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

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INTRODUCTION

Plaintiffs' Opposition fails to address the recent Supreme Court precedent cited in defendants' moving papers, ignores or misconstrues New York law construing personal jurisdiction, and consists almost entirely of sweeping allegations of perjury that are both unfounded and entirely rebutted by the declarations submitted concurrently herewith.

Plaintiffs have put forth no evidence that would support the exercise of personal jurisdiction over these defendants, but rely on mere argument, calumny and innuendo, which is insufficient to meet their burden.

Nor can plaintiffs make out a viable argument for venue in this district, as they concede that their witnesses and documents are located in Germany, that defendants' witnesses and documents are located on the West Coast, and that they chose this forum merely as a matter of convenience.

STATEMENT OF FACTS

I. DEFENDANT MBL OF AMERICA HAS NEVER HAD A NEW YORK OFFICE

Defendants Peter Alexander and David Alexander previously attested that MBL OF AMERICA has never had an office in New York. Specifically, their initial declarations attest to the fact that:

- MBL OF AMERICA has never had an office or registered agent in the State ofNew York;
- MBL OF AMERICA has never maintained any sort of presence in the State ofNew York;
- MBL OF AMERICA has not rented, owned or maintained real estate in New York;
- MBL OF AMERICA has not opened accounts at any New York banks;
- MBL OF AMERICA has not registered to do business in New York;

- MBL OF AMERICA has never had showrooms in New York.

(*See* Amended Declaration of Peter Alexander ISO Motion to Dismiss, Document No. 29; *see also* Amended Declaration of David Alexander ISO Motion to Dismiss, Document No. 30)

Plaintiffs cannot refute any of these plain factual statements, but attempt to obfuscate the issue by offering up three business cards as purported "proof" that MBL OF AMERICA had an office in New York. None of these business cards support plaintiff's case.

A. Jeremy Bryan's Apartment Was Never MBL OF AMERICA's Office

The first business card offered by plaintiffs purports to show Jeremy Bryan as a Vice President of MBL OF AMERICA with a New York address. Defendants deny any knowledge of this card, deny issuing it or authorizing its issuance, and deny that Bryan was ever a Vice President of MBL OF AMERICA. Moreover, defendants attest that Bryan was merely a 1099 part-time contractor who was issued a business card that followed the standard MBL OF AMERICA format, listing only his name, telephone number, and email address. Bryan's real business card, redacted 1099s and email from him requesting copies of his 1099s are attached to the supporting declarations filed herewith. (*See* Declaration of Peter Alexanader ISO Reply, ¶¶9, 10, and Exhibits A, B, and D thereto; *see* Declaration of Thomas Dunbar ISO Reply, Exhibit A thereto). In addition, defendants further attest that:

- MBL OF AMERICA never at any time listed, or used, Bryan's apartment as its place of business in New York;
- Bryan's apartment address was not listed in New York's Yellow Pages as the local office for MBL OF AMERICA, nor was it listed on MBL OF AMERICA's website;
- MBL OF AMERICA did not lease Bryan's apartment, and did not reimburse him for rent he paid for his apartment;
- MBL OF AMERICA did not store merchandise at Bryan's apartment, and did not deliver merchandise to Bryan's apartment;

- MBL OF AMERICA did not establish or pay for a business telephone line, fax or internet connection at Bryan's apartment;
- MBL OF AMERICA did not create invoices, purchases orders, letterhead or business cards listing Bryan's apartment as its New York office;
- MBL OF AMERICA never held out to customers, distributors, retailers or the general public that Bryan's apartment was MBL OF AMERICA's New York office;
- Peter Alexander, President of MBL OF AMERICA, has never been to Bryan's apartment.

(*See* Declaration of Peter Alexander ISO Reply, ¶¶2-10, 20). These facts are not in dispute.

B. Petra Wilde's Apartment Was Never MBL OF AMERICA's Office

The second business card plaintiffs rely on purports to show Petra Wilde as the East Coast representative of MBL OF AMERICA, with a New York office at 168 Prospect Avenue, Sea Cliff, New York. Plaintiffs allege based solely on the existence of this card that Ms. Wilde was in fact the East Coast representative of MBL OF AMERICA and that the company had a New York office. This is doubly untrue.

