

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION**

MULTIMEDIA TECHNOLOGIES PTE. LTD.,

Plaintiff,

v.

VIZIO, INC.,

Defendant.

Civil Action No.: 2:23-CV-00124-JRG

JURY TRIAL DEMANDED

REDACTED

**MULTIMEDIA TECHNOLOGIES PTE. LTD.'S RESPONSE IN OPPOSITION TO
VIZIO, INC.'S MOTION TO DISMISS PURSUANT TO FEDERAL RULE OF CIVIL
PROCEDURE 12(b)(3)**

PARKER BUNT & AINSWORTH, P.C.

Robert Christopher Bunt
Texas State Bar No. 00787165
100 E. Ferguson Suite 418
Tyler, Texas 75702
Tel. (903) 531-3535

SCHULTE ROTH & ZABEL LLP

Timothy K. Gilman (*pro hac vice*)
Christopher M. Gerson (*pro hac vice*)
Gregory R. Springsted (*pro hac vice*)
John P. Mixon (*pro hac vice*)

919 Third Avenue
New York, New York 10022
Telephone (212) 756-2000
Facsimile (212) 593-5955

*Attorneys for Plaintiff Multimedia
Technologies Pte. Ltd.*

TABLE OF CONTENTS

	Page
PRELIMINARY STATEMENT	1
PROCEDURAL HISTORY	2
STATEMENT OF FACTS	3
I. MULTIMEDIA	3
II. VIZIO	3
III. THE DISTRIBUTION CENTER	4
ARGUMENT	8
I. LEGAL STANDARD	8
II. VENUE IS PROPER UNDER § 1400(b) AND <i>TC HEARTLAND</i>	9
A. The Distribution Facility is a Regular and Established Place of Business of VIZIO	9
1. The Distribution Facility is a Physical Place in this District (<i>Cray Factor 1</i>)	10
2. The Distribution Facility is a Regular and Established Place of Business (<i>Cray Factor 2</i>)	12
(a) VIZIO Employees Have a Regular, Physical Presence at the Distribution Facility	14
(b) iDC is an Agent of VIZIO and Has a Regular, Physical Presence at the Distribution Facility	16
3. The Distribution Facility is a Place “Of” VIZIO (<i>Cray Factor</i> 3)	19
B. Venue is Evaluated at the Time the Complaint is Filed	21
III. IF THE COURT DEEMS VENUE IMPROPER, IT SHOULD TRANSFER THIS MATTER TO THE CENTRAL DISTRICT OF CALIFORNIA	22
CONCLUSION	23

TABLE OF AUTHORITIES

Cases	Page(s)
<i>AGIS Software Dev. LLC v. Google LLC</i> , No. 2:19-CV-00361-JRG, 2022 WL 1511757 (E.D. Tex. May 12, 2022).....	<i>passim</i>
<i>Arigna Tech. Ltd. v. Volkswagen AG</i> , No. 2:21-cv-00054-JRG-RSP, 2022 WL 2681012 (E.D. Tex. Jan. 18, 2022).....	8
<i>In re Cray Inc.</i> , 871 F.3d 1355 (Fed. Cir. 2017).....	<i>passim</i>
<i>In re Google LLC</i> , 949 F.3d 1338 (Fed. Cir. 2020).....	10, 12, 13, 17
<i>In re Google LLC</i> , Nos. 2022-140, 2022-141, 2022-142 2022 WL 1613192 (Fed. Cir. May 23, 2022)	9
<i>Gulf Ins. Co. v. Glasbrenner</i> , 417 F.3d 353 (2d Cir. 2005).....	8
<i>Intirion Corp. v. Coll. Prod.</i> , No. 6:22-cv-00459-ADA, 2023 WL 2904584 (W.D. Tex. Apr. 11, 2023).....	8
<i>Personal Audio, LLC v. Google, Inc.</i> , 280 F. Supp. 3d 922 (E.D. Tex. 2017).....	21
<i>Personalized Media Commc'ns, LLC v. Google LLC</i> (Mem. Op. & Order), No. 2:19-cv-00090-JRG, Dkt. No. 291 (E.D. Tex. July 30, 2020), <i>mandamus</i> <i>denied sub nom. In re Google LLC</i> , 823 F. App'x 982 (Fed. Cir. 2020).....	12, 19
<i>Raytheon Co. v. Cray, Inc.</i> , 258 F. Supp. 3d 781 (E.D. Tex. 2017).....	21
<i>San Shoe Trading Corp. v. Converse Inc.</i> , 649 F. Supp. 341 (S.D.N.Y. 1986).....	21
<i>Seven Networks, LLC v. Google LLC</i> , 315 F. Supp. 3d 933 (E.D. Tex. 2018), <i>mandamus denied sub nom. In re</i> <i>Google LLC</i> , No. 2018-152, 2018 WL 5536478 (Fed. Cir. Oct. 29, 2018), <i>reh'g en banc denied</i> , 914 F.3d 1377 (Fed. Cir. 2019)	12, 16

