UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

CAROLINE MAZZONE, Plaintiff, -vs- GRANT WILFLEY CASTING, et al. Defendants.	CIVIL ACTION NO. 05-CV-2267 (WHW)

REPLY MEMORANDUM OF LAW IN SUPPORT OF DEFENDANTS MASSEY, SABEL & RYMAN'S MOTION FOR SUMMARY JUDGMENT

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PRELIMINARY STATEMENT AND REPLY STATEMENT OF FACTS

In opposition to the motion by the Associate Defendants, Reba Massey, Jennifer Sabel and Ross Ryman, plaintiff Caroline Mazzone takes two tacks. Realizing that there is no substantive factual premise whatsoever for the assertion of jurisdiction over the Associated Defendants, plaintiff makes the specious argument that the Associate Defendants waived their rights to object to personal jurisdiction based on their "participation" in the litigation "since April 2005," and that if the Court will only accept **invented** facts, then there is jurisdiction after all.

The irony of plaintiff's waiver claim is evident to anyone familiar with the record, because the only reason this litigation has taken over two years to get to this point is plaintiff's inaction, requests for extensions of time – granted over the objection of the Associate Defendants – and procedural dithering. What is also notable is that (1) plaintiff fails to identify a single prior opportunity, as the cases discussed below consistently highlight, for the jurisdiction objection to be decided by motion, and (2) any personal jurisdiction motion brought prior to the close of discovery would have inevitably have been greeted with the objection by plaintiff that "discovery will prove the jurisdictional facts" – which, quite clearly, it has not.

The procedural "truth" must first be addressed here. First, it must be noted that plaintiff's use of the date "April 2005" is very misleading. That is indeed the month (the actual date was April 28, 2005) during which the Complaint was filed. This hardly constitutes participation of the Associate Defendants. Indeed, it was nearly a month later, on May 25, 2005, that the Amended Complaint was first filed, and in fact the current, operative answer[1] including the necessary jurisdictional defense was not filed by the Associate Defendants until – after plaintiff moved in October for leave to amend or correct its own complaint – December 28, 2005. Thus it

[1] An answer to the first Amended Complaint was filed by the Associate Defendants on August 15, 2005.

was exactly eight months after the day plaintiff claims, quite disingenuously, that the Associate Defendants first "litigated" this case. Not only this, but the initial conference in the case did not take place until nearly a month later, on January 23, 2006. Until this point, then – **nine months** after the April 2005 date claimed by plaintiff – it is fair to say the Associate Defendants did no "litigating" besides avoiding default and pleading their affirmative defenses.

In the spring of 2006, the Associate Defendants did, indeed, participate in discovery by serving basic "paper discovery demands" on plaintiff and participating in her deposition. It would hardly have made any sense to do otherwise, because there was no way to know, from the record, what the factual basis was for plaintiff's personal jurisdiction claim. And it was at her deposition that plaintiff admitted, as set out in the Associate Defendants' moving brief, that she had no actual knowledge whatsoever of any availment by any of the Associate Defendants of this State. In May the discovery deadline was extended until September 30, 2006, and, again in October, over the strenuous objection of the Associate Defendants expressed in a letter which also adverted to the forum issue (see Exhibit A hereto). Notwithstanding this objection, the deadline was extended, on **plaintiff**'s application, to December 1, 2006; and again to March 15, 2007.

The best plaintiff can do in response to a record of its own lassitude is cite to the undisputed, and fairly unremarkable, fact that the Associate Defendants hired an attorney from New Jersey who made an appearance on their behalf and that that attorney complied with the Federal Rules of Civil Procedure and the orders of this Court. At no juncture prior to the close of discovery was a dismissal based on defendants' personal jurisdiction defense obviously appropriate, and indeed in the absence of the close of discovery plaintiff would inevitably have

been heard to insist that the connection between any actions or legally cognizable omissions by the Associate Defendants would only be revealed during these defendants' own depositions.

Yet plaintiff did not see fit to depose the Associate Defendants all through 2006, thus guaranteeing that that discovery could not be taken and the issue resolved. Finally, on the last day of February, **2007 – 22 months** after **plaintiff** first initiated this action – plaintiff took the last of the Associated Defendant's depositions. And, as the bare record set forth in her opposition brief demonstrates, plaintiff evinced not a single word of testimony from any of the three of them to support the claim that any of them availed themselves of this forum such that the assertion of jurisdiction would be proper under traditional notions of fair play and substantial justice. Months of motion practice and quasi-discovery, utterly unrelated to the Associate Defendants, followed, until the Associate Defendants' motion to dismiss was brought in, not in December, but in August of this year.

