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8 UNITED STATES DISTRICT COURT
9 SOUTHERN DISTRICT OF CALIFORNIA
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11 REFLECTION, LLC, a California
12 Corporation,
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14 Plaintiff,
15 v.
16 SPIRE COLLECTIVE LLC (d.b.a.,
17 StoreYourBoard), a Pennsylvania
18 Corporation; and DOES 1-10,
19 Defendant.

Case No.: 17cv1603-GPC(BGS)

**ORDER GRANTING DEFENDANT'S
MOTION TO DISMISS FOR
IMPROPER VENUE**

[Dkt. No. 11.]

19 Before the Court is Defendant's motion to dismiss pursuant to Federal Rule of
20 Civil Procedure 12(b)(3) and 28 U.S.C. § 1406(a). (Dkt. No. 11.) Plaintiff filed an
21 opposition on December 18, 2017. (Dkt. No. 13.) A reply by Defendant was filed on
22 December 29, 2017. (Dkt. No. 14.) Based on the reasoning below, the Court GRANTS
23 Defendant's motion to dismiss.

24 **Background**

25 Plaintiff Reflection, LLC ("Reflection" or "Plaintiff") filed a complaint against
26 Defendant Spire Collective LLC ("Spire" or "Defendant") for patent infringement of its
27 United States Patent No. 7,213,713 entitled "Storage System for Sport Equipment."
28 (Dkt. No. 1. Compl.) Plaintiff is a California limited liability company with its principal

1 place of business located in Vista, California. (Id. ¶ 2.) Defendant is a Pennsylvania
2 corporation with its principal place of business located in Troy, Virginia. (Id. ¶ 3.)

3 Defendant maintains a Professional Selling Account with Amazon.com
4 (“Amazon”) for which it pays a monthly subscription fee. (Dkt. No. 11-3, Mavraganis
5 Decl. ¶ 4.) It enrolls its products in a service called Amazon-Fulfilled. (Id. ¶ 5.)
6 Initially, Spire indicates the quantity of products it has available to send to Amazon. (Id.
7 ¶ 7.) Then Amazon directs Spire to send products to certain Amazon Fulfillment Centers
8 (“Amazon FC”) for storage and fulfillment. (Id. ¶ 8.) Amazon may require all products
9 be sent to one Amazon FC, or it may require Spire to split the products into multiple
10 shipments to be sent to multiple Amazon FCs. (Id.) After its products are shipped to
11 and received by the Amazon FCs, Amazon sometimes decides, in its sole discretion, to
12 redistribute Spire’s products to different Amazon FCs for storage and fulfillment. (Id.)
13 To its knowledge, Spire’s products have been stored by Amazon in 23 states including
14 California. (Id.) Spire does not lease or have any rights to any space in Amazon FC in
15 California. (Id. ¶ 9.)

16 **A. Motion to Dismiss for Improper Venue**

17 Defendant moves to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(3)
18 and 28 U.S.C. § 1406(a) for improper venue. Plaintiff opposes.

19 Federal Rule of Civil Procedure 12(b)(3) provides that a defendant may move to
20 dismiss a case for improper venue. Fed. R. Civ. P. 12(b)(3). Under Rule 12(b)(3),
21 “pleadings need not be accepted as true, and facts outside the pleadings may be
22 considered.” Doe 1 v. AOL LLC, 552 F.3d 1077, 1081 (9th Cir. 2009) (citation omitted);
23 see also Argueta v. Banco Mexicano, S.A., 87 F.3d 320, 324 (9th Cir. 1996). Once venue
24 is challenged, the plaintiff bears the burden of demonstrating the propriety of venue in the
25 chosen judicial district. Piedmont Label Co. v. Sun Garden Packing Co., 598 F.2d 491,
26 496 (9th Cir. 1979). Pursuant to 28 U.S.C. § 1406(a), if a case is filed in an improper
27 venue, the district court “shall dismiss, or if it be in the interest of justice, transfer such
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1 case to any district or division in which it could have been brought.” 28 U.S.C. §
2 1406(a).