<i>TC Heartland LLC v. Kraft Foods Grp. Brands LLC</i> , 581 U.S. 258 (2017)	8, 9
<i>In re Volkswagen Grp. of Am., Inc.</i> , 28 F.4th 1203 (Fed. Cir. 2022)	13, 17
<i>Welch Sci. Co. v. Hum. Eng’g Inst., Inc.</i> , 416 F.2d 32 (7th Cir. 1969)	21, 22
<i>In re ZTE (USA) Inc.</i> , 890 F.3d 1008 (Fed. Cir. 2018)	8, 20
Statutes	
28 U.S.C. § 1400(b)	8, 9
28 U.S.C. § 1406(a)	22
Rules	
Fed. R. Civ. P. 12(b)(3)	2, 8
Other Authorities	
14D Charles Alan Wright & Arthur R. Miller, <i>Federal Practice & Procedure Juris.</i> § 3823 (4th ed. 2023)	21
Elise Dopson & Jessica Wynne Lockhart, <i>What is 3PL: Meaning and How to Pick One</i> , Shopify (Feb. 1, 2022), https://www.shopify.com/enterprise/third-party- logistics-3pl	18
Compl. for Pat. Infringement, <i>Multimedia Techs. Pte. Ltd. v. LG Elecs. Inc.</i> , No. 2:22-CV-00494-JRG-RSP, Dkt. No. 1 (E.D. Tex. Dec. 23, 2022)	2

Plaintiff Multimedia Technologies Pte. Ltd. (“Multimedia”) submits this opposition to Defendant VIZIO, Inc.’s (“VIZIO”) motion to dismiss. For the reasons set forth below, VIZIO’s motion should be denied.

PRELIMINARY STATEMENT

VIZIO uses and controls a “distribution facility”—located at 2773 TX-114, Fort Worth, TX 76177—in this District as part of importing and selling the products accused of infringement in this case (the “Distribution Facility”). Although the building is nominally owned by a company called iDC Logistics (“iDC”), VIZIO has [REDACTED]

[REDACTED] and for which VIZIO’s [REDACTED] [REDACTED] (which discovery has confirmed they have done). VIZIO retains ownership and control of the accused products housed in and distributed from the Distribution Facility. Under the *Cray* factors—discussed in detail below—this Distribution Facility comprises a regular and established place of business of VIZIO within this District.

Contrary to VIZIO’s assertions, facts elicited *after* the filing of VIZIO’s motion confirm that VIZIO set up and maintains the Distribution Facility, that VIZIO’s employees are able to and in fact have accessed the distribution center, and that VIZIO maintains particular and tight control over the facility. Under the agreement between VIZIO and iDC, this control ranges from [REDACTED]

[REDACTED] Thus, the agreement makes clear that VIZIO exerts control [REDACTED] rendering it VIZIO’s regular and established place of business. And VIZIO has further confirmed that not only can its employees access the facility, but they have. Venue is proper in this District and VIZIO’s motion should be denied.

PROCEDURAL HISTORY

On March 24, 2023, Multimedia filed its complaint against VIZIO for willful infringement of ten asserted patents relating to intelligent TV technologies.¹ Dkt. No. 1. In its complaint, Multimedia specifically alleged that venue is proper because “Vizio’s systematic and continuous business activities in Texas and this District further include operating, in conjunction with iDC Logistics, or otherwise using a distribution center located in this District at 2773 TX-114, Fort Worth, TX 76177, to distribute Vizio’s infringing products throughout Texas and this District.” *Id.* ¶ 9.

On June 1, 2023, VIZIO filed a motion to dismiss for improper venue pursuant to Rule 12(b)(3) of the Federal Rules of Civil Procedure. *See generally* Def. Mot.² In its motion to dismiss, VIZIO purported to address the Distribution Facility, arguing that “nowhere does the complaint allege, much less plead facts, that the iDC Logistics distribution center is a regular and established place of VIZIO.” *See id.* at 7-8 (emphasis in original). But VIZIO did not actually address any of the relevant facts regarding the Distribution Facility. Instead, VIZIO attempted to distance itself from the Distribution Facility alleging that [REDACTED]

[REDACTED] VIZIO does not control operations there, and that “VIZIO has no employees at the iDC distribution center.” *Id.* at 7-8. Significantly, however, VIZIO failed to

¹ Multimedia also has a lawsuit pending in this District against LG Electronics Inc. and LG Electronics USA, Inc. for willful infringement of various asserted patents relating to intelligent TV technologies, many of which are the same as those it asserts in this action. *See* Compl. for Pat. Infringement, *Multimedia Techs. Pte. Ltd. v. LG Elecs. Inc.*, No. 2:22-CV-00494-JRG-RSP, Dkt. No. 1 (E.D. Tex. Dec. 23, 2022).

² Citations to Def. Mot. refer to Defendant’s Motion to Dismiss for Improper Venue, filed under seal on June 1, 2023. *See* Dkt. No. 20 (redacted copy of motion).

attach or acknowledge the iDC Agreement or address any facts regarding VIZIO's use of and visitation to the Distribution Facility.