Thus plaintiffs' two responses to the Associate Defendants' jurisdictional basis for its motion to dismiss[2] are effectively rebutted: Any delay or prejudice arising from the Associate Defendants' "participation" in this litigation is solely a result of plaintiff's own desultory prosecution of its own case. And, when all was said and done and plaintiff bothered to get the testimony of the Associate Defendants, she could not by virtue of that testimony, or of her own, link a single action of theirs to this State. This Court should send a message to forum-shoppers such as plaintiff and rule that, notwithstanding their blamelessness for the actions of which they are accused, the Associate Defendants here should never have been hauled into this honorable Court in the first place.

[2] The Associate Defendants, as set out in the their moving brief, join in the substantive grounds for dismissal set forth in the submissions by the Grant Wilfley defendants as well.

LEGAL ARGUMENT

I. THE ASSOCIATE DEFENDANTS DID NOT WAIVE THEIR OBJECTIONS TO PERSONAL JURISDICTION.

As set forth extensively above, the argument that the Associate Defendants waived their constitutional due process rights as to personal jurisdiction because they participated in this litigation depends entirely on a highly strained interpretation of the word "participated." Not surprisingly, plaintiff relies for all practical purposes on one case to make this argument, *Wyrough & Loser, Inc. v. Palmor Labs*, 376 F.2d 543 (3rd Cir. 1967), a case decided well before any of the Associate Defendants were born and called into question since and quite inapposite as to the facts here.

Plaintiff cites the general rule of *Loser* but not facts of the case. In *Loser*, there was, unlike here, considerable motion practice on the merits prior to the raising of the jurisdictional ground for dismissal:

> The complaint, containing a request for an injunction pendente lite, was filed on February 14, 1966, and a summons was issued on February 17th and received on February 18th, requiring an answer within thirty-five days. No answer or motions were filed prior to or during the hearings on the motion for a preliminary injunction which were held on February 25th and 28th and March 1st and 2nd. At the conclusion of the hearing on March 2nd, the district court orally stated its findings of fact and conclusions of law and announced its intention to enter a preliminary injunction It was not until March 18th that defendant first raised the question of personal jurisdiction. In its formal findings, the district court considered this argument and held that:
>
> '* * * any alleged defect in regard to * * * service (upon the defendant) and to jurisdiction of the person was waived by defendant by its action in participating in day-to-day hearings on the issue of the preliminary injunction wherein defendant cross-examined plaintiff's witnesses and called to the stand witnesses in its own behalf.'

376 F.2d at 545-546. Here, of course, there has been no preliminary or other judicial engagement with the merits of this case, until now. And, unlike the defendant in *Loser*, here the

Associated Defendants preserved their jurisdictional defense in their Answer, which plaintiff never disputes. This distinction has been considered dispositive when considering the application of *Loser*. Thus:

> First, as defendants point out, there are general questions about the soundness of the rule *Loser* enunciates. More importantly, however, is that the case is factually distinguishable: Defendants here both sought to preserve their objection in the first pleading and then raised the issue in their first substantive responsive pleading before the hearing was held. These facts remove the case from the *Loser* holding.
>
> For its part, plaintiff points to a series of opinions holding that a defendant has not waived its objections by participation in a pretrial motion hearing. While each of these cases is factually distinguishable from the instant case, the Court believes the general rule they reflect is a sound one. Thus, the Court holds that defendants here did not waive their personal jurisdiction and venue objections because they preserved them in their first pleading (opposing the preliminary injunction) and asserted them in their first substantive responsive pleading (this motion), filed prior to the preliminary injunction hearing.

Drayton Enterprises, L.L.C. v. Dunker, 142 F.Supp.2d 1177, 1181-82 (D.N.D. 2001) (internal citations omitted).

Indeed, plaintiff implicitly admits, by its quotation from *Loser*, that the case is inapposite, for as the quote says, "preliminary matters such as . . . personal jurisdiction . . . should be raised and disposed of **before the court considers** the merits or quasi-merits of a controversy." *Loser*, 376 F.2nd at 547; Plaintiff's Opp. Brief at 2 (emphasis added). But of course, this Court has not considered the merits or quasi-merits of this controversy and, if it rules as urged by the Associate Defendants, it will not. *See*, *Tracinda Corp. v. Daimlerchrysler AG*, 197 F.Supp.2d 86 (D.Del. 2002) (distinguishing *Loser* where "the Court did not touch on the merits or quasi-merits of the case before addressing the personal jurisdiction issue").

