

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

BROOK + WHITTLE LTD,	§	
	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	CIVIL ACTION NO. 2:24-CV-00735-JRG-RSP
	§	
NESTLE USA, INC., and FUJI SEAL	§	
INTERNATIONAL, INC.	§	
	§	
<i>Defendants.</i>	§	

REPORT & RECOMMENDATION

Before the Court is Defendant Nestle USA, Inc.’s Motion to Dismiss for Improper Venue Pursuant to Federal Rule of Civil Procedure 12(b)(3). **Dkt. No. 18.** For the reasons discussed below, the Motion should be **DENIED**.

I. Legal Standard

A party may move to dismiss an action for “improper venue.” Fed. R. Civ. P. 12(b)(3). “Once a defendant raises a 12(b)(3) motion to dismiss for improper venue, the burden of sustaining venue lies with the plaintiff.” *ATEN Int’l Co. v. Emine Tech. Co.*, 261 F.R.D. 112, 120–21 (E.D. Tex. 2009) (citations omitted). A plaintiff may carry its burden by presenting facts, taken as true, that establish venue. *Id.* The Court “must accept as true all allegations in the complaint and resolve all conflicts in favor of the plaintiff.” *Mayfield v. Sallyport Glob. Holdings, Inc.*, No. 6:13-CV-459, 2014 WL 978685, at *1 (E.D. Tex. Mar. 5, 2014) (citing *Ambraco, Inc. v. Bossclip, B.V.*, 570 F.3d 233, 237–38 (5th Cir. 2009)). In determining whether venue is proper, “the Court may look beyond the complaint to evidence submitted by the parties.” *Id.* If venue is improper, the Court must dismiss it, “or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought.” 28 U.S.C. § 1406(a). The Federal Circuit has described “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. If any statutory requirement is not satisfied, venue is improper under § 1400(b).” *In re Cray Inc.*, 871 F.3d 1355, 1360 (Fed. Cir. 2017). In deciding whether a place is a regular and established place of defendant “[r]elevant considerations include whether the defendant owns or leases the place, or exercises other attributes of possession or control over the place.” *Id.* at 1363. “Another consideration might be 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.” *Id.* Additionally, “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” is a relevant consideration. *Id.* at 1364.

II. Analysis

Nestle asserts that it does not have a regular and established place of business in this District and thus venue is improper.¹ Dkt. No. 18 at 3 (citing 28 U.S.C. § 1400(b)). Key to Nestle’s Motion is its assertion that “B+W incorrectly alleges that ‘Nestle makes sales in this District through its “Sales/Regional Office” located at 5800 Granite Parkway, Plano, TX 75024.’” *Id.* at 4. (quoting Dkt. No. 1 at ¶ 13). Nestle declares that “at the time of the filing of the complaint, [Nestle], did ***not, in fact***, own or lease an any office spaces in Plano, Texas.” *Id.* (quoting Dkt. No. 18-1 at ¶ 4) (emphasis added by Nestle). Nestle concedes that this office location was listed on its website, but claims it was in error. *Id.* at 4–5.

Plaintiff Brook and Whittle (“B+W”) responds that it has sufficiently pleaded venue as to Nestle based on the 5800 Granite Parkway location. Dkt. No. 29 at 4. Plaintiff argues that the Court

¹ The Parties do not dispute that Nestle does not reside in this district. The Parties also do not dispute that Plaintiff has alleged that Nestle has committed acts of infringement in this district.

should take its pleading and the screenshot of the location from Nestle’s website as true at this stage of the case. *Id.* On these facts, Plaintiff argues that the *Cray* factors are easily met. *Id.* at 5. First, the Granite Parkway address is a physical location. *Id.* Second, Nestle’s “longstanding representations on the website” indicate that it is a regular and established place of business including because the website shows this location seeking to hire individuals. And third, Nestle advertises the location as its own on its website. *Id.*

The Court agrees with Plaintiff that it has sufficiently pleaded venue to survive a 12(b)(3) motion. Defendant attempts to turn the 12(b)(3) inquiry on its head and have the Court treat its assertions as true. But at the 12(b)(3) stage the Court “must accept as true all allegations in the complaint and resolve all conflicts in favor of the plaintiff.” *Mayfield v. Sallyport Glob. Holdings, Inc.*, No. 6:13-CV-459, 2014 WL 978685, at *1 (E.D. Tex. Mar. 5, 2014) (citing *Ambraco, Inc. v. Bossclip, B.V.*, 570 F.3d 233, 237–38 (5th Cir. 2009)). The Court finds that taking Plaintiff’s allegations as true, the Granite Parkway location readily meets the *Cray* test as explained by Plaintiff in its response. Nestle admits that its assertions are factual in nature. Dkt. No. 18 at 4 (“Nestle, did ***not, in fact***, own or lease any office spaces in Plano, Texas”) (emphasis by Nestle). However, Nestle’s conclusory factual assertions claiming that the website listing was “in error” do not help its Motion at this stage of the case because a 12(b)(3) motion is not the proper vehicle for resolving factual disputes.²

III. Conclusion

A party’s failure to file written objections to the findings, conclusions and recommendations contained in this report within 14 days bars that party from *de novo* review by the District Judge of those findings, conclusions, and recommendations and, except on grounds of

² While not relevant to the disposition of this Motion, the Court notes that Nestle still lists this location on its website. See <https://www.nestlejobs.com/locations>.

plain error, from appellate review of unobjected-to factual findings and legal conclusions accepted and adopted by the district court. FED. R. CIV. P. 72(b)(2); *see also Douglass v. United Servs. Auto. Ass'n*, 79 F.3d 1415, 1428–29 (5th Cir. 1996) (*en banc*). Any objection to this Report and Recommendation must be filed in ECF under the event “Objection to Report and Recommendation [cv, respoth]” or it may not be considered by the District Judge.

SIGNED this 11th day of August, 2025.



ROY S. PAYNE
UNITED STATES MAGISTRATE JUDGE