Shortly after VIZIO filed its motion, Multimedia made targeted venue discovery requests to VIZIO to which VIZIO responded and produced relevant documents and information. Among the documents and information VIZIO provided were an agreement between VIZIO and iDC [REDACTED] to VIZIO at, *inter alia*, the Distribution Facility; information pertaining to VIZIO's employees' access to the Distribution Facility; and third-party retailer agreements. As discussed in greater detail below, the discovery relating to the Distribution Facility, which VIZIO failed to include or even address in its motion, demonstrates that venue is proper here.

STATEMENT OF FACTS

I. MULTIMEDIA

Multimedia is a Singapore corporation and the sole, lawful owner of dozens of patents, including the patents asserted in this matter. *See* Compl., Dkt. No. 1 ¶¶ 1-2, 50. The asserted patents generally relate to intelligent TV technologies and were originally owned by Flextronics International Ltd. before Flextronics assigned them to Multimedia. *See id.* ¶¶ 50-51. In particular, the asserted patents have improved existing intelligent TV technology by allowing Smart TVs to present a natural and practicable overlay for end-users to seamlessly interact with the content on the television screen. *See id.* ¶ 49.

II. VIZIO

VIZIO is a California corporation, but is registered to transact business in the State of Texas and regularly does so, including within this District. *See id.* ¶ 4. VIZIO maintains a place of business at 14901 Quorum Dr., Dallas, TX 75254 (the "Dallas Facility"). *See id.* ¶ 7. Although this facility is located outside of this District, it is little more than 35 miles away from the

Distribution Facility from which VIZIO conducts a central part of its business—storage, distribution, and packaging of its products for retail stores and other purchasers—and which is in this District. *See* Decl. of John Mixon, Ex. 3.³ This short distance is not a coincidence, as it is conveniently located near Downtown Dallas, but it is still close enough for VIZIO employees to get to the Distribution Facility to conduct compliance reviews and provide instructions to iDC.⁴

VIZIO's business consists of designing, developing, finalizing, distributing, and selling Smart TVs and other consumer electronics products. In conducting its business, VIZIO markets, distributes, and sells the accused products within this District. *See id.* ¶ 12. More critically though, as a major part of conducting its business, VIZIO utilizes the Distribution Facility to store and distribute its product inventory, pursuant to an agreement it has with iDC. *See generally* Ex. 1.

III. THE DISTRIBUTION CENTER

On [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at VIZIO-MMT-00000065. [REDACTED]

[REDACTED] *Id.* at VIZIO-MMT-00000066 [REDACTED]

[REDACTED]; *id.* at VIZIO-MMT-00000083 [REDACTED]

[REDACTED]. This

³ All citations to Exhibits hereinafter are to the Exhibits attached to the Declaration of John Mixon.

⁴ Publicly available information regarding certain VIZIO logistics and inventory employees that have visited the Distribution Facility reveals that they reside and/or work in the Dallas-Fort Worth, Texas area.

⁵ The Distribution Facility is located in the part of Fort Worth, Texas that is in Denton County. *See* Ex 5.

agreement [REDACTED]

[REDACTED] *Id.* (Section 2).⁶ The [REDACTED]

For example, the following provisions [REDACTED]

See id. at VIZIO-MMT-00000067 (Section 7(b), (c), (e)).⁷ [REDACTED]

[REDACTED] *Id.* (Section 8). Section 9 of the iDC Agreement also includes the following noteworthy provisions:

⁶ VIZIO has represented that it ceased using the Distribution Facility at the end of April 2023. As set forth below in Section II(B), this recent development is irrelevant for venue purposes.

⁷ All emphasis in quotations has been added unless otherwise indicated.

See id. at VIZIO-MMT-00000068 (Section 9(b), (e)). Similarly, Section 14(a) calls for [REDACTED]

[REDACTED]

[REDACTED]

See id. at VIZIO-MMT-00000070 (Section 14(a)).

Appendix B to the iDC Agreement sets [REDACTED]

[REDACTED]

See id. at VIZIO-MMT-00000080 (ID # 1.04-1.05) [REDACTED]

[REDACTED]

[REDACTED]

See id. at VIZIO-MMT-00000081 (ID # 2.01-2.09) [REDACTED]

[REDACTED]

VIZIO's control over the Distribution Facility does not stop there. [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See *id.* VIZIO-MMT-00000081 (ID # 5.01-5.04)

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See *id.* (ID # 5.04-5.05).

Finally, the iDC Agreement [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

See *id.* (ID # 5.08-5.09). Within the last six months, VIZIO employees have visited the Distribution Facility to ensure compliance with key performance indicators set forth in the iDC Agreement. See Ex. 2.⁸ The Distribution Facility is VIZIO's regular and established place of business.

⁸ VIZIO has confirmed that its employees have worked at the Fort Worth Distribution Facility, but purport not to track how often or when they work there and have not provided that information in response to discovery requests. Ex. 2.