Plaintiff also suggests, without citing any authority to the effect, that participation in discovery constitutes a waiver. As set forth above, any such "participation" by the Associate

Defendants was of the most marginal and, in fact, reluctant sort. But in any case, courts in this Circuit have rejected this proposition:

> The plaintiff argues that the defendants consented to personal jurisdiction by litigating on the merits: they participated in discovery and demanded replies within 30 days. Defendants can waive lack of personal jurisdiction by engaging in litigation, but the cases plaintiff cites for this proposition involve much more aggressive and long-term litigation than is present here.
>
> In *Continental Bank v. Meyer*, 10 F.3d 1293 (7th Cir.1993), defendants had waived lack of personal jurisdiction by participating in litigation for over two-and-a-half years without contesting personal jurisdiction. Defendants here only instituted discovery to meet the court's discovery deadline if the action is not dismissed. In *In re Texas Eastern Transmission Corp.*, 15 F.3d 1230 (3rd Cir.1994), counterclaim defendants consented to personal jurisdiction by failing to move to dismiss before litigating motions for summary judgment on other grounds. Here the defendants contested personal jurisdiction in their responsive pleading and have not filed any motion or demonstrated other intent to submit to the jurisdiction of this court beyond the minimal action of requesting discovery. Plaintiff's argument is unpersuasive.

Paul Yanuzzi Builders, LLC, 2003 WL 925368 (E.D.Pa. 2003) at *2. Here, while there have been years of litigation, most of the time has passed with nothing happening, and most of that is due to the plaintiff's delays. More importantly, here, as in *Paul Yanuzzi Builders*, "the defendants contested personal jurisdiction in their responsive pleading and have not filed any motion or demonstrated other intent to submit to the jurisdiction of this court beyond the minimal action of requesting discovery," and here, too, plaintiff's argument is unpersuasive. *See also, Malaysia Intern. Shipping Corp. Berhad v. Sinochem Intern. Co. Ltd.*, 2004 WL 503541 (E.D.Pa.), *vacated on other grounds*, 436 F.3d 349 383 (3rd Cir. 2006) at *7 ("to find Defendant's prior discovery application and this Court's order relevant to a determination of personal jurisdiction in this case would be inconsistent with other findings in this Circuit").

II. THE RECORD IS BARE OF ANY EVIDENCE OF A PURPOSEFUL COURSE OF CONTACT WITH PLAINTIFF IN THE STATE OF NEW JERSEY BY THE ASSOCIATE DEFENDANTS.

Plaintiff's second point in opposition to this motion is that, contrary to all the evidence in the record, defendants "engaged in a purposeful course of contact with Ms. Mazzone here in the State of New Jersey." Plaintiff then, at page 4 of her opposition brief, sets forth a truly pathetic list of alleged actions by the Associate Defendants that supposedly constitute that "course of contact" – **not one of which is supported by a citation to the record**.

It hardly matters. Assuming, *arguendo*, that these actions were properly before the Court for its consideration, they could hardly satisfy the test necessary to establish minimum contacts – a requirement of federal constitutional dimensions. Considered *seriatim*, these alleged actions are as follows:

- "They called Ms. Mazzone over the telephone on many occasions to engage her services as a background actor."
    - **Response**: Plaintiff does not say which of the Associated Defendants made these telephone calls; when they were made; how many were made; where plaintiff was located when she received them (it is virtually impossible in our era to know where a phone will ring, regardless of the area code). Furthermore, this Court ruled only weeks ago that, as courts have recognized for decades, telephone calls that are incidental to a business relationship do not constitute minimum contacts. *Deflora Lake Development Associates, Inc. v. Hyde Park Ltd. Partnership*, 2007 WL 3125233 (D.N.J. 2007) at *3.
- "They solicited gifts from her in exchange for the services that they provided to her, in violation of New Jersey law."

- **Response**: Besides the fact that these claims are controverted and not supported by the evidence, they have nothing to do with the State of New Jersey. True, such acts would be a "violation of New Jersey law" **if**, in fact, New Jersey law applied to them, which is very much in question if this State has no jurisdiction over the Associate Defendants. It appears that plaintiff is arguing that because New Jersey law forbids the alleged actions, this in itself amounts to a ground for finding minimum contacts in New Jersey – a concept that turns the entire discussion of minimum contacts (and choice of law) on its head.

