguishable facts, including different car manufacturers and different state laws. Additionally, the current case presents a more complete record about the manufacturer-dealership relationships at issue.

VWGoA relies primarily (at 13-14) on *Omega Patents, LLC v. Bayerische Motoren Weke AG*, a decision by the Northern District of Georgia that found venue under § 1400(b) improper for BMW of North America. 508 F. Supp. 3d 1336 (N.D. Ga. 2020). There, the plaintiff alleged only that BMWNA had five dealerships in the metro-Atlanta area, and coordinated business and marketing activities with those

[8] Regardless, as discussed above, VWGoA has dealerships around the country, and they are all subject to these same restrictions.

dealerships, such as through a website. *See id.* at 1340, 1342. The district court found the complaint lacked sufficient allegations about agency. *See id.* at 1340 ("Absent such allegations . . . ."). That is not the situation here, where the record includes dealership agreements and a VWGoA declaration demonstrating that VWGoA exercises extensive control over dealerships' facilities, inventory, premises, signage, and financial records, as detailed above.

As to ratification, *Omega* is also wholly distinguishable. That district court believed that *Cray* did not allow for ratification "in the absence of an alter-ego relationship" because *Cray* addressed "a residential home office." *Id.* at 1342. This improperly collapses the agency and ratification inquiries into one. As explained above, the mere fact that *Cray* involved a home office does not mean that ratification is only possible on the basis of employee locations. Here, the dealerships themselves act on VWGoA's behalf as VWGoA's agents. Moreover, *Omega* did not cite any Georgia law comparable to Texas Occupations Code § 2301.251(c), which says reimbursing for warranty work is doing business in Texas.

VWGoA's remaining cited cases do not support mandamus either. VWGoA relies on *West View Research, LLC v. BMW of North America, LLC*, where the Southern District of California also rejected venue under § 1400(b) for BMWNA. No. 16-2590, ECF No. 64-1 (S.D. Cal. Feb. 5, 2018). There again, however, the district court focused almost exclusively on the manufacturer and the dealerships

being "two distinct corporate entities," and whether "the Court could ignore the formal corporate separateness of Defendants and the dealerships." *Id.* at 13-14. Again, corporate distinctness does not apply to the question of agency. The *West View* court also conducted essentially no analysis on the ratification prong. *Id.* at 9. Here, a proper ratification analysis based on the considerations in *Cray* and *ZTE* shows that the Western District of Texas did not clearly abuse its discretion in finding that Hyundai ratified its dealerships' places of business. Also, as in *Omega*, the *West View* decision cites no state statute about warranty work—indeed, the case has no discussion of warranties at all. VWGoA's other cited cases involving "distributors" simply do not apply here. *E.g.*, *Reflection, LLC v. Spire Collective LLC*, No. 17-cv-1603-GPC(BGS), 2018 WL 310184, at *2 (S.D. Cal. Jan. 5, 2018) (rejecting venue argument based on defendant's use of Amazon Fulfillment Centers).

Additionally, other courts have ruled that venue is proper under similar factual circumstances. *In Blitzsafe Texas, LLC v. Bayerische Motoren Werke AG*, a district court found venue proper over BMWNA based on several comparable factors: (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; and (iv) BMWNA's website directed users to nearby dealerships, allowed them to search new vehicle inventory, browse brochures,

schedule test drives, select vehicle models and trims, and obtain pricing information from the dealerships. No. 2:17-CV-00418-JRG, 2018 U.S. Dist. LEXIS 173065, at *20-22 (E.D. Tex. Sept. 5, 2018). For these reasons, the court concluded that the manufacturer "has undoubtedly adopted and ratified the dealerships within this District as its places of business." *Id.* at *20.

The amicus brief filed by VWGoA-affiliated "Alliance for Automotive Innovation" ("AAI"), an "advocacy group and trade association," asks this Court to ratify the analysis in *Omega* and *West View* by holding this Court's *Andra* decision requires an alter ego finding as a "threshold" for proper venue. Such an approach is clearly wrong. First, in *Andra* the discussion of whether the parties were alter egos did not appear in the portion of the decision discussing agency—because it was not relevant to that analysis. *See* 6 F.4th at 1287-89. As noted, agents are typically separate legal entities from their principal. If alter ego is the test, agency could never lead to venue, which is plainly inconsistent with this Court's recent venue analysis. *See, e.g.*, *Google*, 949 F.3d at 1345 (noting "Congress' characterization of a 'regular and established place of business' for venue purposes as a 'permanent agency'"). Indeed, if alter ego were required to establish venue, there would have been no need to analyze agency in *Google*, no need to analyze ratification in *Cray*, and no need to remand in *ZTE*. None of these recent venue cases involved two alter ego companies, but that did not end the venue inquiry. It did not even end the venue inquiry in

Andra: after finding the companies were not alter egos of one another, this Court went on to conduct an analysis of the *Cray* ratification factors. 6 F.4th at 1289-90. Read in context, it is clear that this Court analyzed alter ego status in *Andra* for two reasons: first, because the patent holder raised it, and second, because if the Stores and Non-Stores Defendants were truly alter egos of one another, that would have ended the venue inquiry *in the patent holder's favor*. In other words, an alter ego analysis can be an important preliminary inquiry (when it is raised, which here it is not), but it is not a "threshold" requirement to finding proper venue.

VWGoA's remaining cases about "distributors" are generally outside the context of car manufacturers and car dealerships, and their facts are not analogous. In sum, VWGoA's and amici's entreaties about the need for mandamus are misplaced because they ignore the fact-specific nature of the venue inquiry, and the factual and legal differences between prior decisions and this case. The presence of a few distinguishable prior decisions does not warrant the extraordinary intervention of mandamus.

V. CONCLUSION

The district court analyzed the correct legal standards, and based its conclusion on facts drawn from VWGoA's own agreements. VWGoA does not contest the law the district court relied on, or any of the facts underlying its opinion. Accordingly, it cannot establish that the district court's conclusion that VWGoA

ratifies its authorized dealerships as its own constitutes an abuse of discretion, and its petition should be denied.

November 9, 2021

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Dated: November 9, 2021

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2022-108

United States Court of Appeals for the Federal Circuit

IN RE VOLKSWAGEN GROUP OF AMERICA, INC.,

Petitioner.

On Petition for a Writ of Mandamus to the United States District Court for the Western District of Texas in Case No. 6:20-cv-01131-ADA, Honorable Alan D. Albright, Judge

SUPPLEMENTAL APPENDIX IN SUPPORT OF STRATOSAUDIO, INC.'S RESPONSE TO PETITION FOR A WRIT OF MANDAMUS

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IN RE VOLKSWAGEN GROUP OF AMERICA, INC.
Case No. 22-108

STRATOSAUDIO'S SUPPLEMENTAL APPENDIX

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

STRATOSAUDIO, INC., *Plaintiff*, v. VOLKSWAGEN GROUP OF AMERICA, INC., *Defendant*.	Case No. 6:20-CV-1131

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

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

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

1. **Plaintiff's Venue Allegations**

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

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

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

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

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

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

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

2. <u>A Franchised Automotive Dealership Is Not an Automaker's Own Place of Business</u>

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

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

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

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

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

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

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

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

for a regular and established place of business for purposes of the patent venue statute: "(1) there must be a physical place in the district; (2) it must be a regular and established place of business; and (3) it must be the place of the defendant." 949 F.3d at 1343; *see Cray*, 871 F.3d at 1360. "In the final analysis, the court must identify a physical place, of business, of the defendant." *Cray*, 871 F.3d at 1364.