Ms. Wilde – now known as Ms. D'Agostino – is the daughter of defendant Peter Alexander, and states that although she contemplated working for MBL OF AMERICA in 1993, and business cards were made in preparation of her employment, her family responsibilities as a single mother of three small children precluded her from actually ever working for the company. (*See* Declaration of Petra D'Agostino ISO Reply). Ms. D'Agostino further attests that 168 Prospect Avenue in Sea Cliff, New York was simply her home address in 1993, and was never used by MBL OF AMERICA as an office. (*Id.*) Her recollection is that MBL OF AMERICA business cards at that time were created in Germany and shipped out by plaintiff MBL, as the card design originated in Germany (*Id.*)

C. The Business Card Attributed to Peter Alexander Is Not His

The third business card plaintiffs rely on to support their claim purports to list Peter Alexander as President of MBL OF AMERICA, but with contact information that all belongs to Jeremy Bryan – i.e., it lists Bryan's home address, Bryan's telephone number, and Bryan's email address (i.e., jeremy@mbl-hifi.com). Peter Alexander denies ever authorizing, possessing or using a business card that bore Bryan's contact details, and denies ever using Bryan's apartment as MBL OF AMERICA's office in New York. (*See* Declaration of Peter Alexander ISO Reply, ¶¶11, 12, 13). It simply defies logic that any businessman – let alone the President of a prominent audio company – would hand out business cards with someone else's address, phone number and email address on it, and this did not occur. (*Id.*)

II. DEFENDANT MBL OF AMERICA DID NOT EMPLOY NEW YORK RESIDENTS

As defendants stated previously, the only New York resident ever employed by MBL OF AMERICA was 1099 contractor Jeremy Bryan, who was employed part-time for approximately three years from 2004 – 2007 to assist with trade shows, coordinate with advertisers, and act as a sales representative in the Northeast. Bryan was never a Vice President of MBL OF AMERICA, never included in the management of the company, never played any role of significance, and was fired by Peter Alexander in 2007. (*See* Declaration of Peter Alexander ISO Reply, ¶¶20, 21; Declaration of David Alexander ISO Reply, ¶¶9, 10, 11).

Contrary to Bryan's baseless, factually vague allegations about his dealings with New York customers and dealers, as a practical matter he had no such dealings, as MBL OF AMERICA never had any New York dealers. The only authorized dealers the company ever had in the Northeast were GTT Audio, located in Long Valley, New Jersey and Perrotta Consulting,

located in Bethel, Connecticut. (*See* Declaration of Peter Alexander ISO Reply, ¶¶22, 26, 27, 28; *see* list of MBL OF AMERICA's authorized dealers, attached as Exhibit D thereto).

The short list of individuals that Bryan claims worked for MBL OF AMERICA in New York from the early 1990s simply did not do so, and Bryan's testimony on this issue should be disregarded out of hand. Bryan had no association with MBL OF AMERICA in the 1990s, has never had any access to its books and records, and there is no possible foundation upon which he could competently testify as to who was employed by MBL OF AMERICA at any time. The undisputable facts are as follows: Petra Wilde (now Petra D'Agostino) did not work for MBL OF AMERICA. (*See* Declaration of Petra D'Agostino ISO Reply). Mark Lawrence was a contract employee for a brief period of time in the mid-1990s, but worked out of Chicago, Illinois, not New York. (Declaration of Peter Alexander, ¶17). Ted Lindblatt was never an employee of MBL OF AMERICA. (*Id.*, ¶18). Nathan Rachimi was never an employee of MBL OF AMERICA. (*Id.*, ¶19).

III. DEFENDANT MBL OF AMERICA DID NOT ADVERTISE IN NEW YORK

While MBL OF AMERICA advertised in Stereophile Magazine and The Absolute Sound, these are audiophile magazines which-as plaintiffs themselves acknowledge (*See* Opposition, p. 8)-are distributed nationally and internationally, and do not in any way specifically target the New York market. (Declaration of Peter Alexander ISO Reply, ¶23). There is no allegation that defendant advertised in any publication that specifically targeted New York.

IV. DEFENDANT MBL OF AMERICA DID NOT TAKE STEPS TO ENGAGE IN COMMERCE WITH NEW YORK

Plaintiffs point to no competent evidence that defendant MBL OF AMERICA has taken any steps to direct commerce to New York nor engage in commerce with its citizens.