- "They kept in the Grant Wilfley files [in New York] a resume and head shot of Ms. Mazzone that she sent from her home in New Jersey."
  - This assertion presents the novel concept that a plaintiff can establish a defendant's minimum contacts in that plaintiff's home state by delivering something to the defendant at its own domicile: if the defendant keeps the material, a magical jurisdictional bond is formed between where the material was sent and where it is filed. Obviously plaintiff cites no authority to support this innovative suggestion because it is laughable, and it makes a mockery of the concept of long-arm jurisdiction.
- "They called her on the phone at her New Jersey number."
  - **Response**: At this point plaintiff is repeating herself; this was the first specious "minimum contacts" premise proposed, above.
- "They sent her to sound stage locations in North Bergen, New Jersey for the work they solicited her to do."

- **Response**: There is no support in the record for this assertion, nor even any proposed connection between any specific action of any specific one of the Associate Defendants and any particular assignment to a sound stage in New Jersey. Nor does plaintiff bring legal support for the assertion that, if there were such a link, the location of a place of employment and operated by a third party (i.e., the production company) would justify the assertion of personal jurisdiction over a third person who secured that employment for the plaintiff from another jurisdiction.

- "Ms. Mazzone testified that the Defendants employed numerous other New Jersey residents, as background performers, as well, just multiplying the contacts the purposely made in New Jersey."
  - **Response**: The referenced "testimony" is not before the Court, though if it exists it is not clear how the fact that the Associate Defendants (who do not "employ" anyone) may have interacted with other persons in New Jersey would help **this** plaintiff. This is not a class action and, as plaintiff admits, she claims specific, not general, jurisdiction here (Plaintiff's Opp. Brief at 4.)
- "They knew or should have known that, by reaching out to Ms. Mazzone and employing her to work for Grant Wilfley's principals in New Jersey and elsewhere, their actions would have a substantial economic affect [*sic*] in New Jersey."
  - **Response**: This claim wraps up all the prior factually unsupported and legally insufficient assertions in the rest of the pargraph and characterizes them in a conclusory fashion. It also is premised on the unproved assertion of an principal-agent relationship between Grant Wilfley Casting and its production

company clients, and elides the distinction between Grant Wilfley Casting and the Associate Defendants as individuals. The only thing it adds is the allegation that some sort of "substantial economic effect" in New Jersey has been caused by the Associate Defendants, but that effect is not identified, quantified or in any way linked to the Associate Defendants and this State.

In short, plaintiff has fallen far short in her attempt to show that the Associate Defendants engaged in a purposeful course of contact with plaintiff in the State of New Jersey.

III. IT WOULD OFFEND TRADITIONAL NOTIONS OF FAIR PLAY AND SUBSTANTIAL JUSTICE TO REQUIRE THE ASSOCIATE DEFENDANTS TO DEFEND THEMSELVES AGAINST PLAINTIFF'S CLAIMS IN A JURISDICITON TO WHICH THEY HAVE NO CONNECTION.

Plaintiff claims that it would not offend traditional notions of fair play and substantial justice to require the Associate Defendants to defend themselves in New Jersey. We again consider her purported rationales in turn and suggest that the Court will find them wanting:

First, plaintiff claims that the burden on the Associate Defendants is "slight" because "many thousands of people make the commute between Manhattan and New Jersey twice every week day" and makes similar generalities about the metropolitan area. Plaintiff's Opp. Brief at 5. In short, plaintiff is arguing that in **every case** involving the assertion of jurisdiction by this Court over a New York City citizen, there is never a substantial burden. We urge the Court to reject this reasoning and to focus on the fact that the Associate Defendants, as the record indicates, have nothing to do with this State.

Second, plaintiff writes that "it is axiomatic that the courts of New Jersey have an interest in adjudicating a matter concerning the alleged injury of a New Jersey resident." *Id*. at 6. Accepting this analysis, again, would render any claim by a New Jersey resident as meeting the

second prong of the "traditional notions" analysis, when what is required is an analysis of why this **particular** claim is one that the New Jersey courts should adjudicate. And, in fact, it is not: Based on the record, absolutely every act complained of took place outside this jurisdiction; plaintiff herself testified extensively about her own travels into the City of New York and her supposed "adventures" there involving the defendants; every defendant is located outside this jurisdiction; and by all indications the economic activity – casting television shows – affects the economies of states other than New Jersey far more than it affects New Jersey. It is hard to credit the assertion that the courts of this State are, in fact, interested in "hosting" litigation that has so very little to do with its economy, its citizens or any articulated interest.

Plaintiff skips the third factor, "the plaintiff's interest in obtaining convenient and effective relief," but it may be fairly concluded that this prong does in fact favor the plaintiff – and is the sole reason she brought suit here.

