No. 22-108

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
No. 6:20-cv-01131
Judge Alan D. Albright

VOLKSWAGEN GROUP OF AMERICA, INC.'S REPLY IN SUPPORT OF ITS PETITION FOR A WRIT OF MANDAMUS

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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 Volkswagen Group of America, 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: 11/12/2021

Signature: /s/ Mark Hannemann

Name: Mark Hannemann

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
Volkswagen Group of America, Inc.		Volkswagen AG

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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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David Whittlesey (Shearman & Sterling LLP)	Daniel M. Chozick (Shearman & Sterling LLP)	

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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IN RE VOLKSWAGEN GROUP OF AMERICA, INC. , No. 21-149 (Fed. Cir. 2021) (decided 6/9/2021)	StratosAudio, Inc. v. Hyundai Motor America, Case No. 6:20-CV-01125-ADA (W.D. Tex.)	In re Hyundai Motor America, No. 22-109 (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. Improper-Venue Decisions Are Reviewed De Novo, Not for Abuse of Discretion

Plaintiff StratosAudio (Stratos) aimed its entire opposition brief at the wrong target. The standard of review is de novo, not abuse of discretion. *See Celgene Corp. v. Maylan Pharm.*, No. 21-1154, 2021 WL 514331, at *3 (Fed. Cir. Nov. 5, 2021); *Andra Grp. v. Victoria's Secret Stores*, 6 F.4th 1283, 1287 (Fed. Cir. 2021) ("We review de novo the question of proper venue under 28 U.S.C. § 1400(b).").[1] *Cf.* Opp. Br. at 2, 9, 10, 12 ("The only question presented here is whether the district court committed a clear abuse of discretion . . . ."), 17, 22, 25, 28, and headings IV.A, IV.C.

Stratos had the burden to plead sufficient facts to establish venue under 28 U.S.C § 1400(b) in the trial court. *See, e.g.*, *In re ZTE (USA)*, 890 F.3d 1008, 1013 (Fed. Cir. 2018). As de novo review of Stratos's allegations makes clear, Stratos failed as a matter of law to meet its burden to establish venue, and VWGoA's "right to mandamus is 'clear and indisputable.'" *In re Google*, 949 F.3d 1338, 1341 (Fed. Cir. 2020) (quoting *Cheney v. U.S. Dist. Court for D.C.*, 542 U.S. 367, 380 (2004)).

II. This Is Not a Close Case

Some of this Court's recent venue opinions—*Cray*, *Google*, and *Andra*, for example—have dealt with situations where there could be a reasonable dispute about

[1] Federal Circuit law governs the patent-venue issue. *See, e.g.*, *In re ZTE (USA)*, 890 F.3d 1008, 1012 (Fed. Cir. 2018).

whether the accused infringer has "a regular and established place of business" in a district. But in each of those cases, consistent with the Supreme Court's instruction that the "requirement of venue is specific and unambiguous" and is not "to be given a 'liberal' construction," *Olberding v. Illinois Cent. R. Co.*, 346 U.S. 338, 340 (1953), the Court found venue not to be proper.

In *Cray*, for example, the Court held that an employee's home office is not their employer's place of business. *See In re Cray*, 871 F.3d 1355 (Fed. Cir. 2017). In *Google*, the Court held that a computer server center operated by an Internet service provider using servers owned by Google, maintained per Google's instructions, and carrying out Google's business of providing search results to customers, is not Google's place of business. *In re Google LLC*, 949 F.3d 1338 (Fed. Cir. 2020). And in *Andra*, the Court held that subsidiaries' stores are not the parent company's own places of business, even when those stores have a close business relationship with the parent company and, *e.g.*, accept returns of merchandise purchased directly from the parent. *Andra*, 6 F.4th at 1287–89.

This is not one of those arguably close cases. VWGoA is not the dealers' parent corporation. It has no employees at the dealerships. It is not doing business using equipment at the dealers' locations. The relationship between the dealers and VWGoA is arms-length and governed by contract. Even Stratos "does not argue a lack of corporate separateness" in this situation. Opp. Br. at 15 n.5. Stratos instead

focuses on misguided arguments that the dealers are VWGoA's agents, but those arguments are both wrong and insufficient. The dealers are VWGoA's customers, not its agents.

III. The Dealers Are Not VWGoA's Agents

Stratos's argument boils down to the contention that the quality-control provisions to which VW- and Audi-brand dealers agree make those dealers VWGoA's agents. *See generally* Opp. Br. at, *e.g.*, 1. Stratos is incorrect on the law.

An agency relationship between two parties only exists if (1) the principal has the right to direct or control the agent's actions, (2) the principal manifests its consent to the agent that the agent shall act on its behalf, and (3) the agent consents to act. *See Google*, 949 F.3d at 1345.

The district court's analysis of the second and third agency factors is limited to a single sentence, simply concluding that VWGoA "exercises a broad scope of control over its authorized dealerships." Appx0009. The district court, however, ignored the fact that VWGoA's agreements with the dealerships explicitly disclaim any rights for the dealerships to act on behalf of VWGoA: "Dealer Not an Agent. 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." Appx0088; *see also* Pet. at 25 n.17.

