UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

MBL-AKUSTIKGERÄTE GMBH & CO., KG and MBL NORTH AMERICA, INC. Plaintiffs, -against- MBL OF AMERICA, INC., PETER F. ALEXANDER and DAVID ALEXANDER, Defendants.	Civil Action No.: 12-civ-3508 (ALC) (MHD)

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS FOR LACK OF PERSONAL JURISDICTION OR, IN THE ALTERNATIVE, FOR IMPROPER VENUE

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INTRODUCTION

This case involves an attempt by a German manufacturer and its recently formed Delaware subsidiary to invoke the jurisdiction of the New York District Court over non-resident defendants that have no ties to New York and have done nothing to purposely avail themselves of the protection of New York laws.

Plaintiff MBL-AKUSTIKGERÄTE GMBH & CO., KG ("MBL") and defendant MBL OF AMERICA, INC. ("MBL OF AMERICA") are currently engaged in litigation in Germany over their respective rights and duties under a distribution agreement which gave defendant the exclusive rights to sell MBL's audio products in the United States. That litigation involves allegations that MBL improperly terminated the distribution agreement, that MBL is obligated to continue to sell its products to defendants, and that defendants unequivocally have the right to use the "MBL" trademark and logo pursuant to the terms of the distribution agreement. In attempting to bring their trademark infringement claims in this Court, plaintiffs have improperly sought an end run around the jurisdiction of the German court, as the distribution agreement expressly calls out that disputes arising out of the agreement are to be determined under German law and that the proper jurisdiction for such disputes is the German court in Berlin.[1]

Not only is subject matter jurisdiction absent here, but plaintiffs simply have no basis to assert personal jurisdiction over defendants under either federal law or New York's long-arm statutes. The Lanham Act does not provide for nationwide service of process, and therefore this

[1] Given the terms of the distribution agreement and the Berlin court's current exercise of jurisdiction over the disputes raised by plaintiffs' Complaint, subject matter jurisdiction is plainly lacking and defendants will file a Motion to Dismiss for Lack of Subject Matter Jursidiction should that prove necessary after resolution of the instant motion.

Court must look to New York's jurisdictional statutes to determine personal jurisdiction.[2] However, plantiffs' rote assertions that defendants have "transacted business within the state" or committed "tortious acts without the state causing injury to plaintiffs within the state" are not supported by any facual allegations in the Complaint. Absolutely no basis in fact or law is alleged that would justify the exercise of personal jurisdiction over these defendants.

Defendants thus move pursuant to Fed. R. Civ. P. 12(b)(2) for dismissal of the complaint against them for lack of personal jurisdiction or, in the alternative, for dismissal pursuant to Fed. R. Civ. P. 12(b)(3) for improper venue.

THE PARTIES

The parties to this controversy are as follows:

(1) Plaintiff MBL-AKUSTIKGERÄTE GMBH & CO., KG ("MBL"), a German manufacturer of high-end audio equipment that has no business address in the United States (Complaint, ¶1)

(2) MBL's recently formed subsidiary, plaintiff MBL NORTH AMERICA, INC. ("MBL NORTH"), a Delaware corporation that lists an apartment at 263 West End Avenue, No. 2F, New York, New York 10023, as its business address in New York (Complaint, ¶2);

[2] *Sunward Electronics, Inc. v. McDonald*, 362 F.3d 17, 22 (2d Cir. N.Y. 2004)("Because the Lanham Act does not provide for national service of process, the New York state long-arm statute governs this inquiry. *See generally*, 15 U.S.C. § 1051, et seq.; FED. R. CIV. P. 4(k)(1)(A)")

(3) Defendant MBL OF AMERICA, INC. ("MBL OF AMERICA"), an Arizona corporation and long-time distributor of MBL products, with offices in Scottsdale, Arizona (Complaint, ¶3);

(4) MBL OF AMERICA's President, defendant Peter Alexander, an Arizona resident since 1978 (Complaint, ¶4; Decl. P. Alexander ISO Mot. Dismiss, ¶2); and

(5) MBL OF AMERICA's Vice-President, defendant David Alexander, a California resident since 2002 (Complaint, ¶5; Decl. D. Alexander ISO Mot. Dismiss, ¶2).

STATEMENT OF FACTS

MBL is a German company which manufactures high-end audio equipment for sale to wealthy audiophiles through a number of distributors worldwide. On January 1, 2006, MBL and defendant MBL OF AMERICA entered into a distribution agreement ("Agreement") which provided that MBL OF AMERICA would be the exclusive distributor of MBL products in the United States. (*See* Agreement, attached as Exhibit C to Plaintiffs' Order to Show Cause for Preliminary Injunction).

In 2009, MBL terminated the Agreement, which resulted in a series of lawsuits between MBL OF AMERICA and MBL in Berlin, Germany. (*See* Decl. P. Alexander ISO Mot. Dismiss, ¶23).[3] The lawsuits are ongoing, and concern MBL OF AMERICA's claims, among other things, that it has the right to continue to use the trademarks plaintiffs claim are being infringed upon. Consistent with that position, defendants have exercised their rights to continue to sell their inventory of MBL equipment while marketing that equipment through display of the MBL

[3]The background details of the parties' relationship provide relevant context for the Court, and are authenticated by the Declaration of Peter Alexander ISO Opposition to Order to Show Cause for Preliminary Injunction. *See Id*, ¶6.

logo on their website and truthfully representing to customers that they are selling authentic MBL products.[4]

What is important to note for purposes of this motion, however, is that defendants have not engaged in such sales in New York, nor have they had any relevant contact with New York that could serve as a basis to haul them into this Court. The uncontroverted evidence is that MBL OF AMERICA has never maintained any sort of presence in the State of New York. It has not rented, owned or maintained real estate in New York; it has not opened accounts at any New York banks; it has not registered to do business in New York; it has never had showrooms in New York; it has never employed employees in New York; it has not advertised or marketed in New York; it has not taken any steps to engage in commerce with citizens of the State of New York; and it has not made specific efforts to direct its goods to the State of New York. (*See* Decl. P. Alexander ISO Mot. Dismiss, ¶6; *see also* Decl. D. Alexander ISO Mot. Dismiss, ¶6).

