2022-109

United States Court of Appeals for the Federal Circuit

IN RE HYUNDAI MOTOR AMERICA,

Petitioner.

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

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

JONATHAN J. LAMBERSON
HENRY YEE-DER HUANG
WHITE & CASE LLP
3000 El Camino Real
Two Palo Alto Square
Suite 900
Palo Alto, California 94306
(650) 213-0300
jonathan.lamberson@whitecase.com
henry.huang@whitecase.com

HALLIE KIERNAN
WHITE & CASE LLP
1221 Avenue of the Americas
New York, New York 10020
(212) 819-7576
hallie.kiernan@whitecase.com

MICHAEL J. SONGER
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005
(202) 626-3200
michael.songer@whitecase.com

DANIEL S. STERNBERG
WHITE & CASE LLP
75 State Street
Boston, MA 02109
(617) 979-9300
dan.sternberg@whitecase.com

Counsel for Respondent StratosAudio, Inc.'s

NOVEMBER 9, 2021

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF INTEREST

Case Number 22-109

Short Case Caption In re Hyundai Motor America

Filing Party/Entity StratosAudio, Inc.

Instructions: Complete each section of the form. In answering items 2 and 3, be specific as to which represented entities the answers apply; lack of specificity may result in non-compliance. **Please enter only one item per box; attach additional pages as needed and check the relevant box**. Counsel must immediately file an amended Certificate of Interest if information changes. Fed. Cir. R. 47.4(b).

I certify the following information and any attached sheets are accurate and complete to the best of my knowledge.

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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Charles Larsen	David Markoff	Don Zhe Nan Wang
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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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StratosAudio, Inc. v. Volkswagen Group of America, Inc., No. 6:20-cv-01131-ADA (W.D. Tex.)	In re Volkswagen Group of America, Inc., No. 22-108 (Fed. Cir.)	

6. Organizational Victims and Bankruptcy Cases. Provide any information required under Fed. R. App. P. 26.1(b) (organizational victims in criminal cases) and 26.1(c) (bankruptcy case debtors and trustees). Fed. Cir. R. 47.4(a)(6).

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I. INTRODUCTION

Petitioner Hyundai Motor America's ("HMA") request for mandamus asks this Court to ignore the detailed factual determinations from the district court showing the extensive control HMA has over its dealers. Yet HMA does not contest a single factual finding necessary to the district court's ruling, nor can HMA establish that the district court based its opinion on a clearly erroneous view of the law. In short, HMA'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: HMA has control over what types of employees its dealer must employ, how the dealership must structure its operations, its "space, appearance, amenities, layout, equipment, and signage," the inventory the dealer must maintain, the prices the dealer must advertise, the tools the dealership must use to repair cars, the computer equipment the dealership must purchase, and the working capital the dealer must maintain. HMA can require dealership employees to attend mandatory training sessions, it can evaluate their performance, and it can force dealers to take "prompt action" to correct any issues. HMA can send a dealer parts and material without the dealer's consent. HMA has the right to enter a dealership to conduct inspections and audits. HMA has veto

power over dealership relocation, transfers of ownership, or changes in general manager. Finally, HMA uses the dealerships to provide HMA warranties, which by law constitutes HMA doing business in the state of Texas. With this level of control, there is no genuine dispute HMA'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 HMA was in the business of marketing and distributing cars in the United States, and that it uses dealers carry out that business.

As to ratification, there was also no abuse of discretion in the district court's decision. The district court's findings were based on the high level of control HMA exercises over a dealer's physical space, the fact that HMA directs customers to these physical locations, and the fact that HMA conditions dealership upon location. Once again, HMA 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, HMA's petition for an extraordinary writ should be denied.

