

¹ The Court notes the removal of BMW Manufacturing Co., LLC from the First Amended Complaint. (*See* Dkt. No. 60 at 1 n.1). The Court also notes the restyling by the Parties of the caption. (*See id.*; Dkt. No. 66). The Court is not aware of any motions or notices to the Court regarding dismissal or otherwise removal of the BMW Manufacturing Co., LLC Defendant nor any motion to restyle the case. The Parties shall rectify this deficiency at their earliest opportunity.

(Dkt. No. 60 at 11). Additionally, BMWAG argues that it is not subject to specific personal jurisdiction in this District, as it has not “purposefully directed any activities at Texas residents, or that Blitzsafe’s claims arise out of any such activities,” and, accordingly, subjecting BMWAG to specific personal jurisdiction would not be reasonable nor fair. (*Id.* at 12).

Personal jurisdiction in patent infringement actions is governed by Federal Circuit law. *See Silent Drive, Inc. v. Strong Indus.*, 326 F.3d 1194, 1200-01 (Fed. Cir. 2003). To determine whether personal jurisdiction exists over an out-of-state defendant, the Court must consider: “(1) whether a forum state’s long-arm statute permits service of process, and (2) whether the assertion of personal jurisdiction would violate due process.” *Autobytel, Inc. v. Insweb Corp.*, No. 2:07-cv-524, 2009 WL 901482, at *1 (E.D. Tex. Mar. 31, 2009) (citing *Genetic Implant Sys., Inc. v. Core-Vent Corp.*, 123 F.3d 1455, 1458 (Fed. Cir. 1997)). Because the Texas long-arm statute reaches “as far as the federal constitutional requirements of due process will allow,” the two inquiries collapse into a single inquiry of whether the exercise of personal jurisdiction comports with federal due process. *ATEN Int’l Co. v. Emine Tech. Co.*, 261 F.R.D. 112, 118 (E.D. Tex. 2009).

Due process is satisfied if (1) the defendant has minimum contacts with the forum state; and (2) the exercise of jurisdiction over the defendant does not offend “traditional notions of fair play and substantial justice.” *Autobytel*, 2009 WL 901482, at *1 (citing *Int’l Shoe Co. v. State of Wash., Office of Unemployment Comp. & Placement*, 326 U.S. 310, 316 (1945)). “Specific jurisdiction exists when the nonresident defendant has ‘purposefully directed’ his activities at the residents of the forum, and the litigation results from alleged injuries that ‘arise from or relate to’ those activities.” *Icon Health & Fitness, Inc. v. Horizon Fitness, Inc.*, No. 5:08-cv-26, 2009 WL 1025467, at *3 (E.D. Tex. Mar. 26, 2009) (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 474 (1985)).

In addition, an “independent basis” for personal jurisdiction is the “stream-of-commerce theory.” *Icon Health*, 2009 WL 1025467, at *4. While “the precise requirements of the stream-of-commerce theory remain unsettled,” *Polar Electro Oy v. Suunto Oy*, 829 F.3d 1343, 1348 (Fed. Cir. 2016), the Federal Circuit has consistently followed the stream-of-commerce approach it set forth in *Beverly Hills Fan Co. v. Royal Sovereign Corp.*, 21 F.3d 1558, 1564 (Fed.Cir.1994). *See, e.g., AFTG-TG, LLC v. Nuvoton Tech. Corp.*, 689 F.3d 1358, 1363–64 (Fed. Cir. 2012) (“we [] apply our precedent that interprets the Supreme Court’s existing stream-of-commerce precedents. That precedent is *Beverly Hills Fan Co. v. Royal Sovereign Corp.*”) (citation omitted).

Under *Beverly Hills Fan*, where a defendant “purposefully ship[s]” an accused product into a forum state “through an established distribution channel” and “[t]he cause of action for patent infringement is alleged to arise out of th[o]se activities,” “[n]o more is usually required to establish specific jurisdiction.” *Beverly Hills Fan*, 21 F.3d at 1565 (citing *Burger King*, 471 U.S. at 472–73; *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 774–75 (1984)); *see also Beverly Hills Fan*, 21 F.3d at 1566 (“the necessary ingredients for an exercise of jurisdiction consonant with due process [are present where] defendants, acting in consort, placed the accused fan in the stream-of-commerce, they knew the likely destination of the products, and their conduct and connections with the forum state were such that they should reasonably have anticipated being brought into court there.”).

As the Plaintiff points out, these facts are similar to facts previously considered within this District. In *MHL Tek, LLC v. Nissan Motor Co.*, No. 2:07-cv-289 (TJW), 2008 WL 910012 (E.D. Tex. Apr. 2, 2008), this Court found that where a defendant manufactured accused vehicles and provided them to an intermediary for distribution throughout the country, including Texas, with

knowledge of this distribution, the manufacturing defendant “should reasonably anticipate being haled into court in Texas.”²

This is no different. BMWAG states that it manufactures accused vehicles and transfers them to BMWNA for nationwide distribution. (*See* Dkt. No. 60 at 5 (“Vehicles produced by BMWAG and BMWMC are transferred to BMWNA, and BMWNA distributes the vehicles to independent dealers throughout the United States.”); *id.* at 13–14 (“BMWAG transfers vehicles to BMWNA for nationwide distribution.”)). BMWAG also states that BMWNA distributes the accused vehicles to consumers in Texas through independent dealerships, including at least one Mini-brand dealer and three BMW-brand dealers in this District. (*Id.* at 5 (“One Mini-brand automobile dealer and three BMW-brand automobile dealers are located in the EDTX”)).

BMWAG argues that these facts are not sufficient to subject it to personal jurisdiction within this District as BMWAG does not conduct business in Texas or this District nor has it purposefully directed any activities at Texas residents. (*Id.* at 13). These arguments are unavailing.

BMWAG places the accused products into the stream of commerce with knowledge that, through BMWNA’s established distribution to other BMW entities, the accused vehicles will be sold in Texas. This knowledge alone is more than sufficient to meet the requirements of *Beverly Hills Fan*. *See Avocent Huntsville Corp. v. Aten Int’l Co.*, 552 F.3d 1324, 1345 (Fed. Cir. 2008) (Newman, J., dissenting) (noting the holding of *Beverly Hills Fan* is that “a non-resident manufacturer may be subject to personal jurisdiction based on the manufacturer’s placement of

² *Id.* at *1 (“BMWMC admitted in its briefing that it places the X5 and Z4 model vehicles into the stream of commerce via an established distribution channel with other BMW entities. Further, BMWMC knows the likely destination of its products. BMWMC sells its products to BMW AG knowing that BMWNA will purchase some of those vehicles for distribution in the United States. BMWNA then distributes X5 and Z4 model vehicles throughout the United States, including Texas. BMWMC should reasonably anticipate being haled into court in Texas.”)

infringing goods into the stream of commerce with the reasonable expectation that they would reach that forum.”); *accord AFTG-TG*, 689 F.3d at 1365 (declining to place an “[e]mphasis on assessing the presence of ‘something more’” when applying *Beverly Hills Fan*). It is also undisputed that, at the time this suit was filed, the relationships between BMWAG, BMWNA, and the dealerships in Texas were and continue to be ongoing. Consequently, these relationships are, a sufficient basis upon which to find BMWAG knew, or should have known, that a termination point of the distribution channel which BMWAG availed itself of included Texas. Such provided BMWAG with the expectation that it may be haled into court in this District as a chosen destination of its products.