Moreover, the individual defendants here have had absolutely no contact with this forum. Peter Alexander has been a resident of Arizona since 1978, and his son David Alexander has been a resident of California since 2002. Neither of the individual defendants has ever been a resident of New York, nor owned, rented or maintained a home of any sort in New York; they are not registered to vote in New York, or licensed to drive motor vehicles by the State of New York; they were not raised in New York, did not attend school in New York, do not have any close family in New York, and do not regularly visit New York for any purpose – in short, they

[4] *Id*, ¶11.

have virtually no contact with New York. (Decl. P. Alexander ISO Mot. Dismiss, ¶¶9-20; Decl. D. Alexander ISO Mot. Dismiss, ¶¶9-20).[5]

LEGAL ARGUMENT

I. PLAINTIFFS' FACTUAL ALLEGATIONS FAIL TO SHOW THE EXISTENCE OF PERSONAL JURISDICTION

Plaintiffs bear the burden of demonstrating the existence of jurisdiction over the defendants. *Metropolitan Life Insurance Co. v. Robertson-Ceco Corp.*, 84 F. 3d. 560 (2d Cir. 1996). Once challenged on the issue, plaintiffs bear the burden of proving by a preponderance of the evidence the facts necessary to establish personal jurisdiction. *Landoil Res. Corp. v. Alexander & Alexander Servs., Inc.*, 918 F.2d 1039, 1043 (2d Cir. 1990). Plaintiffs must in good faith plead allegations of jurisdiction sufficient to defeat a motion to dismiss for lack of personal jurisdiction. *Guo Jin v. EBI Inc.*, 2008 WL 896192 (E.D.N.Y. 2008). Such allegations must constitute more than mere legal conclusions cast as statements of "fact." *Jazini v. Nissan Motor Co.*, 148 F. 2d 181 (2d Cir. 1998). To make a prima facie showing of personal jurisdiction, a plaintiff is required to make specific "averments of fact that, if credited by the ultimate trier of fact, would suffice to establish jurisdiction." *Krepps v. Reiner*, 588 F.Supp.2d 471, 478-9

[5] In addition, defendants' declarations reveal that they are not registered or otherwise licensed to do business in the State of New York; they have not sold or contracted to sell any goods or services in the State of New York on a regular and ongoing basis, and do not transact any business in New York; they do not maintain any offices, places of business, post office boxes, or telephone listings in New York; have no real estate, bank accounts or other interest in property in New York; they have not incurred any obligation to pay, and have not paid, any taxes in New York; they have no agents, employees, distributors, dealers or other sales representatives, or warehouses in New York; they have not conducted any regular and ongoing advertising, solicitation, marketing, or other sales promotion activities in New York. (Decl. P. Alexander ISO Mot. Dismiss, ¶¶9-20; Decl. D. Alexander ISO Mot. Dismiss, ¶¶9-20).

(S.D.N.Y. 2008). Thus, conclusory allegations of jurisdiction are insufficient to establish that the Court has personal jurisdiction over defendants. *Wickers Sportswear, Inc. v. Gentry Mills, Inc*., 411 F. Supp. 2d. 202 (E.D.N.Y. 2006).

Before even weighing the plaintiffs' allegations against the relevant legal standards for determining jurisdiction, it must be noted that the Complaint makes no real effort to justify the assertion of personal jurisdiction over these defendants. While the Complaint acknowledges that all defendants are foreign residents and domiciliaries (Complaint, ¶¶ 3-5), in the section entitled "Jurisdiction and Venue," plaintiffs make no mention of any facts upon which personal jurisdiction could be based, but simply recite that defendants' conduct includes such things as (a) the "transaction of business within the state," (b) the "commission of tortious acts outside the state causing injury to plaintiffs within the state," and (c) that defendants "derive substantial revenue from interstate commerce." The only other allegation found elsewhere, upon which plaintiffs presumably intend to hang their jurisdictional hat, is that defendants maintain a website that displays the MBL trademark and logo for all the world to see. (Complaint, ¶¶18, 19).

These allegations of fact are insufficient as a matter of law to establish a prima facie case for personal jurisdiction. The fact that New Yorkers can view the website and therefore potentially transact business is not sufficient to confer jurisdiction here, as "the Second Circuit has made clear that personal jurisdiction over a defendant is not appropriate simply because the defendant maintains a website which residents of New York may visit." *Hsin Ten Enter. United States v. Clark Enters.*, 138 F. Supp. 2d 449, 456 (S.D.N.Y. 2000). Plaintiffs have alleged no sales in this forum, nor any activity directed specifically to this forum, but merely point in dumb horror to a website that is viewable by anyone with an internet connection. The Complaint's utter

lack of jurisdictional facts dooms plaintiffs' efforts to haul defendants into this Court, thousands of miles away from their homes and business.

II. PLAINTIFFS HAVE NOT MET THE HEIGHTENED JURISDICTIONAL STANDARDS IMPOSED BY RECENT SUPREME COURT PRECEDENT

Plaintiffs have filed their Complaint without any regard for the jurisdictional analysis enunciated in the two recent landmark decisions from the Supreme Court – *J. McIntyre Machinery, Ltd. v. Nicastro*, 131 S.Ct. 2780 (2011) and *Goodyear Dunlop Tires Operations, S.A. v. Brown*, 131 S.Ct. 2846 (2011). The opinions in *Nicastro* and *Brown* reaffirmed some traditional points of Supreme Court precedent pertaining to personal jurisdiction while further providing new insight on the limits and scope of the stream of commerce theory.