Though plaintiffs make much of defendants' participation in the Home Entertainment Trade Show in New York in 2007, they point to no sales made to any New York citizen, and grossly misconstrue the nature of the show itself. MBL OF AMERICA has never denied the fact that it exhibited products at trade shows nationally, including the Home Entertainment Show. The other major trade shows at which MBL OF AMERICA exhibited products were the Consumer Electronics Show in Las Vegas, Nevada; the Rocky Mountain Audio Fest in Denver, Colorado; and the Los Angeles Audio Show in Los Angeles, California. These trade shows are national events during which new products are typically announced, and are meant to drive sales nationally (and internationally). They are in no way targeted to the particular State in which the trade show takes place. The fact that MBL OF AMERICA paid for exhibition space for a weekend along with the other 150+ exhibitors in New York on a handful of occasions does not mean that MBL OF AMERICA targeted its business to New York consumers, or that it was doing business in New York. (*See* Declaration of Peter Alexander ISO Reply, ¶¶24, 25). Moreover, MBL OF AMERICA has not attended any trade show in New York since 2007. (*Id.*)

Plaintiffs' assertion that MBL OF AMERICA was providing customer service in New York is also incorrect. Contrary to what is claimed by Mr. Bryan in his affidavit, MBL OF AMERICA has never maintained an authorized service center in New York, and has no formal relationship with High End Audio Repair in Brooklyn, New York. While MBL OF AMERICA has on occasion directed customers who needed minor repairs to local audio repair shops as an alternative to incurring the cost of shipping their products back to the manufacturer in Germany, MBL OFAMERICA has no contract with, or ownership interest in, any audio repair shop in New York. (*Id.*, ¶31).

Similarly incorrect is plaintiffs' assertion that MBL OF AMERICA has relationships with a network of retailers in New York. While sporadic sales have been made to a handful of New York retailers over the last twenty years, MBL OF AMERICA has no contracts with any New York retailers, and has never sold any products to either Audio Arts or Lyric HiFi & Video. (*Id.*, ¶29). MBL OF AMERICA's historical sales to New York retailers have been de minimis, constituting far less than 1% of total sales. (*Id.*, ¶30). Contrary to Bryan's unsupported claims, New York has never been anything close to the "hub" of MBL OF AMERICA's sales in the United States.

LEGAL ARGUMENT

I. PLAINTIFFS HAVE NOT MET THEIR JURISDICTIONAL BURDEN

Plaintiffs have abandoned their claim that jurisdiction could lie under CPLR §302(a)(1), and instead rely solely on CPLR §302(a)(3), which provides no basis for the exercise of jursidiction here.

To establish jurisdiction under section 302(a)(3), a plaintiff "must show both that an injury occurred 'within the state,' and that the elements of either clause (i) or (ii) have been satisfied." *Ingraham v. Carroll*, 90 N.Y.2d 592, 596, 687 N.E.2d 1293, 665 N.Y.S.2d 10 (1997). Plaintiffs assert that they have met §302(a)(3)'s threshold requirement of "a tortious act without the state causing injury to person or property within the state," C.P.L.R. § 302(a)(3), insofar as they allege that defendant tortiously infringed upon their trademark, diluting the mark and deceiving their customers, and that defendants did so from Arizona and/or California. *See, e.g.*, Complaint ¶¶18-21. While there is some authority that these allegations satisfy the threshold requirements of §302(a)(3), compelling countervailing authority exists to support the proposition that "the mere fact that the plaintiff resides in New York and therefore ultimately experiences a financial loss

there is not a sufficient basis for jurisdiction." *See Jash Raj Films (USA) Inc. v. Dishant.com LLC*, No. 08-CV-2715, 2009 U.S. Dist. LEXIS 116431, 2009 WL 4891764, at *9 (E.D.N.Y. Dec. 15, 2009) (citing *Andy Stroud, Inc. v. Brown*, No. 08 Civ. 8246, 2009 U.S. Dist. LEXIS 18725, 2009 WL 539863, at *6 (S.D.N.Y. Mar. 4, 2009)).