II. THE PRIOR PROCEEDINGS

On February 22, 2021, HMA moved to dismiss under 28 U.S.C. §§ 1400(b) and 1406. Appx034-051. In its motion, HMA made four arguments. First, HMA argued that its franchised dealerships "are separately owned, operated and controlled." Appx040-042. Second, HMA argued that it did not control its

dealerships because such control was prohibited under Texas law. Appx042-043 (citing Tex. Occ. Code § 2301.476(b), (c)). Third, HMA argued that only its franchise dealerships performed sales and maintenance work in the district. Appx046-048. Fourth, HMA argued that its warranty program did not establish venue because "HMA does not perform repair or service of customer cars in this district, those functions are performed by independent dealerships selected by vehicle owners." Appx048-049.

In response, StratosAudio demonstrated that HMA ratified its franchisees' places of business as its own. In support, StratosAudio pointed to HMA's website, which allows users to view inventories at local dealerships, apply for financing, and schedule test drives. Appx093, Appx128, Appx130. StratosAudio further noted that the degree of control HMA possessed over its dealerships through its franchise agreements provided additional support that HMA held out the dealership locations as its own places of business. Appx095-101, Appx139-170. StratosAudio also explained that the dealers are HMA's agents and, under Texas law, HMA was conducting business at its dealership locations. Appx333-337.

On September 17, 2021, the district court denied HMA's motion. Appx388-399. In its decision, the district court determined that HMA ratified its dealers' places of business as its own, and HMA employed the dealers as its agents to conduct

its business. Appx396-399. The district court's opinion relied on numerous factual findings, none of which HMA contests.

To support its conclusion of ratification, the district court found that HMA exerted a significant degree of control over its dealers, including over: (1) "the dealers' premises and facilities;" (2) "the dealers' inventory;" (3) "the price and manner of payment;" (4) "the dealers' minimum net working capital amount;" (5) "the price and the terms upon which dealers purchase HM[A] vehicles and maintenance service;" (6) "the terms and scope of warranties to be included in its vehicle sales;" (7) "monthly or even daily reporting of finances and operations by each dealer; (8) "the IT equipment such as computers and data processing systems that its dealers must use and maintain;" (9) "the number of personnel that its dealers must have on-site and their certifications and training;" (10) "performance reviews on the dealers' sales, service, and parts, customer satisfaction, and even the dealer's maintenance of its premises and facilities;" and (11) "restricting whether and to whom a dealer may sell or transfer its business." Appx393-394.

The district court found HMA's arguments concerning the Texas Occupational Code rang hollow, explaining that "HMA cannot have its cake and eat it, too. HMA cannot enter into the Sales & Service Agreement with dealers in this District and try to enforce the Agreement on the one hand, and on the other hand

argue that provisions of the Agreement are unenforceable for venue purposes." Appx395.

The district court also found that HMA's relationship with its dealers is conditioned on the dealer's continued presence in the district. *Id*. Finally, the district court found that HMA represented to the public that it had a place of business because "[w]hen a user searches for Hyundai dealerships in the District, HMA's website displays a list of its authorized dealerships, allows the user to search for these dealerships' inventory, and gives the user an opportunity to schedule a test drive." Appx396. The district court also dismissed HMA's argument that the dealerships, rather than HMA, perform warranty services, finding that under Texas law, because HMA pays for the warranty services, "that means HMA 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 HMA's agents. Specifically, the district court found that the franchise agreements demonstrated that "HMA exercises a broad scope of control over its authorized dealerships in this District through their agreements." Appx398. The district court found that "the agreements between HMA and its dealerships clearly show that there is manifestation of consent by HMA to the dealerships that the dealerships shall act on HMA's behalf, and the consent by the dealerships to act." *Id.* As an alternate basis for its finding, the district court

found that the dealerships were HMA's agents because they conducted HMA's business in the district by distributing vehicles to consumers and HMA "provides new purchase warranties and services to consumers through its dealerships." Appx399.

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. U.S. 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." *In re Cray, Inc.*, 871 F.3d 1355, 1360 (Fed. Cir. 2017); *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

HMA 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 HMA's agents for venue purposes. HMA cannot meet its burden to show that the district court's ruling on either issue was an abuse of discretion.