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

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

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

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

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

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

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

Dated: February 19, 2021

Respectfully submitted,

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

STRATOSAUDIO INC.,	)	
	)	Case No. 6:20-CV-01131-ADA
Plaintiff,	)	
	)	
v.	)	**JURY TRIAL DEMANDED**
	)	
VOLKSWAGEN GROUP OF AMERICA, INC.,	)	
	)	
Defendant.	)	

STRATOSAUDIO, INC.'S OPPOSITION TO VOLKSWAGEN GROUP OF AMERICA, INC.'S MOTION TO DISMISS OR TRANSFER

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I. INTRODUCTION

Volkswagen Group of America, Inc.'s ("Volkswagen") Motion to Dismiss or Transfer (D.I. 16) ("Motion") presents one main argument for transfer: that Plaintiff StratosAudio, Inc. ("StratosAudio") cannot utilize Volkswagen's dealers in this District to establish venue because the dealers are "separate entities." Motion at 4. This argument both ignores the controlling law on venue determination for patent cases and the facts regarding Volkswagen'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 Volkswagen's arguments, the mere fact that a defendant and an entity in a judicial district are "separate entities" is not dispositive in determining venue.

In addition, Volkswagen's Motion ignores the facts of its *actual* relations with its dealers. The reality is that Volkswagen ratifies and controls almost every aspect of its dealers' business, including, but not limited to, (i) the location, structure, use, and maintenance of its dealers' premises and facilities, (ii) advertising, (iii) sales, (iv) parts, (v) inventory, (vi) service and warranty, (vi) pricing, (viii) personnel, and (ix) records keeping. As set forth in more detail below, Volkswagen's ratification and control over its dealers is so pervasive that Volkswagen even controls what brochures the dealers must display in their waiting areas, as well as what computer equipment and stationery the dealer may use.

Judge Gilstrap in the Eastern District of Texas has already examined the venue issue raised by Volkswagen – 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 Volkswagen's dealers' premises are, for the purposes of venue, to be treated as Volkswagen's own place of business. Volkswagen's Motion to Dismiss/Transfer for Improper Venue should be denied.

II. LEGAL STANDARDS

A plaintiff bears the burden of establishing proper venue. *In re Cray Inc.*, 871 F.3d at 1360. 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 1355 at 1360.

III. ARGUMENT

Volkswagen meets the requirements of the second prong of Section 1400(b). First, Volkswagen has not disputed – because there can be no dispute – that Volkswagen's dealerhips 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 "*Blitzsafe III*").[1] The only issue is whether Volkswagen's dealers located in this District satisfy the third requirement – that the dealerships are "places" of Volkswagen 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). Volkswagen'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 Volkswagen.

A. Volkswagen 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 Volkswagen dealerships (including Volkswagen and Audi dealerships) in this District. D.I. 1 (Compl.), ¶ 10. New Volkswagen vehicles are available for purchase exclusively through these authorized dealers. *Id.* The dealerships include the name "Volkswagen" or "Audi" with no reservations or disclaimers. *Id.*, ¶ 11. The dealerships also prominently display the "Volkswagen" or "Audi" logos and use Volkswagen's and Audi's trademarks, trade names, and other intellectual property associated with the distribution and sale of vehicles and provision of related services. *Id.*, ¶ 11. Moreover, Volkswagen's websites (www.vw.com and www.audiusa.com/us/web/en.html) direct users to these dealerships when

[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.

searching for Volkswagen vehicles in this district. *Id.*, ¶ 12. These websites will display a list of these franchise dealerships when a user inputs a zip code within this District. From there, the user can view inventory and trade-in information, apply for financing, and arrange a test drive at these franchise dealerships. *Id.*, ¶ 12. 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 bochures, 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]

Volkswagen does not dispute any of these factual allegations. Volkswagen merely argues that the *Blitzsafe I* decision is "wrong" and instead argues exclusively that Volkswagen's lack of ownership interest in its dealerships defeats venue. Motion at 4 ("regardless of the fact that dealerships sell cars, and use the car makers' trademarks to do so, and regardless of the fact that the car makers refer consumers to the dealers, the dealerships are nonetheless separate entities from the car makers."). Volkswagen's argument, however, ignores the fact that the Federal Circuit has not articulated such a rigid "ownership" test for venue. The test instead

[2]

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).

In addition to its cursory discussion of *Blitzsafe I*, Volkswagen relies on two cases to support its argument: *West View Research, LLC v. BMW of N. Am., LLC*, 2018 WL 4367378 (S.D. Cal. Feb. 5, 2018) and *Omega Patents, LLC v. Bayerische Motoren Werke AG*, 2020 U.S. Dist. LEXIS 248567 (N.D. Ga. Dec. 21, 2020). Neither of these cases supports a finding that Volkswagen has not "ratified" the activites of its dealerships in this district. First, *Omega Patents* expressly acknowledges 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). Second, *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.[3] For example, *West View Research* "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

[3] In this regard, Volkswagen Group has it backwards. Motion at 4 ("But … the *West View Research* court … explicitly rejected this reasoning [of *Blitzsafe I*].").

theory. *Blitzsafe I*, 2018 U.S. Dist. LEXIS 173065, at *30, n.15. *Omega Patents* also failed to analyze venue separately under ratification and control, instead collapsing those two into a single analysis.

Moreover, both decisions opt for a rigid rule (that a separate entity cannot be a basis to support venue of another absent an alter ego relationship[4]) over a more flexible, fact-based approach. The Federal Circuit, however, 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).

Volkswagen's focus on "ownership" and the cursory analyses *Omega Patents* and *West View Research* is thus misplaced. Indeed, Volkswagen has all but ignored the wide scope of its

[4] The alter ego test is also inapplicable in this case because StratosAudio is not alleging any parent-subsidiary relationship between Volkswagen Group 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, Volkswagen's control over its dealers is so extensive and pervasive that in reality, Volkswagen "and [its] dealer[s] function as 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, Volkswagen would meet its requirements.

activities showing "ratification" of its dealers – activities that clearly demonstrate the connection and influence by Volkswagen over its dealer entities.