Accordingly, BMWAG’s Motion to Dismiss for Lack of Personal Jurisdiction is hereby **DENIED**.

II. Improper Venue

Both BMWAG and BMWNA (collectively, “BMW”) move this Court dismiss the First Amended Complaint for Improper Venue, or, in the Alternative, Transfer. (Dkt. No. 60 at 14).

Venue lies only “in the judicial district where the defendant resides, or where the defendant has committed acts of infringement and has a regular and established place of business.” 28 U.S.C. § 1400(b). “[A]s a matter of Federal Circuit law [], upon motion by the Defendant challenging venue in a patent case, the Plaintiff bears the burden of establishing proper venue.” *In re ZTE (USA) Inc.*, 890 F.3d at 1013. “[Section] 1400(b) requires that ‘a defendant has’ a ‘place of business’ that is ‘regular’ and ‘established.’ All of these requirements must be present.” *In re Cray Inc.*, 871 F.3d 1355, 1362 (Fed. Cir. 2017). “[T]he first requirement is that there must be a physical place in the district”; “[t]he second requirement . . . is that the place must be a regular and established place of business”; and “the third requirement . . . is that the regular and established

place of business must be the place of the defendant.” *Id.* at 1362–63 (internal quotation marks omitted).

Pursuant to *Brunette Mach. Works., Ltd. v. Kockum Indus., Inc.*, 406 U.S. 706, 706–07 (1972), when a foreign defendant is sued in a patent infringement action, the general venue provision, 28 U.S.C. § 1391, governs. Under § 1391, a foreign defendant may be sued in any judicial district. *See* 28 U.S.C. § 1391(c)(3); *In re HTC Corp.*, 889 F.3d 1349, 1354 (Fed. Cir. 2018) (finding it was not error to rely on *Brunette* and § 1391(c)(3) “to hold that . . . a foreign corporation, is subject to suit in any judicial district.”).

II.A. Venue as to BMWAG

BMWAG argues that, despite the Supreme Court’s statement in *TC Heartland* that “we express [no] opinion on this Court’s holding in *Brunette*,” (*TC Heartland*, 137 S. Ct. at 1521 n.2), the holding of *TC Heartland* now “generally” governs patent infringement proceedings and, “[a]ccordingly, § 1400(b) governs ‘[a]ny civil action for patent infringement,’ including the present case.” (Dkt. No. 69 at 6). This is not the law as recently confirmed by the Federal Circuit in *In re HTC*. 889 F.3d 1349. BMWAG is a foreign entity. (*See* Dkt. No. 60 at 4). Accordingly, as to BMWAG, venue is proper in this District and, indeed, in any district. *In re HTC*, 889 F.3d at 1354.

II.B. Venue as to BMWNA

Under 28 U.S.C. § 1400(b), “[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.” BMWNA submits that it is a Delaware corporation (Dkt. No. 60 at 14–15) and thus does not reside in Texas. Blitzsafe does

not contest this. Accordingly, the inquiry turns to the second part of § 1400(b), whether the defendant has committed acts of infringement and has a regular and established place of business.

BMWNA argues that it has not committed acts of infringement in this District and, even if it has, it does not maintain a regular and established place of business in this District. (Dkt. No. 60 at 15).

II.B.i. Acts of Infringement

BMWNA submits that “[t]he accused automobiles and automobile parts allegedly associated with the Infotainment Systems have no connection to this District—e.g., they were not designed, developed, manufactured, or tested here,” that neither it nor its employees were involved in the “research, design, . . . or implementation of the accused Infotainment Systems in any accused vehicle [] located in Texas,” and that it does not have any training school or provide continuous or regular training programs to employees at EDTX dealerships. (*Id.*)

An “act of infringement” occurs when a person or entity, without authority, “makes, uses, offers to sell, or sells any patented invention” or induces such conduct. 35 U.S.C. § 271(a)–(b). Although the statute uses the phrase “act of infringement,” courts have “consistently held that an allegation of infringement is itself sufficient to establish venue and [the] plaintiff is not required to demonstrate actual infringement by [the] defendant[].” *Funnelcap, Inc. v. Orion Indus., Inc.*, 392 F. Supp. 938, 943 (D. Del. 1975); *SEVEN Networks LLC v. Google LLC*, No. 2:17-cv-442, Dkt. No. 235, Slip Op. at 8 (same) (collecting cases). Thus, an allegation that a defendant has committed one of those acts in the district is sufficient to satisfy this requirement of the venue statute.

Blitzsafe has alleged the following:

- (i) that BMWNA “manufacture[s], import[s], and/or sell[s]” infringing audio and multimedia integration systems that are installed in vehicles sold in this District; (Dkt. No. 39 (First Amended Complaint) ¶ 26);
- (ii) that BMWNA “promote[s] the sale of [infringing] products to customers and/or potential customers” located in this District; (*id.* ¶ 16);
- (iii) that BMWNA “maintain[s] interactive commercial websites, accessible to residents of Texas and the Eastern District of Texas” that, among other things, directs customers to buy infringing products in this District; (*id.*);
- (iv) that BMWNA “engage[s] in sales of [infringing products] to three BMW dealerships and at least one MINI dealership in the Eastern District of Texas;” (*id.* ¶ 5);
- (v) that BMWNA “regularly, continuously, and systematically provides support to and control over the BMW and MINI dealerships located in the Eastern District of Texas,” which sell vehicles containing the infringing products in the District; (*id.* ¶ 9; *see also id.* ¶¶ 10–15), and is not authorized to “make, use, offer for sale, sell, or import” any such products. (*Id.* ¶¶ 32, 40; *see also id.* ¶¶ 33–35; 41–43).

(Dkt. No. 66 at 15–16). Additionally, Blitzsafe argues that “Defendants admit that BMWAG manufactures accused vehicles and transfers them to BMWNA for ‘nationwide distribution,’ and

that BMWNA then distributes the accused vehicles to independent dealerships, including at least four dealerships in the District.” (*Id.* at 15) (record citations omitted).