A. HMA Has Not Shown the District Court Abused its Discretion in Finding HMA's 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, HMA has the right to direct and control its dealers, in many ways. For example:

- HMA controls what type of employees the dealer must employ (Appx150 ("Service and Parts Personnel"));
- HMA controls what inventory the dealer must maintain and the prices it displays for cars (Appx146 ("Adequate Vehicle Inventory"); Appx147 ("Disclosure as to Prices of Hyundai Products"));

- HMA requires dealers to perform warranty services (Appx149 ("Warranty and Policy Service," "Reimbursement Rates"));
- HMA requires dealers to use the tools and equipment it specifies (Appx151 ("Service Equipment and Special Tools"));
- HMA controls the types of computer systems the dealer must use (Appx154 ("DATA PROCESSING SYSTEMS"); Appx155 ("UNIFORM ACCOUNTING SYSTEM"); Appx152 ("DEALER will install and maintain a parts inventory control system approved by HMA…"));
- HMA can require attendance at mandatory training sessions for dealership employees (Appx152 ("Service Training Assistance"));
- HMA controls dealers' working capital requirements (Appx154 ("NET WORKING CAPITAL")); and
- HMA controls the dealers' "space, appearance, amenities, layout, equipment, and signage" including their usage of trademarks (Appx153 ("RESPONSIBILITIES OF DEALER")).

Notably, HMA does not challenge that it possesses these and other indicia of control. These indicia of control are what led the district court to correctly conclude the

dealers in the district serve as HMA's agents. Appx398-399. Based on this undisputed factual record, this decision was not "a clear abuse of discretion."[1]

HMA argues (at 19) that its dealers are not its agents because its dealership agreements "give HMA no authority whatsoever over the hiring and firing of dealership employees." This argument is a red herring: StratosAudio does not contend, and the district court did not find, that the dealership's employees are HMA's agents; rather, it is the ***dealership itself*** that is HMA's agent. *See* Appx333-337, Appx397-399 ("The authorized dealers are HMA's agents"). This is not unusual or an error, since courts in Texas[2] and elsewhere have long held that a corporation can serve as an agent for another corporation. *See Milligan v. S. Express, Inc*., 246 S.W.2d 662, 664 (Tex. Civ. App. 1952) ("another corporation may be the 'agent or representative' of the defendant corporation."); *Daniels v. CT Corp. Sys*., No. 03-99-00850-CV, 2000 Tex. App. LEXIS 4899, at *1 n.1 (Tex. App. July 27, 2000) ("CT Corporation Systems (CT Corporation) is an agent for Albertson's [Inc.]"); *Painter Bus Lines, Inc. v. Carpenter*, 146 S.W.2d 278, 280-81 (Tex. Civ. App. 1940); *see also United Bonding Ins. Co. v. Banco Suizo-Panameno, S. A.*, 422

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[1] HMA's petition does not challenge that "manifestation of consent" by both principal and agent are present, and it did not raise these factors below, Appx372-377, likely because consent is amply demonstrated by the existence of HMA authorized dealers in the district. *See* Appx112-124.

[2] HMA agrees Texas law governs its relationships with its dealers in Texas. HMA Pet. at 7.

F.2d 1142, 1146 (5th Cir. 1970) ("The District Court correctly held as a matter of law that a corporation may serve as an agent for another corporation"); *United States v. Delaware, L. & W.R. Co*., 238 U.S. 516, 529 (1915) ("one corporation can be an agent for another corporation"). Texas courts have even found automobile dealerships can be agents for venue purposes. *See Gen. Motors Acceptance Corp. v. Lee,* 120 S.W.2d 622, 625 (Tex. Civ. App. 1938) (finding dealer an "agent or representative" by virtue of its sale of a GMAC fire insurance policy).[3]

The fact that the dealership itself (and not its employees) serve as HMA's agents distinguishes this case from *Andra Grp., LP v. Victoria's Secret Stores, L.L.C.*, 6 F.4th 1283 (Fed. Cir. 2021). In *Andra,* the patent holder argued that store *employees* were agents for 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, there is no dispute HMA has the ability to enter into dealership agreements with its agents, and, more

[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. HMA 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 HMA in the same position as any other company with employees or agents in the district. If HMA does not like the result, it can always modify its dealership agreements.

importantly, to terminate those agreements. *See* Appx156-162 ("TERMINATION OF AGREEMENT").[4]

HMA also argues (at 19) that "the franchise agreements explicitly disclaim any agency relationship and provide that HMA does not consent to dealerships acting on its behalf," 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 a single, self-serving piece of boilerplate.