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

Additional facts exist which further demonstrate Volkwagen's ratification of its dealerships activities beyond those considered in *Blitzsafe I*, *West View Research*, or *Omega Patents*. Public records indicate that Volkswagen has the authority to approve or reject any proposed locations and structures of its dealer's premises. *See e.g.*, Declaration of Ryuk Park ("Park"), Ex. A at 1 ("VWoA[5] has approved the location of Dealer's Premises as specified in the Dealer Premises Addendum"); Park Ex. D at 1 (same for Audi). Volkswagen also prohibits its dealers from changing the location or structure of its premises without its approval. Park Ex. A at 1 ("Dealer agrees that, without VWoA's prior written consent, it will not (a) make any major structural change in any of the Dealer's Premises, (b) change the location of any of Dealer's Premises or (c) establish any additional premises for Dealer's Operations" without Volkswagen's prior written consent."); Park Ex. D at 1 (same for Audi). Volkswagen further requires its dealers to construct and use its facilities according to its specifications and requirements. Park Ex. A at 6 ("Dealer agrees to construct a new or renovated Volkswagen dealership facility at the Fairfield Facility that complies in full with all of ***VWoA's requirements for a White Frame Facility*** …, including without limitation sufficient square footage to ***meet White Frame Facility requirements***, ***Corporate Identification***, ***Branding Elements***, full compliance with all current Volkswagen Dealer Operating Standards."); Park Ex. B at 3 ("Dealer will display conspicuously

[5] "WVoA" stands for "Volkswagen of America, Inc." which is "an operating unit of Volkswagen Group of America, Inc." *See Volkswagen of America, Inc. v. Maverick Auto Group 2, LLC*, No. 2:13-cv-00802-JAM-EFB, ECF No. 1 at 1:17-18 (E.D. Cal. Apr. 24, 2013).

at Dealer's Premises such ***Authorized Signs*** at such location ***as VWoA reasonable may require***.") (emphases added); Park Ex. E at 3 (same for Audi); Park Ex. C at 8 (Standards 19-23, detailing requirements for the facility interior and exterior space, such as showrooms, reception area, and lounge); Ex. F at 1-2 (detailing similar facility requirements for Audi). In other words, Volkswagen adopts, and thus ratifies, the location, structure, and use of its dealers' premises.

Further, Volkswagen retains title to the vehicles delivered to its dealers until Volkswagen has "collected their full purchase price in cash." Park Ex. B at 9 (Volkswagen); Park Ex. E at 9 (Audi). In other words, until Volkswagen collects the full purchase price for its vehicles stored at its dealers' premises, those vehicles belong to Volkswagen. And to the extent Volkswagen provides "floor plan" loans to its dealers through its affiliates (*e.g.*, Volkswagen Credit and Audi Financial Services), those affiliates will likely retain title to the vehicles until the loans are repaid. Compl., ¶ 14. Put differently, except where a dealer always purchases all of its inventory using its own funds, a dealer effectively provides its premises to Volkswagen and/or its affiliates for "the storing of materials at a place in the district so that they can be distributed or sold from that place," a relevant factor for determining whether a place is a place of the defendant. *In re Cray*, 871 F.3d at 1363.

None of these additional factors were considered in *West View Research* or *Omega Patents*. Yet these facts, combined with those specific facts analyzed in the *Blitzsafe I* decision, demonstrate the breadth of Volkswagen's "ratification" of its dealerships and the propriety of venue over Volkswagen in this Court.

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

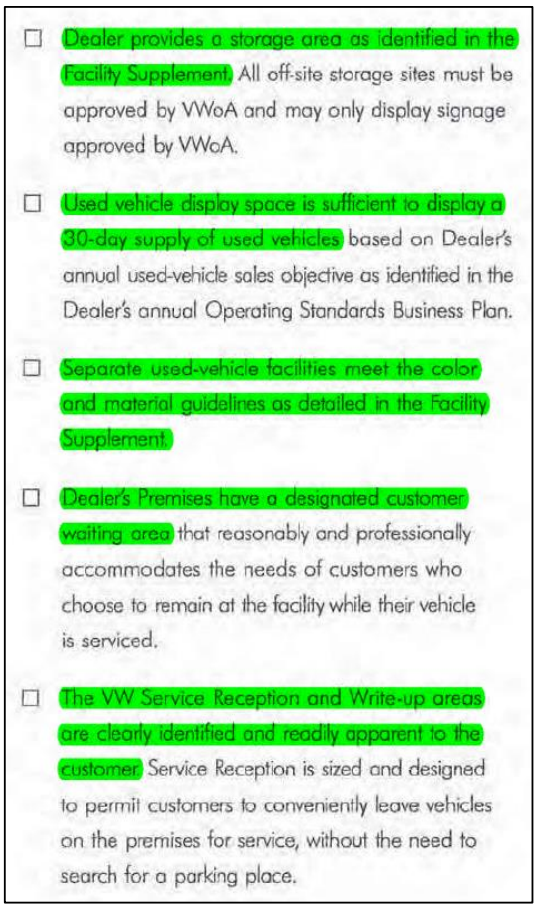
While ratification alone sufficiently establishes venue against Volkswagen, venue is also proper against Volkswagen under the "control" theory. Volkswagen's Motion all but ignores

this issue, as it must, because the facts demonstrate an extraordinary amount of control exerted by Volkswagen over its dealers.

All of the above-stated facts regarding Volkswagen's "ratification" of its dealerships apply equally to demonstrating Volkwagen's "control" of its dealerships for venue purposes. These facts and other demonstrate that Volkswagen 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, and (vii) facilities maintenance, and (viii) records keeping. *See generally* Park Ex. B at 3-4 (Volkswagen); Park Ex. E at 3-4 (Audi). Volkswagen's Dealer Agreements (Park Exs. A & D), Standard Provisions (Park Ex. B & E), and Operating Standards (Park Ex. C & F). The following examples, from Volkswagen's own documents, demonstrate this control.

First, Volkswagen has control over the dealer premises. As noted above, Volkswagen has the authority to approve or reject any proposed locations and structures of its dealer's premises. *See e.g.*, Park Ex. A at 1; Park Ex. D at 1 (same for Audi). Volkswagen prohibits its dealers from changing the location or structure of its premises without its approval. Park Ex. A at 1; Park Ex. D at 1 (same for Audi). Volkswagen further requires its dealers to construct and use its facilities according to its specifications and requirements, including specific designs (such as the "white frame" facility). Park Ex. A at 6 Moreover, dealers are not permitted to "(a) make any major structural change in any of the Dealer's Premises, (b) change the location of any of Dealer's Premises or (c) establish any additional premises for Dealer's Operations" without Volkswagen's approval. Park Ex. A at 1; Park Ex. D at 1.

Second, Volkswagen specifies how its dealers' premises and facilities should be maintained and used. *See e.g.*, Park Ex. C at 13 ("All Dealers will comply with the facility requirements as indicated in the Volkswagen Facility Supplement."); *see also id.* (below):



- ☐ Dealer provides a storage area as identified in the Facility Supplement. All off-site storage sites must be approved by VWoA and may only display signage approved by VWoA.
- ☐ Used vehicle display space is sufficient to display a 30-day supply of used vehicles based on Dealer's annual used-vehicle sales objective as identified in the Dealer's annual Operating Standards Business Plan.
- ☐ Separate used-vehicle facilities meet the color and material guidelines as detailed in the Facility Supplement.
- ☐ Dealer's Premises have a designated customer waiting area that reasonably and professionally accommodates the needs of customers who choose to remain at the facility while their vehicle is serviced.
- ☐ The VW Service Reception and Write-up areas are clearly identified and readily apparent to the customer. Service Reception is sized and designed to permit customers to conveniently leave vehicles on the premises for service, without the need to search for a parking place.