3 A patent infringement case is governed by the patent venue statute which states
4 that “[a]ny civil action for patent infringement may be brought in the judicial district
5 where the defendant resides, or where the defendant has committed acts of infringement
6 and has a regular and established place of business.” 28 U.S.C. § 1400(b). By enacting
7 the patent venue statute, “[Congress] ‘placed patent infringement cases in a class by
8 themselves, outside the scope of general venue legislation.’” TC Heartland LLC v. Kraft
9 Foods Group Brands LLC, 137 S. Ct. 1514, 1518 (2017). The patent venue statute is
10 construed as “a restrictive measure, limiting [the] prior, broader venue.” Stonite Prods.
11 Co. v. Melvin Lloyd Co., 315 U.S. 561, 566-67 (1942). Therefore, the patent venue
12 statute should be strictly construed. Symbology Innovations, LLC v. Lego Sys., Inc., --
13 F.Supp.3d --, 2017 WL 4324841, at *7 (E.D. Va. Sept. 28, 2017) (citing Schnell v. Peter
14 Eckrich & Sons, Inc., 365 U.S. 260, 264 (1961)); Personal Audio, LLC v. Google, Inc., --
15 F.Supp.3d -- 2017 WL 5988868, at *3 (E.D. Texas Dec. 1, 2017) (patent venue statute is
16 a statute “that is to be narrowly construed as written.”). Its purpose is to subject a
17 defendant to a forum where its presence is permanent and not transitory. Symbology
18 Innovations, 2017 WL 4324841, at *8.

19 Here, the parties do not dispute the first clause of § 1400(b) that Spire does not
20 reside in this district. Instead, the parties dispute an element of the second clause as to
21 whether Spire has “a regular and established place of business” in this district.

22 Defendant argues that venue is improper because it has no “regular and established
23 place of business” in this district. Plaintiff opposes arguing that Spire’s relationship with
24 Amazon satisfies this factor.

25 In a recent case, the Federal Circuit provided factors courts should consider to
26 determine what constitutes a “regular and established place of business” under the patent
27 venue statute. In re Cray Inc., 871 F.3d 1355, 1359-60 (Fed. Cir. 2017). The three
28 factors are the following: “(1) there must be a physical place in the district; (2) it must be

1 a regular and established place of business; and (3) it must be the place of the defendant.”
2 Id. at 1360. “If any statutory requirement is not satisfied, venue is improper under §
3 1400(b).” Id.

4 The first factor requires a physical place in the district such as a “[a] building or a
5 part of a building set apart for any purpose” or “quarters of any kind” where the business
6 is conducted. Id. at 1362 (citations omitted). A virtual space or electronic
7 communication is not sufficient. Id. While a fixed physical presence such as an office or
8 store is not required, there must be a “physical, geographical location” from which the
9 defendant’s business is carried out. Id.

10 Defendant asserts that it does not maintain a physical place in this district nor does
11 it have any offices, business address, employees, leaseholds or other fixed physical
12 presence where its business is being conducted. (Dkt. No. 11-3, Mavraganis Decl. ¶ 3.)
13 Spire also does not lease or have any rights to any space in any of the Amazon FC. (Id. ¶
14 9.) Moreover, Amazon controls Spire’s storage fulfillment and shipping by dictating
15 where Spire’s products should be sent and once sent, Amazon has discretion to
16 redistribute Spire’s products to other Amazon FCs. (Id. ¶¶ 6, 8.) In response, Plaintiff
17 argues that the Amazon warehouses in this district where Spire contracts to store and
18 fulfill orders of its products are a physical, geographic location in the district from which
19 its business is carried out.