First, these recent decisions confirmed that distinct requirements and inquiries exist for specific and general jurisdiction. Specific or "case-linked" jurisdiction is limited to cases where the cause of action arises out of the nonresident's purposeful contacts with the forum state.[6] If the litigation is unrelated to the activities the nonresident has directed at the forum state, specific jurisdiction is unavailable and general jurisdiction is the only constitutional basis for the court's power. General or "all purpose" jurisdiction empowers a court to adjudicate claims regardless of their connection to the forum if, and only if, the nonresident's in-state corporate operations are so continuous, systematic and pervasive that it can fairly be regarded as "at home" in the forum.[7]

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[6] *See Nicastro*, at 2788 ("In other words, submission [to judicial power] through contact with and activity directed at a sovereign may justify specific jurisdiction 'in a suit arising out of or related to the defendant's contacts with the forum.'") (internal citations omitted); Brown, at 2853 ("Adjudicatory authority is 'specific' when the suit 'arises out of or relates to the defendant's contacts with the forum.'")(internal citations omitted).

[7] *See Brown*, at 2851 ("A court may assert general jurisdiction over foreign (sister-state or foreign-country) corporations to hear any and all claims against them when their affiliations with the State are so 'continuous and systematic' as to render them essentially at home in the forum

As demonstrated in *Brown*, any confusion or blending of these discrete concepts may result in an unconstitutional exercise of personal jurisdiction.

The opinion in *Brown* also reestablished the "high threshold" showing required for general jurisdiction over a nonresident corporation. The Supreme Court negated any validity to the stream of commerce theory in the context of general jurisdiction, holding that the sporadic and indirect flow of products into a forum falls short of the "continuous and systematic" contacts required for general jurisdiction. Indeed, the unanimous *Brown* court held that even regular sales to, or purchases from, the forum are not enough. Based upon this precedent, the exercise of general jurisdiction requires a showing that the forum state essentially constitutes the home or domicile of the nonresident entity.

Nicastro reaffirmed that specific jurisdiction cannot exist without the support of purposeful availment by the nonresident corporation. Although the Supreme Court could not agree on precisely what constitutes purposeful availment in products liability cases, six of the nine justices agreed that a nonresident manufacturer must have targeted the forum state in some manner in order for specific jurisdiction to exist.[8] In other words, it is not enough that the

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State.")(internal citations omitted).

[8]The justices' disagreement on this issue reflects the conflicting opinions in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102 (1987), in which the Supreme Court first introduced the stream of commerce theory. Justice O'Connor (joined by three justices) wrote in *Asahi* that "a defendant's awareness that the stream of commerce may or will sweep the product into the forum State does not convert the mere act of placing the product into the stream an act of purposeful availment." *Id*. at 112. Justice Brennan (also joined by three justices) would have adopted a contrary view and wrote that "as long as a participant in this process is aware that the final product is being marketed in the forum State…jurisdiction premised on the placement of a product into the stream of commerce is consistent with the Due Process Clause." *Id*. at 117. The Supreme Court's divergent opinions in *Asahi* gave rise to a longstanding debate about which Justice took the correct approach to the stream of commerce theory in products liability cases. That debate has now been settled in favor of Justice O'Connor by the Supreme Court's decision

nonresident defendant knew or should have known that the stream of commerce would deliver its products to a certain state. Consequently, those six justices agreed that a nonresident's targeting of the U.S. market as a whole is insufficient to render it amenable to specific jurisdiction in any and all states where its products are purchased. Following *Nicastro*, a nonresident corporation cannot be haled into a foreign court simply because it was foreseeable that its product could end up there. Instead, specific jurisdiction only exists where the nonresident manufacturer has targeted the forum in some manner and that targeted activity caused injury to the plaintiff.

Together, these constitutional clarifications from the *Nicastro* and *Brown* decisions make clear the Supreme Court's intent to halt the trend toward broader grants of personal jurisdiction over nonresident corporations. Mere "stream of commerce" arguments are no longer sufficient to establish either general or specific jurisdiction. General jurisdiction essentially requires a showing that the nonresident is "at home" in the forum state, and specific jurisdiction now must be analyzed in terms of the nonresident's conduct in targeting the forum state rather than the mere foreseeability that its products could end up there. When tested against this constitutional framework, the facts of this case clearly demonstrate that a court in New York cannot assert either specific or general jurisdiction over defendants. Plaintiffs' claims do not arise from any purposeful contact defendants had with this forum, and the level of business conducted by the

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in *Nicastro*, where the plurality (4 justices) specifically denounced Justice Brennan's approach and the concurrence (2 justices) similarly rejected the plaintiff's contention that a manufacturer should be subject to jurisdiction if it knew or should have known that its products could reach the forum state. *Nicastro*, 131 S.Ct. at 2788-89, 2793. Given the Supreme Court's apparent rejection of Justice Brennan's approach, neither knowledge nor expectation of sales to a forum state is a sufficient basis for specific jurisdiction.

defendants with New York entities – i.e. no business at all –is clearly insufficient to establish a continuous corporate presence in this state.