See also Park Ex. F at 15-16 (requirements regarding facility exterior space), 17-21 (requirements regarding facility interior space, such as a customer lounge and an interior display stand) (see below):

Criteria 7.3:	**Customer lounge**		
	Owner:	Network development	
	Formula:	Exclusive type A/B	exclusive to Audi with café
		Brand dedicated	can be shared with other brands
		Universal	can be shared with other brands
	Note:	All dealerships must have a customer lounge or quattro cafe that is easily accessible to service reception, the showroom, the parts retail counter and the accessory boutique. The lounge must be in good condition and large enough to accommodate the dealership's average volume of waiting customers. Furniture, flooring, lighting, wall treatment, and refreshment apparatus are kept clean at all times. It is recommended that wireless Internet access is available to customers in or near the lounge area.	
Criteria 7.4:	**Interior display stands / interior brand elements**		
	Owner:	Network development	
	Formula:	Y or N	
	Note:	Audi offers to Audi dealers literature display stands, vehicle positioning stands, horizontal and vertical wall units, wheel stands and plaques to create an Audi retail and merchandising environment. Audi dealers select the right quantities relative to the size of the showroom following Audi's recommendation to effectively merchandise Audi point of sale literature and accessories.	

Third, Volkswagen specifies how its dealers should utilize its trademarks, trade names, and other intellectual property in advertising and marketing. *See e.g.*, Park Ex. B at 3 (requiring Volkswagen dealers to (i) "Display conspicuously at Dealer's Premises such Authorized Signs at such locations as [Volkswagen] may require"; (ii) maintain "a listing in a principal local classified telephone directory in Dealer's Area," (iii) "prominently display and make readily available "all legally required brochures, as well as all current sales, service and parts literature and promotional materials" provided by Volkswagen; and even (iv) prepare "[a]ll stationery and business forms used in Dealer's Operations … in accordance with Recommendations," such as using stationery bearing "Authorized Trademarks"); *see also* Ex. E at 4 (same for Audi).

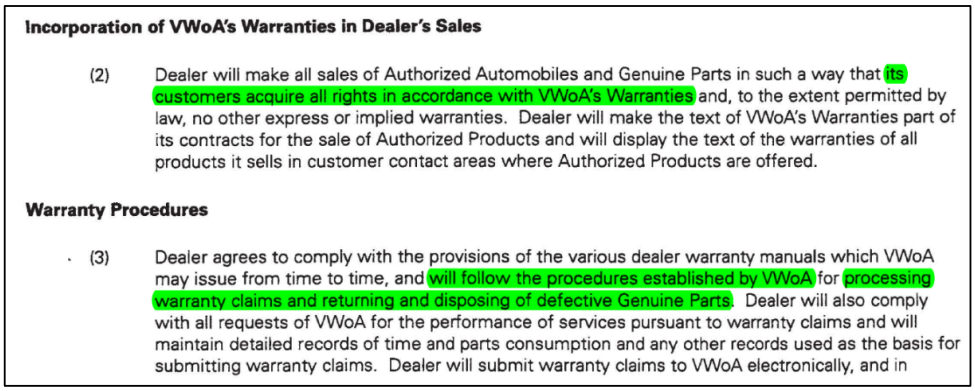
Fourth, Volkswagen unilaterally determines the price and the terms upon which its dealers purchases its vehicles. *See e.g.*, Park Ex. B at 7-8 ("VWoA will sell Authorized Products to Dealer at prices and upon terms established by VWoA" and to "transmit orders for [those vehicles] … electronically, at the times and for the periods, that VWoA reasonably requires."); *see also* Park Ex. E at 7 (same for Audi).

Fifth, Volkswagen specifies the number and types of vehicle inventory its dealers must maintain at their premises. *See e.g.*, Park Ex. B at 8 ("Dealers will maintain in inventory at all times the assortment and quantity of Authorized Products required by the Operating Standards, Operating Plan or Recommendations."); Park Ex. E at 8 (same for Audi).

Sixth, Volkswagen also specifies what parts its dealers may use and how many its dealers must maintain. *See e.g.*, Park Ex. B at 6 (requiring Volkswagen dealers to "maintain an inventory of Genuine Parts which is sufficient to perform reasonably anticipated warranty service and wholesale trade requirements in Dealer's Area"); Park Ex. E at 6 (same for Audi)..

Seventh, Volkswagen specifies the terms and scope of warranties to be included in its vehicle sales as well as requires the manner in which its dealers provide notice and advertise such warranties. *See e.g.*, Park Ex. B at 10 (requiring Volkswagen dealers to (i) ensure that all customers purchasing vehicles or parts also "acquire all rights in accordance with [Volkswagen's] Warranties," (ii) "make the text of [Volkswagen's] Warranties part of its contracts for the sale of Authorized Products," and (ii) "display the text of the warranties of all products it sells in customer contact areas where Authorized Products are offered."); *see also* Park Ex. E at 10 (same for Audi). Further, Volkswagen, and not its dealers, establishes the procedures for processing warranty claims and returning and disposing of defective parts and requires its dealers to comply with such procedures. Park Ex. B at 10 (see below)[6]; Park Ex. E at 10.

[6] The Court in *Blitzsafe I* found the control over "the provision of warranty services" as an independent basis for venue under the "control" theory. *Blitzsafe I*, 2018 U.S. Dist. LEXIS 173065, at *24; *see also Blitzsafe Tex. LLC v. Mitsubishi Elec. Corp.*, 2019 U.S. Dist. LEXIS 86350, *6 (E.D. Tex. May 22, 2019) (hereinafter "*Blitzsafe II*").



Incorporation of VWoA's Warranties in Dealer's Sales

(2) Dealer will make all sales of Authorized Automobiles and Genuine Parts in such a way that its customers acquire all rights in accordance with VWoA's Warranties and, to the extent permitted by law, no other express or implied warranties. Dealer will make the text of VWoA's Warranties part of its contracts for the sale of Authorized Products and will display the text of the warranties of all products it sells in customer contact areas where Authorized Products are offered.

Warranty Procedures

(3) Dealer agrees to comply with the provisions of the various dealer warranty manuals which VWoA may issue from time to time, and will follow the procedures established by VWoA for processing warranty claims and returning and disposing of defective Genuine Parts. Dealer will also comply with all requests of VWoA for the performance of services pursuant to warranty claims and will maintain detailed records of time and parts consumption and any other records used as the basis for submitting warranty claims. Dealer will submit warranty claims to VWoA electronically, and in

Eighth, Volkswagen, and not its dealer, determines the rate or price at which a Volkswagen or Audi dealer will be reimbursed for services. *See e.g.*, Park Ex. B at 7 ("VWoA will reimburse Dealer for performing such services at the then-current rate of reimbursement ***specified by VWoA*** for Dealer.") (emphasis added); Park Ex. D at 7 (same for Audi).