ARGUMENT

I. LEGAL STANDARD

On a motion to dismiss for improper venue under Rule 12(b)(3), the burden lies with the plaintiff to show that venue is proper. *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1013 (Fed. Cir. 2018). But unless the court holds an evidentiary hearing, “the plaintiff need only make a *prima facie* showing of venue.” *Arigna Tech. Ltd. v. Volkswagen AG*, No. 2:21-cv-00054-JRG-RSP, 2022 WL 2681012, at *1 (E.D. Tex. Jan. 18, 2022) (quoting *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353, 355 (2d Cir. 2005)). Courts must view all of the facts in a light most favorable to plaintiff, and the court may look beyond the complaint to evidence submitted by the parties. *Intirion Corp. v. Coll. Prod.*, No. 6:22-cv-00459-ADA, 2023 WL 2904584, at *2 (W.D. Tex. Apr. 11, 2023).

Venue for patent infringement cases is governed by 28 U.S.C. § 1400(b). *TC Heartland LLC v. Kraft Foods Grp. Brands LLC*, 581 U.S. 258, 269 (2017); *In re ZTE (USA) Inc.*, 890 F.3d at 1012. Under section 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.” *TC Heartland*, 581 U.S. at 261. For the second prong, there are “three general requirements relevant to the inquiry: (1) there must be a physical place in the district; (2) it must be a regular and established place of business; and (3) it must be the place of the defendant.” *In re Cray Inc.*, 871 F.3d 1355, 1360 (Fed. Cir. 2017). Whether there is a “regular and established place of business” is a fact-specific inquiry—“no precise rule has been laid down and each case depends on its own facts.” *Id.* at 1362.

II. VENUE IS PROPER UNDER § 1400(b) AND *TC HEARTLAND*

A. *The Distribution Facility is a Regular and Established Place of Business of VIZIO*

Here, venue is proper in this District under the second prong of § 1400(b). Specifically, VIZIO has (1) committed and continues to commit acts of infringement in this District and (2) it has a regular and established place of business in this District—namely, the Distribution Facility from which VIZIO distributes its infringing products throughout this District and Texas generally. The only element at issue here is whether VIZIO has a “regular and established place of business” in this District. And as both the terms of the iDC Agreement and VIZIO’s actual use of the Distribution Facility affirmatively demonstrate, it does.⁹

The Court’s decision in *AGIS Software Development LLC v. Google LLC*, No. 2:19-CV-00361-JRG, 2022 WL 1511757 (E.D. Tex. May 12, 2022) is particularly instructive here.¹⁰ In that case, this Court held that contractual provisions—which are highly analogous to those in the iDC Agreement here—between Google and a third-party logistics facility in this District were sufficient to establish that the third-party facility was Google’s “regular and established place of business.” *Id.* at *2-4. In *AGIS Software*, Google had entered into a services agreement and statement of work (“SOW”) with a third-party for the provision of “repairing, refurbishing, and warehousing

⁹ To the extent that VIZIO has asserted that it is not responsible [REDACTED]

[REDACTED] x. 1. Further, the VIZIO employees who have visited the Distribution Facility within the last six months are employed by VIZIO, Inc. Ex. 2.

¹⁰ In the *AGIS* case, Google also moved in the alternative to transfer venue. In addressing Google’s motion, the Court bifurcated the improper venue and transfer portions of the motion and denied the motion to transfer in a separate opinion, which has been sealed on that case’s docket. Subsequently, Google filed a mandamus petition solely seeking to transfer the case, which the Federal Circuit granted. *See generally In re Google LLC*, Nos. 2022-140, 2022-141, 2022-142, 2022 WL 1613192 (Fed. Cir. May 23, 2022). The Federal Circuit’s mandamus opinion does not address Google’s improper venue motion or this Court’s separate opinion finding that venue was proper. *See id.*

services for Google devices.” *See id.* at *2. Under the SOW, the third-party was required to provide Google with a secured area at the facility that was solely meant for Google devices, and the requirements of which were set forth in the SOW. *See id.* These requirements stated that the area for Google’s devices and services must have “walls from floor to ceiling,” “be fully separate from other operations and other third[-]party products, as determined by Google,” and “have video monitoring and recording of all access points, as well as badge access limited solely to [the third-party’s] employees authorized to work with Google products.” *See id.* (first alteration in original). The SOW also provided that the facility could not change without Google’s agreement in writing. *See id.*

Based upon the terms of the SOW and the manner in which Google used the facility pursuant to it in *AGIS Software*, this Court determined that the third-party facility Google used was a “regular and established place of business” of Google for venue purposes. *See id.* Here, the iDC Agreement contains highly analogous contractual provisions to those that this Court found established venue in *AGIS Software*, which is reinforced by the presence of VIZIO employees at the place of business for VIZIO’s accused products.

1. **The Distribution Facility is a Physical Place in this District (Cray Factor 1)**

To satisfy the “physical place” requirement, the location must be “a physical, geographical location in the district from which the business of the defendant is carried out.” *Cray*, 871 F.3d at 1362. However, the physical place need not be “real property that the defendant must ‘own[] or lease,’” so long as business can physically be carried out at that location. *In re Google LLC*, 949 F.3d 1338, 1343 (Fed. Cir. 2020) (alteration in original) (citing *Cray*, 871 F.3d at 1363).