Fourth, plaintiff complains about the inconvenience to her in having to re-file these claims against the Associated Defendants in the appropriate jurisdiction. In fact, she should have thought of this at the outset. As set forth extensively in the first section of this brief, any prejudice or delay resulting from plaintiff's forum-shopping and litigation choices are her own fault.

Plaintiff "acknowledges" that the fifth factor, "the shared interest of the several states in furthering fundamental social policies," does not apply here. This "catchall" prong may, however, be of some use to the Court – for both New York and New Jersey have a policy, as all the states do, of discouraging forum shopping. And forum shopping is the only possible explanation for plaintiff's filing of this New York case in the State of New Jersey.

CONCLUSION

For the foregoing reasons, the Associate Defendants request that the Court dismiss the claims of the plaintiff.

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Dated: December 3, 2007

EXHIBIT A

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BY FACSIMILE

RESPOND TO NEW YORK

Hon. Madeline Cox Arleo, U.S.M.J.
United States District Court
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Martin Luther King, Jr. U.S. Courthouse
50 Walnut Street – Room 2060
Newark, NJ 07102

Re: ***Mazzone v. Grant Wilfley Casting***
Civil Action No. 05-2267 (SDW-MCA)

Dear Judge Arleo:

This office represents the individual defendants Reba Massey, Jennifer Sabel and Ross Ryman in this action. We write in response to the letter from plaintiff's counsel, Mr. Salisbury, of today, requesting yet another extension of time for discovery. We write to firmly object to the suggestion that this case be prolonged again.

Initially, we must object to the statement by plaintiff that her request is made "[i]n accordance with a tacit agreement among counsel who participated in Plaintiff's deposition [that] the parties were going to finish taking her testimony before Plaintiff began taking her own depositions." This formulation, to give plaintiff every benefit of the doubt, places more than a slightly excess amount of weight on the word "tacit." We say this because, frankly, there was **no** agreement; **no** understanding; **no** arrangement; **no** *quid pro quo* – not with this office, not with our clients.

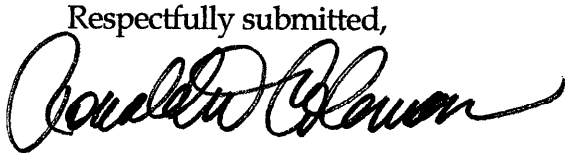
It is entirely possible that plaintiff's counsel discussed this topic with any number of the multiplicity of parties his client has sued here, and that he assumed those with whom he spoke held proxies for the rest of us. This assumption is not justified. Our clients did not agree to such an arrangement, and there is no reason they would have.

Unlike the corporate defendants in this case, equipped with legal budgets, in-house counsel and the representation of some of the top law firms in the country, the financial and emotional burden for Mr. Ryman, Ms. Massey and Ms. Sabel of being defendants in a federal lawsuit in a distant state is terrific. They are simply three young people, in their 20's, two of whom make a meager living as actors and one of whom works for the defendant Grant Wilfley casting agency. They cannot afford to litigate; they cannot afford to lose; they cannot afford to win.

Plaintiff writes that the denial of her request would be "grossly unfair" and would "prejudice" her case. The source of her moral offense is hard to fathom. Any prejudice here is the result of plaintiff's own lassitude. This case was filed in July of **2005**. Plaintiff has had well over a year to notice our clients' depositions or to ask us explicitly, in writing or orally, if some special arrangement were possible. Alternatively the deadline for discovery has been changed once already; at that time, if plaintiff desired to ask the Court for the slow-motion "half track" discovery schedule she suggests, the opportunity to debate the merits of such an illogical and wasteful process was the previous scheduling conference. There and then plaintiff could have raised the issue, shown cause for proceeding so inefficiently, and if the Court, over our objection, had agreed to it, it could have been incorporated into a scheduling order which itself would have been subject to timely appeal. This did not happen.

In sum, we urge the Court that (1) there was no agreement, tacit or otherwise, to delay discovery involving defendants Sabel, Massey and Ryman; (2) there is no rationale in plaintiff's letter that could constitute cause for a one-side-at-a-time discovery process in a simple case where discovery has already stretched over 15 months; and (3) plaintiff's time to make this request has long elapsed and the effect of any prejudice has long passed over to defendants' side. For these reasons we could not stipulate to a further prolongation of this litigation. We urge the Court not to reward plaintiff for her own dilatory approach to prosecution of her claims and in the alternative, to the extent further delay is authorized, not to reopen discovery as to defendants Sabel, Massey and Ryman.

Respectfully submitted,



Ronald D. Coleman

cc: All Counsel (email)