

**UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA**

CASE NO. 22-CV-61407-SMITH

SHENZHEN HAPPY VAPING
TECHNOLOGY LTD.,

Plaintiff,

v.

LOGIC TECHNOLOGY
DEVELOPMENT LLC, and
JAPAN TOBACCO INTERNATIONAL
U.S.A., INC.,

Defendants.

**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO
DISMISS FOR IMPROPER VENUE OR TO TRANSFER VENUE**

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Plaintiff Shenzhen Happy Vaping Technology Ltd. (“Happy Vaping Technology”), through counsel, responds to Defendants’ Motion to Dismiss for Improper Venue or to Transfer Venue (“Defendants’ Motion to Dismiss or Transfer Venue”) and respectfully requests the Court to deny Defendants’ Motion to Dismiss or Transfer Venue. Plaintiff intends to file an Amended Complaint, which will render Defendants’ Motion to Dismiss or Transfer Venue moot.

I. INTRODUCTION

Together, Defendants Japan Tobacco International U.S.A., Inc. (“JTI USA”) and Logic Technology Development LLC (“Logic”) have operated as a joint enterprise, jointly pursuing the common mission of marketing and selling nicotine products in this District and throughout the United States. JTI USA has a regular and established place of business at 501 Brickell Key Drive, Suite 402, Miami, FL 33131. As members of a joint enterprise, each member is an agent of the other. Because venue is proper for JTI USA, it is proper for Logic too.

Such a holding comports with both common sense and justice. As such, it is both equitable and legally correct to treat JTI USA and Logic as a single enterprise.

II. BACKGROUND

This is an action for patent infringement. One of the accused products is the Logic Pro device imported and sold by Logic and JTI USA. *See* ECF 1, ¶¶ 16 - 18.

In Logic’s most recent 2022 filing with the Secretary of State of Florida, Logic listed three individuals as Logic’s managers: Corrado Mautone, Renee Duszynski, and Emil Weiss. *See* Logic’s 2022 filing with the State of Florida, attached hereto as Exhibit B. All three of those managers are also listed as executives of JTI USA. *See* JTI USA’s 2022 filing with the State of Florida, attached hereto as Exhibit C. Corrado Mautone is listed as President, Director of JTI USA. Ex. C. Renee Duszynski is listed as Vice President of Sales for JTI USA and Emil Weiss is listed as Head of Corporate Affairs and Communications for JTI USA on JTI’s website. *See*

Screenshot of JTI USA's Website, attached hereto as Exhibit D.

In JTI USA's 2022 annual filing with the State of Florida, it identified John Colton as a director of JTI USA with a place of business at 501 Brickell Key Drive, Suite 402, Miami, FL 33131 ("Brickell Key Place of Business"). Ex. C. In its Motion to Dismiss or Transfer Venue, Defendants asserted:

John Colton was previously a member of the Board of Directors for JTI USA. However, he **resigned from this position in August of 2022**, as shown in Ex. 21. Mr. Colton previously worked from the Brickell Key Facility but as an employee of JTI Holding, not JTI USA.

ECF 13-2, ¶ 9 (emphasis added).

Defendants' supporting exhibit (ECF 13-21) is heavily redacted and Plaintiff has not had an opportunity to conduct discovery on this matter. JTI USA has an employee, Constanza Bunster Gandolfo, working out of the Brickell Key Place of Business. ECF 13-2, ¶ 8. Ms. Gandolfo's roles include handling marketing and advertising projects. *Id.*

Both defendants use the same registered agent in Florida: Corporation Service Company, 1201 Hays Street, Tallahassee, FL 32301-2525. Exs. B, C.

JTI USA has asserted that "JTI USA sells tobacco products in the United States and provides certain services to Logic in accordance with a services agreement between Logic and JTI USA." ECF 13-2, ¶ 3. Plaintiff has not conducted discovery on this service agreement or any other agreements between JTI USA and Logic.

Defendants assert that Logic is wholly owned by JTI (US) Holding Inc ("JTI Holding"). ECF 13-1, ¶ 3. JTI USA is also wholly owned by JTI Holding. ECF 13-2, ¶ 3. In its 2022 filing with the Secretary of State of Florida, JTI Holding identified its principal place of business as 501 Brickell Key Drive, Suite 402, Miami, FL 33131. *See* JTI Holding's 2022 filing with the State of Florida, attached hereto as Exhibit E.

Logic has admitted to operating a warehouse at 2004 NW 25th Avenue, Pompano Business Center, Pompano Beach, Florida until November of 2018, with a lease for that warehouse ending March of 2019. ECF 13-1, ¶ 7.

The facts above are either known or supported by publicly available information. Plaintiff intends to investigate, through discovery, the extent of which JTI USA, Logic, and other JTI Holding entities operate as joint enterprises and agents of one another. If this Court does not find that the venue is proper based on the facts herein, then Plaintiff respectfully requests that this Court allow Plaintiff an opportunity to conduct discovery on the relevant issues here, including both the extent of which JTI USA, Logic, and other JTI entities operate jointly and the extent of their activities in Florida.