This Court recognizes that a sale has both a physical and a conceptual dimension, and, accordingly, an offer to sell may occur at the location of the buyer, the seller, or “points along the shipment route in between.” *North American Philips Corp. v. American Vending Sales, Inc.*, 35 F.3d 1576, 1579 (Fed. Cir. 1994) (“The difficulty in answering this question is that unlike the ‘making’ and the ‘using’ of an infringing article, which as purely physical occurrences are relatively straightforward to place, the ‘selling’ of an infringing article has both a physical and a conceptual dimension to it.”); *see also Halo Elecs., Inc. v. Pulse Elecs., Inc.*, 831 F.3d 1369, 1377 (Fed. Cir. 2016) (“[U]nder *North American Philips*, a sale may occur at multiple locations, including the location of the buyer, for purposes of personal jurisdiction.”); *accord MEMC Elec. Materials, Inc. v. Mitsubishi Materials Silicon Corp.*, 420 F.3d 1369, 1377 (Fed. Cir. 2005) (“*North American Philips* simply noted that in some cases the criterion for determining the location of a ‘sale’ under section 271(a) is not necessarily where legal title passes; the ‘more familiar places of contracting and performance’ may take precedence over the passage of legal title.”).

Since the sale may occur where the buyer is located, BMWNA has at least offered for sale and/or sold vehicles containing the infringing products in this District. In addition, Blitzsafe’s pleadings alleging acts of infringement by BMWNA sufficiently establish infringing acts for purposes of the venue inquiry under § 1400(b).³

³ Where a complaint alleges infringement, the allegations “satisfy the ‘acts of infringement’ requirement of § 1400(b)” “[a]lthough the[] allegations may be contested.” *Symbology Innovations, LLC v. Lego Sys., Inc.*, 282 F. Supp. 3d 916, 928 (E.D. Va. 2017) (citing *Gunter & Cooke, Inc. v. Southern Elec. Servs. Co.*, 256 F. Supp. 639, 648 (M.D.N.C. 1966), *aff’d*, 378 F.2d 60 (4th Cir. 1967)). “The issue of infringement is not reached on the merits in considering venue requirements.” *In re Cordis Corp.*, 769 F.2d 733, 737 (Fed. Cir. 1985) (citing *Gunter*). Nor do the alleged acts of infringement need be substantial or numerous. A single alleged act of infringement may be sufficient to properly establish venue. *Rackman v. Texas Instruments, Inc.*, 712 F. Supp. 448, 450 (S.D.N.Y. 1989) (finding “no support for [the] contention that 28 U.S.C. § 1400(b) requires more than ‘de minimis’ infringement”); *see also Union Asbestos & Rubber Co. v. Evans Prods. Co.*, 328 F.2d 949, 952 (7th Cir. 1964) (“We think the true rule in the case at bar is that

II.B.ii. Regular and Established Place of Business

The remaining venue restraint of § 1400(b) requires a prospective defendant to have a “regular and established place of business” within this District. Under *In re Cray*, § 1400(b) has “three general requirements relevant to the [regular and established place of business] inquiry: (1) there must be a physical place in the district; (2) it must be a regular and established place of business; and (3) it must be the place of the defendant. If any statutory requirement is not satisfied, venue is improper under § 1400(b).” 871 F.3d 1355, 1360 (Fed. Cir. 2017).

BMWNA argues that “Blitzsafe fails to demonstrate any ‘regularly conducted business’ at a place of business of Defendants within the EDTX, and the Court need not accept Blitzsafe’s conclusory allegations.” (Dkt. No. 60 at 16). Blitzsafe argues that BMWNA has a regular and established place of business within the District “because BMWNA has four dealerships in this District that sell BMWNA’s products, and those dealerships are physical places of business of BMWNA that are regular and established.” (Dkt. No. 66 at 16).

There can be little dispute that the dealerships at issue are “physical places” within the District and that they are “regular and established.” Indeed, BMWNA’s argument in reply focuses solely on the last factor of the inquiry: whether the dealerships are places “of the defendant.” Specifically, BMWNA argues that, not only does Blitzsafe “not dispute that the four BMW- and MINI-branded dealerships in this District are independently owned and operated,” but that it is prohibited from such ownership or operation, per the Texas Occupations Code.⁴ (*Id.* at 5). Thus,

the systematic and continuous solicitation plus the two demonstrations is sufficient to establish venue on the basis of plaintiff’s allegation of selling.”).

⁴ Tex. Occ. Code Ann. § 2301.476(c) (West 2015) (providing that “a manufacturer or distributor may not directly or indirectly: (1) own an interest in a franchised or nonfranchised dealer or dealership; (2) operate or control a franchised or nonfranchised dealer or dealership; or (3) act in the capacity of a franchised or nonfranchised dealer.”).

“BMWNA does not transact business in this District in a ‘regular and established’ manner, let alone do so at a BMWNA place of business.” (*Id.* at 5). BMWNA also stresses that, to the extent that its employees visit the independently-owned BMW and MINI-brand dealerships, their visits are “periodic” in nature, and insufficient to support a finding of proper venue under the statute. (*Id.*)

The Federal Circuit set forth a number of considerations relevant to determining if a regular and established place of business is “of the defendant” in *In re Cray*. Specifically, the Circuit noted that “[r]elevant considerations include whether the defendant owns or leases the place, or exercises other attributes of possession or control over the place”; “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”; “[m]arketing or advertisements also may be relevant, but only to the extent they indicate that the defendant itself holds out a place for its business”; “a defendant’s representations that it has a place of business in the district”; and “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.” 871 F.3d at 1363–67. It does not appear that these considerations are exhaustive, but are more illustrative in nature as to the types of inquiries courts should undertake in ascertaining the extent of a prospective defendant’s presence through a physical place which is a regular and established place of business.

Blitzsafe argues that “Blitzsafe has alleged, and BMWNA does not dispute, that BMWNA and its employees regularly, continuously, and systematically provide support to and control over the dealerships in this District. BMWNA exercises control over the sales, marketing, and service of BMWNA’s automobiles in the District by, *inter alia*, requiring its employees, including twenty

BMWNA employees that live in Texas, to travel to these dealerships to provide on-site technical training to the dealerships' service technicians and to educate dealership employees regarding features of the infringing products sold in this District.” (Dkt. No. 66 at 17 (record citations omitted)). In addition, Blitzsafe alleges that “BMWNA pays for and supervises new car warranty services on BMWNA products at the dealerships in this District.” (*Id.* at 18 (citing Dkt. No. 39 at ¶¶ 7–15)).

In response to these allegations, BMWNA has provided an affidavit from Jaime Hernandez, Real Estate Transactions Manager, Americas Region, who has asserted personal knowledge of BMWNA's operations and locations within the United States. (Dkt. No. 60-2 (“Hernandez Decl.”) at 1). The declaration states that BMWNA “does not own or control” the automobile dealers and that “they are independent from BMW.” (Hernandez Decl. at 2). It also states that “[t]here are no BMWNA training schools” in this District, nor does BMWNA “provide continuous or regular training programs for employees of the independent BMW or Mini dealerships in Texas.” (*Id.*) Further, BMWNA engages in “a nationwide marketing campaign” which is consistent throughout the country and that BMWNA “does not have any unique contacts with Texas as compared to any other state” with BMW or Mini dealers. (*Id.* at 3).