The Distribution Facility is a physical, geographical location within this District as it is a physical facility located at 2773 TX-114, Fort Worth, TX 76177, which is located within this

District. Moreover, VIZIO does not, and cannot, contest that it both stores its inventory of products at and carries out the distribution of its products to purchasers from the Distribution Facility. As such the business of VIZIO is being carried out from the Distribution Facility. Finally, [REDACTED]

[REDACTED] For example, the terms of the iDC Agreement specify that [REDACTED]

[REDACTED] See Ex. 1 at VIZIO-MMT-00000083. Additionally, VIZIO [REDACTED]

[REDACTED] See *id.* at VIZIO-MMT-00000068 [REDACTED]

[REDACTED] Similarly, [REDACTED]

[REDACTED] See *id.* at VIZIO-MMT-00000067 [REDACTED]

Furthermore, under [REDACTED]

[REDACTED] See *id.* at VIZIO-MMT-00000081 (ID # 5.01, 5.03). [REDACTED]

[REDACTED] See *id.* (ID # 5.04-5.05). [REDACTED]

[REDACTED] See *id.* (ID # 5.02).

These provisions in the iDC Agreement are more than sufficient to demonstrate that the Distribution Facility is a physical, geographical place within this District in satisfaction of the first *Cray* factor. See *AGIS Software*, 2022 WL 1511757, at *2-3 (holding that Google’s secured area at a third-party’s facility was a “physical, geographic location” in this District because Google “set[] out the physical specifications for its” area in the facility, “restrict[ed] use to its [area] to services solely performed for its products,” “exclude[ed] all ‘other operations and other third-party products’” and mandated video recording of all access points and limited access to authorized employees only) (last alteration in original); Mem. Op. & Order 3-4, *Personalized Media Commc’ns, LLC v. Google LLC*, No. 2:19-cv-00090-JRG, Dkt. No. 291 (E.D. Tex. July 30, 2020), *mandamus denied sub nom. In re Google LLC*, 823 F. App’x 982 (Fed. Cir. 2020) (holding the same); see also *Seven Networks, LLC v. Google LLC*, 315 F. Supp. 3d 933, 951-53 (E.D. Tex. 2018), *mandamus denied sub nom., In re Google LLC*, No. 2018-152, 2018 WL 5536478 (Fed. Cir. Oct. 29, 2018), *reh’g en banc denied*, 914 F.3d 1377 (Fed. Cir. 2019) (holding that physical servers and physical space where servers were located constituted a physical, geographical place within District for venue purposes based on level of control Google exerted over them and the physical presence the servers had).

2. **The Distribution Facility is a Regular and Established Place of Business (*Cray* Factor 2)**

Under the second *Cray* factor, for a business to be “regular” it merely needs to “operate[] in a ‘steady, uniform, orderly, and methodical’ manner” and to be established it merely needs to be stable “for a meaningful time period.” See *Cray*, 871 F.3d at 1362-63. Additionally, for a place to be a “place of business” it need only have “the regular, physical presence of an employee or other agent of the defendant conducting the defendant’s business at the alleged ‘place of business.’” See *Google*, 949 F.3d at 1345. The elements of an agency relationship “are (1) the

principal's right to direct or control the agent's actions, (2) the manifestation of consent by the principal to the agent that the agent shall act on his behalf, and (3) the consent by the agent to act." *In re Volkswagen Grp. of Am., Inc.*, 28 F.4th 1203, 1209 (Fed. Cir. 2022) (quoting *Google*, 949 F.3d at 1345). The Federal Circuit has emphasized that the requirement of "control" over the agent is merely "interim control," such as the ability to give interim instructions. *See id.* (citing *Google*, 949 F.3d at 1345-46).

Here, the Distribution Facility is "regular" because [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Ex. 1 at VIZIO-MMT-00000081 (ID # 5.17). [REDACTED]

[REDACTED]

[REDACTED] See *id.* (ID #5.16). The Distribution Facility is also "established" because [REDACTED]

[REDACTED]

[REDACTED] See *id.* at VIZIO-MMT-00000065 (Section 2). [REDACTED]

[REDACTED] is certainly indicative of stability "for a meaningful time period."¹¹

Finally, the Distribution Facility constitutes a "place of business" for two independent reasons: (1) VIZIO's employees have a regular, physical presence at the Distribution Facility, and

¹¹ In its June 28, 2023 letter regarding venue discovery, VIZIO's counsel noted that VIZIO "ceased using the iDC Logistics Facility at the end of April 2023." See Ex. 2. As discussed below in Section (II)(B), this is irrelevant as venue is measured from the time of, or shortly before, the filing of the complaint, and at the time of such filing, VIZIO had already been utilizing the Distribution Facility for almost two years with more than a year left on the initial contract term.