20 In Symbology, the district court held that the fact that the defendant derives
21 revenue from products sold in the district, holds promotional events, is registered as a
22 foreign corporation, has an appointed agent to accept service of process, and its
23 subsidiary has three stores selling the company’s products were not sufficient to
24 demonstrate a regular and established place of business. Symbology Innovations, 2017
25 WL 4324841 at *9-11. Courts have held that distributors and even subsidiaries, that are
26 independently owned and operated, that are located in the forum and work with the
27 accused infringer, is not sufficient to show that the accused infringer has a regular and
28 established business under § 1400(b). See Symbology Innovations, 2017 WL 4324841 at

1 *10-11 (subsidiary’s three locations in the district were not imputed to the parent
2 company as subsidiary was distinct corporate entity with separate finances, assets,
3 officers and records); JPW Indus., Inc. v. Olympia Tools Int’l, Inc., No. 16cv3153-JPM,
4 2017 WL 4512501, at *3 (M.D. Tenn. Oct. 10, 2017) (venue not proper where
5 defendant’s business relationships with distributors, retailers and consumers in the district
6 that further its commercial goals did not demonstrate that Defendant maintains a physical
7 presence in the district); CAO Lighting, Inc. v. Light Efficient Design and Electrical
8 Wholesale Supply Co., Inc., Case No. 16cv482-DCN, 2017 WL 4556717, at *3 (D.
9 Idaho Oct. 11, 2017) (defendant’s preferred partner distributors having a physical
10 presence in Idaho with regular and established business are locations of the distributors,
11 and not of the defendant).

12 In CAO Lighting, Inc., the district court concluded the defendant did not have a
13 regular and established place of business in Idaho even though its sales representatives
14 visited Idaho occasionally and the preferred partner distributors had physical locations in
15 Idaho. Id. at 3. The court explained that the distributors’ physical locations in Idaho
16 were that of the distributors and not of the defendant. Id. Furthermore, the defendant did
17 not own, rent, lease or occupy any property in the state, or employ anyone who owned,
18 leased, or occupied any real property in Idaho. Id.

19 In this case, Plaintiff does not present any evidence or legal authority to support its
20 argument that the Amazon FCs are the physical, geographical location of Spire. While
21 Amazon FCs are where Spire’s good are stored and orders are fulfilled, caselaw
22 demonstrates that Spire does not have a physical presence in this district. See Symbology
23 Innovations, 2017 WL 4324841 at *10-11; JPW Indus., Inc., 2017 WL 4512501, at *3.

24 Second, as to a “regular and established place of business”, “regular” means a
25 “‘steady[,] uniform[,] orderly [, and] and methodical’ manner” of operation, and not
26 sporadic activity. In re Cray Inc., 871 F.3d at 1362 (citation omitted). An “established”
27 business is one that is not transient but must be “‘settle[d] certainly, or fix[ed]
28 permanently.’” Id. at 1363. For example, a business that displays its products at a trade

1 show in the district semi-annually creates only a temporary presence while a five-year
2 continuous presence in the district establishes proper venue. Id.

3 Defendant contends that while Amazon may direct Spire to send its products to
4 Amazon FCs, from time to time, Amazon may, in its own discretion move Spire's
5 products to different Amazon FCs for storage and fulfillment. (Dkt. No. 11-3, Mavragani
6 Decl. ¶ 8.) Therefore, it contends that this district cannot be said to be Spire's regular and
7 established business as it does not have absolute control of the distribution of its
8 products. Plaintiff asserts that the fulfillment centers are "permanent" locations intended
9 to be accessed by Plaintiff to receive, store, maintain and fulfill the inventory of the
10 business for the purpose of advancing sales of its products and provide faster shipping in
11 locations far away from its headquarters. Spire pays a "storage fee" to Amazon for
12 storing its products there and are "regular" within the meaning of § 1400(b). It also
13 summarily asserts, without legal authority or evidentiary support, that Spire maintains an
14 agency relationship with Amazon for the benefit of accessing Amazon's FC services.