The Declaration does not go into detail as to what involvement BMWNA *does* have with its Texas-located BMW or Mini dealers. The Declaration does note that BMWNA engages in nationwide “support activities for BMW-brand vehicles,” although the nature of these support activities is not clear. (*Id.* at 3). BMWNA “distributes the imported and acquired vehicles through independent dealers throughout the United States.” (*Id.* at 2).

The Declaration, as noted above, goes to great lengths to demonstrate that BMWNA “does not have any unique contacts with Texas as compared to any other state” via BMW or Mini dealers.

However, that does not mean that BMWNA does not, in fact, do business within Texas or this District. As Blitzsafe points out in its response, (a response which BMWNA does not address in its reply), BMWNA admitted, without reservation, in a prior answer submitted to this Court in a different case that “it has conducted and does conduct business in [the Eastern District of Texas] by distributing automobiles to dealers.” *Entry Systems, LLC v. Vivint, Inc.*, No. 2:14-cv-1089-JRG (Lead case), Doc. No. 21, ¶ 4 (E.D. Tex. Nov. 14, 2012). The Court takes notice of this admission. *Norris v. Hearst Trust*, 500 F.3d 454, 461 n.9 (5th Cir.2007) (“[I]t is clearly proper in deciding a 12(b)(1) motion to take judicial notice of matters of public record.”).

BMWNA argues stridently that “in accordance with the Texas Occupations Code, BMWNA [] cannot own, operate, or control the four independent dealerships in this District.” (Dkt. No. 60 at 19; Dkt. No. 69 at 2–3 (“In view of the unambiguous Texas Occupations Code, BMWNA is prohibited from directly or indirectly operating or controlling BMW- and MINI-brand dealerships located in this District and throughout Texas.”); Tex. Occ. Code Ann. § 2301.476(c) (West) (“[A] manufacturer or distributor may not directly or indirectly: (1) own an interest in a franchised or nonfranchised dealer or dealership; (2) operate or control a franchised or nonfranchised dealer or dealership; or (3) act in the capacity of a franchised or nonfranchised dealer.”). The Court notes first that there are exceptions to this bar on ownership and interest,⁵ so

⁵ Tex. Occ. Code § 2301.476(d) (West 2015) (“**A manufacturer or distributor may own an interest in a franchised dealer, or otherwise control a dealership**, for a period not to exceed 12 months from the date the manufacturer or distributor acquires the dealership if: (1) the person from whom the manufacturer or distributor acquired the dealership was a franchised dealer; and (2) the dealership is for sale by the manufacturer or distributor at a reasonable price and on reasonable terms and conditions.”); § 2301.476(e) (“On a showing of good cause by a manufacturer or distributor, the board may extend the time limit imposed under Subsection (d) for a period not to exceed an additional 12 months. An application for an extension after the first extension is granted is subject to protest by a dealer of the same line-make whose dealership is located in the same county as, or within 15 miles of, the dealership owned or controlled by the manufacturer or distributor.”); § 2301.476(g) (West 2015) (“For the purpose of broadening the diversity of its dealer body and enhancing opportunities for qualified persons who are part of a group that has been historically underrepresented in its dealer body, or other qualified persons who lack the resources to purchase a dealership outright, but for no other purpose, **a manufacturer or distributor may temporarily own an interest in a dealership** if the manufacturer’s or distributor’s participation in the dealership is in a bona fide relationship with a franchised dealer who: (1) has made a significant investment in the dealership, subject to loss; (2) has an ownership interest in the

the prohibition is not as absolute as BMWNA makes it out to be. However, there exceptions are of no moment in the present analysis.

BMWNA characterizes itself as “the exclusive importer and distributor of BMW-brand passenger cars, sport activity vehicles, and motorcycles in the United States.” (Dkt. No. 60 at 5). This accords with how Texas views BMWNA as well. Tex. Occ. Code § 2301.002(11) (“‘Distributor’ means a person, other than a manufacturer, who: (A) distributes or sells new motor vehicles to a franchised dealer; or (B) enters into franchise agreements with franchised dealers, on behalf of the manufacturer.”). BMW dealerships within this District, such as BMW of Tyler are properly characterized as “franchised dealers” as they are “engaged in the business of buying, selling, or exchanging new motor vehicles and servicing or repairing motor vehicles under a manufacturer's warranty at an established and permanent place of business under a franchise in effect with a manufacturer or distributor.” *Id.* at § 2301.002(16).

Even though BMWNA is not permitted to own or control, generally, the dealerships within this District, that does not mean that they are not places *of* BMWNA under the third *In re Cray* factor, although, certainly, at first glance, the prohibition cuts against such a finding. 871 F.3d at 1360. As the Federal Circuit instructed in *In re Cray*, “a defendant’s representations that it has a place of business in the district are relevant,” to consideration of this factor. 871 F.3d at 1363. Further, even though “the mere fact that a defendant has advertised that it has a place of business or has even set up an office is not sufficient” to meet the statutory requirements of § 1400(b), the 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.” *Id.* The considerations a district court may examine in determining the extent to which a defendant

dealership; and (3) operates the dealership under a plan to acquire full ownership of the dealership within a reasonable time and under reasonable terms.”).

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.” *Id.*; see also *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1015 (Fed. Cir. 2018) (“The magistrate judge also made no findings as to whether any signage on, about, or relating to the call center associates the space as belonging to ZTE USA.”).

Here, BMWNA has undoubtedly adopted and ratified the dealerships within this District as its places of business.⁶ First, BMWNA does not permit sales of any new BMW vehicle from any location *except* authorized dealers, such as the BMW Centers found within this district. The authorization by BMWNA of the BMW dealerships as its exclusive new-vehicle sales locations is, in this Court’s opinion, sufficient ratification to meet the statutory requirement. Second, the