Ninth, Volkswagen requires each Volkswagen or Audi 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. B at 11 ("Dealer will transmit … a financial and operating statement reflecting the consolidated operations of Dealer."); Park Ex. E at 11 (same for Audi). Volkswagen further requires its dealers to "use accounting, sales, bookkeeping and service workshop forms; business machines; data processing and transmission equipment; and other office equipment which meets specifications" required by Volkswagen, and "keep accurate and current records in accordance with [Volkswagen's] uniform accounting system." *See e.g.*, Park Ex. B at 11; Park Ex. E at 11.

Tenth, Volkswagen even specifies the type and quantity of IT equipment such as computers its dealers must use and maintain. *See e.g.*, Park Ex. F at 22 (requiring dealers to maintain (i) one computer terminal with a minimum of 512K Internet speed for each brand specialist; (ii) one computer with a minimum of 512K Internet speed for every two technicians;

(iii) one designated computer with a minimum of 512K Internet speed for parts department) (see below).

Criteria 8.2: ABS computer terminals
Owner: Network development
Formula: 1 terminal for each ABS
Note: Each Audi brand specialist (ABS) must have a computer at their workstation with an Internet connection with a minimum of 512 K speed at each terminal.

Criteria 8.3: Technician computer terminals
Owner: After sales development
Formula: 1 computer terminal for 2 technicians
Note: One computer terminal workstation for every two technicians. No more than two technicians per terminal. Minimum 512k speed per terminal.

Criteria 8.4: Service consultant and other service computer terminals
Owner: After sales development
Formula: Y or N
Note: One designated easily accessible service department computer terminal workstation with internet access with a minimum of 512 K, that meet Audi specifications and requirements for each Audi service consultant; however, variances will be allowed for dealers utilizing production groups, teams or rotating schedules. A separate computer must be available for the shop foreman and any other shop employees with access to the Internet with 512K speed at each terminal.

Criteria 8.5: Parts department computer terminal
Owner: After sales development
Formula: Y or N
Note: Exclusive parts department computer terminal with access to Audi's parts system and the Internet with a minimum of 512K speed at each terminal.

Eleventh, Volkswagen specifies the number of personnel that its dealers must have on site and their certifications and training. *See e.g.*, Park Ex. E at 25 (see below):

Criteria 10.1: Training certification
Owner: Audi academy
Formula: Y or N
Note: Through the standards evaluation process the dealer principal and the area team / regions agree on a number of dealer personnel, based on the dealer operating standards but adjusted to local market conditions and the specific situation of the dealer.
The agreed upon number of dealer personnel are required to be Audi academy certified as stated in the following standards. Please refer to the annual certification program course catalog for specific training requirements by job position. Twice a year (January with December status and July with June status) the dealership will be evaluated against the training status to become or remain compliant with the standards bonus requirements.
Existing personnel must be and remain certified at any time. New hires have a special time allowance to become certified:
Certification timing for new positions: sales manager, pre-owned manager, service manager, and parts manager: Audi academy certification is required to be achieved within 120 days (4 months) of being hired into the position. Certification is then to be maintained on an annual basis according to the academy certification requirements for the position.
ABS, service consultant, Audi technical specialist, parts consultant, and warranty administrator: All employees in this position are required to achieve Audi academy certification within six months of being hired into the position. Certification is then to be maintained on an annual basis according to the academy certification requirements for the position.

Twlevth, Volkswagen 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. *See e.g.*, Park Ex. B at 12 (for Volkswagen); Park Ex. E at 12 (same for Audi) (see below):

Evaluation of Dealer's Vehicle Sales, Service and Parts Performance

(2) VWoA will evaluate the effectiveness of Dealer's vehicle sales, service and parts performance in accordance with factors and measures set forth in the Operating Standards, the Operating Plan and Recommendations.

Evaluation of Dealer's Premises

(3) VWoA will evaluate Dealer's performance of its responsibilities pertaining to Dealer's Premises, analyzing both separately and collectively Dealer's sales facilities, service facilities, parts facilities, administrative offices, storage, parking and signage. In making such evaluation, VWoA will consider the factors set forth in the Operating Standards, the Operating Plan and Recommendations.

Evaluation of Dealer's Customer Satisfaction

(4) VWoA will evaluate Dealer's performance of its responsibilities pertaining to customer satisfaction, analyzing both separately and collectively the satisfaction of customers with Dealer's sales activities and service activities. In making such evaluation, VWoA will utilize a uniform measure of customer satisfaction, which will be disclosed to Dealer, and will consider the factors set forth in the Operating Standards, the Operating Plan and Recommendations.

Lastly, Volkswagen controls and can restrict whether and to whom a dealer may sell or transfer its business. *See e.g.*, Park. Ex. B at 13 ("If Dealer chooses to transfer its principal assets or change owners, VWoA has the right to approve the proposed transferees … and … their premises. … VWoA will notify Dealer in writing of the approval or disapproval of a proposal by Dealer for transfer of principal assets or change of owners"); Park Ex. E at 12 (same for Audi).

These scope and breadth of these agreements directly contradict Volkswagen's claim that its dealers are "independent" franchises, at least for venue determination purposes.[7] Motion at 4. On the contrary, they show that Volkswagen exercises a vast amount of control over its dealers by imposing various obligations and restrictions that one would ordinarily expect to be imposed

[7] The Volkswagen and Audi documents were 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.

on its own employees only. Given the dominant control Volkswagen exercises over its dealers, venue against Volkswagen is proper in this District under the "control" theory as well.

C. To the Extent Helpful To the Court, Volkswagen's Motion Should Be Denied Until Parties Have Completed Venue Discovery

The facts as set forth above are sufficient to establish venue against Volkswagen in this District. Volkswagen has not challenged any of the facts as alleged in the Complaint. To the extent Volkswagen challenges the facts as presented in Volkswagen's (and Audi's) own Operating documents, StratosAudio respectfully requests that the Court deny Volkswagen's Motion without prejudice allos targeted venue discovery pursuant to the Federal Rules and this Court's Standing Order that focus on the following:

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

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 Volkswagen's Motion to Dismiss or Transfer for Improper Venue with prejudice or, in the alternative, without prejudiced to refile after completion of venue discovery.