III. SPECIFIC JURISDICTION CANNOT EXIST BECAUSE PLAINTIFFS' CLAIMS DO NOT ARISE FROM DEFENDANTS PURPOSEFUL CONTACT WITH THE STATE OF NEW YORK

A. Specific jurisdiction is inappropriate under C.P.L.R. § 302

New York's long-arm statute provides that a court may exercise specific personal jurisdiction over an entity which acts directly or by an agent as to a cause of action arising from or related to the following:

1. Transacts any business within the state or contracts anywhere to supply goods or services in the state; or

2. Commits a tortious act within the state, except as to a cause of action for defamation of character arising from the act; or

3. Commits a tortious act without the state causing injury to person or property within the state, except as to a cause of action for defamation of character arising from the act, if he

   (i) regularly does or solicits business, or engages in any other persistent course of conduct, or derives substantial revenue from goods used or consumed or services rendered, in the state, or

   (ii) expects or should reasonably expect the act to have consequences in the state and derives substantial revenue from interstate or international commerce;

C.P.L.R. § 302(a)(1)-(3) (2009). Specific jurisdiction may exist only as to a cause of action arising from these enumerated acts. In determining whether specific jurisdiction exists, this Court must first determine whether the long-arm statute authorizes the exercise of jurisdiction. *CutCo Indus., Inc. v. Naughton*, 806 F.2d 361, 365 (2d Cir. 1986). If so, then this Court must determine if the assertion of jurisdiction comports with the constitutional standards of due process. *Id*.

Plaintiffs' claims against defendants are related to the use of the character mark MBL and related logo on defendants' website, as used in the advertisement of MBL audio equipment. However, plaintiffs do not allege anywhere in the Complaint that defendants have sold any MBL equipment in New York, which deprives them of any asserted basis for jurisdiction under C.P.L.R. §302(a)(1).[9] A website that only provides information about services for sale and contact information for the seller, without any ability to directly purchase the services through the website, is considered "passive" and therefore "insufficient to demonstrate that the website operator has purposefully availed itself of the privilege of conducting activities within New York." *Zibiz Corp. v. FCN Tech. Solutions*, 777 F. Supp. 2d 408 (E.D.N.Y. 2011); *ISI Brands, Inc. v. KCC Int'l, Inc.*, 458 F. Supp. 2d 81, 86 (E.D.N.Y. 2006)("Internet websites that are not of a commercial nature and do not permit the purchase of products on-line are not sufficient to confer personal jurisdiction pursuant to section 302(a)(1).").[10] Since defendants have testified that they

[9] *See, e.g.,Scottevest, Inc. v. AyeGear Glasgow Ltd*., 2012 U.S. Dist. LEXIS 55546 (S.D.N.Y. Apr. 17, 2012)(holding that even where a Complaint alleges defendant's ownership of "an interactive web site" that sells goods "in to the United States and New York," this bare assertion is insufficient to confer personal jurisdiction where the Complaint does not identify any transaction that was directed to New York. "It does not meaningfully distinguish commerce in New York from commerce in the United States generally.")

[10] *See, e.g., Aqua Prods., Inc. v. Smartpool, Inc*., 2005 U.S. Dist. LEXIS 17246, 2005 WL 1994013, at *5 (S.D.N.Y. 2005) ("Passive websites which primarily make information available to viewers, but do not permit an exchange of information, fail to justify the exercise specific jurisdiction over anon-domiciliary."); *Rescuecom Corp. v. Hyams*, 477 F. Supp. 2d 522, 2006 U.S. Dist. LEXIS 45282, at * 16-17 (N.D.N.Y. 2006) (determining that the website did not confer personal jurisdiction because it was not of a commercial nature and it did not offer products for sale); *Molozanov v. Quantum Telecomms. Ltd*., 2006 WL 367576, *5 n.11, 2006 U.S. Dist. LEXIS 16788, at * 19 n. 11 (S.D.N.Y. 2006) ("Although in some instances a defendant's contacts with New York via the internet can provide a basis for jurisdiction under CPLR § 302(a)(1). . . this would not hold true here, as this case involves at most the publishing of a statement on a passive website"); *Knight-McConnell v. Cummins*, No. 03 Civ. 5035, 2005 WL 1398590, at *3, 2005 U.S. Dist. LEXIS 11577 at * 10 (S.D.N.Y. 2005) (finding no transaction of business in New

did not make any concerted efforts to direct product to New York, and consumers could not purchase MBL product through their website directly, plaintiffs cannot rely on the existence of the website to invoke jurisdiction. (*See* Decl. P. Alexander ISO Mot. Dismiss, ¶¶6, 8, 13, 19; *see* Decl. D. Alexander ISO Mot. Dismiss, ¶¶6, 8, 13, 19).

Plaintiffs' claim that specific jurisdiction over defendants is authorized pursuant to C.P.L.R. §302(a)(3) is similarly ill-founded. To establish jurisdiction under § 302(a)(3)(ii), a plaintiff must demonstrate that: "(1) the defendant's tortious act was committed outside New York, (2) the cause of action arose from that act, (3) the tortious act caused an injury to a person or property in New York, (4) the defendant expected or should reasonably have expected that his or her action would have consequences in New York, and (5) the defendant derives substantial revenue from interstate or international commerce." *Penguin Group (USA) Inc. v. Am. Buddha*, 640 F.3d 497, 498-499 (2d Cir. 2011). The allegations against defendants fail the first element of the 302(a)(3)(ii) jurisdictional test insofar as they fail to demonstrate, not only that any of the defendants committed a tortious act outside of New York, but that the defendants committed a tortious act of any sort at all. While plaintiffs allege that defendants have committed trademark infringement because they operate a website that can be viewed by New York residents and which allegedly displays MBL's trademarks without permission, defendants' right to display the MBL trademarks is a matter that is being actively litigated in Germany. No tort is committed by displaying a trademark as of right.

Moreover, in determining whether there is an injury in New York sufficient to warrant jurisdiction under § 302(a)(3), courts generally apply a "situs-of-injury" test, which asks them to

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York based on online postings of statements about a New York resident on an out-of-state website).

identify "'the location of the original event which caused the injury, not the location where the resultant damages are felt by the plaintiff.'" *Whitaker v. Am. Telecasting, Inc*., 261 F.3d 196, 209 (2d Cir. 2001) (quotation omitted). Plaintiff MBL NORTH's nebulous claims of "harm" do not arise out of actions that were alleged to have been taken by defendants in New York, but out of posting on defendants' passive website. Plaintiffs simply ignore settled law that "the occurrence of financial consequences in New York due to the fortuitous location of plaintiffs in New York is not a sufficient basis for jurisdiction under § 302(a)(3) where the underlying events took place outside New York." *Id*.