Further, HMA's contention that it "does not consent to dealerships acting on its behalf" is clearly wrong. As just one example, its dealership agreements provide that dealers will explain and provide a copy of warranties to customers at the time of sale (Appx147), and that the dealer will perform warranty repair services reimbursed by HMA (Appx149). Under Texas Occupations Code § 2301.251(c), that constitutes HMA conducting "business in [the] state," and HMA uses its dealers

[4] HMA identified two other cases as allegedly supporting its points on hiring and firing, but neither case has any relevant discussion. Regardless, as noted HMA has the power to both hire and dismiss dealers.

to conduct that business. HMA curiously argues (at 21) that it does not offer warranty repair services, but its own declarant stated, "[w]hen sold by authorized Hyundai dealerships in the WDTX, new Hyundai branded vehicles come with a warranty from HMA." Appx054. Its dealership agreements further provide that it will compensate the dealer for warranty repair work. Appx149 ("HMA agrees to compensate DEALER for all warranty, policy, and campaign inspection work"). To the extent HMA is arguing it does not itself perform the actual repair, that only proves StratosAudio's point: HMA has delegated fulfilling warranty repairs to the dealers as HMA's agents, and the dealerships have virtually no discretion in how to carry out these repairs, with HMA dictating even what tools they must use. Appx151.

HMA analogizes this case to *Arguello v. Conoco, Inc*., 207 F.3d 803 (5th Cir. 2000), but there the agreement only specified that Conoco-branded stores must conduct business "in a consistent manner with the standards of Conoco, Inc., and that customers should be treated fairly and courteously." *Id*. at 808. Here, as discussed above, the control is much more extensive, covering the types of employees the dealer employs, its training, inventory, pricing, and working capital. These provisions also go far beyond the mere "right to receive reports" discussed in *Cardinal Health Sols., Inc. v. Valley Baptist Med. Ctr*., 643 F. Supp. 2d 883, 888–89 (S.D. Tex. 2008).

HMA argues (at 21) that the District Court "improperly disregards the corporate distinctness between HMA and the independent dealerships." A corporation, however, does not lose its "distinctness" simply by becoming the agent of another corporation. As the Restatement explains, "[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." Restat. 3d of Agency § 1.01. The case Hyundai cites, *EMED Techs. Corp. v. Repro-Med Sys., Inc.*, No. 17-728, 2018 U.S. Dist. LEXIS 93658, at *4 (E.D. Tex. June 4, 2018), is not to the contrary. There, the patent holder relied solely on the fact that the manufacturer used a distributor in the district to establish venue. *Id*. at *4. Agency was never raised, making the decision inapplicable here.

Finally, HMA argues (at 23) that the district court "entirely ignored" Texas laws that prohibit it from controlling a franchised dealership. This is incorrect: the district court expressly addressed this issue, noting "HMA cannot have its cake and eat it, too." Appx395. The district court correctly noted that HMA cannot enter into its dealership contracts, with the intent that they be enforceable, but at the same time argue they are unenforceable for venue purposes. Regardless, HMA's argument is irrelevant because, even if its dealership agreements are somehow unenforceable, its dealers have nevertheless chosen to voluntarily enter into these agreements and to

give HMA *effective* control over their operations. That is all agency requires. *See* Restat. 3d of Agency § 1.01 ("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.").