III. LEGAL STANDARD

Plaintiff has the burden to show that venue is proper. *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1012 (Fed. Cir. 2018). In patent cases, venue is governed by 28 U.S.C. § 1400. *TC Heartland LLC v. Kraft Foods Grp. Brands. LLC*, 137 S.Ct. 1514, 1519 (2017).

Under 28 U.S.C. § 1400 venue is proper in (1) the district in which the defendant resides, or (2) where the defendant has committed acts of infringement and has a regular and established place of business. 28 U.S.C. § 1400. Venue is proper in a district if a party or its *agent* has a regular and established place of business in that district. *In re Google LLC*, 949 F.3d 1338, 1345 (Fed. Cir. 2020) (“We conclude that a ‘regular and established place of business’ requires the regular, physical presence of an employee *or other agent* of the defendant conducting the defendant's business at the alleged ‘place of business.’”) (emphasis added).

IV. ARGUMENT

A. JTI USA AND LOGIC OPERATED AS AGENTS OF ONE ANOTHER AS PART OF A JOINT ENTERPRISE

Even based on the limited information Plaintiff possesses at this time, the facts show that JTI USA and Logic have operated as part of a joint enterprise, and thus, as agents of one another.

When operating as part of a joint enterprise, the actors of the joint enterprise are agents of one another:

[W]here two or more actors form a joint enterprise, all can be charged with the acts of the other, rendering each liable for the steps performed by the other as if each is a single actor. *See* Restatement (Second) of Torts § 491 cmt. b (“**The law ... considers that each is the agent or servant of the others**, and that the act of any one within the scope of the enterprise is to be charged vicariously against the rest.”)

Akami Techs., Inc. v. Limelight Networks, Inc., 797 F.3d 1020, 1023 (Fed. Cir. 2015) (citing Restatement (Second) of Torts § 491 cmt. b) (emphasis added).

As with the principles governing agency, whether one is engaged in a joint enterprise turns on control and consent:

A joint enterprise requires proof of four elements:

- (1) an agreement, express or implied, among the members of the group;
- (2) a common purpose to be carried out by the group;
- (3) a community of pecuniary interest in that purpose, among the members; and
- (4) an equal right to a voice in the direction of the enterprise, which gives an equal right of control.

Akami Techs., 797 F.3d at 1023 (citing Restatement (Second) of Torts § 491 cmt. c).

In *Akami Techs.*, the Federal Circuit held that the defendant could be held liable for direct infringement because of the actions by those that the defendant controlled. *Id.* at 1025. The application of the law on joint enterprises should extend to the application of venue. As the Federal Circuit held in *In re Google*, venue is proper in a district when a defendant’s **agent** has a regular, established place of business in that district. *See In re Google*, 949 F.3d at 1345.

Here, JTI USA's and Logic's agency relationship stems from its participation in a joint enterprise. As for the first and second factors, there appears to be, at a minimum, an implied agreement among the members of the group to carry out the common purpose of selling and marketing nicotine products. Ex. D. Moreover, it is likely that written agreements confirm this implied agreement. At a minimum, they operate as part of a service agreement (although Plaintiff has not yet seen this agreement). ECF 13-2, ¶ 3.

As for the third factor, JTI USA and Logic possess a community of pecuniary interest in their purpose of marketing and selling nicotine products. Moreover, both JTI USA and Logic are wholly owned by JTI Holding. ECF 13-1, ¶ 3, ECF 13-2, ¶ 3.

As for the fourth factor—control—both JTI USA and Logic share key executives, in addition to being both wholly owned by JTI Holding. **All three of Logic's named managers are also named executives for JTI USA.** In Logic's most recent 2022 filing with the Secretary of State of Florida, Logic listed three individuals as Logic's managers: Corrado Mautone, Renee Duszynski, and Emil Weiss. Ex. B. Corrado Mautone is listed as President, Director of JTI USA. Ex. C. Renee Duszynski is listed as Vice President of Sales for JTI USA and Emil Weiss is listed as Head of Corporate Affairs and Communications for JTI USA on JTI's website. Ex. D. This shows control of both entities—JTI USA and Logic—at the highest levels.

In addition to sharing high-level executives, JTI USA and Logic share office space. ECF 13, 3. And they use the same registered agent in Florida. Exs. B, C. Even based on public information, it is difficult to separate the key elements of JTI USA and Logic. That is because they are operating together, controlled by the same people from the same locations to serve a common purpose.

Because JTI USA and Logic have engaged in a joint enterprise, the law considers them to

be agents of one another. This comports with common sense and justice. As such, it is both equitable and legally correct to consider them as a single enterprise for the purposes of venue.

B. JTI USA AND LOGIC HAVE HAD A REGULAR ESTABLISHED PLACE OF BUSINESS IN THIS DISTRICT

Both JTI and Logic have and have had a physical presence in this District.