Plaintiffs cannot avoid the ruling of the Second Circuit that "the mere existence of a website that is visible in a forum and that gives information about a company and its products is not enough, by itself, to subject a defendant to personal jurisdiction in that forum." *Best Van Lines, Inc. v. Walker,* 490 F.3d 239, 253 (2d Cir. 2007). There is no claim that defendants' website is "interactive," nor could there be, because the site was not designed to process orders from internet customers and has never accepted online payments. (*See* Decl. P. Alexander ISO Mot. Dismiss, ¶8). While potential customers may find out information about MBL products on the website, and may contact MBL OF AMERICA via email or phone for more information about pricing and how to purchase, a consumer could not buy a $40,000 speaker online by submitting a credit card number (*Id*.) Despite plaintiffs apparent belief that they can invoke jurisdiction anywhere defendants' website is viewable, this is simply not the law.[11] Plaintiffs' allegations are insufficient on their face to confer personal jurisdiction over the defendants.

[11] A website is considered passive and insufficient to confer jurisdiction where, as here, the only purported "exchange of information" available on the website is a direct link allowing a user to contact the seller and does not allow for any part of a transaction to occur online. *See, e.g., Stephan v. Babysport*, LLC, 499 F. Supp. 2d 279, 288 (E.D.N.Y. 2007) (holding that the

B. The Absence of Purposeful Availment By Defendants Is Fatal to Specific Jurisdiction in New York

The Due Process Clause protects an entity's liberty interest in not being subject to the binding judgments of a forum with which it has established no meaningful contacts, ties or relations. *Int'l Shoe v. Wash*., 326 U.S. 310, 319 (U.S. 1945). Therefore, the United States Supreme Court has long recognized that a constitutional exercise of personal jurisdiction requires some act by which the nonresident defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws. *Hanson v. Denckla*, 357 U.S. 235, 253 (U.S. 1958).

When a forum seeks to assert specific jurisdiction over a nonresident defendant who has not consented to suit there, the requirement of due process is satisfied if: (1) the nonresident has purposefully directed his activities at residents of the forum and (2) the litigation results from alleged injuries that arise out of or relate to those activities. *Burger King Corp. v. Rudzweicz*, 471 U.S. 462, 472 (1985).

The importance of this "purposeful" element cannot be downplayed because it is the basis of fairness in specific jurisdiction. The purposeful availment requirement ensures that a

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defendant's website was passive where customers could not complete a contract for sale); *see also Yanouskiy v. Eldorado Logistics Sys., Inc*., No. 05-CV-2202, 2006 U.S. Dist. LEXIS 76604, 2006 WL 3050871, at *3 (E.D.N.Y. Oct. 20, 2006) ("Specifically, the website contains a contact information page where viewers may leave their e-mail address and a short message, both of which will presumably be transmitted to the defendant after the viewer clicks 'submit query.' However, the mere ability to contact defendant, standing alone, establishes nothing for purposes of this Court's general jurisdiction analysis."); *see also Arouh v. Budget Leasing, Inc*., 63 A.D.3d 506, 506, 883 N.Y.S.2d 4, 5 (1st Dep't 2009) ("Defendant's website, which described available cars and featured a link for email contact but did not permit a customer to purchase a car, was not a projection of defendant into the State."); *See Citigroup Inc. v. City Holding Co*., 97 F. Supp. 2d 549, 565 (S.D.N.Y. 2000) (Where defendants' website is "akin to [an] advertisement in a nationally-available magazine or newspaper, this does not without more justify the exercise of jurisdiction.").

defendant will not be haled into a foreign jurisdiction solely as a result of fortuitous contacts or the unilateral act of a third person, but only where the contacts proximately resulted from actions by the defendant himself that created a "substantial connection" with the forum state. *Id*. at 475; *see also Asahi*, *supra,* 480 U.S. at 112 ("The 'substantial connection' between the defendant and the forum State necessary for a finding of minimum contacts must come about by an action of the defendant purposefully directed toward the forum State*."); Lesnick v. Hollingsworth & Vose Co*., 35 F.3d 939, 945 (4th Cir. 1994)("The touchstone of the minimum contacts analysis remains that an out-of-state person have engaged in some activity purposefully directed toward the forum state."). The United States Supreme Court has specifically recognized that "it is the defendant's purposeful availment that makes jurisdiction consistent with traditional notions of fair play and substantial justice." *Nicastro*, 131 S.Ct. at 2787.

Additionally, the purposeful availment requirement cannot be overshadowed or displaced by arguments related to the stream of commerce or foreseeability. *Id*. at 2791; *see also Federal Ins. Co. v. Lake Shore, Inc*., 886 F.2d 654, (4th Cir. 1989)("A 'stream of commerce' theory of personal jurisdiction, therefore, cannot supplant the requirement that a defendant in some way purposefully avail itself of forum law."). The mere likelihood that a product may find its way into a forum state has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause. *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 295 (U.S. 1980).[12] Indeed, six of the nine Supreme Court justices recently held that a defendant's targeting of the United States market as a whole is not a sufficient basis for finding that it purposefully availed

[12] *See also World-Wide Volkswagen*, at 296 ("If foreseeability were the criterion…[e]very seller of chattels would in effect appoint the chattel his agent for service of process. His amenability to suit would travel with the chattel.").

itself of the market of an individual state where its product happened to cause an injury. *Nicastro*, 131 S.Ct. at 2788-90, 2792-94. Accordingly, plaintiffs are required to prove that their claims arise from or are related to some act that defendants purposefully directed at New York in order for specific jurisdiction to exist, but they have utterly failed to allege any conduct that would satisfy this standard.