In sum, there is no "erroneous view of the law" here because the law of agency is not disputed. Nor is there any "clearly erroneous assessment of the evidence." That evidence too is undisputed, and overwhelmingly shows car companies possess unique control over their dealerships. It is not necessary for this Court to address whether HMA is violating Texas Occupations Code § 2301.476(c)(2) through entering into agreements that give it such extensive control over its dealers. The only question presented here is whether the district court committed a clear abuse of discretion in finding HMA's dealers are its agents for venue purposes. There was no such abuse, so the petition should be denied.

B. The Dealerships Conduct HMA's Business

HMA argues (at 25) that even if its dealers are its agents, they are not conducting HMA's business, which HMA suggests is limited to "selling Hyundai-brand vehicles to independent dealerships." The very idea that dealers are not conducting HMA's business is absurd. HMA's dealership agreement states, "HMA has established [its] network of authorized Hyundai Dealers, operating at approved locations and according to Hyundai standards, ***to sell and service Hyundai***

Products."[5] Appx132 (emphasis added). In other words, dealerships only exist to carry out Hyundai's purpose of selling its cars. Appx399. The district court did not clearly abuse its discretion in refusing to hold otherwise.

The fact that HMA's business includes sales of Hyundai-branded cars cannot be reasonably disputed. For example, HMA lists vehicle inventories and prices on its website. Appx128. HMA helps users schedule test drives to purchase those vehicles. Appx130. HMA runs marketing campaigns urging customers to buy Hyundai vehicles. Appx071, Appx148 ("Sales Promotion Assistance"). Indeed, HMA's privacy policy says it collects personal information from consumers, ***including information collected by its dealers***, and uses that information to aid its marketing efforts. Appx063, Appx065-066. Presumably HMA does not dispute marketing is one of its business purposes (Appx148), so this use of dealers to aid in data collection is clearly having the dealer conduct HMA's business.

HMA also provides "field sales personnel to advise and counsel DEALER on sales-related subjects, including but not limited to merchandising, training and sales management." Appx148 ("Field Sales Personnel Assistance"). HMA requires attendance at trainings and "refresher courses" for dealer personnel. Appx152.

[5] "Hyundai Products" are defined as "all Hyundai Motor Vehicles, parts, accessories and equipment which FACTORY, in its sole discretion, and/or authorized suppliers sell to HMA for resale to authorized Hyundai Dealers." Appx169.

HMA reviews its dealer's sales performance. Appx148. These efforts, too, aid HMA's business purposes, even though they focus on the dealer's relationship with end customers.

Warranty services are another clear example of HMA doing business in the district. "When sold by authorized Hyundai dealerships in the WDTX, new Hyundai branded vehicles **come with a warranty from HMA**." Appx054, ¶ 12 (emphasis added). The dealers must "clearly explain to the Customer the extent of any warranty … and will deliver a copy of such warranty to the Customer at the time of sale." Appx147. "To the extent maintenance or services need to be performed for a customer in the WDTX pursuant to a warranty, those services are performed by authorized Hyundai dealerships." Appx054, ¶ 12. The dealers are reimbursed by HMA for these services. Appx149. Under Tex. Occ. Code § 2301.251(c), this constitutes HMA conducting "business in this state," and it is conducting that business at the locations of its authorized dealers.

HMA argues car warranty repair services are similar to the "maintenance activities" at issue in *Google*. As an initial matter, this Court in *Google* said maintenance provisions "may be suggestive of an agency relationship," 949 F.3d at 1346, so it is improper to simply ignore them for purposes of determining agency, as HMA does. More importantly, the maintenance at issue in *Google* was only ancillary to the implicated video streaming services Google offered. Indeed,

customers were likely unaware of where Google housed its servers, let alone what maintenance was done on them. Here, a car warranty—and specifically the backing of that warranty by HMA—are a critical part of why customers choose to purchase a vehicle, and why they choose to buy a new car rather than a used car. Indeed, customers are certainly aware of (and likely thankful for) the HMA warranty every time they bring their car to an HMA-approved dealer for covered repairs. The warranty services are not "ancillary" to HMA's business as was the case in *Google*—they are an integral part of that business.