(2) iDC is an agent of VIZIO and iDC's employees have a regular, physical presence at the Distribution Facility.

(a) VIZIO Employees Have a Regular, Physical Presence at the Distribution Facility

Based on the terms of the iDC Agreement and the representations VIZIO has made regarding its employees' presence at the Distribution Facility, VIZIO employees have a regular, physical presence at the Distribution Facility.

First, the iDC Agreement terms provide that [REDACTED]

[REDACTED]

[REDACTED] See Ex. 1
at VIZIO-MMT-00000081 (ID # 5.08-5.09). This indicates that the [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹² In other words, [REDACTED]

[REDACTED] And [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] See Ex. 2.

¹² Although VIZIO represented in its June 28, 2023 letter that [REDACTED]

[REDACTED] employees must visit when an iDC employee is at the facility to let them in and escort them. To this point, nothing in VIZIO's letter indicates that VIZIO employees have ever been denied access to the Distribution Facility upon arrival to visit. Additionally, the [REDACTED]

[REDACTED]

While it is unclear exactly how many times VIZIO's employees visited the Distribution Facility within the last six months, it is reasonable to infer that they visited it regularly in light of VIZIO's admission that it "does not maintain a log of when these employees visited the Distribution Facility." See Ex. 2. See *AGIS Software*, where this Court found that Google's employees had a "regular, physical presence" at a third-party facility in part because Google did not track and monitor its employees' visitations to the facility. 2022 WL 1511757, at *3. According to this Court in *AGIS*, this latter fact "suggest[ed] that the physical presence of such employees within the EDTX was regular and established." *Id.* The same reasoning applies here.

Second, VIZIO has confirmed [REDACTED]

[REDACTED] See Ex. 2. This is akin to the purpose of Google's employees' visits to the facility in *AGIS Software*. In fact, just as the Google's employees' activities at the third-party facility "included operational reviews of key performance indicators over Google's business of repairing, refurbishing, and warehousing services performed for Google devices," see *AGIS Software*, 2022 WL 1511757, at *3, [REDACTED]

[REDACTED] The iDC Agreement makes this clear, as it [REDACTED]

[REDACTED] See Ex. 1 at VIZIO-MMT-00000080 (ID # 2.01-3.12).

As an example, iDC must ensure the completion of the following for loading outbound shipments: [REDACTED]

[REDACTED] See *id.* (ID # 2.07).

Additionally, the iDC Agreement states that [REDACTED]

[REDACTED] and imposes a requirement of [REDACTED]

[REDACTED] *See id.* (ID # 2.08). And where [REDACTED]

[REDACTED] *See id.* at (ID # 2.09). [REDACTED]

[REDACTED] This is identical to the Google employees’ activities at the facility in *AGIS Software*, as both involved reviewing compliance with KPI requirements of the business conducted at their respective facilities. *See AGIS Software*, 2022 WL 1511757, at *3; *see also Seven Networks*, 315 F. Supp. 3d at 960 (“However, were that same party to integrate the storage arrangement into its own logistical operations (similar to, for example, Amazon and its relationship with its own fulfillment centers), there can be little doubt that the storage warehouses are places of business, *even if the public never interacts with the warehouse.*”).

Accordingly, VIZIO’s employees have a “regular, physical presence” at the Distribution Center in this District.

(b) iDC is an Agent of VIZIO and Has a Regular, Physical Presence at the Distribution Facility

Even if the Court finds that VIZIO’s employees do not have a regular, physical presence at the Distribution Facility, iDC—through its employees—has a regular, physical presence there and iDC is an agent of VIZIO.

VIZIO, as principal, has the right to “direct or control” iDC’s actions in that it possesses “interim control” over iDC, which is borne out in the terms of the iDC Agreement. Specifically,

[REDACTED]

[REDACTED]

Ex. 1 at VIZIO-MMT-00000067 (Section 7(b)).

[REDACTED]

[REDACTED] *Id.* (Section 7(e)). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* at VIZIO-MMT-00000068 (Section 9(b)). In similar fashion, [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] *Id.* (Section 9(e)). Finally, [REDACTED]

[REDACTED]

[REDACTED] . at VIZIO-MMT-00000070 (Section 14(a)).

These contractual provisions on their own, especially Section 14(a), [REDACTED]

[REDACTED]

[REDACTED] *See AGIS Software*, 2022 WL 1511757, at *5-6 (highlighting various provisions between Google and third-party facility as basis for finding “interim control” including that the third-party facility (1) “will provide the following OOW Services, **unless instructed otherwise in writing by Google**”; (2) “may provide Kitting Services . . . **in accordance with Google’s instructions**”; and (3) “will generate and apply a label . . . **as directed by Google**”) (omissions in original). This is all that the Federal Circuit requires for the first element of an agency relationship. *See Volkswagen*, 28 F.4th at 1209 (quoting *Google*, 949 F.3d at 1345-46).