Specific jurisdiction over defendants here would be impermissible even under the liberal "stream of commerce" approach championed by the dissenting opinion in *Nicastro*. Despite its emphasis on foreseeability, the *Nicastro* dissent still recognized that specific adjudicatory authority is appropriately exercised only where actions by the defendant himself gave rise to the affiliation with the forum. *Id.* at 2801 (emphasis in original). In *Nicastro*, the "actions by the defendant himself" was McIntyre's employment of a U.S. distributor and the "affiliation with the forum" was the McIntyre's distributor selling the injury-causing machine into New Jersey. *Id*. Here, all of those elements are missing. Unlike *Nicastro*, there is no allegation that defendants sold MBL goods into New York, or that defendants sold MBL goods through some vehicle by which they could reasonably foresee that the products would wind up in New York. Indeed, the Complaint is devoid of any allegations that defendants ever even attempted to sell MBL products to the New York market. As such, even the foreseeability-based approach advocated by the *Nicastro* dissent compels the conclusion that defendants lack the purposeful availment required for specific jurisdiction. Therefore, the minimum contacts required for a constitutional assertion of specific jurisdiction by any court in New York do cannot exist in this case.

C. Specific Jurisdiction Would Offend Traditional Notions of Fair Play and Substantial Justice

The United States Supreme Court has long held that a state court can exercise personal jurisdiction over a nonresident defendant if, and only if, there exist minimum contacts between the defendant and the forum state. *World-Wide Volkswagen*, 444 U.S. at 291 (citing *International Shoe*, 326 U.S. at 316). The court's consideration of fairness factors is therefore the second prong to any jurisdictional inquiry which is only to be considered if minimum purposeful contacts have been established.[13] Because plaintiffs cannot establish the requisite minimum contacts between defendants and New York, this Court's inquiry should end here without any consideration of whether personal jurisdiction would comport with "fair play and substantial justice." Nevertheless, the traditional fairness factors weigh against an assertion of personal jurisdiction over defendants in this case.

If sufficient minimum contacts exist, a court must then assess the fairness of asserting specific jurisdiction over a nonresident defendant based on such factors as (1) the burden on the defendant; (2) the interests of the forum state; (3) the plaintiff's interest in obtaining relief; (4) the efficient resolution of controversies as between states; and (4) the shared interest of the several states in furthering fundamental substantive social policies. *Lesnick*, 35 F.3d at 946. The absence of overall reasonableness in the assertion of personal jurisdiction constitutes an independent ground for dismissal. *Federal Ins.*, 886 F.2d at 661.

New York's legitimate interest in this dispute is non-existent. Plaintiff MBL is a German company, and its newly formed subsidiary, MBL NORTH, is a Delaware corporation that has attempted to manufacture some connection with New York by listing an executive's apartment in

[13] *See, e.g.*, *Burger King*, 471 U.S. at 476 ("Once it has been decided that a defendant purposefully established minimum contacts within the forum State, these contacts may be considered in light of other factors to determine whether the assertion of personal jurisdiction would comport with 'fair play and substantial justice.'")(emphasis added).

New York as its business address. Defendants for their parts are an Arizona corporation, an Arizona resident, and a California resident, respectively. The allegedly wrongful conduct of defendants – the posting of MBL's trademarks on the website www.mbl-usa.com – took place outside of New York, and is not alleged to have resulted in sales of MBL goods in New York, nor any harm other than plaintiffs' rank speculation that customers somewhere might hypothetically be confused about whether MBL OF AMERICA is still MBL's authorized dealer in the United States. This is not a harm alleged to have been suffered by any New York resident, and simply ignores the fact that the status of MBL OF AMERICA's authority to sell MBL products in the U.S. is subject in any event to ongoing litigation in Germany. Plaintiffs have not indicated that they would experience any hardship by bringing this action outside of New York.

The utter absence of any legitimate basis for filing suit in New York is compelling evidence that plaintiffs filed here in an effort to seek an unfair litigation advantage and make the defense of the case as difficult as possible. New York is some 2,800 miles away from defendants' homes, and has no connection to any of the parties who have any interest in the trademarks at issue[14] or any contractual relationship with one another.[15] Presumably, the locale was chosen for the convenience of plaintiffs' New York counsel, and ignored the obvious financial hardship it will cause defendants to defend from afar. The overall unreasonableness of the assertion of personal jurisdiction under such facts, standing alone, warrants the dismissal of the present case.

[14] MBL is the registered owner of the trademarks at issue herein, and there is no allegation that any assignment of rights or interest in the trademarks has been made to its U.S. subsidiary MBL NORTH (*See* Complaint, ¶11).

[15] MBL AMERICA has never had any contractual relationship with MBL NORTH. (Decl. P. Alexander ISO Mot. Dismiss, ¶21).

IV. GENERAL JURISDICTION CANNOT EXIST BECAUSE DEFENDANTS ARE IN NO SENSE HOME IN NEW YORK

Where, as here, specific jurisdiction fails because the cause of action does not arise from the nonresident defendant's purposeful contacts with the forum, then jurisdiction must arise from its general, more persistent, but unrelated contacts with the state. *ALS Scan, Inc. v. Digital Service Consultants, Inc*., 293 F.3d 707, 712 (4th Cir. 2002). The linchpin of general personal jurisdiction is the quantity and quality of the nonresident defendant's activity in the forum state. *Stover v. O'Connell Associates., Inc*., 84 F.3d 132, 136 (4th Cir. 1996). To establish general jurisdiction, the defendant's activities in the State must be "continuous and systematic," a far more demanding standard than is necessary for specific jurisdiction. *ALS Scan, at 712; see also ESAB Group, Inc. v. Centricut, Inc*., 126 F.3d 617, 623 (4th Cir. 1997)("But the threshold level of minimum contacts to confer general jurisdiction is significantly higher than for specific jurisdiction."). The question, then, is whether defendants' contacts with New York are so continuous, systematic and substantial that they amount to a surrogate for physical presence and thus render the exercise of jurisdiction just.