15 Again, Reflection presents arguments without any evidentiary or legal support. As
16 indicated above, a distributor or subsidiary of a parent corporation selling the infringer's
17 product does not demonstrate that a defendant has a regular and established business in
18 this district. See Symbology Innovations, 2017 WL 4324841 at *10-11; JPW Indus.,
19 Inc., 2017 WL 4512501, at *3. Moreover, as noted by other district courts, merely
20 selling products in California through a third party is not sufficient to satisfy the patent
21 venue statute. See Symbology Innovations, 2017 WL 4324841 at *10-11 ("Revenue
22 derived from the forum has no bearing on whether § 1400(b)'s requirements are met.");
23 JPW Indus., Inc., 2017 WL 4512501, at *3 (commercial sales of defendant's product in
24 the forum not sufficient to demonstrate venue under the patent venue statute); CAO
25 Lighting, 2017 WL 4556717, at *3 (revenue sales from the forum state have little
26 significance on the three In re Cray factors).

27 Lastly, the "regular and established place of business" must be the "place of the
28 defendant." In re Cray Inc., 871 F.3d at 1363. Courts may consider "whether the

1 defendant owns or leases the place, or exercises other attributes of possession or control
2 over the place.” Id.

3 Defendant argues that the Amazon FCs are not the place of Spire. It does not own
4 or lease the space from Amazon FC and there is no indication of possession or control
5 over the storage facility. Without evidentiary and legal support, Plaintiff contends that
6 Spire leases the place of business since it pays a storage fee to Amazon in exchange for
7 storing the product.

8 Plaintiff has not conducted a legal analysis demonstrating that a monthly
9 subscription fee equates to leasing space in the FCs. On the other hand, Defendant has
10 presented evidence that it has no control over which FCs its products will be sent, and
11 once stored at one Amazon FC, Amazon has discretion to redistribute Spire’s products to
12 another Amazon FC. Since Spire has no control over its products once they are sent to
13 Amazon FCs, these storage centers cannot be said to be the “place of Defendant.”

14 Accordingly, the Court concludes that Plaintiff has not demonstrated that
15 Defendant has a “regular and established place of business” in this district” and thus,
16 venue is not proper in this district. See In re Cray, 871 F.3d at 1359-60.

17 **B. Dismissal Versus Transfer**

18 In its motion, Defendant seeks dismissal of the action under 28 U.S.C. § 1406(a).
19 Plaintiff opposes the dismissal but does not request a transfer of the case.

20 Under 28 U.S.C. § 1406(a), “[t]he district court of a district in which is filed a case
21 laying venue in the wrong division or district shall dismiss, or if it be in the interest of
22 justice, transfer such case to any district or division in which it could have been brought.”
23 “Whether the interest of justice militates in favor of transfer rather than dismissal is a
24 judgment committed to the sound discretion of the district court.” Citizens for a Better
25 Environment-California v. Union Oil Co. of California, 861 F. Supp. 889, 898 (N.D. Cal.
26 1994). “Normally transfer will be in the interest of justice because normally dismissal of
27 an action that could have been brought elsewhere is time-consuming and justice-
28 defeating.” Miller v. Hambrick, 905 F.2d 259, 262 (9th Cir. 1990).

1 However, in this case, Plaintiff, in its opposition, does not request a transfer¹ and
2 Defendant only moves for dismissal. Neither party has briefed where venue would be
3 proper under current venue law. Defendant is a Pennsylvania limited liability company
4 and while a domestic corporation resides only in the state of incorporation under the
5 patent venue statute, it is not clear which district court in Pennsylvania is proper. TC
6 Heartland, 137 S. Ct. at 1517 (domestic corporation resides only in its state of
7 incorporation). Since the case was recently filed, it does not appear that Plaintiff would
8 be unfairly prejudiced by a dismissal. Accordingly, the Court exercises its discretion and
9 dismisses the complaint and Plaintiff may file its complaint in the proper district court in
10 Pennsylvania.

11 **Conclusion**

12 Based on the above, the Court GRANTS Defendant’s motion to dismiss the
13 complaint for improper venue. The hearing set for January 19, 2018 shall be **vacated**.

14 IT IS SO ORDERED.

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¹ The Court notes that Plaintiff also does not seek any discovery on the venue issue.