Further evidence of VIZIO's control over the iDC can be found in [REDACTED]
 [REDACTED] which sets forth various requirements and conditions with which VIZIO requires iDC
 to comply. For instance, VIZIO:

- requires [REDACTED]³ See Ex. 1 at VIZIO-MMT-00000080 (ID # 1.04-1.05).
- requires [REDACTED] *id.* at VIZIO-MMT-00000081 (ID # 5.01-5.05).
- specifies [REDACTED] See *id.* at VIZIO-MMT-00000080 (ID # 2.01-2.03)
- specifies [REDACTED] See *id.* (ID # 2.04-2.07).
- mandates that [REDACTED] See *id.* at VIZIO-MMT-00000081 (ID # 5.10-5.11).

Furthermore, the [REDACTED]
 [REDACTED]
 [REDACTED] See *id.* at VIZIO-MMT-00000079. This is further
 confirmed in Appendix B, where [REDACTED]
 [REDACTED] See *id.* at VIZIO-MMT-
 00000081 (ID # 4.01-4.02).

Most, if not all, of the above-described provisions in the iDC Agreement are directly
 comparable to the contractual provisions this Court cited in *AGIS Software* to support its

¹³ 3PL refers to “third-party logistics,” which is what iDC provides to VIZIO. See Elise Dopson & Jessica Wynne Lockhart, *What is 3PL: Meaning and How to Pick One*, Shopify (Feb. 1, 2022), <https://www.shopify.com/enterprise/third-party-logistics-3pl>.

conclusion that the third-party facility was Google’s agent. In particular, the Court found that Google retained “complete, absolute, and exclusive control over” its secured area in the facility because only Google products and services could be in Google’s area in the facility, no other operations or third-party products could enter the area, and Google required security in and restrictions for entering the area. *See AGIS Software*, 2022 WL 1511757, at *5. The Court also cited to the fact that Google provided “step-by-step instructions” to the third-party facility to perform services, and Google’s right to provide “interim instructions” to the third-party facility, as spelled out in the parties’ agreement. *See id.* at *5-6; *see also Personalized Media Commc’ns*, No. 2:19-cv-00090-JRG, Dkt. No. 291 at 6-8 (same). As demonstrated above, the iDC Agreement expressly calls for [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] This is the type of interim control that the Court found to exist in *AGIS Software*.

Finally, the fact that all of the above provisions are in writing in a signed agreement between VIZIO and iDC demonstrates that VIZIO manifested consent to iDC that iDC would act as its agent, and that iDC consented to act as VIZIO’s agent. Therefore, iDC is VIZIO’s agent and, by virtue of iDC’s employees’ presence at the Distribution Facility, VIZIO has an agent with a regular, physical presence at the facility.

3. **The Distribution Facility is a Place “Of” VIZIO (Cray Factor 3)**

The final *Cray* factor requires that the regular and established place of business be a place of VIZIO. In order for a third-party facility to be a place of a defendant, the defendant “must establish or ratify the place of business.” *Cray*, 871 F.3d at 1363. “Relevant considerations include whether the defendant owns or leases the place, or exercises other attributes of possession or

control over the place,” “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.” *Id.* Additional factors include: “the nature of [the defendant’s] relationship with [its] representatives [in the District] or whether it has any other form of control over any of them”; “whether [the defendant] possesses, owns, leases, or rents the [facility] . . . or owns any of the equipment located there”; “whether any signage on, about, or relating to the [facility] associates the space as belonging to [the defendant]”; and “whether the location of the [facility] was specified by [the defendant] or whether [a third-party] would need permission from [the defendant] to move [the facility] outside of the [District] or to stop working for [the defendant].” *In re ZTE (USA) Inc.*, 890 F.3d 1008, 1015 (Fed. Cir. 2018).

Here, VIZIO has ratified the Distribution Facility as its place of business in this District. For the same reasons detailed for the second *Cray* factor, [REDACTED]

[REDACTED] Additionally, the fact that a customer on the “BusinessYab.com” webpage for “iDC – Ft Worth TX” commented: “This is VIZIO. Super quick! Make sure you have safety vest on you, you’ll have to witness while they’re loading you buy out in 1.5hrs” means that, to some extent VIZIO holds itself out to its customers (even if not retail consumers) as conducting business out of the Distribution Facility. See Ex. 4. And VIZIO certainly has equipment in the form of its product inventory at the Distribution Facility as that is the entire basis for its relationship with iDC. Finally, the location of the facility was specified by VIZIO as it specifically contracted with iDC to store and distribute its products there, and, as set forth in the iDC Agreement, [REDACTED]

See Ex. 1 at VIZIO-MMT-000000067 (Section 7(b)). See *AGIS Software*, 2022 WL 1511757, at *9 (holding that third-party facility was the physical place of Google because, *inter alia*, (1) Google “exercises interim control over the [facility’s] activities” including “all aspects of [the facility’s] conduct as it pertains to Google’s exclusive and restrictive Google Secured Area,” “[a]s detailed under the second *Cray* factor,” and (2) nothing on shipping and packaging labels used for Google’s repairs identified the third-party facility).

Therefore, the Distribution Facility is the regular and established place of business of VIZIO within the Eastern District of Texas. As such, venue is proper in this District.