Dated: March 5, 2021

Respectfully submitted,

/s/ Corby R. Vowell

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

STRATOSAUDIO, INC., *Plaintiff*, v. VOLKSWAGEN GROUP OF AMERICA, INC., *Defendant*.	Case No. 6:20-CV-1131

VOLKSWAGEN GROUP OF AMERICA, INC.'S REPLY BRIEF IN SUPPORT OF ITS MOTION TO DISMISS OR TRANSFER FOR IMPROPER VENUE

Plaintiff relies heavily on Judge Gilstrap's decision in the *Blitzsafe* case, *Blitzsafe Texas, LLC v. BMW of North America, LLC, et al.*, 2:17-CV-00418-JRG, 2018 WL 4849345 (E.D. Tex. Sept. 6, 2018). However, the persuasiveness of this decision is undermined by its procedural history—Judge Gilstrap initially found venue to be proper, but after that initial decision, BMW moved for reconsideration, Blitzsafe was given venue discovery, and the parties ultimately asked Judge Gilstrap to vacate the decision, which he did. The reconsideration motion was never decided.[1] *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 40–41 (1950) (explaining that

[1] *See Blitzsafe*, 2:17-CV-00418-JRG (D.I. 95) (motion for reconsideration); *Blitzsafe Texas LLC v. Mitsubishi Elec. Corp.*, No. 2:17-CV-00418-JRG, 2019 WL 2210686 (E.D. Tex. May 22, 2019) (order granting Blitzsafe's venue discovery requests); *Blitzsafe Texas LLC v. Mitsubishi Elec. Corp.*, No. 2:17-CV-00418-JRG, 2019 WL 3494359 (E.D. Tex. Aug. 1, 2019) (order vacating venue decision). BMW had also applied for a writ of mandamus, but that application was denied because of the pendency of the reconsideration motion before Judge Gilstrap. *In re Bayerische Motoren Werke AG*, 744 F. App'x 703 (Fed. Cir. 2018).

vacatur "is commonly utilized … to prevent a judgment, unreviewable because of mootness, from spawning any legal consequences."); *see also Los Angeles Cnty. v. Davis*, 440 U.S. 625, 634 n.6 (1979) ("Of necessity our decision vacating the judgment of the Court of Appeals deprives that court's opinion of precedential effect.") (internal citations and quotations omitted).

And Judge Gilstrap's initial decision was fundamentally flawed as a matter of law. As argued in VWGoA's opening brief, the proper analysis is contained in two other district-court decisions that both concluded that an independent automotive dealership is the *dealer's* place of business, not the manufacturer's. *See Omega Patents, LLC v. BMW of North America et al.*, 1:20-CV-01907-SDG, 2020 WL 8184342 (N.D. Ga. Dec. 21, 2020); *West View Research, LLC v. BMW of North America, LLC, et al.*, 16-CV-2590 JLS (AGS), 2018 WL 4367378 (S.D. Cal. Feb. 5, 2018).

In an attempt to distinguish these cases, Plaintiff argues that *In re Cray*, 871 F.3d 1355 (Fed. Cir. 2017), sets forth two separate legal tests—"ratification" and "control"—and that neither *West View Research* nor *Omega Patents* "supports a finding that Volkswagen has not 'ratified' the activities of its dealerships." Opp. Br. at 3, 5. But all the *Cray* opinion says is, "[t]he defendant must establish or ratify the place of business," 871 F.3d at 1363, and both *West View Research* and *Omega Patents* considered this *Cray* holding. *See West View Research*, 2018 WL 4367378, at *5–9;[2] *Omega Patents*, 2020 WL 8184342, at *2–6.[3]

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[2] The *West View Research* opinion states: "The third element [of *Cray*] requires that the place of business must be the defendant's and not solely the place of the defendant's employee. '[T]he defendant must establish or ratify the place of business.'" *West View Research*, 2018 WL 4367378, at *5.

[3] The *Omega Patents* opinion states: "The Court finds it inappropriate to apply a ratification theory under the facts here.[24]" *Omega Patents*, 2020 WL 8184342, at *5.

Omega's footnote 24 reads: "To reiterate: (1) BMWNA does not own, operate, or rent the dealerships; (2) the dealerships' employees are not BMWNA's employees—the latter has

With respect to "ratification," Plaintiff never explains what its proposed test is, other than to argue that VWGoA's trademark licenses, and website references, to the dealerships, and the warranty relationships with those dealerships, amount to ratification. *Cray* does not support that argument; it was addressing the question of whether an employee's home office was the employer's place of business, not whether one company's place of business (a dealership) is actually another company's (the manufacturer's) place of business. *See generally* 871 F.3d 1355. Trademark licensors across the country would be shocked to learn that by licensing their distributors to use their name, by seeking a uniform look-and-feel of the facilities, and by referring business to the distributors, they have converted the distributors' places of business into their own places of business. *Cf., e.g., Board of Regents v. Medtronic PLC*, A-17-CV-942-LY, 2018 WL 4179080, at *1–*3 (W.D. Tex. July 19, 2018) (holding that the presence of a subsidiary in a San Antonio building that "bears the generic Medtronic company sign" does not make venue in this Court proper as to parent company Medtronic).[4]

With respect to "control," what *Cray* says is, "Relevant considerations 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. Here, both sides agree that VWGoA does not own or lease the dealerships. Plaintiff instead argues that VWGoA exercises such tight control over the dealers as to make the dealerships into VWGoA places of business. *See* Opp. Br. at section B. But Plaintiff ignores that, by Texas statute, VWGoA is forbidden to "operate or control" the dealerships. Tex.

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no employees residing or working in this District; (3) Omega does not allege an agency or alter ego relationship between BMWNA and the dealerships; and (4) Omega does not allege BMWNA has failed to treat the dealerships as separate corporate entities." *Id.* at n.24.

[4] In this case, Plaintiff "is not alleging any parent-subsidiary relationship" between VWGoA and the dealers. Opp. Br. at 6 n.4.

Occ. Code § 2301.476(c); *see also Ford Motor Co. v. Texas Dep't of Transp.*, 264 F.3d 493, 507 (5th Cir. 2001) (the statute "provides that a manufacturer may not directly or indirectly, operate or control a dealer or act in the capacity of a dealer").

Plaintiff's argument, like the arguments in *West View Research* and *Omega Patents*, is that an operating agreement between an automaker and a dealer in which the dealer agrees to operate the dealership according to certain standards is enough to subject the automaker to the patent venue statute. That exact argument was rejected in both cases. *West View Research*, 2018 WL 4367378, at *7–*9; *Omega Patents*, 2020 WL 8184342, at *5–*6.

In *West View Research*, the "parties conducted limited venue-related discovery and produced an operating agreement between BMWNA and a dealership … which the parties stipulated is representative of similar agreements with BMW and MINI dealerships across the district." *West View Research*, 2018 WL 4367378, at *6. The *West View* court explained:

> Plaintiff zeroes in on the language in *Cray* that "[r]elevant considerations include whether the defendant owns or leases the place, *or exercises other attributes of possession or control over the place.*"
>
> Plaintiff then rigorously examines the operating agreement, which consists of the agreement itself, and the requirements addendum. Plaintiff lists at least thirty examples of BMWNA's control in the operating agreement. A non-exhaustive list of examples of BMWNA's control over the dealerships includes: [Redacted] In sum, Plaintiff argues that the thirty separate provisions from the operating agreement are illustrative of BMWNA's control over the dealerships.

Id. (citations omitted; emphasis in original). The court rejected this approach:

> The third *Cray* element requires the physical location to be the place of Defendants, not solely a place of Defendants' employees. Plaintiff would have the Court find Defendants' control over the dealerships, evidenced by the operating agreement, to meet the third requirement. The Court disagrees. Plaintiff's argument ignores the difference between separate and distinct corporate entities.

Id. at *7.