HMA also again analogizes this case to *Andra*, but here too the facts are different. In *Andra* there was very little evidence on the relationship between the Non-Store Defendants and the Store Defendants. As noted, the patent holder did not argue the Store Defendants were agents of the Non-Store Defendants, and apparently only suggested the entities "work together in some aspects." 6 F.4th at 1290. Here, StratosAudio has shown much more, including that HMA exercises effective control over many aspects of the dealers' operations.

C. HMA 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 HMA's dealers are its agents for venue purposes, the same facts demonstrate ratification is also present.[6]

Again, the law is not disputed. In *Cray* this Court held that a physical place may be considered a "place of the defendant" if the plaintiff shows that the defendant "establish[ed] or ratif[ied] the place of business." *Id.* at 1363. The Court listed various "considerations" that are relevant to that analysis, 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) whether the defendant has made "representations that it has a place of business in the district." *Id*. 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 relevant *Cray* and *ZTE* ratification factors and finding HMA ratified its dealers places of business.

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[6] 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.

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

As noted, HMA's agreements with its dealers give HMA extensive control over its dealers' physical location, including their "space, appearance, amenities, layout, equipment, and signage." Appx153 ("RESPONSIBILITIES OF DEALER"); Appx154 ("EVALUATION OF DEALERSHIP FACILITIES"). For example, dealers must display whatever "authorized signs" HMA requires, and "shall in no way alter or modify such authorized signs without obtaining prior written approval" from HMA. Appx153 ("SIGNS"). As discussed above, HMA controls what employees must be employed at dealership locations. Appx150. HMA controls the computer systems the dealer must use at that location. Appx152, Appx154-155. HMA controls what inventory the dealer must maintain at that location. Appx146. HMA maintains control over what tools and equipment are used at each location. Appx151. These facts all support the district court's finding that HMA "exercise[s] *de facto* control" over the physical location of its dealerships. Appx392.

HMA argues (at 28) that the above facts are irrelevant because they do not relate to a dealer's physical place of business, but it does not explain this argument. Controlling where a dealer can locate its business, what inventory it must keep at that location, what signs it can display at that location, who it must employ at that location, and what computers it must place at that location, are all forms of control

over the physical space. They are controls far beyond anything at issue in *Cray*, which involved individuals working from home.

HMA also argues (at 28-29) the control it possesses over dealers is irrelevant because "the ratification analysis focuses on whether the defendant 'publicly' adopts the place of business as his own" and "[t]here is no evidence that the franchise agreements are open to the public." Nothing in *Cray* suggests the "possession or control" analysis must be based solely on publicly-available information.[7] HMA's argument would improperly collapse the analysis of this factor with the third *Cray* factor, "whether the defendant has made representations that it has a place of business in the district."

HMA next argues (at 27) that it "does not own or lease physical dealership locations," but 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, HMA argues (at 28) that it has no "possession or control" over its dealers because it purportedly cannot enter a dealership without permission. That argument is false—HMA's dealership agreements say HMA "will have the right, at all reasonable times and during DEALER's regular business hours, to examine, audit

[7] Even if that were the test, the HMA dealership agreement is publicly available; it was filed as a public exhibit in an unrelated litigation. Appx109, ¶ 13.

and reproduce all records, accounts and all other data relating to the sale and service of Hyundai Products by DEALER." Appx155 ("AUDIT OF DEALER RECORDS"). Refusal to comply is grounds for termination. Appx158, Subpart i. Regardless, even assuming there are limits on HMA's control of its dealers' physical location, that does not negate the other aspects of control HMA indisputably possesses. *Cf.* 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…").