In *Jash Raj Films*, the court noted that a plaintiff's speculative allegations that its New York customers were deceived by a defendant's allegedly infringing website, if unsupported by factual allegations suggesting that the defendant targeted New York, do not satisfy the threshold requirements of § 302(a)(3). *Id.* Such is the case here. Plaintiffs offer purely speculative allegations of customer confusion and that defendants' website targets New York residents,[1] which is contradicted both by the defendants' declarations and by the Complaint's allegations that the website targets "all segments of the marketplace" and has "interfered with plaintiffs' business operations in the United States" as a whole. *See* Complaint ¶¶18, 21. There are no declarations from any New York customers averring that they have been deceived or confused, nor even any correspondence from the alledgly deceived class, only plaintiffs' conclusory allegations. These bare allegations do not suffice to establish jurisdiction. *See RVDirect.com v. Worldwide RV*, 2010 U.S. Dist. LEXIS 135567, 17-19 (N.D.N.Y. Dec. 21, 2010)(finding that speculative allegations did not give rise to jurisdiction).

Even assuming arguendo that plaintiffs have satisfied the threshold requirements of §302(a)(3), they do not carry their burden under subsections (a)(3)(i) or (a)(3)(ii). To establish jurisdiction under C.P.L.R. § 302(a)(3)(i) a plaintiff must "demonstrate that the tortfeasor '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.'" *Ingraham*,

[1] *See, e.g.*, Affidavit of Jeremy Bryan In Opposition to Motion to Dismiss, ¶42.

supra, 90 N.Y.2d at 596. Plaintiffs have not shown any persistent course of conduct, or even a single sale by defendant that occurred in New York, and defendant MBL OF AMERICA has explicitly denied that it does business in New York State. While plaintiffs may argue that CPLR §302(a)(3)(i) is satisfied due to the constant presence of the defendant's website, which allowed a user to view MBL OF AMERICA's goods – but not order them[2] – "the mere existence of a web site accessible from New York is insufficient to establish 'solicitation' for purposes of personal jurisdiction." *See A.W.L.I. Group, Inc. v. Amber Freight Shipping Lines*, 828 F. Supp. 2d 557, 573 (E.D.N.Y. 2011). Plaintiffs offer no evidence that MBL OF AMERICA consistently does business within the State of New York. In fact, plaintiffs have not provided any evidence that MBL OF AMERICA has done any business in New York. There is also no evidence that MBL OF AMERICA derives any revenue from the state. Therefore, the court cannot assert jurisdiction under CPLR § 302(a)(3)(i). *Id.* at 573*; see also Research Found. of State Univ. of N.Y. v. Bruker Corp.*, 2010 U.S. Dist. LEXIS 23804at *8-9 (N.D.N.Y. 2010)("Plaintiff has failed to demonstrate that Defendant 'regularly does or solicits business' within New York State or 'engages in any other *persistent* course of conduct'" (emphasis in original); *see also RVDirect.com v. Worldwide RV*, 2010 U.S. Dist. LEXIS 135567, 17-19 (N.D.N.Y. Dec. 21, 2010).

To establish jurisdiction under N.Y. C.P.L.R. § 302(a)(3)(ii), "a plaintiff must demonstrate that the nonresident tortfeasor: (1) 'expects or should reasonably expect the act to have consequences in the state'; and (2) 'derives substantial revenue from interstate or international commerce.'" *Ingraham, supra*, 90 N.Y.2d at 598. "The first prong is intended to ensure some link between a defendant and New York State to make it reasonable to require a defendant to come to

[2] *See* Declaration of Peter Alexander ISO Reply, ¶¶32, 33; Declaration of David Alexander ISO Reply, ¶¶14, 15.

New York to answer for tortious conduct committed elsewhere. The nonresident tortfeasor must expect, or have reason to expect, that his or her tortious activity in another State will have direct consequences in New York." *Id.* The second prong "narrows the long-arm reach to preclude the exercise of jurisdiction over nondomiciliaries who might cause direct, foreseeable injury within the State but whose business operations are of a local character." *Id.* at 599. Plaintiffs' allegations do not satisfy the first prong. The test of whether a defendant expects or should reasonably expect his act to have consequences within the State "is an objective rather than subjective one." *Kernan v. Kurz-Hastings, Inc.*, 175 F.3d 236, 241 (2d Cir. 1999) (quoting *Allen v. Auto Specialties Mfg. Co.*, 45 A.D.2d 331, 357 N.Y.S.2d 547 (3d Dep't 1974)).