⁶ Throughout the following analysis, the Court references the following sources: Google Maps (<https://maps.google.com>), BMWNA’s corporate website (<https://www.bmwusa.com>, and <https://cpo.bmwusa.com>), and BMW of Tyler’s website (www.bmwofTyler.com). Under the Federal Rules of Evidence, courts can judicially notice facts that are not subject to reasonable dispute, either because they are “(1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.” Fed. R. Evid. 201. “Normally, in deciding a motion to dismiss for failure to state a claim, courts must limit their inquiry to the facts stated in the complaint and the documents either attached to or incorporated in the complaint. However, courts may also consider matters of which they may take judicial notice.” *Lovelace v. Software Spectrum*, 78 F.3d 1015, 1017–18 (5th Cir. 1996) (citing Fed. R. Evid. 201). The Fifth Circuit has found that “publicly available [information] on [a company’s] official website,” may be considered “an authoritative source” in certain contexts where the facts a court is taking notice of may be “accurately and readily determined from sources whose accuracy cannot reasonably be questioned.” *United States v. Flores*, No. 16-40622, 2018 U.S. App. LEXIS 9738, at *6 n.1 (5th Cir. Apr. 18, 2018) (citing *United States v. Long*, 562 F.3d 325, 334 n.22 (5th Cir. 2009) (taking judicial notice of an American Psychiatric Association, Diagnostic and Statistical Manual of Mental Disorders because its “authoritative nature makes the criteria ‘capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned’”); *Baker v. St. Paul Travelers Ins. Co.*, 595 F.3d 391, 394 & n.8 (1st Cir. 2010) (taking judicial notice of an online PDF of the “Massachusetts Commercial Automobile Insurance Manual”); *O’Toole v. Northrop Grumman Corp.*, 499 F.3d 1218, 1225 (10th Cir. 2007) (holding that the trial court erred in refusing to take judicial notice of historical retirement fund earnings of a corporation as shown on its website); *City of Monroe Emps. Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 655 n.1 (6th Cir. 2005) (taking judicial notice of a term defined on the website of the National Association of Securities Dealers, Inc.); *United States v. Johnson*, 979 F.2d 396, 401 (6th Cir. 1992) (taking judicial notice of a definition of “Adjustment Disorder” in the American Psychiatric Association’s Diagnostic and Statistical Manual of Mental Disorders to help determine whether the defendant qualified for downward departure from the sentencing guidelines); and 2 McCormick on Evid. § 330, Facts Capable of Certain Verification (7th ed. 2016) (“Information obtained from online sources is becoming a frequently used basis for judicial notice. To this point, government and corporate websites and well-recognized mapping services are among the most commonly relied upon sources.”) (cleaned up); see also *Muller-Paisner v. TIAA*, 289 F. App’x 461, 466 n.5 (2d Cir. 2008) (judicial notice may be taken of the defendant’s website for the fact of its publication). Accordingly, the Court takes judicial notice, pursuant to Fed. R. Evid. 201, of those websites and their contents for the purposes identified herein.

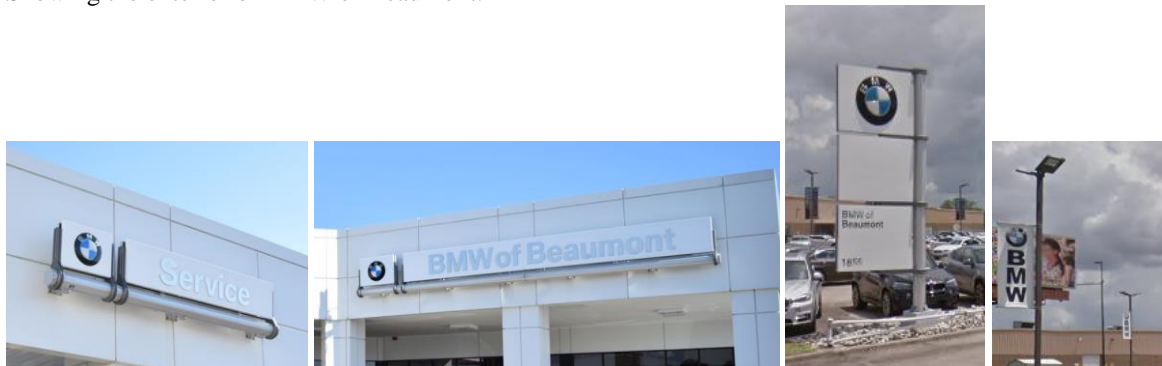
dealerships are *named* “BMW” (for example, BMW of Tyler, BMW of Beaumont, Classic BMW (located in Plano)) and referred to by BMWNA as “BMW Centers.” Third, the dealerships prominently display the singular logo of BMW with no reservations such as “authorized dealer” or “exclusive distributor.” The dealerships are held out to the consuming public as places of BMW where BMW, through its franchised dealers, sells BMW cars to said consuming public.⁷ Fourth,

⁷ See, e.g., the following captures from Google Maps (accessed on July 29, 2018):
Showing the exterior of BMW of Tyler:



(https://www.google.com/maps/@32.3040667,-95.3310318,3a,75y,57.92h,90t/data=!3m6!1e1!3m4!1sloCk_1LmEOsSSB2CKZkxuQ!2e0!7i13312!8i6656 (Google Maps image captured Feb. 2017); <https://www.google.com/maps/@32.3041459,-95.3313007,3a,15y,51.73h,91.9t/data=!3m6!1e1!3m4!1sdEnM3TvwqkkekiiB18bNA!2e0!7i13312!8i6656> (Google Maps image captured Feb. 2017); <https://www.google.com/maps/@32.3042175,-95.3303638,3a,17.1y,333.46h,93.15t/data=!3m6!1e1!3m4!1s6SzBOcIRSXiG5amMWuxQnA!2e0!7i13312!8i6656> (Google Maps image captured Feb. 2018); https://www.google.com/maps/@32.3039936,-95.3307576,3a,15.1y,362.5h,94.99t/data=!3m6!1e1!3m4!1s-38m6mVm9J4l-A5_v0usJg!2e0!7i13312!8i6656 (Google Maps image captured Feb. 2017));

Showing the exterior of BMW of Beaumont:



(https://www.google.com/maps/place/BMW+of+Beaumont/@30.0583144,-94.1351647,3a,75y,90t/data=!3m8!1e2!3m6!1sAF1QipP36aH-4USRvt49mDw_GorE_XPe1TFWR8tB-Xxu!2e10!3e12!6shttps:%2F%2Fh5.googleusercontent.com%2Fp%2FAF1QipP36aH-4USRvt49mDw_GorE_XPe1TFWR8tB-Xxu%3Dw203-h135-k-no!7i6000!8i4000!4m12!1m6!3m5!1s0x863ecb72163e943d:0xba75de9fa53e9511!2sBMW+of+Beaumont!8m2!3d30.0583144!4d-94.1351647!3m4!1s0x863ecb72163e943d:0xba75de9fa53e9511!8m2!3d30.0583144!4d-94.1351647 (BMW of Beaumont photo, Feb. 2016); https://www.google.com/maps/place/BMW+of+Beaumont/@30.0583144,-94.1351647,3a,75y,90t/data=!3m8!1e2!3m6!1sAF1QipP36aH-4USRvt49mDw_GorE_XPe1TFWR8tB-Xxu!2e10!3e12!6shttps:%2F%2Fh5.googleusercontent.com%2Fp%2FAF1QipP36aH-4USRvt49mDw_GorE_XPe1TFWR8tB-Xxu%3Dw203-h135-k-no!7i6000!8i4000!4m12!1m6!3m5!1s0x863ecb72163e943d:0xba75de9fa53e9511!2sBMW+of+Beaumont!8m2!3d30.0583144!4d-94.1351647 (BMW of Beaumont photo, Feb. 2016);

BMWNA, whose website is www.bmwusa.com, represents the dealerships within this District are places of BMWNA with respect to the purchase of new BMWs. This is made clear by BMWNA on its website. This may be seen in a number of ways. First, BMWNA's website lists at the bottom of its homepage under "Buy" and "Purchase Tools" the following links of interest: "Search New Vehicle Inventory," "Schedule a Test Drive," "Contact a BMW Center," "Build Your Own" and "Get a Quote."⁸ Each is discussed below.