2. HMA Conditions Dealership On Location

Regarding whether HMA "conditioned employment on an employee's continued residence in the district or the storing of materials at a place in the district so that they can be distributed or sold from that place," this factor is also met. For example, the dealership agreement states, "HMA has entered into this Agreement in reliance upon DEALER's representation that it will establish and maintain dealership facilities and operations only at the location(s) identified … DEALER agrees, therefore, that it will not, under any circumstances, conduct Dealer operations at any other location, whether a satellite operation, subdealership, through an associate Dealer or otherwise, without the prior written consent of HMA." Appx153. "DEALER agrees not to display Hyundai marks or to conduct any dealership operations . . . *at any location other than the location(s) approved herein*,

without the prior written consent of HMA." Appx134 (emphasis added). Dealership contracts also tie inventory to location: "Dealer shall not move or permit to be moved any Inventory from the Premises without the prior written consent of Lender." Appx177. Also, HMA may send "parts and other materials" for storage at a dealer's location "*without DEALER's authorization*." Appx149 ("Campaign Inspections") (emphasis added). This evidence all weighs in favor of finding ratification. *Cray*, 871 F.3d at 1363-64.

HMA suggests this factor cannot be present because its dealers are an "independent third party." HMA Pet. at 30. As discussed above, that is incorrect: the dealers are HMA's agents. HMA's slippery slope argument—that a ruling in StratosAudio's favor will lead to venue "any time a distributor contracts with a third-party"—is clearly overblown.[8] HMA willingly chose to bind its dealers with extensive control provisions. It could just as easily modify its dealership agreements

[8] HMA also frets (at 14) that "[d]istant manufacturers and distributors will be faced with unprecedent new risks, as they potentially become responsible for he acts of retailers over whom they have no right of control." First, as noted, HMA does have control over its dealers. Second, there are existing limitations on liability of a principal for the acts of its agent. *See* Restat. 3d of Agency § 7.03. Third, 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").

to remove this control. More fundamentally, if a party is truly independent, it will not be an agent, so the test in *Google* will not be met. Also, other companies in a traditional manufacturer-distributor relationship will almost certainly not have the extensive control provisions at issue here. The relationship between a car company and a dealer is unique, and each case is fact-specific. The district court correctly recognized this when it analyzed the facts specific to this case. Nothing in the district court's holding was an abuse of discretion, making mandamus inappropriate.[9]

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

Finally, as to whether the HMA has made "representations that it has a place of business in the district," this factor too is met. HMA's website not only lists authorized dealerships with the Hyundai logo and trademarks, but also allows users to "search for these dealerships' inventory, and gives the user an opportunity to schedule a test drive." Appx108-112, Appx126-130. A customer using these online tools would see the dealership as a Hyundai dealership—a location displaying Hyundai trademarks and signage, where the customer can view, test drive, and purchase Hyundai vehicles offered with Hyundai-backed warranties. As HMA is the only Hyundai-authorized distributor in the United States, these HMA vehicles

[9] As noted below, HMA could choose to modify its dealer agreements to eliminate its control over the dealers, and any burdens and obligations HMA imposes on those dealerships.

and HMA warranties, available exclusively through HMA authorized dealers, are how HMA conducts business in this district.

HMA argues (at 31) the facts here are "materially identical" to *Andra*, but as discussed previously, HMA exercises far more control over its dealerships than the store agreements in *Andra*. There, the stores were simply resellers whose employees needed to follow a Victoria's Secret "Code of Conduct." 6 F.4th at 1288-89. In this case, the dealership agreements go much further and cover almost all aspects of operation, including the premises and facilities, inventory, price, minimum net working capital, terms of service, terms and scope of warranties, financial reporting, personnel, and organizational structure. *See* Appx392-394. Under these facts, it cannot be said that dealerships are "mere resellers."

HMA also suggests (at 32) that references to "Hyundai" at dealerships does not matter because its own corporate name ("Hyundai Motor America") is not displayed. But HMA also uses the branding of its foreign parent. *See, e.g.*, Appx109, Appx128, Appx130. Ultimately, what name and logo HMA obligates its dealers to display is irrelevant; what is relevant is the fact that HMA has sufficient control over the dealers' physical places of business to require them to show the signage and logos of HMA's choosing.