Stratos incorrectly suggests that those explicit statements of non-consent in the dealership agreements are not determinative, and that, despite those explicit statements, an agency relationship exists between the dealers and VWGoA. *See* Opp. Br. at 11. The only opinion Stratos cites to support this contention—which, in effect, would erase the second and third agency requirements—is *Pacific Gas & Electric Co. v. United States*, 838 F.3d 1341 (Fed. Cir. 2016). But, in that case, the Court ***found no agency despite the fact that the contracts in question specifically said that the parties were agents***. 838 F.3d at 1359–61. Far from showing that statements of non-consent to agency can be ignored, that case instead stands for a very different proposition: that a statement of agency alone may not establish all the requirements of an agency relationship. A statement of non-consent to agency, however, expressly undermines at least the two consent requirements, without which an agency relationship cannot exist. *Pacific Gas* is therefore inapposite.

Having failed to find relevant facts that could plausibly establish an agency relationship, Stratos instead encourages the Court to ignore the two consent factors because, here, "indicia of control . . . are far too extensive to be swept away." Opp. Br. at 11. But even if VWGoA may be able to negotiate certain quality control measures, such quality controls alone are not sufficient to establish an agency relationship. All three agency factors must be present. *Google*, 949 F.3d at 1345.

Moreover, the district court's analysis of control focused on VWGoA's control of "minutiae such as lighting, furniture, stationery, and brochures." Opp. Br. at 9; *see also* Opp. Br. at 7–8 (listing respects in which VWGoA has the right to control the dealerships). Such minutiae do not show that the dealers are VWGoA's agents. Rather, those controls reflect that the dealerships are licensees of VWGoA's trademarks. They serve to protect the image associated with the VW and Audi trademarks. The same is true for Stratos's asserted litany of other brand-protecting contractual requirements (requiring training, inspecting facilities, ensuring financial solvency, and approving locations). *See, e.g.*, Opp. Br. at 1–2.

The kind of control required (but not sufficient) to find agency is different: it means day-to-day control over the actions of the alleged agent and its employees. *See Google*, 949 F.3d at 1345–46 (referring to "the power to give interim instructions," and citing the Restatement (Third) of Agency). Here, there is not even a contention that VWGoA has any control over the dealers' business decisions. *Cf.* Br. for the Alliance for Automotive Innovation as Amicus Curiae at 7–8 (explaining that "dealers conduct their sales business autonomously" and that dealers "own the cars that they sell, and they sell those cars without approval from the manufacturer").

VWGoA requires VW- and Audi-brand dealers to maintain their businesses in a way that protects the Volkswagen and Audi brands. That doesn't make the dealers into VWGoA's agents.

IV. VWGoA Neither Established the Dealers' Places of Business Nor Ratified Them as VWGoA Places of Business

Google explicitly "requires the regular, physical presence of an employee or other agent of the defendant conducting the defendant's business." 949 F.3d at 1345. But *Google* does not say that the presence of an agent at a place is, by itself, sufficient to show that the agent is regularly performing ***the defendant's business*** at that place (as required by the second and third *Cray* factors, *see Cray*, 871 F.3d at 1362–64; Appx0003 n.1 (noting the district court "treats the *Google* requirement as a fourth requirement in addition to the three *Cray* requirements")).

This is consistent with this Court's opinion in *Cray*, where the admitted presence of the defendant's employee at the place in question—the employee's home—was not sufficient to establish venue. *See Cray*, 871 F.3d at 1363. In addition to the presence of an agent at a place, "the defendant must establish or ratify the place of business." *Id.*[2]

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[2] This Court's opinion in *Andra* appears to considers agency and ratification as two alternative theories of venue; but, to the extent this analysis was meant to suggest that ratification is a route around agency, or *vice versa*, this is at odds with *Google* and *Cray*.

Andra also states that, as long as the corporate form is maintained, "the place of business of one corporation is not imputed to the other for venue purposes." *Andra*, 6 F.4th at 1289. There is no assertion in this case that the corporate forms were not respected, and Stratos admits it is not pursuing an alter-ego theory. Opp. Br. at 15 n.5.

Here, VWGoA did not "establish or ratify the place of business." *Cray*, 871 F.3d at 1363.

There is no contention in this case that VWGoA established the dealers' places of business. Stratos argues instead that VWGoA ratified those locations as its own. To support that argument, Stratos points to the same indicia of supposed control that it relies on in its agency theory. Opp. Br. at 15 ("the same facts also demonstrate that ratification is present").