94.1351647,3a,75y,90t/data=!3m8!1e2!3m6!1sAF1QipOxOkjRvSQIWzeHIjYEnP15RIMWuBAH64QIrbx5!2e10!3e12!6shttps:%2F%2Fh5.googleusercontent.com%2Fp%2FAF1QipOxOkjRvSQIWzeHIjYEnP15RIMWuBAH64QIrbx5%3Dw392-h261-k-no!7i6000!8i4000!4m5!3m4!1s0x863ecb72163e943d:0xba75de9fa53e9511!8m2!3d30.0583144!4d-94.1351647 (BMW of Beaumont photo, Feb. 2016); <https://www.google.com/maps/@30.0585495,-94.1359979,3a,33.7y,84.78h,98.59t/data=!3m6!1e1!3m4!1sSJYR2lhd47bmEyNnZATJwQ!2e0!7i13312!8i6656> (Google Maps image captured Apr. 2017); *id.*)

Showing the exterior of Classic BMW:



(<https://www.google.com/maps/place/Classic+BMW/@33.0665345,-96.8214362,3a,75y,90t/data=!3m8!1e2!3m6!1sAF1QipNXnuHURLaZaYCuyHUnWWpCuEle8chdX7qovCLq!2e10!3e12!6shttps:%2F%2Fh5.googleusercontent.com%2Fp%2FAF1QipNXnuHURLaZaYCuyHUnWWpCuEle8chdX7qovCLq%3Dw188-h106-k-no!7i5312!8i2988!4m5!3m4!1s0x864c234e78f26217:0x731b8775d33f1868!8m2!3d33.0665345!4d-96.8214362>; (Glenn Rutledge photo, Oct. 2016); https://www.google.com/maps/place/Classic+BMW/@33.0656519,-96.8213017,3a,15y,43.55h,85.89t/data=!3m6!1e1!3m4!1sjP7LKaN_JnX6vs0bjXt6A!2e0!7i13312!8i6656!4m5!3m4!1s0x864c234e78f26217:0x731b8775d33f1868!8m2!3d33.0665345!4d-96.8214362 (Google Maps image captured Mar. 2017)).

⁸ www.bmwusa.com (accessed July 29, 2018):

Search New Vehicle Inventory

When a user to www.bmwusa.com clicks the link to “Search New Vehicle Inventory,” BMWNA’s website asks the user for their zip code so that *BMWNA* can show the user the BMW inventory available in the user’s local area.⁹ After entering a zipcode, BMWNA’s website shows

Buy

Purchase Tools

Search New Vehicle Inventory

Digital Brochures

Schedule a Test Drive

Contact a BMW Center

Build Your Own

Get a Quote

Find Your Trade-In Value ↗

Shop BMW Parts & Accessories

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(<https://www.bmwusa.com/>)

FIND YOUR BMW

Getting behind the wheel of your perfect BMW may be closer than you think.

Enter your Location to see the BMW vehicles in your area.

ZIP Code

SEE VEHICLES

9

(<https://www.bmwusa.com/inventory.html#!/>)

the user BMWs near them.¹⁰ A user is *able to reserve a BMW at their local “BMW Center”*¹¹ through BMWNA’s website. Having clicked on the “Reserve a BMW” button, the user is prompted to enter various personal information so that “[t]he BMW center listed below” can “provide [the user] with an accurate quote on [their] chosen [BMW].”




Accordingly, BMWNA, through its website, specifically identifies each dealership as a place of business of BMWNA to consumers as a place where a customer may purchase a vehicle selected through the BMWNA website.

Schedule a Test Drive/Contact a BMW Center/Request a Quote

Having clicked on the “Schedule a Test Drive” link, a user is provided with the ability to select a specific BMW model, “Find [Their] BMW Center” via zip code search, and provide their

¹⁰

Vehicles near **75701**
Sort by: MSRP: Low to High

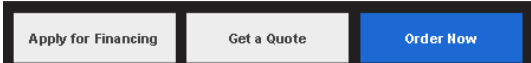
<p>\$39,245 MSRP ⓘ X1 sDrive28i</p>  <p> Year: 2018 Color: Alpine White Upholstery: Black Dakota Leather Fuel: Gasoline </p> <p>Vehicle Located at:</p> <p> BMW of Tyler (903) 561-7049 https://www.bmwoftyler.com/ </p> <p>View Vehicle Details ></p> <p>RESERVE NOW</p>	<p>\$39,245 MSRP ⓘ X1 sDrive28i</p>  <p> Year: 2018 Color: Jet Black Upholstery: Black Dakota Leather Fuel: Gasoline </p> <p>Vehicle Located at:</p> <p> BMW of Tyler (903) 561-7049 https://www.bmwoftyler.com/ </p> <p>View Vehicle Details ></p> <p>RESERVE NOW</p>	<p>\$41,890 MSRP ⓘ X1 xDrive28i</p>  <p> Year: 2018 Color: Mediterranean Blue Metallic Upholstery: Canberra Beige SensaTec Fuel: Gasoline </p> <p>Vehicle Located at:</p> <p> BMW of Tyler (903) 561-7049 https://www.bmwoftyler.com/ </p> <p>View Vehicle Details ></p> <p>RESERVE NOW</p>
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(<https://www.bmwusa.com/inventory.html#!/results/> (having supplied 75701 as the zip code on the prior screen)).

¹¹ An alternative reference to a BMW dealership. The Court notes that this nomenclature is selected by BMWNA as how it chooses to reference its dealerships. This nomenclature, BMW Center, further cements the impression by the consuming public that BMW’s business is done at and through its dealerships, the BMW centers.

personal information so that BMW Center can contact the user. Accordingly, BMWNA names and ratifies the BMW centers as places of business where the user of its website may test drive its cars and assists the user in scheduling such test drive at the BMW center. Similar options are presented upon clicking the “Contact a BMW Center” link and lead to the same conclusion: the BMW Centers are places where BMWNA does business and BMWNA so names them by identifying the BMW Centers, collecting customer information, and providing that information to its BMW Centers. Similar options are also presented upon clicking the “Request a Quote” link, which enables *a consumer who visits BMWNA’s website to solicit a quote to purchase a vehicle from a local BMW Center*. BMWNA has ratified these dealerships, its BMW Centers, as places of business of BMWNA.