The United States Supreme Court has addressed the issue of general jurisdiction over a nonresident defendant three times, only finding the sufficient "continuous and systematic" contacts required for general jurisdiction once in *Perkins v. Benguet Consol. Min. Co*., 342 U.S. 437 (1952). *Perkins* involved a stockholder's claims against a mining company from the Philippine Islands that temporarily relocated to Ohio, the forum state, during the wartime occupation of the Islands by the Japanese. *Id*. at 447. During its temporary relocation, however, the mining company carried on significant corporate activities in Ohio – the president maintained an office where he kept company files and carried on correspondence related to the business and

its employees; salary checks were drawn and distributed; two active bank accounts with substantial funds were maintained; and several directors' meetings were held. *Id*. at 447-48. In short, many of the mining company's wartime activities were supervised and directed from Ohio. *Id*. at 448. The cause of action did not arise in Ohio nor did it relate to the mining company's corporate activities there. *Id*. at 438. However, the Supreme Court found that "the business done in Ohio by the respondent mining company was sufficiently substantial and of such a nature" as to permit the forum state to entertain claims that were entirely distinct from its activities in Ohio. *Id*. 447-48.[16] The *Perkins* case set the bar very high by suggesting that general jurisdiction is improper unless corporate management and planning activities actually take place inside the forum state.

That standard was solidified by *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408 (1984), where the Supreme Court determined that even regular business dealings with forum state residents are insufficient to render a nonresident amenable to general jurisdiction. *Id.* at 417-18. The nonresident defendant in *Helicopteros* was a Colombian company ("Helicol") that provided helicopter transportation for businesses in South America. *Id*. at 409. Helicol was sued in Texas following a fatal crash of one of its helicopters in Peru. *Id*. at 410. Like defendants in the present case, Helicol had never been authorized to do business in the forum state and had no offices, property, contracts, long-term employees or agents for service located there. *Id*. at 411. However, Helicol had significant contacts with Texas that consisted of several

[16] *See also Brown*, 131 S.Ct. at 2856 (Ohio's assertions of general jurisdiction was permissible in *Perkins* because "[t]o the extent that the [mining] company was conducting any business during and immediately after the Japanese occupation of the Philippines, it was doing so in Ohio."); *Keeton v. Hustler Magazine*, 465 U.S. 770, 779-780 n.11 (1984) (general jurisdiction was permissible in *Perkins* because "Ohio was the corporation's principal, if temporary, place of business.").

business trips to the forum by its employees, over $5 million in payments drawn from a Houston bank and, most notably, the purchase of approximately 80% of its helicopter fleet, component parts and training services from a company in Fort Worth at the price of more than $4 million. *Id*. at 411.

The Supreme Court determined that Helicol's contacts with Texas did not reach the level of "the continuous and systematic general business contacts" it found to exist in *Perkins*. *Helicopteros*, at 416-417. Importantly, the *Helicopteros* decision held that mere purchases, even if occurring at regular intervals (and for substantial money), are insufficient to warrant a forum state's assertion of general jurisdiction over a nonresident corporation in a cause of action not related to those purchases or transactions. *Id*. at 418. The Supreme Court further held that the brief presence of Helicol employees in Texas for the purpose of attending training sessions related to those purchases was also insufficient for general jurisdiction.[17] *Id*. Therefore, even recurring business transactions with and visits to the forum state cannot establish the persistent corporate presence required for general jurisdiction over a nonresident defendant.

In what can be considered a companion case to *Helicopteros*, the Supreme Court recently confirmed in *Brown* that regularly occurring sales to the forum state cannot subject a nonresident defendant to general jurisdiction.[18] *Brown*, 131 S.Ct. at 2856-57. The Supreme Court described the high threshold of "continuous and systematic" contacts required for general jurisdiction as

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[17]The Supreme Court's conclusion on this point relied on a prior decision in *Rosenberg Bros. & Co. v. Curtis Brown Co*., 260 U.S. 516 (1923), where it held that even regular business trips to the forum "would not warrant the inference that the corporation was present within the jurisdiction." *Id*. at 518.

[18] *See also International Shoe*, 326 U.S. at 318 (holding that even a corporation's "continuous activity of some sorts within a state" is not enough to support general jurisdiction).

follows:

> *International Shoe* distinguished from cases that fit within the "specific jurisdiction" categories, "instances in which the continuous corporate operations within the state [are] so substantial and of such a nature as to justify suit against it on causes of action arising from dealings entirely distinct from those activities." Adjudicatory authority so grounded today is called "general jurisdiction." For an individual, the paradigm forum for the exercise of general jurisdiction is the individual's domicile; for a corporation, it is an equivalent place, one in which the corporation is fairly regarded as at home.

Brown, at 2853-54. In *Brown*, the Supreme Court explicitly held that this burden of proof cannot be satisfied by "stream of commerce" arguments. *Id*. at 2851.[19] It further unanimously determined that the indirect sales of a foreign manufacturer's tires in the forum state were insufficient for general jurisdiction despite the fact that those sales had resulted in "tens of thousands" of the foreign manufacturer's tires entering the forum during a three-year period. *Id*. at 2852, 2856-57.