Similarly, in *Omega Patents*, the district court explained:

> To be sure, BMWNA's business and marketing efforts are intertwined with the dealerships. Common insignia and logos are displayed, website links are created, marketing strategies are dispatched, and agreements are executed all to ultimately facilitate the sale of BMW-branded vehicles to customers. But Omega's allegations are not enough to overcome the persuasive authority holding 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)." *Reflection, LLC v. Spire Collective LLC*, No. 17-cv-1603-GPC(BGS), 2018 WL 310184, at *2 (S.D. Cal. Jan. 5, 2018). … The Court finds it inappropriate to apply a ratification theory under the facts here.
>
> At 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. *E.g.*, *Uni-Sys., LLC v. U.S. Tennis Ass'n Nat'l Tennis Ctr. Inc.*, No. 17-cv-147(KAM)(CLP), 2020 WL 1694490, at *15 (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") (emphasis in original); *Zaxcom, Inc. v. Lectrosonics, Inc.*, No. 17-cv-3408-NGG-SJB, 2019 WL 418860, at *9 (E.D.N.Y. Feb. 1, 2019) ("[T]he facts here demonstrate that Defendant has contracted with Jaycee over a period of years to provide non-exclusive 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."). Further, the Court does not find that common marketing strategies and some modicum of control over the dealerships' macro-level operations by BMWNA transforms them into its own places of business.
>
> A finding that venue is proper in this District as to BMWNA under the facts alleged would, in this Court's view, significantly expand the scope of § 1400(b)—a result it does not believe the Federal Circuit intended with its decision in *Cray*, 871 F.3d at 1361. *See*

> *also Uni-Sys.*, 2020 WL 1694490, at *15 ("Reading the statute as [plaintiff] suggests would read out any distinction between the 'doing business' inquiry of the general venue statute, 28 U.S.C. § 1391, and the 'regular and established place of business' inquiry of the patent venue statute, 28 U.S.C. § 1400(b)."); *Tour Tech.*, 377 F. Supp. 3d at 209 (distinguishing *Blitzsafe* and holding "[a]lthough RTV's actions and contacts within the district would likely be sufficient to satisfy the general venue statute, the Court is mindful that the patent venue statute is narrower ."). In sum, the Court finds that venue is not proper in this District against BMWNA under § 1400(b).

Omega Patents, 2020 WL 8184342, at *5–6.

One of Plaintiff's arguments is particularly misleading. On page 8 of its opposition brief, Plaintiff appears to be arguing that VWGoA owns the dealers' inventory. This argument is wrong, and a close reading of Plaintiff's brief reveals that on this point, Plaintiff is relying on conjecture, and perhaps misdirection, not evidence. For example, Plaintiff is correct that VWGoA retains title to its automobiles until the dealers have paid for them, but neglects to explain that VWGoA receives payment in full before the cars even arrive at the dealer's premises. Plaintiff posits that lenders "will likely retain title to the vehicles until the loans are paid off," but neglects to explain that those lenders never receive title to the vehicles at all, only security interests in them. Plaintiff argues that "a dealer effectively provides its premises to Volkswagen" for storing automobiles, "except where a dealer always purchases all of its inventory using its own funds"—which is always the case. VWGoA never owns any of a dealer's inventory. *See* Hahn Decl. submitted in support of VWGoA's opening brief, at ¶ 6 ("VWGoA does not have ownership of an inventory of vehicles or parts at warehouses or other facilities in the Western District of Texas.")

As the *West View* and *Omega* courts found, none of Plaintiff's other factual contentions are indications of control or ratification as those terms are used in venue analysis.

Plaintiff also completely fails to address the Federal Circuit's *In re Google* decision, 949 F.3d 1338 (2020). As explained in VWGoA's opening brief, that case holds that "a 'place of business' generally requires an employee or agent of the defendant to be conducting business at that pace." 949 F.3d at 1344. But Plaintiff makes no allegation that VWGoA employees or agents work at the dealerships.

"The purpose of the statutory limits on venue in a patent venue statute are to protect defendants from suit in forums distant from their place of incorporation or residence." *Optic153 LLC v. Thorlabs Inc.*, 6:19-CV-667-ADA, 2020 WL 3403076, at *2 (W.D. Tex. June 19, 2020). This is exactly such a suit. VWGoA has no place of business in this District, and venue therefore is not properly laid here.

Dated: March 12, 2021

Respectfully submitted,

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Subject: RE: StratosAudio cases (6-20-cv-01125, -1131)

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Thank you; received and noted by Plaintiff.

Mike Songer

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Subject: RE: StratosAudio cases (6-20-cv-01125, -1131)

Counsel,

In its reply in support of the motion to dismiss, Hyundai points out that the Federal Circuit's recent holding in *In re Google*, 949 F.3d 1338, 1345 (Fed. Cir. 2020) requires 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.'" However, this issue was not fully briefed by the parties. Therefore, the Court orders the parties to fully brief this particular issue in both the -1125 and -1131 cases. Plaintiff shall have 5 pages and 7 days from today to file its brief on this particular issue, and defendants shall have 5 pages and 7 days from plaintiff's filing date to respond.

-Jun

Jun Zheng

Law Clerk to the Honorable Alan D Albright
United States District Court, Western District of Texas

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Subject: StratosAudio cases (6-20-cv-01125, -1131)

Counsel,

The Court will hold a hearing for the motions to dismiss/transfer in the above 2 cases on **6/21 Monday at 1:30PM**. Please use the following Zoom information for the hearing:

Topic: Judge Albright – Private Proceedings

Join ZoomGov Meeting
https://txwd-uscourts.zoomgov.com/j/1601902244?pwd=Q202TUVhTU15eUZzNmM5OXlXNVlPQT09

Meeting ID: 160 190 2244
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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 Case No. 6:20-CV-01131-ADA **JURY TRIAL DEMANDED**
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] StatosAudio'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.

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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.

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

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.

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

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. Legitimating 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

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

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:

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

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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

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).*

Restat 3d of Agency, § 1.01

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).*

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*

Restat 3d of Agency, § 1.01

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. Burglin, 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

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

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 & Jor-gensen, 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 *Condus 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-subsidiary 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*

(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"); Expediters 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 perforate 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)

(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 nonwar-ranty 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

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 antiquities 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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Restat 3d of Agency, § 1.02

Restatement of the Law, Agency 3d - Official Text > Chapter 1- Introductory Matters > Topic 1- Definitions and Terminology

§ 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

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).

Restat 3d of Agency, § 1.02

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 plaintiffs 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).

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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Restat 3d of Agency, § 8.13

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

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

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."

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

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

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).

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

STRATOSAUDIO, INC., *Plaintiff*, v. VOLKSWAGEN GROUP OF AMERICA, INC., *Defendant*.	Case No. 6:20-CV-1131-ADA

VOLKSWAGEN GROUP OF AMERICA, INC.'S SUPPLEMENTAL BRIEF IN SUPPORT OF ITS MOTION TO DISMISS OR TRANSFER FOR IMPROPER VENUE

The Federal Circuit's *In re Google* decision addressed the question of whether a company that contracted for Internet service providers to host computer servers in Texas therefore has a "place of business" in Texas for purposes of the patent venue statute. *See generally* 949 F.3d 1338 (Fed. Cir. 2020).