Finally, clicking “Build Your Own” (also located at the top of the BMWNA homepage) a user is presented with an interactive form via which they may “assemble” a customized “build” of any BMW model. At the end of the building process, the user has three options presented by the BMWNA website: “Apply for Financing,” “Get a Quote,” or “Order Now.”¹² Clicking the “Order Now” button brings the user to a new screen where the user enters personal contact information for “the dealer who will handle your order,” where the BMW Center is identified by user zip code as before. As before, BMWNA ratifies the BMW Centers in this District as places of *its* business, going so far as to *solicit orders* on its own website for its BMW Centers. These are orders for BMW vehicles which BMWNA provides to its BMW Centers in this District for sale to the consuming public in this District.

¹²  (https://www.bmwusa.com/byo.html#!/build/color/dowrb0k1)

On the basis of such clear-cut ratification, this Court finds that the BMW dealerships in this District are places of business of BMWNA within the context of the special patent venue statute, § 1400(b).

Additionally, the Court finds that there is a separate and independent basis for this holding. Beyond the distribution of the automobiles containing the accused devices themselves through the dealerships in this District, there is additional business undertaken by BMWNA in this District and at the dealerships which meets the test of *In re Cray*. Specifically, BMWNA pays for and supervises new car warranty services on BMWNA products at the dealerships in this District. (See Dkt. No. 39 at ¶¶ 12–14).¹³ Notably, once more, BMWNA does not respond to this argument in its reply, nor did it address this aspect of the complaint in its opening Motion. Being undisputed, it must be taken as true at this stage of the proceedings. *Braspetro Oil Servs. Co. v. Modec (USA), Inc.*, 240 F. App'x 612, 615 (5th Cir. 2007) (“On a Rule 12(b)(3) motion to dismiss for improper venue, the court must accept as true all allegations in the complaint and resolve all conflicts in favor of the plaintiff.”). Separate and distinct from the sale and distribution of BMW vehicles

¹³ (*Id.* at ¶ 12 (“Upon information and belief, **through its exclusive agents, instrumentalities and representatives, BMWNA provides new car warranty service within the district on the infringing products.** Upon information and belief, BMWNA warrants to the original and each subsequent owner of new BMW and MINI vehicles that any authorized BMW or MINI dealer will make any repairs or replacements necessary to correct defects in material or workmanship arising during the warranty period. Upon information and belief, all such warranty work is paid for by BMWNA. Upon information and belief, there are four authorized dealers in the Eastern District of Texas, at the service departments at BMW of Beaumont, BMW of Tyler, Classic BMW, and MINI of Plano.”); *id.* at ¶ 13 (“Upon information and belief, BMWNA provides Service and Warranty Information Booklets (“Booklets”) to BMW and MINI customers, including those customers that purchase BMW and MINI vehicles in the Eastern District of Texas. The Booklets direct questions regarding warranty rights and responsibilities to BMWNA’s Customer Relations and Services Department. Upon information and belief, **the Booklets direct customers, including those customers that purchase BMW and MINI vehicles in the Eastern District of Texas, to provide direct, written notification of any alleged unrepaired defects or malfunctions and service difficulties to BMWNA’s Customer Relations and Services Department,** including notifications under applicable state laws.”); *id.* at ¶ 14 (“Upon information and belief, **the BMW and MINI dealerships located within this district are BMWNA’s exclusive agents, instrumentalities, and representatives within this judicial district for the provision within this District of all new warranty service for BMW and MINI vehicles sold both within the district and outside the district.** Upon information and belief, if a BMW or MINI customer located within the district needs to have new car warranty repairs performed within the district, Defendants require the BMW or MINI customer to have the work performed at one of their authorized BMW dealers within the District.”)).

through dealerships within the District, BMWNA's provisioning of warranty service to new BMW and Mini customers through such dealerships makes venue in this District proper under § 1400(b). As required by *In re Cray*, the dealerships are "a physical place in the district" which are "regular and established" and, with respect to the provisioning of warranty service to new BMW and Mini customers, the dealerships constitute a "place of the defendant." 871 F.3d at 1360.

This finding accords with how other courts have approached this subject in similar circumstances examining the operation of BMWNA's warranty program. For example, in *Morano v. BMW of N. Am., LLC*, the district court analyzed BMWNA's warranty program and noted that "[t]his is not the classic privity case of a sale from A to B, followed by a sale from B to C, who is a stranger to A. **Rather, BMWNA and the dealer function as an integrated, two-part seller (or lessor).** BMWNA makes *all* of its consumer sales or leases through its authorized dealers. Each sale is accompanied by a standard express warranty, developed by BMWNA, identifying BMWNA as the warrantor. Meanwhile, the dealer handles the mechanics of the sale or lease to the retail customer. Servicing under the Warranty or Maintenance Program occurs at the authorized service center (i.e., the dealer)." 928 F. Supp. 2d 826, 837 (D.N.J. 2013) (emphasis added). The district court also noted that in that case, BMWNA had asserted that, under the terms of the Maintenance Program and Limited Warranty, BMWNA, not the dealership, had "rightfully refused to cover a loss caused by the owner's conduct." *Id.* at 838. Accordingly, the district court explained that "[i]f BMWNA is the entity that made the decision whether to cover certain losses—conveying that decision through the local dealer—it stands to reason that the dealer acted as BMWNA's agent, or at least that the two acted together." *Id.*

It is certainly true that "dealers are not 'agents' of manufacturers" in a broad sense of the term, nor does this Court so hold. *Connor v. Ford Motor Co.*, No. 96 C 8343, 1997 WL 724528,

*2 (N.D. Ill. Nov. 12, 1997). However, while “an automobile manufacturer or an oil company [which] licenses its tradename, [] represents to the public only that the dealer is authorized to sell the products manufactured or approved by the licensor. . . . [and, thus] does not[] represent anything other than that the dealer sells its products[,] it does [] represent that the dealer is its agent for [] the selling of goods” *Ago v. Begg, Inc.*, 705 F.Supp. 613, 619 (D.D.C. 1988); *accord Kent v. Celozzi-Ettleson Chevrolet, Inc.*, No. 99 C 2868, 1999 WL 1021044, *4 (N.D. Ill. Nov. 3, 1999) (“While it is certainly true that the mere fact that Celozzi-Ettleson is an authorized General Motors dealer does not make it General Motors’ agent, *it is equally true that an automobile dealership may under certain circumstances be an agent of the manufacturer*”) (emphasis added).¹⁴

Of interest, the Texas Occupations Code defines “Warranty work” as “parts, labor, and any other expenses incurred by a franchised dealer in complying with the terms of a manufacturer’s or distributor’s warranty.” *Id.* § 2301.002(37). While BMWNA argues that it is, essentially, unable to do business within this District as it cannot “directly or indirectly operat[e] or control[] BMW- and MINI-brand dealerships located in this District and throughout Texas,” (Dkt. No. 60 at 3), Texas itself considers BMWNA to engage in business within this state. Tex. Occ. Code § 2301.251(c) (“A manufacturer or distributor that directly or indirectly reimburses another person