The import of the Supreme Court's decisions in *Perkins*, *Helicopteros* and *Brown* is clear – even regular business transactions with forum residents are not enough to render a nonresident corporation amenable to general jurisdiction. Rather, continuous and systematic activities related to the actual management of the corporation must be performed within the forum state for the exercise of general jurisdiction to be constitutional. Here, there is absolutely no evidence showing that defendants have engaged in such activities in New York. MBL OF AMERICA is organized under the laws of Arizona, has its principal place of business

[19] Specifically, the Supreme Court held that the indirect delivery of goods does not create a sufficient connection between the nonresident manufacturer and the forum state to warrant the exercise of general jurisdiction. *Id.* at 2851 ("A connection so limited between the forum and the foreign corporation, we hold, is an inadequate basis for the exercise of general jurisdiction. Such a connection does not establish the "continuous and systematic" affiliation necessary to empower North Carolina courts to entertain claims unrelated to the foreign corporation's contacts with the State.").

in Arizona, and is not registered or otherwise licensed to do business in New York. The individual defendants reside in Arizona and California. During the past five years, defendants have not maintained, among other things, any offices, post office boxes, telephone listings, real estate, bank accounts, warehouses, agents, employees, distributors, dealers or other sales representatives in New York. (Decl. P. Alexander ISO Mot. Dismiss, ¶¶5-20; Decl. D. Alexander ISO Mot. Dismiss, ¶¶5-20). In short, defendants perform no corporate operations within the forum state. They certainly lack the "continuous and systematic" presence in New York that is required to render them subject to general jurisdiction. Under any analysis, defendants' contacts with New York do not provide any evidence that they are "at home" in New York. Accordingly, the exercise of general jurisdiction by this Court would be constitutionally impermissible.

V. VENUE IN THIS COURT IS IMPROPER

A. Plaintiffs' Factual Allegations Do Not Meet Their Burden of Showing Why Venue In This Court Is Proper

If venue is improper in the district court where the action was filed, as here, the Court may, within its discretion under 28 USC § 1406(a), dismiss the action or transfer the action to any district in which it can be brought to promote the interest of justice. *Minnette v. Time Warner*, 997 F. 2d 1023 (2d Cir. 1993). As with allegations respecting jurisdiction, the burden is on plaintiffs to properly to plead and demonstrate, that venue in this district is proper. *Garg v. Winterthur*, 2007 WL 136263 (S.D.N.Y. 2007); *Cartier v. Micha*, 2007 WL 1187188 (S.D.N.Y. 2007). Plaintiffs have not done this, and could not do so even upon additional submissions.

The applicable statute, 28 U.S.C. §1391(b) provides:

> A civil action wherein jurisdiction is not founded solely on diversity of citizenship may, except as otherwise provided by law, be brought only in (1) a judicial district

> where any defendant resides, if all defendants reside in the same State, (2) a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred, or a substantial part of property that is the subject of the action is situated, or (3) a judicial district in which any defendant may be found, if there is no district in which the action may otherwise be brought.

Paragraph 9 of the Complaint is the sole basis of its allegation of venue, and is insufficient as a matter of law. It merely recites what the applicable venue statute is, setting forth neither specific provision of that statute nor any information or basis for the belief for alleging in conclusory fashion that "Venue is proper in this District pursuant to 28 U.S.C. §1391." In fact, the standards of that statute are not met here, neither in the Complaint nor in the facts. Courts require, just as with any other pleading matter, more than conclusory allegations when pleading venue:

> G.F.C. also argues, in conclusory fashion, that venue is proper because its complaint alleges (1) that "a substantial part of the events or omissions giving rise to the claims herein occurred in this district" and (2) that "Goody's actions have had, and continue to have, an impact on interstate commerce and on commerce within the state of New York." . . . These general and conclusory allegations do not alone support a finding of venue under § 1392(b). Further, as discussed below, the specific allegations contained in its opposition papers also fail to support venue here.

G.F.C. Fashions, Ltd. v. Goody's Family Clothing, Inc., 1998 WL 78292, 3 (S.D.N.Y. 1998).

It is undisputed that this is not a district in which "any defendant may be found." No defendant is alleged to reside in this district, to do business here, nor to have been served here. *See, e.g., Jackson v. American Brokers Conduit,* 2010 WL 2034508, 2 (S.D.N.Y. 2010) (dismissing claim based on improper venue). Alternatively, Section 1391(b)(2) permits an action to be brought in a judicial district in which "a substantial part of the events or omissions giving rise to the claim occurred." Under §1391(b)(2), significant events material to plaintiff's claim must have occurred in the district for venue to be proper, as the Second Circuit Court of Appeals explained in *Gulf Ins. Co. v. Glasbrenner*, 417 F.3d 353 (2d Cir. 2005):

> [W]e caution district courts to take seriously the adjective "substantial." We are required to construe the venue statute strictly. *See Olberding v. Illinois Cent. R.R.*, 346 U.S. 338 (1953). That means for venue to be proper, significant events or omissions material to the plaintiff's claim must have occurred in the district in question, even if other material events occurred elsewhere. It would be error, for instance, to treat the venue statute's "substantial part" test as mirroring the minimum contacts test employed in personal jurisdiction inquiries.

417 F.3d at 357. Thus, to establish venue in a trademark action, it has been held that the defendant must have aimed its marketing and advertising at the district or have sold its infringing goods there. *See D'Anton Jos, S.L. v. Doll Factory, Inc*., 937 F. Supp. 320, 321-22 (S.D.N.Y. 1996). Here, nothing about this case provides a legitimate basis for venue in the Southern District of New York, notwithstanding the address of plaintiffs' counsel or the fact that an employee of MBL's newly formed subsidiary has an apartment in New York. Ultimately, venue is not based on a plaintiff's convenience, or that of its lawyers. *See, e.g., Rappoport v. Steven Spielberg, Inc*., 16 F.Supp.2d 481, 494 (D.N.J. 1998)("The only nexus to this District appears to be that Rappoport currently resides here and apparently made telephone calls . . . from here. . . . Based on the foregoing, venue is improper in this District pursuant to § 1391(b).").

CONCLUSION

WHEREFORE, for the foregoing reasons, defendants respectfully request that this Honorable Court dismiss the complaint in its entirety for want of personal jurisdiction and improper venue.

Respectfully submitted,

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