As part of its decision that venue was not proper in that situation, the Federal Circuit made the bright-line holding that a regular and established place of business under the patent venue statute "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.'" 949 F.3d at 1345.

This decision does not say that the presence of an agent at a place of business makes that place's District a proper venue for patent suits against the principal. Lack of an agent means improper venue; presence of an agent is a factor to be considered along with all the others discussed in the parties' main briefing.

In its supplemental brief, plaintiff StratosAudio suggests, but notably does not actually state, that someone connected to certain Volkswagen dealerships—it never specifies whether it is referring to the owners of the dealerships, dealership employees, or someone else—is Volkswagen's agent for the sale of automobiles. (Similarly, in its complaint StratosAudio nowhere identifies any alleged Volkswagen agent in this district, a fact that should itself be the end of the agency inquiry.)

StratosAudio doesn't identify any Volkswagen agents at the dealerships because there aren't any.

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." 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." *In re Google*, 949 F.3d at 1345 (quoting *Meyer v. Holley*, 537 U.S. 280, 286 (2003)) (brackets in original).

Dealerships are not agents for automobile manufacturers. They don't act "on the [alleged] principal's behalf"; they sell cars they themselves own, at whatever price they themselves choose.

While StratosAudio recites the three essential elements of agency, it appears to promote some alternative test that focuses on "control" and the "conduct of manufacturer's business." Specifically, it argues that the alleged direction and control of how each dealer carries out the

promoting, selling, and servicing of Volkswagen's products "creat[es] an agency relationship,"[1] and that the dealers are allegedly conducting the manufacturer's business (which allegedly implies agency). But control is only one aspect of the test, and StratosAudio's second argument is nowhere found in the actual test for agency. StratosAudio's argument fails at least because it neglects to substantively address the second and third elements of the agency test: "manifestation of consent by the principal to the agent that the agent shall act on his behalf" and "consent by the agent to act."

There can be no agency relationship here at least because those two elements are not met. The dealerships cannot affect Volkswagen's legal relationships, nor is there any allegation that they can. StratosAudio's supplemental brief substantively ignores these required elements of the agency test, vaguely alleging that "[t]he various agreements … demonstrate these elements, as they are replete with requirements and obligations demonstrating that the dealers are acting on behalf of … VW, with the dealers consenting to such actions."[2] But this statement says nothing about whether Volkswagen has consented to the creation of an agency relationship. If anything, it has to do with the first prong of the agency test regarding control.

And as explained in Volkswagen's main opening and reply briefs, Volkswagen does not, in fact, control its dealers. Those dealers are independent businesses who buy from Volkswagen and sell to consumers. They are subject to Volkswagen's quality-control contracts, but are unquestionably separate businesses.

[1] StratosAudio, Inc.'s Supplemental Briefing to Hyundai Motor America's and Volkswagen Group of America, Inc.'s Motion to Dismiss (DE 40) (hereinafter "Plaintiff's Supp. Br.") at 2.

[2] Plaintiff's Supp. Br. at 5.

The dealer agreements that StratosAudio submitted as alleged evidence in opposition to Volkswagen's motion explicitly reject any form of agency relationship between Volkswagen and the dealership:

> **Dealer Not an Agent**
>
> (1) Dealer will conduct all Dealer's Operations on its own behalf and for its own account. Dealer has no power or authority to act for the Manufacturer or VWoA.[3]

StratosAudio implies that these contractual provisions disclaiming any agency relationship between Volkswagen and the dealerships lack relevance.[4] That is wrong. Provisions like this, while not conclusive, "are relevant to determining whether the parties consent to a relationship of agency…."[5]

The actual relationship between Volkswagen and the dealerships-at-issue is one of an independent franchise, a common relationship in the automobile industry, one that does not imply a principal-agency relationship.

> 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.[6]

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[3] *See* StratosAudio, Inc.'s Opposition to Volkswagen Group of America, Inc.'s Motion to Dismiss or Transfer (DE 22) (hereinafter "Plaintiff's Br."), Exhibits B, C, and E (Article 17); *see also id.* Exhibits B, C, and E (Article 8(6) "From time to time, VWoA may conduct incentive programs which involve payments to Dealer or to Dealer's personnel. Dealer acknowledges that regardless of the nature of such programs or payments, ***Dealer's personnel are not employees, contractors or agents of VWoA.***") (emphasis added).

[4] *See* Plaintiff's Supp. Br. at 5, n.6.

[5] *See* Plaintiff's Supp. Br., Exhibit A (Restatement (Third) of Agency, § 1.02(b)).

[6] *See* Plaintiff's Supp. Br., Exhibit A (Restatement (Third) of Agency, § 1.02(a), emphasis added).

The dealers and the manufacturers are completely separate corporate entities,[7] with very different roles in the automobile business. Volkswagen designs, makes, and sells to dealers automobiles and spare parts. Dealers enter into agreements with Volkswagen with provisions directed to maintaining certain standards of quality for business and trademark purposes.[8] Dealers purchase automobiles from Volkswagen, and ownership of the automobiles transfers from Volkswagen to the dealer before the cars reach the dealers' lots. The dealerships do not operate as agents of Volkswagen.[9]

It is critical to bear in mind, as the Federal Circuit noted in *In re Cray*, that "the Supreme Court has cautioned against a broad reading of the venue statute." To hold that venue in this district is proper because a franchised automobile dealership is an agent of an automobile manufacturer would be a fundamental shift in the automobile economy, and would be directly contrary to the Court's caution against a broad interpretation of the patent venue statute.

The Complaint should be dismissed, or, alternatively, this litigation should be transferred to a district in which venue is proper.

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[7] Volkswagen's Motion to Dismiss or Transfer for Improper Venue (DE 16), Hahn Decl., ¶10.

[8] The jurisprudence of agency law recognizes that a certain level of control with respect to trademarks is necessary to avoid a "naked license," which is deemed to be an abandonment of the trademark. *See* Plaintiff's Supp. Br., Exhibit A (Restatement (Third) of Agency, §1.01(g)) (citing, *e.g.*, Thomas McCarthy, McCarthy on Trademark and Unfair Competition § 18:42 (1998).

[9] There is at least one example of an agency arrangement in the automobile industry. For example, "Toyota New Zealand will sell new vehicles to customers under an agency structure, with dealers being an agent for Toyota New Zealand." https://www.toyota.co.nz/about-toyota/toyota-news/2018/april/the-drive-happy-project/ (also mentioning "Toyota Stores") (last visited July 6, 2021) Two fundamental differences are that, in the cited agency arrangement in New Zealand, (1) the agent-dealer does not own its stock; rather, the stock remains the property of the manufacturer until it is sold to the consumer; and (2) agent-dealers are typically paid a handling fee for selling vehicles, which is different from a franchise arrangement—such as that at issue here—in which the franchised dealerships purchase vehicles from the manufacturer and sell them to consumers.

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Respectfully submitted,

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