JTI USA's presence in this District far exceeds that of the defendant in *In re Google*. In *In re Google*, the Federal Circuit pointed to the fact that the defendant did not have a human employee or agent in the district as a reason for finding improper venue. *See In re Google*, 949 F.3d at 1347 (“We conclude that the Eastern District of Texas was not a proper venue because Google lacked a ‘regular and established place of business’ within the district since it has no employee or agent regularly conducting its business at its alleged ‘place of business’ within the district.”). Google's presence in the district was a machine, that is, a server. *See id.* Maintenance personnel contracted to perform maintenance, as needed, on that server did not count. *See id.*

Here, the person conducting business on behalf of JTI USA was a director—not a machine or a contractor for maintenance of machines. Mr. Colton was a person at the very top of the hierarchy. And he was listed as working in this District. This alone makes venue proper in this District.

In JTI USA's 2022 annual filing with the State of Florida, JTI USA identified John Colton as a JTI USA director with an address at the Brickell Key Place of Business in Miami, FL. In its Motion to Dismiss or Transfer Venue, Defendants indicated that Mr. Colton had resigned as director as of August of 2022. ECF 13-2, ¶ 9. This does not change the fact that Mr. Colton was still a director at the time this action was filed.

In addition to having a director listed at the Brickell Key Place of Business, JTI USA also has an employee, Ms. Constanza Bunster Gandolfo, working out of the Brickell Key Place of

Business. ECF 13-2, ¶ 8. Ms. Gandolfo's roles include handling marketing and advertising projects. *Id.*

For at least these reasons, venue is proper for JTI USA. Because, as discussed above, JTI USA is an agent of Logic, venue is proper for Logic too.

In addition to this, Logic has operated a warehouse at 2004 NW 25th Avenue, Pompano Business Center, Pompano Beach, Florida until November of 2018 with a lease for that warehouse ending March of 2019. ECF 13-1, ¶ 7. Acts of infringement occurred while Logic operated out of the Pompano Beach facility. ECF 1, ¶¶ 13 - 30. For all of these reasons, both Logic and JTI USA have and have had regular, established places of business in this District.

C. THIS COURT DOES NOT NEED TO DECIDE WHETHER VENUE ATTACHES AT THE TIME OF FILING OR DURING THE ACTS OF INFRINGEMENT

Defendants argued that venue is improper because Defendants did not have a regular and established place of business in this District at the time of filing of this action. Plaintiff disagrees. Furthermore, whether venue is proper at the time of filing of an action or during the acts of infringement is an unresolved issue governed by Federal Circuit law. *See In re Google*, 949 F.3d at 1340 n.1. Courts are split on this issue. *See id.*

Here, this Court need not decide whether venue attaches at the time of infringement or at the time of filing. As discussed above, venue was proper during both timeframes because JTI USA and Logic have operated as a joint enterprise with regular, established places of business in this District.

This is not a case where the parties have little to no activities in the District. As discussed above, both parties have operated regular and established places of business in this district, including at the Brickell Key Place of Business in Miami, FL and at the warehouse in Pompano

Beach, FL.

The core issue here is whether JTI USA and Logic have operated as a joint enterprise. As discussed above, JTI USA and Logic pursue the common objective of marketing and selling nicotine products. JTI USA and Logic share key executives. They share office space. They had a director and an employee working from the Brickell Key Place of Business in Miami, FL. Both JTI USA and Logic are wholly owned by JTI Holding, whose principal place of business is the Brickell Key Place of Business.

At a minimum, JTI USA and Logic have operated as a joint enterprise. As such, each has served as an agent of the other. JTI USA's activities at the Brickell Key Place of Business are attributable to Logic.

Plaintiff intends to file an Amended Complaint to add allegations regarding this joint enterprise (as well as other additional allegations) by January 5, 2023, pursuant to Fed. R. Civ. P. 15, which should render Defendants' Motion to Dismiss or Transfer Venue moot. To the extent that the Court finds such allegations are insufficient to defeat Defendants' Motion to Dismiss or Transfer Venue, Plaintiff respectfully requests limited venue-related discovery to investigate the related corporate entities of Defendants. *See, e.g., Javelin Pharms., Inc. v. Mylan Labs. Ltd.*, No. 16-cv-224, 2017 U.S. Dist. LEXIS 201175, at *8-10 (D. Del. Dec. 1, 2017) (finding that "Plaintiffs' theory—that the 'places' of any Mylan entity, including Mylan affiliates, subsidiaries, parents, or alter egos, may be attributable to the named Mylan Defendants for purposes of venue—is not frivolous and justifies some limited venue-related discovery").

V. CONCLUSION

For at least the foregoing reasons, venue is proper for both JTI USA and Logic in this District. Therefore, Plaintiff respectfully requests that the Court deny Defendants' Motion to Dismiss or Transfer Venue or allow Plaintiff to take limited venue-related discovery to

investigate the related corporate entities of Defendants.

Dated: December 29, 2022

Respectfully submitted,

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