Finally, HMA's arguments ignore warranty services. As noted, "[w]hen sold by authorized Hyundai dealerships in the WDTX, new Hyundai branded vehicles

come with a warranty from HMA." Appx054, ¶ 12 (emphasis added). HMA reimburses the dealers for warranty repair services (Appx149) which, under Tex. Occ. Code § 2301.251(c), constitutes HMA conducting "business in this state," at the location of its authorized dealers.

Collectively, this evidence more than adequately supports the district court's conclusion that Hyundai ratifies its dealerships' place of business, which forecloses the extraordinary intervention of mandamus.

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

HMA contends (at 14-17) 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. HMA'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.

HMA relies primarily 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 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 an HMA declaration demonstrating that HMA 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 HMA's behalf as HMA'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.

HMA's remaining cited cases do not support mandamus either. HMA mentions (at 15) *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.

Additionally, other courts have ruled that venue is proper under similar factual circumstances. In *Blitzsafe Tex., 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 HMA-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.

HMA also identifies *Causey v. Sewell Cadillac-Chevrolet, Inc.*, 394 F.3d 285 (5th Cir. 2004), as an example of a case where a dealer was found not to be an agent, but it ignores other decisions that have reached a contrary result. *See, e.g., Morano v. BMW of N. Am., LLC*, 928 F. Supp. 2d 826, 837-38 (D.N.J. 2013) ("it stands to reason that the dealer acted as BMWNA's agent"); *Kent v. Celozzi-Ettleson Chevrolet, Inc.*, No. 99-C-2868, 1999 WL 1021044, at *4 (N.D. Ill. Nov. 3, 1999) ("an automobile dealership may under certain circumstances be an agent of the manufacturer"). In *Causey*, agency was only discussed in a single sentence, where the court said, "the documents provided by GM show that Sewell is an independent business and that GM does not control Sewell's daily operations." 394 F.3d at 290. Here, the evidence of control is far more extensive. The *Causey* decision did not address § 1400(b) or rule categorically that dealerships cannot be agents of car manufacturers.

HMA's remaining cases about "distributors" are generally outside the context of car manufacturers and car dealerships, and their facts are not analogous. *See 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); *Guy A. Shaked Invs. Ltd. v. Ontel Prods. Corp.*, No. 19-10592, 2020 WL 6107066, *3-4 (C.D. Cal. July 30, 2020) (rejecting venue theory based on storing straightening brushes in third-party warehouse); *FrenchPorte, LLC v. C.H.I. Overhead Doors, Inc.*, No. 20-00467, 2021 WL 242499, *5-8 (D. Md. Jan. 25, 2021) (declining venue where plaintiff offered only "conclusory assertion" about control over dealers and defendant did not require use of "name or logo at all"); *Vaxcel Int'l Co. v. Minka Lighting, Inc.*, No. 18-0607, 2018 WL 6930772, at *3 (N.D. Ill. July 11, 2018) (discussing venue allegation based on sales of motion-sensing lights through Home Depot stores). In sum, HMA'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

For the foregoing reasons, HMA's mandamus petition should be denied.

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Respectfully submitted,

By: /s/ *Jonathan Lamberson*

Jonathan Lamberson
Henry Huang
WHITE & CASE LLP
2 Palo Alto Square, Suite 900
Palo Alto, CA 94306

Michael Songer
WHITE & CASE LLP
701 Thirteenth Street, NW
Washington, DC 20005-3807
(202) 626-3600

(650) 213-0333
lamberson@whitecase.com
henry.huang@whitecase.com

Hallie Kiernan
WHITE & CASE LLP
1221 Avenue of the Americas
New York, NY 10020-1095
(212) 819-7576
hallie.kiernan@whitecase.com

songer@whitecase.com

Daniel Sternberg
WHITE & CASE LLP
75 State Street
Boston, MA 02109-1814
(617) 979-9326
dan.sternberg@whitecase.com

Counsel for Respondent StratosAudio, Inc.

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Dated: November 9, 2021

/s/ Jonathan Lamberson
Attorney for Respondent
StratosAudio, Inc.