B. Venue is Evaluated at the Time the Complaint is Filed

Generally, venue under the patent venue statute is assessed at the time the plaintiff’s cause of action accrued and a lawsuit is filed. See *Raytheon Co. v. Cray, Inc.*, 258 F. Supp. 3d 781, 787 (E.D. Tex. 2017). Stated another way, “venue under § 1400(b) should be analyzed based on the facts and circumstance that exist on the date suit is filed.” *Personal Audio, LLC v. Google, Inc.*, 280 F. Supp. 3d 922, 930 (E.D. Tex. 2017). In some cases, courts will even evaluate venue from a time *before* the complaint is filed, assessing venue from the time the claim accrues so long as the complaint is filed in a reasonable time thereafter (“the so-called *Welch* rule”). 14D Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure Juris.* § 3823 (4th ed. 2023) (“[C]ourts have concluded that one who had a regular and established place of business in the district and committed acts of infringement there can be sued in that district for a reasonable time after abandoning the place of business. That result seems correct.”); *San Shoe Trading Corp. v. Converse Inc.*, 649 F. Supp. 341, 344–45 (S.D.N.Y. 1986) (applying the so called ‘*Welch* Rule,’ holding that patent venue is determined when the claim accrues); *Welch Sci. Co. v. Hum. Eng’g Inst., Inc.*, 416 F.2d 32, 35–36 (7th Cir. 1969). But if venue is proper when the suit is filed, it

cannot be retroactively removed by a defendant's attempts to reconfigure its ongoing infringement to avoid a Court's jurisdiction.

On reply VIZIO may argue that the Court should disregard its use of the Distribution Facility because it "ceased using the iDC Logistics Facility at the end of April 2023." See Ex. 2. This fact is irrelevant. Multimedia filed this lawsuit on March 24, 2023. Accordingly, at the latest, the Court must assess whether venue was proper based upon the facts and circumstances as they existed on March 24, 2023. The Court may even assess venue earlier than that under the *Welch* rule, but certainly as of March 24, 2023, VIZIO still used the Distribution Facility and, in fact, the

See Ex. 1 at VIZIO-MMT-00000065 (Section 2).

III. IF THE COURT DEEMS VENUE IMPROPER, IT SHOULD TRANSFER THIS MATTER TO THE CENTRAL DISTRICT OF CALIFORNIA

As established above, venue in this District is proper. However, if the Court disagrees and determines that venue is not proper here, it should alternatively transfer this case to the Central District of California. When a court determines that venue is improper, it shall either dismiss the case, "or if it be in the interest of justice, transfer such [a] case to any district or division in which it could have been brought." 28 U.S.C. § 1406(a).

Here, if the Court determines that venue is not proper, the interests of justice warrant transferring the case to the Central District of California. Before opposing VIZIO's motion, Multimedia first confirmed it had a basis to do so by taking targeted venue discovery, which led to the production of the iDC agreement as described above, which corroborates the venue and jurisdictional averments in Multimedia's Complaint. If venue is found improper—which it should not be, as discussed above—the Complaint remains filed in good faith based on all publicly-available information about the specific location of VIZIO's alleged infringement within the State

of Texas. Rather than dismiss Multimedia's Complaint and require Multimedia to expend additional resources refiling in the Central District of California, this Court—only if it disagrees with Multimedia that venue is proper here—should instead transfer the matter to the Central District of California based on Multimedia's reasonable course of conduct and to save resources.

CONCLUSION

Based on the foregoing, the Court should deny VIZIO's motion to dismiss. Alternatively, the Court should transfer the case, in the interests of justice, to the Central District of California.

Dated: July 5, 2023

PARKER BUNT & AINSWORTH, P.C.

By: Robert Christopher Bunt
Robert Christopher Bunt
Texas State Bar No. 00787165
100 E. Ferguson Suite 418
Tyler, Texas 75702
Tel. (903) 531-3535
rcbunt@pbatyler.com

Timothy K. Gilman
(admitted *pro hac vice*)
Tim.Gilman@srz.com
Christopher M. Gerson
(admitted *pro hac vice*)
Christopher.Gerson@srz.com
Gregory R. Springsted
(admitted *pro hac vice*)
Gregory.Springsted@srz.com
John P. Mixon
(admitted *pro hac vice*)
John.Mixon@srz.com

Schulte Roth & Zabel LLP
919 Third Avenue

New York, NY 10022
Telephone: 212.756.2000

*Attorneys for Plaintiff Multimedia
Technologies Pte. Ltd.*

CERTIFICATE OF SERVICE

I hereby certify that, on July 5, 2023 a copy of the foregoing was served to all counsel of record via email.

/s/ Robert Christopher Bunt
Robert Christopher Bunt

CERTIFICATE OF AUTHORIZATION TO FILE UNDER SEAL

I hereby certify that the foregoing document is authorized to be filed under seal pursuant to the Motion for Leave to File under Seal filed concurrently in this case.

/s/ Robert Christopher Bunt
Robert Christopher Bunt