New York courts have tried to harmonize the "reasonable expectation" requirement with constitutional due process requirements. *Id.* (citing *In re DES Cases*, 789 F. Supp. 552, 570-71 (E.D.N.Y. 1992)). Thus, what is required is objective foreseeability, where "foreseeability relates to forum consequences generally and not to the specific event which produced the injury within the State." *Allen*, 357 N.Y.S.2d at 550. New York's courts have found that "the simple likelihood or foreseeability 'that a defendant's product will find its way into New York does not satisfy this element, and that purposeful availment of the benefits of the laws of New York such that the defendant may reasonably anticipate being haled into New York court is required.'" *Kernan*, *supra*, 175 F.3d at 241; *see also Schaadt v. T.W. Kutter, Inc.*, 169 A.D.2d 969, 564 N.Y.S.2d 865, 866 (3d Dep't 1991) ("foreseeability must be coupled with evidence of a purposeful New York affiliation, for example, a discernible effort to directly or indirectly serve the New York market"). Plaintiffs allege that MBL OF AMERICA's website targets New York customers and invites them to make purchases, but has not alleged a single sale occurring in the state, and has no evidence that a "shopping cart" function was ever available on the website. Plaintiffs rely entirely on the

factually deficient affidavit of Jeremy Bryan, who claims to "know" that MBL OF AMERICA sold product into New York, but cannot provide evidence of a single sale made at any time, much less during the period in which the trademark infringement is alleged to have occurred. The simple fact that defendants have a website that can be viewed in New York does not show that MBL OF AMERICA made any discernible effort to directly or indirectly serve the New York market. Long-arm jurisdiction is not satisfied merely because it is conceivable that New York residents may have learned of defendant's business over the internet. *Kernan*, *supra*, 175 F.3d at 241 (section 302(a)(3)(ii) requires purposeful affiliation with New York).

With respect to the second prong, plaintiffs have offered no evidence that defendant was engaged in extensive business activities on an interstate or international level. Plaintiffs' bare allegations that defendant was the sole distributor of MBL products in the United States does not speak to its revenue in any way, shape or form, and does nothing to satisfy the "bigness requirement" designed to assure that the defendant is "economically big enough" to defend suit in New York. *See Ingraham, supra*, 90 N.Y.2d at 599. Indeed, the evidence is quite clear that MBL OF AMERICA is a small, family run business whose only employees are the two individually named defendants.

II. VENUE IS NOT PROPER IN NEW YORK

Venue in trademark and unfair competition cases is governed by the general federal venue statute, which requires that the action be brought only in "a judicial district in which a substantial part of the events or omissions giving rise to the claim occurred." 28 U.S.C. § 1391(b). Once an objection to venue has been raised, the plaintiff bears the burden of establishing that venue is proper. *French Transit Ltd. v. Modern Coupon Systems*, 858 F. Supp. 22, 24 (S.D.N.Y. 1994). Plaintiffs have not established that defendants have anything other than de minimis contact with

New York, and have not established that defendants sold product into New York or targeted New York in any way. Plaintiffs have no evidence of any business conducted by defendants in New York, and point to such spurious things as attendance at a trade show five years ago and adverstising in national magazines as alleged "proof" of defendants' contacts with New York. The law in this circuit is abundantly clear that national advertising and attendance at trade shows does not demonstrate sufficiently active attempts to market products to New York. *See, e.g., D'anton Jos, S.L. v. Doll Factory*, 937 F. Supp. 320, 321-322 (S.D.N.Y. 1996).

As a final point, plaintiffs admit that all of "MBL's witnesses and dcouments are located in Germany and Defendants' witnesses and documents are located on the West Coast." (Opposition, p. 21). New York is neither home to either plaintiffs or defendants, and plaintiffs admit that they chose it simply because in their minds "as a matter of relative burden, New York is the only reasonable jurisdiction." (Id.) With all due respect, picking a jurisdiction roughly in the midpoint between the location of plaintiffs and defendants is not authorized by the venue statute, and is simply facially improper.

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. In the alternative, defendants request that the matter be transferred to the district court in Arizona pursuant to 28 U.S.C. § 1404(a).

Respectfully submitted,

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