¹⁴ This interpretation of agency is supported further by reciprocal identification by the dealerships in this District of BMWNA as the responsible party of the warranties provided to new car purchasers. *See, e.g.*, <https://www.bmwofTyler.com/bmw-ultimate-care-plus.htm> (accessed July 29, 2018) (“**BMW Ultimate Care or Ultimate Care+ coverage applies only to U.S.-specification BMWs imported and distributed by BMW of North America, LLC and sold or leased through authorized BMW Centers** or its European Delivery program or the BMW Military Sales Program. Vehicles purchased or leased from BMW Centers in any other country do not qualify for BMW Ultimate Care or Ultimate Care+. **Visit bmwusa.com/ultimatecare for details.** For model year 2015 or later vehicles sold or leased by an authorized BMW Center on or after July 1, 2014, BMW Ultimate Care coverage is not transferable to subsequent purchasers, owners, or lessees. **Please see bmwusa.com/ultimatecare or ask your authorized BMW Center for details.**”); *see also id.* (“All work must be performed by an authorized BMW Center. See the Service and Warranty Information booklet for specific terms, conditions and limitations.”).

to perform warranty repair services on a vehicle is engaged in business in this state regardless of whether the manufacturer sells or offers for sale new motor vehicles in this state.”).

The Court also notes that BMWNA also appears to do business through the sale of Certified Pre-Owned BMW vehicles, advertising such vehicles as being “Certified and **fully backed by BMW of North America, LLC**” <http://cpo.bmwusa.com/certification> (accessed on July 31, 2018) (prior to this certification and backing, “they must be thoroughly inspected, reconditioned and approved by a BMW inspection team of BMW trained technicians, Service Managers and Pre-Owned Managers.”). It also appears that BMWNA charges BMW purchasers *directly* for transfer of the Certified Pre-Owned warranty to a subsequent private buyer, further supporting the finding that the warranty purchased by the BMW purchaser is the warranty of BMWNA, not its affiliated BMW dealer. See <http://cpo.bmwusa.com/Content/docs/BMWCPOLimitedWarrantyTransferApplication.pdf> (accessed on July 31, 2018) (“BMW Certified Pre-Owned Limited Warranty Transfer Application[:] This form and all supporting documentation . . . must be submitted via mail to: BMW of North America, LLC . . . Required: \$200 warranty transfer fee; check payable to BMW of North America, LLC.”).

In this case, BMWNA conducts its own business through the dealerships in this districts in at least two ways: first, it conducts its business of the exclusive distribution of new BMW automobiles to the consuming public in this district through its authorized dealers in this district; and, second, it conducts its business of the provision of new purchase warranties and service pursuant to those warranties to the consuming public in this district through its authorized dealerships. Under either theory of how BMWNA conducts business through its dealerships in this District, independently, this Court finds that there is, as required by *In re Cray*, “a physical

place in the district” that is “a regular and established place of business” that is “the place of the defendant,” here, BMWNA. 871 F.3d at 1360.¹⁵

II.C Venue Conclusion

In view of the above, venue in this District is proper as to BMWAG under § 1391(c) and as to BMWNA pursuant to § 1400(b). Accordingly, the Defendants’ Motion to Dismiss or Transfer based on Improper Venue is **DENIED**.

III. Transfer for Convenience

In the final part of its Motion, BMWNA and BMWAG raise inconvenient venue as a basis for transfer in the alternative, pursuant to § 1404(a). The Court is of the opinion that postponing resolution of this issue for the moment is in the interest of judicial economy and that rebriefing of that issue in light of the Court’s determination of the propriety of venue in this District is appropriate. In short, the Parties deserve an opportunity to readdress their convenience arguments

¹⁵ Citing supplemental authority, (Dkt. No. 85), BMWNA argues that this Court should follow the Southern District of California District Court in *West View Research, LLC v. BMW of North Am., LLC et. al.*, Case No. 16-CV-2590 JLS (AGS), Dkt. No. 64-1 (Order Granting Motion to Transfer) (S.D. Cal. Feb. 5, 2018) (“*West View*”). With greatest respect to its brethren court, this Court declines to do so. First, the district court in that case did not address BMWNA’s provisioning of new vehicle warranties to customers through the dealerships, as this Court has done and upon which it found an independent basis for proper venue. *Supra* p. 22. Further, as noted by the district court, the “third element [of *Cray*’s inquiry] requires that the place of business must be the defendant’s,” *id.* at 9, but the district court’s analysis focused entirely on the alleged “control” which BMWNA exerts on its dealerships, as urged by the plaintiff’s briefing. *Id.* at 11. As discussed, BMWNA has admitted it has and continues to conduct business within this District at and through the dealerships “by distributing automobiles to dealers”, *supra* p. 13, BMWNA and its authorized dealers function as an integrated, two-part seller of BMWNA’s automobiles to the consuming public in this District, *supra* at 22, and, finally, BMWNA represents to the public that the dealer is authorized to sell the products distributed by BMWNA, *supra* at 24. These aspects of BMWNA’s business conduct were not addressed by the district court, and are more than sufficient for this Court to reach a different conclusion from the district court. Even so, like the district court, this Court finds there is not sufficient rationale to collapse the corporate forms of BMWNA and the dealerships. *West View*, Slip Op. at 16. Rather, this Court finds that, in conducting its business *through* the dealerships, either in provisioning warranties and subsequent service or through the distribution and sale of automobiles, BMWNA ratifies the dealerships as to that business and the dealerships constitute places “of the defendant” for those select business purposes. The dealerships constitute parts of a necessary distributorship which the law commands BMWNA adopt in order to conduct its business within the state of Texas; the business of BMWNA in Texas is necessarily done by and through its BMW Centers. This is not, by contrast, a situation where a generic retailer independently acquires and sells goods to consumers. To the contrary, and as evidenced by the record and cited authorities, it is BMWNA which conducts its own business through the dealerships and, accordingly, subjects itself to proper venue in this district.

in light of the above, especially as the clear majority of their prior briefing was focused on § 1400(b) and § 1391(c) and not § 1404(a).

Accordingly, the Court **DENIES WITHOUT PREJUDICE** the Defendant's Motion to Transfer pursuant to § 1404(a) and **ORDERS** the Parties to rebrief the issue of venue pursuant to § 1404(a) with Defendant's opening brief due no later than 30 days after the issuance of this Order.

IV. Conclusion

Having addressed each aspect of the Defendants Bayerische Motoren Werke AG and BMW of North America, LLC's, Motion to Dismiss the First Amended Complaint for lack of personal jurisdiction improper venue or, in the alternative, to transfer for convenience, (Dkt. No. 60), the Court hereby **DENIES** the Motion in its entirety.

So ORDERED and SIGNED this 5th day of September, 2018.



RODNEY GILSTRAP
UNITED STATES DISTRICT JUDGE