On this point, *Andra* controls. In *Andra*, as in this case, the plaintiff argues that the manufacturer/distributor (in *Andra*, the "Non-Store Defendants") had "a unified business model" with the dealers (the "Store Defendants"). 6 F.4th at 1290. And, as in this case, the *Andra* plaintiff relied for its ratification theory on "many of the same facts it set forth in support of its agency theory." *Id.* However, *Andra* concluded that the fact that the entities work together "is insufficient to show ratification." *Id.*

And in this case, as in *Andra*, "[s]everal additional factors weigh against a finding of ratification." *Id.* The factors listed in *Andra* and present in this case include these:

- VWGoA does not own or lease the dealers' places of business.
- The "Find a Volkswagen Dealer" function on the vw.com website points to dealers, not to any of VWGoA's places of business (*see* Petition at 11 n.10,

giving examples of VWGoA's actual places of business). The ***separate*** VWGoA website (volkswagengroupofamerica.com) has a map of VWGoA locations, which notably does not include any dealers.

- VWGoA's corporate name is not displayed at dealer locations.
- VWGoA carries out a different business function (manufacturing and distributing vehicles) from its dealers (who sell to consumers).
- The dealers are licensed to use VWGoA trademarks, but "the companies' shared use of [Volkswagen] in their name does not detract from the separateness of their businesses."

Id.

In fact, VWGoA does not "exercise[any] attributes of possession or control ***over the place***." *Id*. at 1289 (emphasis added). Volkswagen and the dealers agree on standards that the dealers are to follow. But if a dealer violates those standards, VWGoA could at most terminate the dealer agreement. Control over the place itself is entirely and firmly in the dealers' hands.

V. Other District Court Opinions Have Specifically Considered the Same Issues Raised Here, and Correctly Concluded that Venue Cannot be Based on the Location of a Dealership

The district court in this case ignored the *Omega* and *West View* opinions. *See* Appx0008; *Omega Pats., LLC v. Bayerische Motoren Weke AG*, 508 F. Supp. 3d 1336 (N.D. Ga. 2020); *West View Rsch., LLC v. BMW of N. Am., LLC*, 16-cv-2590

JLS, 2018 WL 4367378 (S.D. Cal. Feb. 5, 2018). Stratos urges this Court also to ignore these opinions, despite the fact that they deal with exactly the same sorts of alleged "control" as alleged here. Opp. Br. at 23–25. Those opinions thoughtfully walk through the facts and this Court's opinions, ultimately finding no ratification on nearly identical facts. While those decisions are not binding on this Court, they are persuasive. *See Woodard v. Sage Prods., Inc.*, 818 F.2d 841, 844 (Fed. Cir. 1987) ("[O]ur decision to follow another [court]'s interpretation . . . results from the persuasiveness of its analysis, not any binding effect."). The district court's analysis here pales in comparison.

The *West View* court found improper venue despite noting the following:

> Plaintiff then rigorously examines the operating agreement, which consists of the agreement itself, (*see id.*, Ex. A (Sealed Document), at 34), and the requirements addendum, (*see id.*, Ex. B (Sealed Document), at 53). ***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] (*Id.* at 11-12.) In sum, Plaintiff argues that the thirty separate provisions from the operating agreement are illustrative of BMWNA's control over the dealerships. (*See id.* at 11-18.)

West View, 2018 WL 4367378, at *6 (emphasis added).

While Stratos argues that "other courts have ruled that venue is proper under similar factual circumstances," Opp. Br. at 25, that assertion in misleading. Stratos points to only ***one*** decision in its favor: *Blitzsafe Texas, LLC v. Bayerische Moteren*

Werke AG, No. 2:17-cv-00418-JRG, 2018 WL 4849345 (E.D. Tex. Sep. 6, 2018). That now-vacated decision not only predates *Google* and *Andra*, but it was wrong for all the same reasons the district court in this case was wrong.[3]

VI. Doing Business in the District Does Not Make Venue Proper

Stratos's argument boils down to the contention that VWGoA is doing business in the district. *See, e.g.*, Opp. Br. at 14 (citing to a Texas statute for the proposition that VWGoA is doing business in Texas by reimbursing dealers for warranty work). Doing business in the district might, in some cases, suffice for the district court to exercise specific personal jurisdiction over VWGoA. But the law is clear—absolutely crystal clear—that the patent venue statute is narrower than the general venue statute. The general venue statute permits suit in any district where there is personal jurisdiction over a defendant. 28 U.S.C. § 1391(b). The patent venue statute does not reach that far. *See* Pet. at 11 and 26 (citing authorities).

Permitting VWGoA to be sued in the Western District of Texas merely because it has business relationships with dealers located there would "significantly expand the scope of § 1400(b)." *Omega*, 508 F. Supp. 3d at 1343; *see also, e.g.*,

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[3] As a vacated decision, *Blitzsafe* has no precedential value. *See United States v. Munsingwear, Inc.*, 340 U.S. 36, 40–41 (1950) (explaining that 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).

Google, 949 F.3d at 1346 ("the Supreme Court has cautioned against a broad reading of the venue statute").

This Court should not countenance such an expansion.

Dated: November 12, 2021

Respectfully submitted,

/s/ Mark Hannemann

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FORM 19. Certificate of Compliance with Type-Volume Limitations **Form 19**
July 2020

UNITED STATES COURT OF APPEALS
FOR THE FEDERAL CIRCUIT

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS

Case Number: 22-108

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

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